

Campaigns & Elections

Why the high court deserves some credit

by Jeff Brindle / Mar 23 2012



In the wake of the *Citizens United v. FEC*, the U.S. Supreme Court has become less popular than Darth Vader in the eyes of most good government advocates. But as a regulator, I'm not sure the Court deserves such animosity. The *Citizens United* case may have added to the frenzied fundraising atmosphere, but it hardly started it.

The explosion began shortly after the passage of the 2002 Bipartisan Campaign Reform Act, commonly known as McCain-Feingold, which failed miserably in its attempt to end so-called soft money. What has been ignored is the fact that the Supreme Court has sent some positive signals recently to those who remain concerned about the influence of money in politics.

Let's begin with *Citizens United*. The justices allowed corporations and unions to spend independently in federal elections, overturning a major 1990 case. Even so, the court left intact the ban on direct monetary contributions by corporations and unions to federal candidates. The court also found the 30 and 60-day blackout periods on independent ads unconstitutional. Nevertheless, the justices took a more expansive view of what should be disclosed in campaign finance reports.

In earlier rulings, the Supreme Court allowed regulation only of "express advocacy" that used so-called magic words like "vote for" or "vote against." Groups that do so must regularly report their fundraising both before and after elections. For decades, issue advocacy groups have routinely avoided campaign finance disclosure rules by assailing candidates with more generally worded attack ads.

But Citizens United declared that advertisements containing language that is the “functional equivalent of express advocacy” may now be given a dose of sunlight. That means disclosure for any ads that, to a reasonable mind, the purpose is to influence an election. It already denied a related appeal from the Ninth Circuit in *Human Life v. Brumsickle*. The decision upheld issue ad disclosure under Washington state law. ELEC’s bipartisan Commission has urged the state Legislature to adopt a similar law in New Jersey.

Moreover, in the D.C. Circuit Court of Appeals case *SpeechNow.org v. FEC*, the court allowed unlimited contributions to PACs and unlimited spending as long as the activity in question was independent. While doing this, the Appeals Court strongly endorsed registration and disclosure by PACs. There was an attempt by *SpeechNow.org* to appeal the decision to the Supreme Court, hoping it would scrap registration and disclosure requirements. But the Supreme Court denied the request, leaving both intact.

In a very recent decision, the Supreme Court denied an appeal in *National Organization for Marriage v. McKee*. The U.S. Court of Appeals for the First Circuit upheld Maine’s law involving PAC registration and financial disclosure. Even in cases that did not involve questions of disclosure, the court provided campaign regulators with something to support.

The majority in *Randall v. Sorrell* agreed Vermont’s \$200 to \$400 contribution limits were too low, but disregarded Justice Clarence Thomas’s impassioned plea to entirely end contribution limits on candidates. By denying an appeal in *Cao v. FEC*, the Supreme Court let stand restrictions on coordinated expenditures by the national political parties. And, in *Blumen v. FEC*, the Supreme Court upheld a ban on campaign contributions and independent expenditures by foreign nationals.

Though finding Arizona’s Clean Elections Program unconstitutional, it did so on grounds that the rescue money provision was an abridgment of free speech. Public financing in general was upheld, and not found to be outside of constitutional boundaries. There’s a clear pattern running through these decisions that should not be overlooked by legislatures, regulators or the general public.

The First Amendment freedom of political speech is sacrosanct and, it seems, so is disclosure. While some may think the high court has run amuck because of *Citizens United v. FEC*, the record indicates otherwise.

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