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November 16, 2005

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VIA FACSIMILE

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Draft AO 2005-16

To the Commission:

On behalf of my clients Duncan Black, Markos Moulitsas Zúniga and Matt Stoller, I wanted to offer these brief comments in support of your draft advisory opinion regarding Fired Up! LLC ("Fired Up").

During this nearly year-long process of exploring how grassroots political activity on the Internet could best be protected by law, we have constantly returned to the press exception as the superior means for doing so. By focusing on *what* participants do (news story, commentary and editorial) rather than the means in which they are organized for doing so (individual, group, incorporated, etc.) or the mode of Internet communication (weblog, podcast, instant message chatroom, etc.), a robust application of the press exception provides the broadest, most flexible protection possible short of an outright Congressional exemption of the Internet from campaign finance regulation.

We favor the press exception because it provides clearest signal to participants that their activities will not be chilled by the threat of investigation or subpoena. With that protection for their commentary and activism, innocent users cannot accidentally fall into political committee status or having their incorporated status being subject to some nebulous "purpose" test. As you well note, the legislative history of FECA also supports a broad reading of the press exception:

[I]t is not the intent of the Congress in the present legislation to limit or burden *in any way* the first amendment freedoms of the press and of association. Thus [the press exception] assures the

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unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.

H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 4 (1974) (emphasis added).

In particular, we are gratified by the language on page 9 which strongly affirms the right of media to be partisan and biased, that neither the First Amendment nor FECA require the press to be "serious", "objective" or "fair and balanced" as some have argued. All the law requires is that the speaker be engaging in news, editorial or commentary, and any inquiry beyond that would lead the Commission into murky, and likely unconstitutional waters.

The initial Fired Up request noted that the websites planned to "endorse, expressly advocate, and urge readers to donate funds to the election of Democratic candidates for federal state, and local office." While the draft advisory opinion does not address this point explicitly, we infer that it supports Fired Up engaging in such speech as part of its commentary and editorial function, and would encourage the Commission to make this clear in issuing its formal opinion. We saw in 2004 how the Internet empowered small-dollar donors to become involved in campaigns, and the goals of campaign finance reform are fulfilled by removing any doubt that speakers on the Internet can encourage readers to donate directly to favored candidates and offset the influence of the wealthy. (The alternative could be to force private citizens to be as conversant on the Commission's rules regarding "soliciting" and "directing" funds as candidates, parties and political committees, and this is not a desirable result.)

As we have made clear in our written comments and testimony, we strongly believe that the Commission should keep its focus on the candidates, parties, political committees and other entities with the resources and the experience to deal with its regulatory scheme, and ought not force private citizens to become equally conversant in the details of Title 11 of the Code of Federal Regulations.

There are two paradigms the Commission could employ in examining the Internet. One would be to see it as a threat to clean elections similar to commercial mass media and treat online activities as presumptively subject to regulation unless they fall into one of the narrowly-tailored categories deemed acceptable.


The other would be to recognize that the Internet is inherently different, that its unique ability to empower millions of citizens to become more directly involved in national affairs than ever before requires that regulation be drawn with a light touch and narrow focus, treating citizen activities as presumptively legitimate unless falling into a narrow band of known harms. The press exception allows the Commission to exclude the overwhelming bulk of online activities from its ambit, leaving the regulatory focus on the sophisticated entities where it belongs.

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We strongly endorse the Commission's draft approach to AO 2005-16.

Sincerely,

COZEN O'CONNOR


By: Adam C. Bonin

ACB

cc: Office of General Counsel