THE PRACTICAL CONSEQUENCES OF *McCUTCHEON*

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The U.S. Supreme Court's recent decision in *McCutcheon v. FEC*,[1] striking down longstanding limits on the overall amount an individual could spend on federal political contributions, will further loosen the reins on major political donors. It probably will not have a dramatic effect on the campaign finance system, however. There are relatively few people who are rich enough to spend more on political contributions than the pre-*McCutcheon* limits allowed and who have the ideological motivation to do so. Those few can now knock themselves out with profligate political giving. But the fundamental dynamic shaping our campaign finance system today — the legally enforced advantage that outside groups hold over political parties — will remain largely undisturbed by *McCutcheon*.

Under the old regime, a major donor could not have spent more than $123,200 per election cycle on direct political contributions to federal candidates and political committees. Today, post-*McCutcheon*, a donor can make political contributions to every single candidate for Congress, every "leadership PAC"[2] maintained by a member of Congress, and every national and state political party committee. There is still a cap on how much the donor can give to a particular recipient. For example, the maximum individual contribution to a federal candidate currently is $2,600 per election, with the primary and general counting as separate elections, for a total of $5,200 per candidate during a single two-year election cycle. But in the absence of an overall cap on spending, the donor could, in theory, spend millions of dollars before running out of federal candidates and committees to support.

One important practical consequence of *McCutcheon* is that it will further elevate the importance of an obscure campaign finance vehicle called the "Joint Fundraising Committee" or "JFC." JFCs have been around for a long time, but until very recently there were only a

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[1] 134 S. Ct. 1434 (2014).

[2] "Leadership PACs" are political action committees associated with particular members of Congress. The first leadership PACs were formed by members of the congressional leadership. Thus their name. But in recent years, even freshmen members of Congress have formed leadership PACs. Hundreds of them have been formed, and in some cases they live on even after a member leaves Congress. The practical effect is that a donor can give directly to a member of Congress's campaign committee and then bolster support for the member with a contribution to his or her leadership PAC. The member can use these funds for a wide range of purposes, though leadership PAC funds generally cannot be used to cover the member's own campaign expenses.

handful of campaign finance experts who knew and loved them. JFCs were much discussed (and vilified) in the *McCutcheon* briefing, so they are now enjoying their day in the sun. In its brief, the FEC suggested that if the overall contribution limits were lifted, a donor could contribute as much as $3,628,000 in an election cycle to "entities affiliated with a single party."[3] The FEC warned that "[c]andidates, the national party committees, and their state party affiliates could simply form a 'joint fundraising committee,' which could then receive a lump-sum contribution of hundreds of thousands or millions of dollars."[4] Likewise, Justice Breyer included among the parade of horribles in his *McCutcheon* dissent a notional "Joint Party Committee," which he described as a JFC whose participants would include all of the national and state party committees of a particular political party, which could accept a check for up to $1.2 million from each of its donors.[5]

So what exactly are these much-maligned JFCs? They have been part of the federal campaign finance firmament almost from the moment of creation when the Federal Election Campaign Act ("FECA") was enacted. Joint fundraising was first referenced in FECA in the 1976 amendments to the Act,[6] and in Federal Election Commission regulations issued in 1977.[7] A series of FEC advisory opinions in 1977 defined the current system.[8]

The basic concept is that a group of candidates, political party committees, or political action committees can choose to raise money jointly, often at a single fundraising event or series of events. FEC regulations provide that the group must form a committee, the JFC, and register it with the FEC. The JFC pays its own costs and then distributes any net proceeds to the participants in the JFC, based on a pre-determined allocation formula that is embodied in a "joint fundraising agreement." Donors are also permitted to designate their contribution for a particular candidate or committee. But absent such a designation, the donor's contribution is allocated among the participants in the JFC. This enables a donor to write a single check to support multiple candidates and committees all at once. The more participants there are in the JFC, the more the donor can accomplish with that single check. It is a great convenience for major donors and for the candidates and parties they support.

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[3] Brief for the Appellee at 37, *McCutcheon*, 134 S. Ct. 1434 (No. 12-536).

[4] *Id.*

[5] *McCutcheon*, 134 S. Ct. at 1472 (Breyer, J., dissenting).

[6] Pub. L. No. 94-283, 90 Stat. 486 (codified as amended at 2 U.S.C. § 441a(a)(5)(A) (2012)).

[7] 42 Fed. Reg. 19,324 (Apr. 13, 1977) (codified at 11 C.F.R. § 110.3(a)(2)(i) (1977)).

[8] *See* FEC Advisory Opinion 1977-08 (Sasser); FEC Advisory Opinion 1977-14 (Bayh, Harris, and Shriver); FEC Advisory Opinion 1977-23 (Steers); FEC Advisory Opinion 1977-61 (Dinner with the Vice-President Committee).

In the first advisory opinion about JFCs, the presidential campaigns of Birch Bayh, Fred Harris, and Sargent Shriver asked the FEC whether they could form a joint committee to retire their debts. The FEC's reply laid out basic rules for JFCs that are largely unchanged today, focused on staying within contribution limits, disclosing all activity, and giving notice to donors about the JFC's membership and allocation formula.[9] In 1983, the FEC adopted regulations codifying this system.[10] The FEC last revised the general JFC rules in 2002 in response to the Bipartisan Campaign Reform Act of 2002[11] (known colloquially as the McCain-Feingold law), which banned "soft money," the unlimited donations that political parties had used to support party-building activities.[12] Those rules are still in place today and govern JFCs in the post-*McCutcheon* era.

While the qualities of JFCs have remained largely unchanged for the past thirty-five years, their quantity and size have not. According to one study, their growth has been exponential, rising from just 42 new JFCs registered in 1994 to 372 new registrations in 2012.[13] In 2013, FEC data showed 415 new or continuing JFCs.[14] Moreover, because it was no longer possible to make unlimited soft money donations to the political parties after McCain-Feingold, JFCs have played a more prominent role as a vehicle for collecting large contribution checks. It became standard operating procedure for the presidential candidates of both parties to form JFCs with their national party committees and key state party committees. Both the Obama and Romney campaigns formed JFCs in the 2012 election. The amount of money raised via JFCs formed by the presidential campaigns has shown blockbuster growth, nearly doubling from $449 million in 2008 to $953 million in 2012.[15]

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[9] FEC Advisory Opinion 1977-14 (Bayh, Harris, and Shriver).

[10] 48 Fed. Reg. 26,296, 26,296–303 (June 7, 1983). It also adopted similar rules for presidential campaigns seeking matching funds to participate in JFCs. *See* 48 Fed. Reg. 5224, 5229–30 (Feb. 4, 1983).

[11] Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 8, 18, 28, 36, and 47 U.S.C.).

[12] 67 Fed. Reg. 49,064, 49,074, 49,112 (July 29, 2002).

[13] Paul Blumenthal, McCutcheon v. FEC*'s Other Threat: Case Could Super-Size Joint Fundraising Committees*, HUFFINGTON POST (Oct. 7, 2013, 2:33 PM), http://www.huffingtonpost.com/2013/10/07/mccutcheon-joint-fundraising-committees_n_4057547.html, *archived at* http://perma.cc/FNJ2-XEVC.

[14] FED. ELECTION COMM'N, http://www.fec.gov/finance/disclosure/candcmte_info.shtml (select "Joint Fundraising Committee" for "Committee Type" under "More Search Options," then "01/01/2013" and "12/31/2013" for "Filed between," then select "Get Listing") (last visited June 9, 2014).

[15] *Joint Fundraising Committees*, CENTER FOR RESPONSIVE POLITICS, http://www.opensecrets.org/pres12/jfc.php?cycle=2012 (last visited June 9, 2014), *archived at* http://perma.cc/4ZUG-MHV6; *Joint Fundraising Committees*, CENTER FOR RESPONSIVE

One of the great bogeymen of the FEC's argument in *McCutcheon* was that new Super JFCs could, once freed from the aggregate contribution limits under FECA, raise money in multi-million dollar increments. In the FEC's apocalyptic vision of the campaign system after *McCutcheon*, hundreds of campaign committees, party committees, and PACs would combine to organize JFCs of enormous scale, which could accept large contributions reminiscent of the soft money donations made to the national political parties before McCain-Feingold.

After *McCutcheon*, there is no legal obstacle to forming JFCs with numerous participants, but there are operational realities that make building large-scale JFCs challenging. For example, organizing a large group of candidates to raise funds jointly, and to participate in events at the same time and place, could be a little like herding cats. The administrative hassle of organizing and operating a large JFC would be substantial. That is one reason that so far no large-scale Super JFCs exist.

While around twenty new JFCs have been established since the *McCutcheon* decision, only a few have taken advantage of the new rules. These include the Republican Victory Fund, which consists of all three Republican national party committees, and the 2014 Senators Classic Committee, which has nineteen senatorial candidates as members. They can solicit a maximum of $97,200 and $98,800 per individual, respectively. This is only slightly more than the mid-$70,000 figures that the Obama and Romney JFCs solicited in 2012. While it is early still, so far the story of JFCs in the post-*McCutcheon* era is more of the same.

There is ample reason, however, to expect that the recent pre-*McCutcheon* surge in the number of new JFCs will accelerate after *McCutcheon*, and that the JFCs themselves will grow in size. Eventually, though not immediately, we will see the emergence of large-scale JFCs with, at least, twenty or more participating committees. In theory, and perhaps in practice, Super JFCs could be much larger than that. A diverse array of Super JFCs may emerge in the coming years. Some will likely be formed by powerful members of Congress, such as members of the leadership and committee chairmen. These will effectively operate like leadership PACs on steroids. As is true of the existing leadership PACs, they would enable a powerful member to help out his friends.

Another variant could be Super JFCs focused on caucuses or state delegations. For example, a member of Congress, or a major donor, could initiate the formation of a Congressional Black Caucus JFC, a

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POLITICS, http://www.opensecrets.org/pres08/jfc.php?cycle=2008 (last visited June 9, 2014), *archived at* http://perma.cc/3KR4-8SRF.

pro- or anti-gun control caucus JFC, and so on. Or a JFC might be targeted at all House incumbents in a particular state, including large states like California and Texas. Previously, the overall spending caps made it difficult to form such broad-based JFCs. Today, nothing stands in the way.

That JFCs will grow in size, which seems inevitable, does not necessarily mean that they will reshape the campaign finance system in any way that matters, however. Major donors never stopped writing big checks after McCain-Feingold. They just wrote them to unregulated outside groups, such as trade associations, 501(c)(4) social welfare organizations, and other tax-exempt political vehicles. Larger JFCs will provide more efficient mechanisms for major donors to spend their money. But because the amount of support that can be provided to any one candidate or political party committee remains tightly limited even after *McCutcheon*, major donors will continue to direct super-sized contributions to outside groups rather than to the political parties. In other words, even if JFCs eventually take the gargantuan shape envisioned by the FEC and Justice Breyer (and a few such beasts may eventually emerge), they are unlikely materially to alter the *relative* advantage held by unregulated outside groups over the political parties.

Although the Republican National Committee participated in the *McCutcheon* case, it remains to be seen whether *McCutcheon* will help or hurt the national political parties. If it does either, the effect is likely to be only incremental. While it will help the parties slightly by allowing them to set up larger JFCs, and enabling major donors to give the maximum amounts to all of the party committees, there are potential downsides for the parties as well. The new, larger JFCs will create power centers outside the political parties, which may be controlled not by the parties but rather by influential members of Congress or even by individual major donors. Those players may sometimes align themselves with the national political party establishment. But the new, super-sized JFCs may prove to be attractive vehicles for candidates and major donors who seek to *challenge* the status quo and prefer to operate outside, or even in competition with, the national party organizations.

Moreover, there are other trends favoring outside groups and major donors over the parties, and *McCutcheon* could end up contributing to those trends. McCain-Feingold put the national party committees in a legal vice grip, while leaving outside groups like 501(c)(4)s, trade associations, and ultimately Super PACs free to raise and spend unlimited funds. Inevitably, that shifted power away from the parties toward the outside groups. The Supreme Court upheld McCain-Feingold in its

2003 *McConnell v. FEC*[16] decision. That decision, and the overwhelming ascendance of outside groups that followed, turns out to have been far more consequential for the campaign finance system than anything that will result from *McCutcheon*. And while *McCutcheon* may hold the seeds of a future court decision overturning McCain-Feingold's soft money ban, for now it leaves the institutionalized preference for outside groups intact.

With the benefit of a decade of data since *McConnell v. FEC*, there can be little doubt that McCain-Feingold profoundly favored the outside groups. Since it was enacted, the number of advertisements that political parties sponsor relative to other groups has fallen precipitously.[17] In 2000, the Republican and Democratic parties aired about two-thirds of all advertisements in the presidential general election.[18] In 2004, after McCain-Feingold took effect, that figure dropped to just over one-third.[19] In 2008, the parties' share of political ads dropped to under one-fourth of the total.[20] This dramatic implosion of the political parties took place *before* the Supreme Court's much–talked-about 2010 decision in *Citizens United v. FEC*.[21] The downward spiral continued after *Citizens United*. By 2012, just six percent of all advertisements were sponsored by the political parties.[22] At that level, the parties are essentially contributing little more than background noise amid the cacophony of advertising by outside groups. These figures highlight the fundamental dynamic shaping both our campaign finance system and the larger American political process: the very dramatic *relative* loss of power by political parties compared with outside groups that began after McCain-Feingold.

The campaign finance reform community, and its fans in the media, has tried to rewrite history by attributing the explosion of outside spending to *Citizens United*. The outside groups had already taken a dominant role on the political stage prior to the Supreme Court's 2010 *Citizens United* decision, however. For example, in the 2004 election cycle, Swift Boat Veterans for Truth, which was organized as a tax-exempt "political organization" under Section 527 of the Internal Revenue Code, played a decisive role in supporting the reelection of George W. Bush. It had multiple high-net worth funders.

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[16] 540 U.S. 93 (2003).

[17] *See* Michael M. Franz, *Interest Groups in Electoral Politics: 2012 in Context*, 10 FORUM, no. 4, 2012, at 62.

[18] *See id.* at 67 tbl.2.

[19] *See id.*

[20] *See id.*

[21] 130 S. Ct. 876 (2010).

[22] Franz, *supra* note 17, at 67 tbl.2.

In the same election, six years before *Citizens United*, groups such as Americans Coming Together and MoveOn.org raised and spent large sums on election-related activities. Major advocacy organizations like the Sierra Club, League of Conservation Voters, NAACP, and League of Conservation Voters likewise spent significant sums through their 501(c)(4) affiliates, all prior to *Citizens United*. Trade associations organized under Section 501(c)(6) of the I.R.C. were major players as well in the years before *Citizens United*. These included the U.S. Chamber of Commerce and newer associations like Americans for Job Security.

This rising tide of unregulated outside group spending, rather than the Supreme Court's tweaking of contribution limits for regulated funds, is the dominant drama in our campaign finance system. Viewed against the backdrop of the political parties' collapse due to McCain-Feingold, *McCutcheon* looks like a ripple on the campaign finance pond, not a tsunami.