

February 9, 2010

## Citizens United v. Federal Election Commission

On January 21, the U.S. Supreme Court struck down the restrictions on corporate expenditures encompassed in the Bi-Partisan Campaign Reform Act of 2002 (commonly known as the McCain-Feingold Act). The 5-4 opinion found the Act's prohibition on the use of general treasury funds by corporations or unions to directly advocate the election or defeat of candidates or to broadcast electioneering communications ran afoul of the First Amendment's established protections of free speech. This finding reversed a line of previous decisions that upheld restrictions on corporate political expenditures. The Court did not, however, reverse its prior position on general disclosure and disclaimer requirements.

Prior to this decision, corporations and unions were prohibited from using general treasury funds to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary or 60 days of a general election. The Court noted that the following acts would be felonies under the Act:

- The Sierra Club runs an ad within the crucial phase of 60 days before the general election, that exhorts the public to disapprove a congressman who favors logging in the national forest;
- The NRA publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a hand gun ban; and
- The ACLU creates a website telling the public to vote for a presidential candidate in light of that candidate's defense of free speech.

The Court described these prohibitions as "classic examples of censorship." It went on to explain that the PAC exemption from the expenditure ban was a "burdensome alternative" to corporate free speech because PACs are expensive to administer and subject to extensive regulations, resulting in a higher burden on smaller and non-profit corporations.

Applying a strict scrutiny analysis, the Court determined that there was no compelling governmental interest in prohibiting corporate political expenditures because it does not distort the marketplace of ideas, and there is no evidence that it creates a quid pro quo political arena. It concluded that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."

While the Court struck down these prohibitions, it upheld the Act's disclaimer and disclosure requirements because "they impose no ceiling on campaign-related activities or prevent anyone from speaking." Under the Act, televised electioneering communications funded by anyone other than a candidate must include:

1. a disclaimer that "\_\_\_\_\_ is responsible for the content of this advertising;"
2. a statement that the communication "is not authorized by any candidate or candidate's committee;" and
3. the name and address (or Web site) of the person or group that funded the advertising.

And the Act also requires any person who spends more than \$10,000 on electioneering communications within a calendar year to file a disclosure statement with the FEC. The statement must identify: (1) the person making the expenditure, (2) the amount of the expenditure, (3) the election to which the communication was directed, and (4) the names of contributors.

However, the Court acknowledged that as-applied challenges to these restrictions would be available if a group could show a "reasonable probability" that disclosure of its contributors names "will subject them to threats, harassment, or reprisals from either Government officials or private parties."

The Court expressly declined to address whether there would be a compelling governmental interest in placing a similar limit on foreign corporations.

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