Divided Court Supports Ted Cruz’s Campaign Debt Reimbursement but Denies Would-Be Citizen Chance to Correct Bureaucratic Error: SCOTUS Today

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It is fair, I think, to say that a substantial majority of those who heard the argument in the case of Federal Election Commission v. Ted Cruz for Senate doubted that,
irrespective of whatever they might think of Ted Cruz, it was highly likely that he and his campaign organization would prevail in challenging the federal campaign finance law limitation on the use of post-election funds to repay a candidate’s personal loans as violative of the First Amendment rights of candidates who want to make expenditures on behalf of their own candidacy through personal loans. But, by a six-three division between the Court’s judicial conservatives and liberals, that is precisely what has occurred. Those who criticize the Court’s decision in Citizens United v. Federal Election Commission, 558 U.S. 310 (2010), likely will feel much the same way about the Cruz case.

Ted Cruz had personally loaned $260,000 to his campaign committee (“Committee”). The Bipartisan Campaign Reform Act of 2002 (BCRA) restricts the use of post-election contributions by limiting the amount that a candidate may be repaid from such funds to $250,000. The Federal Election Commission (FEC) promulgated regulations allowing a campaign to repay up to $250,000 in candidate loans using contributions made “at any time.” To the extent the loans exceed $250,000, a campaign may use pre-election funds to repay the portion exceeding $250,000 only if the repayment occurs “within 20 days of the election.” When the 20-day post-election deadline expires, the campaign must treat any portion above $250,000 as a contribution to the campaign, precluding later repayment. In Cruz’s case, his Committee began repaying him after the 20-day post-election window for repaying amounts over $250,000 had closed. It accordingly repaid Cruz only $250,000, leaving $10,000 of his personal loans unpaid. Cruz thereupon sought declaratory relief, arguing that Section 304 of BCRA violates the First Amendment and raising challenges to the FEC’s implementing regulation. The three-judge District Court granted Cruz and his Committee summary judgment on their constitutional claim, holding that the loan-repayment limitation burdens political speech without sufficient justification.

In an opinion delivered by the Chief Justice, the Court first rejected the FEC’s challenge to the Committee’s standing, holding that the injury alleged was directly traceable to the loan-repayment limitation imposed by the BCRA and that there is no exception created by the fact that the injury might have been willingly incurred. Here, the fact that appellees’ injuries are directly inflicted by the FEC’s threatened enforcement of the provisions they now challenge is unchanged by the fact that they chose to subject themselves to the provisions that they challenge.

Going to the heart of the matter, the Court holds that Section 304 of BCRA burdens core political speech without proper justification. By restricting the sources of funds that campaigns may use to repay candidate loans, the law increases the risk that such loans will not be repaid in full, thus deterring candidates from loaning money to their campaigns. In creating what the Court says is a barrier to entry that abridges political speech, the government has failed to establish that the loan-repayment limitation furthers a permissible goal. The Court argues that the government has only made a hypothetical, scholarly claim that the law prevents “quid pro quo” corruption or its appearance. The Chief Justice cites both the absence of direct evidence of it and the fact that the statutory limitations on individual and organizational contribution amounts obviate the theory that big-money contributors somehow will gain influence by their post-election contributions. In essence, in what they would characterize as a decision grounded in the promotion of free speech and
individual liberty, the members of the majority hold firmly that any law that burdens First Amendment freedoms, even slightly, must be justified by a permissible interest, and that that interest must be documented in fact, not as a hypothesis. Critics, of course, would hold that a reasonable hypothesis, if supported by ineluctable logic, would be sufficient. And that is precisely what Justice Kagan, writing for the liberal wing of the Court, has attempted to do. She expresses the view that there is no documented quid-pro-quo corruption because “the challenged finance measure at issue here has for two decades checked the crooked exchanges just described” by the majority as would be a permissible ground for regulation. This insoluble dispute goes on, and, despite legislative attempts to limit campaign contributions, in this case by wealthy candidates themselves, those limitations continue to fall to First Amendment challenges.

One side note. Readers of the opinion itself will note that it comes as an appeal, not a petition for certiorari, from a federal District Court, not a Circuit Court of Appeals. That is a feature of the Federal Election Campaign Act that defines jurisdiction.

Many will argue that at least as arbitrary a result as in Cruz has been reached in Patel v. Garland. Mr. Patel, who had entered the United States illegally some years earlier, applied for an adjustment of his status that would have allowed him to become a permanent lawful resident. While that application was pending, he applied for a Georgia driver’s license and incorrectly checked a box that indicated he was a citizen of the United States. What he later argued—and the government even ultimately agreed—was a mere clerical error did not prevent an immigration judge from ordering Patel’s removal from the country. Writing for all the Court’s conservatives, except Justice Gorsuch, Justice Barrett opined that federal courts lack jurisdiction to review facts found as part of discretionary-relief proceedings under the immigration law. This hyper-literal view of the text stems from what the majority takes to be the meaning of the word “judgment,” a meaning that describes what would be reviewable on appeal. With the government agreeing with Patel that the term should be inclusive of factual findings made at the administrative adjudicatory level, Court-appointed counsel argued successfully that “judgment” meant only the final legal pronouncement at issue. His libertarian bent unleashed, Justice Gorsuch dissented, joined by the three Court liberals. He writes what could have been the opening chapter of a Dickens novel that, according to the majority’s decision, “no court may correct even the agency’s most egregious factual mistakes about an individual’s statutory eligibility for relief. It is a novel reading of a 25-year-old statute. One at odds with background law permitting judicial review. And one even the government disavows.”

Both of today’s decisions will resonate with critics as triumphs of the literal over the logical. They will have much to write about.

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