

THE ORANGE COUNTY BETA REGISTER

Editorial: Happy ending to 'Hillary movie' case

2010-01-21 15:51:03



In *Citizens United v. Federal Election Commission*, commonly known as the "Hillary movie" case, the U.S. Supreme Court finally vindicated a proper understanding of the First Amendment, which provides that "Congress shall make no law" restricting freedom of speech. One might ask what part of "no law" do you not understand, but for much of the past century, especially since Watergate – in what we may stipulate has been a sincere effort to reduce corruption or the appearance of the possibility of corruption – Congress has imposed restrictions on political speech and the use of money to promulgate such speech.

As well-intentioned as political campaign restrictions might have been, many of them run afoul, as Justice Anthony Kennedy noted Thursday in his opinion for the 5-4 majority, of constitutional guarantees of free speech, and it is precisely the high court's job – not illegitimate "judicial activism," as some contend – to strike down such laws.

In this case, Citizens United, a generally conservative nonprofit, created a movie critical of then-presidential candidate Hillary Clinton, sought to make it available "on demand" with some cable TV companies, and then run TV ads promoting it. The Federal Election Commission argued that under the 2002 Bipartisan Campaign Reform Act – widely known as McCain-Feingold – the ads violated the law's ban on using corporate funds to undertake an "electioneering communication" or any speech advocating the election or defeat of a candidate within 30 days of a primary election and 60 days of a general election.

Federal campaign laws are curious. Although the First Amendment has been used (properly in our view) to protect speech and expression that many people find lewd or objectionable, its most fundamental purpose is to protect political speech. It would seem that this freedom is most important precisely in the periods leading up to elections. Yet McCain-Feingold explicitly banned such speech and political expression.

As Justice Kennedy noted in his opinion: "Thus the following acts would all be felonies under Sec. 441b: The Sierra Club runs an ad ... that exhorts the public to disapprove of a congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship."

This censorship is compounded by the fact that the FEC has created extensive rules implementing various laws that, as Justice Kennedy put it, "allows it to select what political speech is safe for public consumption by applying ambiguous tests."

John Eastman, dean of the Chapman University School of Law, whose Center for Constitutional Jurisprudence filed a brief in the case on behalf of free speech, said the decision was "pretty sweeping. They could have distinguished between nonprofit advocacy corporations and business corporations, but they didn't. However, when Congress is considering something like health care reform, which will affect every business, why should businesses not be allowed to speak out?"

Ilya Shapiro, a legal analyst at the libertarian Cato Institute, took note of an argument Chief Justice John Roberts made in his concurring opinion. There is an argument for not overturning prior court decisions, as this one did, because people have come to rely on those decisions even if they were wrong. However, nobody

relies on having less freedom than the Constitution guarantees, so some decisions are ripe to be overturned.

All that said, some concerns about corruption and influence that campaign finance laws have sought to address are serious. Such concerns can be best addressed, however, by mandating full and immediate disclosure, by candidates and issue-oriented organizations, of campaign contributions and spending. With the Internet this is perfectly feasible and would allow voters to decide whether, for example, a contribution by an insurance company or electioneering by an environmental organization is sufficient to decide how one votes.

This decision does not mark, as a coalition of groups calling for a constitutional amendment in the wake of the decision declared, a "Pearl Harbor for American Democracy." It would be more accurate to call it, as President Lincoln said in a different context, a "new birth of freedom."

See related column, this page.

WRITE A LETTER TO THE EDITOR

Letters to the Editor: E-mail to letters@ocregister.com. Please provide your name and telephone number (telephone numbers will not be published). Letters of about 200 words will be given preference. Letters will be edited for length, grammar and clarity.

© Copyright 2010 Freedom Communications. All Rights Reserved.

[Privacy Policy](#) | [User Agreement](#) | [Site Map](#)