FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of

Jerry Falwell Ministries, Inc.
The Liberty Alliance, Inc.

MUR 5491

STATEMENT OF REASONS

Chairman Scott E. Thomas
Commissioner Danny L. McDonald

We voted to dismiss this matter primarily because whatever amount was expended for the Internet-based communications at issue was probably *de minimis* and not worth using Commission resources to investigate or pursue further. *See Heckler v. Chaney*, 470 U.S. 821 (1985). Furthermore, pursuing this matter would be inappropriate given an unfortunate paradox in the current state of the law created by the Commission.

At issue was whether the respondent, Liberty Alliance, made a prohibited corporate expenditure in connection with an Internet communication that expressly advocated the re-election of President Bush and contained a solicitation for contributions. The Office of the General Counsel (OGC) concluded that the respondent did not qualify for exemption from the Act's prohibition under the 'press exemption' or as a "qualified non-profit corporation" under 11 CFR 114.10, and therefore recommended the Commission find reason to believe there was a violation of the Act.

Ironically, even if OGC's conclusions were correct and none of the exemptions to the prohibition on corporate expenditures applied, had the respondent simply approached the Bush campaign and made the Internet communication at issue a coordinated effort, the activity would have been completely free from regulation. This result is illogical, yet compelled under the current regulatory scheme.

Had coordination been present, the respondent's activity would have been properly evaluated as a coordinated communication. Under the Commission's current regulations, in order to constitute a "coordinated communication," a communication must meet a three-part test set forth in 11 C.F.R. § 109.21. Pursuant to 11 C.F.R. § 109.21, a communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third party; (2) satisfaction of one of four "content" standards; and (3) satisfaction of one of six "conduct" standards. In matters such as this one involving Internet communications, the content test *cannot* be met because under the Commission's current regulations, communications covered by section 109.21 must be "public communications" as defined in section 100.26 of the regulations, and communications over the Internet are specifically excluded from that definition.[1] Consequently, coordinated Internet communications are totally exempt from regulation.

In our view, it hardly seems justifiable to pursue this respondent for doing independently what they are free to do in coordination with a campaign or committee.[2] We are hopeful the Commission will soon eliminate this incongruence in the law.[3]

7/25/05
Date

Scott E. Thomas

07-25-05
Date

Danny L. McDonald by FJ/D

[1] *Shays v. FEC*, 2005 WL 1653053 (D.C. Cir. July 15, 2005), affirmed a district court decision that invalidated the content standard of the coordinated communications regulation including the Commission's exclusion of Internet activity from the definition of "public communication " However, the "deficient rules technically remain 'on the books,'" pending promulgation of a new regulation. *Shays v FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004).

[2] Our vote in this matter is consistent with our votes in previous matters involving communications over the Internet. Where independent Internet advocacy has been involved, we have been willing to vote for OGC recommendations to find reason to believe there was a violation as long as they also included taking no further action. Where the OGC recommendation has been to simply take no action regarding such activity, we have been willing to support that approach as well. *See* MURs 5474 & 5579 (Dog Eat Dog Films, Inc., 2005)(OGC recommended no action regarding Westside, an LLC that owned website in question); MUR 5522 (Wisconsin Right to Life, Inc., 2005) (voted to find reason to believe candidate endorsement on corporate website violated the Act, but take no further action); MUR 5281 (American Muslim Council and Palestine Media Watch, 2004) (voted to find reason to believe express advocacy and solicitations of contributions on corporate websites violated the Act, but take no further action); MUR 4686 (New York State AFL-CIO, 1999) (voted to find reason to believe candidate endorsement on labor union's website violated the Act, but take no further action)

[3] We also voted to dismiss this matter because respondent Liberty Alliance, the entity responsible for the activity at issue, appears to meet the requirements for status as a "qualified nonprofit corporation," *see* 11 CFR 114.10, in the Fourth Circuit where it has its principal place of business. *See North Carolina Right to Life, Inc. v. Barlett*, 168 F.3d 705 (4th Cir. 1999), *cert denied*, 528 U.S. 1153 (2000), First General Counsel's Report at 10-11 Attempting to pursue the respondent in the District of Columbia Circuit where the legal standard may be slightly different did not seem to be worth the complications certain to ensue.