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An Election-Related Video Led To A Landmark Supreme Court Ruling And Surging Independent Spending In Elections. It Also Set Down A Strong Foundation for Disclosure Laws

JEFF BRINDLE • April 2, 2019, 12:22 pm

In 2013, when former governor Chris Christie ran for a second term, independent, outside groups spent a record $41 million attempting to influence the outcome of the election.

Four years later, during the contest that would make Phil Murphy governor, independent group spending rose to $47 million.

Last year's congressional races witnessed spending by outside organizations that reached a record $49 million.

Given that there appears to be no easing of this trend, new records will continue to be set in the future.

The intensity of independent spending began at the federal level. The catalyst for the growth in independent groups was the 2002 Bipartisan Campaign Reform Act (BCRA), known as McCain/Feingold.

A tidal wave of independent spending then followed in the aftermath of the U.S. Supreme Court decision in *Citizen United v. Federal Election Commission (FEC)* in 2010, even flowing down from the federal level to the State and local levels.

In recent years, as mentioned above, the impact of independent group spending in New Jersey has been significant.

Unquestionably, the *Citizens United* ruling played a major role in fostering the rapid growth in independent expenditures.

The *Citizens United* case derived from a constitutional challenge to BCRA. *Citizens United* is a 501(c)(4), non-profit organization.

The organization desired to make a film it had produced about Hillary Clinton available through video-on-demand within thirty days of the 2008 presidential primary election.

"Hillary: The Movie" had been released in theaters and on DVD. But *Citizens United* planned to increase its availability through video-demand.

Citizens United had concerns, however, that the film would be subject to potential civil and even criminal penalties under BCRA.

One section (441b) banned corporate-funded independent expenditures within 30–days of a primary and 60-days of a general election.

Citizens United sought declaratory and injunctive relief against the FEC, arguing that the 441b restrictions were unconstitutional as applied to the film. It also maintained that the Acts disclaimer and disclosure requirements were unconstitutional as applied to “Hillary: The Movie.”

In accepting the case, the U.S. Supreme Court at first focused on the specific issues brought before it by *Citizens United*. In time, however, it became clear that the court was broadening the scope of the case to address the federal ban on corporate and union spending in general.

Writing for the majority, Justice Anthony Kennedy acknowledged that “there is no reasonable interpretation of Hillary other than as an appeal to vote against Senator Clinton. Under the standard stated in *McConnell* and further elaborated in WRTL (Wisconsin Right to Life), the film qualifies as the functional equivalent of express advocacy.”

Having established this point, though, Kennedy proceeded to set forth the majority opinion. He stated: “These prohibitions (in 441b) are classic examples of censorship and necessarily reduces the quantity of expression by restricting the number of issues discussed.”

Thus, the ban on corporate and union spending and the 30– and 60-day blackout periods were deemed unconstitutional by a 5-4 majority.

In addressing *Citizens United* challenge to disclaimer and disclosure requirements, the Court had a different take. Justice Kennedy wrote “Disclaimer and disclosure requirements may burden the ability to speak; but they impose no ceiling on campaign-related activities, “[Buckley].” The Court has subjected these requirements to ‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirements and a ‘sufficiently important’ governmental interest.”

The dissenting opinion, joined by Justices Stevens, Ginsberg, Breyer, and Sotomayor supported the ruling involving disclaimers and disclosure. Only Justice Clarence Thomas opposed disclosure. Thus, the Supreme Court, in *Citizens United*, strongly supported disclosure.

Recently the State Senate and Assembly passed legislation that will require 527 and 501(c)(4) independent groups to register and disclose their financial activity directed toward electioneering and issue advocacy communications.

Senate bill 1500 (Singleton)/Assembly bill 1524 (Zwicker) is currently on the Governor’s desk. Hopefully, it will receive his signature.

While certain groups expressed concerns about First Amendment rights and threaten a court challenge if the bill is enacted, the strong support for disclosure by *Citizens United*, *SpeechNow, Carey*, and a number of lower court and state court decisions should allay fears that the bill’s strong disclosure requirements would be undone in court.

It is hoped that disclosure by increasingly influential independent groups will become law and that New Jersey will join the ranks of other states that have made disclosure by these organizations an important part of transparency in government.

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.