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Robert A. Levy: Untangling campaign finance rulings in Citizens United and McCutcheon

By Robert A. Levy

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Contributions, independent expenditures, super PACs, electioneering communications — the terminology and regulations governing campaign finance are incomprehensible to the average voter.

Moreover, the U.S. Supreme Court's last two major decisions on the issue — Citizens United v. Federal Election Commission, and more recently McCutcheon v. Federal Election Commission — have been widely misinterpreted. Let's dispel some of the confusion.

First, a few basics: Currently, federal limits apply to contributions of money, goods or services by individuals or groups to candidates, political parties and political action committees (PACs). For example, individuals cannot give more than $5,200 to a single candidate — $2,600 for the primary election plus $2,600 for the general election. Corporations and labor unions are forbidden from making direct contributions.

Prior to the McCutcheon decision, individuals were limited to aggregate contributions of $48,600 to all candidates plus $74,600 to all PACs and parties. Accordingly, anyone wishing to donate the maximum $5,200 per candidate would be constrained to nine candidates before encountering the combined limit.

In McCutcheon, the Supreme Court overturned the aggregate ceilings because they did not advance the anti-corruption rationale underlying campaign finance laws. After all, if $5,200 did not corrupt the first nine candidates, why would the same amount corrupt the tenth, or the 50th? Contrary to what some have written, McCutcheon actually left intact all the limits on contributions to single candidates, parties and political committees.

Additionally, our laws still require disclosure of independent expenditures, which are outlays for advertisements and publications that expressly advocate the election or defeat of a clearly identified candidate for a federal office. Before the Citizens United ruling, a corporation would have violated campaign finance rules if it published a book containing the words "vote for Obama." Of course, Americans are not supposed to be in the book-banning business. That's why

the Supreme Court invalidated the outright prohibition on independent expenditures by corporations and unions, despite retaining the disclosure requirement.

Citizens United also struck down the prohibition on electioneering communications, which are broadcast ads that even name a candidate within 60 days of a general election or 30 days of a primary. Under the new rules, corporations and unions can pay for those communications — as long as they are fully disclosed and independent; that is, not coordinated with candidates or their agents.

It should be noted that Citizens United had no effect whatsoever on contribution limits; it related only to independent outlays. Nor did Citizens United grant corporations and unions the same rights as persons; it simply established that persons may, if they wish, express their political views through the medium of those organizations.

What about super PACs? They were created by the U.S. Court of Appeals in Washington in a case called SpeechNow.org v. Federal Election Commission, which expanded on the Citizens United decision. Super PACs make no contributions to candidates or parties. They do, however, make independent expenditures. Before the SpeechNow ruling, individuals acting alone could spend as much as they wanted; but two or more persons jointly would be limited to $5,000 each. To correct that anomaly, the law now allows individuals to give unlimited funds to a super PAC, on condition that donations to, and expenditures by, the PAC be fully disclosed.

The logic of Citizens United and SpeechNow is that independent expenditures do not have the same potential for corruption as direct contributions to candidates. Besides, many Americans have come to realize three truths about campaign finance regulations: First, their stated reason — to prevent corruption — is too often trumped by their real motive, which is to protect incumbent officeholders from underfunded challengers. Second, each new regulation inevitably spawns an adroit means by which the regulation is circumvented. Third, campaign money is mostly designed to support candidates whose views agree with those of the donor — not to entice candidates to change their views in return for a donation.

Meanwhile, disclosure by corporations, unions and super PACs facilitates transparency. Only 501(c)(4) social welfare organizations, 501(c)(5) labor and agricultural groups, and 501(c)(6) boards of trade and chambers of commerce can accept donations without disclosure, and none of those entities can contribute to candidates or engage in political activities as their primary purpose.

Furthermore, campaign finance abuse can be prosecuted under long-standing bribery and anti-corruption laws. Misuse of a government office — such as awarding federal contracts as quid pro quo for donations — and payoffs secretly contributed to a candidate, then spent on personal pleasures like a new car, are plainly illegal. But when a candidate discloses a donation and puts the money in a segregated fund that can be used only for constitutionally favored political expression, that’s not corruption; it’s free speech.

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