

Seventh anniversary of Citizens United v. Federal Election Commission

January 4, 2017

It has been seven years since the United States Supreme Court issued its *Citizens United v. Federal Election Commission* opinion on January 21, 2010. This (5-4) decision significantly altered the campaign finance legal landscape.

Citizens United, a nonprofit corporation released a documentary critical of then-Senator Hillary Clinton who was running for the democratic presidential nomination. *Citizens United* wanted to make the documentary available on cable television through video-on-demand within 30 days of primary elections. They produced television ads to run on broadcast and cable television. 2 U.S.C. §441b prohibited corporations and unions from using their general treasury funds from making independent expenditures for speech that is “electioneering communication” or for speech that expressly advocates for the election or defeat of a candidate. Violators of this law could have faced civil or criminal penalties. *Citizens United* sought declaratory and injunctive relief. They argued that §441b was unconstitutional as applied to the documentary and that the Bipartisan Campaign Reform Act of 2002 (BCRA) §§201 and 311 were unconstitutional as applied to the documentary and advertisements for it.

Justice Kennedy wrote the opinion for the majority which held that political spending is a form of protected speech under the First Amendment, and the government may not prevent corporations or unions from spending money to support or denounce individual candidates in elections. The Court noted that although corporations may not give money directly to campaigns, they may seek to persuade the voting public through other means, including ads.

Before *Citizens United*, individuals and corporations were able to contribute unlimited checks to social welfare groups such as 501(c)3 and 501(c)4 organizations, whose principal purposes were issue advocacy rather than political activity. Groups such as Americans for Prosperity and Karl Rove’s Crossroads GPS are social welfare groups. Social welfare groups generally do not have to disclose donor’s identities to the public.

Individuals could also contribute without limits to 527 groups, such as America Coming Together or Swift Boat Veterans for Truth. However, neither 527 groups nor social welfare groups could engage in “express advocacy” which was considered overtly making the case for one candidate over another. These groups were also prohibited from using corporate money for “electioneering communications” which is a category of speech defined as radio or television advertising that mentions a candidate’s name within 30 days of a primary or 60 days of a general election.

After *Citizens United*, any group is permitted to use corporate money to directly advocate for candidates that it believes to deserve citizens’ votes and explain why. Groups may use corporate money to do this right up to Election Day. The “old” 527 groups have been made effectively obsolete and have been replaced by super political action committees (PACs). Super PACs must disclose the identity of their donors to the Federal Election Commission but may raise unlimited amounts of money from donors, including corporations and groups such as labor unions. Super PACs may also spend unlimited amounts of money to advocate for and against candidates for office but cannot donate money directly to political candidates. And their spending must not be coordinated with that of the candidates they benefit.

Although it may not seem so, *Citizens United* did clarify the expenditure rules for corporations. Corporations may not make

coordinated communications. In general, a communication is coordinated if it is made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee or their agents, or a political party committee or its agents. However, corporations and labor organizations may use treasury funds to make independent expenditures in connection with federal elections and to fund electioneering communications. An independent expenditure is the exact opposite of a coordinated communication. Therefore, corporations may use treasury funds to expressly advocate the election or defeat of a clearly identified candidate as long as it is independent and not made in coordination with the candidate or his or her campaign.

Many campaign finance reform advocacy groups and other Americans from both parties have argued for the overruling of the Citizens United decision. Recent polls have shown that four out of five Americans say money plays too great a role in political campaigns. However, most Americans are skeptical about campaign finance reform because they believe most candidates promote their donors' interests. These voters' campaign finance reform cynicism may be proven wrong as the country inaugurates President-elect Trump, who has promised to "drain the swamp" in Washington, D.C., and purported to self-fund his primary campaign.

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