

January 2014

# McCutcheon v. Federal Election Commission and the Supreme Court's Narrowed Definition of Corruption

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### Recommended Citation

Mikala L. Noe, *McCutcheon v. Federal Election Commission and the Supreme Court's Narrowed Definition of Corruption*, 67 Me. L. Rev. 163 (2014).

Available at: <http://digitalcommons.mainerlaw.maine.edu/mlr/vol67/iss1/7>

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*MCCUTCHEON V. FEDERAL ELECTION COMMISSION*  
AND THE SUPREME COURT'S NARROWED  
DEFINITION OF CORRUPTION

*Mikala Noe*

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## MCCUTCHEON V. FEDERAL ELECTION COMMISSION AND THE SUPREME COURT'S NARROWED DEFINITION OF CORRUPTION

Mikala Noe\*

### I. INTRODUCTION

On June 17, 1972, five men were caught attempting to bug the offices of the Democratic National Committee in the Watergate complex in Washington, D.C.<sup>1</sup> The first link between this break-in and President Richard Nixon's re-election campaign funds was discovered when a \$25,000 cashier's check, earmarked for Nixon's re-election fund, was found to have been deposited into the bank account of one of the men involved in the break-in.<sup>2</sup> Shortly thereafter, reporters revealed that then U.S. Attorney General John N. Mitchell controlled a secret campaign fund used to gather information about the Democratic Party.<sup>3</sup> During the resulting Watergate investigation, the Federal Bureau of Investigation "established that hundreds of thousands of dollars in Nixon campaign contributions had been set aside to pay for an extensive undercover campaign aimed at discrediting individual Democratic presidential candidates and disrupting their campaigns."<sup>4</sup> Nearly one year after the Watergate break-in, President Nixon accepted the responsibility of the actions taken by his subordinates and appointed a new Attorney General, recommending changes in the law "to prevent future campaign abuses of the sort recently uncovered," referring to the secret election funds.<sup>5</sup> On August 8, 1974, President Nixon formally announced his resignation.<sup>6</sup> The Watergate scandal

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1. Alfred Lewis, *5 Held in Plot to Bug Democrats' Office Here*, WASH. POST (June 18, 1972), <http://www.washingtonpost.com/wp-dyn/content/article/2002/05/31/AR2005111001227.html> (reportedly the third break-in to the Democratic National Committee's offices).

2. Carl Bernstein & Bob Woodward, *Bug Suspect Got Campaign Funds*, WASH. POST (Aug. 1, 1972), [http://www.washingtonpost.com/politics/bug-suspect-got-campaign-funds/2012/06/06/gJQAyTjKJV\\_story.html](http://www.washingtonpost.com/politics/bug-suspect-got-campaign-funds/2012/06/06/gJQAyTjKJV_story.html).

3. Carl Bernstein & Bob Woodward, *Mitchell Controlled Secret GOP Fund*, WASH. POST (Sept. 29, 1972), [http://www.washingtonpost.com/politics/mitchell-controlled-secret-gop-fund/2012/06/06/gJQAoAcAKJV\\_story.html](http://www.washingtonpost.com/politics/mitchell-controlled-secret-gop-fund/2012/06/06/gJQAoAcAKJV_story.html).

4. Carl Bernstein & Bob Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, WASH. POST (Oct. 10, 1972), [http://www.washingtonpost.com/politics/fbi-finds-nixon-aides-sabotaged-democrats/2012/06/06/gJQAoHIJJV\\_story.html](http://www.washingtonpost.com/politics/fbi-finds-nixon-aides-sabotaged-democrats/2012/06/06/gJQAoHIJJV_story.html).

5. Laurence Stern & Haynes Johnson, *3 Top Nixon Aides, Kleindienst Out; President Accepts Full Responsibility; Richardson Will Conduct New Probe*, WASH. POST (May 1, 1973), [http://www.washingtonpost.com/politics/3-top-nixon-aides-kleindienst-out-president-accepts-full-responsibility-richardson-will-conduct-new-probe/2012/06/04/gJQAx7oFJV\\_story.html](http://www.washingtonpost.com/politics/3-top-nixon-aides-kleindienst-out-president-accepts-full-responsibility-richardson-will-conduct-new-probe/2012/06/04/gJQAx7oFJV_story.html).

6. Richard Nixon, President of the U.S., Resignation Speech (Aug. 8, 1974), available at [http://www.pbs.org/newshour/spc/character/links/nixon\\_speech.html](http://www.pbs.org/newshour/spc/character/links/nixon_speech.html).

served as “the impetus for the last wave of campaign finance reform.”<sup>7</sup>

The dictionary definition of corruption includes: “dishonest or illegal behavior especially by powerful people”;<sup>8</sup> “dishonest proceedings”; “bribery”; “perversion of integrity”; “depravity”;<sup>9</sup> and “a vicious and fraudulent intention to evade the prohibitions of the law.”<sup>10</sup> The Supreme Court once subscribed to this very broad definition of corruption.<sup>11</sup> However, over time, the Court has adapted a narrower view of corruption. Instead of corruption including all dishonest or illegal behavior and a fraudulent intention to evade the law, today’s Supreme Court defines corruption solely as *quid pro quo*.<sup>12</sup> *Quid pro quo* corruption is the trading of one thing for another; in campaign finance, it’s often the trading of money to be used to get the candidate into office (through campaign contributions) in exchange for a benefit after the candidate takes office.<sup>13</sup> As the definition of corruption has become narrower, the Supreme Court has begun to overturn campaign finance laws, finding that the laws are not tailored closely enough to the purpose of preventing this type of corruption.

On April 2, 2014, the Supreme Court overturned a portion of campaign finance law. The Supreme Court in *McCutcheon v. Federal Election Commission*,<sup>14</sup> held that aggregate limits on political campaign contributions “intrude without justification on a citizen’s ability to exercise ‘the most fundamental First Amendment activities.’”<sup>15</sup> Aggregate limits were created by the Federal Election Campaign Act of 1971,<sup>16</sup> and later amended by the Bipartisan Campaign Reform Act in 2002.<sup>17</sup> These aggregate limits provided that a single person could donate up to a certain fixed amount every two years to political campaigns and committees.<sup>18</sup> Contrary to aggregate contribution limits that govern how much a person can donate to *all* candidates or committees, individual contribution limits restrict how much money a person can donate to a single candidate or committee.<sup>19</sup> Congress created aggregate limits to prevent evasion of other campaign finance contribution laws, including individual limits, and to further the government’s anti-corruption interest.<sup>20</sup>

Shaun McCutcheon and the Republican National Committee (RNC) brought

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7. Donald J. Simon, *Beyond Post-Watergate Reform: Putting an End to the Soft Money System*, 24 J. LEGIS. 167, 167 (1998).

8. *Corruption*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/corruption>.

9. *Corruption*, DICTIONARY.COM, <http://dictionary.reference.com/browse/corruption?s=t>.

10. *Corruption*, Black’s Law Dictionary 281 (11th ed. 2004).

11. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 143 (2003), *overruled by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

12. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1441 (2014).

13. Robert Barnes, *The High Court: When is a campaign contribution a bribe?*, WASH. POST (Aug. 12, 2012), [http://www.washingtonpost.com/politics/the-high-court-when-is-a-campaign-contribution-a-bribe/2012/08/12/68cdd94e-e2f9-11e1-a25e-15067bb31849\\_story.html](http://www.washingtonpost.com/politics/the-high-court-when-is-a-campaign-contribution-a-bribe/2012/08/12/68cdd94e-e2f9-11e1-a25e-15067bb31849_story.html).

14. *McCutcheon*, 134 S. Ct. at 1460.

15. *Id.* at 1462 (quoting *Buckley v. Valeo*, 424 U.S. 1, 14 (1976)).

16. Federal Election Campaign Act of 1971 (FECA), Pub.L. 92–225, 86 Stat. 3 (1972) (codified as 2 U.S.C.A. § 431).

17. Bipartisan Campaign Reform Act of 2002 (BCRA), PL 107–155, 116 Stat 81 (2002).

18. *McCutcheon*, 134 S. Ct. at 1443.

19. *Id.* at 1442.

20. *Id.*

the challenge against restrictions in campaign finance contribution law.<sup>21</sup> McCutcheon was a frequent contributor to political campaigns but due to the aggregate limits, was unable to contribute to as many candidates as he wished.<sup>22</sup> Additionally, the RNC wished to receive as many contributions as McCutcheon wanted to make but could not due to the same aggregate limit.<sup>23</sup> Both appellants argued that the aggregate limits on campaign contributions violated their First Amendment rights.<sup>24</sup> In *McCutcheon*, the Court focused on a narrow definition of corruption to determine that the Government's interest in preventing corruption and the appearance of corruption did not outweigh a person's First Amendment right to contribute to political campaigns, and thus removed aggregate limits from campaign finance law.<sup>25</sup>

*McCutcheon* is met with a sharply divided audience. Some characterize the Supreme Court's holding as "obvious common sense,"<sup>26</sup> others, as "a devastating blow to our democratic system."<sup>27</sup> This Note begins in Part II by briefly examining the complex history of campaign finance reform, the movement to analyze restrictions on contributions and expenditures under the First Amendment's freedom of expression, and the Supreme Court's shifting definition of corruption. Part III examines the facts and procedural background of *McCutcheon*, in particular, the Supreme Court's approach to defining corruption in campaign financing. Part IV will suggest the impact this decision will have on political campaigns. This Note contends that the Government's justifications for enacting the aggregate limits were sufficient for the Court to uphold the limitation. This Note further contends that the Supreme Court maintains an unreasonably narrow definition of corruption in campaign finance laws. The U.S. Congress should act and pass a law to overturn the Supreme Court's troubling narrow quid pro quo definition of corruption to protect the anti-corruption interests in American democracy.

## II. A BRIEF EXAMINATION OF CAMPAIGN FINANCE REFORM

### A. *The Early History of Campaign Finance Reform*

In 1906, President Theodore Roosevelt listed his first item of congressional business as creating "a law prohibiting political contributions by corporations."<sup>28</sup> This request came after Roosevelt's election garnered a "popular feeling . . . that aggregated capital unduly influenced politics, an influence not stopping short of

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21. *Id.* at 1443.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1462.

26. Ashby Jones, Legal Experts React to Supreme Court's Campaign-Finance Ruling, Blog, WALL ST. J. (April 2, 2014 12:42 PM), <http://blogs.wsj.com/law/2014/04/02/legal-experts-react-to-supreme-courts-campaign-finance-ruling/> (quoting Bradley Smith, former Federal Election Commissioner and current law professor at Capital University).

27. *Id.* (quoting Robert Weissman, president of Public Citizen).

28. *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers of Am. (UAW-CIO)*, 352 U.S. 567, 575 (1957).

corruption.”<sup>29</sup> The idea was to prevent the wealthy from using corporate funds to send candidates to the legislature who in turn would protect and advance the interests of the wealthy.<sup>30</sup> In 1907, Congress passed the Tillman Act to address this concern.<sup>31</sup> The Tillman Act was “the first concrete manifestation of a continuing congressional concern for elections ‘free from the power of money.’”<sup>32</sup> Shortly after its passage, the Act was amended to require the disclosure of House and Senate race campaign contributions.<sup>33</sup>

Then, in 1925, Congress passed the Federal Corrupt Practices Act (FCPA).<sup>34</sup> The FCPA was “limited to general election activities and required the disclosure of contributions and expenditures by candidates and political action committees (PACs).”<sup>35</sup> In debating this Act, Senator Robinson stated that,

Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.<sup>36</sup>

The first individuals charged with violating the Act were two members of a political election committee, Ada L. Burroughs and James Cannon, Jr.<sup>37</sup> In 1932, Burroughs, acting as treasurer, “accepted contributions and made expenditures for the purpose of influencing and attempting to influence the election of presidential and vice presidential electors in two states.”<sup>38</sup> Burroughs was alleged to have violated the FCPA by failing to report the names and addresses of contributors, with the amount and date of each contribution.<sup>39</sup> In defending himself, Burroughs argued that the sections of the Act relating to presidential electors were unconstitutional because they sought to regulate “political activities pertaining to the appointment of the electors,” a power that is conferred solely upon the state.<sup>40</sup>

In *Burroughs v. United States*,<sup>41</sup> the Supreme Court held that Congress has the

29. Fed. Election Comm’n v. Beaumont, 539 U.S. 146, 152 (2003) (quoting *United States v. Auto. Workers*, 352 U.S. 567, 570 (1957)).

30. *UAW-CIO*, 352 U.S. at 571 (quoting the statement made by Rep. Elihu Root) (“The idea is to prevent . . . the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public.”), hearing before the H. Comm. on Elections, 59th Cong. 12 (1905).

31. Tillman Act of 1907, ch. 420, 34 Stat. 864 (1907).

32. *UAW-CIO*, 352 U.S. at 575.

33. Publicity Act of 1910, ch. 392, 36 Stat. 822 (1910) (repealed 1925).

34. The Federal Corrupt Practices Act of 1925, Ch. 368, §§ 302, 313, 43 Stat. 1070, 1074 (1925) (repealed 1971).

35. Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who’s Running Now*, 99 DICK. L. REV. 357, 358 (1995).

36. *UAW-CIO*, 352 U.S. at 576-77 (citing 65 Cong. Rec. 9507—9508 (1925)).

37. *United States v. Burroughs*, 65 F.2d 796, 798 (D.C. Cir. 1933) *aff’d in part, rev’d in part and remanded*, 290 U.S. 534 (1934).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Burroughs v. United States*, 290 U.S. 534, 545 (1934).

power to pass laws that are “essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.”<sup>42</sup> Focusing on the corruptive effect of money in politics, the Supreme Court determined that Congress “reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections.”<sup>43</sup> The Court recognized that the Act sought to “preserve the purity of presidential and vice presidential elections.”<sup>44</sup> “To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self-protection.”<sup>45</sup>

The Hatch Act Amendments of 1940 imposed the first yearly limit on individual contributions to federal candidates and national party committees for officers and employees of the government.<sup>46</sup> Section 13(a) made it unlawful for any person to contribute more than \$5,000 during a calendar year to any campaign or national committee.<sup>47</sup> In 1943, Congress took it a step further and passed the Smith-Connally Act, prohibiting “labor organizations from making contributions in connect[ion] with federal elections.”<sup>48</sup> Congress hoped the Smith-Connally Act would reduce the undue influence of labor on elections.<sup>49</sup> However, after the 1944 presidential election, Congress recognized a loophole in existing law that confined the definition of contribution so that it could be read to apply to only direct gifts or payments, not expenditures made by labor organizations on behalf of candidates.<sup>50</sup> Acknowledging the loophole, and further amending part of the FCPA, Congress passed the Labor Management Relations Act of 1947 making it unlawful for any national bank or organization to make a contribution or expenditure in connection with any election for political office.<sup>51</sup>

Two cases were brought before the Court challenging the Labor Management Relations Act. In *United States v. Congress of Industrial Organizations*,<sup>52</sup> the Supreme Court recognized that Congress intended the Labor Management Relations Act to destroy “the influence over elections which corporations exercised

42. *Id.* at 545.

43. *Id.* at 548.

44. *Id.* at 544.

45. *Id.* at 545.

46. Hatch Act, 54 Stat. 767, ch. 640, §13(a) (1940) (codified as amended at 18 U.S.C.A. §§ 594, 595, 598, 600, 601, 604, 605 (2014)).

47. *Id.* (“It shall be unlawful, for any person, directly or indirectly, to make contributions in an aggregate amount in excess of \$5,000, during any calendar year, or in connection with any campaign for nomination or election, to or on behalf of any candidate for an elective Federal office . . . or to or on behalf of any committee or other organization engaged in furthering, advancing, or advocating the nomination or election of any candidate for any such officer or the success of any national political party.”)

48. Comment, *Regulation of Labor’s Political Contributions and Expenditures: the British and American Experience*, 19 U. CHI. L. REV. 371, 373 (1952).

49. *Id.*

50. *United States v. Cong. of Indus. Orgs.*, 335 U.S. 106, 115 (1948).

51. Labor Management Relations Act, 1947, 61 Stat. 149 § 313.

52. *Cong. of Indus. Orgs.*, 335 U.S. at 106.

through financial contribution.”<sup>53</sup> Then, in *United States v. International Union United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO)*,<sup>54</sup> the Supreme Court held that the use of union dues to create a television commercial designed to influence Congressional elections violated the FCPA.<sup>55</sup> In so holding, the Court recognized Congress’s intent in passing the Labor Management Relations Act as one “to protect the political process from what it deemed to be the corroding effect of money employed in elections by aggregated power.”<sup>56</sup> These two early cases demonstrate Congress’s concern for money in politics and the possible corruptive effect it presents.

The next major campaign finance law was not passed until 1971. The Federal Election Campaign Act of 1971 (FECA)<sup>57</sup> repealed the FCPA.<sup>58</sup> FECA set out guidelines for campaign communications,<sup>59</sup> placed limitations on contributions and expenditures,<sup>60</sup> and required the disclosure of campaign contributions.<sup>61</sup> Then came Watergate. Public cynicism about the campaign finance process resulted from shady government decisions benefitting large contributors.<sup>62</sup> For example, the Nixon campaign received more than \$1.7 million in campaign contributions from people who were later appointed to be ambassadors.<sup>63</sup>

In 1974, following the campaign finance law violations by President Richard Nixon, Congress passed amendments to FECA.<sup>64</sup> These amendments “placed limits on the amounts that individuals could contribute to candidates and political committees and limited spending by candidates in federal elections.”<sup>65</sup> These limitations included:

A \$1,000 limit on individuals donating to a candidate for federal office, limiting the donation of Political Action Committees (PACs) to \$5,000 per election, limiting donations to national committees of political parties to \$20,000 a year for individuals and \$15,000 a year for PACs, and an aggregate cap of \$25,000 a year on the amount an individual could contribute to all federal candidates, national parties, and PACs.<sup>66</sup>

The aggregate caps were meant to close loopholes in previous laws allowing candidates to “use an unlimited number of political committees for fundraising

53. *Id.* at 113.

54. *United States v. UAW-CIO*, 352 U.S. 567, 588 (1957).

55. *Id.* at 567.

56. *Id.* at 582.

57. Federal Election Campaign Act of 1971 (FECA), Pub.L. 92–225, Feb. 7, 1972, 86 Stat. 3 (codified as 2 U.S.C.A. §431) (hereinafter FECA).

58. *See* Burke, *supra* note 35, at 359.

59. FECA, Title 1, § 101.

60. *Id.* at Title 2, § 608.

61. *Id.* at Title 3, § 302.

62. Simon, *supra* note 7, at 168. For a more in-depth review of such practices, *see* Ciara Torres-Spelliscy, *How Much Is an Ambassadorship? And the Tale of How Watergate Led to A Strong Foreign Corrupt Practices Act and A Weak Federal Election Campaign Act*, 16 CHAP. L. REV. 71, 71-94 (2012).

63. *Id.*

64. Brandi Cherie Sablatura, *Reformation of 527 Organizations: Closing the Soft Money Loophole Created by the Bipartisan Campaign Reform Act of 2002*, 66 LA. L. REV. 809, 817-18 (2006).

65. *Id.* at 818.

66. *Id.*

purposes.”<sup>67</sup> The FECA Amendments went into effect on October 15, 1974.<sup>68</sup>

### B. Buckley v. Valeo<sup>69</sup>

Shortly after the FECA Amendments went into effect, Senator James Buckley, among others, filed suit against Francis R. Valeo, the Secretary of the Senate, in a case that became known as *Buckley v. Valeo*.<sup>70</sup> The complainants sought a declaratory judgment that the FECA Amendments were unconstitutional and an injunction against enforcement of those provisions.<sup>71</sup> The United States District Court for the District of Columbia recognized the government’s “clear and compelling interest in safeguarding the integrity of elections and avoiding the undue influence of wealth,” stating that “[b]oth the reality and appearance of electoral corruption justify Congressional intervention.”<sup>72</sup>

On appeal, the Supreme Court held that individual contribution limits, the disclosure and reporting provisions, and the public financing scheme were constitutional; however, the limitations on candidate expenditures were not constitutional.<sup>73</sup> In its discussion, the Supreme Court focused on the complainant’s First Amendment argument and characterized campaign contributions as free speech:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor’s support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor’s freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.<sup>74</sup>

Even though the Court recognized that individual campaign contributions and expenditures were a recognized form of constitutionally protected speech, the Court held that the \$1,000 individual contribution limit was constitutionally justified.<sup>75</sup> In so holding, the Court weighed a person’s First Amendment right

67. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 118 (2003), *overruled by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

68. Federal Election Campaign Act, Pub. L. 93–443, Oct. 15, 1974, 88 Stat. 1263.

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

70. *Id.* at 7–9.

71. *Id.* at 8–9.

72. *Buckley v. Valeo*, 519 F.2d 821, 841 (D.C. Cir. 1975), *aff’d in part, rev’d in part*, 424 U.S. 1 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), and *modified*, 532 F.2d 187 (D.C. Cir. 1976).

73. 424 U.S. at 143.

74. *Id.* at 21 (footnote omitted).

75. *Id.*

with the primary purpose of the Act, to limit corruption.<sup>76</sup> Although the Court determined that the limit regulated speech,<sup>77</sup> the limit did not affect a person's ability to "engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources."<sup>78</sup> In determining that the individual contribution limit was justified, the Court addressed the possibility of corruption: "of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."<sup>79</sup> According to the Court, the great interest in preventing corruption and the appearance of corruption justified limiting a person's political contribution to an individual candidate or committee.<sup>80</sup>

However, there were several shortcomings in FECA.<sup>81</sup> The Court's determination that expenditure limitations were unconstitutional allowed campaign costs to rise.<sup>82</sup> In the mid-1990s, political parties began using soft money more frequently.<sup>83</sup> Money donated in violation of campaign finance law is considered soft money.<sup>84</sup> Soft money contributions are often large donations by corporations, unions, or individuals to a political party who in turn use the donation for "party building purposes."<sup>85</sup> Soft money, often used for grass-roots activities, includes money spent on printing campaign materials, get-out-the-vote efforts, and voter registration.<sup>86</sup> Soft money spending grew from \$86 million in 1992 to \$495 million in 2000.<sup>87</sup> "This unlimited party spending permitted corporations, unions, individuals, and other interested entities to evade contribution limits by channeling money through political parties, potentially leading to a *quid pro quo*."<sup>88</sup>

### C. *The Slow Decline of Campaign Finance Restrictions*

The Bipartisan Campaign Reform Act of 2002 (BCRA) amended FECA.<sup>89</sup> This law was the result of a six-year political struggle and "is the most significant

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76. *Id.*

77. *Id.* at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.")

78. *Id.* at 28.

79. *Id.* at 27.

80. *Id.* at 28.

81. See generally 148 CONG. REC. S33 (daily ed. March 20, 2002), available at <http://www.gpo.gov/fdsys/pkg/CREC-2002-03-20/pdf/CREC-2002-03-20-senate.pdf>.

82. See Simon, *supra* note 7, at 170 ("The invalidation of spending limits resulted in the unrestrained ability of campaign costs to rise, while money into campaigns continued to be subject to limits.")

83. George Comeau, *Bipartisan Campaign Reform Act*, 40 HARVARD J. ON LEGIS. 253, 260 (2003).

84. Simon, *supra* note 7, at 175.

85. *Id.* (internal quotations omitted).

86. Comeau, *supra* note 83, at 253 n.58-59.

87. *Id.*

88. *Id.* at 259 (emphasis in the original).

89. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 114 (2003) *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

change in federal campaign finance law” since FECA.<sup>90</sup> Included in BCRA was a prohibition against soft money,<sup>91</sup> an increase in the individual contribution limitations,<sup>92</sup> and an increase in the aggregate limit on individual contributions.<sup>93</sup> Several suits challenging the Act’s constitutionality followed its passing. These suits were combined into *McConnell v. Federal Election Commission*.<sup>94</sup> In upholding the prohibition on soft money, the Supreme Court stated that this Act “does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.”<sup>95</sup>

The Court used a broad definition of corruption, worrying about the influence large sums of money might have on elections.<sup>96</sup> The Court’s definition of corruption included improper influence and opportunities for abuse, in addition to quid pro quo arrangements.<sup>97</sup> Justice Kennedy, concurring in part and dissenting in part, argued for a more narrow definition to include only quid pro quo corruption. In Justice Kennedy’s opinion, “only a single definition of corruption has been found to identify political corruption successfully and to distinguish good political responsiveness from bad—that is *quid pro quo*.”<sup>98</sup> Justices Stevens and O’Connor wrote for the majority regarding Titles I (regulating the use of soft money) and II (prohibiting corporations and unions from using general treasury funds for communications that are intended to influence federal election outcomes). The opinion stated that Justice Kennedy’s interpretation of corruption was too narrow and would “render Congress powerless to address more subtle but equally dispiriting forms of corruption.”<sup>99</sup> It is obvious throughout the *McConnell* opinion that the Supreme Court was split on the definition of corruption.

In 2006, the Supreme Court heard a case challenging a Vermont campaign finance statute that regulated both the amount a candidate could spend on their campaign, and the amount individuals, organizations, and political parties could contribute to those campaigns.<sup>100</sup> In *Randall v. Sorrell*, the Supreme Court held that both limitations were unconstitutional.<sup>101</sup> In so holding, the Supreme Court explained that the Act burdened “First Amendment interests by threatening to inhibit effective advocacy by those who seek election, particularly challengers; its

90. Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1180 (2002).

91. Bipartisan Campaign Reform Act of 2002, PL 107–155, §323(a)(1), 116 Stat 81 (codified at 2 U.S.C. 441(i) (2014) (“A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.”).

92. *Id.* at §307(a).

93. *Id.* at §307(b).

94. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) *overruled by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

95. *Id.* at 138.

96. *See id.* at 144.

97. *Id.* at 143.

98. *Id.* at 297.

99. *Id.* at 153.

100. *Randall v. Sorrell*, 548 U.S. 230, 230 (2006).

101. *Id.*

contribution limits mute the voice of political parties; they hamper participation in campaigns through volunteer activities; and they are not indexed for inflation.”<sup>102</sup> Further, the Court stated that the Act burdened speech disproportionately to serving the interests of prevention of actual or apparent corruption.<sup>103</sup> This was the first time the Supreme Court struck down a campaign contribution limit.

Then, in 2010, a nonprofit corporation, Citizens United, wished to sell a documentary critical of a candidate for the 2008 Presidential primary election they produced to a cable company for on-demand viewing; the promotion of the film would include two short ads for the film.<sup>104</sup> Citizens United feared that the ads would qualify as an electioneering communication, defined as “any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office and is made within 30 days of a primary or 60 days of a general election.”<sup>105</sup> Fearing that the film and ads qualified as electioneering communication, Citizens United brought a suit seeking declaratory and injunctive relief against the FEC as a preemptive move to avoid civil and criminal penalties associated with the prohibition against electioneering communication.<sup>106</sup> The suit alleged that section 203 of BCRA, prohibiting electioneering communication, was unconstitutional.<sup>107</sup> In *Citizens United v. Federal Election Commission*, the Supreme Court began its analysis by recognizing that the First Amendment protection applies to corporations.<sup>108</sup> The Government argued that corporate political speech should “be banned in order to prevent corruption or its appearance.”<sup>109</sup> The Supreme Court, citing *Buckley*, held that “the interest in preventing corruption . . . [was] inadequate to justify [the ban] on independent expenditures.”<sup>110</sup> Suggesting it would be impossible to use these types of expenditures for quid pro quo corruption, the Court held “that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>111</sup> The Court turned toward a narrow definition of corruption, which included only quid pro quo corruption, believing that the broader definition (including the appearance of influence or access) would not cause voters to lose faith in the democracy.<sup>112</sup> The Supreme Court held that the federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment, overruling *McConnell*.<sup>113</sup>

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102. *Id.* at 261.

103. *Id.* at 262.

104. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 320 (2010).

105. *Id.* at 321 (internal quotations omitted).

106. *Id.*

107. *Id.*

108. *Id.* at 342.

109. *Id.* at 315.

110. *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)).

111. *Id.* at 357.

112. *Id.* at 360.

113. *Id.* at 365-66.

III. THE *MCCUTCHEON* DECISIONA. *Factual Background*

As previously stated, Congress passed the Bipartisan Campaign Reform Act in 2002. Although focused on eliminating soft money, BCRA increased the contribution limitations from FECA in order to account for inflation.<sup>114</sup> BCRA allowed “an individual to contribute up to \$2,600 per election per candidate . . . ; \$32,400 per year to a national party committee; \$10,000 per year to a state or local party committee; and \$5,000 per year to a political action committee.”<sup>115</sup> Additionally, for the 2013-2014 election cycle, the BCRA provided aggregate limits: an individual could contribute \$48,600 to federal candidates for office and \$74,600 to other political committees.<sup>116</sup> In total, an individual could donate \$123,200 to candidates and non-candidate committees in a two-year election cycle.<sup>117</sup>

During the 2011-2012 election cycle, Shaun McCutcheon contributed a total of over \$33,000 to sixteen different federal candidates, complying with the base requirements for each candidate.<sup>118</sup> McCutcheon wished to contribute to more candidates but was unable to do so because of the aggregate limits of BCRA.<sup>119</sup> Additionally, McCutcheon alleged that he wished to increase his donation even more during the 2013-2014 election cycle, but would be prevented from doing so under BCRA and FECA.<sup>120</sup> Co-appellant, the Republican National Committee (RNC), wished to receive contributions by McCutcheon and other similarly situated people, but was unable to do so because of the aggregate limits on contributions to political committees.<sup>121</sup>

B. *Procedural History*

In accordance with BCRA § 403(a)(1), McCutcheon and the RNC filed a complaint before a three-judge panel of the United States District Court for the District of Columbia.<sup>122</sup> McCutcheon and the RNC claimed that the aggregate limits on contributions to individuals and committees were unconstitutional under the First Amendment, and sought to enjoin the enforcement of such limits.<sup>123</sup> In response, the Government moved to dismiss the case.<sup>124</sup> The District Court denied the preliminary injunction and granted the Government’s request for dismissal.<sup>125</sup> In so holding, the District Court stated that the limits were “valid expressions of the government’s anti-corruption interest” and that the “aggregate limits . . . prevent

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114. 2 U.S.C.A. § 441a(a)(1) (West 2002).

115. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1442 (2014).

116. *Id.*

117. *Id.*

118. *Id.* at 1443.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *McCutcheon v. Fed. Elections Comm’n*, 893 F. Supp. 2d 133, 142 (D.D.C. 2012).

evasion of the base limits.”<sup>126</sup> McCutcheon and the RNC appealed directly to the Supreme Court.<sup>127</sup>

### C. Arguments and Decision of the Court

Appellants argued that the aggregate limits on campaign contributions restricted their First Amendment right to free speech.<sup>128</sup> Appellants challenged the “distinct legal arguments that *Buckley* did not consider,” specifically the overbreadth challenge of the aggregate limits.<sup>129</sup> The Government argued that aggregate limits prevent the circumvention of individual limits thus serving the Government’s legitimate interest in combating political corruption.<sup>130</sup> To support its position, the Government offered several scenarios demonstrating how the aggregate limits further their anti-circumvention interest.<sup>131</sup> First, the Government argued, “there is an opportunity for corruption whenever a large check is given to a legislator, even if the check consists of contributions within the base limits to be appropriately divided among numerous candidates and committees.”<sup>132</sup> The Government further argued that the solicitation of large contributions posed a danger for corruption.<sup>133</sup>

The Court held that the aggregate limits do little to combat political corruption and instead, extremely restrict an individual’s right to participate in the democratic process.<sup>134</sup> The Court began by stating, “any regulation must . . . target what we have called *quid pro quo* corruption or its appearance.”<sup>135</sup> Though the Court recognized the strong interest the Government has in combating corruption and its appearance, the Court explained that the interest must be limited to a certain type of corruption “in order to ensure that the Government’s efforts do not have the effect of restricting the First Amendment right of citizens to choose who shall govern them.”<sup>136</sup> The Court took issue with the dissent’s broad interpretation of corruption, stating that the dissent “dangerously broadens the circumscribed definition of *quid pro quo* corruption articulated in our prior cases, and targets as corruption the general, broad-based support of a political party.”<sup>137</sup> The Court believed that “the line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights.”<sup>138</sup>

In addressing the Government’s concern about circumvention,<sup>139</sup> the Court

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126. *Id.* at 140.

127. *McCutcheon*, 134 S. Ct. at 1444.

128. *Id.* at 1443.

129. *Id.* at 1447.

130. *Id.* at 1452.

131. *Id.* at 1453.

132. *Id.* at 1460.

133. *Id.* at 1461.

134. *Id.* at 1442.

135. *Id.* at 1441.

136. *Id.* at 1462.

137. *Id.* at 1460.

138. *Id.* at 1451.

139. The circumvention argument stems from *Buckley*. In *Buckley*, the Court of Appeals found that §608(e)(1) of the FECA of 1971 (a provision which limited expenditures by any person spending money

believed that “the improbability of circumvention indicates that the aggregate limits instead further the impermissible objective of simply limiting the amount of money in political campaigns.”<sup>140</sup> Further, the Court found the Government’s and dissent’s examples of circumvention to be implausible. Instead of an aggregate limit to prevent circumvention of individual limits, the Court believed that other options would be more effective, including “restricting transfers . . . to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients.”<sup>141</sup>

Filing a separate concurrence, Justice Thomas recommended overturning *Buckley*, stating that the Court’s decision in *Buckley* “denigrates core First Amendment speech.”<sup>142</sup> He argued that the bifurcated standard of review for contributions and expenditures outlined in *Buckley*, requiring a lesser standard of review for contributions, failed to withstand careful review.<sup>143</sup> Thomas argued that although the Court believed contributions were different in kind from expenditures, both usually have some intermediary between the one contributing money and the message, or the one spending the money to produce the message.<sup>144</sup> Thomas continued his concurrence by stating that the “remaining justifications *Buckley* provided are also flawed” and therefore should be overturned.<sup>145</sup> Although Justice Thomas did not explicitly address corruption in his concurrence, he did state that he is in full agreement that the “Government may not penalize an individual for robustly exercising his First Amendment rights.”<sup>146</sup> It can be implied that Justice Thomas believes that corruption is not a strong enough justification to restrict a person’s First Amendment rights.

In their dissent, Justices Breyer, Ginsburg, Sotomayor, and Kagan took issue with the Court’s definition of corruption and advocated the importance of the aggregate contribution limit. The dissent disagreed with the majority’s belief that the aggregate limits do not further a significant governmental interest because, according to the majority, given the individual limits, spending large amounts of money on elections does not rise to corruption.<sup>147</sup> The dissent recognized that this belief was based on a “narrow definition of corruption that excludes efforts to obtain influence over or access to elected officials or political parties.”<sup>148</sup> The dissent also disagreed with the majority’s belief that, because of the individual limits, the aggregate limits do not function meaningfully.<sup>149</sup> The dissent found it impossible to reconcile the Court’s narrow definition of corruption in this case with the Court’s broad definition in *McConnell*, because the Court’s definition in this

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within a calendar year to advocate for the election or defeat of a candidate to \$1000) was a loophole-closing provision, meant to prevent circumvention of contribution limitations. *Buckley v. Valeo*, 424 U.S. 1, 44 (1976).

140. *McCutcheon*, 134 S. Ct. at 1456.

141. *Id.* at 1458.

142. *Id.* at 1462 (Thomas, J., concurring).

143. *Id.* at 1462-63 (Thomas, J., concurring).

144. *Id.* at 1463.

145. *Id.*

146. *Id.* at 1464.

147. *Id.* at 1465-66 (Breyer, J., dissenting).

148. *Id.* at 1466 (internal quotations omitted).

149. *Id.*

case “excludes efforts to obtain influence over or access to elected officials or political parties.”<sup>150</sup> The dissent stated that aside from the Court’s holding in *Citizens United*, case law has insisted upon a considerably broader definition of corruption than what the Court held here.<sup>151</sup> Worried, the dissent wrote that: “[i]n the absence of limits on aggregate political contributions, donors can and likely will find ways to channel millions of dollars to parties and to individual candidates, producing precisely the kind of ‘corruption’ or ‘appearance of corruption’ that previously led the Court to hold aggregate limits constitutional.”<sup>152</sup>

The dissent supported this view by providing three examples in which a donor could produce corruption in the absence of an aggregate limitation. The first example provided that a person would be able to donate \$1.2 million dollars over two years to a political party; with aggregate limits, this was previously only \$74,600.<sup>153</sup> The dissent worried that without the aggregate cap, political parties would organize in a way to ensure the legality of this greater donation.<sup>154</sup> For instance, each major political party has three national committees and fifty state committees; to ensure the ease of large donations, each party could form a “Joint Party Committee” and then allocate the large donations they receive accordingly.<sup>155</sup> The dissent feared that this action would breed the same corruption the Court has sought to avoid in the past: “elected officials . . . obliged to provide [the donor] special access and influence, and perhaps even a *quid pro quo* legislative favor.”<sup>156</sup>

The second example the dissent provided was the increase in donations to individual candidates.<sup>157</sup> In a given election year, there are 435 House seats and thirty-three Senate seats open for election.<sup>158</sup> Without the aggregate limit, an individual donor can now donate to their party’s candidate for every open seat; this would equate to an additional \$2.4 million every two-year election cycle.<sup>159</sup> This example combined with the previous example means that a wealthy individual could now contribute \$3.6 million every two years to their political party and its candidates.<sup>160</sup> The “Joint Party Committee” from the first example could now be expanded to include each of these individual candidates for office.<sup>161</sup> The dissent feared that current law would allow these “Joint Party Committees” to shift these large donations to a single candidate.<sup>162</sup> “[A] party could proliferate these joint entities,” carefully naming them to avoid earmarking rules.<sup>163</sup> Then, these joint party committees could each write the same single candidate a check.<sup>164</sup> Even

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150. *Id.* (internal citations omitted).

151. *Id.* at 1471.

152. *Id.* at 1472.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1473.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

though the initial \$3.6 million donation from a single donor has to be divided up according to limits placed on candidates and political parties, a loophole is created to allow those candidates and political parties to reroute that money to a single candidate.<sup>165</sup> Thus, \$2.37 million of the single donor's \$3.6 million donation could be rerouted to a single candidate.<sup>166</sup> The dissent feared that this routing and rerouting routine would be explained to a donor in order to circumvent individual donation limitations, and the candidate receiving the donation would learn who the donor was—perhaps leading to the obligation of providing special access and influence to the donor.<sup>167</sup>

Finally, the third example from the dissent provided that there would be a proliferation of political action committees.<sup>168</sup> A rich donor could donate \$10,000 (over the course of two years) to 200 PACs created by party supporters.<sup>169</sup> Nine other donors could do the same, bringing the total to \$20,000 per PAC.<sup>170</sup> Each PAC would have \$100,000 and would then write 10 checks to the most embattled candidates for \$10,000 each.<sup>171</sup> If this were a concerted effort, each candidate would then get \$2 million total.<sup>172</sup> Although a candidate would not know who specifically donated the money they received from each PAC, they would likely know who the big ten donors were.<sup>173</sup> According to the dissent, examples two and three exemplify the anti-circumvention argument in campaign finance without aggregate limits, while all three examples demonstrate the possibility for corruption, either through influence, special access, or quid pro quo.

#### IV. THE COURT'S DEFINITION OF CORRUPTION IN *MCCUTCHEON* IS TOO NARROWLY DRAWN AND SHOULD BE BROADENED TO INCLUDE CIRCUMVENTION AND IMPROPER INFLUENCE

In its opinion, the majority used the narrow definition of corruption, quid pro quo corruption or outright bribery, to determine that aggregate limits violate the First Amendment.<sup>174</sup> The Court refused to consider the prevention of influence through donations and circumvention of other limits to be an adequate justification for regulation.<sup>175</sup> The Government's justification for the aggregate limits should have provided sufficient justification for the Court to uphold the aggregate limits. Furthermore, because the Supreme Court has very narrowly defined corruption to exclude circumvention and influence, Congress should pass a law expanding the definition of corruption to include these acts.

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165. *Id.*

166. *Id.* at 1474.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1474-5.

171. *Id.* at 1475.

172. *Id.*

173. *Id.*

174. *Id.* at 1462.

175. *Id.* at 1450-52.

*A. The Government's Justification for the Act was Correct*

The Supreme Court never reached the standard of review question because, according to the Court, there was a “substantial mismatch between the Government’s stated objective and the means selected to achieve it.”<sup>176</sup> However, the Government’s stated objective for the enactment of the BCRA (anti-corruption and anti-circumvention of campaign finance law) was achieved by the BCRA aggregate limits. When President George Bush signed BCRA into law he stated that the Act: “will result in an election finance system that encourages greater individual participation, and provides the public more accurate and timely information, than does the present system.”<sup>177</sup>

At the time FECA was passed, its justification was called into question as well. In *Buckley*, the Court held that FECA was justified by three governmental interests:

[T]he prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office . . . mute[s] the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections, . . . [and] act as a brake on the skyrocketing cost of political campaigns and thereby serve to open the political system more widely to candidates without access to sources of large amounts of money.<sup>178</sup>

Although the Court believed FECA was justified for all three of the above reasons, the Court stated that it was “unnecessary to look beyond the Act's primary purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions” to justify its constitutionality.<sup>179</sup> Since *Buckley*, the Supreme Court has focused on that sole justification when balancing an act’s intrusion on a person’s First Amendment rights.

In *McCutcheon*, the Court focused on the Government’s anti-circumvention and anti-corruption interests.<sup>180</sup> Perhaps it was the fault of the Government to not raise one of the remaining justifications in *Buckley*.<sup>181</sup> As mentioned above, one of the justifications raised in *Buckley* was to “mute the voices of affluent persons and groups . . . to equalize the ability of all citizens to affect the outcome of elections.”<sup>182</sup> Although this justification, in terms of equalizing political participation, has been found to be insufficient by the Supreme Court since *Buckley*,<sup>183</sup> this justification can also go to the broader definition of corruption: the

176. *Id.* at 1446.

177. George W. Bush, *President Signs Campaign Finance Reform Act*, THE WHITE HOUSE (March 27, 2002), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020327.html>.

178. *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976).

179. *Id.* at 26.

180. *McCutcheon*, 134 S. Ct. at 1450-56.

181. The third justification provided in *Buckley*, to prevent the increased cost of campaigns, does not speak to the Court’s definition of corruption and will not be discussed in this Note in further detail. *See supra* note 67.

182. *Id.* at 25.

183. *See Davis v. Fed. Election Comm’n*, 554 U.S. 724, 742 (2008) (finding that asymmetrical contribution limits were unconstitutional because “[l]eveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an

appearance of improper access. Aggregate limits on campaign contributions prevent a person from donating more than \$123,200 a year; without these limits, it is estimated that the new cap on aggregate donations by a single person could reach \$3.5 million.<sup>184</sup>

To put this in perspective, it is helpful to look at the numbers. Just shy of 10 million people in the United States have a net-worth of greater than \$1 million dollars;<sup>185</sup> however, the United States has a population of an estimated 316,128,839 people.<sup>186</sup> In the 2011-2012 election cycle, the Huffington Post found forty-nine donors to be well over the aggregate contribution limits, demonstrating that a few affluent people significantly contribute to elections.<sup>187</sup> Without the aggregate limits, the appearance of elections being bought by a few wealthy individuals may cause people to believe their contribution has no effect on the outcome of an election, and thus lose interest in the democratic process. The aggregate limits serve to prevent the appearance that a few wealthy individuals buy elections to influence policy or to benefit themselves, much like when individuals made significant donations to the Nixon campaign to later be appointed to an ambassadorship.

#### B. Corruption Should be Defined More Broadly Than *Quid Pro Quo*

The Majority's definition of corruption in *McCutcheon* only included quid pro quo corruption. In its eyes, corruption is only corruption if a contributor gives money to a candidate in exchange for a vote or other favor (or the appearance that a contributor gave money to a candidate in exchange for a vote or other favor). Quid pro quo: "where, say, a donor gives money with the understanding that the politician will do a specific thing in return."<sup>188</sup> An example of quid pro quo corruption is a California state senator who accepted \$100,000 in bribes from undercover FBI agents posing as Hollywood movie executives in exchange for

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election," which should be for the voters to decide, not Congress); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2822 (2011).

184. *Most Likely to Exceed: Who's Poised to Double Down in Post-McCutcheon*, CTR. FOR RESPONSIVE POLITICS & THE SUNLIGHT FOUND. (Jan. 14, 2014, 11:00am), <http://www.opensecrets.org/news/2014/01/most-likely-to-exceed-whos-poised-to-double-down-post-mccutcheon.html>. This figure takes into account the number of candidates and committees that could be donated to, figuring the maximum individual donation is contributed to each one.

185. Emily Jane Fox, *Number of millionaire households in the U.S. reaches high*, CNN (March 14, 2014, 10:55 AM), <http://money.cnn.com/2014/03/14/news/economy/us-millionaires-households/>. This figure includes only households worth more than \$1 million, this number would be significantly lower for those who are worth multi-millions and would be in a position to donate \$3.5 million to a campaign.

186. UNITED STATES CENSUS BUREAU, *State & County QuickFacts*, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Jul. 8, 2014). This number does include children and others who would not be able to vote.

187. Paul Blumenthal, *Campaign Contribution Limits Broken Repeatedly in 2012 Election with No FEC Oversight*, HUFFINGTON POST (May 3, 2013, 9:17 AM), [http://www.huffingtonpost.com/2013/05/03/campaign-contribution-limits\\_n\\_3132474.html](http://www.huffingtonpost.com/2013/05/03/campaign-contribution-limits_n_3132474.html).

188. Robin Abcarian, *Did the Supreme Court just open the door to political corruption?*, L.A. TIMES (April 2, 2014, 11:00 AM), <http://www.latimes.com/local/abcarian/la-me-ra-supreme-court-strikes-down-campaign-money-limits-20140402,0,3228984.story#ixzz2zZw5EC6m>.

directing legislation in their favor.<sup>189</sup>

The dissent argued for a broader definition, including the appearance of influence, which could result in a cynical public who, in turn, loses interest in political participation altogether.<sup>190</sup> Relying on the dissent in *McConnell*, the *McCutcheon* dissenters argued that the Court's definition of corruption would exclude "influence over or access to elected officials, because generic favoritism or influence theory . . . is at odds with standard First Amendment analyses."<sup>191</sup> An example of this broader definition of corruption is a mayor who accepted bribes from businessmen "in exchange for access to city officials responsible for planning, zoning and permitting."<sup>192</sup>

Empirical studies suggest the *McCutcheon* dissent might be right. According to one study, even if quid pro quos were not to occur, money could still bias a candidate's policy choices.<sup>193</sup> For example, fundraising considerations may weigh on the minds of candidates, leading them to vote a certain way or support specific legislation.<sup>194</sup> Over time, candidates would be "subject to many pressures to behave in ways that may hide their true beliefs."<sup>195</sup> Another study found that Congressional members meet more frequently with donors than non-donors.<sup>196</sup> That study concluded that those who can afford to contribute to campaigns have a higher likelihood of commanding greater attention from influential policymakers.<sup>197</sup> Although the study did not address *why* influential policymakers were more likely to meet with large campaign contributors, the conclusions display the influence campaign contributors can have on Congressional candidates.<sup>198</sup>

Corruption is broader than quid pro quo corruption and in the past the Supreme Court has recognized this. However, with the Court's ruling in *McCutcheon*, the Court continues to employ a definition that is too narrow and excludes the corruption Congress meant to protect elections against. If the Court refuses to recognize the capacity of potential corruption in politics, Congress should act to create a statute defining corruption in a broader scope.

189. Dan Whitcomb, *California lawmaker indicted on bribery, corruption charges*, REUTERS (Feb. 21, 2014, 5:25pm), <http://www.reuters.com/article/2014/02/21/us-usa-california-corruption-idUSBREA1K1S620140221>.

190. *McCutcheon*, 134 S. Ct. at 1468 (Breyer, J., dissenting) ("The appearance of corruption can make matters worse. It can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose. And a cynical public can lose interest in political participation altogether.") (internal quotations omitted).

191. *Id.* at 1471 (2014) (Breyer, J., dissenting) (internal quotations omitted).

192. FOX NEWS, *Mayor of Charlotte resigns after public corruption, bribe charges* (March 26, 2014), <http://www.foxnews.com/politics/2014/03/26/mayor-charlotte-arrested-on-public-corruption-charges/> (the mayor involved also participated in quid pro quo arrangements).

193. Justin Fox & Lawrence Rothenberg, *Influence without Bribes: A Non-Contracting Model of Campaign Giving and Policymaking* 3-4 (March 16, 2009).

194. *Id.* at 13-14.

195. *Id.* at 18.

196. Joshua L. Kalla & David E. Broockman, *Congressional Officials Grant Access Due To Campaign Contributions: A Randomized Field Experiment 2* (U. CAL. BERKLEY DEP'T OF POLITICAL SCI.), available at [http://www.ocf.berkeley.edu/~broockma/kalla\\_broockman\\_donor\\_access\\_field\\_experiment.pdf](http://www.ocf.berkeley.edu/~broockma/kalla_broockman_donor_access_field_experiment.pdf).

197. *Id.* at 20.

198. *Id.* at 22.

## V. CONCLUSION

“We all know that money is the chief source of corruption.”<sup>199</sup> “We all know that large contributions to political campaigns . . . put the political party under obligation to the large contributors, who demand pay in the way of legislation.”<sup>200</sup> With the Court’s holding in *McCutcheon*, the obligation that comes from a large contribution does not count as corruption. In discussing the Court’s holding in *McCutcheon*, journalist Ari Berman wrote, “under the leadership of Chief Justice John Roberts, the Supreme Court has made it far easier to buy an election and far harder to vote in one.”<sup>201</sup> Before the Supreme Court ruled on *McCutcheon*, the Washington Post predicted the future of campaign finances should the aggregate limits be struck down.<sup>202</sup> The predictions included wealthy donors having a greater influence, an increase in size and power for joint fundraising committees, and the eventual demise of individual limits.<sup>203</sup> While *McCutcheon* does not eliminate campaign finance regulation, it is an obvious step in that direction. The U.S. Congress should act and pass a law to overturn the Supreme Court’s troubling narrow quid pro quo definition of corruption to protect the anti-corruption interest in American democracy.

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199. *United States v. UAW-CIO*, 352 U.S. 567, 577 (1957) (citing the 86 Cong. Rec. 2720).

200. *Id.* at 577-78.

201. *How the Supreme Court Blowtorched Democracy and What You Can Do About It*, THE NATION (April 8, 2014), <http://www.thenation.com/article/179264/how-supreme-court-blowtorched-democracy-and-what-you-can-do-about-it>.

202. Sean Sullivan, *Everything you need to know about McCutcheon v. FEC*, WASH. POST (April 2, 2014, 10:30 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/10/08/supreme-court-takes-up-the-sequel-to-citizens-united/>.

203. *Id.*