New Federal Initiatives Project

Fair Elections Now Act

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Fair Elections Now Act

Congress is considering a novel way to regulate campaigns. The bill at issue, the Fair Elections Now Act[1] (FENA), combines federal campaign funds with subsidized advertising for candidates who participate in the program. Modeled, to some extent, on existing programs at the state and local level, FENA presents interesting constitutional and policy questions.

Mechanics

For those candidates who participate, FENA is a funding program that imposes strict qualifying requirements before bestowing its benefits.

To qualify, a candidate must file a statement of his intent to participate within 180 days of the primary election.[2] Only upon filing this statement may the candidate begin raising the "qualifying contributions" needed to earn FENA's benefits. Interestingly, the window for raising these contributions closes 30 days before the primary election,[3] leaving *at most* four months in which to gather the many small contributions necessary to qualify.

The bill defines "qualifying contributions" to include donations between $5 and $100 from residents of the state in which a candidate is seeking election.[4] A candidate for U.S. Senate will need 2,000 such contributions plus another 500 for each congressional district in the state.[5] At the low end, this formula requires 2,500 qualifying contributions; for California, it means 28,500 of them. The math is easier for House candidates, who must attract a flat 1,500 qualifying contributions to obtain FENA funding.[6] In addition, the qualifying contributions must reach a minimum total value that varies, depending on the size of the state and whether the candidate is running for Senate or House.[7]

For candidates who marshal the required contributions within the narrow window allowed, their prize is a base award of federal funds plus matching funds for small contributions. The base amount for House candidates is 80 percent of the average of what successful House candidates spent in the previous two election cycles.[8] For Senate seats, the amount is $750,000 plus an additional $150,000 for each congressional district in the state.[9] Moreover, the federal government will match all private "small dollar contributions" (those less than $100) at a rate of four federal dollars per dollar from donors.[10] A final benefit for participating candidates is a discount on advertising. FENA provides vouchers for broadcast advertisements in the amount of $100,000 for each House seat in the state (or $100,000 for House candidates).[11] In a separate provision, the bill specifies that the rates broadcasters may charge candidates paying with a FENA voucher cannot exceed 80 percent of the lowest charge for similar advertising time during the 45 days before a primary election or 60 days before a general election.[12]

Restrictions apply. Participating candidates may not spend money from any source other than those discussed above—qualifying contributions (i.e., in-state and between $5 and $100), small dollar contributions (i.e., $100 or less), and funds from the government.[13] They must also agree to participate in one debate before a primary election and two before a general election.[14]

If every candidate participated in the FENA system, its costs could easily stretch into the billions of dollars.[15] From where would the funding of this program come? The Senate version of the bill suggests, but does not require, that fair election funds come from a .5 percent tax on government contractors.[16] The House Bill intends to raise money from the sale of broadcast spectrum.[17]

Constitutional and Policy Issues

Among the objectives listed in both the House and Senate versions of FENA is the desire to make elected office more attainable for qualified challengers.[18] Evidence from states that have adopted broad public financing schemes calls into question whether FENA will improve challengers' chances for unseating incumbents. In Arizona and Maine, for instance, clean election laws have not systematically lowered the high rates of incumbent re-election.[19] A different outcome under FENA seems even less likely because of the need for numerous small contributions within a short window of time, a task that is arguably more difficult for any challenger who has not earned the blessing of his party or an organized interest group.[20]

By shifting emphasis toward collecting many small contributions in a short time, FENA aims to remedy what its supporters see as the "disproportionate and unfair influence" of "monied interests."[21] The U.S. Supreme Court has condemned regulations with the purpose of equalizing the opportunities for speech available on the basis of wealth.[22] The FENA process of capping qualified contributions and then matching them with a four-fold government grant puts the law's equalization purpose into practice. The only government interest that the Court has found to be sufficiently compelling to support campaign finance rules is the prevention of corruption or the appearance of corruption.[23]

FENA also attempts to target conflicts of interest. Specifically, the bill aims to improve democracy by rejecting "large campaign contributions from private interests that are directly affected by Federal legislation."[24] Supporters make an argument that large contributions per se cause at least the appearance of corruption if not an outright conflict of interest. Setting aside the speech rights of persons affected by legislation, some recent scholarship questions FENA's premise—that any link in fact exists between contributions and legislative favors.[25] Still, FENA's supporters might argue, democracy suffers when the electorate perceives a quid pro quo, whether one exists or not. However, prior efforts at campaign finance regulation have not changed voter perceptions or increased voter turnout.[26]

Beyond its effect on the amount and number of contributions, FENA treats differently contributions from in-state and out-of-state donors. It favors the former because only they count toward the "qualifying contributions" needed to gain access to FENA support.[27] This restriction arguably limits the ability of out-of-state donors to promote a federal campaign with which they agree, where the eventual winner might enact laws affecting the nation's entire population. Critics argue that relegating out-of-state contributors to second-class status undermines and contradicts the concept of a federal right to free speech and association, applied uniformly across the country. The critics cite precedent that they claim supports the same conclusion. When *Randall v. Sorrell* was before the U.S. Court of Appeals for the Second Circuit, that court held that a law restricting out-of-state contributions to 25 percent of a campaign's funds was unconstitutional.[28] As the court explained, "[T]he out-of-state contribution limit isolates one group of people (non-residents) and denies them the equivalent First Amendment rights enjoyed by others (Vermont residents)."[29]

Critics also argue that FENA's advertizing vouchers raise their own constitutional concerns in forcing broadcasters to subsidize political speech. First, the 20 percent discount FENA requires for candidate advertisements requires broadcasters to subsidize speech with which they may disagree. Second, as the National Association of Broadcasters explained in a letter to Senator Feinstein, the subsidy amounts to content-based discrimination that favors political speech to the detriment of all others. Supporters of the bill assert that its benefits, reducing corruption and the appearance of corruption in elections, and making elected office more attainable to a greater number of qualified candidates, outweigh the potential legal and constitutional concerns raised by critics.

While both the House and Senate bills are, as of the date of this posting, works in progress, should any final version of the law contain the provisions discussed above, the law could face several formidable challenges to its constitutionality.

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[1] Fair Elections Now Act, S. 752, 111th Cong. (March 31, 2009), H.R. 1826, 111th Cong. (March 31, 2009).
[2] S. 752 at § 501(4). If a state does not have a primary election, then the qualifying period begins 180 days prior to the last date on which a candidate may qualify for a position on the general election ballot. *Id.*
[3] *Id.* at § 501(3)(B).
[4] *Id.* at § 501(10).
[5] *Id.* at § 512(a)(1)(A).
[6] H.R. 1826 at §512(a)(1).
[7] For House races, the total amount must be $50,000, which implies an average donation of at least $33.33. H.R. 1826 at § 512(a)(2). In the Senate, it must equal 10 percent of the base amount to be awarded. S. 752 at § 512(a)(2)(A), *see infra* n.9 and accompanying text. For Senate candidates, the average contribution will fall between $30.53 in California and $36 in states with one House seat.
[8] H.R. 1826 at § 522(d) ("80 percent of the national average spending of the cycle by winning candidates in the last two election cycles"). The Center for Competitive Politics (CCP) estimates the base amount for House candidates in a general election to be approximately $540,000. CENTER FOR COMPETITIVE POLITICS, FAIRLY FLAWED: ANALYSIS OF THE 2009 FAIR ELECTIONS NOW ACT 2 (2009).
[9] S. 752 at § 522(d)(1)(A). In both Houses, the new Fair Elections Commission could also set higher base amounts.
[10] S. 752 at § 523(a). Matching funds cannot exceed 200 percent of the base amount. *Id.* at § 523(b).
[11] *Id.* at § 524(c).
[12] *Id.* at § 202(3).
[13] *Id.* at § 513.
[14] *Id.* at § 514.
[15] Without any matching funds, and assuming only two candidates for each House seat (i.e., no primary election and no qualifying third-party candidates), the cost for House races alone would be $556.8 million, using CCP's $540,000 figure (*see* footnote 8). If the candidates exercised even half of their permissible matching funds, the cost doubles. Throw in 33 Senate races with a median base funding of $1.65 million for each candidate ($750,000 plus 6 House seats times $150,000), and the base amount climbs by another $108.9 million (again, assuming no qualifying third-party candidates, no primary election, and no matching funds).
[16] S. 752 at § 502(b).
[17] H.R. 1826 at § 502(b)(1)(B).
[18] *Id.* at § 101(a)(5),(6), S. 752 at § 101(a)(5),(6).
[19] CENTER FOR COMPETITIVE POLITICS, *supra* note 8, at 7.
[20] *Id.* at 17-21.
[21] *Id.* at § 101(a)(3), H.R. 1826 at § 101(a)(3).
[22] Davis v. FEC, 128 S. Ct. 2759, 2773-74 (2008).
[23] *Id.* at 2773.
[24] S. 752 at § 101(a)(1), H.R. 1826 at § 101(a)(1).

[25] *See* Stephen Ansolabehere, James M. Snyder, and Michiko Ueda, *Did Firms Profit from Soft Money*, 3 ELECTION L. J. 193 (2004).
[26] CENTER FOR COMPETITIVE POLITICS, *supra* note 8, at 6.
[27] S. 752 at §§ 501(10) (limiting "qualifying contributions" to donations from in-state contributors), 512(a)(1) (establishing minimum number of qualifying contributions for FENA participation).
[28] Landell v. Sorrell, 382 F.3d 91, 146-47 (2d Cir. 2004), *rev'd on another point of law sub nom.* Randall v. Sorrell, 548 U.S. 320 (2006).
[29] *Id.* at 146.

Related Links:

Fair Elections Now Act – Federalist Society Podcast with Craig Holman, William Maurer, Allison R. Hayward: http://www.fed-soc.org/publications/pubID.1663/pub_detail.asp

Center for Competitive Politics—Fairly Flawed: Analysis of the 2009 Fair Elections Now Act: http://www.campaignfreedom.org/research/detail/fairly-flawed-analysis-of-the-2009-fair-elections-now-act

Public Campaign Action Fund—2009 Fair Elections Now Act Bill Summary: http://www.publicampaign.org/node/38166