FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Accountability after Citizens United:

The Role of the Federal Election Commission

The Brennan Center for Justice at NYU School of Law

April 29, 2011

Prepared Remarks by Cynthia L. Bauerly, Chair

Federal Election Commission

Good morning. Thank you, Michael, for the kind introduction. Thank you to the Brennan Center for Justice, NYU School of Law, and Ms. Torres-Spelliscy and her team for putting this symposium together. I am grateful to be a part of this effort to examine one of the most important questions facing our democracy: How do we ensure that our government and those who serve in it remain accountable to those who elected them in the first place?

I've been asked to talk specifically about the role of the Federal Election Commission with respect to promoting accountability in the wake of the Supreme Court's *Citizens United* decision. I should preface these remarks by making it clear that, although I currently serve as the Chair of the FEC, my remarks today are my own and should not be imputed to the Commission

or any of my fellow Commissioners.

As you all know, the FEC's mission is to administer and enforce the Federal Election Campaign Act. It's a rather limited role in the scheme of federal campaign finance law – we don't write the laws and we don't decide whether they are constitutional. Rather, we are told by Congress or the Courts what our next steps should be when they act. And let's face it, we regularly lose in court – either because our regulations weren't regulatory enough, or more recently, because the statute (and thus the regulations implementing it) have been found to infringe on someone's First Amendment rights. We fairly could paraphrase Lord Tennyson, "Ours is not to reason why. Ours is but to do and …" – well, you know the rest.

That said, the Commission plays a substantial role in the process by administering and enforcing the Act. A good share of the Act and our regulations are aimed at disclosure. Enforcement and disclosure both promote accountability in their own ways. Through the enforcement process, we attempt to ensure compliance with the Act's requirements, including the limits and prohibitions on certain activities. Given the current environment, in which many of the limits and prohibitions on activity – some of which have been around for a long time – are now considered constitutionally infirm, disclosure takes on an even more significant role with respect to accountability.

With many new speakers – and new types of speakers – becoming engaged in new ways, the public increasingly must rely on disclosure of the kind provided by the FEC to effectively respond to and participate in the political debate. Knowledge about the source of funding for political messages helps promotes accountability.

One of the resulting benefits of reporting is that it provides an opportunity to take a snapshot of a particular moment in time and allows us to use that data to get a better

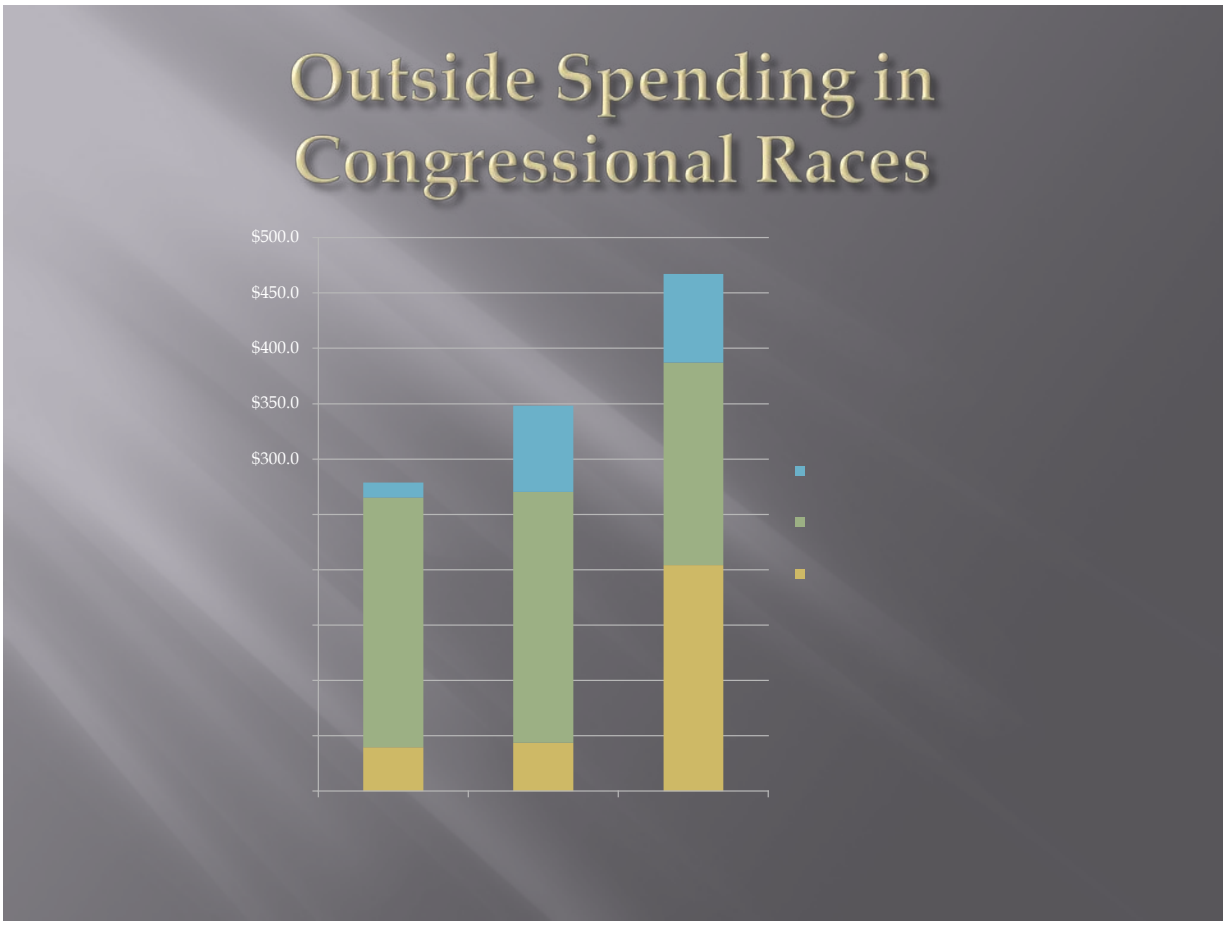
understanding of what is actually happening in the aggregate. The 2010 elections were the first elections taking place in what can be called the "post-*Citizens United* world."

There was a lot of discussion during the election about ads and who was paying for them, and I thought it would be interesting to take a look at the spending captured in FEC reporting. This data was compiled by the data gurus at the FEC, who provide an invaluable service to the agency and the public. Our staff took a look at outside spending in congressional races over the last few cycles, and found some interesting results:

- Independent expenditures by PACs, Groups and Individuals jumped from $43.6 million in the 2008 cycle to over $204 million in the 2010 cycle. This reflects nearly five times more spending than in 2008.
- At the same time, we saw independent expenditures by parties drop from $226.8 million in 2008 to $183 million in 2010.
- Electioneering communications stayed pretty steady at roughly $80 million (after a noticeable uptick between the 2006 and 2008 cycles as a result of the Supreme Court's decision in *FEC v. Wisconsin Right to Life*).[1]

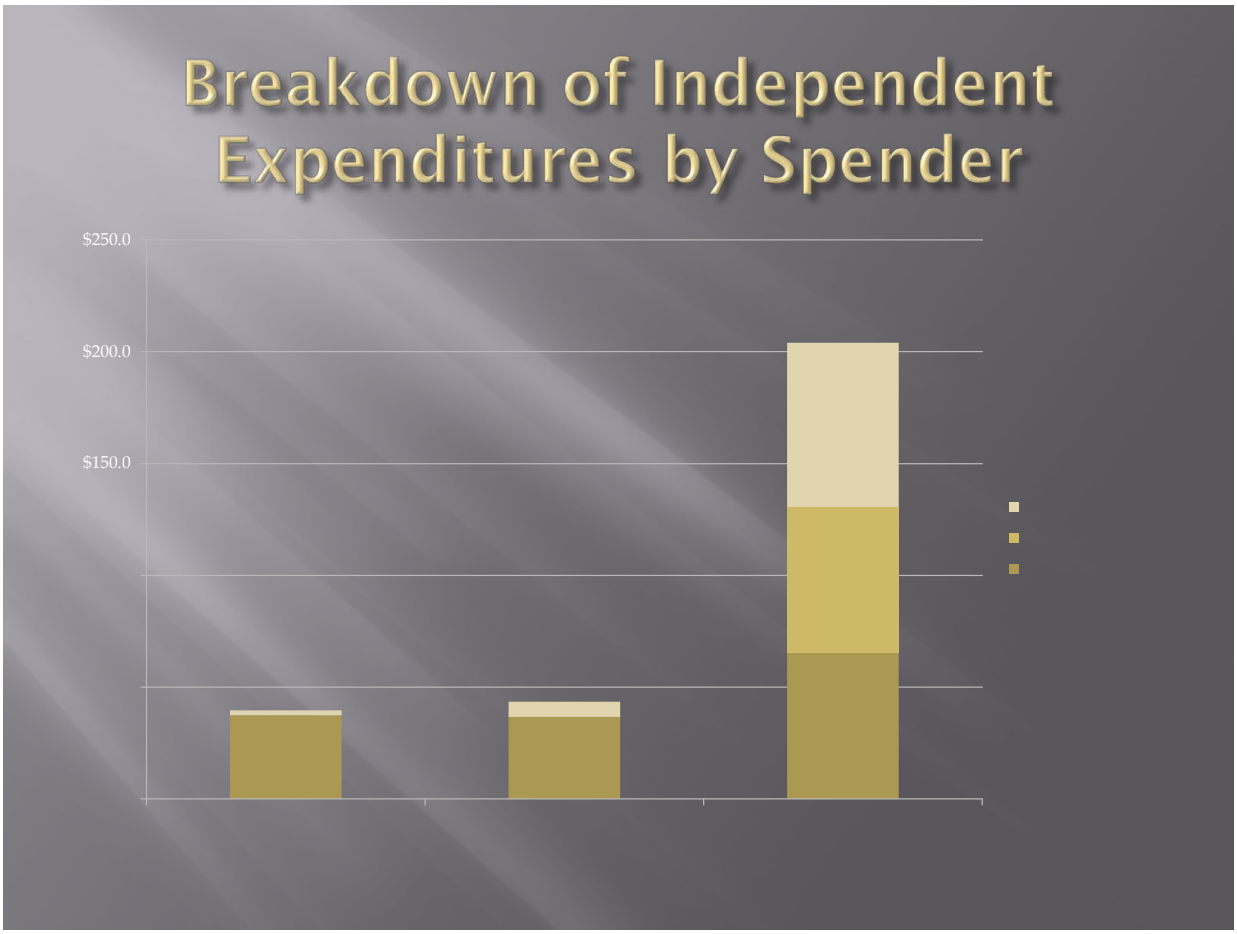
So there has been a shift in independent activity from parties to PACs, groups, and individuals.

[1] *FEC v. Wisconsin Right to Life,* 551 U.S. 449 (2007).



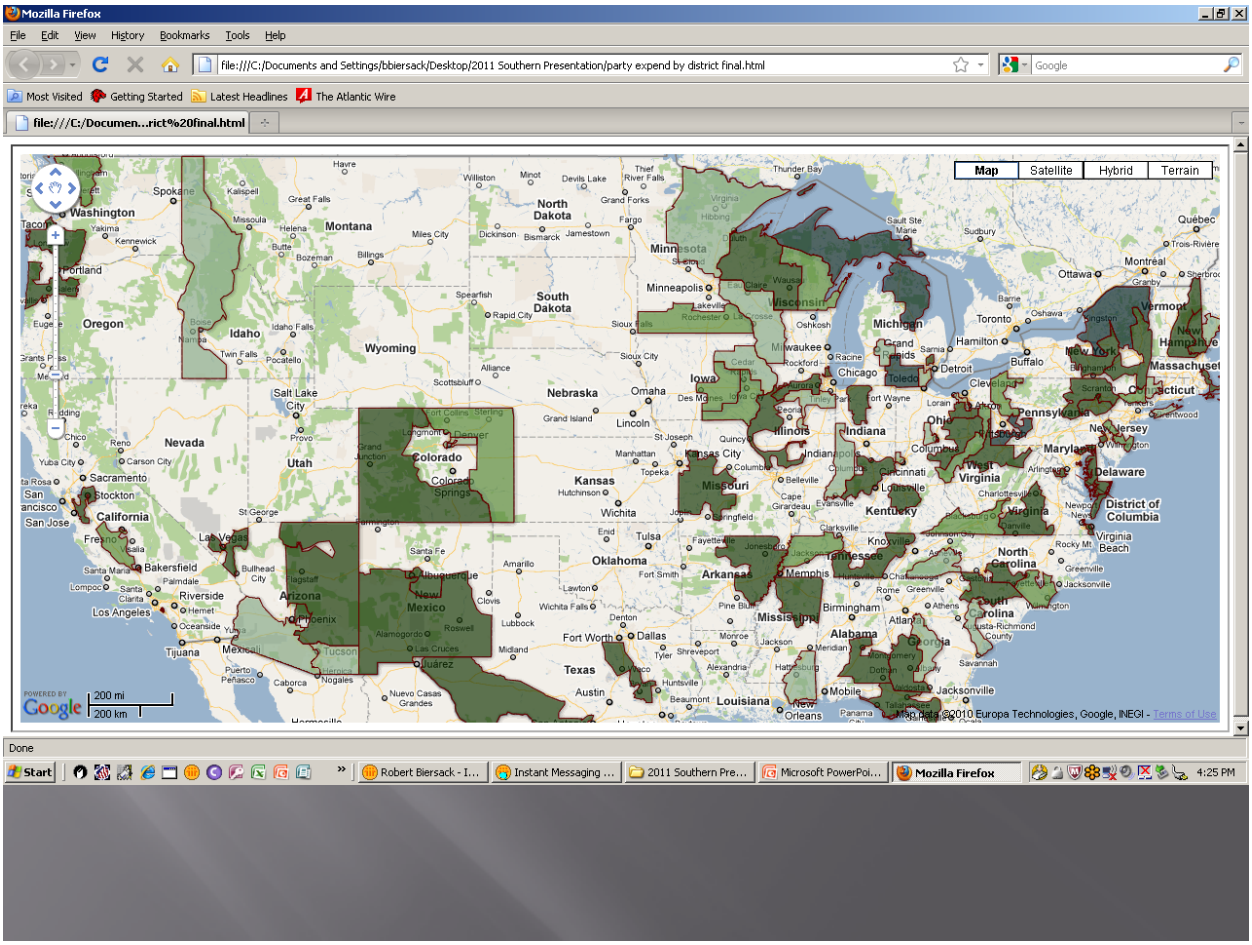
Drilling down a little more, that independent spending by PACs, groups and others breaks out as follows:

- About $65 million in independent expenditures were made by each of the classes of PACs:
  - Traditional PACs, and
  - Independent Spending Only PACs, which are sometimes referred to in media reports as “SuperPACs.” I’m afraid that name is going to stick now that Stephen Colbert has latched on to it.
- About $73.5 million were spent by individuals, corporations, unions, c4's, etc.



That represents a pretty substantial increase over past cycles, almost doubling the amount spent on independent expenditures by PACs and representing a tenfold increase in independent spending by the class of individuals, corporations, unions, and other non-PAC entities.

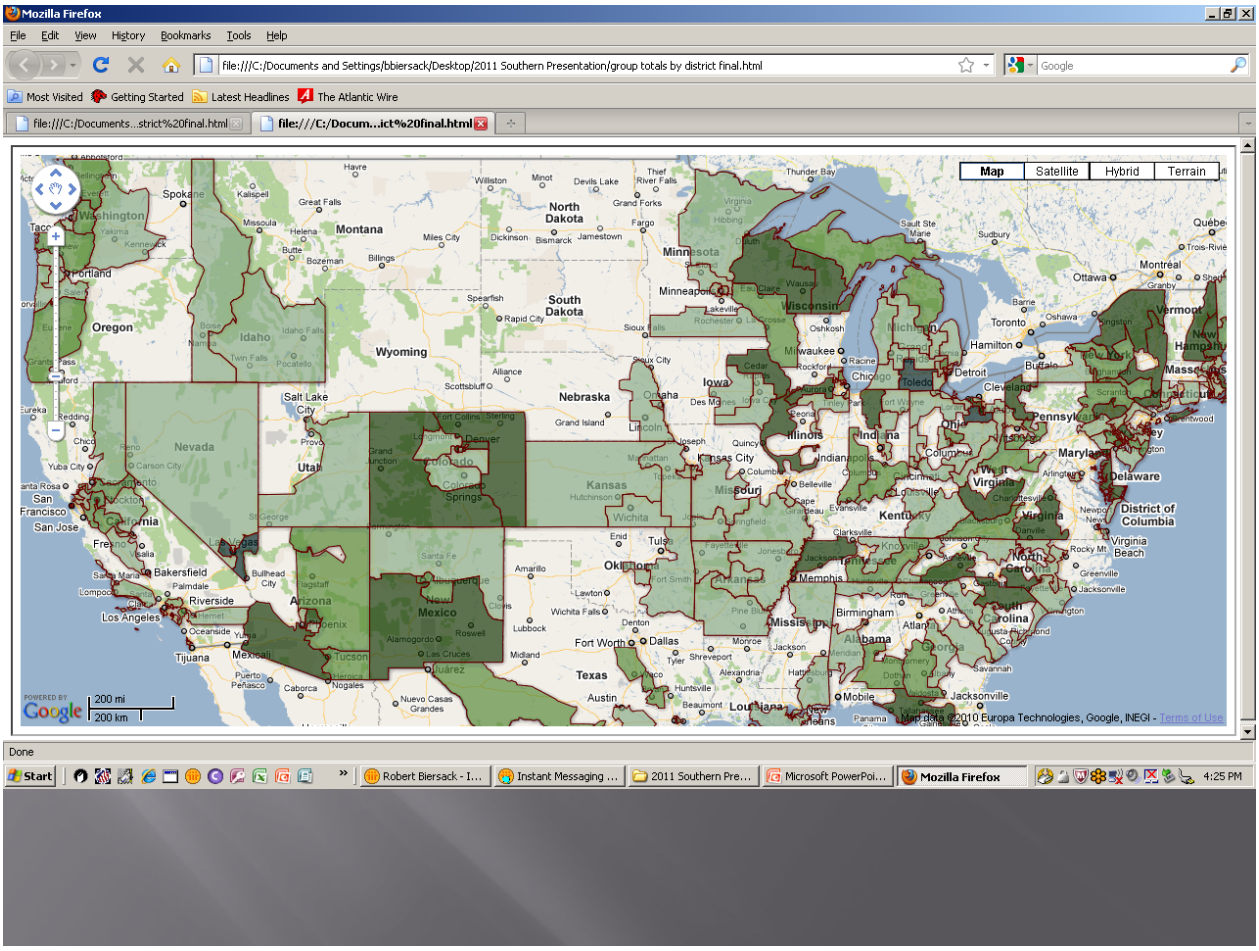
The staff also pulled together some maps that demonstrate the geographic representation of this shift. Basically, we have seen parties take a far more targeted approach, while other groups, PACs and individuals are far broader in their scope. We have divided this into two sections of the country. In the first slide, you see the independent spending by political parties by congressional district.



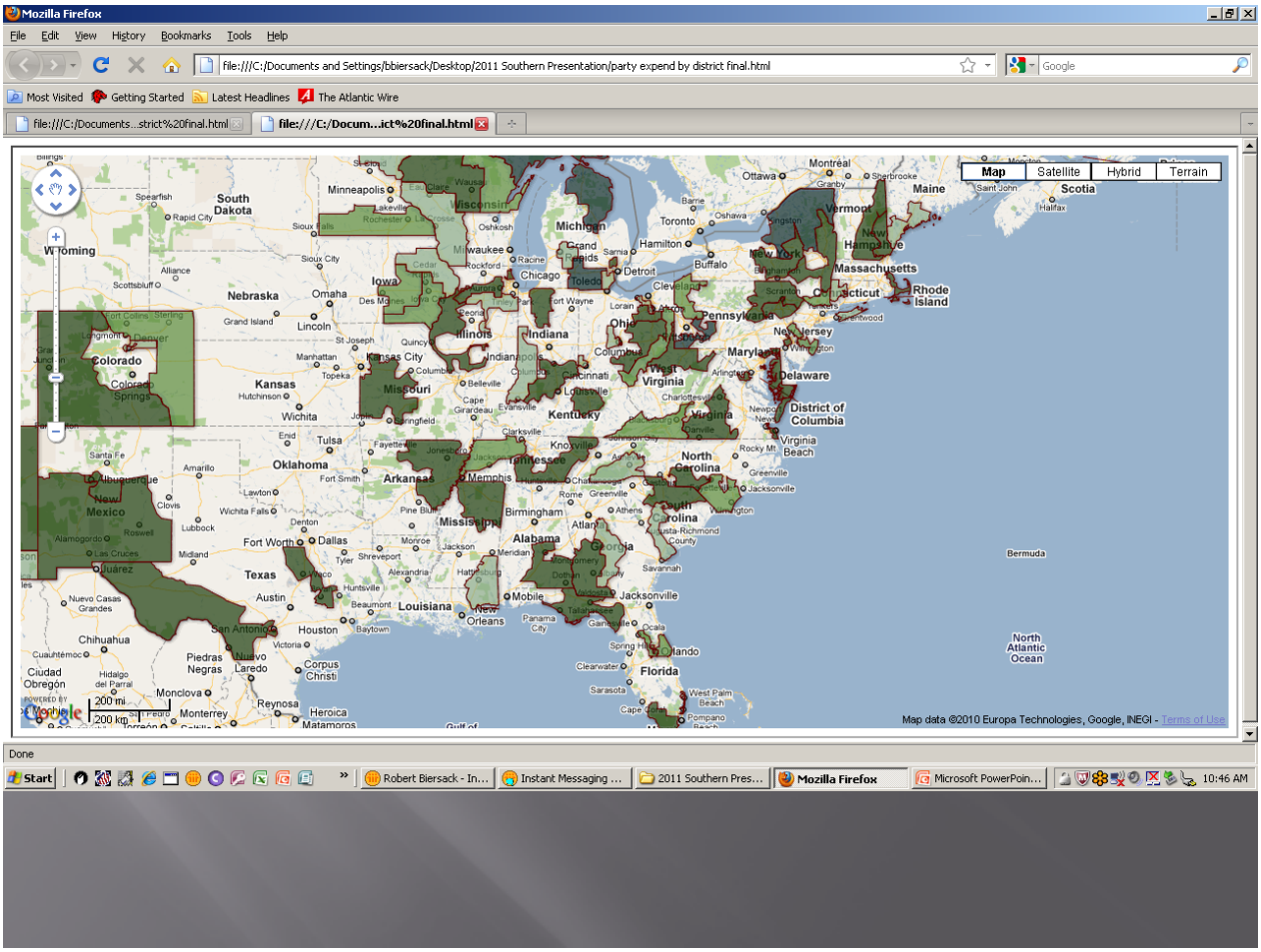
From lightest to darkest the colors represent:

- 0 - $500,000
- $500,000 - $1,000,000 – half a million to 1 million
- $1,000,000 - $3,000,000 – 1 million to 3 million
- more than $3,000,000

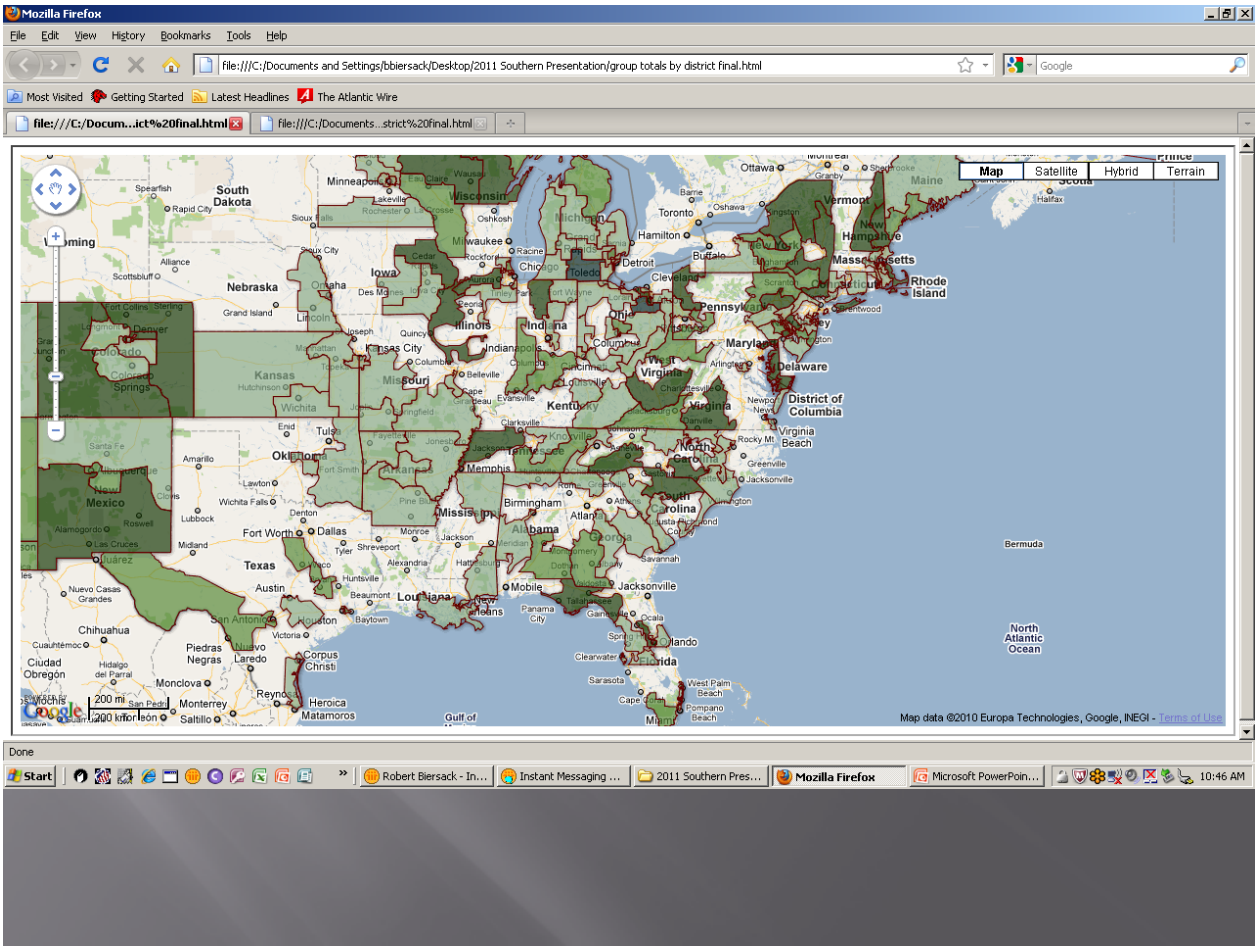
The second slide shows the same geographic area with additional independent activity by non-party committees, groups and individuals.



You can see the same thing in the next two slides. First, the eastern half of the U.S. with independent spending by parties.



And next the same geographic area with the additional spending by non-party committees, groups and individuals.



So, at least for the last cycle, we are seeing party committees take a more narrow focus with their independent spending, while outside groups are casting a somewhat wider net.

That represents the spending that's being reported. Whether that reporting contains the right level of detail about the source of funds being spent on these activities is another question. And that is one of many questions I hope will be discussed further as the day goes on.

There is a case to be made that, although we are seeing a substantial increase in campaign-related spending by some, we are not seeing a corresponding increase in disclosure of that spending – certainly not the kind of reporting the public expects when it thinks of "political spending" and wanting to know who is behind it. And not even the kind of reporting that one would necessarily expect after looking at the statute.

Just last week the *Los Angeles Times* issued a detailed report concluding that few of the nation's leading companies are disclosing their political spending.[2] The focus of that article was on the fact that, despite complying with legal reporting requirements at the state and federal levels about their own spending, many of these major companies are simply not reporting any of their contributions to politically active third parties who engage in political activity on their behalf.

A recent report by the Public Advocate for the City of New York tried to quantify the quality of reporting the source of funds in the cycle.[3] The report is based on the FEC's data, although the analysis is entirely the Public Advocate's. I think it is a very useful addition to the discussion about political spending and accountability. The report concludes that outside groups spent $290 million on independent expenditures in 2010. You'll note that this number is a little higher than what the FEC's numbers suggest for a category of independent expenditures by PACs, Groups and Individuals, although it may include electioneering communications, which we have included as separate category.

Among the conclusions of this report is that tax-exempt non-profits reported spending more than $130 million on independent expenditures, which is a little less than half of all outside spending by non-party committees. These groups, according to the report, however, are not reporting the source of the funds they are spending on independent expenditures, even when they are reporting the expenditures themselves.

The report also suggests that there is a tendency for ads to be more negative when the donors to the expenditure are not reported (75% as compared to 54% of ads in which funding

[2] Noam N. Levey and Kim Geiger, *Much corporate political spending stays hidden*, Los Angeles Times, April 23, 2011.

[3] The Public Advocate for the City of New York, Citizens United and the 2010 Midterm Elections, December 2010.

sources are reported). That finding shouldn't be terribly surprising. In the absence of disclosure, which helps to foster accountability for the contributor, there is not much of a check on the quality and tone of discourse we see in the political marketplace.

Disclosure, whether through disclaimers or reporting, provides the public with vital information. And unlike other aspects of the FECA and BCRA after *Citizens United*, there is no uncertainty about the extent to which effective disclosure is both constitutionally valid and good public policy in the eyes of the Supreme Court.

And it has been so since the beginning of the Supreme Court's modern campaign finance jurisprudence. We all know that *Buckley v. Valeo* is relied upon to question campaign finance regulation at every opportunity, so much so that one might fill any pause in any discussion, whether about contribution limits or coordination, with a knee-jerk cite to *Buckley*'s admonition against restricting speech through expenditure limits or a reference to footnote 52's examples of express words of advocacy.

Nonetheless, when discussing matters that relate to disclosure, we rarely hearken back to *Buckley*'s robust endorsement of "recordkeeping, reporting, and disclosure requirements." So in case anybody has forgotten, here is what the Court had to say about disclosure nearly 40 years ago:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.
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> * * *
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> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.
>
> This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.
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> * * *

> Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.
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> The disclosure requirements, as a general matter, directly serve substantial governmental interests.[4]

Accordingly, Ms. Torres-Spelliscy is on very firm ground when she declares in her recent paper on *Transparent Elections after Citizens United*: "Disclosure of campaign spending is fully constitutional." And yet challenges are raised fairly frequently. Recently those associated with California's marriage ban proposition argued for anonymous speech rights by raising the concern that disclosure of their contributions to the referendum effort might result in economic harm to their businesses as a result of boycotts by those who disagreed with their political spending.

In our country, and around the world, businesses have been held accountable for their behavior – whether political or social – by consumers for quite some time through the tried and true boycott. Certainly the Montgomery Bus Boycott was bad for business. That was sort of the point. And we know that boycotts have been used to register consumer opposition from everything from apartheid to selling baby formula in Africa.

And so it is in our political system. Voters, like consumers, get to make their choices armed with the knowledge of who is speaking or paying for the speech. That information helps to eliminate distortions within the marketplace of ideas. Without it, the market may be unreliable. The fact that sometimes voters decide to use that same information to make economic decisions doesn't change the value of the information to the very important interests behind disclosure.

Nonetheless, there are still efforts to characterize anonymous speech as necessary to all First Amendment expression. As recently as this week, an opinion column cited to the

[4] *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

protection afforded by the Court in *NAACP v. Alabama*[5] to support the argument for anonymous speech in the context of political contributions.[6] In that case, the Court found that the state interest – determining whether an organization needed to register as doing business in the state – was insufficient to obtain membership lists.

In stark contrast, the courts have repeatedly held that the interest in disclosure of political contributions is sufficient. In 2009, the U.S. Court of Appeals for the DC Circuit confronted both *NAACP* and *Buckley* in the context of the Honest Leadership and Open Government Act. That case, *National Association of Manufacturers v. Taylor*, challenged the lobbying disclosure rules, in part, because, in the words of NAM's General Counsel: "Taking policy positions that are unpopular with some groups may lead to boycotts, shareholder suits, demands for political contributions or support, and other forms of harassment."[7]

The D.C. Circuit rejected that argument, holding that "the risks that NAM claims its members would suffer if their participation in controversial lobbying were revealed are no different from those suffered by any organization that employs or hires lobbyists itself, and little different from those suffered by any individual who contributes to a candidate or political party."[8] The panel went on to note that this argument is inconsistent with *Buckley*'s statement that "certainly in most applications" compelled disclosure laws will survive exacting scrutiny.[9]

Less than 6 months after the NAM case, the Supreme Court reaffirmed its support for broad disclosure as it applies to independent speech in *Citizens United*: "The First Amendment

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[5] 357 U.S. 449 (1958).

[6] David Marston and John Yoo, *Political Privacy Should Be a Civil Right*, Wall Street Journal, April 27, 2011.

[7] 582 F. 3d 1, 19 (D.C. Cir 2009).

[8] *Id.* at 22.

[9] *Id.* at 19.

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 such speakers and messages."[10]

Not long after *Citizens United*, in *Doe v. Reed* the Court held that disclosure of support for referendum petitions for the marriage ban I mentioned earlier does not violate the First Amendment. I note *Doe* in part because it continues the long line of cases rejecting the idea that anonymous political speech requires blanket protection. But I also note it because of the particularly strong concurrence by Justice Scalia.

Scalia concurred in the result, but thought that referendum petitions were more akin to legislating and probably not protected by the First Amendment at all. Even if they were protected by the First Amendment, he argued that history suggests that protection doesn't include anonymity. He concluded his concurrence with this: "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."[11] You won't find me quoting Justice Scalia a lot, but there is something particularly powerful in the way he ties transparency and disclosure to our tradition of self-governance and "civic courage" as the Justice puts it.

Despite repeated and recent declarations by the Supreme Court upholding disclosure and expounding upon its merits, I expect that as pressure for disclosure mounts in a variety of arenas – for example, shareholders voting on corporate spending – we will hear more of these arguments.

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[10] *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

[11] *Doe v.* Reed, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

Turning back for a few minutes to the corporate expenditure ban aspect of *Citizens United*, although it was a landmark decision, it did not come out of the blue. It followed a series of cases, including *Wisconsin Right to Life* (*WRTL*) and *Massachusetts Citizens for Life*[12] (*MCFL*) that had previously chipped away at the statutory prohibition on corporate expenditures.

So, while *WRTL* and *MCFL* indicated there were some constitutional problems with uniform application of the corporate expenditure prohibitions in the Act, it was *Citizens United* that finally brought this line of reasoning full circle and, in doing so, overturned the *Austin* case,[13] which had previously upheld a similar corporate expenditure ban in Michigan.

At the end of the day, *Citizens United* has some pretty clear implications. Corporations and labor unions are no longer prohibited from making independent expenditures or electioneering communications. There is no longer any need to apply the *WRTL* "no reasonable interpretation" test to determine whether an electioneering communication is prohibited or not. As I've noted, the Court also rejected the argument that the Act's disclosure requirements must be limited to speech that is the functional equivalent of express advocacy; instead it offered a full-throated defense of the value of disclosure.

In response to the decision, the Commission declared that it will no longer enforce the statutory provisions or its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications. As an Administrative Agency, that was, of course, what we needed to do in response to a Supreme Court decision. "Ours is not to question why… " And as those of you who are close observers of the

[12] *FEC v. Massachusetts Citizens for Life,* 479 U.S. 238 (1986).

[13] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

Commission know, a declaration about not enforcing regulations is not exactly a heavy lift these days.

The statement did not, however, provide much in the way of useful guidance to those who are trying to comply with the patchwork of rules that still apply to corporate and labor organizations – including now the reporting of electioneering communications and independent expenditures. In my view, one of the most important duties we have as a Commission is providing clear guidance to those who must follow the statute and regulations.

While *Citizens United* certainly and appropriately got significant attention last year, the D.C. Circuit's en banc decision in *SpeechNow*[14] also shifted the landscape. In that decision, the court held that contribution limits are unconstitutional as applied to individuals who desired to make unlimited contributions to SpeechNow, an organization that intended to make only independent expenditures. Relying on the majority opinion in *Citizens United*, the court concluded that independent spending poses an insufficient risk of corruption to justify limiting contributions to groups that make only independent expenditures. The court noted that an individual may make unlimited independent expenditures with his or her own resources. By analogy, the court could not find a constitutional justification for prohibiting groups of individuals who want to engage in independent speech to do the same.

Both *Citizens United* and *SpeechNow* upheld, however, the requirements related to disclosure, reporting, and organization, essentially concluding that once we are no longer talking about prohibitions on expenditures or limits on contributions, we no longer are talking about substantial impediments to the exercise of First Amendment rights, but rather reasonable and

[14] *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010) (en banc).

important opportunities for the public to be informed with respect to their democratic decision-making.

As is frequently the case, where the law is developing rapidly, Advisory Opinions are presented for the Commission's consideration. The Commission considered a couple of requests last year that dealt with the decisions in *Citizens United* and *SpeechNow* cases (as well as the *EMILY's List*[15] case)

First, Club for Growth.[16] Club for Growth is a 501(c)(4) corporation. It maintains a Separate Segregated Fund (SSF) that makes contributions and expenditures. Club for Growth sought to establish an independent expenditure only committee – IEOPC – that would, like the SSF, be a component of the Club's overall corporate structure. It also wanted to pay for the establishment, administrative, and solicitation expenses of the new IEOPC.

In essence, the Club for Growth wanted to apply the same approach a corporation takes with respect to an SSF and apply that to an IEOPC. The Commission decided that the Club for Growth may establish a connected IEOPC and pay its establishment, administrative, and solicitation expenses. However, because the IEOPC is not an SSF, the establishment, administrative, and solicitation expenses are not exempt from definition of contribution and must therefore be reported.

In this AO, the Commission also noted that this arrangement could present concerns about coordination if the contribution committee were to pass along information or requests to the independent committee from candidates with whom the contribution committee was working. We thus noted in the opinion, that while not required, implementing a firewall consistent with

[15] *EMILY's List v. FEC,* 581 F.3d 1 (D.C. Cir. 2009).

[16] Advisory Opinion 2010-09.

the one outlined in the Commission's coordination safe harbor would address potential concerns with respect to the conduct standards of the Commission's coordination rule.

The Club for Growth Advisory Opinion (along with the Commonsense Ten AO,[17] which asked whether corporations and labor organizations could give to IEOPCs) provided a template letter that committees could submit to the Commission to signal an intention to accept unlimited contributions because they will be making independent expenditures and not contributions. So designating will help avoid confusion by those reviewing reports and also help IEOPC's avoid unnecessary probes by the Commission. By indicating that a committee is an IEOPC, our reports analysts won't need to ask whether large contributions are excessive or not. So it has a practical effect in house and for the committees, but it also has value for reporters and others who spend a lot of time reviewing reports and who will be noticing contributions to certain committees that are larger than what would have previously been permitted.

The other significant advisory opinion request was submitted by the National Defense PAC.[18] National Defense PAC is a nonconnected committee that makes contributions and expenditures. In its advisory opinion request, it sought to create a separate "independent spending" account within the organization rather than create a connected IEOPC for the purpose of accepting unlimited contributions and making independent expenditures. The Commission considered alternative approaches but could not reach consensus and did not issue an opinion. At the core of the Commission's disagreements were the application of the *EMILY's List* and *SpeechNow* decisions as well as some previous Supreme Court cases (e.g., *CalMed*)[19] to the

[17] Advisory Opinion 2010-11.

[18] Advisory Opinion Request 2010-20.

[19] *California Med. Assn. v. FEC,* 453 U.S. 182 (1981).

proposal and whether a rulemaking was necessary even if the Commission was inclined to accept the two-account approach proposed by NDPAC.

Although the subject matter of this request continues to be one of the issues the Commission hopes to consider as part of a rulemaking, we may get an assist by the courts. NDPAC filed a lawsuit in January in the U.S. District Court for the District of Columbia.[20] The suit challenges the Commission's failure to provide an advisory opinion granting NDPAC's request last year. While we are in the very early stages of this litigation, the complaint argues that NDPAC is entitled to accept unlimited contributions to an independent spending account while also maintaining a Federal "hard money" account. This lawsuit is not really about what organizations such as NDPAC are permitted to do, but rather how, or with what structure, they are permitted to do it. And it raises questions of recordkeeping, reporting and disclosure.

And, as if to make the point that the Commission is sued for being too lenient as well as for being too regulatory, a little more than a week ago we were sued over the Commission's electioneering communications reporting regulation. The lawsuit challenges our existing rules for the reporting of electioneering communications by corporations and labor unions as being inconsistent with the statute and, to quote the complaint, by "allowing corporations, including non-profit corporations, and labor organizations to keep secret the sources of donations they receive and use to make 'electioneering communications.'"[21] I am sure this will be watched by many because it touches on one of the major topics of interest in the wake of *Citizens United* about what kind of disclosure is appropriate.

[20] *Carey v. FEC*, Civ. No. 11-259 (D.D.C. filed Jan. 31, 2011).

[21] *Van Hollen v. FEC*, Civ. No. 11-766 (D.D.C. filed Apr. 21, 2011), Complaint at ¶1.

As I said at the outset, the FEC's role extends to the reach of the statute. As it stands, some organizations – particularly those that are not Political Committees – may not be doing much that falls within the FEC's jurisdiction. These organizations may be engaging in political activities but may not reporting much, if any, of their contributions or donations and spending. In many cases, these organizations raise questions to which the Commission will not be of much assistance because we are applying a limited statute that has been subsequently narrowed by the Courts.

For those organizations who do register with us, or who make independent expenditures and electioneering communications, I believe the Commission should, at a minimum, take steps to shed some light on our disclosure rules which currently cross reference sections of the regulations rendered meaningless by *Citizens United*. More generally, the Commission should seriously consider whether past interpretations of our reporting rules are adequate in a post-*Citizens United* world, particularly in light of the Court's holding on the statute's disclosure and reporting requirements.

To be clear, I am not talking here about the type of fundamental and broad reform that has been proposed in legislation like the DISCLOSE Act. I am talking about simply updating our reporting rules and forms to reflect, for example, that corporations may make electioneering communications without restriction. I am talking about providing useful guidance to entities that are trying to comply with the new landscape. I would even consider addressing the very basic question: "Do our reporting rules work now that we have entirely new classes of entities able to make electioneering communications and independent expenditures?"

As you know, in January, the Commission was unable to issue a Notice of Proposed Rulemaking with respect to *Citizens United* because the Commission was deadlocked on the

scope of the proposed rulemaking. At that point in time we didn't have four votes to even ask the public whether we should update our reporting rules to reflect the new reality or address questions about the role of foreign nationals and any control by that group over those who could now newly make independent expenditures or electioneering Communications.

Until we are able to find a way forward to ask questions, gather public comment and consider updates to our regulations and our forms, it's too optimistic to expect the FEC will lead the way on increased accountability. In reality, many corporations and labor organizations will be struggling to comply with rules that are out of date, doing the best they can to live up to the basic expectations with respect to reporting. And, as of January, there were not four votes at the Commission to begin the process of providing further guidance or creating clearer rules to follow. It is extremely disappointing.

Although the Commission is not doing as much as I would like, the FEC does promote accountability through its existing efforts to provide the public with a clear, accurate record of who is spending what in federal elections. The Commission and its dedicated staff will be making sure that data is available swiftly and easily accessible on our website. For most committees, the data is available within hours of it being filed. And our analysts will review all of those reports, and where there appears to be a problem or a lack of required information, they will be contacting committees to request further information and clarification to ensure that the public record is accurate. Many of you may be familiar with our data disclosure blog, where we do a pretty impressive job of working with those consumers who are interested in our bulk data to make sure it as usable as possible. For others, including the general public, reporters, and voters interested in knowing more about those participating in the political process, our website is the primary source for that information.

I know that our data is not as robust as some, including I, would like. But I know it is important, because I read an article the other day in which Shelia Krumholz, the Executive Director of the Center for Responsive Politics, said, in reference to the organization's website Open Secrets: "If everybody hates us, we must be doing something right – as long as they keep using our data." And I thought that since much of Open Secrets data is, in fact, the FEC's data, it must be good enough that the CRP wants to claim it for their own. I'm giving CRP a hard time here, but it illustrates my point about the good work the agency is doing on a daily basis within the existing constraints.

I recognize this is going to sound self-serving, but I think those calls to defund the agency are probably not all that well thought out. While it is true that the Commission deadlocks on many of the hard cases these days, if the FEC were to disappear, our data would disappear and our website would disappear, and that would have a devastating effect on accountability across the spectrum.

Accountability requires knowledge about where money is coming from, and in the absence of meaningful disclosure, there is little to check the types and quality of discourse we see in the political marketplace.

I am looking forward to today's discussion about the role of accountability among the academic and practitioner experts gathered here. Whether we are talking about corporate accountability to shareholders or a political committee's accountability to its contributors, in my view, access to meaningful information about the source and types of spending is the very foundation of empowered citizen decision making.