HUNTER: Sizing up the superPACs

High court ruling affirmed free speech for political committee backers

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ANALYSIS/OPINION:

Jan. 21 marked the second anniversary of the Supreme Court's decision in CitizensUnitedv. FederalElectionCommission. Already controversial at the time it was issued, the ruling has taken center stage in the debate over superPACs' role in the race for the White House. Contrary to some suggestions that superPACs are acting under the radar and outside of any regulation, they are, in fact, subject to the same long-standing disclosure requirements and objective rules applicable to everyone else.

To place superPACs in context, it is important to understand their origin. In CitizensUnited, the government was put in the unenviable position of defending a statute dictating who could speak, when they could speak and how they could speak. Specifically, the law prohibited corporations and labor unions from sponsoring broadcast advertisements that expressly advocate the election or defeat of candidates for federal office. Not only that, the law purported to impose a blackout period on certain ads that even mentioned candidates.

During oral argument, the government conceded that the law required adjustment "to give it some flexibility." Under such a free-floating approach, perhaps some types of corporations, including certain issue-advocacy groups that accept funds from for-profit corporations, would be permitted to speak, while others, such as small family-owned businesses and trade associations, might not. Media corporations, on the other hand, always had been free to speak about politics and were exempt from

FederalElectionCommission (FEC) disclosure requirements. Moreover, according to the government, some forms of speech, such as books and DVDs, might be permissible for corporations to underwrite, while others, such as video on demand, might not.

The Supreme Court did away entirely with this tenuous line-drawing. Consistent with long-standing precedent that independent political speech by individuals was not corrupting and thus could not be restricted, the court applied the same principle to corporations and, by extension, to labor unions as well. Shortly thereafter, the U.S. Court of Appeals for the District of Columbia Circuit held in SpeechNowv. FederalElectionCommission that political committees engaged in independent political speech also could not be limited in the amount of funds they could raise. This decision eliminated the anomaly whereby individuals were not subject to any restrictions on their own independent political speech, but when they got together with one or more other individuals, they suddenly faced limits on how much they could contribute to their own group.

In response to advisory opinion requests by groups on the left and right, the FEC took bipartisan action and confirmed the clear logical extension of these judicial decisions: that political committees could accept unlimited individual, corporate and union funds to sponsor independent political speech. Those political committees, which must register and report to the FEC, came to be known as “superPACs.”

Notwithstanding the FEC’s initial bipartisan approval of superPACs and the inescapable conclusion of the court rulings, these outside groups have come under fire for allegedly acting on candidates’ behalf and for being the campaigns’ “evil twin.” Before reaching such conclusions, however, it is important to understand that superPACs must abide by the same rules as all other similarly situated speakers.

First, superPACs may not serve as an arm of a candidate’s campaign. With the exception of leadership PACs, any political committee that is established, maintained or controlled by any candidate or agent thereof is deemed to be part of the candidate’s campaign and thus cannot accept unlimited funds from individuals, corporations or unions, as superPACs may do. (The FEC recently also rejected unanimously a proposal by a leadership PAC to accept unlimited funds.)

Second, superPACs may not coordinate with any candidate. The FEC has objective standards for determining when individuals or groups are coordinating their speech with campaigns. These rules apply to everyone, whether a superPAC, George Soros, Rupert Murdoch, the Sierra Club, the National Rifle Association or an average Joe. These

rules, passed after much deliberation with bipartisan votes, have been fodder for Comedy Central personalities (whose corporate employer enjoys the media exemption) for being underinclusive. The alternative, however is to leave government regulators to determine on their own whether an ad has the intent or effect of benefiting particular candidates. This type of subjective speech supervision would be unconstitutionally vague, unpredictable and inhibitive to speakers.

Third, superPACs are subject to the same disclosure requirements as traditional PACs. They must register with the FEC and file regular reports for all spending, as well as additional special reports for spending exceeding certain thresholds. These disclosures are all made available promptly on the FEC's website.

The Supreme Court and other federal courts have made it clear that the government cannot make casual and subjective determinations over who can speak about the candidates who aspire to run our government, regardless of whether the speaker is an individual, an advocacy group, a traditional PAC or a superPAC.

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