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DAN BILLINGS: Court rulings could mean big changes for Clean Elections Act

While the 2010 campaigns are just heating up, recent court decisions are likely to have a dramatic impact on how future Maine campaigns are financed.

In 1996, Maine became the first state to adopt a public financing system, when the Maine Clean Elections Act passed at referendum with 56 percent of the vote.

Advocates of the system sold it as a way to reduce the influence of private contributions on Maine government, to reduce the amount of money spent on campaigns, and to level the financial playing field for candidates. The Clean Elections system, which went into effect beginning with the 2000 election, provides limited public financing to qualifying candidates who agree to forgo private campaign contributions.

A key part of the Clean Elections system is matching funds. Candidates can receive up to twice their initial funding if they face a privately financed candidate who spends more than the Clean Elections funding or if independent groups spend money on the race.

Without matching funds, candidates who are limited to a relatively small amount of public funds could be swamped by big money spent by a privately financed opponent or an outside group. Matching funds allow candidates to respond to late campaign spending and have been critical in Clean Elections candidates running winning campaigns.

Maine's system is popular among candidates, and opinion polls show strong public support for the system.

Only a third of legislative candidates participated in the system in its first year in 2000, but about 80 percent of them ran as Clean Elections candidates during the last three elections, and 85 percent of those elected to the current Legislature were Clean Elections candidates.

Other states have followed Maine's lead. Both Arizona and Connecticut have public financing systems that include matching funds. Constitutional challenges to their systems, however, raise questions about the future of Maine's system.

Earlier this week, the Second Circuit Court of Appeals upheld a federal district court decision that Connecticut's matching funds system violates the First Amendment.

The court relied on the Supreme Court's decision in *Davis v. FEC* in finding that matching funds impose a penalty on privately funded candidates and others who spend private funds on races involving publicly funded candidates. The basic rationale is that those who spend private funds opposing a publicly funded candidate are penalized because their political speech results in public funds being provided to candidate they oppose.

A similar challenge to Arizona's law appears on its way to the United States Supreme Court.

Last month, the Supreme Court took the unusual step of reinstating an injunction issued by a lower court, while the Court decides if it will consider the Arizona case during its next term.

The Supreme Court's action means that Arizona can't release matching funds this year. Many observers, including me, expect the Supreme Court to accept the Arizona case, and, given its recent track record of striking down campaign finance laws on First Amendment grounds, will find that matching funds violate the First Amendment.

If matching funds are struck down, states such as Maine will still be able to provide public funding to candidates, but one of the major incentives to participate in the Clean Elections system will be gone. Without matching funds, candidates in competitive races may be reluctant to participate in a system that leaves them vulnerable to being significantly outspent by a privately funded opponent or independent groups.

This may result in public financing being used primarily by candidates in safe seats or those with little chance of winning. If that happens, the whole system will be at risk.

With matching funds unlikely to survive a constitutional challenge, the Legislature will be forced to attempt to reform the Clean Elections system. Advocates already are considering alternatives, and individual legislators and the Ethics Commission likely will put forward reform proposals.

Reaching consensus about changes, however, will be difficult because, when you change the rules of any contest, the impact on the game is hard to predict. Legislators will consider not only how the changes would affect the system as a whole, but also how any changes could affect their next campaign.

The uncertainty will give Clean Elections opponents a forum to raise questions about the value of the system — questions that may gain traction in a legislature facing another budget crisis.

While the outcome of the forthcoming debate is impossible to predict, one thing is clear: Big changes are in store for Maine's Clean Elections system.

Dan Billings is a Republican activist and commentator. He practices law in Waterville. He can be reached at dib9@aol.com.



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