FEDERAL ELECTION COMMISSION
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TESTIMONY OF
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REGARDING REGULATION OF ON-LINE POLITICAL SPEECH
HOUSE ADMINISTRATION COMMITTEE
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The central question before Congress and the FEC in the months ahead is whether the federal government will begin regulating the political speech of Americans over the Internet.

Under current Federal Election Commission regulations, the vast majority of on-line political activities in this country are conducted free of government review and restriction. In 2002, the FEC promulgated regulations that largely exempted the Internet from the prohibitions and restrictions of the McCain-Feingold campaign finance law. The Commission's decision to exempt the Internet was based on the plain meaning of the McCain-Feingold legislation and was consistent with the statute's legislative history – namely, that Congress in no way intended to impede or impair on-line politics when it enacted McCain-Feingold. The Commission's decision to exempt the Internet from regulation also reflected the fact that the World Wide Web is a democratizing medium of public discourse through which millions of Americans speak every day about politics at little or no cost; accordingly, there is no indication that such robust on-line political activity has any potential to create corruption or the appearance of corruption.

However, the FEC's regulations exempting on-line political speech from the McCain-Feingold law are in jeopardy. The United States District Court for the District of Columbia struck down the Commission's Internet regulations, contending that they were contrary to law under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Shays v. FEC*, 337 F.Supp. 2d 28 (D.D.C. 2004). The Commission appealed to the D.C. Circuit, arguing that the *Shays* plaintiffs lacked legal standing to challenge the Internet rule and a number of other regulations. A three-judge panel of the D.C. Circuit rejected the Commission's standing argument and affirmed the lower court's ruling. *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. July 15, 2005). The Commission recently filed a petition in the D.C. Circuit seeking rehearing en banc in the *Shays* litigation. If the petition for rehearing is denied, without congressional action, the Commission may abandon its regulations exempting the Internet from regulation and begin restricting on-line political speech.

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[1] I would like to thank Melissa Laurenza for her able assistance in preparing this statement.

I strongly believe that the on-line political speech of all Americans should remain free of government review and regulation. The actions of Congress, the courts, and the FEC during the next six months likely will determine whether Internet politics will continue to flourish in the future free of government restriction.

The FEC's Decision to Exempt the Internet from Regulation is Consistent With the Plain Meaning of the McCain-Feingold Law.

The Internet is not subject to the McCain-Feingold law under the plain meaning of the statute. When Congress defined what is a "public communication" that is subject to the many prohibitions and restrictions of McCain-Feingold, 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, or any other form of general public political advertising." 2 U.S.C. § 431(22).

However, Congress did not refer to the Internet in the statutory definition of "public communication." I do not believe this statutory omission was an accident or oversight. Congress was undoubtedly aware of the Internet when it enacted McCain-Feingold.[2] Therefore, the omission of the Internet from the statutory definition of "public communication" reflects a conscious, informed judgment by Congress that the World Wide Web should not be subject to the many restrictions that McCain-Feingold applies to other types of mass communications.[3]

The FEC's Internet Regulations are Consistent with the Legislative History of McCain-Feingold.

There is no evidence in the legislative history that Congress intended to regulate or restrict on-line politics when it enacted McCain-Feingold. To my knowledge, when the

[2] This congressional awareness is confirmed by the fact that the Internet is referenced numerous times in the legislation. See e.g., 2 U.S.C. § 434(d)(2) (requiring that reports filed electronically be "accessible to the public on the Internet"); 2 U.S.C. § 434(a)(12)(A)(III) (requiring the development of software allowing the "Commission to post the information on the Internet immediately"); 2 U.S.C. § 434(a)(12)(D) (requiring the Commission, "as soon as practicable, [to] post on the Internet any information received"); and 2 U.S.C. § 434(h) (requiring the Federal Election Commission to make public any report filed by an Inaugural Committee "accessible to the public...on the Internet").

[3] Some argue that the phrase "any other form of general public political advertising" in 2 U.S.C. § 431(22) can be read to include the Internet. Yet, under traditional canons of statutory construction, this catchall phrase includes only additional types of media that are similar to the media that are enumerated in the statute. Given that the World Wide Web is fundamentally different than any other type of mass communication, there is no basis for concluding that the Internet is encompassed by the catchall phrase in 2 U.S.C. § 431(22).

McCain-Feingold law was debated on the House and Senate floor, there was no indication by any of the legislation's sponsors or by any other Member of Congress that the Internet would be subject to the law's many strictures. Given that such a result would potentially affect the activities of millions of on-line political activists, the fact that there was no floor discussion of the subject is powerful evidence that Congress did not intend to restrict the Internet when it passed the McCain-Feingold law.

The evidence becomes stronger every day that Congress did not intend for the FEC to regulate the Internet when it enacted McCain-Feingold. In March, Senator Reid sent a letter to the FEC expressing "serious concerns" about the Commission's Internet rulemaking that was initiated in response to the *Shays* litigation. *See* March 17, 2005, Letter from Senator Reid to Chairman Scott Thomas. Senator Reid, who voted for the McCain-Feingold law, noted 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." *Id.*

Similarly, Representative Conyers, and 13 other Members of the House Judiciary Committee, wrote the Commission in March expressing concern about the potential impact of the FEC's rulemaking on Internet weblogs. Representative Conyers and his colleagues stressed that many of them "were strong supporters of campaign finance reform generally" and of McCain-Feingold in particular. *See* March 11, 2005, Letter from Representative Conyers et. al. to Chairman Scott Thomas. Nevertheless, Representative Conyers urged 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." *Id.* Representative Conyers concluded that "such an interpretation is entirely consistent with [McCain-Feingold]." *Id.*

Senator Feingold reportedly agrees. In a posting entitled "Blogs Don't Need Big Government," Senator Feingold indicated earlier this year that "certainly 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." Senator Russ Feingold, *Blogs Don't Need Big Government*, Mar. 10, 2005, *available at* www.mydd.com/story/2005/3/10/112323/534.

Moreover, Senator John Kerry and Senator John Edwards, who both voted for McCain-Feingold, filed comments with the Commission during its rulemaking this year stating categorically that "Congress did not intend to create new barriers to Internet use when it passed [McCain-Feingold]." Comment to the Federal Election Commission, June 3, 2005, *available at* www.fec.gov/pdf/nprm/internet_comm/nprm_comments.shtml. In the written comments, counsel for Senator Kerry noted that Senator Kerry was a co-sponsor of McCain-Feingold and emphasized that

> he supports the law and its objective of removing corruption from the political process. He believes that [McCain-Feingold] can and should tilt the balance of political power back toward ordinary citizens. Nonetheless, for those like Senator Kerry who strongly support giving average Americans a more effective voice in the political process, [Internet regulation] raises more concern than hope.

Id.

Senator Reid has introduced legislation that would "make it clear that Congress did not intend to regulate this new and growing medium in the Bipartisan Campaign Reform Act" by specifically exempting the Internet from the statutory definition of "public communication." *See* March 17, 2005, letter from Senator Reid to Chairman Scott Thomas. Senator Reid's bill, S.678, currently has three cosponsors, and a similar bill introduced by Representative Hensarling has nine co-sponsors. Both bills enjoy bipartisan support. This Committee adopted the statutory language concerning the Internet sponsored by Representative Hensarling when it approved the Pence-Wynn bill earlier this year.

The Internet Has Had a Democratizing Influence on American Politics and Should Not be Regulated or Restricted.

Strong policy reasons support the FEC's current regulations exempting on-line political speech from restriction.

First, the Internet is a unique medium with tremendous potential for citizens to become actively involved in the political process. The Internet is virtually a limitless resource, where the speech of one person does not interfere with the speech of anyone else. 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. The Supreme Court has noted that there are "special justifications for regulation of the broadcast media that are not applicable to other speakers: ...the history of expansive Government regulation of the broadcast medium; the scarcity of available frequencies at its inception; and its 'invasive' nature…Those factors are not present in cyberspace." *Reno v. ACLU*, 521 U.S. 844, 869 (1997). Additionally, the Internet is 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 observed that "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'" *Id.* at 869.

Second, unlike other forms of mass media, millions of Americans use the Internet every day to communicate at virtually no incremental cost.[4] 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." *Id.* at 870.

Third, the 2004 election provided overwhelming evidence of how the Internet is a democratizing force that permits robust political speech at the grass-roots level. Groups such as Moveon.org and Meetup.com not only provided a means for organizing like-minded individuals, but also encouraged individuals to become actively involved in politics, from the presidential election to the race for the county courthouse.

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." Lee Rainie, "The Internet and Campaign 2004," Mar. 6, 2005, *available at* www.pewinternet.org/PPF/r/150/report_display.asp. Pew reported that 17 million people last year sent emails about campaigns to groups, family members, and friends as part of listservs or discussion groups. *Id.* 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. *Id.* 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. *Id.*

The primary constitutional basis for campaign finance regulation is preventing corruption or the appearance of corruption. Whereas campaign finance regulation is meant to ensure that money in politics does not corrupt candidates or officeholders, or create the appearance thereof, such rationales cannot plausibly be applied to the Internet, where on-line activists can communicate about politics with millions of people at little or no cost. As the counsel for Markos Moulitsas Zuniga and Duncan Black emphasized earlier this year:

> The purpose of campaign finance law is to blunt the impact of accumulated wealth on the political process, but this is not something that occurs online. While wealth allows a campaign or large donor to dominate the available space on TV or in print, there is no mechanism on the Internet by which entities can use wealth or organizational strength to crowd out or silence other speakers…In sum, the Internet fulfills through technology what campaign finance reform attempts via law.

[4] As of the end of 2004, an estimated 201 million people in the United States used the Internet, including 63% of the adult population and 81% of teenagers, and approximately 70 million American adults logged onto the Internet every day. Lee Rainie, "Internet: The Mainstreaming of Online Life," Jan. 25, 2005, *available at* http://www.pewinternet.org/PPF/r/148/report_display.asp.

Adam Bonin, *Keep Blogs Unregulated*, National Law Journal, July 18, 2005, *available at* www.nlj.com. *See also* Center for Democracy and Technology, "Campaign Finance Regulation and the Internet: A Set of Principles to Protect Individuals' Online Political Speech" (May 11, 2005) ("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."). As the AFL-CIO noted in comments submitted to the Commission:

> [T]he fundamentally democratic and leveling aspects of the Internet render it a potentially potent counterweight to concentrations of financial power in the political marketplace, and there is no apparent means at present by which corporations, unions or others can utilize their resources to dominate the medium.

Comment to the Federal Election Commission, Jan. 7, 2000, *available at* http://www.fec.gov/pdf/nprm/use_of_internet/comments.shtml#inquiry.

Even Narrowly Tailored Regulation of the Internet is Problematic.

The Commission earlier this year, in response to the *Shays* litigation, issued a Notice of Proposed Rulemaking ("Internet NPRM") which contained a number of proposed regulations concerning the Internet. *See* "Internet Communications," 70 Fed. Reg. 16,967 (April 4, 2005). The proposed regulation at the heart of the NPRM would include paid advertisements on the Internet within the definition of "public communication." *See id.* at 16,977 (proposing that public communication include "announcements placed for a fee on another person's or entity's Web site."). The proposed regulation, if enacted, would subject such activity to regulation and restriction.

Fortunately, most of the conceptual approaches and proposed regulations in the Internet NPRM are narrowly tailored and seek to regulate only certain aspects of on-line politics. Although many of the proposed rules are restrained, their adoption would nevertheless create numerous complexities for people active in politics through the Internet. One key virtue of the Commission's current regulatory approach is that people involved in on-line politics can know -- without consulting federal statutes and regulations, and without hiring high-priced lawyers – that what they are doing is legal. However, were the Commission to adopt the regulations proposed in the NPRM, Internet political activists would confront numerous legal issues and concerns, including, but not limited to:

- Whether their on-line speech is an "announcement[] placed for a fee" and therefore potentially a "public communication" under 11 CFR § 100.26;

- Whether their on-line speech contains "express advocacy" under 11 CFR §100.22;

- Whether their on-line speech qualifies for the media exemption under 11 CFR §§ 100.73 and 100.132;

- Whether their on-line speech is considered to have been made independently or in coordination with any candidate under 11 CFR §§ 109.10, 109.11, 109.20, 109.21, 109.22, and 109.23, and the consequences that flow from either determination; and

- Whether they have made an in-kind contribution if they do not charge for the placement of an announcement on their website or blog or if they charge less than the usual rate.

Inevitably, none of these questions would have easy answers, particularly for those on-line political activists who do not have the means to hire experienced campaign finance lawyers who are familiar with the Commission's rules and all their exceptions and exclusions. In this regard, it is the mere act of exercising regulatory jurisdiction over the Internet that is problematic, and which likely would become a trap for the unsophisticated and unwary. Moreover, if the history of campaign finance regulation is any guide, once the FEC exercises jurisdiction over the Internet, the Commission's initial set of regulations, even if narrowly tailored, are likely to lead to broader regulation in the future.

In written comments submitted to the Commission regarding the Internet NPRM, Senator John Kerry aptly noted that

> [t]he draft rules published by the Commission for consideration are more modest in scope than some potential alternatives. However, their adoption would nonetheless have the potential to chill the sort of activism that had such a positive force in 2004.

Comment to the Federal Election Commission, June 3, 2005, *available at* www.fec.gov/pdf/nprm/internet_comm/nprm_comments.shtml.

Conclusion

Senator Mitch McConnell has observed that the Internet

> is potentially the greatest tool for political change since the Guttenberg press. It empowers the ordinary citizen to become a publisher, a broadcaster, or a political commentator with a worldwide audience. It is an extraordinary tool for citizens seeking to organize with like-minded people to exercise their First Amendment freedom to petition the government and speak out on elections and issues.

Political Activity on the Internet: Hearing Before the Senate Comm. on Rules and Administration, 106th Cong. (2000) (statement of Sen. Mitch McConnell, Chairman, Senate Comm. on Rules and Administration).

On the broadest level, the question to be decided in the months ahead is whether the on-line political speech of every American will remain free. Must every aspect of American politics be regulated and restricted by the Federal Election Commission? Can there not be any part of politics in the United States that is free of government review, investigations, and potential enforcement actions?

I do not view these as rhetorical questions. If any domain in American politics is going to remain free of regulation, the Internet is one of the most promising prospects.

The Internet is not only a unique medium that defies most if not all of the legal premises for regulating political speech, it also has had a democratizing influence on American politics. The Word Wide Web has been a leveling force that has allowed millions of people across the political spectrum -- whether by email, blogs, Internet discussion groups, or websites -- to organize and voice their support for candidates at all levels of government. The Internet has provided the means for individuals to freely express, even shout, their political speech to millions of people at little or no cost.

I remain hopeful that Congress and the Commission will take whatever steps are necessary to ensure that every American can continue to engage in on-line politics free of government regulation or restriction.