

Nonprofit Electoral Advocacy After *Citizens United*

On January 21, in a rare special session, the Supreme Court issued a 5-4 opinion in *Citizens United v. FEC*, a case that will greatly impact nonprofit advocacy activities. Although much of the media focus is on for-profit corporations, it is important to recognize what this decision means for nonprofits.

Some implications of the *Citizens United* decision:

- It does not impact 501(c)(3)s. Regardless of the changes in election law, the federal tax law that prohibits 501(c)(3)s from supporting or opposing candidates still apply. 501(c)(3)s still cannot endorse candidates or make independent expenditures suggesting who is the “better” candidate.
- It does not allow corporations to make monetary or in-kind contributions directly to candidates for federal office or to coordinate communications with candidates. The prohibition on corporate contributions to candidates and coordinated communications remain intact.
- It allows corporations, including nonprofit corporations such as issue-based 501(c)(4)s and 501(c)(6)s, to make independent expenditures containing express advocacy using the corporation’s general treasury funds to support or oppose candidates for the U.S. House, U.S. Senate, and President. An independent expenditure is a communication that urges someone to vote for or against a candidate, typically using words like “support,” “oppose,” “elect,” “defeat,” or “vote for” a candidate. Previously, independent expenditures that contained express advocacy needed to be made through Political Action Committees (“PACs”) using voluntary donations, rather than general treasury funds. However, nonprofit corporations remain subject to federal tax law, including a primary purpose restriction (political activities cannot be the primary purpose of a 501(c)(4), 501(c)(5), and 501(c)(6)) and possible tax on political activities.
- It allows corporations to make “electioneering communications.” An “electioneering communication” is a broadcast ad which refers to a federal candidate and are distributed within 30 days of a primary or convention and 60 days of a general election and are the “functional equivalent of express advocacy.” An ad is the “functional equivalent” of an express advocacy communication when it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified federal candidate.”

Although the Court split 5-4 in deciding to allow corporations to engage in independent expenditures, it overwhelmingly upheld existing disclosure and disclaimer requirements. Consequently, corporations that make “independent expenditures” and/or “electioneering communications” involving a candidate for federal office must comply with the Federal Elections Commission’s disclosure requirements as well as include appropriate “disclaimers” in the communication.

While much of the focus has been about increased spending by for-profit corporations, it is important to remember that these changes apply to issue-based organizations that promote the social good. More than ever, nonprofit corporations can and should actively participate in elections. Even if you think the case was wrongly decided, 501(c)(4)s and other nonprofit corporations (except for 501(c)(3)s) should take advantage of it--use it to strengthen democracy by increasing your public communications about the candidates and what's best for the future of our country.

The full implications of this case remain to be seen. For instance:

- Does the ruling apply to labor unions as well as corporations? While the decision does not directly address labor unions, we see no reason why unions would be treated differently.
- Will state or local laws prohibiting corporations or labor unions from engaging in express advocacy be deemed unconstitutional? It seems likely.

We anticipate that Congress, as well as state and local elections officials, will try to undo the effect of the Court's decision. AFJ will work hand-in-hand with its members and the nonprofit community to successfully steer through the post-Citizens United political arena. It may be a bumpy ride as calls for new legislation to reverse the course the Roberts court has taken are already being heard. We continue to analyze the impact of this case, and will provide updates as appropriate.

Background on the *Citizens United* case:

At the heart of *Citizens United v Federal Elections Commission (FEC)* is a feature-length documentary created by a 501(c)(4) nonprofit corporation, Citizens United, that sharply criticized then-Senator and Presidential Candidate Hillary Clinton. Although this documentary did not encourage people to vote against Senator Clinton, the depiction of Senator Clinton was the "functional equivalent" of encouraging people to vote against her, because of the way it characterized Ms. Clinton (including 40 in-depth interviews with people who personally "locked horns" with the Clintons).

The organization partially funded creation of this movie with corporate contributions and then sought to distribute the film as a pay-per-view show and to run ads to promoting the film during the period 30 days prior to the 2008 presidential primary election, in which then-Senator Clinton appeared on the ballot.

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