Navigating Election and Political Law

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Campaign Contributions and Spending: What You Do Not Know Can Get You in Trouble

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Introduction

First in Government

I became a practicing attorney in 1985. Out of Columbia Law School, I went to work at the New York City Law Department as an assistant corporation counsel. I worked in the Division of Legal Counsel, rendering legal opinions to the officers and agencies of New York City government and drafting legislation responsive to the mayor's agenda.

The mayor, at the time, was Ed Koch. Early in my career, New York City was rocked by a series of corruption scandals in the awarding of City contracts. (These scandals came to light after Queens Borough President Donald Manes' first attempt at suicide; he ultimately succeeded in killing himself in a very gruesome fashion.) The resulting criminal cases and convictions cast a pall over the third Koch term. As I recall, very early on, indeed, shortly after the first Manes suicide attempt, the Law Department put together an "ethics team" to examine and develop possible reforms in response to the scandals. I was a junior attorney on that team. Lesson one for new lawyers: an early assignment might just shape the focus of your entire career. It did for me.

Our group worked on various issues, including public campaign financing. First, we drafted a state bill to institute a public financing program for New York City. That effort failed. We then analyzed the city's legal authority to adopt that kind of campaign finance reform by local law. Thereafter, we drafted local legislation, which was proposed by Mayor Koch and enacted into law by the city council.

What I had initially seen as a culmination—seeing a concept through to enactment as law—then became a new beginning. I decided to take on the challenge of helping to make that new law a reality.

Thus, when the new New York City Campaign Finance Board staffed up, I was the first lawyer hired. First, I served as counsel to the executive director. My work included advising the board and executive director on the requirements and strategies for implementation, drafting regulations and advisory opinions, preparing educational materials, and conducting training

programs for candidates. Later, when the Board created the position of general counsel, I took on an expanded role, gaining responsibility for enforcement. Altogether, I served at that agency for almost twelve years, bringing my total time in New York City government to nearly fifteen years.

Going Private

I was then thirty-eight-years old, it was the millennial year, and I found myself ready to try something new. So I gave up a job I loved and began to sell my services to the regulated community. I recall that some of my former government colleagues saw this as a kind of Darth Vader moment.

The New York City elections scheduled for 2001 would be unprecedented. It would be the first election in which a two-term limit (enacted by referendum in 1993) would force many long-serving incumbents out of office. It was also to be the first city-wide election in which a multiple matching formula of four dollars in public funds paid for every one dollar of "matchable contributions" would be in effect (a 1:1 payment formula had applied in previous city elections). In other words, there would be many open seats and a number of candidates looking to fill them. As I recall, some of the primaries had as many as ten candidates on the ballot that year.

I saw that electoral prospect as a business opportunity. Together with a lifelong friend (who was not an attorney), I created a consulting firm to provide campaign management and campaign finance compliance services to candidates for New York City offices. It was a big success and we were one of the top vendors in the 2001 elections. That said, I also gained an appreciation for the complexities of having a friendship turn into a business partnership. Further, I missed practicing law and came to understand that my clients would derive more benefit from my provision of services as an attorney.

So the consulting firm broke up, I opened shop as a solo practicing attorney, and most of the clientele I had serviced as a consultant came to retain me as an attorney. At that time, my clients were mostly candidates for New York City office, together with several other individuals and entities engaged in political activities.

I did not remain solo for long. I was invited to join the firm now known as Genova Burns Giantomasi Webster LLC. GBGW is based in New Jersey, with offices throughout that state, and in New York City and Philadelphia. Joining as a partner, I head the firm's corporate political activity law practice, which is headquartered in our New York City office. In addition to the NYC candidate-clientele, we continue to serve, our practice group focuses on what might be called the "contributor-side" of campaign finance: individuals, political action committees, not-for-profit organizations, and companies engaged in political activity. Our clients encounter various rules in different jurisdictions concerning campaign finance, lobbying and other interface with government, public procurement, and conflicts of interest standards applicable to public officials.

Today we have a wide variety of clients, including candidates and elected officials, such as New York City Mayor Bill de Blasio and New York City Comptroller Scott Stringer, corporations, trade associations, PACs, Super PACs, not-for-profit organizations, wealthy individuals, and other public policy advocates. Often we work directly with in-house corporate counsel, government affairs personnel and lobbyists, corporate boards, and top executives. Whether by choice or circumstance, clients of all kinds find benefit in legal counsel, strategic guidance, and/or representation on issues related to political speech and its funding.

Rewards and Challenges

I have always had an interest in government and politics. That is probably why I initially chose to work in government, although, again, the focus of my practice came about by chance. However, the attraction goes beyond the subject itself. What I mean is that I have always found this field to be a terrific outlet for creativity.

There is the drafting of legislation, regulations, and opinions, whether in the context of working out the demands of implementation of a reform program or in addressing issues, that implementation poses for the regulated community. The reform dynamic is another aspect. One hardly even thinks of campaign finance as a field distinct from the impulse for reform, hence the ubiquitous label "campaign finance reform." Change and experimentation are rife in a quest for "good government" that never quite seems to reach that destination.

This ongoing-reform impulse constantly runs up against trends in First Amendment[1] jurisprudence, trends that are currently rolling back legislated reforms such as restrictions on corporate expenditures in elections and limits on aggregate political donations by individuals. This conflict yields uncertainty and gray areas as to the legality of various kinds of political activity, further underscoring that the need to think creatively is at a premium in this environment.

Elections, of course, are very public affairs, drawing constant scrutiny by the media and opposing factions. The stakes could not be higher, as candidates (and their teams) compete for the opportunity to wield the power of elective public office. Sometimes fundraising and spending activities draw front-page attention in the heat of a political campaign or its aftermath. A campaign finance attorney will, sooner or later, find the opportunity to use many elements of the lawyer's tool-box, as matters entail strategic counseling in advance of any controversy, damage control should controversy arise, bringing and defending of complaints regarding election-related activities, representation in the context of compliance reviews and enforcement proceedings, both before and after elections, and litigation (including on constitutional issues).

The rapid pace of change in this field, which again is the result of forces in conflict, as well as the extraordinary level of public scrutiny, poses significant challenges for attorneys. One example is that changes in the rules often stimulate new behaviors that outpace the law's evolution. Advocates of all stripes, including government relations specialists, professional fundraisers, and political operatives, often promote innovative strategies to meet *their* clients' political objectives. It is the lawyer's job to recognize all the complexities and, as necessary, temper *our* clients' enthusiasm with cautious counsel. When a client looks to move faster than the courts have, counsel may sound at bit like the parent to the kid in the back seat: "we're not there—yet."

Look to the Supreme Court

Buckley vs. Valeo[2] is the landmark 1976 decision that sets the framework for all campaign finance laws in this country. More recently, *Citizens United vs.*

[1] U.S. CONST. amend. I.
[2] *Buckley v. Valeo,* 424 U.S. 1 (1976).

Federal Election Commission[3] points toward new de-regulation under the First Amendment, a path the Supreme Court majority has continued to follow in subsequent cases, most recently, *McCutcheon v. Federal Election Commission.*[4] Under Chief Justice Roberts, the Court has actively reshaped the constitutional parameters for campaign finance, an effort that shows no signs of abating for as long as the current majority holds sway.

There are two choices in spending money in an election: one is to make a contribution directly to a candidate's campaign, which may then spend those funds in the election. The other way is to use funds to communicate a viewpoint to the electorate independent of the candidate who benefits from that spending. Each choice is a manifestation of speech that is protected from governmental interference under the First Amendment, albeit to different degrees.

The two more recent cases mentioned above each address one of these two choices. *Citizens United* deals with independent spending, specifically holding that corporations have a constitutional right to express their viewpoint through independent expenditures in a federal election. *McCutcheon* concerns the other kind of spending: the right of individuals to write checks (each up to the maximum permissible per recipient) to support as many candidates and political party committees as they may choose. In both cases, the Court overturned precedent to strike down longstanding restrictions. Further, dicta in both cases strongly signal further deregulation under the First Amendment. Think of these as triple-play cases: overturn a precedent, turn a restriction into permission, and signal that more deregulation is on the way. That is about as big an impact as any court decision can have.

Response to the Court's Decisions

It seems clear that precedents will not get in the way of the Court majority's mission. This trend invites creative arguments designed either to roll back pesky precedents or to develop new theories in defense of old rules. The billions-of-dollars campaign finance question of today is not so much whether the current Court majority will go further, but how much further

[3] *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310 (2010).
[4] *McCutcheon v. Fed. Election Comm'n.*, 134 S. Ct. 1434 (2014).

will it go before that majority changes? Should the majority's sentiments change, the next question will be whether the new majority looks to narrow or neuter the Roberts Court's campaign finance decisions and, if so, how? This prospect of new judicial thrusts and potential counter-thrusts will continue to drive the change-dynamic in the field for many years to come.

In the meantime, legislatures and regulated parties must aim to keep pace with the courts.

When the Court speaks in constitutional terms, legislatures react. Conscientious legislators wrestle with finding constitutional solutions to problems previously addressed by laws now found to be unconstitutional. One possible response is deregulation. Thus, in addition to repealing limits held unconstitutional, a legislature may choose to repeal or modify other laws based on the Court's dicta. Alternatively, a legislature may try to respond with reregulation, such as a new approach to curb specified campaign finance activities in a way that might pass constitutional muster. Two such alternatives are "pay-to-play" requirements and public campaign financing. Both of these reforms share a carrot-and-stick approach for imposing limitations on narrow classes of contributors and/or candidates.

What issues do these Court decisions raise for candidates? *Citizens United*[5] held that corporations might spend independently to support or oppose candidates in a federal election. That decision inspired an explosion of independent expenditure activities in federal, state, local, and judicial elections across the country with funding from unlimited sources. More so than before, candidates worry about outside groups running negative ads and whether they will have sufficient resources to compete against that bombardment. While the independent spender can spend whatever his or her wallet will afford, the candidate must raise money, unless he or she is independently wealthy. In most jurisdictions, including federal, the candidate is under a limit on how much they can raise from any particular source. Thus, candidates must do more work to marshal resources to get their own message across in races that would otherwise be dominated by independent spending.

Two solutions have been proposed for the dilemma candidates' face. One would put candidates on the same ground as independent spenders,

[5] *Citizens United*, 558 U.S. at 355-366.

permitting candidates to raise unlimited sums to get their own message out. The other proposal is public campaign financing. If candidates could at least qualify for some public funds, plus the contributions they could permissibly raise, it might make a competitive difference in a race that would otherwise be totally dominated by independent spending.

One might think this is a great era to be a donor. The donor is now a very big man on campus, although he may find popularity as much burden as benefit as candidates and independent spending entities alike repeatedly seek his support. In any event, donors' dollars can help bring them greater access to elected officials. The Court has made clear that—absent *quid pro quo* corruption—mere unequal access does not justify governmental restrictions on speech. Since unequal access (like unlimited spending) is the outgrowth of the exercise of First Amendment freedoms, the question becomes: is there any constitutional means for tempering the outsize role of the big man on campus in the interest of democracy?

One impulse is to mandate more public disclosure. In theory, if voters have access to more information about who is donating how much to whom and how those funds are being used, they will be able to draw their own conclusions about who is set to dine on the legislature's sausage and therefore be able to cast an informed ballot.

Another indirect means for tempering unequal access builds upon the constitutional fact that the right to spend freely on advocacy communications to an electorate hinges on the independence of those communications from the candidate who benefits. This avenue for further possible regulation concerns the meaning of "independence" and its flip side, "coordination." If a public communication has been coordinated with a candidate, it is not independent, but rather will be treated as an in-kind contribution, subject to limitation.

While legislatures, candidates, and big spenders try to keep pace with developments in campaign finance law, a last group generally does not. You can call them the 99 percent and that is probably a good estimate of that portion of the electorate that does not participate through monetary donations. The trend of campaign finance jurisprudence tends to leave most of these folks on the sidelines, in the bleachers, or out of the ballpark all together. The fear is that, as election campaigns become seemingly ever more

dominated by the voices of big donors and spenders, the large majority of people will become ever more cynical about who calls the tune for elected officials. Or perhaps they will just tune in, turn off, and drop out.

Donors and Recipients

This is the legal atmosphere of the American political process and the field for the practice of campaign finance law. Sometimes you get to argue over big principles, but day to day this atmosphere is just our oxygen.

Returning to the mundane, we meet a client who (as so often happens) voices confusion. On the one hand, the Court is saying individuals and corporations are free to speak out without limitation. That is exactly what the client sees (or fears) her business competitors or ideological opponents appear to be doing. On the other hand, the laws on the books say there are still many tripwires. If the client does not comply, her message will backfire—with the legal authorities, the press, and ultimately the public. What *can* she do? What *should* she do?

After the *Citizens United*[6] decision, corporations are *legally* free to make independent expenditures. However, as creatures of the marketplace, no for-profit entity is free to ignore potential customer reaction to political activity. This risk to reputation is compounded if the political activity is not in compliance with applicable laws and it can absolutely catch flame when one considers the toxic elements in this atmosphere.

There are all kinds of scrutiny. While some regulators are under-funded or held up by partisan divisions (although that certainly varies), federal and state prosecutors have built careers and even advanced into high elective office themselves by bringing public corruption prosecutions alleging campaign finance improprieties. Business competitors are watching, ready to pounce on any mistake. So too the political opponents of the candidate or issue the client seeks to advance; they are ready to seize on anything that can be turned into fodder for advancing the opposing campaign. Reform advocates who say they speak in the name of principle not politics are always on the lookout for potential scandals to use as exhibits in their case for campaign finance reform. Then there are partisan or ideological warriors

[6] *Citizens United*, 558 U.S. 310.

engaged in a broader power struggle over the political direction of the country (state or municipality), who often attack each other's campaign finance tactics. The latter two categories overlap with editorial boards and pundits who buy ink by the barrel or rather blog, post, and tweet around-the-clock.

Politics is not a parlor game. People get burned all the time. It is important to weigh carefully the risks that even technical non-compliance poses.

The road to full compliance starts with understanding the basic architecture of campaign finance: donors and recipients. Of course, political spending entities are generally both.

A candidate (or rather, the candidate's authorized political committee) is one kind of recipient. In most jurisdictions, contribution limits apply to the candidate's campaign receipts. The candidate's campaign funding and spending transactions are generally subject to public disclosure requirements. Similarly, donations to political party committees are often limited (albeit at higher levels than limits applicable to candidates) and public disclosure is required.

A political action committee (PAC) is an association of people who raise money for the purpose of making donations to candidates. In many jurisdictions, including federal, the money a PAC raises is subject to contribution limits. In other words, often PACs are not permitted to accept more than a specified amount from any particular source. These limits are intended to serve an anti-circumvention purpose: to ensure that PACs do not function as a conduit for donors to evade limits on direct contributions to candidates. Dicta in the recent *McCutcheon*[7] decision casts doubt on this rationale as a matter of constitutional law.

After the *Citizens United*[8] case, a new phenomenon took off, called the Super PAC. Like an ordinary, Clark Kentish political action committee, a Super PAC must register with the Federal Election Commission (or state or local analogue) and publicly disclose its receipts and expenditures. The main difference is that a Super PAC does not make direct donations to

[7] *McCutcheon*, 134 S. Ct. 1434 (2014).
[8] *Citizens United*, 558 U.S. 310.

candidates, but rather is dedicated solely to independent spending. (IE-only committee is another term for Super PAC.) It is for this reason that Super PACs may raise unlimited sums from individuals and corporations and may spend these monies, without limitation, on public communications to support or oppose candidates. These spending activities, however, may not be coordinated with candidates or the agents of the candidates.

All of the above political committees, candidate-authorized committees, political party committees, PACs, and Super PACs, are exempt from federal income taxation pursuant to Internal Revenue Code Section 527.[9] With some exceptions, these political organizations are also subject to IRS registration and reporting requirements.

Finally, not-for-profit organizations have entered this fray, especially social welfare organizations, labor organizations, and trade associations or business leagues, which are exempt from federal income taxation under Sections 501(c)(4), 501(c)(5), and 501(c)(6) of the Internal Revenue Code,[10] respectively. While these not-for-profits are not allowed to advocate the election or defeat of candidates as their primary activity, such organizations frequently undertake issue advocacy and public (and member) education campaigns containing messages about candidates in an election. Donations to these entities are unlimited and, in general, not subject to public disclosure requirements, although recent state and local law proposals and enactments have begun to require public disclosure of donations in some instances. These not-for-profits must ensure they operate in a manner that does not trigger a duty to register as a political committee, does not constitute coordination with a candidate or a political party that would result in in-kind contributions, and does not jeopardize their tax exemption.

Regulatory Schemes

On the federal level, we have a public financing system for presidential candidates that had a high level of participation among major candidates until the last decade, but is now widely considered a dead letter. We have never had any kind of public financing program for congressional races. In federal elections, contribution limits apply to candidates, party committees,

[9] I.R.C. § 527.
[10] *Id.* §§ 501(c)(4), 501(c)(5) and 501(c)(6).

and PACs. Contributions by corporations and labor organizations are prohibited in federal elections, except through individually funded connected PACs or to Super PACs. Federal law also prohibits contributions by foreign nationals, national banks, and federal contractors. Disclosure requirements apply to registered political committees, including candidate-authorized, political party, PACs, and Super PACs. Disclosures must also be filed by individuals and entities making independent expenditures and electioneering communications.

Every state's campaign finance laws are different, although many follow elements of the federal scheme, such as requirements for registration and reporting as a political committee, standards for independent expenditures or coordination, and contribution limitations. Following the federal approach, some states continue to prohibit direct political contributions by corporations. While the logic of a corporate contribution ban may have been undermined by dicta in *Citizens United* and *McCutcheon*, the Supreme Court has previously upheld that ban.[11]

Some localities have their own campaign finance regimes; otherwise, state law sets standards for campaign financing in local elections. A few states and municipalities have public financing programs. Some have pay-to-play restrictions on government contracting or other specified opportunities to do business with governmental entities in relation to political contributions by the entity or associated persons. Pay-to-play restrictions on political contributions are also administered by the Municipal Securities Rulemaking Board (for municipal finance professionals), the Securities and Exchange Commission (for investment advisors), and the Commodity Futures Trading Commission (for swap dealers). Enforcement regimes vary. Agency funding, expertise, and whether it has a bipartisan or non-partisan makeup are factors in determining whether enforcement will be vigorous and comprehensive.

Protecting Contributors

A lawyer's client receives a solicitation. The client asks the lawyer for guidance on whether the contribution may be made without risk, as a matter of law or otherwise.

[11] *See Fed. Election Commission v. Beaumont,* 539 U.S. 146 (2003).

What do we need to consider? First, who is the client—is it an individual or a business corporation? In addition to advising on applicable limits and disclosure requirements, we may need to consider whether the company (or the contributor's employer) does business (or seeks to do business) with the state or local government conducting the election, and whether a pay-to-play restriction is applicable, and to whom? Is the proposed contribution subject to a company policy regarding employee political activity? Are any internal reporting or preclearance procedures applicable to such contributions? May the donor give any direction to the recipient for the use of their contribution, or might such instructions pose legal complications? On the flip side, does (or should) the donor know anything about how the recipient intends to use these funds, such as independently or in coordination with a candidate, before writing the check?

Companies are at the mercy of their officers and employees. It is generally beneficial to have a clear internal policy and training to safeguard against the improper use of company resources to make unreported in-kind contributions or illegal reimbursement of contributions to political campaigns.

So what should the donor do to assure compliance? First, it is important to know who and what the proposed recipient is. Is it an independent committee or authorized by a candidate? Has it registered as a political committee and, if so, in which jurisdictions? Will it be making public disclosure? To whom and when will it make disclosure? What, if any, representations has the recipient made regarding their intended use of the contribution? The prospective contributor should never instruct the recipient on how the contribution should be used unless she has first received guidance from an attorney about the implications of earmarking. Indeed, in general, a contributor should never rely on the proposed recipient for guidance on the law that governs the contribution.

After the contribution is issued, it is important to confirm that the funds were deposited by the intended payee and to ensure that the contribution has been accurately reported by the recipient, to the extent public disclosure is required. What expenditures did the recipient ultimately make and report? Did the recipient meet all pertinent legal requirements? Has the recipient made any public representations concerning the contributor's role that have drawn problematic attention?

No matter how lax a law or how complacent an enforcement authority appears to be, one must never take compliance for granted. Here in New York, for example, limited liability companies are not subject to the $5,000 annual aggregate limit that applies to contributions by corporations. Some call this an enormous loophole. Thus, over the years, we have seen many instances in which limited liability companies under common control have sprinkled large contributions to a single candidate, which, in the aggregate, far exceed the amount any one contributor may give to that candidate.

While the substantive law currently remains the same, new legislation empowering an enforcement counsel at the New York State Board of Elections suggests that existing legal limitations will soon be enforced with more vigor. But what difference should that make in the case of a loophole? Plenty, if contributors have not accurately understood the scope of the "loophole" and the resulting contributions were not fully vetted for legal compliance.

The LLC must use its own funds to make the contribution. Were an LLC funded for the purpose of making political contributions, it would need to register and file public disclosure reports as a political committee. Moreover, the use of an LLC as a mere "pass-through" conduit for a controlling person's contribution would arguably violate the statute requiring that contributions be recorded under the true name of the contributor. What if the new enforcement agent chooses to give attention to either or both of these concerns? Will previous LLC contributions pass muster? Or, in other words, was the LLC contribution "bullet-proof" with respect to all potential compliance issues, including those for which enforcement had appeared dormant?

As pertinent, both individual and organizational contributors should be instructed on the relevant limitations on contributions made to candidates and political party committees; political committee registration and reporting requirements; independent expenditure reporting requirements; restrictions on the use of corporate funds or resources; what constitutes improper coordination with a candidate; the law prohibiting reimbursement of political contributions; any applicable "pay-to-play" restrictions limiting eligibility for government contracts in relation to political contributions; the fact that offering a contribution as a *quid pro quo* for governmental action or inaction is criminal bribery; and restrictions on political activity due to tax exempt status (as applicable).

Successful Strategies

A successful compliance strategy entails being proactive before the check is written. Elements include written confirmation to the recipient entity of the candidate and election (for limitation tracking purposes) and provision of additional information to help ensure the recipient fully and accurately reports the contribution as required by law. In the case of corporate contributions (or individual contributions subject to a company's procedures for political activity), records should be maintained showing that required approval (or preclearance) has been obtained and that the contribution has been recorded appropriately to ensure ongoing compliance with limitations. A corporate political activity policy is often beneficial, but only if officers and employees are trained to monitor and enforce compliance.

The larger the amount of the contribution, or the more sophisticated the donation strategy (e.g., bundling of contributions), the more attention should be given to its potential for sparking public controversy separate from the question of legal compliance. Some donors and recipients may court attention for donations in order to draw public attention to their message. Voluntary public disclosure may also be instituted to demonstrate and routinize the contributor's or recipient's commitment to transparency via information dump. Voluntary disclosure policies also help distinguish between those political contributions that stem from corporate decision-making and those that are simply the free expression of individual officers and employees—a line the press is often quick to blur.

Yet nondisclosure is generally preferred as the key for avoiding controversy. But even where legally tenable, such as in the case of donations to 501(c)(4)[12] entities, it is advisable to nonetheless think through a "damage control" strategy in the event of leaks, inadvertent disclosure by the recipient, or subpoenas issued in the course of law enforcement. Put another way, if there is a sense that damage control will be needed if the contribution becomes public information, that in itself may be an indication that the contribution should not be made.

So what can happen if you are caught up in a scandal over political donations? The whiff of scandal can be fatal to candidacies and businesses

[12] I.R.C. § 501(c)(4).

alike.[13] Regardless of the growing room under the First Amendment for marshaling financial support for candidates of your choice without limitation, dangers lurk that can change the making of a contribution from an asset into a liability into an instant.

Looking Ahead

Eventually the Supreme Court will likely consider striking down the corporate contribution prohibition at the federal level, in which case, states would follow suit. Also, courts and legislatures may soon revisit the general applicability of receipt limitations on PACs, political parties, and defeated candidates, among other classes of recipients. Conceivably, those limitations could be rendered inapplicable in instances where the nexus between contribution and elected official is too attenuated to be upheld as a closely drawn protection against *quid quo pro* corruption or its appearance.

Whether a further rollback of limitations proceeds, the push for greater mandatory and voluntary public disclosure—by both donors and recipients—will likely continue. What motivates that push? The urge to ensure that voters are better informed about forces exerting influence over candidates and that shareholders have more complete information for judging whether political spending is putting corporate profits at risk? Or, as disclosure opponents argue, is the move toward disclosure a backdoor effort to re-impose the corporate spending limitations that *Citizens United*[14] invalidated, whereby efforts to drum up negative public (or shareholder) reaction are the means of enforcement? Might the latter goal bring constitutional justification for detailed disclosure into question under the current First Amendment[15] jurisprudence?

Pay-to-play restrictions continue to be a robust regulatory approach. Will there be cases that examine whether such restrictions on political contributions have been closely drawn prophylactic steps against the buying of government favors (or its appearance)? Alternatively, might the pay-to-

[13] *See, e.g.*, David W. Chen, *Citing Irregularities, City Board Rejects Public Money for Liu's Campaign*, N.Y. TIMES, Aug. 6, 2013, at A12; Christopher Baxter, *Indicted N.J. engineering firm Birdsall Services Group sold for $5.6 million to California firm*, NJ.COM, June 5, 2013, http://www.nj.com/politics/index.ssf/2013/06/indicted_nj_engineering_firm_b_6.html (last updated June 21, 2013).
[14] *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310 (2010).
[15] U.S. CONST. amend. I.

play model of tight restrictions for a narrowly defined sector be extended to directly restrain a government contractor's right to make independent expenditures in the same way their contributions have been restricted or prohibited? And, if that reach is constitutionally valid, does it begin to undermine the *Citizens United*[16] premise that independent expenditures do not pose a risk of corruption?

Finally, one should expect to see more jurisdictions adopt or expand public campaign financing programs, including some based on the generous multiple match model currently in effect in New York City. Public financing of candidates and pay-to-play restrictions for government contractors are analogous: the party seeking payment from the government agrees to adhere to restrictions on political activities not generally applicable to other business entities and non-publicly-financed candidates. Under both regimes, the balance of carrots and sticks should be carefully drawn to ensure that compliance burdens are reasonable and that competitive values in both public procurement and political campaigns are not subverted.

Limits are crumbling, however; the Supreme Court has a long way to go before spending in American elections is made limit-free, if indeed that is the ultimate logic of the First Amendment. Disclosure requirements remain intact and the capacity for public scrutiny and debate remains high, thanks in large part to the communications revolution that is the Internet. The battle between those who want more campaign finance regulation (i.e., restrictions, disclosure, public funding) and those who want to deregulate political speech (i.e., no limitations, fewer disclosure burdens, no public funding) will continue. Indeed, the level of contention over campaign finance rules is an excellent barometer for the magnitude of division among various groups battling for their share of political power. How can it be otherwise? In our system of representative democracy, that larger battle never ends. The fight over campaign finance reform will remain important and fiercely fought precisely because it determines the weaponry available in that larger battle for power.

Conclusion

Neither First Amendment jurisprudence nor legislated reforms give a complete picture of the trend of the laws governing political contributions

[16] *Citizens United,* 558 U.S. 310.

and spending. One often hears rhetoric decrying the high cost of running for office. Regardless of that handwringing, in American elections, money talks and political spending enjoys the robust protection of the First Amendment. In recent years, several contribution and spending limitations have been held unconstitutional, a trend that is still unfolding, but many other requirements remain in effect. These differ among federal, state, and local elections. It is essential to learn and adhere to the relevant rules before making a political contribution.

However, an effective strategy goes beyond mere legal compliance. Before making a donation to a candidate, PAC, or not-for-profit organization making political expenditures, one must anticipate and look to manage risks associated with all political activity. Every contribution, fundraising tactic, and advocacy communication courts controversy and blowback. The bigger the contribution, the bigger the risk. Individuals and corporations do best when they have taken into account the highly charged political atmosphere and worked through all potential pitfalls of participation in advance.

Key Takeaways

- A contributor should never rely on the prospective recipient for guidance on the law that governs the contribution.
- Under the *Citizens United* decision, corporations are legally free to make independent expenditures to support or oppose candidates, but no for-profit entity can ignore risks created by potential customer reaction to political activity.
- Companies should have a clear internal policy and regular training to safeguard against the improper use of company resources to make unreported in-kind contributions or illegal reimbursement of contributions to political campaigns. If the company seeks government contracts, the policy should also include procedures for compliance with pay-to-play laws, where applicable.
- Do not instruct the recipient on how the contribution should be used unless you have obtained guidance on the implications of earmarking in the relevant jurisdiction.
- The anecdotal breath of a "loophole" or current laxity in enforcement can be deceptive; such reliance provides no assurance of compliance.

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Before joining the firm, from 1988 to 2000, Mr. Laufer served as counsel to the executive director and as general counsel of the New York City Campaign Finance Board.

APPENDIX A

A NOT-SO-SERIOUS GUIDE TO CAMPAIGN FINANCE TERMINOLOGY, OR WHAT CYNICS THINK[17]

A **501(c)(4) organization**, a/k/a c4—Social welfare organization, as a condition of tax exemption a c4 may not engage in electoral politics as its primary activity; unlike a *Super PAC*, c4s generally are not required to publicly disclose donations that finance their political activities.

A **527 organization**—A political organization as defined by the IRS.

Access, as in access to public officials—What *contributions* may constitutionally purchase, *see McCutcheon v. FEC*, 134 S. Ct. 1434, 1438 (2014).

Buckley v. Valeo—Equivalent to Book of Genesis, wherein money created and became speech, and it was good.

***Citizens United v. FEC*—**(1) Equivalent to Book of Revelations, as herald of Apocalypse; (2) *Declaration of Independence* made applicable to corporations.

Constitution—*See* First Amendment and libertarian values; *but, generally, do not see* egalitarian values.

Contribution—(1) Monetary; (2) in-kind, i.e., provision of goods and services; (3) as a legal matter, mutually exclusive with independent expenditure; see also *hard money* and *soft money*

Contribution limit—Monetary ceiling on the amount or in-kind value that may be donated by a contributor to a candidate or other political recipient; as of publication date, contribution limits remain constitutional as a prophylactic measure against *quid pro quo* corruption, if not too low.

Coordination—What candidates and independent spenders may not do.

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[17] The definitions herein are generic, often based on common or partisan perceptions, and not entirely serious. Do not rely on these definitions in determining the legal propriety of any act. Please consult the law and regulations applicable to candidates and activities in the relevant federal, state, or local election for actual legal definitions.

Corruption—What bad public officials do, either allegedly or as proven at trial; *see also* anti-corruption, the constitutional purpose advanced by campaign finance reform.

Declaration of Independence—Stated intent of every independent spender.

Easy Money—Commissions earned for placing broadcast advertisements.

Electioneering Communication—Speech directed to the relevant electorate that clearly identifies a candidate in an election, within X days of that election, that often conveys a message (generally negative) about that candidate but does not expressly support or oppose that candidate for election; in federal and other jurisdictions, treated like independent expenditures and subject to public disclosure requirements.

Expenditure Limit—Unconstitutional for individuals, *see Buckley v. Valeo*, 424 U.S. 1, 39 (1976), and for corporations, *see Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

First Amendment—(1) Bulwark against government interference with political speech and the campaign spending that conveys that speech to the public; (2) pesky impediment to campaign finance reform.

Grassroots lobbying—Speech directed to the public in an effort to persuade elected officials that a *special interest* is the *public interest.*

Hard Money—(1) *Contributions* that are limited with respect to the election for which they will be spent; (2) fundraising by a non-incumbent.

Independent Expenditure, a/k/a "IE"—Expenditure made by independent person or group to support or, more likely, oppose a candidate in an election, which may not be limited under the *First Amendment* but is generally subject to *public disclosure* requirements.

Issue Advocacy—political speech that is not regulated as election campaign speech; overlaps with *grassroots lobbying.*

Legal Precedent—Something that is here today, *see e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), but may be gone tomorrow, *see,*

e.g., Citizens United, 310 U.S. at 365; *see also Buckley*, 424 U.S. at 38, *and McCutcheon*, 134 S.Ct. at 1447; *see also FEC v. Beaumont*, 539 U.S. 146 (2003) *and*_____ *v.* _____, ___ U.S. ___(20__) — oops, premature.

Quid Pro Quo—A dollars-for-favors exchange that *contribution limits* may constitutionally combat, whether the risk of that kind of exchange is actual or apparent.

PAC, a/k/a political action committee—(1) A group that, in most jurisdictions, must register and report the *contributions* it raises and the *contributions* it makes to candidates and other political recipients; (2) the political arm of *special interests*.

Pay-to-Play—(1) Obtaining specified governmental favors (such as contracts) in exchange for *contributions*, or the appearance thereof; (2) a species of regulation designed to combat the award of governmental favors in relation to political *contributions*.

Public Disclosure—(1) Required to shed light on who is trying to gain access to or influence over elected officials, so voters may make informed choices and learn what *special interests* are trying to buy their votes; (2) required to intimidate and silence people who wish to speak out on issues of importance in an election with the implicit threat of economic boycotts or other reprisals staged through the Internet; (3) information about financial transactions contained in reports submitted by candidates and other political spenders.

Public Financing—A panacea that provides public dollars to participating candidates to help them run for office so as to reduce their reliance on *special interest* dollars, which, in turn, allows them to govern in the *public interest*; herald of Plato's *Republic*.

Public Interest—(1) What campaign finance reformers claim to speak for; (2) a *special interest* advocated for purposes other than direct profit; (3) a *special interest* that has triumphed; (4) what successful politicians stand for; (5) what political speech often claims to espouse; (6) never clearly defined, other than by *The New York Times* editorials.

Self-Funding—What wealthy candidates do.

Soft Money—(1) *Contributions* that are not limited with respect to the election for which they are theoretically not being spent; (2) new avenues of fundraising devised in response to court decisions striking down campaign finance reforms.

Solicit—(1) To ask for *contributions;* (2) what non-wealthy candidates do.

Special Interest—(1) What no one claims to speak for but everyone claims to hear; (2) something your opponent is or stands for.

Super PAC—A PAC dedicated solely to making *independent expenditures*, which can raise *contribution*s not subject to limitations, including from corporations, and which is generally required to make *public disclosure* of the *contributions* it receives and the expenditures it makes.

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