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An earlier version of a few portions of this article appeared in the recent update of Mr. Goldfeder's book. These are reprinted with permission by the publisher.

Election Law Developments

By Jerry H. Goldfeder

As the 2010 New York elections are starting to heat up, this is an opportune time to review recent Election Law developments. I write this for the election law bar, whose practice requires familiarity with the procedural and substantive issues addressed in recent decisions and laws. But I also write with a wider audience in mind; after all, the rest of you may find some of this interesting.

Corporate and Union Dollars at Work

The United States Supreme Court's controversial decision in *Citizens United v. Federal Election Commission* has shaken the foundation of campaign finance jurisprudence.[1] Put simply, the Court held that corporations and unions, like natural persons, have a constitutional right to spend unlimited sums of money on behalf of, or in opposition to, a federal candidate, provided that these expenditures are "independent" of the candidate's campaign. *Citizens United* overruled previous Supreme Court decisions and upended the century-old view that corporations, in the context of political campaigns, were different than individuals and, given their resources, should be treated with a wary eye.

President Obama immediately lamented the holding; Senator Charles Schumer has introduced legislation in Congress to blunt its reach;[2] State Senator Daniel Squadron and Assemblymember Rory Lancman have proposed a law in New York to do the same.[3] It remains to be seen whether such legislation will be passed and, if it is, whether it would withstand judicial scrutiny. On the other hand, it appears that if a corporation is characterized as having the same constitutional rights as a natural person in a campaign, then it is a matter of logic, assuming the current voting pattern on the Supreme Court is maintained if Elena Kagan replaces Justice Stevens, that the ruling of *Citizens United* might very well be extended to invalidate the long-standing ban on direct corporate contributions to federal candidates as well.[4]

Two observations about the case: First, the law relating to what is an independent expenditure is murky. A federal statute attempts to set the parameters of campaign activity that is independent versus that which is "coordinated."[5] However, whether or not an expenditure is independent is fact-driven. As such, how corporations or unions spend their money in a campaign will undoubt-

edly be subject to complaints to, and scrutiny by, the Federal Election Commission.

Second, and closer to home, is the question of how *Citizens United* impacts New York law. At present, corporations are permitted to contribute an aggregate of $5,000 in a calendar year to all state and local candidates, while individuals may contribute up to $150,000 in a year; in New York City, corporate contributions to municipal candidates are banned altogether. If the ruling of *Citizens United* is extended to invalidate the ban on direct contributions to federal candidates, then the state restriction and the city ban, if challenged, might also fall. This, of course, would mean that corporate and union contributions could be made directly to state and local candidates at the same levels as natural persons.

It remains to be seen what next steps will be taken by supporters of the Supreme Court's holding in *Citizens United*.

You Think We Can't Do This? . . . Just Watch!

Two of the most newsworthy court decisions in New York this past year related to the highly unusual exercise of raw power, one by the Governor, the other by the State Senate.

Although very few students of government thought he had the authority to do so,[6] Governor David A. Paterson, on July 8, 2009, appointed Richard Ravitch as Lieutenant Governor. The context, of course, was that Lieutenant Governor Paterson became Governor when Governor Eliot Spitzer resigned, and, for the ninth time in New York's history, there was a vacancy in the office of Lieutenant Governor. That was March 2008. Later in the year the Democrats took control of the State Senate for the first time in over 40 years, enabling Democrat Senator Malcolm Smith to become Temporary President of the Senate and, therefore, to assume the duties[7] (though not the office) of Lieutenant Governor.

In June 2009, however, several Democratic Senators switched allegiance and Republican Senator Dean Skelos was elected Temporary President. This unprecedented upheaval – and uncertainty as to who was the legitimate Temporary President and thus next in line to succeed Governor Paterson – prompted the Governor to name a new Lieutenant Governor.

Amid the great skepticism that the Governor had the power to fill the vacancy in this way, the matter was litigated, and, overturning years of conventional wisdom, the New York Court of Appeals, in a 4-3 decision, held that he did.[8]

This November, we elect a new Governor and Lieutenant Governor.[9] Should a vacancy in the office of Lieutenant Governor occur in the future, the Governor, relying on the Ravitch precedent, would meet no legal resistance to appointing a new comrade-in-arms. The better practice, however, would be to reform the law so that the decision is not solely a governor's. The federal model, embodied in the 25th Amendment to the United States Constitution, allows Congress to approve a President's choice to fill a vacancy in the vice presidency. New York should adopt this procedure.[10]

The New York State Senate also flexed its muscles this year by expelling one of its duly elected members, former Senator Hiram Monserrate. The media chronicled his tawdry conduct in great detail, leading up to his misdemeanor conviction of recklessly assaulting his female companion; so, too, did they broadcast all the details of his role in the Senate "coup" engineered by him and several allies. A Senate committee found him "unfit to serve" and the full Senate expelled him.

Monserrate took the matter to federal district court, which cited the Legislature's plenary power to preserve the integrity of its body, and declined to enjoin the expulsion; it also suggested that Monserrate may pursue in state court the issue of whether Legislative Law § 3, which allowed for such expulsion, was constitutional under the New York State Constitution.[11] The Second Circuit affirmed, holding that the District Court did not abuse its discretion.[12]

In that Monserrate did not test the state constitutional issue, it remains unresolved whether a future expulsion, if challenged in state court, would succeed. Fifty years ago, an Assembly committee concluded that the state constitution barred it from expelling a member; last year a Senate committee concluded that it did have such power. The federal court, in finding that no federal constitutional right existed or was sufficiently abridged to warrant enjoining Monserrate's expulsion, neither supports nor prevents any future expulsion by the Legislature.

One additional question is raised. Assuming *arguendo* that the Legislature has the power to expel, there is, nevertheless, no bright line test for whether an elected official is "unfit to serve." The Monserrate case's heuristic value in this regard is ambiguous.

Campaign Finance Prosecutions

It is highly unusual for prosecutors to charge a candidate or campaign with campaign finance violations. Nevertheless, in 2008, New York County Surrogate-elect Nora Anderson was indicted for various campaign finance law violations. Eight of 10 counts were dismissed on the ground the court lacked geographical jurisdiction; the remaining two counts charged false filings in the first degree.[13]

Although it was actually the treasurer of the campaign committee who filed the campaign finance disclosure documents, the District Attorney prosecuted Anderson and a former employer who had gifted and loaned her approximately $250,000.[14] Anderson then contributed these sums to her campaign committee, and the treasurer identified Anderson as the contributor in the campaign filings. The prosecution essentially argued that the campaign committee should have listed Anderson's employer as the contributor instead, and, as such, her filings were false instruments. Anderson's defense was that the gift and loan became her money and the filings were, therefore, accurate. Surrogate Anderson and her co-defendant were acquitted, and she now serves on the bench.

A different result ensued in the case of Norman Hsu. Mr. Hsu, a prominent fundraiser for former Senator Hillary Clinton and many other nationally known candidates, was found to have concocted an elaborate Ponzi scheme in which he used approximately $50 million of other people's money for his contributions. He pled guilty to federal fraud charges and a jury found him guilty of violating federal campaign finance laws. He was sentenced to 24 years and four months for his crimes.[15]

Although such prosecutions have been extremely rare, candidates and practitioners are alerted to the apparently greater interest that federal and state authorities have recently exhibited. Indeed, in the aftermath of *Citizens United*, it would not be surprising if prosecutors scrutinize whether purportedly independent expenditures of corporations and unions are in fact improperly coordinated with a candidate's campaign.

It's My Party . . . and You're Not Invited

Political parties almost never oust their members. But that is exactly what the Conservative Party did last year, when it "disenrolled" approximately 1,500 new members on the ground that they joined *en masse* for the purpose of taking over its Suffolk County chapter. The disenrolled members challenged the Conservative Party's action in *Walsh v. Abramowitz*,[16] but Supreme Court, Suffolk County, upheld the disenrollment. The court articulated the case's "central issue" as

> whether an intentional and organized effort by an outside organization, in this case, the Suffolk County Police Benevolent Association, to cause massive enrollment changes of its members, their families and friends, into a political party, in this case, the Conservative Party, for an ulterior motive that has little if anything to do with the principles of the party, can be the subject of a removal [disenrollment] proceeding under the Election Law.[17]

The court surveyed various provisions of the Election Law that protect the prerogatives of political parties under New York's closed primary system and concluded that, as long as proper procedures were followed, parties had the right to bar those who sought a "take-over."

In the case before the court, the Suffolk County Conservative Party "believed itself to be the focus of . . . a conspiracy to perpetrate a scheme of large-scale fraudulent enrollment" for the purpose of electing a new sheriff who would be more supportive of the Suffolk County Police Department. The effort by the the Police Benevolent Association, seen as an organized, blatant attempt to use the party for its own purposes, was quintessential "party raiding" according to the court. Under the circumstances, therefore, the local Conservative Party had the right to challenge the bona fides of the 1,500 new members, and disenroll them.

This was an unusual decision. Voter registration and enrollment drives are to be *encouraged*. And, of course, a concerted effort by a group of people to re-direct a party's policies, or to nominate a particular candidate, is exactly what active political participants do. Witness, for example, the current "tea party" movement. Although some observers questioned the broader implications of

examining the motives of new enrollees, the court's ruling was not appealed. In fact, in an extraordinary step after the new enrollees were ousted, the Suffolk County Conservative Party commenced an action seeking damages for tortious conduct by those who tried to take over their party. The action continues, having survived a motion to dismiss.[18]

The Continuing War Over Absentee Ballots

Recent close elections have engendered a good deal of hand-to-hand combat over absentee ballots. In *Fingar v. Martin*,[19] the Appellate Division, Third Department restated its continuing view that absentee ballots cast by those voting from "second homes" are not presumptively suspect. On the contrary, the court treated the ballots as presumptively valid and appropriately placed the burden upon a challenger to prove that a voter's second residence was not a legitimate one. The court thus upheld the long-standing precedent that candidates and voters may have more than one home and may choose to vote from any one of them, so long as it is a bona fide residence. This year, in *Stewart v. Chautauqua County Board of Elections*,[20] the Court of Appeals reiterated the law that a New Yorker may vote from a "second" home, provided, of course, that there are "legitimate, significant and continuing attachments" to it.

Voters with a country or beach house, therefore, have a choice from which of their homes to cast a ballot.

"If You Can't Take the Heat, Get Out of the Kitchen!"

President Harry S Truman famously uttered this warning over 50 years ago to members of his administration, but in light of the New York Court of Appeals's decision in *Shulman v. Hunderfund*,[21] it should be taken to heart by would-be elected officials.

The facts of this action involved a school board candidate who, during his campaign for re-election, was the subject of an anonymous flier alleging that he "flagrantly broke the law." After the candidate lost the election, he discovered the perpetrators and sued them for libel. The Court of Appeals dismissed the complaint, and held that

> [i]t is understandable, of course, that [plaintiff] Shulman did not like [defendant] Hunderfund's provocatively phrased, and anonymous, charges against him. But so long as Hunderfund did not substantially depart from what he believed to be the truth, the only remedy for Shulman and other figures similarly situated is, as the Supreme Court said in its order setting aside the verdict in this case, *to develop a thicker skin*.[22]

It is, therefore, the law in New York that running for office is not for the meek or weak-hearted. If you are a candidate for office and opponents raise ballot access, campaign finance or residency issues, take it in stride. Develop a thicker skin! ■

1. 130 S. Ct. 876 (2010).
2. The Schumer-Van Hollen Bill is known as the "Democracy Is Strengthened by Casting Light On Spending in Elections [DISCLOSE] Act."
3. Bryan Fitzgerald, *New York Bill Asks Shareholder Permission Before Corporate Spending in Politics*, Albany Times Union (Apr. 15, 2010) *available at* http://www.timesunion.com/ASPStories/Story.asp?StoryID=921791&LinkFrom=RSS.
4. Currently, corporations and unions can assist a candidate by establishing a political action committee, which can, in turn, make direct contributions to federal candidates.
5. 2 U.S.C. § 431(17). *See* Robert F. Bauer, *The McCain-Feingold Coordination Rules: The Ongoing Program to Keep Politics Under Control*, 32 Fordham Urb. L.J. 507 (2005).
6. Jerry H. Goldfeder, *New York State of Mindlessness*, N.Y. Times, June 11, 2009.
7. N.Y. Const. art. IV, § 6.
8. *Skelos v. Paterson*, 13 N.Y.3d 141, 886 N.Y.S.2d 846 (2009).
9. Although candidates for the two offices seek their respective political party nominations in separate primary elections, the winners run together as a ticket, just as candidates do for President and Vice President of the United States. N.Y. Const. art. IV, § 1.
10. The Election Law Committee of the Association of the Bar of the City of New York issued a Report that recommended reforming state law to adopt the federal method. *See* Letter from Jerry Goldfeder, chair, N.Y. City Bar Comm. on Election Law, to Charles O'Byrne, Secretary to the Governor (July 1, 2008) (on file at www.nycbar.org/pdf/report/Governor_re_Succession.pdf).
11. Jerry H. Goldfeder, *Monserrate and the Question of Pink Slips for Elected Officials*, N.Y.L.J., Jan. 20, 2010, p. 4, col. 1.
12. *Monserrate v. N.Y. State Senate*, 599 F.3d 148 (2d Cir. 2010).
13. *People v. Anderson*, N.Y.L.J., Nov. 2, 2009, p. 17, col. 3 (Sup. Ct., N.Y. Co.).
14. I was retained as an expert by the defense.
15. *United States v. Hsu*, 643 F. Supp. 2d. 574 (S.D.N.Y. 2009).
16. N.Y.L.J., Sept. 23, 2009, p. 42, col. 1 (Sup. Ct., Suffolk Co.).
17. *Id.*
18. *Walsh v. Frayler*, 26 Misc. 3d 1237(A) (Sup. Ct., Suffolk Co. 2010).
19. 68 A.D.3d 1435, 892 N.Y.S. 2d 235 (3d Dep't 2009).
20. 14 N.Y.3d 139 (2010).
21. 12 N.Y.3d 143, 878 N.Y.S.2d 230 (2009).
22. *Id.* at 150 (emphasis supplied).

"I have a typical nine to five job. It's enough work for nine people and I'm treated like a five year old."