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40th Anniversary Keynote Address
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Thank you very much for inviting me to be here today. The 40th Anniversary of the establishment by voter initiative of the California Fair Political Practices Commission (FPPC) is an event in American political life and law well worth celebrating. After many years working with and for government agencies, I know that their success depends on a talented and committed staff. I would like to begin by acknowledging and thanking all of the hard working women and men at the FPPC, both those at the Commission now and those who have given many years of their lives to it. You have made this agency a true success story and national model in the field of campaign finance disclosure and enforcement. Thank you.

This year marks a milestone anniversary for the FPPC and California and for the nation. Forty years ago the nation experienced the end of the Watergate scandal with Richard Nixon's resignation from the Presidency. The public outrage over the unethical and illegal conduct uncovered in the Watergate investigation resulted in the enactment of reforms at both the federal and state levels. The FPPC and its federal counterpart—the Federal Election Commission (FEC), also created in 1974—were a direct response to the nation's recognition of the corrosive danger of large, or undisclosed, sums of money in politics. The 40th Anniversary of these comprehensive reform measures provides a good opportunity to take stock of where we are at this point—what is working and what is not in our campaign finance system and the enforcement of campaign finance laws—and where we might go from here.

As we begin to evaluate where we are, I'd like to start with the positive and what is working—especially the FPPC. Since its creation, the FPPC has worked hard to fulfill its mission of enforcing the state's campaign finance, lobbying and ethics laws. The FPPC—as part of the Political Reform Act—was approved by California citizens with an impressive 70 percent of the vote.

When the Political Reform Act appeared on the ballot, the argument in favor of the Act, read:

> It is time for the people of California put an end to corruption in politics. It is time politicians are made directly responsible to the people—not to purchased demands of special interests. It is time to open wide the doors of the state capitol, of county boards, and of city halls so that we may all look inside. . . . Big money unduly influences politics: big money from wealthy individuals and wealthy organizations. In politics, these powerful interests—whatever their party—usually have one goal: special favors from government.

These words echo much of what is said about money in politics today. That this 40-year old ballot description could have been written to describe present-day concerns about the role of money in politics, underscores the fact that no reform is ever the final answer in the world of democratic self-government: reforms are enacted, they succeed for a while, then memories of scandal grow dim, the special interests begin to push the edge of envelope, carefully at first and then more aggressively and recklessly, the watchdogs get defanged through either regulatory capture or legislative and budgetary neglect, and things then return to their previous sorry state until the next scandal creates a demand for action. Governor Brown's great story in this morning's video about how the disclosure statute in California was ignored when he first began in politics makes the point. We are, I believe, again in such a period, where the norms of enforcement and disclosure established after Watergate are under attack.

In this environment, the FPPC's effective enforcement of the law's disclosure requirements provides a rare—and much needed—beacon of light at a time when undisclosed dark money is flooding into our elections and when state and federal disclosure laws face persistent attacks aimed at narrowing their reach. As you are all well aware, wealthy contributors seeking to influence California voters on two state ballot initiatives, while hiding their involvement, funneled more than $12 million into election expenditures through out-of-state nonprofits in the closing days of the 2012 election. The funders—including some California residents—sought to keep their donations anonymous by channeling the money through organizations that, under federal law, do not have to publicly disclose their donors. It is exactly these types of contributions and transfers that have led to the proliferation of undisclosed dark money in campaigns at all levels across the country. California law, on the other hand, requires that the underlying source of significant political spending in California elections and ballot campaigns be disclosed. The FPPC, under Ann Ravel, then-Chair of the FPPC, and Gary Winuck, Enforcement Division Chief, worked with the California Attorney General to ensure that voters knew the true source of these donations. The California Supreme Court met on a Sunday to enable disclosure to occur.

I would like to highlight two crucial aspects of this story: (1) The Commission's recognition that the disclosure of the true sources of campaign funding was most valuable before the election, and worth fighting for; and (2) the Commission's follow through in investigating and holding accountable the groups and individuals who tried to avoid disclosure. The combined effect demonstrated to political players and the citizens of California that the law is enforced in this state. This in turn increases citizens' faith in the institution created to defend their interests. As Chair Jodi Remke told us earlier this morning, enhanced and timely disclosure is a top FPPC priority today.

Although the FPPC's efforts are commendable, and worth recounting today, they should not have been novel because the Commission was simply doing its job. However, in today's world where the laws on the books are merely just that, and often do not reflect actual campaign practices, this case was novel. The FPPC acted on an expedited basis to make information available to the electorate before the election. This simply cannot be done today at the federal level, and under the enforcement procedures of many states.

Why is the 2012 California example such a novelty nationally? Unfortunately, there is so much to say on this topic, I could go on all afternoon. From a 10,000 foot level, I would attribute many of the problems with the current system to a general disregard for the law. In particular, I think it is most evident when you look at two things: (1) ineffective executive agencies; and (2) the resulting disconnect between the laws on the books and actual campaign practices, most notably, political players' ability and willingness to essentially nullify duly enacted laws. I believe we are currently in a situation where there is now a significant disconnect between the campaign finance laws on the books, on the one hand, and the way campaigns are actually conducted on the other.

For example, let's look at two aspects of the Supreme Court's *Citizens United v. FEC* decision, where the Court said the law was one thing, and today's reality is quite another. The Court made two statements of law (or assumptions of fact): (1) that the sources of independent spending would be fully disclosed; and (2) that independent spending would in fact be independent.

Let's begin with disclosure. To state the obvious, we do not now have full disclosure in federal elections. To the contrary, political funders at the federal level have the choice of disclosure by contributing to Super PACs (assuming they do not do so through a shell corporation, in which case the true donor is not disclosed) or non-disclosure by funneling their contributions through 501(c)(4)s and (c)(6)s and other entities that do not disclose their donors to the public. Expenditures on political ads in federal elections paid for by outside groups that did not fully disclose their donors quadrupled between 2008 and 2012, increasing from $69 million to more than $310 million, with every sign that such spending this year will dominate many key Senate, House, and gubernatorial races.

A study released yesterday by the Wesleyan Media Project led to the headline "TV Political Ads Aired by Outside Groups Dominated by Those Not Disclosing Donors." The study found that in Senate races this summer more than half of all advertising was from groups that did not disclose their donors. In House races, the figure is that more than 60 percent of advertising is coming from dark money groups.

The Supreme Court has stated that donor disclosure provides voters with critical information about who is supporting and opposing candidates. This information can help voters determine who elected officials will be indebted to once they are in office. In fact, while the Supreme Court has recently struck down the prohibition on corporate and union independent expenditures (*Citizens United*) and the limits on aggregate contributions (*McCutcheon v. FEC*), it has consistently upheld the importance of disclosure within our campaign finance system. Beginning with its seminal campaign finance decision, *Buckley v. Valeo*, and continuing with its most recent decisions in this field, the Court has supported efforts to disclose the sources of campaign funding, upholding the McCain-Feingold disclosure provisions for issue advocacy "electioneering communications" (those mentioning a candidate in so called issue ads 30 days before a primary or 60 before a general election) by an 8-1 vote.

However, the FEC has effectively gutted the electioneering communications and independent expenditure disclosure provisions of federal law, through regulations contrary to the

statute and then deadlocks on enforcement actions. The FEC's disregard for what the Supreme Court has said on disclosure is a serious problem for our democracy. Shareholders who do not know how their corporations are spending their money lack the very information necessary to object to that spending. And voters lack the information which the Supreme Court has said is essential for a well-informed electorate to judge political advertising and hold elected officials accountable.

I know that California came close to passing a more rigorous disclosure law this summer. The California DISCLOSE Act would require some political advertising to display the names of the three largest individual funders. This legislation failed because certain major political players prefer voters not know that much information about who—exactly—is trying to influence them.

Although some describe the battle over disclosure as a partisan one, that is not correct. The reality is that those who believe they can raise more money without disclosure fight to keep that perceived advantage. Many times these are economic or ideological interests who believe their desire for greater resources outweighs all other interests, even if it means their opponents can raise the same resources from their secret sources—or more.

In Washington, those pushing to keep money secret have been the Republican leadership, and the Chamber of Commerce, which fears a loss of political power if its business members cut their political giving rather than face shareholder and customer objections over disclosed political spending. In Sacramento, in the battle over the California DISCLOSE Act, it has been labor unions. In Arizona, it has been the Democratic Attorneys General Association, which does not want to disclose the $1.5 million it spent attacking the Republican candidate for Attorney General.

> So the debate is not so much partisan as a matter of those who are raising and spending secret money—on all sides—trying to keep it that way. In addition to the Court's error in assuming that the funders of independent spending would be disclosed, the danger is that soon everyone will be doing it everywhere, and it becomes addicting, and thus harder to put the genie back in the bottle.

The Supreme Court's second incorrect assumption in *Citizens United* was that all of the independent spending unleashed by the decision would be "totally," "truly" or "wholly" independent of candidates—words used in several Supreme Court decisions going back to *Buckley* to explain the sort of speech that the government cannot limit. Justice Kennedy, writing for the majority in *Citizens United*, said, "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." The Court's expectation that independent expenditures are not coordinated with a candidate is built on the *Buckley* Court's description of independent expenditures as "totally" independent of a candidate and his/her campaign, and the legal conclusion that they do not create the same potential for corruption as expenditures in which the candidate or his/her agents are involved.

The Supreme Court's 2003 *McConnell v. FEC* decision followed this line of reasoning referring to "wholly" independent expenditures. Justice O'Connor wrote for the majority, "[T]he rationale for affording special protection to wholly independent expenditures has nothing to do

with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. . . . Independent expenditures are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate's point of view. By contrast, expenditures made after a wink or nod often will be as useful to the candidate as cash." The unfortunate reality is that many of today's allegedly independent expenditures are made with a wink and a nod. I do not recall a time in my professional work in this area when a Supreme Court standard for conduct has been at such variance with the reality of how campaigns are actually conducted.

In his book *Big Money*, Ken Vogel describes the decisions of each of the 2012 Presidential candidates to set up or bless the creation and staffing of Super PACs organized for the sole purpose of supporting their candidacies. Remember that the Supreme Court said "independent" spending is "totally/truly/wholly" independent of candidates and therefore cannot corrupt candidates. In reality, single-candidate Super PACs are now almost always run by close allies of the candidate, publicly blessed by the candidate, and sometimes the beneficiary of direct fundraising by the candidate. Senior officials in Governor Romney's campaign reportedly created the entity that the Governor referred to in a press conference as "my Super PAC." Governor Romney also attended a meeting to thank major Super PAC donors.

On the other side, President Obama's Super PAC was run by former White House aides, and publicly blessed by the President. Top administration and campaign aides were enlisted to raise funds for its "independent" efforts. It is exactly these signals of coordination—the candidates blessing, the presence of high level staff and certainly the candidate's personal thank you—that makes major donors comfortable and Super PAC fundraising so successful. Donors don't want to do something unhelpful to a candidate, so they want assurance that the Super PACs are acting with the candidate's approval and they want the candidate to be grateful.

Now we have the legal battle in Wisconsin, where top campaign aides for Governor Walker allegedly coordinated with outside groups making independent expenditures. One recently released document from the ongoing litigation in that case quotes a fundraising consultant for Governor Walker as saying, in the process of raising money to be spent to defend the Governor in the recall campaign, "As the governor discussed . . . he wants all the issue advocacy efforts run thru one group to ensure correct messaging. We had some past problems with multiple groups doing work on 'behalf' of Gov. Walker and it caused some issues."

This isn't even Justice O'Connor's "wink and a nod." The legal fiction that these "independent outside groups" are truly outsiders unconnected to the candidate and officeholder, and thus the candidate will not be beholden to them, is shredded in conversations such as these. All of this reminds me of the statement in Charles Dickens' novel *Oliver Twist*, "If the law supposes that . . . the law is a[n] ass – a[n] idiot."

Why is it that our campaign practices are now so far from the wording of our statutes, or the expressed interpretation of our courts, as in these examples of disclosure and independent spending? There appears to be a dangerous new lawless reality in Washington and many states: laws are passed by democratically elected legislators; the laws are then signed by the President

or Governor, only to be completely frustrated by political actors who do not have the legislative strength to change them but do have sufficient strength to block their enforcement.

Perhaps no other agency represents this dysfunction and unraveling of the law better than the FEC. Again, the FEC is also celebrating its 40th anniversary this year—although I'm afraid the FEC has much less to celebrate and the occasion merely marks another year for that gridlocked agency. I know FEC Vice Chair Ravel hoped to change this when she accepted her appointment to the Commission—I wish I thought she would be able to work magic and turn things around during her year as Chair in 2015, but as far as I know she will have to work with the same three-three partisan and philosophical divide on the Commission during her Chairmanship.

In recent years (and this is a new development) the FEC has had the persistent problem of deadlocking along party lines on important policy and enforcement questions—and the effect of a three-three deadlock is that the Commission does not have the four votes required by statute to take "any action" and therefore lies there, dead in the water, unable to move. Often, the FEC is not enforcing the statute even in cases that the staff have found evidence of clear and blatant violations of the law, because even opening an investigation and asking questions requires four votes—a two-thirds majority of the Commission. Thus many cases, involving huge expenditures of money in federal elections, are dismissed at the pre-investigation stage of the enforcement process at the FEC.

In the case of the IRS, political efforts to undermine the law and the turmoil it can create have been well documented. The Internal Revenue Code provides a tax exemption for section 501(c)(4) organizations defined as "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." However, the agency's implementing regulation, apparently for administrative ease, stated that an organization is operated "exclusively" for the promotion of social welfare if it is "primarily" engaged in promoting social welfare. Although the IRS has never defined that term, practitioners used to advise that 501(c)(4) organizations avoid more than some relatively low level of political expenditures to avoid IRS challenge. However, with the recent explosion in the use of 501(c)(4)s as vehicles to engage in secret political spending, aggressive practitioners now advise their clients that up to 49 percent of an organization's activity can be political without becoming its primary purpose—they then claim that political activity should be defined under the tax laws in a far narrower way than it is defined by the election laws. Now, after the "IRS scandal" created by an overwhelmed IRS administering the 501(c)(4) regulations in demonstrably stupid and politically disastrous ways, the IRS shows little interest in enforcing any part of the 501(c)(4) standards because of the backlash in Congress from the alleged targeting of conservative applicants.

Finally, the Election Assistance Commission (EAC) has been reduced to an agency in name only by Congressional nullification. Created by Congress in response to public opinion in the wake of the 2000 Florida presidential election debacle, the EAC is an independent, bipartisan federal agency charged with developing guidance to meet the requirements of the Help America Vote Act, and act as a clearinghouse for information on election administration. The Commission, which is supposed to be comprised of four Commissioners—two Democrats and two Republicans—has not had a quorum since 2009 and has not had a single Commissioner

since December 2011. That's five years of essentially a zombie agency. And with each passing year parts of our system of election administration become more and more out of date. The agency's most recent voting system guidelines were adopted in 2005—that's nearly ten years ago and completely unacceptable in a field dealing with rapidly changing technology. The reason for this bizarre state of affairs appears to be that congressional Republican leaders no longer support the existence of the EAC—but do not have the votes in Congress to pass legislation abolishing it. So they have simply prevented the nomination of new Republican Commissioners, or confirmation of Democratic ones. A clever way for one party in the minority to legislate without legislation and I think dangerous for transparent and constitutional government.

It is a dangerous moment for our system of government when existing laws can effectively be nullified without legislation and Presidential signature. Such an environment allows political players—including FEC Commissioners acceding to their party's policy wishes at the expense of the statute—to ignore the law and do what they want, secure in the knowledge that Congress itself is gridlocked and will not act to correct the situation, and remedies in the courts are difficult to obtain and long in coming.

So where do we go from here? And what do we want moving forward? First and foremost, we need the full disclosure of the true sources of campaign spending that the Supreme Court said is important to the successful functioning of our democracy. As the Court itself has noted in discussing the Internet in *Citizens United* and *McCutcheon*, we have never had more powerful tools for timely and easily accessible disclosure. However, without meaningful content these tools are of little use. It is time to bring campaign fundraising and spending into the daylight and give voters full, timely, and accurate information about who is supporting and opposing candidates.

Second, we need to take a look at how our elections are funded. Candidates are increasingly elected as a result of large dollar donations and expenditures of wealthy individuals and interest groups. We have seen increasingly more money given to candidates and parties after the Supreme Court's *McCutcheon* decision, and vastly more money given to Super PACs and 501(c)(4)s after *Citizens United* and *Speech Now*. Super PACs are overwhelmingly funded by very wealthy contributors—the one percent of the one percent of the one percent. In the 2012 election, just 1,587 donors were responsible for more than $760 million, or 89 percent, of all Super PAC contributions. President Obama, who as a candidate had unprecedented success raising money from small dollar contributors, is quoted in Ken Vogel's book *Big Money* as saying at a fundraiser in 2012 to a roomful of Seattle millionaires and billionaires, "You now have the potential of 200 people deciding who ends up being elected President every single time." This is a fundamentally anti-democratic prospect which would have appalled our founders, who believed they had created a form of government which a tiny financial aristocracy could not dominate, as the British aristocracy controlled Parliament.

It is clear that officeholders today spend far more time raising money from a tiny elite than talking with most voters. A Power Point slide prepared by the Democratic Congressional Campaign Committee (DCCC) and presented to incoming Democratic freshmen after the 2012 election provided the newly minted Members with a "Model Daily Schedule" for the days they're in Washington, and the single largest item on it was fundraising telephone calls—at 40

percent of their supposed workday. This compared with 20 percent of their time on Congressional business, which is the work they are actually paid by the American people to go to Washington and do.

Preventing incumbent Presidents from selling official action, or spending their uniquely valuable time fundraising instead of addressing the nation's problems, was one of the principal arguments in favor of the presidential public financing system established after Watergate. After President Obama opted out of the public financing system, choosing to rely solely on private contributions instead, the amount of Presidential time spent fundraising has soared. Let me give you two numbers: 9 and 222. The first is the number of fundraisers that President Reagan attended in 1984, his re-election year. The second number—222—is the number of fundraisers that President Obama attended in 2012, his re-election year. And he has kept going in 2013 and 2014: an article recently estimated he is currently attending a political fundraiser once every five days. This helps stockpile millions of dollars for Democratic candidates in the midterm elections to attempt to enable them to compete with the hundreds of millions of dollars being raised and spent by Republicans and their Super PACs and tax exempt groups—which are in turn being combated by the Democratic "outside" groups—all funded by a tiny percentage of the American people. FEC statistics show that as few as one-third of one percent of Americans ever contribute a reportable amount to any federal candidate or party committee in an election cycle—so 99 and two-thirds percent of all Americans are not even participating in the money system that determines who the candidates are and who gets elected to public office.

One alternative—dating back to the reform efforts of Teddy Roosevelt, although never enacted on the congressional level—is to ensure that every citizen has a role in funding elections. Professor Richard Painter, who served as President George W. Bush's White House ethics chief and was appalled by what he saw in Washington, has recently proposed a new and inclusive, rather than restrictive, idea: $100 a year "taxpayer rebate," a return to every registered voter in a voucher or debit card of the first $100 of his/her tax dollars, to be used by the voters to support candidates or parties of their own choosing. They can divide the amount between their favored candidates or parties, which the recipient then redeems from the government. As Professor Painter has put it, "the key point is that the money is our money, not the government's, and the first $100 a year should go toward allowing the taxpayer to choose who spends the rest." This is not "food stamps for politicians," this is citizens re-asserting their primacy in our democratic system, and using the first fruits of their labor to decide who gets to spend the rest of their tax money. This concept is far more in tune with our founders' goals than dependence by officeholders upon a tiny aristocracy of wealth and special interest. Instead, 140 million Americans would be given the same opportunity to speak, and be heard, that only a few have now. And it is fully consistent with the First Amendment because no individual's speech is being restricted by the government.

All of this is ambitious, but we have to start somewhere, and that somewhere is reasserting fundamental American values. These values are the rule of law, transparency in election finance, and the opportunity for full involvement by all citizens. These are the American values that we preach when we go to other countries, as I have as a representative of our government, and tell them how they should conduct their elections. It is time that we lived up to these values ourselves, and keep faith with our citizens who expect this much—just as the

citizens of California expected much when they adopted the initiative creating the FPPC 40 years ago.

Francis Fukuyama, the historian who wrote *The End of History and the Last Man*, a book about the victory of liberal democracy over communism and fascism, has written a new book, *Political Order and Political Decay*. In it, he argues that the continuation of a successful democracy depends on three conditions: (1) political accountability; (2) a strong effective state; and (3) the rule of law. Fukuyama argues that free and fair multiparty elections are necessary for a successful democracy, but not enough. A true liberal democracy needs to have elections supplemented by a government that can get things done, and by rules and regulations applied transparently and equally to all. Fukuyama writes that the American political and governmental system is now decaying, rather than strengthening. He talks of economic and political inequality, and gridlock caused by an array of factions that "are collectively unrepresentative of the public as a whole" but which exercise disproportionate influence over government.

This depressing historical analysis is born out in a poll maintained by the American National Election Studies, which has tracked citizen opinion for more than 50 years. In 1964, 29 percent of voters said that they believed that government was "run by a few big interests looking out for themselves." In 2012, that number was a shocking 79 percent.

Benjamin Franklin is supposed to have been asked in the street after the Constitutional Convention in Philadelphia what the delegates had created. He famously responded "a Republic, Madam, if you can keep it." Here in California, your citizens took an important step to keep that Republic in 1974 with passage of the Political Reform Act and creation of the FPPC. You need to build on those actions today. As a country we too need to address these broader issues. We need "history to end" with a stronger American democracy, a Republic we have kept and improved.