

# FIRED UP! IN THE BLOGOSPHERE: INTERNET COMMUNICATIONS REGULATION UNDER FEDERAL CAMPAIGN FINANCE LAW

## I. INTRODUCTION

In March 2005, Jean Carnahan and Roy Temple began Fired Up! Missouri, a political website—or, more precisely, a political *blog*—that seeks “to keep Missourians informed and united in the fight for responsible government, strong communities, and secure families.”<sup>1</sup> Their blog is a mix of original contributions from the authors and hyperlinks to other news articles and websites of interest.<sup>2</sup> Fired Up! can be accessed as easily as any other website, though readers can, if they choose, register with the site for free, which allows them to post their own comments and hyperlinks directly to the site.<sup>3</sup> Podcasts are available for free download.<sup>4</sup> Already, Fired Up! has expanded by creating state-specific websites for Maryland and Washington, as well as a national site.<sup>5</sup> In short, writes Carnahan, Fired Up! is “a launching pad for community action that grows out of our discussions and concerns.”<sup>6</sup>

Despite Fired Up!’s laudable mission, there is little doubt that the political content of the blog is of a decidedly partisan nature. This should come as no surprise: Carnahan is a former Democratic senator from Missouri, and Temple is a former executive director of the Missouri Democratic Party who also served in former Missouri Governor (and late husband of Jean) Mel Carnahan’s administration.<sup>7</sup> Fired Up! became increasingly well known for its “withering attacks on Republican officials in the state and in Congress,” chief among them Missouri Governor Matt

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1. Jean Carnahan et al., Who We Are, Fired Up! Missouri, <http://www.firedupmissouri.com/whowere> (last visited Dec. 30, 2005).

2. Fired Up! Missouri, <http://www.firedupmissouri.com/> (last visited Dec. 30, 2005).

3. Fired Up! Missouri, <http://www.firedupmissouri.com/user/register> (last visited Dec. 30, 2005).

4. Fired Up! Missouri, <http://www.firedupmissouri.com/templetantrum> (last visited Dec. 30, 2005).

5. Sam Hananel, *Regulators Give Press Exemption to Missouri Political Blog*, KANSAS CITY STAR, Dec. 1, 2005, available at <http://www.kansascity.com/mld/kansascity/news/politics/13304974.htm>.

6. Jean Carnahan, A Message From Jean Carnahan, Fired Up! Missouri, <http://www.firedupmissouri.com/jean> (last visited Dec. 30, 2005).

7. Fired Up! Missouri, <http://www.firedupmissouri.com/bio-jean>, <http://www.firedupmissouri.com/bio-roy> (last visited Dec. 30, 2005).

Blunt and his father, U.S. House majority leader Roy Blunt.<sup>8</sup> But if Fired Up! were no different than a partisan political advertisement on the Internet, then it might be subject to regulation under the Federal Election Campaign Act of 1971 (hereinafter FECA).<sup>9</sup> Could the costs that Fired Up! incurred in producing and collecting commentary and news and posting it to the web, not to mention its endorsing and soliciting contributions to Democratic candidates for office, be considered “expenditures” or “contributions” under FECA, and therefore be subject to disclosure and limitation requirements?<sup>10</sup>

Before we can develop an answer to the Fired Up! question, we should have an understanding of what a “blog” is, and why they have become so important in politics. The term “blog,” derived from “web log,” is nothing more than a website that contains commentary and hyperlinks that are constantly changing and being updated, usually by one individual, and usually on a several-times-daily basis.<sup>11</sup> What separates a blog from a traditional website is its chronological arrangement of information, added in discrete intervals known as “posts.”<sup>12</sup> Today, perhaps the most important feature of a blog is that it is almost always free or very inexpensive to begin and maintain one.<sup>13</sup> In other words, virtually anyone with an opinion on politics and access to the Internet can start a blog and maintain it as her schedule allows, though blogging is increasingly becoming a full-time endeavor.<sup>14</sup> For many, blogging has even become a profession, sometimes a very lucrative one.<sup>15</sup>

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8. Hananel, *supra* note 5.

9. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at scattered sections of 2, 18, and 47 U.S.C.).

10. These terms embrace any gift of money or “anything of value” given for the purpose of influencing a federal election. *See* 2 U.S.C. §§ 431(8)(a), (9)(a) (2000); 11 C.F.R. §§ 100.52(a), 100.111(a) (2005).

11. Merriam-Webster’s defines a blog as “a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer.” Though Webster’s added “blog” in 1999, the term did not appear in the Oxford English Dictionary until 2003. Alan R. Nye, *Blog Wars: A Long Time Ago in an Internet Far, Far Away . . .*, 20 ME. B. at 94, 102 (2005); Daniel Lyons, *Attack of the Blogs*, FORBES, Nov. 14, 2005, at 128, 138.

12. Gary O’Connor & Stephanie Tai, *Legal and Appellate Weblogs: What They Are, Why You Should Read Them, and Why You Should Consider Starting Your Own*, 5 J. APP. PRAC. & PROCESS 205, 206 (2003). Posts to blogs are often organized by topic, as they are on Fired Up!; a topical organization of posts is sometimes referred to as a “thread.”

13. *Id.* at 212. *See also* Lisa Sink, *Could Blogs Get Tangled in Web of Ethics Rules?*, MILWAUKEE J. SENTINEL, Jan. 29, 2006, at A1 (“Most bloggers spend less than \$150 a year . . . [b]ut the more popular a blog gets, the more bandwidth is needed and the more expensive it gets.”).

14. *See* Clive Thompson, *Blogs to Riches: The Haves and Have-Nots of the Blogging Boom*, NEW YORK, Feb. 20, 2006, at 26.

15. Ana Marie Cox, creator of the popular political blog Wonkette (<http://www.wonkette.com>), published a best-selling novel based on her blog’s role in uncovering a beltway sex scandal. *See, e.g.,*

Americans are increasingly turning to blogs, especially political blogs, as a source of news. In 2005, sixty-seven percent of adults used the Internet.<sup>16</sup> Half of them used the Internet for political purposes during the 2004 election—from determining candidate positions on issues, to checking the validity of rumors, to reading online newsletters.<sup>17</sup> Approximately eleven million adults used political blogs to get news during the 2004 presidential election,<sup>18</sup> with eighteen percent of Americans citing the Internet as their primary source of election news.<sup>19</sup> Ken Mehlman, chairman of the Republican National Committee, succinctly summarized these data when he remarked that “[t]he effect of the Internet on politics will be every bit as transformational as television was.”<sup>20</sup> The sheer volume of blogs on the Internet<sup>21</sup> and the rate at which the appearance of new blogs is accelerating<sup>22</sup> suggest that their full impact may yet to be realized.<sup>23</sup>

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Toby Young, *Below the Beltway*, SLATE, Jan. 20, 2006, <http://www.slate.com/id/2134565/>; Rosen, *infra* note 22. Cox is currently the Washington editor for Time.com. See also Alexia Garamfalvi, *The Anonymous Anti-Hero*, LEGAL TIMES, Sept. 7, 2006, <http://www.law.com/jsp/article.jsp?id=1157557741781> (noting the success of Jeremy Blachman, a law student who turned his blog, Anonymous Lawyer, into a book and possibly a television series); Thompson, *supra* note 14 (detailing the rise of a few elite millionaire bloggers, but also noting that “[m]ost bloggers toil in total obscurity”).

16. Pew Internet & American Life Project, “How Women and Men Use the Internet,” Dec. 28, 2005, available at [http://www.pewinternet.org/pdfs/PIP\\_women\\_and\\_men\\_online.pdf](http://www.pewinternet.org/pdfs/PIP_women_and_men_online.pdf), at i.

17. Burns Announces Support for Online Freedom of Speech Act, STATES NEWS SERVICE, June 6, 2005 (“[B]y a 10 to 1 margin, these Americans said that the Internet was a positive addition to public debate in the 2004 campaign.”). See also Joe Garofoli, *Candidates and Voters Relying More on Internet*, S.F. CHRON., Jan. 18, 2007, at A2 (statistics for 2006 midterm elections, reflecting rise in use of Internet as news source).

18. Jessica Mintz, *When Bloggers Make News—As Their Count Increases, Web Diarists are Asking: Just What are the Rules?*, WALL ST. J., Jan. 21, 2005, at B1.

19. Pew Internet & American Life Project, “Internet: The Mainstreaming of Online Life,” available at [http://www.pewinternet.org/pdfs/Internet\\_Status\\_2005.pdf](http://www.pewinternet.org/pdfs/Internet_Status_2005.pdf), at 68.

20. Adam Nagourney, *Internet Injects Sweeping Change into U.S. Politics*, N.Y. TIMES, Apr. 2, 2006, § 1, at 1.

21. In early October 2005, the *Washington Post* reported that there were fifteen million blogs on the Internet. Yuki Noguchi, *Cyber-Catharsis: Bloggers Use Web Sites as Therapy*, WASH. POST, Oct. 12, 2005, at A1. But see *infra* note 22.

22. Just one month later, Forbes put the number of active blogs at twenty million, and noted that 100,000 new blogs are created per day, or more than one per second. Lyons, *supra* note 11, at 129. Compare Jeffrey Rosen, *Your Blog or Mine?*, N.Y. TIMES MAG., Dec. 19, 2004, at 24 (five million active blogs with 15,000 added daily in December 2004). Lyons and Rosen both derived their numbers from the blog-tracking website Technorati, <http://www.technorati.com>.

23. Not everyone agrees, however. One commentator suggests that “political reporters will turn on bloggers if the promised revolution doesn’t materialize in the form of a Democratic sweep in the midterms. We are probably just under five months away from a wave of coverage positing that bloggers weren’t that powerful after all.” John Dickerson, *The Markos Regime*, SLATE, June 12, 2006, <http://www.slate.com/id/2143502/>.

But by 2005, the term “blog” had yet to enter the legal lexicon in significant measure.<sup>24</sup> One court defined a blog as “[a] Web site (or section of a Web site) where users can post a chronological, up-to-date e-journal entry of their thoughts.”<sup>25</sup> The D.C. Circuit, in its (in)famous *Judith Miller* opinion, took a less than favorable view of what it called “the stereotypical ‘blogger,’ sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way . . . .”<sup>26</sup> In 2005, the Supreme Court cited a law professor’s blog in its landmark sentencing guideline decision, *United States v. Booker*.<sup>27</sup>

There is perhaps no better example of an impending collision between blogs and the law than the dubious legal nexus between political bloggers (collectively, the “blogosphere”) and federal election law. According to one commentator, the blurring of the line between journalists and others, particular bloggers, is having “ripple effects” in the world of campaign finance, creating a “possibility of some significant regulation of blogging activity.”<sup>28</sup> To take an obvious example, in 2004, \$14 million was spent on Internet campaign advertising, a 3000% increase over 2000.<sup>29</sup> Since many blogs carry such advertising, are bloggers compelled under campaign

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24. A January 29, 2006 search of Westlaw’s federal case database with the query “blog! or weblog” yielded a scant seventeen cases.

25. *In re Stevens*, 15 Cal. Rptr. 3d 168, 173 n.3 (Cal. Ct. App. 2004).

26. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979 (D.C. Cir. 2005) (Sentelle, J., concurring). Judge Sentelle is apparently not alone in his diminutive view of bloggers. At a hearing before the House Administration Committee, Congressman Vernon Ehlers (R-Mich.) said to Michael Krempasky, director of the conservative blog RedState.org, “[y]ou look remarkably normal for [a] blogger[.]” *Hearing on Political Speech on the Internet: Should it Be Regulated?, Before the H. Comm. on Administration*, 109th Cong. 75 (2005) [hereinafter *Hearing on Political Speech*]. Krempasky replied, “Sir, you look remarkably normal for a congressman.” *Id.*

27. 543 U.S. 220, 277 n.4 (2005) (Stevens, J., dissenting in part). Justice Stevens cited Professor Douglas Berman’s Sentencing Law and Policy blog, which has also been cited by at least four other federal appellate courts and more than ten federal district courts. See Leigh Jones, *Blogging Law Profs Assault Ivory Tower*, NAT’L L.J., Feb. 27, 2006, at P1. To be fair, Professor Berman is probably not the “stereotypical blogger.” In fact, many law professors have created their own blogs, which operate as depositories of a variety of legal scholarship that is typically more current than the articles published in traditional law reviews. See generally *id.* (finding that 182 law professors have blogs, and that most law schools have at least one blogger on the faculty); Nye, *supra* note 11, at 107–08; O’Connor & Tai, *supra* note 12, at 206 n.3; Rosen, *supra* note 22, at 26. In April 2006, Harvard Law School hosted a two-day symposium on the effects of blogging on legal scholarship. See Symposium, *Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 WASH. U. L. REV. \_\_\_\_ (forthcoming 2006).

28. Richard L. Hasen, *The Ripple Effects of the FEC’s Rules on Political Blogging: Why They Will End Up Undermining Limits on Corporation and Union Campaign Finance Activities*, FindLaw’s Writ (Apr. 5, 2005), [http://writ.findlaw.com/commentary/20050405\\_hasen.html](http://writ.findlaw.com/commentary/20050405_hasen.html).

29. Editorial, *Cyber Loophole*, WASH. POST, Oct. 11, 2005, at A16.

finance laws to meet disclosure requirements and contribution limits?<sup>30</sup> What about bloggers with close ties to federal candidates?

This Note will examine the state of campaign finance law governing political blogs on the Internet. In Part II, I will discuss the history of federal campaign finance law, paying special attention to a recent opinion from the D.C. Circuit, *Shays v. FEC*,<sup>31</sup> as well as Congressional responses to the decision and the FEC's advisory opinion on the status of Fired Up!. Then, in Part III, I will weigh and consider the analysis of the possible regulation of political blogs from a variety of sources, including campaign finance law scholars, practitioners, and the bloggers themselves. Finally, in Parts IV and V, I will explore the FEC's final rulemaking and the work that remains to be done in this complex and important area of the law, and propose some alternatives to the current solution.

There is nothing less at stake for Internet communication and federal campaign finance law than the future of free speech in an ever-evolving and transforming democratic system of government. Fired Up! Missouri is a crucial outpost in this new frontier. In the words of Jean Carnahan, "I view the expansion of the Internet in the political discourse as an important civic space."<sup>32</sup> The issue of whether her blog should be regulated reverberates across party lines, across state borders, and across generations of politicians, members of the media, and their common constituent, the American voter.

## II. HISTORY

### A. Overview

The Fired Up! problem began with a district court decision, *Shays v. FEC*,<sup>33</sup> in which the court struck down several regulations that had carved out a safe harbor for bloggers within the Bipartisan Campaign Reform Act's (hereinafter BCRA) regulatory framework.<sup>34</sup> The district court in *Shays* held that the FEC's interpretation of the statutory terms

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30. *Hearing on Political Speech*, *supra* note 26, at 59 (Blogger Duncan Black testified, "I run advertising and [I've] accepted paid advertising on behalf of Federal campaigns.").

31. 414 F.3d 76 (D.C. Cir. 2005).

32. Hananel, *supra* note 5.

33. 337 F. Supp. 2d 28 (D.D.C. 2004).

34. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified primarily in scattered sections of 2 and 47 U.S.C.A. (West 2005)). BCRA is known more commonly as the McCain-Feingold Act, after the Act's Senate sponsors, Sens. John McCain (R-Ariz.) and Russell Feingold (D-Wisc.); Christopher Shays (R-Conn.) and Martin Meehan (D-Mass.), plaintiffs in *Shays*, were the House sponsors of BCRA.

“electioneering communications”<sup>35</sup> and “coordinated communications”<sup>36</sup> (terms which might have arguably embraced a political blog run by prominent Democrats, thus exposing the blog to regulation) did not comport with the clear mandate of BCRA to keep “soft money,” or money given to political parties rather than directly to candidates, out of federal elections.<sup>37</sup> The circuit court subsequently upheld the district court’s invalidation of fifteen relevant regulations.<sup>38</sup> For Fired Up! and other political blogs, perhaps the most important of these defeated regulations was the FEC’s exclusion of “communications over the Internet” from the definition of “public communication.”<sup>39</sup> Moreover, recent attempts by Congress to pass new legislation governing Internet communications (including blogs) under prevailing campaign finance laws have so far failed.<sup>40</sup> In November 2005, Fired Up! received clarification of its status from the FEC in an advisory opinion that, far from settling the law, raised new questions leading up to the 2006 midterm elections.<sup>41</sup> Finally, on April 12, 2006, the FEC promulgated new regulations at the behest of the *Shays* court.<sup>42</sup>

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35. 2 U.S.C. § 434 (Supp. 2003).

36. *Id.* § 441a(a)(7)(B).

37. *Shays*, 337 F. Supp. 2d at 54–129. For the Supreme Court’s definition of soft money, see *McConnell v. FEC*, 540 U.S. 93, 122 (2003) (“[d]onations made solely for the purpose of influencing state or local elections [which are] therefore unaffected by FECA’s requirements and prohibitions”) In 1995, the FEC ruled that parties could also use soft money for get-out-the-vote drives and generic party advertising. See FEC Advisory Op. 1995–25 (1995), available at <http://ao.nictusa.com/ao/no/950025.html>.

38. *Shays v. FEC*, 414 F. 3d 76, 115 (D.C. Cir. 2005).

39. *Shays*, 337 F. Supp. 2d at 65 (invalidating 11 C.F.R. § 100.26 (2003)).

40. Internet Free Speech Protection Act, H.R. 4900, 109th Cong. (2d Sess. 2006) (exempting “Internet site[s] or services[s]”); H.R. 4389, 109th Cong. (1st Sess. 2005) (removing non-coordinated money spent on Internet commentary from the definition of “expenditure” and providing special protection for “Meet Up” services); Internet Anti-Corruption and Freedom of Speech Protection Act, H.R. 4194, 109th Cong. (1st Sess. 2005) (excepting only certain kinds of “communication made over the Internet . . . [including] corporation[s] . . . whose principal purpose is operating a web log”); Online Freedom of Speech Act, H.R. 1606, 109th Cong. (1st Sess. 2005) (broadly excepting all “communications over the Internet”) (later inserted into Pence-Wynn 527 Fairness Act, H.R. 1316, 109th Cong. (1st Sess. 2005) (not enacted)). These four pieces of proposed legislation are discussed in depth in Section II.C. See *infra* notes 128–51 and accompanying text.

41. FEC Advisory Op. 2005-16 at 1, available at <http://ao.nictusa.com/ao/no/050016.html>.

42. Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, and 114).

*B. A Brief History of Federal Campaign Finance Law*<sup>43</sup>

The purpose of this section is not to present an exhaustive catalogue of campaign finance law's evolution. Indeed, the law is now so sprawling and complex that it would command entire volumes.<sup>44</sup> Rather, my goal in this section is to illustrate how eliminating the influence of money has become the primary focus of campaign finance law. Moreover, it is important to realize that regulating money—which, according to the Supreme Court, is equivalent to speech in the context of elections—is in tension with another vital component of speech, namely a free press, which today is increasingly taking the form of blogs on the Internet.

Beginning with FECA in 1971, Congress has repeatedly sought to reduce the influence of large monetary contributions in federal elections and, similarly, the appearance of impropriety that such contributions bring.<sup>45</sup> These efforts have not been completely successful. Candidates and parties have consistently found loopholes in the law, creating exemptions where Congress intended none.<sup>46</sup> But Congress and the FEC have always recognized a blanket exemption from the law for media outlets, an exclusion known simply as the “press exemption.”<sup>47</sup>

Portions of FECA were struck down by the Supreme Court in 1976 in its controversial landmark decision, *Buckley v. Valeo*.<sup>48</sup> The Court was primarily concerned with FECA's potential intrusion into free speech and freedom of association,<sup>49</sup> but the fact that the Court remained divided on

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43. The history of federal campaign finance law surely does not begin with FECA. For a brief survey of pre-FECA campaign finance law history, see *McConnell*, 540 U.S. at 115–17.

44. For starters, see DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* (2d ed. 2001). For a practitioner-oriented approach, see ROBERT F. BAUER, *MORE SOFT MONEY HARD LAW: THE SECOND EDITION OF THE GUIDE TO THE NEW CAMPAIGN FINANCE LAW* (2004).

45. The “appearance of corruption” language first appeared in *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (“[T]he primary interest served by the limitations and, indeed, by the Act as a whole, is the prevention of corruption and the *appearance of corruption* spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office.”) (emphasis added). See *infra* notes 48–50 and accompanying text.

46. See Gary J. Andres, Op-Ed., *Reforming Reform: Unintended Consequences of Campaign Law*, WASH. TIMES, Mar. 2, 2006, at A19.

47. 2 U.S.C. § 431(9)(B)(i). The exemption covers “[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate. . . .” 11 C.F.R. §§ 100.73, 100.132. Additionally, while this Note will refer to § 431(9)(B)(i) as “the press exemption,” some quoted sources use “press” and “media,” as well as “exemption” and “exception,” interchangeably.

48. 424 U.S. 1 (1976).

49. *Id.* at 52, 57 (ceiling on personal expenditures “imposes a substantial restraint on the ability

many important issues resulted in a perplexing array of concurring and dissenting opinions.<sup>50</sup> However, the press exemption was one of the few legal constants throughout the following decades' congressional and judicial attempts to grapple with the competing values of FECA.<sup>51</sup>

After *Buckley* upheld limits on campaign contributions, donors looked for new channels through which to fund candidates.<sup>52</sup> The method of choice became donations to political parties, rather than to candidates themselves, because parties were not subject to FECA's contribution limits so long as the money was spent on generic campaign activity like get-out-the-vote initiatives.<sup>53</sup> Money donated in this fashion came to be known as soft money, and the legality of soft money was eventually challenged in two Supreme Court cases. The first, *Colorado Republicans I*, held that the First Amendment protected unlimited expenditures by political parties.<sup>54</sup> The second opinion, *Colorado Republicans II*, held that certain arrangements between parties and candidates, in which a candidate essentially received unregulated soft money from his or her party and

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of persons to engage in protected First Amendment expression. The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues . . ."; limits on campaign expenditures invalid because "it is not the government, but the people—individually and as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign").

50. See, e.g., *id.* at 244 (Burger, C.J., concurring in part and dissenting in part) (All statutory contribution and expenditure limits should be expunged because "[t]he Court's attempt to distinguish the communication inherent in political *contributions* from the speech aspects of political *expenditures* simply 'will not wash.'"); *id.* at 264–66 (White, J., concurring in part and dissenting in part) (All contribution and expenditure limits are valid because they "eradicate the hazard of corruption," "free [candidates] to communicate in more places and ways unconnected with the fundraising function," and "assure that only individuals with a modicum of support from others will be viable candidates."); *id.* at 289 (Marshall, J., concurring in part and dissenting in part) (Limits are "a device to reduce the natural advantage of the wealthy candidate [and] provid[e] some symmetry to a regulatory scheme that otherwise enhances the natural advantage of the wealthy."); *id.* at 290 (Blackmun, J., concurring in part and dissenting in part) (finding no "principled constitutional distinction between the contribution limitations . . . and the expenditure limitations"). Justice Rehnquist also wrote an opinion concurring in part and dissenting in part. *Id.*

51. The legislative history of the press exemption, though sparse, makes it clear that it was a crucial part of the regulatory framework. FECA was not intended to "limit or burden in any way the first amendment freedoms of the press." and sought to protect "the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. REP. NO. 93-1239, at 4 (1974). Obviously, however, Internet communications of any sort were not then embraced by the language "and other media." See also 15 U.S.C. §§ 1801–04 (2000) (exempting press from antitrust laws); 47 U.S.C. § 315(a) (2000) (exempting broadcast news from equal time requirements for candidates).

52. Andres, *supra* note 46, at A19.

53. See *McConnell v. FEC*, 540 U.S. 93, 123–26 (2003) (recognizing that soft money given to political parties was exempt from FECA, that soft money expenditures by parties increased from five percent in 1984 to forty-two percent in 2000, and that FECA was thus circumvented).

54. *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996).



exercised limited control over how the money was spent, should be treated as any other coordinated expenditure under the *Buckley* framework.<sup>55</sup> While both opinions dealt with how soft money was spent, neither addressed the problem of how it got into parties' coffers in the first place. Thus, the soft money continued to flow.

But soft money was eventually outlawed for good (at least in theory) by BCRA.<sup>56</sup> Nearly three decades after FECA, Senator John McCain, still stinging from a nasty loss in the 2000 Republican presidential primary (in which eventual winner George W. Bush used "issue ads" against him in key battleground states),<sup>57</sup> joined with Senator Russ Feingold to produce BCRA. Marshalling a groundswell of popular support for election reform, McCain and Feingold, along with their counterparts Shays and Meehan in the House, led the way for BCRA's passage through Congress.<sup>58</sup> By its completion, BCRA was a massive, complex piece of legislation.<sup>59</sup> President Bush signed the measure into law on March 27, 2002, putting a remarkable and somewhat ironic capstone on a political tussle that had spanned more than two years.<sup>60</sup>

Congress passed BCRA primarily to close two large loopholes in the existing federal campaign statute.<sup>61</sup> First, BCRA sought to eliminate soft money entirely.<sup>62</sup> Soft money had become the preferred method of circumventing FECA, and the practice of soliciting and spending soft money had grown quite sophisticated by the 1990s.<sup>63</sup> To an increasing

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55. *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001).

56. See, e.g., Michael Munger, *Unintended Consequences 1, Good Intentions 0*, LIBR. ECON. & LIBERTY, Jan. 9, 2006, <http://www.econlib.org/library/Columns/y2006/Mungergoodintentions.html> ("BCRA has been a failure . . . 1. It actually enhances the power of narrowly focused, highly organized and well-funded special interests. 2. It reduces the accountability of those interests by encouraging those groups to disguise their identities. 3. It raises a nearly impenetrable financial force field of protection around incumbents.")

57. See Richard H. Davis, Op-Ed., *The Anatomy of a Smear Campaign*, BOSTON GLOBE, Mar. 21, 2004, at C12.

58. See Recent Case, *District Court for the District of Columbia Invalidates Regulations Implementing Bipartisan Campaign Reform Act*, 118 Harv. L. Rev. 2453 (2005).

59. Brian C. Anderson, *The Plot to Shush Rush and O'Reilly*, CITY J., Winter 2006, at 16. ("[By] amending the already baffling campaign-finance rules . . . [BCRA's] dizzying dos [sic] and don'ts, its detailed and onerous reporting requirements of funding sources—which require a dense 300-page book to lay out—have made running for office, contributing to a candidate or cause, or advocating without an attorney at hand unwise and potentially ruinous."); see also James Bopp, Jr., Op-Ed., *Reformzilla*, WALL ST. J., Jan. 12, 2006, at A12 (describing BCRA as a virus that continues to mutate).

60. See *supra* note 34.

61. *Shays v. FEC*, 414 F.3d 76, 79 (D.C. Cir. 2005).

62. "The ban on soft money defines the legislation." BAUER, *supra* note 44, at 1 n.2 (quoting Sen. Feingold) (citations omitted). The term "soft money" is an inelegant legal term of art, one that did not appear in the United States Code until BCRA was passed. *Id.* at 1.

63. *McConnell v. FEC*, 540 U.S. 93, 124–32 (2003).

extent, corporations, unions, and other large donors funneled their contributions through political parties, which then used the money to support the election of their candidates in various ways.<sup>64</sup> Second, the Act regulated “issue ads,” described by the *Shays* court as “ostensibly issue-related advocacy functioning in practice as unregulated campaign advertising.”<sup>65</sup> The two issues are somewhat related, since soft money could be pumped into issue ads without implicating FECA’s disclosure requirements and contribution caps.<sup>66</sup>

Moreover, two portions of BCRA appeared to speak directly to the issue of Internet communication, including blogs. First, the Act prohibits or places disclosure requirements on certain kinds of “electioneering communications” (otherwise known as issue ads, though the language is necessarily broad to encompass a wide variety of activities).<sup>67</sup> Second, it seeks to include “coordinated communications” (specifically, “public communication”<sup>68</sup> financed by outside groups but coordinated with a candidate) as a garden-variety “contribution” to a candidate, thus subjecting this type of communication to regulation as well.<sup>69</sup> However, in the nascent days of BCRA, the FEC interpreted the statute narrowly. Its rule interpreting “electioneering communications” did not apply to “communications over the Internet, including electronic mail[.]” instead it applied only to traditional broadcast communications.<sup>70</sup> Moreover, the rule interpreting “public communication” provided a specific exemption for “communications over the Internet.”<sup>71</sup> Bloggers, at least in the early days of the BCRA regime, appeared to be in the clear.<sup>72</sup> The Court’s most recent campaign finance decision, *Randall v. Sorrell*,<sup>73</sup> struck down Vermont campaign contribution limits as impermissibly low. Though not directly relevant to the issue of electioneering communications, the case is significant, as Professor Hasen points out, because it is the first campaign finance case decided by Chief Justice Roberts and Justice Alito, and it shows that they are willing to uphold the basic *Buckley* framework.<sup>74</sup> It is

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64. *Id.*

65. *Shays*, 414 F.3d at 79.

66. BAUER, *supra* note 44, at 67.

67. It includes “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office. . . .” 2 U.S.C. § 434(f)(3)(A)(i) (Supp. 2003).

68. *Id.* § 431(22).

69. *Id.* § 441a(a)(7)(A)–(B)(i) (2000).

70. 11 C.F.R. § 100.29(c)(1) (2003); BAUER, *supra* note 44, at 77.

71. 11 C.F.R. § 100.26 (2003); BAUER, *supra* note 44, at 68.

72. *See supra* note 71 and accompanying text.

73. 126 S. Ct. 2479 (2006).

74. *See Hasen, infra* note 223, at 1.

also significant, as Professor Richard H. Pildes adds, because it shows that “the Court views itself as having an essential role to play in preserving the *structural integrity of the democratic process*.”<sup>75</sup>

### 1. *Coordinated Communications*

“Coordination” was a concern even before BCRA. An early anti-coordination rule under FECA spoke to situations in which an “expenditure” would be regulated as a regular contribution to a candidate if it were made “in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate . . . .”<sup>76</sup> Yet, it was not clear, at least initially, how this rule would operate apart from the rules regulating an ordinary direct contribution.<sup>77</sup> With the rise of soft money contributions in the 1990s, especially contributions used to finance issue ads, reform of the coordination rules seemed inevitable.<sup>78</sup> But rather than prescribe a new rule explicitly in the text of BCRA, Congress instead hammered out a compromise to “direct the FEC to develop [one].”<sup>79</sup>

Before the FEC could promulgate a new rule, the Supreme Court heard another challenge to the federal statute in the landmark decision *McConnell v. FEC*.<sup>80</sup> This time around, the statute emerged largely unscathed.<sup>81</sup> The Court, erring on the side of stronger restrictions, held that coordination rules should cover all expenditures save those that are “made totally independently of the candidate and his campaign,”<sup>82</sup> and that such a rule would not place “great[] restraints on the freedom of speech and association.”<sup>83</sup> Moreover, the Court cautioned, “[w]e are under no illusion that BCRA will be the last congressional statement on the matter. Money,

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75. Posting of Richard H. Pildes, PILDES@juris.law.nyu.edu, to election-law@majordomo.lls.edu (June 26, 2006) (on file with author).

76. 2 U.S.C. § 441a(a)(7)(A)-(B)(i).

77. Robert F. Bauer, *The McCain-Feingold Coordination Rules: The Ongoing Program to Keep Politics Under Control*, 32 FORDHAM URB. L.J. 507, 509 (2005).

78. *Id.* at 512.

79. *Id.* The only guidance Congress gave was that the rule reflect consideration of four factors: “(1) payments for the republication of campaign materials; (2) payments for the use of a common vendor; (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and (4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.” Pub. L. No. 107-155, 116 Stat. 95 (2002).

80. 540 U.S. 93 (2003).

81. *Id.* at 224 (“In the main we uphold BCRA’s two principal, complementary features: the control of soft money and the regulation of electioneering communications.”).

82. *Id.* at 221 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

83. *Id.* (quoting *Buckley*, 424 U.S. at 44).

like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.”<sup>84</sup>

The FEC eventually promulgated a new coordination rule once Congress and the Supreme Court had had their say.<sup>85</sup> Though the rule was complex, it essentially put forth a three-prong test for whether communication was “coordinated” and therefore subject to regulation.<sup>86</sup> “First, someone other than the candidate, such as a corporation, a union, or any person, must have paid for a ‘communication.’”<sup>87</sup> “Second, the communication must meet one of the ‘content’ standards, such as a communication expressly advocating a candidate’s election or defeat.”<sup>88</sup> Other content standards include whether the communication refers to a clearly identified candidate;<sup>89</sup> whether the communication is a redistribution of a candidate’s campaign materials;<sup>90</sup> and whether the communication refers to a political party or candidate, is publicly distributed within 120 days of an election, and is directed at voters eligible to cast a ballot for that candidate or any of that party’s candidates.<sup>91</sup> “Third, there must be some connection between the communication having the required content and some ‘conduct’ by the candidate and the spender, or their political allies.”<sup>92</sup> Finally, this new coordination rule only applied to “public communications,”<sup>93</sup> and the FEC expressly stated “[t]he term public communication shall not include communications over the Internet.”<sup>94</sup>

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84. *Id.* at 224. Here, the Court is referring to the so-called “hydraulic effect” of campaign finance reform. This simply means that blocking campaign spending in one area causes it to pop up somewhere else. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

85. See 11 C.F.R. § 109.20 (2003).

86. Bauer, *supra* note 77, at 514.

87. *Id.* at 515 (citing 11 C.F.R. § 109.21(a)(1)). Many bloggers, especially those who sell advertising or otherwise make a living from blogging, have incorporated to limit liability. See Richard L. Hasen, *Lessons from the Clash Between Campaign Finance Laws and the Blogosphere*, 11 NEXUS 23 (2006). Fired Up!, for example, is incorporated as an L.L.C. See *supra* note 2.

88. Bauer, *supra* note 77, at 515 (citing 11 C.F.R. § 109.21(a)(2)).

89. 11 C.F.R. § 109.21(c)(3).

90. *Id.* § 109.21(c)(2).

91. *Id.* § 109.21(c)(4)(ii)–(iii). The rule also includes communication made 120 days before a primary election or a political convention. *Id.*

92. Bauer, *supra* note 77, at 515 (citing 11 C.F.R. § 109.21(a)(3)).

93. 11 C.F.R. § 109.21(c)(4).

94. *Id.* § 100.26.

## 2. *The Press Exemption*

Two Supreme Court cases have interpreted 2 U.S.C. § 431(9)(B)(i), the exemption for press entities from the definition of campaign expenditures. The first, *FEC v. Massachusetts Citizens for Life* (hereinafter *MCFL*),<sup>95</sup> construed the exemption somewhat narrowly. The Court held that a nonprofit corporation's expenditures on a newsletter that urged readers to vote pro-life were subject to FECA's disclosure requirements and expenditure limitations.<sup>96</sup> Although *MCFL* published a regular newsletter, the newsletter at issue was a "special edition" distributed publicly.<sup>97</sup> "A contrary position[.]" reasoned the Court, "would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition [on corporate and union campaign expenditures]."<sup>98</sup>

The second case, *Austin v. Michigan Chamber of Commerce*,<sup>99</sup> upheld a state campaign finance law with a press exemption similar to FECA's, and the Court had occasion to refine its reasoning in *MCFL*. As a general proposition, the Court observed that "[t]he media exception ensures that [campaign finance laws do] not hinder or prevent the *institutional press* from reporting on, and publishing editorials about, newsworthy events."<sup>100</sup> In explaining its use of the qualifier "institutional," the Court added that "[a] valid distinction . . . exists between corporations that are part of *the media industry* and other corporations that are not involved in the regular business of imparting news to the public."<sup>101</sup> This construction of the press exemption was slightly narrower than that in *MCFL*, but the Court did note that "the press' unique societal role" provides "a compelling reason . . . to exempt media corporations from the scope of political expenditure limitations."<sup>102</sup> But would an incorporated blog be part of the "institutional press" or "the media industry" under *Austin*?

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95. 479 U.S. 238 (1986).

96. *Id.* at 243, 250–51.

97. *Id.* at 250.

98. *Id.* at 251.

99. 494 U.S. 652 (1990).

100. *Id.* at 668 (emphasis added).

101. *Id.* (emphasis added).

102. *Id.*

### C. Shays, *Fired Up!*, and Congress

The FEC's interpretation of "coordinated communications" following *McConnell* did not satisfy BCRA's House sponsors, Shays and Meehan, who brought suit in the District Court for the District of Columbia challenging the rule.<sup>103</sup> Applying the familiar *Chevron* rubric<sup>104</sup> in the *Shays* opinion, District Judge Kollar-Kotelly invalidated two portions of the coordination rule.<sup>105</sup> The court said first that "the FEC's exclusion of coordinated communications made more than 120 days before [an election], as well as any that do not refer to a candidate for federal office or a political party and any not aimed at a particular . . . electorate . . . undercuts FECA's statutory purposes and therefore . . . [is] entitled to no deference."<sup>106</sup> Second, the court struck down the FEC's exclusion of Internet communications.<sup>107</sup> The FEC defended its position by arguing, *inter alia*, that Congress did not include the Internet in "the list of media that constitute public communication under the statute. BCRA does not reference the 'Internet' or 'electronic mail' in [the coordination rule], although Congress used the terms 'Internet,' 'website,' and 'World Wide Web address' in other sections of BCRA."<sup>108</sup> The court was not persuaded: "The Commission's exclusion of Internet communications from the coordinated communications regulation severely undermines FECA's purposes and therefore violates the second prong of *Chevron*."<sup>109</sup> The court's remedy of choice was to strike down 11 C.F.R. § 109.21(c) (coordination content regulations) and 11 C.F.R. § 109.21(c)(4) (excluding

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103. *Shays v. FEC*, 337 F. Supp. 2d 28, 54–72 (D.D.C. 2004).

104. The first inquiry for courts reviewing administrative regulations promulgated pursuant to formal rulemaking procedures under the Administrative Procedure Act is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. . . . [But if] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

105. *Shays*, 337 F. Supp. 2d at 64–65.

106. *Id.*

107. *Id.* at 70 (striking down 11 C.F.R. § 100.26).

108. *Id.* at 66.

109. *Id.* at 70. The court elaborated:

To allow such expenditures to be made unregulated would permit rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption . . . . To permit an entire class of political communications to be completely unregulated irrespective of the level of coordination between the communication's publisher and a political party or federal candidate, would permit an evasion of campaign finance laws, thus "unduly compromis[ing] the Act's purposes," and "creat[ing] the potential for gross abuse."

*Id.* (quoting *Orloski v. FEC*, 795 F.2d 156, 164–65 (D.C. Cir. 1986)) (alteration in original) (citation omitted).

the Internet from coordination communication regulations), and remand back to the FEC for further consideration.<sup>110</sup>

On appeal to the D.C. Circuit, Judge Kollar-Kotelly was affirmed in all respects.<sup>111</sup> Curiously, while the district court specifically addressed the Internet exemption in detail, the appellate court never mentioned it. This might have been an indication of reluctance on the part of Judge Tatel to deal with such a controversial issue. Regardless, the ensuing battle over regulation of Internet communications under federal election laws would be fought by Congress and the FEC.<sup>112</sup>

After *Shays*, the FEC once again took up the task of implementing rules pursuant to BCRA.<sup>113</sup> Scott E. Thomas, chairman of the FEC, expressed these sentiments shortly after the notice of proposed rulemaking was issued:

The best approach would be to rework the coordinated communication rules to clarify which forms of Internet communication are not to be covered (perhaps relying on an expanded definition of the “individual volunteer activity” exemption . . . and the media exemption). This would leave other situations—where someone, in essence, is paying for the Internet communication costs of a candidate or party committee—to be regulated as coordinated communication and hence as in-kind contribution activity.<sup>114</sup>

But before a final rule could be formulated, Carnahan and Temple took their case directly to the FEC on August 22, 2005, seeking clarification of their status under the law.<sup>115</sup> As Chairman Thomas predicted, the issue was framed not in terms of the coordination rules, but in terms of whether Fired Up! qualified for the press exemption.<sup>116</sup>

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110. *Shays*, 337 F. Supp. 2d at 130.

111. *Shays v. FEC*, 414 F.3d 76, 115 (D.C. Cir. 2005).

112. The case was denied for rehearing en banc in October 2005. Alexander Bolton, *It's Back to Square One for the FEC*, THE HILL, Oct. 25, 2005, at 1.

113. Electioneering Communications, 70 Fed. Reg. 49,508 (Aug. 24, 2005) (to be codified at 11 C.F.R. pt. 100).

114. Hon. Scott E. Thomas, *Commissioner's Perspective: A Few Lukewarm Topics for Real Insiders*, in CORPORATE POLITICAL ACTIVITIES 2005, at 577 (Jan Witold Baran et al. co-chairs, PLI Corp. L. & Prac., Course Handbook Series No. 6819, 2005) (emphasis added).

115. FEC Advisory Op. 2005-16 at 1.

116. *Id.* For the FEC's proposals on coordinated communications regulations, see Coordinated Communications, 70 Fed. Reg. 73,946–59 (Dec. 14, 2005).

The FEC held in its advisory opinion that Fired Up! qualified for an exemption as a member of the press.<sup>117</sup> The Commission applied a three-step analysis to reach this conclusion.<sup>118</sup> First, it asked whether Fired Up! was a press entity.<sup>119</sup> It concluded that it was because the website was “both available to the general public and . . . the online equivalent of a newspaper, magazine, or other periodical publication . . . .”<sup>120</sup> Second, the Commission asked whether Fired Up! was owned or controlled by a political party, political committee, or candidate.<sup>121</sup> Without analysis, it answered this question in the negative.<sup>122</sup> Third, it asked whether Fired Up!, in operating a blog, was acting as a press entity.<sup>123</sup> The Commission noted that the press exemption was still available for activities which showed “a lack of objectivity,” or even those which “expressly advocate[] the election or defeat of a clearly identified candidate for Federal office;” it found, *a fortiori*, that Fired Up!’s blogging activity was part of its “legitimate press function.”<sup>124</sup>

Thus, while Fired Up! was exempt from FECA regulation, other blogs remained at risk. Beyond the press exemption issue, the second issue that emerged was whether or not blogs not qualifying for the exemption can be regulated under the “coordinated communications” provision.<sup>125</sup> Some feared that candidates could cozy up to established political bloggers and demand a quid pro quo for access, perquisites, or cash.<sup>126</sup> Others posited that candidates could encourage supporters to begin their own sham blogs.<sup>127</sup> These and any similar arrangements could have freed candidates

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117. FEC Advisory Op. 2005-16 at 1. See 11 C.F.R. § 100.73, 100.132; see also 2 U.S.C. § 431(9)(B)(i) (2000).

118. The language of the Advisory Opinion frames the inquiry as two-step (collapsing what I call the second and third steps into one step), but I separate out what are actually three distinct questions for clarity. See FEC Advisory Op. 2005-16 at 4; see also Reader’s Digest Ass’n v. FEC, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981) (formulating the two-step approach).

119. FEC Advisory Op. 2005-16 at 4.

120. *Id.* at 5.

121. *Id.* at 4.

122. *Id.* at 6.

123. *Id.* at 4.

124. *Id.* at 6.

125. In fact, the “electioneering communication” clauses may not have implicated any communication over the Internet because they specifically provided that electioneering communication must be “broadcast.” 2 U.S.C. § 434(f)(3) (Supp. 2003). The FEC has interpreted this to mean “aired, broadcast, cablecast or otherwise disseminated for a fee through the facilities of a television station, radio station, cable television system, or satellite system.” 11 C.F.R. § 100.29(b)(3)(i). However, both *Shays* opinions found that the “for a fee” provision was inconsistent with the plain text of BCRA.

126. This concern was implicated by “reports that two bloggers in South Dakota were paid \$35,000 to support Senate candidate John Thune against incumbent Tom Daschle in the 2004 federal election in South Dakota.” Hasen, *supra* note 87, at 25.

127. DailyKos claimed to have unearthed evidence of sham blogs tied to Senate races in Vermont



from both disclosure and expenditure limitations and exploited yet another loophole through which soft money could flow.

At least four pieces of legislation were proposed in 2005 and 2006 to protect bloggers from campaign finance laws.<sup>128</sup> The first piece, entitled the Online Freedom of Speech Act, was proposed on April 13, 2005, by Rep. Jeb Hensarling (R-Tex.).<sup>129</sup> After the district court's decision in *Shays*, the Act proposed to broadly exempt Internet communication<sup>130</sup> from the definition of coordinated communication in keeping with the FEC's original rule.<sup>131</sup> The Act "would accomplish by statute what the FEC sought to do by regulation . . . ."<sup>132</sup> Seeking a broad swath of testimony on this somewhat extraordinary measure from regulators and bloggers alike, the Committee on House Administration called, among others, Chairman Thomas; Michael J. Krempasky, director of the conservative blog RedState.org; and Duncan Black, author of the liberal blog Eschaton.<sup>133</sup> But these largely pro-bloggers' rights witnesses were not persuasive. Despite the support of a majority of members of the House, the measure failed on a 225-182 vote because it did not muster the two-thirds

and Minnesota. GOP Sen. Candidate Bankrolls Fake Blog, DailyKos (Feb. 15, 2006), <http://dailykos.com/storyonly/2006/2/15/141513/629>. Candidates have committed fraud on the Internet in other ways as well. See Patrick D. Healy, *Weld Aides Find a Way to Deal With Negative Press: Re-Edit It*, N.Y. TIMES, Feb. 4, 2006, at B1 (candidate for governor of New York posting edited versions of newspaper articles to official website). See also Anne Saunders, *Top Aide to N.H. Congressman Resigns*, WASH. POST, Sept. 26, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/26/AR2006092600699.html> (aide to Rep. Charlie Bass (R-N.H.) resigned after posing as Bass's opponent in fraudulent posts to liberal blogs).

128. See *supra* note 40.

129. H.R. 1606, 109th Cong. (1st Sess. 2005). The bill's Senate sponsors were Minority Leader Harry Reid (D-Nev.) and Conrad Burns (R-Mont.). *Burns Announces Support for Online Freedom of Speech Act*, *supra* note 17. The Senate version was S. 678, 109th Cong. (1st Sess. 2005). The bill was eventually inserted into another bill, the Pence-Wynn 527 Fairness Act, H.R. 1316, 109th Cong. (1st Sess. 2005), which also addressed so-called "527 groups" (after their IRS designation for tax purposes) like Swift Boat Veterans for Truth. The legality of 527 groups is an important related topic, but is beyond the scope of this Note. See generally Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949 (2005).

130. This includes "Web sites, blogs, and online advertisements." Brian DeBose, *House Bill Eyes Campaign-Finance Changes*, WASH. TIMES, June 9, 2005, at A4.

131. The text of the measure would have amended 2 U.S.C. § 431(22) (defining "public communication") to also state that "[s]uch term shall not include communications over the Internet." H.R. 1606, 109th Cong. § 2 (1st Sess. 2005).

132. Michael Toner, Vice Chairman of the FEC, Setting the Record Straight on HR 1606, RedState.org (Nov. 4, 2005), <http://redstate.org/story/2005/11/4/21850/4447>.

133. *Hearing on Political Speech*, *supra* note 26, at 7, 59. Also invited to attend, but unable to appear due to scheduling conflicts, were Markos Zuniga of DailyKos.com and Eli Pariser of MoveOn.org. *Id.* Pariser was also a major player in the 527 controversy. See Briffault, *supra* note 129, at 951 n.17; Munger, *supra* note 56.

supermajority needed to pass under a special rule that governed the vote.<sup>134</sup>

The second piece of legislation, presented by Shays and Meehan, sought a stronger regulatory hand in regulating Internet communications. Their bill, known as the Internet Anti-Corruption and Freedom of Speech Protection Act of 2005, would have amended 2 U.S.C. § 431(22) by exempting “communication made over the Internet,” this time with four explicit exceptions.<sup>135</sup> The Act would impose BCRA’s regulations on coordinated communication if it qualifies as (1) “a communication placed on another person’s website for a fee;” (2) “a communication made by [a labor union or corporation]<sup>136</sup> (other than a corporation whose principal purpose is operating a web log”); (3) “a communication made by a State, district, or local committee of a political party . . .”;<sup>137</sup> or (4) “a communication made by any political committee.”<sup>138</sup>

Shortly after the bill was introduced, Krempasky and Zuniga sent letters to House members urging them to reject the bill.<sup>139</sup> Shays and Meehan responded immediately in a letter posted on the National Journal’s Hotline blog,<sup>140</sup> addressing three major concerns expressed by the bloggers. First, Shays and Meehan explained that “any communication by an individual made on that individual’s website is exempt from the definition of ‘public communication’ in the campaign finance law.”<sup>141</sup> Second, all incorporated bloggers would also be “exempt from the law,” including, apparently, “bloggers who engage in partisan political activities and routinely solicit contributions to candidates of one party . . . .”<sup>142</sup> Finally, they dispelled the notion that some bloggers would be required to register as political action committees (PACs) as “untrue . . . . Even large amounts of spending by individuals for computer equipment and services to communicate over the Internet would not turn such group activity into a

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134. Reuters, *Internet Campaign-Finance Carve-Out Fails in House*, SAN DIEGO UNION-TRIB., Nov. 3, 2005, <http://www.signonsandiego.com/news/computing/20051103-06460-congress-internet.html>. However, the bill was scheduled to be reconsidered in March 2006. Adam Bonin, *The Return of H.R. 1606*, DailyKos (Mar. 2, 2006), <http://dailykos.com/storyonly/2006/3/2/132743/3164>.

135. H.R. 4194, 109th Cong. (1st Sess. 2005).

136. The text of the Act refers to 2 U.S.C. § 441b(a), prohibiting contributions to federal candidates by unions and corporations.

137. As defined by 2 U.S.C. § 441i (2000).

138. H.R. 4194, 109th Cong. § 2 (1st Sess. 2005).

139. Shays/Meehan Respond . . . , *The Hotline*, Nov. 10, 2005, [http://hotlineblog.nationaljournal.com/archives/2005/11/shaysmeehan\\_res.html#more](http://hotlineblog.nationaljournal.com/archives/2005/11/shaysmeehan_res.html#more).

140. <http://hotlineblog.nationaljournal.com>.

141. Shays/Meehan Respond . . . , *supra* note 139.

142. *Id.*

political committee.”<sup>143</sup> Perhaps the forum of these debates between lawmakers and bloggers is more significant than their content: they largely took place on blogs.<sup>144</sup> H.R. 4194 was referred to the House Committee on House Administration on November 1, 2005.<sup>145</sup>

The third piece, H.R. 4389, was proposed by Brad Miller (D-N.C.) on November 18, 2005.<sup>146</sup> This bill, like the Hensarling bill, appeared less restrictive than the approach Shays and Meehan favored, but with a few important differences. First, it actually offered stronger protection to Internet communications than the defeated Online Freedom of Speech Act because it would insert an Internet exemption into the very “source code” of FECA.<sup>147</sup> Second, it protected “Meet Up” services from regulation, defined in the text as “services provided through the Internet [for] organizing and coordinating meetings of individuals to discuss a candidate or political committee or to volunteer on behalf of a candidate or political committee, whether the services are provided with or without compensation.”<sup>148</sup> The bill thus recognized another unique strength that blogs possess and singled it out for exemption. The bill was also referred to the House Committee on House Administration.<sup>149</sup>

The final bill, H.R. 4900, was proposed by Tom Allen (D-Me.) and Charlie Bass (R-N.H.) and styled the Internet Free Speech Protection Act of 2006.<sup>150</sup> The bill was introduced shortly before final FEC action was expected on the rules struck down by the *Shays* court. As such, it may

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143. *Id.*

144. Not to be outdone, DailyKos.com responded to Shays and Meehan on the website the next day, lamenting the bill’s lack of “robust protection of citizen activity on the Internet . . . .” Adam Bonin, H.R. 4194: Shays and Meehan Respond, And So Do We, DailyKos (Nov. 11, 2005), <http://www.dailykos.com/story/2005/11/11/122854/69>. This was also the case for the debate on the Hensarling bill. Both Chairman Thomas and Commissioner Toner posted their thoughts to RedState.org. Robert F. Bauer, The Internet Debate: FEC Commissioners Cross Swords at Redstate.org, More Soft Money Hard Law: Web Updates (Nov. 8, 2005), <http://www.moresoftmoneyhardlaw.com/news.html?AID=533>.

145. H.R. 4194, 109th Cong. (1st Sess. 2005).

146. H.R. 4389, 109th Cong. (1st Sess. 2005). John Conyers (D-Mich.) was the bill’s co-sponsor.

147. I refer here to 2 U.S.C. § 431(9)(B)(i). The bill effectively redefines the Internet as a media “facility,” meaning that blogs would automatically qualify for the press exemption (it changes the definition of “expenditure,” not “public communications,” which was the focus of the Online Freedom of Speech Act). The bill was introduced on the same day the Fired Up! opinion was adopted (though well after the FEC had posted a draft of the opinion to their website). It thus codifies the FEC’s interpretation of the press exemption. Whether the bill was introduced to coincide with the FEC meeting as a fail-safe in case the draft opinion was rejected by the Commissioners is purely speculative.

148. H.R. 4389, 109th Cong. § 2 (1st Sess. 2005). Meet Up services were offered by MoveOn.org, among others, as a way to connect individuals at the grassroots level.

149. H.R. 4389, 109th Cong. (1st Sess. 2005).

150. H.R. 4900, 109th Cong. (2d Sess. 2006).

never have had any real political traction in Congress. Nevertheless, the bill had broad support in the reform community because of its expansive language—it would have broadened the § 431(9)(B)(i) press exemption to include any “Internet site or service.”<sup>151</sup>

### III. RUMORS ON THE INTERNETS<sup>152</sup>: THE POST-FIRED UP! LANDSCAPE

Despite the encouraging progress that had been made since *Shays*, political blogs might still have been implicated under the federal election campaign statute and its regulatory framework, as well as under state campaign finance laws. Though the FEC had previously left Internet-based election communication untouched after BCRA and *McConnell*, *Shays* held that the FEC’s lax treatment of such communication was inconsistent with Congress’s intent.<sup>153</sup> The FEC then issued an advisory opinion vindicating Fired Up!, but this was only one blog among thousands. Congress also had yet to speak with finality on the issue. After Fired Up!, those bloggers most affected by the law’s uncertainty were those who had any kind of contact with a candidate or party which would not obviously amount to coordinated communication. Examples of conduct which might have exposed bloggers to liability include: linking to campaign websites,<sup>154</sup> accepting money for political advertisements,<sup>155</sup> or reprinting candidates’ press releases.<sup>156</sup>

#### A. Bloggers Respond

Not surprisingly, the possible regulation of blogging became a lightning rod for controversy in the blogosphere.<sup>157</sup> When they went before the House Administration Committee’s hearing on regulating Internet political speech, bloggers Duncan Black and Michael Krempasky were both asked by Chairman Bob Ney (R-Ohio) if bloggers in general were “concerned about regulation . . . ?”<sup>158</sup> Both replied in the affirmative,

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151. *Id.* § 5.

152. At the second 2004 presidential debate, held at Washington University in St. Louis, President Bush famously (mis)spoke this line in response to a question regarding possible reinstatement of the draft: “I hear there’s rumors on the Internets [sic] that we’re going to have a draft.” Commission on Presidential Debates, *The Second Bush-Kerry Presidential Debate*, <http://www.debates.org/pages/trans2004c.html>.

153. See *supra* text accompanying notes 100–08.

154. Wendy Davis, *Fear of Blogging*, 91 A.B.A. J. 16, 17 (2005).

155. *Id.*

156. Reuters, *supra* note 134.

157. Hasen, *supra* note 87, at 23.

158. *Hearing on Political Speech*, *supra* note 26, at 73. Maybe this question takes on new

not only because they believed many bloggers operated on small budgets and therefore could not afford counsel to pore over the intricate and complicated issues raised under current law, but also because they feared that the FEC complaint process could become a popular method of attack for bloggers' partisan opponents.<sup>159</sup>

In addition to these two complaints, the ensuing debate over regulating Internet communication focused on three essential problems. First (and most importantly to bloggers and many other observers) was the potential for any type of regulation to chill political discourse on the Internet.<sup>160</sup>

meaning in light of Ney admitting to taking bribes from lobbyist Jack Abrahamoff and possible bribery charges against Burns, a co-sponsor of the Online Freedom of Speech Act. See Philip Shenon, *Ex-Congressman is Sentenced to 2 1/2 Years in Abramoff Case*, N.Y. TIMES, Jan. 20, 2007, at A5; Philip Shenon, *Lawmaker Admits He Took Illegal Gifts*, N.Y. TIMES, Sept. 16, 2006, at A10; Jeffrey H. Birnbaum, *A Growing Wariness About Money in Politics*, WASH. POST, Nov. 29, 2005, at A1. One highly cynical inference to draw from this turn of events is that members of Congress who favor less regulation are also those who break the law. The author would also humbly submit that one cannot spell "money" without "N-e-y."

However, even the seemingly unimpeachable Sen. McCain may have overstepped ethical campaign finance boundaries in 2006. A blogger for the National Review Online found that McCain kept a stealth blogger on his payroll to hype the senator's possible presidential run in 2008. Jim Geraghty, *If You're Consulting for John McCain's PAC, You Ought to Tell Your Readers*, NAT'L REV. ONLINE, July 27, 2006, <http://tks.nationalreview.com/post/?q=YmVjN2Y1YzEzMDdmZjcwY2I0ZGNhZDEyMzVIMGQ0MmY=>. But this may be merely one of many rumors on the Internets. See also John M. Broder, *Edwards Learns Blogs Can Cut 2 Ways*, N.Y. TIMES, Feb. 9, 2007, at A1 (detailing 2008 presidential candidate John Edwards' minor imbroglio after bloggers on his staff criticized the Catholic church).

159. *Hearing on Political Speech*, *supra* note 26, at 73–74. Bob Bauer described the growing debate among bloggers, Congress and the FEC on his own blog:

The Internet . . . has opened the once insular [campaign finance] debate to wider scrutiny. The regulated community is not the one of old: now it includes an even larger number of people with politics on their mind and the capacity to reach millions with their opinions about it. Red[S]tate.org has established space on its website to follow just this issue, and any statement or suggestion made on this issue is met with informed and impassioned responses from individuals and organizations otherwise left cold by the dry fare of standard FEC deliberation.

Robert F. Bauer, *The Politics of Internet Regulation, More Soft Money Hard Law: Web Updates* (Oct. 3, 2005), [http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/update/other\\_related\\_legal\\_developments.html?AID=426](http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/update/other_related_legal_developments.html?AID=426). And on her blog, Allison Hayward described how the complaint process could be used to harass bloggers:

If the matter is based on a complaint, the "respondent" will receive a letter from the FEC with the complaint and will be asked to show why the FEC shouldn't investigate . . . [An investigation entails] the usual tools of civil litigation—document requests, depositions, briefs, and the like . . . if a complaint is filed against you, there will be a flurry of activity while you respond, then perhaps silence—then another letter will arrive and you will be required to respond promptly, then maybe nothing again for months.

Allison Hayward, *FEC Enforcement Process*, SKEPTICSEYE.COM (June 1, 2005), <http://skepticeye.com/2005/06/fec-enforcement-process/>.

This is particularly worrisome for casual bloggers with "day jobs who like to exercise their right to voice their opinions. If doing so without a lawyer puts them or their families at risk, many will simply stop blogging about politics—or never start." Anderson, *supra* note 59, at 18.

160. "[T]he government should take steps to not implement and force regulations which impact

This argument was hardly new. In fact, it carried great weight in the Supreme Court's decision in *Buckley*.<sup>161</sup> Bloggers contend that it should carry even more weight as applied to blogs, because a blog can give "anyone the full powers of the press and [the ability] to potentially command a large audience at a minimum cost. . . . Anyone can reach a large audience for a minimal cost."<sup>162</sup> To chill discourse on the Internet, therefore, is far worse than to chill the discourse of the pamphleteer on the corner because Internet communication, by its very nature, has the potential to reach billions of people around the world at almost no cost. Bloggers do not hesitate to squeeze every last drop of persuasive force from this argument, suggesting that regulation implicates the very foundation of democracy because "technology, the Internet, [and] the ability to communicate across the Internet [have] done more to democratize our politics than any law could hope to do."<sup>163</sup> Thus, bloggers contend, if Internet discourse is negatively affected, so is the American system of governance.

The second problem was the impact that regulation may have on future communications technology. Bloggers note that regulation is "not just about a blog or about an e-mail list or something that we are talking about today, it is [about] the next forum of communication . . . how can we make sure that we don't just chill speech, but that we don't actually inhibit the development of new technology[?]"<sup>164</sup> Indeed, this is singularly why both proponents and opponents of regulation did not support a specific carve-out for blogs: because it would throw the status of existing but fledgling technology like podcasts, text messaging, and chatrooms, in addition to any number of new types of communication technology, into serious confusion, catalyzing another volatile regulatory chain reaction.<sup>165</sup>

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the ability of small actors to engage in political speech on the Internet . . ." *Hearing on Political Speech*, *supra* note 26, at 59. *See also* Jerry Berman (President, Center for Democracy and Technology), Letter to the Editor, *Let the Political Bloggers Blog*, WASH. POST, Oct. 22, 2005, at A20 ("The Internet is the most powerful tool for political discourse since the printing press. . . . How many will abandon their valuable discourse to avoid running afoul of federal law?").

161. "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." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). This language certainly applies with even more force to the Internet, since it is almost costless.

162. *Hearing on Political Speech*, *supra* note 26, at 59. *See also* George F. Will, *Free Speech Under Siege*, NEWSWEEK, Dec. 5, 2005, at 76.

163. *Hearing on Political Speech*, *supra* note 26, at 65.

164. *Id.* at 66.

165. But beware the inverse of this argument. One observer warns that "packet-switched technologies that are [today] most accurately described as part of 'the Internet' are very soon going to [be part of] telephone, television, and even radio services [and] will be every bit as expensive to

The third problem with regulation was the absence of any demonstrable harm stemming from unregulated blogs. Though there were a plethora of hypothetical<sup>166</sup> and anecdotal harms<sup>167</sup> rumored to exist, bloggers argued that Congress was attempting to “fix[] something that hasn’t really been demonstrated to be broken yet . . . we [haven’t] see[n] rampant spending across the Internet distorting or corrupting our politics.”<sup>168</sup> Moreover, the defeated Online Freedom of Speech Act contained at least one significant loophole of its own, suggesting that even if Congress is successful in passing regulatory legislation, the menace of soft money will persist.<sup>169</sup> The *Washington Post* posited the following hypothetical in an editorial opposing the Online Freedom of Speech Act:

A member of Congress faces a tough reelection race and needs as much financial help as possible. The politician can’t legally take money from a corporation or labor union, and the most individuals can give is a few thousand dollars. But the lawmaker goes to a company and suggests another way to help out. He proposes that it pay for his Internet advertising. The campaign’s consultants will produce the spots and choose the Web sites; the company need only write the check. And the company’s help won’t ever show up in campaign finance records.<sup>170</sup>

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advertise on as legacy media.” Posting of Joseph Birkenstock, JMB@capdale.com, to election-law@majordomo.lls.edu (Nov. 14, 2005) (on file with author). In other words, a blanket Internet exemption today may open up a gigantic loophole down the road.

166. Quipped Krempasky, “I think what we are really talking about is the specter that was raised at the hearings this summer about what if Halliburton had a blog; wouldn’t that be awful?” *Hearing on Political Speech*, *supra* note 26, at 74.

167. *See supra* note 126 and accompanying text.

168. *Hearing on Political Speech*, *supra* note 26, at 65. *See also* Posting of Brian Svoboda, BSvoboda@perkinscoie.com, to election-law@majordomo.lls.edu (Nov. 14, 2005) (on file with author):

[If] the Internet is now the means by which one “would return soft money to federal elections” . . . [and w]e have seen three years with a working definition of “public communications” that excluded the Internet, [why do] we have yet to see the state party that evaded the Federal election activity restrictions in any significant way through its web site[?]

Svoboda also points out that “the Internet experience over the past three years has been largely to see individuals empowered through small-dollar, online contributions.” *Id.*

169. Editorial, *supra* note 29.

170. *Id.*

But election law attorney Bob Bauer explains that the hypothetical is flawed.<sup>171</sup> He says the activity described by the *Post* is already illegal because it does not “depend on the use of the Internet.”<sup>172</sup>

Nevertheless, Bauer still placed the blame for the post-Fired Up! confusion on Congress.<sup>173</sup> Indeed, Congress may be an even less hospitable engine of change than the courts or the FEC: “The politicians fear that Internet blogs will permit people to communicate in ways the Congress can’t control, so they want to regulate them . . . .”<sup>174</sup> In response to the confusion, the Electronic Frontier Foundation (EFF) created its own “Legal Guide for Bloggers,” available on EFF’s website, with an entire section devoted to bloggers and election law.<sup>175</sup>

### *B. Not Fired Up About the Fired Up! Opinion: Bloggers and Proponents of Regulation Find Common Ground*

While the Fired Up! opinion was, according to bloggers and commentators, “great,”<sup>176</sup> “significant,”<sup>177</sup> and “a tremendous victory for online free speech,”<sup>178</sup> it still left a number of big questions unanswered. First, the FEC did not address whether any activity reasonably related to blogging would fall within the press exemption. It only stated that blogging, as currently carried out by Fired Up!, was exempt.<sup>179</sup> As a result, it was unknown whether, for example, distributing a candidate’s campaign

171. Robert F. Bauer, “Cyber Loophole,” *More Soft Money Hard Law: Web Updates* (Oct. 11, 2005), [http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/other\\_related\\_legal\\_developments.html?AID=424](http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/other_related_legal_developments.html?AID=424).

172. *Id.*

173. “Congress, in its early expression of bipartisan will, has indicated an unwillingness to exercise [its will] in accordance with reform community preference. So much, then, for ‘deference’ to Congress in matters of campaign finance, resoundingly endorsed by the Supreme Court upon the urging of reformers.” Robert F. Bauer, *The House Hearing on Internet Regulation, More Soft Money Hard Law: Web Updates* (Sept. 22, 2005), [http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/other\\_related\\_legal\\_developments.html?AID=428](http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/other_related_legal_developments.html?AID=428).

174. Editorial, *Speech Regulation Alert*, N.Y. SUN, Sept. 16, 2005, at 10. *See also* Editorial, *supra* note 29 (“There’s no need for Congress to interfere with this process—and great peril in its doing so in this broad-brush fashion.”).

175. Electronic Frontier Foundation, *Legal Guide for Bloggers*, <http://www.eff.org/bloggers/lg/> (last visited Oct. 5, 2006).

176. Allison Hayward, “Fired Up” Draft Approved, *Skepticseye.com* (Nov. 18, 2005), <http://www.skepticseye.com/2005/11/fired-up-draft-approved/>.

177. Robert F. Bauer, *The Fired Up Opinion and the Emergence of NIMBY, More Soft Money Hard Law: Web Updates* (Nov. 18, 2005), <http://www.moresoftmoneyhardlaw.com/news.html?AID=547>.

178. Adam Bonin, *FEC: Blogs are Just as Much ‘Press’ as Everyone Else*, *DailyKos* (Nov. 17, 2005), <http://www.dailykos.com/storyonly/2005/11/17/132311/79>.

179. *FEC Advisory Op. 2005-16* at 6 n.12.



material via e-mail would remove Fired Up! from the scope of the “legitimate press function.” Second, the commissioners were very careful to caution that “if there is a change in any of the facts or assumptions presented . . . then [Fired Up!] may not rely on [the opinion] as support for its proposed activity.”<sup>180</sup> In a concurring opinion, Chairman Thomas and Commissioner Danny Lee McDonald repeated the warning of the Commission: “Qualification for the press exception is a fact specific determination.”<sup>181</sup> Accordingly, it is not at all clear that other bloggers would have automatically qualified for the press exemption.<sup>182</sup>

Besides the FEC’s highly fact-specific approach to applying the press exemption to blogs, there was another concern: Fired Up! is a partisan political organization, not a citizen-pundit exercising his First Amendment rights.<sup>183</sup> It is run by two influential Democrats with obvious ties to their party and its candidates.<sup>184</sup> Its clear purpose is to see that Democrats are elected to state and federal offices, and it solicits campaign contributions for Democrats.<sup>185</sup> These characteristics are probably not consistent with “the press” generally.<sup>186</sup> And while there are blogs that surely do function as members of the press, there are also those that surely do not.<sup>187</sup> By the same token, there are numerous avowed partisans in the institutional media (Rush Limbaugh, Al Franken) who are not in danger of losing their press exemptions.<sup>188</sup> While the press is not required to be fair and balanced,<sup>189</sup> the issue in Fired Up! was “not whether a press entity can have a point of view on matters of public policy. [It was] whether a group

180. *Id.* at 6.

181. *Id.* at 10. “As the Supreme Court has warned, the press exemption must be narrowly construed. To do otherwise would threaten to ‘eviscerate’ [FECA].” *Id.* (citing *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986)).

182. “The Fired Up! opinion may well be a victory in the short term . . . . But in the long term, the opinion is meaningless—if not a setback to those who seek full repeal (congressional or judicial) of the nation’s campaign-finance laws.” Ryan H. Sager, *First Amendment, Cap in Hand*, TECH CENT. STATION, Nov. 22, 2005, <http://www.tcsdaily.com/article.aspx?id=112205C>.

183. *See infra* note 185.

184. *See supra* note 7.

185. “Fired Up intends to endorse, expressly advocate, and urge readers to donate funds to the election of Democratic candidates for federal, state and local office.” FEC Advisory Op. Req. 2005-16 at 2, available at <http://www.fec.gov/aos/2005/aor2005-16.pdf>. It also “intends aggressively to support progressive candidates and causes at all levels . . . .” *Id.* at 7.

186. Comments, FEC Advisory Op. 2005-16 at 2, available at <http://www.fec.gov/aos/2005/aor2005-16comments.pdf>.

187. *Id.*

188. *See Sink, supra* note 13 (“Talk radio spends 16 to 24 hours a day doing the same thing [as partisan political bloggers].” (quoting Bill Christofferson)).

189. FEC Advisory Op. Req. 2005-16 at 5.

whose self-declared purpose is to endorse, support and solicit funds for Democratic candidates is a press entity at all.”<sup>190</sup>

This argument carried great weight with those who favored strong regulation of blogs. Opponents of blogging have described bloggers as “smug,” “toxic,” “obscene, vile, abusive, offensive,” and “an online lynch mob spouting liberty but spewing lies, libel and invective,”<sup>191</sup> and opponents of campaign finance exemptions for bloggers warned that a lack of regulation or weak regulations may have had profound implications for the 2008 presidential election. “Wait until the next election rolls around and these bloggers start smearing people who are up for reelection . . . [m]aybe then things will start to happen.”<sup>192</sup>

There is evidence that bloggers, much more than the mainstream media or political allies, will publish libelous or false information because they know they can get away with it. During the 2004 election, a phony rumor that John Kerry kept a secret mistress was spread by bloggers<sup>193</sup> and even splashed across the heavily-trafficked Drudge Report.<sup>194</sup> “It’s not like journalism, where your reputation is ruined if you get something wrong. In the blogosphere people just move on.”<sup>195</sup>

### C. Was Congress Right?

The Online Freedom of Speech Act was defended by many, and its defeat lambasted by at least one commentator.<sup>196</sup> For one, the Act was “reasonable and modest in scope,” whereas new FEC rules or legislation

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190. See Comments, *supra* note 186, at 3.

191. Lyons, *supra* note 11, at 134, 130, 132, 129. President Bush’s deputy chief of staff Karl Rove has echoed similar sentiments: “There is so much ugliness and viciousness and fundamental untruths that the blogosphere transmits . . . . It also is a vehicle for ugly rumors, for scurrilous personal attacks, an avenue for the creation of urban legends which are deeply corrosive of the political system and of people’s faith in it.” Matt Drudge, Bush Cheers Decline of Mainstream Media, Rise of Alternative Press, Drudge Report (Feb. 28, 2006), [http://drudgereportarchives.com/data/2006/02/28/20060228\\_231201\\_flash3wsb.htm](http://drudgereportarchives.com/data/2006/02/28/20060228_231201_flash3wsb.htm).

192. Lyons, *supra* note 11, at 138 (quoting Gregory Halpern).

193. *Id.* at 134.

194. Matt Drudge, Campaign Drama Rocks Democrats: Kerry Fights Off Media Probe of Recent Alleged Infidelity, Rivals Predict Ruin, Drudge Report (Feb. 12, 2004), [http://www.drudgereportarchives.com/data/2004/02/13/20040213\\_090404\\_mattjk1.htm](http://www.drudgereportarchives.com/data/2004/02/13/20040213_090404_mattjk1.htm).

195. Lyons, *supra* note 11, at 134 (quoting Christian Grantham). “Bloggers are more of a threat than people realize . . . . [T]here is bad information out there in the blog space, and you have only hours to get ahead of it and cut it off, especially if it’s juicy.” *Id.* at 130 (quoting Peter Blackshaw and Frank Shaw). But bloggers can also expose libelous smear attempts before they do real damage. When CBS News relied on forged documents to question President Bush’s military service, bloggers quickly discovered their mistake. See Drudge, *supra* note 191.

196. Allison Hayward, *System Failure*, NAT’L REV. ONLINE, Nov. 4, 2005, <http://www.nationalreview.com/comment/hayward200511040830.asp>.

never come with such guarantees.<sup>197</sup> Indeed, H.R. 4194 was much narrower in the exemptions it gave to blogs. But if Congress is to blame for not clarifying the law sooner, it is also in the crosshairs when it makes any attempt to write a coherent statute: “The Republican leadership seemed to feel little at stake in this issue. . . . The Democrats? They seem intent on using ‘ethics’ as a blunt instrument against Republicans.”<sup>198</sup> In other words, politics as usual.

Confusion and rumors spread about blogger liability, and the sometimes fickle echo chamber of the blogosphere only compounded the problem. Thus, one of the best features of the failed Online Freedom of Speech Act was that it proposed to add just one short, simple line of text to the federal election statute.<sup>199</sup> In response to the enormity of the task of making sense of the law, one approach would appeal BCRA altogether.<sup>200</sup> Perhaps the “thicket [that] McCain-Feingold introduced” is due “another look” because it will “affect what an individual may or may not post on the Internet,” and “[a]dding another exception to an already bloated federal legal code isn’t the best answer, either.”<sup>201</sup>

#### IV. THE FEC SPEAKS: CERTAINTY IN AN UNCERTAIN WORLD

On April 12, 2006, the FEC finally promulgated new rules to comport with the mandate of the *Shays* court, the precedent established by the Fired Up! decision, and the desire of a majority of the House of Representatives to free blogs and other Internet communication from the federal election regulatory morass.<sup>202</sup> Most importantly, the new rules redefined “public communication” in a way that specifically exempts “communications over the Internet, except for communications placed for a fee on another person’s Web site.”<sup>203</sup> Additionally, the new rules exempted from the definition of “contribution” anything termed an “Internet activity,” as long as it is uncompensated; such activity may be performed either

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197. *Id.*

198. *Id.*

199. The measure read in full: “Paragraph (22) of section 301 of the Federal Election Campaign Act of 1971 (2 U.S.C. 431(22)) is amended by adding at the end the following new sentence: ‘Such term shall not include communications over the Internet.’” H.R. 1606, 109th Cong. (1st Sess. 2005).

200. Editorial, *Free Virtual Speech*, OMAHA WORLD-HERALD, July 20, 2005, at 6B.

201. *Id.*

202. Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, and 114).

203. *Id.* at 18,613 (revising 11 C.F.R. § 100.26, defining 2 U.S.C. § 431(22)). The change is almost identical to the change that would have been made (albeit in a more direct fashion) by the Online Freedom of Speech Act.

independently *or* in coordination with a political candidate, committee or party.<sup>204</sup> “Internet activity” is a new term in the regulations that “includes, but is not limited to: Sending or forwarding electronic messages; providing a hyperlink or other direct access to another person’s Web site; blogging; creating, maintaining or hosting a Web site; paying a nominal fee for the use of another person’s Web site; and any other form of communication distributed over the Internet.”<sup>205</sup> This sweeping language seems to answer many of the questionable activities bloggers puzzled over prior to rulemaking.<sup>206</sup>

The Commission provided very detailed rationale for writing the new rules as it did, and much of its reasoning seems to mirror (if not totally crib from) the blogosphere’s agenda. First, the Commission recognized that the Internet is “a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach.”<sup>207</sup> Citing its “accessibility, low cost, and interactive features,” the Commission went on to note the Internet’s critical importance in delivering news to voters.<sup>208</sup> Second, while seeking to draft a rule in line with BCRA’s paramount goal of eliminating corruption and the appearance of corruption, the Commission pointed that there

is no record that Internet activities present any significant danger of corruption or the appearance of corruption, nor has the Commission seen evidence that [the old definition of “public communication,” which exempted all Internet communications including advertising] has led to circumvention of the law or fostered corruption or the appearance thereof.<sup>209</sup>

In explicitly bringing paid Internet advertising under the regulatory umbrella (for obvious reasons stemming from the *Shays* decision<sup>210</sup>), the Commission noted that the new rule is designed to include “all potential

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204. *Id.*

205. *Id.*

206. *See supra* notes 164–65 and accompanying text.

207. Internet Communications, 71 Fed. Reg. at 18,589. “[T]he Internet can hardly be considered a “scarce” expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds.” *Id.* at 18,590 (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

208. The argument advanced by the Commission was largely the same as in Part I of this Note. *See supra* notes 16–23 and accompanying text.

209. Internet Communications, 71 Fed. Reg. at 18,593. This would seem to speak to one of the three major arguments advanced by bloggers post-Fired Up!; *see supra* notes 166–68 and accompanying text.

210. *See supra* note 109.

forms of advertising, such as banner advertisements, streaming video, pop-up advertisements, and directed search results.”<sup>211</sup> Such advertising poses a significant problem in the eyes of the Commission, just as the *Shays* court had intimated, because “[a]s the public has turned increasingly to the Internet for information and entertainment, advertisers have embraced the Internet and its new marketing opportunities. Internet advertising revenue increased by 33.9 percent” from 2004 to 2005, totaling \$3.1 billion for the third quarter of 2005.<sup>212</sup> The Commission also pointed out that creating a specific carve-out for bloggers would be fatally underinclusive, because emerging technology (e.g. podcasting) could be subject to regulation.<sup>213</sup> As written, the rule reasonably contemplates all forms of political Internet communications on the horizon.<sup>214</sup>

## V. CONCLUSION

The FEC should be commended for clarifying the law before the 2006 elections. Had the FEC let the blogging question fester, there could have been serious consequences for bloggers and candidates alike in 2006.<sup>215</sup> Moreover, the FEC’s lengthy rumination on the new rules contains language that should assuage any fears that regulation will chill political discourse on the Internet. The rules do not provide a specific carve-out for bloggers; rather, they act prospectively in scope, contemplating at least those advances in Internet communications technology that are reasonably on the horizon, such as political podcasts, interactive chats and meet-up communications. As Bauer puts it, “campaign finance laws should not oppress the development of [Internet] communication, available to all and thus highly ‘democratic’ in impact.”<sup>216</sup>

While the FEC’s approach to changing the definitions of both “contribution” and “public communications” probably affords bloggers

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211. Internet Communications, 71 Fed. Reg. at 18,594.

212. *Id.* Of course, these statistics are of questionable significance without disaggregating political advertising revenues from revenues for, say, herbal impotence remedies.

213. *Id.* at 18,595–96.

214. . . . almost. See *infra* notes 221–22 and accompanying text.

215. However, Bob Bauer has made a compelling case for a solution that avoids the familiar pattern of Congress, the FEC, and the courts: a Constitutional amendment. Robert F. Bauer, Who Controls Campaign Finance?, More Soft Money Hard Law: Web Updates (Feb. 22, 2006), <http://www.moresoftmoneyhardlaw.com/news.html?AID=624>.

216. Bauer, *infra* note 217. Professor Eugene Volokh, who operates his own blog, “The Volokh Conspiracy” (<http://volokh.com>), agrees: “The First Amendment can’t give special rights to the established news media and not to upstart outlets like ours. Freedom of the press should apply to people equally, regardless of who they are, why they write or how popular they are.” Eugene Volokh, Op-Ed, *You Can Blog, But You Can’t Hide*, N.Y. TIMES, Dec. 2, 2004, at A39.

more protection than the Online Freedom of Speech Act would have provided, it ignores another potential avenue of attack.<sup>217</sup> While it might be difficult and expensive for advocates of regulation to attack individual bloggers, collective enterprises engaging in Internet activity could come under attack as “political committees.”<sup>218</sup> Such a divide-and-conquer tactic has the same potential to chill discourse as going after individual bloggers. In fact, a very strong case might be made that many of the most heavily-trafficked political blogs are actual “political committees” which must file with the FEC. The Commission singled out these comments during its formal rulemaking:

[O]ne commenter drew upon his own experience as a blogger in noting that much of the emerging Internet culture depends on collaboration for the construction of a blog or website, the generation of content (according to the blogger’s testimony, most blogs do not have paid staff to perform such functions), and the sharing of information and online resources. The commenter stated that his website has more than 50,000 registered users contributing to its content, and he estimated that he writes only about 2,000 of the 200,000 words of content published on his website each day.<sup>219</sup>

Because some bloggers might be compelled to file as political committees (because of administrative proceedings, litigation, or threats from politicians or even rival bloggers), the definition of political committee should be changed to protect them from such divide-and-conquer tactics. But any change must be balanced against a concern for weeding out “real” corruption. In other words, the definition must not create a loophole for candidate—or party—controlled political committees masquerading as bloggers.<sup>220</sup>

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217. Robert F. Bauer, Internet Legislation and “Political Committees,” *More Soft Money Hard Law: Web Updates* (Nov. 21, 2005), <http://www.moresoftmoneyhardlaw.com/news.html?AID=548>.

218. 2 U.S.C. § 431(4)(A) (2000). “The term ‘political committee’ means any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year . . . .” *Id.* Political committees are subject to FECA regulation.

219. Internet Communications, 71 Fed. Reg. at 18,590.

220. Bauer offers one proposal: groups that should be exempt from the definition of political committee are those “*organized exclusively to make communications, including partisan or election-related communications, through the Internet.*” Bauer, *supra* note 217. But groups falling within this exemption are still political committees if they are “*owned, established, maintained, financed or controlled by a political committee, political party organization, or candidate,*” or by a corporation or a union “*whose principal purpose is other than the making of such communications.*” *Id.*

Additionally, rather than broadly referring to “communications over the Internet,” a superior definition of “public communication” would use more precise language in order to accommodate future technologies that are inexpensive (and thus do not pose a threat of opening up a new soft money loophole), without exempting future technologies that will be expensive. One example of such language might be “interactive communications via the World Wide Web,” which would include blogs but exclude, for example, television programming transmitted via a packet-switching technology (which would presumably be expensive to produce),<sup>221</sup> the communications protocol that is the essence of Internet communication.<sup>222</sup>

Finally, it is important to remember that the new regulations do not protect bloggers from regulation under state campaign finance regimes. Indeed, early scrutiny of the *Randall* case has warned that the decision could open the door to a slew of challenges to specific state laws.<sup>223</sup> Yet the Fifth Circuit, in construing Louisiana’s campaign finance laws under *McConnell*, has recognized that lawsuits “challenging the validity of state election laws are classic examples of cases in which the issues are ‘capable of repetition, yet evading review.’”<sup>224</sup> Already, states have demonstrated a willingness to go after bloggers for seemingly minor infractions.<sup>225</sup> And it goes without saying that thousands of blogs—including Fired Up!—deal solely with state election issues and thus may still be subject to regulation.

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221. See Ryan Lizza, *The YouTube Election*, N.Y. TIMES, Aug. 20, 2006, § 4, at 1. The article describes the impact that YouTube, a kind of massively interactive blog for video clips, has had on the 2006 congressional races, though whether content posted to YouTube would or should qualify as “television programming transmitted via a packet-switching technology” is a question well beyond the scope of this Note. See also Chris Cillizza & Dan Balz, *On the Electronic Campaign Trail*, WASH. POST, Jan. 22, 2007, at A1 (describing 2008 presidential candidates’ use of web video).

222. See *supra* note 165. The language should also exempt emerging technology like Voice Over Internet Protocol (the routing of voice conversations over the Internet or any other general-purpose packet-switched network). *Id.* For a sampling of other technology on the horizon that may be potentially troublesome for election regulators, see Mark Z. Barabak, *Campaign ‘08 Preview: Podcasting Politicians*, L.A. TIMES, July 21, 2006, at A18 (noting efforts within campaigns to keep up with emerging technology like, inter alia, content for mobile phones).

223. See Richard L. Hasen, *Some Initial Thoughts on the Vermont Campaign Finance Decision*, Election Law (June 26, 2006), <http://www.electionlawblog.org/archives/006026.html> (“Battles will rage across the country over the constitutionality of particular contribution limit laws.”).

224. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) (quoting *Morial v. Judiciary Comm’n*, 565 F.2d 295, 297 n.3 (5th Cir. 1977)).

225. See Robert Weisman, *Blogger who Criticized Maine Tourism Office Faces Lawsuit*, BOSTON GLOBE, Apr. 28, 2006, at E1 (Maine Department of Economic Community Development filed lawsuit against blogger for making false statements, “putting bloggers on notice that they need to use their power responsibly”).

No matter what Congress or the FEC had decided to do, the scourge of money's influence in politics probably could not have been eliminated *in toto*. This is precisely the admonition of scholarly proponents of the "hydraulic effect" in campaign finance, a sentiment echoed by the Supreme Court in *McConnell*.<sup>226</sup> The FEC's advisory opinion in the Fired Up! case was a step in the right direction, but more needed to be done to protect independent bloggers. The press exemption alone was not equipped to deal with future technology, and Fired Up!'s status as a press entity seemed to tread dangerously close to a coordinated communication under FECA. If the FEC (or, in its stead, Congress) had not acted when it did, the blogosphere might have been yet another soft money loophole for the 2006 and 2008 elections.

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226. See *supra* note 84 and accompanying text.

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