Supreme Court Reconsiders Contribution Limits

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This selection originally was titled "In Shrink PAC v. Nixon, Supreme Court to Hear Challenge to Contributions Limits," from the "Recent Developments in the Campaign Finance Regulations" section of the Brookings Institution's web site (www.brookings.org). This article addresses the Supreme Court's decision to review *Nixon v. Shrink Missouri Government PAC*, in which the Eighth Circuit Court of Appeals invalidated Missouri's limits on campaign contributions.

The case was heard in the fall of 1999. The article summarizes not only the positions of the two parties to the case but also those of other groups that presented briefs to the Court including the ACLU, Common Cause, various PACs, and academics. It is an important case because in its January 24, 2000, decision, the Court upheld the Court of Appeals, thus validating campaign contribution limits at the state level and implicitly at the federal level.

In fall 1999, the Supreme Court will hear *Nixon v. Shrink Missouri Government PAC*, its first contribution limits case since the landmark 1976 *Buckley v. Valeo*. The Court will review the decision of the U.S. Federal Court of Appeals for the 8th Circuit, which invalidated Missouri's state contribution limits on First Amendment grounds. The Missouri law set limits at $1,075 for statewide office, $525 for state senate, and $275 for state representative.

The Court in *Buckley* upheld the constitutionality of the Federal Election Campaign Act's $1,000 contribution limit applicable to federal candidates, including candidates for president, senator, and representative, despite arguments that they were unconstitutional restrictions on free speech.

Several federal courts have recently invalidated low contribution limits on the basis that they prevent candidates from raising sufficient money to wage an effective campaign for office. These cases have ad-

dressed contribution limits of $100 to $200, and the Supreme Court has declined to review those decisions. The 8th Circuit decision marks the first time a contribution limit higher than the current $1,000 federal limit has been ruled unconstitutionally low.

The *Shrink PAC* case will enable the Court to reaffirm or revise its holding in *Buckley* in light of twenty-five years of historical experience, the development of campaign finance case law, and the impact of inflation on the value of campaign contribution limits.

KEY ISSUES

The parties and friends of the court, with a few exceptions, agree on key parts of Buckley's holdings on contribution limits:

- Contribution limits may be constitutionally justified if they stem corruption or the appearance of corruption.
- Contribution limits may violate the First Amendment if they are so low that candidates are unable to raise enough money to engage in "effective advocacy," i.e., to wage an effective campaign.

The parties and friends of the court disagree, however, on key questions:

1. Are contribution limits unconstitutional not only because they violate candidates' free speech rights, but the free speech rights of contributors?
2. What standard of proof should be required for candidates and contributors to demonstrate that their rights have been unconstitutionally restricted?
3. What standard of proof should be required for states to demonstrate corruption or the appearance of corruption in the

campaign finance system sufficient to justify contribution limits?

4. Who bears the initial burden of proof—i.e., in this case, must the candidate or contributor (plaintiffs Shrink PAC and Zedman) first demonstrate that their free speech has been substantially restricted in order to challenge the Missouri law, or must Missouri first demonstrate that the state has a "real" problem with corruption and the appearance of corruption to justify the contribution limit?
5. What constitutes corruption—only legislative quid pro quos, or other political "favors" such as special access to lawmakers? Can contribution limits be justified by the "appearance of corruption" alone, and if so how can the "appearance of corruption" be demonstrated?
6. Are contribution limits below a certain dollar amount per se unconstitutional? The 1974 *Buckley* opinion summarily stated that there was no evidence that the $1,000 contribution limit was too low. Now, twenty-five years later, some argue both that evidence to the contrary exists since that $1,000 limit approved in *Buckley* is worth only $350 today after inflation.

The Supreme Court's decision could have far-reaching effects. Not only might it invalidate existing limits, it may undercut efforts to enact contribution limits in states through the referendum process. In addition, although the issues are not raised in this case, *Shrink PAC* may affect other campaign finance limitations, including contribution limits to PACs and the current federal aggregate $25,000 limit applicable to individuals.

BRIEFS

Briefs of the Parties

Jeremiah (Jay) Nixon, attorney general of Missouri (Petitioner), argues that, before a court closely scrutinizes a contribution limit, a party such

as Shrink PAC has the burden of proof to show that its free speech rights have been unconstitutionally restricted, and that the standard of proof required of Missouri to demonstrate that contribution limits are justified by corruption or the appearance of corruption is an intermediate, not strict, standard of scrutiny. Missouri also notes that political candidates in the state have raised more money since enactment of the state's contribution limits laws, suggesting the contribution limits have not severely restricted fund-raising efforts.

Shrink Missouri Government PAC (Respondent) argues that Missouri has the burden of proof to show corruption constitutes a "real harm" to Missouri, not merely that there is an "appearance of corruption." Shrink PAC argues that the evidence offered in the trial and appeals court, including the affidavit of a key sponsor of the legislation and newspaper articles documenting possible (but unproven) quid pro quos by lawmakers, is insufficient.

Joan Bray (Intervenor-Respondent in Support of Missouri's position), a Missouri state representative whose brief was prepared by the Brennan Center for Justice, argues that litigants challenging contribution limits not only have the burden of proof but must prove that their speech rights have been substantially limited—i.e., that contribution limits "severely interfere with the ability of candidates" to "conduct effective advocacy" in order to trigger strict scrutiny. More generally, Bray's brief argues such a standard is consistent with what it views as the Court's "flexible" approach to campaign finance law, including a "pragmatic" evidentiary standard. Under this standard, the brief says, anecdotal evidence sufficed in *Buckley* to demonstrate "corruption." The brief says legislators and the public, when voting for legislative referenda, are owed substantial deference by the courts.

Amicus (Friends-of-the-Court) Briefs

United States Solicitor General's Office asserts that upholding the 8th Circuit's opinion would not merely invalidate the Missouri law but would necessarily overrule *Buckley v. Valeo*'s contribution limits frame-

work. The brief argues that Missouri offered hard evidence of corruption, even though, the brief argues, the state was not required to do so.

Mitch McConnell, Missouri Republican Party, Republican National Committee, and National Republican Senatorial Committee, urges the Court to consider ruling that contribution limits are "per se" unconstitutional. The brief argues that limits have had a "severe adverse effect" on the ability of candidates to fund their campaigns. The brief also argues that contribution limits have not succeeded in stemming corruption or the appearance of corruption. Finally, the McConnell brief says that contribution limit cannot be justified by an "appearance of corruption" alone and that the granting of "access" to contributors does not constitute corruption or the appearance of corruption.

The brief on behalf of Senators Jack Reed, John McCain, Russ Feingold, Congressmen Christopher Shays, Marty Meehan, and other members of Congress, like the McConnell brief, urges the Supreme Court to "reexamine its campaign finance jurisprudence," which it says has "become a straitjacket" limiting reform efforts. However, the members of Congress urge the Court to be more deferential, rather than more strict, in reviewing campaign finance legislation. Specifically, they urge the court to use an intermediate standard of review when ruling on finance legislation and generally give substantial deference to legislative enactments in the area.

The brief of Secretaries of State of Arkansas, Connecticut, Iowa, Massachusetts, Mississippi, Missouri, Montana, New Hampshire, New Mexico, Rhode Island, Tennessee, West Virginia, and Wisconsin, and Election Officials from Hawaii and Kentucky, drafted by the National Voting Rights Institute, argues that the contribution limits are justified by "the pervasive appearance of corruption in electoral politics not only [arising] from the legion historical examples of influence peddling but also from the simple fact that the vast majority of Americans cannot afford to contribute substantial money to campaigns as their wealthy counterparts do." The brief says that the Court's analysis "must be

informed by this reality," despite the fact that *Buckley* squarely rejected the so-called "level playing field" rationale for limits.

American Civil Liberties Union (ACLU), which argued unsuccessfully that contribution limits were unconstitutional in the original *Buckley* decision, argues that, in light of twenty-five years of historical experience, contribution limits are "clearly unconstitutional" because in its view contribution limits have done nothing to "provide a meaningful check on the corrupting influence of money in the electoral system." The ACLU continues: "The First Amendment bargain that *Buckley* struck in upholding contribution limits simply has not paid off. It is time to consider a different approach."

Common Cause, Democracy 21, League of Women Voters, Public Campaign, et al. argue that Missouri has a low standard of proof to demonstrate corruption or the appearance of corruption—in fact, they argue corruption is "inherent" where campaign contributions are unlimited and that courts should not require evidence or proof of corruption. The brief also includes a lengthy section on incidents of corruption, including recent controversies arising out of the 1996 presidential election.

The brief of the National Right to Life PAC, National Rifle Association Political Victory Fund, and National Right to Work Committee PAC (State Employee Rights Campaign Committee) argues that contribution limits should be subject to a strict scrutiny standard of proof because of how contribution limits restrict the rights of contributors, not just candidates. The brief further argues that the Court defines "corruption" narrowly, to include only money exchanges for political favors—i.e., quid pro quos. It states that "empirical studies demonstrate that there is no causal connection between campaign contributions and legislative behavior."

The brief of William J. Olson, P.C., for Gun Owners of America, Inc., et al., challenges the entire scheme of campaign finance regulation as an impermissible restraint on free speech, designed to protect incum-

bents from challenges and to preserve the media's powerful voice as the only entities able to spend an unlimited amount of money on elections.

Public Citizen urges the Court to rule for the petitioner based on "the basic rule that laws passed by democratically elected legislatures are presumed constitutionally valid and that the burden is on those challenging a law to establish their invalidity." In addition, the brief says courts should not "second-guess elected representatives" on the proper level of contribution limits, unless a candidate offers evidence that the limits interfere with the candidate's ability to run for office.

U.S. Term Limits makes the most strongly libertarian argument against contribution limits, saying that "any campaign finance regulation has the undeniable effect of limiting the very speech that this Court has ruled is at the 'zenith' of First Amendment protection." The brief generally argues that contribution limits necessarily favor incumbents and that the wise course is to deregulate campaign finance.

The James Madison Center argues that Missouri has the burden of proof—and the high standard of strict scrutiny—to demonstrate corruption or the appearance of corruption. The center says contribution limits are invalid unless justified by substantial record evidence rather than "unreasonable and manipulated public perceptions of an appearance of corruption." In addition, the center says "contribution limits can be so low that they are themselves a cause of corruption."

The amicus brief by fourteen political scientists—Professors Paul Allen Beck, Thad Beyle, Janet M. Box-Steffensmeier, Leon D. Epstein, Donald P. Green, Ruth S. Jones, Ira Katznelson, Jonathan S. Krasno, David B. Magleby, Michael J. Malbin, Thomas E. Mann, Burke Marshall, Frank J. Sorauf, Raymond E. Wolfinger—offers empirical analyses of the effect of contribution limits, and concludes that the Missouri limits as well as federal contribution limits do not severely restrict candidates. Specifically, the brief argues many challengers raise money in amounts rivaling or exceeding the amounts raised by opposing incumbents and that the growth in campaign spending has outpaced inflation. It also notes that the average spending per candidate in Missouri's statewide

races in 1996 increased for all but one candidate, despite the new contribution limits.

The brief of Pacific Legal Foundation and Lincoln Club of Orange County, California, argues that legislatures do not enact contribution limits for the legitimate purpose of combating financial quid pro quos—which the brief argues are very rare in any case. Rather, it argues the anticorruption rationale is a subterfuge for constitutionally illegitimate policy objectives of "leveling the playing field" and enabling "legislatures to set the rules of the electoral game so as to keep themselves in power." The brief argues—as Justice Clarence Thomas has—that contribution limits are unnecessary in light of bribery and disclosure statutes, and press scrutiny.