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Donald B. Tobin

University of Maryland Francis King Carey School of Law, dtobin@law.umaryland.edu

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Regulate, Don't Eliminate, 527s

by Donald Tobin and Edward B. Foley

Donald Tobin is an Assistant Professor of Law with the Moritz College of Law. Edward B. Foley is the director of Election Law@Moritz, Moritz College of Law.

Section 527 organizations have become the bad boys of American politics. The president had called for the elimination of all 527s and now advocates regulating them. We have been outspoken critics of the failure to regulate section 527 organizations, and have been longstanding advocates of treating most section 527 organizations as political action committees. What is missing from the current debate, however, is a realization that section 527 organizations have an important place in our election law system, and that needed reforms promoted by Senators John McCain, R-Ariz., and Russ Feingold, D-Wis., before passage of the Bipartisan Campaign Reform Act have had a significant impact on the current election campaign.

We often forget that many section 527 organizations have strong, valid electoral purposes.

Section 527 organizations used to be referred to as stealth PACs because they engaged in electioneering activities without having to disclose their contributions or expenditures. This allowed section 527s to operate in a political environment without accountability.

The first set of McCain-Feingold reforms, however, changed that. Section 527 organizations, which are generally exempt from tax, are required to disclose contributions and expenditures above certain limits. If they fail to make these disclosures, they are subject to tax. As a result, section 527 organizations are reasonably transparent. We generally know who contributes to them and what they are funding — although even better disclosure would result from regulating 527s as PACs.

With all the complaints surrounding Swift Boat Veterans for Truth, its membership and its funding are transparent. We know the group is funded by supporters of President Bush. We know the names of its directors and members. And we know who has provided them with advice. In fact, the Bush campaign's attorney, Benjamin Ginsberg, resigned after he disclosed that he was providing legal advice to the Swift Boat organization.

As a result of these disclosure provisions, Senator John Kerry, D-Mass., has been able to run campaign ads defending his record against these attacks. He can point out to the electorate that the ads are being run by veterans who were not on his boat, who did not necessarily see the activities in question, and that some of the members of the organization are closely allied with the Bush campaign. In fact, *The Washington Post* conducted an investigation of the group's claims and ran a story analyzing the veracity of the story.

Even if you are partial to one side or the other in this Swift Boat debate, the disclosure provisions in section 527 have substantially worked. And even if one condemns the initial Swift Boat ad as an inappropriate and unsubstantiated attack on Senator Kerry's service in Vietnam, as Senator McCain did (and as he called on President Bush to do), the consequence of the new disclosure rules has been the ability of the Kerry campaign and its supporters to respond through a major counteroffensive. While it is too early to tell what the ultimate effect of the Swift Boat controversy will be in this year's presidential election and whether or not its ultimate effect will correlate with the merits of the charges against Senator Kerry, the spirited public discourse that has ensued since the dissemination of the initial ad can be seen as evidence of the First Amendment process at work.

Section 501(c)(4) organizations may be the new stealth PACs.

In addition, in this debate we often forget that many section 527 organizations have strong, valid electoral purposes. Almost every Republican and Democratic party organization is a section 527 organization, and most candidate PACs are organized as 527 organizations as well. They are the mechanism through which a tremendous amount of political discourse is conducted.

Finally, the Constitution and our strong tradition of First Amendment protection requires that there be a valid way for individuals and groups to engage in political advocacy, and this advocacy is important in a democratic society. The Supreme Court has recognized, rightly in our view, that these First Amendment rights are balanced against the potential of large donations to corrupt the political process. In addition to strong disclosure rules, a key requirement with respect to 527s that function as PACs is that the donations they receive be capped at \$5,000 per donor, as is currently

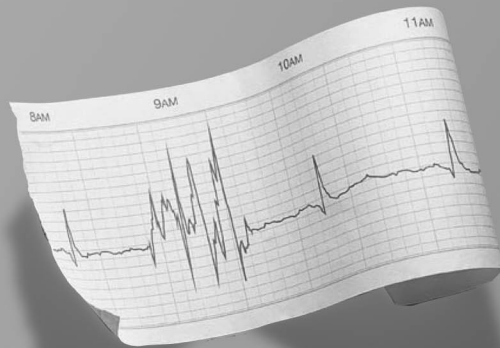
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required for PACs. But as long as these disclosure and contribution rules are enforced, 527s are appropriate participants in campaign discourse — assuming that they do not cross the line into deliberate or reckless falsehoods (which are not protected by the First Amendment).

While there are still problems that need to be resolved with regard to regulating 527 organizations, an even bigger problem may be raising its head with regard to other tax-exempt organizations, including section 501(c)(4) organizations. These exempt organizations are supposed to be engaged in social welfare functions. They may engage in some political activity as long as such activity is not their primary purpose. Section 501(c)(4) entities are not subject to campaign finance disclosure provisions and their contributors remain anonymous. As the rules for 527 political organizations tighten, groups seeking to keep their donors anonymous are seeking 501(c)(4) status. The problem is that these organizations are sometimes

political organizations masquerading as social welfare organizations to avoid disclosure. Section 501(c)(4) organizations may be the new stealth PACs.

Section 527 political organizations and 501(c)(4) social welfare organizations are not inherently evil. They are a necessary part of a political system that encourages free speech. What is necessary is basic regulation of these entities. Senators McCain and Feingold took the first step almost five years ago to rein in 527s through public disclosure. It is now time to recognize that most 527s are really PACs and that the same corruption concerns exist with regard to 527s as exist with candidate PACs. Once the dust settles on this election, Congress and/or the FEC should impose clear rules that treat as political committees section 527 organizations that have as their primary purpose influencing an election. Congress must also address the widening use of 501(c)(4)s to get around the disclosure provisions in section 527.



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