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The Honorable Johnny Isakson
Chairman
Senate Ethics Committee
220 Hart Senate Office Building
Washington, DC 20510

The Honorable Barbara Boxer
Vice Chairman
Senate Ethics Committee
220 Hart Senate Office Building
Washington, DC 20510

The Honorable Charles Dent
Chairman
House Ethics Committee
1015 Longworth HOB
Washington, DC 20515

The Honorable Linda Sanchez
Ranking Member
House Ethics Committee
1015 Longworth HOB
Washington, DC 20515

Dear Chairman Isakson, Vice Chairman Boxer, Chairman Dent & Ranking Member Sanchez:

The Campaign Legal Center strongly urges the Senate and House Ethics Committees to issue new guidance interpreting congressional rules that addresses how Senators and Representatives should avoid or reduce the appearance of special treatment or legislative favors for political donors.

New, more detailed guidance is needed because existing guidance was drafted prior to new developments in campaign finance jurisprudence, regulations and practice in the aftermath of the *Citizens United* decision. They are premised on a system that has enforceable limits on an officeholder's solicitation of campaign contributions. While the general rules and admonitions regarding the need for Senators and Representatives to act in a manner that is above suspicion do apply to a range of current campaign finance activities, they do not provide specific enough information and advice to Senators and Representatives about how to protect against the appearance of special favors for political donors to Super PACs and dark-money groups. Current practices that create the appearance of a link between contributions solicited and favors provided fail to uphold public confidence in the institution as is reflected in numerous polls which show Congressional job approval hovering in the low teens.

Four notable changes relating to campaigns and contributions that affect the application of rules governing the appearance of special treatment of donors have occurred since the Committee last spoke publicly on this issue in 2002. First is the emergence of Super PACs in the aftermath of the Supreme Court's decision in *Citizens United v. FEC*. Super PACs can accept unlimited

amounts of money from donors. The second change is the growing number of candidate-connected Super PACs – PACs that are ostensibly independent but which have close ties to candidates and are perceived by the public as an affiliated arm of the candidates. Third, the Federal Election Commission (FEC) recently issued new guidance that allows candidates (including Senators) to solicit funds for Super PACs in essentially private meetings. These private meetings, especially when coupled with the Super PACs’ ability to raise unlimited funds, are likely to create the appearance of special access and treatment, particularly given the amount of money involved in Super PAC contributions and expenditures. Fourth, is the rise of so-called dark-money groups that are organized as 501(c)(4) social welfare entities and spend significant amounts of money on activities intended to influence the outcome of elections.

Relevant Laws and Standards

The problem of creating the appearance of special favors provided by Members of Congress to donors and political supporters is not new. In addressing this concern, the *Senate Ethics Manual (Senate Manual)* cites a Special House Committee, which investigated the “Credit Mobilier” scandal more than 100 years ago:

No member of Congress ought to place himself in circumstances of suspicion so that any discredit of the body shall arise on his account. It is of the highest importance that the national legislature should be free of all taint of corruption, and it is of almost equal necessity that the people should feel confident that it is so.

The *Senate Manual* goes on to say:

Because Senators occupy a position of public trust, every Senator always must endeavor to avoid the appearance that the Senator, the Senate, or the governmental process may be influenced by campaign contributions or other benefits provided by those with significant legislative or governmental interests.¹

The admonition to avoid the appearance created by a Senator’s solicitation of money is not just limited to requests for contributions to his or her own campaign. The *Senate Manual* includes contributions to a Senator’s “causes.”²

The *House Ethics Manual (House Manual)* provides more complete guidance on the prohibitions against “linking official actions to partisan or political considerations.”³ That guidance provides that:

It is probably not wrong for the campaign managers of a legislator . . . to request contributions from those for whom the legislator has done appreciable favors, but this

¹ *Senate Manual* at p. 184.

² *Senate Manual* at pgs. 183 and 194. The term “cause” is not further defined in the *Manual*, A Senator’s solicitations for contributions to party committees and other entities to which a Senator may lend his or her support, such as Super PACs and dark-money groups, thus are reasonably covered by this term. Also, 18 USC §607 prohibits the solicitation of any campaign contribution in a federal building, not just contributions for a Senator’s own campaign committee.

³ https://ethics.house.gov/campaign-activity/campaign-contributions-and-contributors#campaign_no_special_access.

should never be presented as a payment for the services rendered. Moreover, the possibility of such a contribution should never be suggested by the legislator or his staff at the time the favor is done. Furthermore, a decent interval of time should be allowed to lapse so that neither party will feel that there is a close connection between the two acts. Finally, not the slightest pressure should be put upon the recipients of the favors in regard to the campaign.⁴

This guidance has also not been updated post-*Citizens United*.

U.S. Senate

Senate Rule 43 requires Senators to avoid creating improper links between campaign contributions and official actions when “assist[ing] petitioners before executive and independent government officials and agencies. The Rule states: “The decision to provide assistance to petitioners may not be made on the basis of contributions or services, or promises of contributions or services, to the Member's political campaigns or to other organizations in which the Member has a political, personal, or financial interest.”⁵ (Emphasis added.)

Guidance included in the *Senate Manual* recognizes that Senators are not barred from pressing the case of a campaign contributor if the Senator reasonably believes “it is in the public interest or the cause of justice or equity to do so.” But the *Senate Manual* also warns that “[b]ecause Senators occupy a position of public trust, every Senator always must endeavor to avoid the appearance that the Senator, the Senate, or the governmental process may be influenced by campaign contributions or other benefits provided by those with significant legislative or governmental interests.” The *Senate Manual* further cautions Senators to be “mindful of the appearance that may be created and take special care to try to prevent harm to the public's trust in the Senator and the Senate.”⁶

While Senate Rule 43 directly refers to actions before executive agencies, the Committee has found that Senators must also take care that their legislative actions and other acts that benefit campaign contributors do not give rise to the appearance of special treatment. The *Senate Manual* also cites a “Dear Colleague” letter written in August 2002 by Sen. Reid when he was Chairman of the Ethics Committee. The “Dear Colleague,” co-signed by then-Vice Chairman Sen. Pat Roberts (R-KS),⁷ was written in response to the so-called “K Street Project” connected with former House Majority Leader Tom DeLay (R-TX).

The letter noted Rule 43's prohibition against providing assistance on the basis of campaign contributions and cited an earlier “Dear Colleague” from 1987 that said: “Obviously Senators must discuss policy and legislative issues with constituents, political supporters, and individuals and organizations with specific concerns and interests in legislation. Frequently such meetings will include campaign contributors.” The Committee also stated, however, that it is

⁴ The *House Manual* cites Paul H. Douglas, *Ethics in Government* at pgs. 89-90 (1952).

⁵ *Senate Manual* at p. 330.

⁶ *Senate Manual* at p. 184.

⁷ The Committee has historically issued advice in the form of “Dear Colleague” advisory letters covering a particular subject (*Manual* at xi).

neither necessary nor appropriate "for Members to offer special treatment, such as automatic access to those discussions, to contributors in return for campaign contributions." The 2002 "Dear Colleague" noted that the House Ethics Committee had made a similar determination regarding taking or withholding any official action on the basis of campaign contributions.⁸

The 1987 and 2002 "Dear Colleague" letters thus set forth a broader application of Senate Rule 43 to bar Senators from "offer[ing] special treatment" or "access" to campaign contributors in connection to legislative activity—not merely with respect to issues before executive agencies. As the *Senate Manual* explained when discussing the Reid-Roberts "Dear Colleague":

[T]he Committee also advised Members that identifying those seeking access to Members based on party affiliation, political contributions or past employment, or encouraging others to do so, suggests a motive to grant special access, or deny access, based on those criteria and tends to adversely affect public confidence in the Senate. Therefore, the Committee advised that Members should take every effort to avoid any conduct which may create the appearance that, because of party affiliations, campaign contributions, or prior employment, a petitioner will receive or is entitled to either special treatment or special access, or be denied access.

U.S. House

The U.S. House of Representatives has gone further in explaining the prohibition against linking official actions to partisan or political considerations. Guidance on the House Ethics Committee's website specifically addresses this issue.⁹ The guidance states as follows:

A solicitation for campaign or political contributions may not be linked with an official action taken or to be taken by a House Member or employee, and a Member may not accept any contribution that is linked with an action that the Member has taken or is being asked to take. A corollary of these rules is that Members and staff are not to take or withhold any official action on the basis of the campaign contributions or support of the involved individuals, or their partisan affiliation. Members and staff are likewise prohibited from threatening punitive action on the basis of such considerations.

The guidance in the *House Manual* addressing solicitations by Members of Congress for charitable organizations and other "non-qualified" entities was written before the advent of Super PACs and dark-money groups. The guidance is not sufficiently clear as to the permissible activities of Members and staff when soliciting funds for dark-money groups.

As a general matter, the Committee permits (without the need to seek prior Committee approval) Members and staff to solicit on behalf of organizations qualified under § 170(c)

⁸ Among the reports linking the "K Street Project" to legislative activity was a report that then-House Speaker Newt Gingrich (R-GA) and Rep. DeLay "held up a bill protecting intellectual property right to protest the electronic industry's decision to hire a former Democratic congressman from Oklahoma." While this matter did not directly involve the making of contributions, the letter's reference to providing assistance based on campaign contributions shows the same ethical rules were involved, <http://www.npr.org/templates/story/story.php?storyId=5148982>.

⁹ https://ethics.house.gov/campaign-activity/campaign-contributions-and-contributors#campaign_no_special_access.

of the Internal Revenue Code – including, for example, § 501(c)(3) charitable organizations – subject to certain restrictions. Solicitations on behalf of non-qualified entities or individuals are decided on a case-by-case basis through the submission to the Standards Committee of a written request for permission to make such solicitations. The general permission granted by the Committee does not extend to activities on behalf of an organization, regardless of tax status, that was established or is controlled by Members (or staff). In such circumstances the Member must seek and be granted written permission by the Standards Committee before making any solicitations on the organization’s behalf. Such permission will only be granted for organizations that exist for the primary purpose of conducting activities that are unrelated to the individual’s official duties. The Committee has determined that the only exceptions under the statute are for solicitations on behalf of the campaign and other political entities.¹⁰

The House explanation of the prohibition against linking official actions to partisan or political consideration makes clear that the “guidance is applicable to all official actions taken by Members and staff, including with regard to legislation,” and cites paragraph 5 of the *Code of Ethics for Government Service* which is incorporated by reference into Senate Rules.¹¹:

5. Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept for himself or his family, favors or benefits under circumstances which might be construed by a reasonable persons as influencing the performance of his governmental duties.

It also cites paragraph 10 of the “Code” that says “public office is a public trust,” and thus the public has a right to expect House Members and staff to exercise impartial judgment in performing their duties.

What Has Changed and the Need for More Guidance Related to Activities Giving Rise to the Appearance of Special Treatment Because of Campaign Contributions

When the Committees last issued guidance about avoiding actual or perceived connections between official action and campaign contributions, the maximum contribution amount was \$1,000 per election for an individual and \$5,000 per election for a political action committee.¹² Since the 2010 *Citizens United* court decision, followed by *SpeechNow v. Federal Election Commission (FEC)* and *McCutcheon v. FEC*, Senators are allowed to solicit contributions at fundraising events for Super PACs, i.e., political committees that can raise unlimited contributions from individuals, corporations and unions. While the FEC turned down a request from two candidate-connected Super PACs to allow federal officeholders and candidates to solicit unlimited contributions for Super PACs, they did allow officeholders and candidates to solicit for each Super PAC \$5,000, the legally-permissible amount they may solicit from one donor to a traditional PAC.

¹⁰ *House Manual* at p. 348.

¹¹ *Senate Manual* at p. 436.

¹² The indexing of individual contribution limits began in 2003 as part of the Bipartisan Campaign Reform Act.

In practice, however, this \$5,000 solicitation restriction is essentially meaningless, because a Senator can appear at a Super PAC fundraiser and make a “limited” ask while a representative of the Super PAC solicits unlimited amounts either at the fundraiser or in a subsequent follow-up meeting.

Furthermore, recent guidance from the Federal Election Commission has further eased the restrictions on Senators’ ability to raise funds for Super PACs.¹³ Just this past November, the FEC issued, by a 4-2 vote, an Advisory Opinion (AO 2015-09) that held for the first time that just two attendees—the prospective donor and a Super PAC representative—in addition to the candidate are needed to qualify a meeting as a “Super PAC fundraising event.”. This ruling allows a candidate to attend what is effectively a private meeting with a donor where a representative from “his” Super PAC can solicit unlimited amounts, sending a clear message to the contributor and to the public that the contribution is tied to support of the candidate. Allowing Senators to participate in this kind of private meeting will place Senators in a position where there is the appearance of special access and special treatment.¹⁴

The magnitude of the money involved in solicitations post-*Citizens United* merits heightened attention. The *Manual* already recognizes that the “amount of money contributed” by a donor is a central factor to be weighed as a Senator determines whether to assist a donor.¹⁵

An Example to Consider

A December 17, 2015 article in *HuffPost Politics* illustrates the urgent need for further guidance in this area. The article recounts a situation where Senate Minority Leader Harry Reid (D-NV) solicited campaign contributions from a donor whose financial interests subsequently benefited from legislative actions taken by Sen. Reid.

According to the article, then-Senate Majority Leader Reid directly solicited campaign contributions from private equity CEO David Bonderman at a meeting in May 2013 at the Milken Institute. The article states, “[T]he private equity giant then gave more than \$1 million to a super PAC connected to Reid, and Reid later moved to insert two pieces of language into the 2015 end-of-year omnibus budget bill that would be a boon to Bonderman.”¹⁶

According to *HuffPost Politics*, in a meeting with Sen. Reid, Mr. Bonderman “gave Reid a rundown of the difficulties [the Las Vegas casino company] Caesars was having that led to a controversial restructuring and bankruptcy.” Mr. Bonderman’s company, TPG Capital, was a part owner of Caesars, which resulted in multi-billion dollar debt for the company. Mr.

¹³ Ian Swanson, *FEC makes it easier for candidates to ask for Super PAC donations*, THE HILL, Dec. 25, 2015.

¹⁴ The FEC also advised that candidates’ agents can solicit unlimited contributions to Super PACs, further connecting million-dollar contributions directly to Senators and Senate candidates.

¹⁵ *Manual* at p. 184. “Has the contributor given or raised more than an average contribution?”

¹⁶ Ryan Grim and Paul Blumenthal, *Harry Reid Directly Solicited Contribution from Private Equity Giant Before Controversial Rider*, *HuffPost Politics*, Dec. 17, 2015. According to *Politico*, Senate Majority PAC’s operations were led by Rebecca Lambe, a former chief political strategist for Senator Reid during his 2010 reelection campaign, and Susan McCue, Sen. Reid’s former Senate Chief of Staff. <http://www.politico.com/story/2011/02/senate-dems-launch-super-pac-050010>.

Bonderman reportedly was seeking legislative changes to laws governing finance and bankruptcy.

After Mr. Bonderman finished his presentation, *HuffPost Politics* reports that Sen. Reid expressed concern to Mr. Bonderman about the ability of the Democrats to hold on to the Senate majority and asked him for a contribution. "Often, after a lawmaker or candidate asks for the legal limit, a fundraiser connected with the Super PAC will follow up," the article states. Mr. Bonderman and his wife subsequently made seven contributions to Senate Majority PAC during the 2014 elections cycle. The Bondermans were also donors in lesser amounts in 2012 to the Senate Majority PAC as well as Super PACs run by EMILY's List and the League of Conservation Voters. "This was, however, their single biggest investment to one group in an election cycle to support Democrats," according to the article.

The article reports that Sen. Reid attempted to insert two provisions into the 2015 Omnibus budget bill. One would have made significant changes to a "Depression-era financial law [Trust Indenture Act] to help Mr. Bonderman's TPG Capital muscle out public pensions and other bondholders in a battle over the potential bankruptcy," the article stated. That measure was not included in the final bill after running into opposition from other Democrats who were "concerned about preserving an important law safeguarding less powerful investors." A second provision that *HuffPost Politics* says was also beneficial to Caesars was included in the Omnibus. That provision relates to a Real Estate Investment Trust—"a special legal entity that received favorable tax treatment compared to other corporate structures. The omnibus bill was set to wipe out those tax benefits, but Reid secured a measure that would allow Caesars to continue to receive them," the article said.

Need for Additional Guidance from the Committee

The Senate and House Ethics Committees should issue new, more explicit guidance to members of each body to better protect against the appearance of special access or treatment related to official actions (including legislative activities and contacts with executive branch and independent agencies). The Committees should also publicly disclose their reasoning in determining the guidance in order to make clear to Senators, Representatives, staff and the public the range of permissible activities. The rise of Super PACs, especially Super PACs closely connected with candidates, and dark-money groups (501(c)(4) organizations active in the election arena) have increased exponentially the potential for creating the appearance of special treatment for campaign contributors. This danger has been exacerbated by the recent FEC ruling which now permits sitting Senators and Representatives to participate in small, private meetings with donors, many of whom are likely to have legislative or administrative matters of concern on which the official could potentially be helpful.

We urge the Committees to issue new guidance that incorporates the following:

➤ **Limit Discussions of Official Actions When Soliciting Donors in Private Meetings**

The Committees should provide new, more explicit guidance regarding the discussion of specific policy matters and the solicitation of campaign contributions, whether for authorized campaign committees, party committees, leadership PACs, Super PACS or

dark-money groups in private meetings since such discussions can reasonably create the appearance of special access or treatment. The new guidelines should make clear that it is improper for a Member or staff to discuss legislative matters and policy issues in private meetings when such a solicitation is made, either by the Member or by someone else. The nexus between the solicitation and official action creates the impression, especially on the part of the donor, that there is linkage between the solicitation and the actions a Member may or may not take related the matter under discussion. The potential for creating the appearance of a linkage is even more dangerous given the FEC's action to permit essentially one-on-one solicitations for Super PACs.

➤ **Clarify “Senator’s Causes”**

The Senate Committee should clarify what is meant by the term “Senator’s causes” to which the *Senate Manual* refers and specify that this applies to Super PACs which support the candidate.

➤ **Apply the “Keating Five” Rules to Legislative Action**

In the aftermath of the “Keating Five” scandal, the Senate Ethics Committee and outside counsel issued revised guidance to assist Senators in their determination of whether to intercede with an administrative agency when a donor is involved. The questions the guidance states a Senator should consider are:

- The amount of money contributed. Has the contributor given or raised more than an average contribution?
- The history of donations by a contributor. Has the constituent made contributions to the Senator previously?
- The nature and degree of action taken by the Senator. To what extent does the action or pattern of actions deviate from the Senator’s normal conduct?
- The proximity of money and action. How close in time is the Senator’s action to his or her knowledge of or receipt of the contribution(s)?

Both the House and Senate Ethics Committees should make clear that this guidance also applies when a Senator or Representative is making the determination to undertake legislative activities at the request of or to benefit a donor, especially if it is a donor whom the Member has solicited for contributions to either a campaign committee or other entities engaged in political activities such as Super PACs and dark-money groups.

The guidance should prescribe a cooling-off period between making a solicitation and undertaking actions to benefit the donor (or potential donor).

➤ **Clarify the Guidance for Dark-Money Groups**

The Committees should issue new guidance that distinguishes between the solicitation of campaign contributions related to Super PACs and the solicitation of contributions to dark-money groups. While the exceptions in the congressional gift rules explicitly provide the solicitation of campaign contributions, donations to dark-money groups are not

included in this exception. Without clearer guidance, Senators and Representatives may not have sufficient information to understand what constitutes a potential violation.

Conclusion

Just as both the House and Senate Ethics Committees moved to provide greater clarification about interceding with administrative agencies in the aftermath of the Senate Ethics Committee's investigation of the Keating Five and the K Street Project, the Committees should similarly act to provide greater clarification about the rules governing legislative actions in the aftermath of the *Citizens United* decision and its progeny. Similarly, just because the FEC has stated that soliciting campaign funds for Super PACs in a private meeting is statutorily permissible does not mean that it will not create serious ethical problems. Those problems are within the province of the Ethics Committees.

Issuing new guidance is a much-needed service to Senators and Representatives and their staff and will help them avoid or reduce the appearance of special treatment when soliciting donors for contributions to Super PACs, especially candidate-connected Super PACs, and dark-money groups acting on matters of concern to those donors, whether through legislative action, legislative advocacy¹⁷ or through other actions in the exercise of their official duties.

We look forward to hearing from you regarding the Committees' efforts to address these important matters.

Sincerely,

Meredith McGehee
Policy Director

¹⁷ The *House Ethics Manual* differentiates between voting and other legislative "advocacy" actions such as "sponsoring legislation, advocating or participating in an action by a House committee, or contacting an executive branch agency." The Senate Ethics Committee should consider a similar explicit construct.