University of Florida Journal of Law & Public Policy

Volume 19 | Issue 2 Article 1

2008

Choices and Voices in the 2008 Election: History Is Upon Us

Clifford A. Jones

FOREWORD

CHOICES AND VOICES IN THE 2008 ELECTION: HISTORY IS UPON US

Clifford A. Jones

As this issue appears, the 2008 general election is nearly upon us, and it has already seen landmarks which can only be described as historic. It surely is already the longest presidential election campaign in history, the most expensive presidential primary election campaign in history; it featured the most presidential primary candidate debates in history, and it will set new presidential campaign fundraising and spending records by its conclusion in November; assuming, it does not spill over into December like the 2000 contest. Oh, and by the way—it will see the first major party Black U.S. presidential nominee in history in Barack Obama and the first female Republican nominee for Vice-President, Sarah Palin. It has already seen the first serious female presidential major party candidate in Hillary Rodham Clinton go down to the wire; she suffered a close loss to Barack Obama who received the nomination of the Democratic Party. From a political perspective, major new voices have attained unprecedented prominence in presidential politics in the form of Obama, Clinton, Palin, Richardson, and of course pundit/comedian Stephen Colbert!

From an election and campaign finance law perspective, the development of historic landmarks is incomplete. What can be said is that for the first time in a general election, a major party presidential candidate (Obama) has opted out of the public funding system after finding that its strictures were not worth the paltry $84.1 million dollars available from the presidential campaign fund for the major party candidates to spend. Obama also set new records in fundraising. By using the Internet, he raised $295.5 million from January 1, 2007 through May 31, 2008, more than all Democratic candidates combined in 2000 or 2004, and more than George W. Bush in 2004. Of course, Obama had already previously made campaign finance history by being one of the first candidates to take advantage of the "Millionaire's Amendment" in his 2004 Senate campaign which allowed him to accept larger contributions than the Federal Election Campaign Act normally

allowed. Ironically, the Supreme Court found the Millionaire's Amendment to be unconstitutional in the last week of the 2007 term.[1]

Campaign finance history was made in 2002 with the passage of the Bipartisan Campaign Reform Act (BCRA), better known as "McCain-Feingold" after its Senate sponsors. With the announced intent to take "big money" out of elections, specifically, to take large "soft-money" contributions out of elections, the legislation saw spending by "527" and other "independent" groups surge to new highs in the 2004 election. It is yet to be seen whether such nonprofit and tax exempt groups will continue to spend at such levels in 2008.

The BCRA also tried to shut down corporate "issue advocacy." The BCRA banned corporate advertisements that mentioned a federal candidate within certain proximity to federal elections even in express advocacy of the defeat or election of the candidate. Although *McConnell v. FEC*[2] upheld this prohibition on corporate or union "electioneering" against a facial challenge, in 2007, the Roberts Court struck down the law as applied to nonprofit corporate "grassroots lobbying" advertising.[3] The 2007 decision may open the door for the Supreme Court to decide that direct corporate political advertising (distinct from advertising through a political action committee) is lawful.

This issue begins with Florida Attorney General Bill McCollum's speech titled, *The Freedom of Speech*, which concerns freedom of political speech without directly addressing political campaign speech. He discusses the controversy over the showing of the film *Obsession* by student groups on the University of Florida campus and the ill-advised and unconstitutional demand by an administrator that the groups apologize to unspecified offended people on campus for their factual observation that "Radical Islam Wants You Dead."

The articles in this issue address both political and legal perspectives on the 2008 election. Some may believe that Barack Obama's success in securing the Democratic nomination for President puts a more complete lock on the votes of Blacks and African American voters for the Democratic Party. Professor Cleveland Ferguson's article, *Of Republicrats and DemPublicans: Can African American Voting Patterns at the Local Level Translate Into Broader Support for National Republican Candidates?* questions whether this is necessarily the case. Professor Ferguson suggests that some politicians at state and local levels, such as Republican Florida Governor Charlie Crist, regardless of party, have shown a willingness to represent Black and African

1. Davis v. FEC, No. 07-320 (U.S. June 26, 2008).
2. 540 U.S. 93 (2003).
3. FEC v. Wis. Right To Life, Inc. (*WRTL II*), 127 S. Ct. 2652 (2007).

American concerns, while the Democratic Party has not necessarily delivered on its promises. He explores the possibility that Black and African American voters might have more success in erasing the remnants of past discrimination by supporting candidates who demonstrate commitment to their issues regardless of party affilitations.

As to somewhat more legal analyses, *The Fall of the Federal Election Campaign Act of 1971: A Public Choice Explanation* offers a unique speculation. In his article, Jon Simon Stefanuca tries to draw an analogy using public choice theory between a cartel of oil producers who fail to maintain high price stability due to inherent incentives to cheat, and the failure of the Federal Election Campaign Act to control campaign spending by members of Congress who he dubs the "FECA cartel." Stefanuca suggests that incumbent Congressmen had an analogous incentive to "cheat" by spending more than the spending limits allowed, and that this can be compared to oil cartel members' incentive to cheat by overproduction.[4]

The issue of corporate expenditures in federal elections is considered in different aspects in two articles. In her article, *Exempt Organizations in the 2008 Election: Will Wisconsin Right to Life Bring Changes?*, Professor Frances R. Hill examines the potential effects of the Supreme Court's above-mentioned 2007 decision in *WRTL II* on the electioneering activities of tax exempt groups such as "527," "501(c)(4)," and "501(c)(3)." She expresses concern about the impact of the Supreme Court's approach to corporate political speech; in particular, its impact on associational rights of members who support the policy aims of such groups without necessarily agreeing with their political advertising.

My own article, *The Stephen Colbert Problem: The Media Exemption for Corporate Political Advocacy and the "Hail to the Cheese Stephen Colbert Nacho Cheese Doritos® 2008 Presidential Campaign Coverage"* takes a serious look at the legality and normative issues involved in the Peabody-winning comedic pundit's brief faux campaign for the Presidency from the standpoint of whether it qualified for the media exemption for corporate political advocacy. I suggest that the campaign was perfectly legal, quite hilarious (at least to campaign finance lawyers), and does not implicate normative concerns about media political influence because it merely represents doing indirectly what corporate media moguls can already do directly.

Finally a student note by Sarah Walker, *Arrest as an Invasion of the Right to Privacy: How Officer Gilroy's Arrest of Shelwanda Riley for Violating the Fort Pierce Youth Protection Ordinance Violated Her*

4. The article does not address the effect of Buckley v. Valeo, 424 U.S. 1 (1976), which declared the spending limits unconstitutional before they ever took effect.

Privacy Rights Under the Florida Constitution, and a student comment by Jason Pill, *Constitutional Law: Drawing a New Critical Line Between the State's Competing Interests in Abortion Regulation to Comport with Social Palpability*, Gonazales v. Carhart, 127 S. Ct. 1610 (2007), concerning abortion rights, round out the issue by discussing important if not election-related constitutional issues.