

Citizens United v. FEC: After a 63-Year Hiatus, the U.S. Supreme Court Welcomes Corporations Back to Federal Politics

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Winstead News Alert

On January 21, 2010, the U.S. Supreme Court issued its much anticipated ruling in *Citizens United v. FEC*—a landmark decision for campaign finance law that strikes down a longstanding federal prohibition against independent expenditures by corporate entities. The Court's holding overturns decades old statutory law and judicial precedent (including two prior Court opinions) that have effectively barred corporations from directly participating in federal politics. In the process, it reveals the Court's varying views on the correlation between money and political voice as well as the constitutional rights afforded corporations. The holding also provides an excellent roadmap of the appropriate First Amendment analysis for laws purporting to restrict political speech.

Background. Prior to this holding, federal law prohibited corporations (as well as national banks and labor unions) from using general treasury funds to make independent expenditures in connection with a federal election, although corporations may sponsor political action committees (PACs) so their stockholders, executives and administrative personnel may engage in those activities. Independent expenditures include communications that expressly advocate the election or defeat of a federal candidate (such as campaign ads) as well as "electioneering communications" (generally defined as any broadcast, cable or satellite communication which refers to a clearly identified federal candidate, which is made within 30 days before a primary election or 60 days before a general election, and which is targeted to the relevant electorate). This corporate prohibition was first implemented by statute in 1947 and had survived the Court's scrutiny for over six decades.

Hillary: The Movie. In connection with the 2008 Presidential elections, a non-profit corporation known as Citizens United released a 90-minute documentary entitled "Hillary: The Movie" (interpreted by the Court as express advocacy against then-Senator Hillary Clinton's bid for the Presidency). Citizens United produced a series of 10- and 30-second ads to further promote its documentary and scheduled those ads to air on broadcast and cable television within thirty days prior to the 2008 Presidential primaries. Having received a small portion of its \$12 million annual budget from for-profit corporations, Citizens United sought declaratory and injunctive relief against the Federal Election Commission (FEC) on the basis that the electioneering communications statute was unconstitutional as applied to its documentary and ads.

Citizens United v. FEC. Laws that serve to restrict, suppress or otherwise burden political speech are analyzed under a strict scrutiny standard. In the parlance of First Amendment jurisprudence, a governmental entity imposing a speech restriction must show that such restriction furthers a compelling interest and is narrowly tailored to achieve that interest. In defense of the challenged statute, the FEC asserted three separate compelling interests in limiting corporate political speech: an antidistortion interest (preventing the distortive effects of immense aggregations of corporate wealth), an anticorruption interest (preventing corporations from garnering a *quid pro quo* from recipient political candidates), and a shareholder-protection interest (preventing dissenting shareholders from being compelled to fund corporate political speech). Each of these interests was summarily dismissed by the Court as it interpreted "a law that beyond doubt discloses serious First Amendment flaws" and held the broader statutory prohibition on corporate independent expenditures to be an outright ban on speech. According to the Court, the prohibition effectively restricts political speech based on the speaker's corporate identity which runs counter the Court's long-held position that First Amendment protections for individuals apply equally to corporations, including in the context of political speech. The Court further opined that independent expenditures by corporations do not give rise to the same concerns over corruption or the

appearance of corruption as may apply in the context of political contributions made directly by corporations to federal candidates (which are still prohibited).

The Opinion. Justice Kennedy penned the Court's majority opinion which held the corporate prohibition on independent expenditures to be unconstitutional, there being no recognized governmental interest justifying the suppression of political speech based on the speaker's corporate identity. Several factors reveal the difficulties that the Court faced in reaching this opinion. First, the Court ordered an unusual re-argument of the case last summer and then took over four months after final oral arguments were heard to render its decision. Second, a narrow 5-4 majority signed the majority opinion with only four members of the Court (Justices Kennedy, Roberts, Scalia and Alito) backing the entire opinion. Third, the majority opinion was augmented by two separate concurring opinions (Justices Roberts and Scalia), a staggering 90-page offering in dissent by Justice Stevens, and a separate dissenting opinion by Justice Thomas (actually proposing an even broader application of the majority holding).

Notable Takeaways from the Majority Opinion:

- The Court takes a dubious view of restraints on political speech—"the Court cannot resolve this case on a narrower ground without chilling political speech, speech that is central to the meaning and purpose of the First Amendment."
- The Court views the FEC as having attained undue influence on political speech, bordering on censorship—"the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests."
- The Court considers PACs to be inadequate proxies for corporate political activity and does not view corporate PACs as a means for absolving the Court's relevant First Amendment concerns—"PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations . . . PACs have to comply with these regulations just to speak."
- The Court is not overly persuaded by arguments of the negative influence of corporations and prefers to rely on the public's ability to filter political messages through the "open marketplace" of ideas—"Factions should be checked by permitting them all to speak . . . and by entrusting the people to judge what is true and what is false."
- The Court is cognizant of evolving technology and will not uphold laws that restrict or give preferential treatment to political speech disseminated through certain media outlets.

Lingering Issues:

- The Court did not extend its holding to the existing prohibition against direct political contributions by corporations to federal candidates. Although the Court did in dictum acknowledge the government's compelling interest in preventing *quid pro quo* corruption that may be associated with such contributions, it remains unclear whether the Court would uphold such prohibition if properly challenged on constitutional grounds.
- The Court did uphold limited regulation of corporate political speech via existing disclaimer and disclosure requirements (such as identifying the communication's source, disclaiming any coordination with a federal candidate, and filing disclosure statements with the FEC). Similar requirements could facilitate a future examination of the corporate contribution ban.
- The future role of PACs in federal politics may be diminished as corporations (and presumably labor unions) can now directly fund political ads so long as such ads are not coordinated with or authorized by a federal candidate and satisfy disclaimer requirements. However, PACs remain the only viable option for corporations to assist their stockholders, officers and employees in making direct contributions to federal candidates.
- With the November mid-term elections looming, we should soon see the impact of this holding on federal politics, particularly in the context of electioneering communications.
- The battle lines have now been drawn as President Obama and certain Congressional Democrats have already indicated that they will soon propose legislation to undercut the opinion. It should be anticipated that the Court will eventually respond in kind as it has on prior occasions in the area of campaign finance law.

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