The Biennial Limit
The *McCutcheon* $3.6 Million Straw Man

Supporters of the overbroad biennial limit provision in the McCain-Feingold campaign finance law claim that if Shaun McCutcheon wins his case at the Supreme Court in *McCutcheon v. FEC*, officials such as House Speaker John Boehner and Minority Leader Nancy Pelosi will be able to ask for multi-million dollar donations through joint fundraising committees, perhaps as much as $3.6 million.

Supporters of the law are conjuring images of a kind of campaign-finance zombie apocalypse. While their doomsday scenario is theoretically possible, it is not really likely. If this is their best argument, and it appears to be, they have a very weak case.

Boehner and Pelosi can already ask for $4.3 million, but they don't.

The biennial limit only applies to individuals, not PACs. So Boehner or Pelosi could already set up a joint fundraising committee to raise millions from PACs today. The committee could raise funds of up to $10,000 each for up to 435 House candidates, plus up to $15,000 for their party's House campaign committee, or a total of $4.37 million in one ask. Yet they don't do it. They don't even do it in smaller amounts for the 50 to 100 "competitive" races in each cycle.

Similarly, if the aggregate limit is so important in supposedly battling corruption, why does it only apply to people and not to PACs? PACs can give to as many candidates as they want, and they can give a lot more to each candidate, up to $10,000 if the PAC donates for both the primary and general election campaigns. Yet we don't see officeholders soliciting these million dollar sums through joint fundraising for PACs.

No PAC to our knowledge has ever used or proposed the type of joint fundraising tactic described by advocates of aggregate limits. Presumably, PACs, like individuals, when given the chance, prefer to donate limited contributions to candidates and committees directly and to joint fundraising committees on a narrow basis.

37 states have no aggregate limit of any kind. This is not an issue in those states.

States are the laboratories of our democracy, and they are doing just fine without aggregate limits. If the fear that top officials would use joint fundraising committees to foster corruption were justified, such a pattern of contributions surely would have been

manifested in one of these jurisdictions at some time over the past half century of fundraising. There is no such evidence.

McCutcheon's case does not challenge the solicitation ban on such large contributions. It is not clear if the ban would fall.

If McCutcheon wins his case, it is not clear that a president, leader in Congress, or any candidate can solicit the million dollar donations that opponents claim.

McCutcheon's lawsuit challenges the law's ban on his ability to give the money and the Republican National Committee's right to receive it, but there is no challenge to the solicitation limits in the McCain-Feingold law.

The solicitation limits in the law (2 U.S.C. §441i) banned raising of so-called soft money. The law states that the president and members of Congress "shall not solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject to the limitations … of this Act." While the limitation would be lifted on the ability of the individual to give contributions only up to that aggregate limit, the law would still be on the books and may well still restrict the ability of a congressman to solicit over that amount.

We believe that, in the event the Court rules for McCutcheon, the law would permit candidates to form larger joint fundraising committees and solicit larger contributions. Such contributions would still be divided among participants, and could not exceed existing contribution caps, so why make fundraising more complicated and expensive than it already is? But we recognize that, as a legal matter, it is not clear whether the law's solicitation limits would survive the Court's decision.

The *SpeechNow.org v. FEC* case created the Super PAC, which allows individuals to form and donate unlimited amounts to these groups. However, the limits on solicitations by candidates and members of Congress for Super PACs still apply under the law. It may well be the case that the solicitation limits would survive *McCutcheon*.

Even if some mechanism is needed to prevent corruption, the aggregate ban is not "narrowly tailored" as required by the Constitution.

Under long-standing First Amendment jurisprudence, the state must demonstrate an important interest before infringing on First Amendment rights. Even after demonstrating such an interest, it must then address it with a "narrowly tailored" solution that goes no further than necessary. Here, neither requirement is met.

The real reason for the aggregate limit is probably pretty simple: it helps the incumbents who wrote the law.

Consider that as of September 25, 2013, the Cook Political Report rated 84 House and Senate races as competitive. This means a citizen, who, for example, wants to help every

Republican or Democrat in a competitive race with a maximum contribution, cannot. That contributor would only be able to support nine candidates to the legal maximum, or barely 10% of the competitive races, if he or she donates in both the primary and general election campaigns. As such, challengers feel the pinch of the aggregate cap more than incumbents. Another major source of challenger funding are the party committees, and as already noted, the aggregate caps hurt the parties.

When it comes to the aggregate contribution caps at issue in *McCutcheon*, Congress created no record of corruption or any other public harm that would be prevented by the caps. The record does not tell us why Congress drafted the provision, what evils it was meant to address, or whether any less speech restrictive approaches were considered.

If members of Congress do raise millions of dollars for such joint fundraising committees, this would help challengers and help the parties. However, if at some point it becomes clear that the lack of a biennial limit creates corruption, there are other more narrowly tailored solutions than the aggregate caps. Most obviously, individuals could still be permitted to support as many candidates as they want, but limits could be placed on solicitations by members of Congress and the president. Other alternatives might consist of stiffer penalties for corruption or more disclosures by elected officials. But the government may not jump immediately to the excessive infringements of a complete ban on further contributions.