

Square Pegs & Round Holes: Applying Campaign Finance Law to the Internet - Risks to Free Expression and Democratic Values

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I. Introduction

The US Federal Election Campaign Act (FECA) regulates the contributions of corporations and individuals to political campaigns. Intended to limit the “corrupting” influence of big money and to “return the political process to the people,” the complex campaign finance rules were developed for the centralized, scarce, and expensive media of radio, television and print. The Internet is uniquely decentralized, global, abundant, inexpensive, interactive and user-controlled. It supports a diverse range of content, much of it spontaneous and independent from campaign committees and the political parties. It would be worse than ironic if rules designed to de-emphasize the unfair advantage of money and to broaden the diversity of voices meaningfully heard in the election process were applied in ways that deterred individuals from using the “electronic soapbox” of the Internet.

Initial efforts by the Federal Election Commission (FEC) to map the FECA onto these new and varied Internet communications yielded troubling results, threatening to burden — even silence — the voice of average citizens in American political life online. The FEC’s decisions were widely criticized for failing to recognize the unique aspects of the Internet. In more recent rulings, the FEC has limited or effectively reversed some of its early rulings and exempted certain Internet-based activity from regulation, for example, allowing corporations to make free Internet space available to candidates on a non-partisan basis and exempting volunteer Web-based activity from the law’s contribution limitations. Yet individual users who do not wish to “volunteer” for a particular campaign are left in legal limbo, and other questions remain.

There have been calls from some individual Commissioners for broader redefinition of the campaign finance law’s application to the Internet. In the Fall of 1999, the Commission issued a “Notice of Inquiry,” soliciting public comments on a wide range of Internet-related issues. CDT and a diverse group of public interest organizations urged the Commission to recognize — to the maximum extent

possible within the terms and exceptions of FECA —that a large portion of the political activity by individuals in cyberspace does not merit regulation, but otherwise recommended that the FEC refrain within the 2000 election cycle from trying to adopt comprehensive rules for political advocacy online. Ultimately, it may require a Congressional amendment to FECA to protect individual advocacy online and remove any cloud from this most democratic, open and inexpensive of mass media.

For those in and outside the US, the difficulties posed in applying campaign finance law to the Internet offer a case study of the sometimes fitful process by which governments worldwide are struggling to reconcile this unique medium to pre-existing laws of general applicability.

II. Characteristics of the Internet

A. The Architecture and Economics of the Internet

In evaluating the First Amendment standards applicable to any medium of communication, the US Supreme Court has long recognized that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.” In its landmark 1997 decision in *Reno v. ACLU*, the Supreme Court found that the Internet is a unique medium, distinct from broadcast, print, and cable. The Court described the speech outlets of the Internet as “vast democratic fora,” which comprise a “new marketplace of ideas.” Consequently, the Court concluded, the medium was entitled to the highest level of protection under the First Amendment.

These unique characteristics should guide the application of campaign finance rules to the Internet:

- **Decentralized and Open.** Traditional mass media are based on systems of limited distribution channels controlled by a relatively small number of entities, or gatekeepers. In contrast, the Internet is decentralized, open and distributed. It is a network of networks consciously designed to function without gatekeepers.
- **Global.** The Internet provides immediate access to information from around the world. With simple email, it is as easy and inexpensive to send a message to another continent as to the building across the street. Search engines on the World Wide Web list local and foreign sites without distinction. Those wishing to avoid government regulation can quickly “mirror” content on servers outside the reach of censors.
- **Abundant and Inexpensive.** While the architecture of mass media creates scarcity, the Internet’s architecture places little limit on the amount and diversity of information that can be made available. As the Supreme Court stated, “Unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a scarce expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds... .”
- **Interactive and User-controlled.** Unlike the one-way transmissions typical of radio and television, the Internet is bi-directional. Individuals can speak as well as listen. Unlike television and radio, the Internet is a user-controlled medium. As the Supreme Court found in striking down the Communications Decency Act, individuals are not assaulted by information on the Internet but rather enjoy an unequalled ability to direct and control the information that they come in contact with.

B. Political speech on the Internet

All of the presidential candidates use Web sites to distribute information, solicit volunteers, and highlight campaign activities. What is more important, however, is the way in which the Internet serves as a platform for informal, unorganized, grassroots political discussions of a breadth and variety rarely witnessed in the offline world. Much of the debate and discussion of candidates and issues was removed from candidate Web sites and control — conducted instead by individuals and unincorporated, informal groups.

The Internet can lower barriers to participation. Small groups and minor parties, among the first to use the Internet, are currently engaged in long-term affiliation-building activities online. Foreshadowing the significant future role of the Internet in political campaigns and the national political dialogue, the Web has been credited as a decisive factor in recent Congressional elections (most notably of challengers). The successful campaign of Jesse Ventura for governor of Minnesota is frequently cited as the leading example of how an outsider can use the Internet to overcome the advantage of money and traditional organization.

In addition to broadening the number and diversity of speakers, the Internet creates opportunities for new forms of speech. Real-time dialogues can be hosted, creating a parallel to the town hall meeting without the time and expense. Conversations can be held outside of real-time, as postings on Web sites form “threaded” discussions on specific topics, which can be archived and returned to at any time.

The Internet also provides voters with an efficient and timely method to gather detailed information about candidates. It has been suggested that many voters make uninformed choices or become frustrated and drop out of the process not because they do not care about the outcome of an election but because becoming informed takes too much effort. The Internet has particular advantages in enabling voters to obtain information, compare candidates, review voting records, and hear from third parties through easy-to-find resources. Voters can access information when they want it. They can find information on the Internet that is simply not available in traditional mediums.

Online, voters can easily check distorted candidate or organization statements. A search for a candidate name is sure to deliver not only the candidate’s views on an issue but critiques and criticisms of the candidate’s position as well as other relevant information. The expense of responding online to distorted claims made by incumbent candidates or moneyed interests is relatively low. Through linking and searching, opposing points of view and responses to a candidate’s claim will be simultaneously available to the voter.

III. The Federal Election Campaign Act

A. The Framework

The Federal Election Campaign Act (FECA), adopted in 1971 and significantly amended in 1974, seeks to quantify the cost of political speech, limit the amount of money collected and spent on campaign-related activities, and enable public scrutiny of the impact of money on campaigns and elected officials through disclosure of the identity of contributors. In general, the law establishes:

- Contribution limits: The law sets caps on individual contributions: to a candidate at \$1,000 per election; to a national party committee at \$20,000 per calendar year; and to other political committees at \$5,000 per calendar year. While “contributions” are limited, “independent expenditures” by individuals or groups are not.

- Prohibited contributions and expenditures: The law prohibits corporations, labor organizations, federal government contractors and foreign nationals from making any contributions and expenditures to influence federal elections.
- Disclosure requirements: Candidate committees, party committees and PACs must file periodic reports disclosing the money they raise and spend, and candidates must identify individuals who contribute more than \$200 per year.
- Identification requirements: While “independent expenditures” by individuals or groups are unrestricted, any communication expressly advocating the election or defeat of a candidate must identify the author by name (i.e., no anonymous advocacy).

B. The Assumptions of the Federal Campaign Finance Law

Existing campaign finance law is based on assumptions that reflect the nature of traditional mass media. First and foremost, the law assumes that speech is expensive and that therefore money inextricably determines the amount and impact of political speech. In contrast, the Internet greatly reduces the cost of speech. The effect of money is vastly diminished in the online environment.

In addition, the campaign finance law assumes that there is a distinction between speakers and listeners, that the speakers will be the candidates (and their committees and parties), and that most citizens will participate in the campaign process not by speaking but by contributing money. Under this traditional scenario, to the extent that individuals become involved in the political process as “volunteers,” it is assumed they will not be speaking, but rather will be disseminating material (mainly printed material) produced by the campaign in the form of leaflets that volunteers will stuff into envelopes or deliver door-to-door. On Internet, in contrast, anybody can be a speaker. A “volunteer” can create a Web site as good as the campaign webmaster’s. A volunteer on a well-subscribed list, an active chat room or a frequently-visited newsgroup can reach thousands of potential voters.

There are other differences between the traditional mass media and the Internet, having to do with the role of advertising. On television and radio advertisements pay for the content. By and large on television and radio, the content is not political in nature — the only way that political speech is broadcast outside of the news is in the form of very expensive paid political advertisements. On the Internet, there is a great deal of content not supported by any advertising. Most political content on the Internet is not in the form of paid political advertisements; it is in the form of freestanding Web pages. Banner ads try to attract viewers to click away from one content page to another (i.e., the candidate’s). User choice works quite differently on the Internet: On TV, if viewers feel bombarded with ads, they avoid them by clicking away from the content they wanted. On the Internet, viewers click on banner ads to go to the actual advertising. They consciously choose to abandon the content to receive the text of the ads.

IV. The FEC’s Approach to Online Activities

The FEC was quick to rule that disseminating information about federal elections through the Internet could be subject to regulation under the FECA. In 1995, the FEC ruled that a Web site distributing information, run by an independent, “virtual PAC,” was a form of “general public political advertising.” The FEC subsequently found that an individual may have to report to the government in order to create a Web page expressing support for a candidate, that hyperlinks may constitute political contributions, and that corporation’s providing free Web sites to all candidates was a prohibited contribution.

More recently, the FEC pulled back from both the specifics and the broader implications of these rulings. In cases involving Democracy Net and Election Zone, it held that sites created by both non-profit and for-profit corporations to host campaign-related material and candidates' statement on an equal basis were exempt as nonpartisan activity designed to encourage people to vote. In an opinion issued to the George W. Bush campaign, it held that expenditures incurred in creating Web sites by individuals who were "volunteers" for a campaign were exempt from the contribution limitations. Further, the use of home computer equipment by a campaign volunteer to send email would not be covered. And the FEC held that a hyperlink was "something of value" only if a Web site normally charged for similar links. hyperlinks were not otherwise charged for.

The FEC has been limited in its approach to the Internet by the structure of its authority. Either the FEC can issue "advisory opinions" limited to specific and real factual situations, or it can issue rules of general applicability after issuing a notice and giving opportunity for public comment. So far, all of the FEC's statements on the Internet have been in the context of individual requests for advisory opinions; in such cases, the FEC cannot answer hypotheticals nor can it answer questions about the actions of someone other than the party filing the query. The limitations of this process means that so far there are significant gaps in the pronouncements of the FEC regarding the Internet.

A. Creating a Web site

In 1998, in the now notorious and largely discredited Leo Smith case, the Commission ruled that a personal Web site advocating the election of Charlotte Koskoff, a Democratic challenger, over an incumbent Republican in a Connecticut district was regulated under the FECA, even though the site's creator asserted that no funds were received or expended to create the site. Accordingly, Smith was required to include his full name as creator of the Web site and indicate whether it was authorized by the Koskoff campaign. Moreover, without deciding whether the site's cost met the threshold triggering reporting requirements, the FEC noted that Smith would have to count a portion of the fee for registering the domain name and the overhead costs including hardware and software, divided by the number of sites Smith maintained. Smith seemed to be in a double-bind: If his actions in creating the Web site were completely independent of the Koskoff campaign, and if the portion of the expenses allotted to the Web site exceeded \$250 in one year's time, it would qualify as an "independent expenditure" and Smith would be required to submit reports to the FEC. On the other hand, if he was cooperating or consulting with the campaign, the Koskoff Committee would have to report his expenses as an in-kind contribution. As an in-kind contribution, the cost of the site, combined with any other donations to the Koskoff campaign from Smith, could not exceed \$1000.

In November 1999, the FEC adopted an Advisory Opinion that pulled back from some but by no means all of the broader implications of the Leo Smith advisory opinion. In an opinion issued to the campaign of George W. Bush, the FEC concluded that a "volunteer" for a political campaign can prepare a Web site on his or her own time and equipment without making a contribution.

Ironically, however, if the person who creates the Web site is not a "volunteer" controlled by the campaign, the ruling of the Leo Smith opinion would still apply: If the creation of the Web site were not completely independent, it would be an in-kind contribution, reportable by the campaign, while if it is totally independent, the same activity would be considered an independent expenditure and its creator would need to file reports with the FEC if costs exceeded a certain threshold. Nor did the FEC clarify how the costs of creating a Web site with one's home computer were to be calculated. And the Bush opinion did not reconsider the requirement that a Web site created by anyone other than a volunteer must bear the name of the person who created it.

B. Linking

Hypertext links form one of the distinguishing characteristics of the World Wide Web. In 1998, the FEC concluded that “links” constitute a thing of value and that a link on a corporate site would constitute an illegal corporate contribution. In a 1999 Advisory Opinion, the FEC ruled that links on a Web site operated by the Minnesota Secretary of State were permissible under the exemption for “nonpartisan activity designed to encourage individuals to vote or to register.” And, as noted, in the George W. Bush advisory opinion, the FEC made it clear that the issue of whether a link is a contribution turns on whether or not the owner of the Web page providing the link would normally charge for the providing of such a link.

C. Non-partisan activities and the media exemption

In 1996, the FEC ruled that online service provider CompuServe could not offer free Web sites and member accounts on a “non-partisan basis” to all federal candidates in order to allow the posting of position papers and to facilitate responding to questions from voters via email. The free accounts would be considered prohibited corporate contributions to federal candidates. In a pair of 1999 opinions, the FEC essentially reversed its CompuServe ruling, holding that DNet, a non-profit entity, and Election Zone, a for profit LLC, could post political content, including express advocacy by candidates and links to candidates’ sites.

D. Organizing and advocacy

In a 1997 advisory opinion, the FEC ruled that a non-profit entity could not announce its candidate endorsements on its public Web site. Corporations, including non-profits groups, can communicate endorsements to their members, but if they communicate to the general public it is considered an illegal corporate contribution. The FEC ruled that the group would have to institute a screening mechanism to ensure that its endorsement was only accessed by members. On the other hand, since groups can issue press releases announcing their endorsements, it would probably be permissible for a group to put such a press release on its Web site.

E. Is there room for anonymity?

The FEC’s actions appear to leave little room for anonymous campaign-related speech online, for individuals who create Web sites that advocate around elections or solicit funds (even by directing an individual to another Web site) must provide information about their sponsorship. This conclusion, and the FECA statutory requirement on which it is based, seem fundamentally incompatible with the 1995 Supreme Court decision in *McIntyre v. Ohio Elections Commission*, holding that a law against anonymous pamphleteering was unconstitutional.

F. Silencing — the use of FECA to silence non-traditional speakers

A too-rigid application of campaign finance laws may allow those most familiar with the laws — the mainstream candidates and their lawyers — to intimidate newcomers and ordinary citizens. Candidates have already begun to threaten owners of unregistered campaign-related Web sites. In 1996, Pete Wilson’s campaign sent an angry letter to the owners of a parody site demanding that they take down the site or be charged with violating election laws. In the current cycle, George W. Bush has asked the FEC for an enforcement action against Zach Exley, the creator of *gwbush.com*. The site, a parody of the official Bush site, criticizes Bush for being hypocritical on drug policy. Referring to the FEC decision in the Leo Smith case, the Bush campaign said that Exley should have registered the site as an independent expenditure and filed semi-annual reports because the costs of the site probably exceeded \$250 if the cost of computer hardware, utility costs, and software were included. If the

value of the gw bush.com site exceeded \$1,000, the Bush campaign argued, Exley must register as a political committee with the FEC and file regular reports. The Bush campaign asked for “a thorough investigation.”

G. Media exemptions

An FECA distinction rendered obsolete by the Internet is the distinction between media and non-media. To meet the FEC’s definition for the “media exemption,” one must meet several requirements: the content must be a news story, editorial, or commentary from a qualified press entity using the press entity’s routine means of distribution. This definition assumes the model of traditional mass communicators. The Internet has fostered an explosion of alternative news providers, some of which become absorbed into the mainstream media, while many have only an online presence.

V. Conclusion

The FEC is limited in what it can do by the language of FECA — the Commission cannot ignore or rewrite the statute. However, there is room within the terms and exceptions of the Act to allow much greater use of the Internet for election-related purposes by individuals and informal groups not affiliated with candidates or the political committees.

As of February 2000, the Commission was reviewing public comments in response to its Notice of Inquiry. CDT and others urged the FEC to define the costs of online activity from an individual’s home computer in a way that exempted most individual activity online, regardless of whether one was a “volunteer.” Otherwise, the large amount of individual activity on the Internet that is totally independent of a candidate or committee could fall into the independent expenditure category.

We do not advocate creating a regulation-free zone on the Internet. Fundraising and contributions through the Internet would still be regulated. Candidate and committee expenditures for Internet-based activity would still be counted. Our concerns focus on the individual and the informal organization having little or no connection with a campaign. That is where the democratizing potential of the Internet is most dramatic — and should be most unrestricted.

Sources

The Federal Election Commission is at <http://www.fec.gov>. A brief overview of the FECA is available at <http://www.fec.gov/pages/citnlist.htm>. The Notice of Inquiry on the Internet, and copies of all comments filed, are at <http://www.fec.gov/internet.html>.

The comments filed jointly by CDT, ACLU, People for the American Way, the Free Congress Foundation and others, urging the FEC to create a safe harbor for political speech by individuals, but otherwise to delay any attempt at comprehensive rulemaking, are at <http://www.cdt.org/speech/political/000106fec.shtml>.

Former FEC Commissioner Trevor Potter has been updating his excellent summary of FEC Advisory Opinions affecting the Internet, “The Internet and Federal Election Law,” http://www.wrf.com/publications/election/the_internet.html.

The Brookings Institution has collected materials on campaign finance, including its relation to the Internet, at http://www.brook.edu/gs/cf/cf_hp.htm.

The Democracy Online Project at George Washington University is building an information base about campaign-related Web usage, <http://www.democracyonline.org>.