

THE BROOKINGS INSTITUTION

CAMPAIGN FINANCE IN THE 2012 ELECTIONS:
THE RISE OF THE SUPER PACS

Washington, D.C.
Thursday, March 1, 2012

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P R O C E E D I N G S

MR. MANN: Ladies and gentlemen, welcome to Brookings. I'm Tom Mann, a senior fellow here at Brookings, and am delighted to join with my long-time colleagues, Trevor Potter and Tony Corrado, to talk about money in the 2012 campaign and, in particular, the evolution, the role, the development of so-called super PACs.

I guess Eliza gets credit for having named them that. They actually now, with the FEC, have a formal title which is, I believe, Independent Spending Only Political Action Committees. Have I got that?

In any case, it's really quite close. Trevor and Tony play many roles in helping all of us understand the role of money in politics. They have had important positions in this. They are scholars of the subject, they have had practical experience in a variety of ways, and they also importantly each have been instrumental in starting and running two nonprofit organizations that have played an extraordinarily constructive role in helping all of us understand the role of money in politics.

Trevor is founder and president of the Campaign Legal Center, which -- and Trevor, I think we've had our 10th anniversary on that. Its particular focus is really understanding and challenging within the courts and the FEC the law regulating money in politics. And I'm delighted to recognize that. Trevor, of course, is also a former chairman of the Federal Elections Commission. He has an active election law practice, Caplin & Drysdale, and now he's moved beyond his normal rock star status to be election law lawyer for Stephen Colbert. Trevor is going to be discussing the legal development of super PACs in his initial remarks.

Tony Corrado, who also played a role in the development of the Campaign Legal Center, has chaired the Campaign Finance Institute during its 10-year or so period. And I'm happy that Michael Malbin, the founder and executive director of the

Campaign Finance Institute, is with us today as well. We've all come to depend upon their very reliable, creative, and informative analysis of data, as well as some of the research projects that they have launched over the years, including -- most importantly, I think -- small donors.

Tony is a professor at Colby College. He's had experience in campaigns and in the financial side of campaigns, so he's seen it from both ends and is a prolific scholar on the subject.

So I'm just tickled that they are here. We're all sort of co-authors of the Brookings book, *The New Campaign Finance Source Book*. They are nonresident fellows. They are part of the team and here we are ready to go.

Trevor, why don't you kick us off?

MR. POTTER: Thank you, Tom, very much. It's great to be back at Brookings. Brilliant as Stephen Colbert is, you may have noticed that his evening slot for news reporting is relatively short and the segment devoted to campaign finance is about four and a half minutes, so I'm happy that we'll have a longer chance this morning to discuss all this, though I regret to say that I can't promise it will be as funny.

I thought it would be helpful to put where we are today legally in some historical context, before we get to the really fast-forward developments of the last 18 months or so.

If you look back on an entire century from roughly 1900 to 2000 -- that 100-year span from 1907 to 2002 -- what you will see is that there have been concerted and, I believe, successful attempts to address the questions of money in politics. Or put perhaps differently, the corrupting problems of huge sums of money being spent by people who are seeking specific legislative and policy actions and how our society as a whole, and particularly Congress, has dealt with those.

I can think of the four major reforms over that period. One was Theodore Roosevelt, elected on a wave of corporate money, who went to Congress, really an embarrassment, and said we need a different system. We need public funding for the two major parties, which he didn't get, and we need to outlaw corporate expenditures and contributions in elections, which he did get.

Then you go forward to the issue of labor money. From a different perspective, it was Republicans who pushed successfully to restrict the amount of money spent by labor unions in elections, mirroring the corporate ban in '47.

Then you go forward to the Watergate reforms, where the issue was unlimited individual contributions to candidates and undisclosed money in elections. And you have a Democratic Congress that comes up with the Federal Elections Campaign Act, that structure that we still have today, the creation of the FEC, and so forth.

And then, finally, you have McCain-Feingold in 2002, which dealt with the issue of unlimited individual money and corporate money being given to national party committees, and solicited by the President of the United States and the leaders of Congress with the demonstrated tie-in to specific legislation that was sought or opposed. That all came out in the court record. And you had, therefore, a piece of legislation designed to remove what we called soft money, this individual and corporate money from the party committees, as well as to limit the corporate and labor money that could be spent on political advertising, consistent with the Roosevelt corporate ban and the Taft-Hartley ban on labor.

If you look at those, one of the things that's interesting is that there's an obvious cycle there. It's 40 years after Roosevelt before you get to Taft-Hartley, it's 30 years after that to Watergate, it's 30 years after that to McCain-Feingold. I think this is consistent with the views expressed by people like Senator McCain over the years,

namely there is no silver bullet. Society doesn't stay in stasis. Things change, political spending changes, aggressive lawyers figure out ways around the rules, and over time you go back to what I think have been a consistent set of first principles, and Congress enunciates them again, it changes the law to enable those principles to again be the dominant feature in our campaign finance. And those principles have been money ought to be fully disclosed and contributions to candidates ought to be limited -- and to party committees -- so as to avoid corruption and the appearance of corruption.

So that's where I think we've been for the first century, really, looking at this. My view is that those limits for most of that century after those enactments largely worked. It took time for the system to get out of whack, as it did with soft money, for instance, and to have to have another congressional reaction to it. You could have a whole session on issues of enforcement and changing of norms and how it is that corporations that wouldn't think of dipping their toe in politics in 1975 -- because executives had just gone to jail -- ended up 20 years later cheerfully sitting in the Oval Office discussing giving corporate money to a President. But those do change. That's why you have over time the need to go back and restate the laws.

What I think is very different today is, first of all, we don't have a 30-year cycle because we've had a Supreme Court intervention. So we've had a roughly five- or six-year cycle before things have changed radically. And that, I think, is what puts us where we are today and why we're all in this room talking about non-connected independent expenditure only committees.

So let's talk about, quickly, how we got there. The Supreme Court in the *Citizens United* case -- and I will spare you the long lawyer's discussion about how this was essentially a trumped up case, how there were five justices who were determined to get to this, even though it wasn't an issue even raised in the briefings below. The

challenge was whether disclosure applied, not whether the corporate spending applied.

The only reason I flagged that at all is that I think one of the problems we have here is that the Supreme Court took on this huge issue -- and as I will explain -- with a number of unintended, probably unknown consequences. And they did so without briefing on most of these issues, without any trial court record below on them, and so forth. So they were, to some extent, flying blind. And I think they've hit a wall in the process.

But what the Court did was to say that going back to the first principles of the *Buckley* case that reviewed the Watergate law, there is a difference. According to the Supreme Court, going back to *Buckley*, there's a difference between contributions to candidates and party committees and other committees which are potentially corrupting because you're giving money to a political player and they may do something in response or may feel grateful.

So there's a difference between that, and what the Court said in *Buckley* was spending wholly independent of a candidate and a party committee, personal spending. In *Buckley* we were talking about the rights of individuals as candidates to spend their own money and, also, as citizens to go out and take out advertising explaining a citizen's political view to the rest of the polity. And what the Court had said in *Buckley* is because it's not a contribution to a candidate -- you're not giving it to someone to spend, but instead you're spending it yourself -- and presuming it is wholly independent of the candidate or party, then it's not going to corrupt the system.

Now, that itself was a sort of political science flyer. There's no footnote there that says here's why it's not corrupting, here's the evidence it's not corrupting. Instead, the Court theorized that it shouldn't be corrupting in those circumstances. I would submit that it is possible, of course, to come back and say on a fact-based basis,

that hasn't turned out that way and there is the danger of corruption, but we'll get there.

So, in *Citizens United* the Court says if it's not corrupting to engage in independent political speech for individuals, it shouldn't be corrupting to engage in the same speech for corporations. So that's their first leap and that was the key issue that the five justices insisted on reaching in *Citizens United* is should corporations be treated as individuals for the purpose of the independent expenditure limitation in federal election law. And the Court says for this limit, we don't see any difference between corporations and individuals. They ought to be treated the same. Therefore, corporations, also -- even this nonprofit corporation with some corporate money that was doing a film about Hillary Clinton -- should be entitled as a constitutional right to do their film, make their independent expenditure in federal elections.

And the Court, in the course of doing this, says there's no evidence of corruption and, by the way, all of this independent spending will, of course, be fully disclosed pursuant to the existing laws. And that's an important thing. It's in some ways central to our decision. At least Justice Kennedy got eight justices to go along with him in a two-page section of the opinion, which is a paean to the virtues of disclosure.

Shareholders would know how their corporation's money is being spent, and it's left hanging, but presumably, therefore, can do something with that knowledge. And voters will know who was paying for all this advertising, which the Court says is important because then they will be able to judge the advertising by the speaker, that you get information from knowing whether this ad for or against a candidate is paid for by the NRA or the Sierra Club. And if you know where the money is coming from, you'll know more about what motivates the speech, which is a clue for voters. All of that is in the *Citizens United* decision. So, coming out of that, we know corporations can make independent expenditures.

The other shoe to drop was a case called *SpeechNow*, which came out a couple months later and explicitly relied on *Citizens United*. That's a D.C. Circuit case. It had been brought before the *Citizens United* opinion. And what it says is, if you have -- you, anyone, but corporations, unions, individuals after *Citizens United* -- if you have a right to make unlimited independent expenditures and it is by definition not corrupting -- which is why this is a constitutional right, it can't be limited by the government -- then you ought to be able to do so by giving your money to a political committee which will make the political expenditures for you rather than having to do it yourself, provided that that committee only makes independent expenditures.

Again, the thinking is if they're not giving to candidates -- which is what's supposed to be corrupting under Supreme Court doctrine -- and they're simply spending it themselves independently, it should, said the Court, make a difference whether I am Trevor Potter spending my \$10 independently or whether I'm Trevor Potter and I give my money to this independent expenditure committee, other people give the money, they assemble it together, and they spend it. That case, relying on *Citizens United* for the proposition that there's a constitutional right here to do this and, therefore, you should be able to do it collectively, was not appealed by the Federal Election Commission, which lost. And I think it wasn't appealed because the Court had relied expressly on *Citizens United* and the FEC presumably thought that was a pretty direct line.

So there has been a dispute about whether this is really *Citizens United* or whether it's really *SpeechNow*. I would say they are linked at the hip and the two of them together gave us a situation where individuals and corporations and unions could make these unlimited expenditures whereas before it had only been individuals.

And the crucial difference, they could do it by contributing to a group. They didn't have to do it themselves. And I'm sure in the Q&A session we can talk about

what I think are the practical implications of that and my colleagues will have views, but I think that's an enormous difference from where we were before.

So, what is a super PAC now? It is a cover letter, a piece of paper filed with the FEC that says we're a PAC just like everyone else. Here's our treasurer, here's our bank account. We will file our regular reports, but we are an independent expenditure only, non-connected committee, and signed sincerely yours. Which means that where the FEC normally looks at these things and says, you know, you haven't given more than \$5,000 in a year, there's no corporate or union money, instead they look at it and they see \$10 million from an individual, \$2 million from a corporation, and that is permitted because it's only being spent for independent expenditures.

To make it even more confusing, the FEC has then had a series of advisory opinions and rulings where it has essentially said you don't have to be an independent expenditure-only only committee. Instead you can have two pockets and one of them can be a regular PAC and limited, and the other can be your independent expenditure PAC. You just have to account for them in your reports.

So that's where we are. If any of you haven't seen it, my favorite Colbert episode is the one where he holds up the letter and says, so let me get this straight. This is a PAC; it can't take any corporate money. This is a super PAC, it can take unlimited corporate money and the difference is the cover letter. The answer is yes, that is the difference. So, that's how we got to the so-called super PACs, a much easier phrase.

So what are the legal issues that we have here? First, my view is that there simply is a fundamental difference of opinion here as to whether corporations are like people for political purposes. And, you know, there are lots of briefs filed on it. As you're probably aware, that is not an iron-clad rule in the Supreme Court. There are some rights that corporations have; there are other rights that they don't have. The Court

has treated them in different ways over time.

To me the reason this is important in the political world is that corporations in the political world are what I call one-dimensional entities. By that I mean everyone in this room is a person. You have parents or children or relatives. You have political views, you have health care issues, you are interested in education, you have views about whether you want people you know to go off to foreign wars. There are a whole range of issues that we interact with society on that affects how we vote. Corporations don't have that. The people in them do, but, of course, the people in them could have given before *Citizens United*. They could have given in an organized fashion through the PAC, which was individual money.

Corporations, by law, have a single reason for existence, which is to maximize the profits of shareholders. You can be sued if you don't do that as a director. So let me just sort of summarize it by saying if you talk to corporate executives, you will find that they will have a wide range of views about political matters and whether they like one party or the other, and what they think ought to happen with funding and education and taxes and foreign policy. And then you say to them, well, you know, is that what your corporation does, believes, acts on? The answer is, well, not necessarily, no.

Its job is to maximize profits, so it wants to spend its money to elect the people who will give us the lowest tax rate, the best advantage, will help us with the tariff bill that knocks our competitors out. It's a single focus and it's properly supposed to be a single focus on maximizing their economic benefit. And that, it seems to me, introduces a very different element to our campaign system than the multiple ones that voters have that corporate executives as individuals have.

Going past that, here are, I think, the two key problems with the *Citizens United* case as we're seeing it play out as a legal matter. Go back to *Buckley*. The Court

said independent expenditures are constitutionally protected because they're wholly independent of a candidate and, therefore, they can't corrupt -- wholly independent of a political party. Well, that's their standard. They're not saying that all expenditures are. They're saying that those that are wholly independent are constitutionally protected from limitation.

Well, if you look at what we have today, we have a landscape of expenditures that are simply not wholly independent of candidates and parties. I'm not saying they're illegal. The FEC has a regulation that allows most of them. The FEC has issued advisory opinions that allow activity that is specifically coordinated with candidates and party committees. But if you run down the list, you have a group of super PACs that are created to essentially be pseudo-parties. They were the first wave that came out, I think, of American Crossroads. There are Democratic versions that so far have been less active, but what they basically do is they take former party chairs, presidential or former presidential advisors with national names, all the party strategists, fundraisers, TV ad-makers, they create this entity that doesn't have really any member delegates, or anything else, but it can raise unlimited money, and it does so from the people who used to fund the party.

There was an interesting complaint by RNC Chairman Steele, back when he was chairman, saying basically these people are eating our lunch. There are former chief fundraisers, they're soliciting the people who used to be our donors, but unlimited contributions from a small group of people setting up an organization that basically does what the parties used to do, but without any of these limits and now able to take federal funds. And because they have often two pockets, their super PAC pocket which discloses and then their 501(c)(4) pocket which doesn't disclose, they can take money without even disclosing it, which party committees can't do. So, you have those groups

that are essentially pseudo-parties.

Then this year, really, only, we've developed this thing called a candidate super PAC. Just think how that reflects the Supreme Court jurisprudence here. The candidate super PACs, what Mitt Romney has referred to as "my super PAC," are created by people closely associated with the candidates. That's the whole point. They are created by the people who used to be the candidate's lawyer, for many years were their chief fundraiser, are the business partner of their campaign manager. The fundraising operation is done by people who for years have been associated with the candidate.

In some cases now -- this is moving so fast -- the chief fundraisers travel with the candidates and appear on stage with the candidates, but presumably don't talk about the one thing the FEC regulation prohibits, which is the actual content of the ad and where it should be run. Because the FEC's view on wholly uncoordinated has become did they discuss the specific ad and did the candidate request it or approve it? Which is a whole different question than what the Supreme Court was talking about. So you have these groups closely associated with candidates.

The FEC has said that candidates may, in fact, appear with these groups and solicit for them, not unlimited amounts because that would still be a violation of McCain-Feingold, but up to the federal limit of \$5,000. That doesn't matter. What they can do is appear and say this group is doing good work, it is really helpful to me, I want to thank you all for being here. What more does a potential donor need by way of security that they're giving to the right group?

And this gets you back to the corruption issue. If you are, effectively, only one thin veil away from making an unlimited contribution of corporate money or individual money to the candidate, instead you're doing to the group the candidate has

blessed, aren't you in a situation where you have the same corruption -- appearance of corruption problem that you had with contributions, which the Court has said can be regulated? So, as I say, that's an issue that the Supreme Court has not grappled with.

There is this Montana case coming up where the state of Montana says our prohibitions on independent expenditures by corporations are constitutional because we can show a history of corruption by corporations in our state elections. That doesn't really deal with what I think is becoming the fundamental issue, which is the spending that we are seeing by these groups is not actually independent spending of the sort the Court said was constitutionally protected. But I'm not sure that issue gets addressed head-on in the Montana case.

The other thing that happened in *Citizens United* is the Court said that this spending will be fully disclosed. They presumably were reading McCain-Feingold, which says basically that any spending within 60 days, at least, of an election that mentions a candidate has to disclose the sources of the funding of more than \$1,000 for that spending. So that's pretty straightforward if you're on the Supreme Court. They were evidently unaware that there's an FEC regulation, there's an explanation of justification for it that says, no, no, it doesn't really mean what it says. It, in fact, only refers to contributions that are given, specified, earmarked for particular political advertising.

And then you had a dispute at the FEC in a deadlock where essentially the position now is you have to give money for a particular ad -- which may not even have been made, so that would be impossible -- in order for the donor to be disclosed. So you've ended up with sort of the reverse of what McCain-Feingold intended for super PACs.

And then, as I mentioned earlier, you have these other groups -- c4s,

c6s, et cetera -- which can be players, can under *Citizens United* make independent expenditures even though they're corporations, even though they have corporate and labor money. And those groups, because they were never intended to be political committees, political entities, don't have to disclose their donors. They report to the IRS, but that is not made public. So, effectively, we are now in an election year, in the twinkle of an eye, where spending can be unlimited. Contributions to these PACs can be unlimited -- corporate, labor, individual money -- and disclosure is essentially voluntary.

It's easier to disclose. You give to the super PAC, the money is 100 percent spent on politics, but if you don't want to disclose, you can give to a c4 or a c6. There will be various -- it may not be as effective, but they can take out the same ad. They can still say, you know, vote for this person, the other person would be a terrible President. So that's the legal description of how we got to where we are.

I think at this stage Professor Corrado is going to tell us what this state of law means for the political system and the money we're seeing spent in this election year. Thanks.

MR. MANN: Before Professor Corrado comes up I want to welcome our live webcast viewers and for all of you to realize that if you're moved to Tweet, there is the hashtag: #BISuperPac. We'll be turning to questions from the live audience here as well as from the web audience.

Now to Tony.

MR. CORRADO: Thank you, Tom. I want to thank you all for sharing your time with us this morning. And I have to say that it's quite a difference, I think it was about four years ago, Tom, that I was here with you at about this very same point in the presidential race, where Tom had brought me down from Maine to talk about the remarkable rise in small donors and the power of small contributions in the presidential

race and the role of the Internet as a fundraising vehicle. Today he asked me to come down to talk to you about what role millionaires and billionaires are playing in the presidential race. So I think that alone shows us the difference that we're seeing underway in terms of the financing of our campaigns.

And I think perhaps the best way to give you some idea of this is to build on the legal developments that Trevor just noted, to talk about what this is starting to mean in terms of the flow of money that we're seeing in our elections by perhaps casting 2010 and what we're seeing in the presidential race so far as two examples of what we can expect as we look forward to this election year.

In the 2010 midterm elections, groups not affiliated with the parties, or at least groups other than political parties -- PACs, super PACs, labor unions, 527 committees, nonprofit organizations -- reported spending \$290 million on independent expenditures in support of a candidate or on electioneering communications under the McCain-Feingold law, the advertisements that are broadcast close to an election that feature a federal candidate. That was more than was spent on independent expenditures and electioneering communications by non-party organizations in the presidential year of 2008. And it was five times more than we saw in the previous midterm of 2006.

What was clear is that there was an emerging trend towards more and more of this non-party organization spending and that, for the most part, much of this money was coming from sources that were not available to the party committees. It also just represented only a piece of the pie because the \$290 million that was reported didn't include other monies that these organizations spent on election-related activities, didn't include spending on issue ads that did not count as electioneering communications and had to be disclosed, didn't include the non-broadcast activities and much of the voter registration and voter identification programs that they had expended monies on, which

were not required to be disclosed.

Of what they did disclose, what we know is that, you know, super PACs were not the dominant part. In fact, about \$65 million was spent on the non-connected independent expenditure only political action committees. I myself have been looking for a new term for this, thinking I have to write about this for Brookings in another year, and what am I going to call this? And I'm sure the editors are going to say this is too long. Super PAC seems more convenient. But I'm still searching for a term.

What was important was that of this money about \$65 million came from super PACs, in part because, as Trevor noted, this was a very late-breaking development. It wasn't until the court cases had been issued and you had the *SpeechNow* decision that this was an option available to these organizations. So just to give you some idea, the most notable committee, the American Crossroads committee -- the pro-Republican conservative organization associated with Karl Rove -- they were the top super PAC spender in 2010. They spent \$21 million, at least reported spending \$21 million, but they didn't form until the end of July of 2010.

In fact, I was checking their FEC organization statement before I came down and they basically got together towards, you know, the end of the summer and managed to amass that amount of money in fairly quick succession. The top spenders were there for many of the other groups that were unleashed by the *Citizens United* decision or groups that have traditionally been involved in some of this campaign activity. The top spender was the Chamber of Commerce at \$33 million in reported spending on these independent expenditures. Two nonprofit organizations associated with American Crossroads reported a total of some \$43 million and 2 labor unions reported \$29 million.

We're seeing in 2012 the emergence of a different pattern in many ways where the super PACs are going to play a much more prominent role. They have now

gone through the learning curve. They have more or less established what they are going to be capable of doing legally and they have now been shifting to this new model. And we can see this most clearly from the activity that's just been reported so far.

Through January, super PACs -- particularly the major super PACs that are amassing funds for this year's federal elections -- have already raised \$126 million. And that includes \$66 million that is just being raised through this point by these committees supporting specific candidates in the Republican presidential race. So that gives us some idea of the steep upslope in fundraising that we're beginning to see.

Of the money that these committees are amassing, they're able to raise money quickly because of the fact that they're not subject to contribution limits. And as has been widely reported, most of the money to these candidate-specific groups is coming from a relatively small handful of donors. I think it was *USA Today* that first noted 25 percent of the money that had been raised by these committees came from 5 donors, so more than \$30 million.

If we look at the various PACs that have allied themselves with the Republican presidential candidates, in just about every instance the bulk of their funding comes from a handful of donors. In most cases, three or two or one donors at this point are responsible for the bulk of the funding. The one exception is the PAC that has allied itself with Mitt Romney, Restore Our Future, which has engaged in broad-based fundraising in comparison. Most of their money has come from 24 donors who have each given at least \$500,000, and that accounts for more than half of the \$36 million that they have already raised. And that includes 10 donors who have each given at least \$1 million.

So we have gotten into a very rarified atmosphere very quickly and, as a result, what we're seeing I think are two important things. One is that the super PACs

have developed a very outsized and influential role in the presidential race. And I think one reason for that is obviously the fact that they're not subject to contribution limits, but it's also the case that they have great incentive to participate in this election, in large part because the candidate fundraising has been so tepid. And I just want to make a point of this because I think it forms an important context for thinking about the presidential campaign, which obviously is on everyone's minds at this point.

We have distributed in your packets some of the fundraising analyses done by the Campaign Finance Institute. We provide detailed examinations that are done by Michael Malbin with Brendan Glavin of our staff. For those of you who are watching on the webcast, the analyses of the reports through January is available on the Campaign Finance Institute website, www.cfinst.org.

And on February 27th, we issued a press release that summarizes where we are. And there were a couple of things that struck me about this.

First of all, if you look through the end of January, the Republican field has raised relatively little money. They've basically raised \$145 million and spent \$133 million, which sounds like a lot of money, of course, but if you look at that in the context of a presidential race, you know, that's less than half of the amount of money that was in the Republican field in 2008 or the amount that had been spent by this point in 2008. By this point in 2008, the Republican candidates had spent \$277 million. The Democrats had spent over \$300 million. So if we add the candidate fundraising and the super PAC spending together at this point, we're still trailing where you were in the Republican race last time around. And, in fact, this year's Republican field has raised less than the Democratic field at this point back in 2004. They've raised less than the Republican field in 2000. So it really has not been a very strong fundraising on the part of the Republican candidates.

One other way you might think about this is Mitt Romney has essentially raised about as much money as he raised from donors in 2008 at this point in 2012. In 2008, he had more money because he put more than \$40 million out of his own pocket. The super PAC has essentially replaced that money. Friends and allies went out and raised some money so that Mr. Romney wouldn't have to write another big check. Instead, they're writing the big checks and letting the PAC do the work.

What this means, I think, is a couple of things. First, one wonders if there's a bit of a chicken-and-egg problem here, that candidates are now capable of depending more on these outside organizations, capable of depending on their allied super PACs, and, therefore, there's less pressure to raise money internally because of the fact that they know that their funds are essentially being supplemented by what is a parallel campaign, basically following the same strategy, the same imperatives, the similar types of approaches that a presidential campaign would be pursuing.

My sense at this point is that it's difficult to answer this question, in part because it raises the issue of individuals out there instead of raising a million dollars for a campaign, just writing a million-dollar check to the PAC and calling it a day. Or is it the case that the candidates are experiencing a lot of weakness in fundraising? Right now my sense is that the weakness in fundraising is, in some ways, the more important issue. And the reason why I raise that is because as you look at the breadth of the Republican fundraising, as you look particularly at the amount of small contributions coming into these campaigns, you know, I think it's fairly anemic.

What has surprised me most so far was Romney's fundraising in January, where he only took in about \$1.2 million in small contributions, less than half of any other Republican contender in the month of January; nothing like the \$36 million that Obama raised in January of 2008, not even much like the \$11 million that John McCain

raised in January of 2008. I was surprised at how little he got out of the announced victory in Iowa and the victory in New Hampshire. And as a result, it has made these candidates much more dependent on this outside funding, and their wealthy supporters have been more than happy to write those checks, particularly given the status the race, which has been so volatile that there's a real advantage to keeping your horse in the race because it seems this race is going to keep going on for a while and you never know when you might win a Derby.

Consequently, what we've seen so far is that in 2012 the super PACs have played a major role in the presidential campaign. While it's the case that money isn't determinative, and it has been the case that where some candidates have outspent others they have still won, it's clearly the case that we are seeing a very different pattern than what we have seen in the past.

To give you some idea of that, if you look at January of 2008, Republican candidates, you know, not counting Hillary Clinton and Barack Obama who were dwarfing these sums, but the Republican candidates spent \$49 million on advertising in the presidential race. At that point independent groups had spent \$1.1 million on advertising. Compare that to what you're seeing this time around, where in January super PACs spent more than \$15 million advertising as compared to the candidates that spent \$13.7 million.

What we're seeing, and this has continued as we've now moved into February, as we've seen in Michigan, as we will see on Super Tuesday, as we will see in any states going forward, the super PACs are playing a major role in the financing of the advertising campaigns. In fact, in Michigan, 58 percent of the advertisements were sponsored by the independent committees allied with the candidates as opposed to the share produced by the candidates. So that what we have seen is that these parallel

campaign organizations have essentially allowed candidates to remain in the race.

In the past, cash-strapped candidates running on a shoestring rarely won and were rarely considered viable if they stayed in. Why? Because they lacked the money for media advertising, they lacked the cash needed to sustain organizations.

And if you look in 2012, Gingrich and Santorum have clearly been cash-strapped candidates. By the end of January, their available cash wasn't very far ahead of their debts. They weren't raising substantial amounts of money, certainly not the types of money that give you the free cash to both pay for a field organization and make substantial advertising buys. And so what has happened is that the super PACs have propped them up and kept them in the race. Essentially a couple of their wealthy supporters have been willing to front the money to provide the advertising they need so that the candidates have enough money to keep traveling and at least solve the problem of keeping some media advertising going. The organization still falls short.

For those of you who weren't paying attention, Rick Santorum never got around to even opening a campaign headquarters in Michigan. They have very little organization out there. And we're now reaching that point in the race where we'll start to see that become more important as you see on Super Tuesday already, where Gingrich and Santorum have missed the ballot in Virginia; Santorum has failed to file delegate slates in some of the congressional districts in Ohio, where it's winner take all by congressional district, so he's ceding those delegates. And that aspect of the campaign is becoming more important. But nonetheless we have a situation now where one of these committees with simply the largesse of a single donor can essentially intervene in a race and help a candidate in a way that is substantial and meaningful beyond the types of intervention we saw in the past, where these groups were operating under the \$5,000 contribution limit.

It's also the case that we're seeing more activity early when you start to move beyond the presidential race. In fact, every indicator we're seeing so far suggests that the super PACs are going to play the prominent role in much of the spending that takes place by independent groups. And you see that on almost every front.

If you want to look ahead to the presidential general election, we're already seeing organizations like Americans for Prosperity and Crossroads GPS, two of the nonprofit organizations that Trevor mentioned, having already spent almost \$9 million on advertising in targeted media markets in the presidential general election states -- or at least I'm assuming they're targeted presidential media markets. It may be that they have other reasons for advertising in Orlando; Green Bay, Wisconsin; Albuquerque; Cleveland, Ohio; and some of these other markets. But they seem to match pretty well with the presidential general election battlegrounds.

We're already seeing labor unions become much more involved, including direct expenditures, where labor unions have already spent more than a million dollars in Florida. One of the unions conducted a million-dollar ad campaign against Mitt Romney. Labor unions have already provided \$4 million in seed money for the Democratic PACs that will be responsible for much of the spending in the congressional elections next fall. And we've also seen the AFL-CIO create its own super PAC, so that they can use their treasury funds in that way and solicit large contributions to use their particular voice in some of these elections.

The Chamber of Commerce has already spent more than \$3 million on advertising in targeted congressional races, what is said to be the beginning of an initial \$10 million wave of advertising in some of these key congressional battlegrounds, and some estimates as high as \$100 million for the target for their spending this cycle. And a number of PACs and nonprofit organizations have begun to target Senate and House

races, including just in Massachusetts alone I believe we've now had more \$4 million in spending by non-party organizations and these races are just getting underway.

So we're seeing more money spent early. We're seeing more money in groups becoming engaged in primaries and key congressional races and contests. And I think that this is just a taste of what is going to be coming.

And I think the best indication of that is the shift of position on the part of President Obama with respect to these groups. That example we saw just, I guess, a week or two ago now, where we saw the triumph of experience over hope -- -- of practice over principle, of suddenly a position where having been opposed to these groups for so long and basically having adopted a campaign strategy dating back to 2008, where it was very important to the campaign that they control the monies that were being disbursed on messaging so that they had centralized and unified message control, now basically sanctioning fundraising for the group that is allied with him and encouraging individuals to donate.

And I expect that we will now see a number of campaign officials, a number of administration officials starting to attend fundraisers for Priorities USA and some of the other PACs. That will be part of what we will now begin to see as much more aggressive fundraising by these committees. We saw that last week when we saw Rick Santorum attend a super PAC fundraiser for his Red, White, and Blue fund that is allied with his campaign, and we are going to see much more of this.

We are also going to see much more money coming in from corporations and labor unions. How much more and how much more of this independent group spending we'll see will be difficult to discern. We'll know how much more independent expenditure and electioneering communications is spent, but much of the money will continue to remain hidden from view. It won't be clear how much money is being shifted

from activities that used to be undisclosed to activities that are now in the light of day, but it is clearly the case that there will be greater corporate funding.

We've already seen in the case of American Crossroads more than a third of their money coming in from corporate sources. The Mitt Romney-related Restore Our Future super PAC has already raised about 23 percent of its money from corporate sources. And in the case of some of these Democratic or pro-Democratic or progressive Democratic-oriented independent super PACs we've started to see some substantial money coming in from labor unions and I expect more will be following.

The problem is that because of the FEC rulings on disclosure, as Trevor noted, even in the case where we have groups reporting how much they spend on electioneering communications in some of these activities, we won't know the source of the money because of the FEC's narrow interpretation of the disclosure rule. If you want a model: In 2010, groups reported about \$70 million in electioneering communications and attached to those expenditures were \$6.9 million in contributions. Basically one 1 out of 10 dollars in terms of the source of these expenditures was disclosed. And I expect that because most of that money was -- that was disclosed was on behalf of a progressive group that fights for campaign reform, we'll probably see an even smaller percentage this time around.

So in this election we will see more undisclosed money than ever before, more secret funding than ever before, and more undisclosed money will flow in the election to the point where the secret slush funds revealed in Watergate will basically look like relatively small change. So a much more prominent role for super PACs this time around, more undisclosed money, and a much, much more expensive presidential campaign ahead.

MR. MANN: Tony, thank you very much. It's a wonderful start. We're

going to have a little discussion here and then I would very much welcome your questions from those of you present here at Brookings and those of you tuning into the live webcast.

Trevor, if I could begin with you, there's been a lot of blowback against the assertion that *Citizens United* was the key factor that directly or indirectly led to the formation of and expansion of so-called super PACs. They say, why, look what happened in 2004 with George Soros and Peter Lewis on the Democratic side, with the Swift Boat gang on the Republican side. What couldn't they do then that they can now? And can the differences be traced to *Citizens United*?

MR. POTTER: Right. I do think *Citizens United*, both legally and in terms of the political environment, was a game-changer. *Buckley* had said that individuals and only individuals could make these independent expenditures. That meant you had to go out, put your name on the ad, which I think is a significant difference, and then you would have to hire a team to produce the ad, figure out where to air it, all those things.

Where we are now is that individuals can give their money to a group of professionals, they will be solicited by professionals associated with the candidate or the party committees. Those groups will go out and do all the work, so all you have to do is write the check, and not only does your name not appear on the ad, but, as Tony just explained, in many circumstances your name never appears in any report as a donor, as one of the people paying for the ad. So you've gone from fully disclosed with all the implications that has for what an individual wants to put their name on to essentially secret speech that they've had very little to do with except deciding to write a check.

Now, the question is where does Swift Boats and those groups, the 527s, fit into that picture? And the answer is that McCain-Feingold had said, and the law

since Watergate had said, that if groups get together and engage in political activity to elect or defeat federal candidates, they become a political committee. And as such, they have to register with the FEC, they have to disclose their donors, and crucially they are limited because they can't take contributions of more than \$5,000 per donor. That's what the law was before McCain-Feingold and afterwards.

What we had for a bubble of time was an attempt to get around the law by creating what were called 527s, groups that registered with the IRS, said we don't have to register with the FEC, we're not a political committee, our principal purpose is not to spend money to elect or defeat federal candidates, therefore, we're not subject to the \$5,000 political committee limit, which was the crucial fact. That did occur in 2004. Groups spent money; nothing like the sort of money we're talking about now, but they spent money by giving to those 527s. Complaints were filed.

After the election, the FEC found that, in fact, these groups had violated the law. They should have been federal political committees. They spent their money on political ads for or against candidates. Those were not so-called issue ads, which was the other loophole, that just talked about issues and happened to mention candidates. They crossed the line and they made it clear they wanted someone to vote for or against that candidate. And those groups were fined that were not large fines, so you could argue it's the cost of doing business, but it established a clear legal precedent. It meant in the future that lawyers advising similar groups couldn't say, well, it's okay or it's a gray area. They had to say, well, the FEC has said that this sort of activity should have registered as political committees. Anything over 5,000 is an illegal contribution. And if you go ahead and do that again in the next election, it is potentially a criminal violation. It's a knowing and willful violation referable to the Department of Justice.

Now, that requires an act of FEC willing to do that. But legally, it put

people after the 2004 election, after those FEC investigations back where it was not really possible to do that sort of activity in the next cycle. And indeed, in 2008, everyone has reported there was relatively little independent spending and has attributed it to the candidates because both McCain and Feingold -- I'm sorry, McCain and Obama, for their own reasons, discouraged that spending. I think Obama had enough money in his campaign that he didn't want the distraction of independent spending. McCain, who could have desperately used it, shut it down, saying that if anyone gives to these groups, they're never entering the door of a McCain White House. Not surprisingly, those groups went right away because they couldn't raise any money.

So that's what the press has reported. I think that's all true. But legally, as a lawyer, I can tell you that there was another reason you didn't see a lot of that spending in 2008, and that is it wasn't clear there was a legal path to do it through the 527 mechanism after the 2004 election and the enforcement actions.

So, yes, you could do it through c4s or c6s, but you still had -- it had to be an issue ad, it couldn't be express advocacy. The whole thing was gray, murky, difficult, and not an easy path for someone who wanted to spend an unlimited amount of money until Citizens United. Presto, it's now clear the Court robustly says -- by four, but still -- robustly says this is great stuff. This is free speech. You ought to go out and do it. It's a good thing to do and it's legally permissible in unlimited quantities. And then *SpeechNow* ties that in a bow and says and you don't have to do it yourself. You can give it to a group that'll do everything for you and, you know, by the way, your name may not even appear in the record. And that I think is what changes everything.

MR. MANN: That makes sense. Tony, you hinted that the really critical super PAC activity in this election cycle may not be in the presidential race, but really in contests for the House and the Senate, where majority control is up for grabs in both, I

would submit. What's the evidence now that some of these super PACs are beginning to plot strategies or beginning to intervene already with advertising in key races? And are we also seeing these, if you will, candidate-specific super PACs in the congressional arena as we have seen them in the Republican presidential primary struggle?

MR. CORRADO: We're already seeing preliminary activity. You know, as I mentioned in my opening remarks, there's a number of places you can look to see where these committees have started to spend money, particularly some of the nonprofit organizations were spending money last fall, in part to get some issue ads out there and to do some issue advertising that they could then count on their balance sheet so they could do more political advertising in the fall of 2012 and make sure that the majority of their spending still wasn't political spending.

If you look in the Massachusetts Senate race, Nevada Senate race, Ohio, we've already seen ad campaigns underway. I'm looking forward now that Olympia Snowe has decided that she isn't going to seek reelection to a raft of advertisements that I'll be able to watch for the next 10 months in Maine, given the open state of that seat.

MR. MANN: Lucky you.

MR. CORRADO: And I think that, you know, we're also going to be seeing some of these candidate-specific committees. There have been a couple that have already been created in support of a particularly candidate. I know that we've seen two or three created. That will be the next evolution.

I think most of the funding, though, is going to come from a much more coordinated effort that will be run through a couple of principal PACs, with American Crossroads and the Chamber kind of leading on one side, and if these Democratic committees ever get any funding, a House and a House majority PAC on the other side playing the principal role. And the amounts will be substantial. You know, let's not forget

in 2010, despite the late-breaking nature of some of these developments, in 8 Senate races \$109 million was spent by independent groups, including more than 20 million in Colorado and at least 10 million in 7 other Senate races. That's a significant amount of money.

If you look at the House races, you had the case where in nine of the most contested House races, the independent groups spent more than the two candidates combined. You had 100 races where at least 1 of the candidates was outspent by the independent groups, so that they can bring enormous sums of money into these races. And when you look at the figures it doesn't begin to suggest the effect they have because most people are looking at how much did the candidate spend and forgetting that that might have been over two years or, in the case of a Senate candidate, six years, where most of the spending by the independent groups is coming in September and October.

And I think this year what you're going to find is that in these key races, the independent spending is going to begin much earlier. I've been particularly interested, Tom, in instances where we're now starting to see, for example, there was recently a \$1.8 million advertising buy against a number of what were thought to be fairly safe liberal Democrats in the House. The idea being put them on the defensive, make them spend money, let's see who we can soften up, and then take a look in June at where we are for the contest ahead.

But I think particularly in the Senate races we're going to see an enormous flow of independent money and we're going to see candidate-specific groups set up if it's a real bare-knuckles tight race. And the real problem is going to be not the money, but how to spend it. Because I'm expecting you're going to run out of advertising space and spots to buy. It's going to be as simple as that in four or five of these states.

MR. MANN: Yeah. Trevor, you want to come in?

MR. POTTER: Well, I think certainly you're going to see these groups being very active in Senate races and House races. One way to look at it is to say that right now the action is in the Republican primary side, and that's where \$5 million can go a long way as we've seen in Iowa and then we've seen in South Carolina, where these groups can step in and really change the dynamic of the race. Well, the same thing applies to a Senate race. When you move to the general election another \$5 million spent on advertising in the presidential campaign is really going to be barely noise. You take that and you spend it at the last minute in a Senate race, where the candidates -- that may be more than they've spent themselves, and you can really make a difference.

We are seeing a development where members of the House and Senate and the leadership on both sides have been essentially blessing super PACs, which I think will then turn around and see if they can raise money. One of the -- you create these super PACs now, you get associated with the Democratic or Republican leadership. That doesn't mean they're going to be funded at this stage; that's not where the action is. You don't have perhaps a target list because it's early. What I think you will see is in the summer, those groups then go out and find out if they can raise money and make their pitch to donors that they can actually affect the control of the Senate or knock off key members of the House. And then you'll see that spending.

One thing I would say, and I'm channeling here the spirit of Fred Wertheimer, the great campaign reformer and head of Democracy 21, is we are assuming that there simply are no limits here now. And that's the gist, I think, of what you're hearing.

I would like to point out that there are good legal arguments that can be made that some of this has already gone too far. The distinction between a candidate

endorsing a super PAC, but only soliciting hard money in \$5,000 limits, is a somewhat fine distinction that can get lost in the haze of battle. I think it's possible candidates will, in fact, solicit illegal, unlimited contributions. McCain-Feingold says that not only are candidates limited, but agents of candidates are limited. And so you look at some of the fundraisers now in this presidential cycle where they are raising money as authorized agents of candidates and then they're raising money for the super PACs, the law would appear to say they can't do that.

I know that Democracy 21 has filed complaints already with the Department of Justice on the activity of some of these groups. And I think it is possible that we will find out that some of what is going on and some of what does during the rest of the cycle has crossed legal lines that are still there, specifically the raising and spending of soft money by federal candidates and their agents. So it is not a free fire zone, but I will admit there's a great deal of fog on the legal battlefield.

MR. MANN: Yeah. Tony, part of Trevor's comments touched on a subject that you mentioned, but maybe you could elaborate, the euphemism "independent groups" is indeed a euphemism, that most of the super PACs are now allies of, if not direct agents of, both candidates and individual political parties. So much of the time we hear, well, it's the parties are weakened because of the proliferation of the groups. But alas, the groups are operating on behalf of the parties in many cases. Do you see that developing further in the congressional races?

MR. CORRADO: Yeah. I think basically what you're going to have it's going to be more of a team sport. You're going to have two teams, two sides, with the party committees continuing to play an important role.

You know, in all of this, you know, we tend to forget about the fact that the parties still do raise substantial sums of money and will spend substantial sums of

money. In the last midterm the Hill committees alone spent \$182 million independently in support of their candidates. In the last presidential year they spent about 225 million. So there's going to be a lot of party support in these congressional races.

The difference is if you look at 2006, in terms of the relative prominence, the party was the more dominant voice. In those races where candidates were being outspent in the final weeks of a campaign, particularly on television, it was the party doing spending on their behalf. What's happened in 2010 you saw a shift. What you saw was that it was independent groups who were responsible for the majority of the spending. So that to give you, you know, just an idea, you know, a party independent expenditures in communications were 4 to 1 greater than independent group independent expenditures in 2006. By the time we get to 2010, these groups are outspending the parties almost 2 to 1. So what happens is they will act as an allied organization. They will all be spending in the same races. They will all be focusing on many of the same issues. The difference is the division of labor will be that candidates are able to essentially focus on the positive advertising and the parties and the outside groups will carry the negative advertising or the attack ads because they're somewhat less accountable.

And I think the other development we are likely to see that Trevor didn't mention in his beginning where he was talking about the partisan-allied PACs and the candidate-allied PACs, I think that we will see a number of more specific group or issue-oriented PACs that will be more active. Whether it's the AFL-CIO or the NRA or a coalition that forms, for example, on, you know, social issues that will intervene in targeted races or in targeted markets to push that issue where they think it will be valuable.

MR. MANN: One last question before we go to questions from our audience. And Trevor, this is for you. It really picks up, in part, on the whole Colbert

experience with, what is it, Americans for a Better Tomorrow --

MR. POTTER: Americans for a Better Tomorrow Tomorrow.

MR. MANN: -- Tomorrow, thank you. Is there any sign that you can detect that members of the Supreme Court are feeling any discomfort, if not -- if not outright embarrassment over their decision? We know that two members in the minority side are urging using the Montana case as a means of reviewing the factual underpinnings of the decision, but is there any sign that Justice Kennedy is getting buttonholed at cocktail parties and feeling uncomfortable? And could you imagine the Roberts Court really reconsidering this decision?

MR. POTTER: Well, I think the only window certainly that I have, and I think most Americans have, into what the justices are thinking is through their public statements. And the five members of the majority in *Citizens United* have been pretty clear so far that they think that was the right decision. I thought the Ginsberg-Breyer statement in connection with this Montana case, that they thought this was an opportunity for the Court to take another look at *Citizens United* in light of what is happening this year, clearly is an invitation to their colleagues, which I don't think they would have made if they didn't think the case was so strong, the facts were so strong, that things have gone not as advertised in *Citizens United*.

To me the answer to Tom's question is actually the telling drumbeat we're beginning to hear -- the George Will column of today -- that this wasn't all the fault of *Citizens United*. It's really unfair to either blame or credit *Citizens United* because it's really a bunch of other things. That, to me, is pretty interesting where even the people who defend Citizens United are now a little bit back on their heels trying to say that what we're seeing isn't the result of Citizens United. And I think that tells you that probably far more than people initially thought, the popular reaction to where we are is that the Court

made a wrong turn in *Citizens United*. And I think that's becoming the view of a broader range of the population.

MR. MANN: Yeah. Thank you. Let's begin with -- do we have a question from our web land? Let's start.

SPEAKER: Yes, we have a question from Michael Bakal and he's in --

MR. MANN: A little louder.

SPEAKER: Sorry, he's in Washington, D.C. And he asks what rule did the *Wisconsin Right to Life* case play in increased spending by 501(c) nonprofits versus how much did *Citizens United* aid nonprofits?

MR. POTTER: I'll answer that quickly. I think *Wisconsin Right to Life*, which came before *Citizens United*, was the first attack by the five justice majority on McCain-Feingold. It opened the door, in some ways perhaps signaled where they were going. But the difference was that *Wisconsin Right to Life* basically said your spending has -- in order to be restricted by McCain-Feingold the corporate spending has to be real campaign spending and if it's what can loosely be called an issue ad, then it is not prohibited, whereas in *Citizens United* they say, well, enough of this stuff between issue ads and express advocacy and where the line is. We're simply going to throw the prohibition out entirely rather than worry about whether it's an issue ad or not. So it was a first step and it opened things up, but only a fraction of what *Citizens United* then did.

MR. MANN: Okay. Let's take a second question and then we're coming right back to you.

SPEAKER: Oh, I'm sorry. Our second question is from Eliza Newlin Carney, who is a writer at the *Roll Call*.

MR. MANN: Hello, Eliza.

SPEAKER: She asks will the outside spending disproportionately assist

the GOP?

MR. MANN: Well, Tony?

MR. CORRADO: My sense is that the outside spending will be to the benefit of the Republicans. You know, there's going to be significant amounts spent on the Democratic side. I mean, clearly the labor unions themselves have said that they will be more engaged in this election than any in the past 20 years, and that's a significant amount of funding.

But it's the case that if you look right now at the agenda facing the Congress and you look at the sun-setting of the Bush tax cuts, if you look at Dodd-Frank, if you look at further financial regulation, the upcoming budget cuts, there is an agenda on which, you know, the interests that tend to be allied with the Republican side have a very high stake in participating. We're seeing more money flow into those entities now than into any of the Democratic entities. And I think it's still an open question as to how much money you're going to see get developed on the Democratic side.

You know, in 2004, when you had the realm of 527s, there was disproportionate funding on the Democratic side compared to the Republican side. We saw last election, in 2010, a substantial advantage for these Republican groups over the Democratic groups. And so far I don't see any signs that that's going to change.

You know, the real question will be to what extent can kind of the President's shift of position and more aggressive fundraising on the part of congressional leaders start to provide some significant funding to these Democratic PACs? You know, we haven't seen much go in yet and, you know, there are lots of theories on whether they were holding back on the funding because they weren't sure of the President's position or they thought the President was going to have plenty of money and the Democrats would have plenty of money, so they didn't need the super PACs. We now have the tacit

admission that we need the PACs, and the question now will be how much funding that tends to trigger.

And that's why in my earlier remarks I said expect to start to see much more aggressive fundraising by these groups because the Democrats want to catch up and the Republicans want an advantage. My sense is there's going to be more money on that side of the equation in a year when, you know, the Democrats have more seats to defend.

MR. MANN: Just on this point, what's the evidence so far from Obama's fundraising that he will be able to match or exceed his small donor fundraising this round?

MR. CORRADO: Well, you know, I think, you know, Obama had such extraordinary fundraising last time around that was the result of the historic nature of the candidacy, the incredibly intense competition in the primaries, the fact that fundraising for him almost became a cultural phenomena amongst some parts of the electorate that, you know, I think he's still going to do very well in small donors. He's developed a great small donor base. He's ahead of his pace from last year, as the CFI results note. You know, but he's not going to keep pace with what he did last time. You know, he's not going to have -- he didn't have a \$36 million January. He's not going to have a \$55 million February. You know, that was extraordinary what you faced last time. And as Michael Malbin first observed, I think, a couple weeks ago, he would have to raise \$50 million a month from here on in to match his total from last time.

He's going to be very well funded. I think just not as much as last time. But this time he also has the Democratic National Committee, where they have been raising money for the DNC. We're going to see a much bigger role for the DNC this time. Last time the Democratic National Committee spent \$7 million independently in support

of Barack Obama, okay? I'm going to go on the record right now: This year they'll spend more.

MR. MANN: God, you're a risk taker.

MR. CORRADO: Putting it right out there.

MR. MANN: Trevor.

MR. POTTER: Tom, I agree with what Tony just said, but despite that, I think it is actually difficult to answer Eliza's question. And the reason is that we're all operating in a backward-looking fashion, which is what humans do and, you know, lawyers and political science do based on what's happened before. And I think we haven't fully grasped the different environment that we are in this year as a result of *Citizens United* and these super PACs.

Sheldon Adelson was asked whether he'd give more money to the Gingrich PAC. And his answer was, well, I might, I might now. I give it 5 million, 10 million, 100 million, I don't know. Well, people sort of laughed and thought that was being hyperbolic, but this is a man who could, in fact, give a billion to the super PAC.

MR. MANN: Right.

MR. POTTER: I'm not saying he will, but what I'm saying is to answer the question of whether the Democrats or Republicans are going to end up with more money is not something that in the past you looked at what 100,000 donors did and you could come up with some conclusions or what 10,000 bundlers did or what today the 100, you know, major donors to these super PACs are doing. This is a matter of what a handful of billionaires could do if they felt so moved; if they felt the future of the country was at stake; if, like Mr. Adelson, they felt the future of Israel was at stake, which he has said is an important motivator to him. Who knows what somebody who has that kind of money would choose to do with it if they thought it was important enough? And we don't

know. And obviously by definition it only takes one of those to change the equation entirely, and, if they chose, spend more than the entire Obama campaign.

Do I think that will happen? You know, probably not, but I'm not a psychologist and I don't know what's, you know, going to motivate an individual person in this environment where they could do it if they chose.

MR. MANN: We know there are conservative and liberal billionaires who have on occasion played in politics. Maybe they're more conservative than liberal, but there's certainly enough to make an incredible difference.

MR. POTTER: But the point again is, yes, I think there are more probably angry conservative billionaires at the moment than there are motivated liberal billionaires but it only takes one.

MR. CORRADO: But that's my point. I think the incentive structure favors the Republican side, although, you know, we now have to, Tom, start to consider what will the implications be of the Facebook IPO as we create this new generation of multimillionaires that might be willing to give to the Democratic side. I guess we'll have to start to think about that.

MR. MANN: And, of course, you're part of that, aren't you, Tony? You got in early there.

MR. CORRADO: I hope.

MR. MANN: Never. Yes, please.

MR. GILBERT: Yeah. I'm Craig Gilbert with the *Milwaukee Journal Sentinel*. How much room has the current Court left in *Citizens United* and other rulings for Congress, if it chooses to require more activity to be disclosed than is currently disclosed? So what's the legal and political (inaudible) --

MR. MANN: Repeat that question.

MR. GILBERT: -- when it comes to greater disclosure?

MR. POTTER: The question is on the disclosure side, how much room is there left after *Citizens United* to require more disclosure? Great question because the answer is so simple for me. A huge role. I mean, what happened in *Citizens United* is eight justices said disclosure is fully constitutional and, in fact, you know, Kennedy says we think it's required now. What we're discovering is that the way Congress wrote it or the way the FEC has interpreted it has not provided the level of disclosure the Court thought existed. But I think they are clear that as a matter of constitutional law you can require extensive disclosure. And they said specifically not just of express advocacy of these campaign ads, but of ads intended to influence the election. So they've opened the gate to broad disclosure, if Congress chooses to, if the FEC enforces it, if the states want to go there.

MR. MANN: Which reminds me, Olympia Snowe's resignation I tie back to many things, but one of them was the extraordinary pressure she felt under to support the Republican filibuster on the disclose bill in the last Congress.

Questions here. Peter? We'll get a mic to you.

MR. OVERBY: Peter Overby from NPR. Going back to the donor --

MR. MANN: Peter, can you turn the mic on?

MR. OVERBY: Oh. It is on. Is that better? Okay.

Okay. Going back to the donor question, when you look at the conservative super PACs as a group or the Democratic super PACs as a group what about the competition among them to get these guys? Are the donors going to spread their money around, do you think, or are the groups going to be fighting for the money?

MR. POTTER: I think the groups clearly are fighting for the money. They're fighting for the mantle that each of them wants to be the sort of official unofficial

party PAC or the official unofficial Senate Democrat or House Republican PAC because then they're going to get the money, they're going to have their salaries paid, their TV consultants are going to make their commissions. And since they can't officially be given the label, there is a certain amount of elbowing going on amongst the groups, a little Darwinian perhaps, to see who ends up on top and closest to the candidate or closest to the party committees and, therefore, the most official of the unofficial groups. I think we've been seeing that and probably will. You have on both sides a range of people who can claim close ties to the parties or close ties to the candidates.

Obviously when you get to the point of having party nominees, as you already do on the Democratic side, I think then you will see a little more designation going on. My impression of what President Obama has said in terms of turning loose cabinet secretaries and so forth to assist fundraising for specific groups is that he is putting his finger on some and saying these are my groups. You can see that happening on the Republican side once you have a nominee.

MR. MANN: Yeah. Please, right here.

MS. LEVEN: Rachel Leven, *The Hill* newspaper. So we've seen the Justice Department investigation requests by Democracy 21 and we've seen a request for the FEC commissioners whose terms have expired to be turned over. What's the likelihood that this could change the super PAC deals in 2012 or does it have to wait until after this election at this point?

MR. CORRADO: I think we are pretty far down the road in 2012, although if people involved with super PACs began to think the Justice Department was actually looking at how independent these groups are and whether they violate initial law that might result in some pulling back. It is still theoretically possible that the President could nominate five people to five vacant FEC seats and there could be congressional

action or, more likely, a recess appointment. And an active FEC that wasn't deadlocked 3-3 on these issues could make a difference. But the clock is ticking, so, you know, my sense is that we pretty much are going to have what we have now for the next whatever it is, eight months.

MR. MANN: Trevor, is that true as well for the IRS, the SEC, the FCC, other groups that have some potential regulatory authority in this arena?

MR. POTTER: All of these have potential roles. All of them have opportunities before them. There's a petition at the Securities & Exchange Commission to require a greater shareholder role in political contributions by corporations. The FCC is dealing with a public notice issue that would require stations to put online the files they have for political advertising and implicitly raises the question of whether stations should be requiring more disclosure of funders of those ads, so that's in the mix. It's unclear where that's going to go.

The IRS, I think, has at the moment buried its head under a very big boulder somewhere. It does not want to be in the partisan crossfire. Some of you may have noted there was an incident earlier this year where it became known that IRS agents were auditing tax returns to find out why gift taxes weren't paid on contributions to c4s, which has been an open issue in the tax law bar for some time and a matter of sort of quiet controversy. It was no longer quiet when the whole thing appeared on the front page of the *New York Times*.

And it was suggested this might be an administration attempt to go after Republican donors to Republican c4s. Republican senators wrote the IRS. And I think somewhat extraordinarily what happened is the commissioner of the IRS announced he was overruling his career staff, there would be no gift tax audits of contributions to c4s until and unless Congress clarified the law. So I see the IRS saying, you know, we don't

want to be on this battlefield. You guys solve this.

So each of those agencies, there is activity out there. I can see in the future actions by them. But, again, whether we'd see anything that changed the playing field in the next couple months I personally think is doubtful.

MR. MANN: Okay. John?

MR. FORTIER: John Fortier, BPC. I was wondering if you could comment on the Presidential Public Financing System in the general election. Are you sure that both the President and the Republican nominee will not take the funds? Will they raise their own money?

And then secondly, you've hinted at this, but on the super PAC front, do you see one large super PAC for each candidate, the one that the President and the candidate bless? And if so, what's the -- what are the amounts of money we're talking about both that they would privately raise for their campaigns and what are the amounts of money a personal super PAC would raise?

MR. CORRADO: I do believe that neither candidate will take the funding, the public funding in the presidential election. I think that that's clear on the case of President Obama. And I think the one lesson that came out of 2008 on the Republican side was that McCain made a strategic error in taking the public funding and they're not going to repeat that mistake again, particularly given the fact that whoever the Republican nominee is is going to be capable of raising substantial amounts of money, certainly much more than was the case for Senator McCain in 2008.

I do believe that you are going to see some sort of parallel committee formed. Clearly on the Democratic side Priorities USA has more or less been given the green light to be the group that will primarily be responsible in the presidential race. I think kind of what's more interesting now is that given what we've seen in the Republican

primaries, John, you're likely to see, you know, let's say Mitt Romney is the nominee, Restore Our Future then becomes the PAC for Mitt Romney, which has two effects. Number one it creates another pool of money for the Romney campaign, but, more importantly, number two, three months ago most people would have told you that they thought American Crossroads was going to be the main super PAC spending money against President Obama. And you may end up having some of these other top-tier PACs freed up from the presidential race to spend more money on the congressional side, which will increase the pressure there.

In terms of the amounts of money, you know, it is not possible in some way to predict what you will see because, as Trevor noted, it largely depends on motive. And you're really talking about, in the case of the super PACs now, not, you know, can we go out and find 1,000 or 2,000 guys to put together \$100,000? You know, what we're now saying is can I find five or six people who are willing to say, okay, I'll write you an eight-figure check? And as a result, it would not surprise me to see tens of millions of dollars being raised by these committees.

Part of the problem is estimating it is that it's also going to be a function of what does the race look like? The closer the race looks, the more competitive the race looks, the more that you have a contest that looks like the possibility of defeating the President, the more the money will flow. If the President actually starts to break one way or the other, that will change the incentive structure. So it's really the type of thing that you can't predict.

What does seem to be clearly the case is that the President's team has decided that whatever their budgeting, in addition to whatever they're budgeting at the DNC, is not going to be enough. And, therefore, they want this supplemental funding now.

MR. MANN: Tony had mentioned earlier the weakness in the Republican candidate fundraising thus far and I would submit that reflects the weakness of the Republican candidates in the field and the belief among many Republicans that only Romney is a plausible general election candidate and President, so it's very hard for the others to do serious fundraising. And now over the course of the primary season, though he remains ahead, he is a weakened candidate. And so we don't -- we really don't know where things look after the Republican Party Convention. And I think Tony's absolutely right, the perception of the competitiveness of the race will influence greatly the fundraising patterns in the subsequent months.

MR. POTTER: Tom, as someone -- the only one up here who bears the scars of the McCain campaign fundraising battles in 2008, I think another scenario, though, before, you know, all the Democrats in the audience get too excited about the Republicans not raising money -- is that motivated Republicans this year are -- I think what we're hearing is they're not actually strongly in favor of one candidate or another. What they're in favor of is defeating the incumbent President.

MR. MANN: Right.

MR. POTTER: So I think a fair number of them are simply holding their fire, saying you work it out. You tell us who's going to be the nominee and then we will put our money where we want it to be, which is on defeating Obama. So I think you will see, as the McCain people did in 2008, a big spike in fundraising by both the nominee apparent and the party committee once we know who the nominee is.

Now, given the dynamics of this cycle it is possible that that will be much later than it was last time. I mean, it looks like this will drag on for some time before one candidate will be able to claim they numerically have a majority of pledged delegates for the convention. McCain made that claim, I believe, right after Super Tuesday, which was

early March last time. That does not appear to be where we're going to be this year. So it may be much later before people decide that whoever it is is the nominee and the fundraising can kick in.

And just, you know, another element of that, which I think is less clear to see from the outside, is that the party fundraising is affected, too, because the party will not -- needs to work with the nominee apparent to raise the money from major donors. They can't do that until they have a nominee apparent. So once McCain was clearly the winner last time, and, in fact, the RNC required that the other candidates withdraw so we were waiting for the second-tier candidates to get out, once that happened the RNC and McCain worked closely and you began to see significant money raised for the party committees, but that's later in the process.

MR. MANN: Right. Well, you heard that and many other things here at Brookings. It's -- I want to thank Trevor and Tony, up to their normal high standards. And thank you all for coming. (Applause)

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I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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