INTRODUCTION TO
CITIZENS UNITED v. THE FEDERAL ELECTION COMMISSION

This article discusses the Supreme Court of the United States (SCOTUS) decision on the case of Citizens United v The Federal Election Commission (CUvFEC). This landmark case overturned a series of campaign finance laws and Supreme Court decisions made in the 20th Century[1]. It describes the prelude to the Court's hearing of the case, the issues stated in the decision and the changes to campaign finance law and the privileges of corporations that resulted from that decision.

The Supreme Court session traditionally begins on the first Monday in October of each year. By that time, the list of cases to be heard has been announced and scheduled and the attorneys for claimants are prepared to present their arguments. The announcement of the decisions is the last duty for the Court before it adjourns for the summer in June. The case*, Citizens United v the Federal Election Commission (CUvFEC*), followed a very different path.[2]

What is Citizens United?

Citizens United describes itself as "an organization dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens".[3]

The Case: Citizens United versus the Federal Election Commission

In January 2008, Citizens United released a documentary entitled "Hillary: The Movie," critical of then-Senator Hillary Clinton, a candidate for her party's Presidential nomination. Anticipating that it would make the documentary available on cable television through video-on-demand within 30 days of primary elections, Citizens United produced television ads to run on broadcast and cable television. While they considered their documentary comparable to Michael Moore's "Fahrenheit 9/11"[4], they expected to be challenged by the Federal Election Commission (FEC) because they intended to show it during the "black out period" legislated by the Bipartisan Campaign Reform Act (BCRA) of 2002. BRCA, sometimes called "The McCain-Feingold Act," was enacted in 2002 in direct response to a scandal involving five sitting Senators who had interceded in the criminal investigation of a campaign

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1 Citizens United v. Federal Election Commission, Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/supct/html/08-205.ZS.html

[2] Toobin, Jeffrey, *Money Unlimited: How Chief Justice John Roberts orchestrated the Citizens United decision*, The New Yorker, May 21, 2012, http://www.newyorker.com/magazine/2012/05/21/money-unlimited, viewed by 02/04/16

[3] "Who We Are", *Citizens United*, http://www.citizensunited.org/who-we-are.aspx, viewed 02/01/16

[4] Rucker, Philip, "Citizens United used 'Hillary: The Movie' to take on McCain-Feingold", *The Washington Post*, January 22, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/01/21/AR2010012103582.html, viewed 02/04/16

contributor[5]. Citizens United's challenge was one of a series of efforts since its passage in 2002 to weaken or undermine the Act.

Citizens United argued that BCRA was unconstitutional as applied to "Hillary" and that its disclaimer, disclosure, and reporting requirements were also unconstitutional as applied to "Hillary" and to their ads. The District Court denied Citizens United a preliminary injunction and granted the Federal Election Commission (FEC) summary judgment.[6]

That decision denied Citizens United the opportunity to broadcast their documentary during the 2008 Presidential campaign. However, their suit to the Supreme Court was considered urgent by Chief Justice John Roberts because "substantial time would be required to clarify BCRA's application on the points raised by the Government's position in order to avoid any chilling effect caused by an improper interpretation[7]". Because he believed such a "chilling effect" is a direct interference with the First Amendment right to Free Speech, Roberts agreed to hear the case in 2009.[8]

Chief Justice Roberts saw this case as much more important than merely a challenge to the BCRA. He stated, "As the District Court found, there is no reasonable interpretation of "Hillary" other than as an appeal to vote against Senator Clinton. Under the standard stated in McConnell and further elaborated in Wisconsin Right to Life,[9] the film qualifies as the functional equivalent of express advocacy"[10].

Because of the history of challenges to BCRA and of this particular case, it was expected that five of the nine justices would rule in favor of the plaintiff, Citizens United. Instead, according to Jeffrey Toobin,[11] after an important internal debate among the Justices, Chief Justice John Roberts postponed announcing the decision in 2009. Instead, he directed the attorneys to prepare for a completely different argument from the one just heard in the case. According to Jeffrey Toobin and restated by Lawrence Tribe:[12]

> *"Fully cognizant of the thick body of precedent disfavoring sweeping facial challenges in cases where holding a law unconstitutional as applied to the case at hand would suffice to give the challenger full relief, Citizens United had expressly abandoned the facial challenge it had originally launched in the district court. Despite the narrowness of the question thus presented, Justices Scalia, Kennedy, Thomas, and Alito were eager to decide the broad constitutional issues potentially raised by the application of the federal statute at issue to cases not before the Court. Justice Souter, meanwhile, stood ready with a scathing dissent lambasting the majority for its*

[5] *Keating Five*, The New York Times, http://topics.nytimes.com/top/reference/timestopics/subjects/k/keating_five/index.html?8qa, viewed 02/14/16
[6] Citizens United v. Federal Elections Commission, Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/supct/html/08-205.ZS.html , viewed 02/14/16
[7] Ibid.
[8] Toobin, Jeffrey, Op. cit.
[9] Federal Election Commission v Wisconsin Right to Life, https://www.oyez.org/cases/2006/06-969 , viewed 02/14/16
[10] Sullivan, Kristin and Adams, Terrance, *Summary of Citizens United v. Federal Election Commission*, OLR Research Report, March 2, 2010, https://www.cga.ct.gov/2010/rpt/2010-R-0124.htm , viewed 02/14/16
[11] Toobin, Jeffrey, Op. cit.
[12] Tribe, Lawrence H., *Dividing 'Citizens United': The Case v. The Controversy*, Social Science Research Network, March 9, 2015, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2575865 , viewed 02/14/16

> *unwarranted activism. Chief Justice Roberts engineered a compromise and ordered re-argument, without any opinions being issued.*[13]"

Chief Justice Roberts directed the attorneys to return for new argument in September, 2009, before the official October beginning of the next session, the traditional October, stating,

> *"This Court must, in an exercise of its judicial responsibility, consider BCRA's facial validity. Any other course would prolong the substantial, nationwide chilling effect caused by BCRA's corporate expenditure ban. If there were a valid basis for deciding this statutory claim in Citizens United's favor (and thereby avoiding constitutional adjudication), it would be proper to do so. . . .in the absence of any valid narrower ground of decision, there is no way to avoid Citizens United's broader constitutional argument".*[14]

The arguments were heard and the decision was released January 21, 2010. Normally Supreme Court decisions are issued during the last days of the session in June. This case stood out for urgent consideration and action, before the 2010 political campaign season. In writing his opinion, Chief Justice Roberts stated that this particular case demanded that the Court focus on the constitutional validity of the law, BCRA, itself, and all other cases preceding. The case of particular concern to Chief Justice Roberts was *Austin v Michigan Chamber of Commerce (AvMC).* Roberts stated, "Because the question whether §441b [BCRA]applies to Hillary cannot be resolved on other, narrower grounds without chilling political speech, this Court must consider the continuing effect of the speech suppression upheld in Austin.[15]

"Chilling political speech" relates directly to the First Amendment, which says,

> *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*[16]"

However, the issue with *AvMC* involved a very separate issue that had been distinctly addressed in all of the preceding legislation dealing with regulating the financing of political campaigns. Oyez summarizes,

> *"The law was enacted with the assumption that "the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption."*[17]

The Michigan Chamber of Commerce claimed non-profit corporate status as its claim to Free Speech and intended to use money from its general fund to pay for political advertising. When they heard the case in 1990, the Supreme Court restated the validity of the State's concern about money and corruption, stating "preventing corruption or the appearance of corruption in the political arena by reducing the threat that huge corporate treasuries, which are amassed with the aid of favorable state laws and have

[13] Toobin, Jeffrey, Op. cit.
[14] Sullivan, Kristin and Adams, Terrance, Op. cit.
[15] Ibid.
[16] U.S. Constitution, Amendment 1, http://www.usconstitution.net/xconst_Am1.html , viewed 02/14/16
[17] Austin v. Michigan Chamber of Commerce, Oyez, HT Chicago-Kent College of Law, http://www.oyez.org/cases/1980-1989/1989/1989_88_1569

little or no correlation to the public's support for the corporation's political ideas, will be used to influence unfairly election outcomes*".*[18]

Oyez states as Facts of the Case,

> *"The Michigan Campaign Finance Act prohibited corporations from using treasury money for independent expenditures to support or oppose candidates in elections for state offices. However, if a corporation set up an independent fund designated solely for political purposes, it could make such expenditures. The law was enacted with the assumption that "the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption." The Michigan Chamber of Commerce wanted to support a candidate for Michigan's House of Representatives by using general funds to sponsor a newspaper advertisement".*[19]

The Court disagreed and upheld the Michigan law. Justice Marshall found that the Chamber was akin to a business group, given its activities, linkages with community business leaders, and high degree of members (over seventy-five percent) which were business corporations. Furthermore, Marshall found that the statute was narrowly crafted and implemented to achieve the important goal of maintaining integrity in the political process.[20]

The five Justice Majority of the 2009-10 Supreme Court used the case brought by Citizens United and stated:

> *"Austin is overruled, and thus provides no basis for allowing the Government to limit corporate independent expenditures. Hence, §441b's [BCRA] restrictions on such expenditures are invalid and cannot be applied to Hillary. Given this conclusion, the part of McConnell that upheld BCRA §203's extension of §441b's restrictions on independent corporate expenditures is also overruled*[21]*."*

Working through the history of every attempt to legislate campaign finance reform and the challenges to it, the five justices in the majority struck down most of the Congressional efforts to regulate the behavior of individuals and "organizations of individuals"[22] in election campaigns. Because striking down precedent is a very serious issue, the *CUvFEC* majority opinion contains a citation for each decision, the majority opinion and pertinent minority opinions and discussion of why the precedent is wrong.

The Justices stated,

> *"Stare decisis is instead a principle of policy. When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions decided against the importance of having them decided right. As Justice Jackson explained, "this requires*

[18] Oyez, Op. cit.
[19] Ibid.
[20] Ibid.
[21] Citizens United v. Federal Elections Commission, Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/supct/html/08-205.ZS.html , viewed 02/14/16
[22] Ibid.

a sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other."[23]

While each of the preceding decisions had held the use of corporate general funds to be a different kind of wealth resource in political speech Chief Justice Roberts, Kennedy, Scalia, Alioto and Thomas held that, "The Court has recognized that the First Amendment applies to corporations."[24]

The Decision

The majority opinion was written by Justice Kennedy. With Justice Antonin Scalia concurring, Chief Justice Roberts wrote the following statement stating the urgency he felt in regard to the current case and the dangers that limiting wealth in political speech entail for the country:

"The Government urges us in this case to uphold a direct prohibition on political speech. It asks us to embrace a theory of the First Amendment that would allow censorship not only of television and radio broadcasts, but of pamphlets, posters, the Internet, and virtually any other medium that corporations and unions might find useful in expressing their views on matters of public concern. Its theory, if accepted, would empower the Government to prohibit newspapers from running editorials or opinion pieces supporting or opposing candidates for office, so long as the newspapers were owned by corporations—as the major ones are. First Amendment rights could be confined to individuals, subverting the vibrant public discourse that is at the foundation of our democracy".[25]

Statements made in the Majority Decision:

Justice Kennedy expressed the same concern about "confin[ing]" First Amendment Rights to "individuals. The following statements reflecting the impacts of this decision were made by Kennedy in the CU v. FEC case.

"The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy". [26]

"This Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.
That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.[27]*"*

[23] Chief Justice Roberts Concurrence, Citizens United v. Federal Election Commission, Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/supct/html/08-205.ZO.html ,viewed 02/14/16
[24] Citizens United v. Federal Election Commission, Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/supct/html/08-205.ZS.html , viewed 02/14/16
[25] Chief Justice Roberts Concurrence, Op. cit.
[26] Justice Anthony Kennedy's Majority opinion, Citizens United v. Federal Election Commission, Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/supct/html/08-205.ZS.html , viewed 02/14/16
[27] Ibid

"Because §441b is not limited to corporations or associations created in foreign countries or funded predominately by foreign shareholders, it would be overbroad even if the Court were to recognize a compelling governmental interest in limiting foreign influence over the Nation's political process.[28]"

"Political speech is so ingrained in this country's culture that speakers find ways around campaign finance laws. Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. In addition, no serious reliance issues are at stake [29]"

"The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not.[30]"

The Immediate Impact of the 2010 Decision

Open Secrets described the impact in this way, "Citizens United's immediate impact was substantial. In one swift stroke, the Court overturned at least twenty years of its own precedent, rendered unconstitutional more than sixty years of federal law restricting corporate electioneering expenditures, and annihilated the statutes of twenty-two states that previously prohibited election spending from corporate general-treasury funds".[31]

The Court's decision in Citizens United likely calls into question laws in 24 states, including Connecticut, prohibiting corporations from making independent expenditures from their general treasury. While the ruling's immediate effect is unclear, experts predict it is only a matter of time before these laws will be challenged in court or repealed by state legislatures. Experts also predict that, since the laws are vulnerable, they will be difficult for state election officials to enforce.[32]

The Supreme Court's 2010 decision in Citizens United v. Federal Election Commission helped unleash unprecedented amounts of outside spending in the 2010 and 2012 election cycles. The case, along with other legal developments, spawned the creation of super PACs, which can accept unlimited contributions from corporate and union treasuries, as well as from individuals; these groups spent more than $600 million in the 2012 election cycle. It also triggered a boom in political activity by tax-exempt "dark money" organizations that don't have to disclose their donors.

Sullivan and Adams write that "Citizens United also ignited widespread popular, academic and political discussion about money, politics and the Constitution—a nationwide dialogue that has not yet abated".[33]

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[28] Justice Anthony Kennedy's Majority opinion, Citizens United v. Federal Election Commission, Cornell University Law School, Legal Information Institute, https://www.law.cornell.edu/supct/html/08-205.ZS.html , viewed 02/14/16

[29] ibid

[30] Ibid

[31] Citizens United v. FEC, *OpenSecrets*, http://www.opensecrets.org/news/reports/citizens_united.php , viewed 02/14/16

[32] "Summary of Citizens United v. Federal Elections Commission", *Connecticut General Assembly,* https://www.cga.ct.gov/2010/rpt/2010-R-0124.htm , viewed 01/09/16

[33] Sullivan, Kristin and Adams, Terrance, Op. cit.

To Repeat: The Immediate Impact of the 2010 Decision

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