WASHINGTON POLICY CENTER
Improving lives through market solutions

POLICY NOTE

Citizens United Decision Affirms Free Speech Rights

"The First Amendment confirms the freedom to think for ourselves."

by John J White, Jr.
WPC Adjunct Scholar

April 2010

The Supreme Court's recent decision in *Citizens United*, striking down part of the 1971 Federal Elections Campaign Act that criminalized political speech by corporations and unions, has drawn much attention and criticism. The attention is warranted, but not the criticism. *Citizens United* is noteworthy, not so much for the decision itself, but because criminalizing independent political speech survived for so long in the face of the clear meaning of the First Amendment.

Here are the facts of the case. Citizens United, a nonprofit corporation, had produced a number of politically-themed movies. In January 2008, it released *Hillary: The Movie*. The 90-minute documentary was about then-Senator Hillary Clinton, who was also running for the Democratic Party's 2008 presidential nomination. Highly critical of the Senator, the upshot of the film was that she was unqualified to be President, bringing the film under the statutory limits on campaign spending if it were publicly distributed during election season. *Hillary: The Movie* had been released previously in theaters and on DVD, and Citizens United wanted to make it available during the 2008 presidential primary season.

The group's $12 million annual budget came mostly from individual contributions, but it also accepted corporate donations. The presence of corporate money in the Citizens United treasury exposed it to prosecution if it engaged in election-related speech.[1] Citizens United challenged the restrictions on distribution of the film and to its promotional advertising. Eventually, the case reached the Supreme Court.

The Supreme Court heard arguments on the case twice - a very unusual event. At the first session, the following exchange occurred between the government's lawyer defending the speech ban and the Court:

> JUSTICE ALITO: "What's your answer to [the] point that there isn't any constitutional difference between the distribution of this movie on video demand and providing...the same thing in a book? Would the Constitution permit the restriction of [that] as well?"
>
> MR. STEWART: "...the Constitution would have permitted Congress to apply the...restrictions to...additional media as well."
>
> CHIEF JUSTICE ROBERTS: "If it's a 500-page book, and at the end it says, and so vote for X, the government could ban that?"

[1] Use of corporate or union money for electoral advocacy involving federal candidates was a felony, punishable by five years in prison if the amount spent was $25,000 or more.

> MR. STEWART: "Well, if it says vote for X, it would be express advocacy and it would be covered by the pre-existing Federal Election Campaign Act provisions [which prohibit using corporate or union treasury money to speak about federal candidates]."[2]

Thus, under the government's theory, the freedom for the traditional press (generally corporate-owned) rested not on the First Amendment, but on an exemption in federal election laws.

Because of the far-reaching claims made by the government, the Supreme Court ordered a special, second session to address directly whether the prohibition on corporate and union speech about candidates violated the First Amendment.

The case generated multiple lengthy opinions, but the underlying reasons for the Court's decision overturning its earlier decision are best, and succinctly, expressed by the opening paragraph of Chief Justice Roberts' concurring opinion:

> "The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the First Amendment that would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations - as the major ones are. First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy."[3]

When dealing with core political speech, the Court reasoned, only a "compelling" governmental interest such as avoiding actual corruption or the appearance of corruption could justify a restriction. The Court viewed "corruption" as exchanging votes for campaign contributions - a "*quid pro quo*." The case does not affect the prohibition on corporate or union contributions directly to federal candidates, which can cause "corruption."

Independent spending, in contrast, cannot be coordinated with or approved of by a candidate. It is direct speech intended to persuade the voting public. The court held the public cannot be "corrupted" by hearing different, independent voices, even if they belong to corporations or unions.

The Court ruled that the independent spending ban impaired not only the speaker, but the public too, by limiting the public's sources of information about elections. The Court ruled: "When Government seeks to use its full power . . . 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."[4]

The Court rejected assertions of a governmental interest in restricting well-financed voices to prevent them from "distorting" debate. Justice Stevens, in dissent, argued that the government *did* have a compelling interest in preventing "distortion" of political debate that could result from spending by large institutions.

Weighing heavily against a conclusion that corporate or union spending "distorts" elections and so justifies restricting core political speech, the Court noted

---

[2] Transcript of Oral Argument, Tr. of Oral Arg. at 26-7, 29 (March 24, 2009). Available at www.supremecourtus.gov/oral_arguments/argument_transcripts/08-205.pdf.
[3] __ U.S. __, 130 S. Ct. 876, 175 L. Ed. 2d 753, 803 (2010), Roberts, C.J. concurring.
[4] 175 L. Ed. 2d at 792{-93}.

that 26 states already permit these organizations to make political expenditures in state elections, with no evidence that the electoral process in those states is corrupted thereby.

Washington is one of those 26 states. Ever since Washington state adopted limitations on campaign contributions and spending, corporations and unions have had full freedom to speak on issues or state candidates using their general funds. The *Citizens United* will have limited impact on how Washington elections for state office are conducted.

Whether and to what extent corporations and unions will use their newly confirmed right to speak about federal candidates in our state remains to be seen. But in the *Citizens United* decision, the high court re-affirmed that independent political speech is protected by the First Amendment when individuals band together, even in corporate or union form, as well as when they speak alone.

John J. White Jr. is an Adjunct Scholar of Washington Policy Center and a principal with the firm of Livengood, Fitzgerald and Alskog, PLLC, and represents a range of clients on free speech, First Amendment and campaign finance matters.