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## 527s in a Post-Swift Boat Era: The Current and Future Role of Issue Advocacy Groups in Presidential Elections

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# 527s in a Post-Swift Boat Era: The Current and Future Role of Issue Advocacy Groups in Presidential Elections

Lauren Daniel\*

## I. INTRODUCTION

We resent very deeply the false war crimes charges [Senator John Kerry] made coming back from Vietnam [in 1971 and repeated in the book *Tour of Duty*.] [W]e think those have cast aspersion on [American veterans] both living and dead. We think that they are unsupportable. We intend to bring the truth to the American people. We believe that based on our experience with him, he is totally unfit to be commander in chief.<sup>1</sup>

¶1 In 2004, U.S. Senator John Kerry was defeated by incumbent George W. Bush in the race for the United States presidency by a margin of less than 2.5% of the popular vote.<sup>2</sup> Political pundits have offered numerous explanations for Kerry's defeat: his alleged flip-flopping on the Iraq War, his perceived lofty New England intellectualism, and his reported lack of appeal to the influential Evangelical Christians on morality issues.<sup>3</sup> One of the most widely recognized reasons for Kerry's 2004 loss, however, credits the involvement of the Swift Boat Veterans for Truth (Swift Boaters). Under their tax-exempt status as a "527" organization,<sup>4</sup> the group launched a highly visible publicity campaign that focused on Kerry's alleged dishonesty about his military service during the

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<sup>1</sup> This statement was issued in May 2004 by the Swift Boat Veterans for Truth, an outside advocacy 527 group that launched a negative publicity campaign against the 2004 Democratic presidential nominee, Senator John F. Kerry. Robert J. Caldwell, *Vietnam Still Echoes in 2004 Campaign*, SAN DIEGO UNION-TRIB., May 9, 2004, at G4.

<sup>2</sup> FED. ELECTIONS COMM'N, FEDERAL ELECTION 2004, at 5 (2004), available at <http://www.fec.gov/pubrec/fe2004/federalections2004.shtml>.

<sup>3</sup> See, e.g., *Scarborough Country* (MSNBC television broadcast Feb. 28, 2007), available at 2007 WLNR 3881354; Letters, *Red, White, and Blue Review*, U.S. NEWS & WORLD REP., Dec. 6, 2004, at 14, available at 2004 WLNR 21767765; Bhargavi Shiva, *Why John Kerry Lost*, HINDU (INDIA) FIN. TIMES LTD., Nov. 19, 2004, available at 2004 WLNR 15488330.

<sup>4</sup> As explained in Part I, the term "527" is used to reference political organizations that have registered under § 527 of the U.S. Internal Revenue Code (I.R.C. § 527 (2006)). While a variety of groups, many of which are created to promote the election or defeat of a particular political candidate, register under § 527, the term "527" most often refers to those political groups which do not advocate for or against particular candidates, but rather advocate for or against political issues. Such 527 groups were not regulated by the Federal Elections Commission at the time of the 2004 election. While 527s that engage in issue advocacy, on the one hand, and express candidate advocacy, on the other, are equally entitled to tax-exempt status under the IRC, the latter are uniquely subject to fundraising and spending limits under the purview of the Federal Elections Commission.

Vietnam War and argued, as a result, that he was unfit for the Office of President of the United States.<sup>5</sup>

¶12 Created under § 527 of the Internal Revenue Code (IRC),<sup>6</sup> the Swift Boaters are one of the many tax-exempt groups to have exploited gaping loopholes in campaign finance regulations. The “527 loophole” exists because 527s that self-identify as “issue advocacy” groups (i.e., those seeking to influence the public through advertisement with respect to an issue, such as abortion, education, the environment, etc.) are not subject to the federally mandated fundraising and contribution limits that are imposed on 527s that self-identify as candidate and political committees (i.e., those that explicitly advocate for or against a particular candidate). Thus, several 527s that engage in subtle yet discernible advocacy for or against a particular political party or candidate have misleadingly characterized themselves as “issue advocacy” 527s to dodge federal funding limits. Over the past decade, 527 groups similar to the Swift Boaters, such as MoveOn.org Voter Fund, the Media Fund, and America Coming Together, have successfully influenced federal elections through high volumes of media advertisements while remaining virtually free from regulation by the Federal Election Commission (FEC).<sup>7</sup> While campaign finance measures over the past decade have limited the contributions to and expenditures of individuals, party committees, and political action committees (PACs),<sup>8</sup> such measures leave the influential contributions of 527s largely unregulated.

¶13 As the 2004 presidential election demonstrated, 527s provide a vehicle through which wealthy individuals can redirect limitless contributions that would otherwise be subject to strict caps if received by political parties or individual candidates. The pervasive activities of independent groups during the 2004 race have been described by one scholar as detrimental to democracy given their circumvention of contribution limits and full disclosure requirements.<sup>9</sup> To deter 527s’ further circumvention of campaign finance regulations, the FEC implemented a case-by-case analysis in late 2004 to determine whether particular 527s should be treated more like PACs, which are subject to monetary caps.<sup>10</sup> These reforms were not, however, prophylactic. Instead, they held off recharacterizing a 527 that engaged in express candidate advocacy as a PAC until *after* the 527’s advertisement campaign had already been launched.<sup>11</sup>

¶14 While the landscape of campaign finance regulation has progressed towards more candor and accountability, the remaining loopholes involving 527s undermine the regulatory system and create a fairly unsupervised alternative for political contributions

<sup>5</sup> See Dennis Chaptman, *Negative Campaign Ads Contribute to Healthy Democracy*, *Political Scientist Argues*, U. WIS.-MADISON NEWS, Jan. 14, 2008, <http://www.news.wisc.edu/14606>.

<sup>6</sup> I.R.C. § 527.

<sup>7</sup> See Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law*, in *NEW CAMPAIGN FINANCE SOURCEBOOK* 7, 34 (Anthony Corrado et al. eds., 2005).

<sup>8</sup> A “political action committee” or “PAC” is defined as “[a]n organization formed by a special-interest group to raise money and contribute it to the campaigns of political candidates who the group believes will promote its interests.” *BLACK’S LAW DICTIONARY* 1196 (8th ed. 2004).

<sup>9</sup> See Sara Tindall Ghazal, *Regulating Nonconnected 527s: Unnecessary, Unwise, and Inconsistent with the First Amendment*, 55 *EMORY L.J.* 193, 193 (2006) (calling 527s “not healthy for democracy”).

<sup>10</sup> See Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 *HARV. J. ON LEGIS.* 471, 490 (2008) (citing Political Committee Status, Definition of Contribution and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 *Fed. Reg.* 68,056, 68,064–65 (Nov. 23, 2004)).

<sup>11</sup> See *id.* at 492–93.

and expenditures. Even so, in September 2009 the D.C. Circuit endorsed such laissez-faire treatment of 527s, declaring in *Emily's List v. FEC* that the First Amendment protects unlimited contributions to and spending by a 527 unless the 527 acts in direct coordination with a particular candidate or party.<sup>12</sup> Said differently, so long as the 527 group is not a candidate committee (e.g., Joe Smith for Congress) or a political party committee (e.g., the Democratic National Committee), the decision in *Emily's List* states that a 527 can expressly advocate for a candidate without subjection to federal funding limits. The decision legitimizes the “527 loopholes” and greatly impedes regulation of 527s’ unlimited use of funding and spending. And though 527s may not coordinate directly with campaigns by giving money to the campaign or by allowing the committee to control the 527s’ funds,<sup>13</sup> the story of the Swift Boaters and the 2004 election reveal that explicit advocacy for or against a candidate need not be coordinated to have a dramatic impact.

15 Notably, 527 groups played a smaller role in the 2008 presidential election than they did in the 2004 elections. This Comment explores the diminished role 527s played in the 2008 presidential election in comparison to the 2004 race, and argues that the decline of 527 activity in 2008 is primarily attributable to the recent economic downturn, rather than evidence of a permanent shift in the political activity of outside groups. This Comment contends that the decline of 527s is a fleeting phenomenon which will soon give way to a revival of unregulated, unscrupulous independent activity, especially given the 2009 D.C. Circuit decision in *Emily's List v. FEC*,<sup>14</sup> which prohibits any imposition of funding limits on outside 527s. In order to ensure transparency and fairness in political campaigns, the FEC must, with the renewed blessing of the judiciary, impose stricter and more lucid standards to determine which 527s are, in fact, outside issue advocacy groups and which 527s are disguised political committees that engage in candidate advocacy yet avoid the required contribution and spending caps. Part II will explore the evolution of 527s, along with their function and legal status as recognized by the U.S. Internal Revenue Service (IRS) and the FEC. Part III will examine the great impact that 527s had on the 2004 presidential election, particularly the effect that the Swift Boaters had on the defeat of Democratic nominee John Kerry. Part IV will discuss the steps Congress took after 2004 to tighten loopholes in 527 regulation. Assessing the efficacy of such actions, Part V will explore the apparent reduced role of 527s in the 2008 presidential election. Next, Part VI will survey the reasons behind the decline of 527 activity in 2008. Here, the probable ramifications of *Emily's List* will also be examined.<sup>15</sup> In conclusion, Part VII will argue that any reduced activity among 527s in 2008 can be largely attributed to the economic recession that coincided with the 2008 presidential race rather than to any paradigmatic shift among outside groups. In essence,

<sup>12</sup> See generally 581 F.3d 1 (D.C. Cir. 2009).

<sup>13</sup> This issue of what conduct constitutes “coordination” with political committees was addressed in *McConnell v. FEC*, 540 U.S. 93, 106 (2003): “FECA § 315(a)(7)(B)(i) long has provided that expenditures that are controlled by or coordinated with a candidate will be treated as contributions to the candidate. BCRA § 214(a) extends that rule to expenditures coordinated with political parties; and §§ 214(b) and (c) direct the FEC to promulgate new regulations that do not ‘require agreement or formal collaboration to establish coordination,’ 2 U.S.C. § 441a(a) note. FECA § 315(a)(7)(B)(ii) is not overbroad simply because it permits a finding of coordination in the absence of a pre-existing agreement. Congress has always treated expenditures made after a wink or nod as coordinated.”

<sup>14</sup> *Emily's List*, 581 F.3d 1.

<sup>15</sup> *Id.*

outside groups—whether in the form of a 527, 501(c), or other classification—will continue to circumvent campaign finance regulations by using unregulated money to indirectly support the election or defeat of federal candidates until the FEC requires such groups, with the acquiescence of the judiciary, to automatically register as “political committees” subject to strict caps on fundraising and spending. The FEC’s current case-by-case analysis waits for 527s to exploit loopholes before such 527s are deemed “political committees” and subjected to monetary caps. Beyond creating unpredictability and little deterrence for future malfeasance, this “wait-and-see” policy leaves the door wide open to an even greater rise in outside group involvement in presidential elections.

## II. THE RISE OF THE 527

### A. Overview

¶6 The term “527” is derived from the section of the IRC that governs their activity as organizations for which contributions are not taxed.<sup>16</sup> Enacted in 1975, § 527 of the IRC covers organizations that primarily conduct election-related activity, defined as “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office.”<sup>17</sup> By this definition, candidate committees and PACs are technically 527s; however, references to this IRC section most commonly refer to the unique outside groups that are generally not regulated by the FEC due to their presumed abstention from express candidate advocacy in federal elections. For the purpose of this Comment, the term “527” exclusively refers to non-PAC and non-candidate outside advocacy groups that, at least ostensibly, advocate for and against political issues instead of particular federal candidates or parties.

¶7 Traditionally, 527s have been considered non-profit organizations that coordinate voter registration or turnout drives, as well as campaign on specific issues. When § 527 of the IRC was initially enacted in 1975, Congress did not require independent political organizations to itemize their expenditures or contributions with regard to political activity.<sup>18</sup> Instead, Congress relied on the FEC to monitor 527 disclosures on the basis of the groups’ political nature.<sup>19</sup> However, the 1976 Supreme Court decision of *Buckley v. Valeo* created a loophole that allowed 527s to circumvent the Federal Elections Campaign Act (FECA),<sup>20</sup> which mandated disclosure and reporting by political committees involved in federal elections and limited political contributions made by individuals.<sup>21</sup> The landmark decision of *Buckley* allowed 527s to dodge FEC regulation by avoiding the use of particular advocacy-related words in their advertisements that would trigger FEC supervision.<sup>22</sup> While *Buckley* upheld portions of FECA limiting

<sup>16</sup> I.R.C. § 527 (2006).

<sup>17</sup> § 527(e)(2).

<sup>18</sup> See Frank J. Favia, Jr., *Enforcing the Goals of the Bipartisan Campaign Reform Act: Silencing Nonprofit Groups and Stealth PACs in Federal Elections*, 2006 U. ILL. L. REV. 1081, 1086–90 (2006).

<sup>19</sup> *Id.*

<sup>20</sup> The FECA was adopted in 1971 and later amended in 1974 to include limiting political contributions made by individuals. 2 U.S.C.A. § 431 (West 2010).

<sup>21</sup> *Buckley v. Valeo*, 424 U.S. 1, 17–19 (1976). It is important to note that the debate about the restrictions on free speech and campaign finance reform, which is at the core of the *Buckley* decision, is beyond the scope of this Comment.

<sup>22</sup> See *id.* at 44 & n.52 (explaining that express advocacy includes statements that “in express terms

individual contributions and mandating disclosures, it struck down limitations on campaign expenditures by individuals, groups, and campaigns, as well as personal expenditures by candidates, on the grounds that such caps unduly restricted free speech and the right to association.<sup>23</sup>

¶18 The *Buckley* decision also articulated that the touchstone for characterizing “political committees” under FECA is whether “the major purpose” of the organization is “the nomination or election of a candidate.”<sup>24</sup> In doing so, the Court excluded organizations concerned with issue advocacy from the FECA requirements that: (1) political committees disclose its contributions and expenditures,<sup>25</sup> and (2) that individual contributors to political committees submit to a \$5000 contribution cap per year.<sup>26</sup> Issue advocacy groups are those groups that solicit the public’s vote on particular issues, such as immigration, education, reproductive rights, etc., rather than particular candidates.

¶19 In an effort to avoid FEC oversight, 527s would ostensibly channel their contributions toward political issues—rather than explicit candidate advocacy—by tactically avoiding FEC trigger words, such as “vote for” and “don’t elect,” as articulated in *Buckley*.<sup>27</sup> Thus, for example, instead of airing commercials that state “not to vote” for a particular candidate, a pro-life 527 organization that is aligned with a particular candidate might disseminate information regarding the opponent’s support of “killing of helpless babies” through the commercial. Though the commercial clearly advocates against a particular candidate, these groups manage to avoid contribution caps and disclosure requirements under FECA by not using words such as “vote for” or “don’t elect.”<sup>28</sup> This strategy allows 527s to significantly impact political campaigns through millions of dollars in television advertisements and other publicity channels while remaining virtually free from regulation.<sup>29</sup>

¶10 At the time of its enactment, § 527 of the IRC sought to make clear that contributions to politically affiliated organizations and committees were not subject to

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advocate the election or defeat of a clearly identified candidate for federal office . . . containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject’”).

<sup>23</sup> *Id.* at 44.

<sup>24</sup> *Id.* at 79.

<sup>25</sup> 2 U.S.C. § 434(a) (2006).

<sup>26</sup> 2 U.S.C. § 441a(a)(1)(c) (2006).

<sup>27</sup> Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 957 (2005).

<sup>28</sup> To further illustrate this point, suppose candidate Joe Smith sponsors a television ad that frames his opponent, John Doe, as a mouthpiece for special interests. At the end of the advertisement, the following words appear on the screen: “Government should serve your interests, not special interests. Vote against John Doe.” A 527 organization that favors Joe Smith’s candidacy and opposes John Doe is permitted to run the very same advertisement so long as it omits the word “vote,” even though the ad conveys such words by inference. Since the former advertisement is run by a political committee or campaign, disbursements that went toward creating the ad will be regulated and capped at the \$3000 limit in accordance with BCRA. Donations that went into creating the latter commercial will remain unregulated since these groups have been characterized as issue-based and not as explicit advocates of any particular candidate or political party. However, both advertisements send the same message to the public: John Doe is unfit for office. For a similar example, see Brandi Cherie Sablatura, *Reformation of 527 Organizations: Closing the Soft Money Loophole Created by the Bipartisan Campaign Act of 2002*, 66 LA. L. REV. 809, 826–27 (2006).

<sup>29</sup> Fredrick G. Slabach, *Introduction to Campaign Finance Law and Organization of Materials*, in THE CONSTITUTION AND CAMPAIGN FINANCE REFORM: AN ANTHOLOGY 3, 10–13 (Fredrick G. Slabach ed., 2006).

income tax.<sup>30</sup> However, it was not until 1998 that the IRS declared in a private letter ruling that issue-advocacy groups (e.g., groups concerned with advocating for a single issue of public concern, such as the environment, same-sex marriage, and the promotion of gun control) were not within the FEC's purview, and were thus eligible to register with the IRS under § 527 of the IRC rather than with the FEC.<sup>31</sup> This declaration broke with past practices which required that any group possessing political affiliations or objectives register with the FEC and disclose all financial contributions. The IRS's ruling held that 527s would not be subject to the same disclosures required of PACs or candidate committees, groups that openly advocate for the election of a particular candidate with words like "vote for" or "don't elect." The IRS's 1998 announcement allowed for a substantially more lax registration process than that under other sections creating tax-exempt entities.<sup>32</sup>

¶11 In 1998, the Sierra Club became the first large independent political group to organize under section 527.<sup>33</sup> Immediately after the IRS's approval of the club's status, an influx of 527 organizations followed.<sup>34</sup> Standing under § 527 was appealing on many levels. First, all contributions to 527s were free from taxation. Second, compliance with the arguably rigorous registration requirements under FEC was not required. Lastly, 527s could work to reinforce the messages already disseminated by political campaigns while avoiding public disclosure of either the sources or beneficiaries of 527 expenditures.<sup>35</sup>

¶12 The lack of transparency required by 527s in comparison to other politically-affiliated organizations led to an emergence of what was termed "stealth PACs."<sup>36</sup> Second only to state and national political party committees, 527s became the primary sponsors of political issue advertisements—many of which were undeniably linked to advocacy for a particular candidate.<sup>37</sup>

### B. 2000 Reporting to the IRS

¶13 In response to the surge of 527 advertising in the 1998 midterm congressional elections, Congress amended § 527 of the IRC to require outside organizations to disclose expenditures and submit various reporting information to the IRS in 2000.<sup>38</sup> This amendment did not, however, include the imposition of contribution or spending limits

<sup>30</sup> Albert L. May, *Swift Boat Vets in 2004: Press Coverage of an Independent Campaign*, 4 FIRST AMEND. L. REV. 66, 76 (2005).

<sup>31</sup> See I.R.S. Priv. Ltr. Rul. 1999-25-051 (Mar. 29, 1999); see also Richard Kornylak, Note, *Disclosing the Election-Related Activities of Interest Groups Through § 527 of the Tax Code*, 87 CORNELL L. REV. 230, 245 (2001).

<sup>32</sup> David M. Peterson, *Do the Swift Boat Vets Need to Move On? The Role of 527s in Contemporary American Democracy*, 84 TEX. L. REV. 767, 773 (2006).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 FED. REG. 76,138, 76,142 (Dec. 6, 2000) (codified at 11 C.F.R. pts. 100, 109, 110).

<sup>36</sup> May, *supra* note 30, at 77.

<sup>37</sup> Shayla Kasel, *Show Us Your Money: Halting the Use of Trade Organizations as Covert Conduits for Corporate Campaign Contributions*, 33 J. CORP. L. 297, 310 (2007) (citing Kathleen Hall Jamieson et al., *Introduction* to ANNENBERG PUB. POLICY CTR., ISSUE ADVERTISING IN THE 1999–2000 ELECTION CYCLE 4 (2001), available at [http://www.annenbergpublicpolicycenter.org/Downloads/Political\\_Communication/IssueAdvocacyIn19992000Election/2001\\_19992000issueadvocacy.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/Political_Communication/IssueAdvocacyIn19992000Election/2001_19992000issueadvocacy.pdf)).

<sup>38</sup> I.R.C. § 527 (2000), amended by Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 (2000).

on 527 money. Since the FEC maintains exclusive jurisdiction over entities that engage in express political advocacy (i.e., “vote for candidate *X*, not *Y*”), and 527s were strategically characterizing themselves as mere issue advocates (i.e., “support comprehensive education reform, which candidate *X* incidentally endorses”), such outside groups fell just outside of the FEC’s reach.<sup>39</sup>

¶14 After 2000, 527s were subject to disclosure with the IRS—a process comparably as rigorous as filing with the FEC. The IRS mandates that 527s elect to submit either monthly or quarterly reports during an election year, along with a special report due twelve days prior to an election.<sup>40</sup> The new disclosure requirements also sought to make information about both financial disbursements and leadership officers in 527s more accessible to the public.<sup>41</sup> To achieve this end, the IRS required organizations to register with the government at least twenty-four hours prior to formation and provide the names and contact information for organization officers.<sup>42</sup> Independent organizations were also required to disclose the names of individual contributors who had given more than \$200 in a calendar year.<sup>43</sup> To deter noncompliance, Congress even went so far as to tax all unreported 527 contributions above \$200 at the highest corporate tax rate.<sup>44</sup>

¶15 The constitutionality of these public disclosure requirements were subsequently upheld by the Eleventh Circuit in *Mobile Republican Assembly v. United States*.<sup>45</sup> Legislators saw such requirements as the end of the “stealth PAC” and a deterrent to unregulated campaign activity by 527s.<sup>46</sup> However, while the disclosure requirements mandated by the IRS made information regarding 527s sufficiently accessible to the public, they did not address the fact that individuals could give limitless contributions to 527s to avoid the caps placed on candidate committees and PACs. The donors’ information became more transparent, but no efforts were made to limit their contributions.

¶16 The lack of 527 oversight thus appears to stem not from a lack of disclosure requirements, but rather from an absence of the contribution and expenditure limits that control political parties and candidates committees.

### C. 2002 Campaign Finance Reform Measures: The Bipartisan Campaign Reform Act

¶17 The advent of the Bipartisan Campaign Reform Act of 2002 (BCRA)<sup>47</sup> underscored the shortcomings of 527 regulation and became a catalyst for bringing independent groups back to the forefront of the campaign finance debate. BCRA

<sup>39</sup> See Kornylak, *supra* note 31, at 249.

<sup>40</sup> See Internal Revenue Service, Pre-Election Reporting Dates, <http://www.irs.gov/charities/political/article/0,,id=118835,00.html> (last visited Feb. 16, 2010).

<sup>41</sup> Peterson, *supra* note 32, at 774.

<sup>42</sup> Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 (2000) (codified as amended at I.R.C. § 527 (2006)).

<sup>43</sup> *Id.*

<sup>44</sup> See I.R.C. § 527(j)(1) (2006). Public Law 106-230 imposes the highest corporate tax rate—currently thirty-five percent—on organizations failing to comply with the law’s disclosure requirements. Pub. L. No. 106-230, § 1(c), 114 Stat. at 479 (2000) (codified at I.R.C. § 6652 (2006)).

<sup>45</sup> 353 F.3d 1357 (11th Cir. 2003).

<sup>46</sup> Peterson, *supra* note 32, at 774.

<sup>47</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended at 2 U.S.C. §§ 431–456 (2006)). The Act is also known by the name “McCain-Feingold” after its Senate sponsors.

instituted a mandate on all 527 advertisements to disclose the source of funding for such advertisements that picture or reference specific candidates within sixty days of a federal general election, or thirty days before a primary or nominating convention.<sup>48</sup> This “electioneering communications” provision applied to all political advertisements, regardless of their characterization as “issue” or “express” advocacy and required reports disclosing expenditures for the ads and a list of contributors who financed the ads to be filed with the FEC.<sup>49</sup>

¶18 BCRA also overhauled campaign finance to eliminate the contribution of “soft money”—money unregulated by the FEC—to candidates and political parties on the local, state, and national levels.<sup>50</sup> BCRA did not, however, eliminate or even limit the contribution of soft money to 527s.<sup>51</sup> The reform measures omitted traditional 527s from the categorization of “political committee[s],” which are defined as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.”<sup>52</sup> Even though most traditional 527s appear to fit this definition, since such groups receive the requisite \$1000 annually and mainly seek to influence federal elections, the FEC chose not to treat 527s as “political committees” under BCRA.<sup>53</sup> This is because money spent by 527s on political advertising was, and is, deemed unassociated with political campaigns or candidates. Thus, 527 expenditures were viewed as independent financing outside the purview of BCRA. The result was that while political party committees were banned from raising or spending any funds not subject to federal limits under any circumstances, 527s were permitted to freely collect and spend unlimited soft money.

¶19 Much of the exclusion of 527s from BCRA’s ban on soft money traces back to the *Buckley* decision’s pronouncement that an organization does not fall within the definition of “political committee” unless its “major purpose” is to influence federal elections.<sup>54</sup> While 527s had undeniably been influencing the outcome of recent federal elections through issue advocacy which avoided use of *Buckley*’s “magic words,” they were still considered entities separate from “political committees.” After the enactment of BCRA, 527s stood in the unique position of being able to accept soft money that political candidates and parties were barred from receiving.<sup>55</sup>

¶20 Congress is undoubtedly faced with a conflict of interest in regulating the 527s that both help and hinder congressional reelection campaigns. Few can disagree that these outside organizations have grown into strikingly significant entities that were far from congressional contemplation in the early 1990s.<sup>56</sup> While Congress may have foreseen

<sup>48</sup> 2 U.S.C. § 434(f) (2006); see also *Court Cases: McConnell v. FEC*, FEC RECORD, Jan. 2004, at 4, available at <http://www.fec.gov/pdf/record/2004/jan04.pdf>.

<sup>49</sup> *McConnell v. FEC*, 540 U.S. 93, 189–94 (2003); see also *Court Cases*, *supra* note 48, at 4–5.

<sup>50</sup> Sablatura, *supra* note 28, at 825–826.

<sup>51</sup> *Id.* at 826.

<sup>52</sup> 2 U.S.C. § 431(4)(A) (2006).

<sup>53</sup> Sablatura, *supra* note 28, at 826.

<sup>54</sup> *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

<sup>55</sup> Sablatura, *supra* note 28, at 828.

<sup>56</sup> See David D. Storey, *The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform*, 77 IND. L.J. 167, 182–84 (2002) (stating that Congress initially, and incorrectly, thought when it permitted 527s to qualify as tax-exempt entities that such groups would ultimately be subject to FECA disclosure requirements).

527s as tax-free entities that would stand on the periphery of political campaigns as they advocated for single issues of public concern or conducted get-out-the-vote efforts, it is improbable that anyone could have predicted the vital role these groups would play in candidate advocacy by 2004.

¶21 BCRA's ban on soft, or unregulated, money was upheld as constitutional in *McConnell v. FEC*, despite Justice Scalia's scathing dissent which argued that a limit on donations to outside groups was a hindrance to a candidate's right to free speech.<sup>57</sup> Just as FECA did not address 527s, so too did BCRA fail to tighten the regulation of 527s in any regard. While the reform measure achieved its goal of banning unregulated donations from corporations, wealthy individuals, and labor unions towards candidate committees and PACs, it did not address the role of outside issue-focused organizations. Unlike the \$2,000 limit placed on individual contributions to political candidates and committees, wealthy donors could make limitless contributions to 527s to achieve a similar result. As a result of BCRA, independent groups did, in fact, emerge as a primary conduit for soft money.<sup>58</sup>

¶22 The reason that 527s created such a viable alternative to direct candidate contributions was because these groups could convey essentially the same message to the public as the candidates themselves while avoiding almost any contribution limit. Additionally, 527s play a vital role in disseminating negative campaign messages since, by doing so, these groups allow candidate committees to refrain from negative campaigning while still publicizing the negative message. In other words, 527s do the "dirty work" of attack ads so candidates can distance themselves from such communications and keep their messages to the public positive.

### III. THE ROLE OF 527S IN 2004

¶23 The failure of federal regulation of outside groups rendered the 2004 presidential election host to the largest proliferation of 527s to date. Two of the most strident and effective voices among the independent groups were the conservative Swift Boaters and the liberal MoveOn.org Voter Fund.<sup>59</sup> Both groups utilized the internet and airwaves to influence the electorate's impressions of Kerry and Bush, respectively,<sup>60</sup> and emerged as pivotal players in candidate advocacy by avoiding the magic words articulated by the Court in *Buckley*. While Swift Boaters attacked the verity of Kerry's personal accounts of serving in Vietnam,<sup>61</sup> MoveOn.org Voter Fund accused Bush of "draft-dodging" during Vietnam.<sup>62</sup> The ability of 527s to collect multi-million dollar donations from

<sup>57</sup> 540 U.S. 93, 251 (2003) (Scalia, J., dissenting) ("[G]overnment bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited these principles by attacking all levels of the production and dissemination of ideas.").

<sup>58</sup> Peterson, *supra* note 32, at 774–75.

<sup>59</sup> *Id.* at 775.

<sup>60</sup> See Michelle Goldberg, *MoveOn Moves Up*, SALON, Dec. 1, 2003, <http://www.salon.com/news/feature/2003/12/01/moveon/index.htm>.

<sup>61</sup> Andrea Stone, *Fog of War, Partisanship Clouds Kerry's Record*, USA TODAY, Aug. 19, 2004, at 8A, available at [http://www.usatoday.com/news/politicsselections/nation/president/2004-08-19-swiftboat\\_x.htm](http://www.usatoday.com/news/politicsselections/nation/president/2004-08-19-swiftboat_x.htm).

<sup>62</sup> Mark Memmott, *New Ad Accuses Bush of Allowing False Advertising*, USA TODAY, Aug. 16, 2004, at

single donors allowed organizations like Swift Boaters and MoveOn.org Voter Fund to significantly impact the public's perception of candidates through the influence of media outlets, such as television and radio advertisements.<sup>63</sup>

¶24 Perhaps the most disconcerting fact about 527 candidate advocacy is that most 527 advertising during the 2004 election was comprised of negative attacks often involving “blatant misrepresentations and falsities” about opposing candidates.<sup>64</sup> For example, the liberal-leaning Media Fund erroneously claimed in a radio ad that family members of terrorist Osama Bin Laden were allowed to depart the United States by plane “when most other air traffic was grounded” after the terrorist attack on September 11, 2001; however, commercial air traffic had actually resumed the week earlier.<sup>65</sup> On the other side, the conservative National Rifle Association Political Victory Fund aired a television ad falsely claiming that Kerry voted to ban deer hunting ammunition when, in fact, he voted to outlaw rifle ammunition “designed or marketed as having armor piercing capability.”<sup>66</sup>

¶25 In total, 527 groups dedicated more than \$430 million to the 2004 federal elections.<sup>67</sup> Most of these resources were directed toward independent advertising in battleground states, such as Ohio, Pennsylvania, and Florida.<sup>68</sup> Tellingly, a Public Opinion Strategies study determined that two of the three most influential political advertisements that aired in battleground states in 2004 were funded by the Swift Boaters and the Progress for America Voter Funds, not by candidate campaigns or PACs.<sup>69</sup> The Swift Boaters' attacks ads criticizing Kerry's service in Vietnam and his receipt of medals of honor were remembered by seventy-five percent of television viewers surveyed.<sup>70</sup> The pro-Bush Progress for America commercial, which featured a sixteen-year-old girl whose mother was killed during the September 11, 2001 terrorist attacks, ranked second in terms of viewer recollection.<sup>71</sup>

#### A. Democratic-Affiliated 527s

¶26 The efforts of MoveOn.org Voter Fund, a 527 offshoot of the 501(c)(4) MoveOn.org,<sup>72</sup> proved significant in advocating against the election of George W. Bush. MoveOn.org Voter Fund declared on its website its primary purpose was to “run ads

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10A, available at [http://www.usatoday.com/news/politicsselections/2004-08-16-ad-watch\\_x.htm](http://www.usatoday.com/news/politicsselections/2004-08-16-ad-watch_x.htm).

<sup>63</sup> Peterson, *supra* note 32, at 775 n.60 (noting that George Soros contributed over twenty-four million dollars to nine different 527s during the 2004 election cycle).

<sup>64</sup> Sablatura, *supra* note 28, at 814.

<sup>65</sup> Factcheck.org, Media Fund Twists the Truth More Than Michael Moore (Oct. 27, 2004), <http://www.factcheck.org/article294.html>.

<sup>66</sup> Factcheck.org, NRA Ad Falsely Accuses Kerry (Oct. 28, 2004), <http://www.factcheck.org/article296.html>.

<sup>67</sup> OpenSecrets.org, 527s: Advocacy Group Spending in the 2010 Elections, <http://www.opensecrets.org/527s/index.php> (last visited Feb. 17, 2010).

<sup>68</sup> See, e.g., Ghazal, *supra* note 9, at 198 n.43; Matthew Murray, *D.C. Democrats Launch Big 527*, ROLL CALL, Nov. 12, 2007.

<sup>69</sup> Jeffrey H. Birnbaum & Thomas B. Edsall, *At the End, Pro-GOP '527s' Outspent Their Counterparts*, WASH. POST, Nov. 6, 2004, at A6.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Section 501(c)(4) of the Internal Revenue Code exempts from federal income taxation not-for-profit civic leagues, social welfare organizations, and local associations of employees. I.R.C. § 501(c)(4) (2006).

exposing President Bush's failed policies in key 'battleground' states."<sup>73</sup> Attracting support from high-profile Democratic partisans, the 527 was heavily funded by Hungarian-born financier George Soros who donated a reported \$2.6 million to the organization.<sup>74</sup> Soros explained on CNN's *American Morning* his reasons for selecting 527s as his primary political mouthpiece<sup>75</sup>:

Well, I fund organizations that bring out the vote and, of course, they have a certain bias. There's no question about it . . . [I] felt that in 2004, the greatest benefit that I could bring to humanity was to prevent [President Bush's] reelection . . . I was willing to, you know, go out, and I put my money on the line, and I put my mouth where my money was [sic]. I spoke out against him. And I think that events have kind of validated that, in fact, we would be in a much better place if he had not been reelected.<sup>76</sup>

¶27 In the same corner as the Voter Fund was the progressive 527 America Coming Together (ACT). Outfitted to "lead the fight against George Bush's radical right-wing agenda,"<sup>77</sup> ACT was largely funded by insurance mogul Peter Lewis, who poured into ACT an astounding \$3 million.<sup>78</sup> Similarly, the progressive Media Fund—also largely funded by wealthy individuals—spent over \$54 million to air anti-Bush advertisements.<sup>79</sup> Perhaps the most notable of these broadcasts was a radio ad which sought to corroborate popular criticism that the Bush family had close ties with the Saudi royal family, particularly during the time of September 11, 2001 terrorist attacks.<sup>80</sup>

### B. Republican-Affiliated 527s

¶28 While liberal 527s active in the 2004 presidential election were quicker to form and raise capital than their conservative counterparts, right-wing groups ultimately produced effective publicity campaigns and, at points during the election, out-spent Democratic 527s on radio and television ads by as much as six-to-one.<sup>81</sup> Perhaps the most memorable among 2004 independent attacks were those launched against Senator John

<sup>73</sup> Benjamin S. Feuer, *Between Political Speech and Cold, Hard Cash: Evaluating the FEC's New Regulations for 527 Groups*, 100 NW. U. L. REV. 925, 928 (2006).

<sup>74</sup> Center for Public Integrity, *Silent Partners: MoveOn.org Voter Fund, 2004 Election Cycle*, <http://www.publicintegrity.org/527/profile.aspx?act=dir&id=682&cycle=2004&sub=1> (last visited Feb. 17, 2010). Soros has been depicted on *Saturday Night Live*, a late-night sketch comedy show, as the "owner" of the Democratic Party. *George Soros is Interviewed on CNN's American Morning* (CNN television Broadcast Oct. 22, 2008) (transcript on file with CQ Capital Transcripts) [hereinafter *Soros Interview*].

<sup>75</sup> *Soros Interview*, *supra* note 74.

<sup>76</sup> *Id.*

<sup>77</sup> Feuer, *supra* note 73, at 928.

<sup>78</sup> OpenSecrets.org, *America Coming Together: Top Contributors, 2004 Cycle*, [http://www.opensecrets.org/527s/527cmtedetail\\_contribs.php?ein=200094706&cycle=2004](http://www.opensecrets.org/527s/527cmtedetail_contribs.php?ein=200094706&cycle=2004) (last visited Feb. 5, 2010).

<sup>79</sup> Michael J. Ushkow, Comment, *Judicial Supervision of Campaign Information: A Proposal to Stop the Dangerous Erosion of Madison's Design for Actual Representation*, 34 HOFSTRA L. REV. 263, 299 (2005).

<sup>80</sup> *Id.*

<sup>81</sup> Thomas B. Edsall, *After Late Start, Republican Groups Jump Into the Lead*, WASH. POST, Oct. 17, 2004, at A15. The article also quoted a Democratic public policy strategist as stating that Republican 527s "have developed 'messages that inherently have more leverage than others because they go at something that is at the heart of the campaign'—in this case Kerry's use of his military record." *Id.*

Kerry by the conservative Swift Boaters, who accused Kerry of having lied about the details of his service in Vietnam to receive combat medals.<sup>82</sup> Just three months before the presidential election, the group began a vehement attack campaign throughout the remaining few months of the 2004 presidential election and dominated media coverage of the campaign in August and September of 2004.<sup>83</sup> Largely funded by T. Boone Pickens, a Texas oilman and influential Republican donor, Swift Boaters were comprised of Vietnam Veterans alleged to have served on “swift boats” (small, lightly-armed patrol boats) with John Kerry during the Vietnam War.<sup>84</sup> The collection of veterans claimed that Kerry fabricated accounts of his service and his conduct during enemy attacks in order to receive one of his two decorations for bravery and two of his three Purple Hearts.<sup>85</sup> However, while many of the Swift Boaters had served in Vietnam, few had ever even met Kerry while serving in Vietnam.<sup>86</sup> *USA Today* reported, “Of the [Swift Boat]’s 254 members—out of 3500 swift boat sailors who served in Vietnam—only one served under Kerry. The rest who did serve on Kerry’s boats back his record.”<sup>87</sup>

¶129 Early in 2004, the Kerry campaign touted the senator’s military service, commonly referring to the three Purple Hearts the senator received for his Vietnam service. For public campaign events, they also gathered pro-Kerry veterans, many of whom had served under Kerry on the swift boats.<sup>88</sup> The publicity received by such events awakened latent vendettas harbored by anti-Kerry veterans who were unhappy with the senator’s war protests subsequent to his return from Vietnam and equally soured by his receipt of three Purple Hearts for his service.<sup>89</sup> One author reports that John E. O’Neill, a longstanding adversary of Kerry’s who also served on the swift boats in Vietnam, and Rear Admiral Roy F. Hoffman, head swift boat commander, gathered to discuss the best manner in which to make the case for Kerry’s unfitness for the position of commander-in-chief.<sup>90</sup> Angered by Kerry’s anti-war activism post-Vietnam, both men debated whether it would be more effective to attack Kerry’s military record and awards, or to focus on his anti-war activism.<sup>91</sup>

¶130 One participant in the early Swift Boat meetings explained the dilemma: “We all agreed that John was unfit to be commander in chief. The only difference of opinion was how to go about making the case: whether to focus solely on his [anti-war] testimony before the Senate Foreign Relations Committees in 1971 or to question his military record as well.”<sup>92</sup> The Swift Boaters heavily relied both on mass media coverage and the

<sup>82</sup> May, *supra* note 30, at 68.

<sup>83</sup> See Human Events Online, DNC Lawyers Work to Muzzle Swift Boat Vets’ Ads, [http://humaneventsonline.com.edgesuite.net/unfit\\_pdf.html](http://humaneventsonline.com.edgesuite.net/unfit_pdf.html) (last visited Feb. 24, 2010).

<sup>84</sup> See, e.g., Swift Boat Veteran for Truth, Swift Boat Veterans for Truth Political Organization Report of Contributions and Expenditures Form 8872, Second Quarter 2004, <http://forms.irs.gov/politicalOrgsSearch/search/Print.action?formId=13244&formType=E72> [hereinafter Swift Boat Second Quarter Report 8872]; May, *supra* note 30, at 92–101.

<sup>85</sup> Factcheck.org, Republican-funded Group Attacks Kerry’s War Record (Aug. 22, 2004), <http://www.factcheck.org/article231.html>.

<sup>86</sup> See Andrea Stone, *Anti-Kerry Vets Say ‘Lies’ Drove Them to Act*, USA TODAY, Aug. 8, 2004, available at [http://www.usatoday.com/news/politicselections/nation/president/2004-08-08-kerry-vets\\_x.htm](http://www.usatoday.com/news/politicselections/nation/president/2004-08-08-kerry-vets_x.htm).

<sup>87</sup> *Id.*

<sup>88</sup> See Patrick Healey, *Vietnam Duality Challenges Kerry*, BOSTON GLOBE, Sept. 6, 2004, at A8.

<sup>89</sup> Pamela Colloff, *Sunk*, TEX. MONTHLY, Jan. 2005, at 100.

<sup>90</sup> May, *supra* note 30, at 85; see also Colloff, *supra* note 89, at 100.

<sup>91</sup> Colloff, *supra* note 89, at 102.

<sup>92</sup> *Id.* (quoting Dallas businessman Michael Bernique, who later dropped out of the Swift Boaters).

publication of an exposé book by O’Neill to first disseminate information regarding Kerry’s alleged falsities about his military service.<sup>93</sup> Titled *Unfit for Command*, O’Neill’s bestselling book argued that injuries Kerry suffered during service in Vietnam—injuries which were arguably the reasons for the receipt of his first and third Purple Hearts—were the result of self-inflicted wounds, not enemy attacks.<sup>94</sup> O’Neill argued that the details of Kerry’s rescue of fellow Swift Boat members cast him in a far more heroic light than in reality.<sup>95</sup> O’Neill relied on testimonial affidavits signed by swift boat veterans as evidentiary sources.<sup>96</sup> However, some of these affidavits have since been retracted and serious uncertainty exists as to the proximity of many of the Swift Boaters to Kerry’s rescue efforts in question.<sup>97</sup> Importantly, both the television commercials and alleged exposé book were strategically timed for release on August 11, 2004, which directly followed Kerry’s nomination acceptance speech at the Democratic Convention in which he emphasized his military service.<sup>98</sup>

¶31 The first public disclosure filing of the Swift Boaters was posted on the IRS website in the middle of July 2004—nearly two months after the group had announced itself to the public during a May 2004 press conference.<sup>99</sup> These Second Quarter reports listed a combined \$100,000 contribution from Bush’s longtime friend Karl Rove and active Bush supporter Bob Perry, a Houston homebuilder, as well as a \$25,000 gift from Harlan Crow, trustee of the George Bush Presidential Library Foundation.<sup>100</sup> Given how late in the election the Swift Boaters had formed and how little funding the 527 had received by the summer of 2004, the media disregarded the group as a viable factor in the presidential race.<sup>101</sup>

¶32 However, the Swift Boaters received a total of \$270,000 by the end of July 2004 from a handful of wealthy Texas oilmen who played a pivotal role in electing George Bush as Governor of Texas.<sup>102</sup> These donations remained unreported for two months due to the IRS’s lax protocol for disclosure.<sup>103</sup> Thus, when the Swift Boaters aired its first

<sup>93</sup> See Peterson, *supra* note 32, at 776; see also May, *supra* note 30, at 83 (“[O’Neil] harbored a longstanding animus toward Kerry dating from the early 1970s when Kerry was a leader of the anti-war veterans.”).

<sup>94</sup> See Editorial, *Kerry Fit to Sue ‘Unfit’ Author*, N.Y. POST, Nov. 18, 2004, at 10.

<sup>95</sup> See *id.*

<sup>96</sup> See Swift Boat Vets and POWs for Truth, “‘Any Questions?’ cover letter for TV station managers,” <http://www.swiftvets.com/article.php?story=20040808144320243> (last visited Apr. 14, 2010) (referencing sworn affidavits from each veteran participant in the Swift Boaters’ advertisement entitled “Any Questions?”); see also Factcheck.org, Republican-funded Group Attacks Kerry’s War Record (Aug. 22, 2004), <http://www.factcheck.org/article231.html> (providing hyperlinks to five Swift Boaters’ affidavits in the left-most column).

<sup>97</sup> See Factcheck.org, Republican-funded Group Attacks Kerry’s War Record (Aug. 22, 2004), <http://www.factcheck.org/article231.html> (noting that *Tour of Duty*, a book by Douglas Brinkley, “describes [the] rescue (and the sniper fire) as happening ‘several hundred yards back’ from where the crippled PCF-3,” who Kerry allegedly rescued, “was lying, not ‘a few yards away,’ the distance from which the anti-Kerry veterans claim to have witnessed the incident”).

<sup>98</sup> May, *supra* note 30, at 99.

<sup>99</sup> Wayne Slater, *PI Digs into Kerry’s War Past*, DALLAS MORNING NEWS, July 13, 2004, at A6.

<sup>100</sup> See Swift Boat Second Quarter Report 8872, *supra* note 84; Wayne Slater, *Texan Funds Anti-Kerry Vets*, DALLAS MORNING NEWS, July 23, 2004, at A10.

<sup>101</sup> May, *supra* note 30, at 92–93.

<sup>102</sup> *Id.* at 93.

<sup>103</sup> See Wayne Slater, *Texan Gives Anti-Kerry Vets Another \$100,000*, DALLAS MORNING NEWS, Aug. 18, 2004, at A17.

television commercial in crucial key states, disclosure reports revealed Perry and Crow as the only donors, omitting contributions from a significant amount of other Texas oilmen with ties to the Bush family.<sup>104</sup> During August 9–16, 2004, almost half of all cable television viewers polled nationally reported having seen either the actual Swift Boater commercial or news coverage of the ad, despite its broadcast in only three states—West Virginia, Ohio, and Wisconsin.<sup>105</sup> The survey’s director noted, “[t]he influence of this ad is a function not of paid exposure but of the ad’s treatment in the free media,” which the group largely relied on to disseminate the information to the national market.<sup>106</sup> In essence, the vast national dissemination of the Swift Boaters’ direct attacks against Kerry was unprecedented. Local and national media outlets covered the advertisements, and, as a result, these anti-Kerry ads made their way through the morning and evening news circuits, attracting even more public attention.

¶33 Media coverage of the Swift Boater ad attacking Kerry’s service record helped to elicit more contributions from donors through the internet, accumulating a total of nearly \$8 million.<sup>107</sup> Wealthy donors, such as Perry, Pickens, and Simmons, contributed a total of \$10.5 million to the efforts by the end of the campaign.<sup>108</sup> Nonetheless, the media had difficulty linking the Swift Boat donors to the Bush family since contribution disclosures lagged up to three months behind the circulation of Swift Boat advertisements and public statements.<sup>109</sup> Since the Swift Boaters were subjected to less frequent disclosure deadlines than PACs and candidate committees, the additional round of contributions remained undetected by the public for months after it was made.

¶34 As savvy as free-riding on media coverage was, the Swift Boaters even more skillfully dodged Congress’s new disclosure time windows under the 2002 BCRA reform, allowing their ads to seem more independent than if their conservative donors had been publicly disclosed.<sup>110</sup> The group’s second advertisement aired from August 14 to September 2, 2004, and focused its criticism on Kerry’s anti-war activism after his return from Vietnam in the 1970s.<sup>111</sup> This second ad was subject to the 2002 BCRA’s new electioneering communications provision, which required disclosure for any advertisements costing over \$1000 that aired within sixty days of the general election, or with thirty days of a primary or nominating convention, and pictured or referenced a candidate.<sup>112</sup>

<sup>104</sup> *Id.*

<sup>105</sup> See Press Release, Annenberg Pub. Policy Ctr., Cable and Talk Radio Boost Public Awareness of Swift Boat Ad (Aug. 20, 2004), available at [http://www.annenbergpublicpolicycenter.org/Downloads/Political\\_Communication/naes/2004\\_03\\_swiftboat-ad\\_08-20\\_pr.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/Political_Communication/naes/2004_03_swiftboat-ad_08-20_pr.pdf). The Swift Boat television ad can be viewed at <http://www.youtube.com/watch?v=oObCOFiIrDc> (last visited Feb. 23, 2010).

<sup>106</sup> Press Release, Annenberg Pub. Policy Ctr., *supra* note 105.

<sup>107</sup> Colloff, *supra* note 89, at 102, 167.

<sup>108</sup> May, *supra* note 30, at 95–96. “The problem of lag-time in campaign finance disclosure reports is an old one for journalists. . . . However, the 527 vehicle . . . exacerbates the problem for journalists accustomed to candidate committees, political parties, or PACs who raised hard money more slowly because of contribution limits. This new vehicle, which allows unlimited contributions, enables a committee to ramp up quickly.” *Id.* at 96.

<sup>109</sup> *Id.* at 97–98.

<sup>110</sup> *Id.* at 68–69

<sup>111</sup> *Id.* at 103. The Swift Boat television ad can be viewed at <http://www.youtube.com/watch?v=phqOuEhg9yE&feature=related> (last visited Feb. 24, 2010).

<sup>112</sup> See FEC.gov, Electioneering Communications,

¶35 Because of the varied timing of the Republican and Democratic conventions, each party’s convention disclosure was different. While the Democratic convention window for Kerry ads ran from June 26 to July 29, 2004, the Republican convention window for Bush ads ran from July 31 to September 2, 2004.<sup>113</sup> The FEC disclosure window for ads that either pictured or referenced either candidate leading up to the general election began on September 3, 2004, and ran through to the general election.<sup>114</sup> By postponing their attacks until August 5, 2004, the group circumvented the Democratic convention “disclosure window” for ads that reference Kerry, set from June 26 to July 29, 2004, as well as the sixty-day disclosure window for the general election. Ads triggering disclosure during this time period would have linked the actions of T. Boone Pickens and the Swift Boaters to the Bush family. Instead, their attacks coincided with “‘dark’ periods” of the new IRS public disclosure requirements which made it difficult for the media to link Bush family cohorts with Swift Boaters—at least until after the election had occurred.<sup>115</sup> While the August ad fell within the Republican convention reporting time window set from July 31 to September 2, 2004, the ad did not reference Bush and did not require reporting during the Republican time frame.

¶36 It was not until a September 10, 2004 IRS disclosure report that both the Swift Boaters’ \$7 million of funding and the group’s connections to T. Boone Pickens and other Texan financiers with ties to the Bush family were revealed.<sup>116</sup> Despite this revelation, one author points out that the mainstream media had already shifted its attention away from Swift Boaters to cover liberal 527s’ counterattacks focusing on Bush’s alleged “draft-dodging” antics.<sup>117</sup> Thus, connections made between Bush and Swift Boaters were treated as marginal and were not impressed upon the public as much as the initial coverage revealing the Swift Boaters’ ads.<sup>118</sup>

¶37 Ultimately, the attacks on Kerry claiming that he had lied about the details of his service to receive medals for valor were disavowed by the mainstream press.<sup>119</sup> A somewhat incomplete military record—attributable to the military’s administrative oversight—supported Kerry’s account of the details, and testimony supplied by the Swift Boater was often contradictory.<sup>120</sup> Still, during August 2004, the public was unable to discern who, in fact, was behind the Swift Boater brand and whether these individuals were fueled by the mere issue of John Kerry’s service or by a greater objective to expressly advocate on behalf of Bush. Regardless of the fact that several veterans retracted their criticism of Kerry and that connections between Swift Boaters and Bush

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<http://www.fec.gov/finance/disclosure/electioneering.shtml> (last visited Mar. 30, 2010).

<sup>113</sup> May, *supra* note 30, at 103–04.

<sup>114</sup> *Id.* at 104.

<sup>115</sup> *Id.* Since the ad did not fall under the electioneering communications provision because it aired after the Democratic National Convention, the Swift Boaters did not have to submit the immediate disclosures required by the FEC under the electioneering provision. The submission of an electioneering communications disclosure would have immediately revealed the most recent contributions in connection with the Swift Boaters’ August advertisement. Instead, the Swift Boaters held off airing the second advertisement until after the electioneering window had closed, which had the effect of delaying disclosure of their contributors until the standard IRS quarterly disclosure report released in September 2004.

<sup>116</sup> *Id.* (citing Thomas B. Edsall, *Swift Boat Group’s Tally: \$6.7 Million*, WASH. POST, Sept. 11, 2004, at A5).

<sup>117</sup> *Id.* (citing *60 Minutes II* (CBS television broadcast Sept. 8, 2004)).

<sup>118</sup> *Id.*

<sup>119</sup> See Michael Kranish, *Veteran Retracts Criticism of Kerry*, BOSTON GLOBE, Aug. 6, 2004, at A1.

<sup>120</sup> May, *supra* note 30, at 100–01.

were eventually corroborated, the damage done to Kerry's reputation and candidacy was presumably irreversible.<sup>121</sup>

¶38 The lag in disclosure reports prevented media outlets from reporting the strong connection between George W. Bush and the allegedly independent and issue-focused Swift Boaters early on when such a report would have been most effective. The 527 loopholes of unlimited soft money contributions and delayed disclosure reports allowed the group to broadcast highly effective anti-Kerry ads long before its financiers were revealed to the public.

¶39 The events of 2004 have demonstrated that the FEC's ex post regulation of 527s, which relies on an examination of expenditures oftentimes months after they have been made, is futile in an election setting. Evinced by the effective disclosure-dodging strategies of the Swift Boaters and explicit candidate advocacy of MoveOn.org, the 2004 presidential election made an important case for stronger ex ante regulation of independent political groups that goes beyond Congress's 2000 reforms for 527s, as well as the scope of BCRA.

#### IV. TIGHTENING THE 527 LOOPHOLES: A CALL FOR REFORM

¶40 As the Swift Boater account demonstrates, the special treatment of 527s began to show its real perils during the 2004 presidential election. Subsequent to the election, several legislators attempted to close the 527 loophole by lobbying the FEC to mandate the registration of 527s as "political committees" under FECA, as BCRA was not intended to address the status of 527s.<sup>122</sup> Senator John McCain<sup>123</sup> criticized the FEC for its disregard of the express advocacy of some 527s on the Senate floor:

These [527] groups readily admit that their intended purpose is to influence the outcome of Federal elections. FECA has long required these groups to register as Federal political committees and comply with Federal campaign finance limits . . . . But here we are, with these groups openly flouting the law and openly spending soft money for the express purpose of influencing the presidential election while the FEC sits on its hands once again.<sup>124</sup>

¶41 Although McCain's plea for wholesale, comprehensive 527 reform was not entirely satisfied, the FEC did respond with significant regulatory reform in an attempt to prevent the reoccurrence of a 527-dominated political field in future elections.

<sup>121</sup> See Edward B. Foley & David Goldberger, *The Swift Boat Ad: A Legal Analysis*, in ELECTION LAW @MORITZ, E-BOOK ON ELECTION LAW § 3.2 (Aug. 13, 2004), [http://moritzlaw.osu.edu/electionlaw/ebook/part3/campaign\\_false02.html](http://moritzlaw.osu.edu/electionlaw/ebook/part3/campaign_false02.html) (speculating that Kerry might have a viable libel lawsuit against the Swift Boaters for injury to his reputation).

<sup>122</sup> Political Committee Status, 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004) (codified at 11 C.F.R. pts. 100, 102, 104, 106, 114).

<sup>123</sup> Senator McCain was the 2008 Republican presidential nominee. He has served as a U.S. senator from the State of Arizona since 1987.

<sup>124</sup> 150 CONG. REC. S4472 (daily ed. Apr. 28, 2004) (statement of Sen. McCain).

*A. FEC Reforms Re: 527 Regulation*

¶42 Rather than requiring all 527s to register as “political committees” subject to strict fundraising regulations, the FEC decided to render case-by-case determinations as to whether a 527 was a “political committee” with express advocacy as its “major purpose.”<sup>125</sup> The FEC was careful not to redefine “political committees” so as to include 527s, as doing so would bar legitimate issue advocacy groups from tax-exempt status.<sup>126</sup> Nonetheless, the FEC significantly amended its rules in late 2004 to limit, in three distinct ways, the instances in which 527s could utilize soft money in election-influencing efforts.

¶43 First, the FEC chose to characterize as “contributions” any funds received from contributors in response to a 527 communication that “indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.”<sup>127</sup> Here it is important to recall the definition of a “political committee” under BCRA: an organization with the “major purpose” of influencing elections that receives “contributions” or makes “expenditures” in excess of \$1000 per calendar year.<sup>128</sup>

¶44 Consequently, the rule requires that all “contributions” received in this manner—more or less with the donor’s expectation that they will be used to explicitly advocate for or against a particular candidate—be subject to FEC caps similar to those imposed on political committees.<sup>129</sup> Currently, contributions that funnel into hard money accounts for political organizations are capped at \$5000 annually for any single contributor.<sup>130</sup> The reforms also require 527s, which receive “contributions” used toward the election or defeat of both state and federal candidates, to raise at least half of their finances with hard money subject to the \$5000 cap per donor.<sup>131</sup>

¶45 Second, the rules mandated that any advertisement referring to a specific political party or candidate be funded by the sponsoring 527 with entirely hard money to which the \$5000 cap per donor is applied.<sup>132</sup> In this manner, it appears as though the FEC was attempting to carve out an isolated “political committee” feature within a 527 group. The contributions that were received in response to express candidate advocacy communications would be poured back into regulated accounts that continued to fund

<sup>125</sup> See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064–65 (Nov. 23, 2004) (codified at 11 C.F.R. pts. 100, 102, 104, 106). Note that the “major purpose” standard holds roots in the Supreme Court’s interpretation of the definition of “political committee.” See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>126</sup> Feuer, *supra* note 73, at 944. As previously explained, a “political committee” under the FECA is defined as an organization with a “major purpose” of express political advocacy that receives “contributions” or makes “expenditures” in excess of \$1000. 2 U.S.C. § 431(4) (2006); see also *Buckley*, 424 U.S. at 62–63.

<sup>127</sup> FEC Scope and Definitions, 11 C.F.R. § 100.57(a) (2009); see also Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. at 68,066.

<sup>128</sup> See, e.g., 2 U.S.C. § 431(4); *Buckley*, 424 U.S. at 79 (declaring that 527s could legally avoid FEC regulation so long as such outside groups refrain from using express advocacy “magic words,” such as “vote” and “elect”).

<sup>129</sup> See FEC Rules for Political Committee Status, 11 C.F.R. § 106.6(f)(1) (2009).

<sup>130</sup> See 2 U.S.C. § 441a(a)(1)(C) (2006).

<sup>131</sup> See 11 C.F.R. § 100.57(b)(2).

<sup>132</sup> See 11 C.F.R. § 106.6(f)(1).

additional advertisements that explicitly advocated for a particular party or candidate. The rule aimed to avoid the use of issue advocacy contributions to fund express advocacy campaigns. This limitation did not, however, apply to publicity that referenced candidates for state office.<sup>133</sup>

¶46 The FEC also sought to ensure that the issues for which 527s advocate are of legitimate political concern with public appeal, rather than mudslinging tactics aimed to defeat a particular candidate. To achieve this end, the third major reform adopted by the FEC required all 527 groups, regardless of whether their advertisements and literature directly reference federal candidates, to raise at least fifty percent of their expenditures with hard, regulated money.<sup>134</sup> The purpose of this requirement was to ensure that the election issues for which 527s advocate are important to a large group of society, warranting small contributions from a significant number of individuals, rather than to the concentrated interests of a small group of wealthy donors.<sup>135</sup>

¶47 Combined, the FEC reforms make raising and spending money to advocate for specific candidates far more difficult for 527s. In order to accept soft money donations, which are recorded and made public by the IRS,<sup>136</sup> 527s cannot disclose to prospective donors the particular candidates that the 527 supports.<sup>137</sup> At face value, the reforms force 527s to limit their efforts to strict issue advocacy lest they be subject to the restrictive fundraising rules governing hard money.

¶48 While undisputedly a significant change from the laissez-faire treatment 527s enjoyed prior to 2005, the FEC reforms still allow outside groups to raise unregulated soft money and ultimately influence the outcomes of campaigns. Some have argued that the best method of closing the soft money loophole is to simply redefine the term “political committee” under FECA and BCRA to include any group whose “major purpose” is to influence the outcome of elections—certainly most 527s would fall under this category, even if their efforts strictly consisted of issue advocacy.<sup>138</sup> A competing proposal, which provides for a more practical bright-line rule, suggests that the IRC be amended to require every 527 group to register with the FEC as a “political committee,” thus subjecting these groups to the same fundraising restrictions imposed upon candidate committees and political party committees.<sup>139</sup>

<sup>133</sup> See 11 C.F.R. § 106.6(f)(2).

<sup>134</sup> See 11 C.F.R. § 106.6(c).

<sup>135</sup> See Feuer, *supra* note 73, at 944–45.

<sup>136</sup> 26 U.S.C. § 527(j)–(k) (2006).

<sup>137</sup> See Feuer, *supra* note 73, at 944–45.

<sup>138</sup> See, e.g., *id.* at 945; Edward B. Foley, *The “Major Purpose” Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. KY. L. REV. 341, 351 (2004).

<sup>139</sup> The most recent of these attempts was a congressional bill titled the “527 Reform Act of 2007,” introduced in January 2007 by Reps. Meehan, Shays, and Castle to the House of Representatives and by Sens. McCain and Feingold to the Senate. H.R. 420, 110th Cong. § 2(a) (2007); S. 463, 110th Cong. § 2(a) (2007). The Act sought to amend the definition of “political committee” to encompass “any applicable 527 organization,” which in turn includes any organization that “has given notice to the Secretary of the Treasury under section 527(i) of the Internal Revenue Code of 1986 that it is to be treated as an organization described in section 527 of such Code.” *Id.* The proposed bill exempted certain organizations from the classification “political committee” that are required to pay tax for expenditures, “reasonably anticipate” less than \$25,000 of financing, are engaged exclusively in state and local (i.e., not federal) elections. *Id.* However, the Reform Act died after being referred to the Committee on House Administration in 2007.

*B. Adjudicating Complaints Against the 527s of 2004*

¶49 It was not until November 2006 that the FEC began to settle through monetary fines the various complaints against 527s that allegedly spent soft money on express advocacy during the 2004 elections.<sup>140</sup> The FEC’s amended rules rendered many of the 527s active in 2004 “political committees” by virtue of either: (1) their “expenditures” used toward express advocacy, or (2) their requests for “contributions” through messages indicating that such funds would be put toward the influence of elections.<sup>141</sup> Notably, the fines levied by the FEC on 527s were not the result of an ex post determination in the sense that they were based on the post-election reforms that had not yet existed during the 2004 campaign season. Instead, the 527s active in 2004 had simply gambled on the fact that the FEC would rely solely on the magic words test in *Buckley*—as the Commission had done over the past decade—to determine whether 527s were “political committees.”<sup>142</sup> Instead, the FEC resurrected its far broader “reasonable interpretation” express advocacy test,<sup>143</sup> a standard the FEC adopted in response to a 1987 Ninth Circuit decision, though rarely invoked.<sup>144</sup>

¶50 The FEC’s proceedings against 527s involved in the 2004 election demonstrated how the agency’s recent reforms had effectively disposed of the magic words test of advocacy in favor of a broader definition, which rendered any payment to produce a broadcast “that could only be interpreted by a reasonable person as containing advocacy of the election or defeat” of a candidate as an “expenditure” even in the absence of the words “vote for” or “vote against.”<sup>145</sup> Moreover, the FEC resolved to no longer rely on any groups’ self-characterization as a 527, but rather to evaluate evidence such as statements, contributors, and representatives to determine the group’s “major purpose.”<sup>146</sup>

¶51 These determinations had a great impact on the Swift Boaters, which were found by the FEC to have violated the spirit of FECA by failing to register as a “political

<sup>140</sup> Under FECA, the FEC may, upon “finding . . . probable cause to believe” that a violation of federal campaign regulations occurred, “attempt to reach a tentative conciliation agreement with the [supposed violator]” often involving monetary fines to be paid by the violator. 11 C.F.R. § 111.18 (2006) (codified at 2 U.S.C. § 437g(a)(4)).

<sup>141</sup> Ryan, *supra* note 10, at 491.

<sup>142</sup> *Id.* at 491–94; see also FEC Conciliation Agreement with Swift Boat Veterans and POWs for Truth, § IV, ¶ 30 (Dec. 13, 2006) [hereinafter FEC Swift Boat Agreement], available at <http://eqs.nictusa.com/eqsdocs/000058ED.pdf> (“While the Commission disagrees with its reasoning, SwiftVets contends that it was uncertain as to the continued validity and application of the alternative express advocacy test set forth in 11 C.F.R. § 100.22(b) because of: (1) SwiftVets’ understanding of the First and Fourth Circuit court decisions holding 11 C.F.R. § 100.22(b) unconstitutional; (2) SwiftVets’ understanding of the Commission’s history of not relying on 11 C.F.R. § 100.22(b) in recent enforcement matters; (3) SwiftVets’ understanding of the division on the Commission in voting whether to initiate a rulemaking to revise or repeal 11 C.F.R. § 100.22(b); and (4) SwiftVets’ understanding of the Commission’s decision in 2004 not to issue specific regulation regarding the political committee status of 527 organizations whose major purpose was the nomination or election of Federal candidates (May 13, 2004), and its September 27, 2001 decision to hold in abeyance a rulemaking to revise the definition of ‘expenditure’ and to promulgate a definition for the ‘major purpose’ test.”).

<sup>143</sup> See 11 C.F.R. § 100.22(b).

<sup>144</sup> See *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (stating that the “magic words” need not be used to constitute express advocacy under the FECA; instead, the advocacy must, “when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate”).

<sup>145</sup> See FEC Swift Boat Agreement, *supra* note 142, § IV, ¶ 25.

<sup>146</sup> See FEC Conciliation Agreement With Freedom, Inc. (Oct. 31, 2006), available at <http://eqs.sdrdc.com/eqsdoc/00005949.pdf>.

committee” with the FEC.<sup>147</sup> In addition to making “expenditures” and receiving “contributions” that indicated a use of such funds towards the defeat of Kerry’s bid for the presidency, Swift Boaters had expressly advocated against Kerry despite the omission of the magic words<sup>148</sup>:

The Commission concludes that all of these communications comment on Senator Kerry’s character, qualifications, and fitness for office, explicitly link those charges to his status as a candidate for President, and have no other reasonable meaning than to encourage actions to defeat Senator Kerry. Therefore, because the Commission concludes that the communications are “unmistakably, unambiguous, and suggestive of only one meaning” and because reasonable minds cannot differ that the communications urge Kerry’s defeat, the Commission concludes that they are express advocacy . . . . According, the Commission concludes that SwiftVets made expenditures in excess of \$1,000 surpassing the statutory threshold for political committee status.<sup>149</sup>

¶52 In reparation for unlawfully raising more than \$22 million to influence the 2004 election,<sup>150</sup> the Swift Boaters were ordered to pay a mere \$299,500 in penalties to the FEC.<sup>151</sup> Similarly, the MoveOn.org Voter Fund was fined \$150,000 for expressly soliciting contributions to defeat George W. Bush under the guise of 527 status.<sup>152</sup> While many other 527s were required to pay penalties to the FEC, America Coming Together (ACT), which raised a total of \$103 million, made the largest payment of \$775,000 to the FEC for its illegal use of non-federal funds toward, among other purposes, its express advocacy for John Kerry.<sup>153</sup> The FEC collected a total of \$3 million from mischaracterized 527s and other tax-free or non-profit groups that were influential in the 2004 federal elections, and which continue to remain active in federal elections.<sup>154</sup>

¶53 Still, the FEC’s action against these 527s is likely to have little deterrent effect on future conduct. First, the penalties levied by the FEC on 2004 independent groups constituted a very small fraction of the unlawful money raised by such groups. The rulings, thus, portrayed FEC fees merely as the cost of doing business, rather than a deterrent to prevent 527s from exploiting campaign finance loopholes in the future. Next, 527 complaints were settled a startling two years after the 2004 election—far too late to impact the outcome of the 2004 election. Additionally, many claims against 527s

<sup>147</sup> See FEC Swift Boat Agreement, *supra* note 142, § IV, ¶ 18.

<sup>148</sup> *Id.* at § IV, ¶ 28.

<sup>149</sup> *Id.*

<sup>150</sup> See David Saltonstall, *Swift Boat Veterans for Truth Gear UP for 2008 White House*, U.S. NEWS & WORLD REP., July 7, 2008, available at <http://www.usnews.com/articles/news/campaign-2008/2008/07/07/swift-boat-veterans-for-truth-gear-up-for-2008-white-house-race.html>.

<sup>151</sup> FEC Swift Boat Agreement, *supra* note 142, § IV, ¶ 14.

<sup>152</sup> See FEC Conciliation Agreement with MoveOn.org Voter Fund, § VII, ¶ 15 (Dec. 13, 2006), available at <http://eqs.nictusa.com/eqsdocs/000058F4.pdf>.

<sup>153</sup> See FEC Conciliation Agreement with America Coming Together (Aug. 24, 2007), available at <http://eqs.sdrdc.com/eqsdocs/000061A1.pdf>.

<sup>154</sup> Press Release, FEC, Media Fund to Pay \$580,000 Civil Penalty (Nov. 19, 2007), available at <http://www.fec.gov/press/press2007/20071119mediafund.shtml>.

in the 2004 election remained outstanding and unsettled beyond the 2006 midterm elections.

¶154 The FEC’s refusal to recognize all 527s as “political committees” by promulgation of new rules was upheld by the D.C. Circuit in *Shays v. FEC*, under the reasoning that a great deal of deference must be given to agency decisions on whether or not to create or alter existing regulations.<sup>155</sup> In an effort to codify stricter 527 regulation than the FEC’s mere case-by-case analysis, nearly every Congress since 2004 has attempted to amend FECA’s definition of “political committees” to include 527 organizations involved in federal elections so as to subject such groups to FEC disclosure requirements, contribution limits, and donor prohibitions.<sup>156</sup>

### C. *Emily’s List v. FEC: A Step Back from Reform*

¶155 On September 18, 2009, the D.C. Circuit delivered an unexpected blow to the progress toward greater 527 regulation.<sup>157</sup> In an opinion delivered by Judge Kavanaugh, the court unanimously struck down the FEC’s 2004 527 reforms and ruled that independent groups, including 527s, have a First Amendment right to raise and spend funds freely to influence elections, so long as they do not coordinate their activities with a specific candidate or political party.<sup>158</sup> Weighing the government’s interest in deterring the corruption that stems from unlimited contributions toward a candidate or party against First Amendment rights to association and free speech, the court held that donations to 527s cannot corrupt candidates or elected officials.<sup>159</sup> As Judge Kavanaugh noted, “to the extent a non-profit . . . spends its donations on activities such as advertisements, get-out-the-vote efforts and voter registration drives, those expenditures are not considered corrupting, even though they may generate gratitude from and influence with officeholders and candidates.”<sup>160</sup>

¶156 At specific issue in the case were the FEC’s three major 2004 reforms, namely 11 C.F.R. §§ 106.6(c), 106.6(f), and 100.57, which (1) require 527s to pay for at least half of their election-related, non-express advocacy activities through hard money accounts funded by individuals who have given no more than \$5000 in a calendar year,<sup>161</sup> (2) limit the amount of money 527s can use to finance voter drives and public communications that reference federal, and not state, candidates to the same limits imposed on PACs,<sup>162</sup> and (3) restrict contributions received in response to solicitations indicating that such contributions will be used for the express advocacy of a clearly identified federal candidate to PAC limits of \$5000 per individual.<sup>163</sup> The court struck down all three of these provisions, allowing 527s to return to their pre-2005 status in which they could freely raise and spend money for election-related activities, *including* express advocacy for or against a particular candidate. In his majority opinion, Judge Kavanaugh

<sup>155</sup> *Shays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007).

<sup>156</sup> Ryan, *supra* note 10, at 501.

<sup>157</sup> See generally *Emily’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

<sup>158</sup> *Id.* For a description of what constitutes “coordination” with a political campaign, see quotation from *McConnell v. FEC*, *supra* note 13.

<sup>159</sup> *Emily’s List*, 581 F.3d at 11.

<sup>160</sup> *Id.*

<sup>161</sup> See 11 C.F.R. § 106.6(c) (2009).

<sup>162</sup> See § 106.6(f).

<sup>163</sup> See § 100.57.

remarked, “non-profit groups—like individual citizens—may spend unlimited amounts out of their soft-money accounts for election-related activities such as advertisements, get-out-the-vote efforts, and voter registration drives.”<sup>164</sup>

¶157 While some advocates of campaign finance reform have accused the D.C. Circuit of overreaching its authority in rendering an “overly broad” opinion,<sup>165</sup> the decision is certain to impact outside group involvement in future elections.<sup>166</sup> As one reporter notes, the decision opens the door even wider to outside anti-Obama conservative groups, such as those which hosted “Tea Party” protests of big government in 2009, in advance of the impending 2010 midterm elections and future 2012 presidential election.<sup>167</sup>

#### D. Beyond Emily’s List

¶158 As history demonstrates, 527s have always been able to align themselves with a particular candidate in a manner that ostensibly appears to be zealous issue advocacy by conveying a certain message through inference, rather than through language that explicitly advocates for or against a federal candidate. However, *Emily’s List* remarkably allows 527s to engage in blatant candidate advocacy and yet still remain free from caps on contributions and expenditures. As the court states, its decision seeks to protect the “right of citizens to band together and pool their resources as an unincorporated group or non-profit organization in order to express their views about policy issues and candidates for public office.”<sup>168</sup> The decision virtually does away with any distinction between non-PAC 527s that engage in issue advocacy and express advocacy, respectively, since it shields both categorizations from subjection to funding limitations.

¶159 Moreover, as one scholar notes, the decision also places political parties at a great disadvantage since they are still subject to the hard money fundraising limits. *Emily’s List* makes the regulatory treatment of 527s and PACs even more disparate, despite the fact that the two entities both register under § 527 of the IRC. Registration under the section gives the presumption that an organization’s purpose is to:

directly or indirectly accept[] contributions or mak[e] expenditures, or both . . . . to **influenc[e] or attempt[] 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, whether or not such individual or electors are selected, nominated, elected, or appointed.<sup>169</sup>

<sup>164</sup> *Emily’s List*, 581 F.3d at 14.

<sup>165</sup> See Sean Parnell, Op-Ed, *Getting Emily’s Gist*, WASH. TIMES, Sept. 23, 2009, at A18.

<sup>166</sup> The FEC is allowed ninety days from the date of the decision to determine whether it will petition the Supreme Court to hear the *Emily’s List* case. See SUP. CT. R. 13. The FEC is also allowed forty-five days to ask the full D.C. Circuit Court to rehear its argument. See FED. R. APP. P. 40(a)(1). On October 22, 2009, the FEC decided not to appeal circuit court’s ruling. See Reid Wilson, *FEC Won’t Appeal Emily’s List Ruling*, THEHILL.COM, Oct. 22, 2009, <http://thehill.com/homenews/campaign/64437-fec-wont-appeal-emilys-list-ruling>.

<sup>167</sup> See Del Quentin Wilber & Dan Eggen, *Independent Groups’ Political Spending Cap Overturned*, PITTSBURGH POST-GAZETTE, Sept. 19, 2009, at A5.

<sup>168</sup> *Emily’s List*, 581 F.3d at 4.

<sup>169</sup> 26 U.S.C. § 527(e)(1)–(2) (2006) (emphasis added).

¶160 Given that the two entities share the same tax-exemptions under § 527 of the IRC and the same self-characterized objective—to influence federal and state elections—527s should be subject to registration as “political committees” just like PACs and candidate committees. Emily’s List supporters would respond that the traditional 527 groups, despite their record of unlawful campaign conduct, have a greater claim to First Amendment rights which separate them from political committees.

¶161 Perhaps others find something uniquely “American” in seeing small groups of everyday individuals impact presidential elections, albeit through often negative publicity. For example, when asked his opinion about the Swift Boaters smear campaign in 2004, FEC Chairman Bradley Smith remarked, “I think it’s great that we live in a country where 260 . . . average guys can go out and put their point of view out there before the public and influence a major presidential race.” As one professor put it, “Otherwise we all sort of go to sleep, and that’s bad for us.” However, both individuals fail to see that it is also “bad” for us as citizens of a democracy to awaken to a political field largely wrought by the smear campaigns of stealth outside groups.

### 1. If *Emily’s List* Sticks

¶162 If *Emily’s List* is not ultimately overruled and the 2005 FEC reforms remain stricken, the FEC will simply have its hands tied in attempting to limit 527s activities in any manner. Instead, full disclosure of financial disbursements and the identity of 527 contributors will remain as the exclusive method of 527 oversight. In this light, the smear tactics of the Swift Boaters in an express advocacy-regulated regime may pale in comparison to future 527 publicity campaigns in a regime entirely devoid of 527 regulation where express advocacy and issue advocacy are equally protected from funding limitations. As one law professor has observed, under *Emily’s List* 527s “are now free to accept unlimited contributions, to spend unlimited funds independently supporting or opposing federal candidates.”<sup>170</sup>

¶163 Still the government had hoped to vitiate the *Emily’s List* precedent by prevailing in *Speechnow.org v. FEC*, a similar case involving a 527 that was denied permission by the FEC to accept unlimited donations for the purpose of express advocacy.<sup>171</sup> Speechnow.org appealed the FEC’s denial of the request under the claim that its First Amendment rights to free speech were violated by complying with funding limits.<sup>172</sup> The D.C. District Court ruled against Speechnow.org in July 2008, but the decision was overturned by the D.C. Circuit in March 2010.<sup>173</sup> The D.C. Circuit struck down limits on individuals’ and corporations’ contributions to political committees for the purpose of advocating for and against candidates so long as the political committee does not also make direct contributions to candidates or political parties.<sup>174</sup> Had the FEC prevailed en

<sup>170</sup> See Wilber & Eggen, *supra* note 167, at A5.

<sup>171</sup> 567 F. Supp. 2d 70 (D.D.C. 2008).

<sup>172</sup> Richard Winger, Federal Government Won’t Appeal Emily’s List Campaign Finance Decision (Dec. 17, 2009), <http://www.ballot-access.org/2009/12/17/federal-government-wont-appeal-emilys-list-campaign-finance-decision/>.

<sup>173</sup> See generally *Speechnow.org v. FEC*, 567 F.Supp.2d 70 (D.D.C. 2008), *rev’d* Nos. 08-5223, 09-5342, 2010 WL 1133857 (D.C. Cir. Mar. 26, 2010).

<sup>174</sup> *Id.*

banc, the decision would have essentially overshadowed *Emily's List* because *Emily's List* is an ordinary appellate decision issued by a standard three judge panel.

¶164 *Speechnow.org* and *Emily's List* join the landmark 2010 *Citizens United* case, in which the Supreme Court declared limitations on corporations' independent spending for the express advocacy of federal and state candidates unconstitutional, dramatically altering the campaign finance landscape.<sup>175</sup> Whereas the early 2000s were host to a tightening of campaign finance loopholes that once allowed inside and outside political groups to exercise a disproportionate influence over the election process, the subsequent years have amplified such loopholes in the interest of First Amendment rights. These recent federal court decisions illustrate what one scholar calls a recent "mov[ement] toward a deregulated federal campaign finance system."<sup>176</sup>

¶165 *Emily's List* presents a major hurdle to 527 regulation reform. Still, many political strategists are adopting a "wait-and-see" policy before advising independent groups to disregard the new FEC regulations adopted after the 2004 election. In response to the decision, a Democratic campaign finance lawyer remarked, "[i]n the short term, I don't think that any lawyer should advise their client that the law is gone and they need not follow the current regulations."<sup>177</sup>

## 2. If *Emily's List* is Overruled

¶166 Despite recent court decisions favoring deregulation, *Emily's List* may still be overruled amid the high volume of campaign finance cases recently navigating the judicial system. Should the judiciary ultimately permit regulation of independent groups, a blanket requirement that *all* 527s register with the FEC and submit to the agency's oversight appears the only plausible solution to close the loopholes that allow outside groups to use soft money for express candidate advocacy. Even if *Emily's List* were overturned and the FEC's 2004 reforms were to stand, the distinction between 527s and "political committees" no longer makes practical sense given the similarity of the groups' conducts in candidate advocacy.

¶167 So long as the gray area between issue advocacy and express advocacy exists, 527s will always strive to create the illusion of sheer issue advocacy—even if this means creating candidate inferences without using explicit names or pictures—regardless of the reality of the organization's conduct. Anything short of requiring all 527s to submit to FEC registration and contribution and spending limits fails to provide the requisite predictability or clarity about the categorizations of 527s.

¶168 Moreover, while the "major purpose" test applied in FEC actions against 2004 527s is superior to *Buckley's* magic words standard, which focuses merely on the employment of terminology, the major purpose test is often applied in an ex post manner though FEC

<sup>175</sup> See generally *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>176</sup> David D. Kirkpatrick, *Court Rejects Rules on Spending by Nonprofits*, N.Y. TIMES, Sept. 19, 2009, at A10.

<sup>177</sup> Matthew Murray, *FEC Weighs Appeal of Ruling on Nonprofit Groups*, ROLL CALL, Sept. 22, 2009, [http://www.rollcall.com/issues/55\\_29/politics/38766-1.html](http://www.rollcall.com/issues/55_29/politics/38766-1.html) (internal quotation omitted). One source writes that the "current [FEC] rules will remain in effect until the [new] rulemaking process" through which the FEC will promulgate rules in compliance with the *Emily's List* decision "is complete." Lateefah Williams, *FEC Proposes Rules to Comply With Emily's List Decision* (Dec. 18, 2009), <http://www.ombwatch.org/node/10661>. "[B]ut the 2010 edition of the FEC's code of regulations will note that the rules are 'no longer in effect' due to the decision in the *Emily's List* case." *Id.*

527 adjudications occurring after the conclusion of the election (when public judgment has already been impacted) as evinced by the Swift Boaters and the MoveOn.org Voter Fund. Beyond having an unpredictable impact on 527 regulation, the non-bright-line standard of the major purpose test does little to deter outside groups from testing their limits at the onset of election-related activity. The FEC will first have to assess the actions of a 527—its advertisement, contributors, and spokespeople—before it decides that the 527’s major purpose is to advocate for particular candidates. Thus, the 527 will get to play out its publicity campaign before its express candidate advocacy is ascertainable. This “wait-and-see” 527 policy usually defers any FEC action against the 527 group until after the election’s conclusion, rendering FEC fines merely a transactional cost in exploiting 527 soft money loopholes.

¶69 After 2004, both the lack of ex ante wholesale regulation of 527s and the FEC’s issuance of meager penalties left many scholars and political pundits wondering whether the 2008 presidential election would see a steady growth of these independent groups. As one author posited, “It is possible that 527[s] . . . wishing to raise and spend illegal soft money to influence the 2008 federal elections will take their chances with the FEC, viewing a fine that amounts to one or two percent of the amount illegally raised and spent as the cost of doing business.”<sup>178</sup> However, despite the FEC’s failure to restrain 527 candidate advocacy, the role of 527s in this most recent 2008 presidential election appears to have been somewhat diminished.

#### V. 527S IN THE 2008 ELECTION

¶70 Though political pundits held on to see whether independent groups would make a final push in expenditures immediately before the 2008 presidential election, the role played by 527s in the most recent presidential race between U.S. Senator John McCain and then-Senator Barack Obama was distinctly muted in comparison to that in 2004. As one reporter observed, “[I]f 2004 was the year of the 527 advocacy organization, 2008 will not produce a sequel.”<sup>179</sup> The Center for Responsive Politics reports that 527 federal expenditures in 2008 totaled just under \$250 million—a startling drop off from the \$438.9 million spent in 2004.<sup>180</sup> Possible reasons for this decline will be discussed in Part VI of this Comment.

¶71 Although the FEC’s fines levied on 527s in 2004 were seen by most as nothing more than the cost of doing business, some assert FEC sanctions as one possible basis for the diminished participation of 527s in 2008.<sup>181</sup> Another reason for the reduction of 527 activity could be attributed to both McCain’s and Obama’s publicly denouncement of 527 spending in light of the large loopholes that still exist in campaign finance laws.<sup>182</sup> Still, it is impossible to ignore the most likely explanation: the grave economic turmoil that

<sup>178</sup> Ryan, *supra* note 10, at 504.

<sup>179</sup> Bill Swindell, *527s Stuck in Port as Other Organizations Jump Into Fray*, CONG. DAILY, Oct. 22, 2008, available at <http://www.sunlightfoundation.com/presscenter/articles/2008/10/24/527s-stuck-port-other-organizations-jump-fray/>.

<sup>180</sup> OpenSecrets.org, *527s: Advocacy Group Spending in the 2010 Elections*, <http://www.opensecrets.org/527s/index.php> (last visited Feb. 24, 2010).

<sup>181</sup> Swindell, *supra* note 181; see also Matthew Mosk, *Economic Downturn Sidelines Donors to ‘527’ Groups*, WASH. POST, Oct. 18, 2008, at A9.

<sup>182</sup> Matt Kelley & Fredreka Schouten, *Wealthy Few Provide Much of the Cash for Independent Political Groups*, USA TODAY, July 22, 2008, at 5A.

shrouded the 2008 election and consequently left donors too concerned with their plummeting portfolios to finance independent political groups.<sup>183</sup>

#### A. Democratic-Affiliated 527s

¶72 Despite an overall decline of 527 contributions and expenditures, some 527s were still quite active during the 2008 election. Liberal groups, such as Brave New PAC, took matters into their own hands to “spread the word about McCain” since “it’s clear the corporate media won’t.”<sup>184</sup> This group sought to disseminate information about McCain’s alleged short temper and volatile nature through a television advertisement featuring a former prisoner of war (POW) familiar with McCain who stated that the emotionally disturbing POW experience is “not a good prerequisite” for the position of commander-in-chief.<sup>185</sup>

¶73 The left-wing MoveOn.org Voter Fund, which was active in 2004, also returned for a second round of attacks on the Republican nominee in its portrayal of McCain as a mere conduit of special interests, as well as a candidate who took an unpopular stance on the Iraq war.<sup>186</sup> Similarly, VoteVets ran advertisements speciously suggesting that McCain would reinstate the military draft if elected.<sup>187</sup>

¶74 Other 527s aligned with then-Senator Obama include the California Nurses Association, which aired its one “heartbeat away” advertisement in an attempt to unnerve the public by focusing on McCain’s selection of the “inexperienced” Alaska Governor Sarah Palin as his running mate.<sup>188</sup> The advertisement aired in traditional swing states, such as Ohio and Wisconsin.<sup>189</sup>

#### B. Republican-Affiliated 527s

¶75 Despite the fact that liberal 527s have traditionally outspent their conservative counterparts, right-wing 527s aggressively advocated against the election of Barack Obama.<sup>190</sup> Vets for Freedom featured an ad campaign attacking Obama’s position that

<sup>183</sup> See Mosk, *supra* note 183; Jennifer Haberkorn, ‘Swift Boaters’ Lack Spending to Sink Campaigns, WASH. TIMES, Oct. 17, 2008, at A1; *Stocking Away Small Donors*, THE HOTLINE, Oct. 20, 2008; Sabrina Eaton, *Special Interests Zero in on Ohio But Ad Spending Down this Year*, PLAIN DEALER, Oct. 24, 2008, at A1.

<sup>184</sup> Christina Bellantoni, *Ads from 527s Aim to Divide, Conquer*, WASH. TIMES, Sept. 17, 2008, at A1.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* While McCain suggested that an “all-out World War III” might warrant the reinstatement of the military draft, he did not affirmatively say that he would implement a draft if elected. He did say, however, that he “might consider it,” although he didn’t think a draft was “necessary.” Ali Frick, *McCain on Reinstating a Military Draft: ‘I Don’t Disagree,’* (Aug. 20, 2008), <http://thinkprogress.org/2008/08/20/mccain-support-draft/>.

<sup>188</sup> Brian C. Mooney, *Political Groups Playing Reduced Role in 2008 Race, Now Less Money for Negative Ads*, BOSTON GLOBE, Oct. 13, 2008, at 12. This advertisement highlighted the fact that if McCain were to win the election and later decess, his allegedly highly inexperienced running mate, Sarah Palin, would run the country.

<sup>189</sup> Bellantoni, *supra* note 186, at A1.

<sup>190</sup> OpenSecrets.org shows liberal-leaning 527s as having disbursed \$367,943,779 in federal receipts during the 2004 campaign, in comparison to conservative 527s’ \$105,774,597 in receipts. OpenSecrets.org, *527s: Advocacy Group Spending in the 2010 Elections*, <http://www.opensecrets.org/527s/index.php> & <http://www.opensecrets.org/527s/index.php?filter=D> (last visited Feb. 24, 2010).

the troop surge in Iraq has been a failure.<sup>191</sup> The advertisement juxtaposed clips of Obama’s stump speeches with footage of General Petraus, in which Petraus asserts that the surge had actually brought more stability to the region.<sup>192</sup>

¶76 A common theme among conservative 527 attack ads was Obama’s status as a former congregant of the controversial Reverend Jeremiah A. Wright’s church in Chicago. The California-based Our Country Deserves Better PAC ran an ad referencing the “hateful sermons” of Reverend Wright.<sup>193</sup> The same group also ran ads featuring the mother of an Iraq Marine who alleged that “[Obama] says he’ll play nicey-nice with Islamic militants who want to kill Americans both here at home and abroad.”<sup>194</sup>

¶77 While the presence of 527s remained palpable in the 2008 presidential race, the arena did not appear to be dominated by any single group as was the case in 2004 with the Swift Boaters and MoveOn.org Voter Fund. Evan Tracey, president of the Campaign Media Analysis Group, argues that 527s have changed their method to focus on the “message,” not necessarily on “tonnage”<sup>195</sup> by producing fewer, yet more effective and persuasive, advertisements. In essence, by focusing on a handful of politically fluctuating districts within several swing states, 527s are able to get more “bang for their buck” than broadcasting nationwide advertisements in markets that have clearly favored Obama or McCain in voter polls.

### C. *A New Breed: The 501(c)s*

¶78 Some pundits assert that 527s have not so much disappeared as they have evolved into a new breed—nonprofit, “social welfare” groups.<sup>196</sup> A study conducted by the Campaign Finance Institute found that 501(c)(4) social welfare groups,<sup>197</sup> (c)(5) labor unions,<sup>198</sup> and (c)(6) business leagues<sup>199</sup> disbursed at least *three times* as much money as they did in 2004 or 2006.<sup>200</sup> One paper reports that the St. Louis-based American Issues Project (AIP), which aims to promote “conservative values,” has emerged under IRC 501(c)(4) as a new vehicle to press a conservative agenda with less regulation than traditional 527s.<sup>201</sup> The AIP was one of the first sources to link Democratic presidential candidate Barack Obama with William Ayers, a former member of the radical Weather Underground, in television ads.<sup>202</sup> The ad was funded primarily by Harold Simmons, a McCain donor and former supporter of the Swift Boaters. In response, Obama called for

<sup>191</sup> Bellantoni, *supra* note 186, at A1.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> Mooney, *supra* note 190, at 12.

<sup>196</sup> Deirdre Shesgreen, *Outside Groups Ready to Enter Political Fray*, ST. LOUIS POST-DISPATCH, Sept. 18, 2008.

<sup>197</sup> See 26 U.S.C. § 501(c)(4) (2006).

<sup>198</sup> See § 501(c)(5).

<sup>199</sup> See § 501(c)(6).

<sup>200</sup> CAMPAIGN FIN. INST., *SOFT MONEY POLITICAL SPENDING BY 501(C) NONPROFITS TRIPLED IN 2008 ELECTION 1* (2009), <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=221>.

<sup>201</sup> Shesgreen, *supra* note 198.

<sup>202</sup> *Id.*

an investigation of the group by the Department of Justice to determine whether the 501(c)(4) was merely a political committee, subject to soft money limits, in disguise.<sup>203</sup>

¶79 501(c)(4)s, named for the section of IRC which sanctions them, are social welfare organizations which can lobby without contribution limits so long as the topic of the lobbying directly relates to the organization’s tax-exempt purpose.<sup>204</sup> Such organizations can also raise and spend money to influence the outcome of federal and state candidate elections so long as the candidate advocacy does not constitute the primary purpose of the 501(c)(4).<sup>205</sup> As the section under which lobbying groups and ballot initiative committees are often registered, 501(c)(4)s do not allow their contributors to claim tax deductibility for their donations.<sup>206</sup> Typically such organizations, along with their sibling 501(c)(5) labor unions and 501(c)(6) business leagues, are allowed to engage in political activity under applicable 501(c) rules without disclosing the identity of their donors to the public.<sup>207</sup>

¶80 Alluding to the tactics of Swift Boaters in 2004, one 2008 activist observed, “[a] lot of these [501(c)(4)] groups don’t get started until [late in the campaign] and they don’t report until October, so it’s hard to know exactly what they’re doing.”<sup>208</sup> Moreover, he expressed concern over the less stringent disclosure requirements for 501(c)(4)s, stating that “we may never know” the extent of their activity in influencing the presidential race.<sup>209</sup>

## VI. ASSESSING THE DECLINE OF 527 ACTIVITY IN 2008

¶81 While the FEC’s 2005 “wait-and-see” reforms appear to be as easily circumvented as the magic words articulated in *Buckley*, 527s played a significantly diminished role in the 2008 presidential election. In 2004, the ten largest contributors to Democratic and Republican organizations gave more than \$100 million to outside political groups during the Bush/Kerry election.<sup>210</sup> By contrast, the ten contributors in 2008 donated only \$30.4 million to outside groups during the McCain/Obama election.<sup>211</sup>

¶82 The diminished role in outside group activity has been attributed to three main reasons. First, the reduction of 527s’ presence in 2008 may be a consequence of both McCain’s and Obama’s public denouncement of 527 spending in light of the large loopholes that still exist in campaign finance laws.<sup>212</sup> McCain and Obama both denounced the large expenditures made by 527s for unregulated sprees of negative

<sup>203</sup> *Id.*; see also Ben Smith, *Obama to DOJ: Block Terrorist Ad*, POLITICO.COM, Aug. 25, 2008, [http://www.politico.com/news/stories/0808/12816\\_Page2.html](http://www.politico.com/news/stories/0808/12816_Page2.html).

<sup>204</sup> Ryan, *supra* note 139, at 478–79.

<sup>205</sup> See Swindell, *supra* note 181.

<sup>206</sup> See 26 U.S.C. § 501(c)(4).

<sup>207</sup> See Swindell, *supra* note 181.

<sup>208</sup> *See id.*

<sup>209</sup> *See id.*

<sup>210</sup> Matt Kelly & Fredreka Schouten, *Top Political Donors Cut Way Back as Actions of 527s Studied, Funding Slips from '04 Pace*, U.S.A. TODAY, July 22, 2008, at 1A.

<sup>211</sup> See OpenSecrets.org, Top Individual Contributors to 527 Organizations, 2004 Election Cycle, <http://www.opensecrets.org/527s/527indivs.php?cycle=2004> (last visited Feb. 24, 2010); OpenSecrets.org, Top Individual Contributors to 527 Organizations, 2008 Election Cycle, <http://www.opensecrets.org/527s/527indivs.php?cycle=2008> (last visited Feb. 24, 2010).

<sup>212</sup> Kelley & Schouten, *supra* note 212, at A5.

campaigning.<sup>213</sup> Similarly, for fear of appearing hypocritical, both candidates avoided coordinating their campaign publicity efforts with 527s that launched negative publicity against each candidate's opponent. Second, while most agree that the fines levied by the FEC in the aftermath of 2004 were far too insignificant to have any deterrent effect for groups seeking to exploit soft money loopholes, political pundits have sometimes cited the "legal gray cloud" over 527 activity since the FEC levied sanctions in 2004 as one possible basis for the decline of 527s in 2008.<sup>214</sup> Lastly, the devastating economic recession that coincided with the 2008 election may have been the most significant factor in the decrease of 527 spending in 2008.

#### A. Candidate Denouncements of 527s

¶83 One plausible explanation posited for the reduced role of 527s in 2008 is that both presidential candidates denounced the alleged illegal spending by such groups. 527 contributions and expenditures demonstrated signs of decline early on when both Senator McCain and then-Senator Obama discouraged their supporters from donating to these groups notorious for exploiting regulation loopholes in 2004. As one media outlet explained, such conduct by highly unregulated organizations "run[s] counter to the reformist images both candidates were attempting to burnish."<sup>215</sup> A more cynical take on their denouncements is that the candidates wanted to channel money to their own campaigns in order to have more control over the field of political publicity. As Joe Scarborough noted on his MSNBC morning talk show:

You know . . . telling people not to give money to 527s is also a wise political move. Because you go back to 2004, and you see the John Kerry campaign and you see all of these 527s that were shooting from all directions. It wasn't coordinated. And in the end, a lot of people looked back and wrung their hands and said, Why did we do that? This makes so much more sense. It's a much smarter political move. And it also does stop this [sic] sleazy third-party attacks.<sup>216</sup>

¶84 Scarborough's argument is that a candidate wants to stay on message in conveying a certain image to the public. The saturation of 527s into the media airwaves, even 527s that might be supportive of said candidate, inevitably meddles with the image that a candidate attempts to impress upon the public. Essentially, a candidate wants to retain full control of the message being conveyed to the public and even 527s advocating on his or her behalf detracts from this control.

¶85 Interestingly, a popular political blog reported during the early fall of 2008 that the Obama campaign had retreated from its initial denouncement of 527s in the last few months of the campaign.<sup>217</sup> The campaign let Obama supporters know that support of

<sup>213</sup> *Id.*; see also Mooney, *supra* note 190, at 12.

<sup>214</sup> Swindell, *supra* note 181; see also Mosk, *supra* note 183, at A9.

<sup>215</sup> Mosk, *supra* note 183, at A9.

<sup>216</sup> *Morning Joe: Robert Gibbs Interview* (MSNBC television broadcast Sept. 15, 2008) (transcript available at CQ Capital Transcripts).

<sup>217</sup> Tom Baldwin, *Obama's Army of Donors Outgunned as Republicans Profit from Palin*, *TIMES* (UK), Sept. 19, 2008.

such groups was welcome—especially as a counterattack against conservative 527s which had pooled a significant amount of contributions.<sup>218</sup> A senior advisor to Obama denied such acquiescence with 527 activity and admitted that the campaign discouraged 527 contributions, in part, to encourage direct campaign donations.<sup>219</sup>

### B. FEC Crackdown in 2004

¶186 While scholars seem to agree that the deterrent effects of the FEC’s fines in 2004 were likely minimal,<sup>220</sup> political news correspondents have oftentimes attributed the decline of 527 activity in the 2008 election to the penalties levied on 527s in 2004.<sup>221</sup> One political blogger observed that “[t]he legal environment is much tougher in 2008 than it was in 2004.”<sup>222</sup> In actuality, FEC fines amounted to only a tiny fraction of the total amount 527s raised and spent in 2004. While the stigma of violating campaign finance rules may deter some groups looking to exploit FEC loopholes, the size of the penalties levied in 2004 hardly provides a disincentive for groups in this election cycle. As a campaign spokesperson for a candidate in Colorado’s 4th Congressional District observed, the legal consequences 527s face “aren’t steep consequences . . . so many just bite the bullet and pay fines but continue their actions.”<sup>223</sup> As a result, the FEC fines of 2004 are an unlikely explanation for the decrease of 527 presence in 2008.

### C. The Backdrop of Economic Turmoil

¶187 It would be imprudent to discuss the financial outlay during the 2008 election without accounting for the tremendous economic turmoil that coincided with the final months leading up to Election Day 2008. The 2008 election took place less than two months after the U.S. investment bank Lehman Brothers filed for bankruptcy, and the U.S. Federal Reserve was forced to bail out American International Group (AIG), along with many other major financial institutions. The announcement of the filing was followed by a freeze in credit markets and a startling plunge in stock prices. According to the U.S. Commerce Department’s report issued in the spring of 2009, the U.S. gross domestic product shrank 3.9% from spring 2008 to spring 2009, indicating the worst decline since the Great Depression.<sup>224</sup> Because most contributions to independent groups

<sup>218</sup> *Id.*

<sup>219</sup> Bellantoni, *supra* note 186, at A1.

<sup>220</sup> *See, e.g.,* Ryan, *supra* note 10, at 504 (“It is possible that 527 organizations wishing to raise and spend illegal soft money to influence the 2008 federal elections will take their chances with the FEC, viewing a fine that amounts to one or two percent of the amount illegally raised and spent as the cost of doing business.”); Adam Welle, *Campaign Counterspeech: A New Strategy to Control Sham Issue Advocacy in the Wake of FEC v. Wisconsin Right to Life*, 2008 WIS. L. REV. 795, 803 n.51 (2008) (citing Fred Wertheimer & J. Gerald Hebert, Another “Cost of Doing Business” Fine for Media Fund’s 527 (Nov. 20, 2007), [http://www.clcblog.org/blog\\_item-192.html](http://www.clcblog.org/blog_item-192.html)); Lauren Eber, *Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1159 (2006).

<sup>221</sup> *See, e.g.,* Shesgreen, *supra* note 198 (“The FEC’s [2004 fines] seem[] to have dampened the enthusiasm for 527s [in 2008], campaign experts say.”); Mosk, *supra* note 183, at A9 (noting that in light of the FEC’s levying of \$2.6 million in fines in 2004, “lawyers advising the donors to [527] groups” in 2008 “warn[ed] that the FEC fines could be a precursor to action by the Justice Department”).

<sup>222</sup> Swindell, *supra* note 181.

<sup>223</sup> Andrew Villegas, *Candidates Question Outside Group Influence on Elections*, GREELEY TRIB., Oct. 19, 2008.

<sup>224</sup> Bob Willis, *U.S. Recession Worst Since Great Depression, Revised Data Show*, BLOOMBERG.COM, Aug.

are made within the final month or two of a campaign season, the economic distress in the fall of 2008 had a significant impact on 527 funding.

¶188 One Republican fundraising consultant explained how acute of an impact the economic turmoil had on the last few months of the general election:

After the [GOP] convention, things looked good. Major donors interested in issue advocacy were tuned in, political juices were flowing, polling looked good, and then blammo! Most donors lost 20 or 30 percent of their net worth in eight days. With few exceptions, that pretty well shut down the money discussion for a lot of folks.<sup>225</sup>

¶189 As of October 18, 2008—just three weeks before the 2008 election—the media reported a \$113 million drop in 527 expenditures.<sup>226</sup> Illustrative of this reality was the conservative Freedom Watch, which had plans to spend as much as \$200 million on federal elections with the assistance of billionaire casino financier Sheldon Adelson.<sup>227</sup> After a strong start of \$30 million in 527 expenditures and an ad campaign highlighting Bush’s effective war strategy, the market began its downward spiral.<sup>228</sup> Adelson was reported to have lost \$4 billion of his private fortune even before the market’s lowest dip in early October.<sup>229</sup> The organization played a far less pivotal role in the 2008 presidential race than initially anticipated.<sup>230</sup>

¶190 The story behind Freedom Watch was all too common among 527s in the 2008 election cycle and remains the most plausible explanation for 527 decline in 2008. In fact, MoveOn.org—the liberal organization that heavily relied on individual donors for soft money—adapted to the frail economic landscape by collecting hard money within the legal limits set out by the FEC for individual contributors.<sup>231</sup> Large donations in the form of unregulated soft money from individual wealthy donors became less feasible in the tough economic times surrounding the 2008 election. Instead, contributions were more readily available in the form of small donations within the \$5,000 per individual hard money limit from a larger sector of the public. While some might argue that MoveOn.org shifted tactics to avoid FEC-imposed fines, hard money had simply become a more viable solicitation method in 2008’s down-economy than in previous elections. However, it did not substantially trump large individual donations.<sup>232</sup> The FEC’s imposition of fines equivalent to approximately one to two percent of an organization’s expenditures simply places a tax on 527s that dubiously raise limitless soft money for express advocacy.

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1, 2009, <http://www.bloomberg.com/apps/news?pid=20601087&sid=aNivTjr852TI>.

<sup>225</sup> Mosk, *supra* note 183, at A9.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> See, e.g., Press Release, Campaign Fin. Inst., Outside Soft Money Groups Approaching \$400 Million in Targeted Spending in 2008 Election (Oct. 31, 2008), *available at* <http://www.cfinst.org/pr/prRelease.aspx?ReleaseID=214>; Baldwin, *supra* note 219; *Obama’s Fundraising Slowdown: Will It Cause Him to Look More toward Large Donors?*, US FEDERAL NEWS, June 23, 2008.

### D. Alternate Outside Group Vehicles

¶91 Financial disclosures from the 2008 election cycle demonstrate that 501(c) groups have actually closed the gap between the diminished role of 527s in 2008 versus their role in 2004. By law, 501(c)s can engage in the same conduct as 527s so long as “partisan campaign activity,” as defined by the IRS, does not become their “primary” function.<sup>233</sup> Moreover, 501(c)s can engage in explicit advocacy for or against a candidate so long as their activities are not financed by corporations or union organizations.<sup>234</sup> Unlike 527s, disclosure requirements for 501(c)s are far more lax, requiring reporting of only a minimal amount of expenditures and allowing information about contributors to remain relatively unreported.<sup>235</sup>

¶92 While the focus of 501(c)s, such as the National Association for the Advancement of Colored People, National Rifle Association, and America’s Agenda: Health Care for Kids Inc., has been largely at the congressional level, such organizations aired an increasing number of ads attempting to affect the outcome of federal elections.<sup>236</sup> Even the U.S. Chamber of Commerce, a 501(c)(6) designated organization, spent more than \$20 million in 2008 for candidate advocacy purposes.<sup>237</sup>

¶93 Just as 527 regulation has been challenged by the recent *Emily’s List* decision, so too have similar cases challenged new restrictions on the amount of money corporations and labor unions can spend in federal elections. As mentioned in Part IV, *Citizens United v. FEC* sought to determine whether corporations and labor unions have the same First Amendment free speech protections as individuals to engage in political debates during elections without government censorship.<sup>238</sup> In 2008, the D.C. District Court sided with the FEC in finding that a documentary critical of then-Senator Hillary Clinton, which was produced by Speechnow.org and aired close to the 2008 Democratic National Convention, violated the provision in the McCain-Feingold Act restricting “electioneering communications” thirty days before primaries.<sup>239</sup> However, in January 2010, the Supreme Court overturned the lower court’s decision and declared that non-profit and for-profit corporations are able to use their general treasuries toward express advocacy of state and federal candidates.<sup>240</sup> This landmark decision overturns a strong tradition of prohibiting corporations’ express advocacy out of fear over the impact such advocacy would have on the political process. The decision marks a decisive step toward the deregulation of campaign finance—a trend that will almost certainly secure a future of unregulated soliciting and spending by 527s.

## VII. CONCLUSION

¶94 The FEC’s reforms concerning the treatment of 527s in late 2004 provided a starting point for closing the loopholes that permit limitless money to be spent for

<sup>233</sup> Press Release, Campaign Fin. Inst., *supra* note 234.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

<sup>236</sup> Swindell, *supra* note 181.

<sup>237</sup> *Id.*

<sup>238</sup> 530 F.Supp.2d 274 (D.D.C. 2008).

<sup>239</sup> *Id.*

<sup>240</sup> *See generally* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

candidate advocacy. Still, the FEC's failure to promulgate regulations that would subject 527s to contribution limits from the point of the groups' inception has sent the message that the circumvention of campaign finance laws is permissible. The FEC's case-by-case analysis of 527s—often years after the relevant election has come to fruition—has provided unclear directives on how independent groups should proceed in a post Swift Boat era. Additionally, the FEC's 2004 rules “wait to see” whether the publicity campaigns of outside groups embody the express advocacy that warrants monetary caps, rather than requiring prophylactic solicitation and spending limits up front. As the 2004 presidential election illustrated, a reactive “wait-and-see” approach invites injury to the electoral process before the FEC can intervene and remedy 527 malfeasance.

¶95 Most problematic, however, is the 2009 *Emily's List* decision of the D.C. Circuit which precludes any expectation of 527 regulation beyond disclosure mandates. So long as *Emily's List* stands, FEC regulations that require 527s to pay for a large amount of election-related activity out of hard money accounts, as well as limit contributions for the purpose of express advocacy to \$5000, will be deemed unconstitutional. Until the judiciary permits the FEC to require registration of 527s identical to that of political committees, such groups will continue to wreak havoc in the political arena, often engaging in misleading and harmful advertisement campaigns that skew the public's perception of political candidates.

¶96 While a decline of 527 activity in the 2008 president election led many analysts to suggest that the FEC succeeded in frightening some outside groups into retirement or, alternatively, incentivized them to rely on hard money contributions,<sup>241</sup> these analyses are likely erroneous. Sanctions levied by the FEC in 2004 were de minimis and likely incapable of effectively deterring 527s' circumvention of campaign finance laws. Candidate denouncement of the activities of 527s also continued to be an ineffective deterrent; such declarations have little effect on the outside groups that have become institutional to the American political process. The most probable reason for the decline in 527 activity was the catastrophic downturn in the economy surrounding the 2008 presidential election, which drained 527s of their finances. However, the economic recession only temporarily reduced 527 expenditures.

¶97 Without lasting reform closing 527 contribution loopholes, individuals looking to circumvent campaign finance regulations will continue to exploit these organizations' tax-free status and evade contribution limitations. The *Emily's List* ruling exacerbated the 527 loopholes, and the decision is “going to make it harder to constrain the role of influence-seeking money in federal campaigns.”<sup>242</sup> Moreover, future elections are likely to host far more negative publicity than in the past due to the decision's likely provocation of a 527 proliferation. Since *Emily's List* deemed impermissible any restrictions on 527s' right to raise and spend money freely, such groups need only to comply with disclosure requirements, rather than the monetary caps implemented by the FEC in late 2004. This substantial relaxation of 527 regulation will not only encourage existing 527s to strengthen their involvement in elections, but it is also likely to

<sup>241</sup> See *supra* Part IV.B.

<sup>242</sup> Kirkpatrick, *supra* note 178, at A10 (quoting Fred Wertheimer, President of Democracy 21).

encourage the formation of new outside groups seeking to exercise an unrestrained influence over the political process.<sup>243</sup>

¶98

Going forward, the judiciary must allow Congress to take immediate and drastic action to enact comprehensive reform, such as that proposed in the 527 Reform Act of 2007 that treats 527s identically to political committees,<sup>244</sup> and to close the 527 loophole once and for all. When the 527 loopholes are closed, Congress should use the regulations imposed on issue advocacy groups as a model to regulate 501(c) spending, since outside groups have begun to shift to using 501(c)s as a vehicle to achieve the same goals as those of 527s. Congress would be remiss to stand idle while special interest groups use 501(c)s to parrot the 527 loopholes.

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<sup>243</sup> See Wilber & Eggen, *supra* note 167, at A5 (quoting Loyola Law School professor Richard Hasen, an expert in election law, as saying that “[o]ne of the things we know about outside groups, as opposed to political parties, is that they run more negative ads . . . . This could lead to a more negative campaign season.”).

<sup>244</sup> See H.R. 420, 110th Cong. § 2(1) (2007); S. 463, 100th Cong. § 2(a) (2007).