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Foundation Watch

The War on Corporate Campaign Spending

By Michael Marinaccio

Summary*: Last year's Supreme Court decision in* Citizens United v. FEC *drove the activist Left to madness. The decision affirmed a principle that corporations, like individuals, have free speech rights, which liberal doomsayers predict will lead to nothing less than the downfall of American democracy. To combat the ruling, the Obama White House has drafted an executive order that, if issued, will compel both for-profit and non-profit corporations (including labor unions) to disclose their political contributions whenever they apply for federal grants and contracts.*

The 2010 State of the Union address was one for the history books. President Barack Obama took the highly unusual step of scolding the assembled members of the Supreme Court for daring to uphold the First Amendment rights of American businesses. Obama claimed that the high court's recent ruling in *Citizens United v. FEC* has "reversed a century of law to open the floodgates – including foreign corporations – to spend without limit in our elections."

Obama's rhetoric was at odds with the facts. Justice Samuel Alito quietly shook his head as TV cameras captured him mouthing the words "not true." Liberals across America feared the court's ruling would flood federal elections with corporate money. They cared little that the president seemed to be bullying the Supreme Court and that Alito was only defending the court's dignity.

President Obama has been using his bully pulpit to aggressively roll back First Amendment protections.

Months after the ruling the left-wing groups MoveOn.org, People for the American Way, and Alliance for Justice Action Campaign ran newspaper attack ads accusing the high court of becoming "corporate America's newest subsidiary." And now the Obama White House is further responding to the decision by circulating a draft executive order. If it is issued it will force both for-profit and non-profit corporations (including labor unions) that seek government grants and contracts to disclose their political contributions.

The proposal, which supporters say is intended to promote transparency in government, promises to politicize the federal procurement process like never before.

Citizens United v. FEC

Let's be clear on what the Supreme Court actually decided.

Citizens United, a 501c4 advocacy organization headed by conservative activist David Bossie, filed suit seeking to block the FEC from regulating "Hillary: The Movie," a 90-minute film documentary critical of then-

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Sen. Hillary Clinton (D-N.Y.), who at the time was the frontrunner in the race for the Democratic presidential nomination.

In early 2008 a U.S. district court ruled against Citizens United and upheld the provisions of the Bipartisan Campaign Reform Act (known as McCain-Feingold) that prohibited the broadcast of any "electioneering communications" (including the movie and ads for the movie) on television within 30 days of the Democratic primary elections that year.

In addition the district court ruled that ads promoting the film crossed the line and were unacceptably political, and therefore violated McCain-Feingold. The law, the court found, prohibited Bossie's group from advertising its own movie because it was financed by donations from unnamed third parties**.**

Lawyer Floyd Abrams, who represented Sen. Mitch McConnell (R-Ky.), a longtime foe of campaign finance regulation, denounced the lower court ruling: "Criminalizing a movie about Hillary Clinton is a constitutional desecration," Abrams said.

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Liberals who supported McCain-Feingold warned that allowing more corporate money into the political process would harm political discourse. "This is rough business," said Fred Wertheimer, a veteran advocate for tighter campaign regulations. "We're not dealing with campaign finance laws. We're dealing with the essence of power in America." (*New York Times*, Aug. 30, 2009)

Citizens United appealed the lower court decision as advocacy groups of all political stripes took sides on the case. On January 21, 2010 the U.S. Supreme Court announced its decision. In an opinion authored by Justice Anthony Kennedy, the Court ruled 5 to 4 that McCain-Feingold's ban on corporate and union expenditures independent of a political candidate or campaign violated the Constitution. "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech," Kennedy wrote.

Writing in the June 2010 issue of *Organization Trends* attorney Karl Crow explained:

> It is important to note that expenditures are different from contributions under the law; contributions are political donations made to a candidate or campaign, while expenditures are simply what a candidate or campaign spends. The U.S. Constitution permitted governments to place legal restrictions on campaign contributors and their contributions, but said individuals and groups could spend freely on political issues they cared about—until McCain-Feingold.

What President Obama Says He Wants

President Obama has argued that special interest money endangers political discourse. In an August 2009 town hall meeting, Obama said "every time we're in sight of reform, the special interests start fighting back with everything they've got. They use their influence. They run their ads. And let's face it, they get people scared."

White House press secretary Jay Carney says the Obama administration "believes very strongly that taxpayers deserve to know" how special interests spend money in politics. Carney said taxpayers want to know "how they're spending their money, and how … they're spending in terms of political campaigns. And [Obama's] goal is transparency and accountability." (WashingtonPost.com, April 20, 2011)

Liberals like to decry the influence of big money in politics. In fact, political spending from all sources is very small in comparison to the federal government's $3.729 trillion budget in fiscal 2012. As George Will pointed out after the Supreme Court ruling, "In the 2007-08 election cycle, spending in all campaigns, for city council members up to the presidency, was $8.6 billion, about what Americans spend *annually* on potato chips." [italics in original]

In recent presidential election cycles—2000, 2004, 2008—political spending has grown by about $1 billion over the previous cycle, while mid-term election cycles—2002, 2006, 2010—show an increase of around $500-$800 million, according to OpenSecrets.org. In the 2008 presidential election cycle, Democrats spent $3 billion (57% of total spending), while Republicans spent $2.2 billion (42% of total spending). Of the Democrats' $3 billion, $750 million went directly to the Obama presidential campaign.

One wonders why President Obama and Democrats are so concerned about excessive campaign expenditures if they're the ones spending the most? And why are liberals so agitated about corporate spending in particular? Is it possible that Obama and the Democrats want to restrict corporate spending because they fear Republicans will benefit in 2012?

The Proposed Executive Order

President Obama is being egged on by the Left to do something, anything, about the corporate freedom that the Supreme Court's *Citizens United* decision makes possible. On August 5 the *New York Times* editorialized that the president should bypass Congress and take matters into his own hands.

> The Supreme Court did democracy no favor at all when it opened the floodgates to unlimited campaign spending by corporations and unions. It at least recommended a healthy dose of disclosure as the antidote, allowing tracking of who is "in the pocket" of any and all moneyed interests. Congress has resisted mandating such disclosure. Mr. Obama has said he is appalled. He can prove that — and make an important start — by requiring disclosure for government contractors.

Last April President Obama proposed a partial solution to what is a non-existent problem. The administration began to leak a draft executive order that the president could sign forcing all corporations that receive federal contracts or grants to disclose their political contributions. Obama and his staff contend the order would protect the public from influence-peddling and bring transparency and accountability to the contracting system.

The draft executive order lays out its rationale.

> The Federal Government must ensure that its contracting decisions are merit-based in order to deliver the best value to the taxpayer. It is incumbent that every stage of the contracting process – from appropriation to contract award to performance to post-performance review – be free from undue influence of factors extraneous to the underlying merits of contracting decision making, such as political activity or political favoritism.

The order's language is succinct. "Every contracting department and agency shall require all entities submitting offers for federal contracts (in excess of $5,000) to disclose certain political contributions and expenditures that they have made within the two years prior to submission of their offer."

The order applies to non-profits, for-profits, and unions that make "contributions…to or on behalf of federal candidates, parties or party committees made by the bidding entity, its directors or officers, or any affiliates or subsidiaries within its control." This suggests that for the sake of transparency a corporation may be required to disclose the personal political contributions of its executives and board members.

Additionally, the draft says "any contributions made to third party entities with the intention or reasonable expectation that parties would use those contributions to make independent expenditures or electioneering communications" would also be subject to regulation, inquiry or investigation. This suggests that if a contract-seeking corporation makes a grant to a 501c4 advocacy group whose activities may be deemed political it must disclose the amount to the government.

Further, the Obama draft order delegates to a government body the power to decide what types of contribution should be considered "political" and hence must be disclosed. According the draft, the Federal Acquisition Regulatory (FAR) Council, which is an existing committee of Executive Branch contracting officials, will need to establish a regulatory process to carry out the order. By not specifying precise guidelines to identify political corporate contributions, the president avoids an immediate legal challenge and invites the observer to assume that impartial administrative action guarantees accountability and transparency.

Not mentioned is the enormous amount of red tape the order's reporting requirements and timetables will create. The language of the proposed executive order states that "all disclosed data shall be made publicly available in a centralized, searchable, sortable, downloadable and machine readable format on data.gov as soon as practicable upon submission." This requirement to have the federal government centralize reports on corporate and perhaps individual political spending data is certain to chill if not freeze political free speech.

"Who Sent You?"

Last April when the order was first disclosed, 27 Republican senators wrote the president that instead of achieving "the goal of keeping politics out of the contacting process, the draft EO would make political considerations a part of every federal contract offer." ("Obama's Enemies List of Contractors' Donations," by Hans von Spakovsky, HumanEvents.com, June 30, 2011)

In other words, "Who sent you?"—as the suspicious Chicago ward-heeler said to the volunteer. Critics note that the draft executive order actually does very little to address the issue of special interest power. Instead, the order creates a dangerous new power by authorizing a heretofore obscure government agency, the FAR Council, to make inquiries in deciding who is subject to the order and what spending is to be considered "political."

An American Enterprise Institute policy analysis suggests that administration aims to overturn the Supreme Court's decision with "Chicago-style politics." Former Justice Department official John Yoo and attorney David Marston write that the Obama order is an "unprecedented assault on the First Amendment political speech rights of Amer-

icans—thinly masked as 'accountability,' 'disclosure,' or 'transparency.'" (See http://www.aei.org/outlook/101066) They observe that in 2010 the high court made it clear that the First Amendment protects the right of corporations to make independent political expenditures. Legislation like McCain-Feingold that bars spending on "electioneering communications" is unconstitutional. The court concluded:

> Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials, does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.

How Special Interests Exploit the "Transparency" Argument

Last year 304,041 federal contractors received $537.8 billion in contracts, and the federal government made 371,263 grants totaling $573 billion, according to USAspending.gov. Under the proposed executive order, the FAR Council would exercise at its discretion, the power to require each of these contractors and grant recipients to disclose those contributions that it considers "political" according to standards that are as yet unannounced. The proposed executive order refers only to "certain" contributions, a vague indicator of its true intent.

Democratic lawmakers who support the draft order have called it "both justifiable and beneficial." Anna Eshoo (D-Calif.), Michael Capuano (D-Mass.), and 22 others cosigned a letter to Obama asserting that the order would allow the "public to have access to information regarding the political involvement of federal contractors." Disparaging the Supreme Court's *Citizens United* decision in the same terms that Obama used, they blame the Court for allowing companies "to spend unlimited sums on independent expenditures regarding election campaigns." (The letter is available at http://www.citizen.org/documents/Letter-EO-Contractor-Contributions-20110602.pdf.)

The Democrats' claim contains a contradiction. On the one hand, they say disclosing corporate contributions "will help to prevent the temptation to engage in inappropriate and illegal behavior." But they also say they don't want "the disclosure information as part of the procurement process." What makes Democratic politicians think agency officials involved in negotiating contracts and distributing grants will be unaffected by the legally mandated disclosure of the applicants' political contributions—especially when special interest groups are eager to identify and publicize corporations (and their officers and directors) that have contributed to particular issue campaigns and advocacy organizations?

Notes Marion C. Blakey, president and chief executive of the Aerospace Industries Association:

> As written, the draft EO would for the first time introduce political contributions into the government contracting process. It is unclear how the information would be used by a contracting officer in the source selection process. This creates the possibility that donations to a particular party or candidate would be a consideration when evaluation contract proposals, whether specifically intended or not. This might also have the unfortunate consequence of contributing to the belief among some that particular political contributions are a requirement for winning contracts. Political contributions should never be considered by any procurement officer when making a decision to either award or deny a contract to any entity.

Liberal campaign finance groups like Citizens for Responsibility and Ethics in Washington (CREW), Public Citizen, the Brennan Center, and Campaign Legal Center have endorsed the draft order. A CREW letter co-signed with 33 other groups encouraged the president to "move ahead promptly." It applauded Obama for attacking "the perception and the reality of…"pay-to-play" arrangements" that make the bidding system corrupt. "Pay-to-play" refers to corrupt agreements requiring payoffs in return for government access.

But former Federal Elections Commission (FEC) chairman Brad Smith, founder of the Center for Competitive Politics, suggests that public disclosure of contributions may accomplish just the opposite. Disclosure will enable politicians to reward their corporate supporters and punish their enemies.

> This information, most of it, is already out there in one way or another, but it's not put in one place like that and it's not part of the contracting process. Why would you want to have that in the process if not to use it? And that's only going to make people think the process is more politicized. It's going to make them more cynical about government and it's going to open up new opportunities for political abuse of the contracting process.

The Next Battles: The Shareholder Protection Act

Impatient Democrats aren't waiting for President Obama to issue his executive order mandating disclosure of political contributions. However, the Senate failed by one vote (59-39) to pass the DISCLOSE Act, a government-wide disclosure bill. And the House rejected a Democratic bill to amend the National Defense Authorization Act to require disclosure by government contractors. It failed by a 248-176 vote. An opposing Republican attempt by Rep. Tom Cole (Okla.) to bar the government from funding disclosure regulations surely won't get the president's signature.

Despite the apparent stalemate, Democrats are determined to pass some kind of disclosure legislation. On July 13 Rep. Capuano introduced a "Shareholder Protection Act" (H.R. 2517), which goes in a new direction. It requires corporations to disclose their political contributions to their shareholders. Senators Robert Menendez (D-N.J.) and Richard Blumenthal (D-Conn.) shared a press conference with Capuano, who outlined his bill's provisions.

The Shareholders Protection Act would require a publicly traded company to secure its shareholders' consent and agreement to its political expenditures. It also would require the company to file quarterly reports with the Securities and Exchange Commission disclosing contributions to any group engaged in independent expenditures or electioneering communications.

Paul Sherman, staff attorney at the libertarian Institute for Justice, dismisses the Capuano bill. When the First Amendment states Congress shall make no law abridging the freedom of speech, writes Sherman,

> "that command—written in terms of 'speech,' not speakers—prohibits Congress from burdening speech from any source, including corporations. By requiring corporations to seek permission before they may speak about candidates, the Shareholder Protection Act functions as what courts call a 'content-based prior restraint' on speech. In other words, it turns the First Amendment on its head by imposing special burdens on speech about a particular subject: the election or defeat of political candidates."

Liberals Against Free Speech

Seventy-two left-leaning groups have joined together as the Corporate Reform Coalition to back the Capuano bill. They want restrictions on speech because what they most care about is driving a wedge between corporate profits and political contributions. CREW, Greenpeace, Public Citizen, USPIRG, Common Cause and similar groups are convinced that the greatest problem facing democracy is the "overwhelming influence of corporate America" on elections in a "post-*Citizens United* world." The groups have formed the current coalition to promote the Shareholders Protection Act.

In a press release, Lisa Gilbert, deputy director of Public Citizen's Congress Watch and a veteran of the anti-corporate Left, writes: "Corporations cannot vote, but they have access to massive accumulated wealth, which now can be targeted like a laser to influence the election of candidates … Decisions to use this wealth for political influence are made by CEOs, often without the knowledge or consent of their shareholders."

On this point, Gilbert is correct. For several decades Capital Research Center has urged shareholders to become more vigilant in monitoring their corporations' philanthropy. CRC's *Patterns of Corporate Philanthropy* series underscored the extent of corporate giving to left-of-center think-tanks and advocacy groups. However, CRC was always careful to oppose attempts to impose government mandates on corporate philanthropy and other management prerogatives.

By contrast, the Shareholders Protection Act, uses the power of government to force corporate disclosure on management.

Conclusion

Since the beginning of the 20th century, the "progressive" movement has fought to establish government control over business enterprise. A key strategy in that effort has been to reduce business influence in politics by preventing corporations from contributing money to electoral candidates and parties, issue campaigns, and advocacy groups.

In 2010 the U.S. Supreme Court in *Citizens United v. FEC* set back that strategy in a major way when it made clear that corporate political giving is protected by the First Amendment. The immediate response of anti-corporate groups has been to assert that private spending inevitably leads to public corruption and that in the absence of public control over corporate spending the next-best solution is "disclosure" rules to guarantee "transparency" and "accountability."

The Obama administration's attempt to draft an executive order requiring the disclosure of political contributions by corporations seeking government contracts and grants should be understood in that context. It is but the latest tactic in the continuing struggle to impose government control over the business community

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Your contribution to advance our watchdog work is deeply appreciated.

Many thanks.

Terrence Scanlon
President

PhilanthropyNotes

Octogenarian philanthropist **George Soros** is being sued for $50 million by a former companion, 29 year-old former Brazilian soap opera star **Adriana Ferreyr**, for allegedly reneging on two promises to buy her an apartment. Soros further engaged "in a deliberate and malicious campaign of extreme and outrageous harassment and intimidation against Ferreyr, which has directly resulted in her suffering and continuing to suffer severe emotional distress and damages," her lawsuit claims.

According to the *New York Post* ("Jilted Gal Pal Tells All"), Soros told Ferreyr he was giving the $1.9 million Upper East Side apartment she had located to his other companion, 39 year-old **Tamiko Bolton**. Soros subsequently reneged on buying Ferreyr a $4.3 million apartment he had promised her when they temporarily reconciled.

In the *New York Times* billionaire **Obama** fundraiser **Warren Buffett** has again demanded that Congress raise his taxes. *Washington Examiner* columnist **Timothy P. Carney** reminds us that Buffett has made money buying out family businesses sold to pay estate taxes that exceed their liquid assets. The Oracle of Omaha also owns life insurers that use the burden of the death tax to promote their estate-planning services. Buffett also made money investing in Goldman Sachs on the expectation that it would benefit from a government bailout. If your own wealth benefits from taxes and bailouts, of course you want more big government.

Was Hollywood duped? A Russian charity called the **Federation Fund** is under fire for failing to fund programs for the sick Russian children it claims to serve, *The Guardian (UK)* reports. The fund was created last year by rock star **Vladimir Kiselyov**. Actor-director **Woody Allen** and actors **Sophia Loren** and **Orlando Bloom**, appeared at a Moscow concert staged by the charity.

Petrochemicals magnate **Mukesh Ambani**, the wealthiest person in India, said Western corporate philanthropy is a "disempowering tool" that does less good for the needy than voluntary service and anonymous giving. The Western approach to charity "increases dependency and reduces initiative and enterprise. … It doesn't create the necessary human capacity to make communities self-sustaining and independent," said Ambani, who is worth US$27 billion.

Goldman Sachs WATCH

Goldman Sachs will cashier about three percent of its work force after a lousy second quarter. Chief Financial Officer David Viniar says both senior and junior employees will be let go. "Part of the reason for this is symbolic: Goldman needs to show investors—who are deeply disappointed at this latest stumble—that it takes their interests seriously. And cutting some senior jobs may convey that message," says CNBC.com. Goldman made a profit of only $1.1 billion in the second quarter, down from $2.7 billion in the first quarter.

Goldman has made campaign contributions to two of the 12 members on the new "Super Committee" that will recommend ways to cut the federal deficit. Goldman gave $51,900 to Sen. Max Baucus (D-Montana) but only $11,000 to Rep. Jeb Hensarling (R-Texas).