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HAND DELIVERED

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

Re: Comments in response to the FEC's Notice of Inquiry dated November 1, 1999 regarding news organizations and campaign activity on the Internet.

Dear Ms. Smith:

The enclosed 3.5" disk contains comment which is submitted to the Federal Election Commission (FEC) in response to the FEC's Notice of Inquiry regarding news organizations and campaign activity on the Internet dated November 1, 1999, and published in the Federal Register on November 5, 1999 at Volume 64, Number 214, pages 60360-60368. The comment is formatted in basic HTML, and is readable in any browser.

These comments primarily apply to item 7 (regarding "news organizations") of the FEC's Notice of Inquiry.

Also enclosed is a paper copy printed from a browser view of the comment. It lacks the hypertext linking of the original.

This comment was hurried written over the long New Year's weekend. It is cursory, and on some points, incomplete. Also, I did not complete entering the footnotes which document this comment. I apologize.

If you have any questions, please advise.

Yours very truly,

David Carney

Comments in Response to the
Federal Election Commission
Notice of Inquiry
Regarding

News Organizations and Campaign Activity and the Internet

Submitted by
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I. Introduction.

A. Any FEC action which recognizes an institutional press, or which classifies political speakers, and treats them differently, is a violation of the free speech or press clause of the Constitution, as well as the equal protection clause.

The FEC's treatment of political speech is already in violation of Constitution, on multiple grounds. The NOI indicates that the FEC is contemplating further actions which are prohibited by the First Amendment. When a government agency recognizes an "institutional press" and treats its members differently from other political speakers, it violates the Constitution. Consider, for example, the following statement from the concurring opinion of Chief Justice Warren Burger in FNB v. Bellotti:[1]

> "The very task of including some entities within the "institutional press" while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England - a system the First Amendment was intended to ban ..."[2]

Furthermore, Burger, quoting from earlier Supreme Court opinions, wrote:

> "Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'"[3]

2 U.S.C. 431(a)(9) violates the Constitution. 11 C.F.R. 100.8(b)(2) compounds and expands the violation. Several FEC Advisory Opinions carry the violation even further. And now, the FEC contemplates yet more prohibited regulation of political speech on the Internet. It is time for the FEC to stop, take a close look at the meaning of the free speech or press clause, and bring its activities into compliance. If the FEC does not, injured parties will obtain declaratory relief from the Courts.

1. Any FEC action which decides either (a) what press is entitled to special status or exemption from the contribution and expenditure requirements of the FECA, (b) what is bona fide news, (c) what is legitimate press, or (d) what is equal coverage, is unconstitutional.

This Comment focuses on two fundamental problems with the FECA's and FEC's classification of

press: denying freedom of speech or press to political actors is prohibited (see, below); also, classifying an institutional press for special treatment is prohibited. The very notion of establishing an institutional press entails government action to determine who is entitled to membership in the privileged class. This is a form of government licensing. Licensing of printing presses or political speech is unconstitutional.

Unfortunately, the FEC has compounded the problem with its own independent actions. FEC regulation adds the requirements of "bona fide news" and "equal coverage." That neither term is anywhere defined is fatal. That the FEC has no statutory authority to impose these requirements is also fatal. But a crucial point of this Comment is that deciding either the "bona fideness" or "equality" of speech entails application of disputed criteria, and subjective values, to judge the content of political speech.

The FEC is valuing the content of speech. The violates the most fundamental concept of free speech. Free speech means that it is better to allow all political speech – good, bad, and ugly – and then allow the marketplace of ideas to assign merit or value, rather than have the government judge the value of speech, and regulate it accordingly.

2. Any FEC action which accords less protection to political speech by candidates or parties than to political speech by persons or entities other than candidates and parties is unconstitutional.

Assume for the sake of argument that it is permissible to create some special status for certain political speech or press. The next question then whether it is constitutionally permissible to treat the speech or press of candidates, parties, and those under their control, any differently from the speech or press of others. Certainly, the FEC's regulations and Advisory Opinions follow the directive of the Congress. But, what authority does Congress have to create such a distinction? The simply answer is that there is no such authority.

Here is the argument. The founding fathers did not explain what they meant by the freedom of speech or press. There was, however, a long series of abuses of freedom of the press in colonial American, and in England, which served as their frame of reference. The drafters and ratifiers sought to prevent recurrence of these abuses. In the two centuries prior to the adoption of the Bill of Rights, almost every instance where an infringement of freedom of the press took place, the speaker was a person involved in politics (either as a political candidate, office holder, party, or someone acting on their behalf). The Congress and FEC today are attempting to reverse the priorities of the drafters and ratifiers. The clause was inserted in the Bill of Rights to give protection to people involved in politics. Now the Congress and FEC are purporting to exclude from protection under the clause the very people the clause was inserted to protect.

This is important not only to politicians. The notion that any speaker can be forced to defend against a mere allegation that he is "controlled" by some candidate or party has a chilling effect, particularly for those speakers who cannot procure expensive legal counsel in Washington DC.

B. The policy underlying the free speech or press clause, FECA, and §230 of the Telecom Act is to promote the efficient operation of democratic institutions by increasing the quantity and diversity of, and opportunity to engage in, political speech. §230 specifically provides that both the "Internet and other interactive computer services offer a forum for a true diversity of political discourse" and "It is the policy of the United States to promote the continued development of the Internet

and other interactive computer services and other interactive media ... unfettered by Federal or State regulation".

The FEC is currently pursuing a course of action which is contrary to the policy underlying the legal authorities which guide the FEC. By providing special status to the high cost corporate institutional press, and penalizing other speakers, including Internet speakers, the FEC is suppressing these speakers, and decreasing the amount and diversity of information available to the public. If the FEC seeks to decrease the role of wealth in the dissemination of political information, it should not be penalizing and suppressing the lowest cost providers of political information. It should not be inhibiting the medium with the greatest potential for diversity. The FEC should be encouraging political speech on the Internet.

C. §230, and cases decided thereunder, bar the FEC from imposing any requirements of the FECA upon operators of interactive computer services, including discussion groups, bulletin boards, and IRC, for the speech of others, regardless of the identity of the operator and/or speakers, or status under 2 U.S.C. 431(a)(9).

Congress recently passed a law which greatly limits the FEC's ability to regulate Internet speech. Section 230 of the Telecom Act of 1996 provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

This section has been applied by the courts in several cases to shield America Online from liability for the allegedly defamatory statements of others in such things as bulletin boards.[xxx - citations] In the very least, the FEC cannot treat the speech by participants in discussion groups as a contribution or expenditure by the operator. Nor can the FEC treat the operation of any interactive computer service as a contribution or expenditure.

If the FEC is tempted to impose a very narrow interpretation of this section, it should follow the ongoing proceedings in Kathleen R. v. Livermore,[4] wherein the trial court ruled that this section shields against not only publisher liability, but also liability under the state laws pertaining to nuissance, waste of funds, and premises liability.[5].

D. The Internet is a medium which provides individuals and small entities increased opportunities to disseminate political speech, and citizens increased opportunities to receive competing speech. FEC regulation, and complaints filed with the FEC pursuant to such regulation, are far more likely to have a chilling effect on these Internet speakers than upon large corporate media, which possess the resources to contest administrative and legal proceedings. Hence, Internet political speech is entitled to as much, if not more, protection under the free speech or press clause as speech by institutional media.

The institutional media that would likely be licensed by the FEC as bona fide news tend to be a part of very large corporations. Many of these corporations, in turn, own many other media corporations, as well as non news media corporations. The trend is towards ever more concentration into ever larger conglomerates. Moreover, only well capitalized ventures can enter into television, cable, newspaper, radio, and magazine communications markets.

In contrast, the Internet is a medium which allows over half of all citizens the opportunity to engage in, and receive, political speech at very low cost, or no cost at all. Many people already possess, or have access to, all of the resources they need to engage in online political speech. They have computers, software and Internet connections at home or work, or have access via universities, public libraries, or other institutions. Also, it takes very little skill.

Individuals who engage in political speech online usually are incapable of participating in FEC or Fed.Comm.Comm. proceedings, or litigation. If the FEC were to refuse a request from CBS that one of its TV programs be licensed by the FEC as bona fide press, it would have the ability to contest that decision. In contrast, many individuals, if faced with hostile FEC action, would simply stop speaking, regardless of the merits of their position. And this would be very unfortunate.

E. In rendering decisions affecting the Internet, the FEC should refrain from taking sides in the marketplace with respect to either competing media technologies, or competing market participants.

The course currently being pursued by the FEC may have significant effects upon the marketplace. By extending special privileges to speech in one medium, but not to speech in another medium, the FEC provides an economic incentive for speakers to use the privileged media. This works to the prejudice of persons and companies developing the technology of the penalized medium, as well as those utilizing the penalized medium. This also decreases market efficiency.

The history of the telecommunications industry should offer some guidance. That industry is heavily regulated by the Fed. Communications. Comm. It regulates speech. ("Communications" is a bureaucratic word for "speech.") History shows that companies regulated by the FCC regularly use regulatory proceedings and litigation as a means of competition. The FEC should not put itself in the position of picking winners and losers in the marketplace. Yet, it is heading in that direction.

II. Any state action which classifies press, including 2 U.S.C. 431(a)(9) and 11 C.F.R. 100.8(b)(2), is unconstitutional.

If anything can be said with certainty about the origin of the First Amendment, it is that the founding fathers intended to prohibit the abhorrent practice of government licensing of printing presses, and the penalization of persons for engaging in political speech.

Unfortunately, today, if a business or person publishes speech regarding politics, then it is at risk of being fined, prosecuted, penalized, and enjoined for its expression. The FEC can institute action against the business or person. Politicians, candidates, government officials, parties, lobbyists, and other can file complaints with the FEC. Or, they may merely threaten to file complaints in order to intimidate the publisher into giving them more favorable coverage. Also, competing businesses can file complaints with the FEC to burden or eliminate their competition. Finally, either the political people or the competing businesses can file complaints with the FEC against the companies which buy advertising. Advertisers do not want to be caught up in FEC proceedings, and may quickly move on to other publishers. This could dry up revenues, and investment in, the publishers who are the subject of these attacks.

There is only one way for a publisher to preclude almost all of these threats: obtain a determination from the FEC that the business is "institutional press". The FEC sets the criteria for obtaining such a

determination. The FEC judges whether a business or person meets these criteria. And once a business or person receives this determination, it obtains privileges and immunities that are denied to others.

This fits the classic definition of licensing. And it is the licensing of political speech.

Prior to the drafting of the Bill of Rights governments in both England and the colonies had required the licensing of printing presses, and had punished political speech. Both of these practices were abhorrent to the founding fathers; so they banned them.

Moreover, there was no "institutional press" at the time. It came about later. The Bill of Rights was not written to condone the licensing of "institutional press". And, the Supreme Court has done nothing to change this since.

A. The Supreme Court: In construing the free speech or press clause, the Court has never recognized an institutional press.

Burger wrote in his concurring opinion in FNB v. Belloti that "The Court has not yet squarely resolved whether the Press Clause confers upon the "institutional press" any freedom from government restraint not enjoyed by all others."[6] He then proceeded to advance arguments as to why it the Court should not recognize an "institutional press". He found two problems with recognizing an "institutional press. First, "the history of the Clause does not suggest that the authors contemplated a "special" or "institutional" privilege".[7] Second, it is impossible to define what the "institutional press" because "the officials undertaking that task would be required to distinguish the protected from the unprotected on the basis of such variables as content of expression, frequency or fervor of expression, or ownership of the technological means of dissemination. Yet nothing in this Court's opinions supports such a confining approach ..."[8]

Burger also specifically addressed the importance of the history of licensing:

> "The liberty encompassed by the Press Clause, although complementary to and a natural extension of Speech Clause liberty, merited special mention simply because it had been more often the object of official restraints. Soon after the invention of the printing press, English and continental monarchs, fearful of the power implicit in its use and the threat to Establishment thought and order - political and religious - devised restraints, such as licensing, censors, indices of prohibited books, and prosecutions for seditious libel, which generally were unknown in the pre-printing press era. Official restrictions were the official response to the new, disquieting idea that this invention would provide a means for mass communication."[9]

Burger concluded: "In short, the First Amendment does not "belong" to any definable category of persons or entities: It belongs to all who exercise its freedoms."[10] By application of this principle, the sort of exemption contained in 2 U.S.C. 431(a)(9) does not belong to any definable group of "institutional press," it belongs to all political speakers.

Other Supreme Court opinions support this conclusion. The Supreme Court wrote in Near v. Minnesota, 283 U.S. 697 (1931), that "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press". Clearly, the Court determined here that freedom of the press belongs to "every freeman", and not to an "institutional press."[11]

Also, constitutional scholars have written in support of this principle. For example, Rotunda and Nowak write that:

> "Thus far, when the Court has guaranteed a right of access -- as the right of access to a criminal trial, the right of a public trial -- this right has been granted to all; it is not limited to the institutional press. The Court has refused to draw any constitutional distinction between speech and "the press," or between speech and the "institutional press," or between speech and the "organized media." The reason for the judicial unwillingness to make such a differentiation lies, in part, in the fact that there is no principled way of doing so."[12]

Finally, there is the assessment of the eminent constitutional scholar, Thomas Cooley, who wrote that:

> "The constitutional liberty of speech and of the press, as we understand it, implies a right to utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing ..."[13]

Clearly, Cooley observed that freedom of the press belongs to any "citizen". This is a far cry from the "institutional press".[14]

B. Original Understanding: the Declaration of Independence, Articles of Confederation, Constitution, Bill of Rights, and ratification debate provide no support for recognizing an institutional press.

The debate over freedom speech and freedom of the press from the Revolution through the ratification of the Constitution and its Bill of Rights can be summed up simply: **There was no debate.**

There are two reasons. First, the British were not suppressing speech in the 13 colonies during this time. Second, there was no dispute regarding what speech or press ought to be protected.

1. The Declaration of Independence does not reference speech or press.

The Declaration of Independence lists a long series of grievances against British rule of the colonies. Yet, there is nothing which is remotely related to licensing, suppression, regulation or censorship of speech, expression, or printing presses. For Thomas Jefferson and the signers of the Declaration, free speech and free press were not at issue in the break from Britain.[15]

2. The Articles of Confederation references speech, but not press, and only in the context of legislators.

The Articles of Confederation does not include a general protection of freedom of speech or press. However, it did contain language protecting the speech of legislators:

> "Freedom of speech and debate in the Congress shall not be impeached or questioned in any court, or place out of Congress ..."[16]

That the Articles of Confederation protects only the speech of legislators provides some support for interpreting the freedom of speech or press clause of the Constitution to especially protect legislators.

3. The original Constitution does not reference speech or press.

The original Constitution does not address speech or expression. Records pertaining to the Constitutional Convention reflect that these matters were hardly touched. There was a proposal for a bill of rights, which was rejected. There was then a proposal to include a free press clause, but it too was rejected.

Moreover, accounts of the constitutional convention report that there was very little discussion of the subject.[17] There was a vote on including a bill of rights, which was rejected. The convention also rejected a press clause.

4. The Bill of Rights.

It was not until the Bill of Rights were drafted by the first Congress that the federal government finally put into writing a protection of various types of expressive behavior: including religion, speech, and press.[18] Yet, there was almost no mention of the speech and press clauses in the debates surrounding the drafting and ratification of Bill of Rights.

The reason is very likely that there was a common understanding at the time as to what the words freedom of speech and press meant (see, II.C.6., below), and the common law notion of freedom of the press was settled (see, II.C.7., below).

C. Original Understanding: The history licensing and censorship of printing presses, and the concept of freedom of the press, in England and America up to through the ratification of the Bill of Rights, precludes recognition an institutional press.

1. Introduction.

To learn what the drafters and ratifiers understood by the terms freedom of speech and freedom of the press, it is necessary then to look at the history of government regulation of speech and press leading up to the ratification.

There are two historical reasons why there was almost no discussion of these terms by the founding fathers. First, at the time the Bill of Rights was approved, and for over fifty years prior to then, the American colonists enjoyed a high degree freedom from restraint by governmental authority to speak, print, petition, and assemble on political matters. Neither the British government, nor the British colonial governments, interfered with political expression around the time of the revolution. The British government was doing mean and nasty things with respect to its taxation and merchantile policies, but it left the printers and their presses alone.

The licensing of printing presses in the colonies ended in 1725. Nor was there any registration, taxation, or censorship of printing presses. The last seditious libel case in the colonies was in 1736, and it never got past the jury.[19]

Many of the items which were included in the Bill of Rights, and which were the subject of speeches and debates, were responses to British violations of colonial liberties. The speech or press clause was not discussed much, however, because there had been no British violations of American's liberties of

speech or press in several generations. There drafters must therefore have had some much earlier events, and events in England in mind. More on this below.

The second historical reason why there was almost no discussion of what speech and press freedom meant was that these terms had clear and understood meanings at the time. Had there been any uncertainty, or difference of opinion, these terms would have been the subject of debate. More on this below, too.

2. 16th Century licensing and censorship of printing presses in England: Tyndale and vernacular Bibles.

Gutenberg began use of his printing press around 1450 in Germany. The first printing press in England was operated by William Caxton in about 1477.[20] However, at this time, and earlier, licensing of presses, as well as hand written manuscripts, did not exist. Hand copying was so lengthy and tedious a process that neither the church nor the states considered it a threat. The first printing presses were used, often under state or church sponsorship, to print items which authorities did not find objectionable. The occasional heretic got burned at the stake, but that was for heresy. The acts of printing and writing were essentially regulated.

Licensing of the printing presses began in England, and elsewhere, when the presses began to be used used for purposes which the states and the established church opposed. The first collection of items which prompted authorities to mandate licensing was the printing of vernacular Bibles. The church objected, in part, because if ordinary people could read the Bible, it would loose its monopoly on interpretation of the Bible. The church and secular leaders saw this as a threat to the political order. [21]

The first vernacular Bible in to be printed in the English language was the work of William Tyndale. He originally set out to do his work in England but was denied permission. He fled to the continent, and often moved from town to town, because Henry VIII's agents continually tried to cause the local authorities to shut him down. He ended up in Antwerp where he had a degree of immunity.

No one could get a license to print his Bibles in England. In addition, it was made illegal to import vernacular Bibles. Some were prosecuted for violating the ban. Of course, censorship is hard to enforce across borders, and beginning in 1516, many copies were smuggled into England. While Wolsey had sought his arrest, Tyndale eventually was caught, but not by King Henry VIII. Charles V's men caught him in Belgium. He was burned at the stake.[22]

The licensing of printing was followed in many European states and churches by the practice by the drafting of lists of particular books which were prohibited from being published or imported. A review of the various 16th Century indices, such as the *Index liborum Prohibitorum* shows that most items on the list were religious in nature. A few made the list for their lacivious nature.[23]

However, Tyndale's Bible was to have a major influence on English religous thought, and subsequent English translations. Scholars generally agree that 90% of his work was incorporated into the King James version.

The licensing of printing presses that began in England that Tyndale continued until 1695.

3. 17th Century licensing and censorship of printing presses in England:

Milton, Twyn, and Locke, and repeal of the licensing statute.

The end of licensing of printing in England can be traced to an eloquent speech[24] by the metaphysical poet, John Milton. While Milton's most famous work is the poem, *Paradise Lost*, perhaps his second most famous work, and second greatest contribution to English literature and thought, is his *Areopagetica*. It was subtitled *A Speech for the Liberty of UNLICENC'D PRINTING*. Parliament did not immediately repeal the licensing statute, but Milton so turned opinion against licensing and censorship of expression that the statute would eventually lapse. After the Glorious Revolution of 1688, the parliament allowed the law to lapse, never to be reinstituted again.[25]

It is not popular today to study the works of 17th Century writers such as Milton or Bunyan.[XXX] However, in colonial America, they were widely read. Milton is perhaps best known today for have been belittled by Donald Sutherland in the movie, *Animal House*. However, one constitutional scholar, Stanley Brubaker, wrote that on the matter of the free press clause, Milton was one of the major theorists who most influenced the framers of the Constitution.[26]

Licensing laws were also in effect in the American colonies, but were repealed in 1725.

But none of the activity that was being licensed, censored, or prosecuted for heresy or sedition, during these years, was anything remotely close to what is known as news media today. The initial target of licensing and prosecutions was the printing of Bibles and other religious works in the English language.

Milton published his *Areopagetica* in 1644. He did so in part because he was charged with printing an unlicensed work. But, it was not part of a "newspaper". It was not even news. It was a single pamphlet which he published on three occasions. It was a plea for the legalization of divorce in limited circumstances. As Donald Sutherland pointed out, his first wife did not like him.

It is also quite relevant to the matter now before the FEC that Milton was not solely a metaphysical poet in a miserable marriage. He was a political activist. He was an early and ardent support of Oliver Cromwell. He published numerous tracts in support of Cromwell, and in turn derived much income from a salary provided to him by the Cromwell government. He blindly supported the Commonwealth to the very end.

Paradise Lost came late in his life. Perhaps because of his Republican past, the Restoration censors dallied in issuing a license to print *Paradise Lost*.

Another major figure who was well known and respected by the founding fathers was John Locke. He too was affected by England's licensing and censorship of printing. He too, was a political activist. In Restoration England he was an assistant to Shaftsbury, the leader of the whig party for a time. He was a writer and theorist for the whig party in Parliament. Some scholars trace his great works -- the *First Treatise on Government* (his attack on the theory of the divine right of kings) and the *Second Treatise on Government* (his theory of democratic government) -- back to the Oxford Parliament. The theory is that he wrote a series of pieces for whig parliamentarians to use in debate. In today's terms, he was a speech writer and editorialist for a political party.

Shaftsbury died, James II ascended to the throne, the whigs lost power, and Locke fled the country for his life. While in exile he wrote and published *A Letter Concerning Toleration*. He also likely converted his Oxford Parliament materials into books during this time.

Subsequently, in 1688, William of Orange came to power in the Glorious Revolution, Locke returned to England, and obtained licenses to publish his works. The *Second Treatise on Government* served as a rationalization of the Glorious Revolution of 1688. He was soon rewarded with a position on the Board of Trade. Thomas Jefferson also borrowed heavily from the *Second Treatise* when he drafted the Declaration of Independence.[27]

The significance of all this is that two of the prime examples of the abhorrence of the licensing laws in England, which were likely on the minds of many Americans at the time the Bill of Rights was adopted, involved people who were not "bona fide news" writers. They were partisan political actors. And, they used printing presses to speak, but they part of no "institutional press."

There was one other famous censorship 17th Century incident which may have been know to 18th Century Americans. This was the case of John Twyn. He was a printer in Restoration England who was found to have "proofs of a book arguing that a king whose decrees violated the 'law of God' should be called to account by the people."[28] He was promptly drawn and quartered.

4. Licensing and censorship of printing presses in colonial America: repeal of the licensing statute, and John Peter Zenger.

There was licensing of printing presses in 17th and early 18th Century American. However, the licensing law was repealed in about 1725.

The other problem for printers was prosecution for seditious libel. However, in the colonies the last time anyone was prosecuted for sedious libel was in 1735-6 when the bungling and incompetent William Cosby, royal governor of New York, had John Peter Zenger tried for publishing a criticism of his sacking of the Chief Justice of New York. Zenger was acquitted by the jury, and became a New York celebrity.

The circumstances of this case are also significant for the issues facing the FEC. Zenger had just started, and was struggling with, his *New-York Weekly JOURNAL*. There were not yet formal political parties like today. But there were informal parties. The popular party, which opposed the sacking of the Chief Justice, supported Zenger's publication. Indeed, in the issue published the week after his arrest, he wrote a letter about his arrest which was addressed "To all subfcribers and Benefactors".

Also, Zenger's journal was not shut down (his wife ran it while he was in jail), and he was allowed to continue his write letters for publication. This indicates just how minimal the regulation of the printing presses was by this time. Moreover, after the Zenger episode, there was nothing in the colonies that remotely resembled licensing or censorship of printing presses, until the Alien and Sedition Act controversy, which was well after the ratification of the Bill of Rights.[29]

There is a continuing pattern here. Milton, Locke, and Zenger were all politically involved, and supported by politicians. None were part of an "institutional press". None wrote "bona fide news."

5. Licensing and censorship of printing presses in England just prior to the Bill of Rights: Junius and Wilkes.

However, this pattern continues. While there were no other instances of suppression of printing in America before the Bill of Rights, there were two sets of events in England that must have been on the

minds of the framers. These were the efforts by authorities in London to censor John Wilkes (the flamboyant publisher-politician), and the writer then known by the pseudonym of "Junius" (now known to have been the politician Sir Phillip Fisher).[30]

Both were well known figures on both sides of the Atlantic. Madison, Hamilton, and Jay imitated Fisher when they used the pen name "Publius" when the published the *Federalist Papers*. As for John Wilkes, American mothers named their sons for him, and cities where named for him.

Wilkes was a publisher, perennial politician, and rabble rouser. For several years in the 1760s he published *The North Briton*. He had a printing press in his house. He also frequently ran for Parliament. He won many elections. He was refused his seat or expelled from Parliament on many occasions. He was also elected mayor of London.

Wilkes' problem was that he published on his printing press. He was a member of the party of the elder Pitt in Parliament, and an opponent of the party of Bute. In issue No. 45 his *North Briton*, he attacked Bute's policies, and accused Bute of having an affair with the King's mother. Secondly, he published a scandalous and salacious satire of Pope's *Nature of Man*, titled *Nature of Woman*.[31]

The critical point about Wilkes is that he was no professional journalist. He was an incessant office seeker whose printing of a journal was part and parcel of his political ambition.

Junius, on the other hand, was a educated and erudite man. He wrote letters for publication under a pen name. In his day his identity was not known. (It was the printer of the journal which contained his letters who was the object of censorship.) What scholars have learned since is that he was Sir Phillip Fisher, a leading government official and Member of Parliament. Albeit, at the time he was writing under the name Junius, he was a high ranking official in the war department, and not a candidate for elective office. However, he later stood for, and was elected to Parliament. But whatever, he was not employed by any "institutional media", he was not writing "bona fide news", and he was not a journalist.

The overall pattern is clear. None of the individuals who were adversely affected by licensing or censorship, and who were likely to have been known to the framers, were part of any "institutional press" or "bona fide news" operation. Milton, Locke, Wilkes, and Junius were all political players. All four held high office. Wilkes and Junius both were elected to Parliament. Milton, Locke, and Wilkes all worked for parties or political factions.

Tyndale was not a politician. But neither was he remotely connected with news. He was a linguist and translator. Twyn and Zenger were professional printers, not journalists. Zenger is known to have been financially supported in his work by the informal political party which his journal supported editorially.

All encountered troubles in connection with printing presses.

None would fit within the FECA's or FEC definition of press. Something is wrong here. The FECA's and FEC's understanding of the freedom of speech or press clause is grossly at odds with the framers' understanding of the clause.

The original understanding of the Constitution, as evidenced by the events which proceeded the inclusion of the free speech and free press clause in the Bill of Rights, was that freedom of the press meant that licensing of printing presses, for whatever use, is prohibited, and that censoring or

penalizing the expression views regarding political issues, especially by candidates and office holders, is prohibited.

6. The common understanding of freedom of the press in late colonial America.

There was also a common understanding of what was meant by freedom of the press in colonial America. For example, one contempory wrote:

> "But, by the Freedom of the Press, I mean a Liberty, within the Bounds of Law, for any Man to communicate to the Public, his Sentiments on the Important Points of Religion and Government; of proposing any Laws, which he apprehends may be for the Good of his Countrey, and of applying for the Repeal of such, as he Judges pernicious. . . .
>
> "This is the Liberty of the Press, the great Palladium of all our other Liberties, which I hope the good People of this Province, will forever enjoy . . . ."[32]

Finally, much can be inferred from the activities of the people who drafted and ratified the Bill of Rights. In particular, the very people who put the freedom of speech or press clause in the Constitution were employing or supporting journalists to sway public opinion for the purpose of influencing outcomes of federal elections.

The federalists supported journalists. Similarly, Professor Lange writes that "Thomas Jefferson, for example, employed a journalist to attack the policies of Washington's party while Jefferson was himself Washington's secretary of state."[33]

Jefferson was the leader of the Jeffersonian democrats, and was maneuvering to become President himself, a task at which he succeeded, in the election of 1800. Jefferson was also one of the strongest supporters of the Bill of Rights, and the rights enumerated therein. It is implausible to suggest, given his actions, that he did not understand the freedom of speech or press clause to protect the speech of politicians and candidates for federal office.

7. The common law notion of freedom of the press in 1791.

Another of the reasons why the founding fathers did not discuss or debate the meaning of freedom of the press was that its common law notion was clear at the time. There is no better source on the common law at the time, nor source more read in late colonial America, than Blackstone's Commentaries. Blackstone wrote:

> "The Liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this is to destroy the freedom of the press:"[34]

It should not go unemphasized that both Blackstone in the mid 18th Century, and the Supreme Court in Near v. Minnesota, used the word "freeman" (not "institutional press") to describe who holds the right of freedom of the press. The concept did not change in two intervening centuries.

D. The history of the printing press. The institutional press did not come into existence until technological advancements of the industrial revolution made the mass produced, cheap print publications economically feasible.

It is important to distinquish between the printing press as understood by the framers, and current notion of "the press." The framers wrote to protect the former. The later wrongly claim to be the sole beneficiaries of the clause.

When the Bill of Rights was written, the printing press was a low technology medium. It involved movable metal type, arranged in a tray. This tray was suspended above a table which supportd sliding tray for holding blank sheets of paper. The movable type, facing down, was inked by hand, and a screw for applied considerable pressure to print the ink onto the paper. Guttenberg's simply took an existing technology, the wine press, and employed it for a different purpose. Instead of using the screw device to press the juice out of grapes, he used the screw device to press the ink on the type onto the paper.

It was a very small scale operation. For several centuries, it was comparable in size to piece of furniture, or a large appliance. Will Durant reminds us that when John Wilkes was arrested for printing the satire *Nature of Woman*, the press was in his house; and he had printed all of 13 copies.[35]

The printing press could be operated by one person, but in some shops was handled by two workers. The process of printing was tedious, slow, and expensive. A pair of experienced pressmen could turn out only about 500 pages per hour. The type setting was altogether another matter. The typesetter used tweezers to place individual letters one at a time into a tray. And of course, everything was backwards and reversed. Paper was still small and expensive. Moreover, each sheet was first soaked, and after printing, had to be hung up to dry.

While the press was a vast improvement over the hand copying of manuscripts by medieval monks, it was vastly inferior to the technology that came with the industrial revolution.[36]

This technology could not, and did not support any "institutional press." Developments of the industrial revolution made the newspaper, the daily, and the "institutional press" possible. The invention of typesetting machines, rotary presses, steam powered presses, and cheap "newsprint" in the 19th Century began to development of an institutional press. Also, improvements in transportation (to get newsprint from forest to print shop) were necessary. Finally, the concentration of huge numbers of people in large industrial cities made the distribution of newspapers much cheaper.

Technologies continued to improve. Soon, "the press" did not even use presses. But the "institutional press" held on to the name, in part because the word was enshrined in the Bill of Rights.

The "institutional press" did not yet exist when the Bill of Rights was approved, and the press clause was not included for the protection of any "institutional press."

E. Buckley v. Valeo supports the conclusion that FEC action which recognizes an institutional press, or which classifies political speakers and treats them differently, is a violation of the free speech or press claus of the Constitution.

The Supreme Court's analysis in Buckley v. Valeo, 424 U.S. 1 (1976), is applicable to the present

question. In Buckley v. Valeo, the Court reasoned that the campaign contribution limits of the FECA are not an unconstitutional restraint on speech because the only speech component of a monetary contribution is the fact that a contribution is made. The money itself is not speech. The Court wrote:

> "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor."[37]

The court in Buckley upheld the contribution limits in the context of "financial contributions" only -- not in the context of FEC attempts to treat other activities as equivalents of "financial contributions". The Court stated:

> "In sum, although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."[38]

In the case of political speech on the Internet, there is no dichotomy between the monetary component and the speech component in the act. The entirety the act is speech. Therefore, under the Supreme Court's analysis in Buckley v. Valeo, any attempt by the Congress or FEC to treat political speech on the Internet as a "contribution" subject to limitation would be unconstitutional.

The Supreme Court expounded the constitutional difference between money contributions and political speech in Buckley v. Valeo. The FEC is using 2 U.S.C. 431(a)(9) to exclude constitutionally protected free speech or press from the protection of the constitutional. It is simply attempting to redefine speech as a monetary contribution, and thereby evade the constitution and the Supreme Court's ruling in Buckley v. Valeo. It is a semantic slight of hand that will not withstand judicial scrutiny.

The freedom of association analysis of the Supreme Court in Buckley v. Valeo would also protect many political speakers on the Internet. However, inasmuch as Tech Law Journal does not associate itself with any candidate, this is not expounded upon here.

F. Economic Analysis of regulation of political contributions and speech.

The FEC should also consider an economic analysis of this topic. The FECA regulates monetary transactions. The FECA is based on the economic analysis that there is an exchange of contributions for policy. Justice Holmes wrote in his dissent in Abrams v. U.S.[39] that freedom of speech requires a "free trade in ideas" and "competition in the market" of ideas. And, the Supreme Court described a quid pro quo exchange in Buckley v. Valeo.

> "To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."[40]

The FEC should particularly examine the marketplace of ideas in the context of political speech and the "institutional press."

The analysis of the FEC to date has been that there is an informal exchange, or at least the appearance of one. A person or entity engages in the non-financial act of engaging in political speech which furthers a candidacy, and the candidate reciprocates by granting access to the speaker, or by supporting policies which favor the speaker. The argument is essentially that there is a barter market where public speech is exchanged for policy favors for the speaker. This sort of economic analysis leads the FEC to conclude that speech can be classified as an contribution or expenditure.

Assume, just for the sake of argument, that this approach is both enforceable and constitutional. If this economic logic were applied uniformly to all barter exchanges involving political speech to which candidates are a party, it would lead to some strange results.

Here is an example. There is another barter market for political speech that the FEC is now ignoring. Government officials and candidates routinely give information, documents, and access to reporters, editors, and publishers. In exchange, these reporters, editors, and publishers give coverage -- and more favorable coverage -- to their suppliers.

Reporters and writers are hired to produce stories. They are in competition with other reporters and writers working for other media companies. The salaries, promotions, and future job prospects of reporters and writers depend on their ability to produce stories with content. There are also similar incentive structures further up the corporate media hierarchy. These reporters and writers are often dependent upon the people and entities that they write about for much of their content. The people and entities which are the subject of political reporting usually want to maximize the quantity and favorableness of this writing. They take advantage of the competition among reporters and writers to improve what is said about them. They selectively provide information, documents, interviews, and access to those who provide the more favorable coverage. This leads writers and reporters to alter the character of their writings -- alter their speech -- in return for the beneficence of politicians.

There is a often a quid pro quo. There is a barter market for speech. If the FEC were to consistently apply its speech as in kind contribution analysis to this situation, it would treat the activities of politicians in this exchange as expenditures within the meaning of FECA. It would also treat the stories of reporters and writers in this exchange as contributions to the candidates.

Of course, the FEC does not do this. And of course, this commenter argues that any FEC attempts to force the FECA upon either market for speech would be impossible to enforce, constitutionally defective, and absurd.

Nevertheless, the FEC is pursuing a course of action which treats the exchange of speech for policy and access as subject to regulation, but the exchange of speech for information, access, and documents as not subject to regulation.

Why should the two exchanges be treated differently? In both cases, the speaker is expressing

something in order to obtain something from the candidate. In both cases, the public speech may not represent what the speaker actually believes. Hence, both practices have the potential to mislead voters.

Many voters tend to believe most corporate media speakers more than other speakers. So, the argument could be made that the corporate media exchange is more harmful to the democratic process, and hence, is more worthy of FEC regulation.

On the other hand, one might argue that the exchange between corporate media and candidates is less harmful because the quid pro quo is information and access, rather than policy favors. But there is a weakness to this argument. Corporate media have their own policy interests. Most media companies own media which are heavily regulated by the federal government. The TV and radio broadcast media are utterly dependent upon the Fed.Comm.Comm. for their licenses and spectrum. To keep their licenses they must comply with a myriad of rules and regulations. Ultimately, the Congress (which passes telecom bills and confirms Fed.Comm.Comm. Commissioners) and President (who signs telecom bills and appoints Fed.Comm.Comm. Commissioners) set the rules. Satellite TV and cable TV are also substantially regulated by the federal government. Also, many companies own both broadcast and print media, or other combinations.

In addition, media corporations often own businesses whose purpose something other that disseminating news. These businesses have their own interests in federal policy.

The National Association of Broadcasters and the National Cable Television Association are among the most powerful lobbying groups in Washington. Most media companies are active in lobbying the Congress. The consequence of all this is that just as candidates exchange information and access with reporters, candidates exchange policy with owners and executives of media companies. Why should the FEC assume that a big media company is any less interested in government policy than a big computer company? Why should the FEC assume that a big media company is any less likely to barter coverage for policy, than a computer company is to barter speech for policy?

There are other examples which illustrate more of the insurmountable problems associated with treating speech as in kind contributions or expenditures. Two others are mentioned here, but for the sake of brevity, are not fully discussed. One is the practice of some media companies to mix "news" and "consulting" operations. Another is the practice of some media companies to produce niche publications that cover a single regulated industry, and sell subscriptions for several thousand dollars per year to a small group of people and companies in that industry.

In conclusion, the point is this. If the FEC is going apply in kind contribution or expenditure analysis to one type of barter exchange involving speech, it should logically be applied all others. But better yet, it should be applied to none. It is unworkable, unconstitutional, and unreasonable in any case.

G. Conclusions regarding the meaning of freedom of speech or press as applied to political speech and the "institutional media".

The "institutional press" frequently states that the reference to "the press" in the First Amendment gives the "institutional press" special status and privilege. The Congress, in adopting the FECA, codified this misstatement. The FEC carries the misinterpretation further. The FECA and FEC also wrongly exclude candidates and parties from the meaning "the press."

The history of licensing of presses, and censorship of speech, makes it clear that the understanding of the framers was not to give special status to any "institutional press". Rather it was to prohibit licensing of presses used for any political or religious speech, by anyone, and to protect political and religious speech by all persons. The reference to the press in the First Amendment was also included with the specific understanding that political speech or press of politicians and candidates was especially worthy of protection.

The Supreme Court has deviated from original understanding in a few areas. However, it has not done so on the matter of interpretation of the freedom of speech or press clause. It has adhered to the original understanding. The FEC has no basis for imposing a new and different interpretation of the First Amendment today.

H. Unconstitutionality of statutes, regulations, and advisory opinions.

1. 2 USC 431(a)(9) and 11 CFR 1000.8(b)(2) are unconstitutional for classifying press.

2 U.S.C. § 431 provides, in part, at Section 431(a)(9):

> (A) The term "expenditure includes---
>
> > (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
> >
> > (ii) an written contract, promise, or agreement to make an expenditure.
>
> (B) The term "expenditure" does not include---
>
> > (i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

11 C.F.R. § 100.8, provides, in part, at 100.8(b)(2):

> (2) Any cost incurred in covering or carrying a new story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication is not an expenditure unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the costs for a news story (i) which represents a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility, and (ii) which is part of a general pattern of campaign-related news account which give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not an expenditure.

Both the statute and the regulation treat some political speakers differently from others. In particular, both give great preference to an "institutional press". The statute is unconstitutional on its face. The

regulation carries the violation to extremes. For example, the regulation does not even attempt to disguise the government licensing of speech. It writes the word license right into the regulation.

2. 2 USC 431(a)(9) and 11 CFR 1000.8(b)(2) are unconstitutional for providing less protection for political speech by candidates and parties than for speech by others.

As is elaborated upon in Section II, above, the drafters and ratifiers understood the free speech or press clause to especially protect political speakers: office holders, parties, candidates, and their employees included. Impermissibly, 2 USC 431(a)(9) and 11 CFR 1000.8(b)(2) attempt to exclude speech that is "controlled by any political party, political committee, or candidate".

3. 11 CFR 1000.8(b)(2) is unconstitutional for classifying bona fide news.

Classifying "bona fide news" suffers from substantially the same defects as classifying "institutional press". Impermissibly, some protected political speech gets licensed, and some does not.

Perhaps this is a good place to point out some of the absurdities that have resulted from the Fed.Comm.Comm.'s attempts to decide what is bona fide news, and what may be in store for the FEC. The Fed.Comm.Comm.'s lawyers are frequently called upon to rule upon requests of this nature in 315 (a) proceedings.[41]

With some regularity, high priced lawyers from the poshest law firms in Washington DC solemnly plead to the Fed.Comm.Comm. that some TV program of one of their media conglomerate clients is seriously engaged in bona fide journalism, and therefore deserves exemption from 315(a). Bright young Fed.Comm.Comm. lawyers from the finest law schools seriously study the matter, and pronounce genuinely qualified bona fide journalists to be exempt.

Late last year the Fed.Comm.Comm. pronounced that Bill Maher (who hosts a late night comedy featuring flippant comics and leggy actresses discussing serious current topics, like sex) is a bona fide journalist.[42] Bill Maher exercises independent editorial discretion, and provides a benefit to the public. Wouldn't you know.

Other distinguished journalistic institutions so honored by the Fed.Comm.Comm. recently include Access Hollywood, Entertainment Tonight, and Entertainment This Week.[43]

Now, recall that when Compuserve sought license from the FEC to provide a venue for all federal candidates, on a non-partisan basis, to publish their policy statements and other materials, which all voters could access for free, the FEC refused.[44] Compuserve's activity did not qualify as news, but Access Hollywood's activity does. What is the distinguishing legal principle? If Compuserve had hired a few bubble breasted bimbos would the FEC have given them permission?

Whatever the difference is, the Fed.Comm.Comm.'s Hollywood decisions have done nothing to decrease the information available to voters,[45] while the FEC's misguided Compuserve advisory opinion has.

Sarcasm aside, the Fed.Comm.Comm.'s 315 proceedings provide some hint of what is in store for the FEC if it continues down the road of deciding what is bona fide news. It will not only be unconstitutional; it will be farcical.

4. 11 CFR 1000.8(b)(2) is unconstitutional for requiring equal coverage.

Requiring "equal coverage" violates the First Amendment. The Supreme Court squarely addressed this issue in Miami Herald Publishing Co. v. Turnillo, 418 U.S. 241 (1974). In this case the Supreme court **unanimously** overturned a Florida statute that required newspapers to give free reply space to political candidates who had been criticized by the newspaper. The Court wrote:

> "It has yet to be demonstrated how government regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."[46]

The FEC may look enviously upon the Fed.Comm.Comm.'s statutory authority to regulate speech by broadcasters. This is written into the Communications Act, and very sadly, has been upheld by the Supreme Court. In National Broadcasting Company v. U.S., 319 U.S. 190 (1943) the Court upheld the practice on the theory of scarcity. That is, spectrum is scarce, so there is limited opportunity to engage in speech. Therefore, it is appropriate for the Fed.Comm.Comm. to regulate it.

There are serious defects with this theory. The notion of scarcity is based on junk science and quack economics. Television markets could permit ten or more different broadcasters. Moreover, the number of available TV broadcast licenses has been limited by the Fed.Comm.Comm.'s own spectrum management policies.

Then, the Supreme Court again upheld the practice of regulation of broadcast speech in Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). The Court wrote:

> "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[47]

In 1969 there might have been three to a dozen or so TV broadcasters, and a few dozen radio broadcasters, in a particular urban area. This is not scarcity. But soon after this decision cable technology was developed and deployed, and programmers could soon deliver over a hundred different channels. Then came satellite transmission of TV type programming. And this was in addition to competition from newspapers, magazines, and radio. The scarcity argument became ridiculous, and widely recognized as such.[48]

Today the Internet has millions of web sites which cast anywhere in the world there is a phone connection. There is unlimited potential for expanding the number of web sites.

The FEC should drive a wooden stake through the heart of the scarcity rationale for regulation of speech.

Now, nevertheless, the FEC wants to get in on the act of regulating the content of political speech with its "equal coverage" clause in 2 C.F.R. 100.8(b)(2). The FEC has no authority under the Communications Act. The FECA contains no "equal coverage" language. The FEC created its "equal coverage". The FEC has no statutory authority to promulgate this regulation.

The FEC cannot possible claim the scarcity rationale for regulating the print press, cable, DBS, or the

Interent. Nor can it even claim it as to broadcast media. The FEC is bound by the First Amendment, and the Turnillo case. The "equal coverage" clause of 2 C.F.R. 100.8(b)(2) is unconstitutional.

There another point to be raised. 2 C.F.R. 100.8(b)(2) requires that the story "give reasonably equal coverage to all opposing candidates in the circulation or listening area". What is the "circulation or listening area" of a web site?

It is the world. There are 537 different federal elective offices. Who could possibly be expected to give equal coverage to all opposing candidates in 537 races?

5. FEC Advisory Opinions which recognize a "legitimate press" are unconstitutional.

Again, classifying "institutional press", "bona fide news", and "legitimate press" all amount to impermissible licensing of protected political speech.

6. FEC Advisory Opinions which incorporate Fed.Comm.Comm. interpretation of fairness in broadcasting are unconstitutional.

7. Any requirement that the names of political speakers be reported is unconstitutional.

The FEC no doubt has authority to require the disclosure of the names and other data of certain monetary contributors. It is provided in the FECA. The Supreme Court upheld this in Buckley v. Valeo. Furthermore, the Court distinguished its earlier opinion in NAACP v. Alabama, 357 U.S. 449 (1958).

However, the Court decision in Buckley v. Valeo addressed the question of reporting names of monetary contributors. The Court distinguished between giving money, which is not speech, and speech, which is protected by the First Amendment. If the purported contribution is political speech, rather than a monetary contribution, then the basis for distinguishing NAACP v. Alabama disappears.

The Court in NAACP v. Alabama ruled that a state cannot compel a membership organization to disclose the names of its members; this is a restraint on constitutional rights of association. A disclosure law cannot trump a constitutional right. In the case of FECA, its disclosure provisions cannot trump the First Amendment.

There is also considerable support for this proposition in the original understanding of the First Amendment. Anonymous political speech was a common and respected practice in the late 18th Century. Junius (the pen name of Sir Phillip Fisher) was the object of one of the most serious infringements of freedom of speech or press just prior to the adoption of the Bill of Rights. James Madison, John Jay, and Alexander Hamilton used the pen name of Publius when they published the Federalist Papers; **Madison wrote the First Amendment**.[49] Cato was another prominent pen name of the era. This is a practice that many drafters and ratifiers must have sought to protect.

Therefore, assuming for the sake of argument that the FEC can treat political speech as an in kind contribution or expenditure within the meaning of the FECA, it still cannot compel speakers, their

employers, or candidates to reveal the speakers' identities.

There is also a practical concern here. If by chance the FEC were permitted to treat people who post messages in web based discussion groups as though they were making contributions, it would be unworkable for the web site operators to comply with disclosure requirements. First, the are too many "contributions". Some political discussion sites receive thousands of posts per day. Second, most people post anonymously to these discussion groups. Moreover, on the Internet, there is no feasible way to require people to post their names and personal data. A discussion group web site can be configured to require registration. However, posters can, and do, register under fictitious names.

III. In executing its statutory responsibilities, the FEC should take account of the policy underlying the free speech or press clause, FECA, and §230 of the Telecom Act – to promote the efficient operation of democratic institutions by increasing the quantity and diversity of, and opportunity to engage in, political speech.

The FEC is currently pursuing a course of action which is contrary to the policy underlying the legal authorities which guide the FEC.

The court stated in Buckley v. Valeo that the FECA

> "is aimed in part at equalizing the relative ability of all voters to affect electoral outcomes by placing a ceiling on expenditures for political expression by citizens and groups."[50]

The Court continued that one of the problems is that "The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech."[51]

Today, the Internet offers a far lower cost alternative for the dissemination of information. Widespread use of the Internet could decrease the expensive dependence on the old media, and thereby decrease candidates' dependence upon campaign contributions. It would also tend to equalize citizens' ability to participate in, and influence, election outcomes.

Therefore, the policy underlying the FECA dictates that the FEC promote political speech on the Internet, not restrict it.

The Congress also wrote a policy statement into Section 230 of the Telecom Act of 1996.

> The Congress finds the following:
>
> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
>
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
>
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural

development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY - It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

No commentary or explanation of this statement is necessary.

By providing special status to the high cost corporate institutional press, and penalizing other Internet speakers, the FEC is suppressing these speakers, and decreasing the amount and diversity of information available to the public. If the FEC seeks to decrease the role of wealth in the dissemination of political information, it should not be penalizing and suppressing the lowest cost providers of political information. It should not be penalizing the medium with the greatest potential for providing specialized and local content. It should not be inhibiting the medium with the greatest potential for diversity. It should not suppress the medium most likely to publish unpopular views.

The FEC should be encouraging political speech on the Internet.

IV. Section 230 of the Telecom Act of 1996, and cases construing it, prevent the FEC from regulating certain Internet activities.

Congress recently passed a law which greatly limits the FEC's ability to regulate Internet speech. Section 230 of the Telecom Act of 1996 provides:

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

This section has been applied by the courts in several cases to shield America Online from liability for the allegedly defamatory statements of others in such things as bulletin boards. In the very least, the FEC cannot treat the speech by participants in discussion groups as a contribution or expenditure by the operator. Nor can the FEC treat the operation of any interactive computer service as a contribution or expenditure.

If the FEC is tempted to impose a very narrow interpretation of this section, it should follow the ongoing proceedings in Kathleen R. v. Livermore, wherein the trial court ruled that this section shields against not only publisher liability, but also liability under the state laws pertaining to nuissance, waste of funds, and premises liability.

V. Vulnerability of Internet speakers.

The institutional media that would likely be licensed by the FEC as bona fide news tend to be a part of very large corporations. Many of these corporations, in turn, own many other media corporations, as well as non news media corporations. The trend is towards ever more concentration into ever larger conglomerates. Moreover, only well capitalized ventures can enter into the television, cable, newspaper, radio, and magazine communications markets.

In contrast, the Internet is a medium which currently allows over half of all American citizens the opportunity to engage in, and receive, political speech at very low cost, or no cost at all. Moreover, use of the Internet is only likely to become more ubiquitous in the near future.

Many people already possess, or have access to, all of the resources they need to engage in online political speech. They have computers, software and Internet connections at home or work, or have access via universities, public libraries, or other institutions. Also, it takes very little skill to use the Internet to receive speech. Also, publishing speech on the Internet is possible for anyone willing to spend a brief amount of time learning a few basics. And it is getting easily, as software companies produce ever more user friendly and functional web development tools.

There are two significant consequences of the low cost and ease of publishing on the Internet. First, many people can participate. Second, most of these people have limited financial resources. Individuals who engage in political speech online usually are incapable of participating in FEC or Fed.Comm.Comm. proceedings, or litigation. The do not know the relevant law. They cannot afford to higher the specialized high priced attorneys who handle communications and election law matters. They cannot even afford to travel to Washington DC.

If the FEC were to refuse a request from CBS that one of its TV programs be licensed by the FEC as bona fide press, it would have the ability to contest that decision. In contrast, many individuals, if faced with hostile FEC action, would simply stop speaking, regardless of the merits of their position. And this would be very unfortunate.

Government relations and litigation budgets for many media conglomerates are huge, but only comprise a very small percentage of the overall budget. However, for small Internet companies, or individuals, which can get by with few people, and little initial investment, there is no budget for government relations and litigation. For a modestly capitalized Internet startup corporation, being forced to defend against or participate in a few regulatory proceedings or lawsuits could mean the difference between folding or succeeding.

Political people who are written about by Internet speakers may take advantage of this vulnerability. So may the "institution press".

Consequently, the "institutional press," with all their financial resources, are not as much in need of First Amendment protection as smaller political speakers. Therefore, as a matter of policy, the FEC ought to act in a manner that protects Internet speech at least as much as, if not more than, it protects the "institutional press."

VI. The FEC should remain neutral regarding competing technologies and market participants.

The course currently being pursued by the FEC may have significant effects upon the marketplace. By extending special privileges to speech in some media (print, broadcast, and cable), but not to speech in another medium (Internet), the FEC provides an economic incentive for speakers to use the privileged media. This will also divert investment and lending from the businesses which use the disfavored media to businesses which use the FEC's favored media. This works to the prejudice of persons and companies developing the technology of the penalized medium, as well as those utilizing the penalized medium.

This also decreases market efficiency. The distortion may be particularly large because the FEC is favoring older high cost media over the newer low cost media.

Also, by extending special privileges to speech by corporate institutional media, but not to smaller enterprises, and individuals, the FEC further prejudices one set of competitors, and compounds the inefficiency of the market place. The companies now favored by the FEC tend to be settled in their business plans. The new startups on the Internet are more likely to experiment with new ideas, new business models, and new technologies. The FEC is inhibiting the most innovative sector in the marketplace of ideas.

Finally, the history of the telecommunications industry should offer some guidance. That industry is heavily regulated by the Fed.Comm.Comm. Like the FEC, it regulates speech. ("Communications" is a bureaucratic word for "speech.") History shows that the companies regulated by the FCC regularly use regulatory proceedings and litigation as a means of competition. Thus, the Fed.Comm.Comm. frequently makes decisions that should more appropriately be left to the marketplace. The consequences of this are obvious. Compare the rate of innovation and price decreases in the unregulated computer and Internet industries in the last generation to the rate of innovation and price decreases in the heavily regulated telecommunications industry.

The FEC should not put itself in the position of picking winners and losers in the marketplace. The FEC should not function in a Ludditistic capacity on behalf of old, inefficient communications technologies. Yet, it is heading in that direction.

VII. Analysis of questions posed in the Notice of Inquiry.

The FEC's Notice of Inquiry poses many specific questions, including many on what the Notice of Inquiry describes as "news organizations". The thrust of this Comment is that it is unconstitutional for the FEC to even engage in a determination of what constitutes a "news organization". Nevertheless, this section addresses each question from Section 7 of the NOI individually.

> ***NOI: "Under what circumstances should the Commission regard an Internet site as a "newspaper, magazine, or other periodical publication" within the meaning of the exemption in section 431(9)(B)(i)?"***

Bad question.

As is discussed above in Section II of this Comment, 2 U.S.C. 431(a)(9)(B)(i) is unconstitutional. The FEC is asking for comment on how to enforce an illegal restraint on speech or press.

> ***NOI: "Should it make a difference whether the site owner also produces a broadcast***

or print publication?"

No.

This is, however, the position taken by many media conglomerates which own broadcast companies, print publication companies, and which want to limit competition.

NOI: "Should a site be treated as a periodical publication if the owner regularly revises or updates the site?"

Whether a person who engages in political speech uses a web site, whether that person speaks on a regularly basis, or whether that person speaks in a periodical publication, are all irrelevant to the fundamental question of whether that speech is protected by the free speech or press clause.

This is essentially another question which explores what it might mean to be "institutional press". The constitution prohibits recognition by the state of any "institutional press".

Perhaps the FEC should consider also that in many of the cases which involved licensing and censorship which were known to the drafters and ratifiers of the Bill of Rights, few would fit into the category of dailies, or even periodicals.

Tyndale was burned at the stake for publishing several versions of the Bible, not a periodical. Milton was prosecuted for publishing a single item. John Twyn was drawn and quartered before he could finish publication of a single issue item. Locke fled into exile, and published his *Letter Concerning Toleration* in 1685 in Holland. Would the FEC disqualify John Locke for not have published the *Daily Concerning Toleration*? The *New-York Weekly Journal* of John Peter Zenger was at best a temporary weekly. It was published only in the years 1733 through 1736.[52] And this was long run by colonial standards. Junius' letters only appeared in *The Public Advertiser*, which was only in business for barely over three years.[53] The issue of John Wilke's rag, *The North Briton*, that so incensed the British authorities bore the number 45.[54]

Finally, jumping to the 20th Century, the Supreme Court in Near v. Minnesota applied the free press clause to strike down a statute used to prosecute a pamphleteer. The case did not involve a newspaper of the "institutional press", but rather an occasional publication (nine issues) more nearly approximating the product of a pamphleteer.

This is the point: There is nothing in the history of American Constitutional thought to suggest that periodicity should be a criteria for qualifying for the protection of the First Amendment.

NOI: "What, if any, additional characteristics should be required?"

The only required characteristic for First Amendment protection is that a person or entity engage in political speech.

NOI: "The Commission is interested in comments on whether publication and distribution via a list serve or other widely-distributed electronic mail communication should fall within the news story exemption?"

The news story exemption is immaterial. However, email which constitutes political speech is

protected by the First Amendment.

However, putting aside other legal arguments for the moment, the FEC should also consider that historically the letter has been the medium for disseminating much of the most important information and ideas. It is also the genre most used by those who are politically or religiously persecuted.

The New Testament is comprised largely of the letters of Paul. One of John Locke's greatest works was a letter written while in exile: *A Letter Concerning Toleration*.[55] Voltaire used letters as his primarily method of speaking on political issues. John Peter Zenger wrote letters from his jail cell after his arrest, which his wife published in the *The New-York Weekly Journal*.[56] Finally, recall Martin Luther King Jr.'s *Letter from Birmingham City Jail*.[57]

Also, all of these letter writers spent time in jail or exile, or both, for engaging in speech. Indeed, for a person who is in jail, exiled, or otherwise disfavored by the censors, licensers, or regulators of his state, the letter, and the concomitant use of the mail, is often the only available means of expression.

It should also be pertinent that before the development of rapid transportation and telecommunications, large newspapers employed persons around the country, and sometimes the rest of the world, to write letters to the newspapers, which where then published. Indeed, many newspapers and broadcasters still refer to their writers and reporters as "correspondents."

Of course, any action by the FEC which discriminates between the genres of letters and stories would only compound the grounds for objection and legal challenge. But on top of all this, the FEC should recognize the vital role that letters and mail play in political expression, especially for writers who have no other method of speaking. It would be sad if the FEC were to discriminate against letters or mail.

There is another, less vital, point to be made about mail sent via Internet protocol. In the case of businesses which make money from the information business, e-mail is frequently used solely as a promotional device. It is not distributed for the purpose of influencing the outcome of an election for federal office. It is distributed for the purpose of influencing the bottom line on the annual financial statement. There is no reason for the FEC to be concerned about this.

Many businesses, including Tech Law Journal, disseminate information through web sites. Some derive revenue by selling subscriptions. (For example, the business password protects the web site, and sells passwords for an annual subscription.) Others derive revenue by carrying advertising. Some derive revenue from both sources. These businesses want to increase their revenues. One way to do this is to sell more subscriptions. Another is to boost the traffic (and hence the ad "inventory") of the site.

A business can pay other web sites or other media companies to carry paid advertising. Another way is to operate an electronic mail service. It is cheaper. For web based companies, it is often the most effective form of advertising.

> **NOI: "Should it make a difference whether recipients receive these communications without requesting them, only after requesting them, or only after paying a subscription fee?"**

No.

Again, if the content of the electronic mail is political speech, it is beyond the reach of the FEC.

Nevertheless, here are a few additional comments. First, the part of the NOI question regarding "only after paying a subscription fee" is particularly insidious. The policy underlying the First Amendment, the FECA, and Section 230 of the Telecom Act is that democratic institutions work better when citizens have access to more information upon which to make decisions about voting, and other aspects of political participation. If the FEC is only going to license electronic mail that citizens pay for, fewer people will read this mail. People will be less informed. Unless the FEC favors a more ignorant electorate, it should not adopt any requirement that there be a paid subscription.

Also, adopting such a requirement would have the effect of protecting the expensive subscription web sites from new market entrants. The FEC should neither decrease competition in the marketplace, nor pick favorites in the marketplace.

Second, if someone is sending out unsolicited electronic mail which is not political speech (sometimes referred to as "spam"), it may be a problem. However, resolving the problem properly belongs with the Federal Trade Commission and the Congress. In fact, the are many bills pending in the Congress that would regulate spam.[58] This is essentially a consumer protection question. The FEC has no general authority to protect consumers.

> ***NOI: "Questions also arise as to whether and when information distributed via these sites would be a "news story, commentary or editorial" within in the meaning of the exemption. ... The Commission invites comments on whether new rules are needed to determine whether a news organization's Internet activities fall within its legitimate press function. Are there types of web site content that should be regarded as unrelated to the press function?"***

New regulations are needed. In particular, the regulations should be amended by deleting 11 C.F.R. 100.8(b)(2). Furthermore, the FEC, in its next annual report to the Congress, should advise that 2 U.S.C. 431(a)(9) is unconstitutional, and recommend its repeal.

As is discussed in detail in Section II, above, it is altogether inappropriate for the FEC to license or recognize an institutional press, decide what constitutes a "legitimate press function" or what is "unrelated to the press function" or decide whether any particular speaker meets these FEC requirement.

> ***NOI: "Another area of campaign-related activity on the Internet is the use of "chat rooms" and other fora for interactive discussions of issues and candidates."***

First, the terms "on-line discussion" and "the use of chat room and other fora for interactive discussion" do not provide sufficient notice as to what technologies the FEC is inquiring about.

At least four broad categories of discussion could fall within the NOI language:

- Electronic mail.
- Instant messaging.
- Usenet newsgroups.
- Web based discussion: IRC, chat, discussion groups, bulletin boards, etc.

However, it is assumed here that e-mail and instant messaging are not the gist of this question. Rather,

this comment focuses on web based discussion fora.

This is so fundamentally communicative and expressive in nature that it would be repugnant to even the narrowest interpretation of the free speech or press clause to bring this within the purview of FECA. Moreover, any attempt to regulate these web sites would also crash head on into Section 230 of the Telecom Act of 1996.

A discussion group web site can be complex, intricately designed, and minutely managed. This requires time and expertise. The best example is slashdot. On the other hand, the vast majority of these discussion groups are very easy to set up, and inexpensive, if not altogether free of charge.

> ***Does the sponsor make an expenditure by providing a venue for individuals to expressly advocate on behalf of a candidate?"***

No.

There are at least eight arguments for why this is not an expenditure or contribution, and/or why it would be bad policy to make such a determination: (1) the First Amendment prohibits such a determination, (2) Section 230 of the Telecom Act prohibits such a determination, (3) nothing is given or transferred to a candidate, or expended to influence an election, (4) in the case of almost all discussion groups the expenditure or contribution is zero or de minimis, (5) it would be impossible to enforce such a determination because of the large number of discussion groups, (6) it would often be impossible to identify the "sponsor", (7) it would inhibit the growth of the Internet, and (8) such a determination would bring the FEC in public disrepute, and lessen respect for and confidence in the American electoral process.

First and second, the limits upon FEC activity imposed by the First Amendment and Section 230 have been discussed at length above, and are not reiterated here.

Third, the FEC cannot treat the "sponsor" as making a contribution or expenditure within the meaning of FECA, because, nothing is given to any candidate, party or PAC, and nothing is expended to influence any federal election. The fundamental characteristic of any successful or meaningful discussion group is the admission of postings from anybody, or at least a very large class of people. The "sponsor" then has no control over who posts, or what they say. Hypothetically, one could set up a discussion group devoted to praising Candidate A; but the first thing that will happen is that supports of Candidates B, C, and D will post their comments.

The point is that the speech in the discussion groups goes where the users take it, not where the "sponsor" wants it to go.

One case is point is the Free Republic web site. It is a discussion site "sponsored" by a man named James Robinson. He is a conservative who is very sympathetic to the Republican Party and to the candidacy of Alan Keyes. He even attempts to steer the direction of the discussion -- all in vain. George Bush and Patrick Buchanan are both frequently praised, and attacked, in the discussions. Democrats and liberals come in to post their views. Sometimes the "sponsor" blocks certain posters' posts. They re-register under new names, and continue.

Consider the following post made by a Free Republic user in response the the FEC's NOI:

> "I think it would be impossible to point to any one party or candidate as being the principal recipient of any "help" that might be offered around here. This is a pretty fractured group around here, at least as far as potential Presidential candidates are concerned. And I really don't expect to see much more unity after the Republican candidate is selected, either."[59]

Fourth, in the case of almost all discussion groups the expenditure or contribution is either nothing or de minimis. Many people and entities, including Tech Law Journal, could establish a discussion group on the web at no cost. If one already possesses a computer, Internet access, web presence provider, and software, one can easily create a discussion group.

Software for creating and operating discussion groups is available for free, for very low cost, or as a feature of bundled in office suites. For example, one can create and manage a discussion group with Microsoft's FrontPage 2000. It is included with some versions of Office 2000, is available off the shelf for about $92, and it is widely available for free as pirated software. One can design and create a discussion group in a point and click environment in a few minutes.

One can also get free discussion groups from Internet portal companies such as Yahoo!. These companies allow people to run discussion groups on their servers because in drives traffic to Yahoo! properties, and builds community. Yahoo! Clubs provides the software and servers. There is no cost to the person setting up the discussion site.

The cost to Yahoo! on a per site basis is probably a few cents per month. Yahoo! and other companies which provide free discussion groups could provide a more precise analysis. However, just make a few calculations. Assume you have a box with a 15 GB memory capacity. You give away 5 MB maximum discussion groups. If users are limited to text, this is a lot of memory. It also means bandwidth demands will be low. You can host a minimum of 3000 discussion groups on this single off the shelf server. A company like Yahoo! merely sets up the servers, the discussion group management software, and the Internet connection, and leaves the rest to its users. Yahoo! does not even read what people are posting. It just collects the advertising revenues generated by its Internet properties.

The cost per unit for a company like Yahoo! which provides free discussion groups is next to nothing. Why regulate next to nothing?

Five. There are already far too many discussion groups on the web for the FEC to engage in effective regulation. The number will only grow rapidly. Consider for example the free discussion groups offered by Yahoo! Clubs. As of January 3, 2000, there were 1,104 discussion groups listed in its main "politics" section alone. There are perhaps hundreds of thousands in total. And this is just Yahoo!

Who is going to monitor these sites for compliance with FEC rules?

Six. The FEC would be unable to identify the "sponsor" of discussion groups. First, there is the problem of anonymously created discussion groups. Second, even if the FEC knows the entire cast of characters, assigning the role of "sponsor" will be difficult in many cases. Consider the following hypothetical. A high school establishes student clubs. A government club is formed, and over time members join and depart. The local RBOC contributes computers to the club. The students create a discussion group in Yahoo! Clubs. The discussion group engages in speech which seeks to influence a federal election campaign. Who is the "sponsor"? The school? What if it does not know what the

students are posting? What if it is barred by law from regulating the speech of its students?

How about fining and enjoining the students? Which ones? What about the RBOC? It has deep pockets. But what if it does not know about, or have the capacity to control the speech of the students?

There is Yahoo!? But it only provides the box in which the discussion group is stored, and the software which runs it. It does not know or care what is being said in its hundreds of thousands of discussion groups. Does the FEC want to compel Internet companies to eavesdrop upon and censor hundreds of thousands of discussion groups?

The FEC could enjoin the box. It hosts the speech. It serves it to anyone who wants to read it. But it does not know what political speech is. It only reads digital code. It does not even speak English. It only understands UNIX, or other programming languages. Perhaps the FEC could write its own censorship software to regulate the box.

Discussion groups, and IRC chat, are essentially conversations. And like many large conversations, nobody is in charge. Nobody is the sponsor.

Seven. If the FEC would to treat discussion groups as contributions or expenditures by their "sponsors", this would inhibit the growth of Internet. No business wants to be fined or prosecuted by the federal government. The prospect of this happening is enough to chill companies from providing discussion groups. A significant and growing use of the Internet would be inhibited.

Eight. If the FEC were to determine that a discussion group "sponsor" makes a contribution or expenditure within the meaning of the FECA, this would have the effect of bringing the FEC in public disrepute, and lessen respect for and confidence in the American electoral process. For millions of ordinary citizens there are few opportunities to participate in any way in politics. The advent of the Internet, and the use of political discussion groups has given many otherwise uninvolved citizens the opportunity to talk about politics. It is deeply engrained in the minds of these people, as well as all citizens, that anyone is free to speak their minds.

Moreover, it would not matter if the FEC articulates an intricate legal argument justifying its action. Nor would it matter if the Courts upheld the action. The FEC will never be able to explain to ordinary citizens why they cannot speak.

If FEC were to clamp down on these fora, many participants would view this a political oppression. If the FEC is held in disrepute, then respect for electoral process would decrease. The FEC mission is just the opposite, to increase confidence in the democratic electoral process.

FEC should consider the hostile reaction to the lawsuit brought by the Los Angeles Times and Washington Post against the Free Republic for copyright infringement.[60] Free Republic users regularly cut and paste the entirety of news stories. The Free Republic and many of its users fervently believe that this is protected by the free speech or press clause. However, the Courts have long held that the First Amendment does not nullify copyright interests. Nevertheless, the conservative users of the Free Republic, as well as journalists and liberal law professors,[61] have criticized the actions of the L.A. Times and the Washington Post, and even the presiding Judge.

In the Free Republic matter, the L.A. Times and the Washington Post have the law on their side, and

they are still being abused. In the present matter, the FEC has no law on its side.

Some Free Republic users have posted comments on the FEC's NOI questions regarding regulating discussion groups. Here are a couple which illustrate this point.

> "This is a blatant attempt to regulate Free Speech and cannot survive close scrutiny. But it is a shot across the bow and probably the first step toward regulating the Internet, period."[62]

Another discussant had this to say:

> "As far as the FEC is concerned, they have a mandate to see that elections follow certain rules, with the exception of Liberals under any banner. The heartburn they get from the internet is because of its low cost and easy availabilty, putting it out of reach of taxing organizations. If politicians buy a TV spot, the TV station is taxed on the income. Newspaper ads, direct mail, political conventions, debates, etc., all use facilities that generate taxable income. E-mail, chat rooms, etc., don't and political websites have a minimal cost.
>
> The low cost makes it also difficult to obtain a political advantage by illegal campaign contributions, union expenditures, NEA propaganda, and coercing government employess. The less dependent on the mainstream media a candidate is for getting out his message, the smaller advantage the Liberals have.
>
> That is why the government should not control or tax the internet and why they probably will."[63]

The reference to taxation may not be clear to all readers. Whatever, it is never flattering to be compared to the I.R.S. What may be most significant about this post is that it accuses the FEC of sustaining the influence of large contributions in federal election campaigns. It accuses the FEC of violating its mission.

The FEC has not yet instituted a rule making preceding, and it is already being trashed for contemplating regulation of Internet talk. Today, the vast majority of Americans probably do not know what the FEC is. It is an inside Washington Commission that only regulates big political players -- candidates, parties, PACs, and rich donors. It does not touch upon the lives of ordinary citizens, whose only acts of political participation are to vote and to talk. If the FEC decides to regulate discussion groups, it will become known by millions of regular voters. And it will be known as the ugly and oppressive defender of large financial interests and huge media conglomerates.

Don't go there.

> ***NOI: "Are there circumstances under which the sponsor of such a forum should be responsible for statements made by persons participating in the discussion?"***

No.

This commenter is dumbfounded that the FEC would even pose this question. The FEC cannot hold a person responsible for his own political speech. Where would the FEC get the authority to hold a

person responsible for the political speech of a different person?

This would be analogous to holding a phone company responsible for statements made in a phone conversation. This would be analogous to holding Xerox responsible for a statement made on a sheet of paper copied on one of its machines. This would be analogous to holding McDonalds responsible for statements made by its customers while eating breakfast together.

Even if one assumes for the sake of argument that the FEC can treat political speech as an in kind contribution or expenditure within the meaning of the FECA, there is still no rationale for treating the speech of one person as an in kind contributions or expenditures of another person.

VIII. Conclusion.

It is unconstitutional for the FEC to recognize or give any special status to an "institutional press".

IX. Endnotes.

[1] See, First National Bank of Boston v. Bellotti, 435 U.S. 765, at 801 (1978). Also, the concurring opinion of Burger, C.J., is attached hereto as Appendix C.

[2] See, FNB v. Bellotti, 435 U.S. 765, at 801.

[3] See, FNB v. Bellotti, 435 U.S. 765, at 801. Quoting from Branzburg v. Hayes, 408 U.S. 665, at 704-705 (1972), which in turn quoted from Lovell v. Griffin, 303 U.S. 444, at 452 (1938).

[4] See, Kathleen R., in her capacity as guardian ad litem for Brandon P., a minor v. City of Livermore and Does 1 to 10, Case No. V-015266-4, filed May 28, 1998, Superior Court of California, County of Alameda, Livermore-Pleasanton-Dublin Branch. Amended Complaint dismissed without opinion, January 14, 1999. See also, Kathleen R., et. al. v. City of Livermore, Appeal to the Court of Appeal of the State of California, First Appellate District, Division 4, Appeal No. A086349, pending.

[5] Kathleen R. has filed an appeal in state court. In addition, one amicus brief has been filed by the ACLU Northern California and People for the American Way, and another by the California State Association of Counties, 48 California cities, and two library boards. See also, Tech Law Journal coverage of Kathleen R. v. Livermore.

[6] FNB v. Belloti, at 435 U.S. 798.

[7] FNB v. Belloti, at 435 U.S. 798.

[8] FNB v. Belloti, at 435 U.S. 800.

[9] FNB v. Belloti, at 435 U.S. 800-801.

[10] FNB v. Belloti, at 435 U.S. 800-802.

[11] Near v. Minnesota, 283 U.S. 697, at page 713-714 (1931). The Supreme Court held unconstitutional a Minnesota state statute that provides that anyone who engages in the business of publishing "a malicious, scandalous and defamatory newspaper, magazine or other periodical," is guilty

of a nuisance, and may be enjoined.

[12] Ronald Rotunda and John Nowak, Treatise on Constitutional Law, 2nd ed., 1992, at vol. 4, pages 112-113, ¶ 20.19.

[13] Thomas Cooley, A Treatise on the Constitutional Limitations, 8th ed., 1927, at vol. 2, page 886.

[14] If the FEC seeks authority for the proposition that it is permissible to recognize an "institutional press", it will not find it in the written opinions of the Supreme Court. However, one Justice gave a speech in support of the notion in the wake of the Watergate Affair. See, Potter Stewart, *The Free Press: The Great American Risk*, speech at Yale Law School, November 2, 1974. This speech was subsequently published in a law journal. See, Potter Stewart, *Or the Press*, 26 Hastings Law Journal 631 (1975). Out of court speeches do not constitute legal authority. Some law professors have also argued for recognition of an "institutional press." See, for example, Melville Nimmer, *Introduction – Is Freedom of the Press a Redundancy: What Does it Add to the Freedom of Speech?* 26 Hastings Law Journal 639 (1975).

[15] The laws requiring licensing of printing presses in the colonies had long since been repealed, no prosecution for seditious libel had been brought since the Zenger case, and King George III had no Colonial Communications Commission or Colonial Election Commission.

[16] Articles of Confederation, Art V, Paragraph 5. The Articles of Confederation contain no "bill of rights".

[17] See, Stanley Brubaker, *Original Intent and Freedom of Speech and Press*, published in The Bill of Rights: Original Meaning and Current Understanding, edited by Eugene Hickok, University of Virginia Press, 1991. Professor Brubaker wrote: "The debates in Congress concerning the speech and press clauses shed scant light on the question of meaning." [at page 85] Prof Brubaker continued: "Nor do we find enlightening comments in the state legislatures that considered the amendments ..." [at page 85] Prof Brubaker concluded that, "If the free speech clause had deviated from what was the established law, surely there would have been some debate about it." He continued that Blackstone's Commentaries was the best statement of the law at the time. [at pages 85-6]

[18] Some constitutional scholars have discussed whether the press guarantee is separable from the speech guarantee. See, for example, Melville Nimmer, *Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?* 26 Hastings Law Journal 639 (1975). However, the both religion clauses should also be considered along with the press clause. The first licensing of printing presses in England was instituted to prevent the printing of vernacular Bibles, which were viewed by the established church (then still in communion with Rome) as a part of the protestant threat.

[19] "There is no record of seditious libel trials in the colonial courts after Zenger's acquital." Ralph Holsinger and Jon Paul Dilts, Media Law, 3rd ed., 1994.

[20] G.M. Trevelyan, English Social History, Longmans, London, 1942, at page 80.

[21] See, generally, Anna C. Paves and Herbert Hensley Henson, *English Bible*, The Encyclopedia Brittanica, 11th ed., Cambridge University Press, 1911, at vol. 3, pages 894-905; and S.L. Greenslade, *English Versions of the Bible: A.D. 1515-1611*, The Cambridge History of the Bible, vol. 3, at pages 141-172.

[22] See generally, *William Tyndale*, The Encyclopedia Brittanica, 11th ed., Cambridge University Press, 1911, at vol. 27, pages 498-499; *William Tyndale*, The Oxford Encyclopedia of the Reformation, ed. by Hans Hilderbrand, Oxford University Press, 1996, vol. 4, at pages 189-191; Will Durant, The Reformation, Simon and Schuster, New York, 1957, at pages 533-534; and brittanica.com article on William Tyndale.

[23] See, *Index of Prohibited Books*, Oxford Encyclopedia of the Reformation, vol.2, at pages 313-314.

[24] Milton wrote *Areopagetica* in the form of a speech to the Parliament. However, he was not a Member of Parliament, and had not been invited to address the Parliament. He employed a literary device in a political essay.

[25] See, *John Milton*, The Encyclopedia Brittanica, 11th ed., Cambridge University Press, 1911, vol. 18, pages 480-492; and brittanica.com article on John Milton.

[26] See, Stanley Brubaker, *Original Intent and Freedom of Speech and Press*, published in The Bill of Rights: Original Meaning and Current Understanding, edited by Eugene Hickok, University of Virginia Press, 1991, at page 86.

[27] See, brittanica.com article on John Locke.

[28] See, Ralph Holsinger and Jon Paul Dilts, Media Law, 3rd ed., 1994, at pages 23-24.

[29] See, Clinton Rossiter, The First American Revolution, Harcourt Brace and World, New York, 1956; and brittanica.com article on John Peter Zenger.

[30] Most historians who write on this point plainly state that Junius was Fisher. See, for example, Will and Ariel Durant, Rousseau and Revolution, Simon and Schuster, New York, 1967, at pages 701-708. However, see also the brittanica.com article on Junius.

[31] See, brittanica.com article on John Wilkes; and Will and Ariel Durant, Rousseau and Revolution, Simon and Schuster, New York, 1967, at pages 701-708. John Wilkes also obtained fame for his reply to an insult from the Lord Sandwich. Sandwich said to Wilkes: "You will either die on the gallows, or of the pox." Wilkes replied: "That must depend upon whether I embrace your lordship's principles or your mistress." The Oxford Dictionary of Quotations, 3rd ed., at page 574.

[32] A. Bradford, Sentiments on the Liberty of the Press, in L. Levy, Freedom of the Press from Zenger to Jefferson 41-42 (1966) (emphasis deleted) (first published in Bradford's The American Weekly Mercury, a Philadelphia newspaper, Apr. 25, 1734). Quoted in the concurring opinion of C.J. Burger in FNB v. Belloti.

[33] David Lange, The Speech and Press Clauses, 23 U.C.L.A. Law Review, 77, at page 90 (1975). The journalist to whom he refers is Phillip Freneau. His principal target was Alexander Hamilton, a leader of the Federalist Party.

[34] William Blackstone, Commentaries on the Laws of England, London, 1765-9, in 4 volumes, at Chapter 2, Section 13. See also, brittanica.com article on Blackstone.

[35] Will and Ariel Durant, Rousseau and Revolution, Simon and Schuster, New York, 1967, at pages 701-708.

[36] See, Charles T. Jacobi, *Printing*, The Encyclopedia Brittanica, 11th ed., Cambridge University Press, 1911, at vol. 22, pages 350-359; and brittanica.com article on printing.

[37] 431 U.S. 1 at pages 21-22, footnote omitted.

[38] 431 U.S. 1 at page 23.

[39] Abrams v. U.S., 250 U.S. 616 (1919).

[40] Buckley v. Valeo, 424 U.S. 1 at pages 26-27.

[41] See, 47 U.S.C. Section 315(a). In these proceedings broadcasters seek exemption from the "equal opportunities" requirements on the grounds that their programs are "bona fide news."

[42] See, Fed.Comm.Comm. ruling in In re Request of ABC, Inc. For Declaratory Ruling, DA No. 99-2768, at http://www.fcc.gov/Bureaus/Mass_Media/ Orders/1999/da992768.doc (MS Word format).

[43] See, Fed.Comm.Comm. ruling in Access Hollywood proceeding, DA No. 97-1357, at http://www.fcc.gov/Bureaus/ Mass_Media/Orders/1997/da971357.txt.

[44] See, In Re Compuserve, FEC Advisory Opinion 1996-2, April 25, 1996.

[45] The Fed.Comm.Comm. wrote of Bill Maher: "the risk of some broadcasters abusing the exemption for partisan purposes was outweighed by the benefit to the public inherent in increased news coverage of political campaigns."

[46] Miami Herald Publishing Co. v. Turnillo, 418 U.S. 241, at page 258.

[47] Red Lion Broadcasting v. FCC, 395 U.S. 367, at page 388 (1969).

[48] For further analysis of the lack of merit of the scarcity rationale, see Peter Huber, Law and Disorder in Cyberspace, Oxford University Press, 1997, Chapter 14, *Free Speech*, at pages 165-177. See also, Richard Posner, Economic Analysis of Law, 3rd ed., Little Brown and Company, 1986, §28.3, *The Regulation of Broadcasting*, at pages 633-635.

[49] See also, brittanica.com article on James Madison.

[50] Buckley v. Valeo, 424 U.S. 1, at page 17.

[51] Buckley v. Valeo, 424 U.S. 1, at page 19.

[52] Clinton Rossiter, The First American Revolution, Harcourt, Brace and World, New York, 1956, at page 224.

[53] Will and Ariel Durant, Rousseau and Revolution, Simon and Shuster, New York, 1967, at page

705.

[54] Will and Ariel Durant, Rousseau and Revolution, Simon and Shuster, New York, 1967, at page 705.

[55] *A Letter Concerning Toleration* was written (originally in Latin under the title *Epistola de Tolerantia*) by John Locke in 1685 while in exile in Holland. He was not free to publish in King James II's England. After the Glorious Revolution of 1688 in which William and Mary came to power, he was free to return. He published the *Letter* in English in England in 1689. He still had to obtain a license. The title page reads:

A
LETTER
CONCERNING
Toleration :
Humbly Submitted, *&c*,

LICENSED, *Octob*. 3. 1689.

See, *A Letter Concerning Toleration*, edited and introduced by James H. Tully, Hackett Publishing Co., Indianapolis, IN, 1983.

[56] John Peter Zenger's first letter from jail was published in the November 25, 1734 edition of *The New-York Weekly Journal*. See, Thomas A. Bailey, The American Spirit: United States History as Seen By Contemporaries, D.C. Heath and Co., Boston, 1967, at vol. 1, at pages 77-81.

[57] Dr. King wrote his *Letter from Birmingham City Jail* over the Easter weekend of 1963 while in jail for engaging in speech which condemned racial inequality.

[58] See for example:

- S 759, Inbox Privacy Act of 1999 (Murkowski-Torricelli).
- HR 1685, Internet Growth and Development Act (Boucher-Goodlatte).
- HR 1686, Internet Freedom Act (Goodlatte-Boucher).
- HR 1910, E-Mail User Protection Act (Green).
- HR 2162, Can Spam Act (Gary Miller).

[59] Anonymous post to the Free Republic discussion group, November 29, 1999, by CubicleGuy, who listed his email address as mnich13@my-deja.com.

[60] See, Los Angeles Times, and The Washington Post Company and its wholly owned subsidiary, WASHINGTONPOST.NEWSWEEK Interactive Company v. Free Republic, Electronic Orchard, Jim Robinson, and Does 1 through 10, filed in U.S. District Court, Central District, California, September 28, 1998, Case No. 98-7840 MMM(AJWx). The Court issued a tentative ruling on November 8, 1999, which, among other things, rejected the Free Republic's argument that its republication of stories for discussion purposes is protected by the First Amendment. See also, Tech Law Journal summary of L.A. Times v. Free Republic.

[61] See, for example, Yochai Benkler, *The Free Republic Problem: Markets in Information Goods vs. The Marketplace of Ideas*, http://webserver.law.yale.edu/censor/benkler.htm, Associate Prof of Law at NYU Law School, conference paper, Yale University conference on *The New Age of Information Regulation*, April 9-11, 1999.

[62] Anonymous post to the Free Republic discussion group, November 29, 1999, by M^2.

[63] Anonymous post to the Free Republic discussion group, November 29, 1999, by Mind-numbed Robot.

Appendix I. About Tech Law Journal.

Tech Law Journal is an Internet news and documents publication with no affiliation with any corporation, group, candidate, party, political committee, or other entity.

More specifically, Tech Law Journal is a Washington DC based publication that covers legislation, litigation, and agency proceedings that affect the computer, software, Internet, and communications industries. Tech Law Journal's content includes news stories, bill summaries, and court case summaries. However, the vast majority of files published by Tech Law Journal are original documents, including drafts of bills and amendments, court complaints, briefs, and orders, and transcripts of speeches and other events. Tech Law Journal publishes solely by Internet protocol at http://www.techlawjournal.com/. It does not publish in print, by broadcast, or by cable.

Tech Law Journal is harmed by 2 U.S.C. 431(a)(9), 11 C.F.R. 100.8(b)(2), and various advisory opinions of the FEC which construe these provisions. Tech Law Journal could be further injured by adoption of regulations by the Federal Election Commission that do not afford Internet speakers the same treatment that is currently afforded print, broadcast, and cable speakers, under the freedom of speech or press clause of the First Amendment.

Tech Law Journal does not endorse or contribute to candidates for federal office. However, Tech Law Journal does write about, publish statistics on, and publish documents relevant to, people who are now, or in the future will likely be, candidates for federal office.

Tech Law Journal does not now provide an online discussion group, but probably will in the future.

Tech Law Journal is not now incorporated, but probably will be in the future.

Tech Law Journal does not now provide streaming media, but probably will in the near future. Tech Law Journal does not hold any FCC licenses. Tech Law Journal has no plans to apply for any FCC license.

Tech Law Journal holds no license to publish political speech.

Tech Law Journal has no policy for conforming with the "give reasonably equal coverage to all opposing candidates" provision of 11 C.F.R. 100.8(b)(2)(ii).