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Courts and Congress Respond to Citizens United v. Federal Election Commission

By Brian P. Sharkey

Since the U.S. Supreme Court issued its 5–4 opinion in *Citizens United v. Federal Election Commission*, 558 U.S. __, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), there has been much controversy and heated rhetoric surrounding the campaign finance decision. The debate over the Court's ruling was highlighted during President Obama's 2010 State of the Union Address when he criticized the decision and Justice Alito, who was seated a few feet away, could be seen shaking his head in disagreement and mouthing what appeared to many as the words "not true."

The reason for the intense focus on this case, in the legal community and the mainstream media, is that the Supreme Court struck down corporate political expenditure bans. Specifically, the Court's ruling overturned federal law, as amended by section 203 of the federal Bipartisan Campaign Reform Act of 2002 (BCRA), that barred non-profit and for-profit corporations and unions from using their general treasury funds to make independent expenditures for speech expressly advocating the election or defeat of a federal candidate and for speech considered an "electioneering communication" as defined by federal law. Such expenditures were considered independent because they are separate from and not coordinated with candidates or campaigns.

The Court ruled in *Citizens United* that it was unconstitutional for Congress to prohibit corporations and unions from making such expenditures because they constitute core political speech that is protected by the First Amendment. The Court rejected each of the rationales that the government offered in support of the ban on corporate and union expenditures: 1) *an anti-distortion rationale*: the government argued that corporations, due to their corporate form, could aggregate immense wealth and then use that unfair economic advantage to distort the political process for their own benefit; 2) *an anti-corruption rationale*: the government asserted that corporate political speech could lead to corruption or the appearance of corruption; and 3) *a shareholder protection interest*: the government sought to protect dissenting corporate shareholders from being forced to fund corporate political speech. A short quote from the opinion concisely summarizes the majority's view: "the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations." *Citizens United*, 558 U.S. ___, 130 S. Ct. at 913, 175 L. Ed. 2d at 799.

The Court's ruling is especially significant because it not only struck down the federal law banning corporate expenditures but it also invalidated the laws of twenty-four states that limit or ban such expenditures. However, it is important to note that the *Citizens United* decision left intact the federal law that prohibits corporations from making political contributions directly to candidates.

The importance of the Court's decision in *Citizens United* can be seen through criticisms of the ruling during recent hearings held by various U.S. Senate and House committees. (*See* http://judiciary.senate.gov/hearings/hearing.cfm?id=4459; http://rules.senate.gov/public/index.cfm?p=CommitteeSchedule&ContentRecord_id=7c3867e2-85df-46aa-84e1-b7112cda41a2; http://www.house.gov/apps/list/hearing/financialsvcs_dem/hrcm_030410.shtml; http://judiciary.house.gov/hearings/hear_100203.html.) During those hearings, several senators, including Sen. Schumer, along with constitutional law scholars like Laurence Tribe outlined their critiques of the decision. Some of the critics labeled *Citizens United* as the most destructive campaign finance decision in Supreme Court history because they felt that the Court's ruling that corporations have a First Amendment right of free speech would result in corporations using their warchests to control campaigns and intimidate candidates and officeholders. Others criticized the procedural aspects of the case and contended that the Court could have avoided the constitutional First Amendment issue and decided the case on narrower grounds. Still others criticized the Court on *stare decisis* grounds because the majority overruled several of its recent decisions.

Supporters of the ruling, such as Sen. Bennett and constitutional law scholar Bradley Smith, also made their presence felt during those hearings. They defended *Citizens United* as a reaffirmation of the importance of the First Amendment right to engage in political speech. They asserted that the ruling would simply lead to more political speech, which is beneficial to the political system, and they questioned whether corporations would spend nearly as much money as critics claim.

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Supporters of the decision also contended that the Court did not deviate from precedent but instead corrected several decisions that were inconsistent with prior case law.

One aspect of *Citizens United* that appears to go largely unnoticed is that the Court upheld BCRA's disclosure and disclaimer requirements, which, among other things, require individuals who spend more than $10,000 on electioneering communications within a calendar year to file a disclosure statement with the Federal Election Commission. Such disclosure statements must identify the person making the expenditure, the amount of the expenditure, the elections to which the communication was directed, and the names of certain contributors. The Court rejected constitutional challenges to these provisions.

For campaign finance attorneys and those who have clients who are interested in participating in the political system, *Citizens United* leaves us with several key issues to monitor. First, what, if anything, will Congress do in response to *Citizens United*? As noted previously, the U.S. Senate and the House have held hearings about the decision, and several pieces of federal legislation have been introduced to chip away at the ruling. Second, what impact will *Citizens United* have on lawsuits that challenge other aspects of campaign finance law? Already, the U.S. Court of Appeals for the District of Columbia Circuit applied *Citizens United* to strike down a ceiling on contributions to independent political groups that use their funds to expressly advocate for the support or defeat of federal candidates. www.*SpeechNow.org* *v. Fed. Election Comm'n*, No. 08-5223 (D.C. Cir. Mar. 26, 2010). However, a three-judge panel of the U.S. District Court for the District of Columbia upheld federal limits on certain "soft money" donations to political parties, as the court determined that *Citizens United* did not support the plaintiffs' constitutional challenge to those limits. *Republican Nat'l Comm. v. Fed. Election Comm'n*, No. 08-1953 (D.D.C. Mar. 26, 2010). Moreover, challenges to other provisions of federal and state campaign finance laws are currently pending in courts throughout the country. Congress' response to *Citizens United* and how campaign finance lawsuits are decided will significantly impact the political process.

NEXT **STEPS**

- *Analysis of the* Citizens United *Case: A Victory for Free Speech or a Threat to Democracy* (CLE Audio CD Package). 2010. PC # CET10CUCC. ABA Center for CLE, Section of Individual Rights and Responsibilities, Section of State and Local Government Law.

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