THREE JUDGE PANEL UPHOLDS EXISTING BAN ON FOREIGN DONATIONS TO U.S. POLITICAL CAMPAIGNS

For nearly 40 years, U.S. law has prohibited "foreign nationals," defined in law as all foreign citizens except lawful permanent residents of the United States, from making campaign contributions to all candidates for any political office in the United States, whether federal, state, or local. Recently, two foreign nationals challenged this prohibition. They argued that the restriction on campaign contributions by foreign nationals was a violation of their First Amendment right to free speech under the U.S. Constitution. On August 8, 2011, a special three-judge panel authorized to hear election law disputes ruled that the prohibition was not unconstitutional and dismissed the foreign nationals' lawsuit.

The court began by noting that foreign nationals enjoy many of the same constitutional rights as U.S. citizens, such as criminal due process, access to public education and welfare benefits, protection under public safety rules and the right to seek redress for contractual disputes. The court drew a distinction, however, between those areas and areas where foreign nationals do not have constitutional rights, such as the right to vote in U.S. elections or the right to hold certain public and political offices. In drawing that distinction, the court relied on a long line of court precedent that a State's "power to exclude aliens from participation in its democratic political institutions is part of the sovereign's obligation to preserve the basic conception of a political community." The court concluded that "the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process."

Over the last several years, courts in the United States have relaxed restrictions on campaign contributions - for example contributions that are not coordinated with any campaign, as well as a relaxation on campaign contributions by U.S. corporations. On the specific issue of campaign contributions by foreign nationals, however, this court, as well as the U.S. Congress, have not indicated any interest in relaxing or removing the restriction on foreign campaign contributions. Foreign corporations and foreign nationals with operations in the United States or interest in doing business in the United States should exercise caution to ensure that they comply with the prohibition on campaign contributions by foreign nationals.

In particular, U.S. subsidiaries of foreign-owned corporations are often interested in establishing a Separate Segregated Fund, commonly known as a Political Action Committee or "PAC," to which its US employees can make political contributions. Although PACs for such companies are expressly permitted under US law, caution must be taken to ensure that the foreign parent corporation does not violate the prohibition on contributions by foreign nationals, which extends to financial support from the foreign parent corporation for operation of the PAC.

Kaye Scholer's National Security Practice Group advises U.S. and foreign clients on foreign acquisitions in the U.S. defense and national security sector, as well as compliance matters affecting foreign-owned U.S. defense and national security contractors, including compliance with U.S.

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