



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

MAR 07 2005

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Eric Kleinfeld, Esq.
Ryan, Phillips, Utrecht & MacKinnon
1133 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036

RE: MUR 5542
Texans for Truth

Dear Mr. Kleinfeld:

On October 1, 2004, the Federal Election Commission notified your client, Texans for Truth, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information provided by you, the Commission, on February 17, 2005, found that there is reason to believe Texans for Truth violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, by knowingly accepting contributions in excess of \$5,000, and by knowingly accepting corporate and/or union contributions. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information. Please note that respondents have an obligation to preserve all documents, records and materials relating to the Commission's investigation.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath.

In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be

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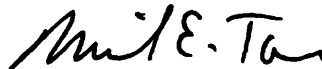
pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Michael E. Toner
Vice Chairman

Enclosures

Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**
2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 RESPONDENT: Texans for Truth

MUR: 5542

6
7 **I. INTRODUCTION**

8 This matter concerns allegations that Texans for Truth (“TFT”), an entity organized
9 under Section 527 of the Internal Revenue Code, has violated various provisions of the Federal
10 Election Campaign Act of 1971, as amended (“the Act”). The complaint alleges that TFT is a
11 federal political committee as defined by the Act which has failed to register and report with the
12 Commission and failed to comply with the Act’s contribution limits and source prohibitions.
13 TFT has not registered as a political committee and in its response denies being a political
14 committee. Response at 1-2.¹

15 **II. FACTS**

16 TFT was formed on August 31, 2004. TFT’s stated purpose on its registration with the
17 Internal Revenue Service (“IRS”) is to “educate voters on the records and views of candidates
18 for public office and to promote interest in political issues and participation in elections.”²
19 TFT’s website page “About Us,” however, mentioned only a single candidate: “Texans for
20 Truth, an organization from Bush’s home state, believe time has come [sic] for America to learn

¹ The complaint does not specifically allege that TFT coordinated its advertisements with the Kerry campaign or the Democratic National Committee. The subject of coordination is noted in a press article attached to the complaint, in which the White House Press Secretary generally alleged coordination between TFT and the Kerry campaign, which was denied by both parties Howard Witt and John McCormick, *Agile “527” Groups Lead Well-funded Hit-run War*, CHICAGO TRIBUNE, September 10, 2004, at 1. Another article, not attached to the complaint, stated that TFT produced its advertisements attacking President Bush’s National Guard service “just as the Democratic National Committee unveiled a campaign with the same thrust,” but provided no additional information. John Riley, *527s on the Campaign Trail*, NEWSDAY, October 7, 2004, at A4. TFT’s response, while noting that the complaint did not allege coordination, addressed the issue by stating that it did not coordinate its advertisements with either the Kerry campaign or the DNC. Response at 10.

² See TFT’s IRS form 8871, which does not list any related entity

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1 the truth about Bush’s shadowy past.”³ Further, TFT was reportedly created to respond to Swift
2 Boat Veterans for Truth, the group of Vietnam veterans backed by prominent Texas Republican
3 donors who launched a television commercial in early August 2004 alleging that Senator Kerry
4 lied about his decorated Vietnam service.⁴

5 TFT is the Section 527 arm of DriveDemocracy, a non-profit Texas corporation launched
6 in April 2004. DriveDemocracy, in turn, was initially funded through a grant from
7 MoveOn.org.⁵ Funds were initially raised for TFT through a mass e-mail from MoveOn.org
8 Voter Fund (“MOVF”) to MoveOn members in Texas and to the members of DriveDemocracy.⁶
9 This e-mail, titled “Where was Bush? Help expose truth [sic] of his service record,” is dated
10 September 7, 2004 and undersigned by Wes Boyd, MoveOn.org Voter Fund.⁷ Mr. Boyd begins:

11 The Bush Campaign took a huge risk last week: rather than focus on issues or
12 vision at their convention, they attacked John Kerry where he is strong and where
13 they are weak. This isn't surprising. Big lies have become a trademark strategy
14 of the Bush administration and now the Bush campaign. However, lies come
15 back to haunt.

16
17 In this case, smearing John Kerry about his service in Vietnam has brought focus
18 back on Bush’s embarrassing evasion of service. Today, a group in Texas,
19 Texans for Truth, is launching an ad campaign that highlights Bush’s absence
20 from duty in 1972. The first ad, featuring a National Guardsman at the base
21 where Bush was supposedly posted, will air as soon as Texans for Truth can raise
22 their \$200,000 budget for the ad.

23
24 Let’s help get this ad on the air now. You can make this possible by going to

25
26 <http://www.texansfortruth.com/contribute.html>

³ <http://texansfortruth.com/about.html>

⁴ Howard Witt and John McCormick, *Agile “527” Groups Lead Well-funded Hit-run War*, CHICAGO TRIBUNE, September 10, 2004, at 1

⁵ <http://texansfortruth.com/pr.html>; <http://drivedemocracy.org/about.html>

⁶ Press articles describe the mass e-mail campaign as sent out in part by the MOVF, but do not identify other parties. In addition, MoveOn.org had a link to TFT on its website.

⁷ Mr. Boyd is co-founder, president and board member of MoveOn.org and treasurer of MOVF.

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1
2 Mr. Boyd goes on to describe the TFT advertisement⁸ and state that “[s]purred by Bush’s cynical
3 and ugly attacks on Kerry, people who have never spoken before have now begun to come
4 forward to talk about this period in Bush’s career.” Finally, Mr. Boyd notes that TFT is run by
5 “our friend Glenn Smith, who also runs an affiliated 20,000 member Texas-based advocacy
6 group called DriveDemocracy.org.”

7 Mr. Smith reportedly founded both TFT and DriveDemocracy. Mr. Smith is treasurer
8 and Executive Director of TFT and is the Director of DriveDemocracy. In addition, Mr. Smith
9 helped manage MoveOn’s “Defending Democracy” campaign regarding the congressional
10 redistricting in Texas. Defending Democracy’s remaining proceeds served as MoveOn.org’s
11 grant to DriveDemocracy.

12 In its filings with the IRS covering the period August 31 through November 22, 2004,
13 TFT lists itemized receipts of \$225,495 and disbursements of \$486,929. In three electioneering
14 communication reports filed with the Commission, TFT lists \$155,000 in donations received and
15 \$303,000 in electioneering communications made covering the period from September 13
16 through October 20, 2004.⁹ According to a statement on DriveDemocracy’s website dated
17 September 12, 2004, two weeks after TFT was formed and just five days after the MOVF
18 solicitation, TFT had raised \$400,000 from 6,300 individuals.¹⁰

⁸ The advertisement described is titled “AWOL” and was one of the three TFT advertisements posted on TFT’s website

⁹ TFT disclosed receiving a \$100,000 donation from one individual. TFT’s next largest donation was \$10,000 from an LLC entity. TFT disclosed no other donations larger than \$5,000, although one donor gave multiple donations aggregating to \$6,000.

¹⁰ <http://www.drivedemocracy.org/blog/index.php?m=200409>. The variations in the reported figures appear to be due to disclosure thresholds. The Act provides for the disclosure of donations of \$1,000 or greater for electioneering communications. See 2 U.S.C. § 434(f)(2)(E) and (F). The Internal Revenue Code (“IRC”) provides for the disclosure of donations to section 527 organizations by donors who give an aggregate of \$200 or more to the organization during a calendar year. See 26 U.S.C. § 527(j)(3)(B). Neither statute requires the disclosure of total

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1 TFT solicited donations on its website. Before the November 2004 election, the webpage
2 soliciting donations to TFT specifically stated that a donor’s contribution “will help us put the
3 Texans for Truth TV ad on the air in key swing states across the nation.”¹¹ The webpage also
4 contained the statement:

5 By contributing you certify the following:

6
7 My contribution is from my own funds, by credit card, for which I have a legal obligation
8 to pay. The funds are not from an incorporated source, and the contribution is not made
9 by any prohibited source, including: the general treasury funds of corporations, labor
10 organizations, or national banks (including corporate or company credit cards); any
11 person contributing another person's funds; foreign nationals who lack permanent
12 resident status; and government contractors.

13
14 If you're under 18 years old: I am contributing knowingly and voluntarily, the funds are
15 my own, and the contribution is not controlled by another individual or made from the
16 proceeds of a gift given to provide funds to be contributed.

17
18 I understand that contributions to Texans for Truth are not tax deductible.

19
20 See *id.*

21 TFT ran three television advertisements criticizing President Bush’s National Guard
22 service.¹² The advertisements do not mention Senator Kerry or the 2004 election. For example,
23 the following advertisement entitled “Honor” was paid for by TFT:

24

<i>Audio</i>	<i>Video</i>
ANNOUNCER: Today under President Bush’s order National Guardsmen are fighting and dying in Iraq. Serving their country with courage and honor.	<i>On screen: Still photos of soldiers, military vehicles, a soldier being carried in a stretcher, and a burning vehicle. Small text below: www.texansfortruth.org</i> ¹³

donations. Cf 2 U.S.C. § 434(b)(2) Glenn Smith reportedly stated that of the initial \$300,000 raised by TFT, aside from the \$100,000 donation, most of the rest came in \$25 donations. Katharine Seelye and Ralph Blumenthal, *Documents Suggest Special Treatment for Bush in Guard*, NEW YORK TIMES, September 9, 2004

¹¹ This statement appeared at <http://texansfortruth.com/contribute.html> until the election

¹² The advertisements were available at <http://texansfortruth.com/watch.html>

¹³ This text remains in place throughout the advertisement

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<p>George Bush walked away from his duty to the nation and to the National Guard.</p>	<p><i>On screen: Still photo of a young George W. Bush in military uniform climbing into an airplane</i> <i>On screen: image of George W. Bush darkens</i></p>
<p>His father got him into the Guard and out of the Guard.</p>	<p><i>On screen: Still photo of a young George W. Bush and his father, George H.W. Bush</i></p>
<p>Mr. President you owe our troops an explanation.</p>	<p><i>On screen: Still photo of a young George W. Bush next to text: MR. PRESIDENT YOU OWE OUR TROOPS AN EXPLANATION.</i></p>
<p>You pledged to release all of your military records but you have not signed the papers to do so.</p>	<p><i>On screen: Still photo of President Bush next to text: Q: "BUT YOU AUTHORIZE THE RELEASE OF EVERYTHING TO SETTLE THIS?" BUSH: "YES, ABSOLUTELY." Source: Meet the Press, Feb. 8, 2004.</i></p>
<p>Sign them now. Keep your word. Choose honor.</p>	<p><i>On screen: SIGN THEM NOW. Superimposed over a form titled "Request Pertaining to Military Records" and a blank "Signature" field.</i></p>
<p>Texans for Truth is responsible for the content of this advertisement.</p>	<p><i>On screen: CHOOSE HONOR. Smaller print below: Paid for by Texans for Truth, www.texansfortruth.org, not authorized by any candidate or candidate's committee. Texans for Truth is responsible for the content of this advertisement.</i></p>

- 1
- 2 TFT's disclosed disbursements and other public information including its website do not indicate
- 3 any additional television advertisements.¹⁴

¹⁴ TFT's website contained an advertisement for a book, *Unfit Commander Texans for Truth Take On George W Bush*. TFT's reports to the IRS, which disclose disbursements beyond those disclosed to the Commission relating to electioneering communications, do not indicate any payments to publish this book. In addition, TFT's IRS reports do not indicate any public communications other than the three television advertisements, see 2 U S C. § 431(22), or any voter drive activity

1 It appears that TFT’s primary activity was to fund television advertisements which
2 clearly identify then-Republican Presidential candidate George Bush. All three of the TFT
3 advertisements criticize President Bush’s National Guard service. TFT’s disbursements for these
4 advertisements were made within 60 days of the general election and so would qualify as
5 electioneering communications if TFT was not a political committee. *See* 2 U.S.C.

6 § 434(f)(3)(A)(i). Accordingly, the three electioneering communication reports TFT filed with
7 the Commission list just one candidate, President Bush. *See* 2 U.S.C. § 434(f)(2)(D). There was
8 no information on the TFT website about any other candidates for federal, state or local office.

9 **III. ANALYSIS**

10 It appears that TFT may be a “political committee” subject to the contribution limitations,
11 source prohibitions, and reporting requirements of the Act. *See* 2 U.S.C. §§ 431(4)(A), 433, 434,
12 441a and 441b. The Act defines a “political committee” as any committee, club, association, or
13 other group of persons that receives “contributions” or makes “expenditures” for the purpose of
14 influencing a federal election which aggregate in excess of \$1,000 during a calendar year.
15 2 U.S.C. § 431(4)(A). The term “contribution” is defined to include any gift, subscription, loan,
16 advance, or deposit of money or anything of value made by any person for the purpose of
17 influencing any election for Federal office. 2 U.S.C. § 431(8)(A)(i). *See, e.g., FEC v. Survival*
18 *Educ. Fund, Inc.*, 65 F.3d 285, 295 (2nd Cir. 1995) (where a statement in a solicitation “leaves
19 no doubt that the funds contributed would be used to advocate [a candidate’s election or] defeat
20 at the polls, not simply to criticize his policies during the election year,” proceeds from that
21 solicitation are contributions).

22 TFT is a Section 527 organization that files reports with the IRS. By law, a 527
23 organization is “a party, committee, association, fund, or other organization (whether or not

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1 incorporated) organized and operated primarily for the purpose of directly or indirectly accepting
2 contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1).
3 The “exempt function” of 527 organizations is the “function of influencing or attempting to
4 influence the selection, nomination, election or appointment of any individual to any Federal,
5 State, or local public office or office in a political organization,” or the election or selection of
6 presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore,
7 an organization that avails itself of 527 status has effectively declared that its primary purpose is
8 influencing elections of one kind or another.

9 While TFT claims that its purpose is to “educate voters on the records and views of
10 candidates for public office and to promote interest in political issues and participation in
11 elections,”¹⁵ the available information does not show any TFT statement regarding any specific
12 state or local candidate, or for that matter, any federal candidate other than President Bush. In
13 fact, its website and fundraising solicitations point to an intention to influence the 2004
14 presidential election. As noted above, TFT was reportedly formed to respond to Swift Boat
15 Veterans for Truth’s advertisement criticizing Senator Kerry, and TFT’s website described the
16 organization as believing the “time has come for America to learn the truth about Bush’s
17 shadowy past.” TFT focused its activities and operated in “swing states,” where the presidential
18 election was most competitive. A TFT press release stated that its initial advertisement buys
19 were in Harrisburg, PA; Columbus, OH; Detroit, MI; Portland, OR and Phoenix, AZ.¹⁶

20 TFT states in its Response that it has never run an advertisement containing express
21 advocacy of the election or defeat of any candidate. Response at 9. TFT also denies that there is

¹⁵ This statement appears on TFT’s IRS form 8871.

¹⁶ [http //texansfortruth com/pr.html](http://texansfortruth.com/pr.html)

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1 a basis in the language of its press release for a finding that TFT made any expenditure. *Id.*; see
2 <http://texansfortruth.com/pr.html>.

3 Even if both of TFT's assertions are true, however, TFT's activity may nonetheless
4 satisfy the criteria for political committee status. See 2 U.S.C. § 431(4)(A). TFT's response
5 mentions neither its own solicitation for donations on its website nor MOVF's solicitation on
6 TFT's behalf. Although TFT's website solicitation contained an advisory regarding donated
7 funds that appears to limit such funds to those permissible for making electioneering
8 communications, *see* 2 U.S.C. § 441b, the sole statement on the donations page regarding the use
9 of funds received by TFT points to an intention to influence the presidential election: "Your
10 donation will help us put the Texans for Truth TV ad on the air in key swing states across the
11 nation."¹⁷ In fact, TFT's website was replete with expressions of an intention to defeat President
12 Bush.

- 13 • "[The] time has come for America to learn the truth about Bush's shadowy
14 past";¹⁸
- 15 • "The ad, paid for by online donations, will begin airing [September 13, 2004] in
16 swing states communities who've sustained the most losses in Iraq."¹⁹
- 17 • an advertisement for a book, *Unfit Commander: Texans for Truth Take On*
18 *George W. Bush*;²⁰ and

¹⁷ As noted above, TFT disclosed the receipt of a \$10,000 donation from an LLC, an entity treated under the Commission's regulations as a corporation if it elects to be treated as a corporation by the IRS. *See* 11 C.F.R. § 110.1(g). Such a corporate donation would be prohibited by Section 441b.

¹⁸ <http://texansfortruth.com/about.html>

¹⁹ <http://texansfortruth.com/pr.html>

²⁰ <http://texansfortruth.com/>

- 1 • the donations page contained a link to the advertisements that would be paid for
2 with the donors' funds, advertisements featuring President Bush;²¹ thus showing
3 that "swing states across the nation" referred to the 2004 presidential election.

4 As shown, TFT's own solicitation leaves no doubt that the funds raised would be used to
5 broadcast an advertisement intended to influence the Presidential election "in key swing states."

6 Thus, proceeds from that solicitation are contributions. *See Survival Educ. Fund*, 65 F.3d at 295;
7 2 U.S.C. § 431(8)(A)(i). Similarly, the MOVF solicitation that raised funds for TFT begins:

8 The Bush Campaign took a huge risk last week: rather than focus on issues or
9 vision at their convention, they attacked John Kerry where he is strong and where
10 they are weak. This isn't surprising. Big lies have become a trademark strategy
11 of the Bush administration and now the Bush campaign. However, lies come
12 back to haunt.

13
14 These references to Bush "campaign" strategy and to the "convention" leave no doubt that the
15 solicited funds would be used to defeat President Bush. The solicitation goes on to criticize the
16 Bush campaign for "smearing" John Kerry about his military service in Vietnam, announce
17 TFT's advertising campaign highlighting President "Bush's absence from [National Guard] duty
18 in 1972" and state that the first advertisement will air "as soon as Texans for Truth can raise their
19 \$200,000 budget for the ad. Let's help get this ad on the air." TFT's advertisement text is
20 incorporated into MOVF's solicitation which refers to "Bush's cynical and ugly attacks on
21 Kerry" and goes on to further reference the Bush campaign's "stonewalling on details of the
22 President's service." Thus, the solicitation informs potential donors that the funds contributed
23 would be used to advocate President Bush's defeat at the polls, not simply to criticize President

²¹ <http://texansfortruth.com/contribute.html>

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1 Bush’s policies. *See Survival Educ. Fund*, 65 F.3d at 295. Therefore, the proceeds from that
2 solicitation would be contributions to TFT.²² *See id.*

3 The available information demonstrates that the objective of TFT was to influence the
4 2004 presidential election and TFT apparently raised and spent hundreds of thousands of dollars
5 in furtherance of that objective. In this circumstance, it is appropriate for the Commission to
6 investigate whether, among those funds spent and received, TFT received \$1,000 in
7 “contributions” or made \$1,000 in “expenditures.” If it did, TFT is a political committee subject
8 to the contribution limitations, source prohibitions, and reporting requirements of the Act.²³ *See*
9 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b.

10 Therefore, there is reason to believe that TFT violated 2 U.S.C. §§ 433, 434, 441a(f), and
11 441b(a) by failing to register as a political committee with the Commission; by failing to report
12 its contributions and expenditures; by knowingly accepting contributions in excess of \$5,000;
13 and by knowingly accepting corporate and/or union contributions.

²² As noted above, the solicitation reportedly raised over \$300,000 in 24 hours and \$400,000 within a few days. These figures make up the bulk of the \$486,929 that TFT disclosed spending during September-November 2004.

²³ To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976), *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986). TFT’s response to the complaint asserts that there is no statutory or regulatory basis for applying a “major purpose” test to the definition of “political committee.” Response at 8.

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