‘Activist’ Supreme Court Likely To Weaken Campaign Finance Controls

By Carey L. Biron
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WASHINGTON – The U.S. Supreme Court on Tuesday heard oral arguments for a major campaign finance-related case, three years after the justices were widely credited with allowing a fresh flood of money into politics – and, in the eyes of some, jumpstarting a new, more polarized era of U.S. politics.

In the run-up to Tuesday’s hearing of McCutcheon v. Federal Election Commission, proponents of stricter controls on campaign finance had switched into high gear, warning that the verdict could have a broader impact than that of the last precedent-setting case on the issue, Citizens United v. Federal Election Commission, which was decided in a split ruling in 2010.

“This could be a devastating decision, in that it would basically mean that the richest and most powerful people would have the most influence in Washington, with everyone else being shut out,” Melanie Sloan, executive director of Citizens for Responsibility and Ethics in Washington (CREW), an accountability-focused advocacy group, told Mint Press News. “Yet at this point, following the arguments, it looks like the justices will strike down contribution limits.”

Indeed, every Supreme Court watcher with whom Mint Press News spoke following Tuesday’s arguments forecasted a close decision but one that went against the government. The impact would be a significant lifting of limits on individual political contributions. (While much of the rest of the federal government is currently in some state of shutdown, the Supreme Court, which began its new term this week, reportedly has enough funding to function into next week.)

Sloan notes that while the Supreme Court justices did not mention Citizens United by name at Tuesday’s arguments, the specter of the decision was clearly felt.

“Justice [Antonin] Scalia really seemed to be hanging his hat on the fact that, given that there is already so much money in the system, why should we have these particular limits?” she says. “Of course, that’s so ludicrous, given that this money is in the system today specifically because of Citizen’s United, which they just decided.”

In 2010, the Citizens United decision found unconstitutional a longstanding cap on the political contributions made by corporations. The effect has been to allow nearly unlimited amounts of anonymous corporate money to slosh around in the past two election cycles. Most of this has been funneled through nominally unaffiliated outside organizations known as political action committees, or PACs.

Two years later, the 2012 presidential election turned out to be the most expensive ever fought, amounting to a staggering $6 billion or more. On Tuesday afternoon, President Barack Obama connected this impact to the current stalemate in Washington.

“Citizens United contributed to some of the problems we’re having in Washington right now. You know, you have some ideological extremist who has a big bankroll, and they can entirely skew our politics,” the president told reporters at the White House.

“The latest case would go even further than Citizens United. I mean, essentially, it would say anything goes; there are no rules in terms of how to finance campaigns. There aren’t a lot of functioning democracies around the world that work this way, where you can basically have millionaires and billionaires bankrolling whoever they want.”

The president noted that while every politician is forced to raise money for campaigns, he would prefer to see elected lawmakers “bind ourselves to some rules that say the people who vote for us should be more important than somebody who’s spending a million dollars … because we don’t know what their agendas are.”

Elite donors

Shaun McCutcheon, a Georgia businessman, conservative donor and namesake litigant at the heart of the new Supreme Court case, feels that the rise to prominence of super PACs has eclipsed a key tenet of the U.S. democratic system: the strength of individual support for candidates of their choice.

Under current law, an individual is limited to $123,200 in political giving per election cycle, a figure known as the aggregate ceiling. While supporters would indeed be able to give smaller amounts to hundreds of candidates, they would only be able to give maximum amounts to less than a dozen. Currently those upper limits are set at $2,600, a figure McCutcheon isn’t trying to change.

McCutcheon’s lawyers argue not only that this aggregate limit is an infringement on First Amendment rights but that the current system is bad for democracy. Unhappy voters can always boot politicians out of office, after all, but there is no similar mechanism with regard to super PACs.

Yet supporters of campaign finance controls say the opposite would also be true. Doing away with the current individual aggregate limit would raise the potential individual contribution to more than $3.5 million to a particular party’s candidates or committees, as well as unlimited amounts to super PACs.

Furthermore, these supporters say, the current limit of more than $120,000 per person is already twice the median income, thus offering outsized political influence to the well-off. By this logic, doing away with that limit would only serve the interests of the very rich.

According to new estimates by public policy groups Demos and USPIRG, the impact of this change on the 2012 national election would have been startling. Without aggregate contribution limits, the groups estimate that little more than 1,200 "elite donors" in 2012 would have given nearly 50 percent more money than both President Obama and Governor Mitt Romney raised from more than 4 million small donors – combined.

The groups say the new rule would result in $1 billion in additional spending during future campaign cycles.

In part because of the Citizens United decision, liberal researchers have increasingly suggested that the court of Chief Justice John Roberts is one of the most corporate- and elite-friendly on record. According to a report released over the summer by the Alliance for Justice, "the Court, led aggressively by Chief Justice Roberts, has noticeably engaged in 'judicial overreach' in order to consider certain legal issues and draw attendant conclusions that comport with pro-corporate and other conservative interests."

Indeed, such a conclusion was supported by remarks that Justice Ruth Bader Ginsburg made in a rare media interview in August. "If it's measured in terms of readiness to overturn legislation," she said of the Roberts court, "this is one of the most activist courts in history."

The McCutcheon case now looks set to offer another opportunity for the court to overturn longstanding precedent. In fact, many analysts suggest that Chief Justice Roberts himself may be the deciding swing vote in the McCutcheon decision, and he will also likely make the final decision on how narrow or sweeping the final ruling turns out to be.

Since Buckley

A key issue in this case is the extent to which the spending of money should be directly equated with free speech.

"In a regime where money equals speech, people with no money have no voice, and that's a problem for our democracy," Brenda Wright, vice-president of legal strategies at Demos, told Mint Press News. "But to uphold the limits at issue today, the court just needs to apply precedent – the aggregate limits being challenged today are perfectly acceptable court precedents of the past 30 years."

The decision that set U.S. jurisprudence on the issue of political donations as protected free speech was handed down by the Supreme Court in 1976 in a case known as Buckley v. Valeo. In response to the Watergate scandal, that case made a distinction between campaign expenditures and contributions, and set out the theory that legal limits on the former would indeed be an infringement on free speech, but that the latter wouldn't. At the time, limits on contributions were seen as important to squelch corruption.

Finding on behalf of McCutcheon in the current case would thus overturn several decades of precedent. But critics say laws on political contributions have become too complex in the years since the Buckley case was decided.

"Since it was originally conceived of in 1976, the campaign finance system has become unstable – subsequent amendments, like barnacles on a ship's hull, have made the distinction between contributions and expenditures increasingly unworkable," Ilya Shapiro, a senior fellow with the Cato Institute, a libertarian think tank that filed a brief with Supreme Court in support of McCutcheon, told Mint Press News.

"Every campaign finance case after Citizens United will get a lot of attention, though this isn't really a successor to that case. How it does relate is that you have an imbalance today, in that there are no restrictions on independent speech so long as you don't 'coordinate,' but parties and candidates are still living with these strong restrictions. In this sense, they are relatively disadvantaged."

Shapiro also pushes against the connection that some, including President Obama, have drawn between the increased amount of money in the political system and today's increased political polarization.

"Spending on campaigns has increased in recent years, but it's also been increasing for decades," he says.

"This isn't really surprising, as the government grows and as the decisions of those elected can carry greater and greater consequences, more money will try to affect those decisions. If you want to reduce money in politics, reduce the amount of government we have – that will cut down on the amount of money chasing the politics."

Amend!

Others are pointing to a different approach entirely: if the Supreme Court keeps finding that the U.S. Constitution disallows limits on money in politics, then perhaps the Constitution needs to be amended. In fact, this idea has already garnered a surprising amount of national support.

"The First Amendment was doing just fine for its first 200 years of existence – it wasn't until the Buckley case that the court determined that money is equal to speech. What is most dangerous in the McCutcheon case is the possibility that the court could now choose to extend this money-is-speech ruse," Brendan Fischer, general counsel for the Center for Media and Democracy, a progressive think tank in Madison, told Mint Press News.

"It now seems increasingly likely that the response is going to be a Constitutional amendment, declaring that money is not speech and that Congress does indeed have the power to regulate elections spending."

To date, 16 states and hundreds of cities and municipalities have passed resolutions or taken other actions to formally call for such an amendment.

The Supreme Court will rule on McCutcheon v. FEC by the end of June 2014, just in time for the mid-term elections.