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SUPREME COURT RULES ON CAMPAIGN FINANCE CASE: The Legal and Political Impact of McConnell v. FEC

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P R O C E E D I N G S

MR. MANN: Good afternoon, welcome to Brookings. I'm Tom Mann, a senior fellow here, and I'm delighted to have the opportunity to moderate our distinguished panel here.

It's often said we are a 50/50 nation, evenly divided between Democrats and Republicans, ideologically polarized. Three years ago, the Supreme Court handed down a stunning 5:4 decision that, ultimately, was followed by George Bush being elected President of the United States.

Yesterday, another 5:4 decision that surprised many, although, certainly, not all members of this panel, in the reach and clarity of its findings on the Bipartisan Campaign Reform Act of 2002, otherwise known as McCain/Feingold.

Now, the broad shape of the decision is well known. The Court has upheld the twin pillars of the new law: the abolition of party soft money and the regulation of electioneering communications or what the reformers like to call "sham-issue ads."

Now the press was filled with its initial coverage of the decision. Our purpose today is to better understand what the Court decided and on what grounds and to ruminate about its significance for campaign finance law more broadly.

Now, we'd also like to say a bit about the potential impact of the law now affirmed by the Court on campaign finance practice, but much of that is conjectural at this point. Although, reading the newspapers this morning, it looked like statements of fact about who would win and who would lose. We will engage some of those this afternoon.

I'm thrilled to have the panel that we have today. Let me introduce. First of all, closest to me, Seth Waxman, who is a partner at Wilmer, Cutler & Pickering and was the Counsel of Record for the Intervenor-Defenders in the McConnell versus FEC case, that is Senators McCain, Feingold, Snowe, and Jeffords and Congressmen Chris Shays and Marty Meehan. Seth is a distinguished attorney and served as Solicitor General of the United States.

To his right is Ken Starr, and I'm delighted to welcome Ken to Brookings. He is a partner in Kirkland & Ellis and the Counsel of Record for the Plaintiffs in McConnell versus FEC. He is, too, a former Solicitor General and former federal judge and a distinguished attorney.

And the final participant, to Ken's right, is Trevor Potter, a partner at Caplin & Drysdale; General Counsel of the Campaign Legal Center; a former Chairman

of the Federal Election Commission; and, most importantly, a nonresident Senior Fellow of the Brookings Institution.

The panel is here to analyze, not advocate, at this point. And it's a good thing for Ken, because we've got him outnumbered three to one, just truth in labeling. I'd mentioned Seth's prominent role in this case. And some of you heard him, as well as Ken, argue the case before the Supreme Court. Trevor is part of--was part of--the legal defense team. And I, actually, filed an expert witness report on behalf of the Defendant-Intervenors.

I'm also the only non-lawyer on this panel, and, therefore, I won't resist the opportunity to say a bit about the potential impact of this decision and the law on campaign finance practices. But before momentarily turning the floor over to my colleagues, I simply wanted to put on the table a few of my non-lawyer observations in reading this decision that might provoke some response from Seth and Ken and Trevor.

First of all, I was struck by the pragmatic view of money and corruption. If you will, a sort of common-sensical as opposed to a sort of refined, abstract, theoretical argument about money and corruption in the majority report. I think they made it clear the law was not about limiting the amount of money in politics, but effecting the way in which money flows between and among various actors.

They also made it clear this was not about quid pro quo corruption, about cash for votes, but it was about more subtle forms of the independence of the judgment of recipients of large contributions and the preferential access that might be gained and the corrupting potential that flows from that. A matter, certainly, open to debate, but they embraced that argument in a very definitive way.

Secondly, I was struck by the substantial deference to Congress by the Court. We live in a time in which people now talk about judicial activism from the right. Certainly, we've talked about judicial activism from the left. We've had this Court overrule a number of actions of Congress. In this case, the majority quite self-consciously deferred to the special expertise of the Congress.

Thirdly, which is a surprise to me, I was struck by the heavy reliance on the Thompson Committee Report, the report that came from the Senate Committee investigation of campaign finance practices in the 1996 election. The majority made very extensive use of both the findings in that report, as well as the recommendations for change.

Fourth, I was struck by the broad agreement, not just in the majority, but among most of the justices that the express advocacy standard in Buckley, first, was statutory interpretation, not constitutional doctrine, but, as important, is effectively useless in today's campaigns. That is, there seemed to be a consensus in this Court about that. As was there a broad acceptance that so-called "sham-issue ads" are election ads. Justice Kennedy made that clear in his comments at the oral argument, and there seemed to be no dispute about it.

Now, another thing that struck me was the relatively cursory affirmation of the new bright-line test in Title II in the electioneering communications. For those of you who followed this case, there was an extraordinary battle of competing evidence and disputes over denominators measuring the degree of potential over breadth of this test. The Court said, very briefly, the preponderance of these ads are the--near the campaign mentioning a federal candidate, are clearly campaign ads. That's all we need to say. Quite striking to me.

And, finally, what I took away from this decision was a clear desire on the part of five members of the Court. And as my colleagues were saying, that's the only number that counts in the Supreme Court, five. A clear desire to uphold past decisions from, if you will, from Burroughs to Buckley, from Austin to Shrink, Missouri PAC and Colorado, II. And the statutes that Congress has been enacting since 1907. And explicitly not to encourage movement toward a more deregulated system.

I think there's a real debate on the Court about that, but I think we now have a 5:4 majority favoring a continuation of a practice of congressional efforts to constrain the role of large contributions and money from corporations and unions in federal elections.

Enough of the observations of the amateur. Now, on to the pros. We're going to speak from our seats, and we'll begin with Seth Waxman.

MR. WAXMAN: Well, Tom, thank you very much. And thanks, Brookings, too, for arranging what, for me, is the first, I guess of what probably will be many debriefing or decompression exercises following the very, very intensive, what was it two years or two decades--I can't really tell--of litigation over this--the Bipartisan Campaign Reform Act.

I guess, I'd like to say, at the outset, what a great professional privilege it was for me to be able to participate in what I think most people would agree is one of the most momentous free-speech decisions in decades. Certainly, one of the most momentous decisions the Court has issued in this millennium, this young millennium.

The litigation, I just want to say, on both sides, was very, very intense, over a very telescoped period of time. But I, myself, have not been involved in litigation in my almost 30-year career in which the level of professionalism and high-mindedness and adherence to really what is the very, very best about our adversarial system, as was evidenced in this case. There were great, dedicated lawyers--many, many, many of them on both sides of the litigation.

And, although inevitably in litigation there are squabbles that seem incredibly petty in retrospect, in this litigation there were far fewer, both in absolute number and in percentage. And for the most part, the litigation that was conducted in

this case, which began, seemingly, the minute after the law was enacted or was it the minute before the law was enacted--

MR. STARR: It was about 20 minutes after.

MR. WAXMAN: --until yesterday morning, was conducted in a way that I think everybody would agree reflects the very finest traditions, Anglo-American traditions, of bar in an adversarial system. And it was edifying for the people on our side of the case to have had as adversaries people like Ken and Chuck Cooper and Floyd Abrams and Bobby Birchfield on the other side.

It was gratifying, also, for me, having now been retired out of government, to have had the privilege of participating in a case in defense of an active Congress, alongside all of my former colleagues in the Justice Department and the FEC.

I am not a First Amendment expert. I'm not a campaign finance expert. I'm not really even somebody who's very active in terms of partisan politics. I had my first involvement with campaign finance litigation when I became Solicitor General and people kept raising First Amendment challenges to all kinds of things that the government did. And it was my job to defend it. And I found that in representing the United States in Shrink, Missouri and Colorado Republican II, too, which were the two campaign finance cases that came up during my tenure, that this was a really fascinating area of law. And one in which it actually was possible for me to win cases on behalf of the United States in the area of the First Amendment.

And, so, when this opportunity came along again after I'd been retired out, I really jumped at the chance to be part of the team defending this law.

I also, I must say, and I think this reflects quite a bit on the nature of the debate, was really motivated by the fact that, to my mind what was at stake in this litigation, regardless of what the outcome was, was something that really transcends any particular partisan political party or any particular provision of the Constitution. I think there was a lot of attention paid to the First Amendment. And there, probably, is as Floyd Abrams frequently said, a reason why the First Amendment is the First Amendment and not the Seventh Amendment or the Thirtieth Amendment.

But the way I saw the case, and I think the way the justices, the majority of the justices, saw the case--the First Amendment is an amendment to something. The Constitution, itself, is founded on--it's sort of common to say these days--an underlying postulate. There's an underlying premise of representative--any representative democracy that, in order for it to work and work effectively and work with integrity, the people who are elected by the citizens that have the franchise have got to conduct themselves and be seen as conducting themselves in the best interests of the people in whom sovereignty in this country resides. And that is the voters.

And that--maintaining that trust, both the actuality of integrity and the appearance of integrity in the system--is the very first predicate of any representative democracy. If we reach a stage in which the people no longer believe that their representatives, when they have to make the multitude of decisions, large and small, in the process of governance, no longer have in mind the interests of their constituents but, also, the interests of large, monied contributors, the fundamental predicate of our system of governance and our system of government breaks down.

And that feature is what has motivated campaign finance legislation ever since the time--ever since the turn of the last century. The Supreme Court began its opinion with a late 19th century quote from Elihu Root; it's also the way we began our brief in the Supreme Court, which reflected on the corrosive impact of the influence of large accumulations of wealth on the integrity of the system of representative democracy.

And that theme, that concern about corrosion of the integrity of the system has pervaded campaign finance reform efforts at least since Elihu Root spoke those words in 1896. And it is certainly what motivated the sponsors of the Bipartisan Campaign Finance Reform Act as it motivated the sponsors of the Federal Election Campaign Act of 1972 and the amendments of 1974 that the Supreme Court adjudicated in Buckley versus Valeo.

And we saw circumstances, events that post-dated Buckley, had precipitated two glaring loopholes in the system of campaign finance reform that survived Buckley versus Valeo. And the first one was the so-called soft money problem, that is the entrance into the federal election campaigns of hundreds and hundreds and hundreds of millions of dollars of federally unregulated money. That is, money that Congress had said may not be used for the purpose of effecting influencing federal candidate elections. And, yet, were.

And the other problem being the so-called issue-ad problem. That is, advertisements run, directed at a particular electorate in the immediate run-up to a federal candidate election, financed by sources that federal law absolutely prohibits from participating in federal elections without any disclosure as to the source of the funds. And the effort at reform was simply to close the soft-money loophole. That is, as the majority opinion in yesterday's decision explained, to basically restore the FECA contribution limits to what Congress had, in fact, enacted in 1974, before soft-money was allowed by the FEC to filter back into the system.

And to establish that money that is spent in public advertising with the purpose and effect of influencing how voters view candidates, comes from sources and with the appropriate disclosure that federal law requires for all other expenditures that influence federal campaigns.

Now, there was a lively and legitimate debate about whether Congress drew the lines in the right place. And I'm, you know, needless to say, happy that the

Court agreed with our defense of the law. But, really what was at stake here as I see it, and as I believe the majority saw it, was a reaffirmation of the right of the political branches--not just the right--the duty of the political branches to repair cracks in the system of integrity of electoral democracy. And to not construe the First Amendment, essentially, as a straightjacket that would prevent Congress from addressing the root problem of what was causing citizens in this country to lose interest in participating in campaigns, participating in contributing in campaigns, and a rising degree of public cynicism about the extent to which their views and their voices mattered.

And I think what the Supreme Court did yesterday was to respond to that widespread truth. And what's notable to me about the opinions of the Court is, first, the extent to which the Supreme Court really did appreciate that, although BCRA was a very complicated, highly reticulated law with more provisions than even I could remember standing up and arguing the case in the Supreme Court--I know Ken feels the same way--it was, nonetheless, an organic whole.

It, nonetheless, reflected an effort to close loopholes that had manifested themselves and anticipate at least the first generation of the next loopholes that would be created. And the Supreme Court basically did view the law as an organic whole. It also viewed the law as an organic effort at remediation, remediation of problems that had crept up into the system. And the extent to which the opinion hews carefully to the Court's prior decision in Buckley and Shrink, Missouri and, you know, even going back to Pipe fitters and Burroughs and Colorado Republican I and II, I think is a testament to the interest of the majority in stability in this area of the law.

It is notable the extent to which the dissenters in yesterday's opinion, one and all, called for the overruling of prior precedents of the Supreme Court. And the reliance of yesterday's opinion on stare decisis I think not only reflects a strong interest in this Court in stability of the law, but, also, an acknowledgment of the extent to which Congress in enacting BCRA was very mindful of what the Supreme Court had already said, very mindful of the fact that the Supreme Court had, in a line of cases, said the First Amendment allows this, and it doesn't allow this, and it will allow you to go this far, but not that far.

And a number of the sponsors who I represented in the Supreme Court said to me when I first got involved in this, look, we read Buckley versus Valeo, and we read Shrink, Missouri, and we read Colorado Republican, and we tried to craft a law that would be effective but faithful to what the Supreme Court said. And if you want to know why it's so complicated and has so many different provisions, it's because it is difficult to reconcile the need to repair cracks in the system with what the Supreme Court had already done.

Anyway, lots of other thoughts are crowding to my mind, but I was exhorted not to speak for more than 10 minutes and I probably have already exceeded my limit. So, I'll defer to my friend and colleague, Ken Starr.

MR. MANN: Seth, thank you very much. Please, Ken.

MR. STARR: Well, my gratitude, Tom, to you and to Brookings for sponsoring this post mortem, which I think is very accurately described--

MR. MANN: It's the first day of the rest of your life.

MR. STARR: From my perspective, my heartfelt congratulations to Seth and his superb team at Wilmer Cutler. And to the United States, very ably represented in the briefing and then at the podium by the Solicitor General, Ted Olson, and the principal Deputy Solicitor General, Paul Clement.

And so it can briefly be stated: they won, and we lost. We have a saying in litigation that there are victories and there are developments. From my perspective, yesterday was a fairly significant development.

I'd like to reflect on the Court a bit and really pick up on some of Seth's latter observations, which were quite intriguing.

First, the Court was, of course, deeply divided, which I think reflects the bedrock fact that reasonable minds can differ. And that where you ended up in the case may, in no small measure, depend on how you started out on the inquiry.

I have to completely agree with Tom's opening comment about the pragmatic nature of the opinion, which I think was your initial observation about the opinion--the majority opinion. It is deeply pragmatic, and it gets--again a tribute to the exquisite lawyering done by the defense team--to paint this portrait, which was an extremely unflattering portrait of a BCRA-less world of American politics. A vision that was rather Hobbesian in nature but, perhaps, could best be described as a "Jurassic Park" in pinstripes. A sort of seedy and dark world that would cause me to, perhaps, move to Vermont or, perhaps, even New Zealand, if things were so terribly bad.

But that is the portrait so effectively painted by the sponsors, painted by the government, and especially by the intervenors very effectively. And in the opinion, which is 119 pages long. And I think the length of the opinion, of the majority opinion, is beguilingly misleading.

That would suggest struggle, that these were difficult issues. They didn't seem difficult at all. Arguments that some thought, I among them, were serious arguments-- four justices thought they were serious arguments--were given rather, if I may say so, short shrift.

The equality principle, which we thought was a principle that motivated the Court--animated the Court in so much of its jurisprudence--merited all of three paragraphs in being dispatched at about page 115. You get the idea this was a pragmatic decision, as opposed to a deeply doctrinal opinion.

Whereas, when one then moves to the dissenting opinions, one sees, sort of, cries from lawyers. What happened to doctrine? What happened to First Amendment doctrine? What about these fundamental principles that we've expressed in various arenas of First Amendment jurisprudence. And, yes, even including Buckley. The lawyers will disagree with respect to that, in terms of whether the Court was treating with great respect its prior body of precedent.

Our submission, in fact, which was not received happily by five members of the Court, was that political parties are terribly important stabilizing influences in the American polity and that the message to be drawn at a high level of generality, admittedly, from a case or two cases that Seth referred to, like Colorado I and Colorado II, is essentially the equality principle. Don't let the political parties lay claim to special privileges, but on the other hand, don't single them out for disparately unfavorable treatment.

I was struck by how easily, almost as with a fly swatter, that line of argumentation was dismissed.

The extent to which the law regulates activity at the state level, if it occurs in a federal election cycle: a lot of ink was spilled with respect to that, and no small part of the argument, with the parties challenging this particular dimension of the statute, including the California Democratic Party and the California Republican Party, and a fairly considerable record to the effect that there would, in fact, be under law a diminution in activity. Most demonstrably by the California Democratic Party, which was quite dependent on large contributions that were compliant--individual contributions--that were compliant with California law. I think that merited four paragraphs of the opinion.

There's a certain, in short, Olympian quality to it that this is our decision, here you have it. And what is it that was guiding or driving the decision?

My own view is that it was this very effective portrait painted about American politics and, thus, essentially a pragmatic opinion, as opposed to a doctrinal opinion.

Ordinarily, one would also expect in a case that I think was viewed rightly as it was developing as an epic case, certainly a highly important case, possibly doctrinally but, certainly, in terms of American politics and the role of law and regulation in American politics. I think one would have expected a bit more of a dialogue as between the majority and the dissenters, especially since there were four justices, count them, including the Chief Justice of the United States in dissent, more of a dialogue or a conversation.

I was very struck by the fact that there was relatively little dialogue or conversation. It's not unique, but I was struck by that.

It is said that this is a Court that is quite cautious, careful, incremental, but, at the same time, we know from time to time the Court can be quite bold. And we saw that in Lawrence against Texas last term. We have seen it in various decisions from time to time in the Rehnquist Court.

This was a bold decision, very bold. And I think that the line that one can effectively draw is really an answer to a question that Trevor has very--in our various discussions and debates along the way--put very concretely. Are you saying that Congress has, essentially, no power because of the First Amendment and, perhaps, federalism constraints, as well? Put First Amendment restraints and freedom of speech and freedom of association to regulate in this area.

Our answer to that was no, but it has to regulate cautiously with care, with nuance, and so forth; and this law does not do that. The answer to Trevor's question: a robust, yes. This deference to Congress that Tom very accurately pointed out is a remarkable message in the arena of First Amendment law.

Heretofore, including in Buckley versus Valeo, one goes back to Buckley and senses a struggle, a real struggle; these are tough questions; these are difficult questions; we're agonizing over these questions, and we're drawing lines. One doesn't get that in the majority opinion at all.

So, my final point in reflecting, really, on the Court, as opposed to our politics--but I hope that in the discussion, we will be moving on to talk about the future and what this portends or what it may portend for our politics--is that so much attention has been given--and understandably and rightly so--to the pivotal vote of Justice Sandra Day O'Connor. And I think many of the lawyers believed that this would likely be 4:4 with Justice O'Connor then deciding the case.

That is right, and her very pivotal role is illustrated by the fact that--quite unusually for a Supreme Court opinion--she is shown as a co-author of the opinion. This is the kind of opinion that one would expect the senior justice in the majority to author, be it the Chief Justice or Justice Stevens as the senior justice. But it was co-authored, the pivotal part, those 119 pages I'm talking about.

My final point is: I think that we also have a need to reflect on this as essentially the triumph of the vision of John Paul Stevens. Justice Stevens has been adamant throughout the 1990s, in particular, that money is to be treated quite differently than, quote, "speech." And he built a very bi-polar, intellectual construct that did not seem to be gaining that many adherents. And some of us steeped in the traditions of the Court didn't take it with as much seriousness as, perhaps, we should because of our being steeped in traditions like New York Times versus Sullivan, admittedly a different area, but, nonetheless, a paid advertisement about a political message that engaged in very negative advertising, accusing Commissioner Sullivan of crimes or at least, at a minimum, of abuse of power.

And the fact that it was born in an advertising agency in New York, placed with no editorial review whatsoever in the New York Times, gave the Supreme Court of the United States no pause, whatsoever, a generation ago, at a time when the Court had a rather narrow interpretation of the First Amendment so as not to include commercial speech. The Court just gave that the back of a hand, saying, of course, money is instrumental, it enables speech and facilitates speech.Yesterday, John Paul Stevens's vision was vindicated with five members of the Court saying we agree with what Justice Stevens has been saying all along.

Footnote: There was quite an interesting doctrinal shift with essentially the Chief Justice of the United States confessing error on his part in terms of a very important principle that obtained with respect to Title II of the Act of the electioneering communication. And then, Justice O'Connor seeming to shift over, moving away from a position which she had previously advanced, shall I say from a more libertarian or pro-speech position and into the pro-regulatory or pro, if you will, reform realm.

And that was a very dramatic shift. It was extremely dramatic at the oral argument with Chief Justice Rehnquist saying, I voted that way in a particular case called Austin, but, in effect, I'm paraphrasing here, there's been a lot of water over the jurisprudential dam since then. And, sure enough, he voted that way and wrote that way yesterday. But Justice O'Connor, in turn, made the shift back across the line.

Five:four, but as Justice Brennan said, famously, to his law clerks, the most important rule in constitutional law is the rule of five, as we were talking amiably outside the hall--outside this hall--it is five votes that carries the day, and all those dissenting opinions will be just that, grist for the mill for discussions such as that. But the fact is, I come before you with four votes, and that means I extend renewed congratulations. To the visitors, I am here on my Spartan shield.

MR. MANN: Thank you, Ken.

MR. WAXMAN: And how well it becomes you.

MR. MANN: Trevor.

MR. POTTER: It's a pleasure to participate in these discussions with such august company. I have to note that I come here still walking but hobbling, because the last time Ken and I were on a panel discussion, it was before the Federalist Society, and I was the one who was dodging arrows and attempting to get out of there behind my shield.

As a major campaign finance law specialist, someone with perhaps a worm's eye view of all this, over the last ten years, it too has been an enormous professional experience. One, I greatly appreciated participating in this entire case,

starting with the evolution of the new legislative proposals as they went through Congress and then were passed. And then the defense.

Because, as you've heard from Seth and Ken, they come at it from the perspective of Supreme Court specialists and people who have wide experience in constitutional law. And I and many of my colleagues in the campaign finance field came at it from the perspective of understanding what the problems were and trying to come up with solutions that would be constitutional, solutions that had empirical evidence to support them.

I think it's important to at least note, for a moment, what brought us here, because there's a piece of it in the Rehnquist opinion that I'll cite, that I think illustrates that. In the majority opinion, it says, flatly, that what Congress was trying to do here in terms of these soft-money donations to national party committees, was to re-institute the law passed by Congress. And that had been subverted--their word--by the Federal Election Commission and its allocation process and its allowance of soft-money in the system.

That is a point that Tom and others have made through this process. Obviously, we were gratified to see that was the view that five justices took. But I think more than five justices took it.

The quote from Justice Rehnquist's dissent is that many of the abuses described by the Court involved donations that were made for, quote, "the purpose of influencing a federal election," close quote, and, thus, are already regulated (see Buckley). Congress could have sought to have the existing restrictions enforced.

And what's interesting to me, from the perspective of somebody in the trenches, is that when I was at the FEC and sort of naively reading the statute to my colleagues and saying, why isn't this for the purpose of influencing a federal election, they said, no, no, no, no, that's what Congress wrote, but that's no longer the test. And over the last 20 years, the Commission and the courts--there was a famous Fourth Circuit case where the FEC, prodded by me, I will admit, took the position that the Act and Congress had regulated speech that was intended to and did demonstrably influence elections. And the Fourth Circuit said, absolutely not, not only based on Buckley but on the Constitution, that is a ridiculous argument, and we hereby award the defendants plaintiff's fees against the Federal Election Commission.

How could any government agency take that position?

Well, here we are, almost ten years later, and you have a Supreme Court taking that position. So I think what we had here was the Federal Election Commission creating soft money for political reasons through a regulatory administrative process of advisory opinions and Congress, not in a position to oversee it and overturn it and with great self-interest in not doing so. Because, after all, the political party committees, to

some level, began to benefit from what the FEC had created. And we wouldn't be here, had the FEC done its job in a nonpartisan way from the start.

Instead, you had the '88 campaign where soft money came along. The '96 campaign—I was in a conversation yesterday with a Democratic Party lawyer who said, you know, it never occurred to any election lawyer in Washington that the Clinton campaign could raise that money, run those ads, feature Clinton, and it would be permissible. And, yet, that's what happened.

The Republicans followed suit, but my own sense is they knew at least they got cover from the Democrats. And the Commission looked at the situation and said it's above our pay grade. We're not going after it. If anything needs to be done, the Commission said, it needs to be done by Congress. Fair enough--Congress stepped in and did it. And, in Rehnquist's view, over-did it.

But I think it is important to recognize that this process developed, because the regulatory system didn't work as it should. And I mention that because there's, obviously, the possibility of going through a cycle like that again. And I think it would be helpful--I may be a Pollyanna here--but it would be helpful if the parties realized it's not in their own interest to push aside all self-restraint and to end up with a result that they really couldn't defend with a straight face.

The original theory of soft money was it didn't affect federal elections. And how we ended up in a system where you had ads run by the national party committees with the presidential candidates in them, focused at the target states, is something of a mystery. Or, perhaps, an indictment of how this law has been regulated. I think that Rehnquist quote is an important one to remember.

In terms of what the new law did, I'd just say that it was the concept of those who were involved early on in trying to figure out in '96, '97, '98, what Congress could constitutionally do here. That was--I think Seth has very well said--the goal was to build on existing Supreme Court precedent. And, in particular, the notion that the Court had already allowed Congress to limit contributions to party committees, and, thus, this soft-money system was, essentially an aberration; the notion that it was a donation, not a contribution, nowhere embodied in law or Supreme Court precedent and that that made a difference was the first target.

The second target was to build on the Court's allowance of Congress to regulate corporate and union spending. And there we have, as you've already heard, the question of whether Austin as a precedent survived. Most of the justices who had voted in Austin were no longer on the Court; it was a Justice Marshall decision. And our view was, if the Court was willing to abide by its precedent and say that corporations could not spend money in federal elections, then, going after corporate and labor funding for the issue ads was a solid constitutional case. The question is--we all were sharply focused on the oral argument when Justice Rehnquist, the Chief Justice, began to express questions--is would they abide by that precedent?

And I would note, in a tip of the hat, that Professor Dan Ortiz at Virginia, who has been very involved in this process in a number of discussions with Brookings, was the first academic I know to really push that and define what Congress ought to do is to follow the line of precedents that allowed the regulation of corporate and labor money.

In terms of a quick sort of run-through of what I think the interesting developments are in this opinion: The first is that, as Ken Starr noted, Justice O'Connor went with precedent. In order to do that, she had to overlook or express fault with her own previous precedent because she had been on the losing side in Austin. And she changed. My own sense of it, and on that I defer to wiser heads, is that, as is often the case, she values deference, stere decisis, she values stability, and casting her lot with a complete change in 100 years of thinking, in terms of the regulation of corporate spending, is not a place she wanted to go.

I note, though, that there isn't, in my view--and I think this is something that we need to think about--a clear doctrinal statement of exactly why corporate, and separately, labor money is a problem in federal elections. That's a nod to the corrosive and distorting effects of aggregations of wealth coming from Austin, going back to Burroughs and other cases. But there wasn't a fresh restatement from the majority of exactly what the problem is with corporate and labor money. I think there could be, but that's something that, if you look into the decision, you see, we're going with precedent as opposed to a restatement of why it's still vibrant today.

I note labor because--and this is a little-noticed aspect of the opinion--this is the first time that the Court has flatly said that labor unions may be regulated as corporations are regulated, in terms of their spending in federal elections. So there's been a little lacuna here where the lawyers-in-the-know knew that when we talked about Congress regulating corporations and labor unions, there was Austin out there for corporations. There was not a corresponding decision for labor unions.

One of the questions I'd have for the very able Larry Gold who represented the AFL-CIO, is why did you not push that harder and make the majority come up with an explanation why a usually voluntary association of individuals is treated the same way as a corporation, since the underlying theory is presumably different. He may not have done that on the basis that he just couldn't come up with a possibility that the Court was going to outlaw corporate money but permit labor money. But that's a--it's out there. In the majority opinion they just flatly say these may be applied to labor unions, as well.

There's also an interesting vote there. First, it's the whole issue of corruption. What constitutes corruption? What's the difference between--and as Rehnquist and others note in their dissents--having a friendly acquaintance with wealthy donors who are supporting you on the one hand and, on the other, corruption--actually being influenced--and the appearance of corruption, which the majority separates and says, there are two real

problems here: one is that large contributions are, in fact, empirically likely to influence office holders and legislators and the other is that the whole country thinks they are. So that even if the influence doesn't occur, it tends to drive people out of the system. It tends to cause other, smaller players to feel that they are less significant--in the language of the Court.

Where is that line? When does a contribution, legal under the FEC regulations--allocation regulations of soft-money--become something that is more akin to a bribe, even without the quid pro quo? The majority says we're not just talking about access being a result of contributions. We're talking about the sale of access, the avowed sale. And then they cite to party fund-raising sheets. For $10,000, you get X-meetings with members of Congress; for $20,000, you get a meeting with an Executive Branch official.

The question I'd have is, if that's the standard--I personally think that's the right issue to look at--where are we under the hard-money system? Because if the problem is the avowed sale of access, if that's what the Court is offended by--correctly so, I think--then, shouldn't there be some attention in the congressional ethics process or our laws to make certain that we're not selling access just because it's a hard-money contribution from an individual, as opposed to a soft-money contribution from a corporation?

You may not have noticed, but the Department of Justice has actually stated that it is not a federal crime to sell access, something that I'm not sure Congress has fully focused on.

The entire issue of express advocacy, over which entire forests have been felled over the last ten years, simply disappeared. Apparently, both sides in the Court, maybe nine justices, think that express advocacy is not only not a constitutional test, which they came down firmly and said, which is how we got here in the first place. The argument that this is not required by the Constitution, but a way for the Buckley decision to deal with a cleaning up a congressional enactment, but that it doesn't work.

And I think that's, you know, it's not only important for this decision, it's going to be important for all the states. All those states where federal district and circuit courts have thrown out state laws regulating money in politics on the basis that they attempted to regulate communications that went beyond express advocacy.

Now, the question I think I have is, so what's left? Express advocacy disappeared into a black hole. What is the new test? I--as near as I can tell in only a couple of readings and, clearly, there will be many, many hours spent looking at it--is it has to be a clear statute so it's not vague; it has to provide notice, clear notice so that you know that you are affected by it, which may be the same thing; and it has to reach speech that is designed to influence federal elections and does so. In fact, the Court left an opening and said, if it's possible that you can come up with speech that you utter in this period, within these restricted windows from corporations and unions and you can

show that it's designed to have no effect on a federal election, then you might have an as-applied challenge. They're basically saying, we don't believe it exists. But they're dealing, also, with the ACLU that says, ah, we can do it at least once in a test ad to make our case to the Court.

So what is the standard if it's not express advocacy is going to be an important question, particularly for states as they go forward.

Two more points quickly: One, disclosure--the Court upholds the disclosure provisions; they uphold disclosure provisions, sometimes on a 5:4 vote, that the lower court had overturned, including notification of intentions to purchase broadcast time, et cetera. On a much broader vote, they uphold other disclosure provisions, 8:1 on a communication having to say that it was authored by, authorized by, a particular candidate or committee. Disclosure is the big winner here. It may be because it looked like the lesser of two evils to the dissenting justices, but broad support for disclosure of speech way beyond what had been disclosed before. And, again, I think that's important for a lot of states. And, to me, indicates that there is significant room here for Congress or states to require disclosure as they look ahead.

Finally, to me, the missing piece in the dissents was the question--as we've been talking this through for the last year or two--: What's the alternative? And there are four votes that say we don't like this regulatory approach. I think four votes that say we think corporate and labor spending ought to be permissible in federal elections. Not contributions, because you've got Beaumont in June of this year, was 7:2, no, you can ban corporate contributions. But at least spending on communicating with the public, in general, on political issues, and on candidates by corporations and unions.

What would that look like? That one--I think that's an open question to me, because with a 5:4 decision, you've got to wonder what the four would look like if they had another colleague on there some day.

MR. MANN: Trevor, thank you very much; I'm going to ask Ken and Seth if they would like to respond to any of the comments that have been made thus far?

MR. STARR: Yes, very briefly and especially inspired by Trevor's comments. It is intriguing that the majority opinion did sweep quite broadly and, essentially, putting aside suggestions for what I would call more modest suggestions, including some specific legislative proposals that have been before Congress or, then, positions advanced in litigation to say, all right, let us assume that the problem is--and lawyers were quarreling over this, but let us assume for purposes of argument, that large contributions tied to activity by federal office holders or candidates is the problem--are the problem. Then, calibrate this statute so as to get at that problem. Therefore--and our colleague, Mr. Birchfield, specifically argued in the lower court and one of the judges in the lower court embraced this--all right, then let us prevent federal office holders from engaging in this kind of money-raising activity.

Chuck Hegel of Nebraska offered another proposal, which was if the problem is large money contributions--now let's leave aside who is seeking the contribution--then a way of going about it is, as in hard money, as Trevor was emphasizing, well, okay, we're going to put a cap on that. And you can argue about what the cap should be, but you don't abolish, you simply put a cap on it and thereby diminish it. But you, thereby, don't deprive the parties as much of activity as resources that they need.

And, then, one proposal that was vigorously debated is: all right, if the problem with these, quote, "ads," that you disapprove of and, where some of us have difficulty with the government disapproving of ads, but let's--all right--let's assume that that's the problem. All right, then, again, don't starve the parties of funds that are used for traditional activities, which is voter identification, mobilization--very expensive activity. Then prevent the funds from being used for those kinds of, quote, "issue ads." In other words, calibrate.

And what, again, was very interesting about the opinion, the majority opinion, is the concept of narrow tailoring was essentially jettisoned in this area. And a level of judicial review or scrutiny that was extremely--to go back to your point--deferential to Congress, as opposed to engaging in what had historically been viewed as exacting scrutiny--the nomenclature varies, but we're going to take a pretty careful look at this, including, looking very closely at the fit between the goal to be achieved and the means to be employed. That is now a relic of election law from yesteryear.

MR. MANN: Thank you, Seth.

MR. WAXMAN: Well, there's much that I've heard since I stopped talking to disagree with. Which is, I guess, you know, what makes our adversarial system so terrific. First of all, I think it's very important to bear in mind, going forward, as it was important for the Court to bear in mind in deciding this case that the law--it's so easy to say, well, the law bans ads. Or, issue ads, or sham issue ads. The significant fact is the law doesn't ban any ad, by anybody, at any time. It requires that certain ads may, for what the evidence shows was overwhelmingly the purpose and intent and effect of influencing candidate elections, be paid for with hard money. That is the money that Congress had determined and the Supreme Court had long upheld could be regulated for these purposes, with the sources disclosed.

Now the argument that corporations and labor unions are not allowed to participate, what, on earth, is the justification is that is also a false question.

Corporations and labor unions are allowed to participate, have been allowed since the '40s to participate in federal candidate elections in the same way that everyone else does. That is, the people who vote, individuals, have the ability to contribute and spend money to advance the interests and welfare of their candidates. And, you know, we use the term political action committee, or PACs, which is such a sort of harsh, inelegant word, but what they are is a legal device, an association that labor unions and corporations can create that allow their members to do collectively

what we can all do as individuals, which is put your--contribute your own money toward a collective fund that will influence candidate elections.

And I think it's very important to bear in mind that we're not talking about legislation over a ban. I also think, I was sort of struck by Ken's observation that what seems to be lacking in the majority 119-page decision is any form of dialogue with the dissent about important doctrinal issues. It's an interesting insight.

And I guess, my reaction to it is: it was the dissent that was calling for something very doctrinally radical. Buckley versus Valeo be overruled; Shrink, Missouri, be overruled; Austin be overruled. The dissents uniformly depend upon an overruling of precedent. The majority opinion simply says, we have this rich body of precedent, and we are going to apply it consistently to what was--and this goes to the deference to Congress point--a literally overwhelming record of circumvention, not just the Thompson Committee, which engaged in exhaustive and exhausting hearings and findings of the abuses that had occurred. Abuses not in the sense that they were illegal, but that reflected, you know, the results of decades of burrowing away at little loopholes so that they became huge, glaring loopholes. And a record that was not only before Congress but, I think, interestingly, was laid before the three-judge court in this case.

There is something like 200,000 pages of rich, rich documentary evidence that literally leaves the table groaning from its weight on the level of cynical employment of larger financial contributions to obtain political gains in a way that was very, very destructive of public confidence.

And the one thing that I think I can say on a going-forward basis and that we would all agree on is that for political scientists and scholars, the record in this case, the evidence that was established in this case, which was all documentary, will be a very, very rich treasure trove for historians and political scientists and other scholars and, I think, is really an important resource that people ought to avail themselves of. That this decision is not going to end the burrowing away at loopholes in the system. That the majority made the point that, you know, money and politics are sort of like water on the roof of your house. Sooner or later, it's going to find a way in while you're sleeping or on vacation or something.

And that doesn't mean that it isn't worthwhile to repair it. But this is a process that needs periodic repair. And what the Court has done is basically empower Congress to attend to that--under the watchful eye of both the third branch of government and the legal academy and public opinion--as to what the foundational document in our government, the Constitution, does and doesn't permit. So, stay tuned.

MR. MANN: Thank you, Seth. In just a moment, I'm going to turn to your questions. I, with C-SPAN here, I would like you to wait until we bring a mike to you.

But to set the table for some additional questions, that is to focus on matters pertaining to the potential impact of the law on campaign finance practice, I thought I would take just a moment to be a provocateur here.

Reading the press coverage this morning, I think one would conclude that the impact of this decision and of the law is that parties will become weaker and interest groups stronger.

That Republicans will win and Democrats will lose.

That incumbents will be buttressed and challengers further harmed.

And that the money that used to flow through political parties will almost, in its totality, flow now to other outside entities, some newly created that are less transparent and accountable.

I think that'd be a relatively fair reading of the arguments put forward.

What I want to submit to you is that none of those are matters of certainty, certainly not matters of fact, and, if I had 20 minutes, I would lay out the reasons why all of those should be called into question, not that I have--can tell you--that parties will certainly be strengthened not weakened. Not that I can tell you that, in fact, the Republican Party Committee advantage in hard-money-raising in no way creates an overwhelming, or even decisive, advantage in presidential and congressional elections.That, in this case, it's pretty hard to figure how you create more incumbent protection than the system in place in 2002 when the smallest number of incumbents were defeated by challengers in the House in American history—four--and in which less than 10 percent of the seats were competitive. And that, in fact, much of the soft money, especially from corporations, will, happily, remain in corporate treasuries or be used by corporations themselves to engage in communications with their restricted classes, all of which is provided for and encouraged by the law. And that, in fact, many of those so-called 527 organizations were created beforehand. Those that continue, to the extent they are incorporated, will be constrained in the kind of activities they can do.

It's a subtle and complex set of calculations, but what I simply want to assert is that there is a case to be made for a lively debate on the impact of the law on each of these dimensions. And, as you might guess, I would place myself on the side of those who would argue that some of the potentially harmful effects on political parties, say, are unlikely to be realized.

But we will be spending the next set of years trying to measure the impact of the law. Not only do we have a treasure trove of materials in the archive of the case; we have extraordinary opportunity to monitor developments in the 2004 election cycle and begin to understand the impact of this new set of regulations.

Final point: What's really important here is that last time Congress took a crack at this, with the FECA amendments of 1974, only part of their plan remained in place after Buckley. This time around, virtually their entire plans is in place. So they're getting what they wanted. And now it's a question of seeing how well it works.

We'd love to have questions. Who would--we have one right--right back here. Please identify yourself.

MR. MOONEY: Hi, I'm Tim Mooney, with the Alliance for Justice. And I have a question about the state of express advocacy and what the definition is now. Clearly the magic words test or magic words standard is gone. But what has replaced it? The regulations actually already have a standard right now, which is kind of a reasonable person standard, that's been rejected by most of the circuits, except for the Ninth. The question is, does McConnell now allow this reasonable standard application of express advocacy to be applied, and do you think the FEC will enforce that standard?

MR. MANN: That sounds like a Trevor Potter question.

MR. POTTER: As I indicated in my remarks, I think that is the question that comes out of this decision. I believe the Court has said that Congress, the government, by deputizing it, the FEC, can come up with standards, nothing to do with express advocacy, so long as they're not vague, so long as they are reaching election speech, so long as the person affected by them will know in advance they're affected.

But I have a question as to whether the reasonable person standard meets that or not. I don't know. Clearly there is more latitude, but that I think is one of the issues that will be fleshed out. Probably, more likely, at the state level first, because there are a range of state laws out there--some that were declared unconstitutional because of express advocacy--that now are going to work their way back through the courts. But on that, I would be fascinated to know what the Supreme Court experts think of that.

MR. STARR: I would say, it is to me, an imponderable as to how this is going to develop empirically. That this was a huge issue left to resolve for another day. And there's this sense throughout the opinions that we know that you'll be back. And so we're not going to try to answer all these questions. And, in fairness to the Court, the Court did feel, I think, the statutory obligation and the moral obligation to get this thing resolved as quickly as possible. And, of course, that doesn't mean that there won't be a large number of questions.

But it is interesting that--and here the one view really did prevail that the Court did not take express advocacy and magic words all that terribly seriously, even though, as you know, so many of the courts of appeal said, by golly, we really have to. Most have said as long as you avoid that. And so it has,I think, given rise to one of those standards--I'm really reminded of what the Court went through in, of all things, racial gerrymandering, saying, here it is, there is a problem out here and now it took

roughly a decade for the Court to come forward with a standard, saying here's the standard that will now guide the disposition by the lower courts as to whether a particular congressional district runs afoul of 14th Amendment kinds of values.

We're in for, I believe, subject to Trevor's views and those of Seth, I think a good deal of litigation now over common laws that were in development in the real world.

Since I have the floor, could I also just add, by way of addition. In light of this being an express advocacy group, your group, one of the things that I think, conceding Seth's point, but then adding a very critical point. His point with respect to this is not a ban, all you have to do is form a PAC. It is absolutely clear that there will be a diminution of speech by various and sundry groups, many of which--and of course, when we use the term corporation, we're, of course, including nonprofit corporations, and, of course, it is nonprofit corporations that frequently want to speak.

They are motivated by issues, as opposed to we're simply worried about our fiduciary duty to shareholders and the bottom line, economically.

Non-profits come together in order to articulate a vision of the world in some particular sense, great or small, narrow or large. And the American Civil Liberties Union is the paradigmatic example. In its 80-year history, as its very able advocates made clear in the litigation, it has never had a PAC, it will never--maybe it will--but it doesn't want to have a PAC. And this is an intrusion, as they see it, into their liberty. But now they're going to have to, if they want to speak out in the ways that they have historically been able to speak out; they will have to, in fact, you know, make a very fundamental judgment: Do we want to have a political action committee when we've never been political? We're issue-focused, as opposed to political.

MR. WAXMAN: Well, I think I agree with my colleagues that the question of what the First Amendment will allow in the way of--in lieu of--express advocacy is going to be left for common-law development, and it's almost certainly going to be development that comes out of litigation over state statutes. Some of which, as Trevor has said, were struck down under the old express advocacy standard.

I mean, this is an area, thankfully, we have a system in which courts decide cases and don't issue doctrinal edicts for all time. And the case before the Court was, look, here's the test. It is absolutely clear, it is positively clear. It applies to broadcast ads within 60 days of a general election that are targeted at a candidate's electorate and that mention the name of a candidate. And the question is: Does the Constitution allow Congress to say those ads have to be funded with hard-money and the funding for those ads has to be publicly disclosed?

And with respect to that test, the Supreme Court said, yes and yes. And the rest will be the, you know, the history of the future. The notion of, you know, like

sort of a dog that's, you know, on a strap, and neither Ken nor I can really leave this point alone about corporations.

The ACLU is such a delicious example of the overheated rhetoric in this case. The ACLU has a proud 80-year history, and it is one that has served this country very well. And that has provided more than its share of litigation for the Supreme Court of the United States. And it does not want to be political, and it has never had a PAC. And there is one other feature that was dramatically demonstrated in this case, which is that in its proud 80-year history, it had never run a single ad, ever, that would have been covered by BCRA's definition until the week before BCRA was passed when, the documents in this treasure trove reveal, it deliberately ran an ad specifically with the sole purpose of becoming a plaintiff in this litigation. And that--the extent to which organizations like that had to go to bring themselves within the draconian reach of this First Amendment-hating law--I think spoke volumes. But time will tell.

MR. MANN: At the same time—no, please, tell me what you really think.

MR. STARR: At the same time, what the record also showed is that organizations--many do not have PACs and don't want to have PACs. Those that do have PACs still depend upon membership dues in order to effectively get their message out because they don't have the wherewithal to. As for the for the AFL-CIO, I think it documented this, quite lavishly. They will simply not be able to communicate in the way that they have historically communicated because their PAC is a relatively small PAC in comparison to a corporate PAC.

MR. POTTER: The last word, I've just got to take you down in the weeds for one rich moment to point out why this will continue to be an interesting conversation.

The Court also wrote in this decision, again, re-asserting pre-existing standard for certain types of nonprofit corporations, which it calls MCFL, or Masters of Citizens for Life corporations. So nonprofit groups that are interested in public issues do not have to have a PAC, if they do not take corporate and labor money. Then they can just go ahead and engage, directly in this activity without a PAC, so long as they are relatively small and can show it would be a burden to do this sort of thing through a PAC. Or, I think, like the ACLU, they don't want to do it through a PAC, so long as they don't use corporate and labor money.

So, there's going to be a back and forth about how this actually evolves. At the state level, I think you're going to see not only that you can do exactly what the Supreme Court here said Congress can do. I didn't see restrictions here in the theory that said it had to be limited to broadcasting if the evidence at the state level showed that there was a lot of corporate and labor speech going on in some other forum. That I think gets played out in common law.

MR. MANN: It reminds us how this is just the beginning and not the end. The beginning of renewed administrative process to write regs. via the FEC and the litigation that follows. Question here, Gary.

MR. MITCHELL: Thanks. Gary Mitchell, from the Mitchell Report. I pray that I can configure this into a question. But it's intended to be one. I'm struck by a kind of discontinuity or disconnect between what seems to be the impact of the Court's decision and what one might argue the sort of man-in-the-street's perspective about this issue is. And to put it simply, it seems to me the sort of man-in-the-street/woman-in-the-street point of view on this issue is getting money out of politics or, at least, getting a lot of money out of politics.

And, of course, here we are in a year when we've already had three candidates who were, you know, going to take themselves out of the system. So my question is really to try to understand what's the really practical impact of this decision on the political system. It certainly isn't a Miranda kind of decision where before Miranda you didn't have to read rights and now you do. So the question is what has the Court really given us here, and what practical difference is it going to make in how politics gets practiced?

MR. MANN: I'm going to ask our colleagues to conjure up a response to that. Let me just say, I think nothing done by the Court in McConnell versus FEC in any way contradicts prior actions that make it impossible in a non-voluntary way to limit the amount of money in politics. That is to say, the framers of this legislation were not intending to reduce the overall amount of money in politics.

They were concerned about the nexus between donors, large contributions, political parties, and elected officials and the problems that arise as a consequence. And they were concerned about the loss of legitimacy of a regulatory regime that had sprung so many loopholes that it had no effect.

They were not intending to reduce the amount of money in politics. Politics costs a lot of money. You're absolutely right about ordinary citizens thinking we'll just solve all this by getting money out. But, A) our Constitution doesn't allow that; and B) it isn't clear it would be helpful to our politics, but it does rearrange the flows in the way that we discussed today.

MR. WAXMAN: I am not a political scientist, and/or a political actor; I'm a consumer of informed opinions from the likes of Tom Mann who was, I think it should be noted--he's too modest to say it himself--was cited and quoted many times in the Court's opinions, and it's a testament to his life's work.

Having said that, what--the effect of the Supreme Court's opinion yesterday was to leave in place what has been the legal status quo for the last 13 months. And, while I'm no student of this, it doesn't appear to me that we've seen in the last 13 months a shriveling up of money in federal candidate campaigns.

The effect of the law was to, if you will, more democratize the provision of those funds. If you have to raise hard-monies, if political parties--political parties are very important; they're wonderful institutions; they are terribly important to the health of our national polity. And if what this means is that they can't rely on some narcotic-like fix of contributions in the million-dollar range and have to go out door-to-door and solicit involvement in contribution by the citizens of that country--while, maybe, that's hard work, but that is all to the good, not only to the country but to the parties themselves. And I think, as I said, you can take this with more than a grain of salt, because I'm just a lawyer.

As a citizen, it seems to me that it's highly restorative to the integrity of the political parties that the hard-money contribution, which may well be beyond the ability--as it is--beyond the ability of most citizens but is a lot closer to the ability of most citizens than hundred-million dollar or hundred-thousand dollar contributions, is restorative. It restores faith that the parties and the candidates that they support need to go to citizens for help and for participation.

And there will be many, many more loopholes, but the process--the constitutional structure that allows Congress to address the creation of loopholes and to address the source of public cynicism--is, itself, restorative. At least that's what I believe.

MR. STARR: I think, to the person in the street, the Court has essentially issued, Seth said it earlier, the warning that the water imagery--the money will flow, and creative and ingenious persons are already at work, and there's been very significant reporting with respect to that. My own concern is that will continue to feed this perception of cynicism and the like and will lack the transparency that I happen to think, as a policy matter, is what is called for.

I appeal to the next generation which believes in information and liberty, which is information, disclosure--and Trevor's exactly right that the Court was emphatic in saying if there's one thing we have been clear about for a century, it is there can in this arena be disclosure, even though disclosure obviously has serious privacy consequences, but, here, this is an arena of Justice Brandeis--let the sunshine in.

And when we see, then, these various and sundry reports--and they are now many, and this has been a good deal of the commentary that Tom thoughtfully articulated, that the money's already there in vast quantities through surrogate activity--my concern is the cynicism will be just back, then I think that the Court, again, recognized that. I don't mean that critically; I'm just saying I think the courts foresaw, they read the newspapers. They know what George Soros is doing. The great tide of human events has not passed these judges by.

What they've essentially said, I think, to the Court is: it's your--to the Congress is--it's your responsibility. And this should come as no surprise that Senator

McCain was on this morning saying, that's right, now we're back in action, we're going to be back on the next level of reform. So I think that until we have a political change, as opposed to a jurisprudential change, we will be in the arena of command and control and regulation as opposed to what seemed to be the thrust, which is liberty disclosure and the like.

In other words, it's a command and control regime, even though we know that there will be very skillful persons who will be able to have all the influence that they want.

Final point, in terms of individual contributions: It should not go unsaid, since we've talked about history and the treasure trove, that one of the unsuccessful challenges back in Buckley versus Valeo, when I was a young pup of a law clerk and sitting there and watching Eugene McCarthy in the court room, he obviously didn't argue but saying I needed venture capital--our terms--in order to launch my insurgent campaign in 1967 and '68 against a sitting President in my own party.

If I had not had very large contributions from individuals like Stewart Mott, giving me an enormous amount of ability to go forward without spending all this time chasing after these smaller amounts of money, I never could have mounted my campaign.

Now is that a good thing or a bad thing, that's an ultimate--now we know--it's an ultimate policy issue.

MR. POTTER: Well, I would start by saying that Tom's absolutely right, that the purpose of this law was not to take money out of politics. The purpose was to take corruption out of raising the money that is spent in politics. That is very different. Getting office holders out of the business of raising hundred-thousand-dollar or million-dollar contributions, particularly, I think, from corporations and labor unions, is what this act was attempting to achieve. Not to limit the amount that is available to spend.

To go to the Eugene McCarthy example. One that I'm, I think, of that generation, very respectful of the idea that he needed venture capital. Whatever one thinks--and I hasten to add, I am not a Howard Dean supporter--whatever you think of Howard Dean, he's done a brilliant job of using the Internet for exactly that.

I think if Eugene McCarthy were running today, he would have venture capital. He would have it in small contributions in a way he could never technologically have gotten it at that point. But if you think of the antiwar movement and the people who would have been willing to send him $10, I think there are ways that the parties and individual candidates are going to be able to mobilize small donors that--I don't think the system has fully adjusted to that--iIn a way they couldn't even five years ago. So there will be a change there. I'm conscious of the pervasive cynicism in what I would sort of describe as Inside Washington. There's no way the law will be passed. There is no way the Supreme Court will ever uphold any of the important provisions. And, witness all the calls I got

yesterday from my friends in the press, it doesn't mean anything anyway. It's 527s are the answer, it's all been taken over, the same thing will happen.

Well, I don't believe it should under this law, the way it's designed. 527s shouldn't have the same corrupting nexus that party committee fund-raising by incumbent officeholders has had. But I'll go back where I started, which is that does depend on an oversight FEC fulfilling its role the way it is supposed to do.

The Commission currently has before it an advisory opinion request that says: Can we involve federal candidates and officeholders in raising money for our 527s? Which gets us right back to what this law was trying to prevent.

I don't know how that Commission will rule on it and what those facts will be. But that's the sort of thing that could get us back into the problem we have but needn't.

MR. MANN: We're--Sally, we'll take a question right here in the back. This is going to have to be our last question; 90 minutes has gone very quickly. In fact, 97 minutes has gone very quickly. Bob, please.

MR. SAMUELSON: Robert Samuelson from Newsweek. Just to follow-up on your point there. How do any of you understand the coordination rules or concept to apply to these 527s? In other words, if I set up an organization that is dedicated to helping the Democrats or helping the Republicans, who can I and can't I talk to, and when can I do it, and what can I talk about?

MR. POTTER: One of the things the Court did here is to say that the coordination provision passed by Congress was constitutional. Now, that provision simply threw out the old coordination rules, said that the FEC had to write new ones and said that the FEC couldn't require actual agreement. And the majority says there's no reason to require actual agreement; we have allowed a finding of coordination when information is shared, where there is joint activity without actually agreements. But what coordination means, thus, has been deferred by Congress to the FEC.

The FEC has new regulations that are very specific about it. In my view and the views of the congressional sponsors of the new law, those regulations fall far short of what they should. They, in fact, allow a degree of coordination that would have been impermissible under the old law, which Congress felt was inadequate. So that is another piece that will be fought out in the courts, because the congressional sponsors, Congressmen Shays and Meehan have already brought suit against the new FEC regulations. In 13 days now, Judge Kollar-Kotelly, in the District Court here, one of the judges in the three-judge panel, will be meeting to determine how to proceed with that case and set a schedule for argument.

That is going to be an issue. What is permissible coordination is one of the issues for those 527 groups. Clearly, merely having former party officials involved

isn't coordination. If they are, however, actively conferring with current party officials or federal candidates about what is useful to their campaigns, that's going to be a different situation.

MR. MANN: Bob Samuelson's question underscores the complexity and the difficulty of regulating money in politics and makes it all the more understandable why a Ken Starr vision of an alternative, which is one of really deregulation and transparency is an attractive one.

This Court has come down, though, with a 5:4 decision, very much on the side of continuing with the course that Congress set out upon almost a hundred years ago. And I suspect, as Ken suggested, until we get some--until and unless we get some--major change, which could be one justice, say, a composition of the Court or a changed disposition among members of Congress or the public, that we are going to be living with these complexities. We can point to what seems the silliness of it, the difficulty of it.

But the alternative is deregulate and disclose, and it turns out there simply isn't support for that now in the courts, in the Congress, or in the country. And, therefore, we're going to labor on as best that we can.

I want to thank my colleagues, Seth Waxman, Ken Starr, and Trevor Potter. They have been lucid and wonderfully generous in taking the time. Brookings is honored to have had you here today. Thank you all. And thank you for coming.

[End of briefing.]