

February 6, 2019

From: Rick Bourdon, Co-Chair, Open Democracy Action
Re: SB 155
Before: NH Senate Election Law & Municipal Affairs Committee

Chairperson Levesque and Members of the Committee,

First, some historical perspective. I'll begin with a quote:

"All contributions by corporations to any political committee or for any political purpose should be forbidden by law; directors should not be permitted to use stockholders' money for such purposes; and, moreover, a prohibition of this kind would be, as far as it went, an effective method of stopping the evils aimed at in corrupt practices acts."

Teddy Roosevelt, Address to Congress, 1905

In 1907 President Roosevelt signed into law the Tillman Act, which prohibits contributions from corporate treasuries to political campaigns, and that has been federal law ever since.

It was the law in New Hampshire as well! until 1999. In that year, the section of RSA 664 describing prohibited political contributions from businesses was struck down in the U.S. District Court's decision in *Kennedy v. Gardner*. The court found the prohibition to be overly broad.

I have included a descriptive section of the Court's ruling in the appendix to this testimony. In brief, the Court cited two sources of corporate political contributions: (1) "treasury funds," from the business's operating accounts and (2) "segregated funds," from individual donations solicited from corporate officers, directors, employees, and shareholders, i.e., corporate PACs. The court found that treasury funds, having derived from business activities, did not reflect popular support for the business's political views, and could be prohibited. Segregated funds, however, since they do to some extent reflect popular support, could not be.

It was the statute's overly broad language, language that did not distinguish between the two types of funds, that the Court objected to. The Court went on to suggest a fix. In its response to the State's reargument of the case, the Court stated: "There is, of course, a simple solution to this simple problem... ..the General Court can easily and effectively amend the statute to reflect its actual (constitutional) intent." The Court made it clear that the law was easily fixable if it banned donations from business's treasury funds only.

So what did the Legislature do? It simply struck completely the section of RSA 664 referring to businesses and, in effect, made legal (or, at least, not illegal)

direct contributions from businesses to New Hampshire political campaigns. And that has been the state of affairs for the past 18 years.

The intent of SB 155 is to provide the fix called for by the Court that many years ago, barring once again direct contributions from businesses to political campaigns.

Will this change run into the same legal problems that arose in 1999? Short answer: No. The new language refers to "business organizations," which are defined in RSA 664:2 as:

RSA 664:2, XVI. "Business organization" means any enterprise, whether corporation, partnership, limited liability company, proprietorship, association, business trust, real estate trust or other form of organization, organized for gain or profit, and includes any enterprise which is expressly made exempt from income taxation under the United States Internal Revenue Code of 1986. It does not include a political committee as defined in RSA 664:2, III, or the political committee of a political party, as defined in RSA 664:2, V.

Because political committees are excluded from the business organization definition, the new wording satisfies the court's objection in 1999 that "segregated funds" had been unconstitutionally banned.

I strongly encourage the Committee to vote *Ought to Pass* on SB 155.

Thank you for considering my testimony,

Rick Bourdon, Co-Chair, Open Democracy Action

Appendix

Source: Kennedy v. Gardner, 1999

A. Types and Sources of Political Contributions.

Generally, corporate political contributions come from two different sources. One is the corporation's operating or treasury accounts. Money in that type of account is derived from corporate business activities, such as the sale of goods and services or the sale of corporate stock. It is generally accepted that a corporation's ability to amass such funds reflects its business acumen, but not popular support (or even the support of its shareholders) for its political views. See, e.g., *Federal Election Commission v. Mass. Citizens For Life, Inc.*, 479 U.S. 238, 258 (1986) ("The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.").

The other potential source of corporate political contributions is a "segregated account." Typically, segregated accounts are funded by contributions solicited from corporate officers, directors, employees, and shareholders. These accounts also represent corporate money, but money that does reflect some degree of popular support for the corporation's political goals and ideas."