Wiley Rein & Fielding LLP

MEMORANDUM

TO: WRF Clients and Interested Persons

FROM: Jan Witold Baran 202.719.7330 jbaran@wrf.com
Thomas W. Kirby 202.719.7062 tkirby@wrf.com
Caleb P. Burns 202.719.7451 cburns@wrf.com

DATE: December 10, 2003

RE: The *McConnell v. FEC* Campaign Finance Decision – A Summary

Today 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 decision of the special three-judge court ordered by Congress to hear constitutional challenges to the BCRA.

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.[1] 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.

  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 or 60 days before a general 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

[1] Separate dissents and opinions were authored by Chief Justice Rehnquist, Justice Stevens, Justice Scalia, Justice Thomas, and Justice Kennedy.

did not restrict much 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 ("Stand by Your Ad," "Hard Money" Limits, "Millionaire" exemption, and Minors): The Court determined that the parties to the case lacked standing to challenge 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, the increase of the "hard money" contribution limits, and the "Millionaire" provision which allows candidates facing self-financed opponents to receive contributions in excess of the normal limits. 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, and the Associated Builders & Contractors in this case. For more information about the firm visit www.wrf.com.