

# Beware of a Naive Perspective

A *Prebuttal* to Possible U.S. Supreme Court Rulings in  
*McCutcheon v. Federal Election Commission*

*(Part 2 of 2)*

## **Acknowledgments**

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## Executive Summary

Many believe that U.S. Supreme Court Chief Justice Roberts will provide the swing vote in the court's decision in *Shaun McCutcheon v. Federal Election Commission (McCutcheon)*, a case challenging the constitutionality of caps on the total amount of campaign contributions an individual may make to candidates, political parties, and political action committees. Based on his comments during oral arguments, some have speculated that Roberts will vote to strike down limits on aggregate contributions to candidates but will support maintaining limits on contributions to parties and political action committees (PACs).

We illustrated in Part 1 of this two-part series that eliminating limits on aggregate contributions to candidates while leaving other aggregate limits intact would enable joint fundraising committees (JFCs) operated by party leaders and elected officials to solicit contributions as large as \$2.5 million from a single donor. This report shows that a supposed middle ground that permitted unlimited aggregate contributions to candidates but retained caps on contributions to parties would also likely end up eroding the integrity of limits on contributions to parties.

Under a scenario in which only caps on total contributions to candidates were struck down, the party leaders and elected officials who administer joint fundraising committees would likely end up soliciting checks of more than \$2.5 million from major donors. The vast majority of these contributions would be distributed to candidates in increments of \$5,200 per recipient. However, because candidates could transfer their share of contributions received from JFCs to party committees, leaders of JFCs, would likely pressure candidates, the majority of whom are running in uncompetitive races, to redirect that money to back party committees.

Using conservative estimates about the number of major donors that would contribute \$2.5 million to a joint fundraising committee if the court eliminated caps on total contributions to candidates, and data on the number of competitive and non-competitive congressional races in recent election cycles, we estimate that eliminating the aggregate limit on contributions to candidates could enable candidates to transfer more than \$74 million to the national party committees combined. Each donor would effectively be contributing the equivalent of more than \$1.8 million to party committees, or more than 24 times the legal limit.

## Introduction

Sometime between now and early July, the U.S. Supreme Court will likely issue a ruling in *Shaun McCutcheon v. Federal Election Commission*, a case that challenges federal limits on the total an individual can contribute to federal candidates, political parties, and political action committees. (Limits on contributions to individual candidates, party entities and PACs are not being challenged.)

The court could rule in several different ways. First, it could reject the plaintiffs' argument and maintain limits on aggregate contributions. Second, and conversely, it could eliminate the \$123,200 biennial limit and the sub-limits for total contributions to candidates, parties and PACs. A third, hybrid approach would preserve aggregate limits on contributions to parties and PACs but eliminate those on contributions to candidates.

One potential byproduct of eliminating some or all aggregate limits would be the expanded use of joint fundraising committees, which would enable party leaders to solicit and collect multi-million dollar checks from donors. In [Part 1](#) of this two part series, we reported that elimination of all aggregate limits could permit JFCs to collect checks of as large as \$5.9 million from individual donors. Even a middle ground that maintains limits on contributions to parties and PACs while eliminating them for contributions to candidates would still permit donors to contribute more than \$2.5 million to a JFC. This in itself would greatly increase the likelihood of *quid pro quo* corruption, the risk of which prompted the Supreme Court to uphold contribution limits in its 1976 *Buckley v. Valeo* decision.<sup>1</sup>

As discussed in Part 1, there has been some speculation based on Chief Justice Roberts' questions during the oral argument that the court may strike down limits on aggregate contributions to candidates, but not parties and PACs. Such a decision might be defended on the basis that, while candidates are ostensibly primarily concerned with their own fortunes, federal, state and local parties all work in service of the same mission. Thus, contributions to any of them are functionally contributions to the same entity. Permitting unlimited aggregate contributions to party committees would therefore largely destroy the integrity of limits on contributions to individual party committees.<sup>2</sup>

But this report will show that eliminating aggregate limits on contributions to candidates would provide a means to circumvent limits on contributions to parties even if the court left the aggregate cap on party contributions intact. Circumvention of the remaining

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<sup>1</sup> *Buckley v. Valeo*, 424 U.S. 1, at 26-27 (1976).

<sup>2</sup> Currently, an individual can contribute \$32,400 to a national party committee and \$10,000 combined to state, district, and local party committees.

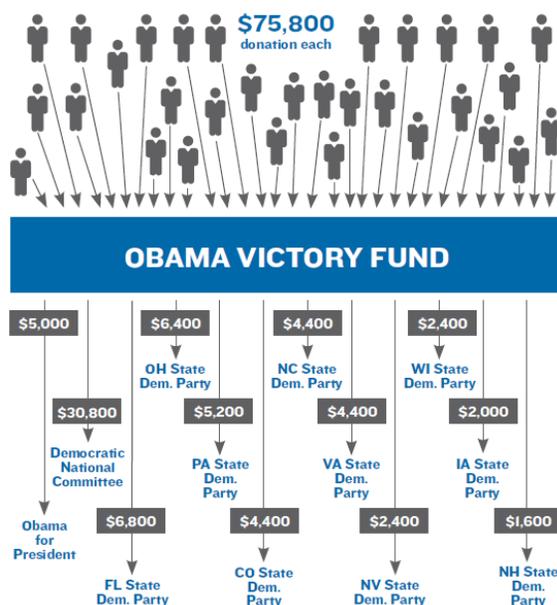
aggregate limits would be likely because candidates can transfer unlimited amounts of money to party committees. The likelihood that a large percentage of candidates would transfer proceeds from JFC fundraisers to their parties is increased because most candidates in a given election cycle are running in uncompetitive races. As a result, the leaders of JFCs are likely to pressure candidates in uncompetitive races to transfer their money so that it can be used to aid their party.

What are the real world implications if the cap on total contributions to candidates were struck down? Using conservative assumptions about the number of maximum contributors to joint fundraising committees that would arise and recent data about the number of competitive congressional races per election cycle, our analysis shows that a decision in *McCutcheon* solely to strike down limits on aggregate contributions to candidates could enable candidates to transfer a total of more than \$74 million to the national party committees combined.

## Transferability of Money Could Erode the Integrity of Contribution Limits if any Aggregate Restrictions Were Lifted

If the court were to strike down limits on aggregate contributions to individual candidates, the decision would also diminish the effect of caps on contributions to parties, even if the court technically left them intact.

**Figure 1: A Fundraising Event With Michelle Obama for President Obama's Joint Fundraising Committee, 2012 Election Cycle**



Striking down aggregate limits on contributions to candidates would have this effect because candidates can transfer unlimited sums of money to party committees at all levels (national, state, district, and local). Therefore, if a single donor were permitted to contribute to an unlimited number of candidates, those candidates could, in turn, transfer those contributions to party committees. Such transfers could be facilitated if large contributions were channeled through a joint fundraising committee. Joint fundraising committees collect large contributions from individual donors and then distribute those funds to a variety of candidates and party committees according to a predetermined formula. [See Figure 1

for an illustrate of how JFCs operate.<sup>3]</sup>

Leaders of a JFC could encourage the majority of candidates to whom they disbursed contributions to transfer the money to a party committee. Explicit pressure could be placed upon candidates in non-competitive races to do so. Indeed, party committees already employ this practice. For example, Rep. Jim Himes (D-Conn.), the finance chair of the Democratic Congressional Campaign Committee (DCCC), is responsible for convincing sitting House Democrats to transfer their campaign funds to the DCCC.<sup>4</sup>

Public Citizen made several assumptions in the following analysis. First, we assumed that aggregate limits on contributions to candidates would no longer be in force, allowing a donor to contribute \$2,518,600 to a joint fundraising committee that aims to aid each nominee and committee of one of the major parties. Specifically, we assumed the JFC would then disburse the majority of this money (\$2,438,800) to 435 House candidates and 34 Senate candidates at the maximum allowed amount for the candidates' primary and general election campaigns. Current limits, which are indexed for inflation, are \$2,600 per election. Although, many incumbents do not face meaningful challenges for their primaries, they may still collect contributions up to the per-election maximums for them. The remaining \$74,600 would be given to the national party committees, in accordance with the existing aggregate limit. [See Table 1]

**Table 1: Potential Contribution Limits Under Two Potential McCutcheon Outcomes**

Scenario	To each candidate or candidate committee, per election	To national party committee, per year	To state, district, and local party committee, per year	To any other political committee, per year	Special Limits
Maintain Current Law	\$2,600 <sup>5</sup>	\$32,400	\$10,000 (combined limit)	\$5,000	\$123,200 biennial limit: <ul style="list-style-type: none"> <li>\$48,600 to all candidate committees</li> <li>\$74,600 to all PACs and parties<sup>6</sup></li> </ul>
"Hybrid Option." No aggregate limit on candidates; limits remain for PACs and parties	\$2,600	\$32,400	\$10,000 (combined limit)	\$5,000	\$2,518,600 biennial limit <sup>7</sup> ; <ul style="list-style-type: none"> <li>\$2,444,000 to all candidates</li> <li>\$74,600 to all PACs and parties<sup>8</sup></li> </ul>

Source: *Contribution Limits 2013-2014*, FEDERAL ELECTION COMMISSION (viewed November 20, 2013), <http://1.usa.gov/8PEPaN>.

<sup>3</sup> *Invitation to Fundraiser with First Lady Michelle Obama for the Obama Victory Fund, Friday, March 30, 2012* (viewed December 17, 2013), <http://bit.ly/1DaFNI>.

<sup>4</sup> Charles J. Lewis, *Himes Puts the Squeeze on Fellow Democrats*, NEWSTIMES.COM (November 24, 2013), <http://bit.ly/1azKj4p>.

<sup>5</sup> The limit is effectively \$5,200 because donors can contribute both to a candidate's primary and general election campaign.

<sup>6</sup> Only \$48,600 of this amount may be contributed to state and local party committees, and PACs.

<sup>7</sup> Public Citizen's analysis assumed a donor would contribute the maximum to 435 House candidates, 34 Senate candidates, and a presidential candidate. Aggregate contributions to national party committees, state, district and local committees, and other political committees would remain limited to \$74,600 per cycle, per donor.

<sup>8</sup> Only \$48,600 of this amount may be contributed to state and local party committees, and PACs.

Further, based on data concerning large contributors in recent elections, we assumed that a party would have 40 donors willing to make maximum contributions under the new rules.<sup>9</sup> Finally, we used the average number of non-competitive House and Senate races from 2008, 2010, and 2012 as a stand-in for the number of future non-competitive races.<sup>10</sup> These numbers are shown below in Table 2.

**Table 2: Number of Non-Competitive House and Senate Races, 2008-2012**

Uncompetitive Races	House	Senate
2008	331	22
2010	313	23
2012	354	29
<b>Average, 2008-2012</b>	<b>333</b>	<b>25</b>

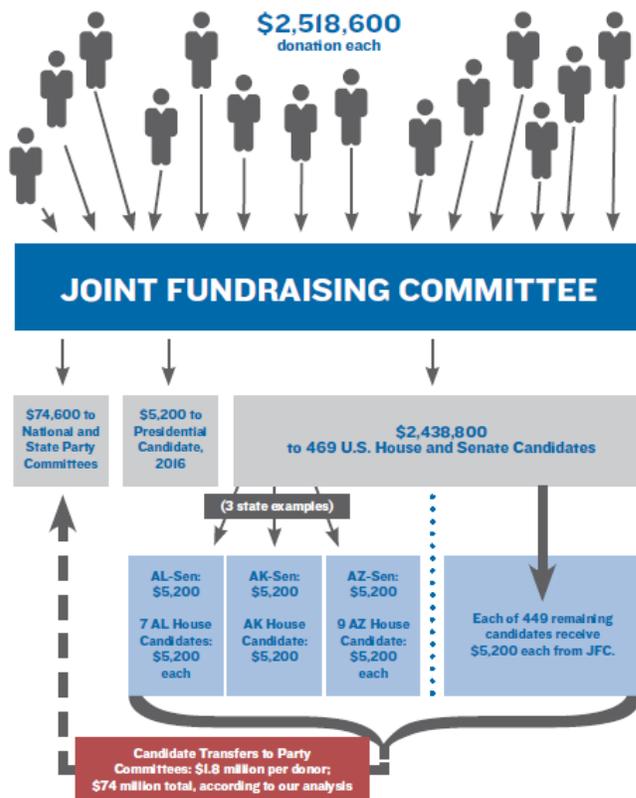
Source: Public Citizen analysis of Center for Politics House and Senate ratings, 2008-2012.

Public Citizen determined that if the aggregate limit for candidates were eliminated and if each party had 40 donors who were willing to donate the maximum to one candidate in each U.S. House and Senate contest, party committees could receive more than \$74 million combined through transfers from candidates in non-competitive races. [See Table 3] This assumes that those candidates in non-competitive races would each transfer the \$5,200 they received through the JFC from each of the donors to a national party committee. The more than \$1.8 million per donor that would be redirected back to party committees would be nearly 24 times the aggregate limit of \$74,600 for contributions to party committees that, in this scenario, the court would have left in force.

<sup>9</sup> During the 2012 cycle, there were 159 donors who contributed at least \$1 million to one or more SuperPACs. These donors were nearly evenly split (80 to 79) between supporting Democratic and Republican SuperPACs. In this analysis, we assumed that about half of these donors, about 40 per party, could be convinced by party leaders to contribute the maximum to a joint fundraising committee in a post-*McCutcheon* climate. See BLAIR BOWIE AND ADAM LIOZ, DEMOS, BILLION DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2012 ELECTIONS (2013), <http://bit.ly/1bSsstm>.

<sup>10</sup> Public Citizen analyzed the number of competitive House and Senate races as reported by the Center for Politics for the 2008, 2010, and 2012 elections. See *2008 House Outlook*, CENTER FOR POLITICS (viewed December 4, 2013), <http://bit.ly/1eWI9Sv>; *Senate Outlook for 2008*, CENTER FOR POLITICS (viewed December 4, 2013), <http://bit.ly/IHN2IK>; *2010 House Ratings*, CENTER FOR POLITICS (viewed December 4, 2013), <http://bit.ly/1clXVVD>; *2010 Senate Ratings*, CENTER FOR POLITICS (viewed December 4, 2013), <http://bit.ly/1jlXwFR>; *Projection: Obama Will Likely Win Second Term*, CENTER FOR POLITICS (viewed December 4, 2013), <http://bit.ly/1bt2MK>; *President and Senate: Where We Stand Now*, CENTER FOR POLITICS (viewed December 4, 2013), <http://bit.ly/1ePKSvd>. The number of competitive races was subtracted from the total number of races to determine the number of non-competitive races.

**Figure 2: Candidate to Party Transfers, Hybrid Option**



To put this number in perspective, in 2012 the Democratic National Committee transferred more than \$43 million combined to the Democratic parties of Virginia, Colorado, Ohio, and Florida.<sup>11</sup> An additional \$74 million could enable national party committees to nearly double their spending in key battleground states.

The assumption that candidates would have the ability and willingness to transfer funds channeled through a JFC is not unreasonable. In 2012, the average winning House candidate had more than \$371,000 remaining in his or her campaign committee’s bank account. One member, Rep. Frank Pallone (D-N.J.), had more than \$3.4 million cash on hand at the end of his campaign.<sup>12</sup>

**Table 3: Potential Candidate to Party Transfers**

Money Available for National and Local Party Committees	Amount
Total per Donor, minus Competitive Races	\$1,861,600
Number of Maximum Donors	40
<i>Total Back to Party Committees</i>	<i>\$74,464,000</i>

Source: Public Citizen analysis of potential changes to campaign finance laws following the Supreme Court’s ruling in *McCutcheon v. Federal Election Commission*. The analysis assumes the court strikes down aggregate limits on contributions to candidates but not other committees. The \$1,861,600 figure is the result of taking the maximum contribution to one candidate for each non-competitive House and Senate race (\$5,200 multiplied by 358 equals \$1,861,600).

Funds collected by party committees could be used directly to assist particular candidates, especially those in competitive races. The additional financial assistance to those candidates could make them beholden to the sources of the money, which could foster

<sup>11</sup> *Democratic National Committee—Expenditures*, CENTER FOR RESPONSIVE POLITICS (viewed December 11, 2013), <http://bit.ly/1aV7Exw>.

<sup>12</sup> *Election Stats, 2012*, CENTER FOR RESPONSIVE POLITICS (viewed December 4, 2013), <http://bit.ly/1EnTIC>.

corruption. Moreover, to the extent that these contributions helped facilitate an entire party's success, all elected officials from that party (including those not in competitive contests) would stand to benefit and could therefore be beholden to the large donors.

## Conclusion

A Supreme Court decision in *McCutcheon* that failed to anticipate the practical effects of eliminating aggregate contribution limits would be reminiscent of the court's 2010 *Citizens United v. FEC* decision. In *Citizens United*, the court allowed ostensibly independent groups to spend limitlessly to influence elections. The court's ruling was based on a mistaken assumption that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" and therefore could not constitutionally be restricted.<sup>13</sup>

However, many of the supposedly independent, unrestricted groups that have emerged in the aftermath of *Citizens United*<sup>14</sup> have had very close ties to individual candidates and parties, as Public Citizen previously reported.<sup>15</sup> Many of these groups are not credibly independent.

The court should have recognized prior to issuing its *Citizens United* decision that the decision would encourage the creation of pseudo-independent groups. For the sake of its legacy and the integrity of our electoral process, the Supreme Court should be careful not to succumb to such myopic thinking again.

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<sup>13</sup> *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), <http://1.usa.gov/9Hn7y5>.

<sup>14</sup> *Citizens United v. Federal Election Commission*, 130 S.Ct. 876 (2010), <http://1.usa.gov/9Hn7y5>. *Citizens United* outlawed restrictions on the ability of outside entities, including corporations and unions, to spend money from their treasuries to make independent expenditures (expenditures expressly intended to influence the outcomes of elections). A subsequent decision by the U.S. Court of Appeals for the District of Columbia Circuit determined that limitations on the amounts of contributions to groups engaging in independent expenditures could not be justified in the wake of *Citizens United*. See *SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010), <http://1.usa.gov/sPC9tI>. The Federal Election Commission then ruled that independent expenditure groups may accept unlimited contributions from corporations and unions, as well as individuals. See Federal Election Commission, Advisory Opinion 2010-11 (July 22, 2010), <http://bit.ly/lK6LUX>. The cumulative effect of these decisions was to permit outside entities to use unlimited contributions from corporations, unions and individuals to influence the outcomes of elections. Entities that acknowledge a primary purpose of using unlimited contributions to influence elections are known as independent expenditure-only committees, or super PACs. See also TAYLOR LINCOLN, PUBLIC CITIZEN, SUPER CONNECTED: OUTSIDE GROUPS' DEVOTION TO INDIVIDUAL CANDIDATES AND POLITICAL PARTIES DISPROVES THE SUPREME COURT'S KEY ASSUMPTION IN CITIZENS UNITED THAT UNREGULATED OUTSIDE SPENDERS WOULD BE 'INDEPENDENT' 9 (March 2013), <http://bit.ly/1bhTZR1>.

<sup>15</sup> TAYLOR LINCOLN, PUBLIC CITIZEN, SUPER CONNECTED: OUTSIDE GROUPS' DEVOTION TO INDIVIDUAL CANDIDATES AND POLITICAL PARTIES DISPROVES THE SUPREME COURT'S KEY ASSUMPTION IN CITIZENS UNITED THAT UNREGULATED OUTSIDE SPENDERS WOULD BE 'INDEPENDENT' (March 2013), <http://bit.ly/1bhTZR1>.