# NOTE

## A PRESUMPTION AGAINST REGULATION: WHY POLITICAL BLOGS SHOULD BE (MOSTLY) LEFT ALONE

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## I. INTRODUCTION

During the past several years, the number of web logs ("blogs")[1], particularly those of a political nature, has exploded, peaking around the time of the 2004 presidential election. The power of these blogs to shape politics and opinion has attracted the attention of politicians and the media. As political blogs have gained power, there has been an attempt to curb their influence and correct potential political abuses. Most notably, there is an ongoing effort to apply campaign finance reform laws to political blogs and other forms of Internet communication. Recently, the Federal Election Commission ("FEC") instituted a set of rules ("the new rules") that apply current election laws to the Internet. The actions taken by the FEC have profound implications for American political discourse and free speech.

Part II of this note will address the history of campaign finance reform, culminating in the Bipartisan Campaign Reform Act ("BCRA") and the current FEC regulations regulating Internet political speech. Part III will address the history of blogs (especially political blogs), their many uses, and their infiltration of the "mainstream media." Part IV will address the current application and resulting problems of the BCRA's press exemption to Internet speech by issue advocacy organizations, individuals, and the traditional media. Part V will address additional difficulties posed by the unique nature of Internet communication, particularly difficulties involving disclosure. Part VI will address the problems involved in creating appropriate remedies for violations of campaign finance reform laws on the Internet. Finally, Part VII will address the proposed solutions to these problems, assessing the balance between preservation of the integrity of political campaigns and preservation of the free flow of ideas.

## II. THE HISTORY OF CAMPAIGN FINANCE REFORM

Although minor efforts to curb financial influences on political campaigns have been made since the founding of the United States, serious campaign finance regulations were not established until the 1970's. In 1971, Congress passed a sweeping overhaul of campaign finance regulations with the Federal Election Campaign Act of 1971 ("FECA")[2] and the Revenue Act of 1971,[3] in

[1] The word "blog" is defined as "an online diary; a personal chronological log of thoughts published on a Web page." Webster's New Millennium Dictionary of English, Preview Edition (v 0.9.6), *available at* http://.dictionary.reference.com/browse/blog (last visited Jan. 16, 2007).

[2] Pub. L. No. 92-225, 86 Stat. 3 (codified as amended in scattered sections of 2 U.S.C. & 26 U.S.C.).

[3] Pub. L. No. 92-178, 85 Stat. 497 (codified as amended in 26 U.S.C. §§ 991-997 (1972)).

an attempt to consolidate previous reforms and move towards public financing of presidential campaigns. Then, in 1974, public outrage over the Watergate scandal resulted in several substantial amendments to FECA.[4] In response to a constitutional challenge to several of the amendments in *Buckley v. Valeo*,[5] the United States Supreme Court upheld contribution limits,[6] disclosure requirements,[7] and voluntary public financing,[8] but struck down most limits on expenditures.[9]

After *Buckley*, few substantive changes were made to FECA until the rise of the Internet began to pose difficulties due to fundamental differences between media control and power in the online world and media control and power in traditional media. Most notably, there are few barriers to entry for someone who wants to publish and disseminate online content.[10]

Courts addressing issues raised by online content have expressed a willingness to protect online political speech from government intrusion.[11] In *Reno v. ACLU*, the United States Supreme Court acknowledged that the First Amendment's protections apply to online material,[12] and that online content is subject to greater protection than that found in other more traditional media.[13] The Court also acknowledged that the Internet is a "unique" medium[14] that enables anyone to disseminate his or her message significantly "farther than

[4] Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of 2 U.S.C.) (creating the Federal Election Commission ["FEC"], passing stricter contribution and expenditure limits, and creating public financing for presidential general election campaigns).

[5] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[6] *Id*. at 58-59 & n.67.

[7] *Id*. at 84 & n.113.

[8] *Id*. at 108 & n.147.

[9] *Id*. at 58-59 & n.67.

[10] With just a computer and an Internet connection, users can create and distribute content cheaply and quickly. Although individual users have fewer institutional advantages in attracting audiences than large online media institutions, the potential still exists for these individuals to create and distribute content effectively.

[11] *See, e.g*., Reno v. ACLU, 521 U.S. 844, 882 (1997).

[12] The Court reviewed the constitutionality of several provisions of the Communications Decency Act ("CDA"). In analyzing the provisions, the Court used traditional First Amendment analysis to determine that the CDA was not narrowly tailored to meet a compelling government interest and was impermissively vague and overbroad. *Id*. at 874-879.

[13] *Id*. at 868-69 (there are "special justifications for regulation of the broadcast media that are not applicable to other speakers . . . .").

[14] *Id*. at 850.

[they] could from any soapbox."[15]

Presumably in response to *Reno* and to growing concerns about the applicability of FECA to online content, the Federal Election Commission ("FEC") began a rulemaking process to determine how best to apply FECA to the Internet. The FEC issued a Notice of Inquiry on November 5, 1999 seeking comments from interested parties. [16] In response to those comments, the FEC issued a Notice of Proposed Rulemaking ("2002 NPRM") addressing the agency's approach to the regulation of political activity on the Internet.[17] However, the FEC never got a chance to enact the proposed rules because Congress stepped in instead.

Spurred by the enormous Enron scandal, among other reasons, Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA").[18] The BCRA eliminated all soft money donations to national party committees,[19] but doubled the contribution limit of hard money.[20] In addition, the BCRA banned the use of corporate or union money to pay for broadcast advertising identifying a federal candidate within 30 days of a primary or nominating convention or within 60 days of a general election.[21] Any such ads identifying a federal candidate had to be paid for with regulated hard money, or with contributions exclusively made by individual donors.[22]

Later that year, the FEC adopted a set of rules implementing the BCRA.[23] Notably, the FEC excluded all Internet communications from the definition of "public communication."[24] Shortly after the adoption of these rules, Congressmen Christopher Shays and Marty Meehan, the sponsors of the BCRA in the U.S. House of Representative, filed a lawsuit against the FEC in federal district court, arguing that many of the FEC rules were inconsistent

[15] *Id*. at 870.

[16] Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360 (proposed Nov. 5, 1999) (to be codified at 11 C.F.R. pts. 100, 102-104, 106-107, 109-10, 114 & 116).

[17] The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358 (proposed Oct. 3, 2001) (to be codified in 11 C.F.R. pts. 100, 114, & 117).

[18] Pub. L. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., & 47 U.S.C.).

[19] 2 U.S.C. § 441i(a)(1) (2002).

[20] It was increased from $1,000 to $2,000 per election cycle. 2 U.S.C. § 441a(a)(1)(A) (2002).

[21] 2 U.S.C. 434(f)(3)(A) (2002).

[22] 2 U.S.C. 434(f) (2002).

[23] Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064 (July 29, 2002) (codified as amended in 11 C.F.R. pts. 100, 102, 104, 106, 108, 110, 114, 300 & 9034).

[24] *Id*. at 49,071-72.

with the BCRA.[25] In September, 2004, the district court issued a decision in *Shays v. FEC*, which struck down 15 separate FEC regulations and ordered the FEC to rewrite them.[26]

First, the district court held that the exclusion of all Internet communications from the definition of "public communication" in 11 CFR 100.26 was inconsistent with the BCRA.[27] The court concluded that "[w]hile all Internet communications do not fall within [the scope of 'public communications'], some clearly do."[28] The court left it to the Commission to determine "[w]hat constitutes 'general public political advertising' in the world of the Internet," and thus what should be treated as a "public communication."[29]

Second, the court found that the Commission's definition of the term "generic campaign activity" was "an impermissible construction of the Act" to the extent that it excluded all types of Internet communications.[30]

Third, the court "invalidated the 'content prong' of the Commission's coordinated communications rule at 11 CFR 109.21(c), which incorporates the definition of 'public communication' at 11 CFR 100.26."[31] The court found that expenditures for candidate or committee coordinated communications are "in-kind contributions, to that candidate or committee, regardless of the content, timing, or geographic reach of the communications,"[32] and that certain regulatory exclusions in the content prong "undercut [the Act's] statutory purpose of regulating campaign finance and preventing circumvention of the campaign finance rules."[33] The court then remanded each of these rules to the Commission for further action consistent with its opinion.

In response to *Shays*, the FEC issued a Notice of Proposed Rulemaking ("2005 NPRM").[34] According to the 2005 NPRM, "the proposed rules . . . would identify the types of Internet communications that are forms of 'general public political advertising' and that therefore would qualify as public communications."[35] Although the Commission stated its intent to retain the

[25] Shays v. FEC, 337 F. Supp. 2d 28 (D. D.C. 2004)

[26] *Id*. at 130-31.

[27] *Id*. at 69 & n.39.

[28] *Id*. at 67.

[29] *Id*. at 70.

[30] Internet Communications, 70 Fed. Reg. 16,967, 16,968 (proposed Apr. 4, 2005) (to be codified at 11 C.F.R. pts 100, 110 & 114) [hereinafter 2005 NPRM] (citing *Shays*, 337 F. Supp. 2d at 112).

[31] *Id*. at 16,969.

[32] *Id*. (citing *Shays*, 337 F. Supp. 2d at 63-64).

[33] *Id*. (quoting *Shays,* 337 F. Supp. 2d at 63).

[34] *Id*. at 16,967.

[35] *Id*. at 16,969.

general exclusion of Internet communications from the definition of "public communication," it suggested that Internet advertisements would constitute "general public political advertising" and thus fall under the definition of "public communication."[36] Since only paid political advertising would be affected, the Commission anticipated that this change would "have an extremely limited impact, if any, on the use of the Internet by individuals as a means of communicating their political views, obtaining information regarding candidates and elections, and participating in political campaigns."[37]

Second, the 2005 NPRM republished and invited comment on the current definition of "generic campaign activity" in section 100.25, which included the term "public communication."[38] The Commission noted that "any changes to the underlying definition of 'public communication' pertaining to the Internet would automatically apply to 'generic campaign activity.'"[39]

Third, the Commission proposed modifying its rules regarding which Internet communications require disclaimers.[40] The Commission did not propose any changes to the required content of the disclaimers.[41] Political committee websites would continue to need disclaimers.[42] Individuals and entities other than political committees, however, would need to place disclaimers only on paid Internet advertisements,[43] and only if the advertisements either solicit contributions or expressly advocate the election or defeat of a clearly identifiable candidate for federal office.[44] The Commission also proposed to clarify the current requirement that disclaimers be included in electronic mail of "more than 500 unsolicited substantially similar communications" by defining "unsolicited" as "those e-mail [sic] that are sent to electronic mail addresses purchased from a third party."[45] The Commission's aim was to "continue to require disclaimers on political 'spam,' without interfering with . . . large on-line communities."[46] Additionally, the

[36] *Id.*

[37] *Id.*

[38] *Id.* at 16,971.

[39] *Id.* at 16,969.

[40] *Id.* at 16,971.

[41] Generally, a disclaimer must clearly and conspicuously state the identity of the person or political committee that paid for and authorized the communication. 11 C.F.R. § 110.11(c)(1) (2002); *see also* 11. C.F.R. 110.11(b)-(f) (2002) (discussing the specific requirements for the scope and content of disclaimers).

[42] 2005 NPRM, *supra* note 30, at 16,968.

[43] Internet communications that constitute "general public political advertising" under the proposed definition of "public communication."

[44] 2005 NPRM, *supra* note 30, at 16,972.

[45] *Id.* at 16,978.

[46] *Id.* at 16,969.

Commission proposed a rule excluding certain volunteer activities on the Internet from the definitions of "contribution" and "expenditure,"[47] and sought to establish an "Internet exception from the definitions of 'contribution' and 'expenditure' for certain media activity."[48]

On March 27, 2006, the FEC voted unanimously on a new rulemaking ("draft rules") that would largely exempt bloggers and other individuals on the Internet from the ambit of the BCRA.[49] The substance of the draft rules tracks almost exactly with the 2005 NPRM upon which they are based. The FEC amended the definition of "public communication" to include paid political advertisements on the Internet,[50] but declined to include any other form of Internet communication within the definition.[51] As a result, any paid political advertisement placed on a blog or other website will be considered a paid political communication subject to the disclosure and coordination rules of the BCRA.[52] However, anyone using the Internet for any purpose will not be subject to the BCRA unless they are being paid by a political campaign or party.[53] This includes Internet activity that would not otherwise be subject to the press exemption.[54] Additionally, the FEC decided to make the traditional press exemption available to websites and other Internet communications.[55]

## III. THE HISTORY OF BLOGS AND INTERNET SPEECH

A blog is a web-based publication that usually provides updated headlines and news articles from other sites, and may include journal entries and commentaries compiled by the user. Many different entities author blogs on a variety of topics.[56] A particular blog can range in scale from just one author[57]

[47] *Id.*

[48] *Id.*

[49] FEC AGENDA DOCUMENT NO. 06-20, FINAL RULES AND EXPLANATION AND JUSTIFICATION FOR THE INTERNET COMMUNICATIONS RULEMAKING (Mar. 24, 2006), *available at* http://www.fec.gov/agenda/2006/mtgdoc06-20.pdf [hereinafter Draft Rules].

[50] *Id.* at 19.

[51] *Id.*

[52] 2 U.S.C. § 441i (2002).

[53] Draft Rules, *supra* note 49, at 1.

[54] *Id.* at 21-22.

[55] *Id.* at 57.

[56] Such entities and topics include individuals writing diaries, media organizations disseminating news and opinion, political campaigns spreading political messages, and businesses selling products or conducting public relations.

[57] *See, e.g.*, Eschaton, http://atrios.blogspot.com/ (last visited Jan. 16, 2007); Instapundit, http://instapundit.com/ (last visited Jan 16, 2007).

to a large community of authors.[58] Many blogs also enable visitors to leave public comments, resulting in an interactive discussion and the development of a community of readers and contributors.

Blogging is different from other forms of Internet communication (e.g. forums or newsgroups) in that only the author(s) can create new subjects for discussion.[59] By allowing reader comments and providing tools to make linking to other pages easier, blogs accurately reflect the personality of the blog's author, allowing that blogger[60] to develop a unique style.

Although blogs have been around since the early 1990's, they only recently began to exert any sort of influence over the political process. The first blog-aided political controversy is thought to be the fall of U.S. Senate Majority Leader Trent Lott.[61] Although the blogs played a role in the Trent Lott scandal, they remained little-noticed by the general public even as the increasing debate over the Iraq war spread to the Internet.[62] These blogs filled a void in the national discourse and citizens seeking information beyond that available from traditional sources flocked to the Internet in droves.[63] However, despite their popularity with certain segments of the population, blogs still

[58] *See, e.g.*, DailyKos, http://www.dailykos.com/ (last visited, Jan 16, 2007); The Volokh Conspiracy, http://volokh.com/ (last visited (Jan. 16, 2007).

[59] Because they are the only ones who can start a topic on the main page of the blog, blog owners have the ability to frame an issue more precisely than they would in a forum or newsgroup.

[60] The term "blogger" refers to the author of a blog.

[61] Lott had remarked during a party honoring U.S. Senator Strom Thurmond, that America would have been better off if Thurman had been elected President. Thurmond had run for President on the Dixiecrat ticket, expressly endorsing segregation. After Lott's statements were criticized in the media, Republicans rallied to his defense, arguing that he had merely misspoken. *See, e.g.*, Editorial, *Losing the Verbal Lottery*, WASH. TIMES, Dec. 11, 2002, at A18. Left-leaning bloggers such as Josh Marshall demonstrated that Lott's remarks were not an isolated misstatement, by finding past quotes of Lott's which appeared to condone segregation. *See, e.g.*, Talking Points Memo, http://www.talkingpointsmemo.com/archives/000464.php (Dec. 14, 2002, 05:07 PM EST). The bloggers' efforts kept the story alive in the press until a critical mass of disapproval forced Lott to resign his position as Senate Majority Leader. *See, e.g.*, Carl Hulse, *Divisive Words: The Overview; Lott Fails to Quell Furor and Quits Top Senate Post; Frist Emerges as Successor*, N.Y. TIMES, Dec 21, 2002, at A1.

[62] By the end of 2002, as the road to war began, the percentage of Americans visiting political- or issue-oriented websites had increased by 3 and 5 percent respectively from 2000. THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, MODEST INCREASE IN INTERNET USE FOR CAMPAIGN 2002: POLITICAL SITES GAIN, BUT MAJOR NEWS SITES STILL DOMINATE 5-6 (2003), *available at* http://www.pewInternet.org/pdfs/PRC_PIP_Election_2002.pdf.

[63] *Id.*

attracted little attention from the traditional media and the Washington political establishment.

The situation changed with the 2004 Democratic presidential candidacy of Howard Dean.[64] Dean used blogs to disseminate his message on the Iraq war and other issues of the day, cementing the role of blogs as news sources. Even more importantly, in terms of getting the national press to take notice, Dean was able to effectively use blogs as a significant source of fundraising and grassroots support.[65] Blogs were now on the minds of the media establishment and politicians.[66] During the 2004 presidential campaign, thirteen percent of Americans used the Internet as one of their main sources of political news, compared to just nine percent during the 2000 campaign.[67]

In 2004, blogs reached the mainstream when "political consultants, news services and candidates began using them as tools for outreach and opinion formation."[68] "In the summer of that year both the Democratic and Republican National Conventions credentialed bloggers, and blogs became a standard part of the publicity arsenal . . . ."[69] Even traditional media programs began forming their own blogs.[70] Merriam-Webster's Dictionary declared "blog" as the word of the year in 2004.[71] Blogs had arrived.

As discussed in Part II, the principle purpose of the BCRA is to stem the flow of soft money into politics in coordination with campaigns.[72] While the new FEC rules will only minimally affect individual blogging activities, the

[64] Dean, a little-known governor from Vermont, was able to catapult himself to front-runner status in the primaries through the use of Internet communications, including blogs.

[65] *See* Shedon Rampton, *On the Internet, Nobody Knows You're an Underdog*, PR WATCH, Third Quarter 2004, at 1-2, *available at* http://www.prwatch.org/files/prw11_3.pdf.

[66] On Feb. 14, 2005, CNN began devoting a segment of their news coverage to a rundown of the hot topics being discussed by the blogs, calling the segment "Inside the Blogs." By the end of 2003, blogs such as Instapundit, DailyKos, and Atrios were all receiving upwards of 75,000 visitors daily. Juiceenewsdaily, The History of Blogs, http://www.juiceenewsdaily.com/0505/news/history_blogs.html?1133412833296 (last visited Jan. 16, 2007).

[67] THE PEW RESEARCH CENTER FOR THE PEOPLE & THE PRESS, CABLE AND INTERNET LOOM LARGE IN FRAGMENTED POLITICAL UNIVERSE PERCEPTIONS OF PARTISAN BIAS SEEN AS GROWING – ESCPECIALLY BY DEMOCRATS 1-2 (2004), *available at* http://people-press.org/reports/pdf/200.pdf.

[68] Juiceenewsdaily, *supra* note 66.

[69] *Id.*

[70] *See, e.g.*, Hardblogger, http://www.msnbc.msn.com/id/5445086/ (last visited Jan. 16, 2007).

[71] Merriam-Webster's Words of the Year 2004, http://www.m-w.com/info/04words.htm (last visited Sept. 27, 2006).

[72] *See* McConnell v. FEC, 540 U.S. 93, 228 (2003).

rules are only part of the overall regulatory picture. The application of existing campaign finance reform laws to corporations, individuals, and traditional media on the Internet is not simple. There are a host of differences between the traditional versions of these groups and their Internet counterparts. As a result, there are a number of problems posed by attempting to apply existing campaign finance laws to communications on the web. These problems are related to (1) the press exemption; (2) defining campaign contributions; (3) the anonymity of Internet speech; and (4) the fashioning of appropriate remedies for violations of the BCRA.

## IV. THE PRESS EXEMPTION

In passing FECA, Congress sought to protect the political process from the corrupting influence of money by limiting individual contributions and expenditures and barring corporations from contributing directly to federal candidates, even if those corporations were members of the media.[73] Consistent with its stated mission to ensure that campaign finance reforms would not infringe on First Amendment freedom of the press,[74] Congress created an exemption to the definition of expenditures when it passed the BCRA.[75] This "allowed the media to report and comment on political campaigns and elections without having to disclose the cost of this activity to the FEC."[76]

Shortly thereafter, the FEC extended this exemption to its definition of campaign contributions.[77] Several interest groups,[78] objecting to both the BCRA and the extension of the exemption, mounted a court challenge to several key provisions of the new law.[79] In *McConnell v. FEC*, these groups argued that media companies exercise the ability to spend their considerable resources on political speech without regulation, while non-media companies

[73] 2 U.S.C. §§ 441b(a)-441b(b)(2) (2000) (a corporation may communicate with its restricted class about federal campaigns and elections but a corporation wishing to send communications outside of its restricted class must form a separate segregated fund, or political action committee).

[74] H.R. REP. NO. 93-1239, at 4 (1974) ("[I]t is not the intent of the Congress . . . to limit . . . the first amendment freedoms of the press . . . .").

[75] 2 U.S.C. § 431(9)(B)(i) (2000) (this is known as "the media exception").

[76] Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act's Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6, ¶ 7 (2004), *available at* http://www.vjolt.net/vol9/issue2/v9i2_a06-Zubowicz.pdf.

[77] 11 C.F.R. § 100.73 (2006).

[78] Including the ACLU, the Republican National Committee, and the National Rifle Association. *See* McConnell v. FEC, 540 U.S. 93, 93 (2003).

[79] *Id.*

face such restrictions.[80] They argued, in essence, that the Act's definition of electioneering communications was underinclusive. The Supreme Court dismissed this contention, citing *Buckley v. Valeo* for the proposition that Congress has the "authority to act incrementally in regulating this area."[81] The plaintiffs also attacked the Act's reporting and disclosure requirements, arguing that "political campaigns and issue advocacy constitute protected press activities."[82] The Court dismissed this contention outright.[83] The Court also held that the press exemption does not discriminate against non-media entities because it "excepts news items and commentary only. . . ."[84] Thus, the BCRA's definition of electioneering communications was held constitutional.[85]

### *A. When Does the Exemption Apply?*

Several subsequent court challenges and FEC rulings have led to the adoption of a two-prong test to determine the applicability of the press exemption to individual cases.[86] The exemption applies when (1) a qualifying press entity (2) spends resources performing a proper press function.[87]

#### 1. Qualifying Press Entity

Prior to the implementation of the new rules, an entity had to be a broadcasting station,[88] cable television station, "bona fide"[89] newspaper, "bona fide" magazine, or other "bona fide" periodical publication to qualify as a press entity.[90] Additionally, "[o]nly magazines and periodicals which ordinarily derive their revenues from subscriptions and advertising would be considered

[80] Zubowicz, *supra* note 76, at ¶ 9.

[81] *Id.*

[82] *Id.* at ¶ 10 (citing Brief for Congressman Ron Paul at 39, McConnell v. FEC, 540 U.S. 93 (2003) (No. 02-1747)).

[83] *McConnell*, 540 U.S. at 209 n.89.

[84] *Id.* at 208.

[85] *Id.* at 224.

[86] Zubowicz, *supra* note 76, at ¶ 13.

[87] *Id.*

[88] "[T]he term 'broadcaster' . . . include[s] broadcasting facilities licensed by the Federal Communications Commission, as well as networks." Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734, 76,735 (Dec. 27, 1979).

[89] A "bona fide" newspaper is "a publication of general circulation produced on newsprint paper which appears at regular intervals. . .and which is devoted primarily to the dissemination of news and editorial opinion to the general public." *Id.*

[90] *Id.*

'bona fide,'"[91] and even then only if they were "in bound pamphlet form, appearing at regular intervals . . . and containing articles of news, information, opinion and entertainment . . . . "[92]

However, the new rules' extension of the definition of "media" to include websites and other Internet communications specifically eliminates several of these requirements with regard to Internet communications.[93] This modification abolishes the bound-pamphlet requirement for Internet communications and websites.[94] Additionally, the regular-interval requirement for periodical publication is replaced by a more dynamic general frequency requirement.[95]

2. Proper Press Function

Once an individual or organization qualifies as a press entity, "the commission must determine whether the activity at issue [is] a proper press function."[96] If the entity is not using its resources to cover or carry a news story, commentary, or editorial, then the exemption's protections obviously do not attach to its conduct.[97] In determining the eligibility of the activity at issue for the press exemption, the FEC considers two criteria: (1) whether the press entity is owned or controlled by a political party, political committee, or political candidate and (2) whether the press entity is acting like a member of the media in conducting the activity at issue.[98]

*a) Political Control*

Political parties, committees, or candidates may disseminate content that qualifies for the press exemption. However, when an entity is under political control, it has a higher burden of proof that it is acting as a news

[91] *Id.*

[92] *Id.*

[93] Draft Rules, *supra* note 49, at 75.

[94] *Id.* at 83.

[95] *Id.*

[96] Zubowicz, *supra* note 76, at ¶ 17 (citing FEC v. Phillips Publ'g, Inc., 517 F. Supp. 1308, 1312-13 (D.D.C. 1981)).

[97] *See* FEC Advisory Op. 1982-44 (Aug. 27, 1982), *available at* http://ao.nictusa.com/ao/no/820044.html.

[98] Reader's Digest Ass'n v. FEC, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *see e.g.,* Phillips Publ'g Inc., 517 F. Supp. at 1313; FEC Advisory Op. 2000-13 (June 23, 2000), *available at* http://ao.nictusa.com/ao/no/200013.html; FEC Advisory Op. 1996-48 (Dec. 6, 1996), *available at* http://ao.nictusa.com/ao/no/960048.html; FEC Advisory Op. 1982-44, *supra* note 97.

organization.[99] "The entity must show that its media content consists of a bona fide news account that is widely disseminated to the public. In addition, the organization must demonstrate that it is providing 'reasonably equal coverage' to opposing candidates that are in the area where the . . . activity occurs."[100] Thus, the scope of the exemption is extremely limited for entities under political control.[101]

*b) Press Function*

In addition to establishing itself as free from political control, an entity must also demonstrate that it is engaged in a legitimate media activity for it to be subject to the exemption.[102] A genuine press entity which is not under political control will not be subject to rigorous scrutiny and will probably be covered by the exemption.[103] If it is clear that the press entity's conduct was not a legitimate press activity, then that conduct will not be covered by the exemption.[104]

There are very few situations in which the FEC has concluded that a press entity's conduct was inappropriate. For example, a publication that endorses a particular candidate for federal office and solicits contributions can still qualify for the exemption as long as the publication instructs individuals to send the contributions directly to the candidate and does not collect the contributions itself.[105] The FEC has, however, refused to protect even seemingly innocuous activity that benefits particular candidates[106] when that activity deviates from the Commission's understanding of traditional media practices.[107]

[99] Zubowicz, *supra* note 76, at ¶ 18.

[100] *Id.*

[101] *Id.*

[102] *Reader's Digest Ass'n.*, 509 F. Supp. at 1215.

[103] Zubowicz, *supra* note 76, at ¶ 18.

[104] *Reader's Digest Assoc*., 509 F. Supp at 1215.

[105] FEC Advisory Op. 1980-109 (Oct. 6, 1980), *available at* http://ao.nictusa.com/ao/no/800109.html.

[106] FEC Advisory Op. 1988-47 (Nov. 8, 1988), *available at* http://ao.nictusa.com/ao/no/880047.html (the exemption did not apply where a political magazine wanted to distribute free copies to various federal candidates because such a distribution was not part of a press entity's normal business function).

[107] FEC Advisory Op. 2004-7 (Apr. 1, 2004), *available at* http://ao.nictusa.com/ao/no/040007.html (concluding that MTV's attempt to place various election-related materials on its website and distribute these materials at community events was not an action typically performed by a press entity).

### *B. Application of the Press Exemption to Online Content*

Prior to the recently-enacted FEC rules,[108] the FEC provided little guidance about the application of FECA to online material.[109] However, past FEC advisory opinions and prior case law did suggest ways to apply the exemption to some online content.[110] Now, with the advent of the draft rules, the FEC has explicitly stated its intent to apply the press exemption to almost all forms of Internet communication, including the online speech of (1) traditional press entities such as broadcasting stations, newspapers, magazines, and periodical publications; (2) press entities that only have an online presence; (3) bloggers and other individuals; and (4) issue advocacy groups.[111]

#### 1. Online Speech of Traditional Media Entities

Because traditional media entities are already entitled to a press exemption regarding their broadcasting and publishing, there is little reason not to apply the exemption when a traditional broadcasting station or publisher places the same content online as it prints or broadcasts in its traditional format – assuming that the website is not under political control and the content is part of the entity's press function. As there is no meaningful distinction to be made between the print and online versions of a traditional media entity, the press exemption likely applied to them even before the draft rules were enacted.[112]

Similarly, the exemption was also likely to apply when a traditional broadcasting station or publisher placed different content online than what it broadcasted or published.[113] This follows logically, given that the online content is merely a sign of the traditional press entity's desire to expand its product in the Internet environment.[114] Assuming that the content is a valid press function, there appears to be nothing unique about it that would justify a departure from the exemption. In fact, the FEC had already concluded that content that is only available online can be subject to the press exemption,[115] and that coverage of national party conventions by an entity that normally covers national politics qualifies for the press exemption under the news story and commentary categories.[116]

Since the creation of the press exemption, the FEC has repeatedly expanded

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[108] Draft Rules, *supra* note 49, at 75.

[109] Zubowicz, *supra* note 76, at ¶ 32.

[110] Such online content included that published by traditional newspapers.

[111] Draft Rules, *supra* note 49.

[112] Zubowicz, *supra* note 76, at ¶ 33.

[113] *Id.* at ¶ 34.

[114] *Id.*

[115] FEC Advisory Op. 2000-13, *supra* note 98.

[116] *Id.*

its scope as applied to online content. The Commission has concluded that the press exemption applies to the broadcasters of a fictional show that includes depictions of or discussions about actual federal candidates,[117] as well as the online efforts of a TV network to promote and conduct a "Prelection" via email, text messaging, and the web.[118] The FEC has explicitly recognized the applicability of the exemption to the Internet, stating that "the media exemption applies to media entities that cover or carry news stories, commentary and editorials in traditional media such as printed periodicals or television news programs."[119] The practical result of this amendment appears to be that traditional media entities publishing content which would be subject to the press exemption if published in a traditional medium will remain protected when published online.[120]

2. Media Entities That Only Have an Online Presence

Several websites could be classified as media entities even though they only exist online and thus do not fit neatly under the previous versions of the press exemption. Websites like CNET,[121] Salon.com,[122] and Slate Magazine[123] can only be found online, and they offer "original news, commentary, and editorial content in a format that cannot easily be categorized as a newspaper, magazine, or other periodical publication."[124] They are not controlled by political parties, committees, or candidates, and they engage in a press function by publishing news content.

The FEC initially rejected the idea that an online-only entity could qualify for the press exemption.[125] However, the Commission has concluded that the exemption applies to an electronic town hall meeting, featuring candidate remarks, questions from a live audience, and e-mail questions from online users.[126] Applying its two-prong test, the FEC concluded that the "broadcaster," Bloomberg L.P. ("Bloomberg"), was a press entity when it

[117] FEC Advisory Op. 2003-34 (Dec. 19, 2003), *available at* http://ao.nictusa.com/ao/no/030034.html.

[118] FEC Advisory Op. 2004-7, *supra* note 107.

[119] Draft Rules, *supra* note 49, at 75.

[120] *Id*. at 76.

[121] CNET News, http://news.com.com (last visited Jan. 16, 2007).

[122] Salon.com, http://www.salon.com (last visited Jan. 16, 2007).

[123] Slate Magazine, http://www.slate.com (last visited Jan. 16, 2007).

[124] Zubowicz, *supra* note 76, at ¶ 39.

[125] FEC Advisory Op. 1996-2 (Apr. 25, 1996), *available at* http://ao.nictusa.com/ao/no/960002.html.

[126] FEC Advisory Op. 1996-16 (May 23, 1996), *available at* http://ao.nictusa.com/ao/no/960016.html.

provided news and commentary, performing a publication function for computer users even though those users were not journalists.[127] However, it was important to the FEC that Bloomberg maintained editorial control over the way that the content was presented.[128]

The FEC's new rules eliminate the uncertainty of the FEC decisions over the years, explicitly protecting such entities by adding "websites" and "any Internet or electronic publications" to the list of "media" in the press exemption.[129] "In so doing, the Commission recognizes that the media exemption is available to media entities that cover or carry news stories, commentaries, or editorials solely on the Internet . . . ."[130]

3. Individuals Who Publish Online

Given the current state of technology, it is extremely easy for an individual to become an online content-publisher.[131] The Supreme Court has recognized the unique ability of the Internet to enable anyone to contribute to the creation and dissemination of constitutionally-protected speech.[132] Many popular blogs contain original content and offer links to other online sources of political content, such as newspapers, columns, and editorials. These blogs sometimes link to breaking stories before any other news outlet, including traditional media giants.[133] Unlike traditional media entities, bloggers have few financial resources. Until recently, the FEC had declined to address the potential application of the press exemption to such individuals.

Prior to the FEC Advisory Opinion regarding the website Fired Up!,[134] as well as the implementation of the new FEC rules, the analytical framework in place could have conceivably protected a blogger who (1) regularly published online news, commentary, or editorial content; (2) was not controlled by a political party, political committee, or candidate; and (3) acted like a traditional press entity. Theoretically, a blogger who published an election-related article online a week before an election would not have been able to take advantage of the exemption.[135] On the other hand, a blogger who regularly published political material could have argued that the election content was simply a standard feature of frequently published news, commentary, and editorials.

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[127] *Id.*

[128] *Id.*

[129] Draft Rules, *supra* note 49, at 75.

[130] *Id.* at 75-76

[131] Reno v. ACLU, 521 U.S. 844, 870 (1997).

[132] *Id.*

[133] *See, e.g.*, Drudge Report, http://www.drudgereport.com (last visited Jan. 16, 2007).

[134] *See infra* notes 147-52 and accompanying text.

[135] Zubowicz, *supra* note 76, at ¶ 71.

Such an argument would have been difficult, however, due to the requirement that publication occur at regular intervals.[136] Most bloggers, even if they publish frequently,[137] do not publish in regular intervals.

With the advent of the FEC advisory opinion in Fired Up!,[138] and especially with the new FEC rules,[139] it appears that bloggers and other individuals communicating on the Internet will be protected by the press exemption. The new FEC rules make individual bloggers eligible for the media exemption as if they were traditional media entities.[140] As such, bloggers are required to publish regularly, perform a legitimate press function, and not be controlled by a political party, committee, or candidate to be included in the media exemption.[141]

4. Certain Online Speech of Issue Advocacy Groups[142]

Issue advocacy groups use many different means of communication to get out their messages. In addition to television, print advertisements, and use of volunteers, these groups also use mail, e-mail, and telephone calls to disseminate their message and to mobilize voters, spending massive amounts of money in the process.[143] As such, these groups are fairly strictly regulated by campaign finance laws; they can generally only be categorized as qualifying press entities if they disseminate information to a large, generalized audience.[144]

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[136] Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734, 76,735 (Dec. 27, 1979).

[137] Bloggers often publish multiple times a day but then go days, weeks, or even months without publishing at all.

[138] *See infra* notes 147-52 and accompanying text.

[139] Draft Rules, *supra* note 49.

[140] *Id.* at 82.

[141] *Id*. at 72-83.

[142] The term "issue advocacy group" refers to an organization that pursues specific public policy objectives through press and non-press activities.

[143] Annenberg Public Policy Center, IssueAds@APPC: Previous Reports, *available at* http://www.annenbergpublicpolicycenter.org/issueads/reports_previous.htm (last visited Jan. 16, 2007) (spent an estimated $509 million on issue advocacy during the 1999-2000 election cycle); ANNENBERG PUBLIC POLICY CENTER, LEGISLATIVE ISSUE ADVERTISING IN THE 107TH CONGRESS 6 (2003), http://www.annenbergpublicpolicycenter.org/issueads/appc_issueads107th.pdf (issue advocacy groups spent an estimated more than $105 million on print and television issue advertising in Washington, D.C. during the 107th Congress).

[144] *See* FEC Advisory Op. 1982-58 (Feb. 18, 1983), *available at* http://ao.nictusa.com/ao/no/820058.html (the exemption did not apply to an in-house magazine for the company); FEC Advisory Op. 1984-23 (June 22, 1984), *available at*

In rejecting the issue advocacy organization Massachusetts Citizens for Life's ("MCFL") application for a press exemption, the United States Supreme Court stated that the nature of election-related materials is essential to eligibility for the press exemption.[145] However, by distinguishing MCFL from other for-profit corporations, the court implied that an issue advocacy group *could* conceivably be considered a press entity and thus could be eligible for the press exemption.[146]

Recently, the FEC clarified its position on the online speech of issue advocacy groups in its response to an advisory opinion request by Fired Up! LLC ("Fired Up").[147] The Commission's advisory opinion concluded that Fired Up's Internet activities, as described, were entitled to the press exemption. [148] Fired Up qualified as a press entity because it is not owned or controlled by any political party, committee, or candidate, and its websites are both available to the general public and are the online equivalent of a newspaper, magazine, or other periodical publication.[149]

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http://ao.nictusa.com/ao/no/840023.html.

[145] FEC v. Mass. Citizens for Life, 479 U.S. 238, 249-50 (1986) (the exemption did not apply to an issue advocacy organization's special election-year newsletter because it differed from its regular newsletters in several important ways).

[146] The Court noted that MCFL: (1) did not amass the same degree of wealth; (2) was formed to disseminate political ideas, not political capital; and (3) did not amass its resources based on its success in the economic marketplace, but based on its popularity in the political marketplace. *Id*. at 259. The Court also noted that, because individuals who do support it are aware of its ideology, there are fewer concerns that it will exert a corrupting influence on politics. *Id*. *But see* FEC v. Beaumont, 539 U.S. 146, 159-60 (2003) (direct contributions of advocacy corporations should be treated the same as direct contributions from traditional business corporations because "the corrupting potential underlying the corporate ban may indeed be implicated by advocacy corporations").

[147] Fired Up intended to establish a network of state-specific websites to provide political information relevant to individuals who live in a given state. Access to Fired Up's websites is free and available to the public without registration or subscription. Some of the founders of Fired Up are former operatives of the Democratic Party, but the company generates revenue only from the sale of merchandise. The content of the websites is unabashedly progressive and is mostly generated by users of the site. However, some content is posted by one of the founders. Most of the content is editorial, but some is original news reporting. Guest editorials are also occasionally written by the founders and other individuals. *See* Fired Up!, http://firedupamerica.com/ (last visited Jan. 16, 2007).

[148] FEC Advisory Op. 2005-16 (Nov. 18, 2005), *available at* http://ao.nictusa.com/ao/no/050016.html.

[149] The FEC based this conclusion on the fact that the primary function of the websites is to provide news and information to readers through commentary, quotes, summaries, hyperlinks, and original reporting. Additionally, Fired Up retains editorial control over the content displayed on its websites, much like how newspaper or magazine editors determine

The FEC specifically noted that reader comments appearing on Fired Up's websites are similar to letters to the editor and do not alter the basic function of Fired Up.[150] The Commission further noted that it had already expressly extended the press exemption to qualifying activities that appear on the Internet.[151] An entity otherwise eligible for the press exemption would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocated the election or defeat of a clearly identified candidate for federal office.[152]

Despite these "victories," it remains more difficult for issue advocacy groups to demonstrate that they are acting as press entities than it is for traditional media organizations to do so, because of advocacy groups' stated desire to influence policy choices and elections.[153] In order to qualify for the press exemption, such groups likely "need to show a history of publishing online news, editorial, and commentary content, especially if they wish to broadcast or publish material that explicitly advocates the election or defeat of federal candidates."[154]

The FEC's new rules do not appear to alter this basic framework, despite expanding the definition of "media entity" to include "website[s] . . . [and] any Internet or electronic publication . . . ."[155] On its face, this change appears to suggest that instead of being required to show a history of publishing news, editorial, or commentary, issue advocacy groups may only have to show that they are not "controlled by any political party, political committee, or candidate . . . ."[156] Further, issue advocacy groups may even be free to disseminate content on the Internet even if they publish only in an election

which news stories, commentaries, and editorials appear in their own publications. *Id.*

[150] FEC Advisory Op. 2005-16, *supra* note 148 (citing FEC Advisory Op. 1996-16, *supra* note 126).

[151] In its Advisory Opinion 2000-13, the Commission found that iNEXTV, a company operating a network of specialized news and information websites with limited original content, qualified for the press exception through its Internet activities even though it lacked a traditional "offline" media presence. The Commission concluded that iNEXTV and its EXBTV website were press entities "both as to their purpose and function." FEC Advisory Op. 2000-13, *supra* note 98.

[152] FEC Advisory Op. 2005-16, *supra* note 148 (citing FEC, Matter Under Review 5440, First General Counsel's Report (May 17, 2005), *available at* http://eqs.sdrdc.com/eqsdocs/00004578.pdf.

[153] Zubowicz, *supra* note 76, at ¶ 52.

[154] *Id.*

[155] Draft Rules, *supra* note 49, at 86-87.

[156] *Id.* at 87.

year.[157] This appears to be true given the FEC's intent to exempt bloggers even though they do not have "a history of publishing" and do not publish "at regular intervals." It is difficult to see any way to distinguish bloggers and issue advocacy groups in this regard.

The FEC addressed this problem, however, by changing its interpretation of "periodical publication." The FEC had interpreted "periodical publication" to require an entity to publish "in bound periodical form"[158] and "at regular intervals."[159] In the draft rules, the FEC distinguished that opinion by exempting only Internet communications made on a "frequent, but perhaps not fixed, schedule."[160] While it remains unclear what level of infrequency will result in ineligibility for the media exemption, issue advocacy groups will be able to apply for the media exemption if they publish (either online or off) at least as frequently, with at least as much regularity, as the typical blogger.

### *C. Proposed Reform of the Press Exemption*

The goal of any regulation of online political speech must be to confer the highest possible protection to First Amendment rights.[161] A website with a large quantity of news, commentary, and editorial content should not have to be concerned about whether it must file disclosure reports with the FEC because it endorses a presidential candidate. Ultimately, regulations should overprotect rather than underprotect online freedom of political speech. Otherwise a certain amount of political commentary will be chilled.[162]

The current FEC regulations are an excellent start towards protecting political speech online. The FEC has wisely chosen to overprotect First Amendment activities in light of the current changes in the dissemination of news brought on by the accessibility of the Internet. Yet while the FEC's restraint is commendable, they have failed to address several concerns.

#### 1. Eliminating the "Press Entity" Requirement

The United States Supreme Court has recognized online speech as being especially worthy of First Amendment protection.[163] Commendably, the FEC

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[157] This would appear to contradict the ruling in *FEC v. Mass. Citizens for Life*, which specifically refused to grant the exemption where an issue advocacy organization published newsletters only in election years. 479 U.S. 238 (1987).

[158] FEC Advisory Op. 1980-109, *supra* note 105.

[159] *Id.*

[160] Draft Rules, *supra* note 49, at 83.

[161] *Id.* at 73.

[162] FEC v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 54-55 (2d Cir. 1980).

[163] Reno v. ACLU, 521 U.S. 844, 882 (1997).

has adopted a significantly clearer definition of what constitutes a press entity when determining eligibility for the press exemption. It is evident that Congress enacted the press exemption with the understanding that new forms of media might develop.[164] Otherwise, it would not have kept the door open for the FEC to include "other media" within the ambit of the exemption.

Taking the advice of several commentators and academics,[165] the FEC decided to clarify the situation by including websites as qualifying press entities.[166] This clarification ensures that online political speech will receive formal protection under the exemption, preventing the FEC from having to consider difficult analytical issues. Instead, the agency will automatically consider all websites as press entities.

Although the FEC's decision will fully protect bloggers and other Internet communicators, the decision is problematic because it provides an avenue for the corruption of the political process, without acknowledging the potential for such abuse. By completely exempting websites, the FEC's decision allows entities otherwise excluded by the BCRA to corrupt the process by spreading money and influence through online sources. While websites are often used for media purposes, they can also be used in other ways. The practical effect of designating all blogs and websites as press entities is the de facto elimination of the first prong of the two prong test to qualify for the press exemption in regard to online speech only. While the protection of online political speech is certainly positive, this positive development should not be muddied by replacing the first prong with an empty shell.

Instead, the FEC should explicitly acknowledge that it has eliminated the first prong of the test as unworkable in the Internet era. Doing so would clarify the rule and allow the FEC to go about the business of protecting against the inevitable abuses of Internet speech. Elimination of the first prong would shift the inquiry away from defining the entity, and enable the FEC to look exclusively at the activity at issue. If the activity is a press activity, then the actor should be exempted in regard to that activity, regardless of whether it is a "press entity." While this would allow any organization (including a union, corporation, or special interest group) to editorialize or disseminate news, regardless of the organization's status, such an approach would best preserve the free exchange of ideas. Admittedly, this opens the door to potential corrupting influences, but such influences could be protected against through new legislation if Congress sees fit to do so.

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[164] *See* H.R. REP. NO. 93-1239, at 4 (1974).

[165] *See, e.g.*, Zubowicz, *supra* note 76, at ¶ 99.

[166] Draft Rules, *supra* note 49, at 75.

2. Refining the "Press Function" Requirement

Because the Internet has rendered traditional media classifications obsolete, the FEC needs to determine its approach to cases in which it is less clear whether an entity is acting like a member of the press. Although there are legitimate concerns regarding an FEC attempt to craft a definition of what constitutes "news" or "journalism,"[167] it seems that the FEC is in as good a position as any to attempt to resolve such issues.

However, because there is substantial debate about what constitutes an online journalist, as well as what standards should apply to online news, commentary, and editorial content, the FEC should adopt a presumption in favor of applying the exemption to close cases. Such a presumption could be rebutted by showing that the entity is somehow compromised in its ability to act as a bona fide member of the media. This approach would ensure that online political speech would continue to receive as much protection as its traditional print and broadcasting counterparts, while minimizing the potential corrupting influence of political parties, committees, and other organizations.

3. Potential Effects of the Proposed Reform

*a) Equitable Application of the Press Exemption*

Applying the press exemption to all political speech (including online political speech) will help ensure greater participation in the creation and dissemination of news, commentary, and editorial content. Members of the traditional press can currently report on, comment on, and even attempt to influence federal campaigns and elections by devoting entire opinion and editorial pages to the outright endorsement of particular candidates, all without any FEC regulation. On the other hand, non-media entities cannot behave similarly without running into compliance problems with FECA and FEC regulations. This puts such entities at a severe disadvantage when it comes to disseminating their preferred political messages.

This disadvantage is further compounded by BCRA restrictions on the extent to which individuals and various interest groups can engage in certain

[167] Constructive proposals have been offered with respect to defining who is a journalist and what constitutes news, but there is little agreement about the exact contours of such definitions. *See* Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1406-16 (2003); Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL'Y REV. 97, 130-35 (2002); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002).

kinds of issue advocacy.[168] The BCRA "escalates Congress' discrimination in favor of the speech rights of giant media corporations . . . ."[169] This discrimination amounts to "the codification of an assumption that the mainstream media alone can protect freedom of speech. It is an effort by Congress to ensure that civic discourse takes place only through the modes of its choosing."[170]

The marketplace of ideas is the cornerstone of our democracy. Increased media monopolization and the abolition of the so-called "fairness doctrine"[171] has increased barriers to the wider dissemination of competing ideas. While the exemption cannot and should not force the dissemination of alternative views,[172] it is essential that it not serve as an additional obstacle to such dissemination. Instead, the exemption should be extended to include all political speech. The limited costs associated with establishing and running a website make it easy for individuals from across the political spectrum to reach millions of people, contributing to, rather than diminishing, the amount of political speech created.

*b) Continued Protection of the Integrity of the Political Process*

There is no doubt that an expanded press exemption would generate concerns about the integrity of campaign finance laws. It is conceivable, even likely, that some parties might attempt to operate as press entities for the primary purpose of influencing federal elections.[173] The purpose of the press exemption is to protect important press functions. In doing so, the exemption also protects members of the media when they are attempting to affect federal elections through candidate endorsements, because these members of the media also perform important press functions and are not necessarily focused on getting certain individuals elected. Although the use of the press exemption as a screen for the advancement of an overtly electoral agenda hinders FECA's

[168] Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, §§ 201-204, 116 Stat. 81, 88-92 (codified in scattered sections of 2 U.S.C.).

[169] McConnell v. FEC, 540 U.S. 93, 287 (2003) (Kennedy, J., concurring in part and dissenting in part).

[170] *Id.*

[171] The "fairness doctrine" was an FCC policy that attempted to ensure balanced coverage of controversial issues by requiring that all sides of such issues be addressed. The policy was deemed constitutional by the Supreme Court in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). In 1987, the FCC abolished the doctrine.

[172] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 251 (1974).

[173] James Bopp, Jr. & Richard E. Coleson, *Election Law Symposium: The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance "Reformers,"* 51 CATH. U.L. REV. 785, 815 (2001-02).

institutional goals,[174] it was Congress' intent to exempt the press from campaign finance laws. In any case, the FEC retains the ability to investigate claims that the press exemption is being used inappropriately.[175]

4. Conclusions Regarding the Proposed Expansion

The principle purpose of the press exemption is to shield members of the media acting in their constitutionally valued capacity from FECA's restrictions. In keeping with this purpose, the coverage of the exemption should expand as technology allows more avenues for the distribution of news and editorial content. As we have seen, the press exemption, as currently interpreted, applies to the online activities of traditional press entities, entities that only have an online presence, issue advocacy groups, some corporations that conduct media and non-media activities, bloggers, and, in extremely limited circumstances, political parties, committees, or candidates.

However, the FEC's decision to explicitly include websites in the types of media covered by the exemption, though not harmful, is ill-advised. Instead, the commission should eliminate the "media entity" requirement when determining the application of the exemption and adopt a presumption in favor of applying the exemption to online political speech. Such a policy would ensure that all speech performing a press function is protected regardless of the speaker and the medium of speech, while simultaneously clarifying the inquiry into eligibility for the exemption.

## V. OTHER INTERNET-SPECIFIC ISSUES

Although an expanded press exemption is advisable, such expansion does not address some of the other problems regarding Internet political speech. In fact, the current FEC rules open the door to potential problems unique to the Internet context. For example, the FEC must determine what counts as a campaign contribution. Additionally, because of the nature of the Internet, the FEC and the courts may need to step in and address the problem of disclosure of connection to a campaign.

### *A. What Counts as a Campaign Contribution*

When someone acts in coordination with a candidate or committee and provides them with a benefit, the financial value of that benefit qualifies as a campaign contribution.[176] For example, if someone donates $1,000 worth of cash, labor, or materials at the request of a candidate's committee, that donation counts as a $1,000 contribution. The law limits the amount an

[174] Zubowicz, *supra* note 76, at ¶ 93.

[175] *Id.* at ¶ 94.

[176] 2 U.S.C. §431(8)(A) (2000).

individual can contribute to a candidate, even through in-kind activities or gifts.[177] The Internet is a unique medium and has spawned various unique types of communication, some of which could be considered a campaign contribution. The most prominent of these communications are hyperlinks and email.

In the draft rules, the FEC, despite its prior suggestion that it might consider a hyperlink on a blog to a candidate's home page to be coordination with that candidate,[178] explicitly rejected such a policy.[179] There is no corruptive influence in creating such a hyperlink and no good reason to discourage what looks like beneficial, grassroots political activity. Furthermore, it is difficult, if not impossible, to measure the value of such a link. Normally, the value of a contribution is determined by its value to the candidate. A hyperlink, however, costs next to nothing, but can potentially provide a tremendous benefit to the candidate in the form of website traffic.

While many commentators agree that linking to a candidate's website should not be considered a contribution subject to the $2,000 limit, email is a different story. Email differs from hyper-linking in a number of ways. Firstly, email, like TV advertising, is passively received by consumers. A consumer does not choose to receive such communications, which gives the communications an invasive quality, thus suggesting that regulation might be necessary. Currently, the FEC only considers email paid for by a campaign, committee, or non-press entity to be a campaign contribution subject to regulation.[180] The FEC does not consider unpaid-for email to be a campaign contribution, unless it is coordinated by a candidate, campaign, or committee using said candidate's resources.[181] There are several good reasons for the FEC's reluctance to consider unpaid-for email subject to regulation, as well as several reasons to reconsider this approach.

At first glance, there appear to be several reasons for exempting unpaid email as a campaign contribution. Most notably, like hyper-linking, email is extremely difficult to evaluate financially. Because it doesn't cost very much, an individual could potentially send email to millions of people without spending anything approaching the $2,000 contribution limit. As such, it does not seem that the FEC would be entitled to regulate even if it wanted to. It should be recognized, however, that the value of a mass email to a political

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[177] 11 C.F.R. § 106.1 (2002).

[178] Declan McCullagh, *The Coming Crackdown on Blogging*, CNET NEWS, Mar. 3, 2005, http://news.com.com/The+coming+crackdown+on+blogging/2008-1028_3-5597079.html.

[179] Draft Rules, *supra* note 49, at 42-43.

[180] FEC Advisory Op. 1999-17 (Nov. 10,1999), *available at* http://ao.nictusa.com/ao/no/990017.html.

[181] *Id.*

campaign is significantly higher than its cost. There is little doubt that a national campaign would be willing to pay significantly more than $2,000 dollars for the opportunity to disseminate its message to everyone in the nation. If the FEC wanted, it could place a value on such communications, which would bump into the contribution threshold.[182]

Another reason the FEC might not want to regulate email is also related to its low cost. Because the cost is so low, email is available to almost all citizens. Since access is equal, the potential for corruption is minimized. Since the primary purpose of the BCRA is to prevent such corruption, there is little need for the FEC to regulate email. However, it should be noted that the majority of political email is sent in bulk to targeted recipients. The names and email addresses of these recipients are obtained by purchasing email lists compiled by various companies and organizations. Although it is easy for anyone to send emails, access to these email lists is more limited. Thus an argument could be made that the potential for corruption still exists.

In its draft rules, the FEC addressed several concerns relating to email. Specifically, the FEC emphasized that it does not consider email to be "general public political advertising" because there is almost no cost to send mass emails[183] and because Congress views mass email as different from other mass mailings.[184] The FEC noted, however, that the transfer of an email list to a political party, committee, or candidate will be considered a contribution and is subject to the requirements of the BCRA.[185] Additionally, the FEC reiterated its ruling in 2002 that unsolicited email of 500 or more substantially similar communications will be subject to the BCRA's disclosure requirements.[186] However, such a mass email will be required to disclose its source only if that source is a political committee.[187] Furthermore, the FEC chose not to attempt to put a value on email as a campaign contribution beyond its cost to the sender.[188]

While these regulations do much to curb the worst abuses of political

[182] For example, the FEC could set the value based on the amount of money it would take to hire someone to engage in bulk emailing for a campaign.

[183] *See* Draft Rules, *supra* note 49, at 30.

[184] *See id*. at 30-31 (citing *Meeting to Approve New Electronic Communications Policy: Meeting Before the H. Comm. on House Admin.*, 108th Cong. (2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:89894.pdf).

[185] *See id*. at 41.

[186] *See id*. at 44. (citing 11 C.F.R. 110.11(a) (2006); 2 U.S.C. 441d(a) (2000 & Supp. 2002)).

[187] *See* 11 C.F.R 110.11(a)(1) (2006).

[188] A mass emailer will thus only bump into the contribution limit if they spend over $2,000 sending email.

emailing, they do not go far enough. While the FEC's desire not to interfere with the free exchange of ideas over the Internet is laudable, it fails to recognize the need for further regulation in this area. While the FEC correctly decided not to attempt to place a value on mass email above and beyond its cost to the sender, there does not appear to be any compelling substantive reason why the FEC should not require disclaimers on all such unsolicited political mass email; indeed, the FEC does not offer any. The FEC should not be entitled to substantively regulate private emails, regardless of their content, but there does not appear to be significant harm to a mass emailer in requiring the placement of a disclaimer alerting recipients of the communication's origin.

The FEC's answer to these complaints is that the purpose of the BCRA is to curb the influence of money on elections. To that end, it is procedurally improper to focus on the content of emails when the question should be confined to the money spent to send them.[189] While it is reasonable to conclude that the regulation of mass email to prevent inaccurate corruptive speech is outside the purview of the FEC, this does not diminish the legitimate concerns about that sort of mass emailing. To address these concerns, regulations should be enacted requiring the placement of disclaimers on any unsolicited mass email of over 500 substantially similar items.

### *B. Problems Relating to Anonymity*

Due to the impersonal nature of the Internet, it is often possible for bloggers and other Internet communicators to remain anonymous indefinitely. This can create several problems for any regulatory scheme. There are many excellent reasons for bloggers, especially political bloggers, to remain anonymous. Bloggers might fear retaliation from their employers, they might be corporate or government whistleblowers, or they might fear for their safety from the millions of anonymous strangers who may read and disagree, perhaps violently, with their stated opinions. While a full discussion of the advantages and disadvantages of anonymity on the Internet is beyond the scope of this Note, it seems reasonable to conclude that, because it invites controversial or unpopular speech, such anonymity is healthy for our democracy and essential to the vitality of the Internet as a medium for political speech.

The FEC has narrowly defined "public" communication in regards to Internet speech, mandating only that candidates and committees disclose money spent on election-related advertising on blogs.[190] Thus, if a blogger receives money for an advertisement on his blog that promotes a federal candidate for office, that payment must be reported, just as it must be for

[189] *See* 2005 NPRM, *supra* note 30, at 16,972.

[190] Draft Rules, *supra* note 49, at 19.

advertisements appearing in traditional media.[191] The decision to limit the definition of "public communication" was made to protect bloggers and other Internet communicators from having to file reports with the FEC every time they make a communication that would not otherwise be subject to the press exemption.[192] The FEC correctly concluded that the vitality of the Internet demands that individuals be allowed freedom of speech without excessive government intrusion.[193]

However, this policy fails to address what happens when a campaign pays bloggers to blog. In its new rules, the FEC only requires a disclaimer on a website for a paid political advertisement.[194] This makes sense, given that the alternative would be to require a disclaimer on all communication on every website. However, the FEC has failed to go far enough.

In the 2005 NPRM, the FEC invited comment on whether it should require a website operator to place a disclaimer on his or her website and file with the FEC if he or she was being paid by a political party, committee, or candidate.[195] In its decision, however, the FEC declined to take such a step.[196] The FEC gave two main reasons for this decision: (1) political parties, committees, and candidates are already required to disclose such payments; and (2) no other recipients of campaign funds are required to disclose such payments.[197] The FEC suggests that it should be enough that the payment is disclosed by the political entity and that it would be unfair to require bloggers and website operators to disclose more than similarly situated recipients of campaign payments.[198]

Unfortunately, the FEC has missed the point. Because of the anonymous nature of the Internet, the fact that a campaign must disclose all the recipients of its payments will do nothing to inform voters of potential conflicts of interest. Bloggers often post under a pseudonym, so even if the public knows the names of every person on the payroll of a given campaign, the public might still be unaware that a given blog is run by one of the individuals on that payroll. The concern here is that members of the public attempting to inform themselves by reading the thoughts and opinions of individuals whose independent judgment they have come to trust are, without their knowledge,

[191] *Id.* at 51.

[192] *Id.* at 57.

[193] *Id.*

[194] *Id.* at 21.

[195] *See* 2005 NPRM, *supra* note 30, at 16,972.

[196] Draft Rules, *supra* note 49, at 50.

[197] *Id.* at 50-51.

[198] *Id.*

being influenced by candidates for office.[199]

Similar problems may arise when bloggers get paid in indirect ways to express favorable opinions about political candidates, especially if those payments are not disclosed to the FEC. For example, much consternation resulted when several bloggers began consulting with Howard Dean's presidential campaign.[200] While the Armstrong Williams and Maggie Gallagher payola scandals suggest that this is also a problem for traditional media,[201] the anonymity afforded by the Internet makes the issue even more problematic in regard to bloggers. Because Williams and Gallagher did not write anonymously, their receipt of funds from the Bush administration was discoverable through the disclosure requirements imposed on the administration. However, in the case of Markos Moulitsas,[202] who was writing under the pseudonym "Kos" at the time, his receipt of funds from the Dean campaign could not be linked to his online identity unless he disclosed it himself.

Initially, this problem may appear unrelated to the FEC. The FEC is not generally in the business of policing the media for accuracy. There is a compelling argument that use of website disclaimers should be left to the discretion of bloggers, just as the use of disclaimers is left to the discretion of the traditional media. Bloggers who fail to disclose such relationships will, if discovered, presumably lose their credibility among bloggers and blog readers, just as Williams and Gallagher did among their colleagues and readers.

On the other hand, there is also a compelling public interest in the accuracy of political information. This interest must, of course, be balanced by First Amendment concerns, but where, as here, First Amendment concerns are virtually nonexistent,[203] government regulation might serve the public good.

[199] For example, two South Dakota bloggers who were paid $35,000 to support the candidacy of John Thune should have been required to post a disclaimer on each blog page stating that the writing was paid for by the applicable candidate or committee. Additionally, the $35,000 must be registered as a campaign expenditure.

[200] It should be noted that the bloggers in this case (Jerome Armstrong and Markos Moulitsas) were technical consultants, were not paid to blog, and disclosed their connections to Dean's campaign on the home pages of their blogs.

[201] In January, 2005, it was discovered that Williams had been paid $250,000 by the Department of Education to regularly promote the No Child Left Behind Act and to interview Education Secretary Rod Paige on Williams' nationally syndicated television show. Later that month, it was discovered that syndicated columnist Maggie Gallagher had also been paid tens of thousands of dollars by the Department of Health and Human Services to promote President Bush's "Healthy Marriage Initiative."

[202] *See supra* note 200.

[203] It is hard to imagine any negative effect on freedom of speech by requiring the disclosure of a conflict of interest held by the speaker.

However, given the First Amendment concerns, regulation in this area must be tailored to the type and purpose of the payment made to the blogger.

1. Bloggers Paid to Promote a Specific Candidate, Party, or Issue

The FEC should require full and immediate website disclosure for any blogger paid directly by political parties, committees, or candidates to promote or attack an issue or a candidate for federal office.[204] In addition (or in the alternative), the FEC should require the filing of the name *and* pseudonym of any blogger who has been paid directly to blog. Admittedly, this alternative has a potential chilling effect, in that it "outs" a blogger who has chosen to blog anonymously and has taken campaign money to do so. However, it seems unlikely that this chilling effect would be substantial. After all, any blogger who takes money from a candidate must have already disclosed his or her real name to that candidate. Such disclosure arguably waives any right to maintain anonymity, especially in light of the public interest in full disclosure of the uses of campaign money. While the benefits of anonymity on the Internet cannot be emphasized enough, this regulatory step is essential to mitigate the problems posed by that anonymity.

2. Bloggers Paid for Reasons Unrelated to the Blog Itself

Additionally, the FEC should require that all individuals with a direct financial connection to a campaign, candidate, or committee disclose that connection prominently on their web page or blog, even if the connection is unrelated to the blog itself.[205] While indirect conflicts of interest such as these have less potential for harm, some form of disclosure should still be required. In this instance, however, the FEC should not require disclosure of such blogger's identity for several reasons. Firstly, the number of bloggers who would be affected by such a policy is significantly higher in this context than in the context of those who receive direct payments to attack a candidate.[206] Second, the corruptive influence of indirect payments is less significant. As such, the potential chilling effect outweighs any public good that might arise from disclosure of the blogger's identity.

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[204] The FEC has signaled that it will probably require disclosure when a candidate pays a blogger to disseminate a specific message. Draft Rules, *supra* note 49, at 51. However, the FEC will not require disclaimers for any general payments made to bloggers solely to promote the candidate. *Id.*

[205] For example, if a blogger is being paid by a campaign to design T-shirts, the blogger should be required to disclose that fact on his website.

[206] This is admittedly a broad assumption. No data have yet been gathered on indirect payments made to bloggers. As the medium continues to grow, it is conceivable that this could become commonplace.

3. Policing Website Disclosure Violations

Although simple website disclosure requirement would not have the potential for any of the filing requirement's negative effects, it has a glaring problem of its own. If implemented, a mere website disclosure requirement would be impossible to police in the timeframe of a given election. This is mainly the result of the instantaneous nature of internet communications coupled with the ability of speakers to remain pseudonymous. By the time the violation is discovered and the violator identified, the damage is already done. As a result, such a disclosure requirement must be coupled with significant penalties on bloggers who fail to disclose such connections on their websites. While such penalties might seem unfair, they are rendered necessary by the improbability of violators being discovered until well after the relevant election.[207] Unfortunately, such a penalty regime could be difficult to implement for a whole host of reasons. Such a proposal demands a full inquiry into its potential viability prior to implementation.

## VI. DIFFICULTIES IN FASHIONING APPROPRIATE PENALTIES

While there is no doubt that Congress and the FEC will achieve workable solutions to most of the problems addressed in this Note, it is unlikely that they will address one potentially glaring problem: enforcing the law. Although there is a broad range of penalties that can be levied against violators of the BCRA,[208] such penalties have several issues. First, the penalties do not appear to be strong enough, given the remote likelihood of getting caught, to deter candidates, committees, corporations, and individuals from violating the election law. Second, the legal process in which the penalties are levied takes too long to affect the election in which the law was violated.

When investigating a violation, "FEC staff review each report filed by federal candidates and committees to ensure that they have complied with the disclosure requirements and the limits and prohibitions on contributions."[209] In some cases, FEC staffers will refer apparent violations or deficiencies in reporting to the Commission for enforcement action; most violations are

[207] For example, the South Dakota Bloggers were not caught until months after the election.

[208] Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg., 76,962, 76,978 (Dec. 13, 2002) (codified as amended in 11 C.F.R. pts. 100, 110, 111 & 113) (stating that the civil penalty for a violation shall not exceed $5,500, or the amount of the illegal contribution, whichever is greater; in the case of a willful violation, the penalty shall not exceed $11,000, or double the amount of the illegal contribution, whichever is greater).

[209] FEC, The FEC and the Federal Campaign Finance Law, Feb. 2004, http://www.fec.gov/pages/brochures/fecfeca.shtml.

resolved by asking filers to voluntarily correct or clarify something in their reports.[210]

The FEC has exclusive jurisdiction over the civil enforcement of the federal campaign finance law.[211] FEC staff may generate enforcement actions (Matters Under Review, or "MURs") in the course of reviewing the reports filed by committees or candidates.[212] In addition, individuals and groups outside the agency may initiate MURs by filing complaints.[213]

If a majority of Commissioners have reason to believe that a violation of the election law has taken place, the FEC may investigate the matter in more depth.[214] If the FEC decides that the investigation (performed by the FEC's Office of General Counsel) confirms that the law has been violated, the FEC tries to resolve the matter by reaching a settlement agreement with the respondents.[215] The agreement may require them to pay a civil penalty and take other remedial steps.[216] If an agreement is not reached, the FEC may file suit against the appropriate persons in a U.S. District Court.[217] "As required by law, the Commission keeps enforcement matters strictly confidential until they are concluded[, but] once the Commission has closed a MUR, the pertinent documents are placed on the public record."[218]

It is important to note that the FEC, unlike many other agencies, does not have adjudicatory powers and can resolve enforcement matters only through informal, voluntary compromise.[219] If no agreement is reached, the FEC may bring a civil action in court, where the matter is considered de novo.[220]

Roger Witten, who practices before the FEC, described the Commission in this way:

> Fundamentally, we have a law enforcement agency here who [sic] lacks [1] the power to find that a violation of the law has occurred and [2] lacks the power to stop the violation as it is occurring. That's ludicrous. If

[210] FEC, Filing a Complaint, July 1998, http://www.fec.gov/pages/brochures/complain.shtml [hereinafter FEC, Filing a Complaint].

[211] FEC, Enforcement Matters, http://www.fec.gov/em/em.shtml (last visited Jan. 16, 2007).

[212] *Id.*

[213] FEC, Filing a Complaint, *supra* note 210.

[214] *Id.*

[215] FEC, The FEC and the Federal Campaign Finance Law, *supra* note 206.

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] FEC, Matters Under Review, http://www.fec.gov/em/mur.shtml (last visited Jan. 16, 2007).

[220] FEC, Litigation, http://www.fec.gov/law/litigation.shtml (last visited Jan. 16, 2007).

> you're going to have an effective agency, it's got to have the ability itself to find that a violation has occurred . . . . A commission that doesn't have the power to find that a violation occurred, or to stop one, is a commission that will always be a toothless tiger.[221]

The authority to intervene when there is a violation is essential to the efficacy of law.[222] The agency should therefore be granted the authority to seek injunctive relief when there is evidence that a violation is occurring or is about to occur. According to several experts, interviewed by the Center for Responsive Politics, the power to seek temporary injunctions is essential for an effective enforcement system.[223] Nicole Gordon, a member of the New York City Campaign Finance Board, says, "Even if agencies don't make a lot of use of it, they've got to have it in their arsenal. There's no question that you've got to be able to run in and take care of business."[224]

Injunctive authority also has a deterrent effect. "Having the authority to seek injunctions makes a difference. When a client consults with his lawyer during a campaign, he says, 'Well what can [the enforcement agency] do to me prior to an election?' And [obtaining an injunction] is one of the things they can do."[225] Without this ability, there is no way for the agency to prevent violations before they occur. It is thus left to the FEC to prosecute campaign finance violations after the election has already occurred, at which point it is essentially too late.

The inadequacy of the civil penalties for violating the election law is also a problem. Because the fines are determined in relation to the violation and not to the violator, the effect is to allow wealthy individuals, candidates, campaigns, and corporations to violate the law and then pay the fine, while less wealthy individuals are deterred by the fine. This undermines the entire rationale for campaign finance laws.

In order to address these problems, the FEC must be given adjudicatory powers. This would be the easiest and most effective step in deterring and appropriately punishing violations. This is especially true in relation to the Internet. Since using the Internet in election campaigns is so inexpensive, and since the message gets delivered so quickly, the potential for abuse by anonymous individuals and corporations is that much higher. An entity could raise illegal contributions and use them shortly before the election in a last

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[221] Center for Responsive Politics, Enforcing the Campaign Finance Laws: Discussion of the model Enforcement Agency, http://www.opensecrets.org/pubs/law_enforce/enforce03.html (last visited Jan. 16, 2007).

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] *Id.*

minute effort to influence the outcome. Without injunctive relief, this illegal activity is not addressed until it is too late.

## VII. CONCLUSIONS

At this moment, we are in the midst of a profound shift in the nature of human communication. The explosion of information and communication on the Internet has both immediate and lasting implications for the way political campaigns are conducted. While there is no doubt that the emergence of the Internet places a strain on the existing campaign finance laws, it is important that we do not discard the fundamental principles enshrined in campaign finance reform efforts. In service of this goal, some aspects of the BCRA and the FEC rules supplementing it must be modified and expanded to accommodate this new media.

Most importantly, the press exemption must be expanded to include certain Internet political activities within its ambit. While the FEC has attempted such an expansion by making websites and other Internet communication eligible for potential exemption, it has not sufficiently clarified the situation. The first step the FEC should take is eliminating the requirement that an online entity be a "press entity" to qualify for the press exemption. This would shift the inquiry away from defining the entity and enable the FEC to look exclusively at the activity at issue. If the activity is a press activity, then the actor, regardless of whether it is a "press entity," should be exempted in regard to that activity. While this would allow any organization (including unions, corporation, and special interests) to editorialize or disseminate news, regardless of its status, such an approach would both simplify the inquiry and preserve the free exchange of ideas.

The second step is to refine the scope of the press exemption. The FEC should adopt a presumption in favor of applying the exemption. This presumption could only be rebutted by showing that (1) the entity's ownership or control by a political party, committee, or candidate compromised its ability to be a bona fide member of the media, or (2) the entity was created for the primary purpose of advocating the election or defeat of clearly identified federal candidates. This approach would ensure that media sources of online political speech continue to receive as much protection as their traditional print and broadcasting counterparts, while minimizing the potential corrupting influence of political parties, committees, and other organizations.

Because an expansion of the press exemption would open the door to a certain amount of corruption, further regulations are needed. The FEC should require that a blogger or Internet communicator who coordinates with a political campaign must place a disclaimer on his or her website informing the reader of that coordination. Additionally, the FEC should require that all individuals with a direct financial connection to a campaign, candidate,

committee, corporation, or interest group must disclose that connection prominently on their web pages or blogs. These reforms would go a long way in addressing some of the unique concerns related to the Internet as a medium for political activity. Finally, the FEC should be given adjudicatory power to enforce new and existing campaign finance laws. Open and fair elections are the cornerstone of a successful democracy. As the governmental agency responsible for ensuring such fairness, the FEC should be given all the necessary tools to enforce its rules. This will be especially true as advances in technology and the methods of skirting campaign finance laws become more and more sophisticated.