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CAMPAIGN FINANCE AND THE 2008 ELECTIONS: HOW SMALL CHANGE(S) CAN REALLY ADD UP

ELLEN L. WEINTRAUB & JASON K. LEVINE*

At the Federal Election Commission, (“FEC”) we regulate money in politics. Why should anyone care about money in politics? Last year, there were six billion reasons; that’s how many dollars were spent on elections for federal office in 2008 by candidates, parties, political committees, independent groups, and the U.S. taxpayer (through the presidential public funding system and subsidies for the national political conventions). Presidential candidates spent almost \$1.7 billion (not including money spent on the conventions)—up from an even billion dollars in 2004.¹ That is a lot of money.

The 2008 election saw the largest amount of money ever raised during an election cycle and the greatest number of individual donors ever to give money to an individual candidate. Perhaps not coincidentally, the 2008 election cycle also had the largest voter turnout in a generation.² Numerous explanations can be offered for this spike in participation (the state of the world and the state of the economy prominent among them), but this symposium’s topics—race, gender, and media—all played key roles. Plainly, the race and gender of the major candidates were significant sources of inspiration for many. After all, with one exception—the Reagan–Bush vs. Mondale–Ferraro race of 1984—every other national election in U.S. history has been a battle between two white men on one

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¹ FEC Presidential Campaign Finance National Map, http://www.fec.gov/DisclosureSearch/mapApp.do?cand_id=P00000001 (last visited Feb. 27, 2009); Press Release, FEC, 2004 Presidential Campaign Financial Activity Summarized (Feb. 3, 2005), *available at* http://www.fec.gov/press/bkgnd/pres_cf/pres_cf.shtml.

² See Michael McDonald, *2008 Unofficial Voter Turnout*, United States Election Project (Jan. 28, 2009) http://elections.gmu.edu/preliminary_vote_2008.html. Dr. McDonald reported a nationwide turnout of 61.7% of eligible voters voting for President in 2008 (approx. 132 million votes). *Id.* 2008 represented an increase of 1.6% over 2004, but fell short of the 1968 turnout rate of 62.5%. *Id.*

side and . . . two white men on the other. In 2008, voters were offered historic choices during both the Democratic primary and in the general election. Moreover, innovative uses of media, particularly the Internet, brought record-shattering amounts of money into the campaign finance system. So, the questions raised are how did race, gender, and media affect campaign finance in the 2008 election, and what does it all mean for the future of campaign finance in federal elections?

I. WHY AND HOW WAS SO MUCH MONEY RAISED IN THE 2008 ELECTION?

More than \$1.6 billion was raised by the presidential candidates alone in 2008.³ This figure does not include independent spending by political action committees (PACs), unregistered political groups organized under section 527 of the tax code, or issue groups organized under section 501(c)4 of the tax code. The \$1.6 billion is more than a 149% increase over the amount raised by presidential candidates in 2004 (approximately \$674 million).⁴ Significantly, this figure also does not include funds raised by the national and state parties, nor does it include money spent on activities supporting one of the presidential candidates. Why did 2008 engender such an increased level of financial participation as compared to 2004 and previous years? The answers, we believe, fall into three broad categories: the field of candidates, the Internet, and the diminished viability of the public funding program.

A. *The Candidates*

The 2008 election was the first time since 1952⁵ where there was a completely open set of primaries and where there were no incumbents, sitting vice presidents, or even ex-vice presidents running. Accordingly, a wide-open primary field led to a great uptick in interest by the public as well as an unusually large number of candidates from both parties. That the field was so open also contributed to an earlier start to the 2008 election than that of almost any previous cycle. By the time Senator Obama

³ FEC Presidential Campaign Finance National Map, <http://www.fec.gov/DisclosureSearch/mapApp.do> (last visited Feb. 3, 2009).

⁴ See McDonald, *supra* note 2; FEC Presidential Campaign Finance National Map, *supra* note 1.

⁵ See generally MARK O. HATFIELD ET AL., VICE PRESIDENTS OF THE UNITED STATES, 1789–1993 (U.S. Gov. Printing Office 1997). While President Truman was on the ballot for the New Hampshire primary in 1952, he withdrew from the race shortly after losing the primary. *Id.* His Vice President, Alben W. Barkley, entered and withdrew from the race in the span of a month. *Id.*

declared his candidacy in February 2007, candidates including Senators Biden, Clinton, and Edwards on the Democratic side, and Mayor Giuliani, and Governors Huckabee and Romney on the Republican side had already either declared they were candidates or had formed formal exploratory committees.⁶ The earlier a campaign begins the more time there is to raise money for it, no matter how realistic or quixotic it might be.

A year later, following “Super Tuesday” in February 2008, on the Democratic side, the race had narrowed to Senators Hillary Clinton and Barack Obama, who continued to challenge each other into June. In a year perceived to auger well for a Democratic win, this very dynamic race, between two candidates either one of whom had the potential to make history, generated a tremendous amount of enthusiasm and media attention, which in turn brought in a lot of money for both candidates. Although Senator McCain wrapped up the Republican nomination by early spring, the ongoing battle between the Democrats gave notice to McCain’s supporters that more money would need to be raised to keep pace. In fact, the primaries alone saw candidates raise \$1.22 billion, almost double the amount raised in the 2004 primaries.⁷

B. The Internet

A second factor contributing to the increase in fundraising in 2008 was the Internet. Of course, campaign funds have been raised online in previous elections. The FEC first approved online fundraising in a 1995 Advisory Opinion issued to a PAC asking if it could solicit funds via a “World Wide Web site.”⁸ While Howard Dean made Internet fundraising a central component of his campaign in 2004, online fundraising reached unforeseen levels in 2008.

Senator Obama’s extraordinary success at Internet fundraising may be attributable to his appeal to the netroots,⁹ his increased use of online advertising, and his innovative uses of newer modes of communication, such as social networking sites and text-messaging, reaching a broader

⁶ FEC Filings from Prospective 2008 Presidential Campaign (Sept. 10, 2007), available at http://www.fec.gov/press/bkgnd/pres_cf/2008filings.html (listing when the candidates for the 2008 elections submitted their statement of organization and statement of candidacy).

⁷ See FEC Presidential Campaign Finance National Map, http://www.fec.gov/DisclosureSearch/mapApp.do?cand_id=P00000001 (last visited Feb. 3, 2009); Press Release, FEC, 2004 Presidential Campaign Financial Activity Summarized (Feb. 3, 2005), available at http://www.fec.gov/press/bkgnd/pres_cf/pres_cf.shtml (noting the amount of funds raised in the 2004 primaries).

⁸ FEC, AO 1995-9 (Apr. 21, 1995), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=continue>.

⁹ See generally William Safire, *On Language, Netroots*, N.Y. TIMES, Nov. 19, 2006, § 6.

geographic and socio-economic audience than could be reached via traditional media and political fundraising events. However, Obama was not the only candidate in 2008 to reap the rewards of an energized online political community. Republican Congressman Ron Paul from Texas chose not to apply for public funds because accepting them would be inconsistent with his libertarian views.¹⁰ He went on to raise \$35 million over the course of the 2008 campaign from donors across the country.¹¹ As a result, Paul's ideologically focused campaign remained competitive longer than expected, and in December 2007 he set a single-day record for Internet fundraising by bringing in \$6 million.¹²

We would like to think that the FEC can enjoy a small share of the credit for the expansion and innovation demonstrated by campaigns in 2008 in their uses of technology. In 2005–06, the FEC explored in a rulemaking, the extent to which the Federal Election Campaign Act, as amended, ought to be construed to limit online politics. The Commission chose at that time to regulate only paid political advertising on another person's website and otherwise, to protect and encourage online political organizing, communications, and activities.¹³ In so doing, the Commission gave the green light to the kind of imaginative uses of the Internet that thrived in the 2008 elections.

More traditional fundraising, using events and professional and volunteer fundraisers, continued to play a substantial role in 2008. Candidates Obama and McCain each disclosed the names of over 500 "bundlers," generally individuals who voluntarily solicit from friends, family, and associates and are acknowledged by the campaigns for raising certain threshold amounts of money, in some cases as much as half a million dollars. According to the Center for Responsive Politics (CRP), "540 elites have directed at least \$207,200,000 to McCain, and 561 have gathered at least \$63,200,000 for Obama."¹⁴ The Internet, which makes it easier for

¹⁰ See Ron Paul, R. Rep., Statement to U.S. H.R.: So-Called "Campaign Finance Reform" is Unconstitutional (Feb. 13, 2002), available at <http://www.house.gov/paul/congrec/congrec2002/cr021302.htm>.

¹¹ See OpenSecrets.org, Ron Paul: Contributions by Geography, <http://www.opensecrets.org/pres08/geog.php?cycle=2008&cid=N00005906> (last visited Aug. 13, 2009).

¹² See Kenneth P. Vogel, 'Money Bomb': Ron Paul Raises \$6 Million in 24 Hour Period, USA TODAY, Dec. 17, 2007, available at http://www.usatoday.com/news/politics/election2008/2007-12-17-ronpaul-fundraising_N.htm.

¹³ See Public Communication, 11 C.F.R. § 100.26 (2009); Uncompensated Internet Activity by Individuals that is not a Contribution, 11 C.F.R. § 100.94 (2009); Uncompensated Internet Activity by Individuals that is not an Expenditure, 11 C.F.R. § 100.155 (2009); see also Rules and Regulations of Federal Election Commission, 71 Fed. Reg. 18589-01 (Apr. 12, 2006) (to be codified at 11 C.F.R. Pts. 100, 110, 114).

¹⁴ See OpenSecrets.org., Barack Obama: Bundlers, <http://www.opensecrets.org/pres08/>

candidates to issue invitations and reminders and to track the contributions generated by their bundlers, has enhanced even these more traditional methods of fundraising.

Nonetheless, it is striking from a historical context that more than 80% of Senator Obama's contributors made their contributions online.¹⁵ Senator Obama is reported to have raised \$500 million online,¹⁶ which almost equals the entire amount raised by *both* President Bush and Senator Kerry in 2004. The ease of contributing online (as opposed to attending a fundraiser in person, or mailing in a check) facilitated the participation of literally millions of contributors.

C. Continued Decline of Public Funding System

The public funding system has been in decline for most of the last decade. In 2000, for the first time since the creation of the presidential public funding program in 1976, a major party candidate—Governor George W. Bush—chose not to participate in the matching program during the primaries. In 2004, President Bush, Senator John Kerry, and former Governor Howard Dean all declined to participate in the primary matching funds program. In 2008, many candidates followed suit in the primaries, and Senator Obama declined the general election grant.

Why would anyone give up free money and subject themselves to the grind of raising the volume of private funds necessary to run a national campaign? Public funding comes with strings attached. There are restrictions on how much money can be spent, how it can be spent, state-by-state limits on where it can be spent, qualification requirements to meet and document, and the campaign must submit to an audit by the FEC.¹⁷ Campaigns that have been confident of their abilities to out raise not only the spending limits but their opponents—such as the 2000 Bush campaign with its sophisticated bundling operation and the 2008 Obama campaign with its Internet juggernaut—have been willing to break with tradition and bypass public funding.

By 2008, the ability to raise enough money to make it worthwhile to forego matching funds in the primaries had become one of the markers of a serious candidacy. Although Senator McCain flirted with the notion of

bundlers.php?id=N00009638 (last visited Aug. 13, 2009).

¹⁵ See Jose Antonio Vargas, *Obama Raised Half a Billion Online*, WASH. POST, Nov. 20, 2008, available at http://voices.washingtonpost.com/the-trail/2008/11/20/obama_raised_half_a_billion_on.

¹⁶ See *id.*

¹⁷ Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001–13 (2008).

accepting matching funds during the primaries, once his campaign took off after his win in New Hampshire, he pulled out of the matching program.¹⁸ Ultimately, candidates McCain, Obama, Clinton, Huckabee, Romney, Giuliani, and Thompson all declined to participate in the public financing program during the primary campaign. Thus, almost all of the top contenders on both sides opted out of public funding in the primaries. And once Senator Obama established his fundraising prowess in the primaries, it was not really a surprise that he became the first candidate to decline the general election grant. This left him free to continue to raise private contributions during the final two months of the campaign. In this period, the Obama campaign raised an additional \$260 million, an amount essentially equal to all of the McCain fundraising during the primary season.¹⁹

Further, both campaigns assisted in the raising of party funds in the general election period through Joint Fundraising Committees (JFCs).²⁰ These JFCs collected tens of thousands of dollars from individual contributors and divided the proceeds largely among national and battleground state parties, all with the implicit understanding that the funds were to be used in support of the presidential campaign.²¹ Like the controversial “hybrid ads” of 2004 (party subsidized ads that promoted the presidential candidate and generically, the rest of the ticket),²² JFCs became a mechanism for using party funds to magnify the reach of candidate spending.

Finally, the threat of spending by the outside groups known as 527s may have exacerbated the money chase. Campaigns may have felt the public funding spending limits would not have allowed them sufficient funds to

¹⁸ Jim Kuhnhen, *McCain Rejects Primary Public Funds*, USA TODAY, Feb. 3, 2009, http://www.usatoday.com/news/politics/2008-02-11-3851408301_x.htm.

¹⁹ See Bill Buzenberg & Amy Goodman, *Does Obama's Record-Setting Fundraising Mark the End of Public Campaign Financing?* (Democracy Now internet broadcast Oct. 22, 2008), available at http://www.democracynow.org/2008/10/22/does_obamas_record_setting_fundraising_mark; FEC Campaign Finance Reports and Data, available at <http://www.fec.gov/disclosure.shtml> (last visited Feb. 3, 2009).

²⁰ See FEC Presidential Campaign Finance, Contributions to Obama, Barack by State Through 12/31/2008, http://www.fec.gov/DisclosureSearch/mapApp.do?cand_id=P80003338&searchType=&searchSQLType=&searchKeyword= (last visited Feb. 3, 2009) (stating Transfers-In in the amount of \$86,950,000); FEC Presidential Campaign Finance, Contributions to McCain, John S by State Through 12/31/2008, http://www.fec.gov/DisclosureSearch/mapApp.do?cand_id=P80002801&searchType=&searchSQLType=&searchKeyword= (last visited Feb. 3, 2009) (stating Transfers-In in the amount of \$44,053,246).

²¹ See, e.g., Michael Luo, *McCain Tests Fundraising Limits*, N.Y. TIMES, Sept. 20, 2008, at A1.

²² See Ellen L. Weintraub, Comm'r, Fed. Election Comm'n, Statement on the Report of the Audit Division on Bush-Cheney '04 Inc., (March 22, 2007), available at http://www.fec.gov/audits/2004/20070322bush_cheney_stmt_01.pdf.

defend themselves from a late onslaught of independent advertising.²³ In 2004, 527s spent over \$440 million during the presidential election.²⁴ While the “pro-Kerry/anti-Bush” groups significantly outraised and outspent the “pro-Bush/anti-Kerry” groups (by a factor of almost 3 to 1),²⁵ the pro-Bush groups outspent the pro-Kerry groups 3 to 1 in the critical last weeks of the election,²⁶ particularly in the swing states of Florida and Ohio—both of which were won by Bush. Moreover, the most memorable 527 group, “Swift Boat Veterans for Truth” was seen as having a significant impact against Kerry.

As it happened, the activity of 527 groups dramatically declined in 2008. According to CRP, 527 spending on federal races dipped to \$216 million in 2008.²⁷ While this is still a significant amount of money, it is less than half the amount spent in 2004. Further, given the increases in candidate fundraising, 527 activity represents a much smaller percentage of overall spending in 2008 than in 2004, (4% as opposed to 10%)²⁸ and no 527 in 2008 had the kind of impact as the Swift Boat Veterans in the last election.

What caused this drop? There were probably several factors. Given the success of candidate fundraising, donors might not have perceived as much of a need for 527 activity in this election cycle. Some of the funds may have been diverted to groups organized under other sections of the tax code (notably section 501(c)(4)) that do not share the same disclosure obligations.²⁹ Finally, we believe that FEC action played a role. After the 2004 elections, the FEC investigated a number of 527 organizations and negotiated conciliation agreements that resulted in more than three million dollars in penalties being paid.³⁰ In 2004, some of these groups may have

²³ See Shailagh Murray, *Obama to Reject Public Funds for Election*, WASH. POST, June 20, 2008, at A01 (Senator Obama cited concerns about potential “smears and attacks from . . . so-called 527 groups, who will spend millions and millions of dollars in unlimited donations”).

²⁴ OpenSecrets.org, *527s: Advocacy Group Spending in the 2008 Elections*, <http://www.opensecrets.org/527s/index.php>, (last visited Feb. 3, 2009).

²⁵ The Campaign Finance Institute reported the fundraising as \$320 million as compared to \$109 million. Thomas B. Edsall, *FEC Adopts Hands-Off Stance on ‘527’ Spending*, WASH. POST, June 1, 2006, at A04.

²⁶ Alex Knott et al., *GOP 527s Outspend Dems in Late Ad Blitz: Progress for America and Swift Boats Dominated Airwaves in Swing States*, CENTER PUB. INTEGRITY, Nov. 3, 2004, <http://projects.publicintegrity.org/527/report.aspx?aid=421>.

²⁷ *Advocacy Group Spending in the 2008 Elections*, *supra* note 24.

²⁸ See generally OpenSecrets.org, *U.S. Election Will Cost \$5.3 Billion*, Center for Responsive Politics Predicts (Oct. 22, 2008), <http://www.opensecrets.org/news/2008/10/us-election-will-cost-53-billi.html>. Percentages reflect all federal elections in 2004 and 2008.

²⁹ See Press Release, Steve Weissman and Suraj Sazawal, *Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election*, The Campaign Finance Institute (Feb. 25, 2009), available at <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=221>.

³⁰ See Press Release, FEC, *Media Fund to Pay \$580,000 Civil Penalty* (Nov. 18, 2007), available at <http://www.fec.gov/press/press2007/20071119mediafund.shtml>.

thought they could operate with impunity. Once the FEC established that it was willing to investigate and pursue 527s for violating the law, they became a much less attractive option for political activity.³¹

II. WHAT DOES IT ALL MEAN? IS IT A NEVER ENDING CYCLE OF "MORE?"

In 2008, Americans spent approximately \$6.1 billion on all federal elections, which included at least \$2.4 billion to elect the President (figures include spending by the presidential candidates, public funding for the candidates, public funding for the national conventions, private fundraising for the national conventions, and spending by the Republican and Democratic National Committees).³² When asked if \$2.4 billion was too much to spend on the 2008 presidential campaign, 70% of respondents to an October 29, 2008 poll in USA Today said yes.³³ That seems to be a resounding vote for reducing campaign costs, but it is less clear how this is to be accomplished. Only 32% of the respondents said that candidates should be required to participate in the public financing system, which limits spending and provided only approximately \$100 million of the \$2.4 billion. Although 32% appeared to endorse public financing, the percentage of taxpayers that have earmarked \$3 of their taxes on their income tax returns to the Presidential Election Campaign Fund has steadily declined almost since the inception of the program in 1976. The percentage reached its peak in 1980 at 28.7%, but by 2007 only 8.3% of taxpayers checked the box, the lowest figure to date.³⁴

³¹ It remains to be seen whether the Commission, which has experienced major turnover in its membership, will continue to pursue the same enforcement theories vis-à-vis 527 organizations. See Cynthia L. Bauerly & Ellen L. Weintraub, *Comm'rs, Fed. Election Comm'n, Statement of Reasons of Commissioners in the Matter of The November Fund*, MUR 5541 (Dec. 19, 2008), available at <http://eqs.nictusa.com/eqsdocs/28044222185.pdf>. Moreover, cases that are currently being litigated have the potential to change the legal landscape and breathe new life into 527s in time for the 2012 election. There are two prominent cases currently on appeal. First is *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008). *Citizens United* is challenging the application of funding restrictions and disclosure requirements to its activities related to promoting and broadcasting a movie that is critical of a federal candidate. *Id.* The case is due before the Supreme Court on March 24, 2009. Second is *SpeechNow.org v. FEC*, No.1:08-cv-00248 (D.C. Cir. July 1, 2008). Appellants there are challenging the constitutionality of imposing contribution limits on independent spending groups that expressly advocate for and against federal candidates. *Id.*

³² See generally FEC Summary Data Files, <http://www.fec.gov/finance/disclosure/ftpsum.shtml>. Data analysis performed by authors on publicly available disclosures made to the FEC (last visited Aug. 13, 2009).

³³ Susan Page, *Poll: Too Much Money Spent on Presidential Campaign*, USA TODAY, Oct. 29, 2008, available at http://www.usatoday.com/news/politics/election2008/2008-10-29-poll_N.htm. The \$2.4 billion figure was based on pre-Election Day predictions by the Center for Responsive Politics. See OpenSecrets.org, U.S. Election Will Cost \$5.3 Billion, Center for Responsive Politics Predicts (Oct. 22, 2008), <http://www.opensecrets.org/news/2008/10/us-election-will-cost-53-billi.html>.

³⁴ FEC, PRESIDENTIAL MATCHING FUND INCOME TAX CHECK-OFF STATUS (2008), available at

It is sometimes suggested that making free media time available to candidates could reduce campaign costs.³⁵ Such opportunities would be beneficial in that they could lower entrance barriers for political newcomers and thereby enhance the diversity of political voices and ideas to emerge. We are less sanguine, however, that overall campaign costs would necessarily decline as a result. We believe that one of the lessons of the 2008 campaign is that candidates will find uses for as much money as they can raise. If advertising costs are reduced, more money will be channeled to other aspects of campaigning, such as organizing and get-out-the-vote activities, which appeared to have a significant effect on the Democrats' ability to turn former red states blue in 2008.³⁶

The USA Today poll suggests that Americans want to reduce the costs of campaigns without necessarily dedicating tax dollars to the problem.³⁷ This could prove difficult to accomplish, given that the Supreme Court has only upheld campaign-spending limits in the context of voluntary public financing programs.³⁸ And while \$6.1 billion is undeniably a lot of money, it pales in comparison to what we as a nation spend annually on potato chips (\$6.3 billion) or bottled water (\$12 billion).³⁹ In 2008, Americans spent almost as much on Halloween (an estimated \$5.7 billion)⁴⁰ as what was spent on all the federal campaigns that culminated 4 days later (\$6.1 billion). So perhaps, in context, \$6.1 billion is not really an excessive amount of money to spend to choose our leaders in a time of war and economic turmoil.⁴¹

Surprisingly, some spending actually declined from 2004 to 2008. In addition to the reduction in 527 activity noted above, spending on Senate

http://www.fec.gov/press/bkgnd/Fund_Status_05_08.pdf. Authors note that the 2007 figures are unofficial.

³⁵ See, e.g., Fair Elections Now Act, S. 1285, 110th Cong. § 202 (2007) (providing for broadcast vouchers for Senate candidates).

³⁶ See, e.g., Jim Rutenberg & Christopher Drew, *National Push by Obama on Ads and Turnout*, N.Y. TIMES, June 22, 2008, at A1 (discussing President-Elect Obama's plans for "extensive advertising" to substantially increase voter turn-out).

³⁷ See Page, *supra* note 33.

³⁸ See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

³⁹ Kim Severson, *The Best Chip? The First One Out of the Bag*, N.Y. TIMES, July 4, 2007, at F1; INTERNATIONAL BOTTLED WATER ASSOCIATION, 2008 MARKET REPORT FINDINGS, available at http://www.bottledwater.org/public/statistics_main.htm.

⁴⁰ National Retail Foundation, *Halloween Celebrations Rise as Consumers Look to Escape Everyday Realities* (Sept. 30, 2008), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=578.

⁴¹ See *id.* Lest one despair over the spending priorities of Americans (more for candy than for politics), it can at least be said that we are a romantic nation—we spent almost three times as much in connection with Valentine's Day in 2008 (\$17 billion) than was spent on federal campaigns. David Goldman, *Can't Buy Me Love*, CNNMoney.com, Jan. 28, 2008, http://money.cnn.com/2008/01/28/news/funny/valentines_day/.

elections declined by almost 10%, from \$489 million in 2004⁴² to \$444 million in 2008.⁴³ This may simply reflect that donors in 2008 were particularly motivated by the presidential race and were channeling their contributions accordingly.

A. The Candidates and Their Contributors

Donor demographics could be one of the key indicators as to whether 2008 was simply an unusual year or was the beginning of a new trend. The prediction, and hope here, is that the trends that began to develop in 2008 will continue to expand. It is not coincidental that 2008 saw increasing diversification of the donor class. This past election saw the election of the first African-American to the Presidency, the first female candidate to come close to capturing a major-party nomination for President, and the first female candidate on a Republican national ticket. Any or all of these individuals could be national candidates again. Further, while the 2008 primaries featured a much more diverse cast on the Democratic side, one of the individuals already considered a front-runner for a future Republican nomination is an Indian-American—Bobby Jindal—who is also currently the Governor of Louisiana.⁴⁴

Another trend that is likely to continue to diversify the candidate and donor pools is the growing influence of the Hispanic vote. In 2004, President Bush received between 40% and 44% of the Hispanic vote, while in 2008 Senator Obama received 67%.⁴⁵ This difference was crucial in four swing states won by Obama that were all lost by Senator Kerry in 2004: Colorado, Florida, Nevada, and New Mexico. Moreover, Hispanic influence is likely to expand as, according to the U.S. Hispanic Leadership Institute, Hispanics are registering to vote at a rate six times that of the general population.⁴⁶ This increase in registration, in combination with current population trends that project Hispanics will constitute 29% of the

⁴² See OpenSecrets.org, Big Picture, Price of Admission, <http://www.opensecrets.org/bigpicture/stats.php?display=T&type=A&cycle=2004> (last visited Feb. 3, 2009).

⁴³ See FEC 2008 House and Senate Campaign Finance National Map, http://www.fec.gov/DisclosureSearch/mapHSApp.do?election_yr=2008 (last visited Feb. 26, 2009).

⁴⁴ See Adam Nagourney, *At Defining Moment for G.O.P., A Diverse Choice of Leadership*, N.Y. TIMES, Jan. 11, 2009, at A1 (discussing diversity issues in the race for chairman of the Republican Party).

⁴⁵ See MARK H. LOPEZ, THE HISPANIC VOTE IN THE 2008 ELECTION, Pew Hispanic Center (2008), available at <http://pewhispanic.org/reports/report.php?ReportID=98>.

⁴⁶ UNITED STATES HISPANIC LEADERSHIP INSTITUTE, RESEARCH AND REPORTS, <http://www.uskli.org/research> (last visited Feb. 3, 2009).

total U.S. population by 2050,⁴⁷ make it very likely that the electorate of the future will be even more diversified than in 2008.

The demographic make-up of donors in 2008 was a true change from the past. In 2000, over 70% of donors were male, almost 96% were white, and they were also predominantly over the age of 50, college educated and with family incomes of \$100,000 or more.⁴⁸ Experts estimate that this very small group of donors comprised only about two percent of the population.⁴⁹

Conversely, approximately 44% of Senator Obama's contributors were women and they gave him 42% of his total funds.⁵⁰ Interestingly, Senator McCain's numbers moved in the opposite direction; he raised an even higher percentage from men than the 2000 average. Seventy-two percent of his contributions came from men, who also accounted for 72% of his contributors. However, it is important to keep in mind that Senator McCain was required to stop raising funds for his own campaign as soon as he accepted the nomination, which was also when he named Sarah Palin his running mate. While gender numbers have not yet been estimated, the Republican National Committee is reported to have raised over \$1 million in the hours after Sarah Palin became the nominee at the Republican National Convention,⁵¹ and broke its own fundraising record with a \$66 million haul in September 2008 due in great part to the excitement surrounding Governor Palin.⁵²

Before the general election period even began, it was estimated that women in 2008 had given three times more than they gave in 2000 and almost as much as they had given in all of 2004.⁵³ Not surprisingly, half of

⁴⁷ JEFFREY S. PASSEL & D'VERA COHN, POPULATION PROJECTIONS: 2005–2050, Pew Hispanic Center (2008), available at <http://pewhispanic.org/files/reports/85.pdf>.

⁴⁸ Spencer A. Overton, *The Donor Class: Campaign Finance, Democracy & Participation*, 153 U. PENN. L. REV. 102 (2004) (citing E-mail from Clyde Wilcox, Professor of Government, Georgetown University, to Spencer Overton, Associate Professor of Law, The George Washington University Law School).

⁴⁹ *Id.*

⁵⁰ Center for Responsive Politics estimates at www.Opensecrets.org, based on FEC statistics. See OpenSecrets.org, *Cost of '08 Presidential Race Already Tops All Elections Prior to '04*, Feb. 4, 2008, <http://www.opensecrets.org/news/2008/02/cost-of-08-presidential-race-a.html>. The FEC does not ask for candidates to request or disclose the gender of contributors.

⁵¹ Posting of Brody Mullins to Washington Wire, *RNC Picks Up \$1 Million After Palin Speech*, <http://blogs.wsj.com/washwire/2008/09/04/donations-pour-in-to-rnc-after-palin-speech/> (Sept. 4, 2008, 16:25 EST).

⁵² Posting of Jonathan Martin to Politico, *RNC Shatters Monthly Fundraising Record*, http://www.politico.com/blogs/jonathanmartin/1008/RNC_shatters_monthly_fundraising_record.html (Oct. 2, 2008, 18:09 EST).

⁵³ See WOMEN'S CAMPAIGN FORUM FOUNDATION, VOTE WITH YOUR PURSE 2.0: WOMEN'S ONLINE GIVING, OFFLINE POWER (2008), available at http://wcf.3cdn.net/fa0ca3a210d66b6641_i0m6bprb4.pdf.

Hillary Clinton's donors were women—and she raised more than half of her money from these women donors.⁵⁴ When Senators Clinton and Obama's numbers are combined, women contributed at least \$193 million to these two candidates alone this election cycle.⁵⁵ To put these numbers in perspective, remember that in 2000, over 70% of the donors were men, and in 2004 the eventual Democratic nominee, Senator Kerry raised a total of approximately \$227 million from all of his individual donors.

Time will tell whether these newly engaged political contributors will continue to be involved in funding campaigns. A lot may depend on the demographics of the candidates. But seeing the level of support generated for candidates other than Caucasian males in 2008 may help to encourage a more diverse candidate pool in the future. In 1984, a woman ran on a major party's national ticket for the first time, but when that ticket lost, that "experiment" was not repeated for a generation. This time, we do not believe that diversity will be a blip that falls out of fashion after a single election. We will hazard a prediction that in our increasingly diverse country, 2008 will mark the beginning of what we see as a positive trend towards more diversity among both candidates and donors.

B. The Internet

We expect that campaigns will seek to expand their use of the Internet going forward because of its obvious benefits as a fundraising tool. For the donor, it is easy. For the campaign, it is cheap, and, as the 2008 election showed, it can be amazingly effective. But from the standpoint of the public (and, we must confess, the regulator), the Internet has one more outstanding benefit. Raising funds over the Internet substantially limits the opportunities for the kind of actual or apparent improper influence that can arise in direct face-to-face or telephone solicitations by candidates.

The Internet's facilitation of small donations further reduces the potential for corruption. Looking at only the Obama campaign as an example, by the end of August, Senator Obama raised \$217 million in contributions of less than \$200.⁵⁶ By the conclusion of the campaign, Obama claimed to have

⁵⁴ See OpenSecrets.Org, Hillary Clinton: Donor Demographics, <http://www.opensecrets.org/pres08/donordemCID.php?cycle=2008&cid=N00000019> (last visited Feb. 3, 2009).

⁵⁵ See *id.* The total amount of donations identified as being given by women in 2008 to President Obama and Senator Clinton could be substantially more than \$193 million because these figures do not include any donors that gave less than \$200. *Id.*

⁵⁶ CAMPAIGN FINANCE INSTITUTE, PRESIDENTIAL CANDIDATES FUNDRAISING ACTIVITY JAN. 1, 2007 THROUGH AUG. 31, 2008, available at http://www.cfinst.org/president/pdf/Pres08_M9_Table2.pdf.

over 3 million individual donors who made a total of 6.5 million donations online.⁵⁷ Six million of these contributions were for less than \$100 each.⁵⁸ While some contributors gave more than once, the majority donated less than \$1000 total, and an estimated 2.5 million out of the reported 3.5 million donors (71%) donated less than \$200 total.⁵⁹ These 2.5 million donors equal the total number of small (less than \$200) donors estimated to have contributed to all candidates **combined** in 2004.⁶⁰ In sum, more than 57% of Senator Obama's record-breaking total was raised in contributions of less than \$200.⁶¹ Senator McCain raised 35% of his funds in comparable contributions.⁶² In 2004, Senator Kerry raised 31% and President Bush raised 32% from contributions of less than \$200.⁶³

A spirited academic debate has been joined as to the appropriate characterization of the Obama donors, in particular those who gave small amounts (less than \$200) repeatedly and ended up giving totals that exceeded \$200.⁶⁴ New categories have been posited, including "micro-donors" for those whose total donations remained under \$200,⁶⁵ and "mid-range repeaters" for those who started small but over time gave more than \$200.⁶⁶ It seems to us that the amount of the donation (and whether the total is marginally over or under \$200) is ultimately less significant than the method and the purpose. What is truly worth celebrating about the funding of the 2008 election is the sheer number of donors who gave as a pure expression of their political views, donors who gave over the Internet, or by paying \$5 to attend a large speech, or by buying a \$4.50 key-chain

⁵⁷ See Jose Antonio Vargas, *Obama Raised Half a Billion Online*, WashingtonPost.com, Nov. 20, 2008, http://voices.washingtonpost.com/the-trail/2008/11/20/obama_raised_half_a_billion_on.html (discussing the unconventional way that President-Elect Obama raised campaign funds – like through emails and Facebook).

⁵⁸ *Id.*

⁵⁹ See Press Release, The Campaign Finance Institute, CFI Analysis of Presidential Candidates' Donor Reports, REALITY CHECK: Obama Received About the Same Percentage from Small Donors as Bush in 2004, Nov. 24, 2008, available at <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=216> [hereinafter CFI Analysis].

⁶⁰ *Id.*

⁶¹ OpenSecrets.org, Donor Demographics: Contribution Size, <http://www.opensecrets.org/pres08/donordems.php?cycle=2008> (last visited Feb. 3, 2009).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Compare CFI Analysis, *supra* note 59, and Bob Bauer, *Obama Fundraising and the "Small Donor"*: *Strange Views from the Campaign Finance Institute*, More Soft Money Hard Law, Nov. 25, 2008, http://www.moresoftmoneyhardlaw.com/updates/other_related_legal_developments.html?AID=1378.

⁶⁵ Rick Hasen, More Supply, More Demand: The Changing Nature of Campaign Financing for Presidential Primary Candidates 1 (Dec. 2008) (unpublished manuscript, on file with Loyola Law School of Los Angeles) available at <http://ssrn.com/abstract=1267312>, (last visited Jan. 7, 2009).

⁶⁶ CFI Analysis, *supra* note 59.

online, without personal contact from the candidate and without hope of gaining some personal benefit in return.⁶⁷ Call them ideological donors, in contrast to influence seekers. They present virtually no threat of corruption, and they exemplify the spirit of the First Amendment.

To the extent such donors influence policy, they enhance the mix of viewpoints that policymakers consider. As Professor Clyde Wilcox has written, "Candidates who spend their time raising money from the traditional pool of larger donors hear the voices of a distinctive choir – composed of a narrow elite whose priorities and policy views differ substantially from the general population."⁶⁸ The Internet has the potential to create a donor population that is more representative of the general population.

Need the increased role of the Internet in fundraising generate a new spate of regulation? We think not. Already some have suggested that the sheer volume of funds raised in increments of \$200 or less requires a rethinking of the disclosure thresholds.⁶⁹ These commentators voice understandable concerns that when a candidate reports receiving almost \$335 million in unitemized contributions of \$200 or less, perhaps a little more detail might be in order. Addressing this concern would require statutory change but would not necessitate reopening the issue of regulating politics on the Internet, nor would we advocate doing so at this point. As the primary author stated during the 2006 Internet rulemaking, "the Internet really is a special case in politics. We have yet to begin to tap its potential, and [the FEC] should not get in its way."⁷⁰

While it is likely that a greater percentage of political fundraising will take place via the Internet in the years to come, the key question is whether Obama's extraordinary fundraising success can be duplicated by other candidates. Was this "lightening in a bottle," a unique set of circumstances having more to do with a particular candidate at a particular time than with any structural innovations in his fundraising strategies? Or is this the beginning of a new day in campaign fundraising? One interesting trend to

⁶⁷ David D. Kirkpatrick, et al., *Obama's Camp Cultivates Crop in Small Donors*, N.Y. TIMES, July 17, 2007, at A1.

⁶⁸ Clyde Wilcox, *Internet Fundraising in 2008: A New Model?*, 6 FORUM 2 (2008), available at <http://www.bepress.com/forum/vol6/iss1/art6> (last visited Jan. 7, 2009).

⁶⁹ See, e.g., Posting by Rick Hasen to Election Law Blog, *Slides on Internet Fundraising and Campaigning*, <http://electionlawblog.org/archives/012639.html> (Dec. 8, 2008, 08:08 EST) (discussing the issue of disclosure for micro-donations).

⁷⁰ Ellen L. Weintraub, *Comm'r, Fed. Election Comm'n, Statement On Adoption of Final Rules Affecting Certain Internet Communications* (Mar. 27, 2006), available at http://www.fec.gov/members/weintraub/weintraub_speeches.shtml.

watch in 2010 will be whether Congressional candidates are able to imitate on a state-wide or district-wide basis the new fundraising techniques.

C. Public Funding

An overview of this length is not the place for a full review of the future of the Presidential Public Funding program but suffice it to say, the program was in trouble prior to 2008. As discussed above, in 2004, neither of the eventual nominees of the two major parties chose to participate in the primary matching program, and in 2008, few of the major party candidates chose to participate. What does the future likely hold for the public funding program? The short answer is that unless the statute is amended, the program will remain on the books, but only be used by long-shot candidates.

Serious candidates will not return to the public finance system unless and until the program provides sufficient funding to enable participating candidates to be competitive with the amount of money a non-participating candidate can raise and spend. There have been a variety of changes proposed to address this need. One recent proposal regarding Presidential elections includes allowing small contributions to be multiplied by public money—by a factor of 4 to 1—thus allowing candidates to continue to benefit from showing a large base of supporters, but removing the large donors from the mix.⁷¹ This proposal might be viewed as appealing to President Obama since it cleverly plays to his strength, the ability to amass a vast number of small contributions. Another proposed solution aims to significantly increase the money available in the Presidential Election Campaign Fund by raising the amount of money earmarked by taxpayers when they check the box on their tax returns.⁷²

There are a number of obstacles that reformers will need to overcome in any attempts to fix the public finance system. We will highlight two, one legal and one practical. First the legal hurdle: For those who advocate for public financing of elections, part of the appeal is that public financing “levels the playing field,” providing equal opportunities for candidates to get their messages out, and doing so in a way that minimizes the risk of corruption or even the appearance of corruption.⁷³

⁷¹ See Fred Wertheimer, *The \$200 Campaign Finance Fix*, WASH. POST, Nov. 13, 2008, at A23 (exploring campaign financing and the role small donations of \$200 and less played in the 2008 election).

⁷² Presidential Funding Act of 2007, S. 436, 110th Cong. §§ 7–8 (2007). The bill was sponsored by Senators Feingold and Obama but failed to make it out of committee.

⁷³ See Press Release, Public Campaign, “A Better Alternative to Big Money Elections Exists,”

The problem is that the Supreme Court views the concept of “leveling the playing field” as “wholly foreign to the First Amendment,”⁷⁴ and indeed, “ominous.”⁷⁵ Literally, the Court is correct that the concept is a foreign one. The egalitarian notion of leveling the playing field is widely accepted internationally,⁷⁶ but here in the United States, more libertarian views prevail. Recently, for example, in *FEC v. Davis*,⁷⁷ the Court struck down a provision in BCRA that raised contribution limits for opponents of wealthy candidates who infuse large sums from personal resources into their campaigns. The Court found the asymmetrical limits to be “discriminatory” to the wealthier candidate and ruled that leveling electoral opportunities is not a “legitimate government objective.”⁷⁸ Thus, other rationales must be offered for future reforms, and attempts to compensate for imbalances in resources are likely to be viewed with disfavor.⁷⁹ The increasing skepticism of the post-Sandra Day O’Connor Supreme Court towards campaign finance reform measures in general has been widely noted⁸⁰ and will continue to pose a challenge for both existing reforms and new proposals.⁸¹

More pragmatically, in an era when billions of dollars can be raised for campaigns, funding a viable public finance system will be very expensive. In the current economic climate, in a time of unprecedented deficits, it may be difficult to summon the political support for committing substantial taxpayer funds to save a system that seems well able to function on private

Says Public Campaign (Nov. 2, 2004), <http://www.publiccampaign.org/pressroom/2004/11/02/while-big-money-soars-nationwide-clean-elections-thrive-in-arizona-and-maine>. Public Campaign is a non-profit, non-partisan organization that advocates campaign finance reform – seeking to eliminate “big special interest money.” Public Campaign, Who We Are, <http://www.publiccampaign.org/about> (last visited Aug. 13, 2009).

⁷⁴ *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

⁷⁵ *Davis v. FEC*, 128 S.Ct. 2759, 2772 (2008).

⁷⁶ See generally Richard L. Hasen, *Regulation of Campaign Finance*, in GLOBAL PERSPECTIVES IN CONSTITUTIONAL LAW (Vikram Amar & Mark Tushnet eds., 2008); PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE (Keith Ewing & Samuel Issacharoff, eds., 2006).

⁷⁷ 128 S.Ct. 2759 (2008).

⁷⁸ *Id.* at 2771, 2773.

⁷⁹ See *Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006) (striking down a Vermont campaign finance law marked by both spending limits and very low contribution limits).

⁸⁰ See, e.g., Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807, 808–809, 822, 825 (2007) (noting that the “WRTL reopens the vexing question of how to distinguish electioneering ads . . . from constitutionally protected issue speech”); Richard L. Hasen, *Beyond Incoherence: The Roberts Court’s Deregulatory Turn in FEC v. Wisconsin Right to Life*, 92 MINN. L. REV. 1064, 1071–72 (2008) (explaining that the replacement of Justice O’Connor has led to major changes in campaign finance jurisprudence that may “seem afoot”).

⁸¹ See *FEC v. Wis. Right to Life*, 127 S.Ct. 2652, 2659 (2007) (limiting the reach of BCRA’s electioneering communications provision); see also *Randall*, 548 U.S. at 236–37 (striking down a Vermont campaign finance law marked by both spending limits and very low contribution limits).

funds.

CONCLUSION - AND HERE'S THE GOOD NEWS

It is easy to be distracted by the sheer volume of money raised and spent on the campaign of 2008. But the campaign also featured innovation, increased turnout, unprecedented diversity among candidates and donors, and transparency about the process of raising and spending money that is unequalled in the world.

In 2008, more than 450 federal races were run, and more than 1,600 authorized committees filed regular public disclosures with the Federal Election Commission. All of that information was posted on the FEC website almost instantaneously for all of the public to see—often within less than 24 hours. That means every contribution or expenditure over \$200 was made available for inspection by the public, by the media, and by competing candidates, in real time. Most of the data cited in this article was compiled from information originally filed as part of regular, mandated disclosures to the FEC.

Moreover, candidates went above and beyond the law, disclosing information about small donors and large bundlers, providing grist for analysis and insights about an election that motivated millions of Americans to donate their time and their money. Ironically, in defeating Senator McCain, Barack Obama also vindicated him. At a time when national campaigns relied increasingly on unregulated “soft money,” John McCain championed campaign finance reform, sponsoring the Bipartisan Campaign Reform Act of 2002 (better known as “McCain-Feingold”), and insisting that candidates could raise enough in small contributions to fund federal elections. President Barack Obama’s phenomenal fundraising success, fueled by small donations made over the Internet, proved him right.

