

The McCain-Feingold soft money ban should be repealed

TUESDAY, 20 MARCH 2012 11:17



BY JEFF BRINDLE

COMMENTARY

Few realize that the explosion of spending by Super PACs and other groups in this year's presidential campaign began with a fuse lit more than 30 years ago.

Federal Election Campaign Act (FECA) amendments in 1979 set the stage for the "soft money" binge now impacting elections.

For the first time, the law allowed national political parties to receive soft money contributions in unlimited amounts. Further, the parties were no longer subject to expenditure limits, provided these funds were spent independently of any candidate.

Soft money could be used for voter registration, voter turnout, and overhead expenses- classic "party building" expenses. It could not be used for advertisements.

Soon afterward, however, the Federal Election Commission (FEC) issued regulations that created a massive loophole.

That loophole still is having repercussions today.

The Commission allowed spending on ads as long as the ads were generic and did not promote or oppose any candidate. It greenlighted this spending even though ads were specifically prohibited in the federal amendments.

The national parties soon drove a truck through this opening. They used soft money for newly permitted "issue ads" while also spending funds on a wide variety of other purposes not originally envisioned in the 1979 law.

Soft money was transferred to state and local parties and used for the sharing of costs for phone banks and door-to-door canvassing. It even was used to purchase computers and real estate.

By the 1990s, the use of soft money for ads and other party-building activities had mushroomed. In fact, it served to revitalize the parties both nationally and at the state level.

Marjorie Randon Hershey, in "Party Politics in America," writes that "state and local parties, energized by money, became more involved in campaigns . . . soft money allowed the parties to play more of a role in the most competitive races than had been the case in more than a half a century."

Reformers, however, fretted over all the large checks going to the parties. They called for a curb on soft money and for improved disclosure.

The effort resulted in the 2002 Bipartisan Campaign Reform Act (BCRA), known as McCain/Feingold.

McCain/Feingold banned soft money to national parties, forcing them to depend on hard money- contributions subject to federal contribution limits.

The law limited parties to contributing \$5,000 to candidates and restricted coordinated expenditures to \$42,000.

Another goal of McCain/Feingold was to check the influence of outside, independent groups. Though minimal at the time, activity by these groups showed great potential for growth.

The law tried to limit this potential by banning ads by independent groups within 30 days of a primary and 60 days of the general election.

Unfortunately, federal courts decided this and many other restrictions in McCain/Feingold were on shaky legal footing. Instead of curtailing the influence of independent groups and bringing greater transparency to the process, this well-intentioned reform did just the opposite.

The Center for Responsive Politics estimates that independent spending reached \$27.3 million in 2002.

In the years between McCain/Feingold and the 2010 U.S. Supreme Court decision in Citizens United v. FEC, independent spending grew over 1,000 percent.

Following Citizens United, which initially was blamed by many for the proliferation of independent groups, spending increased by a minimal amount to \$305 million in 2010 compared with \$302 million in 2008. However, outside political spending is expected to reach new highs in 2012 as the creation of Super PACs has unleashed a whole new wave of financial activity.

McCain/Feingold instigated a string of lawsuits that upended once-settled campaign finance law. The legal challenges culminated in the monumental Citizens United case, which permitted unlimited spending by corporations and unions while strongly upholding the principle of disclosure. They also led to subsequent rulings such as SpeechNow and Carey, which cleared the way for the current runaway spending by Super PACs.

So in the wake of McCain/Feingold, there has been a seismic shift in the electoral landscape. There has been tremendous growth in independent groups along with a rapid decline in transparency.

So how do we get the horse back in the barn? We probably can't.

But at least we can show who is riding the horse.

Through certain measures, the playing field can be leveled between the outside groups, political parties and candidates.

Frankly, it made no sense to weaken political parties through reforms that only shifted resources and influence to less accountable outside groups with little or no disclosure requirements.

Therefore, in addition to enacting legislation that would enhance disclosure by 527's, 501(c's) and Super PACs, Congress should repeal the remaining section of McCain/Feingold that forbids soft money contributions to political parties.

Congress might also consider easing restraints on their coordinated expenditures with candidates. The U.S. Supreme Court might have done both had it reviewed the recent *CAO v. FEC* case but, to some surprise, it declined to do so.

My guess is that if these steps are taken, money and influence would begin to shift back to the political parties where it belongs. And the scourge of Super PACs and other outside groups hopefully will diminish.

Political parties act more responsibly and are more accountable than outside, independent groups because voters identify candidates with the political party whose label they share. Parties also have the benefit of being permanent, while many independent groups are fly-by-nighters. That's one reason party committees have to be more accountable.

Therefore, the McCain/Feingold soft money ban should be repealed, political parties should be strengthened to offset the influence of renegade independent groups, and outside groups should disclose their financial activity in a timely and detailed manner.

Let's let the political parties be the organizations that play the biggest role in campaigns, not Super PACs or their brethren.

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.