

2014

Are Political Bloggers Weakening the Democratic Election Process by Being Paid to Give You Their "Unbiased" Opinions?

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<http://ir.law.fsu.edu/lr/vol41/iss2/6>

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FLORIDA STATE UNIVERSITY LAW REVIEW



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VOLUME 41

WINTER 2014

NUMBER 2

Recommended citation: Douglas McAlarney, Note, *Are Political Bloggers Weakening the Democratic Election Process by Being Paid to Give You Their "Unbiased" Opinions?*, 41 FLA. ST. U. L. REV. 511 (2014).

ARE POLITICAL BLOGGERS WEAKENING THE DEMOCRATIC ELECTION PROCESS BY BEING PAID TO GIVE YOU THEIR “UNBIASED” OPINIONS?

DOUGLAS MCALARNEY*

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“What’s happening is in the last . . . (two to four) years, there has been a radical, rapid change with technology,” said Doug McAlarney, a Republican political consultant based in Tallahassee. “Stuff that you would only see in a presidential campaign or a well-funded Senate campaign now can be used by someone running for city council or mayor. It’s become more affordable and more prevalent, and the state just needs to evolve with the change in technology.”¹

I. INTRODUCTION: BLOGGING DEMOCRATIZES CAMPAIGNING; HOWEVER, UNREGULATED PAID BLOGGING THREATENS THE DEMOCRATIC PROCESS

The mainstream media has begun neglecting serious, in-depth coverage of congressional, state, and local elections² due to financial problems and staffing cuts.³ In response, voters are turning to the

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1. Christina Silva, *Scott Wagman to Fight Online Ad Complaint in a Case That Could Set Precedent*, TAMPA BAY TIMES (Aug. 10, 2009, 7:51 PM), <http://www.tampabay.com/news/politics/kyc/scott-wagman-to-fight-online-ad-complaint-in-a-case-that-could-set/1026451>.

2. Barbara Bliss Osborn, *Election Neglected on L.A.’s Local TV*, FAIRNESS & ACCURACY IN REPORTING (July 1, 1997), <http://fair.org/extra-online-articles/election-neglected-on-l-a-s-local-tv>; Sandra Storey, *JP Observer: Major Media’s Bad Election Coverage Habits*, JAMAICA PLAIN GAZETTE (Feb. 28, 2014), <http://jamaicaplaingazette.com/2014/02/28/jp-observer-major-medias-bad-election-coverage-habits>.

3. See, e.g., Steve Myers, *What the Future of News Looks Like in Alabama After Advance Cuts Staff by 400*, POYNTER.ORG (June 14, 2012, 6:47 AM), <http://www.poynter.org/>

Internet and blogs for sources of political news to fill the void⁴ as coverage decreases.⁵

With this backdrop, some people are alleging that bloggers are being paid⁶ to give voters their supposedly unbiased opinions.⁷ Politicians, political parties, and interest groups, from government officials to labor unions to candidates for local office, are “secretly funding bloggers to promote or attack candidates.”⁸ Some candidates for office are concerned that their opponents are covertly retaining and paying bloggers to post, write, and plant negative stories against them that have the potential to affect the outcome of elections.⁹ Political campaigning on the Internet has become more like the proverbial Wild West than the stable American democratic republic that has been historically revered around the world.

II. THESIS

The current state of unregulated paid political blogging in cyberspace¹⁰ debases America’s democracy. Bloggers are not required by the Federal Election Commission (“FEC”)¹¹ to disclose whether they have been paid by an outside source to post their content or provide

latest-news/top-stories/177191/what-the-future-of-news-looks-like-in-alabama-after-advance-cuts-staff-there-by-400/.

4. Niki Vlachos, Comment, *The Federal Election Commission & Political Blogging: A Perfect Balance or Just Not Enough?*, 24 J. MARSHALL J. COMPUTER & INFO. L. 611, 616 (2006); Seema Mehta, *The Rise of the Internet Electorate*, L.A. TIMES (Apr. 18, 2011), <http://articles.latimes.com/2011/apr/18/nation/la-na-social-media-20110418>; Chandra Steele, *Election 2012: How Social Media Will Convert Followers into Voters*, PC MAG (Jan. 20, 2012), <http://www.pcmag.com/slideshow/story/293078/election-2012-how-social-media-will-convert-followers-into-v>.

5. See, e.g., Myers, *supra* note 3; Leonard Pitts, Jr., *The Case for Journalists and Why Every Citizen Can't Be One*, DETROIT FREE PRESS (June 26, 2012), <http://www.freep.com/article/20120626/OPINION05/206260323/The-case-for-journalists-and-why-every-citizen-can-t-be-one>.

6. See, e.g., Response of Bachmann for Congress to the Complaint at 1-2, MUR Case No. 5682 (Fed. Election Comm’n, Nov. 22, 2005), available at <http://eqs.nictusa.com/eqsdocsMUR/00005951.pdf>.

7. David Paul Kuhn, *Blogs: New Medium, Old Politics*, CBS NEWS (Feb. 11, 2009, 7:43 PM), http://www.cbsnews.com/2100-250_162-659955.html.

8. See Patrick McGreevy, *California Ethics Czar Urges Disclosure of Payments to Web Pundits*, L.A. TIMES (Apr. 20, 2012), <http://articles.latimes.com/2012/apr/20/local/la-me-blogs-20120420>.

9. See E-mail from Rich Glorioso, Former Fla. State Rep., to author (Sept. 30, 2013, 1:13 PM) (on file with author).

10. Thomas B. Edsall, *FEC Rules Exempt Blogs from Internet Political Limits*, WASH. POST (Mar. 28, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/27/AR2006032701474.html>.

11. The FEC was created by the U.S. Congress in 1975 to regulate the Federal Election Campaign Act (“FECA”), which is a statute that regulates federal campaign finance contributions and expenditures. *About the FEC*, FED. ELECTION COMM’N, <http://www.fec.gov/about.shtml> (last visited Mar. 13, 2014).

favorable or negative coverage to suit their political needs.¹² This lack of disclosure precludes the American public, and at times even elected officials, from having sufficient knowledge to make informed decisions regarding for whom or for what to vote and how the government should be run. "Information about who is spending in politics and how much allows voters to analyze the message coming out and allows voters to vote competently."¹³

The FEC, as well as state and local elections regulators, should promulgate a new rule implementing blogger disclosure laws that requires a blogger to disclose on her blog, in a prominent and visible manner, whether a blogger has received a consulting retainer, gifts, reimbursements for travel, hotel, or meal expenses, or has changed the price of advertisements in exchange for news coverage from a candidate for office, a political party, an interest group, or any other entity.¹⁴

III. HISTORY

Government regulation of elections is constantly in flux, and it is usually controversial. But such regulation is necessary for the stability of our democratic republic. Republican President Theodore Roosevelt was one of the first to see the need for campaign finance reform after a corporate scandal affected his 1904 campaign.¹⁵ In response, he pushed to ban corporate political contributions, and reforms were passed in the Tillman Act of 1907 ("the Act").¹⁶ The Act was followed by further reform attempts which sought to: 1) limit the influence of wealthy individuals and special interest groups on the outcome of federal elections; 2) regulate spending in campaigns for federal office; and 3) deter abuses by mandating public disclosure of campaign finances.¹⁷

Currently, there are federal laws and rules governing federal campaigns for the United States Congress and the presidency. "One

12. Internet Communications, 71 Fed. Reg. 18589, 18602 (Apr. 12, 2006) (codified at 11 C.F.R. § 110.11 (2013)).

13. Elizabeth Garrett, Remarks at the USC Sol Price School of Public Policy and California Fair Political Practice Commission Symposium: Rethinking Campaign Finance Reform and Disclosure (Apr. 19, 2012), available at <http://www.cal-span.org/cgi-bin/archive.php?owner=FPCC&date=2012-04-19>.

14. While the First Amendment, media exemptions to campaign finance laws, and jurisdictional issues are relevant to the discussion, these topics are not within the scope of this Note.

15. See Peter Overby, *Big Money and Politics: A Century of Corporate Influence on Campaigns*, NAT'L PUB. RADIO (Nov. 4, 2003, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=1491981>.

16. *Id.*

17. *Appendix 4: Brief History, The Federal Election Campaign Laws: A Short History*, FED. ELECTION COMM'N, <http://www.fec.gov/info/appfour.htm> (last visited Mar. 13, 2014).

of the main goals of campaign finance law is to prevent corruption and the appearance of corruption”¹⁸ This was the intent of the United States Supreme Court’s 1976 ruling in *Buckley v. Valeo*.¹⁹ In *Buckley*, the Court reviewed the 1974 reforms to the Federal Election Campaign Act of 1971 (“FECA”).²⁰ The FECA created the FEC as a result of the concern that large contributions given to secure political quid pro quos from current and potential office holders undermines the integrity of the American system of representative democracy.²¹ After *Buckley*, it is clearly constitutional for the government to regulate campaign contributions and expenditures.²² In *Citizens United v. FEC*,²³ the Court reaffirmed that the government may regulate corporate political speech through disclaimer and disclosure requirements as long as it does not suppress their speech altogether.²⁴

In 1992, the United States Congress passed, and President George W. Bush signed, the Bipartisan Campaign Reform Act of 2002 (“BCRA”).²⁵ The BCRA, which is also known as the McCain-Feingold Act, attempted to modernize campaign finance disclosure laws.²⁶ The FEC was to regulate and enforce BCRA.²⁷ Campaign Internet communications were exempted from new disclosure laws under the rules promulgated.²⁸

However, the BCRA was controversial,²⁹ and campaign finance reform was again in flux. In *Shays v. FEC*,³⁰ the United States District Court for the District of Columbia found the new rules too weak and ordered the FEC to promulgate a clear rule relating to campaign Internet activity and disclosure.³¹ The BCRA’s failure to require campaigns to report their advertising expenditures in cyberspace created a situation in which an identical television, radio, or newspa-

18. Richard L. Hasen, *Lessons from the Clash Between Campaign Finance Laws and the Blogosphere*, 11 NEXUS 23, 27 (2006).

19. 424 U.S. 1, 25-26 (1976).

20. *Id.* at 6 & n.1.

21. Franita Tolson, Betty T. Ferguson Professor of Voting Rights, Fla. State Univ. Coll. of Law, Lecture in Election Law Class: Campaign Finance Regulation (Apr. 4, 2012).

22. *Id.*

23. 558 U.S. 310 (2010).

24. *Id.* at 371.

25. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §§ 201-204, 116 Stat. 81, 88-92 (codified at 2 U.S.C. §§ 431, 434, 437(g), 441(a)-(h), 453, 455).

26. See Seth Gitell, *Making Sense of McCain-Feingold and Campaign-Finance Reform*, THE ATLANTIC (July 1, 2003, 12:00 PM), <http://www.theatlantic.com/magazine/archive/2003/07/making-sense-of-mccain-feingold-and-campaign-finance-reform/302758/>.

27. *See id.*

28. Anne E. Kornblut, *F.E.C. to Consider Internet Politicking*, N.Y. TIMES (Mar. 6, 2005), http://www.nytimes.com/2005/03/06/politics/06blog.html?_r=0.

29. *See* Gitell, *supra* note 26.

30. 337 F. Supp. 2d 28, 130 (D.D.C. 2004).

31. *See id.*; Kornblut, *supra* note 28.

per advertisement promoting a candidate needed to be fully disclosed when not run on the Internet, while the same exact advertisement running simultaneously in cyberspace on a blog, or any other website, such as YouTube, did not need such a disclaimer or to be reported by the campaign to the FEC.³² In response to *Shays*, the FEC requested Notice and Comment for a Proposed Rulemaking ("NPRM") in 2005.³³ The FEC requested comments on whether traditional campaign finance disclosures, which are required on most non-Internet campaign material, should be extended to Internet-based campaign material.³⁴ The NPRM included the question of whether bloggers should be required to disclose if they have received payment from a political campaign or interest group to post a positive or negative story.³⁵ All but one of fifty comments received was opposed to such a rule.³⁶ The FEC promulgated and published their rule in 2006. Disclosures on Internet-based communications by campaigns were required as well as disclosure by campaigns of payments to bloggers.³⁷ However, the rule exempted bloggers from any obligation to disclose payments made by a campaign for placing or writing comment on their blogs.³⁸ Bloggers, both incorporated and unincorporated, did not have to inform their readers if they had received payment in the form of a consulting fee, advertisements, or something of value.³⁹ An advertisement posted by a blogger would still need to include a disclaimer that the advertisement was paid for by the campaign; however, it is the campaign that must include this disclaimer in the advertisement.⁴⁰ Specific stories written by the blogger that refer to this campaign would not have to disclose that the campaign had advertised on the blog in the past.⁴¹

Bloggers wishing to promote one candidate or criticize another without compensation can continue to do so without any new restraints. Even bloggers who are paid by a candidate, party, or political action committee (PAC) to promote a candidate or cause—in

32. Kornblut, *supra* note 28; Chris Suellentrop, *McCain-Feingold's Internet Loophole*, SLATE (Apr. 27, 2004, 7:32 PM), http://www.slate.com/articles/news_and_politics/net_election/2004/04/mccainfeingolds_internet_loophole.2.html.

33. Internet Communications, 70 Fed. Reg. 16,967 (proposed Apr. 4, 2005).

34. *Id.*

35. *See id.*

36. Internet Communications, 71 Fed. Reg. 18,589, 18,602 (Apr. 12, 2006) (codified at 11 C.F.R. § 110.11 (2013)).

37. *Id.* at 18,602.

38. *Id.*

39. *Id.*

40. *See id.*

41. *Id.*

non-advertisement form—are not be required to disclose this fact themselves. (The candidate or party, however, would.)⁴²

The rule promulgation was one of the most important FEC rule-makings in 2006 because of the Internet's ability to involve average citizens in politics and affect their ability to engage in the political process in cyberspace.⁴³

The U.S. Congress considered revising the current laws within the "Democracy is Strengthened by Casting Light on Spending in Elections Act" ("DISCLOSE Act") in 2010.⁴⁴ The main emphasis of the DISCLOSE Act was to require independent groups that received a donation of \$10,000 or more for use in a political campaign to disclose the name of the donor within twenty-four hours of the contribution being spent.⁴⁵ It also included a provision for Internet disclosure.⁴⁶ The reforms passed the U.S. House of Representatives⁴⁷ but died in the U.S. Senate⁴⁸ for lack of support from Republicans who believed "the measure could have a chilling affect [sic] on political giving, subjecting campaign donors to intimidation from their political opponents."⁴⁹ Thus, there was no new rule on Internet blogging disclosure to close the disclosure loophole.

The current federal rule states that if a campaign pays a blogger to post or write a story or puts the blogger on a retainer, only the

42. *Election Law*, ELECTRONIC FRONTIER FOUND., <https://www EFF.ORG/issues/bloggers/legal/election> (last visited Mar. 13, 2014).

43. See Anne E. Kornblut, *F.E.C. to Consider Internet Politicking*, N.Y. TIMES (Mar. 6, 2005), http://www.nytimes.com/2005/03/06/politics/06blog.html?_r=0.

44. Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. (2d Sess. 2010); see also Ezra Klein, *The DISCLOSE Act Won't Fix Campaign Finance*, WASH. POST WONKBLOG (July 27, 2012, 11:14 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/27/the-disclose-act-wont-fix-campaign-finance/>.

45. Editorial, *Disclosure Vote Leaves Trail of Broken Republican Vows*, BLOOMBERG (July 17, 2012, 6:30 PM), <http://www.bloomberg.com/news/2012-07-17/disclose-vote-leaves-trail-of-broken-republican-vows.html>.

46. Democracy is Strengthened by Casting Light on Spending in Elections Act, H.R. 5175, 111th Cong. § 105 (2010).

47. See Final Vote Results for Roll Call 391, OFF. CLERK, U.S. H.R. (June 24, 2010, 4:29 PM), <http://clerk.house.gov/evs/2010/roll391.xml>.

48. Ted Barrett, *Senate Republicans Block DISCLOSE Act for Second Straight Day*, CNN.COM (July 17, 2012, 8:56 PM), <http://www.cnn.com/2012/07/17/politics/senate-disclose-act/index.html>.

49. Rosalind S. Helderman, *DISCLOSE Act, New Donor Transparency Law, Blocked in Senate*, WASH. POST 2CHAMBERS (July 16, 2012, 6:45 PM), http://www.washingtonpost.com/blogs/2chambers/post/disclose-act-new-donor-transparency-law-blocked-in-senate/2012/07/16/gJQAbm7WpW_blog.html ("The bill is a response to the 2010 Citizens United ruling, in which the U.S. Supreme Court said that corporate campaign donations are a form of free speech and cannot be limited by government. Some nonprofit groups and unions are not required to reveal their donors. The bill would require speedy disclosure of big donors.").

campaign itself is required to disclose the payment.⁵⁰ The campaign must list the payment as an expenditure on its regularly scheduled campaign finance reports filed with the FEC for a federal candidate or designated state or local elections official for a state or local candidate.⁵¹ The blogger is under no obligation to disclose a payment to any reporting authority or on the blog itself.⁵²

However, disclosure only on the campaign side of the transaction, and not the blogger side, is insufficient to ensure that voters are fully informed of whether the blogger is providing an unbiased opinion or is in fact an agent of the campaign. A tenacious voter would have to spend hours wading through the FEC record-keeping labyrinth⁵³ to find a link between the blogger and the campaign. Voters will not be able to link a specific post to a specific payment in a timely manner, which does not afford them the opportunity to cast a well-informed vote. This is not a realistic scenario because even if the voter was able to locate a campaign's financial reports rapidly, she may not find the answer for which she was looking. Campaigns have found, and are utilizing, this loophole in the law to conceal payments to bloggers. Furthermore, a voter's efforts to research would be stonewalled by another loophole. To wit, campaigns are hiding payments and connections to bloggers by "writing checks to consultants who then pay the blogger. Also, disclosure of payments need not be made on the blog or website where a reader can easily see it."⁵⁴

IV. WHY THE FEC SHOULD RECONSIDER THE QUESTION OF WHETHER BLOGGERS SHOULD BE REQUIRED TO DISCLOSE POLITICAL PAYMENTS

Since the FEC's 2006 rule, there has been a radical, rapid change in technology. Techniques and tactics that were, until then, only seen in a well-funded presidential campaign or U.S. Senate campaign now can be utilized by local candidates running for city council or mayor.⁵⁵ The technology and know-how to set up and run a blog have become more affordable and widely available, and it has been alleged that bloggers are being paid by campaigns, political parties, and interest

50. Internet Communications, 71 Fed. Reg. 18,589, 18,602 (Apr. 12, 2006) (codified at 11 C.F.R. § 110.11 (2013)); McGreevy, *supra* note 8.

51. See FED. ELECTION COMM'N, FEDERAL ELECTIONS COMMISSION CAMPAIGN GUIDE: CONGRESSIONAL CANDIDATES AND COMMITTEES 99 (2011), available at <http://www.fec.gov/pdf/candgui.pdf>.

52. Internet Communications, 71 Fed. Reg. at 18,602; McGreevy, *supra* note 8.

53. See *Detailed Files About Candidates, Parties and Other Committees*, FED. ELECTION COMM'N, <http://www.fec.gov/finance/disclosure/ftpdet.shtml> (last visited Mar. 13, 2014). "These files contain the most recent 10 years of data, the current election cycle plus the most recent five (5) election cycles." *Id.*

54. McGreevy, *supra* note 8.

55. Silva, *supra* note 1.

groups to post or write positive and negative articles.⁵⁶ The FEC rules need to evolve with the changes in technology to protect voters and assist them in getting a true, unbiased picture of the political landscape. Moreover, the rule revision needs to distinguish between traditional journalism and paid political blogging.

In practice, there is little to no distinction between a paid blogger and a paid campaign press secretary or spokesperson. “The only real question is whether the bloggers should have to [disclose payments] on their own.’”⁵⁷ UCLA Law Professor Eugene Volokh has stated,

“When a blogger is paid to write for a campaign, that’s basically a campaign buying a political advertisement. . . . The Supreme Court has held (in *McConnell* and *Citizens United*) that the government may require political advertisers to identify the source of the advertisement. Requiring the blogger to identify his speech as an advertisement paid for by a campaign would be much the same as the identification requirements that had been upheld—it would inform the public about who is actually paying for the speech, and do so at the moment the speech is received.”⁵⁸

In conjunction with blogging technology becoming more readily available, some voters are beginning to get a majority of their election-related news from the Internet.⁵⁹ Bloggers’ stories are affecting politics as never before imaginable⁶⁰ and can be very influential on the political process. A prime example is the *Drudge Report*’s⁶¹ breaking news of former President Bill Clinton’s affair with a twenty-three-year-old White House intern.⁶² While *Newsweek* magazine reporter Michael Isikoff had the story, the magazine attempted to kill it by refusing to publish it in print or on its Internet site.⁶³ Drudge ran

56. E-mail from Rich Glorioso, *supra* note 9.

57. John Hrabe, *Calif. Blog Regulations Could Hit Drudge, Citizen Journalists*, CALWATCHDOG (Apr. 25, 2012), <http://www.calwatchdog.com/2012/04/25/calif-blog-regulations-could-hit-drudge/> (quoting Michael Houston, partner at Cummins & White, LLP).

58. John Hrabe, *Some Bloggers Still Concerned About FPPC Censorship*, FOX & HOUNDS (Sept. 19, 2012), <http://www.foxandhoundsdaily.com/2012/09/some-bloggers-still-concerned-about-fppc-censorship/> (quoting Professor Eugene Volokh, UCLA law professor and publisher of *The Volokh Conspiracy* blog).

59. Steven Maviglio & Jon Fleischman, Op-Ed., *Viewpoints: FPPC Shouldn’t Become the Internet Police*, SACRAMENTO BEE, Sept. 18, 2012.

60. *See id.*

61. The *Drudge Report* is a blog operated by Matt Drudge of Miami Beach, Florida. The blog hosts links to political news stories and columns regarding U.S. and international politics, and it garners billions of visits each year. *See* Brett Sokol, *The Drudge Retort*, MIAMI NEW TIMES (June 28, 2001), <http://www.miaminewtimes.com/2001-06-28/news/the-drudge-retort/>.

62. *Scandalous Scoop Breaks Online*, BBC NEWS (Jan. 25, 1998, 8:06 GMT), http://news.bbc.co.uk/2/hi/special_report/1998/clinton_scandal/50031.stm.

63. *Id.*

with the story.⁶⁴ His posting brought attention to one of the biggest political scandals of the century and the impeachment of a President of the United States by the House of Representatives.⁶⁵ Drudge's ability to affect the political arena with merely a personal computer demonstrates the power of one person blogging about issues and people. It also underscores the importance of readers and voters knowing whether content is paid content or the blogger's own opinions. Ironically, *Newsweek* magazine, one of the world's most respected print media, is no longer printed in hard copy and is now published only as an Internet version, joining the *Drudge Report* as a cyberspace-only publication.⁶⁶ *Newsweek* now must compete with bloggers like Drudge on equal footing. "Love him or hate him, Matt Drudge's report on the Clinton scandal is the most visible sign to date of the changing nature of journalism."⁶⁷

"According to the Pew Research Center, 34 percent of Americans say the Internet now is their main source of campaign news. Google research indicates that 68 percent of American voters use the Internet to research political information."⁶⁸ Bloggers, such as Drudge, have become extremely successful in influencing online readers.⁶⁹ In 2011, his website referred more online readers to mainstream newspaper websites than worldwide publications such as *BBC News*.⁷⁰ The Pew Research Center ("Pew") reported in 2011 that only Google⁷¹ directed more traffic to news websites than Drudge. In fact, using data from the Nielsen Company to examine twenty-one news sites on the Internet, Pew demonstrated in their 2011 report that the *Drudge Report* directed more traffic to news websites than Facebook and Twitter combined, even though the *Drudge Report* had less monthly

64. *Id.*

65. See Peter Baker & Helen Dewar, *The Senate Acquits President Clinton*, WASH. POST (Feb. 13, 1999), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeach021399.htm>.

66. Jennifer Saba & Peter Lauria, *After 79 Years, Newsweek Goes Digital Only*, REUTERS (Oct. 18, 2012, 5:53 PM), <http://www.reuters.com/article/2012/10/18/us-newsweek-digital-idUSBRE89H0L020121018>.

67. *Scandalous Scoop Breaks Online*, *supra* note 62.

68. Maviglio & Fleischman, *supra* note 59.

69. See Robert Andrews, *Paid Content: Where UK Newspapers Get Their Traffic*, THE GUARDIAN (June 28, 2010, 10:06 AM), <http://www.guardian.co.uk/media/pda/2010/jun/28/interactive-newspaper-uk-traffic-source>.

70. *Id.*

71. Google is an Internet-based search engine that allows Internet users to research various topics, including political candidates. A voter can type in the name of a candidate and find links to news and blog stories covering the candidate. The search result listings can be manipulated by savvy political consultants who know how to move a story up or down in the search result rankings. See Tom Zeller Jr., *Gaming the Search Engine, in a Political Season*, N.Y. TIMES (Nov. 6, 2006), http://www.nytimes.com/2006/11/06/business/media/06link.html?_r=0.

users.⁷² The report stated that Drudge drove 7 percent of all traffic sent to mainstream news websites⁷³ across the ideological spectrum, including: 1) *Washington Post* (15 percent), 2) *ABC News* (11 percent), 3) *Fox News* (11 percent), and 4) *USA Today* (8 percent).⁷⁴

Drudge's success in driving Internet traffic demonstrates the strong need for readers to know whether bloggers are being paid to post their stories by candidates, political parties, or interest groups. While there are no reported instances of Drudge being paid, his effectiveness demonstrates the power of posting, burying, removing, or deleting a link to a story. "Visit the Drudge Report several times in a day and you'll see how he tweaks headlines and moves articles around to get the optimal configuration."⁷⁵

With 40 percent of mainstream media website traffic on specific stories coming by referrals from other websites rather than direct visits,⁷⁶ it is clear that voters are increasingly relying on blogs, such as the *Drudge Report* on the right⁷⁷ or the *Daily Kos* on the left,⁷⁸ to educate themselves on political issues. These readers have a right to full disclosure of whether the bloggers are being paid for their blogging.⁷⁹ Ann Ravel, Chair of California's Fair Political Practices Commission stated, " 'In order for people to really know whether they can have faith and trust in the independence of recommendations they are receiving, they have to be aware' of any payments."⁸⁰

72. David Carr, *How Drudge Has Stayed on Top*, N.Y. TIMES (May 15, 2011), http://www.nytimes.com/2011/05/16/business/media/16carr.html?_r=0; Lauren Indvik, *Study Says Drudge Report Drives More Traffic Than Facebook & Twitter Combined*, MASHABLE (Aug. 10, 2011), <http://mashable.com/2011/08/10/news-traffic-referral-study/>; Eric M. Jackson, *Why Matt Drudge Still Beats Mark Zuckerberg*, GIGAOM (May 17, 2011, 4:00 PM), <http://gigaom.com/2011/05/17/why-matt-drudge-still-beats-mark-zuckerberg/>.

73. Jackson, *supra* note 72.

74. *Id.*

75. *Id.*

76. Carr, *supra* note 72.

77. See, e.g., Lindsay Beyerstein, *Matt Drudge's Rescue Mission*, SALON (Apr. 26, 2012, 7:30 AM), http://www.salon.com/2012/04/26/matt_drudges_rescue_mission/.

78. See, e.g., Sean Sullivan, *Why Some Liberals Aren't on Board with Andrew Cuomo (and How It Could Matter)*, WASH. POST (Dec. 7, 2012, 1:30 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/12/07/why-some-liberals-arent-on-board-with-andrew-cuomo-and-how-it-could-matter/>.

79. See Jim Sanders, *FPPC Leader To Seek Blogger Disclosure of Campaign Payments*, SACRAMENTO BEE (Apr. 19, 2012, 3:03 PM), <http://blogs.sacbee.com/capitolalertlatest/2012/04/california-fair-political-practices-commission-leader-to-seek-blogger-disclosure-of-campaign-payments.html> (stating that at least one Fair Political Practices Commission leader sought mandatory blogger disclosure for future elections).

80. McGreevy, *supra* note 8.

V. WHAT IS A BLOG AND WHO IS A BLOGGER?

Defining what is a blog and who is a blogger is not an easy task. Prominent, well-respected Florida blogger Justin Sayfie⁸¹ of the *Sayfie Review*⁸² states that anyone who uses any type of social media is a blogger.⁸³ "Everyone is a blogger. Anyone who tweets and anyone who posts status updates on Facebook is a blogger."⁸⁴ In the political arena, bloggers may include grassroots activists, volunteers, campaign staff, consultants, and mainstream journalists. "Both the Obama and Romney campaigns have armies of staffers who blog, tweet and post items to Facebook."⁸⁵

Another Florida blogger, Peter Schorsch,⁸⁶ defines a blog on his blog, *Inside the Lines*, in the following way:

On the campaign trail, in the newspaper and even when you are talking to voters, you've likely heard a lot about: "what's in the blogs." But you're probably still wondering: What does that really mean? "The blogs" actually refers to the ever increasing number of social networking platforms used to deliver important news and messages, be it an actual website, Facebook page, Twitter account, YouTube video or whatever technology has been invented in the time since you started reading this paragraph.⁸⁷

The court in *United States v. Cassidy*⁸⁸ defined a blog as follows:

A "Blog" is a shorthand term for a "web log," i.e. a log or web page maintained on the World Wide Web. A Blog is like a bulletin board and contains whatever material its sponsor decides to post. It does not send messages, and there is no limitation on the length of statements that may be contained on a Blog. Like a bulletin board,

81. Justin Sayfie is an attorney; he is also a lobbyist for companies such as Google and AutoNation. *Our People*, SAYFIE L. FIRM, <http://www.sayfielawfirm.com/OurPeople.html> (last visited Mar. 13, 2014). He is a former top advisor to Florida Governor Jeb Bush and runs a political blog called *Sayfie Review*. See *Arena Profile: Justin Sayfie*, POLITICO, http://www.politico.com/arena/bio/justin_sayfie.html (last visited Mar. 13, 2014).

82. *Sayfie Review* is a political blog covering legislative news in Florida and discloses when a candidate, political party, or interest group pays to post a link or content. SAYFIE REVIEW, <http://www.sayfiereview.com/> (last visited Mar. 13, 2014).

83. E-mail from Justin Sayfie, Owner & Editor of *Sayfie Review*, to author (Oct. 16, 2012, 6:09 PM) (on file with author).

84. *Id.*

85. Maviglio & Fleischman, *supra* note 59.

86. Peter Schorsch is a non-partisan political consultant based in St. Petersburg, Florida. See *Peter Schorch, a Bio*, FLA. VOICES, <http://www.floridavoices.com/user/peter-schorsch> (last visited Mar. 13, 2014). He is the founder and Executive Editor of *Inside the Lines*. About Peter Schorsch, Executive Editor, INSIDE THE LINES, <http://insidethelinesfla.com/about/> (last visited Mar. 13, 2014).

87. Peter Schorsch, *Advertising on Inside the Lines*, INSIDE THE LINES, <http://insidethelinesfla.com/advertising-on-inside-the-lines/> (last visited Mar. 13, 2014).

88. 814 F. Supp. 2d 574 (D. Md. 2011).

it does not communicate except to those who voluntarily choose to read what is posted on it.⁸⁹

Most blogs are not written by professionally trained journalists, who must comply with ethical standards, but by amateur writers free from any editorial supervision.⁹⁰ Computers and blogging gives anyone the ability to write, edit, and publish their own editorial stories, reach millions of readers, and have the readers respond back.⁹¹ Blogs create a direct connection between writers and readers. It is “a conversation with distinct voices carried out in comments and e-mails and other blogs.”⁹² In fact, an average person’s blog can be just as valuable, for example, as ESPN’s website as far as reaching and influencing other people and potential advertisers.⁹³ Anybody with a computer and access to blogging software can publish stories being ignored by the mainstream news media and push the issue into the public eye. “Blogging technology has, for the first time in history, given the average Jane the ability to write, edit, design, and publish her own editorial product—to be read and responded to by millions of people, potentially—for around \$0 to \$200 a year.”⁹⁴ While this may be healthy for democracy in most instances, there also lies beneath the surface the ability “to disseminat[e] blatant rumors and lies to large audiences.”⁹⁵ For example, Shashank Tripathi, a campaign manager for congressional candidate Christopher R. Wright,⁹⁶ sent false tweets during Hurricane Sandy stating that the New York Stock Exchange was flooded with three feet of water.⁹⁷ He tweeted under the code name of *@ComfortablySmug*, and his falsehoods were disseminated to a worldwide audience by CNN and the Weather

89. *Id.* at 576.

90. See generally Matt Welch, *The New Amateur Journalists Weigh In*, COLUM. JOURNALISM REV., Sept.–Oct. 2003, available at <http://ruby.fgcu.edu/courses/tdugas/ids3332/acrobat/blogworld.pdf>.

91. *Id.*

92. John Tozzi, *Bloggers Bring in the Big Bucks*, BLOOMBERG BUSINESSWEEK (July 13, 2007), <http://www.businessweek.com/stories/2007-07-13/bloggers-bring-in-the-big-bucks-businessweek-business-news-stock-market-and-financial-advice>.

93. Richard Lawson, Econ. Crimes Dir., Fla. Office of the Att’y Gen., Guest Lecturer at the Florida State University College of Law Cyber Law Seminar (Sept. 28, 2012).

94. *A Blogging First at White House*, NBCNEWS (Mar. 8, 2005, 10:21 AM), <http://www.nbcnews.com/id/7117260/ns/politics/t/blogging-first-white-house/#.UtG2dtJDvAs> (quoting Matt Welch in the *Columbia Journalism Review*).

95. *Id.*

96. Shashank Tripathi is a New York based hedge fund analyst and former campaign manager for Republican candidate Christopher R. Wright, who was running for U.S. Congress from New York’s 12th District. See *Update w/ Romney Campaign Ties – Republican Campaign Manager Outed as Tweeter of False Storm Info*, DAILY KOS (Oct. 30, 2012, 6:28 PM), <http://www.dailykos.com/story/2012/10/30/1152833/-Republican-Campaign-Manager-Outed-As-Tweeter-Of-False-Storm-Info>.

97. *Id.*

Channel.⁹⁸ Tripathi apologized for what he described as "irresponsible and inaccurate tweets" and resigned from the Wright campaign.⁹⁹ This demonstrates how one person's blogging efforts can make their way into the mainstream media and affect current events. The purpose of any FEC rule on blogging should not encroach on a citizen's right to express her opinion in cyberspace but should target those who are paid to blog.

The mainstream media is given a press exemption from complying with the current FEC campaign finance laws in both their print and Internet media in regards to hard stories, editorials, leaks, tips, and leads.¹⁰⁰ In contrast, a copy placed in the media as advertising by a campaign must be disclosed.¹⁰¹ The news media does not need to file campaign finance reports with the FEC for expenditures or electioneering communication, as campaign finance laws do not apply to them because they qualify for a media exemption under FEC rules.¹⁰² Paid political bloggers are not subject to the same editorial controls as traditional journalists who blog and should not qualify for the FEC press exemption. In order to determine who is and who is not qualified for the exemption, the FEC applies a two-step test.¹⁰³ The two-step test is:

- 1) "Whether the entity engaging in the activity is a press or media entity," and
- 2) Whether the entity can establish:
 - (A) That the entity is not owned or controlled by a political party, political committee, or candidate; and
 - (B) That the entity is acting as a press entity in conducting the activity at issue. (i.e., whether the press entity is acting in its 'legitimate press function.')

If this two-step test is applied to paid political bloggers, then paid bloggers should not receive the exemption. They cannot satisfy prong 2-A or 2-B of the test. When paid to blog, they act under the control of

98. Andrew Beaujon, 'ComfortablySmug' Apologizes for Misleading Tweets, Resigns from GOP Campaign, POYNTER (Oct. 31, 2012, 7:39 AM), <http://www.poynter.org/latest-news/mediawire/193737/comfortablysmug-apologizes-for-misleading-tweets-resigns-from-gop-campaign/>.

99. ComfortablySmug, *I Wish to Offer the People of New York a Sincere, Humble and Unconditional Apology*, TWITTER (Oct. 30, 2012, 7:24 PM), <https://twitter.com/ComfortablySmug/status/263466343360253952>.

100. Internet Communications, 71 Fed. Reg. 18,589, 18,607-08 (Apr. 12, 2006) (codified at 11 C.F.R. §§ 100.73, 100.132).

101. *Id.* at 18,602.

102. *Id.* at 18,607-08; *see, e.g.*, Press Release, *FEC Extends Press Exemption to Citizens United*, FED. ELECTION COMM'N (June 10, 2012), available at <http://www.fec.gov/press/press2010/20100610OpenMeeting.shtml>.

103. Internet Communications, 71 Fed. Reg. at 18,607.

104. Citizens United, Advisory Opinion 2010-08, at 4-5 (Fed. Election Comm'n June 11, 2010), available at <http://saos.nictusa.com/aodocs/AO%202010-08.pdf>.

a political party, committee, or candidate. They become an arm of the campaign, disseminating a campaign advertising expenditure as opposed to an unbiased blogger sharing her viewpoint. Conversely, political bloggers, such as Justin Sayfie,¹⁰⁵ should receive the press exemption so long as they continue to disclose voluntarily sponsored news on their blog and sell advertisements at market rates.

VI. HOW PAID POLITICAL BLOGGING HARMS THE DEMOCRATIC PROCESS: TACTICS AND EXAMPLES

A. *Tactics*

With the rise of the Internet age, individuals now have instant access to more information regarding candidates running for political office than ever before. In the beginning of the Internet age, computers, websites, and blogs were considered something of a novelty used only by presidential campaigns and well-funded senate campaigns.¹⁰⁶ Now, the Internet has become more affordable for the average person and has been mainstreamed into political campaign structures.¹⁰⁷ Paid political blogging has sprung up as a cottage industry for political consultants and activists of both major political parties. For example, news reports allege that in 2004, Democratic presidential candidate Howard Dean paid a well-known blogger \$12,000, and the Campaign of Republican U.S. Senator John Thune paid a total of \$35,000 to two bloggers.¹⁰⁸

Candidates have traditionally struggled with garnering constant media coverage and battled with the media over whether the stories written by journalists were fair or accurate.¹⁰⁹ Journalists have sometimes played favorites and ignored or refused to run damaging stories on their favorite candidate or have run skewed articles against the candidates they did not like.¹¹⁰ Now anyone with a computer and basic blogging software can create her own blog and pub-

105. See *infra* note 122 and accompanying text.

106. Silva, *supra* note 1.

107. Jim Barney, *Affordable Online Campaign Technology*, WINNING CAMPAIGNS, <http://www.winningcampaigns.org/Winning-Campaigns-Archive-Articles/Making-Online-Campaign-Technology-Affordable.html> (last visited Mar. 13, 2014).

108. Kenneth P. Doyle, *FEC Backs Narrow Internet Proposal in Attempt to Quiet Online Controversy*, 10 ELECTRONIC COM. & L. REP. (BNA) 317 (Mar. 30, 2005).

109. See, e.g., Marc Caputo, *In "Reprehensive Party of Florida" Flap, NBC & News Service Issue Apology, Staffer Fired*, MIAMI HERALD (Jan. 31, 2014, 4:53 PM), <http://miamiherald.typepad.com/nakedpolitics/2014/01/in-reprehensive-party-of-florida-flap-nbc-news-service-issue-apology-staffer-fired.html>.

110. See, e.g., Charles Krauthammer, *Rather Biased*, WASH. POST (Jan. 14, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A8099-2005Jan13.html>; Tierney Sneed, *RNC Votes to Boycott CNN, NBC Over Plans for Hillary Clinton Specials*, U.S. NEWS (Aug. 16, 2013), <http://www.usnews.com/news/articles/2013/08/16/rnc-votes-to-boycott-cnn-nbc-over-plans-for-hillary-clinton-specials>; *Scandalous Scoop Breaks Online*, *supra* note 62.

lish stories as she sees fit.¹¹¹ These technological advances have allowed the average person, as well as candidates, political parties, and interest groups, to be on equal footing with the mainstream media in cyberspace.

This has led some in the political arena to capitalize on the situation and gain the exposure they covet by recruiting and secretly funding bloggers to promote or attack candidates.¹¹² There is some suspicion about partisan political bloggers in Florida. For example, the *Tampa Bay Times* recently reported that five people active in politics accused Peter Schorsch, a political blogger, of pressuring "them for hundreds or thousands of dollars in exchange for good stories or the deletion of bad ones."¹¹³ The *Times* also reported that former congressional candidate Jessica Ehrlich's campaign manager accused Schorsch of attacking her and made a connection to Schorsch having received advertising money from Ehrlich's opponent's, the late Congressman Bill Young's, campaign.¹¹⁴ Additionally, the *New Times Broward-Palm Beach* questioned the propriety of conservative blogger Javier Manjarres.¹¹⁵ The publication reported that Manjarres investigated the arrest records of former congressional candidate Ozzie deFaria and took advertising money from opponent Karen Harrington.¹¹⁶ The *New Times* wrote that "it highlights once again the precarious situation Manjarres is in: He's in charge of the blog's content *and* its advertising. How can readers be sure they're getting a fair deal? How can readers be sure Manjarres isn't pulling punches to keep his ad money coming in?"¹¹⁷ Both bloggers' names, or the names of their blogs or corporation, appear on the campaign finance reports of candidates whose opponents have been attacked after buying advertising on the blogs or receiving a consulting fee.¹¹⁸

111. See, e.g., sources cited *supra* note 110.

112. See McGreevy, *supra* note 8.

113. John Woodrow Cox, *Cash for Coverage? Questions Arise About Local Political Blogger Peter Schorsch*, TAMPA BAY TIMES (Nov. 15, 2013, 8:59 PM), <http://www.tampabay.com/news/politics/cash-for-coverage-questions-arise-about-local-political-blogger-peter/2152747>.

114. Jessica Ehrlich is a lawyer from St. Petersburg, Florida, who ran against the late Congressman Bill Young in the 2012 election for U.S. Congress. See Craig Pittman, *Democrat Jessica Ehrlich's Fight to Upend C.W. Bill Young Gets a Little Tougher*, TAMPA BAY TIMES (Oct. 3, 2012, 8:21 PM), <http://www.tampabay.com/news/politics/elections/democrat-jessica-ehrlachs-fight-to-upend-cw-bill-young-gets-a-little/1254690> (reporting that Ehrlich's campaign manager "called Schorsch 'a Republican political consultant masquerading as a journalist'").

115. Rich Adbill, *Karen Harrington Paying Shark Tank Blogger Javier Manjarres for Ads*, NEW TIMES BROWARD-PALM BEACH (Aug. 9, 2012, 1:14 PM), http://blogs.browardpalmbeach.com/pulp/2012/08/karen_harrington_paying_shark.php.

116. *Id.*

117. *Id.*

118. See Cox, *supra* note 113.

Such bloggers may be hired to write, or at times post verbatim, positive or negative stories that the media will not cover. If the scoop is juicy enough and garners enough attention on the Internet, the mainstream media will follow the blogger's lead and run a similar story. This seemed to be the case when the *Tampa Bay Times* picked up on Schorsch's blogging on Ehrlich's background.¹¹⁹ This is an extremely effective way to plant a negative story about an opponent in the mainstream media, which can then be used in attack advertisements by the campaign or interest group that paid the blogger.

Another method of remuneration is to have links to mainstream media news stories placed on a blogger's website or to have such links removed if it is damaging to the favored campaign.¹²⁰ Not only can blog links be added to or removed from a website, they can also be moved to a more prime location for visitors to see. On blog sites, such as the *Drudge Report*, story links are moved around the site and are added and removed throughout the day.¹²¹ Some blogs, such as the *Sayfie Review*, prominently disclose payments received from campaigns, political parties, or interest groups for such sponsored news,¹²² while many other blogs do not.

Before voting, many people will conduct an Internet search using the name of a candidate for office utilizing a search engine, such as Yahoo! or Google. The search engine produces several website links regarding the candidate. The results will produce the good, the bad, and the ugly stories. The goal of the paid political blogger is to crowd out the good stories listed in Internet search engine results and knock the good stories off the first page of results and replace them with negative stories.¹²³

There are three basic ways a campaign usually compensates a blogger for her services.¹²⁴ The first is by paying a general consulting fee.¹²⁵ The blogger is on standby to post a link, story, or video sent by the campaign. The second is by paying inflated or deflated prices for

119. See Pittman, *supra* note 114.

120. See, e.g., Cox, *supra* note 113 (reporting that Schorsch acknowledged trading money for the deletion of negative content).

121. See, e.g., Jackson, *supra* note 72.

122. SAYFIE REVIEW, *supra* note 82.

123. See, e.g., Cox, *supra* note 113 (reporting on the existence of an offered contract between Schorsch and Michael Pinson, a Republican activist, which would have provided for a \$1000 bonus if any of Schorsch's articles on Pinson did not show within the top thirty online search results).

124. Laurel Rosenhall, *FPPC Approves New Rules for Political Bloggers*, THE SACRAMENTO BEE (Sept. 19, 2013, 5:15 PM), <http://blogs.sacbee.com/capitolalert/latest/2013/09/fppc-approves-new-rules-for-political-bloggers.html>; Jonathan Strong, *True Stories of Bloggers Who Secretly Feed on Partisan Cash*, DAILY CALLER (Aug. 23, 2010, 3:00 AM), <http://dailycaller.com/2010/08/23/true-stories-of-bloggers-who-secretly-feed-on-partisan-cash>.

125. Rosenhall, *supra* note 124; Strong, *supra* note 124.

advertising space on their blog.¹²⁶ The third, based on my personal experience working in politics, is by paying for trips, hotels, meals, and travel or by granting special access to events and celebrities. None of these are regulated at the current time.

B. Examples

In the 2010 California Republican gubernatorial primary between Steve Poizner¹²⁷ and Meg Whitman,¹²⁸ both candidates' campaigns were accused of offering money to various media for positive coverage.¹²⁹ In Poizner's campaign, the California-based blog *Red County*¹³⁰ fired a writer, supposedly because he had been paid for favorable coverage by one of Poizner's consultants.¹³¹ In the Whitman campaign, blogger Joe Matthews¹³² was allegedly approached by the campaign to buy advertising after he posted "some negative items."¹³³

In 2006, a purportedly paid Minnesota Democratic-Farmer-Labor ("DFL")¹³⁴ operative, who was a writer for the House DFL media office, wrote numerous letters to the editor attacking Congresswoman

126. Strong, *supra* note 124.

127. Steve Poizner is a conservative Republican and Silicon Valley entrepreneur who ran for governor of California and lost the Republican primary election to Meg Whitman. Michael Rothfeld, *Shifts in California GOP Candidate Poizner's Position on Abortion Scrutinized*, L.A. TIMES (Mar. 6, 2010), <http://articles.latimes.com/2010/mar/06/local/la-me-poizner-abortion6-2010mar06>; Whitman, *Fiorina Win GOP Nods in Calif.*, NBCNEWS.COM (June 9, 2010, 9:23 AM), http://www.nbcnews.com/id/37577424/ns/politics-decision_2010/t/whitman-fiorina-win-gop-nods-calif/.

128. Meg Whitman is the former chief executive of the Internet company eBay. *Whitman, Fiorina Win GOP Nods*, *supra* note 127. She ran for governor of California in 2010. *See id.* She won the Republican nomination and spent roughly \$178.5 million on her campaign, but she lost the general election to Jerry Brown. Juliet Williams & Judy Lin, *Meg Whitman Outspent Brown by Over \$140 Million*, HUFFINGTON POST (Feb. 1, 2011, 1:16 AM), http://www.huffingtonpost.com/2011/02/01/meg-whitman-outspent-bro_n_816677.html.

129. McGreevy, *supra* note 8.

130. *Red County Blog* is a formerly prominent Republican blog in California that highlighted discussions regarding various Republican viewpoints. Vern Nelson, *A Wake for Red County*, ORANGE JUICE BLOG (Aug. 5, 2012), <http://www.orangejuiceblog.com/2012/08/awake-for-red-county/>.

131. Brian Calle, *Red County Blogger Paid To Be Pro Poizner?*, ORANGE COUNTY REG. (Dec. 10, 2009, 12:39 PM), <http://www.oregister.com/orangepunch/blogger-488762-county-poizner.html>; McGreevy, *supra* note 8; Martin Wisckol, *Blogger Axed for Taking Poizner Campaign Cash*, ORANGE COUNTY REG. (Dec. 9, 2009, 3:18 PM), <http://www.oregister.com/totalbuzz/poizner-467306-strong-county.html>.

132. Joe Mathews is the California editor of *Zocalo Public Square* and was the lead blogger at NBC's *Prop Zero*. Joe Mathews, *As Prop Zero Says Goodbye, Five Tips for the Road*, NBC BAY AREA (Dec. 16, 2012, 1:49 PM), <http://www.nbcbayarea.com/blogs/prop-zero/Prop-Zero-Goodbye-Tips-Road-Blog-California-Governance-Final-Post-183084321.html>.

133. McGreevy, *supra* note 8.

134. The Minnesota Democratic-Farmer-Labor Party ("DFL") is a major political party in Minnesota and is affiliated with the Democratic Party. *Overview & DFL History*, DEMOCRATIC-FARMER-LABOR PARTY, <http://www.dfl.org/about-our-party/overview-dfl-history/> (last visited Mar. 13, 2014).

Michelle Bachmann and participated in a *Dump Michelle Bachmann* website blog during her first run for Congress.¹³⁵ The blog urged readers to file election complaints against Bachmann, instructed them on how to file the complaint, and then posted the complaints on his blog.¹³⁶ This was done in an attempt to generate negative stories.¹³⁷ Michelle Bachmann filed a response with the FEC, alleging he was a paid Democrat operative who had “at least some control over the blog.”¹³⁸

Another 2006 example was online attacks against Congresswoman Mary Bono¹³⁹ by a blogger connected to her Democratic opponent who created *www.MaryBono.net*.¹⁴⁰ The blogger’s name did not appear on the campaign finance reports of her opponent but was exposed by e-mail and fax communications provided to Congressman Bono by Google, which was said to have demonstrated that her opponent and the blogger had coordinated the attacks against her.¹⁴¹ In this case, the blogger made the blog appear to be as if Congresswoman Bono herself created the site and as if she personally made the embarrassing postings.¹⁴² Congresswoman Bono filed a complaint with the FEC alleging that the blogger was paid by her opponent, coordinated attacks,¹⁴³ did not disclose the connection or payment on the blog, and misled voters into believing that she was personally posting the unflattering statements and photos.¹⁴⁴

Javier Manjarres, a blogger in South Florida whose blog is called *The Shark Tank*,¹⁴⁵ made waves in 2010 by allegedly accepting payments from the campaign of former State House Speaker and current

135. Response of Bachmann for Congress to the Complaint, *supra* note 6.

136. *Id.*

137. *See id.* at 2.

138. *Id.* at 2 n.2.

139. Mary Bono is a former U.S. Congresswoman from California and is affiliated with the Republican Party. She is the former wife of the late Congressman and singer Sonny Bono and former Congressman Connie Mack. *Connie Mack and Mary Bono Mack Are Divorcing*, WASH. POST (May 24, 2013, 6:11 PM), <http://www.washingtonpost.com/blogs/reliable-source/wp/2013/05/24/connie-mack-and-mary-bono-mack-call-it-quits/>.

140. Letter from William B. Canfield, Counsel to Congresswoman Mary Bono, to Office of the Gen. Counsel (Fed. Election Comm’n Matter Under Review Case No. 5853) (Oct. 18, 2006), available at <http://eqs.nictusa.com/eqsdocsMUR/000061AD.pdf>.

141. *Id.*

142. *Id.*

143. *FEC Won’t Regulate Political Blogging*, USA TODAY (Sept. 4, 2007, 8:28 PM), http://usatoday30.usatoday.com/news/politics/2007-09-04-903538036_x.htm.

144. *See* Canfield, *supra* note 140.

145. *Shark Tank – About Us*, THE SHARK TANK, <http://shark-tank.net/about/> (last visited Mar. 13, 2014). *The Shark Tank* is an Internet blog that covers Florida politics on a federal, state, and local level. *Id.*

U.S. Senator Marco Rubio.¹⁴⁶ At the time, Senator Rubio was running in a long-shot bid for the Republican nomination for U.S. Senate against incumbent Republican Governor Charlie Crist.¹⁴⁷ The *New Times Broward-Palm Beach* reported that Manjarres "frequently attacks Republican candidates in primaries, and has a record of only attacking those candidates that do not pay him for advertising space on his site. Frequently, positive articles about his clients and negative articles about their opponents only appear once payment is made."¹⁴⁸ FEC records show that Rubio paid Manjarres \$19,000 for both "Media" and "Media Ads."¹⁴⁹ Some political insiders credit Manjarres for lighting the spark that helped implode the Crist campaign and propel Rubio to capture the Republican nomination.¹⁵⁰ It is alleged that Rubio paid Manjarres not for advertising, but to attack Crist.¹⁵¹ Republican primary voters may have been unaware that the news coverage they were reading may have been due to the "Rubio for U.S. Senate" campaign advertising on Manjarres' blog.¹⁵² It is my belief that an FEC disclosure rule modeled off of the FTC blogging disclosure rule may have required Manjarres to disclose to his readers if his coverage was based on being paid to blog rather than being paid an advertising fee.

Senator Rubio was not the only candidate who purportedly paid Manjarres during the 2010 election cycle. Manjarres received a documented total of \$37,490 in the 2010 election cycle,¹⁵³ including \$10,500

146. *In the Tank? Conservative Blogger on the Rubio Payroll*, REID REPORT BLOG (Oct. 9, 2010), <http://blog.reidreport.com/2010/10/in-the-tank-conservative-blogger-on-the-rubio-payroll/>.

147. U.S. Senator Marco Rubio is the current junior U.S. Senator from the State of Florida. *Biography*, MARCO RUBIO, <http://www.rubio.senate.gov/public/index.cfm/biography> (last visited Mar. 13, 2014). His surprising strength in early polling against Governor Charlie Crist in the 2010 primary prompted Crist to leave the Republican Party and run for U.S. Senate as an independent. Karen Tumulty, *Charlie Crist Leaves Republican Party to Run as Independent in Fla. Senate Race*, WASH. POST (Apr. 30, 2010, 12:24 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/29/AR2010042904884.html>. Rubio easily defeated Crist and the Democratic nominee. *Florida Senate Election Results*, NBCNEWS, <http://elections.nbcnews.com/ns/politics/2010/florida/senate#.Uu8Pwc-A3IW> (last updated Feb. 16, 2014, 11:44 PM).

148. Bob Norman, *Swimming with Sharks: Rising GOP Blogger Is Funded by Campaign Cash*, NEW TIMES BROWARD-PALM BEACH (Dec. 2, 2010, 4:06 PM) http://blogs.browardpalmbeach.com/pulp/2010/12/the_shark_tank_javier_manjarres.php.

149. See *2010 Candidate Disbursements*, FED. ELECTION COMM'N, ftp://ftp.fec.gov/FEC/data.fec.gov/candidate_disbursement/FL_SOFL00338.csv (last visited Mar. 13, 2014).

150. See Jim Hoft, *Javier Manjarres from the Shark Tank Awarded CPAC Blogger of the Year*, GATEWAY PUNDIT (Feb. 11, 2011, 10:27 PM), <http://www.thegatewaypundit.com/2011/02/javier-manjarres-from-the-shark-tank-awarded-cpac-blogger-of-year-title>.

151. Charles Robinson, *CPAC Honors Shark Tank for Attacking Conservatives?*, POLITICAL WATCHMAN (Feb. 4, 2011), <http://www.politicalwatchman.com/cpac-honors-shark-tank-for-attacking-conservatives>.

152. Strong, *supra* note 124.

153. Bob Norman, *Swimming with Sharks: Rising GOP Blogger Is Funded by Campaign Cash*, NEW TIMES BROWARD-PALM BEACH (Dec. 2, 2010, 4:06 PM),

from current Governor Rick Scott.¹⁵⁴ Scott disclosed in his campaign finance expenditure reports filed with the Florida Division of Elections that he paid Manjarres for “Media Production” as well as “Communication Services.”¹⁵⁵ This differed from how Scott classified expenditures to media outlets such as *The Miami Times* and “WWFE La Poderosa 670 AM,” where the expenditures were listed as “Media Placement.”¹⁵⁶ Thus, people reading *The Shark Tank* blog might have been influenced by the coverage of Rick Scott, believing it to be unbiased coverage when, in reality, it was likely a paid political advertisement.¹⁵⁷

Another example of high profile blog allegations can be found, according to *The Florida Times-Union*, in Peter Schorsch and his *SaintPetersBlog* based out of St. Petersburg, Florida.¹⁵⁸ Schorsch allegedly doubles as a political consultant and a blogger, at times blogging on campaigns in which he is heavily involved.¹⁵⁹ When it comes to candidate advertising, Schorsch says: “‘It is absolutely to a candidate’s benefit to advertise on my site[.] . . . Being on my radar screen is a very good thing.’”¹⁶⁰

In October 2012, the late Congressman Bill Young paid \$1200 for advertising on *SaintPetersBlog*,¹⁶¹ and an advertisement was placed on the blog. Around this time, Schorsch also wrote damaging articles about Young’s opponent Jessica Ehrlich. For example, he documented and exposed her alleged resume padding¹⁶² and spotty voting history in a series of stories.¹⁶³ The *Tampa Bay Times* began writing on the same subject.¹⁶⁴ His blogging caught the attention of the mainstream

http://blogs.browardpalmbeach.com/pulp/2010/12/the_shark_tank_javier_manjarres.php (using chart from *Political Watchman*).

154. *Id.*

155. *Campaign Finance Database*, FLA. DIV. OF ELECTIONS, <http://doe.dos.state.fl.us/campaign-finance/expand.asp> (last visited Mar. 13, 2014) (choose “Election Year: General Election 2010”; under “Candidate Search” type “Rick Scott” then select “Governor, Republican Party”).

156. *Id.*

157. I reach this opinion based on how the Scott campaign reported the expenditures as “Media Production” and “Communication Services,” rather than “Media Placement.”

158. Matt Dixon, *State GOP Memo Warns National Media About SaintPetersBlog*, THE FLA. TIMES-UNION (Nov. 1, 2013, 3:00 PM), <http://members.jacksonville.com/opinion/blog/403455/matt-dixon/2013-11-01/state-gop-memo-warns-national-media-about-saintpetersblog>.

159. Aaron Deslatte, *On the Eve of Crist’s Announcement, RPOF Goes After SaintPetersBlog*, ORLANDO SENTINEL (Nov. 1, 2013, 2:06 PM), <http://www.orlandosentinel.com/news/blogs/political-pulse/os-on-the-eve-of-crist-s-announcement-rpof-goes-after-saintpetersblog-20131101,0,3889412.post>.

160. Cox, *supra* note 113.

161. Pittman, *supra* note 114.

162. Pittman, *supra* note 114.

163. Peter Schorsch, *Trying to Make Sense of Jessica Ehrlich’s Questionable, Spotty Voting Record*, SAINTPETERSBLOG (Oct. 12, 2012), <http://www.saintpetersblog.com/trying-to-make-sense-of-jessica-ehrlachs-questionable-spotty-voting-record>.

164. Pittman, *supra* note 114.

media,¹⁶⁵ crowded search engine returns for "Jessica Ehrlich" with negative stories, and damaged Ehrlich's chances of winning.¹⁶⁶

Schorsch alleged that Ehrlich tried to use the "attacks" to her advantage and mentioned them in a fundraising e-mail to raise money.¹⁶⁷ He also alleged that her letter said she was being attacked by a paid campaign aide of her opponent Bill Young.¹⁶⁸ Schorsch said that he got a copy of her fundraising letter and responded.¹⁶⁹ His attorney sent Ehrlich a cease-and-desist letter demanding she stop saying he was a paid consultant for Young.¹⁷⁰ He blogged about and posted a copy of his cease-and-desist letter to her.¹⁷¹ Again, the *Tampa Bay Times* followed suit and wrote about Ehrlich. The *Tampa Bay Times* wrote, "Schorsch, a campaign consultant, said he wasn't being paid by anyone to attack Ehrlich, although he said Young had bought \$1,200 in advertising on his website."¹⁷² Ehrlich's resume padding and spotty voting history was once again in the mainstream media, with negative stories in the *Tampa Bay Times* and on the *SaintPetersBlog*.

Another Florida blogger is Justin Sayfie of South Florida, who runs *Sayfie Review*, a blog similar in style to the *Drudge Report*. Sayfie was a high-ranking staffer under former Governor Jeb Bush. *Sayfie Review* is read by most decision-makers in Florida politics, government, and lobbying. Unlike some other political bloggers, Sayfie prominently discloses which section of his website is "Sponsored News."¹⁷³ In his sponsored news section, press releases, talking points, and mainstream media news links are posted exactly as provided by anyone wishing to post.¹⁷⁴ He states that his website is "a really awesome free service!"¹⁷⁵ However, what Sayfie does not state or disclose on his site is that, currently, he is a paid Florida legislative and executive branch lobbyist for large companies, such as Google, is a Republican operative-turned-lobbyist,¹⁷⁶ and may have

165. *See id.*

166. *See id.*

167. Peter Schorsch, *My Cease-and-Desist Letter to Congressional Candidate Jessica Ehrlich*, SAINTPETERSBLOG (Oct. 15, 2012), <http://www.saintpetersblog.com/my-cease-and-desist-letter-to-congressional-candidate-jessica-ehrllich>.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Pittman, *supra* note 114.

173. SAYFIE REVIEW, *supra* note 82.

174. *Sayfie Review Press Release Ticker*, SAYFIE REVIEW, http://www.sayfiereview.com/page/press_release_ticker_info (last visited Mar. 13, 2014).

175. E-mail from Justin Sayfie, Owner & Editor of *Sayfie Review*, to author (Oct. 16, 2012, 4:57 PM) (on file with author).

176. *See Our People*, *supra* note 81.

an interest in the content in the links to stories he posts in his unsponsored section.

Equally interesting are the “Blog Ticker” and “Most Read” sections of his website.¹⁷⁷ These sections carry links to mainstream media blogs and are updated every five minutes and hourly, respectively. It is concerning that bloggers can be paid to blog a negative story, have the story picked up by the mainstream media, e-mail the link to the *Sayfie Review*—the editor of the site potentially unaware that another blogger was originally paid to write the story—who then innocently posts the mainstream media link free of charge. The posting magnifies the effect of the attack by distributing it to the connected elite of Florida and national politics. The candidate who originally paid the blogger for the coverage reaps the benefits of the magnified exposure by taking the stories from the mainstream media and quoting them in her political attack mail, radio, and television advertising.

Paying for news stories is not limited to online political campaigns. Both former Presidents Bill Clinton and George W. Bush used government money to pay for positive press coverage for their domestic and foreign policy agendas.¹⁷⁸ Specifically, the George W. Bush administration reportedly paid \$240,000¹⁷⁹ to syndicated television commentator and newspaper columnist Armstrong Williams.¹⁸⁰ In exchange, Williams endorsed and promoted the “No Child Left Behind Act”¹⁸¹ on his radio show, in news articles, and online.¹⁸² Additionally, “the Bush administration spent \$254 million in its first term on public relations contracts, nearly double what the last Clinton administration spent.”¹⁸³

177. See SAYFIE REVIEW, *supra* note 82.

178. David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged TV News*, N.Y. TIMES (Mar. 13, 2005), <http://www.nytimes.com/2005/03/13/politics/13covert.html?pagewanted=print&r=0>.

179. Greg Toppo, *Education Dept. Paid Commentator to Promote Law*, USA TODAY (Jan. 7, 2005, 11:16 AM), http://usatoday30.usatoday.com/news/washington/2005-01-06-williams-whitehouse_x.htm.

180. Armstrong Williams served as an aide to U.S. Supreme Court Justice Clarence Thomas when Thomas was Chairman of the U.S. Equal Employment Opportunity Commission, and he is a prominent, conservative African-American columnist. *Armstrong Williams Biography*, WCHSTV.com, http://www.wchstv.com/blogs/political_pulse/bios/index.shtml (last visited Mar. 13, 2014).

181. The No Child Left Behind Act was bipartisan education reform legislation supported by President George W. Bush and the late U.S. Senator Ted Kennedy. *Kennedy's Top 10 Legislative Battles: No Child Left Behind*; TIME MAG., http://content.time.com/time/specials/packages/article/0,28804,1918873_1918869_1918857,00.html (last visited Mar. 13, 2014). The Act expanded the federal role in education through annual testing and increasing teacher qualifications. *No Child Left Behind*, EDUC. WK. (Aug. 4, 2004), <http://www.edweek.org/ew/issues/no-child-left-behind>.

182. Toppo, *supra* note 179.

183. Barstow & Stein, *supra* note 178.

Political parties and sitting Presidents have taken notice of the power of bloggers. In 2004, bloggers were invited to cover the Democratic and Republican national conventions, and in 2005, the Bush administration invited the first blogger, Garrett M. Graff, to join the White House press corps.¹⁸⁴ At the 2004 Democratic National Convention, the Democrats gave bloggers the same credentials as mainstream journalists and treated them the same as traditional reporters.¹⁸⁵ Also, the Republican National Committee gave bloggers credentials to their convention in 2004.¹⁸⁶ The Democrats had a special breakfast for the bloggers on the first day of the Convention.¹⁸⁷ Democratic blogger Markos Moulitsas Zúniga,¹⁸⁸ who runs the Berkeley, California-based *Daily Kos* blog, stated that the reason that the bloggers were invited was that

many bloggers will beam a reliably pro-Democratic message back to their readers. "We're all partisan. We don't pretend to be otherwise and would not be constrained by bounds of having to balance out what we write with the other side So it's a much more direct way to get out the party's message to its constituents and potential constituents."¹⁸⁹

VII. THE CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION BLOGGER DISCLOSURE RULE

In 2012, Ann M. Ravel,¹⁹⁰ the former chair of the Fair Political Practices Commission ("FPPC"),¹⁹¹ California's ethics agency, and recent appointee by President Obama to the Federal Election Commission,¹⁹² submitted a proposed rule in California that "require[s] campaigns to report payments made to bloggers, tweeters and others to

184. *A Blogging First at White House*, *supra* note 94.

185. Brian Faler, *Parties to Allow Bloggers to Cover Conventions for First Time*, WASH. POST (July 6, 2004), <http://www.washingtonpost.com/wp-dyn/articles/A29588-2004Jul5.html>.

186. *Id.*

187. *Id.*

188. Markos Moulitsas Zúniga is a lawyer, founder, and publisher of the *DailyKos*, a left-leaning blog that covers national and international politics. *About Daily Kos*, DAILY KOS, <http://www.dailykos.com/special/about2#> (last visited Mar. 13, 2014).

189. Faler, *supra* note 185.

190. Ann Ravel is a California-based attorney who was appointed by Governor Jerry Brown to be Chair of the California Fair Political Practices Commission. Will Evans, *New Chair of Campaign Finance Watchdog Draws Strong Reactions*, ABC 13 (Nov. 21, 2011), <http://abclocal.go.com/ktrk/story?section=news/state&id=8440187>.

191. The California FPPC regulates campaign finance and spending for state and local elections in California. *About the FPPC*, CAL. FAIR POL. PRACS. COMM'N, <http://www.fppc.ca.gov/index.php?id=2> (last visited Mar. 13, 2014).

192. Reid Wilson, *California Campaigns Must Report Paying Bloggers*, WASH. POST (Sept. 20, 2013, 3:58 PM), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/09/20/california-campaigns-must-report-paying-bloggers/>.

promote their candidacy in the Internet, including the Web location where the paid advocacy occurs.”¹⁹³ California has since adopted Ravel’s proposed rule with some modifications.¹⁹⁴ Her proposal required “immediate disclosure by the bloggers themselves. But after objections from Internet privacy and free speech advocates, the commission shifted the reporting burden to the campaigns.”¹⁹⁵ Under the new rule, if a blogger discloses the payment, then the campaign does not have to report the payment.¹⁹⁶ The reasoning behind Ravel’s original proposal and the new rule is that there should be more transparency regarding when campaigns are “ ‘purchasing opinion’ on the Internet.”¹⁹⁷

The rule as proposed excluded cases where a campaign staffer or volunteer informally blogs her own views in an unofficial capacity.¹⁹⁸ The proposed rule was drafted in a manner that would not “impact the casual blogger who might be paid to do something else in a campaign.”¹⁹⁹ Bloggers would not have to disclose market-rate payments from political advertising sources.²⁰⁰ Ravel stated:

The issue for us [the FPPC] is if the candidate or ballot measure committee pays anyone to provide favorable/unfavorable content on a web site or web log, or social media site, or creates video content to be posted online – then the committee must disclose it, under our proposal. So if [the blogger] is paid for any content by a committee, [then] it should be disclosed.²⁰¹

Any complaints filed would “generally be dealt with by a complaint being filed with the Commission, followed by an investigation, and an administrative hearing process. Ultimately, the Commission would make decisions on the violation and the penalty.”²⁰²

193. Patrick McGreevy, *Ethics Czar Angers Bloggers with Proposal to Shine Light on Campaign Pay*, L.A. TIMES (Sept. 14, 2012, 9:05 AM), <http://latimesblogs.latimes.com/california-politics/2012/09/ethics-czar-bloggers-pay.html>.

194. Wilson, *supra* note 192; see CAL. CODE REGS. tit. 2, § 18421.5 (2013).

195. Wilson, *supra* note 192; see CAL. CODE REGS. tit. 2, § 18421.5 (2013).

196. Wilson, *supra* note 192; see CAL. CODE REGS. tit. 2, § 18421.5 (2013).

197. McGreevy, *supra* note 193.

198. Patrick McGreevy, *State Ethics Czar to Scale Back Proposed Disclosure Rules on Blogs*, L.A. TIMES (Sept. 19, 2012, 8:48 AM), <http://latimesblogs.latimes.com/california-politics/2012/09/california-ethics-czar-blog-disclosure-rules.html>.

199. *Id.*

200. McGreevy, *supra* note 8.

201. E-mail from Ann M. Ravel, Chair of the Cal. Fair Political Practices Comm’n, to author (Oct. 16, 2012, 6:03 PM) (on file with author).

202. E-mail from Ann M. Ravel, Chair of the Cal. Fair Political Practices Comm’n, to author (Oct. 16, 2012, 9:48 PM) (on file with author).

The rule as enacted reads as follows:

§ 18421.5. Reporting an Expenditure for Paid Online Communications.

....

(b) When reporting an itemized expenditure pursuant to Sections 84211(k) or 84303, a committee, pursuant to Section 82013(a), must specifically describe amounts the committee paid to provide favorable or unfavorable content on a candidate or ballot measure by:

- 1) Providing such content for or posting on a web site or a web log ("blog"), whether one's own or another's;
- 2) Providing such content for or posting on a social media platform or service;
- 3) Providing such video content for posting online.

(c) When reporting these expenditures, whether the payment is made directly or through a third party, committees must list specific details of the payment, including the amount of the payment, the payee, the name of the individual providing content, and the name of the website or the URL on which the communication is published in the first instance. The committee must report the expenditure for online content using the expenditure code "WEB" and the specifics described in this section.

....

(f) The reporting requirements of this regulation are in addition to the reporting requirements of Sections 84211(k) and 84303.

(g) If the fact that a campaign has paid for content as described in this regulation is posted in a clearly conspicuous manner along with the posted content in each instance of the content appearing on the Internet or other digital platform, reporting is not required as described in this regulation. For example, the following type of posting would satisfy this requirement: "The author was paid by the Committee to Re-Elect Mayor Jane Doe in connection with this posting."

....

Note: Authority cited: Sections 83112 and 84211(k), Government Code. Reference: Sections 84211 and 84303 Government Code.²⁰³

VIII. THE FEDERAL TRADE COMMISSION
COMMERCIAL BLOGGING MODEL

California's FPPC proposed and final rule were modeled after guidelines promulgated by the Federal Trade Commission ("FTC") in

203. CAL. CODE REGS. tit. 2, § 18421.5 (2013).

2009, which require commercial bloggers who endorse a product to disclose that they have received something of value from the seller of the product.²⁰⁴ At their core, the FTC guidelines require that if a blogger has a “‘material connection’ with a third-party advertiser or sponsor,” it must be disclosed.²⁰⁵ Broadcast and Online Journalism Professor Al Tompkins²⁰⁶ of the Poynter Institute in St. Petersburg, Florida, a journalism school which strives to teach ethical journalism that enables people “to participate fully and effectively in our democracy,”²⁰⁷ believes that political blogging could fall under the FTC’s proposal itself because it is advertising, and “[t]he FTC regulates, among other things, advertising. And if something is paid advertising, it has to be disclosed.”²⁰⁸

The FTC acted to regulate paid blogging because it feared that consumers were unaware that bloggers were being paid and acting as covert marketers for corporations.²⁰⁹ Consumers, the FTC believed (according to one blogger), saw bloggers “as regular folks with personal opinions – suburban moms, electronics hobbyists, and opinionated teens who are free from the influence of advertisers.”²¹⁰ The FTC sought to rectify this misconception by helping to educate the public by specifically targeting bloggers who were paid to write about any product on their own blog or social media sites, such as Facebook and Twitter.²¹¹ The guidelines require that “bloggers who make an endorsement must disclose the material connections they share with the seller of the product or service.”²¹² An FTC guide book to the use of endorsements and testimonials in advertising gives an example and states that the “poster should clearly and conspicuously disclose her relationship to the manufacturer to members and read-

204. See McGreevy, *supra* note 8.

205. Michael Hyatt, *Five Ways to Comply with the New FTC Guidelines for Bloggers*, MICHAELHYATT.COM (Jan. 11, 2010), <http://michaelhyatt.com/five-ways-to-comply-with-the-new-ftc-guidelines-for-bloggers.html>.

206. Al Tompkins is a senior faculty member and professor of broadcast and online journalism for the Poynter Institute. *Al Tompkins*, POYNTER.ORG, <http://about.poynter.org/about-us/our-people/al-tompkins> (last visited Mar. 13, 2014).

207. *A Brief History of the Poynter Institute*, POYNTER, <http://about.poynter.org/about-us/mission-history> (last visited Mar. 13, 2014).

208. E-mail from Al Tompkins, Senior Faculty, Broadcast & Online, Poynter Inst., to author (Oct. 2, 2012, 11:29 PM) (on file with author).

209. See Nathaniel Cahners Hindman, *Federal Trade Commission Reins in on Blogger Swag Orgy*, HUFFINGTON POST (Apr. 22, 2010, 8:32 PM), http://www.huffingtonpost.com/nathaniel-cahners-hindman/federal-trade-commission_b_548827.html.

210. *Id.*

211. See Michelle Sherman, ‘Astroturfing’ with Fake Reviews Exposes a Company to Legal Risk, SOC. MEDIA L. BLOG (Sept. 10, 2012), <http://www.socialmedialawupdate.com/2010/09/articles/advertising/astroturfing-with-fake-reviews-exposes-a-company-to-legal-risk/>.

212. Press Release, Fed. Trade Comm’n, FTC Publishes Final Guides Governing Endorsements, Testimonials (Oct. 5, 2009), available at <http://www.ftc.gov/opa/2009/10/endortest.shtm>.

ers of the message board.”²¹³ Under the guidelines, the FTC evaluates each complaint on a case-by-case basis to determine if there is a nexus between the blogger, who receives something of value from the seller, and the posting.²¹⁴ There is some bite to the FTC rule. Each violation can result in a \$16,000 civil penalty, and one corporate abuser paid a \$250,000 fine to the FTC for having marketers act as ordinary consumers while posting “independent” reviews, editorials, and endorsements.²¹⁵

The FTC guidelines apply only to amateur bloggers, as opposed to bloggers for the mainstream media.²¹⁶ The FTC believed the guidelines were necessary as it was difficult for consumers to determine which blog posts were genuine and which were paid advertisements;²¹⁷ “[c]onsumers have a right to know when they’re being pitched a product.”²¹⁸ Richard Cleland, an assistant director at the FTC, further explained that the FTC rule is based on the presumption that it can “‘apply traditional advertising principles like transparency and accountability to social media the same way as it would apply to traditional media.’”²¹⁹ However, television and print journalists are exempted from the new FTC disclosure rule as it only applies to the Internet.²²⁰ The reason for the exemption is that the mainstream media has strict ethics rules in regards to accepting and keeping products sent to journalists,²²¹ and consumers can put more faith in them than in regular bloggers.

One reported example of a blogger payment in the commercial arena includes a mother of two whose website, *ClassyMommy.com*,²²²

213. Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255 (2009); 74 Fed. Reg. 53,124 (Oct. 15, 2009), *available at* <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.

214. Press Release, *supra* note 212.

215. Press Release, Fed. Trade Comm’n, Firm to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online “Consumer” and “Independent” Reviews (Mar. 15, 2001), *available at* <http://www.ftc.gov/opa/2011/03/legacy.shtm>.

216. See Al Tompkins, *What the FTC Says Bloggers Owe Readers*, POYNTER.ORG (July 28, 2009, 7:22 AM), <http://www.poynter.org/latest-news/als-morning-meeting/97460/what-the-ftc-says-bloggers-owe-readers/>.

217. See *id.*

218. Pradnya Joshi, *Approval by a Blogger May Please a Sponsor*, N.Y. TIMES (July 12, 2009), http://www.nytimes.com/2009/07/13/technology/internet/13blog.html?_r=0 (quoting Richard Cleland, an assistant director at the FTC).

219. Douglas MacMillan, *Blogola: The FTC Takes on Paid Posts*, BLOOMBERG BUSINESSWEEK (May 19, 2009), http://www.businessweek.com/technology/content/may2009/tc20090518_532031.htm (quoting Richard Cleland, an assistant director at the FTC).

220. See Tim Jones, *F.T.C. Proposes Problematic Regulation of Online Free Speech*, ELECTRONIC FRONTIER FOUND. (Oct. 8, 2009), <https://www.eff.org/deeplinks/2009/10/ftc-regulation>.

221. See *id.*

222. *Classy Mommy* is an Internet blog operated by Colleen Padilla. *About*, CLASSY MOMMY, <http://classymommy.com/about/> (last visited Mar. 13, 2014). She is paid by pro-

had 60,000 unique hits monthly as of July 12, 2009.²²³ She has reviewed between 1400 to 1500 products such as baby clothes, video games, and food.²²⁴ In return, she allegedly received free items from companies that wanted her to blog positively about their products.²²⁵ Another example of a supposed payment is when 150 bloggers and reporters were flown to Jamaica for a weekend at a beach resort, all expenses paid.²²⁶ They received free gifts, lodging, and flights, which they later blogged about on social media sites or consumer blogs.²²⁷

Paid bloggers are not limited to the consumer and political arena. They can be found in the corporate arena as well.²²⁸ Corporations, such as Chevron and VeriSign, have been accused of paying bloggers to attack rivals or regulating entities.²²⁹ VeriSign allegedly paid bloggers to attack ICANN,²³⁰ and Chevron allegedly paid bloggers to attack a business rival.²³¹ Any FEC rule for political blogging should be modeled after the FTC rule.

IX. PROPOSED MODEL LAW

The California FPPC rule does not go far enough in requiring disclosure as it ignores the paid blogger's side of the transaction. The FEC should require all bloggers to disclose on their website whether they have been paid to post their story by any entity, including a political campaign, political party, interest group, labor union, or government entity, or if non-market advertising rates have been provided. Any promulgated rule should require a prominent disclosure requirement on a blog that 1) receives direct payment via a consulting fee in exchange for blogging; 2) receives a donation from a campaign or someone connected to a campaign in exchange for blogging; 3) accepts advertising below or above market rates; or 4) adds or removes a news link in exchange for a fee or a donation.

ducers of baby and children's products to blog about her positive experiences using the products. See Steve Heimoff, *Holier than Thou? When It Comes to Pay to Play, Blogging Is Looking a Lot Like Print*, STEVEHEIMOFF.COM (July 15, 2009), <http://www.steveheimoff.com/index.php/2009/07/15/holier-than-thou-when-it-comes-to-pay-to-play-blogging-is-looking-a-lot-like-print/>.

223. Joshi, *supra* note 218.

224. *Id.*; *About*, *supra* note 222.

225. Heimoff, *supra* note 222.

226. Hindman, *supra* note 209.

227. *Id.*

228. See, e.g., *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495 (9th Cir. 2010).

229. See, e.g., *id.* at 505; *In re Application of Chevron Corp.*, 736 F. Supp. 2d 773, 788-89 (S.D.N.Y. 2010).

230. *VeriSign*, 611 F.3d at 505.

231. *In re Application of Chevron Corp.*, 736 F. Supp. 2d at 788-89.

Also, any rule should 1) include political bloggers; 2) include "paid blogger" in the definition of a public communication; 3) more clearly define "advertising"; 4) cover not only current blog technology but also any new electronic communication technology that has not yet been developed; and 5) require the campaign to inform the blogger of the duty to disclose and to have a system in place to monitor the blogger. The technologies should include, but should not be limited to, blogs, websites, social media, text messages, e-mails, directed search results, including Google ad words programs, and search engine optimization.

Enforcement of the blogging disclosure laws would follow the current procedures the FEC uses to enforce violations of election laws.²³² In other words, there is a system already in place to deal with election law violations, and the same complaint process can be used. Currently, candidates, political parties, news media, and individual citizens can file election law violations complaints by notifying the FEC in writing of the specifics of the alleged violation.²³³ The FEC administratively processes the complaint, and a panel reviews it to evaluate whether a violation of the law has occurred.²³⁴

Under the proposed law, once a complaint is received, the FEC would have five days to contact both the campaign and the blogger.²³⁵ The campaign and the blogger would be given fifteen days to submit letters explaining why they are acting within the law and no action should be taken, or admitting guilt.²³⁶ If the FEC believed the campaign or blogger to be in violation, an investigation would be conducted.²³⁷ If a violation of the disclosure laws was found, the FEC would assess civil and monetary penalties to be paid by the offending candidate using personal funds.²³⁸ However, if a violation was not found, the complaint would be dismissed.²³⁹ Furthermore, if the blogger was found to be blogging in an individual, unpaid capacity, then the blogger would be exempt from having to comply with the law, as there is no payment that is needed to be disclosed.

232. See *Filing a Complaint*, FED. ELECTION COMM'N (June 2008), <http://www.fec.gov/pages/brochures/complain.shtml>.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

X. CONCLUSION

In conclusion, the Federal Election Commission, as well as regulators of state and local elections, should promulgate a new rule. The new rule should implement blogger disclosure laws, requiring a blogger to disclose on her blog in a prominent and visible manner whether the blogger has been paid or given something of value by a campaign, political party, interest group, or any other entity in exchange for news coverage or lack thereof. Furthermore, the blogger should be required to disclose if he or she received a consulting retainer, marked up or down the price of advertisements, received gifts, or travel, hotel, or meal expense reimbursements in exchange for a blog post.

The government has taken action on items as simple as books, baby diapers, and TV dinners but remains silent on something as serious as democratic elections. In the commercial arena, a blogger can expect to make \$5.35 to \$10 per post and 11 cents to 68 cents every time a reader clicks from her blog to a corporation's website.²⁴⁰ The FTC has acted to require disclosure in the corporate arena to protect consumers. In contrast, the FEC's lack of action in the political arena creates a campaign finance expenditure disclosure loophole that enables bloggers to receive multi-thousand dollar payments without disclosure.²⁴¹ It is clear that the current state of unregulated paid political blogging is detrimental to the health of our democratic republic, and the FEC and their state counterparts must take action. Election regulators should follow the FTC's and Ann Ravel's lead and promulgate a rule similar to, but stronger than, the California FPPC rule. In addition to fuller disclosure on the campaign side of the transaction, there must be disclosure on the blogger side of the transaction. Bloggers must be required to disclose clearly and prominently on their website whether they are compensated. The FEC rule promulgated in 2006, which exempts political bloggers from disclosure requirements, is not sufficient to allow the public to educate themselves properly. Neither is it sufficient for voters to make informed decisions regarding voting and the running of their government.

240. See Joshi, *supra* note 218.

241. Kuhn, *supra* note 7.