

SQUARE PEGS & ROUND HOLES:

*APPLYING CAMPAIGN FINANCE LAW TO THE INTERNET
RISKS TO FREE EXPRESSION & DEMOCRATIC VALUES*



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The Center for Democracy and Technology is a non-profit, non-partisan public interest organization dedicated to developing and implementing public policies to protect and advance civil liberties and democratic values on the Internet.

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I. INTRODUCTION

As we enter upon the increasingly wired year 2000 presidential race, there is considerable uncertainty — and some ominous initial signals — over the application of the campaign finance laws to campaign-related speech and political activities on the Internet. So far, the Federal Election Commission (FEC) has failed to recognize the unique aspects of the Internet and therefore has failed to adopt a policy approach that maps the objectives of campaign finance restrictions onto this new medium in a manner consistent with the First Amendment.

The Internet is uniquely decentralized, global, abundant, inexpensive, interactive and user-controlled. The campaign finance laws were developed for the centralized, scarce, and expensive media of radio, television and print. The Internet supports a diverse range of content — text, graphics, audio and video; chat rooms, moderated and unmoderated email lists, and “newsgroups;” and World Wide Web sites endlessly and seamlessly linked on a global basis — much of it spontaneous and independent from campaign committees and the political parties. Initial efforts to apply the Federal Election Campaign Act (FECA) to these new and varied Internet communications have yielded troubling results, threatening to burden — even silence — the voice of average citizens in American political life.

The Internet fosters what the Supreme Court has called a “never-ending world-wide conversation.” As such, the Court has held, expression on the Internet is entitled to the highest level of protection under the First Amendment. It would be worse than ironic if rules designed to deemphasize the unfair advantage of money, to broaden the diversity

of groups that can have an impact on the election process and to “return our electoral process to the people” were applied to deter individuals from using the “electronic soapbox” of the Internet.

More recently, there has been a hint of change from the FEC, with bolder calls from some individual Commissioners for redefinition of the campaign finance law’s application to the Internet. We support such calls, and we urge the Commission — to the maximum extent possible within the terms and exceptions of FECA — to recognize that a large portion of the political activity in cyberspace does not merit regulation. Ultimately, however, it will likely require a Congressional amendment to FECA to protect individual advocacy and remove any cloud from this most democratic, open and inexpensive of mass media.

ABOUT CDT

The Center for Democracy and Technology is a public interest organization dedicated to developing and implementing public policies that protect and enhance civil liberties and democratic values in the new digital media. We are not experts in campaign finance law and we have not taken a position on legislative proposals concerning campaign finance. However, we have made it one of our priorities to defend freedom of expression on the Internet. CDT staff were among the first to articulate the ways in which the architecture of the Internet serves core First Amendment values by increasing access to diverse information sources and minimizing the need for

government content regulation. [1] CDT helped organize the Citizens Internet Empowerment Coalition, which challenged Congress' first attempt to control content on the Internet, the Communications Decency Act (CDA). We brought the Internet into the courtroom in Philadelphia, demonstrating its unique features to the three judge panel hearing the CDA case. Our user-controlled vision of the Internet proved central to the Supreme Court's landmark ruling in *Reno v. ACLU*, holding that the Internet was a unique medium entitled to the highest First Amendment protection. [2] It is from that perspective that we have become concerned about the implications of the FEC's initial efforts to apply the campaign finance law to the Internet.

OVERVIEW

This paper briefly describes the unique architectural and economic characteristics of the Internet and explores their impact on political and campaign-related speech and activities (Part II). It then briefly discusses the framework, assumptions and goals of existing federal campaign finance law (Part III), and reviews the FEC's Advisory Opinions and other actions applying FECA to campaign-related activities online (Part IV). The paper analyzes the ways in which the Internet merits a different approach (Part V) and concludes that the mechanical approach of the early FEC actions, if not reversed, would undermine both the goals of campaign finance reform and the Internet's potential to strengthen the democratic process.

[1] Jerry Berman and Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 *Yale L. J.* 1619 (1995).

[2] *Reno v. ACLU*, 521 U.S. 844 (1997).

II. CHARACTERISTICS OF THE INTERNET

In evaluating the First Amendment standards applicable to any medium of communication, the Supreme Court has long recognized that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.” [3] In its landmark decision in *Reno v. ACLU*, the Supreme Court found that the Internet is a unique medium, distinct from broadcast, print, and cable. The Court described the speech outlets of the Internet as “vast democratic fora” and a “new marketplace of ideas,” which “provides relatively unlimited, low-cost capacity for communication of all kinds,” the growth of which “has been and continues to be phenomenal.” [4] The Court recognized that it is the very breadth and variety of speech over the Internet that gives the Internet its extraordinary communicative power:

This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through 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. As the District Court found, “the content on the Internet is as diverse as human thought.” [5]

As the district court in *ACLU v. Reno* had concluded:

[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. [6]

[3] *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

[4] *Reno v. ACLU*, 521 U.S. 844, at 870, 886 (1997). The Supreme Court based its decision on the District Court’s detailed findings of fact, which remain perhaps the best statement of the relevant characteristics of the Internet for purposes of First Amendment analysis. The District Court opinion is online at http://www.ciec.org/decision_PA/decision_text.html. The Supreme Court’s opinion is online at http://www.ciec.org/SC_appeal/decision.shtml.

[5] *Id.*, 521 U.S. at 870.

[6] *ACLU v. Reno*, 929 F. Supp. 824, 881-82 (E.D. Pa. 1996) (Dalzell, J.) (citations and internal quotations omitted), *aff’d*, 521 U.S. 844 (1997).

A. THE ARCHITECTURE AND ECONOMICS OF THE INTERNET

Architectural and economic characteristics of the Internet make it a medium uniquely suited, if properly fostered, to achieving the marketplace of ideas which the First Amendment is intended to support and through which our democratic ideals can best be realized. These unique characteristics must guide the application of campaign finance rules to the Internet.

- **Decentralized.** Traditional mass media's system of limited distribution channels sets up a gatekeeper system controlled by a relatively small number of entities. In contrast, the Internet's architecture is decentralized and distributed. It is a network of networks consciously designed to function without gatekeepers.
- **Global.** The Internet provides immediate access to information from around the world. With simple email, it is as easy and inexpensive to send a message to another continent as to the building across the street. Search engines on the World Wide Web list local and foreign sites without distinction. Those wishing to avoid government regulation have shown the ability to quickly "mirror" content on servers outside the reach of censors.
- **Abundant.** The Internet can accommodate a virtually unlimited number of speakers. Thus, while the architecture of mass media creates scarcity, the Internet's architecture places little limit on the amount and diversity of information that can be made available. As the Supreme Court stated, "Unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a scarce expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds... ."
- **Inexpensive.** Existing campaign finance law reflects the economics of the mass media: speaking effectively is expensive. In contrast, on the Internet, "talk is cheap." The Internet sustains a level of speech

among individuals and loosely organized groups unparalleled in other media. It is the first electronic medium to allow every user to be a publisher. Users can reach and create communities of interest despite geographic, social, and political barriers, enabling nearly everyone who wants to espouse political opinions to do so. Armed with an email account, an individual can send a mass emailing to hundreds of thousands of individuals with little expense. At one of the many portal services, individuals can create Web pages to discuss their likes, dislikes, wage a campaign against a corporation, flak products, or express their political views — for free.

- **Interactive.** Unlike the one-way transmissions typifying most radio and television, the Internet is bi-directional in nature. It allows responsive communications from one-to-one, from one-to-many, and from many-to-one.
- **User-controlled.** Unlike television and radio, which offer individuals little opportunity to make decisions about what information they receive, the Internet is a user-controlled medium. As the Supreme Court found in striking down the Communications Decency Act, individuals are not assaulted by information on the Internet but rather enjoy an unequalled ability to direct and control the information that they come in contact with.

B. POLITICAL SPEECH ON THE INTERNET

The 1996 presidential election witnessed the beginning of Internet-based political activity. Both the Clinton-Gore and the Dole-Kemp campaigns used Web sites to distribute information, solicit volunteers, and highlight campaign activities. What was more important, however, than the major political parties' adding the Internet to their campaign strategies was the way in which the Internet served as a platform for informal, unorganized, grassroots political discussions of a breadth and variety rarely witnessed in the offline world. Much of the debate and discussion of

candidates and issues was removed from candidate Web sites and control — conducted instead by individuals and unincorporated, informal groups.

In the context of political speech and electioneering, the Internet provides individuals and informal organizations the ability to communicate inexpensively. From their virtual platforms, individuals and organizations are publishing newsletters, advertisements, voters guides and other election-related materials; creating dynamic forums that support issue-based organizing, interactive discussions, and political advocacy; and registering voters.

The Internet can lower barriers to participation. Small groups and minor parties, among the first to use the Internet, are currently engaged in long-term affiliation-building activities online. Foreshadowing the significant future role of the Internet in political campaigns and the national political dialogue, the Web has been credited as a decisive factor in recent Congressional elections (most notably of challengers), and its role in Jesse Ventura's upset gubernatorial victory is now widely studied. [7]

In addition to broadening the number and diversity of speakers, the Internet creates opportunities for new forms of speech. Real-time dialogues can be hosted, creating a parallel to the town hall meeting without the time and expense. Conversations can be held outside of real-time, as postings on Web sites form "threaded" discussions on specific topics, which can be archived and returned to at any time.

The Internet also provides voters with an efficient and timely method to gather information about candidates. It has been suggested that many voters make uninformed choices or become frustrated and drop out of the process not because they do not care about the outcome of an election but because becoming informed takes too much effort. The Internet has particular advantages in enabling voters to obtain information, compare candidates, review voting records, and hear from third-parties through easy-to-find resources. Voters can access information when they want it. 10% of voters have already used the Internet to gather information they used in a voting decision. Exit poll respondents said that the information they found on the Internet was simply not available in traditional mediums. They also highlighted the convenience of the Internet and the sheer volume of information available. [8]

[7] See generally, Rash, Wayne, *Politics on the Nets* (1997); Graeme Browning, *Electronic Democracy: Using the Internet to Influence American Politics* (1996); Oram, Jon, "Will the Real Candidate Please Stand Up?: Political Parody on the Internet," 5 *Journal of Intellectual Property Law*, 467, 476-481 (1998); Levine, Peter, paper presented at the George Washington University conference on "Online Politics and Democratic Values," March 29, 1999.

[8] Oram, Jon, "Will the Real Candidate Please Stand Up?: Political Parody on the Internet," 5 *Journal of Intellectual Property Law* 467, 476-481 (1998); Foley, Edward, "Public Debate and Campaign Finance," *Connecticut Law Review* (1998).

III. THE FEDERAL ELECTION CAMPAIGN ACT: THE FRAMEWORK, ASSUMPTIONS, AND GOALS OF EXISTING FEDERAL CAMPAIGN FINANCE LAW

A. THE FRAMEWORK

The Federal Election Campaign Act (FECA), adopted in 1971 and significantly amended in 1974, seeks to quantify the cost of political speech, limit the amount of money collected and spent on campaign-related activities, and enable public scrutiny of the impact of money on campaigns and elected officials through disclosure of the identity of contributors. [9] In general the law establishes:

- **Contribution limits:** Federal election law limits the amount of money individuals and groups can contribute to candidates, party committees, and political action committees (PACs). In particular, the law limits an individual's overall contributions at \$25,000 per calendar year and sets caps on contributions: to a candidate at \$1,000 per election; to a national party committee at \$20,000 per calendar year; and to other political committees at \$5,000 per calendar year. While "contributions" are thus limited, "independent expenditures" by individuals or groups are not. [10]
- **Prohibited contributions and expenditures:** The law prohibits corporations, labor organizations, federal government contractors and foreign nationals from making any contributions and expenditures to influence federal elections. [11] It also prohibits contributions to federal elections in another person's name and prohibits cash contributions in federal elections of more than \$100.
- **Disclosure requirements:** Candidate committees, party committees and PACs must file periodic reports disclosing the money they raise and spend, and generally identifying the source of contributions. Candidates must disclose and attribute contributions from PACs and party committees and they must identify individuals who contribute more than \$200 per year.
- **Identification requirements:** While "independent expenditures" by individuals or groups are unrestricted, where any expenditure finances communications expressly advocating the election or

[9] See the FEC's summary at <http://www.fec.gov/pages/citnlist.htm>.

[10] An "independent expenditure" is one made "without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. §431(17). See generally 11 C.F.R. §109.1.

[11] Corporations and labor organizations may establish PACs which are able to raise voluntary contributions from a restricted class of individuals and use them to support federal candidates and political committees. See the Campaign Guide for Corporations and Labor Organizations, available in PDF form at <http://www.fec.gov/pages/citnlist.htm>.

defeat of a clearly identified candidate or soliciting contributions through any general public political advertising, the communication must identify the party responsible by name and indicate whether or not it is authorized by the campaign. [12]

B. THE ASSUMPTIONS OF THE FEDERAL CAMPAIGN FINANCE LAW

Existing campaign finance law is based on several assumptions that reflect the nature of traditional mass media. First and foremost, the law assumes that speech is expensive and that therefore money inextricably determines the amount and impact of political speech. In contrast, the Internet greatly reduces the cost of speech. Because the initial startup costs of becoming a speaker on the Internet are relatively low and, once the investment is made, the difference between communicating to a single individual and communicating to masses of individuals is marginal, the effect of money is vastly diminished in the online environment.

In addition, the campaign finance law assumes that the content of political speech (at least the political speech that matters) will be conducted by a relatively small set of entities created to influence elections. The law assumes that there is a distinction between speakers and listeners, that the speakers will be the candidates (and their committees and parties), and that most citizens will participate in the campaign process not by speaking but by contributing money. Under this traditional scenario, to the extent that individuals become involved in the political process as “volunteers,” it is assumed they will not be speaking, but rather will be disseminating material (mainly printed material) produced by the campaign in the form of leaflets that volunteers will stuff into envelopes or deliver door-to-door. (Consequently, the FECA exempts the value of services by “volunteers,” almost on the assumption that anything volunteers do matters so little that it is not worth regulating.) On Internet, in contrast, anybody can be a speaker. A “volunteer” can create a Web site

as good as the campaign webmaster’s. A volunteer on a well-subscribed list, an active chat room or a frequently-visited newsgroup can reach thousands of potential voters.

There is another difference between the traditional mass media and the Internet, one having to do with the role of advertising. Television and radio work on the advertising model: advertisements pay for the content. By and large on television and radio, the content is not political in nature. Most content providers on radio and television are studiously apolitical in their programming. To the extent there is content regarding politics, it is in the form of news, which is exempt from FECA. By and large, on television and radio, the only way that political speech is broadcast outside of the news is in the form of very expensive paid political advertisements.

On the Internet, the distinctions between content, news and advertisement are very different. There is a great deal of content not supported by any advertising. Some content on the Internet is supported by advertising, but it is different in two crucial ways, especially in the campaign context. On the Internet, most political content is not in the form of paid political advertisements; it is in the form of freestanding Web pages. On the Internet, there is no disincentive for political content. By and large, candidates do not spend a lot of money on the Internet for paid political advertisements that support the (entertainment) content of others. Rather, to the extent that candidates “advertise” on the Internet, they do it the way everybody else does, with banner ads that do not carry content, but that try to attract viewers to click away from one content page to another content page (i.e., the candidate’s). And this leads into the second major difference between the Internet and traditional advertising-supported media: user choice: On TV, if viewers feel bombarded with ads, they have to click away from them; the choice they exercise is to try to avoid ads. On the Internet, viewers click on banner ads to go to the actual advertising. Even if they feel bombarded by banner ads, they consciously choose to receive the content of the ads.

[12] 2 U.S.C. §441d, 11 CFR 110.11.

C. THE GOALS OF CAMPAIGN FINANCE REGULATION

One way to assess the application of campaign finance laws to the Internet is to try to map the asserted goals of campaign finance regulation onto the new medium. Doing so illustrates how the goals of campaign finance would be best achieved by **not** regulating much of the campaign and election-related activity on the Internet:

Reducing the Impact of Money During Campaigns:

Supporters of campaign finance restrictions argue that the role of money in politics fosters inequality in our democratic system. The original supporters of FECA feared that well-financed political action groups thwart the one person, one vote principle. The goal of FECA was to “broaden the diversity of groups that can have an input on the election process” and to “return our electoral process to the people.” Current campaign finance reformers share this goal. Senator John McCain said his recent legislative proposal is designed to “reduce the influence of the special interests.” [13] Representatives Shays and Meehan, the sponsors of the main campaign reform bill in the House, have said that the limitation on independent expenditures in their bill seeks to address the practice of “outside groups, including labor unions and corporations [who] pour millions of dollars into campaign advertisements.” [14]

***Impact of Internet:** The Internet is an inherently equalizing force for non-candidates and minor candidates to participate in campaign discussions in ways previously reserved to well-funded candidates. Because it is open and inexpensive, the Internet empowers all users with the ability to speak to a large audience. A single wired individual can be powerful: one man organized*

over 100 campus protests against the Republican Party’s Contract with America from his basement computer. [15]

Preventing the Corruption or Undue Influence that Stems from the Demands of Fundraising: Election law supporters argue that large contributors are able to buy influence with legislators. A central purpose of FECA was to “avoid corruption” and to “reduce the corrupting influence of big money in Federal elections.” Common Cause, the leading campaign finance reform organization, says it “represents the unified voice of the people against corruption in government and big money special interests.” [16] Campaign finance reform sponsor Senator Russ Feingold believes that because of loopholes, the problem of undue influence persists today: “Interests with big money to contribute to candidates or spend on ad campaigns have the inside track to access in Congress.” [17]

***Impact of the Internet:** The Internet is unlikely to reduce the amount campaigns spend on radio and television. But certainly, the Internet does not significantly increase the amount of money spent by campaigns, and does not impose large additional fundraising demands on politicians and candidates.*

Improving the Quality of Electoral Debate: The dominance of television is said to degrade the quality of information available to citizens and decrease informed voting. As one scholar has concluded, the “national political ‘debate’ is now directed by ad executives and political consultants and conducted mainly through thirty-second ‘sound bite’ television and radio commercials.” [18] Election law is aimed at reducing the influence of simplistic and, in the view of many, misleading 30-second spots.

[13] McCain, John, “McCain Wins Agreement in Senate to Fight Influence of Special Interests,” <http://mccain.senate.gov/cfrwin.htm>.

[14] Shays, Christopher and Marty Meehan, Testimony before the House Administration Committee on HR 417, June 29, 1999 <http://www.house.gov/shays/reform/629test5.htm>.

[15] Oram, Jon, “Will the Real Candidate Please Stand Up?: Political Parody on the Internet,” *Journal of Intellectual Property Law*, Spring 1998.

[16] Mission Statement, <http://www.commoncause.org>.

[17] “Making Washington Work for You and Not the Special Interests,” Sen. Feingold Web site position paper, <http://www.senate.gov/~feingold/cfr.html>.

In testimony regarding their campaign finance reform initiative, Representatives Shays and Meehan said that the purpose of their bill was to ‘stop the flow of unlimited, and at times undisclosed money into the Federal election system... to ensure that our future elections are the result of a strong and effective democracy rather than the chance outcome of a no-holds-barred fundraising race.’ [19]

Impact of the Internet: *Online, voters can easily check distorted candidate or organization statements. A search for a candidate name is sure to deliver not only the candidate’s views on an issue but critiques and criticisms of the candidate’s position as well as other relevant information. Proponents of campaign finance reform often raise concerns about the expense and delay of responding to distorted claims made by incumbent candidates or moneyed interests in traditional media. The expense of responding online is relatively low. Through linking and searching, opposing points of view and responses to a candidate’s claim will be simultaneously available to the voter. Special interest groups can and will spend money on Internet political efforts, but individuals and smaller groups can inexpensively build Web sites responding to or critiquing candidate and interest group statements.*

Ensuring Competitive Elections: Supporters of campaign finance restrictions point out that most campaigns are not truly competitive, most often because incumbents have a clear advantage. The availability of money is said to entrench current officeholders in their positions and limit reasonable challenges. Election law was crafted so as to reduce the gap between the most well-funded candidates and their challengers, giving each candidate a fair chance to convince the voters that he or she would be the best representative.

Impact of the Internet: *The Ventura campaign is frequently cited as the leading example of how an outsider used the Internet to overcome the advantage of money and traditional organization: “An independent with no party structure or endorsements, all [Ventura] had was fame, blunt-spoken ideas — and the Net. For months Ventura had no physical headquarters, just an ever-growing e-mail list. Two thirds of his fund-raising pledges arrived via the Internet. His final, three-day, get-out-the-vote bus trip was organized by e-mail. Ventura’s site never was fancy. No elaborate graphics. It was a simple, text-based community of Ventura fans. The network generated a surge at the end, especially among young, new voters — an age group, not coincidentally, that grew up online. He won half the under-30 vote in a three-way race. ‘The Internet didn’t win it for us,’ says Ventura Webmaster Phil Madsen, ‘but we couldn’t have won without it.’” [20]*

Preventing Outside Influence on Elections: Disclosure provisions in campaign finance laws are said to alert voters to groups or individuals from outside their district attempting to influence their elections. Restrictions on foreign contributions are designed to prevent any influence from groups or individuals completely outside of U.S. jurisdiction.

Impact of the Internet: *Given the global nature of the Internet, this is one goal that no amount of regulation can achieve. Restricting outside influence to local elections is probably made substantially more difficult by the Internet. Because the Internet is a global medium, an out-of-state voter or organization utilizing the Web for political advocacy is just as likely to influence an election as an in-state voter or organization. Web sites overseas will be beyond the reach of U.S. regulators.*

[18] Dworkin, Ronald, “The Curse of American Politics,” N.Y. Review of Books, Oct. 17, 1996.

[19] Shays, Christopher and Marty Meehan, Testimony before the House Administration Committee on HR 417, June 29, 1999 <http://www.house.gov/shays/reform/629test5.htm>.

[20] <http://www.politicsonline.com/coverage/newsweek/index.html>

IV. THE FEC'S APPROACH TO ONLINE ACTIVITIES

How well has the FEC done in applying the substance and goals of FECA to the Internet? So far, the results has been disappointing, if not alarming.

The FEC has clearly established that disseminating information about federal elections through the Internet can be subject to regulation under the Federal Election Campaign Act. [21] In 1995, the FEC ruled that a Web site distributing information, run by an independent, "virtual PAC" is a form of "general public political advertising." [22] The FEC has found that an individual may have to report to the government in order to create a Web page expressing support for a candidate, that hyperlinks may constitute political contributions, and that providing free Web sites to all candidates is a prohibited corporate contribution.

A. CREATING A WEB SITE

In 1998, Leo Smith created a site to criticize the Republican Congress and advocate the election of Charlotte Koskoff over incumbent Representative Nancy Johnson. Smith's site allowed visitors to fill

out a form indicating their desire to contribute money or time, which was forwarded directly to the Koskoff campaign. The address of the Koskoff campaign and a link to the email address of Koskoff's principal campaign committee were also provided. The site included a disclaimer stating, "This Web site is posted by a registered independent voter in the sixth District. The site is not affiliated with or supported by the official Koskoff for congress campaign."

Smith asked the FEC to review his actions for compliance with federal election law, writing that the Web site was maintained from his computer personally. He told the FEC that the Koskoff campaign had asked him to correct the spelling of her name and to remove a statement referring to credit card contributions. He pointed out that he owned a business creating Web sites for businesses and non-profit organizations and had negotiated for free Internet access. The address of Smith's Web site for Koskoff was a sublisting found under a domain name used by Smith's company to display information and thus had no cost associated with it. In his letter to the FEC, Smith asserted that no funds were received or expended to create the Web site.

[21] See Advisory Opinions 1997-16, 1996-16, 1995-35, 1995-33, and 1995-9. "Because the general availability of access to the Internet, the Commission has concluded that communication via a Web site would be considered a form of communication to the general public." Advisory Opinion 1998-22, p. 3.

[22] Federal Election Commission, Advisory Opinion 1995-9. The Commission ruled that the PAC (NewtWatch) activities of distributing communications and soliciting contributions through a World Wide Web site were "general public political advertising" under 11 C.F.R. §110.11.

The FEC concluded that Smith's site was "something of value" that "expressly advocates" the election of a candidate for federal office. [23] Smith was required to include his full name as creator of the Web site and indicate whether it was authorized by the Koskoff campaign.

The FEC rejected Smith's claim that his Web site was built at no cost. While the Commission in its advisory opinion did not determine whether the site's cost met the threshold triggering reporting requirements, it noted that Smith would have to count the fee for registering the domain name and the overhead costs including hardware and software; the total cost of the equipment and Internet services were to be divided by the number of sites Smith maintained.

If Smith's actions in creating the Web site were completely independent of the Koskoff campaign, and if the portion of the expenses allotted to the Web site exceeded \$250 in one year's time, it would qualify as an "independent expenditure" and Smith would be required to submit reports to the FEC. On the other hand, if he was cooperating or consulting with the campaign, the Koskoff Committee would have to report his expenses as an in-kind contribution. The FEC cited the Koskoff campaign's request that Smith correct spelling on his site as possible evidence of coordination with the official campaign. As an in-kind contribution, the cost of the site,

combined with any other donations to the Koskoff campaign from Smith, could not exceed \$1000.

More recent developments: In July of this year, the FEC's General Counsel circulated to the Commissioners a draft advisory opinion which, if adopted, would pull back from some but by no means all of the broader implications of the Advisory Opinion 1998-22. [24] The General Counsel's draft concludes that a "volunteer" for a political campaign can prepare a Web site on his or her own time and equipment without making a contribution. [25] The draft advisory opinion reasons that because an individual may volunteer personal services on his or her residential premises to a candidate without making a contribution, the creation of a Web site on personal time with personal equipment would not be considered a contribution. [26] Ironically, however, if the person who creates the Web site is not a "volunteer," the ruling of the Advisory Opinion 1998-22 would still apply: If the creation of the Web site were not completely independent, it would be an in-kind contribution, reportable by the campaign, while if it is totally independent, the same activity would be considered an independent expenditure and its creator would need to file reports with the FEC if costs exceeded a certain threshold. [27] And the draft opinion does not reconsider the requirement that a Web site created by anyone other than a volunteer must bear the name of the person who created it.

[23] Federal Election Commission, Advisory Opinion 1998-22, November 20, 1998. The FECA defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office." 2 U.S.C. §431(9).

[24] The draft Advisory Opinion was prepared in response to a letter from the Presidential campaign of George W. Bush posing a series of largely hypothetical questions about Internet activity. Commissioner Karl Sandstrom subsequently circulated an alternative draft, based on his objection to using the Advisory Opinion process to establish rules of general applicability in the absence of concrete facts. Commissioner Sandstrom has made clear his view that much Internet-related activity should not be regulated.

[25] Federal Election Commission, Draft Advisory Opinion 1999-17.

[26] Id. at p. 5 discussion 11 CFR 100.7b)(4). The draft goes on to distinguish the same activity conducted with corporate equipment, stating that if the "use went beyond occasional, isolated or incidental," the campaign would have to reimburse the corporation or it would be considered a prohibited corporate contribution.

[27] In discussing independence, the draft states that, "The fact the Committee may have no editorial input in the content of a web site would be a factor in determining whether or not a web site is truly independent of a campaign or its control (for example, if the contents change without notice to or without the permission of the Committee)."

B. LINKING

Hypertext links form one of the distinguishing characteristics of the World Wide Web. In 1998, the FEC concluded that “links” constitute a thing of value and that a link on a corporate site constitutes an illegal corporate contribution.

[28] The case concerned a Congressional candidate who owned and was president of a company that had a Web site whose URL was the company president’s name. The bottom of the company’s home page included the following text with a link to the campaign Web site: “Dal La Manga, the founder and president of TWEEZERMAN, is running for the U.S. Congress in New York.” The linked text took users to a Web site that raised money for the candidate. The corporate site contained no other reference to the candidate.

The FEC ruled that the link itself constituted a contribution because it promised “additional exposure to members of the general public, which is tantamount to advertising.”

[29] The FEC said that this interpretation was justified because FECA “broadly defines a ‘contribution’ as ‘anything of value.’” The company and the campaign asserted that the link was free of charge and that linking was critical to navigating on the Internet, and therefore the link should not be considered an in-kind contribution. The FEC rejected the company’s reasoning, stating that, “Although the respondents are correct in stating that links between sites are routinely used and that links make surfing the net easy, they are incorrect in further stating that ‘these links are [customarily] free of charge. There is no disputing that paid advertising and paid hyperlinks on

the WWW are a very big business.” Furthermore, it concluded that “the mere fact that something is ordinarily provided free of charge does not alone answer the question of whether it has value — certainly, something can be free of charge but still have value.” The campaign agreed to a settlement with the FEC, admitting that its link was a political contribution in violation of 2 U.S.C. 441b(a). The campaign agreed to pay \$16,000 for this and other violations, but the amount was not subdivided into fines for each offense. [30]

More recent developments: Earlier this year, the State of Minnesota asked permission to include links to candidate Web sites on the Secretary of State’s Web site as non-partisan political activity. In a 1999 Advisory Opinion, the FEC ruled that the links were permissible under the exemption for “nonpartisan activity designed to encourage individuals to vote or to register.” [31] The Secretary of State’s office had been engaged in a great variety of these activities, the links were to be provided systematically by allowing each candidate to submit the Web address, and there was no danger of favoritism; therefore, the activities were allowable.

The General Counsel’s draft advisory opinion of July 1999 would clarify that the issue of whether a link is a contribution “turns on whether or not the owner of the web page providing the link would normally charge for the providing of such a link.” [32] The draft states that in determining whether a link was something of value, “custom that pertains to the particular type of web site” would be applied (i.e. does this type of web site normally charge?). In addition, the draft states that “links provided free of charge by media owned web sites... may be within the ‘news story exemption’ found at 2 U.S. C. §431(9)(B)(i).” [33]

[28] FEC, General Counsel’s Report, Matter Under Review 4340 (Feb. 9, 1998). See Sandler, Joseph and Neil Reiff, “Is the Campaign Finance Regime Ready for the Internet?,” paper presented at the George Washington University conference on “Online Politics and Democratic Values,” March 29, 1999.

[29] Federal Election Commission, Counsel’s Report, Matter Under Review 4340.

[30] Sandler, Joseph and Neil Reiff, “Is the Campaign Finance Regime Ready for the Internet?,” paper presented at the George Washington University conference on “Online Politics and Democratic Values,” March 29, 1999; Federal Election Commission, Matter Under Review 4340, Agreement.

[31] Federal Election Commission, Advisory Opinion 1999-7, April 22, 1999.

[32] Federal Election Commission, Draft Advisory Opinion 1999-17, at 9.

[33] To fit into the “news story exemption,” one must be a “press entity” “acting as a press entity in performing the media activity.”

Separate from the question of whether a link is a “contribution” is the question whether a Web site that provides a link to an official candidate site will be classified as an associated political effort. If the FEC determines that linking constitutes “coordination” with an official campaign, then the entire site on which the link appears would be a contribution. As such, the owner, like Leo Smith, would need to calculate the cost of her or his entire online political effort (not merely the value of the link) to insure that the costs did not exceed the \$1000 contribution limit. This would effectively mean that expensive Web sites, even if built by individuals or small groups, would be restricted from linking to an official candidate Web site.

C. NON-PARTISAN ACTIVITIES AND THE MEDIA EXEMPTION

The most important FEC ruling on non-partisan online political activities is Advisory Opinion 1996-2. [34] Online service provider CompuServe wanted to offer free Web sites and member accounts on a “non-partisan basis” to all federal candidates in order to allow the posting of position papers and to facilitate responding to questions from voters via email. CompuServe told the Commission that it typically charged \$9.95 per month for the service but provides free accounts to many journalists, schools, charities, government entities, and non-profit organizations. In response, the FEC ruled that the free accounts would be considered prohibited corporate contributions to federal candidates. The Commission had previously permitted a cable television station to give free airtime to candidates. That fell under the exemption for news stories or commentary by media outlets, but CompuServe did not qualify for the media exemption. Neither CompuServe’s contention that the Web sites would add value to the CompuServe service nor the fact that the accounts were similar to those given to other non-profit entities allowed CompuServe to escape the law against corporate contributions.

Financial information provider Bloomberg later asked the FEC to review its proposal to conduct electronic town meetings with federal candidates on its Web site. [35] In the Bloomberg proposal, journalists were to moderate the discussions, which would be available for later broadcast on Bloomberg television. The FEC ruled that Bloomberg was a “news and commentary provider via computer linkages” and was “performing a newspaper or periodical function for computer users.” The Commission said that the Bloomberg proposal differed from CompuServe’s because the “means of presentation [were to be] controlled by a press entity.” Because Bloomberg was only exempted as a “wire service,” the question of whether any exclusively Internet-based company can be defined as a media company remains unanswered. (The General Counsel’s draft advisory opinion of July would clarify that Internet polling may also be restricted because a Web site would not qualify as a media company based on an online poll; only an established media company would be permitted to use the exemption for this purpose.)

D. ORGANIZING AND ADVOCACY

In Advisory Opinion 1997-16, the FEC made its first ruling on organizational activities on the Web. [36] The Oregon Natural Resources Council Action (ONCRA) wanted to announce candidate endorsements of its affiliated PAC, Oregon Natural Resources Council Action Federal PAC (PAC), to its members on the ONCRA Web site instead of by mail. The FEC ruled that the group could not list its endorsements on the site unless it instituted a screening mechanism to ensure that it was only accessed by members. Corporations, including non-profits groups, can communicate endorsements to their members, but if they communicate to the general public it is considered an illegal corporate contribution. PACs on the other hand can make endorsements, contributions and expenditures with regard to Federal elections subject to the limits and disclosure requirements of FECA.

[34] Federal Election Commission, Advisory Opinion 1996-2, April 25, 1996.

[35] Federal Election Commission, Advisory Opinion 1996-16, May 23, 1996.

[36] Federal Election Commission, Advisory Opinion 1997-16, September 19, 1997.

The FEC found that if ONCRA provided the information through its Web site without limiting access to its members it would be considered an illegal corporate contribution. The Commission suggested requiring unique identification numbers or a password to access the endorsements on the Web site. The group could circulate the endorsements to a small group of non-members such as the news media, but only if the number of copies distributed to non-members

was a small percentage (about 1%) of the total. In the alternative, if the PAC wanted to provide unrestricted access to its endorsements on a Web site, the PAC would have to establish a separate segregated account to pay for the site and register the site either as an independent expenditure or in-kind contribution to each of the candidates. The PAC also could not use the funds or personnel from the main organization to produce the new site.

V. *IMPACT OF THE FEC'S RULINGS ON CAMPAIGN-RELATED SPEECH AND ACTIVITIES*

There is growing dissatisfaction with the FEC's approach to the Internet. Former FEC Commissioner Trevor Potter said that the FEC has "wandered" into the area of Internet campaign regulation without any clear method or set of principles. [37] Instead of evaluating the particulars of this new medium for political speech, the FEC has tried to force the Internet into the paradigm of broadcasting. Looking beyond the particulars of the agency's advisory opinions and enforcement actions to date, it is clear that the Commission's actions may chill political speech and activities on the Internet. As attorney Joseph Sandler recently put it, "If a single voter, raising no funds from others, spending a few hundred dollars of his own funds, can thus be pulled into the maze of regulations that now constitutes the campaign finance regime, it seems clear that this regime may pose significant obstacles to widespread, grass-roots use of the Internet for political communication." [38]

A. IS THERE ROOM FOR ANONYMITY?

By treating Web sites as "something of value" and "general public political advertising," the FEC's actions appear to leave little room for anonymous campaign-related

speech on the World Wide Web, for individuals who create Web sites that advocate around elections or solicit funds (even by directing an individual to another Web site) must provide information about their sponsorship. This is certainly the implication of the Leo Smith Advisory Opinion (1998-22): an individual creating such a Web site would have to include his or her full name and a statement as to whether or not the communication is authorized by a campaign. His statement that the site was maintained by an "independent voter" was insufficient.

In reaching this conclusion, the FEC brushed aside the 1995 Supreme Court decision in *McIntyre v. Ohio Elections Commission*, in which the Supreme Court held that a law against anonymous pamphleteering was unconstitutional. The Commission stated that the *McIntyre* decision only affected an Ohio statute and that it did not need to decide whether FECA was unconstitutional. Yet the Supreme Court decision was quite broad, noting that anonymous communication was an "honorable tradition of advocacy and dissent" that has served as a "shield from the tyranny of majority." [39] Authors write anonymously for many reasons: to avoid retaliation or ostracism, to maintain personal privacy, because they fear losing their jobs, or as a rhetorical tactic. The Supreme Court has ruled that

[37] Potter, Trevor, paper presented at the George Washington University conference on "Online Politics and Democratic Values," March 29, 1999.

[38] Sandler, Joseph and Neil Reiff, "Is the Campaign Finance Regime Ready for the Internet?," paper presented at the George Washington University conference on "Online Politics and Democratic Values," March 29, 1999.

[39] *McIntyre vs. Ohio Elections Commission*, 514 U.S. 334(1995); Carr, George, "Application of U.S. Supreme Court Doctrine to Anonymity in the Networld," *Cleveland State Law Review*, 1996

political activity disclosure laws create a threat of reprisal, especially for supporters of minor parties or unpopular candidates.

While AO 1998-22 can be distinguished on the grounds that it related to candidate advocacy while McIntyre related to issue advocacy, the broad inclusion of all Web sites as “general public political advertising” will limit Web-based anonymous campaign-related speech similar to that protected by the Supreme Court in McIntyre v. Ohio Elections Commission. In cases where a Web site is created by an individual or a small group, the identification of the author(s) will contribute little to the understanding of visitors to the site. [40]

Requiring individuals engaged in online political efforts to register with the FEC may chill political communication on the Internet. Not allowing Web-based anonymous activism by individuals may undermine the election law goals of equalizing political influence, improving the quality of electoral debate, and ensuring competitive elections by reducing the number of citizens and perspectives in the online political debate. This would undermine the goal of election law reformers by actually preventing an equalization of political influence. It may also have a detrimental effect on the ability of citizens to provide a check on well-financed candidates to prevent distorted election outcomes. It is likely to reduce the number of voices in the political debate, thereby backtracking on our efforts to improve the quality of electoral debate and ensure competitive elections.

B. SILENCING — THE USE OF FECA TO SILENCE NON-TRADITIONAL SPEAKERS

A too-rigid application of campaign finance laws may allow those most familiar with the laws — the mainstream candidates and their lawyers — to intimidate newcomers and ordinary citizens. Candidates have already begun to threaten owners of unregistered campaign-related Web sites. In 1996, Pete Wilson’s campaign sent an angry letter to the owners of a parody site demanding that they take down the site or be charged with violating election laws. [41] George W. Bush recently asked the FEC for an enforcement action against Zach Exley, the creator of gw bush.com. [42] The site, a parody of the official Bush site, criticizes Bush for being hypocritical on drug policy. Referring to the FEC decision in the Leo Smith case, the Bush campaign said that Exley should have registered the site as an independent expenditure and filed semi-annual reports because the costs of the site probably exceeded \$250 if the cost of computer hardware, utility costs, and software were included. If the value of the gw bush.com site exceeded \$1,000, the Bush campaign argued, Exley must register as a political committee with the FEC and file regular reports. The Bush campaign asked for “a thorough investigation.” In Exley’s response, he said that he had not spent over \$250 but that he was caught in a “Catch 22:” paying for a lawyer to address the FEC complaint would put him over the limit. He reasoned that he may also even go over the \$1000 limit because of the extra cost associated with the increased Web traffic after the press coverage of the Bush complaint. [43]

[40] Heinicke, Malcolm, “Political Reformers Guide to McIntyre and Source Disclosure Laws for Political Advertising,” Stanford Law and Policy Review, Summer 1997.

[41] Oram, Jon, “Will the Real Candidate Please Stand Up?: Political Parody on the Internet,” Journal of Intellectual Property Law, Spring 1998.

[42] Federal Election Commission Matter Under Review 4895, letter from Bush campaign, <http://www.gwbush.com>.

[43] Letter from Zach Exley to the Federal Election Commission, <http://www.gwbush.com>.

If the FEC determines that Exley or another Web user spent over \$1,000 in support of a candidate, the user will have to register as a political committee. Those who are required to register must provide their name and address, appoint a custodian of books and a treasurer, and report all bank accounts and funds to be used for political activities. [44] If any contribution to the political committee exceeds \$200, such as a computer, the committee must also have records of the contributor's occupation and employer. [45]

Similarly, if the FEC strictly enforces the election law's limits on association with the official campaign, many activities such as collecting information from campaigns for inclusion on a Web site, linking to the official campaign Web site, or other minimal communications between campaign staff and the outside individual or group may constitute associated efforts. [46] Individuals or small groups without knowledge of election laws could easily inadvertently become "associated" with official campaigns. If an expenditure by an individual or group is considered an in-kind contribution, they would be required to post the official disclaimer of the campaign committee on their Web site. Because the group or individual developing an "associated" Web site must get permission to use the disclaimer from the campaign committee, this requirement could stifle any "associated" Web efforts. Candidates would most likely not approve of "off-message" or uncontrolled communications that included a "paid for by" disclaimer designating the official campaign. Online efforts that were considered "associated" would likely either become controlled or suppressed by the official campaign.

C. NAVIGATING

The FEC's actions to date may limit the ease with which individuals can navigate the Web in search of campaign-related information. Hyperlinks are the essence of the Web; links make the Web what it is, an easily traveled interconnected network of computer files. [47] While the Commission's decision allowing the Secretary of State for Minnesota to include links to candidates' Web sites is a step in the right direction, the ruling does not clear a path for linking generally. The Secretary of State is a government official with a history and purpose of encouraging voting; if this is the standard, it is unclear whether non-governmental entities could meet it.

To the extent that an entity's link to another Web site can be considered a contribution, this effectively means that corporate Web sites and the Web sites of individual foreigners cannot link to official candidate Web sites in the US. Since the FEC has concluded that links constitute in-kind contributions, candidates will probably also have to report the personal information of any Web site operator that links to the candidate Web site. Web sites that announce the availability of linked images or html code for linking to their Web site could run into trouble when they are not informed that other sites have decided to link to their site. The prohibition on links from corporate Web sites creates problems for any site linking to candidate Web sites. Additionally, if individuals and small groups register their advocacy sites with the FEC, linking to those Web sites may constitute reportable in-kind contributions to private political committees. This extra layer of potential reporting means that Web sites would never know whether with every hyperlink they are making a prohibited or reportable contribution.

[44] Nielsen, Vigo, "Contribution and Expenditure Limitation and Reporting Requirements by PACs," *Corporate Political Activities 1998: Complying with Campaign Finance, Lobbying, and Ethics Laws*, Practicing Law Institute, September 1998.

[45] Federal Election Commission, Advisory Opinion 1998-22, November 20, 1998.

[46] Sandler, Joseph and Neil Reiff, "Is the Campaign Finance Regime Ready for the Internet?," paper presented at the George Washington University conference on "Online Politics and Democratic Values," March 29, 1999.

[47] Rash, Wayne, *Politics on the Nets*, W.H. Freeman: New York, NY, 1997.

If candidate Web sites are difficult for users to find, citizens will find the wealth of information on the Web overwhelming and cumbersome to navigate. Internet users are currently frustrated by the number of parodies and non-official sites that have taken the domain names where they expect to find the official Web site. [48] The Internet's way of solving for such problems without reducing the number of participants in the debate or closing down important efforts by third parties is to allow Web site operators to link to the official site. Citizen efforts, search engines, ISPs, non-profit groups, and individuals can point users to the official site while perhaps also providing links to their favorite independent efforts. Commentators have even suggested that the FEC provide links to candidate Web sites or free space on its server. The FEC has not only refused to include these links on its Web site, it has erected barriers to others' linking to candidate Web sites. For online politics to truly become an important force in voter decision-making, links to official Web sites need to be encouraged, not discouraged.

Ensuring that each candidate has a voice through free links might reduce the influence of money in politics; candidates would be able to buy banner ads on other sites but anyone who wanted to compare candidates could easily find all positions. [49] Because providing a link to a site does not cost the Web site (a site may derive revenue from charging for such a link, but the link itself does not cost additional money), candidates voices would be spread not based on the size of their pocketbook but on the resonance of their ideas. Independent efforts need to be allowed to link to official candidate Web sites so that users who accidentally visited an independent effort can be redirected.

Classifying all links as contributions is particularly problematic because linking is not always a complementary

gesture. Links can be used to illustrate inconsistent campaign statements or otherwise contradict a candidate's official Web site or message. For instance, the Republican National Committee links to the Democratic National Committee Web site to allow voters to compare the positions. [50]

Linking is more analogous to what the news media would do. In crafting FECA, Congress recognized that it had to exempt news media, otherwise election-related news coverage would be discouraged. Using the same analysis, it is hard to see how any coercion could come from an affirmative choice by an Internet user to click a link and review candidate statements. Unregulated linking is vital to advancing the goals of equalizing political influence, preventing distorted election outcomes, reducing the emphasis on fundraising, and ensuring competitive elections. If voters are only able to find campaigns with large banner ad budgets, the problems in other media will extend to the Web; on the other hand, if a lot of Web sites link to all candidates in an election, or if independent efforts by citizens on all sides provide links to candidate Web sites, most voters will see both campaign messages before making a decision. The benefits of connecting users to requested information about candidates should thus outweigh the costs.

D. NONPARTISAN ACTIVITIES, CORPORATE CONTRIBUTIONS, AND MEDIA EXEMPTIONS — A CONUNDRUM FOR WEB FORUMS

One of the premises of FECA is the presumption that there is a clear-cut distinction between corporate and individual activity. [51] Direct or in-kind contributions to federal political candidates from corporations are prohibited.

[48] Oram, Jon, "Will the Real Candidate Please Stand Up?: Political Parody on the Internet," *Journal of Intellectual Property Law*, Spring 1998.

[49] Stone, Pamela, "Electronic Ballot Boxes: Legal Obstacles to Voting over the Internet," *McGeorge Law Review*, Summer, 1998.

[50] Rash, Wayne, *Politics on the Nets*, W.H. Freeman: New York, NY, 1997.

[51] Potter, Trevor, "The Internet and Federal Election Law," Wiley, Rein & Fielding, March 29, 1999; Carr, George, "Application of U.S. Supreme Court Doctrine to Anonymity in the Networld," *Cleveland State Law Review*, 1996

On the Internet, however, drawing the distinction between individual and corporate speech may be difficult. For example, is it a corporate contribution if an ISP or a provider of free Web site hosting allows the posting of statements supporting candidates on Web sites, chat rooms or bulletin boards, especially if the ISP or other service provider is not a common carrier but retains some control over the content of information? Is the service provider subject to a take-down obligation following notice?

Another FECA distinction rendered obsolete by the Internet is the distinction between media and non-media. To meet the FEC's definition for the "media exemption," one must meet several requirements: the content must be a news story, editorial, or commentary from a qualified press entity using the press entity's routine means of distribution. The Internet has fostered an explosion of alternative news providers, some of which become absorbed into the mainstream media, while many have only an online presence. The current definition of media assumes the model of traditional mass communicators. Rupert Murdoch and Donald Graham are able to use their media empires to advance particular agendas; Rush Limbaugh and Jim Hightower are permitted to support or criticize political candidates in their daily radio programs. [52] The media exemption from campaign finance regulation has been broadened to include talk shows and other television programming with no news content. Certain political Web sites could be the Internet equivalent of such talk shows but they probably would not meet FEC guidelines. The FEC allowed networks to give free airtime to candidates but rejected an offer of free web space from CompuServe. [53]

The Supreme Court has said that "the liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." [54] Justice Thomas has said that "when the framers thought of the press, they did not envision the large, corporate newspaper and television establishments of our modern world;" instead they believed in a system of "many independent publishers." [55] Such a vision is made possible by the ease of publishing in the online world. However, federal election law has not adapted its definition of media to the Internet; when the FEC defines the "media exemption," it leaves out the millions of individuals and small organizations using the Web to voice political concerns.

The corporate restrictions could inadvertently destroy methods of political communications by small groups or individuals. Users could create a Geocities home page expressing support for a candidate, enter a chat room and advocate the election of a candidate, or post a message to a bulletin board with a link to a candidate Web site. The FEC has not considered any of these methods but each example would have the same net effect: a corporate Web site would include words expressly advocating the election or defeat of a federal candidate. Neither of the potential alternatives for the corporation — monitoring user forums for illegal content or declining to provide the service for political discussion — is particularly appealing. If a non-profit Web site included words expressly advocating the election or defeat of a candidate, for example in a reprinted editorial, it might also fail the FEC's test. [56] The net effect will most likely be a decrease in political discussion and involvement by average citizens.

[52] Smith, Bradley, "Campaign Finance Regulation: Faulty Assumptions and Undemocratic Consequences," Cato Institute Policy Analysis No. 238, September 13, 1995.

[53] Rodger, Will, "Feds Block CompuServe Campaign Help," USATODAY.com, July 28, 1999, <http://www.usatoday.com/life/cyber/tech/ctf717.htm>.

[54] Carr, George, "Application of U.S. Supreme Court Doctrine to Anonymity in the Network," Cleveland State Law Review, 1996.

[55] McIntyre vs. Ohio Elections Commission, 514 U.S. 334(1995).

[56] Sandler, Joseph and Neil Reiff, "Is the Campaign Finance Regime Ready for the Internet?," paper presented at the George Washington University conference on "Online Politics and Democratic Values," March 29, 1999.

IV. CONCLUSION

The blanket application to the Internet of campaign finance restrictions designed with other media in mind poses substantial risks to the burgeoning online political expression and activity. In the areas of greatest promise, campaign finance laws are the most restrictive and troubling. The concern is not that the large national parties or organized interests will suffer, but that the smaller organizations and individuals that the Internet promises to empower will instead be silenced, thereby discouraging grassroots efforts of the very type that campaign finance laws were intended to enable and encourage.

The First Amendment freedom to associate and to speak should be encouraged in the world of the Internet. Opening the political dialogue to grassroots efforts with no official organization is the essence of the Internet's democratic potential. The FEC has instead started down the path of restriction. By permitting only well-established organizations who strictly adhere to FEC standards the right to be involved in the electoral debate, its decisions would move us further away from the goal of equalizing political influence. The ensuing decrease in online political discussion will also prevent an improvement in the quality of debate.

The Internet offers a chance to reduce the role of more expensive communication and advertising media — television, radio, and direct mail — and move to a platform accessible to those with less funding. Many of the goals cited by election law reformers are independently advanced by Internet communication.

Application of existing campaign finance rules to the Internet would have the undesirable effect of maintaining the inequality of influence in elections afforded by the cost of traditional media, and limiting individuals' ability to use the Internet. Laws designed with television advertising in mind, when applied to the Internet, may actually thwart individuals' and groups' efforts to engage in the type of discourse election reformers sought to promote.

Premised on the limited capacity of the airwaves to carry information and the expense of communicating through mass media, existing election law limits contributions. When applied to the Internet, an abundant media with an unlimited capacity for information and participation, these same restrictions have perverse results. Rather than raising the relative voice of the less well-funded and third-party candidates, the campaign finance limitations may greatly decrease their effectiveness, visibility and prevalence in this emerging medium.

Registration requirements triggered by contributions, designed to shed light on the influence of donors on elected officials, may on the Web force individuals engaged in the online equivalent of pamphleteering or posting a sign in their front yard to identify themselves to the federal government and the public at large. Rather than encouraging the participation of individual citizens, such disclosure requirements may chill the increasingly privacy-wary public from expressing their opinions — as independent as they may be.

There are growing signs of uneasiness about the impact of FECA from within the FEC itself. Commissioner David Mason has asked the FEC general counsel to investigate whether some forms of Internet communication are “more akin to the provision of information only upon request” than to general public political advertising. [57]

FEC Commissioner Karl Sandstrom recently wrote, “In regulating the Internet, we should seek to unleash its promise. Only such regulation as is absolutely necessary to achieve the core purposes of the [FECA] law is merited.” [58] The course charted by the FEC to date, if followed, may have the effect of chilling the competitive marketplace of ideas on which our First Amendment jurisprudence is premised and which many believe the Internet has the potential to realize.

Therefore, the Commission should account for the specific characteristics of this vibrant new communications medium and exempt much of what occurs there from regulation under the campaign finance law.

The Commission, of course, is limited in what it can do by the language of FECA — the Commission cannot ignore or rewrite the statute. However, it seems that there is ample room within the terms and exceptions of the Act to allow much greater use of the Internet for election-related purposes by individuals and informal groups not affiliated with candidates or the political committees:

- The FEC could interpret the “volunteer” exemption to ensure that much of the online activity carried out by individuals is not covered by the contribution or expenditure rules. Just as the FEC does not count the value of a volunteer’s automobile when the volunteer drives to campaign headquarters to pick up yard signs, so the FEC should not count the value of a volunteer’s computer when the volunteer creates a Web site supporting the candidacy.

- The Commission should make it clear that one does not have to take directions from a campaign in order to be a volunteer. Otherwise, the large amount of “volunteer” activity on the Internet that is totally independent of a candidate or committee could fall into the independent expenditure category. The Commission should avoid putting ordinary citizens into this “Catch-22.”
- The FEC could also broaden its interpretation of the media exemption to cover more Internet-based commentary and reporting by those outside the traditional media.
- Also, the FEC could make it clear that, as a normal matter, a hyperlink is not “something of value.” (An analogy might be made to the phone numbers and addresses in the white pages, for which a telephone subscriber does not pay extra, or to the free listings provided in any number of advertising supported telephone books.)
- In recognition of the unique economics of the Internet, the Commission could make it clear that free Web service is not a “thing of value.” This could exempt bulletin boards, chat rooms and free Web pages.

Ultimately, however, it is likely that the FECA will have to be amended to take into account the unique aspects of the Internet. In addition to addressing the foregoing, Congress should reexamine the disclosure/labeling rules as they apply to the Internet, especially in light of the Supreme Court’s decision in *McIntyre v. Ohio Elections Commission*.

We do not advocate creating a regulation-free zone on the Internet. Fundraising and contributions through the Internet would still be regulated. Candidate and committee expenditures for Internet-based activity would still be counted. Our analysis focuses on the individual and the informal organization having little or no connection with a campaign. That is where the democratizing potential of the Internet is most dramatic — and should be most unrestricted.

[57] Mason, David, “Memorandum to the Commissioners,” April 16, 1999.

[58] Karl Sandstrom, “... And the Internet,” *Washington Post*, Sept. 5, 1999.



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