

New Jersey's Campaign Finance Law

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COMMENTARY

Following the Citizens United ruling, numerous individuals expressed alarm over how the January 2010 decision would impact campaign finance law in New Jersey. Others, including me, tried to calm the waters by maintaining that the ruling would have little negative affect on the State's statutes.

Here is what I said in a January 26, 2010 New Jersey Newsroom column:

“. . . state campaign finance law is consistent with the federal ruling . . . it contains no outright ban on corporate or union giving. . . the court's decision is an argument in favor of the judicious way our elected officials have fashioned the Garden State's statutes.”

So how have things turned out?

First, Citizens United allowed independent spending at any time, in any form, whether issue ads, or direct advocacy. Issue ads focus mainly on campaign issues. Direct advocacy ads actually urge voters to support or defeat candidates. The federal judges also upheld a long-time ban on direct contributions by corporations and unions. Finally, they strongly endorsed disclosure. In the aftermath of this controversial decision, other cases followed. And there are more to come.

SpeechNow, decided in March 2010 by the Ninth Circuit Court of Appeals in D.C., allowed unlimited contributions to independent groups and reinforced support for disclosure. It was *Carey v. FEC*, in refining the SpeechNow decision in August 2011, that ushered in the era of Super PACs. It permitted unlimited contributions to Super PACs, as long as the funds are used for independent expenditures only. These funds must be in a separate account, segregated from funds used to make contributions to candidates. *Carey* endorsed disclosure as well. It required Super PACs to divulge contributions and expenditures to the Federal Election Commission.

Now, there's a new challenge to federal campaign law before the Supreme Court. Will this case impact New Jersey? *McCutcheon v. FEC* challenges the federal aggregate, or overall, limits on how much an individual can give to all candidates and national party entities. Under federal law, individuals can contribute no more than \$123,200 every two years to federal candidates and committees. Of that amount, individual donors can give no more than \$74,600 to PACs and parties during the same period. Individual donors can give no more than \$48,600 to all candidates every two years. These limits are indexed for inflation.

While the suit does not challenge the federal limit of \$2,600 to individual candidates, it is possible the Court may address this issue as well. The D.C. Court of Appeals recently dismissed another lawsuit, *James v. FEC*, which did contest individual limits. It said that issue could be raised in the *McCutcheon* case. The *McCutcheon* case would not appear to pose a challenge to New Jersey's campaign finance law. Even if the Court strikes down the aggregate limits as violative of First Amendment rights (which I think it will), there is no impact on New Jersey statutes. The Legislature never enacted aggregate limits.

Regarding the Court striking down contribution limits in general, there is little chance of that happening. From *Buckley v. Valeo* in 1976 through *Citizens United* in 2010, the Court has consistently upheld contribution limits as constitutional. It reaffirmed that stance as recently as February 25, when it refused to take up *U.S. v. Danielczyk*, which challenged the century-old federal ban on corporate donations to candidates.

So despite the concerns expressed by many reasonable individuals, New Jersey campaign finance law should withstand *Citizens United* and subsequent federal cases like *McCutcheon*. *Citizens United* even could have a positive impact on New Jersey law.

The Commission has recommended that independent expenditure-only groups that participate in New Jersey elections be required to register and disclose their contributions and expenditures, whether or not they expressly support or oppose a candidate. Assemblyman Reed Gusciora (D-Mercer) has introduced legislation incorporating the Commission's recommendation.

Citizens United clearly indicated that while contributions and spending could not be limited to 527, 501(c)'s and Super PACs, these groups can be required to disclose their financial activity. Enacting this legislation would strengthen the State's campaign finance law and further enhance transparency in the electoral process.

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.