OPENING STATEMENT OF
VICE CHAIRMAN MICHAEL E. TONER
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The central question in this rulemaking is whether the federal government will begin regulating the political speech of Americans over the Internet. Several key principles guide my thinking on this rulemaking.

First, some commenters contend that in light of the District Court's ruling in *Shays,* the Commission has no choice but to regulate online politics in at least some manner. I do not agree. The Commission is challenging the legal standing of the *Shays* plaintiffs and is currently awaiting a ruling from the D.C. Circuit. If the Commission prevails on appeal, the District Court's ruling could be vacated and made null and void. Moreover, even if the *Shays* ruling is upheld, it would only apply in the District of Columbia and would not be a binding decision anywhere else in the United States, including in the other 10 circuit courts of appeals. If the Commission decides to regulate online political speech, it should do so only if a majority of Commissioners conclude independently -- apart from the *Shays* decision -- that the McCain-Feingold law requires the FEC to regulate the Internet.

Second, I continue to be highly skeptical that the McCain-Feingold law requires the Commission to regulate the Internet or alter its current regulations in any manner. The plain meaning of the statutory language supports this conclusion. When Congress defined what is a "public communication," it identified a wide variety of communications, including "broadcast, cable, or satellite communication[s], newspaper[s], magazine[s], outdoor advertising facilit[ies], mass mailing[s], or telephone bank[s] to the general public . . ." 2 U.S.C. § 431(22). However, Congress did not include the Internet in the statutory definition of "public communication." I do not believe this omission was an accident. Rather, I believe it was a conscious, informed judgment by Congress that the Internet should not be subject to the many restrictions that McCain-Feingold applies to other types of mass communications.

The evidence has mounted during this rulemaking that Congress did not intend for the Commission to regulate the Internet when it passed the McCain-Feingold law. Senators Kerry and Edwards filed comments with the Commission stating categorically that "Congress did not intend to create new barriers to Internet use when it passed [McCain-Feingold]." In these comments, counsel for Senator Kerry noted that Senator Kerry was a co-sponsor of McCain-Feingold and emphasized that he

> supports the law and its objective of removing corruption from the political process. He believes that [McCain-Feingold] can and should tilt the balance of political power back toward ordinary citizens. Nonetheless, for those like Senator Kerry who strongly support giving average Americans a more effective voice in the political process, this rulemaking raises more concern than hope. The draft rules published by the Commission for consideration are more modest in scope than some potential alternatives. However, their adoption would nonetheless have the potential to chill the sort of activism that had such a positive force in 2004.

Similarly, Senate Minority Leader Harry Reid sent a letter to the FEC this spring expressing "serious concerns" about the Commission's Internet rulemaking. Senator Reid has introduced legislation that would specifically exempt the Internet from the statutory definition of "public communication." Earlier this month the House Administration Committee passed legislation containing the statutory provisions that Senator Reid proposes regarding the Internet; the full House is expected to act on the legislation within the next couple of weeks.

Third, the great virtue of the Commission's current approach to the Internet is that people involved in online politics can know -- without consulting federal statutes and regulations, and without hiring lawyers – that what they are doing is legal. However, if the Commission adopts the regulations proposed in the NPRM, people involved in online politics in the future will face numerous legal concerns, including, but not limited to:

- Whether their speech is a "public communication" under 11 CFR § 100.26;
- Whether their speech is "express advocacy" under 11 CFR §100.22;
- Whether their speech qualifies for the media exemption under 11 CFR §§ 100.73 and 100.132;
- Whether their email communications require a disclaimer under 11 CFR §§ 100.27 and 110.11;
- Whether their speech is considered to have been made independently or in coordination with any candidate under 11 CFR §§ 109.10, 109.11, 109.20, 109.21, 109.22, and 109.23, and the consequences that flow from either determination.

The federal election laws occupy over 225 pages of the United States Code, and the Commission's regulations consume over 500 pages of the Code of Federal Regulations. The proposed regulations regarding the Internet would add yet another chapter to these voluminous legal authorities.

Finally, on the broadest level, this rulemaking challenges us to answer the following question: must every aspect of American politics be regulated by the Federal Election Commission? Can there not be any part of politics in the United States that is free of government review, investigations, and potential enforcement actions?

I don't view these as rhetorical questions. If any domain in American politics is going to remain free of regulation, the Internet is one of the most promising prospects. The

Supreme Court has observed that the Internet is "the most participatory form of mass speech yet developed," (*Reno v. ACLU*, 521 U.S. 844, 863 (1997)), whose "content is as diverse as human thought." *Id.* at 870. The Internet is not only a unique medium, it also defies most if not all of the legal premises behind the federal election laws. One key premise is that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Yet, millions of Americans today use the Internet to communicate about politics at virtually no cost. As the AFL-CIO pointed out in their comments to the Commission:

> [T]he fundamentally democratic and leveling aspects of the Internet render it a potentially potent counterweight to concentrations of financial power in the political marketplace, and there is no apparent means at present by which corporations, unions or others can utilize their resources to dominate the medium.

The Commission's action in this rulemaking will determine whether people of all political persuasions will be able to continue supporting the candidates of their choice on the Internet free from any legal concerns or challenges. I look forward to working with everyone at the Commission as it decides this important question.