TESTIMONY OF
COMMISSIONER MICHAEL E. TONER
BEFORE THE COMMITTEE ON HOUSE ADMINISTRATION
MAY 20, 2004

Thank you Mr. Chairman and Members of the Committee for the opportunity to testify before you today.

Last week the Federal Election Commission voted on proposed regulations that Commissioner Thomas and I offered regarding Section 527 organizations. Our proposed regulations sought to do four major things. First, they would have made clear that 527 organizations that run ads promoting or attacking federal candidates are political committees which must register with the FEC and abide by the hard dollar limits of federal law. [1] Second, they would have made clear that 527 organizations that engage in partisan voter mobilization activities are also political committees that must abide by federal law. Third, our proposal would have overhauled the Commission's antiquated allocation regulations and required all independent groups that are political committees, including 527 organizations, to pay for their activities with at least 50% hard dollars. Finally, our proposal would have preserved the regulatory status quo for 501(c) organizations, which would continue to operate as they do under current law.

Last week the Commission declined to adopt the regulations that Commissioner Thomas and I proposed and decided not to adopt any new regulations concerning 527 organizations for the 2004 election cycle. The Commission also decided to revisit these issues in 90 days to determine what regulations, if any, should be enacted for the 2006 election.

I am disappointed that the Commission did not enact the regulations that Commissioner Thomas and I sponsored. Our proposed regulations would have strengthened the law. They also reflected the Supreme Court's teachings in McConnell

[1] The following kinds of 527 organizations were exempt from the proposed regulations: (1) State and local campaign organizations; (2) Groups organized solely to influence the nomination or election of one or more state or local candidates; (3) Groups organized solely to influence elections in which no federal candidate appears on the ballot; (4) Groups organized solely to influence state ballot initiatives or referenda; and (5) Groups organized solely to influence the nomination or appointment of individuals to non-elective offices, such as judgeships.

v. FEC, 124 S.Ct. 619 (2003), Buckley v. Valeo, 424 U.S. 1 (1976) and FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) [hereinafter MCFL]. In the aftermath of the Commission's action, I believe we will likely see a significant increase in soft money spending by 527 organizations on attack ads against federal candidates and partisan voter mobilization operations – activities that will directly affect the outcome of the 2004 election.

The regulations that Commissioner Thomas and I proposed were based upon several key legal principles.

First, the Supreme Court in McConnell concluded that the express advocacy test is not constitutionally mandated. The Court stated, in the bluntest possible terms, that the express advocacy test is "functionally meaningless" in the real world of politics. McConnell, 124 S.Ct. at 689. The Court noted that many commercials aired by campaigns do not contain express advocacy, and that many campaign consultants long ago discovered that using express advocacy 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 do not use words of express advocacy. See Id.

Prior to McConnell, the Commission frequently relied upon the express advocacy test for determining when the spending of an outside organization should count as an "expenditure" subject to the annual $1,000 threshold for triggering political committee status under the Federal Election Campaign Act of 1971, as amended ("FECA"). Given the Supreme Court's conclusions about the express advocacy test in McConnell, Commissioner Thomas and I believed the Commission was obligated to develop a broader standard for determining political committee status. Specifically, we proposed that when 527 organizations air advertisements that "promote, support, attack, or oppose" a clearly identified federal candidate or political party, such spending should count towards, and potentially trigger, political committee status.

In advocating this broader standard, Commissioner Thomas and I relied upon the fact that the Supreme Court in McConnell upheld the "promote, support, attack, oppose" standard in the Bipartisan Campaign Reform Act of 2002 ("BCRA") against a constitutional vagueness challenge. The Court held that the BCRA 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. at 675 n.64 (quoting Grayned v. City of Rockford, 408 U.S. 104 (1972)). In so holding, 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. See also Buckley, 424 U.S. at 79. Commissioner Thomas and I believe the same can be said of 527 organizations, whose exempt function, as a matter of law, is "influencing or attempting to influence the selection, 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." 26 U.S.C. § 527(e)(2). This conclusion is also strongly

supported by McConnell, in which the Supreme Court found that "Section 527 'political organizations' are, unlike 501(c) groups, organized for the express purpose of engaging in partisan political activity." McConnell, 124 S.Ct. at 678 n.67. See also id. at 679 (noting that 527 organizations "by definition engage in partisan political activity").

Second, the Supreme Court determined in McConnell that advertisements that "promote, support, attack, or oppose" federal candidates "undoubtedly have a dramatic effect on Federal elections." Id., 124 S.Ct. at 675. The Court stressed that "any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating." Id. (emphasis added). In light of the Court's finding, it is fully appropriate to treat 527 organizations that finance such advertisements as political committees and require them to follow the prohibitions and limitations of the federal election laws.

Third, the Supreme Court concluded in McConnell that voter registration, voter identification, and get-out-the-vote activities "confer substantial benefits on federal candidates." Id. The Court determined that "federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls." Id. at 674. Moreover, the Court stressed that "many of the targeted tax-exempt organizations engage in sophisticated and effective electioneering activities for the purpose of influencing elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large scale voter registration and GOTV drives." Id. at 679 n.68. Given the Court's conclusions, Commissioner Thomas and I likewise thought 527 organizations that underwrite partisan voter mobilization operations should be treated as political committees and required to abide by the federal election laws.

Fourth, in construing the permissible reach of FECA, 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. In Buckley v. Valeo, the Court ruled that organizations may be treated as political committees if, in addition to meeting FECA's $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 Court quoted this controlling phrase in Buckley ten years later in MCFL, 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). The Court concluded in MCFL that such organizations "would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." Id. 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 the "major purpose" test.

As was noted above, 527 organizations operate as a matter of law for the purpose of "influencing or attempting to influence the selection, 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." 26 U.S.C. § 527(e)(2). Furthermore, the Supreme Court recognized in McConnell that section 527 groups are organized for "the express purpose of engaging in partisan activity," McConnell, 124 S.Ct. at 678 n.67, and 527 organizations "by definition engage in partisan political activity." Id. at 679. In light of the foregoing, Commissioner Thomas and I viewed those 527 organizations that were covered by our proposed rules – specifically, those 527s that operate to influence elective offices -- as meeting the Supreme Court's "major purpose" test per se.[2] Any other conclusion is difficult to square with the fact that the 527 groups that would have been subject to the proposed regulations hold themselves out and legally operate as electorally-oriented organizations.

Fifth, the Supreme Court in McConnell indicated that the government has the power – indeed the obligation – to prevent circumvention of the campaign finance laws. The Court stressed that the First Amendment does not require the government "to ignore the fact that 'candidates, donors, and parties test the limits of current law,'" and that "these interests have been sufficient to justify not only contribution limits themselves, but laws preventing circumvention of such limits." McConnell, 124 S.Ct. at 661 (internal citations omitted). Significantly, the Court reiterated that "all Members of the Court agree that circumvention is a valid theory of corruption." Id. (quoting FEC v. Colorado Republican Federal Campaign Comm., 533 U.S. 431 at 457-56 (2001)).

Section 527 organizations are currently being used to replicate, with soft money funds, the attack ads and partisan voter mobilization activities that the national parties used to finance with soft money prior to BCRA. The regulations that Commissioner Thomas and I proposed sought to prevent any potential circumvention of BCRA by requiring 527 groups that engage in such activities -- which the Court found in McConnell to have a "dramatic effect" on federal elections -- to register with the Commission and abide by the hard dollar limits of federal law.

In addition to our proposed regulations concerning political committee status, Commissioner Thomas and I also sought to significantly strengthen the Commission's outmoded allocation regulations for outside organizations that are political committees under federal law. We believed decisive action in this area was necessary given the manner in which many outside groups are currently operating and the Supreme Court's admonitions in McConnell. Specifically, the Court in McConnell sharply criticized the Commission's pre-BCRA allocation rules for political parties, concluding that "FEC regulations permitted more than Congress, in enacting FECA, had ever intended." McConnell, 124 S.Ct. at 660 n.44. The Court also found that the Commission's allocation rules "invited widespread circumvention" of the law. Id. at 661.

Current Commission allocation regulations set no hard dollar minimum for groups that are involved in both federal and non-federal elections, no matter how much of a group's activities are devoted to influencing federal elections. In addition, groups can

[2] 527 organizations that operate solely to influence non-elective offices were exempted from the proposed rules. See footnote one, supra.

easily manipulate the current allocation regulations such that their hard dollar ratio is at or near 0% and their soft dollar ratio is at or near 100%. In fact, one prominent 527 organization today, whose publicly avowed purpose is to defeat President Bush, is reportedly operating with an allocation split of 98% soft money and 2% hard money. By way of comparison, when the national political parties aired issue ads and conducted get-out-the-vote operations prior to BCRA, they could legally use only 35% soft money to finance such activities. Thus, some 527 groups today are using two to three times the proportion of soft money that the national parties could legally use on the same activities prior to BCRA.

The allocation rules that Commissioner Thomas and I sponsored would have addressed this phenomenon and required all independent groups that are political committees to pay for their activities with at least 50% hard dollars. The 50% hard-dollar minimum would have applied to a group's administrative expenses, salaries and overhead, partisan voter mobilization activities, and any public communications that promote or attack a political party. In addition, Commissioner Thomas and I sought to codify in the regulations the Commission's recent advisory opinion issued to Americans for a Better Country. See Advisory Opinion 2003-37. This would have established in the regulations the requirement, among other things, that political committees use hard dollars to pay for public communications that promote or attack federal candidates.

The FEC declined to enact the allocation regulations that Commissioner Thomas and I proposed in a 3-3 vote, which was only one vote short of the number needed for adoption. It appears there could be greater consensus on the FEC to take decisive action in the future to tighten the Commission's currently porous allocation rules. Such corrective action is critically needed in light of current practices.

Commissioner Thomas and I proposed a narrowly tailored set of rules that sought to significantly strengthen the Commission's political committee and allocation regulations. It is unfortunate that the Commission decided not to issue any regulations in these areas for the 2004 election. I fear that, as a result, we will likely see vast sums of soft money spent through Democratic and Republican 527 organizations alike this year, perhaps reaching the level of hundreds of millions of dollars. That being said, the Commission has acted for 2004, and I accept the Commission's decision. I will continue to urge the Commission to take decisive action on these issues for the 2006 election and beyond. I look forward to working with all of my colleagues to try to forge a consensus.