

## MCCUTCHEON V. FEC: A CASE COMMENT

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### INTRODUCTION

The landmark ruling of the United States Supreme Court in *Citizens United v. Federal Election Commission*<sup>323</sup> caused tremendous uproar about extending certain First Amendment<sup>324</sup> rights that were traditionally reserved for people to companies. As a result of this case and subsequent proceedings, restrictions on political spending of companies, labour unions and associations were removed. This led to the creation of Super PACs. Political Action Committees that had no restrictions on campaign spending. Hundreds of millions of dollars were poured into Super PACs in order to support campaigns that ran parallel to that of the candidate. Super PACs were allowed to spend unlimited amounts of money, but they could not communicate with the candidate they were backing.

With the removed restrictions on election spending, along with a very close presidential race, the election cycle of 2011-2012 was the most expensive one ever, with candidates receiving \$7.1 Billion in contributions, out of which they spent \$7 Billion.<sup>325</sup> Even with the FEC failing to change its regulations post *Citizens United*, a new case emerged that sought to further deregulate election spending. In *McCutcheon v. Federal Election Commission*<sup>326</sup>, the plaintiff sought the removal of aggregate contribution limits so that he could contribute to more candidates than was previously permissible. This in theory, could potentially allow people to contribute millions of dollars, even though the limit on the amount of money that could be contributed to a particular candidate would be limited.

### FACTS OF THE CASE

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<sup>323</sup> 558 U.S. 310 (2010)

<sup>324</sup> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.", Amendment I, United States Constitution

<sup>325</sup> FEC SUMMARIZES CAMPAIGN ACTIVITY OF THE 2011-2012 ELECTION CYCLE,

[http://www.fec.gov/press/press2013/20130419\\_2012-24m-Summary.shtml](http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml) (last visited Sep 9, 2014)

<sup>326</sup> 572 U.S. \_\_\_\_ (2014)

In 1971, the legislature passed the Federal Election Campaign Act (herein referred to as FECA), which along with subsequent amendments<sup>327</sup>, imposed an aggregate limit<sup>328</sup> on the amount of money which a person could contribute to national political parties and federal election candidates. It also limited the amount of political expenditure. In January of 1975, Senator James L. Buckley of New York filed a lawsuit challenging the constitutional validity of the law. The case would reach the Supreme Court<sup>329</sup>, which ruled the following year that any limits on political expenditure would violate the First Amendment<sup>330</sup> protection of free speech, the Court, however, ruled that individual contributions could be limited by the government.

In 2002, The Bipartisan Campaign Reform Act<sup>331</sup> (BCRA) further amended FECA to compensate for inflation, increasing the aggregate limits on political contribution. It also changed the individual limitations from annual biennial. This was the last legislative attempt to control the rampant spending on political campaigns that would reach unprecedented levels in 2012.

The plaintiff in *McCutcheon* was Shaun McCutcheon, a businessman and electrical engineer based in Birmingham, Alabama. He was a regular campaign contributor and activist for the Republican Party. He had begun contributing to Republican candidates in the 1990s and would go on to join the Jefferson County Republican Party Executive Committee. As of September 2012, McCutcheon had contributed extensively<sup>332</sup> and wanted to donate to more federal candidates. This would however bring his total contributions over the aggregate limit set by FECA. As a result, he filed suit against the Federal Election Commission and was joined in this suit by the Republican National Convention.

It became apparent that the case was meant to increase the influence of wealthy donors on the political system. Without political contribution limits, donors would be free to contribute to as many candidates as they desired. This would open up the possibility of Parties forming new organizations called Joint Fundraising Committees that could effectively bypass the contribution limit to individual candidates. As an unexpected silver lining to *McCutcheon*, the ruling could undermine Super PACs, which had allowed unlimited spending and anonymous donors.

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<sup>327</sup> Federal Election Campaign Act and subsequent amendments provided by the Federal Election Commission, accessible at <http://www.fec.gov/law/feca/feca.shtml> (last accessed on 9th September, 2014)

<sup>328</sup> Contributions to federal candidates were limited to \$46,200, national parties to \$70,800, or \$117,000 in aggregate. (As of the election cycle of 2011-2012) [Source: Federal Election Commission, accessible at <http://www.fec.gov/info/contriblimits1112.pdf> (last accessed 9th September)]

<sup>329</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976)

<sup>330</sup> This idea that political spending equated to free 'speech' would go on to play a major role in *McCutcheon*.

<sup>331</sup> Also known as the McCain-Feingold Act, Pub. L. 107-155

<sup>332</sup> He had contributed \$33,088 to sixteen federal candidates and over \$25,000 to non-candidates.

## PROCEDURAL HISTORY

The U.S District Court for the District of Columbia had previously granted the Federal Election Commission's motion to dismiss. The court held that the Government may justify the aggregate limit as a way to prevent corruption, or even the appearance of corruption or the circumventing of the imposed limits in order to further the anticorruption interest of the State.<sup>333</sup>

## ISSUES AND CONTENTIONS

- A) Whether the imposition of the aggregate limit imposed on the freedom of speech guaranteed by the First Amendment to the United States Constitution
- B) Whether the removal of aggregate limits would allow the wealthy to have a disproportionately large impact on the political climate of the country
  - 1) If the political contributions could lead to corruption as a result of limitless contributions.

## JUDGEMENT

The Supreme Court overturned the ruling of the D.C District Court and struck down the provision of the FECA<sup>334</sup> which dealt with placing the aggregate limit on campaign contributions.

The judges on the Plurality were of the opinion that limiting the number of candidates a person could contribute to was violating the First Amendment to the United States Constitution. Justice Roberts reasoned that the limitation was akin to restricting the number of candidates that could be endorsed by a newspaper. Justice Thomas, who wrote the concurrence, was of the opinion that there should be no limits on campaign contributions as it imposed a "direct restraint" on political communications. Justice Roberts also had a very positivist interpretation of corruption, he only acknowledged *quid pro quo*<sup>335</sup> corruption, which did not include 'soft money'<sup>336</sup> that could be contributed to the candidate. The dissenting justices argued that the ruling would create a loophole that when taken with *Citizens United* would "eviscerate" the campaign finance laws.

## ANALYSIS AND CRITIQUE

### 1. A CHANGE IN THE COURT'S ATTITUDE TOWARDS CAMPAIGN CONTRIBUTIONS

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<sup>333</sup> *McCutcheon v. Federal Election Commission*, 893 F. Supp. 2d 133 (D.D.C 2012)

<sup>334</sup> *Supra* n4

<sup>335</sup> The direct exchange of money for an official favour.

<sup>336</sup> Money that could be used without directly endorsing the candidate directly. For example the campaign ad would either attack the opposition or implicitly support the candidate.

Over the years, the court was of the opinion that the right to participate in democracy through political contributions was protected by the first amendment, however, it was not an absolute right.<sup>337</sup> In more recent cases, the court has said that the government may not regulate contributions to just reduce the amount of money in politics, or to restrict the contributions of some to achieve equality of influence over the political process.<sup>338</sup> The court equated campaign contributions to free speech, and therefore campaign contributions were protected under the First Amendment. The court uses a *non sequitur* comparison by saying that if flag burnings were protected as free speech, campaign contributions should be too.<sup>339</sup>

The problem with equating campaign contributions to free speech is that by doing so the Court would, in effect, automatically give people with more money more influence over the political process. The Court should have considered the balance between letting a person have more freedom and maintaining the equality of representation by not giving any one group too much power. With the contributions from wealthy donors being unrestricted, they will be essential for either party to win elections. In order to keep them satisfied, both parties will inevitably have to cater to their needs if they want more contributions. This would effectively mean that people who cannot afford to back their candidates for office will not be represented in the legislature to the same extent as those who can afford to donate millions to political parties.

The most troubling part of the ruling was the interpretation of corruption by Chief Justice Roberts. He reasoned that the gratitude a candidate may feel towards those who contributed was not corruption, and that corruption was limited to *quid pro quo* corruption, or the exchange of an official act for money.<sup>340</sup> The problem with such a narrow interpretation of corruption is money could be contributed to the candidate without it directly passing through the hands of the candidate. An example of this is how a donor could contribute to organizations that operated independently of the candidate's campaign, but parallel to it.<sup>341</sup> With the availability of several ways to contribute anonymously and without the fear of getting caught, it is unlikely that anyone would contribute money in a fashion that could be construed as *quid pro quo* corruption. While addressing the issue of individual corruption, the Court has failed to take into account group or party level of corruption.<sup>342</sup>

The court then considered the two types of restrictions imposed on the candidates. The first, an absolute limit on how much money can be contributed to a particular candidate, and second, the aggregate limit on how much

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<sup>337</sup> *Supra* n7, 26-27

<sup>338</sup> 2011 U.S. LEXIS 2113

<sup>339</sup> *Supra* n4, 2

<sup>340</sup> *Ibid*, 2-3

<sup>341</sup> Super PACs, Independent political groups, etc

<sup>342</sup> Michael S. Kang, *Party-Based Corruption and McCutcheon v. FEC*, 108 NORTHWESTERN UNIVERSITY LAW REVIEW 240–256



money a person can contribute. The court said that the former was still valid to combat corruption, but the latter had to be overturned as they did little to combat corruption while severely restricting the right to participate in democracy.<sup>343</sup>

The problem with removing the aggregate limit on the campaign contributions is that the donor is still able to contribute millions of dollars to the party, even if the amount he gives to each candidate is limited. This still leads to the donor having significant influence over the party. An example of this is how Sheldon Adelson<sup>344</sup> has a troubling amount of influence on the Republican Party. When New Jersey Governor Chris Christie made a comment that offended Adelson, Governor Christie had to fly to Las Vegas to apologize. The fact that any person who was not directly involved in the Government having such influence over a Governor is inherently problematic.

The Court in this ruling was very politically motivated. This is apparent as the Court went against the Statute and against the case law on the subject. FECA limited the amount of money any individual could contribute to a particular federal candidate as it was likely that unlimited contribution directly to a candidate could lead to corruption. The same logic applied to political parties. The idea behind the aggregate limit was to limit the total amount a person could give one party. Without the limit a person could give any amount to a party, but it would be split into smaller amounts. The whole purpose of the law was to limit the influence on the party as a whole. The removal of limits on organizations already compromised the integrity of the system, as could be seen in the example of Sheldon Adelson.

A link can also be established between the contributions of various donors to the voting records of politicians. To name a few examples, Senator Scott Brown of Massachusetts received significant contributions from the banking lobbies, and he always voted against finance reforms. All but 3 of the 45 Senators who voted against gun regulations were funded by the NRA in their campaigns. The list of people who have voted for their backers is long, and the list of problems they have failed to solve as a result of this is even longer. The decision of the court to ignore the effect of money on politics will have drastic consequence on the long term.

That was the level of influence that donors had on politics before the court saw it fit to remove the aggregate limit on political contributions. It may be pointed out that since the limits on contributions to specific individuals still

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<sup>343</sup> *Supra* n4, 3

<sup>344</sup> A billionaire and significant contributor to the Republican Party, he contributed over \$100 million in an attempt to defeat President Obama in the 2012 Presidential Elections.

stand, this ruling may not have much of an impact in reality. That might have been true at some point, however, a new type of organization has come into the spotlight as a result of *McCutcheon*.

## 2. PRIORITIZING FREEDOM OVER EQUALITY

With a relatively small limit of \$2,600<sup>345</sup> on the contribution to a specific federal candidate, the impact of this ruling has been questioned by the media and the public. This ruling has raised the notoriety of a previously obscure organization called the Joint Fundraising Committee (herein referred to as JFC). It allows several candidate or parties to come together to form a single committee that can accept payment in the place of each of them individually. This could effectively mean that a JFC in each of the states could accept up to \$1.2 million from each of its donors.<sup>346</sup> This amount is a far cry from the limits imposed on the campaign contributions.

The Court in *McCutcheon* either failed to realize the consequence of removing aggregate limits, or decided to ignore the consequence in order to empower certain individuals over others. In order to understand the implications of this issue, it is necessary to revisit the free speech issue raised by the court. Traditionally, when considering First Amendment issues, there was a balance that needed to be struck between the rights of a certain individual and maintaining a degree of equality with others in the community. However, with the Roberts court, there has been no balance, with the court routinely leaning towards individual liberty over societal wellbeing. In a democracy, the right to be represented in legislature is inestimable in value to the people.<sup>347</sup> In order for this right to be utilized properly, it is extremely important that each person get equal rights in expressing themselves politically, however, by the Court's own reasoning, campaign contributions are free speech. By allowing a few wealthy donors to contribute millions of dollars, the Court is in effect allowing them to drown out the voices of every person who is not able to afford such contributions in order to get their needs represented in the legislature.

## 3. MAKING CAMPAIGN CONTRIBUTIONS WITHOUT ANONYMITY

In the years following *Citizens United*,<sup>348</sup> a new form of political organization called the Super PACs emerged. They could accept unlimited contributions and the identity of the donors would be kept anonymous. They were allowed to spend unlimited amounts of money, but were not allowed to coordinate with candidate who was being supported by the Super PAC. While the unlimited spending led to some of the most expensive elections that humanity has ever seen, it also posed a significant problems for the candidates.

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<sup>345</sup> CONTRIBUTION LIMITS 2013-2014, Data provided by the Federal Election Commission, <http://www.fec.gov/pages/brochures/contriblimits.shtml> (last accessed 9th September)

<sup>346</sup> Robert K. Kelner, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380

<sup>347</sup> Thomas Jefferson in the United States Declaration of Independence (1776)

<sup>348</sup> *Supra* n1

Firstly, since the donors were kept anonymous, the Super PACs had no issues with running vicious attack ads on the competition, this led to a significant rise in negative campaigning on both sides. Secondly, Super PACs were not allowed to communicate with the candidates, this meant that even if the candidates were opposed to tactics like negative campaigning, they still could not stop them. Such problems associated with 'soft money' or 'dark money' caused a lot of trouble for candidates. With the emergence of the JFCs, all money would come from sources that could be verified and public will be able to see who's paying for the advertisements. This will inevitable case a decline in attack advertisements as the person who is paying for the ads will necessarily have to reveal his identity.

With candidates wanting to have more control over the campaigns that are supporting them, the move from Super PACs to JFCs would help them maintain control over their message. People funding Super PACs would no longer have the freedom to transpose their own message on top of the one of the candidate, who could not communicate with the Super PAC. The lack of anonymity also means that the Federal Election Commission would be able to monitor the transactions taking place and keep track of the amount of money being transferred into each campaign. In the opening up of the contribution process, regardless of whether it was intention or otherwise, the Court has helped to make the process more transparent.

There is also a possibility that with more of the contributions being monitored by the Federal Election Commission, the overall spending on the elections will go down. This is, however, contingent on the fact that this ruling will cause more funds to flow through the JFCs rather than Super PACs. This is a very distinct possibility as politicians on both sides have shown a preference towards the JFCs.

### CONCLUSION

Over the last decade, political lobbies have tried to undermine the process that restricted the powers of the rich and protected those who were not financially secure. The Supreme Court made their work easier by chipping away at key statutes and case laws that were in place. With rulings like *Citizens United* and *McCutcheon* the Court made it easier for the wealthy individuals and organizations to have a disproportionate impact on politics. They are now able to pour in limitless amounts of money to back candidates that they know will be supportive of their motives. They are able to block legislation that will have a negative impact on them, like in climate change regulation or gun regulation. They are able to make sure that people who speak for the average person do not get elected. The consequences of this are evident. The superrich get a trillion dollars in tax cuts, they pay taxes at a lower rate than their secretaries. On the other side of the equation, people have to pay more than three times as much to go to college than their parents did, student loans are charged interest at a rate of 9% while banks get a

bailouts at the rate of 1%. The Government makes a profit off the backs of people trying to get an education while taking a loss trying to save big banks. The cost of money being involved in politics has been borne by the middle class and those that are on the brink of bankruptcy.

The Court, in its attempts to enforce personal liberties over the rights of the community has obliterated the middle-class. It has consistently supported big companies and wealthy individuals, even when they have caused irreparable damage to the people under them in the economic pyramid. They did the same thing in this case, even as the country recovered from one of the worst financial meltdowns, one that was caused by banks and their predatory lending practices, that put millions of people in bankruptcy, because the banks wanted a bit more profit. The link between the deregulation that led to the meltdown and contributions from Wall Street has been well documented. Knowing full well the consequences of letting more money into politics, 5 Justices of the Court saw it fit to go against established statutes and case law and strike down aggregate limits on campaign contributions. In doing so, they have decided to give preference to the rights of a few rich people over the rights of the millions of others who will be affected as a result of this ruling. They have decided to ignore the negative impact this ruling would have on the free speech of people who cannot afford to pay for the campaigns of people who will represent them. The Court has, in effect, told the people of the United States that the rich get a more proactive role in politics because they can afford it.



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