COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

DAVID C. BAXTER, MARY BAINE CAMPBELL, CATHERINE BRUN-COTTAN, GEORGES BRUN-COTTAN, LEIGH CHINITZ, BETTINA NEUEFEIND, and LEO T. SPRECHER, Plaintiffs, v. ATTORNEY GENERAL AND SECRETARY OF STATE OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	)	Civil Action No. SJ-2022-

COMPLAINT FOR DECLARATORY RELIEF

NATURE OF THE ACTION

1. This action for declaratory relief arises from the Attorney General's refusal to certify initiative petition 22-01 entitled "Initiative Petition for a Law Relative to Limiting Political Contributions to Independent Expenditure PACs" (the "Petition" or "Proposed Law") under Article 48 of the Massachusetts Constitution.

2. The Attorney General refused to certify Plaintiffs' Petition on the grounds that "the proposed law would violate the free speech rights afforded by the state constitution."

3. The Attorney General's determination is wrong. There is no controlling legal precedent, in either state or federal law, holding that the regulation of contributions to independent expenditure political action committees violates either the First Amendment of the federal constitution or Article 16 of the Massachusetts Declaration of Rights.

4. Plaintiffs therefore seek a declaratory judgment that the Attorney General erred in refusing to certify the Petition as consistent with Article 48.

5. The Attorney General has further indicated that Plaintiffs must submit signatures by December 2022 for a Petition that the Attorney General has ruled "inconsistent" with Article 48 and that Plaintiffs intend to submit to the General Court in 2024. If Plaintiffs do not submit those signatures by December 2022, the Attorney General argues, the Petition would be moot.

6. The Attorney General is again wrong. Article 48, Part II, section 3 of the Massachusetts Constitution[1] does not require that Plaintiffs submit signatures until the first Wednesday of December 2023. The Attorney General's position to

[1] All references in this complaint to Article 48, part II, section 3 refer to that section as amended by Article 74.

the contrary is both inconsistent with the clear language and purpose of Article 48, and contrary to the balance of equities for any petition submitted more than two years before it would appear on the ballot.

7. Plaintiffs therefore further seek a declaratory judgment that they are not required to deliver to the Secretary of the Commonwealth the "remainder of the signatures," as that phrase is used in Article 48, Part II, section 3, until the first Wednesday of December 2023.

PARTIES

8. Plaintiff, David C. Baxter, is a registered voter in Acton, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

9. Plaintiff, Mary Baine Campbell, is a registered voter in Cambridge, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

10. Plaintiff, Catherine Brun-Cottan, is a registered voter in Belmont, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

11. Plaintiff, Georges Brun-Cottan, is a registered voter in Belmont, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

12. Plaintiff, Leigh Chinitz, is a registered voter in Wellesley, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

13. Plaintiff, Bettina Neuefeind, is a registered voter in Brookline, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

14. Plaintiff, Leo T. Sprecher, is a registered voter in Newton, Massachusetts, who signed the Petition submitted to the Attorney General for certification.

15. The Attorney General, who is sued only in her official capacity, has certain official duties under Article 48 of the Massachusetts Constitution.

16. The Secretary of State (the "Secretary"), who is sued only in his official capacity, has certain official duties under Article 48 of the Massachusetts Constitution.

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction over this matter under:

A. G.L. c. 214, § 1 because this Court has original jurisdiction in all matters of equity cognizable under the general principles of equity jurisprudence; and

B. G.L. c. 231A, § 1 because it satisfies the requirements for a declaratory judgment action in that there are actual controversies between the Plaintiffs and the Attorney General as to whether (i) the Attorney General erred in refusing to certify the Petition as compliant with Article 48 and (ii) the Plaintiffs are to deliver the "remainder of the required signatures" required by Article 48, Part II, section 3, on or before the first Wednesday of December 2022 or December 2023.

18. This Court has statewide jurisdiction, and therefore has personal jurisdiction over the Attorney General and the Secretary.

19. As this Court has jurisdiction throughout the Commonwealth, venue as to the Plaintiffs is proper in this Court. G.L. c. 214, § 1, G.L. c. 231A, § 1, et seq.

STATEMENT OF FACTS

The Attorney General Erred in
Refusing to Certify the Petition.

20. In June 2022, Plaintiffs filed Initiative 22-01 with the Attorney General in accordance with Article 48 of the Massachusetts Constitution. A true and accurate copy of the Petition is attached as Exhibit A.

21. The Petition proposes to limit the amount individuals may contribute to political committees that make independent expenditures to advocate for or against particular candidates without cooperation or consultation with those

candidates. Those committees are referred to here as Independent Expenditure PACs ("IEPs"). The per annum limit for individual contributions to such committees would be $5,000.

22. Article 48, The Initiative, Part II, section 2, of the Massachusetts Constitution ("Excluded Matters") provides, in relevant part, "[n]o proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative: . . . freedom of speech . . . ."

23. It is the rule of this Court that the Attorney General should not refuse to certify a petition unless "it is reasonably clear that a proposal contains an excluded matter." *Associated Industries of Massachusetts v. Attorney General*, 418 Mass. 279, 291 (1994). As this Court has determined, it is not "reasonably clear" when "facts might show that what appeared on the limited factual record to be at least constitutionally questionable was in fact a permissible subject of a referendum." *Id.* at 286. Where such "possibilities exist," this Court has reflected, "[the Court's] role is not to prevent the people from voting on the proposal." *Id.* (citing *Yankee Atomic Elec. Co. v. Sec'y of the Commonwealth*, 402 Mass. 750, 760 n.9 (1988)).

24. Despite this Court's instruction, on September 7, 2022, the Attorney General determined that the Petition would violate Article 16's freedom of speech

clause and refused to certify it as compliant with Article 48. The Attorney General's letter to Plaintiffs denying certification is attached as Exhibit B.

25. The Attorney General based her determination upon the observation that "[c]ourts across the country have uniformly held that limits on contributions to independent expenditure PACs — like those at issue in this proposed law — violate free speech protections." Ex. B. She concluded that the Supreme Judicial Court would reach the same conclusion construing Article 16's free speech clause. *Id*.

26. None of the courts referenced by the Attorney General have any jurisdiction over Massachusetts or Massachusetts law.

27. No Massachusetts court has ever addressed whether regulation of contributions to IEPs "violate art. 16's free speech protections."

A. As this Court has instructed, petitions are to be evaluated under Massachusetts law.

B. As the Attorney General acknowledged, "Massachusetts courts have not specifically weighed in on the constitutionality of laws limiting campaign contributions" to IEPs. *Id.*

C. More specifically, no Massachusetts court has articulated any test under Article 16 for evaluating limitations on contributions to IEPs. This Court has identified a standard for evaluating limits on political speech. *Associated*

Industries, 418 Mass. at 289 n.8. But as it has instructed, "[t]he identity of the standard does not, however, mean that this court's conclusions on applying the compelling State interest standard will invariably be the same as those of the Supreme Court of the United States." *Id.*

28. Under Massachusetts law, Plaintiffs could establish facts that would adequately justify limits on contributions to IEPs.

A. Plaintiffs could establish that the rise of IEPs has created an improper and corrupting dependence of representatives and constitutional officers of the executive upon large donors to IEPs.

B. This improper dependence corrupts the representative process.

C. Avoiding such dependence corruption is a compelling interest in any representative democracy.

D. Initiative 22-01 would advance that compelling interest without interfering with the freedom of anyone to speak on any political matter.

29. Federal law does not compel this Court to recognize any free-speech-related prohibition on limiting contributions to IEPs.

A. Lower federal courts have extended Supreme Court precedent to bar regulation of contributions to IEPs. *See, e.g.*, *SpeechNow v. F.E.C.*, 599 F.3d 686, 694 (D.C. Cir. 2010) (en banc) (extending *Citizens United v. F.E.C.*, 558 U.S.

310 (2010), *cert. denied sub nom. Keating v. FEC*, 562 U.S. 1003 (2010), extending *Citizens United v. F.E.C.*, 558 U.S. 310 (2010).

B. Because the certification process requires only a determination of whether the petition would clearly violate "free speech" under the Massachusetts Constitution, this Court is not bound by these lower court precedents, all of which are outside the First Circuit and none of which construe Massachusetts law.

C. To the extent the Court relies on the First Amendment of the United States Constitution in making that determination, this Court is bound by decisions of the United States Supreme Court construing the First Amendment. That Court, however, has never addressed the question whether regulations of contributions to IEPs "violate free speech protections." Letter from Office of Attorney General, Ex. B.

D. Were the United States Supreme Court to consider the question, Plaintiffs submit that that Court would likely permit the regulation of contributions to IEPs under the First Amendment.

(1) A clear majority of the Supreme Court now identifies itself as committed to the principle of "originalism" in interpreting the United States Constitution. *See Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228

(2022); *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

(2) Applying the method of originalism that Justice Thomas proposes for the First Amendment, the First Amendment would clearly not bar the regulation of contributions to IEPs. *See, e.g., Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1223–24 (2021) (Thomas, J., concurring) ("regulations that might affect speech are valid if they would have been permissible at the time of the founding."). That test would plainly allow the regulation of contributions to IEPs. *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 259 (2017).

(3) Even applying a less robust version of originalism, the First Amendment would not bar the regulation of contributions to IEPs.

(1) Current Supreme Court doctrine permits the regulation of political speech if and only if the regulation advances a compelling state interest.

(2) The current Court has recognized the interest in avoiding "corruption" as a compelling state interest.

(3) As there are many different conceptions of "corruption," *see McCutcheon v. FEC*, 572 U.S. 185, 235–45 (2014) (Breyer, J., dissenting); *see also* Deborah Hellman, *Defining Corruption and Constitutionalizing Democracy*, 111 MICH. L. REV. 1385 (2013), *available at* https://perma.cc/UJ3A- X8TQ, an originalist would select that conception most clearly embraced by the Framers of either the First or Fourteenth Amendment.

(4) Plaintiffs submit the Framers were animated to avoid *both* quid pro quo *and* dependence corruption. *See* Testimony of Professor Jack Rakove, Ex. C.

(5) While the regulation of contributions to IEPs would not constitute a regulation to avoid quid pro quo corruption, it plainly would constitute regulation to avoid dependence corruption.

(6) Though the Supreme Court has not yet embraced a conception of "corruption" beyond quid pro quo corruption, the Court has never been presented with an

argument grounded in originalism about the scope of campaign finance regulations. Originalists have therefore not had the opportunity to consider and apply their principles to the Free Speech Clause of the First Amendment as it might affect campaign finance regulation.

(7) Were at least two of the current 6-justice conservative majority to accept these arguments of originalism, there would likely be a compound majority of the Supreme Court to uphold the regulation of contributions to IEPs.

(8) Plaintiffs therefore submit that these facts about originalism constitute "facts" that "show that what appear[s] on the limited factual record to be at least constitutionally questionable [is] in fact a permissible subject of a referendum." *Associated Industries*, 418 Mass. at 286.

30. Therefore, because (1) there is no state authority to the contrary, (2) there is no binding federal precedent to the contrary, (3) were the question presented to the United States Supreme Court, it would likely conclude, consistent with its dominant methodology for interpreting the Constitution, that limiting the

contributions to IEPs is permitted under the First Amendment, and (4) Plaintiffs could establish a compelling interest for limiting contributions to IEPs under state law, it is not "reasonably clear" under the standard articulated by this Court in *Associated Industries*, that the proposed limits violate "free speech, and therefore the Attorney General erred in refusing to certify Initiative 22-01.

The Plain Language of Article 48 Does Not Require the Plaintiffs to Deliver the "Remaining Required Signatures" Referred to in Part II, section 3, Until the First Wednesday in December 2023.

31. As with a minority of the initiative processes in constitutions across the nation, the Massachusetts constitution specifies a preclearance process before signatures can be gathered for a proposed petition.

32. This preclearance procedure serves two important functions. First, it lowers the burden of the petition process by assuring proponents that their petition is qualified before they undertake the cost of gathering signatures. Second, it assures that petitions that are not appropriate are not circulated to the public with the imprimatur of the Commonwealth.

33. In establishing this preclearance procedure, Article 48 specifies the timing for both (1) when an initiative must be presented to the Attorney General, and then after an initiative is certified, (2) when it may be filed with the Secretary of State.

A. The first sentence of Article 48, Part II, section 3, ("Mode of Origination") addresses the timing relevant to the Attorney General, and provides that:

> [The] petition shall first be signed by ten qualified voters of the commonwealth and shall be submitted to the attorney-general **not later than the first Wednesday of the August before the assembling of the General Court** into which it is to be introduced, and if he shall certify […] it may then be filed with the secretary of the commonwealth. (Emphasis added).

B. The last sentence of Article 48, Part II, "Mode of Origination," section 3, addresses the timing relevant to the Secretary of State, and provides that:

> All initiative petitions, with the first ten signatures attached, shall be filed with the secretary of the commonwealth **not earlier than the first Wednesday of the September before the assembling of the General Court** into which they are to be introduced, and the remainder of the required signatures shall be filed not later than the first Wednesday of the following December. (Emphasis added).

34. Proponents of Initiative 22-01 filed a Petition with the Attorney General before the first Wednesday in August 2022 which, if certified, they intend to be introduced into the General Court in 2024. This procedure is consistent with the plain text of Article 48.

A. The first sentence of section 3 requires that proponents submit their initiative to the "attorney-general not later than the first Wednesday of the

August before the assembling of the General Court into which it is to be introduced."

B. "[T]he first Wednesday of the August before the assembling of the General Court" of 2024 is August 2, 2023.

C. At least ten registered voters signed the Petition and filed it with the Attorney General in June 2022.

D. June 2022 is "not later than" August 2, 2023.

35. When certified, Plaintiffs intend to file their Initiative "with the secretary of the commonwealth not earlier than the first Wednesday of the September before the assembling of the General Court into which they are to be introduced."

A. "[T] first Wednesday of the September before the assembling of the General Court" of 2024 is September 6, 2023.

B. Plaintiffs are, in this very action, prosecuting the appeal of the Attorney General's refusal to certify, so that they may have a certified Initiative to file with the Secretary "not earlier than" September 6, 2023.

36. Plaintiffs followed this procedure because they understood their Initiative would raise constitutional questions. They therefore intended to assure adequate time for any necessary appeal of the Attorney General's decision. Plaintiffs accept that the constitutional argument they are presenting is of first

impression, both within Massachusetts, and for the United States Supreme Court. Rather than attempting to litigate that question in the compressed period between late 2023 and May 2024, they chose instead to present the Initiative to the Attorney General in June 2022, which is "not later than the first Wednesday of the August before the assembling of the General Court into which it is to be introduced" — which will be August 2, 2023.

37. Consistent with the dual purposes of preclearance, the Massachusetts Constitution requires that a petition be certified before being filed with the Secretary and before the Secretary provides blanks for the collection of signatures.

A. To require signatures be collected before certification would conflict with the objective to lower the burden of collection.

B. To require signatures to be collected before certification would conflict with the objective to assure that only appropriate initiatives be carried to the public.

38. Because the Attorney General refused to certify Initiative 22-01, until her determination is reversed, the plain text of the Massachusetts Constitution directs that the Secretary cannot accept proponents' petition, nor issue blanks to use to collect signatures.

39. Notwithstanding this plain text, the Attorney General has advised Plaintiffs that when she declines to certify an initiative petition, it is her practice to

offer to enter a Stipulated Order with proponents allowing them to file petitions with the Secretary and to begin collecting signatures on blanks prepared by the Secretary.

40. The Attorney General has offered to enter such a Stipulated Order for the Plaintiffs.

41. Requiring proponents to participate in such a procedure is inconsistent with Article 48, especially so when the petition covers an alleged "Excluded Matter." It is likewise inconsistent with this Court's instruction for how Article 48 is to be construed.

A. One purpose manifest in the plain language of the constitution is to avoid the circulation of petitions covering excluded matters, so as to avoid the initiative process becoming a means by which rights protecting minorities might be used by populists to sow division within the Commonwealth. A requirement to collect signatures to appeal the Attorney General's determination that a matter is "Excluded" contravenes this objective.

B. A second purpose manifest in the plain language of the Constitution is to provide proponents with certainty about their initiative before they bear the burden of collecting signatures. A requirement to collect signatures simply to be able to appeal a contrary Attorney General's determination would

impose undue burdens on proponents before they have certainty that their petition could appear on the ballot.

(1) Plaintiffs intend to rely upon volunteers to gather the signatures necessary to place the Petition on the ballot.

(2) Volunteers would be unlikely, rationally, to devote the substantial energy necessary to gathering signatures in the face of the Attorney General's judgment, fearing that even if they were successful, the Petition might not appear on the ballot.

(3) Likewise, political parties and non-profits would be unlikely to support a volunteer petition drive for a petition that has been ruled as an "Excluded Matter" under the initiative process.

(4) While Plaintiffs could rely upon paid petition services to gather signatures in 2022, paid petition signature costs during an off-year cycle would reach $15-$20 per signature, two to three times higher than the estimated cost of gathering signatures in the fall of 2023. *See* Affidavit of Harold Hubschman, Ex. D. Such costs may well be appropriate for a petition that has been certified.

They are extreme simply to secure a right to appeal a contrary Attorney General ruling.

C. Finally, a requirement to collect signatures to appeal the Attorney General's determination that a matter is "Excluded" is inconsistent with this Court's directive to "construe Article 48 in a manner 'mindful' that art. 48 establishes a 'people's process.'" *See, e.g., Anderson v. Att'y Gen.*, 479 Mass. 780, 785 (2018) (first quoting in part *Bates v. Director of the Office of Campaign & Political Fin.*, 436 Mass. 144, 154 (2002), and then quoting *Buckley v. Secretary of the Commonwealth*, 371 Mass. 195, 199 (1976)).

42. Recognizing that the language of Article 48 does not compel her reading of Article 48, the Attorney General has made equitable arguments in prior cases to support her contention that the "remaining required signatures" are due in December of the year the Attorney General has ruled, regardless of whether the petition is intended for the following year's ballot, or the ballot two years hence. *See, e.g.*, Letter from the Office of the Att'y General to the Single Justice dated September 26, 2016, in *PassMass Amendment, et al., v. Attorney General and Secretary of The Commonwealth*, No. SJ-2016-0374 (D.E. #5), Ex. E. These arguments fail.

A. The Attorney General defends her process citing the interest in conserving judicial resources. But when there is a genuine legal question about an

"Excluded Matter," the appropriate issue is in what context that question should be resolved. By filing their petition in an even-numbered year, two years before the Initiative would appear on the ballot, Petitioners have given this Court ample opportunity to consider the matter, rather than forcing a resolution within the context of an appeal briefed and decided on an expedited basis.

B. The Attorney General defends her process on the grounds that it will avoid opinions that might turn out to be advisory if the petitioners ultimately fail to collect the requisite signatures. Ex. E. Even assuming that interest might justify a bond of sufficient size to assure that signatures on a petition this Court ruled was not excluded would be collected. It does not justify imposing what is, in effect, a $1 million penalty simply to appeal the Attorney General's legal determination. *See supra,* ¶ 41(B)(iv). In no other context of Massachusetts law is a plaintiff required to expend $1 million simply to preserve its right to appeal a legal determination of the Attorney General. Such a burden certainly makes no sense of the "people's process" that this Court has described Article 48 to be.

C. Justices of this Court have recognized that the precise question raised by this complaint — whether signatures on a petition filed in an even-numbered year, two years before it could appear on the ballot, must be collected before a decision of the Attorney General could be appealed — is unresolved.

(1) In response to the parties' written submissions including the Attorney General's letter cited above in *PassMass Amendment*, Justice Lenk, sitting as single justice, observed: "[t]he defendants suggest in their letter dated September 26, 2016, the plaintiffs are not entitled to a ruling on the merits of their claim challenging the certification decision unless and until they first gather sufficient signatures to put the petition on the ballot." *See* J. Lenk's Memorandum of Decision in *PassMass Amendment, et al. v. Attorney General and Secretary of the Commonwealth*, SJ-2016-0374, D.E. #8, a true and accurate copy of which is attached hereto as Ex. F, at 3-4.

(2) Justice Lenk then wrote: "That may or may not be correct; I leave that to be decided if and when the plaintiffs choose to pursue that route." *Id.*

D. While other justices sitting as a single justice have entered orders, apparently in the form proposed by the Attorney General, dismissing as moot cases brought by pro-se plaintiffs for failure to deliver signatures to the Secretary by the first Wednesday in December, so far as Plaintiffs' counsel have been able to determine, all of those orders appear to have been entered in cases

where the plaintiff was represented pro se, none was accompanied by a reasoned opinion analyzing the text of Article 48, and none was based on the record presented here. *See, e.g.*, *Bokron, et al. v. Attorney General and Secretary of the Commonwealth*, SJ-2020-0613, D.E. #5; *Bokron, et al. v. Attorney General and Secretary of the Commonwealth*, SJ-2017-0326, D.E. #9.

E. Whatever the merits of the Attorney General's equitable arguments, they cannot stand in the face of the plain language of Article 48.

(1) Article 48 gives proponents the choice of the year during the two-year cycle for ballot initiatives to have an initiative submitted to the General Court.

(2) Plaintiffs have chosen to have their petition submitted to the General Court that will convene in January 2024.

(3) Based upon that choice, and the plain language of Article 48, Plaintiffs must submit a certified petition to the Secretary "not earlier than the first Wednesday of the September before the assembling of the General Court."

(4) That Wednesday is September 6, 2023.

(5) To have a certified petition to submit on or after September 6, 2023, Plaintiffs submitted to the Attorney General their proposed initiative "not later than the first

Wednesday of the August before the assembling of the General Court."

(6) That Wednesday is August 2, 2023.

(7) Petitioners submitted their Initiative to the Attorney General before that date, in June 2022.

(8) As the language of Article 48 directs, Plaintiffs are not authorized to collect signatures before they file a "certified petition" with the Secretary.

(9) Plaintiffs are prosecuting this appeal so that they may have a "certified petition" to file with the Secretary on or after September 6, 2023.

COUNT I
(Declaratory Relief)

47. Plaintiffs restate and reallege the allegations of the paragraphs set forth above as if restated and realleged herein.

48. There is an actual controversy between Plaintiffs and the Attorney General as to whether the Attorney General erred in denying certification of the Petition on the basis that it violated "freedom of speech." This controversy will be terminated by this Court's determination of whether the Attorney General erred.

49. For the reasons set forth above, the Attorney General did err.

WHEREFORE, Plaintiffs request the relief set forth below:

COUNT II
(Declaratory Relief)

50. Plaintiffs restate and reallege the allegations of the paragraphs set forth above as if restated and realleged herein.

51. There is an actual controversy between the Plaintiffs and the Attorney General as to whether Plaintiffs must file "the remaining required signatures" with the Secretary by the first Wednesday in December 2022 or December 2023, and thus whether the Petition and/or this action will be moot if the Plaintiffs do not deliver the signatures by the first Wednesday in December 2022. This controversy will be terminated by the Court's ruling on this issue.

52. As outlined above, because Plaintiffs filed their Petition and the Attorney General declined to certify it in an even-numbered year, Article 48 does not require the Plaintiffs to deliver the signatures to the Secretary until December 2023.

WHEREFORE, Plaintiffs request the relief set forth below:

PRAYERS FOR RELIEF

Plaintiffs respectfully request this Court enter judgment:

A. On Count I, declaring that the Attorney General erred in refusing to certify the Petition as compliant with Article 48, and that the Petition complies with Article 48;

B. On Count II, declaring that the Plaintiffs are not required to deliver the "remaining required signatures" required by Article 48 to the Secretary before the first Wednesday of December 2023; and

C. On both Counts, granting the Plaintiffs such other relief as may be appropriate and just.

Respectfully Submitted,

DAVID C. BAXTER,
MARY BAINE CAMPBELL,
CATHERINE BRUN-COTTAN,
GEORGES BRUN-COTTAN,
LEIGH CHINITZ,
BETTINA NEUEFEIND, and
LEO T. SPRECHER

Dated: October 24, 2022

By their attorneys,

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EXHIBIT A

Initiative Petition for a Law Relative to Limiting Political Contributions to Independent Expenditure PACs

Be it enacted by the People, and by their authority:

SECTION 1: This act may be referred to and cited as the "End Super PACs Act."

SECTION 2: Subsection (a) of section 7A of chapter 55 of the General Laws is hereby amended by striking out paragraph (3) and inserting in place thereof the following paragraph:

(3) An individual may in addition make campaign contributions to any political committee not specified in paragraph (1), (2), (4) or (5); provided, however, that the aggregate of such campaign contributions to any one such political committee shall not exceed in any one calendar year the sum of five hundred dollars.

SECTION 3: Subsection (a) of section 7A of chapter 55 of the General Laws is hereby further amended by adding the following paragraph:

(5) An individual may in addition make campaign contributions to any independent expenditure PAC as defined in section 18A; provided, however, that the aggregate of campaign contributions to any one such independent expenditure PAC shall not exceed in any one calendar year the sum of five thousand dollars.

SECTION 4: This act shall take effect on January 1, 2024.

Initials

1. _____	5. _____	9. _____	13. _____	17. _____
2. _____	6. _____	10. _____	14. _____	18. _____
3. _____	7. _____	11. _____	15. _____	19. _____
4. _____	8. _____	12. _____	16. _____	20. _____

The undersigned qualified voters of the Commonwealth of Massachusetts have personally reviewed the final text of this initiative petition, fully subscribe to its contents, agree to be one of its original signers and have signaled that agreement by initialing the page with the petition, and hereby submit the measure for approval by the people pursuant to Article 48 of the articles of amendment of the Constitution of the Commonwealth of Massachusetts, as amended by Article 74 of said articles of amendment.

#	Signature	Printed Name	Address at which signatory is registered to vote
1.		Lesley Lawrence Lessig	20 Amory St, Brookline
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EXHIBIT B

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

TEL: (617) 727-2200
www.mass.gov/ago

September 7, 2022

Thomas O. Bean
Verrill Dana LLP
One Federal Street, 20th Floor
Boston, MA 02110

Re: Initiative Petition No. 22-01: Initiative Petition for a Law Relative to Limiting Political Contributions to Independent Expenditure PACs

Dear Mr. Bean:

In accordance with the provisions of Article 48 of the Amendments to the Massachusetts Constitution, we have reviewed the above-referenced initiative petition, which was submitted to the Attorney General on or before the first Wednesday of August this year. I regret that we are unable to certify that the proposed law complies with Article 48. Our decision, as with all decisions on certification of initiative petitions, is based solely on Article 48's legal standards and does not reflect the Attorney General's policy views on the merits of the proposed laws.

Below, we describe the proposed law and then explain why we why we are unable to certify that the petition is consistent with the right to free speech embodied in Article 16 of the Declaration of Rights.

Description of Petition

This proposed law would impose a $5,000 per-calendar-year limit on campaign contributions made by an individual to a political committee or entity that makes independent expenditures to advocate for or against particular candidates without cooperation or consultation with those candidates. This proposed law would go into effect on January 1, 2024.

The Petition is Inconsistent with the Rights of Free Speech

Article 48, the Initiative, Part 2, Section 2 provides, in pertinent part, that "No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition," including the freedom of speech. As explained below, the proposed law is inconsistent with these rights

protected by the state constitution because it would impinge on the freedom of speech. *Associated Indus. of Massachusetts v. Att'y General*, 418 Mass. 279, 283-84, (1994) (noting that Article 48 looks at inconsistency with rights under state constitution, not the federal constitution).

Article 16 of the Massachusetts Declaration of Rights provides, in relevant part, that the "right of free speech shall not be abridged." Courts in Massachusetts interpret Article 16's protections as being coextensive with, or broader than, the First Amendment to the United States Constitution. Courts across the country have uniformly held that limits on contributions to independent expenditure PACs – like those at issue in this proposed law – violate free speech protections. See, e.g., SpeechNow.org v. FEC, 599 F.3d 686, 695 (D.C. Cir. 2010); New York Progress & Protection PAC v. Walsh, 733 F.3d 483, 488 (2d Cir. 2013); Wisconsin Right to Life State Pol. Action Comm. v. Barland, 664 F.3d 139, 154 (7th Cir. 2011).

Although Massachusetts courts have not specifically weighed in on the constitutionality of laws limiting campaign contributions made by an individual to a political committee or entity that makes independent expenditures to advocate for or against particular candidates without cooperation or consultation with those candidates, where the Supreme Judicial Court has recognized that courts in the Commonwealth interpreted the protections of free speech under the Declaration of Rights to be "comparable to those guaranteed by the First Amendment," *Opinion of the Justices*, 418 Mass. 1201, 1212 (1994), it is clear that this proposed law would violate the free speech rights afforded by the state constitution.

For this reason, the Attorney General's Office is unable to certify that Petition No. 22-01 complies with Article 48.

Very truly yours,

Anne Sterman
Deputy Chief, Government Bureau
617-963-2524

cc: William Francis Galvin, Secretary of the Commonwealth

EXHIBIT C

Exhibit C:
Expert Report and Testimony of Professor Jack Rakove,
in
Alaska Pub. Offices Comm'n v. Patrick,
Supreme Court of Alaska,
S-17649 (2020)

Contents

Expert Report of Jack Rakove, Ph.D.

Background

I am the William Robertson Coe Professor of History and American Studies, and Professor of Political Science and (by courtesy) Law at Stanford University, where I have taught since 1980. I earned an A.B. in History from Haverford College in 1968 and a Ph.D. in History from Harvard University in 1975. I am the author of seven books on the American Revolution and Constitution, including *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (1979); *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996), which received the Pulitzer Prize in History and two other book prizes; *Revolutionaries: A New History of the Invention of America* (2010), which was a finalist for the George Washington Prize; and *A Politician Thinking: The Creative Mind of James Madison* (2017). I have edited another six books, with a seventh, *The Cambridge Companion to The Federalist*, due to be published next year. I have written roughly seventy-five scholarly articles and chapters, and numerous other short essays and op-eds.

I have also been the principal author of four *amicus curiae* historians' briefs submitted to the United States Supreme Court in these cases: *Vieth v. Jubilier* (2003-2004), which dealt with partisan gerrymandering in Pennsylvania; *Hamdan v. Rumsfeld* (2005); *D.C. v. Heller* (2008); and *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015). I also participated in drafting an *amicus curiae* brief on the meaning of the two Emoluments Clauses of the Constitution in *C.R.E.W. v. Trump*

(2017). In 1983-1988 I was a consultant to Goodwin, Procter & Hoar and expert witness in *Oneida Indian Nation v. State of New York*.

For this litigation, I have been asked to discuss how issues of governmental corruption were viewed during the Founding era of the American republic, with reference to prevailing political ideas and debates and constitutional and legal provisions that were conceived to deter or limit the impact of corruption on public life. This report is, in effect, a discussion of the concept of political corruption, which has different meanings and connotations in different periods and societies.

As compensation, I am receiving a flat fee of $12,500 as well as travel expenses covering my trip to Anchorage. My accompanying CV contains a list of my publications within the last ten years. I have not testified as an expert witness in a legal case within the previous four years.

Introduction

How did the founding generation of the American republic, and more specifically, the framers and ratifiers of the Federal Constitution, think about the problem of political corruption? There is obviously no question that they understood overt forms of bribery to be blatant forms of corruption. The Impeachment Clause of the Constitution identifies bribery as one of three categories of offenses that warrant removal from office. The Foreign Emoluments Clause, which is now much in the news, was written with well-established historical knowledge of the formerly secret Treaty of Dover of 1670, when Louis XIV had effectively bribed Charles II of England to pursue a pro-French foreign policy and privately commit himself to support the Church of Rome. Some framers of the

Constitution believed that the wartime French embassy to the United States had bribed at least one member of the Continental Congress—John Sullivan of New Hampshire—to support French policy. Back in the 1760s, Virginia politics had been wracked by charges of financial corruption directed against John Robinson, the speaker of the lower house of the Virginia legislature.

But was the founding generation's understanding of corruption limited to bribery alone? The short answer is that while bribery was, by definition, the most obvious form of corruption, it was only one example of the ways in which a political system could be corrupted. As one of the numerous political *concepts* that the American colonists had inherited from European and British writers, the concept of corruption covered a whole array of phenomena. One could use it, as Machiavelli did, to describe the civic erosion of an entire political culture. It could also describe a set of relationships between institutions that had befouled the true principles of constitutional government, as eighteenth-century British opposition writers used it to lambaste the Crown's influence over the House of Commons. Like most political concepts, *corruption* had inflationary properties: it could be used opportunistically to criticize some innovation that one detested for other reasons. History provided numerous examples of what corruption had meant in the past, but that did not eliminate the appearance of other forms of corruption in the present or future.

The concept of political corruption

The practice of corruption is the subject of countless books. Like obscenity, we know corruption when we see it, and cases are easily multiplied. The distinguished American jurist, John T. Noonan, Jr., for example, has written a massive history of *Bribes*

that spans several millennia, moving from ancient Egypt to the ABSCAM scandal of the late 1970s and early 1980s.[1] Specific episodes of corruption have their particular histories. The history of the Yazoo land scandal of the late 1790s or the presidencies of Ulysses S. Grant and Warren G. Harding easily generate probing accounts of greedy politics and public malfeasance.

Yet a comprehensive history of the *concept* of political corruption has yet to be written. As a political phenomenon, corruption has an intellectual history of its own. The concept of corruption is not reducible to a simple definition or a mere compendium of acts of bribery, embezzlement, or patronage. One could write a history of the concept of corruption that could go as far back as Thucydides' *History of the Peloponnesian War* and Aristotle's *Politics*.[2] The problem of the *corruzione* of a state was a main topic in the political thinking of Niccolò Machiavelli, whom scholars often treat as the first modern student of politics. His chapters on this subject in the *Discourses on Livy* proved fundamental to the development of early modern republican thinking in the sixteenth century. Machiavelli's ideas about republicanism were soon transmitted to English readers in the Tudor and Stuart eras of the sixteenth and seventeenth centuries.[3] A concern with the corruption of an independent and legally supreme Parliament by the Crown then became a major theme in eighteenth-century British opposition thinking. The Scottish philosopher-historian David Hume wrote an influential essay on this subject, and that essay, along with comparable work by other English opposition writers, had a major

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[1] John T. Noonan, Jr., *Bribes* (New York, 1984).
[2] J. Peter Euben, "Corruption," in Terence Ball, James Farr, and Russell L. Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge, UK, 1989), 223-230.
[3] Felix Raab, *The English Face of Machiavelli: A Changing Interpretatiuon, 1500-1700* (London and Toronto, 1964, 2010).

impact on America's revolutionary founders. Their ideas about separation of powers, checks and balances, and the idea of an extended federal republic were profoundly influenced by their inherited perceptions of the corruption of the eighteenth-century British constitution.

One cannot reconstruct the Founding generation's view of corruption, then, simply by examining how the word was defined in eighteenth-century dictionaries. The word *corruption* does not appear in the Revolutionary-era constitutions that were written first at the state and then at the national levels of government. The closest one gets is the presence of the word *bribery* in the impeachment clause of Article II, Sect. 4 and the references to *emoluments* in Article I, Section 9, and Article II, Section 1. Corruption is much more a concept than a mere word, and to grasp its original meaning at the time the Constitution was adopted, one has to ask how the Founding generation thought about the diverse ways in which their polity or government might be corrupted. In a sense, one has to be able to write an intellectual history of how the Founding generation thought about politics in the broadest sense of the term.

Machiavelli's significance

At first glance, Machiavelli seems an odd figure to place at the start of a report asking how the Founding generation thought about political corruption. We know Machiavelli primarily as the author of *The Prince*, that landmark manual of statecraft that asked how a prince could secure his rule in a new city he had not previously governed. Manuals for princes were a standard element of medieval and early modern political theory, universally couched in terms of Christian morality. Machiavelli broke decisively

with that moral tradition. He famously asked whether it is better to be feared or loved, and came down decisively on the side of fear. To his many critics, Machiavelli is cast as a "teacher of evil." When we characterize some political actor or action Machiavellian, it is this calculating, cynical, and even brutal perspective that we have in mind.

Yet the Machiavelli who wrote *The Prince* was also working more or less concurrently on his *Discourses on the First Ten Books of Titus Livy*. Determining the relationship between these two texts is the great challenge that has shaped the rich scholarship on Machiavelli. That question need not interest us here. Two other essential facts, however, do matter. First, the *Discourses* is a foundational text of early modern republican thinking, and concepts and arguments that Machiavelli used there resonated throughout the sixteenth, seventeenth, and eighteenth centuries, with important results in both England and revolutionary America. Second, the problem of corruption was a controlling theme in Machiavelli's thinking. Corruption, as he thought about it, had little to do with prosaic acts of bribery or nepotism or non-bid contracts. It involved forces more essential and corrosive: the emergence of a degraded way of life that would prevent a community from leading a political life (*vivere politico*) or a civil life (*vivere civile*) or from living in *uno stato libero,* a "free state." (This term reappears in the preamble to the Second Amendment of the U.S. Constitution, and one could indeed draw a straight line from Machiavelli's concerns with having a militia of Florentine citizens to the language of that Amendment.) For Machiavelli, the concept of corruption offered an essential way of describing the health—or better, diagnosing the diseases—of a body politic. In his era, and later, the idea that a state had a constitution did not mean, as it later would, that it had

a written charter of government; it was rather a metaphor for the organic strength of the body politic, and therefore for the lasting welfare of the whole society.[4]

Machiavelli devoted three chapters to the problem of corruption in Book I of the *Discourses*.[5] In Chapter 16, in a preliminary way, he announced that "a people which has become completely corrupted"—which had lost all the attributes of living in liberty—"cannot live free even for a brief time, not even a moment." For that reason, Machiavelli declared that he would limit his "concern [to] those peoples where corruption has not spread too widely and there remains more of the good than the tainted." The prime historical example of this, Machiavelli observed in concluding Chapter 16, was the Roman people after their expulsion of the Tarquin kings and their creation of the republic in 509 BCE. In Chapter 17, Machiavelli then argued that "it was Rome's greatest good fortune that its kings quickly became corrupt, so that they were driven out, and long before their corruption had passed into the heart of the city." From this situation Machiavelli concluded "that where the material is not corrupt, disturbances and other disorders can do no harm, and where the material is corrupt, carefully enacted laws do no good," unless they are imposed by an individual—a prince or lawgiver—"in such a way that the material becomes good." When Machiavelli speaks of "material" (as in "*la*

[4] There are numerous analyses of Machiavelli's political ideas and, more specifically, his view of corruption. In this report, I rely on J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republic Tradition* (Princeton, 1975), 183-218, and a recent book by Fabio Raimondi, *Constituting Freedom: Machiavelli and Freedom*, trans. Matthew Armistead (New York, 2018), 1-31. Also very helpful is Quentin Skinner, *Machiavelli: A Very Short Introduction* (Oxford, UK, 1981), 54-87.

[5] In this and the next paragraph I have used the translation by Julia Conaway Bondanella and Peter Bondanella, *Niccolò Machiavelli: Discourses on Livy* (New York, 1997), 62-71.

materia dove la è corrotta") he is describing the formative qualities and characteristics of a city's citizens and subjects.

Machiavelli described the great problem he was raising in the opening sentence of Chapter 18: "to consider whether or not it is possible to maintain a free government [*lo stato libero*] in a corrupt city if one already exists; or whether or not, if one does not already exist, it can be established there." This was, Machiavelli immediately conceded, a truly difficult problem, and he made the challenge even greater by assuming that "the city in question is extremely corrupt." In his accounting, the forms of corrupting *la materia* of the people were many and diverse, and the paths to reform few and difficult. But the end goal for Machiavelli remains the same: to enable a people to lead a political life (*vivere politico*) or a civil life (*vivere civile*) where laws are obeyed; inequalities minimized; all citizens, even the most meritorious, remain subject to the laws when they commit unjust acts; and where ordinary people could participate in public life and be required to defend their republic against its enemies (rather than relying on the mercenary armies that Machiavelli utterly distrusted). In such a republic, the people would have legal devices available to monitor and prosecute the misdeeds of the elite. The great example on which Machiavelli drew was the Roman tribunate, which was elected by the plebeians, and which had the authority to bring legal charges against patricians.

All of these practices and institutions instantiated and exemplified "the new modes and orders [*modi ed ordini nuovi*]"[6] that Machiavelli proposed instituting in cities

[6] Machiavelli used this famous phrase in the opening sentence of his preface to the autograph manuscript of *The Discourses*, asserting that the difficulties of explaining how to establish a republic are no less dangerous than the task of exploring "unknown lands and seas." Some translators prefer to say "new methods and institutions," but in my view,

that were not yet too corrupt, where a civil and political life reconstituted on republican principles could still be restored. Machiavelli derived these "new modes and orders" either from the Roman history that he had studied or from his own rich experience. The great attraction of Roman history lay in the centuries-long process whereby the Roman republic had been able to expand and to create a vast empire across Italy and then the Mediterranean. The most important consequence of implementing these new modes and orders would be to create or revive a deep sense of civic *virtú*. Among all the other key words that characterized his thought—*corruzione*, *stato*, *fortuna,* and *materia—virtú* was arguably the one that remained most essential to Machiavelli's republican commitments.

Just like *corruzione*, the concept of political *virtú* also has a complicated meaning. In *The Prince*, for example, *virtú* embodied the talents that enabled the lone ruler of a community to master all the vicissitudes and contingencies of *fortuna*. In effect, *virtú* and *fortuna* were linked as opposites. *Fortuna*, the chaotic world of human affairs, created the unstable and dangerous political world that the prince had to master; *virtú* identified the talents that the prince needed to wield in order to command it. But in *The Discourses*, Machiavelli's notion of *virtú* takes a different form. Now it involves all those relations—the "new modes and orders"—that collectively enable the citizens of a polity to maintain their republic. *Virtú* connotes a set of civic obligations and attitudes that a people must possess to create a stable republic, one that will resist both the turmoil of *fortuna* and the various sources of *corruzione*.

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institutions in contemporary English has too specific a meaning to capture the range of practices Machiavelli had in mind.

Foremost among the latter is the underlying ambition of the upper classes and aristocracy (sometimes known as the *grandi* [the great] or the *ottimati* [optimates]). As the historian John Najemy observes, "the unifying theme of the *Discourses* is the precariousness of republics and their vulnerability to the ambition of the noble and elite classes. The motor driving the history of republics, their forms of government, and their capacity for survival, defense, and expansion is the perpetual antagonism between the nobles and the people." In opposition to other writers, who viewed the antagonism between the patricians and plebeians with contempt, Machiavelli boldly and radically argued that the active struggles between the *grandi* and the *populo* made possible by the creation of the tribunate was the real source of Rome's stability. Where the nobility wanted to dominate the people, and would happily use corrupt means to attain their ends, the people only wanted to be left alone to govern their own lives, and to rely upon the legal system to secure their liberty.[7]

Machiavelli's fear of corruption, it can thus be said in conclusion, takes the form of a deep and persisting worry that the wealthy who want to dominate the rest of the population will always look for devices that will enable them to exploit their resources and influence for politically sinister purposes, to the weakening of the free state the republic is conceived to be. The proper answer to this corruption is the preservation of popular *virtú*, which will be especially enhanced both by the people's participation in the militia and by the existence of means to impose justice on the elite. Unlike other writers

[7] John M. Najemy, "Society, Class, and State in Machiavelli's *Discourses on Liberty*," in Najemy, ed., *The Cambridge Companion to Machiavelli* (Cambridge, UK, 2010), 102-104. For a much more extended treatment of these issues, see John P. McCormick, *Machiavellian Democracy* (New York, 2011).

who perpetually worried about the danger of turmoil, in any form, Machiavelli believed that the active prosecution of civic crimes, even when directed against a society's elite or its past heroes (who had gone astray), was one of the "orders" that would maintain the collective *virtú* of the population.

Corruption in Anglo-American Political Culture

The theme of *virtú*, now translated in pale form into English as virtue,[8] had a prominent place in American republican thinking. "If there is a form of government then, whose principle and foundation is virtue," asked John Adams in his revolutionary pamphlet, *Thoughts on Government* (1776), "will not every sober man acknowledge it better calculated to promote the general happiness than any other form?"[9] Like Machiavelli in the early 1500s, the American revolutionaries believed that the fate of the republican governments they were now forming depended on the people's possession of civic virtue, which they defined primarily as a willingness to subordinate private interest to public good. Republican government required a culture where "each man must somehow be persuaded to submerge his personal wants into the greater good of the whole."[10] Montesquieu had taught that each of the three forms of government (monarchy,

[8] The colloquial use of virtue in contemporary English does not really capture the robust political character of Machiavelli's *virtú.* In their translation of *The Discourses* (p. 361) the Bondanellas, for example, list "ability, skill, merit, ingenuity, strength, [and] sometimes even virtue" as defining synonyms for *virtú*.

[9] Philip Kurland and Ralph Lerner, eds., *The Founders' Constitution* (Chicago, 1987), I, 108.

[10] Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill, N.C., 1969), 65-70 (quotation at 68).

aristocracy, republic) had a defining moral characteristic: virtue was the true signifier of republicanism.

On the question of political corruption, however, the American revolutionaries accepted a much more focused definition that was the direct product of British history since the Glorious Revolution of 1688, when the Dutch *stadtholder* William of Orange and his wife, Mary, replaced her father, James II, on the throne. The main constitutional result of this revolution, as confirmed by the Declaration of Rights of 1689, gave legal supremacy to Parliament. The Stuart monarchs had previously voiced claims to absolutist authority, and they had periodically attempted to rule either without allowing Parliament to meet at all or by prolonging a single Parliament without holding fresh elections to the House of Commons. After 1689, that disdain for parliamentary consent to acts of government was no longer possible. A Triennial Act adopted in 1694 required that Parliament meet every three years, but equally important, the practice of granting "annual supplies" (appropriations for funding government) and the annual adoption of a Militia Act (which evolved into a general statute organizing military activities) made Parliament a standing institution of government.[11]

So far, so good: England (or, after the adoption of the Act of Union with Scotland in 1707, the United Kingdom of Great Britain) had become a constitutional monarchy unlike the absolutist monarchies of France, Spain, and Russia. Its "mixed" constitution combined the estates of royalty, aristocracy, and common subjects in one sovereign Parliament, known as the King-in-Parliament. This "boasted" or "vaunted" British

[11] For a great survey of this subject, see J. H. Plumb, *The Origins of Political Stability; England, 1675-1725* (Boston, 1967).

constitution became the envy of enlightened Europe. Its virtues were celebrated in a famous section of the Baron of Montesquieu's *The Spirit of the Laws*, arguably the greatest work of eighteenth-century political science, which noted that there was only one nation whose constitution made the preservation of liberty its chief end: Britain.

But in the years after the Hanoverian dynasty took the throne in 1714, the practice of British politics evolved in significant ways. Beginning with Sir Robert Walpole, this period marked the beginning of the growth of ministerial government, in which effective control of the executive (the Crown) passed to whichever leader commanded majority support in the House of Commons (as well as the personal favor of the king). British politics became coalitional politics, as leaders gathered coteries of followers and negotiated to form stable coalitions. Other mechanisms worked to make politics more manageable. A Septennial Act extended the period between parliamentary elections from three years to seven. The existence of "pocket" and "rotten" boroughs—parliamentary constituencies respectively either controlled by some dominant government interest or that contain few, easily influenced voters—made it easier for ministries to manage elections. The national electorate contracted, so that an estimated ten thousand voters in a nation of eight million determined who served in the Commons.

Perhaps most important, the Crown found reliable techniques to build a steady phalanx of supporters in Parliament. Offices, pensions, sinecures, and other sources of patronage and influence guaranteed the loyalty of backbenchers. If individual ministers occasionally lost the support of the majority of the Commons, requiring new coalitions to form, the Crown was never in the minority. The king retained the right to veto legislation, but its use was abandoned after 1707 because there was never any need to deploy it.

This was the form of corruption, by patronage and other forms of influence, that opposition political writers began denouncing in the 1720s and 1730s, and which the American colonists in turn absorbed through newspapers and pamphlets. It was a distinctively British form of *corruzione*, in Machiavellian terms, because it violated the true principles of the Glorious Revolution. The idea of parliamentary supremacy rested on the belief that the true duty of the legislature was to check the misuse of the executive power held by the king and his ministers. The concrete exercise of power was the natural work of the Crown; the protection of liberty was the chief responsibility of Parliament. It could fulfill that task only if it preserved the legislative privileges that secured its deliberative independence; only if it accurately represented the feelings and interests of its constituents; and only if its members remained free from the different forms of corrupt influence the Crown could bestow.

Drawing upon ideas that went as far back as the 1670s, British politics was often described in terms of a division between "Court" and "Country" parties, the former favoring the policies of the king and his ruling ministers, the latter worrying about all the insidious uses of patronage and influence that were enabling the Crown to sap the independence of a theoretically supreme Parliament. These were not political parties in the modern sense of the term, but rather perspectives that were repeatedly, even tediously, echoed in public debate, yet which also retained a deep hold on contemporary views of how the British constitution was actually working. It was in this sense that the philosopher-historian David Hume referred to "the principles of the *court* and *country*

parties, which are the genuine divisions in the BRITISH government."[12] Adherents of the country perspective repeatedly argued for excluding "placemen" from Parliament, and for requiring members of the House of Commons to serve relatively short terms.[13] A House of Commons whose members were habituated to government offices and pensions was constitutionally corrupted. On the other side of the question, advocates of the Court party believed, as party-men always do, that patronage makes government more efficient and decisive; it is something the constitution needs to make it work.

Hume addressed this issue incisively in his short essay "Of the Independency of Parliament." The "paradox" of the British constitution, Hume argued, was that although "The share of power, allotted by our constitution to the house of commons, is so great, that it absolutely commands all the powers of government," it nevertheless refused to wield that power to its full extent, but was content to remain "confined with the proper limits" of the constitution. The motivation for that restraint lay in the personal "interest of the majority of its members. The crown has so many offices at its disposal, that, when assisted by the honest and disinterested part of the house," it always had the support it needed to preserve monarchical power within the balanced constitution. "We may call [this] influence by the invidious appellations of *corruption* and *dependence*," Hume wrote; "but some degree and some kind of it are inseparable from the very nature of the constitution, and necessary to the preservation of our mixed government"—and with it the liberty it was boasted to preserve.[14]

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[12] David Hume, "The Parties of Great Britain," in Eugene F. Miller, ed., *David Hume: Essays Moral, Political, and Literary*, rev. ed. (Indianapolis, 1985, 1987), 71.
[13] Pocock, *Machiavellian Moment*, 406-410.
[14] Hume, "Of the Independency of Parliament," in Miller, ed., *Essays Moral, Political, and Literary*, 44-45.

As forms of corruption go, these ideas of using patronage and pensions to produce reliable legislative majorities hardly seem the most odious threat the liberty of the people might face. As Hume argued, there was a net positive good to the Court party's position: it preserved the balanced constitution of King, Lords, and Commons that Montesquieu and other eighteenth-century observers so admired, and which distinguished Britain from all other regimes. But from the vantage point of English opposition writers and their American colonial readers, the danger remained real nonetheless. A Commons staffed by placemen and party-men would be unable to check all the forms of aggrandizement and personal enrichment that the King's ministers would assiduously pursue. Perhaps the constitutional settlement of 1688 and its immediate aftermath could be preserved if there was a "king above party," as Henry St. John, the Viscount Bolingbroke, argued—a monarch who would not be the captive of his ministers, but who would instead embody the entire national (or even imperial) interest. But that was not the working reality of British government during the reigns of the first three Georges.

For opposition, country-party style writers—like John Trenchard and Thomas Gordon, the co-authors of the influential *Cato's Letters*—the best cure to the forms of corruption that Parliament was now illustrating lay in governing the composition of the House of Commons. There were two basic methods to minimize legislative corruption, *Cato* argued in two essays published in January 1721:

> these deputies must be either so numerous, that there can be no means of corrupting the majority; or so often changed, that there shall be no time to do it so as to answer any end by doing it. Without one of these regulations, or both, I lay it

> down as a certain maxim in politicks, that it is impossible to preserve a free government long.[15]

There were long periods in English history when these ends had not been obtained. In a hilarious sentence, *Cato* described the temptations that had corrupted past parliaments.[16] But the deeper considerations that would prevent the corruption of legislatures lay in narrowing the distance between legislators and subjects through "the frequent fresh elections of the people's deputies," or "what the writers in politicks call rotation of magistracy." Such rules would have two main benefits. First, legislators new to office would "remember what they themselves suffered, with their fellow-subjects, from the abuse of power, and how much they blamed it." In effect, lawmakers who came and went would recall their status as subjects and legislate with the understanding that they would be bound by the same measures they were enacting. Second, because their terms would be short, they would avoid the vices of long-term incumbents, "seeing themselves in

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[15] "How free Governments are to be framed so as to last, and how they differ from such as are arbitrary," January 13, 1721, in Ronald Hamowy, ed., *Cato's Letters: Or, essays on Liberty, Civil and Religious, and Other Important Subjects* (Indianapolis, 1995), I, 421, echoing a similar passage in "All Government proved to be instituted by Men, and only to intend the general Good of Men," January 6, 1721, *ibid*., 418.

[16] For the record, here is *Cato*'s text on the multiple sources of corrupt "disservice" in the Commons: "What with the promises and expectations given to others, who by court-influence, and often by court-money, carried their elections: What by artful caresses, and the familiar and deceitful addresses of great men to weak men: What with luxurious dinners, and rivers of Burgundy, Champaign, and Tokay, thrown down the throats of gluttons; and what with pensions, and other personal gratifications, bestowed where wind and smoke would not pass for current coin: What with party watch-words and imaginary terrors, spread amongst the drunken 'squires, and the deluded and enthusiastick bigots, of dreadful designs in embryo, to blow up the Church and the Protestant interest; and sometimes with the dread of mighty invasions just ready to break upon us from the man in the moon: I say, by all these corrupt arts, the representatives of the English people, in former reigns, have been brought to betray the people, and to join with their oppressors." *Ibid*., 422.

magnifying glasses, grow, in conceit, a different species from their fellow-subjects; and so by too sudden degrees become insolent, rapacious and tyrannical."[17]

The concern with corruption in eighteenth-century Anglo-American political discourse was primarily institutional in nature. It was a conception of corruption that was much more narrowly drawn than Machiavelli's notions of *corruzione*. Although Machiavelli sometimes focused on specific officials and agencies of government, when he spoke about cities being either irredeemably corrupt or not corrupt enough to lose the possibility of civic reformation, he was contemplating the health of the whole body politic—the *virtú* of its rulers and subjects alike. The opposition writers who influenced eighteenth-century Americans did have some comparable concerns. They worried, for example, about the complicated ways in which the manly *virtú* idealized in Machiavelli's militiaman was being effeminized—that is the best term for it—by the softening habits of commerce, the taste for luxury, and the flourishing of mechanisms of private and public credit that made Britain the Atlantic world's wealthiest and most commercial empire.[18] But the dominant story remained political and constitutional. The concern with corruption was first and foremost a matter of allowing Parliament to play the role that the political turmoil of the seventeenth century had ultimately assigned to it. A Commons controlled by patronage and influence, representing too many pocket and rotten boroughs, serving seven-year terms insulated from the wishes of their constituents, was inherently corrupt. And its corruption would enable power to devolve upon other institutions, and enable the real holders of power to strip subjects of their liberty.

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[17] *Ibid*., 423.
[18] This complex relationship is explored in Pocock, *Machiavellian Moment*, chapter XIV: "The Eighteenth-Century Debate: Virtue, Passion and Commerce," 462-505

American perceptions

For a wide array of reasons, American colonists were deeply attracted to this image of a corrupted Parliament, and this perception influenced not only their movement toward independence in the decade after the Stamp Act crisis of 1765-66 but also the substance of the new constitutions they began adopting in 1776.

In the decades following the Glorious Revolution, Americans repeatedly argued that the legislative privileges that Parliament had secured in 1688 also set the dominant precedents that should define the proper rights of their own provincial assemblies. Those privileges included the right to initiate legislation, to meet regularly, and to enjoy freedom of speech within their legislative chambers. It also meant that colonial acts of legislation, responsive to Americans' own perceptions of their needs and interests, should not be subject to the twin evils of being suspended or vetoed. The American colonists happily imagined their provincial legislatures, housed in small but handsome buildings, evolving into miniature parliaments. Although this comparison seemed preposterous to many imperial officials, who treated the colonists as backwater provincials, Americans found their claims for near-equality wholly convincing.[19]

Their ability to achieve this result, however, faced several persisting obstacles. First, royal governors were firmly instructed not to treat the colonial assemblies as miniature parliaments. Second, and arguably more important, governors retained aspects

[19] The classic studies include Mary Patterson Clarke, *Parliamentary Privilege in the American Colonies* (New Haven, 1943), and Jack P. Greene, *The Quest for Power: The Lower Houses of Assembly in the Southern Royal Colonies, 1689-1776* (Chapel Hill, 1963). Numerous monographs make the same case for the political history of individual colonies.

of the royal prerogative—powers deemed inherent to the Crown—which had effectively lapsed in Britain. They had the authority, for example, to *veto* or *suspend* legislation (the latter meaning, delaying its enforcement pending further review by the Privy Council). They could also *prorogue* or *dissolve* legislative assemblies (meaning, postponing their meeting until the lawmakers seemed more amenable to imperial preferences, or terminating the existence of one troublesome legislature and calling for the election of another, hopefully more compliant body). Where English judges now enjoyed the tenure during good behavior provided by the Act of Settlement of 1701, which had led to the Hanoverian succession, colonial judges still served at the pleasure of the Crown, making them subject to immediate dismissal.[20]

These disparities between English precedent and colonial practice made Americans highly receptive to opposition writings. Because Parliament played no formal role in colonial governance—other than regulating imperial trade through the Navigation Acts—the responsibility for regulating colonial affairs devolved on various ministries in London. In effect the colonists saw themselves as objects or victims of the same cabals of ministerial power-seekers whom English opposition writers (like Trenchard and Gordon) held responsible for the erosion of parliamentary independence and supremacy. As the distinguished historian Bernard Bailyn argued, a full half-century ago,

> The opposition vision of English politics, conveyed through these popular opposition writers, was determinative of the political understanding of eighteenth-century Americans . . . . Threats to free government, it was believed, lurked everywhere, but nowhere more dangerously than in the designs of ministers in

[20] Bernard Bailyn, *The Origins of American Politics* (New York, 1968), 59-70.

> office to aggrandize power by the corrupt use of influence, and by this means ultimately to destroy the balance of the constitution. Corruption, especially in the form of the manipulation and bribery of the Commons by the gift of places, pensions, and sinecures, was as universal a cry in the colonies as it was in England, and with it the same sense of despair at the state of the rest of the world, the same belief that tyranny, already dominant over most of the earth, was spreading its menace and was threatening even that greatest bastion of liberty, England itself.[21]

Many Americans (certainly Thomas Jefferson) had read and understood John Locke; but it was this less famous group of opposition writers who shaped American political thinking much more directly.

Yet between Britain and its American colonies two other critical difference remained. First, the techniques of influence that worked so well in Georgian Britain were not readily available to imperial governors in America, simply because they lacked the same resources that Crown ministers "at home" freely wielded. David Hume's analysis of the real sources of political influence in eighteenth-century Britain did not apply to America. In Bailyn's vivid language, "The armory of political weapons so essential to the successful operation of the government of [Sir Robert] Walpole and the [Duke of] Newcastle was reduced in the colonies to a mere quiverful of frail and flawed arrows."[22] Royal governors were themselves only creatures, not manipulators, of eighteenth-century patronage. Lacking offices to bestow on colonial notables, they repeatedly had to reach

[21] Ibid., 56-57.
[22] Ibid., 72.

some kind of working bargain with the provincial assemblies that generally disappointed their superiors in London.

Second, and equally important, the use of rotten and pocket boroughs to manage politics did not work in the colonies, where freehold tenure enlarged the electorate and new communities regularly received the right of representation in their provincial legislatures.[23] Even before the Stamp Act crisis of 1765-66 dramatized these points, the colonists sensed that that there were profound differences between how political representation operated in Britain and how it worked in America. The idea that there were "rotten" aspects to the British constitution was not an eighteenth-century discovery. In his *Second Treatise of Government*, for example, John Locke (writing in the early 1680s) had alluded to the existence of parliamentary boroughs lacking any serious number of voters as a sign of rot. Americans expected every community in the land to have a seat in the legislative chamber, and they regarded their delegates, not as distant lawmakers whose first duty was to contemplate the general good of the whole society, but as attorneys for their townships and counties, representatives who could be instructed to follow the directions of their constituents. When the Stamp Act crisis made the question of representation a fundamental point of controversy between Britain and America, colonial writers like James Otis boasted of the superiority of the American insistence on the accountability of lawmakers to their constituents. When British writers asked why the Americans should have a voice in the House of Commons when such prosperous cities as Birmingham and Sheffield held no seats either, Otis simply scoffed in reply. "To what purpose is it to ring everlasting changes to the colonists on the cases of

[23] Ibid., 70-105.

Manchester, Birmingham, and Sheffield, which return no members?' Otis wrote. "If those, now so considerable, places are not represented, they ought to be."[24] Indeed, it was precisely because ideas like these were so powerful—and so potentially embarrassing in Britain—that spokesmen for Parliament's authority over America largely abandoned the argument about representation and relied instead on a simple assertion of Parliament's legal sovereignty over the entire empire.

This prevailing perception of the corruption of British politics through the ministerial domination of Parliament thus played a critical role in the American movement toward independence by providing a systematic and self-confirming explanation of why the British government was pursuing one measure after another inimical to American rights.[25] That issue does not concern us here. What does matter, however, is the impact this perception had on the new state constitutions that Americans began adopting in 1776. These documents, more than the Federal Constitution of 1787, illustrated the underlying political conceptions and commitments that shaped American constitutionalism in its first, creative phase.

In many respects, the constitution writers of 1776 looked backward in defining their underlying concerns. They were naturally more inclined to apply lessons derived from the past than to anticipate problems likely to arise in the future. As James Madison observed in 1785, while denouncing the lack of "*wisdom* and steadiness to legislation" revealed in the separate states, "The want of *fidelity* in administration of power having

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[24] James Otis, *Considerations on Behalf of the Colonists* (London, 1765), 9.
[25] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, 1967, 1992, 2017), esp. 94-159; Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765-1776* (New York, 1972).

been the grievance felt under most Governments, and by the American States themselves under the British Government[;] It was natural for them to give too exclusive an attention to this primary attribute."[26] For Madison and his contemporaries, the "administration of power" meant the workings of the executive—that is, the Crown and its officials. With hindsight and his own experience in Virginia's fifth provincial convention, which drafted the commonwealth's new constitution, Madison grasped that the constitution-writers of 1776 were the conceptual prisoners of history.

This retrospective attitude deeply informed the first state constitutions. The dominant animus of the first state constitutions was to reconcile the principle of legislative (or parliamentary) supremacy inherited from the Glorious Revolution of 1688 with the criticisms of British politics laid down by opposition writers like Trenchard and Gordon. The whole imperial controversy of 1765-1776 had reminded the colonists that their practice of "actual" representation was superior to the arguments for "virtual" representation that the defenders of parliamentary supremacy over the colonies "in all cases whatsoever" had propounded.[27] The coming of independence only confirmed that position. To secure maximum support for "the cause," the provincial conventions encouraged communities to send representatives to government, and they actively debated whether the franchise should be broadened (but not narrowed). Even more important, every state except South Carolina applied a rule of annual elections to the

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[26] James Madison to Caleb Wallace, August 23, 1785, in Jack N. Rakove, ed., *James Madison: Writings* (New York, 1999), 40.

[27] The theory of "virtual" representation argued that Americans who sent no members to the House of Commons were nevertheless legitimately represented in Parliament. The American claims for the superiority of their system of "actual" representation relied on the existence of a broad electorate and the allocation of legislative seats to every community (townships or counties). See Bailyn, *Ideological Origins*, 161-175.

lower house of their legislature. As John Adams observed in his *Thoughts on Government*, in a widely repeated saying: all elections "should be annual, there not being in the whole circle of the sciences, a maxim more infallible than this, 'Where annual elections end, there slavery begins.'"[28]

This commitment to annual elections was arguably the single most important anti-corruption provision of the first state constitutions. It presumed that legislators would recognize that they would soon return to the body of the people, to be governed by the same laws they were framing, with no status higher than that of ordinary citizens; and that virtuous voters would understand the benefits of rotation in office. These views were fully consistent with *Cato*'s argument of 1721, which had assumed that routine turnover in office would minimize the dangers of corruption because it would make no sense to bestow pensions and positions on lawmakers who essentially held office as an avocation. This perception was also fully consistent with the principle articulated in several of the declarations of rights issued by the states as they were adopting their first constitutions. As Article 5 of the Virginia Declaration of Rights stated, in order to ensure that members of the legislative and executive branches of government "may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station, return into that body from which they were originally taken, and the vacancies be supplied by frequent, certain, and regular elections," leaving the legislature free to determine whether these former officials should

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[28] *Founders' Constitution*, I, 109. Adams then added this further observation, drawing on a couplet from Epistle III of Alexander Pope's famous poem, *An Essay on Man*: "These great men, in this respect, should be, once a year

> 'Like bubbles on the sea of matter borne,
> They rise, they break, and to that sea return.'"

be made "eligible, or ineligible" for further service.[29] This was (in modern legal analysis) a *standard* rather than a *rule*, a principle that officeholders and voters should honor rather than a mandate that had to be enforced. Term limits in fact were applied only to a few state governors and delegates to the Continental Congress.[30] No legal barriers limited the number of terms that legislators could serve. Yet scholars who have done quantitative studies of legislative service have demonstrated that rates of turnover at both the national and state levels of government remained high well into the nineteenth century. Down to the 1890s, the mean term of service in the House of Representatives was three years, meaning that the vast majority of its members served one or two terms. Rotation in office was thus a working principle of American politics.

Viewed in this way—and recalling the inherently retrospective nature of much constitutional thinking—it is important to recognize that the prevailing view of political corruption in the founding era was primarily concerned with relations between institutions, or more specifically, the relation between a dominant executive and a supplicant legislature. Lacking a monarch, Americans had no need to worry about the sycophantic behavior of courtiers and royal flatterers. But with the British opposition

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[29] Virginia Declaration of Rights, *Founders' Constitution*, I, 6. Cf. the corresponding Article VIII of the Massachusetts Declaration of Rights of 1780: "In order to prevent those, who are vested with authority, from becoming oppressors, the people have a right, at such periods and in such manner as they shall establish by their frame of government, to cause their public officers to return to private life; and to fill up vacant places by certain and regular elections and appointments." Ibid., I, 12.

[30] As it happens, James Madison was the first delegate who was term limited out of the Continental Congress following the ratification of the Articles of Confederation. Patrick Henry was term limited out of service as Virginia's governor. But in both cases, the prohibition was limited to restricting service to three years out of six, so that Henry returned to the governorship in the mid-1780s and Madison returned to the Continental Congress in 1787.

writers' model of an office- and influence-wielding Crown firmly implanted in their political consciousness, American constitutionalists wanted to insulate the legislature from executive manipulation. The idea of annual elections in a society where the pursuit of public office was more an avocation than a career thus seemed the most obvious way to accomplish this. Equally important, the first constitutions minimized the political capacity and influence of the executive. In most states governors were annually elected by the legislature and (quoting John Adams) "stripped of most of those badges of domination called prerogatives."[31] Executive power became just that: the duty to execute and administer policies enacted by the legislature. Yet even so, of all the branches of government that the people had to fear, the executive still remained the most threatening.[32]

The decade separating the adoption of the first state constitutions from the ratification of the Federal Constitution in 1787-88 modified these views in some important ways. The Revolutionary War placed enormous and unprecedented burdens on governance. While legislative assemblies met and adjourned, governors had to respond on a daily basis to the demands of war. Moreover, the idea that experience in office would be a boon to sound governance led some thinkers to challenge the hoary maxim about annual elections, with its expectations of high turnover. Considering this question in 1785, Madison noted that "For one part of the Legislature Annual Elections will I suppose be held indispensably though some of the ablest Statesmen & soundest

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[31] *Founders' Constitution*, I, 109. The second-generation constitutions of New York (1777) and Massachusetts (1780) allowed the people to elect the governor, triennially in New York, still annually in Massachusetts. Not surprisingly, George Clinton and John Hancock became revolutionary America's two most powerful governors.
[32] Wood, *Creation of the American Republic*, 132-150.

Republicans in the U States are in favour of triennial."[33] He counted himself in the latter group.

Two years later, the framers of the Constitution proved amenable to this claim. In their initial discussion of June 12, 1787, they voted (seven states to four) to give the lower house a term of three years. Nine days later, they reduced the term to two years. Some speakers still favored the "fixed habit" of annual elections, while Madison and Alexander Hamilton, soon to be the co-authors of *The Federalist*, endorsed three years. Madison offered the most balanced account of the reasons for abandoning annual elections. There was, first, a general question of convenience, and the difficulty of enabling members coming from distant corners of the country to go back and forth between their homes and the capital. Secondly, members "from the most distant States" who wished to be reelected and who faced "a Rival candidate" at home would have to "travel backwards & forwards at least as often as the elections should be repeated." Third, and arguably most important to Madison, "Much was to be said also on the time requisite for new members who would always form a large proportion [of the total membership], to acquire that knowledge of the affairs of the States in general without which their trust could not be usefully discharged." As other speakers also noted, the United States was a much larger country than Britain, and it would take each member some time to be educated in the diversity of American affairs.[34] Madison believed that the ideal model of congressional deliberation was one in which each lawmaker—and

[33] Madison to Wallace, August 23, 1785, *Madison: Writings*, 44.
[34] Max Farrand, ed., *Records of the Federal Convention of 1787* (New Haven, 1911, 1937, 1966), I, 214-215, 360-362, 367-368. After this second debate of June 21, the two-year term remained non-controversial for the rest of the Convention.

especially the numerically preponderant newcomers —would learn the business of government only in the course of each Congress, which would meet over several sessions with intervals allowing representatives to visit their constituents at home.[35]

The two-year term for members of the House of Representatives predictably became an object of discussion during the ratification debates of 1787-88. But it was arguably another Convention decision, limiting the initial size of the House to sixty-five members (if all thirteen states ratified) that seemed more controversial, when the British House of Commons had fully 558 members. The Anti-Federalist opponents of the Constitution argued that so small a number would make the House of Representatives vulnerable to "cabal," and it also violated the British opposition writers' belief that the greater size of a legislative body was also an antidote to its corruption. Madison responded to these arguments in *The Federalist* in multiple ways, not least by arguing that the quality of legislative deliberation would decline if a body grew too numerous. To his way of thinking, the best alternative to legislative corruption involved developing the legislative habits that would encourage representatives to act responsibly. If a body grew too numerous, he worried, that sense of political responsibility would decline, and the danger of corrupt or factious activity would increase.

There was one other source of corruption that the framers of the Constitution actively considered. This was the idea that key officials of the national government, in either the legislative or executive departments, could become the targets of bribes from foreign powers. The key word used to describe this danger was *emolument*—a word that

[35] For a more sustained examination of Madison's ideals of legislative deliberation, see Jack N. Rakove, *A Politician Thinking: The Creative Mind of James Madison* (Norman, Okla., 2017), 54-95.

seems mysteriously exotic today, but which was commonly used in the eighteenth century to describe a wide array of material payments and benefits. History provided a famous example of the misuse of foreign emoluments that every framer knew quite well: the secret Treaty of Dover of 1670, in which Louis XIV of France turned Charles II into his ally in his war against Holland, in part by giving him a young French mistress, but also by providing Charles with the additional funds he badly needed. This Treaty was well known to eighteenth-century readers. At the Federal Convention, Gouverneur Morris of Pennsylvania, who is often regarded as a chief architect of the presidency, explicitly invoked it during the July 20, 1787 debate over impeachment:

> Our Executive was not like a Magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay, without being able to guard agst. it by displacing him. One would think the King of England well secured agst. bribery. He has as it were a fee simple in the whole Kingdom. Yet Charles II was bribed by Louis XIV.[36]

This idea of overt bribery directed by foreign powers at the president or senators remained part of the ratification discussions of 1787-1788. The Anti-Federalist opponents of the Constitution were inventive advocates, and many of their arguments reflected the deep fear of the self-aggrandizing nature of political power that was embedded in American political thinking well before 1776. In a sense, the Anti-Federalists were

[36] Farrand, ed., *Records of the Federal Convention*, II, 68-69.

deeply loyal to the revolutionary cause of 1776.[37] But from the vantage point of modern views of political corruption, two aspects of these debates remain especially salient.

First, the disputants of 1787-88 were preoccupied with the role of institutions, in the strict sense of the term. They were not concerned with the ways in which interests and groups acting outside of government would try to capture its institutions for their own self-interested, and therefore potentially corrupt, purposes. Of course, some aspects of the social dimensions of national politics—like the division between slave and free states—were not wholly ignored. But those were fundamental regional interests that any system of national government would have to confront or accommodate directly. They were not sources of corruption but rather the basic, inescapable stuff of national politics. Perhaps this story would have looked different, had the American economy been more developed and differentiated, and had economic interests sought to obtain public support for their particular ends. But the newly independent United States had no equivalent to the East India Company, which had played so influential a role in eighteenth-century British politics, to the point of helping to precipitate the American Revolution by pushing the adoption of the Tea Act of 1773. One could argue, as Charles Beard famously did a century ago in his *Economic Interpretation of the Constitution*, that the holders of the revolutionary public debt did form one such interest, and that the whole movement to adopt the Constitution was contrived in many ways to secure the interests of speculators over the sufferings of its original holders. Yet most students of the policies that Hamilton pursued as first secretary of the treasury believe that his program rested not on corrupt

[37] Bailyn, *Ideological Origins*, 331-351.

motives but rather on a sophisticated analysis of the economic and political benefits of securing the public credit of the United States.

Second, contrary to our contemporary understanding of the ambitions of politicians—and especially congressmen—the desire to secure re-election was not the driving motive of officeholders. At both the state and national levels of government, rates of legislative turnover remained remarkably high by twentieth- and twenty-first-century standards. Because that was the case, a modern study of the corrupting forces of political behavior remains extremely difficult to apply to the Founding era. Today we assume as a matter of course that the desire of legislators to serve term after term after term explains the whole nexus of political ambition; it is what leads them to spend enormous amounts of time courting donors and, in the process, feeding a common perception of the underlying corruption of (to borrow a phrase from Madison) "the political system of the United States." There were no real equivalents to this in the world of the Founders. They did not actively campaign for office, though occasionally they might give a public speech or write letters to trusted correspondents or even engage in a debate (as Madison and James Monroe once did during their rival efforts to be elected to the First Congress of 1789). There was little if anything they could obtain by spending money. Perhaps more important, few of them were active seekers of office or individuals who would have thought or said that politics was their career. Madison was one exception here, serving three-and-a-half uninterrupted years in the Continental Congress and four successive terms in the federal Congress after 1789. Other leading revolutionaries wound up following similar careers, but less from outright ambition than because the Revolution seemed to demand their service.

Yet the idea that they would inhabit a political universe in which the continuous solicitation of campaign-related funds had become a norm of daily behavior would have struck them as being wholly improbable and morally offensive. Privately, too, they would have regarded such an existence as a shameful mark of their own political corruption.

I-N-D-E-X

EXHIBITS

Do you solemnly swear or affirm the testimony you give before this Court will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE COURT: All right. You may be seated. Professor, will you please state and spell your first and last name for the record.

THE WITNESS: I'm Jack Rakove, J-A-C-K R-A-K-O-V-E.

THE COURT: Counsel, you may proceed.

MR. LESSIG: Thank you, Your Honor.

JACK RAKOVE,

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LESSIG:

Q. So, Professor Rakove, would you please state for the record where you work.

A. I teach at Stanford University.

Q. And what is your title at Stanford?

A. My full title is the William Robertson Coe Professor of History and American Studies, professor of political science and, by courtesy, law at Stanford.

Q. And how long have you been at that job at

Stanford?

A. I came to Stanford in 1980.

Q. And so what are some of your duties at Stanford?

A. Well, my typical duties are to teach four classes each academic year and to do as much scholarship as I can find the time to do.

Q. And where did you attend school, starting with your college?

A. I did an AB in history at Haverford College, including one year studying history at the University of Edinburgh in Scotland. And then I did a Ph.D. in history at Harvard University.

Q. And do you teach, then, in this topic of history?

A. I teach history, and most of my classes are cross-listed in political science.

Q. Are you a member of any professional associations?

A. A member of the American Historical Association, the Organization of American Historians, the Society for the History of the Early American Republic, the Omohundro Institute of Early American History and Culture, the American Political Science Association. I'm also

an elected member of the American Philosophical Society, the American Antiquarian Society, the American Academy of Arts and Sciences.

Q. Even remembering that is impressive.

So do you specialize in any particular subfield of history?

A. The main areas of my research are the origins of the American Revolution and Constitution. I've done a lot of work on the political ideas and practices, activities of James Madison, in particular. I've done some work on the role of history in constitutional interpretation.

Q. Great. And do you have a CV?

A. I do have a CV.

MR. LESSIG: Your Honor, may I approach?

THE COURT: You may.

MR. LESSIG: So this document would be marked Exhibit 1002.

BY MR. LESSIG:

Q. So looking at the document I've just handed you, Professor, is that your CV?

A. Yes.

Q. And can you say looking at this CV, unless

you have it in your memory, are there any publications or research in the list here that you think are particularly relevant to the inquiry that this court is engaged in today?

A. Well, I think the work that's most relevant is my 1996 book "Original Meetings: Politics and Ideas in the Making of the Constitution." And the reason for that is it deals fairly directly with the question of, how does one recover what we call the original meaning of the Constitution.

Q. And that book, I think, received a pretty significant award?

A. It received several, actually, but the most important was the Pulitzer Prize in history.

Q. Okay. And the work that you've done that's listed in your CV, has some of that work been peer-reviewed?

A. Some of it has. Although, I have to note that my three -- what I call my three big books, my first book, "Beginnings of National Politics," "Original Meetings," and then a book I published in 2010 called "Revolutionaries," were all trade books. Meaning they were written, to my way of thinking, with the highest academic standards but

also written for general audiences.

So those books, in fact, were not peer-reviewed. I've done a fair amount of writing -- actually a significant amount of writing for law reviews, which as you know, are student-edited. Sometimes academics get involved, but often they don't. And then a number of other chapters and essays I've done have also been peer-reviewed.

Q. Okay. So could you please explain to the Court the materials that you reviewed in creating the report that we will be reviewing today?

A. Well, the report I prepared for today basically invited me to think about the concept of political corruption, which was an important concept and something I've thought about in other contexts off and on over the years.

So primarily what I did was to go back and reread some critical passages from Machiavelli, the 16th century Italian author, Florentine author; go back and review some materials relating to the nature of political corruption in 18th century England, which was directly relevant to how the Americans thought about constitutional issues at the time when the state and federal

constitutions were written during the revolution; and then go back through some of the materials from the Revolutionary Era.

Q. And these are all materials that you've been referring to or using or studying for pretty much the whole of your career as a historian?

A. Much of it. My interest in Machiavelli is somewhat more recent than other things. But certainly everything relating to 18th century Anglo-American -- British and American practice is something I've thought about, really, going back to the 1970s.

Q. We're going to discuss a little bit more of your methodology when we get into the substance of our report. But the methods that you used in deriving your conclusions about the conceptions that the framers of our constitution had for concepts like corruption, these are methods that are standardly used by historians when they examine periods like this to come to such conclusions?

A. In a general sense, yes. I think I'd say more specifically it's a kind of a method that I worked out. It's almost a kind of model for interpretation that, in all the work that led up

to "Original Meetings," I've been asking myself seriously, If you want to talk about the original meaning of the Constitution, how would you do it?

It seemed to me that was inherently a historical question, and I wanted to come up with an adequate intellectual way of trying to answer it.

Q. And after you set the pattern, which "Original Meetings" did, have you seen other scholars following a similar pattern in trying to understand the original meanings and the context of the Constitution?

A. Some; my younger colleague Jonathan Gienapp at Stanford, a guy named Saul Cornell at Fordham. Because we've done a lot of work together on originalism and, particularly, on the 2nd Amendment.

I should say, you know, by way of complementing this that most historians are not originalists, and many historians think that originalism is kind of a foolish enterprise. But it's something I've taken seriously for a long time.

Q. And so the historians who find themselves on the Supreme Court as justices of the Supreme

Court, they adopt and follow a pattern or a method which they refer to as originalism too.

Would you say that the scholarship that you have participated in has affected or influenced the way that they think the project needs to be undertaken, whether they, in fact, are able to do that or not?

A. I hope it has. I mean, I think there's some evidence of this. I mean, I have done four amicus curiae briefs for, actually, some leading Supreme Court cases. A couple are cited specifically and others, I think, are referred to in different ways.

So I think the kinds of arguments historians would make do become part of the, I guess, in fact, the court record, that one way or another it has to be wrestled with.

Q. Right. So, then, do you believe that the testimony you'll be providing this Court would help this Court understand the conceptual framework that the framers adopted as they were thinking about concepts like corruption?

A. Yes.

MR. LESSIG: Okay. Your Honor. At this point, I would like to move for the admission

of the expert report of Jack Rakove.

MS. FOX: No objection.

MR. LESSIG: May I approach?

THE COURT: You may. Counsel, do you also want to move for the admission of the CV as well?

MR. LESSIG: I apologize, Your Honor. Yes. May I move for that admission as well?

MS. FOX: No objection, Your Honor.

THE COURT: All right. So the CV for Professor Rakove is admitted as well as the expert report.

MR. LESSIG: And this will be marked Exhibit 1003.

(Exhibits 1002 and 1003 admitted.)

BY MR. LESSIG:

Q. So, Professor Rakove, looking at the report with your name and Ph.D. at the top, what I'd like to do is start at the very end, actually, at page 33.

At page 33 you say, "The idea that they" -- speaking of people in public life -- "would inhabit a political universe in which the continuous solicitation of campaign-related funds

had become a norm of daily behavior would have struck them as being wholly improbable and morally offensive. Privately, too, they would have regarded such an existence as a shameful mark of their own political corruption."

So when you say "their own political corruption," can you tell us what you mean by that?

A. I think the best way to put it would be to say they would have regarded it as a modern equivalent of a pattern of depending upon Aristocratic favor, which in an 18th century republican culture like that in the United States would have seemed dishonorable and unseemly.

In a sense, a violation of an office holder's fundamental obligation to be an independent thinker and actor. In a sense, it would have been regard as a way of cultivating the equivalent Aristocratic favor in a way that would be distinctively anti or unrepublican. For our case, unrepublican in nature.

Q. Okay. This idea of dependence we're going to return to. But you don't mean by saying that it would have been corrupt that they would be engaging in bribery, do you?

A. If they accepted such? I mean, I think you gave me a double negative, which I'm trying to sort out here.

Q. I'm sorry. So when they said -- when you say "their own political corruption," they wouldn't be saying -- or they're not saying, are they, that they're engaging in a practice of bribery when they're living in this world where they're participating in campaign contributions?

A. I think they would have thought they were living in the equivalent of that kind of world in the sense -- if they were continuously needy or directly dependent upon having the patronage in this form of outside interest.

Q. And if I could say to them, Look, are you engaged in quid pro quo bribery? And they said, Well, no, never do I engage in quid pro quo bribery. Would that mean they would no longer feel themselves engaged in a corrupt enterprise when they were in this --

A. No. Well, I think they would have still felt themselves engaged in a corrupt enterprise.

Q. Okay. Now, this point is critical, I think, to your report and also to the issue in this case. Because clearly, as you indicate, "the

concept of corruption," which is the way you describe it, included the idea of bribery; is that correct?

A. Right.

Q. So, for example, you describe at page 2 of your report the impeachment clause, which expressly refers to bribery; the foreign emoluments clause, which, of course, was written in response to a famous historical instance of bribery with a British monarch; John Sullivan of New Hampshire, bribed by the French embassy; John Robinson, speaker of the Virginia house, engaging in bribery.

These were all instances of bribery, which would have been at the forefront of their minds. And it would have been their objective to avoid this type of behavior in the future?

A. Yes. I mean, I think any form of bribery in the political context would be the most obvious and manifest example of what corruption would be.

Q. Okay. So for clarity sake, can we call these forms of corruption individual corruption where it's an individual who's engaged in a quid pro quo that we refer to as corruption?

A. Yes.

Q. And then plainly, as you describe, the framers were concerned about this concept of individual corruption?

A. Yes.

Q. But it is your view that within this conception of corruption, as you describe the framers to have, bribery was the only way, quote, as you say on page 3, "in which a political system could be corrupted"?

A. No. It's the most obvious, but by no means the only method.

Q. Okay. So then do you believe that the concept of corruption could be reduced, as you describe, "to a simple definition" or a compendium of "bribery, embezzlement, or patronage" and still be an accurate characterization of the framers' conception?

A. No.

Q. Okay. So then let's think a little bit about the corruption beyond this category we've created of individual corruption. And in light of the evidence that you've submitted in your report beyond individual corruption, I'd like to distinguish between two other types.

One we could call institutional

corruption -- and I'll describe that in a second -- and the other term I'm creating here is societal corruption.

Okay. So let's start with institutional corruption. On page 3 of your report, you identify this example. You speak of a corrupt "relationships between institutions that had befouled the true principles of constitutional government." And the example you're speaking of is "the Crown's influence over the House of Commons" in Parliament.

Can you first describe, when is the period that is being spoken of when we're thinking of their referring to the House of -- to Parliament as corrupt?

A. It would essentially be the period of the first two or three Georgian kings, meaning the phase of English monarchy that begins with the death of Queen Ann in 1714 and then the succession to the thrown of the first George, the Electorate of Hanover.

And concurrently with that, the growth of what's called ministerial government, really beginning with Sir Robert Walpole and then his various successors who served as what would later

be called -- not really an 18th century term, but what would later be called the Prime Minister of Britain.

So essentially it's a broad way of characterizing early to mid to late 18th century English -- English, you could say British -- politics.

Q. Okay. So when you refer to the Crown's influence over the House of Commons, what was the nature of the influence that is being described here?

A. The nature of the influence involves the role that the king and his ministers play in disbursing honors, offices, pensions, places, other forms of royal or governmental favor upon members of Parliament as a means of securing their loyalty to the dominant ministerial coalition.

Q. And is there also a way in which the king would exercise control over who gets elected to Parliament through special provisions --

A. I'm not sure I would say -- I think I would say the Crown more than the king.

Q. The Crown, yes, of course.

A. Yes. There were a number of techniques that were developed, again, starting really in the

17-teens and 1720s, to make parliamentary boroughs, you know, corporate charters that they had the rights to send members to the House of Commons to make them more manageable.

The conventional language that was used was to talk about rotten boroughs, essentially constituencies that had hardly any voters. Old Sarum outside Salisbury is the best known example. Or pocket boroughs, which meant constituencies where either the government or some local aristocrat or member of the gentry had a dominant personal interest so they could easily sway or influence or control the electoral.

Q. Okay. So then the Crown would exercise control over these boroughs, and those boroughs would send representatives to the House of Commons. And so the improper influence was that the Crown was essentially creating a dependency with those representatives who were in the Parliament?

A. Yes.

Q. And so that dependency wouldn't necessarily involve any bribery. It wouldn't necessarily involve any quid pro quos. It would be more, This is my man in Parliament because he's

come from this rotten borough?

A. The theory might involve some bribes, but I think there were multiple forms the influence might take.

Q. Yeah. But conceptually speaking, just to be clear about the analytical claim that you're making, to say that that nature -- that type of influence is corrupt, you are not necessarily saying that there was any bribery at all?

A. Right.

Q. It could have been corrupt even if everyone involved was living completely beyond the means of bribery?

A. Yes. Yes.

Q. Okay. So would you be comfortable if we could refer to this type of arrangement or this type of corruption as a kind of institutional corruption?

A. Yes.

Q. Okay. Now by contrast, I'd like to focus on the conception of corruption you described, for example, in the writings of Machiavelli. In particular, in his Discourses.

As you say at page 6, Machiavelli's writing has "little to do with...acts of bribery

or nepotism" but instead the "emergence of a degraded way of life that would prevent a community from leading a political life" -- and then I'm not going to try the Italian -- "or a civil life or from living in...a free state."

That's his conception approach?

A. Right.

Q. So can you explain a little bit more what this conception is focused on?

A. Yeah. This conception, broadly defined, is focused on the nature of the -- in effect, the communal life of a city like Florence, which was, of course, Machiavelli's home.

So it has -- you know, there are three dimensions of this. And one is -- and, you know, the terms I use here, whether translated to English or used in Italian, are in a sense complementary. They are, in a sense, mutually reinforcing.

To lead a political life is, in a sense, a kind of Aristotelian idea. The argument that man is a political animal. That the participation in public life is a fundamental characteristic of who we are as mature citizens, subjects of a community. The idea of a civil life implies

notions, other notions, broader notions of community.

There may be multiple ways in which we form attachments to our culture, to our society, to our community that will reinforce its corporate, corrective existence.

And the -- and the idea of living in a free state, in a sense, would be the collective product of both having a political life of a vetted republican, or perhaps democratic form, and of living within a community that was united around some set of values, attachments, aspirations, and so on.

Q. Okay. So this is looking at corruption beyond the corruption of institutions. It's looking at, really, the corruption of a whole society?

A. Right.

Q. So would you object if I referred to that as societal corruption?

A. I'd be happy with the definition, yeah.

Q. Okay. And, of course, it's not just Machiavelli who you describe as focused on societal corruption. Page 11 of your report, you describe John Adams insisting that virtue -- and

this is virtue in the society -- is a cornerstone of a republic.

You quote your friend the historian Gordon Wood to state, "republican government" -- this is at page 11, again -- "republican government required a culture where 'each man must somehow be persuaded to submerge his personal wants into the greater good of the whole.'"

These are consistent with the perspective of Machiavelli in the sense that you're thinking about the society as a whole and whether that society is living up to its ideals or has been corrupted; is that correct?

A. Yes.

Q. Okay. So it's fair to say that the framing generation would have considered it corruption, corruption in the societal sense, if the virtue in the society were somehow degraded; is that correct?

A. It is correct. And it echoes very deeply in 18th century political culture.

Q. Okay. Or that they -- when they would have spoken of such a decline of virtue or moral decay, they would have referred to that as the corruption of the society?

A. Yes.

Q. All right. And to keep this clear, let's summarize a little bit where we are at this point. At the time of the framing, what we're saying is the conception of corruption was multiple.

It would have included the conception of individual corruption, for sure. But it also would have included what I've called institutional corruption and societal corruption. Are you --

A. I would agree with you.

Q. And I'd like you to explain a little bit more about your methodology in coming to this judgment about how the framers would have thought about this. Because, of course, you're telling the Court that these texts existed out there, like Discourses.

And you're basing your judgment on the framers' understanding, in some part, based on the fact that there are these texts. Well, you know, these texts exist now. You can go on the internet and you could get the Discourses tomorrow. But I don't think anybody would think, therefore, members in Congress understand the Discourses.

So can you explain from the methodology of the historian why you are confident that you can

rely on these framing texts as good evidence about what was going on in the minds or the culture of the framers at the time?

A. Right. Not the easiest question to answer, but I'll try to do it as succinctly as I can. So when I set out many years ago, really some decades ago, to start thinking about this problem, my basic understanding was that if you wanted to talk about the original meaning of the Constitution, whether in whole or in its parts, you were asking an inherently historical question.

And, therefore, it made a lot of sense to ask, it's a historical question, What kind of historical methods would a working historian like myself bring to bear or try to apply to answer specific questions about the meaning of the Constitution?

So it seemed to me as I thought about it, there were two obvious and two more subtle sources of evidence. The obvious sources were really two sets of records relating to the actual adoption of the Constitution, meaning primarily Madison's notes of debate from Philadelphia, then a variety of -- a small set of directly relevant documents written in preparation for the convention.

And you could also talk about the ratification conventions and the accompanying public debate that took place in the United States in 1787 and 1788, which got to the ratification of the Constitution. And I call those textual sources because they were the most direct forms of evidence.

But as a working historian, it also seemed to me that there were at least two other areas of knowledge and experience that one would want to bring to bear. The obvious one, it seemed to me, was the framers' emersion in the literature of early modern political thinking.

You know, we could certainly say people like (inaudible), Sir William Blackstone. But Machiavelli, it turns out, is a core contributor to the formation of modern republican ideas. And then there's a whole group of more obscure characters, Trenture (phonetic), Gordon, Woolsworth (phonetic), Harrington, a bunch of names not familiar to most of us today, who were also part of the intellectual world the founding generation had.

And then, finally, as the kind of historian I was, it also seemed to me that you'd

have to find ways to think about the relationship between the political experience. You know, day to day, year to year, the emersion in events that the revolutionaries shared and the kinds of lessons, concerns, inferences, and so on that they would have drawn from that experience.

And so the basis of my method was to say, here is kind of a -- here, in effect, is a -- I think a reasonably comprehensive way of identifying the different kinds of sources -- let's say the different kinds of materials and the specific sources that one would have to rely upon in order to come up with reasonably plausible but hopefully persuasive answers to the questions you wanted to pose.

Q. So I know that you're about to publish a book that is a set of work about the Federalist Papers. Of course, very important set of original founding documents.

A. Uh-huh. Yeah.

Q. If you were to read the Federalist Papers, would there be evidence in the Federalist Papers that the framers actually knew something about these particular people or moments in history that would be relevant to the understanding of

republican government?

A. Oh, sure. I mean, there are numerous references to ancient republics in different essays. Of course, we also know more generally -- whether or not you rely on the Federalists, we know a lot about the nature of education in 18th century America, the great emphasis that was placed on antiquity and the classics.

Q. Right. So these were essays that were written primarily by Hamilton and Madison also early on for the purpose of persuading Americans to support the new Constitution. And theses essays are filled, aren't they, with references to what to us seem like obscure historical facts and writers that, of course, are just forgotten today?

And in the context of using this evidence for persuasive purposes, is it your judgment, then, that this is pretty good evidence this understanding was common within the society?

A. Yeah. Reasonably good.

Q. Yeah. Okay. So are these practices that you've described -- even though I think all of us should acknowledge your book Original Meetings helped frame this in a very compelling way -- are these practices for understanding what they meant

common among those who would call themselves historians at this period?

A. Yeah. Historians and political theorists. I mean, multiple disciplines have an interest in thinking about this.

Q. Okay. So I'd like to go back, then, to these conceptions of corruption. Let's think of them as buckets. What's striking in your report is that you say that the primary concern they had was with institutional corruption.

On page 18 you say, "The concern with corruption in 18th century Anglo-American political discourse was primarily institutional in nature."

Page 26 you say, "The prevailing view of political corruption in the founding era was primarily concerned with the relations between institutions."

Is that --

MS. FOX: Objection. Sorry, Your Honor. Could we keep it more to the witness testifying and less reading just in general?

THE COURT: Yeah, Counsel. I mean, you can certainly direct him to it and have him testify about it.

MR. LESSIG: Okay. I can have him read the sections or --

THE COURT: Yeah.

MR. LESSIG: Okay. Happy to do that.

BY MR. LESSIG:

Q. So are these characterizations of their primary concern correct?

A. Yes. Or, you know, to put it in my own voice, the dominant concern in 18th century Anglo-American political discourse starting from, you know, the 1720s on was with the use of various techniques of influence, which can also align with corruption, on the part of the Crown.

In effect, to subvert, compromise, dilute, minimize, reduce the independence of the House of Commons, which was seen ever since the glorious revolution of 1688 as having been, in effect, a principal check upon the Crown acting arbitrarily. Meaning the Crown making laws of his or her own accord without any mechanisms of consent.

Q. Okay. And then so by a primary concern -- of course, that's not negating what we said earlier that they also were concerned about bribery. But when they were thinking about

structuring their constitutions by saying this is a primary concern, you're also saying, then, that they weren't so much concerned directly about how setting up checks and balances might save the virtue in the nation.

They wanted virtue saved in the nation. They wanted the societal corruption to be avoided as well, but that's not what these debates in the constitutional convention were directed --

MS. FOX: Objection. Same thing, counsel's characterization versus the witness testifying.

BY MR. LESSIG:

Q. So to be clear, I'm asking the question, whether by saying you are identifying a primary concern, you're saying that concern is more central to their focus than the concern on what I -- focus on the concern of what I've called societal corruption?

THE COURT: Counsel, how about breaking that up into parts? Because, honestly, your commentary was long enough that I'm not sure I'm going to understand the answer.

MR. LESSIG: Okay. I apologize, Your Honor.

THE COURT: I appreciate that.

BY MR. LESSIG:

Q. So you have identified a primary concern. And it's important that we understand the sense in which you mean it's a primary concern.

A. So --

Q. Please.

A. The primary concern in 18th century Anglo-American political thinking, particularly on the part of the colonists down to 1776 -- I'll say down to the mid-1770s, the crisis of independence -- was the belief that the extensive use of all the techniques of corruption and influence on behalf of the Crown had effectively subverted the independence of the House of Commons. Had effectively turned the House of Commons into a tool, to use an 18th century term, of the dominant ministry.

And so as Americans tried to explain, why was the British government pursuing the policies it was that the colonists deemed inimical to their rights, it's a core belief that the reigning ministries had all these mechanisms for subverting the independence of Parliament.

And then when you get to the point where

Americans are prepared to declare independence and, therefore, to write their own constitutions, they did so under what we call republican suppositions about who the Americans were as a people. They wrote republican constitutions.

And you can say that meant two things. It meant, you know, in the first place there would be no crown or aristocracy. I mean, in one sense, to be republican simply means to live in regime, to live in and government where there's no king and no aristocracy to, you know, control the instruments of state.

But the second thing the republican -- republicanism means is that the people -- and this is the Machiavellian motif, is that republicans as a people have to possess something called virtue. Or to use the Italian phrase, virtu.

That they have to have certain characteristics. And those characteristics should, you know, in their own way resist corruption.

Q. Okay. So then thinking about how they structured the institutions of government to avoid this corruption, you've described -- you've pointed repeatedly, both here and in your writing,

to this notion of dependence. And I just wonder if you could help us understand the particular sense of dependence that you are referring to here.

A. Well, you know, the opposite of dependence is independence. Independence means that, in the case of an institution, it should not be subject to excessive or distorting influence or control by someone else.

Or more specifically, since the key institutions in the new American constitutions were actually the representative branches of government, the idea of independence here meant that the legislative assembly should be supreme not only in theory but also in practice. That they -- you know, they should not be subjected to the direct control of the executive branch.

So, for example, there was no -- well, except for New York and Massachusetts, which wrote their constitutions later -- there should be no veto over legislation. Legislators should be elected annually so that they would be accountable not to other institutions of government but to the people themselves or, really, to their constituent communities.

But there should be a lot of turnover in office. So, again, representatives would not have a long-term relationship, kind of a running investment in holding onto their offices. They would show up and do their duty responsibly. And, actually, in most cases they were expected to go back into the community and act simply as citizens.

All of these were thought of as a means of reducing the risk of corruption or the danger of corruption, because they would enhance and promote the independence of the legislature from anybody else other than the desires of their own constituents.

Q. Okay. So independence is what they sought. But in that description you just gave us, of course, it also depended on a certain dependence, right?

So Madison, in Federalist 52, said the house would be "dependent on the people alone." So in what sense is that consistent, the idea of that dependence, with your claim that what they were seeking was to eliminate dependence or create independence?

A. Well the proper -- I think at the time you

would say representatives have two essential duties. One is, Americans had very advanced notions sometimes called the theory of actual representation. But Americans had very advanced notions that there should be a close connection between the representative and his constituents.

There's a lot of discussion, for example, could constituents actually instruct their representatives as to how they were supposed to behave? And that's -- you know, it's related, for example, to the petition -- the assembly and petition clause of the 1st Amendment is actually related to this.

And then secondly, particularly when you move to a national level of government, you do expect representatives to be open to deliberation. They have to learn what other constituencies want. They have to be open-minded and fair in terms of trying to think about what Madison would call the collective public good.

So there are -- those are the two dominant dimensions, Americans emphasize accountability to constituents and a kind of openness in deliberation so that you act responsibly.

Q. So they're a dependence on the people.

And you're saying there's an independence, as you testified, from the --

A. Right. Yeah.

Q. -- executive, for example, in that dynamic?

Okay. And then what is the role of elections in the framers' conception in assuring that dependence on the people?

A. The short answer, which is, you know, a very common saying -- I think I quote John Adams saying this -- is "Where annual elections end, slavery begins." Or sometimes "tyranny begins." That's the other version.

So that reinforces the idea of accountability that I just mentioned. It also stands in contrast with the dominant English practice, which was to have a septennial parliament. Meaning the new House of Commons could sit seven years before a new election was called.

So Americans believed very much that elections conducted as frequently as possible would be the best way to -- you know, to promote the right set of attitudes among the representatives.

Q. So you note that in the states the annual election was the dominant form. The federal government didn't adopt that. So why didn't we have annual elections for the members of the House, for example?

A. Yeah. Madison liked three years. The convention settled on two. I think they felt for one thing it would -- you know, it would be a big deal if you have a national legislature to go back and forth from your constituency to the capital.

Probably -- well, really two reasons. One is political service was still avocational in nature. It wasn't really a career the way it would become. Members of Congress might still have their own occupations, as lawyers or whatever, that they'd want to pursue.

And secondly, it would be helpful for them to go back and consult with their constituents. Three years seemed too long. Madison liked it. But, you know, that wasn't good enough. Two years was the minimum.

And I think they also felt there was actually -- something I've been writing about, actually, a lot recently -- that each session of congress would be its own learning cycle. You'd

have a bunch of newcomers. Madison correctly anticipated there would be high rates of turnover -- which, in fact, was true for the next century -- that most congressmen would be newcomers. They would need some time in office to learn, actually, what their duty was.

Q. And so the rates of turnover, you testify in your submission, were very high all the way through the 19th --

A. Right.

Q. So what does "very high" mean here?

A. According to work done by the distinguished political scientist from Berkeley, Nelson Polsby -- (inaudible), I think, came out 40, 50 years ago now -- I think the mean term of service in the House of Representatives down to about the -- down to the 1890s was three years.

Meaning the vast majority of representatives were serving -- members of the House were serving one or two terms. In the case of the senate, there are very few two-term senators. Six years is a long time to spend -- to spend away from your home.

So the idea of rotation in office, in a sense, is a mechanism for preventing corruption.

In a sense, for limiting the desire for reelection that today we take as being, you know, the dominant ambition of every member of Congress is really to be reelected.

That wasn't really the norm at the time the Constitution was written, and it didn't really become a practice until really the turn of the 20th century.

Q. Okay. And then one more part of that. When we're thinking about the dependence on the people, who would they have thought of "the people" as? Were the people -- well, let me just --

A. Who were the people?

Q. Yeah.

A. When we say "we the people," who do we mean?

Q. Yeah.

A. Well, I think the best way to answer this is go back and make the Anglo-American comparison. At the time of the American Revolution, if you rely on the famous British political writer James Burgh, B-U-R-G-H, who publishes just on the eve of independence, I think the estimated size of the electorate for the House of Commons in Britain,

which is a nation of about 8 million people, was about 10,000.

In the American colony -- and, you know, of course, then you also have this problem of pocket and rotten, particularly rotten, boroughs. You have to remember the House of Commons was not really reformed -- to use the term we use -- was not really reformed until you have two famous acts of legislation in, I think, 1832 and 1868.

The American practice from the beginning had two really striking dimensions. One was communities were routinely given the right of representation when they were organized, whether they were townships in New England or communities, you know, in other provinces. That just happened pretty much as a matter of course. So there's no selective use of the privilege of chartering to create the right representation.

Secondly, access to land in the American colonies was relatively easy. And so meeting the standard -- you know, what's known as the standard of the 40-shilling freehold, a land holding that would produce 40 shillings of income in any given year, wasn't a big deal in the American colonies. It was easy to qualify to vote.

The one thing that holds the vote down is you need political competition. When you have political competition, people want to vote. If you don't have competition, which oftentimes was not the case, then the incentive to vote declines.

But the Americans had practice pretty much from the start, let's say even from 1619 when the first Virginia House of Burgesses met, House of Doggetts met, their norms of representation look in some ways remarkably modern.

Q. And so these people, what's the breakdown of rich and poor in this? Does it look like America today?

A. Well, short answer is no. I can't give you the data because it's not something I've studied. There are some large estates, obviously, that emerged in the plantation south. Although, there the real capital effect that matters is not how much land you have but how many slaves do you own. That's the real variable that matters.

The northern colonies were settled, I think as we all know, you know, with -- pretty much on freehold tenure with most sons of fathers being given, you know, their own farms. Starts to become a bit of a problem by the end of the 18th

century in New England, but that's not a detail we need to go into.

Q. And so beyond the actual numbers, was it a conceptual fact about the framers that they would have objected to a system of representation that benefitted one class over another?

A. Yes. You know, there was some discussion at the convention of -- and a position Madison favored -- you know, Should we increase the property holding requirements either for the electorate or for the elected, for officials? And there was some discussion about that.

And there's -- some people, you know, were positive to the idea. The problem with that is it would be very difficult to come up with a national norm to fit either the existing set of potentially 13 states or the new states that would be created in the interior. Pretty hard to specify what that norm would be.

So in the end, the default option was you'd have the same electorate for the House of Representatives that you'd have for the lower house of assembly in each state. And there was no property requirement to hold office that was ever attached to any federal office.

Q. Okay. So then when Madison says "by the people" means not the rich more than the poor, that's consistent with your understanding of that?

A. Right. Yes.

Q. Okay. So you've described a system where we would have a dependence on the people alone. The people would not be the rich more than the poor. That's an institution for representation.

Can you give us an example of how that might be corrupted in the institutional corruption sense?

A. Well, I think the first -- you know, I can't say just off the top of my head, but, you know, one way to think about this would actually be to think about the time, place, and manner clause of the Constitution.

There was a worry about -- you couldn't say jerrymandering or gerrymandering quite yet in 1787. But one reason that we have the time, place, and manner clause, from Madison's perspective, was the idea that, in fact, state legislatures might corrupt the distribution of seats. So that they were not constituted on what we now call the one person, one vote principle. That would be one way of corrupting the House of

Representatives.

On the positive side, there's a very strong conviction in the Americans, it's -- John Adams says in 1776 and George Mason repeats in 1787, that a representative assembly should be, the terms they use, a mirror, a miniature, a portrait, a transcript of the entire society.

You think of representation, it's almost a kind of mapping function between society on the one hand and particularly the lower house of the assembly on the other.

Q. Okay. So then in the way that they would have spoken of corruption of institutions, if you imagined developing an institutional structure that screwed up that mapping, that interfered with that mapping, that's what they would refer to as a corruption as well?

A. There would be a corruption, yes.

Q. Okay. So let me give you one hypothetical and you tell me whether that fits, okay? Imagine today the political parties, say members of Congress, are spending too much time raising money.

So what we're going to do is we're going to appoint one person on the democratic side and

one person on the republican side who is going to give all of his or her money to support political candidates.

So on the republican side it's the Koch brothers. On the democratic side it's the Soros. And that -- those two people or those two forces get to decide who the candidates are by effectively deciding who they're going to give money to.

In the sense of the 18th century conception of institutional corruption, would this be an example a kind of institutional corruption?

A. You know, historians are not great at hypotheticals, I'll say straight off. But I think the shortest answer I could give is this would represent a form of Aristocratic larges domination that would be fundamentally antirepublican in nature.

Q. Okay. But in the terms that we've just described, would that be an example where the dependence of the members is not on the people?

A. Right. Obviously. Yeah. Obviously.

Q. It's on the rich more than the poor?

A. Obviously.

Q. Okay. So in this sense, we can understand

institutional corruption as breaking that dependence that they intended, an intended dependence about that relationship?

A. Yes.

Q. Okay. All right. So near the end of your report, I'd like you to look at page 31. I'd like you to clarify the meaning of something you've said. But given counsel's objections, would you please read beginning at "First." "First, the disputants."

A. Yeah. Number one, I should have brought my glasses up here. Though I can get by without them.

I'm sorry. What line are we at?

Q. "First, the disputants."

A. Okay. "First," okay. Yeah. You want me to start there?

Q. Yeah.

A. "First, the disputants of 1787-88 were preoccupied with the role of institutions, in the strict sense of the term. They're not concerned with the ways in which interests and groups acting outside of government would try to capture institutions for their own self-interested, and therefore potentially corrupt, purposes."

Q. That's it. Okay. So I take it by this, what you're saying is that they were not so much concerned with special interests like what we would think of as oil companies or unions today, capturing -- is that what you're trying to describe?

A. In part. I think the best way to put it is -- there's a great passage in Federalist 10 that illustrates this -- that they certainly expected representatives, particularly members of the lower house, to speak for the dominant prevalent interests of their own communities.

And they expected them to learn something about the interests that representatives for other communities would voice. And then to try to think collectively about the national interests, the public good.

Q. Okay. But does that -- do you mean by that, then, that if these interests began to become a dominant force inside of a legislature, that their conception of institutional corruption would not read on that, it would not be relevant to that?

A. Yeah. That's a fair implication. I think if you want to take one great example, Americans

would have thought about the East India Company, you know, whose financial woes were paramount to the passage of the Tea Act of 1773, which provoked the Boston Tea Party and eventually leads you to the Coercive Acts of 1774.

They would have thought of that as a paradigmatic example of the corruption of government on behalf of a specific corporate interest that was -- it became so dominant, so pervasive that it was exercising undue influence over policymaking.

Q. And this is in the sense of institutional corruption that you described?

A. Yes.

Q. Okay. Then you talk a lot about the relationship in republics and this antagonism between the nobles and the people. Can you tell us a little bit about what you are reflecting --

A. What I'm getting at?

Q. Yeah.

A. Well, that's kind of -- in a sense, that's kind of Machiavellian theme. It's a major theme of Machiavelli to kind of oversimplify what's a more complicated point. That the rich want to dominate. They want to control. They want to

manipulate.

And the rest of us mostly want to lead secure lives. Secure in our liberty. Our women should be secure, that's a theme that Machiavelli refers to repeatedly. We should be allowed to lead the lives we lead without domination.

So Machiavelli sees this. And, of course, he's speaking about 16th century Florence. And Machiavelli sees this as a kind of pervasive characteristic; the rich want to dominate and most citizens want to lead lives of liberty and security. And he sees this as a recurring antagonism in political life.

Q. And would that antagonism manifest itself in different forms in different -- in these different contexts?

A. Right. And so can I pursue the Machiavelli motif? I mean, so, you know, the application of this -- one of the great lessons that Machiavelli draws from reading Livy is that one of the best institutions the Romans had was the role of the tribunes -- who, in fact, were elected by the people -- in terms of bringing prosecutions against the rich.

And Machiavelli felt that -- where most

other writers would say this is a terrible way to disrupt society because you're going to pit one class against another. Machiavelli said, No, actually, the use of prosecutions pursued by the tribunes against the rich when they abuse their power would actually reinforce democratic or republican values.

And the citizens would -- in a sense, it would be a way of building that political and civil life. We won't use the Italian phrases here, but that political and civil life which constituted the essence of a republican society.

Q. All right. Great. So then one final part I want to frame before a pause before our conclusion here. So you've described here this difference between individual, institutional, and what I've called societal corruption. And you've testified that all three were present.

In light of that distinction, I'd like you to reflect on the way the Court has spoken of the -- the Supreme Court has spoken of corruption.

Without objection, if I can just refer to a couple lines from the Supreme Court opinions that are relevant here. So, as you know, as you've written, since Buckley versus Valeo, the

Court has said that if you regulate political speech, you can only do so to address "corruption."

And the conception of corruption that the Court has addressed so far quite consistently has been what Chief Justice Roberts and McCutcheon referred to, for example, as quid pro quo corruption, as he says at page 2 and 3.

And I have copies of the opinion here to submit -- the hallmark of corruption is the financial quid pro quo, dollars for political favors. And throughout these cases, including Citizens United before and Buckley originally, the reference to corruption here is a reference to corruption as in quid pro quo.

Would you agree that by quid pro quo corruption Justice Roberts is speaking of what we've referred to here as individual corruption?

A. Yes.

Q. Okay. And so it's quite clear the Court has endorsed the power of Congress to target individual corruption in the sense in which they've said this is authorized?

A. Uh-huh.

Q. So, likewise, Justice Scalia has a

concurrence in the Citizens United case where he was deeply troubled by the fact the opinion was charged as being "unhistorical," page 7 of his opinion.

And, of course, for Scalia those are fighting words. Because Scalia is an originalist, and he believes what he does is historical understanding of the Constitution. But his response to this charge is, I think, telling. And I want to make sure to get your characterization of it as well.

He pointed to the evidence that was offered in the dissent by Justice Stevens. And that included an author -- an article by Professor Zephyr Teachout. And Scalia quoted this from the -- from Zephyr Teachout's article: "Corruption was originally understood to include moral decay and even actions taken by citizens in pursuit of private rather than public ends."

So Scalia rejected the idea that you can restrict 1st Amendment freedom to address that corruption. But would you understand the kind of corruption that's being referred to there in the way that we've been discussing as societal corruption?

A. Yes. You know, I think the whole point of my report, just to try to summarize, is to say that corruption is a concept with a rich and complicated history of its own. The framers were heirs to that complication. They were trying to sort out within the framework of assumptions about republican government, what it might mean.

It's worth noting -- let me just add a point, you know, beyond what you suggested. Because curiously I was just teaching a book yesterday that talks about this. The role of the press, if we think about the press as -- or the media as main instruments for the disbursements of funds that may or may not be corrupting of politics, that's something that the founding generation was actually doing a lot of experimenting with.

I mean, there's a terrific expansion of the press in the 18th century. And there's a discussion of the whole nature of the process of, How do you shape and form and figure out what public opinion is all about? So that's -- you know, in a sense it kind of complicates my answer, Larry, because this was a dynamic problem. It was something they were actively wrestling with.

And they had to think about, you know, How do you create a political press? I mean, the number of the newspapers in the United States multiplies enormously in the 1790s and with each successive decade. Many newspapers were created to kind of run particular elections.

So there's a lot of creativity that's involved here so that it makes it hard to oversimplify any one response. But I do think -- I think it remains fair to say that the conception of how these processes could be corrupted, or what are potential uses that would be inimical to the health of a republican body politic, I think the evidence for that remains fairly strong. And that's what I've tried to summarize here.

Q. Okay. Right. But it sounds like, though -- you say this is complicating the answer. It seems to me that's simplifying your answer, right? Because if the question is --

A. Trying to do both, I think.

Q. Good. If the question is: Do the framers have a broader conception of corruption than just quid pro quo --

A. Yes.

Q. -- then what you're saying is --

A. Yes.
Q. Absolutely. Okay. Let me just take one minute and then...
(Pause in proceedings.)
MR. LESSIG: Okay. So first rookie mistake -- actually, the second rookie mistake, I'd like to move to qualify Jack Rakove as an expert for the purposes of these proceedings.
MS. FOX: No objection. But expert in what?
MR. LESSIG: I'm sorry?
MS. FOX: Sorry. I said no objection. Expert in what, though?
MR. LESSIG: So he's an expert in history and, in particular, in early American political and constitutional law.
MS. FOX: No objection.
THE COURT: Okay. So qualified.
BY MR. LESSIG:
Q. Okay. And the second follow-up question, just to be clear, about the relationship between what you've been saying and the adoption of the Constitution and, in particular, in the adoption of the 1st Amendment, is there anything in your experience or understanding of this period that

would suggest that in adopting the 1st Amendment, the framers meant to weaken the opportunity to address these different forms of corruption?

A. No.

Q. Okay. And in the Constitution itself -- in the adopting of the Constitution and the debates about the Constitution, was there present in those debates, in the conventions as well as in the Philadelphia Convention -- state conventions as well as the Philadelphia Convention, a recognition of the need for the government to be able to police or be vigilant about avoiding at least the first two categories of corruption, individual and institutional?

A. Well, those were dominant political values. So I guess I would say as a deep background condition as kind of representing underlying assumptions about the nature of political life, those concerns were very much part of, you know, the founding era debates, the framing era debates.

Q. Okay. Great. So I'd like to just summarize some key points that we've got here and make sure we've got an agreement on that summary.

So as I've simplified these into three

buckets of individual, institutional, societal, whether there are three or 30 of these buckets, is it your view as a historian expert in the political thought of the early American republic and constitutional history of America that it would be, in the words of the late Justice Scalia, unhistorical to insist that the only conception of corruption that they were animated to avoid was individual corruption?

A. Yes.

Q. Okay. And that whether or not the hallmark of one of these conceptions of corruption is quid pro quo, that there were more -- that there was more than one prominent conception and not all of them had the same hallmark?

A. Yes.

Q. That the institutional corruption of Parliament involved no necessity of quid pro quo corruption?

A. It was a product of the conception of quid pro quo.

Q. And that the societal conception that Machiavelli or Adams was focused on had no necessary connection to quid pro quo?

A. Yes.

Q. And that while it would be true to say that the hallmark of individual corruption was quid pro quo, it would not be true to say that the hallmark of "corruption," as it was understood at the framing, was quid pro quo corruption?

A. Yes.

MR. LESSIG: I have no more questions. If counsel has questions...

MS. FOX: No, Your Honor.

MR. LESSIG: Your Honor, do you have questions?

THE COURT: No.

MR. LESSIG: Thank you.

THE COURT: Sir, it looks like your testimony is concluded at this time.

THE WITNESS: Thank you.

THE COURT: Thank you.

Counsel, if we could just briefly address briefing schedule.

MR. LESSIG: So one question we had is when we could expect transcripts so that we could use that for the briefing.

THE CLERK: I can make you a CD after the hearing.

MR. LESSIG: Oh, that's very quick.

Okay.

Is four weeks adequate?

THE COURT: Counsel?

MS. FOX: Are you going to want simultaneous briefing, or them briefing and us responding or what?

THE COURT: No. I was anticipating them filing their brief first, and then give you the time you need to file your brief.

MS. FOX: Okay. I mean, if they're going to be filing first, I have no problem with them doing that in a month or whatever it was that you said. And then --

UNIDENTIFIED SPEAKER: I can't hear.

MS. FOX: -- if I could have the same amount.

UNIDENTIFIED SPEAKER: I can't hear.

THE COURT: Can you speak up? We have someone in the back who can't hear.

The indication was that she had no objection to filing the brief in four weeks; is that correct?

MR. LESSIG: Our filing.

MS. FOX: To opposing counsel filing in four weeks.

THE COURT: Just looking at the calendar here.

MR. LESSIG: So can I just clarify one question? The CD that you're going to give me is an audio CD?

THE CLERK: Yes.

MR. LESSIG: I see. So then we need to get that transcribed?

THE CLERK: Exactly.

MR. LESSIG: So I wonder if we could talk about six weeks rather than four weeks.

MS. FOX: That would be fine.

THE COURT: Okay. Why don't we make it November 19th, which is a Monday. Does that work?

MR. LESSIG: Yeah.

THE COURT: And, Ms. Fox, how long would you like to have --

MS. FOX: I don't know. A month or --

THE COURT: Well, a month puts you at December 17th. Do you want -- Counsel, is there any objection to just -- do you have

holidays planned?

MS. FOX: More time would be fine too.

THE COURT: Any objection to just making it the 1st of January?

MR. LESSIG: No, sir.

THE COURT: And then time for reply?

MR. LESSIG: Two weeks is fine for us.

THE COURT: All right. So January 15th?

MR. LESSIG: Yeah.

THE COURT: All right. Anything else that we need to address today?

MR. LESSIG: I don't think so, Your Honor.

THE COURT: Ms. Fox?

MS. FOX: No, Your Honor.

THE COURT: All right. Well, thanks to everyone. I hope that this achieved the goal that everybody wanted of being able to supplement the record. I do appreciate the extra information.

Are you having trouble hearing me as well?

UNIDENTIFIED SPEAKER: No. It's fine.

THE COURT: Okay. And I will look forward to the briefings starting on November 19th. All right. Thank you all. We'll go off record.

THE CLERK: Please rise. Court is adjourned.

(Hearing adjourned.)

EXHIBIT D

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY

DAVID C. BAXTER, MARY BLAINE CAMPBELL, CATHERINE BRUN-COTTAN, GEORGES BRUN-COTTAN, LEIGH CHINITZ, BETTINA NEUEFEIND, and LEO SPRECHER, Plaintiffs, v. ATTORNEY GENERAL AND SECRETARY OF STATE OF THE COMMONWEALTH OF MASSACHUSETTS, Defendants.	Civil Action No. SJ-2022-

AFFIDAVIT OF HAROLD HUBSCHMAN

I, Harold Hubschman, do hereby depose under oath and state as follows:

1. I founded the business now named SignatureDrive.com in 1999. I have served as President of the business since its founding. As President, I am familiar with the operations of the business including, without limitation, the signature collection drives undertaken by the business and the prices it charges to collect signatures.

2. I have personal knowledge of the facts set forth herein.

HH

3. SignatureDrive.com is one of the leading petition drive firms in the United States. It is the leader in Massachusetts where the company is based. I and my partners and our team of petitioners and managers around the country have successfully completed over 100 statewide signature drives for ballot initiatives and candidates in twenty-six states.

4. SignatureDrive.com is currently the only petition firm in the country that runs paid signature drives in Massachusetts. Since 2009, there have been 29 initiative campaigns in Massachusetts that hired paid signature drive firms. We ran 26 of them.

5. SignatureDrive.com regularly runs multiple drives at the same time. In 1999, we were the first firm in Massachusetts to complete three signature drives simultaneously, each requiring 100,000 signatures, a record that we've repeated on numerous occasions. No other firm that has worked in Massachusetts has ever completed more than one at a time. We have never failed to get an initiative or candidate on the ballot.

6. I am generally familiar with some of the ballot initiatives that were filed with the Attorney General on or before the first Wednesday in August 2022 including, without limitation, initiative petition 22-01 entitled, "Initiative Petition for a Law Relative to Limiting Political Contributions to Independent Expenditure PACs." (the "Petition").

7. I am also familiar with signature drives for ballot petitions being run across the country in fall 2022. The demand for signature gatherers in fall 2022 is great because of the number of petitions for which signatures are being collected in California and, to a lesser extent, Maine.

8. If I had been asked to run a signature drive for the Petition in Massachusetts during summer 2022 to begin on or after the first Wednesday in September, I would have charged $15-$20 per raw signature collected because of the competition for experienced signature collectors we regularly hire now working in other states, and the fact that we would be running a signature collection effort for only one ballot initiative.

9. Rather than collecting the minimum required number of 80,239 certified signatures, I would have recommended that we collect 125,000 raw signatures, a number we would expect to net at least 90,000 certified signatures.

10. I anticipate running multiple signatures drives for ballot initiatives in Massachusetts in fall in 2023. Because my signature collectors would be collecting signatures for several initiatives, there would be economies of scale that would likely reduce the price to $7.50 per signature next fall.

Further sayeth, affiant not.

Signed under the pains and penalties of perjury, this 20 day of October 2022.

Harold Hubschman

EXHIBIT E

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

MAURA HEALEY
ATTORNEY GENERAL

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September 26, 2016

BY HAND & EMAIL
Hon. Barbara A. Lenk
Supreme Judicial Court for Suffolk County
John Adams Courthouse
One Pemberton Square, Suite 1-300
Boston, MA 02108-1707

Re: *PassMass Amendment, Nick Bokron & Terra Friedrichs v. Attorney General and Secretary of The Commonwealth*, No. SJ-2016-0374

Dear Justice Lenk:

During the telephonic hearing on Friday, September 23, Your Honor asked why the interests of efficiency would not support having the full Court decide legal challenges to decisions by the Attorney General not to certify Amend. Article 48 initiative petitions, even when those petitions have not gathered sufficient signatures to remain viable under the constitutional process. I am writing to provide a fuller answer to Your Honor's question than I was able to do during the hearing.

First, adopting such a rule would likely increase requests for adjudication of constitutional matters in the abstract, unsupported by a viable Article 48 petition. During each two-year election cycle going back to 1999, the Attorney General has declined to certify up to ten petitions, and usually one or two legal challenges have been perfected (with 2015 being the exception to this rule):[1]

Year	Petitions Received	Not Certified	Challenges
2015	35	10	4
2013	33	5	1
2011	31	8	1
2009	30	5	0
2007	13	0	1
2005	16	1	2
2003	14	3	0
2001	27	9	1
1999	33	5	1

[1] These numbers are approximate, as some petitions may have been withdrawn or may be duplicates.

As is evident, relatively few of the non-certified petitions went on to gain sufficient signatures and culminate in a live appeal of the Attorney General's determination. If petitioners were able to secure judicial review of the Attorney General's decision not to certify petitions without having to satisfy the signature gathering requirement of Article 48, the full Court could easily receive ten or more additional Article 48 challenges in each two-year cycle (including a smaller number of additional challenges in even-numbered years).

Moreover, would-be petitioners might well choose to file petitions and secure constitutional rulings—in effect, advisory opinions—from the Court as part of pre-filing research and political strategy for a subsequent year's petition, or for some other reason. Indeed, this may be the petitioner's plan for this petition, in light of his admission during Friday's hearing that he is aware that the necessary signatures will not be gathered this year. Hearing and deciding these constitutional questions in a vacuum would waste judicial resources, lead to the unnecessary adjudication of hypothetical controversies that have no immediate impact on any party, and involve the Court in the strategic political calculations of potential Article 48 petitioners.

Your Honor further asked if the mootness exception of "capable of repetition, yet evading review" would apply to the petitioners' complaint. I strongly disagree that it would. This exception has been applied where structural systemic attributes preclude meaningful judicial review before mootness. *Wolf v. Comm'r of Public Welfare*, 367 Mass. 293, 295 (1975) (replacement of delayed benefit check mooted plaintiff's claim for injunction governing such replacement). This is not the case with Article 48 petitions, as the full Court has specifically held. *See Lockhart v. Attorney General*, 390 Mass. 780, 785 (1984) (declining to review challenge to Attorney General's decision not to certify an initiative petition that had become moot upon the petitioners' failure to gather the necessary signatures). The Court noted that, should the constitutional issues raised by the Attorney General's decision not to certify the petition reappear, "they need not evade review before they become moot." *Id*

No inherent characteristic of the initiative petition process precludes the timely gathering of sufficient signatures before review may be had. The repeated inability of a particular petitioner to do so does not support a departure from the principle that courts will not decide moot controversies, particularly moot constitutional controversies. *See Matter of Sturz*, 410 Mass. 58, 60 (1991) (noting court's particular hesitancy to decide constitutional questions that become moot). Moreover, it is not the passage of time that moots these cases, but rather the inability of petitioners to secure the necessary demonstration of popular support for their petition to allow its presentation to the general electorate. *Contrast Wolf*, 367 Mass. at 298 (court may adjudicate claim mooted by the "mere passage of time during the appeal process"). In other words, the constitutional validity of certifying (or not) a proposed law that gathers insufficient support to go on the ballot—and thus will never be enacted—remains a moot question, no matter how many times a petitioner attempts to place the measure on the ballot. Thus, while Article 48 petitioners are required to gather signatures under strict constitutional timelines, those requirements do not create a "capable of repetition, yet evading review" exception to the

mootness doctrine.[2] Imposing such an exception in this situation would require the overruling of *Lockhart* and may—as noted above—result in a deluge of unnecessary constitutional litigation.

Thank you for your consideration of these points.

Very truly yours,

Juliana deHaan Rice
Assistant Attorney General
(617) 963-2583

cc: Nicholas Bokron (by email and first-class mail)
Terra Friedrichs (by first-class mail)

[2] And, notably, this Court has held that, for petitions that *do* collect the required number of signatures, this Court can and will adjudicate the propriety of certification even after such a law is placed on the ballot, meaning that the passage of time does not defeat this Court's review. *See Sears v. Treasurer and Receiver General*, 327 Mass. 310, 326-327 (1951).

EXHIBIT F

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. SJ-2016-374

PASSMASSAMENDMENT - NICK BOKRON & TERRA FRIEDRICHS

v.

ATTORNEY GENERAL AND SECRETARY OF THE COMMONWEALTH

MEMORANDUM OF DECISION

I have considered all of the written submissions to date and the helpful oral arguments that were made by both sides last week. I decline to issue a preliminary injunction in the form requested by the plaintiffs.

This is the fourth consecutive year that the plaintiffs have filed the identical initiative petition, and each time the Attorney General has declined to certify it as a proper matter for the ballot under amend. art. 48 of the Massachusetts Constitution. In each of the three previous years, the plaintiffs commenced an action like this in the county court challenging the Attorney General's decision not to certify, and each time, as is typical in these cases, the parties voluntarily agreed to the terms of an order that allowed the plaintiffs, while the action remained pending, to continue with the

signature-gathering process as if the petition had been certified. Each year, however, the plaintiffs failed to collect a sufficient number of signatures to move the petition forward, and their action was therefore dismissed as moot.

This year, unlike in the previous years, the parties have been unable to agree on the terms of an order. The plaintiffs ask me to issue an order identical to last year's order, essentially compelling the Attorney General to summarize the petition, and the Secretary to print blank signature forms for the plaintiffs to use, as if the petition had been certified. The Attorney General and Secretary have no legal obligation under the Constitution or statutes to do this for petitions that have not been certified. They appear to have done so voluntarily in the past, for this petition and other petitions, as a practical matter and as an accommodation to petitioners so that the petitioners can move forward with their petitions while their court challenge to the Attorney General's certification decision is pending. The parties have not directed me to any decision in which the defendants have been compelled to submit to such an order over their opposition. Moreover, the defendants have offered in this case to agree to an order voluntarily again this year with one additional condition, i.e., that before the local and State officials are put to the burden

of certifying and counting signatures, the plaintiffs be required to submit an affidavit averring a good faith belief that they have collected a sufficient number of signatures. That does not seem unreasonable to ask for in light of the history involved here, and for the reasons set forth in the defendants' supporting affidavit and other materials. I am mindful of the plaintiffs' claim that they are a small organization with limited resources. Nevertheless, they are not entitled as a matter of right, either under the Constitution or by statute, to proceed on the same terms that the defendants agreed to in the previous years, and I will not compel the defendants in these circumstances to allow them to do so.

If the parties cannot agree on the terms of an order that would allow the petition to go forward for signature-gathering at this time, the plaintiffs can proceed with their legal challenge to the Attorney General's refusal to certify their petition. I am not aware of any obligation on their part to accept the defendants' terms and proceed to the next step of the petition process while their action remains pending. The defendants suggest in their letter dated September 26, 2016, that the plaintiffs are not entitled to a ruling on the merits of their claim challenging the certification decision unless and until they first gather sufficient signatures to put the

petition on the ballot. That may or may not be correct; I leave that to be decided if and when the plaintiffs choose to pursue that route.

If the plaintiffs do choose to press forward with the litigation at this time, they shall have thirty days to amend their complaint to allege sufficient facts to ensure that it would withstand a motion to dismiss for failure to state a claim on which relief can be granted. See Mass. R. Civ. P. 12 (b) (6). See also Iannachino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008). The complaint as presently written does not allege the contents of the initiative petition, the Attorney General's reasons for declining to certify the petition, or any reasons why the plaintiffs claim that the Attorney General's refusal to certify was improper. I would ask the Attorney General, in the spirit of cooperation, to provide the plaintiffs with two or three examples of proper complaints in cases like this, if the plaintiffs request them. After an amended complaint is filed, the defendants will have an opportunity to respond, and I will be in a position to decide whether the case ought to be reported to the full court; either way, the case will proceed expeditiously.

Alternatively, if the parties wish to, and are able to, agree on terms for a court order allowing the petition to

proceed to the signature-gathering phase now, while the case remains pending and further action is stayed, as they have done in the past years, they continue to be free to do so, and I will entertain their joint request for such an order. The plaintiffs should let the clerk know as soon as practicable how they wish to proceed - with their legal challenge to the certification decision or with an order that is mutually acceptable to both sides.

Barbara A. Lenk

Barbara A. Lenk
Associate Justice

Dated: September 27, 2016