

**THE DARK NIGHT RISES THE GROWING ROLE OF
INDEPENDENT EXPENDITURES IN JUDICIAL ELECTIONS
AFTER *CITIZENS UNITED***

Now, two full election cycles removed from *Citizens United*
trends suggest that although *Citizens United*

increased spending in federal elections, *Citizens United* significantly transformed the role and spending power of interest groups throughout the political system, notably in judicial elections.

A. *Citizens United v. FEC*

Citizens United held that the First Amendment bars limits on corporate independent expenditures for engaging in express political advocacy.³¹ *Citizens United*, a nonprofit corporation, sought to release a 90-minute documentary that criticized Democratic presidential candidate Hilary Clinton.³² The corporation wanted to make the documentary available through video-on-demand and wished to avoid restrictions on using its general treasury funds to pay for advertising and distribution.³³ Because the Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b, placed limits on corporate independent expenditures, *Citizens United* sought declaratory relief.³⁴

The Court sided with *Citizens United*, ruling that “[t]he [g]overnment may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether.”³⁵ The Court reasoned that BCRA’s restrictions on corporate independent expenditures were subject to strict scrutiny, which required the government to prove that the restriction “furthers a compelling interest and is narrowly tailored to achieve that interest.”³⁶ The government advanced several interests in support of the restriction: (1) it reduced the distorting influence of deep-pocketed corporations³⁷ (2) it prevented corruption and the appearance of corruption,³⁸ and (3) it prevented dissenting shareholders from being compelled to speak.³⁹ The Court disagreed with all three of these arguments, rejecting the anti-distortion and shareholder protection rationales and concluding that independent expenditures do not give rise to corruption or the appearance of corruption.⁴⁰ The Court

31. *Citizens United v. FEC*, 558 U.S.310, 365 (2010).

32. *Id.* at 319.

33. *Id.* at 320-21.

34. *Id.* at 321.

35. *Id.* at 319.

36. *Id.* at 340.

37. *Id.* at 348.

38. *Id.* at 356.

39. *Id.* at 361.

40. *Id.* at 357, 361-62.

therefore held that restrictions on independent expenditures failed to survive strict scrutiny.⁴¹

B. SpeechNow.org. FEC

While *Citizens United* opened the door to unlimited corporate and union independent expenditures, it was not until *SpeechNow.org v. FEC* that individuals could engage in unlimited independent expenditures. SpeechNow, an unincorporated nonprofit association promoted free speech rights and provided support to like candidates.⁴² It sought to receive unlimited individual contributions for the purposes of making electioneering communications, in spite of §441a of the BCRA's limits on such contributions.⁴³ SpeechNow had

huge increase on television advertising expenditures. In 2004, \$24.4 million was spent on television advertising, and in the 2007-08 biennium, that number rose slightly to \$26.6 million.⁶¹

At first, candidates funded over half of the total spent on television advertising, ranging from 71.5 percent in 2002⁶² to 50.9 percent in 2004.⁶⁴ By 2008, however, a shift emerged and independent spenders began to ~~take~~ ^{take} the airwaves. Independent groups spent an unprecedented \$10.4 million on television advertising in 2008.⁶⁵ Candidates, meanwhile, spent only \$9.5 million⁶⁶ in total, 52.3 percent of television advertisements in 2008 came in the form of independent expenditures.

2. The Rise of Super-Spenders in the 2000s

Prior to

and its Ohio affiliates spent \$4.4 million in Ohio in 2000. The Alabama Democratic Party, with the backing of plaintiffs' lawyers, spent \$2.4 million in 2000. In 2004, the Illinois Democratic Party, also with plaintiffs' lawyers' support, spent \$2.8 million battling the Illinois Republican Party, who, in turn, spent \$1.9 million. Don Blankenship infamously spent \$3 million of his own money in 2004 to win one seat on the West Virginia Supreme Court. His spending laid the groundwork for the eventual Supreme Court decision in *Caperton v. Massie*⁷² which ruled that Blankenship's high spending was so extreme that it created a right to recusal under the Due Process Clause of the U.S. Constitution.⁷³

Super-spenders exerted their influence on 29 elections from 2000 to 2009, with the top five spenders in each of those races—145 in all—spending \$68.7 million.⁷⁴ In contrast, the other 116,600 donors in those same 29 races spent a total of \$99.2 million.⁷⁵ The average super-spender spent \$473,679, while the average donation from a nonsuper-spender was \$850.

The 2000 Ohio Supreme Court election exemplifies the high level of spending by independent groups that emerged in the 2000s. David Goldberger described the Ohio race as:

[T]he first judicial campaign where a well-funded interest group operating completely independently, spent millions of dollars more.³(y i)]TJ a</MCID ur(s)2.6Ford tauTw -9.70he3,679,.2(e)-4(ve)6.5(l)rhahan eteterlting com

decisions that the Chamber disagreed with, including decisions that invalidated a comprehensive tort reform⁷⁹ and that expanded personal liability for supervisors in employment discrimination cases.⁷⁹

Because the U.S. Chamber's election communications were not subject to Ohio's campaign finance regulations, its spending rocketed. The Chamber successfully persuaded the Ohio Election Commission (OEC) that its issues ads were merely "abstract issue advocacy" that did not tell the public how to vote; therefore, restrictions on independent political spending from corporate treasuries did not apply.⁸⁰ With the spending restrictions lifted, the Chamber continued to pour money into the race. One tactic included forming a nonprofit organization through which to run negative ads targeting Justice Resnick. The Chamber funded a nonprofit organization called Citizens for a Strong Ohio during the election, which was nominally independent of political advocacy. Taking advantage of the OEC rule, the Chamber spent \$4.4 million on unregulated issue advertisements through Citizens for a Strong Ohio.⁸³ To viewers, those ads resembled political attacks ads more than anything else.⁸⁴

C. After Citizens United What Changed?

1. Trends in Judicial Election Spending After Citizens United

Many of the spending trends that emerged before Citizens United remained after the decision: overall spending totals remained high, judicial election campaigns spent heavily on television advertising, and super-spending boomed large. In 2009–10, candidate fundraising and independent television spending totaled \$38.5 million, compared with just over \$39 million four years earlier.⁸⁵

79. *Id.*

80. *Id.* at 10.

81. Kara Baker, *Is Justice for Sale in Ohio? An Examination of Ohio Judicial Elections and Suggestions for Reform Focusing on the 2000 Race for the Ohio Supreme Court*, AKRON

Television spending rose just slightly, from \$16.1 million in 2006 to \$16.8 million in 2009.⁸⁶ The top ten spenders in 2009 averaged \$1.49 million in candidate contributions and independent expenditures.⁸⁷

Little changed in the 2011–12 biennium. Candidate fundraising and independent television spending combined were \$51.9 million, compared with \$58.2 million in 2007–08.⁸⁸ Television spending rose from a total of \$26.6 million in 2007–08 to \$33.7 million in 2011–12.⁸⁹ Television spending in 2011–12 actually set a new year record.⁹⁰ Yet again, the top ten spenders in 2011–12 spent an average of \$1.95 million each.⁹¹

Perhaps unsurprisingly, one important aspect of judicial campaign spending did change after *Citizens United*—money began to shift hands from candidates to independent groups. In 2009–10, candidate fundraising fell to just over \$27 million. This number is well below the \$33.2 million candidates raised four years earlier.⁹² Meanwhile, independent television spending rose to \$11.5 million,⁹³ up from just \$5.8 million in 2006.⁹⁴ Of the total spent on television in 2009–10—\$16.8 million—over two-thirds were independent expenditures.⁹⁵ Independent groups spent \$11.5 million on television advertising in 2009–10—over 68 percent of the total for the biennium.⁹⁶

These trends continued in 2011–12. Candidate fundraising fell to just under \$32 million,⁹⁸ far below the \$45.7 million candidates had raised four years earlier.⁹⁹ Meanwhile, independent television spending jumped to \$20.7 million,

60 percent of television spending came in the form of independent expenditures.¹⁰¹ Independent groups spent \$20.7 million of the total \$33.7 million in television advertising in 2011–12 over 61 percent of the total for that biennium.¹⁰²

2. What Changed? Perspectives from Two States

North Carolina and Michigan are two states that illustrate how *Citizens United* both did and did not change spending trends in judicial elections. In Michigan's case *Citizens*

Coalition alone spent nearly \$2.9 million in support of Justice Newby's reelection.¹²¹ In total, independent groups drove television spending in North Carolina to over \$3.5 million.¹²² This \$3.1 million significantly outpaced the \$480,200 that the state's public financing program gave to the candidates.¹²³

The prominence of just one Super PAC in the state's supreme court race indicated a significant development in judicial elections. Before *Citizens United*

ended the 2009-10 cycle among the top ten super-stars.¹³⁹

Whether the events in Iowa and Illinois in 2010 portended a new reality or were a flash in the pan is not immediately clear.¹⁴⁰ The 2012 retention race in Florida suggests the former. In 2010, a tea

IV. CONCLUSION

The trajectory of spending in judicial elections suggests that independent expenditures may routinely outstrip candidate spending in the future as partisans and special interests seek to exert their influence over American courts. A rise in independent spending will subsequently increase efforts to hide its sources. Additionally, because independent spenders have proven more likely to engage in the practice, misleading attack advertisements will grow in frequency, making it more difficult for voters in judicial elections to separate truth from fiction. Recent cycles suggest that this tactic can be expected for contested judicial elections and retention elections alike.

Advocates for fair and impartial courts have presented several imperfect options:

