

FEC Testimony
of
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I am pleased to be back at the Federal Election Commission, where I started my legal career 29 years ago.

I represent the Institute for Politics, Democracy & the Internet, whose mission is to improve campaign conduct and promote democratic values through the Internet.

I want to use my limited time this morning to make three points.

First, the political landscape has changed profoundly because of the Internet, and the campaign finance regulatory scheme has to change with it. One of the most important things the Internet has done is to lower the financial barriers to entry to politics and to journalism.

Because of the Internet, politics is no longer limited to big donors and professional and semi-professional operatives. Those days are over. So are the days when corporate media elites could treat serious national journalism as their exclusive domain.

Now, thanks to the investigative efforts of bloggers, we no longer have to treat the pronouncements of network television anchors like Dan Rather as received wisdom. Stories like the racist comments of Trent Lott that would have died on the vine in years past now see the light of day thanks to bloggers who refused to give him a pass.

The second point I want to make is to urge that this rulemaking not become a vehicle for contributions by corporations and unions and wealthy individuals that are otherwise prohibited. For almost 100 years – since the Tillman Act was passed in 1907 – federal law has prohibited corporate contributions, in order to limit the corrosive influence of large aggregations of wealth.

To accomplish this goal while at the same time serving an equally important goal – not interfering with a free press, the Federal Election Campaign Act (the FECA) has made a fundamental distinction between media corporations and other corporations.

And that brings me to my third point, media exception. At its essence, this provision allows a media corporation, through certain of its employees -- reporters, editorial writers, and cartoonists -- to spend an unlimited amount of corporate money communicating with candidates, asking them anything about their campaigns, with no question relating to money or strategy off limits, activities, in short, that would be considered “coordination” if the person doing the asking were not considered media.

This exemption is so broad that, aside from the various journalists’ codes of ethics, there is absolutely nothing to stop the reporters from becoming partisan advocates of a candidate – what reporters derisively call “getting in the tank” with the candidate.

The media exemption, however, allows them this leeway, because to do otherwise would interfere with their rights as journalists. And all members of the press are entitled to this exemption: the good, the bad, the hacks, the partisans, and the crazies. Everyone from *The New York Times* to the *National Inquirer* to the independent journalist working in his basement distributing his work around the neighborhood on a mimeographed sheet is protected by the media exemption.

This broad treatment is in keeping with the legislative history, and is consistent with the FEC’s previous advisory opinions. Given these precedents, I expect that the members of the Commission will grant the exemption widely to bloggers, or you will send it back to Congress and they will specifically include bloggers.

But this broadly granted media exception contains within it an absolutely unavoidable consequence. And that is, there is no way to keep big money out of this picture.

My concern is not with the average citizen who chooses to publish a blog and share his or her viewpoints on the Internet, but with large corporations and unions who seek to unfairly influence campaigns by spending huge amounts of money under the guise of being a blog.

Let's use one of my fellow panelists and his excellent blog as examples. Let's assume that he is granted the media exemption, as I assume will happen.

As a media entity, he is entitled to use his own funds and the funds of his advertisers and any investors he can persuade to support his enterprise. Let's say that the Halliburton Corporation wants to invest.

Call this new media entity the Halli-blogger. Like any media entity – for example, *The New York Times* or *ABC News* -- it can publish anything it wants on any topic.

Like *The New York Times* it can publish editorials advocating the election or defeat of any candidate. *The New York Times* does this every election, using its corporate money to produce its content and distribute its views -- and so can the Halli-blogger. Although *The New York Times* does not solicit money for candidates, there is nothing in campaign finance laws or any other law to stop it from doing so. Its own policies, not law, prevent this.

Similarly, the Halli-blogger can spend an unlimited amount of its money -- corporate funds or any other funds -- advocating the election or defeat of a candidate, and can solicit money for a candidate. It can take these two actions through prose editorials, through political cartoons, or as *ABC News* does, through videotaped clips.

Further, the FEC has stated that the current media exception allows a media entity to distribute its content in any manner that is consistent with industry practice. So in keeping with the practices of other media entities, the Halli-blogger can distribute its political “editorials” and political solicitations by putting them up on the website, or by email, or RSS feed, or list serv. It can also produce expensive videos that other people can use for their own purposes, such as TV commercials.

The only way to prevent the Halli-blogger from taking and spending corporate money is to prevent all media entities from having corporate shareholders or receiving corporate investments. And that is not going to happen.

I don't want to single out Halliburton or my fellow panelist. The same media exemption is available to any union, and to any millionaire or billionaire.

George Soros or the AFL-CIO can team up with a blogger or just create their own blog. So can every well-heeled fundraiser for President George W. Bush or Senator John Kerry. As a former campaign finance lawyer, I can think of any number of ways to use the media exemption to pump big money into the system.

That is what I fear about the widely granted media exemption. Not that the old media will lose its power. They can take care of themselves. What I fear is that our fragile, very flawed system of campaign finance regulation will be completely destroyed.

There are those who applaud that result. But only if you think the system cannot get any worse than it is, should you welcome a development that will gut the 98-year-old prohibition on corporate contributions in federal elections.

The FEC or the Congress can widely grant the media exception to anyone with a blog, or almost anyone, and the precedents, and the legislative history all point in that direction. Or they can preserve the prohibition on corporate money that has stood for almost a century. They cannot do both.

And that's a pity, because they are both goals worth fighting for.