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## Campaign Law Update

On January 21, the United States Supreme Court released a ruling that has, in the days since its release, been labeled a landmark case that will dramatically change the landscape of campaign finance nationwide.

### Case Summary

The case at issue is *Citizens United vs. FEC*. The case focused on whether a film produced by a corporation violated federal campaign finance laws. The film, *Hillary: The Movie*, was critical of then Senator Hillary Clinton. Ads promoting the film aired during the 2008 Democratic Presidential primary season, and promoters contemplated putting the film on “on demand” television. The U.S. Supreme Court examined federal campaign finance laws, which prohibit corporations from making certain political-related expenditures. Ultimately, the Supreme Court ruled that any law prohibiting corporations from making independent political expenditures is unconstitutional.

### Court’s Holding

- Prohibiting corporations from making independent expenditures (uncoordinated with any campaign) is unconstitutional. This is true for federal, state, and local laws and ordinances. Accordingly, corporations may now make unlimited independent expenditures in support of or in opposition to candidates, and any laws to the contrary are deemed unconstitutional.
- While blanket prohibitions on independent expenditures are unconstitutional, laws may require those making expenditures to comply with certain disclosure requirements, such as a political advertising disclaimer and regulatory filings.
- The Court found that *Hillary: The Movie* could be subject to campaign finance laws.
- The Court did not discuss the prohibition on corporations making direct contributions to political campaigns.

### Practical Effect of the Ruling

- Third party groups will be able to make unlimited third party expenditures either supporting or opposing candidates, so long as those expenditures are not coordinated with any campaign.

- Because third parties will be able to make their own independent expenditures, there may be a decreased focus by various interest groups in directly contributing to candidates, and instead an increased focus in third party advertising.
- Political parties will likely see a decrease in funding, as third party groups may wish to remain non-partisan in their advertising.
- The Court’s finding that *Hillary: The Movie* could be subject to campaign finance laws could expand the scope of activities subject to disclosure requirements under campaign finance laws.
- At this time, there is no change in the prohibition on corporations contributing directly to candidates, but a challenge is possible.
- Revisions to campaign finance laws, both locally and nationally, are likely.

### Detailed Analysis

While most commentaries and analyses to this point have focused on the immediate effect of this change, this opinion may have an even broader impact. To fully explain the effect this opinion may have on campaign finance laws going forward, this analysis explains the general background of constitutional limitations on campaign finance laws and how this ruling fits with them.

### Background on the First Amendment

Almost any time someone challenges a campaign finance law by claiming it is unconstitutional, the person raises a First Amendment claim based on the freedom of speech. The U.S. Supreme Court has said that, in the context of political campaigns, money is speech. Because money is speech, the restrictions around the use of money are highly disfavored and subject to strict scrutiny.

One of the most cited cases dealing with campaign finance laws and the First Amendment is the 1976 U.S. Supreme Court case of *Buckley vs. Valeo*. Below is a recap of the important takeaways from that case, all of which were still “good law” until *Citizens United*.

### Restrictions on Contributing

When a person contributes to a candidate, that person is engaging in protected political speech. His or her speech is, in essence, a statement that he or she supports this candidate. Therefore, any limitation on a person contributing to a candidate is subject to strict scrutiny.

### Contribution Limits

While a person's contribution to a candidate shows he or she is supporting the candidate, the amount of the contribution is not as important and may be limited. The amount of money a person contributes "permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues." Therefore, some limitations on contributions, like federal contribution limits of \$2,300 per contributor per election, are permissible.

### Restrictions on Independent Expenditures

Limits on independent expenditures are unconstitutional, but certain disclosure requirements are constitutional. Unlike contributions, where the political speech is showing support for a candidate, the political speech of independent expenditures is the expenditure itself. Expenditure limits are therefore unconstitutional, as they would necessarily limit the political speech. While laws cannot restrict the amount of independent expenditures, they may require certain disclosures, such as stating who paid for the advertising and requiring certain regulatory filings related to the advertising. Independent expenditures that do not contain the so-called "magic words" of vote for, vote against, support, or oppose are not subject to any regulation.

### Restrictions on Corporations

In the 1976 opinion, the Court did not weigh in directly on whether the prohibition of using corporate funds for political contributions and/or independent expenditures is constitutional. However, those prohibitions remained in effect, and were upheld in later Supreme Court opinions as reasonable

restrictions.

### *Citizens United*

Those four basic components of the First Amendment's restrictions on campaign finance laws have remained in effect since the 1976 case. While there have been some changes over the years (for instance, the Supreme Court allowed Congress to go farther in regulating certain independent expenditures that contained the functional equivalent of express advocacy, instead of merely requiring the "magic words"), the basic premise that money is speech has remained intact.

At issue in *Citizens United* was a documentary (*Hillary: The Movie*) that, according to the Court, was aimed primarily at showing then-Senator Hillary Clinton was unfit for office. The question was whether the production and advertisement of this film violated federal campaign finance laws. The Court found that, because the advertising for the film contained derogatory statements about Ms. Clinton and because the advertising aired during the 2008 Democratic primary campaign, the film could be subject to the campaign finance laws.

Several provisions of the federal campaign finance laws came into play in this case. Under federal laws, individuals, working together or independently of one another, were allowed to make unlimited independent expenditures, while corporations were prohibited from making independent expenditures. Further, the laws prohibited "electioneering communications" from being made as independent expenditures within a certain period before an election.

After finding the film was indeed subject to the campaign finance laws, the Supreme Court declared prohibitions on corporations making independent expenditures unconstitutional. The Court allowed the government to require disclosure of the source of the information, as well as certain regulatory filings. The opinion did not engage in any discussion about the restrictions of corporations contributing directly to political campaigns.

### Application to Texas

Texas campaign finance laws, like the federal laws, carry restrictions on corporate activity. Specifically, corporations are prohibited from both contributing directly to a political campaign and from making "direct campaign expenditures" (the Texas term for an independent expenditure).

After the *Citizens United* ruling, it is possible for groups (or individual corporations acting independently) to spend unlimited amounts of corporate money directly advocating for or against particular candidates. At this time, the only restriction appears to be that the expenditures must not be coordinated with the campaigns. Further, all political advertising must contain the political advertising disclaimer, and certain filings must be made with the Texas Ethics Commission.

Another important note is the finding that *Hillary: The Movie* could be subject to campaign finance laws. This underscores the importance of the disclaimer and disclosure requirements laws may force on political advertising. If an advertisement appears to be political advertising (supporting or opposing a candidate for elective office), the person paying for the advertising should consult with attorneys to determine whether any administrative disclosures or political advertising disclaimers are necessary.

### Prohibition on Corporate Contributions

As discussed, the *Citizens United* case did not discuss the prohibition on direct corporate contributions to political campaigns. However, throughout the opinion, the Supreme Court made clear that First Amendment protections apply to corporations. For instance, the Court stated: government "may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether;" allowing a corporation to support a PAC, and to

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use the PAC for political speech, “does not allow corporations to speak;” and the First Amendment prohibits “restrictions distinguishing among different speakers, allowing speech by some but not others.” Further, the opinion states: “The Court has recognized that First Amendment protection extends to corporations” and that “political speech does not lose First Amendment protection ‘simply because its source is a corporation.’” In other words, “no sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”

The strong language in the opinion appears to give corporations the same First Amendment protections as natural persons. Based on the Court’s 1976 opinion, which stated that political contributions to candidates is constitutionally protected, it is possible the First Amendment would render unconstitutional any laws that prohibit corporations, but not individuals, from contributing directly to a political campaign. However, absent a clear legal opinion, any such contribution would surely warrant a lawsuit. In fact the Texas Ethics Commission has already issued a press release stating corporations are still prohibited from contributing directly to any campaign.

**Conclusion**

*Citizens United* is a game-changing decision, and its importance cannot be understated. Absent a statutory change, this ruling will likely lead to an increased focus on outside groups and, potentially, a decrease in the direct funding of campaigns. As a practical matter, this could lead to “shadow campaigns,” where consultants or interest groups create a coalition of donors to fund a political campaign with no official ties to any candidate. This appears to be a win for political consultants and interest groups, and a loss for parties and candidates.

We anticipate this opinion will spur the Texas Legislature to change its campaign finance laws, potentially allowing corporations to contribute directly to political campaigns. In addition, it is possible certain groups will try to push the question of whether, under the First Amendment, prohibitions on corporate contributions to candidates are constitutional. However, any changes, either via

legislative or judicial means, will take time to create and implement. We will work to keep our clients updated on the status of those changes, if any.

**About Locke Lord Bissell & Liddell LLP**

Locke Lord has experience working with campaign finance laws and regulations, ranging everywhere from local and state-wide political campaigns to groups providing pure issue advertising. The firm currently represents political campaigns, political committees, and prominent consultants and lobbyists. In addition to working with our clients to comply with the campaign finance laws, Locke Lord also monitors activities at the Texas Ethics Commission to keep our clients updated on proposed rules. During the legislative session, Locke Lord monitors campaign finance legislation, letting our clients know of potential statutory changes they may wish to comment on.

**About the Authors**

Robert Miller is chair of Locke Lord’s Public Law section. Listed in Best Lawyers in America for Government Relations Law in 2007 and named one of the Top 12 lobbyists in Texas by Capitol Inside, he has demonstrated his skill and dedication by lobbying local, state, and federal governments on behalf of public and private concerns for more than twenty years.

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