ROLL CALL

FEC Was Right to Allow Soft Money In Calif. Initiatives

September 13, 2005
By Michael E. Toner,
Contributing Writer

FEC Was Right To Allow Soft Money In Calif. Initiatives

Last month the Federal Election Commission correctly decided that the McCain-Feingold campaign finance law does not apply to the various ballot measures that California voters will consider this fall. As a result of the FEC's ruling, Members of Congress will be able to fully participate in the initiative process in California, and there will be a level fundraising playing field between the measures' sponsor, Gov. Arnold Schwarzenegger (R), and those who oppose the ballot questions.

The FEC's ruling also may have ripple effects in other states that are considering redistricting initiatives. Ohio election officials are expected to decide shortly whether a redistricting measure will go on the ballot there in November. Published reports indicate that efforts are also under way in Florida to try to qualify a redistricting referendum. The FEC's ruling has the potential to significantly broaden the ability of federal candidates and officeholders across the country to raise unlimited contributions in connection with initiatives and referenda.

The FEC's decision in the California case was compelled by the plain meaning of the McCain-Feingold campaign finance law. Under McCain-Feingold, Members of Congress are prohibited from raising and spending soft money — corporate, union and large individual contributions raised outside the prohibitions and limitations of federal law. However, Congress extended this soft-money ban only to federal and state elections for "office."

The plain meaning of the statute is that the soft-money ban applies to elections for public office, but does not apply to non-candidate political activity, such as ballot initiatives and referenda. Any other interpretation would render the statutory reference to "office" a nullity. The FEC correctly followed the plain meaning of the law and rejected efforts for the Commission to go beyond its statutory authority.

The legislative history is consistent with the FEC's interpretation of the statute. In debating the McCain-Feingold law, not a single Member of Congress, including the legislation's sponsors, indicated that the soft-money ban would apply to initiatives and referenda. Revealingly, several Members of Congress who voted for McCain-Feingold, including House Minority Leader Nancy Pelosi (D-Calif.), informed the FEC last month that this was their understanding of the law.

The FEC's ruling also advances important policy interests. Had the FEC concluded that McCain-Feingold applied to the California initiatives, a vast fundraising imbalance may have resulted. Schwarzenegger and his allies are permitted under California law to raise unlimited corporate and individual contributions, and published reports indicate that the governor plans to raise $50 million or more on behalf of the initiatives.

By contrast, had the restrictions of the McCain-Feingold law applied, Members of Congress would have been strictly limited to raising funds consistent with federal law – in most instances, contributions from individuals not exceeding $5,000. If such contribution limits had applied, it would have been difficult if not impossible for Members of Congress to compete with the financial resources that Schwarzenegger and his allies are likely to amass.

Moreover, the FEC's action is consistent with a number of U.S. Supreme Court rulings striking down efforts to limit contributions in connection with initiatives and referenda. In declaring such limits

unconstitutional, the Supreme Court has noted that ballot measures are issue-oriented and that no one is elected to public office when an initiative succeeds or fails. As the court emphasized in First National Bank of Boston v. Bellotti, “referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections ... is not present in a popular vote on a public issue.”

I strongly agree with Daniel Lowenstein, a law professor at the University of California-Los Angeles and a former board member of Common Cause, who submitted the following comment to the FEC in connection with its ruling last month: “The Governor of California, in the exercise of his responsibilities as he sees them, is leading one side of a great political struggle that will affect the lives and governance of the people of California for decades to come. Our country is based on the proposition that such issues should be freely and vigorously debated on all sides.”

I am very pleased that the FEC has ruled that the fundraising restrictions of the McCain-Feingold law do not apply to the initiative process in California this fall. As a result, Members of Congress will be able to raise unlimited contributions, as Schwarzenegger can, in connection with the redistricting initiative and other initiatives whose fates hang in the balance. The FEC ruling has created a level fundraising playing field and will help ensure that all points of view are heard on the initiatives between now and November.

Michael E. Toner is vice chairman of the Federal Election Commission.