The 2004 presidential election was the first election waged under the McCain-Feingold law, which made the most significant changes to the federal election laws in a generation. The McCain-Feingold legislation has three key components, all of which had a major impact on how the Bush-Kerry race was fought. Under McCain-Feingold:

- The national political parties, including the Republican National Committee ("RNC") and Democratic National Committee ("DNC"), were barred from raising and spending any soft money for any purpose;

- The individual contribution limit to presidential candidates dou-
bled from $1,000 to $2,000, and the amount individuals could give to the national parties increased by 25%; and

- Corporations and labor unions were restricted in how they financed television and radio advertisements depicting or referring to presidential candidates within 30 days before a primary and 60 days before the general election.

President Bush, Senator Kerry, the political parties, and outside interest groups were forced to adapt their campaign strategies to these major changes in the nation’s campaign finance laws. In this chapter I will focus primarily on the impact of the first two sets of legal changes on the 2004 presidential campaign. More than ever before, presidential campaign strategy in 2004 was infused, and in some instances driven, by legal considerations. The legalization of presidential politics is likely to continue on the road to the White House in 2008.

THE SOFT MONEY BAN AND THE RISE OF 527 ORGANIZATIONS

Under the McCain-Feingold law, the national political parties are prohibited from raising and spending soft money for any purpose.1 Prior to the McCain-Feingold legislation, the Democratic National Committee and Republican National Committee spent hundreds of millions of dollars of soft-money funds each election cycle on issue advertisements attacking and promoting presidential candidates, as well as on partisan get-out-the-vote operations.2 This soft-money spending was a key part of the campaign support the Democratic and Republican parties historically provided to their
presidential nominees and often played a role in determining which candidate was victorious on Election Day.

With the national parties subject to the soft-money ban for the 2004 presidential race, soft-money spending migrated from the national political 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. Under 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 of Vice-Presidential electors.” Section 527 organizations are partisan political organizations as a matter of law.

Early in the 2004 election cycle, several prominent Democratic 527 organizations contended that, despite the soft-money ban that applied to the national political parties, they remained legally able to continue raising and spending soft money. The Democratic 527s contended that they were legally able to spend unlimited soft money funds on issue advertisements promoting and attacking the presidential candidates and on partisan voter registration and get-out-the-vote activities, provided their public communications did not contain express advocacy, and they did not coordinate their operations with any candidate or political party.

Many Democrats believed it was critical for 527 groups to play an aggressive role because they feared that President Bush, who had already raised record sums of money in the 2000 presidential race, and was unopposed in the Republican primary in 2004, would substantially outspend the Democratic nominee, particularly in the key
time between March of the election year, when each party’s presumptive nominee emerges, and the summer nominating conventions.

Accordingly, several prominent Democratic 527 groups began spending tens of millions of soft money funds during the spring and summer of 2004 on hard-hitting issue ads attacking President Bush and on extensive voter-registration and get-out-the-vote operations. The biggest Democratic 527 group, Americans Coming Together (“ACT”), reportedly spent $76 million on a wide range of voter-registration and GOTV activities during the 2004 election cycle. According to published reports, ACT deployed up to 2,500 canvassers to register approximately 500,000 voters. Moreover, the Media Fund, a Democratic 527 run by Harold Ickes, who was Deputy Chief of Staff under President Clinton, reportedly spent approximately $55 million on anti-Bush advertising. In addition, the Moveon.org Voter Fund reportedly spent approximately $21 million.

Republican strategists initially contended that the soft-money spending of the Democratic 527 groups was illegal and urged the Federal Election Commission (“FEC”) to require the groups to register with the FEC and abide by the hard-dollar limits of federal law. In May, 2004, the FEC rejected proposed regulations that would have subjected certain 527 groups to hard-dollar limits, and announced that it would not issue any regulations governing 527 organizations for the 2004 election.

Following the FEC’s decision, Republican operatives quickly began raising and spending soft money funds through 527 organizations on the same kinds of activities that the Democratic 527s were undertaking. The largest Republican 527 was the Progress for America Voter Fund (“PFA”), which reportedly spent more than $35 million on a wide range of political activities. PFA sent out
millions of direct-mail pieces and aired hard-hitting issue ads attacking Senator Kerry and promoting President Bush that were targeted to battleground states. However, perhaps the most memorable and effective Republican 527 in 2004 was the Swift Boat Veterans for Truth, which spent more than $20 million on a series of ads attacking Senator Kerry’s Vietnam War record.

All told, 527 groups reportedly raised and spent approximately $409 million on activities designed to influence the 2004 presidential race. Of this amount, Democratic-oriented 527s reportedly spent $266 million, for 65% of the total, and Republican groups spent $144 million, for 35% of the total. However, Republican-oriented 527s reportedly outspent their Democratic counterparts during the closing weeks of the campaign.

To put the scope of 527 spending in perspective, President Bush and Senator Kerry were each limited to spending only $75 million during the entire general election phase of the campaign.

Individual donors donated staggering sums of money to 527 groups. The top 15 donors to 527s gave $125 million to the groups combined, accounting for about 25% of their total funding. Democratic donors were the most prolific givers: George Soros was the biggest 527 contributor, at $23.7 million, followed by Peter Lewis ($23.3 million), Stephen Bing ($13.7 million), and Herb and Marion Sandler ($13 million). On the Republican side, Bob and Doylene Perry reportedly donated $9.6 million to 527 groups, and Alex Spanos and Dawn Arnall each gave $5 million.

Moreover, six of the top 10 donors to 527 groups were billionaires who were on the Forbes Magazine list of the richest Americans. Published reports indicate that $8 out of every $10 collected from individuals by Democratic-oriented 527s came from donors...
who gave at least $250,000 each. On the Republican side, the amount was $9 out of $10. The Swift Boat Veterans for Truth reportedly was able to finance the bulk of its activities from just four contributors, who gave the group over $12.7 million. To put these multi-million dollar donations to 527 groups in perspective, individuals may only give $25,000 a year to the DNC and the RNC.

Although Democrats were the first to make major use of 527 groups as soft-money vehicles, Republicans quickly matched and even exceeded the Democrats, at least in the final stages of the election. Moreover, the Republican Swift Boat Veterans for Truth emerged as the most influential 527 group during the 2004 election. For Democrats in terms of 527 groups, the old adage was fitting—he who lives by the sword can die by it.

**MCCAIN-FEINGOLD’S HIGHER CONTRIBUTION LIMITS TRIGGERED RECORD FUNDRAISING BY PRESIDENTIAL CANDIDATES AND PAVED THE WAY FOR THE NOMINEES OF BOTH MAJOR PARTIES TO DECLINE MATCHING FUNDS**

Beginning with the 2004 election cycle, the McCain-Feingold law doubled the amount of money individuals could contribute to all federal candidates, including presidential candidates, from $1,000 to $2,000 per election. The new law also increased the amount of money that individuals could give to national political parties—from $20,000 to $25,000 per year—and doubled what each person could give to state parties, from $5,000 to $10,000 per year. The only important contribution limit that did not increase was the
amount that individuals could give to multi-candidate political action committees ("PACs"), which remained at $5,000 per year.

The increased contribution limits, combined with a highly competitive presidential race, led presidential candidates in 2004 to raise unprecedented sums of money for the primaries. These factors also resulted in both major party nominees, for the first time, declining matching funds and operating outside of the presidential public financing system during the primaries.

Under the presidential public financing system, candidates can receive matching funds from the government up to $250 for each individual contribution they receive.\(^{21}\) To be eligible to receive matching funds, candidates must raise $5,000 in 20 or more states from individuals in amounts of $250 or less. In 2004, each presidential candidate could receive a maximum of approximately $19 million in matching funds. However, candidates electing to receive matching funds for the 2004 race were subject to a nationwide spending limit of approximately $45 million, as well as state-by-state spending limits based on the population of each state.\(^{22}\) 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 primary spending limits apply throughout this period of time. Candidates who decline to take matching funds are not subject to any spending limits during the primary period, and may raise as much money as they want, subject to the contribution limits.

The general election period legally begins for candidates when they are nominated at their national conventions and runs through Election Day in November. Candidates can legally opt out of the public financing system during the primaries, but opt for public
money for the general election. The general-election public grant for major party candidates in 2004 was approximately $75 million. Candidates who accept a public grant for the general election are subject to a national spending limit of the same amount and are prohibited from raising private contributions, except for separate funds to pay for legal and accounting expenses. No major party candidate has ever declined public funds for the general election.

In 2000, George W. Bush raised approximately $100 million during the primaries—which was the greatest amount of money ever raised by a presidential candidate at the time—and became the first person to decline matching funds to win the presidency. In 2004, fueled by the increased contribution limits, President Bush again opted out of public financing during the primaries and raised a record-breaking $270 million. This total was more than six times the $45 million spending limit that would have applied if the President had opted for matching funds.

Senator John Kerry also raised extraordinary sums of money and likewise opted out of public financing during the primaries. Kerry raised approximately $235 million during the primary phase of the campaign, which was more than five times the spending limit. President Bush and Senator Kerry combined raised over $500 million for the primaries; if they had participated in the public financing system, they would have been limited to spending only approximately $90 million.

Overall, all the presidential candidates running in 2004 raised $673.9 million combined. This aggregate total was 92% higher than the $351.6 million that all the presidential candidates raised during the 2000 election cycle. It also represented a staggering 172% increase over the total amount that presidential candi-
In light of this data, there is no question that McCain-Feingold’s higher contribution limits greatly strengthened the fundraising abilities of presidential candidates from both major parties in 2004.

The law’s increased contribution limits also helped spur increased fundraising by congressional candidates during the 2004 election cycle. Congressional candidates participating in the 2004 general election raised a combined $985.4 million from January 1, 2003, through Election Day, which was a 20% increase over the comparable period in the 2002 election cycle. House candidates participating in the 2004 general election raised a total of $613.8 million, which was 14% higher than the aggregate total raised for the 2002 election cycle. Moreover, Senate candidates participating in the 2004 general election raised a combined $371.6 million, which was 32% higher than their counterparts raised during the 2002 cycle.

**NATIONAL PARTY FUNDRAISING**

McCain-Feingold’s increased limits to the national political parties helped the Democratic National Committee and Republican National Committee raise unprecedented amounts of hard money for the 2004 election. For the 2000 election, when it was still legal for the national parties to raise and spend soft money, the DNC collected a total of $260 million of hard and soft money combined. For the 2004 election, the DNC raised more hard money than the combined hard and soft money it had raised for the 2000 election. The DNC raised a total of $391 million for the 2004 election, which was a 150% increase in hard-dollar receipts compared to the 2000
The RNC likewise raised more hard money for the 2004 race than the total amount of hard and soft money it had collected in 2000. The RNC raised $384 million during the 2004 election cycle, which represented a 69% increase in hard-dollar receipts.

However, perhaps the most surprising development in 2004 was that the DNC outraised the RNC for the first time in decades. The RNC pioneered and perfected direct-mail, small-dollar fundraising during the late 1970s and 1980s, which helped provide the RNC with a clear hard-dollar fundraising edge over the DNC for more than two decades. The RNC’s hard-dollar edge ended in 2004. The RNC raised a total of $384.3 million during the 2004 election cycle. However, the DNC raised a total of $391.2 million.

The DNC’s efforts to expand and enhance its low-dollar fundraising programs through Internet and direct-mail appeals played a major role in its historic fundraising success. In 2000, the DNC raised a total of $58.8 million in contributions from individuals in amounts of $200 or less per year. For the 2004 cycle, the DNC nearly tripled this amount, raising $165.2 million of low-dollar contributions. The RNC also raised record sums of contributions from individuals under $200 a year, with its aggregate total increasing from $88.2 million in 2000 to $153.9 million in 2004.

Although low-dollar donations were an important part of the DNC’s and RNC’s record fundraising in 2004, high-dollar contributions also played a major role in each party’s success. The McCain-Feingold legislation increased the individual contribution limit to the national parties from $20,000 to $25,000 per year. This 25% increase in the national-party contribution limit did not receive nearly as much attention as the law’s doubling of the candi-
date-contribution limits to $2,000 per election. However, both national committees capitalized on the increased limits.

For the 2000 election, the DNC received $10.9 million in contributions from individuals giving the maximum $20,000 contribution, which accounted for 9.9% of the total receipts the DNC raised.39 For the 2004 cycle, the DNC raised nearly four times as much money from maxed-out donors, receiving $43.5 million from individuals giving the maximum $25,000 contribution, which accounted for 12.2% of the DNC’s total receipts.40 The RNC also greatly increased the amount of money it raised from contributors giving the legal maximum. For the 2000 cycle, the RNC raised $12.7 million from maxed-out donors, which accounted for 6.8% of its total receipts.41 During the 2004 election cycle, the RNC increased that figure more than four-fold, raising $60.8 million from maxed-out contributors, who comprised 17.7% of its fundraising total.42

In light of the foregoing, it is clear that the increased contribution limits were a major ingredient in the ability of the DNC and RNC to raise record sums of money for the 2004 election, surpassing even the combined amount of hard and soft money the two committees raised during 2000. Some analysts feared that McCain-Feingold’s soft-money ban would weaken and even cripple the national parties. In 2004, the national parties were more than able to off-set the loss of soft-money funds by targeting low-dollar donors and taking full advantage of the increased contribution limits.

The RNC and DNC spent their funds, as in past election cycles, on a wide range of voter registration, voter identification, and get-out-the-vote programs. The vast majority of these voter mobilization activities took place in the 18–20 states that were targeted by
the presidential campaigns. Under federal law, each national party also may make coordinated expenditures on behalf of their presidential nominees. Coordinated expenditures permit the parties, in full consultation with their nominees, to pay for any campaign expenses they choose—including radio and television advertisements, polling services, and campaign staff salaries. In 2004, each national party could make up to $16.25 million of coordinated expenditures on behalf of their nominees.

THE RISE OF INDEPENDENT PARTY SPENDING

Under Supreme Court precedent, political parties have a constitutional right to make unlimited independent expenditures on behalf of federal candidates. Independent expenditures are public communications that expressly advocate the election or defeat of a clearly identified candidate. Under FEC regulations, for any entity, including a political party, to legally make an independent expenditure on behalf of a federal candidate, the expenditure must not be made “in cooperation, consultation, or concert with, or at the request or suggestion” of the candidate. The expenditure also must be paid for entirely out of hard dollars raised subject to the prohibitions and limitations of federal law.

During the 2004 election cycle, the national parties significantly increased the amount of independent expenditures that they made on behalf of their presidential nominees as compared to previous election cycles. The DNC spent approximately $120 million on independent expenditures on behalf of Senator Kerry. Much of the DNC’s independent expenditures were made during August and
early September, while Senator Kerry was attempting to conserve general election funds for the fall campaign.46

The RNC reported making $18.2 million of independent expenditures on behalf of President Bush.47 The RNC also spent $45.8 million on media advertisements that contained joint campaign messages on behalf of both President Bush and the Republican ticket.48 The cost of these joint advertisements was split between the Bush-Cheney Campaign and the RNC.49

2004 saw a remarkable surge in the amount of independent expenditures that the national political parties made on behalf of congressional candidates. The National Republican Senatorial Committee (“NRSC”) made no independent expenditures on behalf of Republican Senate candidates during the 2002 election cycle and only $267,600 during the 2000 cycle.50 However, during the 2004 campaign, the NRSC made $20.1 million in independent expenditures on behalf of Republican Senate candidates across the country.51 The growth of independent spending was even more dramatic for the National Republican Congressional Committee (“NRCC”). The NRCC made only $1.2 million of independent expenditures on behalf of Republican House candidates in 2002. For the 2004 election, the NRCC spent nearly 40 times more money on independent expenditures, with a total of $46.9 million.52

The Democratic congressional committees likewise dramatically increased their independent expenditures in 2004. Like the NRSC, the Democratic Senatorial Campaign Committee (“DSCC”) made no independent expenditures during the 2002 election cycle and only $133,000 in the 2000 cycle.53 However, during the 2004 cycle, the DSCC made $18.7 million of independent expenditures.54 The surge in independent expenditures was even more dramatic for the
Democratic Congressional Campaign Committee ("DCCC"). The DCCC made only $1.1 million in independent expenditures during the 2002 election cycle. For the 2004 campaign, the DCCC’s independent expenditures increased 36-fold, totaling $36.1 million.\textsuperscript{55}

The notable increase in the amount of independent expenditures made by the national parties in 2004 is potentially significant in at least two respects. First, the independent expenditure programs were fueled and made possible only because the national parties broke all hard-dollar fundraising records. Although political parties have a constitutional right to make unlimited independent expenditures on behalf of their candidates, they are only legally able to do so if they have sufficient hard dollars to pay for the advertising.

Second, and more importantly, independent expenditures may be one way that the national parties are adapting to the soft-money prohibition under the McCain-Feingold law. Prior to McCain-Feingold, the national parties used hundreds of millions of dollars of soft money funds to help underwrite issue ads attacking and promoting federal candidates. With the national parties barred from spending soft money for the 2004 election, the parties channeled tens of millions of hard dollars into independent advertising, and thereby maintained an active presence on the nation’s airwaves on behalf of their candidates. In this respect, the 2004 election may have ushered in a new era in campaign finance with the rise of independent party spending.

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NOTES

1. “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 political action committees and have historically been harder to raise; hence, these funds are known as “hard money.”

2. “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 Bush” and “Vote Against Gore” are examples of express advocacy. The Supreme Court established the express advocacy standard in Buckley v. Valeo, 424 U.S. 1 (1976).


8. The author co-sponsored the proposed 527 regulations. The 6-member FEC declined to adopt the proposed regulations by a vote of 4-to-2.


12. Ibid.

13. Ibid.


17. Ibid.

18. Ibid.

19. Ibid.

21. PAC contributions are not matchable.

22. The state spending limits in some of the most important early primary and caucus states were very low. For example, the spending limit in Iowa was only $1.3 million. FEC Record (November 2003) at 9. The spending limit for the New Hampshire primary was even lower, at $730,000. Ibid.

23. These accounts are known as General Election Legal and Accounting Compliance Funds ("GELACs"). GELAC funds are subject to the same $2,000 per-person limit as applies to primary campaign accounts.


26. Even Governor Howard Dean, who dropped out of the presidential race in March 2004, raised approximately $51 million, which was 113% of the primary spending limit. “2004 Presidential Campaign Financial Activity Summarized,” FEC Press Release (February 3, 2005).


28. Ibid.

29. Ibid.

30. FEC Record (November 2003) at 8–9.

31. Ibid.

32. Ibid. It should be noted that some of the increase in Senate candidate receipts may be attributable to the fact that there were Senate campaigns in several mega-states in 2004 that typically are more expensive. California, New York, and Pennsylvania had incumbents seeking re-election in 2004, and Illinois and Florida had open-seat races.


34. Ibid.

35. Ibid.

36. The DNC reportedly expanded its list of direct-mail prospects from one million to 100 million and its Internet contacts from 70,000 to one million. Davis S. Broder, “A Win for Campaign Reform,” Washington Post, February 3, 2005, p. A27.

37. Ibid.

38. Ibid.


40. Ibid.

41. Ibid.

42. Ibid.


44. 11 C.F.R. § 100.16.


46. Candidates who opt for public funds for the general election under the presidential public financing system become general-election candidates when they receive their party’s nomination at the national convention. Once candidates enter the general-election phase, they are required to defray all of their campaign expenses out of public funds and are prohibited from raising or spending private contributions, other than to cover certain legal and accounting expenses. Senator Kerry was nominated during the last week of July and began the general election at that time. President Bush was not nominated until the first week of September, which legally allowed the President to continue using private contributions to defray campaign expenses throughout August.

48. Ibid.
49. Ibid.
51. Ibid.
52. Ibid.
53. Ibid.
54. Ibid.
55. Ibid.