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# **SWIFT BOAT VETS IN 2004: PRESS COVERAGE OF AN INDEPENDENT CAMPAIGN**

**ALBERT L. MAY\***

## **INTRODUCTION**

On July 29, 2004, in Boston's Fleet Center, John Kerry strode to the stage to accept the Democratic nomination for president. Surrounded by his "band of brothers,"<sup>1</sup> he saluted the convention delegates and announced, "I'm John Kerry, and I'm reporting for duty."<sup>2</sup> That theatrical gesture highlighted his war record as a swift boat commander in Vietnam thirty-five years earlier and set the stage for the fall campaign.<sup>3</sup>

Little did Kerry know that the Swift Boat Veterans for Truth, a little known group of Vietnam veterans who had organized an independent campaign dedicated to crippling Kerry's candidacy, had planned to launch a television advertisement attacking his

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1. The "band of brothers" label adopted by the Kerry campaign echoed the title of the best seller and television drama based on the real-life experience of a company of paratroopers in World War II. See STEPHEN E. AMBROSE, *BAND OF BROTHERS: E COMPANY, 506TH REGIMENT, 101ST AIRBORNE FROM NORMANDY TO HITLER'S EAGLE'S NEST* (1992).

2. Roger Simon et al., *In The House of the Believers*, U.S. NEWS & WORLD REP., Aug. 9, 2004, at 20.

3. *Id.*; see also Patrick Healy, *Vietnam Duality Challenges Kerry*, BOSTON GLOBE, Sept. 6, 2004, at A1 (discussing Kerry's Vietnam strategy). Officially designated by the Navy as Patrol Craft Fast (PCF), the patrol boat popularly known as a "swift boat" was designed for combat in Vietnam. It was lightly armored but heavily armed, typically carrying a crew of one officer and five enlisted men. See DOUGLAS BRINKLEY, *TOUR OF DUTY: JOHN KERRY AND THE VIETNAM WAR* 172-174 (2004).

combat record that very night.<sup>4</sup> But the strike did not come off, a lucky break for the Swift Boat Vets, as it turned out, who emerged as the best known of the so-called 527 committees<sup>5</sup> that shaped the 2004 presidential election. The 527 organizations, hatched in the 1990s and regulated by the Internal Revenue Service (IRS),<sup>6</sup> have emerged as the weapon of choice for independent political actors raising unlimited amounts of money to influence federal elections – all under the constitutional doctrine that political spending enjoys First Amendment protection as speech.<sup>7</sup> The Swift Boat Vets proved to be the perfect prototype. The angry group of anti-Kerry vets also tested new federal campaign finance disclosure rules and confounded journalists attempting to follow the campaign money and police the political airways in their role as watchdogs of the political process.

However, before recounting the rise of the Swift Boat Vets, it is important to expand on the attack that did not happen on July 29, 2004. The Swift Boat Vets' opening attack ad against Kerry was postponed for a week because, as a Swift Boat strategist said in a post-election conference, "a check didn't clear . . . so we had to

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4. Chris LaCivita, Swift Boat Veterans for Truth, Panel Discussion at the 7th Annual American Democracy Conference: Analysis of Armageddon 5 (Dec. 3, 2004), *available at* <http://www.centerforpolitics.org/programs/adc/adc04-p1.pdf>; Telephone Interview with Chris LaCivita, Media Consultant, LaCivita Consulting, in Midlothian, Va. (June 28, 2005); Telephone Interview with Jennifer Webster, Former Spokesperson, Swift Boat Veterans for Truth, in Houston, Tex. (June 14, 2005); *see also* John J. Miller, *What the Swifties Wrought*, NAT'L REV., Nov. 29, 2004, at 20.

5. The name derives from the section of the IRS code under which they are formed, I.R.C. § 527 (2003). *See infra* note 52 and accompanying text. The group registered with the IRS as a 527 organization as of April 23, 2004 under the name of Swift Boat Veterans for Truth, but changed the name to Swift Boat Vets and POWs for Truth as of September 30, 2004. The focus of the article is on the period prior to the name change, but the organization will be referred to as Swift Boat Vets throughout. *See* Internal Revenue Service Homepage, <http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp> (click box for Form 8872, enter search terms: \*Swift Boat Vets\*, EIN 20-1041228, 01/01/2004 to 01/01/2005).

6. *See* Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, TAX NOTES, Jan. 17, 2000, at 387.

7. *See infra* note 22.

wait.”<sup>8</sup> As federal records would later disclose, \$400,000 arrived on August 2, 2004, from T. Boone Pickens, a famous Texas oilman, Republican Party financier, and supporter of President George W. Bush.<sup>9</sup> Three days later, with the money in hand, the Swift Boat Vets launched a modest, week-long \$546,000 television buy in three battleground states.<sup>10</sup> The incendiary advertisements accused Kerry of having lied to win his combat medals and triggered news media coverage that would dominate the campaign for the rest of August and early September.<sup>11</sup> But during that critical period, no major news organization linked Pickens to the attackers, much less that he largely paid for the air time for the first television advertisement.

From the perspective of the attackers and those booking guests on television talk shows, the post-convention timing turned out to be exquisite, hitting during a news lull after Kerry had elevated the issue of his military service with his convention speech. However, from the perspective of journalists who depend on campaign finance disclosure laws to reveal who finances our politics, the timing was also key. Whether by cunning or luck, the decision by the Swift Boat Vets to postpone their attack avoided a disclosure trigger that would have turned up Pickens and other Texans with ties to both President Bush and his father. Indeed, the

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8. LaCivita Panel Discussion, *supra* note 4, at 5.

9. See Swift Boat Veterans for Truth, Second Quarter Report 8872, <http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp> [hereinafter Second Quarter Report 8872] (click box for Form 8872, enter search terms: \*Swift Boat Vets\*, EIN 20-1041228, 01/01/2004 to 01/01/2005, go to Third Quarter reporting, search for Pickens, Boone) (showing \$100,000 as a current contribution and \$500,000 in total contributions). Campaign finance data used in this article comes primarily from Political Money Line, a commercial online database that collects and formats disclosures from the Federal Election Commission, the Internal Revenue Service and other databases. See generally Political Money Line, <http://www.tray.com> [hereinafter Political Money Line] (last visited Oct. 27, 2005).

10. See SourceWatch: A Project of the Center for Media and Democracy, Swift Boat Veterans for Truth, [http://www.sourcewatch.org/index.php?title=Swift\\_Boat\\_Veterans\\_for\\_Truth#SBVT\\_television\\_advertisements](http://www.sourcewatch.org/index.php?title=Swift_Boat_Veterans_for_Truth#SBVT_television_advertisements) (last visited Nov. 17, 2005).

11. See HumanEventsOnline, DNC Lawyers Work to Muzzle Swift Boat Vets' Ad, [http://humaneventsonline.com.edgesuite.net/unfit\\_pdf.html](http://humaneventsonline.com.edgesuite.net/unfit_pdf.html) (last visited on Nov. 17, 2005).

timing of the group's first two highly effective attack ads neatly coincided with the "dark" period of the new financial disclosure regime, which was used for the first time in the 2004 election. By timing their advertising as they did, the Swift Boat Vets proved the best mislaid plans can go right, by slipping into a loophole created by Congress when it established new disclosure windows under reform legislation adopted in 2002.<sup>12</sup>

That the press "missed" Boone Pickens and other well-connected contributors to the advertising campaign of the Swift Boat Vets may seem minor, but this lapse was symptomatic of the uneven coverage of a crucial event of the 2004 Presidential election by the mainstream political press. This uneven coverage has drawn criticism from the right for ignoring the emergence of the Swift Boat Vets in May,<sup>13</sup> and from the left for overplaying their attack on Kerry's combat record in August.<sup>14</sup>

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12. See *infra* note 64.

13. From the right, journalists were criticized for underplaying or dismissing the Swift Boat Vets when they launched their campaign against Kerry in a conventional news conference at the National Press Club on May 4, 2004. Conservative columnist John J. Miller wrote that because the initial media coverage dismissed the vets as "ax-grinding Republican operatives," reporters did not investigate the Swift Boat Vets' charges that Kerry had exaggerated his war record. Miller, *supra* note 4, at 18 (claiming that the "May 4 press conference was perhaps the most overlooked major news event of the campaign – and the media's failure to give the Swifties their due led to an ad campaign that will go down in history for its stunning effectiveness").

14. From the left, the news media drew fire for overemphasizing the Swift Boat Vets' first attack advertisement. Todd Gitlin, Columbia University Professor of Sociology and Journalism, sweepingly branded journalists "accomplices to liars," and particularly criticized the television coverage:

[C]lips of the Swifties' ads, with interview supplements, wallpapered FOX News, MSNBC, and CNN. Matt Drudge, Rush Limbaugh, and their fellow shovelers in the boiler room of the Republican smear machine sweated away. Their claims then percolated into the rest of the media – the networks' evening and morning news, the Sunday shows, the newspapers. For most of August this was *the story*. . . . A low six-figure ad buy became the slander heard round the world.

Todd Gitlin, *Swifter Than Truth*, AM. PROSPECT, Nov. 2, 2004, at 29.

This Article examines those criticisms and also explains the difficulty journalists had in grasping the complexity and potential of the campaign finance vehicle that the Swift Boat Vets utilized, the 527 organization. This Article also explores how journalists were handicapped by a new disclosure system that proved opaque, easy to manipulate and unable to keep pace with an independent campaign vehicle built for speed.

Nothing in this Article suggests that the Swift Boat Vets or the political benefactors who backed them violated federal laws or regulations. The public record provides no evidence to contradict the notion that they did anything other than exercise free speech rights and take full advantage of a campaign finance legal system that Congress, the courts and regulators have created. Indeed, the evidence demonstrates that they took advantage of the system better than most.

But a full understanding of the independent campaign waged by Swift Boat Vets, requires placing their attack within the historical context of previous political spending by independent actors in American politics, a controversial tradition from which the Swift Boat Vets emerged.

## I. HISTORY AND BACKGROUND

### *A. History of Independent Campaign Finance*

Independent campaigns<sup>15</sup> are as old as the modern two-party system and mass appeal campaigns. Historians mark as an early example the spending in 1832 by Nicholas Biddle, president of the Second Bank of the United States, against the re-election of Andrew Jackson. By one estimate, Biddle spent what was then a huge sum, \$100,000, on literature and advertisements aimed at defeating Old Hickory, who wanted to shutter the bank.<sup>16</sup> Biddle

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15. The term independent campaign here is used in the general sense of a group or organization operating independently of a candidate or political party.

16. See DONALD B. COLE, *THE PRESIDENCY OF ANDREW JACKSON* 145 (1993); BRADLEY A. SMITH, *UNFREE SPEECH: THE FOLLY OF CAMPAIGN*

failed on both counts: Jackson won re-election and Biddle lost his bank.<sup>17</sup>

In the federal regulatory regime of the twentieth century, independent committees were the preferred device for evading the campaign contribution and expenditure limits, making a mockery of campaign finance laws. This trend continued until the Watergate reform era.<sup>18</sup> In 1967, Senator Albert Gore, Sr. (D-TN), father of the later vice president, described the decades-long practice of setting up independent committees: "I know in my own campaigns I have had barbers for Gore, farmers for Gore, teachers for Gore, businessmen for Gore, and as we approached a limit . . . why, we just established another committee. This is clearly within the law, which means we really have no law."<sup>19</sup>

To address that issue, among others, Congress passed the Federal Election Campaign Act (FECA) in 1971 and then added important amendments in 1974,<sup>20</sup> which limited independent expenditures on behalf of a federal candidate by an individual or group to \$1000.<sup>21</sup> However, while contribution limits and disclosure requirements were upheld, all limits on independent expenditures were struck down in 1976 by the Supreme Court in *Buckley v. Valeo*,<sup>22</sup> which accorded First Amendment protection to political spending as a form of free speech.<sup>23</sup>

In *Buckley*, the Court established two principles that would be used by courts, regulators, and Congress to profoundly shape campaign finance regulation for more than two decades. First, the

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FINANCE REFORM 19 (2001); GEORGE THAYER, WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN FINANCING PRACTICES FROM 1789 TO THE PRESENT 29 (1973).

17. Biddle had a controversial relationship with what was then a highly partisan press and was accused of bribing influential editors with favorable loan practices. COLE, *supra* note 16, at 102-03.

18. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 72-73 (1988).

19. *Id.* at 72.

20. Federal Election Campaign Act, 2 U.S.C. § 431 (2000).

21. MUTCH, *supra* note 18, at 74-76.

22. 424 U.S. 1 (1976).

23. *Id.* at 39-59; *see also id.* at 23-38 (affording different protection to political contributions).

only rationale the Court recognized for overriding First Amendment protections was that the threat or appearance of corruption would erode the integrity of the political system.<sup>24</sup> Thus, the rationale often voiced by reformers, to “level the playing field” by banning large independent expenditures in order to equalize the influence of Boone Pickens or other wealthy contributors, has not held legal sway as courts and regulators implemented *Buckley*.<sup>25</sup>

Second, *Buckley* instituted the “express advocacy” test, which established that only communications that advocated the election or defeat of a specific candidate using the so-called “magic words,” such as “vote for” or “vote against,” could be regulated under FECA.<sup>26</sup> If a communication fell short of express advocacy for or against a clearly identified candidate, it would later be interpreted by lower courts as “issue advocacy” that was constitutionally protected from regulations such as expenditure limits, even if the advertisements were clearly aimed at influencing the elections of specific candidates.<sup>27</sup> The express advocacy test particularly constrained effective regulation of independent campaigns.

By the mid-1980s, a series of statutory amendments, Federal Election Commission (FEC) rulings, and court decisions established the law governing independent expenditure campaigns that engage in express advocacy.<sup>28</sup> In sum, they could spend unlimited amounts to expressly advocate the election or defeat of a specific candidate as long as they did not coordinate their activities with a candidate or political party. However, the independent campaigns were subject to FEC disclosure requirements,<sup>29</sup> and

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24. See Anthony Corrado, *The Legislative Odyssey of BCRA*, in LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 25 (Michael J. Malbin ed., 2003).

25. *Id.*

26. *Buckley*, 424 U.S. at 44 n.52.

27. See L. PAIGE WHITAKER, CAMPAIGN FINANCE: CONSTITUTIONAL AND LEGAL ISSUES OF SOFT MONEY, C.R.S. DOC. NO. IB98025, at 3-5 (Nov. 3, 2004), available at [http://www.opencrs.net/rpts/IB98025\\_20041103.pdf](http://www.opencrs.net/rpts/IB98025_20041103.pdf).

28. MUTCH, *supra* note 18, at 76-80.

29. 2 U.S.C. § 434 (2002).



contributions to independent expenditure committees were limited to \$5000 per person per year.<sup>30</sup>

Even under that restrictive regime, effective independent expenditure campaigns emerged, starting with the 1980 election of Ronald Reagan. Several conservative political action committees (PACs) ran independent campaigns on Reagan's behalf that by one estimate totaled \$12 million.<sup>31</sup> By the end of the 1980s, the reputation of independent expenditure campaigns as vehicles for negative television advertising attacks against opponents, rather than as positive efforts on behalf of candidates, was entrenched.<sup>32</sup> The most notorious example in this era was the 1988 attack on Democratic nominee Michael Dukakis by Americans for Bush (George H.W. Bush), a subsidiary of an independent expenditure committee called the National Security Political Action Committee (NSPAC).<sup>33</sup> As described by *The New York Times* at the time, the

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30. Independent expenditure committees can accept no more than \$5000 per person in a calendar year. 2 U.S.C. § 441(a)(1)(C) (2002). In an election year, the committees are required to make quarterly reports of contributions and expenditures and to make pre-election and post-election reports. 2 U.S.C. § 434(a) (2002). Outside of twenty days before the election, the committees must publicly disclose to the FEC any expenditure of \$10,000 or more within forty-eight hours of making the expenditure. 2 U.S.C. § 434(g)(2)(A) (2002). The reporting threshold drops to \$1000 with twenty-four hours to report if there are twenty or fewer days until the election. 2 U.S.C. § 434(g)(1)(A)-(B) (2002).

31. Among the groups were the Fund for a Conservative Majority, the National Conservative Political Action Committee, better known as NCPAC, and the Congressional Club, the political organization of then-Senator Jesse Helms (R-NC). ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* 134 (1983). In 1984, independent expenditures for federal races, mostly on behalf of Reagan's re-election, would top \$23 million. HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM* 64 (4th ed. Congressional Quarterly 1992). By 2000, independent expenditures would plateau at the \$26 million mark. JOSEPH E. CANTOR, *CAMPAIGN FINANCE*, C.R.S. DOC. NO. IB87020, at 5 (June 27, 2005), available at <http://fpc.state.gov/documents/organization/50275.pdf>.

32. ALEXANDER, *supra* note 31, at 64-65.

33. Richard L. Berke et al., *Bush, His Disavowed Backers And A Very Potent Attack Ad*, N.Y. TIMES, Nov. 3, 1988, at 1A.

group “emerged from obscurity” to have a major impact on the campaign.<sup>34</sup>

NSPAC aired an ad on cable television in the September before the election that pictured a black convict named William Horton, dubbed “Willie” by the group.<sup>35</sup> Horton had assaulted a Maryland couple while on a Massachusetts prison furlough program during the Dukakis administration. The Horton ad had all the elements of a racial appeal and although the ad ran before a limited cable audience, it received wide exposure in the broadcast news and print press, prompting post-election criticism of the press for having been manipulated.<sup>36</sup> The ad was doubly controversial because of the suspicion that it was not independent, given that Bush campaign manager Lee Atwater was pushing the Horton story (although without overtly highlighting its racial appeal) and that the independent ad’s creator was a former employee of Roger Ailes, then the Bush campaign’s media consultant. After an investigation, the FEC dismissed allegations that the committee had violated the law.<sup>37</sup>

In the 1990s, the use of independent expenditure committees waned. From the standpoint of political operatives, they proved too transparent and too hobbled by the \$5000 contribution limit mandated by FECA,<sup>38</sup> which made them dependent on costly and slow direct mail fundraising.<sup>39</sup>

The 1990s also witnessed a resurgence of large amounts of federally unregulated contributions, so-called “soft money,”<sup>40</sup> flowing into presidential and congressional campaigns through the

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34. *Id.*

35. KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION, AND DEMOCRACY* 128-29 (1992).

36. *Id.* at 16-42.

37. *See* DARRELL M. WEST, *CHECKBOOK DEMOCRACY: HOW MONEY CORRUPTS POLITICAL CAMPAIGNS* 16-38 (2000).

38. *See supra* note 30.

39. JEFFREY M. BERRY, *THE NEW LIBERALISM* 94-95 (1999).

40. The terms “soft money” and “hard money” refer to money raised, respectively, outside and inside the contribution limits of FECA. These terms were popularized in a series in the *New Yorker* magazine and in a book by journalist Elizabeth Drew, who picked up on the jargon being used by fundraisers in the 1980 campaign. DREW, *supra* note 31, at 14-15.

national political parties and into independent advocacy groups waging issue advocacy campaigns.<sup>41</sup> Statutory changes and FEC advisory opinions in the late 1970s opened the door to soft money contributions for “party building” activities in the states aimed at influencing federal elections.<sup>42</sup> Soft money to the national parties exploded, starting in 1996, when parties waged issue advocacy advertising campaigns that were thinly veiled promotional ads for candidates.<sup>43</sup> The flow of soft money to the parties, about \$500 million in 2000,<sup>44</sup> triggered a series of scandals, a congressional investigation, and a reinvigorated reform movement that led to the passage of the McCain-Feingold law in 2002.<sup>45</sup>

The rise of soft money in the mid-1990s had another effect: it reinvigorated journalistic interest in tracking political money. Long an interest of American journalists, the coverage of political money was enhanced by the advent of computer assisted reporting techniques and Internet-based government and third party databases.<sup>46</sup> Press scrutiny of money in politics dramatically increased, elevating the watchdog role of political journalists. By the mid-1990s the national parties were required to disclose soft money contributions, providing fodder for the journalists armed with the new tools.<sup>47</sup>

### *B. Development of the 527 Organizations*

As noted above, the expansion of soft money into issue advocacy campaigns by independent groups also occurred in the 1990s, a development that proved much harder for journalists to track because of weaker disclosure requirements in the law. The old independent expenditure committees, which were required to

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41. Corrado, *supra* note 24, at 28.

42. WHITAKER, *supra* note 27, at 2.

43. Corrado, *supra* note 24, at 28.

44. *Id.* at 34.

45. *See infra* note 64.

46. ALBERT L. MAY, THE VIRTUAL TRAIL: POLITICAL JOURNALISM ON THE INTERNET 22-28 (2002), available at [http://www.ipdi.org/UploadedFiles/virtual\\_trail.pdf](http://www.ipdi.org/UploadedFiles/virtual_trail.pdf).

47. *Id.* at 24.

disclose finances, were largely replaced by competitors in the nonprofit world, from which 527 committees would emerge.

The new involvement of nonprofits, initially comprised of mostly 501(c)(4) social advocacy organizations, drew public attention in 1996 when groups on both sides of the political divide waged issue advocacy television advertising campaigns. These campaigns were fueled by soft money contributions from labor organizations, corporations, and ideological issue groups which were not required to publicly disclose their donors.<sup>48</sup> The 501(c) organization, however, proved a risky and inefficient vehicle because of the tax code's restrictions on political activity by the organizations and unfavorable gift tax treatment of large contributions. This led enterprising lawyers for politically interested groups, aided by some favorable IRS rulings,<sup>49</sup> to perfect the vehicle of the 527 nonprofit organization in the late 1990s. Unlike its nonprofit brethren, the 527 organization's sole mission, as far as the IRS was concerned, was to influence elections. Moreover, the 527s had tax advantages over the 501(c)s.<sup>50</sup>

Congress added Section 527 to the tax code in 1975 for the politically benign purpose of giving organizations whose primary purpose was to influence elections an exemption from most taxes.<sup>51</sup> All candidate committees, political party committees, and political action committees are technically 527s, but those that make contributions and expenditures in connection with federal elections report to the FEC, while those that make contributions and expenditure in connection with state elections are generally required to report to the relevant state board. Those that are not required to file with the FEC or a state election board must file disclosure reports with the IRS.<sup>52</sup>

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48. Hill, *supra* note 6, at 389. By one estimate, the issue advocacy groups spent \$137 million in 1996, rising to \$509 million in the 2000 election, amounts eclipsing the money spent by the old independent expenditure committees. CANTOR, *supra* note 31.

49. Hill, *supra* note 6, at 389-94 (discussing the tax rationale behind Section 527).

50. *Id.* at 388-89.

51. *Id.* at 387.

52. At this writing, Congress was debating whether to regulate 527 organizations, and the outcome was uncertain. The 527 organizers, at least

The result was a vehicle for independent campaigns that engaged in issue advocacy without expressly advocating the election or defeat of a candidate and without coordinating with a candidate or party. These crucial distinctions meant that the groups could escape regulations such as disclosure requirements mandated by the FEC.<sup>53</sup>

Campaign finance reformers and journalistic watchdogs labeled the new 527 organizations “stealth PACs,” as they flew under the public’s radar in the 1998 and 2000 elections. Groups across the political spectrum, from the pharmaceutical industry to the Sierra Club, waged issue advocacy campaigns, reported to the IRS for tax purposes, and made no mandatory public financial disclosures. How much money they spent remains largely unknown.<sup>54</sup> However, one 527 group would stir a controversy that would capture major press attention in the 2000 election, not unlike the stir caused by the Horton ad of 1988. Once again supporters of a candidate named Bush were involved.

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through the 2004 election, successfully argued to the IRS that they were entitled to the 527 tax exemption because their primary purpose was to influence elections. At the same time, they were successful in arguing to the FEC that they were not subject to regulation, including public disclosure rules or contribution limits, because they engaged only in issue advocacy that fell short of express advocacy for or against federal candidates. Indeed, to qualify for the 527 exemption with the IRS, a group or individual had to disavow the express advocacy related to federal candidates that had become a familiar feature of the independent expenditure committee that gained prominence in the 1980s. Hill, *supra* note 6, at 389-91. See generally ERIKA LUNDER, POLITICAL ORGANIZATIONS UNDER SECTION 527 OF THE INTERNAL REVENUE CODE, C.R.S. DOC. NO. RS21716 (Jan. 11, 2005), available at [http://www.opencrs.net/rpts/RS21716\\_20050111.pdf](http://www.opencrs.net/rpts/RS21716_20050111.pdf).

53. WHITAKER, *supra* note 27, at 4-5.

54. COMMON CAUSE, UNDER THE RADAR: THE ATTACK OF THE ‘STEALTH PACS’ ON OUR NATION’S ELECTIONS (2000); see also DEREK WILLIS & ARON PILHOFER, SILENT PARTNERS: HOW POLITICAL NON-PROFITS WORK THE SYSTEM, (Sept. 25, 2003), available at <http://www.publicintegrity.org/527/report.aspx?aid=7> (discussing the role of 527s in state and federal elections).

*C. Effect of the 527 Organizations*

During the 2000 GOP presidential nomination battle between then Texas Governor George Bush and Senator John McCain (R-Ariz), a mysterious group called Republicans for Clean Air launched a \$2.5 million television advertising attack against McCain's environmental voting record. Republicans for Clean Air launched its attack just six days before the March 7, 2000 Republican primaries in California, New York, and Ohio.<sup>55</sup> For the span of a twenty-four hour news cycle, the identity of the group became a political whodunit that attracted national press attention. The "environmental group" turned out to be two Texas billionaire brothers from Dallas, Sam and Charles Wyly, who had previously contributed more than \$200,000 to Bush's Texas gubernatorial campaigns.<sup>56</sup> While funding the independent attack on McCain, Charles Wyly was a member of the "Pioneers," an elite corps of fundraisers who each raised \$100,000 or more for the Bush presidential campaign.<sup>57</sup>

A day after the ad campaign started, Republicans for Clean Air issued a news release identifying themselves.<sup>58</sup> However, the attendant outrage over the Wyly brothers' stealthy and dubious

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55. SourceWatch: A Project of the Center for Media and Democracy, Republicans for Clear Air, [http://www.sourcewatch.org/index.php?title=Republicans\\_for\\_Clean\\_Air](http://www.sourcewatch.org/index.php?title=Republicans_for_Clean_Air). McCain's campaign filed a complaint with the Federal Election Commission charging that advertising by Republicans for Clean Air amounted to an illegal campaign contribution to the Bush campaign on two counts: that the attack had been coordinated and that it constituted express advocacy by comparing McCain's record unfavorably to Bush's on environmental issues. The commission deadlocked 3-3 on partisan lines. FEDERAL ELECTION COMMISSION, CERTIFICATION, MATTER UNDER REVIEW 4982 (Jan. 23, 2002); *see also* FEDERAL ELECTION COMMISSION, FIRST GENERAL COUNSEL'S REPORT, MATTER UNDER REVIEW 4982 (Dec. 20, 2001) (discussing facts and issues raised in the case). These documents may be accessed by using the Federal Election Commission's Enforcement database. FEC Enforcement Query System, <http://eqs.sdrdc.com/eqs/searcheqs> (last visited Oct. 27, 2005).

56. *See* FIRST GENERAL COUNSEL'S REPORT, *supra* note 55.

57. *Id.*

58. *See* John Mintz, *Texan Aired 'Clean Air' Ads*, WASH. POST, Mar. 4, 2000, at A6.

“issue” attack spurred McCain to champion legislation that passed Congress four months later.<sup>59</sup> The legislation required 527 organizations that were not otherwise required to file reports with the FEC or with a state elections board to file disclosure reports with the IRS at least quarterly in election years and to file pre-election and post-election reports.<sup>60</sup> Although the disclosure regime was modeled on the FEC approach to disclosure, the 2000 legislation further required the IRS (not the FEC) to publish the 527 groups’ reports on a publicly accessible website.<sup>61</sup>

In 2002, the first full election cycle covered by the new disclosure law enacted in 2000, 527 organizations spent, by one estimate, \$151 million to influence federal elections.<sup>62</sup> That number rose to \$405 million in the 2004 election cycle when the 527 organizations took center stage as the new soft money vehicle, following the passage of the McCain-Feingold law two years earlier.<sup>63</sup>

The implications of the 527 organizations for the Bipartisan Campaign Reform Act (BCRA) of 2002 are beyond the scope of

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59. See Eric Schmitt & John M. Broder, *Senate Votes to Open Books of Nonprofit Political Groups*, N.Y. TIMES, June 30, 2000, at A1.

60. I.R.C. § 527(j)(2) (2005). The disclosure requirement is applicable to organizations expecting to raise \$25,000 or more. I.R.C. § 527(i)(5)(B). Organizations must publicly disclose the name, address, and occupation of contributors of \$200 or more as well as expenditures of \$500 or more. I.R.C. § 527(j)(3). Accord LUNDER, *supra* note 52, at 3-5. The IRS reporting schedule tracked the schedule set by the FEC for independent expenditure committees. INTERNAL REVENUE SERVICE, FORM 8872 FILING DATES FOR 2004, <http://www.irs.gov/charities/political/article/0,,id=118832,00.html> (last visited Oct. 27, 2005). Unlike the independent expenditure committees that filed with the FEC, 527 groups filing with the IRS did not have to file special interim reports if they spent over a certain amount, such as the FEC requires for independent expenditures over \$10,000. See *supra* note 30.

61. I.R.C. § 527(k)(2) (2005); see *supra* note 9.

62. Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in THE ELECTION AFTER REFORM: MONEY, POLITICS AND THE BIPARTISAN CAMPAIGN REFORM ACT (Michael J. Malbin ed., forthcoming Fall 2005) (Draft Chapter 5 at 2), available at [http://www.campaignfinanceinstitute.org/studies/ElectionAfterReform/pdf/EAR\\_Chapter5\\_WeissmanHassan.pdf](http://www.campaignfinanceinstitute.org/studies/ElectionAfterReform/pdf/EAR_Chapter5_WeissmanHassan.pdf).

63. *Id.* The McCain-Feingold law is the Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002).

this article, but what is important here is that the law established a new approach to regulating independent expenditures. A new “electioneering communications” provision covered radio and television advertisements that referred to or picture a federal candidate within sixty days of the general election or thirty days before a primary or nominating political convention, even if the ads fell short of express advocacy.<sup>64</sup> This provision ensnared independent 527 organizations that placed certain candidate-oriented issue advocacy advertisements on TV or radio during the election season, and required them to file reports with the FEC disclosing expenditures for the ads and the contributors who paid for them. In a five to four decision, the Supreme Court in *McConnell v. FEC* rejected the arguments that the First Amendment and *Buckley*’s express advocacy test doomed the electioneering provision.<sup>65</sup> The Court downplayed *Buckley*’s express advocacy test and found the “magic words” test “functionally meaningless.”<sup>66</sup>

The disclosure requirements for 527 organizations were now firmly in place. But, the 2000 law requiring financial disclosures to the IRS and the 2002 electioneering communications provision of BCRA requiring disclosures to the FEC for certain TV and radio

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64. See Guide to 2004 Reporting: Coverage Periods for Electioneering Communications Made on Behalf of 2004 Presidential Candidates, FEC, available at [http://www.fec.gov/info/charts\\_ec\\_dates\\_press.html](http://www.fec.gov/info/charts_ec_dates_press.html) (search using the entire title, then search document using ‘ctrl+f’ and ‘electioneering’). The BCRA, which became effective Nov. 6, 2002 to cover the 2004 elections, was the most sweeping campaign finance reform since the Watergate era. The law was largely upheld in *McConnell v. FEC*, 540 U.S. 93 (2003), including the electioneering communications provision. Designed to curtail the rise of issue advocacy advertising that started in the mid-1990s, this provision required, in the case of congressional races, that the covered ads target voters in the respective congressional districts or states. Advertisements paid for by corporations or labor unions, using “soft money,” i.e. donations unregulated by the FEC, would be banned during the coverage windows. However, nonprofit organizations and 527 organizations could air the ads, provided that the funds used came only from individuals. 2 U.S.C. § 434(f)(3)(A) (2005).

65. *McConnell v. FEC*, 540 U.S. 93, 189-94 (2003).

66. *Id.* at 193.



advertising combined to create a dual reporting system.<sup>67</sup> These disclosure requirements are further complicated by the fact that the two government websites upon which journalists and other trackers of the money depend are very different. The FEC site, built with thirty years of disclosure experience, offers more depth, more detailed breakdowns of data, and search engines that are easier to navigate. While functional, the IRS site has a more bare bones architecture, consisting largely of reports that can be downloaded as simple lists of donors and expenditures.

Journalists also found it difficult to sort out which of the groups registered with the IRS were actually engaged in federal campaign activity. Third party websites built to track the 527 organizations helped sort out the major players, although those sites did not always agree on the amounts being spent.<sup>68</sup> The

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67. Even the amounts required to be disclosed by the two reporting systems were different. The FEC electioneering communications disclosure provision required individuals or committees spending more than \$1000 to file a report no later than the day after the advertisement first aired, but the filer only had to identify individual donors who gave \$1000 or more. 2 U.S.C. § 434(f)(2)(E)-(F) (2005). In the quarterly reports to the IRS, committees were required to identify donors who gave \$200 or more and to report expenditures that exceeded \$500. I.R.C. § 527(j)(3) (2005). The two reports could produce significantly different numbers based on contributions and expenditures that were required to be reported. The Swift Boat Vets would ultimately report to the FEC that it had received \$21 million in donations to cover \$19 million worth of television advertising during the 2004 election. The group would report to the IRS that it had received \$17 million in reportable contributions and spent \$22.5 million for the election. *See supra* note 9.

68. After the election, there were about 20,000 organizations in the IRS database, but the Center for Public Integrity had identified about 600 to track in its 527 database for election activity in 2004. *See* Interview with Aron Pilhofer and Derek Willis, Database Editors for the Center for Public Integrity, in Washington, D.C. (Nov. 9, 2004). The Center, a nonprofit journalism organization, built one of two major third party databases to track 527 activities during the election that became popular with reporters. *See* Silent Partners – The Center for Public Integrity, <http://www.publicintegrity.org/527> (last visited Oct. 15, 2005). The other site was Political Money Line, a for-profit company founded by former FEC officials Kent Cooper and Tony Raymond. *See* Political Money Line, <http://www.tray.com> (last visited Oct. 15, 2005). The Center for Responsive Politics, a nonprofit campaign finance watchdog group, maintained a less comprehensive database on 527s. The Center for Responsive Politics, 527

unsettled nature of the law, including issues unresolved until the spring of 2004,<sup>69</sup> and the largely unappreciated potential of the 527 groups in the 2004 election, made it even harder for reporters to fulfill their watchdog role.<sup>70</sup> This was particularly true for journalists unfamiliar with the history of independent organizations.

The difficulty of the task became obvious as journalists confronted the Swift Boat Vets who had seized upon an ideal vehicle for their campaign, a 527 committee. This allowed them to organize relatively late in the election cycle, raise unlimited amounts of money quickly under a complicated and lagging reporting system, and launch a negative personal attack that avoided accountability by the party or candidate benefiting from the attack. The message they espoused also struck a chord with a lot of Americans.

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Committee Activity, <http://www.opensecrets.org/527s/527cmtes.asp> (last visited Oct. 15, 2005).

69. After several months of debate over potential rules to try to regulate the 527s, the FEC commissioners voted 4 to 2 on May 13, 2004, to drop the effort to regulate the groups in the 2004 election. See Thomas B. Edsall, *In Boost for Democrats, FEC Rejects Proposed Limits on Small Donors*, WASH. POST, May 14, 2004, at A9. On August 19, 2004, the FEC adopted new rules, effective on January 1, 2005, which added restrictions on 527s that could curtail some fundraising activities for the 2006 election. A 527 group will trigger FEC regulations, including limits on contributions, if it solicits contributions specifically to support or oppose a clearly identified federal candidate. See 11 C.F.R. § 100.57(a) (2005). A group that raises both “hard money” regulated by the FEC and unregulated “soft money” under an associated 527 would have to pay at least half the costs of administrative expenses for generic voter drives and political communications that mention a political party with regulated hard money. See 11 C.F.R. § 106.6(c) (2005); see also LUNDER, *supra* note 52, at 3.

70. Derek Willis, formerly of the Center for Public Integrity, now a database editor with the *Washington Post*, observed:

Talking to reporters out across the country, there were all sorts of perceptions about what these [527s] are and what the whole situation was. For many of them, they kept asking, ‘These are new, right?’ It was a little depressing how many people you had to remind of the Republicans for Clean Air, and [when you did] it didn’t seem to jog any memories.

Interview with Aron Pilhofer and Derek Willis, *supra* note 68.

## II. ENTER THE SWIFT BOAT VETS

The Swift Boat Vets came late to the 527 party,<sup>71</sup> but they announced themselves and their goal three months before they took control of the campaign dialogue in August. They tried to win press attention, but when they emerged in the spring of 2004 they displayed few markers that reporters use in assessing the potency of new players on the political stage. The Swift Boat Vets started off without much money and media sophistication, but with a lot of anger and some largely undetected political connections.

It is unclear whether the Swift Boat Vets would have organized had Kerry not emphasized his Vietnam War record in his campaign. Some members of the group, notably Houston lawyer John O'Neill, harbored a long-standing animus toward Kerry dating from the early 1970s when Kerry was a leader of anti-war veterans.<sup>72</sup> But only in early 2004, when Kerry suddenly became the presumptive nominee by crystallizing his war hero image, did the Swift Boat Vets mobilize.

In early January 2004, historian Douglas Brinkley published *Tour of Duty*, a sympathetic book describing Kerry's combat

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71. The new McCain-Feingold law banning soft-money to political parties had hardly taken effect before the Democrats began organizing an alternative soft money vehicle in major 527 organizations. The most notable of these were America Coming Together and the Media Fund. See Weissman & Hassan, *supra* note 62 (Draft Chapter 5 at 6-8). By the end of the election, Democratic groups supporting Kerry's election would outspend by 3 to 1 the Republican groups supporting Bush, the largest of which would not start organizing as 527s until the spring of 2004 when it appeared the FEC would not attempt to regulate. *Id.* (Draft Chapter 5 at 8-10); see also Michael Janofsky, *Advocacy Groups Spent Record Amount on 2004 Election*, N.Y. TIMES, Dec. 17, 2004, at A31 (discussing amounts spent by 527s in 2004 Presidential election).

72. O'Neill, who served in same the unit shortly after Kerry departed Vietnam, clashed with Kerry after the war, debating him on *The Dick Cavett Show* on June 30, 1971. The bitter encounter festered, and O'Neill co-authored a book during the campaign excoriating Kerry's service. MICHAEL KRANISH, ET AL., JOHN F. KERRY: THE COMPLETE BIOGRAPHY BY THE BOSTON GLOBE REPORTERS WHO KNOW HIM BEST 133-36 (2004); JOHN E. O'NEILL & JEROME R. CORSI, UNFIT FOR COMMAND: SWIFT BOAT VETERANS SPEAK OUT AGAINST JOHN KERRY 11-19 (2004).

service.<sup>73</sup> Two days before the January 19, 2004 Iowa caucuses, Kerry was reunited with Jim Rassmann, the Army officer Kerry rescued from the Bay Hap River on March 13, 1969 – a feat that earned him his second medal for valor and his third Purple Heart.<sup>74</sup> This emotional but orchestrated media event (NBC's Tom Brokaw was on hand) contributed to Kerry's upset win in Iowa, leading to the nomination. Ensuing Kerry campaign appearances featured Rassmann and other pro-Kerry veterans, including most of the men who served under him on two swift boats, the "band of brothers."<sup>75</sup>

These developments rekindled old grudges among an entirely different set of former swift boat veterans, who had never forgiven Kerry for his anti-war activities after he returned from Vietnam.<sup>76</sup> After weeks of telephone calls and e-mails, nine of them, including O'Neill and retired Rear Admiral Roy F. Hoffman, who had overall command of the swift boats in Vietnam during the period of Kerry's service, held an organizational meeting in Dallas on April 4, 2004.<sup>77</sup> Although united in outrage over Kerry's anti-war activities, the group was initially divided on how they would frame their message when they presented it to the mainstream media.<sup>78</sup>

Despite the passage of more than three decades, outrage lingered over Kerry's testimony before the Senate Foreign

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73. The book, based partly on Kerry's personal journals, portrayed Kerry as the brave but reluctant warrior. BRINKLEY, *supra* note 3.

74. Healy, *supra* note 3.

75. *Id.*

76. After the election, *Texas Monthly* magazine conducted extensive interviews with the protagonists in the Swift Boat drama, mostly Texans, which were published as an oral history that describes the first meeting and the evolution of the group's campaign through the election. Pamela Colloff, *Sunk*, TEX. MONTHLY, Jan. 2005, at 100.

77. Despite ambivalence about Kerry over the years since the war, Hoffman was angered by Brinkley's unflattering portrayal of him and other commanders. Brinkley described Hoffman as a hotheaded, bloodthirsty and egomaniacal commander who he compared to the Robert Duval character in the movie *Apocalypse Now*, an Army colonel who "loved the smell of napalm in the morning." BRINKLEY, *supra* note 3, at 177, 301-302. Several of the veterans at the Dallas meeting came armed with copies of Brinkley's book annotated to the parts they disliked. Colloff, *supra* note 76.

78. Colloff, *supra* note 76.

Relations Committee in 1971, in which he charged that American service men had committed widespread atrocities in Vietnam, testimony that Kerry himself later admitted was “over the top” even for a young and angry anti-war leader.<sup>79</sup> Thus, the issue for the anti-Kerry vets was whether to attack Kerry’s record in Vietnam, which included three Purple Hearts, a Silver Star and a Bronze Star, all won in a combat tour of about four months, or to focus on his anti-war activities. Michael Bernique, a Dallas businessman who served with Kerry as a swift boat skipper, described the group’s first meeting as follows: “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 testimony before the Senate Foreign Relations Committees in 1971 or to question his military record as well.”<sup>80</sup>

Bernique, who once called Kerry “fearless” in combat,<sup>81</sup> would later drop out of the group. Others who had also praised Kerry’s combat bravery, recommended him for a decoration in one case, and even stood by him when his Vietnam record had been questioned in past campaigns would later accuse him on television of lying to win medals. As will be described below, the Swift Boat Vets eventually would offer both frames in their advertising campaign: a portrayal of Kerry as an unpatriotic figure in the still-divisive debate over the Vietnam War and an assault on his character for claiming a military record they said he did not deserve. In May, the first frame was offered in a conventional way and drew a tepid response from the news media, but the second frame would be offered in a visually powerful ad that would light up the late summer political sky.

On May 4, 2004, one day after the Kerry campaign launched a \$25 million advertising campaign that featured his Vietnam combat service,<sup>82</sup> the Swift Boat Vets announced themselves to the

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79. *Meet the Press* (NBC television broadcast Apr. 18, 2004).

80. Colloff, *supra* note 76, at 102.

81. KRANISH, *supra* note 72, at 83.

82. The timing of the ads and news conference apparently was a coincidence, but the Kerry television advertisement ran in nineteen states for three weeks, featuring Rassmann and Del Sandusky, a former Kerry

world by holding a news conference at the National Press Club, which was carried by the C-SPAN public affairs cable television channel.<sup>83</sup> For more than an hour, in a room filled with reporters and cameramen, swift boat veterans, including five officers whom Kerry served under, trooped before a microphone to emotionally denounce Kerry, primarily for his 1971 anti-war testimony.

O'Neill announced that the group had registered as a 527, had no ties to the Bush campaign, and had gathered about two hundred signatures of veterans on an anti-Kerry letter. Hoffman's comments, used by CNN, were typical: "I signed this letter because I do not believe John Kerry is fit to be the commander-in-chief of the United States armed forces. This is not a political issue. It is a matter of his judgment, truthfulness, reliability, loyalty and trust."<sup>84</sup> Hoffman called Kerry's medals "specious," and others questioned the awarding of his first Purple Heart for what they called a minor wound. But the thrust was frame one, not frame two. In fact, O'Neill said, "[a]s a group, we're not here to question John Kerry's medals. We're here to call on him to tell the truth."<sup>85</sup>

However, only one broadcast network, CBS News, aired a story that evening that mentioned the group.<sup>86</sup> Fox News and MSNBC featured brief stories, and CNN's Judy Woodruff's *Inside Politics*, which like the other broadcasts was dominated by the breaking news on the Iraqi prisoner abuse story, relegated the coverage to a down-segment item.<sup>87</sup> In what now seems remarkably understated, CNN's Candy Crowley reported:

We did have another group come up called  
Swift Boat Veterans for Truth. This is headed  
by a man, Retired Admiral Roy Hoffman.

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crewman. Scott Shepard, *Kerry Starts \$25 Million Ad Campaign*, ATLANTA J.-CONST., May 4, 2004, at A3.

83. *Swift Boat Veterans for Truth News Conference* (C-SPAN2 television broadcast May 4, 2005), available at [rtsp://video.c-span.org/project/c04/c04050404\\_antikerry.rm](http://rtsp://video.c-span.org/project/c04/c04050404_antikerry.rm) [hereinafter *News Conference*].

84. *Judy Woodruff's Inside Politics* (CNN television broadcast May 4, 2004) [hereinafter *Inside Politics*].

85. See *News Conference*, *supra* note 83.

86. See *infra* note 99.

87. See *Inside Politics*, *supra* note 84.

They are critics of John Kerry. They don't like what he said about veterans when he came home. They believe his war record has been exaggerated, they believe that Kerry in fact has not put out all of the records that are there. They want him to tell the Pentagon to put everything out there so that they can see it. But in the end when you listened to it, what you heard is much of what we've been hearing over the past couple of weeks about John Kerry's service record as well as his peace record.<sup>88</sup>

The press conference also drew stories in the major newspapers and several newspaper wire services, but the attention was decidedly mixed, with most major newspapers playing the story inside the papers.<sup>89</sup> The Associated Press decided not to move a story.<sup>90</sup> But, there were glimmers in the coverage that it was more

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88. *Id.*

89. See, e.g., Stephen Braun, *The Race to the White House: Crew Contradicted Kerry over Battle, Doctor Alleges*, L.A. TIMES, May 5, 2004, at A20; Paul Farhi, *Veterans Group Criticizes Kerry's War Record*, WASH. POST, May 5, 2004, at A6; Jodi Wilgoren, *Veterans Group Criticizes Kerry on His Record in Vietnam*, N.Y. TIMES, May 5, 2004, at A22.

90. A request to interview an AP editor on the news judgment involved in the Swift Boat Vets coverage was not granted. A spokesman for the wire service did respond to written questions, writing:

On the May 4 news conference: AP Washington's bureau chief and political editor were in New York City for a [Republican] convention walk thru at Madison Square Garden. A young reporter was sent to the news conference, and based on his description, the political desk decided not to write anything. The Swift Boat people complained to the political editor within a day or so, and then she never heard a word from them until August. AP Washington's first story was when the group finally did an ad buy and it treated them the same way it would any advocacy group that makes a small ad buy and then tries to hype it through free media: a small story. The story exploded when John McCain weighed in [McCain called the ad

than a routine event. The *New York Daily News* reported that in “a remarkable news conference that showed how raw emotions can remain even after 33 years, 15 graying vets got up one by one to vent old bitterness. Some shook with anger and several choked up as they recalled Kerry testifying that troops had committed atrocities.”<sup>91</sup>

The *Boston Globe*, which had followed the hometown candidate’s Vietnam experience for years, put the story on the front page and included a sidebar profile of O’Neill. The *Globe*’s Michael Kranish keyed the significance of the event to the individuals involved in the group:

The senator’s campaign has long weathered criticism from some Vietnam veterans over Kerry’s actions in Vietnam and as an antiwar leader, but yesterday’s event was unprecedented because it included nearly all of his commanding officers. Two of those officers, former lieutenant commander George Elliott and former Coast Guard captain Adrian Lonsdale, stood by Kerry’s side when questions were raised during the 1996 Senate campaign about whether Kerry deserved the Silver Star.<sup>92</sup>

The *Note*, an internet posting of ABC’s political unit, described the event as “[a]ll the coverage of yesterday’s anti-Kerry presser has a ‘he said/he said’ quality to it, with a dollop of skepticism that the anti-Kerry folks are acting fully independently of the Bush operation, although no direct proof is offered

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dishonest and dishonorable. *Infra* note 137]. From August 5 on, AP Washington’s coverage of the story was heavy – 78 stories in August, 28 in September, 10 in October that mention Swift Boat or the controversy in some fashion.

E-mail from Jack Stokes, Director of Media Relations, The Associated Press, to Albert L. May, Associate Professor of Media and Public Affairs, George Washington University (June 17, 2005).

91. Helen Kennedy, *Navy Vets Torpedo Kerry*, N.Y. DAILY NEWS, May 5, 2004, at 31.

92. Michael Kranish, *Kerry’s Commanders Speak Out Against Him*, BOSTON GLOBE, May 5, 2004, at A1.



anywhere.”<sup>93</sup> The Kerry campaign, which distributed talking points to reporters during the news conference, charged that the group had ties to the Bush campaign and that they were the “same people behind the smears” against McCain in 2000.<sup>94</sup>

In a tantalizing echo of a past independent campaign, some reporters noted that the publicist working for the Swift Boats was one Merrie Spaeth of Dallas, a former official in the Reagan administration and “the spokeswoman in 2000 for Republicans for Clean Air.”<sup>95</sup>

The Swift Boat Vets debut was a one-day story for the national media, and little was made of the Kerry campaign charges that the group was tied to past smear campaigns or the Bush campaign, which denied any knowledge of the group. The judgment was made, collectively by the press, that this was not a story to pursue and that the Swift Boat Vets were no different from the dozens of other groups vying for press attention.

“I can’t tell you the number of people or groups like this that show up in a campaign,” said Tom Hannon, political director

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93. See ABC News Vote 2004: Sen. John Kerry and Vietnam, [http://www.abcnews.go.com/sections/politics/TheNote/TheNote\\_May504.html](http://www.abcnews.go.com/sections/politics/TheNote/TheNote_May504.html).

94. Julie Mason, *Veteran Group Criticizes Kerry's Vietnam Record*, HOUSTON CHRON., May 5, 2004, at A7; see also Kranish, *supra* note 92. CBS News reported that group was tied to a group of veterans, who during the 2000 South Carolina primary, attacked McCain’s Vietnam record and his support of veterans’ issues, and the network linked the Swift Boat Vets to the 2002 televised attack that helped defeat Georgia Sen. Max Cleland, a Vietnam War veteran. Nothing in the public record that this author has found supports either assertion. *CBS Evening News* (CBS television broadcast May 4, 2004).

95. See Farhi, *supra* note 89. The organizing meeting of Swift Boat Vets in April was held in the office of Spaeth Communications Inc., and Spaeth’s late husband, Harold “Tex” Lezar, had been a law partner of O’Neill. Lezar also had been the 1994 Republican nominee for lieutenant governor of Texas, running on the same ticket as George Bush. Spaeth said in an interview that she never worked for the Wyly brothers and her association with the Republicans for Clean Air was to informally assist the Republican consultant who did work for the group in fielding calls from reporters. Telephone Interview with Merrie Spaeth, Founder, Spaeth Communications Inc. (Jun. 9, 2005). Some news stories in Texas at the time, however, attributed comments by Spaeth as the spokeswoman for Republicans for Clean Air. See Ken Herman et al., *Bush Backer Admits Buying Anti-McCain Ad: Governor Denies Role*, AUSTIN AM. STATESMAN, Mar. 4, 2000, at A1.

for CNN.<sup>96</sup> He said that “given the noise” at the time he was not surprised the Swift Boat Vets debut drew little coverage. Hannon described Vietnam as an “old issue” that just keeps popping up in presidential campaigns, including controversies over Dan Quayle’s National Guard service in 1988, Bill Clinton’s avoidance of the draft in 1992, and George Bush’s National Guard service in 2000 and 2004. But Hannon is more self-critical of how the story played out over the summer:

We may have been less cognizant of the debate that was still going on about this [Vietnam] and we, collectively, were slow to respond. . . . Clearly the lesson is that it is a very complicated judgment to make and it did take awhile for reporters to hone in on it in an effective way. I think in the end we got the story and sorted out the facts. I think voters had full access to the facts that would inform them on this. I wish we’d been quicker.<sup>97</sup>

Others were puzzled by how little attention Swift Boat Vets drew when they emerged on the scene. “I was surprised that other reporters didn’t cover that press conference,” said the *Globe’s* Kranish. “I knew it was going to be an important story.”<sup>98</sup> In the months following the May 2004 news conference, however, the Swift Boat Vets virtually disappeared from the mainstream media’s radar. A search of LexisNexis during the period of May through July 2004, found the group’s name appeared only fifty-eight times in the database for United States newspapers. The coverage remained muted until the Swift Boat Vets returned with a vengeance on August 5, 2004, launching their attention-grabbing television advertising, and prompting a jump in print stories to 1226 in August 2004 alone.<sup>99</sup> The spike was even more dramatic for

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96. Telephone interview with Tom Hannon, Political Director, CNN (Jun. 10, 2005).

97. *Id.*

98. Telephone Interview with Michael Kranish, Reporter, Boston Globe (Jun. 10, 2005).

99. Data drawn from search of LexisNexis Academic Universe for the key words Swift+Boat+Truth, falling within five characters of each

national broadcast television news shows where the group's name appeared only twice during the time period of May through July 2004, before jumping to thirty-nine broadcast network news stories in August 2004. For cable news, the search revealed eleven stories during the period of May through July 2004 and 262 stories in August 2004.<sup>100</sup>

Although the mainstream news media had turned its attention elsewhere and showed little interest in the Swift Boat Vets in the summer before their August 2004 attack, the group had been busy spreading its story on the Internet<sup>101</sup> and on the conservative talk radio circuit.<sup>102</sup> They had also written a book and hired Republican political consultants in Washington to produce the television advertisements. They started raising money in large chunks from interesting sources. But, if the political journalists covering the 2004 campaign were ignoring the Swift Boat Vets in mid-summer, one organization was paying attention - the Kerry campaign.

### III. THE GUNS OF AUGUST

In early July 2004, Wayne Slater, a reporter for the *Dallas Morning News*, answered the telephone to hear a source inside the

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consecutively, in U.S. newspapers and transcripts in news shows for broadcast networks, ABC, NBC and CBS and cable news shows by CNN, Fox and MSNBC.

100. *Id.* Newspaper coverage tapered off in September to only 818 stories, and from October through the November 2 election, coverage dropped to only 334 stories. Television coverage dropped more sharply from September through the election. There were only eleven stories on the broadcast networks and ninety-three on cable news.

101. Although the group is inactive, the site was still being maintained in 2005, and it housed a mass of information, including its television advertisements. See Swift Vets and POWs for Truth Homepage, <http://www.swiftvets.com> (last visited Oct. 17, 2005).

102. According to a log of media interviews provided to the author by Merrie Spaeth, representatives of the group put in about 125 appearances on local and national radio from the May 4, 2004 press conference until the end of July 2004. The use by the group of alternative media, particularly the Internet and talk radio, is a subject deserving further research that is beyond the scope of this Article.

Kerry campaign offer a tip – a private investigator, working for the Swift Boat Vets, was questioning veterans who served with Kerry in the Mekong Delta. On July 13, 2004, Slater reported that the group was gathering information “aimed at discrediting” Kerry’s military service.<sup>103</sup> A few days afterwards, Slater later recalled,<sup>104</sup> a second tip came from the Kerry campaign, this time as an aside in a conversation. The Kerry source steered Slater to the first public disclosure filings of the Swift Boat Vets, posted in mid-July on the IRS website.<sup>105</sup>

The Second Quarter IRS disclosure report revealed that Houston homebuilder Bob Perry, a major Bush supporter, friend of Bush strategist Karl Rove and financier of Texas Republican politics, had bankrolled Swift Boat Veterans for Truth with \$100,000 of the \$158,750 total the group had collected by the end of June.<sup>106</sup> Harlan Crow, a Dallas developer and a trustee of the George Bush Presidential Library Foundation, gave \$25,000.<sup>107</sup>

Although he did not know it then, Slater had a close encounter with a story that would explode three weeks later. The work of the Swift Boat Vets’ private investigator and the early seed money from prominent Texas Republicans with ties to the Bush family were the underpinnings of an attack on Kerry’s military record that would send journalists scrambling in mid-August.

But, looking at the first report, Slater said, “[t]here was little to suggest that the group would be able to raise the money and have the impact that they did.”<sup>108</sup> Slater did not pursue the story

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103. Wayne Slater, *PI Digs Into Kerry’s War Past*, DALLAS MORNING NEWS, July 13, 2004, at A6.

104. Telephone Interview with Wayne Slater, Senior Political Writer, Dallas Morning News (June 9, 2005); E-mail Interview with Wayne Slater, Senior Political Writer, Dallas Morning News (June 9, 2005) [hereinafter Slater].

105. See Second Quarter Report 8872, *supra* note 9.

106. Complaint at 5, *Democracy 21 v. Swift Boat Veterans for Truth*, available at <http://www.campaignlegalcenter.org/attachments/1232.pdf>; see also Second Quarter Report 8872, *supra* note 9.

107. Wayne Slater, *Texan Funds Anti-Kerry Vets*, DALLAS MORNING NEWS, July 23, 2004, at A10.

108. In a number of election postmortems, the Kerry campaign drew criticism for failing to take the Swift Boat Vets seriously. Thinking back a

after his exclusive articles ran inside his own newspaper, and the articles drew scant attention from other news organizations. “They got no play, they got no bounce,” Slater said. “There didn’t seem to be much interest and I moved on.”<sup>109</sup>

Unbeknownst to Slater, at the time he was writing the first story about the Swift Boat Vets financing, Boone Pickens had given his first \$100,000, and Perry had given a second \$100,000.<sup>110</sup> Albert Huddleston, another Dallas oilman and Bush fundraiser, had given \$50,000, and Sam and Charles Wyly of the Republicans for Clean Air fame, had each given \$10,000 of the early seed money that would get Swift Boat Vets on the air in August 2004.<sup>111</sup>

Had Slater been able to see the money flowing into Swift Boat Vets in July 2004, he would have confirmed what the Perry and Crow contributions had suggested – that big-money Texas Republican contributors, who had built the party in the state and helped elect George Bush governor and president, were early investors in what otherwise looked like a band of disaffected veterans. With the addition of Dallas businessman Harold Simmons, who donated his first \$1 million in mid-August,<sup>112</sup> the Texas Republican money establishment that Rove helped build was represented, according to Slater. “If I regret anything in our coverage, and I mean my coverage, I should have written the story making the connections,” he said.<sup>113</sup>

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year later to the efforts to steer him to the story, Slater said, “[i]n retrospect I think it shows that the Kerry campaign recognized the potential of this early on.” See Slater, *supra* note 103. The confidential nature of Slater’s sources makes the motivation of the Kerry leaks speculative. However, Slater would have been a logical recipient because of his twenty years experience in covering politics, mostly in Texas during the ascendancy of President Bush. He is the co-author of a book about Bush’s top political adviser Karl Rove. See JAMES MOORE & WAYNE SLATER, *BUSH’S BRAIN: HOW KARL ROVE MADE GEORGE W. BUSH PRESIDENTIAL* (2003).

109. Slater, *supra* note 104.

110. See *supra* notes 5, 9.

111. See Political Money Line, *supra* note 9; see also FEC Form 9: F.E.C. Image 24038513207, September 10, 2004, available at <http://images.nictusa.com/cgi-bin/fecimg/?C30000178>.

112. See Political Money Line, *supra* note 9.

113. See Slater, *supra* note 104.

None of the July 2004 contributions mentioned above except one<sup>114</sup> became public until the Swift Boat Vets filed an electioneering communications disclosure report with the FEC on September 10, 2004. The disclosure report, meeting the requirements of the McCain-Feingold law, coincided with the start of the group's *third* round of television advertising.<sup>115</sup> Until then, the Second Quarter IRS disclosure report, which covered activities only up to the end of June 2004, was all reporters had to go on. Consequently, when the Swift Boat Vets launched their first advertisement on August 5, 2004, in small markets in Wisconsin, Ohio and West Virginia, reporters logging on to the IRS site found the financial report listing only \$158,750 in contributions, including Harlan Crow's \$25,000 contribution and Perry's first \$100,000 contribution.<sup>116</sup>

Awakening to the Swift Boat Vets story, the Associated Press reported that Perry was "helping bankroll" the television attack on Kerry's military record, although Slater had reported Perry's first contribution two weeks earlier. Without much else to go on, the AP report said the attack was "reminiscent . . . of the 2000 ads run under the auspices of 'Republicans for Clean Air' criticizing McCain."<sup>117</sup> As noted above, at this stage Pickens had actually contributed more than Perry, a total of \$500,000, and the ad was not just reminiscent of Republicans for Clean Air. The

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114. See Wayne Slater, *Texas Gives Anti-Kerry Vets Another \$100,000*, DALLAS MORNING NEWS, Aug. 18, 2004, at A17 (showing that without the benefit of federal disclosure records, Slater learned of Perry's second \$100,000 contribution and reported it in August).

115. Thomas B. Edsall, *Swift Boat Group's Tally: \$6.7 Million*, WASH. POST, Sept. 11, 2004, at A5; see also Glen Justice & Eric Lichtblau, *Windfall for Anti-Kerry Veterans' Group, With Texans Among Those Giving Most*, N.Y. TIMES, Sept. 11, 2004, at A13.

116. See Second Quarter Report 8872, *supra* note 9; see also *supra* note 106 and accompanying text. Bob Perry became such a focus of the stories about the Swift Boat Vets financing that Kerry supporters picketed his home in late August. See Kristen Hays, *Protesters at Home of Swift Boat Backer*, ASSOCIATED PRESS, Aug. 28, 2004, available at [http://www.boston.com/news/politics/conventions/articles/2004/08/28/protesters\\_at\\_home\\_of\\_swift\\_boat\\_backer?mode=PF](http://www.boston.com/news/politics/conventions/articles/2004/08/28/protesters_at_home_of_swift_boat_backer?mode=PF).

117. Sharon Theimer, *Texas Homebuilder, GOP Donor Helps Finance Anti-Kerry Veterans' Group*, ASSOCIATED PRESS, Aug. 5, 2004.

Wyly brothers were actually helping to pay for the Swift Boat Vets effort, and the group had raised closer to \$1 million, not the modest amounts shown in the then-out-of-date Second Quarter IRS report cited by journalists.

The problem of lag-time in campaign finance disclosure reports is an old one for journalists, who should remind readers and viewers more often that the picture might have changed. However, the 527 vehicle, as the Swift Boat Vets demonstrated, exacerbates the problem for journalists accustomed to candidate committees, political parties, or PACs who raise hard money more slowly because of contribution limits. This new vehicle, which allows unlimited contributions, enables a committee to ramp up quickly. The case could be made that the Swift Boat Vets simply could not have conducted the politically effective campaign they did had the 527 route not legally existed in the 2004 election.<sup>118</sup>

The first Swift Boat Vets' television ad aired for one week, during the week of August 5, 2004.<sup>119</sup> The ad aired in three states, but a survey taken shortly after it went on the air showed just how deep it had penetrated with voters, courtesy of the news coverage. The August 9-16, 2004 National Annenberg Election Survey found that a third of all poll respondents said they had seen the ad, and almost half of the respondents who watched cable news said they had seen the ad.<sup>120</sup> Of course, it is impossible that so many

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118. According to an analysis of Swift Boat Vets finances by an opponent of regulating the 527 organizations, of about \$850,000 million raised by the group by August 4, 2004, only \$50,000 of the contributions would have been permitted under FEC regulations that limit contributions to political committees to no more than \$5000 per person. David M. Mason, a Republican FEC member, said his analysis showed that Swift Boat Vets "might never have gotten off the ground" and would have been effectively "muzzled" if they had been so regulated. *See 527 Reform Act of 2005: Hearing on S. 271 Before the Comm. on Rules and Administration*, 109th Cong. 5 (Mar. 8, 2005) (citing David M. Mason, Commissioner, FEC), available at <http://www.fec.gov/members/mason/testimony2005-03-08.pdf>.

119. *See* LaCivita, *supra* note 4 (run dates for the Swift Boat Vets advertisements were supplied by LaCivita from his files and are on file with author).

120. The national survey interviewed 2209 respondents and had a margin of error of plus or minus two percentage points. *See* Press release, Cable and Talk Radio Boost Public Awareness of Swift Boat Ad, Annenberg Public

Americans actually saw the ad, which ran in only three small markets. "The influence of this ad is a function not of paid exposure but of the ad's treatment in the free media," said Kathleen Hall Jamieson, director of the survey and the University of Pennsylvania's Annenberg Public Policy Center.<sup>121</sup> Thus, it was not the ad itself, but the news coverage of the ad that had reached the large number of voters.

The August 2004 news coverage of the Swift Boat Vets' first television advertisement also helped push the money throttle. It stimulated a flood of contributions from small donors over the Internet, who contributed \$8 million through the election, according to the group's estimate.<sup>122</sup> The media success also prompted large donors to give more. Three donors, Perry, Pickens and Simmons, accounted for \$10.5 million in contributions by the end of election, with the bulk donated after the initial attack.<sup>123</sup>

The television attack, launched in early August 2004, bore little resemblance to the more cautious and conventional approach of May 2004. In June 2004, however, the group had turned to a battery of Republican consultants, including Chris LaCivita, a veteran Virginia-based media consultant. LaCivita also worked for Progress for America, the flagship Republican 527 group formed for the election, which itself had close ties to the 2000 Bush political

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Policy Center, Aug. 20, 2004, available at [http://www.annenbergpublicpolicycenter.org/naes/2004\\_03\\_swiftboat-ad\\_08-20\\_pr.pdf](http://www.annenbergpublicpolicycenter.org/naes/2004_03_swiftboat-ad_08-20_pr.pdf).

121. *Id.*

122. As O'Neill later said:

The whole thing was like a snowball that rolls downhill gathering force and mass as it goes. Once we had major contributors backing us, it was easier for us to solicit donations. We also began operating a very sophisticated Web site, which gave us an additional way to raise money, particularly with small donors. Ultimately the Web site took in more than 150,000 individual contributions. We raised \$8 million on the Internet alone.

Colloff, *supra* note 76, at 102, 167.

123. Political Money Line, *supra* note 9.



operation.<sup>124</sup> The Swift Boat Vets were steered to LaCivita by Progress for America officials,<sup>125</sup> and they would eventually hire a media production firm (Stevens, Reed, Curcio & Potholm of Alexandria, Virginia), a media advertising placement firm (Mentzer Media Service Inc. of Towson, Maryland), and Washington, D.C. lawyer Benjamin Ginsberg. All of these professionals also worked for Progress for America.<sup>126</sup> In addition, Ginsberg worked for the Bush-Cheney committee, a post he would resign in late August when journalists sought to uncover links to the Bush campaign.<sup>127</sup>

In August 2004, when the Swift Boat Vets dominated the news, journalists searched for links between the 527 organization and the Bush campaign and the White House, specifically President Bush's top political advisor, Karl Rove. For example, the *New York Times* published an extensive account of the Swift Boat Vets, describing the initial April 4, 2004 meeting and graphically presenting a web of connections to Rove and the Bush family.<sup>128</sup> Several lines led through Dallas publicist and early Swift Boat spokeswoman Spaeth, who by August was playing a secondary role to the Washington consultants. Some of the connections were flimsy such as Texas Senator Kay Bailey Hutchison. She was ensnared by virtue of connections to Spaeth and Rove, but appears nowhere else in Swift Boat web of supporters that the author found. The *Times*' interlocking web properly featured Perry and Crow but, significantly, did not include Pickens, Simmons, Huddleston, or the Wyly brothers.<sup>129</sup>

The connections that were reported then and those disclosed in later reports would cause Slater and others to continue to argue, long after the election, that the Swift Boat Vets had all the markings of a strategy Rove has used in past Texas campaigns.

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124. Weissman & Hassan, *supra* note 62, at 8.

125. Telephone Interview with Chris LaCivita, Media Consultant, LaCivita Consulting (June 28, 2005).

126. Political Money Line, *supra* note 9.

127. Dan Balz & Thomas B. Edsall, *Lawyer Quits Bush-Cheney Organization*, WASH. POST, Aug. 26, 2004, at A1.

128. Kate Zernike & Jim Rutenberg, *Friendly Fire: The Birth of an Attack on Kerry*, N.Y. TIMES, Aug. 20, 2004, at A1.

129. *Id.*

That strategy was to attack an opponent's perceived strength through surrogates and leave no fingerprints, but Slater added that he has never been able to directly connect Rove to the Swift Boat Vets. "I've never been able to close the loop," he said.<sup>130</sup> No one else has been able to close the loop either, and reporters might have been thinking too linearly, missing the larger network.

With the advantage of a full set of IRS and FEC reports, it is easy to see how closely tied the group eventually became to Progress for America, both through the consultants it hired and the big money it raised. In other words, the Swift Boat Vets did not need to be connected to the Bush campaign to be part of the network employed to re-elect the president. Thirteen individuals gave the Swift Boat Vets contributions in excess of \$100,000 or more, for a total of \$12.6 million, roughly half the group's money. The same big contributors gave \$8.5 million to Progress for America and gave \$3 million to other Republican 527s, which could legally accept the large soft money contributions. Seven gave the maximum contributions legally allowed to the national Republican Party committees.<sup>131</sup>

The Swift Boat Vets also evolved in other ways. In the hands of the campaign professionals, any lingering ambivalence about attacking Kerry's combat record disappeared. On July 9, 2004, more than thirty of the veterans assembled in a downtown Washington, D.C. studio to be interviewed and filmed by LaCivita and company for thirteen hours.<sup>132</sup> The footage would be boiled down and used in the first two Swift Boat Vets ads. Thirteen of the veterans, several repeating the mantra, "I served with John Kerry," appeared in the first ad and accused him of lying to win his medals. It was a vivid image that featured the aging veterans against a montage of black and white photographs of young sailors in Vietnam.

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130. Slater, *supra* note 104.

131. Political Money Line, *supra* note 9. Democratic 527s had similar interlocking relationships among themselves, the Kerry campaign, and the Democratic Party. See James V. Grimaldi & Thomas B. Edsall, *Super Rich Step Into Political Vacuum, McCain-Feingold Paved Way for 527s*, WASH. POST, Oct. 17, 2004, at A1; see also Weissman & Hassan, *supra* note 62, at 6-8.

132. Miller, *supra* note 4, at 20.

The first ad was released in conjunction with the release of O'Neill's book, *Unfit for Command*, which amounted to an indictment of Kerry's war record. Excerpts from the book were available on the website of *Human Events* magazine, the conservative periodical that shares a parent company with the book's publisher, Regnery Publishing.<sup>133</sup> The book went on sale on August 11, 2004, and it became a *New York Times* bestseller. The core charges of both the advertisement and the book were that Kerry's first and third Purple Hearts were from self-inflicted wounds, the details of his acts in winning his Silver Star were far from heroic, and Kerry's rescue of Rassmann was not performed under hostile fire.<sup>134</sup> The supporting evidence consisted largely of affidavits signed by the anti-Kerry veterans who had served on other boats or units, including several of his former commanding officers.<sup>135</sup>

The news media reaction was cautious at first as the Kerry campaign labeled the ad a "vanity buy" meant only to generate news coverage,<sup>136</sup> but quickly built when McCain, a Republican, Vietnam War hero, and Bush supporter, branded the attack "dishonest and dishonorable."<sup>137</sup> The conflict, an important news value, escalated when the Kerry campaign sent out its own supportive veterans to counter the charges of the Swift Boat Vets. The result was dueling Vietnam veterans on cable and broadcast talk shows, which also included the replaying of snippets of the

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133. Regnery Publishing is a subsidiary of Eagle Publishing, which also publishes *Human Events*. See generally Regnery Publishing, Inc., <http://www.regnery.com/about.html> (last visited Nov. 10, 2005).

134. See FactCheck.org, Republican-funded Group Attacks Kerry's War Record, <http://www.factcheck.org/article231.html> (last visited Nov. 10, 2005). Factcheck.org, a nonprofit television advertising watchdog project of the Annenberg Policy Center of the University of Pennsylvania, summarized the factual issues that had been raised and assessed the accuracy of the assault on Kerry's combat record. See *id.*

135. *Id.*; see also Swift Vets and POWs for Truth Homepage, <http://www.swiftvets.com> (depicting advertisement and supporting documents) (last visited Oct. 15, 2005).

136. Jodi Wilgoren, *Vietnam Veterans Buy Ads to Attack Kerry*, N.Y. TIMES, Aug. 5, 2004, at A16.

137. Jim VandeHei & Mary Fitzgerald, *McCain Criticizes Ad Attacking Kerry on Vietnam War Record*, WASH. POST, Aug. 6, 2004, at A1.

Swift Boat Vets advertisement. There was little independent truth testing. "I think the journalism, as distinct from the commentary, lagged behind the talk show format," said Hannon.<sup>138</sup>

In contrast to the coverage of the May 2004 press conference, the response to the August 2004 television ad from the print press, particularly the major newspapers, consisted of attempts to truth test the charges.<sup>139</sup> The *Boston Globe* was one of the first to raise questions about one of Kerry's primary accusers, retired Navy Captain George Elliott. He recommended Kerry for the Silver Star but was featured in the ad saying Kerry had "not been honest about what happened in Vietnam."<sup>140</sup> Elliott recanted to the *Globe*, saying that he had made a "terrible mistake" in signing the affidavit that supported his words in the ad.<sup>141</sup> Elliott would later recant the recantation, but the *Globe* story was the first crack in the Swift Boat armor. With the exception of the *Globe*, however, few news organizations had previously invested much time in closely examining Kerry's combat record, and it took almost two weeks for the major newspapers to truth test the Swift Boat Vets' ad. The stories appeared from August 17 to August 22, 2004.

During the period, stories appeared in major newspapers quoting veterans who were eyewitnesses who supported Kerry's version of events but who had not taken sides in the partisan contest. Journalists found that military records tended to support Kerry, although the record was not complete. The thrust of the coverage was that the Swift Boat Vets had not substantiated the charges that Kerry had lied to win his medals for valor, and that, at

138. Hannon, *supra* note 96.

139. One national political reporter later described the effort: "Almost immediately my paper and other papers started debunking these charges and raised questions about the people who were making them . . . the *Times*, *USA Today*, the *Washington Post*, the *Chicago Tribune*, nobody had an impact on this. We were nothing in the day of cable television and talk radio." Jill Lawrence, Staff Writer, *USA Today*, Panel Discussion at American Democracy Conference, Center for Politics at the University of Virginia, Washington, D.C. (Dec. 3, 2004), *available at* <http://www.centerforpolitics.org/programs/adcd/adcd04-p2.pdf>.

140. See *supra* note 134.

141. Michael Kranish, *Veteran Retracts Criticism of Kerry*, *BOSTON GLOBE*, Aug. 6, 2004, at A1.

best, the evidence and eyewitness accounts were contradictory about the severity and circumstance surrounding the wounds that resulted in the first and third Purple Hearts. The third Purple Heart, under Navy rules then in effect, allowed Kerry to exit combat operations after four months.<sup>142</sup>

#### IV. THE TRUTH TESTING ROLE OF JOURNALISTS

In addition to disclosing who is paying for campaigns and how the money is being spent, political journalists since the 1990s have enlarged their role as arbiters of truth and appropriate behavior in advertising and other campaign messages. One scholar in the early 1990s refined the traditional notion of the watchdog journalist, a member of the idealized "Fourth Estate," with a sports analogy – the journalist as the "essential referee."<sup>143</sup>

A legacy of the 1988 Horton episode, when journalists felt manipulated, was an effort by referees in news organizations to "adwatch" television advertising, gauging such measures as accuracy, civility, purpose and fairness. Fact checking candidate assertions in debates also became standard journalistic practice. A similar resurgence of truth testing by news organizations occurred in the fall of 2004, which some journalists attributed to the Swift Boat Vets' August campaign.<sup>144</sup>

As the advertising attack of the Swift Boats Vet demonstrated, it is difficult for journalists in the polarized atmosphere of our modern campaigns to simply label something untrue or a distortion, without seeming to take sides and forfeiting the role of the referee. It is particularly difficult when dealing with thirty-five-year-old events in which participants have diametrically opposed recollections of what happened. Michael Dobbs of the *Washington Post* tried to sort it out when, in early August, he

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142. See *supra* notes 133-35.

143. See PHILIP SEIB, *CAMPAIGNS AND CONSCIENCE: THE ETHICS OF POLITICAL JOURNALISM* 6 (1994). The Fourth Estate refers to the historical role the press has played in checking and balancing the traditional three branches of government.

144. Lori Robertson, *Campaign Trail Veterans for Truth*, AM. JOURNALISM REV., Dec. 2004/Jan. 2005, at 39.

endeavored to recreate the battle of the Bay Hap River, the climatic episode of Kerry's combat tour when he rescued Rassmann, won a Bronze Star, and received his third wound.

When he embarked on the assignment, Dobbs said he was struck by how "the debate was devoid of facts" and consisted mostly of "blathering heads" on television.<sup>145</sup> Dobbs spent almost three weeks reporting the story. Along the way he unearthed a medal citation for valor for one of Kerry's accusers, Larry Thurlow, who also commanded a swift boat during the Bay Hap engagement. Thurlow's Bronze Star citation was for bravery "despite enemy bullets flying about him," enemy fire that Swift Boat Vets said hadn't occurred.<sup>146</sup>

On August 22, 2004, the *Post* published Dobbs' full account of the battle of the Bay Hap, including his finding that both O'Neill's book attacking Kerry and Brinkley's book supporting Kerry contain "significant flaws and factual errors."<sup>147</sup> Dobbs' story first appeared in the newspaper's "bulldog" Saturday edition, although it was missing a paragraph as Dobbs contemplated how he should try to conclude who was telling the truth. At deadline for the main Sunday edition, he inserted the following: "Both sides have withheld information from the public record and provided an incomplete and sometimes inaccurate picture of what took place. But although Kerry's accusers have succeeded in raising doubts about his war record, they have failed to come up with sufficient evidence to prove him a liar."<sup>148</sup>

How Dobbs viewed his role is instructive for journalists. He did not view himself as a "truth cop" but more like a member of a jury. "Even [with] the best work in the world, you can't completely establish facts from more than 30 years ago," he said. "After the

145. Telephone Interview with Michael Dobbs, Staff Writer, Washington Post (June 9, 2005).

146. Michael Dobbs, *Records Counter a Critic of Kerry: Fellow Skipper's Citation Refers to Enemy Fire*, WASH. POST, Aug. 19, 2004, at A1.

147. Dobbs based his reporting in part on interviews of more than two dozen swift boat veterans, but noted that Kerry was "the only surviving skipper on the river that day who declined a request for an interview." Michael Dobbs, *Swift Boat Accounts Incomplete; Critics Fail to Disprove Kerry's Version of Vietnam War Episode*, WASH. POST, Aug. 22, 2004, at A1.

148. *Id.*

reporting I had done, I thought I had the right to make a conclusion. . . . We're not interpreting the evidence so much as we weigh it."<sup>149</sup>

The journalistic verdict on the first Swift Boat ad was in, but the ad had been off the air for ten days. The Swift Boat Vets had moved back to attacking Kerry for his anti-war testimony in 1971 in a second ad. There was little for journalists to truth test in the second ad because it largely featured video footage of Kerry, in all his 1970's long-haired, combat-fatigued splendor, testifying about atrocities committed by Americans in Vietnam.

Some have argued that the second Swift Boat Vets ad was even more damaging to Kerry than the first, even though it did not generate the news coverage of the earlier one. But it did not have to because the second advertisement was propelled by a much more substantial \$1 million media buy, mostly targeted to a national cable news audience that would swell during the coverage of the Republican National Convention.<sup>150</sup> The second advertisement ran from August 14 to September 2, 2004,<sup>151</sup> an important period that requires one final dip into the prosaic world of campaign finance rules.

September 2, 2004, was the last day that the Swift Boat Vets could advertise in the "dark," outside the time windows that triggered disclosure under the new electioneering communications provision.<sup>152</sup> Again, several factors came into play in how the new provision worked: the amount spent (\$1000 or more), proximity to the general election (within sixty days) or the primaries or nominating conventions (within thirty days), and the content of the advertising.<sup>153</sup> The Democratic convention disclosure window for issue advocacy ads that pictured or referred to Kerry was from June 26 to July 29, 2004, which the Swift Boat Vets avoided by postponing the attack until August 5, 2004. The disclosure window for advertisements that pictured or referred to Bush in advance of and through the Republican convention was from July 31 to

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149. Dobbs, *supra* note 145.

150. See LaCivita Interview, *supra* note 4.

151. See *supra* notes 4, 119 and accompanying text.

152. See *supra* note 64.

153. See, e.g., *supra* notes 64, 67.

September 2, 2004. None of the Swift Boat Vets ads mentioned or pictured Bush. The window for disclosure set by the FEC involving ads that pictured or referred to either candidate was September 3, 2004 through the date of the general election. On September 3, 2004, the Swift Boat Vets went off the air for more than a week.<sup>154</sup>

So, the question arises: Was the second ad buy timed to end right at the close of the Republican National Convention or avoid disclosure, or maybe both? "I do not recall that we made any decisions on timing or content based on the reporting requirements," said LaCivita, but he said that complying with the reporting requirements by inputting the names and identities of a large number of contributors held up the third wave of Swift Boat ads. He added, "I was literally being held back by our accountant."<sup>155</sup>

The disclosure report that the Swift Boat Vets filed on September 10, 2004, when they launched their third wave of advertising against Kerry, showed that they raised almost \$7 million.<sup>156</sup> In the disclosure report, reporters would discover Pickens, the Wyly brothers, and other major contributors.

A reader, however, would have to look inside the various papers for the news because journalists had moved onto another story about a presidential candidate and Vietnam. Two days earlier, CBS News aired a story that, based on documents later found to be forged, said that Bush had received preferential treatment while in the Texas Air National Guard.<sup>157</sup> The CBS story changed the dynamics of the campaign, and shifted attention away from the Swift Boat Vets, who would continue their media assault, tripling their spending in the campaign against Kerry.<sup>158</sup> But the Swift Boat Vets would never again command the media stage as they had for almost six weeks, and the campaign story would shift to a more comfortable frame for journalists. Now both sides were

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154. See LaCivita Interview, *supra* notes 4, 119.

155. *Id.*

156. See Edsall, *supra* note 115.

157. *60 Minutes II* (CBS television broadcast Sept. 8, 2004).

158. In its subsequent television advertising through the election, Swift Boat Vets never again directly accused Kerry of having lied to win his medals, suggesting that press scrutiny of the first advertisement took a toll.



misbehaving, which made it a lot easier to write about. A September 20, 2004 *Newsweek* cover captured the change: “The Slime Campaign: How Both Sides Are Using the 527 Loophole to Throw Mud and Turn Out the Vote.”<sup>159</sup>

### CONCLUSION

The Swift Boat Vets added a chapter in American political history that reaffirmed the power of independent actors to change the course of elections. However, they also tested the ability of journalists to perform their traditional role as essential referees in a new era of media politics, and gave future independent groups a roadmap for working the system.

A group of individuals, united by their fury toward a major party candidate for president, showed how to take advantage of a newly popular vehicle for waging independent campaigns – a 527 committee – that allows unlimited contributions to be raised quickly and without timely disclosure. In spending that money on an audacious, or cynical, advertising campaign, they leveraged modest purchases of inflammatory television advertising to attract invaluable free media coverage, demonstrating how to take advantage of a fragmented and polarized media environment.

The history of independent activity indicates that the system will provide avenues to political actors with the money to get their message out. At this writing, it appears unlikely the campaign finance regulatory regime will change dramatically for either the 2006 or 2008 elections. Whether Congress, the courts, or federal regulators should restrict contributions and expenditures of 527 organizations is not the focus of this article. What this case study demonstrates is that the current disclosure regime is a rowboat, not a swift boat.

A dual reporting system to two very different regulatory agencies is hard to navigate and even harder to justify. In the electronic age, significant contributions and expenditures can be disclosed in real time, not inside or outside artificial disclosure

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159. Howard Fineman & Michael Isikoff, *Slime Time Live*, NEWSWEEK, Sept. 20, 2004, at 18.

windows or with lag times of several weeks or months. If journalists had had a contemporaneous understanding of the network financing Swift Boat Vets, they might have taken the group more seriously and the story might have unfolded more deliberately. The real-time, political free speech of the Swift Boat Vets and their ability to raise unlimited amounts of money to air attack advertisements enjoyed First Amendment protections. In an era of instant reporting and the twenty-four/seven news cycle, full disclosure should be in real time, too, especially when it helps journalists protect the integrity of the democratic process.

Journalists can draw several lessons from the story of the Swift Boat Vets. Some are obvious, such as more openness to new groups appearing on a crowded stage, more truth testing of campaign messages regardless of how they are communicated, and more restraint in reacting to small television buys for attack ads. However, there is one more core lesson to draw: more humility. This would mean not only less arrogance in dismissing a noisome or unfamiliar group, but a renewed appreciation that even the best reporter rarely has the whole story on any given day. In politics, there is almost always something more just beneath the surface that is worth digging for, sometimes even a Boone.