

COMMENT

IS EVERYONE NOW A JOURNALIST?: HOW THE FEC'S APPLICATION OF THE MEDIA EXEMPTION TO BLOGGERS WEAKENS FEC REGULATION

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INTRODUCTION

In the spring of 2006, the Federal Election Commission (FEC) issued its first regulations addressing political activity on the Internet.¹ Contrary to the FEC's original interpretation of the Bi-Partisan Campaign Reform Act² (BCRA), the decision in *Shays v. FEC*³ forced the FEC to create Internet regulations for the first time in the FEC's history. In revising its regulations, the FEC granted the Federal Election Campaign Act's (FECA)⁴ Media Exemption⁵ to nearly all bloggers,⁶ adding more controversy to the heavily debated question⁷ of whether bloggers should be treated as journalists.

1. 11 C.F.R. §§ 100, 110, 114 (2006).

2. The Bi-Partisan Campaign Reform Act of 2002 (BCRA) addressed "soft money" campaign contributions and sought to limit the corruptive influence of money in politics. See Pub. L. No. 107-155, § 101, 116 Stat. 81 (2002) (encompassing specific Internet activity within the meaning of "public communication" regulated by the Federal Election Commission (FEC)); see also FED. ELECTION COMM'N, THIRTY YEAR REPORT 7 (2005), available at <http://www.fec.gov/info/publications/30year.pdf> [hereinafter REPORT] (summarizing the BCRA).

3. 337 F. Supp. 2d 28, 70 (D.D.C. 2004).

4. Pub. L. No. 92-225, 86 Stat. 3 (1972); see also REPORT, *supra* note 2, at 4 (describing concerns that resulted in the passage of Federal Election Campaign Act (FECA) and how FECA addressed the corruptive effects of financial influence in federal elections).

5. See 2 U.S.C. § 431(9)(B)(i) (2000) (excluding media distribution from the definition of "expenditure").

6. A blogger authors a blog (i.e., web-log). Since the early 1990s, individuals have published web-logs to comment on current events or to write journal entries. See Media Bloggers Association, About, <http://www.mediabloggers.org/about> (last visited Apr. 29, 2008); see also Comment from Duncan Black, Markos Moulitsas Zúniga & Matt Stoller to Brad C. Deutsch, Associate General Counsel, FEC (June 3, 2005), http://www.fec.gov/pdf/nprm/internet_comm/comm_09.pdf [hereinafter B.M.S. Comment] (including under the heading of "What [Bloggers] Do" activities such as commenting on politics, maintaining diaries, creating videos, fundraising, chatting, and advertising).

7. The D.C. Circuit recently addressed the issue when discussing whether a blogger deserved inclusion under a reporter's shield law:

Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly newsletter to inform his neighbors, lodge brothers, co-religionists, or co-conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not?

In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 979 (D.C. Cir. 2005). Compare David Paul Kuhn, *Blogs: New Medium, Old Politics*, CBSNEWS.COM, Dec. 8, 2004, <http://www.cbsnews.com/stories/2004/12/08/politics/main659955.shtml> (warning that bloggers are in "the Wild West of cyberspace" and, unlike traditional journalists, are not bound by standards of accountability or professional ethics), with 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. 1, 37-38 (2004) (urging adoption of the Media Exemption to include bloggers because blogs present an alternative to traditional media), and B.M.S. Comment, *supra* note 6, at 6 (reasoning that bloggers are "other media" within the Media Exemption).

The Media Exemption excludes any non-politically controlled press entity from FEC regulation by not defining the expenses that the entity incurs during its coverage of a federal campaign as a “contribution” or an “expenditure.”⁸ The Media Exemption ensures that journalists have an unfettered ability to access and cover candidates for national office,⁹ and it stems from a historic, national belief that the press facilitates a desirable and robust exchange of ideas on public issues.¹⁰ Granting all bloggers the Media Exemption gives bloggers the same privileges and rights as journalists,¹¹ leaving bloggers¹² outside the reach of traditional FEC regulations.¹³

A Media Exemption for all bloggers implicates election laws in several respects. Bloggers engage in a broad variety of activities¹⁴—including those of political activists, donors, and fundraisers—all of which the FEC regulates.¹⁵ Markos Moulitsas, founder of the popular blog DailyKos.com, has indicated that, “I run a site and I’m part of a movement that has hundreds of thousands to millions of *committed activists working on behalf*

8. 2 U.S.C. § 431(9)(B)(i) (excluding as an expenditure or contribution any cost incurred in covering or carrying a “news story, commentary, or editorial” by any “broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate”).

9. H.R. REP. NO. 93-1239, at 4 (1974).

10. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (referencing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” when declining to find a newspaper liable for publishing information harmful to a public official).

11. In addition to the Media Exemption, journalists enjoy privileges such as shield laws, permitting them to claim journalistic privilege when reporting news stories. *E.g.*, Frontline PBS: Interview with Josh Wolf, <http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/wolf.html> (interview conducted Sept. 10, 2006) (describing Josh Wolf, an Internet blogger who was imprisoned for eighteen months for contempt of court while claiming journalistic privilege when refusing a court’s order to turn over demonstration footage that he shot). Compare Julie Hilden, *Bloggers Deserve the ‘Journalist’s Privilege,’* CNN LAW CENTER, Apr. 27, 2005, <http://www.cnn.com/2005/LAW/04/27/hilden.blogging/index.html> (describing how some have tried to assert the “journalistic privilege”), with Comments from Carol Darr, Director, Institute for Politics, Democracy & the Internet to Brad C. Deutsch, Assistant General Counsel, FEC (June 2, 2005), <http://ipdi.org/UploadedFiles/Comments%20to%20FEC%20in%20Internet%20NPRM.pdf>, [hereinafter IPDI Comment] (anticipating the demise of journalistic privilege if bloggers receive status as journalists because the right will be valued less as more individuals claim it).

12. 11 C.F.R. § 100.94(a), 100.155(a) (2007).

13. See, *e.g.*, 2 U.S.C. § 431(8)(A), (9)(A); *infra* note 15 and accompanying text.

14. See B.M.S. Comment, *supra* note 6, at 3 (specifying these activities under “What [Bloggers] Do”).

15. *E.g.*, 2 U.S.C. § 431(8)(A) (elaborating on the contribution limitations that hypothetically could apply to bloggers’ work product and the exposure’s value to politicians in activities like advertising, express advocacy, and fundraising); *id.* § 431(9)(A) (explaining that expenditure limitations would apply to bloggers’ advertising or other electioneering activities).

of their candidates.”¹⁶ This situation creates problems for FEC law because bloggers want the exemptions the law affords to journalists, while participating in activities that fall under the FEC’s regulatory authority for “activists working on behalf of their candidates.”¹⁷ In essence, a Media Exemption for all bloggers creates a loophole for any blogger wishing to eviscerate FEC regulations pertaining to public disclosure and contribution limits.¹⁸

Bloggers are dramatically changing political campaigns.¹⁹ Today, bloggers enrich the marketplace of ideas and contribute information,²⁰ thereby revolutionizing political journalism.²¹ New “citizen journalists”²² are blogging their way into influencing elections²³ and establishing interest groups,²⁴ while gaining recognition among established media.²⁵ However, the growing wave of bloggers as “citizen journalists” raises questions²⁶ about the appropriateness of such a title.²⁷ Critics argue that bloggers do

16. *Meet the Press* (NBC television broadcast Aug. 12, 2007) (transcript available at <http://www.msnbc.msn.com/id/20214115>) (emphasis added).

17. *Id.*

18. *E.g.*, 2 U.S.C. § 431(8)(B) (2000 & Supp. V).

19. Because posting messages on the Internet is less expensive than traditional advertising, candidates can craft more detailed messages to specific constituencies. This results in a more informed electorate because candidates are no longer confined to thirty-second sound bites, and they can address specific groups’ concerns in greater detail. *See, e.g.*, Seth Grossman, Note, *Creating Competitive and Informative Campaigns: A Comprehensive Approach to “Free Air Time” for Political Candidates*, 22 *YALE L. & POL’Y REV.* 351, 382–85 (2004) (discussing candidates’ possible strategies for using the Internet to target specific interest groups).

20. *See id.* at 386–87 (explaining that bloggers enhance “horizontal interactivity” when people speak to each other and “vertical interactivity” when candidates communicate directly to voters).

21. *E.g.*, You Choose ’08, <http://www.youtube.com/youchoose> (last visited Apr. 29, 2008) (allowing candidates to interact directly with “vloggers” (video bloggers), posing questions on everything from important future issues to selecting campaign theme songs).

22. The term “citizen journalist” invokes blogging’s ability to democratize journalism. Bloggers use the term when discussing their claim to be journalists. Media Bloggers Association, *supra* note 6.

23. *See* David Stevenson, Note, *A Presumption Against Regulation: Why Political Blogs Should Be (Mostly) Left Alone*, 13 *B.U. J. SCI. & TECH. L.* 74, 81–83 (2007) (documenting bloggers’ roles in Howard Dean’s success in the 2004 Democratic Presidential Primary).

24. *See* Media Bloggers Association, *supra* note 6 (stating its mission to advance grassroots citizen journalism and defend bloggers’ rights).

25. *See, e.g.*, CNN.com I-Reports Spotlight, <http://www.cnn.com/exchange> (last visited Apr. 29, 2008) (encouraging individuals to upload photos, video, and stories).

26. Merely publishing a blog should not entitle someone to the status of journalist because blogging lacks accountability and the traditional institutional ethics known in journalism. *See* Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 395, 395–96 (2006) (advocating a functional test for bloggers).

27. *See* 16 Op. FEC 1, 8–10 (2005) (Thomas & McDonald, Comm’rs, concurring) (questioning where to draw the line between blogging and journalism when granting the

not merit this distinction²⁸ and distinguish bloggers from established journalists²⁹ by highlighting the lack of accountability or professional ethics in blogging.³⁰

While not wishing to overlook the growing importance of the Internet and how it shapes journalism, this Comment will consider whether it is proper to grant all bloggers the status of journalist. Part I of this Comment traces the development of the FEC's Internet regulations by examining existing case law interpreting the Media Exemption. Part II argues that the FEC's blanket application of the Media Exemption to bloggers is improper because: (A) not all bloggers operate as journalists, and some bloggers differ fundamentally from journalists; and (B) a blanket application ignores the highly complex nature of blogs, is inconsistent with prior court rulings, and invites bloggers to eviscerate FEC law through blogging.

Part III proposes that the FEC should allow bloggers to earn media status by using a multifaceted point system, which would grant a media license certificate to qualifying bloggers so that they can enjoy the same privileges as journalists.³¹ Part III further argues that the point system is better than the FEC's current blanket exemption because it forces qualifying bloggers to operate within the Media Exemption's statutory requirements and gives bloggers incentives to operate like established press entities. This Comment concludes that the FEC should apply the point system because it will distinguish credible "citizen journalists" from less credible bloggers and because its application is necessary to maintain the integrity of FEC law on the Internet.

Media Exemption if a blog's ties to Democratic Party Committee membership made it possible for the blog to be politically controlled).

28. See IPDI Comment, *supra* note 11 (warning that overly broad application of the Media Exemption will eviscerate FEC regulations because "[i]f anyone can publish a blog, and if bloggers are treated as journalists, then we can all become journalists").

29. Congress is currently considering the Free Flow of Information Act of 2007, which defines journalism as the "gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public." H.R. 2102, 110th Cong. § 4(5) (2007).

30. Society of Professional Journalists, Code of Ethics, *available at* <http://www.spj.org/pdf/ethicscode.pdf> [hereinafter Journalist Code of Ethics].

31. See *infra* Part III.

I. THE MEDIA EXEMPTION AND FEC REGULATIONS BEFORE THE EMERGENCE OF THE INTERNET

Congress created the FEC in 1971 when it passed the FECA³² to prevent monetary contributions from having undue influence on national politics.³³ Congress's goals remained the same when it passed the BCRA³⁴—to counteract the effects of “soft money”³⁵ in politics. Regulating financial influence is important to the FEC because unregulated contributions can lead wealthy interests to buy favor from legislators and can erode democratic government by placing disproportionate power in the hands of a wealthy few.

The FEC's regulatory purview most implicates blogs with political ties, particularly those blogs operating as campaign agents. Without the Media Exemption, the FEC would subject these blogs to the same FEC regulations as Political Action Committees (PACs),³⁶ and the blogs would have to comply with public disclosure regulations.³⁷ Specifically, public disclosure regulations would affect bloggers with operating costs or contributions exceeding \$1,000,³⁸ and activities such as advertising or fundraising would

32. Pub. L. No. 92-225, 86 Stat. 3 (1972); *see also* Benjamin Norris, Note, *Fired Up! In the Blogosphere: Internet Communications Regulation Under Federal Campaign Finance Law*, 84 WASH. U. L. REV. 993, 999 (2006) (discussing Congress's desire to reduce the influence of large financial contributors and the appearance of corruption that such contributions may suggest).

33. The FECA meant to, (a) limit contributions from wealthy interest groups, (b) prohibit certain sources of funds for campaigns, (c) reduce reliance on contributors and fundraisers, and (d) require public disclosure of campaign finances. REPORT, *supra* note 2, at 4.

34. The BCRA is more commonly referred to as the McCain-Feingold Act. Pub. L. No. 107-155, 116 Stat. 81 (2002).

35. “Soft money” refers to funds political parties raise for specific campaigns. *See* REPORT, *supra* note 2, at 7 (describing “soft money” and its impact on elections). In the 1996 election cycle, soft money's effects proved particularly troubling, as political parties exchanged access to politicians for large amounts of money, which was then used for issue ads.

36. A Political Action Committee (PAC) is “any committee, club, association, or other group of persons which receives contributions . . . or which makes expenditures aggregating in excess of \$1,000” for the purpose of influencing a federal election. 2 U.S.C. § 431(4)(A) (2000). PACs have additional financial disclosure requirements, such as providing detailed personal financial contribution descriptions. *Id.* §§ 433–434 (Supp. V 2005).

37. Although application of FEC law to blogs remains somewhat unsettled, FEC regulations do require that a PAC publicly disclose its electioneering activity, funds spent, financial contributions, or gifts to candidates. 2 U.S.C. § 431(8)(A), (9)(A) (2000); 11 C.F.R. § 100.52(a), 100.111(a) (2006) (encompassing “anything of value” within the purview of public disclosure).

38. *See* Norris, *supra* note 32, at 994 (discussing that, although starting a blog is inexpensive, maintaining a popular blog may become a lucrative profession).

count as campaign “contributions.”³⁹ The FEC’s current application of the Media Exemption excludes bloggers from the PAC requirements to register with the FEC or disclose their political finances.

A. The Legal Standards of the Media Exemption

The Media Exemption⁴⁰ applies to news stories written by any non-politically controlled press entity⁴¹ to assure “the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.”⁴² The FEC uses a two part analysis when granting the Media Exemption. First, an entity must qualify as a press entity. Second, the press entity must not be under political control and must perform a “proper press function.”⁴³

The Supreme Court addressed the attributes of a legitimate press entity in *FEC v. Massachusetts Citizens for Life, Inc.*⁴⁴ (*MCFL*), where the FEC sought enforcement of its order preventing the publication of a “special edition” newsletter.⁴⁵ The Court considered two factors to determine whether an entity functions as a legitimate press entity: (1) whether the entity has made its materials available to the general public, and (2) whether the publication is comparable in form to a publication the entity ordinarily issues.⁴⁶ In *MCFL*, the special edition newsletter differed significantly from the entity’s regular publication.⁴⁷ For example, the entity did not publish the special edition newsletter through the same facilities as those of the regular newsletter, and the staff preparing the special edition newsletter

39. 2 U.S.C. § 431(8)(A).

40. *Id.* § 431(9)(B)(i).

41. *Id.* (excluding from regulation “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”).

42. H.R. REP. NO. 93-1239, at 4 (1974).

43. *See* Internet Communications, 71 Fed. Reg. 18,589, 18,607 (Apr. 12, 2006) (elaborating on the two part test utilized when considering if an entity qualifies under the Media Exemption).

44. 479 U.S. 238 (1986).

45. *Id.* at 244 (describing the newsletter as giving special attention to only thirteen of the “100% pro-life voting record” candidates amongst the over 400 candidates who were running).

46. *Id.*

47. *See id.* at 243–44 (describing the “special edition” as differing by subject matter, production size and production method from regular publications).

did not prepare any prior or subsequent newsletters.⁴⁸ Moreover, the entity did not distribute the special edition newsletter to the newsletter's regular audience, but rather to a group twenty times the size of the regular audience.⁴⁹ The Court rejected MCFL's contention that the special edition was part of their "periodical publication" because of these differences between the special edition and the regular publication.⁵⁰

The FEC's second factor to determine whether to grant the Media Exemption is whether an entity is performing a proper press function. In *Reader's Digest Ass'n, Inc. v. FEC*,⁵¹ the court indicated that a proper press function under the Media Exemption is an activity conducted by a non-politically controlled press entity functioning within an appropriate journalistic scope. The court denied the publication's request for injunctive relief against an FEC investigation that examined whether the magazine operated within its proper press function when it distributed a reenactment of Senator Edward Kennedy's 1969 traffic accident to television stations.⁵² Reader's Digest contended that the FEC investigation was improper because releasing the reenactment was part of its press function in publicizing an upcoming publication,⁵³ and thereby protected under the Media Exemption. The court denied Reader's Digest relief because the FEC's investigation was pertinent to resolving the question of whether Reader's Digest's actions were proper press functions or whether the distribution was politically motivated.⁵⁴

48. See *id.* at 244 (noting that an officer of MCFL who was not part of the staff that prepared the MCFL newsletters edited the edition).

49. *Id.* at 250–51 (concluding that "[n]o characteristic of the Edition associated it in any way with the normal MCFL publication").

50. *Id.* (dismissing the publication's claim that focusing on such factors was too superficial of an analysis because, the Court reasoned, it is precisely such factors which are most relevant to determine if an entity functions as a legitimate press entity).

51. 509 F. Supp. 1210, 1214–15 (S.D.N.Y. 1981).

52. *Id.* (considering whether the distribution of the reenactment was politically motivated to damage Sen. Kennedy's reputation); *cf.* 07 Op. FEC 1, 4–5 (2004) (concluding that Music Television's (MTV) distribution of election materials via its webpage constituted a proper press function).

53. *Cf.* *FEC v. Phillips Publ'g, Inc.*, 517 F. Supp. 1308, 1312–13 (D.D.C. 1981) (finding that a newsletter's mailing that solicited subscriptions was a press function, despite an opinion poll promoting a candidate, because publicizing a newsletter is a normal press function).

54. *Reader's Digest Ass'n, Inc.*, 509 F. Supp. at 1215.

B. Pre-Shays v. FEC Application of the Media Exemption and the Growing Importance of a Fact-Specific Inquiry

Prior to *Shays v. FEC*,⁵⁵ the FEC applied the Media Exemption using advisory opinions⁵⁶ and court opinions. An example of advisory opinion use⁵⁷ occurred when the FEC granted a political blog the Media Exemption in the advisory opinion, *Fired Up! LLC (Fired Up)*.⁵⁸ An “unabashedly progressive” blog founded by former politicians, Fired Up provides commentary and summaries of news articles on its website.⁵⁹ The FEC advisory opinion concluded that Fired Up qualified as a Press Entity⁶⁰ because it was not controlled by any political interest.⁶¹ The concurring opinion was more cautious about granting the Media Exemption.⁶² Citing the blog’s strong financial and historical ties⁶³ with the Missouri Democratic Party, *Fired Up*’s concurrence raised the possibility that similar outlets may be politically controlled and thus not eligible for the Media Exemption. The concurrence relied upon *MCFL*⁶⁴ and emphasized the importance of a fact-specific determination, warning that “we do not believe it is appropriate to give some sort of blanket press exception to any entity that sets up a website.”⁶⁵

55. 337 F. Supp. 2d 28 (D.D.C. 2004).

56. *E.g.*, 16 Op. FEC 1 (2005) (granting the Media Exemption to Fired Up!, a popular political blog); 07 Op. FEC 1 (2004) (finding that MTV’s efforts to encourage more voter turnout through unbiased education qualified under the exemption); 34 Op. FEC 1 (2003) (determining that a fictional program qualified under the exemption where the program represented commentary on the American political system); *see also* Stevenson, *supra* note 23, at 86 (describing the FEC’s tendency to rely upon advisory opinions and the limited guidance they produced regarding the regulation of online material).

57. *See* Ryan L. Blaine, Comment, *Election Law and the Internet: How Should the FEC Manage New Technology?*, 81 N.C. L. REV. 697, 704–05 (2003) (describing the difficulty in using advisory opinions because “advisory opinions only make determinations on cases with specific facts, considerable uncertainty exists as to how the law will be applied in future similar cases”).

58. 16 Op. FEC 1, 1 (2005).

59. *Id.* at 2.

60. *See id.* at 5 (placing particular emphasis on H.R. REP. NO. 93-1239, where Congress wrote “and other media” in reasoning that Fired Up qualified as a press entity).

61. Curiously, the FEC declined to address the question of whether Fired Up’s activities were a “proper press function.” *See id.* at 6 & n.12 (declining to comment because the question was not raised in the opinion).

62. *Id.* at 1 (Thomas & McDonald, Comm’rs, concurring) (“[O]nly time will truly tell whether Fired Up is actually a media entity . . .”).

63. *See id.* at 8 (noting that Fired Up’s founders include a former U.S. Senator, a former director for the Missouri Democratic Party, and a manager who engaged in business with the party).

64. 479 U.S. 238, 251 (1986); *see also supra* Part I.A.

65. 16 Op. FEC at 10 (2005) (Thomas & McDonald, Comm’rs, concurring).

With the growth of political activity on the Internet,⁶⁶ the FEC's policy of minimal Internet regulation⁶⁷ came under greater pressure. The increased pressure culminated with the decision in *Shays v. FEC*,⁶⁸ which forced a reluctant FEC⁶⁹ to cease regarding the Internet as a "safe harbor"⁷⁰ from FEC regulation. In *Shays v. FEC*, the FEC argued that the BCRA's definition of "public communication"⁷¹ did not include the Internet, and as a result, the FEC lacked authority to regulate the Internet.⁷² The district court disagreed with the FEC's contention that the BCRA exempted online speech, and reasoned that certain forms of Internet communications fell within the purview of "public communication" within BCRA rules because, "[w]hile all Internet communications do not fall within this descriptive phrase, some clearly do."⁷³

A more recent example illustrating the legal implications of granting the Media Exemption to all bloggers comes from the FEC Matter Under Review (MUR) decision⁷⁴ regarding a complaint filed against the political blog DailyKos.com. The complaint in the MUR decision argued that DailyKos.com violated 2 U.S.C. §§ 433 and 434 by failing to register as a PAC.⁷⁵ The issue before the FEC was whether a large, popular⁷⁶ political blog like DailyKos.com was required to register as a PAC and thereby disclose its operational costs as "contributions"⁷⁷ or "expenditures";⁷⁸ or

66. See Stevenson, *supra* note 23, at 81 (documenting the trend of online political activity's growing influence on politicians such as Senator Trent Lott and Governor Howard Dean).

67. See Matthew Fagan, *The Federal Election Commission and Individual Internet Sites after Shays and Meehan v. FEC*, 12 B.U. J. SCI. & TECH. L. 159, 160 (2006) (explaining that, prior to *Shays*, the FEC had minimally regulated Internet content).

68. 337 F. Supp. 2d 28 (D.D.C. 2004).

69. See Statement, Hans A. von Spakovsky, FEC Commissioner, Statement on Internet Rulemaking, Mar. 27, 2006 (emphasizing that he had "no intention of voting to regulate the Internet any more than [was] absolutely legally required by the unappealed decision in *Shays v. FEC*").

70. See Richard L. Hasen, *Lessons from the Clash Between Campaign Finance Laws and the Blogosphere*, 11 NEXUS 23, 24 (2006) (discussing how, prior to *Shays*, the FEC had declined to regulate individual Internet speech).

71. See 2 U.S.C. § 431(22) (Supp. V 2000) (defining 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").

72. *Shays*, 337 F. Supp. 2d at 66.

73. *Id.* at 67.

74. FEC Matter Under Review Decision 5928 (Sept. 4, 2007), available at <http://eqs.nictusa.com/eqsdocs/000061C5.pdf> [hereinafter MUR 5928].

75. *Id.*

76. See *id.* (recognizing that DailyKos.com receives 600,000 daily visits (quoting DailyKos.com, About, <http://dailykos.com/special/about> (last visited Apr. 29, 2008))).

77. 2 U.S.C. § 431(8)(A) (2000).

78. *Id.* § 431(9)(A).

alternatively, whether DailyKos.com deserved the Media Exemption and thus should be excused from such requirements.⁷⁹

After reiterating the recently modified regulations,⁸⁰ the FEC concluded that DailyKos.com fell within the purview of the Media Exemption and was thereby exempt from registering as a PAC.⁸¹ Because the primary function of DailyKos.com was to provide news and commentary to millions of readers, it constituted media worthy of the exemption.⁸² The FEC also noted that DailyKos.com has a staff similar to that of the traditional media, such as a publisher, editors, and staff members necessary to ensure content quality.⁸³ The FEC found that DailyKos.com functioned as a proper press entity when it distributed breaking news, editorials, and political commentary, because these are legitimate press entity functions.⁸⁴

The many uses of blogs, coupled with the growing importance of politics on the Internet, make it critically important to examine the FEC's decision to treat all bloggers identically in granting them all the Media Exemption.

II. ANALYSIS

A. Bloggers and Journalists Are Not Always the Same

Many bloggers see themselves as "citizen journalists"⁸⁵ and assert the same privileges as journalists.⁸⁶ Despite the fact that some blogs legitimately deal with issues of public concern,⁸⁷ many bloggers fail to comport with the requirements of the Media Exemption⁸⁸ because most

79. 11 C.F.R. § 100.73, 100.132 (2006).

80. *See* Internet Communications, 71 Fed. Reg. 18,589, 18,610 (explaining that the Media Exemption applies to media entities covering news stories or editorials over the Internet and that "[t]he Commission concludes that bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities").

81. MUR 5928, *supra* note 74, at 2.

82. *Id.* at 5 (discussing how DailyKos.com is not controlled by a political party).

83. *Id.*

84. *Id.*

85. *See* Media Bloggers Association, *supra* note 6 (accepting "the Wikipedia definition of journalism as 'a discipline of collecting, verifying, reporting and analyzing information gathered regarding current events, including trends, issues and people'").

86. *See id.* (asserting that "[w]hen our members practice journalism, they have the same rights and responsibilities as any other journalist and must be accorded the same First Amendment rights and legal privileges as those who work for traditional media organizations"); *see also* Howard Kurtz, *Jailed Man Is a Videographer and a Blogger but Is He a Journalist?*, WASH. POST, Mar. 8, 2007, at C1 (recounting the case of video blogger Josh Wolf, who spent more than six months in jail for contempt of court while refusing a federal court order to disclose footage he shot of protesters, and explaining that California's shield law for journalists might protect Mr. Wolf if the case were in state court).

87. *E.g.*, POLITICO, <http://www.politico.com> (last visited Apr. 29, 2008) (offering political blogs by former traditional journalists).

88. 2 U.S.C. § 431(9)(B)(i) (excluding from the statute's purview, by virtue of definition, certain materials that the facilities of "any broadcasting station, newspaper,

blogs are more akin to journals and diaries.⁸⁹ Nevertheless, advocates of extending the Media Exemption to bloggers reason that the legislative wording⁹⁰ and intent⁹¹ of the Media Exemption encompasses bloggers. Despite bloggers' positive contributions to democratic discourse, the FEC's current blanket exemption of bloggers is improper for several reasons.

1. *Not All Bloggers Qualify As Press Entities*

Not all bloggers qualify as Press Entities⁹² because there are substantial differences between blogs and traditional journalism, and blogs do not meet established press entity requirements.⁹³ In *FEC v. Massachusetts Citizens for Life*,⁹⁴ the Court evaluated the press entity requirement by examining whether the materials were available to the general public and whether the publication was comparable in form to that ordinarily issued by the entity.⁹⁵ Unlike traditional journalism, blogs do not have subscribers, may or may not be published to the general public, and are not published in regular intervals.⁹⁶ Just because a blog is online does not mean that all of its

magazine, or other periodical publication" distribute, unless a political organization or candidate owns the facility).

89. See Steve Outing, *The 11 Layers of Citizen Journalism*, POYNTER ONLINE, June 13, 2005, http://www.poynter.org/content/content_view.asp?id=83126 (explaining that what is written in blogs is often unedited, and suggesting that site editors often do not edit pieces in order to allow contributors to be the "amateur writers [and] community members" they are, rather than "mini-journalists").

90. See Zubowicz, *supra* note 7, at 31 (citing H.R. REP. NO. 93-1239, at 4 (1974)) (reasoning for greater inclusivity by arguing that Congress "kept the door open" when including "other media" within the definition of a press entity, and noting that Congress did not object when the definition expanded to include cable television).

91. See Hasen, *supra* note 71, at 27 (emphasizing that one of the main goals of the FECA was to prevent the appearance of corruption, and that "[r]ather than presenting a danger of corruption, bloggers can play an important social role in elections by providing information, making persuasive arguments, and organizing voters and contributors for effective political action").

92. Several proposals have been made to refine or eliminate the press entity requirement altogether. *E.g.*, Zubowicz, *supra* note 7, at 30-32 (suggesting the FEC refine the press entity requirement because Congress knew that new forms of media would be created); accord Stevenson, *supra* note 23, at 92-93 (advocating that the FEC eliminate the press entity requirement because such a move would protect all forms of Internet speech while allowing the FEC to avoid difficult analytical questions). These conclusions seem inconsistent with *Shays v. FEC*. In *Shays v. FEC*, the court distinguished between different forms of Internet communication, and recognized that some forms fell within the purview of the FEC's authority, while others forms did not. 337 F. Supp. 2d 28, 69-70 (D.D.C. 2004). The court's logic supports Zubowicz and Stevenson by suggesting that Internet communications cannot be classified under any "uniform category."

93. See *supra* Part I.A.

94. 479 U.S. 238 (1986).

95. See *id.* at 251 (rejecting the suggestion that such factors are merely "superficial considerations of form," and instead asserting that such factors are a central aspect of a broader inquiry intended to prevent organizations that publish newsletters, such as corporations or unions, from claiming the press exemption and thus rendering the campaign law useless).

96. See *Funding and Sponsorship of Federal Candidate Debates*, 44 Fed. Reg. 76,734, 76,734-35 (Dec. 27, 1979) (defining newspapers and magazines as bona fide when they

information is available to the general public; some blogs function as online journals or diaries, and their authors may not wish for broad public disclosure of their content. With regard to publication, the author updates blogs via postings whenever the author desires, rather than at the defined times that a traditional journalist may expect. Although the FEC recently granted DailyKos.com the Media Exception, DailyKos.com⁹⁷ is uniquely popular; the same standard should not apply to other blogs that lack publication boards, editors, and the readership that DailyKos.com enjoys.

In addition, anonymity and a lack of established blogging ethics and accountability⁹⁸ are compelling reasons to reject a blanket application of the Media Exemption to all bloggers⁹⁹ because they illustrate the ways that blogs are unlike press entities. One needs no formal training to maintain a blog,¹⁰⁰ and such a lack of training results in information of lesser credibility.¹⁰¹ Unlike journalists, bloggers work under a cloak of

disseminate “news and editorial opinion to the general public” and when the publication appears at “regular intervals” and derives revenue from “subscriptions or advertising”).

97. Because DailyKos.com has such an established name in blogging, there is little doubt that it would pass all of the criteria indicated in this Comment’s proposal. Daily Kos, About, <http://dailykos.com/special/about> (last visited Apr. 29, 2008); *see infra* Part III.

98. Problems relating to ethics and accountability have led to suggestions for a more functional test that determines whether a blogger is a journalist by examining the nature of the content in question. *See* Jennifer Meredith Liebman, *Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J.L. TECH. & POL’Y 343, 350–52 (distinguishing between bloggers and “traditional print media” and discussing bloggers’ potential liability for “negligen[ce] in publishing false statements about [a] plaintiff” if the law treated blogs and traditional print media similarly); *see also* Flanagan, *supra* note 26, at 407 (suggesting a test based on a “standard that governs the gathering, verifying and dissemination of information” because these elements are, in practice, necessary parts of the “journalistic process”).

99. An example of a blogger’s ethical violations took place in New Hampshire’s 2006 U.S. House race. In that case, Rep. Charles Bass’s policy director anonymously posed as a supporter of Bass’s opponent while posting in a popular blog. In the postings, Bass’s director pretended to support Bass’s opponent but made disparaging remarks about him and tacitly suggested Bass would easily win re-election. After the comments raised suspicion, the “sham” blogger was revealed and resigned. *See* Anne Saunders, *Top Aide to N.H. Congressman Resigns*, CBS NEWS, Sept. 26, 2006, <http://www.cbsnews.com/stories/2006/09/26/ap/politics/mainD8KCRAK80.shtml>.

100. *See* *Reno v. ACLU*, 521 U.S. 844, 853 (discussing how “[a]ny person or organization with a computer connected to the Internet can ‘publish’ information”); *cf.* B.M.S. Comment, *supra* note 6, at 6 (discussing the beneficial effect of allowing everyone to communicate on an equal platform in that it “creat[es] the first truly democratic mass medium in our history” and levels the playing field between individuals and large corporations).

101. *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) (discussing legal issues arising out of a defamation lawsuit against an anonymous blogger and underscoring the reasons that news from blogs is less credible). However, blogs have also served as vehicles in which scholars and academics have made their thoughts and work broadly available to the public. As a result, blogs of these highly respected individuals have become sources for credible information. Justice Stevens recently cited a blog when discussing the issue of sentencing. *See* *United States v. Booker*, 543 U.S. 220, 277 n.4 (2005) (Stevens, J., concurring in part, dissenting in part) (citing Douglas Berman’s Sentencing Law and Policy Blog, <http://sentencing.typepad.com/> (last visited Apr. 29, 2008)). Nevertheless, the use of blogs

anonymity. Journalists know that their names and reputations permanently attach to their work, which results in journalists' taking greater care to ensure the quality of their work. In contrast, bloggers have little incentive to provide quality work because they operate anonymously, and as a result, any mistake or ethical violation will not bring any consequences. Bloggers concede that enforcing standards becomes difficult because of anonymity¹⁰²—a problem not confronted within established journalism where journalists' names and reputations attach to their work.

In addition to blogs' being unlike press entities, blogs are not akin to editorial pages of newspapers, where readers know they are reading the opinion of the author and nothing more. Editorial pages in newspapers are distinguished from the rest of the newspaper because they openly express opinions, rather than objective reporting. Blogs, in contrast, may dedicate themselves exclusively to praising a political interest, unlike a reputable newspaper delivering objective news. Bloggers' lack of accountability or ethics blurs the line between unsubstantiated opinion and objective fact in their blogs and thus distinguishes blogs from newspaper editorial pages, where readers expect to find unsubstantiated opinion.

2. *Bloggers' Susceptibility to Political Control and Failure to Operate Within Proper Press Functions*

In addition to press-entity-related differences, some bloggers fail the second portion of the Media Exemption test because they are more susceptible to political control and are less likely to perform proper press functions. First, bloggers are more susceptible to being controlled because of political campaigns' increased use of blogs.¹⁰³ Additionally, bloggers have previously operated as extensions of campaigns.¹⁰⁴ Some suggested indicators of political control include "linking to campaign websites, accepting money for political advertisements, or reprinting candidates'

by academics is new, and the majority of blogs do not carry the normative importance that the few select blogs of academics or scholars enjoy.

102. See B.M.S. Comment, *supra* note 6, at 4–5 (positing that bloggers' potential to retreat into, or remain in, anonymity poses problems for policies requiring enforcement because such anonymity would make it very difficult to find an individual in the short amount of time necessary to enforce the laws).

103. See Lindsey Powell, *Getting Around Circumvention: A Proposal for Taking FECA Online*, 58 STAN. L. REV. 1499, 1526–27 (2006) (discussing how campaign-paid bloggers influenced South Dakota's 2004 U.S. Senate race, in part by working to discredit the political articles of South Dakota's largest newspaper); see also B.M.S. Comment, *supra* note 6, at 3 (discussing how Markos of DailyKos.com performed consulting work for Howard Dean's presidential campaign).

104. Cf. B.M.S. Comment, *supra* note 6, at 4–6 (discussing the consequences that overly burdensome regulations will have on bloggers who use their anonymity to go "underground" to avoid compliance with any law and thus will frustrate attempts to "rectify campaign abuses").

press releases.”¹⁰⁵ One may also consider how balanced or reasonable a blogger’s coverage is or whether the blog functions as an extension of the candidate’s official webpage. In addition to the legal issues blogger anonymity raises in defamation suits,¹⁰⁶ it is unrealistic to assume that bloggers will be free from political control when the bloggers’ anonymity protects them from legal punishment.¹⁰⁷ Moreover, the issue of anonymity raises questions as to how to monitor a blogger who falls under political control¹⁰⁸ because, unlike journalists who disclose their identity, bloggers can hide behind their anonymity¹⁰⁹ and act with near impunity.

Second, bloggers fail the second portion of the Media Exemption test because they may not always perform a proper press function. In MUR 5928, the FEC considered the issue of whether DailyKos.com acted within a proper press function.¹¹⁰ The FEC determined that, because DailyKos.com’s materials dealt with current events and were widely accessed, DailyKos.com qualified under the definition of an appropriate press function.¹¹¹ Nevertheless, most bloggers seldom meet these requirements because bloggers “slip in and out”¹¹² of their roles when they

105. Norris, *supra* note 32, at 1012 (citations omitted).

106. See Jennifer L. Peterson, *The Shifting Legal Landscape of Blogging*, 79 WIS. LAWYER 8, 11–12 (Mar. 2006) (discussing legal issues arising from bloggers’ anonymity in defamation suits).

107. Accountability requires upfront ownership of one’s actions. One must logically question how bloggers can pledge to be accountable, yet continue to insist upon remaining anonymous. *E.g.*, 16 Op. FEC 1, 2 (2005) (Thomas & McDonald, Comm’rs, concurring) (discussing the risk of blogs being staffed by ex-politicians or individuals with close ties to political interest, and raising the question that those types of blogs could be an extension of political interests and control). *But see* B.M.S. Comment, *supra* note 6, at 10 (arguing that simply receiving payments from political interests does not sufficiently support a finding that a blog is under political control).

108. See Powell, *supra* note 103, at 1,526–27 (discussing how Sen. John Thune hired “The Thune Bloggers” in his Senate race to discredit news about his opponent).

109. See B.M.S. Comment, *supra* note 6, at 4 (detailing the ways that blogger anonymity gives rise to questions of enforcement and reasoning that bloggers will easily avoid any enforcement policy by virtue of their anonymity); *see also* 16 Op. FEC 2–4 (Nov. 18, 2005) (McDonald, Comm’r, concurring) (warning of the danger that a political party could use unlimited contributions to distribute campaign materials about political opponents when political interests exert strong influence over a blog and considering this danger in determining whether the Democratic Party controlled the blog in question).

110. See MUR 5928, *supra* note 74, at 4 (applying a two part analysis to determine whether Dailykos.com is a press entity, and discussing the second part of the analysis as involving the question of “whether the entity’s materials are available to the general public and are comparable in form to those ordinarily issued by the entity”).

111. See *id.* at 5 (determining that DailyKos.com satisfies the requirements for the press function in part because it is “available to the general public” and its “primary function is to provide news and commentary” similar to the availability and news functions of other, more traditional, media).

112. Media Bloggers Association, *supra* note 6.

blog and lack the robust resources enjoyed by DailyKos.com.¹¹³ This means that their work product is not consistently equal to that of a journalist or to material on DailyKos.com.

*B. Fact-Specific Inquiries Can Prevent the Evisceration
of FEC Regulations*

The FEC's recent blanket application of the Media Exemption overlooks blogging's complexities and is fundamentally inconsistent with the fact-specific inquiries used by the Supreme Court and found in prior advisory opinions. Even more troubling is that the current blanket exemption invites the evisceration of FEC law merely by blogging, as FEC regulations exempt all bloggers through this application of the Media Exemption.

A blanket application of the Media Exemption incorrectly treats all blogs as if they are identical in purpose and scope. As bloggers themselves concede, blogging is a multifaceted activity through which bloggers post their thoughts, keep journals and diaries, or merely communicate with a large group of friends.¹¹⁴ Blogs' intended audiences and purposes vary, and consequently, bloggers do not consistently act like journalists.¹¹⁵ Bloggers also concede that they frequently "slip in and out"¹¹⁶ of various roles when blogging and take on various functions as bloggers. As a result, a blanket application of the Media Exemption applies a one-size-fits-all approach and improperly allows bloggers to avail themselves of journalists' privilege while continuing to act in ways that the FEC normally regulates.¹¹⁷

The blanket application's one-size-fits-all approach conflicts with the Court's mandate in *MCFL*. The Court emphasized that using a fact-specific analysis was necessary because to do otherwise would "open the door . . . to engage in unlimited spending . . . thereby eviscerating [the

113. DailyKos.com, About, <http://dailykos.com/special/about2> (noting that, although a very small staff runs Dailykos.com and approximately twelve editors with varied backgrounds contribute material for the site, high profile individuals, such as Jimmy Carter, Harry Reid, Nancy Pelosi, and "dozens of other senators, congressmen, and governors" have posted diaries).

114. See, e.g., B.M.S. Comment, *supra* note 6, at 3–4 (describing the many activities that one can elect to do through blogging).

115. Media Bloggers Association, *supra* note 6 (explaining that blogging is more than a publishing medium, but also a form of personal expression where bloggers "slip in and out of roles as journalists, reviewers, poets, pundits or provocateurs with each post," and distinguishing between the blogger's role as a journalist and the blogger's role in expressing personal thoughts and emotions).

116. *Id.*

117. See IPDI Comment, *supra* note 11, at 7–9 (arguing that, "bloggers cannot wear two hats simultaneously: that of journalist and that of partisan activist" and comparing bloggers to previous generations of pre-Internet or otherwise "offline activists" who had to assume different roles when participating in partisan elections, while noting that this principle becomes even more important when a blogger becomes a "paid political operative").

legislative] prohibition.”¹¹⁸ Moreover, a blanket application is inconsistent with the court’s conclusion in *Shays v. FEC*,¹¹⁹ where the court indicated that some forms of Internet communication were public communication and others were not.¹²⁰ Commissioner McDonald expressed a similar emphasis on fact-specific analysis in the concurrence to *Fired Up*.¹²¹ Commissioner McDonald indicated that “[w]ithout specific facts, *we do not believe it is appropriate to give some sort of blanket press exemption to any entity that sets up a website.*”¹²² The FEC’s blanket application disregards precedent and overlooks the detailed nature of blogs because it gives all blogs the Media Exemption, treating all blogs as identical in purpose and scope. In reality, blogs are complex, highly individualized, and vary greatly. Thus, a blanket exemption ignores the unique nature of blogs.

A blanket application of the Media Exemption to all bloggers invites “rampant circumvention of the campaign finance laws”¹²³ because it will give carte blanche to any blogger to side step FEC regulation. Because anyone can become a blogger in a matter of minutes, anyone will be able to avoid regulation by simply conducting an otherwise regulated activity through blogging. The risk of using the blanket exemption to circumvent¹²⁴ FEC regulations stems from the reasoning that, “[i]f anyone can publish a blog, and if bloggers are treated as journalists, then we can all become

118. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) (rejecting the MCFL argument that focusing merely on the presentation and preparation of the newsletter would be sufficient, and holding that a fact-specific analysis of the factors surrounding the publication and its distribution is necessary to maintain a distinction between those entities governed by the legislative prohibition and those entities falling within the exceptions for the press).

119. 337 F. Supp. 2d 28 (D.D.C. 2004).

120. *Id.* at 67 (emphasizing that “[w]hile all Internet communications do not fall within [the FEC’s legislative mandate], some clearly do” in explaining that Congress’s failure to use the term “Internet” in the statute does not mean that the statute does not include some types of Internet communications).

121. 16 Op. FEC 1, 1–4 (2005) (Thomas & McDonald, Comm’rs, concurring) (discussing the factual circumstances surrounding *Fired Up*’s connections to the state Democratic Party, while noting that “[q]ualification for the press exception is a fact specific determination”).

122. *Id.* at 4 (emphasis added).

123. *Shays*, 337 F. Supp. 2d at 70 (warning against broad application of the Media Exemption); see also Stevenson, *supra* note 23, at 93 (recognizing that indiscriminate inclusion of all bloggers within the Media Exemption eliminates one of the prongs of the two part test, which enables easy circumvention of campaign finance laws).

124. See Stevenson, *supra* note 23, at 95–96 (finding that the current blanket application of the Media Exemption presents an opportunity for issue advocacy groups to bypass FEC regulations, and urging a functional analysis to better evaluate the content of the speech which the FEC considers under the Exemption).

journalists”¹²⁵ and use the Media Exemption. The blanket exemption is problematic because “[b]loggers [get] it both ways,”¹²⁶ availing themselves of the privileges of journalists, but not the demands of journalistic ethics.¹²⁷

III. GETTING RESPONSIBLE BLOGGERS TO FUNCTION LIKE TRADITIONAL JOURNALISTS: A POINT-SYSTEM-BASED MEDIA CERTIFICATE LICENSE

The FEC should resolve questions regarding the proper application of the Media Exemption by allowing bloggers to apply for a point-system-based media certificate license. Such a license would provide a more fact-specific examination of each blog and give bloggers an incentive to operate more like traditional press entities by rewarding bloggers who adhere to journalistic practices. The point system is better than the current blanket exemption because it requires a fact-specific analysis and is thus more consistent with existing FEC case law.¹²⁸

In concept, the FEC would allow bloggers to apply for a media license and thereafter evaluate each blogger using a point system that relies on the following set of objective criteria: (a) reporting accuracy and objectivity,¹²⁹ (b) breaking news stories before the established press, (c) blogger accountability¹³⁰ and disclosure of the blogger’s identity, (d) whether the

125. See IPDI Comment, *supra* note 11, at 7 (criticizing an overly expansive exemption to bloggers for creating a clear incentive to eviscerate campaign finance laws).

126. Brian Faler, *FEC Hears Bloggers’ Bid to Share Media Exemption*, WASH. POST, July 12, 2005, at A19 (quoting Carol Darr as stating that “[b]loggers want it both ways . . . [t]hey want to preserve their rights as political activists, donors and even fundraisers—activities regulated by campaign finance laws—yet, at the same time, enjoy the broad exemptions from the campaign finance laws afforded to traditional journalists”); see also IPDI Comment, *supra* note 11, at 7–8 (asserting that bloggers wish to preserve rights that campaign laws would otherwise regulate while taking advantage of the exemptions these campaign laws provide to journalists).

127. See generally Journalist Code of Ethics, *supra* note 30 (emphasizing requirements of honesty, accountability, and independence within the organization’s preamble). But see CyberJournalist.net, A Bloggers’ Code of Ethics, http://www.CyberJournalist.net/news/000215_print.php (last visited Apr. 29, 2008) [hereinafter Bloggers’ Code of Ethics] (emphasizing similar standards of fairness, accountability, and honesty). Although a code of ethics exists, bloggers are reluctant to adopt anything other than self-policing proposals. See B.M.S. Comment, *supra* note 6, at 1–5 (suggesting that until lack of Internet regulation causes real harm, the FEC should trust the Internet—and by implication the bloggers—to regulate itself and adhere to proper standards); accord Media Bloggers Association, *supra* note 6 (explaining that “[w]hen we blog, each of us is accountable for our own actions, and we own our own words”).

128. Reader’s Digest Ass’n, Inc. v. FEC, 509 F. Supp. 1210, 1214–15 (S.D.N.Y. 1981) (holding that FEC regulations apply to entities that are politically controlled and that operate according to a proper press function); see also *supra* Part I.B.

129. This requirement of reporting accuracy and objectivity should be broadly construed to penalize only the most severe deviations from an objective and reasonable description of the blog’s subject matter. The purpose for broadly construing this requirement is that one would not want to give the government the authority to administer penalties on content-based blogs.

130. The term “accountability,” as used in this context, means that bloggers admit when they make errors in their reporting or when something they represent is uncertain.

blog and a candidate or political committee maintain continued direct relations, and (e) volumes of consistent readership. Upon application to the FEC, bloggers would enter a provisional period where readers would be able to flag material not complying with responsible journalistic practices and report possible violations to a FEC review board. The FEC review board would also be responsible for reviewing compliance using the above criteria. Other online forums have adopted similar self-policing mechanisms,¹³¹ and such mechanisms would be beneficial here because they would relieve the FEC of substantial regulatory burden by placing other bloggers in a position to evaluate the questioned content.¹³²

While licensing-related point systems are most prevalent in traffic enforcement laws,¹³³ federal agencies also use point systems when applying an individualized, flexible evaluation—an evaluation method similar to the fact-specific examination called for in *MCFL*. The most analogous example comes from the Federal Communications Commission's (FCC) use of a point system when granting mutually exclusive noncommercial educational radio licenses.¹³⁴ The FCC's point system awards points based on several factors¹³⁵ so that the process provides an individualized assessment of the applicant.¹³⁶ The FCC's point system attracts praise

131. See, e.g., eBay, Feedback Forum, <http://pages.ebay.com/services/forum/feedback.html> (last visited Apr. 29, 2008). eBay's feedback system consists of individuals who have transacted together and can publicly post evaluations of the others' conduct. Evaluations may be positive, neutral, or negative. eBay members frequently use these evaluations when considering a transaction with such individuals because a member's feedback directly relates to satisfaction.

132. Wikipedia, an online encyclopedia, is an example of an online community that uses a community-based approach to regulation. Individuals submit articles and the community reviews them. See Wikipedia Community Portal, http://en.wikipedia.org/wiki/Wikipedia:Community_Portal (last visited Apr. 29, 2008) (encouraging members of the Wikipedia community to verify articles for accuracy and neutrality, and to update content).

133. E.g., 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 148 (2007) (describing state traffic policies that use point systems to identify persistent violators and suspend a persistent violator's driver's license when that violator meets certain requirements).

134. See Instructions for FCC 340, Application for Construction Permit for Reserved Channel Noncommercial Educational Broadcast Station, 7–9, available at <http://www.fcc.gov/Forms/Form340/340.pdf> (outlining instructions for noncommercial educational radio station licenses, which include a point system that grants points based on answers to several questions).

135. *Id.* (applying points based on answers to such questions as whether an applicant is local to the broadcasting area, whether the applicant would add to diversity of radio station ownership, and whether the applicant meets all the technical requirements for maintaining a radio station).

136. See Carly T. Didden, *Mutually Exclusive Noncommercial Educational FM Applications: Accepted for Filing, Tentatively Selected, and . . . Granted?*, 14 *COMMLAW CONSPICUOUS* 103, 126–27 (2005) (praising the FCC's adoption of a point system, but also underscoring the need for more legislative direction to minimize uncertainty).

because it gives such an individualized evaluation, thus allowing the FCC to issue licenses to better applicants.¹³⁷

Following the FCC's example would resolve the FEC's problems with the blanket application of the Media Exemption because it would provide a more individualized evaluation and would encourage bloggers to conform to a journalistic code of ethics. The first two portions of the Media Certificate point system emphasize reporting accuracy and breaking news stories before the established media has the opportunity to report them. These two closely related points are important because they reward bloggers for adopting practices of established journalism¹³⁸ and for operating more like press entities.¹³⁹ Established journalists emphasize accuracy and stress investigation before reporting. Consequently, bloggers receive an incentive to investigate and research news stories rather than to make unsubstantiated reports. The point system will identify credible bloggers and thereby partially alleviate the problem of having to evaluate content on words alone.¹⁴⁰ The first two portions can be readily accomplished when bloggers expressly adopt and abide by the Blogger's Code of Ethics.¹⁴¹

The third portion of the point system addresses bloggers' accountability and ethics by rewarding disclosure of the blogger's identity.¹⁴² This portion is beneficial because it forces bloggers to adopt traditional press functions.¹⁴³ Bloggers' accountability can manifest itself when bloggers, like journalists, admit errors in reporting or admit when some facts are

137. *Id.* at 111–12 (describing the FCC process as rewarding localism based on the belief that local community residents are more aware “of the special needs of [the local] community”).

138. *See generally* Journalist Code of Ethics, *supra* note 30.

139. *See supra* Part I.A; *see also* Internet Communications, 71 Fed. Reg. 18,589 (Apr. 12, 2006).

140. *Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) (citations omitted) (indicating that because of the anonymous nature of Internet speech, a reader must evaluate the content “based on . . . words alone,” and discussing the challenges that this presents readers in weighing the writer's credibility).

141. Bloggers' Code of Ethics, *supra* note 127 (requiring that bloggers adhere to standards that seek to maintain honesty and fairness, to “[m]inimize [h]arm,” and to ensure accountability).

142. This Comment's point system proposal does not interfere with the First Amendment protections for anonymous speech. In *McIntyre v. Ohio Elections Commission*, the Court held unconstitutional a local statute prohibiting distribution of anonymous campaign literature. 514 U.S. 334, 342 (1995). This Comment's proposal in no way advocates restricting the speech rights of any blogger. Rather, this Comment seeks to refine a flexible set of requirements to determine if a blogger voluntarily wishes to qualify as journalist. More specifically, even an anonymous blogger that the FEC considers under the proposed point system would be compromised in only one of the five areas that the agency evaluates; thus, retaining one's anonymity is not a “deal breaker” when applying for the license. Moreover, any First Amendment concerns about the point system's interfering with anonymous speech apply equally to any other PAC that is currently forced to disclose its financial information.

143. *See supra* Part I.A.

uncertain. In addition to remedying the legal issues raised by bloggers' anonymity,¹⁴⁴ disclosure of bloggers' identity will benefit enforcement and accountability because bloggers will know that their reputations will follow their work. That disclosure will also help determine if bloggers are under political control¹⁴⁵ because public knowledge of their identity will make it more difficult for bloggers to operate as political agents while claiming to be journalists.

The fourth portion examines whether the blogger maintains relations with a candidate or a political committee. Because the Media Exemption cannot encompass any entity that is under political control, unequivocally resolving the question of political control is essential to granting a blogger the Media Exemption. This aspect of the point system reveals any relationships suggesting agency between the blogger in question and the political interest. Some examples of activities demonstrating a blogger's agency with a political interest include a blog's "linking to campaign websites, accepting money for political advertisements, or reprinting candidates' press releases."¹⁴⁶ It is important to underscore that political control of the blog precludes it from receiving the Media Exemption.¹⁴⁷

The fifth requirement rewards voluminous readership. This variable can be easily measured by examining the number of the blog's subscribers or the number of visits the blog receives. This also gauges how closely bloggers operate as journalists by measuring the amount of exposure and readership they receive. Moreover, considering the volume of readership is consistent with the requirements of being a press entity requiring publications.¹⁴⁸ These requirements collectively provide bloggers with incentive to function with traditional journalistic practices.

CONCLUSION

A blanket application of the Media Exemption to all bloggers hinders Internet regulation of federal election law because it creates an avenue for corruption and invites circumvention of federal election law through blogging. The FEC should adopt a media license point system because it rewards bloggers who operate like press entities and applies a more detailed, fact-specific examination to bloggers, in contrast to the FEC's current blanket policy, which erroneously treats all blogs identically.

144. See *supra* Parts II.A, II.C.

145. See *supra* Parts II.A, II.C.

146. Norris, *supra* note 32, at 1012 (citations omitted).

147. Reader's Digest Ass'n, Inc. v. FEC, 509 F. Supp. 1210, 1214–15 (S.D.N.Y. 1981) (explaining that the press exemption does not apply to entities subject to political control).

148. See *generally* Internet Communications, 71 Fed. Reg. 18,589 (recognizing that the number of an entity's subscribers is a relevant category in examining whether that entity qualifies as a bona fide media entity).

Moreover, the media license point system would disclose the blogger's identity and prevent bloggers from falling under political control while addressing problems caused by a blogger's anonymity. Bloggers will want the media license as an outward assurance that their blog's content is credible. Finally, the point system allows for self-regulation when readers report potential violations to the FEC review board. This will limit the regulating pressure involved in each blog. Ultimately, the FEC must modify the current blanket application of the Media Exemption if it wishes to preserve the integrity of FECA and BCRA online.