

Campaign Finance Talk

The Voice of the Michigan Campaign Finance Network

www.mcfn.org

April 2010

Citizens United v. FEC: Disclosure Breakthrough?

The case of *Citizens United v. Federal Election Commission* is widely recognized to be one of those proverbial political game-changers. The fact that corporations now are free to sponsor electioneering communications that explicitly support or oppose candidates for public office could lead to a flood of new money in local, state and federal election campaigns.

Citizens United also could lead to corruption on the cheap. Up to this point, if some well-connected vendor wanted a sole-source, no-bid contract in the Defense budget, they would have to produce a bundle of campaign contributions to get their earmark. Now, they simply have to make a promise or a threat: "Gee, Congressman, we'd hate to run a million-dollar TV ad campaign telling your constituents that you're an unpatriotic job destroyer and they'd better vote you out of office, but if we can't count on your help, that leaves us no choice."

One easily can imagine policy capitulation with no need for troublesome campaign contributions. A mere threat could be just as persuasive as a bundle of checks from lobbyists.

However, there is another aspect of *Citizens United* that could be a crucial gain for voter information and transparency in election campaigns. The U.S. Supreme Court voted 8-1 that corporate 'speakers,' such as Citizens United, can be required to disclose the financial backers who donate the money that is used to exercise the newly won right of corporate political speech. In its case against the

FEC, Citizens United claimed that disclosure requirements should apply only in cases of "the functional equivalent of express advocacy." The Court emphatically disagreed.

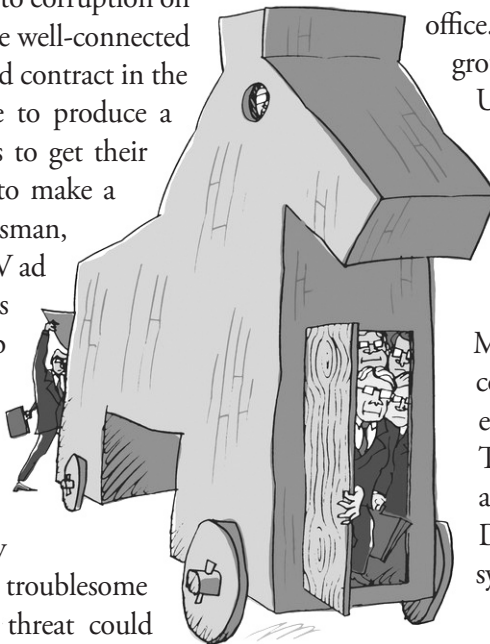
This is particularly significant to Michigan election campaigns. Over the past decade, the Michigan Chamber of Commerce and the political parties have spent more than \$45 million for television 'issue ads' that sought to define the character and qualifications of candidates for statewide office. You know the themes: In the pocket of interest groups; Soft on crime; Job creator; Job destroyer; Unqualified for the bench; Asleep on the bench, and so forth.

Those advertisements studiously avoided the 'magic words' of express advocacy, such as "vote for," "vote against," "support" or "defeat." Under the prevailing interpretation of the Michigan Campaign Finance Act, electioneering communications that don't contain magic words of express advocacy are not campaign expenditures. Therefore, some of the most memorable campaign ads of the last decade are not reported in the Department of State's campaign finance disclosure system.

The Michigan Campaign Finance Network has collected data on those advertisements from the public files of the state's broadcasters and cable systems. The data show undisclosed spending for TV advertisements of: \$11.6 million in the 2002 gubernatorial campaign; \$18.1 million in the 2006 gubernatorial campaign; and, \$14.3 million in Supreme Court campaigns from 2000 through 2008.

The Supreme Court issue ads amounted to more spending than the Supreme Court candidates raised in their

continues on page 2



continued from page 1

own campaign accounts. In other words, the candidates' share of the campaigns was less than that which was off the books.

This is a particularly insidious development as demonstrated in the U.S. Supreme Court case of *Caperton v. Massey Coal Company*. In that case, the Court ruled that extraordinary campaign spending in support of a West Virginia Supreme Court candidate by an individual who also happened to have a case on appeal to the West Virginia Supreme Court created a probability of bias that required the beneficiary justice to disqualify himself from his supporter's case.

In Michigan, big campaign supporters of some of the justices can't be identified because they channeled their support through the Chamber and the parties. So even though the Michigan Supreme Court has adopted a disqualification rule that says that the appearance of bias may be enough to warrant disqualification of a justice from a case, the rule has very weak teeth because there is no public record of who is putting the money into the campaign black-boxes operated by the Chamber and the parties.

What are the disclosure rules going forward?

In February of this year the Michigan Chamber of Commerce asked Secretary of State Terri Lynn Land for a Declaratory Ruling that will articulate disclosure rules for nonprofit corporations such as the Chamber that aggregate funds from like-minded interest groups to buy electioneering communications. The Chamber wants to know whether it is enough to say that funds come from its general treasury. Or, will it have to name its donors when it engages in express advocacy?

Clearly, Secretary Land has the opportunity to take a strong stand for transparency. The Supreme Court's ruling in *Citizens United* gives her a rock-solid constitutional foundation for requiring disclosure of donors. The Court recognized that such disclosure could be chilling to some potential donors who may not want to give if they can't do so under cover of anonymity. However, the opinion noted that the voters' interest in knowing whose political speech they're hearing is a higher order concern. There really are no persuasive arguments for campaign secrecy.

The larger question is: Why shouldn't such disclosure requirements extend to candidate-focused issue advertising? Again, the Court was clear: It is not necessary to limit

disclosure to express advocacy or its functional equivalent. Voters have an interest in knowing whose money is doing the talking, whenever corporate entities give a tongue lashing to candidates at election time – even if there are no magic words.

Would rigorous disclosure rules cause some onerous new accounting practices? No. The Chamber's own tax returns show that their issue advocacy activity is funded by "special dues" and "special assessments," not general membership dues. All that is required is for the Chamber, or any other corporate entity engaged in aggregating funds for electioneering, to make public its internal electioneering bookkeeping.

The U.S. Supreme Court said it very succinctly, "The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."

The sensitivity the Court has shown to shareholders is also important. All investors, but particularly, institutional investors such as mutual funds and public pension funds, need the ability to evaluate whether the management of a corporation in which they invest is acting in the shareholders' interest. Without open disclosure of political spending, they have no means to make such an evaluation.

The case of Meijer, Inc. in Acme Township, where "mistakes were made" and management's left hand claimed it didn't know about the activities of management's right hand, show that nondisclosure can wreak havoc even in privately held corporations. Rigorous disclosure of all corporate political spending is good for all corporations.

If Secretary Land does anything less than requiring full transparency and disclosure, she'll be perpetuating a campaign finance shell game that deceives voters and shields donors from accountability for their actions. Secretary Land should act in the interest of our democracy, not special interests who want to pull political strings anonymously.

The Department of State will publish its proposed response to the Michigan Chamber of Commerce's request for the Declaratory Ruling on or before April 30, 2010. The public will have five days to comment on the proposed response after it is published. The Department will publish its final ruling on or before May 21, 2010. You can view MCFN's initial comment on the request at www.mcfn.org.

Learn more about *Citizens United* and campaign disclosure.

When: **Monday, April 19th • 7 pm**

Where: **Birmingham Unitarian Universalist Church
38651 Woodward Avenue
Bloomfield Hills, MI 48304**

Sponsored by: **Oakland County ACLU**

Discussants: **Brian Dickerson**, Detroit Free Press
Eric Doster, general counsel, MI GOP
Rich Robinson, MCFN

Moderator: **Prof. Robert Sedler**, Wayne State Law School

When: **Monday, May 24th • 7pm**

Where: **Leelanau County Government Center
8527 E. Government Center Dr.
Suttons Bay, MI 49682**

Sponsored by: **Leelanau Independent Women
for Democratic Action**

Discussants: **Rich Robinson**, MCFN
Hon. Dan Scripps, State Representative, 101st Dist.

Campaign Finance Talk

The voice of the



200 Museum Drive, Lansing, Michigan 48933
(517) 482-7198 • E-mail: mcfn@mcfn.org
www.mcfn.org

ADDRESS SERVICE REQUESTED

**FIRST CLASS
PRESORT**
U.S. POSTAGE PAID
LANSING, MI
PERMIT #485

042010



All articles were written by Rich Robinson, executive director of the Michigan Campaign Finance Network.

Newsletter goes electronic

To cut costs and act in an environmentally responsible way, we're moving *Campaign Finance Talk* to cyberspace. Send your email address to mcfn@mcfn.org for future newsletters, or register at www.mcfn.org. Or, if you do not have Internet access and you still want to receive a hard copy of the newsletter, send the coupon below to let us know. We'll continue with a limited distribution as long as we can.

YES! I support the important work of the Michigan Campaign Finance Network. (Please check all that apply.)

- Please continue sending *Campaign Finance Talk* by mail.
- Please send me a free copy of the *Citizen's Guide to Michigan Campaign Finance, 2008*.
- I support the work of MCFN. My tax-deductible contribution is enclosed.

Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Tel: _____ Fax: _____ Email: _____

The Michigan Campaign Finance Network is a 501 (c) (3) non-profit organization. **Mail this coupon to: 200 Museum Drive, Lansing, MI 48933.**

042010