

National Republican Senatorial Committee

ALEX N. VOGEL
GENERAL COUNSEL

VALERIE E. FRENCH
DEPUTY GENERAL COUNSEL

December 3, 2001

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

DEC 4 12 55 PM '01

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Dear Ms. Smith:

The National Republican Senatorial Committee ("NRSC") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on September 27, 2001.

The NRSC is a political committee that promotes the agenda and interests of the Republican Members of the United States Senate. Under the direction of its chairman, Senator Bill Frist, the NRSC is responsible for fundraising, candidate recruitment, and campaign support activities designed to elect Republican candidates to the United States Senate.

I. INTRODUCTION

In its September 27, 2001 NPRM, the Federal Election Commission ("FEC" or "the Commission") issued the following proposed rules regarding the use of the Internet in federal elections: (1) exempt Internet political activity by individuals from the Federal Election Campaign Act's¹ ("FECA" or "the Act") definitions of "contribution" and "expenditure"; (2) permit corporate and labor union web sites to include hyperlinks to candidate and party committee web sites; and (3) allow corporations and labor unions to post press releases announcing candidate endorsements on their web sites. While the NRSC commends the Commission for proposing rules that loosen the regulatory grip on

¹ 2 U.S.C. § 431-55.

certain Internet political activities, we believe the proposed rules do not adequately deregulate Internet political activity conducted by political party committees.

By proposing to exempt individuals who engage in Internet political activity from the purview of the FECA, the Commission tacitly acknowledges that Internet communications are fundamentally different from communications using traditional media.² The NRSC therefore urges the Commission to adopt a more consistent scheme for deregulating Internet political activity by extending the proposed exemption for individual Internet political activity to cover online political speech by political parties as well. Like the Act and the NPRM's treatment of individual volunteers, expenses for general party communications are not treated as "contributions" or "expenditures" for particular candidates. This logic should be explicitly extended to party committee activity on the Internet.

These comments proceed in the following manner: Part II describes the characteristics that differentiate the Internet from traditional media that the FECA was originally designed to regulate. Part III discusses the unique role that political parties play in our political system and the First Amendment protections that parties enjoy. Part IV sets forth needed measures for further deregulating online communications by political party committees. Part V states the NRSC's conclusion.

II. DISTINCTIVE CHARACTERISTICS OF THE INTERNET

"The Internet is a unique and wholly new medium of worldwide human communication."³ In particular, the Internet, as opposed to radio, television, or print media, involves *de minimis* marginal costs. Internet service providers ("ISPs") frequently provide free software and free server space for its users to create an online presence. Thus, instead of having to purchase airtime from a radio or television station, advertising space from a newspaper or magazine, or materials for direct mail, a person who engages in Internet communications need only employ cost-free keystrokes to establish a web site through which he or she may communicate with thousands and perhaps millions of people.

As such, the Internet is an incomparable low cost tool for obtaining and disseminating information about political candidates, issues, and public policy. In attempting to adapt

² This acknowledgement is evidenced by the NPRM exempting individual Internet use from the definitions of "contribution" and "expenditure," the implication of which is that Internet political activity is neither and, therefore, should not be regulated.

³ *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (citations and internal quotes omitted).

FEC regulations to this new medium of political expression, the Commission must fully account for this fundamental difference between the Internet and traditional media.

III. THE ROLE OF POLITICAL PARTIES

It is no exaggeration to state that political “parties are the most fundamental of all democratic institutions.”⁴ As Professor Clinton Rossiter once wrote, “there is no America without democracy, no democracy without politics, and no politics without parties.”⁵ Not only do political parties perform an essential moderating function in our political system—thereby mitigating the influence of “factions,” as James Madison described special interests⁶—but they also serve as an indispensable resource for educating the public about candidates and important issues of public policy.

Because of the critical role they play in our constitutional democracy, political parties enjoy broad First Amendment freedoms. As the Supreme Court noted in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*,⁷ “The First Amendment embodies a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open. Political parties have a unique role in serving this principle; they exist to advance their members’ shared beliefs.”

The FEC has acknowledged that party campaign committees are “far too large and amorphous [] to be said to represent a particular candidate or candidates.”⁸ As a result, the FEC has cited the FECA’s legislative history explaining that expenses for day-to-day activities like “research, speech writing, general party organization and travel, party

⁴ *Hearings on Political Parties in America Before the United States Senate Committee on Rules and Administration* (April 5, 2000) (testimony of Prof. Michael C. Munger) available at <http://rules.senate.gov/hearings/2000/04500hrg.htm>.

⁵ *Id.* (opening statement of Sen. Mitch McConnell).

⁶ *Id.* (testimony of Prof. Michael C. Munger).

⁷ 518 U.S. 604, 629 (1996) (citations and internal quotes omitted).

⁸ FEC Advisory Op. 1975-87.

publications," etc. need not be attributed to individual candidates for purposes of regulation.⁹

IV. PARTY EXPENSES FOR USE OF THE INTERNET SHOULD BE TREATED AS OVERHEAD EXPENSES

Federal election law is premised upon the notion that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."¹⁰ Therefore, the FEC regulatory apparatus seeks to stem the potential "distorting effects of immense aggregations of wealth"¹¹ on the political process by placing limits on the sources and amounts of political contributions and imposing disclosure requirements on political spending.

As demonstrated above, however, Internet communications differ significantly from broadcast and print communications. Consequently, as Commissioner David Mason has noted, the assumptions underlying the federal campaign finance system "may not be valid on the Internet."¹² In particular, the attribution requirements set forth in the FEC regulations make little sense in the Internet context.

For example, the FECA requires all political committees, including those sponsored by political parties, to itemize independent expenditures in excess of \$200 within a calendar year.¹³ Under FEC regulations, independent expenditures made on behalf of "clearly identified candidates" must be "directly attributed" to each candidate according to the benefit reasonably expected to be received by the candidate.¹⁴ If such expenditures are

⁹ *Id.* (citing Cong. Rec. H.7807-7808 (daily ed. August 7, 1974)).

¹⁰ *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

¹¹ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

¹² *Hearings on Political Speech and the Internet Before the United States Senate Committee on Rules and Administration* (May 3, 2000) (statement of FEC Comm'r David M. Mason), available at <http://rules.senate.gov/hearings/2000/05300hrq.htm>.

¹³ 2 U.S.C. § 434(b); 11 C.F.R. § 104.3(b)(3).

¹⁴ 11 C.F.R. § 106.1(c).

incapable of being directly attributed to a particular candidate, then they need only be reported as operating expenses of the committee.¹⁵

Two years ago, the Commission attempted to impose this reporting framework—which, again, was developed with the traditional media model in mind—upon Internet political communications made by a PAC.¹⁶ The Commission concluded that a PAC that engages in political advocacy on the Internet must report these communications as independent expenditures if they can be directly attributed to particular candidates. However, the Commission offered no answer to the following question: how does a committee attribute expenditures for Internet express advocacy to specific candidates when such expenditures are *de minimis*?

In the same opinion, the Commission determined that “expenses for registering and maintaining [a] domain name [and] web site hosting, as well as any costs relating to the purchase and use of computer hardware and software” fall “within the category of overhead expenses” that do not need to be reported as part of any independent expenditures conducted via the Internet.¹⁷ As demonstrated above, once these overhead expenses have been made, the creation of Internet political communications involves mere keystrokes, which are difficult, if not impossible, to place a value upon. Thus, requiring political committees—including party committees—to track the negligible costs associated with Internet political speech imposes an onerous administrative burden.

The purpose of the FECA’s reporting requirements is to “limit the actuality and appearance of corruption resulting from large contributions” by disclosing to the public the sources of political spending.¹⁸ However, the costs associated with Internet political activity are so trivial that no corrupting effect could conceivably arise from exempting such expenditures from the attribution requirements. Consequently, the severe inconvenience resulting from attributing nearly cost-free Internet political communications to particular candidates far outweighs any potential anti-corruption purpose served by these reporting requirements.

¹⁵ *Id.* § 106(c)(1).

¹⁶ FEC Advisory Op. 1999-37.

¹⁷ *Id.*

¹⁸ *Buckley*, 424 U.S. at 26.

Moreover, the legislative history of the FECA and longstanding Commission precedent contemplate that factors unique to political parties exempt them from having to attribute general party communications on the Internet to particular candidates. As explained above, political parties exist to advance the views of all of their members. In order to do so, they incur day-to-day expenses for "research, speech writing, general party organization and travel, [and] party publications" which need only be reported as general overhead expenses.¹⁹ The rationale for treating these expenses as such is that though they may benefit particular candidates, their purpose is to "promote[] overall Republican party goals—that is, winning a majority of Congressional elections."²⁰ Furthermore, these expenses "obviously have some political impact, [but] the precise extent of this impact is difficult to assess."²¹ This is doubly true in the context of *de minimis* Internet expenses.

A party committee website is no different than any other day-to-day expense. In fact, a website is simply an electronic version of a "party publication." A party newsletter may provide candidate names and addresses whereby a party website would contain links. While a "party publication," electronic or otherwise, is bound to benefit particular candidates, the website as a whole exists to "promote overall Republican party goals." Moreover, assigning a value to the benefit obtained by particular candidates is terribly difficult to do.²²

¹⁹ FEC Advisory Op. 1975-87 (citing Cong. Rec. H.7807-7808 (daily ed. August 7, 1974)) (emphasis added).

²⁰ FEC Advisory Op. 1975-87.

²¹ *Id.*

²² FEC Advisory Opinions 1984-15 and 1985-14 are not to the contrary. Both are distinguishable from party Internet activity because they both involved expenditures for television advertisements that focused on specific political candidates. Television advertising does not entail *de minimis* expenditures, nor is television advertising aimed solely at particular candidates akin to a "party publication" or other general day-to-day expenses.

Rosemary C. Smith
December 3, 2001
Page 7

V. CONCLUSION

The NRSC, therefore, strongly urges that the Commission adopt the position that Internet costs incurred by a political party need only be reported as general overhead expenses. By streamlining the reporting process, the Commission would be removing an unnecessary administrative burden, while encouraging the further use of the Internet as an inexpensive tool for disseminating valuable information regarding our political system.

Sincerely,

A handwritten signature in cursive script that reads "Alex N. Vogel". The signature is written in dark ink and is positioned above the printed name and title.

Alex N. Vogel
General Counsel