

SCALIA INFLUENCED U.S. SUPREME COURT

BY JEFF BRINDLE | 11/21/16 11:16am

How will a Trump presidency impact campaign finance law?

Among the first decisions President-elect Donald J. Trump will make upon assuming office January 20th, will be to nominate someone to fill the U.S. Supreme Court seat left vacant by the death of Justice Antonin Scalia.

Further, the new president may have the opportunity to fill three additional seats on the High Court.

Justice Ruth Bader Ginsburg is 83-years old, Justice Anthony Kennedy is 80 and Justice Stephen Breyer 78.

These justices are not required to leave the bench. The Constitution assures lifetime tenure for good behavior. But age and disability could conspire to bring about additional openings on the court.

President-elect Trump has released a list of 21 possible choices to fill the late Justice Scalia's seat.

Moreover, the President-elect has repeatedly said that the person he nominates will be in the mold of the late justice.

This means the nominee will be an "originalist," meaning that his or her judicial philosophy would be sympathetic to deciding cases by interpreting the Constitution according to its original meaning.

If confirmed the new justice, in all probability, would tip the balance on the court to nominally conservative.

In terms of campaign finance law, this means that the Trumpian court will largely resemble a court influenced by the legacy of the late Justice Scalia.

For sure it will be strong in protecting First Amendment free speech and assembly rights.

In terms of the important and controversial case “Citizens United,” many have been calling for its reconsideration by the High Tribunal. A newly constituted Trump court will surely reject this effort.

Thus, the only avenue open for eliminating “Citizens United” would be to amend the Constitution. Since this venerable document has only been amended 27 times in our 229-year history, the likelihood of undoing “Citizens United” is slim.

Therefore, corporations and unions will continue to be a source of funding for independent groups like Super PACs, although to this point corporate participation is not as great as feared because these groups are more likely to be supported by wealthy individuals.

In “Citizens United” the Court did, however, rule decidedly for disclosure, as did subsequent lower court decisions in *Speech Now* 2010 and *Carey* 2011.

In fact, the late Justice Antonin Scalia himself favored disclosure. He stated in *Doe v. Reed*: “there are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.”

It is a good bet that under its new configuration, the court will continue to support disclosure.

Changes may be in the wind in other areas though, in particular with regard to political parties.

Two cases, {perhaps more} that deal with political parties have a chance of being taken up by the U.S. Supreme Court.

In *Republican Party of Louisiana, et al. v. FEC*, a challenge has been mounted for ending the ban on soft money to national parties.

The Louisiana Republican party is questioning the constitutionality of the Federal Election Campaign Act (FECA) provisions that regulate federal campaign finance activity by state and local parties.

While on November 8, 2016, the United States District Court for the District of Columbia ruled in favor of the Federal Election Commission (FEC) in upholding the soft money restrictions, there is a good possibility that the Supreme Court will ultimately be asked to take up the case sometime in the future.

If it grants certiorari the potential for a First Amendment leaning court to find the soft money ban unconstitutional is real.

In another case, Alabama Democratic Conference (ADC) v. Attorney General, State of Alabama, the United States Court of Appeals, Eleventh District, upheld Alabama's ban on transfers of money between political action committees (PACs), including political parties.

If the Supreme Court hears this case on Appeal, the lower court's ruling may well be overturned.

Rulings favoring political parties would strengthen the party system and serve to offset the growing influence of often anonymous Super PACs.

In New Jersey, it could further embolden supporters of a stronger party system to push for the enactment of legislation that would reinvigorate the parties and offset the overwhelming influence of independent groups in the garden state.

Finally, in recent years there has been an all-out assault on contribution limits. A challenge to contribution limits is likely to be heard by the High Tribunal.

A Scalia influenced court is unlikely to overturn precedent, dating back to Buckley v. Valeo in 1976. Contributions limits, through which the state has a valid anti-corruption interest, are likely to be preserved.

While it's difficult to have a crystal ball in terms of what a Trumpian court will do, my guess is it will follow the path set forth by the late Justice Antonin Scalia.

It will protect the First Amendment, let stand "Citizens United," uphold disclosure, find for political parties, and uphold contribution limits. In terms of campaign finance law the policy direction of the U.S. Supreme Court will remain the same as it has been since John Roberts became Chief Justice in 2005.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission.

The opinions presented here are his own and not necessarily those of the Commission.