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Trials&TRIBULATIONS

What's behind the 'Citizens' brouhaha?

The U.S. Supreme Court on Jan. 21 held in a 5-4 decision that the First Amendment does not permit Congress to bar corporations and unions from using general treasury funds to make independent expenditures to support or oppose political candidates.

The Court upheld certain disclosure requirements imposed on corporations that provide the public with information regarding the sources of the expenditures, but the ruling overturned two precedents on campaign financing, *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652 (1990), and a portion of the ruling in *McConnell v. Federal Election Commission,* 540 U.S. 93 (2003).

By MICHAEL R. WOLFORD
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The case emanated from a film "Hillary," a 90-minute documentary about then-Sen. Hillary Clinton, who was a candidate in the Democratic Party's 2008 presidential primary. The film was highly critical of Clinton, and Citizens United brought a declaratory judgment action seeking injunctive relief against the FEC's ban on marketing this type of documentary film. The petitioner believed the film might be covered by Title 2 U.S.C. §441b's ban on corporate funding of independent expenditures, which carried both civil and criminal penalties.

Reaction to the decision so far has been predictable and, by and large, appears split along party lines: The Republicans cheer it, and the Democrats condemn it.

E.J. Dionne Jr., a political columnist for The Washington Post, described the Decision as "reckless," and "an astonishing display of judicial arrogance overreach and unjustified activism."

Ruth Marcus, also of The Washington Post, called the decision "intellectually dishonest," whereas the Post's George Will hailed the decision as a "reaffirmation of the value of political speech."

The New York Times called the decision "a blow to democracy," whereas the Times' Jan Baran referred it to as a "breath of fresh air," noting it will "restrain Congress from flooding us with arcane, burdensome, convoluted campaign laws that discourage political participation."

In an unprecedented comment, President Obama in his State of the Union Address, criticized the ruling in front of six of the Supreme Court justices and suggested it will "open the floodgates for special interests — including foreign corporations — to spend without limit in our elections."

In light of the strikingly different comments the decision is generating, it is worth analyzing the expected impact it may have, and attempt to determine whether the ruling will "end democracy as we know it," or simply is another blip on the radar screen of campaign financing reform.

In reality, the Court actually reached out for its decision since it appears the petitioner, Citizens United, never actually argued the Federal statute (2 U.S.C. §441b) is unconstitutional. Rather, it claimed the documentary "Hillary" is not covered by the statute since the film was "funded overwhelmingly by individuals and not by the corporation". It would appear the Court's majority repudiated the time-honored principle of limiting its rulings to questions presented by the parties, and refraining from tackling Constitutional questions unless it is required to do so.

The process by which the Court reached its final decision also was unusual. To begin with, the Court had two rounds of briefing; two oral arguments; and 54 *amicus* briefs were submitted. The attorneys who participated in the oral arguments were an all-star cast.

Floyd Abrams, who has participated in numerous First Amendment cases — including the Pentagon papers case — appeared at oral argument as an *amicus* to Sen. Mitch O'Connell.

Ted Olson, a former Solicitor General who argued on behalf of President Bush in *Bush v. Gore,* appeared on Citizens United's behalf; and Seth Waxman, another former Solicitor General who successfully argued *Boumediene v. Bush,* appeared as an *amicus* for Sen. John McCain.

Even though the majority opinion focused on the fact that those prior, and relatively recent, Supreme Court decisions were being overruled, the federal government has been involved in placing limitations on corporate expenditures since 1907, when President Teddy Roosevelt engineered the passage of the Tillman Act, which banned corporations from donating money directly to Federal candidates. Interestingly enough, that prohibition remains in place, however corporations now have the right to expend funds from their general treasury on campaign ads.

In essence, the decision could be viewed narrowly in that,

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before the ruling, a corporation's political action committee could have spent millions on campaign ads wherever and whenever it desired while being restricted to spending monies from its general treasury at any time other than 30 days before the last primary election, and within 60 days of a general election. That prohibition has been struck down as unconstitutional.

'Stare decisis'

In the age of the eight-second sound bites, little attention is being paid to the principle of *stare decisis*, and the ease within which the majority overruled precedents issued in 2003 and 1990. The majority decision devoted about a page out of its 39-page opinion to justifying how its prior decisions could be overruled. It concluded the prior decision of *Austin v. Michigan Chamber of Commerce,* decided in 1990, was not well-reasoned, and that corporations have been able to avoid its holding. It also appears to justify the repudiation of that decision by citing technological advances, which have made the prohibition more of a restriction on free speech than otherwise would be the case.

As expected, the dissent devoted a considerable portion of its 60-page opinion to the majority's circumventing *stare decisis.* The dissent takes particular issue with the claim that, since *Austin v. Michigan Chamber of Commerce,* the experience in political expenditures has undermined the decision. The dissent points out, correctly, that alleged justification for overruling *Austin* is curious, since there has been no developed record containing empirical evidence and the petitioner never claimed *Austin* had been undermined. The dissent points out, too, that the decision in *McConnell v. Federal Election Commission* is only six years old and hardly qualifies as a case out of antiquity that needs to be revisited.

The dissenting opinion would appear correct when it concludes the only reason the Court has overruled the two relatively recent cases is that the majority simply disagrees with the result. The only factor that has changed since those decisions is the composition of the Court. Those reasons traditionally have not been sufficient to override the principle of *stare decisis.*

It is uncertain what, if any, impact the decision will have on political campaign expenditures. It has been noted that in New York there will be little, if any, impact since there no state law prohibits such expenditures. The majority of states, in that regard, are comparable to New York.

Some have suggested Congress may take action to circumvent the decision by requiring shareholders to vote on whether direct political expenditures on campaign ads should be undertaken.

In the final analysis, the decision's impact may be less on political expenditures than on the weakening of *stare decisis,* which may have more lasting and unfortunate impacts.

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