

Citizens' United decision influencing late campaign spending



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BY JEFF BRINDLE

COMMENTARY

The U.S. Supreme Court's decision in Citizens' United v. FEC has been widely blamed for the deluge in campaign spending by outside, independent groups in this year's federal election.

Numerous articles have suggested that because corporations can now spend independently, corporate money is now flowing into the coffers of outside groups, enhancing them and their corporate donor's influence.

But corporations could always use back channels to funnel money through outside groups. And, while it is undeniable that spending by outside groups surged dramatically last year, the surge predated last January's landmark Supreme Court case.

However, there is one way in which the court's ruling seems to have had a clear impact.

Far more money arrived late in the campaign than in the previous two congressional elections.

It was an expected result given that the Citizen's United ruling ended controversial "blackout" periods of 30 days before primary elections and 60 days before general elections on some election advertising. The invalidated ban applied to TV and radio ads sponsored by unions and for-profit corporations.

The blackout period originally was imposed in 2002 by the Bipartisan Campaign Reform Act, better known simply as "McCain-Feingold."

The intent, according to the original press release by Sen. John McCain (R-AZ), one of the two lead sponsors, was to end "the explosion of thinly-veiled campaign advertising funded by corporate and union treasuries. These ads skirt federal

election law by avoiding the use of direct entreaties to "vote for" or "vote against" a particular candidate."

McCain had first-hand experience with these so-called stealth attack ads, which didn't disclose their donors.

During the 2000 Republican presidential primary, the senator and his environmental record were assailed through a surprise \$2.5 million TV ad blitz. Sam Wyly, a wealthy Dallas investor who supported the nomination of then-Gov. George W. Bush, eventually acknowledged paying for the ads.

McCain-Feingold banned radio or TV ads that mentioned a candidate's name and cost more than \$10,000 within the respective blackout periods. It didn't stop the clock on issue ads that left out the names of specific candidates. Nor did it forbid the use of print communication, direct mail, voter guides or the Internet during the blackout periods. Unions and corporations also had the option of raising funds for radio and TV ads by forming political action committees that disclosed their donors.

"No speech is banned by the new law- not a single ad nor any word or combination of words would be muzzled," said an impassioned defense of the bill co-written by members of the Brookings Institution and the American Enterprise Institute. "No form of political speech, only the source of funding, is touched by the new law."

A year ago, however, the Supreme Court decided otherwise. A 5-4 majority of the judges declared the blackout period was an unconstitutional infringement on the rights of unions and corporations.

"The law before us is an outright ban, backed by criminal sanctions," said the majority opinion. The judges, citing examples of spending that might be affected, called such prohibitions "classic examples of censorship."

Even as they struck down the blackout period, they added that it would be entirely legal to adopt laws requiring fuller disclosure by independent groups that take part in federal campaigns.

Based on data collected by the Campaign Finance Institute, the court's action had a predictable impact. The Institute is a non-partisan group affiliated with George Washington University that studies campaign finance trends.

No exact figures are available for the amount of non-party independent funding that arrived before and after the 60 days that would have constituted the blackout period last fall. But Institute data show a definite spurt of last-minute campaign funds.

Through mid-October, non-party spending by independent groups, including unions and corporations, totaled \$148 million.

By Election Day, the total had reached \$280 million. So about \$132 million arrived during the final weeks of the campaign.

By comparison, in the 2008 campaigns, non-party independent groups spent \$120 million. Only \$34 million arrived after mid-October (not all independent groups were subject to the McCain-Feingold blackout).

A closer analysis would be required to know exactly how many dollars came from union and corporation treasuries. But the Institute data shows that \$98 million more arrived in the final weeks of the election last year compared to 2008. The difference versus 2006 was even greater — \$111 million during the same period.

It is hard not to conclude that the court's ruling, by lifting the blackout on unions and corporations, dramatically shifted the timing of campaign spending.

Late-arriving campaign cash is important to candidates locked in close races because it can be decisive. Given recent trends, the amount of funds pouring from the coffers of non-party independent groups is likely to keep surging in the next federal election.

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.