LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY

(Reference: Campaign finance reform)

Members:

MRS V DUNNE (The Chair)
MR J HARGREAVES (The Deputy Chair)
MS M HUNTER

TRANSCRIPT OF EVIDENCE

CANBERRA

WEDNESDAY, 28 APRIL 2010

Secretary to the committee:
Dr H Jaireth (Ph: 6205 0137)

By authority of the Legislative Assembly for the Australian Capital Territory

WITNESSES

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Amended 21 January 2009

The committee met at 10.36 am.

DWYRE, PROFESSOR DIANA, Professor of Political Science and Fulbright ANU Distinguished Chair in American Political Science, Australian National University and California State University

THE CHAIR: Professor Dwyre, thank you for attending the inquiry into campaign finance this morning. You have been shown the buff card in relation to privilege—do you understand the privilege implications?

Prof Dwyre: Yes, I do.

THE CHAIR: Would you like to make some opening comments in relation to your submission, which has been published?

Prof Dwyre: Sure. I will go through the outline I have written up for you, quickly, and then, if you have any questions, we can go back to anything.

THE CHAIR: Sure.

Prof Dwyre: Just as some basics: societies value certain things, and in the US liberty is often placed above other values. So liberty, rather than equality, is often more important than other kinds of values—and I think that will become clear as we talk about policymaking in this area.

MR HARGREAVES: Professor Dwyre, could you define, from where you see it, what liberty actually is?

Prof Dwyre: I can give some examples—how is that?

MR HARGREAVES: That is good enough.

Prof Dwyre: When we are talking about government and individuals and citizens and other entities—corporations, labour unions et cetera—liberty generally means, when we are talking about policy, the liberty to not have the government intrude in your affairs. So, in the US, that often means freedom from something rather than freedom to do something: freedom from government intervention in my small business activity; freedom from government intervention in my ability to practise religion; freedom from government intervention in—

MR HARGREAVES: So freedom and liberty are interchangeable?

Prof Dwyre: You could say liberty too—liberty from the government's intrusion or the government's heavy hand. And, of course, that comes a lot from our tradition as a British colony and not wanting to have anybody tell us what to do. Probably the best example is the long tradition in the US of staying very close to the laissez faire capitalist tradition—not moving as far along as most other advanced democracies in things like developing a social safety net, which involves a redistribution of wealth, which is really something you would place under the value of equality more than of liberty. That is the kind of distinction I am making here.

MR HARGREAVES: So you have the freedom to be poor?

Prof Dwyre: You have the freedom to be poor and, if you work hard enough, you have the liberty—because the government is not intruding in your affairs—to succeed and not be poor. That would be the logic. So the government should not stop you from succeeding by having a strict class system, for example.

Let me explain just a few facts about the United States and some things which are different—especially the fact that all candidates are elected independently in the United States. Everybody runs their own campaigns. We have single-member districts with winner-take-all elections. Each election is an individual event. Voting is not compulsory, which I am sure you know, but what that means is that everybody focuses on turnout. That does not mean always just turning out the most number of voters, but sometimes the right voters—your voters, not the other person's voters; these voters we know—we can predict how they vote—not ones who are unpredictable.

Most of the money in elections is raised and spent by candidates, not by political parties or interest groups, corporations, unions or anyone else. Candidates do not need the parties at all to win, because we have primary elections for virtually every office, where the voters select the nominee from each of the political parties. And candidates go out, independent of their parties, run in those primary elections against one another, and then that is the election that chooses who will run in the general election against people from the other party or parties. Every once in a while we will have another party member, but the minor parties, since we have winner-take-all elections, have a very hard time succeeding, as we are seeing in England right now. That is very interesting to watch.

MS HUNTER: When you say "winner-take-all", do you mean first past the post?

Prof Dwyre: Exactly. Yes, the plurality vote system—so whoever gets the most votes wins; I do not care if you get 30 per cent of the vote, you do not get anything, unless that is the most number of votes.

Parties play a very minor role in the financing of elections. If you look at how much money candidates get from parties, for example, it is often just zero per cent. Most of the candidates get nothing from parties. They concentrate just on the very close races. Those races for the House of Representatives, for example, where they think they are going to lose a seat in the House, if they already control it, or where they have an opportunity to gain a seat, those usually are open-seat elections, where someone has died or retired or gone on to run for another office. There were only 41 open-seat elections in the last election, so we are talking about a very small number—and then only a few more that were competitive beyond that.

Parties can participate to a pretty great extent financially, but they choose to only do so in a few. They are being strategic.

MR HARGREAVES: When they do that, are we talking about the parties actually handing over the cash, or are we talking about the parties using their influence on

benefactors to deliver funding to them—or both?

Prof Dwyre: That and more—all those things. Parties can give a limited amount of money to candidates directly, about $48,000 in total to House candidates, for example.

MR HARGREAVES: Is that a set limit?

Prof Dwyre: That is a hard limit set in the law. There are limits on what parties and others can give to candidates. That is the only real big one and we will get into that a little bit in a minute. The parties can also spend independently of their candidates, which is an interesting dynamic, and they do that. That is where they spend most of their money because that is an unlimited amount. The parties also, of course, work with other groups. Our Democratic Party often works with the labour unions to try to get them to participate in the elections financially of the candidates they think need help. It is all of those things. They do what they can to win the races that they are targeting and focusing on.

Primarily because we have primary elections and the candidates do not need parties and also because they do not owe their party anything—the party does not help most of them get elected—there is very low cohesion or party loyalty in Congress. I kind of throw that in just to help understand why it was so hard to pass health care in the United States. This is the one of the reasons. People wondered why all the Democrats did not vote for it. Well, because they come from very different kinds of districts and they did not necessarily get there because the party helped them. They do not all agree with one another.

One thing about the Supreme Court is that the justices serve for life. So once they are appointed they are there for life. The whole idea is that they should not be affected or influenced by public opinion, by any outside influence like money—that life term allows them to be free and independent of that. Alexander Hamilton wrote a lot about that when they designed the Supreme Court. The current ideological makeup of the court has fairly recently, since 2006, shifted slightly to the right. It is more conservative than it was. You will see that is when we see a shift in this policy area, as well as others, but we are just focusing on this.

I will not go into all the details but just show you where we started and how we got to where we are today. We started in the United States at various state levels to ban corporate participation—corporate spending and corporate contributions. That was identified as the big problem that corporations have—the ability to concentrate wealth and then use that to influence the outcome of elections. The very first laws were all about banning corporate contributions and corporate spending in federal elections, our states at first and then the federal election.

So in a variety of laws throughout the 1900s up until 1947 it was reiterated: corporations should not be participating in federal elections; they have the ability to gain too much wealth and use it in ways that would constitute undue influence and possibly cause corruption or be corrupt. In 1947, unions were added to that as the union movement grew. There was a lot of concern about unions having too much power politically, particularly since the Democrats were in office through the 1930s and 1940s. So unions were included in that ban. We also have a tradition of disclosure

that goes way back to 1911—that was all contributions over $100—and candidates were expected to disclose those.

MR HARGREAVES: $100 was a fair amount of money, though, wasn't it?

Prof Dwyre: It was a lot more money then than it is now. But there was disclosure. It is important that way back then they thought disclosure was important.

MR HARGREAVES: Has it kept pace with that?

Prof Dwyre: It has. The disclosure threshold is pretty low. Where disclosure works you have to disclose—

MR HARGREAVES: What sorts of limits are there now?

Prof Dwyre: Individual contributions—if you wanted to give money to a variety of candidates, for example, once you spend $200 you have to—

MR HARGREAVES: Two hundred bucks. So since 1911 it has gone from—

Prof Dwyre: Not too much. If you were an interest group—

MR HARGREAVES: A hundred bucks was like a year's salary and now it's like a week's grog bill.

Prof Dwyre: But you don't have to report it. The candidates and the political parties report it. So it is not your burden to do that.

MR HARGREAVES: Sure.

Prof Dwyre: The individuals, unless they are participating in independent spending, do not have to report it. There is not that much paperwork coming in. That would be very difficult. There were limits put on what parties and candidates could spend. The whole idea I am trying to give you is that these were principles that were pretty much made clear in the laws over time. Those limits were placed on parties and candidates a long time ago. The problem was, of course, that although these were nice laws that were always in response to scandals that had just happened, they did not create any enforcement mechanisms. People could easily evade them. But the principles were clearly established. So those were there.

The real important activities happened in the 1970s right before and right after our big Watergate scandal which some of you may have heard of. It was a pretty bad one. It got a lot of people turning to government to do something about this problem: "Too much money in politics, too much money under the table, we don't know what's going on, who's buying our elections"—those kinds of things.

In the Federal Election Campaign Act, FECA, they reiterated the ban on donations from corporations and unions and added banks, government contractors and foreign nationals. There are a lot of problems with cash contributions—paper bags full of $100 bills going under tables in restaurants and things like that. So they wanted to

regulate that anything over $100 had to be disclosed and it was prohibited to give anything in cash over $100. Also, a lot of people were saying, “I’ll write you a cheque and you just give that to President Nixon’s re-election, please.” That is what was happening. So I give you $10,000 and basically you would launder the money. That became illegal. There are very strict penalties for that, actually, making a contribution in the name of another person.

Disclosure was made quarterly for contributions and expenditures. Expenditures were not really covered so much before this and if a candidate, a political party or a group was spending they had to disclosure that. It captured a whole bunch of other activity, not just what was coming in but what was going out.

A voluntary public funding system for presidential elections with spending limits sounds confusing but, given the focus on liberty in the United States, the idea was that we could not force a candidate to take public money. If they wanted to raise their money and run for office, that is exactly what they could do. If we wanted to try and create a public funding system we had to make it voluntary. If they voluntarily accepted this public money, to try to level the playing field between candidates, so that one candidate did not have so much money over the other, they would have to voluntarily agree to limit their overall spending. They only did this for the presidential election and up until 2000 it worked pretty well.

As I will mention later, the candidates now realise that this is not enough money to make it worth it. They decline the money and raise their own. Obama raised something like four times more money than John McCain did because he did not take the public funding. The system is defunct at this point. I do not see that any candidate who is a major party candidate probably in the future will take it.

Importantly, the act also limited contributions to candidates from themselves. So if I were a billionaire and wanted to run for office I could spend as much of my own money as I wanted to. This act said, “No, we’re not going to let you do that,” and limited contributions from individuals, from parties and from something that they created, political action committees. The idea of creating political action committees was to regulate the activities of groups of people who come together, whether they are corporate interest groups, ideological groups, labour union related groups—any kind of groups—and participate in an election. But they have to do so in the guise of a political action committee, which would be regulated and there would be limits on the amount of money they could take in and the amount that they could give to candidates. So this act sort of created this new entity. If you want to participate in federal elections and you want to influence the outcome of an election, you have to be a political action committee; at least, that was the intent.

They also attempted to limit spending by candidates or put a cap on the amount they could spend overall and to limit independent spending by individuals and groups; that is, any spending you chose to do if you wanted to run a television ad, or the group you belonged to wanted to run a television ad, independent of a candidate or a political party, they tried to limit that. I say “tried” because we will see those things get thrown out.

But, very importantly, they created the Federal Election Commission, which is our

agency that deals with all of the disclosure and enforcement of anything to do with federal campaign finance. Before the Federal Election Commission, there really was no way to enforce anything. There were penalties added to all these things, so it was the Federal Election Commission's job then to go after anybody who broke the law. It was a big improvement; we now have a clearing house for immense amounts of data, but the Federal Election Commission has not been able to keep pace. I have read about some similar problems here—underfunding, not having the power to do certain things, laws not being strong enough; those kinds of things.

Then, a few years later, the act was challenged in Buckley v Valeo and here we see the court for the first time, in 1976, really putting together the idea of freedom of speech and campaign finance; that the policy area involved the value of freedom of speech and that we really had to sort things out, according to the Supreme Court. The way they sorted them out was to distinguish between contributions and expenditures. So they said: "Yes, we agree that contributions to candidates and political parties are potentially corrupting. In order to protect against that corruption, or even the appearance of corruption, it is a good idea to limit those. In fact, that is a constitutional thing. You can do that; it is not a violation of freedom of expression."

However, limits on candidate and individual independent expenditures—you going out to run your own ad; some kind of spending where you are not coordinating with a candidate or a political party at all—is a violation of the first amendment to our constitution which involves freedom of expression. So you cannot limit, for example, the candidates' ability to spend as much of their own money as they want to. That is considered independent spending. You cannot limit the right of an individual to spend as much money as they want on trying to elect or defeat a particular candidate or political party.

So the court has made this distinction, for the first time really, between these two kinds of activities in federal campaigns and said that one falls into protected speech and the other is important enough, although it could be protected, because we have to guard against corruption. So they create these two categories: one where corruption we think is going to happen and one where we do not think corruption is so much of a big deal, so we are protecting that and we can justify only limits where we think that corruption is going to happen.

This case was, and continues to be today, highly criticised because the idea of equating money with speech—that money equals speech; the court did not say that but people have interpreted it that way—is not where we necessarily want to go. In fact, once we start saying that money is something that has protection under freedom of speech, we are kind of on a slippery slope. So this was the warning back in 1976. Some would argue that is where we ended up today.

Twenty-five years later, after a number of attempts to shore up the law after Buckley v Valeo sort of took away some of the meat of it, took away the bite and the controls they were trying to have, and after many years of scandals and the tremendous growth of money in federal elections, particularly House and Senate elections, finally in 2002 the Congress was able to pass another piece of legislation and it focused on two areas that it thought, first of all, would pass constitutional muster and that the Supreme Court would not overturn and that it thought were the biggest problems, and one was

because over time people find various ways—if you close this door, they are going to find another one.

So people had found ways to give political parties unlimited amounts of money—what we call soft money. Some of it was undisclosed. It was completely unregulated. It could be millions and millions of dollars—and it was. So both the political parties were collecting lots and lots of money and spending independently on very few races. So the money was collected in these giant amounts and spent in ways that certainly did not spread the wealth around; there were just a few races where there was a lot of activity. So that was banned outright.

The other thing that was banned was another way that people found around the law. The previous law said that you cannot spend unregulated, undisclosed money independently or directly on express democracy. They created this new thing called electioneering communications because people were getting around the law that said: "If you want to advocate the election or defeat of a particular candidate, you need to do that in ways that are covered by federal law, and the way to do that if you are an interest group is that you can only take money in in limited amounts because you have to be a political action committee and then you can only spend it in ways that are regulated by law. So we will let you do that—we will let you advocate the election or defeat of a candidate—as long as you play by the rules and you disclose everything you are doing."

Instead of following that, people ran things which became known as issue ads. In my ad I could say something like "vote for Jane Doe; she is the greatest candidate in the world". That would be a clear expression of advocacy to vote for someone or vote against someone else. Those were clearly expressions of direct or express advocacy. Instead of doing that, these organisations in particular would get around the law by saying: "Jane Doe is the next best thing to sliced bread and God's gift to humanity and you should really let her know how wonderful she is. Call her at this number." So they do not say anything about the election. They do not call for a vote for or against. More often than not, they are saying: "Jane Doe is a pig and she doesn't dress her children warmly in the winter and she doesn't feed them nutritious meals and she is really a bad person. Tell Jane Doe to clean up her act." They have been much harsher than that, of course, but those are the kind of ads that we tended to see—nothing about the election, no express advocacy, no vote for or against Jane Doe, but what became known then as these issue ads.

So in 2002 in the act they created a whole new category called "electioneering communications": Clearly you do not like Jane Doe; you do not want anyone to vote for her. So they said that anything that features the name or the likeness of a candidate who is running for office is electioneering, so they just created this new category so "You cannot go out and run these ads any more and say that you are really not trying to influence the outcome of the election, you are really not just trying to talk about Jane Doe; you are actually trying to influence it. So we are going to create a broader category. We are going to capture it. That means that that activity now has to be regulated. Anything you do, money has to be raised in limited amounts, has to be disclosed et cetera."

At first, in 2003, the Supreme Court said, "That's fine. We think that these new parts

of the law are important and that they will help us prevent corruption or even the appearance of corruption." So they pass it, they uphold both provisions and other parts of the law as well, there were minor changes made in penalties and disclosure and other things to try to capture some other activity, and the case was upheld by the Supreme Court.

Then, really, the beginning of a very concerted effort to break down these restrictions, to deregulate the campaign finance system, began in the early 2000s and the cases started making it to the court. One made it to the Supreme Court in 2007, Federal Election Commission v Wisconsin Right to Life. This right to life group was an anti-abortion group in Wisconsin, one of the states, which wanted to run ads that basically it said were issue ads; that it really did not care about the election or who got elected. But it wanted to run them, of course, two weeks before the election and it wanted to mention the name of a candidate. But it said: "Really, all we want to do is talk about abortion. We don't want to talk about anything else. It's just our issue and so we should be allowed to do that any time of year and not just months before the election."

The court said: "Yes. If in fact this electioneering communication is about issues or if in fact it could be interpreted as something other than just advocacy for or against voting for someone in an election, you really shouldn't try to limit it because it could put a chilling effect on protected free speech." So here the court is saying: "We've got to be careful where we draw this line. We might allow some of this. Maybe some of this really is just about issues. Maybe these groups just want to run ads all year round and we shouldn't stop them just because it is election season. We are walking a fine line too close to what should be, the court said in 2007, protected free speech." So this really weakened the corporate and union bans on spending in elections that had been in place for a long time. Wisconsin Right to Life is a non-profit corporation, so when we are talking about corporations we are not just talking about big money corporations; we are also talking about these non-profit organisations that organise maybe around some issue but organise to participate in elections and potentially influence the outcome of an election.

So these guys were saying, "No, no, no, we don't want to have anything to do with influencing the outcome of an election," but what they are doing, some people argue, is electioneering. The court said: "Well, we have to be really careful. If they are also trying to advocate for policy issues that have nothing to do with an election—okay, they might mention somebody—this is a really hard, grey area." So here the court have not said, "I am going to draw a bright line between what is permissible and what is not." Unfortunately, they did not do that. If they had, perhaps things might have been more clear. But they did weaken the outright bans and now allow these groups, who were told in the past that they could not participate, to maybe participate a little bit more.

Then we had the big case that I am sure you have heard of—I think some of your other witnesses have referred to it—that just happened in January, the Citizens United case. This group wanted to run a movie on cable television, actually just a pay per view movie, about Hillary Clinton, who was running for President of the United States. It was a really pretty nasty movie. The court basically said: "Yes. Clearly, the movie was all about making sure Hillary Clinton did not become President of the

United States, but we are not even going to care about that because what we are going to do is overturn a hundred years of banning corporate spending in federal elections and we are going to say that corporations now have protected free speech rights." So this is a complete U-turn, just a few months ago. The court said, "Okay, we are just going to ignore what we have done in the past because now we are going to recognise"—and I have a couple of quotes here:

> … the Government may not suppress speech—

so they are using strong language—

> on the basis of the speaker's corporate identity.

So it does not really matter if you are a corporation or a political action committee, for example.

THE CHAIR: So there is no distinction between an individual's right and an entity's right?

Prof Dwyre: That is the sort of radical thing about this. They are really creating a brand-new right for corporations under the first amendment freedom of speech provision and saying that they have protected speech rights. This has not been done before. There are instances that go back to the 1920s of corporations gaining rights under the constitution and it is a concept called corporate personhood, which I do not think you even have here at all. But one of the reasons it was developed was to allow an individual like you and me to actually sue a corporation if they harm us in some way.

So if I am at work and a machine falls on me, the corporation says, "I can't go to court; I am not a human being. You can't sue me." Back in the 1920s that was happening, particularly since they had no workplace laws back then. So that was created—for a variety of other reasons too; there were lots of benefits for corporations because they are persons, because that means that they can also defend themselves: "Yes, I had this factory that polluted this river over 50 years; sorry but it wasn't really my fault alone"—those kinds of things. So it works both ways. This is not a brand-new thing, that corporations are given rights under our constitution. However, it is the first time that the court has said that they have free speech rights.

So it is a real turnaround, and in campaign finance law it really overturns 100 years of laws that have focused from the very beginning on banning corporate participation in federal elections. Then the court say:

> … independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.

So they basically just say, "There is no chance of corruption here so why should we worry about it?" They still say, of course, that corporations and anybody else cannot give to parties and candidates in unlimited amounts. Yes, we recognise that that is an avenue for potential corruption but here we do not see this as corrupt, whereas in the past it was seen as a potential avenue for corruption. They say:

> No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

So they are making it clear that they are talking about both kinds there; they have created this corporate entitlement to free speech and it overturns over 100 years of precedent here. Then, right on the heels of that, a couple of weeks ago, on 26 March, in a lower court—which will probably go to the Supreme Court, and given the court's last decision I do not think this will change—the decision in this lower court, the DC circuit court, deals with the other side of the equation. Citizens United dealt with spending or expenditures. SpeechNow.org deals with contributions and the court says that limits on individual contributions to these independent expenditure groups are unconstitutional; you should not limit actual contributions going to these groups. So, if I want to raise as much money in unlimited amounts, I should have a constitutional right to that; otherwise you are limiting my freedom of expression.

> … the government has no anti-corruption interest—

same argument—

> in limiting contributions to an independent expenditure group …

Because, of course, no correction can happen, they say in Citizens United, since expenditures do not corrupt, which is what they said in Citizens United, neither do the contributions going to the groups that make those expenditures. So they are basically just saying: no corruption happens over here so it is protected free speech; we should not worry about it, and the only reason we need to limit activity is if we are trying to prevent corruption and since there is no corruption we are not going to try to do anything. This is the logic, and it is just in the past few months that the court is now applying.

There are a lot of consequences out of this. We have not seen an election since these decisions but we can guess some of the things that are happening, and some things we already know.

> The resulting regulatory regime limits fundraising and spending activities of candidates and parties.

> They can only raise money in limited amounts and give it out in limited amounts, so a party can only give a candidate a limited amount directly.

So that is all limited. A candidate can only receive so much from a political action committee or an individual so they have to raise money in very limited amounts. They are the only players that appear on the ballot on election day. They are the people whose name and party label appear on the ballot, so they are the only ones who can be held accountable for any campaign finance activity during the election.

The other players, of course—the interest groups, political action committees, labour unions, corporations—are not on the ballot; nobody is voting for or against them and anything they do during elections they are not held accountable for. In fact, candidates often get blamed for the nasty ads that other people run that are supposedly helping

them, so it can backfire and hurt a candidate because, believe it or not, there is a limit to the amount of negative advertising people can take and, if it is bad enough, voters will turn against it. Candidates are not doing it; it is others who are doing it. They are more inclined to run more negative ads because they are not being held accountable, so therefore we have that happening. Because parties and candidates have to raise money in limited amounts, it takes them a lot of time and energy so they are spending their time doing that. The system, however, allows individuals, groups, corporations and unions to raise and spend money more easily and often without much disclosure.

This chart might have been a little bit confusing, but, if you just kind of step back and look at the categories, it shows that candidates, parties, political action committees—all are engaged in raising money and contributing money directly to and from candidates and parties in limited ways, so contributions to candidates are limited, for example—any of the contributions. Any kind of money that goes directly to a candidate is limited. So, if you are a candidate and you have to raise a lot of money to defend yourself if you are running for re-election, for example, you have got to raise it in little chunks and that means you are spending a lot more time raising money than you might be.

Spending by candidates, because of the Supreme Court case Buckley v Valeo, is unlimited. So if I happen to be really rich I can spend as much money as I want to win election, and we have some very good cases of that. It does not mean that billionaires always win, because they do not, but most of the time it helps them. The spending that candidates do overall: so if I am able to raise a lot of money, I can spend as much as I want, so, just like the other groups—independent spending, candidate spending, party spending—they can spend overall as much as they possibly can, depending on how much they have collected.

As you get down further on the chart, you will see these different kinds of groups. The 527 and the 501 just designate the place in the law that talks about them, so we call them 501 groups, for example, because it is section 501 of the tax law that identifies their activity and regulates it. As you get further down, the activity gets less and less regulated, and when you get down to 527 groups you can see that they are allowed to take in corporate and union contributions—that is what that category is—where above that the candidates, the parties and the PACS—political action committees—cannot accept any of those kinds of contributions.

So those are still limits. Contributions directly to candidates, parties or PACS from corporations or unions are still banned, still prohibited. 527 groups cannot give any money to candidates; they are in business to just spend their own money and they are the ones who often run the nastiest ads. You may remember from the 2004 presidential that there was a group called the Swift Boat Veterans for Truth. A lot of people have asked me about them, so I thought maybe you had heard about them.

THE CHAIR: It rings a bell.

Prof Dwyre: They ran very nasty advertisements against John Kerry and questioned his patriotism and whether or not he was a good veteran and things like that. They became kind of infamous for that. They were a 527 group. They could spend as much as they wanted. Now 527 groups have to disclose their activity, so at least we know

what they are doing, But since that disclosure is pretty strict, many groups have now started to form 501 groups, because actually they do not have to disclose all their activities—particularly the contributions to them. So, if I am a 501 group, the contributions I collect from individuals, corporations and labour unions—or whoever I want—I do not have to disclose. They argue it is an issue of privacy and that we should not have to disclose who is giving money. In fact, they say, "We are not just a campaign group, we are not just involved in elections, we also do all these other things." That is a requirement of being a 501 group—that election activity cannot be your primary activity. So they have to show on paper that at least 51 per cent of their activities are non-election related, in order to qualify for this exemption from disclosing who contributes to their organisation.

Even the money they spend in elections directly is only minimally disclosed. They have a much looser disclosure set of regulations that they have to follow. And then-—only since January—corporations and labour unions can now participate directly. They still cannot, of course, give money directly to candidates or parties, but they can spend independently on their own, in unlimited fashion. I am saying that that money is supposed to be disclosed, because that is what our Federal Election Commission is arguing—that, of course, that money will have to be disclosed. We will see what really happens. I am not sure what it is going to fall under, because there is no provision of the tax law that deals with their activities.

And so there are a lot of consequences, and I just tried to write down a few of them. Some of them are quite good. If you look at the whole system overall, one of the things we have is a pretty good disclosure system. The disclosure thresholds are low, so, if I am a person contributing to a candidate, as soon as that candidate collects $200 from me, he has to report that. That is fairly low; it captures almost everything. The other kinds of activities—even if I give $10 at every event I go to, if it hits $200 they have to disclose it. So it is cumulative as well. I know that is an issue here—that people give $999 every day of the year and do not have to disclose it.

So that is one of the things that has been in place for a long time, and it works pretty well. It is not a bookkeeping nightmare for the candidates or the parties—everything is electronic, everything is virtually real time. If they want, they can keep their books right online at the Federal Election Commission. Most of them do not do that; they keep their own books and then upload their data for reporting. It captures multiple donations by the same donor, so that is what I was just talking about.

Importantly, we have pre-election disclosure, quarterly—and in the last 30 days before an election the last report is due. So people know. They know what is going on, where the money is coming from, how it is being spent. You can actually look at the reports that people file—candidates themselves, political parties, political action committees, some of these groups that are participating, you can look at their actual reports. You can see who is spending what, what they spent, how much money they spent on rent, how much money they spent on lunch, how much money they spent on contributions to candidates. You can find all that out if you want to. There is a lot of online data. A lot of it, if you want it, right away; 48 hours later most of it is available. And it may not be all nicely displayed, but you can look at the reports, and that is made available electronically.

A consequence of that is that we have a fairly well-informed media. They understand the data, they know how to use the websites, they know how–

MR HARGREAVES: That is a change then, isn't it?

Prof Dwyre: It is a very good thing, actually. They can ask the right questions. Do we have members of the media here? That is because they have access to the information. An agency, which has a public affairs office—the Federal Election Commission—works very hard to inform citizens and media about the rules and regulations and then what all this data means, what all these numbers are about, how it all works. There are a few reporters out there who have been working on this stuff for 20 years and they are really good and they know what they are talking about. So that helps with informing the public, obviously—they write stories about these things. Then the more information, the more disclosure, the more sunshine on it all, the more we are informed about what is going on.

Also, we have had the developments since the 1970s. There are a number of watchdog groups. One of the oldest ones I list here—the Centre for Responsive Politics. They are very active in trying to change and reform campaign finance laws and lobbying laws—things like that. The other two—the Campaign Legal Centre and the Campaign Finance Institute—are newer ones and look at and analyse the campaign finance data. They look at the policies, make recommendations to Congress and things like that.

The problem is that the disclosure rules have not kept pace—as you saw, the 527 groups: "They are too restrictive. We have to report everything. Why don't we form ourselves into a 501 group? There are fewer restrictions and we can do more of what we want to do." Like anything else, I think if the law cannot keep pace with what human beings are doing to get around the law then you are going to have holes and people escaping disclosure. We are not capturing everything, but overall the disclosure system works pretty well.

The enforcement has got a lot better. It is pretty good. The penalties for very overt illegal behaviour are very strict. You would not want to do something that is illegal and a clear easy catch. So you would not do something that was so easy for someone to see what was going on—laundering money, for example. The penalties are extremely high. Giving over the contribution limit, trying to run it through other people or entities, and those kinds of things are caught easily so we do not see a lot of that happening.

Again, the rules have not kept pace with the new and inventive ways people have figured out in terms of how to get around the system. A lot of people argue that enforcement has improved, but it is not enough. The FEC are underfunded, they do not have enough staff and some of the laws do not give them the bite they need to go after people who have broken the law. Our Environmental Protection Agency makes the same argument: "We can't go after polluters because we're underfunded; we don't have enough staff," and things like that.

As I said before, the presidential public funding system does not work at all anymore. Maybe there will be candidates who accept the money, but they can just raise so much more without it so why should they? They are putting themselves at a strategic

disadvantage.

The limits on contributions to candidates and parties are intended clearly—and the court stands behind this even today—to prevent quid pro quo corruption: "I give you money. I'm buying your vote or whatever—even if I'm just buying access to you." The court has upheld that as a reason to limit that kind of activity. The problem is that, since they have to raise money in those small chunks, that is all they do. There is not a lot more time for making public policy and law-making. Members of Congress complain all the time about the amount of time they have to spend raising money and what a problem that is. It is not good for our democracy. It really is not what they should be doing with their time. Of course, they are the ones who could change the laws. Some of them choose to; some of them do not.

The independent expenditure groups, the corporations and the unions now that can raise with few limits and maybe a lot of it undisclosed, again, are not held accountable on election day. Only the parties and candidates are, particularly the candidates. There are a few races, and we have good examples from the last few elections, where this independent spending was in higher amounts than the candidates were spending themselves. So they were speaking louder than the people who were running for office themselves. In one case in particular there was one group and one voice, one position, that spent more than the candidates running in the race—both candidates combined. People look at that; that is not illegal. They have the ability to spend in unlimited fashion—the freedom of expression to do that—but when the candidates' voices are being drowned out by these outside voices people see that as troubling and not a good thing for democracy.

The freedom of speech and campaign finance issue brings us back to the original mention of it by the court in 1976. The court has now created this entitlement to freedom of speech protection for corporations and unions, again overturning a long history of prohibition on that. The corruption, or appearance of corruption, is now only seen possible when giving contributions to candidates and parties. There is just this one place where corruption is happening now under the law.

Other campaign finance relationships are said to not give rise to corruption. Interestingly, you should know that there is great disagreement about this. Many people disagree with what the court has done in this case. The disagreement falls along ideological lines. Those who are interested in deregulating the system tend to be more conservative. They are also consistently interested in deregulating, for example, financial activity in the private sector, business activity. Most of those people are in our Republican Party. Those who think that the Supreme Court is going too far and that these protections of freedom of speech should not be extended to corporations and unions and we should go back to those prohibitions tend to be more to the left and in the Democratic Party.

So we have an ideological difference. Not everybody is agreeing with this. The court is definitely slightly to the right on issues more recently, since we have had some new players put on the courts since 2006. That is when we saw this big shift in its interpretation. Some find it really troubling. This is an ideological war; it really does not have to do with principles because people are interpreting these principles differently. We do not have agreement on where corruption can be found and how to

rule it out. The debate continues to be highly partisan and ideological.

In fact, the push to deregulate campaign finance laws is a very highly organised effort by a number of conservative groups who are very organised and a few lawyers who work on this issue. They have a whole line of law suits that are in the pipeline right now to continue to chip away at other issues—things like they are trying to give as much money, unlimited amounts of money, to political parties again. They are saying that is an unfair restriction: "I should be able to give as much money as I want to parties. Go back to that soft money allowance." They are trying to argue that they should not have to disclose the source of all the contributions they take in as organisations, corporations or unions—the identity of those people. These are some of the things that are in the works right now. So stay tuned.

MS HUNTER: Just on that last one where you were saying that they are obviously trying to take other cases and keep chipping away, how are they arguing around the whole of issue of corruption or perception of corruption?

Prof Dwyre: Their argument is that these groups that are bringing these suits say that there is independent spending which is not by candidates or political parties, that there is no corruption—they are just spending independently. They are not involving a candidate so there is no agreement, there can be no quid pro quo and there is no exchange of words, paper or money. So the argument is there is just not the opportunity to corrupt anyone.

The argument against that, and an example that a lot of commentators and law-makers have used, is "Well, you may not give me something, but you could come to me and say, 'Hey, you've got this big vote tomorrow and we'd really like you to vote on our side. Just to help you understand how important this is to me, I'd like to show you the ad we're going to run in your next election, just so you can see what we're planning to do.'" They never have to run that ad, but that could be the nastiest ad in the world and it is a threat: "If you vote my way, we won't run this ad." There is nothing illegal about me and you having that conversation.

MR HARGREAVES: They are actually drawing a distinction between the exercising of influence and the acquisition of gain.

Prof Dwyre: The acquisition of?

MR HARGREAVES: Gain. Their definition of corruption means that there has to be a gain for two parties, or one—

Prof Dwyre: Or at least it has to be perceivable.

MR HARGREAVES: Yes, as opposed to wanting to influence an event—and the event being to influence somebody's opportunity to participate in a vote. It is more a prevention than it is a corruption. Is that what they are saying?

Prof Dwyre: Those who would like to turn back the clock are saying, "We're not preventing corruption because we're allowing more avenues of people to participate in unlimited ways." These are players who already have a lot of influence because of

their ability to lobby, for example. Most lobbyists in Washington are sponsored by corporations—for-profit corporations. If you added up all the money spent on lobbying, the vast majority of that—and that is gaining access and influence—is occupied by corporate lawyers who walk up and down the halls of Congress.

If that is not corrupt, because of course everybody can petition the government and they can talk to them freely, the court is saying, "The same is true of people speaking freely during elections." Those who disagree with that idea are saying no because they can really shake down a lawmaker and say: "If you don't do things our way, we now have the power to bring you down, because we can spend unlimited amounts in your little congressional district and have an effect on the outcome of your election. We have the power to do that."

By merely speaking that out loud, or just by winking and not even saying it, if you vote against this tobacco legislation that proposes to tax the tobacco companies an extra 50c a pack, and you are looking at the lobbyist over there who is saying, "I dare you," you know what is going to happen. And that is age-old. That has gone on forever. Now they have new tools. So they have new tools, the ability to spend in unlimited ways, directly from corporations—and labour unions, who could use the same tools—to influence the outcome of an election. That is what some of the controversy is about.

THE CHAIR: It seems, Professor Dwyre, that all of this hangs on the belief in the constitutional right to freedom of speech, and all of the chipping away that we have seen in the last five to 10 years has hung on that. Is that an overly simplistic—

Prof Dwyre: Since the 70s, since 1976, yes. That is when we really started to bring the two together as a pair—campaign financing and freedom of expression should be considered together, the court said in 1976. The big difference with the recent decisions is that, throughout history, the definition or the understanding of corruption has been that corporations and labour unions were an important nexus of corruption that we had to keep an eye on, and therefore limit their activities in elections. So that is the huge change recently.

The two issues really are freedom of speech and prevention of corruption. So where is it that you bring the freedom of speech blanket of protection and cover those people and who is left outside of that because the potential for corruption is too high?

THE CHAIR: But you did make the point that legislators may have it within their power to change the laws. The risk is always there that because the constitutional freedom of speech provisions are so strong in the US Constitution, no matter what legislators do, it can be overridden.

Prof Dwyre: And that is how a lot of them feel right now. For example, I think I put in here that there is an attempt to fix some of the problems that they perceive have emerged with the Citizens United case. They are going to try to do all kinds of things like require corporate CEOs to say in the ad, "This is the chairman of IBM and I sponsor this ad." It is kind of like candidates and parties do, to make them do more disclosure, to share with their shareholders what they are doing in political activity, which they do in the UK. They have a shareholder permission provision that requires

corporations, before they do any kind of spending, to go to their shareholders and say: "Here's what we're going to do this year. Do you approve or not approve?" This is not so much permission that is being proposed; it is just disclosure: "Here's what we're going to do. We don't care if you approve or not approve." But it is disclosing it.

There is the tightening up of the prohibitions on government contractors and foreign companies and not allowing them to be in that protected speech area. Government contractors—there are things like bailed-out banks as well, which everybody thinks are the bad guys. "Why should we subsidise their ability to influence our elections?" So they want to exclude them from that protection.

The problem that you raise that is so important is that they cannot, with legislation, address the freedom of speech issue. They can only fix little things here and try to rein them in, disclose more, make them be up-front about it. But unless or until you change the Constitution of the United States and say, for example—and this would probably work—"Freedom of speech only applies to individual human beings, not to non-human entities", this is actually how they talk about it: "That a corporation is a non-human entity." There are distinctions all over the law made between humans and non-human entities, and that if we give corporations the right to freedom of expression, we are putting them together with humans. So that is what the court has done.

THE CHAIR: My next question is: has there been a development of the doctrine of freedom of speech in this area or in other areas in the United States?

Prof Dwyre: Certainly, in other areas. Some examples are cultural norms changing. For example, until 1990-something, it was illegal to burn the American flag. That was seen as not only unpatriotic but sacrilegious. Then the Supreme Court said: "Wait a minute. That's a freedom of expression issue. If somebody wants to express themselves by burning the American flag, they should be able to do that." So they have applied freedom of speech to those kinds of acts of speech.

Freedom of speech is limited, for example, for minors, for people under the age of 18. There are limitations that the court has upheld about things that they can say or banners that they can hold or T-shirts they can wear to school that may be seen as obscene or promoting illegal activity, for example. There are dress codes in schools that do not allow kids in Los Angeles to wear gang colours, to try to prevent criminal activity and violence in the schools. The court has said, "That is okay; it is not your freedom of expression to wear a red scarf or a blue scarf." In fact, if there is a good reason for that, if it is in the interest of the state—with campaign finance, that would be to prevent corruption and with the dress code issue it would be to prevent violence in a school. So the court has stepped in.

THE CHAIR: So there are limitations?

Prof Dwyre: There are limits, yes. I would say, in the case of campaign finance, in the last few months they have gone farther than in any other area, really. Individuals have lots of freedom of speech. There are very few things they would stop you from doing. You could stand on top of this table and talk and talk about how we should change the government, but as long as you do not incite anyone to actually act on that,

it is okay; you can do that. You can say nasty things about political leaders. It is okay; you can do that as much as you want, as long as you do not incite anyone to riot or action, and as long as violence does not ensue or somebody takes action that is illegal, as long as criminal activity does not follow. But then, of course, you cannot prevent those things if you allow the speech. So this is a very, very grey area, too.

MS HUNTER: Has there been an outcry from the public or any sort of reaction from the public? You mentioned a couple of these centres and so forth that specialise in this area.

Prof Dwyre: There has been a good deal of objection. There have been a few polls. I do not really trust these polls because this is an incredibly complex area. I do not know how regular citizens can really understand how freedom of speech is applied to campaign finance laws. Even if it is just a knee-jerk reaction, saying, "What do you mean, corporations can spend as much as they want in our elections?" President Obama said something about that in his State of the Union address after the Citizens United decision in January. He basically said, "We're opening the floodgates and we're going to allow the most powerful interests in our country to run over and control our elections and determine who gets elected, and therefore determine our policies." So there is this reaction that has been negative. Generally, if you ask people a question in a poll like "do you think it's a good idea that corporations be able to spend as much money as they want in federal elections?" most people have answered questions like that by saying, "No, I don't think that's a good idea."

As with so many areas where there is not a high level of understanding and it does not really affect most individuals directly, it is not like there is a groundswell movement of people saying, "We need to change these laws." Most of that is coming from lawmakers and organisations.

THE CHAIR: Are you expecting to see that with the mid-terms in November there might be substantially new sorts of interventions in key campaigns?

Prof Dwyre: That is a great question. Of course, that is a huge unknown, but one of the things I think we can try to feel comfortable about knowing is how these players will behave, because we know how they behave strategically—how they have tried to get around the law in the past, for example. I refer, for example, to corporations which participate and give through their political action committees. So if they create a political action committee, they can participate. They do not generally go after individuals or even parties. If they think the Republicans are going to win, they give a little bit more to Republicans, but they still give a lot to the Democrats. If they think the Democrats are going to win, they play both sides.

They do not want to take partisan sides, because they know they could alienate people that they need—people they would like to have access to once they get elected to office. They also know that, 10 or 15 years down the line, the other party could be in charge, and they would like to still be around and operating. So corporations behave very differently from individuals and many other groups that are more ideological and who would never, if they give to Republicans, give to Democrats, for example. We may not see too much activity that actually goes after one party at the expense of the other.

THE CHAIR: It would be more about perhaps someone's voting record, a representative's voting record on a particular issue, and if there is issue-based politics, whether it is tobacco taxes or excises or—

Prof Dwyre: They have done that in the past; they will continue to do that. It is usually in a very targeted manner. So they are as good at counting votes as anybody else is. If they figure out they are two votes short, they will go after three people who they know are very vulnerable. To use the tobacco example, if you are a legislator from South Carolina where they grow a lot of tobacco and you really do think that we should impose 50c more per pack tax on cigarettes but most of the people in your district are big pro-tobacco people who work for tobacco industries or grow tobacco, you know it is in your interest, and maybe you do not need to be pushed by an ad on TV that Philip Morris sponsors. But, in fact, that has happened. The last time that we had a big round of tobacco-related legislation, they targeted just five senators, and they were very targeted and very mean ads, very negative ads, and they got all five people to vote their way. I could not tell you that they were not already going to vote their way, but you could argue—

THE CHAIR: In that case they were actually speaking to the senators before a vote, through advertising?

Prof Dwyre: Not necessarily. It is pretty easy to know, just by hanging around Congress, for example, talking to all the players and meeting with staff people and maybe legislators themselves, how they are feeling about an issue and how they are going to vote. Some of them will be quiet about it. If they are seen as toss-ups or we are not sure how they are going to vote then maybe they become a target. Most people will make a speech and say, "I think this is a great piece of legislation and we should vote this way," or "This is a terrible idea and we should vote this thing down." Or they make it clear to their constituents how they feel about that issue, if it is high-profile enough. Or they say something at a committee hearing. Or they have indicated to a party leader or colleague "this is how I'm going to vote". For most of the folks, it is pretty clear. With some people, you just know: this is their ideology; this is how they are going to vote on these kinds of issues. So it usually ends up being just a few people.

I think we will see more activity from corporations, and unions too. As far as we can tell, this applies to unions too. Unions are a different animal, but why would they be excluded, given this argument about freedom of expression? So most people think—and there was only little mention made of labour unions in the decision—it will apply to them. Unions are highly ideological. They support primarily the Democratic Party. Their activities may increase, although they have found all kinds of very effective ways around the law that already allow them to participate at great levels.

THE CHAIR: For instance, how are people getting around the laws without these—

Prof Dwyre: Primarily with these groups. So a lot of organisations have created these 501(c) non-profit organisations.

THE CHAIR: For the benefit of the committee, this is a definition in the tax law?

Prof Dwyre: Right, so the numbers just refer to the section in the tax law.

THE CHAIR: So they are not-for-profit organisations—

Prof Dwyre: Yes, the 527s—

THE CHAIR: who may be involved in social welfare or—

Prof Dwyre: The 501s have other—social welfare is one kind of them, and they also can be ideological groups. They can be business associations. But at least 51 per cent of their activities have to be non election related. With the 527s, 100 per cent of their activity can be election related, and that is why they are required to disclose, because they are saying, "I'm creating myself as a 527 and everything I'm doing is election related; therefore, yes, I understand."

THE CHAIR: But they are not a political action committee?

Prof Dwyre: No.

THE CHAIR: They are separate?

Prof Dwyre: No, they are separate—exactly. It is really complex. They are separate because that designation existed for a long time and nobody used it, but then people realised, "Oh, wait a minute. I can be political over here and raise and spend as much money as I want as long as I disclose it. I'm going to do that." So back 10, 12 years ago we started to see people using that. Even though the designation had been in the tax law for a long time, nobody was utilising it in that way.

MR HARGREAVES: In relation to these disclosures, is there a disclosure period which commences or does it apply 100 per cent of the time?

Prof Dwyre: It is kind of ongoing all the time. You have to register and in some states, for example, you have to submit a certain number of signatures based on various formulas which you file with the local authorities, the state authorities, the election boards. So you are a candidate then. As soon as you do that you become a declared candidate and you are going to appear on the ballot unless you do something to stop that. Then since you are a candidate—

MR HARGREAVES: That is the candidate one.

Prof Dwyre: Right.

MR HARGREAVES: That is quite easy to understand. But for these non-candidate entities whose lives are actually about influence for their own sake, do their obligations kick in at the same time or are they—

Prof Dwyre: All the time—quarterly, every year.

MR HARGREAVES: Full stop.

THE CHAIR: So that while ever the entity exists they have to be reporting—

Prof Dwyre: That is right.

THE CHAIR: But only federally.

Prof Dwyre: Depending on the state—and some states have stricter campaign finance laws and some have looser campaign finance laws—yes, they may have to.

THE CHAIR: What we have been talking about today is national, so it is for national candidates, congressional and Senate elections.

Prof Dwyre: In most states—

THE CHAIR: And presidential elections.

Prof Dwyre: Most states mirror this set-up. All states are affected by the new decisions. Some states have had to go back into their books and change their laws that prohibit corporate—

MR HARGREAVES: Can I just go back to that disclosure period again? Who says that the fundraising activity that a non-human entity engages in has to be for the purposes of an election, to influence the outcome of an election, when one is not necessarily on the horizon?

Prof Dwyre: They have a provision for this, believe it or not.

THE CHAIR: An election is always on the horizon in the United States because they have one every two years.

Prof Dwyre: That is true. Let's say I am a 501 group—the ones that can only do a minority of their activity related to elections—and you are a big time contributor. You say to me, "I'm giving you $10,000 and I want to make sure you don't spend this on campaign activity." You have to designate that. You could just make a note on your cheque, but you have to designate it in writing somewhere. You could attach a memo or something like that. That has to go into a separate bank account. You would have to say that. But what if you come to me and say, "I really like what your group does. I'm going to give you $10,000." I am running the 501 organisation and I decide that we could really use that $10,000 for our election fund. I am going to take your $10,000. I am going to put it in there and I am going to use it so long as you have not specified—

MR HARGREAVES: Am I hearing you say that any 501 organisation is required to have two bank accounts—one for election purposes and one for non-election purposes?

Prof Dwyre: If they are smart they keep not only their books separate but their bank accounts separate.

MR HARGREAVES: Are they required to do that?

Prof Dwyre: No, they do not have to, and some have got into a lot of trouble. It is cleaner if you have two bank accounts and it is certainly easier to have two bank accounts. I think most of them probably do it now. A few have not been able to show that they have actually followed the intentions of their contributors and they have not been able to show that more than 50 per cent of the activity is non-election activity. So having two accounts makes that really easier.

THE CHAIR: Professor Dwyre, with, say, the 501 groups, nationally how many would have emerged over the past—are we talking hundreds?

Prof Dwyre: Probably hundreds. I could get back to you with the exact number.

THE CHAIR: It would be useful to know the quantum and the sorts of organisations that we are talking about.

Prof Dwyre: They run the gamut—anything from purely ideological groups that deal with issues like abortion or gay marriage. That is all they deal with and they work on both the legislative end—and that would be considered non-election activity—and the election—

THE CHAIR: So advocacy for a particular policy position.

Prof Dwyre: Right, so lobbying—

THE CHAIR: Lobbying would not be considered electioneering for the purposes of the act.

Prof Dwyre: No, which, of course, is another grey line. But if I am working to create a grassroots campaign of our members to write letters to their members of Congress, that would be considered lobbying, not campaigning, because I am getting my people who belong to this organisation to write letters to try to tell them, "Please vote in this way, or I demand you to vote in this way."

MR HARGREAVES: That is lobbying and not electioneering?

Prof Dwyre: That is right.

MR HARGREAVES: So if I am the head of this organisation and I write to you saying, "This person is not worthy. Do not vote for this person"—

Prof Dwyre: You are electioneering.

MR HARGREAVES: But if I write to Meredith and I say, "I want you to vote for her because it's a good idea," that is lobbying?

Prof Dwyre: No, do you mean if you are telling a member of your organisation to vote for someone in an election—

MR HARGREAVES: Yes.

THE CHAIR: That is electioneering.

Prof Dwyre: That is electioneering.

MR HARGREAVES: As soon as you make a connection?

Prof Dwyre: No, because you can make a different kind of connection. Let's say you are the head of this organisation and you write an email to all of your members and say, "There's a big piece of legislation coming up in Congress. They're going to vote on gay marriage tomorrow. Please send your representative an email. Here's their address." They make it really easy. Everything is automated. That is not electioneering. That is lobbying your—

MR HARGREAVES: And if you put in that letter, "Make it really clear to your representative that if this person does vote in this particular way there will be ramifications at the next election."

Prof Dwyre: That is electioneering. You cross the line. But you would not do that because you are too smart. You are going to stay on the right side of the line. These are people who know the law and they know what they are doing. Some groups actually have churches, in particular, who are not permitted to participate in any electioneering because of their status as not only a charity but a religion. But nobody knows where that line is now. We have many instances of clergy on the pulpit speaking directly about specific candidates and how they should vote, or issues.

In some states, like California, where I come from, we have a lot of ballot measures. People vote on issues directly by referendum. Generally, the government have not come down on that activity but, in the cases where they have, where people have brought these particular clergy people to court, for example, the churches have not won. They are claiming they have freedom of expression to do this, but the government have said, "No, you have a special tax-exempt status and you're not supposed to be engaging in politics." They are covered by different parts of the tax code. We used to have lots of religious organisations and clergy people out there in huge—

THE CHAIR: But that is not a separation issue.

Prof Dwyre: It is supposed to be part of the separation of church and state, but also the tax system, where they get very generous treatment under the tax laws. I would not necessarily call it a direct subsidy but certainly a subsidy exists. They do not pay property tax, they do not pay income tax and they do not pay charity taxes that other charities pay—those kinds of things. That is an area where there is some controversy. There has not been a lot of case law. Law-makers do not want to touch it because it is religion. They do not want to go anywhere near that.

THE CHAIR: I am very conscious of the time. Do members have other questions?

MS HUNTER: I want to go back to the one you were raising before. We have

focused on the federal elections, the national elections. Are there some states that have stricter disclosure and expenditure-type laws that you could give us as examples? You may not have time now but—

Prof Dwyre: Quickly in a few areas, some of them have much lower thresholds for disclosure. So in some states anything over $25 has to be disclosed. That captures lots of activity—money put in a jar at an event or something. Some states have more robust public funding systems, for example, either for city councils or for state legislatures. Maine is one of those. They seem to be working all right; they are fairly new. But they are all voluntary. Because of the first amendment and this idea that you cannot force somebody to take public money, it is all voluntary. So if you wanted to raise and spend your own money, you could still do that.

THE CHAIR: But you can't do both?

Prof Dwyre: No. So if you voluntarily take the money, you also voluntarily agree to limit your spending.

THE CHAIR: I want to be clear on this: when Senator McCain decided not to take public funding—

Prof Dwyre: No, he is the one who did take it. Obama did not.

THE CHAIR: I am sorry; that is right. When you take public funding, there is a certain amount of public funding but you can raise money over and above that, but to a limit?

Prof Dwyre: No, only before you get the public money. After that, you cannot.

THE CHAIR: You can't raise money at all?

Prof Dwyre: You are stuck.

THE CHAIR: It is completely either/or?

Prof Dwyre: Once you take the money.

THE CHAIR: In the Australian system there is a certain amount, but that does not stop you raising money over and above.

Prof Dwyre: That is right. It is very different in that way. The idea behind the public funding is that you would not have this huge growth in money in politics and that it would somehow level the playing field between candidates.

THE CHAIR: One of the things that occurs to me, and you touched on it, is representatives saying that you spend so much time raising money that you cannot be a legislator. I was looking for the quote this morning but I could not find it. It was McKinley's campaign manager saying, "There's two things about elections: there's money"—and I can't remember what the other one was.

Prof Dwyre: And that was a long time ago.

THE CHAIR: That was a long time ago, yes. Could you express your view about the extent to which the pursuit of money impacts on the fairness and freedom of elections in the United States?

Prof Dwyre: Clearly, running for office in the United States is for people who have money or access to money. We have very few people who are working class in office, even at the lower levels of government. Even at a city council level, it takes increasing amounts of money to run for office. The primary reason for that is television. It is just so expensive. If you live in a place where television is expensive, if you live in New York or Los Angeles, where buying air time costs a lot of money, it is even more costly.

Because we have a system where candidates are running independently and they are running their own primary and general election campaigns, we are talking about the need for a lot of money. So it drives what campaigns are all about and it could drive what the life of a legislator is all about, if they are spending all of their time—or perhaps not all of their time—on staying in office because they have to raise money. Certainly, it is a reality. Even those who want a fully deregulated system would complain about having to spend so much time raising money. So putting the limits on the amount of money that goes to candidates and political parties really puts them at a disadvantage regarding all of these other players.

If we are talking about issues of fairness—which are really hard to pinpoint, because what I think is fair may not be what other people think is fair—is it fair that if I want to be a legislator and a public servant, serving the people, I have to spend so much more time than those people who are out to get me to raise this amount of money to defend myself? Is that fair? I probably do not feel that it is fair. The court says: "Well no, because you are in a particular spot where you're someone who is vulnerable to corruption, and if we allow an opening to you, because you're a decision maker in government and you can decide what policies are, then we're opening an avenue to corruption. So you're different from those guys who are after you, who are outside the law-making house."

With respect to those distinctions, is that fair? "Well no, I recognise that; I'm in a position of power that they're not in. They want access to me, and they're doing all they can to either access me or change who I am and put somebody in there who they agree with more." So figuring out what is fair or not fair is a really hard thing. I think it depends where you sit.

The thing that law-makers and judges are focusing on, and I think should focus on, is corruption. What is corruption? They have defined it in a particular way now. So you need to think about: what is corruption? Where can it happen? And can we try to prevent it? In trying to prevent it, are we doing things that we consider unconstitutional or would the Constitution allow this because it is an important government interest, it is important for the people, it is important to promote representative democracy?

So that is where the decisions have to be made. And those are the lines that are

moving in the United States right now. I think this is just going to keep going on for a very long time. Here, you are at a point where you are deciding where that line is going to be. You have had a couple of cases that talk about freedom of political expression and clearly relate things to corruption and the prevention of corruption. So those are the big issues. How influential is the freedom of political expression when it comes to issues of campaign finance? I think in the US it is clearly more influential than in a lot of other places, including Australia right now, but it is a consideration. So balancing freedom of expression and preventing corruption are clearly the two big things. How much freedom of expression are we going to limit in order to prevent corruption?

THE CHAIR: We have to keep in mind that the tests in the two constitutions are quite different.

Prof Dwyre: Yes, very different.

THE CHAIR: Professor Dwyre, thank you very much for your participation this morning. It has been most enlightening.

The committee adjourned at 11.56 am.