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Supreme Court Opens the Way for Direct Corporate Participation in the Electoral Process

Today, in one of the most significant First Amendment rulings of the past 50 years, the Supreme Court in a 5 to 4 decision overturned both precedent and federal law which had banned corporations from directly participating in the political process. *See Citizens United v. Fed. Elec. Comm'n*, 558 U.S. ___ (U.S. No. 08-205, Jan. 21, 2010). At issue in *Citizens United* was the federal law that banned corporations and labor unions from making either "independent expenditures" or "electioneering communications."

Independent Expenditures

An independent expenditure is any payment that is made independently of a candidate and which calls for the election or defeat of a given candidate. Thus, if one leases space on a bill board to promote the candidacy of George Smith for U.S. Senate and that action is taken without consulting with George Smith or anyone working on his campaign, then that would qualify as an independent expenditure. Independent expenditures are not subject to any contribution limits. However, under federal law in effect since 1947, neither corporations nor labor unions are permitted to make independent expenditures.

Electioneering Communications

An "electioneering communication" is a communication made 60 days before a federal general election or 30 days before a primary election for federal candidates and which is designed to be aired to at least 50,000 individuals. The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, also known as McCain-Feingold, prohibits corporations and labor unions from making electioneering communications.

Impact of Today's Decision — Federal and State Elections

Today's decision invalidates those provisions of federal law that prohibited corporations from making independent expenditures or electioneering communications. As a result, corporations and labor unions will now be permitted to make or directly finance independent expenditures and electioneering communications. Corporations and labor unions will still be precluded from making direct contributions to federal candidates or committees or from making expenditures that are coordinated with a federal candidate. The Court upheld the provisions of McCain-Feingold that require sponsors of televised electioneering communications to run a verbal disclaimer identifying the sponsor of the program and file reports with the Federal Election Commission.

The decision also effectively invalidates all state laws that prohibit corporations and labor unions from directly but independently participating in the political process. The decision does not affect any state law that prohibits or limits corporate contributions or imposes reporting requirements on corporations.

Citizens United

Citizens United, a non-profit corporation, had produced a movie about then-Sen. Hillary Clinton which was to air during the 2008 presidential primary cycle. The movie was less than laudatory and according to the Court, it was "a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President." Slip Op. at 7-8. Citizens United wanted to make its movie, *Hillary*, available through video-on-demand within 30 days of the 2008 primary elections. However, it was concerned that airing its movie over cable could constitute prohibited electioneering communication and therefore, instituted suit against the Federal Election Commission seeking a declaration that the movie, if aired on cable, would not constitute an electioneering communication. The FEC defended, arguing that not only would a televised version constitute improper electioneering communications because it was financed by a corporation, but also it would constitute an illegal independent expenditure by a corporation.

In the Supreme Court, Citizens Union sought narrow vindication. It argued that its televised movie was not an electioneering communication and that if it were, it was only seeking to have McCain-Feingold's restrictions on electioneering communications invalidated as applied to Citizens Union — a non-profit. The Court declined both invitations and addressed the facial validity of the restrictions on electioneering communications and corporate independent expenditures. It noted that it could not resolve the case on narrower grounds without chilling free speech.

The Court then proceeded to examine *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). In *Austin*, the Court had held that the ban on corporate independent expenditures was constitutional. The Court today expressly overturned *Austin*, holding that *Austin* itself had departed from prior case law, especially *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court held that there was no rational basis for discriminating against corporations noting that a "pre-*Austin* line [of cases] forbids restrictions on political speech based on the speaker's corporate identity." Slip Op. at 32. The Court held, for example, that the likelihood of corruption — the usual reason for discriminating against corporations — is minimal because the corporate expenditures at issue in the case are "independent."

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