INSIDE THE MINDS

Navigating Election and Political Law

Leading Lawyers on Understanding Campaign Finance, Speech, Voting Rights, and the Laws that Govern

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Significant Developments in Election Law

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Introduction

Election law and political law encompass a number of constitutional and decisional doctrines, and statutory schemes, related to the nomination and election of public officials, and the adoption of ballot measures. These legal principles include the right to vote (including the Voting Rights Act of 1965),[1] representation (including one person-one vote principles), ballot measures (including initiative measures, referenda, and recall measures), reapportionment and redistricting, campaign finance, election administration (including the counting of votes, as highlighted by the litigation in *Bush v. Gore*,[2] and issues related to incumbency, such as government ethics.

Recent Changes

The most significant changes in recent years have occurred in the areas of the Voting Rights Act, voter identification laws, and campaign finance law. In the watershed decision of *Shelby County, Alabama v. Holder*,[3] the Supreme Court effectively ended the use of the "preclearance" provisions of Section 5 of the Voting Rights Act.[4] These provisions require that certain states and local jurisdictions "pre-clear" any changes to election procedures with a federal district court or the US Department of Justice before implementing those changes. While Congress indicated an immediate interest in enacting new voting rights legislation in response to that Supreme Court decision, no legislation has yet been adopted.

Another significant trend in election law is the enactment of voter identification statutes. In *Crawford v. Marion Cnty. Election Bd.*,[5] the Supreme Court rejected a facial challenge to the constitutionality of an Indiana voter identification law, leading to the adoption of similar statues in other states. These laws generally require that an individual seeking to vote at a polling place (as opposed by an absentee or vote-by-mail ballot) present a specified form of identification—usually a photo ID issued by a government agency—before being allowed to vote.

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[1] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. §§ 1971, 1973 (2006)).
[2] *Bush v. Gore*, 531 U.S. 98 (2000).
[3] *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013).
[4] Voting Rights Act of 1965 § 5.
[5] *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

The Court has broadly construed the First Amendment as applied to campaign finance regulations. In C*itizens United v. Federal Election Commission*,[6] this approach led the Court to invalidate expenditure limits specifically imposed on corporations and unions. Even more recently, applying these First Amendment principles, the Supreme Court invalidated a federal law imposing aggregate limits on the amount any individual may contribute to candidates in an election cycle.

Looking further back over the past fifteen years, there has been a significant increase in election law litigation. This increase is generally attributed to the wide exposure election law received during the *Bush v. Gore*[7] litigation in November and December 2000. The Supreme Court's trend toward vigorously scrutinizing campaign finance regulations has also motivated challenges to both federal and state campaign finance laws.

Oversight

The Federal Election Commission (FEC) is the federal administrative agency charged with interpreting and enforcing the Federal Election Campaign Act of 1971 (FECA).[8] This statutory scheme both limits contributions to federal candidates and parties, and imposes disclosure requirements on candidates for federal office, as well as committees that support or oppose such candidates. The FEC is also responsible for administering FECA's public financing provisions for presidential candidates. The effectiveness of the FEC has been a concern, particularly in recent years. This problem stems from the fact that by law no more than three of the six members may be from the same party and four votes are necessary for the Commission to act, leading to a split vote—and inaction—on critically important regulatory and enforcement issues.

Other agencies responsible for oversight of federal election laws include the Election Assistance Commission (EAC,) which was created by the Help American Vote Act of 2002 (HAVA)[9] and adopted in light of the concerns over the 2000 presidential election controversy in Florida. The EAC focuses on improving the administration of the election process, particularly with

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[6] *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310 (2010).
[7] *Bush*, 531 U.S. 98.
[8] Federal Election and Campaign Act of 1971, 2 U.S.C. §§ 431-42 (2012).
[9] Help American Vote Act of 2002, 42 U.S.C. §§ 15301-545 (2012).

respect to voting systems. Both the Federal Communication Commission and the Internal Revenue Service have specialized roles related to certain campaign activities.

On a state level, each state has its own approach to election administration and campaign finance regulation, although all are subject to preemptive federal laws including the Voting Rights Act, the Help America Vote Act, and the National Voter Registration Act of 1993 (NVRA).[10] One of the most significant differences among the states is the division of authority between state and local election officials. The chief election official in most states is the Secretary of State. Many states have a separate independent agency charged with administering and enforcing state campaign finance laws. These agencies generally have the power to enact implementing regulations and exercise administrative enforcement authority.

Key Federal Laws

FECA applies to candidates for federal office, and committees and individuals seeking to contribute to, or make expenditures for or against, candidates for federal office. One provision of FECA, which prohibits political contributions and expenditures by foreign nationals, also applies to candidates at the state and local level.[11]

The McCain-Feingold law (formally known as the Bipartisan Campaign Reform Act of 2002 or BCRA)[12] amended FECA with the aim of limiting the use of "soft money," such as national party funds, in federal elections. It also sought to regulate "electioneering communications," more commonly known as issue ads paid for by corporations or labor unions during the period immediately preceding an election. Supreme Court decisions, specifically the *Citizens United* decision, have invalidated this provision from the law, though the disclosure requirements for issue ads continue in force.[13]

The Voting Rights Act of 1965[14] was intended to end practices in Southern States that prevented African Americans from voting. The Act banned

[10] National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg to 1973gg-10 (2012).
[11] 2 U.S.C. § 441e (2012).
[12] Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.
[13] *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 367-69 (2010).
[14] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

literacy tests (Section 3), imposed the requirement that certain covered states "pre-clear" changes to their election procedures before those changes were implemented (Section 5),[15] and authorized individuals to bring actions to challenge discriminatory election practices (Section 2).[16] The Supreme Court construed the Section 5 preclearance requirement to extend to election procedures that effectively minimize the influence of the votes of minority voters.[17] In light of the Supreme Court's *Shelby County* decision, the preclearance provisions of Section 5 cannot be enforced, at least until Congress takes action to address the Courts concerns about the formula used to determine which jurisdiction are subject to preclearance.

The National Voter Registration requires states to provide three ways for individuals to register to vote. First, states must provide individuals with the opportunity to register to vote when they apply for a driver's license. Second, states must provide voter registration opportunities at offices that provide public assistance and or services to persons with disabilities. Finally, the NVRA provides that citizens may register to vote by mail.[18]

Changes in Federal Laws

The most significant recent changes have occurred through judicial decisions, such as *Shelby County v. Holder*[19] and *Citizens United*,[20] narrowing the scope of both the Voting Rights Act[21] and federal campaign finance laws. Congress has not responded in either area with the enactment of new legislation.

These changes came about because the courts, particularly the Supreme Court, have become increasingly hostile to laws regulating the political process. The most important decisions, such as *Citizens United* and *Shelby*, were the result of a deeply divided Court. Each case was decided by a 5-4 vote.

Campaign finance laws are among the most complex to interpret and apply. The combination of the intricacy of the laws themselves, administrative

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[15] *Id.* § 5.
[16] *Id.* § 2.
[17] *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).
[18] 42 U.S.C. § 1973gg–3, 4, 5 (2012).
[19] *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).
[20] *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310 (2010).
[21] Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (1965).

regulations and opinions aimed at implementing those laws, the myriad of fact patterns to which they can apply, and judicial decisions construing and limiting those laws based on First Amendment[22] principles, promote this complexity.

Moreover, federal and state laws can differ significantly in how they apply to a particular campaign finance practice, or other election law issue. For example, California has its own voting rights law, and the requirements for complying with that law differ from those imposed by federal Voting Rights Act.[23]

Key State Laws

States have constitutional provisions and election codes that govern the various aspects of the election process, including voter eligibility, voter registration, the candidate nomination, the rights of initiative, referendum and recall, redistricting, absentee voting and vote by mail, election day voting practices, the counting of votes, and post-election procedures, including recounts and election contests. Most states have campaign finance laws, which, at a minimum, impose some form of campaign finance disclosure. Many states also impose substantive limits, such as regulating the amount an individual or entity may contribute to a candidate for state or local office.

Both election administration and campaign finance laws differ widely among the states. For example, in recent years many states have enacted some form of voter ID laws, sparking controversy and litigation.[24] States also vary widely in how they approach the rights of former felons to regain the right to vote, the redistricting process, the recount process, and attempts to address large, anonymous campaign expenditures by independent groups.

Another significant area of difference is the ability of state or local voters to place measures on the ballot. Under article II of the California Constitution,[25] citizen lawmaking is a guaranteed right that is regularly exercised. Twenty-three other states have some form of initiative. Perhaps no state has more complex election law and campaign finance laws than California. This fact should come

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[22] U.S. CONST. amend. I.
[23] CAL. ELEC. CODE §§ 14025-032 (West 2013).
[24] *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 192-96 (2008).
[25] CAL. CONST. art. II.

as no surprise, given the state's size, diversity, and broad constitutional rights of initiative, referendum, and recall. This complexity in California law has resulted in a significant number of attorneys whose practice focuses, at least to some extent, on providing election law advice and representing clients in election law litigation. This led to the formation of the California Political Attorneys Association, a nonprofit organization whose members practice in the area of election and political law.

Different types of election laws apply to different categories of individuals or entities. For example, campaign finance laws generally apply to any candidate, third person or group that makes expenditures or contributions that exceed the statutory threshold. Election administration laws commonly found in election codes apply to candidates seeking nomination and election to office, and residents seeking to register to vote and exercise the franchise. Other laws govern the establishment and activities of political parties. And laws governing the initiative process focus primarily on those who are seeking to qualify a measure for the ballot.

Changes in State Law

In California, one of the most significant changes in election law in recent years is the elimination of the party primary process for state elective offices in favor of a "top two" primary system. Under this system, the two candidates receiving the most votes in the primary appear on the general election ballot, regardless of party. This change was made by California voters through an initiative measure to amend the state constitution.[26] While it is difficult to attribute the motivation for this change to any single issue, it was hoped by some that the change would reduce partisanship, and have a moderating effect on the political process in California. It is too soon to assess whether the change will accomplish this goal.

The Right to Vote

The right to vote is generally governed by state law. The most common requirements are citizenship, residency, and reaching the age of eighteen. Those

[26] *See* S. CONST. amend. 4, 2009-2010 Reg. Sess. (Cal. 2009); TEXT OF PROPOSED LAWS: PROPOSITION 14, OFFICIAL VOTER INFORMATION GUIDE 62, 65 (2010), *available at* http://voterguide.sos.ca.gov/past/2010/primary/pdf/english/text-proposed-laws.pdf#prop14.

state laws are constrained by federal law, such as the Fifteenth Amendment[27] (prohibiting the denial of the right to vote based on race), the Nineteenth Amendment[28] (ensuring women's suffrage), the Voting Rights Act,[29] the Twenty-Sixth Amendment[30] (guaranteeing the right to vote to eighteen-year-olds) and the National Voter Registration Act.[31] State election laws that run afoul of the First or Fourteenth Amendments are unenforceable.[32]

As noted, one area of controversy in recent years is the disenfranchisement of individuals convicted of crimes who have served their sentences, and are no longer on parole. While California allows such individuals to register to vote, other states impose lifetime bans on former felons being able to vote.[33]

Who May Hold Elective Office

Federal law (specifically the Constitution) generally governs the issue of who is entitled to hold federal office, and state law governs it at the local level. State efforts to alter the qualifications for federal office—such as laws imposing term limits—have been invalidated by federal courts.[34]

Ballot Measures

There is no initiative, referendum, or recall right at the federal level. At the state level, this right can be governed by both the state constitution, and implementing state statutes. This is the case in California, where the right to initiative, referendum, and recall is established in Article II of the California Constitution,[35] and the mechanics of those processes are spelled out in the California Elections Code. In California, voters generally have the right to adopt any legislative measure that could be enacted by the state legislature, or in the case of a local initiative measure, by the city council or county board of supervisors. Voters may not enact initiative measures that are

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[27] U.S. CONST. amend. XV.
[28] U.S. CONST. amend. IXX.
[29] Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (1965).
[30] U.S. CONST. amend. XXVI.
[31] National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg to 1973gg-10 (2012).
[32] U.S. CONST. amends. I, XIV.
[33] *See Felon Voting Rights*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx (last updated Feb. 18, 2014).
[34] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).
[35] CAL. CONST. art. II.

administrative rather than legislative in nature, measures that encompass more than one subject, and measures affecting matters that have been exclusively delegated to a specific legislative body.[36]

Candidate Selection

Another area primarily regulated by state law, subject to the federal constitutional and statutory provisions discussed above, is how political parties select candidates. States generally opt for a party primary system, although some states still use a party convention nominating process. As explained above, in recent years, California eliminated partisan primaries for state offices, in favor of the "top-two" primary system.

Campaign Financing

As discussed in detail above, campaign finance for federal elections is governed by federal law. States vary widely in how they regulate the financing of state elections, although most states have some form of campaign finance disclosure. In California, cities and counties that have chosen to organize themselves under the charter form of government may enact their own campaign finance laws (and other election laws) governing election to local office.[37]

Election Administration

Election administration procedures, such as those governing the casting of votes, challenging election results, and ensuring the integrity of the voting process are governed by state law. Of course, all of these state laws are subject to both the federal and state constitutions.

California law allows any registered voter to choose to vote by mail, and Californians are increasingly exercising this right.[38] It is not uncommon in some California jurisdictions for more than half of the ballots to be cast by mail. While this is not the result of a recent change in the law, it does fundamentally affect the dynamics of the campaign and election processes in California.

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[36] *Worthington v. City Council of Rohnert Park*, 130 Cal.App.4th 1132, 1140-41 (2005); *City and County of San Francisco v. Patterson*, 202 Cal.App.3d 95, 105-06 (1988); *Senate of Cal. v. Jones*, 21 Cal.4th 1142 (1999).
[37] CAL.CONST. art. XI, § 5; *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992).
[38] CAL. ELEC. CODE §§ 3000-24 (West 2013).

In states that have enacted voter identification laws, those laws directly affect the casting of votes at the polling place. Individuals who lack the required identification are not allowed to vote, or are required to cast a "provisional" ballot, which may or may not ultimately be counted.

Most states also prohibit the practice of "electioneering" within a certain distance of a polling place. Electioneering occurs when an individual seeks to influence a voter's decision by, for example, distributing literature or even wearing a shirt with the candidate's name on it.[39]

Contesting Election Results

The recount and election contest processes are generally regulated by state law. As the *Bush v. Gore*[40] decision makes clear, however, those processes are subject to federal constitutional provisions, including First and Fourteenth Amendments.[41] The recount process is generally an administrative remedy. In particularly close elections, a recount may be mandated by state law. Otherwise, a party must formally request a recount. Under California law, the person requesting the recount must pay the cost of the recount unless the recount changes the result of the election.[42]

An election contest is a judicial procedure that seeks to invalidate the results of an election for one of the specific grounds—such as misconduct by an elections official or the counting of invalid ballots—that changed the result of the election.[43]

Election fraud

Election fraud is also governed by state law, which can vary widely from state to state. Indeed, the types of activities that can be described as election fraud can also vary widely. Until recent years, the primary focus on preventing election fraud has been through imposing criminal penalties on those who engage in this practice.

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[39] *Id.* § 18370; *Minn. Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (upholding Minnesota statute banning electioneering near polling places).
[40] *Bush v. Gore*, 531 U.S. 98 (2000).
[41] U.S. CONST. amends. I, XIV.
[42] CAL. ELEC. CODE § 15624 (West 2013).
[43] *See e.g.*, *Id.* §§ 16000-940.

The current push for voter identification in many states is defended as necessary to affirmatively protect against one category of voter fraud—voter impersonation at the polling place—although the evidence in support of this position is, at best, mixed. With respect to vote by mail ballots—where voter identification laws would have no application—state laws require that the voter sign the ballot envelope, and that signature can be compared with the signature on the voter registration card. These laws also limit who may handle such ballots.[44]

Current Trends

The current trends include a significant interest in many states in imposing enhanced voter identification requirements, and as discussed above, judicial limits on the scope of campaign finance laws and remedial provisions of the Voting Rights Act.[45] In addition, there has been an interest in some quarters in restoring the voting rights of former felons. As in many other public policy areas, the increasingly partisan nature of our politics is a significant factor driving these issues. This can be seen in both voter identification and campaign finance issues, where the support of and opposition to new laws are usually drawn directly along partisan lines.

Recent Cases

In the campaign finance area, the most important cases in recent years are *Citizens United*, *McCutcheon v. Federal Election Comm'n*,[46] and, with respect to public financing, *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*,[47] all of which significantly limit the ability of the government to regulate campaign finance practices at both the federal and state level.

Citizens United is important because it effectively changed one hundred years of campaign finance law regarding the role that corporations may play in financing political campaigns. *McCutcheon* is significant because it invalidated attempts to limit the aggregate amount of contributions any single person may make to all candidates during an election cycle, which

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[44] *See e.g.*, *Id.* §§ 3000-024.
[45] National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg to 1973gg-10 (2012).
[46] *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310 (2010); *McCutcheon v. Fed. Election Comm'n.*, 134 S. Ct. 1434 (2014).
[47] *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011).

could lead to an increase in money laundering practices. The *Arizona Free Enterprise Club* case is important because it struck down a key provision of many public financing schemes, under which the amount of public funds provided to a candidate would be increased based on the amount of independent expenditures made in opposition to that candidate (or in support of his opponent).

The combination of the three campaign finance cases significantly alters the regulatory landscape. This sea change will be particularly evident in the coming election season. We are already seeing an increased role being played by independent, and largely unaccountable, groups spending vast amounts on both state and federal election campaigns. In other words, the relative voices of—and the accountability of—the candidates themselves are diminishing.

For attorneys representing government entities seeking to regulate campaign finance, the lesson appears clear: The Court is extremely skeptical of campaign finance regulations other than disclosure regulations. Indeed, in a part of the decision not frequently discussed, the *Citizens United* Court upheld the challenged disclosure and disclaimer by an 8-1 vote. So the focus should be on enhancing disclosure requirements to ensure effective transparency while providing voters with timely information about who is supporting and opposing candidates and ballot measures. As for those who are subject to campaign finance regulations, the next legal target is mandatory disclosure. While the Court has approved disclosure requirements, including those for electioneering communications, it may be willing to entertain challenges to laws that are not sufficiently narrowly focused or deemed to be overly burdensome.[48]

In the area of voting rights, the *Shelby County*[49] case fundamentally changed the enforcement of the Voting Rights Act. It remains unclear whether, and to what extent, Congress will respond to *Shelby County* with new preclearance legislation. S*helby County* represents a fundamental change in the Court's view of the preclearance provisions, and the legal justification for them. The decision removes a critical tool for preventing discrimination

[48] *See Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013) (invaliding law imposing continuing and perpetual campaign finance reporting obligation on nonprofit organization regardless of extent of activity).
[49] *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612 (2013).

in the election process. With respect to the Voting Rights Act, the *Shelby Court's* effective invalidation of Section 5 means that the burden will shift to voters—or the United States Justice Department—to show discrimination in the election process under lawsuits brought under Section 2 of the Act.

Investigations

In 2012, the California Fair Political Practices Commission (FPPC) aggressively investigated and sought enforcement of the California Political Reform Act of 1974[50] against out-of-state organizations that made millions of dollars of expenditures for one statewide ballot measure and against another. Ultimately, the Commission was able to compel the organizations to disclose the true source of these funds, and impose significant penalties for the lack of timely, accurate disclosure.[51] The Commission was required to go the California Supreme Court at one point as part of the enforcement effort. The Chair of the FPPC in 2012 is now a member of the FEC.

As the Supreme Court limits other types of campaign finance regulation, disclosure becomes the most important tool in this area. If candidates and third party groups are able to skirt these laws through lax enforcement, little will be left to campaign finance laws aimed at protecting the integrity of the election process.

At least in California, the FPPC appears committed and motivated to ensure that the Political Reform Act, adopted by California voters in 1974,[52] is fully and vigorously enforced.

Campaign Financing Trends

The most notable trend, as previously discussed, is the extent to which the financing of campaigns at the federal and state level is being driven by third parties which are largely unaccountable for their actions, unlike the situation where a candidate himself or herself spends money on political advertising. This trend is the result of the Court's view that the only justification for

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[50] CAL. GOV. CODE §§ 81000-81016.

[51] *See Arizona Dark Money Recipients Sign Judgment, Dosgorge $300,000*, FAIR POLITICAL PRACTICES COMMISSION (January 24, 2014), http://www.fppc.ca.gov/press_release.php?pr_id=787.

[52] CAL. GOV. CODE §§ 81000-81016.

limiting contributions or expenditures is quid quo pro corruption, which is by definition missing when a third party is independently raising and spending funds for or against a candidate.[53] Accordingly, candidates remain subject to limits on contributions to their campaigns, while independent expenditure committees are not.[54]

At both the federal and local level, the largest contributors are business interests, wealthy individuals, and labor organizations. As discussed, in the 2012 election in California, wealthy contributors and business interests expended millions of dollars in California on the eve of the election to defeat a tax measure supported by the governor, and support a measure to limit effective union participation in election campaigns. On a national level, we have seen an explosion of spending by independent expenditure committees. There has been a continuing shift in the funding of campaigns from the candidates themselves to independent expenditure committees. After *Citizens United*, corporations and labor unions are able to make unlimited independent expenditures on behalf of or in opposition to candidates for elected office.

PACs and Super PACs

Traditional PACs make both contributions to, and independent expenditures in support of, candidates for elective office. Super PACs make only independent expenditures. There has been a major trend toward the creation of super PACs. The *Citizens United*[55] decision has freed corporations, and committees funded by them, to make unlimited independent expenditures. By limiting their role solely to making independent expenditures, super PACs avoid the limits on contributions that may apply to traditional PACs.[56]

Considerations for Supporting a Political Candidate or Initiative

Foreign nationals are prohibited from making contributions at the local or federal level. Notwithstanding the *Citizens United* Court's invalidation of limits on independent expenditures by corporations and labor organizations, both

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[53] *Citizens United v. Fed. Election Comm'n.*, 558 U.S. 310, 357 (2010).
[54] *See Texans for Free Enter. v. Tex. Ethics Comm'n*, 732 F.3d 535 (5th Cir. 2013) (invalidating law limiting contributions as applied to independent expenditures).
[55] *Citizens United*, 558 U.S. 310.
[56] *See Texans for Free Enter.*, 732 F.3d 535.

are still prohibited from making contributions directly to candidates for federal office, and many states and local agencies impose similar bans.[57] A number of agencies limit or prohibit government contractors and lobbyists from making contributions to the agency's elected officials.

Risks in Contributing

There are both legal and political risks when contributing to political campaigns. On the legal side, potential contributors must be aware of the laws limiting the amount of contributions, including the rules governing the aggregation of contributions by related entities. On the political side, they must be aware that, with the exception of *de minimus* contributions, all contributions will be publicly reported. And making a contribution to a controversial candidate or measure can lead to public criticism of the contributor. The most significant issue is how controversial or divisive the candidate or measure is. Business entities must be aware that contributions can lead to criticism and more.

In 2010, Target came under fire for making a large contribution to an independent expenditure committee supporting a candidate for governor of Minnesota. The company's chief executive later apologized to employees.[58] To avoid this kind of pitfall, clients need to talk to political and business consultants who are aware of the political landscape and to those who support and oppose the candidate or measure that they are considering supporting.

Successful Campaign Finance Strategy

A successful campaign finance strategy includes hiring talented fundraisers and attorneys who are well versed in campaign finance law. Begin early, and do not cut corners on the legal side. *Citizens United*, and lower court decisions applying the decision, fundamentally altered the campaign finance landscape. For independent expenditure committees, they may now receive unlimited contributions from corporations, which is a game changer.

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[57] *See Federal Election Comm'n v. Beaumont*, 539 U.S. 146 (2002) (upholding strict federal limit on contributions by corporations and unions).

[58] *See* Brody Mullins & Ann Zimmerman, *Target Discovers Downside to Political Contributions*, WALL STREET J., Aug. 7, 2010, http://online.wsj.com/news/articles/SB10001424052748703988304575413650676561696.

Political Law Enforcement Acts

States vary in how they approach enforcement of campaign finance violations. This section outlines the procedure in California.

The California Political Reform Act, and the FPPC's implementing regulation, establish the enforcement procedure under the Act.

If an individual believes that someone has violated the Act—including contribution limits, reporting requirements, and other campaign finance provisions—they may file a complaint with the FPPC.[59] The complaint must be in writing, signed under penalty of perjury, identify the person who allegedly violated the law, describe with specificity the facts of the alleged violation, and identify all know witnesses. No later than fourteen days after receiving a complaint, the FPPC will inform the complainant of how it proposes to proceed. A copy of the complaint is normally provided to the subject of the complaint.

A copy of the complaint is provided to the subject of the complaint. The subject is entitled to respond to the complaint, and to be represented by counsel at any subsequent hearing on the matter.[60]

If FPPC staff determines that a complaint has merit, it will initiate a full investigation, and may issue subpoenas.[61] After the investigation is complete, FPPC staff may close the matter, propose a settlement to the Commission, or pursue a formal enforcement action, which would include a hearing and possibly imposition of administrative penalties.[62] Alternatively, the FPPC may seek enforcement through a civil action filed in court.[63] Finally, the local district attorney (or Attorney General) may seek criminal sanctions.[64]

Violations of the Act can result in criminal, civil, or administrative penalties, depending on the nature and severity of the violation. For example, an

[59] CAL. GOV. CODE § 83115.
[60] *Id.* § 83115.5.
[61] *Id.* § 83115.
[62] *Id.* § 83116.
[63] *Id.* § 91013.5.
[64] *Id.* § 91001.

intentional violation of the Act is a misdemeanor, while knowing or intentional violations can result in a civil action.[65]

Enforcement actions by the FEC follow a similar pattern. The FEC's "Guidebook for Complainants and Respondents on the FEC Enforcement Process" can be found at http://www.fec.gov/em/respondent_guide.pdf.[66]

Key Compliance Concerns

Parties interested in becoming involved in the political process in a significant way must go into that process with their eyes open, and with an understanding of the nuances of election law. This means retaining a qualified election law attorney. Parties should not get involved until they fully understand the legal and political/practical consequences of their contemplated involvement.

The rules governing the various types of contributions vary widely, meaning that the compliance strategies also must vary widely. For example, tax-exempt nonprofits are prohibited from supporting or opposing candidates for elected office, but can have some involvement in ballot measure campaigns, which are viewed as a form of lobbying.[67] Therefore, their electoral and compliance strategies must be informed by this limitation.

Traditional PACs that both contribute to, and make independent expenditures on behalf of, candidates are subject to contribution limits, but Super PACs are not. This distinction means that Super PACs may accept contributions of any size, without compliance issues, provided they are accurately reported to the extent required by law. As noted, corporations and labor organizations are still prohibited from making direct contributions to candidates for federal office (and some states have parallel prohibitions for state elections), but after *Citizens United*, they may make unlimited contributions to Super PACs. So they may focus their efforts there with far less concern about being caught up in a compliance matter.

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[65] *Id.* §§ 91000, 91004.
[66] FEDERAL ELECTION COMMISSION, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS (2012), *available at* http://www.fec.gov/em/respondent_guide.pdf.
[67] *See The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, IRS, http://www.irs.gov/Charities-&-Non-Profits/Charitable-Organizations/The-Restriction-of-Political-Campaign-Intervention-by-Section-501(c)(3)-Tax-Exempt-Organizations (last visited June 22, 2014).

Both the FEC and, in California, the FPPC have procedures for obtaining advice regarding proposed actions that may affect campaign finance laws. Each Commission features its own website with general information regarding requirements and prohibitions.

Of course, attorneys with an expertise in election law are also available. Attorneys can support compliance by, first, remaining continually aware of all changes in the statutory, regulatory, and decisional arenas, and anticipating how changes in the law will affect the activities of their clients. Second, they must ensure that they fully understand the factual nuances of the situation about which they are providing advice, since a very minor change in the facts may fundamentally alter the legal consequences of the proposed activity.

In light of *Citizens United* and related cases, regulatory agencies such as the FPPC are focusing more on ensuring full, timely, and accurate disclosure of campaign finance activities. Therefore, clients and their counsel must be focused on strict compliance with these requirements. Court decisions have left campaign finance reporting obligations as the last area where robust regulation can survive judicial scrutiny.

One area that can be challenging for those wishing to make contributions is the aggregation of contributions by related entities. For example, a contribution by a company, the parent of the company, and the individual who has a significant ownership interest in that company may be treated as a single contribution same contributor, meaning that all contributions must be aggregated for contribution limit and reporting purposes. It may not always be apparent to the candidate, committee, or counsel that entities and individuals are sufficiently related to trigger the aggregation rules.

Compliance with Applicable Law

Contributions Limits

To ensure compliance, groups must know the specific monetary contribution limits, how they apply in the case of primary/general/runoff elections, aggregation rules, and what categories of individuals or entities that may be barred from contributing. Moreover, contributors must ensure that the accurately provide all of the contributor information required by

the governing statute. After *McCutcheon*, there is one fewer type of contribution limit with which to be concerned: limits on the aggregate amount an individual may contribute in an election cycle, invalidated by the *McCutcheon* Court.

Pay-to-Play Restrictions

Pay-to-play restrictions take different forms. The most basic restriction is the prohibition on bribery, traditionally a matter of criminal law. In addition, the law may prohibit a contribution to a public official from an entity during the time that entity is negotiating a contract with the official's agency, and for some period of time after the contract negotiation process is complete. Also, the public official may be banned from participating in a decision that could have a financial effect on the entity for a certain period of time after the contribution was received.[68]

Truth in Campaign Advertising

Laws that seek to ensure truthful campaign advertising are subject to the strictest judicial scrutiny, and are very unlikely to be upheld.[69] The Supreme Court recently granted standing to a party seeking to invalidate an Ohio law prohibiting false statements in political campaigns.[70]

Apart from seeking to regulate the content of political advertising, federal and state laws do require disclaimers in the advertising about who is funding the ad, so that the public may make informed assessments about the credibility of the information in the ad.[71] The *Citizens United* Court upheld the challenged FECA disclaimer law.

Restrictions for Nonprofit Organizations

Nonprofit organizations must ensure their activities do not constitute supporting or opposing candidates for elected office. For example, they

[68] *See* CAL. GOV. CODE § 84308.
[69] See *Brown v. Hartlage*, 456 U.S. 45 (1982); *Washington v. 119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998).
[70] *Susan B. Anthony List v. Driehaus*, No. 13-193, 2014 WL 2675871 (U.S. June 16, 2014).
[71] *See* CAL. GOV. CODE §§ 84501-511.

must ensure that their get-out-the-vote efforts remain nonpartisan, to ensure that they do not risk their tax-exempt status. In light of recent controversies regarding IRS enforcement of these rules, the IRS is in the process of clarifying—and to some extent strengthening—these rules.[72]

Disclosure

Campaign finance disclosure can be difficult and frustrating, and is a significant focus of regulatory agencies. These laws require that certain information, including the contributor's name, occupation, and employer be included on campaign finance reports. Contributors often neglect to provide all of the required information when making a contribution. This requires the candidate or committee to make efforts to obtain the required information, which utilizes valuable campaign resources, and leaves the committee in a difficult position when the information cannot be tracked down.

Recent Changes to Compliance Practices

There has been an increased focus on campaign finance reporting recently, due to court decisions that have limited other regulatory tools for government agencies. *Citizens United* has opened the doors for large contributions to independent expenditure committees, which increases the stakes for ensuring that the public is provided full, accurate, and timely reporting of contributions and expenditures.

The increased focus on enforcing disclosure laws has led to more success in ensuring compliance. See the discussion above of the FPPC's successful efforts to compel full disclosure of large contributions made on the eve of the 2012 election.

The most important steps in helping clients develop new compliance strategies are organizational, since systems can always be established and fine-tuned. Election counsel must establish a compliance culture within the organization, and that requires buy-in from the decision-makers, most importantly the candidate. The attorney must have effective access to the

[72] *See* Julie Patel, *IRS Chief Promises Stricter Rules for 'Dark Money' Nonprofit Groups*, THE CENTER FOR PUBLIC INTEGRITY (June 18, 2014), http://www.publicintegrity.org/2014/06/18/14960/irs-chief-promises-stricter-rules-dark-money-nonprofit-groups.

candidate, campaign manager, treasurer, and other key compliance players, and must be able to receive full, frank, and timely information from those players. In other words, the attorney must be viewed as a critically important part of the team, rather than as an outsider who makes it more difficult for campaign staff members to perform their duties.

One campaign official with whom the attorney must work closely is the treasurer, who is responsible for properly recording and reporting all contributions, expenditure, and other required financial information regarding the campaign's operations. This relationship is particularly important where the treasurer is new to the area, and may have been recruited to work solely on one campaign. Given the complexity and nuances of campaign finance regulations, numerous questions are likely to arise.

One development that may make facilitating such participation by key decision-makers in the campaign is the trend toward requiring verification by those individuals of information provided to enforcement agencies. For example, in California, a candidate (or proponent of a statewide ballot measure) must certify as accurate certain information in the campaign disclosure statement.[73]

Conclusion

In recent years, there have been significant developments in the areas of campaign finance, the Voting Rights Act of 1965,[74] and imposing voter identification requirements. Interestingly, while the Supreme Court has been highly skeptical of the government justifications for campaign finance restrictions and the continuing need for Section 5 of the Voting Rights Act,[75] it appeared quite deferential to the government in *Crawford*,[76] the only voter identification case to make its way to the Court, despite very little evidence that voter impersonation has been a demonstrable problem.

While it is difficult to predict with any confidence the twists and turns election law may take in the coming years, the Court's trend toward limiting campaign finance regulation will very likely continue, at least absent a

[73] CAL. GOV. CODE § 84213.
[74] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).
[75] Voting Rights Act of 1965, § 5.
[76] *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

change in the composition of the Court. This fact could mean that *Citizens United* is extended by invalidating the current federal ban on contributions by corporations and labor unions, previously upheld in *Beaumont*. It could also mean that the Court begins to focus on challenges to campaign finance reporting laws enhanced in light of the *Citizens United*.

It appears increasingly unlikely that Congress will respond legislatively to *Citizens United* or *Shelby County*. In the meantime, it appears that the trend toward imposing stricter voter identification requirement will continue.

Looking Forward

The current focus on demanding full, accurate, and timely disclosure of campaign finance activities will continue. Related to that issue, I think that there will be an increased focus on identifying and punishing money laundering activities.

The key factor driving these changes is the increasing shift to campaign funds going to Super PACs, to which contribution limits cannot be applied. This is influential because the one area where the Court has been permissive in the area of campaign finance regulation is reporting, and this, in combination with the increased role of Super PACs, will make campaign finance disclosure key. Attorneys must stay actively informed of the activities of the regulatory agencies.

Advice

Due to the complex and specialized nature of election and political law, an attorney representing a private client or public agency must have a background in the many elements of election law, as well as First Amendment[77] principles applicable to election activities, including, but not limited to, campaign finance activities. When working with clients, the goal must be to establish a compliance mentality and culture throughout the organization. Providing case studies of the serious and painful consequences of noncompliance would help with that effort. For younger attorneys interested in working in this practice area, try to get the broadest and most

[77] U.S. CONST. amend. I.

practical experience you can obtain. Work for a government agency that administers elections or regulates campaign finance laws. Work on a campaign as a volunteer. Work at a polling place on Election Day. Knowing how the electoral process actually works on the ground, and how government agencies think and approach their business, is invaluable. If available, join an organization such as the California Political Attorneys Association, whose members focus on political law. When I started, I wish I had known the mechanics of election administration and campaign fundraising operations.

The websites and printed materials of the regulatory and administrative agencies, such as the FEC, FPPC, state secretaries, and local elections officials, are the most reliable and valuable resources for further study. I teach with the textbook *Election Law Cases and Materials*, 5th ed. 2012 (Lowenstein, Hasen & Tokaji),[78] which is outstanding.

Key Takeaways

- An attorney who is knowledgeable in campaign finance law is a crucial part of a successful campaign finance strategy. Do not let your clients down by not knowing your stuff.
- Disclosure is paramount in campaign finance law and attorneys must have effective access to the key compliance players and timely information from those players and be viewed as a critically important part of the team.
- Due to the highly specialized nature of election law, attorneys must ensure they are informed of all the activities of regulatory agencies, which are constantly evolving.
- It is very important to have a foundation and background in election law as well as First Amendment principles. Those principles are directly related to election and campaign finance activities.
- New election law attorneys should get broad and practical experience.

Randy Riddle, a partner in the firm of Renne Sloan Holtzman Sakai LLP, advises and represents public sector clients on a wide range of election law, constitutional law, and government law issues. Mr. Riddle possesses a unique combination of election law experience, having served as chief counsel to the California secretary of state, counsel to

[78] LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS (5th ed. 2012).

a county registrar of voters for ten years, and counsel to the 2011 Ed Lee for mayor of San Francisco Campaign. Mr. Riddle, who manages the California Election Law website (www.calelectionlaw.com), has provided advice and litigation representation on matters related to constitutional issues, conflict of interest law, and other governmental ethics matters, open government requirements, initiative, referendum and recall petitions, administrative law, the legislative process, the implementation of new voting systems, the Voting Rights Act and the Help America Vote Act. As chief counsel to the California secretary of state, Mr. Riddle managed a legal staff of twelve attorneys. In 2012, Mr. Riddle was named by the Daily Journal *as one of the top twenty-five municipal lawyers in California. In 2006, he was named a California Super Lawyer in the area of political law. Mr. Riddle also teaches election law at the University of San Francisco School of Law.*

Dedication: *I would like to dedicate this chapter to my mother, Betty Riddle. Thank you for all of your sacrifices, for all of us.*

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