

LEGAL UPDATE

THE FEDERAL ELECTION COMMISSION AND INDIVIDUAL INTERNET SITES AFTER *SHAYS AND MEEHAN V. FEC*

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I. INTRODUCTION

When Congress passed the Federal Election Campaign Act (“FECA”)¹ in 1971, campaign spending on the Internet was unlikely to have been anywhere on its list of concerns. ARPAnet, the Internet's predecessor, had appeared only two years earlier²; at the same time that Congress was debating FECA, Ray Tomlinson was sending the world's first email message.³

Thirty-five years later, the Internet has become the most ubiquitous communications medium in history. Politicians have capitalized on the opportunity; for instance, during his Presidential election campaign in 2004, John Kerry raised \$82 million dollars online, out of approximately \$249 million total.⁴ This and other Internet fundraising was an important feature of the 2004 campaign, but the Internet serves more uses in a democratic society than as a source of campaign contributions. Online advertising and political commentary provide for convenient democratic participation among those who would not otherwise have a voice in the process.⁵

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¹ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 11 (codified as amended at 2 U.S.C. 431 et seq. (2000)).

² Stephanie Sanborn, *Internet Milestones*, INFOWORLD, Oct. 4, 1999, at 34.

³ *Id.*

⁴ Glenn Justice, *Even with Campaign Finance Law, Money Talks Louder than Ever*, N.Y. TIMES, Nov. 8, 2004, at A16.

⁵ See *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (stressing, “[i]t is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country – and indeed the world – has yet seen. The plaintiffs in these actions correctly describe the ‘democratizing’ effects of Internet communication: individual citizens of limited means can speak to a worldwide audience on issues of concern to them.”).

Bloggers⁶ are probably the most well known group of individuals making use of this ability. The nature of the Internet has allowed the blogging phenomenon to grow quickly into a true force in American politics.⁷ The most effective bloggers perform the same functions as journalists: interviewing sources, checking facts, and raising public awareness of important issues.⁸ The potentially low cost of running a blog and the freedom to speak out on any issue of concern has made blogging an attractive option that many private individuals have exploited.⁹

But a recent spate of legislation, rulemaking, and litigation has thrown a shadow over the use of the Internet by private individuals during political campaigns. The Federal Election Commission (“FEC” or “Commission”) is currently debating whether to regulate political commentary on the Internet or maintain a hands-off approach. If Congress and the FEC choose to exempt the Internet from regulation, bloggers and other commentators will continue their participation unfettered. But if the FEC promulgates any rules governing political speech online, no matter how unobtrusive, everyone who posts an opinion about an election on a website will have to consider first whether that speech falls within the FEC's rules, and second whether it complies with the Commission's regulations.

While the FEC initially exempted the Internet completely from its own regulations,¹⁰ in September 2004, the District Court for the District of

⁶ The term “blogger” refers to anyone who posts opinions or information on an Internet website known as a “blog.” A “blog,” short for “weblog,” refers to “an Internet website where users interested in a particular topic can post messages for other users interested in the same topic to read and answer if they wish.” *Cahill v. Doe*, 879 A.2d 943, 945 n.1 (Del. 2005).

⁷ See Center for Individual Freedom, Comment to FEC Notice of Proposed Rulemaking at 3 (June 3, 2005), http://www.fec.gov/pdf/nprm/internet_comm/comm_06.pdf (noting that, as of April 4, 2005, one of the “primary concerns” of the FEC was how much federal election law should regulate bloggers; however, blogging only arose as a phenomenon in the three years between the passage of BCRA and the Commission’s Notice of Proposed Rulemaking on the Internet issue.); see also Catherine Seipp, *Online Uprising*, AM. JOURNALISM REV., June 2002, available at http://www.ajr.org/article_printable.asp?id=2555 (detailing the contributions of bloggers to online debate and their effect on traditional media.).

⁸ Duncan Black, Markos Moulitsas Zúniga and Matt Stoller, Comment to FEC Notice of Proposed Rulemaking at 7 (June 3, 2005), http://www.fec.gov/pdf/nprm/internet_comm/comm_09.pdf.

⁹ See Seipp, *supra* note 7. See also Allison R. Hayward, *It’s Gettin’ Hot (Headed) in Here: The FEC’s Internet Summer*, PERSONAL DEMOCRACY FORUM, June 16, 2005, <http://www.personaldemocracy.com/node/645>.

¹⁰ Definition of “Public Communication,” 11 C.F.R. § 100.26 (2005) (“The Commission did not include the Internet as a form of ‘general public political advertising’ in proposed 11 CFR 100.26 because this provision of BCRA does not refer to the Internet.”).

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Columbia ordered the Commission to promulgate rules that would eliminate the exemption.¹¹ This action spurred debate, more litigation, and more legislation over the next few months, leading one commentator to dub the ensuing time “Washington’s long, hot Internet summer.”¹² While the final outcome of the Internet summer is unclear as of this writing, two opposing camps continue to compete for legislative support.¹³ In the end, either Congress will maintain the status quo or potentially millions of private individuals could come within the ambit of the FEC for the first time.¹⁴

II. THE BIPARTISAN CAMPAIGN REFORM ACT INTERNET EXEMPTION

Between 1971 and 2002, FECA governed American election law.¹⁵ In May 1999, the Republican Party filed a complaint with the FEC, asking the Commission to apply the 27-year old Act to a satirical web site featuring George W. Bush, then the Republican presidential candidate.¹⁶ The Bush campaign also asked the Commission to clarify a number of Internet-related campaign issues.¹⁷ Because of serious questions regarding whether the FEC could apply FECA to online content, the FEC published a notice of inquiry regarding the “Use of the Internet for Campaign Activity” in November 1999.¹⁸ As a result of the comments, the FEC published a set of proposed rules

¹¹ Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004).

¹² Hayward, *supra* note 9.

¹³ Anne Broache and Declan McCullagh, *Net Campaign Finance Reform Plan Draws Opposition*, CNET NEWS, Nov. 2, 2005, http://news.com/Campaign+finance+reform+plan+draws+opposition/2100-1028_3-5927269.html.

¹⁴ Center for Individual Freedom, Comment to FEC Notice of Proposed Rulemaking at 2 (June 3, 2005), http://www.fec.gov/pdf/nprm/internet_comm/comm_06.pdf (stating, “Indeed, by merely entering this area, no matter how lightly it treads, the Commission sweeps within its regulatory reach millions of Americans who use the Internet to discuss and disseminate their thoughts and opinions about issues of the utmost public importance.”).

¹⁵ Ryan Z. Watts, *Independent Expenditures on the Internet: Federal Election Law and Political Speech on the World Wide Web*, 8 COMM.LAW CONSPECTUS 149, 149 (2000) (providing a general discussion of the FECA’s evolution as it applies to the Internet). Watts recommends that “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.” *Id.*

¹⁶ *Id.* at 149.

¹⁷ *Id.* at 149-150.

¹⁸ Christopher P. Zubowicz, *The New Press Corps: Applying the Federal Election Campaign Act’s Press Exemption to Online Political Speech*, 9 VA. J.L. & TECH. 6, 14 (2004). The Notice of Inquiry itself can be found at: Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360, 60,360 (proposed Nov. 5, 1999) (to be codified at 11 C.F.R. pt. 100, 102–04, 106–07, 109–10, 114, 116).

in 2001, which included a section governing “Internet Activity by Individuals.”¹⁹ But it promulgated no final rules.²⁰ Campaign regulation needed a major overhaul, and intervening events eliminated the need for the FEC to interpret FECA’s effect on the Internet. Congress was about to take up the issue for itself.

In 1997, Representatives Christopher Shays and Martin Meehan introduced legislation in the House to reform the financing of political campaigns.²¹ They intended the legislation to address a number of issues, including practices in the 1996 federal elections that many regarded as disturbing.²² Despite passing in the House several times, the bill stalled in the Senate.²³ In 2001 and 2002, the Senate debated and approved the bill, now called the Bipartisan Campaign Reform Act (“BCRA”), which President Bush signed into law in March 2002.²⁴

III. SHAYS AND MEEHAN V. FEC

A. *Facts*

As required by BCRA, the FEC published proposed rules on the implementation of the statute’s ‘soft money’ requirements in May 2002 and opened a notice and comment period.²⁵ These proposed rules explicitly exempted the Internet from regulation by excluding it from BCRA’s definition of “public communication.”²⁶ This move irked the authors of the legislation, and during the notice and comment period, Reps. Shays and Meehan and Senators McCain and Feingold (who introduced the bill in the Senate), sent a comment to the FEC.²⁷ They stressed that the “central component of BCRA”

¹⁹ The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations, and Labor Organizations, 66 Fed. Reg. 50,358 (Oct. 3, 2001).

²⁰ Zubowicz, *supra* note 18, at 14.

²¹ Andrew B. Kratenstein, *Recent Legislation: Campaign Finance Reform*, 36 HARV. J. ON LEGIS. 219, 219 n.1 (1999).

²² John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 598-99 (2005).

²³ Kratenstein, *supra* note 21, at 219 n.1.

²⁴ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, 88-90 (codified at 2 U.S.C. § 431 (Supp. III 2003)).

²⁵ FEC Notice of Proposed Rulemaking, 67 Fed. Reg. 35654 (2002).

²⁶ 11 C.F.R. § 100.26 (2005). FECA, as amended by BCRA, regulates “coordinated communications,” a term including “public communications.” Shays v. FEC 337 F. Supp. 2d 28, 65 (2004). By excluding the Internet from the definition of a “public communication,” the FEC exempted it from regulation.

²⁷ See Shays and Meehan, Comment to FEC Notice of Proposed Rulemaking (May 29, 2002), http://www.fec.gov/pdf/nprm/soft_money_nprm/us_cong_mccain_feingold_shays_

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was the soft money ban,²⁸ and that the legislative purpose could only be upheld if the Commission adopted their recommendations.²⁹ One of those recommendations regarded the Internet exemption:

In response to the question posed in the Commission's commentary concerning the Internet and e-mail, we note that BCRA contains no *per se* exclusion from the definition of a “public communication” for political party Internet or widely distributed e-mail communications. A broad *per se* exclusion of that nature would be problematic, permitting state and local party entities to exploit rapidly developing technology and new communications media to re-create or prolong the current soft money system. In light of the complexities of this area, we urge the Commission to proceed carefully in delineating the scope of FECA's and BCRA's coverage with respect to Internet and e-mail communications, so that appropriate disclosure requirements and funding restrictions apply to public communications by political party committees via electronic means.³⁰

Despite this recommendation, the FEC promulgated its final rules in July 2002 with the Internet exemption intact.³¹ In October 2002, Shays and Meehan filed a complaint in D.C. District Court challenging the final rules.³² They alleged that “[t]he FEC’s new regulations, in multiple and interrelated ways, thwart and undermine the language and congressional purposes of Titles I and II of BCRA.”³³

B. District Court Decision

Shays and Meehan filed a motion for summary judgment, and the FEC responded with a summary judgment motion of its own.³⁴ The District Court analyzed the issues presented in the motions under *Chevron* review.³⁵ While a number of issues were offered for consideration, this paper focuses only on the court's analysis of the Internet exemption.

Chevron calls for a two-step analysis to determine “whether the agency’s construction of the statute is faithful to its plain meaning, or, if the statute has

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²⁸ *Id.* at 1.

²⁹ *Id.* at 2.

³⁰ *Id.* at 10.

³¹ Definition of “Public Communication,” 67 Fed. Reg. 49064, 49071 (codified at 11 C.F.R. § 100.26 (2005)).

³² *Shays v. FEC*, 337 F. Supp. 2d 28 (2004).

³³ Amended Complaint ¶ 6; *Shays*, 337 F. Supp. 2d at 28.

³⁴ *Shays*, 337 F. Supp. 2d at 28.

³⁵ *Id.* at 51 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

no plain meaning, whether the agency's interpretation 'is based on a permissible construction of the statute.'"³⁶ At the first step of the *Chevron* analysis, the court asked whether "Congress [had] directly spoken on the precise question at issue."³⁷ In FECA, as amended through BCRA, Congress defined a "public communication" as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *or any other form of general public political advertising*"³⁸ (emphasis added). The analysis turned on whether Congress intended that final phrase to include the Internet.

The FEC argued that (1) Congress "excluded [the Internet] from the list of media that constitute public communication under the statute. BCRA does not reference the 'Internet' or 'electronic mail' in this section, although Congress used the terms 'Internet,' 'website,' and 'World Wide Web address' in other sections of BCRA;"³⁹ (2) Congress used the term "Internet" in other statutes, but distinguished it from "telecommunications services;"⁴⁰ and (3) the doctrine of *eiusdem generis* precludes an interpretation that "other form[s] of general public political advertising" includes the Internet.⁴¹

The court replied to the first two points by explaining, "while all Internet communications do not fall within this descriptive phrase, some clearly do."⁴² Thus, Congress probably did not intend to exclude the Internet "wholesale."⁴³ As to the third point, the court found *eiusdem generis* to be inapplicable to the case, because the doctrine applies only to "uncertain" statutory language.⁴⁴ The court believed that Congress "clearly" meant that "public communication" would include "all forms of 'general public political advertising.'"⁴⁵ The court found that Congress had intended at least some communications over the Internet to be included in the term "public communication," and thus the FEC's "wholesale exclusion" of the Internet failed at the first step of *Chevron*.⁴⁶ It left the decision as to what Internet communications to include to

³⁶ *Id.* (citing *Arent v. Shalala*, 70 F.3d 610, 615 (D.C. Cir. 1995) (quoting *Chevron*, 467 U.S. at 843)).

³⁷ *Id.* at 65 (quoting *Chevron*, 467 U.S. at 842).

³⁸ 2 U.S.C. § 431(22) (2000).

³⁹ *Shays*, 337 F. Supp. 2d at 66.

⁴⁰ *Id.*

⁴¹ *Id.* at 67-68.

⁴² *Id.* at 67.

⁴³ *Id.*

⁴⁴ *Id.* at 67-68.

⁴⁵ *Id.* at 68-69.

⁴⁶ *Id.* at 69-70.

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the FEC.⁴⁷

The District Court provided an alternative ground for its ruling, finding that the FEC's actions failed *Chevron* at the second step, as well.⁴⁸ If the agency's actions pass step one, then Congress has left a "legislative gap" for the agency to fill. This means that Congress must have delegated authority to the agency "to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."⁴⁹ In a single paragraph, the court explained that "for the same reasons . . . articulated above," the FEC's regulations undermined and compromised BCRA's purposes, "creat[ing] the potential for gross abuse."⁵⁰

The court remanded the regulations to the Commission for further action.⁵¹ The Commission appealed a number of other rulings that the District Court made in its opinion, but chose not to appeal the Internet exemption.⁵² It immediately began the process of crafting new regulations eliminating the exemption.⁵³

IV. SIGNIFICANCE

In April 2005 the FEC offered new proposed rules for comment.⁵⁴ The Commission claims that the new rules would incorporate the District Court's requirements, while balancing the desire to regulate political advertising with the desire to "encourage the Internet as a forum for free or low-cost speech and open information exchange."⁵⁵ The FEC proposed to amend the definition of "public communication" to include the sentence, "The term *general public political advertising* shall not include communications over the Internet, except for announcements placed for a fee on another person's or entity's Web site."⁵⁶ Among the questions asked by FEC in its request for comments was, "Although the Commission's proposed rule would exclude Internet activity that is not placed for a fee, should the Commission amend its regulation to explicitly state that it is not including 'bloggers' in the definition of 'public communication'?"⁵⁷ Thus, the Commission must believe that there is the

⁴⁷ *Id.* at 70.

⁴⁸ *Id.* at 70-71.

⁴⁹ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-844 (1984).

⁵⁰ *Shays*, 337 F. Supp. 2d at 70.

⁵¹ *Id.* at 130.

⁵² Broache and McCullagh, *supra* note 13.

⁵³ *Id.*

⁵⁴ FEC Proposed Rules, 70 Fed. Reg. 16967 (Apr. 4, 2005).

⁵⁵ *Id.* at 16969.

⁵⁶ *Id.* at 16977.

⁵⁷ *Id.* at 16971.

potential for bloggers to fall within the proposed regulation.

The Commission chose to provide some protections for bloggers. For instance, it did not “change the disclaimer regulation in 11 CFR 110.11(a) to require bloggers to disclose payments from a candidate, a campaign, or a political committee.”⁵⁸ The Commission also exempted from the definition of “contribution” and “expenditure” any Internet activities carried out using computer equipment or services that an individual personally owns, are available at any public facility, or are in their residence.⁵⁹ However, this would not protect a number of bloggers, including those who post from a computer at work.

The benefit of a blanket Internet exemption is that those publishing a web site do not need to worry about whether the FEC’s regulations apply to them. Once we admit the potential for regulation into the Internet, bloggers need to be concerned with whether or not they comply with federal election regulations. In his opening statements at a public hearing on the proposed Internet regulations on June 28, 2005, FEC Vice Chairman Michael E. Toner noted:

If the Commission adopts the regulations proposed in the NPRM [Notice of Proposed Rule Making], people involved in online politics in the future will face numerous legal concerns, including, but not limited to:

- Whether their speech is a “public communication” under 11 CFR § 100.26;
- Whether their speech is “express advocacy” under 11 CFR §100.22;
- Whether their speech qualifies for the media exemption under 11 CFR §§ 100.73 and 100.132;
- Whether their email communications require a disclaimer under 11 CFR §§ 100.27 and 110.11;
- Whether their speech is considered to have been made independently or in coordination with any candidate under 11 CFR §§ 109.10, 109.11, 109.20, 109.21, 109.22, and 109.23, and the consequences that flow from either determination.⁶⁰

Bloggers have been quick to point out other potential problems. The new regulations would force them to consider:

⁵⁸ *Id.* at 16973.

⁵⁹ *Id.* at 16977-78.

⁶⁰ Opening Statement of Vice Chairman Michael E. Toner, Public Hearing on Proposed Internet Regulations, <http://www.fec.gov/members/toner/speeches/statement20050629.pdf> (June 28, 2005).

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- Whether group blogs become political committees once they spend \$1,000;
- In what situations blogs can provide fundraising links for candidates and parties (and how that help will be valued);
- Whether incorporated bloggers may expressly advocate for or against federal candidates and parties;
- Whether internet journalists can use their office or faculty computer to blog about politics; and
- Whether political bloggers can post under a pseudonym or would need to file reports or feature “disclaimers” that provide their true identity.⁶¹

Those in favor of increased regulation argue that campaign finance laws distinguish between political activists and the news media “in order to protect a free press while at the same time limiting the influence of big money on federal elections.”⁶² But considering bloggers in that equation makes that distinction troublesome: “If anyone can publish a blog, and if bloggers are treated as journalists, then we can all become journalists. If millions of ‘citizen journalists,’ as bloggers like to call themselves, are given the rights and privileges of the news media,” then they will create a “new loophole that will eviscerate the contribution and expenditure limits of the campaign finance law.”⁶³

Rep. Meehan, speaking on the House floor, argued:

What could happen is you could have an energy bill, provisions of which were written by the oil and gas industry. Let us say a company like Exxon, as a result of it, had the highest profits they have ever had, record profits because of gasoline prices going out of control. The same people who advocated for that energy bill that Exxon supported could go to Exxon and say, “Could you use some of those profits to support my campaign with a massive online campaign ad buy.”

This is no minor affair. This is a major unraveling of the law.⁶⁴

Proponents of the exemption argue that, far from being a threat to democracy, blogging has created what the founders hoped for: a democratic

⁶¹ Allison Hayward, *The FEC and the Internet: Where Are We Now?* PERSONAL DEMOCRACY FORUM, Nov. 8, 2005, <http://www.personaldemocracy.com/node/762>.

⁶² Institute for Politics, Democracy & the Internet, Comment to FEC Notice of Proposed Rulemaking, at 7 (June 2, 2005), <http://ipdi.org/UploadedFiles/Comments%20to%20FEC%20in%20Internet%20NPRM.pdf>.

⁶³ *Id.*

⁶⁴ 151 Cong. Rec. H9478 (daily ed. Nov. 2, 2005) (statement of Rep. Meehan).

society in which anyone can comment on the issues important to them, and where the most well-reasoned arguments are given the most consideration. They contend, “the most important thing the FEC can do with regard to the Internet is to generally leave it alone, to allow it to serve as a vibrant counterweight to other media in which most individuals have no ability to speak to the masses and cannot influence the debate.”⁶⁵ The “unraveling of the law” prophesized by Rep. Meehan is simply scaremongering.⁶⁶ “The exemption is [the] current law today, and none of the developments have taken place – quite possibly because in most situations they would violate some other part of the law. For example, it would remain illegal for a corporation or union to fund a campaign ad for a federal candidate.”⁶⁷

The members of the House Judiciary Committee submitted a comment to the FEC urging the Commission to offer a blanket exemption for bloggers, so long as candidates did not compensate them.⁶⁸ We may have the opportunity to see whether this recommendation will be included in the Final Rules very soon: the FEC issued a press release on November 3, 2005, indicating that it was “committed to completing action” on all of the regulations affected by *Shays* by the end of February 2006.⁶⁹ This action increased pressure on Congress, which is considering a statutory Internet exemption (the “Online Freedom of Speech Act.”).⁷⁰ On November 2, opponents of the Online Freedom of Speech Act mounted a successful last-minute attack, and the bill, which had appeared likely to pass, was defeated by a vote of 225 (in favor) to 182 (opposed).⁷¹ The expedited rules that the House leaders adopted required a two-thirds supermajority to send the bill to the Senate.⁷² Meanwhile, seemingly no longer willing to trust the rulemaking process to the FEC, Representatives Shays and Meehan are planning to draft an alternative bill allowing for some

⁶⁵ Black, Moulitsas and Stoller, *supra* note 8, at 16.

⁶⁶ Hayward, *supra* note 61.

⁶⁷ *Id.*

⁶⁸ *Ex parte* communication from members of the House Judiciary Committee (Mar. 11, 2005), http://www.fec.gov/pdf/nprm/internet_comm/exparte01.pdf.

⁶⁹ Press Release, Federal Election Commission, FEC Describes Plans for Rulemakings (Nov. 3, 2005), *available at* <http://www.fec.gov/press/press2005/20051103shays.html>.

⁷⁰ Online Freedom of Speech Act, H.R. 1606, 109th Cong. (2005) (providing that “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.’”). Senator Reid proposed an identical bill in the Senate. Online Freedom of Speech Act, S. 678, 109th Cong. (2005).

⁷¹ Declan McCullagh, *Democrats Defeat Election-Law Aid for Bloggers*, C|NET NEWS, (Nov. 2, 2005), http://news.com.com/Democrats+defeat+election-law+aid+for+bloggers/2100-1028_3-5929587.html.

⁷² *Id.*

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regulation.⁷³ Regardless of which (if any) version makes it through Congress, the disparity in treatment of the Internet suggests that the extent to which Congress actually intended regulate that medium is unclear.

The potential for abuse exists on both sides. While an unregulated Internet could allow soft money to creep into the system, new regulations could flood the FEC with complaints as bloggers fail to cope with the new rules. The fear of running afoul of the FEC's regulations will likely cause some bloggers not to post their opinions, regardless of whether or not they fall within the Commission's definitions to begin with. The threat of legal action and complaints to the FEC may become the new tools for politicians to shut down web sites that they do not approve of. And regulating so many individuals could prove to be beyond the FEC's capabilities. On the other hand, without any regulation at all, a new generation of Internet pop-ups, banner ads, and advertising pages, financed by large amounts of soft money could spring up. Striking the correct balance is proving to be a difficult task for Congress and the FEC.

V. CONCLUSION

As of this writing, the FEC had not promulgated a new rule eliminating the Internet exemption; but if the Commission holds to its pledge to do so soon, we could have a sweeping new set of regulations governing the Internet just in time for the 2006 elections. However, it is very difficult to predict what the Commission will do: while the original Internet exemption passed the six-member Commission with the support of four members, three new members were sworn in on January 9, 2006.⁷⁴ Thus, the Commissioners who will promulgate the final rule will "not be the ones who heard testimony and asked questions of the various witnesses. That fact could give the career staff greater sway over the final product, and produce a more complex and regulatory final rule as a result."⁷⁵

A complex final rule would be difficult for the courts to interpret, especially given the ambiguous Congressional intent. A complex final rule would be even more difficult for the average blogger to interpret. Many will choose to censor themselves. The most vocal will continue to publish their opinions online. It is these more vocal bloggers that candidates are more likely to complain about and refer to the FEC. Even if the FEC does not intend to regulate the majority of online speech, opening the door to regulation will provide politicians with an avenue of attack; they will look for language in the rule that gives them a chance to shut down websites that could hurt their campaigns. This will leave

⁷³ Broache and McCullagh, *supra* note 13.

⁷⁴ Press Release, Federal Election Commission, New FEC Commissioners Take Office (Jan. 9, 2006), <http://www.fec.gov/press/press2006/20060106members.html>.

⁷⁵ Hayward, *supra* note 61.

the FEC in the position of having to interpret its rule in the face of a flood of complaints.

If 2005 saw Congress' "long, hot Internet summer," 2006 may see the FEC's Internet regulatory nightmare.