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State's Campaign Financing Law Still In Jeopardy

'Self-destruct mechanism' could kick in if legislature doesn't act

By PETER J. MARTIN

With this year's primaries and general elections just around the corner, state and federal laws governing campaign finance, especially Clean Election Laws, have become hot-button issues. In recent weeks, we have seen Connecticut state and federal courts busy shaping the scope and application of these laws. In particular, a recent ruling by the 2nd Circuit Court of Appeals could dramatically affect the landscape of Connecticut's campaign finance laws for this year and beyond.

Finance Law History

In the 1860s, the federal government made its first attempt to regulate campaign financing. However, it took more than a century before the first successful campaign finance law was passed – the Federal Election Campaign Act of 1972 – with many states, including Connecticut, soon to follow.

Constitutional challenges to these types of laws commence almost as soon as they are passed because they raise serious First Amendment questions. The U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), held that spending money to influence elections is a form of constitutionally protected free speech under the First Amendment. Since then, state and federal constitutional challenges have shaped campaign finance laws and the way in which candidates raise and spend campaign funds.

Recently, the U.S. Supreme Court in *Randall v. Sorrell*, 548 U.S. 230 (2006), struck down Vermont's political contribution caps and in *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), struck down provisions of the McCain-Feingold Act prohibiting corporations from making political expenditures.

Clean Election Laws

Over the past decade, many states have passed Clean Election Laws which provide public financing to candidates. In 2005, Connecticut passed its own Clean Election Law called the Citizens' Election Program (CEP), in the wake of the political corruption scandals that plagued the state in recent times. The CEP, like similar Clean Election Laws, was intended to level the financial playing field amongst candidates and reduce political corruption. Opponents, however, see the law as simply a government power grab that provides the State Election Enforcement Commission the authority to ration free speech and silence political discourse.

Candidates choosing to participate in the CEP and receive public financing must first qualify by reaching certain private contribution thresholds while agreeing to abide by expenditure limits. For example, participating major party candidates for governor are required to raise $250,000, in small contributions between $5 and $100, in order to qualify for the $1.25 million primary grant and $3 million general election grant. Participating minor party candidates receive lesser grants. Non-participating candidates

can still raise money the "old-fashioned way" subject of course to campaign finance laws currently in effect, Conn. Gen. Stat. § 9-600 *et seq*.

Federal Court Rules

On Sept. 2, 2009, the CEP was dealt a severe blow when U.S. District Judge Stefan R. Underhill struck down the entire program as unconstitutional. *See Green Party of Conn. v. Garfield*, 648 F. Supp. 2d 298 (D. Conn. 2009). The district court held that the CEP discriminated against mi-

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nor party candidates because they receive lesser grants than major party candidates; penalized non-participating candidates by providing their participating opponents with supplemental matching funds over and above the initial CEP grant; and chilled speech by penalizing third parties that made independent expenditures to oppose participating candidates.

This was not the first time a Clean Election Law was struck down as unconstitutional. Indeed, the U.S. Supreme Court in *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008), struck down a similar federal law in 2008. Likewise, Arizona federal Judge Roslyn Silver struck down the matching funds provision of the Arizona Clean Election Law in January 2010. The 9th Circuit Court of Appeals reversed the district court's decision but the U.S. Supreme Court lifted the 9th Circuit's stay and permitted the district court's permanent injunction to issue. Petitions for certiorari are due next month and it is likely that the Court will take the appeal.

In a separate decision by Judge Underhill in the *Green Party* case, the district court upheld state bans barring political donations from state contractor and lobbyists – Conn. Gen. Stat. § 9-610(e)-(j) and § 9-612(g)-(h) – which were passed during the same period as the CEP. The contractor ban prohibits state contractors and prospective state contractors and their principals and immediate families from contributing to and soliciting on behalf of certain state candidates. Likewise, the lobbyist ban prohibits lobbyists and their families from contributing to or soliciting on behalf of any state candidates.

CEP Saved? Think Again

The CEP was pulled out of the abyss on July 13, when the 2nd Circuit Court of Appeals reversed, in part, and affirmed, in part, Judge Underhill's decisions in the *Green Party* case. See *Green Party of Conn. v. Garfield*, 2010 U.S. App. LEXIS 14286 (2d Cir. Conn., Jul. 13, 2010). While the 2nd Circuit upheld the core provisions of the CEP including the lesser grants for minor party candidates, it found unconstitutional on First Amendment grounds: (1) the supplemental matching fund provision; (2) the independent expenditure provision; (3) the lobbyist ban; and (4) the solicitation ban. Judge Underhill is expected to issue a permanent injunction consistent with that holding as soon as he receives the 2nd Circuit's mandate which is due Aug. 4.

The steps, if any, the legislature may take with regard to the Citizens Election Program is unclear – amend the CEP to eliminate the unconstitutional provisions; repeal and replace the entire CEP with something new; or simply let the program die.

Even though the core provisions of the CEP were upheld by the 2nd Circuit, the entire program is in jeopardy. The CEP contains an anti-severability clause which operates as a self-destruct mechanism effectively rendering the entire program inoperable if any portion of it is found unconstitutional, unless the legislature passes a "fix" within 30 days. Once Judge Underhill issues a permanent injunction, the clock will begin to run. If the legislature does not amend the CEP within 30 days, it will be inoperable for the remainder of the year. And, if the legislature does not amend the CEP by next April 2011, it will be gone forever.

The steps, if any, the legislature may take with regard to the CEP is unclear – amend the CEP to eliminate the unconstitutional provisions; repeal and replace the entire CEP with something new; or simply let the program die. What is clear is that the legislature will only have 30 days within which to take action, and there is no way to save the matching fund provisions or the bans that were held to be unconstitutional.

With more than 100 candidates participating in the CEP – from state representative and senatorial candidates to candidates for state constitutional offices – the legislature's failure to "fix" the CEP could have dramatic consequences for this year's election and for the candidates who are participating in the program this year as well as for their opponents. ■