

June 3, 2005



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Re: Comments of the Center for Democracy & Technology on
Notice of Proposed Rulemaking 2005-10
The Internet: Definitions of "Public Communication" and
"Generic Campaign Activity" and Disclaimers

Dear Mr. Deutsch:

On behalf of the Center for Democracy & Technology, we respectfully submit the
following comments to the Federal Election Commission ("FEC") on Notice of Proposed
Rulemaking 2005-10, entitled 'The Internet: Definitions of "Public Communication" and
"Generic Campaign Activity" and Disclaimers' (the "NPRM"). In addition, CDT requests
the opportunity to testify at the Commission's planned June 28-29 hearings.

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## **I. Introduction**

The Internet is transforming the American political landscape by enabling tens of millions of people to express their opinions to others and receive political information from ever broadening sources of news and commentary. For the first time since the town square ceased being a central focus of civic discourse, individual Americans can participate in a robust political conversation taking place in a national and even global virtual town common. And critically, the Internet provides a counter-balance to the undue dominance that “big money” has increasingly wielded over the political process in the past half-century.

Political discourse on the Internet – and the enhanced civic participation that it promises – is at risk of being chilled or inhibited by the overbroad application of campaign finance rules to the Internet. The application of the entire regime of campaign finance law – which in the off-line world primarily affects candidates, parties and other political sophisticates – onto the political speech of tens of millions of Internet users creates risks for and burdens on online speech that will inevitably dampen political discourse of individual speakers. A burden on ordinary citizens’ online speech is *not* the goal of either the sponsors and supporters of the campaign finance laws or the Federal Election Commission itself. But such a burden is a very real possibility unless the FEC and/or Congress take decisive action to protect the online political speech of ordinary people.

We appreciate the effort of the FEC in the NPRM to confine its regulatory coverage of Internet communications to only a narrow category of speech, and to leave largely unregulated the great bulk of online political speech of ordinary people on the Internet. We understand that the Commission is seeking to comply with a court order while at the same time permit individual speakers on the Internet to continue their political discourse. But because of the nature of the Internet, the lack of fit between the campaign finance laws and the Internet, and the number and scope of the people using the Internet for political activities, we strongly believe that the FEC – and as may likely be necessary, Congress – must take far stronger steps to protect individuals’ online political speech.

The following comments on the NPRM (and on campaign finance laws more generally) focus only on the impact on individual speakers – the ordinary voters expressing their political views on the new medium of the Internet and spending moderate amounts of money to do so.

These comments assume that campaign finance laws do and should apply to some Internet speech (for example, to the online speech of campaigns and party organizations), and they leave for another debate questions about whether the online speech of large corporations and unions should be regulated in exactly the same way as their offline speech. Instead, the concerns discussed below focus only on burdens on online political speech of ordinary men and women acting independently of candidates and political parties.

These comments are informed by the results of an informal and unscientific online survey conducted by CDT and IPDI which sought to ascertain relevant facts about individual online political activities during the last election, and about the general awareness and knowledge of campaign finance laws. *See* <http://fec.cdt.org/educate.html>. A summary of the results of the survey are attached hereto in Appendix B.

## **II. The “Principles” and the Need for a Single, Simple Rule**

As a starting point, CDT respectfully refers the Commission to the Joint Statement of “Principles” developed by CDT and the Institute for Politics Democracy & the Internet (“IPDI”) and submitted on June 3, 2005, to the FEC on behalf of CDT, IPDI, and more than 1,100 organizations, bloggers and other individuals, including a broad spectrum of organizations (such as the American Civil Liberties Union, the Electronic Frontier Foundation, the National Taxpayers Union, People for the American Way, and the Personal Democracy Forum) and bloggers. The Joint Statement of Principles is available at <http://fec.cdt.org>, and the Principles are attached hereto as Appendix A (in a version that includes CDT’s and IPDI’s supplemental explanations of each principle).

The core focus of the Principles is to advocate for providing substantial breathing space within which individuals’ independent online political speech can thrive without concern about campaign finance regulations. Without such breathing space, the mass and complexity of campaign finance regulations is very likely to discourage many online speakers from expressing their political views and participating in a robust online debate about political candidates and policy issues of concern.

### **A. Historic and Practical Underpinnings of the Principles.**

The Principles are in part based on the historical and practical reality that the Internet is fundamentally different from all other forms of electronic mass media, and that the campaign finance regime was designed and aimed at speech that is very different than the bulk of speech that occurs on the Internet. Historically, the campaign finance regime was established long before the Internet emerged as an important communications medium in our society. The Federal Election Campaign Act (“FECA”) was enacted by Congress in 1971, and the FEC was created in 1974 – about the time that the technology that underlies the Internet was first invented.<sup>1</sup> The first commercial dial-up Internet access was not available until 1990, and the World Wide Web was not invented until 1991. The Internet did not see broad adoption until the late 1990s.

Not only did the Internet as we know it emerge long after the campaign finance system was created, but the technical and demographic characteristics of the Internet are radically different from any preceding electronic media of mass communications. As of the 1970s and the advent of modern campaign finance rules, the means of mass communications were well established as narrow channels of speech available to a very limited number of speakers. And critically, to reach a big audience, a speaker needed big money: often tens of thousands of dollars for a single newspaper advertisement and far more for an ad on a national television network. Moreover, for radio, television, and even newspapers, the listening audience had little or no control over what they heard – although they could change channels, they could do little to avoid commercials – including campaign advertisements.

The Internet stands in stark contrast to the mass media of the 1970s. The Internet is open to literally tens of millions of speakers across the United States, and hundreds of millions of speakers around the world. To reach a vast national or global audience, one needs to spend little or no money. One can speak to millions without placing any advertisements, but even ads on the Internet can sometimes be priced at pennies per individual ad. And not only does the Internet

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<sup>1</sup> In May of 1974, Vinton Cerf and Robert Kahn published the first description of what became the Transmission Control Protocol – the “TCP” of the TCP/IP suite of protocols that form the foundation of what we now call the Internet. See V.Cerf & R.Kahn, “A Protocol for Packet Network Intercommunication,” IEEE Transactions on Communications, Vol. Com-22, No. 5, May 1974, available at [http://global.mci.com/us/enterprise/insight/cerfs\\_up/technical\\_writings/protocol\\_paper/](http://global.mci.com/us/enterprise/insight/cerfs_up/technical_writings/protocol_paper/).

offer the potential to speak, but millions are in fact speaking out on the Internet – recent reports about the new phenomenon of blogging indicate that between 2 and 8 million Americans publish their own blog.<sup>2</sup> And tens of millions of American voters are listening to political speech over the Internet – Pew reports that 75 million Americans used the Internet to receive election information or discuss politics.<sup>3</sup> Moreover, those receiving political information over the Internet can precisely choose which blog to read or web site to visit. These conclusions were confirmed in the small informal survey that CDT & IPDI conducted in late May 2005, in which respondents identified well over 100 non-mainstream sources of political news, covering the entire spectrum of political perspectives that they relied on for political news during the last election cycle.<sup>4</sup>

Even more important than the aggregate differences between the Internet and older forms of mass communications is the dramatic difference in the characteristics of the “average” political speaker in the different media. In the 2004 election cycle, thousands (but probably not tens of thousands) of people purchased political advertisement time on radio and television networks around the country in conjunction with a federal election race, but it is likely that the vast majority of those individuals were working for or with an organized political campaign or party. And critically, it is virtually certain that the vast majority of those organized campaigns or parties had retained – and had the resources to retain – one or more attorneys to advise them about compliance with the campaign finance laws.

In the 2004 election cycle, in contrast, millions (and possibly tens of millions) of individual Americans expressed their political views online (commonly spending at most small amounts of money), and at most a tiny fraction of those individuals were working for or coordinating with an organized political campaign or party. And it is certain that the vast

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<sup>2</sup> See R. Bruner, “Blogging is Booming,” IMedia Connection, April 5, 2004, available at <http://www.imediacconnection.com/content/3162.asp>.

<sup>3</sup> See L. Rainie, J. Horrigan, M. Cornfield, “The Internet and Campaign 2004,” Pew Internet & American Life Project and the Pew Research Center for The People & The Press, March 6, 2005, available at [http://www.pewinternet.org/PPF/r/150/report\\_display.asp](http://www.pewinternet.org/PPF/r/150/report_display.asp).

<sup>4</sup> See Appendix B for full summary of responses to survey

majority of those millions of speakers had not retained attorneys to advise them on campaign finance law issues.<sup>5</sup>

### **B. Two Critical Goals that Flow from the Principles.**

It is against this historical and practical backdrop that the Principles seek to insulate the online political speech of individuals. Some of the principles address specific issues that are discussed later in these comments, but several principles provide two overarching and vitally important goals that should guide the FEC's actions in this proceeding. The fourth and fifth listed principles assert:

- The Federal Election Commission (FEC) should adopt a presumption against the regulation of election-related speech by individuals on the Internet, and should avoid prophylactic rules aimed at hypothetical or potential harms that could arise in the context of Internet political speech of individuals. Instead, the Commission should limit regulation to those activities where there is a record of demonstrable harms.
- If in the future evidence arises that individuals' Internet activities are undermining the purpose of the federal campaign finance laws, any resulting regulation should be narrowly tailored and clearly delineated to avoid chilling constitutionally protected speech. The Commission should eschew a legalistic and overly formal approach to the application of campaign finance laws to political speech on the Internet.

As suggested by these principles, the FEC should affirmatively articulate an overarching starting point – that ordinary individuals' online political speech should *not* be covered by the panoply of campaign finance regulations. Rather than seeking to extend the rules to individual online activity that poses at worst a *de minimis* risk to the integrity of the election process, the FEC should declare that individuals' online speech is presumptively excluded from regulation, subject to narrowly focused regulation aimed at specific proven abuses on the Internet. By affirmatively declaring that individuals' online political speech is protected from regulation, the FEC can send the proper message to the millions of Internet users engaged in the nationwide online political conversation that the Internet has enabled.

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<sup>5</sup> Certainly the vast majority of the 600+ bloggers and other individuals who responded to the informal CDT/IPDI survey confirmed that they did not consult with attorneys about whether their online election related speech and activities were subject to campaign finance laws.

A second and equally critical goal is set out in the first sentence of the sixth principle (with emphasis added):

- Ordinary people should be able to engage broadly in volunteer and independent political activity without running afoul of the law or *requiring consultation with counsel*.

Simply put, the current and proposed set of campaign finance rules are overwhelmingly complex and intimidating for individuals to understand or interpret.<sup>6</sup> It is completely unrealistic to expect most ordinary participants in the online political discourse to be able to follow and understand their obligations under the campaign finance regulations.<sup>7</sup> Accordingly, the FEC *must* act to simplify the rules applicable to individuals' online speech.

The sheer volume of law and regulations is overwhelming – an uninitiated speaker wanting to comply with federal law is confronted with hundreds of pages of laws and regulations, and thousands of pages of interpretations, explanations, and adjudications concerning those laws and regulations.<sup>8</sup> Obviously most of these laws and regulations do not directly apply to individuals' online political speech, but unless individuals already knows precisely where to look, the prospect of figuring out what does apply is, to say the least, daunting.

Even if an online speaker knows precisely which regulations to review (and assuming for the sake of argument that the rules proposed in the current NPRM are adopted without change), someone planning to actively use the Internet to express his or her political views would have to

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<sup>6</sup> Even under current rules (and apart from the rules proposed in the current NPRM), an online speaker must be able to determine whether his or her online political activities constitute express advocacy, and if so must be able to figure out whether and when disclosure and reporting obligations attach, and whether political committee rules apply.

<sup>7</sup> The responses to the CDT/IPDI survey to the questions of whether individuals considered campaign finance obligations before engaging in online political activity evinced broad misunderstanding of and confusion about the campaign finance law. Almost all of the respondents believed that campaign finance law governed large contributions to campaigns and had no application to their independent personally financed political speech. Moreover, as noted above, respondents did not consult lawyers before reaching their conclusions. Notably, a few respondents did take it upon themselves to review the campaign finance law and concluded that it did not apply to their activities. The accuracy of their conclusions cannot be verified.

<sup>8</sup> The body of campaign finance law takes up over 225 pages of statutes from the U.S. Code, over 500 pages of FEC regulations from the Code of Federal Regulations, over 702 pages of "explanations and justifications" of the FEC regulations, more than 1300 FEC Advisory Opinions supplementing the regulations, and more than 350 federal court decisions concerning the FEC's regulations.

consult, at a bare minimum, the following provisions from Chapter 11 of the Code of Federal Regulations (“CFR”):

- 11 CFR § 100.26 to determine if their speech would be treated as a “public communication”;
- 11 CFR § 100.22 to determine if their speech qualifies as “express advocacy”;
- 11 CFR §§ 100.73 and 100.132 to determine if they qualify under the news media exemption;
- 11 CFR § 100.94 to determine if their Internet activities count as contributions subject to limits;
- 11 CFR § 100.155 to determine if their Internet activities count as expenditures for reporting purposes;
- 11 CFR § 114.9 to determine if their use of an employer’s computer to access the Internet is permissible;
- 11 CFR §§ 100.27 and 110.11 to determine if their bulk e-mail requires a specific type of disclaimer;
- 11 CFR § 100.5 to determine whether their plan to collaborate with their neighbor to speak on the Internet means that they qualify as a “political committee” subject to registration and reporting requirements; and
- 11 CFR §§ 109.1, 109.3, 109.10, 109.11, 109.20, 109.21, 109.22, and 109.23 to determine whether their speech will be considered independent or coordinated, and the implications of that determination.

In the face of such an array of laws and regulations, it is certain that at least some individual speakers on the Internet will choose to forgo online political speech. That many Internet speakers may in fact be oblivious to the existence of the laws and regulations (and thus may never think to consult them) does not avoid the fact that some speakers will attempt to determine their correct classification under the regulations, and decide to forgo their speech instead. The highly complex and voluminous rules will have an unavoidable “chilling effect” on constitutionally protected – indeed, constitutionally valued – political speech. And once the current rulemaking proceeding concludes and final rules are adopted, the number of Internet speakers aware that their speech may be subject to a civil enforcement regime will rise exponentially, only broadening the likelihood of chill.

The fact that the FEC has laudably sought to narrow the reach of its regulation of Internet speech also does not alter the chilling effect of the rules. Unless the FEC (or Congress) breaks the mold of pre-existing campaign finance regulations and drafts a *single, short and easy-to-*

*understand* exemption of individuals' online speech, the complexity of the rules as a whole will chill individuals' speech – speech that the campaign finance laws and rules should be promoting. The FEC must draft a rule accessible to and understandable by the average Internet speaker.

One could argue that the same complexity facing an online political speaker also faces an offline political activist – and that perhaps rules for *all* activities of individuals should be simplified. CDT would certainly support simplification of offline rules, but we would defer to those with more experience about how the campaign finance rules impact offline grassroots activism. But we also do believe that the Internet has so radically broadened citizens' independent participation in the political process that the need for simplification of online rules may in fact be stronger than in the offline world. Certainly throughout our history offline politics has seen tens or even hundreds of thousands of activists participate in campaigns as volunteers. But the Internet allows millions or tens of millions of people to participate in the national political conversation – including many who never before had volunteered with a campaign or participated in offline grassroots activities. Whatever the merits of changing rules applicable in the offline world, the scope of online political participation is such that the need for clarity and simplicity for online speech is crucial.

### **III. Creating a Single, Simple “Bright Line” Rule**

The existing campaign finance regulations – both before and as tentatively modified by the NPRM – are too complex for the mass of Internet users to understand and follow. It is vital that the FEC address the need to protect individuals' speech *not* by changes and tweaks to the existing regulations, but instead by taking a far bolder step to ensure that individuals have an appropriate breathing space in which to participate in the online political conversation.

There are a number of possible approaches to create – or at least approach – a “single, simple rule,” and three such approaches are discussed below. Whatever approach is taken, as subsection D discusses below, it is important that at a minimum the FEC supplement the existing structure of regulations to simplify what applies to individuals' online speech.

**A. The Commission Should Reconsider Its Entire Approach to the *Shays* Court Decision.**

In *Shays and Meehan v. U.S. Federal Election Commission*, Civil Action No. 02-CV-1984 (D.D.C.), the plaintiffs challenged the almost complete exclusion of Internet communications from the reach of the Bipartisan Campaign Reform Act (“BCRA”), and the district court agreed that Internet communications could not be entirely excluded from that law. *See Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal in part filed*, No. 04-5352 (D.C. Cir.) (“*Shays*”). In partial response to the court decision, the FEC issued its NPRM and initiated the current rulemaking procedure. The NPRM, however, does not focus squarely on what was of concern to both the *Shays* plaintiffs and district judge in that case – instead, the NPRM sweeps more broadly and reaches the online speech of individuals.

It is very clear – both from submissions to the district court and from an *ex parte* submission to the FEC immediately prior to this rulemaking – that the *Shays* plaintiffs had a very focused concern about the challenged regulations: the regulations might permit unlimited *coordinated* expenditures for Internet speech by prohibited entities. In their primary brief to the district court, Congressmen Shays and Meehan were very specific in their argument: “The Commission Acted Unlawfully In *Per Se* Excluding the Internet From the Rules on *Coordinated Communications*” (emphasis added).<sup>9</sup> In their *ex parte* communication to the FEC, Congressmen Shays and Meehan (along with Senators McCain and Feingold) focused on two specific problems that motivated their legal challenge:

This exclusion [of the Internet] would exempt from regulation, for instance, large expenditures of corporate or union funds to buy advertising for a candidate on Internet web sites, *even where those expenditures were fully coordinated with the candidate*. It would also permit state parties to spend unlimited soft money funds to buy advertising on the Internet that promote or attack federal candidates.<sup>10</sup>

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<sup>9</sup> Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, *Shays v. FEC* (D.D.C.) (filed Feb. 27, 2004), at 20, available at <http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7B208005DE-6F98-411E-8B3D-C6124276332B%7D.PDF>.

<sup>10</sup> *Ex Parte* Letter from J.McCain, R.Feingold, C.Shays & M.Meehan to FEC Chairman Scott Thomas, Mar. 22, 2005 (emphasis added), available at [http://www.fec.gov/pdf/nprm/internet\\_comm/exparte03.pdf](http://www.fec.gov/pdf/nprm/internet_comm/exparte03.pdf).

More critically, the focus of the district court's decision also was on *coordinated communications*. The court's significant discussion of the exclusion of the Internet was set out in a section of the opinion addressing "Regulations Governing Coordinated Communications."<sup>11</sup>

The FEC should reconsider the overall approach taken in the NPRM, and should seek to focus the proposed regulations more narrowly on what was of concern to both the *Shays* plaintiffs and court – most significantly, on *coordinated* communications, as well as online speech of state parties and prohibited groups. By changing the focus of the proposed regulations, the FEC could go a great distance toward creating a simple approach that plainly excludes the independent online speech of individuals.

We defer to the Commission on how such a refocus could best be implemented in the regulations, but one approach could be to modify the proposed exclusion of Internet communications contained in proposed § 100.26 so that all Internet communications are excluded except for those of (a) state parties, and (b) corporations or unions if made in coordination with a federal candidate.<sup>12</sup> Most critically, such an approach would make it plain that individuals (who are neither state parties nor corporations or unions) are *not* covered by the regulations.

From the perspective of an individual trying to figure out whether they are covered by campaign finance rules, this approach transforms the threshold question about the coverage of regulation from one of "what is covered" to "who is covered." By focusing on "what," the FEC's currently proposed approach ends up equating the \$10 online advertisement discussed in Section IV.A below with a \$100,000 ad purchase by a state party. In both scenarios, the initial coverage analysis is exactly the same: "it is a paid advertisement, so it is presumptively covered (and one should consult an attorney to figure out if it is actually covered, and if so what obligations does the ad purchase entail)." If this is the threshold analysis, there is no doubt that many if not most prospective purchasers of the \$10 ad would hesitate to proceed. But, if the threshold question turned on "who" is covered, the prospective purchaser of the \$10 ad could

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<sup>11</sup> See *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), appeal in part filed, No. 04-5352 (D.C. Cir.), available at [http://www.fec.gov/pages/bcra/shays\\_meehan\\_mem\\_opinion\\_dc.pdf](http://www.fec.gov/pages/bcra/shays_meehan_mem_opinion_dc.pdf).

<sup>12</sup> Some would argue that all Internet communications of corporations or unions should be covered by campaign finance regulations. These comments take no position on that question, except to note that individual speakers should be able to incorporate, as more fully discussed below.

quickly determine that he or she was not a state party, corporation, or union, and the ad could be purchased without undertaking regulatory obligations.

**B. Alternatively, the Commission Should Craft an “Individual Political Speech Exemption.”**

While we believe that the approach above, which excludes individuals by omission (e.g., by expressly extending regulation only to state parties and other obviously non-individual entities) is a straightforward and clean way to exclude individuals engaged in online political advocacy from BCRA regulation, it would not by itself free individuals online from other relevant campaign finance regulations. Another approach to achieve a single, simple rule protecting individual speech would be to create an express exemption of individuals’ speech – perhaps termed an “Individual Political Speech Exemption.” Under this approach, the Commission could plainly and briefly state that independent online political speech by ordinary individuals is completely exempt from all campaign finance regulation.

Although we believe that individuals’ online speech should be wholly excluded from regulation absent any evidence of misconduct, the vast majority of individuals’ speech could be protected by the designation of a very substantial monetary threshold below which an individual’s online speech would be exempt from all aspects of campaign finance regulation. For example, in a comment submitted in 2000, Common Cause and Democracy 21 proposed an exemption of this type:

Common Cause and Democracy 21 suggest that if an individual is establishing a web site (or posting online) spends more than a substantial threshold amount (e.g., more than \$25,000) for the purpose of advocating the election or defeat of a particular candidate, then, even if the individual acts independently of any campaign, the individual should include a disclaimer and his/her expenditure should be disclosed. But independent activities by individuals on the Internet that do not meet this expenditure threshold should not be regulated.<sup>13</sup>

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<sup>13</sup> Comments of Common Cause and Democracy 21, FEC Notice of Inquiry 1999-24: Use of the Internet for Campaign Activity, Jan. 7, 2000, at 4, available at [http://www.fec.gov/pdf/nprm/use\\_of\\_internet/notice\\_comments/commoncause.pdf](http://www.fec.gov/pdf/nprm/use_of_internet/notice_comments/commoncause.pdf).

In these comments we do not take a position as to whether \$25,000 is the most appropriate amount, but instead simply advocate that under this approach the FEC could set a very substantial amount as a threshold below which *no* campaign finance regulations would apply.

We appreciate that some of the campaign finance regulations are statutorily created and cannot be directly changed by the Commission. Certainly, an “Individual Political Speech Exemption” could be most cleanly created by Congress instead of the FEC. The Commission, however, could create the exemption by, for example, defining expenditures for purposes of certain regulations to not include Internet related expenses up to the substantial threshold amount. Although this approach would make the goal of a “single, simple rule” more difficult, the FEC could use this approach in conjunction with a clearly articulated policy eschewing enforcement for uncoordinated individuals and thereby create – albeit less cleanly – a “single, simple rule” to protect individuals’ online speech.

**C. Alternatively or in Addition, the Commission Should Announce an Enforcement Policy with Respect to Individual Internet Speakers that Excludes All Uncoordinated Online Activity of Individual Speakers from Enforcement.**

In addition to creating a bright line rule exempting individuals’ online political speech from regulation, the Commission should declare that as a matter of general enforcement policy, the Commission will not investigate or penalize the uncoordinated online activity of individual speakers. Thus, to the extent that there exist statutorily created burdens on individuals’ online speech, the Commission can declare that it will not expend its resources enforcing such burdens where the enforcement does not further the goals of the campaign finance regime.

Where appropriate, the Commission can declare such an enforcement policy in conjunction with legislative recommendations to Congress to revise or remove burdens imposed on individuals’ online speech.

**D. The Commission Should Consolidate the Rules Applicable to Individuals Into a Single Section of the Code of Federal Regulations.**

Whatever approach the Commission takes to protecting online political speech of individuals, it can enhance the clarity and simplicity of its efforts by consolidating the rules

applicable to individuals' speech into a single section of the Code of Federal Regulations. Although the FEC could actually move regulations from their current section to a new, consolidated section, such an approach might create confusion. Instead, the Commission could restate any rules relevant to individuals under clear headings such as "contribution limits," "expenditure limits," "reporting requirements," etc., while providing references to the underlying rules.

To be effective, such an effort must clearly articulate the impact of a given regulation on individual speakers, and thus it would likely not be sufficient simply to repeat a given regulation. Instead, the FEC should endeavor to restate the regulations in the clearest and simplest possible terms. Such an approach might require the FEC to initiate an additional rulemaking to receive comment both on whether the restated rules accurately reflect the original underlying rules, and on whether the restated rules are readily understandable by non-attorneys.

In theory some of the value of this proposal could be achieved by the FEC issuing an authoritative summary of the rules applicable to individuals. The difficulty with this approach, however, is that if any dispute arises about the meaning of the rules, resolution of the dispute would primarily focus on the underlying rules, not the summary. Thus, to maximize the protection afforded to individual speakers, the Commission to promulgate any summary or consolidation of rules through the formal rulemaking process.

#### **E. The Absence of a Single, Simple Rule Will Chill Online Political Speech and Likely Lead to the Abuse of the FEC Complaint Process.**

All of the proposals in this section are aimed at simplifying the rules as they apply to individuals' online political speech. Without such simplification, it is inevitable that speech will be chilled. For better or worse the current rulemaking itself – and the online attention that the anticipated and actual rulemaking generated – has significantly heightened online users' awareness of the basic question of how campaign finance rules apply to individual speech. Notwithstanding the high level of obliviousness that many online users had about campaign finance rules during the last election cycle, it is certainly that there will be greater awareness during the next election cycle – and unless the rules are readily accessible to and understandable

by the average Internet speaker, the FEC's rules will discourage the very types of speech that the entire campaign finance system should be encouraging.

Beyond the broad concern that the complexity of the rules, there is also the very real risk that the FEC complaint and enforcement process will further chill online political activity and may become a tool for political mischief. Indeed, in the complex and fast changing Internet environment, even the narrow rules proposed by the NPRM will, if enacted, give rise to enormous uncertainty which will likely have to be resolved through advisory opinions, interpretive rules and enforcement actions. Such proceedings would exacerbate the perception that being politically active online is best done after consultation with counsel, if at all.

Moreover, in this environment, a political opponent can trigger a complaint with the FEC, subjecting the individual to an intrusive investigation and potentially a civil proceeding in Washington, D.C., one in which the speaker would be well advised to take seriously and hire an attorney. In the offline world where only a few thousand "speakers" actually use the mass media, and most have access to attorneys, the complaint process may not be an effective means of harassing an opponent. But if the rules apply to millions of speakers who are engaged in the robust debate that the Internet allows – and if the rules are complex and open to varying interpretations – it is highly likely that the complaint process will be abused. If the rules are simple and clear, the Commission staff will be able to weed out trumped up complaints, but if the rules remain as complex as they are now, it will be all too easy to initiating a complaint that on its face appears to warrant investigation.

For all of these reasons, the Commission should strive to make as clear as possible the obligations – or preferably the *lack* of obligations – imposed on the speech of individuals.

#### **IV. Significant Issues Raised by the NPRM and Related Regulations**

Beyond the overarching concern that the rules are unavoidably too complex to be applied to millions of ordinary people participating in online political discourse, we also have a number of specific concerns about aspects of the NPRM, and about the regime of campaign finance rules more broadly. The issues discussed below serve to illustrate the fact that the rules (existing and as proposed) reach far too deeply into the on-going online political conversation. Many of the

issues raised below would be avoided by the type of bright line exemption for individual speakers discussed above.

The comments below are submitted in the alternative to the broad proposals above to exclude individual online speakers from the reach of the campaign finance laws. Thus, if the FEC decides to broadly exempt individuals from regulation, many of the concerns expressed below would be resolved or significantly diminished.

### **A. Regulating *All* Paid Online Political Advertisements Will Undermine the Goals of Campaign Finance Reform.**

In the offline world of campaign finance rules, regulating paid advertisement makes a great deal of sense. Electronic media are tightly controlled, and there is significant competition for usually expensive advertising slots. Thus at first blush, extending campaign finance rules to online ads appears to make some sense. But ads on the Internet are *not* merely the tool of wealthy political elites. Increasingly, online ads can be purchased for \$10 or \$25 by ordinary people to express their support for particular candidates. Extending campaign finance regulation to this activity makes very little sense, and such regulation will almost certainly discourage individual citizens from speaking. Thus, the Commission's proposal to include all paid online ads placed on third party's web sites in the definition of "public communication" in 11 CFR 100.26 is highly problematic.

Respondents to the CDT-IPDI survey identified numerous examples of online advertising opportunities that are specifically focused on low dollar political speakers including:

- numerous week-long paid advertising opportunities aimed at liberal audiences are available for \$10, \$15, \$20, \$25 (and more) from [http://www.blogads.com/advertise/liberal\\_blog\\_advertising\\_network/order](http://www.blogads.com/advertise/liberal_blog_advertising_network/order);
- numerous week-long paid advertising opportunities aimed at Republican audiences (or other selectable political leanings) are available for \$10, \$15, \$18, \$20, \$25 (and more) from <http://www.blogads.com/order>; and
- thirty-day-long paid political postings are available for \$5.95 at <http://congress.org/congressorg/soapbox/>

The Internet provides numerous more general advertising opportunities for well under \$100, including, for example, offers of 50,000 “hits” or “click-throughs” for less than \$50.<sup>14</sup> If paid online advertising follows the pattern seen with most Internet services, the cost of advertisements will certainly decrease over time.

Just as ordinary people want to endorse their favored candidate in their physical community (through yard signs and bumper stickers), people will increasingly want to do the same in their online communities (through banner ads and other paid and unpaid ways of speaking to specific online audiences). And this type of political expression should *not* in any way be regulated or inhibited.

Thus at a minimum, if the Commission does not generally exclude individuals and their speech, it should define a generous threshold below which paid advertisements do not count as “public communications.”<sup>15</sup> This approach, however, further increases the complexity that is the most critical problem with the regulations. Moreover, this approach highlights the difficulty of trying to define “what is covered” rather than “who is covered.” While it makes little sense to regulate a \$50 paid advertisement by an independent individual, some will argue that it \$50 advertisements placed by (for example) state parties should be regulated. Without a broad “bright line” exclusion of the speech of ordinary people, this is one example of the numerous more specific – and difficult – lines that the FEC will have to draw.

Additional comments on and responses to the Commission’s proposed changes to 11 CFR 100.26 are below in Section V.A.

### **B. Disclaimer Requirements Will Chill Individual Speakers, Harm Privacy, Harm Anonymity, and Are in Any Event Unworkable in Many Online Contexts.**

Under the FEC’s rules, as discussed in NPRM § IV, anyone who expressly advocates for or against a federal candidate in a paid ad must disclose their full name, street address and telephone number (or World Wide Web address). *See* 11 CFR 110.11(b)(3). Thus, individuals

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<sup>14</sup> *See, e.g.*, <http://www.hitflow.com/>; <http://www.justvisits.com/>; [http://www.web-source.net/internet\\_advertising.htm](http://www.web-source.net/internet_advertising.htm).

<sup>15</sup> To be very clear, we believe that it is *far* preferable to entirely exclude the speech of independent individuals as proposed above.

who spend \$10 on a one-week long ad as discussed immediately above must disclose their personal information. This is highly problematic for a number of reasons.

First and most fundamentally, the Internet has supplanted the town square or common as the primary place of citizen-to-citizen public discourse, and there is a very long tradition of permitting anonymity in those historic public spaces. Thomas Paine's "Common Sense" was an anonymous pamphlet, and many of the Federalist (and Anti-Federalist) Papers of Alexander Hamilton, James Madison and others were written using pseudonyms. At bottom, at least some of this historically anonymous speech was "express advocacy" for a change in government, the modern day equivalent of which is expressing one's mind about who should be President. The Commission should affirmatively create the ability of individuals to follow in Thomas Paine's footsteps and anonymously speak on the Internet – by either creating a broad exemption for individuals' speech, or if necessary by crafting a specific exemption from the disclaimer obligations.<sup>16</sup>

Second, and wholly apart from the value of anonymity, the disclaimer rules create a significant threat to personal privacy. In an era of identity theft, telemarketers, and on- and offline stalkers, the Commission should not force individuals to disclose address and telephone information unless there is a very clear need to address a very clear harm to the integrity of the campaign finance system. Again, the Commission should affirmatively act to protect the privacy of individual speakers.<sup>17</sup>

Third, and as a direct consequence of the first two concerns, the disclaimer requirement will discourage individuals from participating in the political debate – participation of a kind that the campaign finance rules should be *encouraging*. Numerous respondents to the informal CDT/IPDI survey made clear that they would refrain from speaking instead of disclose their personal information. For example, when asked if they would have run their political blogs or

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<sup>16</sup> Indeed, anonymity was an essential condition for the vast majority of respondents to the CDT-IPDI survey. People expressed significant concern that disclosure would threaten their employment, their privacy and even their safety. "Yes, in today's highly polarized political environment, anonymity is important to protect yourself from reprisals (employment, etc.)" *See* Summary of Responses to Survey Question 6, attached at Appendix B.

<sup>17</sup> There is no incongruity in suggesting that someone would want to protect their privacy while at the same time taking out an Internet ad that says "Bob Smith of Bethesda Supports Bill Jones for Congress." That someone is willing to publicly proclaim their political preference does not mean that they are willing to publish their unlisted telephone number.

websites if they had been required to disclose their home street address or telephone number on their sites, respondents (with only a few exceptions) emphatically answered no. One woman noted: “No I would not [speak if I had to disclose my personal info]. As a woman who lives alone and has controversial political views (given the state in which I live), I would not disclose that information online. Such a law would effectively silence me.” Another noted: “No. A political reporter for a newspaper is not required to disclose their home address and phone number in their publications. I can see no reason that I should be forced to. If someone wishes to find out who I am, there are methods, but forcing me to open myself to harassment is out of line.”<sup>18</sup>

Finally, as a practical matter, a disclaimer on an Internet banner or comparable ad is not workable or effective. The disclaimer would either be so small as to be unreadable, or so large as to occupy an undue portion of the ad space. Just as disclaimers are not required on bumper stickers, water towers, and sky-writing, disclaimers should not be required on individuals’ online advertisements.

It is *not* sufficient to respond that these problems can be cured by a simple reference to a World Wide Web site. For speakers that already have a web site dedicated to political speech, a link to the site is a plausible option. But for the tens of millions of people who (a) have no web site, (b) have a web site that for privacy reasons does not have personal information, or (c) have a web site dedicated to, for example, pictures of their children, a reference to a web site is not a reasonable option. As a practical matter, forcing someone to refer to a web site that itself discloses personal information does not resolve any of the three problems raised above.

Finally, we note that a hallmark of many low cost ways to speak on the Internet is a lack of optional features – in other words, speakers often have no ability to modify the format (of an ad, for example) to include extra information such as a disclaimer. Although Internet web sites can be enormously flexible, such flexibility can increase the cost of the speech. The Commission should avoid making assumptions about how much control a low-cost Internet speaker has over the format of the speech.

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<sup>18</sup> See Appendix B.

**C. The Commission Should Not Attempt to Control Political “Spam,”  
Which Has Not Been Shown to be a Problem that Needs a Solution.**

As discussed in NPRM § IV.A, the Commission proposes changes to 11 CDR 110.11(a) to narrow the situations in which senders of unsolicited political e-mail must include disclaimers in the e-mails. Although we appreciate that the provision is being narrowed, we question whether *any* regulation of political “spam” is needed, and whether the Commission should attempt such regulation.

There is little if any evidence of harm associated with political e-mail. Political e-mail is often solicited via sign-up forms on campaign Web sites, and is used to mobilize mass participation and keep supporters informed about campaign activities. The few known cases of unsolicited campaign email have generated a great deal of anger from recipients and negative publicity. Most political consultants, parties and candidates agree that unsolicited email is not a useful or widespread tactic.<sup>19</sup>

It appears that political spam, to the extent it was ever a problem, has cured or shortly will cure itself. There is now such broad aversion to spam of any sort that unsolicited political e-mail appears far more likely to alienate voters than attract them. With normal commercial spam, the spammer does not care if the spam irritates 99.99% of recipients, so long as a few people buy whatever the spammer is selling. That same calculation does not apply to political spam.

In light of the lack of evidence of a problem to be solved, we suggest that the Commission should avoid attempting to define “unsolicited” or otherwise drawing lines about political e-mail. In any event, even if one assumes that political spam is a problem, it is not the type of problem the campaign finance laws were intended to solve. There is no evidence whatsoever that spam is a tool of “big money.” Moreover, to date Congress has focused its attention on *commercial* spam, which represents the great bulk of the larger spam problem, and had empowered the Federal Trade Commission to work on the problem.<sup>20</sup> Congress has not legislated about political spam – which raises much greater constitutional issues than commercial spam – and has not directed the FEC to take action.

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<sup>19</sup> See, e.g., “Use of spam in campaign spurs debate,” San Jose Mercury News, Apr. 4, 2002, available at <http://www.mercurynews.com/mlld/mercurynews/news/2996334.htm>.

<sup>20</sup> See CAN-SPAM Act, 15 U.S.C. §§ 7701–7713.

If the Commission remains intent on retaining regulations concerning e-mail, we suggest that any regulations be focused on the activities of campaigns and political parties. If in the future there arise problems relating to individuals' use of e-mail, the Commission can revisit the question at that time, and can focus any regulation on specific types of abuse.

**D. The Commission Should Expand the Media Exemption to Include Internet-Only Sources of News and Commentary.**

The NPRM proposes to expand the media exemption to include online news and commentary sources that have no offline counterpart. The Commission also grapples with whether and to what extent to "bloggers" fall under the media exemption. We strongly support the expansion of the exemption, but we also believe that the Commission should more broadly consider whether the current language of 11 CFR 100.73 and 100.132 accurately reflects Commission policy, and whether that language is consistent with the reality of the news media today, particularly as it migrates to the Internet.

As a preliminary threshold matter, however, the question of whether "all" or even "most" of the 10 million bloggers in operation today should qualify under the media exemption is a difficult one. Many of the most active blogs clearly should be treated as news media, but there are also certainly some blogs that are aimed solely at the close friends and family of the blogger, and we are doubtful that such a blog should be treated as part of the news media. Similarly, some blogs are expressly set up to advocate and directly raise money for candidates and make no pretense of being anything other than advocacy sites. Still others focus on the hobbies and interests of particular communities and neither seek to report or comment on public affairs. However, we believe the answer to this question *should not matter* for most bloggers. We believe that the "individual political speech exemption" proposed above (or one of the other approaches to protecting individuals' online political speech) should be used to protect the vast majority of all bloggers (as well as other individual speakers), and thus most bloggers should be exempt from regulation regardless of whether they qualify for the media exemption.

Nevertheless, we support the expansion of the media exemption, but believe the Commission should more broadly consider whether other language in 11 CFR 100.73 and 100.132 should be changed. For example, the Commission should consider making express in

its changes to 11 CFR 100.73 and 100.132 that the word “periodical” can encompass bloggers and other online speakers who publish on an on-going basis, albeit intermittently. Although most definitions of the word “periodical” refer to repeating *fixed* intervals between publications, the Oxford English Dictionary’s definition of “periodic” includes (as a “loose” definition) something that recurs intermittently. We believe that the underlying statute does not require a rigid or narrow interpretation of the word “periodical,” and thus we believe the FEC could expressly make clear that on-going online publications (of which blogs are an example) can be covered under the media exemption.

Second, we believe the Commission should consider the need for and appropriateness of the requirement that any news media entity be “part of a general pattern of campaign-related news account that give reasonably equal coverage to all opposing candidates in the circulation or listening area.” 11 CFR 100.73(b) and 100.132(b). As a practical matter, the “circulation or listening area” of most Internet sites is national or even global, and it is impractical to suggest that any news media entity can cover “all opposing candidates” across the nation. More fundamentally, the Commission should consider whether to change the language to acknowledge the existence of a point of view in the media, and that news and commentary, even in the offline world, is not always balanced in coverage. While to be sure, the Internet has given rise to new media which does not even pretend to be impartial, the fact that those biases are simply more transparent should not, by itself, disqualify an online publication or blogger from receiving the exemption. In any event, the quoted language is not required by the underlying statute, and should not be used to prevent left-leaning or right-leaning blogs from qualifying as news media.

Third, the Commission should consider declaring that the media exemption is not available to any entities (online or off) that accept payments from candidates outside of any normal advertising placements. This would reduce the concern about payments by campaigns to blogs and other opinion leaders.

Finally, and more generally, the Commission should strive to consolidate its rules for the media exemption so that one is not required to refer to numerous Advisory Opinions to determine whether the media exemption applies in a given situation. Such an approach would reduce the difficulty that thousands or even millions of blogs and other web site authors face in trying to make that determination.

**E. The Commission Should Broaden the Scope of “Internet Activities” in the Proposed Rules Concerning Individual or Volunteer Activities.**

In NPRM § VIII, the Commission proposes to exempt a variety of “Internet activities” from the definitions of “contribution” and “expenditure.” We support the proposals, but believe that the Commission should be more expansive in what it identifies as exempted Internet activities. In the list of activities, we suggest that the Commission should identify functions more generally, and identify examples of services (such as e-mail “exploders,” blogging, or RSS feeds, which are automated news and content distribution systems). Thus, we suggest the following new or edited items for inclusion: *creating and hosting an Internet site; creating, hosting, or participating in an online discussion using blogging or other software; mirroring content that is also available on a candidate’s Web site; offering or using automatic content distribution systems such as RSS or XML feeds.* To the definitions of “computer equipment and services” we suggest the Commission include: *hosting services; and access services.*

On the question of whether the Commission should supersede certain Advisory Opinions (1998-22 and 1999-17) relating to individuals’ use of computer services, we believe that those Advisory Opinions should be superseded both because they are too narrow in their analysis, but more importantly because the Commission should strive wherever possible to clarify a rule directly and thereby eliminate the need to refer to an Advisory Opinion. Short of hiring an attorney who is steeped in the law of campaign finance, it is very difficult to determine which of the decades worth of Advisory Opinions retain validity and relevance.

**F. The Commission Should Expressly Permit the After-hours Use of Corporate or Union Supplied Computer Equipment for Personal Political Use.**

As the Commission notes in NPRM § IX, it is now common for companies and unions to permit (and at times encourage or even require) employees to keep and use company- or union-owned laptops during non-working hours. Thus, for many employees, a company- or union-owned computer is their primary or only home computer, and the employees are permitted to make essentially unlimited personal use of those computers – including, for those so inclined, for

political speech on the Internet. Such political speech can certainly exceed the one-hour/four-hour allowances set out in 11 CFR 114.9. The Commission should amend that section to permit employees unlimited use of company or union computers for personal political activities so long as the use is (a) during non-working hours, and (b) completely self-directed, with no influence or instruction by the company or union to engage in any particular type of political activity.

An additional allowance as suggested here would serve to promote the speech of individuals while not harming the goals of the campaign finance laws.

### **G. The Commission Should Permit Bloggers and Other Small or Individual Online Speakers to Incorporate.**

A small but increasing number of bloggers – particularly the most active or high profile bloggers – are choosing to incorporate for liability purposes. Although it is likely that some if not most of the incorporated bloggers would qualify as news media under the modified exemption proposed above, the Commission should create a narrowly focused exemption to permit the incorporation of small online-only speakers in cases where the business of the corporation consists of the operation of a blog or other forum for online discourse.

Such an additional exemption would serve to support the continued development of the “blogosphere” that dramatically diversified the political discourse during the past election cycle. At the same time, a narrowly focused exemption should not harm the goals of campaign finance reform.

### **H. The Commission Should Create an Academic Exemption to the Constraint on the Internet Speech of Individuals Employed by a Corporation.**

The Internet creates a range of situations in which an employer might permit or even encourage employees to blog or engage in online discussions, even if the employee is solely expressing the employee’s individual opinions. As one example, the constraint on the speech of corporations may have the anomalous effect of chilling the online speech of professors employed by private universities.<sup>21</sup> Blogging and other forms of online public discourse have become a

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<sup>21</sup> The Commission’s proposed rules exempt from regulation speech that takes place at public schools, and thus at least in theory a professor at a public university would be exempt from regulation.

vital part of some professors' academic work. For example, Lawrence Lessig is a noted law professor at a private (and incorporated) university, and he runs a popular blog.<sup>22</sup> Lessig's active online dialogue on a wide range of issues – including “presidential politics” – is certainly an informal part of Lessig's academic work, and thus it is unclear whether his blogging would be considered “incidental” to the corporation. Thus, the prohibition on “corporate” blogging could well chill academic discourse at private universities. The Commission should declare that the individual political speech of academic instructors employed by private schools and colleges will not be attributed to the corporate employer, so long as the employer is not directing the speech in question.

As with the above proposals, this change will promote a diversity of ideas online without harming the goals of the campaign finance laws.

**I. The Commission Should Relax the Political Committee Rules to Permit Two or a Few Individuals to Collaborate on a Blog or Other Online Speech Site.**

The Internet fosters communication, collaboration and community among people with common interests, many of whom never meet in the offline world. In the last election, millions of people joined together on the Internet to blog, to raise money for candidates, and to express their political views. Few registered as political committees and most were unaware of those legal obligations. But under the law, if those collaborations focused on election related issues and the collaborators spent (or raised) more than \$1,000, the individuals may have been considered a “political committee,” subject to a number of burdensome disclosure and reporting obligations. While the political committee designation – with its low financial threshold – likely impacted thousands of groups in the offline world in the last election, as political advocacy continues to grow in the online world, that figure will likely impact millions of informal groups that come together on the Internet to express their political views. As the CDT-IPDI joint principles make clear, we believe there is no reason to treat small groups of political speakers any differently from individuals online. The Commission should create a narrow exception to the political committee rules that permits online collaboration on a blog, an independent political

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<sup>22</sup> <http://www.lessig.org/blog/>.

advocacy site, or other Internet discussion forum without the risk of becoming a political committee. If the Commission excludes individuals from regulation under one of the approaches we set out above in Section III above, then it should make clear that small groups of online speakers do not lose that exemption simply because they join together to speak.

**J. The Commission Should Not Endow Blogging Software or Any Other Specific Internet Application with Heightened Protection.**

The Commission appropriately makes clear that it is not seeking to regulate or interfere with Internet bloggers and the blogging community, and we support that approach. The Commission asks, however, whether it should expressly indicate that “bloggers” are not included in the definition of “public communication.” NPRM § II.B.

We strongly believe that the Commission should *not* specifically regulate (or not regulate) bloggers, because “blogging software” is simply one of many ways on the Internet that one can engage in on-going discussions of topics of interest. Favoring blogging would at the same time disfavor other equally meritorious ways to engage in discourse and debate online. Although blogging has surged onto the Internet political scene in recent years, by the time of the next election a wholly new type of communications software might be the best way to engage in political discussion. Thus, protecting “blogging” might help protect the Internet of today, but would not necessarily protect the Internet of tomorrow. A better approach would be to protect ordinary individuals, no matter what software or online applications they use.

**K. The Commission Should Ensure that Rules Concerning Coordination Do Not Undermine the Protection Afforded to Individual Speakers.**

As discussed in NPRM § V, the Commission has largely deferred consideration of its rules for coordinated communications. This approach raises significant concerns that protection for individual speakers created in this rulemaking could be undermined in the coordinated communication proceeding. To address these concerns, we believe that the Commission should create exemptions for common Internet political activities of individuals within the rules governing coordination. For example, an individual’s placement of a link to a candidate’s web site on the individual’s own web site should not be evidence of coordination, even if the candidate’s web site makes details about how to link available to supporters.

In considering an individual's republication of a candidate's materials, it is important to note that some "republication" or "dissemination" of content is fundamentally different in the online world than in the off line world. A classic example of republication in the offline world might be when a campaign prints 10,000 copies of a brochure, and then a supporter "republishes" the brochure by printing another 10,000 copies. In this scenario, the supporter's republication has directly increased the number of people who can receive the brochure. On the Internet, in contrast, if a campaign posts a position statement onto its web site, and then a supporter copies the statement onto the supporter's web site, the copy does not in fact lead to a wider availability of the statement, because the original statement would still be available to any visitor to the supporter's site (and the supporter could easily supply a link to the original statement). The greater visibility that the position statement has is *not* a function of any "republication" but is instead due to the decision of the supporter to refer to the statement at all (and the visibility would be the same if the supporter provided a mere link). Indeed, the visitor to the supporter's web site often would have no idea (and would not care) whether the position statement was being retrieved from the original campaign web server or the supporter's web server – the visual appearance in the web browser could look identical.

Moreover, there are a variety of technical reasons why a web site might decide to "mirror" the candidate's original statement (i.e., making a copy available on the web site) instead of merely providing a link. Most simply, making a copy of the original statement means that the web site can avoid the risk of a "broken link," which would happen if the candidate's web site moved the original statement to a different location on its web site. Or a web site might want to refer to a specific statement by a candidate, and simply providing a link runs the risk that content on the original web page might change. Thus, making a copy of a statement is simpler for the web site operator, and is the only way to be sure that the referenced content does not change. What is critical here is that the web site operator is "republishing" the candidate's statement *not* to help the candidate, but as a matter of convenience and web site integrity for the web site operator. By "republishing" the underlying statement (instead of using a simple link) the web site operator avoids the daily tasks of verifying (a) that the link still works, and (b) that the underlying content has not changed.

This is yet another example of how a seemingly simple concept in the offline world can be significantly different in the online world. To avoid this kind of difficulty, the Commission should ensure that routine techniques that web sites around the world use (such as linking to and mirroring content) are not alone viewed as evidence of “coordination” that would subject an individual speaker to greater regulation. More broadly, the Commission must ensure that the coordination rules as a whole do not burden individual’s speech.

**L. The Commission Should Make Clear That Any Regulation of Internet Speech (including Future Enforcement Decisions) Should Generally Err on the Side of Permitting Speech to Be Unregulated.**

In promulgating any rules that apply to Internet speech, the Commission should make clear – both in the initial drafting of rules and in their future enforcement – that the rules should be flexibly applied so as to minimize their impact on routine online speech.

To illustrate this point, the Commission can offer the following example on how the rules should be interpreted:

Online content that does not otherwise contain “express advocacy” shall not be deemed to contain “express advocacy” because of words that appear in a domain name, Internet address or URL (Uniform Resource Locator). Thus, online content containing a link to “<http://www.ElectBillSmith.com>” or “<http://www.geocities.com/VoteForBillSmith.html>” should not, without more, be considered to contain express advocacy. Although URLs can themselves express ideas, the domain name and addressing systems on the Internet are so much a part of the communications medium itself, and those elements should not subject online speech to regulation.

By providing this and other examples, the Commission can limit the harmful effect of the rules on ordinary online speech.

**V. Additional Comments on and Responses to the NPRM**

The following comments are provided in the order and with reference to the section headings where the proposals and questions appear in the NPRM. Specific questions posed in the NPRM appear in *italics* (usually paraphrased), with responses following.

### **A. NPRM § II.B Proposing 11 CFR 100.26**

The FEC proposes to include paid Internet advertisements placed on another person's or entity's Web site as part of the definition of "public communication." As discussed above in Section IV.B of these comments, we believe that regulating *all* paid advertising will reach too far and will chill valuable speech by individuals.

As a general matter we note that there is little (if any) evidence of abuse or harm associated with paid political announcements on Web sites. Although regulating paid advertisements of entities such as state parties may be justified, it is less clear that all paid ads should be regulated – most ads are very low cost (even if they are purchased in lots of \$1,000 or more), and most simply drive traffic to web sites.

Along the same lines, it is not clear that there is any evidence of harm that might arise from paid ads that do not contain express advocacy. As discussed above and in the joint "Principles," the Commission should avoid imposing rules aimed at hypothetical or potential harms.

*Is regulating Web announcements placed for a fee on another Web site consistent with the definition of public communication as applied to other kinds of media?* Focusing on paid advertisements is consistent with the intent of Congress in the BCRA. There is far less justification for the regulation of the unpaid use of a web site – which visitors must affirmatively choose to visit. The Internet and the World Wide Web, however, have unique characteristics from other media: it is often inexpensive to purchase advertising and the advertising is typically designed to drive traffic to Web sites by enabling users to click through to access the site. The Commission should therefore be cautious about equating these ads with offline advertising.

*Should communication that does not cost money be considered "general public political advertising"? Should ads where something of value other than money is provided in exchange for advertising be regulated?* No. Link-exchange programs and other means of no-cost promotions of political Web sites help expand the range of political debate. They are more analogous to an entry in a phone directory than a television ad. Thus, until there is evidence of some abuse of link exchanges and other no-cost promotions, the FEC should refrain from extending any regulation to such promotions.

*Should the Commission explicitly state that it is not including “bloggers” in the definition of “public communications”?* As discussed above in Section IV.J, the FEC should not single out blogging for special protection, but should more generally protect the online speech of individuals (including bloggers).

### **B. NPRM § II.C Concerning State Party Committees**

As a general matter we take no position in these comments on the regulation of state party committees, as discussed in NPRM § II.C. The NPRM raises questions, however, concerning the possible allocation of costs of a web site based on the appearance of a PASO reference to a federal candidate. We note generally that the marginal cost of adding information to an existing web site approaches zero. There are generally no incremental costs incurred by adding content to an existing web page or even adding an additional web page to a web site, and we caution the Commission against attempting to measure the costs different elements of a web site. While some content – such as streaming video content – may if popular consume measurable additional resources, most content will not.

### **C. NPRM § IV.B Concerning Bloggers Paid by Candidates**

*Should “bloggers” be required to disclose payments from candidates? Should payments to “bloggers” be considered general public political advertising?* Although we appreciate the reasons why one might want bloggers to disclose payments from candidates, recipients of funds from candidates are generally not required to make any disclosures, and do not believe that online community opinion leaders should be required to make disclosures when offline community opinion leaders (such as community activists, religious leaders, etc.) are not. An alternate approach that is less problematic is defining exemptions from regulation (such as the media exemption or a new “individual political speech exemption”) as not being available to any entities (online or off) that payments from candidates outside of any normal advertising placements.

## VI. Conclusion

We appreciate the efforts of the Commission to limit the impact of its rules on the online speech of individuals, and we look forward to working with the Commission to further refine those rules.

Respectfully Submitted,

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# APPENDIX A

To Comments of the Center for Democracy & Technology



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Campaign Finance Regulation and The Internet:  
A Set of Principles to Protect Individuals' Online Political Speech

May 11, 2005

We believe that the principles set out below should guide any consideration of the possible application of the campaign finance laws to individuals' political speech on the Internet. The text in gray boxes contains background information for each principle.

- The Internet is a unique and powerful First Amendment forum, which supports speech as "broad as human thought." It empowers ordinary people to be speakers and publishers with the ability to reach millions. As such, the Supreme Court has afforded speech on the Internet the highest constitutional protection.

The First Amendment protects our right to speak freely and to gather information. Without it, true democracy would be impossible. The Supreme Court strongly disfavors laws that impinge on First Amendment rights and has been particularly protective of speech on the Internet. The Court declared in *ACLU v Reno* that speech on the Internet should receive the full protection of the First Amendment.

- Unlike the broadcast media, the Internet is a powerful engine for interactive, diverse, and robust democratic discourse, and it has broadened and increased the public's participation in the political process. The Internet's user-driven control and decentralized architecture support a multiplicity of voices and constrain the ability of any one speaker to monopolize attention or drown out other voices.

As the last election amply demonstrated, the Internet has become America's public square, a powerful forum where ordinary people spending small sums of money can express their political views, and be heard by millions of people. Unlike closely controlled forums like TV and radio, which are dominated by a few political speakers, no political speaker on the Internet can dominate the space or prevent others from being heard.

- Robust political activity by ordinary citizens on the Internet, including their monetary contributions, strengthens and supports the central underlying purpose of the campaign finance law: to protect the integrity of our system of representative democracy by minimizing the corrupting influence of large contributions on candidates and office

holders. Individuals' online political activity engages larger numbers of citizens in the political and campaign processes and encourages an increase in smaller contributions.

Campaign finance laws are aimed at diminishing the impact of big money contributions in elections and guarding against their corrupting influences. The Internet can't stop wealthy interests from spending money, but it can help to diminish their influence, both by facilitating small contributions and by opening up avenues for information flow that are not dominated by big money. In the last election cycle, the Internet was responsible for an unprecedented increase in the number of small financial contributors to elections and an increase in the influence of ordinary voters.

- The Federal Election Commission (FEC) should adopt a presumption against the regulation of election-related speech by individuals on the Internet, and should avoid prophylactic rules aimed at hypothetical or potential harms that could arise in the context of Internet political speech of individuals. Instead, the Commission should limit regulation to those activities where there is a record of demonstrable harms.

In the past, the Federal Communications Commission ("FCC") has written very broad rules to try to prevent wealthy interests from exerting a corrupting influence over the political process. Those rules have often been based on hypothetical or potential misconduct, not on clear evidence of a problem. We believe that this would be the wrong approach to campaign finance regulation of individuals' political speech on the Internet, where broad prophylactic rules would hurt millions of ordinary Americans exercising their First Amendment rights to speak out on elections and political issues. This principle urges the FEC to change its approach to regulation on the Internet and only regulate individual speakers where there is a real record of abuse by big money interests.

- If in the future evidence arises that individuals' Internet activities are undermining the purpose of the federal campaign finance laws, any resulting regulation should be narrowly tailored and clearly delineated to avoid chilling constitutionally protected speech. The Commission should eschew a legalistic and overly formal approach to the application of campaign finance laws to political speech on the Internet.

Speaking out during an election is a constitutional right. The government needs to be very careful when it tries to regulate political speech. For that reason, even if the FEC finds clear evidence that wealthy interests are engaging in practices that corrupt the political process, we believe it must write rules that are very narrow and clear, so that it does not also regulate or chill the online speech of small independent political speakers.

- Ordinary people should be able to engage broadly in volunteer and independent political activity without running afoul of the law or requiring consultation with counsel. The FEC should make clear that such activities are as a general matter beyond the scope of all campaign finance regulation (including disclaimers, thus preserving the right of individuals to engage in anonymous online political speech).

We believe that there needs to be a “bright line” between the online political speech of big money interests, which may be subject to the campaign finance laws, and the online political speech of small and independent political speakers on the Internet which we believe should not be regulated. Individual Americans should be able to engage in election related political speech online and spend reasonable sums of their own money to support that speech, without having to disclose their identity, worrying about whether they are violating campaign finance laws, or having to hire a lawyer to advise them.

- Individuals should be able to collaborate with other such individuals to engage in a very substantial amount of independent election related political speech online without being deemed a “political committee.”

The Internet fosters communication, collaboration and community among people with common interests, many of whom never meet offline. In the last election, millions of people joined together to engage in election related activities on the Internet. We believe those people should be treated the same under the Campaign Finance laws as individual speakers acting alone. They should be able to engage in a substantial amount of collective political activity without being deemed a “political committee” under the campaign finance laws. Right now, the campaign finance laws treat people who join together to engage in election related activities as “political committees” with a number of reporting and disclosure requirements, if they spend or raise as little as \$1000. That doesn’t make sense on the Internet.

- The FEC should extend the media exemption to online media outlets that provide news reporting and commentary regarding an election, including those media outlets that exist only on the Internet. In the Internet context, the news media exemption should be construed more flexibly than in the off-line context, so that it can accommodate new technology and new forms of online speech. The Federal Election Commission should clearly articulate the criteria for qualifying for the news media exemption on the Internet.

The growth of online media has provided Americans with new sources of political information and alternative points of view. People are increasing turning to Internet sources of news and commentary, often from sources that only publish online (such as bloggers). The media exception to the federal campaign finance law allows the media to report and editorialize on federal elections without regard to the campaign finance rules. That exception needs to be clearly extended to Internet media and the criteria for qualification needs to be reexamined so that new forms of media on the Internet are covered.

- Independent bloggers and other Internet speakers who report or provide commentary on the Internet but who do not otherwise qualify for the media exemption should nevertheless be able to engage in a very substantial amount of online political speech without any regulation.

While some bloggers should qualify for the media exemption, some probably will not meet the criteria. But almost all bloggers should be exempt from the campaign finance rules to the same extent as other online citizen advocates, even if they don't qualify under the media exemption.

- The FEC should promulgate rules that permit independent Internet speakers or groups of speakers to incorporate for liability purposes without violating the prohibition on corporate political activity.

The campaign finance law prohibits corporations from endorsing or opposing federal candidates or making campaign contributions. But sometimes bloggers and other independent speakers on the Internet incorporate for a number of reasons such as protection from liability. We believe the adoption of the corporate form should not silence independent online political speakers.

- Any rules promulgated by the FEC with respect to Internet political activity should be technology neutral and not distinguish between or disadvantage forms of online speech. Similarly, rules must be sufficiently flexible so as to encourage innovation and the development of new forms of Internet speech.

The Internet is a dynamic and fluid medium. New technologies are constantly spawning new modes of speech on the Internet. We believe that it would be very damaging to the Internet if campaign finance laws were aimed at specific modes of speech like pod casting or blogging. Not only will the rules be quickly outdated, they may stifle innovation on the Internet.

# APPENDIX B

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## Appendix B - Summary of Response to CDT-IPDI Online Survey

The Center for Democracy and Technology (CDT) and the Institute for Politics Democracy and the Internet (IPDI) conducted an informal and unscientific survey that sought to ascertain relevant facts about individual political activities during the last election, and to gauge the general awareness of campaign finance laws. This questionnaire is available on our joint website at <http://fec.cdt.org>. Over 700 individuals who engaged in online election-related speech responded. The survey's results offer a snapshot of the knowledge, attitudes, and activities of the growing online political community of ordinary Americans who are making important contributions to strengthening democratic discourse.

### Question 1

*Did you rely on any blogs or other non-traditional online media sites for political news, and if so which blogs or sites?*

Our respondents listed hundreds online sources they relied on for news during the campaign. While respondents relied heavily on blogs, they also regularly consulted the websites of traditional news media outlets. More importantly, many people stated that they were getting the majority of their news and campaign information from Internet sources. The most popular sites consulted included: [abcnews.go.com/politics/thenote](http://abcnews.go.com/politics/thenote); [blogforamerica.com](http://blogforamerica.com); [buzzflash.com](http://buzzflash.com); [cnn.com](http://cnn.com); [dailykos.com](http://dailykos.com); [drudgereport.com](http://drudgereport.com); [foxnews.com](http://foxnews.com); [news.google.com](http://news.google.com); [instapundit.com](http://instapundit.com); [newyorktimes.com](http://newyorktimes.com); [politicalwire.com](http://politicalwire.com); [redstate.org](http://redstate.org); [salon.com](http://salon.com); [slashdot.org](http://slashdot.org); [slate.com](http://slate.com); [washingtonpost.com](http://washingtonpost.com); and [wonkette.com](http://wonkette.com).

As a group, the respondents tended to consult a wide range of sites during the election, often to get a plethora of views. As one contributor put it, "Yes [in reference to using blogs]- very much so. However, there are too many blogs to list. In the last election cycle, I probably visited anywhere from 70 to 100 different blogs over the course of 6 months - from both sides of the political spectrum and everywhere in between."

The reason for turning to online news and commentary was many consumers of web-based media want honest opinion and are not put off by the biases exhibited by individual sites. For example, one respondent noted, "Any blog I can read with a hearty opinion is taken into account—along with TV, paper media and personal opinion." Another said, "I rely on a long list of blogs for political news. I try to sample both side of each question and find that Internet sources give you both sides if you sample a few from each persuasion."

Many respondents expressed frustration with mainstream media news sources for reasons ranging paradoxically from "their corporate political bias" and "outright paid propaganda" to their "lack of point of view".

### Question 2

*Beyond blogs and web sites, tell us about other specific Internet software or applications that provided you with political news, commentary or other speech during the last election cycle.*

While websites and blogs remained the most popular venue for online political activity, there were a number of other technologies used by the Internet community during the last election. These technologies included e-mail listservs, Usenet newsgroups, chat rooms, audio and video streams, and political alerts downloaded to PDAs and cell phones.

With this wealth of options, many people stated they had given up on traditional news sources and turned the Internet exclusively for their news. One commenter said, "I have given up on TV as a worthwhile news source. I use Google News to search out articles on topics that are of interest to me. And I have signed up for innumerable email alert services on topics that interest me so I can quickly and easily stay current on what is happening and make my voice heard in a timely fashion on the issues that concern me."

Another respondent wrote, "The ability to listen to radio over the web, the ability to view video over the web... basically, the Internet allows for instant and on-demand multimedia coverage to an extent which would be otherwise impossible for me to enjoy."

Another popular method for obtaining information was via RSS feeds from any number of websites and blogs providing them. An RSS feed is a syndication method built into XML, and is used by numerous websites. This allows users to specify exactly what kind of information they want, and get a continuously updated stream of information.

Along with blogs, wiki was another new online technology people used to disseminate and gather political information. A wiki is a piece of software built into a website that allows any user to edit or update the content of the website. This facilitates a quick growth and refinement of the content on the site.

### Question 3

*If you expressed your political views online in the last election cycle, did you consider or think about whether campaign finance laws applied to your speech?*

An overwhelming majority of respondents did not consider whether campaign finance law applied when engaging in online political activity during the last election nor did any believe that these laws did or should apply to their online political activities. Instead, they regarded their activities as fundamental First Amendment conduct. Respondents stated:

"I do not believe that they do or should. I am expressing my opinions according to my first amendment right to free speech, no one is paying me to do this."

"No -- I considered, as an intelligent, well-read "senior citizen" who's been a voter since the 1960 election cycle, that the Internet's providing Americans a chance for truly FREE SPEECH -- as

the Constitution sets out, remember! For the first time in years, and I was delighted to express my opinions in several blogs.”

Only a very small number of users, principally those in a sensitive position in the military or government, were deterred in certain instances from participating online because of perceived consequence from campaign finance regulation. Of particular note, responses evinced a broad lack of knowledge about the campaign finance laws and their scope. For example, one respondent stated, “I assume that the only communications or expenses that “counted” were directly related to a campaign.” Another explained, “I assumed they did not, unless I was making a cash donation to a candidate or political party,” and another, “I didn’t think about campaign finance laws regarding my speech because my contributions to the public discussion was not connected directly to any contributions I make and nobody gave money to me.”

#### Question 4

*If you did not express your political views online last year, was it at all because of any concern about campaign finance laws?*

As stated above, most people said they had participated in online political activity undeterred by, and generally oblivious to, campaign finance laws. A few, however, said that others they knew had been discouraged from participating for fear of violating campaign finance law, and at least one stated that he had decided not to start a blog “that would approach certain political topics ... because I am deeply concerned that people who oppose my particular viewpoint might use the campaign finance regulation to harass me or shut me down.” Another noted, “In actuality yes. I have a good friend who operates a blog...and he expressed concern about getting nicked by regulators if he linked to certain campaign sites or if he delves deeply into the politics of the elections...”

There was some disparity among the data as to how users would react to regulation on the Internet. Some expressed the view that they would limit their online political activity if regulation were extended to the Internet; others however, stated they would increase their activity as a means to fight the regulation.

What many people expressed was confusion and misunderstanding of current campaign finance laws and the NPRM. One user stated, “I was uninformed about the campaign finance laws at that time. Even knowing about them, I would have been hard pressed to allow such a concern to abrogate my right to freedom of speech.”

#### Question 5

*Did you or anyone you know decide against operating a political-oriented blog or web site because of concerns about the campaign finance laws? Give us details.*

The responses generally mirrored those from questions 3 and 4. Most people believed that the Internet was a space for unregulated political activity, and therefore did not consider campaign finance laws before setting up or participating in a blog or website. Many of the respondents

spoke about the nature of online politics as an extremely interconnected community, and that any regulation that attempted to limit or monitor these connections would have a powerful chilling affect.

A few respondents had given prior thought to the question. At least one was prepared to deliberately violate laws, "I have given much thought to this. I think that regulation of blogs by the FEC would be a profound and gross violation of the First Amendment. It would be a frontal assault on our most basic freedoms. Consequently, if the FEC attempts to regulate blogs, I have considered setting up a web site that would deliberately, overtly and explicitly VIOLATE campaign finance laws as an act of civil disobedience. I think this would be my duty as a citizen committed to freedom."

At the same time, some people did decide against starting a website or blog because of campaign finance regulations. A specific example came from a respondent in Colorado who said that a group of people supporting Howard Dean's campaign during the Democratic primaries had considered creating a website to help them organize, but then dropped the idea in part because of fear and confusion over campaign finance laws.

#### Question 6

*Did you or someone you know engage in anonymous political speech during the last election cycle? Do you think the anonymity was important, and if so, why?*

A strong majority of respondents stated that they had engaged in political activity anonymously, and even among those that did not, almost all agreed that preserving anonymity was very important. A number of people explained that the very nature of the Internet supported anonymity, and that was a chief reason for their participation in online politics.

Repeatedly, respondents expressed concern that their identity, privacy, safety and their livelihood would be at stake if disclosure were required. For example, "It certainly could be. I work for an association that has a lobbying arm and is actively involved in national politics. I don't happen to agree with every last policy position they take. Posting my name in connection with a comment that disagrees with my employer could have consequences -- illegal consequences, but these things happen. I value the right to post anonymously (even though I almost never post). Should I take a controversial position, I want to know that hundreds of folks who disagree with me won't be able to stalk me online and treat me to verbal abuse."

This sentiment was repeated by another respondents, "I try to remain anonymous, especially in political discussions. My political opponents are scary enough without them knowing who you are and where you live."

### Question 7

*Did you or anyone you know spend money to place Internet advertisements to express political opinions? If so, how much was spent?*

The vast majority placed no online advertisements during their online political activity, and otherwise spent very little in support of their activities. Instead, many people donated money to various organizations to help buy online ads. These individual contributions ranged in value from \$5 to \$200.

Many people shared the sentiment expressed by this individual, “I donated money to MoveOn.org, perhaps \$50, because I was glad for citizens to finally have the opportunity to make our voices heard against the huge pockets of marketing money spent by Corporate interests and political campaigns.”

A small number of respondents did report that they had spent small amounts of money, ranging from \$5 to \$100 to place ads on soapbox.com and other low dollar sites.

### Question 8

*What is the smallest total amount of money one can spend to place one or more paid political advertisements or speech on a third party’s web site? Give us details.*

While many respondents were unfamiliar with online advertising and its costs, many pointed out that most “advertising” on third party websites could be conducted free of charge—particularly on blogs. Blogs allow their visitors to comment, and within those comments link to other websites. If an Internet user wants to post a link to their site, or any other, they can simply post a comment on a popular blog and hope that generates more traffic.

A number of people, however, noted that increasingly low dollar advertising was available on the web. A popular option in the blogosphere is BlogAds, which is an organization that places ads on wide range of blogs. To place an ad through BlogAds the reported cost can be as low as \$10-\$25 to run for a week. Others noted that Google ads were generally inexpensive, going for as little as \$5. The respondents believed that space on the top blogs and search engines could reach several hundred dollars.

### Question 9

*If you have run an active political blog or other Internet political site, tell us how much the effort cost you, and generally what were your expenses? Did you operate your own blog or web server, or did you use a third party's servers (and if so what if anything did you pay for the use of the servers)?*

As a general matter, respondents to this question did not spend a lot of money on their blogs. A large number of bloggers set up their sites through free third-party services such as Blogger.com or TypePad.com. These services allow anyone to quickly obtain webspace, a sub-domain, and begin posting blogs to their site. These sites also have communities within their webspace, which allows blogs with similar topics, such as politics or campaigns, to link and refer to each with little to no effort.

For those setting up and maintaining their own website and registering their own domain name the cost varied. The cost for registering a domain name ranged in cost from \$8 to \$30, with most people able to register a domain for under \$20 per year. The cost of web hosting also fluctuated. The cheapest was \$30/year for shared web hosting, while the most expensive ran above \$1,000/year for the purchase and maintenance of private web servers. The most common response was a total of approximately \$150/year to run a personal website or blog.

One immeasurable cost for people was their time, as the vast majority of respondents maintained their websites and blogs during their free time, and received no monetary compensation for the time they put into it. Some reported spending 10-20 hours a week involved in political activity online.

### Question 10

*If you have run a political blog or site, did you investigate the campaign finance laws and determine whether you had any obligations under them? Did you consult an attorney (and if so, how much did you spend for legal advice)?*

Again, with little exception, the individuals who participated in our survey did no investigation into campaign finance law before starting their own website or blog. Some people seemed to be offended by the idea of having to consider seeking legal advice before engaging in politics online. "I did neither of those things, and I would no more have thought of doing them than I would have thought to consult an attorney concerning the effect the campaign finance reform laws had on my Xeroxed magazine or school newspaper. The very idea is ludicrous."

Others did, however, attempt to investigate the laws and sought advice, but none paid for legal advice from an attorney. Most people who looked into the laws went the FEC's website and read over the literature available there. Other people contacted their local party offices with questions, while some simply relied on the campaigns they were affiliated with to inform them of the laws and potential violations. One contributor stated, "Yes, I did investigate the expense reporting procedures but did not consult an attorney since my expenses were negligible."

In all cases, no one that participated in our survey spent any money seeking legal advice regarding their online political activity and campaign finance laws.

### Question 11

*Did you or someone you know spend more than \$250 on online election-related speech in 2004? If so, how was the money spent and did any of your speech involve direct advocacy for or against a specific candidate for federal office? Did you report your expenditure to the Federal Election Commission?*

The vast majority of individuals spent well under \$250 on their online speech. Based on their responses, this was also true for people they knew. The majority of respondents also stated that they, and their friends, had made express advocacy for or against candidates, but this expression was done at no cost online.

“I didn't and I don't know if anyone I know did. But I certainly advocated for the candidate I supported and against the candidate I did not support. This whole question is a terrible outrage and attack on American freedom of speech. I'm an American and I don't have to report to anybody or ask for anybody's permission to speak my opinions freely!”

“No money involved. I used my blog to support President Bush. The idea that I had to report anything to the FEC seems Orwellian.”

Those that did state they had spent more than \$250 often estimated how much their time online was worth, and assumed that based on the amount of time spent online they had spent over the \$250. One contributor noted, “I'm a paid columnist for some sites, and the people I work for paid me \$250 to praise and criticize federal candidates. This is no different than the work of a newspaper columns, which are, for the moment, protected by the US Constitution, Amendment I.”

### Question 12

*Can you give us examples of where two or more people collaborated on a web site, blog, or other form of online election-related speech (and if so, can you tell us how much money the group spent on the online speech)?*

Our responses provided us with many examples of collaboration occurring online among bloggers and webmasters during the last campaign season. Many people described the blogosphere as an entirely collaborative environment, with people sharing open source software to create blogs, linking to each other's blog post through trackbacks, and creating local community groups through their websites.

One participant wrote, “Collaboration? The Internet, based as it is on hyperlinks, can be said to be a widely distributed, collaborative discussion. Group blogs like DailyKos.com is collaborative. I don't think this political debate between interested citizens is anything other than our duty as voters.”

An excellent example of community organization through a blog was indyfordemocracy.com. This was a group of people from Indianapolis, IN that started a website to organize support for Howard Dean's candidacy in the Indianapolis area. What started as a small group turned into a sizeable organization that gathered campaign materials from the national Dean for America campaign, raised money for the candidate, and spread literature within the Indianapolis area through their website and on foot.

Other individuals collaborated with popular blogs such as dailykos.com and redstate.org by posting information from those sites on their own blogs. Other collaborative efforts, like indyfordemocracy, which reportedly cost \$100, ranged in cost from \$20 to \$500 depending on this size of the group.

### Question 13

*If you have run a political blog, tell us about how you got content, how much "reporting" or investigation did you do, and generally explain why you believe your blog was (or was not) a part of the news media?*

Gathering information from other blogs, traditional news media websites and search engines, and from television or print news are the methods that nearly all of our respondents reportedly used to obtain their content. Many users explained that when formulating a blog post they would read several different websites, and then use links within their posts to act as references to their sources. As respondents explained:

"Content comes from online news outlets, other blogs, TV, magazines, conversations online with others and in the real world. In turn, other bloggers and occasionally online publications used material from my blog to further the debate."

"When I do comment on politics, it is based either on direct experience (from my former career, and usually not naming any names) or linking to or citing articles I have read from broad based news sources. One of the benefits of blogs is that they expose me to news sources I could never have the time to read on my own, so I am exposed to a much wider variety of news than I could get through traditional media sources. But this is the same sort of thing as discovering new media sources/studies via word of mouth, just more efficient."

While many people felt that blogging did qualify as "media", far fewer felt that what they posted should be considered news. Instead, the vast majority felt that what they wrote were opinion pieces or editorials about news they had read or seen elsewhere. One user explained, "[My posts are] definitely not part of the media. My postings would normally be a critique of the news media rather than any primary source. Much like an opinion piece in the local paper."

#### Question 14

*If you have run a political blog or other Internet site and you have received formal press or media credential at a campaign or political event, provide us details.*

Nearly all of our respondents said they have never been credentialed; however, a small group had applied and been granted some press credentials.

One blogger was granted formal credentials for one of the Democratic debates, which took place in Milwaukee in early February of the primary season. Another blogger was granted credentials for the DNC convention in Boston, which were then rescinded due to a clerical error that apparently affected many bloggers at the convention. Later during the summer that same blogger was granted press credentials to the RNC convention in New York City. One other blogger was granted credentials to a regional meeting of the DNC in Atlanta.

#### Question 15

*If you have run a political blog or other Internet political site and you incorporated for that purpose, tell us why you incorporated. What were the benefits of incorporation that were important to you?*

All but one respondent to our survey had not incorporated their blogs or websites. The one individual who had incorporated stated his reasons were tax related and limited liability. Also, one respondent stated that after learning more about the campaign finance law and the FEC ruling, they planned on incorporating, confirming our earlier observation about the lack knowledge about campaign finance laws in cyberspace.

#### Question 16

*If you have run a blog or other Internet site that discussed political issues as part of your professional life (for example, as a law or political science professor at a university), tell us about your situation.*

Only a few people responded to this question, and in general people misunderstood its intent, which was to explore whether people who held jobs in academia, and who blogged as part of that job, were in any way restricted from discussing electoral politics because of the corporate status of their employer. In most cases individuals stated that they often blogged from their personal experience about how certain national or local policies might affect the industry they worked in.

#### Question 17

*If your political blog linked to a campaign web site or reposted campaign material, tell us what you did and whether you consulted with any campaign before your put up your link or posting.*

In most cases, bloggers and webmasters linked their sites to the official site of their candidate. A smaller group either linked to both candidates in an effort to be balanced, or linked to no official site to avoid being viewed as fully endorsing any one candidate.

Many individuals also stated that they either linked to campaign materials that were available on the official sites, or would repost certain materials on their websites that related to issues or topics that concerned them. Many of our respondents were weary of reposting campaign materials wholesale, and therefore would pull portions and quotes from the materials and post what they wanted to their sites.

Some examples were, “Occasionally linked, and reposted when I thought they would delete it. It's not like they can prevent me from linking, and fair use covers what I quote.”

“I didn't do it very often, but I may have linked to a campaign site as a way of providing a quick link for my readers. I did not consult with anyone from the campaign and linked to it the same way I would a news article.”

Most respondents did not consult campaigns before linking to their sites or campaign materials. One contributor said, “I did register with "Blogs for Bush" but took no direction whatsoever from them.”

Many campaigns encouraged individuals to link to their official sites and explicitly stated no permission was needed to do so. Others described how some campaigns, most notably Dean for America, encouraged bloggers to signup to a listserv that would periodically distribute new campaign materials and information to post on their websites.

### Question 18

*Did your political blog or web site receive money directly from a political campaign or party (in the form of paid advertisements, direct support, or some other form of payment)? If so, generally describe what happened. Other than for money received for banner or other advertisements plainly associated with a candidate, did you disclose the fact that you had received money from a candidate?*

Less than one hundred people responded to this question, but all respondents stated that they had not received money directly from candidates. While many had used their website to raise money for candidates, they received no support from the campaign to run their sites.

One respondent stated that he ran a web site for a candidate, which was paid for directly by that candidate's campaign. This support was reportedly disclosed on the site, and in the candidate's election filings. This individual did not accept any advertising from other campaigns or candidates; however, they did have links to the state and local party web sites.

### Question 19

*Would you have run your political blog or web site if you had been required to disclose your home street address or telephone number on your site? Why or why not?*

With only a few exceptions, respondents uniformly would not have run their website or blog if disclosure were required. Many noted that the privacy and anonymity associated with the Internet made it particularly attractive as an outlet for political discourse; if that anonymity were stripped away, the unique value of the Internet as a forum for free speech would be diminished.

Many expressed the view that anonymity was an important part of their First Amendment rights. Still more expressed the view that anonymity provided important protection against a host of harms ranging from identity theft and SPAM, to harassment and job discrimination. For example, one respondent expressed concern that their safety would be at risk if such disclosure were required. “No, the web is free of stalkers. Politics is seldom a friendly exchange. I get harassed and threatened for my yard signs and bumper stickers. Putting my name and name and address out there is asking for trouble.” That theme was echoed in other comments:

“No, free speech has become fear speech lately, with the trend only getting worse.”

“Probably not, I have received threatening calls in the past for writing letters to the editor in my local newspaper...posting one’s phone number is practically an invitation to harassment.”

Others maintained they would continue to run their blogs and websites without disclosing, even in the face of laws and regulation, in order to protest the law. Others argued that they would have complied if all other Internet media outlets such as CNN, MSNBC and Fox were required to as well. One respondent questioned whether disclosure was really burdensome and dangerous, noting that domain registration information was freely available.

### Question 20

*Did you use bulk e-mail to express your political views or raise money for a candidate during the last election cycle? If so, how many addresses did you typically target, where did you get the e-mail addresses, and how much (if any) did it cost to obtain the addresses?*

The vast majority of our respondents regarded bulk e-mail as SPAM, and were therefore opposed to using it in any way. The sentiment statement by this user was shared by many, “Bulk email is spam. I don't care to receive it, and I don't send it”

Those that did say they had used bulk e-mail stated they limited their mailings to voluntary mailing lists, or sent a small number of messages (under 100 in all cases) to a group of personal contacts. Also, of those that did use bulk e-mail, solicitation for campaign fund raising was rarely part of the content of the message.