INDEPENDENT EXPENDITURES ON THE INTERNET: FEDERAL ELECTION LAW AND POLITICAL SPEECH ON THE WORLD WIDE WEB

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The internet is as beneficial as it is troublesome. It provides a single person the opportunity to reach millions, circumventing such traditional gatekeepers as book and newspaper publishers. However, the same medium provides opportunities for individuals to mistreat its general freedom of communication and widespread availability of information. The internet also creates problems when courts, lawmakers and regulators impose antiquated laws and policies on the new medium. In one of the most recent issues to arise, the regulator is the Federal Election Commission and the antiquated law is the Federal Election Campaign Act of 1971.

The Federal Election Commission (“FEC” or “Commission”) received a complaint May 4, 1999, asking it to apply a 27-year-old statute to an internet site. The site, a satirical criticism of Republican presidential candidate George W. Bush, allegedly violated a number of federal election regulations. The Governor George W. Bush for President Exploratory Committee, Inc. (“Exploratory Committee”) found the website particularly offensive because the site’s appearance and domain name—www.gwbush.com—closely resemble those of the Exploratory Committee’s website at www.georgewbush.com.

The issue goes beyond the Bush campaign’s disfavor for the satire; under the rules of the FEC, anyone who expressly advocates the election or defeat of a clearly defined candidate on a personal internet site and does not disclose expenditure information could be in violation of federal election law. In addition to the complaint, the Bush campaign requested that the Commission issue an advisory opinion clarifying a number of iss...
sues regarding the internet and campaign disclosure laws. The Bush campaign asked how to assess the value of a website created by volunteers or persons unaffiliated with the campaign. Additionally, the Bush campaign asked for guidance concerning Commission regulations of internet vending, internet polls, the use of email by committee volunteers and issues regarding the solicitation of contributions through the internet.

The FEC issued a Notice of Inquiry ("NOI") seeking comment on internet campaign activity and the questions posed by the Bush campaign. The notice focused on the concerns of campaign committees and how the internet activity may trigger contribution disclosure laws. In addition, the Commission asked for comment on how the FEC should determine the value of a website.

Disclosure requirements are part of a broad set of regulations governing election law. Modern election law originated with the enactment of the Federal Election Campaign Act ("FECA") of 1971, which Congress substantially amended in 1974. The United States Court of Appeals for the District of Columbia noted that the FECA was "by far the most comprehensive reform legislation passed by Congress concerning the election of the President, Vice-President, and members of Congress." The FECA's primary purpose was to "limit the actuality and appearance of corruption resulting from large individual financial contributions." Among the restrictions, the FECA imposed limits on expenditures by political committees and individuals and required the disclosure of contributions and expenditures by candidates, political committees and individuals.

This comment will first discuss important Supreme Court decisions that have shaped FEC implementation of the Act. Second, it will examine FEC policy concerning the internet, clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1000.

Id. Buckley, 424 U.S. at 154 (construing 2 U.S.C. § 434). Prior to Buckley, section 434(e) read,

Every person (other than a political committee or candidate) who makes contributions or expenditures, other than by contribution to a aggregate amount in excess of $100 within a calendar year shall file with the Commission a statement containing the information required by this section. Statements required by this subsection shall be filed on the dates on which reports by political committees are filed by need not be cumulative.

2 U.S.C. § 434(e). The current provision imposing disclosure reads,

Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person. (2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) of this section, and shall include—(A) the information required by subsection (b)(6)(B)(iii) of this section, indicating whether the independent expenditure is in support of, or in opposition to, the candidate involved; (B) under penalty of perjury, a certification whether or not such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such candidate; and (C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

centrating on how the Commission calculates expenditures. Third, it will discuss the matter pending before the FEC concerning internet disclosure rules. Finally, this comment concludes that the FEC should carve a narrow exemption for the costs of creating an independent website for advocacy purposes.

1. **Buckley v. Valeo: Campaign Finance and the First Amendment**

In a landmark decision dealing with a number of latent issues in the FECA, the Supreme Court in *Buckley v. Valeo* confronted two issues relevant to independent expenditures on the internet. First, the Court distinguished contributions from expenditures, holding that while a limitation on individual contributions to a federal campaign passes First Amendment scrutiny, financial limitations on expenditures unconstitutionally restrain political speech. The court stated, "A [financial] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." However, limitations on expenditures by individuals and groups "impose direct and substantial restraints on the quantity of political speech." Second, the Court held that expenditure disclosure requirements comport with the First Amendment because they allow public review of information concerning the source of campaign expenditures, deter corruption and provide a means to detect violations of contribution limitations.

A. Limitations on Expenditures

The Supreme Court granted certiorari after the United States Court of Appeals for the District of Columbia held that these sections of the Act and others pass First Amendment scrutiny. In a *per curiam* opinion, the Court evoked strong First Amendment principles in confronting the FECA’s limitations on expenditures. The Court stated, "The Act’s contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." The Supreme Court disagreed with the circuit court’s view that expenditure limitations regulated conduct and not speech. The Supreme Court found limitations on expenditures particularly offensive to the First Amendment and recognized the importance of expensive mass media as tools through which citizens may reach an increasingly large audience. The Court noted, A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached... 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.

The quantitative restriction, which entailed a maximum fine of $25,000 and imprisonment for not more than one year, triggered strict scrutiny to determine “whether the language of section 608(e)(1) affords the ‘[p]recision of regulation [that] must be the touchstone in an area so closely touching our most precious freedoms.’” The Court found the statute’s language limiting “any expenditure... relative to a clearly identi-
fied candidate”

The Court concluded that the statute’s use of the word “relative” must be interpreted as express advocacy for a “clearly identified candidate.” The Court listed “magic words” that, if used, would fall under section 608(e)(1). This list included “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat” and “reject.” However, after reining in the vague language of the statute, the Court found the ceiling on independent expenditures unconstitutional, reasoning that candidate advocacy deserves as much protection as issue advocacy or lobbying to urge the passage of legislation.

B. Contribution Limitations

In the same opinion, the Court contrasted this speech-protective language by upholding a limitation on the amount an individual, partnership, committee, association or corporation may contribute to a federal candidate. Section 608(b)(1) of the FECA stated that “no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed $1000.”

Borrowing the standard set by previous cases on associational freedoms, the Court said “[e]ven a ‘significant interference’ with protected rights of political association” may be sustained if the State demonstrates a sufficient importance and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. The Court cited three government interests furthered by the limitation that would validate the section. First, it noted that limitations on contributions prevent real and perceived corruption through large financial contributions. Second, by limiting the influence of the affluent, more citizens may play a larger role in affecting the outcome of elections. Third, such limitations may serve to suppress the exponentially increasing cost of running for office.

C. Disclosure Requirements

Similarly, the Court upheld the FECA’s expenditure reporting and disclosure requirements.

Section 434(e) of the Act originally read,

Every person (other than a political committee or candidate) who makes contributions or expenditures, other than by contribution to a political committee or candidate, in an aggregate amount in excess of $100 within a calendar year shall file with the Commission a statement containing the information required by this section. Statements required by this subsection shall be filed on the date on which reports by political committees are filed but need not be cumulative.

The Court held that disclosure requirements for political committees pass First Amendment scrutiny.

Again, the Court used a strict scrutiny standard to test the disclosure provision in section 434(e). The Court said, “The provision is responsive to the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act.” Originally, under the Act, expenditure was defined as

(1) ... a purchase, payment, distribution, anything of

38 Buckley, 424 U.S. at 193 (construing 18 U.S.C. § 608(e)(1) (repealed XXXX)).
39 See Buckley, 424 U.S. at 44.
40 Id.
41 See id. at 44 n.52. But see FEC v. Furgatch, 807 F.2d 857, 864 (9th Cir. 1987) (concluding that speech may be express advocacy without using the words listed by the Court in Buckley). The Ninth Circuit said the speech “must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.” Id. at 864. The Court noted that speech can be “express” even though it is ambiguous. See id. Also, “advocacy” necessitates a plea for action. See id. Finally, the Ninth Circuit said it must be clear what action is advocated. See id.
42 See Buckley, 424 U.S. at 47-48.
43 See id. at 35.
44 See Buckley, 424 U.S. at 188 (construing 18 U.S.C. § 608(b)(1) (repealed XXXX)).
45 See, e.g., Cousins v. Wigoda, 419 U.S. 477, 491-92 (1975) (holding that the Circuit Court erred in issuing an injunction that abrogated the National Democratic Party’s selection of delegates for its convention).
46 Buckley, 424 U.S. at 25 (quoting Cousins, 419 U.S. at 488).
47 See id. at 25-26.
48 See id. at 26.
49 See id. at 26.
50 See id. at 61.
51 Buckley, 424 U.S. at 160 (construing 2 U.S.C. § 434(e)). The current applicable section is 2 U.S.C. § 434(c). Section 434(c) reads, “Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(9)(A) of this section for all contribution received by such person.” 2 U.S.C. § 434(c) (1994).
52 See Buckley, 424 U.S. at 84.
53 Id. at 76 (citation omitted).
value, made for the purpose of (A) influencing the nomination for election, or the election, of any person to Federal office, or to the office of presidential and vice presidential elector; or (B) influencing the results of a primary election held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States; (2) . . . a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure; (3) . . . the transfer of funds by a political committee to another political committee.\(^{54}\)

Among its many exceptions,\(^{55}\) section 431(f) exempted “any communication by any person which is not made for the purpose of influencing the nomination for election, or election, of any person to [f]ederal office.”\(^{56}\)

First, the Court addressed the vague language in section 431(f) defining an expenditure as the use of money or assets “for the purpose of . . . influencing” an election.\(^{57}\) Worried that the language of section 431(f) would encompass issue advocacy, the Court concluded that communication must be “express advocacy”\(^{58}\) to fall under the definition of expenditure in section 431(f).\(^{59}\) The Court reasoned that the disclosure requirement, narrowly construed, constitutes “a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view.”\(^{60}\)

Summarizing its holding, the Court said individuals and groups not acting as political committees must comply with the reporting requirements under section 434(e) “(1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.”\(^{61}\)

II. \textit{FEC v. Massachusetts Citizens for Life: Burdensome Disclosure Requirements}

In 1986, the Supreme Court revisited the \textit{Buckley} court’s finding that disclosure requirements comport with the First Amendment.\(^{62}\) In \textit{FEC v. Massachusetts Citizens for Life}, the Court found unconstitutional the disclosure requirements for certain corporations.\(^{63}\) The Court reasoned that the extensive disclosure requirements of section 441(b)(2) unconstitutionally burdened a closely held corporation created for the purpose of issue advocacy.\(^{64}\)

Massachusetts Citizens for Life was a nonprofit, non-stock corporation. Its purpose was “to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities[.]”\(^{65}\) The corporation acquired resources through donations from “members” and fund-raising events.\(^{66}\) Massachusetts Citizens for Life irregularly published a newsletter containing information on legislative activity and court decisions. It was a tool to recruit volunteers, and it usually urged readers to contact government officials to express their views.\(^{67}\)

\(^{54}\) \textit{Buckley}, 424 U.S. at 147–48 (construing 2 U.S.C. \S 431(f)(1)–(3)).

\(^{55}\) Originally, section 431(f) included an exemption for the press. See 2 U.S.C. \S 431(f)(4)(A). Other exemptions include nonpartisan “get out the vote” activity, see 2 U.S.C. \S 431(f)(4)(B), communications to stockholders or members of organizations, see 2 U.S.C. \S 431(f)(4)(C), the use of real or personal property that does not exceed $500 or candidate travel expenses that do not exceed $500, see 2 U.S.C. \S 431(f)(4)(D)–(E), costs incurred by a state or local political party for printing lists of three or more candidates, see 2 U.S.C. \S 431(f)(4)(G), and payments by corporations or labor organizations that are not expenditures under 18 U.S.C. \S 610, see 2 U.S.C. \S 431(f)(4)(H). The current exceptions to the definition of “expenditure” are codified at 2 U.S.C. \S 431(9)(B). In addition to these exceptions, the current list of exceptions to “expenditure” include costs incurred by an authorized committee or candidate while soliciting contributions. See 2 U.S.C. \S 431(9)(B)(vi). Limited legal and accounting services are not expenditures. See 2 U.S.C. \S 431(9)(B)(vii). Also, ballot access payments transferred to another political party’s committee or state official are not expenditures. See 2 U.S.C. \S 431(9)(B)(x).

\(^{56}\) 2 U.S.C. \S 431(9)(B)(x).

\(^{57}\) \textit{See Buckley}, 424 U.S. at 77 (citing 2 U.S.C. \S 431(f)(4)(F)).

\(^{58}\) \textit{See id.} at 44 n.52.

\(^{59}\) \textit{See id.} at 80.

\(^{60}\) \textit{Id.} at 82 (footnote omitted). \textit{But see Talley v. California,} 362 U.S. 60 (1945) (finding unconstitutional an ordinance requiring all handbills to contain the name of the printer, author or manufacturer and the name of the distributor).

\(^{61}\) \textit{Id.} at 80.


\(^{63}\) \textit{See id.} at 264–65.

\(^{64}\) \textit{See id.} at 263–64 (construing 2 U.S.C. \S 441(b)(2)).

\(^{65}\) \textit{Id.} at 241–42.

\(^{66}\) \textit{See id.} at 242.

\(^{67}\) \textit{See id.}
Before the 1978 primary elections, Massachusetts Citizens for Life published a “Special Edition” of its newsletter with the headline, “Everything you need to know to vote pro-life.” The newsletter listed candidates and indicated the organization’s approval or disapproval of the candidates’ voting record on three issues. Additionally, the newsletter published the pictures of candidates who had a 100 percent approval rating from Massachusetts Citizens for Life.

A. Expanding “Express Advocacy”

The Supreme Court found that the “Special Edition” constituted an expenditure under section 441b(b)(2). That section reads, “The term ‘contribution or expenditure’ shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization in this section . . . .” The Court acknowledged that the newsletter must constitute “express advocacy” to fall under the definition of section 441b(b)(2). Although the publication did not contain the “magic words” listed in *Buckley v. Valeo*, the Court held that the newsletter expressly advocated the election of the named candidates because the newsletter’s essential nature was to advocate for the election of pro-life candidates. The Court argued that the newsletter constituted “express advocacy” because it provided names and photographs of candidates with “an explicit directive: vote for these (named) candidates.”

B. The Press Exemption

Additionally, the Court rejected Massachusetts Citizens for Life’s claim that the newsletter fell under the press exemption under 2 U.S.C. § 431(9)(B)(i). Section 431(9)(B)(I) reads, “The term ‘expenditure’ does not include, any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” The Court reasoned that even if the Massachusetts Citizens for Life newsletter were exempt, the “Special Edition” does not benefit from the exemption because it differed substantially from the previous newsletters. The organization used a different staff to publish the “Special Edition,” it was distributed on a grander scale and to readers unaffiliated with the organization, the publication contained no volume or issue number and it did not bear the Massachusetts Citizens for Life masthead. The Court defended this finding against the objection of Massachusetts Citizens for Life by arguing that “it is precisely such factors that in combination permit the distinction of campaign flyers from regular publications.”

C. Disclosures Offending the First Amendment—Carving a Narrow Exception

However, after determining that the Massachusetts Citizens for Life newsletter fell under section 441(b)(2), the Court held that the disclosure requirements imposed upon the corporation violated the First Amendment as applied to Massachusetts Citizens for Life. Because Massachusetts Citizens for Life was a corporation, it had to create a “separate segregated fund” to use for expenditures advocating the election of candidates for federal office.

The act of creating this fund would place the...
organization under the definition of a "political committee" under section 431(4)(B). A political committee must comply with all the disclosure requirements of section 434(c) imposed upon individuals who spend over $250. These disclosure requirements include "the identification of each person who makes a contribution ... during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year . . . "82 Section 434(c)(2)(A) requires that the disclosure include the name and address of each ... person who receives any disbursement during the reporting period in an aggregate amount or value in excess of $200 within the calendar year . . . together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate . . . 83

Also, the report must include "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure."84

In addition to these disclosure requirements, a committee must comply with other procedural requirements set forth in section 432. Under section 432(a), "[e]very political committee shall have a treasurer."85 The treasurer must keep a record of the people and organizations that contribute to the committee, including a detailed accounting of the amount contributed.86 In addition, the treasurer must "preserve all records required to be kept by this section and copies of all reports required to be filed by this subchapter for three years after the report is filed."87

A political committee must update any changes in the required information, "no later than 10 days after the date of the change."90 And "a political committee may terminate only when such a committee files a written statement . . . that it will no longer receive any contributions or make any disbursements and that such committee has no outstanding debts or obligations."91

Furthermore, during an election year, the political committee must file quarterly reports and a pre- and post-election report; during non-election years it is required to file only every six months.92

Political committees under section 441b(b) must register with the FEC by filing, "a statement of organization no later than 10 days after establishment."88 The statement must include

(1) the name, address, and type of committee; (2) the name, address, relationship, and type of any connected organization or affiliated committee; (3) the name, address, and position of the custodian of books and accounts of the committee; (4) the name and address of the treasurer of the committee; (5) if the committee is authorized by a candidate, the name, address, office sought, and party affiliation of the candidate, and; (6) a listing of all banks, safety deposit boxes, or other depositories used by the committee.99

These reports must contain information regarding the amount of cash on hand; the total amount of receipts, detailed by 10 different categories; the identification of each political committee and candidate's authorized or affiliated committee making contributions, and any persons making loans, providing rebates, refunds, dividends, or interest or any other offset to operating expenditures in an aggregate amount over $200; the total amount of all disbursements, detailed by 12 different categories; the names of all authorized or affil-

spending whatsoever.); 2 U.S.C. §§ 441b(a), 441b(b)(2)(C) (1994). Section 441b(b) reads,

For the purposes of this section ... the term 'contribution or expenditure' ... shall not include, ... (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

Id.

86 2 U.S.C. § 432(c). The committee treasurer must keep an account of, (1) all contributions received by or on behalf of such political committee; (2) the name and address of any person who makes any contribution in excess of $50, together with the date and amount of such contribution by any person; (3) the identification of any person who makes a contribution or contributions aggregating more than $200 during a calendar year, together with the date and amount of any such contribution; (4) the identification of any political committee which makes a contribution, together with the date and amount of any such contribution; and (5) the name and address of every person to whom any disbursement is made, the date, amount, and purpose of the disbursement, and the name of the candidate and the office sought by the candidate, if any, for whom the disbursement was made, including a receipt, invoice, or canceled check for each disbursement in excess of $200.

Id.

89 2 U.S.C. § 433(b).
90 2 U.S.C. § 433(c).
The Court acknowledged a substantial government interest in compelling disclosure for corporate expenditures in political campaigns. However, the Court reasoned that Massachusetts Citizens for Life did not pose the evil of a large corporation leveraging its power through capital-fueled expenditures. The Court noted, "The resources it ha[d] available were not a function of its success in the economic marketplace, but its popularity in the political marketplace." Unlike stockholders or union members, those who contribute to an organization like Massachusetts Citizens for Life understand they are funding a political objective. The Court limited its holding by listing three distinguishing features of Massachusetts Citizens for Life that other organizations must possess to claim immunity from section 441b:

First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. Third, it was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

Although the Court's holding in Massachusetts Citizens for Life is limited to only a few organizations that bear these distinguishing features, the implication of this holding opens the door for similarly situated organizations or individuals.

Previously, the Court found that disclosure requirements pose the least restrictive means to achieve the substantial government interest in ridding the election process of corruption. However, Massachusetts Citizens for Life creates an argument that disclosure requirements may violate the First Amendment when they pose heavy administrative burdens.

### III. THE FEDERAL ELECTION COMMISSION'S APPROACH TO THE INTERNET

The Massachusetts Citizens for Life decision directed the Commission to proceed carefully with disclosure requirements. However, at the time the case was decided, the internet was merely a means of communication among academic and government research centers. Just as television revolutionized the way candidates campaign for office and the means by which citizens become informed about candidates and issues, the internet stands to become a powerful tool for candidates to reach voters. The FEC has the challenge of applying statutes crafted in the early 1970s to a technology that has come of age in the 1990s. The FEC's approach to internet activity as an expenditure under section 431(9)(A) and its method for calculating the expense of internet sites for the purposes of sections 431(4)(A) and 434(c) illustrate the problem of applying old law to new technology.

In 1996, the FEC issued an advisory opinion concerning an on-line “electronic town meeting” organized by Bloomberg, L.P., a network that provides news and financial information via the internet. The advisory opinion was  made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure. "Id.

Furthermore, the Court found that Massachusetts Citizens for Life creates an argument that disclosure requirements may violate the First Amendment when they pose heavy administrative burdens.
Candidates linked to offices by two-way television would field questions received through electronic mail. Bloomberg asked whether this activity would constitute a contribution or expenditure under sections 431(8)(A)(i) and 431(9)(A)(i). Because Bloomberg primarily "acts as a news and commentary provider via computer linkages, performing a newspaper or periodical publication function for computer users," the FEC found that the electronic town meeting would fall under the press exemption provided in section 431(9)(B)(i). To support this finding, the Commission cited the legislative history of the statute, which indicated Congress's desire to exempt traditional media from disclosure requirements. The Commission said, "The use of audiences composed of non-reporters, and subscribers and guests at computer terminals, does not alter the basic nature of this meeting either as a news event akin to a press conference or as a form of commentary."

Although the Bloomberg matter did not pose a difficult problem for the FEC because the organization fit neatly into the characterization of a press entity, the Commission has encountered some difficulty computing internet expenditures for non-press entities. For example, the Commission issued an advisory opinion in 1998 finding that an independent website must satisfy the disclaimer requirements if it advocates the defeat of a clearly identified federal candidate. More significantly, the FEC found such a website likely to constitute an expenditure under section 431(9). The individual who requested the advisory opinion was the sole owner of Capital Ventures Group, LLC, who created websites for non-profit groups as part of its business. He created the website in question to advocate the defeat of Republican candidate Representative Nancy Johnson in the Sixth Congressional District of Connecticut. The Commission noted that websites are not without cost, including the registration fee for the domain name, the cost of the computer hardware and the utility costs to create the site. In addition, the Commission acknowledged that Capital Ventures Group creates websites as a business and said the valuation of creating these sites, minus the cost of voluntary personal services, represents the cost of the expenditure. Therefore, it seems the FEC values a website at the rate a company would bill a client for creating a site, minus the cost of labor.

IV. WWW.GWBUSH.COM: POLITICAL SATIRE AS A CAMPAIGN EXPENDITURE

These issues came to a head when the Governor George W. Bush for President Exploratory Committee, Inc. ("Exploratory Committee"), filed a complaint with the FEC against a satirical website aimed at the Republican presidential candidate. Zack Exley's <www.gwbush.com> website uses a slightly altered masthead of the official Bush website and satirizes Bush's policies on illegal drugs, crime and other issues. The Exploratory Committee alleged that the site was in violation of section 441d because it did not have a disclaimer. The Exploratory Committee also argued that Exley's website is an expenditure in aggregate of $250, and therefore he must file an independent expenditure report required under section 434(c) of the Act. Additionally, if Exley has spent over $1,000 on the website during a calendar year, he must register as a political committee under sections 431(4)(A) and 433(a) of the Act.

\[\text{See id.}\]
\[\text{See id. at 12191.}\]
\[\text{See id. at 12192.}\]
\[\text{See id. at 12411.}\]
\[\text{See id. at 12409.}\]
\[\text{See id. at 12411.}\]
\[\text{See id. at 12411 n.9.}\]
\[\text{See Exley Complaint, supra note ????}\]

\[\text{See George W. Bush for President Exploratory Committee Web Site (visited Sept. 5, 1999) <www.georgewbush.com>.}\]
\[\text{See Exley Complaint, supra note ????}\]
\[\text{2 U.S.C. § 441d (1994). Section 441d requires, Whenever any person makes an expenditure for the purpose of financing communication expressly advocating the election or defeat of a clearly identified candidate . . ., (3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.}\]
\[\text{Id.}\]
\[\text{See Exley Complaint, supra note ????}\]
If the FEC applies these statutes consistent with the case law and its advisory opinions, the Commission is likely to find that Exley’s website violates the FECA. First, by using Bush’s name and photograph, the website clearly identifies George W. Bush. In addition, the Exploratory Committee argues—and the FEC is likely to find—that the site expressly advocates Bush’s defeat. The website does not show a disclaimer of any kind. In fact, the site is designed to look like the Exploratory Committee’s official website. For these reasons, the FEC will likely find that Exley’s website violates section 441d of the Act.

If the FEC uses the factors listed in Advisory Opinion 1998-22 for computing the cost of an expenditure over the internet, the Commission will likely find that the cost of Exley’s website exceeds $250, requiring him to file an independent expenditure report under section 109.2 of the Commission’s rules. In his answer to the Exploratory Committee’s complaint, Exley claimed that he had not spent over $250 on the website. However, Exley stated in his answer that because the site has received so much traffic as a result of the ensuing media blitz, the cost of maintaining the site could increase exponentially through his internet hosting service.

Additionally, the Exploratory Committee argues that the fair market value of the domain name should be included in the cost of creating the site. Exley purchased the domain name gwbus.com for $70, the Exploratory Committee rejected his offer to sell the site for $350,000. Therefore, if the FEC uses the broad cost assessment announced in Advisory Opinion 1998-22, the cost of creating and maintaining the website clearly goes beyond the $250 threshold in section 434(c). A. Filing for an Independent Expenditure

Should the Commission require Exley to comply with section 434(c) of the Act, he must file a written statement with the Secretary of State in the state where the expenditure is made. The statement must include Exley’s mailing address, his occupation and the name of his employer. Exley also must disclose the amount of the expenditure. The filing must include a statement indicating that the expenditure was in opposition to Presidential candidate George W. Bush. Additionally, the statement must be notarized and certified under penalty of perjury that the website was created without the cooperation, consultation or suggestion of any candidate or candidate’s committee. Finally, the report must include the name and address of each person who contributed more than $200 in furtherance of the creation of the website. Because Exley pays monthly fees to maintain the website, during the 2000 election year he must file a report by April 15, July 15, October 15, and January 31 of the following year. Additionally, Exley must file pre- and post-election reports.

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125 See gwbus.com (visited Sept. 5, 1999) <www.gwbush.com>

126 See Exley Complaint, supra note ??. The complaint alleges that the website contained the statement “Just Say No” to a Former Cocaine User for President,” which would constitute express advocacy under Buckley, 424 U.S. at 44 n.52.


B. Filing as a Political Committee

Finally, the Exploratory Committee alleges that the website is an expenditure exceeding $1,000, requiring Exley to register as a political committee under sections 431(4)(A) and 433(a) of the Act.\(^\text{142}\) For comparison, the reporting requirements for individual expenditures not exceeding $250 include filling out a two-page form.\(^\text{143}\) If Exley must register as a political committee, the form for disclosure is twenty-eight pages.\(^\text{144}\)

V. BREATHEING SPACE FOR POLITICAL ACTIVITY ON THE INTERNET

The matter concerning Zack Exley, www.gwbush.com and Bush’s Exploratory Committee shines a glaring spotlight on one of the hidden problems of internet regulation. Federal election regulations have not evaded the frustration caused by an interactive mass medium. The Supreme Court acknowledged that regulations on expenditures operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by the Constitution. The First Amendment affords the broadest protection to such political expression in order “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”\(^\text{145}\)

The Court in \textit{Buckley} held that disclosure requirements present the least restrictive means by which the government may rid federal elections of corruption.\(^\text{146}\) However, these requirements become larger barriers when compared to the relative ease of disseminating information via the internet. The burden on free speech created by these disclosure requirements outweighs the potential evil posed by internet communication. Therefore, the FEC should not impose disclosure regulations on individual websites advocating the election or defeat of a clearly identified candidate.

The FEC should take direction from Congress’s policy of non-regulation of the internet. In the Telecommunications Act of 1996, Congress removed the internet from the Federal Communications Commission’s ancillary jurisdiction. Section 230 of the Act provides “it is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”\(^\text{147}\) Furthermore, in \textit{Reno v. ACLU}, the leading case on the internet and First Amendment freedoms, the Supreme Court distinguished the internet from traditional media.\(^\text{148}\) The Court said, “‘Each medium of expression . . . may present its own problems.’”\(^\text{149}\) Factors the Court previously acknowledged in determining the nature of a medium include the history of government regulation of the medium,\(^\text{150}\) the scarce nature of the medium,\(^\text{151}\) and the invasive qualities of the medium.\(^\text{152}\) In \textit{Reno v. ACLU}, the Court recognized that these factors do not exist on the internet,\(^\text{153}\) reinforcing the idea that government restrictions should treat the internet as a completely separate medium with a higher level of First Amendment

\(^{142}\) See Exley Complaint, supra note ????.
\(^{143}\) See, e.g., FEC Form 5 (visited Sept. 20, 1999) <www.fec.gov>.
\(^{144}\) See, e.g., FEC Form 3X (visited Sept. 20, 1999) <www.fec.gov>.
\(^{145}\) \textit{Buckley}, 424 U.S. at 14 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
\(^{146}\) See id. at 66–68.
\(^{148}\) See \textit{Reno v. ACLU}, 521 U.S. 844, 868 (1997) (holding that, under the First Amendment, a statute criminalizing the internet transmission of obscene or indecent material to minors is overbroad).
\(^{149}\) See id. at 868 (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)).
\(^{150}\) See \textit{Reno}, 521 U.S. at 868 (alteration in original); see also Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 391 (1978) (holding that the government’s historical regulation of the broadcast spectrum, among other factors, justifies a lower standard of First Amendment scrutiny).
\(^{151}\) See \textit{Reno}, 521 U.S. at 868; see also Turner Broadcasting System, Inc. v. FCC, 512 U.S 622, 637–638 (1994) (discussing the scarce quality of broadcasting justifying a reduced level of First Amendment scrutiny for the curtailment of free speech).
\(^{152}\) See id. at 868; see also Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 128 (1989) (granting telephony services a higher degree of First Amendment protection compared to broadcast media, reasoning that communication over a telephone wire is less invasive because it requires the affirmative step of dialing phone numbers, where a broadcast listener need only turn on a radio).
\(^{153}\) See id. at 868–69.
A. Creating an Exemption

An exception to section 109.2 of the Commission’s rules for individual internet expenditures would be analogous to the narrow exception created by the Supreme Court in *FEC v. Massachusetts Citizens for Life.* In that case, the Court recognized that administrative costs associated with registration and disclosure requirements unconstitutionally burden political speech when applied to a small, non-profit organization. Similarly, even the most simple disclosure requirements under sections 109.2161 and 104.4(c)(1)162 of the FEC’s rules pose a heavy burden on political speech over the internet. Because the internet has the potential to diminish the gap between those with political influence and those without the resources to organize powerful political committees, the FEC should take measures to make individual political speech unfettered by election law regulation and disclosure requirements. Commissioner Karl Sandstrom, one of the six members of the Federal Election Commission, said,

On the Internet, every woman and man is a potential publisher. There is no class distinction between the elite and the common person. The raw egalitarianism of this new frontier appeals to the American spirit. Here the hope lives that the force of an argument can prevail over the might of the pocketbook. One need only visit the web page of a sophisticated high school student to see how slim a technical advantage media giants enjoy.163

Imposing disclosure requirements will not smother political speech on the internet, but it will impose a formidable deterrent. As the Court said in *FEC v. Massachusetts Citizens for Life,* “[w]hile the burden on [Massachusetts Citizens for Life’s] speech is insurmountable, we cannot permit it to be imposed without a constitutionally adequate justification.”164 Similarly, the FEC should carve out an exemption to section 109.2 of the Commission’s rules. The exception would allow individuals, whose expenditures

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155 See Karl Sandstrom, *... And the Internet,* WASH. POST, Sept. 5, 1999, at B7 (asserting that the FEC should regulate speech on the internet in a manner that will encourage participation in public discourse. However, Sandstrom did not pose any possible solutions or Commission action that would further this goal.).

156 See Massachusetts Citizens for Life, 478 U.S. at 263.


156 See id. at 263.


163 See id. at 263.
would otherwise fall under sections 109.1\textsuperscript{165} and 109.2,\textsuperscript{166} to create internet sites that advocate the election or defeat of a federal candidate.

The burden of disclosure for individual expenditures on the internet is a modest assault on the freedom of speech. However, the Supreme Court said in *Massachusetts Citizens for Life*, “Our pursuit of other governmental ends, however, may tempt us to accept in small increments a loss that would be unthinkable if inflicted all at once. For this reason, we must be as vigilant against the modest diminution of speech as we are against its sweeping restriction.”\textsuperscript{167}

B. Calculating the Cost of an Internet Expenditure

Alternatively, the FEC could simply calculate the amount of an internet expenditure differently than its previous method laid out in Advisory Opinion 1998-22.\textsuperscript{168} In that Advisory Opinion, the Commission said that the cost of a website includes the registration fee for the domain name, computer hardware and the utility costs to create the site.\textsuperscript{169} Also, the Commission indicated that a website’s value may be the amount a web designer charges a client less the cost of labor.\textsuperscript{170} The FEC’s method of computation for internet expenditures is analogous to compelling an expenditure disclosure for creating a political bumper sticker and adhering it to an automobile. For example, an individual creates a single bumper sticker advocating the election of a presidential candidate. This expenditure does not require disclosure to the FEC under section 109.2 of the Commission’s rules because it does not exceed $250.\textsuperscript{171} However, if the Commission included the cost of the automobile in the total cost of the expenditure, the cost of the bumper sticker would easily exceed the $250 disclosure threshold. Furthermore, if the value of the automobile exceeds $1000, the owner would have to register and disclose as a political committee under sections 100.5(a) and 102.1(d) of the Commission’s rules.\textsuperscript{172} Like the automobile, computer hardware and the utility costs associated with creating a web page merely provide the mobility of the message, not the message itself.

Including the cost of a computer’s hardware almost certainly places expenditures involving the internet well above $250. The FEC should ignore these costs when computing expenditures on the internet; the amount paid for the website’s domain name should be the only relevant expenditure.\textsuperscript{173} Obtaining a domain name currently entails a $70 registration fee for two years of service.\textsuperscript{174} The renewal fee is $35.\textsuperscript{175} This method of computation would allow an individual to create a web page advocating the election or defeat of a federal candidate without breaking the $250 disclosure threshold in section 109.2\textsuperscript{176} or the $1,000 threshold in section 100.5(a).\textsuperscript{177}

One could argue that the cost of a website should include the cost of an internet service provider that acts as a gateway, or point of entry to the internet.\textsuperscript{178} However, this cost does not repre-

\textsuperscript{165} See 11 C.F.R. § 109.1 (1999). Section 109.1(a)–(b)(1) defines an “independent expenditure” as an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate. (b) For purposes of this definition—(1) Person means an individual, partnership, committee, association, qualified nonprofit corporation under 11 C.F.R. § 114.10(c), or any organization or group of persons, including a separate segregated fund established by a labor organization, corporation, or national bank (see part 114) but does not mean a labor organization, corporation not qualified under 11 C.F.R. § 114.10(c), or national bank.

\textsuperscript{166} See 11 C.F.R. § 109.2.

\textsuperscript{167} See *Massachusetts Citizens for Life*, 478 U.S. at 264–65.


\textsuperscript{169} See id.

\textsuperscript{170} See id. at n.9.

\textsuperscript{167} See id.

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sent the cost of creating a website, because the cost of an internet service provider implicitly includes costs for a bundle of different services. As the name implies, an internet service provider supplies not only a point of entry to the internet but a number of services such as email and other resources,\textsuperscript{170} including the space to create a website.\textsuperscript{180} Therefore, including the cost of an individual's internet service provider overcompensates for the actual cost of the website bearing the advocacy for a federal candidate. Additionally, once on the internet, an individual may obtain space to construct a website free of charge.\textsuperscript{181}

However, it is important to distinguish internet sites from advertising on the internet. Currently, the FEC considers all communication on the internet to be advertising.\textsuperscript{182} In a 1995 Advisory Opinion, the Commission said,

In recent years, there has been a rapid expansion of services available on the Internet, a sizable increase in the number of persons using it, increased ease of accessing the Internet, and a decline in the costs of hardware and software needed to do so. The Commission concludes that the combination of these factors means that use of . . . World Wide Web site[s] . . . should be viewed as a form of general public political advertising under 11 C.F.R. § 110.11.\textsuperscript{183}

Although the FEC should exempt websites created by individuals, it is important that the Commission continue disclosure requirements for individuals or organizations that pay other website operators to carry their message on the internet. Otherwise, a full internet exemption would license powerful political committees to saturate popular websites with advertisements advocating for their candidate.\textsuperscript{184}

On September 14, 1999, the House of Representatives passed a bill reforming the FECA.\textsuperscript{185} Congressman Tom DeLay introduced an amendment to the bill that sought to exempt all internet activity from regulation.\textsuperscript{186} The amendment was defeated by a 160–268 vote.\textsuperscript{187} Congressman DeLay's amendment to the bill was misguided. DeLay's approach would subvert the purpose of federal election laws, which attempt to "limit the actuality and appearance of corruption resulting from large individual financial contributions."\textsuperscript{188} Congressman Tom Allen said in opposition to Congressman DeLay's amendment,

The Internet is growing at an exponential rate. Congress thus far has taken a hands-off policy to let the Internet grow and flourish. The DeLay amendment, however, could undermine the freedom of the Internet by making it the favored conduit for special interests to fund soft money and stealth issue ads into federal campaigns. Let us not poison the Internet and poison our democracy with this poison pill.\textsuperscript{189}

A categorical exemption for internet expenditures would allow wealthy political committees and candidates to saturate the web with advertisements and fund-raising websites, gouging a giant loophole through which campaign expenditures may flow freely and without disclosure. However, narrowly calculating the cost of creating an internet site will not create a loophole in current federal election law.

\begin{itemize}
\item \textsuperscript{170} See, e.g., America Online (visited Oct. 9, 1999) <www.aol.com>. America Online provides chat rooms and personalized information regarding local weather, movie listings, news and sports in addition to access to the internet and email accounts. See id.
\item \textsuperscript{180} See MILLSTEIN, supra note 101, at § 1.04[1].
\item \textsuperscript{181} See, e.g., Rotfll Online Services (visited Oct. 13, 1999) <www.rotfll.com> (offering free email and two megabytes of web space for individual web pages); Geocities (visited Oct. 13, 1999) <geocities.yahoo.com/home> (offering eleven megabytes of disk space for individual websites and tools to design websites without cost).
\end{itemize}
VI. CONCLUSION

Although the internet does not represent the answer to our problem-ridden campaign finance laws, it presents a new tool with which individuals may voice their opinion and attempt to influence elections without the need for heavily funded political committees. As a matter of policy, it is wise to give breathing space to political activity on the internet. Although our notions of the internet’s impact and implications may change over time, prudence dictates a “hands off” approach to political activity on the internet at this time. It is better to err on the side of free political speech on the internet than to quash a flourishing medium through which all participating may be heard.