The New World of Campaign Finance

Charles F. Williams


Federal law had long prohibited corporations and unions from using general treasury funds to make either direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate. It didn’t matter where the ads appeared—print, online, or TV. In any medium, corporations and unions were barred from printing or broadcasting political ads that said “vote for x” or “don’t vote for y.”

The rationale for these restrictions was plain: Congress believed that without them, big corporations and unions could use their deep pockets to buy ads that would drown out other speech and unfairly influence federal elections. All that seemed specifically at issue in Citizens United, then, was the scope of some amendments to the Federal Election Campaign Act (FECA). The amendments were part of the Bipartisan Campaign Reform Act of 2002 (BCRA), more commonly referred to as “McCain-Feingold.” These provisions added several additional campaign finance restrictions beyond the original ban on express advocacy.

Under McCain-Feingold, corporations and unions were also barred from using their general treasury funds to make independent expenditures for so-called “electioneering communications.” This ban, which includes any corporate or union ad that “refers” to a clearly identified federal candidate even if it doesn’t expressly say, “vote for x” or “don’t vote for y,” was a broader prohibition than the preexisting FECA bans. Nevertheless, these new restrictions only applied in a few specified situations.

They did not apply to print or Internet communications, but only to “broadcast, cable, or satellite” communications—essentially, radio and TV ads. Even then, they applied only to advertisements that featured a candidate for federal elections, and in the case of presidential elections, only to communications that were distributed so as to be capable of reaching 50,000 potential voters. And they only kicked in 30 days before a primary election and 60 days before a general election.

In the run-up to the 2008 election, a seemingly narrow question arose: Could the McCain-Feingold restrictions on traditional broadcast ads be applied to a corporation’s plans to air a 90-minute “documentary” on a presidential candidate? The documentary at issue was entitled Hillary: The Movie, an anti-Hillary Clinton movie produced by Citizens United, a conservative nonprofit corporation that accepted funds from for-profit corporations. The movie had already been shown in theaters and distributed on DVD, but now Citizens United wished to make it available on cable TV. To make that happen, it planned to pay a cable TV consortium $1.2 million to make the documentary available to its subscribers “on demand” within 30 days of the 2008 Democratic presidential primary elections in which then-Senator Clinton was running.

The Federal Election Commission (FEC), the independent regulatory agency charged with administering and enforcing the FECA, declared that the planned delivery of the movie as a video-on-demand within 30 days of the primary was an “electioneering communication” featuring a presidential candidate and paid for with corporate funds. Therefore, it concluded, Hillary: The Movie was barred from cable broadcast during the McCain-Feingold blackout dates. Moreover, the FEC ruled, the campaign finance rule also barred Citizens United from carrying out its plans to broadcast 10- and 30-second advertisements promoting the documentary unless such ads included the required disclosures detailing the people or organizations who were paying for the ads.

Citizens United sued in a special three-judge federal court to challenge these restrictions. The court agreed with the
FEC that (1) *Hillary: The Movie* was the "functional equivalent" of express advocacy, which could not be paid for with corporate funds and (2) that the Act's disclosure rules also applied to the organization's movie ads.

Through the special BCRA procedures, Citizens United then appealed directly to the Supreme Court. When the briefs were filed, Citizens United argued not only that its movie was not the "functional equivalent" of express advocacy but that it also was not a form of "electioneering" under McCain-Feingold.

Oral arguments were held on March 24, 2009. At the opening gavel, the order of battle looked like this: Justices Kennedy, Scalia, and Thomas were deeply skeptical of the constitutionality of any campaign finance law restrictions on speech; Chief Justice Roberts and Justice Alito were generally skeptical of such laws but more reluctant to overrule precedents. And Justices Stevens, Souter, Ginsburg and Breyer were generally supportive of Congress's campaign finance reform efforts.

The issue before the justices, then, was whether McCain-Feingold, which clearly barred corporations from funding a traditional 30- or 60-second political attack ad in the 30-day period prior to a presidential primary, should be read as also barring the same corporation from funding a 90-minute movie that, while not using the words, "please don't vote for Senator Hillary Clinton," was intended to convey that very message.

At the outset, the Citizens United attorney faced aggressive questioning as he tried to argue that, even if it might be constitutional for Congress to bar a 1-minute ad, it couldn't bar a 90-minute one. Even Justice Kennedy, upon whose vote Citizens United was counting, seemed unpersuaded:

If we concede—and at the end of the day you might not concede this, but if we take this as a beginning point, that a short, 30-second, 1-minute campaign ad can be regulated, you want me to write an opinion and say, well, if it's 90 minutes, then that's different... [It] seems to me that you can make the argument that 90 minutes is much more powerful in support or in opposition to a candidate."

So this didn't look too promising for Citizens United. But the tide turned dramatically when, in the course of addressing hypothetical questions designed to
gauge the government’s view of the scope of McCain-Feingold, the government’s attorney in this first round found himself sounding like he was defending the constitutionality of banning books that contained even small passages that could be construed as “the functional equivalent of express advocacy.”

Slate.com’s senior legal correspondent Dahlia Lithwick describes what happened:

But when Justice Samuel Alito asks whether the government—if it can regulate documentaries—might also regulate a book containing “express advocacy” prior to an election, Stewart agrees that it might.

“That’s pretty incredible,” splutters Alito. “You think that if—a book was published, a campaign biography that was the functional equivalent of express advocacy, that could be banned?” Not banned, clarifies Stewart. Congress could just “prohibit the use of corporate treasury funds” to publish it. Oh, Malcolm Stewart. ... You did not just say the government might engage in a teeny little bit of judicious, narrowly tailored book-banning, did you?

At this point, a horrified Anthony Kennedy gets even paler than his usual pale self: “Is it the Kindle where you can read a book? Take it that’s from a satellite. So the existing statute would probably prohibit that under your view? ... If this Kindle device where you can read a book which is campaign advocacy, within the 60- to 30-day period, if it comes from a satellite, it can be prohibited under the Constitution and perhaps under this statute?” Again Stewart clarifies that it wouldn’t be banned, but a corporation could be barred from using its general treasury funds to publish such a book and would be required to publish it through a PAC. The chief justice seeks to clarify that this would be so even in a 500-page book with only one sentence that contained express advocacy. Stewart cheerfully agrees. The chief justice wonders whether this would apply even “to a sign held up in Lafayette Park saying vote for so-and-so.” Stewart doesn’t quite say no.

Well, then, Justice Kennedy pointed out, if the government saw no distinction under the Act between barring a 30-second attack ad and barring Citizens United’s 90-minute movie, that would seem to mean that if the Court thinks application of McCain-Feingold to a 90-minute film is unconstitutional, then “the whole statute should fall.”

Thus a case that had seemed to pose a relatively simple question regarding whether the McCain-Feingold regulations were broad enough to cover Hillary: The Movie veered into much bigger questions: was the McCain-Feingold Act a constitutional limitation on corporate spending on campaign ads and what was the continuing vitality of the Supreme Court precedents that had previously upheld such limits?

Citizens United then took another unusual twist when, rather than issuing a decision by the end of the term in June 2009, the Court ordered rearguements in September 2009—immediately before the traditional opening of the new term in October. Even more surprising, the Court issued an order asking for additional briefing on whether it should overrule its two precedents that had upheld the constitutionality of limiting corporate spending in federal elections.

The reargument before the Court had fewer surprises, but lots of firsts. It was the first Supreme Court case for the new chief justice, Sonia Sotomayor, and it was the first Supreme Court argument by the then-new Solicitor General (and, as this issue went to press, Supreme Court nominee) Elena Kagan.

The attorneys for Citizens United and the government squared off on whether corporations should be viewed as having the same rights as people under the First Amendment, or whether as the Court had previously held, corporate speech could be limited in ways that individual speech could not. Justice Scalia, who is always good at making concise summaries of opposing viewpoints, did so here at oral argument, telling the attorneys that were urging the Court to overturn its decisions upholding corporate spending restrictions:

There are—there are two separate questions that—that have been raised in opposition to your position. One is—one is that we should not resolve a broad constitutional issue where there are narrower grounds and ... an entirely separate question is the issue of stare decisis.

In the end, neither objection deterred a majority, led by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Alito, and Thomas, from overruling its precedents and striking down the McCain-Feingold limits on corporate spending.

In the majority’s view, the prohibitions amounted to an outright ban on speech that was backed by criminal sanctions and therefore in violation of the First Amendment. “If the First Amendment has any force,” Justice Kennedy wrote, “it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”

Justice Stevens filed a 90-page dissent joined by Justices Ginsburg, Breyer, and Sotomayor that hammered at the majority’s decision to treat corporate speech the same as human speech:

In the context of election to public office, the distinction between corporate and human speakers is significant. Although they make enormous contributions to our society, corporations are not actually members of it. They cannot vote or run for office. Because they may be managed and controlled by nonresidents, their interests may conflict in fundamental respects with the interests of eligible voters. The financial resources, legal structure, and instrumental orientation of corporations raise legitimate
concerns about their role in the electoral process. Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races.

It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.

Moreover, Justice Stevens noted, the idea that Congress could not regulate corporate political speech ahead of elections would have been news to the Framers.

The Framers thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues, they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind.

To Justice Kennedy, however, the briefings and reargument had clarified that at bottom this case involved the government’s attempt to censor unpopular political speech, which is the kind of speech that lies at the very core of the First Amendment.

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.

What Effect in the 2010 Elections?

Two points seem clear about the decision: (1) content restrictions on ads bought by corporations and unions are no longer permissible; (2) neither are time-period restrictions on when corporations may buy political advertising. Everything else—including the short- and long-term practical effects of the Court’s decision on political campaigns, remain hotly debated, and for a non-expert, almost impossible to gauge with any confidence.

Critics believe as, President Obama does, that the Court has given a green light to a new stampede of special interest money in our politics. It is a major victory for big oil, Wall Street banks, health insurance companies and the other powerful interests that marshal their power every day in Washington to drown out the voices of everyday Americans. This ruling gives the special interests and their lobbyists even more power in Washington—while undermining the influence of average Americans who make small contributions to support their preferred candidates.

Indeed, the critical reactions from (primarily) Democrats was immediate and unusually harsh. “By acting in such an extreme and unjustified manner, the (high) court badly damaged its own integrity,” said Senator Russ Feingold (D-Wisc.). “By elevating the rights of corporations over the rights of people, the court damaged our democracy.”

The decision’s supporters, on the other hand, agree with Justice Alito, who was caught mouthing the words “not true” at the State of the Union address in reaction to the president’s claim that the Justices sitting just a few feet away from him had “reversed a century of law to open the floodgates for special interests—
including foreign corporations—to spend without limit in our elections.”

On the one hand, said Floyd Abrams, the First Amendment attorney who argued part of the case on behalf of Citizens United, it was a sweeping decision that made it very clear that “the First Amendment protects corporate speech about politics and government. It is not for Congress to decide who can say what.” But on the other hand, he told Politics Magazine, the practical effects might not amount to all that much, noting that “in about half of the country’s states, unlimited corporate expenditures are already permitted and there isn’t much of a difference in corporate spending in those states compared with others.”

Other commentators have wagered that big corporations may be wary of alienating potential customers by associating themselves too closely with one political candidate or another. And Congress is moving quickly to toughen that deterrent by working to enact strict new disclosure requirements designed to ensure corporations cannot mask their identity by funneling their political ad money through other groups.

Meanwhile, the campaign ads have already begun. One of the very first appeared in Texas, when KDR Development Inc. ran ads in the Jacksonville Daily Progress, the Tyler Morning Telegraph and the Panola Watchman attacking a Republican candidate in a primary race for Congress, Chuck Hopson. (Hopson went on to win the race handily.)

Unions too may be getting into the act—in Arkansas, the Communications Workers of America has been preparing TV ads that seek to tie Senator Blanche Lincoln (D-Ark.) to “Big Oil” and the British Petroleum disaster in the Gulf.

In the near term, perhaps the biggest test of the campaign ground rules will be watching how the money flows this fall from corporations and unions affected by Health Care reform. “The most alarming part of Citizens United is that theoretically insurance companies could go to
members and say, "Oppose health reform, or I am going to run a million-dollar ad campaign in your district,"" Dan Pfeiffer, the White House communications director, told Time magazine. "That's the nightmare scenario."10
Time will tell! 

Notes

Charles F. Williams is editor of PREVIEW of United States Supreme Court Cases, a publication of the ABA Division for Public Education.

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