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Impact of Citizens United

On January 21, 2010 the Supreme Court issued its long awaited decision in *Citizens United v. Federal Election Commission*. At issue in the case was whether Citizens United, a nonprofit corporation that receives donations both from individuals and for profit corporations, could distribute in various ways a movie entitled *Hillary: The Movie*. *Hillary* is about former Senator and presidential candidate Hillary Clinton, and is quite critical of her and her capability and qualifications to serve as President. Citizens United proposed to distribute *Hillary* in close proximity to various 2008 primary elections. Citizens United brought this case seeking to overturn provisions of the Federal Election Campaign Act that would have prohibited distribution of *Hillary* because of the influence it may or was intended to have on federal elections and because Citizens United is funded, in part, by for profit corporations.

Federal election law generally prohibits corporations from using corporate treasury funds to make contributions to, or expenditures in support of or opposition to, federal candidates. Corporations are permitted to establish and operate PACs, separate segregated funds consisting only of personal funds contributed voluntarily by individual supporters, for use for political purposes.

In a revolutionary ruling, the Supreme Court overturned decades of precedent, explicitly overruled two of its own relatively recent rulings, and declared that corporations have First Amendment rights to participate in federal election campaigns by making "independent expenditures" using corporate treasury rather than PAC funds. While the decision and the various concurrences and dissent are lengthy and complex, the bottom line is simple and straightforward: Corporations may now make unlimited "independent expenditures," that is, expenditures to create and publicly disseminate communications that expressly advocate the election or defeat of federal candidates using corporate treasury funds. Many pundits believe this decision may have significant impact on federal elections because corporations generally have more access to funds that can be used for political purposes than do PACs, who may solicit and receive contributions only from certain groups of individuals donating personal funds.

The corporate communications permitted under this ruling must, however, continue to be made independent of, and not in cooperation or collaboration with, candidates and their campaigns or political parties. Both for profit corporations and not for profit corporations such as NAR, may now, for example, publish print ads or broadcast electronic communications that are directed to and received by the general public and urge recipients to vote for specifically identified candidates for federal office. Corporate "issue advocacy" communications, that address policy or legislative issues but that also identify and positively or negatively refer to federal candidates in relation to such issues, are equally immunized from regulation under this ruling.

The language used by the Court to condemn, under the First Amendment, any prohibition of expenditures by corporations is quite broad. The Court noted that "Political speech 'is indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual'", and that "Government may not suppress political speech on the basis of the speaker's corporate identity." Thus, this sweeping conclusion would almost certainly apply with equal force to any state-imposed prohibition of political expenditures by corporations. That said, the implications of this decision on the campaign finance laws of the various states will have to be evaluated in light of the specific laws of those states.

The Court's ruling also considered certain disclaimer and disclosure/reporting requirements applicable to communications by corporations regarding federal candidates, and sustained the constitutionality of those requirements. Corporations that engage in expressive conduct regarding federal candidates may thus be required to include disclaimers identifying the sponsor and reporting such expenditures.

The decision addresses only the constitutionality of corporate participation in federal elections by making public communications that advocate the election or defeat of federal candidates. It does not address, and therefore does not alter, other provisions of the Federal Election Campaign Act. The prohibition against direct contributions by corporations to federal political parties, candidates, or campaigns, and the limitations and restrictions imposed on solicitation of contributions to, and contributions and expenditures by, political action committees such as RPAC, are unaffected by the Court's decision.

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