

## POLITICAL E-MAIL: PROTECTED SPEECH OR UNWELCOME SPAM?

*Candidates for political office are using unsolicited bulk e-mails to reach the electorate. Commonly known as “political spam,” this campaign tactic is an inexpensive supplement to television, radio, and print ads. Advocates claim that campaigning via the internet reduces candidates’ dependence on fundraising, but critics detest political spam as the latest nuisance. This iBrief examines the legal basis for political spam, distinguishes political spam from analogous regulated speech, and argues that political spam serves an interest worth protecting.*

### Introduction

As political campaigns grow more expensive and competitive, the Internet provides a new medium for advertising. Recently, candidates have turned to electronic mail as another way to reach the electorate. By sending out unsolicited bulk e-mails, candidates can engage (or annoy) many voters with the click of a button. Commonly known as “political spam,”<sup>1</sup> this campaign tactic is an inexpensive supplement to television, radio, and print advertisements. The 2002 campaign was full of pioneering candidates, angry voters, and bitter opponents: for instance, Delaware Democrat Steve Biener ran for his state’s lone seat in the U.S. House of Representatives without engaging in any fundraising.<sup>2</sup> Part of his low-cost campaign included sending unsolicited e-mails to Delaware voters.<sup>3</sup> In the North Carolina race for U.S. Senate, Republican Elizabeth Dole sent out a number of unsolicited e-mails to voters and was greeted with a lawsuit.<sup>4</sup> Republican Bill Jones, candidate for Governor of California, sent unsolicited e-mails in March to thousands of recipients, some of whom were not California residents or even

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<sup>1</sup> The Internet slang term “spam” comes from a Monty Python skit, where a waitress can only offer a customer items that contain spam: “Well, there’s spam, egg, sausage, and spam. That’s not got much spam in it.” *State v. Heckel*, 24 P.3d 404, 406 (Wash. 2001) (citing GRAHAM CHAPMAN, *THE COMPLETE MONTY PYTHON’S FLYING CIRCUS: ALL THE WORDS* 27 (Pantheon Books 1989); *Kadow’s Internet Dictionary*, at <http://www.msg.net/kadow/answers/> (last visited Oct. 27, 2002)). Meanwhile, actors dressed as Vikings are repeatedly singing the word “spam.” By the end of the skit, the spam song is so loud that it drowns out everything else. Congressman Gary Miller, *How to Can Spam: Legislating Unsolicited Commercial E-mail*, 2 *Vand. J. Ent. L. & Prac.* 127 (2000).

<sup>2</sup> *Steve Biener – Democrat for Congress*, at <http://hometown.aol.com/stevebiener/> (last visited Oct. 27, 2002).

<sup>3</sup> Doug Isenberg, *Political Spam: A Worthy Campaign Tactic?*, GigaLaw.com, July 2002, at <http://www.gigalaw.com/articles/2002/isenberg-2002-07.html> (last visited Oct. 27, 2002).

<sup>4</sup> John Stevenson, *Durham man sues Dole over e-mail ‘spam’: Senate campaign messages provide test of N.C. law against junk mail*, *DURHAM HERALD-SUN*, Oct. 6, 2002, at C1.

U.S. citizens.<sup>5</sup> Finally, in Florida, Governor Jeb Bush's campaign staff seized an opportunity to reach the opposition: replying to an e-mail sent out by challenger Bill McBride, Gov. Bush's staff e-mailed a list of Democratic supporters explaining why they ought to re-elect Republican Gov. Bush.<sup>6</sup> Gov. Bush's staff viewed the e-mail as a way to expand its voter base, but McBride's staff called it a "dirty trick."<sup>7</sup>

While the cost of political spam is quite low, its significance and effectiveness have not yet been determined. This iBrief examines political spam and explores the following questions:

- Is political spam legal?
- What distinguishes political spam from other forms of regulated political speech?
- What is the significance of political spam? Does it diminish candidates' dedication to fundraising and dependence on wealthy special interest groups? Or, does it create another nuisance for voters already bombarded by ubiquitous political ads?

### **Constitutional Protections for Political Speech**

Communication over the Internet (including e-mail) is a form of speech protected by the First Amendment.<sup>8</sup> Political speech has the highest value among protected forms of speech, and therefore receives the greatest protection:

Debate on the qualifications of candidates is at the core of our electoral process and of the First Amendment freedoms, not at the edges. The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance. . . . We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.<sup>9</sup>

In scrutinizing speech regulation, courts apply different standards to regulations that restrict *what* is said and *where* or *how* it is said. Content-based regulations of political speech warrant strict

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<sup>5</sup> Michelle Delio, *Candidate: Spam in Every Pot*, WIRED.COM, March 1, 2002, at <http://www.wired.com/news/print/0,1294,50761,00.html> (last visited Oct. 27, 2002).

<sup>6</sup> William March, *Unsolicited E-mails From Bush Have McBride Camp in Uproar*, TAMPA TRIBUNE, March 28, 2002, at Metro 4.

<sup>7</sup> *Id.*

<sup>8</sup> *See, e.g., Reno v. ACLU*, 521 U.S. 844 (1997) (striking down the Communications Decency Act of 1996, 47 U.S.C.S. § 223, for violating the First Amendment).

<sup>9</sup> *Republican Party of Minnesota v. White*, 122 S. Ct. 2528, 2538 (2002).

scrutiny, requiring a law narrowly tailored to achieve a compelling governmental interest.<sup>10</sup> However, the government may impose “reasonable” restrictions on the time, place, and manner of political speech (a.k.a. “content-neutral” restrictions) that are “adequately” justified.<sup>11</sup> Within this latter category, courts further define these restrictions by the type of forum regulated. Generally, to restrict the time, place, or manner of speech on public property, the regulation must serve an important interest and leave open adequate alternative places for speech.<sup>12</sup> Courts apply lower standards for public property that is not typically a forum for political discussion.<sup>13</sup> The First Amendment also does not guarantee free speech on private property, enabling property owners to regulate speech content and delivery.<sup>14</sup>

## **Analogies to Political Spam and Their Limitations**

### *Commercial Spam*

Recently, many states enacted anti-spam laws to eliminate unsolicited bulk e-mail advertisements that plague inboxes everywhere. However, these anti-spam laws only regulate commercial e-mail, not political e-mail. Commercial e-mail is “intended to sell a product or service in exchange for a fee.”<sup>15</sup> Commercial e-mail is a form of commercial speech, relating “solely to the economic interests of the speaker and its audience.”<sup>16</sup> Courts do not protect commercial speech to the same degree as political speech.<sup>17</sup> Rather, courts apply an intermediate level of scrutiny to commercial speech, allowing regulation that directly advances a substantial government interest and is the least restrictive alternative.<sup>18</sup> Current laws address commercial spam in e-mail,<sup>19</sup> cell phones,<sup>20</sup> and faxes.<sup>21</sup> Although most anti-spam laws are yet to be tested, Washington became the first state to win a judgment against a “spammer.”<sup>22</sup> To date, though, no

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<sup>10</sup> *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982).

<sup>11</sup> *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993).

<sup>12</sup> *Heffron v. Int’l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 648-49 (1981).

<sup>13</sup> *See, e.g., Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119 (1977) (upholding a prison regulation that prohibited prisoners from soliciting other prisoners to join the union).

<sup>14</sup> *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976).

<sup>15</sup> *Isenberg*, *supra* note 3.

<sup>16</sup> *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

<sup>17</sup> *Id.* at 563.

<sup>18</sup> *Id.* at 564.

<sup>19</sup> *See, e.g., N.C. GEN. STAT. § 14-458* (2002).

<sup>20</sup> *See, e.g., 2002 Cal. Bus. & Prof’l. Code § 17538.4.*

<sup>21</sup> *See, e.g., Federal Telephone Consumer Protection Act, 47 U.S.C. § 227* (2002); *2002 Cal. Bus. & Prof. Code § 17538.4.*

<sup>22</sup> *State v. Heckel*, 24 P.3d 404 (Wash. 2001) *noted in* Rob Gavin, *Anti-Spam Laws Gather Steam*, WALL ST. J., Oct. 21 2002, at R9.

federal legislation has directly addressed the issue of unsolicited e-mail. Even if one does, it is unlikely to touch political spam.<sup>23</sup>

### *Prerecorded Telephone Messages*

Federal case law came closer to dealing with political spam in *Van Bergen v. Minnesota*, where the Eighth Circuit upheld a Minnesota law prohibiting a gubernatorial candidate from using a device that automatically dialed residential telephone numbers and played a recorded message campaigning for the candidate.<sup>24</sup> The court held that the law was a valid time, place, or manner restriction on speech,<sup>25</sup> and that the telephone system is a private channel of communication.<sup>26</sup>

In some ways, *Van Bergen* provides a precedent for outlawing unsolicited political e-mails. First, in both instances the government is protecting residential privacy, which the Eighth Circuit recognizes as a significant government interest.<sup>27</sup> Second, telephones and e-mail accounts are private communication devices that are operated by private companies. The Court wrote, “The telephone system . . . is not primarily a conduit for public forum activity. The primary use of the telephone is for personal business, family, and social activities, and the telephone is primarily a device for private communication between only two persons at a time.” E-mail accounts are very similar: they are designed to send and receive electronic mail between individuals. Private companies (internet service providers or “ISPs”) own and operate the system; so the transmissions take place on private property. Although one sender can reach many inboxes at the same time, this feature parallels conference calls. Third, similar alternatives exist to both telephone and e-mail: political campaigners have access to television, radio, and print advertisements. Although these alternatives cost more than e-mail, courts do not require time, place, and manner restrictions to be the least restrictive alternative.<sup>28</sup> That is, since adequate alternatives exist, the law is not invalid simply because those alternatives cost more.

However, there are key differences between *Van Bergen* and political spam that distinguish this precedent. First, telephone calls, like radio and television, are more invasive than e-mail. “Communications over the Internet do not invade an individual’s home or appear on

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<sup>23</sup> See Miller, *supra* note 1, at 129-30 (admitting that Congress does not address political spam because a law that regulates political speech on the internet likely would not pass judicial scrutiny).

<sup>24</sup> See *Van Bergen v. Minnesota*, 59 F.3d 1541 (1995).

<sup>25</sup> *Id.* at 1551.

<sup>26</sup> *Id.* at 1553.

<sup>27</sup> *Id.* at 1554-55.

<sup>28</sup> *Id.* at 1555.

one's computer screen unbidden. Users seldom encounter content by accident."<sup>29</sup> "The receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial"<sup>30</sup> or answering a phone. On e-mail, the recipient has an opportunity to screen any message he receives by merely pressing "Delete," without reading more than the author's name and message title. The e-mail recipient also controls the time and place that the email is opened, unlike a telephone call at dinner hour.

Second, the e-mail recipient has greater ability to respond to political spam than he does with prerecorded telephone messages. In *Van Bergen*, the court found it significant that prerecorded messages offered the recipient no opportunity to tell the caller not to call back again. "The First Amendment permits the government to prohibit offensive speech as intrusive when the captive audience cannot avoid the objectionable speech."<sup>31</sup> E-mail, however, usually allows recipients to respond to or "unsubscribe" from a mailing list. In *Van Bergen*, dealing with a live operator would have been favorable, because the recipient could both decline to listen to the current message and request that the caller not call again.<sup>32</sup> "The recipient thus can gradually reduce the total number of [automatically dialed and delivered] calls he receives, remedying the interruption of his business or leisure activities."<sup>33</sup> E-mail provides those same opportunities, because recipients can delete the message and send a quick "unsubscribe" response to the sender. E-mail recipients, unlike the recipients of prerecorded messages, can avoid or remedy spam, and are therefore not a "captive audience." Thus, because it is less invasive and easier to remedy, political e-mail does not present the same threat to residential privacy as prerecorded phone messages and does not justify government regulation.

### *Unsolicited "Snail Mail"*

Another analogy to political spam is unsolicited mail in traditional mailboxes ("snail mail"). The Supreme Court visited this issue in two cases that facially provide support for critics of political spam, but upon further review are distinguishable. In *Rowan v. U.S. Post Office Department*, the Court upheld a federal law allowing a resident to contact a mailer and request removal from the mailing list and stop all future mailings to the resident.<sup>34</sup> In writing the decision, Chief Justice Burger offered some strong language against unwanted mail:

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<sup>29</sup> *Reno v. ACLU*, 521 U.S. 844, 869 (1997).

<sup>30</sup> *Id.* at 854.

<sup>31</sup> *Van Bergen*, 59 F.3d at 1554.

<sup>32</sup> *Id.* at 1556.

<sup>33</sup> *Id.*

<sup>34</sup> *See Rowan v. U.S. Post Office Dept.*, 397 U.S. 728 (1970).

In effect Congress has erected a wall – or more accurately permits a citizen to erect a wall – that no advertiser may penetrate without his acquiescence. The continuing operative effect of a mailing ban once imposed presents no constitutional obstacles; . . . We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even “good” ideas on an unwilling subject. . . . The asserted right of a mailer . . . stops at the outer boundary of every person’s domain.<sup>35</sup>

However, there are some important differences between *Rowan* and political spam. Not only does *Rowan* address commercial speech, the challenged also law regulates sexually explicit advertisements, a category of speech with far less value and protection than political speech. Furthermore, the law does not completely ban this kind of advertisement. Rather, it simply offers recipients a way to screen future mailings of that type from that vendor. In other words, it gives mail recipients the same remedy that most e-mail recipients already have – contact the sender and request removal from the mailing list. For these reasons, *Rowan* provides limited support for a ban on political spam.

In *USPS v. Council of Greenburgh Civic Associations*, the Court upheld a federal criminal statute prohibiting civic associations from placing notices in their constituents’ mailboxes.<sup>36</sup> The Court found that “the First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”<sup>37</sup> The Court found the regulation to advance a significant government interest<sup>38</sup> and reasonably restrict the time, place, and manner of speech.<sup>39</sup> One feature that distinguishes *Greenburgh* from political spam is the significant government interest that justifies this regulation is the efficiency of the Post Office. Political spam travels over private channels of communication, meaning that it has no effect on the Post Office. Furthermore, in *Greenburgh*, Congress did not generally prohibit the distribution of leaflets or the discussion of civic issues. Rather it merely required civic associations to use the same system (i.e. stamps) as everyone else. Thus, *Greenburgh* does not hinder political campaigns from mailing (or e-mailing) advertisements. It simply requires them to use proper channels to do so.

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<sup>35</sup> *Id.* at 738.

<sup>36</sup> *See* *USPS v. Council of Greenburgh Civic Ass’n*, 453 U.S. 114 (1981).

<sup>37</sup> *Id.* at 129. *See also* *Hudgens v. NLRB*, 424 U.S. 507 (1976) (holding that the First Amendment does not create a right of access to private property for speech).

<sup>38</sup> *Greenburgh*, 453 U.S. at 130.

<sup>39</sup> *Id.* at 132-33.

## The Significance of Political Spam

E-mail presents candidates with a new medium to reach the voters. Traditionally, advertising through a new technology costs more – television ads cost more than radio ads, which cost more than print ads. However, the advantage of e-mail is that it costs so little. Each e-mail message costs roughly two cents, while a direct mail message costs about 35 cents.<sup>40</sup> Thus, e-mail has the potential to liberate candidates from the stranglehold of special interest groups. Historically, the key to a successful campaign was a deep war chest. How else could someone pay for all those television spots? Referring to California gubernatorial candidate Bill Jones' much-maligned e-mail campaign, two political experts wrote, "In an era of cynicism toward money in politics – money typically spent on other unsolicited communication mediums – Jones tried to level the playing field."<sup>41</sup> E-mail reduces a candidate's dependency on fundraising, and diminishes the role of money in elections.

E-mail also gives candidates an opportunity to engage voters directly. While television, radio, and print ads can announce a candidate's position on an issue, there is no way for voters to respond directly. By comparison, e-mail recipients can reply to (or delete) any e-mail they receive, giving them a voice in the election process before they must vote.

Critics detest political spam as another nuisance. To many, unsolicited political e-mails are no different than commercial spam or junk mail. It invades your living room; it clogs your inbox. Advocates, though, see political e-mail in a higher light. "Political e-mail is not selling widgets. The free flow of ideas and information is critical to keeping the U.S. political system and First Amendment of the Constitution intact. Like other forms of political speech – direct mail, television and radio advertising – the medium should not be hindered."<sup>42</sup> Advocates also point out that political e-mail is no worse for the voter-recipient than political advertising on other media.

E-mail is no more intrusive than direct mail, telemarketing, or TV advertising when it comes to politicians seeking to reach voters. A simple link in good e-mail campaigns allows recipients to opt out of future mailings. Direct mail takes at least a phone call or stamp to be taken off the list, and viewers must repeatedly endure TV ads.<sup>43</sup>

So, while e-mail does no more harm to voters than other forms of advertising, it provides candidates with an inexpensive means of campaigning and directly engages the voters.

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<sup>40</sup> Mike McCurry and Larry Purpuro, *A Vote for Political Spam*, BOSTON GLOBE, Aug. 23, 2002, at A27.

<sup>41</sup> *Id.*

<sup>42</sup> Larry Purpuro, *The Big Push: The Case for Political E-mailing*, CAMPAIGNS & ELECTIONS, Oct. 2002, at 47.

In truth, many complaints about political spam come from people who never should have received the e-mail. When Bill Jones e-mailed over a million people, one of the biggest criticisms was the inaccuracy of his mailing list.<sup>44</sup> Intending to mail only California residents, the campaign sent the e-mail to a number of people with the suffix “.ca,” a Canadian domain.<sup>45</sup> That is a technological mistake – one that is correctable as the practice and sophistication of political e-mailing progress. It is not enough to stifle political e-mailing altogether.

The real test for political spam will be its effectiveness in persuading voters. Commercial spam, while inexpensive, is also relatively ineffective.<sup>46</sup> Campaigns are not likely to repeat tactics that generate negative publicity and ill will toward the candidate. However, e-mail may provide an effective option for generating grass-root support for candidates, especially among interested or undecided voters. For this reason, experts predict that political spam is not likely to replace television and print ads. Rather, political e-mail will supplement current advertising schemes.<sup>47</sup>

## **Conclusion**

Political speech remains at the core of the First Amendment freedoms, and it is unlikely that federal or state lawmakers will challenge its protection. Although courts have approved regulation of analogous types of speech, such as commercial spam, prerecorded telephone messages, and unsolicited “snail mail,” these are sufficiently distinct from political e-mail, providing little precedent for regulating political spam. Ultimately, political spam will probably be defined more by market effects than government regulation. E-mail, unlike television, radio, and print, offers political candidates an inexpensive channel to reach broad sections of the electorate. In an age when money defines political campaigns, e-mail helps liberate candidates from the stranglehold of wealthy special interest groups. If it proves to be effective, communicating over the Internet may level the playing field for under-funded candidates. Cynics argue that political spam remains legal because the offenders (i.e. politicians) are precisely the ones who make the law. Free speech is a precious freedom, though, and public consciousness of political issues is vital to a healthy democracy. Considering these values, any technology that facilitates free political discussion is worth protection.

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<sup>43</sup> McCurry and Purpuro, *supra* note 40.

<sup>44</sup> *Id.*

<sup>45</sup> Delio, *supra* note 5.

<sup>46</sup> Isenberg, *supra* note 3.

<sup>47</sup> *Id.*