UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVE SCHONBERG Plaintiff, **v.** FEDERAL ELECTION COMMISSION and THE UNITED STATES, Defendants.	)	Civil Action No. 10-2040 (RWR-JWR-CKK) THREE-JUDGE COURT

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT UNITED STATES'S MOTION TO DISMISS

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INTRODUCTORY ARGUMENT

The Representational Allowance for Members of House of Representatives, a/k/a "MRA," was created by 2 U.S.C. § 57b and provides taxpayer money for members of the House to run their offices. The MRA allotment for 2010 was between $1.4 million and $2.0 million dollars per house member.[1] Nowhere in its memorandum, Doc.34, does the United States explain why, how or whether the members of the House can use MRA funds for campaigning without violating the law. The MRA statute, through both proper and improper use, allows an incumbent member of the House to use the taxpayers' money from the MRA in her/his re-election campaign. The only "improper" use guidelines are contained in the Member's Congressional Handbook[2] and the House Ethics Manual[3] which have no force of law.

The misuse of the MRA by House members is done without a framework of outside oversight, no public accountability, and little fear of retribution. While FECA requires challengers for a seat in the House of Representatives to report all receipts and distributions used in their campaigns, FECA, by omission, excludes incumbents from reporting the use of MRA funds for campaigning.

Rep.FL6 has a master-servant relationship with all of the federal employees who campaign for him. Rep.FL6 controls what his federal employees do. "Control must extend not only to ordering the work to be done or the result to be accomplished, but also to the manner and details of performance." CJS EMPLOYER § 212. Rep.FL6's campaigning employees are paid

[1] See U.S. House of Representatives, 112th Congress, Statement of Disbursements. It is available online at: http://disbursements.house.gov/sod-glance.shtml.

[2] See U.S. Motion to Dismiss, Memorandum, Doc.34 at 15. Plaintiff compiled a list of permitted uses of MRA from the Member's Handbook in Doc.31. ¶163.

[3] Manual cited by plaintiff in Doc.31 ¶57.

out of the MRA. Plaintiff is a taxpayer[4] and a challenger to the incumbent for a seat in the U.S. House of Representatives. As a challenger and taxpayer, the MRA forces plaintiff into paying a share of Rep.FL6's campaign expenses because the taxpayer funds the MRA, and Rep.FL6 uses the MRA for campaign activities. This is a taxpayer injury plaintiff has suffered as a candidate for federal office. Plaintiff's injuries are concrete and particularized and actual or imminent, not conjectural, hypothetical or speculative. *Nat'l Fed. of Indep.Builders v. Architectural & Trans. Barriers Compliance Bd.*, 461 F. Supp. 2d at 23. Plaintiff has met his burden of establishing his standing to sue. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Earmarked legislation is not part of a statutory framework because bills with earmarks may come out of the House of Representatives in almost any form. Earmarks provide funding for special projects that generally only benefit the home state of the member of Congress. Earmarks are used by members of Congress to obtain voter support and special favors from the member's constituency.

PLAINTIFF

Plaintiff is a resident of Florida's House District 6 and was a No Party Affiliation Candidate for that seat in the 2010 election. He was defeated by the only other candidate on the ballot who was referred to throughout the Second Amended Complaint as "Rep.FL6." Plaintiff is also a taxpayer who is eligible to vote in any election for the office of President.
(Doc 31, pgs 4-5, ¶¶ 11, 11(a).)

FACTS

The facts pertaining to this response are set out in Doc. 31, ¶¶15-201, and are hereby incorporated by reference.

[4] Doc.31, ¶ 11(a).

ARGUMENT

A. PLAINTIFF HAS STANDING

Defendant United States's boilerplate standing arguments rest on two grounds, insufficient injury and lack of causation, U.S. Motion to Dismiss, Doc.34, pgs 7-12. With the MRA, Congress not only pays for the members' to run their offices, but the members also use the allowance to pay for campaign expenses at the expense of the taxpayer. The United States does not explain why it is permissible for Rep.FL6 to have plaintiff's taxes pay for Rep.FL6 to have his federal employees campaign against plaintiff. Instead, the United States wastes the Court's time discussing plaintiff's lack of insurance coverage which has nothing to do with the MRA or Earmarked Legislation. See Doc.34 at 10-12.

To meet the requirements of Article III standing, plaintiff must show: (1) that he has suffered an injury in fact, the invasion of a legally protected interest; (2) that the injury is fairly traceable to the defendant's conduct (a causal connection); and(3) that a favorable decision on the merits likely will redress the injury. *Nat'l Fed. of Indep.Builders v. Architectural & Trans. Barriers Compliance Bd.*, 461 F. Supp. 2d 19, 23 (D.D.C. 2006), internal citations omitted. Doc.31. ¶ 203 (b),(c),(f),(k),(l),(m),(n),(o),(p),(q),(r),(s),(t),(u),(v),(w),(x),(y),(z), aa),(bb),(ii), (jj) and ¶ 163 contain a compilation of the MRA injuries plaintiff has suffered. Defendant U.S. did not refer to a single, specific injury plaintiff alleged, it merely cited the law and failed to apply any facts. Doc.34. at 6-9.

Here is a sample from Doc.31 to which plaintiff will apply the law. Rep.FL6 uses his congressional office spaces in Florida for campaigning, he has free campaign advertising at a ".gov" website, and he uses his official stationary to advertise his support for the horse farming

industry.[5] All of these campaign expenses are paid for by the taxpayer. Here is the application of these facts to law:

1. The legally protected interest is the right to a fair election in which both the plaintiff and Rep.FL6 are on equal footing.

2. The injury is that Rep.FL6 receives taxpayer funds to campaign with and plaintiff does not. The funds are directly traceable to the MRA.

3. A ruling that the MRA is unconstitutional will redress plaintiff's injury because Rep.FL6 will no longer have MRA funds to tap into for campaigning.

Two out of many earmarked pieces of legislation which Rep.FL6 was responsible for are indentified in Doc. 31, ¶¶ 5.1 and 5.2. This earmarked legislation rewarded the constituents of Rep.FL6 with spending projects in Florida District 6. In return, Rep.FL6 receives votes and financial support from his constituents, again giving Rep.FL6 a campaign advantage. See Doc. 31, ¶¶ 34, 36, 166-189. These earmarks invidiously discriminate against plaintiff in violation of due process equal protection afforded by the Fifth Amendment.

B. THE MRA[6]

It is incomprehensible that the United States would allow its members of Congress to use money from the Treasury for campaign activities. But that unfortunately is the position taken by the defendant United States in its Motion to Dismiss, which ignores plaintiff's MRA grievances

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[5] Both Rep.FL6 and the plaintiff are residents of Marion County, Florida which claims to be the "Horse Capital of the World." See http://www.ocalacc.com/ocala_florida/templates/tourism.aspx?articleid=18. By referring to himself as the Congressional "Horse Caucus, Co-chairman" on his letterhead, Rep.FL6 receives taxpayer funded advertising and Florida District 6 votes. See Doc. 31, ¶58.

[6] Doc.31. ¶ 203 (b),(c),(f),(k),(l),(m),(n),(o),(p),(q),(r),(s),(t),(u),(v),(w),(x),(y),(z), (aa),(bb),(ii),and (jj) contains a compilation of the MRA injuries plaintiff has suffered.

and states plaintiff's claims are based "on his guess as to how" the MRA is used. See Doc.34 at 11. The plaintiff's Second Amended Complaint contains first-hand allegations pertaining to the use of MRA funds (Doc.31, ¶¶ 57-61,105-132), and also cites the House Ethics Manual and the Member's Congressional Handbook for specific uses, (Doc.31 at 16,34). These are not "guesses," and for the purposes of a FRCP Rule 12(b) motion to dismiss, these examples must be accepted as true. *Swierkiewicz v.Sorema*, 534 U.S. 506, 508 (2002).

The MRA allows campaign spending by the incumbent that is hidden, surreptitious, and unfair to the challenger who not only has no access to MRA campaign funds et al, but has to account to the FEC for every dollar received or spent on campaigning. Plaintiff is invidiously discriminated against and injured because MRA denies him equal protection.

1. FIFTH AMENDMENT DUE PROCESS VIOLATIONS

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court ruled that due process protection afforded by the Fifth Amendment prohibited invidious discrimination and segregation in the District of Columbia public schools. And *Buckley v. Valeo*, 424 U.S. 1(1976), the seminal case on the constitutionality of FECA, provided that, "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," *Buckley* at 93.
It is plaintiff's burden to show that there is invidious discrimination against him of "some substance," *Texas v.White*, 415 U.S. 767,782 (1974).

It is for a single U.S. District Court Judge to determine if the evidence of invidious discrimination alleged in Doc. 31 supports the conclusion that MRA is unconstitutional on the basis of the Fifth Amendment. "An essential element of an equal protection claim is that the challenged statute treats similarly situated entities differently,"[7] *Calif. Med. Ass'n v. FEC*, 453

[7] Quote is from Doc.33-1, pg 34.

U.S. 182, 200, (1981). In ¶¶ 203 and 219-222 of Doc. 31, plaintiff contends that the MRA provides a "monetary advantage" to the incumbent which results in invidious discrimination as follows:

> (b). By supplying the incumbent with a taxpayer funded political website.
>
> (c). By giving the incumbent taxpayer funded internet search engine privileges.
>
> (f). By authorizing incumbents to use federal employees to campaign for them.
>
> (k). By sanctioning the incumbent's use of official, sealed, U.S. government stationary for campaigning.
>
> (l). By giving the incumbent a press secretary paid for by the government to draft and release campaign press releases.
>
> (m). By enabling the incumbent to use federal employees to act as campaign surrogates.
>
> (n). By sanctioning the incumbent's use of official district business offices for campaigning.
>
> (o). By allowing the incumbent's use of government video from the floor of the House of Representatives in campaign advertising.
>
> (p). By permitting an incumbent to use government created mailing lists for their political campaigns.
>
> (q). By providing the incumbent a government employed photographer for campaign photographs.
>
> (r). By empowering the incumbent to use government funded, unsolicited mass

communications containing the Franking privilege.

(s). By failing to prevent the incumbent's use of sealed, official, U.S. government stationary in campaign ads.

(y). By providing a government studio for recording audio and video advertisements by the incumbent.

(aa). By sanctioning official stationary that says, "Ranking Republican Member," "Deputy Ranking Republican Member," and "CONGRESSIONAL HORSE CAUCUS co-chairman."

(bb). By supplying taxpayer funded short-term vehicle rentals with unlimited mileage for use by the incumbent.

(cc). By giving the incumbent a Government Travel Card.

(dd). By allowing the creation of Congressional Member Organizations (CMO's) that are purely political advertising for incumbent campaigns paid for by the taxpayers.

(ii). By allowing the United States to provide email lists and social networking devices to the incumbent without equal access given to the challenger.

(jj). By permitting members of Congress to email constituents promotions about the Congress person's success in representing the constituent.

The monetary value of these MRA campaign benefits to Rep.FL6 are huge, unaccounted for, devoid of oversight, unregulated by the force of law, and withheld from the FEC. The MRA invidiously discriminates against plaintiff by providing Rep.FL6 with a monetary advantage.

By enacting FECA, Congress "broadly addressed" the problem of campaign financing. It wished "…to insure both the reality and the appearance of the purity and openness of the

federal election process," *Buckley*, 424 U.S. at 78. While FECA requires challengers for a seat in the House of Representatives to report all receipts and distributions used in their campaigns, FECA, by omission, excludes incumbents from reporting the use of MRA funds for campaigning. And the MRA requires no reporting at all. The MRA therefore invidiously discriminates against plaintiff by allowing Rep.FL6 to have access to campaign funds, campaign goods, and campaign services which need not be reported to the FEC and which are unavailable to challengers of incumbents. Just as FECA fails the *Buckley* purity test by failing to account for MRA campaign spending by incumbents, MRA fails the test as well by muddling and obfuscating the source of campaign funding. *Buckley*, 424 U.S. at 78.

Plaintiff is a taxpayer.[8] Plaintiff is and was a candidate challenging an incumbent for a seat in the U.S. House of Representatives. As a challenger and taxpayer, FECA and the MRA force plaintiff into paying a share of incumbent Rep.FL6's campaign expenses because the taxpayer funds the MRA, and Rep.FL6 uses the MRA for campaign activities. This is a taxpayer injury plaintiff has suffered as a candidate for federal office. The injury is "concrete and particularized and actual or imminent, not conjectural, hypothetical or speculative." *Center for Law and Education v. Dept. of Education*, 396 F.3d 1152, 1157 (D.C. Cir. 2005), (internal citations omitted).

2. THE MRA VIOLATES THE COMPENSATION CLAUSE

Article I, Section 6, Clause 1 of the Constitution states, "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States." This clause has been labeled the Compensation Clause. Amendment XXVII to the Constitution limited increases to this compensation to prevent

[8] Doc.31, ¶ 11(a).

the House of Representatives from raising its members' compensation "until an election of Representatives shall have intervened."

The compensation of members of Congress is codified at 2 U.S.C. ¶¶ 351-364 as a result of the Salary Act of 1967 and its subsequent amendments. The clear intent of the Constitution and Amendment XXVII is to prohibit members of Congress from receiving any government compensation over and above that contained in the Compensation Clause. The monetary advantage provided by the MRA to Rep.FL6 and detailed in the above section is in clear violation of the compensation clause because money from the Treasury is being converted by Rep.FL6 for his own personal campaign activities. And every other member of Congress could have done the same thing.

C. SOVEREIGN IMMUNITY DOES NOT APPLY

"The government is answerable not only to the people, it is answerable also to the Constitution, and that great instrument prohibits government officials from delegating unto themselves, or exercising, powers that are not consistent therewith." *Kelley v. Metropolitan County Board of Education,Tenn*, 372 F.Supp. 528,536, (1973). Sovereign Immunity and waivers thereto are generally for cases involving claims for money damages to be paid out of the Treasury, not challenges to the constitutionality of a law. The MRA was passed by the House of Representatives, for the House of Representatives. It has been unconstitutionally misused by the House of Representatives. Sovereign Immunity does not apply. "[T]he doctrine of sovereign immunity cannot transcend the authority of the Constitution." *Kelley*, 372 F. Supp. at 536. The members of the House of Representatives cannot pass a law that is a violation of the Compensation Clause and retain the right of its members to collect unconstitutional compensation under a theory of Sovereign Immunity.

D. POLITICAL QUESTION DOCTRINE

Plaintiff has alleged violations of the constitution regarding the MRA and Earmarked legislation. The MRA gives the members of the House of Representatives access to between $1.4 and 2.0 million dollars to run their offices. There is nothing in the MRA preventing a member from using most of his/her MRA funds for campaign related expenses, thus converting the funds to personal use.[9] Congress may not promulgate a statute granting to its House members the use of re-election campaign resources inconsistent with the Compensation Clause and the Fifth Amendment to the Constitution. Resolution of these constitutional questions is reserved for the courts. "[T]he limitations on judicial review imposed by the political-question doctrine apply only when the court is faced with a challenge to action by a coordinate branch of the government , and not where the issue involved falls within the traditional role accorded courts to interpret the law or constitutional provisions." CJS Constitutional Law, IV.,C.,2. Political Questions, March, 2011. "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, *McCulloch v. Maryland,* 4 Wheat. 316 (1819), so long as the exercise of that authority does not offend some other constitutional restriction." *Buckley v. Valeo,* 424 U.S. 1,132, (1976). The MRA offends two parts of the Constitution, making the constitutional question for the Court:

1. Does the MRA violate the Compensation Clause and/or the Fifth Amendment to the Constitution?

E. EARMARKED LEGISLATION

Earmarked legislation is the basis for the last of plaintiff's claims. His opponent's,

[9] Virtually all members of the House disregard many of the recommendations contained in the Members Handbook, especially regarding the .gov web sites, which: "May not include personal, political, or campaign information." Members Handbook, pg 45. See Doc.31, ¶ 201.

"Congressional candidacy, compensation and family income was and will be the beneficiary" of earmarks specified in Doc.31, ¶¶ 5.1,5.2, and 11(b). "Earmarked legislation provides emoluments and/or bribes to the electorate from a Congressman to his constituents." Id., ¶ 34. Several examples of earmarked legislation obtained by Rep.FL6 were provided in Doc.31. ¶¶ 166-169. "Earmarked federal spending brings money, jobs, and business to Florida; and it brings votes for Rep.FL6." Id., ¶ 170. The extra votes Rep.FL6 receives by virtue of his earmarks invidiously discriminate against plaintiff because plaintiff cannot provide earmarks to the Florida District 6 electorate. Earmarks treat the similarly situated candidates, plaintiff and Rep.FL6, differently. *Calif. Med. Ass'n,* 453 U.S., 200.

Plaintiff alleged that earmarks resulted in a quid pro quo arrangement with a local college that resulted in a job promotion for the spouse of Rep.FL6. Id. ¶¶ 171-180. Contrary to the U.S.'s claim that plaintiff never explained why earmarks are unconstitutional,[10] the Second Amended Complaint is replete with examples showing that Rep.FL6 gains votes and compensation from his earmarks, in violation of the Compensation Clause and the Fifth Amendment right of equal protection.

In Florida District 6, earmarks to the "Central Florida Community College," now called the "College of Central Florida," have been going on for years with Rep.FL6 the sponsor of the legislation. Doc.31. ¶¶ 175-176. The following excerpt regarding Mrs. "Rep.FL6" appeared in the Ocala newspaper on March 30, 2011 and identifies Rep.FL6's spouse as the vice president at the College of Central Florida who oversees "grants and the CF Foundation"[11]:

[10] See Doc.34. at 20

[11] The excerpt appeared in the print edition and at: http://www.ocala.com/article/20110330/ARTICLES/110339996/1439?p=2&tc=pg&tc=ar.

> *Ocala StarBanner , March 30, 2011*
>
> "Joan _____, CF's vice president of institutional advancement, oversees the college's marketing, grants and the CF Foundation.
>
> _____, who has worked in a similar capacity six of the last 11 years, said CF is the only college "in the nation that owns a world-class museum."

Plaintiff alleged that there was "nepotism by proxy" because the house ethics rules prohibited Rep.FL6 from hiring his wife with MRA funds. Doc.31. ¶¶ 175-179. The ruse is that Rep.FL6 obtains earmarks for the College of Central Florida which in return hires or promotes Mrs. Rep.FL6. Stopping this sort of corruption is more important than the First Amendment right of free speech and should be foremost on the Court's priorities. "The Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption." *Speechnow.org v. FEC*, 599 F.3d 686, 692 (D.C. Cir. 2010).

Defendant U.S. suggests the Compensation Clause of the Constitution cannot prevent "nepotism by proxy" because of *Made In The USA Foundation v. United States*, 242F.3d 1300, 1311 (11th Cir. 2001); *Nixon v. United States*, 506 U.S. 224, 228; *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321-22 (1937); and *One SimpleLoan v. U.S. Secretary of Education*, 496 F.3d 197, 203 (2d Cir. 2007). See Doc.34 at 20-21. The issue in the political question doctrine "is whether the Constitution has given one of the political branches final responsibility for

interpreting the scope and nature" of the power of that particular branch of government. *Nixon*, 506 U.S. at 239.

Plaintiff can find no interpretation of the Constitution forbidding this Court from deciding his constitutional challenges to the MRA or earmarked legislation. The U.S.'s theory is that an Appropriations bill, once enacted, is constitutionally untouchable[12] because the Appropriations Clause of the Constitution is more important than the Compensation Clause. If this is true, then the Court should admit that the Constitution does not protect the American people from corruption in Congress. An Article V Constitutional Convention would be needed to fix the Constitution, as promoted in "OUR UNDEMOCRATIC CONSTITUTION" by Sanford Levinson,[13] Oxford University Press, 2006.[14]

CONCLUSION

Substantial constitutional questions require the Court's determination of the legitimacy of the MRA and Earmarked Legislation. The United State's Motion to Dismiss should be denied.

Respectfully submitted,

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[12] See Doc.34 at 21-22.

[13] Mr. Levinson is a constitutional scholar and professor of law at the University of Texas.

[14] Plaintiff has argued that a Fourth Branch of government is needed to oversee Congress. A draft of a Containment of Congress, "Fourth Branch," amendment is posted at: http://perfectunion1787.com/containment.html.