

IN 2002, THE
BIPARTISAN CAMPAIGN
FINANCE REFORM ACT
RESTRICTED TELEVISED
FREE SPEECH.

WILL THE SUPREME COURT SET SPEECH FREE?

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ithout the First Amendment, which protects the right of civil liberties groups like the NRA to speak out on public issues, the Second Amendment would have been destroyed long ago.

Today, one of the gravest long-term threats to your Second Amendment rights is the weakening of your First Amendment rights—including your right as a member of the National Rifle Association to participate in free speech in the months before a federal election.

The very future of that right may hang in the balance on Sept. 9, when the Supreme Court hears a challenge to the Bipartisan Campaign Reform Act of 2002 (BCRA) suppressing political speech.

It is sometimes said that the Sedition Act of 1798 was the worst law repressing

political speech in the history of the federal government. Certainly the law was terrible. Because of that law, many Americans were punished for criticizing federal government officials. Yet today, the situation is, in some respects, even worse. Under the Sedition Act, truth was a defense, so if you could prove that your criticism of a federal official was accurate, then you would be entitled

to an acquittal. In contrast, the BCRA restricts even truthful statements about federal candidates.

The Supreme Court's September oral argument in *Citizens United v. Federal Election Commission* involves a case that began in 2008. Citizens United is a conservative, non-profit corporation that produced *Hillary: The Movie*, a film that was sharply critical of then-U.S. Sen. Hillary Clinton. Thus, the film was, in a sense, similar to the 2004 movie *Fahrenheit 9/11*, in which Michael Moore strongly criticized President Bush as he ran for a second term.

Hillary: The Movie addressed various scandals in Clinton's record, such as her role in President Bill Clinton's issuance of a pardon to unrepentant Puerto Rican terrorists—part of her pandering to the Puerto Rican vote in her 2000 Senate race, on the apparent theory that Puerto Ricans who live in New York are pro-terrorism.

Of course, Citizens United, just like other movie producers, including Michael Moore, wanted to advertise the film on television. Citizens United also entered into a contract with a cable television company by which Citizens United would pay a fee to make the film available free as an "on-demand" download for the cable system's viewers.

But then, the Federal Election Commission (FEC) stepped in and blocked the advertising and the on-demand download. The BCRA prohibits (with certain exceptions) corporations from funding television broadcasts—either programs or commercials—about federal candidates during the pre-election period. "Corporation" under BCRA includes not just big businesses but also non-profit corporations and public service organizations like the NRA.

The Supreme Court heard oral arguments in the case in March 2009. Most observers had been expecting the court to decide the case on narrow grounds of statutory interpretation:

BCRA applies to some media (e.g., television, radio) but not to others (e.g., films in movie theaters, newspapers, books, YouTube). Therefore, the Supreme Court could have decided that an on-demand download, which is performed one at a time by individual viewers, does not count as a television "broadcast" according to the statute.

At the oral arguments, the FEC's lawyer contended that Congress can, in the name of "campaign finance reform," even outlaw the publication of corporate-funded books before an election. So, for example, if in September 2012 the NRA wanted to publish a book about gun rights, and one chapter of

2002?" The *Austin* and *McConnell* cases both upheld limitations on corporate speech during elections.

Justices Kennedy, Scalia and Thomas have made it clear that they consider the campaign speech restriction laws to be unconstitutional. Chief Justice Roberts and Justice Alito have not gone that far, but have been willing to interpret the speech suppression statutes narrowly.

The *Citizens United* case would not affect activities such as those of the NRA Political Victory Fund (PVF). The PVF is a political action committee, an entity that raises its own money from donors, makes contributions to political

The Supreme Court is set to hear arguments on whether it is constitutional for groups like the **NRA to have their freedom of speech curtailed prior to national elections.**

that book criticized President Obama who was running for re-election, the government could effectively ban the book.

The government lawyer's argument is consistent, at least. If the government can censor television and radio before an election, why can't the government also censor other forms of communication?

Instead of deciding the case in the Supreme Court term that ended this June, the court ordered that the case be re-argued on Sept. 9, and that the argument address not merely the question of statutory interpretation, but also the constitutionality of spending limits on corporate speech before elections.

The question is: "For the disposition of this case, should the court overrule either or both *Austin v. Michigan Chamber of Commerce* and the part of *McConnell v. FEC* which addresses the facial validity of Section 203 of the Bipartisan Campaign Reform Act of

candidates and buys election advertising urging voters to support or oppose a political candidate.

Instead, the *Citizens United* case will affect organizations such as the NRA itself, which communicates in a wide variety of media, and whose communications include statements of fact about elected officials, including federal candidates during election season.

Although the sponsors of the Sedition Act of 1798 and the Bipartisan Campaign Reform Act of 2002 may have had good intentions, the idea that Congress can pass laws punishing people and organizations for speaking out about politicians during an election cycle is anathema to democracy.

Just one more Obama nomination to the Supreme Court could tip the court against both the First Amendment and the Second Amendment. For the time being, we can hope for the best from the court's upcoming 2009-10 term. ☐