

May 5, 2003

To: Common Cause Community

From: Donald J. Simon, general counsel

Re: Analysis of District Court Ruling in *McConnell v. FEC*

1. On Friday May 2, 2003, a special three-judge district court in Washington, D.C. issued its long awaited ruling in *McConnell v. FEC*, a case challenging the constitutionality of the Bipartisan Campaign Reform Act of 2002 (otherwise known as the McCain-Feingold law).

2. The court produced a lengthy and confusing opinion of over 1600 pages, probably one of the longest court decisions ever issued. In fact, the court issued four opinions: a *per curiam* (“by the court”) opinion on behalf of Judges Colleen Kollar-Kotelly and Richard Leon, and then three additional separate opinions (one by each of the judges individually, including Judge Karen LeCraft Henderson). Each of the four opinions contains separate findings of fact and conclusions of law, and each of the individual opinions addresses 20 separate provisions of the statute. The “decision of the court” is determined for each provision by whether at least two of the three judges agreed to uphold or strike down that provision (even where two judges who agree on a certain result do so for different reasons). For some provisions of the statute, the judges avoided a decision on the merits by finding that the challenge was not properly brought and could not be heard by the court (i.e., it is “nonjusticiable”).

3. Because of the length and complexity of the ruling, it has been difficult for many people to decipher what the court has done. Much of the initial press reporting on the case was incomplete or misleading, and should be read cautiously.

4. The parties to the case may move the district court and then the Supreme Court to “stay” the ruling. If a stay is granted, that would hold the district court’s ruling in abeyance until a final ruling on the matter is issued by the Supreme Court. That would mean that the statute, which went into effect on November 6, 2002, would remain in effect until the Supreme Court rules. If a stay is not issued, then the law as decided by the district court will stay in effect until a Supreme Court ruling. At this time, it is not known whether a stay will be sought, or granted.

5. The timing of the Supreme Court review of the lower court decision is also not settled. The parties on both sides will quickly file an appeal with the Supreme Court, which will definitely take the case for decision. The Supreme Court will then set a schedule for its handling of the case. Although it is possible for the Court to set a schedule that will have the case decided over the summer, it is also possible that the Court will ask the parties to file briefs over the summer, and hold oral argument in early Fall. That would probably mean a Supreme Court decision by December or January.

6. The district court decision upheld many key portions of the law:

- A. The Court upheld the ban on federal officeholders and candidates, as well as any entities they establish or control, raising or spending soft money. This would also prevent the national party congressional campaign committees, which are made up of Members of Congress, from raising or spending soft money.
- B. The Court upheld the ban on both the national and state political parties spending soft money on any public communications, including TV and radio ads, that promote, support, attack or oppose federal candidates. This would cover all of the party sham issue ads that had been funded in the past by soft money.
- C. The Court upheld the regulation (including disclosure) of sham issue ads by outside groups, and rejected the plaintiff's claim that only ads that contain "magic words" of "express advocacy" can be regulated. In fact, the court ended up with a broader regulation of sham issue ads than Congress primarily enacted. The court struck down the "time frame" test that prohibited the spending of corporate or union funds on any broadcast ads that refer to a federal candidate within the period 30 days before a primary or 60 days before a general election. But it upheld an alternative test in the law that prohibits the spending of corporate or union funds on any broadcast ads that "promote, support, attack or oppose" a federal candidate, no matter when the ads are run. This test upheld by the court is a more comprehensive regulation of sham issue advocacy than the "time frame" test that was struck down.
- D. The Court upheld the broad definition of "coordination" in the statute.

7. On the other hand, the court struck down several important provisions:

- A. The court struck down the blanket ban on soft money fundraising by national party committees. The court said the national parties could raise soft money and spend it on voter activities like voter registration drives and get-out-the-vote drives, though not on "public communications" (like broadcast ads) that promote or attack federal candidates. The same is true for state parties.

B. The court struck down the prohibition on the national parties raising or transferring funds to outside tax-exempt organizations in connection with an election.

8. The court also struck down several secondary provisions in the law:

A. It struck down the ban on campaign contributions by minors.

B. It struck down the restriction that a political party can make either independent expenditures or coordinated expenditures for its candidates after the date of nomination, but not both.

9. The court refused to rule on several provisions as “nonjusticiable.”:

A. It left standing the increase in the contribution limit from \$1,000 to \$2,000.

B. It left standing the “millionaire’s provision,” which provides benefits to candidates running against wealthy opponents.