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BACKGROUNDER

August 24, 2009

U.S. Supreme Court May Unleash Flood of Corporate Money Into Elections

On Sept. 9, Court to Revisit Landmark Rulings Restricting Corporate Money in Politics

The U.S. Supreme Court may soon unleash a flood of corporate money into our political system by announcing, contrary to long-standing precedents, that corporations have a constitutional right to spend unlimited amounts of money to promote or defeat candidates.

Already, corporations have ample means to influence our politics through campaign contributions by wealthy corporate executives and lobbyists, as well as through corporate political action committees (PACs), which are funded by contributions from corporate officers, shareholders and employees.

If they had a green light to spend unlimited amounts on races, not only would the nature of elections change fundamentally—the threat of fighting a deep-pocketed industry candidate could push lesser-funded candidates out of races altogether, for instance—but corporations would further crowd out the public in policymaking on health care, climate change and other critical issues.

How did we arrive at this point?

The Supreme Court sought it. In a stunning move, the Supreme Court has transformed a case that posed a limited challenge to the McCain-Feingold law (*Citizens United v. Federal Election Commission*) into a sweeping challenge to a century-old pillar of campaign finance doctrine: restrictions on direct corporate and union financing of candidate campaigns.

The court originally heard the case in March. But on June 29, it called for a second hearing and ordered the parties to argue additional questions posed by the court itself: whether the court should overturn well-established judicial precedents upholding restrictions on unlimited corporate and union spending expressly advocating the election or defeat of candidates. Oral arguments will be heard before a packed courtroom at 10 a.m. Sept. 9 with a decision likely to be issued by year's end. Public Citizen's Scott Nelson is one of the attorneys representing the key congressional sponsors of the McCain-Feingold law and co-authored their amicus brief.

The decision will be nothing less than a historic moment in campaign finance law.

At stake in the case is whether the court should overrule two existing Supreme Court decisions: *Austin v. Michigan Chamber of Commerce*—which held that the government can limit for-profit corporations to the use of PACs to fund express electoral advocacy—and *McConnell v. FEC*, which applied that principle to uphold the constitutionality of the McCain-Feingold law's restrictions on "electioneering communications," that is, corporate funding of election-eve broadcasts that mention candidates and convey unmistakable electoral messages. Striking down these decisions would unleash unlimited corporate and union spending in candidate campaigns, and possibly doom the 1907 Tillman Act, which also prohibits corporate contributions to candidates.

It is impossible to predict how much corporate and union money would flood into elections in an unregulated system, but it is reasonable to assume it would be very substantial indeed—and possibly overwhelming in selected races of particular interest to the business or labor communities.

Even before a single dollar was spent, the threat of corporate spending in elections could wield significant influence over policymakers. Imagine the enormous political pressures these entities could place on Congress as it attempts to grapple with the major economic issues of the day with the looming prospect of being punished or rewarded through direct campaign spending.

Already, corporate interests have clout. Consider that the insurance and drug industries have been at the table since the beginning of the health care reform debate, successfully whittling away at congressional proposals and ensuring that reforms do not eat into their profits. Witness, too, the strength of the fossil fuel industry in climate change legislation; the current legislation is now a shell of President Obama's original proposal, giving polluters emissions credits for free and shrinking the percentage of power that utilities must obtain from renewable energy.

Now imagine if corporations had even more sway. The public would be further shut out of its own government.

Conversely, an unregulated campaign finance environment would expose corporations to corrupt shakedowns for political money. Corporations would face intense pressure to provide direct and indirect financial support for candidates to attract the attention of, and avoid retribution from, elected officials and their parties.

Other probable ramifications of striking down the long-standing laws against direct corporate and union financing of elections include:

- Invalidating the laws of 24 states that currently prohibit or limit corporate spending in state and local elections. [For a listing of states that restrict corporate spending, go to: http://www.citizen.org/documents/Corporate_spending_on_state_candidates.pdf]
- Unleashing direct corporate financing of judicial campaigns in the 39 states that allow for election of judges. [For a listing of state judicial selection processes, go to: http://www.citizen.org/documents/Judicial_selection_chart.pdf]

Any action by the Supreme Court in reversing well-established laws and judicial precedents barring direct corporate and union financing of campaigns would be a radical affront to the American political culture that recognizes the need to rein in corporate money in politics, and would pose grave dangers to the integrity of elections and government itself, and represent judicial activism at its worst.

Citizens United v. Federal Election Commission—the Case That Sparked This Threat

At the center of the legal battle is a Citizens United film about 2008 Democratic presidential candidate Hillary Clinton, titled "Hillary: The Movie." The film has been shown in theaters and circulated as a DVD. Those showings were *not* subject to the Bipartisan Campaign Reform Act of 2002 (BCRA, also known as the McCain-Feingold law) because they were not broadcast. However, Citizens United also planned to show the movie through on-demand satellite transmissions, which fell under BCRA's definition of "electioneering communications" and would be subject to restrictions on who may pay for them as well as to disclosure requirements. Citizens United also prepared three TV ads to promote the movie. The ads fell under the campaign finance law's definition of "electioneering communications" and were therefore subject to disclosure requirements under BCRA.

Electioneering communications are a relatively new class of campaign advertisements regulated under BCRA. They include broadcast ads that depict a federal candidate within 60 days of a general election or 30 days of a primary election. Such ads are subject to disclosure of their funding, regardless of whether they are deemed "issue ads" or campaign ads, and subject to the ban on corporate and union funding if they are the latter.

On Dec. 13, 2007, Citizens United, a nonprofit membership corporation that accepts money from business corporations, filed a complaint in the U.S. District Court for the District of Columbia challenging the constitutionality of the statutory provisions governing disclosure and funding of "electioneering communications." On Jan. 15, 2008, the District Court denied Citizens United's motion for a preliminary injunction, in which Citizens United requested that the court prevent the Federal Election Commission (FEC) from enforcing the law. The court later dismissed Citizens United's lawsuit, and Citizens United petitioned the Supreme Court to hear the case.

Though BCRA was held constitutional in nearly all respects by the Supreme Court in its 2003 decision, *McConnell v. FEC*, a reconstituted court in 2007 limited the scope of that decision. In *FEC v. Wisconsin Right to Life*, the court ruled that the funding source limitations in the law apply only to communications that either directly urge a vote for or against an identified candidate, or are the "functional equivalent" of such express advocacy. Nevertheless, the disclosure requirement for all electioneering communications remains intact.

Three members of the Supreme Court in the majority of the 5-4 ruling in *Wisconsin Right to Life*—Justices Antonin Scalia, joined by Justices Anthony M. Kennedy and Clarence Thomas—suggested that they might be willing to cast aside the *McConnell* decision, as well as the 1990 decision in *Austin v. Michigan State Chamber of Commerce* that allowed government regulation of corporate campaign spending.

The Supreme Court heard arguments in the *Citizens United* case this spring and, on the last day of its term, decided that it would require additional briefs in the case and hear additional arguments on Sept. 9. According to the court order, the rehearing will go far beyond the original challenge posed by Citizens United and reconsider instead whether the entire framework restricting corporate and union spending on explicit campaign advertising is constitutional.

The very brief order reads as follows:

"This case is restored to the calendar for reargument. The parties are directed to file supplemental briefs addressing the following question: For the proper disposition of this case, should the Court overrule either or both Austin v. Michigan Chamber of Commerce, 494.U.S. 652 (1990), and the part of McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003), which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of 2002. 2 U.S.C. §441b."

How Restrictions on Corporate and Union Money in Politics Evolved

At the turn of the last century, the patronage system for financing campaigns through assessments on government salaries was quickly being displaced by corporate contributions, as more and more business interests began aggregating large sums of wealth. Substantial corporate financing of elections first became readily apparent in the 1896 presidential election.[1] Corporate funding of campaigns became an all-out scandal in the 1904 presidential election, when the losing candidate, Alton Parker, publicly accused Theodore Roosevelt of secretly financing his campaign with contributions from life insurance companies, a charge that was later supported in an investigation by the state of New York.[2] Public outrage ensued as it became evident that the insurance companies were simultaneously seeking legislation from the federal government that would limit the ability of policyholders to sue the companies.

President Roosevelt sought to assuage the furor in his 1905 State of the Union address when he urged Congress to prohibit all corporate contributions to campaigns. Roosevelt proclaimed:

> *"The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign – that is, to the Government, which represents the people as a whole – some effective power of supervision over their corporate use."*[3]

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1 Matthew Josephson, THE POLITICOS, 1865-1896 (1938) at 699.

2 Adam Winkler, "Other People's Money: Corporations, Agency Costs and Campaign Finance Law," *Georgetown University Law Journal*, 92:871 (2004) at 886.

3 Theodore Roosevelt, State of the Union Address (Dec. 5, 1905), available at: www.theodore-roosevelt.com/sotu5.html.

Congress responded in 1907 by passing the Tillman Act. Introduced by Sen. Ben "Pitchfork" Tillman (D-S.C.),[4] the act banned corporations from "mak[ing] a money contribution in connection with any election to any political office"—specifically, "any election at which Presidential and Vice Presidential electors or a Representative in Congress is to be voted for or any election by any State legislature of a United States Senator."[5] The legislation specified that any corporation breaking these laws could be subject to a fine of up to $5,000 (more than $114,000 in 2008 dollars), in addition to penalties of up to $1,000 and jail time for individuals in a corporation responsible for violating the law. The Tillman Act was eventually subsumed under the Federal Corrupt Practices Act of 1925.

In 1943, in the War Labor Disputes Act, Congress temporarily extended the ban on corporate contributions to labor unions. Large labor unions had evolved through the New Deal as another vehicle capable of amassing large sums of money that could be used for political purposes. In the 1944 elections, labor unions responded to the War Labor Disputes Act by diverting that money to independent expenditures (rather than contributions) on behalf of their favored candidates. To close this loophole, Congress enacted the Taft-Hartley Act of 1947 to clarify that both campaign contributions and expenditures by corporations and unions were prohibited by law. The legislative history indicates that Congress believed both contributions and expenditures were already prohibited by the Federal Corrupt Practices Act. As Sen. Robert Taft (R-Ohio) explained:

> "[T]he previous law prohibited any contribution, direct or indirect, in connection with any election," and the new legislation "only makes it clear that an expenditure … is the same as an indirect contribution, which, in my opinion, has always been unlawful."[6]

The Federal Election Campaign Act of 1971 (FECA), as subsequently amended, incorporated the Taft-Hartley Act's long-standing provision against corporate and union campaign contributions and expenditures.

Soft Money, Electioneering Communications and BCRA

Due to an exemption in the 1979 Amendments to the Federal Election Campaign Act, state and local parties were allowed to spend money otherwise prohibited in campaigns, such as corporate and union treasury funds and contributions in excess of the limits, on grassroots organizing and voter mobilization activities that affected state or federal elections. These additional party-building funds came to be known as "soft money." Subsequent regulations by the FEC expanded the soft money exemption, allowing the national parties also to raise and spend soft money for party-building and voter-mobilization activities. In 1988, the FEC even permitted the national parties to use soft money to pay for partisan television advertisements that benefited both state and federal candidates, as long as the soft money was used to pay for the non-federal share of the costs.

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4 Sen. Tillman kicked off the 1896 presidential campaign with a rousing speech on the Senate floor in which he challenged President Grover Cleveland for doing very little to address the economic depression. Tillman made several references to pitchforks and threatened to go to the White House and "poke old Grover with a pitchfork" to prod him into action. Afterward, the senator was known as "Pitchfork" Ben.

5 Tillman Act, 1907.

6 Sen. Taft, Congressional statement, 93 CONGRESSIONAL RECORD 6594 (1947).

The parties initially had been slow to take advantage of this new source of revenue—until the 1996 reelection campaign of President Bill Clinton. In that election, the Democratic Party realized the soft money exemption allowed the national party to raise unlimited amounts of soft money and then transfer the funds to state parties. State Democratic parties, in turn, could spend soft money on non-federal election activity, including television and radio advertisements, directly benefiting the Clinton campaign.

Both parties promptly turned their attention to soft money. In the 2000 election cycle, national and congressional party committees broke all previous records in soft money fundraising. National Republican Party committees raised $249.9 million and spent $252.8 million in soft money, while national Democratic Party committees raised $245.2 million in soft money and spent $244.8 million. More than half of this soft money was transferred to state parties and used to pay for television advertisements. Overall, 77 percent of party-sponsored television commercials relating to federal elections in the 2000 election were paid for by state parties. The national party committees and federal congressional committees combined purchased about 23 percent of the party ads that addressed federal elections. Not surprisingly, most of this state party spending activity took place in the most competitive states in the presidential election: Florida, Pennsylvania, California, Michigan, Washington and Ohio. In other words, the national parties found a way to tap into corporate and union money and use that money for television advertising on behalf of federal candidates, particularly for the presidential candidates.[7]

Meanwhile, corporations and unions also found independent ways to spend their money directly in elections, pouring millions of dollars into sham "issue ads" that evaded existing restrictions by avoiding express statements advocating votes for or against candidates, but were unmistakably aimed at particular candidates.

Congress responded in 2002 by passing the Bipartisan Campaign Reform Act (BCRA). Two key pillars of the act dramatically curbed the use of soft money. First, the act prohibits raising and spending soft money by federal officeholders and candidates and by the national parties, and restricts the use of soft money by state and local parties in relation to federal election activities. Second, BCRA redefines what constitutes a campaign advertisement that is subject to the disclosure requirements, contribution limits and prohibitions on the use of corporate and union money. Broadcast advertisements that depict a candidate, target that candidate's election district, and air within 30 days of the candidate's primary election or 60 days of the general election are defined as "electioneering communications" subject to regulation under federal campaign finance laws. The electioneering communications provision was the focus of the Citizens United challenge.

Supreme Court Historically Has Backed Restrictions on Corporate Funding of Elections

Throughout a century of restrictions on corporate and union campaign contributions and expenditures, the Supreme Court has recognized that the large sums of money corporations and unions can tap into to influence elections is problematic. For that reason, the court has generally granted

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[7] Craig Holman, The End of Limits on Money in Politics: Soft Money Now Comprises the Largest Share of Party Spending on Television Ads in Federal Elections, NYU's Brennan Center for Justice (2001), available at: http://brennan.3cdn.net/f1b070cbd490336610_08m6bpvsf.pdf.

deference to Congress to restrict campaign contributions and expenditures. In reviewing the Taft-Hartley Act a half century after the Tillman Act, the court in *U.S. v. United Automobile Workers* recognized that the aggregated wealth of corporations and unions, when used to affect candidate elections, could have "untoward consequences for the democratic process"[8] and defended Congress' efforts to protect the electoral process "from what it deemed to be the corroding effect of money employed in elections by aggregated power."[9]

The court first squarely addressed the restrictions on corporate financing of candidate elections in *FEC v. National Right to Work Committee* following enactment of FECA. This case challenged the law's requirement that corporations may finance candidate campaigns only through PACs that solicit contributions from individuals within the company, subject to contribution limits and disclosure. The court described the careful "step by step" evolution of federal law regulating corporate and union campaign spending and affirmed the PAC requirement. Congress, the court said, has a compelling interest to "ensure that substantial aggregations of wealth" amassed by corporations are not "converted to 'political war chests' which could be used to incur political debts from legislators."[10]

In *FEC v. Massachusetts Citizens for Life,* the court carved out an exception to the ban on corporate political spending for ideological nonprofit corporations that were not established by a for-profit corporation, have no shareholders and do not accept contributions from business corporations. At the same time, it reaffirmed "the legitimacy of Congress' concern" about the financing of campaigns by "organizations that amass great wealth in the economic marketplace."[11]

The court again affirmed restrictions on corporate spending in candidate elections in *Austin v. Michigan State Chamber of Commerce*. Citing its earlier decisions, the court found that the government has a valid interest in ensuring that corporations do not spend their "resources amassed in the economic marketplace to obtain an unfair advantage in the political marketplace."[12] In *FEC v. Beaumont*, the court relied on *Austin* once again to uphold the ban on corporate campaign contributions, even as applied to nonprofit corporations. The court recounted a "century of congressional efforts to curb corporations' potentially deleterious influences on federal elections."[13]

When the court reviewed BCRA for the first time in *McConnell v. FEC*, it acknowledged 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."[14] Just a few years later, a reconstituted court in *FEC v. Wisconsin Right to Life* partly cut back on the *McConnell* decision by narrowing the scope of the "electioneering communications" provision of BCRA to allow corporate or union funding of such broadcast ads if they

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8 *U.S. v. United Automobile Workers*, 352 U.S. 567 (1957) at 578.

9 *U.S. v. United Automobile Workers*, 352 U.S. 567 (1957) at 582.

10 *FEC v. National Right to Work Committee*, 459 U.S. 197 (1982) at 207-209.

11 *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) at 257.

12 *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) at 659.

13 *FEC v. Beaumont*, 539 U.S. 146 (2003) at 152.

14 *McConnell v. FEC*, 540 U.S. 93 (2003) at 203.

are deemed "issue ads," but continued to uphold the restriction for ads that are the functional equivalent of express advocacy, such as by denigrating a candidate's character.[15]

Corporations Have Found Ways to Remain Involved in Elections

BCRA was quite effective at closing the soft money loophole. The $500 million in soft money given by corporations and unions to federal and state parties each election cycle vanished. But the parties adapted well to the new campaign finance system. Both the Democratic and Republican national parties directed their fundraising efforts away from the large donations from corporations and unions and toward small donations from individuals.

Republican national, state, and local party committees that report to the FEC raised $602.3 million during 2005-2006 in federally permissible "hard money." Democratic Party committees raised $483.1 million during the same period. Democratic Party receipts more than doubled compared with 2002, the most recent cycle in which there was no presidential campaign, while Republican Party fundraising grew by 42 percent. Overall, the parties' national committee fundraising totals nearly equaled their 2002 campaign cycle totals, the last year that the national party committees could raise soft money.[16] Both national parties also vastly increased the numbers of donors, building their memberships by millions of individuals.

Though independent spending by outside groups increased, spending by outside groups in the 2006 and 2008 elections was less than half the $500 million previously raised by the parties in soft money. More important, corporate donations to these outside groups totaled less than 13 percent the amount corporations had donated in party soft money.[17]

The electioneering communications section of the law was limited to candidate-specific broadcast, cable and satellite communications to targeted audiences in close proximity to primary and general elections. Its purpose was to extend the existing prohibition on corporate and union expenditures on express advocacy to what had become its functional equivalent. McCain-Feingold left untouched the many avenues for campaigning available to corporations and unions not covered by the bright-line test for electioneering (or by the ban on party soft money).

Avenues for corporate and union involvement in campaigns that remain open include, for example, issue advocacy, lobbying activity, partisan political communications among shareholders and members, contributions and independent expenditures through political action committees, sponsorship of candidate and party appearances at forums and conventions, and the provision of nonpartisan registration and mobilization of voters among the general public. PAC activity is particularly

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15 *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652 (2007).

16 Federal Election Commission, "Party Financial Activity Summarized for the 2006 Election Cycle," press release (March 7, 2007), available at: http://www.fec.gov/press/press2007/partyfinal2006/20070307party.shtml.

17 Stephen Weissman and Ruth Hassan, "BCRA and the 527 Groups," in Michael Malbin, ed. THE ELECTION AFTER REFORM (2006) at 90.

prevalent, with 1,598 corporate PACs, 272 labor PACs and 995 trade association PACs registered in 2009.[18]

Conclusion: The Potential Damage of Unrestricted Corporate Financing of Candidate Campaigns Is Enormous

If the Supreme Court rules that the restriction on corporate and union financing of elections, and perhaps even the disclosure of funding sources behind certain types of campaign advertising, are unconstitutional, the decision would radically alter the way elections are financed. The FEC's July 24 brief defending the laws argued that the Supreme Court's contemplated repudiation of long-standing campaign finance precedents "would fundamentally alter the legal rules governing participation of corporations—including the nation's largest for-profit corporations—in electoral campaigns and would make vast sums of corporate money available for overt electioneering."

Moreover, the FEC noted that the corporations are "artificial persons" with great money-making advantages over natural persons, with whom they might compete for influence over the electoral process. Corporations accumulate other people's money, and because they "do not age, retire, or die, they can amass great wealth from their business activities even while changing owners, directors and officers as needed."

Since this nation has not seen a political landscape with unlimited corporate spending in recent memory, it is difficult to know for sure how much more money will pour into elections. But recent patterns of corporate spending on "sham issue ads" that are designed to affect candidate elections strongly suggest that new direct corporate spending could flow in staggering amounts. Immediately prior to passage of BCRA, the national parties coordinated some $500 million in soft money in each of the 2000 and 2002 election cycles, primarily from corporate and union sources, and spent the bulk of this money on television advertising. Non-party outside groups, which also tapped corporate and union money, spent another conservatively estimated $100 million in the 2000 election cycle alone on electioneering TV ads, up from $11 million spent by outside groups on electioneering ads just two years earlier.[19]

In state judicial elections, which largely fall outside the constraints of BCRA, corporate spending for and against judicial candidates is already growing. In 2006, outside groups spent more than $5 million on television ads promoting or attacking state supreme court candidates immediately before their elections, up from $2.8 million in 2000.[20] This corporate spending is usually indirect—organized and funneled through the Chamber of Commerce or other business associations. One can only speculate as to the likely spike in corporate campaign spending if the Supreme Court lifts all state constraints on corporate political activity.

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18 Federal Election Commission, Number of Federal PACs Increases (March 9, 2009) available at: www.fec.gov/press/press2009/20090309PACcount.shtml.

19 See, for example, Craig Holman and Luke McLoughlin, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS (2001) at 29.

20 James Sample, Lauren Jones and Rachel Weiss, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 (May 2007).

Unlimited corporate and union spending in elections would likely arrest the current popular trend toward small donor involvement in campaigns. With the aid of new technologies and the soft money ban, candidates and the national parties have mobilized small individual donors in unprecedented numbers. Overall, the total number of small donors in federal elections has nearly quadrupled, from 625,000 in 2000 to about 2.8 million in 2004.[21]

The 2008 presidential election proved that the small donor phenomenon continues to grow. Republican candidate John McCain raised $35 million from 827,000 small donors, while Democratic candidate Barack Obama raised $178 million from 3.7 million small donors.[22]

A radical change in the campaign finance system would bring this democratizing trend to an abrupt halt.

Citizens United v. FEC represents nothing less than the possibility of a radical departure from the political culture of this nation. The court is considering reversing long-established law restricting corporate and union financing of elections, deliberated and affirmed repeatedly by Congress, and fundamentally undermining a healthy trend toward small donors in campaigns. If that were to happen, it would be a serious blow to the principles of political equality and popular participation so essential to preserving our democracy.

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Public Citizen is a national, nonprofit public interest advocacy organization based in Washington, D.C. For more information, visit www.citizen.org.

[21] Institute for Politics and Democracy and the Campaign Finance Institute, "Small Donors and Online Giving: A Study of Donors to the 2004 Campaigns" (March 2006) at 5.

[22] David Magleby, ed. THE CHANGE ELECTION: MONEY, MOBILIZATION, AND PERSUASION IN THE 2008 FEDERAL ELECTIONS (2009) at 1-56.