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## The Federal Election Commission & Political Blogging: A Perfect Balance or Just Not Enough?, 24 J. Marshall J. Computer & Info. L. 611 (2006)

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## COMMENT

# THE FEDERAL ELECTION COMMISSION & POLITICAL BLOGGING: A PERFECT BALANCE OR JUST NOT ENOUGH?

NIKI VLACHOS†

### I. INTRODUCTION

While trying to educate himself about the upcoming presidential election, Rob McNeill quickly became disconcerted with the whole process. Political advertisements surrounded him everywhere he turned. They were all over the television and radio, plastered on billboards, and the topic of every conversation. Each candidate criticized their opponent and boldly stated, ‘Don’t believe him,’ all the while promoting themselves and their policies, claiming, ‘I can make a difference.’ Frustrated by the politicians’ seemingly endless self-promoting banter, Rob decided to actively participate in the political debate by starting his own political blog.<sup>1</sup> He created a basic website which he updated daily with his thoughts and opinions.<sup>2</sup>

While developing his political blog, Rob was surprised to learn that political blogs dominated the Internet. One in particular, Penny Pierces Politics, especially impressed him. Started in 2003 and incorporated in 2004, Penny Pierces Politics provided numerous daily updates, and unlike his blog, posted more than just personal thoughts on the upcoming election. The author, Penny Pierce, regularly participated in various aspects of political debate and even posted news stories she considered im-

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1. Merriam-Webster’s Online Dictionary, <http://www.m-w.com/dictionary/blog> (accessed June 13, 2007) (defining the word “blog” as “a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer”).

2. The following hypothetical is fictional.

portant and relevant to voters on her blog. Rob became a regular visitor and soon found himself advocating the election of the candidate supported by Penny. Little did Rob know that Penny Pierce was being paid by the candidate to run her political blog.

Some may fail to see the issue raised in the above hypothetical; however, participation in political debate via the Internet and political blogging is becoming commonplace. During the 2004 U.S. presidential election, the Internet played an important role as a record number of Americans went online to search for political information.<sup>3</sup> Included in this burst of online political activity was political blogging.<sup>4</sup> This was the first U.S. presidential election in which political blogging played a significant role. During the critical months leading up to the election, the ten most popular political blogs collectively had 28 million visits from readers.<sup>5</sup>

In 2007, as we near the 2008 U.S. presidential election, the Internet continues to thrive as a dominant source of political activity and information for Americans.<sup>6</sup> Likewise, since the 2004 election, political blogs continue to attract readers; the combined readership of the top ten political blogs was higher than it was in August of 2004, with more than 31 million visits from readers.<sup>7</sup> This trend indicates that political blogs will

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3. Lee Rainie, et al., *The Internet and Campaign 2004*, Pew Internet & American Life Project, [http://www.pewinternet.org/PPF/r/150/report\\_display.asp](http://www.pewinternet.org/PPF/r/150/report_display.asp) (Mar. 6, 2005) (stating that "[t]he internet became an essential part of American politics in 2004; fully 75 million Americans—37% of the adult population and 61% of online Americans—used the internet to get political news and information, discuss candidates and debate issues in emails, or participate directly in the political process by volunteering or giving contributions to candidates").

4. See Biz Stone, *Who Let the Blogs Out?* 176 (St. Martin's Griffin 2004) (describing the political bloggers who participated in the 2004 presidential election: "Standing on their software soapboxes, these laptop pundits planted the seeds of change. Their mission was to influence political journalism and maybe even democracy as we know it by taking control of the Internet and beaming their ideas into the minds of millions before big media had time to let the ink dry").

5. See David Kline & Dan Burstein, *Blog!: How the Newest Media Revolution is Changing Politics, Business, and Culture* 3, 5 (Arne J. De Keijzer & Paul Berger eds., Squibnocket Partners LLC, 2005) (discussing how the political blog traffic rivaled that of the traditional online cable news networks and suggesting that political blogs had an influence on voter opinion).

6. See John B. Horrigan, *Politics Online August 2006*, Pew Internet & American Life Project, [http://www.pewinternet.org/pdfs/PIP\\_Politics%20Aug06\\_Memo.pdf](http://www.pewinternet.org/pdfs/PIP_Politics%20Aug06_Memo.pdf) (Sept. 21, 2006) (reporting that on a typical day in August, 26 million Americans were using the Internet for news or information about politics and the upcoming mid-term elections, the highest such figure recorded by the Pew Internet Project); see generally Judy Keen, *Politicians' Campaigns Invade MySpace*, USA TODAY 1A (Mar. 17, 2006) (discussing how candidates use popular websites for the first time "to give their campaigns free publicity, reach young voters and bypass traditional media").

7. See Kline & Burstein, *supra* n. 5, at 6.

have an enormous impact on the 2008 U.S. presidential election. Already, the major presidential candidates have all hired “one or more bloggers as a way to tap into the network of online activists who can generate considerable buzz, and donations, in a campaign.”<sup>8</sup> However, not that long ago, fear of regulation by the Federal Election Commission (“FEC”) dominated the blogosphere.<sup>9</sup>

The paramount fear of regulation subsided in March 2006, when the FEC voted unanimously on a new rulemaking regarding the regulation of Internet communications.<sup>10</sup> After a period of heated debate, the FEC only regulated paid political advertisements, leaving a large amount of political activity conducted over the Internet, like blogging, unregulated.<sup>11</sup> Although the new rules appeased bloggers and momentarily silenced the ongoing debate, it still remains to be seen whether the rules will be challenged in the judicial arena or modified by Congress.<sup>12</sup>

In 1971, when Congress first passed the Federal Election Campaign Act (“FECA”),<sup>13</sup> Internet political blogging and Internet campaign spending probably did not factor into the decision making process. At the end of 1969, approximately two years before the passage of FECA, the Internet just got off the ground when four host computers were connected together into the initial Advanced Research Projects Agency Network, or ARPANET.<sup>14</sup> The first blog appeared about thirty years later.<sup>15</sup> Political blogging quickly evolved and bloggers soon overcame the notion that they were “people who had nothing better to do than sit in their bedrooms wearing their pyjamas [*sic*] and tapping away at their key-

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8. Howard Kurtz, *Blogger for Edwards Resigns after Complaints*, <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/12/AR2007021201632.html> (Feb. 13, 2007).

9. The term “blogosphere” refers to the world of Internet blogs. See First Amendment Center, *Proposed FEC Rules Leave Most Political Activity on the Net Unregulated*, <http://www.firstamendmentcenter.org/news.aspx?id=16693> (Mar. 27, 2006) (stating that “[t]here has been an explosion of political activity on the Internet and political bloggers who offer diverse views say they should be free of government regulation”).

10. Federal Election Commission, *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 *Final Rules*].

11. See *id.*

12. See e.g. Internet Free Speech Protection Act of 2006, H.R. 4900, 109th Cong. (2006); *Online Freedom of Speech Act*, H.R. 1606, 109th Cong. (2005); see Anne Broache, *Feds Approve Liberal Election Rules for Net*, [http://news.com.com/2102-1028\\_3-6054254.html?tag=st.util.print](http://news.com.com/2102-1028_3-6054254.html?tag=st.util.print) (Mar. 28, 2006) (making reference to the competing House proposals, pending bills which could affect the political bloggers).

13. Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431-442 (2000)).

14. Internet Society, *All About the Internet: A Brief History of the Internet*, <http://www.isoc.org/internet/history/brief.shtml> (accessed June 14, 2007).

15. See Hugh Hewitt, *Blog: Understanding the Information Reformation That's Changing Your World* ix (Nelson Books 2005).

boards.”<sup>16</sup> By 2004, they were arguably powerful enough to significantly impact the U.S. presidential election.<sup>17</sup> Political blogs influenced the election by making commentary on politics and the media, raising money for candidates, and expanding citizen participation.<sup>18</sup>

With the recent explosion of political blogging came a need for regulation; consequently, the question of exactly what should be subject to regulation had to be addressed.<sup>19</sup> Campaign finance laws were already developed and in place to ensure that campaigns were properly and fairly funded.<sup>20</sup> Initially, the FEC regulations completely exempted the Internet from regulation.<sup>21</sup> This would soon have to change. In September 2004, the United States District Court for the District of Columbia ordered the FEC to revise its rules on campaign finance.<sup>22</sup> The court ordered the FEC to adopt new rules that would impose some regulations on Internet communications.<sup>23</sup> The regulations were to be consistent with Congress’ intent in passing the Bipartisan Campaign Reform Act of 2002<sup>24</sup> (“BCRA,” also known as the “McCain-Feingold” law).<sup>25</sup> As mentioned previously, the FEC unanimously voted to adopt the new Internet regulations in March 2006.<sup>26</sup> Whether the FEC managed to reach the perfect balance between the activity of Internet political blogging and campaign finance laws will be determined after an analysis of the new rules affecting political blogging. The perfect balance would fulfill the court’s order, avoid potential financial loopholes, and protect political bloggers.

This comment seeks to analyze the recently passed FEC regulations in light of the political blogging phenomenon. The background of the comment outlines the events leading up to the FEC final rulemaking. As

16. Iain Dale, *Political Blogs*, [http://www.bbc.co.uk/radio4/today/reports/misc/bloggers\\_20060918.shtml](http://www.bbc.co.uk/radio4/today/reports/misc/bloggers_20060918.shtml) (accessed June 16, 2007).

17. See Hewitt, *supra* n. 15, at ix-x.

18. *Id.*

19. Richard Hasen, *Should the FEC Regulate Political Blogging?* <http://www.personal-democracy.com/node/416> (Mar. 7, 2005).

20. See Center for Democracy & Technology, *Political Speech*, <http://www.cdt.org/speech/political/> (accessed June 10, 2007) (asserting that campaign finance rules aimed to decrease the influence of money on elections as campaign finance reformers were concerned with the corrupting influence of money, the domination of expensive TV advertisements, and the resulting drop in the quality of electoral debate; and furthermore, that the campaign finance laws limit individual contributions, prohibit corporate contributions, and require disclosure of big contributions and the sponsorship of advertisements).

21. See *Shays v. FEC*, 337 F. Supp. 2d 28, 66 (D.D.C. 2004), *aff’d*, 414 F.3d 72 (D.C. Cir. 2005) (citing the FEC’s *Final Rules* to substantiate excluding the Internet).

22. See *id.*

23. *Id.*

24. Pub L. No. 107-155, 116 Stat. 81 (2002).

25. See *Shays*, 337 F. Supp. 2d at 65-70.

26. See *Final Rules*, *supra* n. 10.

such, the background section will discuss the rise of political blogging, its recent impact on the American political scene, and how it reshapes the way people get their political news. The section also introduces federal campaign finance regulations and gives a brief history of their application as well as explains why the FEC altered its rules. Finally, the FEC's new Internet regulations affecting political blogging are presented. This comment analyzes the extent to which the regulations fulfill the district court's order and impact political bloggers. This comment then proposes two changes to the new rules. First, it proposes extending the disclosure requirement to political bloggers, and then this comment proposes clarifying the overly broad media exemption.

## II. BACKGROUND

Before developing the definition of political blogging and discussing the sudden rise of this Internet activity, which has led to the necessity of some form of campaign finance regulation, a basic understanding of a blog is needed. Blogs, short for the term weblogs, "are online journals or diaries where individuals can post daily entries about the subjects of their choice."<sup>27</sup> Biz Stone, a popular blogger and author, provides the following insightful definition: "A blog is a collection of digital content that, when examined over a period of time, exposes the intellectual soul of its author or authors. Blogging is the act of creating, composing, and publishing this content; and a blogger is the person behind the curtain."<sup>28</sup> Furthermore, blogging has certain defining characteristics.<sup>29</sup>

The three basic components of blogs are chronology, frequency, and focus.<sup>30</sup> Regarding chronology, every blog entry is stamped with the time and date as well as grouped together by day or month and arranged with the most recent on top.<sup>31</sup> Blogs are frequently updated; the most active blogs feature multiple posts a day. The focus of blogs varies; they can be about the day to day events of the author's life, or they can focus on a specific topic of interest, such as politics.<sup>32</sup> Readers keep visiting the blog because they are interested in the topic. Moreover, the interactivity of blogs, especially of political blogs, keeps readers involved.

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27. See David L. Hudson Jr., *Blogging*, <http://www.firstamendmentcenter.org/press/topic.aspx?topic=blogging> (Nov. 2005) (stating that blogs fulfill the "participatory, speech-enhancing" function of the Internet that *ACLU v. Reno*, 521 U.S. 844 (1997), describes by allowing individuals to become "one-person outlets of information covering subjects in detail").

28. Stone, *supra* n. 4, at 39-42.

29. See *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

## A. POLITICAL BLOGGING

The public first noticed blogs when they entered into the realm of politics and journalism; these political blogs are also referred to as poliblogs,<sup>33</sup> but for consistency in this comment, they will be referred to as political blogs. Two significant advantages of political blogs are a more specific focus and interactivity. Many blogs, including political blogs, allow readers to post comments and thereby engage in a public, interactive dialogue. Over the years, political blogs have become a major source of information and opinion for millions of Americans.<sup>34</sup> To understand why Internet political blogs have become so popular requires a look at the period during which political blogs arose.<sup>35</sup>

When political blogs entered into the Internet world as sources of news and information, many Americans had lost their respect and trust for the mainstream media.<sup>36</sup> This lack of trust and respect stemmed from, to name a few, the declaration of weapons of mass destruction in Iraq and the actual inexistence of such weapons, the portrayal that documents existed detailing that President Bush received favorable treatment in the Texas National Guard which then didn't exist, and the various plagiarism and circulation scandals which even involved the New York Times.<sup>37</sup> Understandably, such controversies caused many Americans to question the accuracy of news stories being reported. Another explanation for the number of Americans turning to political blogs is that many feel mainstream media attempted to avoid political controversy, which forced the public to seek out "real information" in blogs.<sup>38</sup> Readers of political blogs appear to appreciate the political advocacy exhibited in blogs and are not concerned that many bloggers refuse to be objective in their comments.<sup>39</sup>

While many countries have political blogs,<sup>40</sup> the impact on political

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33. See Hewitt, *supra* n. 15, at ix-x.

34. See Horrigan, *supra* n. 6.

35. See Kline & Burstein, *supra* n. 5, at 6; Lakshmi Chaudhry, *Can Blogs Revolutionize Progressive Politics?*, <http://www.inthesetimes.com/site/main/article/2485/> (Feb. 6, 2006) (stating "the galvanizing cause for the rapid proliferation of political blogs and their mushrooming audience was a deep disillusionment across the political spectrum with traditional media—a disillusionment accentuated by a polarized political landscape").

36. Kline & Burstein, *supra* n. 5, at 6-7.

37. *Id.*

38. *Id.* at 10. (stating that real information is "news unfiltered by editors who 'know what's best for us,' facts boldly stated and supported, and unvarnished opinion openly expressed for all to see and judge").

39. *Id.*

40. See generally Richard Kimber's Political Science Resources, *Index of Political Blogs*, <http://www.psr.keele.ac.uk/blogindex.htm> (accessed July 19, 2007).

discourse is most prominent in the United States.<sup>41</sup> Working alongside the traditional news media, “[p]olitical blogs have often been most effective as populist fact-checkers, challenging, refuting and correcting perceived errors in news coverage.”<sup>42</sup> These traits provide blogs with the necessary means and edge to participate in political discourse, which includes the uncovering of political scandals and other controversies.<sup>43</sup> By covering current political events and controversies, bloggers become critical participants in elections.<sup>44</sup> For example, some political blogs provide reports and specific information as to the candidates, the candidates’ platforms, and controversial issues.<sup>45</sup> Along with news and information, blogs also provide voters with various tools of participation in an election.<sup>46</sup> Furthermore, when effectively used, political blogs can be extremely helpful as well as influential.<sup>47</sup> Basically, it is a blog’s ability to reach a large number of citizens that makes it such an effective tool.<sup>48</sup> This effectiveness however raises the question of how political blogs fit into the already existing world of campaign finance laws.

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41. See Daniel W. Drezner & Henry Farrell, *The Power and Politics of Blogs*, <http://www.utsc.utoronto.ca/~farrell/blogpaperfinal.pdf>, 2-5 (July 2004) (discussing the role and influence of blogs in American politics).

42. Chaudhry, *supra* n. 35 (discussing the relationship between blogging and traditional news media and commenting that the connection between the two is so great that now, when a news story posts, it marks the beginning of a “public conversation in the blogosphere, where experts, amateurs and posers alike dissect its merits and add to its information, often keeping it alive long after journalists have moved on”).

43. See generally Kline & Burstein, *supra* n. 5, at 11; Marvin Ammori, *A Shadow Government: Private Regulation, Free Speech, and Lessons from the Sinclair Blogstorm*, 12 Mich. Telecomm. Tech. L. Rev. 1 (Fall 2005) (discussing the reaction of blogs to the decision of the Sinclair Broadcasting Group to air *Stolen Honor*, a documentary attacking Democratic presidential candidate John Kerry, whereby thousands of individuals coordinated a response, a blogstorm, to change the decision to air the documentary and caused Sinclair Broadcasting to change the decision to air the documentary).

44. See Kline & Burstein, *supra* n. 5, at 11.

45. See generally, K. Daniel Glover, *The Rise of Blogs*, [http://beltwayblogroll.nationaljournal.com/archives/2006/01/the\\_rise\\_of\\_blo.php](http://beltwayblogroll.nationaljournal.com/archives/2006/01/the_rise_of_blo.php) (accessed May 18, 2007) (providing the example of one blog, *There Is No Crisis*, which focused solely on challenging President Bush’s argument that the Social Security system has to be overhauled soon or face dire circumstances during his campaign for re-election in 2004).

46. See Chaudhry, *supra* n. 35 (noting that “[b]logs allow rank-and-file voters to pick the candidate to support in any given electoral race, influence his or her platform, and volunteer their time, money, and expertise in more targeted and substantive ways”).

47. *Id.* (differentiating between Howard Dean’s support gathering online campaign and the Bush/Cheney campaign which used the Internet to coordinate on-the-ground events such as rallies).

48. See *id.*



## B. THE DEVELOPMENT OF CAMPAIGN FINANCE LAW

The purpose of this section is to provide a brief, general overview of federal campaign finance law, focusing on the goals it aims to achieve. Money has impacted the American political campaign process since the very beginning, dating back to the eighteenth and nineteenth centuries, when the American political system matured.<sup>49</sup> The 1904 presidential campaign raised the issue of campaign finance.<sup>50</sup> President Theodore Roosevelt, in response to the criticism for contributions he received from business interests in his 1904 presidential campaign, urged Congress to “ban corporate contributions in federal elections and provide for funding from the U.S. Treasury for political parties.”<sup>51</sup> In 1907, Congress passed the Tillman Act,<sup>52</sup> which banned corporate contributions and gifts to federal candidates.<sup>53</sup> Three years later, in 1910, additional campaign reform legislation was passed which created campaign spending limits for parties and established the first disclosure rules, requiring national party committees to file reports for their contributions and expenditures.<sup>54</sup> The regulation of campaign financing continued over the years,<sup>55</sup> and in 1971, Congress developed a “stringent new law.”<sup>56</sup>

1. *The Federal Election Campaign Act*

Enacted in 1971, the Federal Election Campaign Act (“FECA”) governed American election law.<sup>57</sup> FECA was passed in response to “the rising costs of federal campaigns and the weaknesses in previous disclosure policies.”<sup>58</sup> FECA was an attempt to prevent corruption and

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49. See The Campaign Finance Guide, *A Brief History of Money and Politics*, <http://www.campaignfinanceguide.org/guide-30.html> (accessed June 10, 2007) (stating that in the eighteenth and nineteenth centuries, political parties developed a spoils system which required party supporters who were appointed to government jobs to give portions of their government salaries, assessments, to the political party to support the party’s political activities, and that during the 1880s and 1890s, the primary source of funding started to come from business interests such as banks, oil companies, and steel firms).

50. See The Campaign Finance Guide, *The Early 1900s: Progressive Era Legislation*, <http://www.campaignfinanceguide.org/guide-31.html> (accessed July 24, 2007) [hereinafter *The Early 1900s*].

51. *Id.*

52. 18 U.S.C. § 610 (Formerly 34 Stat. 864) (1907).

53. *Id.*

54. See *The Early 1900s*, *supra* n. 50.

55. See generally Anthony Corrado, Money and Politics, *A History of Federal Campaign Finance Law*, <http://www.brookings.edu/gs/cf/sourcebk/chap2.PDF> (Sept. 22, 1997) (providing the development of campaign finance law).

56. See The Campaign Finance Guide, *The Federal Election Campaign Act: A New Era of Reform*, <http://www.campaignfinanceguide.org/guide-34.html> (accessed June 16, 2007).

57. See *id.*

58. *Id.*

changed campaign finance regulation in two primary ways.<sup>59</sup> First, FECA limited the amount of money candidates could give to their own campaign and limited the amount of money allowed for television advertisements.<sup>60</sup> Second, it revised the disclosure regulations for campaign contributions and expenditures.<sup>61</sup> A contribution is defined as anything of value conferred to a candidate, political party, or political committee.<sup>62</sup> An expenditure is anything of value conferred to a third party for the purpose of influencing a federal election.<sup>63</sup> There are exceptions for both contributions and expenditures.<sup>64</sup> The FECA Amendments of 1974<sup>65</sup> created the FEC, the federal agency responsible for administering and enforcing most campaign finance laws.<sup>66</sup> Along with creating the FEC, the Amendments placed stricter limits on political contributions and expenditures and strengthened disclosure requirements.<sup>67</sup>

Certain activities are exempt from FECA regulation because they do not present a risk of corruption. FECA exempts from its definition of contribution "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee."<sup>68</sup> Services under this individual volunteer exemption are exempted regardless of whether a volunteer acts in coordination with a political candidate.<sup>69</sup> FECA also exempts from its definition of expenditure the costs sustained in conducting media activities.<sup>70</sup> The media exemption states that "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer, or producer), newspaper, magazine, or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate."<sup>71</sup> FECA's individual volunteer and media exemptions are justified because they take into account situations where the possibility of corruption is outweighed by the impingement on individual rights.<sup>72</sup>

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59. *Id.*

60. *Id.*

61. *Id.*

62. 2 U.S.C. 431 (8)(A) (2006).

63. 2 U.S.C. 431(9)(A) (2006).

64. *See* 2 U.S.C. 431(8)(B)(2006) (listing contributions); 2 U.S.C. 431(9)(B) (2006) (listing expenditures).

65. *Federal Election Campaign Act Amendments of 1974*, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

66. *Id.*

67. *Id.*

68. 2 U.S.C. 431(8)(B)(i) (2006).

69. *Id.*

70. *Id.* at (9)(B)(i).

71. 11 C.F.R. § 100.73 (2005).

72. *See Buckley v. Valeo*, 424 U.S. 1, 44-51 (1976) (per curiam).

Furthermore, the value of the media exemption was confirmed in 1990, when the United States Supreme Court upheld the constitutionality of a state law which provided certain exemptions for media corporations from the general limits on corporate election activity.<sup>73</sup>

In the landmark case, *Buckley v. Valeo*,<sup>74</sup> the United States Supreme Court determined the constitutionality of FECA's major provisions. The Court ruled that Congress had the authority to regulate political contributions as a means of preventing "corruption and the appearance of corruption."<sup>75</sup> The Court upheld limits on contributions to candidates and political committees,<sup>76</sup> as well as disclosure requirements for those committees.<sup>77</sup> However, the Court found that the statute limiting independent expenditures by individuals was unconstitutional because its infringement on First Amendment rights was greater than the weight of the governmental interest it sought to further.<sup>78</sup>

These original campaign finance rules applied to the traditional forms of media, but they did not include the Internet.<sup>79</sup> As the Internet began to impact politics, the question arose as to whether it should be subject to federal campaign finance law.<sup>80</sup> In November 1999, the FEC attempted to answer questions of whether the FECA applied to online content, and published a Notice of Inquiry requesting comments on the issues surrounding the use of the Internet for federal election influencing purposes.<sup>81</sup> Furthermore, in 2001, the FEC published a Notice of Proposed Rulemaking which addressed a narrower range of issues concern-

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73. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 667-668 (1990).

74. 424 U.S. 1 (1976).

75. *Id.* at 45-51.

76. *Id.* at 23-29.

77. *Id.* at 60-85.

78. *Id.* at 44-51.

79. See Center for Democracy & Technology, *Political Speech*, <http://www.cdt.org/speech/political/> (accessed June 3, 2007) (attributing the "centralized, scarce, and expensive nature of traditional media" to its need for regulation, and conversely, that the original campaign finance laws were "ill-suited to the decentralized, abundant, and inexpensive nature of the Internet").

80. See *id.*

81. Federal Register publication, 64 FR 60360 (Nov. 5, 1999); see Center for Responsive Politics, *Rulemaking, The Internet in Federal Elections*, <http://www.fecwatch.org/law/regulations/ruleid=00005> (accessed June 17, 2007) (noting that the Notice of Inquiry addressed such issues as the status of campaign-related web sites created by campaign volunteers, references to a candidate on a corporation's web site, labor organizations and political parties, application of the press exemption to internet news sites and electronic mail, and the status of hyperlinks to candidates on the web sites of individuals, corporations and labor organizations).

ing the Internet, although no final rules were issued.<sup>82</sup> At that point, whether the FEC could regulate Internet activity was still uncertain, and on March 20, 2002, the FEC held a public hearing for testimony on the proposed rules.<sup>83</sup>

## 2. *Bipartisan Campaign Reform Act of 2002*

Shortly after the FEC hearing, Congress passed the Bipartisan Campaign Reform Act of 2002 ("BCRA") in order to decrease the amount of money spent on federal elections.<sup>84</sup> The BCRA primarily impacted campaign finance law in two ways. First, the BCRA prohibited national party committees, federal candidates, and federal officeholders from raising and spending soft money.<sup>85</sup> The Supreme Court refers to soft money as "[d]onations made solely for the purpose of influencing state or local elections [which] are therefore unaffected by FECA's requirements and prohibitions."<sup>86</sup> By the 1990s, the solicitation and spending of soft money had become a major issue that needed to be addressed.<sup>87</sup> Second, the BCRA redefined what constitutes a campaign advertisement, which is subject to the disclosure requirements and contribution limits of federal law.<sup>88</sup>

The BCRA extended federal campaign law to regulate a limited set of "public communications," targeting large campaigns involving substantial amounts of cash and expensive advertising.<sup>89</sup> The BCRA defined a "public communication" using a list of traditional media sources: "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising"<sup>90</sup> However, the BCRA did not include the

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82. See Center for Responsive Politics, *supra* n. 81 (stating that "[t]he proposed rules: (1) extended the volunteer exemption in 2 U.S.C. 431(8)(B)(ii) to Internet activity by individuals; (2) allowed corporations and labor organizations to post hyperlinks to candidates on their web sites without violating the prohibition on corporate and labor organization contributions and expenditures, subject to certain conditions; and (3) allowed corporations and labor organizations to post press releases announcing candidate endorsements on their websites, subject to certain conditions").

83. See *id.*

84. *Bipartisan Campaign Reform Act of 2002*, Pub. L. No. 107-155, 116 Stat. 81 (2002).

85. 2 U.S.C. § 441i(a)(1) (2002).

86. *McConnell v. FEC*, 540 U.S. 93, 122 (2003).

87. *Id.* at 124-32.

88. 2 U.S.C. 434(f) (2002).

89. See Bradley A. Smith, *Bradley A. Smith on Internet & Free Speech on National Review Online, Virus Alert! McCain-Feingold is set to infect the Internet.*, <http://www.nationalreview.com/comment/smith200603241208.asp> (March 24, 2006).

90. See 2 U.S.C. 431(22) (2002).

Internet in the definition of “public communication.”<sup>91</sup> Because the BCRA left open to interpretation whether Internet activities fell within the FECA reach, the FEC followed Congress and excluded Internet communications from its regulations of “public communications.”<sup>92</sup> The authors of the legislation<sup>93</sup> opposed the blanket Internet exemption and immediately challenged this initial interpretation of the BCRA.<sup>94</sup> They stressed that the FEC needed to adopt their recommendation to include the Internet in the regulations of “public communications” in order for the legislative purpose of the BCRA to be upheld.<sup>95</sup> Despite their recommendations, the FEC left the Internet exempt from regulation in the final rules.<sup>96</sup>

### 3. Shays v. FEC

The FEC’s decision to exclude the Internet from regulation was challenged in 2004. Congressmen Christopher Shays and Martin Meehan, principal sponsors of the BCRA, filed a complaint alleging that, by keeping the Internet exemption intact, the FEC did not implement the BCRA as it was intended by Congress.<sup>97</sup> They specifically charged that the FEC regulations implementing the BCRA were “arbitrary, capricious, and contrary to law, creating loopholes to get around the new campaign finance laws.”<sup>98</sup> In regard to this issue raised by Congressmen Shays and Meehan, the court’s analysis focused on whether Congress intended to include the Internet in the definition of a “public communication.”<sup>99</sup>

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91. See Smith, *supra* n. 89 (noting that while Congress used the term Internet elsewhere in BCRA, it did not include it in the definition of “public communication”).

92. See *id.*

93. Congressmen Christopher Shays and Martin Meehan and Senators John McCain and Russ Feingold (who introduced the bill in the Senate).

94. See Letter from John McCain, United States Senate, Christopher Shays, Member of Congress, Russell D. Feingold, United States Senate, and Martin Meehan, Member of Congress, to Federal Election Commission, *Comment to FEC Notice of Proposed Rulemaking* (April 10, 2002) (available at [http://www.fec.gov/pdf/nprm/soft\\_money\\_nprm/us\\_cong\\_mccain\\_feingold\\_shays\\_meehan.pdf](http://www.fec.gov/pdf/nprm/soft_money_nprm/us_cong_mccain_feingold_shays_meehan.pdf)).

95. *Id.*

96. See 67 Fed. Reg. 49064, 49071 (codified at 11 C.F.R. § 100.26 (2005)) (for definition of “Public Communication”).

97. See *Shays*, 337 F. Supp. 2d at 65-70 (D.D.C. 2004); see generally Declan McCullagh, *CNET News.com, Elections officials fight for Net political ads*, [http://news.com.com/Elections+group+fighters+for+Net+political+ads/2100-1028\\_3-5410496.html](http://news.com.com/Elections+group+fighters+for+Net+political+ads/2100-1028_3-5410496.html) (accessed June 18, 2007) (noting that Shays and Meehan asked the courts to overturn the FEC regulations because they were not strict enough and didn’t comply with the law).

98. Congressman Christopher Shays, *Appeals Court Upholds Ruling Striking FEC Provisions*, <http://www.house.gov/shays/news/2005/july/julyfec.htm> (accessed May 19, 2007) (internal quotations omitted).

99. 2 U.S.C. 431(22) (2000) (stating that public communication includes: “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine,

In response, the FEC argued that Congress excluded the Internet from the definition and did not intend for the Internet to be regulated.<sup>100</sup> To justify its argument, the FEC focused on the fact that while certain provisions of the BCRA refer to the Internet,<sup>101</sup> the Internet is not included in any of FECA's regulated activity definitions.<sup>102</sup> Additionally, the FEC argued that Congress used the term "Internet" in other statutes and distinguished it from "telecommunications services."<sup>103</sup> In rejecting the FEC's argument, the court stated "Congress probably did not intend to exclude the Internet wholesale."<sup>104</sup> Furthermore, the court held that allowing Internet expenditures to go unregulated "would permit rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption."<sup>105</sup> The court was upholding the goals of preventing corruption or the appearance of corruption and applying them to the Internet.

Ultimately, the United States District Court for the District of Columbia ordered the FEC to revise its rules issued to implement the BCRA.<sup>106</sup> The court held that Congress had intended that some Internet activities be included in the definition of "public communication."<sup>107</sup> Even though Internet communications are not listed, the court found that some of these activities fall into the category of "general public political advertising."<sup>108</sup> The court left it up to the FEC to draft new regulations which would include the Internet.<sup>109</sup>

### C. THE NEW RULES

As dictated by the ruling in *Shays v. FEC*, the Federal Election Commission adopted new rules regarding the regulation of Internet communications in March of 2006.<sup>110</sup> For its final decision, the FEC determined that the BCRA will not apply to most political activity on the Internet.<sup>111</sup> Specifically, in a 6-0 vote, the FEC decided to regulate only

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outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising").

100. *Shays*, 337 F. Supp. 2d at 67.

101. See e.g., 2 U.S.C. 438(a) (2006) (stating that the FEC must maintain a central site on the Internet to make accessible to the public all publicly available election-related reports and information).

102. *Shays*, 337 F. Supp. 2d at 67.

103. *Id.* at 66.

104. *Id.* at 67 (internal quotations omitted).

105. *Id.* at 70.

106. *Id.* at 65.

107. *Id.* at 69-70.

108. *Id.* at 67-69.

109. *Id.*

110. *Final Rules*, *supra* n. 10.

111. See *Broache*, *supra* n. 12.

paid political advertisements placed on another person's website.<sup>112</sup> In adopting the rules, the FEC stated that "the vast majority of Internet communications are, and will remain, free from campaign finance regulation."<sup>113</sup>

While determining the new rules and striving to fulfill the court's order, the FEC also addressed several of its rules to remove potential restrictions on the ability of individuals and others to use the Internet for political advocacy.<sup>114</sup> First, the FEC revised its definition of "public communication," specifically exempting "communications over the Internet, except for communications placed for a fee on another person's Web site."<sup>115</sup> Second, the FEC re-promulgated the definition of "generic campaign activity" without revision because the definition of "generic campaign activity" included "a public communication." The public communication definition now includes paid Internet advertisements as subject to the new definition of "generic campaign activity."<sup>116</sup> Third, because the public communication definition was changed, the FEC revised the disclaimer requirement.<sup>117</sup> Fourth, the FEC added an exception for uncompensated individual Internet activities.<sup>118</sup> Finally, the FEC revised the media exemption and extended it to the Internet.<sup>119</sup> In taking these actions, the FEC decided that provisions of the BCRA would not cover bloggers and online publications.<sup>120</sup> As a result, Internet bloggers and individuals can use the Internet to attack or support federal candidates without running afoul of campaign spending and contribution limits.<sup>121</sup>

### III. ANALYSIS

After a period of heated debate and controversy, which one commentator referred to as "the coming crackdown on blogging,"<sup>122</sup> the FEC adopted its final rules in March of 2006.<sup>123</sup> This section first briefly examines the reaction to the new rules. Next, keeping in mind the task

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112. See *Final Rules*, *supra* n. 10, at 5 (noting that under this rule, when someone pays a fee to place a banner, video, or pop-up ad on another person's website, the person paying makes a public communication).

113. *Id.*

114. See *id.* at 3.

115. See *id.*; 11 C.F.R. § 100.26 (2006) (for "Public Communication").

116. See 11 C.F.R. § 100.25 (2006).

117. *Final Rules*, *supra* n. 10.

118. *Id.*

119. See *id.*

120. See *id.*

121. *Id.*

122. Declan McCullagh, *The coming crackdown on blogging*, [http://news.com.com/TheComingCrackdownOnBlogging/2008-1028\\_3-5597079.html](http://news.com.com/TheComingCrackdownOnBlogging/2008-1028_3-5597079.html) (accessed June 12, 2007).

123. See *Final Rules*, *supra* n. 10.

given to the FEC by the United States District Court for the District of Columbia in *Shays v. FEC*, as well as the goals of federal campaign finance law, this section analyzes the new rules and determines whether or not the FEC adopted regulations that fulfill the court's order. Whether the new rules strike the proper balance between campaign finance regulations and Internet political blogging is examined in light of the FEC's decision to regulate only paid political advertisements placed on another person's website.<sup>124</sup> In analyzing the new rules, the consideration of the goal of preventing corruption or the appearance of corruption is essential. As noted previously, preventing corruption or the appearance of corruption is a fundamental goal of federal campaign finance law.

#### A. REACTION TO THE FEC DECISION

The FEC stated that the new rules "are intended to ensure that political committees properly finance and disclose their Internet communications, without impeding individual citizens from using the Internet to speak freely regarding candidates and elections."<sup>125</sup> The FEC makes it extremely clear that Internet activities by individuals and groups of individuals will face little, if any, regulatory burdens.<sup>126</sup>

The new rules received a mixed reaction. FEC Commissioner Ellen L. Weintraub stated that "[i]t's a win, win, win," and that the new rule satisfies the concerns regarding whether the campaign finance law will apply to Internet political activity.<sup>127</sup> Ohio Congresswoman Deborah Pryce also applauded the FEC's decision.<sup>128</sup> In her statement, she even mentioned that "the House was fully prepared to serve as a backstop against efforts to impinge on the public's ability to freely exchange political ideas over the Internet, and will remain prepared should the [Federal Election] Commission revisit the issue."<sup>129</sup> Congresswoman Pryce was referring to the fact that after the FEC decision, the House ceased their consideration of H.R. 1606, which would exempt the Internet from prohibitions and restrictions of the McCain-Feingold campaign finance law.<sup>130</sup>

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124. *See id.*

125. *Id.*

126. *See id.*

127. *See* David Pace, *FEC Won't Regulate Internet Politics*, <http://www.breitbart.com/news/2006/03/27/D8GK1QTO0.html> (Mar. 27, 2006) (quoting FEC Commissioner Ellen L. Weintraub) (internal quotations omitted).

128. Congresswoman Deborah Pryce, *Pryce Applauds FEC Ruling Protecting Political Speech on the Internet*, [http://www.house.gov/pryce/06%20releases/032906\\_fec\\_free\\_speech\\_ruling.htm](http://www.house.gov/pryce/06%20releases/032906_fec_free_speech_ruling.htm) (Mar. 29, 2006).

129. *Id.*

130. *Id.*



On the other hand, some believe that the rules were not permissive enough. For example, Hans von Spakovsky, recently appointed as Commissioner of the FEC, stated that there was no question that Congress did not intend to regulate the Internet through the BCRA.<sup>131</sup> Spakovsky urged politicians to pass a new law<sup>132</sup> that would revive the FEC's previous Internet exemption.<sup>133</sup> Others are in favor of creating a narrower exemption for Internet-based political activities, but it would not be as narrow as the FEC's final rules.<sup>134</sup>

The Center for Democracy and Technology (CDT)<sup>135</sup> urges people to take action against the regulation of Internet political activity by the FEC.<sup>136</sup> The CDT believes that "the Internet strengthened democratic debate and helped produce a more informed and engaged electorate."<sup>137</sup> Furthermore, the Center argued that there is minimal or no evidence that the Internet is in danger of becoming a tool for "wealthy interests to exert disproportionate influence over the political process."<sup>138</sup> The solution proposed by the CDT is to have Congress exclude the Internet in broad campaign finance rules.<sup>139</sup>

#### B. THE NEW RULES & POLITICAL BLOGGING

While various opinions surround the regulation of online political activity, the FEC determined the final rules in March of 2006. Focusing on the rules specifically impacting political blogging, the following will analyze the federal rules affecting paid political advertisements, the disclosure requirement, the individual volunteer exemption, and the media exemption. The new rules are analyzed in light of the goals of campaign finance law, as outlined in the previous section, and ultimately, this comment will propose that certain changes should be made. Analyzing these

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131. See Broache, *supra* n. 12.

132. *Online Freedom of Speech Act*, H.R. 1606, 109th Cong. (2005);

133. See Broache, *supra* n. 12.

134. *Internet Free Speech Protection Act of 2006*, H.R. 4900, 109th Cong. (2006); see Broache, *supra* n. 12 (describing the House proposal, endorsed by campaign-finance advocacy groups).

135. The Center for Democracy and Technology, *Square Pegs and Round Holes: Applying the Campaign Finance Law to the Internet—Risks to Free Expression and Democratic Values*, <http://www.cdt.org/speech/political/financereport.shtml> (accessed May 12, 2007) (stating that the Center for Democracy and Technology "is a public interest organization dedicated to developing and implementing public policies that protect and enhance civil liberties and democratic values in the new digital media").

136. See The Center for Democracy and Technology, *Urge Congress to Protect Individual Political Advocacy on the Internet: Demand a Moratorium on Internet Speech Rulemaking*, <http://www.cdt.org/action/fec/> (accessed May 8, 2007).

137. *Id.*

138. *Id.*

139. See *id.*

rules individually will provide a better understanding as to their purpose, and their significance to online political activity.

### 1. *Paid Political Advertisements*

The FEC amended its rules to include paid political advertisements on the Internet in its definition of “public communication.”<sup>140</sup> Specifically, the FEC stated:

While no other form of Internet communications is included in the definition of “public communication,” the placement of advertising on another person’s website [by an individual, political committee, labor organization or corporation] for a fee includes all potential forms of advertising, such as banner advertisements, streaming video, pop-up advertisements, and directed search results.<sup>141</sup>

This new definition of “public communication,” which previously excluded all Internet activities, now includes paid political Internet advertising appearing on another person’s website.<sup>142</sup> The placement of advertising on a third person’s website for a fee includes all potential forms of Internet advertising, including, banner advertisements,<sup>143</sup> streaming video,<sup>144</sup> pop-ups,<sup>145</sup> and directed search results.<sup>146</sup> Such

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140. See *Final Rules*, *supra* n. 10.

141. *Id.* at 19-20.

142. See *id.*

143. See Internet Marketing Dictionary, *Banner Advertising*, <http://www.internet-marketing-dictionary.com/banner-advertising.html> (accessed June 17, 2007) Banner advertisements are a form of Internet advertising involving “displaying an image with a sales message on a web site.” *Id.* The goal is to try to get visitors to click on it. *Id.* If they do, they will be directed to the site advertised on the banner. *Id.*

144. See TechWeb, *streaming video*, <http://www.techweb.com/encyclopedia/defineterm.jhtml?term=streamingvideo> (accessed June 17, 2007) (defining “streaming video” as a tool used on the Internet “to deliver video-on-demand or a video broadcast”).

145. See iWEBTOOL, *What is a Popup?*, [http://www.iwebtool.com/what\\_is\\_popup.html](http://www.iwebtool.com/what_is_popup.html) (accessed June 25, 2007) A pop-up is a form of Internet advertising intended to increase web traffic. *Id.* Pop-up advertisements appear in a new web browser window from the one being viewed. *Id.* The pop-up window contains an advertisement which is usually generated by JavaScript, but can be generated by other means as well. *Id.* Pop-up advertisements require the viewer to take action; for example, close the window in order to keep viewing the original screen or click on the advertisement. *Id.*

146. See *Final Rules*, *supra* n. 10, at 20, 25. A “general public political advertising” is triggered if a fee is paid for such a service. *Id.* However, if the search results are displayed as a result of the normal function of a search engine, and not based on any payment for the display of a result, the search results are not forms of “general public political advertising.” *Id.* The FEC makes the distinction that “where a search engine returns a website hyperlink in its normal course, and features the same hyperlink separately as the result of a paid sponsorship arrangement, the latter is a ‘public communication’ while the former is not.” *Id.*; see e.g. Google, *How Do I Get My Site Listed on Google?*, <http://www.google.com/intl/en/webmasters/1.html> (making the point that companies such as Google permit an advertiser to pay a fee and have its website appear as a “sponsored link” when specific words are typed into the search engine).

paid political advertising on the Internet must be reported, regardless of how little or how much it costs.<sup>147</sup> The FEC determined that when a paid advertisement on another person's website occurs on the Internet, the expense of that advertisement sets it apart from other Internet uses.<sup>148</sup> For example, such an expense is distinguishable from publishing one's own website, which is an activity that is done for free or at a significantly low cost.<sup>149</sup> Likewise, a paid political advertisement is distinguished from political blogging, which is also generally performed for free or at a minimal cost.<sup>150</sup> The key is that paid political advertisements are done for a fee, unlike the above activities which are done at low or zero costs.<sup>151</sup>

In the new definition of "public communication," it is clear that the FEC excluded a communication on a person's own website from regulation.<sup>152</sup> Unlike the communications included in 2 U.S.C. 431 (22), which require an individual to pay a fee in order to advertise on a third person's website, no fee is to be paid if an individual seeks to post advertisements on his or her own website.<sup>153</sup> The FEC reconciles this discrepancy by stating that an individual posting or advertising on his or her own website is "analogous to a communication made from a soapbox in a public square."<sup>154</sup> These words echo Biz Stone's description of the political bloggers who participated in the 2004 presidential election: "Standing on their software soapboxes, these laptop pundits planted the seeds of change."<sup>155</sup> In other words, the cost of placing personal political commentary on the Internet is fairly low and generally measured by the "time and energy that is devoted by an individual to share his or her views and opinions with the rest of the Internet community."<sup>156</sup> The FEC decided not to explicitly exclude political blogging from the new definition, because blogging activity was already excluded from the definition of "public communication," as blog messages are not placed for a fee on a third person's website.<sup>157</sup>

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147. See *Final Rules*, *supra* n. 10; Broache, *supra* n. 12 (stating that the responsibility lies with the candidate, political party, or committee backing the advertisement and not with the site accepting the advertisement).

148. See *Final Rules*, *supra* n. 10, at 5 (noting that paid advertisement on the Internet will often be below that of the cost of advertisement in another source of media).

149. *Id.* at 21.

150. *Id.* at 22.

151. See *id.* 21-25.

152. *Id.* at 21.

153. *Id.*

154. *Id.*

155. Stone, *supra* n. 4, at 176.

156. *Final Rules*, *supra* n. 10, at 21.

157. *Id.* at 27.

In directing the FEC to include the Internet in its regulations, the court in *Shays* specifically stated, "Congress probably did not intend to exclude the Internet 'wholesale.'"<sup>158</sup> The FEC has done what was required of it by regulating this form of Internet communications. By including paid political advertisements on the Internet in its regulations, the FEC does not leave the Internet completely excluded from regulation. Along with fulfilling the task dictated by *Shays*, the regulation of paid political advertisements on the Internet mirrors regulations for traditional media sources, as well as furthers the FECA goals.

Paid political advertisements on the Internet are placed for a fee, similar to communications placed in traditional media sources listed under the definition of "public communication" in 2 U.S.C. 431 (22).<sup>159</sup> Similar to advertising costs in traditional media sources such as television and radio, advertising space on the Internet can be expensive.<sup>160</sup> In explaining the rule, the FEC compares placing an advertisement on [www.chicagotribune.com](http://www.chicagotribune.com) to placing the same advertisement in The Chicago Tribune newspaper.<sup>161</sup> While placing the advertisement on the Internet may be less expensive, in both cases, a certain amount of funding is required.<sup>162</sup> Furthermore, in both instances, the advertising goal is to reach an established audience using a forum controlled by another person, rather than a forum that the advertiser controls to establish his or her own audience.<sup>163</sup>

Regulating paid political advertisements on the Internet in the same manner the traditional media sources are regulated also furthers the corruption goals of federal campaign finance law. Describing advertisements on the Internet, Senator Ron Wyden stated that, "[i]nternet campaigning looks like the Wild West. . . [y]ou go in, you sling your mud, hit below the belt, and get the heck out of Dodge before anybody knows who did the dirty deeds. I think people are going to do more of this, because the Net is where the accountability rules don't apply yet."<sup>164</sup> An example of how accountability rules did not apply online is an unregu-

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158. *Shays*, 337 F. Supp. 2d at 67.

159. 2 U.S.C. 431 (22) (2002) (defining "public communication" as "communication by means of any broadcast . . . newspaper . . . outdoor advertising facility to the general public or any other form of general public political advertising").

160. See e.g. Daily Kos, <http://www.dailykos.com/special/advertising> (Nov. 4, 2006) (indicating that a premium advertising slot on this political website sells for \$12,000 a week, a "second slot" ad sells for \$9,000 a week, and that the advertising slots are almost completely sold out till November 2, 2006.).

161. *Final Rules*, supra n. 10, at 23.

162. *Id.*

163. *Id.*

164. Declan McCullagh, *Liberal Net rules spawn political attack ads*, [http://news.com.com/Liberal+Net@ules\\$pawnn\[olitical+attack+ads/2100-1028\\_3-5207277.html](http://news.com.com/Liberal+Net@ules$pawnn[olitical+attack+ads/2100-1028_3-5207277.html) (May 6, 2006) (accessed June 25, 2007) (citing Senator Wyden in a phone interview).

lated Internet video advertisement that ran on the Web site of President George Bush and Vice President Dick Cheney that critiqued Democratic presidential candidate, John Kerry.<sup>165</sup> If this had been on television for example, the advertisement “would have to be revised to include either a ‘full screen’ video of Bush endorsing the video or a photograph combined with a Bush voice-over saying the same thing.”<sup>166</sup> The same advertisement on the radio would also require such a message,<sup>167</sup> and now, as detailed below, the same advertisement placed on the Internet will require a disclaimer.

## 2. *The Disclaimer Requirements*

The revised definition of “public communication,” which now includes paid political Internet advertising, affects the scope of the disclaimer requirement.<sup>168</sup> Under 11 C.F.R. § 110.11(a), the FEC disclaimer requirements mandate that advertisements soliciting donations or expressly advocating the election or defeat of a candidate must carry disclaimers.<sup>169</sup> The disclaimer is required by all non-electronic mailings and all communications supported by political committee disbursements.<sup>170</sup> While the disclaimer rule was not at issue in *Shays v. FEC*, the FEC decided to address this regulation since the revised definition of “public communication” would inevitably affect the scope of the disclaimer requirement, which applies to “public communications.”<sup>171</sup> Accordingly, “any ‘public communication’ that includes the content specified in 11 C.F.R. § 110.11(a)” must contain the required disclaimer.<sup>172</sup> The FEC, recognizing the concerns expressed by commentators,<sup>173</sup> decided to change 11 CFR § 110.11(a) and only require registered political committees to put disclaimers in political e-mails or on Web sites.<sup>174</sup>

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165. *Id.* (quoting Senator Wyden in a phone interview and noting that the advertisement “highlights Sen. John Kerry’s votes to curb military spending and cautions viewers that the Democratic presidential candidate ‘repeatedly opposed weapons vital to winning the war on terror’”).

166. *Id.*

167. *Id.*

168. See 11 C.F.R. §110.11(a) (2006).

169. *Final Rules*, *supra* n. 10, at 44.

170. 67 Fed. Reg. 76,962, 76,964 (Dec. 13, 2002).

171. *Final Rules*, *supra* n. 10, at 44.

172. *Id.* at 45.

173. *Id.* at 48 (discussing how, during the comment period, some commentators raised the concern that it would be difficult to enforce the disclaimer requirement on e-mail given the high volume of e-mail traffic and low cost of sending e-mails, while others expressed uncertainty over requiring individuals to have disclaimers on e-mails and yet not requiring disclaimers for Internet blogs).

174. *Id.*

Political bloggers, as well as other individual Internet commentators, do not have to disclose payments received from candidates, political parties, or campaign committees.<sup>175</sup> However, these political groups still need to report any such payments to bloggers.<sup>176</sup> Although current FEC rules<sup>177</sup> require a political party to disclose any payment disbursed to bloggers, the FEC determined that bloggers are not required to disclose any payment received.<sup>178</sup> Political bloggers, opposing regulation on political speech, view this decision as a victory.<sup>179</sup> Nonetheless, many legal commentators continue to argue that the disclaimer requirement should be extended to politically funded bloggers.<sup>180</sup>

It is not uncommon for a blogger to be on a political party's payroll. During the 2004 U.S. Senate race in South Dakota, the two leading South Dakota political blogs were run by bloggers paid by South Dakota Republican John Thune.<sup>181</sup> The Thune campaign paid Jon Lauck, of the blog, *Daschle v. Thune*, \$27,000 and Jason Van Beek, of the blog, *South Dakota Politics*, \$8,000.<sup>182</sup> Both blogs favored Thune over top Senate Democrat Tom Daschle, but neither provided a disclaimer stating they were on Thune's payroll.<sup>183</sup> Paul Kuhn of CBS news noted that blogs may play an important role in politics, emphasizing that the practices by South Dakota Republican John Thune may be "a telling harbinger for 2006 and 2008."<sup>184</sup> Experts point to the unregulated status of blogs as a characteristic that "makes them particularly attractive outlets for political attack."<sup>185</sup>

The disclaimer requirement for paid political Internet advertisements meets the goals of campaign finance law because it ensures that political committees properly finance and disclose such Internet communications; however, further regulation may be necessary as well as bene-

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175. See Broache, *supra* n. 12; *Final Rules*, *supra* n. 10, at 51.

176. See Broache, *supra* n. 12; *Final Rules*, *supra* n. 10, at 50-51.

177. 11 C.F.R. § 110.11(a) (2006).

178. *Final Rules*, *supra* n. 10.

179. See Center for Individual Freedom, *Comment and Request to Testify Concerning Notice of Proposed Rulemaking on Internet Communications*, [http://www.fec.gov/pdf/nprm/internet\\_comm/comm\\_06.pdf](http://www.fec.gov/pdf/nprm/internet_comm/comm_06.pdf) (June 3, 2005); see also First Amendment Center, *Proposed FEC rules leave most political activity on the Net unregulated*, <http://www.firstamendmentcenter.org/news.aspx?id=16693> (March 27, 2006).

180. See Hasen, *supra* n. 19; see also Lindsey Powell, Student Author, *Getting Around Circumvention: A Proposal for Taking FECA Online*, 58 Stan. L. Rev. 1499 (2006).

181. David Paul Kuhn, *Blogs: New Medium, Old Politics*, <http://www.cbsnews.com/stories/2004/12/08/politics/main659955.shtml> (Dec. 8, 2004).

182. *Id.*

183. *Id.*

184. *Id.* ("But where journalists' careers may be broken on ethics violations, bloggers are writing in the Wild West of cyberspace. There remains no code of ethics, or even an employer, to enforce any standard.")

185. *Id.*

ficial. Excluding political bloggers from the disclaimer requirement, while a victory to some, may be a roadblock standing in the way of the goal of preventing corruption or the appearance of corruption. For example, in the introductory hypothetical, Rob McNeill did not know that the blog he followed was politically funded. Although the FEC excluded political bloggers from the disclaimer requirement, it did not grant them an exemption as it did to volunteers.<sup>186</sup>

### 3. *The Individual Volunteer Activity Exemption*

The FEC added new exceptions to the definitions of "contribution" and "expenditure" to exclude Internet activities and communications that qualify as an individual activity.<sup>187</sup> Under the new rules, "any individual or group of individuals who, without compensation, uses Internet equipment and services for the purpose of influencing a Federal election does not make a contribution or expenditure and does not incur any reporting responsibilities as a result of that activity."<sup>188</sup> Moreover, under certain circumstances, individuals who are volunteers for a specific campaign, known to the campaign, or are employed by the campaign may also fall under the rule.<sup>189</sup> The rule says that individuals can use union or corporate computers or other electronic devices for political activity.<sup>190</sup> The FEC further developed the rule to clear up questions about how much political volunteerism a corporate employer or labor organization can participate in while using their employers' Internet and computer facilities.<sup>191</sup> The Commission decided that, "[o]ccasional, isolated or incidental use remains fine, as long as it's on the employee's time, isn't coerced by the employer, and doesn't bump up the company's costs."<sup>192</sup>

This newly created exemption meets the goal of preventing the FEC rules from interfering with an individual's participation in the political process. In encompassing all individuals volunteering on the Internet regardless of their affiliation with a particular campaign, the FEC followed the regulation afforded to traditional volunteers.<sup>193</sup> FECA uses the term "volunteer" as relating to the act of performing a voluntary, uncompensated service, not to the volunteer's relation to a particular

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186. See *Final Rules*, *supra* n. 10, at 27 (noting that "[i]n light of the evolving nature of Internet communications, the Commission is not explicitly excluding from the definition of 'public communication' any particular software or format used in Internet communications").

187. See *id.* at 55-60.

188. *Id.*

189. *Id.*

190. *Pace*, *supra* n. 127.

191. See *Broache*, *supra* n. 12.

192. See *id.*

193. See *id.*

campaign.<sup>194</sup> Furthermore, whether a volunteer uses their home or work computer to engage in the political process is irrelevant, and the new rules do not prevent such behavior.<sup>195</sup>

The Internet has changed the way people engage in political activity, and these rules clearly followed these changes. The FEC provides the following as its justification for the final rules: “[I]nternet has changed the way in which individuals engage in political activity by expanding the opportunities for them to participate in campaigns and grassroots activities at little or no cost from remote locations.”<sup>196</sup> By exempting the Internet activity of individuals acting both with and without the knowledge of a candidate or political committee, the FEC continues to promote individual participation in the political process.<sup>197</sup> In furthering the goal of promoting such participation, the FEC also extended the media exemption.

#### 4. *Media Exemption*

The FEC added new exceptions to the definitions of “contribution” and “expenditure” in order to exclude Internet activities and communications that qualify for the “media exemption.”<sup>198</sup> Traditionally, the media exemption allowed journalists working for corporations to perform their jobs and not worry about breaking campaign finance law, because the corporate funding limitations for public communications do not apply to media corporations,<sup>199</sup> like the New York Times or the Washington Post.<sup>200</sup> These media corporations can endorse or support a political candidate to any extent.<sup>201</sup> Basically, these protections are designed to protect the freedom of the press, and allow newspapers, for example, to endorse a political candidate without being considered as making a campaign “contribution.”<sup>202</sup>

In March 2006, the FEC ruled that bloggers are entitled to the same exemption from campaign finance law that traditional forms of media

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194. See 2 U.S.C. 431(8)(B)(i) (2002) (exempting from the definition of “contribution,” “the value of services provided without compensation by an individual who volunteers”); 2 U.S.C. 431(8)(B)(ii) (2002) (exempting from the definition of “contribution,” “the use of real or personal property voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services”).

195. *Final Rules*, *supra* n. 10, at 63.

196. *Id.* at 55.

197. *See id.*

198. *See id.* at 72.

199. 11 C.F.R. § 100.73 (2005).

200. See Brian Faler, *FEC Hears Bloggers' Bid to Share Media Exemption*, <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/11/AR2005071101376.html> (July 12, 2005).

201. See 11 C.F.R. § 100.73 (2005).

202. See Faler, *supra* n. 200.



receive.<sup>203</sup> Consequently, the media exemption was extended to “any Internet or electronic publication,” which could include everything from the online presences of major media companies to individual bloggers.<sup>204</sup> To clarify, the FEC acknowledged the expanded role of the Internet, and concluded “that bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities.”<sup>205</sup>

Putting this new rule into context requires a comparison of political blogging with traditional media outlets. In 1990, the United States Supreme Court upheld the constitutionality of a Michigan state law which provided certain exemptions for media corporations from the general limits on corporate election activity.<sup>206</sup> The Court reasoned that the media played a unique role in “informing and educating the public, offering criticism, and providing a forum for discussion and debate.”<sup>207</sup> Many political blogs serve the same purposes as mentioned above, and it can be difficult to try and differentiate some political bloggers from reporters. As will be shown below, political bloggers have actively participated in the political debate in a fashion similar to the traditional media.<sup>208</sup>

Political blogging became hugely popular, in part, due to the major news story involving U.S. Senate Majority Leader Trent Lott and his remarks at former Senator Strom Thurmond’s one hundredth birthday party.<sup>209</sup> At the party, Senator Trent Lott stated that U.S. Senator and former presidential candidate Strom Thurmond would have made a good president.<sup>210</sup> Bloggers like Glenn Reynolds<sup>211</sup> and Josh Marshall<sup>212</sup> hammered Lott’s and Thurmond’s comments until the mainstream me-

203. Pace, *supra* n. 127.

204. See Broache, *supra* n. 12.

205. *Final Rules*, *supra* n. 10, at 82.

206. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 667-668 (1990).

207. *Id.* (in discussing the exemptions, the Court did not mention that the exemptions only applied to a certain form of media).

208. See Kline & Burstein, *supra* n. 5, at 11.

209. *Id.* (noting that at the party, Senator Lott’s speech praised Thurmond’s segregationist views); see John Mercurio, *Lott apologized for Thurmond comment*, <http://archives.cnn.com/2002/ALLPOLITICS/12/09/lott.comment/> (Dec. 10, 2002) (stating that Thurmond’s party ran under a platform that declared in part “[w]e stand for the segregation of the races and the racial integrity of each race”).

210. See Kline & Burstein, *supra* n. 5, at 11.

211. Glenn Reynolds is a Professor of Law at the University of Tennessee and is widely known for his blog Instapundit. For more on Glenn Reynolds, see Instapundit.com, *About Me*, <http://www.instapundit.com/about.php> (accessed June 11, 2007).

212. Josh Marshall is a political journalist and writer. He writes a prominent political blog called Talking Points Memo. For more information on Josh Marshall, see Talking Points Memo, <http://www.talkingpointsmemo.com/bio.php> (accessed June 11, 2007).

dia picked up the story again.<sup>213</sup> There have been other similar instances of political blogs making a significant difference.<sup>214</sup> For example, the blog, TheMemoryHole.com, scooped the media when it published Defense Department photos of the caskets of soldiers who died in the Iraq War.<sup>215</sup> The photos were intended to be kept from the public.<sup>216</sup> In a now infamous media scandal, the Powerline.com blog first published information alleging that Dan Rather used forged documents in his *60 Minutes* story on President Bush's service in the National Guard.<sup>217</sup> These examples illustrate that political blogs are doing the very same thing that the Supreme Court of the United States in *Austin v. Michigan Chamber of Commerce*<sup>218</sup> sought to protect; namely, that political blogs provide certain important information to the public at large, offer criticism, and provide a forum for debate.

Furthermore, the candidacy of Howard Dean proved that "political bloggers can mobilize and unite large groups of citizens in ways that make insurgent candidates more viable."<sup>219</sup> As we have seen, blogs can serve as opinion research tools, sources of news and information, and as Howard Dean experienced, fund-raising vehicles.<sup>220</sup> John Kerry also experienced the generosity of Internet users and raised a significant amount of money online.<sup>221</sup> Consequently, it seems clear that because political blogs accomplish the same objectives that the Supreme Court sought to protect, as well as provide a variety of other useful tools, the media exemption was properly extended to include political blogs.

However, some argue that bloggers engage in activities that are not allowed in journalism.<sup>222</sup> Carol Darr, head of the Institute for Politics, Democracy, & the Internet at George Washington University, states that bloggers want it both ways: "[t]hey want to preserve their rights as polit-

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213. See Kline & Burstein, *supra* n. 5, at 11 (noting that the story made its rounds on other blogs while the mainstream media tried to ignore it; however, *Meet the Press* finally picked it up and Senator Lott, who was due to become Senate majority leader in 2003, stepped down from the position); Jay Rosen, *The Legend of Trent Lott and the Weblogs*, [http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/03/15/lott\\_case.html](http://journalism.nyu.edu/pubzone/weblogs/pressthink/2004/03/15/lott_case.html) (Mar. 15, 2004).

214. See Kline & Burstein, *supra* n. 5, at 11.

215. *Id.* at 11-12.

216. *Id.*

217. *Id.* at 12 (noting that soon after the exposure of the documents as forgeries, Dan Rather resigned as *CBS Evening News* anchor).

218. 494 U.S. 652, 667-668 (1990).

219. Kline & Burstein, *supra* n. 5, at 14.

220. *Id.* at 15 (noting that "Dean raised over \$45 million in online donations that averaged less than \$100 per contributor –more than any Democratic candidate in history had ever raised, online or off, including via traditional \$1,000 plate dinners").

221. *Id.* (stating that Kerry raised \$60 million).

222. See Faler, *supra* n. 200 (noting that some political bloggers work for political candidates and raise money for candidates).

ical activists, donors, and even fundraisers—activities regulated by campaign finance laws—yet, at the same time, enjoy the broad exemptions from the campaign finance laws afforded to traditional journalists.”<sup>223</sup> Darr, along with others, fears that extending the exemption would create a legal loophole that corporations, unions, and wealthy individuals could use to flood campaigns with substantial amounts of money.<sup>224</sup> Another concern is that if the FEC drew the media exemption too broadly, it would potentially allow a lot of corporate and labor activity using soft money, fully coordinated with candidates, to go on the Internet.<sup>225</sup>

In reaching its final decision to extend the media exemption to political bloggers, the FEC considered the concerns of opponents of the exemption such as those perviously discussed as well as the arguments made by proponents of extending the media exemption to political bloggers. Supporters of the media exemption made their arguments very clear to the FEC.<sup>226</sup> Duncan Black, who runs the liberal blog Eschaton and blogs under the pen name Atrios, voiced his concerns at an FEC hearing.<sup>227</sup> Another popular blogger, Markos Moulitsas, voiced the concern that without the media exemption, everybody would file complaints with the FEC attacking opponents of their ideas.<sup>228</sup> This would cause bloggers to hire lawyers, a burden which not many have the capacity to assume, and inevitably, most bloggers would shut down or begin anonymous blogs in order to avoid this type of scrutiny.<sup>229</sup> If this were to occur, the political campaign process would be negatively impacted. Political bloggers have become a news source for many people who have turned to blogs as an alternative source of media information.<sup>230</sup>

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223. *Id.* (internal quotations omitted).

224. See FEC Testimony of Carol Darr, <http://ipdi.org/UploadedFiles/59F2170E.pdf> (June 28, 2005); Faler, *supra* n. 200 (providing the examples of a company or union creating or subsidizing elaborate blogs attacking political candidates or creating a hard-hitting Web video that can attract large audiences).

225. See Faler, *supra* n. 200 (quoting Larry Noble, head of the Center for Responsive Politics).

226. See Kos, *IPDI nonsense: "must protect media from bloggers!"* <http://www.dailykos.com/storyonly/2005/6/2/173550/1995> (accessed June 15, 2007) (addressing Ms. Darr's comments and stating that "These campus blogethists like Carol Darr at IPDI love to pontificate about the harm that bloggers cause their precious profession, even as they fail to understand that bloggers are, in huge part, a response to the failings of their profession").

227. See Faler, *supra* n. 200 (quoting Duncan Black, "I'm troubled by the fact that participants in this emerging medium, which allows anyone the opportunity to participate in the national political discourse at a minimum cost, would face stricter regulation and stronger scrutiny—along with the potential for ruinous legal expenses—than would participants in media outlets owned by large corporations such as Time Warner, General Electric and Disney").

228. See *id.*

229. See *id.*

230. See Lev Grossman, *Blogs Have Their Day*, Time 109 (Dec. 27, 2004).

## IV. PROPOSAL

Some are commending the new rules as a victory, because, as seen above, the new definition of “public communication” does not affect the “vast majority of Internet communications.”<sup>231</sup> Moreover, the FEC’s decision to exclude bloggers from the disclosure requirement and to extend the media exemption to Internet publications signifies the important role and impact of Internet politics.<sup>232</sup> This lack of regulation over most bloggers is consistent with the federal election campaign finance goal of allowing people to participate in the political process. There is, however, one major shortcoming in the current FEC regulations as they apply to many bloggers: they fail to satisfy the goal of deterring corruption or the appearance of corruption. For example, in the above hypothetical, the political blog was funded by a candidate, and the reader was unaware of this fact. In hopes of avoiding such corruption, this comment proposes that the FEC extend the disclaimer requirement and apply it to politically funded bloggers and also that the FEC clarify the overly broad media exemption.

## A. ‘DISCLOSURE: THIS BLOG WAS PAID FOR BY. . .’

Under FECA, political candidates must disclose payments made to consultants and other campaign workers in periodic statements to the FEC.<sup>233</sup> Although the campaign must also disclose any payments made to bloggers, this is not sufficient to further the goal of avoiding corruption. The FEC failed to address the pressing issue that, even though a campaign will disclose all recipients of payments, this will not necessarily help inform blog readers of a potential bias. Due to the anonymous nature of the Internet, even if a blog reader has a list of all the people receiving payments from a political party, they could still not know whether a particular political blog was run by one of those people. Thus, the reader runs the risk of reading and being influenced by a campaign without their knowledge, because they believe they are reading the independent thoughts and opinions of a blogger. If a blogger, like Penny Pierce in the introductory hypothetical, is receiving payment from a political candidate, requiring a disclosure statement on the blogger’s website allows a visitor, like Rob McNeill, to know the blogger’s affiliation

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231. *Final Rules*, *supra* n. 10, at 5.

232. *Id.*

233. See 2 U.S.C. 434(b)(4)(A)(2006) (requiring that candidates and their authorized political committees report all “expenditures made to meet candidate or committee operating expenses” as well as 2 U.S.C. 434(b)(5)(A)(2006) which requires the name and address of each “person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made . . . to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure”).

with a political party.<sup>234</sup>

Of course, the scenario of a political candidate paying a blogger is not merely hypothetical. As seen during the 2004 U.S. Senate race in South Dakota, Representative John Thune paid two of the state's most popular bloggers, who did not disclose this information.<sup>235</sup> Bloggers who do not disclose that they receive payment for their work prevent a reader from knowing the blogger's affiliation with a political party. There are certain bloggers who already disclose such information voluntarily, and their actions should be followed. For example, in the archive section of the political blog *Daily Kos*, blogs from the 2004 presidential election state: "Disclosure: I do some technical work for Howard Dean."<sup>236</sup> Richard Hasen, a political blogger who supports the disclaimer requirement, also discloses payments from political parties or politicians on his website.<sup>237</sup>

In order to avoid corruption or the appearance of corruption, this proposal would require that if a political blogger is being paid by a political party or candidate to run a blog, the blogger should include on each blog page a statement indicating that the writing was paid for by a specific candidate or political committee. The disclaimer should state the blogger's affiliation with the political party and be placed in a visible spot on the blog page. For example, posting the phrase 'Disclosure: This Blog was Paid for by . . .' will allow a person viewing the blog to know that the blogger is connected with the specific political party or candidate. Ultimately, this will help avoid corruption while still allowing participation in the political debate.

#### B. MEDIA EXEMPTION CLARIFICATION PROPOSAL

As part of its new regulations adopted in March 2006, the FEC extended the media exemption to all bloggers.<sup>238</sup> However, this broad media exemption needs to be clarified in order to ensure that it is effective and functional.<sup>239</sup> By including Web sites and Internet communications in the definition of "media," the new FEC rules disregard some of the previous requirements of a media entity.<sup>240</sup> For example, the FEC replaced the regular interval requirement for periodical publication with a less rigid standard.<sup>241</sup> The FEC now states that ". . .the term 'periodical'

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234. See hypothetical, *supra* n. 2.

235. Kuhn, *supra* n. 181.

236. See Archive of Daily Kos, [http://www.dailykos.net/archives/cat\\_elections.html](http://www.dailykos.net/archives/cat_elections.html) (accessed Nov. 11, 2006).

237. See Hasen, *supra* n. 19.

238. See generally *Final Rules*, *supra* n. 10.

239. See Hasen, *supra* n. 19 (presenting a proposal).

240. See *Final Rules*, *supra* n. 10, at 82-83.

241. *Id.* at 83.

within the meaning of the Act's media exemption ought not be construed rigidly to deny the media exemption to entities who update their content on a frequent, but perhaps not fixed, schedule."<sup>242</sup> Also, the new rules abolish the bound-pamphlet requirement in order to accommodate websites and Internet communications.<sup>243</sup> Given the nature of the Internet, such alterations to the definition are inevitable. Nonetheless, it is evident that the FEC is trying to incorporate the unique characteristics of the Internet into its rules.

While including websites in the scope of the media exemption advances political participation via the Internet and recognizes the significance of political blogging, such an exemption needs clarification. As Richard Hasen states, "as everyone gets to own the equivalent of a printing press, and everyone can become a journalist, the corporate and labor limit on campaign activity stands to be swallowed up by the media exemption."<sup>244</sup> This proposal suggests that the FEC clarify exactly who falls into the category of a media exemption by adopting a set of guidelines. The guidelines should explain the scope of this exemption as well as detail the types of activities it covers. By clarifying this overly broad exemption, the FEC will avoid the potential for corruption by political blogs used as financial loopholes.

Ultimately, this comment seeks to incorporate the above two proposals into the current regulations. In support of active participation in political debate, all political bloggers, regardless of their size, audience, or whether they are incorporated or not, should be included in the media exemption. In this regard, the blanket media exemption is a positive decision by the FEC. The issue arises when a political blogger, falling under the media exemption, is being paid by a political candidate to run the blog. Such an activity should require a disclaimer. Incorporating the above disclaimer requirement with the media exemption proposal, this comment's ultimate proposal states: All political bloggers are entitled to the media exemption, but if they receive payment from a candidate or political party, they must disclose that affiliation.

## V. CONCLUSION

Political blogging provides individuals with the opportunity to significantly engage in political debate. This influential activity played an important role in the 2004 U.S. presidential election and has already

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242. *Id.*

243. *Id.* (stating that "[n]or can 'periodical publication' be restricted to works appearing in a bound, pamphlet form).

244. Richard L. Hasen, *The Ripple Effects of the FEC's Rules on Political Blogging: Why They Will End Up Undermining Limits on Corporation and Union Campaign Finance Activities*, [http://writ.news.findlaw.com/commentary/20050405\\_hasen.html](http://writ.news.findlaw.com/commentary/20050405_hasen.html) (Apr. 05, 2005).

contributed to the political debate surrounding the 2008 U.S. presidential election.<sup>245</sup> As blogs developed into effective political tools, it became necessary to determine how political blogging would engage with the existing campaign finance laws. *Shays v. FEC* directed the FEC to include the Internet in its regulations, and the FEC promulgated its final rules in March of 2006.<sup>246</sup> In determining that the BCRA will not apply to most political activity on the Internet, the FEC decided to only regulate paid political advertisements placed on another person's website,<sup>247</sup> leaving political blogging virtually unregulated.

One of the goals of federal campaign finance law is public participation in the political debate, and as such, leaving the activity of political blogging unregulated advances rather than hinders this goal. While this goal is advanced, the possibility of corruption still exists. The proposals to extend the disclaimer requirement to political bloggers paid by a political party or candidate to run a blog and to clarify the overly broad media exemption seek to prevent corruption. By incorporating the above proposals into its regulations, the FEC will further the goals of federal campaign finance regulations without significantly burdening the bloggers.

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245. See Horrigan, *supra* n. 6.

246. See *Final Rules*, *supra* n. 10.

247. *Id.* (noting that under this rule, when someone pays a fee to place a banner, video, or pop-up ad on another person's website, the person paying makes a public communication).