

In The Wake of SpeechNOW:

Are unlimited individual and corporate contributions to PACs in our future?

In its landmark ruling in *Citizens United v FEC*, the Supreme Court held that unlimited corporate spending on independent expenditures was constitutionally protected. The Court found that actual or apparent quid pro quo corruption was the only valid grounds for restricting such political speech, and that independent expenditures posed no such threat. In its wake, the march 26, 2010 decision in *SpeechNOW v FEC* by the U.S. Court of Appeals for the D.C. Circuit has extended the logic of *Citizens United* and held that individuals may make unlimited contributions to political committees that only engage in independent-expenditures and that register and report with the FEC (like any PAC).

Based on the reasoning of the courts in these cases, DB Capitol Strategies is preparing an Advisory Opinion request to the FEC. The focus of our question: In light of *Citizens United* and *SpeechNOW*, can individuals, and corporations, make unlimited contributions to *any* political committee (PAC) so long as those funds are used only for the purpose of independent expenditures, and are segregated from other funds that are used for direct candidate contributions and raised subject to normal PAC contribution limits?

DB Capitol Strategies believes the answer is yes. However, readers are strongly cautioned that what follows is an analysis of the cases and the direction the law *may* be moving. Individuals and organizations should scrupulously adhere to FEC regulations as they stand today and, if in doubt, consult an attorney.

Citizens United reaffirms first amendment rights

In *Citizens United*, 130 S. Ct. 876 (2010), the Supreme Court reaffirmed the seminal case of *Buckley v Valeo*, 424 US 1 (1976), and expressly held that preventing quid pro quo corruption, or the appearance thereof, was the only constitutionally permissible basis to restrict independent expenditures. The Court emphasized the *Buckley* distinction between direct contributions made to candidates & committees, and independent expenditures which are “*not made in concert or cooperation with or at the request or suggestion of*” candidates or committees, 2 U.S.C. § 431(17). The Court held that direct contributions are more easily susceptible to quid pro quo corruption, or its appearance, and that some restrictions on this aspect of political speech may be permissible. By contrast, because independent expenditures are by definition made without the engagement of the candidate or committee, the *Buckley* court held that they “do not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.” 424 US at 46. Now, the Supreme Court has ruled as a matter of law that “Independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,” *Citizens United*, 130 S. Ct. at 909.

SpeechNOW extends protection to political committees

In *SpeechNOW v FEC*, 2010 WL 1133857, the Court of appeals expressly applied *Citizens United*.

SpeechNOW involved a non-profit organization (SpeechNOW.org) that sought to (a) accept contributions in excess of \$5000 from individual contributors (not corporations) to run independent expenditures, and (b) not register as a political committee or be subject to PAC reporting requirements. SpeechNOW.org argued that, because it would not make any candidate contributions, it was a violation of both its and its donors' free speech rights to require SpeechNOW to register, report, and be subject to contribution limits.

In upholding the registration requirements, the Court held that "Disclosure requirements also burden First Amendment interests because 'compelled disclosure, in itself, can seriously infringe on privacy of association and belief.' *Buckley*, 424 US at 64. However, in contrast with limiting a person's ability to spend money on political speech, disclosure requirements 'impose no ceiling on campaign-related activities' *id.*, and 'do not prevent anyone from speaking.' *McConnell v FEC*, 540 US at 201." 2010 WL 1133857 at 8.

However, the Court, following the *Citizens United* holding that independent expenditures do not create actual or apparent quid pro quo corruption, found that applying limits to contributions for that purpose would violate the First Amendment rights of SpeechNOW.org and its donors. The court held that SpeechNOW.org was entitled to accept unlimited contributions from individuals for independent expenditures, but also stated "We should be clear, however, that we only decide these questions as applied to contributions to SpeechNOW, an independent expenditure-only group. Our holding does not affect...limits on direct contributions to candidates." 2010 WL 1133857 at 8.

The result is two core rules. First, an organization formed to accept contributions and make independent expenditures must register as a political committee under the same regime as a PAC. Second, such a committee, if independent-expenditure only, is entitled to accept unlimited contributions from *individuals*.

Making (some) unlimited individual and corporate contributions to PACs

SpeechNOW creates three distinct forms of PAC. The first, post-*SpeechNOW*, may accept unlimited contributions from individuals only and make independent expenditures only. The second, the traditional non-connected PAC, may accept contributions from individuals only, subject to the \$5,000 limit and may make both direct candidate contributions and independent expenditures. The third, the corporate-sponsored separate segregated fund (SSF) PAC, may accept contributions up to \$5000 from members of its restricted class and may make direct contributions and independent expenditures. SSFs also benefit from the corporate-funded "administrative fund," and the corporate parent may, post-*Citizens United*, spend unlimited sums on independent expenditures.

Taken together, corporations now enjoy greater First Amendment political speech capabilities than individuals – a stunning outcome – because they may spend unlimited funds on independent expenditures and contribute to their PACs administrative fund to essentially subsidize the SSFs ability to raise and expend candidate contributions. At the same time, individuals who band together to engage in political

speech are burdened by an unnecessary requirement that they form two distinct entities in order to perform two legally permissible acts – contributing to candidates (subject to contribution limits), and independently advocating for or against candidates if they wish to exercise their right to make unlimited contributions for this latter activity. Finally, it is nonsensical, and an infringement upon the very First Amendment rights of association and speech underlying *SpeechNOW*, that one (even a corporation) who may lawfully spend unlimited sums for independent expenditures cannot also do so in conjunction with others of like mind who share that political view.

Based on this analysis, there are three core issues to address. First, providing individuals with at least the same free speech rights as that enjoyed by corporations. Second, ensuring the exercise of free speech may be done in concert with others when it may lawfully be done by ones' self. Third, eliminating the infringement upon the first amendment by requiring that independent expenditures lawfully funded by unlimited contributions and direct contributions funded by limited contributions be made by separate PACs, even though subject to identical registration and reporting requirements.

Citizens United and *SpeechNOW* form the basis upon which a new approach to PACs should be built to address these issues. First, PACs should be free to accept both unlimited contributions for independent expenditures AND limited contributions for direct candidate contributions. So long as contributors indicate their purpose and the contributed funds are segregated within the PAC, there is no rationale for forcing one who engages in political speech to do so through two separate vehicles, particularly when corporations are not similarly burdened. While there will be questions as to allocation between accounts of the administrative expenses of a joint-purpose PAC, logistic considerations are not sufficient to deny first amendment rights. Secondly, PACs should be free to accept unlimited corporate contributions to their independent expenditure-only accounts. Corporations can now make independent expenditures freely, and independent expenditure-only PACs may accept unlimited contributions, all of which is disclosed to the FEC. There is no rationale to prevent speakers from speaking together in the exact same way they may do so separately, particularly where there is no element of quid pro quo corruption. These changes in the regulations governing PACs are consistent with the rulings of *Citizens United* and *SpeechNOW*, embrace the underlying principle of protecting First Amendment guarantees of free speech in politics, and ensure individuals have at least the same level of political speech rights as corporations now enjoy.

Caveats and final thoughts

It is possible the FEC will not share our robust view of free speech in this regard. DB Capitol Strategies once again cautions all individuals and organizations to follow the regulations as they stand today. No one wants to be the test case. Ultimately, litigation may necessary. Should you or your organization be interested in these issues, please contact us at DBacker@DBCapitolStrategies.com or 202-210-5431.

The Strategist has previously discussed the possibility of *Citizens United* opening the door to direct corporate contributions to candidates subject to the same limits as individuals. *SpeechNOW* moves us closer in that direction. As we approach an environment of equalized First Amendment protections for

individuals and entities, it is reasonable that corporations may soon enjoy the same opportunity for political speech through direct contributions. From a practitioners view, this could lead to a significant rethinking of the SSF model, or at least the company-funded administrative fund that is its main advantage.

About DB Capitol Strategies and Dan Backer, Esq.

DB Capitol Strategies provides legal & operational guidance to political committees with a focus on PAC treasury and FEC reporting and compliance through its lead attorney Dan Backer. Mr. Backer is a graduate of the University of Massachusetts Amherst and George Mason University School of Law and is admitted to practice in Virginia and before the U.S. District Court for both the Eastern & Western Districts. In 2009, Mr. Backer earned the Professional Lobbying Certification (PLC) from the American League of Lobbyists. Mr. Backer has extensive experience with public policy & advocacy programs, grassroots organizations, and Political Action Committees, and is Treasurer or Assistant Treasurer of several PACs.

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