

Supreme Court Upholds BCRA

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On December 10, 2003, the Supreme Court of the United States issued its ruling upholding substantially all of the Bipartisan Campaign Reform Act (BCRA). The Court's ruling is the culmination of an expedited appeal of the May 2, 2003 decision of the special three-judge court ordered by Congress to hear constitutional challenges to the BCRA.

The result means that corporations will need to beef up their PACs in order to make radio and television communications near elections. Corporations also may want to explore communications to their "restricted classes." Finally, corporations will want to be especially careful in their interactions with members of Congress and presidential aides given the Federal Election Commission's coordination regulations and the fact that the election year is upon us.

The Supreme Court issued three separate majority opinions to address the BCRA's five challenged "Titles." Justices Stevens and O'Connor—joined by Justices Souter, Ginsburg and Breyer—delivered the opinion of the Court with respect to Titles I and II. Chief Justice Rehnquist—joined by all members of the Court to varying degrees—delivered the opinion of the Court with respect to Titles III and IV. Justice Breyer—joined by Justices Stevens, O'Connor, Souter and Ginsburg—delivered the opinion of the Court with respect to Title V. Separate dissents and opinions were authored by Chief Justice Rehnquist and Justices Stevens, Scalia, Thomas and Kennedy. In broad outline, the results were as follows:

- Title I and II (Soft Money and Issue Ads): The Court upheld the BCRA's most contested provisions, the regulation of "soft money" and "electioneering communications," as well as the "coordination" provision.

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Under a less rigorous standard of review allowing Congress to weigh competing constitutional interests, the Court held that "soft money" contributions to political parties can be restricted to protect the integrity of the political process without unconstitutionally burdening party speech and associational activities financed with "soft money."

The Court also held that regulation of "electioneering communications"—broadcast ads that refer to a federal candidate 30 days before a primary, convention or caucus or 60 days before a general, special or run-off election—was not precluded by the prior holding in *Buckley v. Valeo* which limited regulation of political speech to that which employed express words of electoral advocacy. The Court also determined that the "electioneering communication" provision did not unreasonably restrict otherwise permissible speech. Therefore, the 30/60 day provision was not unconstitutionally overbroad in scope.

Finally, the Court held that political activity coordinated with political candidates and parties can be regulated even in the absence of agreement to coordinate or formal collaboration. For example, spending at the "request" or "suggestion" of a candidate or party may establish coordination. However, the Court struck down the BCRA's requirement that national parties choose between coordinating with candidates and making independent expenditures.

- Title III and IV (Lowest Unit Charge Certification, "Hard Money" Limits, "Millionaire" Exemption, Expanded Disclaimers, and Minors): The Court determined that the parties to the case lacked standing to challenge (a) the BCRA's denial of the "lowest unit charge" for a candidate ad that does not include a disclaimer that the candidate approved the ad, (b) the increase of the "hard money" contribution limits, and (c) the "Millionaire" provision that allows candidates facing self-financed opponents to receive contributions in excess of the normal limits. Separately, the Court upheld the expanded disclaimer requirements in the Federal Election Campaign Act; however, the Court struck down the BCRA's prohibition on political contributions by minors.
- Title V (Broadcasters' Records): The Court upheld the BCRA's requirement that broadcasters maintain certain publicly available records of politically related broadcasting requests. These include "candidate requests," "election message requests" and "issue requests."

Wiley Rein & Fielding LLP represented Senator McConnell, as well as the Chamber of Commerce of the United States, the National Association of Manufacturers, the Associated Builders and Contractors and the California Republican Party in this case.