Statement of Commissioner Scott E. Thomas

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Before the Committee on House Administration

United States House of Representatives

Mr. Chairman and members of the Committee, I hope this can be a constructive dialogue. The FEC's deliberations regarding how to define its regulatory reach rarely evoke such excitement. Not only did the FEC generate two straight days of C-Span live coverage for its hearings, C-Span actually came back to cover, albeit in tape-delayed fashion, our meeting on May 13 where we considered a final rule proposal. I can only apologize to the C-Span viewers for those programming decisions.

I vaguely recall that in its infancy the agency was called before Congress to explain proposed regulations that would have applied campaign finance restrictions to so-called 'office accounts' of Members of Congress. Those regulations didn't last very long. Here, it seems, the failure to muster four votes for a regulation that would have clarified and tightened the scope of the term "political committee" has generated concern. As one who urged passage, I suppose I should hope Congress wields the same persuasive powers now. In fact, I hope only that the Committee will gain a better understanding of the workings of the FEC and of the many cross-currents that affect a decision like this.

I gather the Committee would like some sense of why the Commission came to the 2-4 vote for the proposal that Commissioner Toner and I put forward on May 13 (affectionately known as the T & T proposal). I can only speak for myself, of course, but I will try to provide some insight regarding the overall process.

Let me begin with noting that this is a matter of great importance. If a group is a "political committee" under the Federal Election Campaign Act (FECA), it not only must register and report to the FEC, it must live with restrictions on its funding. Non-party "political committees" must accept contributions of no more than $5,000 per year from any permissible source, and must not accept any contributions from corporations or labor organizations. Those groups that have resisted "political committee" status are most concerned about those funding restrictions, no doubt. We have seen reports of several unregistered groups spending tens of millions of dollars in the aggregate on hard hitting communications attacking particular presidential candidates, yet *none* of the funds used are being subjected to federal contribution limits or prohibitions.

For groups that cross the "political committee" threshold, the FEC's federal/non-federal allocation regulations have long required use of a 'funds expended' formula under which a share of the groups' administrative expenses and generic voter drive expenses must be paid for with federally restricted funds. The federal share is determined by dividing the "amount contributed to or otherwise spent on behalf of specific federal candidates" by the "total federal and non-federal disbursements . . . for specific candidates." 11 CFR 106.6(c)(1). The formula can be easily manipulated if only contributions and "express advocacy" are counted as 'candidate specific' outlays. For example, a group could contribute $1 to a federal candidate and $99 to a non-federal candidate, avoid "express advocacy," and thereafter work with a 1% federal/99% non-federal ratio for all allocable expenses. Indeed, we have seen evidence of "political

committees" seemingly focused on the current presidential race treating the vast majority of funds raised and spent as non-federal, non-restricted dollars. If the news accounts are close to accurate, tens of millions of dollars are likely to be spent by these groups to influence the upcoming federal elections outside the federal funding restrictions.

There is an IRS disclosure regime apart from the FECA regime that sweeps in many '527 groups' ("political organizations" under the Internal Revenue Code) not reporting to the FEC or to some state-level authority. But that separate reporting regime does not get to the question of funding sources. Only a campaign finance statute like FECA regulates the size and source of contributions. Further, that separate reporting regime does not define what groups should be regulated as "political committees" under FECA and how "political committees" should allocate their federal and non-federal activity. That is a matter that falls squarely in the lap of the FEC. No one should argue seriously that Congress envisioned letting groups simply choose which regulatory scheme they want to follow.

It is sometimes noted that the groups receiving so much press are operating independent of any candidates, and that the opportunity for 'quid pro quo' is diminished. In essence, the argument of some is that this is no big deal. My first response is that the statute passed by Congress does not extend the contribution restrictions only to political committees that coordinate with candidates. For a mere commissioner at the FEC, that should be enough. Second, even if constitutional concerns about governmental interests are raised, the Supreme Court already has indicated there is no basis for such doubts. The Court has approved contribution limits for "political committees" regardless of whether they spend independently or in coordination with candidates. *See McConnell v. FEC*, 124 S.Ct. 619, 665 n. 48 (2003). This stems from the Court's interpretation that "political committees" regulated by the FEC will have as their "major purpose" influencing elections. It is this type of vehicle—organized and run by well-connected political insiders—that donors will use to try to get a message to an elected official. That message, crudely stated, is: "My money got you where you are and it can be used to help your opponent next time." Third, I would note that Congress itself has expressed a willingness to restrict the sources of funds used for independent candidate support efforts. So-called "independent expenditures" that use express advocacy must be paid for exclusively with non-prohibited source funds, and, under BCRA, non-coordinated "electioneering communications" must be paid for without use of corporate, labor, or foreign funds. Bottom line: there is potential for the corruption of the political process even with independent spending, and this potential is at its zenith where the intermediary is a group set up and controlled by Washington insiders with easy access to elected officials.

There is no perfect solution to the question of defining which groups qualify as "political committees." The Commission has long struggled with the concept. Working only with the statutory definition, one would have to conclude that any group that raises more than $1,000 "*for the purpose of influencing a federal election*" or that spends more than $1,000 "*for the purpose of influencing a federal election*" is a "political committee."

On its face, this would reach a law firm partnership that gave a $2,000 primary contribution to one of you. Not a great result.

Mercifully, as noted before, the Supreme Court greatly improved the jurisprudence by construing the term "political committee" to reach only those groups under the control of a candidate or the *major purpose* of which is the nomination or election of candidates or campaign activity. *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 n. 6 (1986). In 1996, through an advisory opinion, the FEC formally adopted by majority vote a legal approach combining the statutory and Supreme Court analysis. Advisory Opinion 1996-3 (Breeden-Schmidt Foundation), available at www.fec.gov. Since then, in my view, the 'law of the land' has been that a "political committee" is a group with the major purpose of influencing elections or campaign activity that receives or spends more than $1,000 "for the purpose of influencing a federal election."

Things couldn't be that simple, of course. Some argue that the cited advisory opinion does not have the effect of 'law;' some say later 3-3 votes in enforcement cases by different FEC commissioners have had the effect of undoing the earlier majority vote; some say the major purpose test mentioned by the Supreme Court is not valid law even if endorsed by the FEC; and some say the FEC must apply "express advocacy" analysis to any "major purpose" or "purpose of influencing a federal election" query.

Since this latter argument took up most of the oxygen during our two days of hearings, I'd like to briefly note my view. *Buckley v. Valeo* applied the "express advocacy" construction to persons and groups that did *not* have influencing elections as their major purpose. In determining the independent expenditure disclosure provision (former § 434(e)) constitutional, the Court noted:

> The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," [footnote omitted] and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. [footnote omitted] To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.
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> But when the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a "political committee" [footnote omitted]—the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of § 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e) [the former $1,000 limit on

> independent expenditures] to reach only funds used for communications that expressly advocate [footnote omitted] the election or defeat of a clearly identified candidate. [424 U.S. 1, 79-80 (1976)]

The Court could not have been clearer that the "express advocacy" test is not needed for groups whose major purpose is the nomination or election of candidates.

The proposal put forward by Commissioner Toner and myself attempted to work with the major purpose concept. It specifically incorporated this test into the regulation, something that had not been done in all these years since *Buckley v. Valeo*. Second, using the tax laws relating to 527 organizations, it built in a presumption that certain 527 organizations would be deemed to have influencing elections as their major purpose. This was justified, we believed, by the fact that groups voluntarily selecting 527 tax status must adhere to the definition of "political organization" in the IRC: "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated *primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for* an exempt function" (which is separately defined as "the function of *influencing or attempting to influence the selection or nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors . . . .*").

Our proposal specifically backed out of the 527 major purpose presumption non-federal candidate committees and committees not involved *at all* in federal candidate elections. For groups that expended some resources on federal elections and some on non-federal elections, the proposal specifically referenced the longstanding allowance for separating out non-federal account activity at 11 CFR 102.5.

The T & T proposal also attempted to clarify that for 527 groups whose major purpose was influencing elections, "express advocacy" would not be a protective shield to avoid having made more than $1,000 in "expenditures" (i.e., payments for the purpose of influencing a federal election). The proposal said that voter drive efforts (voter registration, voter identification, and get-out-the-vote) involving public communications that "*promote, support, attack, or oppose*" a clearly identified candidate or a political party would count toward the $1,000 threshold. Similarly, such public communications undertaken outside the voter drive context would count. We took this position because the record is now full of examples of 527 group ads and mailings stopping short of "vote for" or "defeat" phrases, but nonetheless containing hard-edged attacks or glowing praise of federal candidates.

This effort to borrow a BCRA concept, even for groups whose major purpose is influencing elections, met with a howl of protest. Many commenters wanted to remain in the welcoming arms of an "express advocacy" test. Yet, the "express advocacy" test had just been derided by the Supreme Court as "functionally meaningless"—even in the context of independent spending by persons whose major purpose was *other than* influencing elections! *McConnell v. FEC,* 124 S.Ct. at 689. Moreover, Congress clearly

felt comfortable using the "promote, support, attack, or oppose" test in the context of independent spending by outside groups, since the FEC is given authority to develop exceptions to the "electioneering communication" rules as long as the exceptions do not extend to communications that promote, support, attack, or oppose a clearly identified candidate. 2 U.S.C. § 434(f)(3)(B), relying on 2 U.S.C. § 431(20)(A)(iii).

To Commissioner Toner and myself, there seemed to be ample legal justification for declaring that the "express advocacy" standard would not apply to the "expenditure" analysis for groups that had crossed the major purpose line. Also, the "promote, support, attack, or oppose" test is a distinct improvement. It is more objective than a "for the purpose of influencing federal elections" test, and it avoids the charade of "express advocacy" precedent.

The T & T proposal attempted to compromise on the question of when other groups, like 501(c)(3) or (c)(4) tax exempt groups, would be deemed political committees. (Perhaps the loudest din during the comment period was caused by groups of this sort fearful that the FEC was going to saddle them with a "promote, support, attack, or oppose" standard.) Language was incorporated saying these groups would be subject to the "major purpose" and "expenditure" analysis in place *under applicable law*. The intent was to let the whole existing body of law on this question be applied on a case-by-case basis, preserving the *status quo*.

Given that existing tax law essentially prohibits 501(c)(3) groups from "intervening" in politics at all and provides that 501(c)(4) groups cannot have a "primary purpose" of influencing elections (*see Election Year Issues* by Judith Kindell and John Francis Reilly, www.irs.gov at 335-387, 433-446), this seemed a reasonable approach. Expecting non-527 groups to adhere to 'existing applicable law' seemed a good way to assure that the law would be no more onerous for these groups, while assuring that everyone remained free to make legal arguments they felt appropriate as cases arise. In the entire history of the FEC, I can only recall two instances of any significance where the FEC analyzed whether a 501(c) group crossed the "political committee" line (Matters Under Review 2804 (AIPAC) and 4940 (Campaign for America). In neither did the FEC proceed. Thus, the specter of FEC overregulation was remote under the T & T proposal.

As for the part of the T & T proposal that would have modified the FEC's allocation rules, the purpose was twofold. First, for purposes of calculating the 'funds expended' ratio, political committees involved in both federal and non-federal elections were to use the "promote, support, attack, or oppose" standard for calculating funds disbursed for 'candidate specific' purposes. This would assure that a public communication by a political committee saying, "Bush is wrong" or "Kerry is right" would count as an expense on the federal side of the formula. No longer would registered political committee agents be able to claim that only the cost of "Defeat Bush" or "Elect Kerry" messages count toward the federal portion. This legal approach, by the way, already had been approved by four members of the Commission in Advisory Opinion 2003-37 (Americans for a Better Country), available at www.fec.gov.

Second, the proposal was designed to prevent the same kind of gamesmanship that seems to have emerged using the "contribution" and "independent expenditure" concepts when calculating the federal share. A group that really wants to focus vast soft money resources on the presidential race could simply include nominal references to several non-federal candidates in its communications and thereby skew the ratio. For example, take a message saying, "President Bush's policies are a disaster for America, and State Senators like Washington, Adams, Jefferson, and Madison are fools for not fighting against them." This would result in only 20% of the cost being attributable to the federal part of the 'funds expended' formula. The group involved could use this type of calculation to justify spending $800,000 in soft money for every $200,000 in hard money when paying for administrative expenses and generic voter drive costs. The T & T proposal built in a 50% minimum for the federal share in the allocation ratio to prevent such a result. It was similar to the 65% minimum federal percentage that has been applied for years to the parties' House and Senate campaign committees. 11 CFR 106.5(c)(2).

There is the possibility the 50% minimum might force a group that had expended 80% of its candidate-specific outlays on non-federal candidates to nonetheless pay 50% of its allocable expenses with federally restricted funds. Commissioner Toner and I believed that in the context of the current presidential cycle, there was relatively little likelihood of this happening among the non-party political committees that would be covered by the new rule. At least for the current cycle, where evidence abounds of 527 groups focusing on the presidential race without applying reasonable amounts of federally restricted funds, a 50% federal minimum would be a simple, balanced fix.

So, what is the fate of the world without the T & T proposal? I defy anyone to pronounce with certainty whether clamping down on some of the existing 527 practices during the post-convention phase would have hurt Democrats more than Republicans. I have been offering my hunch that from this point on, Republican-leaning groups will get into the 527 game and out spend and out attack the Democratic leaning groups. And this won't be limited to just the presidential campaign. This may amount to hundreds of millions of dollars raised and spent outside the federal campaign finance restrictions. But that is just a hunch.

For those who predict that under the T & T proposal the 'pols' who set up 527 groups would just open up 501(c)(4) groups to do the same thing, I offer three responses. First, there seem to be gift tax consequences looming for gifts to the latter groups. Second, there are 'political activity' tax issues for 501(c) groups pursuant to 26 U.S.C. § 527(f). Third, if problems develop with 501(c) groups crossing over the "major purpose" line, the FEC and Congress can take yet another look to see if further regulatory clarity is in order. There is no reason to simply pass on the problem we know we do have.

While the new "electioneering communication" restrictions (no corporate, union, or foreign funds) will cover groups that do not deem themselves "political committees," those rules only apply to broadcast ads within 30 days of a primary or within 60 days of a general. Kerry bashers will have until June 29 to run attack ads, and Bush bashers will

have until August 3. Then, the Kerry bashers will have another window from June 30 through September 2 to beat the tar out of the Democratic nominee without "electioneering communication" restraints. Moreover, those rules don't cover mailings, newspaper ads, phone banks, and all the traditional 'ground force' expenses involved in modern voter persuasion. Thus, a boatload of money probably will pass through 527 groups to influence federal elections with no need to adhere to even the source prohibitions applicable to "electioneering communications."

In closing, I want to assure the Members I have no axe to grind here. I have voted to strictly apply the campaign finance laws since my first day on the job. I have a string of statements for the record, dissenting opinions, law review articles, and speeches to hang myself with. I consider myself a loyal Democrat in my personal capacity, but I leave that role behind when I walk into the office.

My position on the T & T proposal stemmed from my simple desire to make the laws passed by Congress work. These laws are designed to free you elected officials from the awkward situations where campaign supporters come calling for favors. They are designed to provide the voting public with some hope they too have a fair chance of getting the ear of their representatives in Washington. And these laws still allow plenty of breathing room for individuals and groups to get involved in supporting candidates. Individuals can contribute $95,000 in the aggregate every two years to federal political committees, can make unlimited independent expenditures acting on their own, and can undertake unlimited volunteer activity to support the candidate or party of their choice. PACs can raise $5,000 per year from individuals, can make contributions of up to $5,000 per election to federal candidates, and can undertake unlimited independent expenditures.

To me, the system of limits, prohibitions, and disclosure Congress has passed has great merit, but it will only work if the FEC as well as Congress has the will to make it work. It was in that spirit I signed onto the T & T proposal, and it is in that spirit I will sign on again if the opportunity arises.