The Internet and Campaign Finance Regulation

testimony of

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before the

Committee on Rules
United States Senate

May 3, 2000

I appreciate the opportunity to appear before the Committee on Rules to present testimony on the Internet and campaign finance. I am presenting my testimony as one Member of the Federal Election Commission, and am not representing the views of the Commission as a whole or of any of my colleagues.

"The Internet is 'a unique and wholly new medium of human communication,'" (*Reno v. ACLU*, 521 US 844, 850) deserving of the highest level of First Amendment protection. (*Id*. at 870)

As one who holds that political speech deserves at least as much constitutional protection as prurient images, I find it notable that the Supreme Court, in severely limiting the government's ability to regulate indecent speech on the Internet, left open the argument that "the First Amendment denies Congress the power to regulate the content of protected speech on the Internet [at all]." (*Id*. at 863 and FN30).

There is a substantial basis to argue that political speech on the Internet should be wholly unregulated. I want to acknowledge this at the outset because the remainder of my testimony proceeds on the assumption that federal election law will apply to Internet activity, perhaps under significantly more lenient interpretations, but still more or less as it applies to traditional print and broadcast activities.

I would be delighted if Congress or the courts largely exempted Internet activity from the restrictions of federal campaign finance law but, in the absence of such a decision by those authorities, the task of my agency, the Federal Election Commission, is to apply the law with appropriate allowances for the nature of the medium. This can mean the application of exemptions as well as restrictions, as, for instance, when the Commission expanded the media exemption to include cable TV operators (11 CFR 100.7(b)(2) and 100.8(b)(2)) along with broadcasters and print publishers mentioned in the statutory exemption (2 USC 431(9)(B)(i)) in the Federal Election Campaign Act (FECA).

The Internet and Campaigns

Discussion of the Internet as a force in politics is marked by millennial optimism, both as to its utility to campaigns and as to the prospect that the Internet will change the political process significantly, empowering individual citizens, leveling the playing field, and dethroning special interests. I note with caution, however, that these identical goals were professed by original supporters of the FECA, though they sought to achieve them through regulation rather than liberty.

The uses of the Internet in campaigns is still in an early stage of development.

Despite the hype surrounding Internet use by the Bradley and McCain campaigns, the Internet thus far has arguably had no more effect than the development of direct mail in the 1970s, and certainly less, at least to date, than the introduction of television. There is no Internet application to compare, for instance, to the Kennedy-Nixon debates or to Lyndon Johnson's "daisy" ad. The most significant Internet uses thus far have been in the very traditional realm of campaign fundraising, the one area of Internet activity which nearly everyone agrees should be regulated.

While I support maximum freedom for Internet activity, I remain unconvinced that the Internet will change politics or political outcomes as rapidly or as significantly as enthusiasts predict. It is particularly important, in my view, to avoid basing a policy of regulatory leniency on the presumption that the Internet is a source of unalloyed political good. As the *Reno* case reminds us, the Internet hosts pornography as often as it houses public affairs; it is used by fast-buck artists as much as by high-minded public policy organizations. Hackers, thieves, and sexual predators should remind us that the Internet is not inherently "better" than other communications technologies. The Internet is a powerful tool which can be used for the good of society. I believe its potential for good will be best fostered by regulatory restraint rather than by government efforts to shape and control the medium.

The Internet may not be more naturally beneficent than other communications technologies, but it is different. There are numerous difficulties in analogizing Internet activity to traditional political activity. These may persuade you that attempting to regulate political activity on the Internet is, for the most part, inadvisable, but exploring those difficulties and considering regulatory choices is the purpose of this hearing. There are three fundamental assumptions of campaign finance law which may not apply on the Internet:

- that the number of "speakers" (regulated entities) is relatively limited;
- that mass communications are relatively costly; and,
- that speakers are easily categorized.

Inter-activity and Unlimited Numbers of Speakers

In requiring disclaimers, disclosure and registration for those undertaking political communications to the public, the FECA assumes that there will be a limited class of speakers – mostly campaigns, political parties, and other political committees – communicating to the public at large: a few will speak, most will merely listen. By operation of the Act, groups spending over $1,000 on political communication are political committees and individuals spending as little as $250 must file reports with the FEC.

On the Internet, however, those listening can respond and not merely by return e-mail or in a chat room. Quite easily and at relatively low cost, listeners can establish their own platforms and become speakers themselves. The capacity of the Internet is not

theoretically limited, and the barriers to entry are quite low.1 The fact that virtually everyone can respond, and that many actually do, brings into question the assumption that nearly every political speaker addressing comments to the public should or can be subject to regulation, required to register, report and include disclaimers.

Low Costs

Relatively low absolute costs and extremely low marginal costs also present significant difficulties in regulating Internet activity. The government may not regulate political speech *per se* we can require disclaimers and regulate communications because funds are spent on the communications, and those funds may be a potential source of corruption. When the cost of speech is so low as to be insignificant, the government's interest in preventing corruption becomes similarly insignificant. *Buckley v. Valeo* assumed that "virtually every means of communicating ideas in today's mass society requires the expenditure of money," and concluded that "the electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." (424 U.S. 1, 19) These assumptions may not be valid on the Internet and may be less valid generally to the extent that the Internet replaces other communication technologies in campaigns.

Marginal costs are so low on the Internet that users do not normally attempt to account for the volume of use (speech) except in the largest increments and, even then, usually on an aggregate basis. Once an appropriate connection is established, there is no usefully measurable cost difference between sending a single e-mail message and 1,000 identical messages.

Blurring Identities

The FECA requires categorization of speakers as political committees, corporations, unions, and the media, which is largely exempt from the requirements of the Act. Who or what constitutes the media on the Internet is difficult to determine. Not only has the Internet spawned non-traditional media, it is difficult to identify a principled basis on which to distinguish an individual's home page containing political opinions

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[1] See *Reno v. ACLU*, 521 US at 863, N. 30 quoting from the District Court opinion of Judge Dalzell (929 F.Supp. at 877):

> Four related characteristics of Internet communication have a transcendent importance to our shared holding that the CDA is unconstitutional on its face....First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.

from the Internet activities of traditional publishers. In *Reno v. ACLU* the Court incorporated a district court finding of fact that:

> Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals. (at 853)

subsequently concluding that:

> 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. (at 870)

Arguably then, anyone posting information on the Internet is a "publisher," as much entitled to the FECA's media exemption as television networks and major newspapers.

Even the definition of "home" is less than perfectly clear on the Internet as the Commission discovered in attempting to interpret the volunteer exemption to cover web pages published by campaign volunteers. (AO 1999-17) The Commission applied an exemption for the use of personal property in the home of a volunteer to web sites despite the fact that most individual web sites are not stored on personal computers in the home of a volunteer but on the servers of ISPs, from whom the volunteers are essentially renting space.

Commission Conclusions

The Commission first addressed the Internet specifically in 1995 (AO 1995-9), but had issued only four advisory opinions and one significant enforcement action before last year, when we issued nine advisory opinions addressing Internet issues. The increasing volume of Internet-related inquiries and the difficulty in deriving valid general principles from some early actions led the Commission to issue a Notice of Inquiry raising a broad variety of issues regarding the FECA and the Internet last year. The Commission is currently evaluating those comments and considering whether to propose specific regulations (including exemptions) regarding the use of the Internet for federal campaign activity.

Underlying the Commission's treatment of the Internet to date (beginning with Advisory Opinion 1995-9, NewtWatch PAC) is the treatment of open Internet postings as "general public political advertising," a significant holding since that phrase occurs eight times in the FECA and 17 times in the Commission's regulations. This effectively prohibits corporations and unions from posting certain political information and

potentially subjects to regulation anyone expressly advocating the election or defeat of a candidate on the Internet. This determination is generally consistent with court decisions holding that open Internet postings constitute making information public. In a FECA context, however, this rule may lead to unnecessarily restrictive results:

- For instance, the Commission permits limited distribution of corporate and union press releases containing political endorsements, but prohibits posting of those press releases on web sites.
- Unions and membership organizations may include endorsements in internal publications but may not then post those publications on their web sites, except with password protection. (*See* MUR 4686 (New York State AFL-CIO) and AO 1997-16)
- Corporations have had difficulty even in using Intranets, access to which is restricted to employees, to provide basic PAC information due to the Commission's interpretation of what constitutes a "solicitation" for the PAC which may only be directed to a restricted class of employees.

The Commission initially considered web links to candidate web sites to be contributions to the campaign, the equivalent of endorsements. (*See*, e.g. MUR 4340) More recently, however, the Commission has looked at the context of the links (for instance, on non-partisan pages linking to all candidates in a given race, AOs 1999-7, 1999-24, 1999-25) or at the practice of the referring page (if an organization does not normally charge for links, a link to a candidate page would not be a contribution, AO 1999-17).

My individual view is that in proceeding further regarding links, we should simply disregard the link *per se* and focus on the placement of a link or the message it is embedded in. In most instances the differences between a commercial banner ad (for which some charge is normally made) and a link included for the convenience of the reader is obvious. In the case of ads (which on the Internet almost invariably include links) the charge made is normally for placement and a message rather than for the link itself.

Looking forward, the most difficult issue the Commission is likely to face in the near future concerns Internet sites containing express advocacy or soliciting funds for candidates, other than those maintained by political committees or those eligible for the volunteer or other exemptions. At least one Internet-based group, Move-on.org, chose to register as a political committee after an early response to its political appeals. Sooner or later, however, the Commission is bound to encounter non-exempt individual or organization Internet sites which include express advocacy, solicit contributions or appear to be the fruit of coordination with candidates. At that point the Commission will have to address what portion of the Internet activities are subject to regulation (for instance, whether we apply something akin to a major purpose test to an Internet site) and how to value those activities.2

[2] AO 1998-22 illustrates the difficulty in assessing costs related even to a discrete Internet

I understand, for instance, that some political "portal" sites are considering offering their users an option to contribute to virtually any candidate through the portal site. It is not clear what sort of arrangements with candidates the sites contemplate, but that idea that corporate-owned sites may be facilitating contributions to candidates under the corporate name and using corporate facilities, even if they have a system for charging campaigns, seems to implicate the corporate contribution ban in a fairly fundamental way.

Issues for Legislation

S. 1747. The Internet Freedom Protection Act, introduced by Senators Bennett, Burns and McConnell, would add an exemption from the definition of "expenditure" for voluntary individual Internet communications. The Commission has recently interpreted the volunteer exemptions in the contribution definition (431(8)(B)(i) and (ii)) to reach a similar result. Enshrining this protection in the law would be helpful: it is better for Congress to establish policy than to delegate it, and a statutory exemption would provide a firmer basis in the courts and protect against potential regulatory backsliding. In addition, S. 1747 would also have the beneficial effect of clearly relieving independent Internet efforts by individuals from potential disclaimer obligations, a step the Commission may have difficulty achieving without legislative authority.3

I would offer two comments on S. 1747. First, it addresses only individual expressions of personal opinions, excluding solicitation, paid advertising and work done for pay. In this respect it is far more modest than many suggestions the Commission received in response to its Notice of Inquiry. I would urge Congress to take additional steps to protect Internet use by voluntary organizations and to consider even broader exemptions for use of the Internet by all speakers.

Second, I know the sponsors do not intend to imply that Internet activity which may not be protected by the individual exemption proposed in S. 1747 is automatically subject to regulation. Exemptions for volunteers,4 non-partisan activities, the media, and

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site developed using shared equipment and software.

[3] Because Section 431(8), the provision the Commission has interpreted to protect individual Internet efforts, relates to the definition of "contribution," it clearly protects efforts made in cooperation with campaigns (see AO 1999-17). The Commission has extended this exemption to individual efforts which may be independent of campaigns (see AO 1998-22), to avoid the untenable result that activities undertaken in coordination with campaigns are exempt from reporting and disclaimer requirements while genuinely independent efforts (which certainly represent a lesser threat of corruption) might be subject to those requirements. Providing a more sound statutory foundation for this result would be quite helpful.

[4] For instance, in AO 1999-17 the Commission determined that volunteer web sites,

others, as well as the threshold requirements for FEC jurisdiction still apply. While this principle ought to be obvious, my experience with arguments presented at and to the Commission tells me that Congress should make this point explicit in the legislation or prominently in the legislative history.5

General Public Political Advertising. The Commission has opened for comment in its Notice of Inquiry on the Internet the question of whether open web postings should be considered a form of general public political advertising equivalent to TV and radio ads, billboards and direct mail. Congress may wish to consider this issue as well. My own view is that it may be useful to distinguish between posting information on the Internet ,on the one hand, and expenditures made to advertise a site or its content, on the other: allow anyone to post whatever they wish, and bring campaign finance laws into play only when they advertise. Obviously, as with the current media exemption, campaign web postings would not be exempt and some consideration as to the treatment of corporate and union web sites (particularly those with a major web presence) would be necessary. In *Reno v. ACLU* the Supreme Court held to be of constitutional significance the District Court's finding that ""[c]ommunications over the Internet do not `invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content `by accident.' " (521 US 869). Thus, simple publication (as opposed to advertising or e-mailing) of material on the Internet may be more akin to a pre-printed letter in response to a common request than to a direct mailing.6

If a distinction were adopted in the law between Internet publication and Internet distribution (through e-mail or advertising), all persons and organizations would be free to publish as they choose for those Internet users who seek information, but would be regulated to the extent that they advertised or affirmatively circulated political material.7

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including sites which solicit funds, are exempt from reporting requirements.

[5] See, e.g. *FEC v. Phillips Publishing* (517 F Supp 1308) and *Readers Digest v. FEC* (509 F Supp 1210) in which courts rebuked the Commission for its impermissibly narrow interpretation of the FECA's media exemption.

[6] *See also*, Sable Communication v. FCC (492 U.S. 115, 127-128):

> In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid, the dial-it [] medium requires the listener to take affirmative steps to receive the communication. There is no "captive audience" problem here; callers will generally not be unwilling listeners. The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message.

Simple Internet postings may well be more akin to call-in services than to radio broadcasts, public displays [and] unsolicited mailings, all of which would qualify as "general public political communications in the FECA.

[7] To further illustrate that FECA exemptions must be viewed as cumulative rather than

The Commission may have already achieved roughly this result for personal web pages through an interpretation of the volunteer exemption, but a different regulatory approach, or legislation, may be necessary to extend similar protection to voluntary groups of persons, corporations or unions.

Reporting Thresholds. Recognizing the difficulty in valuing Internet activity, Common Cause has recommended in its comments on the Internet NOI that Congress consider a special $25,000 exemption for Internet activity. This is another potentially useful approach to protecting most Internet activity, though it would not settle the question of how to value Internet activity generally or what standards might apply above that financial threshold. I believe the proposal to increase thresholds might better be applied more generally. Just as inflation has eroded the effective contribution limits significantly, the $1,000 threshold for political committee status and the $250 independent expenditure reporting requirement are set at levels which now appear relatively insignificant. If those thresholds were adjusted to, for instance, $5,000 for political committee status and $1,000 for reporting independent expenditures, most small scale Internet activity would be protected, as would similarly small scale non-Internet activity. While Internet publication may deserve specific protection, it is difficult to justify treating $25,000 in Internet advertising differently than $25,000 in radio advertising or direct mail.

Disclaimers. Because communications containing express advocacy are generally required to include disclaimers, even when they may be exempt from reporting requirements, Internet publishers may face disclosure requirements even when they do not have to report or register with the Commission. Congress should consider exempting expenditures which fall below the independent expenditure reporting threshold from disclaimer requirements as well. As noted, S. 1747 would address this issue as to Internet activities of individuals

Conclusion

I agree with most of those commenting on the Commission's Internet Notice of Inquiry, including Common Cause which traditionally advocates a strict approach to campaign finance laws, that the Commission and Congress should approach the Internet so as to provide the highest level of freedom and flexibility possible. In my view that goal will best be served in the near future through an incremental approach, attempting to regulate Internet activity only when a clear and specific need appears. Forgoing regulation of political speech on the Internet may allow us once again to prove the

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mutually exclusive, it is clear that the Commission could not apply a distinction between publication and advertising to entities qualifying for the media exemption pursuant to the cases cited in note 4, supra. If we were to treat literally as "publishers" eligible for the media exemption every organization posting material on the Internet, those cases would forbid the Commission from regulating advertising or promotion of that material as well.

principle that "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." (*Reno v. ACLU*, 521 US 885)

Internet-specific legislation should not be written so as to freeze developing political uses of the Internet or to create adverse presumptions regarding activity not specifically exempted. Ideally Congress should adopt a very broad exemption, excluding Internet publications from the definition of general public political advertising. I hope that Congress will support the Commission in a generous application of existing FECA exemptions to Internet activity and will indicate that the Commission should view new Internet-specific exemptions as adding to, rather than restricting, those existing exemptions.