THE BROOKINGS INSTITUTION

The Future of Campaign Finance: Congress, the FEC, and the Courts

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[TRANSCRIPT PREPARED FROM A TAPE RECORDING.]

C O N T E N T S

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P R O C E E D I N G S

MR. MANN: I am Tom Mann, the grizzled veteran of Brookings, campaign finance reform, and I'm pleased that my dear colleagues and friends, Tony Corrado and Trevor Potter, are joining me today to give you a briefing on campaign finance.

Tony Corrado and Trevor are both Nonresident Senior Fellows at Brookings, that's how we think of them, but they think of themselves also as, in Tony's case, the Charles Dana Professor of Government at Colby College, who also holds numerous other titles as one of the wise men of campaign finance, to say nothing of political theory. It's a delight after him having spent last year here in residence with us to have him back for this event.

And Trevor Potter occasionally thinks of himself as an attorney. He is at Caplin & Drysdale. Trevor of course is also the founder, president, and general counsel of the Campaign Legal Center and was a member and Chairman of the Federal Election Commission.

Tony and Trevor both played a critical role in the production of the initial Campaign Finance Reform Source Book. In fact, it was Trevor's idea way back in early 1997 to do just that.

Our major purpose today, as I said, is to provide a briefing, a status report on where things stand on campaign finance in the Congress, the FEC and the courts, but obviously we are also taking the occasion to recognize and announce the publication of The New Campaign Finance Source Book.

The great advantage over the old is it's much lighter, it has a smaller trim size, and it does not include the critical documents which way back in 1997 were hard to get a hold of but now are easily accessible on the Web, on the Brookings campaign finance website and in more recent times on the Campaign Legal Center campaign website. So that here we were able to provide you with text, with original essays on the state of campaign finance law and administration.

You have a little summary of what's in the book. I think that was handed out to you as you came in. That's the table of contents, but I just want to underscore the fact that I think this will be useful to you and your colleagues as a reference to keep on top of a very complicated set of laws and regulations. Tony and Trevor wrote the lion's share of the chapters and have really made signal contributions I think to our understanding of the law.

I'd also like to recognize someone who's in the audience today, that's Larry Hansen of the Joyce Foundation. Larry and I go back a long ways, but importantly in this regard, it was together we started something called the Brookings Working Group on Campaign Finance Reform. It was an effort to pull together people including Trevor and Tony, a wide range of people to begin to discuss what was happening on the Hill with legislation. I have to tell you the original take was very negative. We said it's going nowhere and if it did it might do more harm than good.

Out of that then emerged a set of other activities including the production of the first Source Book so we really had a resource to draw on. And a group that produced five ideas for improving campaigns which ultimately led to a very different piece of legislation, its passage, its implementation in 2004. Larry and Joyce are

supporters and are friends of, collaborators, inspiration over all these years, and I'd just like to recognize that and thank Larry for being here as well.

This book is available online. You can download the PDF files if you prefer or you can pick up a paperback version in the Brookings book store.

There has been a lot of talk, some loose, some serious about the impact of BCRA in the 2004 election cycle. We now have two volumes that have pulled together serious efforts by scholars to figure out what happened in 2004, one by the Campaign Finance Institute — The Election After Reform is up on their website and will be published early next year — the second, Financing the 2004 Elections, Brookings plans to publish early next year.

The bottom line of both of these volumes, if their editors will accept this gross simplification, is that the modest objectives of BCRA, and the objectives of BCRA were modest, were largely realized in the 2004 election cycle. But at the same time, campaign finance in 2004 was driven primarily by larger political forces and, therefore, there are fascinating questions to ask about the interaction of the law and changing political conditions and how that law might influence subsequent election cycles.

We'll have an opportunity over the course of the morning to elaborate on this, but first I'd like us to focus a bit on what's happened since the election.

Tony is going to start us off with a particular focus on fund-raising trends in the new election cycle to see what seems to be happening. You'll recall first it was forecast that parties would die as a result of this, that the Democratic Party was committing suicide. The evidence from 2004 suggested those weren't good forecasts,

but 2004 was a special election, unusual in that the original forecast would prove more accurate in the 2006 and 2008 cycles. We'll ask Tony if that is true.

Trevor is then going to bring us up to date on the extraordinary developments underway both at the FEC and in the courts. I will conclude with a brief status report on legislative initiatives in Congress. Then we will turn to your questions. So we begin with Tony Corrado.

MR. CORRADO: Thank you, Tom, and I want to thank all of you for joining us today. It's always nice to be back down in Washington especially since now up in Maine we're getting to that point where the leaves are falling off the trees and it's getting a little chilly at night and snow is soon to be coming, I'm sure.

I thought I would talk this morning just a little bit about what we're seeing so far and reflect a bit on 2004 because, as Tom noted, 2004 was really an extraordinary election. You had an election cycle in which there was an unusual amount of uncertainty and unpredictability in campaign finance due to the fact that it wasn't clear how groups were going to adapt to BCRA, it wasn't clear how the candidates and parties would respond.

For most of the election cycle the rules were not clear as there were continuing debates over the regulations and what issues should be addressed by the FEC. So that as a result you had an experience that was kind of unique in a regulatory context. And it was also of course an election that was unique because of the extraordinary presidential race that we had that was really driving much of the fund-raising activity in the 2004 cycle.

As a result as we looked at 2004, by the end of it, it seemed that at least some of the issues had been cleared up, some of the regulatory disputes were settled, and it seemed that there were some patterns that had emerged as a result of the 2004 fund-raising experience.

Most importantly, 2004 showed that under BCRA's revised contribution limits, candidate fund-raising was going to continue to thrive especially for incumbents and for the presidential candidates who raised unprecedented amounts of money in the last election cycle.

It was also the case that with respect to parties, the parties proved to be much more resilient than anyone anticipated. They adapted fairly well to the new constraints of BCRA's soft money ban, and as a result in many ways revitalized their fund-raising operations. We saw hundreds of thousands of new donors added to the party donor rolls, we saw a revitalization in both parties of their grassroots and small donor fund-raising networks, and in addition we saw the parties raise more money than they ever had before which, frankly, was something I don't think anyone really anticipated. Certainly I did not anticipate that in one cycle they would be able to match their combined hard and soft money revenues, raising $1.2 billion in the 2004 cycle.

We also of course saw that many political groups adapted to the new rules by placing greater emphasis on 527 organizations and other entities that were designed to take large unregulated contributions and use these contributions for electioneering purposes. So that the other notable fact I think in 2004 was the spike that we saw in 527 funding where you had $151 million worth of activity in 2002, increase to $424 million worth of activity in 2004, with much of that increase, about two-thirds of it, accounted

for by new organizations that were established primarily to influence the presidential race.

The other noteworthy factor of that phenomenon was that it seemed that the money was largely coming from a very small subset of the donor universe, a relatively small group of large individual donors who were responsible for the broadest amount of the funding. If you look at the 527 activity in 2004, $142 million basically came from 24 individual donors each of whom had given more than $2 million to 527 groups. If you expand it out a bit and you include the top 77 donors, what you find is that about $194 million, almost half of the money, came from 77 individuals.

The other noteworthy trend in that regard was the role of labor unions which I think did not get enough attention in the 2004 cycle because everyone was so enamored of the George Soroses and the Peter Lewises and the big donations coming from individuals. One of the other trends in 527 funding was a marked increase in the amount of money labor unions poured into these organizations. It went from about $55 million in the 2002 cycle, to $94 million in 1994. Thus the increase was greater than the $36 million the labor unions used to give to the Democratic Party committees in the form of soft money. So that you really had driving the 527 phenomena basically about 75 people and about eight unions, and as a result, you saw a real spike in that activity.

What does that mean for 2006? It seems in 2006 we're again in a situation where there's a lot of unpredictability in part because we continue to have uncertainty about some of the rules and regulations as Trevor will discuss in a moment, and because you now have the first midterm election which means you don't have a presidential race driving the party fund-raising, driving political group activity. In

addition, you tend to have a cycle where there's going to be a number of congressional races that are competitive, but for the most part most of them won't be competitive, in a context in which you have a president with falling ratings, declining public approval and real questions in the country about the performance of government which will have a material effect on fund-raising in this cycle both negative for the Republicans and positive for the Democrats.

One of the questions I'm looking at now is does 2004 suggest a changed pattern of activity that gets replicated in 2006 or are we going to see some differences in 2006, and I think that it depends on a number of questions.

One is are the parties continuing to build on the donor bases they established in 2004, and are they continuing to enjoy success particularly in recruiting small donor contributions in this cycle?

A second question is going to be are large donors willing to continue to invest in the types of 527 operations that we saw in 2004, and to what extent will these organizations be able to convince donors to invest substantial sums, particularly given some of the rules changes we are seeing since the 2004 cycle?

I thought I would address a couple of these questions this morning just by way of a kind of introduction, Tom, and perhaps begin with the parties because I think the party experience is particularly noteworthy.

Let's begin with a realization. In 2006 I think that it is unrealistic to expect that the parties are going to raise more money than they raised in hard and soft money combined in the previous midterm cycle. In fact, I think that it would be unrealistic to assume that the parties can equal the types of fund-raising we saw in 2002

because of the fact that traditionally parties raise less in off-year elections, and because 2002 was an extraordinary year in terms of party funding because the parties in anticipation of BCRA's soft money ban placed enormous emphasis on soft money fund-raising. They raised $495 million in the 2002 cycle in soft money which was more than double what they had ever raised in an off year before. As a result, as they like to say in the retail trade, tough comps this year, same store sales are going to be tough to match because basically they're going to have to without a presidential race replace $495 million. They did that in 2004 in the context of a presidential race. It will be harder to do that in 2006.

But that having been said, I think you're going to see a continuation of the success of the parties in their capacity to raise money because every indication we have from the early parts of this cycle are that the patterns we saw in 2003 and 2004 are continuing.

For example, all of the national party committees are raising money, and now I'm talking about hard money for the rest of this, at a faster pace than they ever have before and they're banking more cash for use in next year's election at a faster rate than they ever had before. If you look at the party fund-raising totals so far through August, the national committees have raised $243 million already. That is basically $50 million more than they raised in all of 2001, and that's the comparable cycle that we're talking about here. And they are $42 million ahead of where they were at the same point in 2003. So whether you use the 2003 measure or the 2001 measure, party hard money fund-raising is way up.

[See Appendix]

In addition, they're creating much more cash than they ever had before. Right now the parties have $90 million in free cash that they are able to use in terms of their cash on hand minus any debts they might have. That compares to $50 million two years ago, and two years ago half of that $50 million was sitting at the RNC. All of the committees are in better cash positions generally than they ever have been before at this point in the cycle so that they're aggregating money at a faster pace.

Part of that is because they're spending less on fund-raising now because with their Internet fund-raising and their small donor fund-raising they're able to bank a lot more pennies on the dollar than they used to, particularly in the Democratic Party.

The other points that are noteworthy is all six committees are already well ahead of where they were by the end of 2001, five of the six committees are well ahead of where they were at this point two years ago. The only exception is the National Republican Congressional Campaign Committee which has raised only $49 million versus $56 million last time, but they're still a bear of a committee in terms of fund-raising.

I guess the other thing that I would note is that you're going to see a reversion to the norm in this cycle in that the Republicans will raise more than the Democrats and there will be the traditional gap that you tend to see between Democrats and Republicans, although the gap looks like it's going to be much lower. If we look right now, the Republicans have raised about $149 million to $93 million for the Democrats. Two years ago the Republicans had already raised $144 million compared to $57 million for the Democrats. So the gap is much smaller.

The Democrats are actually having great success raising money despite some of the articles I read here in the Washington Beltway scene about what's Dean doing wrong, why aren't the Democrats raising money. If you look, the Democrats are doing extraordinarily well in raising money particularly when viewed historically, even when viewed against the last cycle, and particularly in small donor fund-raising. Their unitemized contributions are way up. In fact, one of the things I noticed was that in terms of unitemized gifts, the gifts under $200, the DNC alone has gone from $15 million to $24 million in a comparable period, whereas the RNC at this point is down a couple million from where they were a couple of years ago.

And one of the interesting things I'm watching now is it seems that Democratic small donor fund-raising is starting to take an up turn, it's been very steady through the year, starting to take an up turn while Republican National Committee small donor fund-raising is really crashing. If you look on a monthly basis, it used to be the case that you could guarantee the number every month that the RNC will pull through their mail. It was kind of like automatic. But what you've seen in recent months is they've gone from $8.5 million in February, to about $7.4 million in March, down to $5 million, down to $2.9 million, and down to closer to $2 million in the last month. There has been a real drop-off as the President's problems and as public approval has plummeted in the last few months in terms of the unitemized contributions going into the RNC.

To what extent that might be a reflection of the country's current feeling about the President is unclear, but it does reflect a pattern that I saw back during Bush I when the President was in trouble, and it also seems to be suggested by the fact that the

unitemized contributions to the DNC have ratcheted up in the last two months. So it's just an interesting thing that you might want to watch if you play this game at home.

The other thing I would note is that both of the parties have very strong cash positions now. The Republicans have $61 million already in the bank; the Democrats have $30 million when you count out any remaining debts. To give you some idea, back at the end of 2001, the Republicans had $56 million in the bank, and the Democrats had $8 million. So historically both parties are doing better, particularly the Democrats in terms of the amounts of cash they're amassing for this election cycle.

With respect to candidates, we're seeing in some ways the same old thing. It will probably shock all of you that candidates are doing very well raising money, particularly incumbent members of Congress. They continue to raise more than they have in past cycles, and there are two noteworthy things I think about this year.

One is we have really seen an acceleration of the permanent campaign. There is a lot of concern on Capitol Hill about making sure you raise your money early, and that phenomenon has accelerated in this cycle. If you look at where we were through midyear, incumbent members of Congress, their fund-raising is up 29 percent. In the previous cycle at this point, they were up 11 percent, the cycle before that, 8 percent. You've really seen a tripling of the rate. Whatever measure you use, the amount of money that incumbents have raised so far, the amount of money that incumbents have in a bank, you see a material difference in this cycle compared to previous cycles. It continues the upward trend, but it has kind of jumped up a notch in this election year.

So that you have incumbents now raising much more. What you're also seeing is much more early fund-raising by prospective challengers. There's an increase in the number of challengers who are already raising money in the first 6 months of this election cycle which suggests that the party committees are working hard not just on recruitment but also on once they get people recruited, getting them raising money early in order that they might be more competitive. And as always, what we see is most of this action in the districts everyone thinks are going to be competitive districts. If you're a challenger in a district that doesn't look like it's going to turn over next year, you're not raising much money at all, and in many of those districts we still don't have challengers.

But at least in the competitive races what you're seeing is, again, more of a push towards the front end of the cycle, get raising money fast, get raising money early. I think part of this is a result of the phenomena of members of Congress wanting to raise extra money because they've got to meet their quotas over to the Hill committees and they've got to raise that $150,000 that they can send to the DCCC, or that $250,000, so what you're seeing is not only increase in their campaign committees, but there is also a significant increase in the amount of money being raised by leadership PACs where we now have over 200 members of Congress with leadership PACs who are amassing money there that they'll probably end up wanting to send to the Hill committees which is why as Tom and Trevor will discuss there has been this wrangling over allowing leadership PACs to send as much money as you want over to the party committees.

With respect to 527s, two quick points. It seems to me one of the key issues in the 527 debate in this cycle is going to be are these committees able to sustain the interest of large donors. All the evidence so far is that the answer is no. At least on

the Democratic side you're seeing real changes in terms of the 527 structure in that two of the major 527 organizations active in the last cycle, the Media Fund and America Coming Together, have now closed their doors. You see indications that Soros, Lewis, a number of the other major donors are now saying that they are unlikely to match the type of commitments they made last time around.

Moreover, if you look more broadly at 527 fund-raising and you look at some of the groups that you all came to know and love like Swiftboat Veterans for Truth, you'll find that their website was last updated in November and most of the links don't work anymore. It doesn't seem like they're going to be a big issue.

If you look on the Republican side I think is where you'll probably see more activity this time in groups like Club for Growth, groups like Progress for America, but even there you don't see really dramatic fund-raising increases. If you look at Progress for America, I was looking at their first 6 months and they basically had raised money from four people. Luckily one of them wrote a million dollar check. But you're not seeing the type of robust fund-raising that suggests these groups are going to become the alternative party committees anytime soon.

In fact, I think what you're going to see is some material change in 527 activity brought about by two events. One is this new regulation that the FEC I guess formally approved yesterday that would require 50 percent hard money with 50 percent soft money for some of these organizations that engage in certain election activities, that is a real obstacle for 527 activity because it may be easy to raise some money from large donors, but when you've got to match that money with hard contributions, it becomes a completely different fund-raising exercise. What it means is that unless organizations

have very large memberships that are capable of making large or smaller contributions, you don't have the hard money match to spend the soft money component.

It's the same problem the parties went through. People forget that in 2002 when the Democrats were having such a great time raising sort money, some of the committees like the Senate Committee had trouble spending money because they had all of this soft money, but they didn't have the hard money to match it. As a result they couldn't put the two halves of the pie together. It was like they were trying to make Reese's Peanut Butter Cups but they had too much peanut butter, not enough chocolate, it doesn't make the same kind of a treat.

I think that at least from some of the indications from ACT, this was a concern and it's probably one of the reasons why we're seeing this focused attack on that regulation because it really changes what you can do.

As a result, I think in terms of 527s the thing that you're going to have to focus on is that we'll probably have smaller entities more focused on media advertising and that what you will tend to see are in targeted congressional races groups forming that will often be ad hoc organizations designed to raise money quickly and put up one or two campaign ads. It's the type of thing that we saw in the presidential primaries last time around. It's the type of thing that can be done quickly where someone like Texans for Truth were able to organize in response to Swiftboat Veterans in two weeks and start raising money and start to put up an ad, and as a result I think that's the type of activity we're more likely to see.

In terms of 527 activity overall, I also think it is likely that in this cycle we'll see a bit more activity on the Republican side than the Democratic side. What will

be a big factor for the Democrats I think is the extent to which the labor unions are willing to match the types of commitments they made in 2004. They poured an enormous amount of cycle into 527 activity in 2004, as I mentioned earlier, $94 million. Given the divisions in the union, given some of the debates taking place within the labor movement about whether to allocate resources to political activity or organizing activity, it seems to me that one of the real questions is how much money is labor going to be willing to put into Democrat oriented organizations to promote grassroots turnout efforts, and my sense is you're not going to see the type of money you saw in 2004 which means that probably we will have the parties greatly outspending 527s in this cycle just as was the case in the last cycle.

MR. MANN: Tony, thank you very much. Now we'll turn to Trevor Potter with a focus on the FEC and the courts.

MR. POTTER: Thank you, Tom, thank you, Tony. It's always a pleasure as a mere lawyer to be in the presence of such academic luminaries. I always learn a great deal specifically what the effect of all this legal maneuvering is. As I expect to, I learned a fair amount from Tony I hadn't known before.

It's a pleasure to be here today. It's a pleasure to be part of the launch of The New Campaign Finance Source Book which I think is a useful tool in understanding where we are.

On the legal side, which is what I've been asked to address, where we are is remarkably fluid, it changes almost daily, and I think it's fair to say that the current legal-legislative-FEC battlefield is as complicated and has as many movable parts as I

have known in 20 years of fund-raising work. In fact, that would be an understatement. It clearly has more than at any time over the last 20 years.

If you step back and think about it, that's a little remarkable. We normally think that you have a titanic legislative battle on the Hill as we did with the Bipartisan Campaign Reform Act, that Congress acts, the President signs it and the battle ends. We're done. In fact, that seems to have been the starting gun. Not only did we have the Supreme Court litigation in *McConnell*, but again one tends to think once the Supreme Court has finally spoken and resolved all the questions that have been out there for many years, the system now goes into working, operating maintenance mode and the legal side of it, the political side of it, recedes and things are left to the politicians to implement. That isn't what's happened.

Instead, we have had perhaps one analogy would be trench warfare from the day the legislation was enacted. We obviously had the full-bore Supreme Court litigation. We've also had a series of Federal Election Commission rule makings which I'll talk about in a moment. We have had court litigation over those rule makings. We've had court litigation over other parts of the BCRA legislation and campaign finance law across the country. We have had multiple attempts in Congress to change campaign finance legislation. Senator McConnell famously said after BCRA, "I don't think Congress is going to want to revisit this for a while." In fact, they almost immediately began to. Much of it has been below the radar, attempts to put legislation into appropriations bills, to fine-tune here or there. That's been going on monthly. There has also been a large legislative battle over 527s, what they mean, should they be

regulated, should the parties be deregulated to respond to them. So all of that has been happening.

At the same time there has been a battle over Federal Election Commission appointments. Most recently the Supreme Court has taken not one but two campaign finance cases. After a drought of many years where they didn't take any, they now suddenly have two cases before them which I will discuss. Both have the potential to change constitutional law in this area.

And most interestingly, I think, has been a recent public development which illustrates what's been going on behind the scenes since the passage of BCRA, and that is that there was an organizing meeting recently to focus on the attack on BCRA in the Supreme Court in the *Wisconsin Right to Life* case, and in that meeting you had Jim Bopp, counsel for National Right to Life, a prominent conservative member of the Republican National Committee, a Republican lawyer, opponent of BCRA, part of the litigation against BCRA in *McConnell,* joined by Bob Bauer, general counsel of the Democratic Senatorial Campaign Committee, a prominent progressive and Democratic lawyer, probably the leading Democratic campaign finance lawyer, and one of his partners, a former Democratic FEC Commissioner, and the Democrats were saying we need to support this challenge to BCRA, we need to support National Right to Life, we need to make it clear this is not just a conservative antiabortion group, but we need to get progressives and liberals involved in this challenge as well. So we now are seeing in a very public way what we have been seeing in battles at the Federal Election Commission and behind the scenes in Congress which is a fairly concerted attack on both the

jurisprudence of *McConnell* and the legislative creation of BCRA. So there's a lot happening.

Let me run through, because I know we're going to want some time for questions, the specifics of some of that.

First, after the law was passed the Federal Election Commission is tasked with producing new regulations implementing the new law. They do that by putting out Notices of Proposed Rule Makings, taking written comments, holding public hearings, and eventually producing new rules. They did so in a public process in which the general counsel put out possibilities. The congressional sponsors of BCRA, McCain-Feingold, Shays-Meehan, commented in virtually all of those rule makings, producing voluminous comments replete with legislative history explaining if there were any question what Congress intended by references to the floor debates in the legislative history. And the FEC by and large on most important issues ignored the congressional sponsors, expressed irritation that they would dare to speak for Congress, suggested that either the statute wasn't clear or where it was, it was ill-advised. And the Commission in a series 4-2 votes adopted regulations that in the views of the sponsors gutted much of what they had attempted to do, or at least left very large loopholes there to be exploited.

At the end of the regulatory process, the congressional sponsors sued in court saying the Commission didn't follow the law, it didn't follow what Congress intended, it didn't follow in some cases the wording of the statute, and we would like the courts to order the Commission to go back and do it again.

As luck would have it, the sponsors drew as the judge to hear the case one of the few Federal District Court Judges who actually knew something about BCRA,

Judge Kollar-Kotelly who had been on the three judge panel that had heard the constitutional challenge in *McConnell* and had written the famous, whatever it was, 1,500 page decision. So she was intimately familiar with the details of the statute and the legislative history.

Once *McConnell* itself was decided and it was clear the statute was constitutional, Judge Kollar-Kotelly ruled and the sponsors had challenged 19 of the regulations, Judge Kollar-Kotelly threw out 15 of them saying either that the FEC had failed to follow the correct administrative proceedings, it hadn't given adequate notice, it hadn't properly explained its reasoning so she couldn't figure out why they had done what they did, or that substantively they were wrong, that they were under the Chevron Standard and the regulations they had adopted were simply contrary to the words of the statute in a facial reading, or that they were contrary to the clear legislative history. It's fairly difficult to get an administrative agency rule overthrown in court because the courts defer to the agency unless they are clearly wrong, so to throw out 15 of 19 was fairly dramatic.

The FEC appealed. A three judge Circuit Court panel upheld Judge Kollar-Kotelly in her entirety. They said they agreed with everything she had said. The FEC has now voted to appeal that to an *en banc*, and interestingly, and this is true really of the last 15 years of FEC litigation, the fight now is not over whether Kollar-Kotelly was right or not on these regulations. The judges appear convinced of that. The FEC has been fairly quiet in its recent briefings on that. The argument instead is on standing, was Kollar-Kotelly, was the three judge panel, right in saying that these members of

Congress as the sponsors of the law but more importantly as candidates had the standing to sue the Commission? Were they actually injured by the Commission's regulations?

The implication of course which came out in the oral arguments is if these people don't have standing, nobody does and nobody can challenge the Commission's rule, and that's what the Commission ended up admitting in court. But their view is, well, sometimes nobody has standing. It just may be that we're entitled to be God and nobody can challenge us. So that's the issue that will now be fought over *en banc*, and standing is an issue that's been an important part of constitutional jurisprudence for a long time, but particularly a hot one in the D.C. Circuit and the Supreme Court. In general I'd say the Supreme Court has been more conservative in the last 15 or 20 years in granting standing, and so this is the area the FEC is going at.

In the mean time though, the Commission was under a court order from Kollar-Kotelly to go back and redo the rules. So we have had in the last year a series of nine rule makings because the FEC joined some together on many of the important areas of BCRA where we have had the same theater we had the first round with the sponsors commenting, with other interested groups commenting, the party committees commenting. I'm not going to go through all nine of them, but let me give you a sense of what we are arguing over here.

Who is an agent of a campaign? Because BCRA says that candidates, committees and their agents can't raise soft money, can't do certain things. Well, who is an agent? What is agency? How do you know? Is it the campaign manager? Is it somebody who was hired by the campaign but also by other people? Is it the candidate's son who is chairman of the state party and wants to do something in the state that may

help the candidate but they say, no, I'm wearing my state party hat? These are not simple questions, but that's one of the issues.

The statute says that federal candidates may appear at state party fund-raising events which was put in because you're not only the Senator from New Jersey, but you are a prominent office holder in New Jersey, that if New Jersey has a fund-raising event, you may of course go to it even though that event is raising what's technically soft money, it's raising money beyond the federal limits, it's raising corporate and labor money. So the question becomes what can that federal office holder or candidate do at that event?

The sponsors believed that they could not solicit soft money. They could appear because that's what the statute said, but they couldn't go in and say please give a million dollars to the state party and it'll help me and the whole ticket. The FEC took the view that the federal office holder could do anything they wanted and say anything they wanted at that state party event including explicitly soliciting unlimited hard money, and that's been part of the dispute in court.

There were questions about what an electioneering communication is, which is an important part of BCRA. The FEC rule limited the application of electioneering communications to advertisements that are paid advertisements. The sponsors say there isn't anything in here that refers to paid advertisements, it refers to any broadcast communication within that window, and why would you want an exemption so that a radio or television station could put up an unlimited amount of free advertising time on behalf of a candidate, a public service notice featuring the candidate,

that doesn't make sense given the law on the record. So these are the sorts of issues that have been argued over in court.

One that I want to notice in particular, and I notice Carol Darr here who has a great deal of experience in this area, is the Internet. You may have heard that there is a great deal of noise about the Internet and the court order. Here's what happened.

The FEC decided to put in a blanket exclusion from the definition of public communication for anything that was put on the Internet. Public communication is a term of art in BCRA that has an important context. State parties can spend only hard money on what BCRA calls public communications which are communications featuring federal candidates in an election year. What the FEC did was to say public communications are generally referred to in the statute elsewhere as radio, television, et cetera, the statute doesn't say anything about the Internet, and so we're going to assume that anything the state party does on the Internet is exempt from this requirement that they use only hard money.

The sponsors objected in court and said this is potentially an enormous loophole because it's an invitation to the state parties to raise unlimited amounts of soft money and spend it on anything from paid advertising on the Internet to Emails on the Internet to get out and elect federal candidates and that if you exclude the Internet from the definition of public communication, the statute doesn't work the way it's intended to in terms of regulating a very large expenditure of sort money.

The judge agreed and said there's nothing in the statute that indicates there should be a blanket exemption for anything from this and sent it back to the

Commission to write a regulation that did not exempt this state party activity from the hard money requirements.

At this stage what the Commission did was say, well, the judge has asked us to look at the Internet. We might as well reopen our Internet rule making which was mired in mud and controversy from a couple of years ago because we couldn't figure out what to do, and we'll not only look at the definition of public communication which is what we were told to look at, but we'll look at how all of election law affects all of the Internet.

Predictably, this has stirred up a storm at the Federal Election Commission and in the blogger community because the FEC rule making is broad enough to raise the question of are bloggers in fact making contributions to candidates, and has raised all of these very complicated, difficult to deal with issues of how does the regulatory regime adopted by Congress in the early 1970s affect a medium that didn't exist there where the amount of money that is being spent by somebody typing at their computer is very difficult to identify. The Commission has had a contentious rule making on this. The sponsors have again and again urged the Commission to go back and restrict the rule making to the question that Judge Kollar-Kotelly put before them which is essentially the spending of soft money by state parties for Internet advertising, but the Commission has been wandering around in the wilderness of what is a blogger, are they entitled to the press exemption, are they entitled to the individual exemption as volunteers, how do we sort all of this out.

This has provided an opportunity for members of Congress to stand up and suggest that there ought to be a legislative Internet exemption to BCRA and that that

would solve the whole problem. As far as I can see, the difficulty with that is that the legislative exemption they're offering in various legislation on the Hill doesn't deal with bloggers at all, it says that state parties can spend soft money on the Internet and leaves open the issue of how a blogger who is operating in incorporated form is regulated given the ban on corporate political activity. So that's there at the Commission and in Congress as well.

The current status is the Commission is finishing many of those rules. True to form, the Commission, which I should note has been comprised of individuals who by and large opposed the passage of BCRA and have been on record as thinking it's a bad idea and ought to be narrowly construed, those Commissioners are again taking as narrow an approach as they can in the rule making leaving open I think the possibility that the sponsors go back to Judge Kollar-Kotelly at the end and say they went and did what you said which is hold a rule making, but they ended up with the same bad results. So this truly is a trench warfare operation.

The other issue that Tony raised that has been alive the last two years is 527s. There the Federal Election Commission in the 2004 election year somewhat famously opened a rule making to determine whether or not these organizations were federal political committees that should be registered with the FEC and complying with the source requirements of funding, i.e., just hard money. This is an issue that the Commission has failed to address in the last 28 years of federal election law. You would think the question of what is a federal political committee and the Supreme Court opinion that says it's a group whose major purpose is to influence federal elections might have been resolved in all those years before BCRA, but it wasn't. So along came these

political organizations registered with the IRS saying our purpose is to engage in political activity but our major purpose is not to influence federal elections even though everything we say to everyone is we want to defeat Bush or reelect the President. The famous quote from the people who did Swiftboats was, "We're not trying to influence the federal election. We're not a federal political committee. We're only trying to say that John Kerry is not qualified to be Commander in Chief." So those are the battles that have been before the Commission.

What the FEC did in the rule making was decide that, gosh, it's an election year and what we determine here might affect the result of the election and that would be an inappropriate role for the election agency, so we will not come up with a new rule, and I'm paraphrasing pretty much what they said, that that wasn't our role in the middle of an election year so we're not going to do anything. They did adopt as Tony noted an allocation rule that says that certain 527s, those that also have a federal PAC associated with them, will have to comply with the hard money, soft money allocation, but that was specifically made effective only after the 2004 election so as not to affect anything happening in the election year.

I'm a little less sanguine than Tony that this will have a huge effect, it certainly will have on some groups, but it may be that ACT doesn't reappear in 2008 and some new incarnation does. If the new group doesn't have a federal political wing, if they don't register a PAC, then they won't be covered by this allocation rule, so we'll have to see the extent to which the allocation rule actually has an effect.

In the mean time, the allocation rule is being challenged in court by Bob Bauer in this case representing Emily's List and he has said the allocation rule is

unconstitutional, violates the statute, et cetera. His firm recently asked the Federal Election Commission for an advisory opinion as to whether Emily's List had to comply with it in certain circumstances, those circumstances being ones that looked fairly far-fetched. The FEC said the rule is the rule, if you want to change it you go back and ask for a revision of the rule, but in the advisory opinion process we're going to follow the rule.

The good news is the Commission said they're going to follow the rule. The bad news is that may be fodder for Emily's List in the litigation because they can now go to the court and say the Commission is insisting on following this rule to a result which we think is absurd which gives you added reason to throw the rule out. So that litigation is ongoing over the allocation.

Meanwhile, in Congress on 527s there has been a ping pong match, and I think it's fair to say we're at a stalemate. There was a bill introduced in the Senate. Senator Lott came out in favor of it; McCain and Feingold were in favor of it. It went to Senate Rules. It went in as a reform bill and it came out as a Republican Christmas tree where a majority of the committee added all their favorite Republican provisions that were seen as aiding the Republican Party, the Democrats withdrew their support as a result. So now you have a bill that I think doesn't go anywhere in its current form in the Senate.

In the House the leadership decided they would address 527 issues not by making it clear that 527s were in many cases federal political committees, but instead by saying we can't do anything about 527s and, therefore, we need to unleash the national parties that are unfairly restricted by BCRA. So in a bill called Pence-Wynn they came

up with a proposal gloriously entitled 527 Reform which doesn't touch 527s but does open up fund-raising for the national parties again. It looks as if that would have trouble passing in the House, and as a result, the Republican allowed the Shays-Meehan 527 reform bill to go through the committee and also be reported out to the floor. So now you're going to have two competing bills. Given a certain amount of turmoil in the House and in the Republican leadership at the moment, it's unclear that either of those go anywhere, and if they do how you'd ever reconcile them with the Senate where the situation is unclear, too.

So I think the best guess is that Congress won't do anything about 527 reform, that the FEC has done what it could and that will lead to the final piece of litigation on that note which is the congressional sponsors, Shays and Meehan, sued the FEC in Federal District Court after they didn't do anything saying the FEC has an obligation as a regulatory agency to come up with a rule that tells people when they're a federal political committee. That is before a district judge, the argument is currently scheduled for December. The Commission is undoubtedly going to respond to that challenge by saying, wait a minute, we've already brought an enforcement action against one of these 527 groups, Club for Growth, and we may be bringing actions against others, so we don't need a rule, we can achieve this through the enforcement process. So we'll wait and see what that judge does with that legislation as to whether the FEC would be ordered to come up after all with some sort of a rule on 527s.

There are two Supreme Court cases coming along. One is *Wisconsin Right to Life* where a right to life group there said that they wanted to run advertising featuring Senator Feingold who is up for election. They wanted to run it within the 30-

day window, and they wanted to urge him and his fellow Democratic senator not to filibuster President Bush's judicial appointments. They filed suit in court saying we want to run this ad, it's not an election ad, it's just pure lobbying of our senators, and BCRA doesn't let us do it. We want a ruling that says we're allowed to do it.

The District Court said you can't do it. That's what BCRA says. The Circuit Court said you can't do it. That's what BCRA said. The case post-election went to the Supreme Court. The Supreme Court agreed to take it.

There are two issues there. One, the threshold legal issue is did the Supreme Court decision in *McConnell* say that electioneering communications prohibitions and restrictions are approved and cannot be challenged on an as-applied basis? Or even though the idea is constitutional and the statute is constitutional, can specific groups that think it isn't constitutional as applied to their circumstances come back in and challenge it? The lower court said, no, you can't, but the Supreme Court in *McConnell* said it's constitutional no matter how applied. So that will be the initial threshold issue in *Wisconsin Right to Life*. We obviously don't know where that will go in the Supreme Court except to note that the Supreme Court usually doesn't like being told that you can't do something and there's no possibility of challenge. Then if there is a challenge and the Court said, no, we can look at it on as-applied basis, the question is whether this group should be exempt from the provisions of BCRA even though they had endorsed Feingold's opponent and said their top priority was to defeat him and, most interestingly, already had a federal PAC which could have engaged in this activity legally without having to have an exemption from BCRA. So that's the battle in

Wisconsin Right to Life, but to some extent with a new Court, with presumably two new Justices sitting by then, it revisits a core issue in the *McConnell* decision.

The other case, *Randall v. Sorrell*, comes out of Vermont. Vermont said we know that *Buckley* said you can't have expenditure limits in elections, but *Buckley* left open the possibility that life could change, we could get more information and we could come to the realization as a legislature that expenditure limits in elections are required for good government, and that's what we Vermont have now come to the conclusion.

In a series of split decisions working their way through the 2nd Circuit, that law has been partially upheld. It's going to the Supreme Court now. The question is are they being asked to overrule part of *Buckley*, is this consistent with *Buckley*? If it's consistent with *Buckley*, is Vermont right that the situation is now different, there's enough evidence to show that expenditure limits as opposed to just contribution limits are permissible, is this in fact the right time to hear the case given that some of it has been remanded to the District Court up there, so all of that will be debated in the Supreme Court.

Finally I know Tom will be happy to hear me say, we do have the issue of FEC Commissioners. Of the sitting, one Commissioner has left, Brad Smith has gone back to Ohio to resume his academic career, so of the sitting five Commissioners, three are sitting in expired terms. Two of them expired over two years ago, and they sit until their successors are qualified, so there is an opportunity here for the President to nominate new Commissioners and the Senate to consent. As usual with the history of FEC appointments, it's a mess. The House leadership has proposals, the Senate

leadership has proposals, the political people have proposals, and the President historically defers to the other party for their seats. The reformers and the congressional sponsors have made the argument that this is the perfect opportunity to appoint people who at least believe in the law and not people who have spent their careers fighting the new law. So the White House is under pressure from Senator McCain and others to pay some attention to whether these people support the statute, and that is all in the laps of a White House that seems fairly occupied with other issues. In the mean time, the five Commissioners soldier on.

So that's the status, and as you can see, there's a fair amount of turmoil and uncertainty. It's fertile ground for lawyers. Thanks.

MR. MANN: Trevor, thank you very much. Trevor mentioned some of the developments on Capitol Hill. Let me literally take two minutes to summarize that and then turn to your questions.

The priorities of the BCRA supporters and members of the reform community coming out of 2004 were threefold, to define the political committee status of 527s, to try to salvage the presidential public financing system which basically is on its death bed, the major candidates opting out of the public matching program in the primaries and opting into the general election side of it but with most of the funding in the general election occurring outside of that public grant.

And third was to restructure the FEC. I think it's fair to say that there has been no progress on any of those priorities with the exception of legislation being drafted and bills introduced, and that in fact BCRA's supporters in the reform

community more generally have found themselves fighting rear guard actions to keep elements of BCRA and, frankly, of FECA from being repealed.

Trevor has already talked to you about the Pence-Wynn bill in the House and the Lott bill in the Senate. Basically we have legislation reported out by committee but in no position to go to the floor because there are no majorities available to pass those bills.

We had an effort, again a provision in both the Lott bill and the Pence-Wynn bill, to allow members with their leadership PACs to transfer unlimited funds to the political parties. That was recently dropped from the Senate appropriations bill at the behest of Senators McCain and Feingold.

There have been efforts although not yet terribly serious again included in the Pence-Wynn bill for a broad exemption from regulation of political advertising on the Internet but, again, that hasn't gone anywhere.

The latest provision is to eliminate the tax check-off for the Presidential Public Financing System. This would be a way of the last push of a system that's teetering between life and death. The trick here is that if you had an up or down vote on it you'd probably defeat it, but if it's part of a reconciliation package it ends up being a very minor matter in a set of much larger fights, and so it isn't clear whether or not it would succeed. But I would say that's the last remaining piece of live campaign finance legislation in this Congress. It will take a major change in the political environment, a change in party control of the Congress in the midterm elections, a major embrace of political reform including campaign finance by presidential candidates after that in order for anything serious to happen with regard to at least the agenda of the original BCRA

supporters which I might say is fairly modest. The real agenda goes beyond that to begin looking for ways of generating resources for challengers which goes to providing media time for candidates, tax credits, other kinds of public subsidies, but I just have to say we're a long ways away from that. The environment has altered, the BCRA coalition is frayed, and it's a tough time. Trevor?

MR. POTTER: The headline on that for the members of the press is the Empire Strikes Back. You remember that BCRA was essentially a unique legislative achievement because it was a grassroots achievement. It was adopted in the House over the objections of the leadership. It was adopted only because you had a discharge petition which is almost never used. In the Senate it was adopted over the objections of the Republican leadership, and with all the public gaze on it, the sponsors of BCRA could get the law through.

However, you go back to the regular workings of Congress and the leaders are in charge again, the committee chairs are in charge again, the Republican leaders in the House control what gets to the floor, and what we are seeing time and time again is that those leaders are looking for ways to backtrack on BCRA.

An unnoticed event, a year ago BCRA contained a new provision on personal use, the prohibition of using campaign funds for personal purposes. It cleaned up a lot of what the FEC had done wrong over the years and made it clear that there were a very limited number of things for which campaign funds could be used for. That was in the new law, passed, upheld, et cetera.

That nobody in this room knew that in an appropriations bill Congress changed that. Nobody in Congress knew it and they voted for that bill in the last session

that it changed that. It threw out the new BCRA standard and it went back to the looser FEC standard. People woke up about a month later and discovered that had happened. That's the sort of thing that is occurring all the time. The leadership PAC provision that Tom referred to was supposed to have been put on the transportation authorization bill, and it was only John McCain going to the Republican Conference and saying over my dead body that he was able to get a commitment by Bill Frist to have an open vote on that provision rather than having it wrapped in. The leadership then withdrew it because with all the attention they were going to lose an open vote.

But most of these aren't open votes. As Tom indicated, the attack on the Presidential Public Funding System could well end up in a reconciliation bill. So you have the leadership back in charge, they didn't like BCRA in the first place, and they have a real incentive here to nickel and dime it where they can.

MR. MANN: Thank you for your patience. We'd love to have your questions or comments.

MR. SCHNEIDER: Jim Schneider from New America. To what extent is the Internet a threat to BCRA? Let me just give you an analogy.

Congress spent 10 years writing what became the Telecom Act of '96. From the perspective of 2005, it seems amazing they didn't include any provisions for the Internet. Now there's a consensus that the Telecom Act is completely broken and they're going to have to come up with a completely new model to deal with the Internet and that maybe eventually everything in telecom, all the old titles for cable, broadcasting and telecom will become obsolete and this new model is going to be the model.

It seems to me potentially the Internet is a mortal threat to the design model in BCRA. I don't know. Clearly there's a tension there. The question is to what degree is it a fundamental tension?

Let's assume for the sake of this answer that eventually all communications become Internet communications and that when it comes to local political information it's all bloggers 10 to 20 years from now, all the old models [off mike].

MR. MANN: I'm going to defer to Trevor and Tony except to say this. Rather than conceptualize the Internet as a threat to BCRA, I see potentially the Internet as a sort of liberating force and potentially lowering the cost of campaign communications and therefore providing a genuine public good and simplifying rather than complicating a lot of matters.

Trevor is going to get into the complication side of it, but I wanted to begin with a sort of positive take on it because I think it offers some real promise.

MR. POTTER: I agree with Tom. I think it does offer great promise. Let me just give you what I think is the legal context.

If I go out on this street corner and take out a bullhorn and urge people to elect a candidate, I'm not covered by the federal election laws because I'm not spending the sort of money that triggers the federal election laws. On the other hand, if I go out and take a newspaper advertisement in The Washington Post and say the same thing, I have spent tens of thousands of dollars and I have obligations under the election laws.

The Internet is much closer to standing on the street corner, and so what it means is that all those people who couldn't be heard unless you happened to be passing

by the corner of Mass and whatever that is, 20th, are now going to be able to at least be accessible as bloggers as what you posit is where most of the political commentary will be without being covered by the federal election laws because they're not spending the sort of money that would trigger anything.

Where you're going to have the issue is what happens when groups that are prohibited from campaigning for candidates, corporations and labor unions or foreign nationals, are spending money on the Internet, and I think clearly if they're spending money on expensive ads they're covered. If they're spending money simply to express their views and on a corporate site you have their political communications, they may not be covered.

MR. SCHNEIDER: [Off mike] the answer is correct. But the content side is still going to be very expensive and you could easily have a lot of money behind the scenes paying for the content even though the distribution sounds like [inaudible] but you could have a very highly paid lobbyist paid person and that might be important to get out there.

So I agree that distribution is going to be trivial like the bullhorn, but the fundamental economics may be just like it is today and that's where the big money will probably on the content side, special interests.

MR. MANN: Next question?

QUESTION: I appreciated the facts on the court cases, but I'm interested in knowing what the panelists' opinions if any are about especially in the *Randall v. Sorrell* ruling either way about the potential effects on BCRA.

MR. POTTER: In the *Sorrell* case which is the Vermont case, it doesn't on its face have a direct effect on BCRA because BCRA doesn't have any expenditure limits. Whenever the Supreme Court takes a case there is a possibility that they could do something dramatic, but I think the expectation, my own expectation, is that the Court will focus on whether this is contrary to *Buckley*, whether Vermont has proved its case. And I think they're going to focus on whether it's right because it seems to me that this is a case that is still in the lower courts and it could be that the Supreme Court ends up saying we really shouldn't have taken this yet or we're only going to rule on a piece of it and wait for the lower courts to rule on the rest.

But my hope and expectation is that it doesn't have an effect on BCRA that does raise an important question which is can the government in some circumstances limit candidate expenditures, Vermont says it's doing so so that candidates don't spend so much money, so much time raising money, and is that a permissible result.

MR. MANN: And yet the particular case as I understand it has a rather dramatic low limit on expenditures that raises questions about its plausibility.

My own take is that I was surprised the Supreme Court took the case and didn't just vacate the decision of the 2nd Circuit. I can't imagine a majority of Justices on the Supreme Court upholding the Vermont law. For me, the really interesting question is whether they use it as an occasion to revisit and perhaps rethink in a deregulatory sense the original *Buckley* ruling.

MR. POTTER: And I need to amend my answer because one of the issues that is certified to the Court is whether the Vermont contribution limits are too

low. They are of the size that was upheld by the Court a couple of years ago in *Shrink PAC Missouri*. It could be an occasion for the Court to revisit those low limits which were $100 and $200. I don't think again that would affect BCRA where the federal limits have just been increased and are $2,100 per election, but it's possible the Court could revisit its statement in *Shrink PAC* that even $100 limit is not too low.

MR. MANN: Yes, all the way in the back?

QUESTION: Katie Fox-Hodess from Brookings. I'm an intern here. I was wondering if you could please comment on the initiative that's going to be in the California special election next month limiting the ability of unions to use union member dues for political campaigns, the legality of the initiative and implications for future legislation.

MR. POTTER: The initiative proposed by Governor Schwarzenegger would require that unions only use member dues for political purposes with the consent of the members. It's a perennial Republican proposal. It has been adopted in some states. It is usually bitterly fought by Democratic interests and union interests for obvious reasons. Current polls show it ahead in California. It's I think part of the underlying battle over who has the high ground in the campaign finance area.

It's a proposal that Republicans in Congress long tried to get into federal law. It was seen I think correctly as ensuring that no law would pass at the federal level because it would have meant none of the Democrats would have supported BCRA, so it was not included in the BCRA legislation. But if you're doing it by voter initiative, you don't have to worry about balancing and horse trading, so we'll see where it goes in

California. I think it's constitutional. To my knowledge it has not been challenged on constitutional grounds.

MR. CORRADO: This comes up from time to time in states in part because where they have adopted this provision, it does show that you can diminish; there are two purposes, one is you diminish the amount of money labor unions have available to them to fight because there's always a percentage of the membership who says no, why do I want to give $7 to the political fund? I don't want to do that. And there's also a question of practical application in terms of can you then move to if you have consent to use the union dues, can you then take it the next step and have the union members express that they would like their funds used for the Republicans or for the Democrats.

One of the things a lot of the Republicans have always been concerned about is they constantly see that 36 percent of union members are voting Republican but they don't get 36 percent of the money. So that I think probably the effort to get it passed in California is we go through cycles on this where they try to revive it and get it going in the states as a way to create some momentum.

I would not be surprised to see some version of paycheck protection tucked into some bill up here on Capitol Hill in the next year or two as a way to try to get back to that because they do tend to come back to it every once in a while on Capitol Hill to see if maybe now the time is right where we can get this through.

MR. MANN: I think it's important to acknowledge that this is separate from political action committees of the labor unions where they have to be voluntary contributions by labor members just as corporate PACs are financed through the

voluntary contributions of executives, managers and others members of their restricted class. It really goes to the use of treasury funds. In the case of a corporation it's their corporate treasury, in the case of a labor union it's the dues that are paid.

Right now corporate executives can allocate funds to their internal political communications and spend outside the system in ways that don't fall under the regulation of federal election law. The question is what the Democrats in the labor unions have always said, there ought to be parallel constructions affecting both labor unions and corporations.

MR. CORRADO: And remember that we're talking about state activity here because federal law is covered by BCRA, labor unions can't use their direct labor money to go out and urge the general public, et cetera. But under California law, unions and corporations are entitled to spend money in California elections and they are across the country entitled to spend that money under federal constitutional law in initiative campaigns. So part of the big battle in California is the unions are opposing Schwarzenegger on his initiatives and so he's trying to undercut their ability to do so in the future.

MS. CARNEY: Eliza Newlin Carney from National Journal. I was interested in the differing views on 527 groups and what the FEC has done. If you talk to some reform advocates in Capitol Hill they would essentially say the FEC has ducked the issue of 527 groups and hasn't done anything significant, but if you talk to some of the groups, they perceive this new allocation rule as being quite restrictive. I would like to get a little more of a sense of whether we feel 527 groups are going to grow and be

influential or are they going to really be curtailed, and I might ask Tom Mann to comment on that as well.

MR. POTTER: Let me give you the legal view again which is the FEC rule only applies to 527s that have registered federal political committees associated with them. Many of the traditional groups like Emily's List did that, and many of the groups in 2004 structured themselves that way because they thought it gave them a safe harbor under the election laws.

This will be the first election we fight with the new allocation rule. I think logically from what we know of the way lawyers behave, they will attempt to now restructure themselves to get out from underneath this rule. New 527s probably won't create a federal PAC as an adjunct, and if they don't and they're just a 527, they are not covered by the rule.

The existing groups may have a harder time like Emily's List getting from underneath it because that's how they've long been set up. That's a legal answer. What that means practically I think we discover in this election cycle.

MR. CORRADO: I think that's a good assessment. One of the issues that you have here, Eliza, is that you've seen this thickening, I like to call it the thickening of the interest group community along Paul Light's sense of thickening government where you have a lot of the major groups that are amply funded having multiple components, so they've got their PAC, they've got their 527, they've got their C4 so that they can use different money for different purposes.

In that regard, most of the major groups that you would tend to see as having been active in the 527 vehicles in the last cycle tend to have PACs associated

with them so that as a result they are now subject to this allocation rule. And particularly if you think about a lot of the labor unions, if you think about groups like Emily's List, if you think about some of the groups that have traditionally been involved in politics in the federal races, this is a real constraint on them because of the fact that it's much more difficult to raise the hard money component.

What it means is that groups that have large membership bases will not be as affected as groups that don't have large membership bases. So I think Club for Growth currently has something like 32,000 members where they have the potential to go out and do some direct mail, Internet-based fund-raising, be able to put together some of the hard money component if they want to do voter mobilization in targeted races.

My sense is that on a lot of the groups it's a real constraint right now, so that's why I think in this cycle we see a shifting emphasis to the media side, that the types of ACT operations you saw last time get much more difficult to do with a hard money match. Therefore, you'll see greater emphasis on doing targeted TV advertising, and I think a lot of it is not going to be these big operations in 20 states that are organized on a presidential scale, they're going to be ad hoc, hit and run, Swiftboat Vets, let's put together some money, let's get some donations, get an ad up on TV, we can be in and out before we even have to report.

I think in the longer term Trevor is right. If it ends up being that you're limited to this fifty-fifty allocation rule and that therefore the federal PAC becomes a trigger, then you'll start to get the formation of groups just like you saw with the media fund in ACT in 2004 which basically read the law carefully and specifically defined themselves in a way that wouldn't breach regulatory triggers. Hence, you have the

Media Fund getting set up, but they never register with the FEC so that they always have this out of being able to argue we're not a federal political committee, because if they had registered with the FEC, it triggers a different regulatory trigger.

As Trevor says, if this is where you leave it and then the regulatory trigger becomes having a PAC, now I know what to do. I have to set up an operation but not set up a PAC.

MR. POTTER: So bottom line, I think it will affect the number of the groups that were active in 2004 if they want to remain active, but it still leaves open this question of how do deal with 527s because there will still be pressure to have pure 527s not covered by the allocation regulation doing just what Tony said, I think that's still going to be an issue, should they be federal political committees themselves.

MR. MANN: It will be an issue but you have to ask where will their resources come from, and it seems to me that's the critical contextual factor here. Corporations aren't relevant because they decided for the most part not to play in this game. It's really unions and wealthy individuals, and what will unions do? There's already a question of sort of the legality of if a labor union can use their treasury funds to mobilize their own members which they can but presumably not mobilize the general public, is it then appropriate for them to give to groups from their treasury whose objective is to mobilize the general public? That's an interesting legal question that's going to be kicking around.

I think as Tony and Trevor have suggested the voter mobilization efforts like ACT are going to be very hard to do without having some federal component to it. In the old days, 1 percent or 2 percent or 5 percent, now 50 percent, and I do believe

that's going to change the logic of how all of this works, and I really think the wealthy individuals have checked out, certainly on the Democratic side, we'll see about the Republican side. I think the investments are going elsewhere. I think the 527s were hyped. I think their influence in 2004 was limited. I think their influence this time around will be even less. And if the Democrats respond as I think they will sort of looking to learn from the Republican experience, you are going to see a tremendous effort to build the voter mobilization activities into the party to make them more efficient. They managed to spend more on this last time than they had previously, and the dollars are there to raise and spend, and I think they are really very likely to do it.

Secondly, we learned that the media fund and other efforts like that simply are not necessary anymore with the possibilities of parties engaging in independent spending and having the ability to raise dollars. So I sort of see a supply side problem with 527s, and frankly I see parties more vigorous, more ambitious and understanding that as Karl Rove knew and used the hybrid spending in the general election, to maintain control over all the advertising that was going on, the party and its candidate are much better off if it's centrally directed and I think you will see the movement to get more and more inside the parties and for 527s to be less significant outside the parties.

MR. POTTER: The only caveat I'd add to that is that I think Tom is absolutely right that the Democrats learned a lesson which was let's try to do it through the party, it's better to coordinate it. If we had sat in this room in 2003 and talked about where this money was going to come from for 527s, we would have looked at the major donors to the Democratic and Republican Party, and yet as Tony makes the point in his

writings, if you look at the 70-some people, 75 people who gave to these 527s, a lot of them we had never heard of before this election. If you look at the people who paid for Swiftboats, they are not the people who were the major donors to the Republican Party.

So it's true that Soros and others are backing off, but there's a lot of money in this country and it only takes a couple people to decide they want to do something in the midterm or in 2008 and they could be people who didn't play last time.

MR. MANN: You're right. The question is what avenues will be attractive to them, and remember, the avenue that always remains available to wealthy individuals is to spend independently on their own. They can do that without any question of its legality, and I think that option will always remain there for them.

MR. CORRADO: The problem is wealthy people don't like to get on the front lines. It's much easier giving a check to somebody else and have them be the one responsible for making the expenditure. And yes, from my perspective it seems that the demand is still going to be there for this type of activity because even though it may not be necessary, necessity never has anything to do with campaign finance. [Laughter.] Campaign finance is always based on what can we think of now to do that might help, let's go do that.

And there's also this kind of perverse incentive involved in that it's often the case it's much better to have some group that's not linked to the party running the negative attack so that the party doesn't get involved in that really nasty ad, and in fact can come out and say those people are really mean, they shouldn't have done that. We would have never run that ad, but allowed the ad to get 1,200, 2,000 points behind it before it goes away. So that as a result I think you're still going to see this type of

activity particularly depending on how this all works out, if you've got a Senate race that looks like there may be three, four or five seats really up to grab, I would put some pretty good money that you'll see some 527 activity in those races.

MR. MANN: Thank you all very much for coming. We are adjourned.

APPENDIX

Table1

National Party Fundraising: 2006 Election Cycle (As of August 2005)
(in $ millions)

	2005 (Aug.)		2003 (Aug.)		2001 (Year End)	
Party	*Receipts*	*Cash*	*Receipts*	*Cash*	*Receipts* (Hard)	*Cash* (Hard)
Republicans						
RNC	75.6	34.9	69.6	24.6	67.3	34.4
NRSC	25.0	8.2	18.4	5.9	25.0	12.0
NRCC	48.8	18.0	55.9	7.2	41.6	9.8
Total	149.4	61.1	143.9	37.7	133.9	56.2
Democrats						
DNC	38.4	7.8	26.3	7.8	28.5	2.0
DSCC	27.4	16.7	13.6	1.8	14.5	4.1
DCCC	27.7	5.1	17.3	4.6	16.7	1.9
Total	93.5	29.6	57.2	14.2	59.7	8.0
Totals	242.9	90.7	201.1	51.9	193.6	64.2

Source: Based on reports filed with the FEC. Cash totals account for any debts or obligations owed by the committee and thus represent net cash-on-hand. Figures are not adjusted for any transfers among committees.

Table 2

National Party Fundraising: 2006 Cycle vs. 2002 Cycle (As of August 2005)
(in $ millions)

	2005		2001					
	(Aug.)		(Year End)					
Party	*Receipts*	*Cash*	*Receipts*			*Cash*		
			(Hard)	(Soft)	(Total)	(Hard)	(Soft)	(Total)
Republicans								
RNC	75.6	34.9	67.3	48.1	115.4	34.4	5.9	40.3
NRSC	25.0	8.2	25.0	23.8	48.8	12.0	9.7	21.7
NRCC	48.8	18.0	41.6	28.2	69.8	9.8	5.5	15.3
Total	149.4	61.1	133.9	100.1	234.0	56.2	21.1	77.3
Democrats								
DNC	38.4	7.8	28.5	29.8	58.3	2.0	3.7	5.7
DSCC	27.4	16.7	14.5	20.7	35.2	4.1	14.3	18.4
DCCC	27.7	5.1	16.7	18.1	34.8	1.9	7.5	9.4
Total	93.5	29.6	59.7	68.6	128.3	8.0	25.5	33.5

Source: Based on reports filed with the FEC. Cash totals account for any debts or obligations owed by the committee and thus represent net cash-on-hand. Figures are not adjusted for any transfers among committees.