2008

Can Congress Authorize the Opponents of Self-Financed Candidates to Receive Extra-Large Contributions?

Richard Briffault
Columbia Law School, brfflt@law.columbia.edu

Case at a Glance

Federal law caps contributions to federal candidates, but the Supreme Court has ruled that limits on how much money a candidate can contribute to his or her own campaign are unconstitutional. This case tests the 2002 Millionaires' Amendment, which enables candidates for Congress running against self-financing opponents to obtain contributions well above the ordinary statutory ceiling and also imposes additional reporting requirements on self-funding candidates.

Can Congress Authorize the Opponents of Self-Financed Candidates to Receive Extra-Large Contributions?

by Richard Briffault

PREVIEW of United States Supreme Court Cases, pages 316–320. © 2008 American Bar Association.

Richard Briffault is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School. He can be reached at rb34@columbia.edu or (212) 854-2638.

ISSUE

Is the so-called Millionaires' Amendment, which permits federal candidates who are running against self-funded opponents to receive contributions significantly above the standard federal statutory ceiling constitutional?

FACTS

As part of the Bipartisan Campaign Reform Act (BCRA) of 2002—also known as the McCain-Feingold or Shays-Meehan law—Congress passed the Millionaires' Amendment. These provisions—there are separate measures for the Senate and for the House of Representatives—permit a candidate who is running against an opponent who is committing a large amount of personal funds to his or her campaign to receive contributions well in excess of the ordinary statutory contribution limits.

In elections for the House of Representatives, the Millionaires' Amendment—technically BCRA § 319—is triggered when a candidate contributes more than $350,000 to his or her campaign. Following a complex and technical set of statutory calculations, if the contributions the non-self-funding candidate has received by the start of the election year fail to offset the self-financing candidate's personal funds' advantage, then the non-self-funding candidate may receive (1) contributions from individuals in amounts up to treble the ordinary statutory ceiling of $2,300—in other words, up to $6,900; (2) contributions from individual donors who have already hit the statutory ceiling of $42,700 in total contributions to all candidates in that election cycle; and (3) unlimited coordinated party expenditures (which are ordinarily subject to a $40,900 ceiling for most House races). These exceptions to the normal contribution rules apply only until the "excess" contributions to the non-self-funded candidate close the financial gap with the self-funded candidate.

The Millionaires' Amendment also adds new reporting requirements. Within fifteen days after becoming a candidate, every candidate must disclose the amount of personal

DAVIS V. FEDERAL ELECTION COMMISSION
DOCKET NO. 07-320

ARGUMENT DATE:
APRIL 22, 2008
FROM: THE DISTRICT OF COLUMBIA CIRCUIT

funds in excess of $350,000 he or she plans to spend during the campaign. Once a candidate's personal funds' expenditure crosses the $350,000 threshold, the candidate must immediately file an "initial notification" of that expenditure with the Federal Election Commission (FEC), each opponent, and the national political party of the opponent. After that, each time the self-funded candidate spends $10,000 in personal funds, he or she must make an additional filing within 24 hours. The non-self-funded candidate must also make additional reports—of eligibility for excess contributions and of the amount, and also if and when the candidate receives the maximum allowable amount of excess contributions.

In the omnibus attack on BCRA that led to the Supreme Court's 2003 decision in *McConnell v FEC*—which upheld most of the key positions of the act—certain plaintiffs challenged the constitutionality of the Millionaires' Amendment on its face, but the Court held that the plaintiffs lacked standing to sue and accordingly did not reach the merits of the challenge.

The present case, *Davis v. Federal Election Commission,* grows out of the 2004 and 2006 campaigns of Jack Davis, the Democratic candidate in New York's 26th Congressional District. Davis funded his 2004 campaign against incumbent Republican Thomas Reynolds primarily, but not exclusively, through personal contributions. He spent over $1.2 million on his unsuccessful effort. In 2006, the FEC opened an investigation into whether he had violated the Millionaires' Amendment's personal funds reporting requirements in 2004. In 2006, Davis launched a second campaign against Rep. Reynolds. He filed a declaration indicating his intent to spend $1 million in the election. In June 2006, he filed suit in the federal district court for the District of Columbia asserting that BCRA §319 is unconstitutional on its face and asking for an injunction against its enforcement. (Davis's suit does not challenge BCRA § 304, which is the Millionaires' Amendment applicable to Senate elections.) Pursuant to BCRA's special jurisdictional provision, a three-judge district court was convened. On August 9, 2007, the court unanimously granted the FEC's motion for summary judgment, *Davis v. FEC,* 501 F.Supp.2d 22 (D.D.C. 2007).

In his opinion for the three-judge court, Judge Thomas B. Griffith of the U.S. Court of Appeals for the D.C. Circuit found that neither the relaxed contribution limits for opponents of self-funded candidates nor the additional reporting requirements violated either the First Amendment or the equal protection component of the Due Process Clause. The court found that the relaxation of contribution limits did not burden Davis since it did "not limit in any way" his ability to use his personal wealth in his campaign. Indeed, the court found that the law actually advanced "core First Amendment values" by protecting the ability of candidates to "particip[e] in the political marketplace." The court rejected the argument that the law discriminates against self-funded candidates, noting that they are "situated differently from those who lack the resources to fund their own campaigns" and that this difference "creates adverse consequences dangerous to the perception of fairness" which Congress could address. The court also rejected the challenges to the reporting requirements, finding that "all of the information required by the reporting provisions would eventually have to be disclosed to the FEC whether or not the Millionaires' Amendment ever applies." Pursuant to BCRA's special jurisdictional provision, Davis appealed directly to the Supreme Court.

While the case was pending before the three-judge court, Davis lost the 2006 general election, after spending about $2.25 million in personal funds in the primary and general elections together. Moreover, his opponent Rep. Reynolds did not actually receive any contributions or coordinated party expenditures in excess of the ordinary statutory limits. In early 2007, the FEC found probable cause that Davis had violated the Millionaires' Amendment's disclosure requirements in his 2004 race. It proposed a conciliation agreement in which Davis would acknowledge the violations and pay a civil penalty of $251,000. Subsequently, the two parties agreed to hold the matter in abeyance until the final resolution of the pending case.

Case Analysis

As a preliminary matter, Davis and the FEC dispute whether Davis has standing. The FEC claims, first, that the case is moot since the 2006 election is now over. Davis contends that the case falls within the well-established exception to the mootness doctrine for cases "capable of repetition, yet evading review." This exception is often invoked in election cases since the limited period of an election campaign typically does not leave sufficient time to litigate fully challenges to an election law. Davis also states that the pending enforcement proceeding growing out of Davis's spending in the 2004 election gives him an ongoing interest on the case. The FEC responds that the "capable of repetition" exception should not be available in this case, since Davis has not indicated that he intends to run for Congress again so that there is no basis for assuming that he might

(Continued on Page 318)

suffer harm in a future race. As for the 2004 enforcement action, the FEC argues that Davis can raise his constitutional arguments as defenses in that case, so that a decision on the merits in this separate, facial challenge to the law would not be necessary.

The FEC also raises a second standing issue: Davis suffered no injury from the relaxation of the contribution limits for his opponent because his opponent did not receive any excess contributions. The district court predicated its finding that Davis has standing on its conclusion that the Millionaires' Amendment's additional reporting and disclosure requirements burdened Davis, and Davis's brief argues that since the amendment is unified scheme integrating the relaxation of limits with additional disclosure, Davis has standing to challenge the entire measure. The FEC, by contrast, contends that the statute is divisible, and that Davis has standing to challenge only the disclosure requirements.

Turning to the merits, the case against the constitutionality of the relaxation of the contribution limits for a self-funded candidate's opponent will turn primarily on whether a majority of the Supreme Court concludes that the law burdens the self-funded candidate's freedom of speech, as Davis contends, or it poses no burden on the self-funded candidate at all, as the district court found and the FEC contends. If the Court does not see the law as burdening or penalizing Davis's speech, then it is likely to accept the justifications the FEC provides for the law and to find that the law is adequately tailored to meet those goals. If the Court sees the law as burdening speech, then it is likely to give much closer scrutiny to both the law's goals and its specific details.

Does the law burden campaign speech? In Davis's view, the law is little more than an effort to circumvent the Supreme Court's holding in the seminal *Buckley v. Valeo* decision in 1976 that a candidate's personal contributions to his or her own campaign cannot be limited. In his view, by liberalizing the contribution limits for the self-financing candidate's opponents, the law penalizes and thereby burdens the self-financing candidate and discourages the use of personal funds. The FEC, by contrast, points out that unlike the limit struck down in *Buckley,* BCRA § 319 places no limit on the self-financing candidate's speech. The benefit to the self-financing candidate's opponent does not infringe the First Amendment rights of the candidate. As the district court concluded, the FEC argues that the amendment actually advances First Amendment values by making it easier for the non-self-financing opponents to raise and spend campaign money.

Turning from the characterization of the impact of the law on First Amendment rights to its justification, the parties agree that a principal justification for the law is "leveling the playing field," that is, making it easier for nonwealthy candidates to compete with those who have the resources to self-finance. According to Davis, that is a "novel and unconstitutional" goal. Until now, contribution limits have been upheld as intended to prevent corruption—the potential that a campaign contribution is given as a quid pro quo for a favor from an elected official—and the appearance of corruption. As Davis notes, relaxing the contribution limits for a self-financing candidate's opponent does not address corruption; if anything it enhances the dangers of corruption and the perception of corruption by enabling some candidates to receive much larger contributions. Moreover, the Court has never held that campaign finance activities can be limited in order to promote equality. To the contrary, in the *Buckley* decision, the Court held that equality could not justify limits on campaign spending and limits on the ability of candidates to self-finance. Davis, thus, argues, that "leveling the playing field" cannot justify the burden on the self-financing candidate's speech that the Millionaires' Amendment imposes.

The FEC counters Davis's argument by noting that the Court has never found that the prevention of corruption or the appearance of corruption are the *only* grounds for regulating campaign finances. Although *Buckley* may have barred the use of equality to justify a *limit* on the self-financing candidate's use of personal resources, the amendment does not impose a limit. The FEC argues that Davis has failed to show why Congress cannot act to promote equality by relaxing the contribution limits on candidates who are at a personal wealth disadvantage.

In addition to challenging the interest that the amendment is said to advance, Davis contends that it is not closely tailored to promoting its egalitarian goal. The amendment relaxes the contribution limits for a self-funded candidate's opponent only if the contributions the opponent received do not offset the self-funded candidate's personal-funds advantage. However, in comparing the finances of the two candidates, the law counts only half of the non-self-funded candidate's contributions, and it compares the two candidates' contributed resources only as of December 31 of the year before the election. According to Davis, by ignoring contributions made during the year of the election, and by counting only half the funds that it recognizes, the law "does not accurately measure the

relative wealth of opponents in the same race." Davis also challenges the use of a $350,000 personal funds threshold for determining whether to relax the contribution, as well as the failure to index that threshold. The FEC responds that "Congress has substantial discretion to craft the details of the campaign-finance regime" so that these issues are "largely entrusted to Congress." The consideration of half the contributed funds received by the non-self-funded candidate also reflected a legislative compromise between relaxing contribution limits based solely on the difference in personal funds used by the two candidates and treating funds raised from private donors in exactly the same manner as the self-financing candidate's use of personal wealth. According to the FEC, "[t]hat choice was Congress's to make."

Finally, the parties disagreed about the nature of the burden imposed by the amendment's additional disclosure requirements. According to Davis, the required "declaration of intent" concerning whether a candidate will spend above the $350,000 threshold constitutes a forced disclosure of "sensitive campaign strategy" and is, thus, highly intrusive. In addition, while the required reporting of each expenditure of $10,000 of personal resources concerns only matters that would ultimately have to be disclosed anyway, the frequent additional reports that would have to be made within 24 hours of each such expenditure makes the requirement quite burdensome as that $10,000 is a "modest sum in competitive House campaigns."

The FEC responds by arguing that the amendment's reporting provisions are far less intrusive than other disclosure requirements the Court has upheld. The "declaration of intent" does not require any disclosure of sensitive or confidential strategy. Indeed, the FEC points out that Davis himself issued a press release shortly after he announced his candidacy in 2006 in which he emphasized he would be spending one million dollars of his own money. Moreover, the various filings required involve only the amounts of money spent by the campaign. Unlike other disclosure requirements, they do not require the identification of contributors and thus do not trigger privacy concerns. As for the 24-hour reports, the Court in *McConnell v FEC* upheld BCRA's requirement that persons spending $10,000 in electioneering communications file reports on those expenditures within 24 hours.

A final issue that divides the parties concerns whether the Millionaires' Amendment should be seen as a suspicious incumbent-protection mechanism. Most self-financing candidates are challengers; incumbents usually have little difficulty in obtaining private contributions. Davis and several of the amici argue that whatever the deference Congress might otherwise receive, deference is inappropriate for a law that is more likely to benefit incumbents. The FEC responds that not only is the law evenhanded on its face, but in practice, it has not benefited incumbents. Of the 110 House and Senate candidates eligible to receive additional contributions under the law during its first four years of operation, only six were incumbents.

Significance

The Millionaires' Amendment involves none of the classic campaign finance reforms—it does not limit the use of private or corporate wealth, it does not require the disclosure of more information about campaign participants, and it does not involve the use of public subsidies. Indeed, it actually permits significantly larger private donations. Nevertheless, the decision in *Davis*—particularly a decision adverse to the amendment—could have broader implications for campaign finance regulation.

First, the case could affect public-funding systems that provide publicly funded candidates who are opposed by high-spending privately funded opponents with certain benefits, such as additional public funds or the right to raise and spend more private contributions. Although the federal presidential public-funding law does not include such provisions, a number of state and local public-financing laws do have such "trigger" mechanisms, e.g., benefits that are triggered by high-spending opponents. These measures have been justified as necessary to assure candidates who accept public funding that they will not be financially swamped by their opponents. For the most part, these provisions have been upheld by the state and lower federal courts that have heard challenges to them. If the Court were to find that the Millionaires' Amendment's relaxation of contribution limits because of the personal funds advantage of an opponent violates the First Amendment, those state and local public financing "trigger" mechanisms could be subject to new challenges.

Second, the case could provide an opportunity for the Court to discuss contribution limits. In the 2006 decision in *Randall v. Sorrell,* the Court for the first time struck down a law imposing dollar limits on contributions to candidates. Although the case focused on the specifics of that law, two members of the Court—Justices Scalia and Thomas—reiterated their view that contribution limits are unconstitutional, and a third, Justice Kennedy, expressed doubts about them. Neither of the Court's two newest

(Continued on Page 320)

members—Chief Justice Roberts and Justice Alito—addressed the question, although they both joined the plurality opinion striking down the state limits in question. Davis would be the first case involving contribution limits since *Randall*. Although it may be difficult for the justices who believe that contribution restrictions unconstitutionally burden First Amendment rights to strike down a law that permits larger contributions, the case could be used to question ordinary limits. It is easy to imagine Justice Scalia or Justice Thomas asking how the current $2,300 cap on individual donations to a candidate per election can be justified as necessary to prevent corruption if Congress is willing to permit some candidates to accept $6,900 contributions.

Third, the case can give some insight into the Roberts' Court's approach to campaign finance law more generally. The Court's first two campaign finance cases—*Randall* and the 2007 decision in *FEC v. Wisconsin Right to Life*—resulted in decisions that were far less deferential to campaign-finance regulation than in the cases decided in the years prior to the appointments of Chief Justice Roberts and Justice Alito. In *Randall,* the Court invalidated Vermont's low contribution limits, and in *WRTL,* the Court created a large, as-applied exception to the ban on corporate issue-advocacy advertising that had previously been upheld in *McConnell*. *Davis* shifts the focus somewhat from regulatory technique to statutory goals. Can Congress promote financially fair competition between candidates and combine fairness and anti-corruption concerns in setting contribution limits? Is leveling the playing field a permissible goal if it can be advanced without limits on spending? Or will the Court be as skeptical about legislative efforts to manage the terms on candidate competition, even if undertaken in the name of fairness, as it has been about other campaign finance measures?

Attorneys for the Parties

For Appellant Jack Davis (Andrew D. Herman (202) 662-9700)

For Appellee Federal Election Commission (Paul D. Clement (202) 514-2217)

Amicus Briefs

In Support of Appellant Jack Davis

Center for Competitive Politics (Erik S. Jaffe (202) 237-8165)

Gene DeRossett and J. Edgar Broyhill II (Kathleen M. Sullivan (650) 725-9875)

James Madison Center for Free Speech and Citizens United (James Bopp Jr. (812) 232-2434)

In Support of Appellee Federal Election Commission

Common Cause (Bradley S. Phillips (213) 683-9100)

Democracy 21 et al. (Seth P. Waxman (202) 663-6000)

In Support of Neither Party

Cato Institute (Benjamin D. Wood (202) 457-6000)