“Michael Moore in TrumpLand” Might Have Been Illegal Before Citizens United—It’s All Incredibly Complex, And That’s One Problem with Our Campaign Finance Laws

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If you’re a politically minded filmmaker, then you should be able to freely make films, advertise them, and try to influence how people think about political issues, right? This is America, after all, and the freedom to try to influence other people’s opinions, especially on vital questions of political importance, is precisely what the First Amendment is supposed to protect. And this has to be doubly true close to an election, especially an election where so much is at stake for the future of our country. Right?

I imagine Michael Moore believes something like the foregoing. The man has dedicated his life to trying to influence the political opinions of others through film, and it would seem absurd to prohibit him from doing that or to require him to register with the government in order to speak about salient political issues. Yet, if Michael Moore’s new surprise film “Michael Moore in TrumpLand” is distributed in a certain way, he and his company may be required to register with the government and disclose their funding sources. And, before the *Citizens United* case, the film might have been forbidden entirely. It’s all very unclear, and that’s a huge part of the problem with our modern campaign finance laws.

In order to understand this, or to even get a basic grasp of the issues, we’re going to have to wade into the arcane world of campaign finance regulation, which is more confusing and surreal than you probably imagine. Bear with me.

Who Can “Influence Our Elections”?

People talk about “money” influencing our elections, but what does that mean? The *New York Times* has a lot of money, and they even specifically endorse candidates, so is that the kind of influence that concerns us? Or movies like “Zero Dark Thirty,” which is about the killing of Bin Laden and was released during the 2012 election, could be described as “money” influencing an election. After all, it cost $40 million to make, and that doesn’t include the promotion budget. Is that the type of money we’re concerned with?

Most people would say "no," but defining the difference between the *New York Times*, "Zero Dark Thirty," and Michael Moore's "Fahrenheit 9/11" is more difficult than you might think. In fact, thousands of lawyers in this country are engaged in trying to figure that out and to help clients avoid run-ins with the Federal Election Commission (FEC).

Have you heard of the Supreme Court case *Michael Moore v. FEC*, when the Court opened up the floodgates of dark money and allowed for-profit corporations to spend unlimited amounts of money to influence our elections? No, you haven't, because that case goes by a different name, the infamous *Citizens United v. FEC*. But Michael Moore and his Dog Eat Dog Films almost ended up as the catalyst for deciding the same issue that the Court would eventually resolve in *Citizens United*, namely, whether corporations can spend independently to advocate for or against a candidate.

Before *Citizens United*, corporations and unions were prohibited from independently funding political speech that was for or against candidates for federal office. This meant ads, movies, or anything else that could be considered a "broadcast." In 2004, David N. Bossie, president of the conservative activist organization Citizens United and current deputy campaign manager for Donald Trump, filed a complaint with the FEC about the movie "Fahrenheit 9/11." The ads for the movie, according to the complaint, were prohibited "electioneering communications"—meaning they clearly referred to George W. Bush, a candidate for federal office—that were illegally funded by corporate money.

Citizens United went after the ads for the movie because the ads were "broadcast," whereas the movie itself would not be broadcast, at least as that term was generally construed. This was a crucial distinction that would be relevant in the later case of *Citizens United v. FEC* and is still relevant today. Campaign finance laws generally focus on communications that people might encounter accidentally, particularly television and radio ads, because those are seen as a unique threat to our electoral system.

Another complaint was also filed attacking the movie itself, its website, and its affiliated websites. The FEC dismissed the complaints against the movie, the trailers, and website because they were deemed "bona fide commercial activity" rather than campaign speech. Thus, Michael Moore avoided having to fight for his movie in higher courts.

Let's take a step back. Campaign finance laws are premised on the idea that some types of spending on political speech that influences elections need to be monitored and regulated in order to ensure that candidate bribery isn't occurring and that our citizens know who is funding certain ads so, presumably, they can make more informed decisions. But the very existence of such a capacious concept as "spending money to influence elections," coupled with the First Amendment, means that certain groups and certain communications must be exempted from federal oversight. Speech that is political but not specifically election related, for example, is exempt. The press is exempt because a press that must register with the government before criticizing candidates is not a truly free press. And, finally, some entities that produce "bona fide commercial activity," such as filmmakers, are generally exempt. Nevertheless, it is possible that certain movies could be essentially political endorsements or *de facto* attack ads, and then the FEC might decide that a filmmaker has gone too far.

Where's that line? No one exactly knows.

How Can People and Organizations "Influence our Elections"?

Citizens United was emboldened by the FEC's decision not to go after Michael Moore and "Fahrenheit 9/11." As a non-profit corporation that took money from for-profit corporations, they understood the law prohibited corporations from spending independently to advocate for or against federal candidates. But the corporately-funded "Fahrenheit 9/11" got a pass, and that was basically a 1.5 hour attack ad. Moreover, it was important that "Fahrenheit 9/11" wasn't broadcast to the general public and that people had to actively and purposefully travel to the theater to see it. That meant that the movie would only be "influencing" people who want to be influenced, which arguably takes it out of the FEC's purview.

When the 2008 election rolled around and Hillary Clinton, public enemy number one in the eyes Citizens United and David Bossie, was contending for the democratic nomination, they felt they were free to make a "Fahrenheit 9/11" of their own—that is, a de facto 1.5 hour attack ad funded by a corporation that was not going to be generally broadcast. So, they made "Hillary: The Movie."

But the FEC disagreed. "Hillary: The Movie," they said, was essentially an attack ad in a way that "Fahrenheit 9/11" wasn't. They weren't going to get the "bona fide commercial activity" exemption or any other exemption. Moreover, even though the movie was to be on a video-on-demand service—pay-per-view—this was still a "broadcast" in a way going to a theater wasn't. Through such subtle distinctions, the FEC determined which organizations were allowed to "influence our elections" and how they were allowed to do it. But, as I said previously, the very existence of our convoluted campaign finance laws necessitates such distinctions.

The Supreme Court Hears *Citizens United v. FEC* not *Michael Moore v. FEC*

Citizens United was understandably miffed. Why does Michael Moore get to influence elections and they couldn't? Was there really that big of difference between "Fahrenheit 9/11" and "Hillary: The Movie"? True, one was made by a better filmmaker and distributed broadly, but do we really think that our freedom to make political movies should hinge on how good of director you can find or how much promotional investment you can raise? That seems just silly, so they took their case to the Supreme Court.

Originally, the Court was asked to decide whether the prohibition on corporate-funded election speech was unconstitutional as applied to what Citizens United did. A video-on-demand service, after all, while technically a "broadcast," seems hardly what the FEC should be focused on. Moreover, Citizens United argued, a movie that merely lambastes a candidate while not endorsing any other candidate is not exactly a campaign ad, it's just basic political speech.

When the Supreme Court heard oral arguments in *Citizens United*, the case quickly turned into something bigger than merely how campaign finance laws apply to political movies shown on pay-per-view. It changed when Chief Justice John Roberts asked Deputy Solicitor General Malcolm Stewart if it was the government's position that the prohibition on corporately funded campaign speech applied to books. "A 500-page book," for example, "and at the end it says, and so vote for X, the government could ban that?" Stewart responded, "we could prohibit the publication of the book using the corporate treasury funds."

The government's attorney looked into the faces of the justices of the Supreme Court and said that the government could ban books. It is not surprising that the Court was somewhat taken aback. They asked for the case to be reheard, but not on the narrow question of whether there is a pay-per-view exemption to the ban on corporate spending. Instead they asked whether the entire prohibition on corporate spending violated the First Amendment. That was eventually what the Court held.

This move was controversial, and it's still controversial today. Many people who understand the nuances of the *Citizens United* case believe that striking down the entire law was where the Court went wrong. Citizens United should have won, they argue, on the narrow question of whether pay-per-view videos were exempt from the law, but the Court went too far striking down the whole law.

The Chief Justice wrote separately to explain why the Court went as far as it did. Essentially, Roberts explained what I've written in this article: that there was no rhyme or reason anymore to which entities were allowed to influence elections and which weren't. According to the government, Michael Moore can but Citizens United couldn't. The *New York Times* (a corporation) can but other corporations couldn't. There were so many holes and exceptions to the law organizations had been essentially reduced to asking the government for permission to criticize it, and that is contrary to the essential purpose of the First Amendment. No more narrow exceptions given to one group but not another, the whole thing must go.

"Michael Moore in TrumpLand" in a Post-*Citizens United* World

Things are simpler now, but still incredibly complex. Corporations like Citizens United and Michael Moore's Dog Eat Dog films can now spend money on political advocacy. Yet the *Citizens United* decision left in place the reporting and disclosure requirements for independent political spending. Generally speaking, individuals or corporations that spend more than $250 on election speech must disclose the names and addresses of those who funded the communications. Yet it is still fuzzy what constitutes "election speech," what's a "broadcast," and how to count whether something is worth $250.

We still don't know if disclosure is triggered by using video-on-demand services, which now might include things like buying the movie over iTunes. If Moore decided to put his movie on YouTube, is that more like broadcast media or like video-on-demand? Some members of the FEC want to say it is more like broadcast media, but others are trying to keep the commission from sticking its nose too far into the internet. Asking people to consult a lawyer before posting a political rant on YouTube seems like too much.

Unfortunately, people like Michael Moore are still hamstrung by our convoluted and bizarre campaign finance laws. Moore sees Trump as a unique and dangerous threat to the United States, and he would like to influence as many people as possible with his movie. If he put it on YouTube, however, it is possible that the FEC could determine that it is essentially a corporate-funded campaign ad that is being widely broadcast to the general public. In that situation, Moore and his companies would have to register with the government and report the names and addresses of those who funded the movie. This may seem like a minor inconvenience, but the failure to report can actually have criminal penalties.

And why wouldn't Moore want to have to register with the government and disclose who funded his movie? Well, possibly because the candidate that his movie criticizes has shown himself to be thin-skinned and litigious. As president, he could destroy the lives of those who displease him with a simple call to the IRS.

What's certainly clear is that Moore and his company needed to consult campaign finance attorneys before distributing his film. He also presumably had his attorneys watch the film to ensure that there weren't too many explicit endorsements to vote for specific candidates. His attorneys also likely explained that, even in the post-*Citizens United* world, there are many possible legal landmines and it is unclear where they are buried.

Conclusion

With the release of this new film, the Michael Moore/*Citizens United* saga now has a new chapter. While the *Citizens United* decision correctly made it easier for people like Michael Moore to have their opinions heard, our campaign finance laws are still a mess. The vague restrictions and unclear definitions can ensnare even the most casual political actor. The laws are so complex, that it is good advice to retain a lawyer before engaging in any political speech that might come close to triggering certain requirements. Even more frustratingly, there are many types of seemingly benign political speech that can trigger legal repercussions.

Thankfully, Michael Moore has enough money and enough lawyers to effectively negotiate the laws. But speaking out on political issues is becoming increasingly dangerous, and that by itself is contrary to the First Amendment.

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