

# CRS Report for Congress

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## **Campaign Finance Reform and Incentives to Voluntarily Limit Candidate Spending From Personal Funds: Constitutional Issues Raised by Public Subsidies and Variable Contribution Limits**

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### **Summary**

The Supreme Court in *Buckley v. Valeo* ruled that spending limits, including the amount a candidate can spend on his or her own campaign from personal funds (also known as personal fund expenditure limits) are unconstitutional. The Court did, however, uphold a system of spending limits, on the condition that they are *voluntarily* accepted in exchange for some form of public financing. As a result of these Court rulings, the concept of various incentives toward voluntary compliance with a personal funds expenditure limit has been developed. This report discusses some constitutional issues raised by two such incentives: public subsidies and variable contribution limits.

An amendment to S. 27 (McCain/Feingold), SA 115 (Domenici) (approved 70 to 30 on March 20, 2001), would raise the limits on contributions to a Senate candidate whose opponent exceeds a designated level of personal funding in his or her campaign.

### **Origin of Incentives Toward Compliance With Personal Funds Expenditure Limit**

Legislation to impose *mandatory* expenditure limits on the amount a candidate can spend on his or her own campaign from personal funds (also known as personal fund expenditure limits) is unlikely to be upheld as constitutional. In *Buckley v. Valeo*, the U.S. Supreme Court expressly ruled that limits on personal expenditures by candidates from personal or family resources are unconstitutional.<sup>1</sup> Similar to limitations on independent

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<sup>1</sup> 424 U.S. 1, 54 (1976). For further discussion of the Supreme Court's holding in *Buckley* and subsequent related decisions, see CRS Report RL30669, *Campaign Finance Regulation Under* (continued...)

expenditures, the Court found that such restraints impose "a substantial restraint on the ability of persons to engage in protected First Amendment expression."<sup>2</sup> A candidate has a First Amendment right to advocate vigorously and tirelessly for his or her own election, according to the Court. Further, the Court noted, it is particularly important that candidates have the "unfettered opportunity" to communicate their views and positions on the issues in order for the electorate to make an informed vote.<sup>3</sup>

The *Buckley* Court did, however, uphold a system of *voluntary* spending limits conditioned on the acceptance of some form of public financing.<sup>4</sup> According to the Court, public financing is within the constitutional powers of Congress to reform the electoral process and does not violate any First Amendment rights by abridging, restricting, or censoring speech, expression, and association, but rather encourages public discussion and participation in the electoral process.<sup>5</sup> Specifically, the Court held:

Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.<sup>6</sup>

As a result of these Court rulings in *Buckley*, the concept of various incentives toward *voluntary* compliance with a personal funds expenditure limit has been developed.

## **Public Subsidies (or “Trigger Provisions”)**

It appears that a proposal providing public subsidies (or the opportunity to raise more money) to candidates participating in a personal funds expenditure limit, when their opponents have exceeded certain levels of spending from personal funds, could be upheld as constitutional so long as the public subsidy incentives (also known as “trigger provisions”) are not found to coerce candidates into accepting the spending limits. We caution that the Supreme Court has not provided specific guidance as to the constitutionality of trigger provisions, although the issue has been examined by some lower courts.

For example, in *Gable v. Patton*, the Sixth Circuit upheld a state trigger provision whereby the candidate participating in spending limits can raise money over the spending limit and continue to receive matching public funds (in a 2:1 ratio) if the non-participating

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<sup>1</sup> (...continued)

*the First Amendment: Buckley v. Valeo and its Supreme Court Progeny*, by L. Paige Whitaker.

<sup>2</sup> *Id.* at 52 (citations omitted).

<sup>3</sup> *Id.* at 52-53.

<sup>4</sup> *Id.* at 57 n. 65. Specifically, *Buckley* upheld the current presidential public financing system whereby public subsidies are offered in exchange for spending limits in the primary and general presidential elections. *See* 424 U.S. at 97-108.

<sup>5</sup> *Id.* at 90-93.

<sup>6</sup> *Id.* at 57 n. 65.

candidate spends any amount above the limit. The court acknowledged that due to the trigger provision, a non-participating candidate receives no relative advantage from the spending limit, while the two-for-one matching public funds subsidy provided to the participating candidate assesses “a substantial cost for nonparticipation.” Further, the court found, “there is only a narrow set of circumstances under which a candidate could make a financially rational decision not to participate.”<sup>7</sup> Nevertheless, the court held that this type of financial pressure is not sufficient coercion to render the spending limit program unconstitutional: “Absent a clearer form of coercion we decline to find that the incentives inherent in the Trigger provision are different in kind from clearly constitutional incentives.”<sup>8</sup>

In *Rosenstiel v. Rodriguez*,<sup>9</sup> the Eighth Circuit upheld a Minnesota state statutory trigger provision under which candidates participating in spending limits in exchange for receiving public subsidies are released from the limits if opposed by candidates who exceed the limits. Further, the statute provides that a participating candidate is then permitted to raise private funds without limit and permitted to keep the public subsidy funds of up to 50% of the spending limit.<sup>10</sup> The Eighth Circuit found that by allowing the participating candidates to be released from the spending limits, the state is simply attempting “to avert a powerful disincentive for participation in its public financing scheme,” that is, “a concern of being grossly outspent by a privately financed opponent with no expenditure limit.”<sup>11</sup> Moreover, in holding that the statute was not coercive, the court determined that it afforded the non-participating candidate “control” over whether and when the participating opponent candidate would be released from the spending limits and that, therefore, the statute actually worked “in favor of, rather than to the detriment of, the nonparticipating candidate.”<sup>12</sup> In fact, the court concluded, the triggering provision at issue created a “choice-increasing framework” that “promotes, rather than detracts from, cherished First Amendment values.”<sup>13</sup>

Similarly, it appears that a proposal to offer a tax credit to contributors to candidates who have complied with a personal funds limit on expenditures could be upheld. Like reduced postal rates, a tax credit is a form of public subsidy, as it uses funds that would otherwise go to the Treasury.<sup>14</sup> In *Rosenstiel*, the Eighth Circuit Court of Appeals also upheld a Minnesota state tax refund statutory scheme against a challenge that it was not voluntary, but coercive. The court found that a tax refund, when used with other public

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<sup>7</sup> 142 F.3d 940 (6<sup>th</sup> Cir. 1998), *cert. denied*, 525 U.S. 1177 (1999).

<sup>8</sup> *Id.* at 949.

<sup>9</sup> 101 F.3d 1544 (8<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997).

<sup>10</sup> *Id.* at 1547-48.

<sup>11</sup> *Id.* at 1550-51.

<sup>12</sup> *Id.* at 1551.

<sup>13</sup> *Id.* at 1552.

<sup>14</sup> Buckley, 424 U.S. at 107 n. 146; *see also* Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) (finding that tax credits and the deductibility for contributions are a form of government subsidy to the entity receiving the contributions).

funding to encourage candidates to accept spending limits, was “simply an additional public subsidy provided to participating candidates” and was therefore, constitutional.<sup>15</sup>

## Variable Contribution Limits (or “Cap Gap” System)

Under certain circumstances, a proposal that allows candidates who agree to spending limits from personal funds to accept larger contributions than those who do not participate in such spending limits could pass constitutional muster. Under such a proposal, the differing contribution limits are often referred to as “variable contribution limits” and the system itself is often referred to as a “cap gap” because it creates a gap between the caps on contributions permitted to be made to participating versus non-participating candidates.

When a court evaluates the constitutionality of a cap gap provision, it will consider whether the overall statutory framework providing for spending limits is truly voluntary, as the Supreme Court in *Buckley* required, or coercive. While the Supreme Court has not provided specific guidance as to how to make this determination between voluntary and coercive, some lower courts have considered the issue.<sup>16</sup> For example, the First Circuit in *Vote Choice, Inc. v. DiStefano* upheld a Rhode Island state statute imposing a \$1,000 limit on contributions to non-participating candidates, while allowing participating candidates to accept contributions of up to \$2,000 per donor.<sup>17</sup> Here, the court recognized that the statutory scheme was “not in exact balance,” suspecting that “very few campaign financing schemes ever achieve perfect equipoise,” ultimately holding that the law was not unfairly coercive. Moreover, the *Vote Choice* court determined, a statutory framework that merely provides candidates with a “voluntary alternative to an otherwise applicable, assuredly constitutional, financing option” does not impose a First Amendment burden.<sup>18</sup>

The *Vote Choice* court cautioned, however, that there is a point where “regulatory incentives stray beyond the pale, creating disparities so profound that they become impermissibly coercive.”<sup>19</sup> That is, if the additional contribution amounts that participating candidates may accept are too much larger than the contribution amounts that non-participating candidates may accept, the disparity might render the program

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<sup>15</sup> 101 F.3d at 1551.

<sup>16</sup> Although the issue was not raised in any case we examine, a challenge to the constitutionality of variable contribution limits could also include the argument, which merges the two constitutional standards of free expression and equal protection, that the government may not discriminate between different kinds of messages. *See, e.g.,* *Police Department v. Mosley*, 408 U.S. 92 (1972) (ordinance struck down that barred all picketing around a school building except for labor picketing); *Carey v. Brown*, 447 U.S. 455 (1980) (same); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (permission to use parks for some groups but not for others). It could be argued that with a variable contribution limit system, the government is, essentially, favoring speech by one contributor over the speech of another, depending on the amount of personal fund spending engaged in by each contributor’s preferred candidate. Moreover, it could also be argued that such a system, by providing incentives to abstain from personal fund spending, results in government disfavoring candidate spending over other types of spending.

<sup>17</sup> 4 F.3d 26, 37 n. 13 (1<sup>st</sup> Cir. 1993).

<sup>18</sup> *Id.* at 39.

<sup>19</sup> *Id.* at 38.

unconstitutional. For instance, a Kentucky federal district court invalidated a state statutory system in which the cap gap, in effect, created a 15-1 disparity in favor of those who accepted the spending limits, stating that it was not aware of any case in which a disparity of greater than 2 to 1 was upheld. Further, the court found that “[w]hile there need not be absolute equality between the contribution limits, the disparity must not be so great as to ‘destroy the voluntariness of the public-financing system.’”<sup>20</sup>

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<sup>20</sup> *Wilkinson v. Jones*, 876 F. Supp. 916, 930 (W.D. Ky. 1995) (*quoting id.* at 38).