Campaign Finance Law

Under Siege in Minnesota

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I. Historical Background

A. Minnesota a Leader

1. Minnesota has long been a leader in campaign finance reform. It had campaign reporting requirements and spending limits for decades before Watergate. *See* Laws 1912, Ex. Sess. ch. 3, §§ 5, 15-21, 25; Laws 1939, ch. 345, pt. 10, ch. 1, §§ 6, 9, 18, 20, 26.

2. **Ethics in Government Act of 1974.** In 1974, in response to Watergate, it enacted an ethics in government act, including several campaign finance reforms. *See* Laws 1974, ch. 470.

a. New contribution limits. § 27 (codified as amended at Minn. Stat. § 10A.27).

b. New campaign expenditure limits. § 25 (codified as amended at Minn. Stat. § 10A.25).

c. Public financing for candidates for statewide office and for legislators, through an income tax checkoff. § 31 (codified as amended at Minn. Stat. § 10A.31).

d. A tax credit of $12.50 per person for contributions to candidates for state office, or $5 for contributions to a political party. § 35 (codified at Minn. Stat. § 290.06, subd. 11, repealed 1987).

3. The tax credit for political contributions was repealed in 1987, in an effort to simplify the income tax form following the enactment of the Internal Revenue Code of 1986. But it was reinstated in 1990, with the dollar amounts increased to $50 per person for contributions either to a state candidate or to a political party and a separate form required. Laws 1990, ch. 608, art. 3, § 28 (codified as amended at Minn. Stat. § 290.06, subd. 23). In 1991, the tax credit was made a refund, without regard to the amount of taxes owed. Laws 1991, ch. 291, art. 6, § 24.

4. In 1990, Minnesota enacted public financing for the congressional campaigns of candidates who agreed to abide by state spending limits. Laws 1990, ch. 608, art. 4 (codified at Minn. Stat. §§ 10A.40-.51, repealed 1999).

B. Courts Frustrated Efforts at Reform.

Minnesota's efforts at reform have been frustrated by federal court decisions striking down parts of its new laws.

1. ***Bang v. Chase***

a. In 1977, following the U.S. Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), a federal district court in Minnesota struck down many of the state's limits. *Bang v. Chase*, 442 F. Supp. 758 (D. Minn. 1977), *aff'd sub nom. Bang v. Noreen*, 436 U.S. 941 (1978) (mem.).

(1) The overall limit on candidate expenditures.

(2) The limit on expenditures from the candidate's own assets.

(3) Limits on independent expenditures.

b. The court in *Bang* also struck down the state's system of public financing, saying that the formula for allocating money raised from the

income tax checkoff discriminated against certain candidates based on their political party, since the allocation was based on party strength statewide rather than party strength in the candidate's district.

2. ***Weber v. Heaney***. Minnesota's attempt to provide state financing for congressional candidates who agreed to state spending limits was soon declared preempted by federal law in *Weber v. Heany*, 793 F. Supp. 1438 (D. Minn. 1992).

C. **The Legislature's Response.** The Minnesota Legislature has responded by amending its new laws to conform to federal court requirements. Laws 1978, ch. 463, repaired some of the damage done by the federal court in *Bang v. Chase*.

1. It restored the overall limits on a candidate's expenditures by applying them only to candidates who accepted them as a condition of receiving public financing. § 74 (codified as amended at Minn. Stat. § 10A.25).

2. It changed the formula for distributing the checkoff money so that the amount allocated to the candidates of each party in each district was in proportion to the amount checked off by taxpayers in the counties in that district, rather than in proportion to the amount checked off by taxpayers statewide. § 91 (codified as amended at Minn. Stat. § 10A.31, subd. 5).

II. Recent Efforts at Reform

A. **Campaign Finance Reform Act of 1993.** Laws 1993, ch. 318, art. 2, made a number of significant changes to Minnesota's campaign finance laws.

1. **Contribution limits**

a. It lowered existing contribution limits for both statewide candidates and legislators. § 26 (codified as amended at Minn. Stat. § 10A.27, subd. 1).

b. It prohibited a candidate who accepts a public subsidy from contributing to the candidate's own campaign more than ten times the candidate's election year contribution limit. § 29 (codified as amended at Minn. Stat. § 10A.27, subd. 10).

c. It prohibited a principal campaign committee from accepting a contribution from another principal campaign committee. § 28 (codified as amended at Minn. Stat. § 10A.27, subd. 9(a)).

d. It imposed new contribution limits on PACs, lobbyists, and large givers, limiting the total a candidate may receive from these sources to 20 percent of the spending limit for that office. § 30 (codified as amended at Minn. Stat. § 10A.27, subd. 11).

e. It imposed a limit of $100 on contributions to a political committee. § 31 (codified at Minn. Stat. § 10A.27, subd. 12, repealed 1999).

f. It counted contributions that were bundled from several contributors as contributions also from the person delivering the bundle, subjecting the bundled contributions to the limit applicable to a single contribution. § 26 (codified as amended at Minn. Stat. § 10A.27, subd. 1).

2. **Transfers**

   a. It prohibited a principal campaign committee from transferring any of its assets to any other candidate, whether for state, federal, or local office. § 28 (codified as amended at Minn. Stat. § 10A.27, subd. 9).

   b. It likewise prohibited a principal campaign committee from accepting a transfer from any other candidate. *Id.*

   c. One exception was provided. When a candidate for state office dissolves the principal campaign committee, the committee may transfer its assets to another state principal campaign committee, subject to contribution limits. *Id.* (In 2002, the Legislature raised the contribution limit on the transfer of assets from a dissolving principal campaign committee to ten times the normal limit and eliminated the limit for a candidate who dissolves a legislative campaign committee and transfers its assets to another committee of the same candidate. *See* Laws 2002, ch. 363, §27 (codified as amended at Minn. Stat. § 10A.27, subd. 2).)

3. **Caucus fundraisers**

   It prohibited the political party caucuses in the Legislature from holding fundraisers while the Legislature was in session. § 6 (codified as amended at Minn. Stat. § 10A.273).

4. **Contributions by corporations**

   It expanded the prohibition on contributions by business corporations to political campaigns to cover nonprofit business corporations, such as health maintenance organizations. § 49 (codified as amended at Minn. Stat. § 211B.15).

5. **"Friends of" Committees**

   a. The 1974 law required each candidate to designate a single "principal campaign committee" to record all contributions to and expenditures by the candidate. Laws 1974, ch. 470, § 19 (codified as amended at Minn. Stat. § 10A.105).

   b. Over the years, however, many of the most powerful officeholders had created additional committees, frequently called "Friends of" the officeholder. These committees received and spent additional amounts on behalf of the officeholder outside the spending limits applicable to the officeholder.

   c. The 1993 reform act prohibited a candidate from authorizing any other committee with the candidate's name or title or otherwise operating under the direct or indirect control of the candidate. § 14 (codified as amended at Minn. Stat. § 10A.105).

6. **Expenditure limits**

   a. It increased the spending limit for first-time candidates by ten percent. § 20 (codified as amended at Minn. Stat. § 10A.25, subd. 2(d)).

   b. If a candidate agreed to accept a spending limit, but the candidate's major party opponent did not, it gave the opponent's general account

public subsidy to the candidate who had accepted the spending limit. § 22 (codified at Minn. Stat. § 10A.25, subd. 10(b)(iii), repealed 1996).

7. Independent expenditures

a. It provided that an expenditure by a political party unit in a race where the political party has a candidate on the ballot is not an independent expenditure. § 2 (codified as amended at Minn. Stat. § 10A.01, subd. 18).

b. In order to enable candidates to respond to attack ads paid for with independent expenditures against them, it required those responsible to report their independent expenditures (in excess of $100) within 24 hours after becoming obligated to make them. §17 (codified as amended at Minn. Stat. § 10A.20, subd. 6b).

c. It increased a candidate's expenditure limit by the amount of any independent expenditures made against the candidate. § 25 (codified at Minn. Stat. § 10A.25, subd. 13, repealed 1999).

d. It increased the candidate's public subsidy by one-half the amount of the independent expenditures made against the candidate. *Id.*

B. Public Financing

1. A separate law enacted in 1993 provided a standing appropriation of $1.5 million for each general election from the general fund, to be distributed among all candidates in the general election who received at least five percent of the vote statewide for candidates for constitutional office or ten percent of the vote in a legislative district for candidates for the Legislature. Laws 1993, 1st Sp. Sess. ch. 3, § 3 (codified as amended at Minn. Stat. § 10A.31, subd. 4(b)).

2. That law also limited the distribution of money from the general account so that it could not be used to increase the total amount a candidate received from both the party account and the general account to more than 50 percent of the candidate's spending limit. Laws 1993, 1st Sp. Sess. ch. 3, § 4 (codified as amended at Minn. Stat. § 10A.31, subd. 7).

III. Minnesota's Basic System Upheld

The basic features of Minnesota's campaign finance system have been upheld by the courts.

A. Contribution Limits

1. Year-Based Contribution Limits

a. Contribution limits for federal candidates were upheld in *Buckley v. Valeo*, 424 U.S. 1, 20-38 (1976) (*per curiam*).

b. Contribution limits for state candidates generally were upheld in *Nixon v. Shrink Missouri Government PAC*, No. 98-963, 528 U.S. 377 (2000).

c. The contribution limits for state candidates under Minn. Stat. § 10A.27 were upheld in *Minnesota Citizens Concerned for Life v. Kelley*, 291 F. Supp.2d 1052, 1061-62 (D. Minn. 2003).

2. Transfers Between Candidates. The ban on transfers between candidates in Minn. Stat. § 10A.27, subd. 9, was likewise upheld in *Minnesota Citizens*

Concerned for Life v. Kelley, 291 F. Supp.2d at 1059-61, relying on *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 456, 456 n.18 (2001).

3. **Limit on Contributions from Political Committees.** The aggregate limit on contributions from political committees, lobbyists, and large contributors to no more than 20 percent of a candidate's spending limit in Minn. Stat. § 10A.27, subd. 11, was also upheld in *Minnesota Citizens Concerned for Life v. Kelley*, 291 F. Supp.2d at 1063-64.

B. Spending Limits

1. **Spending Limits by Agreement**. The system of providing public subsidies to candidates who voluntarily agree to spending limits, and imposing penalties on candidates who violate the agreement they have signed, was upheld in *Rosenstiel v. Holahan*, No. 3-94-1008, slip op. at 7-10, relying on *Republican Nat'l Comm. v. FEC*, 487 F. Supp. 280, 283-86 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980), and *Vote Choice Inc. v. DiStefano*, 4 F.3d 26 (1st Cir. 1993).

2. **Waiving Limit if Opponent Raises or Spends Above a Threshold**

   a. As explained in section IV, E, below, in response to the district court's decision in *Rosenstiel v. Holahan*, the Legislature amended Minn. Stat. § 10A.25, subd. 10, to eliminate the feature whereby a candidate whose opponent failed to sign a spending limit agreement was given the opponent's public subsidy. *See* Laws 1996, ch. 459, § 2.

   b. The same amendment changed the triggering event from the opponent's failure to sign a spending limit agreement to the opponent's having raised or spent more than a certain threshold amount before the state primary or general election.

   c. As amended, the waiver of the participating candidate's spending limit was upheld. *Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1549-53 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (May 19, 1997) (No. 96-1454).

C. Reporting Requirements

1. **Registration and Reporting by Political Committees**. The requirement of Minn. Stat. § 10A.14, that political committees register with the Campaign Finance and Public Disclosure Board, and the requirement of Minn. Stat. § 10A.20, that political committees report their contributions and expenditures to the board, have been upheld by the Minnesota Supreme Court, even as against Indians residing on the Red Lake Reservation. *State by Ethical Practices Board v. Red Lake DFL Comm.*, 303 N.W.2d 54 (Minn. 1981).

2. **Registration and Reporting by Political Funds**. The requirement of Minn. Stat. § 10A.14, that political funds register with the Campaign Finance and Public Disclosure Board, and the requirement of Minn. Stat. § 10A.20, that political funds report their contributions and expenditures to the board, have been upheld by the federal courts. *Ethical Practices Board v. National Rifle*

Ass'n of America, 761 F.2d 509 (8th Cir. 1985) (relying on *Buckley v. Valeo*, 424 U.S. 1, 60-85 (1976)).

3. **Reporting by Unregistered Associations**. The requirement of Minn. Stat. § 10A.27, subd. 13 (formerly numbered Minn. Stat. § 10A.22, subd. 7), that a political committee not accept a contribution of more than $100 from an association not registered under chapter 10A unless it is accompanied by a written statement that meets the disclosure and reporting requirements of Minn. Stat. § 10A.20, has been upheld by the Minnesota Court of Appeals, even as against an Indian tribe. *Shakopee Mdewakanton Sioux (Dakota) Community v. Campaign Finance and Public Disclosure Bd.*, No. C3-98-1727, 586 N.W.2d 406 (Minn. App. 1998).

4. **Disclaimer for Independent Expenditures**. The requirement of Minn. Stat. § 10A.17, subd. 5, that those who make independent expenditures on behalf of a candidate disclose the fact that the expenditures were not authorized by the candidate, was upheld by a three-judge federal court in *Bang v. Chase*, 442 F. Supp. 758, 769-70 (D. Minn. 1977), *aff'd sub nom. Bang v. Noreen*, 436 U.S. 941 (1978) (mem.).

D. Public Subsidies

1. **Income Tax Checkoff.**

   a. An income tax checkoff for presidential candidates was upheld in *Buckley v. Valeo*, 424 U.S. 1, 86-108 (1976).

   b. The income tax checkoff for state candidates created by Laws 1974, ch. 470, § 31 (codified as amended at Minn. Stat. § 10A.31), was upheld in *Bang v. Chase*, 442 F. Supp. 758, 763-68 (D. Minn. 1977), *aff'd sub nom. Bang v. Noreen*, 436 U.S. 941 (1978) (mem.).

2. **Political Contribution Refund.** The political contribution refund program in Minn. Stat. § 290.06, subd. 23, was upheld in *Rosenstiel v. Holahan*, No. 3-94-1008, slip op. at 17-21, *aff'd sub nom. Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1554-57.

IV. Certain Provisions Struck Down

Notwithstanding that the basic features of Minnesota's campaign finance system have been upheld, several provisions of the Campaign Finance Reform Act of 1993 have been struck down by the federal courts.

A. $100 Limit on Contributions to PACs. The $100 limit on contributions to PACs, Laws 1993, ch. 318, art. 2, § 31 (codified at Minn. Stat. § 10A.27, subd. 12 (repealed 1999)), was the first to fall, only six months after it was enacted.

1. ***Minnesotans for Term Limits v. Hayes***

   a. Minnesotans for Term Limits, a group formed to advocate for the adoption of term limits, challenged the limit.

   b. They registered both as a political committee and as a lobbyist principal, but said they did not plan to make contributions to candidates.

c. They planned first to lobby candidates for the Legislature and then the Legislature to pass a law putting term limits on the ballot as a constitutional amendment. They then planned to conduct a public campaign supporting the adoption of the ballot question.

d. They showed that they were heavily dependent on large contributions to support their effort, and that none of the money received would be used to make contributions to candidates, so that the danger of *quid pro quo* corruption did not apply to them.

e. The court preliminarily enjoined the Ethical Practices Board from enforcing the $100 limit as applied to Minnesotans for Term Limits, pending a trial on the merits. *Minnesotans for Term Limits v. Hayes*, Civ. No. 4-93-766 (D. Minn. Nov. 26, 1993) (Murphy, J.). The court based its decision on *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), which had struck down a $250 limit on contributions to organizations formed to support or oppose ballot measures.

2. ***Republican Victory Club v. Hayes***

a. The Republican Victory Club, a group formed to raise money for Republican caucuses and candidates, also challenged the limit.

b. The court denied the Republican Victory Club's motion for a preliminary injunction, relying on *California Med. Ass'n v. Federal Election Commission*, 453 U.S. 182 (1981), which had upheld a limit on contributions to a multicandidate PAC. *Republican Victory Club v. Hayes*, Civ. No. 4-93-805 (D. Minn. Nov. 26, 1993) (Murphy, J.).

3. ***Day v. Hayes***

a. Scott Day, treasurer of the political fund of the Minnesota Education Association, also challenged the $100 limit. His suit was consolidated with one brought by Minnesota Citizens Concerned for Life.

b. In January 1994, the court denied a motion for a preliminary injunction in these two cases, using the same reasoning as had Judge Murphy in *Republican Victory Club*.

c. After a trial on the merits, however, the court found the $100 limit was not narrowly tailored to satisfy the government's compelling interest in avoiding the potential for corruption of the political process and the appearance of such corruption, and struck it down. *Day v. Hayes*, 863 F. Supp. 940 (D. Minn. 1994) (Magnuson, J.).

4. ***Day v. Holahan***

a. On appeal, the new chair of Ethical Practices Board, John Holahan, was substituted for former chair, Vanne Owens Hayes, as the defendant.

b. The 8th Circuit Court of Appeals struck down the $100 limit as applied to all three organizations (*MEA, MCCL and Republican Victory Club*). *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995); *Longley v. Holahan*, 34 F.3d 1366 (8th Cir. 1994).

c. It found the $100 limit was not narrowly tailored—it simply was too low.

(1) It was far lower than the $1,000 limit upheld in *Buckley* in 1976, especially considering that a $100 contribution in 1976 would be worth only $40.60 in 1994.

(2) Two-thirds to three-fourths of MCCL's contributions in the most recent election cycle exceeded the $100 limit, so the limit was a significant impediment to MCCL's ability to raise money.

B. Contributions by Nonprofit Corporations Not Conducting a Business

1. Since the Progressive era, Minnesota has been among those states prohibiting business corporations from contributing to political campaigns. *See* Laws 1907, ch. 42, § 1 (insurance companies) (codified as amended at Minn. Stat. § 72A.12, subd. 5); Laws 1912, Ex. Sess. ch. 3, §§ 26-28 and Laws 1939, ch. 345, pt. 10, ch. 1, §§ 27-29 (business corporations) (codified as amended at Minn. Stat. § 211B.15).

2. State prohibitions on political contributions by business corporations have been upheld by the U.S. Supreme Court. *See Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

3. The Minnesota Supreme Court has assumed that they are valid. *See Minnesota Ass'n of Commerce & Industry v. Foley*, 316 N.W.2d 524 (1982) (construing Minn. Stat. § 211B.15 as applying to business corporations).

4. In 1993, the Legislature was concerned that some corporations, organized as nonprofits, were actually engaged in significant business activity.

a. Health insurance plans and health maintenance organizations were multimillion dollar businesses.

b. These "nonprofits" were very active in contributing to political campaigns and lobbying the Legislature.

5. The Campaign Finance Reform Act of 1993, Laws 1993, ch. 318, art. 2, § 49 (codified as amended at Minn. Stat. § 211B.15), extended the prohibition on corporate contributions to political campaigns to nonprofit corporations, except those that met the test laid down by the Supreme Court in *FEC v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986).

a. They could not engage in business activities.

b. They had no shareholders or other persons affiliated so as to have a claim on their assets or earnings.

c. They were not established by a business corporation or a labor union and had a policy not to accept significant contributions from those entities.

6. Minnesota Citizens Concerned for Life ("MCCL") challenged the new law on the ground that it had two characteristics that brought it wrongly within the restrictions.

a. It engaged in minor business activities that generated minimal income — renting its mailing list and selling ads in its newsletter.

b. It did not have a policy not to accept significant contributions from business corporations or labor unions and did accept some contributions, though they were not in significant amounts.

7. The district court rejected MCCL's challenge, *Day v. Hayes*, 863 F. Supp. 940 (D. Minn. 1994), but the 8th Circuit reversed. *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 115 S.Ct. 936 (1995).

a. The court of appeals found that the amount of business income and corporate contributions MCCL had received in the past did not justify treating it as a business corporation rather than as a voluntary association.

b. It found the law unconstitutional as applied to MCCL under the current facts.

c. The court invited the State to reconsider applying the law to MCCL if the amount of its business income or corporate contributions were to increase in the future.

8. Following the decision, the Legislature amended the law to apply, not to every nonprofit corporation that engaged in business activities, but only to those "organized or operating for the principal purpose of conducting a business." *See* Laws 1996, ch. 459, § 3 (codified as amended at Minn. Stat. § 211B.15, subd. 15).

9. The U.S. Supreme Court has since held, in *Federal Election Comm'n v. Beaumont*, No. 02-403, 539 U.S. ____ (2003), that even nonprofit advocacy corporations like MCCL may be prohibited from making contributions to candidates, though they remain free to make independent expenditures on a candidate's behalf as permitted by *Federal Election Comm'n v. Massachusetts Citizens For Life*, 479 U.S. 238 (1986).

C. Independent Expenditures by Political Parties

1. The Campaign Finance Reform Act of 1993 had tried to close a loophole in the definition of "independent expenditures" by saying that "An expenditure by a political party . . . in a race where the political party has a candidate on the ballot is not an independent expenditure." *See* Laws 1993, ch. 318, art. 2, § 2 (codified as amended at Minn. Stat. § 10A.01, subd. 18).

2. The Campaign Finance and Public Disclosure Board interpreted the phrase "on the ballot" to mean the general election ballot so that the limitation did not begin to apply until after the party had nominated its candidate at the state primary. Adv. Op. 299 (Aug. 5, 1998).

3. The Republican Party of Minnesota challenged the law on the ground that it had "a chilling effect on their protected First Amendment right to engage in political speech in the form of independent expenditures." *Republican Party of Minnesota v. Pauly*, 63 F. Supp.2d 1008, 1012 (D. Minn. 1999).

4. The federal district court, applying the requirement set forth in *Colorado Republican Fed. Campaign Comm. v Federal Election Comm'n*, 518 U.S. 604 (1996), that there must be proof of "actual coordination" between a political

party and its candidate before expenditures by the party may be attributed to the candidate, found that the legislative record was "void of any committee findings, legislative debate transcripts, legislative findings, or other empirical evidence to support such a legislative determination" that a party and its nominee work together. 63 F. Supp.2d at 1017.

5. The court also found that the State had failed to introduce evidence at trial that there had been "actual coordination" between the Republican party and its candidate on how money raised by the party would be spent to benefit the candidate. 63 F. Supp.2d at 1016-17.

6. There being neither an adequate legislative determination nor adequate judicial proof of actual party coordination with its candidate following the state primary, the law was held unconstitutional in violation of the First Amendment. 63 F. Supp.2d at 1019.

D. Responding to Independent Expenditures

1. Scott Day and Minnesota Citizens Concerned for Life also challenged the new law's treatment of independent expenditures, requiring reports and allowing a candidate against whom independent expenditures were made an increased spending limit to combat them, along with an increased public subsidy. *See* Laws 1993, ch. 318, art. 2, §§ 17, 25 (codified at Minn. Stat. §§ 10A.20, subd. 6b; 10A.25, subd. 13 (repealed 1999)).

2. The district court found that the increase in spending limit and public subsidy to combat independent expenditures did not burden the plaintiffs' rights of free speech. *Day v. Hayes*, 863 F. Supp. 940 (D. Minn. 1994).

a. They remained free to speak as much as they wished.

b. The government has no obligation to subsidize various types of expression equally, as long as the subsidy scheme is content-neutral.

c. Because the independent expenditure provisions facilitate more speech in some instances, they may actually advance core values underlying the First Amendment.

3. The court of appeals reversed. *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995).

a. It found that the law had a chilling effect on the political speech of the person or group making the independent expenditure.

(1) The expenditure would permit the opponent to spend more.

(2) The expenditure would give the opponent half the money to be spent.

b. It found the chilling effect was based on the content of the candidate's speech, i.e. speech supporting the candidate or opposing the candidate's opponent.

c. It found the state's professed interest in encouraging candidates to voluntarily accept limits on their spending was not legitimate.

(1) Acceptance of spending limits was already approaching 100 percent, even without the new treatment of independent expenditures.

(2) The new treatment of independent expenditures was so likely to discourage them that candidates were unlikely to get any increase in public subsidy as a result of independent expenditures.

d. It found the requirement to report independent expenditures was not severable from the new treatment of them and thus unconstitutional as well.

E. Public Subsidy When Opponent Does Not Agree to Spending Limits

1. In the early years of voluntary spending limits coupled with public financing, one reason some candidates had given for not agreeing to spending limits was the fear that their opponent would not agree to the limits and be free to outspend them.

2. To remedy that weakness in the law, the 1988 Legislature provided that, if a candidate agreed to spending limits as a condition for receiving a public subsidy, but the candidate's major party opponent did not, the first candidate could keep the public subsidy but would not be bound by the spending limit. Laws 1988, ch. 707, § 2 (codified as amended at Minn. Stat. § 10A.25, subd. 10).

3. As a result of that and other changes over the years, by 1992, 95 percent of all candidates were agreeing to spending limits.

4. To close the final gap, the Legislature in 1993 went a step further. It provided that, not only would the candidate receive the public subsidy and not be bound by the spending limit, the candidate would be given the opponent's share of the general account public subsidy as well. Laws 1993, ch. 318, art. 2, § 22(b)(iii) (codified as amended at Minn. Stat. § 10A.25, subd. 10(b)(iii) (repealed 1996)).

5. In 1995, the federal district court found that the Legislature had gone too far and struck down the added incentive. *Rosenstiel v. Holahan*, No. 3-94-1008, slip op. at 11-16, 22 (D. Minn. Mar. 21, 1995) (Kyle, J.), *aff'd sub nom. Rosenstiel v. Rodriquez*., 101 F.3d 1544 (8th Cir. 1996), *cert. denied*, 520 U.S. 1229 (May 19, 1997) (No. 96-1454).

a. The court noted that, with participation approaching 100 percent, the added incentive was not "essential" to the program. Slip op. at 14.

b. The court also noted that, following enactment, participation in the program had actually declined from 95 percent in 1992 to 92 percent in 1994. Slip op. at 16.

6. In 1996, the Legislature repealed the offending provision. Laws 1996, ch. 459, § 2.

7. The court's skepticism appears to have been justified. In the 1996 election, with the added incentive struck down, participation increased to over 99 percent.