Lessons from America

Citizens United v Federal Election Commission

'[W]ith all due deference to separation of powers': President Obama criticises the Supreme Court of the United States for reversing 'a century of law' on campaign financing. Six justices (bottom right) look on. Photo: Getty Images.

On 21 January 2010, the Supreme Court of the United States decided *Citizens United v Federal Election Commission,* one of the most important cases in recent years considering the First Amendment guarantee of freedom of speech. The Supreme Court declared invalid a provision of the federal campaign finance legislation (commonly referred to as the McCain-Feingold Act) prohibiting corporations from using funds for speech that is an 'electioneering communication' or that advocates the election or defeat of a political candidate. Although the decision did not disturb bans on direct contributions to candidates, it is likely to have a significant impact on the conduct of elections in the United States by allowing political spending by corporations during campaigns on public broadcasts including television advertisements.

Remarkably, just a few days after the decision was delivered, President Obama criticised it in his annual State of the Union address to an audience that included six justices, three of whom were in the majority in the 5-4 decision (Justice Kennedy, who wrote the opinion, Chief Justice Roberts and Justice Alito). The president said 'with all due deference to separation of powers' that the court had 'reversed a century of law' and that the decision would 'open the floodgates for special interests, including foreign companies, to spend without limit in our elections'.

That statement yielded the jarring spectacle of the six justices sitting stony faced while surrounded by members of Congress providing the president with a standing ovation. It was too much for Justice Alito – he was widely perceived to have uttered the words 'not true, not true' while shaking his head at the president's remarks. Chief Justice Roberts waited until after the speech to register his displeasure. In March, while answering a question from a law student at the University of Alabama, the chief justice reportedly said in relation to his attendance at the State of the Union Address, 'I'm not sure why we're there', and that he found troubling the 'image of having the members of one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering while the court – according to the requirements of protocol – has to sit there expressionless'. Supreme Court watchers will be interested to see whether any of the justices attend the State of the Union Address next year.

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What brought about this controversy? Ironically, the decision itself concerned a documentary released by Citizens United, a nonprofit corporation, in January 2008 called '*Hillary: The Movie*' that was critical of then Senator Clinton who at the time was in the early stages of her epic battle with then Senator Obama for the Democratic Party's presidential nomination. ('She is steeped in controversy, steeped in sleaze' said the narrator of the documentary.) Citizens United produced advertisements for the movie to run on television and was concerned about

civil and criminal penalties for violating the McCain-Feingold Act. It sought declaratory and injunctive relief.

Standing in their way was the 1990 decision of the Supreme Court in *Austin v Michigan Chamber of Commerce,* which held that political speech may be banned based on the speaker's corporate identity. In the Federal District Court, Citizens United abandoned a challenge to the constitutional validity of the legislation and relied on a narrower argument that *Hillary* was not 'electioneering communication' for the purposes of the Act. That argument failed because it was found that the film had no purpose other than to discredit Senator Clinton.

The Supreme Court heard oral argument on 24 March 2009. In an unusual development, on 29 June 2009 the Supreme Court issued an order directing the parties to reargue the case after providing submissions on whether the Supreme Court should overrule *Austin*.

Justice Kennedy delivered the main opinion for the majority holding that the restrictions on corporate expenditures in the McCain-Feingold Act were invalid and could not be applied to *Hillary*. *Austin* was overruled. The majority opinion emphasised the essential role that speech plays in holding officials accountable to the people. Justice Kennedy wrote that the 'right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it'. The First Amendment, in providing that Congress 'shall make no law … abridging the freedom of speech', was premised on mistrust of governmental power and there was no basis for the government to impose restrictions on 'certain disfavoured speakers'. The government may not 'deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration'.

Justice Scalia, in a separate concurring opinion, based his decision on 'the original meaning of the First Amendment'. His Honour held that because the First Amendment's text is written in terms of 'speech' not speakers there was no foothold for excluding any category of speaker from its protection, including corporations.

Justice Stevens's dissenting opinion at 90 pages was the longest in his 35 years as a justice. He was joined by justices Breyer, Ginsburg and Sotomayor. In one of several acerbic asides Justice Stevens suggested that under the majority's view of the First Amendment it might be a 'problem that corporations are not permitted to vote, given that voting is, among other things, a form of speech'. His Honour rejected the notion implicit in the majority opinion that the identity of a speaker has no relevance to the government's ability to regulate political speech and said that 'such an assumption would have accorded the propaganda broadcasts to our troops by 'Tokyo Rose' during World War II the same protection as speech by Allied commanders'. (Justice Stevens, who is 90 years old, is a veteran of the Second World War and served at Pearl Harbor between 1942 and 1945 where he analysed Japanese communications. He was apparently warned by his clerks, to no effect, that the reference to 'Tokyo Rose' might be lost on contemporary readers.)

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A significant aspect of the decision is its discussion of judicial restraint and the role of *stare decisis* in constitutional cases. Chief Justice Roberts wrote a separate opinion (which was joined by Justice Alito) addressing those issues. The chief justice said there is 'a difference between judicial restraint and judicial abdication'. For the chief justice the policy of *stare decisis* was the 'preferred course' but was not an 'inexorable command' especially in constitutional cases. It was rather a 'principle of policy' that required the court to balance 'the importance of having constitutional questions decided against the importance of having them decided right'. For his Honour, *stare decisis* is not an end in itself but a means 'to serve a constitutional ideal – the rule of law'. For Justice Stevens a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided. His Honour's view was that no such justification existed.

On 9 April 2010, Justice Stevens informed the president of his intention to retire at the end of the current term. After receiving the news the president vowed to replace him with someone who 'knows that in a democracy powerful interests must not be allowed to drown out the voices of ordinary citizens', an indication that the president's attitude to the *Citizens United* decision has not softened with time. We can confidently expect to hear more about the decision at the confirmation hearings for the new justice that will take place over the coming months.

By Justin Hewitt