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Welcome to the PAC jungle

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A federal court decision in the District of Columbia recently spawned another political entity to add to the growing field of political action committees, 527s and Super PACs. These new dual-purpose PACs are the latest creatures to enter the crowded, mutating environment created by the recent spate of campaign finance judicial rulings. Their arrival, sadly, does little to clarify the rules governing campaigns. In fact, it raises the already substantial barriers to authentic, grassroots political activity.

To understand the origins of dual-purpose PACs, we need to explore how Super PACs came to be. These misleadingly named creatures of statute exist because of a court case, SpeechNow.org v. FEC, which required the Federal Election Commission to allow both individuals and groups of individuals to engage in political speech on the same terms. Since a single person was permitted to spend unlimited amounts on political speech, that same rule was extended to groups of people in the forms of PACs and 527s.

Similarly, dual-purpose PACs arose because of Carey v. FEC, a case concerning a PAC run by James Carey, a retired Navy admiral. That organization, the National Defense PAC (ND PAC), supported candidates who had served in the armed forces. Its support came primarily through direct contributions to candidates, which were limited by law. But taking advantage of the SpeechNow.org case and other precedents, ND PAC also wanted to accept unlimited sums to spend on its own advertisements.

Regulators and Carey's lawyers agreed: he could set up another PAC to make independent expenditures (IEs), but that would double his group's record-keeping and registration burdens – not to mention dilute ND PAC's name recognition. Carey and his team preferred to handle both direct contributions and IEs within ND PAC, using segregated bank accounts for the two pools of funds. The U.S. District Court for D.C. agreed, and the FEC entered into a settlement conceding the unconstitutionality of regulations forbidding ND PAC's arrangement. Hence dual-purpose PACs were born.

That all PACs may now also operate as SuperPACs is a notable development for campaign professionals. But that's just the point: only campaign professionals are likely to be aware of this option.

No form exists to start a dual-purpose PAC – just as no form exists for a SuperPAC despite the passage of more than 18 months since the SpeechNow.org decision. In both cases, PACs are expected to attach a letter to their filings apprising the FEC of their desire to take advantage of their constitutional rights – a slapdash procedure that has been mocked, justifiably, on Comedy Central's "Colbert Report." Similarly, the regulations that purport to guide campaigns have not been updated to reflect these new entities. The FEC has not even managed to update its regulations to accord with Citizens United, which was handed down in January 2010.

In the case of Carey, major questions remain. FEC commissioners have declared the need for additional regulations implementing the decision, regulations which, given our experience with SpeechNow.org and Citizens United, may not appear for years. In the interim, committees that choose to exercise their constitutional rights may do so only by accepting the risk that their interpretation of Carey, however sincere, may be deemed incorrect after the fact and attract an enforcement action.

This state of affairs would be disturbing enough if it involved an environmental or business regulation. If the Environmental Protection Agency was, say, the relevant authority, regulated companies would expect to hire lawyers to ensure their compliance with the complicated body of law governing their operations. But the FEC deals with fundamental liberties, and things are supposed to be different for political speech. As the Supreme Court noted in Citizens United, "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day."

Yet that is precisely where we find ourselves. No average citizen can be expected to dig into the tangle of regulations, interpretive decisions and court orders that presently govern our elections. And when they try, they often make mistakes.

In Colorado, for example, the secretary of state's office began evaluating its online data to determine which groups were committing the most violations and suffering the most administrative penalties. They found that "[v]olunteers and grassroots groups are far more likely to run afoul of the law because the law is so complex. Large, big-money groups are able to hire attorneys and accountants and pay very, very few fines."

That is the tragedy. While courts across the country are paring back campaign laws that violate the First Amendment, their decisions are simply increasing the volume of regulation standing between citizens and their representatives. That result is disappointing enough for corporations, unions, major political committees and candidates – all of whom can afford top-notch professional guidance. But it also harms the small, unrepresented groups that are equally entitled to the protections of the Constitution.

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