

# SIEPR

## *policy brief*

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## The Costs of Political Corruption in America

By Bruce M. Owen

Many citizens seem to believe that Congress and state legislatures are corrupt; certainly both are held in low esteem. The Supreme Court's 2010 decision in the *Citizens United* case left the feeling that campaign finance reform was dead and that political corruption had been given a green light. Two recent publications have identified more precisely than ever before the nature of the political problems that bedevil representative government in the United States. Legal scholars Lawrence Lessig and Richard Hasen come at the issue from different perspectives, but, together with a little economic seasoning, their work provides a deeper understanding of the sources and effects of political corruption in America.

### I. Sources of corruption

#### A. The principal-agent challenge.

Elected officials are agents for voters. In theory, voters' preferences determine representatives' behavior.

In practice, political representatives have conflicting incentives, and voters have no practical way to monitor their agents' performance, except for big-picture, highly salient issues. The emotional impulses that determine voter choices are unaffected by low-visibility matters. Thus, representatives have great freedom to act in their own interests on the many hundreds of obscure or detailed, but nevertheless important, decisions they face. In short, members of Congress have little or no accountability for most of their votes and other official actions.

#### B. The collective action hurdle.

Interest groups have always been important in U.S. politics, but not all interests form groups. Unorganized interests are not effectively represented. Small groups with strong economic interests in a highly focused set of issues, such as

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### About the Author

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large firms and some industry associations, typically are well-organized. Even large groups with very passionate members and effective leaders, such as environmentalists, pro- and anti-abortion activists, the National Rifle Association or the AARP, are also able to organize for political action. But many other interests, however important in the aggregate, cannot organize because their members have small or diffuse stakes in many unrelated issues or face free rider problems. This category includes most consumer interests and many non-union workers and small investors.

## **C. The scope of the administrative state.**

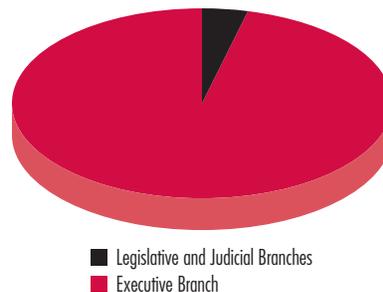
Over the past century every nook and cranny of the economy has been subjected to federal regulation. Regulation was once confined to utilities, banks, and insurance companies. But in the last 50 years regulation of workplace and consumer safety, environmental effluents, health care, retirement, private education, public accommodations for minorities and the disabled, and other sectors has brought virtually the entire formal economy within the jurisdictions of numerous federal or state agencies.

## **D. Congressional control of the administrative state.**

The federal government employs about 2.8 million civilians. Only 2 percent work in the legislative and judicial branches. One might think that the president

is in charge of and responsible for the 2.7 million “executive branch” employees.<sup>1</sup> But as a practical matter most of this huge bureaucracy is controlled by members of Congress and congressional committees. The committees and their staffs control agency budgets, have oversight over agency performance, and take an active day-to-day interest in agency doings. Many agencies are explicitly “independent” of the executive branch. Even within the rest of the executive branch, agencies and departments must answer to Congress when important politicians are unhappy with agency policy or performance. The courts no longer intervene in agency policy decisions. While agency actions can be appealed to the courts, the courts review policies only for conformity with procedural rules. The president can intervene, but the president and his aides have limited resources and political capital. Sustained presidential intervention on more than a few fronts at one time is not possible.

## **Federal Civilian Employees, 2010**



## **E. Campaign financing competition.**

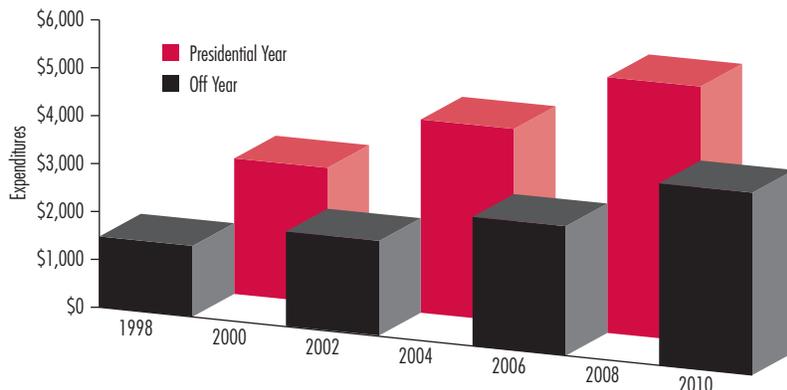
Political candidates must compete for campaign contributions. Other things being equal, the candidate with the most (effectively spent) money wins. Well-funded interest groups are the most convenient sources of campaign funding, although interest groups capable of mobilizing large numbers of volunteer campaign workers are also important. Opposing interest groups must compete for congressional supporters, and campaign contributions or independent expenditures are one effective way to compete. Both candidates and interest groups win by outspending their opponents—it is *relative* expenditure that counts, not necessarily the dollar amounts. Thus, candidates, including incumbents facing serious challengers, and interest groups are mutually interdependent. They constitute the demand and supply, respectively, of political influence. Their respective competitions tend, over time, to drive up campaign budgets and expenditures.

## **II. Consequences of political corruption**

Campaign financing is a serious challenge for candidates and for interest groups. They must stay in the game in order to defend their interests. It is neither necessary nor accurate to think of this process as extortion or bribery. Campaign

1 Source: U.S. Office of Personnel Management, 2010 data.

## Reported Political Expenditures— All Federal Races Billions of \$



Source: Federal Election Commission

contributions benefit politicians to the extent they want to remain in or attain office but otherwise do not benefit them personally. Rarely, a member of Congress is caught taking a personal bribe, perhaps hiding the cash in a home freezer. But such behavior seems to be uncommon at the federal level in the United States. Most campaign contributions and independent expenditures are publically reported and perfectly legal. More important, neither politicians nor interest groups have much choice. The system forces politicians to solicit contributions from interest groups and it forces interest groups to compete for political influence. Lessig's term for this unfortunate system is "Type 2 corruption." (Type 1 is bribery/extortion.) The Supreme Court says campaign contributions and independent expenditures do not constitute *quid pro quo* corruption, but both Type 1 and Type 2 corruption involve at least tacit *quid pro quo*.

Competition among opposing interests leads to ever-higher supplies of support for candidates. Competition to obtain or retain office leads to ever-higher campaign funding demand, ever-greater supply of interest group funding, and ever-greater congressional pressure on the bureaucracy to favor supporters in order to generate rents responsive to contributions. The fact that Congress controls the bureaucracy makes this possible and is part of the explanation for the great expansion of federal economic interventions.

On the whole, special interest groups want to be protected from changes such as higher taxes, competition, and competitive innovation. They also want to stop or at least tone down new regulations costly to themselves intended to benefit outsiders, such as disfavored minorities, consumers, and others. The influence of special interests thus tends to be conservative,

favoring the status quo. In sum, Type 2 political corruption of Congress promotes bureaucratic policies that shift tax burdens to poorly represented interests and that keep prices higher and private costs lower than they would be in unregulated markets or markets regulated to serve consumer interests. Obviously, the middle-class American consumer is a primary victim of this process. Other victims include entrepreneurs kept out of markets by protective regulations, standards, tariffs, quotas, licenses, and the like. Unorganized interests are frozen out of the debate. Their slices of the pie are easy targets for the interests that are effectively organized. Obviously, in any game where well-organized interests have more influence over policy than other interests, unrepresented interests will steadily lose economic ground.

There is no invisible hand guiding the competing special interests to inadvertently promote the public interest. What the system of competitive elections and competing contributors promotes instead is reallocation of wealth to politically effective interest groups and reduced aggregate economic welfare. All this is consistent with the growing disparities in the distribution of wealth that the "occupy" movement laments. Of course, special interests really have no choice—if they don't defend their own slices of the pie, they too will lose out. In effect, Congress "owns" access to the national economic pie and enjoys the benefits of being the

slicer. But members pay a price on the fund-raising treadmill. The rhetoric of business leaders is opposed to regulation, but in fact Type 2 corruption helps many businesses benefit from regulation.

But it gets worse. Another way to think about Type 2 corruption is that various special interests are not just asking for bigger slices of the national pie, but they are doing so in a way that imposes additional costs, beyond the amounts they seek to transfer from consumers or competitors to themselves. As Richard Hasen points out, the process of transferring percentage shares of the pie from one group to another tends to shrink the size of the pie. It is one thing to shift a given amount from ordinary people to some special interest, as happens routinely with our tax system. But it is entirely another to reduce consumers', workers', and investors' slices of the pie by \$10 for every transfer of \$1 to the well-represented interests. That happens because redistribution by the agencies (or directly by Congress in the case of taxes) takes place by inefficient means, due to various institutional and legal constraints on how the process operates.

A dynamic game in which the portions of ill-organized interests are repeatedly reduced—both by redistribution and by decreased economic efficiency—cannot go on forever, nor can it end well. Eventually, the portions of the losers will be reduced so much that other opportunities will beckon. These may include

political revolt or removal from the jurisdiction of the system. In some countries, black markets and migration provide escape opportunities; in others, it is revolution or anarchy. It would be good for the United States to avoid such outcomes.

### III. Solutions to Type 2 corruption

There are no easy answers. Every proposed solution that seeks to preserve most of our existing constitutional framework has downsides or faces huge implementation hurdles. Here is a brief list of some possibilities.

#### A. A constitutional amendment.

An amendment to the Constitution could repeal *Citizens United* and permit Congress to enact campaign financing reform without violating the First Amendment. However, it is not clear that this would solve the problem, even if a constitutional amendment stood a chance of passing Congress and state ratification. Campaign finance laws have always had loopholes. Also, most campaign finance laws would merely produce proportional disarmament of interest groups, without necessarily changing the nature or extent of Type 2 corruption. For example, expenditure on hiring effective K Street lawyers and lobbyists might become even more important if contribution amounts were reduced. Furthermore, there is no reason to expect real change so long as important interests remain unrepresented.

#### B. A constitutional convention.

Lessig, calculating that Congress is unlikely to pass an amendment, suggests a constitutional convention under Article V of the Constitution. This requires action by a supermajority of the state legislatures. The last constitutional convention was in 1787. The delegates were asked to suggest specific changes in the Articles of Confederation. The convention went berserk; it threw out the articles and wrote a whole new Constitution. That episode turned out well. Would we be happy today with a convention that had such power? Delegates to the 1787 convention included George Washington, James Madison, Alexander Hamilton, Benjamin Franklin, George Mason, and other intellectual and patriotic giants. They were appointed by state legislatures. Could we expect the same today?

#### C. The unitary executive.

During the New Deal era, the Supreme Court repealed the “implied non-delegation clause” and permitted Congress to delegate its power to make law, and the courts’ power to interpret and enforce law, to the federal bureaucracy. Over the next half-century the bureaucracy acquired great power over all economic activity. Political control of the bureaucracy was vested in congressional committees, with a comparatively minor role for the president and the

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courts. This circumstance has led to defensive demands by well-organized interests for a degree of control over their own economic fates and also demands for opportunistic rent seeking. Many of the operations of the bureaucracy are obscure and technical—Congress exercises its control in the crevices of thousand-page budget and tax bills. “Rather than working primarily to change legislative minds on issues of high public salience, lobbyists, like mushrooms, thrive in areas of low light.” Hasen at 220. What if the president simply took control of the bureaucracy? If that happened, at least an elected official would be accountable for the overall performance of the bureaucracy.

#### **D. Repeal *Humphrey’s Executor*.**

The Supreme Court permitted congressional delegation of power directly to agencies (rather than to the president) in a 1935 decision known as *Humphrey’s Executor*. If this doctrine were repealed, we would return to having three branches of government rather than four. Congress cannot reasonably be expected to assume all the responsibilities for law making and enforcement that it has now delegated to the bureaucracy. Presumably, the president would have to

assume these powers. The result might be similar to the unitary executive proposal, although the path would be different.

#### **E. Intelligent due process.**

The Supreme Court has pulled back from oversight of regulatory decisions made by the federal bureaucracy, except for ensuring that the agencies ensure “due process” in making those decisions. Due process itself is defined by laws and court precedents; it’s a complex subject, but the courts have always insisted that they have the last word. Currently, due process is satisfied if agency rulemaking proceedings take place in the sunlight, with anyone permitted to comment and participate. Obviously, unorganized and unrepresented interests cannot participate, and their points of view are drowned out by the well-represented special interests. If due process access is expected to affect outcomes (else why do we bother?), then this is unintelligent due process. The courts could choose to recognize the obvious—that some interests are not able to participate, skewing the process. The courts could start overturning agency decisions where all affected interests have not been represented effectively—or where outcomes appear to

reduce economic welfare at the expense of the unrepresented.

#### **F. The inspector general (FIG).**

Many federal agencies now have an official called the “inspector general” who is responsible for uncovering fraud, waste, and abuses. This official is appointed by the agency head and is not responsible for uncovering policies that reduce economic welfare. We could instead have a government-wide non-partisan federal inspector general (FIG), elected every four years at the same time as the president, perhaps from a panel of qualified candidates nominated by another body. This official’s job would be to identify the worst cases of welfare-reducing Type 2 corruption, as judged by the consequences for ill-represented interests, and to simply veto such policies in highly visible political acts, subject either to judicial review or congressional override.

#### **Further Reading**

Lessig, Lawrence (2011) *Republic, Lost: How Money Corrupts Congress — And a Plan To Stop It*, New York: Hachette.

Hasen, Richard L. (2012) *Lobbying, Rent-Seeking, and the Constitution*, *Stanford Law Review* 64:191-253.

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