Testimony of Richard W. Painter before the United States Senate, Committee on the Budget, Hearing
"Democracy Distorted: Unraveling the Consequences of Fossil Fuel Dark Money in Politics,"
June 21, 2023

Mr. Chairman, Ranking Member, and Members of the Committee:

I am a law professor at the University of Minnesota, and I was the chief White House ethics lawyer for President George W. Bush from 2005 to 2007. I specialize in corporate law, securities regulation, lawyers' ethics, and government ethics.

The subject of my testimony today is the role of money in politics, with a focus on the fossil fuel industry.

Corruption of government officials is an ancient problem.[1] Edmund Burke, as a Member of Parliament denounced the corrupt influence on government of corporations, particularly the East India Company.[2] After the 1773 Tea Act granted that Company a monopoly on sale of tea in America, Tea Party patriots dumped the tea into Boston harbor. Americans then and now are fed up with corporate money buying legislation.

In early 2016 I authored a book explaining why political conservatives should support campaign finance reform.[3] A few months later Donald Trump was the first

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[1] The late Judge John T. Noonan of the Ninth Circuit Court of Appeals recorded the history of bribery over two thousand years in his seminal book Bribes, published shortly after President Reagan appointed him to the Ninth Circuit Court of Appeals. John T. Noonan, Jr., Bribes (1986).

[2] Mr. Burke's Speech, On the 1st December 1783 [Upon the Question for the Speaker's Leaving the Chair, in Order for the House to Resolve Itself into a Committee on Mr. Fox's *East India* Bill] (describing the East India Company's abuse of global monopoly powers bestowed on it by Parliament). https://quod.lib.umich.edu/e/ecco/004807298.0001.000/1:2?rgn=div1;view=fulltext

[3] See Richard W. Painter, Taxation only with Representation: The Conservative Conscience and Campaign Finance Reform (Take Back our Republic 2016), Richard W. Painter. The Conservative Case for Campaign Finance Reform, Op-ed. The New York Times, February 3, 2016, https://www.nytimes.com/2016/02/03/opinion/the-conservative-case-forcampaign-finance-reform.html

GOP presidential candidate to attack the Supreme Court's decision in *Citizens United v, Federal Election Commission*.[4]

This is not a partisan issue. Without regard to party, many Americans resent the massive political spending by billionaires. I have no patience for those who complain about money in politics and then defend unlimited spending to support candidates they happen to agree with. The claim that "my billionaire is more ethical than your billionaire" is nonsense. Money does not steer the course of a legitimate democracy.

Congress in 1907 passed the Tillman Act[5] which prohibits donations from corporate treasuries to political campaigns. Ever since then, political operatives have exploited loopholes to get around the law. Like manipulators who exploit loopholes to get around taxation and environmental regulation, campaign operatives and donors combine barely legal law avoidance with illegal law evasion – a practice known as law "avoision." This term, introduced by London School of Economics professors in a 1979 book Tax Avoision,[6] was popularized on the television show *The Simpsons*.[7] Avoision is all too common in many areas of the law, including campaign finance. Lawyers, for a fee, often lend a helping hand.[8]

Sadly, so do the federal courts. The Supreme Court in *Citizens United v. Federal Election Commission* struck down a key provision of a law co-sponsored by Senator John McCain and signed into law by President George W. Bush. The Court ruled that unlimited expenditures from corporate treasuries on electioneering

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[4] Citizens United V. FEC, 558 U.S. 310 (2010). See Peter Overby, Presidential Candidates Pledge to Undo 'Citizens United.' But Can They?, NPR, February 14, 2016. https://www.npr.org/2016/02/14/466668949/presidential-candidates-pledge-to-undo-citizens-united-but-can-they

[5] 34 Stat. 864 (1907).

[6] Arthur Seldon, Ed., Tax Avoision: The Economic, Legal, and Moral Inter-Relationships Between Avoidance and Evasion (Institute of Economic Affairs 1979).

[7] See https://www.youtube.com/watch?v=wpEaFmK3lrY (Crusty the Clown arrested for tax avoision)

[8] I have written about this problem for close to thirty years. See Richard W. Painter, The Moral Interdependence of Corporate Lawyers and Their Clients, 67 Southern California Law Review 507-584 (1994).

communications were constitutionally protected speech because corporations are "people" like the rest of us. The Court has not yet struck down the Tillman Act prohibition on direct corporate contributions to campaigns, but corporate funded PACs and Super PACs presumably have First Amendment protection to say whatever they want.[9] The current state of the law is that, while some restrictions on direct contributions to campaigns and political parties are upheld,[10] unlimited spending by campaigns and by dark money organizations is constitutionally protected. As Justices Sandra Day O'Connor and John Paul Stevens famously wrote in *McConnell v. Federal Election Commission*, one of the few cases upholding campaign finance laws, "money, like water, will always find an outlet."[11] And so it does.

Many industries use money to tilt the playing field in their favor. The financial services industry used its influence in Washington to buy deregulation during the Clinton[12] and Bush Administrations, setting the stage for the economic calamity of 2008.[13] Accused crypto currency fraudster Sam Bankman-Fried, with the help of his politically connected parents, bought influence in both political parties, and

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9 See Lieu et. al . v. FEC, No. 19-5072, (D.C. Cir., 2019), Order (dismissing suit brought against the FEC by Rep. Ted Lieu, Rep. Walter Jones, Senator Jeff Merkley, State Senator John Howe, Zephyr Teachout, and Michael Wager asking the Circuit Court to overturn its decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), cert. denied, 562 U.S. 1003 (2010) (interpreting the *Citizens United* holding to allow unlimited spending on Super PACs).

10 See Buckley v. Valeo, 424 U.S. 1 (1976) (holding that dollar limitations on contributions by individuals to campaigns do not violate the First Amendment but that limitations on spending by political campaigns do violate the first amendment); McConnell v. Federal Election Commission. 540 U.S. 93 (2003) (upholding limits on soft money contributions used to register voters and increase attendance at the polls); McCutcheon v, FEC, 572 U.S. 185 (2014) (striking down aggregate limits on donor contributions to multiple candidates).

11 McConnell v. Federal Election Commission. 540 U.S. 93 (2003).

12 See Richard W. Painter, *Standing Up to Wall Street (and Congress),* 101 MICHIGAN LAW REVIEW 1512 (book review) (2003) (reviewing ARTHUR LEVITT, TAKE ON THE STREET (2002) and discussing the role of financial services industry campaign contributions and lobbying in undermining the regulatory role of the SEC).

13 See Claire A. Hill and Richard W. Painter, BETTER BANKERS, BETTER BANKS: PROMOTING GOOD BUSINESS THROUGH CONTRACTUAL COMMITMENT (University of Chicago Press, 2015) (discussing the causes of the 2008 financial collapse and the need for personal accountability of senior bank executives).

even testified as an expert for Congress before he was indicted. In my own field of work, higher education, some university presidents are like corporate CEO's making as much as $4 million a year plus deferred compensation.[14] They expand their influence by setting up academic centers named after their favorite presidential candidate or centers that shill for corporate donors, including the fossil fuel industry.[15]

Today's hearing focuses is on one industry: fossil fuels. Fossil fuel industry pollical spending is massive. According to Open Secrets, the fossil fuel industry spent $124 million on lobbying in 2022.[16] In the 2022 election cycle alone many companies in the oil and gas industry spent millions of dollars each on political campaigns. A single company, Koch Industries spent $27,317,934 in 2021-22. Next comes Occidental Petroleum at $8,052,913, Chevron Corp at $7,587,934, the American Petroleum Institute at $7,183,300, Energy Transfer LP at $5,206,768. Samson Energy at $4,314,555, Devon Energy at $3,908,127, ConocoPhillips at $3,605,546, and so on.[17] Almost all this political money is spent without the consent of shareholders who find out about it belatedly if it becomes public.

In addition to greasing the skids of politics, many companies excel at window dressing or "greenwashing", spending a small portion of their profits on green energy initiatives and paying public relations firms to design "green" websites and other promotional materials. ConocoPhillips even appointed as one of its directors a law professor who directs Harvard Law School's environmental law center, and

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[14] See Susan Snyder, Former Penn president Amy Gutmann earned nearly $23 million in 2021, but most of it was accrued over her 18 years as president, Philadelphia Inquirer, Jun 17, 2023, https://www.inquirer.com/news/amy-gutmann-university-of-pennsylvania-president-salary-20230617.html

[15] See Jack Stripling and Nell Gluckman, To Court a Secretive Donor, Law Deans at George Mason Blasted Climate Scientists and Their Own Accreditor, Chronicle of Higher Education. December 18, 2019. *https://www.chronicle.com/article/to-court-a-secretive-donor-law-deans-at-george-mason-blasted-climate-scientists-and-their-own-accreditor/*

[16] Inci Sayki and Jimmy Cloutier, Oil and gas industry spent $124.4 million on federal lobbying amid record profits in 2022, Open Secrets, February 22, 2023; https://www.opensecrets.org/news/2023/02/oil-and-gas-industry-spent-124-4-million-on-federal-lobbying-amid-record-profits-in-2022/

[17] See, Open Secrets, Summary: Energy and Natural Resources (Top Contributors. 2021-22) https://www.opensecrets.org/industries/indus.php?ind=e01

who now says she's on ConocoPhillips board to make "a positive difference,"[18] plus of course the $350,000 annual board member compensation.

Fossil fuel companies also take advantage of the revolving door in and out of government, when the president appoints their former officers, directors lobbyists or lawyers to high level posts in the Interior Department, Department of Energy and Environmental Protection Agency. There they are allowed to participate in regulatory matters that affect their former employers' industry. Existing ethics rules for the most part only limit participation in matters in which a former employer is an identifiable party, for example an oil drilling permit or a lease of federal land.[19] There ethics rules do not prevent participation in industry wide regulations that affect a former employer.

Ethics rules are even looser in the legislative branch where Members of Congress are allowed to participate in Congressional investigations, hearings and lawmaking that affect companies in which they own stock or have a similar financial interest. Several bills have been introduced that would limit Congressional stock trading and investments in individual companies, but so far none of those bills have passed.[20]

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[18] Steven Mufson, Fallout from Willow oil project lands hard on Harvard climate expert: Jody Freeman has served on the board of ConocoPhillips for 11 years. She's made a "positive difference," she said, but her detractors disagree, Washington Post, April 22, 2023, https://www.washingtonpost.com/climate-environment/2023/04/22/willow-oil-alaska-conocophillips-harvard/

[19] See 5 C.F.R. 2635.502 (Office of Government Ethics impartiality rule) (requiring prior authorization for an executive branch employee to participate in a particular party matter in which a former employer within the past year is a party or represents a party). Presidents Obama, Trump, and Biden each issued executive orders on ethics that lengthened this recusal period to two years or longer for appointees of the president. These ethics rules, however, do little to prevent federal officials from participating in regulatory matters that affect their previous employers' industry. The only legal requirement is that they divest their financial interest in the industry and sever employment with the former employer during their term in office. See 18 U.S.C. Section 208 (financial conflicts of interest for executive branch employees).

[20] In several op-eds and letters to Congressional leadership I have urged passage of a law prohibiting stock trading by members of Congress. See e.g. Richard W. Painter, Why Members of Congress Should Not Trade Stocks, Bloomberg Law, January 25, 2022, https://news.bloomberglaw.com/white-collar-and-criminal-law/why-members-of-congress-should-not-trade-stocks; Donna Nagy and Richard W. Painter, It's Time for Senators, House Members to Divest Stocks in Individual Publicly Traded Companies, Bloomberg

Academia is playing along too. According to a recent study, the fossil fuel industry has provided more than $675 million in funding to twenty-seven top research universities:

> "Many of the nation's most prominent universities, including Harvard, MIT, and George Washington, are awash with fossil fuel funding, and scientists are ringing the alarm about the effects this money has on climate research. A new study revealed that favorability toward natural gas in research is directly related to a university's funding sources. Just as campaign donations are used to buy votes against climate action in Congress, research funding can be leveraged as an attempt to buy results or influence research priorities that benefit the fossil fuel industry's bottom line."[21]

Universities that receive this funding of course say that it does not influence their research and that some of that research advances clean energy. The funding source, however, is suspect, a problem complicated by the fact that many universities don't publicly disclose funding from fossil fuel companies or from other sources.

Law enforcement is not immune from the influence of the fossil fuel industry. Most state attorneys general are elected, and corporate money may determine if they win or lose. As law professor and prosecutor Eli Savit pointed out in 2017, the fossil-fuel industry pours "unprecedented sums of money into AG races throughout the country. That spending has apparently paid off. … This regulatory capture of many AGs seems likely to impede environmental regulation for years to come."[22]

Law, January 6, 2021. https://news.bloomberglaw.com/white-collar-and-criminal-law/its-time-for-senators-house-members-to-divest-stocks-in-individual-publicly-traded-companies

[21] Bella Kumar, Accountable Allies, The Undue Influence of Fossil Fuel Money in Academia (Data For Progress, February 2023). https://www.filesforprogress.org/memos/accountable-allies-fossil-fuels.pdf. This data was assembled by a progressive research group, with which many Americans may disagree on substantive political issues, but the data appears to be accurate, and in any event the influence of the fossil fuel industry in academia is common knowledge.

[22] Eli Savit, The New Front in the Clean Air Wars: Fossil-Fuel Influence Over State Attorneys General — And How It Might Be Checked. 115 Mich. L. Rev. 839 (2017), Available at SSRN: https://ssrn.com/abstract=2926223

Other witnesses here today will testify about the scientific evidence showing the impact of fossil fuel consumption on climate change. I will not reiterate the substance of that debate. I emphasize instead that the fight against climate change is impeded by serious flaws in our political system.

First, as I just discussed fossil fuel companies are taking advantage of the open floodgates of political spending since the Supreme Court's decision in *Citizens United*. In addition to all the other costs of not fixing our campaign finance system, money in politics may enable destruction of our planet.

Second, we live in an era in which objective truth is under attack. Advances in science provide new information, and our perceptions of objective truth will change accordingly, but only a fool would deny there is such a thing as objective truth. People used to think the world was flat; now we know it's round. No rational person can argue that the perspective of someone who sees the earth as flat is just as valid as the perspective of someone who knows it's round. Decades ago, perhaps there was debate about whether we are experiencing climate change, but today science has shown that the earth is warming, and that human activity is a substantial contributing factor.

Third, climate change destroys the economy, and investors' wealth, in addition to destroying the planet. That's one reason so many institutional investors care about climate change. Having profitable fossil fuel companies in a portfolio does an investor little good if environmental externalities destroy economic wealth overall and harm the value of other investments in a portfolio.[23] It is nonsensical to argue that investors don't care about climate change, and that company disclosures about environmental impact are immaterial. Investors do care, such disclosures to investors are material and should be required.

Fourth, fossil fuel companies should not be allowed to lie about their carbon footprint or what they are doing to combat climate change. When corporate executives are called to testify before Congress, they should be held to account for telling the truth. Those who knowingly misrepresent to Congress or to federal agencies about facts that cannot reasonably be disputed should be held to account.

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[23] "Due to the embrace of modern portfolio theory, most of the stock market is controlled by institutional investors holding broadly diversified economy-mirroring portfolios…. [D]iversified investors should rationally be motivated to internalize intra-portfolio negative externalities." Madison Condon, *Externalities and the Common Owner*, 95 WASH. U. L. REV. 1, 1 (2020).)

I also note that investors who are lied to about a company's operations involving fossil fuels can sue. I have taught, practiced law, and published in the field of securities regulation for thirty years and have seen countless companies successfully sued in class actions for lying to investors about their business. Courts will tolerate a certain amount of "puffery" in statements to investors, but companies that say they are green should be specific about what they are doing to protect the environment. Environmentalists who serve as corporate directors and say they are there to "help" had better be specific and honest about how they are helping. Federal securities laws won't force a company to change its carbon footprint, but they do require a company, and its directors and officers, to either tell the truth or remain silent. Corporate "greenwashing" not based on facts, on objective truth, can be securities fraud.

Fifth, much of the world's fossil fuel reserves are under the control of dictatorships including Putin's Russia, Saudi Arabia, and Marxist Venezuela. To access those reserves fossil fuel companies for decades have coddled foreign dictators and encouraged the United States government to do the same. Corporate interests, including some Americans with ties to industry,[24] encouraged Germany and the EU to build the Nord Stream 2 pipeline to import massive quantities of Russian natural gas, all while greenwashing German politicians lectured the rest of the world on climate change. Saudi Arabia uses proceeds from its oil exports to buy weapons from the United States, including a $110 billion arms deal spearheaded by Jared Kushner who coincidentally closed a $2 billion business deal with the Saudi sovereign wealth fund months after leaving office.[25] The Saudis also embrace "sportswashing." Earlier this month the PGA agreed to a merger with LIV Golf, a

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[24] Americans with ties to German industry and fossil fuels promoted the Nord Stream 2 pipeline up until the eve of the Russian invasion of Ukraine. Daniel Benjamin, President of the American Academy in Berlin, which relies heavily on corporate donations, in March 2021 harshly criticized the Biden Administration for not supporting the Nord Stream 2 pipeline. See Daniel Benjamin, How One European Pipeline Is Derailing Biden's 'America Is Back' Promise, Politico, March 21, 2021.
https://www.politico.com/news/magazine/2021/03/18/how-one-european-pipeline-is-derailing-bidens-america-is-back-promise-476901

[25] See David D. Kirkpatrick and Kate Kelly, Before Giving Billions to Jared Kushner, Saudi Investment Fund Had Big Doubts, New York Times, April 10, 2022 (a panel that screens investments for the Saudi sovereign wealth fund had serious doubts about the transaction with Kushner but "days later the full board of the $620 billion Public Investment Fund — led by Crown Prince Mohammed bin Salman, Saudi Arabia's de facto ruler and a beneficiary of Mr. Kushner's support when he worked as a White House adviser — overruled the panel.").

league funded with Saudi Arabia's $620 billion sovereign wealth fund[26] (the 2022 World Cup in Qatar is another example of how oil rich nations also use sports to burnish their image). Before Venezuela's economy collapsed from corruption and mismanagement, Venezuelan oil money subsidized the communist dictatorship in Cuba. In sum, the dictators who control much of the world's fossil fuel supply are not on the side of democracy, or of the United States.

Congress, however, can do something about these issues. In concluding my testimony, I recommend that Congress pass legislation to:

1. Require public companies to disclose in detail to shareholders their expenditures on electioneering communications, PACs and Super PACs, and any other expenditures intended to influence the outcome of an election. The law should also require corporations to obtain prior shareholder approval for electioneering expenditures over a certain threshold.
2. Clarify that the Securities and Exchange Commission is authorized to proceed with rulemaking to require reporting companies to disclose material information about the impact of their business operations on CO2 emissions.[27] Such disclosure requirements should be reasonable and not unduly burdensome, but the information is material to investors[28] and should be disclosed.
3. Pass legislation limiting high ranking executive branch officials from participating in regulatory matters that affect industries in which they have been employed within the past two years.
4. Pass legislation limiting trading and ownership of stocks in individual companies by Members of Congress when such investments conflict with official duties.

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[26] Sean Ingle, 'Gigantic victory for sportswashing': old truths will haunt golf's new dawn: Bad blood is bound to linger despite LIV and PGA Tour merger bringing immediate end to the legal battles between both sides, The Guardian, June 6, 2023, https://www.theguardian.com/sport/2023/jun/06/saudi-liv-pga-tour-divisions-within-golf

[27] See The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 FR 21334 (April 11, 2022) (proposing for public comment amendments to rules under the Securities Act of 1933 and Securities Exchange Act of 1934 that would require registrants to provide certain climate-related information in their registration statements and annual reports). https://www.federalregister.gov/documents/2022/04/11/2022-06342/the-enhancement-and-standardization-of-climate-related-disclosures-for-investors

[28] See Madison Condon, note 23 supra, discussing the impact of climate change on portfolio values.

5. Require research universities that receive federal funds to disclose to the Department of Education their sources of corporate funding, including donations and contracts, as well as conflicts of interest of faculty. This disclosure requirement should resemble existing Department of Education rules requiring universities to disclose funding from foreign countries. False representations by university administrators to the Department of Education about donations and other sources of funds should result in civil or criminal penalties.
6. Provide more generous tax breaks and regulatory relief for businesses that produce clean energy including energy from wind, solar, geothermal, and safe nuclear reactors. Just as the negative externalities from fossil fuel production are great the positive externalities from clean energy are also great. Climate change is a problem the private sector can solve, but government taxation and regulation too often stand in the way. Congress must act now to encourage free enterprise in clean energy production, a sector of our economy that is critical for the survival of our planet.

Thank you for inviting me to testify today. I sincerely hope that Congress will take the issue of climate change as seriously as the American people do. Time is short, and now is the moment to decide.