Congressional Research Service

Report RS22920

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July 17, 2008

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Congressional Research Service
7-5700
www.crs.gov
RS22920

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

In a 5-to-4 decision, the Supreme Court struck down a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold law, establishing increased contribution limits for congressional candidates whose opponents significantly self-finance their campaigns. This provision is frequently referred to as the "Millionaire's Amendment." The Court found that the burden imposed on expenditures of personal funds is not justified by the compelling governmental interest of lessening corruption or the appearance of corruption and, therefore, held that the law is unconstitutional in violation of the First Amendment.

Background

Section 319(a)[1] of the Bipartisan Campaign Reform Act of 2002 (BCRA),[2] also known as the McCain-Feingold law, establishes increased contribution limits for House candidates whose opponents significantly self-finance their campaigns. This provision—in tandem with Section 304,[3] which applies a similar program to Senate candidates—is frequently referred to as the "Millionaire's Amendment." Basically, the complex statutory formula provides that if a candidate for the House of Representatives spends more than $350,000 of personal funds during an election cycle, individual contribution limits applicable to his or her opponent are increased from the usual current limit ($2,300 per election) to up to triple that amount (or $6,900 per election). Likewise for Senate candidates, a separate provision generally raises individual contribution limits for a candidate whose opponent exceeds a designated threshold level of personal campaign funding that is based on the number of eligible voters in the state. For both House and Senate candidates, the increased contribution limits are eliminated when parity in spending is reached between the two candidates. BCRA also requires self-financing candidates to file special disclosure reports regarding their campaign spending—as such expenditures are made—in addition to reporting in accordance with the regular periodic disclosure schedule.[4]

Case History

In 2004 and 2006, Jack Davis was a candidate for the House of Representatives from the 26th Congressional District of New York. During the 2004 election cycle, he spent $1.2 million, which was principally from his own funds, and during the 2006 cycle, he spent $2.3 million, which (with the exception of $126,000) came from personal funds. In 2006, after the Federal Election Commission (FEC) informed Davis that it had reason to believe that he had violated BCRA's disclosure requirements for self-financing candidates by failing to report personal expenditures during the 2004 election cycle, Davis filed suit in the U.S. District Court for the District of Columbia seeking declaration that the Millionaire's Amendment was unconstitutional and an injunction preventing the FEC from enforcing the law during the 2006 cycle. A district court three-judge panel concluded *sua sponte* that Davis had standing to bring the suit, but rejected his claims on the merits and granted summary judgment to the FEC.[5] Invoking BCRA's provision for direct appeal to the Supreme Court for actions brought on constitutional grounds,[6] Davis appealed.

Supreme Court Ruling

Reversing the three-judge district court decision, in a 5-to-4 vote, the Supreme Court in *FEC v. Davis*[7] invalidated the Millionaire's Amendment as lacking a compelling governmental interest in

[1] 2 U.S.C. § 441a-1.

[2] P.L. 107-155. BCRA amended the Federal Election Campaign Act (FECA), codified as amended at 2 U.S.C. § 431 *et seq.*

[3] 2 U.S.C. § 441a(h), (i).

[4] 2 U.S.C. § 434(a)(6)(B).

[5] *See* Davis v. FEC, 501 F. Supp. 2d 22 (D.D.C. 2007).

[6] P.L. 107-155, § 403.

[7] No. 07-320 (U.S. June 26, 2008).

violation of the First Amendment. Justice Alito wrote the opinion for the majority and was joined by Chief Justice Roberts, and Justices Scalia, Kennedy, and Thomas. Justice Stevens wrote an opinion concurring in part and dissenting in part, and was joined, in part, by Justices Souter, Ginsburg, and Breyer. Justice Ginsburg also wrote an opinion, concurring in part and dissenting in part, which was joined by Justice Breyer. The Court remanded the case to the district court for proceedings consistent with its opinion.

Majority Opinion

Citing prior decisions, the Court began its opinion by noting that it has long upheld the constitutionality of limits on individual contributions and coordinated party expenditures.[8] While recognizing that contribution limits implicate First Amendment free speech interests, it has sustained such limits on the condition that they are "closely drawn" to serve a "sufficiently important interest" such as the prevention of corruption or the appearance of corruption.[9] On the other hand, the Court observed that it has definitively rejected any limits on a candidate's expenditure of personal funds to finance campaign speech, finding that such limits impose a significant restraint on a candidate's right to advocate for his or her own election, which is not justified by the compelling governmental interest of preventing corruption. Instead of preventing corruption, a candidate's use of personal funds "'reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which ... contribution limitations are directed.'"[10]

With regard to the Millionaire's Amendment, the Court observed that while it does not *directly* impose a limit on a candidate's expenditure of personal funds, it "imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right."[11] Further, it requires a candidate to choose between the right of free political expression and "subjection to discriminatory fundraising limitations."[12] If it simply increased the contribution limits for all candidates—both the self-financed candidate as well as the opponent—it would pass constitutional muster.[13] Although many candidates who can afford significant personal expenditures in support of their own campaigns may choose to do so despite the Millionaire's Amendment, the Court determined that they would bear "a special and potentially significant burden if they make that choice."[14] In fact, the Court concluded that if a candidate vigorously exercises the right to use personal funds, it creates a fundraising advantage for his or her opponents.[15]

[8] *See id.*, slip op. at 10 (citing Buckley v. Valeo, 424 U.S. 1, 23-35, 38, 46-47, n. 53 (1976); FEC v. Colorado Republican Federal Campaign Comm., 533 U.S. 431, 437, 465 (2001)(Colorado II)).

[9] *Id.*, slip op. at 10-11 (quoting McConnell v. FEC, 540 U.S. 93, 136, 138, n. 40 (2003); Colorado II, 533 U.S. at 456 (2001); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 387-88 (2000); Buckley v. Valeo, 424 U.S. 1, 25-30, 38 (1976)).

[10] *Id.*, slip op. at 12 (quoting Buckley, 424 U.S. at 53 (1976)).

[11] *Id.*

[12] *Id.*

[13] *See id.*, slip op. at 10-11.

[14] *Id.*, slip op. at 12-13 (citing Day v. Holahan, 34 F. 3d 1356, 1359-60 (8th Cir. 1994) (holding that a Minnesota statute that increased candidate expenditure limits and eligibility for public funds based on the amount of independent expenditures made in opposition to his or her candidacy burdened the speech of those making the independent expenditures)).

[15] *See id.*, slip op. at 13.

In its 1976 landmark decision *Buckley v. Valeo,*[16] the Supreme Court upheld a provision of the Federal Election Campaign Act (FECA) providing presidential candidates with the option to receive public funds on the condition that they comply with expenditure limits, even though it found overall expenditure limits to be unconstitutional.[17] Distinguishing the Millionaire's Amendment from FECA's presidential public financing provision, the *Davis* Court observed that the choices presented by each of the statutes are "quite different."[18] By forgoing public financing, a presidential candidate can still retain the unencumbered right to make unlimited personal expenditures. In contrast, the Millionaire's Amendment fails to provide any options for a candidate to exercise that right "without abridgement."[19]

Finding that the Millionaire's Amendment imposes a "substantial burden" on the First Amendment right to expend personal funds in support of one's own campaign, thereby triggering strict scrutiny, the Court announced that it is not sustainable unless it can be justified by a compelling governmental interest.[20] As the Court held in *Buckley,* reliance on personal funds *reduce*s the threat of corruption, and therefore, the burden imposed by the Millionaire's Amendment cannot serve that governmental interest.

Responding to the FEC's argument that the statute's "asymmetrical limits" are justified because they level the playing field for candidates of differing personal wealth, the Court pointed out that its jurisprudence offers no support for the proposition that this rationale constitutes a compelling governmental interest. According to the Court, "[p]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."[21] Moreover, "'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.'"[22]

Specifically, the Court cautioned that restricting a candidate's speech in order to level opportunities for election among candidates presents "ominous implications" because it would permit Congress to "arrogate the voters' authority to evaluate the strengths of candidates competing for office."[23] Voters are entrusted with the duty to judge candidates for public office and, according to the Court,

> Different candidates have different strengths. Some are wealthy; others have wealthy supporters who are willing to make large contributions. Some are celebrities; some have the benefit of a well-known family name. Leveling electoral opportunities means making and implementing judgments about which candidates should be permitted to contribute to the outcome of an election. The Constitution, however, confers upon voters, not Congress, the

[16] 424 U.S. 1 (1976). For further discussion of *Buckley*, *see* CRS Report RL30669, *Campaign Finance Regulation Under the First Amendment: Buckley v. Valeo and Its Supreme Court Progeny*, by L. Paige Whitaker.

[17] *See id.* at 57, n. 65, 54-58.

[18] *Davis*, slip op. at 13.

[19] *Id.*

[20] *See id.*, slip op. at 14.

[21] *Id.*, slip op. at 15 (quoting FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985); Randall v. Sorrell, 548 U.S. 230, 268 (2006) (Thomas, J., concurring in judgment) (noting "the interests the Court has recognized as compelling, *i.e.*, the prevention of corruption or the appearance thereof")).

[22] *Id.*, slip op. at 15-16 (quoting Buckley, 424 U.S. at 48-49 (1976)).

[23] *Id.*, slip op. at 16.

> power to choose the Members of the House of Representatives, Article I, § 2, and it is dangerous business for Congress to use the election laws to influence the voters' choices.[24]

In considering the constitutionality of the disclosure requirements contained within the Millionaire's Amendment, the Court emphasized that it has repeatedly held that compelled disclosure significantly infringes on privacy of association and belief, as guaranteed under the First Amendment. Therefore, it has subjected such requirements to exacting scrutiny in order to ascertain whether there is a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed.[25] In view of its holding that the Millionaire's Amendment is unconstitutional, the Court likewise reasoned that the burden imposed by its disclosure requirements cannot be justified, and accordingly, struck them down.[26]

Dissenting Opinions

In a dissent, Justice Stevens—joined, in part, by Justices Souter, Ginsburg, and Breyer—argued that the Millionaire's Amendment represents Congress's judgment that candidates who spend over $350,000 of their own money in a campaign for a House or Senate seat have an advantage over other candidates who must raise contributions. The statute imposes no burden on self-financing candidates and "quiets no speech."[27] Instead, the dissent found that it does no more than merely "assist the opponent of a self-funding candidate" to make his or her voice heard and that "this amplification in no way mutes the voice of the millionaire, who remains able to speak as loud and as long as he likes in support of his campaign."[28] As a result of finding no direct restriction on the speech of the self-financed candidate, the dissent would subject the Millionaire's Amendment to a less rigorous standard of review.[29] Indeed, the dissent specifically criticized the Court's landmark *Buckley* ruling, which struck down limits on expenditures, arguing that "a number of purposes, both legitimate and substantial," can justify the imposition of reasonable spending limits.[30]

Maintaining that combating corruption and the appearance of corruption are not the only governmental interests justifying congressional regulation of campaign financing, the dissent remarked that the Court has also recognized the governmental interests of reducing both the influence of wealth and the appearance of wealth on the outcomes of elections. While conceding that such prior decisions have focused on the aggregations of wealth that are accumulated in the corporate form, it reasoned that the logic of such decisions—particularly concerns about the "corrosive and distorting effects of wealth" on the political process—could be extended to the context of individual wealth as well.[31]

[24] *Id.*

[25] *Id.*, slip op. at 18.

[26] *See id.*

[27] *Id.*, slip op. at 5 (Stevens, J., dissenting).

[28] *Id.*, slip op. at 5-6 (Stevens, J., dissenting).

[29] *See id.*, slip op. at 2-3 (Stevens, J., dissenting) (quoting Justice White's dissent in *Buckley* maintaining that expenditure limitations should be analyzed not as direct restrictions on speech, but as analogous to time, place, and manner regulations, which are sustainable on the condition that they serve purposes that are "legitimate and sufficiently substantial." Buckley v. Valeo, 424 U.S. 1, 264 (1976) (White, J., concurring in part and dissenting in part)).

[30] *Id.*, slip op. at 3 (Stevens, J., dissenting).

[31] *Id.*, slip op. at 8 (Stevens, J., dissenting).

In a separate dissent, Justice Ginsburg—joined by Justice Breyer—concluded that sustaining the constitutionality of the Millionaire's Amendment would be consistent with the Court's earlier holding in *Buckley v. Valeo*. She resisted, however, joining Justice Stevens's dissent to the extent that it addresses the Court's ruling in *Buckley* invalidating expenditure limits. Noting that the Court had not been asked to overrule *Buckley*—and that this issue had not been briefed—Justice Ginsburg preferred to leave reconsideration of that case "for a later day."[32]

Concluding Observations

The Court's decidedly antiregulatory opinion in *Davis* appears to be a reaffirmation of its finding in the landmark 1976 decision, *Buckley v. Valeo*, that Congress has no compelling interest in attempting to level the playing field among candidates. In fact, the *Davis* Court determined that Congressional attempts to do so would supplant the choices of the voters. Notably, the decision also seems to be a departure from its 2003 decision in *McConnell v. FEC*[33]—upholding key portions of BCRA—where the Court expressed deference to Congress's expertise in regulating the system under which its Members are elected.[34] While Justice Stevens still appears to subscribe to this view,[35] the majority of the *Davis* Court seems less deferential.

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[32] *Id.*, slip op. at 1 (Ginsburg, J., dissenting).

[33] 540 U.S. 93 (2003). For further discussion of *McConnell*, *see* CRS Report RL32245, *Campaign Finance Law: A Legal Analysis of the Supreme Court Ruling in McConnell v. FEC*, by L. Paige Whitaker.

[34] In *McConnell v. FEC*, the Court notably deferred to Congressional findings in upholding BCRA, remarking that its decision showed "proper deference" to Congress's determinations "in an area in which it enjoys particular expertise." Furthermore, "Congress is fully entitled," the Court observed, "to consider the real-world" as it determines how best to regulate in the political sphere. 540 U.S. 93, 137, 188 (2003).

[35] *See Davis*, slip op. at 4, 9 (Stevens, J., dissenting) ("It seems to me that Congress is entitled to make the judgment ..." and "as we explained in McConnell, 'Congress is fully entitled to consider ... real-world differences ... when crafting a system of campaign finance regulation.'") (Stevens, J., dissenting) (quoting McConnell, 540 U.S. at 188 (2003)).