



“The Impact of Federal Election Laws on the 2008 Presidential Election”

*by Michael E. Toner**

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Chapter follows

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THE YEAR OF
OBAMA

HOW BARACK OBAMA WON THE WHITE HOUSE

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THE YEAR OF OBAMA

How Barack Obama Won the White House

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Chapter 6

The Impact of Federal Election Laws on the 2008 Presidential Election

Michael E. Toner¹

Senator Barack Obama's victory in the 2008 presidential election was historic on many political and cultural levels, and the impact of Obama's campaign on the federal election laws was certainly no exception.

In 2008, Senator Obama became the first presidential candidate since Richard Nixon in 1972 to turn down public funds for both the primary campaign and the general-election campaign. In so doing, Obama raised an unprecedented \$750 million for his campaign, which was more than twice what George W. Bush raised in 2004 and more than seven times what Bush raised in 2000, which were both record-breaking amounts at the time. Obama's decision to become the first presidential candidate since 1972 to decline public funds for his entire campaign will likely transform the fundraising strategies of presidential candidates from both major parties in the future. It could also be the death knell of the presidential public financing system, absent major congressional action to overhaul the system in time for the 2012 presidential election.

We witnessed a number of significant campaign finance and election law trends during the historic 2008 presidential campaign. But first we turn to Senator Obama's pivotal decision to turn down public funding for his general-election and primary campaigns, which helped ignite the extraordinary campaign-finance arms race that took place in 2008.

2008 WAS THE FIRST BILLION-DOLLAR PRESIDENTIAL ELECTION, AS OBAMA AND McCAIN RAISED RECORD AMOUNTS OF MONEY

Campaign finance observers predicted in the early days of the 2008 election cycle that the first billion-dollar presidential race was in the offing, and they certainly were not disappointed. Senator Obama's decision to privately finance his entire presidential campaign, and turn down public funds for the general election as well as for the primaries, paved the way for Obama to raise approximately \$750 million for his campaign, including \$414 million for the primaries alone. With Senator McCain raising \$221 million for the primaries

and spending another \$85 million of public funds for the general election, the Obama and McCain campaigns combined spent a record-breaking \$1 billion on the 2008 presidential race.

Under the presidential public financing system, presidential candidates have the option of accepting public funds for their primary election or general election campaigns, or both. For the primaries, presidential candidates can receive matching funds from the government of up to \$250 for each individual contribution they receive. To be eligible to receive matching funds, candidates must raise at least \$5,000 in 20 or more states from individuals in amounts of \$250 or less. For the 2008 primaries, each presidential candidate could receive a maximum of approximately \$25 million in matching funds. However, candidates electing to receive matching funds were subject to a nationwide spending limit during the primaries of approximately \$50 million, as well as state-by-state spending limits based on the population of each state.² Under the federal election laws, the primary season runs from the time a person legally becomes a candidate for the presidency through the national nominating conventions, which can last 18 months or longer. The national and state-by-state spending limits apply throughout this period of time. By contrast, candidates who decline to take matching funds are not subject to any spending limits for the primaries and are free to raise as much money as they can, subject to the contribution limits.³ For the general election, presidential candidates have the option of accepting public funds to finance all of their political activities⁴ and be subject to a nationwide spending limit, or candidates can turn down public funds and raise private contributions subject to the contribution limits and operate free of spending limits. The public grant for the general election in 2008 was approximately \$85 million as was the corresponding national spending limit for candidates who accepted public funds.⁵

Apart from John Edwards, all of the top-tier candidates from both major parties turned down matching funds for the primaries in 2008 so they could be free of spending limits and raise as much funds as they could, subject to the contribution limits. The Democratic and Republican candidates collectively raised a record-breaking \$1.22 billion for their primary campaigns, which was 81 percent more than the presidential candidates raised collectively in 2004.⁶ Obama and the other Democratic candidates collectively raised far more funds for the primaries than did McCain and the other Republican candidates by a margin of \$787 million to \$477 million.⁷ Table 1 summarizes the fundraising totals for the top-tier candidates of both major parties during the 2008 primary season.

Table 1. Fundraising Totals for Top-Tier Presidential Candidates During the 2008 Primary

| Candidate | Total Amount Raised | Compared to Spending Limit |
|--------------|---------------------|----------------------------|
| Obama | \$414 million | 8x |
| Clinton | \$224 million | 4x |
| Edwards | \$53 million | 1x |
| Richardson | \$23 million | .5x |
| Dodd | \$17 million | .3x |
| McCain | \$221 million | 4x |
| Romney | \$110 million | 2x |
| Giuliani | \$60 million | 1x |
| Paul | \$35 million | .7x |
| Thompson, F. | \$24 million | .5x |
| Huckabee | \$16 million | .3x |

Source: Federal Election Commission

The decision of the top-tier candidates apart from Edwards to turn down public funds for the primaries made strategic sense given that most of the candidates raised and spent far more funds than the approximately \$50 million they would have been legally permitted to spend had they accepted matching funds. Specifically, Obama raised eight times more than the spending limit, Clinton and McCain four times more, and Romney two times more.⁸

However, from a fundraising perspective, what made the 2008 presidential race unprecedented was Senator Obama's bold decision to also decline public funds for the general election and collect as many private contributions as he could for the fall campaign. Since the advent of the presidential public financing system in 1976 following the Watergate scandal, no major-party candidate had ever turned down public funds for the general election, which had ensured that the Democratic and Republican nominee each had the same amount of campaign funds for the fall campaign.⁹ All of this changed in 2008, when Obama raised approximately \$336 million for the general election, on top of the more than \$400 million he had previously raised during the primaries, for a fundraising total of approximately \$750 million. McCain, by contrast, accepted the \$85 million public grant for the general election, which turned out to be only one-fourth of the amount of money that Obama amassed for the general election.

Table 2 summarizes the fundraising totals for the major party nominees for the 2000, 2004, and 2008 elections.

Table 2. Summary of the Fundraising Totals for the Major Party Nominees During 2000, 2004, and 2008 Elections

| Candidate | Primary Fundraising Total | General Fundraising Total | Total Campaign Funds |
|-----------|---------------------------|---------------------------|----------------------|
| 2000 | | | |
| Bush | \$100 million | \$75 million ^a | \$175 million |
| Gore | \$50 million | \$75 million ^a | \$125 million |
| 2004 | | | |
| Bush | \$270 million | \$80 million ^a | \$350 million |
| Kerry | \$235 million | \$80 million ^a | \$315 million |
| 2008 | | | |
| Obama | \$414 million | \$336 million | \$750 million |
| McCain | \$221 million | \$85 million ^a | \$306 million |

^aCandidate Accepted Public Grant

Source: Federal Election Commission

Table 2 reveals the substantial financial advantage that Obama enjoyed over McCain, which exceeded \$400 million and included a nearly 4-to-1 advantage during the general election campaign. Obama's broad financial advantage was even more pronounced in the final weeks before Election Day. In September alone Obama raised over \$150 million, and between October 15 and November 24 the Obama campaign raised another \$104 million and spent an additional \$136 million.¹⁰ To put these fundraising and spending figures in perspective, McCain received only \$85 million in public funds to finance his entire general-election campaign.

Numerous commentators have analyzed Obama's fundraising performance during the 2008 campaign and have produced dizzying statistics. However, two simple statistics perhaps illustrate best the remarkable Obama fundraising performance in 2008: 1) The Obama campaign raised more money than all of the private contributions raised by *all* of the Democratic and Republican presidential candidates *combined*; and 2) The Obama campaign raised more money than the Republican National Committee (RNC) and the Democratic National Committee (DNC) raised *combined*. Needless to say, since the adoption of the Federal Election Campaign Act in the 1970s,

no presidential campaign had ever come close to either achievement, and we may never see it happen again.

A key component of Obama's record-setting fundraising performance in 2008 was the half a billion dollars that he collected online. The Obama campaign reported receiving \$500 million of Internet contributions from three million online donors, with an average online contribution of \$80.¹¹ As remarkable as the total amount of money that Obama collected online was, the hundreds of thousands of donors who made multiple contributions, often in monthly increments of \$100, \$50, or even \$25 was even more impressive. Specifically, through Federal Election Commission (FEC) disclosure reports for the period ending on August 31, 2008, over 200,000 Obama donors started off giving contributions of \$200 or less and then made repeat contributions; 93,000 individuals ended up contributing up to \$400 to the campaign and another 106,000 ended up contributing between \$401 and \$999.¹² Interestingly, although Obama received a record number of contributions in amounts of \$200 or less, due to a large number of repeat contributors, the proportion of funds that Obama received from donors whose contributions aggregated \$200 or less was actually not significantly greater than what past presidential candidates had achieved, with Obama's figure at 26 percent, compared with 25 percent for George W. Bush in 2004, 21 percent for John McCain in 2008, and 20 percent for John Kerry in 2004.¹³

A number of academics have analyzed how online fundraising by presidential candidates has been associated with a high degree of public interest in the campaigns and a highly polarized and competitive political environment—starting with John McCain's online surge after winning the New Hampshire primary in 2000 and Howard Dean's strong online fundraising performance in 2004. However, more academic work needs to be done in analyzing the role of the Internet in facilitating political contributions by making it easier for individuals to contribute to the candidates of their choice. A decade ago, if someone was impressed with what a candidate said at a debate or rally and wished to make a contribution, he or she needed to find their checkbook, figure out the payee, determine where to send the check, and get the check in the mail. Today, if someone likes what a candidate says, he or she can make an online contribution on their iPhone in a matter of minutes. Moreover, presidential campaign Web sites today provide donors with the option of making recurring monthly contributions on their credit cards in \$25, \$15, or even \$5 amounts. Through this technology, individuals who may not be willing or able to afford a single contribution of \$300 may cumulatively make the same contribution over a year's time in monthly \$25 installments. In this way, the Internet facilitates the making of political contributions separate and apart from public

interest in presidential races, which may partially account for the record-breaking amounts of money that presidential candidates have raised in recent years. At the very least, this phenomenon deserves further study.

There is no question that the Obama campaign capitalized on its financial advantage over the McCain campaign in numerous ways. The Obama campaign reportedly spent approximately \$250 million on television advertising, which exceeded McCain's television advertising efforts by approximately \$100 million, and which surpassed the \$188 million that the Bush-Cheney campaign spent in 2004.¹⁴ Obama spent \$77 million on television advertising in the first two weeks of October alone, which reportedly was more than McDonald's Corporation typically spends on television advertising in a month.¹⁵ Obama's advertising budget was so extensive that he became the first presidential candidate to air a national network television commercial since Ross Perot in 1992, spending approximately \$5 million to broadcast a 30-minute infomercial on several networks during the final days of the campaign.¹⁶ Obama's advertising advantage over McCain was particularly striking in a number of battleground states. For example, according to published reports, Obama outspent McCain on television advertising by 4 to 1 in Florida, 3 to 1 in Virginia and North Carolina, and 2 to 1 in New Hampshire.¹⁷ Perhaps not coincidentally, Obama won all of those states, becoming the first Democratic presidential candidate to carry Virginia since 1964.

Obama's spending advantage was no less impressive in terms of field operations and get-out-the-vote activities. The Obama campaign and the Democratic Party reportedly operated at least 770 offices nationwide, as compared with only 370 offices for the McCain campaign and the Republican Party.¹⁸ The Obama campaign and the Democrats also reportedly hired 5–10 times more field staff than did the McCain campaign and the Republican Party, and between June 1 and October 15, Obama and the Democrats spent a total of \$56 million on staff expenditures as compared with only \$22 million by McCain and the GOP.¹⁹ In many ways, in light of these stark resource disparities, it is somewhat surprising that Obama's winning margin on Election Day was not even greater.

THE REPUBLICAN NATIONAL COMMITTEE RAISED RECORD SUMS OF MONEY FOR THE 2008 ELECTION AND BOTH PARTIES CONTINUED TO FARE WELL UNDER THE MCCAIN-FEINGOLD LAW

The RNC raised unprecedented sums of money for the 2008 election, continuing the upward fundraising trend it began during the 2004 and 2000 presidential election cycles. For the 2008 presidential election, the RNC raised a record-breaking \$417 million, which was a 26 percent increase over what the

RNC raised during the 2004 election cycle and a 136 percent increase from 2000.²⁰ These record-breaking figures are all the more impressive given that all of the funds raised by the RNC for 2008 and 2004 were hard dollars raised subject to the limitation and prohibitions of the federal election laws, whereas for the 2000 presidential election cycle the national parties were permitted to raise soft money in the form of unlimited corporate, union, and individual contributions. The DNC raised \$255 million for the 2008 presidential election, which was 15 percent less than what the DNC raised during the 2004 election cycle but 145 percent more than it had collected for the 2000 election.²¹

The 2004 presidential election was the first conducted under the McCain-Feingold campaign finance law, which made the most significant changes to the federal election laws in a generation. The cornerstone of the McCain-Feingold law was a prohibition against the national political parties from raising or spending soft money for any purpose.²² In addition to barring the national political parties from raising and spending soft money, McCain-Feingold increased the individual contribution limits to the parties from \$20,000 per year to \$25,000 per year and indexed the limits for inflation. For the 2008 presidential election cycle, individuals could contribute up to \$28,500 per year to the RNC and DNC, and that limit will likely approach \$30,000 per year for the 2010 election cycle.

Table 3 details the fundraising totals for the RNC and DNC during the 2008, 2004 and 2000 election cycles.

Table 3. Summary of the Fundraising Totals for the RNC and DNC During 2008, 2004 and 2000 Election Cycles

| | 2008 | 2004 | 2000 |
|-----|---------------|---------------|---------------|
| RNC | \$417 million | \$330 million | \$316 million |
| DNC | \$255 million | \$299 million | \$210 million |

Source: Federal Election Commission, "FEC Releases Summary of National Party Financial Activity," FEC Press Release, October 29, 2008 and RNC and DNC FEC Post Election Reports filed on Dec. 4, 2008.

As Table 3 indicates, although the Obama campaign raised vastly more than the McCain campaign during the 2008 presidential race, the RNC was able to maintain its historical fundraising edge over the DNC, which helped reduce the resource advantage that Obama enjoyed over McCain. Specifically, the RNC out-raised the DNC by \$162 million, which reduced the Obama campaign's net resource advantage over the McCain campaign from approximately \$444 million to \$282 million. With Obama now in the

White House, it will be interesting to see if the DNC will be able to match the RNC's fundraising prowess in the years ahead.

One innovation that helped fuel the RNC and DNC's fundraising tallies in 2008 was extensive use of joint fundraising committees between the presidential campaigns, the national parties, and selected state parties. Under FEC regulations, candidates and political parties may simultaneously raise hard-money funds through joint fundraising committees (JFCs) which permit them to combine the per-recipient contribution limits and solicit greater amounts of money from donors at any one time.²³

JFCs had been used extensively during the last decade by congressional candidates and national and state political parties, but they had not been used on a broad scale by presidential candidates until 2008. Once Senator McCain clinched the Republican nomination in the spring, the McCain campaign and the RNC created a number of JFCs which included several groups of state parties from battleground states. Because the Republican nominating contest ended months before the Democratic nominating race, McCain and his GOP allies had the JFCs to themselves for several months before Senator Obama and the DNC began joint fundraising activities in the early summer. All told, the McCain campaign and Republican Party committees raised approximately \$221 million through ten separate JFCs.²⁴ Although Obama and Democratic Party entities got a late start using JFCs, they ended up surpassing the Republicans by raising approximately \$228 million through three JFCs.²⁵ Published reports indicate that House, Senate, and presidential candidates, along with their political parties, raised more than \$415 million through JFCs during the 2008 election cycle, which shattered the previous record of \$111 million that was set during the 2004 presidential campaign.²⁶

Given the great fundraising success both major parties enjoyed with JFCs during the 2008 election, joint fundraising activities will likely remain a key part of presidential fundraising in the future. There is no question that the ability of candidates and political parties to combine applicable contribution limits makes it easier for donors to make larger hard-money contributions to the participating entities. The extraordinary growth of JFCs in the 2008 presidential race is yet another example of parties and candidates successfully adapting to the new campaign finance law.

THIRD-PARTY GROUPS HAD AN APPRECIABLE IMPACT ON THE 2008 PRESIDENTIAL RACE BUT WERE LESS INFLUENTIAL THAN IN 2004

As was outlined above, under the McCain-Feingold law the national political parties are prohibited from raising and spending soft money for any purpose.

Prior to the enactment of McCain-Feingold, the RNC and DNC spent hundreds of millions of dollars of soft money each election cycle on issue advertisements—attacking and promoting presidential candidates—as well as on ticket-wide get-out-the-vote operations in the battleground states.²⁷ With the national political parties subject to the soft-money ban for the first time in the 2004 presidential race, soft-money spending migrated from the national parties to a number of prominent Section 527 organizations. Section 527 organizations get their name from the section of the federal tax code under which they operate.²⁸ All told, 527 groups reportedly raised and spent approximately \$409 million on activities designed to influence the 2004 presidential race.²⁹ Of this amount in 2004, Democratic-oriented 527s reportedly spent \$266 million, or 65 percent of the total, and Republican groups spent \$144 million, or 35 percent of the total.³⁰ Although Democrats in 2004 were the first to make major use of 527 groups as soft-money vehicles, Republicans quickly followed suit, and the Republican-oriented Swift Boat Veterans for Truth became perhaps the most influential outside group during that election cycle.

However, following the 2004 election the FEC found that a number of 527 organizations had broken the law by failing to register with the FEC as political committees and by failing to adhere to hard-dollar contribution limits. As a result, as the 2008 presidential campaign began, it was unclear whether 527 organizations would be as active in raising and spending soft-money funds as they had been four years earlier. By Election Day 2008, it was clear that federally oriented 527 groups had spent significantly less than they had during the 2004 election, but it was also clear that greater amounts of soft-money had been spent by various 501(c) organizations,³¹ including an innovative group called the American Issues Project.

The CFI reported that through October 15 federally oriented 527 organizations had raised and spent approximately \$185 million in connection with the 2008 presidential race and likely would end up spending a total of \$200 million by Election Day.³² The biggest Democratic-oriented 527s were reportedly operated by the American Federation of State, County and Municipal Employees (AFSCME) with \$28 million raised, Service Employees International Union (SEIU) with \$24 million, America Votes (\$16 million), and Emily's List (\$13 million).³³ The leading Republican-oriented 527 groups included American Solutions for Winning the Future (\$19 million raised), RightChange.com (\$7 million), College Republicans (\$6 million), and Club for Growth (\$4 million).³⁴ CFI also estimated that federally oriented 501(c) groups would likely raise and spend an additional \$200 million on activities related to the 2008 presidential election, for a total of \$400 million spent collectively by 527 and 501(c) groups.³⁵

One particularly aggressive outside organization in 2008 was the American Issues Project (AIP), which spent approximately \$3 million to air negative television advertisements linking Senator Obama to former Weather Underground radical Bill Ayres.³⁶ AIP operated as a 501(c)(4) social-welfare organization and, as such, was not required to disclose its donors. However, AIP also operated as a Qualified Nonprofit Corporation (QNC) under FEC regulations.³⁷ By operating as a QNC, AIP, unlike other incorporated 501(c) and 527 organizations, was free to air hard-hitting advertisements attacking Obama that contained full-blown express advocacy and which generated considerable press attention for the group.

AIP's innovative use of QNC status could be a harbinger of future outside group advertising strategies in connection with presidential elections. The FEC has adopted a broader interpretation of express advocacy in recent years, which has resulted in a greater possibility that the FEC will find hard-hitting candidate advertisements aired by outside organizations unlawful. The great advantage of an outside group operating as a QNC, assuming that the fundraising and other operating restrictions of QNC status can be met, is the flexibility to air aggressive candidate-oriented advertisements regardless of content, even if they contain express advocacy. That key feature may prove to be very appealing to political consultants as they develop outside group advertising strategies for the 2010 midterm election and beyond.

ONLINE POLITICAL ACTIVITY CONTINUED TO GROW IN IMPORTANCE IN 2008 AND REMAINED LARGELY UNREGULATED BY THE FEC

While the 2004 presidential election was the first election in which online politics played an important role in campaign strategy, we witnessed the full flowering of the Internet in the 2008 presidential campaign. There is no question that the Obama campaign developed an unprecedented Web-based strategy and involved millions of Americans in the campaign through sophisticated and cutting-edge Internet technologies. The Obama campaign's Web strategy in 2008 will likely be studied in the future as rival campaigns seek to narrow the competitive online advantage Obama enjoyed.

One only has to study the raw numbers to appreciate the depth and breadth of the Obama campaign's online advantage. Table 4 compares the Obama and McCain campaign's Internet activities in several key areas.

Table 4. Comparison of Obama Campaign and McCain Campaign Internet Presence

| | Obama | McCain |
|--|--------------------|---------------|
| Number of Facebook friends on Election Day | 2,397,253 | 622,860 |
| Change in the number of Facebook friends since Election Day (as of Nov. 8) | +472,535 | -2,732 |
| Number of unique visitors to the campaign Web site for the week ending Nov. 1 | 4,851,069 | 1,464,544 |
| Number of online videos mentioning the candidate uploaded across 200 platforms | 104,454 | 64,092 |
| Number of views of those videos | 889 million | 554 million |
| Number of campaign-made videos posted on YouTube | 1,822 | 330 |
| Total amount of time people spent watching each campaign's videos, as of Oct. 23 | 14.6 million hours | 488,000 hours |
| Cost of equivalent purchase of 30-second TV ads | \$46.9 million | \$1.5 million |
| Number of Twitter followers | 125,639 | 5,319 |
| Number of references to the campaign's voter contact operation on Google | 479,000 | 325 |
| Number of direct links to the campaign's voter contact tool | 475 | 18 |

Source: Andrew Rasiej and Micah Sifry, "The Web: 2008's Winning Ticket," *Politico*, November 12, 2008, p. 24.

As Table 4 indicates, the Obama campaign far outpaced the McCain campaign in a wide variety of online indicators, particularly in the volume of Obama political activity that took place on popular social networking Web sites such as Facebook, MySpace, YouTube and Twitter. The Obama campaign reportedly consulted with Facebook cofounder Chris Hughes to develop and launch its own social networking site called MyBarackObama.com.³⁸ The MyBarackObama.com Web site reportedly "recruited more than eight million volunteers, attracted more than 500,000 accounts and helped organize more than 30,000 supporter-created campaign events in all 50 states."³⁹ In the final

weeks before Election Day, the Obama campaign launched an application for the Apple iPhone called “Obama ’08,” which enabled supporters to receive information about local campaign events and volunteer opportunities in their areas directly on their iPhones, complete with GPS maps and driving instructions. In addition, the Obama campaign made some of its biggest announcements via the Internet, including Obama’s selection of Senator Joseph Biden to be his running mate, which was unveiled in an e-mail that was sent to millions of Obama supporters. By Election Day the Obama campaign had amassed approximately 13 million e-mail addresses, which far surpassed the number of e-mail addresses collected by previous presidential campaigns.⁴⁰

One key factor that has contributed to the rapid growth of the Internet in presidential politics has been the FEC’s deregulatory approach to online activities. In 2006, the FEC adopted regulations, which remain in place today, concerning use of the Internet in federal elections. The FEC’s regulations exempt the Internet from the various prohibitions and restrictions of the McCain-Feingold law with only one exception: paid advertising placed on another person’s Web site.⁴¹ The practical effect of the FEC’s regulations has been that individuals, volunteers, and anyone else with access to a computer can conduct a wide range of Internet activities on behalf of presidential candidates and other federal candidates—such as setting up and maintaining Web sites, blogging, e-mailing, linking, and posting videos on YouTube—without fear that the FEC will monitor or restrict their activities. Although it is difficult to measure or gauge precisely, undoubtedly the FEC’s hands-off regulatory approach to online political activities has helped the Internet play a growing and vital role in presidential politics.

THE SIGNIFICANT GROWTH OF EARLY VOTING IN 2008 HAD A MAJOR IMPACT ON CAMPAIGN STRATEGY

The number of Americans voting prior to Election Day grew steadily during the 1990s and the early part of this decade, reaching 16 percent of voters in 2000 and 22 percent of voters in 2004.⁴² However, analysts estimate that up to one-third of all Americans cast their ballots prior to Election Day in 2008, which far surpassed the number of early voters in previous presidential elections. Strikingly, some states began early voting more than a month before Election Day and even before the three presidential debates concluded. As a result, presidential campaigns no longer tailor their advertising and get-out-the-vote efforts to culminate on Election Day, but rather, must sustain their efforts for many weeks in most states. In many ways, we no longer have a single Election Day in America, but rather an election window that lasts for a month or even longer in some states.

For many years, voters who expected to be absent from their home communities on Election Day could apply for an absentee ballot and could cast an absentee ballot prior to the election. However, in order to obtain an absentee ballot, many jurisdictions required voters to show cause or otherwise explain why they were not able to vote on Election Day in their local precincts, which reduced the number of people who voted absentee.⁴³ However, in 1978 California amended its laws to permit voters to cast ballots before Election Day without providing any excuse or showing any cause, and today 32 states have similar laws in effect.⁴⁴ The early voting states provide voters with locations to vote early in-person or by mail.⁴⁵ Early voting has historically been most prevalent in a number of western states, including Colorado, Nevada and New Mexico.⁴⁶

The early voting that took place in 2008 was remarkable not only for the number of people who cast their ballots before Election Day, but also for how early they began voting. In Iowa, which was considered a battleground state for much of the campaign, voters began casting their ballots on September 23, which was less than three weeks after the Republican National Convention adjourned in Minneapolis-St. Paul. In Ohio, which proved to be decisive in the 2004 presidential election and was strongly contested in 2008, early voting began on September 30, which was prior to the second and third presidential debates between Obama and McCain and before the vice-presidential debate took place.

The rise in early voting has affected the strategy and tactics of presidential campaigns in the twenty-first century. For many years, the last 72 hours before the election were the primary focus for get-out-the-vote efforts, but now those operations have expanded to last a month or even longer in certain jurisdictions. Mike DuHaime, the McCain campaign's political director, observed that early voting "fundamentally changes two things: timing and budgets. You need to close the deal earlier for some voters, and Election Day can be spread out over weeks. That means your get-out-the-vote costs are more than ever."⁴⁷ With some analysts projecting that up to half the electorate may vote early by 2012, there is no question that future presidential campaigns will continue to refine their get-out-the-vote and voter contact strategies to reflect the modern election-window electoral environment.

LOOKING AHEAD TO 2012

Barack Obama's momentous decision to turn down public funds in 2008, not only for his primary campaign but for his general-election campaign as well, has the potential to transform the fundraising strategies of presidential candi-

dates from both major parties in 2012 and beyond. Obama's refusal of public funds laid the groundwork for his campaign to raise approximately \$750 million for his 2008 candidacy, including over \$400 million for the primaries alone. If Obama runs for reelection, and Congress does not take decisive legislative action to overhaul the presidential public financing system, all of the top-tier Republican candidates in 2012 will likely plan to join Obama in turning down public funds for the primary and general elections. However, any Republican who wishes to run in 2012 must seriously weigh whether he or she is capable of raising the \$700 million or more that likely will be needed to compete financially with Obama. In that sense, the entry price for the White House has never been greater. The stage is set for the 2012 presidential race to be the most expensive in history.

NOTES

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²The state spending limits in some of the most important early primary and caucus states were very low. For example, the spending limit in New Hampshire in 2008 was only \$841,000, which was the same spending allotment as existed in American Samoa. Similarly, the spending limit for the Iowa caucuses was only \$1,532,000. See the Federal Election Commission brochure, "Public Funding of Presidential Elections," http://www.fec.gov/pages/brochures/pub-fund_limits_2008.shtml, February, 2008. The primary spending limits are adjusted for inflation each election year.

³Individuals could contribute up to \$2,300 per election to presidential candidates for the 2008 election and federal multi-candidate PACs could contribute up to \$5,000 per election, with the primary and general elections considered separate elections. The individual contribution limits are adjusted for inflation each election cycle.

⁴The only exception is that publicly financed general-election presidential candidates are permitted to raise private contributions for legal and accounting costs incurred in complying with the federal election laws. These funds, which are known as general election legal and accounting compliance funds (GELAC funds), may accept individual and PAC contributions subject to the federal limits.

⁵The general-election public grant and corresponding spending limit are adjusted for inflation each election cycle.

⁶Campaign Finance Institute, "After Holding Financial Advantage in the Primaries, Obama Likely to Achieve Only Parity with McCain in General Election," <http://www.cfinst.org>, September 26, 2008.

⁷Campaign Finance Institute, "After Holding Financial Advantage in the Primaries, Obama Likely to Achieve Only Parity with McCain in General Election," <http://www.cfinst.org>, September 26, 2008.

⁸It should be noted that of the \$110 million Mitt Romney reported raising for the primaries, \$45 million stemmed from contributions that Romney made to his campaign. The Center for Responsive Politics, "Summary Data for Mitt Romney" at: <http://www.opensecrets.com>,

(December 12, 2008).

⁹In 2000, George W. Bush became the first candidate to win the presidency after turning down public funds for the primaries, and he repeated that feat in 2004. However, he accepted public funds for the general election in both 2000 and 2004.

¹⁰Jim Kuhnenn and Jim Drinkard, "Obama Raised \$104 million Towards Election's Close," Associated Press, December 5, 2008.

¹¹"Obama's Internet Haul: Half a Billion Online," *Washington Post*, November 21, 2008, page A4.

¹²Campaign Finance Institute, "Reality Check: Obama Received About the Same Percentage from Small Donors in 2008 as Bush in 2004," <http://www.cfinst.org>, November 24, 2008. Under the federal election laws, individuals whose contributions aggregate \$200 or less per election cycle to a presidential campaign are not required to be disclosed by name on FEC disclosure reports. This is known as the donor itemization threshold.

¹³Campaign Finance Institute, "Reality Check: Obama Received About the Same Percentage from Small Donors in 2008 as Bush in 2004," <http://www.cfinst.org>, November 24, 2008 (analyzing contribution data through August 31, 2008).

¹⁴Greg Gordon, "Obama Spent \$250 Million on TV Ads in General Election," *Miami Herald*, November 6, 2008; Tahman Bradley, "Obama's Money Was Three Times as Much as McCain in General Election," <http://www.abcnews.com>, December 5, 2008.

¹⁵Jim Kuhnenn, "Money Makes the Political World Go Around," Associated Press, November 3, 2008.

¹⁶Tahman Bradley, "Obama's Money Was Three Times as Much as McCain in General Election," <http://www.abcnews.com>, December 5, 2008. Obama also spent considerable funds on niche advertising that targeted specific audiences. For example, the Obama campaign advertised on video games such as "Guitar Hero" and "Madden NFL 09." Jim Kuhnenn, "Money Makes the Political World Go Around," Associated Press, November 3, 2008.

¹⁷Tahman Bradley, "Obama's Money Was Three Times as Much as McCain in General Election," <http://www.abcnews.com>, December 5, 2008. Obama reportedly held net television advertising margins of \$8.9 million in Miami, \$7 million in Tampa, \$2.6 million in Charlotte, and \$1.6 million in Denver. *Ibid.*

¹⁸T.W. Farnam and Brad Haynes, "Democrats Far Outspend Republicans on Field Operations, Staff Expenditures," *Wall Street Journal*, November 3, 2008.

¹⁹*Ibid.*

²⁰RNC and DNC 2008 FEC Post-Election Reports; "FEC Releases Summary of National Party Financial Activity," FEC Press Release (October 29, 2008).

²¹*Ibid.*

²²"Soft money" is defined as funds raised and spent outside of the prohibitions and limitations of federal law. Soft money includes corporate and labor union general treasury funds and individual donations in excess of federal limits. Funds raised in accordance with federal law come from individuals and federally registered PACs, and have historically been harder to raise; hence, these funds are referred to as "hard money."

²³For example, if a JFC included a presidential campaign, a national party, and two state parties, donors could contribute up to a maximum of \$53,100 to the JFC—up to \$4,600 to the presidential campaign (\$2,300 for the primary and \$2,300 for the general election), \$28,500 to the national party, and \$10,000 each to the two state parties. Any prior contributions that donors made to any participating entities would count against what could be contributed to the JFC. In addition, publicly financed presidential candidates such as Senator McCain may include their GELAC funds in JFCs that operate during the general election.

²⁴Center for Responsive Politics, "Joint Fundraising Committees," <http://www.opensecrets.org>, December 9, 2008.

²⁵*Ibid.*

²⁶Alex Knott, "Joint Fundraising Soars in '08," CQ Today Online News, <http://www.cqpolitics.com>, November 17, 2008 (analyzing fundraising data through October 15, 2008).

²⁷"Issue advertisements" are public communications that frequently attack or promote federal candidates and their records, but which refrain from expressly advocating the election or defeat of any clearly identified federal candidate, which is referred to as "express advocacy." "Vote for McCain" and "Vote Against Obama" are examples of express advocacy. The Supreme Court established the express advocacy standard in *Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁸Under the tax code, groups may organize under Section 527—and therefore shield many of their activities from taxation—if their exempt function is "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors." 26 U.S.C. § 527(e)(2). Thus, 527 entities are partisan political organizations as a matter of law.

²⁹Eliza Newlin Carney, "Rules of the Game: The 527 Phenomenon: Big Bucks for the Upstarts," *NationalJournal.com*, December 13, 2004.

³⁰*Ibid.*

³¹501(c) organizations refers to entities that are organized and operate under Section 501(c) of the Internal Revenue Code. They include 501(c)(4) entities (social welfare organizations) and 501(c)(6) entities (business leagues including trade associations). 501(c)(4) and 501(c)(6) organizations are permitted to engage in partisan political activities, provided such activities are not their primary purpose. By contrast, the activities of 527 organizations may be entirely partisan. 527 organizations are legally required to disclose their donors; 501(c) organizations are not.

³²Campaign Finance Institute, "Outside Soft Money Groups Approaching \$400 Million in Targeted Spending in 2008 Election," <http://www.cfinst.org>, October 31, 2008.

³³*Ibid.* (analyzing contribution data through October 15, 2008).

³⁴*Ibid.* (analyzing contribution data through October 15, 2008).

³⁵*Ibid.*

³⁶Kenneth Doyle, "Anti-Obama Group's Future Plans Unclear; Others Spending on Issue Ads for Hill Races," *BNA Money & Politics Report*, September 9, 2008; Jim Kuhnhen, "Obama Seeks to Silence Ad Tying Him to 60s Radical," *Associated Press*, August 25, 2008.

³⁷QNCs are narrowly defined ideological nonprofit corporations that were first recognized by the Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986). The key characteristics of QNCs are that they exist to promote political ideas, do not engage in business activities, have no shareholders, and do not accept contributions from for-profit corporations. See 11 C.F.R. § 114.10. The Supreme Court ruled in *Massachusetts Citizens for Life* that it was unconstitutional to prohibit such nonprofit corporations, unlike other corporations, from expressly advocating the election or defeat of federal candidates.

³⁸"Barack Obama's Cutting-Edge campaign," *APCO Worldwide*, November 19, 2008, p. 3.

³⁹*Ibid.*

⁴⁰Jonathan Salant, "Obama's Army of E-Mail Backers Gives Him Clout to Sway Congress," *Bloomberg News*, December 1, 2008.

⁴¹For example, if an individual spends money to take out an advertisement for a presidential candidate that appears on the home page of Yahoo.com or CNN.com, the transaction will be subject to regulation in a fashion similar to television, radio, and other mass-media advertising. However, messages that individuals create on their own Web sites or post without charge on other Web sites, such as YouTube, are not subject to FEC regulation.

⁴²Stephen Ohlemacher and Julie Pace, "A Third of Electorate Could Vote Before Nov. 4," Associated Press, September 22, 2008.

⁴³For example, scholars estimate that only about five percent of the nation's voters cast absentee ballots in 1980. June Krunholz, "Forget Election Day—Early Voting for President Has Started," *Wall Street Journal*, September 23, 2008.

⁴⁴Domenico Montanaro, "Can Early Voting Ease Election Day Drama?" <http://www.msnbc.com>, September 24, 2008. By contrast, in 1996 only 11 states provided for early voting; by 2004, the number had climbed to 26. Ibid.

⁴⁵In Oregon voting is done entirely by mail and there are no physical precincts.

⁴⁶In the 2004 presidential election, 53 percent of the ballots were cast early in Nevada, with 51 percent in New Mexico, 47 percent in Colorado, and 36 percent in Florida. June Krunholz, "Forget Election Day—Early Voting for President Has Started," *Wall Street Journal*, September 23, 2008.

⁴⁷Adam Nagourney, "campaigns Adjust Their Pace to Meet Short Season," *New York Times*, October 1, 2008.