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US Supreme Court Ruling on Federal Candidate Loans Unlikely to Affect NJ Non-Federal Candidates

JEFF BRINDLE | January 24, 2022, 1:01 pm | in The Diner Booth

Wednesday, January 19, 2022, marked the day the U.S. Supreme Court heard arguments in *Federal Election Commission (FEC) v. Ted Cruz for Senate*.

U.S. Senator Ted Cruz of Texas challenged a provision in federal campaign finance law that limits the amount federal candidates can be reimbursed post-election for a personal loan to their campaign.

The case raises two main issues: 1) whether the Senator has standing to challenge the law, and 2) whether the limit violates the free speech clause of the First Amendment.

Section 304 of the Bipartisan Campaign Reform Act (BCRA) of 2002- better known as the McCain Feingold Act- limits a candidate who makes a personal loan to his or her campaign from seeking post-election reimbursement of more than $250,000.

The day before election day 2018, Senator Cruz loaned his campaign $260,000; $5,000 from his personal bank accounts and $255,000 from a loan backed by his personal assets.

FEC regulations used to enforce the law's reimbursement limit established a 20-day window following election day during which personal loans up to $250,000 can be repaid using donations received before, on, or after the election. Loan amounts above $250,000 can be retired only with pre-election funds during the 20-day period.

Federal Election Commission Rules for Repayment of Federal Candidate Loans

Candidate Loan Amount	Within 20 Days After Election	More than 20 Days After Election
	Repayment Options	
$250,000 or Less	Can Use Contributions Raised Before, On, or After Election	
More than $250,000	Can Use Contributions Raised Before the Election	Repayment No Longer Allowed

Once the 20-day period ends, loans of $250,000 or smaller still can be repaid, but candidates no longer can draw on campaign accounts to pay off loan amounts above $250,000.

After the election, the Cruz campaign had $2.38 million remaining in his account. Instead of using those funds to repay the entire $260,000 loan, his campaign let the 20-day period elapse and then was able to repay only $250,000.

While acknowledging his action was deliberate, Cruz contended the law still unconstitutionally deprived him of recouping $10,000 of the $260,000 loan.

In 2019, Senator Cruz filed suit with the U.S. District Court for the District of Columbia to prevent section 304 of BCRA from being enforced.

The action claimed that the law violated his First Amendment free speech rights.

A three-judge panel of the D.C. District Court ruled that the Senator did have standing to challenge the law, maintaining that the $10,000 unpaid part of the loan constituted “financial injury.”

The panel then held that Section 304 violated the constitution because the government failed to show that the provision serves an interest in preventing quid pro quo corruption.

Following the ruling by the District Court, the FEC appealed the case to the U.S. Supreme Court, which is currently considering it. A decision is expected this summer.

Several Friends of the Court briefs have been filed in regard to this case. Two of the filings have been made by Senate Minority Leader Mitch McConnell and the Brennan Center for Justice.

While McConnell is using the case to attempt to overturn what remains of the Bipartisan Campaign Reform Act (previous US Supreme Court rulings have invalidated other sections of the law), the Brennan Center is seeking to have the Supreme Court rule Section 304 as constitutional. It contends allowing unlimited reimbursement for candidate loans could be corrupting because it might lead to candidates making political deals with donors to get their loans paid off.

It is my opinion that both the Brennan Center and Senator McConnell will be disappointed.

Though the composition of the Supreme Court leans conservative, it will not overturn BCRA. Some are beginning to refer to the Court as the Thomas Court. They believe long-time Justice Clarence Thomas, a strong conservative, has the most sway over the 6-3 Republican majority.

I believe it remains the Roberts Court. Under Chief Justice John Roberts, the court already has struck down portions of BCRA and is likely to do so again by upholding Cruz's appeal on First Amendment rights.

But also under Roberts, the court generally has respected precedent and tended to act incrementally in campaign finance cases. It is highly doubtful the court will overreach and completely overturn BCRA especially since in recent rulings Justice Brett Kavanaugh often has sided with the Chief Justice.

Furthermore, completely overturning BCRA would sharply reduce disclosure related to election-related advertising. The Roberts court strongly endorsed disclosure of such ads in Citizens United v. FEC (2010).

"While the justices signaled support for Cruz's case, there was no sign they supported a total overhaul of BCRA as advocated for by Senate Minority Leader Mitch McConnell…,'' Courthouse News reporter Kelsey Reichmann wrote after covering the January 19 hearing.

I agree that the Court is likely to rule that Senator Cruz has standing to bring the case and that Section 304 of BCRA is unconstitutional as violative of First Amendment free speech rights.

The Court is likely to accept Senator Cruz's argument that the $250,000 cap places a burden on a candidate to not loan more than $250,000, thus infringing on the candidate's First Amendment rights.

I also believe this ruling would not impact non-federal candidates in New Jersey.

In its wisdom, the state Legislature has permitted non-gubernatorial candidates for office in New Jersey to personally loan their campaign unlimited amounts (debt is treated differently for gubernatorial candidates because they are eligible for public financing) and to have the loans paid back after the election with post-election donations.

Donors are prevented from exerting undue influence on candidates because contributions made after the election are subject to contribution limits for that election and pay-back can be made only up to the amount of the loan.

New Jersey's policy appears to be constitutional, whether or not the Supreme Court rules in favor of Senator Cruz and finds the federal law in violation of the First Amendment.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission. The opinions presented here are his own and not necessarily those of the Commission.