BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

Top Constitutional Scholars Refute Attacks on Constitutionality of Campaign Reform

The following are excepts from a letter written by 67 constitutional scholars which refute the attacks typically made by opponents of campaign finance reform on the constitutionality of McCain-Feingold & Shays-Meehan. Most recently, attacks have focused on the issue ad provision known as the Snowe-Jeffords Amendment. As the Senate began consideration of McCain-Feingold last March, 67 constitutional scholars wrote to affirm their conclusion that McCain-Feingold, Shays-Meehan, and Snowe-Jeffords were constitutional as first proposed in March of 2001. The rebuttals listed below are drawn from the letter signed by the 67 constitutional scholars, including Norman Dorsen, Ronald Dworkin, Frank Michelman, Erwin Chemerinksy, Abner Mikva, Burt Neuborne, Norman Ornstein, and Daniel Ortiz.

Myth #1: **<u>The soft money ban and the issue ad restrictions are both unconstitutional</u>**

Reality:

"We believe that the McCain-Feingold Bill, as currently drafted, is consistent with First Amendment jurisprudence." (p.8)

"We are scholars who have studied and written about the First Amendment to the United States Constitution . . . Critics have argued that it is unconstitutional to close the so-called 'soft money loophole' by placing restrictions on the source and amount of campaign contributions to political parties. Critics have also argued that it is unconstitutional to require disclosure of campaign ads sponsored by advocacy groups unless the ads contain explicit words of advocacy, such as 'vote for' or 'vote against.' **We reject both of those assertions.**" (p.1, emphasis added)

Myth #2: **<u>Congress cannot limit the amount of soft money collected by parties</u>**

Reality:

"Under *Buckley* and its progeny, Congress clearly possesses power to close the soft money loophole by restricting the source and size of contributions to political parties, just as it does for contributions to candidates, for use in connection with federal elections." (p.3)

"Closing the loophole for soft money contributions is in line with the longstanding and constitutional ban on corporate and union contributions in federal elections and with limits on the size of individuals' contributions to amounts that are not corrupting." (p.4)

Myth #3: **It is unconstitutional to require disclosure by electioneering issue groups**

Reality:

"Disclosure rules, according to [the Supreme Court in *Buckley*] are 'the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, p.68 (letter p.5)

Myth #4: **The issue ad provision as proposed is vague and overbroad**

Reality:

"Snowe-Jeffords presents a definition of electioneering carefully crafted to address the Supreme Court's dual concerns regarding vagueness and overbreadth. Because the test for prohibited electioneering is defined with great clarity, it satisfies the Supreme Court's vagueness concerns . . . The prohibition is also narrow enough to satisfy the Supreme Court's overbreadth concerns." (p.7)

Myth #5: **The *Buckley* Court intended to create the magic words test for issue ads and the test has worked for 25 years**

Reality:

In reference to the magic words test, the scholars conclude, "It is doubtful, therefore, that the Supreme Court in *Buckley* intended to single out election regulations as requiring a mechanical, formulaic, and utterly unworkable test." (p.7)

Myth #6: **The issue-ad provision as proposed is a reckless, unnecessary change**

Reality:

Snowe-Jeffords works by "extending current regulation cautiously and only in the areas in which the First Amendment protection is at its lowest ebb." (p.5)

"The careful crafting of Snowe-Jeffords stands in stark contrast to the clumsy and sweeping prohibition that Congress originally drafted in FECA." (p.7)