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## CAMPAIGN FINANCE AND 2012 ELECTION

Presentation to American Politics Group Roundtable "Tracking the 2012 Elections",  
British Association for American Studies Conference,  
University of Manchester, 14 April 2012

### A. Regulatory Framework

1. This cycle has been different because of the Supreme Court's *Citizens United* decision of January 2010.<sup>1</sup>

2. *Citizens United* struck down provisions of Bipartisan Campaign Reform Act ('McCain-Fiengold') of 2002 limiting corporate expenditures on so-called "electioneering communications":

- the Court did *not* strike down the prohibition against donations directly to candidate's campaigns

- however corporations (i.e. companies *and* trades unions) can now directly spend their own money on election advertising, which previously would have had to be undertaken by their associated PACs, financed by voluntary contributions<sup>2</sup>

3. A subsequent Court of Appeals ruling (*SpeechNOW.org v FEC*)<sup>3</sup> held that "contributions to political action committees [so-called 'Super PACs'] that make only independent expenditures cannot be limited."<sup>4</sup>

- the decision did not affect the activities of "527" groups (unregulated by BCRA) which do not advocate the election or defeat of a candidate, but can run issue-advocacy media

- reporting and disclosure requirements of FERA and BCRA remain intact<sup>5</sup>

4. Super PACs must be independent of a candidate's campaign, but the degree of independence has not yet been tested in law and seems superficial; e.g. Romney's Restore Our Future was founded by three aides from his 2008 campaign;<sup>6</sup> and candidates can appear at its fundraisers.

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<sup>1</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 08-205 (21 January 2010)

<sup>2</sup> Congressional Research Service R41542, "The State of Campaign Finance Policy: Recent Developments and Issues for Congress", 21 December 2010, p. 6

<sup>3</sup> United States Court of Appeals For the D.C. Circuit, No. 08-5223, decided 26 March 2010

<sup>4</sup> CRS, p. 7

<sup>5</sup> CRS, p. 9

<sup>6</sup> Charles Spiers, general counsel; Carl Forti, political director; and Larry McCarthy, "a member of the Romney media team" (*The Washington Post*, 23 June 2011)

5. As *The Economist* reported in February: “When asked recently if a super PAC would run afoul of the independence rules by running ads that featured a candidate, were ‘fully co-ordinated’ with his campaign, relied on his website for inspiration and were intended to win him re-election, the FEC could not decide. The three Democratic commissioners thought this would break the rules; the three Republicans thought not.”<sup>7</sup>

6. Twenty-three state broadcasting associations filed *amicus* briefs in the *Citizens United* case, thus demonstrating the economic interest of the media in the outcome.<sup>8</sup>

## **B. Money Raised**

1. Examination of Super PAC fundraising thus far shows Romney very much in the lead.

2. But Super PAC fundraising *and* expenditure is still outstripped by the amounts for the candidates’ official campaigns, considerably so in the case of Ron Paul.

3. The composition of the donations is also telling:

- the news has all been made by the very large individual donations, e.g. Sheldon Adelson’s \$5 million to New Gingrich’s PAC (although this is substantially exceeded by Miriam Adelson’s \$12.5 million)

- however fully \$64 million of Romney’s total money has come from donations of between \$1,000 and \$2,500<sup>9</sup>

- Santorum’s Super PAC received only two million-dollar donations and Paul’s only one

- Gingrich is the only candidate the majority of whose money has come from individual ‘mega-donations’ (i.e. the Adelsons)

- the greater majority of large donors are *individuals* rather than corporations – thus the *Citizens United* decision is important as the basis for the *SpeechNOW* decision, not in and of itself

4. A comparison of this cycle with previous elections does not seem to indicate that money is playing a bigger role at this stage [Graphic of fundraising from 1999 to 2011].<sup>10</sup>

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<sup>7</sup> “The hands that prod, the wallets that feed”, 25 February 2012. At least four commissioners must vote to open an investigation into alleged violations.

<sup>8</sup> Comment made by audience member, 14 April 2012

<sup>9</sup> Whereas 97% of donations to his Super PAC were of \$25,000 or more.

5. Obama's fundraising still outstrips his rivals': the combined total for his campaign and the DNC is just under \$300 million, of which only \$5 million is attributable to his Super PAC ('Priorities USA').<sup>11</sup>

- furthermore, nearly half of Obama's money and a quarter of the money he has raised for his party has come from donations of \$200 or less – significantly different from the situation for the Republican candidates and also from Obama's own fundraising in 2008.<sup>12</sup>

### C. The Effect on the Campaigns

1. It might be hypothesised that Super PAC funding would help challengers to the frontrunner to keep going for longer than they would otherwise:

- this is obviously the case with Gingrich, but was also true of Santorum: Foster Friess's support effectively revived his campaign at the end of 2011 and was substantially increased (by nearly half a million dollars) in the wake of the Iowa caucus.<sup>13</sup>

- some have argued (e.g. Ross Douthat in *The New York Times*) that this has served democracy by extending the campaign and forcing "the frontrunner ... to confront actual voters day after day and week after week".<sup>14</sup>

2. The motivations of the donors can vary. Harold Simmons, who bankrolled the Swift Boat Veterans for the Truth in 2004, has given "\$12 million to American Crossroads, a super PAC running ads against Obama; \$1 million to Gingrich; \$1.1 million to Rick Perry; and \$100,000 to Romney" which suggests an 'anyone but Obama' strategy.<sup>15</sup>

3. Super PACs may have had their greatest impact on advertising, which is almost indistinguishable from the campaigns':<sup>16</sup>

- the majority of negative ads have been funded by Super PACs, thus allowing candidates to claim their hands are clean (e.g. in a debate two days before NH

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<sup>10</sup> Romney's final-quarter fundraising in 2011 actually matched Obama's and Clinton's in 2007 and exceeded McCain's, and also exceeded Bush's in 1999.

<sup>11</sup> "President Obama has been able to tap very large contributions by raising some of his funds for the Democratic Party, which can accept more than \$60,000 from one person over the 2-year campaign."

<sup>12</sup> *The Washington Post*, 18 November 2011

<sup>13</sup> *The Washington Post*, 22 February 2012

<sup>14</sup> 3 April 2012

<sup>15</sup> *Ibid.*

<sup>16</sup> Campaign adverts must now feature a personal message of endorsement; Super PAC adverts cannot .

primary, when Gingrich asked Romney to denounce an ad by Restore Our Future, the candidate said, "I can't direct their ads.")

- fully 85% of the Romney campaigns ads before the Iowa caucus were positive<sup>17</sup>
- [Graphic of negative advertising spending] Most Super PAC ad spending is negative (72% c/w 27% for campaigns) and has greatly increased the proportion of negative media
- *The Washington Post* of 20 February claimed 50% of ads in the GOP primaries were negative compared with 6% in 2008 and two-thirds of Romney's spending was negative: this has cost him support amongst independents
- negativity may be a function of the inability of Super PACs to co-ordinate with campaigns and thus may ads featuring the candidate they wish to support: 'comparison' advertising (almost negative by definition) is the result.

4. Looking forward to the general election, much of the running is currently being made by 501(c)(4) non-profits, which do not have to reveal their donors' identities:

- current interpretation of the law by the IRS allows non-profits to indulge in issue advocacy so long as such political advertising does not exceed half of their budgets (very generous!).
- so far they have spent more than \$24 million in the 2012 cycle on 'issue advocacy' advertising that can criticise an elected official so long as it does not take a position on his/her re-election;
- Crossroads GPS, a nonprofit associated with Karl Rove, has spent more than \$10 million on ads targeting Obama over the federal deficit, energy policy and other issues; whereas its sister super PAC American Crossroads has spent just \$133,000;<sup>18</sup>

5. It is doubtful the new funding mechanisms have changed the organisation or mechanisms of campaigns: arguably the only new communication technology is Twitter and how many Republican Party primary voters use that?

6. The biggest political effect has been to allow Newt Gingrich to revive and sustain an otherwise defunct campaign – a "different kind of campaign", note! -- but the new rules re: proportional allocation of delegates make continuing in the race more relevant.<sup>19</sup>

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<sup>17</sup> *The Washington Post*, 27 December 2011

<sup>18</sup> *The Washington Post*, 6 February 2012

<sup>19</sup> Since 1980 ever winner of the South Carolina Republican primary has gone on to win the nomination.

7. All the money in the world won't help an otherwise unelectable candidate – Rick Perry was extraordinarily well-funded (at \$26 million) and soon imploded – although he did end his campaign in credit and has since formed a Super PAC.<sup>20</sup>

8. Gingrich and Romney are startlingly similar as politicians -- both are policy wonks who've held unfavourable positions (lots of them) in the past. It is the campaigns they've run that have made the difference between the two. Compare Perry and Bachmann – Bachmann was won the Ames straw poll last year, yet was forced to withdraw from the race after finishing 6th in Iowa; both were after the same pool of voters. The better-funded and better-organised campaign will reach those voters. Bachmann wasted her money (in a sense) on developing an advance organisation in Iowa and making bus tours, often to 10 events in a day, rather than saving it for a paid media presence until the last few days before the caucus.<sup>21</sup>

Campaigns are more about persuading your supporters to vote than they are persuading others to vote for you.

9. Have the changes reinforced the primary-as-protest-vote in modern politics? Or do they provide evidence that substantiates the populist belief that the system is rigged in favour of the rich?

If it's all part of a larger NOTA trend, what does that say about the general election and representative democracy in general?

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<sup>20</sup> It may be worth noting that as of early January, Romney, Perry and Huntsman were the beneficiaries of 80% of Super PAC spending (*The Washington Post*, 5 January 2012).

<sup>21</sup> *The Washington Post*, 5 January 2012