OPENING STATEMENT OF VICE CHAIRMAN MICHAEL E. TONER
ON PROPOSED RULES REGARDING THE INTERNET
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At the outset, I want to emphasize that I seriously doubt that Congress intended for the Commission to regulate the Internet when it enacted the McCain-Feingold law. When Congress defined what is a "public communication," it identified a wide variety of communications, including "broadcast, cable, or satellite communication[s], newspaper[s], magazine[s], outdoor advertising facilit[ies], mass mailing[s], or telephone bank[s] to the general public . . ." 2 U.S.C. § 431(22). However, Congress did not include the Internet in the statutory definition of "public communication." I do not believe this omission was an accident. Rather, I believe it was a conscious, informed judgment by Congress that the Internet should not be subject to the many restrictions that McCain-Feingold applies to other types of mass communications.

The evidence becomes stronger every day that Congress did not intend to regulate the Internet when it passed McCain-Feingold. Last week, Senate Minority Leader Harry Reid (D-NV) sent a letter to the FEC expressing "serious concerns" about the Commission's Internet rulemaking. Senator Reid, who voted for the McCain-Feingold legislation, notes that the Internet "has provided a new and exciting medium for political speech," and that "[r]egulation of the internet at this time, with its blogs and other novel features, would blunt its tremendous potential, discourage broad political involvement in our nation and diminish our representative democracy." Senator Reid has introduced legislation that would specifically exempt the Internet from the statutory definition of "public communication."

Similarly, Rep. John Conyers (D-MI) and 13 other Members of the House Judiciary Committee wrote the Commission earlier this month expressing concern about the potential impact the FEC's rulemaking could have on Internet weblogs. Rep. Conyers and his colleagues emphasize that many of them "were strong supporters of campaign finance reform generally" and of McCain-Feingold in particular. Nevertheless, Rep. Conyers urges the Commission to make explicit in this rulemaking that "a blog would not be subject to disclosure requirements, campaign finance limitations or other regulations simply because it contains political commentary or includes links to a candidate's website, provided that the candidate or political party did not compensate the blog for such linking." Rep. Conyers concludes that "such an interpretation is entirely consistent with [McCain-Feingold]."

Senator Feingold apparently agrees. In a recent article entitled "Blogs Don't Need Big Government," Senator Feingold indicates that "linking to campaign websites, quoting from or republishing campaign materials and even providing a link for donations to a

candidate, if done without compensation, should not cause a blogger to be deemed to have made a contribution to a campaign or trigger reporting requirements."

The fact that the Internet is fundamentally different than other modes of communication is widely recognized. First, millions of Americans use the Internet every day to communicate at virtually no incremental cost. The Supreme Court has observed that "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." Reno v. ACLU, 521 U.S. 844, 870 (1997).

Second, the Internet is generally a non-invasive medium, as compared to television, radio and other mass media. Generally speaking, on-line users are exposed to Internet messages and content only after they have taken deliberate, affirmative steps to obtain it. The Supreme Court has noted "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" Reno, 521 U.S. at 869.

Third, unlike many mass media, the Internet is virtually a limitless resource, where the speech and activities of one person do not interfere with the speech of another. Unlike television and other traditional media, which generally are scarce and have significant financial barriers to entry, an individual can communicate with millions of people on-line at little or no cost in an interactive and dynamic way.

As of the end of 2004, an estimated 201 million people in the United States used the Internet, including 63 percent of the adult population and 81 percent of teenagers, and approximately 70 million American adults logged onto the Internet every day.

The 2004 presidential election was a watershed event in which an unprecedented number of Americans became involved in politics on-line. According to a recent Pew Research Center report, "[t]he Internet was a key force in politics last year as 75 million Americans used it to get news, discuss candidates in emails, and participate directly in the political process." Pew reports that last year 17 million people sent emails about campaigns to groups, family members, and friends as part of listservs or discussion groups. Pew found that between 2000 and 2004, the number of registered voters who cited the Internet as one of their primary sources of news about the presidential campaign increased by more than 50 percent. In addition, approximately seven million people signed up to receive email from presidential campaigns, and four million people signed up on-line to volunteer for a campaign. In all these respects, the Internet has had a democratizing influence on American politics.

In light of the foregoing, there are very strong statutory and policy reasons underlying the Commission's current regulations that exempt the Internet from the restrictions of the McCain-Feingold law. All that being said, the Commission is under a court order to re-open its regulations and decide whether to expand regulation of the Internet. In doing so, I believe the Commission should tread very carefully and not do anything that impairs the

current ability of millions of Americans – of all political persuasions and viewpoints – to be involved in politics on the Internet.

In the draft NPRM, the Commission proposes to retain the general exclusion of Internet communications from the definition of "public communication," except for those advertisements where another person or entity has been paid to carry the advertisement on its website. The NPRM notes that "the Commission's proposed rule attempts to strike a balance between provisions of the Act that regulate 'general public political advertising' and significant public policy considerations that encourage the Internet as a forum for free or low-cost speech and open information exchange." I look forward to receiving the public's comments on whether the Commission should adopt the proposed rule.

Whatever the Commission chooses to do in this area, I strongly believe that Internet political activity at the grassroots level should be free of government regulation and restriction. Accordingly, I support seeking comment on proposed regulations designed to make that clear and categorical.

Proposed rules 100.94 and 100.155 would exempt from the definition of "contribution" and "expenditure" a wide range of Internet activities by individuals or volunteers. Specifically, the proposed regulations would exempt Internet activities undertaken by individuals for the purpose of influencing a federal election, regardless of whether they are coordinated with a campaign or political party, and regardless of whether the activities take place in a person's residential premises or any public facility, including public libraries, public schools, and Internet cafes. The Commission seeks comment on whether the proposed exemption should also apply regardless of whether an individual personally owns the computer equipment that is used. I am strongly inclined to say yes, to avoid disparate treatment of individuals or volunteers who may not be able to afford to buy their own computer.

I also believe that bloggers and blog sites should not be subjected to FEC regulation. Just as the 2004 election ushered in a new era in terms of individual Americans getting involved in politics on-line, the last election also marked the arrival of blogs as an important source of political information for millions of Americans. Bloggers on both the left and the right are increasingly serving as important checks on traditional media outlets.

Proposed rules 100.73 and 100.132 would make clear that the press exemption applies to media activities that occur on the Internet. The proposed regulations seek to extend the press exemption to the Internet activities of media entities, such as the Washington Post, that also have off-line media operations. The proposed regulations also seek to allow individuals and entities that conduct all of their activities on the Internet – such as Salon.com, Slate.com, and the drudgereport.com – to qualify for the press exemption.

Given that bloggers provide millions of people with information about politics, the question is squarely presented whether bloggers and blog sites are entitled to the same

protection under the press exemption that traditional media enjoy and, if so, whether such protections exist regardless of whether bloggers are acting as individuals or through incorporated or unincorporated entities. I am strongly inclined to answer all of these questions in the affirmative.

Senator Mitch McConnell has observed that "the Internet is potentially the greatest tool for political change since the Guttenberg press." This will be one of the most important rulemakings the FEC undertakes this year. I look forward to working with everyone at the Commission during this proceeding.