
The Supreme Court Decision in *Citizens United v. Federal Election Commission*: Impact On Corporations

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On January 21, 2010, the Supreme Court ruled 5-4 in Citizens United v. Federal Election Commission. This decision changes the way in which corporations may spend corporate money to support or oppose federal candidates. It should be made clear at the outset, however, that this decision does not give corporations the ability to contribute directly to federal candidates, it merely gives them the ability to make unlimited independent expenditures and partake in electioneering communications.

Brief History

The Federal Election Campaign Act of 1971, as amended (the "Act"), prohibits, among other things, a corporation or labor union from making contributions or expenditures, which includes independent expenditures, in connection with any federal election. The Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the Act to extend the prohibition to any electioneering communication. An electioneering communication is a broadcast, cable or satellite communication which refers to a clearly identified federal candidate and is made within 60 days before a general election, or 30 days before a primary election, for the office sought by the candidate. BCRA also amended the Act by imposing disclaimer and disclosure requirements on electioneering communications.

The Supreme Court's Opinion

In *Citizens United*, the Court overruled the holding in the U.S. Supreme Court case *Austin v. Michigan Chamber of Commerce*. In the *Austin* case, restrictions on independent expenditures by corporations were upheld to prevent corporations from having an unfair advantage in the political marketplace based on resources amassed in the economic marketplace. According to the Court, however, such speech restrictions based on the speaker's corporate identity are contrary to the dictates of the First Amendment. The Court noted that all speakers, including individuals and the media, use money amassed from the economic

marketplace to fund their speech, and the First Amendment protects the resulting speech. Differential treatment of media corporations and other corporations cannot be squared with the First Amendment.

The Court rejected the FEC's argument that corporate political speech can be banned to prevent corruption or the appearance of corruption. The Court concluded that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. The fact that speakers may have influence over or access to elected officials does not mean that those officials are corrupt. The Court also rejected the FEC's argument that corporate independent expenditures can be limited in the interest of protecting dissenting shareholders from being compelled to fund corporate political speech. Such an interest would allow the government to ban the political speech of media corporations, and the First Amendment does not allow that power.

In overruling *Austin*, the Court stated that it is returning to the principle established in prior cases that the government may not suppress political speech based on the speaker's corporate identity and that no sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations. The Court also stated that there is no longer any basis for allowing the government to limit corporate independent expenditures and held that Section 441b's restrictions on such expenditures are invalid. The Court also overruled the portion of the U.S. Supreme Court case *McConnell v. Federal Election Commission* that upheld BCRA's extension of Section 441b's restrictions on corporate and union independent expenditures to electioneering communications.

What The Supreme Court's Decision Means

- Corporations are still prohibited from making contributions **directly** to federal candidates, political committees, PACs and national political parties from their treasury funds.

Independent Expenditures

- Corporations may now use unlimited treasury funds to make independent expenditures to expressly advocate the election or defeat of federal candidates. Such communications may not be coordinated with a candidate or a candidate's committee.
- Treasury funds can be used to communicate to the public and corporate employees and shareholders about federal candidates (e.g., to send out brochures or fliers supporting or opposing specific federal candidates).
- Treasury funds can be used to sponsor advertisements to expressly advocate the election or defeat of a federal candidate, subject to all applicable disclaimer requirements.
- Corporate independent expenditures will be subject to reporting under the Act.

Electioneering Communications

- Corporations may now use treasury funds close in time to an election for advertisements which refer to a federal candidate but do not expressly advocate the election or defeat of the candidate.
- Such advertisements must comply with the disclaimer and disclosure requirements in the Act and BCRA.

Important Note

The Court's decision does not directly impact federal PACs. Federal PACs will continue to function as they did before. Federal PACs can still make contributions directly to federal candidates, other political committees and national political parties (within the same limits). **Caution:** A corporation's PAC activities, particularly those involving sponsorship of events featuring a federal candidate, could be used as evidence of coordination if the corporation makes independent expenditures in support of the same candidate.

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