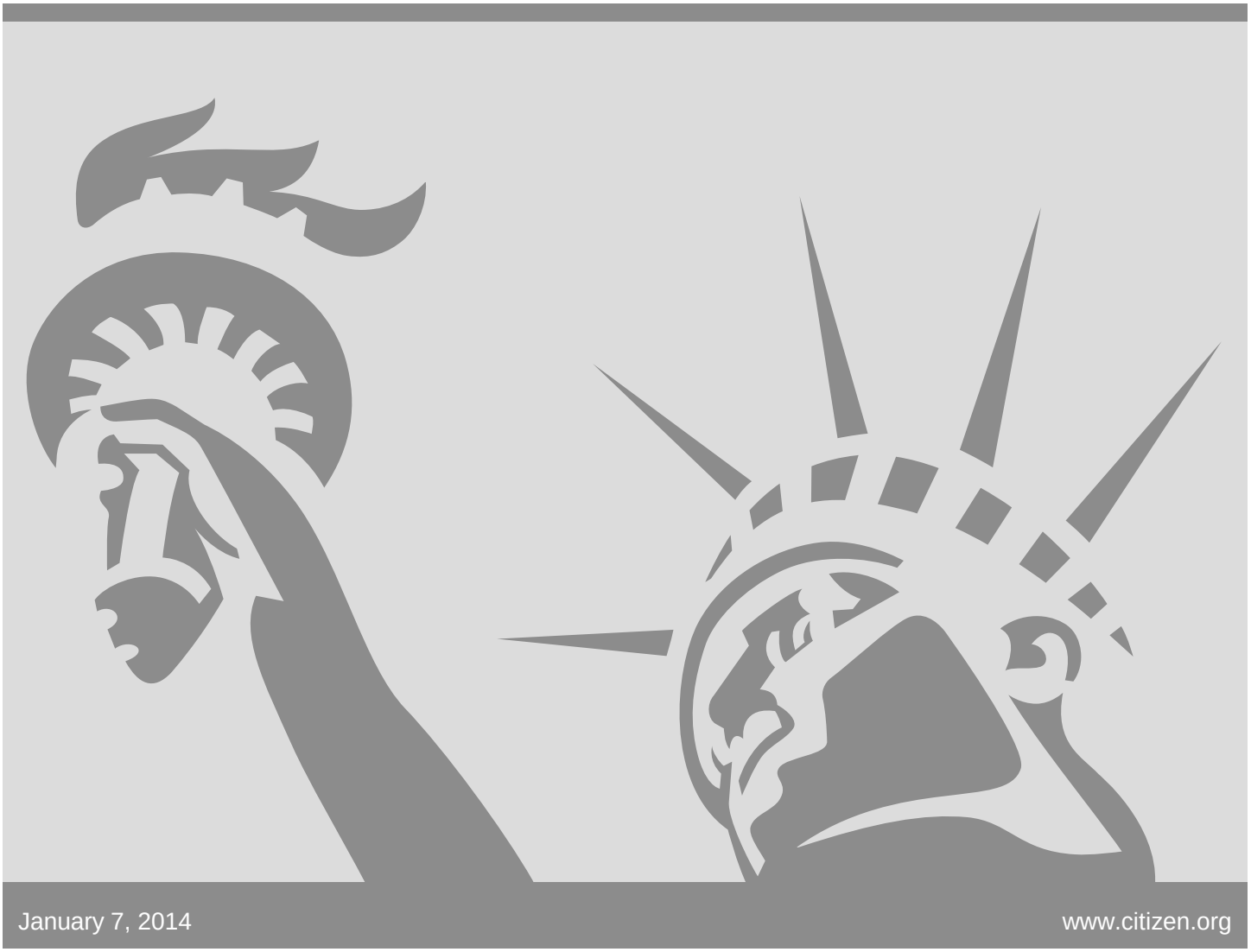

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Beware of a Naive Perspective

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

(Part 1 of 2)

Acknowledgments

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Introduction

In October 2013, the U.S. Supreme Court heard oral arguments in *Shaun McCutcheon v. Federal Election Commission* (*McCutcheon*), a case that challenges federal limits on the grand total an individual can contribute to federal candidates, political parties, and political action committees (PACs). In Part 1 of this two-part series, we examine several options available to the court and how potential outcomes could transform how candidates and parties can raise money.

Under current law, individuals can donate as much as $123,200 per election cycle to regulated federal political committees, with a $48,600 cap on aggregate contributions to candidates and a $74,600 cap on aggregate contributions to PACs and political parties.[1] [See Table 1, page 7] The challengers in *McCutcheon* attack the constitutionality of each of these three aggregate limits. Meanwhile, caps of $2,600 to any single candidate per election, $5,000 to any PAC per year, $10,000 to any state political party committee per year, and $32,400 to any national political party committee per year are not being challenged by McCutcheon.

A Supreme Court decision in *McCutcheon* to eliminate aggregate limits on campaign contributions could enable a single donor to write a single $5.9 million check to a fundraising committee controlled by an elected official or party leader.

Even if the court maintains aggregate limits on donations to party committees but eliminates aggregate limits on contributions to candidates — an outcome some have suggested in light of Chief Justice Roberts' comments at oral argument — a donor would be enabled to write a single check of $2.5 million to a fundraising committee.

This paper will illustrate that even though contribution limits to individual candidates, political parties, and PACs will remain intact, a decision by the court to eliminate aggregate limits would have a profound effect on the amounts of money that elected officials and political party leaders are able to solicit from individual donors. A full repeal of aggregate limits would enable a single donor to write a nearly $6 million check to a joint fundraising committee controlled by an elected official or party leader. Even if the court were to put in place a hybrid system that retained aggregate limits on donations to parties but eliminated aggregate limits for candidates, donors could still write a single check to a joint fundraising committee of more than $2.5 million. The court should consider these practical realities as it considers how to rule on McCutcheon.

[1] *Contribution Limits Chart, 2013-2014*, FEDERAL ELECTION COMMISSION (viewed December 30, 2013), http://1.usa.gov/1ggdyit.

Background

In the past, the Supreme Court has upheld the constitutionality of campaign contribution limits because unrestricted contributions would pose an unacceptable risk of corruption. In its 1976 decision in *Buckley v. Valeo*, the court determined that the corruption threat posed by permitting unlimited contributions outweighs the First Amendment concerns implicit in establishing limits.[2]

"To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined," the court wrote in *Buckley,* which upheld contribution limits established by post-Watergate amendments to the Federal Election Campaign Act.[3] "Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one."

The argument that the plaintiffs have put forth in *McCutcheon* is that there is no anti-corruption rationale for limiting the total amount a person may give to all candidates and parties so long as the limits on the amount of each contribution to a candidate or party remain intact. Therefore, they argue, aggregate limits violate the First Amendment within the rubric established by *Buckley*. Supporters of aggregate limits respond that eliminating aggregate caps on contributions to party entities and candidates would destroy the integrity of caps on contributions to individual party entities because, among other reasons, donations to the various state and national committees of the major parties are tantamount to gifts to a single entity.[4]

In the abstract, the argument for eliminating caps on contributions to individual candidates might seem appealing when evaluated through the court's anti-corruption rationale in *Buckley*. How, the law's challengers ask, would a $5,200 contribution to one candidate be more likely to corrupt her if the donor also gave the same amount to every other congressional candidate? Questions posed by Chief Justice John Roberts during oral arguments of *McCutcheon* created speculation that he might favor a decision that would maintain the cap on aggregate contributions to parties while eliminating it for contributions to candidates.

[2] *Buckley v. Valeo*, 424 U.S. 1 (1976).
[3] *Id,* at 26-27.
[4] Brief for Rep. Chris Van Hollen (D-Md.) and Rep. David Price (D-N.C.). as Amicus Curiae Supporting the Appellee (2013) at 26-27, *Shaun McCutcheon v. Federal Election Commission* (argued before the U.S. Supreme Court October 8, 2013), http://bit.ly/1d5gT0U.

This paper will illustrate that any theoretical reasoning that could justify striking down the aggregate cap on contributions to candidates should be trumped by the practical realities of how such a change could play out in the real world. In short, eliminating any caps on *aggregate* contributions is likely to erode the integrity of limits on contributions to *individual* entities because of the existence of joint fundraising committees, which allow enormous donations to be given to a single recipient that, in turn, apportions the money among multiple entities. If limits on aggregate contributions were lifted, donors would have far more freedom to write checks sufficiently large to elevate the risk of *quid pro quo* corruption. For this reason, *Buckley*'s reasoning requires the court to uphold the aggregate limits.

Options for the Court in *McCutcheon*

The court could rule in several ways. First, it could reject the plaintiffs' argument outright, thereby maintaining the existing limits on aggregate contributions. Second, and conversely, it could accept the plaintiffs' argument and eliminate all aggregate limits, thereby abolishing the $123,200 biennial limit as well as the separate sub-limits for candidates and political and party committees.

There is a third possibility, however. The court could preserve some aggregate limits, such as those applied to donations to political parties, while eliminating others, such as those to candidates. The court might adopt this hybrid option based on the theory that national, state, district, and local party committees are aligned by the same common goal of getting candidates of the same party elected to office. Because of this common goal, contributions to any state or local party committee are functionally a contribution to one entity. Candidates, meanwhile, are individuals. Thus, a Supreme Court justice might see justification in striking down the aggregate limit on contributions to candidates, but not to parties.

Speculation that the court might adopt this hybrid approach was heightened during oral arguments when Chief Justice John Roberts, whom some expect to be the swing vote, asked if it would be possible to eliminate the aggregate limit for contributions to candidates while keeping in place other aggregate limits, such as those to political parties and PACs.[5] Roberts expressed some skepticism that the law should prevent an individual from donating to each of his or her preferred candidates, even if those contributions cumulatively exceeded the existing aggregate threshold.

[5] Amy Howe, *The Chief Justice Looks for a Compromise on Contribution Caps? This Morning's Argument in Plain English*, SCOTUSBLOG (October 8, 2013), http://bit.ly/1bgqenb.

Roberts questioned the need to limit the number of candidates to whom a person could donate the maximum allowed by the limits on contributions to individual candidates, saying, "…we haven't talked yet about the effect of the aggregate limits on the ability of donors to give … to as many candidates as they want. The effect of the aggregate limits is to limit someone's contribution of the maximum amount to about nine candidates, right?"[6] Roberts seemed to be questioning whether it was justified that a donor could be prohibited from donating the maximum amount to more candidates than permitted by the aggregate limits.

However, Roberts suggested a desire to retain some aggregate limits while granting individuals the freedom to contribute the maximum to as many candidates as they want.

"Is there a way to eliminate [the aspect of current law that prohibits a person giving the maximum contribution to more than nine candidates] while retaining some of the aggregate limits?" Roberts asked. "In other words, is that a necessary consequence of any way you have aggregate limits? Or are there alternative ways of enforcing the aggregate limitation that don't have that consequence?"[7] Roberts appeared to be searching for a solution that would eliminate aggregate caps on donors' contributions to candidates while preserving aggregate limits on other types of contributions, including those to party committees and PACs.

Potential Implications

A complete elimination of aggregate limits would permit a donor to give as much as $5.9 million to the various committees, candidates, and leadership PACs of a single party, according to our analysis. Eliminating aggregate contribution limits just on the amount a donor may give to candidates (not parties and PACs) would effectively raise the total amount that a donor intent on aiding candidates from a single party might give from the current cap of $48,600 to more than $2.5 million. [See Table 1]

[6] *Shaun McCutcheon, et al. v. Federal Election Commission* (2013), at 14, http://1.usa.gov/1kceFzf.
[7] *Id*.

Table 1: Potential Contribution Limits Under Hypothetical McCutcheon Outcomes, 2013-2014

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
Option 1: Maintain Current Law	$2,600[8]	$32,400	$10,000 (combined limit)	$5,000	$123,200 biennial limit: • $48,600 to all candidate committees • $74,600 to all PACs and parties[9]
Option 2: No Aggregate Limits	$2,600	$32,400	$10,000 (combined per state)	$5,000	$5,918,400 biennial limit[10] • $2,444,000 to candidate committees • $1,194,400 to party committees • $2,280,000 to Leadership PACs[11]
Option 3: "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[12]; • $2,444,000 to all candidates • $74,600 to all PACs and parties

Joint Fundraising Committees Would Heighten the Risk of Corruption Stemming From Elimination of Aggregate Caps

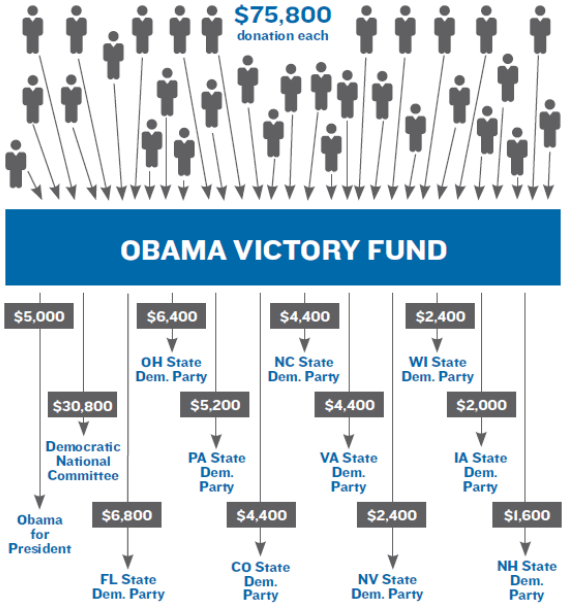
A decision that lifts even some of the aggregate limits would transform how candidates raise money and diminish the effectiveness of caps on contributions to candidates. In part, this is because campaign finance law permits the existence of joint fundraising committees, or JFCs, which facilitate donors giving large checks to a single recipient.

JFCs are one of the most popular vehicles for fundraising. They collect large contributions, then distribute the money to a variety of candidates and party committees in amounts

[8] The limit is effectively $5,200 because donors can contribute to both a candidate's primary and general election campaign.
[9] Only $48,600 of this amount may be contributed to state and local party committees and PACs.
[10] This figure was derived from a Public Citizen analysis of campaign finance laws and potential changes to those laws. The analysis assumed a donor would contribute the maximum in a two-year election cycle to 435 House candidates, 34 Senate candidates (representing a major party candidate for each contest), as well as to a presidential candidate, all 50 state party committees, and three national party committees (for example, the DNC, DCCC, and DSCC). Additionally, there were 456 leadership PACs active in 2012. We are assuming that these leadership PACs have an equal partisan split. Thus, a donor seeking to aid the fortunes of one party could contribute the maximum $10,000 per cycle to about 228 leadership PACs. See *2012 Leadership PACs*, CENTER FOR RESPONSIVE POLITICS (viewed November 26, 2013), http://bit.ly/ojbbol.
[11] This number effectively has no limit as there are potentially an unlimited number of PACs. However, for the sake of this analysis, we used leadership PACs as they have been used in joint fundraising committees before. Leadership PACs are political committees established by elected officials and party members that can collect up to $5,000 per donor per calendar year. Leadership PACs can accept funds from other political committees, businesses, and individuals. These funds can then be distributed to candidate committees of individuals running for office. See *Leadership PACs—Background*, CENTER FOR RESPONSIVE POLITICS (viewed December 17, 2013), http://bit.ly/1fBpGKz.
[12] Public Citizen's analysis assumed a donor would contribute the maximum to 435 House races, 34 Senate races, and a presidential race. 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.

subject to applicable individual and aggregate contribution limits. In 2012, President Obama established a JFC, called the Obama Victory Fund, which solicited checks as large as $75,800.[13] [See Figure 1]

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



Portions of these contributions were then allocated according to a pre-determined formula to President Obama's campaign, the Democratic National Committee, and various state party committees.[14] The Obama Victory Committee raised more than $450 million for President Obama and other Democratic committees in 2012.[15] Republican Presidential nominee Mitt Romney established a similarly structured JFC that raised more than $490 million.[16]

If the court eliminated some or all aggregate contribution limits, joint fundraising committees could take on an entirely new role because they would be able to receive vastly larger contributions than they currently can. Two distinct scenarios are possible. First, complete elimination of aggregate limits would plausibly permit a donor to contribute as much as $5.9 million to a single JFC. These contributions would then be parsed out to hundreds of candidates, parties and PACs according to a predetermined formula. [See Table 2; methodology explained in note.]

[13] Paul Blumenthal, *McCutcheon v. FEC's Other Threat: Case Could Super-Size Joint Fundraising Committees,* HUFFINGTON POST (October 7, 2013), http://huff.to/18m5xCW
[14] Paul Blumenthal, *McCutcheon v. FEC's Other Threat: Case Could Super-Size Joint Fundraising Committees,* HUFFINGTON POST (October 7, 2013), http://huff.to/18m5xCW. See also *Invitation to Fundraiser with First Lady Michelle Obama for the Obama Victory Fund, Friday, March 30, 2012* (viewed December 17, 2013), http://bit.ly/JDaFNJ.
[15] *Joint Fundraising Committees*, CENTER FOR RESPONSIVE POLITICS (viewed December 4, 2013), http://bit.ly/1eWkJeN.
[16] *Id*.

Table 2: Hypothetical Contributions from a Single Donor to a JFC

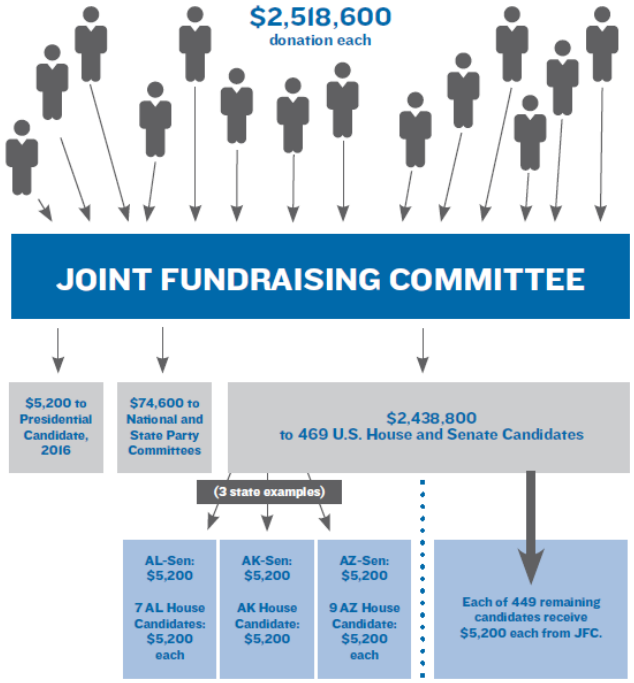
Recipient	No Aggregate Limit on Any Contribution Type[17]	No Aggregate Limit on Contributions to Candidates[18]
House and Senate Candidates (General and Primary Elections)	$2,438,800	$2,438,800
Presidential Candidate	$5,200	$5,200
National Party Committees	$194,400	$74,600
State/District/Local Party Committees	$1,000,000	$0
Other Political Committees	$2,280,000	$0
Total	***$5,918,400***	***$2,518,600***

Under the hybrid option that would lift the cap on aggregate contributions to candidates but maintain them for parties and other political committees, JFCs could ask donors to write checks as large as $2.5 million. These contributions would benefit the party's presidential candidate, the national party committees, and 469 House and Senate candidates. [Figure 2 illustrates how the hybrid option might operate in practice.]

[17] Public Citizen's analysis of campaign finance laws. The analysis assumed a donor would contribute the maximum to 435 House races and 34 Senate races, as well as to all 50 state party committees. The donor would also contribute $32,400 per year to each national party committee. Additionally, there were 456 leadership PACs active in 2012. Assuming a 50 percent partisan split, a donor intent on aiding one party could contribute $10,000 per cycle to about 228 of these PACs. See *2012 Leadership PACs*, CENTER FOR RESPONSIVE POLITICS (viewed November 26, 2013), http://bit.ly/ojbbol.

[18] Public Citizen analysis of campaign finance laws. The analysis assumed a donor would contribute the maximum to 435 House races and 34 Senate races. Contributions to national party committees, state, district, and local committees, and other political committees would remain limited to $74,600 per cycle, per donor. (Though this analysis assumes the donor only contributes to the national party committees, he or she could allocate the $74,600 to those three groups differently.)

Figure 2: Hypothetical Contributions to JFC, Hybrid Option



By greatly increasing the amounts that candidates and party leaders could solicit for their JFCs, a ruling in *McCutcheon* that loosened aggregate limits would increase the probability of *quid pro quo* corruption. Party leaders who also are elected officials (and are likely to spearhead JFCs) would inevitably remember donors who handed them seven-figure checks. And it would be naive to believe that party leaders or the candidates that benefited from funds funneled through JFCs would not be more likely to provide special favors to those donors.

Conclusion

Previously, the Supreme Court has expressed concern that large contributions to political parties could create indebtedness on behalf of elected officials. In *McConnell v. Federal Election Commission*, for example, the court wrote, "large … contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used."[19] Because of the advent of JFCs, a decision that retained aggregate limits on contributions to political party committees while striking down aggregate limits on contributions to candidates would in practice more closely resemble a complete elimination of aggregate limits than their retention. The court should avoid taking a naïve perspective and acknowledge the practical result of either a full or partial elimination of aggregate limits: a campaign finance system that gives a small group of donors the opportunity to unduly influence party and elected officials. Part 2 of this series will illustrate how eliminating the aggregate limits on contributions to candidates alone could also erode the integrity of the aggregate limits on contributions to parties.

[19] *McConnell v. Federal Election Commission* 590 U.S. 93, at 155 (2003).