



Political Party Contributions to City Candidates

Rules Committee Presentation
May 15, 2013

Litigation History

- ❖ As part of the ruling issued by the U.S. District Court in January of 2012 in the *Thalheimer* litigation, the Court struck down the City's \$1,000 limit for contributions from political parties to City candidates.
- ❖ The Court directed the City to consider the balance between the following in adopting new limits:
 - ✓ the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates; and
 - ✓ the need to prevent the use of political parties to circumvent contribution limits that apply to individuals.

Attribution Rules

- ❖ The U.S. District Court upheld the City's attribution rules, which:
 - ✓ require political parties to use only funds from individuals in amounts of \$500 or less to make contributions to City candidates
 - ✓ previously required political parties to file reports identifying the conforming funds used to make contributions to City candidates.

- ❖ Because state law appears to preclude the City from imposing additional filing requirements on political parties, the attribution reporting requirement was deleted effective January 1, 2013.

Attribution Rules - Continued

- ❖ Federal campaign laws require political parties to maintain separate accounts for “hard” and “soft” money:
 - ✓ contributions from individuals up to \$10,000 are deposited into federal accounts; and
 - ✓ other contributions are deposited into state accounts.
- ❖ Federal laws require political parties to pay for all administrative and overhead costs from federal accounts and seek reimbursement of a specific percentage (which changes each year in a four-year election cycle) from state accounts.
 - ✓ results in constant transfers between accounts
 - ✓ parties cannot prove actual conforming funds used to make contributions to City candidates

Attribution Rules - Hypothetical

- ❖ A political party files year-end campaign statement for its federal account reflecting \$15,000 cash on hand.
- ❖ From January to March, its committee receives \$50,000 from 5 individual contributors (\$10,000 each), and \$2,500 from 25 individual contributors (\$100 each).
- ❖ In April, the party makes a \$35,000 contribution to a City Council candidate from its federal account.
 - ✓ How much of the \$15,000 year-end cash on hand was conforming money?
 - ✓ What amount of any pending reimbursements from its state account will be conforming money?
 - ✓ Is there any way to truly know how much of the \$50,000 was used to make the \$35,000 contribution?
- ❖ Creates appearance of corruption.
- ❖ Extensive forensic accounting and analysis required.

2012 Election Political Party Activity

- ❖ As of the date of the general election, November 6, 2012, the Republican Party had contributed \$800,000 to one mayoral candidate, and the Democratic party had contributed \$237,500 to another mayoral candidate.
 - ✓ attribution reports indicate the vast majority of funds came from contributors in amounts under \$99 (unitemized); no way to verify this representation
 - ✓ according to attribution reports, Republican Party used funds received more than 10 years ago
- ❖ Republicans spent over \$1 million on member communications coordinated with a mayoral candidate
- ❖ Democrats spent over \$700,000 on member communications coordinated with a mayoral candidate

Compliance and Enforcement

- ❖ The Ethics Commission must have some evidence of wrongdoing to investigate; cannot investigate on speculation alone; SDMC §26.0422(e)(4)
- ❖ No authority to audit political party committees
- ❖ Investigation or audit would require access to all financial records for both state and local accounts, as well as additional staff resources
- ❖ Demonstration that at some point in past conforming funds received is insufficient to prevent appearance of corruption

Aggregation Rules

- ❖ Laws aggregating contributions from multiple levels of the same party are in place in other jurisdictions and at the federal level
- ❖ Permitting maximum contributions from all 58 county parties untenable
- ❖ Cannot regulate coordination that may take place between party committees

Political Party Contribution Limits: Constitutional Issues

Professor Rick Hasen

Outline of testimony

1. Campaign finance laws and the First Amendment
2. Constitutional standards for party contributions under *Thalheimer*
3. Setting a fair and constitutional new party contribution limit after *Thalheimer*
4. The relevance of the “attribution” rule
5. The constitutional issues surrounding “aggregation” of party committees

1. Campaign Finance Laws and the First Amendment

- ❖ Modern constitutional framework: *Buckley v. Valeo* (1976)
- ❖ Need to balance constitutional rights against governmental interests
- ❖ The Council may wish to enact campaign finance laws for a number of purposes, but only some purposes are constitutionally permissible (anti-corruption is fine, but equality is not)
- ❖ The First Amendment protects rights of free speech and association, including campaign contributions and spending

Buckley's Contribution/Expenditure Distinction

- ❖ Spending limits (such as limits on independent expenditures) subject to “strict scrutiny” and generally unconstitutional
- ❖ Contribution limits (such as limits on amounts individuals can give to candidates) subject to a lesser “exacting” scrutiny in which the laws must be “closely drawn” to “sufficiently important” government interests
- ❖ Contribution limits often, but not always, upheld on anti-corruption grounds

Supreme Court's Cases Swing Like a Pendulum

- ❖ In early 2000s, Supreme Court very deferential to legislative decisions on campaign finance laws.
- ❖ Since Justice O'Connor left the Court, Supreme Court very skeptical of such laws
- ❖ Court has not raised the “exacting scrutiny” level applied to contribution limits, but has struck down some limits under standard.
- ❖ Supreme Court will hear new contribution case next term (*McCutcheon*) which could change things further.

2. Constitutional Standards for Party Contribution Limits under *Thalheimer*

Two key questions:

- ❖ Does the City council want to set a political party limit to prevent circumvention of valid campaign contribution limitations?
- ❖ If so, at what level may the Council set a limit for contributions from political parties to candidates which is fair and would be upheld as constitutional if challenged?

Thalheimer Standard

- ❖ Federal District Court judge held that parties have constitutional right to contribute directly to candidates and amount must be high enough under Supreme Court *Randall* standard
- ❖ Ninth Circuit said issue of party contribution limits was open one and did not endorse judge's reasoning; another 9th Circuit case said *Randall* may not have to be followed because it was not a majority opinion
- ❖ Makes sense to apply *Thalheimer* framework even though courts may apply more deferential standard

Thalheimer Analysis

- ❖ Judge provided detailed analysis, emphasizing just as important as the amount of the limit is the process by which it is passed
- ❖ Looking for a careful balancing (1) “the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates” with (2) “the need to prevent the use of political parties to circumvent contribution limits that apply to individuals.”
- ❖ Judge went through a two-part “danger signs” analysis, followed by looking at 5 *Randall* factors
- ❖ Here I provide just a brief summary of steps to take/factors to consider

Suggested Steps for Council

1. Consider evidence from experts, Ethics Commission, stakeholders, interested parties on question of party limits
2. After considering evidence, and making adequate record, engage in careful balancing of rights and interests

3. Setting a fair and constitutional new party contribution limit after *Thalheimer*

If limits are appropriate, set the limits with these guidelines:

- ❖ Limits should be high enough to allow for First Amendment rights of expression and not be so low as to inhibit competitive elections (consider expert testimony on competitiveness)
- ❖ First Amendment rights should be balanced against City's anti-circumvention interest (good evidence that individual contribution limits being circumvented currently in City elections: \$65K contributions, contributions pre-2010, etc.)

Guidelines, cont.

- ❖ Limits should be set at levels comparable to other large cities, looking at means or medians, and consulting experts
- ❖ Limits should not count value of volunteer time
- ❖ Limits should be set to rise with inflation

Proposed \$10,000 / \$20,000 Limit

- ❖ Professor Kousser's suggestions, and his rationales for them (including a look at other cities, competitiveness, and First Amendment expression) are sound
- ❖ A court is very likely, though not certain, to uphold such limits if the Council passes them and they are challenged

4. The relevance of the attribution rule

The *Thalheimer* court upheld the attribution rule and it was key to constitutional analysis: individual contributors could not circumvent through parties because limited to \$500 contribution per person to fund party contributions

Attribution Rule, cont.

- ❖ Attribution reporting rule repealed because it likely is preempted by state law
- ❖ Attribution rule itself on books but could well be unenforceable
- ❖ This changes anti-circumvention rationale for rule, and supports lower overall limit
- ❖ It means that individuals effectively can send thousands of dollars through parties to candidates, bypassing contribution limits

Attribution Rule, cont.

- ❖ If Council passes new party limitation, I recommend repealing the attribution rule (danger of political mischief, trap for unwary, creates culture of disobeying law, if rule is on books but not capable of being enforced)

5. Aggregation of contributions from multiple levels of same political party

- ❖ Proposed legislation would treat all levels of political party as one for purposes of party contribution limitation
- ❖ Example: National X Party gives \$15K to Citywide candidate; County X Party could give only up to \$5K to candidate: treat all levels of same party as single unit.

Is the Rule Unconstitutional as Suggested by Cal. Republican Party?

- ❖ Aggregation rules exist on federal level, as well as in a number of states including Arizona, Florida, Kentucky, Minnesota, Montana
- ❖ Not aware of a single constitutional challenge to party aggregation rules; it is likely constitutional
- ❖ Upcoming Supreme Court case (*McCutcheon*) raises a different aggregation issue (about contributions to parties and groups)
- ❖ Council could always repeal aggregation rule if anything in *McCutcheon* changes constitutional standard.

Political Party Contributions to City Candidates

Professor Thad Kousser

The Balancing Act

“The need to allow individuals to participate in the political process by contributing to political parties that help elect candidates”



“The need to prevent the use of political parties ‘to circumvent contribution limits that apply to individuals.’”

Reasons Not to Adopt Too Strict a Limit on Party Contributions

- ❖ Parties provide a route for voters to associate and to speak together in favor of a candidate
- ❖ Parties often enhance electoral competition by supporting challengers and concentrating their funds on the most competitive elections
- ✓ In San Diego in 2012, parties focused funds on the mayoral contest and City Council District 1

Reasons Not to Adopt Too Loose a Limit on Party Contributions

- ❖ Parties have alternative opportunities to advocate on behalf of candidates
 - ✓ Member communications (over \$1 million in 2012 mayoral contest)
 - ✓ Independent expenditures (\$125,000 in mayoral)
- ❖ Individuals may circumvent the City's individual-to-candidate limits through parties
 - ✓ Risks corruption or its appearance

What Do Other Large Cities Do?

- ❖ Of the nation's 15 most populous cities:
 - ✓ Three have not enacted limits (Chicago, Indianapolis and Columbus)
 - ✓ Party-to-candidate limits in the others range from \$350 (Austin) to \$4,950 (New York) to \$50,000 (Jacksonville)

Comparisons to Large Cities That Impose Limits

Total Amount

- Median: \$4,950
- Mean: \$9,198

Amount Per Resident

- Median: \$1,382
- Mean: \$11,025

Amount Per Voter

- Median: \$29,277
- Mean: \$6,203

My Recommendation for Party-to-Candidate Limits

- ❖ \$20,000 in citywide contests and \$10,000 in city council contests, per election
 - ✓ Applied in aggregate to all party committees
 - ✓ Indexed to inflation
- ❖ Balance competing considerations:
 - ✓ Larger than comparable cities, twenty times as large as maximum individual contribution
 - ✓ Small enough to prevent corruption if donors attempt to circumvent individual limits



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