

McCutcheon v Federal Election Commission:

Q and A on Supreme Court case that challenges the constitutionality of the overall limits on the total amount an individual can contribute to federal candidates and political party committees

This Q and A on the McCutcheon case was prepared by Democracy 21 President Fred Wertheimer and Democracy 21 Counsel Don Simon, who are attorneys on the Supreme Court amicus brief filed by Representatives Chris Van Hollen and David Price to defend the overall contribution limits.

McCutcheon v. FEC is a challenge to the constitutionality of the overall limits on the total amount an individual donor can contribute to party committees and PACs, and to federal candidates in a two-year election cycle. The plaintiffs in the case are Shaun McCutcheon, an Alabama Republican activist, and the Republican National Committee. The case is scheduled for oral argument in the Supreme Court on October 8, 2013.

The current overall contribution limits for the 2014 election cycle are \$74,600 in total contributions by an individual to party committees and PACs, and \$48,600 in total contributions to federal candidates.

“Joint fundraising committees” were used by President Obama and Mitt Romney to solicit the maximum contribution individuals could give to all party committees for the 2012 election cycle. (The limit in 2012 was \$70,800 per donor.) The contributions were then spent by the parties to support the 2012 presidential campaigns of the candidates who solicited the funds.

If the Supreme Court were to strike the overall contribution limits in the *McCutcheon* case, officeholders and candidates, using “joint fundraising committees,” will be able to solicit, and individual donors will be able to contribute, million-dollar and multimillion-dollar contributions in the future.

Set forth below is a Q and A on the *McCutcheon* case.

Q. What has been the Supreme Court’s position on the constitutionality of contribution limits?

A. Contribution limits, including an overall contribution limit, were enacted in 1974 in the wake of the Watergate scandals. In 1976, the Supreme Court in *Buckley v. Valeo* held that the contribution limits were constitutional. The Court held that large contributions create opportunities for corruption and the appearance of corruption, and therefore contributions to candidates and parties can be limited, consistent with the First Amendment.

Since the *Buckley* decision, the Court has consistently upheld the constitutionality of federal contribution limits.

In 2002, Congress enacted a ban on soft money contributions to political parties, which were large contributions to parties in excess of the federal limits on party contributions. In 2003, the Supreme Court in *McConnell v. FEC* upheld the constitutionality of the ban on soft money contributions to political parties.

In 2010, the Supreme Court in *Republican National Committee v. Federal Election Commission* summarily reaffirmed this ruling, with Chief Justice Roberts voting in the majority.

Q. *How often has the Supreme Court reaffirmed the constitutional framework set forth in the Buckley decision?*

A. The *Buckley* decision has served as the constitutional framework for campaign finance laws since it was issued in 1976. At the heart of the *Buckley* decision is the distinction made between contributions and expenditures. The Supreme Court held that limits on contributions serve a compelling governmental interest in preventing corruption or the appearance of corruption, and are therefore constitutional. The Court also held that limits on independent expenditures do not pose a threat of corruption and therefore are not constitutional. As part of the *Buckley* ruling, the Court upheld the precursor to the overall contribution limits that are again at issue in the *McCutcheon* case.

In almost every campaign finance case decided by the Supreme Court since *Buckley*, the Court has relied on this basic framework to uphold the constitutionality of limits on contributions and strike down limits on expenditures.

In *Randall v. Sorrell* in 2006, the Supreme Court was expressly asked to overrule the *Buckley* framework. Chief Justice Roberts joined an opinion by Justice Breyer in *Randall* which rejected the idea of overruling *Buckley*:

We can find no such special justification that would require us to overrule *Buckley*. Subsequent case law has not made *Buckley* a legal anomaly or otherwise undermined its basic legal principles. We cannot find . . . any demonstration that circumstances have changed so radically as to undermine *Buckley*'s critical factual assumptions. . . . At the same time, *Buckley* has promoted considerable reliance. Congress and the state legislatures have used *Buckley* when drafting campaign finance laws. And . . . this Court has followed *Buckley*, upholding and applying its reasoning in later cases. Overruling *Buckley* now would dramatically undermine this reliance on our settled precedent.

For all these reasons, we find this a case that fits the *stare decisis* norm. And we do not perceive the strong justification that would be necessary to warrant overruling so well established a precedent. We consequently decline the respondents' invitation to reconsider *Buckley*.

Subsequently, in the *Citizens United* decision in 2010, the Court again relied on the *Buckley* framework to hold that the ban on independent expenditures by corporations was unconstitutional. The Court in *Citizens United* noted that *Buckley* upheld "limits on direct

contributions to candidates, “because such limits served a “sufficiently important governmental interest in the prevention of corruption and the appearance of corruption.”

Thus, *Citizens United* is consistent with the framework of the *Buckley* decision that upheld contribution limits, including the overall contribution limit, and the case does not provide any “special justification” for overturning *Buckley*.

Q. If the overall contribution limits are struck down, how would joint fundraising committees create the opportunity for individuals to give huge contributions to directly support candidates and parties?

A. Joint fundraising committees consist of two or more candidate and/or party committees working together to raise contributions for their mutual benefit. Officeholders and candidates can solicit and donors can write a single check to the joint committee in an amount up to the total amount of the contribution limit for each of the participating committees. The joint committee then distributes the funds to each of the participating committees.

Joint fundraising committees have long been used to solicit and raise single contributions in amounts that are much larger than the amount that could be given to a single candidate or single party committee.

In the 2012 presidential election, for example, President Obama and Mitt Romney each had joint fundraising committees consisting of their campaign committee, their national party committee and several state party committees.

These joint committees were used by Obama and Romney to solicit contributions from individuals of \$70,800 per donor, the maximum amount a single donor could give to all political party committees in the 2012 election cycle. The money was then spent to support the campaigns of the presidential candidates who solicited the contributions. 1,257 individual donors gave the maximum amount in party contributions to the Obama and Romney joint fundraising committees, according to the Center for Responsive Politics.

If the overall limits were struck down, the cap on total party contributions would be gone. Donors would then be able to give more than \$1 million per donor to a joint fundraising committee consisting of all of the committees of a political party.

Thus, in the case of a joint fundraising committee formed by a presidential candidate and consisting of all of the committees of a party, the candidate could solicit and a donor could give a contribution of almost \$1.2 million. This would consist of \$64,800 in contributions to each of the three national party committees (for a total of \$194,400) plus \$20,000 to each of the 50 state party committees in a two year cycle (for a total of \$1 million).

Absent the overall contribution limits, President Obama and Mitt Romney could have solicited \$1 million contributions in the 2012 presidential election.

And because parties can make unlimited internal transfers, the money could be electronically disbursed to the participating committees and then electronically consolidated in a single national party committee and spent for the benefit of the presidential candidate who solicited the funds.

Using the same kind of approach, House Speaker Boehner or Democratic Leader Pelosi could create a joint fundraising committee consisting of the candidate committees of all of their party's House candidates. They could then solicit checks for as much as \$2.2 million per donor to support their House candidates. Under the overall contribution limits now in effect, the maximum amount that a donor could give to a joint fundraising committee for House candidates is \$48,600.

In fact, the most powerful national officeholders of a political party (for example, the current President, Senate Majority Leader and House Democratic Leader) could join forces and form a joint fundraising committee consisting of all of their party and candidate committees. The officeholders could then solicit and donors could give contributions for as much as \$3.6 million per donor for the two-year election cycle.

This total contribution would consist of the maximum contributions the donor could make to their three national party committees (a total of \$194,400), plus all their state party committees (a total of \$1,000,000), plus their party's presidential candidate and each of their House and Senate candidates (\$5,200 each, for a total of \$2,438,800).

Thus if the Supreme Court were to strike down the overall contribution limits, we would be back to the same kind of huge contributions that constituted legalized corruption and resulted in the Watergate scandals in the 1970s and the soft money scandals in the 1990s.

Q. What has been the Supreme Court's position on prohibiting federal officeholders and candidates from soliciting large contributions?

A. In 2002, Congress prohibited federal officeholders and candidates from soliciting contributions in excess of the federal contribution limits, such as funds for their state parties and state candidates that might be lawful under state law but were in excess of federal contribution limits. The solicitation ban meant that federal officeholders and candidates could not solicit any donor to contribute more to federal candidates and party committees than the amounts permitted under the overall contribution limits, including contributions to joint fundraising committees. In other words, federal officeholders and candidates could solicit only "hard money" contributions.

In 2003, in the *McConnell* case, the Supreme Court upheld the constitutionality of the solicitation ban. The Court said:

Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself.

Justice Kennedy who joined the majority in voting to uphold the solicitation ban said in a concurring opinion that the ban served an important interest in preventing "quid pro quo" corruption:

The making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request). Rules governing candidates or officeholders solicitation of contributions are, therefore, regulations governing their receipt of *quids*. This regulation fits under *Buckley*'s anticorruption rational.

Q. If the Court strikes down the overall contribution limits, what would the impact be on the ban on soliciting large contributions above the federal contribution limits?

A. As a practical matter, the solicitation ban would be eviscerated. In the absence of the overall contribution limits, federal officeholders and candidates again would be able to solicit million-dollar and multimillion-dollar contributions through the use of joint fundraising committees. Those solicitations would be legal because, in the absence of the overall contribution limits, the contributions solicited would be "hard money," that is, money subject to and within the remaining federal contribution limits.

As the Supreme Court recognized in *McConnell*, such large contributions made "at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder," regardless of how the contributions are spent.

Q. If the problem with striking down the overall contribution limits is the role that joint fundraising committees can play in raising very large contributions, couldn't Congress solve the problem by just banning the use of joint fundraising committees?

A. No. Joint fundraising committees are only part of the problem. Banning these committees would not solve the problem of the huge total amounts that could be contributed by individual donors if the overall contribution limits were struck down. Even without joint fundraising committees, a President, congressional leader or other federal officeholder could solicit and a wealthy donor could contribute more than \$1 million to a political party and more than \$2 million to federal candidates in an election cycle, in the absence of the overall limits.

While it would be more cumbersome to make multiple separate contributions to each recipient committee, rather than writing a single check to a joint fundraising committee, the bottom line is that a donor could still give a huge total amount to a party or to federal candidates. This would create opportunities for corruption of the officeholders of the party who solicited the contributions or benefited from them. Wealthy donors seeking to buy corrupting influence could do so with huge amounts of money, and federal officeholders could reward such massive contributions with government decisions.

In fact, prior to the enactment of the Watergate reforms in 1974, this is the way the system worked. Wealthy donors would give large contributions to a party by breaking them up into numerous smaller contributions that went to separate committees set up by the party in order to evade existing party contribution limits.

Q. If the problem with striking down the overall contribution limits is the ability of officeholders and candidates to solicit huge contributions, couldn't this problem be solved by striking down the overall contribution limits as they apply to donors while maintaining the

overall limits as constitutional for purposes of limiting the amount an officeholder or candidate could solicit from an individual?

A. This approach would not solve the problem and would not prevent the opportunities for corruption provided by large contributions. Donors would still be able to make million-dollar and multimillion-dollar contributions to joint fundraising committees established by officeholders and candidates. Even if the huge contributions were not “solicited” by the officeholders and candidates creating the joint fundraising committees, they would directly benefit from these contributions and the officeholders and candidates would know the donors to whom they are obligated. There would be no real separation between donors providing huge contributions, and the officeholders and candidates benefiting from them.

Q. Opponents of the overall contribution limits argue that candidates and parties are disadvantaged by the overall limits that apply to them while outside groups making independent expenditures are not subject to limits on the contributions they raise. Why isn’t that a basis for striking the overall limits?

A. The Supreme Court has held that money spent independently of candidates and parties does not create opportunities for corruption while contributions directly to candidates and parties do provide such corruption opportunities. Therefore, the fact that outside groups spend money independently from candidates and parties does not provide any constitutional grounds for striking contribution limits, which the Court has held are constitutional to prevent corruption and the appearance of corruption.

Furthermore, candidates and parties spent \$5.2 billion in the 2012 national elections under existing contribution limits, including the overall contribution limits. This constituted 83 percent of the total expenditures made in the 2012 elections and included more than \$2 billion spent by the two major parties. By comparison, outside groups spent about \$1 billion in 2012, or about 17 percent of the total expenditures. Candidates and parties are not starving for resources and are raising billions of dollars to spend on elections, under the existing overall limits.

Q. As a result of the Citizens United decision, individual donors can make unlimited contributions to Super PACs and nonprofit groups to finance independent expenditures. Under these circumstances, why does it matter if they give similarly huge contributions directly to candidates and parties?

A. The Supreme Court has held that money spent by outside groups independently of candidates or parties does not have a corrupting influence on candidates and parties. While many believe this analysis fails to recognize the real world of modern politics, this reasoning has led to the conclusion that contributions to Super PACs are not corrupting and therefore cannot be subject to contribution limits.

On the other hand, the Supreme Court, for nearly four decades, has also held that large contributions made directly to candidates and parties do create opportunities for corruption and the appearance of corruption. For that reason, such contributions directly to parties and candidates can be constitutionally be subject to contribution limits, including the overall contribution limit.

There is also a difference in real terms. Contributions to candidates and parties, unlike contributions to independent spending groups, involve a direct nexus between officeholders and donors seeking to influence officeholders. This creates the most dangerous opportunities for corruption – opportunities for the purest form of legalized bribery. Influence-seeking big donors want to provide their checks directly to those officeholders from whom they can obtain favorable treatment in return for their money.

The fact that independent expenditures by Super PACs and others have created significant problems for our political system does not justify making a bad situation far worse by opening the door to legalized corruption of our federal officeholders.

Q. What is wrong with the argument made by Mr. McCutcheon that each of his contributions to individual candidates is constitutional and he should be able to give legal contributions to more candidates than the overall contribution limit allows?

A. Mr. McCutcheon ignores the ability of joint fundraising committees to be used by officeholders to solicit and by donors to contribute huge individual checks that create opportunities for corruption and the appearance of corruption. Furthermore, even without joint fundraising committees the ability of a single donor to give more than \$2 million to the federal candidates of one party creates its own opportunities for corruption of federal officeholders in that party.

Under the existing overall contribution limits, Mr. McCutcheon can give contributions to each candidate of his party running for federal office. He just cannot give the maximum amount to each candidate.

Q. If the overall contribution limits are struck down, what are the implications for the existing limits on the amounts an individual can give to an individual candidate and a single political party committee?

A. If the overall limits were struck down, the underlying “base” limits will likely be left in place, at least for the time being, since those limits are not being challenged in the *McCutcheon* case. Thus, an individual donor would still be subject to a contribution limit of \$2,600 per candidate, per election, and a limit of \$32,400 per national party committee, per year.

The Court opinion, however, could open the door to striking these “base” contribution limits in future cases. In any event, if the overall limits are struck down as unconstitutional, future challenges can be expected to the constitutionality of the remaining contribution limits. This would include the limits on individual contributions to candidates and parties, enacted in 1974, and the ban on corporate contributions, enacted in 1907.

Conclusion

Beginning with the *Buckley* decision in 1976, the Supreme Court repeatedly has held that large contributions to candidates and parties create opportunities for corruption and can be subject to contribution limits, consistent with the Constitution. There is no legitimate basis for

overturning nearly four decades of Supreme Court precedents to strike down the overall contribution limits.

If the Supreme Court were to strike down the overall contribution limits, it would recreate the system of legalized corruption that existed prior to the Watergate scandals and open the door to striking down the remaining contribution limits. This would take us back to the Robber Baron era of the 19th century, when members of Congress were functionally owned by wealthy interests.

This would be a disaster for the American people and our democracy.