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COULD THE RETURN OF NATIONAL PARTY SOFT MONEY END RUNAWAY ELECTION SPENDING BY INDEPENDENT GROUPS?

BY JEFF BRINDLE | March 3, 2017, 1:40pm

When the U.S. Supreme Court issued its landmark 1976 ruling called Buckley v. Valeo, it validated some provisions of federal campaign finance law and struck down others.

What the judges didn't realize at the time was that one limit they upheld would trigger a debate that rages even today. The issue is whether national parties should be allowed to collect unlimited contributions known as "soft money" for party-building efforts.

This issue soon may be revisited by the nation's high court and it could have an impact on political parties everywhere, including New Jersey.

Under 1974 amendments to the Federal Election Campaign Act (FECA) first enacted in 1972, national party committees were allowed to spend only two cents per eligible voter in presidential elections.

After Buckley v. Valeo, political scientists and party operatives wailed about this limit. Then on August 29, 1978, the Federal Election Commission (FEC), reversing previous policy, issued an advisory opinion allowing state and national parties to raise money for get-out-the-vote drives from unlimited state and local contributions.

The next year, Congress itself let parties spend unlimited amounts on certain party-building activities. The so-called "soft money" exemption was born from these two actions.

The new law gave national parties latitude to spend unlimited money in behalf of voter registration, get-out-the-vote drives, and other party-boosting activities.

Herbert Alexander, University of Southern California political scientist and member of President John F. Kennedy’s Commission on Campaign Costs said: “Anybody who believes in the two-party system will say that to the extent that soft money is used to register voters and invigorate the parties, then it is a valuable, good use of money in the system.”

By the mid-1980s, the national parties were spending millions on these activities. Later, the parties stretched the interpretation of generic party building to include direct mail and broadcast ads, leading to even greater spending.

Overall, the trend in Supreme Court decisions during the period following Buckley v. Valeo was favorable toward the political party system, lifting many restrictions placed on them nationally and throughout the states.

In Party Politics in America, political scientist Marjorie Randon Hershey writes about this period: “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 century.”

Despite court rulings that endorsed the role of political parties, and the positive impact of soft money at the state level, concern grew among reformers.

In 1984, national Common Cause sued the FEC to adopt regulations governing the use of soft money. By 1991, the national parties, for the first time, were required to disclose their soft money party-building activities.

The parties were required to report their expenditures and contributors. Corporations and unions, otherwise unable to donate to federal candidates directly, were permitted to contribute to parties in unlimited amounts.

Soft money activity reached a crescendo by 1996, when the two national parties raised $244 million during a presidential election year ($378 million in current dollars), according to Center for Responsive Politics.

The campaign also led to the biggest election-related scandal since Watergate. Federal prosecutors indicted 27 individuals and two corporations on several charges, including illegal soft money contributions from foreign sources. The Democratic National Committee was forced to return $3.1 million to donors.

Reformers intensified their efforts to end soft money. In 2002, their efforts were rewarded by Congress' enactment of the Bipartisan Campaign Reform Act (BCRA), more popularly known as McCain/Feingold.

Much of the current upheaval in campaign finance law stems from court cases seeking to undo this well-intended but largely misguided legislation.

BCRA banned soft money for parties, placed restrictions on independent issue ads, and imposed a 30-day primary and 60-day general election blackout period on independent electioneering advertising.

Challenges to the new law began almost immediately.

In McConnell v. Federal Election Commission (FEC) in 2003, the pre-John Roberts Court voted 5-4 to upheld BCRA. This support for the reform law did not last long.

Roberts joined the court as chief justice in 2005 and it tilted more toward free speech rights than the previous court. The court soon began dismantling BCRA. Its 2007 FEC v. Wisconsin Right to Life ruling abolished the BCRA blackout period for issue ads.

Next came Citizens United v. FEC in 2010. The Supreme Court ruled that the ban on corporate and union independent expenditures was unconstitutional. Moreover, the Court ended altogether the advertising blackout periods faced by these groups though it strongly endorsed disclosure.

Following Citizens United, the D.C. Court of Appeals issued Speech Now (2010) and Carey v. FEC (2011), resulting in the creation of Super PACs.

Most recently, in McCutcheon v. FEC, 2014, the U.S. Supreme Court upended aggregate contribution limits as applied to donations made to federal candidates, parties, and PACs.

Now, perhaps not too far in the future, the U.S. Supreme Court may hear a case that could surely impact the party system and shake up campaign finance law even more.

In Republican Party of Louisiana v. FEC, a challenge is being mounted calling for an end to the ban on soft money to national parties.

On November 7, 2016, a three-judge panel of the U.S. District Court for the District of Columbia granted summary judgement to FEC in upholding the soft money ban. On November 11, 2016, the plaintiffs filed a motion of appeal to the U.S. Supreme Court.

In the case, the Louisiana Republican party is questioning the constitutionality of FECA provisions that regulate federal campaign finance activity by state and local parties.

The plaintiffs assert that the contribution limits applicable under FECA to state and local federal activity violate First Amendment free speech and associational rights.

Lifting the restrictions would end the soft money ban on state accounts established by national parties.

Campaign activity out of state party federal accounts involves advertising that supports or opposes federal candidates, get-out-the-vote efforts, voter identification tracking, voter registration, and generic party building.

For some years now it has been obvious that the political party system nationally and in New Jersey needs to be strengthened.

The need to rebuild the political parties is all the more apparent given the rise and influence of independent special interest groups apart from candidates and parties. This has taken place since McCain/Feingold was enacted, then followed by the ruling in Citizens United, which further facilitated an explosion in outside spending.

During the 2016 presidential and congressional cycle, independent groups spent $1.7 billion nationally, according to the Center for Responsive Politics.

The issue is also significant in New Jersey. During the gubernatorial and legislative elections of 2013, independent groups outflanked the parties by spending $41 million to $14 million. They spent $27 million in support or opposition to ballot questions this past November and will undoubtedly exceed 2013 totals during this year's gubernatorial and legislative elections.

Independent, often anonymous, groups are not only dominating elections but are now assuming many of the traditional roles played by the more accountable, regulated political parties. Scandals like the one in 1996 are unusual and should face a strong, swift response from regulators and law enforcement officials.

In an opinion filed in Colorado Republican Federal Campaign Committee v. FEC (1996), Justice Clarence Thomas noted that political parties are one of the best means of preventing corruption of candidates. "The structure of political parties is such that the theoretical danger of those groups actually engaging in quid pro quos with candidates is significantly less than the threat of individuals or other groups doing so….campaign funds donated by parties are considered to be some of ‘the cleanest money in politics.’”

What the U.S. Supreme Court will ultimately decide in the Louisiana case is unknown. However, if Judge Neil Gorsuch is confirmed to the court, there is every possibility the soft money ban will end.

In the event the Court reverses McCain/Feingold’s restrictions on state party federal accounts, it would contribute toward rebuilding the parties nationally and at the state level, including New Jersey.

More and more political scientists and other academics, whether from think tanks or universities, are recognizing the importance of parties and the need to offset the influence of independent groups.

Raymond J. La Raja and Jonathan Rauch of the Brookings Institute Center for Effective Public Management wrote “state party officials generally regard the 2002 Bipartisan Campaign Reform Act . . . as a serious blow. McCain/Feingold blocked national parties from raising large dollar contributions and sending them to the states, and it also imposed complex, federal restrictions on state parties’ fundraising and electioneering activities.”

On the heels of McCutcheon v. FEC, a favorable ruling in the Louisiana Republican case would strengthen, not weaken, the electoral system federally as well as throughout the states.

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