

Driving big money out of elections

Whereas starting with [Buckley v. Valeo](#) (1976) the Supreme Court declared that money is protected speech and thereby legalized pay offs from special interests to politicians under the guise of electioneering contributions and expenditures;

Whereas a line of subsequent Supreme Court decisions, including [Citizens United \(2010\)](#) and [McCutcheon v. F.E.C.](#) (2014), and [appropriation bills enacted by Congress and signed by President Obama in 2014](#) and 2015 [expanded such election spending and dark money](#);

Whereas much of the election spending ultimately comes from special interest sources, such as businesses or their owners or their managers who seek to turn profit from public policy;

Whereas such money is either spent directly or it is channeled through non-profits, such as business associations or [national associations of elected officials](#), or this money is routed through lobbyists, [super PACs](#), or party committees;

Whereas businesses that invest money in electioneering commonly receive a return on that investment from policy changes, including passage of particular legislation of importance to the business, a matter of “IOUs, if you will, real or perceived to be there,” [as described by Vermont Attorney General Bill Sorrell](#);

Whereas most elected officials are pressured both by the increasing need to raise money for election and reelection and by the possibility that a substantial dose of the money spent on their behalf in one election may go to their election opponent in the next election, instead of continuing to come their way, giving legislators incentive to temporarily suspend independence of judgment and at least consider the IOUs created by their business supporters when called upon to vote on matters of interest to those businesses (even if, of course, there was no evidence of an express *quid pro quo* agreement to do so);

Whereas the systemic undue influence on politicians created by the increasingly large contributions and independent expenditures by special interests in elections since *Buckley* has degraded and corrupted democracy in the US;

Whereas the widespread appearance of such corruption is evidenced by polls, including a [New York Times poll](#) conducted in June 2015: In answer to the question, “How often do you think candidates who win public office promote policies that directly help the people and groups who donated money to their campaigns — 55% said “most of the time,” 30% said “sometimes,” and 9% said “rarely.” Only 4% said “never;”

Whereas the Supreme Court decisions, along with the appropriation bills enacted in 2014 and 2015, legalized a form of bribery and tilted control over government toward the one percent, replacing equal rights with special rights for those spending big dollars, and creating a plutocracy where money rules, and the consent of the governed is all but an irrelevant product of a controlled media and paid political advertising;

Whereas **the Supreme Court unanimously approved an alternate method that may be used to drive big money out of elections:** in [*Nevada Commission on Ethics v. Carrigan*](#) (2011), the Supreme Court unanimously upheld legislative conflict of interest recusal to prevent corruption;

Whereas the Nevada Ethics in Government Law upheld in *Nevada Commission on Ethics* states:

A public officer shall not vote upon or advocate the passage or failure of . . . a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by his commitment in a private capacity to the interests of others;

Whereas Mr. Carrigan, the public officer found to have a conflict of interest in violation of the Ethics in Government Law by Nevada’s Commission on Ethics, was an elected member of a city council who had cast a vote on the city council to approve a project from which his friend and former election campaign manager would benefit as a consultant;

Whereas in affirming the constitutionality of Nevada’s ethics in government law, the Supreme Court unanimously held that a legislator’s vote is not speech, and therefore, that First Amendment reasoning “has no application when what is restricted is not protected speech;”

Whereas the Supreme Court reinforced its position by further noting in *Nevada Commission on Ethics* that legislative conflict of interest recusal rules go back nearly to the founding of the United States, and that a “‘universal and long-established’ tradition of prohibiting certain conduct creates ‘a strong presumption’ that the prohibition is constitutional.” The court noted that when the US House first achieving a quorum in 1789 it adopted a rule that “No member shall vote on any question, in the event of which he is immediately and particularly interested;”

Whereas the court further noted that “today, **virtually every State** has enacted some type of recusal law, many of which, not unlike Nevada’s, require public officials to abstain from voting on all matters presenting a conflict of interest;” and

Whereas the US Supreme Court *Nevada Commission on Ethics* decision approving conflict of interest recusal provides an effective way to solve the problem created by the same Court in its line of cases legalizing the supplying of special interest money to or for politicians; and

Whereas a rule modeled on the Nevada law – prohibiting action by the elected official who benefits from electoral money, without directly restricting the flow of that money – would not run afoul of any Supreme Court rulings in the “money is speech” line of decisions; and

Whereas the unanimous Supreme Court decision in *Nevada Commission on Ethics* means that updating conflict of interest recusal rules to include electioneering investments by special interests provides a much easier way to begin to stamp out the corrupting influence of money on elections than the much touted alternative that seeks to amend the constitution to enable direct restrictions on the flow of money; and

Whereas updating recusal can be implemented as a rule by a single town council or by a single house of a state legislature or of Congress to cover its own members; and

Whereas updated recusal can also be implemented as a law to cover all elected officials in a jurisdiction; and

Whereas a model updated conflict of interest recusal law could simply state:

No public officer shall be permitted to vote or take any other official action upon any matter with respect to which the independence of judgment of a reasonable person in his or her situation would be materially affected by his or her commitment in a private capacity to the interests of others, including when such a conflict of interest is caused by election expenditures or a promise concerning election expenditures.

Whereas the update clarifies that election expenditures or a promise concerning election expenditures may cause a conflict of interest between responsibility to the citizens as a whole and responsibility to the source of the electioneering money;

Whereas a conflict of interest recusal law is much more easily held valid by a court than is an election spending restriction. As shown by the Nevada ethics in government law approved unanimously by the US Supreme Court, the standard is retention of “independence of judgment” as determined by the objective “reasonable person in the position of the legislator.” By contrast an election spending restriction faces the much tougher to prove *quid pro quo* corruption;

Whereas although it does not directly restrict money in elections, the presence on the books of such an updated recusal rule would seriously discourage the kind of election contribution or independent expenditure that a reasonable person would find causes a conflict of interest; and

Whereas recusal is inherently narrowly tailored to prohibit a legislator from voting only if a reasonable person would consider the vote to involve a payback for election expenditures.

NOW THEREFORE BE IT RESOLVED THAT the National Lawyers Guild calls for adoption of rules and laws that prohibit an elected official from voting or taking action on a question when the independence of judgment of a reasonable person in his or her situation would be materially affected by election expenditures or a promise concerning election expenditures, where the original source of the money for such election expenditures was or will be from others who are specially interested in that question.

Implementation: This Resolution shall be posted to the NLG website and circulated to the news media and other legal organizations by the national office and by interested NLG chapters.

Submitted by:

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The proponent contacted Pooja Gehi regarding implementation before submitting the resolution. In response Pooja wrote that “if passed I agree that the NO will post and circulate.”