



October 29, 2009

Corporate Democracy: Potential fallout from a Supreme Court decision on *Citizens United*

The impending Supreme Court decision in *Citizens United v. Federal Election Commission*, which could be announced as early as Tuesday, Nov. 3, is expected to significantly expand the role of the most powerful special interests in financing American elections. The Court appears poised to turn its back on more than 100 years of law and pave the way for corporations and unions to spend unlimited amounts of money on direct campaigns to elect or defeat federal candidates.

Such a dramatic decision would further reduce trust in government policymaking and take our country in the wrong direction. It is hard to imagine how America can achieve real progress and tackle critical challenges – like health care, climate change and the economy – when our elected representatives are locked in an all-out fundraising arms race that makes them both more dependent on and vulnerable to the powerful special interests opposed to change.

Lifting the ban on corporate political spending could unleash a flood of money into the political system and further diminish the public's voice. Precisely how much money is hard to say, but consider the following:

- **Last year's Congressional and Presidential election was the most expensive in history, with total political and issue advertising exceeding \$3 billion nationwide. Corporations and unions could more than double this amount – every election – if they put as much into political ads as they already spend lobbying Congress, \$6 billion in the last election cycle.**
- **The health and insurance industries alone spent more than \$1.6 billion lobbying Congress during the 2008 election cycle, nearly double the \$861 million that all winning congressional candidates (435 House candidates and 35 Senate candidates) spent on their campaigns during the same period.**
- **PhRMA recently launched a \$150 million advertising campaign to support Senator Baucus' health care plan (without a public insurance option) – more than the \$140 million spent by all 55 winners of hot congressional races in 2008 combined. That's one trade association on one bill.**

- **In the 2008 elections, winning candidates for the House of Representatives spent an average of \$1.4 million – roughly equivalent to what the health care industries are spending per day so far this year to lobby Congress on health care reform.**
- **If the Supreme Court lifts the ban on using corporate profits for political spending, corporations would likely spend vastly more than labor unions. During the 2008 election cycle, corporations outspent organized labor 4:1 on political action committee (PAC) contributions, but 61:1 on lobbying.**

Opening up another avenue for unlimited private money to flow into the political system will almost certainly increase the overall amount spent each election. This, in turn, will further fuel the “arms race” that already forces our elected officials to engage in perpetual fundraising.

One of the only solutions to this deterioration of our democratic process is contained in legislation currently under consideration in Congress. The Fair Elections Now Act (H.R. 1826/S. 752) would allow candidates to run competitive campaigns using a combination of small contributions and limited public funds, instead of relying on large contributions from powerful special interests and bundlers.

Legal Background

Citizens United vs. Federal Election Commission originally concerned whether a movie produced by the nonprofit group Citizens United, entitled “Hillary: A Movie,” qualified as a campaign ad and was subject to disclosure requirements. Instead, the Supreme Court decided to reopen the larger issue of whether corporations and unions should be allowed to spend unlimited amounts of treasury money on advertisements and other campaign activities that expressly endorse or attack a political candidate.

Corporations and unions have been prohibited from spending money from their general funds on this kind of advocacy at the federal level since 1947, when Congress passed the Taft-Hartley Act. The Supreme Court later upheld the constitutionality of this ban in 1957 in *U.S. v. United Automobile Workers*.

If the Supreme Court rules that the ban on direct corporate and union political advocacy is unconstitutional on First Amendment grounds – that corporations and unions have the same First Amendment rights as individuals – the Court could ultimately use the same reasoning to also overturn the ban on donations from corporate and union general funds directly to candidates, which was outlawed in 1907 by the Tillman Act.

Prohibiting corporations and unions from using treasury money to influence federal elections has been upheld repeatedly by the Supreme Court in *FEC v. National Right to Work Committee* (1982), *Austin v. Michigan State Chamber of Commerce* (1990), and most recently in *McConnell v. FEC* (2003) after the passage of the Bipartisan Campaign Reform Act (BCRA). In *McConnell*, the Court noted that, “Congress’ power to prohibit corporations and unions from

using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law.”

The Court has repeatedly upheld these regulations in order to ensure that the special economic status corporations enjoy under the law is not used to dominate the political arena. In *Austin*, Justice Marshall recognized the state’s compelling interest in avoiding a “different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.”

Corporations and unions already spend hundreds of millions per cycle through PACs and 527s to influence federal elections. Allowing corporations to directly tap their enormous profits for unlimited political spending will hasten the nation’s descent into a new era of “corporate democracy,” where entities whose sole purpose is to maximize profits are given free rein to dominate elections and drown out the voices of ordinary Americans.

Political Spending: Corporations vs. Candidates

Corporations already spend huge sums every year to influence the outcome of public policy. While the current system bars direct corporate and union political spending, those entities are still able to wield considerable electoral influence through PACs, 527s, bundling and executive giving. If the Supreme Court strikes down the ban on direct political advocacy by corporations, it would create yet another opening for corporate money to flow into the political system. Under this scenario, companies could effectively run full-blown political campaigns – including television commercials, phone banks, and neighborhood canvassing – that would mirror the official campaigns of the candidates.

When it comes to lobbying – where corporations and unions can tap their treasuries without restriction – corporations and unions spend more in any given election cycle than candidates spend on their own campaigns. During the 2008 election, all candidates for Congress spent a total of \$1.4 billion on their campaigns, or roughly 26 percent of the \$5.2 billion corporations spent on lobbying during the same two year period. For the last five elections, candidate spending has been on average about 29 percent of total corporate lobbying during the same period.

Total Corporate Lobbying vs. Total Candidate Spending

Cycle	Corporate Lobbying	Campaign Spending	%
2008	\$5,170,752,703	\$1,366,384,657	26%
2006	\$5,002,604,155	\$1,411,998,213	28%
2004	\$4,164,795,807	\$1,135,090,248	27%
2002	\$3,410,549,971	\$930,186,153	27%
2000	\$2,981,481,715	\$1,010,902,673	34%
Totals	\$20,730,184,351	\$6,324,802,014	29%

Source: Center for Responsive Politics (www.opensecrets.org)

In theory, if corporations spent about one-third of what they currently spend on lobbying during a two-year election cycle on direct political advocacy, they could outspend all Congressional candidates combined. In practice, corporations could target a discrete number of competitive races in order to give a majority in Congress to a particular party or ensure outcomes on critical legislation.

For example, in the 2008 elections the average winning candidate for the House of Representatives spent \$1.4 million on his or her campaign, and the average winning candidate for the Senate spent \$8.5 million. While total campaign spending does not automatically determine the winner in Congressional races, there is a strong correlation between levels of campaign spending (up to a certain amount) and election results.

In the upcoming 2010 elections, there are 13 seats in the U.S. Senate that are currently considered competitive by the Cook Political Report, six seats held by Republicans and seven held by Democrats. In the House, the Cook Report identifies 47 competitive races for 33 Democratic-held seats and 14 Republican-held seats. Using 2008 spending numbers, the winning candidates in those 60 races could be expected to spend a combined total of approximately \$175 million.

When just one trade association, like PhRMA, can put \$150 million into a targeted advertising campaign for one bill, it doesn't take much to imagine a future election in which corporate spending exceeds candidate spending.

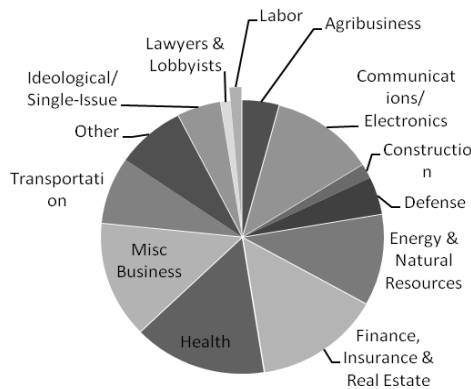
Political Spending: Corporations v. Organized Labor

A Supreme Court holding in *Citizens United* that it is unconstitutional to limit corporate and union political spending would, in all likelihood, lead to a much greater spending gap between corporations and labor. Most of this spending currently takes place through PACs, which have strict limits on how much they can raise and spend. PACs may receive up to \$5,000 from any one individual and can give up to \$5,000 to a candidate per election (primary, general or special). In the last election cycle, corporations outspent unions 4 to 1 when it came to PAC spending. All

corporate PACs spent approximately \$270 million during the 2008 elections, while all organized labor PACs spent \$66.4 million during the same period.

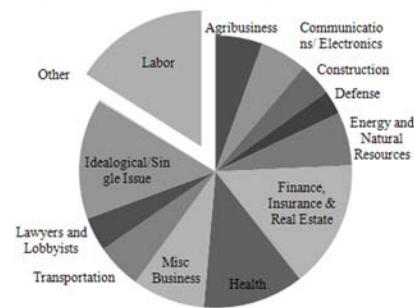
The disparity between corporate and union spending is much more dramatic when it comes to lobbying Congress, where there are no limits on treasury funds. During the 2008 election cycle, corporations spent a total of \$5.2 billion dollars lobbying Congress, or 61 times as much as labor unions, which spent \$84.4 million during the same period.

**Lobbying Spending by Economic Sector
2008 Election Cycle**



Source: Center for Responsive Politics (www.opensecrets.org)

**PAC Spending by Economic Sector
2008 Election Cycle**



Source: Center for Responsive Politics (www.opensecrets.org)

Case Study: Independent Expenditures in California

Supporters of unlimited corporate and union political spending argue that many states already allow this type of advocacy, and that it has not caused a flood of private money into the political process. While that may be true in some states, California’s experience has not been encouraging.

In California, which does not limit corporate and union political spending, independent expenditures exploded after voters adopted campaign contribution limits in 2000. According to the California Fair Practices Commission, independent spending on state legislative races soared from \$376,000 in 2000 to \$23.5 million in 2006. For statewide races, independent spending in California increased from \$526,000 in 2002, when there were still no contribution limits, to \$29.5 million in 2006 – 41 percent of candidate spending for that election, according to data from the National Institute for Money in State Politics.

In many cases, corporations or individuals spent large sums supporting or opposing individual candidates far in excess of contribution limits. In a particularly dramatic example, Intuit spent \$1 million to influence the State Comptroller race. Intuit, which produces “Turbo Tax,” opposed the creation of a free on-line tax preparation program for California residents known as Ready Return. The company spent \$1 million in support of Republican Tony Strickland against Democrat John Chiang, who supported the Ready Return program. Although Strickland lost the race, he continues to serve in the California legislature and has continued to press for the repeal of Ready Return. Intuit stands to profit at least \$25 million per year should he succeed.

Some wealthy individuals have also used independent expenditures as a way to get around contribution limits. Californians for a Better Government, which billed itself as, “A Coalition of Firefighters, Deputy Sheriffs, Teachers, Home Builders and Developers,” spent almost \$10 million on independent expenditures supporting California State Treasurer Phil Angelides during the 2006 election. However, more than 80 percent of the committee’s contributions came from just two individuals, Angelo Tsakopoulos and Eleni Tsakopoulos-Kounalakis, according to the California Fair Practices Commission.

If the Supreme Court strikes down the ban on direct political advocacy by corporations and unions, the decision will also serve as the basis for legal challenges to the 24 states that currently prohibit or limit corporate spending in state and local elections: Alaska, Alabama, Arizona, Colorado, Connecticut, Iowa, Kentucky, Massachusetts, Michigan, Minnesota, Montana, North Carolina, North Dakota, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Wisconsin, West Virginia and Wyoming.

Political Spending as Percentage of Corporate Profits

Not surprisingly, many of the biggest companies in the United States are also some of the biggest political players in Washington. Yet, even the vast amounts many of these large corporations spend are still a relatively insignificant amount compared to the resources they could potentially bring to bear. On average, the biggest Fortune 500 companies, which are also among the biggest political donors, spent less than 1 percent of their profits on lobbying and campaign contributions during the last election cycle.

**Profits Compared to Lobbying and PAC Spending
2008 Election Cycle (millions)**

Company	Profits FY07-FY08	Political Spending		% of Profits
		Lobbying	PAC	
Exxon Mobil	\$80,110	\$45.9	\$0.7	0.06%
General Electric	\$43,037	\$39.0	\$1.6	0.09%
Bank of America Corp.	\$36,115	\$9.6	\$1.4	0.03%
Chevron	\$35,826	\$22.0	\$0.6	0.06%
J.P. Morgan Chase & Co.	\$29,809	\$10.8	\$1.1	0.04%
Pfizer	\$27,481	\$26.0	\$1.5	0.10%
Microsoft	\$26,664	\$17.9	\$1.0	0.07%
Citigroup	\$25,155	\$17.3	\$0.8	0.07%
Altria Group	\$21,808	\$28.5	\$0.9	0.13%
Goldman Sachs Group	\$21,136	\$6.1	\$0.8	0.03%

Source: Center for Responsive Politics (www.opensecrets.org); Fortune Magazine

In fact, if any of the largest companies, such as J.P. Morgan Chase or Exxon Mobile, chose to spend even a tiny fraction of their corporate profits during an election on direct advocacy for or against Congressional candidates, they could easily outpace total candidate spending. All of the Congressional candidates who won in the 2008 election – 435 House candidates and 35 Senate candidates – spent a combined total of \$861 million on their campaigns, or less than 1 percent of the total profits Exxon Mobile recorded during its 2007 and 2008 fiscal years.

The Way Forward: Fair Elections Now

All signs indicate the U.S. Supreme Court has a 5-4 majority in support of rolling back restrictions on corporate and union spending in their upcoming decision in *Citizens United*. Such a decision would come as no surprise for the Roberts Court, as the conservative majority has moved steadily toward deregulation of campaigns over the past two years.

While there are a few defensive legislative options for reducing the impact of a negative decision in *Citizens United* – such as requiring shareholder support for corporate political expenditures or improving disclosure laws – none of them will prevent the corrosive influence of big money in politics from getting worse. The recent direction of the Roberts Court leaves very little room to maneuver in the post-Watergate regulatory regime.

The only short-term option available to “change the game” is to create a new system of paying for political campaigns based on a blend of small donors and limited public funding that allows candidates to run highly competitive races without relying on wealthy special interests. This model is the basis for current legislation to modernize public funding for presidential elections,

under the draft **Presidential Funding Act of 2009**, and to create a new public funding system for congressional elections, under the **Fair Elections Now Act**. The path to the future should be “small-donor democracy,” not “corporate democracy.”

No matter how the Court rules, Congress must avoid the temptation to make matters worse by giving in to temptation and raising contributions limits. This is perhaps the worst of all policy options. Given that corporate executives and PACs already dominate election financing today, raising contribution limits as a response to more corporate spending in elections makes little sense whatsoever. It will only worsen the pay-to-play culture and public policy distortions created by Congress’ current dependence on large contributions – and further undermine voters’ confidence that Congress can act in the public’s best interest – without relieving Members of the crushing burden of year-round fundraising.

It is difficult to predict exactly what will happen if the Supreme Court decides to lift the ban on direct corporate and union political spending. However, it seems certain that the fear of unlimited corporate political spending will fuel a rapidly escalating fundraising arms race between candidates, the parties and outside interests. Elected officials will feel compelled to spend more and more of their time raising money, further distracting Congress from the pressing issues of the day, creating fear of political reprisal for unpopular votes, exacerbating conflicts of interest, and undermining public confidence in their government’s ability to act in the public interest.