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Symposium**

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PANEL 1

**THE IMPACT OF *CITIZENS UNITED* ON DONATION
DISCLOSURE REQUIREMENTS**

PANELISTS

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MR. LUPPINO-ESPOSITO, Editor-in-Chief, *Seton Hall Circuit Review*: Our first panel this morning is “The Impact of *Citizens United* on Donation Disclosure Requirements.” Our moderator today is Professor Frank Pasquale, who is the Schering–Plough Professor of Health Care Regulation and Enforcement here at Seton Hall, and, although his work focuses primarily on health and intellectual property law, his 2008 article, “Reclaiming Egalitarianism in the Political Theory

of Campaign Finance Reform,”¹ was cited and, in fact, directly quoted by the dissent in *Citizens United*.² So I’ll turn it over to Professor Pasquale.

PROFESSOR PASQUALE: [Opening remarks].

MR. BOPP: Thank you very much. It’s a pleasure to be here today to discuss a really landmark case in the area of campaign finance. Historically, there have been four recognized governmental interests that have allowed regulation of campaign finance. *Citizens United* has thrown out one of those key compelling governmental interests, and that is whether or not the participation of corporations and labor unions in our political process is that their mere participation would corrupt the process, such that they could be prohibited from doing independent expenditures and making contributions to candidates. *Citizens United* held that that interest is not a valid regulatory interest, and as a result, they struck down the FECA’s, that’s the Federal Election Campaign Act’s³ prohibition on corporations and labor unions making independent expenditures, advocating the election of the candidates.

The topic of this panel is about the disclosure holding in *Citizens United*. That is with respect to independent expenditures or with respect to what the Congress has defined as electioneering communications, the Court held that you could require disclosure; that is, a one–page report of that expenditure that broadcast ad in the case of an electioneering communication that was broadcast within the proximity of an election, that would disclose the expenditure, as well as those who had contributed the funds to the organization for that purpose. So that ruling, though, is the least important ruling in the case. It is consistent with the Court’s upholding of disclosure, that same disclosure requirement in *McConnell*, the upholding of the independent expenditure disclosure requirements in *Buckley*⁴ in 1976. So the effect of *Citizens United* on disclosure requirements is extremely modest, but on the ability to prohibit speakers from engaging in political speech, it has a tremendously large impact. *Citizens United* is simply the latest case in the centuries–old battle between the citizens and the government over whether or not citizens get to participate in our political system. Historically, the government has been very hostile to citizens who would wish to criticize or even praise, in some cases, the government, point out what the government and

¹ Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599 (2008).

² *Citizens United v. FEC*, 130 S. Ct. 876, 963 (2010).

³ 2 U.S.C. § 431 (2011).

⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976).

politicians are doing in office. Historically, if you criticized the government, you were tortured, imprisoned, often murdered. If you were criticizing the king you were condemned to hell. Once we separated church and state, you were just tortured, imprisoned and murdered. That is until the founding of our country.

Because the most radical campaign finance reform in the history of the world is our First Amendment. That places our law decisively in favor of citizen participation in our government, by protecting the four indispensable democratic freedoms, that is, the freedom of speech, press, petition and assembly, all of which are critical in order to protect citizen's ability to self-govern, as our form of government has been established. Without those indispensable democratic freedoms, self-government would be impossible. We'd be simply back in the time of King George or Julius Caesar or whatever, where the government could punish you for criticizing the government, preventing you from participating in government.

Now, of course, after the founding of our country, politicians can't help themselves. The government will always use the laws to stop people from criticizing them, try to gain a partisan political advantage. In fact, it was only a few years after the adoption of the Bill of Rights that the Federalists passed the Alien and Sedition Acts. They feared the emerging Republican Party of Thomas Jefferson and so they passed a criminal penalty for anyone that held the government in "disrepute." As a result, Republican politicians and citizens were criminally convicted for criticizing the Federalists, who controlled the government at the time. That was unsuccessful. That effort to stop the emerging Republican Party was unsuccessful in 1800, where the Republicans swept both the presidency and Congress, and the Alien and Sedition Acts were repealed and those who were convicted of the criminal offenses under it were pardoned by Thomas Jefferson.

Now, of course, in the modern era in 1905, we had the passage of the Tillman Act.⁵ Of course, Congressman Tillman was a notorious segregationist, who feared that corporations in his district were contributing to Republican candidates and he might lose elections, so he got Congress to pass the Tillman Act to prevent corporations from contributing to candidates. Then, in the 1940's, the Republican Congress now, because after all, there is bipartisan disdain for the First Amendment; incumbent politicians of all strikes will use government to protect themselves. They passed the Taft-Hartley Act,⁶ which extended

⁵ Tillman Act, ch. 420, 34 Stat. 884 (1907).

⁶ 29 U.S.C. § 185 (2011).

the prohibition on expenditures to labor unions, not unsurprisingly, and also extended it to doing expenditures, as well as contributions. Now, in 1974, then the Democrat Congress, passed the post-Watergate Amendments to the Federal Election Campaign Act,⁷ which very broadly limited practically every actor in the political system to contribution limits, expenditure limits and prohibitions, as would be applied to corporations and labor unions from influencing an election.

The result of that was the decision in *Buckley* in 1976, which peeled back those prohibitions on corporations and labor unions in making expenditures to influence an election to only communications which expressly advocate the electioneering via the clearly identified candidate. So as a result, what the Court was doing under the First Amendment was to protect issue advocacy, that is, communications which talk about the government, talk about what politicians are doing to us or for us in office, praising or criticizing them, which would have otherwise been a criminal offense if you would have done that under the Act as adopted by Congress, if you were a corporation or a labor union. If you did it as a person, you'd have to file reports, and if you did it as a PAC or a candidate or a political party, you were subject to expenditure limits. So influencing elections was severely circumscribed until the Court struck down all of the expenditure limits and really severely cut back on what influenced an election, and then to only things that are directly campaign related. And so, participating in our government by talking about bills that are being voted on and how congressmen might vote on those bills or what was their position on the bills were things that people could now do after the Court decision. Well, as you can imagine, incumbent politicians just flipped out over this. I mean, they thought they had gotten the job done, prevented people from criticizing the government and criticizing them personally, and now we have these dastardly issue ads, people running ads, actually saying what the politicians are doing in office. Of course, there's nothing worse in their universe than that happening. So Congress got busy to work on trying to figure out some other way of stopping citizens from doing that and they came up with the Electioneering Communication Provision. In the McCain-Feingold Act,⁸ electioneering communication is a broadcast ad that is done within proximity of an election, sixty days of a general election, thirty days of a primary, that mentions the name of a candidate. So all you have to do is say a candidate's name, and bingo, if you're a corporation or a labor union, you're prohibited and you go to jail for having done that. It is a

⁷ 2 U.S.C. § 431 (2011).

⁸ 2 U.S.C.S § 431 (2011).

criminal, jailable offense. Well that, of course, was challenged in *McConnell* and the argument in support of the Electioneering Communication Provision was that it was really the same thing as expressly advocating, that *Buckley* said you could regulate at least by disclosure requirements. And they said they did studies that had law students look at ads and say whether or not the law students thought that the ads either advocated the election of a candidate or did not and, based on those studies done by a representative sample of law students in Madison, Wisconsin, the Court upheld the prohibition on and the disclosure of these electioneering communication ads.

Now, that brought us then to *Wisconsin Right to Life*.⁹ There, that group, represented by me, wanted to lobby their members of Congress about the filibuster of Bush's judicial nominees. There were two Democratic senators that had been participating in those filibusters, supporting them, and they had a very extensive grass roots lobbying campaign, including doing broadcast advertising that would ask people, to urge them not to filibuster judicial nominees. However, they ran up against this blackout period, beginning in August, the middle of August, because of late primaries in Wisconsin. They were prohibited from writing broadcast advertising that mentioned either Senator Feingold or Senator Cole's name and asking people to contact them to urge them not to filibuster. We brought suit. The result was ultimately two trips to the U.S. Supreme Court and a holding by the Court in *Wisconsin Right to Life II*¹⁰ that this electioneering communication prohibition that only said if you mentioned the name of a candidate was then cut back, I would say 80 percent of it was cut back to a further content requirement. And the content was that the only reasonable interpretation of the ad was that it was calling for a vote for or against a candidate. So simply mentioning the name, doing an issue ad, which *McConnell* recognized that provides information and education of the people about what the position of the candidates, what they are supporting or opposing, what the government is doing, was perfectly legal. But if the ad would be interpreted as calling for a vote for or against, then it could be subject to the prohibition.

That brought us to *Citizens United*. *Citizens United* was originally a disclosure case and I was counsel for Citizens United through the district court and also getting the case accepted by the Supreme Court. It was first saying that, well, if the prohibition was now narrowed to only appeal to vote situations, well, shouldn't the disclosure requirements, that is the

⁹ Wis. Right to Life v. Fed. Election Comm'n, 542 U.S. 1305 (2004).

¹⁰ Fed. Election Comm'n v. Wis. Right to Life, 551 U.S. 449 (2007).

one-page report that I've already described that reports on the expenditure and the contributions, shouldn't it be narrowed also to only things that are campaign related, as opposed to any time that you mention the name of a candidate? But also in the case, and this ultimately became the focus, was what the ads were about and that was *Hillary: The Movie*. It was a ninety minute documentary that was critical of the public activities of Hillary Clinton, both in the White House and as senator and about the prospects for her ultimate election as president. The question before the Court on *Hillary: The Movie*, was whether or not it could be prohibited: did it have an appeal to vote in it, so that under *Wisconsin Right to Life* it could be prohibited. Of course, we know, that as to the prohibition, the Court went further. The Court, in fact, overturned *McConnell*'s upholding of the prohibition, holding that the *Austin*¹¹ recognized interest in corporate and labor union corruption and participation in our process was an invalid interest and they overturned *Austin* as well.

As to what the case really started about, whether you could require this one-page report, because these advertisements mentioned the name of a candidate, consistent with *McConnell* and *Buckley* and these other cases. The Court said, well, no, we recognized in *McConnell* that these ads and all these ads were the functional equivalent of express advocacy; you can require a one-page report, as we upheld in *McConnell*, for those activities, even though you can't prohibit them, consistent with *Buckley* that said you cannot prohibit independent expenditures, you cannot limit independent expenditures when done by PACs and political parties, etc., but you could require reports on them. Now, of course, the FEC should, as a result of that, repeal their regulations that are based exclusively on this corporate and labor union prohibition interest. But the three Democrats on the FEC have refused to do that, which is, if you call it that, dysfunctional. I would call that lawless and absurd and at least unacceptable, that a federal agency would so flaunt a Supreme Court decision that it would not repeal regulations that are based exclusively on a law that the Court has now struck down as unconstitutional.

Of course, the other effect is having done a very modest endorsement of disclosure, which is a one-page report, the incumbent politicians want to go wild, they want to pass ninety pages of prohibitions and regulations that are incorporated in what they call the Disclose Act.¹² Because, look, incumbent politicians don't like people criticizing the government. They are the first ones to go look at these

¹¹ *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990).

¹² H.R. 5175, 111th Cong. (2009).

reports that are done by PACs or parties or candidates to see who is contributing to this dastardly people who are actually criticizing us, and of course, with the plan to punish them in some way for their support of their opposition. You know, Nixon had an enemies list. The Clinton administration illegally had a thousand FBI files of their political opponents. They had all that information, not to send them thank you cards for their opposition, but to punish and harass them for their opposition. Incumbent politicians cannot help themselves. They are human. They do not like to be criticized. They will use the government to stop them and that was exactly what the First Amendment was intended to do, which was to stop the politicians from doing that by putting campaign restrictions on speech and association out of bounds. The First Amendment says that Congress shall make no law abridging the freedom of speech.¹³ They meant what they said: no law. But, you know, Congress is very much like my daughters as they were growing up. Whenever I told them no, they always thought, well, that means it is okay this time. No. No means no and it means so to Congress, just as it meant so to my daughters. Thank you.

MR. RYAN: All right. Thank you all for inviting me here today. It is a pleasure to be here. I am Paul Ryan and I am an attorney and also the FEC Program Director at the nonprofit, non-partisan Campaign Legal Center. We are a watchdog of the FEC. We are also a watchdog of money and politics nationally. We do litigation. We do policy work. And we were involved in the *Citizens United* case as counsel to a group of amici throughout the case. Jim did a great job of describing what led up to *Citizens United* and the core holdings of *Citizens United*.

I am going to talk exclusively about the disclosure aspects of *Citizens United*. The Court upheld, eight to one, the electioneering communication disclosure requirements at issue in *Citizens United* and that is, if there was a silver lining in the decision, from my perspective, the silver lining. What was required under the statute upheld eight to one in *Citizens United* was that any person, and this includes corporations or other types of groups, as well as individuals, that makes electioneering communications exceeding \$10,000 in a calendar year, has to file a report with the FEC. It is not a one-page report, with all due respect to Jim. It is a multi-page report. It requires that the maker of this disbursement for the electioneering communication disclose to the FEC, and consequently to the public, I am quoting from the statute here, “The names and addresses of all contributors who contributed an aggregate

¹³ U.S. CONST. amend. I.

amount of \$1,000 or more to the person making the disbursement.” That disclosure goes back through the two-year election cycle to the beginning of the year prior. Jim explained what electioneering communication is, so I will not go into that. This disclosure requirement was not only upheld in *Citizens United* eight to one, but it had also been upheld in *McConnell v. FEC*¹⁴ in 2003, eight to one. In the *Citizens United* decision, I am going to read an excerpt passage from the majority opinion in that case. There are some ellipses in what I am about to read. I know there’s a transcript being made here, so let the record reflect that this is not a complete excerpt. But the court wrote, “A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. . . . The First Amendment protects political speech and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁵ So it is a pretty strong endorsement of disclosure of money being spent in politics, even for these electioneering communications ads.

So what happened in 2010? In the 2010 midterm elections, \$304 million, roughly, was spent by non-political party groups on these independent types of ads. This more than quadrupled the \$70 million spent in the 2006 midterm elections.¹⁶ One of the possible explanations for this was that corporations and labor unions had their general treasuries freed for the first time to make these types of expenditures. But most of the expenditures, or many of the expenditures, I think it is probably fair to say most, at least other than labor union expenditures, were made through intermediary-type groups, not directly from corporations or by corporations themselves. So the issue becomes, did these groups disclose to the public where they got their money? These are groups with innocuous-sounding names like American Action Network, doesn’t tell you a whole lot about the group, the U.S. Chamber of Commerce, which we do know a little bit about them. The U.S. Chamber spent \$32 million on these ads in the 2010 cycle. The American Action Network spent \$26 million. Neither disclosed any of their donors for these ads.

¹⁴ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

¹⁵ *Citizens United*, 130 S. Ct. at 916.

¹⁶ See Center for Responsive Politics “Outside Spending” data, available at <http://www.opensecrets.org/outsidespending/index.php>.

So why is it that we have a statute that says someone who pays for an electioneering communication has to disclose the name and address of anyone who's given them \$1,000 or more and, in reality, we had no disclosure of donors of a total of well over \$50 million, almost \$60 million of these ads in 2010. In fact, we have seen a decrease in donor disclosure since this electioneering communication law was passed in 2002. Back in 2006, only 7.5 percent of the donors to groups making disbursements for these ads went undisclosed. In 2008, that jumped to 26.5 percent and in 2010 that jumped to 45.1 percent.¹⁷ These are statistics I pulled from the Center for Responsive Politics' website, opensecrets.org, which crunches numbers from the FEC's database. So we have the Supreme Court's ringing endorsements of donor disclosure for these types of election-related ads and we have an ever decreasing actual existence of donor disclosures. So what's going on here? How did this happen?

Well, Jim mentioned his 2007 victory in the *Wisconsin Right to Life* case. Immediately after that Supreme Court decision, which freed up corporations and unions to spend their treasury funds on some types of electioneering communication ads – those that were not susceptible of, and the only reasonable interpretation as, an appeal to vote for or against a candidate. About 80 percent, I think, is probably a fair estimate of what that freed up. It was Jim's number. And in the process of implementing the Supreme Court decision in 2007, the Federal Election Commission promulgated a new rule. Again, we had the statute that said names and addresses of all contributors who contributed \$1,000 or more to the person making the disbursement for the electioneering communication. But the FEC, in its 2007 rule, said that this donor disclosure is only required where \$1,000 or more was given for the purpose of furthering electioneering communications. So they added a purpose requirement to a blanket donor disclosure requirement and that's significant. Words matter and regulations – not many people paid attention to this 2010 FEC rule making. I was involved in it. I think Jim was most certainly involved in it and paying attention, but it didn't get a lot of press outside of D.C. or even within D.C., for that matter.

But Congress passed a statute, saying all donors to these groups get disclosed. The FEC says no, you only get disclosed if you gave the money for the purpose of furthering the electioneering communication. Then in the explanation and justification for that rule, which is published in the Federal Register, the FEC clarified that what it meant by “for the

¹⁷ See Center for Responsive Politics “Outside Spending” data, available at <http://www.opensecrets.org/outsidespending/index.php>.

purpose of furthering electioneering communications” is that the donor “specifically designated” the money for electioneering communications. So that’s a pretty substantial narrowing of the statute. That’s, I think, what led to the plummeting of actual donor disclosure in the 2010 elections.

The situation has only gotten worse, in my view, because in 2010 the Federal Election Commission, in the context of dealing with an enforcement action against a group called Freedom’s Watch, signaled an even narrower interpretation of the statutory disclosure requirement embraced by three of the six Commissioner. The question before the FEC was whether or not to even launch an investigation of this group. The complaint was filed by the Democratic Party against a group that was supporting Republicans and attacking Democrats or opposing Democrats with ads. When the question came before the FEC as to whether even to launch an investigation, the commission deadlocked 3–3. The three Democrats on the Commission were in support of the Office of the General Counsel’s recommendation that an investigation be started. The allegations that were made in the complaint by the Democratic party were that this group had one funder who was responsible for the overwhelming majority of the organization’s budget, not the entirety of its budget, but the overwhelming majority, and that this donor was very hands on, that every dollar of his money that was spent had to have the project it was spent on run past him. We don’t know if this is true. The FEC pointed this out in one of the statements of reasons. They don’t know what the credibility of this information that came from news reports was, but we’re talking about a vote here to at least look into it, start an investigation. What the three Republican commissioners stated in their statement of reasons, their explanation for why they voted against investigating this group, was that they view the law as requiring donor disclosure, “only if such donations are made for the purpose of furthering the electioneering communication that is the subject of the report.” So we have a further narrowing of this legal standard. We go from all donors who give \$1,000 or more to the group making the electioneering communication—that’s what’s in the statute—to the rule saying only donors who gave the money for the purpose of furthering electioneering communications, and that’s kind of a broad term, as long as they gave the money generally to support electioneering communications—arguably disclosure would be triggered. And now you have the three Republican commissioners saying only if they gave the money to further the specific ad that was the subject of the disclosure report being filed.

One of the problems with this is, even if the money is given explicitly for the purpose of furthering electioneering communications generally, no donor disclosure is required according to these three commissioners on the FEC today. These three Republican commissioners acknowledge in their statement of reasons that in this particular instance, the money was given before the ad was even created. They make that point, they include that statement for a point other than the one I'm about to make, but this is really critical. It should be obvious, most of the time the ads don't even exist at the time the "ask" is made. A group will go out, raise as much money as they can, and then start producing ads based on how much money they raise. So if the threshold for donor disclosure is that the ad has to exist, and therefore, the donor gave the money specifically to air that ad, we're going to see virtually no donor disclosure in the 2012 election.

I think that this 2010 cycle was the tip of the iceberg. I think a lot of corporate spenders and, to some extent, union spenders, were on the sidelines waiting to see what happened, waiting to see how they could get their money into the process without suffering the fate of Target Corporation. How many of you heard about Target last summer? Target made a contribution to a group in Minnesota. Their identity was disclosed as a donor to this group because this group was running ads supporting a particular candidate for governor and shareholders revolted, customer base revolted, employees revolted. Revolt is probably too strong of a word, but there was clearly objection, and it was very public. So what was learned was: if you're a corporation and you want to get into the process, you need to launder your money through an intermediary group, like the Chamber of Commerce which, in turn, will not disclose to the public where it got its money. We're going to see a lot more of that in 2012, I predict.

As Jim indicated, the FEC has still not promulgated a rule, or even begun a rule making, to implement the January of 2010 *Citizens United* decision. I have a slightly different opinion on what the deadlock is about than Jim. I don't blame it on three Democratic commissioners refusing to enforce the law. I think the logjam or the deadlock is about disclosure. The three Democrats want to revisit this 2007 disclosure rule, because the 2010 elections, with all the money that was freed up in the cycle by the *Citizens United* decision, shown a spotlight on how ineffective disclosure currently is and the FEC created that problem. Some members of the Commission want to fix that problem, three Democrats in particular. The three Republicans do not want to include that in the rule making, so stay tuned to see whether we have any

Citizens United interpreting rule prior to the 2012 elections. And I'll stop there. Thank you.

MR. JOSEPHSON: Thank you. Well, I want to thank everybody for the opportunity to be here today and to share some thoughts on this important topic. It's an honor and privilege to share the table with two experts in this area like Paul and Jim. So I'm going to probably try to stay away from being the constitutional expert or the FEC rules expert. That's kind of what these guys live, breathe, eat and sleep. I'm oftentimes more down in the trenches with campaigns and political committees and folks who are looking to be involved in the political process, typically here in the State of New Jersey. I hope to take my time sharing a couple of insights on how disclosure impacts decision-making in those realms in political participation, because at the end of the day, that's really what we're talking about here.

As a preview, I probably come down at the end of the day somewhere between my fellow panelists. I share Jim's concerns about the impacts of regulation on political speech in this country. We have, I think, the result in *Citizens United*. I thought one of the most interesting observations in the opinions there was the observation of one of the justices, and it's escaping me now who it is, but I'm sure Jim will correct me. But I think one of justices observed that it's gotten so hard to comply with the campaign finance regulations, that we finally have hit a point where people are just going to decide that I'm not going to speak. That certainly has been my observation certainly over the last twenty years as we've gotten one layer of regulation of, certainly campaign speech, from the FEC and state analogs, which has become a tremendously complicated area. It used to be that somebody did not need a lawyer in order to go out and speak in public or for a corporation to air its views in public or an individual, for that matter or an executive. Today it's a much different universe. You better go talk to your corporate counsel about what the permissible limits are, what you've got to disclose and who you've got to disclose it to. On the other hand, and as somebody who, my first brush with all this was, since we're here at a university, as a student politician running for student government at the University of Michigan. This is 25 years ago now, where we had a system of limited expenditures. I think there was actually a public finance piece to it and we certainly had a disclosure piece on our contributions, as well as proportional voting for the seat, so it was kind of the full-on regulatory system writ small. That was my first encounter with heavy regulation and probably, like most 19 year olds, I had the instinctive urge to rebel from that and instinctive concerns about what

that did for the constraints that really imposed on speech that was going on. And certainly, I think Jim's observations about the use or misuse of disclosure by government to punish those who do not like government's views or actions is certainly a well-founded one and a concern that's out there.

On the other hand, in my view, when we're in a posture where we want to encourage people to speak, I think that reducing the regulatory level on the expenditures that are made, but ensuring that there is broad disclosure of the expenditures that are made, is probably the best balancing that we can do in this imperfect world that we live in. No doubt politicians take a look at campaign reports and take a look at the reports of the various 527 organizations to try to connect the dots. But let's remember that disclosure there, there is a salutary purpose and the courts have recognized it consistently. I think it's probably one of the reasons why there's a lower standard of scrutiny for disclosure provisions than apply to speech provisions. The bottom line is, disclosure allows the citizenry to connect the dots. It allows the press to connect the dots. In a world where, to evaluate the credibility and the perspective of the speaker with the information that's being provided, to know where the money is coming from, is absolutely essential to having, I think, a full, fair and open debate. It certainly may be the case that at the end of the day those disclosure provisions themselves have an impact on speech. No doubt Target is chastened by its experience. No doubt there are contractors, be they public contractors in various states, who are concerned about the impact of disclosure on their relations with the sitting governor or non-incumbents. I don't limit my remarks to the State of New Jersey. I think that observation can pretty much be made across all fifty states. The critical tool, though, that disclosure piece is the critical tool.

Let's remember that there is a far broader range than simply campaign speech, that's regulated by disclosure law and that imposes disclosure requirements in the course of political discourse today. Certainly here, in the State of New Jersey, we have a disclosure requirement for any grass roots communications that are undertaken, whether by corporations or by citizens, that is an entire disclosure regime at elect that is intended certainly to get at the issue advocacy area. Certainly not all states have it, but that's a feature that we do have here in New Jersey. But more importantly in my mind from a disclosure perspective and the ability of the government to figure out, keep score as to who is supporting whom, is a whole issue of lobbying disclosure. I mean, we've kind of taken for granted in this country that the government can require you to disclose to it who you have hired to lobby

the government and how much you paid them to lobby the government on your behalf. I don't know how many folks here think that that's a bad thing, but certainly to me that's a much more direct impact on my client's rights to speech, my client's right to petition the government to redress grievances in terms of having to fully disclose how much money they're spending and who they're spending it on to communicate with government. But certainly, I think from the perspective of the disinfecting, you know, there's the old trope about disclosure is a disinfectant that's going to keep the system clean for us. I think at the end of the day that is true. There is no doubt that disclosure requirements can be essentially turned from a shield protecting our democratic system into a sword against one's political opponents, whether it is the impact on non-incumbents, not being able to raise as much money for campaigns because they don't want their support of a non-incumbent candidate to become known to the incumbent. There's no doubt there's an impact there. There's no doubt there's an impact that information that's included in the disclosure reports can be used to target a boycott or other sort of adverse action against a corporation or a group. There's no doubt that there is some impact on what I call organic or a true grass roots speech, that is, the more regulation we have in the area and the more disclosure we have in the area, and by necessity having to file disclosure forms requires some degree of regulatory burden for the speaker, there is, no doubt, from my perspective and my practice, the more regulation, the less speech.

It's a pretty simple equation. The client comes in and sits down and discovers what kind of disclosure requirements and obligations they have. Many times they will choose either not to speak or to not contribute to a campaign. On the other hand, and where I kind of come out on this one at the end of the day is, let's not kid ourselves. Politics is and always has been a rough and tumble game for those who want to participate in the political process. Certainly candidates know that it's a rough and tumble game when they enter it, expecting that. And frankly, if we want to have a system of vigorous and open debate, by necessity, the field is always going to be one that's going to be a rough and tumble area. Those who choose to participate directly in the process kind of step forward and put themselves into the public forum and the public spotlight, should expect that there may be some feedbacks and blow back for their participation. In my mind, I think that where we stand today is actually a fairly good balancing and I suspect the trends from – what I'm seeing from trends at the federal level – I certainly think we're going to see more and, with Jim's hard work, I'm sure we're going to see some more loosening on the levels of the direct regulation of speech.

But we'll also see clearly – I think Jim's perceived it correctly – greater disclosure requirements. At the end of the day, with certainly the test, the exacting scrutiny test, it strikes me that the Court's adopted in *Citizens United*,¹⁸ that that test is structured so that the state is always going to have an interest in disclosure, I think effectively. I think, as my administrative law professor told me a long time ago in explaining the notions of administrative process – he quoted somebody much more famous than he and I: “You can't always get what you want, but you get what you need.” I think that this is kind of where we wind up in the balancing right now – where we stand today. We may all want that perfect system, but we won't achieve it; but disclosure is probably our best mechanism for being able to have the full and open debate that we all want to have. Thank you.

PROFESSOR PASQUALE (taking question): Just to recap that one: is disclosure a criminalization of politics and is it encouraging what could be seen as a criminal money laundering operation? [Transitional remarks].

PROFESSOR PASQUALE (taking question): Just to recap that question. New Jersey has had a pay-to-play statute¹⁹ in place for some time. Is that going to be affected by developments at the federal level? So I think we'll just go down the panel again. Thank you.

MR. BOPP: Well, as to the first question, well, certainly disclosure laws are the criminalization of speech, because there are criminal penalties for failure to comply with the disclosure laws. I would make three observations about disclosure laws. First is, it's very important that we have bright lines that tell you when you have to disclose and when you don't have to disclose. Because it is always the vague lines that result in the chill of otherwise perfectly legal and constitutional speech and, as always, the place where people are trapped by the laws, and then are subject *ex post facto* to criminal or civil punishment. So bright lines are very important if we're going to make sure that disclosure laws apply only to what we are asking to be disclosed and not other things that the law is not directed at.

The second thing I would note is that the post-*Citizens United* efforts about disclosure have exclusively been targeted at corporations and not labor unions. *Citizens United* freed up both corporations and

¹⁸ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

¹⁹ N.J.S.A. § 19:44A-20.3 *et al.*

labor unions to do independent expenditures with general treasury funds. The unions have not been the least bit shy about using general treasury funds and arguably have spent more than corporations have done on that, in that area. But, of course, interestingly as inevitably is the result, the people that write the laws are always looking for partisan political advantage, so the Democrats that have come up with the Disclose Act, only want to “disclose” corporations. They don’t want to “disclose” labor unions.

The third is, of course, as has been explained; all of these laws do two things. They create less transparency and less accountability, on the one hand. And two, because they create a black mark, they tend to foster and increase corruption, rather than limit it. First, the problem that Paul is talking about, the Disclose Act talks about, is well, we want to disclose group acts in terms of their contributors. But the problem is the people are giving first to Group Y and then to Group X, so now we’re going to require Group Y to disclose, so that we can find out who is giving to Group X. Well, of course, within 30 or 40 seconds, campaign finance lawyers will figure out, if you create a Group A that gives to Group Y and then to Group X, then, of course, you will shield disclosure then. And the campaign finance reformers will say, well, then, we’ve got to disclose these tertiary organizations and, of course, within 30 seconds, campaign finance lawyers will figure out that if you create a fourth group and run your money through that, well then, you will shield disclosure. Of course, it’s endless and pointless and, well, it’s not pointless, because it results in less transparency and less accountability. As we’ve limited money going to candidates and as we’ve limited money going to political parties, the two most accountable, most transparent organizations in the political system, then money has gone to these other organizations and maybe a series of organizations, as has been described. And so we end up with a system that has no accountability whatsoever and very little, if any, transparency. Furthermore, the people who are very willing to comply with the law, as Paul has described, are often discouraged by the complexity of the law and how it affects them. But the people that are less reticent about violating the law find that, man, I can really game this system. I can gain a hell of an advantage in an election. We know they’re never going to overturn an election because we spent money without disclosing it or we spent money, even though we weren’t supposed to. So if we go ahead and do that, we’re going to get our president. We’re going to get our senator. We’re going to get our mayor. And then we’ll try to fight the regulators on what kind of punishment, if ever, we ever receive. So as the Communists found out in

Russia, the more regulation, the more black markets, the more corruption and ultimately the whole system collapsed.

MR. RYAN: I will actually try to do this in two minutes. For starters, in rebuttal to one of Jim's remarks, I, as an advocate of campaign finance reform, do not give labor unions a free pass. I fully support disclosure, equal disclosure, applied to labor unions and corporations, just for the record. In terms of whether or not this type of activity, this type of giving of money through intermediaries, is likely to result in any money laundering prosecutions or convictions, I think the answer is quite clearly no. The campaign finance laws are clear. The FEC has given a free pass to anyone who has given money to an intermediary group, to not be disclosed, as long as they refrain from specifically designating their contribution to the group for the purpose of running electioneering communications. So the law is clear. It's easily evaded in a perfectly legal manner and that is precisely the problem.

In terms of whether or not our disclosure laws encourage evasion of laws or shell games, I'm not sure exactly how the question was phrased, but my answer is clear and unequivocally no. Disclosure laws foster what Justice Scalia would refer to as civic courage, and I'm going to read to you a short passage of Justice Scalia's concurring opinion in the Court's recent decision in *Doe v. Reed*,²⁰ which upheld a ballot measure petition signer disclosure requirement out of the State of Washington. I don't get to quote Justice Scalia very often, so I'll just take this opportunity. Justice Scalia wrote, "There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which Democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum, hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave."²¹ I'll stop there.

MR. JOSEPHSON: I think to the first set of questions, I'll leave it to the federal experts on the federal implications. Certainly, what we've seen here in New Jersey is an increasing trend, especially in the pay-to-play statutes. To throw in a provision that has a broad, what we call the

²⁰ *Doe v. Reed*, 130 S. Ct. 2811 (2010).

²¹ *Id.* at 2837.

“Anti-Circumvention Provision,” that kind of basically says, if you’re trying to get around it, well that’s illegal too. I don’t think we’ve seen anybody find or prosecute or there are not many criminal versions of pay to play, although there is one out in Atlantic County, believe it or not. So the answer is here, at least here in the State of New Jersey, there are issues and implications. As to Jack’s question about the future of pay to play in New Jersey, I’m largely with Jack. I’ve never been a fan of the pay-to-play laws. I don’t think that they solve any problems substantively, they just single out a class of folks for different treatment. I think the experience here in New Jersey, I would concur with Jack and his colleagues and the Governor as well, that the impact of pay-to-play here in New Jersey has been to sideline a lot of corporate money and only amplify manifold the impacts of unions in our political process here in the State of New Jersey. Whether that’s a good thing or a bad thing, I’ll leave that to your own personal politics. I don’t really have a position on it one way or the other. My view is, I’ve never been comfortable with our pay-to-play restrictions here in the state. I think that they’re a content-based speech restriction. Certainly, there is a strong history of corruption here in the state that backstops that law and I think that it has been relied on by our Supreme Court in its decision²² prior to *Citizens United* upholding our pay-to-play laws here in the state. But Jack, I had the same impression as you, that when I got done reading *Citizens United*, it struck me that it is only a matter of time before the next time somebody loses a big enough contract and has enough skin in the game, we are going to see the pay-to-play laws challenged again under some of the reasoning of *Citizens United*. I think, though, I don’t know that the state courts would go so far. I think if that challenge was taken into federal court, one would probably have a pretty good chance of overturning our pay-to-play laws.

²² In re Earle Asphalt Co., 966 A.2d 460 (N.J. 2009).

PANEL 2

REDISTRICTING AND ONE PERSON, ONE VOTE:
POLITICAL POWER FOR EVERYONE

PANELISTS

Roger Clegg, President and General Counsel, Center for Equal Opportunity

John Tanner, Former Chief, Voting Rights Section of the Department of Justice Civil Rights Division

MODERATOR

Mark Alexander, Professor of Law, Seton Hall School of Law

MR. LUPPINO–ESPOSITO: Our second panel is “Redistricting and One Person, One Vote: Political Power for Everyone.” Our moderator is Seton Hall Professor Mark Alexander. Professor Alexander writes and teaches on constitutional law, the intersection of law and politics, criminal procedure and the First Amendment. He’s also active in politics in government, having served most recently as a Senior Advisor to Barack Obama during his 2008 presidential campaign. He also served as general counsel to Cory Booker’s, the mayor of Newark’s, election team in 2006.

PROFESSOR ALEXANDER: Welcome again, to those who have come from outside and welcome to those who are inside. I’m glad you are here for this conversation. So, what we’re going to do is, we actually, unfortunately, lost one of our panelists to an emergency motion that came up, so we have two panelists here today, who will talk about redistricting. Our two panelists are Roger Clegg and John Tanner. John is going to speak first and then Roger will go afterwards. I’ll do a quick introduction of John Tanner.

What I want to do is proceed as follows. I’ll introduce John Tanner and he’ll talk for eight to ten minutes, something like that, and then introduce Roger Clegg and he’ll do the same. And then I’ve got a few questions, which I’m going to put to both of them, to have a little discussion going and then hopefully get some Q & A from everybody here. I know we started a few minutes late and I’ll see what we can do to

keep us on time. I do have a class, but, you know, I'm sure they will be perfectly happy waiting a few extra minutes if we do run over, but I will try to keep us on time.

So starting with John Tanner, he began his work in, as he says, in voting rights as a teenager in Birmingham, Alabama in the 60's and he worked with the Southern Christian Leadership Conference and others with voter registration drives and he moved on to the Voting Section of the Department of Justice in the Civil Rights Division in the 1970's and worked in various roles with the Justice Department in the Federal Government, working to enforce voting rights, to promote rights. He has prosecuted federal criminal civil rights violations. He has worked with the White House directly. He has worked in the Senate Judiciary Committee. He has worked in the Department of Justice, the point being, he has had a quite distinguished career in working in the various branches of the federal government, trying to preserve and promote voting rights. He has also been a Visiting Fellow at the Alabama Law Institute and has taught courses on voting rights. He has been widely honored by groups all over this country and both our panelists are very distinguished in the work they have done. And so I will now turn it over to John Tanner to talk about redistricting.

MR. TANNER: Thank you very much. It's a real pleasure to be here in Newark. I used to live in Newark for a couple of years at the strong suggestion of the United States Army. I lived down at Number Ten Hill Street and, while I was here, I learned my second great lesson about redistricting. The Republican Party, as I remember (and my memory is subject to many flaws) had a great victory in 1972—the Democrats had a great defeat, depending on how you look at it. Flush from that victory, they drew districts that would elect as many Republicans as possible and they spread themselves fairly thin. Then this little thing called Watergate festered and got on the front burner and the result of the 1973 elections was a Democratic sweep. They took something like 75 percent of the legislative seats in New Jersey. So the second great lesson of redistricting I've learned is you should never get greedy. Things change and you need to be ready for change.

The first lesson I learned while I was a page in the Alabama legislature in the spring after *Reynolds v. Sims*²³ was decided and the Alabama legislature had to comply for the first time in its history with the one person, one vote principle. What I learned there, was that in redistricting, you might be able to trust your mother, but no one else. It

²³ *Reynolds v. Sims*, 377 U.S. 533 (1964).

is dog-eat-dog and it brings out the worst in people. Then I went to work for the voting section of the Justice Department and learned the third and greatest lesson in redistricting and that is that it all depends on the facts. The facts of each situation in the voting rights case determine the outcome. The grand principles are grand, but they are so grand that they can be applied in any way, in any situation and the actual facts on the ground determine where there's a violation.

Now, taking the 30,000 foot view of redistricting, the federal Constitutional statutory law has one great aim: that is to overcome systems that permanently freeze out some group from their fair share of representation. That's it.

The first application, of course, is the one person, one vote principle. In Alabama, in *Reynolds v. Sims*,²⁴ the good citizens of Wilcox County, or at least the good white citizens of Wilcox County, were represented by one state senator and the good citizens of Jefferson County, which is where Birmingham is, and which had 39 times as many people as Wilcox County, also were represented by one senator. So the people in Birmingham and other urban areas of the state were permanently frozen out from a fair share of representation. They were stuck with the same number of senators as Wilcox County, which at that time had perhaps 2,000 registered voters. Birmingham had, I think, about 300,000 registered voters.

The second area of people being frozen out, also in Alabama, is racial minorities. The Voting Rights Act²⁵ was passed to overcome the various barriers that were placed in front of African Americans and also Latinos and also other racial and language minority groups. Those are the two real areas that the law addresses in redistricting: one person one vote and racial equality.

There are, of course, other players in the game, the Republicans and Democrats. The Supreme Court has held that the door is still open a little bit. Generally, however, a partisan claim of gerrymandering—that is, that a plan freezes out the Democrats or the plan freezes out the Republicans—is never going to win. The reason for that is, as New Jersey found in the early 70's and as the nation found between 2008 and 2010, is that the winds change and the Democrats are up one year and the Republicans are up the next year. People can and do change their political party preference, whereas they cannot change their race or membership in a language/minority group. Thus redistricting law is basically equal population (one person, one vote) and racial access.

²⁴ *Id.*

²⁵ 42 U.S.C. § 1973 (2011).

Now the racial access gets very complicated and that's, I think, where most of the action is and most of the places where Roger and I will disagree with each other. In order to show that a racial group is permanently frozen out, you have to show a number of facts. And, again, Voting Rights Act cases are very fact intensive. The two main provisions of the Voting Rights Act, Section 2,²⁶ which is a nationwide ban on discrimination, Section 5²⁷ which applies only to certain areas, no areas in New Jersey, but right across the river in Manhattan and Brooklyn and the Bronx, are subject to this provision, as are Alabama and many other Deep South and Southwestern areas of the country.

In order to show a violation under either statute, you have to show first of all that voting is racially polarized. That is, the black voters vote one way, the white voters vote the other way, and that the system is rigged: The minority voters cannot win their fair share of representation, because the majority votes too heavily against them.

This phenomenon arises classically in the case of an at-large, that is, a county-wide or city-wide election, where it's 60 percent white and 40 percent minority. If the 60 percent votes together it can elect all of the representatives to the county commission, the City Council. The minority, no matter what they do, cannot win.

And so you come to single-member as a remedy. That is the second requirement for proving a violation: that is sufficient geographic concentration of the minority so that you can draw a remedial. In most cases, if a 60-40 city is divided into fairly drawn districts, two of the districts will be controlled by the minority and the other three will be controlled by the white majority. They then sit down at the table together and hammer things out as best they can.

It gets more complicated than that. The Senate, in 1982, when amending the Voting Rights Act, identified a number of other factors, history of discrimination, social and economic disparities, racial campaign appeals, and other factors, the totality of which that showed that the system is not equally open. So the challenges under the Voting Rights Act tend to be expert intensive. It is complex litigation. I've heard it described as second only to antitrust litigation.

In Section 5, which Roger will say nasty things about, certain areas of the country were designated, based on the circumstances that existed in either 1964, 1968, or 1972 that indicated that those particular areas, the Deep South largely, needed special attention, and therefore, these areas have to come to Washington, either to the Justice Department or to

²⁶ 42 U.S.C. § 1973 (2011).

²⁷ 42 U.S.C. § 1973c (2011).

the United States District Court for the District of Columbia, to have their plans reviewed. It shifts the burden of proof. If Alabama or New York wants to draw new districts, than they have to show that their districting plan does not make it worse for minority voters. That is, as practical matter, it means at a minimum, that you don't have fewer districts in which minority voters can usually elect representatives of their choice and that the plan is free of a racially discriminatory purpose. That gives you a very rough and superficial idea, of the types of facts that will be important. Gerry Hebert, our missing panelist, has in your folder, I think, a couple of PowerPoint presentations that outline some other things about redistricting.

Now, with your permission, I'll turn it over to Roger to tell you why I was wrong.

PROFESSOR ALEXANDER: Let me just take a moment to introduce Roger Clegg and thank you, John, for your comments. He is the President and General Counsel of the Center for Equal Opportunity, which is a research and educational organization that specializes in civil rights, immigration, and bilingual education issues. He also has served in various capacities for the federal government in the Department of Justice, and he has been a writer, writing in lots of different places, putting forward his perspective, which you will hear, in legal papers, papers of wide distribution. He has served at the National Legal Center for the Public Interest. He is quite an accomplished writer, practitioner, and expert in this field as well. So thank you very much for coming here. Roger Clegg.

MR. CLEGG: Thank you very much, Professor Alexander, for that very generous introduction. I am delighted to be here. I appreciate the invitation. I appreciate being here with John Tanner. I am not going to say that everything he said was wrong. But John is certainly correct that we do have some differences of opinion.

Let me begin this way. The reason we're having this panel in early 2011 is because of the census last year. Every day you pick up the newspaper, it seems like there's another story about the census results: about what the results mean for your particular location, but sometimes talking about what the new numbers show nationally. Of course, there are all kinds of things that you can read about with the census, but two things I think are particularly important to mention today.

One is that it's clear that America, which has always been a multiethnic and multiracial nation, is becoming increasingly, and increasingly rapidly, a multiethnic and multiracial nation. African

Americans are no longer the largest ethnic minority group. Latinos passed them up, I think, the last census and the gap is widening. Blacks and whites are not the most rapidly growing ethnic groups. Latinos and Asians are. Of course, the other thing that's distinct, but related to this, is that we have had and have relatively high levels of immigration in recent years in to the United States.

Now, in my view, this is all a good thing. There are sort of two schools of thought on immigration levels among conservatives. My organization, The Center for Equal Opportunity, actually welcomes high levels of immigration. We think that that's important for the economy, and we think that high levels of immigrants can be successfully assimilated in the United States. That, indeed, has been our national history. But that means that there has to be attention given to assimilation to the principle of *e pluribus unum*, to people identifying themselves first as Americans, before they identify themselves as members of this or that racial or ethnic group. Along with that, it means that governmental policies that sort people according to skin color and what country their ancestors came from are simply untenable. In a multiethnic, multiracial society, we can't have the government sorting people according to race and ethnicity and treating some people better and other people worse or just treating people differently on account of which silly little box they check.

So that's basically where I'm coming from on this. And I think it follows from that that racial gerrymandering is a really bad idea. I'm defining racial gerrymandering to include not only racial gerrymandering of the bad old sort, but also racial gerrymandering of the politically correct variety. You're creating voting districts that are racially identifiable or deciding when to zig and zag in a line, based on the skin color or national origin of the neighborhood. These are all divisive, bad things that we cannot have.

It is ironic that this kind of thing is done through the Voting Rights Act. This is entirely inconsistent with the spirit of the 1965 Voting Rights Act. We were trying to get rid of segregation in the 1960's—not only segregation in schools and the workplace, but also segregation in terms of voting and voting districts. This is a classic example of a statute that has been transformed, that has been distorted, in the course of its interpretation by bureaucrats and judges, with many unintended consequences. In terms of those unintended consequences, let me give you a dramatic reading of what I wrote here in the *Cato Supreme Court Review*:

The racial gerrymandering Sections 2 and 5 [of the Voting Rights Act] foster is pernicious. The Supreme Court has warned about

the unconstitutionality of racial gerrymandering in a number of decisions, because the practice encourages racial balkanization and identity politics. In addition, the segregated districts that gerrymandering creates have contributed to a lack of competitiveness in elections, districts that are more polarized (both racially and ideologically), the insulation of Republican candidates and incumbents from minority voters and issues of particular interest to them – to the detriment of both Republicans and minority communities – and, conversely, the insulation of minority candidates and incumbents from white voters (making it harder for those politicians to run for state-wide or other larger jurisdiction positions). As Chief Justice John Roberts wrote, it is, indeed, “a sordid business, this giving us up by race.”²⁸

The reason that Sections 2 and 5 of the Voting Rights Act have been susceptible to this distortion is because of the fact that both of them prohibit not only intentional discrimination, actual disparate of people on the basis of skin color and ethnicity (which I oppose and which is prohibited by the Fifteenth Amendment) but also prohibits “results” that have a disproportionate racial impact. To put it another way, Sections 2 and 5 include a “results” and “effects” test, as opposed to a disparate *treatment* test.

The disparate impact approach is a very bad approach in civil rights law generally. What it means is that a practice that is not racially discriminatory on its face, was adopted with no racial intent, and is applied evenhandedly without regard to race, is nonetheless illegal because it has politically incorrect results of one kind or another. This, in turn, has two inevitable consequences. Number one, it puts pressure on entities to get rid of perfectly legitimate criteria. So, for instance, in the voting context, it’s used to go after voter I.D. requirements; it also has been used—so far unsuccessfully, thank goodness—to challenge the practice in most states to limit voting by felons. But it is also used to achieve and has a second consequence, which is actually to encourage *more* racial discrimination. It puts pressure on the regulated entities to avoid the disparate impact by adopting surreptitious or not-so-surreptitious quotas, which, of course, are themselves discriminatory. In the voting context, it has been used to pressure entities into exactly the kind of racial discrimination, the kind of racial gerrymandering, that one would have thought would have been inconsistent with the aims of the original ideals of the 1965 Voting Rights Act. Thank you very much.

²⁸ Roger Clegg, *The Future of the Voting Rights Act after Bartlett and NAMUDNO*, 2008-09 Cato Sup. Ct. Rev. 35 (internal citations omitted).

PROFESSOR ALEXANDER: Thank you very much. Great opening from both of you. And so, let me ask you all a few questions and – we’ll keep moving this along. A few questions of broader themes and ultimately I’d like to get you to talk. We already mentioned this before, since we just dealt with this, and we’ve just been reading the headlines about New Jersey. I’ll bring us to New Jersey after a few other broader questions. I’ll start with follow up directly from Roger, from your point, a question for John. And then how about two minutes from John on this and then a one–minute follow up from Roger.

I think one of the key distinctions between the two of you is on race-based gerrymandering, and Roger, you’re calling it divisive, pernicious. So just a quick two minutes from you, John, why – I assume you don’t agree with that, but tell me why and then Roger can give a quick feedback to that.

MR. TANNER: I think it helps to define a loaded term like gerrymandering. In most places, the drawing of districts that are either majority African American or majority white reflects the actual distribution of population in it. You can walk outside of this law school and find areas that are identifiably African American, Latino. If you go a ways you can find white areas. Any racially neutral drawing of districts would result in some districts that were racially identifiable.

The drawing of districts really reflects the realities of our society. It reflects the different voting patterns, and the need for a governing body that actually represents the population it serves. That was not the case prior to the Voting Rights Act. And I think that’s inarguable. The racial identification prior to the Voting Rights Act was much, much sharper than it is today. The Voting Rights Act is actually one of the things that has broken down the racial identification in this country. I grew up in Birmingham, Alabama, and racial identification there was pervasive from the cradle to the grave. It was pervasive in politics and there was basically nothing else that mattered in politics. The good work that the Voting Rights Act has done to get rid of that pervasive racism is very important.

Now, there are situations that the Supreme Court has addressed involving racially gerrymandering, where the districts are inexplicable on grounds other than race. You may be familiar with that famous district in North Carolina that was strung about a hundred miles along an interstate highway and, as one state representative said, if you drove down the highway with both car doors open, you’d kill half the people in the district.

That sort of racial gerrymandering exists, but the law addresses it. The law controls it.

And I think that the idea that today we can just forget about race, that we could ignore race, is really based on a belief, as I heard it put recently, that wolves are vegetarians.

PROFESSOR ALEXANDER: All right. I'll leave it on that note. Let me give you time to follow, but I think there's a particular point, if you could also address this. John's talking about a length of experience, and is there a difference today as compared to, say 1965, in the Voting Rights Act or some other period of time where you would say that race-based gerrymandering would have been okay at a certain point in time or has this always been problematic in your mind?

MR. CLEGG: I think it's always been problematic—but even if you don't agree with me about that, you know, we ought to agree that 2011 is not 1965. There are people—including, I think Abigail Thernstrom, who is one of the experts in this area—who have concluded that something like the effects test was needed in 1965, but that in 2011 it's outlived its usefulness. It's like affirmative action and other raced-based measures like that. There are a lot of people who think, that well, in the 1960's, maybe it was a good idea, but not now.

I'm somebody who thinks that racial discrimination was always a bad idea and I don't want John's comments to – I'm sure he didn't intend to – mislead people. I would have been in favor of a Voting Rights Act in 1965. I'm in favor of ensuring that people are not discriminated against in voting on the basis of race and ethnicity. I was in favor of that in 1965. I'm in favor of it now. The problem is that the way that the Voting Rights Act is being enforced now is not just to end racial discrimination. It is being used to foster racial discrimination. It's being used to create voting districts with an eye on race and ethnicity. I think that you can ignore race and ethnicity in deciding how to draw voting districts, which I think should be done, without ignoring race and ethnicity when it comes to racial discrimination and ethnic discrimination. I'm all in favor of enforcing the Fifteenth Amendment and having a Voting Rights Act that makes it illegal to discriminate against people in voting on the basis of race and ethnicity.

But I think that where John and I differ is, he has a view that I would characterize as racial essentialism, that people can, to a significant extent, have their interests defined by their skin color and have their perspectives defined by their skin color. I don't buy that. I don't think that you can or should, that the government can or should, be treating

groups differently and drawing voting districts differently, by looking at skin color and saying: Okay, we know your race, therefore, we know your political interests, therefore, we've got to make sure that we draw these lines to make sure that those interests are represented.

I would also say that as much as I dislike the many parts of Section 2 and Section 5, Section 2 says "Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."²⁹ I think that that's at odds with what John is arguing for, which is, that yeah, we've got to make sure that these lines are drawn so that each group has its fair share of representation. That's not consistent even with Section 2 as written.

PROFESSOR ALEXANDER: So let me follow up and put something also to John. I think it builds on your point, Roger. So if we're talking about drawing lines based on race and you can take *Shaw v. Reno*³⁰ and map from there, where you have this district that runs all over the state, why would it be that, for example, an African American who lives on a farm in one part of North Carolina, who had the same interest as an African American who lives near a university in another area and an African American who lives in whatever, Raleigh or a larger metropolitan area? If you link folks on race, is that really a common interest, when you have districts which may cut across lots of different, say geographic areas or education levels or things like that?

MR. TANNER: I think that's a good question and an important one. Certainly, not all African Americans, Latinos, or whites, or members of any racial group have identical interests. We're all individuals and every individual is unique. I think you can identify groups, though, largely by the election returns as to whether they have common political interests. That cohesiveness is one of the things you have to improve to show a violation of the Voting Rights Act. It's not a given. It's only if there is cohesion in voting on both sides and there is conflict along those lines. As I said at the outset, it depends on the facts.

The one thing that everyone talks about in terms of redistricting and representation is to respect communities of interest. Larry Sabato, who is a big hotshot political scientist, identified three characteristics that define a community of interest. The first is, do the members of the group self-identify as part of the community? The people who are from the southern part of New Jersey think of themselves as being South Jersey

²⁹ 42 U.S.C. § 1973(b) (2009).

³⁰ *Shaw v. Reno*, 509 U.S. 630 (1993).

folks and the people from Northern New Jersey think of themselves as Northern New Jersey folks. The second is, do other people consider those people to be part of a distinctive group? The third is, are those people now, have those people been, and could those people be, similarly affected by governmental actions? Those factors define what a community of interest is and there are millions of communities of interest in many areas of the country.

In many areas of the country, race is the sharpest definer of a community of interest. That is something that our country has struggled with and we continue to try and deal with. But the election returns show that and the African Americans in Raleigh and in Jones County, North Carolina, which is entirely rural, self-identify as African Americans and white voters identify them as African Americans; and they are, have been and will be affected similarly by legislation. They vote together and the white voters in each of those places vote contrary to their wishes. The two groups have views that are at odds with each other. And rather than let one group control all the representation, to let one group be the decision-makers without influence from the other group, the Voting Rights Act steps in and creates a situation where everyone has a seat at the table, although not necessarily and usually not in proportion to their numbers. But people have what reasonably can be produced by relatively compact, fairly-drawn districts that reflect communities of interest; those groups have a seat at the table, where people make decisions face to face.

PROFESSOR ALEXANDER: Okay. Partly following up to that, and to add something to that, you know, John's talking about these communities of interest, and it reminds me of some of his introductory comments, about everything depends on the facts. One of the questions is, how do we agree on what the facts are? Because I think that both of you, I guarantee if we gave you both a set of facts, you could convince us on both your sides. You're very skilled lawyers. One thing is, how do you agree on the facts, what they may be, sort of think about, what a community of interest may be? A particular, specific point to throw in there is, what if I'm drawing a map in whatever state, and I know that in the last election, 96 percent of African Americans voted for Barack Obama. If I'm a Democrat, I think, well, these are good Democrat voters and I say, well look, I identify them as Democrats, and so I come up to you and I say these are just Democrats. But somebody else says, no, this is based on race. We can look at different facts and we can say, what's a community of interest if you see one group voting consistently the same way? How can we know exactly what's motivating people, what's

dividing people according to proper or improper communities of interest?

MR. CLEGG: Well, I think that we may not be able to know. But the question is whether the government should be drawing lines based on race or not. If the government decides that it's going to draw lines based on whether people voted for Barack Obama or not, that's political gerrymandering.

PROFESSOR ALEXANDER: Right.

MR. CLEGG: But that raises very different legal, constitutional, moral, and historical issues than the government saying that, "we're going to draw lines based on people's skin color." I'm okay with political gerrymandering by and large. I'm not okay with racial gerrymandering.

I think that, there is a problem of a self-fulfilling prophesy here, too. If you create districts based on race, if you are saying that we're going to create this district because we think that black people need to have a representative, and that black people are a community of interest, and you keep saying that and that's part of the law, you're going to encourage people to think of themselves in racial terms. Of course that's going to happen to some extent anyway, but I don't think that the government should be encouraging it.

John talked the Voting Rights Act making sure that people have a seat at the table. Well, I think people should have a seat at the table. But the idea that in 2011 either political party is going to ignore or gang up against large groups of people based on skin color is at odds with the enormous historical progress that we've made. John McCain and Bob McDonnell—the Governor of Virginia, where I came from—would be happy to have anybody vote for them, whatever their skin color. You know, they don't care about color. They just want to win elections. African Americans are at the table, and that's great. But John really wants them to be at a separate table, I think. He wants them to be in a separate district, rather than being in whatever district they would be in but for their skin color.

I'll say one other thing. I think it's always useful in dealing with civil rights issues, with whether you're comfortable with the government doing something or not, or with an employer doing something or not, with whether what's being done can be rightly characterized as discrimination, to ask yourself: Okay, what if the shoe were on the other foot? What if an employer said, "Everybody that we hire is qualified, but I think it's important that our workplace look like our consumer

base.” But he was saying that to justify not hiring *more* African Americans, but to *hire* fewer African Americans. How would you like that? By the same token, what if the community of interest here were white people, and the arguments being made were that we’re going to engage in racial gerrymandering here because white people have to have a place at the table? White people are not having their interest represented. I think that you start to get creeped out pretty quickly by that.

PROFESSOR ALEXANDER: All right. We started late, but we will finish closer to on time. Let me just ask quickly about New Jersey. I sent you both a tiny bit of information. We have a system where we’ve got five Democrats, five Republicans, and one so-called neutral. They just fought this out and came up with results. I guess, if you can do this in a minute or less – some of my former students are cringing because they know my ten-second rule, which I will not impose. But in a minute or less, quick thoughts on whether this is a system which is going to be just doomed to failure because it’s always two parties deciding this thing and it’s all about their political interests or any other thoughts in one minute about where we’re going in New Jersey right now.

MR. CLEGG: I agree with John that it’s essential to know the facts when you’re talking about these issues. I’m quite confident that I don’t know the facts of New Jersey, so I’m going to decline to speculate on that.

PROFESSOR ALEXANDER: Okay. And then the former resident of the City of Newark.

MR. TANNER: One fact that jumped out at me was an allegation, anyway that the Democratic districts, which would tend to be in Northern New Jersey, systematically were less heavily populated than the Republican districts in the South. That is, there is a geographic population imbalance in those. There was a case out of Georgia, *Larios v. Cox*, in which the court struck down the state legislative redistricting plan that created a very substantial imbalance between districts that affected a specific geographic area. I think that could possibly be an issue if the imbalance is severe.

PROFESSOR ALEXANDER: Let me get one more question in and then I’ll take a couple from the audience. Just a quick question again, maybe even 30 seconds. Tell me why the other person is right.

MR. TANNER: I think that in arguments and discussions like this, there is a tendency to attack people on a personal basis. I have a lot of respect for Roger and I think we share a vision of a color-blind society. We differ on how close we are to that division and how we best get there. And I think we are both people of good will. I strongly suspect that I am and I know Roger is. These are very serious issues and should not be made into cartoons as often happens.

MR. CLEGG: I think John is right about all that.

The only caveat is that sometimes in these debates because I am in favor of the law being color blind, the other side makes the move that, we as a society aren't color blind and Mr. Clegg must be crazy to think that race doesn't matter. I may be crazy, but not quite in that way. Saying that I believe the law I be color-blind doesn't mean that I think that racial discrimination no longer exists. It doesn't mean that I think that every American is literally color-blind. Yes, discrimination still exists.

But I think John is right that we may have different views on how to fight the discrimination that remains in the United States. And I am quite certain that the wrong way to fight discrimination is through more discrimination. I feel that way when it comes to university admissions and when it comes to hiring firefighters and when it comes to awarding government contracts and when it comes to redistricting.

PROFESSOR ALEXANDER: Thank you. Now a few quick questions from the audience.

QUESTION: There are two points that I would like to hear on *Bartlett v. Strickland*,³¹ which states that on the subject crossover voting, when you have more than 20 percent crossover voting, you don't have the violation under the judicial system. I was wondering if you could comment on that. The second thing that I'm concerned about is voting strength and in New York there's an effort for prison gerrymandering to make sure prisoners are taken out of Republican areas and counted and prisoners are counted back to whence they came, and they argue in strength if you have prisoners in your district your vote is more powerful than other areas. That same argument could be used with districts that have high populations of non-citizens and yet those same voices that talk about

³¹ *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

prison gerrymandering are silent when it comes to any disparity and you see that in New York.

PROFESSOR ALEXANDER: In the interest of time, I'll take both those questions and let you answer either one of them. Do you want to start, Roger?

MR. CLEGG: On the first one, I agree with Justices Thomas and Scalia in *Bartlett v. Strickland*.³² I think that the whole *Gingles*³³ analysis is one that needs to be reconsidered. I don't know whether the Court will do that. I think that it will depend on the configuration of the Court once the next case gets up there. And I think that you're right to point out that there is a tension, to be charitable, between some folks who are offended by prisoners being counted, but not by non-citizens being counted. I am not an expert on that area. My own sense is that this is an issue to which the Constitution does not speak and so it can be left to state and local jurisdictions to decide how they want to handle that. Briefly, I think that certainly non-citizens who are here illegally should not be counted. But I think that non-citizens who here legally present a tougher question. I think there are good arguments for why, because of the importance of assimilation, that maybe allowing the proportionment to count in non-citizens creates a disincentive for people to seek citizenship. That is a bad thing.

MR. TANNER: I think both those questions really illustrate how important the facts are in a given case. *Bartlett* mentioned the 20 percent crossover voting. It's not just that simple, because you must also look at the number of contests and the results over time. So that if you had 30 percent crossover, but there had been twenty years of unsuccessful minority candidacies, you'd have a strong case. On the other hand, you could have less crossover than that, but minorities winning. Where a minority is, say, 49 percent of the electorate, they don't need as much crossover. These are very, very fact intensive cases.

As to the prison gerrymandering, or non-citizen counts, that illustrates the Washington, DC principle that where you stand depends on where you sit.

As to people in the country illegally, you can't just discount them, because no one knows how many there are or where they are. The

³² *Id.*

³³ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

census does not collect that information. The legal non-citizen information gets you into some real tall weeds because those data are not in the full count. They're in the American Community Survey, which is based on the five-year rolling survey. Census comes up with a number that will be the subject of much expert testimony and much litigation during this cycle. The prisons are – the law now is that states can do what they want—count or not.

There are other populations, though, that are very useful if you want to gerrymander. There is currently, I believe, a district in the State of Virginia which contains the Norfolk Naval Base and maybe 5 or 10,000 more people. It's a legislative district, because they count the military population of the Norfolk Naval Base there.

PROFESSOR ALEXANDER (taking question): If we can do a quick 30 seconds on, is religion going to define a community of interest?

MR. TANNER: The current statutes identify certain minority groups that have historically been the history of discrimination in voting. Those are racial or ethnic and that does not cover, say, the Jewish population or other religious groups, although I think that you could, depending on the facts, build an equal protection case on that under the Constitution.

PROFESSOR ALEXANDER: Roger, do you want to add anything to that?

MR. CLEGG: I agree that the terms of the Voting Rights Act cover racial and ethnic groups and not religious groups. I think that this illustrates again the problem with picking and choosing among different groups as deserving a degree of affirmative action in voting – why racial groups and not religious groups? I think it's best left to the political process without there being statutes that require that kind of affirmative action by statute.

PROFESSOR ALEXANDER (taking question): How does the Voting Rights Act contribute to political polarization in Washington? That's a great question in 30 seconds.

MR. CLEGG: When I did my dramatic reading from my law review article, one of the things that I mentioned in there is that the racial gerrymandering tends to create more extremist districts and that that's on both sides of the aisle. It discourages interracial coalition building and

so, to that extent, too, one of the byproducts of racial gerrymandering is more polarization.

MR. TANNER: As I start to think of members of Congress who are polarizing the debate, I think of a number who come from areas where it just has nothing at all to do with race. Some of the meanest and bitterest voices on both sides of the aisle reflect the personalities of the individuals, the various tensions of that locality. In fact, the districts that are predominantly minority do frequently produce members who can go on to win statewide office and who can become elected President of the United States. They also produce, on both ends, people who talk a lot more than they listen.

PROFESSOR ALEXANDER: On that note, I would say thank you so much, Roger Clegg and John Tanner. Excellent presentations. Thank you very much.

PANEL 3

ETHICAL CONSIDERATIONS IN ELECTION LAW

PANELISTS

Hans von Spakovsky, Senior Legal Fellow, Heritage Foundation

John Carbone, New Jersey Election Law Attorney

MODERATOR

Michael Ambrosio, Professor of Law, Seton Hall School of Law

MR. LUPPINO-ESPOSITO: Now to our final panel of the day, “Ethical Considerations in Election Law.” Professor Michael Ambrosio, our moderator, has been a professor here at Seton Hall since 1970’s. He was the founder and our first director of our clinical program. He’s an accomplished expert and scholar in Professional Responsibility and Ethics and has served on the New Jersey Supreme Court Commission on the Rules of Professional Conduct, as well as the New Jersey Bar Association’s Committee on the Proposed ABA Model Rules of Professional Conduct. I give you Professor Ambrosio.

PROFESSOR AMBROSIO: Thank you. Well, it’s a pleasure to be here to talk about the subject of politics and ethics that perhaps the cynical and the despairing consider to be an oxymoron. But in a true sense of ethics, as moral philosophy, is the quest for standards for determining right and wrong. Ethics is politics. It’s the search for the good life. It’s the search for the conditions necessary to promote the full flourishing of all. So it’s appropriate that we approach this subject from the point of view of all the ways in which lawyers, perhaps unwittingly and perhaps, unfortunately, sometimes intentionally, undermine the political process and perhaps facilitate fraud in the election process.

So I just want to refer briefly, as a starting point here, before I introduce our panelists who are two distinguished members of the bar, to what was perhaps among the lowest points in the history of politics in recent American history, and perhaps a very low point in the history of the American legal profession. This I refer to as the Watergate scandal. As I look around, I see the age of most of you here, as students, you were not born and perhaps you don’t have a very vivid understanding or view of just how the Watergate scandal caused turmoil throughout America, because the supporters of President Nixon and his re-election campaign

fanatically sought to obtain advantages wherever they could, even to the point of violating the law. So this third rate burglary at the Watergate Complex in Washington, a break in on the Democratic Headquarters located there, resulted in a widespread scandal. Ultimately, John Dean, the President's Counsel, in appearing before the Irving Commission to investigate Watergate, was asked why he had an asterisk next to some 13 names on the list of people who were involved with the scandal and the cover-up. His response was, all of those 13 people were members of the bar, were lawyers. So the fact that so many lawyers at the highest rank of the profession were willing to engage in and stand passive in the face of blatantly illegal conduct, as opposed to unethical conduct, indicates precisely how this is a problem that all lawyers should be mindful of and future lawyers should understand the temptations that go with the grasp for power. So when I say it was a low point in the legal profession, at least it led to an attempt by the American Bar Association to revamp and revise the then Code of Professional Responsibility, which clearly was promoting the interest of lawyers and clients and subordinating the public interests. The ABA came up with a proposal for new rules called the Model Rules of Professional Conduct, to replace the Code of Professional Responsibility. The aim of the new rules was to reorder priorities, to put the public interest first, and subordinate client interest and lawyer interest. In doing so, they developed five specific areas where the lawyers representing clients had a duty to disclose fraud. Ultimately, when the ABA adopted the Model Rules in 1983, after heated debate, the House of Delegates decided to water down those proposed new rules and to eliminate the mandatory disclosure requirements.

Now, I have to say, New Jersey, which was the first state to adopt the new Model Rules back in 1984, amended those rules to include all of those mandatory disclosure provisions that so radically altered the priority of interests promoted by the previous rules. Although there are some states that have joined New Jersey, for the most part throughout the United States, lawyers do not have an affirmative obligation to disclose client fraud. Lawyers are permitted to disclose fraud in some circumstances, but we don't have an overwhelming consensus that lawyers should be required to disclose fraud to prevent harm to innocent third parties.

Well, today we have two speakers who will address the problem of fraud. Our first speaker, Hans von Spakovsky, is an expert on election fraud and he's going to deal with the historical importance of this problem of fraud and to what extent it exists today. I think we often think of election fraud as a third-world country problem and we don't

think of election fraud here in the United States. John Carbone is a vibrant lawyer in the political system. He's represented politicians and has been deeply involved in the election process. Let me give you some formal background on both speakers before we ask Hans to be our first speaker.

Hans von Spakovsky was a graduate of the Massachusetts Institute of Technology in 1981 and then graduated from Vanderbilt University Law School in 1984. He's currently a Senior Legal Fellow and Manager of the Civil Justice Reform Initiative in the Center for Legal and Judicial Studies at the Heritage Foundation. He concentrates on voting, elections, campaign finance, civil justice and tort reform, civil rights and government reform. He was a member of the Federal Election Commission, as well as the Advisory Board of the United States Department of Justice. He served as Counsel to that Advisory Board. He served as the on the Board of Advisors to the United States Election Assistance Commission and been directly involved with local politics. He is Vice Chairman of the County Board responsible in Fairfax County, Virginia, for administering elections in that county. He formerly served for five years as a member of the Registration Election Board in Fulton County, Georgia. He is also a member of the Virginia Advisory Board to the U.S. Commission on Civil Rights.

John Carbone graduated from Villanova University and New York Law School. He is a partner in Carbone & Faasse in Ridgewood, New Jersey. He has represented numerous elected officials, political campaigns, municipal and county governments. He has conducted over 84 election contests and 314 election recounts. He served as counsel for Governor Kean in his 1981 statewide recount for governor, Governor Thompson of Illinois in his statewide recount for governor, and Ellen Salbury of Maryland in a statewide recount for governor. He appears as counsel of record in over 23 reported decisions and has argued cases in the New Jersey Superior and Supreme Courts. He has written extensively and is a member and has had political involvement in the news media, especially public radio, Fox Network, and Fox News.

So Hans, will you tell us something about the extent of the problem of fraud in elections?

MR. VON SPAKOVSKY: Sure. I will at the end of this, relate this to the topical subject, which is ethics. I do want to say, though, that I'm not practicing law here today. If you're wondering why I'm saying that, when I get to the end of my discussion you'll see why I put that disclaimer on what I am talking about.

You know, New Jersey and New York are always very competitive, two states right next to each other, and most people know about Boss Tweed, who was probably the greatest vote stealer of the 1800's and, of course, lots of people know about Bill Daley of Chicago, who is infamous for his stealing of the votes, starting in the 1950's. But most people don't realize that first prize for electoral corruption in the first half of the last century would be awarded to Mayor "I Am the Law" Hague, who was the Mayor of Jersey City, which is, I think, six miles from where we are, who was mayor from 1917 to 1947.

MR. CARBONE: It's wherever you want it to be. He had a long reach.

MR. VON SPAKOVSKY: Many of you may have heard the story that he had a special desk in his mayor's office, where he could push a button and a drawer would open on the other side of the desk, where his visitor was sitting, so that gifts of cash and other things could be placed in the drawer and then the drawer would close. You know, when he retired—he had a salary, I think, of \$8,000 a year, and when he retired, his fortune was estimated at about \$10 million. He was also the leader of the New Jersey Democratic Party and he controlled who became governor of the state. He could control judges, both of which were demonstrated in 1939, when a governor that he had placed in office in New Jersey appointed Hague's son to the state Supreme Court. And for those of you who might not finish law school, you should have hope, because his son had never finished law school.

Every Sunday before elections, he would have a big meeting in the Jersey City arena, which was called the Grotto, where all his ward healers would come in and he would give them his orders. He had one worker for every hundred voters. They were able to stuff ballot boxes for Democratic candidates, and for the few Republican votes that came in they were torn up, erased, and altered in order to be sure that he got the election results he had. Princeton University actually, in 1935, sent about 245 students to Jersey City to try to monitor elections. Unfortunately, many of them got beaten up in the polling places and intimidated, and they weren't very successful at that.

Now, you're going to say, this is all old news. Well, in 1989, again Jersey City, there was an election where they released 1,000 illegal votes cast by people who were unregistered and dead. In 1993, there were several dozen psychiatric patients who cast absentee ballots in Secaucus, despite the fact that some thought that Roosevelt and Truman were still on the ballot. Journalist Marc Mappen wrote in *The New York Times* in 1994, which is actually some years before *The New York Times* editorial

page started taking the position that there is no voter fraud in America, “What Renaissance Italy was to art, the old time Garden State was to voter fraud.”

Now, something more recent, in 2007. I have a copy in my office of a letter that was sent by a former zoning president in Hoboken to a senate committee who was looking at voter fraud issues. The case in 2007 was, I actually wrote about this in the *National Review Online*, the former zoning president in the 2007 city council elections, he was on his way to his polling place when he noticed a group of men on a street corner standing around, being given index cards by two other men. He noticed one particular individual because he looked kind of like somebody he knew, although it wasn't his friend. He went on to his polling place, where he was going to be an observer. A little later on, that guy he had noticed on the street came in, gave the name of a registered voter and tried to vote. Now, it just so happened that the zoning president knew the registered voter whose name this guy had just given and knew that this guy was not that registered voter. When he challenged that guy who was trying to vote, the man turned around and ran out of the precinct place. The zoning president actually chased him down and caught him. They called the police. He was arrested and, there are newspapers reports about this, the guy admitted to the police that he was part of a group of men in a homeless shelter who had been paid \$10 each to vote and on the index cards they'd all been handed was the name of the voter whose name they were supposed to vote in.

Now, this isn't limited to New Jersey. I want to give you another case, and I think this is significant, because it explains how fraud can occur. Though the Brennan Center puts out reports constantly saying there's no such thing as voter fraud in the United States. Now, I'm not going to tell you that there's massive voter fraud all across the country. But there are enough reported incidents, reported prosecutions, reported convictions to show that we do have a problem with this. And the place that it really manifests itself is in close elections, because that's where it can make a difference.

Part of your handouts is this, although I don't think you have a color version. This is a booklet that I put out for The Heritage Foundation. It's a case study of three different cases; actual cases of voter fraud, two of them based on grand jury reports, so there's not a lot of speculation going on. The fourth paper is about non-citizen voting, which I'm going to get to in a second. But there was a great New York case that came out in the mid 1980's. The former DA in Brooklyn, a woman named Elizabeth Holtzman, who used to be a Democratic Congresswoman, and when she left Congress she became the DA. She

convened a state grand jury. Now, as you know, grand jury reports are usually secret. But in this particular case, she felt that what the grand jury found was important enough to release the report. I managed to get a copy of it. It's hard to get. What she found was a successful 14-year voter fraud conspiracy that had cast thousands of fraudulent ballots in two primary elections for Congress, four primary elections for the State Assembly, and primary elections for the State Senate. And they had gotten away with this for 14 years without anybody knowing about it. Now, what was going on in that case? The conspirators were submitting false voter registration forms. New York had put in mail-in voter registration prior to it being adopted nationwide by the NVRA, National Voter Registration Act,³⁴ in 1993. So what the conspirators would do is, they would go and they would get stacks of voter registration forms, which anyone of you can do today, and they would fill them out under false names. What they liked to do was, they would take the real last name of a voter that they got off the voter registration list, put in a false first name and then they would put the address of the real voter on the form, so the registration is at the address of a real voter, but they're using a false first name. By doing that, they assumed that, this is what the witness said, it was anticipated that when the mail for the fictitious Mary Brown was delivered to John Brown at his address, John Brown would just discard the notice as a mistake, rather than send it back. The other thing that they did is when they would do petition nominations, they would be going door-to-door to get signatures for people running for office. Well, by doing that, they would knock on somebody's door and that person would say, "Well, I'm sorry, that person has died" or they would say, "I'm sorry, that person has moved away." So they would get the list of names of people who had moved away and had died. And they had witnesses who came in who were part of crews. They had twenty crews of five to eight people each. They had a list of the false names, people who had died, people who had moved away. Every member of the crews went from precinct to precinct to precinct, voting in the names of those individuals and easily getting away with it, because, of course, New York does not require any voter ID. That is the way that was done in New York.

I have other cases here, including Chicago 1982 Governor's race, in which a federal grand jury was called in and this was after, and this just shows you, you've got to be careful when you're doing patronage – a guy who had been promised a city job if he worked at the precinct on election day and helped them stuff ballot boxes, got angry because he

³⁴ 42 U.S.C.S. § 1973gg (2011).

didn't get the city job after the election. So he called the FBI to say, listen, there were a lot of bogus ballots cast in this last election and I can tell you all about it. The Justice Department opened up the largest voter fraud case that it has ever handled. By the end of the case, the entire FBI field office in Chicago, which I can tell you is very large, was involved in this. They brought in people from Washington and I spoke both to the lead FBI agent, who was involved in this, and the federal prosecutor. Basically they ran out of resources to prosecute everybody who had been involved. They estimated there was fraud in every single precinct in Chicago and the conservative estimate was that a hundred thousand bogus ballots had been cast. They came within 5,000 votes of stealing the statewide election for governor. What did they do? One of the things they did is they preyed on the disabled and the elderly. They'd go into senior living centers. They'd get the people to request absentee ballots. Then party officials and others would go in and assist them in voting and basically telling them how to vote, or actually just filling out the absentee ballot for them. That goes on still all the time. They impersonated absent voters, similar to what happened in New York. They registered illegal aliens. The U.S. Attorney estimated there were something like 80,000 illegal aliens registered to vote in the city at that time and they convicted and prosecuted dozens of them. False registrations, again, buying votes and altering the vote counts in the precincts.

There are non-citizens voting all over the United States. I've got a report in here of it. Two weeks ago the Colorado Secretary of State testified in front of a House Committee in the U.S. Congress and said a preliminary check there, where they simply took voter registration information and compared it to DMV, driver's license information, where someone went in to get a driver's license and said, "I'm not a U.S. citizen," turned up 11,000 people who registered to vote, and some of those who had voted.

So what can you do on Election Day, and before Election Day, as a lawyer? Well, I'll give you a good example of something that was done very successfully last fall. There is a Tea Party organization down in Texas that started another organization called True the Vote. What they did is they got a copy of the registration voter list for Harris County, Texas, which I think is the largest county in the state. They started checking voter registration addresses by actually sending people out to check the address. They found thousands of people who were registered at things like vacant lots, at commercial addresses, which is, as you know, against the law, and they found lots of people who were not U.S. citizens who were registered to vote. In fact, the voter registration

process in the county was so, I'm not sure cavalier is the word, but they made mistakes. You know, on the voter registration form, there is a question you have to answer, whether or not you're a U.S. citizen. Now if you answer no, you don't get registered. Well, they started asking for copies of voter registrations forms and they found that the county was registering people to vote, even though they'd answered no on the citizenship question. They also found single-family homes where there were very large numbers of people registered to vote, which is a pretty clear indication that there is a problem. What they did is, they started letting the county know about each of these problems, so the county could investigate and try to fix it. This is a problem all over the country. Many election officials are, frankly, lackadaisical in doing checks of voter registration information to check both the validity and the accuracy of it. And that's something that, as election lawyers, you should be worried on and you should check.

One of the most basic questions you should ask your election officials is this: when they get a voter registration form, do they verify the information on that against DMV records, for example? Now, not everybody has a driver's license, but a very large percentage of people do. If the information is different from one to another, it doesn't mean the person doesn't register, but it's something that needs to be investigated to see why there is a problem. Does your county compare its tax records to its voter registration list? By doing that, you can find out who's registering at a commercial address or who's registering at a vacant lot, which is a pretty clear indication that you may have a fraudulent registration.

The biggest thing lawyers do these days on Election Day is they help coordinate poll-watcher programs, sending people into the polls to be observers. I can tell you that it is very important. We need both parties as observers in the polling places, because when they are there, watching each other like hawks, that's the best way to insure that you're not having problems. The other thing you should be doing as an election lawyer, whichever party you're in, is trying to make sure that, in most states, I assume New Jersey is one too, when election officers are being hired to work in the polls, in most states, Virginia is one, the parties have a right to have equal representation in the ranks of the poll workers. You need to be sure that that is happening, again, so that you have both parties there, because transparency is the key to good elections. Prior to an election, every county in the country has a day where they test their voting equipment. They're supposed to do that. You, as a candidate or as a political party, need to find out when that is going to happen and you need to send an observer there to make sure that as they test the

equipment, whether it's electronic equipment to make sure it is operating properly, or whether you're in a county that uses opti-scan equipment, where you have a paper ballot that is optically scanned, they test that equipment, they make sure that the opti-scan machine, for example, is properly counting ballots. You need to be sure you're there to observe the testing and the certification of the equipment.

You've got to train poll watchers. You cannot send people into the polls without giving them very basic training about what they can do and not do. You know, they can't talk to voters. They can't interfere in the election process. They're just there to observe. But you've got to train them to do that. Because otherwise, you're going to get people who, when they see something going wrong, are going to go over and try to interfere and break the law and get thrown out of the polling place and you can't have that happen. It's lawyers who know the law governing poll watchers and know what they're supposed to be looking for. Because, that's the other thing – you've got to tell them what to look for. You have to be there too at the vote counting at the end of the day. Your job doesn't end when the polls close. You've got to be sure that the ballots, for example, in paper ballot places, are being properly transported from the polling place to the central counting area and you need to have observers there to watch the counting who knows the rules.

The other thing you've got to do as a lawyer these days is you have got to know the rules for provisional balloting. One of the big changes around the country was in 2002: Congress passed the Help America Vote Act.³⁵ That was the first federal law passed governing elections since the Motor Voter Law³⁶ in 1993. One of the things that that law provided was this: in every polling place in America, if a voter shows up and his or her name is not on the voter registration list, but they claim that they did try to register and they're eligible to vote, they can't be turned away. They have to be given a provisional ballot, that's a paper ballot that is then segregated and kept away from other ballots. What happens after election day is over is, the election officials in your county get together and they have a meeting and they look at every single provisional ballot and make a decision as to whether it should be counted or not. You, as a lawyer, need to be there to observe that process, particularly if there are enough provisional ballots to be the margin of victory and change the outcome and make sure the local officials are following the laws and rules that have been set out in your state for that.

³⁵ 42 U.S.C.S. § 15301 (2011).

³⁶ 42 U.S.C.S. § 1973gg (2011).

The other thing you can do prior to Election Day, which hasn't been done, is you can file lawsuits under the National Voter Registration Act. Motor Voter has a private right of action. In the 20 years that law has been in place, it has only been used by people on the left side of the political aisle to go after counties and states that are purging voters and not following these very strict notice proceedings. There's another provision in the NVRA; it's in Section 8.³⁷ It says that states have to do regular list maintenance. What that means is they have to regularly maintain their voter registration lists, by removing people who have died and moved away. I can tell you, there are a lot of states that don't do that. You can sue a state for not complying with that provision and, if you win, you get attorneys' fees. There have been no suits like that filed. The Clinton administration refused to enforce that provision of the law. The first lawsuit to enforce it was filed when I was in the Justice Department in the Bush administration and this administration also is refusing to file those cases. In fact, there is sworn testimony by two voting section attorneys before the U.S. Commission on Civil Rights in the New Black Panther voter intimidation case about the fact that a political appointee in the Justice Department told voting section lawyers that in this administration there would be no enforcement of that provision. So that opens it up for private lawyers.

All this kind of work that you're doing, you need to understand this. If you're licensed in New Jersey and you're acting as an election lawyer here or a poll watcher here, you're not going to have a problem. Now, you do need to remember that if you're in a polling place and you give some advice to somebody about their legal rights, you may have established an attorney-client relationship and you've got to be careful about that. But here's the problem you have to look out for. If you are one of the lawyers that is recruited by either one of the major political parties to be part of a poll watching or ballot security effort across the country, there's a great article, it's the only one I know, written by a friend of mine, Allison Hayward, that's called "Election Day at the Bar."³⁸ This is not in your materials. It's a *Case Western Reserve Law Review* article, Fall 2007. It's about the trouble you can get into if you are a New Jersey lawyer and you go to Ohio to be a poll watcher. In fact, she talks about her very first case is about a woman who was a member of the California and D.C. bars. She was recruited to go to Ohio as an Election Day volunteer. On Election Day, she was in Ohio. She went to polling places. She talked to some voters who were confused

³⁷ 42 U.S.C. § 1973gg-6 (2011).

³⁸ Allison Hayward, *Election Day at the Bar*, 58 CASE W. RES. 59 (2007).

about voting rules. She handed out a few cards and she was given a hat that said “Voting Integrity Team” on it. That’s what she was wearing in the polling place. A complaint was filed against her with the Ohio Board of the Bar for the unauthorized practice of law. And, in fact, they found her guilty of that. She was sent a letter of admonishment, as were her local supervisors, who were Ohio qualified lawyers. Ohio, Texas, and Florida have this rich history of their bar going after out-of-state lawyers for unauthorized practice of law. Avoid wearing any hats or insignia or shirts when you go to another state that say you’re there as part of a legal team. You’ve got to not hold yourself out as a lawyer. That was the key language in Florida, for example. You’re there as a poll watcher. You’re not there as a lawyer. This can get you in big danger in your home state too, because a lot of states have reciprocity. In fact, this woman who got admonished in Ohio had to notify the D.C. bar about it and the D.C. bar, their reciprocity is they usually impose the same penalty that the other bar did on you. Most complaints like this are handled through bar proceedings. But in some states it’s actually a misdemeanor. In California, private parties can actually bring a civil action against you for unauthorized practice of law. And, in Ohio again, which is one of the worst states for this, they actually can impose civil penalties up to \$10,000 per offense. So you’ve got to be very careful about that. That’s one of the ethics issues that can really face you if you participate in this kind of program.

PROFESSOR AMBROSIO: Well, thanks so much, Hans. That’s a primer on how you go about acting as a lawyer in the political arena, that I appreciate as one who has been involved in politics for many years. My brother, Gabe, was a State Senator and I always had aspirations of running for office. But I found out how local politics really is. I couldn’t get the nomination out of the family.

Let’s turn to Jack Carbone, whose experience in dealing with election fraud and other issues is extensive.

MR. CARBONE: Trial attorneys stand. Remember that. You don’t think well unless you’re standing. The article that Hans referred to, the Allison Hayward article, is available on something called the SSRN. If you’re going to do anything as a lawyer, join the Social Sciences Registry Network. It’s free. You can get drafts, generally, of most law review articles at no cost, but Allison’s article is there. You might want to take a look for it.

I want to begin by saying I am repaying a debt from 40 years ago. I mentioned this earlier to the professor. I was a young officer in the

Navy. Unexpectedly, the war wound down in the 1970's. I came home, wanted to go to law school, and had not taken the LSAT. So they told me that there was an LSAT being offered on Saturday at Seton Hall University, not this facility. If you knew the old facility, you will know the industrial building that it was in and they told me that if I went there and spoke to someone, perhaps I could be admitted. I went and I spoke to someone, and very graciously they made room for me to take the LSAT. So I guess this is a way of paying it back.

I stand here today, having done election law for 37 years. How did it start? I was admitted to practice in December of 1973. In April of 1974, I went to my first ICLE course. It was run by a deputy attorney general by the name of Marilyn Loftus, later to become Superior Court Judge Loftus, who has since retired. She had with her another attorney by the name of Frank McQuade, who would change the form of government in Essex County. Frank had left the practice of law. He is an ordained deacon in the Catholic Church. There were two people present at this seminar, myself and Greg Nagy. Greg Nagy went on to become the General Counsel for the New Jersey Election Law Enforcement Commission. He's now retired. So I was there at the beginning. From that date until sometime in 2004, there had never been another election law seminar in the State of New Jersey. So I've been running those and I want to keep pushing them.

I've given you materials. I'm going to go through a couple of things. New Jersey, corruption, Hudson County. No. You're close, but you're dated in time – 1789, Article One, Section 2, the first challenge to a congressional election in the House of Representatives – New Jersey. New Jersey used to be called East and West Jersey, divided by King George by drawing the line from Sussex County to Cape May. There were the West Jersey proprietors, the Berkeley's, and there were the East Jersey proprietors, the Carteret's. When New Jersey finally gained its independence, we still had a community of interest division, to relate back to the last topic—that the people in the Western part didn't talk or deal with the people in the Eastern part. At that time, Governor Livingston signed a bill calling for congressional elections and set the day for the elections. Unfortunately, the legislature and, I love the phrase, in its infinite wisdom, forgot to put when the election was over. In the materials I have for you, the election went on for six weeks. East Jersey stopped. West Jersey continued to vote. Do you want to guess, in the House of Representatives, who won the determination as to who the two congressional people should be? West Jersey, 1789.

But that's not where it ends. I've also included a case in here that I happen to love. I've gotten Judge Haines, the late Judge Haines,

and Judge Villanueva to incorporate it into decisions they rendered for me. It's called *State v. Justices of Middlesex County*.³⁹ It's a 1794 case, November 1794. One New Jersey Law. It's at page [283]. That means the [282] pages immediately preceding it were the first cases in the New Jersey Supreme Court. Real simple. The Legislature passed an act allowing an election to occur in Middlesex County to determine where the courthouse should be built, where the jail should be built, and then authorizing, when the determination was made, a tax on the citizens of Middlesex County for its construction. Perth Amboy wanted it. New Brunswick wanted it. So what do we have? We have an election, but we also have a good election law now. At least it said when the election was over. We have an election that takes place. The cases in there; there's also an article I wrote about it. After the election, we're talking an election determined by the number of votes. Now, realize again, the only persons who could vote were white men who owned property. They were called freeholders. Part of the basis for the challenge was one of the challengers at the election was threatened and insulted. I think it's a gentle way, a gentile way perhaps, you know, for the 18th century version of it. They probably threatened to kick him around if he continued to challenge voters. One of the persons who came forward was, according to the case, a Negro man, who claimed he had been freed in another state. That would be an interesting vote then.

One of the other grounds for challenge was that a large sum of money had been offered to assist in the conduct of the election if the results were to be that the courthouse and jail be built in New Brunswick. But the best, and Hudson County has nothing over Middlesex County, the best part of the case was the box, the ballot box, the box in which the tickets were deposited, was broken open from certain marks of violence, not upon it when the election commenced, and which appeared before its conclusion. I guess somebody broke the lock off the box and stuffed it.

So what do we have? We have an election authorized by the legislature, we have a date set for the election and an end of the election, implemented by the government's regulation, and now we have this vote that nobody is happy with, because there are issues, major issues: ballot box stuffing, persons who shouldn't have voted voting, threats to challengers. Sounds like Hudson County 1940's, 1950's. I mean, it's nothing new, nothing unusual. Last weekend, probably. Chief Justice Kinsey, our first chief justice, a Quaker son of a lawyer from Mount Holly, Burlington County, the only thing this peaceful Quaker did during the revolution was he personally went out and arrested the Governor, the

³⁹ *State v. Justices of Middlesex County*, 1 N.J.L. 283 (1794).

Royal Governor of New Jersey, Ben Franklin's son. Chief Justice Kinsey, and realize now, this is the man who, very recently smelling the smoke of the revolution, unshackling the chains, he comes forward when a petition is filed. The first response is demurrer by Middlesex County, New Brunswick was you have no jurisdiction. Is this going to start sounding like a case called *Marbury v. Madison*?⁴⁰ We beat *Marbury v. Madison*. Chief Justice looked at it and he said, "I have jurisdiction." Every court has inherent jurisdiction to review the acts of the legislature. Every court has a duty to review their proceedings so far to see is justice is done and to vacate them if they swerve from the legal line of their duty or employ their authority for repression. You can read through the decision. So we beat *Marbury v. Madison*. The first two election cases challenged to Congress in a Congressional election and also challenged to election fraud. So New Jersey, Hudson County seems unique. That was just an outgrowth from earlier actions in Middlesex County.

What I want to talk to you about, this is the ethical component. There are ways that this can be done, both professionally and profitably. But you have to be on your guard and you have to be alert to things. You're a lawyer 24 hours a day. As Hans said, your conduct could be considered questionable as an attorney if you are more than overzealous, you involve yourself too much. As Hans was speaking about wearing a hat, I looked up at Mark Sheridan and we started cracking up. So, let me talk about the Kean–Florio 1981 recount and the federal court order for a national ballot security task force. So on Election Day 1981, I have to vote. I didn't vote by absentee. I got delayed somehow. So, I went to my polling place and I drove to Union County, New Jersey and I was one of the attorneys assigned there with W. Carey Edwards and Irwin Kimmelman, Tommy Greelish, John Barry, Maryanne Trump Barry's late husband. We all started arriving there about ten o'clock. And as I walked in, and they shall go nameless, there were three attorneys there, all of whom became Superior Court judges, who were in a tizzy. I said, "What's the matter?" And they said, "Arm bands . . . guns . . . national ballot security task force . . . 800 phone number." I said, "What are you talking about?" They said, "We had a representative from the Republican National Committee who had been setting this operation up and he said that Prosecutor Stamler is on the way." "What do you mean, he's on the way?" "He's coming here. He wants to find all this stuff." So I said, "Well, what have you done?" They said, "We haven't done anything." Oh, I'll probably debate with the Professor whether this was the most ethical move, but the way I justified it was, I wanted to preserve

⁴⁰ *Marbury v. Madison*, 5 U.S. 137 (1803).

evidence. I wanted to gather it all together. So I ripped the phone out of the wall, threw it in a box, tell them to gather up all the armbands and the signs, put all this crap in the back of a Chevy Impala. This is how old it was. I gave the kid ten bucks. I said, put Jack Kelly and his guns in your car, get on Route 78, drive to Pennsylvania and stay there until eight o'clock that night. I was careful. I wanted to preserve all that evidence. We didn't answer the phone. We didn't talk to the press. When Prosecutor Stamler showed up, I saw Tommy Greelish do a shuffle that probably seriously qualified for him to become the U.S. Attorney. A Seton Hall graduate, by the way. He hemmed and hawed and talked to the prosecutor and their investigators for five hours, didn't say a thing, but it seemed like he did say something.

Now, who was Jack Kelly? Jack Kelly was somebody who showed up and was from the "Ly" family. Does anybody know what the "Ly" family is? Mark, you're not allowed to answer. The "Ly" family is the 'formerly': I was formerly a Green Beret; I was formerly a DEA agent; I was formerly a member of the White House Transition Team; I was formerly Assistant Counsel to the Republican National Committee; and I'm sitting there going, the guy's two years younger than I am. I'm just a lawyer and a former Naval officer. But I had my doubts. He so impressed everybody, got taken in, that particular lawyer, who when we had an issue on the New Jersey Election Law Enforcement Commission that had to be argued, he went with the attorney who was representing the finance part of the campaign. This attorney, who was not a foolish person, moved his admission *pro hac vice* before the New Jersey Election Law Enforcement Commission. Jack Kelly beat Angelo Genova, my good friend and a very seasoned and experienced attorney, in the legal argument before New Jersey Election Law Enforcement Commission. Jack Kelly had never gone to college, never gone to law school, wasn't a Green Beret, wasn't a DEA agent, wasn't a White House staffer. Oh, yeah, he did come from the Republican National Committee. They sent him out to get rid of him. So what does Jack Kelly do? He does all these dastardly things and we end up with this 1981 consent order signed by Judge DeBevoise, which now has nationwide effect. It's only binding on the New Jersey Republicans and the Republicans statewide. It's not reciprocal to the Democrats. It talks about ballot enforcement issues. It talks about wearing armbands, intimidation, etc.

So what I'm going to suggest to you is, in a campaign: watch the "Lys." Be suspicious. To use a wonderful phrase of Ronald Reagan, "Trust, but verify." Don't get sucked in by people, and I apologize, Hans, for saying, people who come from Washington, who seem to have,

and you want to be part of that too. Be cautious. Just remember, when it's over, you're still here in New Jersey. And as the young lady in Ohio with her hat that said something about ballot integrity, you too are going to have consequences. Because you are a lawyer twenty-four hours a day.

Ethical compliance is more than not just being indicted. Does that sound easy? Ethical compliance is more than not just being indicted. The problem we have is, everybody says well, the RPC is this, the RPC is that. That's a minimum standard of conduct. That's a minimum standard of conduct. You should do more. You should do better. As an attorney involved in politics, and there are a couple of them here who are my friends, you're going to find it is difficult to get through a campaign without having to do something like, "No!" Okay? These people are desperate. These people want to win for whatever it is. Sometimes they don't know why they win.

Let's flash forward to Christie Whitman's first campaign. Peter Verniero, later to be Justice Verniero, now our commentator for the rule book; Peter and I were the attorneys for the Whitman campaign. Shows up Ed Rollins and Lyn Nofziger, two prominent national Republicans, who had helped Ronald Reagan become Governor and helped Ronald Reagan become President. I was impressed; I have to be honest with you. But New Jersey is a little different. Tip O'Neill says all politics is local. I'll tell you, all elections are local. Elections are won one vote at a time. So they came up with some grand schemes. They were grand and they were expensive and generally worked. But it was the hustle on the ground that got us elected.

After the election, Ed Rollins returns to Washington D.C., goes to the Sperling breakfast, which is a little thing that has Democrats and Republicans. And he will admit, he even did in his book, had one Mimosa too many, and he's sitting there with Jim Carville who had run the Florio campaign and the question is, "How did you win? What single thing did you do?" Well, there's no single thing. There's no silver bullet. There's no one thing that causes an election to tip one way or the other. And Ed Rollins says, "I paid black ministers and black churches to keep the vote down." Hello, grand jury. Mark's uncle was involved. Mark's father was involved. I kept asserting attorney-client privilege, attorney-client privilege. Peter kept going "humada-humada-humada." And I said attorney-client privilege. But there was a succession of investigations, thinking that might have been real. It took on a life of its own. But it wasn't. What we had done, having gone through 1981, is every meeting we had, I had a former client, who had been a borough clerk administrator, sitting there quietly taking notes, and it was called

the “insurance policy.” And we turned it over to the U.S. Attorney and demonstrated that it was never discussed, it was never done. In fact, it was cautioned against. Ed Rollins dutifully apologized to Christie Whitman. Nothing became of it, but it was something that happened.

Now, a small aside: About two years go by, and I know Ed’s writing the book and I’ve spoken to him. And I’m in New York and I get a call from somebody. The book is out. Uh-oh. They said you can get it at Barnes and Noble up by the Philharmonic. I left the office that I was in, in a rush, not taking my glasses. I go to Barnes and Noble. I walk in. You know how they stack the books – like a castle – in the front. They’re stacking up Ed Rollins’ book. I pick up a copy of the book and I realize I can’t read a damn thing. And I’m standing there and I turn to one of the prettiest women I’ve ever seen and I said, “Would you do me a favor? I think I’m in this book . . . Would you do me a favor and just look in the index and see if my name is in there?” She says, “Yes, you’re in the index and it shows four page references.” “Would you do me another favor? Would you read to me each of the page references?” And she dutifully does this. I’m going “Okay... Oh, that looks good... good, good... I’m fine.” I get all done. I pick up three copies of the book. She goes, “That’s it?” I said yeah. She says, “I thought you had the greatest pick-up line in the world.” And I said, “I’m an ordained deacon and happily married, thank you very much!”

But again, ethics. You can’t build a reputation on things that you’re going to do. You can’t maintain a reputation by sliding or crossing the line. Your function in a campaign is to call them up short. Now, how do you do that? I have a phrase, L-S-U-F: Lump Sum Up Front. When I go into a campaign, I’m paid up front in full. If I’m not happy, I walk. If I’m not happy, I threaten to walk. I don’t have invested the need to be paid, the worry that I won’t be paid, that I can’t say or do what I want. My motto is very simply that of General Marshall, who was Chief of Staff during World War II. I give direct blunt advice always, keep all discussions to myself, and if the decision goes against me, I dutifully implement what the decision is. Easy. Easy. But I also don’t have to worry about where I’m going to be.

So you’re in a campaign and you’re worried about ethical compliance. You’re worried about cases out of Watergate, as the Professor mentioned. Donald Segretti, suspended. [Herbert] Kalmbach, suspended. All the lawyers got punished in that case. So how do you know what’s right and what’s wrong? How do you know good art and pornography? You just do. You’ll feel it. It won’t seem right. It won’t smell right. Somebody will be looking at you and you’ll be looking back

going “eh-eh-eh-eh-eh.” You’ll start to wonder. And the moment you ask, “Is it wrong?” it is. You’ll get it with experience.

And experience. Everyone know what experience is? Making a mistake a second time. I didn’t grow up smart. I became smart. I have had issues, never ethical, but I’ve always been very careful. But you will start to realize what it’s about and what you have to do with it.

I gave you materials. I’m not going to go through the materials. But I am going to go through two other parts. Understand what an election is about. We have an ancient election law in New Jersey. It doesn’t comport with the present electronic machines we use. It doesn’t have the right terminology. Even if we changed it to comport with the electronic machines we have to use in the 90’s, they changed in the early 2000’s and it changed again recently.

I was arguing a case in the Supreme Court three years ago. You’re going to have to learn, in arguing a case in the Supreme Court, forget what you wrote. You’ve got to connect with the justices. They’re sitting there looking, thinking. You want to read your brief to them. Jesus Christ, they’ve already read your brief. They got a memo from their law clerk. So I like to bring everybody up short. I turned to the Chief Justice and I said, “So you understand, the function of an election is not choosing the winner. The function of an election is making sure the loser believes and feels that they lost fair and square.” At that point, I have all my justices up on the ends of their chairs. And I said, “I’ll repeat it for you again.” And I could see the little pencils moving. You know the pencil rule? I’m sure you’re going to be taught this in law school. If you argue before a judge and she or he is not writing stuff, “you ain’t scoring points.” If they’re looking out the window, watch the pencils. Well, I had them up. Okay. I got that phrase. I got that in. I got that working through. And they understood what all the things I argued about had meant and it became very clear to them.

Let me talk also about relations with other attorneys. Paul Josephson, he and I have never represented the same clients, but we’re very close friends. Mark and I have represented the same clients and we are friends. Angelo Genova, who was my adversary in the 1981 Kane–Florio recount, is still my very dear friend. There is a quote I put in there from Roger Alan Moore, who is the Republican National Committee General Counsel. Don’t fault him because he’s from the Republican National Committee and don’t fault him because it’s somewhat dated and sexist. But when I’m working post–Watergate, hoping we get somebody elected, he sits me down and he says, “Never do to the other guy what you wouldn’t respect him for doing to you first, if he thought of it.” That’s really what it is. Because you pull some unique stunt or you do

something which is embarrassing or you do something which is unethical or unprofessional. I see Paul all the time. We're going to do three panels. We did an election panel in March in Atlantic City, we're doing this one today, and we're doing another one for people in May. Okay. He does to me, I do to him. Mark and I plan things we do to others. But you never fall below the standard. The standard is, don't do to them what you wouldn't respect them for doing to you if they thought of it first. Gee, the Golden Rule perhaps. Do unto others. Okay. It's not in the ethical rules, but it's sound. It's what you want to do. Because if you're going to get into the elections, and if you're going to get into this political world, you're going to see the same people over and over.

The Professor asked me earlier, he's got the two volumes of the statute there. There are exactly 121 reported cases. What area of the law could you master by knowing 121 cases? Easy. I have 23 of those cases. And I'm going to be honest with you. I was trying a case the other day where my co-counsel up there and somebody started referring to a case of *In re Evans*.⁴¹ And they're citing it to hurt me. And I'm going, I tried that case. Let me see if I can remember what it was about. Thank God, I had my computer there and I could do LexisNexis and FastCase and call it up, because I realized what the distinctions were. Because there's not a lot of case law. There is a lot of unwritten law. I can give you unwritten decisions that go either way. So, again, never do to the other what you wouldn't do to you.

Fees – written retainer agreement. The RPC's require it. You are crazy if you represent anyone in politics: "Oh, I'll show up and I'll help you. Oh, I'll be there on election day." Written retainer, understanding your relationship, understanding any fees that there may or may not be, understanding what you will do and what you will not do, if the client will be truthful to you. There's a whole series of things you would put in it. Paul represents Democrats. Mark represents Republicans. I represent Americans. Why? Because it dawned on me about twenty-five years ago, why would I cut out half the potential clients? Now, I have an adage, and it's not totally true. Republicans promise to pay you, Democrats do. It's not always true. But don't go into a campaign thinking I'm going to get a job. Don't go into a campaign thinking, I'll be paid someday. In every gubernatorial campaign I've been in they have salaries for staff, employees. Three weeks before the campaign is over, they realize money is getting short, so they cut the staff salary in half. A week before the election they tell everybody no paychecks until after the election. There isn't going to be any money for you – at all.

⁴¹ *In re Evans*, 227 N.J. Super. 339 (Law Div. 1988).

There are only 400 and some Superior Court judges in New Jersey. Not every lawyer is going to get to be a Superior Court judge. Not every attorney working in a campaign is going to get it. Lump sum up front.

I once represented Lyndon LaRouche. They looked at me and they said “What’s your fee?” I was not comfortable representing Lyndon LaRouche. But then again, when I go home, my wife doesn’t say, “Who paid you?” All she wants to know is, “Did you get paid?” So I told him what I wanted. And he said, “Would you take a check?” Now, realizing Lyndon LaRouche went to jail for credit card fraud, and a lot of other stuff, I said, “No, I [don’t] want a check.” He said, “Would you like cash?” I said, “No, I just want a check made payable to my trust account.” He said, “Would you like gold bullion?” At this point, I’m going, “You don’t want to represent this man.” I represented him as co-counsel with a gentleman by the name of Jim Shaner and we were able to get through it.

I’m going to start winding up. There’s a cheat sheet at the end that walks you through all the questions you’re going to have on Election Day if you’re a volunteer attorney. It talks to you about who the players are, and, if you don’t know the players, don’t go out on the field. Who is the Secretary of State? What is her responsibility? Who is the Commissioner of Elections? Who is the Superintendent of Elections? Who is the District Board? Who is the County Board? Who is the Municipal Clerk? Not only know their functions, but know their names. I’ve got to be honest with you – I am the worst person for names you’re ever going to meet. I’ll mash up your name, I’ll forget your name. But you know what? When it comes to those times, even if I have to write them on 3 by 5 cards. God forbid, I show up at some election board– and I lecture the election officials every year. They all love me and I bring donuts and cannolis, which I just found out violates the state ethics code, but I’m going to have to see how we’re going to deal with that. You know, know their names, one. Two, do not, do not go into a polling place unless you’re a challenger. If you’re a challenger, you’re not an attorney. And I see Mark smiling, because we’ve all done this before. I love to get my adversary attorneys who are in the polling place and as soon as we have a contest, guess what I do? I make him a witness. Don’t become a witness. If you’re going to be an advocate, be the advocate.

Post-election, we got a call from somebody in Middlesex County, and I think it was in Old Bridge in District 3. I’m not sure, maybe it wasn’t Old Bridge. There was some person they were carrying into the polling place who died in the voting machine. You’re not going to remember it. You’re not going to remember it. My first election

campaign was from my best friend in college at Villanova for the Student Body President, Bill Martini, now Federal Judge Martini. You're laughing because you know – Bill is a notebook person. Every campaign I've ever been in with him, he and I agree, you get this stupid little, grade school, marbled, black and white notebook that has the pages stitched in, so when the election is over, you aren't pulling out business cards, match books, napkins, rips of paper and scraps of paper. Document it. The first thing you want to write on the front of it is "Attorney-Client Work Product," because you don't want to lose it.

The final thing: When you're out there doing these things, start to consider what you're really doing. Attorneys are the worst advisers in political campaigns on Election Day, because attorneys only see one remedy: go to court, go to court, go to court. Observe. Document. Write it down. Get witnesses. Get phone numbers. If you win, put that notebook away. If you lose, you have something to do. But the dumbest thing you can do on Election Day is think like an attorney. I'm going to court and I'm going to get an Order to Show Cause and a court order. I'm going to document verifications from my campaign manager that in Middlesex County, I believe in Old Bridge, they were bringing a lady into the polling place who died. And then you win. Guess what you did? You gave your adversary a reason to challenge the election, which just went from what you want to consider as a pristine, virginal election, just became a major problem and you're going to have to eat your certifications. So on Election Day, document, but be very careful about going into court. That's something you want to think long and hard about.

It's fun. It can be exhilarating. It can be exciting. You can get subpoenaed for a grand jury. You are going to have to hire outside counsel. In the 1981 election, I didn't have to go before a grand jury; in the Christie Whitman/Ed Rollins election. I was subpoenaed to go before a grand jury. Very nicely, the Republican State Committee offered to give me an attorney. No, no, no, I hired a Democrat to represent me, which they were very uncomfortable about at every meeting, because I had this prominent Democrat sitting there.

You're going to meet a lot of interesting people. You'll meet the "Ly" family. But your function during the campaign is to bring everybody up short, to make them understand that nothing that is morally wrong is ever politically right. It just isn't the way we do things. Sure we started that way in the 1789 Congressional election, and yeah, it looks like we did it in Middlesex County, and I could talk about Hudson County, and I will talk about the Chicago case that he mentioned. Always remember who your client is.

Hans wrote about the Chicago election, the ballot fraud in Cook County, the theft, pushing voting machines in trunks of cars and throwing them into the Chicago River. So I'm hired to go out and represent Governor Tommy Thompson to assist them in their recount. I'm going to graduate school for vote theft. I am going to be so excited. So I get on a plane and I go out there. I arrive, and Hans is right. There is corruption and there is stealing. But it isn't limited to the Democratic Party. The local counsel sits me down, he later became the U.S. Attorney, and he says, "We're making a deal, we're going to dinner tonight with some people." So I meet Mayor Daley's son, Junior. And I meet another attorney. And we decide to discuss something. And what do we discuss? You don't touch Cook County, Chicago and we Democrats won't touch DuPage County, just west of Chicago. And I'm going, "But, but, but, but" and they're going "Shh, shh." What I didn't realize was, as much as the Democrats stole in Cook, the Republicans stole in DuPage. So be careful who your client is.

Final thing. Hudson County. This one's for you, Sean. So we're doing the Kean-Florio recount. There are 1793 votes, 1794 votes. It's up, it's down, it's left, it's right. Three weeks, nobody knows who the governor is. And then a Sunday morning I'm with Tommy Greulich, Carey Edwards, Irwin Kimmelman, and myself, counting ballots in the Board of Elections office in Hudson County. Real early Sunday morning. We're winding down. It's kind of over. But, we just want to bring this thing to a conclusion and a close. My Democratic adversaries are there and there's coffee and donuts. We had all these paper absentee ballots. And the clerk to the board would take this folded ballot and would hand it to one of the Democratic Board members, who would open the ballot and he would proceed to take his hand and spread all the wrinkles out and then we'd count the votes. In New Jersey, if a paper ballot has what they call an identifying mark on it, a stray mark on it, it is rejected, the old idea being, going back to Hudson County, the only way you could prove the way they wanted you to vote was to put your initials on it or a number or a star or something. So no stray marks on paper ballots. I'll be damned. Every time it's a Tom Kean ballot, it's got a stray mark on it and it gets rejected. And I'm sitting there going, "We don't have a lot of Republicans in Hudson County, but how come they're all dumb Republicans." So I'm watching this. He unfolds them, smooths them all out. And I spotted it. In his pinky fingernail, he had a piece of pencil lead. As he smoothed it out, he put the mark on the paper. Okay. So as he went to do the next one, I grabbed his hand. The pencil lead, I mean, it sounded like an earthquake, hitting the piece of paper on the table. And everybody is looking at everybody. I won't

mention the guy's name, but he was Mayor Tommy Smith's son-in-law and Tommy Smith is standing there over me and everybody's just quiet. And I've got this grin, a Cheshire cat grin. Got him. So Tommy Smith says to me, could we step into the other room to discuss this? Well, the Deputy Attorney General wanted to come and he says, "No, we don't want you to come." We finished the recount in 10 minutes and Tom Kean had a major, major win in Hudson County. I guess I just must have been counting the votes wrong up until that point. The moral is that sometimes we find these issues, we find these things and perhaps they can be used to your benefit. As in Chicago, be sure who your client is, because sometimes you think they steal, but sometimes we steal. Thank you.

PROFESSOR AMBROSIO: I would like to give Hans just a few moments to respond to what he's heard from John.

MR. VON SPAKOVSKY: Well, I don't have a response, because it was all very, very interesting. But I will actually just mention one other thing that I didn't have time to say. That is, if you're going to be an election lawyer, and I'm sure John agrees with me on this, you need to prepare ahead of time. A lot of lawyers don't do that. What do I mean by that? You should have, ready to go on Election Day, a draft of the most commonly occurring complaints, dealing with the most commonly occurring problems that you may encounter. What is one of the most commonly occurring problems? Well, a problem in a polling place, because of voting equipment or the weather or something like that that requires you to go to a judge and ask for the polling place hours to be extended. Okay. You don't have a lot of time to draft something like that on Election Day and you had better have something that's ready to go, where you just fill in the names and the polling place and stuff like that and have it ready to go. During the 2008 election, I write a lot for different publications, so I actually have a lot of sources of various places. Someone sent to me, an anonymous source, sent to me a draft pleading that had been put together by the Obama campaign. It was a stack of pleadings about this tall of complaints dealing with every kind of imaginable problem that they wanted to have ready to go to file in states all over the country. And you better be ready for that.

The other thing I'll add, since we got kind of long is, you need to, ahead of time, put together an investigative plan in case your client loses the election and you think that there were illegalities or there were unlawful things done. Because the time to contest an election is very short. You had better have lined up, for example, a private investigator,

people that you're going to use to investigate claims that are made, that can talk to people and you better have all this lined up ahead of time and ready to go and understand what it is you have to do. Because if you're formulating a plan on Election Day, or the day after, you're way behind the curve.

MR. CARBONE: Mike, I just have one other thing. Despite the fact that we've made fun of New Jersey elections, conformance and compliance, and I just mentioned this to Hans and I think it's going to be his next article. In last year's election in Park Ridge in Bergen County, in a very close municipal election, counsel election realized they give \$1,000 if you tell me why you want to be the counsel person in Norwood. A Democratic candidate won. He won by a very small margin of 19 votes. There was a trial. During the trial, it came out that a number of non-residents voted in the Park Ridge election. His brother, his sister-in-law from the adjacent municipality, two police officers, a lady from Hoboken who had her mother cast her absentee ballot and she swore up and down that she voted Republican, except her mother was a Democratic leader in Norwood. It got so bad during the trial that Judge Wilson Mirandized every witness. Every witness. He had a PBA policeman there, a policeman. My son, both my sons are Army officers. My oldest son is on Special Forces, he's in Afghanistan now on his fourth tour, but I feel for young police officers. We took a break. I said, "Do yourself a favor, schmuck." Go see an attorney during the break, because you're going to get yourself jammed up and you're going to lose your pension. "Oh, no. No. No." Well, he did. He went and saw somebody and he came back and said, "I talked to my PBA rep. He said they never indict cops." The Bergen County prosecutor, John Molinelli, in March of this year, charged seven people, including two police officers and someone from Hoboken for voting illegally in the election. The results changed. These people pleaded to crimes of the third degree, crimes of the third degree. That's heavy. That's not a misdemeanor. It's not a fourth. Crimes of the third. We do prosecute. That was a Democratic prosecutor, prosecuting Democratic voters. The process does work. The process does work. There are occasionally anomalies, but the process generally works.

PROFESSOR AMBROSIO: Let me thank our speakers for wonderful, practical suggestions about how to practice law in the political arena.