CENTER *for* COMPETITIVE POLITICS

NC H120, "Matching Funds," and Wishful Thinking about *Davis*

The following analysis focuses on the constitutionality of public "matching fund" provisions in taxpayer-financed political campaign programs in the wake of the U.S. Supreme Court's decision in *Davis v. Federal Election Commission.*

First Amendment Infringement

Campaign finance regulations are constitutional only to prevent the corruption of candidates and officeholders or its appearance. *See generally Buckley v. Valeo*, 424 U.S. 1 (1976). Candidates, or individuals and groups who speak independently of candidates, have an unfettered right to speak without limitation and cannon be forced to accept expenditure limits. Limiting the expenditures of independent speakers does nothing to prevent candidate corruption. *See generally id.* Following this logic, the Supreme Court held, in *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008), that an asymmetrical system of contribution limits triggered solely by the spending of a self-financing candidate penalizes the candidate for exercising his right to speak and is unconstitutional.

The "matching fund" provisions allowed in the North Carolina House Bill No. 120 (H120) are equally unconstitutional under the reasoning of *Davis*. Should it be enacted, the "matching fund" provisions of this municipal program would provide a candidate who participates in the public financing system with additional taxpayer dollars when funds in opposition to a participating candidate or in support of an opponent to that candidate exceed a certain monetary threshold. If enacted, the "matching fund" provisions unconstitutionally penalize donors to privately funded (or non-participating) candidates merely because they choose to exercise their First Amendment rights of free speech and association without the salutary effect of the provisions at all preventing the corruption of those candidates or their opponents. The "matching funds" would also penalize independent speakers (i.e., concerned citizens) for exercising their constitutionally protected rights to freely speak and associate.

A Summary of *Davis*

Section 319 of the federal Bipartisan Campaign Reform Act of 2002 created the so-called "Millionaire's Amendment" designed to aid Congressional candidates facing opponents using personal funds for their campaigns. Under the Millionaire's Amendment, when Congressional candidates exceed $350,000 in personal campaign expenditures their opponents may be entitled to receive: (1) contributions from donors at triple the statutory limit; (2) contributions from donors who have reached their statutory limit for aggregate campaign donations; and (3) coordinated expenditures from party committees in excess of the statutory limit. *See* 2 U.S.C. § 441a-1.

In *Davis*, the Supreme Court held that while the Millionaire's Amendment "does not impose a cap on [an opponent's] expenditure of personal funds, it imposes an unprecedented penalty on any [opponent] who robustly exercises that First Amendment right." *Davis*, 128 S. Ct. at 2771. The Court held that "[an opponent] who wishes to exercise that right has two choices: abide by a limit on personal expenditures or endure the burden that is placed on that right by the activation of a scheme of discriminatory contribution limits." *Id.* at 2772. That burden is not justified by any interest in preventing corruption, as self-financing candidates do not corrupt themselves. *See id.* And any interest in leveling electoral opportunities is equally unconstitutional and "wholly foreign to the First Amendment." *Id.* at 2773.

Ignoring the Relevance of *Davis*

Some commentators have said that whatever the Supreme Court held in *Davis*, the holding has no application to public financing programs.[1] But these commentators ignore the fact that public financing programs upheld by the Supreme Court are constitutional because they are voluntarily accepted by affected speakers and participants. Unlike the "matching fund" provisions considered by North Carolina, constitutional public funding schemes do not contain provisions that force outcomes on non-participants. As the Supreme Court said in *Davis*, a "[r]esulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Id.* at 2772.

Such commentators also fail to acknowledge the Court's direct citation to the Eight Circuit case of *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994). *See Davis*, 128 S. Ct. at 2772. In *Day*, the U.S. Court of Appeals for the Eighth Circuit reviewed a similar "matching fund" provision of Minnesota law — specifically, a statute that increased a candidate's expenditure limits and eligibility for public funds based on independent expenditures made against her candidacy. *See generally Day*, 34 F.3d 1356. The Eight Circuit permanently enjoined the enforcement of that

[1] One such noted commentator is Paul S. Ryan. *See, e.g.*, Paul S. Ryan, "Public Funding After *Davis*: 'The Reports of My Death Are Greatly Exaggerated,'" July 23, 2008 (available at http://www.clcblog.org/blog_item-239.html).

provision after finding that "[b]y advocating a candidate's defeat ... via an independent expenditure, the individual, committee, or fund working for the candidate's defeat instead has increased the maximum amount [the candidate] may spend and given [the candidate] the wherewithal to increase that spending — merely by exercising a First Amendment right to make expenditures opposing [the candidate] or supporting her opponent." *Id.* at 1362. The Eight Circuit acknowledged the chill that flows from the operation of "matching fund" provisions:

> The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy ... as a direct result of that independent expenditure, chills the free exercise of that protected speech. This 'self-censorship' that has occurred even before the state implements the statute's mandates is no less a burden on speech ... than is direct government censorship.

Id. at 1360.

Thus, contrary to the assertions of some that "[t]here is no unfair constraint on someone who opts out,"[2] allowing "matching funds" as a part of North Carolina's H120 municipal elections program permits the transgression of the First Amendment rights of candidates who choose not to participate in the program, as well as those citizens who are not even eligible or have the choice to participate in the program (*e.g.*, such as independent groups wishing to run ads and individual citizens considering contributing to a non-participating candidate).

Conclusion

Davis and *Day* demonstrate that involuntary provisions, including so-called "matching funds," designed to "level the playing field" among candidates — and that frustrate candidates' and individuals' rights to engage in constitutionally protected speech and association with no effect on preventing *quid pro quo* corruption or its appearance — are unconstitutional. This is because the "matching fund" programs permitted by H120 would penalize donors to privately funded candidates merely for exercising their rights of association without preventing the corruption of those candidates or their opponents, and also penalize independent speakers for exercising their constitutionally protected rights to speak. In other words, not only should the North Carolina General Assembly not enact H120, but also if it did it would only be inviting a constitutional challenged because "matching funds" provisions are unconstitutional the Supreme Court's reasoning in *Davis*, especially given the Court's approval and adoption of the reasoning of the Eight Circuit's decision in *Day*.

---

[2] *See, e.g.*, Laura McCleery (deputy director of the Brennan Center's Democracy Program), "Dispatches: Saving clean elections," *South Brunswick Post*, August 7 2008 (available at http://www.packetonline.com/articles/2008/08/07/south_brunswick_post/opinions/doc289b0957f26bb939295286.txt).