HEARING ON POLITICAL SPEECH ON THE INTERNET: SHOULD IT BE REGULATED?

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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POLITICAL SPEECH ON THE INTERNET: SHOULD IT BE REGULATED?

THURSDAY, SEPTEMBER 22, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The Committee met, pursuant to call, at 9 a.m., in room 1310, Longworth House Office Building, Hon. Robert W. Ney (chairman of the committee) presiding.

Present: Representatives Ney, Ehlers, Miller, Millender-McDonald, and Lofgren.

Staff Present: Paul Vinovich, Staff Director; Karen Christian, Counsel; Audrey Perry, Counsel; Samantha Drudge, Staff Assistant; George Shevlin, Minority Staff Director; Tom Hicks, Minority Professional Staff Member; and Jannelle Hu, Minority Professional Staff Member.

The CHAIRMAN. The Committee will come to order.

The Committee is meeting here today to hear testimony on the subject of regulation of political speech and activity on the Internet. We have a very interesting group of witnesses here today to testify. I really look forward to hearing from them.

This is a very controversial subject—well, everything in this building is controversial, but this is horrifically controversial. Groups and people really take a stand on it.

But before we get to our witnesses, I want to provide the general public with a little background on the subject so those listening know where we are in the process and what could be at stake. The Bipartisan Campaign Reform Act, McCain-Feingold, and Shays-Meehan, required the Federal Election Commission to develop regulations to implement this Act. The Commission determined Congress didn't intend for BCRA to cover Internet communications, and therefore adopted regulations that exempted them.

Two of the Members of the House, pleading that the FEC's regulations didn't follow the intent of BCRA, sued the Commission. The Court agreed with the Members of Congress and ordered the FEC to rewrite the rule. As a result of this lawsuit and court decision, the FEC was forced to rewrite the rules that covered communications on the Internet. That new rulemaking began in March of 2005.

While this new rulemaking was going on, some Members of Congress made clear that they didn't intend for BCRA to cover the Internet, and they did not want the FEC regulating these communications.

In March, our good friend, Congressman Conyers, and 13 of his colleagues wrote to the FEC seeking exemption for the Web logs or blogs. I would like to include in the record a letter and press release from the gentleman from Michigan. Dated March 11, entitled, "Representative Conyers Leads Call on FEC for Campaign Finance Exemption for Web Blogs."

[The information follows:]

Press Release

Congressman John Conyers, Jr.
Michigan, 14th District

Ranking Member,U.S. House Judiciary Committee
Dean, Congressional Black Caucus

www.house.gov/judiciary_democrats/index.html

For Immediate Release:
March 11, 2005

Contact: Danielle Brown
(202)225-1294

Rep. Conyers Leads Call on FEC For Campaign Finance Exemption For Web Logs

Says Bloggers Critical To Democratization of Media

Representative John Conyers, Jr., Ranking Member on the House Judiciary Committee, sent the following letter, joined by fourteen additional co-signers, to the FEC calling on the Commission to remove any ambiguity in upcoming rulemaking and make explicit that a blog would not be subject to disclosure requirements, campaign finance limitations or other regulations simply because it contains political commentary. The letter follows below:

March 11, 2005

The Honorable Scott E. Thomas, Chairman
The Honorable Michael E. Toner, Vice Chairman
The Honorable David M. Mason, Commissioner
The Honorable Bradley A. Smith, Commissioner
The Honorable Danny L. McDonald, Commissioner
The Honorable Ellen L. Weintraub, Commissioner
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Dear Mr. Chairman and Commissioners:

We write to express our concern over the possible implications of U.S. District Court Judge Colleen Kollar-Kotelly's decision in *Christopher Shays & Martin Meehan v. Federal Election Commission*, 337 F.Supp.2d 28 (D.D.C. 2004), to overturn the Federal Election Commission's (FEC) blanket exemption of the Internet from the Bipartisan Campaign Reform Act of 2002 (BCRA). Specifically, we are concerned about the impact this decision could have on internet weblogs ("blogs").

We have been advised the FEC will soon open a rulemaking in this area. Many of us were strong supporters of campaign finance reform generally, and of the BCRA. While the impact of the *Shays* decision on blogs remains subject to debate, we urge you to remove any ambiguity and make explicit in this rule that a blog would not be subject to disclosure requirements, campaign finance limitations or other regulations simply because it contains political commentary or includes links to a candidate or political party's website, provided that the candidate or political party did not compensate the blog for such linking. We believe such an interpretation is entirely consistent with the BCRA, which has helped to mitigate the impact of soft money on politics. We also believe such an interpretation would easily pass judicial muster as well.

Throughout our nation's history, Americans have turned to the press for information and analysis in order to make a more informed decision concerning politics. The past decade has witnessed exponential growth of the Internet, as well as in the number of Americans accessing the World Wide Web. Along with this growth has been the emergence of Web reporters who play a critical role in commentating on American political affairs and who seek to inform the debate in an environment that is generally accessible by all.

In our view, this "democratization" of the media is a welcome development in this era of media consolidation and a corresponding lack of diversity of views in traditional media outlets. Given the emergence of this new method of reporting and Americans' increasing reliance on it for their political information, it is critical that BCRA's press exemption should be clarified to apply to those who are reporting on the Internet.

Thank you for your attention to this important matter.

Sincerely,

Rep. John Conyers, Jr.
Rep. Bernie Sanders
Rep.Luis Gutierrez
Rep. Jim McDermott
Rep. Maxine Waters
Rep. James McGovern
Rep. Adam Smith

Rep. Rick Boucher
Rep.Zoe Lofgren
Rep. Chaka Fattah
Rep. Lynn Woolsey
Rep. Raul Grijalva
Rep. Sheila Jackson Lee
Rep. Ron Paul

The CHAIRMAN. Identical bills were also introduced in both bodies to preserve the exemption—in the Senate by minority leader Harry Reid, and in the House by Jeb Hensarling. Their bill language was actually adopted by this Committee when we inserted it in the Pence-Wynn bill reported by the Committee.

These bipartisan congressional endorsements with Members from both sides of the aisle, in both the House and the Senate, are the exception, and shows there are still some issues on which both sides of the aisle obviously can agree.

We will later hear from two witnesses who operate blogs, one conservative and one liberal—or if you want to classify yourselves a different way, that is fine—but who probably may not agree on anything philosophically except they don't want the FEC to be regulating their businesses or what is said on the Web sites.

So the debate here today is really not between Republicans and Democrats or liberals and conservatives. It is between those who favor regulation on this issue and those who don't.

A lot of the reform community favor regulation. They believe that Internet speech has to be regulated in the same manner as other speech or we would create a loophole that would allow people to evade the Campaign Finance Reform Act. This prospect doesn't frighten those who oppose regulation. What frightens them is the prospect of requiring bloggers to answer to a Federal agency if regulations are extended to cover what they can or cannot say on the Web sites.

So, I think we have a real clash here of two fundamentally different views of the world, one being that regulation is necessary to preserve the health of our democracy, and the other that freedom from regulation is required for democracy to flourish. With the FEC in the midst of a rulemaking on the subject and the Congress considering pending legislation, we have a great opportunity today to just air the arguments and where people stand and what they think. I really look forward to the testimony.

I want to thank our Ranking Member, the gentlelady from California; and I would note that we had a wonderful historic event together yesterday with Congressman Fattah, the unveiling of the Congressman Rainey portrait, who was the first seated African American elected and seated in the House. We had a great ceremony, and the Rainey family actually met each other and were present. Some of them had not ever met each other. It was a great day with our Ranking Member; and, as usual, we appreciate her interest in legislation.

Ms. MILLENDER-MCDONALD. Thank you so much, Mr. Chairman, for your continuing to bring people together as you did the Rainey family yesterday. I was amazed that many of them had not met each other, and so they came to meet each other yesterday at that great event put on by our colleague from Pennsylvania, Congressman Fattah.

Regretfully, because this is the annual legislative conference of the Congressional Black Caucus Foundation, I am going to have to leave after I give my opening statement; and I regret that. But then I have a group of young 11-year-olds, 11- and 12-year-olds who will be doing demonstration flying with the military and—through Boeing, and so I have got to get out to this flying field

wherever I am flying to. I have been flying all morning, but I do want to thank the chairman for scheduling this oversight hearing, and my leaving is not because of a disinterest, but it is because of the multiple schedule that I have today.

Being from California, I have seen firsthand how the Internet has become an innovative and powerful medium. A little more than a decade ago, when public use of the Internet was still in its infancy, people around the world were just beginning to use this new technology to instantaneously communicate with one another. Today, the Internet has grown into a powerful tool for commerce, information, and the media.

Looking back on this last Presidential election cycle, some of the positive consequences of enacting the Bipartisan Campaign Reform Act, or BCRA, were the democratization of grassroots involvement in this process and broadening of political free speech and the grassroots efforts to increase voter turnout, all of which were facilitated or made possible by the use of the Internet. Federal officeholders and their political parties were forced to appeal to a broader audience of small donors, and the Internet was tapped for that purpose.

The Internet was also used by Federal candidates to get their message out and to become more involved in grassroots activities. Presidential candidates used the Internet to raise substantial amounts of money. Internet fundraising is much more efficient and much more—less costly than conventional outreach such as hiring phone banks, producing and airing TV ads and sending out mass mailers. All of the resources raised by the campaign is fully reported to the Federal Election Commission and publicly disclosed.

Millions of small, first-time donors recently became involved with the political process by using the Internet. Americans were not only able to contribute to candidates using the Internet, but they were also able to learn about the candidate's position on issues when they arose and not wait for a news cycle. The Internet is leveling the playing field between everyday Americans and big donors and between the candidates and the news media which covers them.

Hurricane Katrina destroyed the Gulf Coast, flooded 80 percent of the City of New Orleans, and caused the worst disaster in this nation's history. The Internet helped to raise millions of dollars in relief for the Red Cross and other relief organizations; and, as a result, the first beleaguered evacuees might be able to return to their city and their homes.

But for every legitimate charity working miracles, there are hucksters and scam artists trading on America's generosity and community spirit; and this is an issue I want to raise with our witnesses today, or I will raise it later on.

As I stated earlier, the Internet facilitated the participation of millions of new low-dollar political contributors. This was a remarkable and extraordinarily positive development. Regretfully and inevitably, as complaints to the FEC have disclosed, a few criminals took advantage of the enthusiasm of ordinary citizens to participate in our democracy and stole their contributions through phony political Web sites. These sites, by mirroring legitimate candidate sites, were able to deceive an unknown number of people.

Unless addressed, this type of crime stands to undermine the confidence of people who would otherwise be willing to use the Internet to contribute to the candidates and parties of their choice.

The Commission's normal enforcement procedures are not designed to respond in a timely manner to such crimes. Therefore, I would urge the Commission to develop procedures and to work with the private sector, the political committee, and other governmental agencies to address this problem and this type of fraud. I would be interested in hearing from you in addressing this very critical and serious issue.

Mr. Chairman, thank you again for this hearing. Don't think that you are alone because there are—no other members will be on your side. But we do recognize the importance and the seriousness of this issue.

Thank you.

The CHAIRMAN. I thank the Ranking Member, the gentlelady from California, for also readjusting your schedule. You are not actually going to fly a plane, are you?

Ms. MILLENDER-MCDONALD. Heavens, no.

The CHAIRMAN. I wanted to make sure. Thank you, and I think it is important to have the hearing for the record. Of course, the record will be open for follow-up questions, so I want to thank you so much for your support.

We will start with the first panel today. We are fortunate today to have with us three distinguished commissioners from the Federal Election Commission who discussed their ideas and proposals regarding the regulation of political speech on the Internet.

First, we will hear from Chairman Scott Thomas, followed by Vice-Chairman Michael Toner and, finally, Commissioner Ellen Weintraub.

We look forward to your remarks. Welcome all three commissioners today.

STATEMENTS OF SCOTT E. THOMAS, CHAIRMAN, FEDERAL ELECTION COMMISSION; MICHAEL E. TONER, VICE CHAIRMAN, FEDERAL ELECTION; AND ELLEN L. WEINTRAUB, COMMISSIONER, FEDERAL ELECTION COMMISSION

The CHAIRMAN. We will hear from the Chairman first.

STATEMENT OF SCOTT E. THOMAS

Mr. THOMAS. Chairman Ney, Ranking Member Millender-McDonald and members of the committee, thank you for inviting me and my colleagues to testify on the proper reach of any regulation of campaign activity on the Internet. I plan to read just a few snippets of my prepared statement, and I would ask that the full statement be entered for the record.

I hope here to make a few basic points.

I would add—since the ranking member does have to leave, I would just jump outside of my prepared remarks to indicate I think there are some interesting opportunities to work with the private sector to help develop seals of approval, if you will, that indicate a particular Web site is an official Web site. So I would be very happy to sort of explore along with your staff and your office ideas along those lines.

There is actually a group that I know of that is working on that. It is called Election Mall Technologies, and they have started to develop and work with States to develop, in essence, an official seal of approval so people know that a particular Web site is the real deal.

Ms. MILLENDER-MCDONALD. That is encouraging. Thank you so much.

Mr. THOMAS. Now back to where I was initially leading.

I hope to make a few basic points.

First of all, the Commission's 2002 regulations, in my view, mistakenly adopted a total carveout for Internet communications that exempts from core statutory provisions even paid campaign advertising.

Second, there are ways for the Commission to rectify the situation by regulating only Internet activity that raises the concerns underlying the core statutory provisions while leaving the vast majority of the Internet activity, including blogging, uninhibited.

Third, Congress I think should await the Commission's effort and should not compound the current problem with enactment of the same total carveout approach.

Now, as the Chairman referenced, the Commission is in the midst of a rulemaking concerning the proper reach of regulation regarding political activity on the Internet. We have put out a notice of proposed rulemaking with several options. This summer we had a couple days of hearings, and we hope to be able to adopt final rules on this topic by the end of the year.

The regulations adopted by the Commission in 2002 created a very broad exemption from several statutory restrictions for Internet activity. It is similar to the exemption adopted by this committee when considering the Pence-Wynn bill, and the Commission has been in litigation over this broad exemption since October of 2002.

The broad exemption the Commission adopted leaves serious gaps in the statutory system put in place by Congress to require hard money funding of State or local party communications supporting particular Federal candidates and to limit or prevent certain contributions on behalf of Federal candidates and committees and to require disclaimers on political advertising.

Experience teaches that political professionals will exploit any perceived loopholes. For example, the national party soft money loophole started as a minor blip in the 1980s and exploded to a half billion dollar binge by the 2000 election cycle. Internet advertising and e-mail sent to millions are themselves showing signs of growing in terms of usage and costs.

I would interject here we had a witness testify, Mr. Michael Bassick. He is with the Online Coalition, and he told us in 2004 alone over $14 million in Internet campaign advertising was purchased. He said this represented a 3,000 percent increase over the amount of paid Internet advertising from the 2000 cycle.

So we have a growing development in terms of paid Internet advertising, and I would suggest that carefully crafted regulation on this topic is in order.

I won't belabor with you the details of the legal problems with the Commission's approach except to note that really there is only

one provision in the statute that defines the term public communication and uses it; and it is a provision that is designed to require State and local party committees to use hard money to pay for certain public communications that promote, support, attack or oppose a Federal candidate. That is where the Commission adopted this broad, across-the-board exemption for, in essence, any Internet activity. This arguably leaves State and local parties free to fund hard-hitting, candidate-specific attack ads placed for a fee on popular Internet Web sites, no matter the cost, as some sort of allocable expense that can be paid for, in large part, with soft money.

Second, when later crafting new regulations specifying when coordinating a paid communication with a candidate or committee makes the communication an in-kind contribution, the Commission unnecessarily adopted a content requirement which, in turn, adopts that restricted public communication definition and thereby excludes all communications over the Internet. This leaves corporations or unions or foreign governments and wealthy individuals free to fund, without regard to the statutory limits and prohibitions, Internet communications of any sort in full coordination with Federal candidates and committees.

Imagine a huge cooperation or union being able to fully fund the Internet ad campaign or million person e-mail operations of a cooperating Presidential or congressional or party committee.

Now, the third mistake, in my view, of the Commission came when drafting the post-BCRA regulations dealing with disclaimers. Though the statute requires notice identifying the payor and indicating whether or not there is candidate authorization on any type of general public political advertising, the Commission again adopted its restricted public communication definition and thereby excluded communications over the Internet. The result is that candidates, party committees and other persons who pay for Internet campaign ads on popular Web sites do not have to follow statutory disclaimer rules.

In sum, as a result of the decisions made by the Commission in the rulemaking process, party committees will be using soft money to pay for Internet ads bashing candidates; corporations, unions, foreign nationals and wealthy individuals will be paying for Internet-related expenses of requesting candidates and parties; and the public won't have a clue who is paying for virtually all Internet advertising they will see.

I would say this is not inconsequential or hypothetical. A search of the FEC database shows about $25 million on Schedule B disbursement schedules which describe with terms like Web or Internet or e-mail—$25 million. And that is just really what we can see because people have happened to label those kinds of activities that way. So there is a fair amount of activity out there.

The invalidated regulations of the Commission would essentially gloss over this significant financial activity and the potential for soft money and other otherwise restricted sources being used to pay for it.

So we are in the process of this rulemaking. I think we are working pretty well to try to correct the problem that I have identified.

The focus of any Internet regulation should be those Internet campaign ads placed on Web sites that normally charge a commer-

cial fee for such placement. That is the focus of the Commission's proposed regulation that we put out.

For ads placed for a fee on another person's Web site, State and local parties would have to follow the funding restrictions intended for public communications in the statute; all persons who coordinate such ads with a candidate or party would have to treat them as contributions or coordinated expenditures; and, third, disclaimers saying who paid for them and whether they were authorized by a candidate would have to be included, unless it was otherwise impractical.

Importantly, under the Commission's proposed rules, no other Internet communication would be regulated as a public communication. Thus, State and local parties would not have to apply the new BCRA soft money prohibition to material placed on their own Web sites or to e-mail activity. Likewise, persons coordinating with candidates or parties regarding material placed on such persons' own Web sites would not have to worry about triggering the coordinated communication rules.

With regard to disclaimers for persons other than political committees, the Commission's proposed rules would not require a disclaimer under any circumstances if the communication did not include express advocacy or solicitation of Federal contributions. Beyond that, other than for paid ads placed on someone else's Web site, the proposal would only require a disclaimer on e-mail sent to more than 500 recipients if the sender paid for a mailing list to accomplish that mailing. Thus, for material placed on one's own Web site and for e-mail that is sent to 500 or fewer persons or to a list developed without having to purchase the names, there is no disclaimer requirement.

Taken as a whole, the Commission's proposed regulations already described move toward a reasonable balance. They get at the heart of the problem noted by the court in Shays v. FEC and at the same time leave wide latitude for individuals, bloggers and others to undertake Internet political activity.

I would say to further assure that vast array of individuals who use the Internet for political speech that the Commission intends to leave individuals free to operate outside the relatively few constraints noted above, the Notice of Proposed Rulemaking suggested several revisions to other regulations. For example, we clarified that we would expand the so-called volunteer activity allowance to independent activity, not just coordinated activity.

This is important because, heretofore, the Commission has felt compelled to treat noncoordinated or independent activity on the Internet as something that is still subject to the current regulations on independent expenditures. So at some point a person would be subjected to the rule that only hard money can be used to pay for independent express advocacy communications and at a $250 threshold a person has to start reporting independent expenditures. So our intent with this rulemaking is to clarify that we will work with the volunteer allowance that is in the statute and make it extend to independent activity so that independent Internet activity likewise will have freedom from the independent expenditure restrictions.

We also put in some provisions to clarify that our current rules on allowing an individual to use the employer's facilities will extend to use of computer facilities and Internet facilities at the workplace.

We also put in some rules to clarify that we intend to apply the existing media exemption to Internet activity.

So we hope those additional proposed revisions would assure the regulated community that our focus is only on these paid ads placed on someone other's Web site.

We received over 800 comments. As I said, we held 2 days of hearings, and we are right now going over the voluminous record and trying to come toward a resolution on that particular rulemaking.

In closing, I would just urge that the committee not adopt the approach that the committee approved in June, just because it will fall into the same set of problems that I described when we went through the regulation process. That broad exemption, at least in my mind, does not work well.

I would just finish by saying the Internet, we all understand, is a wonderful tool for political activity. Its accessibility and generally low cost are invigorating the body politic. By the same token, its increased usage by candidates and parties and the increased resources being put into this technology for campaign advertising suggests a need to be cautious about attempts to exempt all Internet activity from Federal campaign finance laws. I hope Congress can await the outcome of the Commission's regulation proceeding.

I thank the chairman and the ranking member and the members of this committee for the opportunity to testify, and I assure you the Commission stands ready to assist the committee further in any way it would find helpful.

The CHAIRMAN. Thank you.

[The statement of Mr. Thomas follows:]

Statement of Scott E. Thomas
Chairman, Federal Election Commission

Before the Committee on House Administration
September 22, 2005

Chairman Ney, Ranking Member Millender-McDonald, and members of the Committee, thank you for inviting me to testify on the proper reach of any regulation of campaign activity on the Internet.

I hope to make a few basic points: (1) The Commission's 2002 regulations mistakenly adopted a 'total carve out' for Internet communications that exempts from core statutory provisions even paid campaign advertising; (2) There are ways for the Commission to rectify the situation by regulating only Internet activity that raises the concerns underlying the core statutory provisions while leaving the vast majority of Internet activity, including blogging, uninhibited; and (3) Congress should await the Commission's effort and should not compound the current problem with enactment of the same 'total carve out' approach.

The Commission's Mistake

As you know, the Federal Election Commission is in the midst of a rulemaking proceeding concerning the proper reach of regulation regarding political activity on the Internet. Earlier this year, the Commission published a notice of proposed rulemaking laying out several options, and this summer the Commission held two days of hearings. We hope to be able to adopt final rules by the end of the year.

The situation is somewhat complicated by the fact that the regulations adopted by the Commission in 2002 created a very broad exemption from several statutory restrictions for Internet activity—similar to the exemption adopted by this Committee when considering the Pence/Wynn Bill—and the Commission has been in litigation over this broad exemption since October of 2002. A federal district court held these regulations, along with several others, contrary to the statute or otherwise invalid, and though the FEC did not appeal regarding the Internet exemption, it has appealed regarding other regulations.[1] In theory, if the full U. S. Court of Appeals for the District of Columbia rules that the plaintiffs challenging the Commission's regulations had no standing to bring the suit in the first place, some commissioners might urge that the

[1] The U.S. District Court for the District of Columbia concluded that the Commission's broad Internet exemption would "severely undermine [the Federal Election Campaign Act's] purposes," and would permit "rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption." *Shays v. FEC*, 337 F. Supp. 2d 28, 70 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), *petition for rehearing en banc filed* (Aug. 29, 2005). Though the district court held some 15 regulations invalid, it nonetheless indicated that pending resolution of the litigation and adoption of needed revisions by the FEC, the challenged regulations remain in effect. *Shays v. FEC*, 340 F. Supp. 2d 39, 54 (D.D.C. 2004).

Commission simply drop its Internet rulemaking proceeding and leave the current regulations—with their 'total carve out' for Internet communications—on the books.

Speaking on my own behalf, I would oppose that approach for several reasons. Procedurally, any ruling that the plaintiffs did not have standing no doubt will be appealed to the Supreme Court and, as a result, there is the prospect of looming uncertainty for many more months. Even if plaintiffs ultimately lose on standing grounds, there is the probability that another suit based on a new standing argument would be initiated, meaning years more litigation. The Commission should proceed to repair through regulation those most obvious defects it created in 2002, and should do so in time to give guidance to those participating in the 2006 elections.

On the merits, the broad exemption the Commission adopted leaves serious gaps in the statutory system put in place by Congress to require 'hard money' funding of state or local party communications supporting particular federal candidates, to limit or prevent certain contributions on behalf of federal candidates and committees, and to require disclaimers on political advertising. Experience teaches that political professionals will exploit any perceived loopholes. For example, the national party 'soft money' loophole started as a minor blip in the 1980s, and exploded to a half-billion dollar binge by the 2000 election cycle.[2] Internet advertising and e-mails sent to millions are themselves showing signs of growing, in terms of usage and cost. Thus, carefully crafted regulation is in order.

Acting in haste after passage of the Bipartisan Campaign Reform Act (BCRA), the Commission made several mistakes. First, when dealing with the new 'hard money' restrictions placed on state and local party funding of "public communications" that promote, support, attack, or oppose a federal candidate,[3] the Commission indiscriminately crafted language that excluded "communications over the Internet."[4] *This arguably leaves state and local parties free to fund hard-hitting, candidate-specific attack ads placed for a fee on popular Internet websites—no matter the cost—as some sort of allocable expense that can be paid for in large part with 'soft money.'*[5] Second,

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[2] As the Supreme Court has observed, "of the two major parties' total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($498 million) in 2000." *McConnell v. FEC*, 40 U.S. 93, 124 (2003).

[3] 2 U.S.C. 431(20)(A)(iii), 441i(b)(1). This involves but one of the types of activity BCRA labeled as "Federal election activity" (FEA). It is the only Federal Election Campaign Act provision that actually uses the "public communication" term of art. It is critical to note that the statute includes in the term "public communication," not just the specific examples of "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public," but also "*any other form of general public political advertising*" (emphasis added).

[4] 11 CFR 100.26. The Commission took this post-BCRA approach even though it had long held Internet websites and widespread e-mail to be a type of "general public political advertising" under the analogous disclaimer language at 2 U.S.C. 441d. *See* Advisory Opinions 1999-37 and 1995-9, available at www.fec.gov.

[5] In another area, dealing with "generic campaign activity" that state and local parties cannot pay for with 'soft money,' the Commission narrowed the statute's reach by confining the definition to "public

when later crafting new regulations specifying when 'coordinating' a paid communication with a candidate or committee makes the communication an in-kind contribution or party coordinated expenditure, the Commission unnecessarily adopted a 'content' requirement which, in turn, adopts the Commission's own restrictive "public communication" definition that excludes all "communications over the Internet."[6] *This leaves corporations, unions, foreign governments, and wealthy individuals free to fund, without regard to the statutory limits and prohibitions, Internet communications of any sort in full coordination with federal candidates and committees.* Imagine a huge corporation or union being able to fully fund the Internet ad campaign or million person e-mail operations of a cooperating presidential or congressional campaign or party committee![7] The third mistake of the Commission came when drafting the post-BCRA regulations dealing with disclaimers. Though the statute requires notice identifying the payor and indicating whether there is candidate authorization on "any . . . type of general public political advertising," the Commission again adopted its restrictive "public communication" definition and thereby excluded "communications over the Internet" (aside from two situations separately covered: websites of "political committees" and e-mail sent unsolicited to over 500 recipients).[8] *The result is that candidates, party*

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communications." *Compare* 2 U.S.C. 431(21) *with* 11 CFR 100.25. This means the restrictions intended for "generic campaign activity" will not reach Internet communication of any sort, no matter what its cost.

[6] The statute defines a "contribution" as "*any* gift. . . [or] loan. . . of money or *anything of value* made by any person for the purpose of influencing any election for Federal office" (emphasis added). 2 U.S.C. 431(8)(A)(i). It further states that "expenditures [defined at 2 U.S.C. 431(9)(A)(i) as "*any* purchase, payment, . . . loan, . . . or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office"] made by any person . . . in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, *shall* be considered to be a contribution to such candidate" (emphasis added). 2 U.S.C. 441a(a)(7)(B)(i).

Notwithstanding that the statute contains no 'content' standard—and certainly no "public communication" limitation—the Commission's "coordinated communication" regulation adopted a 'content' requirement at 11 CFR 109.21(a)(2) and narrowed its reach to: "(1) A communication that is an electioneering communication under 11 CFR 100.29 [radio or TV]; (2) A *public communication* that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing. . . ; (3) A *public communication* that expressly advocates the election or defeat of a clearly identified candidate for Federal office; (4) A communication that is a *public communication*, as defined in 11 CFR 100.26, and about which each of the following statements . . . are true: (i) The communication refers to a clearly identified candidate for Federal office; (ii) the public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and (iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot" (emphasis added).

[7] Some may argue that other Commission regulations would trump the exemptions carved from the "coordinated communications" rule. While it is true that other regulations regulate "in kind contributions" of "goods or services," 11 CFR 100.52(d), and corporate or union "contributions" and "communications to those outside the restricted class that expressly advocate," 11 CFR 114.2(b)(1), (2)(ii), the "coordinated communication" regulation cannot be read as a nullity where there is a communication involved and there is 'coordination.'

[8] The statute, at 2 U.S.C. 441d, requires paid for/authorization notice on communications "through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising." At 11 CFR 110.11(a) the Commission specified: "This section applies only to public communications, defined for this section to include the communications at 11 CFR

committees, and other persons who pay for Internet campaign ads on popular websites do not have to follow the statutory disclaimer rules.

In sum, as a result of the poor decisions made by the Commission in the rulemaking process, party committees will be using 'soft money' to pay for Internet ads bashing candidates; corporations, unions, foreign nationals, and wealthy individuals will be paying for Internet related expenses of requesting candidates and parties; and the public won't have a clue who is paying for virtually all Internet advertising they will see.

This is not an inconsequential or hypothetical concern. The 2004 elections clearly illustrated that the Internet has arrived as an important medium for influencing federal elections. In 2004, candidates used the Internet to solicit contributions online, provide content to download and distribute, recruit volunteers, and send videos and e-mail messages to supporters.[9] Not surprisingly, the presidential campaigns of George Bush and John Kerry made extensive use of the Internet:

> Both have transformed their web sites into virtual campaign offices that offer an array of tools. After feeding online supporters a steady diet of hard-hitting Web videos--designed to stir their partisan juices--the campaigns are now urging them to use those tools to help spin the media, contact voters and get out the vote."[10]

Given the number of e-mail addresses held by the campaigns, it is likely these were widespread communications. According to press reports, the Bush campaign had a list of approximately 6 million of its supporters' e-mail addresses; the Kerry campaign 2.5 million.[11] A blanket Internet exemption would allow all of these candidate Internet activities to be underwritten, without regard to amount or source, by outside groups.

Moreover, evidence shows that the money spent on these Internet activities to influence elections is significant. Even though most citizens' use of the Internet involves little expense, there are groups that are raising and spending large sums on Internet communications and other Internet-related expenses. A search of the FEC database shows about $25 million on Schedule B disbursement schedules described with terms like "web," "Internet," and "e-mail." That figure does not even include Senate filings that are not electronic, state party disbursements that appear on other disbursement schedules, or other Internet-related expenditures described by less descriptive terms such as "communication expenses." Moreover, a number of the payments were very large. In 2004, for example, one of the national party committees made payments of $260,000 for e-mail acquisition, payments of $200,000 and $179,000 for e-mail services, and payments of $170,000 and $147,000 for web advertising. Likewise, a review of 527 group filings with the Internal Revenue Service showed large Internet disbursements. For example, Progress for America Voter Fund spent over $450,000 on e-mail

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100.26 plus unsolicited electronic mail of more than 500 substantially similar communications and Internet websites of political committees available to the general public. . . ."

[9] *See* "E-Mail Credited with Pivotal Role in 2004 Election," *New Jersey Record* (November 7, 2004).

[10] "Bush, Kerry Make Last Minute Pleas for Help by E-Mail," *Washington Post* (Oct. 19, 2004).

[11] *Id.*

disbursements during the 2004 election cycle, over $158,000 for website services and over $213,000 for Internet banner advertisements. Swift Boat Veterans showed a total of over $320,000 in similar categories. The November Fund showed a total of over $512,000 in these categories.[12]

The invalidated regulations of the Commission essentially would ignore this significant financial activity and the potential for 'soft money' and other otherwise restricted sources being used to pay for it. Thus, I will vigorously oppose any effort to simply stick with the current regulations. The Commission can do better, and we should be encouraged to do so.

The Commission's Effort to Correct Its Mistake

The Commission has heeded the basic message of the district court that overturned the 'total carve out' approach in the Commission's regulations:

> Congress intended all other forms of "general public political advertising" to be covered by the term "public communication." What constitutes "general public political advertising" in the world of the Internet is a matter for the FEC to determine. [337 F. Supp. 2d at 70]

The focus of Internet regulation should be those Internet campaign ads placed on websites that normally charge a commercial fee for such placement. That is precisely what the Commission attempted in its Notice of Proposed Rulemaking published on April 4, 2005. The proposed definition of "public communication" was revised as follows:

> *Public communication* means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term *general public political advertising* shall not include communications over the Internet, except for announcements placed for a fee on another person's or entity's Web site. [70 Fed. Reg. 16977]

As crafted and applied to the state and local party funding rules, the coordinated communication rules, and the disclaimer rules, the proposed language would repair the most obvious flaw in the Commission's earlier regulations. For ads "placed for a fee:"

- state and local parties would have to follow the funding restrictions intended for "public communications" and "generic campaign activity,"
- all persons who coordinate such ads with a candidate or party would have to treat them as contributions or coordinated expenditures,

[12] Documentation for these figures was submitted as part of the Commission's Internet rulemaking record. "Supplemental Materials for the Internet Communications Rulemaking," Office of General Counsel Memorandum (July 13, 2005).

- and disclaimers saying who paid for them and whether they were authorized by a candidate would have to be included (unless otherwise impractical).[13]

Importantly, under the Commission's proposed rules, no other Internet communication would be regulated as a "public communication." Thus, state and local parties would not have to apply the new BCRA 'soft money' prohibition to material placed on their own websites or to e-mail activity. Likewise, persons coordinating with candidates or parties regarding material placed on such persons' own websites would not have to worry about triggering the "coordinated communication" rules.

With regard to disclaimers for persons other than political committees, the Commission's proposed rules would not require a disclaimer under any circumstances if the communication did not include express advocacy or solicitation of federal contributions. For anyone, other than for paid ads placed on someone else's website, the proposal would only require a disclaimer on e-mail sent to more than 500 recipients if the sender paid for a mailing list to accomplish the mailing.[14] Thus, for material placed on one's own website, and for e-mail that is sent to 500 or fewer persons or to a list developed without having to purchase the names, there is no disclaimer requirement.

Taken as a whole, the Commission's proposed regulations already described move toward a reasonable balance. They get at the heart of the problem noted by the court in *Shays v. FEC*, and at the same time leave wide latitude for individuals, bloggers, and others to undertake Internet political activity. In my view, the regulations also need to address situations where a person produces an Internet campaign ad and then places the ad on a popular website that ordinarily charges a fee for placement but the fee is waived. It would be as if a newspaper waived its normal advertising fee. Also, there might be a need to address situations where someone pays a vendor a significant amount for a polished, hard-hitting campaign ad placed on that person's own website for viewing, copying, and distributing. Finally, there might be good reason to assure that a person could not simply get around the in-kind contribution rules by paying for the website or e-mail expenses of a candidate or party. But these are refinements that can be the subject of deliberations by the full Commission in the coming days.

To further assure the vast array of individuals who use the Internet for political speech that the Commission intends to leave individuals free to operate outside the relatively few constraints noted above, the Notice of Proposed Rulemaking suggested several revisions to other regulations. For example, because the current exemption in the statute for use of one's personal property, such as a computer and Internet service, is

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[13] The Commission's regulations have long recognized exceptions for communications where placement of the disclaimer would be inconvenient or impracticable. 11 CFR 110.11(f). *See also* Advisory Opinion 2002-9, available at www.fec.gov, where the Commission concluded that a disclaimer was not required on text messages sent via wireless telephones.

[14] **§ 110.11 Communications; advertising; disclaimers** would cover "unsolicited" e-mail, and the latter would be defined as "those e-mail that are sent to electronic mail addresses purchased from a third party." 70 Fed. Reg. 16978. The Commission settled on the number 500 because Congress has used this line when defining the reach of "mass mailing" and "telephone bank." *See* 2 U.S.C. 431(23), (24).

ambiguously worded to cover "volunteer" activity,[15] the Commission proposed making it clear that this exemption would extend not only to activity coordinated with a candidate or party, but also to activity undertaken independently.[16] The Commission also proposed clarifying that this exemption would extend to use of computer equipment and services available at a public facility like a library, public school, community center or Internet café. *Id.* This set of modifications is critical because the Commission heretofore has had to regulate independent Internet activity that crosses over into 'express advocacy' as "independent expenditure" activity that must be paid for only with 'hard money' and that must be reported even by individuals if it crosses a $250 threshold.[17]

In addition, the Commission proposed clarifying its rules allowing an employee's or member's use of facilities of a corporation or labor organization as long as it doesn't impede the person's or organization's normal amount of work (11 CFR 114.9(a) and (b)). The proposal would apply specifically to use of "computers, software, and other Internet equipment and services."[18]

Further, the Commission's proposed regulation included language implementing the so-called 'media exemption' (2 U.S.C. 431(9)(B)(i)) to make clear that Internet activity can qualify. Specifically, the Commission proposed revising 11 CFR 100.132 to state:

> Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication, *whether the news story, commentary, or editorial appears in print or over the Internet*, is not an expenditure unless the facility is owned or controlled by a political party, political committee, or candidate. . . . [70 Fed. Reg.16978; emphasis added]

Overall, the Commission's proposed regulations offer a great deal of additional assurance to individuals, bloggers, and others that the great majority of citizen activity using the Internet will fall outside any Federal Election Commission interest. As it stands, the proposal package would only regulate as a "public communication" Internet ads placed on another's website for a fee and, additionally for disclaimers, e-mail sent to more than 500 recipients where the list has been purchased.

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[15] 2 U.S.C. 431(8)(B)(ii) exempts from the definition of "contribution" the "use of real or personal property. . . voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises or in [a] church or community room for candidate-related or political party-related activities. . . ." The Commission has extended this same exemption concept to the definition of "expenditure." *See* 11 CFR 100.135, 100.136.

[16] Proposed § 100.155, 70 Fed. Reg. 16978.

[17] *See* Advisory Opinions 1998-22 and 1999-37, available at www.fec.gov.

[18] 70 Fed. Reg. 16978, 16979. Some have mistakenly assumed that the 'safe harbor' the Commission created in this area, a *per se* allowance for use of facilities not exceeding one hour per week or four hours per month, is a hard rule. In fact, the 'normal work/normal activities' test is the overall rule, and this frees organizations to allow significant use during non-work hours.

The Commission received nearly 800 comments on the proposal and the various issues raised. The Commission held two days of hearings on June 28 and 29. Twenty-one witnesses testified. The commissioners are now pouring over the voluminous record in the proceeding and working toward a potential final rule. I strongly urge the Congress to let the Commission attempt to work out this complicated matter using its expertise and understanding of the various statutory and regulatory provisions involved.

While the Internet is unique, and the Internet community is very interested in minimal restrictions being imposed, the Commission must be mindful of the underlying statutory scheme Congress has in place. While it may be appropriate to interpret some statutory terms, such as "public communication" or "general public political advertising," in a way that only reaches some Internet activity, there are other terms, such as contribution" or "expenditure," that do not so readily bend to such distinctions. The Commission has to be careful about applying the state and local party FEA funding restrictions and the in-kind contribution concepts to communications using, say, facsimile technology, but not Internet technology. The Commission has to think hard about whether it should apply such rules to traditional mailings or phone banks to more than 500 people, but not to Internet e-mail. The Commission has to ascertain whether there is a justifiable legal distinction for disclaimer purposes between someone photocopying and distributing thousands of flyers at virtually no cost, and someone downloading and distributing the same number of flyers over the Internet. These are the kinds of distinctions and decisions that Congress rightly has delegated to the Commission through its authority to "prescribe rules . . . to carry out the provisions of" and "formulate policy with respect to" the provisions of FECA. 2 U.S.C. 437c(b)(1), 438(a)(8).

Congress should not approve the language adopted when considering the Pence/Wynn Bill

In June this Committee adopted a short amendment to the Pence/Wynn bill (Sec. 14 of H.R. 1316). It follows the same approach the FEC took two years ago, and it will lead to the same problems I have noted above. I strongly urge the Committee not to pursue this course.

There are better ways to craft rules in this area, and the Federal Election Commission should first be given a chance to draw lines that will uphold the core provisions of the Act while leaving free the types of Internet political activity that engage millions of citizens.

The amendment adopted by this Committee (and adopted also on the Senate side in S. 1053) simply exempts "communications over the Internet" from the definition of "public communication." On the one hand, this might not exempt all the Committee expected, because the term "public communication" actually is used in FECA only once, to describe one type of "Federal election activity" that a state or local party committee must pay for with 'hard money' only. 2 U.S.C. 431(20)(A)(iii). It is only through the Federal Election Commission's creativity that the "public communication" concept has

drifted into regulations that define "generic campaign activity" by state and local parties (11 CFR 100.25), that define "coordinated communications" (11 CFR 109.21(a), (c)), and that define the scope of disclaimer requirements (11 CFR 110.11(a)). Thus, if the Commission were to revise its regulations, it is conceivable the amendment would have very limited application. To be effective, any statutory change would have to address the various statutory provisions that touch on how Internet activity might be regulated: the definitions of "contribution," "expenditure," and "Federal election activity" (in all its variations); the separate definition of "contribution or expenditure" applicable to corporations and labor organizations; the exemptions covering personal property used for 'volunteer' activity and 'media' activity; and the disclaimer rules. *See* 2 U.S.C. 431(8), 431(9), 431(20), 441b(b)(2), 431(8)(B)(ii), 431(9)(B)(i), and 441d, respectively. Unless a comprehensive approach is taken, Congress might create a situation where only Internet activity tied to the "public communication" definition is unregulated, but other Internet activity, such as "independent expenditure" activity, continues to be regulated. These problems can best be avoided by letting the Commission deal with these issues in the rulemaking context.

More importantly, if the Commission were to retain use of the "public communication" construct in all its current locations, the broad exemption of all Internet communication now in the Pence/Wynn bill would forever thereafter require that even hard-edged candidate-specific attack ads placed for a fee on popular Internet sites escape the party 'soft money' restrictions and the in-kind contribution restrictions at the core of the statute, as well as the disclaimer rules. While the amount of paid Internet advertising may be only in the tens of millions of dollars now, it is certain to grow as a means of providing candidate support. A statutory exemption that doesn't make a critical distinction for commercial ads could lead potential 'friends' to offer to pay for a candidate's entire Internet related advertising effort while avoiding the contribution limits and prohibitions that have been on the books for decades. The Supreme Court in *Buckley v. Valeo* upheld the contribution limits at issue and warned that the limits would become meaningless if they could be evaded "by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." 424 U.S. 1, 46 (1976). A more careful approach is needed to avoid this problem. The Commission can achieve a well-crafted regulatory approach along the lines needed.

Conclusion

The Internet is a wonderful tool for political activity. Its accessibility and generally low cost are invigorating the body politic. By the same token, its increased usage by candidates and parties and the increased resources being put into this technology for campaign advertising suggest a need to be cautious about attempts to 'exempt' all Internet activity from federal campaign finance laws.

A few years ago, the Federal Election Commission adopted a 'total carve out' for Internet activity that has only brought litigation and confusion. A federal court roundly criticized the Commission for its approach, and the Commission now has a chance to better calibrate a focused set of regulations. The approach thus far taken by the

Commission suggests a balanced, reasonable outcome—one that will apply longstanding campaign funding restrictions to paid Internet advertising, but will leave virtually every other Internet activity by individuals, bloggers, and others completely unfettered. Disclaimers would be required on paid Internet ads, unless impracticable, and on express advocacy e-mail sent to more than 500 recipients, but only if the list used was purchased.

Congress should await the outcome of the Commission's regulation proceeding. Passage of the amendment adopted by this Committee in June would only recreate many of the problems brought on by the Commission's earlier attempt in this area.

I thank the Chairman, Ranking Member, and members of this Committee for the opportunity to testify. The Commission stands ready to assist the Committee further in any way it would find helpful.

The CHAIRMAN. Vice Chairman Michael Toner.

STATEMENT OF MICHAEL E. TONER

Mr. TONER. Thank you, Mr. Chairman. I want to thank you and the ranking member and all members of the committee for inviting me to testify here today on Internet regulation.

I want to emphasize three things today:

First, there is no indication that Congress intended for the many prohibitions and restrictions within the McCain-Feingold law to apply to the Internet. As I detail in my written testimony, the Internet is not subject to McCain-Feingold under the plain meaning of the statute.

Congress identified a large number of mass media that are subject to McCain-Feingold restrictions, including broadcast, cable and satellite communications, newspapers, magazines, mass mailings, telephone banks. Even outdoor advertising facilities are mentioned in this statute. Virtually every type of mass media in this country was identified by Congress in this key statutory provision except for one, the Internet.

I do not believe that the statutory omission was an accident or an oversight. Rather, I believe it was a conscious, informed judgment by Congress that the World Wide Web should not be subject to the many restrictions and prohibitions that McCain-Feingold applies to other types of mass communications.

There is also no evidence in the legislative history that Congress intended to restrict online politics when it enacted the McCain-Feingold law. To my knowledge, during the lengthy floor debates on this legislation not a single Member of Congress, including the legislation's sponsors, indicated that the Internet would be restricted or regulated in any way in the McCain-Feingold law.

Given that such a result would potentially affect the activities of millions of online political activists, the fact that there was no floor discussion of the subject is powerful evidence, in my view, that Congress did not intend to restrict the Internet when it passed the McCain-Feingold legislation. So, given the plain meaning of the statute and its legislative history, in my view the FEC was correct to exempt the Internet from its regulations implementing the McCain-Feingold law.

Second, there are very strong policy reasons that support in my mind exempting online political speech from government regulation and restriction. As many commentators have noted, the Internet is virtually a limitless resource where millions of Americans communicate every day at virtually no cost. Unlike television and other traditional media, which generally are scarce and have significant financial barriers to entry, an individual can communicate with millions of people online at little or no cost in an interactive and dynamic manner; and the speech of one person does not and cannot interfere with the speech of anyone else.

Published reports indicate that, as of August, 2005, there were over 14 million Web blogs and over 1.13 billion links in cyberspace, that approximately 80,000 new blogs are created every day, which works out to about one every second, that the blogosphere continues to double about every five and a half months, that approximately 70 million American adults log on the Internet every day

and that Americans send out approximately 43 million e-mail messages per day. In light of this, it is simply not possible, in my view, for any person or entity, no matter how wealthy they may be or how much money they can spend, to dominate political discourse on the Internet.

By contrast, if a multi-millionaire decides to spend millions of dollars on television or radio advertising to try to elect or defeat a Federal candidate, that person could buy up much of the available advertising time and could make it difficult for anyone else to be heard on those traditional media. But such dominance, in my view, is not possible on the Internet, given its extraordinary size and accessibility.

Third, there is no constitutional basis, in my view, for the Federal Government to restrict online politics. The primary constitutional basis for campaign finance regulation is preventing corruption or the appearance of corruption. Where campaign finance regulations meant to ensure that money and politics does not corrupt candidates or officeholders or create the appearance of corruption, such rationales cannot plausibly be applied to the Internet, given its size, affordability and accessibility.

As bloggers Markos Moulitsas Zuniga and Duncan Black pointed out to the FEC earlier this year, the purpose of campaign finance law is to blunt the impact of accumulated wealth on the political process, but this is not something that occurs online. While wealth allows a campaign or large donor to dominate the available space on TV or in print, there is no mechanism on the Internet by which entities can use wealth or organizational strength to crowd out or silence other speakers. In sum, the Internet fulfills through technology what campaign finance reform attempts through law.

On the broadest level, the question to be decided in the months ahead is whether the online political speech of every American will be free. I ask, must every aspect of American politics be regulated by the Federal Election Commission? Can there not be any part of our politics that is not subject to Government review, investigation and potential enforcement action? I don't view these as rhetorical questions. I view them as going to the heart of the debate of whether the Internet should be regulated by the Federal Election Commission.

I remain hopeful that Congress and the Commission will take whatever steps are necessary to ensure that every American can engage in online politics free of Government regulation and restriction.

I want to thank again the committee for inviting me to testify. I look forward to the committee's questions.

[The statement of Mr. Toner follows:]

FEDERAL ELECTION COMMISSION
Washington, DC 20463

TESTIMONY OF
VICE CHAIRMAN MICHAEL E. TONER
REGARDING REGULATION OF ON-LINE POLITICAL SPEECH
HOUSE ADMINISTRATION COMMITTEE
SEPTEMBER 22, 2005[1]

The central question before Congress and the FEC in the months ahead is whether the federal government will begin regulating the political speech of Americans over the Internet.

Under current Federal Election Commission regulations, the vast majority of on-line political activities in this country are conducted free of government review and restriction. In 2002, the FEC promulgated regulations that largely exempted the Internet from the prohibitions and restrictions of the McCain-Feingold campaign finance law. The Commission's decision to exempt the Internet was based on the plain meaning of the McCain-Feingold legislation and was consistent with the statute's legislative history – namely, that Congress in no way intended to impede or impair on-line politics when it enacted McCain-Feingold. The Commission's decision to exempt the Internet from regulation also reflected the fact that the World Wide Web is a democratizing medium of public discourse through which millions of Americans speak every day about politics at little or no cost; accordingly, there is no indication that such robust on-line political activity has any potential to create corruption or the appearance of corruption.

However, the FEC's regulations exempting on-line political speech from the McCain-Feingold law are in jeopardy. The United States District Court for the District of Columbia struck down the Commission's Internet regulations, contending that they were contrary to law under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Shays v. FEC*, 337 F.Supp. 2d 28 (D.D.C. 2004). The Commission appealed to the D.C. Circuit, arguing that the *Shays* plaintiffs lacked legal standing to challenge the Internet rule and a number of other regulations. A three-judge panel of the D.C. Circuit rejected the Commission's standing argument and affirmed the lower court's ruling. *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. July 15, 2005). The Commission recently filed a petition in the D.C. Circuit seeking rehearing en banc in the *Shays* litigation. If the petition for rehearing is denied, without congressional action, the Commission may

[1] I would like to thank Melissa Laurenza for her able assistance in preparing this statement.

abandon its regulations exempting the Internet from regulation and begin restricting on-line political speech.

I strongly believe that the on-line political speech of all Americans should remain free of government review and regulation. The actions of Congress, the courts, and the FEC during the next six months likely will determine whether Internet politics will continue to flourish in the future free of government restriction.

The FEC's Decision to Exempt the Internet from Regulation is Consistent With the Plain Meaning of the McCain-Feingold Law.

The Internet is not subject to the McCain-Feingold law under the plain meaning of the statute. When Congress defined what is a "public communication" that is subject to the many prohibitions and restrictions of McCain-Feingold, it identified a wide variety of communications, including "broadcast, cable, or satellite communication[s], newspaper[s], magazine[s], outdoor advertising facilit[ies], mass mailing[s], or telephone bank[s] to the general public, or any other form of general public political advertising." 2 U.S.C. § 431(22).

However, Congress did not refer to the Internet in the statutory definition of "public communication." I do not believe this statutory omission was an accident or oversight. Congress was undoubtedly aware of the Internet when it enacted McCain-Feingold.[2] Therefore, the omission of the Internet from the statutory definition of "public communication" reflects a conscious, informed judgment by Congress that the World Wide Web should not be subject to the many restrictions that McCain-Feingold applies to other types of mass communications.[3]

The FEC's Internet Regulations are Consistent with the Legislative History of McCain-Feingold.

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[2] This congressional awareness is confirmed by the fact that the Internet is referenced numerous times in the legislation. See e.g., 2 U.S.C. § 434(d)(2) (requiring that reports filed electronically be "accessible to the public on the Internet"); 2 U.S.C. § 434(a)(12)(A)(III) (requiring the development of software allowing the "Commission to post the information on the Internet immediately"); 2 U.S.C. § 434(a)(12)(D) (requiring the Commission, "as soon as practicable, [to] post on the Internet any information received"); and 2 U.S.C. § 434(h) (requiring the Federal Election Commission to make public any report filed by an Inaugural Committee "accessible to the public...on the Internet").

[3] Some argue that the phrase "any other form of general public political advertising" in 2 U.S.C. § 431(22) can be read to include the Internet. Yet, under traditional canons of statutory construction, this catchall phrase includes only additional types of media that are similar to the media that are enumerated in the statute. Given that the World Wide Web is fundamentally different than any other type of mass communication, there is no basis for concluding that the Internet is encompassed by the catchall phrase in 2 U.S.C. § 431(22).

There is no evidence in the legislative history that Congress intended to regulate or restrict on-line politics when it enacted McCain-Feingold. To my knowledge, when the McCain-Feingold law was debated on the House and Senate floor, there was no indication by any of the legislation's sponsors or by any other Member of Congress that the Internet would be subject to the law's many strictures. Given that such a result would potentially affect the activities of millions of on-line political activists, the fact that there was no floor discussion of the subject is powerful evidence that Congress did not intend to restrict the Internet when it passed the McCain-Feingold law.

The evidence becomes stronger every day that Congress did not intend for the FEC to regulate the Internet when it enacted McCain-Feingold. In March, Senator Reid sent a letter to the FEC expressing "serious concerns" about the Commission's Internet rulemaking that was initiated in response to the *Shays* litigation. *See* March 17, 2005, Letter from Senator Reid to Chairman Scott Thomas. Senator Reid, who voted for the McCain-Feingold law, noted that the Internet "has provided a new and exciting medium for political speech," and that "[r]egulation of the Internet at this time, with its blogs and other novel features, would blunt its tremendous potential, discourage broad political involvement in our nation and diminish our representative democracy." *Id.*

Similarly, Representative Conyers, and 13 other Members of the House Judiciary Committee, wrote the Commission in March expressing concern about the potential impact of the FEC's rulemaking on Internet weblogs. Representative Conyers and his colleagues stressed that many of them "were strong supporters of campaign finance reform generally" and of McCain-Feingold in particular. *See* March 11, 2005, Letter from Representative Conyers et. al. to Chairman Scott Thomas. Nevertheless, Representative Conyers urged the Commission to make explicit in this rulemaking that "a blog would not be subject to disclosure requirements, campaign finance limitations or other regulations simply because it contains political commentary or includes links to a candidate's website, provided that the candidate or political party did not compensate the blog for such linking." *Id.* Representative Conyers concluded that "such an interpretation is entirely consistent with [McCain-Feingold]." *Id.*

Senator Feingold reportedly agrees. In a posting entitled "Blogs Don't Need Big Government," Senator Feingold indicated earlier this year that "certainly linking to campaign websites, quoting from or republishing campaign materials and even providing a link for donations to a candidate, if done without compensation, should not cause a blogger to be deemed to have made a contribution to a campaign or trigger reporting requirements." Senator Russ Feingold, *Blogs Don't Need Big Government*, Mar. 10, 2005, *available at* www.mydd.com/story/2005/3/10/112323/534.

Moreover, Senator John Kerry and Senator John Edwards, who both voted for McCain-Feingold, filed comments with the Commission during its rulemaking this year stating categorically that "Congress did not intend to create new barriers to Internet use when it passed [McCain-Feingold]." Comment to the Federal Election Commission, June 3, 2005, *available at* www.fec.gov/pdf/nprm/internet_comm/nprm_comments.shtml. In the

written comments, counsel for Senator Kerry noted that Senator Kerry was a co-sponsor of McCain-Feingold and emphasized that

> he supports the law and its objective of removing corruption from the political process. He believes that [McCain-Feingold] can and should tilt the balance of political power back toward ordinary citizens. Nonetheless, for those like Senator Kerry who strongly support giving average Americans a more effective voice in the political process, [Internet regulation] raises more concern than hope.

Id.

Senator Reid has introduced legislation that would "make it clear that Congress did not intend to regulate this new and growing medium in the Bipartisan Campaign Reform Act" by specifically exempting the Internet from the statutory definition of "public communication." *See* March 17, 2005, letter from Senator Reid to Chairman Scott Thomas. Senator Reid's bill, S.678, currently has three cosponsors, and a similar bill introduced by Representative Hensarling has nine co-sponsors. Both bills enjoy bipartisan support. This Committee adopted the statutory language concerning the Internet sponsored by Representative Hensarling when it approved the Pence-Wynn bill earlier this year.

The Internet Has Had a Democratizing Influence on American Politics and Should Not be Regulated or Restricted.

Strong policy reasons support the FEC's current regulations exempting on-line political speech from restriction.

First, the Internet is a unique medium with tremendous potential for citizens to become actively involved in the political process. The Internet is virtually a limitless resource, where the speech of one person does not interfere with the speech of anyone else. Unlike television and other traditional media, which generally are scarce and have significant financial barriers to entry, an individual can communicate with millions of people on-line at little or no cost in an interactive and dynamic way. The Supreme Court has noted that there are "special justifications for regulation of the broadcast media that are not applicable to other speakers: ...the history of expansive Government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and its 'invasive' nature...Those factors are not present in cyberspace." *Reno v. ACLU*, 521 U.S. 844, 869 (1997). Additionally, the Internet is a non-invasive medium, as compared to television, radio and other mass media. Generally speaking, on-line users are exposed to Internet messages and content only after they have taken deliberate, affirmative steps to obtain it. The Supreme Court has observed that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" *Id.* at 869.

Second, unlike other forms of mass media, millions of Americans use the Internet every day to communicate at virtually no incremental cost.[4] The Supreme Court has observed that "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Id.* at 870.

Third, the 2004 election provided overwhelming evidence of how the Internet is a democratizing force that permits robust political speech at the grass-roots level. Groups such as Moveon.org and Meetup.com not only provided a means for organizing like-minded individuals, but also encouraged individuals to become actively involved in politics, from the presidential election to the race for the county courthouse.

According to a recent Pew Research Center report, "[t]he Internet was a key force in politics last year as 75 million Americans used it to get news, discuss candidates in emails, and participate directly in the political process." Lee Rainie, "The Internet and Campaign 2004," Mar. 6, 2005, *available at* www.pewinternet.org/PPF/r/150/report_display.asp. Pew reported that 17 million people last year sent emails about campaigns to groups, family members, and friends as part of listservs or discussion groups. *Id.* Pew found that between 2000 and 2004, the number of registered voters who cited the Internet as one of their primary sources of news about the presidential campaign increased by more than 50 percent. *Id.* In addition, approximately seven million people signed up to receive email from presidential campaigns, and four million people signed up on-line to volunteer for a campaign. *Id.*

The primary constitutional basis for campaign finance regulation is preventing corruption or the appearance of corruption. Whereas campaign finance regulation is meant to ensure that money in politics does not corrupt candidates or officeholders, or create the appearance thereof, such rationales cannot plausibly be applied to the Internet, where on-line activists can communicate about politics with millions of people at little or no cost. As the counsel for Markos Moulitsas Zuniga and Duncan Black emphasized earlier this year:

> The purpose of campaign finance law is to blunt the impact of accumulated wealth on the political process, but this is not something that occurs online. While wealth allows a campaign or large donor to dominate the available space on TV or in print, there is no mechanism on the Internet by which entities can use wealth or organizational strength to crowd out or silence other speakers…In sum, the Internet fulfills through technology what campaign finance reform attempts via law.

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[4] As of the end of 2004, an estimated 201 million people in the United States used the Internet, including 63% of the adult population and 81% of teenagers, and approximately 70 million American adults logged onto the Internet every day. Lee Rainie, "Internet: The Mainstreaming of Online Life," Jan. 25, 2005, *available at* http://www.pewinternet.org/PPF/r/148/report_display.asp.

Adam Bonin, *Keep Blogs Unregulated*, National Law Journal, July 18, 2005, *available at* www.nlj.com. *See also* Center for Democracy and Technology, "Campaign Finance Regulation and the Internet: A Set of Principles to Protect Individuals' Online Political Speech" (May 11, 2005) ("As the last election amply demonstrated, the Internet has become America's public square, a powerful forum where ordinary people spending small sums of money can express their political views, and be heard by millions of people. Unlike closely controlled forums like TV and radio, which are dominated by a few political speakers, no political speaker on the Internet can dominate the space or prevent others from being heard."). As the AFL-CIO noted in comments submitted to the Commission:

> [T]he fundamentally democratic and leveling aspects of the Internet render it a potentially potent counterweight to concentrations of financial power in the political marketplace, and there is no apparent means at present by which corporations, unions or others can utilize their resources to dominate the medium.

Comment to the Federal Election Commission, Jan. 7, 2000, *available at* http://www.fec.gov/pdf/nprm/use_of_internet/comments.shtml#inquiry.

Even Narrowly Tailored Regulation of the Internet is Problematic.

The Commission earlier this year, in response to the *Shays* litigation, issued a Notice of Proposed Rulemaking ("Internet NPRM") which contained a number of proposed regulations concerning the Internet. *See* "Internet Communications," 70 Fed. Reg. 16,967 (April 4, 2005). The proposed regulation at the heart of the NPRM would include paid advertisements on the Internet within the definition of "public communication." *See id.* at 16,977 (proposing that public communication include "announcements placed for a fee on another person's or entity's Web site."). The proposed regulation, if enacted, would subject such activity to regulation and restriction.

Fortunately, most of the conceptual approaches and proposed regulations in the Internet NPRM are narrowly tailored and seek to regulate only certain aspects of on-line politics. Although many of the proposed rules are restrained, their adoption would nevertheless create numerous complexities for people active in politics through the Internet. One key virtue of the Commission's current regulatory approach is that people involved in on-line politics can know -- without consulting federal statutes and regulations, and without hiring high-priced lawyers – that what they are doing is legal. However, were the Commission to adopt the regulations proposed in the NPRM, Internet political activists would confront numerous legal issues and concerns, including, but not limited to:

- Whether their on-line speech is an "announcement[] placed for a fee" and therefore potentially a "public communication" under 11 CFR § 100.26;

- Whether their on-line speech contains "express advocacy" under 11 CFR §100.22;

- Whether their on-line speech qualifies for the media exemption under 11 CFR §§ 100.73 and 100.132;

- Whether their on-line speech is considered to have been made independently or in coordination with any candidate under 11 CFR §§ 109.10, 109.11, 109.20, 109.21, 109.22, and 109.23, and the consequences that flow from either determination; and

- Whether they have made an in-kind contribution if they do not charge for the placement of an announcement on their website or blog or if they charge less than the usual rate.

Inevitably, none of these questions would have easy answers, particularly for those on-line political activists who do not have the means to hire experienced campaign finance lawyers who are familiar with the Commission's rules and all their exceptions and exclusions. In this regard, it is the mere act of exercising regulatory jurisdiction over the Internet that is problematic, and which likely would become a trap for the unsophisticated and unwary. Moreover, if the history of campaign finance regulation is any guide, once the FEC exercises jurisdiction over the Internet, the Commission's initial set of regulations, even if narrowly tailored, are likely to lead to broader regulation in the future.

In written comments submitted to the Commission regarding the Internet NPRM, Senator John Kerry aptly noted that

> [t]he draft rules published by the Commission for consideration are more modest in scope than some potential alternatives. However, their adoption would nonetheless have the potential to chill the sort of activism that had such a positive force in 2004.

Comment to the Federal Election Commission, June 3, 2005, *available at* www.fec.gov/pdf/nprm/internet_comm/nprm_comments.shtml.

Conclusion

Senator Mitch McConnell has observed that the Internet

> is potentially the greatest tool for political change since the Guttenberg press. It empowers the ordinary citizen to become a publisher, a broadcaster, or a political commentator with a worldwide audience. It is an extraordinary tool for citizens seeking to organize with like-minded people to exercise their First Amendment freedom to petition the government and speak out on elections and issues.

Political Activity on the Internet: Hearing Before the Senate Comm. on Rules and Administration, 106th Cong. (2000) (statement of Sen. Mitch McConnell, Chairman, Senate Comm. on Rules and Administration).

On the broadest level, the question to be decided in the months ahead is whether the on-line political speech of every American will remain free. Must every aspect of American politics be regulated and restricted by the Federal Election Commission? Can there not be any part of politics in the United States that is free of government review, investigations, and potential enforcement actions?

I do not view these as rhetorical questions. If any domain in American politics is going to remain free of regulation, the Internet is one of the most promising prospects.

The Internet is not only a unique medium that defies most if not all of the legal premises for regulating political speech, it also has had a democratizing influence on American politics. The Word Wide Web has been a leveling force that has allowed millions of people across the political spectrum -- whether by email, blogs, Internet discussion groups, or websites -- to organize and voice their support for candidates at all levels of government. The Internet has provided the means for individuals to freely express, even shout, their political speech to millions of people at little or no cost.

I remain hopeful that Congress and the Commission will take whatever steps are necessary to ensure that every American can continue to engage in on-line politics free of government regulation or restriction.

The CHAIRMAN. Commissioner Weintraub.

STATEMENT OF ELLEN L. WEINTRAUB

Ms. WEINTRAUB. Mr. Chairman, Representative Miller, it is a pleasure to be here. You have my written statement. I ask that it be entered into the record. I won't read it to you.

Let me say at the outset that I got to the Commission after most of the rulemakings that were necessitated by BCRA had already been completed; and, as you have already heard and I think will continue to hear today, a lot of people who were involved in that process—at the Commission and on the outside as commentors feel very strongly about those regulations, whether they were right, whether they were wrong.

I wasn't there, and I don't have a dog in that fight, and I am not here to relitigate that. I am also not here to lobby you over whether you should or should not pass a law governing the Internet and politics. But I am here to talk to you about where the Commission finds itself today.

And where we are today is a place where, without congressional action, the Commission has no choice. We are under a judicial mandate to issue a regulation addressing at least some aspects of political speech on the Internet. Barring statutory change, that is exactly what we will do, although I believe the Commission should and will take a very restrained approach to any such regulation. But if you don't want us to issue that regulation, then we need a change in the law.

I think that, I want to assure you that we are, as a group, and I know I am personally, committed to taking a very restrained approach to any regulation that we pass that governs people's use of the Internet. We are not interested in creating a new category of Internet outlaws. I am not interested in having anyone out there sitting at their computer, whether it is at their home or their office, about to send out a message and thinking, well, before I press that send button do I have to call my lawyer or, God forbid, read an FEC advisory opinion? I think that would be a very bad result, and we will do everything within our power—I will do everything within my power to make sure that is not the result of our regulations.

In our proposed regulation, the only Internet activity that we propose to cover as a regulated public communication is an advertisement that is placed for a fee on another person's Web site; and we tailored that on purpose to be as narrow as we thought we could while still complying with the judge's concerns.

Now I will point out that we received some testimony during our hearing that Internet ads can be placed very cheaply, as cheaply as $50 for 50,000 hits on some sites, according to the Center For Democracy and Technology; and it has been suggested to us that there perhaps ought to be some kind of a minimum threshold before we would look at even paid advertising. The threshold that has been suggested by several witnesses is $25,000. That might be a perfectly good idea, but I don't think we can do that, again, without a statutory change. So I will just suggest that to you that if you are interested in that approach, that is another area where we would need to see legislation.

Our proposed regulation also addressed disclaimers on e-mail, only because we have a regulation on the books that I believe is vastly overbroad, and I think we need to pare that down.

Right now, if an individual sends out 500 substantially similar unsolicited e-mails that advocate the election or defeat of a candidate, it requires a disclaimer. And when I think about how many addresses people routinely keep in their e-mail address books—I know I have over 500—people belong to listserv groups that have many, many names on them; and it is very, very easy, I think, for someone who is involved and excited about politics to, when it gets close to the election, decide to send out an e-mail to everybody in their address book, which could very well be over 500 names, saying please vote for my favorite candidate or vote against this other guy.

For us to say that that would require a disclaimer or that the Federal Government has any interest in regulating that kind of e-mail I think is ridiculous. So I think we need to change the regulation on the books.

The proposal we have made is to import a commercial transaction requirement onto that so, unless the individual had paid for their mailing list, which most individuals wouldn't do, they would not have to worry about that disclaimer requirement. But it has been suggested that that is not enough, and I am still contemplating, and I am looking at this issue.

I think that it is quite possible that we might want to repeal that entire disclaimer regulation as it applies to e-mail except insofar as it would govern political committees, candidate committees, party committees, all political committees so that individuals would never have to be concerned about that, no matter the source of their address lists.

The proposal also makes clear a couple of things that I think are already true, but perhaps, given all the attention to this, people using the Internet would feel more comforted by seeing it in writing—maybe not—and that is that the media exemption does apply online. Online publications are given the same protection that paper publications are and that the volunteer exception that is in our rules does cover individuals' use of computers in their own residences, on their own equipment, or on publicly available equipment such as in libraries or, in many instances, on corporate or labor union equipment that they otherwise have access to that they are free to use under the terms of their employment or the relationship with their union for nonbusiness purposes.

A lot of people are concerned that the way our regulations are written, this would limit individuals' use of those kinds of computers to 4 hours a month, which isn't a lot of time. No witness could come up with any reason why we would want to import that kind of restriction, and I don't see any reason to do so. So I am also looking at whether our rules are already clear enough on that, that this 4-hour limit wouldn't apply or whether we need to specifically broaden them.

But the argument has also been made that perhaps we don't want to even go so far as to address the Internet in this context. Because even by virtue of exempting activity, we impliedly say that

they are under our jurisdiction; and that is a debate that is ongoing at the Commission as well as outside.

Let me say couple of words about bloggers, because the bloggers have generated and received a lot of attention in this debate.

No one wants to regulate the bloggers. I think that is pretty clear now. But some commentors pointed out that blogging is only one form of communication technology that currently millions of people use, but there are many other ways that people use the Internet to communicate. And when we—if we are going to craft an exemption, we ought to make it broad enough that it is not limited to just a technology that happens to be popular today but also have it broad enough that it would cover the way people will continue to use the Internet next year and the year after that, or the way things change online, tomorrow and the day after that. So I think we want to be technology neutral in our approach, and an exemption for bloggers would probably not be broad enough.

In addition, some of the bloggers have asked that they be allowed to incorporate for liability purposes the way political committees can without incurring all the corporate restrictions. I think that is an excellent idea. I would be happy to pursue that. I am not sure we can do that in the context of this rulemaking, given the requirements of the administrative procedure act for noticing what we do. The courts have been very strict with us on those requirements, and I think we might have to notice that in a new rulemaking, but I am very interested in pursuing that because I see no reason not to do it.

One other issue that has come up with bloggers, in the last election a couple of bloggers received payments from candidates, and that became controversial, and some people have suggested that those payments should be disclosed by the bloggers themselves.

However, we do not normally require disclosure by commentators of payments they receive by campaigns. It is usually the campaigns that disclose those payments. And I don't think that we—for myself, I personally would not support a rule that imposed a new requirement for people who comment on the Internet that does not otherwise exist for people who comment on television or newspapers or in any other forum.

One other sort of technical point on the republication of campaign materials, which is generally covered under the law and is regulated. On the Internet, it takes on a whole different character because it requires virtually no cost or effort to cut and paste something or to add a link or to forward something that you have received from another source online. It is very different in character than Xeroxing a bunch of papers and then stuffing them in envelopes and folding them and addressing them and stamping them and buying the stamps. There is a lot of effort that goes into that, and it just doesn't track what happens on the Internet.

So I think we ought to make clear that whatever our rules are in other contexts for republishing campaign materials that they would not apply in the same way to linking and forwarding and cutting and pasting online.

I think we can all agree that the Internet is a potent and dynamic tool for fostering political debate and that any regulation we undertake should proceed on a "less is more" theory. We need to

be very narrow and focused and restrained, and I am committed to doing it that way. The Internet brings people together who can't leave their house and or who live in faraway places and provides them with a forum where they can get together and talk about the future of our Nation, and who would want to interfere with that? I know I don't.

I thank you for your attention. I am happy to answer any questions.

The CHAIRMAN. Thank you.

[The statement of Ms. Weintraub follows:]

Statement of Commissioner Ellen L. Weintraub
Before the Committee on House Administration
September 22, 2005
Political Speech on the Internet: Should it Be Regulated?

Chairman Ney, Ranking Member Millender-McDonald, and Members of the Committee: Thank you for inviting me here today. I am always happy to have the opportunity to discuss the Commission's work with the Members of this Committee.

The topic of this hearing is whether political speech on the Internet should be regulated. This is an important question for Congress to debate because without Congressional action, the Commission has no choice. We are currently under a judicial mandate to issue a regulation addressing at least some aspects of political speech on the Internet. Barring a statutory change, we will do so, although I believe the Commission should and will take a very restrained approach to any such regulation.

How did we get here? Congress, in the Bipartisan Campaign Reform Act (BCRA), limited how one can pay for communications that are coordinated with political campaigns, including any form of "general public political advertising." In 2002, the Commission issued a regulation defining those communications so as to exempt anything transmitted over the Internet. A Federal judge struck down that regulation as inconsistent with the law.

Recently introduced legislation in both the House and Senate would exempt all Internet activity from regulation under BCRA, effectively codifying the Commission regulation that the court struck down. In a letter to the Commission, Senator Reid, who introduced the proposal in the Senate, stated that the Internet "has generated a surge in grassroots involvement in our government and has proven to be a democratizing medium in our political process."[1] And let me state for the record that if this amendment to BCRA passes, I will be delighted to move that we cease any attempt to qualify the exemption in our current rule.

In the absence of legislation, to comply with the judge's decision, we must issue a rule that provides something less than a blanket exemption. This does not mean that the FEC must regulate all, most, or even very much Internet activity. We are faced with a question of statutory interpretation, and the phrase we are interpreting is "general public political advertising." In March, we began the process of defining that term in the context of the Internet, with a Notice of Proposed Rulemaking. We have taken the statutory language as our guidepost and focused on paid advertising. We have also taken the opportunity to try to clarify various types of Internet communications that remain unregulated and to address what I believe to be an overbroad regulation currently on the books that requires disclaimers on certain group e-mails.

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[1] Available at http://www.fec.gov/pdf/nprm/internet_comm/exparte02.pdf

In the course of preparing the Notice, and during the hearing that we held in June, some of the most spirited debates that have taken place concern how best not to regulate certain activities, such as blogging. Should we not regulate by not issuing a regulation about blogging or should we not regulate by issuing a regulation that specifically exempts blogging from other regulations? Some commenters have persuasively argued that we not focus on specific Internet communication technologies for fear that users of other emerging communication technologies might be left at risk. This debate has been helpful and has reinforced the importance of proceeding in a very careful and measured way so as not to stifle innovation and the free flow of ideas.

This is appropriate because the focus of the FEC is campaign finance. We are not the speech police. The FEC does not tell private citizens what they can or cannot say, on the Internet, or elsewhere. As stated by BCRA's main sponsors, Senators McCain and Feingold, "[t]his issue has nothing to [do] with private citizens communicating on the Internet. There is simply no reason - none - to think that the FEC should or intends to regulate blogs or other Internet communications by private citizens."[2] They are absolutely correct. It is my intent to preserve the Internet exemption to the greatest extent possible, and to make clear that our rulemaking is about paid advertising, and not an attempt to limit any individual's right to free speech on the Internet. It would be ironic indeed if, in the name of campaign finance reform, we were to squelch good old-fashioned grassroots political rabble-rousing in its new, inexpensive, on-line iteration. Fortunately, I am not aware of any intent to do so.

In its proposed rulemaking, the Commission has purposely taken a very restrained approach. The only Internet activity the proposed rules define as public communications are advertisements placed for a fee on another person's website. Additionally, the NPRM suggests that the FEC's current disclaimer requirements for certain e-mail communications are overbroad. Under current regulations, disclaimers are required if 500 substantially similar unsolicited e-mails are sent. The proposed rule seeks to add a provision eliminating the disclaimer requirement except in cases where the recipient list was acquired in a commercial transaction. This is not so much an attempt to restrict political "spam" (probably a futile endeavor) as an attempt to ensure that individuals may communicate freely with all of their personal contacts without fear of running afoul of government regulation. We may want to pursue this limitation of the disclaimer requirement, even if Congress acts to preempt the other aspects of the rulemaking. Based on the comments received, the proposed solution may not go far enough.

The proposed rules also specifically exempt a substantial amount of Internet activity from regulation. The proposal:

- makes clear that the media exemption applies to the Internet; and
- exempts any Internet activity by unpaid individuals or volunteers in their own residences, on their own equipment, on publicly available equipment, or in many

[2] Available at http://feingold.senate.gov/~feingold/statements/05/03/2005308652.html

instances, on corporate or labor union equipment to which they otherwise have access.

I cannot speak for my colleagues, but I am not aware of anyone who views this rulemaking as a vehicle for shutting down the right of any individual to use his electronic soapbox to voice his political views. For people who worry about the influence of money on politics, the Internet can only be seen as a force for good, for the simple reason that it is generally a very cheap form of communication. As the Internet becomes an increasingly effective political tool, a candidate may not need to raise large sums of cash to run television ads, if she can get her message out cheaply and efficiently over the Internet.

In the NPRM, we invited the commenters to look carefully at our proposals and tell us what we could do better to protect expression, while still complying with the court order that made the rulemaking necessary. We received some very detailed and insightful examinations of our proposals and will continue to consider these comments as we shape a final rule. I appreciate that many of the comments were generally supportive of the Commission's focus and precision in this sensitive area. I want especially to acknowledge the over eight hundred private citizens around the country who offered comments regarding the Commission's proposals.

The Internet can be an antidote to the cynicism that develops when citizens feel that they have no voice. Many of the comments provide firsthand insight into how the medium provides an outlet that many people believe is not otherwise available. The resounding message that has been conveyed by these commenters is that the Internet has emerged as the great equalizer in political debate, allowing ordinary citizens a potential audience limited only by the appeal of their arguments. As Chiara LaRotonda of Seattle, Washington wrote: "I used political blogs to enhance and expand my understanding of the issues pertaining to the 2004 presidential elections and honestly believe that I would not have been as informed a voter otherwise.... One of the best things about the internet for me is the multitude of voices to be found, from every perspective and standpoint."[3]

The Internet is a potent and dynamic tool for fostering political debate. Thus, any regulatory efforts must proceed on a "less is more" theory. The Internet has dramatically altered the political landscape in this country. It will undoubtedly continue to be an innovative, interactive medium for engaging the electorate in political debate. The Internet permits individuals who might otherwise never meet to get together and talk about the future of this nation. And why would anyone want to interfere with that?

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[3]Available at http://comments.fec.gov:62999/A/internetruling/bbb.nsf/38d46bf5e8f08834852564b500129b2c/11f9a84afe5941198525701c00527289?OpenDocument

The CHAIRMAN. I have a couple of questions now. I want to move on to both members who are here to ask questions and come back and still have some left.

We will start with you, Commissioner Weintraub, and maybe someone else can answer. What is the difference between a blogger or a web site or what the courts said you ought to regulate? I know that the authors of BCRA when asked the question, both House and Senate, do you support regulating bloggers, said no. But they obviously sued the FEC to have regulation.

Ms. WEINTRAUB. General public political advertising. And I think what this debate concerns is what is advertising? What we have—the way we have proposed to do it in our rules is that we would only cover ads that are placed for a fee on somebody else's Web site, which would not be the case for bloggers sitting at their computers and sending out their own opinions. But, you know, it could be defined in a more capacious way. I don't think we have any intention of doing so.

The CHAIRMAN. The question eventually somebody is going to have to try to answer, because—well, I will let the other two gentlemen comment.

Mr. TONER. Thank you, Mr. Chairman; and I think Commissioner Weintraub is absolutely right. That was sort of the key statutory phrase that the court drew upon. But I have to note that the court decision is not in any way limited to paid advertising. In fact, nowhere in that decision is there any suggestion that if the FEC takes care of paid advertising it is in good shape.

The CHAIRMAN. So what did the court tell you you have to do?

Mr. TONER. It validated the blanket exemption for the Internet and said you have got to regulate at least some aspects of it in some way.

The CHAIRMAN. So this is pretty wide open as to what you can get restricted or not.

Mr. TONER. Right. It is always hard to know how these courts are going to react, but there is a real possibility of additional litigation, even if regulations along these lines are adopted.

But the other point I wanted to make—and I think there is no question that the Commission's proposals are very restrained as compared to others that could have been made, and I think that was a very healthy development. But, you know, as my written testimony indicates, I do think there would be a number of complexities, even under a narrowly tailored regulation.

But my bigger point here is that it is the exercise of jurisdiction in the first place that, in my view, would be problematic. Because if the history of campaign finance legislation is repeated in the future, the regulation of today will lead to broader regulation tomorrow. We have seen it over and over in different areas of the law. And if the Congress believes that the Internet is of a different nature than other mass media, doesn't have the same potential for corruption because of its accessibility, its affordability, its breadth, this is the opportunity to stand firm on that and make clear there will be no regulation of this medium.

Mr. THOMAS. Mr. Chairman, thank you.

I would just note a couple things. As I read the court decision, when it got around to the Internet exception it was dealing with

that part of the public communication definition that ends with the phrase "any other form of general public political advertising." and in so many words the Court said, I leave it to the Federal Election Commission to properly interpret what Internet activity fits within the confines of that phrase, "any other form of general public political advertising." so that is why we are focusing on this paid advertising prong.

With regard to blogs, I have to also mention when we were doing the hearings we had lots of folks come through; and the fellow who has set up Daily Kos, which is a very popular Web site these days, was in a conversation with another witness who you will be hearing from today, Larry Noble; and they were going back and forth. But I gathered that Daily Kos, which is a blog, they post comments and responses to comments, and they go on and on quite a bit, and they cover lots of topics, but they also, apparently, accept advertising. So you are starting to see a bit of a blend, where some of the blogs are making a go of it commercially by offering up advertising.

You should inquire, I guess, from Mr. Noble. My recollection is that he was talking about how he had discovered that Daily Kos was offering advertising over a certain length of time for $50,000.

So we are starting to see some opportunities for advertising on the Internet and even on blogs that might turn out to be fairly expensive. So that is kind of—the focus of our proposal is really just on those paid ads, at least at this time.

Ms. WEINTRAUB. Could I add, Mr. Chairman, that, to the extent that we are looking at paid ads, it would—even if an ad is placed on a blog, the restriction in the proposed regulation would only govern the ad. It wouldn't govern the entire blog.

The CHAIRMAN. I ask this question: I know that there are people out there that have formed groups, and you think they are 527, and you find out they are nonprofit or 501(c)(3) and then they go after candidates and have press conferences in the states. They bring up—they get one citizen, and they say, this is the committee against so-and-so. Then you see them on a blog all of a sudden, and they are out there blogging. So do they become an individual blogger that shouldn't be regulated?

But this is someone—you can see the track, and people put money into advertisement on her blog. But she is a private citizen, so we don't touch her. Yet we know she has done press conferences. She has been here. She took money, 527 money.

So, this is what kind of baffles you. How would you ever determine, you know—well, you go after them if you saw that they did a press conference for political activity and the money came in for an advertisement, but you don't go after them if they are just bloggers? I don't know the answer. That is why I asked you about them, a blog versus a web site.

Mr. THOMAS. Well, briefly, I would note you struck on one of the many complexities in this area.

The CHAIRMAN. I gave you a real live case, too, that I have personal knowledge about.

Mr. THOMAS. Many members have lived through the experience of dealing with blogging operations that are fired up and active and usually going after the member in question, and it is a tough one.

We have exemptions in the law, however, for individual volunteer activity. If you really are acting as an individual and you are basically doing activity on your noncompensated time, we think there are ways that should be used to exempt whatever those people do using their own computer and so on. So if you set up a blog, a Web site using your home computer, do it inexpensively, that is fine.

What we are trying to focus on are situations where maybe someone does, in fact, pay for advertising on a Web site of some sort. It might be a blog, it might be some other very popular Web site like Yahoo, which has very, very expensive advertising space as Internet ad activity goes. So we are trying to focus on the most obvious situation where money is being spent to influence someone's election.

Ms. WEINTRAUB. I think that is a really important distinction—I am sorry, Mr. Chairman, if I could jump in—that we are talking about, is potentially regulating money that pays for the ad that would appear on the blog. The fact that we have a regulation that might regulate the money that is paying for the ad on the blog does not mean that the blogger cannot then continue to blog, cannot then hold press conferences or exercise his or her rights of free speech in any other area. It actually goes more to the person who is buying the ad than to the blogger him or herself.

The CHAIRMAN. It still goes to disclosure in a sense. Because I am not by any stretch of the imagination saying, to be frank with you, when these individuals go into the districts and do a press conference: "I am here to clean up the government, et cetera", you usually find out they have, tripped over themselves anyway somewhere along the line. Then you look at their web sites and the stuff they stand for and the out-of-towners in here. So a lot of it, frankly, is not effective politically in anybody's district, either side of the aisle.

But it goes to the question about the money. I am not suggesting you stop press conferences or free speech, but the reformers will say it still comes down to disclosure. Because if soft money is banned in the system, or trying to get soft money out of the system, the next thing you know somebody comes along and says, "Hey, I will tell you what, you start this blog, but I am going to make sure that the money flows over towards that blog or wherever you go. In fact, why don't you go on a couple of the online radio shows, and we will go ahead and advertise $100,000 worth there." Now you start to say, is that some type of coordination?

But that comes to the heart of my question: How do you determine that? And I would like to ask you, Chairman Toner, how do you determine that? How would the FEC say there was coordination and soft money afloat? Does it kick in because somebody files a complaint? Or do you have your staff surf web sites? I am just really curious to know how you determine that, if there has been a violation

Mr. THOMAS. Well, Mr. Chairman, most of the activity we get involved with in terms of enforcing the law as it relates to Internet activity comes to us through complaints. There is a very vigorous community out there on both sides of the political spectrum, and they are always looking at Web sites, they are always scratching

behind it to try to find out if it looks like someone is actually subsidizing the Web site that is within, say, the control of a candidate or a party committee or something like that. So we have gotten several complaints along those lines.

The coordination investigations are always difficult. It is very difficult to find someone who will ultimately admit that, yes, I had this conversation and, yes, within the technical confines of the Commission's coordination regulations we crossed the line. But, for the most part, it comes to us through the complaint process.

We don't have a process—or we don't have staff onboard who are surveying Web sites and looking for potential problems on our own initiative. We don't do that right now.

Mr. TONER. If I could, Mr. Chairman, I think this raises two points.

First, there has been some discussion about that we are focusing on paid advertising, but we also have a proposal that would make clear that the press exemption extends to online politics; and also the chairman, I think, correctly noted that the individual volunteer exemption exists for people.

But I think my point is that there would be no need for the agency to decide or for people on the outside to worry about whether the press exemption applies to the Internet if we didn't exercise jurisdiction over the Internet in the first place.

Similarly, there would be no need for individuals to have to determine whether or not they were in the individual volunteer exemption if there was no jurisdiction over the Internet in the first place.

These are examples of the complexity of the law that arise if we exercise jurisdiction and regulate in any manner. If we don't regulate in the first place, we don't have to get into thorny issues of whether somebody is an individual volunteering for a campaign and protected. They would be protected like everybody else, because we would be saying, in very straightforward English, if that is ever possible in these regulation books, that we are not exercising jurisdiction in the first place; and, therefore, you don't have to hire the lawyers——

The CHAIRMAN. That is the key, to regulate or not regulate. That is the question. And the court said you have to do something, so that is why this is a——

Mr. TONER. I should note that the Commission has sought en banc review by the full D.C. Circuit, and one of the challenges in that en banc review is whether or not the plaintiffs in the Shays case have legal standing.

Now I don't know how that is going to play out, but if it is found they do not have legal standing to bring suit in the first place, then there could be the possibility that the entire lower court ruling would be vacated, including the obligation on this Internet rulemaking. So it is hazardous to predict what might happen in the future, but I did want to note that there is ongoing litigation in that area.

The CHAIRMAN. I would have normally moved on to the Ranking Member, and she is not here, so I will move on for 5 minutes and then the gentlelady from Michigan.

The gentlelady from California.

Ms. LOFGREN. Thank you, Mr. Chairman. I am happy to be here this morning.

As you know, I represent Silicon Valley in the Congress, so I am not the first person you would think of who would say let us regulate the Internet. In fact, I think it is a blessing that we have managed to keep the heavy hand of regulation off the Internet. I recall when I was sitting on the Judiciary Committee looking at the Digital Millennium Copyright Act that the first draft of that actually prohibited Web surfing, which I thought was interesting. So when the government moves in to regulate the Internet, we will almost always get it wrong, it seems to me. And I am inclined—obviously I want to listen to all the witnesses, but I am inclined to believe that we ought to just keep hands off. I mean, the whole point of Federal campaign finance regulation is because, you know, TV is so expensive. I mean, you need to have a level playing field.

But the ability to enter the Internet, I mean, there is no barrier to entering the Internet. And so the rationale for regulation and control, that does burden free speech, and maybe for good reason when you are talking about buying million-dollar TV ad buys isn't present in the Internet. It is a great leveler of people being able to communicate and have their opinions out there, and really it is what is interesting gets heard. It is a wonderful endeavor where the most interesting person, the most exciting blog actually floats to the top.

So I am interested in—I don't know whether you have had a chance to look at the bill that has been introduced by Senator Reid and Congressman Hensarling relative to this. Do you have a comment on whether that really accomplishes what I have just said I want to accomplish, Commissioner Weintraub, or any of you?

Ms. WEINTRAUB. I think that it would. It certainly would lead to a hands off the Internet approach. I have seen those proposals in various iterations, sometimes freestanding and sometimes folded into larger packages. So obviously the Members will decide whether they want to have other things in addition to an Internet exemption. But my comments only extend to the Internet exemption itself.

Mr. TONER. And if I could note, I think the Reid bill is excellent. It would solve the public communication part of the problem that was introduced by the Federal court decision here. There may also be—might make some sense to focus on whether a similar type of total exemption from the Internet from the definition of contribution or expenditure which would make ironclad that all activity on line is exempt from regulation, not just public communications, but in all forms, and regardless of whether coordinated or done independently.

Mr. THOMAS. Congresswoman, I take a slightly different approach. While you are here, I will try to bend your ear. I think the problem that I have tried to articulate in my statement is that this blanket exemption for all Internet activity, it is in essence too broad because we are starting to see the use of paid Internet advertising increasing. In my opening remarks I referred to statistics from one of the on-line coalition representatives who testified at our hearings, and he pointed out that in 2004 he had identified more than $14 million worth of paid Internet advertising just in

2004 alone for campaign purposes. And it is like a lot of things, it is an opportunity; it starts out small, but it grows and grows and grows. We saw that with the soft money phenomenon.

There are some other statistics. You are starting to see some large outlays by national party committees. One of the national party committees, it is in my statement, made payments of $260,000 for e-mail acquisition, payments of 200,000 and payments of 179,000 for e-mail services, and payments of 170,000, and 147, 000 for Web advertising. So the numbers are starting to grow. And on a committee-by-committee basis, a campaign-race-by-campaign-race basis, you see the potential for someone who is otherwise prohibited from subsidizing that activity all of a sudden maybe being able to subsidize a significant amount in a particular candidate's race. So that is what we are trying to focus on.

As we have tried to point out, none of us has any interest in regulating what John Q. Citizen does on their home computer. We want people to be able to use the facilities at their workplace as long as it does not interfere with the normal amount of their work. They can work at the office at night on the office computer. We have regulations and ways of getting at really opening up the ability of individual of bloggers to undertake what they do, but we do think this broad exemption that is in the amendment that this committee adopted and that is in Senator Reid's bill, at least I do, I think it is a little bit too broad. It can be better tailored. We are trying to do that through our regulations at the Commission.

Ms. LOFGREN. If I may, Mr. Chairman, I know my time has expired, but I have a statement I would like to submit for the record, and I certainly will listen, but I am not persuaded that the Federal Government should regulate the Internet. I just am not. At the end of the day, there are many contentious issues before the committee, but it may be that we are going to agree on this one. And if we took the Reid-Hensarling bill and put it on the suspension calendar, we could probably get it done this afternoon, and that might be an approach we want to take. So I yield back.

The CHAIRMAN. The additional materials are entered into the record.

[The information follows:]

Statement of Congresswoman Zoe Lofgren
Committee on House Administration
"Political Speech on the Internet: Should it be Regulated?"
September 21, 2005

Chairman Ney and Ranking Member Millender McDonald, thank you for holding this very important hearing today.

I represent California's 16th Congressional District which includes San Jose and parts of Silicon Valley. The people of my district are some of the most creative, innovative, smartest people on the planet. My constituents work for companies like Ebay, Yahoo, Google, Sun, Cisco, Intel, HP, Apple and Symantec. The businesses in and around my district are creating the products that keep our country moving and they are striving to remain competitive in a world that is getting more advanced every day.

The internet is the life-blood of Silicon Valley and for over a decade it has also been a major engine of the U.S. economy. It is for that reason that I am stringently opposed to regulation of the internet.

During my decade in Congress, I've noticed time and again that the Federal Government can't help but interfere with the tech world. From technology standards to internet taxation, the government has tried to impose rules that would limit its ability to grow.

I recall a time during the debate over the Telecom bill, an early draft actually contained a provision that would have outlawed web browsers! Thankfully, we were able to remove this provision before the bill was signed into law.

Simply put, technology moves too fast and government cannot get in the way.

The 2004 elections marked the first time that our country saw the widespread use of blogs. People all over the country went online and expressed their opinion like never before. I believe that interest in blogs caused more people to get involved at the grassroots level in 2004. And as we all know, last year's elections saw the greatest increase in voter participation since 1968. Voter turnout was over 60%. Turnout last year rose by 6.4 percentage points over 2000, the biggest election-to-election increase since 1952. In 2000, 105 million people turned out to vote. In 2004, approximately 122.3 million voted.

Voters were motivated like never before to get involved and vote. This is a good thing for our democracy. I believe that blogs played a key role in getting more people engaged in our electoral process and I do not want this Committee or this Congress to do anything that would discourage this positive trend.

My Republican colleagues claim that, H.R. 1316, the Pence-Wynn 527 Fairness Act, is the only bill in the House that would amend FECA to exclude Internet communications from being considered "public communications." What they fail to mention is that the Pence-Wynn Bill will also throw out the reforms that came out of the Watergate scandal. The bill will remove aggregate limits on what an individual can give to a political party. The current limit is $101,400 per election cycle, but the supporters of this bill want more.

In addition, several members have introduced bills that exempt communications over the internet from the BCRA definition of "public communication." Both Senator Reid Congressman Hensarling have introduced bills that would do this without throwing out Watergate era reforms.

I think we can protect the online world and the free speech of bloggers from excessive government regulation without undermining the campaign finance reforms that have been in place for over 30 years. BCRA has only been in place for one election. If the FEC finds evidence that campaigns and political parties have abused our campaign finance laws through the internet, the FEC should investigate and look for ways to close the loophole. However, I do not think you can close loopholes by putting limits on technology and free speech.

The CHAIRMAN. Gentlelady from Michigan.

Mrs. MILLER. Thank you, Mr. Chairman. I was a few minutes late as well. I do have an opening statement. Without your objection, I would like to offer it for the record also.

[The information follows:]

OPENING STATEMENT – Rep. Candice Miller
Cmte on House Administration – 22 Sept. 2005

Thank you, Mr. Chairman. I appreciate your holding today's hearing on this very important issue.

The advent of the Internet Age has brought about a host of new ways for citizens participate in the political arena. Websites, email, and blogging have provided new avenues for political candidates to reach potential voters, raise issue awareness, solicit campaign contributions, and mobilize Get Out the Vote efforts.

The Internet has also generated a more widespread flow of news information through not only mainstream media sources but also independent websites and blogs. Most importantly, it has created a completely new opportunity for all citizens to exercise their right

to free speech by opining on the most important issues of the day, as they see them.

The Internet has also raised a host of questions as to what, if any, regulations should be imposed on campaign activity that occurs in cyberspace. We already have a plethora of regulations candidates must follow.

If there is regulation of the Internet it should be done with the understanding that the Internet is unique compared to other forms of traditional media. The Internet has encouraged political participation and an open exchange of ideas. I think we as Congress must be very hesitant before we take any action that would infringe on people's right to free speech.

Unfortunately, there are many in the so-called reform community who believe that everything related to political activity must come under federal regulation. Whether it is soft money, 527s, or speech on the Internet, the answer is always the same – let's kill it with a new law or regulation.

In fact, Mr. Chairman, I may begin referring to the "reform community" as the "regulation community." I find it unfortunate that many in the regulation community, in their zeal to stomp out any scent of corruption in politics, will argue that we should regulate an individuals' right to free speech, even though there is no evidence that political speech on the Internet has ever been a corrupting influence.

What has brought us here today, Mr. Chairman, for this particular hearing, is the same thing that

has brought us here for many meetings this year: The Bipartisan Campaign Finance Reform Act of 2002. The more we look at this law, Mr. Chairman, it seems we have more and more problems with it.

In the case of political activity on the Internet, it appears the law was unclear, because we saw the FEC interpret it one way while the bill's sponsors argued in the Court's that Congress' intent was something different. And now we are at a point where we have many Members of Congress on both sides of the aisle who say they oppose regulation of political speech on the Internet. Liberal Democrats ~~from Senate Minority Leader~~ Reid ~~and Mr. Conyers~~ to conservative Republicans ~~such as Mr. Hensarling~~ agree on this point. It is just one more disappointment that BCRA has given us.

Ultimately, I believe it is the responsibility of this Committee and the Congress to rule on this matter. Congress opened this can of worms by passing a poor piece of legislation. Congress should step up to the plate and clarify its intent on this matter instead of leaving it to federal agencies and the court system.

As we do move forward on this issue, I would urge everyone to remember the importance of the right to free speech and that we as Members of Congress have the duty to uphold and protect that right, not infringe upon it. Thank you, Mr. Chairman, and I look forward to hearing what out witnesses have to say on this topic.

Mrs. MILLER. You know, first of all, I think we need to stop calling some of these different groups reformers. They are really not reformers, they are regulators, I believe. They just want to regulate, regulate, regulate. In fact, in another committee I sit on, I am the chairperson of the Regulatory Affairs Subcommittee on Government Reform, and we are spending a lot time looking at onerous governmental burdens through the regulatory process and what it is doing to industry, how uncompetitive it is making America in the global marketplace, and trying to dissect and eliminate some of these onerous government relations. What we are talking about here is not going to stifle competition, but has every opportunity to stifle free speech.

As we are all marching down the information highway, and my staff sometimes refers to me as a technotwit, I try really hard to keep up to date. But if you were not really familiar with technology, some of this would just seem like gibberish, I think, to the average American who is trying to understand how what we are talking about actually is going to help them understand who is trying to influence their vote and influence the election process. And perhaps what you are dealing with as a result of the court action goes to why a lot of people raise consternation about activist courts legislating from the bench rather than the legislative body doing what they were elected to do.

I agreed with your statements, Mr. Toner. I was not in Congress when BCRA passed, but it did seem to me, reviewing the law, that Congress did make a conscious decision to exempt the Internet from the McCain-Feingold Act, and that was the clear intent. I agree with your observation on that. And I notice that there was actually an article in The Hill last month where it was reported that Senator McCain had suggested that President Bush reappoint the Chairman to the FEC, and so I wonder why would he want to reappoint someone who was interested in internet regulation. Have you had an opportunity to talk to Senator McCain, and does he agree with your position on this subject, Mr. Thomas?

Mr. THOMAS. I have not talked with Senator McCain except, I guess, twice in my life, and it has been years since that occurred. I assume that Senator McCain is reflecting what we are seeing in a comment that was just handed to me today from several of those groups who are basically taking the position that, I think, they don't want to regulate the vast majority of what we are seeing on the Internet. I think they, as I suggested this morning, are thinking we do need to preserve the core provisions of the statute that would prevent someone from just paying for a candidate's Internet services, and that would at least get at this phenomenon we are starting to see of paid advertising. That is real money that someone can pay to support a particular candidate's race, and so where you have got that clear pattern of money actually being expended, maybe the base contribution limits and prohibitions limits should apply to someone who is paying for advertising on the Internet. But I think that is probably the position that Senator McCain would take, along with the groups that have filed that recent comment.

Mrs. MILLER. Well, like all types of regulatory things, particularly when it comes to campaign finance, there is never any really black and white. I think there is a lot of gray in this rainbow.

I was trying to make some notes when you were speaking about 80,000 new blogs—was it a day—are coming, on-line? I can't even imagine that you have any estimate of what your budget and your staffing level requirements would be if you actually had to start to regulate some of these kind of things. And, of course, we have very strict regulations under the Campaign Finance Act about corporate involvement, et cetera. Some of these blogs, I understand, actually incorporate to protect exposure. How would you be able to regulate that to be certain that these bloggers are not already negatively impacting the laws on the books?

Mr. TONER. Congresswoman, as you know, I don't think we should go there across the board. That would be the solution, because otherwise we might have to hire some additional staff to keep up with this. But 80,000 new blogs are created every day in cyberspace. Billions of links exist on the World Wide Web; millions of Websites, millions of e-mail sent out ever day. For me, that is what makes it fundamentally different than other types of communications.

I think the Chairman is correct in noting in the past cycle spending that is related to the Internet, there is no question that political committees and others are focusing on that. They are developing e-mails, Websites, the ability to do links, candidate often set up their own blogs, a wide variety of Internet activities. But where is the potential for any of that to dominate this medium? Where is the potential for anyone, no matter how much money they might want to devote, to be able to crowd anyone else out in this medium? That is different from television or radio or other types of communications where you really can buy a lot of points and prevent other people from getting on the air. And so if the Internet is different from that, there is no danger of that, given it is doubling every 5½ years. Where is the basis for regulation where the touchstone of any permissible campaign finance regulation is corruption or the appearance of corruption? How can that happen in this kind of environment?

Mrs. MILLER. I know my time is up. One more question. Just to follow up on that, because it is so true. I had been a secretary of state before I did this job and did campaign finance in my State of Michigan, and obviously I was always looking at Buckley and what it meant. And the impetus of Buckley was to negate the impact of big money on the influence of the electoral process. I am just wondering, could anybody give me an example right now where you would see a specific example of something that is happening on the Internet with paid political advertisements that you feel is corrupting the process?

Mr. THOMAS. Well, we get that question fairly frequently, show me some evidence of corruption.

Mrs. MILLER. Show me the money.

Mr. THOMAS. Exactly. It is always—I am not going to go there. I am not going to assert any particular thing I have seen is corruption. What I would say, and this goes back to the type of example I alluded to, even a blog site like Daily Kos has one advertising op-

tion whereby you can spend as much as $50,000 to get on that very popular Website. I suppose there is even more expensive advertising on bigger Websites that a lot of Americans go to like Yahoo or something like that, Google, if that is your opening Website on your computer. So if someone wants to pay for advertising to support a candidate on a site like that that is very popular and would be seen by a lot of folks, it can start costing a lot of money.

So that is really the focus I am trying to bring to you. There are some situations where I guess this advertising is starting to get a little bit more expensive. We did get folks at the hearing telling us for the most part most Internet advertising space is very inexpensive. And so most of it probably—if someone is running a site that for some reason provides paid advertising, and they are an individual, if it supports a particular candidate and basically someone is subsidizing that, that person has a contribution limit as an individual of up to $2,100 per election, so a little $50 ad on someone's Web site is not going to be a problem. But I grant you there are situations where you can start to affect more and more folks because there is probably more and more opportunity for paid Internet advertising. As the vice-chairman pointed out, lots more Websites are popping up.

So it does have the potential, even if we focus on this advertising aspect, to be fairly broadly—broad in impact. I think that Commissioner Weintraub's idea of maybe trying to allow some flexibility for bloggers to incorporate without triggering the standard corporate prohibition rules, I think we can try to find a way to work there. That would be very helpful.

Ms. WEINTRAUB. Congresswoman, if I might, you had mentioned how many staff we would need to try and deal with this issue. About half the people in the room right now are staff of the agency who are here trying to read the tea leaves on what kind of regulation they might be writing or maybe not.

Mrs. MILLER. So this is a full employment bill for them, right?

Ms. WEINTRAUB. We have plenty of work to do, Congresswoman, and I would like to differ with something the Chairman said earlier. I think that you can see the outlines of the regulatory approach that we are contemplating now. Again, I didn't come here to lobby one way or the other, but if you are going to pass a law and obviate this rulemaking, on behalf of the staff that would still have to put in a lot of hours to work out the fine points, I would appreciate it if you would do that sooner rather than later, not after we write the regulation, but before we put that work in, because believe me, we can find other jobs for them to do. Thank you.

The CHAIRMAN. I have just one more question. If you want to ask another question before we go to panel two, whatever either Member would like to do. Let me ask you just a quick answer for this: How effective do you think the Internet actually is in its believability when it comes to bloggers and political activity? The internet might not be particularly credible because you can put anything you want on there. Something becomes very salacious, and then the other supporters come out and attack another candidate in the case or beat each other with baseball bats, and the rest is history.

In a way, the internet is not as effective a tool as the good old-fashioned way of people talking to each other in communities and neighborhoods on where they stand on the candidate. I also think there are times where the internet tries to get something going politically on groups, or advocacy groups, or candidates, and hope to get it into the mainstream media, where it would—I can't believe I am saying this—have some validity in the mainstream media. But it would have more validity if it is printed in a major newspaper, radio or TV rather than if you read it on the blog, because anybody can sit there and get mad and blog back.

Having said that, how effective are the blogs politically? If people are advertising and spending all this money, should you really regulate it? It is out there, it is free speech, but not really an effective political tool as much as going door to door and things like that? Any comments in that direction? This is probably outside the box, what I am asking.

Ms. WEINTRAUB. Well, Mr. Chairman, I think that the second panel would probably have a lot to say on that subject.

The CHAIRMAN. I am not saying they are not effective, but if you are looking for the political activity in the blog, and it is going around BCRA and soft money, maybe it is not in the sense—maybe the advertisement angle is too much to look at to regulate. That is what I was trying to get at.

Ms. WEINTRAUB. I think that the information that is out there on the Internet is about as reliable as what you get walking around in your neighborhood and talking to your neighbors. Some of your neighbors are more reliable than others; some are biased, and others are not. You can make that assessment. I think what a lot of people find to be one of the great virtue of the Internet, if somebody says something not reliable, inevitably there is somebody else who is going to be banging away at their keyboard a minute later pointing out the fallacies.

The CHAIRMAN. So you think they are politically effective, the bloggers?

Ms. WEINTRAUB. I think the last election showed an awful lot of effective political activity took place.

The CHAIRMAN. So why don't you want to regulate them?

Ms. WEINTRAUB. It is not a question of whether I want to regulate it or not.

The CHAIRMAN. If you say they are politically effective, and it is an arm of politics, and there is money over there.

Ms. WEINTRAUB. We will regulate it. We are under a court order to regulate it.

The CHAIRMAN. I am not trying to ask a trick question. If they are politically effective entities, and soft money is going to them so the reformers would say, "Yes, it is effective", or "We write them off, they are really not effective", people are still talking to each other in neighborhoods, so why should we regulate them at all? I have supported along the lines of not regulating, but I am just saying this argument becomes so confusing, and they either are politically effective and are utilizing soft money to bypass the system, or they aren't, and if they were, how would you even regulate them?

Mr. THOMAS. I would note, Mr. Chairman, you are about to hear from a gentleman, Mr. Mike Krempasky, who runs RedState.org. If you don't think that is an effective Website, you are not really sort of following the political process. It is a very effective political Website, and I would note from the outset he spoke with advisors, and they basically decided they were going to set themselves up as a political committee, operating as a political committee.

There is a broad array of Websites, and some are obviously more effective than others. I think the committee would be very well served to do some really good research to see if you can get some sense as to which of these Websites were utilized effectively during the campaign and how, get some flavor for whether this phenomenon of Internet advertising really is something where it was effective in a particular race. You have got a lot of colleagues, and maybe you could inquire from your colleagues, "Tell me about your race; can you remember any advertising that was on Internet Websites that people seemed to have picked up on and followed and that may have gotten tons of chatter?" I think that is a very valuable part of this committee's function.

The CHAIRMAN. I am not saying by any stretch of the imagination that they are not effective. I just threw that out there, not being facetious, but throwing it out there. Some people say, well, you dismiss it, but you might want to have some regulation because they are effective, and soft money is going there. And I am saying it is a very confusing issue, but it still comes down to free speech and the internet, which is a unique, different creature than a newspaper or a radio or a television. Even here in the House we have looked at the transmission of an e-mail, as long as it is not for political purposes, as a different thing that we look at to regulate versus if the Member puts out the newsletter. So the Internet is a different, type of creature.

Mr. TONER. If I could, Mr. Chairman. I think a strong argument could be made that Web blogs and the Internet in general is self-regulating. If there are over 14 million blogs in this country, the raw number of them prevents any one of them, no matter how widely read, to dominate discourse. And also, Internet communications often require proactive steps by the viewer to go get that information, unlike television or radio, which can be very passive. The raw breadth of the Internet, the accessibility of it, I think an argument can be made, really prevents the ability for anyone to have a corrupting influence no matter how much money they may be spending on it.

The CHAIRMAN. Do either of the Members have additional questions?

Thank you for enlightening us today and confusing us today, but actually being here to have a good discussion on the issue. I want to thank all three of the Commissioners.

The CHAIRMAN. We will now move on to the second panel. After the hearing I am sure the second panel will blog us to death to show how prominent and powerful they actually are. Our second panel, we are fortunate to have with us today two operators of two very popular political web logs or blogs. These witnesses will explain to the committee their perspective on Internet regulation, which will shed light on how the blogs operate.

First we have Michael Krempasky, who runs a conservative blog, RedState.org. Then we will hear from Duncan Black, who runs the liberal blog Eschaton. We look forward to their remarks.

We also, I would note, invited Eli Parser of moveon.org. and Marcos Zuniga of dailykos.com. They weren't able to come due to some scheduling conflicts.

We are glad to have both of you here to hear your point of view, and we will begin again, I think, with Mr. Black. Thank you.

STATEMENTS OF DUNCAN BLACK, FOUNDER, ESCHATON WEBSITE; AND MICHAEL KREMPASKY, DIRECTOR, REDSTATE.ORG, FALLS CHURCH, VIRGINIA

STATEMENT OF DUNCAN BLACK

Mr. BLACK. Chairman Ney, members of the committee, thanks very much, and thanks for the introduction. I will stick roughly to my prepared remarks, although I will deviate somewhat in response to some of the comments of the previous panel.

I just stated my name is Duncan Black. I write for the Website Eschaton, a blog. Everything on the Internet these days tends to be called "a blog," but whether or not that is valid or not I don't know, but I do actually have a blog, and I started it in April of 2002. On the Website, I cover politics, current events, economics, and cultural issues.

During the 2004 campaign the site averaged between 1- to 3 million viewings per month, and in addition to writing about politics, I also engage in fundraising drives for a number of Federal candidates and the DNC and other organizations, candidates including Joe Hoeffel, John Kerry, Ginny Schrader, and Richard Morrison and others. I run advertising and accepted paid advertising on behalf of Federal campaigns.

My goal is really here more to provide helpful information as I can regarding the narrow question of whether greater scrutiny and regulation of Internet political speech is really necessary in order to meet the intent or spirit, what I consider to be the intent and spirit, of campaign finance law. I am no expert in this area, but my understanding of the basic motivation and statutory language of the legislation and the general purpose behind all such campaign finance language and laws is to reduce the impact of concentrations of financial power on Federal elections.

It is my opinion, either through the regulatory process of the FEC, if possible, given the current court decision, or through slight modification of actual legislation, the government should take steps to not implement and force regulations which impact the ability of small actors to engage in political speech on the Internet, an activity which neither requires nor necessarily benefits from being backed by significant financial resources.

The Internet generally and blog specifically is a medium which allows anyone the full powers of the press and to potentially command a large audience at a minimum cost. Unlike broadcast, cable or newspaper distribution where there are significant barriers to entry, both financial and otherwise, there are almost no barriers to entry on the Internet. Anyone can reach a large audience for a minimal cost. I find it hard to believe that the intent behind cam-

paign finance legislation was to sort of leave large media corporations essentially untouched through the media exemption by campaign finance law while failing to grant similar latitude or exemption to small Web-based publishers.

If the current statutory language doesn't make it clear, and the court decree requires Internet communications be regulated by legislation which I believe is poorly suited for doing so on the Internet, which is inconsistent with the broader intent of campaign finance legislation, then the legislation should really be changed. Whether by clearly extending the current media exemption or through other means, those who use the Internet for the purpose of disseminating news, commentary and editorial should be as free to do so as are Clear Channel, Disney, News Corp., Time Warner and others.

So I began my site, as I said, in the spring of 2002. Both then and now I use almost entirely free web services. My direct operating costs of my website, really being generous here, are about $150 a month, if that, and that includes paying for a standard Internet connection and maintaining a working computer. I have never spent any money to advertise my sites or on any other sort of public relations activity or any promotion of my site whatsoever. While the meaning of Internet statistics is always somewhat unclear, I get about 125,000 visits per day on an average day, and that probably means I reach maybe 40,000 unique sets of eyeballs for a day.

I began my site simply as a hobby. I had no intention of making money, but eventually, through large enough traffic, I could make money through advertising. I haven't yet incorporated, but other bloggers have done so primarily for the purpose of limiting liability.

As with many other blogs, my site provides links and excerpts of current news article, commentary and other events and other editorial comments. I have endorsed candidates for Federal elections, as most newspapers do. I encourage readers to donate money to candidates I recommend, something which you see all throughout the media. Just the other day Sean Hannity was telling all of his listeners to donate to a candidate for Federal election and pointing to them on his website. No different than what I have done. The primary differences between me and Sean Hannity or major newspapers, or partisan magazines, talk radio, cable new networks, broadcast news, et cetera, is what I do doesn't require any money. That is the real thing.

The actual financial expenditures I have to make, as I said, $150 a month, a generous estimate. Now, it is true you can spend money on a site, and other bloggers do. You can add some bells and whistles and retain more control over some aspects of your site by spending money, but it really isn't necessary to spend money to have successful and influential sites. It is unclear what the advantage often is of spending money.

So I think those who want more Internet speech to sort of fall under the regulatory framework believe that, at some point, large sums of money spent on the Internet could have a corrupting process. Now, I share the concerns about the future possibility. I certainly wouldn't say that this is not a concern at all, but I don't see that such abuses have yet to take place. I don't yet see a mecha-

nism by which money, just simply throwing vast sums of money at the Internet, is really going to have sort of a disproportionate effect on the electoral process.

You were talking about the effectiveness of Internet sites and whether they are effective. I think the real key here is there isn't a very strong connection now between the effectiveness of a site and how much money is spent on it. On site, you can spend a lot money on the site and not be effective at all; you can spend very little money as I do, and I am occasionally effective. Hopefully I am. But the point is there is a disconnect between the effectiveness and money.

I would also submit that to the extent that we are concerned that as technology evolves and individuals or groups, organizations, spend large amounts of money on, say, Internet video advertising and these kinds of things, I think the real power of those ads won't be when they are on the Internet; it is when cable news, or the nightly news decides they are interesting ads and rebroadcasts the ads for free over free media to the world as just part of their political conversation. It is sort of the amplification effect of other media that is going to make the difference, not so much the money spent on the Internet itself. How you deal with that, I don't really know.

I do share the expressed concerns by Senator Feingold and the Chairman of the Commission that the overly broad language in the Reid bill potentially opens up loopholes on coordinated activity. I think the example of being concerned that if you essentially allow somebody not linked to the campaign to essentially pay for the entire Internet operations of a political campaign, that that is something to be perhaps concerned about.

Whether money spent on the Internet is something we are concerned about is corrupting the process, certainly any campaign now has to spend nontrivial amounts of money to have an Internet operation. That is just part of having a modern campaign. If you let somebody just pay a million dollars to cover those expenses, we could potentially have either corruption or the appearance of corruption.

So I understand those kinds of concerns, and I certainly think those concerns can be addressed largely if a broad media exemption is passed by the FEC. I think what is critical, both for the poor staffers for the FEC as well as the rest of us, is that we get some clarity on these issues sooner rather than later, because we are heading into the 2006 election season just about now, and it is sort of vital people like me or any ordinary citizens participating in political discourse on the Internet don't suddenly find themselves experiencing investigations as a result of complaints filed through the FEC or some other mechanism.

I thank you for your time, and I look forward to answering your questions.

[The statement of Mr. Black follows:]

Chairman Ney and members of the Committee, my name is Duncan Black, and I write for the Eschaton website (http://atrios.blogspot.com), which I founded in April 2002. The website covers politics, current events, economics and cultural issues. The website averaged 1-3 million viewings per month during the 2004 campaign, and engaged in fundraising drives on behalf of a number of federal candidates, including Joe Hoeffel, John Kerry, Ginny Schrader, and Richard Morrison. In addition, Eschaton has accepted paid advertising from federal campaigns.

I thank you for the opportunity to give testimony today. My goal here today is to provide as much helpful information as possible regarding the narrow question of whether greater scrutiny and regulation of Internet political speech is necessary in order to meet the intent and spirit of current campaign finance law. While no expert in this area, my understanding of the basic motivation and statutory language of the legislation, and of the general purpose behind all such campaign finance language, is to reduce the impact of concentrations of financial power on federal elections.

With that in mind, it is my opinion that either through the regulatory process of the FEC, if possible given the recent court decision, or through slight modification of the legislation, the government should take steps to not implement and force regulations which would impact the ability of small actors to engage in political speech on the Internet, an activity which neither requires nor necessarily benefits from being backed by significant financial resources.

The Internet generally, and blogging specifically, is a medium which allows anyone the full powers of the press, and potentially command a large audience at minimum costs. Unlike broadcast, cable or even newspaper distribution, where there there are significant barriers to entry, both financial and otherwise, there are almost no entry barriers on the Internet. Anyone can put up a site, anyone can reach a large audience, for a minimum of cost. I find it hard to believe that the intent behind campaign finance legislation was to leave large media corporations essentially untouched by campaign finance law while failing to grant a similar exemption to small web-based publishers.

If current statutory language does not make that clear, and the court decree requires that Internet communications be regulated by legislation which is poorly suited for doing so in a way which is consistent with the broader intent of the legislation, then that legislation should be changed. Whether by clearly extending the current media exemption, or through other means, those who use the Internet for the purpose of disseminating news, commentary, and editorial should be as free to do so as are Clear Channel, General Electric, Disney, News Corp., Time Warner, and others.

I will use my own experience creating and operating a weblog or blog to highlight the fact that concerns about the influence of the concentration of money on the Internet are currently overstated by many. I began my site, known as Eschaton, in the Spring of 2002. Then and now I ran my site using free services, and my direct operating costs, which include maintaining a basic working computer and a standard cable broadband connection, are no more than $150 per month. I never spent any money on public relations or advertising, or any other kind of promotion of my site. While the meaning of Internet statistics is always somewhat unclear, my site receives about 125000 visits a day.

A conservative estimate of how many distinct readers I reach daily is 40,000 or more.

While it began as a hobby and with intention of making money from the site it did eventually begin running advertising which has provided a modest income. While I haven't yet incorporated, other bloggers have done so primarily for the purpose of limiting liability.

As with many other blogs, my site provides links and excerpts of current news articles, commentary on current events, and other editorial comment. I have endorsed candidates for federal elections, and encouraged readers to donate money to candidates I would recommend. The primary differences between the activities and speech I engage in, and that of other media outlets – which include newspapers and their op-ed pages, partisan magazines, political talk radio, cable news networks, network broadcast news, etc... - is that what I do requires almost no monetary expenditure and can be done by almost anyone who has extra time and an Internet connection.

It is true that other bloggers spend more money on their sites, and I wouldn't want the cost of running a site to be critical test. The key issue is that while the incurring of greater costs can allow you to add certain bells and whistles to your site, it isn't really necessary to make such expenditures in order to have a successful and influential site. As cost is not a significant barrier to entry for engaging in internet activities, it's difficult to see where the corrupting influence and disproportionate power of money would come into play.

Those who want more Internet speech to fall under the regulatory framework of the FEC believe that at some point large sums of money spent on the Internet could have a corrupting effect on the political process. I share their concerns about the future possibility, but the fact is that such abuses have yet to take place. Given the lack of evidence of current abuse and the speed at which technology changes, it would counterproductive and against the spirit of the legislation to limit participation in the medium which currently enhances the ability of people without financial means to participate in the public discourse before there's any evidence that such abuses are taking place.

I do share concerns expressed by Senator Feingold and others that the overly broad language of the language being considered today may open up loopholes which would allow coordinated activity between groups and candidates not currently allowed under current law. If the FEC, through their regulatory process, would carve out a broad media exemption which could encompass bloggers and other internet publishers the appropriate protections could be in place without such a proposal. What is critical is that clarity on these issues is achieved sooner rather than later. As we head into the 2006 election process it's vital that ordinary citizens engaging in what they think is constitutionally protected speech on the internet don't suddenly find themselves subject to investigations as a result of complaints filed with the FEC.

I thank you for your time, and I look forward you answering any questions you might have.

Biography: Duncan Black has held teaching and research positions at the London School of Economics; the Université catholique de Louvain; the University of California, Irvine; and, recently, Bryn Mawr College. Black holds a PhD in economics from Brown University and is a Senior Fellow at Media Matters for America.

The CHAIRMAN. Mr. Krempasky.

STATEMENT OF MICHAEL KREMPASKY

Mr. KREMPASKY. Mr. Chairman, members of the committee, I want to thank you for your invitation to be here this morning. Not long ago if someone would have asked me to come to Congress, I would have expected it would be to apologize for some intemperate remark I wrote on a Website. Now that Commissioner Weintraub informs me that there is a roomful of FEC lawyers behind me, I am just hoping to get out alive at this point.

I want to talk to you as someone who is quite potentially looking at the business end of the regulations that you are considering, the regulations that the Commission is formulating, and I want to start with a statement that I hope that we can agree on, regardless of our opinions or views on campaign finance generally, and that is that technology, the Internet, the ability to communicate across the Internet has done more to democratize our politics than any law could hope to do. It has put more opportunity in the hands of more individuals than we have seen any contribution limits or bans on communication. It has given anybody around the country, the law professor in Tennessee, the homemaker in Ohio, the college student in Arizona, the ability to participate at an influential level in our politics whether they are local campaigns or national campaigns.

One thing that is crucially important to remember about this medium is that despite what figures you are going to hear about how much money is spent on line or how many people participate on line, it is a medium in which passion and creativity really do trump brute force and muscle and funding. And to your question, Mr. Chairman, earlier about whether or not they are effective, I think they are, but that doesn't mean they ought to be a target of regulation. Effective free speech is no more dangerous to our politics than ineffective free speech.

Now, in our rush to close loopholes, or perceived loopholes, I think it is important to remember that we are talking about fixing something that hasn't really been demonstrated to be broken yet. We did not see massive amounts of soft money circumventing the system in 2004; we didn't see rampant spending across the Internet distorting or corrupting our politics. We are really talking about fixing a problem that is either not there or certainly that we don't understand yet. And unlike parties and candidates and campaigns, whether at the national or local level, bloggers are not sophisticated legal actors. They do not have general counsel, don't have budgets to pay to deal with audits and reporting. They really are the small speakers that we ought to protect at almost all cost.

I want to make sure that we understand that when we hear about potential loopholes or we hear the specter of these things, that in the rush to close them, it is the small speaker that is going to be trampled. They are not going to navigate Federal election law, they are not going to read FEC advisory opinions, they are just going to be quiet. If that is the end result of either a piece of legislation that is passed or not passed, or a rule from the FEC that is either passed or not passed, that would be a real terrible thing to happen.

Chairman Thomas, in fact, urged you to wait and let the FEC sort through these issues. I think in his written testimony he refers to sort of bringing their expertise to bear on this question. And there is no doubt that the Federal Election Commission has experts in law and politics and regulations. But I think that when it comes to the issue of expertise and technology, I think that may be overstating it a bit. I have brought up several times that one of the Commissioners opened the first hearing on this issue by telling the entire room present that no one in the room knew less about the Internet than he did. To his credit, he has tried to learn a little bit since then, but I still think that the issues of speech and freedom that we are talking about are really important, and we have to understand that it is not just about a blog or about an e-mail list or something that we are talking about today, it is what is the next form of communication, what is the next opportunity the people have to participate, and how can we make sure that we don't just chill speech, but that we don't actually inhibit the development of new technology.

Now, as Duncan mentioned, I think that one of the easiest ways to solve this question is to simply acknowledge in law what we already know, and that is that new and alternative media, the most commonly talked about one now of which is bloggers, are, in fact, media. Rush Limbaugh wakes up every day trying to change the country, influence elections, and the law grants him an exemption for everything he does through his outlet. So what possible good is it to protect Rush Limbaugh and Paul Begala on CNN while they are spending corporate money to affect our politics while potentially regulating people like Duncan and I? That to me doesn't seem to make any sense at all.

Finally, I think I would just like to point out that the legislation before this committee which mirrors the Reid and Hensarling bills doesn't solve all the problems. It does leave gaps in the campaign laws before BCRA that still have to deal with bloggers and people that communicate on the Internet, but what it would do is put Congress on the record saying that this ought not to be regulated, and we are going to figure out how to make sure that is the case, that there still remains some place, some opportunity for people to participate as freely as they want, and that we are going to support and protect that.

So I thank the committee for its time, and I look forward to answering any questions you might have.

[The statement of Mr. Krempasky follows:]

Before the
Committee on House Administration
United States House of Representatives

Hearing
"Political Speech Over the Internet: Should it be Regulated?"

September 22, 2005

Testimony of Michael J. Krempasky

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Thank you, Chairman Ney, Ranking Member Millender-McDonald, and distinguished members of the Committee – my name is Michael Krempasky, and I blog at RedState.org

I appreciate the opportunity to appear before this committee to talk about an issue of great importance to the future of America's political discourse and freedom of speech.

The legislation you have before you today will directly affect millions of people. Not just the more than seventeen million blogs currently indexed by the search engine Technorati, but the millions of people who currently have the freedom to take a few minutes and add their voice to our ongoing political conversation.

The rapid increase in blogging after 9/11, accelerated by technology and ease of use, gave individuals of every background, persuasion, and political stripe an equal voice in the public square of the internet. The academic in Tennessee, the homemaker in Ohio, and the lawyer in California all have a voice, and an ability to share their thoughts and beliefs with broadest audience.

Yet blogs are more than a medium populated by random individual voices—they are gathering places, the modern descendants of the town hall meetings and citizen speeches of the 18th century that provided the very basis for America's existence.

Free to speak their minds, Americans have proven to be surprisingly unchanged from when de Tocqueville spoke of our boundless "liberty of opinion," creating a virtual community that is vibrant, entertaining, intellectual, and informative.

Even more important – it has created exactly the sort of political "utopia" that the so-called 'campaign reformers' ought to be praising. It's an environment in which Big Money has no significant advantage over small speakers – a level playing field on which creativity and passion trump volume and muscle.

But instead, thanks to the consequences of a lawsuit and the vagaries of the FEC rule-making process, this thriving and popular medium faces the prospect of destruction.

Make no mistake: there can be no effective political regulation of the blogosphere without destroying the freedom that makes this medium great. In fact, the only reason we're here today is that while ordered by a federal court to create rules to govern political activity on the internet – the regulators at the Federal Election Commission have been unable to do so.

The reform community stands terrified of an unregulated internet. Surely they fear that mighty corporations or well-heeled donors will simply use this new outlet – let's call it a "loophole" to pour vast sums of money into our politics to distort and harm our democracy. During a hearing this summer at the Federal Election Commission, we heard of the horrors of the "Haliblogger" and what sort of damage he could do combining a blog and corporate power.

They will talk about "expensive video productions" and "animated emails" and wonder how the little guy could ever compete.

Members of the Committee, the problem with this analysis is that it is simply not rooted in fact – and those raising this problem just don't understand the internet.

The blogosphere is, in the simplest sense, not a broadcast medium. Consumers of news and information are not passive participants, they actively seek out the content they want. They have millions of choices at their fingertips. The power of the blogosphere is its amazing speed combined with a vast array of distributed resources. Many small voices speaking together consistently outweigh the well-funded interests. Bloggers don't have influence because they start with large chunks of capital – in fact, most if not all start out as relatively lonely voices with tiny audiences. By delivering credible, interesting, and valuable content – their audience and influence grows over time.

Regulations that would create legal obstacles, burdens, thresholds and loophols for every individual blogger would generate a minefield that only the wealthy or the lawyers could navigate.

Take a look at how the application of the Bipartisan Campaign Reform Act plays out today – just about every political campaign in the country has its own lawyer. And consider those millions of bloggers – do we really want to create that many new prospects for our nation's legal industry?

Even worse - if individual bloggers must pass a governmental test every time they discuss their feelings on political issues, the reaction will be completely predictable: rather than deal with the red tape of regulation and the risk of legal problems, they will fall silent on all issues of politics.

The question we must ask is this: what is the proper role of government in relation to the blogosphere? Or, put another way: Should the government treat bloggers with the same level of fairness and respect for their right free speech enjoyed by the news media?

Indeed, it is my belief that the legislation now before you is only a down payment on free speech. As other witnesses will surely point out – this bill only deals with a specific provision within the mountains of statutes, regulations, and judicial opinions that govern campaign finance. But nonetheless, you have an opportunity to put Congress on the record – for the first time in a long time – with a clear statement that some places and some activities ought to be beyond the reach of federal regulators. The internet ought to be such a place.

But again, this remains just a down payment. Even if Congress determines that communications over the internet do not constitute "public communications" for the purposes of BCRA, bloggers and other small speakers are still facing considerable regulatory problems that can only serve to chill speech. While this legislation addresses a very specific provision of the statute, and I support its passage into law, it remains that an enterprising litigant or overactive regulator could easily force the weight of the rest of the law onto bloggers.

I will leave it to the lawyers appearing today to speak to the specifics of the regulatory dangers that remain, but I would like to address what I believe is the best practical solution that Congress could enact – without waiting for courts or the Federal Election Commission to act: simply acknowledge what we already know: that bloggers are part of the new media.

Our current campaign finance regulations touch nearly every area of political participation by associations, corporations, candidates, political parties and individuals. But one group is notably and, for practical purposes, completely exempt – the news media.

There is no doubt that bloggers are, by any reasonable definition, media entities. Nor is there any doubt that the tradition of citizen journalists is a long accepted part of our national culture. From before very founding of our country, individuals and relative unknowns have contributed to this great conversation. The boundaries defining who or what a "media entity" is have eroded to the point of irrelevance. We no longer have a limited number of easily-defined outlets or a restricted professional community.

Presumably, this media exemption is rooted in the notion of the intrinsic value of trusted, objective, and comprehensive information in the hands of the citizenry. Unfortunately, when we look at our traditional media today – it is neither trusted, nor objective, nor comprehensive.

A recent Pew study showed that: "The percentage [of respondents] saying they can believe most of what they read in their daily newspaper dropped from 84% in 1985 to 54% in 2004." Worse yet, another study by Columbia University showed that among journalists themselves, 45% are less trusting of the professional behavior of their own colleagues – just two years ago, only 34% had such doubts.

As far as the objectivity of the established and bona fide press is concerned, we need not look very far to see a deep distrust of our mainstream media. Organizations on both the right and on the left raise and spend millions of dollars documenting examples of bias in coverage when it comes to campaigns and elections.

Moreover, the popular established media in this country is anything but comprehensive. Large majorities of Americans believe that news organizations are more concerned with gathering large audiences than informing the public with facts.

Minutes after Hurricane Katrina struck the Gulf Coast, bloggers were collecting, sharing, and distributing first-hand reports of the devastation, hosting documentary video footage, and lending help to the relief efforts. Lousiana bloggers who could maintain connections continued to post updates on the areas around them in greatest need—some direct from the heart of New Orleans.

In a news cycle measured in tiny increments, bloggers were hours ahead of their mainstream counterparts. And in reaction to tragic devastation and humanitarian need, they were willing and ready to lend their voices, time, and effort to help. De Tocqueville wrote of this as well—of the "Countless little people, humble people, throughout American society, expend their efforts in caring and in the betterment of the community, blowing on their hands, pitting their small strength against the inhuman elements of life … [as the] Constitution of their nation undergirds and strengthens this activity."

Time and time again, it is the new media – bloggers – who fill the information gap. The vast resources of the blogosphere as a whole, its expertise, creativity and motivation – dwarf any newsroom in the country. Free of the constraints of bureaucratic hierarchies and concerns of column inches, blogs can provide news coverage that is both faster and more in depth than anything the mainstream media can hope to provide.

What goal would be served by protecting Rush Limbaugh's multimillion dollar talk radio program – but not a self-published blogger with a fraction of the audience? How is the public benefited by allowing CNN to evade regulation while spending corporate dollars to put campaign employees on the airwaves as pundits, while forcing bloggers to scour the Congressional Record and read FEC advisory opinions?

Worse yet, if the government were to adopt a policy of examining individual blogs on a case-by-case basis, how is that to be distinguished from a government license to publish free of jeopardy – only granted (or denied) after the fact? Unlike previous investigations in the offline world, these cases would affect not large corporations or interest groups with the ability to hire the best firms in Washington, but instead unsophisticated and unfounded individuals poorly suited to navigate the regulatory process.

Perhaps it takes a Frenchman to recognize the most important elements of America's greatness. I hope Congress will see fit to recognize this truth as well.

I thank you again for your time and attention, and I look forward to answering any questions you have.

Before the
Committee on House Administration
United States House of Representatives

Hearing
"Political Speech Over the Internet: Should it be Regulated?"

September 22, 2005

Biography of Michael J. Krempasky

Michael Krempasky is a co-founder of RedState.org (http://www.redstate.org), a Republican community blog. Michael is also a Director of the RedState.org corporation, a political committee registered with the Federal Election Commission. He has been a blogger since 2001, and in that capacity, testified before the FEC earlier this year on the regulation of political speech on the internet. He is the co-founder of The Online Coalition (http://www.onlinecoalition.com), a bipartisan association of bloggers and online professionals formed earlier this year to support freedom of speech and political participation online. Mr. Krempasky is a frequent lecturer at technology and internet seminars. He is currently a Vice President of Edelman, focusing on internet strategy, communications, marketing, and advocacy for Edelman clients. He participated in the development and launch of the first blog for the largest corporation in the United States.

The CHAIRMAN. I think the point you both made was the point I was making at the end: Blogs are effective. Some people say they aren't, but they are effective. Of course, the blog is only as effective as its credibility, how it conducts itself, how it outreaches; but I think you both make a good point that effectiveness does not necessarily equate to money. You can spend a million bucks a year on the best bells and whistles on a blog, or spend 150 bucks a month, and it can be just as effective. So that is kind of a leveling of the issue, and should be able to support candidates and raise money and all that.

Well, we will have some reformers today, but I assume if candidates are directly involved and out there soliciting soft money out of companies and unions and trying to get that in the system, that might be a whole different world. But the bloggers on their own are just generally independent and will have candidates, like the two of you, that you will support. That is the point I was trying to make. I am not sure just because the blog is successful, which they are, a lot of them, equates that you have to take it and regulate it.

I just have one question to both of you. Do you think the blogging community—not both of you, but just the blogging community in general in the United States are worried that if regulation comes out that they could run afoul? Would they go towards hiring the lawyers they need, or would it stifle communication? Are bloggers around the United States concerned about regulation, or do they know it is going on?

Mr. KREMPASKY. The fact that Duncan and I have been working together on this issue sort of speaks to sort of dogs and cats living together. I know that when the first—when this first hit the news back in March, a group of us, conservatives, liberals, libertarians, put together an on-line coalition of people that didn't agree on anything except this. We presented an open letter to the Chairman of the Commission, and within about 36 hours we had about 38,000 bloggers sign on to the principles of that letter, asking for more protection as media, opposing more intrusive regulations, and warning about really two things; one, that they would chill speech, because bloggers don't have access to counsel, they don't have folks like the talented people here that come and testify on behalf of either groups or candidates. But just as dangerous for those that support campaign finance reform or regulation, with the 17 or 14 million blogs that Commissioner Toner pointed out, that is a lot of potential complaints that can be flung at each other. If you like the idea of getting big money out of politics, the last thing you want to do is have the people behind me spend all their time with the 3,000 complaints they could get in a morning about this blogger or that blogger filed by other bloggers. So absolutely they are concerned.

Mr. BLACK. They are definitely concerned. I agree with just about everything he said.

I just want to add to stress while I imagine certain bloggers might hire counsel and have access to lawyers, and the community would probably get to work lobbying Congress to the extent they could, and we would see how effective we are, but it certainly would have an incredibly chilling effect and in part because of what

Michael said, in part because it is a very partisan atmosphere, and one way to attack would be to attack your opponents through the FEC through the complaint process. The instant any of us, or most of us, who—for most people it is just a hobby, just something to do on the side. They get that registered letter or however the complaint arrives, that would have a serious chilling effect, and a lot of people who were participating the process would decide it was no longer worthwhile to do so.

The CHAIRMAN. Why don't we move on to the other Members.

I think blogs are effective. I think the greatest thing about the blogs, you do not have to have a lot of resources behind yourself to start it. I think that gives the average citizen from any walk of life the ability to get into the political process.

The gentlelady from California.

Ms. LOFGREN. Just a couple of questions. I think I have already made my inclinations known to the prior panel. I never am very interested in regulating the Internet because of where I am from, I guess, but I do want you to comment on the suggestion made by the Chairman of the committee. I am summarizing, but my sense is that he was thinking that a distinction could be made between what you do and say, for example, Yahoo. I mean, Yahoo is publicly traded. Their CEO came from Walt Disney Corporation, they are different than you guys, and that that somehow should be a subject of regulation. I am not sure how you make the distinction, but I am wondering if you have thoughts on that proposition.

Mr. BLACK. First of all, it is not clear—I mean, Yahoo is a publicly traded company, but it is also a media company. It runs newspaper articles from newspapers all over the world, including editorials from all over the world, people operating other media; publishes columns by opinionated people who are trying to affect elections in this country in one way or another. So Yahoo is a media company, and they are free to do all this without having any regulatory oversight by the FEC. There are restrictions on other types of corporate activity that they engage in outside the context of their media operation, but nonetheless the basic activity of running news and commentary on their portal site, they are perfectly free to do that. In that sense I am not sure what the important distinction would be between what I do either as an unincorporated blogger, which I am, or if I were to incorporate as a media company, and Yahoo the media company.

Mr. KREMPASKY. I think Duncan's point about Yahoo is a good one. I think what we are really talking about is the specter that was raised at the hearings this summer about what if Halliburton had a blog; wouldn't that be awful? Professionally I work with a lot of corporations to try to teach them how to communicate either through or with blogs, and I can tell you that all of the things that make blogs successful, speed, responsiveness, personality, tone, credibility, even a bit of irreverence, none of those exist very well in a corporate environment.

So the prospects of a successfully funded blog in the presence of things like general counsel—and I have to say that I can tell you that I had a conversation with a corporate legal counsel this week that had not only convinced his client but the rest of the company that if they were to run a blog, they would not be allowed to link

to a news article without violating some copyright laws. And so the risk of the corporate environment when it comes to succeeding in this medium, they are really not as compatible as people think they are.

Ms. LOFGREN. Let me ask another question, because I really think opening the door to regulating the Internet is a mistake; however, there are regulations that are going to apply whether or not you are on the Internet. I am wondering, I don't know whether either one of you has filed as a 527. Have you? The 527 regulation in terms of tax-exempt status is going to continue to rule your activities, whether it is on the Internet or off the Internet, in terms of just whether you are eligible for the exemption. You wouldn't suggest that the IRS rules be changed in any way, would you?

Mr. KREMPASKY. Let me say that RedState filed all of these legal forms and with all these specific agencies because we expected this issue to come up this year. And we saw everything that was going on in the campaign last year and had to go out to raise the money to pay a lawyer to file the paperwork and file reports every quarter disclosing every penny that comes in and goes out. And we did that hopefully so others would not have to go through that burden.

I don't have any comment specifically on the IRS or the rules that govern political committees except to point out it is not an easy thing for small speakers, individuals, or even small groups to navigate that process at all.

Ms. LOFGREN. I know my time is almost up, but it seems to me that while we don't want to regulate speech, people who are getting a tax exemption are going to have to still follow the tax exemption rules of the IRS, and that we should make that clear.

I thank the Chairman and yield back.

The CHAIRMAN. Mr. Ehlers.

Mr. EHLERS. Thank you, Mr. Chairman. Thank you for having this hearing. I think it is a very important topic. I have read a few blogs here and there, but I wish I had more time to read them. They are very interesting, very entertaining, and it is a pleasure to have you here to present your point of view. You look remarkably normal for bloggers.

Mr. KREMPASKY. Sir, you look remarkably normal for a Congressman.

Mr. EHLERS. I am a fellow nerd, and I managed to cover it pretty well, but my plastic pocket protector always gives me away.

As you know, most of the laws we write are designed to regulate the bad guys, not the good guys, and from all appearances you folks are good guys, and I applaud what you are doing. I think it is very good.

The concern that I think the FEC and that some Congressmen have is what about the bad guys who will misuse the Internet, misuse blogging, and in ways that certainly at least violate the spirit of the campaign finance reform law. Can you imagine ways in which some of your less ethical colleagues could basically subvert the law or violate the intent of the law by misusing their freedom on the Internet? I would just be interested in any responses you might have to that.

Mr. KREMPASKY. I think regardless of how they might do that, the unfortunate companion to that is that it is absolutely unenforceable. If they chose——

Mr. EHLERS. We will get to that later. I want you to think creatively about——

Mr. KREMPASKY. Certainly people could use servers and Websites in other countries. Chairman Thomas mentioned foreign nationals and governments spending money. I am not sure how you get at that, if it is actually a Canadian or English company and Websites pouring content into America that Americans are reading, whether or not that violates the law or not. It certainly doesn't seem to be a question we can start to answer. I suppose there are ways that people can spend a lot of money on the Internet that maybe they would not otherwise be able to spend if it were in television or radio or things like that.

But I think one thing that Duncan made pretty clear is that there is really not a corollary between spending and effectiveness. Commissioner Toner pointed out earlier that you cannot really crowd anybody else out. So even though you might be able to spend amounts of money, it is not like you can have the same impact in this medium, which I think is a completely different animal.

Mr. BLACK. I think people can behave unethically on the Internet as they can in all walks of life, and a lot of what we think of as ethical issues, such as not disclosing conflicts of interest, not disclosing financial connections to individuals or groups, or anything else that you may be endorsing or supporting one way or the other, all those are potential unethical behavior that can be engaged in on the Internet and are engaged in every single day throughout the rest of our media where people are going on TV and certainly not always disclosing what groups they work for or what groups they represent. Maybe they are not even being unethical, it is just in the interest of time, they are not going to post their CV on the television screen every time they have something to say.

I think those issues of ethics exist throughout the media and potentially would be no different in Internet activity. I am not sure that means, therefore, we have to regulate Internet activity exactly.

Mr. EHLERS. Let me give an example that just occurs to me. In the last election we saw some individuals who spent millions and millions of dollars of their personal money on the campaign, all of which was duly reported some ways through the IRS, which is not as effective as FEC or as timely, but nevertheless they did that, and it was reported, and everyone knew what they spent and that they were trying to influence it.

I suppose someone with huge amounts of money would hire 1,000 bloggers and say, okay, you go to it. I want you to talk about this, and I want you to have this political point of view, and in order to boost your readership, I want you to offer prizes to your readers if they read your message all the way through and spot certain key points, can answer a question at the end; they send it in, and if they are right, they get $200 or whatever. This would be a very effective way of spreading false information and clearly violating the intent of the campaign laws, because someone would be spending a lot of money to spread a message in a very effective way. Would

you regard that as inappropriate? Clearly they are not in your category where you are trying to scrape along and write entertaining, interesting, concise letters, but basically being bribed to read propaganda.

Mr. BLACK. I think to some extent you described an extension of the modern public relations industry. Yes, you can find ways.

Mr. EHLERS. But they have to report.

Mr. BLACK. Certainly, but as long as this stops short of endorsing Federal candidates, then they are probably not going to run afoul of campaign finance laws. The public relations industry is very good at influencing public opinion on a variety of issues up to and including essentially writing op-eds and signing other people's name to them with their permission, for payment. These kinds of things go on all the time. It is only once you get to influencing Federal elections directly that you run into issues with the campaign finance laws.

Mr. EHLERS. I will yield back in a minute, Mr. Chairman. I just want to apologize for being late; I had a couple of other meetings and shortly have to go to the floor to speak on a bill that is up. This is a topic I am very interested in, and thank you very much for being here. The short time I have been here, I have learned a great deal. Thank you.

The CHAIRMAN. Thank you.

Gentlelady from Michigan.

Mrs. MILLER. Thank you, Mr. Chairman.

I think it has been interesting listening to you both using similar examples about how, as we sort of move towards the possibility of regulating the Internet, which I think is regulating free speech, and thus very dangerous, yet the media has a complete and free blanket of protection under free speech. The media is protected, and yet oftentimes—I think you, Mr. Black, used an example of the media using as part of their newscast, something they saw on a blog or on the Internet. So the very impetus of that particular newscast, which is freedom of the media, yet we are moving to actually regulate that part of it.

And it is a very common element in campaigns. You showcase an advertisement that you are about to play, and you have a press conference, you have all the media come in, you show them the ad, and you are hopeful the media will then broadcast your ad for free. Probably the best example of that in the last Presidential was the swift boats, which was a very small buy and ended up with everybody just broadcasting and talking forever about this particular ad, yet they didn't have to really disclose how much was spent all over the media on that.

I think most people would agree that many media outlets do have a bias toward an ideology, whether that is conservative or liberal or what have you. So I just make that observation as we are looking at this question, because it is almost counterintuitive, in my mind, to be thinking about regulating the internet—perhaps because it is unconstitutional in my mind as well. There certainly is a very slippery slope about regulating the internet and free speech.

I would just ask for your observation. I am not sure if either of you have any thoughts on this. Why is the thinking that you have to regulate it because of dollars spent? You were commenting about

how inexpensive it is to create these blogs. How could you even place a value on an endorsement that is on a blog or a candidate's picture that is on a blog or those kinds of things, an endorsement, et cetera? Could you comment on that? How could the FEC even determine a dollar value and decide whether or not they were going to regulate it?

Mr. KREMPASKY. I think I would almost leave it to someone associated with the FEC to talk about how they come to conclusions and have formulas and such. I think, though, it does raise really one interesting question, and that is if the Federal Election Commission were to come up with a threshold or some line over which if you spent above that, you are now considered an active participant in the target of resolution. On the Internet there is a dynamic that does not exist off line, and that is you can actually create content at home as a volunteer that you find interesting. Maybe you edit some videos yourself and set them to music or do something interesting or funny, and if a site like Duncan's actually notices it and drives people to watch it, you can actually get a bill for the resources that your site has spent to serve that video to people that simply come along and want to see it that not only may cross that threshold considerably, the bill may come in after the election, and you have no control over it whatsoever. You simply put up a little video, 30,000 people come and watch it, and you get a bandwidth bill from your hosting company for $3,000, which is higher than all these contribution limits.

So there are costs out there that even if the Commission says once you spend past this, there are costs you simply cannot control at all.

Mr. BLACK. I mean, just to add, I think if we start placing value on a link or an endorsement on a hot traffic site, once we start thinking about anything on the Internet in terms of in-kind contributions, you basically shut down political speech on the Internet in its entirety. It would be over.

I do not see how in practice it could be done. Even if it could be done, it would just have an extreme chilling effect. No one would bother because it would be impossible to know when you cross some threshold of traffic or directed traffic or receive traffic. It would just be absolutely impossible.

Mrs. MILLER. Thank you, Mr. Chairman.

The CHAIRMAN. I surely appreciate both of you coming here today. I appreciate what you do and the effectiveness of the blogs in this issue. We talk about this issue and Mr. Elhers and I were just talking, and all of a sudden you go in circles because it starts with regulation somewhere in the campaign law. And all of a sudden, it goes back and you know to the Internet. It is just like an endless discussion. I think also technologically it would be so difficult—and you made a good example. It would be so difficult to find out who—you know, how many people you are talking to. Does that count as in kind? It is mind-boggling to think we could go in that direction to try to regulate that.

And with that I have no more questions. Mr. Ehlers, do you have any?

Mr. EHLERS. I would like to know how to get on your list.

The CHAIRMAN. And thanks again and please blog us nicely tonight if you can.

Mr. BLACK. Certainly.

Mr. KREMPASKY. Yes.

The CHAIRMAN. On our last panel, we are fortunate to have with us three highly qualified election law experts who explain what they believe would be the implications of regulating or not regulating the Internet through campaign finance laws.

First we will hear from Professor Bradley Smith, former Chairman of the FEC, who now teaches election law at Capital University in Ohio.

Then we will hear from Karl Sandstrom, of counsel for Perkins Coie, and also former member of the FEC.

And our final witness of the day will be Lawrence Noble, who serves as Executive Director of the Center for Responsive Politics. Mr. Noble previously served as General Counsel at the FEC.

I want to thank all three of you for being here, and we will start with Mr. Bradley Smith.

STATEMENTS OF BRADLEY A. SMITH, PROFESSOR OF LAW, CAPITAL UNIVERSITY LAW SCHOOL, COLUMBUS, OHIO, FORMER CHAIRMAN, FEC; KARL J. SANDSTROM, COUNSEL, PERKINS COIE, FORMER MEMBER OF FEC; AND LAWRENCE NOBLE, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, CENTER FOR RESPONSIVE POLITICS, FORMER GENERAL COUNSEL OF FEC

STATEMENT OF BRADLEY A. SMITH

Mr. SMITH. Thank you, Mr. Chairman. I would like to thank the members who have joined us today for part or all of the hearing. It is a pleasure to be here and be back here in the capacity in which I previously testified as a private citizen exactly 1 month today.

I want to begin by talking about the scope of the issue, I think which is not fully understood, the potential threat, and then a little bit about the press exemption. First let's talk a little bit about the scope of the issue.

What needs to be understood is that if you enact Pence-Wynn, if Congress were to pass Pence-Wynn, essentially you would be passing the exemption that has been on the books now and remains on the books even in light of the court's decision in this Shays-Meehan case because that regulation remains in place until the Commission writes another.

And as we think about that we begin to realize that in fact even now the Internet is not unregulated. Indeed I would suggest that Congress might want to consider taking steps to further deregulate the Internet.

Earlier you heard the Chairman, Commissioner Thomas. My friend made some comments about the amounts that were spent on Internet ads in the last campaign. He estimated it from one source of 14 million. That was about three-tenths of 1 percent of what was spent overall.

But what is interesting is then he cited a number of figures that political parties and other groups had spent on Web and Internet

and e-mail and so on. Well, how did he know that data? Because that is regulated activity already and it had to be reported to the FEC.

In other words, even under Pence-Wynn, corporations cannot generally advocate the election or defeat of political candidates. Political parties and political candidates are still regulated in the money that they can take in and then use to spend, whether it is for Web activity or anything else. So it is a mistake to think that the Internet under the exemption either was or is unregulated or that it would be unregulated if you enact Pence-Wynn.

Secondly, it is worth pointing out that there are people who definitely want to regulate it more. I very much appreciate the comments of my former colleague, Commissioner Weintraub and the light-handed touch that she has brought to this issue. I think she has been very sensitive to the concerns. But I disagree with her when she makes a statement that no one wants to regulate the Internet or unpaid blogcasting and bloggers. There are clearly people who want to regulate the Internet and want to regulate unpaid ads as well. As Vice Chairman Toner pointed out, the court decision is not limited to paid advertising, and indeed arguably paid advertising is already regulated.

The exemption could be read in the same way as the current press exemption. If you read the press exemption literally, any broadcast commentary is exempt. And that would mean a commercial. But no one has ever interpreted this as applying to paid ads. But if we go beyond that and look a little bit at the notion of whether or not we want to limit it to paid ads, I just want to cite to you the comment submitted to the FEC by the primary House and Senate sponsors of the Bipartisan Campaign Reform Act, or BCRA.

They wrote, "the proposed rules"—this was the FEC's proposed rules—of "retaining a broad exemption for Internet communications with the single exception of paid political advertising is an invitation to circumvention."

So clearly, there is more than just paid advertising on the table, and people should not be lulled into thinking that that is the only goal of those who are pushing for more regulation here.

I think the scope is also not understood because of the fact that Web entities, people acting on the Web are still regulated if their activities amount to expenditures or contributions.

And there are a number of issues that go there. We have talked a little bit today about small, incorporated bloggers and that type of thing. There is also the issue of how one values that. And that has come up from time to time. I think it is worth noting here only that at least in some circumstances the FEC has valued expenditures not by the amount actually spent, but rather by the perceived value to the campaign. And if that is the case, then a link which might cost just a few cents to be done could have a value to the campaign of many thousands of dollars.

And now, the Commission is not always consistent in that type of application. And so perhaps it could be handled through some type of rule. But again to the extent that we don't want to rely on forbearance of the Commission there may be some value in Congress acting. And it is worth noting when we talk about the Com-

mission being light handed, light in touch, that there are four seats that are up for reappointment on the Commission. And the regulatory lobby, the same people who say we don't want to limit this to paid advertising, are lobbying very hard to have commissioners on board who will be more regulatory than the current set of commissioners. So we can't kid ourselves about that.

I want to conclude with just a couple quick thoughts about the press exemption because again there has been some confusion there. The people talk about the "Halliblogger." "It would be a horrible thing, a big corporation could have the press exemption." I want to point out that Halliburton, to use an example, already has the press exemption. And so do all kinds of big corporations. You see, the press exemption isn't based on who you are. It is based on what you do. And so if you are the Philadelphia Inquirer, you have the press exemption. And you have it even though the owners of the Inquirer are giving hundreds of thousands of dollars to the Democratic candidate for Senate in Pennsylvania, it appears, even though they announced last year that one of their primary goals was to elect John Kerry and they used their newspaper relentlessly for that purpose.

Sinclair Broadcasting is a corporation and it is not a small one, and it already has the press exemption. And last year it ordered all of its stations to run a documentary that many people viewed as simply a long anti-John Kerry commercial. It ultimately backed off that. But it shows that corporations can already do these things, and they do. And they are powerful and they are influential.

And Halliburton can start a newspaper or buy a radio station any time it wants. What is different about the Web is that you don't have to have that kind of money. You need a lot of money to get the press exemption by starting a newspaper or a radio network or a TV station. But you don't need a lot of money to start a successful Web page. And so I think it is important that we keep that in mind and not be distracted by the red herring that somebody else might, you know, gain the press exemption.

The press exemption is available to any American who engages in press activities, and I don't think it is clear that the Internet is covered by that press exemption at this time. And I think it would be very valuable if Congress were simply to add to the two parts of the act that include the press exemption. It now says "by periodical or broadcast," "distribute through periodicals or broadcast," to simply ad "or through the Internet." That would make clear that Internet sites do have the press exemption. And there would still be limits on it just as now, for example, we don't interpret the press exemption as getting to paid ads. We don't have to interpret that for the Web, but we could in that way give people a great deal of insurance that their basic editorial content they want to put out, whether they are in a blog or whether they are in a Web forum or however they want to do it, would be protected.

Thank you very much and I look forward to questions. Thank you.

[The statement of Mr. Smith follows:]

Before the
Committee on House Administration
United States House of Representatives

Hearing
"Political Speech Over the Internet: Should it be Regulated?"

September 22, 2005

Testimony of Bradley A. Smith

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Mr. Chairman and members of the Committee:

My name is Brad Smith, and I am Professor of Law at Capital University Law School in Columbus, Ohio. I am also Of Counsel to the law firm of Vorys, Sater, Seymour and Pease, where I practice in the field of election law, although I am not testifying today on behalf of the firm or any of its clients. And until August 21 of this year, I had served for over five years as a member of the Federal Election Commission (FEC), including serving as Vice-Chairman of the Commission in 2003, and Chairman in 2004.

Introduction

I want to first thank Chairman Ney, Ranking Member Millender-McDonald, and the Committee for holding this hearing on this most important topic. Over the last decade, the internet has dramatically reshaped many elements of American society, and holds the promise of still greater change. Political campaigning is one such area. The internet has proven to be a valuable resource for raising small political contributions; for mobilizing voters and encouraging them to go to the polls; and for providing a wide range of political news and commentary.

In my comments today I want to make four points:

- First, the on-line community has reason to be concerned. Although few want to say so publicly, there is a sizeable and powerful lobby both in and out of Congress that clearly wants to regulate the internet. Theirs is a stealth campaign, with soothing, moderate rhetoric in highly public settings, but a little probing demonstrates their disdain for the idea of a deregulated on-line community.

- Second, there are many pitfalls for average citizens hoping to participate in on-line political activity. Moreover, proposals in Congress to remove the internet from the statutory definition of "public communication" are helpful, but do not solve the problem. A broader exemption is necessary.
- Third, part of that broader exemption should include clearly extending the press exemption to on-line activity.
- And finally, Congress should not be fooled by misleading rhetoric about "Hallibloggers" and other red herrings. A regulated internet will strengthen those who already have political power and influence; a deregulated internet will boost the influence of ordinary Americans who just want to play by the rules

What is perhaps most notable about the internet, for our purposes, is that there is probably no other medium by which the average citizen can exercise so much political influence with so little an expenditure of money. There are no barriers to entry in the world of blogging, or in creating email lists. Free software and free websites are available to blog, and a blog can therefore be established by the most amateurish computer user in under an hour, at literally zero cost. The person need not even own a computer or have internet service at his home or workplace – access to a public library equipped with computers with on-line access will do. If one is truly concerned with reducing the influence of "big money" in politics, then a deregulated internet is, by definition, "reform."

Background: BCRA and The* Shays *Decision

Today there is understandable concern in the vast and growing internet community over whether the internet will remain a source for the political empowerment

of millions of average Americans. In the Bipartisan Campaign Reform Act of 2002, more commonly known by its acronym, "BCRA," or by the names of its sponsors ("McCain-Feingold" in the Senate, and "Shays-Meehan" in this Chamber), Congress did not specifically include the internet as a regulated medium. Accordingly, in the summer of 2002 the FEC, in its rules implementing BCRA, excluded the internet from much (but not all) of the regulatory scheme, by excluding internet communications from the definition of "public communication." See 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. This exclusion was challenged in court by the House sponsors of the law, and their efforts were successful – in *Shays v. Federal Election Commission*, 337 F. Supp.2d 28 (D.D.C. 2004), the District Court for the District of Columbia held that the FEC's exclusion of the internet from the definition of "public communication" was improper under the statute. The FEC chose not to appeal. Thus, earlier this spring the FEC began a rule making, which remains pending, to provide for added regulation of the internet. *See* 70 Fed. Reg. 16967, April 4, 2005.

Why the On-Line Community is Concerned; What is at Stake

The threat of added internet regulation, and in particular of regulation of blogs and on-line forums, created something of a public outcry. Bloggers, and others who use the internet for political activity, whether in some formal way or merely in their own compilation of email lists and participation in various on-line communities, are correct to be concerned. In recent months those who favor regulation of the internet have gone out of their way to present a moderate image.

In response to the public outcry, the Campaign Legal Center, a lobbying group which also represented Senators McCain and Feingold in filing an amicus brief in the

Shays case, rushed out a press release stating that only "paid advertising" was at issue, a charge repeated by others favoring regulation, including some members of Congress. Of course, this is not true – nothing in the Court decision in *Shays v. FEC* limits the decisions reach to paid advertising, and in fact if one reads the plaintiffs' complaint and legal briefs in the case, including the amicus brief filed by the Campaign Legal Center, you will see that the plaintiffs and amici did not argue that paid advertising was the only concern. Indeed, in another part of the same lawsuit, the plaintiffs sued the FEC for exempting certain unpaid ads from the regulations, and they were successful in getting the court to rule that that exemption for unpaid ads was also improper.

In fact, despite assurances that the target of the lawsuit was only "paid advertising," *see* Statement of Senators Russ Feingold and John McCain on Internet Communications, Mar. 8, 2005 ("the FEC will be looking at whether and how paid advertising on the Internet should be treated,"), in comments to the FEC on the proposed rulemaking, BCRA's primary House and Senate sponsors argued that, "the proposed rule's approach of retaining a broad exemption for internet communications with the single exception of paid political advertising is an invitation to circumvention." Comments of Representatives Shays and Meehan and Senators McCain and Feingold on FEC Notice of Proposed Rulemaking, June 3, 2005, p. 3. So there is clearly some interest in seeing that unpaid political activity, including internet activity, does not escape regulation.

Moreover, while those who sued the FEC to require it to increase regulation of the internet are now careful to praise the internet's worth, stress the benefits of internet participation for democracy, and argue that they favor "unregulated and robust political

debate on the internet," (Letter from Senators McCain and Feingold, and Representatives Shays and Meehan, to FEC Chairman Scott Thomas, March 22, 2005), until recently their language was quite different. Rather, Plaintiffs' brief in *Shays v. FEC* argued that the exempting the internet from some regulation under the definition of "public communication" would, "open new and powerful avenues for circumventing the governing contribution limitations, source restrictions, and reporting requirements." In that legal brief, they described or approvingly quoted others who described exemption of the internet as a "poison pill," a "loophole," "a step backwards," "anti-reform," and "the favored conduit for special interests," that "undermines BCRA's aims," and "opens an avenue for rampant circumvention of all of … BCRA's central provisions." Plaintiffs Brief at 25, 26, 28.

Why should the internet community remain nervous and watchful? Consider that in prepared comments to the FEC, several groups in the "reform" lobby wrote, "the FEC should consider whether it has the authority to establish by rule a reasonable dollar threshold (e.g. $25,000) for spending by an individual on production costs for materials to be disseminated via the internet, where only costs over that threshold would be treated as a "contribution" or "expenditure…" Comments of Democracy 21, Campaign Legal Center, and Center for Responsive Politics, FEC Hearing on Internet, June 3, 2005. However, at the FEC's hearing, when I asked the legal counsels for two of those lobbying groups, Democracy 21 and the Campaign Legal Center, whether or not they thought that the FEC had the authority to exempt such low dollar spending on the internet, and both said no. FEC, Transcript of Public Hearing on Internet Communications, p. 163, 241. In fact, Trevor Potter, Counsel for the Campaign Legal Center, asked if his organization

would agree not to sue the FEC to invalidate any such dollar threshold that might be passed, pointedly avoided any such assurance. *Id.* at 242. One can hardly blame the on-line community for thinking that the sudden moderation of the "reform" lobby reflects temporary expediency rather than a serious policy position.

***The Problem is Bigger Than Commonly Understood, and Goes Beyond* Shays.**

I think it is clear that if the internet is to remain entirely, or even largely, free from bureaucratic interference, some type of congressional action is required. But I do not believe that the contours of the problem are fully understood. For example, some in Congress have proposed reinstating, through legislation, the Commission's exemption of the internet from the definition of "public communication." This would be a promising start and I favor such a measure. However, it would not leave bloggers and others in the on-line community free from legal risk. Under BCRA, the term "public communication" only comes into play for certain activities of political parties and for communications coordinated with a political candidate.

Exempting the internet from the definition of "public communication" still leaves internet activity subject to regulation as "expenditures" and "contributions." Thus, exemptions from these statutory definitions are also needed if the internet is to remain a forum for free, uninhibited political discussion. For example, it is illegal for any corporation to spend any money on communication containing "express advocacy," if that communication goes outside the corporation's "restricted class" of shareholders and managers and their immediate families. Therefore, if an incorporated blogger or web forum such as Wonkette, or even one incorporated as a limited liability corporation, publishes anything explicitly supporting or opposing a candidate for office, it is in

violation of the law. Restrictions also apply to unincorporated entities. An individual who spends just $250 on such activity is required, by law, to file reports with the government. In other words, even with the FEC's partial exemption of the internet, by excluding the internet from the definition of public communication, in the 2002 and 2004 campaigns there was quite probably a great deal of illegal – albeit unknowingly illegal – campaign activity taking place over the internet. That this did not result in widespread prosecutions and enforcement is, in my view, due to the fact that most Americans assumed – in part because of the FEC's exclusion of the internet from "public communication" - that their participation on the internet was exempt. However, the *Shays* decision has changed that. People now understand that the internet is and can be regulated under federal law, and that many types of political activity over the internet can be and are illegal. And thus, I would expect to see far more complaints filed about internet activity in the 2006 and 2008 cycles, unless Congress acts to protect the internet.

On-line political activity is fraught with traps for the unwary. For example, under the law, republication of a campaign's material constitutes a coordinated expenditure, and therefore a contribution to a campaign. Thus an individual who forwards to his personal email list a notice he receives from a campaign has apparently republished campaign material, and so made a contribution. If that individual has already made a maximum legal contribution to a campaign, this forwarding of campaign email would put him over the limit.

Perhaps more dangerously, while republication of campaign materials is by law automatically a coordinated contribution, the "reform" organizations have long argued that any content can be investigated for coordination with a candidate's campaign, not

just a republication of campaign materials. Thus, a blog that merely talks about issues of interest in any of your districts can be investigated to see if it has "coordinated" its activities with you, thereby triggering federal liability. This keeps in place the largest chill on bloggers of modest means: the fear and expense of a federal investigation. For most average Americans and small time bloggers, the threat of a government investigation is chilling – even if the activities ultimately are determined to be legal.

Some will argue that some of the above internet activities might not be regulated because little or no money is spent. As I've noted above, however, comments of the Court, of plaintiffs in the *Shays* case, and of various reform organizations indicate that they may not view this as a factor exempting the internet from regulation. But the pro-regulation forces have made clear that they believe that internet production costs should be considered, and here it is easy even for average citizens to top the $250 threshold that triggers federal law. Furthermore, the analysis may not be so straightforward. In Advisory Opinion 1998-22, the FEC held that not merely the marginal cost of web based communication counted toward reporting and spending thresholds, but also a percentage of the fixed costs of maintaining internet access, including hardware costs. The FEC has since moved away from rigid enforcement of this logic, but never completely rejected it. Additionally, the FEC has long had a policy of placing a value on political activity not only by the actual costs of engaging in the activity, but by the benefits received by the campaign. Thus, if a corporation or union devotes $50 to sending out a fundraising letter on behalf of a candidate, the Commission values the expenditure not at $50, but at the amount raised by the solicitation – possibly thousands of dollars. In other cases, the Commission has ruled that minimal expenditures on advertising can have a value far

exceeding actual costs outlays if, in the Commission's opinion, the value to the campaign is greater than the cost to the payer. Translated to the internet, this means that a simple link, costing but a few cents in actual outlays, even accounting for time, could be valued at thousands of dollars, triggering the Act's limitations and prohibitions.

Another problem web activists face is that they cannot always control the costs of their activity. For example, a small blog might cost the owner just a few dollars a month to pay for bandwidth space. However, if that blogger should suddenly find a hot political secret, increased traffic could cause the cost of hosting the site to mushroom, far exceeding the thresholds of the Act, without the blogger being able to control the expenditure. And even when a blogger's expenses rise, should this subject the blogger to regulation? For example, in his testimony before the FEC, blogger Markos Moulitsas of Daily Kos noted that the cost of operating his blog are now well into the six figures. Yet that is the result of Moulitsas's success in blogging. His blog is not successful because he started with lots of money, or spent lots of money on his blog. He did not. Rather, his blog now costs – and earns – considerable sums because it is popular, because he offers commentary and news that many citizens find valuable.

Why Congressional Action is Needed

Despite the decision not to appeal *Shays,* the FEC has indicated, in its proposed rule, some desire to take a light handed touch in complying with the Court's ruling in *Shays v. FEC.* But no rules have been adopted yet, and as I've noted, the sponsors of BCRA and various reform lobbyists submitted testimony to the FEC calling for more regulation than that in the proposed rule. Currently, the seat that I held on the Commission is vacant, and three other Commissioners' terms have expired, so that those

Commissioners could be replaced at any time. The "reform" lobby has already demanded that the President appoint replacements who favor greater regulation. Furthermore, the reform lobby groups pointedly refuse to promise not to sue over new regulations – even regulations that follow their advice – and we do not know that a federal court would not again strike down lenient regulations as outside the scope of the statute.[1] Thus, I stress that if Congress wants to see the internet remain a medium of robust political debate, it would be wise to act, and not to count on the forbearance of the FEC and the federal courts.

I will leave it to the actual bloggers appearing before you to further lay out some of the other practical and technical problems that the internet community faces from regulation, and the ways in which regulation could smother this wonderful, new democratizing technology. I would also urge members of the Committee to read the testimony and comments from the FEC's June hearing on internet regulation. I wish to conclude in a different vein – first by considering the internet and press exemption, and then by asking the simple question, "why do we want to regulate the web?"

The Press Exemption and the Internet

I'll start with the press exemption. If the internet is not exempt from regulation, then the web sites of the Washington Post and New York Times, of the Wall Street Journal and the National Review, would all be regulated, unless they can claim the press exemption provided for at 2 U.S.C. §431 (9)(B)(i). The press exemption is widely misunderstood. Read literally, the statutory press exemption only applies to the "periodicals" and "broadcast facilities." It does not protect political books, such as Bill Press's *Bush Must Go: The Top 10 Reasons Why George Bush Doesn't Deserve a Second*

[1] Let me make clear that I believe that the unappealed district court decision was in error.

Term, or John O'Neill and Jerome Corsi's, *Unfit for Command: Swift Boat Veterans Speak Out Against John Kerry*, and it does not protect movies, such as Michael Moore's *Fahrenheit 9/11*. To my knowledge, no one has filed complaints about books, and it seems hard to me to believe that movies and books can be censored through our campaign finance laws, but in fact the FEC has twice issued advisory opinions holding that some movies, at least, are not protected. See Advisory Opinions 2004-30 (Citizens United) and 2004-15 (David T. Hardy).

Of course, the statutory language, just as it does not include books and movies in the press exemption, does not specifically include the internet within the press exemption (though one might argue that any regular publication on the internet qualifies as a periodical). So how would the press exemption apply to the internet? I think all of us would instinctively agree that the web sites of the *Post*, the *Times*, the *Journal*, and *National Review* would be able to take advantage of the press exemption. What about publications, though, that exist only on-line, such as Slate and Solon, or Conservative News? Well, we might say, these publications have the look and "feel" of a newspaper, even if they aren't in print, so they should be exempt. Then what about sites such as TownHall.com or the Drudge Report, which do little original reporting but provide many links to news and commentary? And what about, then, successful bloggers such as Instapundit (which is not a major corporation, but merely a law professor's site), AndrewSullivan.com, and Daily Kos? What about corporate owned blogs such as Wonkette? Do we really mean to stomp out such blog sites – especially those, such as Kos and Instapundit, or Duncan Black's Eschaton – that have allowed individual citizens political influence here before restricted to journalists or the super wealthy? Of course

not. But if we allow these widely read blogs the exemption, how can we deny the press exemption to smaller, less successful, less influential blogs?

Would it really make sense to have a press exemption that exempts powerful, corporate-owned entities such as CBS News and the New York Times, but not average citizens? No.

The only conclusion I can draw is that we must extend the press exemption to all internet web sites. But that will not happen, I do not believe, without congressional action. Because while few seem to have the stomach to call for regulation of books and movies, as I pointed out above, many are prepared to call for, and sue in court to attain, expansive regulation of the internet.

The "Halliblogger:" A Red Herring

Some have expressed worries, however, that if blogs and websites are generally protected by the press exemption, we could see corporate and union blogs. There could be what they call the "Halliblogger," a term coined to shock us. This is a complete red herring. Nothing in the law stops a large corporation such as Halliburton from buying a newspaper and taking advantage of the press exemption now. In fact we are all familiar with large entities – including unions and wealthy entrepreneurs as well as corporations – that own newspapers, and companies such as Sinclair and Clear Channel that own broadcast stations – not to mention the giant corporations that own networks. All of these corporations and unions and wealthy individuals can take advantage of the press exemption, and some do.

Halliburton already has the press exemption, if it chooses to use it. So do other groups. For example, in response to BCRA, the National Rifle Association started its

own radio station. The main difference with the internet is that anyone – not just a large corporation like Halliburton, or a large group such as the NRA - can start a successful web publication at virtually no cost. Why would we possibly want to interpret the press exemption such that Halliburton can own a chain of radio stations, but blogs are regulated? Of course, we should also note that in fact there is no "Halliblogger," just as there is no HBC (The "Halliburton Broadcast Corporation").

Even if the press exemption is clearly extended to blogs, it is unlikely that Halliburton (or some other corporation, or union, or multi-millionaire) will spend large sums on the blog for the same reasons that most do not now spend large sums to operate newspapers or broadcast stations at a loss – it is simply not what they do, and not how they spend money. Of course, perhaps they will spend tiny amounts on blog – but if the amounts are tiny, how has big money polluted the system? And if they are willing to spend big money – the ever present threat of "circumvention" – is the internet really the problem, when they can always go and start a newspaper or buy a radio station, which could then be simultaneously broadcast over the web? Perhaps the entire press exemption is the problem.

In other words, how can we have a press exemption that goes to large corporations, and to influential, powerful organizations such as the Washington Post and New York Times, but excludes average citizens, right at the time when we have found the format – the internet – that puts average citizens on the same footing as powerful unions, large corporations, and wealthy individuals?

Why Regulate the Web?

This leads me to my second question: Why do we want to regulate the internet at all? The "reform" lobby argues that if the internet is left unregulated, why, corporations and unions might spend large sums on internet communications. But it is not self-evident that this is a problem. The law already allows corporations and unions to spend large sums in many different ways. For example, unions can spend millions of dollars to communicate with their members on politics. In doing so, they can explicitly endorse candidates. The law allows this not only because doing otherwise would raise constitutional concerns, but also because it is considered a good thing that unions communicate with their members. The law allows corporations to communicate with shareholders. It allows unions and corporations to undertake voter registration drives. It allows unions and corporations to amass large political action committees in voluntary contributions from members and managers, respectively, and for those PACs to contribute to candidates.

For those concerned about corporate and union influence, the internet ought to be viewed much more benignly. For one thing, people must affirmatively opt-in to take advantage of web sites. People go to sites precisely for news and commentary, rather than being passively bombarded with commentary and commercials, as with traditional broadcast media.

We might also note that large corporations and unions often have large PACs. Small businesses and non-union workers rarely have PACs at all. Large corporations and unions have lobbyists. Small businesses rarely do. It may be true that large corporations and unions can spend money on the web. But what is different about the web is that

small businesses and individuals can compete on equal, or near equal terms. Restricting the internet, then, will be but a minor blow to powerful interests, who have other means of influencing public debate. But it will be a major blow to small businesses and average citizens, who do not have their own PACs and lobbyists, and for whom the internet is the medium that truly allows them to participate on equal footing – witness, again, the success of an Instapundit or Daily Kos.

Some argue that at a minimum operators of web sites should have to disclose if they receive any reimbursement from campaigns or candidates. I here note only that such payments are already disclosed, by the campaigns themselves. In no other medium – not on broadcast or cable TV, not on radio, not in newspapers and periodicals, and on no other recipients of campaign funds - certainly not on individual citizens – is a burden placed on the recipient to disclose payments received. Rather, our law regulates candidates and campaigns. There is no reason that the internet needs to be subject to more disclosure than anyone else.

Conclusion

To summarize:

- 1) Despite the sudden moderation in the rhetoric of the pro-regulatory lobby, there is good reason to believe that aggressive regulation of the internet remains the goal, absent congressional action to the contrary;
- 2) such regulation is likely to sharply curtail citizen ability to participate in politics in a variety of internet based activities, including blogs, web forums, and email lists;

- 3) there is no valid reason that the law should exempt large, corporate-owned press entities, while denying that exemption to bloggers and average citizens; and
- 4) the mere fact that corporations and unions can spend money on the internet does not mean that limiting the internet will achieve our goals of less special interest influence and broader citizen participation – instead, limiting the internet will leave corporations and unions with other sources of influence while taking from average citizens the one medium whereby they can compete on near equal terms.

Again, I want to thank both the Chairman and the Ranking Member for taking the lead on this important issue, and I thank all members of the Committee for your time and consideration.

The CHAIRMAN. Thank you.
Mr. Noble.

STATEMENT OF LAWRENCE NOBLE

Mr. NOBLE. Thank you very much, Chairman Ney, and members of the committee. I appreciate the opportunity to appear before you today.

It is beyond doubt that the Internet is changing the way that we do politics in this country. It is really a transformative tool. When television came in over 50 years ago, it also changed the way we did politics. But television has a very high threshold for entry, and that threshold is so high that most of us have been left as observers and not participants in the debate.

The Internet is different because it does really allow a vast segment of society, though not necessarily everybody, a vast segment of society, to have access to what is a very large loudspeaker. But I think it is a mistake to assume that just because political activity on the Internet can be undertaken for very little money that it will not be used as an avenue for spending large amounts of undisclosed soft money, money from corporations, from labor unions that is spent in coordination with Federal candidates, also soft money being spent by State party committees where normally a mixture of hard and soft money would have to be spent.

And when that type of money is spent by corporations and labor unions on the Internet, it poses the same potential for corruption and apparent corruption that you see in television ads, that you see on the radio or in the newspapers.

Now there has been some talk here about drowning out voices, and that since everybody can get on the Internet, most people can get on the Internet, there is so much room that individuals will not be drowned out. But the reality is the Federal Election Campaign Act is not about equalizing voices. The Supreme Court has said that, that the laws are not about making sure everybody has the same access. What the laws are about is stopping apparent corruption from the large aggregations of wealth.

The law is also not about the effectiveness of the ads. I would suggest that if the law was about the effectiveness of the ads, some party committee ads and even candidate ads, they could probably go unregulated. I think one of the fundamental ironies that runs through this debate is that we are hearing a lot today from people who are saying that because the access to the Internet is so easy, because you can get on the Internet and spending such little money that there is no need to regulate the Internet.

But the fundamental irony here that is what we are really talking about is access by those with large aggregations of wealth. What we are talking about is access by corporations and labor unions who can spend a lot of money on the Internet. And for those who are saying that, you know, people are not spending money on the Internet, Chairman Thomas was correct, the Daily Kos has a place where you can sign up $50,000 worth of ads, though I will give them credit they said they have not been unable to sell that yet. But ads are being sold on the Internet.

If you go on a lot of commercial Web sites or newspaper Web sites you are first now hit with very sophisticated ads that are in

effect videos. Now these are commercial ads that I suspect cost a fair amount of money. Andas more and more commercial interests find it effective to run expensive ads on the Internet, I think you are going to see more and more candidates, more and more political parties, and more and more interest groups deciding it is effective to run political ads on the Internet, and run them when they are very sophisticated and where they are very expensive.

But it doesn't mean that we should regulate everything on the Internet, and nobody is trying to regulate everything on the Internet. As it stand now the Federal Election Campaign Act has exemptions and the FEC's regulations have exemptions, and the FEC is working on further refining them, that allow individuals to set up blogs and say whatever they want. Nobody is talking about going after this. It hasn't happened. It is not going to happen.

First of all, there is a definitional exemption if you are not spending any money. So for those who say, well, you can do so much without money, without spending money, then the answer is then you don't come under the campaign finance laws. There is also volunteer, the individual volunteer exemption that allows individuals to get on their computers at home, in the dorm room, in some ways at their work and blog to their heart's content and talk about which candidates should be voted for, and in fact they can coordinate that activity with the candidates. So in that sense it is no different from handing out leaflets, and people right now do that without having to hire lawyers.

Some of these exemptions can be further expanded to allow people on their Web sites to spend some money on doing sophisticated ads or sophisticated graphics, but that is different again than having some labor union come in and working with the candidate and paying for that.

Now there has also been the question of the press exemption. The Supreme Court in 1990 said media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. All I want to say here is that the concept of the media and journalism is changing. There is no doubt about that. I think this is a debate in some ways that has to be had with journalists participating. But if you say that every blogger is a journalist or everybody now with a computer is a journalist, effectively what you have said is that there is no special profession of journalism. Maybe that is the end result of this. I wonder how that is going to affect shield laws in the State. I wonder when a blogger is subpoenaed by the government for something totally unregulated whether they are going to try to take a shield law and whether or not a court will accept it.

And one final point. It is not—and I think Congressman Lofgren said this. You cannot say the Internet is not regulated. Copyright laws are enforced on the Internet. Tax laws are enforced on the Internet. All we are talking about here is enforcing the campaign finance laws which deal with the spending of money on the Internet.

Thank you.

[The statement of Mr. Noble follows:]

Testimony of Lawrence Noble
Executive Director and General Counsel
Center for Responsive Politics

Before the Committee on House Administration
Hearing on the Regulation of Political Speech Over the Internet
September 22, 2005

Mr. Chairman, and members of the committee, my name is Larry Noble. I am executive director and general counsel of the Center for Responsive Politics, a non-partisan, non-profit research organization that studies money in politics and its impact on elections and public policy. I am also an Adjunct Professor at George Washington University Law School, where I teach a course in campaign finance law. Prior to joining the Center in 2001, I was general counsel of the Federal Election Commission for 13 years. I appreciate the invitation to address the committee today on the regulation of the spending of money for political activity on the Internet.

The Center for Responsive Politics was founded in 1983 by two U.S. Senators, Democrat Frank Church of Idaho and Republican Hugh Scott of Pennsylvania, who wanted to make Congress more responsive to the public. As part of its mandate, the Center began to examine the relationship between money and politics during the 1984 presidential elections, when it first studied contribution patterns to Federal candidates. Since 1989, we have systematically monitored contributions to Federal candidates and political parties, both from political action committees and from individuals. We publish the results of our work on our Web site, OpenSecrets.org.

The reason for our existence is simple: to inform citizens about who's paying for Federal elections and who is in a position to exercise influence over the elected officials who represent the public in our nation's capital. A February 23, 2004 *New York Times* editorial referred to the Center as "a research group dedicatedly nonpartisan in publicizing the power of money in politics." It is with that mission in mind that I offer these comments.

It is beyond debate that the Internet is having a transformative impact on numerous aspects of our lives, including how we conduct politics. While the Internet is still in its relative infancy, we already know it can be a market for commerce and ideas; a public meeting place or a closed room, a place for a few people to converse or a tool of

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mass communication; a public square or a dark alley, a bustling main boulevard or a seedy back street. It is a place for the vibrant exchange of profound ideas, as well as rants that make sidewalk graffiti look like the writing of Shakespeare, and everything in-between. It is also something that is evolving; changing as it changes the society with which it connects.

In many ways, the Internet is unique. While there is no doubt that the introduction of television as a mass medium over 50 years ago changed the way we conduct political campaigns, the financial barriers to entry into that market have always been so high that most of us have been forced into the role of observer rather than participant in the debate. In contrast, one of the hallmarks of the Internet is that the financial and technological barriers to participation have been lowered to the point where what is perhaps one of the most powerful communications tool we have ever seen is within reach of a wide segment of our society. Moreover, it is a tool that easily crosses traditional geographic and political boundaries. The result is that the Internet is already allowing individuals and groups of individuals to engage in robust and widespread exchange of political ideas for little or no cost. In short, the Internet is unlike any other medium that has come before and is having significant beneficial effects on our politics.

But it is a mistake to assume that because political debate can take place on the Internet for very little money, very large undisclosed sums cannot and will not be used to finance political activities on the Internet. There is little doubt that the Internet can be used in much the same way television, radio and the print media have been before; as an avenue for the spending of large amounts of undisclosed soft money to finance various forms of political ads aimed at electing or defeating Federal candidates. And, given the opportunity, there is little doubt that the spenders of that money will work both in coordination and independently of the candidates and political parties. When the Internet is used in this way, the large sums used by a corporation, labor union or wealthy individual – sums that could be in the millions of dollars – pose precisely the same dangers of corruption and the appearance of corruption as large amounts used to finance communications through any other media.[1]

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[1] Recent reporting and research documents the trend towards large sums of money being spent on Internet-related activities to influence Federal elections. In a recent article in *Online Media Daily,* political consultant Michael Bassik "forecast that 2006 will be a big year for online advertising in the political sector. 'I think '06 is going to be insane,' he said. 'The amount of work we've done – it's more attention than I've ever seen paid to online.'" S. Gupta, *Consultants: Politicos Coming Around On Online Ads,* ONLINE MEDIA DAILY, May 17, 2005, at http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=30221.

The Pew Internet & American Life Project has published several studies on the impact of the Internet on political campaigns. Although one study notes that, as of August, 2004, the "primary players in presidential politics" had spent "just $2.66 million" on online banner ads, *see* M. Cornfield, "Presidential campaign advertising on the internet," (Oct. 2004) at http://www.pewinternet.org/pdfs/PIP_Pres_Online_Ads_Report.pdf, a subsequent Pew study concluded that "the internet has become an essential medium of American politics." M. Cornfield, "The Internet and Campaign 2004: A Look Back at the Campaigners," (March 6, 2005) at http://www.pewinternet.org/pdfs/ Cornfield_commentary.pdf, *see also* L. Rainie, "The Internet and Campaign 2004," (March 6, 2005) at http://www.pewinternet.org/pdfs/PIP_2004_Campaign.pdfhttp://www.pewinternet.org/ pdfs/PIP_2004_Campaign.pdf (noting that 2004

That is why when talking about regulation of political activity on the Internet it is important to keep in mind that the campaign finance laws deal with the source, amounts and disclosure of money used to influence Federal elections. While the subject of this hearing is "the regulation of political speech over the Internet," it could just as accurately be described as "the regulation and disclosure of the use of large aggregations of wealth to pay for efforts over the Internet to influence Federal elections."

In this formulation lies a fundamental irony that runs through the debate about the use of the Internet in political campaigns. Those arguing for the Internet to be totally exempt from campaign finance laws talk in terms of how the Internet empowers those without resources to have a voice in the political debate. That is true. But what we are really talking about when discussing the application of the campaign finance laws is the ability of those *with* access to large aggregations of wealth to use that money to influence elections. Exempting the Internet from all campaign finance regulation will make little difference to the average person sitting at a computer, whether it is in their home, the public library or a college dorm. The unique nature of the Internet makes it possible for the campaign finance laws to be interpreted and applied in a manner that leaves the college student, the steel worker, the stay at home parent or the farmer unencumbered when he or she goes on a Web blog to argue politics or tout the merits of the candidates or political parties.

"was a breakout year for the role of the internet in politics." *Id.* at 1). A report published in August, 2004 by the media research firm PQ Media concludes that "Of all nine advertising and marketing communications segments, spending on Internet advertising has seen the fastest growth since 2000, up an estimated 853.8%...." P.Q. Media, "Political Media Buying 2004" (August 2004) at 5, at http://www.pqmedia.com/pmb2004-es.pdf. A story about this study quotes the President of PQ Media as stating, "Eight years ago the Internet was a national medium that wasn't used in the political process. Now it's a vehicle that's used to raise large amounts of campaign money and is being used by candidates to reach niche audiences on a national and local level." A. Gonsalves, "Internet Posts Fastest Growth In Political Spending," TechWeb.com (Aug. 19, 2004), at http://www. techweb.com/wire/30000087

For a small sampling of other pertinent articles and reports describing the continued growth in political spending on the Internet, *see also,* E-Voter Institute, *E-Voter 2002 Study Reveals Internet Use in Senate Races,* (Nov. 13, 2002), at http://www.e-voterinstitute.com/public/rel-search.php?action=list (analysis of 2002 state and local races "that used Internet advertising and email blasts to get attendance at rallies, solicit last minute contributions, and get out the vote"); Jonathan Roos, *Internet top tool for candidates*, (Nov. 17, 2003), at http://www.dmregister.com/news/stories/c4789004/ 22779230.html; Cliff Sloan, *Political Ads + Internet = A Good Fit*, (Jan. 2, 2004), *available at* http://www.newsday.com/news/ opinion/ny-vpslo023608369jan02,0,5803906.story?coll=ny-viewpoints-headlines ("All indications are that as the 2004 presidential race gets under way in earnest we will see an explosion of paid political advertising online."); Alexis Rice, *Campaigns Online: The Profound Impact of the Internet, Blogs, and E-Technologies in Presidential Political Campaigning*, (Jan. 2004), *available at* http://www.campaigns online.org/reports/online.pdf; Dana Milbank, *Curtain Goes Up on Glass-House Attack,* THE WASHINGTON POST, Feb. 15, 2004, at A-4 (Bush-Cheney reelection campaign sent an e-mail to 6 million people with an Internet advertisement attacking Sen. John F. Kerry); *see also* Bob Tedeschi, *E-Commerce Report: Your Web surfing is being interrupted to bring you a paid video commercial. Advertisers think you will stick around,* THE NEW YORK TIMES, Jan. 19, 2004, at C-7 (new ad technology and high-speed connections now allow TV ads to be run on Web pages, evading pop-up blockers).

In contrast, what the opponents of applying any of the limits, prohibitions and disclosure requirements of the laws to the Internet really are arguing for is allowing wealthy corporations, labor unions and individuals to spend large sums of money, often in coordination with candidates and political parties, to produce expensive ad campaigns over the Internet. This discussion is not about the average blogger; it is about opening another soft money loophole.

The Federal election campaign finance laws already contain several exemptions that provide safe harbors for everyday political discourse on the Internet, and these provisions can be further refined, if necessary. Most notably, since the campaign finance laws regulate the money in campaigns, activities undertaken at no real expense or that provide no commercial value fall outside those laws. Since one of the central virtues of the Internet so often cited is that so much can be done at little or no cost, this would seem to answer many of the objections. In addition, the law already has a "volunteer exemption" that broadly leaves individuals free to work to support the candidate of their choice, whether it is by handing out leaflets or posting their views on a blog. And this activity can be done in coordination with a campaign or a political party.

Then there is the press exemption. Here, the issue has become a little more complex with the development of the Internet. Since the enactment of FECA, there has been an exemption from the definition of "expenditure" for any "news story, commentary, or editorial" distributed by "any broadcasting station, newspaper, magazine, or other periodical publication...." 2 U.S.C. § 431(9)(B)(i). The Commission's longstanding regulation has implemented this provision by excluding from "expenditure":

> Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication....
> 11 C.F.R. § 100.132 (emphasis added).

Of course, at one time we thought we had a pretty good idea of who was part of the "press." In 1990, the Supreme Court said, "[M]edia corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public....A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 667-8 (1990); *see also McConnell,* 540 U.S. at 208.

But some of those distinctions may need refining. The Internet now serves as the pipeline for online versions of traditional off-line media, such as the New York Times or Fox News, as well as media that exist only on the Internet, such as Slate.com or the Drudge Report. At the same time, traditional news organizations are turning to people in the street with cell phones and digital cameras to provide breaking news and some

bloggers are reporting items they say the institutional press has missed or ignored. Thus, it is no surprise that some are challenging the very definition of the "press" and "journalist." Do they include anyone who can write or publish on the Internet? Do they include bloggers who are paid by political candidates for the express purpose of writing favorable stories?

Our concept of journalism as a profession may be evolving. If it is, the ramifications go beyond campaign finance laws' application to the Internet and may impact such issues as the application of press shield laws and the existence of a reporter's privilege. Exempting the Internet from campaign finance regulation will not address these broader issues; nor will deciding that everyone with the ability to blog is entitled to the press exemption. Moreover, any serious discussion of these issues should involve those from the traditional press.

Each time a new technology takes hold and reshapes the world around us there is a need to examine both what has changed and what has stayed the same. There is no doubt the Internet is changing the nature of how we conduct political campaigns and opening up new avenues for people to become politically engaged. At the same time, it also has the potential for quickly becoming another avenue for the use of undisclosed soft money to finance expensive political advertising by candidates, political parties, corporations, labor unions and wealthy individuals seeking to elect and defeat Federal candidates. There is no reason why the campaign finance laws cannot protect and encourage the new avenues for citizen participation, while addressing the real and apparent corruption that Congress and the Courts have long recognized comes from the political influence of large aggregations of wealth.

Thank you for this opportunity to testify and I will be glad to try to answer any questions you may have.

The CHAIRMAN. Thank you.
Mr. Sandstrom.

STATEMENT OF KARL SANDSTROM

Mr. SANDSTROM. Thank you, Mr. Chairman, members of the committee. When you are the last witness on the last panel you are reminded of what Congressman Udall once said, everything has been said but not everybody has said it.

So I will try to say something a little different and I may start with something that the aging regulator and the New York Times might find fairly shocking. I believe that the Internet is entitled to greater protection than the traditional media, and I think that previous panel is a good example why. The previous panel of bloggers didn't get their job from Rupert Murdoch or the Sulzberger family. They are not employees of NBC or Disney.

The traditional media is concentrated power. The Internet is dispersed power. The traditional media has high entry costs. The Internet has low entry costs. These differences make a difference, and the Internet should be treated differently because of the wonderful role it has played in democratizing our politics.

You know, I have heard some nonsense here today. But nonsense sometimes dressed up in legal analysis is no more than a clown in a bow tie. For example, I have heard that somehow there was a complete exemption for the Internet put into the Commission's regulations. In many ways I am for a broader exemption, but that was never the case. For example, a labor union could not pay for a candidate's Internet ads. That is not permissible under the current law. It is not permissible because 441(b) prohibits it.

All there was was an exemption from the definition of public communication. Yard signs are exempt from public communication. But not a single member on this committee would ever go to a corporation in their district and say purchase yards signs for me because they are not a public communication, and you can use your corporate money for that purpose.

That just is not the case. That is not the law. And no amount of obfuscation can make it the law. 441(b) is a ban on using corporate and union funds in connection with an election, the purchase of ad space that is expressly advocates election or defeat if a candidate clearly falls within that prohibition.

Now, this committee and the Commission will fund most of its efforts—if it chooses to go down this wrong path—to regulate the Internet will be a failure because it can't quite get a hold on what they are regulating. Are they regulating a library? Are they regulating what books you can go to and check out at Google? Is Google a media entity? If Google is a media entity, why would a blogger not be a media entity? But a blogger is just someone using a particular type of software. Why isn't my 14-year-old son a media entity since he is capable of putting up a Web page?

Don't think of it as a media entity because it is not. It is not the Fourth Estate. It is the Fifth Estate. It is a new power center, and you have to grapple with that power center. Yes, people will lie on that power center. They will slander and they will defame and sometimes it will be difficult to find them, and that is going to make your lives more difficult.

But let's just—for instance when people are afraid of all this undisclosed soft money that may be used over the Internet to promote, support or attack or oppose a candidate, that is an interesting perspective. Given that two of the three groups, I visited their Web sites this morning. Two of the three groups who took that regulation to court to challenge it have on their Web sites very interesting materials about Members of Congress. Remember we are using undisclosed money. I find that two of these groups—I have to put in the record—make some very critical comments of members of this committee by name, distribute this to the press, make it as widely available to anyone who has access to a computer, which is more and more every one of us.

The other thing I would like to point out is how difficult your task is going to be. Right here I click that on, this is where you want to place disclaimers? That is CNN. If I put a, you know, banner ad on that, tell me how big that banner ad is going to appear on that screen.

And don't forget that almost everything I get on the Internet is something that I as an individual citizen went out to retrieve. I sought the information. And maybe not information you want me to hear because it is critical of you, but I am the one as an individual citizen. And if I want to give it to my neighbor and my neighbor is across the country, in that virtual community that has been created I should have that ability.

And so I think most of what you see here today and those who say that the Commission went too far, the problem with the Commission, is it didn't go far enough.

[The statement of Mr. Sandstrom follows:]

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TESTIMONY OF KARL J. SANDSTROM
ON REGULATING POLITICAL USE OF THE INTERNET
BEFORE THE COMMITTEE ON HOUSE ADMINISTRATION
UNITED STATES HOUSE OF REPRESENTATIVES

SEPTEMBER 22, 2005

Is the Internet more like a library, a broadcast studio, the post office or a family den? Is Google a card catalogue with recommendations? Is Mike Krempasky George Will without the bowtie? Is Slate the New York Times without the ink? Is spam merely junk mail without postage? The point of these questions is that the Internet defies easy categorization. As a result, it resists regulation.

When I arrived in 1998, the prevailing view on the Federal Election Commission was that there was nothing of importance that distinguished the Internet from the more traditional forms of communications. The consensus on the Commission was a few tweaks of the regulations and a couple well crafted Advisory Opinions and the Internet would surrender to government regulation. Government

was in the saddle and the Internet could be tamed. The Commission soon discovered that breaking this bronco was no mean feat. Each time that the Commission tried to harness the Internet it failed. Advisory opinions were discarded. Rulemakings stalled. Investigations foundered.

To the credit of the Commission, it has learned from its false starts. As the committee will discover in these hearings, the dominant view of the Commission is no longer to impose new regulation on the Internet. In fact, a majority of the Commission is intent on freeing the Internet from cumbersome and unnecessary regulation. In no area is this emerging consensus more evident than in its efforts to free bloggers from Commission oversight. I may disagree with the ways that the Commission proposes to achieve the result, but I do no quarrel with the goal. Similarly I applaud the members of Congress who seek the same result legislatively.

The problem with the regulatory and legislative proposals that I have seen is that they tend to be half measures. One proposal will address the regulation of bloggers. Another will address coordination with candidates. Still another will address the use of e-mail. Combine these well intentioned proposals and suddenly you have extensive regulation which requires a law degree to navigate. The flaw in this approach is that it accepts regulation as the norm. I would argue that on the

Internet freedom should be the norm and any regulation must be narrow and well justified. I think that the courts will concur in that judgment.

In a seminal case, ACLU v. Reno, the Supreme Court described the Internet as the "most participatory form of mass speech yet developed." It accorded the Internet "the highest protection from governmental intrusion." In no sphere of civic participation is that protection more justified than in the political arena. One needs to look no further than last year's election to appreciate the positive force that the Internet is playing in our nation's public life. Using the Internet, people participated in politics in unprecedented numbers. Voters organized. Citizens debated. The convinced contributed. Even the most cynical observers could not deny that the Internet was transforming American politics for the better.

Experience is teaching us all that the underlying premises of campaign finance regulation simply do not hold on the Internet. A core justification for regulation is the widely acknowledged link between money and influence in politics. On the Internet the link is broken. Influence over the Internet is more a product of persuasiveness and allegiance than money. Recent elections attest to this fact. There has been little, if any correlation, between a strong presence on the Internet and a candidate's or committee's beginning cash on hand. On the Internet the well-heeled have not been

able to crowd out the merely inspired. The capacity of the Internet to level the political playing field has truly been remarkable.

The fact that the Internet is largely unregulated promotes parity. Because the risks have been low, political participation over the Internet has prospered. Low compliance costs have allowed ordinary citizens to participate on the same footing as well funded special interests. Prior to the advent of the Internet, political organizing was increasingly the province of the well paid professionals. Thanks to the Internet there is a renewed place in our nation's political life for the highly motivated citizen activist. Nothing stands to arrest this healthy trend more than the imposition of ill-considered regulation.

For example, one proposed regulation would require the Commission to police unsolicited e-mail. To enforce the rule the Commission would regularly need to determine whether the e-mails sent were substantially similar, were unsolicited, were to addresses purchased from a third party and exceeded 500 in number. The rule is so narrow that it can be easily circumvented. At the same any investigation prompted by a complaint will necessarily be intrusive and chilling. The proposed regulation accomplishes little but inserts government regulation into a medium where the freedom of expression is being most fully realized. Under this seemingly

uncontroversial proposal, one can easily imagine the Commission finding it necessary to investigate e-mails sent from the dorm room of a politically active undergraduate.

A fundamental flaw of many of the proposals is that they fail to recognize that the Internet is truly a revolutionary medium. It requires judges, legislators and citizens generally to rethink and to discard outmoded political and social models. When it comes to the Internet, old categories do not apply. For example, before the Internet it was relatively easy to say who was a member of the press. The House press gallery knew to whom to issue a pass. No longer is that the case. The Commission faces a similar quandary in deciding which websites qualify for the press exemption.

At the Commission, there is no question that the New York Time's Web edition qualifies for the press exemption. Extending the press exemption to Internet publications such as Salon or Slate would be uncontroversial. Trouble begins when the Commission must consider whether portals like AOL or search engines like Google are press entities. The problem becomes insurmountable when the Commission grapples with blogs.

As noted earlier, the Commission appears intent on extending the press exemption to blogs. There is no justification, however, for according a blogger greater protection than an operator of a website maintained with different software.

Nor is there any satisfactory test to distinguish between bloggers. Consequently, the Commission should abandon its efforts to identify criteria for credentialing some bloggers, but not others, as members of the Fourth Estate. Such efforts are doomed. The Commission would be better off if it recognized that the Internet occupies a new position in society-- equally as important but different from the press. The rights and protections accorded to its users should be commensurate with its emerging importance in democratizing our politics.

Some may argue that the Commission is constrained by its governing statute in achieving this goal. There is some truth to that contention but less than one might think. Regulation of political use of the Internet turns for the most part on valuing particular activity. The Commission has the power to determine how Internet activity shall be valued. Exercising this power, the Commission could value a person's own use of the Internet at the zero. The Commission could do so by exempting the costs of establishing, operating and maintaining a website and the cost of e-mail from the definition of contribution and expenditure. By assigning no monetary value to a person's own use of the Internet, the Commission would be treating all users alike and would recognize the innate equality of the medium.

Taking this approach has added benefits. It would allow people full use of the Internet to engage in politics without fear that their activity would trigger any

registration or reporting obligation. This exemption would reflect the open access and low entry costs that characterize Internet speech. At the same time, it would leave unaffected payments made for banner ads or other forms of Internet advertising on other people's websites. It would rescue the Commission from the difficult and ultimately futile task of making distinctions between Internet users based on outdated criteria.

The Internet is freeing the electorate from historic, economic and social constraints on political participation. It is achieving this without government assistance or direction. Left to develop on its own the Internet can flourish as a public forum where the force of one's argument counts more than the size of one's pocketbook. Congress and the Commission should provide the space for the Internet to realize its democratic promise. Each should reject the opportunity to become a zoning board of cyberspace and should leave the Internet to function as an open political space where all are invited and all are to be heard.

The CHAIRMAN. Thank you, all three, for your testimony.

There has been a lot of discussion about the media exemption, and it goes back to something all three of you said maybe in different directions or maybe you all feel differently about it, but it is well established and I think generally accepted by pretty much everyone that the friends of the media can say whatever they want about politics and campaigns and spend as much as they want to in doing so. And they don't have to worry about getting a knock at their door from the FEC, no matter who owns it—Disney or whoever. They will never be asked to explain why they chose to write something—whether they have relatives that lobby. Relatives get mad at Members of Congress, next thing you know a reporter does an article. You know we can all make up or talk about a lot of real life things that go on. So they will never be asked to say why they, in fact, wrote something because it was a relative that prompted them into doing it.

So there are a lot of issues in play. Now, when you look at that, and again we don't have the FEC looking at them, so what would make the internet any different that we should start saying, "Well, the person that started that blog is related to somebody, and they, you know, received money from a union or corporation." I think you understand my point.

What makes a second tier that we start to regulate the Internet?

Mr. NOBLE. Mr. Chairman, if I may start, first of all, I think it is more accurate to say that the media or the press is not regulated when they are acting in their press function. And the courts have said this. And the classic example used was that the New York Times can editorialize and say vote for John Kerry. It cannot take out an ad on TV that says vote for John Kerry, and it cannot take out a billboard that says vote for John Kerry. It has to be acting in its media function.

Also, they can't be owned or controlled by a political party. So there are limits on the media. And likewise when they talk about—we have heard a lot about NBC is owned by General Electric and all the companies that own media. General Electric doesn't get the media exemption for its other activities. NBC gets the media exemption. So I just want to say we are talking about them being functionally working as the media.

When you are talking about the Internet, there is no doubt that there are a lot of Internet entities that fall into the media exemption. Some of them have offline newspapers, obviously New York Times is on the Internet now. Some exist only on the Internet such as Slate.

The question that keeps coming up is bloggers, and I think bloggers really present a different issue. There are some bloggers who probably fall within the media exemption. But there also are a number of bloggers I think who do not fall into the media exemption. But more importantly you don't need to reach that because they are not related to this individual activity. They are not regulated because there is no money being spent on it.

Mr. SANDSTROM. But that is just not the case. We have heard there is money being spent on blogs. And if the Daily Kos wants to give me a regular piece on its site for nothing, a regular ad, I will probably accept it. Others have to pay for it.

So it isn't the case. There are many different business models for blogs. And I will show you how even what a traditional category—we talked a lot about advertising. But what is advertising on the Internet? Is a sponsorship of a Web site advertising? If I like what one of the former bloggers is saying, if I send him a gift, is that advertising? Sponsorship? Is that something that is now subject to regulation and may transform the degree that they are going to be regulated? And when is a blogger acting in his blogger capacity?

The CHAIRMAN. We are not regulating the blogs.

Mr. SANDSTROM. But what is a blog? It is a particular type of software. So I am opposed to essentially regulating almost anything that occurs on the Internet. One, it is a futile effort. And two, it undermines the most democratizing technology that has come along, more democratizing than television or radio, and maybe even more so than the telephone.

Mr. SMITH. Perhaps I can add, as Commissioner Sandstrom says, there is a very low monetary threshold in the law. In fact, small amounts are spent. Many blogs now, many Web sites again, I kind of use blog generically for whatever is developing on the Web in the context of this debate. But many blogs now ask people for some kind of contributions: Please contribute to help me do this, find the time to pay for some space on the Web, and so on. Andrewsullivan.com has such a link. Steve Bainbridge, who runs a pretty popular blog called Professor Bainbridge, does that.

Now if these guys collect over a thousand dollars from these people through the PayPal accounts, do they become political committees? They are spending over a thousand dollars. They engage in expressly advocating the election or defeat of candidates. And it would seem that they are political committees.

So I just don't buy this notion that there is—you know, don't worry about it, don't worry about it. I will feel more comfortable when people are specific about what not to worry about.

Again it seems like we hear two sides of things. Whenever we are in a public forum where the press might be there we hear a lot of soothing words about how no one wants to regulate the Internet, and then we get comments to the FEC saying, "well, that's a mistake when you only go after paid advertising, that is a mistake." We get soothing words in the press release and then we get the brief that just goes into court and isn't going to be seen by most people that describes the Internet, deregulated Internet as, "a poison pill," "a loophole," "a step backwards," "anti-reform," "the favored conduit for special interests that undermines BCRA's aims," an avenue that opens—"a medium that opens an avenue for rampant circumvention for all of BCRA's central provisions."

We sort of are hearing two things. When we had the hearing at the Commission, three of the groups that lobby for more regulation, including Mr. Noble's, made a suggestion to us that we consider exempting the first $25,000 that you spend. I did not ask this question to Mr. Noble. I did ask it of the counsels for the other two groups that appeared before us. "Do you think we actually had the authority to do that?" And both of them said, "well, no, we don't."

So they are telling us you can do this. It makes them appear very moderate and laid back. And then I asked one of those two, "Well, if we did do this, would you promise not to sue us?" And he

pointedly refused to promise not to sue us if we did pass the regulation that he was recommending we consider passing.

So there are some real issues here, and I think that I agree entirely with Commissioner Sandstrom's point. I think he has put it out very well. But it is a mistake to say the Internet is already unregulated. That is not true. It is a mistake to say that if Pence-Wynn is passed it will be unregulated. And when we hear all the soothing words, just for me, you will have to make your judgment, but I find myself feeling rather suspicious.

Mr. NOBLE. If I may respond to that, I think Mr. Smith is painting with a rather broad brush and ignoring a lot of very well stated distinctions that were drawn over time. First of all, we do think you need to be specific and we think the FEC needs to be specific, and we have talked about specifics.

With regard to the paid advertising issue, I believe that was in the context of saying that if you go only on paid advertising, State party committees who don't pay for their own advertising on their own Web site are going to be able to use soft money for advertising on their Web site.

The $25,000 issue is an important one. There is a question of whether there should be a threshold to allow use of Adobe software on your own Web site, to spend a lot of money on your own Web site to put up your own material. And we said, yes, and a $25,000 threshold may be appropriate. And we also said that the FEC may not have the authority to do that. And maybe they should go to Congress to do that.

And we are not saying that the whole Internet should be regulated. What we are saying is that the spending of coordinated money on the Internet in certain circumstances should be regulated. We acknowledge that a lot should not be regulated and a lot naturally will not be regulated.

So I don't think this is painting with a broad brush. There are two sides. One group says regulate everybody on the Internet, break into everybody's home and see if they are on the computer, and the other side wants total freedom from regulation. I don't think that is really accurate. I think there are more nuanced approaches than that.

The CHAIRMAN. The bells are ringing, so we have five minutes for each of the members.

Ms. LOFGREN. I will be very quick. I think as someone who has always resisted the heavy hand of government on the Internet this has been a very useful hearing and of course it is correct the ordinary laws still do apply. The libel laws still work if it is online, and copyright laws are enforced and antitrust laws still exist. But the issue is you don't single out the Internet for special types of treatment.

And as I have listened to all the witnesses it has become clear to me that we would just be opening up—this is a mess to try and do that. The one question that remains in my mind—and I am not suggesting that we should do this—but I would like people to think about it and maybe even jot some notes to me after the hearing—is whether a distinction should be made between publicly traded—for example, a Google that is in my district, it is publicly traded. They have a different relationship to the online world than the

Daily Kos. I am not suggesting that that should be a subject of regulation. But I am just wondering what your thoughts are on it.

Mr. SANDSTROM. My thoughts are that Google and Yahoo are a greater threat right now to freedom on the Internet than the government is, and I think Yahoo's activities in China demonstrate that. I think they are driven by profit, and that is fine. That is how they succeed. That is how they employ many people in your district. But they are—with respect to—because they are the creators of the architecture that allows, you know, the suppression of speech in some of these countries I think worldwide, they pose a greater threat than anything the FEC—

Ms. LOFGREN. For example, if Google wanted to, and they never would do this, they could make sure that all traffic that Google flows through a particular site, and if you type in Republicans it goes to the DNC instead. Should that be or should it not be the subject of inquiry?

Mr. SANDSTROM. If they started doing it then certainly it should be because, like I say, they are the greater threat.

Mr. NOBLE. I would agree that if something like that happened there may be a need for inquiry. But a lot has been raised about bloggers who incorporate for liability purposes and whether they would fall under the general corporate prohibitions.

Ms. LOFGREN. They are not publicly traded.

Mr. NOBLE. They are not publicly traded and they are really corporations for very limited purposes. Most of them say they are not profit making, though maybe they would like to be. But I think the Congress could very well come up with a equivalent of what is called the NCFL exemption in the law right now, that the Supreme Court added, which is to say there is a certain class of corporations that are—or a certain class of blogs that are incorporated for liability purposes only that don't fall under the corporate rules.

Ms. LOFGREN. Maybe just those are subject to SEC jurisdiction. I am just thinking out loud.

Mr. SMITH. I would just say, Congresswoman, I think you raised a good issue. As Commissioner Sandstrom says, if that was to happen it might be regulatable and there are a number of different statutes I would suppose.

The point I would make is that if we don't extend the press exemption broadly, we are oddly enough in a situation where the scenario where you say who could be protected under the press exemption, because who is going to get it? The Washington Post and the New York Times Web sites clearly get it. Probably Slate and Salon. Well, Yahoo's Web site looks an awful look like an newspaper, too. So they would be much more likely to spend the resources and have it look clearly like a newspaper and get the press exemption than would Duncan Black. That is the question. Do we want to extend the press exemption to Duncan Black? And that is the question that the reform community doesn't want to answer. And I think they don't want to answer that because I think their answer is no.

Ms. LOFGREN. Which I disagree with, and I am wondering is there a limit or is there not? Given that, that is the second bell, I will yield back and let Mr. Ehlers——

The CHAIRMAN. I want to thank the gentlelady. The gentleman from Michigan.

Mr. EHLERS. Thank you, Mr. Chairman. I will be very brief. I have no questions. I just want to say it has been very enlightening hearing the discussion and I am very pleased with the panels you have put together. I found some issues have been clarified my for me, others have confused me, which is probably appropriate.

It is a very complex issue. You have certainly given us things to think about, and I went to thank you for being here.

With that, I will yield back my time.

The CHAIRMAN. I want to thank the Members, staff of the ranking member and our majority staff, and the witnesses of all three panels. I think it is a baffling issue in the sense everybody gets a little confused, but I think it is a very important issue.

And with that again, I want to thank all witnesses. I ask unanimous consent that Members and witnesses have 7 legislative days to submit material for the record, that those statements and materials be entered in the appropriate place in the record. Without objection, material will be added.

I also ask unanimous consent the staff be authorized to make technical and conforming changes in all matters considered by the Committee of today's hearing. Without objection, so ordered.

And we have completed our business for the hearing. Thank you.

[Whereupon, at 11:35 p.m., the committee was adjourned.]

[Addtional statements for the record follow:]

SUBMITTED VIA ELECTRONIC MAIL
IN PDF FORMAT

COMMENT

TO:	Brad C. Deutsch, Associate General Counsel, Federal Election Commission
FROM:	Duncan Black, Markos Moulitsas Zúniga and Matt Stoller*
DATE:	June 3, 2005
RE:	*Notice of Proposed Rulemaking*: The Internet: Definitions of "Public Communication" and "Generic Campaign Activity" and Disclaimers

The 2004 election cycle showed the revolutionary role which individual citizens can play in the election process through the Internet, from breaking important news stories to grassroots organizing to fundraising drives on behalf of candidates. As bloggers, we have devoted thousands of hours over the past few years as online advocates, reporters and fundraisers, and we are deeply concerned about the regulatory proposals currently before the Federal Election Commission.

We are troubled by much of what we see in the proposed regulations. As we understood Judge Kollar-Kotelly's opinion in Shays v. FEC, the concern was that the absence of regulations concerning coordinated expenditures on the Internet created a potential for "gross abuse", thus undermining Congressional intent in passing the BCRA. However, it appears to us that the FEC has taken that narrow concern and exploded it into a mandate to regulate all aspects of political activity on the Internet. The Notice of Proposed Rulemaking now makes possible everything from making group weblogs into regulated "political committees", to potentially imposing a "blogger code of ethics" with disclosure and disclaimer requirements enforceable by law (requirements otherwise unheard of for any other independent actor who deals with political campaigns), to intruding into the workplace to tell readers how much time they can spend participating in online political discussion groups.

We believe that Judge Kollar-Kotelly's order only requires the FEC to engage in rulemaking to prevent candidates and parties from improperly coordinating with outside groups regarding Internet communications, just as is the case in other media. The FEC should go no further. Until true harms are demonstrated, the FEC should allow the unique free market of ideas that is the Internet to regulate itself. No such harms manifested in the 2004 election cycle. Unlike every other medium which the FEC regulates, there is no mechanism by which entities can use wealth or organizational strength to crowd out or silence other speakers, thus negating a

* We wish to thank all the users of our websites whose research and insights have contributed to this document. This was truly a collaborative effort, and we are grateful for and humbled by your support.

fundamental premise of many of the regulations proposed here.[1] Democracy is being fulfilled here, and this experiment should not be disrupted without due cause.

To the extent that the FEC is compelled to act in any other area regarding political activity on the Internet, we believe that two principles should guide the Commission: **equality and clarity**. By **equality**, we mean that individuals, PACs and candidates operating on the Internet should be treated no more harshly than they would be in any other medium. Indeed, the nature of the technology (low cost of entry, no scarcity of space due to unlimited bandwidth) is such that less regulation than other media will often be justified, but certainly never more.

By **clarity**, we insist that because of the low cost of entry and the ability of unsophisticated parties to easily enter the political sphere through the Internet, any regulations should make unmistakable any obligations or restrictions on ordinary citizen use of the media. These regulations should be invisible to the overwhelming number of amateur Internet bloggers and diarists, with impact only on those parties engaged in the kind of financial transactions such that they can reasonably be expected to be knowledgeable of the law. Even for those parties, these rules should be made clear in advance, so that there is no omnipresent worry about a citizen complaint being filed by partisans of the opposite side for acts not covered in these regulations.

Each of us is interested in to traveling to Washington D.C. to testify before the FEC regarding these matters. Please contact our attorney, Adam C. Bonin of Cozen O'Connor to discuss our testimony. He can be reached via email at abonin@cozen.com, via phone at 215.665.2051, or via traditional mail at 1900 Market Street, Philadelphia, PA 19103.

With these general thoughts in mind, we briefly state the background behind our interest in these matters before moving on to specific commentary on portions of the NPRM.

Interests Of The Parties

Duncan Black founded the weblog Eschaton (http://atrios.blogspot.com) in April 2002. The website covers politics, current events, economics and cultural issues. Posting under the pseudonym "Atrios", his website averaged 1-3 million viewings per month during the 2004 campaign. During the 2004 campaign, the website engaged in fundraising drives on behalf of a number of federal candidates, including Joe Hoeffel, John Kerry, Ginny Schrader, and Richard Morrison. The website allows anonymous and pseudonymous commenting by visitors as well. During the 2004 campaign and afterwards, Eschaton has accepted paid advertising from federal campaigns, charging fair market rates as determined via BlogAds.com.

Markos Moulitsas Zúniga started DailyKos (http://www.dailykos.com) three years ago. Focusing exclusively on Democratic and progressive politics, the website averages twelve

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[1] As Justice Jackson recognized a half a century ago, "The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself...." Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). See also City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 496 (1974) ("Different communications media are treated differently for First Amendment purposes.") (Blackmun, J., concurring).

million visits per month. The website allows registered users to provide comments and post their own news stories pseudonymously. The website, which is a wholly owned part of Kos Media, LLC, raised a significant sum of money on behalf of its "Kos Dozen" list of candidates by directing readers towards preferred candidates' websites. During the 2004 Presidential campaign, Moulitsas served briefly as a paid consultant on technical issues to the Howard Dean campaign, a fact disclosed prominently on the website's main page. DailyKos has accepted paid advertising from federal campaigns and other vendors, charging fair market rates as determined via BlogAds.com. While Moulitsas is not currently consulting, he has reserved the right to work for federal campaigns while continuing his independent blogging.

Matt Stoller is one of several bloggers behind The Blogging of the President (http://www.bopnews.com), a website devoted to covering the national politics and the ways in which coverage has been affected by contemporary technology. Stoller has recently been hired by the Corzine for Governor campaign, leading to concerns regarding his ability to blog independently on federal candidates during his employment under the new regulations. During the 2004 campaign and afterwards, BOPnews has accepted paid advertising from federal campaigns, charging fair market rates as determined via BlogAds.com.

What We Do:

To help you understand why most regulation of political activity on the Internet would be misguided, it is first important that the Commission understand how individuals use the Internet at present for political activities. Among the activities we have participated in and observed are:

- Individuals posting **commentary regarding federal candidates and parties on their own websites** or ones operated by groups of like-minded individuals, either in their own names or under pseudonyms
- Individuals posting **comments and "diaries" regarding federal candidates and parties on websites owned by other individuals**, either in their own names, under pseudonyms or anonymously
- Individuals and groups **creating videos, advertisements and other audiovisual tools** both independently from and/or encouraged by candidates and parties to promote federal candidates and parties
- Individuals and groups **fundraising** on behalf of federal candidates and parties through pledge drives, where viewers are encouraged to visit the candidate or party website and directly contribute money
- Individuals **promoting or republishing candidate-authored materials**, or creating their own printable materials, on their own websites and on websites owned by others
- **Chats**, live discussions and threaded discussions between individuals and candidates (or their representatives)
- **Advertising** by candidates, parties and PACs on the above websites

- Individuals **providing links** from their own websites (or other people's websites) to any and all of the above, including websites controlled by federal candidates, parties and PACs
- Individuals **using email** to promote candidates, parties, PACs and other electioneering organizations.
- Individuals using email and websites, whether their own or those owned by other individuals or entities (such as Meetup.com), to **organize grassroots political activities** on behalf of federal candidates, parties and PACs.

All of this, mind you, is 2004-specific. No one knows what technologies will come of age and become widespread for the 2006 cycle, let alone 2020.

Anonymity, Futility, and the Problem of Enforcement

The architecture of the Internet is such that enforcement of regulations on all of the proposed areas might be quite difficult, even futile, and the FEC should be aware of the ways in which certain of its efforts might be evaded. Almost all of these proposed regulations have the potential to drive bloggers "underground" in order to avoid potential complaints. Unlike other media, the Internet allows for unprecedented levels of anonymity, in a way largely impossible to track down to an individual – especially not within the time it would take to rectify campaign abuses in any meaningful way.

Cost-free blogging tools allow anyone to blog in complete anonymity, as both Black and Moulitsas did when they first began. More sophisticated sites can be set up in overseas servers beyond the jurisdiction of U.S. law enforcement. Free email addresses can be set up via services such as Hotmail, Yahoo or Google to enable communication without surrendering one's identity or location. Nor need one's identity be revealed to have credence in this world: given that the blogosphere is a near-meritocracy, people's work is judged by the content of their writing and not their real-world characteristics. All three of us interact daily with fellow bloggers whose actual names, ages, occupations and locations are a complete mystery.

In an over-regulated environment, bloggers would be able to avoid legal headaches and expenses by either returning to (or remaining in) the realm of anonymity. The vast majority of bloggers have neither the legal expertise nor the resources to deal effectively with frivolous or partisan-motivated complaints to the FEC. Given the ease of maintaining one's identity a secret, the choice won't be a difficult one. This is especially going to be the case if any kind of FEC-related liability is attached to the postings by others on one's site, as it will be impossible for us to police every item posted.[2]

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[2] DailyKos.com, for instance, hosts between 250-600 user-submitted diaries per day, generating anywhere from 4000-10,000 individual comments in response. In all, about 200,000 words are added to the site every day, only about 1000-2000 of them written by Moulitsas, or about 1% of the site's daily content.

Therefore, if a blogger plans on or fears of running afoul of the regulations – whether through nondisclosure of ties to campaigns or other means -- then there is no doubt that anonymity would provide the only technological shield needed to bypass the regulations.

As such, it will be those bloggers who post under their real names who will bear the brunt of the regulations, not those truly seeking to use the medium in nefarious ways. Given the highly charged partisan atmosphere we operate under, we have little doubt that – unless given full and clear protection from these regulations – we will someday be bombarded with multiple frivolous complaints in order to distract us from our work or outright shut us down.

In short, those who blog honestly will face the brunt of frivolous complaints, while those who seek to violate the rules can avoid any repercussions by remaining anonymous. The FEC must therefore focus its regulations on those entities which can actually be regulated – the sophisticated candidates, parties, PACs and other regulated entities which cannot hide underground.

Commentary on Proposed Regulations

From that background, we urge the Commission take the following actions:

Keep It Simple: As noted in the introduction, these regulations go much further than is necessary to comply with Judge Kollar-Kotelly's order. Her grievances stemmed from the absence of regulations regarding coordinated communications and did not reach into other substantive areas. Therefore, proposed regulations amending 11 CFR §§ 109.21 and 109.37 regarding coordinated communications are within the proper scope of the regulations, though we would further encourage the FEC to amend 11 CFR § 109.21(c) to exempt all dissemination, republication, etc., of campaign materials on the Internet generally.

We want to ensure that citizens who post comments or diaries on our sites have the freedom to include within their messages portions of or links to campaign materials, and believe that the regulations ought to make beyond peradventure their right to do so. Because the cost of republication on the Internet is essentially free, the FEC ought not be involved.

As such, even when paid campaign staffers visit independent websites to republish and provide links to official campaign materials, that behavior too should not be prohibited. Not only is such behavior cost-free, but it is likely impossible to police: Nearly all websites that allow comments and diaries permit them to be posted anonymously or pseudonymously. Even sites that require users to register cannot prevent campaign staffers from using non-official email addresses when doing so.[3] It would be impossible to bar or even track this innocuous activity, as already explained, so it is best not regulating it at all.

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[3] We have seen (or suspected) campaign staff members of doing both. Those that post under their own names attract additional attention and credibility, but they also create a risk that the campaign will be held responsible for any excesses within their posts. When staffers post anonymously, on the other hand, their posts carry none of the prestige or credibility that might otherwise flow from being official campaign outreach to the

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We recognize that the Commission has concerns regarding the use of corporate/labor facilities for political purposes, seeking to revise 11 C.F.R. § 114.9 accordingly to clarify that the prohibition on the use of corporate/labor facilities also extends to the Internet. However, the majority of our readers surf the Internet, participate on our websites and exchange email from work or at school (many universities are, of course, incorporated). So the proposed one-hour-per-week, four-hours-per-months regulations, if strictly enforced, would basically serve to limit adult participation in political activity on the Internet to the unemployed and self-employed (and unincorporated).

Let us suggest a different paradigm for work-related regulations: Corporations and labor organizations ought not coerce employees and members into participating in political activity while using company resources. Rules can properly prevent them from leveraging their power over employees and members into political influence. But voluntary Internet use should be left out of the scope of these rules.

Other Regulations

Beyond that, these regulations go much further than necessary. We believe that regulations on Internet-related political activities need to remain focused on the regulated candidates, parties and PACs spending money, and not on the media sources receiving it. We therefore have several critical suggestions as to how to best proceed. In all cases, the FEC's bias needs to be towards freedom of speech and promotion of lowercase-"d" democratic activity; that regulations should only constrict freedoms where clear harms have been demonstrated; and that, otherwise, the FEC should be acting instead to formalize the leveling of the playing field which the Internet has enacted and recognize the value of the new speakers empowered by technology.

The Media Exemption: We believe that it is vital that the FEC extend the media exemption from 11 C.F.R. §§ 100.73 and 100.132 to Internet-based news and commentary. Such regulations would cement the rights of bloggers to participate equally with large corporations in the discussion of electoral issues, and to be able to incorporate themselves as a liability shield and for other legitimate protective and financial purposes.

Through the Internet, private citizens perform the same vital role of disseminator and commentator as do television, print and radio news sources – indeed, more so, as the medium allows for anyone to participate at little or no cost, creating the first truly democratic mass medium in our history. Therefore, there is no reason not to extend the same exemption to citizens engaging in discourse on the Internet. Certainly, once the exemption is extended to the online arms of offline-based entities (such as CBSNews.com or WashingtonPost.com), it is only logical to include online-only media within the scope of the exemption. Indeed, the legislative history of FECA also supports a broad reading of the media exemption:

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grassroots, but it allows them to be freer in their discourse. Still, as noted elsewhere, they have to rely on the merits of their speech to be heard, nothing else.

> [I]t is not the intent of the Congress in the present legislation to limit or burden *in any way* the first amendment freedoms of the press and of association. Thus [the media exemption] assures the *unfettered* right of the newspapers, TV networks, and other media to cover and comment on political campaigns.

H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974) (emphasis added).

We also believe that under the plain meaning of 2 U.S.C. § 431(9)(B)(i), bloggers already qualify as "periodical publications." These are websites which are regularly updated with new information, and nothing about the term "periodical" has previously required some fixed interval between publications. Furthermore, analytically, it makes sense to look at bloggers for what they are not – media entities "owned or controlled" by candidates, parties or PACs – even though, like other journalists, they may have contact with campaign staff members in order to obtain "scoops" as to what a campaign is doing. But when they are not controlled by regulated entities, bloggers are entitled to the same presumption of legitimacy and integrity.[4]

At their best, bloggers are true journalists, contacting sources, researching facts and raising public awareness of vital issues. Even at their "worst," bloggers perform the same function as talk radio hosts or opinion journalists in the print and televised media, energizing partisan supporters through humor, vitriol and innuendo. That which is allowed under the media exemption in other formats (TV, radio, print) should be equally permitted on the Internet. There is no legitimate reason to distinguish between Sean Hannity, Maureen Dowd, Bill O'Reilly and us in terms of who among us can freely speak in support of or opposition to federal candidates without incurring federal reporting obligations or contribution limits. The advocacy that bloggers engage in is certainly within the contours of the "legitimate press function" as defined by Reader's Digest Ass'n, Inc. v. FEC, 509 F. Supp. 1210 (S.D.N.Y. 1981) and FEC v. Phillips Publishing, Inc., 517 F. Supp. 1308 (D.D.C. 1981).[5]

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[4] Certainly, the revelations during the past year of "independent" journalists and opinion writers being paid by the current presidential administration should put to rest any notion that advocates in one medium are presumptively any more or less objective than those in any others.

[5] The "legitimate press function" test operates to prevent the government from investigating and harassing providers of news and commentary, while preventing corporations, labor organizations and political parties from injecting their influence into politics under a journalistic guise.

The activity of online bloggers clearly falls within the contours of the legitimate press function, which includes measures taken in furtherance of the business of selling news or commentary. Phillips Publishing, 517 F. Supp. at 1313. Unlike the disputed activity in Readers Digest and Phillips Publishing, these blogs almost exclusively traffic in online commentary, purely journalistic in nature. The typical business activities of a blog -- displaying paid campaign advertising for example -- are clearly related to its core business functions. Just as Phillips Publishing acted in its press function by soliciting potential subscribers who would purchase its content, 517 F. Supp. at 1313, a blog is acting within its legitimate press function by accepting advertisements that are of interest to its readers. Without advertisers' money, bloggers like us would be unable to devote themselves full time to their websites.

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However the media exemption is ultimately structured, clarity is crucial. We fear the passage of vague regulations creating a multifactor test determining who is eligible for the media exemption, leading to a Massachusetts Citizens for Life-type situation in which complex tests are employed to determine whether an entity qualifies and uncertainty sets in.[6] Given the number of legally unsophisticated parties engaging in political speech activities on the Internet, it is vital that bloggers and commenters are given unmistakable assurance of their right to speak freely and comment on the news of the day. All of them. Left, right, large, small, Democratic, Republican, centrist (do they exist?), if an individual wants to run or participate in a website to become engaged in the political process, she should know that it is her unfettered right to do so.

We also recognize the concern, as expressed via the comments being submitted by the Institute for Politics, Democracy and the Internet and others, that to expand the media exemption to include bloggers would diminish "the privileged status the press currently enjoys." Curiously referring to bloggers' desire to equal treatment as "demands", the IPDI portends that such an expansion would destroy campaign finance regulations and/or reporter shield laws.

Such claims are either legally irrelevant or factually invalid, and often both. Neither the First Amendment nor our federal campaign finance laws exist in order to entrench a regime in which only an elite class of speakers possessed rights to speak out on political affairs (and be paid for doing so).[7] The duties of the Federal Election Commission, according to its own website, "are to disclose campaign finance information, to enforce the provisions of the law such as the limits and prohibitions on contributions, and to oversee the public funding of Presidential elections."[8] The FEC does not exist to ensure that a particular type "privileged status" is given only to one preferred group of "serious" media members. Indeed, the FEC has long extended the media exemption beyond a selected caste of the j-school anointed to include such entities as MTV,[9] and even the National Rifle Association was allowed to broadcast "NRAnews" in 2004 without being deemed to fall outside the restriction.

Moreover, as explained throughout this document, we can no longer pretend that journalists and pundits currently operating under the media exemption are never themselves

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Nor are blogs susceptible to being utilized as a cover for disallowed expenditures as was the special edition "election newsletter" in MCFL. Blogs do not substantially change in form, even during the furor of a national political campaign.

[6] One must wonder: if the MCFL exception applies to the National Rifle Association, FEC v. National Rifle Association, 254 F.3d 173 (D.C. Cir. 2001), does it also apply to Kos Media, LLC, assuming that Kos Media's revenues are solely from advertising from regulated political entities and not from corporations?

[7] Paraphrasing Justice Holmes' famous dissent in Lochner v. New York, the 1st Amendment did not enact Ms. Katharine Graham's social circle.

[8] http://www.fec.gov/info/mssion.shtml

[9] FEC Advisory Opinion 2004-7.

activists – have the IPDI leaders listened to talk radio during the past decade-plus? Did they miss every single one of Paul Begala and James Carville's appearances as hosts on CNN's "Crossfire" during the 2004 campaign while they were simultaneously functioning as consultants to the Kerry for President campaign? [10] Have they not consulted the public records compiled at websites like OpenSecrets.org, which detail the massive personal campaign contributions made by the owners,[11] editors and journalists[12] of these sacrosanct media corporations?

It would be profoundly ironic for the interests of established media organizations, which so gleefully reported on the rise of the blogosphere and its role in democratizing politics, to themselves contribute to building an iron wall between themselves and bloggers. The Internet did not only open up politics to citizen participation in the way the Framers intended; it did so to the news media as well, returning to the days when individual pamphleteers like Thomas Paine could rally a nation. Nothing in the First Amendment, campaign finance law or the FEC's interpretation thereof suggests that the Freedom of the Press be limited to those who write without expressing opinion or passion.

Finally, because of the low costs of entry and infinite bandwidth in the Internet speech "market," the FEC can abandon within this sphere any restrictions employed in other media meant to combat excessive partisanship. Requirements on other media like giving "reasonably equal coverage" to all candidates or that equal rates be extended to all advertisers have no place in a medium defined by the infinite space it provides to all speakers. Such regulations only make sense with regards to television and radio, where market entry is costly and the avenues for expression limited.

Advertising and Control: Clearly, to avoid the regulations regarding coordinated communications, it is important that the FEC carefully define when a website is "owned or controlled" by a candidate/party/etc. All three of us, as well as countless other bloggers, have accepted and hope to continue to accept paid advertising from federal campaigns. Generally, this

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[10] This blind spot is especially odd given that "Crossfire" is broadcast from the very building at George Washington University in which the IPDI has its offices – the Media and Public Affairs Building, 805 21st St., NW, Washington, DC 20006. *See also* Howard Kurtz, "The Kitchen Sink Campaign," Washington Post online edition (9/13/04), available online at http://www.washingtonpost.com/wp-dyn/articles/A17738-2004Sep13.html .

[11] E.g., Michael Eisner, head of Disney/ABC News: $46,500 in federal contributions during the 2004 cycle; Rupert Murdoch, head of News Corp/Fox News and other media entities, $61,004 in federal contributions since 2001.

[12] One example should suffice: Katrina vanden Heuvel, editor of The Nation, has given $194,000 to federal candidates, PACs and party organizations over the years, Surely, she still is a journalist worthy of the media exemption, no? *See, generally* Howard Kurtz, "Journalists Not Loath to Donate To Politicians", Washington Post A-1 (1/18/04), available online at http://www.washingtonpost.com/ac2/wp-dyn/A26386-2004Jan17?language=printer. ("More than 100 journalists and executives at major media companies, from NBC's top executive to a Fox News anchor to reporters or editors for the Washington Post, Wall Street Journal, New York Times, USA Today, CBS and ABC, have made political contributions in recent years."). See also http://www.newsmeat.com/, or just go to http://opensecrets.org/indivs/index.asp and type in "journalist" under occupation.

advertising comes through a third-party intermediary like Google AdWords or BlogAds, and we do not deal with the campaigns directly.

We therefore urge the FEC to import its strict definition of "control" from 11 C.F.R. § 100.5(g)(4) into this realm: Where the candidate in question lacks the power to hire and fire website employees, does not control a significant percentage of the website's budget or otherwise control its activities, the independence and legitimacy of the website *must* be assumed by the law and protected under these regulations. Merely accepting advertising from campaigns does not mean that a weblog is any less independent in its editorial content, just as a newspaper's endorsements are not presumed to flow from whichever campaign advertised in it more heavily.

Corporate Form: Similarly, we seek protective regulation from the FEC to ensure that bloggers can avail themselves of the benefits of incorporation without falling into the 2 U.S.C. § 441b restrictions. It should not matter whether a website is organized by a corporation or a legal partnership or an unincorporated individual. Obviously, the FEC has run into similar issues with NRA News and the Wal-Mart/Elizabeth Dole magazine (MUR 5315) and there is a danger of corporations using the media exemption to avoid 2 U.S.C. § 441b. However, based on those examples, that risk is no greater online than it is offline. So long as the Washington Post Co.-owned Slate.com retains the exemption online, so too should Kos Media LLC-owned DailyKos.com. The FEC can deal with abuses of this exemption without denying it to those who have legitimate reasons for assuming the corporate form.

Payment to Bloggers: It should make no difference to the FEC in granting the protections of the media exemption, whether a blogger is compensated for editorial content or advertising revenues. Merely receiving payments for legitimate services from a campaign is not sufficient indicia of ownership or control.

Part of the FEC's analysis here needs to be grounded in an understanding of the way the blogosphere works. Credibility is earned over time. Some, like Andrew Sullivan or Joshua Marshall, transfer some of it through preexisting experience in print journalism, but for most bloggers, like the three of us, it has been built exclusively on the value of the news and editorial content we provide. No campaign would pay any blogger a dime if his or her website had not already developed a reliable readership based on the quality of the information provided.

Once protected under the media exemption, we believe that bloggers who receive occasional payments from campaigns would be free from the legal morass predicted by commentator Bob Bauer:

> Assume that a blogger decides, for whatever reason, to accept payment from a candidate to cover her campaign, or positions on issues, intensely, for an agreed period. Later the blogger devotes similar attention to another campaign, but this time, for reasons of friendship, passion, or reconsidered editorial policy, there is no charge. There is every reason to believe that the blogger has opened himself to a complaint that he has made an "in kind" contribution to the second candidate. 11 C.F.R. §§ 100.111(a), (e)(1). Under the relevant rules, the space provided is something of "value," an "in-kind" contribution," and the value

> would be the difference between what is charged to the first candidate and the amount charged—nothing—to the second. 11 C.F.R. §§ 100.111(e)(1)-(e)(2). If the blogger is incorporated, this contribution is illegal; and even if he is not, the contribution has to be accounted for in other ways. [13]

Providing an expansive media exemption to bloggers should eliminate that catastrophic result: None of our speech would be regarded as a "contribution", and the in-kind rules would not apply. It might also obviate the dire consequences forecast by the Online Coalition members and others in their submissions – by placing group blogs (even incorporated ones) under the media exemption, their expenditures on behalf of their website or personal contributions to candidates outside of the blog would not be used to force them to file as a formal political action committee. [We hope.]

We recognize that the FEC might feel some skittishness about allowing bloggers to be paid while simultaneously being treated as "media." This fear may stem from an assumption that bloggers are more likely to be swayed by money and become a *de facto* controlled entity. We do not believe this to be the case, primarily because of every blogger's need to maintain credibility given the diversity of competing options available of the blogosphere. In short, the free market of ideas works here: With zero cost of entry for participants (Blogger.com, the most popular blog service, is free) and zero cost for readers, citizens have unlimited options in terms of who to read and *who to trust*. Moreover, without the ability to receive paid advertising for our advocacy from those entities most desiring to reach our readers, we would no longer be able to sustain ourselves as independent voices and practice the kind of around-the-clock journalism that the Internet enables.

Instead, the "control" test under 11 CFR §109.21(d) is sufficient for these purposes: If a campaign does not have day-to-day control of a website's contents, it is an independent website worthy of the media exemption. However, if a website is constantly fed inside information by a campaign, receives the bulk of its operating revenues from that campaign and exists for no other purpose other than promote that campaign's interests and is in effect a de facto agent of the campaign, *then and only then* might the exemption be inappropriate.[14] Even so, it begs the question: *What is the harm that you are seeking to prevent?*

Whether other such payments should be disclosed is discussed later.

Fundraising By Weblogs: The NPRM does not address whether a website can engage in fundraising on behalf of candidates while maintaining the media exemption. We urge the FEC to make clear that websites can do so while retaining the exemption, and without falling under any regulations that do not apply to others who independently solicit money on behalf of campaigns.

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[13] Bob Bauer, "Harmless Surgery and Internet Politics" (4/15/05), available on the Internet at http://www.moresoftmoneyhardlaw.com/articles/20050415.cfm.

[14] Clearly, disclaimer requirements should attach to websites which are actually owned and controlled by candidates, parties and PACs. Jane Doe for U.S. Senate should not be able to create and operate Jane's-Opponent-Stinks.com without revealing the site's ownership.

The FEC has already ruled on this issue in Advisory Opinion 1980-109, which explicitly addressed the question as to whether a publication otherwise meriting the media exemption could engage in fundraising and advocacy on behalf of a federal candidate. The question there was whether The Ruff Times, a financial advisory newsletter, could endorse federal candidates and encourage its subscribers to support them financially. There, the FEC determined that so long as the publication did not act as a conduit or intermediary for the funds – in other words, the funds passed directly from the donor to the campaign – then the publication would remain covered by the exemption and the fundraising solicitation would not result in a contribution from the publication to the campaign.[15]

We believe that this holding was correct, and that these regulations must make it explicitly applicable to the Internet and other media. Surely, no one in the FEC raised an eyebrow when on December 5, 2003, syndicated columnist Charles Krauthammer wrote in his Washington Post column (and elsewhere) encouraging readers to send donations "not exceed $2,000 ($4,000 for a married couple)" to the Republican National Committee in order to oppose Gov. Howard Dean's presidential bid.[16]

Two of us (Duncan, Markos) engaged in significant fundraising during the 2004 election cycle, posting links and graphics to encourage our readers to contribute to candidates we favored. At all times, we directed people either to the campaign's (or party's) own website, or to ActBlue.com, a federal PAC lawfully aggregating pass-through online donations. At no time did we touch the money ourselves or receive any commission from the campaigns for doing so.[17] As the 2006 federal elections draw near, we would prefer clarity as soon as possible so that we understand what behavior is permitted under the exemption, and without having to request an Advisory Opinion the day after these regulations are issued.

Disclosure Of Payments To Bloggers: This is a section of the NPRM which has attracted much attention from our readers, understandably, given the recent controversies over payments made to bloggers by the John Thune for Senate campaign for blogging activities and to Markos Moulitsas and Jerome Armstrong by the Dean for America campaign for consulting services.

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[15] See, similarly, the Statement of Additional Reasons filed by Commissioner Mason in In the Matter of Robert K. Dornan, et al., MUR 4689 (2000) ("The media exemption would clearly allow a broadcaster to air a Dornan campaign rally replete with express advocacy, to bracket the broadcast with favorable commentary, to follow it with an editorial endorsing Dornan, and to cap it off with an appeal for listeners to contribute funds to Dornan. *See, e.g.*, AO 1980-109. Thus, the relationship of a broadcast to a campaign (e.g. whether it includes express advocacy or constitutes an endorsement) can have no bearing on whether the media exemption applies.")

[16] Charles Krauthammer, "The Delusional Dean", Washington Post A-31 (12/5/03), available on the Internet at http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A37125-2003Dec4&notFound=true.

[17] At most, there was communication with certain campaigns in order to develop a system for "tagging" receipts from our websites, so that we could publicize the total amount raised from our sites for the candidates during "pledge drive" periods. We similarly request clarification from the Commission that such behavior does not constitute undue coordination.

We believe that the FEC **should not** generally require bloggers to disclose payments from candidates, and that bloggers should instead be treated the same as any other vendor paid by candidates for legitimate services rendered, whether in terms of separate advertising or the provision of editorial content. Here's why:

First, we note again that such regulations would run far afield of Judge Kollar-Kotelly's mandate. The FEC has not been asked to act in this field, so until some harm is demonstrated, **please don't**.

Beyond that, we return to the principle of parallelism. Unless circumstances dictate otherwise, the Internet should be regulated no more stringently than any other medium. The fact is that all payments to bloggers are already disclosed on the "other end" of the transaction, as part of a campaign's disbursement filings, just as payments to any other vendors.[18]

Ethical bloggers already engage in voluntary disclosure. Markos disclosed his consulting relationship with the Dean campaign on the front page of his website throughout his contract while Jerome ceased blogging during his consultancy, and even one of the controversial Thune-financed bloggers acknowledged he was a paid consultant in an interview with the Sioux Falls Argus Leader in August 2004.[19] Bloggers have done so and will continue to do so voluntarily because, as stated above, credibility is their most crucial currency, and a blogger later found to have concealed such relationships will soon find himself without any readers. The free market of ideas can govern; the FEC need not.

On a factual level, it is worth noting to the Commission that most payments to bloggers come through paid advertising, not paid editorial content. Such advertising by its nature discloses its source, and there is no need to double the disclosure requirements by forcing private citizens to reveal what the campaign has done already.

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[18] Unfortunately, payments by Senate candidates are not filed electronically and are extremely difficult to parse through. Citizens who wanted to determine whether the Thune bloggers were being paid were required to read through a 3500+ page PDF document that was completely un-searchable in order to locate the entries indicating payment to the bloggers in question for "research consulting" work. It is our understanding that primary responsibility lies with the Senate Rules Committee, and not the FEC, to require electronic filing, and we strongly encourage it to do so.

Moreover, the technology that exists would certainly allow campaigns to easily file all disbursement reports within 72 hours of all disbursements made that relate to media expenditures. Such disclosure, especially in the final two months of a campaign (similar to the 48-hour rule for late contributions), would do a great service in benefiting the public's understanding of how a campaign is behaving in the public sphere.

[19] Jennifer Sanderson, "Blogging: A venue to rant, rave and review," Sioux Falls Argus-Leader (8/9/04), available on the Internet at http://www.southdakotaelections.com/Story.cfm?Type=Election&ID=2713. ("Blogs run by campaigns often are seen as less pure, so some candidates buy space on independent pages. There can be other ties, too. Lauck dissects 'Daschle v. Thune' on his blog without mentioning he's a paid consultant for Thune's campaign.")

It is our understanding that requiring the recipient of a disbursement from a campaign to make his own disclosure of the payment is absolutely unprecedented under campaign finance law. In all circumstances that we have researched, that duty lies with the federally regulated entity and not private citizens. Indeed, when we look at other media entities, there is no similar duty imposed by law:

- on a cable news show, for the host or guest to disclose all of the campaigns for which s/he is presently working;
- on talk radio, for callers or guests to disclose whether they have been paid by a campaign to call in and spout talking points; or
- in print, for writers of op-ed columns or letters to the editor to disclose when they have been paid by a campaign.

To be sure, such information about paid speech across all media would be of interest to some citizens. That, however, cannot be the end of the inquiry, because the same is true of many other campaign expenditures or contributions which are only disclosed on a quarterly basis, both with regards to the media and otherwise. There is no substantive reason why the Internet should be singled out for intrusive, compulsory disclosure requirements when parallel, more legally sophisticated outlets for expression are not, especially when there is no legal mandate that it regulate this area at all. While it would do wonders for the consultant/pundit class to have to disclose all their conflicts of interest every time they appeared in print or on radio or on TV, such disclosure is mandated by one's ethics, not the law, and no special legal obligation should be placed on speakers in this sphere which is not applicable to all media.[20]

Furthermore, there should be no disclosure requirement for non-speech activities provided to campaigns by bloggers-as-vendors. As we have seen, bloggers can be paid by campaigns for non-blogging activities as well. As was widely (and often inaccurately) reported, Mr. Moulitsas was paid by the Dean for America presidential campaign for technical consulting services regarding their web-based activities, not for speech. Such payments were fully disclosed as part of the campaign's standard disbursement practices and, based on his personal sense of his ethical obligations, by Mr. Moulitsas on the front page of his website throughout the duration of his consultancy. These regulations need not require anything in this realm.

We also would like to flag the issue of campaign staffers blogging in their spare time about other federal candidates. Mr. Stoller, as noted above, is a paid staffer for a state campaign (Corzine for Governor). So long as he writes on his own time, without abusing campaign resources, without coordinating with the federal campaigns on which he reports or opines (under

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[20] Just this week, Los Angeles Times national political columnist Ronald Brownstein disclosed that his wife had taken a position on the staff of Sen. John McCain, whom Brownstein covers on a regular basis. Ronald Brownstein, "On Filibuster and Stem Cells, GOP Bears Pain of Compromise," Los Angeles Times A16 (5/30/05). We mention this merely to suggest that if the FEC is truly concerned with ferreting out potentially corruptive conflicts-of-interest, looking at money alone may not be enough. Does the FEC really want to investigate with whom bloggers share their beds?

the definition previously established by law), we do not see the harm in such behavior, nor when staffers for federal candidates do the same.

This brings us to the issue of paid editorial content. When a campaign pays a blogger for the explicit purpose of publishing favorable stories, this arguably constitutes "announcements placed for a fee" under the revised 11 C.F.R. § 100.26 and therefore constitute public communications subject to disclosure rules – that is, disclosure by the campaign, not the website, though we would argue that if the blogger (and not the campaign) drafts the posts, then it might be insufficiently coordinated to require immediate disclosure. But why stop there? When a presidential hopeful wines and dines a print journalist on a New Hampshire campaign bus with the understanding that favorable coverage will ensue from such exclusive access, the current campaign finance laws do not require said journalist to disclose such largess when said story is printed, though ethical requirements of the profession might. The same should hold here.

Again, technology can fix what the law need not. Quick, electronic filing and disclosure of all media-related disbursements can provide the information the public needs without forcing unprecedented obligations upon private citizens. More importantly, in the absence of any demonstrated harm, there is no need for the FEC to move forward at all in this realm.

Paid Advertising: We want to highlight for the FEC one additional enforcement difficulty in requiring disclaimers on paid internet advertising. Google AdWords – the largest advertising mechanism on the Internet – limits its advertisements to twenty characters or less (before linking the reader to the designated site). It would be impossible for such advertisements to contain a disclosure while also functioning as advertising within such technological limits. Therefore, it makes more sense to require for online advertisements that the source of the funding be displayed within the advertisement *or* on the site to which the advertisement is linking readers.

Volunteer Activity: As noted above, we believe that individuals acting independently or as volunteers posting blogs or other content should be entitled to the exception just as if the content were posted on their own websites. Voluntary grassroots activity should result in no filing or disclosure requirements. Even when done in cooperation, consultation, or concert with a candidate or a political party committee, no contribution or expenditure should result and neither the candidate nor the political party committee should incur any reporting responsibilities. This is democracy at its best, and the Commission should encourage such behavior.

CONCLUSION

The Federal Election Commission should proceed cautiously in this area, and follow its original instincts as expressed in its 2002 rulemaking: Except when there is a demonstrated potential for corruption, steer clear of regulation of political activity on the Internet. Unfortunately, these proposed regulations go far afield of what is necessary to comply with the Court's order, and well beyond any demonstrated need based on the 2004 election cycle.

The most important thing the FEC can do with regard to the Internet is to generally leave it alone, to allow it to serve as a vibrant counterweight to other media in which most individuals have no ability to speak to the masses and cannot influence the debate. As Judge Stewart Dalzell observed in ACLU v. Reno, 929 F. Supp 824 (E.D. Pa. 1996), no medium better fulfills the promise of the First Amendment than the Internet in reclaiming for ordinary Americans from wealthy interests the power to participate in and influence the national debate:

> It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country -- and indeed the world -- has yet seen. The plaintiffs in these actions correctly describe the "democratizing" effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them. Federalists and Anti-Federalists may debate the structure of their government nightly, but these debates occur in newsgroups or chat rooms rather than in pamphlets. . . .
>
> [I]f the goal of our First Amendment jurisprudence is the "individual dignity and choice" that arises from "putting the decision as to what views shall be voiced largely into the hands of each of us", then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions. Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig.[21]

Let us suggest a second metaphor. A neighbor has come to visit your house, and notices that there's a draft coming through the window, leaking in some unpleasant cold air. You call your handyman over to the house, and he presents you with two options: close and repair the window frame, or bulldoze the house and start from scratch – because, as the handyman explains, there are bound to be other problems with the house in the future.

We think this house is in pretty good shape, and we'd like to keep it pretty much the way it is. Thank you for your consideration, and we look forward to testifying before the Commission.

/s/
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http://atrios.blogspot.com

Markos Moulitsas Zúniga
Berkeley, CA
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[21] 929 F. Supp 824, 882 (E.D. Pa. 1996) (citations omitted).

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Keep blogs unregulated

Adam Bonin
Special to The National Law Journal

07-18-2005

The usual suspects were lined up to testify for two days of hearings at the Federal Election Commission (FEC) regarding political activity on the Internet-representatives of presidential campaigns, major political players like the AFL-CIO and advocates from the reform lobby.

Then there were my clients: a war refugee from El Salvador whose father loaded freight in a warehouse, a "recovering economist" who works in his pajamas from home and a former software product manager who had never cared about politics until three years ago. They are all political bloggers sharing a common goal: to convince the FEC that the Internet makes the basic premises of campaign finance law virtually inapplicable.

The McCain-Feingold campaign finance reform legislation did not mention the Internet, leading the FEC to enact regulations which confirmed that the rules that applied to television, radio and print media did not apply online. This would not last.

In *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), Judge Colleen Kollar-Kotelly agreed with the act's sponsors that such a blanket exemption could frustrate the purposes of the act by allowing unregulated coordination among state or local committees of political parties; political action committees (PACs) or 527 organizations; and candidates-a purported loophole creating "the potential for gross abuse." That such abuse did not actually occur during the 2004 elections did not matter. In March, the FEC responded to the court's order with 13 pages of proposed regulations. While containing sensible provisions closing that purported gap, the regulations unfortunately went much further, as the FEC has tried to bring the entire Internet under its jurisdiction.

The proposed regulations now make possible everything from turning group Weblogs into regulated "political committees," to imposing a "code of ethics" requiring more of bloggers than of talk radio hosts or newspaper columnists, to decreeing how much time we can spend at work participating in politics online, to considering links to candidate Web sites as "in-kind" contributions subject to reporting requirements.

Wealth is not a factor here

None of these additional regulations is wise. The purpose of campaign finance law is to blunt the impact of accumulated wealth on the political process, but this is not something that occurs online. While wealth allows a campaign or large donor to dominate the available space on TV or in print, there is no mechanism on the Internet by which entities can use wealth or organizational strength to crowd out or silence other speakers. Any citizen who wants to establish a Web site that discusses political matters can do so within five minutes, and their words are instantly available to hundreds of millions of users on an equal basis with every other site.

Moreover, one need not invest millions of dollars to reach people on the Internet. The most popular Web sites are often the cheapest ones, many using the free Blogger service to publish their thoughts at no cost at all. The Internet also empowers small-dollar donors and magnifies their impact, as Howard Dean's presidential bid demonstrated.

The high production values of TV ads do not translate to credibility on the Internet. To the contrary, three times as many visitors saw JibJab's "This Land Is Your Land" cartoon with George W. Bush and John Kerry than visited Bush

and Kerry's official Web sites, despite the fact that it cost only a few hundred dollars and was not advertised on other sites.

In sum, the Internet fulfills through technology what campaign finance reform attempts via law. It magnifies the power of each citizen's voice to equal that of large corporations. Any speech, whether from a campaign, a wealthy PAC or a news report, can be immediately countered by any ordinary citizen-as the Internet's uncovering of the "Rathergate" scandal showed.

This all leads to two conclusions: First, rather than introduce regulation to control a vibrant speech market, the FEC should proceed cautiously and steer clear of additional restrictions until real corruption seems possible. The most important thing the FEC can do with regard to the Internet is to leave it alone, to allow it to serve as a vigorous counterweight to other media in which most individuals have no ability to speak to the masses and cannot influence the political debate. Second, when it does act, the FEC should keep its focus on the candidates, parties and PACs already responsible for complying with its voluminous regulations. It should keep its attention on their use of money and their speech, rather than that of individual speakers who lack the resources to "lawyer up."

Judge Stewart Dalzell had it right in 1996, when he ruled in *ACLU v. Reno* on the Communications Decency Act, the first real effort to regulate the Internet. He wrote: "If the goal of our First Amendment jurisprudence is the individual dignity and choice that arises from putting the decision as to what views shall be voiced largely into the hands of each of us, then we should be especially vigilant in preventing content-based regulation of a medium that every minute allows individual citizens actually to make those decisions. Any content-based regulation of the Internet, no matter how benign the purpose, could burn the global village to roast the pig."

We traveled to Washington to convince the FEC not to view citizen political activity on the Internet as a new "problem" in need of regulatory solution. Wealth loses its corrupting power online because it cannot silence the opposition. If reducing money's influence on politics is the FEC's command, a vibrant online marketplace of ideas *is* the solution.

Adam Bonin, an associate at Philadelphia's Cozen O'Connor, is representing pro bono high-profile liberal bloggers, including Markos Moulitsas Zúniga of Daily Kos (www.dailykos.com) and Duncan Black of Eschaton (atrios.blogspot.com). He drafted comments on behalf of them to the FEC. See www.redstate.org/documents/kos.pdf. He can be reached at abonin@cozen.com.

September 22, 2005

Dear Representative:

The House Administration Committee is holding a hearing today to examine "regulation of political speech on the Internet" under the campaign finance laws. The Committee has already reported H.R. 1316, the Pence-Wynn bill which, among a number of other provisions, would exempt the Internet from the statutory definition of "public communication."

The undersigned groups strongly oppose this blanket exemption for expenditures made to finance communications on the Internet, which would open up new huge soft money loopholes in the federal campaign finance laws for federal candidates, parties, corporations, labor unions and wealthy donors.

The groups are the Campaign Legal Center, Common Cause, Democracy 21, the League of Women Voters, Public Citizen and US PIRG.

We recognize, as do most others, that the growth of the Internet is an important and positive development for political discourse and activities, and for increasing the number of small donors in politics, an important goal for those of us who support campaign finance reform.

The blanket Internet exemption in the Pence-Wynn bill, however, is not necessary for individual bloggers communicating on their own Web sites to be exempt from the campaign finance laws. The FEC currently is considering proposed rules that would affirm that the campaign finance laws already do not apply to such individual bloggers.

The blanket Internet exemption in Pence-Wynn would wrongly allow federal candidates to coordinate with corporations, labor unions and wealthy donors in the expenditure of unlimited amounts of soft money to purchase Internet banner and video ads supporting their federal campaigns or attacking their opponents.

The Internet exemption also would wrongly allow state political parties to spend unlimited amounts of soft money to finance ad campaigns on the Internet that support or oppose federal candidates.

One of the great virtues of the Internet is that it facilitates political discourse at very low cost. But simply because it is possible to communicate through the Internet at very low cost, it does not follow that very large sums of money cannot also be spent to communicate through the Internet to influence federal elections.

And when such large sums represent soft money being used by candidates, parties, corporations, labor unions and wealthy donors to influence federal elections, the campaign finance laws that protect against corruption or the appearance of corruption have as much application to the financing of federal election activities conducted on the Internet as they do to activities conducted through television or other off-line media.

This problem is all the more pernicious if the spending of large sums of soft money for ads on the Internet to support a federal candidate could be done in coordination with that federal candidate, which the blanket Internet exemption in Pence-Wynn would allow. This provision in Pence-Wynn would virtually invite federal candidates to directly control the spending of unlimited amounts of corporate and union soft money to pay for Internet banner and video ad campaigns to promote their candidacies.

The same pernicious problem would exist if state political parties were permitted to use the Internet as a vehicle to spend soft money on Internet ad campaigns supporting or opposing federal candidates, which the blanket exemption in the Pence-Wynn bill would also allow.

Individual bloggers communicating on their own Web sites are not and should not be covered by the campaign finance laws. Thus, bloggers do not need any additional exemption, such as would be provided by the so-called "press exemption." In any event, however, individual bloggers should not automatically be treated as "members of the media" and thereby exempt from the laws under the "press exemption," as some bloggers have proposed.

A blogger distributing information may or may not be eligible for the "press exemption." The FEC should apply the "press exemption" on a case-by case basis to Internet activities, just as it has in the past to off-line activities. It is simply wrong to define every individual in the world with a Web site as a member of the media for purposes of the campaign finance laws.

The campaign finance laws should not, and do not, limit political discourse by individual bloggers on the Internet. At the same time, the campaign finance laws must not be subverted by opening new soft money loopholes that would allow the Internet to become the vehicle for candidates, parties and others to spend soft money to influence federal elections.

We strongly urge you to oppose any blanket exemption for the Internet that would create new huge soft money loopholes in the campaign finance laws.

Campaign Legal Center
Common Cause
Democracy 21
League of Women Voters
Public Citizen
US PIRG

Statement of Mark Fletcher
CEO of Bloglines
Concerning
Regulation of Political Speech on the Internet
Before the
Committee on House Administration
U.S. House of Representatives
September 22, 2005

Chairman Ney and Members of the Committee:

On behalf of Bloglines and our thousands of active users, I am pleased to provide the following statement concerning regulation of political speech on the Internet. Bloglines, founded in 2003, is a free online service for searching, subscribing, creating and sharing news feeds, blogs and rich web content. The company is a property of Ask Jeeves, Inc., a wholly-owned subsidiary of IAC/InterActiveCorp, and is headquartered in the San Francisco Bay Area.

We believe it is critical for us to speak out on behalf of individual bloggers who, while empowered by the Internet, have a limited capacity to carry messages to Congress. We commend you and the Committee for convening this hearing and focusing needed attention on this issue.

We urge Congress and the FEC to ensure that the Internet, particularly blog activity, remains free from campaign finance regulation. While regulation of campaign financing plays an important role in maintaining public confidence in our political system, we believe the significant public policy interests in encouraging the Internet as a forum for free or low-cost speech and open information exchange should stand paramount.

Linking to campaign websites, quoting from or republishing campaign materials, or providing a link for donations to a candidate, if done without compensation, should not result in a blog or blogger being deemed to have contributed to a campaign or trigger registration and disclosure requirements.

Blogs permit the expression of and access to a diversity of political opinions and other information on a scale never before seen. This speech must remain free and not be discouraged by burdensome regulation. As such, it should be explicit that the activities of bloggers are covered by the press exemption provided by the Commission's rules.

Should the FEC fail to provide this critical protection to Internet activity, or if courts determine the Commission lacks statutory authority, we urge Congress to promptly move legislation to achieve the goal.

Thank you for this opportunity to share our comments on this important issue.

* * *

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Dear Committee Member:

We write on behalf of the Center for Democracy and Technology ("CDT") to offer our recommendations to the House Administration Committee on the broad questions of whether and how individuals' online political speech should be covered under campaign finance laws, and the specific question of whether Internet communications should be excluded from the definition of "public communications" under the Bipartisan Campaign Reform Act ("BCRA"), 2 U.S.C. § 431 *et seq.* We strongly share the Committee's concern that application of campaign finance laws to the Internet will significantly burden the election-related speech of ordinary Americans who are not working in coordination with any candidate or political party. We appreciate the efforts of the Federal Election Commission ("FEC") to confine its regulatory coverage of Internet communications to only a narrow category of speech. But because of the unique and dynamic nature of the Internet; the lack of fit between campaign finance rules and the Internet; and the sheer numbers of people using the Internet for political activity, we question whether the FEC can achieve that goal. In any event, we believe that Congress in the first instance should make the judgment as to whether and how these rules should apply to Internet activities.

For the first time since the town square ceased being a central focus of civic discourse, individual Americans can participate in robust political conversation with their fellow citizens, and can do so without spending significant amounts of money. And as the last election amply demonstrated, online citizen speech can provide a critical counter balance to the undue dominance that "big money" has increasingly wielded in our political process. But, unless Congress takes decisive action to protect it, that new political commons and the enhanced civic participation it promises is at risk of being chilled by overbroad application of the campaign finance rules.

During the FEC rulemaking, CDT joined with the Institute for Politics and Democracy on the Internet ("IPDI") to draft principles to guide the FEC's consideration of the need to protect individuals' online political speech. CDT and IPDI convened Internet activists, bloggers, election law experts, and organizations from across the political spectrum to draft the proposed principles, and over 1,000 bloggers, grassroots groups and national organizations joined together to submit the principles to the FEC. (See Statement of Principles attached) The core focus of the principles is to advocate for substantial breathing space within which individual online political activities can thrive without concern about campaign finance rules. Without such breathing space, the mass and complexity of the rules is likely to discourage many Americans from participating in robust online advocacy and debate about candidates and issues. We believe that these principles should guide Congress' consideration of this issue as well.

Two of the principles are of particular importance because they provide an overarching framework for deciding whether and how to apply campaign finance laws to independent election activities:

- The Federal Election Commission (FEC) should adopt a presumption against the regulation of election-related speech by individuals on the Internet, and should avoid prophylactic rules aimed at hypothetical or potential harms that could arise in the context of Internet political speech of individuals. Instead, the Commission should limit regulation to those activities where there is a record of demonstrable harms;
- If in the future evidence arises that individuals' Internet activities are undermining the purpose of the federal campaign finance laws, any resulting regulation should be narrowly tailored and clearly delineated to avoid chilling constitutionally protected speech. The Commission should eschew a legalistic and overly formal approach to the application of campaign finance laws to political speech on the Internet.

Unfortunately, the federal court has already imposed on the FEC a broad mandate to regulate Internet political activities, making it unlikely that the FEC will regulate in accordance with these principles. Even if the Commission tries to exercise that authority narrowly to mitigate the effect on individual Internet speakers, it is restrained in that effort by the ill-fitting requirements of the campaign finance laws themselves. And as a number of witnesses at the recent Committee hearing made clear, the history of the FEC offers little comfort that the current round of rulemaking will be the last word on this issue.

For these reasons, CDT believes that it is incumbent on Congress to act now to make sure that the law does not inadvertently silence ordinary people who spend small sums of money to engage in political activity on the Internet. Rather than trying – after the fact – to fix any rules the FEC might issue in its current proceeding, we urge you to begin with a clean slate. If there is evidence of actual (rather than hypothetical) harm arising from particular classes of speakers or activities on the Internet, then Congress may enact a narrowly tailored statute to address only that harmful activity. In the absence of such a record, the Internet speech of ordinary individuals should be free from campaign finance regulation. Thank you for consideration of our views on this matter.

Sincerely,

John Morris
Staff Counsel

Leslie Harris
Senior Consultant

CENTER FOR DEMOCRACY & TECHNOLOGY

INSTITUTE FOR POLITICS DEMOCRACY & THE INTERNET www.ipdi.org

Campaign Finance Regulation and The Internet Principles*

May 11, 2005

We believe that the following principles should guide any consideration of the possible application of the campaign finance laws to Internet activity:

- The Internet is a unique and powerful First Amendment forum, which supports speech as "broad as human thought." It empowers ordinary people to be speakers and publishers with the ability to reach millions. As such, the Supreme Court has afforded speech on the Internet the highest constitutional protection

  The First Amendment protects our right to speak freely and to gather information. Without it, true democracy would be impossible. The Supreme Court strongly disfavors laws that impinge on First Amendment rights and has been particularly protective of speech on the Internet. The Court declared in ACLU v Reno that speech on the Internet should receive the full protection of the First Amendment.

- Unlike the broadcast media, the Internet is a powerful engine for interactive, diverse, and robust democratic discourse, and it has broadened and increased the public's participation in the political process. The Internet's user-driven control and decentralized architecture support a multiplicity of voices and constrain the ability of any one speaker to monopolize attention or drown out other voices.

  As the last election amply demonstrated, the Internet has become America's public square, a powerful forum where ordinary people spending small sums of money can express their political views, and be heard by millions of people. Unlike closely controlled forums like TV and radio, which are dominated by a few political speakers, no political speaker on the Internet can dominate the space or prevent others from being heard.

- Robust political activity by ordinary citizens on the Internet, including their monetary contributions, strengthens and supports the central underlying purpose of the campaign finance law: to protect integrity of our system of representative democracy by minimizing the corrupting influence of large contributions on candidates and office holders. Individuals' online political activity engages larger

numbers of citizens in the political and campaign processes and encourages an increase in smaller contributions.

Campaign finance laws are aimed at diminishing the impact of big money contributions in elections and guarding against their corrupting influences. The Internet can't stop wealthy interests from spending money, but it can help to diminish their influence, both by facilitating small contributions and by opening up avenues for information flow that are not dominated by big money. In the last election cycle, the Internet was responsible for an unprecedented increase in the number of small financial contributors to elections and an increase in the influence of ordinary voters.

- The Federal Election Commission should adopt a presumption against the regulation of election-related speech by individuals on the Internet, and should avoid prophylactic rules aimed at hypothetical or potential harms that could arise in the context of Internet political speech of individuals. Instead, the Commission should limit regulation to those activities where there is a record of demonstrable harms.

In the past, the Federal Communications Commission ('FEC") has written very broad rules to try to prevent wealthy interests from exerting a corrupting influence over the political process. Those rules have often been based on hypothetical or potential misconduct, not on clear evidence of a problem. We believe that this would be the wrong approach to campaign finance regulation of individuals' political speech on the Internet, where broad prophylactic rules would hurt millions of ordinary Americans exercising their First Amendment rights to speak out on elections and political issues. This principle urges the FEC to change it approach to regulation on the Internet and only regulate individual speakers where there is a real record of abuse by big money interests.

- If in the future evidence arises that individuals' Internet activities are undermining the purpose of the federal campaign finance laws, any resulting regulation should be narrowly tailored and clearly delineated to avoid chilling constitutionally protected speech. The Commission should eschew a legalistic and overly formal approach to the application of campaign finance laws to political speech on the Internet.

Speaking out during an election is a constitutional right. The government needs to be very careful when it tries to regulate political speech. For that reason, even if the FEC finds clear evidence that wealthy interests are engaging in practices that corrupt the political process, we believe it must write rules that are very narrow and clear, so that it does not also regulate or chill the online speech of small independent political speakers.

- Ordinary people should be able to engage broadly in volunteer and independent political activity without running afoul of the law or requiring consultation with counsel. The FEC should make clear that such activities are as a general matter beyond the scope of all campaign finance regulation (including disclaimers, thus preserving the right of individuals to engage anonymous online political speech).

  We believe that there needs to be a "bright line" between the online political speech of big money interests, which may be subject to the campaign finance laws, and the online political speech of small and independent political speakers on the Internet which we believe should not be regulated. Individual Americans should be able to engage in election related political speech online and spend reasonable sums of their own money to support that speech, without having to disclose their identity, worrying about whether they are violating campaign finance laws, or having to hire a lawyer to advise them.

- Individuals should be able to collaborate with other such individuals to engage in a very substantial amount of independent election related political speech online without being deemed a "political committee."

  The Internet fosters communication, collaboration and community among people with common interests, many of whom never meet offline. In the last election, millions of people joined together to engage in election related activities on the Internet. We believe those people should be treated the same under the Campaign Finance laws as individual speakers acting alone. They should be able to engage in a substantial amount of collective political activity without being deemed a "political committee" under the campaign finance laws. Right now, the campaign finance laws treat people who join together to engage in election related activities as "political committees" with a number of reporting and disclosure requirements, if they spend or raise as little as $1000. That doesn't make sense on the Internet.

- The FEC should extend the media exemption to online media outlets that provide news reporting and commentary regarding an election, including those media outlets that exist only on the Internet. In the Internet context, the news media exemption should be construed more flexibly than in the off-line context, so that it can accommodate new technology and new forms of online speech. The Federal Election Commission should clearly articulate the criteria for qualifying for the news media exemption on the Internet;

  The growth of online media has provided Americans with new sources of political information and alternative points of view. People are increasing turning to Internet sources of news and commentary, often from sources that only publish online (such as bloggers). The media exception to the federal campaign finance law allows the media to report and editorialize on federal elections without regard to the campaign finance rules. That exception needs to be clearly extended to Internet media and the criteria for qualification needs to be reexamined so that new forms of media on the Internet are covered.

- Independent bloggers and other Internet speakers who report or provide commentary on the Internet but who do not otherwise qualify for the media exemption should be nevertheless be able to engage in a very substantial amount of online political speech without any regulation.

  While some bloggers should qualify for the media exemption, some probably will not meet the criteria. But almost all bloggers should be exempt from the campaign finance rules to the same extent as other online citizen advocates, even if they don't qualify under the media exemption.

- The FEC should promulgate rules that permit independent Internet speakers or groups of speakers to incorporate for liability purposes without violating the prohibition on corporate political activity.

  The campaign finance law prohibits corporations from endorsing or opposing federal candidates or making campaign contributions. But sometimes bloggers and other independent speakers on the Internet incorporate for a number of reasons such as protection from liability. We believe the adoption of the corporate form should not silence independent online political speakers.

- Any rules promulgated by the FEC with respect to Internet political activity should be technology neutral and not distinguish between or disadvantage forms of online speech. Similarly, rules must be sufficiently flexible so as to encourage innovation and the development of new forms of Internet speech.

  The Internet is a dynamic and fluid medium. New technologies are constantly spawning new modes of speech on the Internet. We believe that it would be very damaging to the Internet if campaign finance laws were aimed at specific modes of speech like pod casting or blogging. Not only will the rules be quickly outdated, they may stifle innovation on the Internet.

** Gray text boxes contain background information for each principle*

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