

# Campaigns & Elections

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### The next campaign finance challenge

by Jeff Brindle / Jul 06 2012

Are contribution limits the next to go?...



Another major challenge to campaign finance law has suddenly appeared on the horizon. The latest target: federal contribution limits.

The new challenge was filed just three days before the U.S. Supreme Court struck down a Montana law that banned corporate spending in its state elections. The judges decided the 100-year-old Montana Corrupt Practices Act and the limits it imposed were inconsistent with *Citizens United v. FEC*, the decision which declared corporations could spend unlimited amounts in elections as long the funds were spent independently.

The new threat to campaign finance law emerged June 22 when lawyers sought to enjoin the FEC from enforcing the aggregate biennial contribution limits.

The Motion for Preliminary Injunction, which appears to be part of an orchestrated effort to dismantle campaign finance law, was filed on behalf of Shaun McCutchen, a 44-year-old Alabama contractor, and the Republican National Committee. *McCutchen v. FEC* may have the potential to further erode contribution limits. Specifically, it targets aggregate contribution limits that apply to individual contributors.

Under federal law, individuals can contribute no more than \$117,000 every two years to federal candidates and committees. Of that amount, individual donors can give no more than \$70,800 to PACs and parties. Individual donors can give no more than \$46,200 to all candidates every two years. These limits are indexed for inflation.

The plaintiffs, represented by James Bopp, Jr. and Steve Hoersting, maintain that the two-year aggregate limits “substantially burden core political activity protected by the First Amendment rights of free expression and association.” The lawyers contend they are unconstitutional on their face.

Bopp has filed numerous challenges to campaign finance laws, including the original *Citizens United* case, one of his major successes. General counsel to the National Right to Life Committee since 1978 and vice chairman of the Republican National Committee, the Indiana native doesn't hide his long-term goal.

“We had a 10-year plan to take all this down,” he told the New York Times in 2010. “And if we do it right, I think we can pretty well dismantle the entire regulatory regime that is called campaign finance law.”

In filing his motion with the United States District Court, District of Columbia, he might have given himself an advantage. It is the very Court that paved the way for Super PACs in its decision in *Carey v. FEC*. That decision held that PACs could set up segregated accounts, receive contributions in unlimited amounts, and be unrestrained in spending, as long as the activity was independent.

Given the history of the DC court, it is more than likely that it will grant the motion for injunction and ultimately find aggregate limits to be unconstitutional. This would also impact a number of states and localities that impose aggregate limits on donors.

Bopp and Hoersting maintain that in order for the aggregate limits to be viewed as constitutional “they must be justified for the government under ‘the closest scrutiny’ and any restriction must ‘avoid unnecessary abridgement of associational freedoms.’”

In other words, the government must demonstrate that there is a compelling interest (i.e. corruption) for the state to impose aggregate contribution limits on these entities.

Moreover, the McCutcheon Motion makes the further point that the restrictions applied to the national parties led to money flowing instead to independent committees. It contends aggregate contribution limits essentially are obsolete in the post-Citizens United world since there is no realistic way to stop circumvention. While the motion focuses on aggregate limits, the case potentially opens the door to a reexamination of all contribution limits. As demonstrated in *Citizens United*, the U.S. Supreme Court hasn’t been shy about expanding its review of campaign finance issues.

Some members of today’s court expressed serious doubts about contribution limits in *Randall v. Sorrell* (2006), another case brought by Bopp.

“There is simply no way to calculate just how much money a person would need to receive before he would be corrupt or perceived to be corrupt (and such a calculation would undoubtedly vary by person),” said Justice Clarence Thomas in his dissent.

Given that the U.S. Supreme Court has placed heavy importance on the First Amendment freedom of speech and association provisions, it is conceivable the judges may decide to weigh the constitutionality of contribution limits generally. Even previous courts have struck down contribution limits under some circumstances.

In the landmark *Buckley v. Valeo* (1976), the Supreme Court ended contribution limits for independent expenditures. In *First National Bank of Boston v. Bellotti* (1978), the Supreme Court invalidated a Massachusetts statute that prohibited corporations from making contributions or expenditures for the purpose of influencing ballot questions. The *Bellotti* case foreshadowed the legal reasoning in *Citizens United* by declaring that spending to influence popular votes on public issues poses no risk of corruption and therefore cannot be constrained.

However, *Buckley*, while exempting independent spending, also upheld contribution limits for candidates. Even *Citizens United* upheld the power of the federal government to ban direct corporate contributions to candidates.

So while the McCutcheon case may be worrisome, there is strong precedent to not toss out all contribution limits. Whether the U.S. Supreme Court would take McCutcheon on appeal, or simply let the lower court ruling stand, remains to be seen.

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