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Supreme Court Loosens Restrictions on Ads Companies May Run Before Elections

By Larry Norton and Jim Kahl

On June 25, 2007, the U.S. Supreme Court removed barriers on ads financed by corporations that mention a federal candidate and are run in the days before an election. (*Federal Election Commission v. Wisconsin Right to Life*). In sweeping aside the rules of the road that it approved just three-and-a-half years ago, the Supreme Court has freed corporations and trade associations to pursue more robust communications strategies.

The *Wisconsin Right to Life* case involved a challenge to a key part of the 2002 McCain-Feingold law -- the "electioneering communications" provision -- which banned corporations and unions from using general treasury funds to pay for ads on television, radio, or satellite that mention a federal candidate and that are run shortly before an election (30 days before a primary; 60 days before a general election). Under McCain-Feingold, such ads can be financed only through a political action committee (PAC) funded by the voluntary donations of corporate officers, directors, and shareholders.

In a 5-4 ruling, the Supreme Court effectively ended the 30 and 60 day blackout periods. Chief Justice Roberts, writing for the majority, said, "we give the benefit of the doubt to speech, not censorship." The majority of the Court concluded that so long as an ad may be reasonably interpreted as something other than an appeal to vote for or against a specific candidate, it is constitutionally protected from regulation.

For corporations, trade associations, and unions, the focus now shifts away from blackout periods and the mode of communication to whether a proposed ad contains, in the words of the Court, "express advocacy" or its "functional equivalent." Inevitably, there will be questions over whether specific ads can *only* be interpreted as an appeal to vote for or against a specific candidate. The Court's decision will also revive a longstanding debate at the FEC and in the courts over the limits of "express advocacy."

With that caution in mind, however, the Supreme Court decision leaves ample room for well-crafted ads aimed at influencing legislative and executive action. In particular, the decision opens up the use of radio and television during periods when the public is paying greater attention and officials are most susceptible to persuasion.

Lawrence H. Norton and James A. Kahl served as General Counsel and Deputy General Counsel, respectively, of the Federal Election Commission, spanning the period from September 2001 to March 2007. As the FEC's chief legal officers, Larry and Jim played a central role in the implementation and enforcement of the McCain-Feingold law, and led the FEC's litigation team in the landmark case of *McConnell v. Federal Election Commission*.