Wednesday Luncheon Session
May 23, 2012

The Wednesday luncheon session of The American Law Institute convened in the State Room of The Mayflower, Washington, D.C., and was called to order at 1:08 p.m. by President Roberta Cooper Ramo.

**President Ramo:** Ladies and gentlemen. Hello, hello, hello. Could you just keep it down a little bit? Thank you very much. I appreciate it.

This has been an extraordinary Meeting. And when we were putting it together, I thought so how do you follow Justice Stevens and Nina Totenberg and Bill Lee? I had a fabulous epiphany.

As I go around my regular life, what people care deeply about is election law. Who would have ever thought that that would be the common—I was saying at the lunch table that I had to give a graduation speech last week at a business school, and there was a large reception afterwards, and everybody that came up to me, and I am talking about people from tiny towns in New Mexico to people at the national laboratories, because apparently they think it is my job to do this and said, "What are you going to do to fix the election laws?" (*Laughter*) Well, I had some answers for them.

Our speaker this afternoon is a really remarkable lawyer named Trevor Potter, and you have all read his résumé so I won't repeat it here. Instead, what I want to say about him is that, in my mind, what is as important in many ways as the civil-rights issues at their time are questions about the American democratic process, and at the heart of that really are issues involving our elections, and one of the reasons, "When people ask me why do you like being a lawyer so much; why are you so proud of lawyers and judges?" I always say, "Because I have seen American lawyers step up and do miracles." And to me, an example of an American lawyer who has really looked around, and in the most thoughtful way tried to address issues of the election law, is Trevor Potter.

The only thing about Trevor Potter that I didn't completely understand is that I saw in his résumé that he was an under gardener at Poke Gardens. So of course I Googled, I Wikipediaed, even though my classmate who is general counsel, Lance knows, at Encyclopedia Britannica, tells me not to do this. And I then went to the Encyclopedia Britannica, and nowhere did I find anything about Poke Gardens. But as I was thinking about this last night I thought, well, I understand, because one of the definitions that you get on Google and everyone else is poke-in-the-eye garden, and I thought, well, maybe that's kind of where we seem to be in our elections.

What is very important right now is that somehow we find a way not only to understand the issues that as a democracy we have to face about election law, but most importantly that we find a way to talk to the people who are not in this room, regular American citizens, about what the election finance law situation is.

Two people who figured that out right after *Citizens United* [v. Federal Election Commission, 558 U.S. ___, 130 S. Ct. 876 (2010)], were Trevor Potter and his client Stephen Colbert. (*Laughter*) And aided and abetted by his client, whom you will see in a second, he recognized that there had to be a way to point out where we were to the people who don't think

about things in legal terms. So cast your eyes for a moment to the screen, and you will see what one client had to say about these things.

(*The video was played, as follows:*)

**Mr. Stephen Colbert:** Here to help me make my move to secrecy and obfuscation completely transparent, please welcome former general counsel to the McCain campaign and my personal lawyer, Mr. Trevor Potter. Trevor, nice to see you.

(*There was a chorus of "Yea!"*)

**Mr. Colbert:** You want something? Bipartisan? You want some ham roll?

**Mr. Trevor Potter:** I'll wait till later, thanks.

**Mr. Colbert:** No. Yeah. Well, he's not kosher. All right.

Now, Trevor, I've got all these people down at the bottom of the screen who have been giving me money, individual Americans. But I haven't gotten any of the big corporate money. That's why I have a SuperPAC! Why wouldn't a corporation give money?

**Mr. Potter:** Well, they would be nervous about giving in a way that their name is publicly disclosed. People might object to what they have done: their shareholders, their customers.

**Mr. Colbert:** Okay, so that's where a (c)(4) comes in. A corporation or an individual can give to a (c)(4), and nobody gets to know that they did it. Right?

**Mr. Potter:** That's right.

**Mr. Colbert:** Okay, so how do I get one?

**Mr. Potter:** And that money can be used for politics.

**Mr. Colbert:** Oh great, that's good too.

**Mr. Potter:** So, we need to get you one.

**Mr. Colbert:** As long as it goes through me, it can go to anything it wants. So how do I gets me one, Trevor?

**Mr. Potter:** Well, lawyers often form Delaware corporations, which we call shell corporations, that just sit there until they are needed.

**Mr. Colbert:** So they are just some anonymous shell corporation?

**Mr. Potter:** Right, and I happen to have one here in my briefcase.

**Mr. Colbert:** Let's see it. Okay, what's it called?

**Mr. Potter:** It's called Anonymous Shell Corporation. (*Laughter*)

**Mr. Colbert:** That's got a real ring to it, Trev.

**Mr. Potter:** Registered in Delaware.

**Mr. Colbert:** Now I don't have to go to Delaware, do I?

**Mr. Potter:** No, it's already been done for you. (*Laughter*)

**Mr. Colbert:** [*Whistles*] Okay, okay, badadum, badadum: Anonymous Shell Corporation, filed in Delaware. Okay, I got this; so now, now I have a (c)(4)?

**Mr. Potter:** Right. Now we need to turn it into *your* shell corporation, your anonymous one, and we do that by having normally a board-of-directors meeting.

**Mr. Colbert:** And who's on the board of directors?

**Mr. Potter:** Well, just you. We can just have you do this.

**Mr. Colbert:** Sounds like a nice group of people. (*Laughter*) All right, let's do it. Let's call— [*Hammers gavel*] And I have shattered my champagne glass. (*Laughter*) I hope—I hope there's no sensitive electronic equipment down there.

All right, called to order. Let's do this thing.

**Mr. Potter:** All right. So this says that you are the sole director of the corporation.

**Mr. Colbert:** I am. [*Begins signing document*]

**Mr. Potter:** And that you are now electing yourself president, secretary, and treasurer.

**Mr. Colbert:** Sounds like a great board.

**Mr. Potter:** And you are authorizing the corporation to file the papers with the IRS in May 2013.

**Mr. Colbert:** So I could get money for my (c)(4), use that for political purposes, and nobody knows anything about it till six months after the election?

**Mr. Potter:** That's right, and even then they won't know who your donors are.

**Mr. Colbert:** That's my kind of campaign-finance restriction. (*Laughter*) Okay, okay, so now I've signed it. I have a (c)(4)?

**Mr. Potter:** You have a (c)(4). It's up and going.

**Mr. Colbert:** So without this I am transparent; with this I am opaque.

**Mr. Potter:** That's it.

**Mr. Colbert:** Without it you get to know; with it you go to hell. (*Laughter*)

Without it, here's who gave me my money; with it, you know what, your mother gave me my money. (*Laughter*) Well, I like that, Trev. (*Applause*)

Okay, okay, so now I can get corporate, individual donations of unlimited amount for my (c)(4). What can I do with that money?

**Mr. Potter:** Well, that (c)(4) could take out political ads and attack candidates or promote your favorite ones as long as it's not the principal purpose for spending its money.

**Mr. Colbert:** No, the principal purpose is an educational entity, right?

**Mr. Potter:** There you go.

**Mr. Colbert:** I want to educate the public that gay people cause earthquakes. (*Laughter*)

**Mr. Potter:** Okay. There are probably some (c)(4)s doing that.

**Mr. Colbert:** Can I take this (c)(4) money and then donate it to my SuperPAC?

**Mr. Potter:** You can. [*Sly nod*]

**Mr. Colbert:** [*Smile spreads slowly across face*] Well wait. Wait. SuperPACs are transparent?

**Mr. Potter:** Right, and—

**Mr. Colbert:** And the (c)(4) is secret?

**Mr. Potter:** Uh-huh.

**Mr. Colbert:** So I can take secret donations of my (c)(4) and give it to my supposedly transparent SuperPAC?

**Mr. Potter:** And it will say given by your (c)(4).

**Mr. Colbert:** What is the difference between that and money laundering? (*Laughter*)

**Mr. Potter:** It's hard to say.

**Mr. Colbert:** Well, Trevor, thank you so much for setting me up in this brave new world. Dismissed. Trevor Potter, everybody. We'll be right back.

(*End of video.*)

(*Applause*)

**Mr. Trevor Potter:** Well, the bad news for all of you is that ALI forgot to ask Stephen Colbert—they asked me instead to come and speak to you. So my comments will be neither as short nor as funny as what you just saw.

When I first went on the show, the staff said to me as I was just about to step onto the stage and into the maelstrom, they said, "Now just remember the most important thing: He's the funny one." (*Laughter*)

So I have remembered that. You have the straight man here today to talk to you.

I notice that President Ramo teased you, but she didn't actually tell you why or how I am the under gardener at Poke Gardens. The answer is that I have taken to heart the admonition in *Candide* to cultivate your own garden, and that is our seven acres out in Marshall, Virginia, and I am very disturbed you couldn't find the website; I'll have to go look for it.

For years now in Washington, when I tell people I am at Caplin & Drysdale, they say, "I didn't know you were a tax lawyer." *Now,* thanks to the Colbert Report, I can respond, "I'm not—I just play one on TV." (*Laughter*)

I am often asked how, after 25 years as an election lawyer, service as an FEC Commissioner, and general counsel to two presidential campaigns, I ended up as Stephen Colbert's lawyer on late-night television, and the answer is "I was just lucky." (*Laughter*)

It just goes to show that 90 percent of life *is* "just showing up"—and returning phone calls.

I was sitting at my desk one day when the phone rang and it was the Colbert staff. They said, "Do you know what a PAC is? Can you explain it to us? Would you be willing to come to New York and explain it to us?" And I said yes and have been doing that ever since, with the kind forbearance of my law partners, although as one of them put it to me, after about the second or third episode of doing this, "For the first time in 30 years, my kids care what I do, (*laughter*) because I work with Stephen Colbert's lawyer!" (*Laughter*)

Stephen Colbert does have a knack for taking very complicated legal subjects, and hours of behind-the-scenes staff discussions and research, and distilling them into the four-and-a-half minutes of Q and A that you saw that usually captures the *essence* of the issue, and explains it in

layman's language in a humorous, captivating way, just what every Supreme Court advocate wishes for!

On the show you just saw, that corporation, by the way, actually was registered in Delaware as "Delaware Shell Corporation." (*Laughter*) After that show, I had a call from a law professor at a prominent West Coast law school. She said she wanted to thank me for my work on the Colbert Report. She said, "I have been trying to find ways to explain the role of incorporator to my students—now I can just show them the Colbert Report." (*Laughter*)

But it is *not* the role of the incorporator that causes millions of idealistic younger Americans—and seen-it-all older ones—to watch the Colbert Report's coverage of campaign finance in this presidential election year. Nor is it the riveting discussion of IRS filing procedures for § 501(c)(4) organizations that earned the show a Peabody Award.

The Colbert Report coverage is so successful because it accurately describes a campaign-finance world that seems too surreal to be true. A system that claims to require disclosure of money spent to elect or defeat candidates, but in fact provides so many ways around that requirement as to make disclosure voluntary; a system that says that "independent expenditures" cannot be limited as a matter of constitutional law because they cannot *corrupt* because they are "totally independent" of candidates and parties—when the daily news reports about these supposedly "independent" groups show that candidates raise money for them, candidates' former employees run them, and candidates' polling and advertising vendors advise them. And the major donors to these "independent" groups are often also official fundraisers for the candidate. Other major donors have private meetings with the candidates, or travel with them on campaign trips!

Some of the other realities of modern campaign finance are just as bad. This year, for the first time since 1972, we have a presidential election with no candidates financed by public funds in either the primary or the general elections. Instead of receiving grants from the U.S. Treasury to campaign, we see a race by both sides to raise a billion dollars each from private donors. They won't make it, by the way, in my opinion, because so much of the money instead will be going into the SuperPACs and 501(c)(4)s and 501(c)(6)s allied with the parties and the candidates.

These groups will raise and spend hundreds of millions of dollars, not just in the presidential race but in House and Senate races, which present "opportunities" for the interests funding them, opportunities to change control of Congress by knocking off unsuspecting incumbents with last-minute expenditures of large sums of money, often paid for by undisclosed sources.

And all of this will be done with unremittingly negative ads created by unaccountable media advisers for unaccountable "independent" "outside groups." Because if the candidates do not have to stand behind their advertising, and answer to the public for it, there is nothing to prevent every minute of every campaign ad being negative, because those ads are more effective—they do a better job of depressing the opponent's vote. The dirty secret is that voters may not like your candidate any better, but they grow disheartened about theirs, and stay home.

Incumbents have reacted to this new world by running faster and faster on their fundraising treadmills. Incumbent Senators now have to raise hundreds of thousands of dollars a month—every month of their six-year terms.

I recently heard a presentation by the president of a respected centrist Washington foreign-policy think tank. He discussed the tense situation in the South China Sea, the pirates in the Strait of Malacca, and the geopolitical challenges of the melting polar ice cap. Then he identified what he said was "the greatest threat to the United States today"—"the campaign finance system." I couldn't believe my ears. He explained that there were two reasons for this. The first was that campaign money had become the largest corrupting factor in Washington policymaking today. And the second was the *time* that fundraising takes. Members are only in Washington two-and-a-half days a week anyway—from Tuesday afternoon until Thursday night. While here, they spend most of their free moments in party-provided phone booths dialing for dollars—or at lunch and cocktail and dinner fundraising receptions. On weekends, they are often on a coast—or a mountaintop—far from home, at fundraising events. The result, said the think-tank president, is that it is the staff who are trying to make policy. As he put it, "I was staff, and I have great respect for staff, but that job belongs to the elected Members, not to staff!" And they are not doing it.

Harvard law professor Larry Lessig has written a new book called *Republic, Lost* [: *How Money Corrupts Congress—and a Plan to Stop It*], in which he argues that our campaign-finance system is destroying our ability to have a functioning government. He does not claim that Members of Congress are venal and corrupt—to the contrary, he says that they are largely good people, stuck in a system that focuses overwhelmingly on the need to raise money from interests who have it and contribute it to influence legislation. To give you a sense of his book—which I commend to you—a couple of the chapters are called:

What *So Damn Much Money* Does

How *So Damn Much Money* Defeats the Left

How *So Damn Much Money* Defeats the Right

As you may have heard, Jack Abramoff is now back in Washington, out of prison and having seen the light. "Ban contributions from lobbyists," he says, "and from the executives of companies that employ them." Not because lobbying is bad, he hastens to add, but because, in his own personal experience, the involvement of lobbyists in campaign fundraising can dominate the legislative process.

All of this is observed—overseeing would be the wrong word, because it implies some activity—by the Federal Election Commission (*laughter*) riven with partisan and philosophical gridlock. It is so bad that the Commission did not even have the necessary majority vote—four of the six Commissioners—to put out a Notice of Proposed Rulemaking after *Citizens United* and seek comment on whether it should change the regulations just invalidated by the Supreme Court. It is an agency so deadlocked that, on several occasions, it has not been able to agree to appeal when its own regulations were declared "contrary to law" by federal district courts.

Meanwhile, Congress itself is gridlocked over most of these issues—when they are here, and working, rather than fundraising. Disclosure, which used to be like "Mom and Apple Pie"—everyone was for it . . . is suddenly one of the most partisan issues in Washington. For two straight Congresses, there is not a single Republican Senator supporting the DISCLOSE Act [the Democracy Is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2010); S. 3628, 111th Cong. (2010)], which would give us the disclosure the Supreme Court said in *Citizens United* that we already had! And the Republicans' response is that the Act is written to avoid requiring the unions to disclose the individual names of their millions of small dues-paying members. That is true, but is it a relevant criticism? Would they really support disclosing the names of millions of individual small donors to the NRA as well?

So how did we get to where we are now? It is often forgotten, but for long periods of the 20th century, we had a pretty-well-functioning campaign-finance system. In 1904, President Roosevelt called for public funding of the political parties, and a ban on corporate contributions. In 1907, he got one of those with the passage of the Tillman Act [ch. 420, 34 Stat. 864], which banned corporate contributions in federal elections. Congress extended contribution and expenditure restrictions to unions in 1947, rewrote the laws following Watergate to ensure disclosure, set new individual contribution limits to candidates and parties, created for the first time a public funding system for presidential elections, and established the FEC as an enforcement and disclosure agency.

Then, in 2002, Congress passed McCain-Feingold [the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.)], which essentially was designed to bring the system back into compliance with the Watergate-era reforms. I know everyone does not agree, but I believe the McCain-Feingold law largely worked in the 2006 and 2008 elections—the parties and candidates raised more money than before, much in small contributions, and there were comparatively few attempted end runs around the system, and relatively little undisclosed money.

All of that has changed this year. Obviously, not everything I have described is the result of *Citizens United*—the Congressional fundraising race has been getting worse for years. But much of what we face today is the result—intended or otherwise—of that 2010 Supreme Court decision.

I think the Court made three fundamental mistakes in *Citizens United*. First, it declared that while corporate spending in all elections—state and local as well as federal—must now be allowed, it would be accompanied by complete disclosure of all campaign spending. Shareholders would know how their corporations are spending their funds, and voters would know who is paying for the election ads they are watching. As we have seen, this has not proved to be the case—largely because the Supreme Court majority was reading the statute, rather than the more obscure FEC regulations, which "interpreted" the statutory disclosure mandate virtually out of existence.

Then, the Court assumed that "independent expenditures" would in fact be "totally independent," their words, of candidates and parties—which is how the Supreme Court defined independent expenditures in Buckley v. Valeo [424 U.S. 1 (1976)] back in 1976, and why it found them to be free of any possibility of corruption. As we have learned this year, that is a nice theory—with very little grounding in political reality, or in FEC regulations. Instead, the FEC has

actually deadlocked on an advisory opinion asking about the possibility of making coordinated noncoordinated election communications.

Finally, the Court erred, most seriously of all, in announcing that the only corruption that the government can attempt to avoid is "quid pro quo" corruption—explicitly trading votes or similar official actions for money—exactly the sort of personal venality that rarely exists. Justice Kennedy wrote: "The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. . . . Ingratiation and access, in any event, are not corruption." [*Citizens United*, 130 S. Ct. at 910.] The Court seems to be saying that the Congress, and state legislators, cannot address systemic corruption—what Professor Lessig calls "type two" corruption—the effect on the legislative process of the massive amounts of money being raised and spent, the sale of special access to large donors, and the threats of massive "independent" expenditures if the legislatures don't vote the way they are asked. This, the Court seems to say, is all protected by the First Amendment—even if it is this sort of systemic corruption which most worried the founders when they sought to make Congress independent of other interests, "accountable only to the people," as they wrote.

I do not pretend that this is a simple constitutional issue, precisely because this is where two important constitutional values meet, sometimes head on: the First Amendment, the quintessential *individual* right to free speech, which we all know about, and the important *collective* right to a functioning, representational government, which we sometimes forget is the whole purpose of the Constitution. But the Supreme Court has, until now, recognized repeatedly that the legitimacy of government is threatened at its core when it is corrupt, or even appears to most citizens to have a serious conflict of interest.

Since the Supreme Court's decision in *Buckley*, which upheld most of the Watergate campaign-finance reforms (with the important exception of "expenditures totally independent of a candidate or party"), the Supreme Court's jurisprudence in campaign finance has changed. The Court has moved from largely upholding regulation of campaign finance and corporate spending, to striking it down. The six-three *Austin* decision [Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990)] acknowledging the corrupting potential of corporate and labor money in elections was succeeded by the Supreme Court's five-four decision in McConnell v. FEC [540 U.S. 93 (2003)] upholding the McCain-Feingold restrictions, and then shortly afterwards by the Court's five-four decision the other way in *Citizens United*, striking down McCain-Feingold's regulation of corporate and labor money in elections.

One noteworthy aspect of *Citizens United* is that it was decided by a Court which, for the first time in U.S. history, has not a single Member who has held elective office. Justice O'Connor, the key vote to uphold McCain-Feingold earlier on, had run for office, raised campaign funds, served in the Arizona legislature as majority leader, and understood how dangerous and complicated the intersection of campaign money and legislation can be. She was willing to defer to Congress, after it spent years discussing the potential and appearance of corruption in the fundraising done by members and party committees. She deferred to the considered judgment of Congress in dealing with what it identified as a serious problem, on the theory that they knew more than the Supreme Court about corruption in the legislative process.

Other Justices show no such deference—in fact, they appear to think that any regulation of campaign finance by Congress is suspect, that it must be nothing more than incumbent protections. Having watched firsthand as insurgents and rank-and-file members of Congress passed McCain-Feingold with considerable public support and over the bitter opposition of insiders of both parties, I did not regard the legislation that way.

But more importantly, I think the clear propensity of this Court to brush aside Congress's considered judgment that there *is* a danger of corruption of the legislative process because of election spending creates a serious institutional barrier to Congress's ability to safeguard the legislative process.

In the last two years, the Supreme Court has allowed unlimited corporate and labor spending in all elections in the United States, overturning 60-year-old federal laws and some older laws in 26 states. It has declared unconstitutional as a restriction on speech the Arizona public-financing system, because it provided additional public funds for more speech to candidates participating in the public-funding system, triggered if their opponents spent that amount. The D.C. Circuit [in SpeechNow.org v. Federal Election Commission, 599 F.3d 686 (D.C. Cir. 2010) (en banc)] has declared unconstitutional the long-standing $5000 contribution limit to independent expenditure-only political-action committees, which decision resulted in the creation of what we know as SuperPACs—like Stephen Colbert's Americans for a Better Tomorrow, Tomorrow. (*Laughter*)

All of this has been done in the name of the First Amendment, which as Americans, and as lawyers, we revere. But one can be a First Amendment absolutist without being absolutely sure what it requires and what it prohibits. Well-meaning and wise people can differ on these questions, which I believe argues for some deference to Congress when it seeks to limit corrupting activity, as they are the ones who experience the campaign-finance system on a daily basis.

The courts themselves have been of several minds about what the First Amendment requires, and remain closely divided. The Supreme Court's current doctrine is that spending money for an ad that elects a candidate is not corrupting, but giving the candidate the same money to run the same ad is. The Court has held that Congress could prohibit corporate and labor expenditures in elections—until it held that it couldn't. The Supreme Court in *Citizens United* said that the government has no business limiting anyone's speech, and that we are better off hearing *all* voices, no matter their source. Then it turned around and summarily affirmed [132 S. Ct. 1087 (2012) (mem.)] the decision of a three-judge district court in *Bluman* v. FEC [800 F. Supp. 2d 281 (D. D.C. 2011)] that the government could prohibit foreigners, resident and working in the United States, from speaking in U.S. elections. The three-judge court explained that the difference was that foreigners were traditionally *outside* of participation in the U.S. political system, even if they lived here. Of course, many people thought that was true of corporations, too, until *Citizens United*.

My point is not that the Court was right in one case or wrong in another, but rather, that these are close and complicated issues of constitutional interpretation and that the Court slashing its way through campaign-finance statutes with a machete seriously threatens the stability of our democracy.

I am occasionally asked by reporters and foreign visitors about our campaign-finance system, and I have taken to responding to them that there *is* now no such system. The laws written by Congress have been so rearranged by various court decisions that they resemble the pieces of a jigsaw puzzle, laid out randomly on a table, with important pieces missing.

On occasion, it suits the partisan interests of one side or another to claim that the pieces cannot be put back together even when they can—that a constitutional barrier exists when it does not—because that argument sounds better than acknowledging the partisan reality.

One example of this is the current debate about disclosure. There are certainly good reasons for some of the organizations running political ads this year to think that they will raise more money if they do not have to disclose their donors. The group called American Crossroads started as an organization that disclosed its contributors—but it did not have as many as it expected. Then, it created a 501(c)(4) that did not disclose its contributors—and suddenly it had a whole lot more money.

Corporations may have a good reason to seek to keep political expenditures secret—secret from their shareholders and customers and employees, at least. The example of Target, which faced consumer boycotts, shareholder resolutions, and angry employees when it contributed to a committee supporting a controversial candidate for governor in its home state of Minnesota, in 2010, is often cited as what other corporations hope to avoid.

However, in addition to these practical arguments, opponents of disclosure attempt to wrap their position in the Constitution. They claim that requiring the disclosure of funders of political ads would "undermine" *Citizens United*. They also claim that the secrecy of corporate funding is protected by the 1950s civil-rights case NAACP v. Alabama [357 U.S. 449 (1958)].

The *Citizens United* claim is particularly far-fetched. One underreported aspect of the *Citizens United* decision is that the Court upheld the broad disclosure requirements of McCain-Feingold eight to one: every member of the Court except Justice Thomas agreed that "the public has an interest in knowing who is speaking about a candidate shortly before an election." [130 S. Ct. at 915.]

The eight Justice majority for this portion of Justice Kennedy's Opinion went on to praise disclosure of the sources of political speech in robust terms:

> 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. 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. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

[130 S. Ct. at 916 (citations omitted).]

It is hard to think of a more ringing endorsement from the Court of mandated disclosure of the funding of political spending!

The NAACP comparison rests on a similarly flawed foundation: The harm faced by members of a small and highly unpopular civil-rights organization in Alabama in the 1950s was severe physical violence—even death. Groups that allege a fear of "reprisals" today are of a different nature entirely, as is the nature of the alleged reprisal. The NRA and the Chamber of Commerce are hardly small and vulnerable, unpopular minority groups. Nor is the organization in California that led the campaign against same-sex marriage in that state to a 52 percent popular-vote victory. And the harm alleged is not death or serious physical danger, but insults and consumer boycotts (itself protected First Amendment activity).

As Justice Scalia wrote in Doe v. Reed [561 U.S. ___, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring)], a case about disclosure of ballot signatures:

> There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which . . . campaigns anonymously . . . . This does not resemble the Home of the Brave.

So where do we go from here, on disclosure or any of the other campaign-finance issues?

We have campaign-finance practices that both parties—and both presidential candidates—say they dislike. I would like to think that after this election the problems with the status quo will be overwhelmingly clear to both sides, and a consensus on a new way forward will emerge. Unfortunately, at the moment only the first part of that sentence seems accurate—the problems are clear, but the ability to reach a consensus is not.

There is talk of a constitutional amendment. Not only would such an amendment be hard to draft, putting the interpretation right back into the hands of the courts, but I think talk of an amendment encourages avoidance of the hard work that should be done to resolve these problems. For there are legislative solutions that would be both effective, and constitutional—they just take legislative willpower. Such a reform agenda could include:

- Defining independent expenditures so that they are truly independent—of the candidates, their agents, previous staff, close family members, and current vendors

- Requiring disclosure of the sources of funding of all election ads, no matter who runs them

• Reform of the FEC, so that it becomes an effective, independent, enforcement agency

• Restrictions on contributions, and fundraising, by lobbyists

• Lobbying regulation reform, as proposed by the American Bar Association, to ensure that people who lobby or run lobbying campaigns, become registered lobbyists

• Finally, I know controversially, an effective public-funding system, so that candidates for President and the Congress have the resources needed to campaign for office, and to run for reelection, without spending every moment of their working day thinking about fundraising rather than doing the work they were elected to do

These are not easy solutions, and I do not claim they are the only ones, or even necessarily the right ones. But the time has come that we—all of us—need to dedicate ourselves to acknowledging the problems with our campaign-finance practices—and what they are doing to our governmental system—and resolve to correct them together.

Thank you very much. (*Applause*)

Thank you, and I have run on into your time too long. But if we have a moment for questions, I am happy to do that.

**President Ramo:** Absolutely, indeed we do. Questions.

**Unidentified Speaker:** Can we include historians in the registration of lobbyists? (*Laughter*)

**Mr. Potter:** Yes, if they are directing lobbying activities, as I believe might be the case in some instances.

**Ms. Allison Hayward (Va.): A** very interesting and informative talk. I don't want to be too much of a geek on this topic, but I do want to give you the opportunity to explain a little bit how the shell corporation's fate unfolds as it collects money for a tax-exempt purpose and then uses it for a purpose that belongs to a political organization. Because the IRS, as I am sure people know, will not necessarily take Mr. Colbert's assertion that his purpose is a social-welfare one; they will apply a "facts and circumstances" test. But I think it would be interesting, I would like to hear what your observations are as far as how would the next 18 months roll out for that 501(c)(4).

**Mr. Potter:** Thank you, Allison. In full disclosure, I should say Allison and I have known each other for years. She has at least worked with me, if not for me. We have disagreed on most campaign-finance issues, but it is a great question, essentially are these (c)(4)s really going to get away with it?

Part of the answer was in the film there, which is, to my surprise as a non-tax lawyer when I sat down with my tax partners to figure out what the Colbert SuperPAC was—what the Colbert (c)(4) was actually going to have to do, one of my questions was, "When do they file their request with the IRS, their application for (c)(4) status?"

And one of my partners looked at me merrily and said, "Well, you know, they don't have to." I said, "What do you mean? You mean not right now?" He said, "No, no, they actually legally never have to file an application for (c)(4) status. They can claim to be a (c)(4) without being recognized by the IRS." He said, "I wouldn't recommend it, because when they file their (c)(4) tax return, their 990, the IRS isn't going to know what to do with it if they don't have them in the system."

But the point of it all was the revelation to me that all of this was going to happen a year or more after the election, that these groups could be created, could call themselves (c)(4)s, have corporate status so that you weren't sure even who was running them. I mean, people say occasionally, "Well, we know who's running the Colbert (c)(4) because we saw it on television." My answer is, "Sure, because we chose to go on television, and he chose to become president on the public record. But what happens if we just left it over at Caplin & Drysdale in the drawer, and it was called 'Delaware Shell Corporation,' and the only incorporator was our paralegal?" It could still take all that money and spend it in the election, file nothing with the IRS until after the election, well after the election.

Then the IRS is overwhelmed. This is a politically sensitive area. They have shown, I think, real concern about diving in here. When they sent letters to some of the (c)(4)s this year asking for additional information, they got a very stiff letter from members of one party, the U.S. Congress, saying, "How dare you ask these Tea Party (c)(4)s for additional information; this is political persecution."

So I am not sure the IRS is actually going to look carefully, but if they do look carefully, as Allison knows, the standard is, are they spending a majority of their money on political activities, political intervention, or on social welfare? The answer to that is very murky. In a room full of tax lawyers, you will get a bunch of different answers about what qualifies on one side of the line or the other. The worst that can happen, at the end of the day years later, is the IRS decides they are not a (c)(4), in which case what are they? Maybe they pay a 35 percent excise tax because they're not, but then they still don't have to disclose their donors.

So I didn't add to my long list perhaps reforming the tax laws in this area. But I think people at traditional (c)(3)s and (c)(4)s are getting very nervous that they are going to end up being the unintended battlefield casualties of changes in law in this area, because people are using these as vehicles for political spending that was intended by the tax code to be spent in other organizations, which have, as a result, timely filings and full disclosure of donors.

**President Ramo:** One more question if there is one.

Trevor, I cannot thank you enough, not just on behalf of The American Law Institute, and Trevor, by the way, is one of the Advisers to our Election Law project, but on behalf of all

Americans. There is nothing more important to our democracy than this discussion about elections, and I think I am at the point where I think we are at fire in the crowded theater. Thank you, Trevor.

**Mr. Potter:** Thank you. Thank you very much. (*Applause*)

**President Ramo:** Well, you just have time to walk off your dessert by very quickly going across the hall, where we are going to start talking about our election-law project. Thank you.