

Corporate Expenditures in Support of, or Against Political Candidates: Has the Legal Landscape Changed After the BCRA and *Citizens United*

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*With the 2002 passage of the McCain-Feingold Campaign Finance Law, Congress made political speech a felony for one class of speakers – corporations and unions. Corporations and unions were now prohibited from spending their own funds in support of or against candidates for political office. Opponents of the law believed it was incompatible with the First Amendment. In 2010, the U.S. Supreme Court weighed in the issue in *Citizens United v. Federal Elections Commission*. This decision has unleashed a myriad of questions and concerns about what is allowed in the area of corporate involvement in the political process.*

INTRODUCTION

The public's ability to participate in the discussion and debate about the character and fitness of candidates for political office is at the core of the First Amendment's prohibition that, "Congress shall make no law...abridging the Freedom of Speech" (U.S. Const., amend I). The public is comprised not just of individuals, but also of associations and groups of individuals, including corporations and unions. Since free speech applies to all citizens regardless of form, outlawing political speech based on the identity of the speaker would appear to be as unconstitutional as if speech in general were banned. Despite this fundamental principle, in November 2002, Congress made political speech a felony for one class of speakers – corporations and unions. The passage of the Bipartisan Campaign Reform Act ("McCain Feingold law") meant corporations and unions could face monetary penalties and up to five years in prison for speaking in support of or against candidates for political office.

According to many campaign finance critics, one of the great political evils is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions (Potter, 2002). Many of these observers believe that when an individual or association of individuals makes large contributions to candidates of political parties, they expect, and sometimes demand, and occasionally receive, consideration by the candidate or political party, which on occasion is harmful to the interests of the general public. As a result, the McCain-Feingold law was initially believed to be a critical component to solving the perceived problem of excessive corporate political influence.

On January 10, 2010, the United States Supreme Court addressed this collision in *Citizens United v. Federal Elections Commission*. In one of the most controversial decisions in decades, the Supreme Court, in *Citizens United*, invalidated the portions of the McCain-Feingold law that dealt directly with corporate expenditures in support of political candidates. This decision set off an eruption of political debate and fierce partisanship (Barnes, 2010). Some legal scholars and journalists called the decision "wrongheaded"

and claimed the decision was made in “bad faith” (Dworkin, 2010). Still others characterized Justice Kennedy’s majority opinion as “more like the ranting of a right-wing talk show host than the rational view of a justice with a sense of political realism” (Hansen, 2010). The *New York Times*, in several editorials, blasted the Court and called the decision “disastrous,” “terrible,” and “reckless.” In fact, the decision sparked so much controversy that President Obama “called out” the Court and specifically referred to *Citizens United* during his State of the Union Address in January 2009. According to President Obama, “the Supreme Court reversed a century of law that I believe will open the floodgates for special interests – including foreign corporations – to spend without limit in our elections. I don’t think American elections should be bankrolled by America’s most powerful interests, or worse, by foreign entities...” (Obama, 2010).

The Court’s decision in *Citizens United* unleashed a torrential wave of criticism from the media along with raising new questions and concerns from corporations who were unsure about how this decision impacted the rules governing the area of corporate expenditures and it left many companies afraid to run afoul of the law since there are criminal penalties at stake. Businesses are afraid to use their funds in support of candidates since they are unsure what, if anything, the Court invalidated and what restrictions remain in place when it comes to corporations expending their own funds in support of political parties and/or campaigns.

In order to effectively analyze the impact of the Court’s holding in this controversial 5-4 decision, this article will discuss the case law and regulatory history of campaign finance law in the United States over the past one-hundred years. Next, it will look at the campaign finance law at issue in *Citizens United* (the McCain-Feingold law) and some of its critical components, along with the background and holding of the *Citizens United* case and some of its practical implications. Finally, it will examine some lesser-discussed aspects of the decision as well as the issues that have been misinterpreted by the media.

THE MCCAIN-FEINGOLD CAMPAIGN FINANCE REFORM LAW

In 2002, Congress passed the Bipartisan Campaign Reform Act (“BCRA”), otherwise known as the McCain-Feingold Act. The McCain-Feingold Act was one of the most far-reaching overhauls of campaign finance law since the 1970’s and in broad terms, it banned unlimited corporate donations to national political party committees, put limitations on advertising by organizations not affiliated with parties, and banned the use of corporate and union money for “electioneering communications” – ads that name a federal candidate – within 30 days of a primary election or 60 days of a general election. The sponsor of the bill, John McCain, stated that the BCRA,

“...seeks to reform the way we finance campaigns for federal office in three major ways. First, BCRA prohibits the national political parties from raising or spending "soft money" (large contributions, often from corporations or labor unions, not permitted in federal elections), and it generally bans state parties from using soft money to finance federal election campaign activity. Second, it increases the hard money contribution limits set by the 1974 amendments to the Federal Election Campaign Act ("FECA"). Finally, the new law prohibits corporations and unions from using soft money to finance broadcast campaign ads close to federal elections (though corporations and unions can finance these ads with hard money through their political action committees), and it requires individuals and unincorporated groups to disclose their spending on these ads. The law represents the most comprehensive congressional reform of our federal campaign finance system since FECA was enacted and amended in the 1970s” (McCain, 2002, p.1017).

By passing the BCRA, Congress was hoping to stop the unregulated flow of soft money and return the world of campaign finance regulation to its pre-Watergate position where there were defined prohibitions and limits on contributions to political parties. The BCRA was the end result of a protracted six-year legislative and political struggle; however, as President Bush was signing the bill into law, the

first wave of more than a dozen lawsuits challenging its constitutionality were already crashing upon the Supreme Court's shores. Since the BCRA's enactment, the Supreme Court has heard several cases addressing various campaign finance issues regulated therein, but none of these cases have been as controversial or had the impact on campaign finance law as *Citizens United*.

The specific BCRA provisions at issue in *Citizens United* were sections 201, 203 and 311, all of which served as amendments to the Federal Election Campaign Act of 1971 ("FECA"). Section 203 of BCRA regulates using corporate funds for "electioneering communications." In general, an electioneering communication was identified as a "broadcast, cable, or satellite" communications made within 60 days of a general election or 30 days of a primary election. Section 203 continues by restricting corporations and labor unions from funding electioneering communications from their general funds except under certain specific circumstances, such as get-out-the-vote campaigns. Even though certain types of "electioneering communications" are permissible, they are subject to BCRA's disclosure and disclaimer requirements that are delineated under sections 201 and 311.

Section 201 of BCRA contains a donor disclosure provision for electioneering communications. Persons who disburse an aggregate of \$10,000 or more a year for the production and airing of electioneering communications are required to file a statement with the Federal Election Commission (FEC). The statement must include the names and addresses of persons who have contributed in excess of \$1,000 to accounts funding the communication.

BCRA's section 311 contains a disclaimer provision for electioneering communications. If the candidate or the candidate's political committee did not authorize the electioneering communication at issue, then the organization responsible for the communication must disclose that the organization is responsible for the content of this advertising.

CITIZENS UNITED & HILLARY: THE MOVIE

Citizens United is a non-profit corporation with an annual budget of about \$12 million. The corporation acquires the majority of these funds via donations from individuals; however, it receives donations from for-profit corporations as well. In January 2008, Citizens United released a 90-minute documentary examining the record, policies, and character of the then-Presidential Democrat primary candidate Hillary Clinton. The documentary, called *Hillary: The Movie*, examined Hillary Clinton's political background in a critical light and mainly focused on "five aspects of Hillary's political career: (1) the firing of certain White House staff during her husband's presidency, (2) retaliation against a woman who accused her husband of sexual harassment, (3) violations of finance restrictions during her Senate campaign, (4) her husband's abuse of presidential pardon power, and (5) her record on various political issues" (Harmon, A. 2009). The film was to be released in theaters and on DVD; however, Citizens United desired a broader distribution and arranged to have the movie broadcast on cable through video-on-demand.

Since the documentary was to be broadcast during Clinton's presidential primary campaign, Citizens United was aware that its movie and advertising might be considered electioneering communications and would be subject to BCRA's sections 201, 203 and 311. As a preemptive strike, Citizens United sought an injunction to block the FEC from enforcing those sections on the grounds they violated the First Amendment to the U.S. Constitution. To Citizens United's disappointment, the broadcast was banned when the Federal Elections Commission declared that the broadcast would violate various provisions of the BCRA. Since the BCRA's drafters anticipated the likelihood of lawsuits questioning its validity, it contains a provision that specifically addresses constitutional challenges to its various prohibitions. This provision requires that these claims be brought before a three-judge panel of the United States District Court for the District of Columbia. Appeals from this court go directly to the United States Supreme Court. As a result of these jurisdictional restrictions, Citizens United went to the District Court for injunctive relief but its application was denied. Citizens United immediately appealed to the Supreme Court.

When analyzing the numerous arguments presented in *Citizens United*, the Court determined that “in the exercise of judicial responsibility,” it needed to examine the validity of the BCRA on its face, and not on the narrower grounds suggested by the litigants and the holdings of earlier decisions, because to do so would lead to further litigation and, in the interim, political speech would be chilled (*Citizens United*, 130 S. Ct. at 888-94). The Court rejected Citizens United's as-applied challenges based on the finding that the documentary *Hillary The Movie* was the functional equivalent of express advocacy because it was essentially a “feature-length negative advertisement that urged viewers to vote against Senator Clinton for President” (Id. at 889-90). The Court further rejected the contention that it should create an as-applied exception for documentary films because to do so would require it to redraw constitutional lines for different types of media, which could have the unintended result of chilling political speech.

The Court correctly noted that if it applied the test established in *Austin* (the anti-distortion test), instead of examining the statute on its face, it could “produce the dangerous, and unacceptable, consequence” of banning political speech emanating from media corporations (Id. at 789). While noting that media corporations were technically exempt from the corporate expenditure ban set forth in section 441b, the Court observed that media corporations also accumulate immense wealth with the help of the corporate form and that “the views expressed by media corporations often ‘have little or no correlation to the public’s support’ for those views” (Id. at 790). As the Court went on to observe, the “line between the media and others who wish to comment on political and social issues has become far more blurred” with the advent of the Internet, blogs, and cable television, and the decline of traditional print and broadcast media (Id. at 905-06). Within the context of this dilemma, the Court recognized that making distinctions between media corporations and non-media corporations would be difficult at best. Analyzing the statute on case-by-case basis could have the unfortunate result of exempting a corporation that owns both media and non-media businesses, while simultaneously, a wholly non-media corporation could be forbidden to speak even though it may have the same interests. Such a result cannot be squared with the First Amendment.

Last, after the Court examined the morass of existing legislation, FEC advisory opinions, explanations and justifications, and FEC regulations governing the universe of campaign finance, it concluded that the existing complicated regulatory scheme acted as a prior restraint on speech in the harshest of terms. As such, the Court determined that the proper adjudication required it to finally consider the facial validity of section 441b of the BCRA, and whether courts should continue to adhere to *Austin* and the relevant portion of *McConnell*.

The First Amendment provides that, “Congress shall make no law...abridging the freedom of speech” (U.S. Const., amend I). It is undisputable that free speech is an “essential mechanism of democracy” because one of its many benefits is that it affords citizens the opportunity to hold their elected officials accountable (*Citizens United*, 130 S. Ct. at 898). As such, the “*First Amendment* ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office” (Id.). The Supreme Court has already recognized that the “discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution” (*Buckley*, 424 U.S. at 14). Thus, in this context, if the First Amendment is to mean anything, it must mean that the government is not permitted to fine or imprison citizens or associations of citizens merely for engaging in political speech.

Recognizing the above to be true, it is a natural progression to hold that political speech must be protected from laws that are designed to either intentionally suppress it, or do so inadvertently. For it is political speech, emanating from diverse sources, that provides the voters with some of the information necessary to decide which candidates to support. Every first-year law student learns that laws that burden speech, even political speech, will be subject to “strict scrutiny” review by the Court. In order to successfully make it past this review the government will be required demonstrate that the law “furthers a compelling interest and is narrowly tailored” to promote that interest (*Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. 410 (2006)). In *Citizens United*, the Supreme Court recognized that on rare occasions it has upheld a narrow class of speech restrictions that do infringe on a speaker’s First Amendment rights; however, in all these cases, the Court found a compelling governmental interest.

The Court did not find a compelling interest in *Citizens United*. Justice Kennedy observed that the Court has a long history of holding that corporations are entitled to the rights recognized under the First Amendment. These rights include political speech. First Amendment protections do not vanish merely because the speaker is a corporation. As the Court correctly recognized, “speech restrictions based on the identity of the speaker are all too often simply a means to control content” (*Citizens United*, 130 S. Ct. at 899). “The concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment” (*Automobile Workers*, 352 U.S. at 597). Here, the Court recognized that the FEC set in place a complicated process whereby it, and it alone, would select what political speech is safe for dissemination to the public, and in so deciding, it employed a series of subjective and ambiguous tests. Such a scheme would act as a prior restraint and an unprecedented governmental intrusion on the right to speak, the likes of which cannot be sustained.

By taking the right to speak from some and giving it to others, the Government deprives the disadvantaged person or class of the right to use speech to strive to establish worth, standing, and respect for the speaker’s voice. “The Government may not by these means deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration” (*Citizens United*, 130 S. Ct. at 899). Moreover, the Court recognized that upholding the statute and allowing the government to ban corporations from engaging in political speech could result in suppression of speech in other media such as books, blogs, or social networking websites. The government’s interest in leveling the political influence playing field between individuals and corporations was unconvincing when one considers that a “mere 24 individuals contributed an astounding total of \$142 million” during the 2008 election (*Id.* at 908). Simultaneously, other like-minded citizens who have organized under the corporate form were prohibited from having their voices heard. The Court rightly concluded that the First Amendment is part of the foundation for the freedom to exchange ideas, and the public must be able to use all kinds of forums to share those ideas without fear of governmental reprisal.

CAMPAIGN FINANCE LEGAL LANDSCAPE POST-*CITIZENS UNITED*

As mentioned at the outset of this article, *Citizens United* caused an eruption of criticism about the holding’s impact on the world of campaign finance and the potential corruptive influence of corporations and unions on the political process. Critics of the decision should take some comfort in the reality that *Citizens United* will likely have less of a negative impact, if at all, than originally feared.

First, while some early supporters of the BCRA touted that its provisions barred corporations and unions from funding political ads, in reality, the BCRA merely required that corporations and unions finance the ads through their PACs or similar voluntarily financed segregated funds. PAC’s were exempted under the BCRA, and even though they were complicated to create and manage, they did afford corporations a forum to participate in the political process. So, as long as corporations and unions collected campaign funds from their members with the member’s informed consent, these entities could continue to influence elections and some experts even expected the number of ads to increase after the passage of the BCRA. Moreover, even though corporations and unions are no longer prohibited from engaging in independent expenditures in support of or against political candidates, their participation in elections remains highly regulated. For example, direct contributions by corporations and unions are still prohibited under federal law and under the laws of 24 states. A corporation or union still cannot donate corporate money directly to, or coordinate their political spending with, candidates for political office. The laws requiring specific notices or disclaimers on political advertising remains untouched by *Citizens United*. There is still a myriad of disclosure laws governing independent expenditures and electioneering communications on the part of corporations and unions. Thus, even if a corporation or union were to independently expend funds in support of a candidate, money that is donated to the corporation for the purpose of financing said expenditures would be subject to the disclosure laws. And last, despite President Obama’s declaration that foreign entities will now have greater influence on American elections, foreign corporations and their subsidiaries are still subject to the existing spending bans.

What has not been widely discussed is that *Citizens United* has spawned a new wave of litigation concerning several other aspects of the BCRA. For example, two federal courts issued campaign finance law decisions in the spring of 2010 that can trace their origins back to *Citizens United*. In *SpeechNow.Org v. FEC*, the D.C. Circuit Court of Appeals was asked to weigh in on the constitutionality of the BCRA's contribution limitations and disclosure requirements as applied to contributions to a PAC. The court held that, since the expenditures themselves do not corrupt, it should follow that; contributions to groups that plan to make those expenditures will not lead to corruption either. But this unfettered right to donate to a group like SpeechNow does not extend to the right to donate to an actual political party. As such, "under current law, outside groups – unlike candidates and political parties – may receive unlimited donations to both advocate in favor of political candidates and to sponsor issue ads" (Republican National Committee v. Federal Election Commission, 698 F. Supp. 2d 150 (D.C.D.C. 2010)). This particular dilemma was raised in the second case – *Republican National Committee v. FEC*. In the *Republican National Committee* case, the RNC challenged the BCRA's soft-money ban claiming that it had the right to raise and spend unlimited amounts of money on all kinds of election-related issues and that the ban discriminates against the national political parties. The court held that plaintiffs' claims were at odds with the Supreme Court's holding in *McConnell* and that the Court's recent decision in *Citizens United* did not disturb the part of *McConnell's* holding that addressed the constitutionality of BCRA's limits on contributions to political parties.

There are also several new issues that have been raised as a result of the holding in *Citizens United*. When President Obama "dressed down" the Supreme Court in his State of the Union address in 2009, he, along with other critics conveniently failed to mention the group that benefitted the most from the decision – labor unions. Skeptics could argue that this is because nine out of ten dollars spent on elections by unions goes to the Democrats – Obama's party. It is interesting that the majority of the criticism of *Citizens United* comes from the political left, and while they lament the decision's impact as it relates to corporations, those same critics often fail to mention the impact on union participation in the electoral process. Unions admittedly spent approximately one half billion dollars in the 2008 election, a figure that dwarfs the spending of corporations.

In addition, while critics of the decision claim the majority "piously claim it's about free speech," they have sat silent, or in some cases applauded, as the Supreme Court relies on First Amendment jurisprudence in cases about Internet pornography, flag burning, topless dancing, cross-burning, and even the creation, sale, or possession of films depicting animal torture for purposes of sexual arousal. To hold that such conduct described in these cases is worthy of constitutional protection, yet simultaneously support the idea that a corporation that expends its funds in support of a political candidate should be exposed to criminal liability seems irreconcilable. Last, while political pundits and scholars have criticized the ability of corporations to use their vast wealth to allegedly influence elections, they rarely express the same concern for the sudden rise of wealthy individuals who are using their own millions to either buy an elected position for themselves or use it to influence the outcome of others. Recent political candidates like Mayor Michael Bloomberg in New York, California Gubernatorial candidates Arnold Schwarzenegger and Meg Whitman, New Jersey Governor John Corzine, the Kennedy and Bush families, Connecticut Senate candidate Linda McMahon and Florida Senate candidate Jeff Greene, and billionaires George Soros and Rupert Murdoch, just to name a few, have all used their own immense financial resources in an effort to influence the electorate.

While many critics focus on corporations making sizable expenditures on behalf of a candidate, they lose focus of the reality that the public's participation in the political process has changed with the advent of the Internet. For example, given the success of Internet fundraising in the 2008 presidential election, it is likely that in future elections, aggregations of smaller individual donations will actually outweigh the spending of corporations. In his 2008 Presidential campaign, Barack Obama raised close to a half-a-billion dollars via Internet donations to his campaign. Of the 6.5 million donations received by Obama, 6 million were for \$100 or less, with the average on-line donation being \$80. According to the Federal Election Commission, the total sum of individual donations of \$200 or less to all political candidates in the 2008 election exceeded that of contributions from individual donors who gave more than \$2,000. In

fact, to simplify and hopefully enhance this trend, some experts have suggested new ways for individual citizens to contribute to campaigns by way of a tax credit. The proposal provides that each American should be allowed a limited federal tax credit that could only be applied if the money is donated to a federal candidate during election years. It is further posited that, if the tax credit could be collected electronically in the form of a credit card, debit card, or directly from a bank account, the simplicity would increase participation and could result in candidates paying more attention to mainstream issues.

CONCLUSION

Citizens United, while controversial, marks the end of more than twenty years of erosion of the First Amendment rights of corporations and unions, particularly on the issue of political speech. As Justice Kennedy stated, one of the hallmarks of the First Amendment is that it should not be applied based on the identity of the speaker. The idea that a speaker who engages in the political process can be imprisoned for his or her conduct is the antithesis of what freedom of speech is all about and sadly brings to mind regrettably similar acts in our history such as the Alien and Sedition Acts. As noted above, there is likely to be very little change in corporate political activities after *Citizens United* because corporations have been participating in the political process despite the existence of the BCRA. They just had to do so through their PACs. After the dust settles, if Congress still believes that it is wrong to allow corporations and unions to use independent expenditures in support of or in opposition to a candidate for political office, they can certainly take appropriate action to address the problem – so long as that action is not unconstitutional.

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