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RULES OF THE GAME

Campaign Finance Rules May Take A Beating

A SERIES OF COURT CASES NIBBLING AT DECADES OF LEGISLATION COULD ADD UP TO A FULL-SCALE DISMANTLING

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by Eliza Newlin Carney

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Even as Congress and the Obama administration mull a new round of campaign finance regulations, a series of legal challenges threatens to dismantle the existing rules, election law experts warn.

Emboldened by the court's tilt to the right under Chief Justice **John Roberts**, conservatives who champion the First Amendment have mounted more than 20 challenges to election laws in both federal and state court recently, according to a **recent analysis** by the Campaign Legal Center.

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At least one of these, ***Citizens United v. Federal Election Commission***, is already before the Supreme Court and will be decided by the end of June. Other cases, most notably *Republican National Committee v. FEC* and *SpeechNow.org v. FEC*, are working their way through the lower courts and appear inevitably headed to the high court.

What worries lawyers defending the existing regulations is not that the Roberts court will overturn the campaign finance rules wholesale. Rather, they foresee the Supreme Court continuing its pattern over the past two years of chipping away at the building blocks of the current campaign finance regime. These include contribution limits, disclosure requirements and the ban on direct corporate and labor expenditures, which some warn are now under siege.

"Slowly but surely, the move is toward deregulation," said **Richard L. Hasen**, a professor at Loyola Law School in Los Angeles, at a May 8 **conference on money in politics** at the National Press Club. The event was sponsored by the Brennan Center for Justice at New York University School of Law.

Following a string of rulings favorable to campaign finance limits, including the landmark *McConnell v. FEC* ruling in 2003 that upheld the McCain-Feingold law, the Roberts court has moved in exactly the opposite direction, Hasen noted. In case after case, including the 2006 *Randall v. Sorrell* ruling that rejected Vermont's contribution limits as too low, the high court has favored deregulation. Hasen likened this to "death by a thousand cuts."

Justice **David Souter**'s pending departure from the court may or may not accelerate this trend. While Obama is likely to pick a progressive successor, Souter has nonetheless staunchly defended the existing regulations. There's no guarantee his replacement won't take a different tack.

On the court's front burner is *Citizens United*, a case brought by a conservative group of that name which challenges the McCain-Feingold law's disclosure requirement for organizations engaging in so-called electioneering communications. The group wanted to distribute and advertise a film highly critical of

Hillary Rodham Clinton's presidential bid without revealing its underwriters.

Citizens United and its allies have set out "to basically gut political disclosure," warned **Bruce Freed**, executive director of the Center for Political Accountability. In an amicus brief, the center and allied groups argue that dismantling the disclosure rules would eliminate accountability and remove "all restraints on corporate political influence."

Citizens United is challenging not only the McCain-Feingold disclosure rules, but a key Supreme Court ruling in 1990, *Austin v. Michigan State Chamber of Commerce*, that upheld federal restrictions on corporate campaign spending, legal experts note. "It would not be a shock to me if we saw the *Austin* case overturned in this term by the *Citizens United* case," Hasen said.

Also wending its way to the high court is *RNC v. FEC*, which challenges the constitutionality of two key provisions the McCain-Feingold law: the soft money ban, and the limits on how much political parties may spend in coordination with candidates. The RNC argues that it should be free to spend unregulated money on activities, such as issue advocacy, that are not directly related to federal elections.

Like most of the cases in question, the *RNC* case is an applied challenge, meaning that it seeks to overturn the rules in proscribed circumstances, not flat out. But the implications of a pro-RNC ruling would still be sweeping, said lawyers at the Brennan Center conference.

"The [Republican] Party is seeking to roll the clock back prior to McCain-Feingold and open these soft-money accounts," said **Donald J. Simon**, a partner at Sonosky, Chambers, Sachse, Endreson & Perry.

Even more significant could be the *SpeechNow* challenge. In that case, a First Amendment advocacy group dubbed SpeechNow.org argues that it should be allowed to expressly advocate the election or defeat of federal candidates using unregulated money. That means the group would not be subject to contribution limits.

"This is a case that is potentially a fundamental challenge to *Buckley v. Valeo* itself," said former FEC chairman **Trevor Potter**, at the Brennan Center conference, referring to the landmark 1976 ruling that upheld contribution limits. Potter is president of the Campaign Legal Center and heads the political activity law practice at Caplin & Drysdale.

"That case could be a blockbuster," concurred First Amendment advocate **Bradley A. Smith**, another former FEC chairman who is now a professor at Capital University Law School in Columbus, Ohio. Smith is backing the *SpeechNow* challenge as chairman of the Center for Competitive Politics. The key question with *SpeechNow* and other pending cases, noted Smith, is how broadly or narrowly the high court rules.

"Is the Roberts court going to be aggressive here?" he asked. "Or are they going to keep moving at a slow and incremental pace?"

CORRECTION: SpeechNow.org is not challenging the ban on direct corporate and union contributions.