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RSC Policy Brief:
Citizens United v. Federal Election Commission
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"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."

"When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves."

- Justice Anthony M. Kennedy, writing the majority opinion

On Thursday, January 21, 2010, in *Citizens United v. Federal Election Commission*, the United States Supreme Court produced a decision that has a historic significance on election and campaign law. In a 5-4 decision, written by Justice Anthony M. Kennedy, the Court overturned a ban preventing corporations and unions from using their treasury funds for independent expenditures supporting or opposing political candidates. Below is an analysis of how the *Citizens United* decision impacts campaign finance, the effects of the decision, and most importantly, how this ruling is a triumph in ongoing efforts to defend First Amendment rights to free speech.

Note: See the bottom of this document for definitions of words or phrases marked with an *.

Background

Citizens United is a nonprofit organization that produced a film called *Hillary: The Movie* – a film highly critical of then-Senator Hillary Clinton. While most of its funding came from individual donations, some of Citizens United's contributions came from for-profit entities.

Citizens United wanted to release the film onto on-demand channels via cable television within 30 days of an election, which is a time when electioneering communications* are prohibited under McCain-Feingold. The group sued the FEC on grounds that the law is unconstitutional as it applied to their video.

Common Questions

What did *Citizens United* change?

- Two Supreme Court precedents. *Citizens United* overturned the Supreme Court's decisions in *Austin v. Michigan Chamber of Commerce* (1990) and a key portion of *McConnell v. Federal Election Commission* (2003). *Austin* prohibited corporations from using their treasury funds to support or oppose candidates. In *Citizens United*, Justice Kennedy states in his majority opinion that "*Austin* interferes with the 'open marketplace' of ideas protected by the First Amendment…**It permits the Government to ban the political speech of millions of associations of citizens."** *McConnell*

upheld Section 203 of BCRA. Section 203 prohibited the use of corporate treasury funds from being spent on electioneering communications* right before an election.

- Parts of McCain-Feingold. *Citizens United* invalidated key aspects of the campaign finance law in the Bipartisan Campaign Reform Act of 2002 (BCRA), commonly referred to as "McCain-Feingold." Specifically, it struck down a provision in McCain-Feingold that barred electioneering communications* in the days preceding an election.
- State laws regarding corporate spending. According to this New York Times article, 24 states have laws restricting corporate independent expenditures* on elections. Many of these laws run afoul of the *Citizens United* decision.

What practical effects will this have on election and campaign law?

- Labor unions and corporations (including incorporated non-profits) will now be able to use general treasury funds for electioneering communications* and express advocacy.* Practically speaking, corporations will be able to pay for advertisements that support or oppose a candidate up until Election Day.
- By preventing corporations from using their funds to directly advocate for a particular candidate, current law was preventing vital information from being dispensed to the public. As Justice Kennedy indicated in his opinion, "corporations may possess valuable expertise, leaving them the best equipped to point out errors of fallacies in speech of all sorts." Thus, the ban on input from corporations and unions via advertisements before an election has stymied debate in the public sector.

Should corporations be awarded the same First Amendment rights as individuals?

- The Supreme Court argues that the short answer is "yes." In quoting the case, *First National Bank of Boston v. Bellotti* (1978), Justice Kennedy states that political speech is "indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." Justice Kennedy goes further in arguing that *Austin* should be overturned by writing, "The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin's* antidistortion rationale all the more an aberration."

What was *not* changed by *Citizens United*?

- The ban on direct corporate contributions to candidates or PACs. Incorporated entities still may not make contributions directly to candidates or PACs (or coordinate with them on their campaigns).
- The ban on foreign nationals* contributing to elections. Current law states that: "It shall be unlawful for a foreign national, directly or indirectly, to make a contribution or donation of money or other thing of value…in connection with a Federal, State, or local election; a contribution or donation to a committee of a political party; or an expenditure, independent expenditure, or disbursement for an electioneering communication..." (2 U.S.C. 441e)
- The ban on foreign nationals* directing spending or engaging in other election activities. Current campaign finance regulations state that: "A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee." (11 CFR 110.20(i))
- Disclosure and disclaimer requirements. According to Justice Kennedy, "Disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' (*Buckley*) and 'do not prevent anyone from speaking' (*McConnell*)." He further states, "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

- Individual contribution limits to political parties and candidates. There have been no changes to the amounts that individuals may give to candidates or political parties.

Definitions

Electioneering Communication: "Any broadcast, cable, or satellite communication that: Refers to a clearly identified candidate for Federal office" and "Is publicly distributed within 60 days before a general election…or within 30 days before a primary..." (2 U.S.C. 434(f)(3))

Independent Expenditure: "...an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." (Opinion of the Court, Justice Kennedy)

Foreign Principal (national): "A government of a foreign country and a foreign political party; a person outside of the United States… and a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." (22 U.S.C. 611)

Express Advocacy: Explicit words or activities calling for the election or defeat of a clearly identified federal candidate.

Triumph in Defense of the First Amendment

Organizations that represent a wide variety of interests have shown their support for the *Citizens United* ruling. Among the many groups that signed an amicus brief on behalf of Citizens United were the National Rifle Association, the U.S. Chamber of Commerce, the AFL-CIO, the American Civil Rights Union, and the American Civil Liberties Union. This clearly was not solely a victory for conservative groups. It is a victory for any organization that believes it can triumph in the marketplace of ideas.

Former FEC Commissioner Bradley Smith (2000-2005) sums up the importance of this case well in his recent *Wall Street Journal* article, "Newsflash: First Amendment Upheld." He insightfully observes that over the last 20 years, "the Court has provided less protection to core political speech than it has to Internet pornography, the transmission of stolen information, flag burning, commercial advertising, topless dancing, and burning a cross outside an African-American church." *Citizens United* restores some protection to political speech that Congress and the Supreme Court have eroded over the last few decades.

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