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SENATE JUDICIARY COMMITTEE,
SUBCOMMITTEE ON
THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS

HEARING ON
"TAKING BACK OUR DEMOCRACY:
RESPONDING TO *CITIZENS UNITED*
AND THE
RISE OF SUPER PACS."

JULY 24, 2012

INTRODUCTION

Mr. Chairman, and Members of the Committee, my name is Lawrence Lessig, and I am the Roy L. Furman Professor of Law and Leadership at Harvard Law School. I also direct the University's Edmond J. Safra Center for Ethics. I have been a professor at Stanford and the University of Chicago. Before teaching, I clerked for Judge Richard Posner of the Seventh Circuit Court of Appeals, and Justice Antonin Scalia.

I commend this Committee, and its Chairman, for holding this hearing, a celebration of the extraordinary grassroots movement that has developed to demand the reversal of *Citizens United*, and an end to a system for funding elections that leads most Americans to believe that this government is corrupt. Hundreds of thousands of citizens have gotten hundreds of cities, and now a half a dozen states, to pass resolutions calling on Congress to correct the Supreme Court's mistake. It has been a century since we have seen such anti-corruption activism, and it is a testament to the leadership of the many new grassroots organizations, such as *Free Speech*

for People, and *Move to Amend,* that in just two years, they have achieved so much.

Yet this hearing is just the beginning of the serious work that will be required to address the problem in America's democracy that *Citizens United* has come to represent. That problem can be simply stated:

The People have lost faith in their government.

They have lost the faith that their government is responsive to them, because they have become convinced that their government is more responsive to those who fund your campaigns. As all of you, Democrats, Republicans, and Independents alike, find yourselves forced into a cycle of perpetual fundraising — spending, according to the estimates in the academic literature, anywhere between 30% and 70% of your time raising money to get back into office or to get your party back into power — you become, or at least most Americans believe you become, responsive to the will of "the Funders." But "the Funders" are not "the People": .26% of Americans give more than $200 in a congressional campaign; .05% give the maximum amount to any congressional candidate; and .01% — the 1% of the 1% — give more than $10,000 in an election cycle.[1] We have *up-sourced* the funding of your campaigns to the tiniest fraction of the 1%; America has grown cynical in response.

Citizens United has only made this problem worse, as it has further and predictably concentrated funding in an even smaller slice of America. In the current presidential election cycle, .000063% of America — that's 196 citizens — have funded 80% of Super PAC spending.[2] 22 Americans — that's 7 one-millionths of 1% — account for 50% of that funding. *Citizens United* has thus further shifted the sources of campaign funding toward an ever shrinking few.

This, Senators, is corruption. Not "corruption" in the criminal sense. I am not talking about bribery or quid pro quo influence

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[1] See Lee Drutman, *The Political One Percent of the One Percent*, Sunlight Foundation Blog, http://bit.ly/LHoAfr.

[2] Ari Berman, The .000063% Election, The Nation, http://bit.ly/LHoOmE.

peddling. It is instead "corruption" in a sense that our Framers would certainly and easily have recognized: They architected a government that in this branch at least was to be, as Federalist 52 puts it, "dependent upon the People alone." You have evolved a government that is not dependent upon the People *alone,* but that is also dependent upon the Funders. That different and conflicting dependence is a corruption of our Framers' design, now made radically worse by the errors of *Citizens United*.

As the Supreme Court has now doubled down on its deeply flawed decision, it is both appropriate and necessary for this Congress to consider how best to respond.

But in considering that response, you should not lose sight of this one critical fact: On January 20, 2010, the day before *Citizens United* was decided, our democracy was already broken. *Citizens United* may have shot the body, but the body was already cold. And any response to *Citizens United* must also respond to that more fundamental corruption. We must find a way to restore a government "dependent upon the People alone," so that we give "the People" a reason again to have confidence in their government.

How you do that will be as important as *what* you do. America's cynicism about this government — whether fair or not — is too profound to imagine that this Congress alone could craft a response that would earn the confidence of the People. The eyes of Americans glaze over when they hear you speak of "campaign finance reform," because they don't believe you would ever do anything that would truly end the institutional corruption that too many within this beltway depend upon.

Instead, this Congress needs to find a process to discover the right reforms that could itself earn the trust of the American people. That process should not be dominated by politicians, or law professors, or indeed any of the professional institutions of American government. It should be dominated instead by the People.

I have today submitted to this committee the outline of one such plan — a series of "citizen conventions," constituted as a kind of citizen jury, and convened to advise Congress about the best means of reform. But whether it is this process or another, your challenge is to find a process that could convince America that a

corrupted institution can fix itself. That is not an easy task, though it is crucial if you are to stop the spiraling cynicism that marks America's attitude towards its government.

The confidence of the American people in this government — in you — is at an historic low. That is not because of the number of Democrats sitting in Congress. It is not because of the number of Republicans. It is because of a dependence that all of you, and all of us, have allowed to evolve in this government, that we all see draws you away from a dependence upon "the People alone." I commend you for the beginning this hearing represents, but I urge you to act now in a way that has a real chance to restore that confidence.

CITIZENS UNITED AND ITS EFFECT

There have been but few decisions in the history of the Supreme Court that have excited as much outrage and sustained fury from citizens across the political spectrum as has *Citizens United.* Whether or not the decision is the "worst … this century," as Senator McCain has described it, it is, in my view, one of the most clumsy. One could easily agree with the principle at the core of the Court's reasoning — that Congress hasn't the power to effectively ban for any sustained period of time the speech of any entity engaging in political activity — without accepting the principle that the case has come to stand for: that Congress has no power to limit the corrupting influence of unlimited independent expenditures. That second principle does not follow from the first: One could easily insist that the government does not have the power to effectively silence the political speech of any one or any group — whether immigrants, corporations, the French or dolphins for that matter — without concluding that the government has no power to limit the corruption of its democracy.

Yet it is this broader principle that has led courts and the Federal Election Commission to truly revolutionize the actual practice of campaign funding, and not just at the federal level. Courts have taken the hint from the Supreme Court's recent cases, and remade the nature of campaign fundraising.

This is not to say that before *Citizens United*, large contributions or expenditures did not matter. Of course they did. But *Citi-*

zens United and its progeny have changed the way that large expenditures can matter. And that change in turn has inspired an explosion in the level — both the amount and the size — of such contributions.[3]

Before *Citizens United*, individuals could make large contributions to *qualified nonprofit corporations* ("c(4)s"). But c(4)s were not permitted by the IRS to make "political influence" their primary purpose. Thus c(4)s had to spend 50% or more of their funds on activities other than "political influence." In this way, the influence of c(4) contributions was effectively taxed at a 50% rate.

Likewise, before *Citizens United*, individuals and corporations could contribute to independent political committees organized under section 527 of the Internal Revenue Code ("527s"). All 527s can spend 100% of their money for purposes of "political influence." If they acted independently of any political campaign, 527s could also accept unlimited contributions — but only so long as they avoided express advocacy for or against any candidate. Thus, money contributed to these 527s wasn't taxed with the burdens of a c(4). But it was burdened by the risk that its indirect advocacy would be deemed express advocacy, and thus subject to penalties from the F.E.C.

Citizens United and its progeny have radically changed these two limits. Relying upon *Citizens United,* the D.C. Circuit lifted the contribution limits on independent 527s that engage in express advocacy. The F.E.C. then formalized the rules governing these committees, creating what has been dubbed, by Eliza Newlin Carney, the "Super PAC."

Super PACs are thus a classic story of American innovation: deliver more bang for the buck, and radically change the market. Because Super PACs aggregate contributions, they spend their money more efficiently than contributors could on their own. Because they are freed of the effective 50% tax on c(4)s, the aggre-

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[3] Throughout this testimony, by "contributions" I mean both direct contributions to a campaign, and indirect contributions to "independent" political action committees. This aggregation is not meant to deny that the independent committees act independently. Whether they do or not, the beneficiary (the candidate) certainly can recognize what he or she must do in order to induce more such contributions.

gated contributions will have more effect. And because they are freed of the rule against express advocacy, the contributions can be more effective. As the iPhone taught the cellphone, or the Internet taught the mainframe, or the PC taught the calculator: do more more efficiently, and demand will take off.

And so has the demand for Super PAC spending soared: As the Sunlight Foundation reports, in the 2011-12 cycle so far, more than a quarter of a billion dollars has been raised by Super PACs. Of the $142 million spent so far, negative spending has outstripped positive spending 2 to 1.[4] OpenSecrets.org reports that through April, "outside spending in all its forms has doubled since 2008, but independent expenditures have more than tripled."[5] And while there are questions about whether that growth was truly caused by *Citizens United*,[6] there can be no question that changes in the concentration of funding have been driven by changes caused by *Citizens United*. Whether there was a comparable amount of money in 2008 or not, the number of large funders has grown. In my view, it is this concentration that defines the corruption, for it is this concentration that creates the corrupting dependence.[7]

The full effect of *Citizens United*, however, is not captured in numbers. Indeed, there are three points beyond the numbers that this committee should keep in view.

1. *Citizens United has radically changed the business model of political fundraising.*

The most important effect of *Citizens United* is a change in the business model of campaign funding. When contributions (either directly to a campaign or indirectly to an "independent" commit-

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[4] See *Follow the Unlimited Money*, http://bit.ly/LIJ77Y.

[5] See Bob Biersack, Outside Spending: The Big Picture (So Far), OpenSecrets-Blog, http://bit.ly/LIJb7R.

[6] See, e.g., Matt Bai, How Much Has Citizens United Changed the Political Game?, New York Times, July 17, 2012. See also Rick Hasen's succinct response to Bai's piece. *Election Law Blog*, http://bit.ly/LIJe3w.

[7] It is for this reason that proposals to "remedy" the problem caused by *Citizens United* by simply lifting all contribution limits simply misses the point: If the corruption is caused by the gap between "the Funders" and "the People," lifting contribution limits will simply increase that corruption, by increasing that gap.

tee) are limited, candidates must appeal to a large number of potential contributors to fund their campaigns. But when such contributions are unlimited, the most efficient way to fund a campaign is to appeal to large contributors alone. Candidates' time is short. It makes much more sense to spend that time trying to secure large contributions rather than small. And this fact in turn radically expands the influence of large contributors over others within the electoral system.[8]

This is precisely the point that the Montana Supreme Court made when upholding its regulation of corporate speech in political elections, but which the United States Supreme Court reversed (without even granting Montana the courtesy of a fully briefed opinion). As the Montana Court wrote, "allowing unlimited independent expenditures of corporate money into the Montana political process would drastically change campaigning by shifting the emphasis to raising funds."[9] Instead, by limiting contributions and the source of those contributions, campaigns in Montana are "marked by person-to-person contact and a low cost of advertising compared to other states."[10]

By structuring an election system in which candidates must rely upon small contributions from citizens only, the system assures that candidates pay attention to the needs of those contributors — and hence the needs of these citizens. But when contributions are concentrated in the very few, those few have a corrupting influence,

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[8] Congressman John Sarbanes (D-MD) has reacted to this dynamic by creating a formal structure to create pressure on him, and his campaign, to raise small contributions to support his election. Through a legal trust, his campaign raised funds that could only be accessed once 1,000 small contributors had been secured. See Paul Blumenthal, *John Sarbanes Experiments With His Own Campaign To Promote Public Financing,* http://huff.to/PzpkVm. To my knowledge, this is only time such a device has been used in the history of the Naiton, and it reflects the strong pressure on a congressional campaign that would otherwise exist to raise funds in large contributions only. On June 30, Sarbanes met his initial target of 1,000 contributors.

[9] *Western Tradition Partnership, Inc. v. Montana*, 2011 MT 238, p18 (2011).

[10] The Montana Court also credited the work by Edwin Bender of the National Institute on Money in State Politics, who found that the "percentage of campaign contributions from individual voters drops sharply from 48% in states with restrictions on corporate spending to 23% in states without." Id. This finding is consistent with the theory that unlimited contributions drive the business model of fundraising away from small contributions to large. *Id.*

because the government's dependence upon them conflicts with a dependence upon the people "alone."

Yet concentrated influence is exactly what the current system of campaign funding induces. As many have recognized, it is as if America runs two elections each election cycle — one a money election, and one a voting election. To succeed in the latter, you must succeed in the former first. But while in the voting election, all citizens can participate, in the money election — at least when contributions are unlimited — only a tiny slice of America can participate meaningfully. Those tiny few have extraordinary influence relative to the rest of us. And so long as effective contributions are unlimited, candidates will continue to be dependent upon those tiny few, and hence not "dependent upon the People alone."

2. Citizens United has affected local as well as national elections.

The principles that the Court announced in *Citizens United* derive from the First Amendment. Yet because of incorporation, they apply to every political entity subordinate to the federal government as well. Thus the rules of unlimited expenditures that are changing the nature of presidential and congressional elections are changing the nature of state and local elections too — including judicial elections.[11] Norms favoring campaigns funded primarily by large contributions are displacing the practice of small, citizen funded elections. David Sirota, for example, writes in Salon about the extraordinary story of a school board race in Denver dominated by $25,000 contributions.[12] Total contributions in that race approached $1 million. Sirota's story is an increasing norm.[13]

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[11] Perhaps strangely, when it comes to judicial elections, the Supreme Court is quite sensitive to the corrupting influence of unlimited independent expenditures. In *Caperton v. A. T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), for example, the Court crafted a new constitutional rule to force a judge to recuse himself in the face of large independent campaign expenditures, for fear that the taint of corruption would taint the judicial process. Why independent expenditures could taint judicial elections but not legislative or presidential election was not explained well by the Court.

[12] See http://bit.ly/LIJiAa.

[13] See Ben Tribbett, *Citizens United Goes Local,* Huffington Post, http://huff.to/LHeU4E.

No doubt real differences are at the core of these races, and drive these contributions. And in a democracy, in my view, we need more, not less, attention to political and policy differences. That attention, in turn, will cost more real money.

But the problem with the post-*Citizens United* campaigns is not the amount of money. It is the source. Again, to qualify as a viable candidate in elections from school board to president, you increasingly need the effective approval of the tiniest slice of the 1%. Without that approval — expressed in contributions, not votes — the vast majority of candidates have no chance in the voting election. For most, winning the (tiny fraction of the) 1% election is thus a necessary condition for winning in the 99% election.

We ridiculed Soviet "democracy" when it effectively did the same thing, by requiring every candidate be cleared by the Politburo before being allowed on the ballot. Yet most in America today don't even recognize the parallel that we have produced here.

3. *More effective disclosure alone could not reveal the influence that Citizens United has effected.*

There are some who believe that any problem that *Citizens United* created could be remedied simply by more effective disclosure. It is critical that this Committee recognize that however important disclosure is, disclosure alone *could not* reveal the actual influence of unlimited independent expenditures.

This point is clear from both academic work and practical political experience.

Marcos Chamon and Ethan Kaplan, for example, in their work describing the "Iceberg Theory of Campaign Contributions," point out that the incentive produced by a $10,000 contribution to a candidate is the same as the incentive produced by a $2,000 contribution to that candidate, *plus* a credible threat of an $8,000 contribution to that candidate's credible opponent.[14] Given that equivalence, it's not surprising the contributor would opt for the smaller contribution. But obviously, the influence of that $8,000 would be completely missed even by the most effective disclosure statute. No

[14] See http://bit.ly/LHojZN. The $10,000 assumes PAC contributions ($5,000 per cycle).

rule requires that implicit threats be disclosed. Nor could any such rule be enforced.

The same point has been recognized by at least former Members of this body, relying less on formal modeling and more on the practical reality of post-*Citizens United* politics. I had the privilege, for example, of participating on a panel with Senator Evan Bayh, conducted by Senator Arlen Specter, discussing *Citizens United*. Senator Bayh explained quite clearly the dynamic that *Citizens United* has produced: As he put it, the biggest fear an incumbent has now is that 30 days before an election, some Super PAC will drop a $1 million in attack ads on the other side. If that happens, the incumbent can't simply turn to his or her largest contributors, for by definition, they have already maxed out in the campaign. So instead, the incumbent must, in effect, buy (what we could call) "Super PAC insurance": the assurance that if a Super PAC attacks, there will be another Super PAC on the incumbent's side to defend. But as with any insurance, premiums must be paid in advance — which in this case means the incumbent must behave in a way that gives Super PACs on his or her side a reason to defend the incumbent. ("We'd like to support you Senator, but we have a rule that forbids us from supporting anyone with less than a 90% grade on our report card…"). The Senator thus has a target. And long before even a dollar is spent by anyone, that threat has the potential to change the incumbent's behavior.

This is the economy of a protection racket. And once again, the influence of that protection racket *could not be* captured by any disclosure scheme. Thus disclosure may be essential, but disclosure is not enough.

Let me emphasize this point to be clear: I serve proudly on the advisory board of the Sunlight Foundation, and I am a strong supporter of disclosure legislation. Effective disclosure makes it possible for the public to identify the influences that might influence their candidates. It makes it harder for illicit influence to find its effect within a political system.

But as valuable and as necessary as disclosure is, we must recognize that it *could not be* a sufficient response to the corruption that now defines this government. Only a system of "citizen funded elections" — where dependence upon "the Funders" is the same as

dependence upon "the People" — could reform that corruption. I don't need to explain this point to this Chairman, who has championed one version of "citizen funded elections" in the form of the Fair Elections Now Act. But I do find that in the frenzy to reverse *Citizens United*, too many have forgotten that even if we succeeded, a more fundamental problem would remain. That problem too requires your attention.

THE POLITICAL RESPONSE TO *CITIZENS UNITED*

On the day that *Citizens United* was decided, the political response to the Supreme Court's mistake was born. But interestingly, and importantly, that response came not just from traditional, existing, inside the beltway organizations. It came as well from a slew of new organizations, formed by outraged citizens from across the country. Groups such as *FreeSpeechForPeople.org* and *MoveToAmend.org,* launched almost simultaneously and joined many other more established organizations, such as *Common Cause, Public Citizen, MoveOn.org,* and *People for the American Way*, to push for a constitutional response to the Supreme Court's ruling.

These grassroots movements have in turn inspired scores of local city councils to adopt resolutions calling on Congress to initiate an amendment to overturn *Citizens United.*[15] Half a dozen state legislatures have now passed similar resolutions.[16] And literally thousands of citizens have been joining meet-ups and public fora

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[15] Using the compilation provided by *People for the American Way,* Harvard Law student Alan Rozenshtein has calculated that more than 270 cities and towns have now passed resolutions. Of these, 38% call for an amendment declaring that "corporations are not people"; 10.2% that "money is not speech"; and 8.5% that corporations be denied full First Amendment rights. These cities and towns come from more than half the states (27).

[16] California, Hawaii, Maryland, New Mexico, Rhode Island, Vermont.

to discuss what should be done to respond to the corruption of this system.[17]

I have had the privilege of witnessing this extraordinary energy first hand. Since January, 2010, I have given more than a hundred talks across the country to literally tens of thousands of citizens. These events, organized by a wide range of groups, have been packed with frustrated and angry citizens — and packed not just because of my stunning good looks. Instead, ordinary citizens on both the Right and the Left have come to see that something fundamental is rotten on this Hill, and that *they* have a crucial role in fixing it.

The cities and states that have passed these resolutions are not aliens within our culture. Indeed, as my colleague Paul Jorgensen has calculated, they look very much like the rest of America. If we created a Nation comprised of the states that have passed resolutions against *Citizens United*, it would have the same basic demographics as the rest of America: the same percentage of women (50.5% vs 50.8%), fewer African Americans (8.6% vs. 12.6%), more Latinos (32.6% vs. 16.3%). And if we created a Nation comprised of the cities and townships that have passed resolutions against *Citizens United*, it would look even more like the rest of America: women, 50.7% vs. 50.8%; African Americans, 12.9% vs. 12.6%; Latinos, 26.8% vs. 16.3%. The only significant difference between these two "anti-*Citizen United* nations" and the rest of America is the per capita political contributions: Anti-*Citizen United* America gives, per capita, *much more* in political contributions than the rest of America: $12.10 (States) vs. $8.80 (Nation); $18.90 (Cities/Towns) vs. $8.80 (Nation).

Many in Congress have now responded in turn to this energy, and taken the lead to propose amendments to overturn *Citizens United*. While these amendments are different, they are all born of

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[17] *People for the American Way* has the most complete list of passed and pending resolutions, which I have attached as an Appendix to this testimony. *MoveToAmend.org* has a similar list of resolutions opposing corporate personhood, as well as others that the organization believes "don't fully address corporate constitutional rights" (http://bit.ly/LHou7z). Finally, *United4ThePeople.org*, a site maintained by *People for the American Way*, has a list of public officials endorsing constitutional remedies, as well as a collection of the amendments that have been introduced so far.

the common view that our democracy has been corrupted. Some believe the best way to attack that corruption is to deny the status of "personhood" to corporations. Some believe that the First Amendment should be amended to reverse *Buckley v. Valeo*, and declare that "money is not speech." And some believe the best way to respond is simply to affirm that Congress has the power to enact content-neutral laws regulating campaign contributions and expenditures.

While we all have our own convictions about which of these various solutions would work best, what has been most striking to me in this process has been the open willingness of even proponents of various amendments to recognize that they are not yet certain about which response is best. In this way at least, this period is unlike the Progressive Era of a hundred years ago, when a primary source of federal corruption was thought to be, whether rightly or not, the structure of the United States Senate. In that context, the task of crafting a constitutional response was simple, and the 17th Amendment achieved it.

But today, as everyone with even an ounce of humility recognizes, the challenge of crafting an appropriate constitutional response to *Citizens United* is incredibly difficult. The First Amendment has become the heart of America's democracy. As with open heart surgery, one must be extraordinarily careful before tinkering with the freedoms that amendment secures, even if the cause is as significant as the struggle to restore faith in this democracy.

Yet in one way, the challenge facing this Congress is simpler than at other times in our history when constitutional reform has been needed.

When the Radical Republicans proposed the Civil War Amendments, no one doubted that they were proposing to change critical principles of the original constitution. No one today questions the wisdom of that change. But change it was.

Likewise with the 17th Amendment: Everyone recognized that the decision to displace the power of state legislatures to appoint United States Senators was a decision to modify the constitutional commitment to federalism.

And likewise with the 19th Amendment: Everyone, women especially, understood that amendment to be a change in the Constitution's responsibility to guarantee equality to women.

Almost everyone today agrees with each of these changes. But I appreciate how difficult each of them must have been, at least for constitutionalists of the day. The temptation to conservatism is strong. And against the genius of the Framers' (flawed but) brilliant design, it is always difficult to muster the courage or confidence to commit to changing it.

But the reform that this Congress needs to effect is not any *change* of the Framers' design. It is a *restoration* of that design. We don't need to decide whether to add a new principle to their constitution. We need simply to figure out how best to respect the principles that already guided them.

The Framers gave us a "Republic." But by a Republic, they meant a "representative democracy." And by a "representative democracy," they meant a government with a branch that would be "dependent upon the people alone."

This Congress, however, is plainly not "dependent upon the people alone." It is dependent as well upon "the Funders." And in my view, the simplest and most important objective of any amendment must be to restore that critical constitutional principle, by removing a dependence on anything save "the People alone."

For the reasons that I sketched in my introduction, simply reversing *Citizens United* would not achieve this end. Indeed, returning America to the democracy that existed before *Citizens United* would still leave us with a democracy in which Congress was dependent upon the tiniest slice of the 1% to fund its elections. That dependency is corrupting — by drawing your attention away from the attention the Framers intended — in exactly the way that *Citizens United* is corrupting. And any constitutional reform must consider that corruption alongside the immediate and pressing need to reverse *Citizens United*.

The ideals of the Framers' Republic could, and should, guide your reform. For in my view, here at least, the Framers were clearly right: We need a Republic, a representative democracy, with a leg-

islature "dependent upon the People alone." Reversing *Citizens United* alone won't get us that Republic. It may be an essential step. But it is not the last.

NEXT STEPS

The task this Congress faces is not just to determine the best amendment to restore trust in this government. It is also to do that in a way that itself earns the confidence of the people in that amendment. No constitutional reform can ever pass without broad and cross-partisan support. But in this political climate, no such support is possible unless the process you adopt for identifying the necessary reform itself convinces America of its own integrity.

This is a concern that the Framers themselves were focused upon. When the drafters of the constitution first architected Article V, the amending procedure, they vested in Congress exclusive control over the amendments that could be proposed. But an obvious question was then raised: What if Congress itself was the problem? That concern led the Framers to open a second path to amendment — securing to state legislatures the power to demand that Congress call an Article V convention, that itself could propose amendments. Those amendments must be ratified in the same way as amendments proposed by Congress. But by creating the possibility that they could be proposed by a body other than Congress, the Framers guaranteed a path to reform that was not controlled exclusively by the body that needed reform.

There are many who are skeptical about an Article V convention today. In my view, much of that concern is misguided. But independently of the power of the states to demand that Congress convene a convention, Congress plainly has the power to constitute its own independent procedure for advising it about the best means for reform.

In a separate submission, I have outlined one such procedure that in my view could both identify the correct reforms and do so in a way that would earn the confidence of the American people. Through a series of "citizen conventions," constituted by a random selection of 300 citizens within each, and conducted as deliberative polls, Congress could empower a body that could both deliberate carefully about the question of reform, and itself earn the confi-

dence of the American people in its work. That body would be removed from the influences thought to corrupt this Congress, but secured in its work through a series of protections that Congress would by law enact. Its product would represent a mature and considered judgment of a statistically fair snapshot of America. And if confirmed through a series of deliberations, could well earn the trust sufficient to support the broad movement for reform that this government needs.

I recognize that this sounds like a radical proposal — though how odd is it, that in a Republic, the idea of returning to the People for guidance sounds "radical." I know there are many who are skeptical about the ability of ordinary citizens to deliberate seriously and effectively about an issue as important as the Constitution.

But as a law professor who has taught in the most elite of America's law schools for more than 20 years, I am not at all skeptical of the work of ordinary citizens properly convened within a convention. Indeed, in the few examples that I've seen, I have only been inspired by that work.[18]

Yet to the skeptics I would say this: the worst that this proposal could produce is ideas that may fail to inspire Congress. By contrast, the best that would happen from a process controlled exclusively by this Congress is a series of proposals that will certainly fail to earn the confidence of a significant proportion of the American people.

Whether it is "citizen conventions" or some other procedure, however, my point is simply this: ordinary process will not work here. America won't trust the work of Congress alone. Neither will it trust the work of any "blue ribbon commission" comprised of experts with strong ties to this Congress. Instead, this Congress must

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[18] I was first convinced after a "mock" Constitutional Convention that I co-chaired with Mark McKinnon, conducted at a CoffeePartyUSA.com convention in Kentucky. See http://bit.ly/LHpusd. More than hundred attendees at that convention deliberated for just a day about the problems they had identified, and crafted a set of innovative and valuable responses. Those responses were not "liberal." They were not "conservative." To one who has studied the Constitution carefully, they were simply restorative.

find a process that gives America a reason to listen. America has grown bored with elites and insiders.

Conclusion

Every one here recognizes that the work of a Member of Congress is not easy. Nor is it often fun. As your families know, you spend endless hours serving this Republic. You have almost no time to focus on even the most fundamental questions.

In such a context, it is easy to lose perspective. And surrounded by those offering their support, and seeking your help, it is easier still to focus simply upon your good intentions.

There is no doubt that the intentions of Members from both sides of the aisle are good. This is not the Congress of the Gilded Age. Corruption in its criminal sense is almost extinct.

But good intentions are not enough. And with respect for this Committee, and love for this institution, I would urge you to step back and recognize something that is as clear to most Americans as anything could be: Our confidence in this institution is collapsing. This body, the crown jewel of the Framers' Republic, created in the first article of their Constitution, has lost our trust. Poll after poll finds confidence ratings at or below 10%. *Ten percent.* It is certainly the case that a higher proportion of Americans had faith in the British Crown at the time of the Revolution than have faith in this body today.

It is critically necessary that you act swiftly — not as Democrats or as Republicans, but as trustees to the most important democratic body crafted within our tradition — to give America a reason to trust you again. You will do that only if you make yourselves again "dependent upon the People alone" — through both the votes that elect you, and the funding that makes your elections possible.