

MEMORANDUM

TO: Interested Parties

FROM: William M. Todd

DATE: January 25, 2010

SUBJECT: *Citizens United v. Federal Elections Commission*

The Supreme Court of the United States has just announced one of the most significant decisions regarding the intersection of campaign finance laws and the First Amendment. In *Citizens United v. Federal Elections Commission*, the Supreme Court struck down key provisions of the federal campaign laws that contained restrictions on corporate and union spending in connection with federal elections. This decision is a strong reaffirmation of the rights of freedom of speech and association guaranteed by the First Amendment.

Background

Citizens United is a non-profit organization that is tax exempt under §501(c)(4) of the Internal Revenue Code. In January, 2008 Citizens United released a documentary film that portrayed then Sen. Hillary Clinton in a very unflattering manner. Because the film would circulate during the 2008 primary season, Citizens United was concerned about its potential liability under the McCain-Feingold “electioneering” limitations in federal campaign finance law (2 U.S.C. § 441b).

Under the McCain-Feingold limitations, as written, corporations and labor unions are prohibited from independent expenditures on any communications to the public that meet the definition of “electioneering.” Generally speaking, the McCain-Feingold provisions criminalized any communications that criticized a federal candidate during the 30 days before a primary election and 60 days before a general election, that was paid for with corporate or union treasury funds.

In order to clarify whether circulation of the documentary might subject Citizens United to civil and criminal penalties, the organization filed a lawsuit in federal court against the Federal Elections Commission (“FEC”) seeking declarative and injunctive relief. After losing in the lower court, Citizens United appealed to the U.S. Supreme Court.

The Supreme Court Decision

In the majority opinion, written by Justice Kennedy, the Supreme Court held that the McCain-Feingold limitations on the right of corporations, and labor unions, to freely speak about their opinions of federal candidates were unconstitutional on their face. The Supreme Court held that these statutes violated the First Amendment's express statement that Congress can enact "no law" limiting freedom of speech and freedom of association.

In his sweeping opinion, Justice Kennedy held that organizations such as for profit and non-profit corporations, as well as labor unions, have essentially the same First Amendment protections of their political speech as enjoyed by individuals. The majority opinion flatly rejects the often offered excuse for these statutory limitations upon First Amendment rights, that granting freedom of speech to organizations will lead to "corruption" in the political process.

The Court's opinion also specifically dismantled the "media corporation" exception that had been written into the McCain-Feingold limitations. The Supreme Court found that there is nothing in the First Amendment that permits "media corporations" to be treated any differently than any other corporate or unincorporated organization.

In reaching its conclusion in the *Citizens United* case, the Supreme Court specifically overruled earlier precedents, such as *Austin v. Michigan Chamber of Commerce*, that had indicated that corporations (for profit and non-profit) and labor unions had a lesser degree of First Amendment for political speech than individuals.

The unmuzzling of these organizations has drawn a predictable response from the political class that promotes this type of censorship. President Obama decried the ruling and New York Senator Chuck Schumer called for "hearings," into the Supreme Court's decision.

Similarly, progressive groups are calling for a constitutional amendment to deprive corporations and labor unions of their free speech rights. Moreover, their allied liberal law school professors are already seeking new ways to limit the freedom of speech by circumventing the decision in *Citizens United*.

Whether or not the commentators agree with the result in *Citizens United*, all have agreed that this is a watershed decision that has dramatically changed the balance between First Amendment rights and the ability of the Congress to restrict those rights the guise of "campaign finance" relations.

What Has Changed

There is a tremendous amount of misinformation circulating in the media and general public regarding the scope of the *Citizens United* decision. In light of the complexity of the campaign finance laws, this is hardly surprising.

In reality, the *Citizens United* decision has a limited specific impact on the federal campaign finance laws. It does not address state laws that are similar to the federal statutes. However, we can expect that the opinion in *Citizens United* will be used to invalidate similar state laws in the near future.

The *Citizens United* decision has specifically invalidated the federal campaign finance law provisions that prohibited the use of corporate, or union, treasury funds to publically comment upon politicians in the 30 days before a primary election or 60 days before a general election. The Court held that these censorship provisions, that prohibited even independent communications by organizations, that were labeled “electioneering,” violated the First Amendment.

Accordingly, beginning immediately corporate and union treasury funds can be used for public communications that criticize federal politicians at any time. The McCain-Feingold “electioneering” restrictions on free speech are now gone.

What Has Not Changed

The Court did not overturn the disclaimer and disclosure provisions that apply to “electioneering” communications in the federal campaign finance laws. Thus, organizations that elect to engage in “electioneering” communications are free to do so – however, they must comply with the disclaimer rules and the disclosure rules.

The Court’s decision only applies to “electioneering” public communications that are not “coordinated” with a candidate or political party. “Coordinated” communications are still subject to the regulatory scheme that remains in place.

However, it is important to note that the rules governing “coordinated” expenditures generally apply to third party messaging. Thus, an independent group and a candidate can coordinate certain types of activities, without tripping over this prohibition.

Importantly, the Court’s decision does not address the long-standing prohibition on direct corporate and union contributions to candidates, and certain political party accounts. Although political parties and candidates are likely to press for an extension of the *Citizens United* decision in this area, it is unlikely that even the current members of the Court would be willing to change those long standing prohibitions.

Lessons From Citizens United

Perhaps the most strictly legal feature of the decision is the breadth of protection afforded to political speech. Whereas certain earlier Supreme Court decisions had encouraged the political class to trim away free speech rights (*e.g., Austin v. Michigan Chamber of Commerce*), the *Citizens United* decision states out a broad swath of political speech that is protected by the First Amendment. In the future, it will be extremely difficult to justify restrictions on political speech because of this decision.

From a practical perspective, the *Citizens United* decision has completely changed the dynamics of prohibited fundraising. Hereafter, independent organizations and groups will be permitted to collect and expend unlimited sums of money for or against a candidate. Only political parties and candidates will be subject to the regulated environment of the political process.

Accordingly, we can expect that countless groups will be organized quickly to take advantage of this newly granted freedom. Moreover, candidates and, to a lesser degree, political

parties will be forced to assemble loose-knit coalitions of independent groups to advance their interests. This will dramatically reduce the power of political parties over the process, and consequently, permit more independent voices to be heard in the political debate.

Accordingly, the door is now wide open for independent groups to engage in the political debate and have a real impact upon the process. Groups that choose not to do so have no one to blame but themselves.

WMT:vw