

New era of campaign financing is upon us

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BY JEFF BRINDLE

COMMENTARY

We have never witnessed a period like this in the area of campaign financing.

Since Watergate, the trend has been toward increased regulation of the size, timing, and type of federal campaign donations.

Now we are moving in the opposite direction though there is one encouraging sign — the nation's top court remains committed to disclosure.

The last hurrah for reformers came in 2002. It was then that the Bipartisan Campaign Reform Act (BCRA) was enacted.

This measure, known as McCain/Feingold, prohibited political party committees from accepting unlimited donations, or soft money. It also banned corporate and union sponsored "electioneering communications" within 30 days of a primary and 60 days of a general election.

Though initially the U.S. Supreme Court in *McConnell v. FEC* upheld most provisions of the Act, since that time there has been a systematic chipping away of BCRA.

The 2007 ruling, *FEC v. Wisconsin Right to Life, Inc.*, is a case in point. In it, the U.S. Supreme Court overturned the "electioneering communication" provision in BCRA, except when an ad called for election or defeat of a specific candidate.

Then, just a year later, the millionaires' amendment was found unconstitutional in *Davis v. FEC*. This provision applied a higher contribution limit to contributions to federal candidates who were opposed by self-financed candidates spending more than \$350,000.

Next came the eye-opening decision of 2010, in *Citizens United v. FEC*. While upholding the ban on direct monetary contributions by corporations and unions, the Supreme Court found unconstitutional the ban on independent spending by these entities.

In a further blow to McCain/Feingold, the Court deemed the blackout period in the Act an infringement of First Amendment free speech rights.

In a bow to transparency, however, the decision strongly favors disclosure, a position the Court would again defend in refusing to hear an appeal of *SpeechNow v. FEC* later in the year.

The Ninth District D.C. Appellate Court in *SpeechNow* allowed for unlimited contributions to independent, outside groups, but upheld the right of government to require disclosure of their financial activity.

Thus, the decades long trend toward regulating in this area is being reversed. In the Court's view, First Amendment protections outweigh regulatory needs in the context of elections.

Soon the high court will take up another case, *CAO v. Federal Election Commission*. If recent history is any guide, another key provision of McCain/Feingold may be struck down.

Under current federal law, the national political party committees are limited to contributing \$5,000 to federal candidates and spending \$42,100 in coordinated expenditures.

To spend unlimited amounts, the parties must spend independently of their own candidates. Furthermore, owing to McCain/Feingold restrictions, the parties cannot take in unlimited soft money, only hard money subject to FEC contribution limits.

In the CAO case, the Republican National Committee (RNC) maintains these restrictions create a wedge between the party and their own candidates, places them at a disadvantage in relation to outside groups, and constitutes a violation of their First Amendment rights of free speech and association. In particular, the RNC wants the removal of restrictions on coordinated expenditures.

This legal challenge not only involves BCRA but reaches all the way back to *Buckley v. Valeo*, the 1976 Supreme Court case that first authorized Congress to place restrictions on coordinated expenditures. The latest case holds the real possibility of

further undoing established regulatory practice in this area.

So what does this mean for policy makers in New Jersey? First, policy makers should be cognizant of the reformist "trail of tears" displayed in recent court decisions.

Secondly, they should push ahead with strengthening disclosure laws. Disclosure has been strongly endorsed by the Supreme Court.

And third, policy makers should be careful to not go too far in banning certain contributor activity, or placing too stringent limitations on contributions.

Contribution limits that are reasonable, not too high nor too low, are preferable. Moreover, strong disclosure laws pertaining to campaign finance, lobbying, and pay-to-play are a necessity of good government.

Reforms such as requiring 527 and 501(c) groups to disclose election related activity, and the simplification, standardization, and strengthening of pay-to-play, should be pursued.

However, in pursuing and crafting reform legislation, it is important for policy makers to keep in mind the new reality enveloping campaign finance issues, namely court decisions that are loosening regulatory restrictions in this area.

By being mindful of this new direction, law makers can insure that New Jersey's strong disclosure laws, whether campaign financing, lobbying, or pay-to-play, will withstand potential constitutional challenges.

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The opinions presented here are his own and not necessarily those of the Commission.