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John C. Bonifaz

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The Progressive Critique of the Current Socio-Legal Landscape: Corporations and Political Injustice*

John C. Bonifaz¹

I am honored to be on this panel with these distinguished speakers and to be part of this important conference. I was also honored to have been at law school with Julie Su and to have occupied buildings overnight with her challenging Harvard's discrimination in its faculty hiring. So, I am pleased to see her again twelve years later.

I am going to give you an overview of our perspective at the National Voting Rights Institute on this question of corporations and political injustice. We have spent most of our time, since our formation in 1994, addressing the question of campaign finance and challenging the campaign finance system on voting rights grounds, as well as defending meaningful campaign finance reform laws that get passed at the state and local level across the country.

To start, I want to tell you a story that appeared on NBC Nightly News before the 1996 presidential election a couple of years after we started our work.² NBC Nightly News did a rare thing for network news. It staked a cameraman and a reporter outside of a major fundraiser. This fundraiser was outside of a Hollywood mansion where literally millions of dollars, ten million dollars that night, were being raised for the Democratic National Committee and then-President Clinton's reelection campaign.

The reporter wanted to get some of the attendees to answer some questions after the fundraiser about the campaign finance system. This particular group of attendees, of course, is one of people well accustomed to bright lights: actors and actresses, producers, and directors. But the moment they came out of this mansion and saw the NBC News truck and the NBC News cameraman and the reporter with his microphone, they did

not want to have anything to do with this particular set of lights. All of the attendees ducked out the door. Steven Spielberg, who was a co-host of the fundraiser, saw the lights and did not want anything to do with answering questions, so he ducked into his limo. Everyone ducked the lights, except for one person. The only person who agreed to stop and answer some questions was Barbra Streisand.

She stopped, and the reporter said, “what do you think about this process?” Then she said, “what do you mean ‘what do I think about this process?’” He said, “I mean, what do you think about this process of candidates having to raise large sums of money in order to compete and run for public office?” She gave a big smile, and she said, “that is what is great about America. If you have the money, you can do whatever you want with it.” Then the reporter asked the follow-up question: “What about those who do not have the money?” She acted confused and started to back away from the camera. Then she said, “they can vote,” and she rushed away into her limo. That was the end of the broadcast.

We can pre-select the candidates who are viable, competitive, and go on to win elections. They can vote. We can determine what issues are on the table, what issues are off the table. They can vote. We can control our elections and our government. They can vote. We at the National Voting Rights Institute firmly believe, and more than fifty years of voting rights case law demonstrates, that the right to vote is far more than simply the right to pull that lever on Election Day. It is the right to an equal and meaningful vote. Today’s campaign finance system is the newest barrier to that right.

Now, you might ask, what is the link to corporations here? Well, the fact is Barbra Streisand’s view expressed that night on NBC News is not unique. In fact, her view permeates corporate boardrooms all over this country. To focus on the disproportionate power that corporations have in our political process, I want to first start with some big picture facts, many of which you may already know, just to get them on the table.

We call this process of the campaign finance system the “wealth primary,”³ and the wealth primary is the dominant process in our overall election process.

Fact one: The wealth primary is exclusive. Less than 1 percent of the population in this country gives over 80 percent of all money to federal election campaigns.⁴ These statistics are mirrored at the state level as well. This less than 1 percent of the population is, of course, made up largely of extremely wealthy, white men.⁵ It has a disproportionate exclusion on communities of color, which are, of course, disproportionately poorer in our society.⁶

Fact two: The wealth primary is expensive. The average cost of running and winning a United States House of Representative seat today is over \$966,000.⁷ A run for the United States Senate is \$5 million.⁸ For a run for the presidency, check back soon for the latest record. This system is beyond the reach of the ordinary citizen.

Fact three: The wealth primary is determinative. Overwhelmingly, almost invariably, the candidates who win the wealth primary, who out-raise and outspend their opponents, go on to win the election. On the Senate side, in 2004, 91 percent of candidates running for the United States Senate first won the wealth primary, then went on to win the election.⁹ On the House of Representatives side, 95 percent of those candidates who first won the wealth primary went on to win the election.¹⁰

When we take out the incumbency factor and look only at open seat races for the House of Representatives and the United States Senate, the statistics are nearly the same. Four out of five times those who win the wealth primary go on to win the election.¹¹

So, these are the big picture facts of a system that clearly is not open to all, and is, in fact, controlled by the wealthy few. The bulk of this money comes from corporate America. Now, it is true that the soft money loophole¹² that many of you may know about—a loophole that existed for the past couple of decades through which corporations were able to funnel

large sums of money directly from their general treasuries to political parties—has been closed by the McCain-Feingold legislation.¹³ But it would be a mistake to suggest that, therefore, the corporate dominance of our politics is now over.

In fact, the mistake was always to define the problem solely as a soft money problem. Eighty percent of the money in our system is hard money, money now raised in \$2,000 increments, the increases allowed under the McCain-Feingold legislation, that goes directly to candidates' campaign coffers.¹⁴ The money that the candidates raise directly for their campaigns is the money that counts the most for them.

Yet, despite the fact that there are limits on what individuals can give, the reality is that corporations are able, not only through their political action committees (PACs), but also through bundlers, through their corporate executives, through top-level management people in their companies, to funnel huge sums of money, millions of dollars, to candidates running for federal office. That is, in fact, the real story behind the campaign finance system, which has not been addressed in any way by the McCain-Feingold legislation.

Agribusiness, defense, and energy industries are among the top donors, making up the bulk of campaign money.¹⁵ The Center for Responsive Politics ran some numbers recently for a new book they have on their website.¹⁶ They found that between 1989 and 2004, the top industry donor was the finance, insurance, and real estate industry, giving over \$1.2 billion to federal candidates.¹⁷

So the reality here, again, is that corporations dominate our politics, and they dominate it through their money. There are many examples, obviously, that we could focus on, many in which the money gets the policy results for corporate America. I want to just highlight three that are currently in the news and illustrate this point very clearly.

The first exhibit is the Bankruptcy Bill.¹⁸ This bill overhauls the bankruptcy laws and is designed to enable credit card companies and

finance companies to prevent, in effect, those who are hit the hardest, at working-class and poor levels in this country, from declaring bankruptcy and trying to get a new start. This bill is designed to take away that kind of protection and take it away entirely. It has been introduced over the past several sessions in the Congress, and it had been defeated by close votes, but nevertheless been defeated. It had been filibustered.

But this time, the Bankruptcy Bill has at least passed on the Senate side on March 10, 2005, by a vote of seventy-four to twenty-five.¹⁹ Finance and credit companies contributed more than \$7.8 million in individual and PAC contributions during the 2004 election cycle, 64 percent to Republicans. The credit card giant, MBNA, which probably wanted this legislation more than any other company, contributed more than \$1.5 million overall through their employees and PACs.²⁰

But, of course, they needed Democrats to get to that figure of seventy-four to twenty-five, and it would be a mistake to suggest that this money is solely going to Republicans. One powerful Democrat who had a lot to do with helping get this overhaul passed was Senator Joseph Biden of Delaware. He is on the Senate Judiciary Committee, where the bill was voted out twelve to five, and he was among those voting it out onto the floor of the United States Senate.²¹

Why, you might ask, why would Senator Biden be supporting this kind of overhaul? Well, let us look at his top contributor over the past six years. MBNA, \$147,000 funneled from that one corporation to Senator Biden's campaign finance coffers.²² The Bankruptcy Bill is exhibit one.

Exhibit two would be, in my view, the Arctic National Wildlife Refuge Drilling Resolution that was just attached to the 2006 budget.²³ On March 16, 2005, the Senate voted fifty-one to forty-nine to approve the drilling in the Arctic National Wildlife Refuge.²⁴ Now, there is still a fight to be made here, but this was a critical vote, and again, it was introduced in sessions past and had been unable to make it thus far. But now it has moved past this critical step.

The oil and gas industry, which is very much behind this, of course, wants to drill into this environmental preserve, and they want to make huge profits. They contributed \$23.8 million in individual and PAC donations during the 2004 election cycle.²⁵

Now, who is on the other side? Environmental interests. Well, let us just look at what they have contributed. They contributed \$1.9 million.²⁶ \$23.8 million versus \$1.9 million.

But again, there had to be some Democrats. There had to be some Democrats. Eighty percent of the oil and gas industry money went to Republicans,²⁷ but there were a few key Democrats that turned the tide. Some Republicans actually voted against the resolution. Mary Landrieu, a senator from Louisiana, was one of the Democrats supporting the resolution.²⁸ Why, you might ask, would Senator Landrieu vote for this resolution? Well, if we look at her top industry contributors, the oil and gas industry is among the top three and is funneling \$292,000 to her campaign coffers.²⁹ So, the Arctic National Wildlife Drilling Resolution would be exhibit two.

But I think the most egregious example today of corporate America dominating our politics against the will of the people is the war in Iraq. Clearly what we have here are Pentagon contractors, the defense industry, making billions of dollars from this war at the expense of both American and Iraqi lives. Overall, the top Pentagon contractors gave \$214 million in campaign contributions in the six-year period analyzed by the Center for Public Integrity from 1998 through 2003.³⁰

We also know that there was a particular secret bidding process that occurred on the eve of the invasion of Iraq in March 2003 in which the United States Agency of International Development asked six companies in the United States only—not French companies or any other companies, but only six American companies—to submit bids for the \$900 million government contract to repair and rebuild Iraq.³¹ Among them were top donors to federal candidates: The Bechtel Corporation, Halliburton, and

Brown & Root.³² So, this is really a story of corporations taking over our democracy and controlling our politics and of ordinary citizen voices being drowned out.

We at the National Voting Rights Institute think there needs to be a solution here. Clearly, we recognize that the problem is one that has been with us for some time. But the real focus for overhauling this system has to be far more than what Congress passed a couple of years ago with the McCain-Feingold Act. It has to be full public funding of our elections and mandatory campaign spending limits.

Now, on the full public funding side there is a movement in some key states, such as Arizona and Maine, which have already passed laws for full public funding in their state elections.³³ Candidates are running under this system, and they are competing like they never would have before. Candidates who never would have run for office are now able to run. Further, candidates who do not come from wealthy circles are able to run and win under this system. These candidates need to gather a certain amount of \$5 qualifying contributions, and then they are in the system. In addition, candidates need to give up all private fundraising and take only public money. The governor of Arizona was elected under this system. As these systems continue and other states experiment with them, we will have a call to Washington that there needs to be this kind of change.

The other piece of it, the mandatory limits piece, requires revisiting and reversing *Buckley v. Valeo*,³⁴ the Supreme Court's ruling in 1976 that equated money with speech and sanctioned today's system of unlimited campaign spending. We are engaged in fighting for revisitation of that decision. We actually just won before the Federal Appeals Court in New York, in the Second Circuit. They issued a ruling finding that Vermont's campaign spending limits, which we are helping to defend, are justifiable on constitutional grounds, and that sets the stage for a potentially historic Supreme Court review of this question.³⁵ In our view, unlimited campaign

spending is antithetical to the First Amendment and no one has the right to drown out other people's speech.

I will close with this quote from Edward G. Ryan, who was the Chief Justice of the Wisconsin Supreme Court in the late eighteenth hundreds. He had this to say on the eve of becoming Chief Justice in 1873:

There is looming up a new and dark power. The enterprises of the country are aggregating vast corporate combinations of unexampled capital. Boldly marching, not for economical conquest only, but for political power. The question will arise and arise in your day, though perhaps not fully in mine, which shall rule, wealth or man [or woman]? Which shall lead, money or intellect? Who shall fill public stations, educated and patriotic free men [and free women], or the futile serfs of corporate capital? The time is long overdue for we, the people, not the corporations, to control our politics.

One hundred and thirty-two years later, the warning that Chief Justice Ryan gave that day is as relevant as ever for us today. And in the ongoing struggle for democracy here at home, we have the right and responsibility to demand that we as citizens be heard in this process on an equal basis and that corporations do not have this kind of dominance.

Thank you.

* This text is a transcript from panel discussion at University of California at Los Angeles School of Law on April 9, 2005 as part of the conference, *New Strategies for Justice: Linking Corporate Law with Progressive Social Movements*, cosponsored by UCLA Law School and the Center on Corporations, Law & Society at Seattle University School of Law. Transcripts from the other panelists, Julie A. Su and Cheryl I. Harris, are also featured in this volume.

¹ John C. Bonifaz is the founder and General Counsel for the National Voting Rights Institute, a non-profit organization dedicated to protecting the right of all citizens to vote and to participate in the electoral process on an equal and meaningful basis.

² See *Clinton: Pitches Education in CA; More Celebrity Money*, HOTLINE, Sept. 13, 1996, (White House). See also *Feature, The End of the Beginning for Election Reform*, 9 GEO. J. POVERTY L. & POL'Y 285, 324 (2002).

³ "Wealth primary" refers to the process prior to every party primary and general election, which effectively excludes non-wealthy voters and candidates from equal and meaningful participation in the political process. Candidates who raise the most money

—the “winners” of the wealth primary—almost always go on to win elections. Voters and candidates lacking access to wealth are shut out of this process that has become a critical part of the machinery for getting elected. See Jamin Raskin & John Bonifaz, *Equal Protection and The Wealth Primary*, 11 YALE L. & POL’Y REV. 273 (1993). See also National Voting Rights Institute, “Wealth Primary”—Legal Theory, <http://www.nvri.org/about/wealth.shtml> (last visited Nov. 5, 2005).

⁴ Opensecrets.org, The Big Picture: 2002 Cycle; Donor Demographics, <http://www.opensecrets.org/bigpicture/donordemographics.asp?cycle=2002> (last visited Oct. 31, 2005).

⁵ MICAH L. SIFRY & NANCY WATZMAN, IS THAT A POLITICIAN IN YOUR POCKET? WASHINGTON ON \$2 MILLION A DAY 13 (2004).

⁶ Press Release, Publiccampaign.org, Big Donors Still Rule the Roost (Oct. 29, 2004), http://www.publiccampaign.org/pressroom/pressreleases/release2004/edmemo_10_29_04.htm (last visited Oct. 31, 2005).

⁷ Opensecrets.org, The Big Picture: 2002 Cycle; The Price of Admission, <http://www.opensecrets.org/bigpicture/stats.asp?cycle=2002> (last visited Oct. 31, 2005).

⁸ *Id.*

⁹ Press Release, Opensecrets.org, 2004 Election Outcome: Money Wins (Nov. 3, 2004), <http://www.opensecrets.org/pressreleases/2004/04results.asp> (last visited Oct. 31, 2005).

¹⁰ *Id.*

¹¹ *Id.*

¹² Federal campaign finance law sets limits on the amount that individuals and political action committees may contribute directly to candidates running for federal office. It also prohibits direct corporate and union contributions to such candidates. An individual or political action committee contribution made directly to a federal election candidate, under these limits, is referred to as “hard money.”

In 1979, the Federal Election Commission created the soft money loophole which allowed for unlimited contributions from individuals, corporations, and unions to political parties. For an extensive discussion on the history of the soft money loophole, and federal campaign finance law in general, see *McConnell v. FEC*, 540 U.S. 93, 122-126 (2003).

¹³ The Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold law, seeks to close loopholes in campaign finance law by eliminating the use of soft money and regulating sham issue advertisements. For the full text of the BCRA, see Pub. L. No. 107-155, 116 Stat. 81 (2002).

¹⁴ See Pirg.org, The Consequence of Raising Federal Contribution Limits, <http://pirg.org/democracy/democracy.asp?id2=5908&id3=democracy&> (last visited Oct. 31, 2005).

¹⁵ SIFRY, *supra* note 5, at 7.

¹⁶ By the way, I encourage any of you who want to look into this further to visit www.OpenSecrets.org and search by any member of Congress or any industry.

¹⁷ SIFRY & WATZMAN, *supra* note 5, at 7.

¹⁸ S. 256, 109th Cong. (2005), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.00256>.

¹⁹ U.S. Senate, Roll Call Votes, 109th Congress-1st Sess., (Question: On Passage of the Bill (S. 256 As Amended)), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00044. The Bankruptcy Bill was signed into law on April 20, 2005. Pub. L. No. 109-8 (2005).

²⁰ Opensecrets.org, Tracking the Payback, <http://www.opensecrets.org/payback/issue.asp?issueid=BA3&congno=109> (last visited Oct. 31, 2005).

²¹ *Senate takes on fight over bankruptcy laws*, COLUM. DAILY TRIB., Feb. 18, 2005, (Business), *available at* <http://www.showmenews.com/2005/Feb/20050218Busi006.asp> (last visited Nov. 7, 2005).

²² Opensecrets.org, Sen. Joseph R. Biden, Jr.: Top Contributors, <http://www.opensecrets.org/politicians/contrib.asp?CID=N00001669&cycle=2004> (last visited Oct. 31, 2005).

²³ The Senate passed the budget reconciliation bill on November 3, 2005. Earthjustice.org, Senate Votes to Allow Oil Drilling in Arctic Refuge, <http://www.earthjustice.org/policy/rider/display.html?ID=45> (last visited Nov. 6, 2005).

²⁴ U.S. Senate, Roll Call Votes 109th Congress-1st Sess., (Question: On the Amendment (Cantwell Amdt. No. 168)), *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00052 [hereinafter U.S. Senate, Roll Call Votes, Cantwell Amend.].

²⁵ Opensecrets.org, Tracing the Payback: Energy/Natural Resources: Arctic Drilling, <http://www.opensecrets.org/payback/issue.asp?issueid=EN4&congno=109> (last visited Oct. 31, 2005).

²⁶ *Id.*

²⁷ *Id.*

²⁸ U.S. Senate, Roll Call Votes, Cantwell Amend., *supra* note 24.

²⁹ Opensecrets.org, Sen. Mary L. Landrieu: Top Industries, <http://www.opensecrets.org/politicians/indus.asp?CID=N00005395&cycle=2004> (last visited Oct. 31, 2005) (note: this number has been slightly revised on that web page since my speech, now \$294K).

³⁰ LARRY MAKINSON, CTR. FOR PUB. INTEGRITY, OUTSOURCING THE PENTAGON: WHO BENEFITS FROM THE POLITICS & ECONOMICS OF NATIONAL SECURITY? 3 (Sept. 29, 2004), <http://www.publicintegrity.org/pns/report.aspx?aid=385> (last visited Oct. 31, 2005).

³¹ Opensecrets.org, Rebuilding Iraq—The Contractors, http://www.opensecrets.org/news/rebuilding_iraq/ (last visited Oct. 31, 2005).

³² *Id.*

³³ Public Campaign.org, Clean Money, Clean Elections in the States!, <http://www.publiccampaign.org/states/index.htm> (last visited Nov. 8, 2005).

³⁴ See *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the United States Supreme Court upheld contribution limits in federal election campaigns, but struck down

congressional campaign spending limits as violative of the First Amendment. *Id.* at 653-54.

³⁵ In August 2004, the U.S. Court of Appeals for the Second Circuit ruled that *Buckley* did not close the door to new facts and new governmental interests that could justify mandatory campaign spending limits. *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004) (finding that Vermont had established compelling governmental interests that justified its campaign spending limits law). At the time of this writing, that case is now pending before the United States Supreme Court. The National Voting Rights Institute serves as counsel for interveners in the case, including Vermont public interest groups, voters, and candidates, in defense of the law.