



EMORY
LAW

Emory Corporate Governance and Accountability
Review

Volume 1 | Issue 1

2014

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Recommended Citation

Patrick Hartobey, *Money, Money, Money!: How the Supreme Court's Decision in McCutcheon v. FEC Could Impact Shareholders and Corporations*, 1 Emory Corp. Governance & Accountability Rev. 53 (2014).
Available at: <https://scholarlycommons.law.emory.edu/ecgar/vol1/iss1/8>

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MONEY, MONEY, MONEY:¹ HOW THE SUPREME COURT'S DECISION IN *MCCUTCHEON V. FEC* COULD IMPACT SHAREHOLDERS AND CORPORATIONS

INTRODUCTION

Barely four years out from the landmark (and controversial) decision in *Citizens United v. FEC*,² the Supreme Court was faced with yet again the task of balancing First Amendment rights and the need to ensure elections free from corruption.³ The case before the Court, *McCutcheon v. FEC*, challenged the constitutionality of the aggregate campaign contribution limits on the grounds that it impeded fundamental First Amendment rights.⁴ The Court granted the appeal directly from the D.C. District Court as a result of special provisions contained in the Bipartisan Campaign Reform Act of 2002 (BCRA).⁵ As part of the judicial review process laid out in this act, the D.C. District Court must hear constitutional challenges to the BCRA.⁶ The District Court's decisions to these constitutional challenges can only be challenged through a direct appeal to the Supreme Court.⁷

On October 9, 2013, the Supreme Court heard oral arguments in this most recent case in the Court's campaign finance and contribution jurisprudence.⁸ The oral argument transcript indicates that the justices were split among three potential outcomes. These three potential outcomes that the Court appeared to be divided over were: finding the aggregate limits unconstitutional, finding the limits constitutional, or deeming the record insufficient and remanding for

¹ ABBA, MONEY, MONEY, MONEY (Atlantic 1976).

² *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

³ See Sean Sullivan, *Everything you need to know about McCutcheon vs. FEC*, THE WASHINGTON POST (Oct. 8, 2013) <http://www.washingtonpost.com/blogs/the-fix/wp/2013/10/08/supreme-court-takes-up-the-sequel-to-citizens-united/>, Transcript of Oral Argument; *McCutcheon v. FEC*, No. 12-536 (2013); Brief for Appellant Shaun McCutcheon at i, *McCutcheon v. FEC*, No. 12-536 (2013).

⁴ See Brief for Appellant Shaun McCutcheon at i, *McCutcheon v. FEC*, No. 12-536 (2013); see generally *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 (D. D.C., 2012).

⁵ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155 (codified at 2 U.S.C. § 431).

⁶ *Id.* at § 403.

⁷ *Id.*

⁸ Transcript of Oral Argument; *McCutcheon v. FEC*, No. 12-536 (2013); see also Amy Howe, *The Chief Justice looks for a compromise on contribution caps? This morning's argument in Plain English*, SCOTUSBLOG (Oct. 7, 2013, 9:57 PM), <http://www.scotusblog.com/2013/10/the-chief-justice-looks-for-a-compromise-on-contribution-caps-this-mornings-argument-in-plain-english/>.

further proceedings.⁹ Ultimately, in the decision issued on April 2, 2014, the Supreme Court ruled that the aggregate limits on contributions violated First Amendment rights.¹⁰ It is this decision that represented the most interesting possible outcome, as it allows individuals to participate through contributions at a greater level in elections through direct campaign contributions to candidates and Political Action Committees (PACs).¹¹ In turn, this ruling in favor of *McCutcheon*, eliminating the aggregate contribution limits, now allows corporations to participate in elections through their segregated funds PACs at a greater level.¹² Corporate PACs could potentially participate in elections at greater levels because without an aggregate contribution limit¹³, shareholders, executives, and employees¹⁴, although still limited by base contribution caps, would be able to donate to an increased number of PACs.¹⁵ This in turn may lead the PACs to be more accountable to their contributors.

This essay seeks to examine the impact that the Court's decision declaring aggregate limits unconstitutional as a violation of the First Amendment could have on future campaign spending. Specifically this essay addresses the potential impacts of the *McCutcheon* decision on corporate PACs. The essay begins with a discussion of the District Court case and the FEC regulations that related to the case. The essay will then move on to discuss the oral arguments before the Supreme Court and briefly address the pluralities opinion. The essay

⁹ See Transcript of Oral Argument; *McCutcheon v. FEC*, No. 12-536 at 14, 30, 34, 42 (2013); see also Amy Howe, *The Chief Justice looks for a compromise on contribution caps? This morning's argument in Plain English*, SCOTUSblog (Oct. 7, 2013, 9:57 PM), <http://www.scotusblog.com/2013/10/the-chief-justice-looks-for-a-compromise-on-contribution-caps-this-mornings-argument-in-plain-english/> (a review of the transcript from oral arguments shows that these were essentially the three positions being weighed by the various justices).

¹⁰ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014).

¹¹ Such greater participation will result from the allowance to contribute to many more entities up to the full individual contribution limit as opposed to a set number of contributions. For PAC's, for example, an individual could only contribute the full amount to about 14 PAC's and national and state party committees. See FED. ELECTION COMM'N, CONTRIBUTION LIMITS 2013-14 (2014), <http://www.fec.gov/pages/brochures/contriblimits.shtml>.

¹² The reason is that corporations are prohibited from making direct contributions to candidates but can form separate PACs that solicit from employees and shareholders. See FED. ELECTION COMM'N, CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR UNIONS 19 (2007), available at <http://www.fec.gov/pdf/colagui.pdf>.

¹³ Individuals could previously only donate a total of \$74,600 to political parties and PACs, meaning they had a limited number of PACs they could contribute the \$5,000 maximum to.

¹⁴ Although corporations are typically bared from soliciting PAC contributions from general employees (non-executive or administrative personnel), corporations are allowed to solicit from this class, as well as their families, twice yearly. *Id.*

¹⁵ *Id.*

will conclude with a discussion of what the removal of aggregate contribution limits means for corporate PACs.

II. PROCEDURAL HISTORY

The path to the Supreme Court for *McCutcheon v FEC*, began on September 28, 2012, in the D.C. District Court.¹⁶ As a result of this challenge arising out of a constitutional challenge to the BCRA, the district court had to hear the case in an unusual manner.¹⁷ The case was presented before the district court with a panel of three judges, 1 appellate circuit judge and 2 district judges.¹⁸ It was in this setting that the initial challenges and decision regarding McCutcheon's challenge to the aggregate limits took place. A review of the district court's decision helps to establish what is at stake, as well as provide some insight into the Supreme Court ultimate decision that the aggregate limits were unconstitutional.

Shaun McCutcheon is an Alabama resident and registered voter.¹⁹ During the 2011–12 election cycle, McCutcheon had contributed less than the aggregate contribution limit.²⁰ Mr. McCutcheon desired, however, to contribute additional funds, which would have put him over the amounts allowed under FEC regulations.²¹ The Republic National Committee (hereinafter RNC), the other plaintiff in the case, asserted that it would like to receive such donations, as they do not violate the individual contribution base limits, only the aggregate limits.²²

The first step in understanding the McCutcheon case and its impact on shareholders and corporations is a look at the challenged regulations. The statute on point for this case is the BCRA, which is implemented by the FEC.²³ The BRCA was created in 2002 in order to regulate campaign finance systems.²⁴ In addition to setting up the appeals process that McCutcheon utilized, the act also established a series of base limits for contributions.²⁵

¹⁶ See *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C., 2012).

¹⁷ Bipartisan Campaign Reform Act of 2002, *supra* note 5.

¹⁸ *McCutcheon v. FEC*, *supra* note 16.

¹⁹ *Id.* at 136.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Bipartisan Campaign Reform Act of 2002, *supra* note 5.

²⁴ Gregory Comeau, *BIPARTISAN CAMPAIGN REFORM ACT*, 40 Harv. J. on Legis. 253 (Winter 2003).

²⁵ *Id.*

There are essentially two sets of limits on contributions, per candidate or entity and aggregate limits.²⁶ The most pertinent limit for this essay—the one McCutcheon challenged—is the aggregate limit, which prohibits total biannual contributions above \$123,200.²⁷

At the outset, the Court acknowledged the standard that contributions and expenditures in political campaigns implicates political speech and association and therefore, fundamental First Amendment rights.²⁸ Thus, the first aspect of the case that the high court addressed was the appropriate level of scrutiny.²⁹ This was important because it established the government’s burden in overcoming a First Amendment challenge.³⁰ The Court noted that all of the Supreme Court decisions related to the area of campaign contributions have been given a level of scrutiny below strict.³¹

The Court here drew a distinction between political speech and political contributions.³² The Court acknowledged that the line between these two has become increasingly blurred.³³ Of particular interest and importance in the Court’s decision is its statement regarding how it drew this line. “Although we acknowledge the constitutional line between political speech and political contributions grows increasingly difficult to discern, we decline plaintiff’s invitation to anticipate the Supreme Court’s agenda.”³⁴ What makes this statement so interesting is that it reveals a potential hidden undertone of willingness to accept plaintiff’s argument but for an adherence *to stare decisis*.³⁵

After establishing that the level of scrutiny would not be the desired strict scrutiny of the plaintiffs, the Court went on to determine if the facts of the case violated the applicable standard of scrutiny.³⁶ The Court began by first

²⁶ *Id.*; see also FED. ELECTION COMM’N, CONTRIBUTION LIMITS 2013–14 (2014),

²⁷ FED. ELECTION COMM’N, CONTRIBUTION LIMITS 2013–14 (2014), <http://www.fec.gov/pages/brochures/contriblimits.shtml>. (these limits are split between candidate and party/PAC donation, with an individual able to donate up to 48,600 total to individual candidates, and 74,600 total to PACs and parties.)

²⁸ *McCutcheon v. FEC*, *supra* note 16 at 137.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 138 (stating that contributions, although protected under first amendment rights, have not yet been deemed speech by the Supreme Court and instead classified as associational rights).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 138, 139.

asserting that the aggregate limits challenged could be upheld as a means of preventing the appearance of actual corruption.³⁷ In looking at this, however, it asserted the logic from *Citizens United* to establish that contributing large dollar amounts does not necessary amount to corruption.³⁸

The district court's decision to uphold the aggregate limits as meeting the established government interest in anti corruption could not be met by actual quid pro quo corruption and instead evolved from an idea of implied quid pro quo.³⁹ “. . . [I]t is not hard to imagine a situation where the parties implicitly agree to such a system . . . and there is no reason to think the quid pro quo of an exchange depends on the number of steps in the transaction.”⁴⁰ It was this idea of the extended quid pro quo where the lower court grounded its justification for the aggregate limits.⁴¹

The district court ultimately ruled in favor of the FEC and upheld the aggregate limits on campaign contributions.⁴² McCutcheon appealed the decision, pursuant to the provisions in the BCRA, to the Supreme Court.⁴³ Both parties filed their briefs with the Court, along with numerous amici curiae briefs.⁴⁴ Oral arguments were heard on October 8, 2013.⁴⁵

III. WHAT WAS BEING ARGUED AT THE SUPREME COURT

McCutcheon's argument can be distilled down to two major points: aggregate limits impermissibly burden free speech and the limits do not further any legitimate government interest.⁴⁶ In the Court's earlier case, *Buckley v. Valeo*, it had been decided that the legitimate government interest, which could trump free speech rights in campaign contributions, was the prevention of

³⁷ *Id.* at 139.

³⁸ *Id.* (mere influence and access are not themselves hallmarks of corruption and large amounts of money do not automatically implicate anticorruption interests).

³⁹ *Id.* at 140.

⁴⁰ *Id.*

⁴¹ *Id.* at 141.

⁴² *Id.* at 142 (dismissing the case and denying McCutcheon's motion for preliminary injunction).

⁴³ See Jurisdictional Statement for Appellants at 38 (Oct. 26, 2012); Bipartisan Campaign Reform Act of 2002, *supra* note 4.

⁴⁴ See *McCutcheon v. Federal Election Commission*, SCOTUSBLOG.COM (last visited March 6, 2014), <http://www.scotusblog.com/case-files/cases/mccutcheon-v-federal-election-commission/>.

⁴⁵ *Id.*

⁴⁶ See Brief for Appellant Shaun McCutcheon at 20, 34, *McCutcheon v. FEC*, No. 12-536 (2013). The failure to further a legitimate government interest is essential as it is necessary to show the regulations fall strict scrutiny, which requires a compelling government interest.

corruption or the appearance thereof.⁴⁷ This is important for the *McCutcheon* case, and in understanding the oral arguments, as McCutcheon’s brief and oral arguments assert that aggregate limits do not prevent corruption or its appearance.⁴⁸ The Court heard from three attorneys during oral arguments: Ms. Murphy representing Mr. McCutcheon, Mr. Burchfield on behalf of Sen. Mitch McConnell as amicus curiae, and Solicitor General Verrilli on behalf of the FEC.⁴⁹

In the oral argument presented by Mr. McCutcheon’s attorney, the focus of the justices’ questions revolved around the idea that removing aggregate limits would allow individuals to circumvent the per-candidate contribution limits. In the first line of questioning the focus was on a particular area of circumvention known as earmarking.⁵⁰ In this instance, counsel for Mr. McCutcheon noted that the FEC already has regulations that prevent donations of this nature.⁵¹ Several of the justices also expressed questions regarding situations where the individual donates to PACs that no longer state they will give to a candidate expressly but instead to those who support a singular idea.⁵² The fear then appeared to be that as a result there would some sort of gratitude or corrupting factor related to these contributions.⁵³

During the second set of arguments, the Court began its questioning by asking about the impact of limits on promoting political speech.⁵⁴ In response the attorney for Sen. McConnell stated that it created intraparty competition for funding.⁵⁵ Further, the attorney addressed previous concerns regarding a PAC implying it would donate to certain candidates by pointing out this process would be classified as earmarking.⁵⁶ The justices also raised concerns about the potential for the individuals to aggregate the donations under a joint fundraising committee.⁵⁷ The attorney in response acknowledged that it was

⁴⁷ *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

⁴⁸ See Brief for Appellant Shaun McCutcheon at 39–40 *McCutcheon v. FEC*, No. 12-536 (2013); Transcript of Oral Argument; *McCutcheon v. FEC*, No. 12-536 at 55 (2013).

⁴⁹ Transcript of Oral Argument; *McCutcheon v. FEC* at 4, No. 12-536 at 55 (2013).

⁵⁰ 11 C.F.R. § 110.6 (earmarking is when donations are given to third parties with the intention that the donations be given to a single candidate so as to get around the individual limits on donations); see also FED. ELECTION COMM’N, CONTRIBUTION LIMITS 2013–14 (2014),

⁵¹ Transcript of Oral Argument; *McCutcheon v. FEC* at 4, No. 12-536 at 55 (2013).

⁵² *Id.* at 6–7.

⁵³ *Id.*

⁵⁴ *Id.* at 18–19.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 23–25.

possible for this to happen but that under the Court's jurisprudence the gratitude that came out of it was not sufficient corruption.⁵⁸ Finally the justices' asked about whether the playing field has changed since Buckley when aggregate limits were upheld.⁵⁹ The attorney answered that the change is that there have been additional regulations promulgated which already address the corruption that the aggregate limits are designed to prevent.⁶⁰

The FEC's attorney made the final set of arguments.⁶¹ The biggest takeaway from these arguments relates to the Court's questions regarding the necessity for aggregate limits.⁶² Several justices asserted that with the Court's recent jurisprudence concerning outside expenditures.⁶³ Specifically, Justice Scalia noted that there is no precedent for a prohibition on big money in political expenditures.⁶⁴ Justice Alito also focused on the unlikely nature that all of the state and national committees would aggregate their contributions.⁶⁵

The Court's plurality decision, handed down April 2, 2014, began with the assertion that the only government interest that can be used to limit political speech is the government's desire to eliminate quid pro quo corruption, or the appearance thereof.⁶⁶ The Court ultimately ruled that, in this case, there was no such threat, as the mere additional contributions, limited by the individual contribution cap, did not create the appearance or threat of quid pro quo corruption.⁶⁷ The Court's decision further rejected the idea that the aggregate limits were necessary to prevent circumvention of the individual limits, because the new earmark provisions already prevented circumvention.⁶⁸ On the basis that the aggregate limits did not serve the government interest of preventing quid pro quo corruption or the appearance thereof, the plurality,

⁵⁸ *Id.* at 25.

⁵⁹ *Id.*; see generally *Buckley v. Valeo*, *supra* note 47 (which upheld aggregate limits on contributions to prevent circumvention of individual limits).

⁶⁰ *Id.* at 26.

⁶¹ *Id.* at 27.

⁶² See generally *Id.* at 27–55.

⁶³ *Id.* at 30–34.

⁶⁴ *Id.* at 31.

⁶⁵ *Id.* at 35.

⁶⁶ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1440 (2014) (although it was a plurality decision, Justice Thomas concurred in judgment and wrote to express his belief that the Court should remove the distinction between spending and contributing established by *Buckley*).

⁶⁷ See generally *id.* at 1441–62.

⁶⁸ *Id.* at 1453.

with Justice Thomas concurring in the judgment, found the aggregate limits violated the First Amendment protections for political speech.⁶⁹

CONCLUSIONS

Based on the oral arguments presented before the Court, it appeared there were three potential outcomes.⁷⁰ The first, and least exciting of these, was for the Court to decide to maintain course and uphold the limitations of contributions.⁷¹ The second option, as uneventful for shareholders as an upholding of the lower court's decision, was to remand the case for further proceedings.⁷² In this instance there would have been little impact on corporations and their shareholders.⁷³ It would essentially continue along as business as usual. The third potential option was to either declare the aggregate limits unconstitutional in whole or in part.⁷⁴ The Court's decision ultimately followed the third likely outcome, overturning the aggregate limits as an unconstitutional limit on free speech.⁷⁵ The removal of these aggregate limits is likely to impact how corporations, and in turn their shareholders, employees, and executives, participate in elections through their corporate PACs. This increased level of participation through increased contributions will also potentially impact how shareholders hold corporate PACs accountable for those contributions.⁷⁶

The Court's decision means that individuals will now be able to donate, up to the enforced limit to a single candidate or group, to as many of the groups and candidates as desired.⁷⁷ For corporations, the impacts are realized through

⁶⁹ *Id.* at 1462–63.

⁷⁰ Transcript of Oral Argument; *McCutcheon v. FEC*, No. 12-536 (2013); Amy Howe, *The Chief Justice looks for a compromise on contribution caps? This morning's argument in Plain English*, SCOTUSblog (Oct. 7, 2013, 9:57 PM), <http://www.scotusblog.com/2013/10/the-chief-justice-looks-for-a-compromise-on-contribution-caps-this-mornings-argument-in-plain-english/>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *McCutcheon*, *supra* note 66 at 1462.

⁷⁶ This is because corporate PACs can only solicit from shareholders and employees, therefore a lack of aggregate limits would allow for more and larger contribution by individuals with diversified holdings. See FED. ELECTION COMM'N, CONTRIBUTION LIMITS 2013–14 (2014); FED. ELECTION COMM'N, CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR UNIONS 19 (2007), available at <http://www.fec.gov/pdf/colagui.pdf>.

⁷⁷ The aggregate limits are supposed to prohibit the total amount that can be contributed and therefore limit the number and amount an individual can contribute to multiple entities. FED. ELECTION COMM'N, CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR UNIONS 19 (2007), available at

the associated PACs they might have. In the absence of aggregate limits, corporate PACs are now able to raise a much larger amount of money.⁷⁸ The reason corporate PACs will be able to raise more money is that the small class contributors for the corporate PAC is no longer limited in the number of PACs that can be given the full \$5,000 limit.⁷⁹ Instead a donor is now permitted to provide the full \$5,000 limit to as many PACs as that person satisfies the restricted donor class for.⁸⁰

The result of the Courts decision was the removal of the aggregate contribution limit on PACs as well.⁸¹ This means that corporate PACs, flush with additional cash, will now be able to donate the full \$5,000 individual contribution limit to a greater number of candidates.

Corporations have to some extent always been reliant on their shareholders for contributions to the corporate PAC.⁸² However, with the potential to raise larger sums of money and contribute to more candidates at a greater level, corporations must ensure that the interests of a given PAC align with all or most of its shareholders.⁸³ Failure of the PAC's interest to align with the majority of the corporation's shareholders automatically puts the PAC at a disadvantage in its fundraising potential as the corporations shareholders will likely refuse to contribute to the PAC. This in turn may place the corporation at a disadvantage to its competitors who by aligning the PACs interests with as many shareholders as possible will be able to participate in elections to a greater extent. As a result, shareholders will likely benefit from the removal of aggregate limits in regards to corporate PACs.⁸⁴ This shareholder benefit will arise because the PACs, dependent on shareholders and employees for their funds, will seek to take full advantage of the now greater source of potential

<http://www.fec.gov/pdf/colagui.pdf>; See e.g. Transcript of Oral Argument; *McCutcheon v. FEC* at 23, No. 12-536 (2013).

⁷⁸ FED. ELECTION COMM'N, CAMPAIGN GUIDE FOR CORPORATIONS AND LABOR UNIONS 19 (2007), available at <http://www.fec.gov/pdf/colagui.pdf>.

⁷⁹ *Id.* at 19.

⁸⁰ For example, an individual who is a shareholder in 100 companies and wished to contribute to all 100 would previously only have been able to donate \$746 to each PAC in order to stay under the \$74,600 aggregate limit. Now that same individual can donate the full \$5,000 individual limit to each PAC. See *id.*

⁸¹ *Id.*

⁸² This results because connected PACs may only solicit donations from employees and shareholders. *Id.* at 19.

⁸³ *Id.* (as a result of the limitations on solicitation shareholders could exert greater influence as to what issues, though not candidates, their dollars go toward or choose not to contribute).

⁸⁴ *Id.*

contributions.⁸⁵ In turn, shareholders and employees who are donating can potentially use their contributions to influence the agenda that the PAC supports.⁸⁶ While the true impact of this decision is still unknown at this point, with the midterm elections nearing its end, and the 2016 presidential race just on the horizon, we will not have to wait long to see the decision's real-world impact and whether shareholders realize this potential benefit of *McCutcheon*.

PATRICK HARTOBEY*

⁸⁵ *Id.*

⁸⁶ Of course the contributors must be careful to not advocate for specific candidates that would violate earmark provisions. *See* 11 C.F.R. § 110.1 (h)(3); 2 U.S.C. § 411 a(a)(8); 11 C.F.R. § 110.6 (b)(1).

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