Free Speech & Election Law

Recent Developments in Election Law

*By Kathryn Biber and John Hilton**

It is difficult to overstate the extent to which political speech in America today is shaped—in volume, timing, and style—by federal election laws and Federal Election Commission regulations. When political actors and issue groups seek to disseminate a message, their first call is often to a lawyer: "How should I organize? Who may contribute to my cause? What am I, and other people and groups that support me, allowed to say?" In recent months, several groundbreaking decisions have shifted dramatically the boundaries of permissible conduct, raising such questions to a fever pitch.

In *Citizens United v. FEC*, the Supreme Court overturned a ban on corporate and union independent expenditures (i.e., expenditures not coordinated with a campaign). In *EMILY's List v. FEC*, the U.S. Court of Appeals for the D.C. Circuit overturned FEC regulations prohibiting non-profit organizations from using "soft money" to fund certain election-related activities. In *SpeechNow.org v. FEC*, the D.C. Circuit overturned limits on individual contributions to organizations making independent expenditures. Finally, in *Republican National Committee v. FEC*, a three-judge panel of the U.S. District Court for the District of Columbia upheld restrictions on soft-money contributions to political parties.

These decisions will have a profound effect on politics in the near and long terms. We summarize them below, describe some developments in Congress, and then provide analysis by four experts in the field.

Case Summaries

Citizens United

Of these four cases, the Supreme Court's decision in *Citizens United v. FEC*[1] certainly caused the biggest splash among pundits, politicians, and scholars. *Citizens United* began as a case about a political documentary film whose makers sought to avoid campaign finance regulations, and eventually led to a confrontation between President Obama and the Supreme Court during the 2010 State of the Union address. To draw the President's ire, the Court overturned *Austin v. Michigan Chamber of Commerce*,[2] and held that the First Amendment protects the right of unions and all corporations (for-and-non-profit alike) to make independent expenditures expressly advocating the election or defeat of a candidate for public office.

Citizens United is a 501(c)(4) non-profit corporation. In addition to other activities, Citizens United has released documentary films on illegal immigration, the United Nations, and America's religious heritage. With the 2008 Democratic presidential primaries looming, Citizens United decided the time was ripe for a documentary about Hillary Clinton's life and career, in the style of Michael Moore's *Fahrenheit 9/11*.

Hillary: The Movie portrays Clinton in a decidedly negative light. Although the film does not use any so-called magic words advocating her "election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' '[Clinton for President],' 'vote against,' 'defeat,' [or] 'reject,'"[3] the Court held that *Hillary* "is equivalent to express advocacy. The movie, in essence, is a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President."[4] The Court thus refused to dodge the main issue, i.e., whether *Hillary* was subject to federal campaign finance regulations at all.[5]

Historically, the Tillman Act of 1907 prohibited corporations from contributing directly to federal candidates.[6] In 1947, over President Truman's veto, Congress passed the Taft-Hartley Act, which "prohibit[ed] independent expenditures by corporations and labor unions," although the Court repeatedly avoided ruling on the constitutionality of this provision.[7] The Federal Election Campaign Act of 1971 ("FECA") later barred corporations and unions from "mak[ing] a contribution or expenditure in connection with" a federal election.[8] The Supreme Court, however, has cautioned that the independent expenditure prohibition is constitutional only to the extent that it prohibits express advocacy or its functional equivalent.[9]

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress prohibited corporations and unions from using general treasury funds to make independent expenditures for "electioneering communications" mentioning a federal candidate.[10] BCRA defines an "electioneering communication" as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is broadcast within thirty days of a primary election or sixty days of a general election.[11] Essentially, BCRA is based on the presumption that any political speech mentioning a federal candidate within this time period is the functional equivalent of express advocacy, and therefore can be regulated constitutionally by Congress.[12]

This was a problem for Citizens United, because, like any producer, Citizens United wanted to advertise *Hillary* on broadcast and cable television. To this end, Citizens United prepared two ten-second ads and one thirty-second ad. Naturally, Citizens United wanted to advertise *Hillary* when public interest was highest, i.e., during the Democratic primary season, which under BCRA was a felony punishable by five years imprisonment. Citizens United also proposed to release *Hillary* through video-on-demand, but the FEC responded that there is "no sound constitutional basis for exempting video-on-demand

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broadcasts from BCRA's restrictions on corporate financing of electioneering communications."[13]

In *Buckley v. Valeo* the Court struck down a limit on *individual* (not corporate) independent expenditures,[14] meaning expenditures that are not coordinated with a candidate. The *Buckley* Court held that in the absence of coordination there was no risk of quid pro quo corruption, and that only this kind of corruption or its appearance could justify the restrictions of FECA.[15] In *Austin*, however, the Court upheld a Michigan law prohibiting corporate independent expenditures to support or oppose candidates. The Court found the Michigan law was supported, not by a compelling interest in preventing the reality or appearance of quid pro quo corruption, but by "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."[16]

Since it was decided, *Austin* has remained a jurisprudential outlier. The Court has not extended its concept of corruption to other cases, while continuing to treat the reality or appearance of quid pro quo corruption as the lodestar of campaign finance regulation. In the 2007 Term, the Court explicitly rejected *Austin*-style distortion-as-corruption and overturned BCRA's "Millionaire's Amendment," which increased contribution limits for opponents of self-financing candidates.[17]

In *Citizens United*, the Court struck down *Austin* altogether, choosing to adopt a bright-line rule rather than burden lower courts (and, ultimately, future litigants) with a balancing test: "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic market research, or seek declaratory rulings before discussing the most salient political issues of our day."[18] Thus, the Court held: "*Austin* should be and now is overruled. We return to the principle established in *Buckley* . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."[19]

EMILY's List

A few months before *Citizens United* was decided, the D.C. Circuit handed down a broad decision overturning several FEC regulations that circumscribed the way non-profit groups spend money in politics. Although the case received less fanfare than *Citizens United*, *EMILY's List v. FEC*[20] has similarly far-reaching consequences.

The regulations in question required certain non-profit entities undertaking election-related activities to use "hard money" accounts—meaning accounts containing contributions from individuals limited to $5,000 per year—to pay for portions of activities such as get-out-the-vote efforts, voter registration activity, generic communications referencing a political party, certain administrative expenses, and advertisements referring to a federal candidate. In addition, the regulations required such nonprofits to treat as "hard money" all donations received in response to a solicitation indicating that donated funds would be used to support or oppose the election of a federal candidate.[21]

The FEC promulgated these regulations in the wake of the 2004 election, responding to sharp outcry by reform groups against the activities of non-profit groups like America Coming Together and the Swift Boat Veterans for Truth.[22] Even under the BCRA reforms, these "527 groups" (named for the section of the Internal Revenue Code exempting them from federal taxation[23]) could accept unlimited contributions from individuals and, depending on their particular activity, from corporations as well.

The regulations had major effects on groups like EMILY's List. In 2005, EMILY's List filed suit in federal court in the District of Columbia; in 2008, the district court granted the FEC's motion for summary judgment,[24] which EMILY's List appealed.

Judge Brett Kavanaugh's appellate opinion began with a detailed review of the Supreme Court's campaign finance jurisprudence.[25] Judge Kavanaugh made four observations crucial to the court's holding. *First*, campaign contributions and expenditures are protected First Amendment "speech."[26] *Second*, the Supreme Court has repeatedly ruled that the government cannot limit campaign contributions and expenditures in the name of "equalization" or "leveling the playing field."[27] *Third*, there is a cognizable governmental interest in combating quid pro quo corruption and its appearance.[28] *Fourth*, in applying this anti-corruption rationale, the Supreme Court has provided more robust protection for independent expenditures than for contributions to candidates and parties, because the former pose far less risk of quid pro quo corruption than the latter.[29]

Given these basic tenets, Judge Kavanaugh reasoned that non-profit entities like EMILY's List may not constitutionally be required to use only hard money for direct contributions to candidates and parties; such a prohibition cuts to the heart of the Supreme Court's anti-corruption rationale. But contrary to the regulations in question, non-profits may not constitutionally be compelled to use hard money when their activities are not coordinated with candidates, because such activity does not touch upon any constitutional rationale for regulation.[30]

In addition to striking down these regulations under the First Amendment, Judge Kavanaugh also agreed with EMILY's List that three of the five regulations exceeded the FEC's statutory authority.[31] Explained Judge Kavanaugh, "[T]here is a significant mismatch between these challenged provisions and the FEC's authority[.]"[32]

Finally, Judge Kavanaugh addressed the perceived unfairness of a regulatory regime that permits non-profit entities to raise and spend unlimited funds, while simultaneously requiring candidates and political parties to raise funds only in limited amounts. The correct solution, he suggested, is not to further regulate non-profits, but instead to raise or eliminate limits on contributions to parties and candidates.[33]

SpeechNow.org

SpeechNow.org v. FEC[34] was a natural extension of *EMILY's List* and *Citizens United*. In *SpeechNow.org*, the D.C. Circuit, sitting en banc, held that "the government has no anti-

corruption interest in limiting contributions to an independent expenditure group such as SpeechNow."[35]

In January 2008, the FEC issued a draft advisory opinion concluding that SpeechNow, a non-profit group intending to engage in independent expenditures expressly advocating the election or defeat of federal candidates, would be required to organize as a "political committee" and thus abide by contribution limits.[36] Instead of accepting that opinion, SpeechNow invoked 2 U.S.C. § 437h, which permits an individual to seek a declaratory judgment to determine the constitutionality of federal election laws. Pursuant to the statute, the district court certified the constitutional questions to the U.S. Court of Appeals for the District of Columbia Circuit for en banc review.[37]

In addition to holding that the FEC could not constitutionally require SpeechNow to adhere to contribution limits when raising money for independent expenditures, Judge Sentelle's opinion also held that such non-profits may constitutionally be required to adhere to FEC organizational and reporting requirements.[38] Such requirements, Judge Sentelle reasoned, did not pose a significant burden on the group: "[T]he public has an interest in knowing who is speaking about a candidate and who is funding that speech, no matter whether the contributions were made towards administrative expenses or independent expenditures."[39] Furthermore, "requiring disclosure of such information deters and helps expose violations of other campaign finance restrictions, such as those barring contributions from foreign corporations or individuals. These are sufficiently important governmental interests to justify requiring SpeechNow to organize and report to the FEC as a political committee."[40]

Republican National Committee

Under each of the above cases, political parties remain at an enormous, and growing, competitive disadvantage because they are permitted to raise and spend funds only within federal limits.

Recognizing this problem, in *Republican National Committee v. FEC*,[41] the RNC brought several as-applied challenges to BCRA's restrictions on political party fundraising. The RNC sought, among other goals, to raise and spend unlimited amounts of soft money to support state candidates in elections where *only* state candidates appear on the ballot and to support state candidates in elections where both state and federal candidates appear on the ballot.[42] The RNC argued that the First Amendment entitles it to raise and spend soft money for these activities because they are not related to a federal election. The RNC averred that it would not use federal candidates and officeholders to solicit soft money, thus eliminating any corruption concern, and that it would not help soft-money donors obtain access to federal candidates or officeholders.[43]

But a D.C. district court panel rejected these arguments, explaining that "this was the whole point of [the] soft-money ban and of the *McConnell* decision upholding it."[44] By the court's logic, the RNC was "asking us to overrule *McConnell*'s holding with respect to the ban on soft-money contributions to national political parties. As a lower court, we of course have no authority to do so."[45] More specifically, the plaintiffs could not "successfully bring an as-applied challenge to a statutory provision based on the same factual and legal arguments the Supreme Court expressly considered when rejecting a facial challenge to that provision[.]"[46]

Under BCRA, the case was heard by a three-judge district court panel and is appealable directly to the Supreme Court. On June 29, the Court affirmed the panel's ruling.[47]

Reactions and Legislation

Most of the publicity thus far has been focused on *Citizens United*, which caused considerable angst among incumbent politicians on Capitol Hill and Washington, D.C.-based reform groups. In hearings before the House Judiciary Committee, New York Congressman Jerrold Nadler assailed "the extent to which an extraordinarily activist court reached out to issue this decision."[48] Florida Congressman Alan Grayson separately predicted the complete collapse of the Republic: "The Supreme Court in essence has ruled that corporations can buy elections. If that happens, democracy in America is over."[49] Fred Wertheimer, President of Democracy 21, predicted *Citizens United* "will unleash unprecedented amounts of corporate 'influence-seeking' money on our elections and create unprecedented opportunities for corporate 'influence-buying' corruption."[50]

Robert Weissman, President of Public Citizen, went further: "Today's decision so imperils our democratic well-being, and so severely distorts the rightful purpose of the First Amendment, that a constitutional corrective is demanded."[51] Addressing the Senate Committee on Rules and Administration, Senator John Kerry echoed this sentiment, urging a constitutional amendment "to make it clear, once and for all, that corporations do not have the same free-speech rights as individuals."[52] Reflecting concerns voiced by Justice Ginsburg at oral argument,[53] and in Justice Stevens's dissent,[54] in his 2010 State of the Union address President Obama accused the Court of "revers[ing] a century of law that I believe will open the floodgates for special interests, including foreign corporations, to spend without limit in our elections," and called for legislation "to correct some of these problems."[55]

Immediately following the decision, more than a dozen bills were introduced in Congress, mostly related to the issue of foreign nationals and corporations. On February 11, Senator Charles Schumer and Congressman Chris Van Hollen held a press conference to outline forthcoming, comprehensive legislation "to pick up the pieces" after "the Supreme Court shattered nearly a century of U.S. law designed to curb the influence of corporations in our election process."[56]

Eventually, on April 29, Senator Schumer and Congressman Van Hollen introduced the Democracy Is Strengthened by Casting Light On Spending in Elections Act ("DISCLOSE Act" or "the Act").[57] President Obama "welcome[d] the introduction of this strong bi-partisan legislation to control the flood of special interest money into America's elections."[58] What follows is a summary of the House and Senate versions of the Act as they were introduced on April 29. Readers are advised that the Act is currently under consideration by Congress, and its provisions may change substantially in the course of the legislative process. The bill's prospects for passing this session were all but

eliminated at the end of July, when Senate Democrats fell short of the sixty votes needed to close debate.

Section 101 of Title I would prohibit government contractors above a $50,000 threshold from making campaign-related expenditures, and it would prohibit all TARP recipients (whether or not they are government contractors) from making any campaign-related expenditure (contributions, independent expenditures, or electioneering communications) until the TARP money is repaid. Section 102 seeks to prevent foreign influence in U.S. elections by prohibiting independent expenditures if the corporation has foreign ownership of twenty percent or more; if a majority of the board of directors are foreign nationals; or, if a foreign national "has the power to direct, dictate, or control the decision-making process of the corporation" regarding either its business or election activities.

Section 103 would restore and expand the regulations banning coordinated communications struck down under the Administrative Procedures Act in *Shays v. FEC*.[59] These regulations prohibited corporations and unions from coordinating radio and television ads with congressional candidates within ninety days of the general election and ninety days of the primary election.[60] Coordination with presidential candidates was prohibited within 120 days of a state's presidential primary election, and continuing in that state through the general election.[61] Outside of the 90-and-120-day windows, however, coordination was allowed if the ad was not merely recycled campaign material and did not use any "magic words," like "vote for."[62] Section 103 of the Act expands the types of communications by corporations and unions that can be regulated within ninety days of the primary *through* the general election. Outside of the 90-and-120-day windows, the Act also would prohibit coordination on any advertisement that promotes, supports, attacks, or opposes any candidate for federal office. Section 104 provides that the cost of any communication made by a political party on behalf of a candidate is only treated as a contribution if the candidate directed or controlled the communication.

Title II expands the definition of "independent expenditure" to include both express advocacy and its functional equivalent, and imposes a twenty-four-hour reporting requirement for expenditures over $10,000 made more than twenty days before an election, and for expenditures over $1,000 made within twenty days of an election. The Act expands the definition of an "electioneering communication," which currently includes all broadcast ads that refer to a candidate within the period beginning thirty days before the primary and sixty days before the general election. The House version would expand the period of general election coverage to 120 days; the Senate version would expand the period to begin ninety days before the primary election and running until the general election. Also, electioneering communication reports would have to contain a statement clarifying whether the communication was intended to support or to oppose the candidate. Title II also requires corporations and unions (and 527s) making aggregate independent expenditures of $10,000 or more to disclose most donors giving $1,000 or more (in the House version, $600) if the entity makes electioneering communications.

If the entity establishes a separate "Campaign-Related Activity" account, then it will only have to disclose donors to the account if the entity transferred $10,000 (or, in the House version, $6,000) or more from its general treasury to the account. Finally, CEOs of corporations or the highest ranking official of a union making independent expenditures for television commercials would have to appear on camera, like candidates, and say that he or she "approves this message." To prevent "funneling money through shell groups" like 527s and 502(c)(4)s, the CEO or highest-ranking official of the entity that is the top funder of the advertisement must make the disclaimer, and the names of the top five corporate contributors must appear on-screen at the end of the advertisement. Additionally, all registrants under the Lobbying Disclosure Act must disclose the date and amount of each electioneering communication greater than $1,000, and the name of each candidate referred to, or supported, or opposed.

Under Title III, all campaign-related expenditures made by a corporation, union, 501(c)(4) or (6) organization, or 527 group, must be disclosed on the organization's website with a clear link on the homepage within twenty-four hours of reporting such expenditures to the FEC, and in the periodic reports to shareholders. Title IV of the Senate version of the Act differs from the House version. The Senate version includes language such that if a corporation or union makes independent expenditures exceeding $50,000 supporting or opposing a candidate, then all legally-qualified federal candidates in that election (as well as national party committees) would be entitled to buy airtime at the lowest unit rate for that media market, and at a reasonable broadcast time. Finally, both the House and Senate versions of the Act provide for judicial review by the U.S. District Court for the District of Columbia; allow any Member of Congress to intervene or sue directly to challenge the DISCLOSE Act; and provide that any section of the Act that may be struck down is severable, allowing the Act's other sections to remain in force.

Predictions and Outlook

The authors of this article consulted four election law experts: Marc Elias;[63] Benjamin Ginsberg;[64] Professor Allison Hayward;[65] and Trevor Potter.[66] Below we include their complete analyses.

Q: Did the courts get it right in Citizens United and EMILY's List?

ELIAS: These are two very different cases. My criticism of the Supreme Court in *Citizens United* is that the Court simply did not need to reach the corporate ban. *Citizens United* involved an as applied challenge involving unusual facts and the Court, on its own, transformed it to a challenge to the entire corporate ban. This is hardly judicial modesty or restraint. *EMILY's List* is a different story. That case was caused by the FEC over-reaching in its regulations. The DC Circuit was responding to oppressive and overbroad regulations. It was a case the FEC could have avoided if it had acted more reasonably.

GINSBERG: Absolutely. Both start with first principles and conclude that there is no such thing as too much speech. The importance of *Citizens United* in reaffirming First Amendment rights has been discussed extensively. *EMILY's List* has gotten less attention but is significant in reining in the Federal Election Commission investigations that made the process the penalty for those who exercised their First Amendment rights, especially with third party groups in 2004.

HAYWARD: Absolutely. The Court in *Citizens United* finally addressed head-on the constitutional issues presented when the government enforces a broad ban on speech based on content. In any other context, such a law would have been found unconstitutional years ago, and civil libertarians would have justly celebrated that ruling.

EMILY's List is also a welcome development, because it recognizes some limits to the reach of federal campaign finance law as against state jurisdiction.

POTTER: What we are experiencing is a decision by a current 5-4 majority of the Supreme Court to re-interpret First Amendment doctrine in the campaign finance arena, in a departure from the balance struck by the Supreme Court in *Buckley* thirty-five years ago. The new majority expresses disdain for, rather than deference to, decisions made by Congress (and, incidentally, state legislatures).

The majority ignores Congress' and the legislatures' concerns with corruption and the appearance of corruption occasioned by the presence of huge sums of money spent in the political system by interests seeking specific legislative results. This is not a "conservative" approach to judging, and will not increase public confidence in our body politic. In this regard, I am struck by the recent comments of the well-known Nixon White House official and religious writer, Chuck Colson, who was asked what the "worst thing about Washington" is today. His response was, "Today, it has been totally corrupted by money. If God has his judgment on us, it is because of special interest money, which determines how Congress acts. The political system is sick, and we need to clean up our act." It is citizen concerns such as these that led to the enactment over 100 years ago of state and federal legislation limiting corporate expenditures in candidate elections. Earlier Courts which upheld these restrictions were populated at least partially by justices themselves who had run for office and served in elective office. Today's Court, but with an ideological agenda untempered by legislative experience, has ridden rough-shod over the other branches of government to reach a result which will decrease public confidence in our democracy.

In *Citizens United* the 5-4 Supreme Court abandoned the precepts of judicial restraint to broadly decide a case that could and should have been decided on very narrow statutory grounds. Instead, the majority used the case as a weapon to overturn decades of constitutional law (most recently upheld in *McConnell* only seven years ago). The activist majority clearly couldn't bear to leave the *Austin* decision alone when they had the voting power to over-turn it. Now, they'll have to decide if they really believe their own rhetoric when presented with the inevitable subsequent constitutional challenges to restrictions on direct corporate contributions to candidates, and the foreign national ban.

In *EMILY's List*, the three-judge panel evinced its disdain for the FEC's attempts to make McCain-Feingold work and prevent circumvention of the limitations, reporting and disclosure structure Congress has established for expenditures in federal elections, over-turning a decision by a seasoned District Court judge with experience in campaign finance cases.

Q: Practically speaking, how will the decisions together affect the 2010 election cycle?

ELIAS: Taken together they will have a profound effect on the 2010 cycle. I expect we will see a much higher level of corporate spending—particularly by 501c6's (trade associations).

GINSBERG: Their greatest significance in 2010 will be for their ringing message to conservative donors that it is not only permissible to participate in the issues debate—there is a constitutional right to do so. Conservative donors largely stayed out of the fray in 2006 and 2008 due to the combination of a sour political environment and a sense of abandonment after the Bush Administration-inspired investigations of 2004 donors to the 527 groups. These decisions and an improved political environment will increase conservatives' participation in 2010. The *Citizens United* decision will also provide a greater number of vehicles with which to participate.

HAYWARD: Honestly, I think we may see some changes in the scripts used in advertising, but it would be erroneous to attribute record levels of spending in the coming cycle to the courts' decisions. It was already destined to be a huge cycle—Republicans sense that the Democrats are on the run, but the Democrats, with both houses of Congress and the White House, have leverage and the ability to attract and retain massive support.

In short, people may argue causation out of the correlation, but I think those observations are spurious.

POTTER: I expect the combination will result in significant increases in expenditures by corporations and other non-party groups seeking to elect or defeat candidates—and the source of that spending will be

virtually non-disclosed to the public (contrary to the misguided assumptions of Justice Kennedy in *Citizens United*, in attempting to mitigate the impact of his determinations).

Q: How will the decisions affect the 2012 presidential cycle and beyond?

ELIAS: It will have greatest impact and state and local elections, followed by House elections, Senate elections and then presidential. That is simply because of how much it costs to influence elections. A corporation seeking to influence a local election can do so for tens-of-thousands of dollars. Influencing a Senate election might take millions. Affecting the outcome of a presidential election would likely take many millions. Thus, I expect the greatest effect will be down ballot—though these decisions will have some, lesser, impact on presidential elections.

GINSBERG: The decisions need to be understood within the overall framework of McCain-Feingold, whose centerpiece of banning the political parties from raising or spending money legal under state law (also known as "soft money") remains intact. That means the political parties will not have the resources to compete with special interest groups in the parties' core areas—money for candidates, mobilization of voters and messaging through independent expenditures and issue ads. The main impact of allowing corporations, unions and trade associations to conduct these activities with their treasury funds is that candidates and parties will no longer be the loudest voices in their campaigns and that special interest groups will be able to fill the void using the same kind of money the parties and candidates cannot raise or spend.

HAYWARD: Again, I think we are living through a very important political era. It would be strange, given the enormous issues this Administration wants to resolve, and the policies they have chosen to resolve them, if a wide range of groups and organizations DIDN'T participate. As I said before, you can't disengage that phenomenon from whatever effect *EMILY's List* and *Citizens United* might add.

POTTER: The same as in 2010, unless Congress does something to mandate disclosure.

Q: Are the decisions likely to help or hurt one party more than the other?

ELIAS: *Citizens United* is a bad decision for both parties, period. Whether it hurts one or the other more is to be seen. But it is ultimately a bad decision for parties and for candidates.

GINSBERG: The Left's special interest groups are currently more developed and effective than the Right's, so it could benefit Democrats unless the Right can make up the deficit as quickly and effectively as it did with 527s in 2004. Remember that the Democrats have long relied on outside groups while Republicans developed a much stronger Party apparatus. With McCain-Feingold sapping the Parties, the Left's combination of nonprofit organizations and wealthy individuals is a better model than what the Right currently has. Advantage to the Democrats until either the Right catches up or the parties can start raising and spending soft dollars.

HAYWARD: Generally speaking, in the short run deregulation tends to benefit unions and thus Democrats, because they are more comfortable with taking bold new approaches and are undeterred by any potential loss in market goodwill. To the extent that those states that prohibited corporate and union expenditures are also locations with strong unions, changes in those laws will reinforce this general trend.

POTTER: I think it's too early to tell—except that it will greatly strengthen the hands of economic interests (both business and labor) seeking to affect legislation.

Conclusion

As the 2010 election season shifts into high gear, the effects of these four cases will start to become clearer. Of course, as soon as the regulated community is comfortable within the new contours, the law could change again. Noteworthy cases are pending in district courts across the country; legislative and administrative bodies are actively considering "fix" legislation and regulations.

As always, political actors and issue groups seeking to exercise their full rights while avoiding legal landmines are advised to pay close attention to these upcoming developments.

Endnotes

1 130 S. Ct. 876 (Jan. 21, 2010).

2 494 U.S. 652 (1991).

3 Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976) (per curiam).

4 130 S. Ct. at 890.

5 The Court also declined to exempt *Hillary* from the strictures of BCRA because it was released in a video-on-demand format, or "to carve out an exception to 441b's expenditure ban for non-profit corporate political speech funded overwhelmingly by individuals." *See id.* at 890-92.

6 *See* 34 Stat. 864 (Jan. 26, 1907).

7 130 S. Ct. at 900-01.

8 2 U.S.C. § 441b.

9 *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 206 (2003).

10 2 U.S.C. § 441b(a).

11 *Id.* § 434(f)(3)(A).

12 *See McConnell*, 540 U.S. at 206 ("[P]laintiffs argue that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications. This argument fails to the extent that the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect.").

13 Brief of Appellee Federal Election Commission at 24, Citizens United v. FEC, No. 08-205 (Feb. 17, 2009).

14 *See* 424 U.S. at 39-51.

15 *See id.* at 45.

16 *Austin*, 494 U.S. at 660.

17 *See* Davis v. FEC, 128 S. Ct. 2759 (June 26, 2008).

18 130 S. Ct. at 889.

19 *Id.* at 913 (citations omitted).

20 581 F.3d 1 (2009).

21 *Id.* at 16-19.

22 *Id.* at 4-7.

23 *See* 26 U.S.C. § 527.

24 *See* EMILY's List v. FEC, 569 F. Supp. 2d 18 (D.D.C. 2008).

25 581 F.3d at 5.

26 *Id.*

27 *Id.* at 5-6.

28 *Id.* at 6.

29 *Id.* at 6-7.

30 *Id.* at 16-18.

31 *Id.* at 19.

32 *Id.* at 21.

33 *Id.* at 19.

34 599 F.3d 686 (D.C. Cir. Mar. 26, 2010).

35 *Id.* at 695.

36 *Id.* at 689-90.

37 *Id.* at 690.

38 *Id.* at 696-98.

39 *Id.* at 698.

40 *Id.*

41 698 F. Supp. 2d 150 (D.D.C. 2010).

42 *Id.* at 154-55.

43 *Id.* at 155.

44 *Id.* at 157.

45 *Id.*

46 *Id.*

47 Republican Nat'l Comm. v. FEC, *aff'd without opinion*, 2010 U.S. LEXIS 5530 (June 29, 2010).

48 *Campaign Finance Reform: Hearing Before the Subcomm. on Constitution, Civil Rights, and Civil Liberties of H. Comm. on the Judiciary*, 111th Cong. (Feb. 3, 2010) (opening Statement of Hon. Jerrold Nadler).

49 *Reaction: Supreme Court's Campaign Finance Ruling*, Associated Press, Jan. 21, 2010.

50 *Id.*

51 *Id.*

52 *Corporate America v. The Voter: Examining the Supreme Court's Decision to Allow Unlimited Corporate Spending in Elections: Hearing Before the S. Comm. on Rules and Administration*, 111th Cong. (Feb. 2, 2010) (statement of Hon. John F. Kerry).

53 Transcript of Oral Argument at 4-5, Citizens United v. FEC (Reargued), No. 08-205 (Sept. 9, 2009).

54 130 S. Ct. at 947-48.

55 *President Obama Delivers State of the Union Address*, CQ Transcriptions, Jan. 27, 2010. Under federal law, foreign nations may not contribute to federal candidates or parties, or make independent expenditures that refer to federal candidates. 2 U.S.C. § 441e. FEC regulations prohibit foreign nationals from participating, directly or indirectly, in any way in the decision-making process of any corporation, labor union or political committee in its election-related activities. 11 C.F.R. § 110.20(i). *Citizens United* did not overturn these provisions.

56 *Sen. Charles E. Schumer, D-N.Y., and Rep. Christopher Van Hollen, D-MD., Hold a News Conference on the Citizens United v. FEC Ruling*, CQ Transcriptions, Feb. 11, 2010.

57 H.R. 5175, 111th Cong. (2010); S. 3295, 111th Cong. (2010).

58 *See Statement by the President on the DISCLOSE Act*, Apr. 29, 2010, available at http://www.whitehouse.gov/the-press-office/statement-president-disclose-act (last accessed Aug. 16, 2010).

59 528 F.3d 914, 925 (D.C. Cir. 2008).

60 *See id.* at 921-22 (quoting 11 C.F.R. § 109.21(c)(4)(i)).

61 *Id.* (quoting 11 C.F.R. § 109.21(c)(4)(ii)).

62 *Id.* (quoting 11 C.F.R. § 109.21(c)(2)-(3)).

63 E-mail from Marc Elias to Kathryn Biber (Mar. 28, 2010, 15:29 MDT) (on file with authors). Marc Elias is a partner at Perkins Coie LLP in Washington, D.C. He specializes in representing public elected officials, candidates, parties, corporations, and PACs in connection with campaign finance, ethics, and white-collar criminal defense matters. He recently served as lead counsel for Senator Franken in the 2008 Minnesota Senate election recount and contest—the largest recount and contest in American history. In 2004 he served as General Counsel to the Kerry-Edwards presidential campaign. He served in that same capacity for Chris Dodd for President during the 2008 primary campaign.

64 E-mail from Benjamin Ginsberg to Kathryn Biber (Mar. 22, 2010, 13:18 MDT) (on file with authors). Ben Ginsberg is a partner at Patton Boggs LLP in Washington, D.C. He represents numerous political parties, political campaigns, candidates, Members of Congress and state legislators, governors, corporations, trade associations, vendors, donors, and individuals participating in the political process. In 2004 and 2000, Mr. Ginsberg served as national counsel to the Bush-Cheney presidential campaigns; he played a central role in the 2000 Florida recount. In 2008, he served as national counsel to Romney for President.

65 E-mail from Allison Hayward to Kathryn Biber (Mar. 22, 2010, 08:59 MDT) (on file with authors). Allison Hayward is an Assistant Professor of Law at George Mason University School of Law. She also serves on the Boards of the Center for Competitive Politics and of the Office of Congressional Ethics.

66 E-mail from Trevor Potter to Kathryn Biber (Apr. 9, 2010, 14:37 MDT) (on file with authors). Trevor Potter is a partner at Caplin & Drysdale in Washington, D.C., and a former Commissioner and Chairman of the FEC. Mr. Potter is also the President and General Counsel of the Campaign Legal Center, a Washington D.C. non-profit which has participated in numerous campaign reform cases as Counsel to the congressional sponsors of BCRA. He advises corporations, nonprofit organizations, and candidates on structuring new political efforts and administering their political, lobbying, and issue-advocacy projects. Mr. Potter served as General Counsel to the John McCain 2008 campaign and also held that position with the McCain 2000 campaign.