John Locke
FOUNDATION

spotlight

No. 365 – January 14, 2009

Taxpayer Financing of N.C. Elections

Clearly unconstitutional after the Supreme Court decision in Davis v. FEC

KEY FACTS: **• In June 2008, the U.S. Supreme Court in a case called *Davis v. Federal Elections Commission* struck down a federal law that punished Congressional candidates for spending too much of their own money on their campaigns. Under that law, once personal spending exceeded a threshold level, the opposing candidate was given fundraising advantages.**

• According to the Court, the punishment was a substantial burden on the free-speech rights of the self-financed candidates and there was no compelling interest for this type of speech regulation.

• North Carolina's public (i.e.) taxpayer financing systems for appellate judicial races and select Council of State races also would be unconstitutional. Any reasonable interpretation of *Davis* would lead to this conclusion.

• As in *Davis,* the N.C. system punishes candidates for spending too much. Once a candidate who has chosen not to accept public funding (a traditional candidate) spends beyond a threshold level, then his opponent who has decided to take public funds (a subsidized candidate) is given what are called "matching funds." For example, if a traditional candidate spends $5,000 above the threshold level, the subsidized opponent is provided $5,000 as well.

• The burden to traditional candidates is even worse than that burden on the self-financed candidates in *Davis*. For example, traditional candidates have limited control over whether matching funds are triggered because spending by independent groups, such as PACs, also can trigger matching funds for their opponents.

• North Carolina's taxpayer-financing systems also punish independent groups for their speech because they can trigger matching funds to the candidates those groups oppose.

• Legislators should not sit idly by and let North Carolinians' First Amendment rights be trampled on. These taxpayer-financed systems should be repealed, or at the very least a moratorium should be placed on them.

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North Carolina has public (i.e., taxpayer) financing systems for appellate judicial campaigns[1] and three Council of State races (Auditor, Commissioner of Insurance, and Superintendent of Public Instruction).[2] In June 2008, the United States Supreme Court in an opinion called *Davis v. Federal Election Commission*[3] struck a major blow against such taxpayer-financed systems.

Any reasonable interpretation of the Court's opinion would lead to the conclusion that these systems are unconstitutional. This *Spotlight* report will provide a brief review of the *Davis* case and explain how this opinion affects North Carolina's taxpayer-financing systems of campaigns.

Davis v. FEC

In *Davis*, a Democratic candidate for the U.S. House of Representatives, Jack Davis, challenged a provision in the Bipartisan Campaign Reform Act of 2002 (McCain-Feingold).[4] The provision, referred to as the "Millionaire's Amendment," sought to penalize excessive personal spending by candidates on their campaigns.[5]

If a Congressional candidate spent personal money beyond a threshold amount, the opposing candidate was able to gain special advantages. These advantages included higher individual contribution limits (the normal limit was $2,300 — it was increased to $6,900), and the candidate could accept party expenditures without limit (otherwise the limit was $40,900).[6]

The "self-financed" candidate (the candidate spending beyond a threshold level) therefore was punished for personal spending. As the Court has made clear, restrictions on spending money are equivalent to restricting a candidate's speech because money is necessary for political communication.[7]

In *Davis*, the U.S. Supreme Court found the penalty imposed on self-financed candidates to be unconstitutional. While the law did not prohibit the self-financed candidate from spending personal funds (and exercising free speech), "it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right."[8] A self-financed candidate "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."[9]

The Court found this burden on speech to be substantial and therefore the provision could only be "justified by a compelling state interest."[10] This standard, often referred to as strict scrutiny, is extremely difficult to meet.

The federal government argued that the penalties were justified because they "level electoral opportunities for candidates of different personal wealth."[11] This argument, as in past campaign-finance cases, was strongly rejected by the Court:

> The argument that a candidate's speech may be restricted in order to "level electoral opportunities" has ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strength of candidates competing for office.[12]

The Court therefore found that leveling or equalizing funds was not a compelling interest that could be used to justify the Millionaire's Amendment.[13] The Court also addressed whether the provision was justified "by a governmental interest in eliminating corruption or the perception of corruption."[14] It found the Millionaire's Amendment did not meet a compelling state interest regarding corruption because personal funding actually "*reduces* the threat of corruption, and therefore [the Millionaire's Amendment], by discouraging use of personal funds, disserves the anticorruption interest."[15]

Davis and North Carolina's Taxpayer-Financing Systems of Campaigns

Candidates for appellate judgeships and the three Council of State positions may choose to accept public (i.e.,

taxpayer) financing for their campaigns. Those who do ("subsidized candidates") agree to limit their spending in the general election to the amount of money provided by the government. At the heart of North Carolina's taxpayer campaign financing systems are what are called "matching funds."

Candidates who decide against taking taxpayer dollars ("traditional candidates") are punished in the way that self-financed Congressional candidates in *Davis* are punished if spending in support of their campaigns exceeds a threshold level. If their opponent is a subsidized candidate, as is highly likely, then once the threshold level has been exceeded, the subsidized candidate is given "matching funds" to equalize the funding between the candidates.

Similar to *Davis*, the traditional candidate is forced to choose between exercising First Amendment rights but at the same time helping fund the opposition, or restricting his speech so the opposition won't receive government help with funding.

North Carolina's Matching Fund System Is a Greater Burden Than the Millionaire's Amendment

North Carolina's system poses an even more significant burden on candidates than the burden created by the federal Millionaire's Amendment. In calculating when the threshold level has been reached, the spending calculated is not just spending by the candidate alone, but instead the sum of expenditures by the candidate and by independent organizations, such as nonprofit groups with political action committees, who support the candidate or oppose his opponents.[16]

1) The problem of limited control. A traditional candidate does not have complete control over whether matching funds will be provided to the opposition. The candidate could decide to limit spending so matching funds are not provided, but expenditures by independent organizations could trigger the matching funds anyway.

2) The effects on First Amendment rights of not just candidates, but also of independent groups. The matching-fund system, unlike the Millionaire's Amendment, also violates the First Amendment rights of independent groups, not just candidates. Independent groups risk being punished for supporting traditional candidates because they may trigger matching funds for the opponent. As a result, groups may decide to restrict their speech out of fear that their support may in fact hurt their candidate.

Their speech is treated differently solely based on *content*, which generally is a violation of the First Amendment. Independent groups that support the subsidized candidate in a race against a traditional candidate have no such burdens on their speech. The only difference between the groups is whom they decided to support.

3) The automatic guarantee of extra funds to the opposing candidate. Under the Millionaire's Amendment, when a self-financed Congressional candidate exceeded the threshold level, contribution levels were increased for the opposing candidate. Whether the opposition secured additional funds was still up in the air — the funds still had to be raised. In the matching-fund system, when a candidate and independent groups exceed the threshold level, additional funding is automatically provided to the opposition.

4) The potential for absurdity. By adding a traditional candidate's expenditures to those by independent organizations to determine when the threshold level has been reached, the matching-fund system can lead to absurd results. Table 1 on the following page shows how, for example, both the traditional candidate and the independent groups supporting the traditional candidate could spend *less* than their counterparts but still trigger matching funds to the subsidized opponent.

Proponents laud taxpayer-financing programs when an increased number of candidates accept public financing. Given the absurdity of the system and all the punishments candidates risk if they choose not to accept taxpayer financ-

ing, it's a wonder that any candidate refuses public financing.

No Compelling Interest

Without question, the matching-fund system imposes a significant burden on traditional candidates and their ability to exercise their First Amendment rights. As in *Davis*, however, the question remains whether this burden is justified by a compelling governmental interest.

Matching funds exist to equalize funds—that is their whole purpose. The Supreme Court in *Davis* made it very clear that the purpose of equalization or leveling funds is not a compelling governmental interest.

Table 1: Potential for the Absurdity in the Matching-Funds System

Hypothetical Court of Appeals race; matching-fund threshold, $160,000

	Traditional Candidate	*Subsidized Opponent*
Expenditures by the candidate himself	$120,000	$160,000 (Lump-sum payment provided to candidate, equal to the threshold level)
Expenditures by independent organizations	$50,000	$1,000,000
Total expenditures	$170,000	$1,160,000

In this example, combined expenditures for the subsidized opponent are $990,000 greater than combined expenditures for the traditional candidate. Nevertheless, under the matching-funds system, the subsidized candidate will receive an additional $10,000 from the government (i.e., taxpayers).

Regarding the "prevention of corruption" rationale, the Supreme Court has found it to be a compelling interest only when applicable to contribution limits and has looked unfavorably upon restrictions on unlimited speech.[17]

An Arizona federal district court, which considered the constitutionality of the matching-fund system after *Davis*, found that not only were the anti-corruption benefits unjustified, but also that the system created new corruption problems through gaming of the system.

For example, PACs may run ineffective ads for the candidate they oppose so that matching funds can be provided to the candidate they support. In addressing these problems, the Court explained:

> This potential for gamesmanship mitigates against the anti-corruption interest of the Act not by nullifying any anti-corruption gains but by creating entirely new corruption concerns and injecting them into the public sphere.[18]

Davis and *Day v. Holahan*

The federal Eighth Circuit Court of Appeals in a case called *Day v. Holahan*[19] held that matching-fund provisions were unconstitutional. It is important to recognize that the Supreme Court expressly cited *Day* and used its reasoning to support its own conclusion in *Davis* that the Millionaire's Amendment burdened free speech.[20] That is a strong indication that the Court agrees with the *Day* opinion.

Before and After *Davis*

There is a split among federal appeals courts over whether matching fund provisions are constitutional.[21] All of these decisions were made *before Davis*, however, including a decision in the Fourth Circuit (where North Carolina resides) that held that matching funds and North Carolina's judicial financing system were constitutional.[22]

After *Davis*, the Supreme Court did decline to hear an appeal of the Fourth Circuit opinion. That action, however, does not suggest one way or another how the Court would rule. Also, the Court decides to hear only about 80 cases a year out of the 8,000 or so requests it receives.

The impact of *Davis* already is being felt. In Arizona, a federal district court was asked to grant a preliminary injunction to block matching funds from being provided to Arizona candidates. While the motion was denied, the court found the plaintiff had shown a high likelihood of success on the merits. In simple terms, the court agreed that the matching funds provisions were unconstitutional due to the *Davis* opinion, but did not make a final decision on the merits.[23]

In New Jersey, the legislative counsel's office cautioned that a proposed public-financing bill likely would be found unconstitutional due to the matching fund provisions:

> … it appears that under *Davis* providing additional public funds to a participating candidate in response to expenditures by a non–publicly funded opponent or an independent group above a threshold amount is likely unconstitutional.[24]

Recommendation and Conclusion

State legislators take an oath to uphold the United States Constitution. The unconstitutional nature of matching funds is clear. Legislators should not sit idly by and let North Carolinians' First Amendment rights be trampled on until a court *officially* rules these particular public-financing systems to be unconstitutional.

The default position for the legislature should be to protect rights, not to protect some system that many legislators already opposed prior to the *Davis* decision. This case should be the final straw for any legislators who were on the fence about taxpayer-financing systems.

The judicial and Council of State public-financing systems should immediately be repealed. At a minimum, there should be a moratorium on these systems until a final, legal decision is made on whether matching funds are constitutional.

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End Notes

1. N.C. Gen. Stat. § 163-278.61 *et seq.*, www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_163/Article_22D.html.
2. N.C. Gen. Stat. § 163-278.95 *et seq.*, www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_163/Article_22J.html.
3. *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008).
4. Bipartisan Campaign Reform Act of 2002, Public Law No. 107-155; for helpful resources on this federal law, see this Federal Election Commission (FEC) web page: www.fec.gov/pages/bcra/bcra_update.shtml.
5. *Davis*, at 2766.
6. *Ibid*.
7. See *Buckley v. Valeo*, 424 U.S. 1 (1976) at 19, *laws.findlaw.com/us/424/1.html*.
8. *Davis*, at 2771.
9. *Davis*, at 2772.
10. *Ibid.*
11. *Davis*, at 2773.
12. *Ibid.*
13. *Ibid.*
14. *Ibid.*
15. *Ibid.*
16. For the judicial taxpayer financing program, see N.C. Gen. Stat. § 163-278.67(a), www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_163/GS_163-278.67.html; for the select Council of State races, see N.C. Gen. Stat. § 163-278.99B(a), www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_163/GS_163-278.99B.html.

    For both systems, an independent group's expenditures do not trigger matching funds until "the total amount of expenditures or obligations made, or funds raised or borrowed, for the purpose of making the independent expenditures or electioneering communications exceeds five thousand dollars ($5,000)"; see N.C. Gen. Stat. § 163-278.66 (applicable judicial elections section); see N.C. Gen. Stat. § 163-278.99A (applicable Council of State elections section).
17. See, *e.g., Buckley v. Valeo*, 424 U.S. 1 (1976).
18. *McComish v. Brewer*, No. cv-08-1550-PHX-ROS, Document 185, October 17, 2008 (D. Ariz.), www.goldwaterinstitute.org/Common/Img/Silver%20Decision2%20%282%29.pdfpage 13.

19. *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994).
20. *Davis*, at 2772.
21. *Op. cit.*, note 18.
22. *N.C. Right to Life, Inc. v. Leake,* 524 F.3d 427 (4th. Cir. 2008).
23. *Op. cit.*, note 18.
24. Letter to Mr. William Castner from Legislative Counsel Albert Porroni, Office of Legislative Services, New Jersey State Legislature, July 21, 2008, www.campaignfreedom.org/docLib/20080725_NJ_davis.pdf.