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The Chamber in the Chambers: The Making of a Big-Business Judicial Money Machine

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THE CHAMBER IN THE CHAMBERS: THE MAKING OF A BIG-BUSINESS JUDICIAL MONEY MACHINE

*Alyssa Katz**

The Clifford Symposium has invited me not as a legal scholar, a judge, or even an attorney, but as a journalist who specializes in investigating and analyzing systems of power, and in particular the intersection of government action and private activity. This pursuit demands researching the workings and impact of the U.S. Chamber of Commerce, an organization that over the last two decades has profoundly reshaped the power dynamic between business and government in the United States as a whole, including elected judiciaries.

This Article assesses what I call the Chamber of Commerce's "judicial climate change operation." The goal of this operation is to transform the composition of state court benches by facilitating the election of business-friendly judges. This Article begins by explaining the Chamber of Commerce's history, organizational framework, and strategy. Then, importantly, the Article analyzes the identities and objectives of the companies funding the Chamber of Commerce's work.

The Basics: What is the U.S. Chamber of Commerce?

The Chamber nominally represents millions of American businesses big and small. However, for all practical purposes, it is acting on behalf of a core group of approximately 1,500 major companies that act in near anonymity.[1] The Chamber has forged its unique power through aggressive fundraising and highly strategic deployment of its resources, maneuvering multiple levers of power simultaneously, in all three branches of government at the federal and state levels.

The Chamber, a 501(c)(6) tax-exempt trade organization, was founded in 1912. It is the biggest lobbyist in Washington, having spent

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1. PUBLIC CITIZEN, THE GILDED CHAMBER: DESPITE CLAIMS OF REPRESENTING MILLIONS OF BUSINESSES, THE U.S. CHAMBER OF COMMERCE GETS MOST OF ITS MONEY FROM JUST 64 DONORS 3 (2014).

in excess of $1 billion on the services of top firms and its own sizeable staff of lobbying personnel in the past two decades.[2] It remains a leader in the use of dark money to secure congressional seats for pro-business Republicans. The Chamber played a decisive role in securing party control of the House in 2010 and the Senate in 2014 and was an innovator of the now commonplace use of tax-exempt groups as weapons of federal election warfare waged anonymously.[3] It funds a massive litigation operation, active in beating back labor, environmental, and consumer regulation as both a primary litigant and a prolific filer of amicus briefs.

On top of all that, the Chamber funnels dark money into judicial elections, and has broken spending records, arguably ushering in the age of mega-money judicial races. Albeit through a foggy window since the identities of donors are rarely disclosed, the Chamber's Institute for Legal Reform makes for an excellent case study in the organizational mechanics and interest-group dynamics of political action.

The Institute for Legal Reform describes its mission on its website as "[p]romot[ing] civil justice reform through legislative, political, judicial, and educational activities at both the national and local levels" and to the Internal Revenue Service as "making America's legal system simpler, fairer and faster for everyone."[4] This is an overly humble and neutral way to describe an organization that spends billions of dollars on lobbying and elections. In 2014, the most recent year for which its IRS filings are publicly available, the Institute for Legal Reform raised $45 million in revenue, on top of the $206 million brought in by the Chamber of Commerce itself. The Institute for Legal Reform spent one-third of this money on political campaigns with a significant share of this amount going to judicial elections.

Like the Chamber of Commerce itself, the Institute for Legal Reform benefits from the Internal Revenue Service, Congress, and most state regulators' indifference toward explicit political campaign activities by tax-exempt trade associations and social welfare groups. This

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2. *Annual Lobbying by U.S. Chamber of Commerce*, CTR. FOR RESPONSIVE POLITICS (Oct. 21, 2017), https://www.opensecrets.org/lobby/clientsum.php?id=D000019798 (collecting statistics derived from U.S. Senate lobbying reports).

3. Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, The Dark Election of 2010 and Why Tax-Exempt Entities Should be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS: CHAP. J.L. & POL'Y 59, 91 (2010–2011); Robert G. Boatright, Michael J. Malbin & Brendan Glavin, *Independent Expenditures in Congressional Primaries After Citizens United: Implications for Interest Groups, Incumbents and Political Parties*, 5 INT. GRPS. & ADVOC. 119 (2016).

4. INSTITUTE FOR LEGAL REFORM, https://www.uschamber.com/institute-legal-reform (last visited January 3, 2018); US Chamber Institute for Legal Reform, I.R.S. Form 990 (2014).

indifference has resulted in a lack of state or federal campaign laws that might compel disclosure of the sources of corporate contributions to such organizations when they engage in campaign-related activities. So long as groups do not coordinate with campaigns and claim that political activity is not their primary purpose, they face no obstacle to political spending funded by anonymous sources, however aggressive it may be.[5]

In 2014, the Institute for Legal Reform's largest political expenditure, $2.75 million,[6] benefited a group called the Republican State Leadership Committee ("RSLC")—making the Chamber of Commerce the largest donor that year to a group that spent $3.4 million on television ads, phone banks, and other voter-influence efforts connected to judicial elections in North Carolina, Montana, Missouri, Tennessee, and Illinois.[7]

As the Brennan Center has documented, one RSLC-funded ad attacked North Carolina Supreme Court Judge Robin Hudson. The ad described her as a friend to child molesters citing her dissent to an opinion that upheld the constitutionality of an offender satellite tracking system. She won reelection despite the attack campaign. One may reasonably conclude she was targeted not because of her stance on the balance between personal privacy and public safety, but because of her opinions favoring corporate liability.

Because the RSLC also spends millions to keep state legislatures under party control and elect business-friendly attorneys general, it is not possible to trace all this spending back to the Chamber of Commerce. Nor is it possible to confirm the Chamber played a role in the RSLC's spending in a second race, in Illinois: the reelection of Lloyd Karmeier, whose first campaign in 2004 was a watershed for dark money in judicial elections. But its past role in Karmeier's election is well documented.

In 2004, the Chamber of Commerce openly targeted a sitting appeals court judge who was seeking retention, Gordon Maag, in a jurisdiction viewed as one of the most plaintiff-friendly in the country, with the goal of securing a pro-business majority. Maag was also running against Karmeier for an open seat on the Illinois Supreme Court.

5. Citizens United v. FEC, 558 U.S. 310 (2010); Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the Dark Money Election*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 383 (2013).

6. US Chamber Institute for Legal Reform, I.R.S. Form 990 (2014) (with help from research done by Alicia Bannon and her colleagues at the Brennan Center for Justice).

7. SCOTT GREYTAK ET AL., BRENNAN CTR. FOR JUST., BANKROLLING THE BENCH: THE NEW POLITICS OF JUDICIAL ELECTIONS 2013–14, at 30–37 (2015).

The Chamber's forceful $2.3 million assault, in partnership with the Illinois Chamber of Commerce, included lurid smear ads. Voters denied Maag retention on the appellate court; he also lost the Supreme Court election to Karmeier.[8]

In doing so, the Chamber achieved two results of incredible value. The Illinois Supreme Court had before it a $10.1 billion jury award against defendant Philip Morris, in a class-action lawsuit alleging that the company had deceptively marketed light cigarettes as a safer alternative to other tobacco products.[9] The court was also about to confront a $1.05 billion judgment against State Farm, in a case concerning corner-cutting on replacement auto parts.[10] Soon after his election, Karmeier cast the decisive vote relieving State Farm of its burden,[11] and in the following year Karmeier was in the 4-2 majority that overturned the Philip Morris judgment.[12]

Just as important, the election victory signaled to prospective donors that the Chamber of Commerce and its Institute for Legal Reform was a winning force well worth the investment. Indeed, in 2004 the Institute for Legal Reform won twelve out of thirteen state high court races where it ran attack ads.[13] Not surprisingly, Chamber of Commerce President and CEO Thomas J. Donohue has been known to pitch that his group provides political "reinsurance" for major businesses, just as insurance companies seek to hedge against their own risks. The Chamber does not win every race; in fact, Karmeier barely won retention in 2014. But the steady trajectory has moved targeted states away from judges perceived as friendly to plaintiffs and toward candidates considered more pro-business.

What Businesses are Donating to the Chamber of Commerce?

This brings us to the $250 million question: What are these businesses? How did they band together in this singularly active, strategic, and longstanding vehicle with such effective results? The search for an answer takes us back two decades, to Donohue's arrival at the Chamber of Commerce in 1997 and his ambitious, wide-reaching ef-

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8. Ctr. for Pol. Accountability, Hidden Rivers: How Trade Associations Conceal Corporate Political Spending, Its Threat to Companies, and What Shareholders Can Do 24–26 (2006); David B. Rottman and Roy A. Schotland, *2004 Judicial Elections*, *in* Couns. of State Governments, Book of the States, 305, 307 (2015).

9. Price v. Philip Morris, Inc., 848 N.E.2d 1 (Ill. 2005).

10. Avery v. State Farm Mut. Auto. Ins Co., 835 N.E.2d 801 (Ill. 2005).

11. *Id.* at 834–35.

12. *Price*, 848 N.E.2d at 50–51.

13. Deborah Goldberg et al., Brennan Ctr. for Just., The New Politics of Judicial Elections 1–12 (2004).

forts to turn what had become an increasingly marginal, politically divided, and largely ineffectual interest group into a political force with the power to reliably sway outcomes in government.

Such an ambition required major funding from companies with a stake in the outcome. In exchange, through the privacy granted to trade associations, the Chamber of Commerce could provide anonymity and political cover—doing the heavy political lifting that companies are uncomfortable doing for fear of alienating investors and the public.

The trove of internal records made public through the 1990s tobacco industry legal settlements provides the clearest window we have into how these transactions worked at the outset. They also illustrate the motives and movements of an industry highly incentivized to seek out such a subterfuge. The tobacco files include highly specific research and lobbying instructions that accompanied donations to the Chamber of Commerce. The instructions detailed how to effectively lobby and conduct public opinion polling in order to attack the tobacco industry litigation mounted by President Clinton's Department of Justice.[14]

The Chamber filed the sole amicus brief in 1999 when Philip Morris, fighting the landmark *Engle* lawsuit with potentially billions of dollars in judgments on the line, sought Supreme Court review of a motion to disqualify Florida trial judge Robert P. Kaye.[15] The Chamber brief argued that Judge Kaye had been a smoker and suffered from heart disease, the linkage between which formed a central issue in the case, and therefore he could not fairly preside over the trial.[16] The Supreme Court, while accepting the brief from the National Chamber Litigation Center, declined to hear the case.[17] The *Engle* litigation ultimately generated a $144 billion jury verdict, which was voided by

14. *See* TRUTH TOBACCO INDUSTRY DOCUMENTS, https://www.industrydocumentslibrary.ucsf.edu/tobacco/ (last visited Nov. 16, 2017).

15. Brief for Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, Philip Morris Inc. v. Engle, 529 U.S. 1144 (2000) (No. 99-1277), 2000 WL 34014091. *See also* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) (upholding class certification for all Florida citizens and residents who suffer harm as a result of addiction to cigarettes containing nicotine); Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 73 (1997).

16. Brief for Chamber of Commerce of the United States as Amicus Curiae Supporting Petitioner, Philip Morris Inc. v. Engle, 529 U.S. 1144 (2000) (No. 99-1277), 2000 WL 34014091.

17. Philip Morris Inc. v. Engle, 529 U.S. 1144 (2000).

the Florida Supreme Court six years later. However, its progeny has nonetheless generated hundreds of millions of dollars in verdicts.[18]

The Chamber's brief foreshadowed the aggressiveness with which its Institute for Legal Reform would seek to remove judges from the bench who presided over costly verdicts. When it began in 1998, the Institute operated as little more than a think tank. It issued papers and press releases complaining about jury awards under a board with plenty of prestige, including former attorneys general Edwin Meese and Richard Thornburgh, but was light on action. It functioned in effect as a successor organization to a 501(c)(3) nonprofit called Citizens for a Sound Economy. This nonprofit was funded by Koch Industries, Philip Morris, and Bernie Marcus, among others, and had devoted itself to advancing a bill in Congress that would have dramatically limited punitive damages in lawsuits.

Marcus, the founder of Home Depot, provided early backing for the Chamber of Commerce and its Institute for Legal Reform. The Chamber, in contrast to Citizens for a Sound Economy, was a 501(c)(6) trade association and therefore was free to spend funds on lobbying and political activities on a significant scale. Marcus brought with him Steven Hantler, who had defended Chrysler Motors in product liability cases, to chair a steering committee that would lead to the establishment of the Institute for Legal Reform. Hantler takes credit for guiding the Chamber leadership toward the ultimate goal of transforming the state judiciary and the culture of juries to guard against mega-verdicts.[19] He also saw fundraising as an antidote to the power and funds amassed by the plaintiffs' bar in many state elections.

The funders and steering committee leading the Institute for Legal Reform rapidly evolved the group into a well-tuned and well-funded arsenal for campaign combat, aimed at judicial elections. Director Jim Wootton, a Reagan and Bush Justice Department veteran, explained: "You could sort of show the corporate leadership that you could reach parity with the plaintiffs' trial bar in these judicial races, that there would be an appetite for engaging in those races, with enough resources to be competitive."[20] In other words, the Institute for Legal Reform sought critical mass and recognized early on that the sheer scale of the spending and the power to tip the balance of the

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18. *What is the* "Engel *Progeny" Litigation?*, TOBACCO CONTROL LEGAL CONSORTIUM (June 2015), http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-engle-progeny-2015.pdf.

19. Telephone Interview with Steven Hantler, Director of Policy Initiatives, Marcus Family Office (Feb. 19, 2013).

20. Telephone Interview with Jim Wootton, Chairman and CEO, Partnership for America (Oct. 1, 2012).

bench, not just in one state but in multiple jurisdictions, would be crucial to the enterprise.

The Institute for Legal Reform aimed to intimidate through sheer volume of cash. As expressed in an email sent from an operative on the front lines of a successful effort to sideline a pro-consumer attorney general candidate, sent to a Chamber political fundraiser: "Need your help reinforcing that being this aggressive and going after bullies like her is what makes us a player and is recognized and what gets us respect."[21]

To concentrate its financial firepower, the enterprise chose its contests carefully. Accordingly, leading Institute for Legal Reform businesses held regular conference calls to choose priority ("Tier 1") targets. The opportunity in Illinois in 2004 to block Gordon Maag and install Lloyd Karmeier was Tier 1. Then CEO of State Farm, Ed Rust Jr., was part of the committee that chose priority targets.[22] Recall, in 2004 State Farm had hundreds of millions of dollars on the line in a case that was being litigated in Illinois.

The question of who else donated to fund the 2004 campaign of Karmeier continues to have powerful repercussions years later. In 2015, Judge Karmeier refused to recuse himself from an appeal in the $10 billion tobacco case, arguing there was no evidence that the tobacco companies had backed his 2004 campaign.[23] He then, again, was part of a 4-2 majority that refused to reinstate the judgment.

However, we do know some of the institute's early sponsors in previous races. In 2001, a rare leak of an internal record revealed several of the stakeholders backing the overall endeavor. They included players from the auto industry—GM, Toyota, and Ford—that were on the defensive against product liability suits.[24] Also sponsoring the Institute for Legal Reform were Walmart and FedEx, as well as insurers State Farm and AIG.[25]

AIG CEO Hank Greenberg was so keen on what the Institute was doing that he devoted $24 million in grants from his Starr Foundation

21. Email from Rob Engstrom, Dir. of Political Affairs, Institute for Legal Reform, to Scott Reed, American Taxpayers Alliance (September 13, 2004) (on file with author).

22. Deposition of Rob Engstrom in *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n,* Super. Ct. of Washington for King County, 04-2-23511-1.

23. Order Denying Motion for Recusal or Disqualification at 8–10, Philip Morris USA v. Appellate Court, No. 117689 (Ill. Sept. 24, 2014), http://www.illinoiscourts.gov/supremecourt/specialmatters/2014/102114_117689_Order.pdf ("In reality, the notion that movant was responsible for financing my run for office ten years ago is just that, a notion. It is based entirely on conjecture, innuendo and speculation[.]").

24. James VandeHei, *Political Cover: Major Business Lobby Wins Back Its Clout by Dispensing Favors*, WALL ST. J., Sept. 11, 2001, at A1.

25. *Id.*

to the Chamber's charitable foundation. This was promptly followed by loans on a similar scale from the foundation to the Chamber itself. Ostensibly for its capital campaign, but fungible in practice, this loan freed funds for other Chamber of Commerce expenditures, including political campaigns. Across disparate industries and diverse priorities, these corporate giants through the Institute for Legal Reform found common ground in creating an environment in state courts hostile to product-liability plaintiffs, making them less vulnerable to verdicts.

Having amassed the funds, the Institute for Legal Reform set out to spend them. In Ohio, in 2000, the Institute with the U.S. Chamber targeted Justice Alice Robie Resnick hoping to decrease the likelihood of her reelection.[26] She had written the 4-3 decision that struck down as unconstitutional a law that capped punitive damages at as little as $250,000 and economic damages at $500,000. Her opinion willfully crossed lines earlier drawn by the court.[27] Wrote Justice Resnick: "[T]he very notion of it threatens the judiciary as an independent branch of government and tears at the fabric of our Constitution."[28] This was not the first time she was part of a majority that struck down Ohio legislation constraining plaintiffs in tort actions.[29]

The bid to block Resnick's reelection brought the U.S. Chamber of Commerce into a strategic alliance with an affiliated state entity, the Ohio Chamber of Commerce.[30] Along with U.S. Chamber and Institute for Legal Reform, the Ohio Chamber and an affiliated group called Citizens for a Strong Ohio spent an extraordinary sum to influence the outcome of Resnick's reelection—more than $5 million in all.[31] In a harbinger of the present political moment, one ad pushed blatantly false information, suggesting that payoffs caused Justice Resnick to switch sides in a ruling. In fact, though Resnick did vote to grant a rehearing to the plaintiffs, she sided with the corporate defendant in that case.[32] The Chamber was so hard-pressed to find ad fod-

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26. Hidden Rivers, *supra* note 9, at 15–19.

27. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1095 (Ohio 1999).

28. *Id.* at 1087.

29. *See*, *e.g.*, Brady v. Safety-Kleem Corp., 576 N.E.2d 722 (Ohio 1991).

30. "Chamber's ad effort failed in Ohio, worked in other states," Associated Press, Nov. 9, 2000.

31. Hidden Rivers, *supra* note 9, at 15; *High Court Unchanged Despite Negative TV Ads*, Columbus Dispatch, Nov. 8, 2000, at 1A; James Sample et al., The New Politics of Judicial Election 2000-2009: Decade of Change 5 (2010), http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf.

32. Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations, 575 N.E.2d 134 (Ohio 1991), *reh'g granted*, 578 N.E.2d 819 (Ohio 1991), *reh'g vacated*, 582 N.E.2d 606 (Ohio 1991).

der it resorted to fabrication. Regarding a separate misstatement of fact in the advertising campaign that Justice Resnick ruled in favor of trial lawyers who contributed to her campaign nearly 70% of the time, the Ohio Elections Commission found the assertion in violation of an Ohio statute prohibiting false statements in election materials and issued a reprimand to Citizens for a Strong Ohio.[33]

Because litigation by the Ohio Board of Elections forced disclosure of the donors behind Citizens for a Strong Ohio we know their identities—a rarity in such races.[34] The Chamber, at $200,000, contributed the most. Other contributors included Procter & Gamble, AT&T, Ford, Enron, Honda, Whirlpool, DaimlerChrysler, Exxon, and Philip Morris.[35]

Justice Robie survived the assault by a healthy margin, but was an exception in 2000. That year, the Chamber spent around $7 million on fifteen judicial and attorney general candidates.[36] Twelve won. The model worked as predicted.

Ohio was not the only state to seek donor disclosure that year—Mississippi's Democratic Attorney General Mike Moore did as well. He also successfully moved to block the Chamber's ads as political advertising falsely posing as educational in the United States District Court for the Southern District of Mississippi.[37] However, the Chamber, on the eve of the election, obtained an order from U.S. Supreme Court Justice Antonin Scalia that allowed the ads to run.[38]

The battle between the Chamber and the states over the Chamber's duty to disclose its donors continued for two years. Ultimately, the Fifth Circuit sided with the Chamber and the Supreme Court denied the petition for review.[39] We see here how the multiple parts of the Chamber's machinery work together: its litigation division stepped in

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33. Kara Baker, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, 35 AKRON L. REV. 159, 162–68 (2002).

34. Ohio Elections Comm'n v. Ohio Chamber of Commerce & Citizens for a Strong Ohio, 817 N.E.2d 447 (Ohio Ct. App. 2004).

35. Jim Tarbell, *Business Buyout: U.S. Chamber of Commerce Rolls Over State Supreme Courts*, 4 JUSTICE RISING: GRASSROOTS SOLUTIONS TO CORPORATE DOMINATION, no. 4, Spring 2010, at 4.

36. Telephone Interview with Jim Wootton, Chairman and CEO, Partnership for America (Oct. 1, 2012).

37. Chamber of Commerce v. Moore, 191 F. Supp. 2d 747, 751–52 (S.D. Miss. 2000) (describing such advertisements).

38. Press Release, U.S. Chamber Institute for Legal Reform, Chamber Wins Free Speech Case (Nov. 5, 2000), http://www.instituteforlegalreform.com/resource/chamber-wins-free-speech-case.

39. Petition for Writ of Certiorari, Moore v. Chamber of Commerce, 537 U.S. 1018 (2002) (No. 02-305).

to do clean-up work for its judicial political operation. Not only did the litigation address the immediate threat of exposure of the Chamber's donors on the Mississippi project, it also ultimately inoculated the Chamber against other states that might contemplate demanding contributor exposure through their campaign finance regimes.

It would appear that the Chamber and its donors were not satisfied even with this measure of security against disclosure. Accordingly, the Chamber and Institute for Legal Reform began to funnel judicial election funds through yet another subterfuge. The Institute funneled millions of dollars in 2002 through two outside groups that we know of, the NRA-associated Law Enforcement Alliance of America and the American Taxpayers Alliance.[40] The Law Enforcement Alliance was the channel through which the Chamber removed Justice Chuck McRae in Mississippi.

The gun industry had been scrambling at the time as cities such as Chicago and Miami sued firearms manufacturers for compensation for the grievous harms their products caused.[41] The industry believed McRae had to be sidelined because he was expected to vote against legislation blocking all such firearms suits in Mississippi. The gun lobby was attempting to push comparable legislation through in numerous states. Ultimately, starting in 2005 federal law barred all such lawsuits, except in circumstances so narrow that even the family members of the Sandy Hook massacre victims have not been able to prevail.[42]

The Chamber of Commerce openly marketed itself to litigation-prone industries as a secret haven for money that the industries wanted to be spent aggressively on judicial campaigns and litigation. And, with proof of concept secured in 2000, the Chamber had proven itself a successful vehicle for removing judges from the bench.

Conclusion

That basic funding and deployment model endures, with the Chamber, the Institute for Legal Reform or, more often, third-party organi-

40. Taylor Lincoln, *The New Stealth PACs: Tracking 501(c) Non-Profit Groups Active in Elections*, Public Citizen (Sept. 2004); *Issue Ads: Judge Refuses to Halt Ban; Attorneys to Decide Whether They'll Appeal*, Harrisburg Patriot-News, Oct. 27, 2001. Scott Reed, director of the American Taxpayers Alliance, eventually took over the Chamber's election operation and ran it until the end of 2016.

41. *See*, *e.g.*, City of Chicago v. Beretta U.S.A. Corp., No. 98 CH 15596 (Ill. Cir. Ct. Sept. 15, 2000); Penelas v. Arms Tech., Inc., No. 99-01941 CA 06, 1999 WL 809838 (Fla. Cir. Ct. Dec. 13, 1999).

42. Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901–7903 (2012)).

zations handling the mechanics of media buys, robocalls, and other armaments of political warfare.

Even where state legislatures and election officials demand information on the sources of corporate funds for independent expenditure committees, it is not uncommon for contributions to committees to come from groups, such as the U.S. Chamber of Commerce, that do not disclose their donors. This allows the source of contributions to remain masked even in a jurisdiction that nominally demands disclosure.[43] One potentially significant development since the 2000, 2002, and 2004 election cycles is the increasing number of firms disclosing their contributions to candidates and/or trade associations, such as the Chamber of Commerce, that expend funds to influence the outcomes of elections—although disclosure is still entirely voluntary and difficult to research.[44]

Millions of Americans have signed a petition to the Securities and Exchange Commission to force disclosure of political spending.[45] Unfortunately, the petition and public comments effectuated little change within the Securities and Exchange Commission. Nonetheless, institutional investors, notably state and union pension funds and their caretakers, have waged a useful campaign to promote corporate disclosure of political activities, reaching agreements with numerous companies.

For the first time since the list leaked in 2001, we know at least some of the sources of the Institute for Legal Reform's funds—much of that spending is earmarked as non-tax-deductible political or lobbying contributions. Among contributors that have publicly disclosed spending are Prudential, MetLife, Anthem, Hartford and the Property Casualty Insurers Association of America.[46]

However, the limitations of voluntary disclosure are self-evident. Voluntary corporate disclosure of political contributions to organiza-

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43. *See*, *e.g.*, Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n, 166 P.3d 1174 (Wash. 2007).

44. Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 945–46 (2013).

45. Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities, SEC File No. 4-637 (proposed Aug. 3, 2011).

46. *See*, *e.g.*, Prudential, *2016 Political Activities and Contributions Report*, http://corporate.prudential.com/media/managed/public/PAC_Annual_Report_2016.pdf (last visited Jan. 7, 2018); MetLife, Inc., *MetLife, Inc. Political Activity*, https://www.metlife.com/assets/cao/chairman/governance/conduct/2016-political-activities-report.pdf (last visited Jan. 7, 2018); Anthem, *Political Contributions & Related Activity Report*, https://www.antheminc.com/cs/groups/wellpoint/@wp_about_government/documents/wlp_assets/d19n/mza1/~edisp/pw_g305374.pdf; The Hartford, *Political Activities & Contributions*, https://ir.thehartford.com/~/media/Files/T/Thehartford-IR/documents/annual-reports-and-proxy-statements/2016-annual-report-political-activities-and-contributions.pdf (last visited Jan. 7, 2018).

tions as presently practiced has been limited to detailing dollars a company provided generally. That holds true even where a firm may have provided a portion of those funds for purposes of a specific category of election-related activity or even to influence the outcome of a specific contest.

But the voluntary disclosure phenomenon nonetheless has a potential chilling effect, both on the contributions themselves and on the aggressiveness of the actions carried out by the Institute for Legal Reform and its partners. Importantly, as much as companies seek to protect against big jury awards, they must worry equally about their liability in the court of public opinion. Bringing dark money into the light begins to make the spending warfare waged to win judicial elections a fair fight.

The institutional investors that have led the way to voluntary public disclosure of corporate political contributions by introducing or threatening shareholder resolutions demanding disclosure have incipient power to accomplish still more. With the aid of social media activism, these investors and allies—among them environmental, consumer, and other groups seeking greater corporate accountability—are poised to further alter the political climate in favor of disclosure and by so doing, diminish outside spending on judicial races by diminishing the benefits to be gained and making the reputational costs of such spending too much for companies to bear. Indeed, in comments submitted to the Securities and Exchange Commission opposing the petition for mandatory disclosure of political spending by firms, the U.S. Chamber of Commerce argued that such disclosure "would be used to attack the company and damage its brand, and thereby hurt shareholder value."[47]

Already, shareholder and ally activism has begun to educate the public to perceive secretly funded intermediary organizations like the Chamber of Commerce as a taint, both on candidates they spend to install in office and on companies revealed to be contributors to those groups. If the shareholder activists fulfill the potential of the movement they have started, it will be the companies that come clean. They will provide a full and explicit accounting of their political spending that includes every candidate their funds supported or opposed. By doing so, these companies will win consumers' loyalty and dollars, the contest that matters most to their bottom lines. For the sake of their shareholders' value, those companies will do well to stay

47. Twenty-Nine Undersigned Organizations, Comment Letter on Petition for Rulemaking to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities (Jan. 4, 2013), https://www.sec.gov/comments/4-637/4637-1198.pdf.

far away from the damaging reputational risks of publicized involvement in judicial races, and leave the contests where they belong, in the hands of the voters.