OPENING STATEMENT OF COMISSIONER MICHAEL E. TONER
PUBLIC HEARING ON NOTICE OF PROPOSED
RULEMAKING ON POLITICAL COMMITTEE STATUS
APRIL 14, 2004

At the outset, I want to personally thank every person who took the time and effort to submit comments to the Commission. Over 100,000 people from across the country filed comments, which is the most this agency has ever received in any proceeding in its history. I may not agree with every comment we received, but I respect the views of everyone who submitted comments.

For over 20 years, the presence or absence of express advocacy in an organization's activities has been a major part of the Commission's test for whether an organization is a political committee that must register with the FEC and abide by the contribution limitations and prohibitions of the federal election laws.

However, in McConnell v. FEC, the Supreme Court ruled that the express advocacy test is not constitutionally mandated. The Court further stated, in the bluntest possible terms, that the express advocacy test is "functionally meaningless" in the real world of politics. The Court noted that many commercials aired by campaigns do not contain express advocacy, and that many campaign consultants have concluded that using terms such as "Vote for Bush" or "Vote against Gore" are not effective in moving voters. The Court also observed that political parties and interest groups for years have aired hard-hitting advertisements that do influence voters, but that do not contain any words of express advocacy.

Given the Supreme Court's treatment of the express advocacy test in McConnell, the Commission now must decide whether it is appropriate to continue using the test for helping to determine political committee status. In short, the Commission must decide whether it is going to continue using a legal test that has largely been discredited by the Supreme Court and is obsolete in the political world, or whether it is going to use a regulatory test – such as the "promote, support attack, oppose" standard -- that might actually be effective and have meaning in the political world. That, in many ways, is the defining issue in this rulemaking.

In construing the permissible reach of the federal election laws, and in determining which organizations may legally be treated as political committees, the Supreme Court has made a fundamental distinction between organizations that are electorally oriented and those that are not. Specifically, in Buckley v. Valeo, the Court ruled that organizations may be treated as political committees if, in addition to meeting the statutory $1,000 contribution/expenditure test, they are either "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." Buckley, 424 U.S. 1, 79 (1976). The Supreme Court quoted this controlling phrase from Buckley ten years later in the Massachusetts Citizens for Life case, holding that organizations may be regulated as political committees if their "major purpose may be regarded as campaign activity." MCFL, 479 U.S. 238, 262 (1986). In both Buckley and MCFL, the critical dividing line was whether an organization's major purpose is electoral politics.

The McConnell ruling did not alter this major purpose test. As the various comments make clear, Section 527 organizations exist for the purpose of influencing the nomination, election, or appointment of any person to public office. Given that is the fundamental nature of 527 organizations, I think a very strong argument exists that 527 organizations satisfy the Supreme Court's major purpose test per se as a matter of law. I look forward to hearing more from the commenters on this important question.

Moreover, in McConnell the Court upheld BCRA's "promote, support, attack, oppose" standard against a constitutional vagueness challenge, ruling that the statutory provisions "provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." McConnell 124 S.Ct. 619, 675 n.64. In doing so, the Court stressed that the promote/support/attack/oppose standard provides reasonable notice as applied to political parties "since actions taken by political parties are presumed to be in connection with election campaigns." Id. I think a very strong argument exists that the same can be said of 527 organizations, given that 527s operate by law for the purpose of influencing the nomination, election or appointment of any person to public office. Again, I am interested in the views of our witnesses on this issue.

The extraordinary volume of comments we received in this rulemaking underscores that the Commission is grappling with critical issues that go to the core of the federal election laws in this country. We may disagree about what action the Commission should take here, but there is no question that these issues are fundamental and must be decided.

There has been considerable debate about whether any new rules the Commission might issue should be effective for the 2004 election. I strongly believe that they should be, otherwise the Commission will be effectively exempting the upcoming election from fundamental aspects of the law. However, I have decided that I will vote for regulations based on the law as I understand it, even if they are not effective until after this election. That is not my preferred course, and I will continue to fight to make whatever the Commission decides effective for 2004. But I think it's more important for the Commission to get the law right than it is to weigh short-term political interests, and I will vote accordingly.