May 15, 2003 -- Legal Center Analysis of Stay Proceedings

Final papers were filed on Wednesday, May 14, in the stay proceedings in ***McConnell v. FEC.*** Given the time-sensitive nature of stay proceedings, the court is expected to rule quickly; in any event, if the court issues no decision by
May 20
, the parties may apply directly to the
U.S. Supreme Court
for a stay, per Chief Justice Rehnquist (discussed below).

The District Court Decision

On the Reform Act's provisions on **soft money**, the three-judge panel, in relevant part:

- **Upheld** the provision forbidding federal candidates or officeholders (or any entities they directly or indirectly establish, finance, maintain or control) from raising or spending soft money - unlimited political contributions from individuals, or contributions from corporate or union treasuries (as opposed to their PACs);
- **Upheld** the provision forbidding national and state parties from spending soft money on "issue advertisements" - public communications that attack, oppose, promote or support a clearly identified Federal candidate (even if they do not expressly advocate an election result);

- **Struck down** the provision forbidding national and state parties from raising and spending soft money for generic campaign activities like get-out-the-vote or voter registration efforts that promote a political party, but do not mention particular Federal candidates; and

- **Struck down** the provision prohibiting national and state parties from soliciting funds for, or making donations to, tax-exempt organizations that spend funds in connection with Federal elections.

On the Reform Act's provisions on **"electioneering communications,"** or issue ads, the panel, in relevant part:

- **Struck down** the law's primary restriction on independent corporate or labor political spending, which forbade the use of their treasury funds to finance television or radio ads mentioning a clearly identified Federal candidate within 30 days of a primary or 60 days of a general election and targeted at the candidate's electorate; and

- **Upheld** part of the law's "backup" restriction on independent corporate or labor political spending, resulting in a prohibition on the use of their treasury funds to finance television or radio ads that promote, support, attack or oppose a Federal candidate.

On the Reform Act's provisions relevant to **broadcasters,** the panel

- **Struck down** the Act's Section 504, which requires broadcasters to maintain and disclose records of all requests to purchase broadcast time for any communications that relate to any political matter of national importance, including communications relating to any election to Federal office or any national legislative issue of public importance.

The Procedure for Requesting a Stay

Motions, or "applications," for a stay of a court's decision are normally made to the court that rendered the judgment. That court's decision may then be appealed to the reviewing court. Thus, in this case, the stay motions, responses and replies (excepting one, discussed below) have been filed with the three-judge panel, and their decision to grant, or refuse to grant, a stay is reviewable by the U.S. Supreme Court. Before issuing a stay, Federal courts in the District of Columbia circuit apply a balancing test, weighing whether the party requesting the stay will be irreparably injured in the absence of a stay, if they are likely to succeed on the merits of the case, if other parties will be damaged by a stay, and if the public interest supports such a move.

Administrative, "Temporary" Stays

A motion may also be made for an emergency (or "administrative") stay of a court's ruling *while that court considers*
whether to put its decision on hold pending review by a higher tribunal. In this case, the
National Rifle Association
moved for such a stay only with regard to the part of the decision dealing with electioneering communications. The
government defendants
also moved for an immediate stay, but as to the entire district court decision. The court has not issued a temporary stay, and appears unlikely to do so.

Finally, the **NRA** (following their request to the district court) filed an emergency application with the **U.S. Supreme Court** to ask the Court to block the decision until the lower court could render a final decision as to a stay. Chief Justice Rehnquist, acting as circuit justice, denied the request, but emphasized that the parties could approach the Court again if the district court failed to reach a decision by May 20, 2003.

Applications to stay the Entire Decision

A stay of the entire decision would leave the Reform Act rules in place.

- **All defendants** - the congressional sponsors of the Reform Act, the U.S. Department of Justice, the Federal Election Commission and the Federal Communications Commission - have asked the three-judge panel to stay the entire decision, and opposed attempts to stay only parts of the decision. The defendants argue that blocking the judgment piecemeal would add confusion to an already complex and changing set of election rules - and one that will likely change again once the Supreme Court rules.
- The motions to block the entire decision were opposed by the **National Association of Broadcasters, the NRA, Sen. McConnell, et al., the Echols plaintiffs (minor children), the RNC, the California Democratic and Republican Parties, the Madison Center plaintiffs (the National Right to Life Committee, Club for Growth, et al.), and the AFL-CIO, and the National Association of Broadcasters**
(only with regard to the decision's treatment of Sec. 504 of the Reform Act, described above).

Applications to Stay ONLY the Decision's "Electioneering Communications" Provisions

Such a stay would leave the Reform Act's primary restriction on electioneering communications in place. That provision would only restrict such ads within 30 days of a primary and 60 days of a general election, while the "backup" definition approved by the court would affect political advertising immediately. For that reason, many of the defendant political organizations moved for a return to the primary restriction, even though they universally oppose that provision, because the Supreme Court will likely rule before the provision affects their advertising, which most often occurs proximate to elections.

- The **ACLU, the NRA, and the AFL-CIO** moved for a stay of the "electioneering communications" part of the decision.

- **All defendants** opposed these motions, asking instead for a stay of all aspects of the decision. Similarly, the **Madison Center** plaintiffs opposed these motions only on the grounds that the proper remedy is to enjoin the entire Reform Act - as opposed to the district court's decision - until the Supreme Court can rule.

Motion to Enjoin the Entire Reform Act

Such an injunction would presumably reinstitute the pre-Reform Act campaign finance regime that ended, in large part, last November 6, 2002 when the Reform Act provisions began to take effect.

- Certain Madison Center plaintiffs, including the **National Right to Life Committee and the Club for Growth** , made such a motion.
- **All defendants** opposed this motion.

For all documents filed in the stay proceedings, please visit the Campaign Legal Center website at www.campaignlegalcenter.org/McConnell-87.html

For a comprehensive library of information on McConnell v. FEC and other campaign finance matters, visit www.campaignlegalcenter.org