Alternatives to Triggers:

Public Campaign Financing After *Arizona Free Enterprise*

by Tracy Westen

CENTER *for* GOVERNMENTAL STUDIES

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Introduction

Dozens of states and localities have enacted public campaign financing programs in which candidates—who voluntarily choose to participate, pass qualifying thresholds and accept certain conditions such as expenditure ceilings—receive varying amounts of public financing to conduct their electoral campaigns. These programs fall into two general categories: full public campaign financing programs (a.k.a. "clean money" programs) and partial public campaign financing programs (a.k.a. "matching funds" programs). In both programs, candidates first qualify by raising a number of initial, small qualifying contributions from private donors.

In full public campaign financing programs, qualifying candidates receive a lump sum of public funds to run their campaigns. In partial public campaign financing programs, qualifying candidates receive public funds to match each subsequent private contribution they raise. The ratio of that match varies by jurisdiction (from one-to-one to six-to-one).

Public financing programs seek to accomplish the following goals: (1) reduce the negative influences of money on campaigns, in part by reducing the amount of money candidates can collect from special interests and large donors; (2) reduce the amount of time candidates have to spend raising money; (3) empower candidates to enlarge the public discussions and general awareness of political campaigns; (4) increase citizen participation in the electoral process; and (5) increase the number and diversity of political candidates. Overall, these goals also increase public confidence in the electoral and governmental processes.

"Trigger" Funds

In both full and partial public campaign financing systems, some jurisdictions have provided participating candidates with additional or supplemental public funds. The payment of these supplemental funds is "triggered" by expenditures from privately

[1] Founder and Chief Executive Officer, Center for Governmental Studies (CGS). This paper was prepared for the State Advocates Convening, "Public Financing after *Citizens United* and *Arizona Free Enterprise Club*," in Arlington, Virginia, September 9-10, 2011. It draws on two CGS publication: *Public Campaign Financing in Albuquerque: Citizens Win with Clean Money Elections* (2011) (hereinafter "*Albuquerque: Citizens Win"*), and *Public Campaign Financing in California: A Model Law for 21st Century Reform (2011)* (hereinafter "*Model Law"*).

financed opponents or independent expenditure groups that exceed specified amounts (e.g., a portion of the publicly financed candidates' expenditure ceilings).

In some clean money jurisdictions, participating candidates receive a single lump sum of additional public funding, or they receive supplemental public funding in installments to match the sums spent by opponents. In some matching funds jurisdictions, participating candidates receive matching funds for private contributions in higher ratios (e.g., two public dollars for every private dollar).

These supplemental "trigger" funds are intended to serve several purposes. They encourage candidates to forego traditional fundraising, accept public financing and limit their expenditures, by assuring them that they will receive additional funds to meet high spending wealthy candidates or independent expenditure groups. They save the jurisdiction money, by only giving supplemental funds to those candidates who need it. And they allow publicly funded candidates to pay for messages to counter those of nonparticipating, high-spending candidates (this is, unfortunately, sometimes called "leveling the playing field").

The United States Supreme Court, however, recently declared these "trigger" provisions to be unconstitutional. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S.___(2011) (hereinafter *Arizona Free Enterprise),* the Court ruled that the possibility that a publicly-financed candidate could receive supplemental funding based on the high expenditures of nonparticipating candidates and independent groups impermissibly "chilled" or deterred the spending (or "speech") of those nonparticipating wealthy candidates and independent groups. Applying strict scrutiny, the Court could find no compelling reason for Arizona's trigger provision and thus found it to be an unconstitutional infringement on the First Amendment rights of nonparticipating candidates and groups.[2]

The ruling in *Arizona Free Enterprise,* however, did not undermine the legitimacy of public financing itself. The Court stated explicitly, "We do not today call into question the wisdom of public financing as a means of funding political candidacy. That is not our business."[3] The Court's ruling, however, may undermine the vitality of many state and local public financing programs, for by removing the important "trigger" fund incentive for candidates to participate in public financing programs, they may reduce the desirability of public financing and curtail candidate participation in it.

Alternatives to "Trigger" Funds

This paper suggests five alternative reforms, or amendments to existing public financing systems, that are designed to retain public financing but avoid the constitutional obstacles described in *Arizona Free Enterprise*. These suggested changes would repeal all existing

[2] An earlier Supreme Court ruling in *Davis v. Federal Election Commission*, 554 U.S. 724 (2008), invalidated a congressional trigger fund in the Bipartisan Campaign Reform Act of 2002 (CICRA), which increased contribution limits for congressional candidates faced with high spending opponents.
[3] Some, including this author, may find in the Court's use of the word "today" an ominous ring.

"trigger" fund provisions that contravene *Arizona Free Enterprise*. but they would still give candidates incentives to participate in a jurisdiction's public financing program, either through single or increased lump-sum grants, a generous public match for small private contributions, or the promise of supplemental funding not triggered by the expenditures of any opposing candidate or group.

Many state and local governments have strong public campaign financing programs that seek to meet these goals. Every effort should be made to preserve them.

1. Increase dollar amounts of public financing grants in a single lump sum grant.

Under this option, jurisdictions would repeal existing triggers and increase the amount of public funding available to participating candidates to the total available to them under the initial and the triggered sums, or possibly more. In clean money jurisdictions, instead of funding candidates in stages, with higher amounts triggered by wealthy opposing candidates or groups, jurisdictions would give participating candidates the entire amount (the initial sum, plus the sum that otherwise would have been triggered) at once.

Single lump sum funding, even in increased amounts, might make the program more attractive to candidates, since they would receive the entire amount at once. This would eliminate the uncertainties that participating candidates might experience from not knowing whether they would receive supplemental "triggered" funds, and it would allow candidates to plan how to expend their funds over their entire campaigns.

On the other hand, this option would likely increase jurisdictions' public financing expenditures, even if candidate participation does not increase. During economic hard times, single or larger sums of public financing might easily encounter political opposition—both from ideological opponents to public financing, who would use the "cost-saving" argument to greater effect, and from voters who, feeling pinched by the recession, might resist supplying candidates with "their tax dollars." Moreover, arguments might be made that "frivolous" candidates would receive full public financing, thereby wasting public funds.

Some jurisdictions, such as Albuquerque, New Mexico, have provisions for participating candidates to return unexpended public funds, and such provisions might mitigate the "sticker shock" of single or increased overall funding amounts. On the other hand, because these provisions do not require candidates to be frugal in their spending, candidate returns of excess funds would no doubt be infrequent.[4]

2. Adopt matching funds—e.g., modeled on New York City's system.

Under this option, jurisdictions would adopt matching funds systems similar to that used in New York City, Los Angeles and other cities. In New York, the city matches small

[4] In two election cycles under Albuquerque's public financing system, only one candidate has returned excess funds to the city. See *Albuquerque: Citizens Win*, supra, at p. 16.

contributions ($175 or below)[5] raised by participating candidates from private contributors ("natural persons") who are residents of New York at a $6-to-$1 ratio.[6] The system requires participating candidates to limit their total expenditures and demonstrate a broad base of support by raising a large number of small qualifying contributions.[7]

This generous six-to-one match gives candidates a significant incentive to participate. Taxpayers in New York find it attractive, because their money is not wasted on frivolous candidates who cannot raise many small private contributions and thus do not receive much public funding. Of course, unlike clean money systems, it has the downside of requiring candidates to continue to fundraise throughout the campaign.

3. Adopt a hybrid clean money/matching funds system

Under this option, jurisdictions would adopt a combination of clean money and matching funds systems. CGS, for example, has recently published a Model Law[8] suitable for adoption by state and local jurisdictions. If adopted, it would establish a hybrid combination of "full"[9] and "partial"[10] public campaign financing. The Model Law takes the best of existing full and partial public financing programs and combines them into one system, much like the public financing system used in Connecticut and proposed in the Federal Fair Elections Act for Congress.

The Model Law requires candidates to raise a certain number of small $5 qualifying contributions—in California, for example, 750 contributions of $5 or more for Assembly candidates and 25,000 contributions of $5 or more for gubernatorial candidates. Candidates must also raise minimum total amounts to qualify for public financing. Qualifying funds may only come from individuals residents of the state. Candidates can raise contributions from corporations, labor unions and PACs, but these contributions

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[5] New York City Campaign Finance Act, Section 3-703 (2) (a). www.nyccfb.info/act-program/CFACT.htm

[6] Id., Section 3-705 (2) (a). The New York City Campaign Finance Board has said, "Both [clean money programs like Arizona's and New York City's system] seek to reduce the influence of large, access-seeking contributions. We strongly believe that these goals are best achieved when most candidates participate. If public financing programs cannot provide an adequate level of public funds to candidates whose opponents opt out, candidates will not take part. New York City's experience with bonus matching funds is instructive . . . . Additional public funds for candidates facing a high-spending non-participant have helped increase — rather than restrict — the volume of speech in City elections." http://www.nyccfb.info/press/news/press_releases/2010-12-1.pdf.

[7] New York City has also had provisions raising expenditure ceilings and increasing the matching funds ratio when participating candidates are faced with nonparticipating candidates who spend over specified amounts (e.g., half the participating candidates expenditure ceiling). These provisions are now presumptively invalid under *Arizona Free Enterprise.*

[8] See *Model Law*, supra, note 1.

[9] As discussed above, the traditional full or "clean money" system requires candidates to collect a certain number of $5 contributions in order to qualify for public funding. Once a candidate qualifies for the public funds, the candidate may not raise any more contributions and in return is given a large amount of money that entirely funds the campaign. Full public campaign financing programs encourage candidates to seek a large number of very small contributions from a wide source of donors. Candidates are therefore prohibited from raising large contributions. Many full public campaign financing systems do allow seed money contributions of up to $100 to get the candidate started.

[10] As also discussed above, a partial public financing program, also known as a matching funds program, requires candidates to raise a certain amount of funds in private contributions, for example $25,000 in $250 or less. These contributions are then matched at one to one, or even as high as six to one.

will not help qualify them for public funds. Only candidates in "competitive" elections will receive full public funding.[11]

Under the Model Law, candidates can receive public funds in two ways. First, all eligible candidates who face competitive opponents will receive a lump sum of 50% of the base amount. The base funding amount will depend on how much was spent by the winner in the last two elections for the office being sought. Second, these candidates are also eligible to receive additional matching funds (matching contributions of between $5 and $100 on a four-to-one match) up to 100% of the base amount. Thus a candidate in a competitive race can receive up to 150% of the base amount (a 50% initial grant plus matching funds up to 100%).

The Model law would be funded by a 10 percent surcharge on all criminal and civil penalties imposed throughout the state, a proposal modeled after Arizona's successful surtax program.[12] The Model Law also prohibits all candidates, whether privately or publicly funded, from raising funds in non-election years.[13]

4. Adopt a New "Trigger" to Disburse Additional Public Funds When Substantial Numbers of Voters are "Undecided" or Lack Sufficient Information to Make an Informed Choice

Under this approach, jurisdictions would adopt a new "trigger" provision that would provide candidates with additional funding, yet avoid the constitutional infirmities of the triggers invalided by the Supreme Court in *Arizona Free Enterprise* and *Davis*.[14] The following recommendation, like option (5) below, is an innovative, but as-yet untested, approach developed by CGS; nevertheless, it offers the promise of improving voter information and providing participating candidates with a significant incentive to participate in public financing programs by giving them additional funding to communicate their messages to voters.

A jurisdiction would change its trigger mechanism from one that is tripped by a high spending opponent, to one that is triggered by a demonstrable lack of candidate information upon which voters can base their choices. The jurisdiction would first specify the total amount of public funding it wishes to make available to qualifying candidates. It would then disburse grants in two stages.

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[11] Only serious candidates should receive public funds; otherwise, precious program resources would quickly become depleted. The Act defines a "non-competitive election" as one in which not more than one candidate has raised campaign funds (including payments from the Public Fund) in an amount equal to or greater than 10 percent of the allocation a candidates would be entitled to receive under the Act for that election. In other words, if a publicly funded candidate has no significantly funded opponents, then that publicly funded candidate will only receive 10% of the funding otherwise provided in a competitive race. This will prevent significantly unopposed incumbents, for example, from receiving full public funding.

[12] Arizona's public financing fund has returned over $64 million to the state's General Fund since 2003, an amount not expended by candidates in the program.

[13] This ensures that campaign funds are given for campaign purposes, not for governmental access purposes. Past CGS reports have found that incumbents raise 90% of the funds in non-election years. Challengers usually do not begin fundraising until the year of the election.

[14] Id. at note 2.

First, in a clean money system, the jurisdiction would distribute 60% of the total amount possible for a specific election to candidates upon their qualification. Then, the jurisdiction would disburse the remaining 40% of the available monies only if the result of a simple public opinion poll, conducted or authorized by the city, showed that the voters needed more election-related information to make up their minds.

The poll would be conducted in the relevant districts on the Friday four weeks prior to Election Day. It would list the candidates in each race and simply ask voters whether they have already decided for whom to vote, or whether they are "undecided." (It might further ask if further information from the candidates would help voters to make up their minds.) If the poll results indicate that 15% or more[15] of the voters queried were "undecided" AND participating candidates had expended 50% or more of their initial grants by the day of the poll, then the city would distribute the remaining 40 percent of the supplemental funding to the participating candidates in that district who meet the expenditure threshold, enabling them to further communicate their messages. Privately-funded candidates, of course, would be able to continue raising additional contributions.

The trigger mechanism suggested here is not based upon a governmental interest in "leveling the playing field." Instead, it is grounded on a powerful government interest to ensure that voters have sufficient information to make informed choices at the polls. It assumes that a significant number of undecided voters would benefit from further campaign-related information prior to Election Day, and on that basis, the jurisdiction would provide supplemental funding to qualified candidates.

This option would also be relatively easy and inexpensive to implement, since the city would only ask one question in the poll: "Have you decided who you will vote for in the [relevant district] race, or are you 'undecided'?" It would not "chill" the speech of non-participating candidates because it would not be triggered by non- participating candidate expenditures. On the other hand, if voters are "undecided" because participating candidates are faced with high-spending privately-funded candidates or independent expenditure groups, it would give participating candidates an opportunity to increase public information about their positions.

In short, while not a perfect substitute for the recent but unconstitutional triggers, this approach would allow jurisdictions to continue providing participating candidates with the incentive of supplemental funding. It would be based upon the need to ensure that voters have sufficient information to cast informed ballots. Supplemental funding would be disbursed, triggered by the lack of information in specific races.

[15] This percentage can be varied depending on local circumstances. Requiring a higher percentage of undecideds (e.g. 20%) would be more sparing of city funds. A lower percentage of respondents may be undecided, however, if a participating candidate is faced by a high-spending wealthy opponent or independent expenditure group.

5. Adopt a New "Trigger" to Disburse Additional Public Funds When Elections are "Competitive."

Under this approach, which is similar to option (4), a jurisdiction, for example a clean money system, would dispense first-stage grants of 60% of the total amount possible for an election in a particular district. The city would then disburse the remaining 40% of the available monies only if the result of a simple public opinion poll showed that the election was "competitive."

The poll should be conducted on the Friday four weeks before Election Day and would ask two or three questions at most.[16] If the poll results show that a participating candidate was either ahead by 15 or fewer percentage points, or within that margin of the leader, AND had "educated the voters" by expending 50% or more of his or her initial grant by the day of the poll, the city would disburse supplemental funding to that participating candidate because the race was "competitive," the assumption being that voters would benefit from more information prior to Election Day. Only those participating candidates who meet both criteria would receive supplemental funding. Privately-funded candidates, of course, would have the opportunity to continue to raise additional contributions.

This option responds to the fact that many jurisdictions spend significant amounts of public funding in races that are lopsided and essentially noncompetitive. This is particularly true when incumbents run against unknown challengers. Some examples from Albuquerque illustrate this point.

In 2007, only City of Albuquerque District 6 had a campaign that was arguably competitive four weeks before Election Day, yet in two other districts (District 2 and District 4) candidates received and spent their entire public financing grants. The winner in District 2 won by 44 percentage points, and the winner in District 4 prevailed by 62 percentage points.

In 2009, the race for mayor was very competitive four weeks before Election Day, but races in District 7 and District 9 were not; candidates in those races were still given full grants and those funds were spent. In District 7, the winner, facing only write-in competition, received 96% of the vote, and in District 9 the winner received 79% of the vote. If the proposed option had been adopted prior to the 2009 municipal election, it would have resulted in the following scenarios:

- The District 3 race would not have been considered competitive. Incumbent Isaac Benton used public financing to defeat a privately-financed challenger by about 19 percentage points. Benton's grant from the city was $29,400. Using the new scheme, Benton would have received a first-stage grant of $26,520, and could have been eligible, assuming he also met the expenditure threshold, to receive an additional $17,680 four weeks before Election Day in a competitive race (for a

[16] The poll contemplated by this option would ask, for example: Q: Have you heard this candidate's name (ask about four names, two planted phonies, names to be rotated)? Q: Can you tell me when the next city election is? Q: If the election were today, for whom you would vote?

total of $44,200). Because the race was not within the 15 point competition threshold, no additional funding above his initial grant from the City would have been disbursed. In fact, he returned slightly more than $1,700 in unexpended funds to the OEE Fund.

- The District 9 race also would not have been considered competitive. Incumbent Don Harris used public financing to defeat a privately-financed challenger by about 58 percentage points. His grant was $32,811. Under this proposal, while he would have been eligible to receive close to $49,200 in a competitive race in which he additionally met the expenditure threshold, his race was not competitive, and he would have received only an initial grant of $29,500, slightly less than the amount which was more than adequate to secure his victory in 2009.

- In the 2009 mayoral race, the grants varied somewhat (based on the seed money raised), but the race among the three candidates was "competitive" throughout. Thus, each candidate would have received $315,000 initially. If a participating candidate had expended $157,000 by the fourth Friday before Election Day (i.e., had not held back a significant portion of his funding but had used it to "educate" the voters), that candidate would have received supplemental public funding. Candidates would have had an incentive to participate, because there would be clear rules to assure the release of supplemental funding. The most a candidate would have been able to spend under this scenario would have been $525,000.

Assumptions that support both options (4 and (5:

Both options (4) and (5) would further a jurisdiction's public financing goals: to deter corruption or its appearance, encourage participation in the program and strengthen confidence in governmental and election processes. In addition, each option would be supported by the strong governmental interest in allowing candidates to provide voters with sufficient information to make their choices, rather than basing such funding on the calculation of an opponent's high spending, thereby avoiding a trigger mechanism that is vulnerable to constitutional challenge.

Further, because these options recognize the government's interest in creating an informed electorate, they directly further the principles set forth in Buckley that the ability of citizens to "make informed choices among the candidates for office is essential . . . ,"[17] and that "debate on public issues should be uninhibited, robust, and wide-open."[18]

CGS suggests that, whether based on a significant bloc of "undecided voters or a close "competitive" race, 15 percentage points represents a reasonable bright line to justify the further expense of taxpayer monies. Under either option, the need for additional voter information would directly link to the Buckley Court's finding that public funding of

[17] Buckley, 424 U.S. at 14.
[18] Id., citing New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

campaigns is appropriate to "enlarge public discussion and participation in the electoral process."[19]

Either approach requires the jurisdiction only to distribute an initial portion of the available public funding. The jurisdiction would award grants in two stages, the second stage being based on a demonstrated need for more money to be spent in a particular race. This would be "demonstrated" by (i) requiring that candidates expend a certain percentage of their initial grant (we suggest 50%) by the date of the poll, so that candidates only receive supplemental funding if they have sought to educate voters in the early weeks of the campaign, and (ii) conducting a simple poll in the relevant district, the question(s) always being the same, to determine if the race warrants further expenditures to give citizens additional campaign information before voting on Election Day.

The promise of a supplemental, second-tier grant would provide an important incentive to candidates to opt-in to the public financing program at the beginning of the campaign cycle. Because supplemental funding would be available only in certain races, based on objective poll results, the plan would be tailored to protect the jurisdiction's resources.

Instituting either of these two-tiered approaches to triggered supplemental funding of publicly financed candidates would require jurisdictions to:

- Determine what percentage of the total funding available to a participating candidate will be released in the first-tier grant. CGS suggests 60% of the grant potentially available be released to candidates initially.
- Define the percentage of the "undecided" voters or "competitive" elections that would trigger the release of supplemental funds. CGS recommends 15% in either option.
- Determine the day the poll would be conducted. CGS recommends the Friday of the fourth week before Election Day and suggests the poll be called the Four Week Poll.
- Determine when the supplemental grants would be disbursed. CGS recommends the Monday following the Four Week Poll.
- Determine an appropriate percentage of the grant and the date by which it must be expended in order for the publicly financed candidate to be eligible for supplemental funding based on poll results. CGS recommends that 50% of the initial grant be required to be expended by the day of the Four Week Poll.
- Embed the specific language of the perennial poll question(s), intended to measure the need for further voter information in particular races, in the jurisdiction's law. Candidates and voters alike will thus have notice of the exact questions to be asked of respondents, and the question(s) will never change, meaning the poll would be consistent and completely transparent.

[19] *Id*. at 92-93.

Conclusion

Public campaign financing programs have been enormously beneficial to a number of state and local jurisdictions. Many of these jurisdictions have a strong interest in seeing them continue and flourish. In light of the Supreme Court's rulings in *Arizona Free Enterprise* and *Davis*, jurisdictions should consider modifying their laws to incorporate some of the suggestions offered above.