How ruling in Menendez case may affect political corruption cases moving forward |

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By Frank Askin

About the best that can be said about Sen. Robert Menendez's defense to an indictment from federal prosecutors outlining 14 counts of criminal corruption against him is that he is playing a very dangerous game with American democracy.

As a long-time supporter of New Jersey's senior senator, I would certainly give him the benefit of the doubt if he were seriously challenging the allegations against him.

But that does not appear to be the case. Rather, by accounts in the press, he seems to be claiming that the actions he is accused of are perfectly legal. And if he is right, it is a sad day for American politics.

As I understand the defense, Sen. Menendez (or his lawyers) says it was perfectly alright for him to accept lavish gifts and $700,000 in political contributions from Salomon Melgen, an "old friend" under indictment in Florida for Medicare fraud and then to intervene on the "friend's" behalf before various governmental agencies. Sen. Menendez (or his lawyers) calls that intervention "constituent services" even though the "constituent" lives in South Florida.

The Menendez defense reaches this conclusion through the merger of two questionable legal doctrines: (1) the Supreme Court's Citizens United decision and (2) an extreme interpretation of the Constitution's Speech and Debate Clause.

In Citizens United, the Supreme Court decided 5 to 4 that anyone could make unlimited contributions to a political committee that was supporting a federal candidate so long as the committee did not coordinate its spending on behalf of said candidate with the candidate's own committee ¬ on the specious theory that uncoordinated expenditures were of little value to a candidate and thus did not give rise to a threat of corruption. To the Menendez lawyers, this meant that Melgen, a wealthy Florida eye surgeon, could donate $700,000 through a company he owns to Majority PAC, a super PAC designed to maintain Democratic control of the Senate. Those funds could be directed to Sen. Menendez's campaign, as long as Majority PAC did not consult the senator's campaign on how to spend the money.

The arguments under the Speech and Debate Clause are a bit murkier. Article 1, Section 6 of the Constitution provides: "(F)or any speech or debate in either House, they (Senators or Representatives) shall not be questioned in any other Place."

The provision has never been strictly limited to speeches on the floor of Congress. Early decisions held that the clause should be read broadly to include anything generally done in a session of Congress by one of its members in relation to the business before it. Rather it has been held to apply to protect members from inquiry into "legislative acts" or the motivation for performance of legislative acts.

However, in the most important case to date under the clause, the Supreme Court also made clear a distinction between "legislative" acts and "political" acts. In the case of U.S. v. Brewster, the Court distinguished the two as follows: "It is well known that Members of Congress engage in many activities other than the purely legislative activities protected by the Speech or Debate Clause. These include a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts. ... They are performed in part ... because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative."

So the question in the Menendez case seems to boil down to determining whether the senator's actions on behalf of his "old friend" and "constituent" were legislative or political in nature. If they are deemed to be "political," it will be up to a jury to determine if Melgen's gifts were part of a corrupt bargain or merely the largesse of an "old friend." But if the court is persuaded by Sen. Menendez' legal team that they were protected from inquiry by the Speech or Debate Clause, I fear it would be a virtual "get out of jail free" card for all elected members of Congress and their staffs, who are also protected for their legislative acts on behalf of their bosses.

As was urged on Shoeless Joe Jackson by a fan during the infamous Black Sox scandal arising out of the 1919 World Series, "Say it ain't so," Bob – but please don't say what you are accused of was perfectly OK.

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