May 4, 2010

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Posted: February 17, 2010 02:16 PM

"A Dose of Realism"? How About This for "Realism": We Need Leadership

Larry Tribe criticizes my February 15 post, which itself had criticized the Democratic Leadership's planned response to *Citizens United* as not good enough. He agrees that the Leadership's response is "incomplete," but, he argues, it at least has "the virtue of being potentially attainable." More importantly, he believes that the key provisions of the Leadership's proposal are not necessarily unconstitutional. As he writes,

"[w]hen Lessig asserts that the Supreme Court probably will not 'look favorably at a broad ban on government contractors speaking,' he fails to consider the arguments that have led the Court to uphold closely analogous political speech restrictions designed to prevent pay-to-play pressures on government employees who might want to participate actively in campaign electioneering. And when Lessig dismisses as 'completely unclear how foreigners get regulated under the Court's reasoning,' he suddenly treats as 'reasoning' what he elsewhere dismisses as barely disguised advocacy and fails to acknowledge the Court's undoubtedly incoherent but nonetheless real insistence that its decision left undisturbed the existing limits on political participation by foreign corporations -- limits that could readily be expanded."

But my argument is not that Congress should not enact these good, if not good enough, measures. Nor is it that the Court *must* hold them unconstitutional. It is instead that it is reckless to gamble that they won't. This Court has become an angry old dog which has now bitten four times in a row. (The government is 0 for 4 in its defense of campaign finance regulations). Sure, maybe it won't bite your kid. Maybe it will be the
sweet moderate dog it was years ago. But you don't need to be the parent of a young child to believe it reckless to let your kid play with this dog. And I don't think you have to be a complete cynic about the Supreme Court to read their decisions to signal that this revolution is not yet over.

One could disagree, of course. A law professor, for example, could well quibble with President Obama when he claims that "the Supreme Court reversed a century of law to open the floodgates for special interests including foreign corporations to spend without limit in our elections." After all, that "century of law" was a ban on corporate contributions to political campaigns, not independent expenditures. *Citizens United* didn't touch that ban.

Yet I wouldn't quibble with the President's claim, because I read this line of cases much as he has: to signal that the Court has launched itself on a radical remaking of First Amendment law in the context of campaign finance regulation.

So no doubt the Court is not compelled to find that limits on government contractors' speech are unconstitutional. And no doubt, it might discover that though "[t]he [First] Amendment," as Justice Scalia put it in *Citizens United*, "is written in terms of 'speech,' not speakers," in fact on the back of the Bill of Rights, Madison had scribbled "except of course for foreign corporations."

But the issue here is not legal compulsion. It is judicial will. I agree with Larry Tribe (always the safe strategy with this, the nation's preeminent constitutional scholar) that the changes the Leadership has proposed should be deemed constitutional. But the question isn't what we law professors might hope or believe. The question is whether this angry dog is going to bite again.

Tribe doesn't actually answer that question. Instead, he counsels us to "leaven the spirit of innovation" with a "dose of realism." (As if there is any "innovation" in seeking ways to avoid improper dependencies within a constitutional government).

But here I have to get off the bus. For if it is realism that we need, how about this for "realism": Fifteen months ago, America elected the most compellingly progressive president in fifty years. It also elected the largest Democratic majority in the House and Senate in more than a generation. Yet practically every major reform that this young president has promised is now stalled in Congress. Health care languishes. Global warming legislation is no longer even discussed. The financial services sector has yet to be re-regulated (Congress is taking a break from that while they shuttle back and forth to Wall Street fundraisers). The bold effort to create a Consumer Financial Protection Agency has died the death of a thousand cuts, as exception after exception has been inserted into this the mother of Swiss cheese reform.

Loyalists, of course, blame all this on the crazy Republicans. No doubt, the GOP has pushed the tradition of partisanship to an extreme. But to pin the faults of the last 13 months on one party is to betray an extraordinary ignorance about the dynamic of the fundraising Congress. The defeats of the past year were not forced on this president by Republicans alone. When the House Banking Committee voted to adopt Republican John Campbell's amendment to exempt car dealers from the Consumer Financial Protection

http://www.huffingtonpost.com/lawrence-lessig/a-dose-of-realism-how-abo_b_466017.html
Agency Act (after all, who ever had a credit problem with a car dealer?), it was the string of "frontliner" Democrats, as the Huffington Post brilliantly recounts, that flipped the vote against the President. And when the President had promised that "[a]ny [health care] plan I sign must include ... a public option," (July 19, 2009) it was the resistance of Democrats like Ben Nelson and Max Baucus that made it impossible for his promise to stick.

So why did these Democrats sell out their President? You tell me. Of course, we can't know what was in their hearts. But we do know what cash was added to their campaign coffers. According to a study by Maplight.org, Democrats voting to exempt car dealers from the CFPA received more than twice as much money from the auto industry as those that voted against the exemption. And Democrats opposing the President's public option (despite overwhelming public support in their own states) had received millions from the insurance industry. It may well be that this money didn't matter. But that's not how the vast majority of Americans see it: They read the Congress taking money and voting against their interests as a clear signal that money buys results in Congress. That view, in turn, fuels the public's profound cynicism about this institution.

No doubt the Republicans have united effectively to block this super smart president with a super majority in Congress. But as commentator after commentator has recognized, extremism is an effective fundraising strategy. And whether you're a Republican or Democrat, the job of Congress is increasingly not the job of solving America's woes, but instead, the job of raising campaign cash. Who could believe that members, some of whom spend between 30% and 70% of their time raising campaign cash, aren't affected by this dependency? Who could believe this dependency is benign?

So if it is a "dose of realism" that we need, here is some realism: Connect the dots. The bold hopes of this extraordinary President have crashed on the shoals of the Fundraising Congress. Every single major reform is going to die, or get gutted, until this economy of influence changes. Tinkering is not enough. Returning to the world before Citizens United is not enough either. We need a leader to get America to see that there is a way to recover this democracy, and to get America to demand that change.

You don't need to believe me to believe this, Larry. Listen instead to "the best student [you] ever had" -- Barack Obama. For as he told us again and again during the campaign,

"If we do not change our politics -- if we do not fundamentally change the way Washington works -- then the problems we've been talking about for the last generation will be the same ones that haunt us for generations to come."

Or:

"So unless we're willing to challenge the broken system in Washington, and stop letting lobbyists use their clout to get their way, nothing else is going to change."

Or:
"If we're not willing to take up that fight, then real change -- change that will make a lasting difference in the lives of ordinary Americans -- will keep getting blocked by the defenders of the status quo."

Somehow this Administration forgot to "take up that fight." Somehow it has allowed the enemy to become the second largest political party in America (Republicans) rather than the single most vilified profession (lobbyists, just below lawyers and used car dealers). Somehow Obama has been convinced that his promise of bold leadership was a mistake. Somehow he has come to believe that realistic if puny ideas are the ways of transformational presidents like Reagan and FDR.

Yet somehow we have got to get this president to recognize that it was the "realism" of 2009 that was his mistake. What American democracy needs right now is leadership. It needs a President who shows us a way to restore our democracy. It needs the anger and impatience of the Republican Roosevelt (Teddy), railing against the corrupting influence of money in politics. It needs the strategic brilliance of the Democratic Roosevelt (Franklin), architecting the long and difficult campaign to, as Arnold Hiatt put it, "convince a reluctant nation to wage war to save democracy."

So I'm not against what the Democratic Leadership has proposed. Of course they should pass it. I am against believing that we should settle for these puny changes. For I believe that true "realism" shows that this is not enough -- not enough leadership, not enough change, and certainly not the kind of change that will make "change believable."

One hundred and thirty five Members in the House of Representatives have co-sponsored a bill that would make change believable. The Fair Elections Now Act would fundamentally transform the economy of influence in Washington. Yet the President now tells us he won't push this legislation. And thus the frustration of those of us whose support for this President is baked into our DNA: It is possible that he is the only political figure in America today who could convince this Nation to this essential change. Yet he has been convinced to be "realistic." And with this "realism" dies any hope of real reform.

Mr. President, FixCongressFirst. Or for the rest of us, show the Democratic Leadership leadership by helping us to get a majority in the House to co-sponsor the Fair Elections Now Act.

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