# United States Senate
# Committee on Rules and Administration

## Prepared Statement
## of
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## Nominee, Federal Election Commission
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Mr. Chairman, and members of the Committee, it is a pleasure to be back before this committee, albeit in a much different capacity than in the past. I am deeply honored to have been nominated to a seat on the Federal Election Commission, and honored to appear before you today in connection with that nomination.

It is, quite frankly, hard for me, the son of a mid-western public school teacher, with no prior political connections, to imagine be called on to fill such a position of public trust. I take the responsibility for which I am being considered most seriously. One of the founding principles of our nation was a commitment to the Rule of Law, and that commitment requires humility on the part of those who serve in government. This humility requires public servants to recognize both the limits of government as a cure for every flaw, whether actual or apparent, in our society, and demands that public servants recognize and respect the limits placed on their authority and power within the framework of our government. This humility is especially important when we consider the role of the Federal Election Commission and those who would serve on it. For the FEC's role in monitoring and enforcing election laws goes to the core of our democratic institutions. Equally important, the FEC necessarily deals with First Amendment issues of the most sensitive nature, as the United States Supreme Court has consistently recognized since the first cases brought under the Federal Election Campaign Act.

This is both an exciting and a challenging time to contemplate an appointment to the Commission. I have met only a handful of people on the Commission staff, but these people have uniformly impressed me with their talent, knowledge, and dedication. I note that a recent management review of the Commission, conducted by Price-Waterhouse-Coopers, went out of its way to praise the Commission's staff for its impartial, ethical, and independent conduct, and for maintaining a high level of confidentiality in enforcement investigations. Although I lack the detailed knowledge that would come from serving on the Commission, in recent years even the casual observer must note the improvements being made in the Commission's operations. Anybody with even a passing familiarity with the Commission cannot help but be impressed by the improvements made by the Commission in carrying out its disclosure function. I am pleased to see little changes at the Commission, such as adding Spanish to the FEC website. As a former resident in Latin America, and the first ever Honorary Member of the Hispanic Republican Coalition of Central Ohio, the low voter turnout in most of our nation's many Hispanic communities is a source of concern to me, and I think it important that these fast growing communities become fully integrated into the functioning of American democracy. Such small steps that move us in that direction are to be applauded. And I am pleased to see big steps at the FEC, such as the Commission moving, with what appears to me to be a appropriate mix of speed and caution, to consider what, if any, rules it should adopt with regard to the internet. I am pleased to see the Commission reducing the number of non-substantive dismissals. Mine is just an

outsider's view, but there seems to be a new, positive direction at the FEC, and I congratulate the Commission and staff for it. And though I cannot hope to replace the experience and wisdom that Commissioner Elliott has given the Commission, I believe that my academic and non-partisan background; my studies of Constitutional issues surrounding campaign finance regulation; my experience in running a very small state PAC, of the type on which the burden of regulation weighs heaviest; and my knowledge of the empirical effects of past regulatory efforts, will make me an effective addition to the Commission.

Given the controversy that has surrounded this nomination since my name first surfaced publicly as a candidate for this position nearly ten months ago, it is perhaps appropriate for me to say, now, a few words on that controversy. In those ten months, certain outside groups and editorial writers opposed to this nomination have relied on invective and ridicule to try and discredit me. Among other things, some have likened nominating me to nominating Larry Flynt, a pornographer, to high office. Nominating me has been likened to nominating David Duke, a onetime leader in the Klu Klux Klan, to high office. Nominating me has been likened to nominating Slobodan Milosovic to high office. Indeed, nominating me has been likened to nominating Theodore Kacynski, aka the Unibomber, a murderer, to high office. Other critics have attempted ridicule, labeling me a "flat earth society poohbah," a "toady," and more. I say this not by way of complaint, for I am sure that many, if not all, of you have been called similar or worse things in the course of your public lives. And although such over-the-top name-calling is not generally what we would associate with the cause of "good government", we recognize that in political life, this is sometimes the unfortunate reality. Rather, I mention this only to point out the extent to which some persons are willing to go to try and defeat this nomination. In my case, this has also included an effort to twist and distort my views, through intentional misrepresentation of my positions, and through selective, out-of-context quotation from the thousands of pages of written work I have produced over the past five plus years. But again, I suspect that some of you are no strangers to such misrepresentation and oversimplification of your views.

It has now been nearly a quarter of a century since the Supreme Court decided the seminal case on campaign finance regulation, Buckley v. Valeo. The issues in Buckley divided observers, to a substantial extent, into two camps. The first camp insisted that the Constitution allowed Congress and the states expansive leeway to regulate all aspects of campaign funding, both expenditures - including what we now call "issue ads" - and contributions. Into this camp fell a broad spectrum of persons, ranging from then Republican Senate leader Hugh Scott, to prominent Democrats such as Archibald Cox, to Common Cause, to the Center for Public Financing of Elections, and finally to numerous scholars, activists, and politicians. The second camp, in turn, insisted that the First Amendment constituted a high barrier to the regulation of both expenditures and contributions. This camp, too, was broad, including then Republican Senator and now U.S. Court of Appeals Judge James Buckley, the American Civil Liberties Union, the Conservative Party, and, once again, numerous scholars, activists, and politicians.

In the end, neither of these two camps gained a complete victory in Buckley. In that decision, the Court recognized that limits on campaign contributions and expenditures infringe upon First Amendment rights, and therefore can only be justified by compelling government interests. Despite the infringement of First Amendment rights, the Court ultimately held that the government interest in preventing "corruption" or the "appearance of corruption" was sufficient to justify some limitation of contributions, so long as the limits on contributions were not set so low as to "(prevent)" candidates and political committees from amassing the resources necessary for effective advocacy." At the same time, the court rejected

efforts to limit a candidate's contributions to his or her own campaign, and also rejected, as unconstitutional under the First Amendment, all mandatory efforts to regulate spending, whether those efforts consisted of direct candidate spending, "independent expenditures," or what we now refer to as "issue advocacy."

Over the years, the Court's distinction between contribution limits and spending limits has been a source of great controversy. Indeed, Chief Justice Burger rejected the distinction in Buckley itself, writing that "contributions and expenditures are two sides of the same First Amendment coin," and arguing that contribution limits are unconstitutional. So did Justice Blackmun, writing, "I am not persuaded that the Court makes, or indeed is able to make, a principled constitutional distinction between contribution limitations, on the one hand, and expenditure limitations, on the other..." In later years, other Supreme Court Justices have also questioned the distinction between contributions and expenditures. Justice Marshall, for example, though part of the original Buckley majority, came to see the distinction as untenable, and came to believe that expenditures, like contributions, could be regulated consistent with the Constitution. Justices Scalia and Thomas, on the other hand, concluded that a proper understanding of the First Amendment precluded regulation of either contributions or expenditures. Not surprisingly, commentators have also reached differing conclusions on what should be the state of the law. Nevertheless, Buckley's distinction has stood. And, throughout, a majority of the Supreme Court, and lower courts, have held that "issue advocacy" remains constitutionally protected speech.

I believe that it is safe to say that few observers are completely satisfied with the distinction that Buckley makes between contributions and expenditures. Although I believe that there are some logical arguments for the distinction, and that contribution limits are better justified than expenditure limits, in the end I find myself in the company of Judge Buckley, Chief Justice Burger, Justices Blackmun, Scalia, and Thomas, and the numerous commentators who believe that the First Amendment should have been, and should be, interpreted to prohibit limits on contributions. That my view on this part of the Buckley decision is not the law is well known and easily understood. What seems not to be so easily understood, at least by some, is that their vision of what Buckley should have said, as to expenditure limits and "issue advocacy," is not the law, either.

Nor is it apparent why those of us who agree with Buckley's holding on expenditure limits, but disagree with it on contribution limits, should be branded as "extremists" who are "unfit" for office; while those who agree with Buckley's holdings on contribution limits, but disagree with it's holdings on expenditure limits and "issue advocacy," and who specifically and loudly call for Buckley to be overruled, should be deemed "mainstream reformer." And I believe that it lowers the quality of debate, lessens our understanding of the serious issues involved, and increases the cynicism of the public, when special interests seek to brand all those with whom they disagree as "extremists."

Regardless of whether any particular Commissioner falls into one camp or the other, it is not the Federal Election Commission, let alone any one Commissioner, which makes the law. These issues are decided by you, the members of the Senate, along with the House of Representatives, and with the signature of the President on legislation, which is interpreted by courts. The job of the Commission, and of the Commissioners, is to enforce the laws of Congress.

This points up an important difference between me and many of the outside groups that have opposed this nomination, and this difference is our respective views of the proper role of the FEC. In the past, the FEC has been criticized for pursuing enforcement actions that push the limits of the law and, indeed, infringe upon the First Amendment rights of Americans. These efforts by the FEC to expand the scope

of the law resulted in a number of defeats for the Commission in the courts of the United States, culminating three years ago with the decision of the Fourth Circuit Court of Appeals in FEC v. Christian Action Network. In Christian Action Network, the Court admonished the Commission for arguing for an expansive interpretation of the law that, said the Court, "simply cannot be advanced in good faith..., much less with 'substantial justification.'" Finding the Commission's legal position "disingenuous," the Court then took the extraordinary step of ordering the Commission to pay the opposing party's attorneys' fees. Not knowing the inside history of this or the various other enforcement actions which have caused the Commission such embarrassment, I do not intend for my comments to be construed as criticism of past or present Commissioners or staff. But it was clear at the time of Christian Action Network that at some point the Commission has made serious errors in its enforcement approach.

There are those, however, who applaud such enforcement actions, and urge the appointment of a commissioner who will continue to vote for such "robust" enforcement. But what they call "robust", the courts have all too often called "unconstitutional." A true commitment to enforcing the law, as it now stands, does not mean pushing the envelope on the Constitutional limits of enforcement every time one thinks one might get away with it. Rather, it must include showing restraint where the courts have indicated that such restraint is required. Moreover, I believe that if we are to continue the strides made by the FEC in recent years, the Commission must continue to respect the statutory and constitutional limits on its power and focus its resources accordingly. Truly effective enforcement requires a careful allocation of its resources. The cost of appellate litigation is substantial, and undoubtedly resources devoted to such adventuresome litigation as Christian Action Network might otherwise be devoted to resolving a much greater number of cases where the law is clear. So what some of my critics have cheered as "robust" enforcement not only has infringed on the Constitutional liberties of our citizens, but it has probably damaged the Commission's overall enforcement efforts. The FEC ought to focus on that vast majority of cases where the law is clear and enforcement can be made swift and sure. Devoting resources to these "meat and potatoes" cases, removing the backlog of cases, and improving response time strikes me as a more appropriate use of enforcement resources, and one more likely to restore and build confidence in the integrity of government, than is pursuing actions that infringe on the constitutional rights of the people and which are likely, eventually, to lose in the courts. Such losses come at great cost to the Commission, to the taxpayers, and to the private defendants attempting to exercise their rights of free speech and political participation.

At the time such decisions were made, members of the Commission may have had justifiable reasons for pursuing cases such as Christian Action Network. I am quite sure that had I been on the Commission I would have voted against that enforcement action, since I viewed the Commission's position as unconstitutional, as the Court of Appeals ultimately did. In any case, after Christian Action Network, future efforts at such "robust" enforcement by the Commission would be nothing less than irresponsible.

The difference between my view of the proper role of the FEC, and that held by many of my critics, is also apparent when considering the Commission's rule making function. For example, in each of the last several sessions of Congress, bills have been introduced and voted on in both the House and Senate to ban "soft" money. Such legislation, however, has not passed, as you well know. In response, some have sought to have the Federal Election Commission ban soft money through the rule-making process.

It strikes me, however, that a proper respect for the Rules of Law requires

the Commission to respect the role of Congress first. It is, of course, necessary at times for federal agencies, through the rule-making process, to fill in gaps or to provide guidelines to assure compliance with the law. But when Congress has specifically considered, and failed to pass legislation, it is not appropriate for unelected federal bureaucrats to legislate in Congress's place. Proper respect for this body, for the House of Representatives, and for the Constitution, requires Commissioners of the FEC to be more humble. Where Congress has specifically defeated legislation, I will not legislate in your place, any more than you would expect me, or any other Commissioner, to ignore legislation which Congress has actually passed.

Let me add that I share many of the concerns of my critics about a growing cynicism, as opposed to healthy skepticism, of government. But I do not believe that this cynicism is best combated by broadly painting all members of this Chamber, and the House of Representative, as "corrupt," when such charges are demonstrably untrue, nor by hurling over-the-top invective at those with whom we have disagreements on issues. Earlier I mentioned some of the extreme analogies that have been made about my nomination, and the truth is that, for the most part, I find such analogies silly, and more amusing than abusing. However, there is one charge that I take as a personal insult to my integrity and to my devotion to the Rules of Law, and that is the charge that as a Commissioner, I would not enforce the law. These critics have no basis - none whatsoever - for making this allegation. And while the Rule of Law is a value I hold deeply, I pretend no particular heroism in this task. For every day in our country, thousands of public servants are called upon to, and do, enforce laws with which they disagree, from the President on down through cabinet officials, lower level officials, civil servants, prosecutors, law enforcement officers, and even clerical staff.

Finally, should you confirm my nomination to this seat, which I hope that you will, here is my pledge to you. First, I will defer to Congress to make law, and not seek to usurp that function to the unelected bureaucracy. Second, when the Commission must choose, under the law, whether to act or not to act, or how to shape rules necessary for the law's enforcement, faithfulness to congressional intent and the Constitution, as interpreted by the courts, will always be central to my decision making. Third, I will act to enforce the law as it is, even when I disagree with the law. Further, noting once again the manner in which the Buckley decision has largely divided commentators into two camps, I will act to enforce the law as it is, even when self-styled "reform" groups or other special interests would urge the Commission to enforce the law as they would like it to be, but not as it is. Finally, I pledge that I will strive at all times to maintain the humility that I believe is necessary for any person entrusted with the public welfare to successfully carry out his or her duties.

Thank you.