

HARMON, CURRAN, SPIELBERG & EISENBERG, LLP

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(202) 328-3500 (202) 328-6918 fax

September 27, 1999

N. Bradley Litchfield
Federal Election Commission
999 E Street NW
Washington, DC 20463

AOR 1999-17
Late COMMENT

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Dear Mr. Litchfield,

At the suggestion of Commissioner David M. Mason, I have enclosed a copy of a letter that our firm sent to the Commissioners of the Federal Election Commission on August 24, 1999.

Mr. Mason thought that Items I and III in our letter were quite relevant to currently pending Advisory Opinion Request 1999-17.

We hope our input is helpful to you.

Sincerely,


Nicole McLaughlin

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SECRETARIAT



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 30, 1999

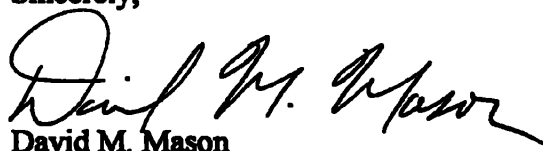
Gail Harmon, Esq.
Harmon, Curran, Spielberg & Eisenberg, LLP
1726 M Street NW, Suite 600
Washington, DC 20036

Dear Ms. Harmon:

Thank you for the recent letter from you and your associates on the Internet and the FECA. I found your comments helpful and would urge you to comment further when the Commission issues its Notice on Inquiry on the Internet and Federal Election Campaigns in the coming weeks.

Items I and III in your letter are immediately relevant to a currently pending Advisory Opinion Request, 1999-17, submitted by the Governor George W. Bush for President Exploratory Committee, Inc. In my view, it would be helpful for you to submit those comments in connection with that AOR to N. Bradley Litchfield here at the Commission.

Sincerely,


David M. Mason
Commissioner

DMM:ktc

cc: ✓ N. Bradley Litchfield

HARMON, CURRAN, SPIELBERG & EISENBERG, LLP

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August 23, 1999

Chairman Scott Thomas
Federal Election Commission
999 E Street NW
Washington, DC 20463

Dear Chairman Thomas:

It is our understanding that the Federal Election Commission General Counsel's Office will soon propose rules regarding application of the Federal Election Campaign Act (FECA) to the Internet. At the risk of being premature, we would like to offer you some general thoughts about the Internet and its potentially positive role in federal elections.

Harmon, Curran, Spielberg & Eisenberg, LLP, is a small law firm representing primarily nonprofit organizations. Many of our clients participate in federal elections via separate segregated funds or pursuant to the regulations regarding membership organizations. However, we are not writing this letter on behalf of any particular constituency or client. Rather, we are speaking as individual lawyers who are concerned with the declining participation in the electoral process and the increasing perception of the corrupting role of big money in that process.

The FECA was designed to prevent corruption, and the appearance thereof, in federal elections. Specifically, it was intended to prevent the use of large amounts of money to buy access to candidates and elected officials. To that end, Congress imposed strict contribution limits, and prohibited corporations from making any contributions at all. Although FECA necessarily impinges on some political speech, it does so only as a means to prevent large amounts of wealth from corrupting the political process. FECA was not intended to curb political speech for the sake of limiting speech.

There is widespread agreement that robust political discourse is beneficial to, and necessary for, a healthy democracy. As a vehicle through which communications can be made to millions of people at very little cost, the Internet helps advance democratic participation in a manner previously unimaginable. Even people with very few resources can now engage in widespread political speech and can access huge amounts of information about candidates and parties. Because the Internet can only enhance our system of representative democracy, restrictions on its use should be scrupulously tailored to counter the specific evil FECA was designed to address.

With these thoughts in mind, we would like to encourage the Commission to use the breadth of the FECA statute to create rules that are practical while respecting the true goals of the

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statute. We hope that the Commission will refrain from simply operating by analogy between the Internet and other communications vehicles, such as mail or telephone. Indeed, operating by analogy could produce some absurd results. To illustrate this possibility, we offer some examples. These examples are not intended to offer solutions but rather to highlight the need for the Commission to approach regulation of Internet communications in a manner fundamentally different from the approach used for other methods of communication.

- I. Internet communications are so inexpensive that requiring PACs or individuals to track and report the costs of communications that contain express advocacy could result in reports to the Commission of literally pennies worth of in-kind contributions. Indeed, by imposing a registration threshold of raising or spending \$1,000, the statute itself recognizes that certain costs are too small to monitor and that the public interest in permitting such costs outweighs any public benefit derived from regulation.

- II. While the costs attributable to traditional forms of communication are generally apparent, costs attributable to Internet communications often are not. For instance, if a membership organization has a web site for which it pays a monthly maintenance fee, and that web site contains some PAC information, how should the monthly maintenance fee be allocated?

Applying the principles for other written communications, it is tempting to say that the PAC should pay for the percentage of the monthly fee that corresponds to the percentage of the site devoted to PAC communications, and that such costs should then be allocated as a contribution to or expenditure for each candidate whose election is expressly advocated. Unfortunately, the world of cyberspace does not function so neatly. It is unlikely that all of the information on the organization's website remains the same throughout any given month. On one day information is added, on another it may be removed. Would the Commission require organizations to break down the \$200 monthly maintenance fee into a daily rate, and then analyze the web site content each day to determine what portion of a fee may be allocable to the PAC, and ultimately a candidate? Does the Commission want to put itself in the position of having to oversee such calculations?

- III. Links between web sites are perhaps one of the best examples of how dramatically different the Internet is from traditional forms of communication. It is links that give rise to the interconnectivity that make the web unique. Because the presence of links clearly provides value to the site on which they appear, they have proliferated in a wide variety of contexts.

Depending on the context, a link may be more or less similar to a mailing address or phone number, a pre-addressed envelope, a command, an advertisement, or an endorsement. For instance, placement of a link on a particular site may be a right

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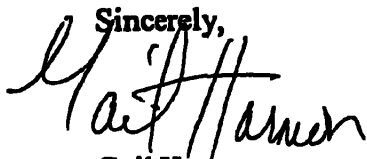
purchased from the linked site, or it may be paid for by the linked site. In some cases, links may make up the entire substance of a web page, as with the results returned by a search engine. In other contexts, they may provide a path to additional information on topics discussed, as with a news story or policy report linking to underlying documents. Still in other circumstances they may simply be a source of revenue, as with banner ads that support free services offered on many sites.

Due to the variety of ways in which links are used, a uniform regulation applicable to all links is unlikely to be a practical or desirable way to accomplish the goals of FECA. Moreover, the use of links is constantly evolving, and we cannot yet imagine the uses to which they will be put in the very short future. Therefore, any attempt to catalog the types in existence today will quickly become outdated. For these reasons, if links are to be regulated at all, they should be regulated in a manner that recognizes their potential to increase participation in electoral politics and flexibly enough to accommodate rapidly changing technology and evolving creativity.

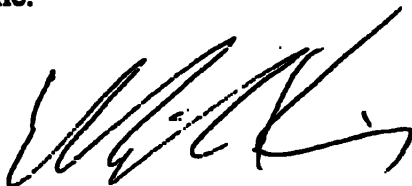
With the advent of the Internet, millions of people who before did not have meaningful access to the political debate so essential to representative democracy are able to obtain information and make their voices heard. The Commission should view this phenomenon as a fundamentally positive development and should approach any rulemaking with an eye toward fostering political participation rather than chilling political speech through the regulation of minutiae which do not undermine the goals of FECA.

Thank you for your time.

Sincerely,



Gail Harmon



Elizabeth J. Kingsley



Nicole McLaughlin

cc: Commissioner David Mason
Commissioner Danny McDonald
Commissioner Karl Sandstrom
Commissioner Darryl Wold
Commissioner Lee Ann Elliott
Lawrence Noble, FEC General Counsel