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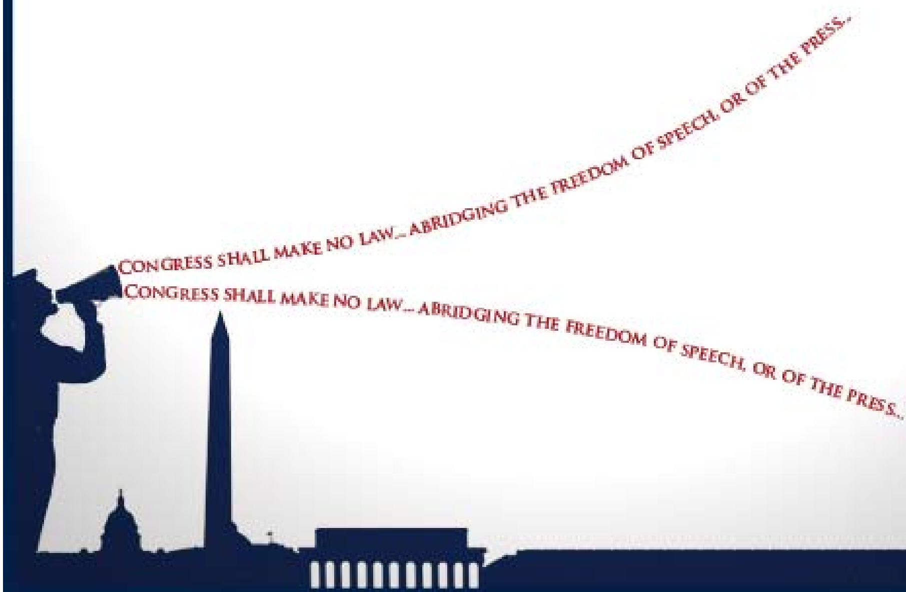
Congress shall make no law...

Policy Primer

Analysis of Legislative Responses to Citizens United v. Federal Election Commission



OVERVIEW

Contrary to the statements of President Barack Obama, members of Congress who favor strict campaign finance regulations and like-minded organizations, available evidence suggests that *Citizens United v. Federal Election Commission* (FEC) will modestly expand independent political speech, not "open the floodgates for special interests—including foreign corporations—to spend without limit in our elections," as Obama said in his State of the Union address.

Congress will consider proposals related to the *Citizens United* decision at hearings during the week of Feb. 1 in the Senate Rules Committee, House Administration Committee and a House Judiciary Subcommittee. Center for Competitive Politics (CCP) vice president **Steve Hoersting** and board member **Allison Hayward**, a professor of law at George Mason University, will testify at Tuesday's Senate Rules Committee hearing.[1] CCP president **Sean Parnell** will testify at Wednesday's House Judiciary Committee (Subcommittee on the Constitution, Civil Rights, and Civil Liberties) hearing.[2] Hayward will also testify at Wednesday's House Administration Committee hearing.

Legislative proposals by congressional leaders mentioned in the press include (1) restricting foreign involvement in political spending, (2) restricting business corporations from political spending using shareholder governance regulations and "Stand by Your Ad" disclaimers, and (3) restricting business corporations that contract with the federal government from political spending. Members of Congress have even proposed restricting the First Amendment.[3]

As a general matter, it seems appropriate to observe how corporations (and unions) react to *Citizens United* before legislating. Judicial review of any burdens on independent spending will demand evidence of a compelling governmental interest behind the restriction. It is doubtful that interest could be established to a court's satisfaction before these associational political speech freedoms are exercised.

About half the states permitted corporate expenditures before *Citizens United*. These states have not found it necessary to amend their state corporation codes in radical or novel ways to regulate pernicious corporate political activity. We may find the same is true in federal campaigns. In any case, federal lawmakers should hesitate before extending federal regulation over corporate governance, which traditionally has been provided in state law. As campaign finance lawyer Adam Bonin noted[4] in a *DailyKos* post, campaign finance regulations changed modestly after *Citizens United*: Before the ruling, corporations could contribute directly to candidates in more than half the states, run political expenditures with "express advocacy" — using words like "vote for" or "vote against"—in more than half the states, and run issue ads in all 50 states and federal elections using words like, "Sen. Smith is wrong on the environment; call him and tell him so." After McCain-

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[1] U.S. Senate Committee on Rules, accessed Jan. 31, 2010; http://rules.senate.gov/public/index.cfm?p=CommitteeSchedule&ContentRecord_id=7c3867e2-85df-46aa-84e1-b7112cda41a2

[2] U.S. House Committee on the Judiciary, accessed Jan. 31, 2010; http://judiciary.house.gov/hearings/hear_100203.html

[3] OpenCongress, H.Res.68, accessed Jan. 31, 2010; http://www.opencongress.org/bill/111-hj68/show

[4] *DailyKos*, "Citizens United: Don't Panic," Jan. 28, 2010; http://www.dailykos.com/storyonly/2010/1/27/830892/-Citizens-United:-Dont-Panic

Feingold in 2002, such ads could not be aired within 30 days of a primary or 60 days of a general election. Now, due to *Citizens United*, business corporations, unions and nonprofit advocacy groups can run "express advocacy" ads for or against candidates in all 50 states and run their issue ads anytime, instead of only when they're likely to be ignored by the voting public (i.e. not near an election).

Citizens United is not a sea change in campaign finance law; it merely expands the ability of organizations to broadcast issue ads and ads with "express advocacy." In defending McCain-Feingold in the Courts, "reformers" argued vociferously that these "issue ads" were no different in effect from the "express advocacy" ads the *Citizens United* Court ruled corporations have a right to broadcast, and the Court had expressly adopted that view in *McConnell v. FEC*. If that is true, then the change in the law is merely, as a practical matter, a reversion to the status quo of the 1980s and 1990s. While some people may not like that change, it is difficult to argue that elections improved, or special interest influence declined, during the seven year reign of McCain-Feingold.

As Stephen R. Weissman noted recently in a *Los Angeles Times* opinion article, "[t]his decision is unlikely to change the political situation on the ground very much. Even before the *Citizens United* decision, business, labor and wealthy individuals (frequently major owners of corporations, such as Sheldon Adelson of the Las Vegas Sands or George Soros of Soros Fund Management) were already able to spend more than $400 million in the 2008 federal elections on communications…"[5] According to a *Talking Points Memo* interview with political consultants, "[c]orporations already move billions into entities that allow them to run hard-hitting 'issue' ads. It's true that those ads couldn't directly advocate for the election or a defeat of a candidate. But [the consultants] said that in their experience, issue ads are more effective anyway. In other words, corporations have long had a potent enough weapon at their disposal to influence elections when they've wanted to..." Steve Murphy, a Democratic consultant and former top aide to Dick Gephardt, said "We found in testing so-called issue ads against candidate ads the voters felt the issue ads had more credibility… They preferred receiving the information without the didactic call to vote for a particular candidate."[6] Murphy also discounted predictions that *Citizens United* would disadvantage Democrats or favor Republicans: "'We heard the same dire warnings about the demise of Democrats' prospects after McCain-Feingold,' he said, noting that in fact, Democrats had retaken Congress not long after."[7]

Citizens United should dispel any lingering doubts that the Supreme Court might not protect political speech with the same vigor it applies to restrictions on speech in press or the arts. It is the task of Congress, based on experience and sound logic (not conspiracy theory hypotheticals), to respond appropriately if aspects of the political system endanger the integrity of the institution and its members. Only when such issues emerge will there be any way to evaluate the threat, the government's interest, and which of the many means available—campaign finance laws, ethics rules or tax incentives, among others—might best meet that threat.

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[5] *Los Angeles Times*, "Campaign finance ruling's likely impact overblown," Jan. 28, 2010; http://www.latimes.com/news/opinion/commentary/la-oe-weissman28-2010jan28,0,6522741.story

[6] *Talking Points Memo*, "Dem Consultants: Citizens United Ruling Not Such a Big Deal," Jan. 29, 2010; http://tpmmuckraker.talkingpointsmemo.com/2010/01/could_citizens_united_effect_be_less_than_meets_th.php

[7] Ibid

ISSUES

Should Congress restrict business corporations associated with foreign nationals?

The most prominent proponent of further restricting foreign involvement in U.S. politics is the President of the United States: "President Barack Obama and other critics say the court's decision to let corporations spend their money to directly influence elections opened the floodgates to foreign involvement. In last week's address to Congress and the nation, Obama asserted the court had allowed special interests, 'including foreign corporations, to spend without limit on our elections.'"[8] Rep. John Hall (D-N.Y.) introduced legislation that would ban political expenditures by a corporation if foreign nationals make up more than 5 percent of its shareholders.[9] Rep. Alan Grayson (D-Fla.) has introduced even more stringent legislation.[10] Rep. Thomas Perriello (D-Va.) proposed legislation that would ban political expenditures by corporations with even one foreign national shareholder.[11] Most recently, Sen. Al Franken (D-Minn.) introduced legislation to restrict "the influence of foreign nationals."[12]

(1) **Foreign corporations, foreign governments and foreign nationals are already banned from participating financially in U.S. elections under existing U.S. law not affected by *Citizens United*.**

(2) **Any regulation of independent political expenditures by business corporations cannot punish U.S. nationals associated with U.S. domestic subsidiaries of foreign companies for participating in political speech because it would raise First and Fourteenth (Equal Protection, Due Process clauses) Amendment concerns under the U.S. Constitution.**

(3) **Unions and nonprofit advocacy corporations with international, institutional relationships must also be subject to similar regulations to satisfy the Constitution's Equal Protection clause.**

(4) **An ownership standard based on foreign national shareholders is unworkable.** Shares are traded rapidly and corporations could not ensure that a threshold of foreign stock ownership in U.S. companies would not be reached under penalty of criminal sanctions. One possibly permissible restriction of independent corporate expenditures would be to ban independent expenditures by domestic subsidiaries of foreign corporations with a majority of foreign nationals on the board of directors of the U.S. corporation. But that's already illegal.

No one seriously believes that the ban on corporate spending (the 1947 Taft-Hartley legislation) was enacted to prevent foreign corporations from engaging in spending, as opposed to all corporations.

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[8] *Associated Press*, "Critics raise specter of foreign campaign spending," Jan. 30, 2010; http://hosted.ap.org/dynamic/stories/U/US_CAMPAIGN_FINANCE_FOREIGN_INFLUENCE?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT

[9] *The Washington Post*, Dan Eggen, "Democrats prepare legislation to counter ruling on campaign spending," Jan. 29, 2010; http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012803630.html

[10] OpenCongress, H.R. 4510, accessed Jan. 31, 2010; http://www.opencongress.org/bill/111-h4510/show

[11] OpenCongress, H.R. 4523, accessed Jan. 31, 2010; http://www.opencongress.org/bill/111-h4523/show

[12] OpenCongress, S. 2959, accessed Jan. 31, 2010; http://www.opencongress.org/bill/111-s2959/show

Accordingly, the government did not even defend the statute on those grounds, but even if we take that argument in good faith, it makes little sense.

Yet critics of the *Citizens United* decision are trotting out horror stories with increasing jingoism about foreign involvement in American politics. So, could *Citizens United* allow foreign corporations—from China! From North Korea!—to pour millions of dollars into U.S. campaigns? The President himself has made the claim, "even foreign corporations may now get into the act."[13] Really? No, not really.

First, a separate and very broad provision of the law clearly bans all foreign nationals from participating financially in any U.S. election, from dog catcher to president. It is true that U.S. subsidiaries of foreign owned corporations could spend money in an election (just as they were able to do in 28 states before Citizens United), but even to do that the subsidiary must be U.S. incorporated and U.S. headquartered, and must make expenditures from funds earned in the United States.

The Supreme Court said the government cannot prevent a corporation from speaking simply because it is a corporation. Therefore, the Court struck down part of 2 U.S.C. § 441b.[14] But a separate section of the law, 2 U.S.C. § 441e[15], prohibits "foreign nationals" from contributing. This section of the law wasn't even at issue, let alone overruled in *Citizens United*. Foreign nationals are prohibited from contributing because they are foreign nationals, not because they are corporations. A "foreign national" is defined to include any "partnership, association, corporation, organization, or other combination of persons organized under the laws of, or having its principal place of business in, a foreign country."

This leaves open the possibility of a foreign owned company incorporating and locating in the United States, and then spending money here on politics. But the definition of foreign national also includes non-resident aliens. And the FEC's regulations, 11 CFR 110.20(i), provide that:

> *A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.*

That is an extremely broad prohibition on any involvement in decisions on political activity. So a foreign parent corporation could not simply channel money into the U.S. company to then make expenditures. No foreign national can be involved, directly or indirectly, in any way, in decisions to spend, or on how to spend, any funds for political purposes.

So what is left? Well, conceivably a group of foreigners could form a U.S. corporation, then hire some permanent legal resident aliens ("green card" holders) to make decisions about spending its money. That doesn't seem likely to be a successful strategy (also, wealthy aliens who live in the U.S. as lawful permanent residents are already able to make personal expenditures, and even direct contributions to candidates). If this were really a worry, it could be addressed narrowly with legislation to broaden the definition of foreign national to include U.S.-based corporations with a majority of foreign nationals on the board of directors.

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[13] White House, "Weekly Address: President Obama Addresses This Week's Supreme Court Decision," Jan. 23, 2010; http://www.whitehouse.gov/blog/2010/01/22/weekly-address-standing-special-interests-fighting-american-people

[14] FindLaw.com, accessed Jan. 31, 2010; http://codes.lp.findlaw.com/uscode/2/14/I/441b

[15] FindLaw.com, accessed Jan. 31, 2010; http://codes.lp.findlaw.com/uscode/2/14/I/441e

However, these U.S. subsidiaries are already eligible to spend unlimited sums on lobbying Congress or on promoting or opposing state ballot measures. Additionally, these U.S. subsidiaries already have, and have long had, the right to create and pay the expenses for corporate Political Action Committees, which can not only spend on political races without limit, but can contribute directly to candidates. *The Washington Post* recently reported that "U.S.-based subsidiaries of overseas firms have contributed more than $20 million to federal campaigns since 2007 and have spent millions more lobbying Congress on issues such as energy and free trade, according to federal disclosure reports. Donations linked to foreign firms have increased from $7.7 million in 2000 to nearly $17 million in 2008, according to the Center for Responsive Politics."[16]

Foreign-owned but U.S. incorporated and headquartered subsidiaries ("domestic subsidiaries") using solely those funds earned inside the United States and controlled solely by U.S. nationals, are eligible to operate PACs because PACs allow U.S. employees and U.S. executives to participate in politics no matter their employer. Indeed, even domestic subsidiaries with a majority of foreign directors are permitted to establish PACs so long as all decisions are delegated to a U.S. national.[17] However, domestic subsidiaries with a majority of foreign directors cannot approve corporate political expenditures from its treasury, even as they continue to allow their U.S. employees to fund a PAC. This is because doing so would be a crime under existing law.

Any characterization that this decision allows foreign corporations to spend without limit in our elections is incorrect, at best. Any tightening of the existing ban to "fix" a nonexistent problem would only prevent U.S. nationals from participating in U.S. elections with funds earned within the United States. This would be shameful legislation, violating the rights of U.S nationals. Tangentially, any harmless belt-and-suspenders approach that merely restates existing law and achieves nothing would be a cynical statute unworthy of U.S. Senators.

The hypothetical horror stories about foreign corporations simply illustrate, again, the weakness of arguments against the Court's ruling in *Citizens United*.

Should Congress restrict business corporations with 'shareholder governance' provisions?

Some lawmakers, such as Rep. Michael Capuano (D-Mass.) have proposed using shareholder governance to restrict corporate political spending: "The legislation would apply to any corporate donation of more than $10,000. Executives would have to convene a shareholder vote to get permission to spend such money for any political purposes. It would also require companies to report such expenditures quarterly to shareholders."[18] Rep. Capuano also proposed so-called Stand By Your Ad restrictions on corporate independent expenditures.[19]

(1) **Regulations on corporate independent expenditures, including Stand By Your Ad restrictions, raise an Equal Protection constitutional issue if Congress only targets business corporations and not other corporations—such as 501(c)4 advocacy corporations and 501(c)5 union corporations.**

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[16] *The Washington Post*, Dan Eggen, "Democrats prepare legislation to counter ruling on campaign spending," Jan. 29, 2010; http://www.washingtonpost.com/wp-dyn/content/article/2010/01/28/AR2010012803630.html

[17] Federal Election Commission Advisory Opinion 2006-15, May 19, 2006; requested by TransCanada Corporation

[18] *Boston Globe*, "Capuano seeks to limit ruling's effect; Wants shareholder approval for most political donations," Jan. 30, 2010; http://www.boston.com/news/nation/articles/2010/01/30/capuano_seeks_to_limit_rulings_effect

[19] OpenCongress, H.R. 4537, accessed Jan. 31, 2010; http://www.opencongress.org/bill/111-h4537/show

(2) **Some proposed regulations, such as advance shareholder approval of each independent expenditure and duplicative disclosure, are unworkable for business corporations and seem designed simply to stifle corporate speech**. Any regulations must be narrowly tailored to achieve a necessary governmental interest and not create an administrative burden that is—in-and-of-itself—a chill on political speech.

(3) **As part of the existing shareholder governance process, shareholders are already entitled to set shareholder guidance and approval regarding independent, political expenditures**. Charitable contributions and lobbying by corporations have political and First Amendment implications, yet Congress has not required advance or separate shareholder approval for these activities.

(4) **Corporations are already required to disclose independent expenditures under existing law and FEC regulations**. Mandatory, ad hoc independent expenditure disclosure to shareholders would be duplicative and burdensome. At most, Congress should require corporations to include a statement on annual filings directing shareholders to the FEC's independent expenditure disclosure data for the corporation.

Some have criticized the *Citizens United* ruling as allowing corporate managers to spend shareholders' money against their best interests. But, even if this is true, this is a question not of campaign finance law, but of corporate governance.

What is really under attack here is the business judgment rule: how corporations should balance the interests of shareholders and directors to ensure effective management. If the business judgment rule is the problem, corporate political spending is the least of our worries. Even before McCain-Feingold, Fortune 500 companies spent roughly ten times as much on lobbying as on campaign expenditures. Must shareholders approve all lobbying in advance?

And, from a public interest perspective, is it better if corporations seek to exercise influence by lobbying lawmakers rather than lobbying the public, through campaign spending? Furthermore, these companies give away roughly ten times as much as they spend on lobbying. These donations can go not only to such causes as the United Way or the local opera, which many shareholders might not like, but to controversial "political" charities, including groups such as the Brennan Center for Justice, which has long received corporate contributions to support its crusade for campaign finance "reform," without ever expressing concern for whether the shareholders were in agreement with its agenda.

In fact, the Brennan Center for Justice, which advocates for shareholder restrictions on corporate independent expenditures,[20] has accepted corporate contributions from The Coca-Cola Company, Citigroup, UBS Paine Webber, Pfizer, Novartis AG, NBC Universal, The Hartford Financial Services Group and The Travelers Companies, Inc., among others.[21] Did the folks at the Brennan Center return those contributions out of concern for the poor shareholders who may oppose their 401(k)s being used to further the Brennan Center's agenda? No. Not only doesn't the Brennan Center mind, they actually are quite active in soliciting such corporate support, with no regard whatsoever for the shareholders whose 401(k)s are being used in this manner.

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[20] Brennan Center for Justice, Ciara Torres-Spelliscy, "Corporate Campaign Spending: Giving Shareholders A Voice," Jan. 27, 2010; http://www.brennancenter.org/content/resource/corporate_campaign_spending_giving_shareholders_a_voice

[21] Center for Competitive Politics, press release, "CCP issues corporate contribution 'hypocrisy' challenge to Brennan Center," Sept. 28, 2009; http://www.campaignfreedom.org/newsroom/detail/ccp-issues-corporate-contribution-hypocrisy-challenge-to-brennan-center

Corporate scholars have long wrestled with the scope of the business judgment rule—indeed, it may be fair to say that there is no more vexing issue in corporate law than the question of how to have efficient corporate governance while preventing officers and managers from betraying their duties to shareholders. But that is precisely why it would be a huge mistake to make a radical assault on long-considered issues of corporate law due to a short term populist panic about corporate political spending, which is a miniscule portion of what any for-profit corporation does.

Furthermore, some of those who argue for shareholder restrictions also propose added disclosure on corporate ads. In a post on *SCOTUS Blog*, Laurence Tribe, a Harvard law professor, argues that "the impact of a campaign ad, whether in the form of a thirty-second spot or an extended production, would be cut down to size if it had to be (accurately) presented as a self-interested attempt by big pharma or by a cigarette or oil company or a bank holding company or hedge fund to influence the outcome of a candidate election for the benefit of the sponsoring company's bottom line rather than masquerading behind a veil of public-spiritedness."[22]

But if the concern is really for shareholders, shouldn't we want the corporate spending to be done as effectively as possible, with as much impact as possible? Why would we limit that?

Prof. Tribe says that the idea is not "to suppress political speech," but in fact that is exactly the idea. He makes a series of proposals specifically designed to suppress political speech. For example, he wants all corporate political ads to feature the name of the corporation's CEO and the percentage of its treasury spent on the ad. But of what benefit would any of that be to the public? The apparent goal is simply to discourage speech. Moreover, he proposes making corporate executives personally liable for damages and legal fees as a "deterrence" to spending corporate dollars on political activity. The basis of such claims would be a "federal cause of action for corporate waste." This would either be toothless, simply relying on the manager's claims of good faith, or would result in hindsight second guessing by prosecutors, minority shareholders, and juries as to whether the corporation could show specific quid pro quo benefits from its political involvement—exactly the thing that campaign finance reformers have long argued should be prevented, not required, when corporations engage in politics.

The lack of wisdom in these proposals is illustrated by the fact that there is no evidence that any substantial percentage of decisions on corporate political spending are, in fact, opposed by shareholder majorities. It seems more likely that the opposite is true. These proposals are clearly intended to make it much harder, if not impossible, for the shareholder majority to support its own best interests (which, again, the "reformers" seem to presume is contrary to their policy preferences), in the name of shareholder rights. It is hard to defend any of this as a victory for shareholder rights, rather than an effort to silence voices that the speech regulators seem to assume they will not like.

Should Congress restrict business corporations that contract with the federal government?

Sen. Chuck Schumer (D-N.Y.) is reportedly considering a proposal that would ban political expenditures by companies which "employ Washington lobbyists; or enjoy government contracts; or receive government bailouts or other substantial subsidies."[23] Rep. Grayson introduced a bill restricting companies

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[22] *SCOTUS Blog*, Laurence Tribe, "What Should Congress Do About Citizens United?" Jan. 24, 2010; http://www.scotusblog.com/2010/01/what-should-congress-do-about-citizens-united

[23] *The Washington Post*, David Broder, "Congress prepares for a battle over campaign finance," Jan. 31, 2010; http://www.washingtonpost.com/wp-dyn/content/article/2010/01/29/AR2010012903835_pf.html

who employ or retain registered lobbyists from political spending.[24] Rep. Niki Tsongas proposed legislation "prohibiting entities from using Federal funds to contribute to political campaigns or participate in lobbying activities."[25]

(1) **Each of these targeted bans would post constitutional concerns under the First and Fourteenth Amendments**. Public employee unions (associations of teachers, firefighters, police officers, etc.) depend on government funds for their salaries and pensions. Doctors and other medical professionals depend on government reimbursements for Medicare and Medicaid patients. Millions of businesses and unions benefit from targeted tax breaks passed by Congress. If Congress banned business corporations from political spending because of a voluntary, financial relationship with the government, it must also ban all other organizations with similar financial connections.

(2) **Congress could only impose political expenditure restrictions on corporations that receive no-bid government contracts or whose controlling shareholder is the federal government** (Fannie Mae, Freddie Mac, Sallie Mae, General Motors, Chrysler and AIG).

Restricting companies that employ lobbyists or contract with the federal government would not satisfy the burden the Supreme Court has imposed on government regulations of political speech. Such restrictions require a compelling government interest, and the Court has repeatedly ruled, since *Buckley*, that independent expenditures do not pose a risk of *quid pro quo* corruption or the appearance of corruption.

Banning companies that employ or retain federal lobbyists would violate the First Amendment right to "petition the government for a redress of grievances." Lobbying is clearly protected under the First Amendment. While Congress may require lobbying disclosure, it may not impose punitive speech restrictions on companies simply because they exercise their rights to petition the government on a range of regulatory and policy concerns. The absence of similar restrictions—no matter how misguided—on unions and advocacy corporations that employ lobbyists would also pose clear Equal Protection concerns.

The government cannot condition First Amendment rights on industries and companies that contract with the government under a competitive, merit-based, transparent bidding process. However, companies that receive no-bid government contracts or congressionally-directed spending (earmarks) could conceivably be restricted from political expenditures. The government may restrict contributions under 2 U.S.C. § 441c[26], but regulations on expenditures by government contractors cannot be justified using the same *quid pro quo* rationale that the Supreme Court has consistently rejected for independent expenditures.

Non-competitive contracts pose a different standard under the Court's *quid pro quo* corruption rationale, and it's reasonable to assume that there may be a governmental interest in restricting speech by entities that receive government funding on a non-competitive basis. The government cannot participate in politics under the Hatch Act, and the political speech of employees may be silenced under this statute. Extending this rationale to companies that receive government benefits as a matter of administrative or congressional direction rather than merit or objective qualifications may be appropriate.

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[24] OpenCongress, H.R. 4511, accessed Jan. 31, 2010; http://www.opencongress.org/bill/111-h4511/show
[25] OpenCongress, H.R. 4550, accessed Jan. 31, 2010; http://www.opencongress.org/bill/111-h4550/show
[26] FindLaw.com, accessed Feb. 1, 2010; http://codes.lp.findlaw.com/uscode/2/14/I/441c

SOLUTIONS

Remove limits on coordinated party spending

Under *Buckley v. Valeo*, individuals and organizations have a right to engage in unlimited spending if they do so independent of a candidate's campaign. In *Colorado Republican Federal Campaign Committee v. Federal Election Commission* ("Colorado I"), the Supreme Court clarified that this right extends to political parties. And, of course, in *Citizens United* the Court has now held that incorporated entities including businesses, unions, trade associations and advocacy groups have the right to draw on an unlimited amount of funds for independent expenditures.

At the same time, the law still limits how much political parties can spend in coordination with their candidates, a limitation upheld by the Supreme Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee* ("Colorado II"). The odd consequence of these cases is to drive a wedge between parties and candidates. Parties can spend unlimited sums to help their candidates, but only if they do so independently of the candidates—that is, without sharing information on the candidate's strengths and weaknesses, strategies, plans, polling data, and so forth. Prior to McCain-Feingold, this dichotomy might have made some type of sense, in that parties could accept and spend "soft" money—unregulated funds—to support candidates so long as they avoided "express advocacy" in spending their dollars. Therefore, "soft money" could be spent independently and hard money could be spent in coordination with the candidate.

Since McCain-Feingold, however, national political parties are prohibited from accepting any unregulated contributions. Thus, all party spending is "hard"—regulated and limited—money. There would seem to be no purpose in any longer limiting the ability of political parties to spend unlimited "hard" money in coordination with a campaign. Eliminating this barrier is unlikely to lead to any added spending—it would merely allow parties and candidates to do what parties and candidates ought to do: work together to gain election, and to spend money on the races they deem most important.

Beyond removing a needless barrier that raises the costs of campaigning, allowing parties and candidates to work together may actually increase accountability and confidence in the system. For example, in 2006, when some observers called on Tennessee Republican Senate candidate Bob Corker to denounce certain ads about his opponent being run by the National Republican Senatorial Committee, Corker had to say—truthfully—that he had nothing to do with the ads (nor could he have under the coordination restrictions). Because most citizens simply do not believe that a candidate cannot somehow instruct his party on advertising, cynicism among the voting public increases when they are correctly told candidates cannot legally ask their own party to stop running a specific ad.

Raise contribution limits to account for inflation

The McCain-Feingold bill doubled individual limits on giving to candidates and indexed them for inflation. This increase, however, accounted for barely half of the loss in value of contributions since the limits

were first enacted in 1974. Moreover, other limits were not increased at all. Had all contribution limits been increased with inflation since their enactment in 1974, by the time McCain-Feingold was passed in 2002 the limit for an individual to contribute to a campaign would have been approximately $3,650. The limit for PACs, both what an individual can contribute to a PAC and what the PAC can contribute to a candidate, would have been approximately $18,250.

Similarly, the aggregate limit for an individual in a two year election cycle would have been in excess of $180,000, up from the $50,000 allowed at that time by the law. McCain-Feingold partially redressed the problem, raising the aggregate limit over a two year election cycle to $95,000 and adjusting it for inflation, but this constituted a less than half of the deficit that had been created by the simple lapse of time. Individual contribution limits to political parties pose a similar issue. Originally set at $20,000 per year, the limits were modestly raised and indexed for inflation in 2002. The annual limit on contributions to political parties is currently only $30,400, while it would be closer to $87,760 had it been indexed to inflation in 1974.

Much of the "soft money" problem that served as the justification for McCain-Feingold was, in reality, a hard money problem, created by contribution limits that were unadjusted for inflation, let alone population growth. By adjusting the contribution limits for inflation to match the original amounts set in 1974, much of the political funding that was first called "soft money" and that has since flowed to 527 and 501(c)4 groups to escape the low limits would instead flow back into candidates and political parties.

Restoring the original buying power of the 1974 contribution limits would also have the effect of reducing the demands on candidate time for fundraising while also providing a boost to lesser-known candidates who would be helped by higher limits. It is worth noting that in 2004, a previously little-known state senator from Illinois was able to build an effective campaign organization in his race for U.S. Senate in part because of the higher contribution limits he operated under thanks to the so-called "Millionaires' Amendment" (since struck down by the U.S. Supreme Court in *Davis v. Federal Election Commission*). Four years later, of course, that relatively unknown state senator was elected President of the United States.

Higher contribution limits also address what many regard as the problem of self-funding candidates. While a candidate's wealth does not increase relative to contribution limits, the ability of non-wealthy opponents to raise funds to remain competitive would significantly increase.

Restore tax credits for small contributions to candidates

Prior to the federal tax reform of 1986, taxpayers received a tax credit for political contributions up to $50, or $100 on a joint return. Adjusted for 1978 dollars (the last time Congress adjusted the amounts) it would today be approximately $165, or $330 on a joint return.

Restoring the tax credit at these levels would increase the pool of small donations available to candidates, which would make it easier to raise funds and reduce time spent fundraising. In addition, a tax credit might encourage more citizens to become involved in politics and could do far more than contribution limits to restore faith in our political process.

Center for Competitive Politics
124 S. West Street, Suite 201
Alexandria, VA 22314
(703) 894-6800
www.campaignfreedom.org

The Center for Competitive Politics (CCP) is a 501(c)3 nonprofit organization based in Alexandria, Va. CCP's mission, through legal briefs, studies, historical and constitutional analyses, and media communication is to promote and defend citizens' First Amendment political rights of speech, assembly, and petition, and to educate the public on the actual effects of money in politics and the benefits of a more free and competitive election and political process. Contributions to CCP are tax deductible to the extent allowed by law.