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HEARING ON FEDERAL ELECTION COMMISSION AND 527 GROUPS

HEARING

BEFORE THE

COMMITTEE ON HOUSE ADMINISTRATION HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

HEARING HELD IN WASHINGTON, DC, MAY 20, 2004

Printed for the Use of the Committee on House Administration

U.S. GOVERNMENT PRINTING OFFICE

94–496 WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
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Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

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FEC AND 527 GROUPS

THURSDAY, MAY 20, 2004

HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The committee met, pursuant to call, at 4:30 p.m., in room 1309, Longworth House Office Building, Hon. Robert W. Ney (chairman of the committee) presiding.

Present: Representatives Ney, Ehlers, Mica, Doolittle, Larson and Brady.

Staff Present: Jeff Janas, Professional Staff Member; Paul Vinovich, Staff Director; Matt Petersen, Counsel; George Shevlin, Minority Chief of Staff; Tom Hicks, Minority Professional Staff Member; Charles Howell, Minority Chief Counsel; and Matt Pinkus, Minority Professional Staff Member.

The CHAIRMAN. The committee will come to order. I want to thank the Chair and the Commissioners for coming today. The committee is meeting today to hear from four members of the Federal Election Commission about the legal and regulatory framework governing nonparty political organizations, more commonly known as the 527s, so called because of the section of the Tax Code under which they are registered.

Earlier this year the FEC commenced a rulemaking to determine whether its current regulations needed to be revised so as to apply to political organizations like 527 groups that had heretofore claimed to be exempt from Commission rules.

The committee does look forward to hearing directly from the Commissioners regarding last week's developments on the rulemaking, but before we do, I first want to look back at the developments, I think, that led to the proliferation of 527 groups in the first place.

Over 2 years ago Congress enacted, as we all know, Bipartisan Campaign Reform Act, or BCRA, which the President signed into law. Among other things, BCRA prohibited the national political party committees from soliciting and receiving soft money, the unlimited and largely unregulated contributions from labor unions, corporations and wealthy individuals. In addition, BCRA placed restrictions on issue ads mentioning candidates for Federal office that run in the days leading up to an election.

Those who champion BCRA on both sides of the aisle asserted that the new law was necessary to cleanse the Federal campaign finance system from the allegedly corrupting influence of soft money. I say allegedly, because obviously I didn't support BCRA

then, and I wouldn't support it today, and wouldn't support it tomorrow.

And in fact, I worked with my friend Al Wynn, a Democrat from Maryland, to block its passage. We had an alternative, I think, that was fair and balanced, and gave the political parties, with some limitations, the options to use soft money for overhead and still allow for voter registration and a lot of other things that I happen to believe. You can call me old-fashioned, but I kind of like the first amendment freedom of speech, expression and association.

Moreover, I believe that BCRA would do serious damage to our democratic process by weakening the political parties and shifting more power and influence to unaccountable, ideologically driven outside groups. And again, if they are operating, and the parties can operate, then I think it is a level playing field.

As I point out repeatedly during the floor debate, BCRA does not ban soft money, notwithstanding repetitive claims to the contrary by the law's supporters; rather BCRA merely redirected soft money to less accountable groups. Unfortunately, I was unsuccessful in efforts to defeat BCRA.

Before the ink on the President's signature had dried, new groups had begun to act like vacuum cleaners, picking up soft money as possible situations began to proliferate, I think, right before our eyes.

Immediate reports indicated that organizations whose primary purpose was to function as a shadow political party committee were being established with the apparent stamp of approval by relevant Federal officeholders and party officials to solicit and spend soft money in support of parties, candidates and their agendas. Most of these groups were established for the express purpose of defeating President Bush in November of 2004, which is particularly stunning, considering that many Democrats, and some Republicans, had championed the efforts to, quote, ban soft money.

However, data compiled by the Center For Responsive Politics notes that the top 24 individual soft money donors of the current election cycle are giving exclusively to Democrat-leaning 527 groups, but, I think, after today you probably will also see them giving it to Republican soft money-leaning groups. I am trying to be fair and balanced, not to steal something from that show on TV. [Laughter.]

But the committee held a hearing last November to provide an opportunity for representatives from prominent 527 groups to explain their activities, and to gain a greater understanding about the extent to which BCRA has reallocated political power and resources in the United States.

The representatives of the Republican-leaning groups showed up. The representatives of the Democrat-leaning groups who had been invited refused to attend. Those who refused to testify then stonewalled, I think, the committee's legitimate attempts to receive more information about the activities of the groups that they head.

Eventually after the committee had to consider exercising subpoena power to gain a measure of cooperation, these groups gradually produced a limited number of documents, almost all of which were already publicly available on the Internet and elsewhere.

At about this same time, the FEC initiated a rulemaking to examine whether its rules ought to be amended so as to regulate 527 groups, especially in wake of the Supreme Court's McConnell v. FEC opinion that upheld most of BCRA. I welcome this effort by the FEC to bring clarity to an area of the campaign finance law where there has been a great deal of confusion. The committee decided to postpone its inquiry into the activities of these 527 groups and their efforts to influence Federal elections to allow the FEC an opportunity to thoroughly look into the issue.

Over the past few months, the FEC has addressed proposed rules, held hearings at which interested parties commented on the wisdom or the defectiveness of the proposed rules, and received over, I believe—and correct me if I am wrong—100,000 written comments from concerned groups and citizens. Comments were submitted by approximately 130-some Members of the House on the Democrat side. One of the passages from the letter reads: "there has been absolutely no case made to Congress or a record established by the Commission to support any notion that tax-exempt organizations and other independent groups threaten the legitimacy of our government when criticizing its policies. We believe instead that more, not less, political activity by ordinary citizens and the associations they form is needed in our country."

Let me say, first of all, it sounds like I probably should have signed that myself, but I am glad to see that members of the other party have discovered the importance of protecting the free speech and the associational rights of our citizens. This is certainly a far cry from some of the rants about the evils of soft money and special interests that were made during BCRA by members of both parties. However, I wish that we would have found this voice to support Congressman Wynn and I at that time, then maybe we could have gotten more votes for our proposal.

Nevertheless, we are now stuck with a complex and convoluted law that doesn't ban or even reduce soft money in the Federal political system, but does impose significant burdens on individuals and groups seeking to be involved in the political process, and especially, I think, in the area of voter registration, which is one of the largest problems I had with BCRA, especially since public communications encouraging people to register are cut off so close to the election when people are really interested in registering to vote.

So we commend the FEC's efforts to inform the regulated community regarding what activities BCRA permits and what activities it forbids, especially with respect to 527 groups. I must confess that my friends on the other side of the aisle aren't the only ones who have had a sudden change of heart about the merits of various campaign finance regulations. Members of my own side of the aisle who oppose BCRA now wish to see it applied broadly so as to hobble the groups that are supporting their political opponents.

It is a strange day indeed when you find the Democrats defending unfettered spending as a legitimate political right and the Republicans want to prohibit it by a regulatory agency, yet that is where I think we find ourselves.

Accordingly, last week's FEC decision to forego regulation of these groups with the election cycle was jeered by some, and obviously cheered by others. I hope the FEC process will provide guid-

ance to the regulated community, some of whom may have felt paralyzed to act because the legal landscape remained too murky for them to operate comfortably, or operate in a pattern they felt might have potentially been illegal.

Though the 90-day delay leaves open the questions of what the rules will be in the next election cycle, there should be no mistake that a decision has been made for this cycle (by the fact that no decision was made), and I will ask some questions on that today. Therefore, I am anxious to hear from the Commissioners themselves regarding the rulemaking. Furthermore, I look forward to hearing the Commissioners' talk on the permissible range, frankly, of activities in which 527 groups may engage.

I understand, of course, that the Commissioners won't be able to comment on the specific actions of particular groups currently subject to ongoing FEC enforcement actions, and I respect that, and obviously yield to the proper nature of not asking you to do that.

One final comment before I recognize our other Members: some of those who support campaign finance reform have argued that last week's action is a demonstration of the deficiencies of the FEC and provides evidence of the need to restructure that agency. These supporters are understandably chagrined by the soft money groups that have made, I think, a mockery of the law that they championed. They are faced with two choices: Admit, number one, that they were wrong and the bill was a mistake, or it is a failure; or number two, that they have to attack the FEC.

Number one probably, I think, is the appropriate response, not the attack of the FEC. Instead, I think they will choose number two, to attack the Federal Election Commission. We should be clear, though, that the deficiencies of this law are the responsibility of the authors and the Members who have voted for it.

I want to thank you again for coming here today. I also want to thank our Ranking Member, Congressman Larson for agreeing to the hearing and our Members for being here today.

And with that, I am going to yield to our distinguished Ranking Member, Mr. Larson.

Mr. LARSON. Thank you very much, Mr. Chairman. And I want to thank you and also thank our distinguished panelists for being here this afternoon and for holding this oversight hearing to review the Federal Election Commission's rulemaking process regarding 527 groups.

I know in conversations with the Chairman the need for additional hearings related to this issue under the committee's jurisdiction, and especially given the Chairman's major role and the outstanding role he played in the passage of HAVA, and also concerns that I think a number of Members have about the Presidential public financing fund. I am interested in hearing from the Commission about the role 501(c)(3)s may be playing in influencing elections.

To that end I would ask unanimous consent to ask that this article from the Washington Monthly be inserted as part of the record, which explores at length the——

The CHAIRMAN. Can I read it first?

Without objection.

Mr. LARSON [continuing]. The both 527s and as the relationship between 527s and 501(c)s, and the potential for one to sort of meld into the other, which I found both interesting reading, and also, I am sure, made for the complexity involved in the decisionmaking that all of you on the Commission have been asked to give.

The news media for the most part has been able to focus on 527s, because they have disclosure requirements, which makes information readily available. But some groups are using 501(c) status as a way not to disclose their donors' activities, and these groups may be a bigger influence on elections than 527s are perceived.

One group, Americans for Job Security, by all appearances is raising millions of non-Federal dollars for the sole purpose of defeating Democrats. This is done without the same donor disclosure rules that 527s follow. While we are here to talk about the FEC rulemaking process, I am interested in hearing from the witnesses how they can bring these groups that have been called the shadow Republican Party into the light as well.

Again, as I have indicated, I would like to submit this article for the record.

[The information follows:]

Washington MONTHLY

May 2004

Bush's Secret Stash

Why the GOP war chest is even bigger than you think.

By Nicholas Confessore

Like the natural world, campaign finance is governed by inescapable laws of physics. One is that what goes up usually keeps going up: During every presidential election, the two parties manage to raise more money than they did the last time around. Another is that any given action rarely produces an equal and opposite reaction. Every four years, the GOP outraises and outspends the Democratic Party, usually by tens of millions of dollars.

Until recently, the Democrats could even the scales somewhat by raising "soft" money, the unlimited contributions from rich individuals, corporations, and labor unions that flowed to both parties in roughly equal amounts during the 1990s. But two years ago, the McCain-Feingold Act prohibited parties from raising soft money, a goal long sought by liberal newspaper editorialists and good-government activists. Ever since, the Democratic Party's fundraising has lagged even farther behind the GOP's than usual.

But last summer, a coterie of labor campaign operatives, liberal advocacy-group leaders, and old Clinton hands began exploiting one of McCain-Feingold's loopholes. They organized several groups under Section 527 of the tax code to raise and spend the soft money which the Democratic Party no longer could. Scores of wealthy liberals, among them George Soros, have together given tens of millions of dollars to these "527s," which have generic names like Americans Coming Together and Voices for Working Families. And in March and April, these groups spent a chunk of the money on issue ads attacking Bush, just as Bush was spending $50 million from his campaign war chest to attack Kerry. Though Kerry has raised $85 million worth of the $2,000 and under "hard money" donations permitted under McCain-Feingold--a Herculean amount for a Democrat--Bush has raised more than twice that. Without help from the 527s, the Kerry campaign would probably be in big trouble.

The GOP, of course, is well aware of this. Which is why its lawyers have filed legal challenges with the Federal Election Commission to get the 527s shut down, charging that this "Democratic shadow party" represents a "conspiracy" to "illegally" pump soft money into the presidential race. Such campaign finance groups as Democracy 21, the Campaign Legal Center, and the Alliance for Better

Campaigns--which once butted heads with Bush over his opposition to McCain-Feingold--have joined the battle against this new Democratic weapon, as have anti-soft money editorial boards at newspapers across the country. In an editorial titled "Soft Money Slinks Back," *The New York Times* inveighed against "political insiders" who were "carving a giant loophole" in election law, while the *Los Angeles Times* called upon the FEC to "issue tough new rules" against the 527s. The Boston Globe was even more acerbic, raging in April that the commission "has all but declared itself impotent to act during this election cycle."

Thus chastened, the FEC last month held two days of hearings on the issue. But a curious thing happened. Instead of coming in for the kill, the GOP's lawyers who were invited to testify refused to appear. Why did they pass up an opportunity to potentially cripple the Kerry campaign, an opportunity for which they had implored the commission for months? Because the FEC had decided that, as long as it was trying to figure out what kind of political activities were legal for 527s, it should also take a look at another category of organizations, known as "501(c)s." Many well-known groups--from AARP to the Nature Conservancy--are set up under Section 501(c) of the tax code, and are also allowed to raise and spend donations for political purposes, including running television "issue ads" that mention candidates. And such 501(c)s as the National Rifle Association and the National Right to Life Committee are vital allies of the GOP; they raise money mostly from their members and use it to buy ads or direct mail supporting the position of one candidate (usually the Republican) or attacking the position of another (usually the Democrat) on issues important to the group. The GOP lawyers had an obvious interest in not wanting the FEC to do anything that might cripple these groups' ability to help the party.

But they were also eager to protect a whole other category of 501(c)s--one that has garnered little attention from campaign finance reform groups or reporters covering the 2004 election. Like the Democratic 527s, these groups have innocuous-sounding names: Americans for Job Security, for example, and Progress for America. Like the 527s, these groups are staffed by veteran party operatives and, in practice, are wholly or primarily devoted to getting their side's candidates elected. And like the 527s, they may raise and spend unlimited amounts of soft money on radio and television ads, direct mail, and voter contact efforts.

There are, however, a few key differences that make 501(c)s a far more insidious vehicle for soft money. The law does not require that they disclose how much they spend until well after Election Day. Worse, they don't have to disclose who their donors are at all. Even foreign governments can in theory give money, with no questions asked. No one knows how much the Republican shadow party has raised or will spend this year. But the tens of millions they spent in 2002 were instrumental in putting the Senate back in GOP hands--and there's every possibility they could help push Bush and the Republicans over the line come November.

They've got issues

One of the peculiarities of Washington's influence industry is that large parts of it

aren't actually in Washington. If you wanted to learn what issues are important to, say, the American Academy of Physician Assistants or the National Rural Letter Carriers Association, you'd have to journey beyond the district line, and in particular to Alexandria, Va., a small suburb located a few miles down the Potomac. Not too long ago, Alexandria was a fading industrial center, its economy kept afloat by tourists and antique-hunters treading the quaint brick sidewalks of colonial-era Old Town. But beginning in the early 1990s, hundreds of trade associations--drawn by the cheap office space, city-subsidized financing, and easy access to Capitol Hill--began setting up shop here. So many trade associations have flocked here during the past decade, in fact, that they've become the city's second biggest industry, producing almost as many jobs as the local tech businesses.

One of the recent arrivals is Americans for Job Security, located in a tidy brick building on the northern border of Alexandria's new white-collar sprawl. "It's so much cheaper out here than being downtown," says AJS's president, Michael Dubke, as he greets me at the front door and leads me into a nondescript conference room. Like many of its neighbors, AJS is organized as a 501(c)(6), which is to say a not-for-profit "business league" or trade organization. But as trade organizations go, it is rather unusual. Not only is the group's membership--several hundred individuals, corporations, and other trade organizations--secret, but by all appearances, the members don't share a particular line of business. Despite a budget of millions of dollars a year, AJS doesn't have the kind of public relations or policy staff that, say, the Chamber of Commerce does. In fact, Dubke, a cheerful, clean-cut 33-year-old with the rangy build of an ex-jock, is AJS's sole employee. The group has no Web site, puts out no policy briefs or press releases, and does no lobbying on the Hill.

About the only thing that AJS does is buy television, radio, and newspaper advertisements--lots of them. This is a source of pride for Dubke. "Ninety-five percent of the money that we take in membership [dues] is spent on our grassroots lobbying," he tells me, like a discount carpet salesman bragging about his low overhead. "We spend our money on product." During the hotly contested 2000 race, widely regarded asa watershed election for issue advertising, AJS spent about $9 million on political ads. A chunk of the money went towards attacking Democratic presidential candidate Al Gore for his prescription-drug plan, with ads airing in such key media markets as Spokane, Wash., and Tampa, Fla. (All told, according to a study by the Brennan Center, AJS was the most active outside group supporting Bush in 2000.) But AJS didn't stick to the presidential race. It also spent millions of dollars on behalf of Republican candidates in closely-fought Senate races in Michigan, Nebraska, and Washington. During the midterm elections two years later, with Democratic control of the Senate at stake, AJS dumped another $7 million into advertising, again mostly in key races, notably Minnesota's.

Traditional 501(c) groups run ads on a narrow set of issues important to their members. This year, for instance, the NRA might run ads attacking candidates who support extending the ban on assault weapons, while the Sierra Club might air

spots against candidates who support drilling in the Arctic National Wildlife Refuge. AJS, by contrast, is more catholic in its interests. During the last two election cycles, the group's campaign ads have addressed taxes, education, tort reform, prescription drugs, immigration, dam removal in the Pacific Northwest, even federal regulation of drinking water--"basically anything we label a 'pro-paycheck' message," Dubke remarks.

Much like a political party, AJS only seems to lurch into action at election time, even if one of its many core issues is being debated in Congress at some other time. Traditional Washington trade associations expend most of their resources trying to affect the legislative process, but Dubke sees this as a waste of time. "Our main purpose is to get these public policy issues out into the debate," he told me. "I have yet to have somebody tell me when is a better time to talk about public policy issues" than during campaign season.

Aside from timing, about the only thing AJS's ads have in common is that nearly all of them attack Democrats, usually those in tight races. And although groups running "issue ads" are not supposed to coordinate with candidates, in at least some cases AJS appeared to do just that. During 2000, for example, AJS launched a massive ad campaign in support of embattled incumbent Sen. Spencer Abraham (R-Mich.). As *Newsweek* reported that year, funding for the ads came from the tech industry, which cut checks to AJS at the request of then-Senate Majority Leader, Trent Lott (R-Miss.), Abraham's mentor. In 2002, the group ran ads in Alaska, where incumbent Republican Sen. Frank Murkowski was in a tight race with the state's Democratic lieutenant governor. According to published reports at the time, AJS's ads followed a conference with Murkowksi's political consultant and used the same themes that Murkowski's own campaign was employing.

The other shadow party

By all appearances, AJS's main purpose is rather like that of a Democratic-leaning 527. Just as the 527s collect soft money from traditionally pro-Democratic interests and spend it to help defeat Republicans, AJS collects soft money from traditionally pro-Republican interests and spends it to defeat Democrats--but without facing any of the scrutiny the 527s do. Indeed, that's the whole idea. The Democratic shadow party has received massive press coverage during the past year, their donors demonized as shady fat cats by Bush surrogates in the conservative press. Contributors can give to the Republican 501(c)s, however, with no fear of being outed. Dubke allows that his donors include corporations, other trade associations, and individuals, but won't disclose their names (though a few, including the American Insurance Association and the American Forest and Paper Association, have gone public with their involvement). It makes sense that corporations and trade groups that give to AJS might not want their names to get out. With business on Capitol Hill, and hence a need to court Democratic members of Congress, they don't necessarily want to be seen contributing to a group that might be targeting some of those same Democrats. As Dubke puts it, "We have the ability to say things that other people might be afraid

to say because they have other agendas and other interests."

Another GOP soft-money conduit is Progress for America, a self-described "national grassroots organization" that listed zero income from membership dues on its last tax return. Like many such groups, it is run by a handful of operatives with a half-degree of separation from the GOP. Its founder is Tony Feather, the political director of President Bush's 2000 campaign. Feather's own consulting firm handles direct-mail and get-out-the-vote contracts for Bush's reelection effort, the Republican National Committee, and the party's congressional campaign committees. The former political director of one of those committees, Chris LaCivita, is now executive director of PFA. The group's Web site used to describe its purpose as "supporting Pres. George Walker Bush's agenda for America," but that slogan, apparently too brazen to pass legal muster, has since been changed; now PFA supports "a conservative issue agenda that will benefit all Americans." The group hopes to raise up to $60 million in soft money this year, and has enlisted the help of some prominent Republicans to do so, including Bush's campaign manager, chief campaign counsel, and party chairman. Thus, when Bush's lawyers accuse the Democrats of organizing a "soft-money conspiracy," they know what they're talking about.

Other GOP soft-money front groups include the American Taxpayer Alliance, run by Republican operative Scott Reed, and two groups chaired by former RNC lawyer Christopher Hellmich, Americans for Responsible Government and the National Committee for a Responsible Senate. Then there's the benignly-named United Seniors Association (USA), which serves as a soft-money slush fund for a single GOP-friendly industry: pharmaceuticals. USA claims a nationwide network of more than one million activists, but, just like Progress for America, listed zero income from membership dues in its most recent available tax return. USA does, however, have plenty of money on its hands. During the 2002 elections, with an "unrestricted educational grant" from the drug industry burning a hole in its pocket, the group spent roughly $14 million--the lion's share of its budget--on ads defending Republican members of Congress for their votes on a Medicare prescription-drug bill.

So how much will these groups spend on behalf of the GOP this year? There's no way to know now, because, unlike 527s, these 501(c)s won't have to disclose their 2004 fundraising activities until 2005 at the earliest. But it's a pretty fair guess that they'll give their Democratic doppelgänger a run for its (soft) money. According to an investigation by *The Washington Monthly*, just three of the pro-GOP groups--Americans for Job Security, the United Seniors Association, and the American Taxpayer Alliance--spent close to $40 million during 2002. And that was an off-year election. By contrast, the eight Democratic groups currently being sued by Bush's reelection campaign have raised about $50 million so far during the 2004 presidential cycle.

Primary colors

To the average person, it might seem that if the Democratic 527s are a cynical

mechanism for evading the ban on soft money, then surely the GOP-leaning 501(c)s are even more so. How, then, does the Republican shadow party get away with it? First, while the 527s admit that their ads are meant to affect elections, the 501(c)s do not. Instead, they insist that they're running "issue ads" intended merely to rouse debate about specific issues, not get anyone elected or defeated. Legally, this is considered "grassroots lobbying," an activity on which 501(c)s can spend unlimited amounts of money.

Now, the IRS code wisely allows 501(c)s to spend some of their money on ads meant to affect elections. Otherwise, traditional membership groups like the NAACP or Concerned Women for America wouldn't be allowed to make their voices heard on a candidate's position on, say, voting rights or gay marriage. So the second legal test is whether a group's "primary purpose" is to affect elections. The Democratic 527s admit up front that electioneering is their primary purpose; indeed, that fact is built into the legal definition of a 527. But to merit 501(c) status, the GOP groups must--and do--insist that electioneering is not their primary purpose. Indeed, like most of the GOP shadow groups, AJS reports on its 2000 returns spending zero dollars on political activity.

This is a curious claim for a group like AJS to make, considering it spends 95 percent of its budget on campaign-season ads that mention candidates. Indeed, were you to compare almost any Democratic 527 spot to one run by the Republican 501(c), you would be hard pressed to explain why one is intended to influence an election and the other is not. Following the 2000 elections, University of Wisconsin political scientist Kenneth Goldstein surveyed the issue-ad campaigns run by dozens of outside groups. As part of the study, his student volunteers viewed a series of AJS spots and answered the question, "In your opinion, is the purpose of the ad to provide information about or urge action on a bill or issue, or is it to generate support or opposition for a particular candidate?" They found without exception that what they had seen fell into the second category. When I mentioned the study to Mike Dubke, he responded, "I think that's ridiculous."

So who should decide whether AJS's ads are electioneering (and, hence, whether AJS's primary purpose is or is not political)? Legally, it's up to the Internal Revenue Service. But here, the GOP has yet another advantage. Because when it comes to checking up on nonprofits, the IRS makes the notoriously lax FEC look like a band of jackbooted thugs. Given that there are 1.4 million tax-exempt organizations in the United States, and enough personnel to inspect about 2,000 of them per year, the chance of a random audit is about one in 700. In practice, the IRS rarely investigates a nonprofit unless somebody files a complaint. And even then, privacy concerns constrain the IRS from revealing whether or not it has opened an investigation, and indeed whether or not it has come to any judgment.

But even if the taxmen did decide to take a closer look at AJS, it would still be in little danger of an unfavorable ruling. Since the IRS was never intended to police elections, the rules governing political activity by nonprofits are extraordinarily

vague. In fact, there is no bright-line test for deciding whether an activity is political in nature or whether a 501(c) organization is "primarily" engaged in electioneering activities, and thus in violation of its tax status. Instead, IRS auditors judge organizations' activities on more than a dozen criteria and decide whether or not all the "facts and circumstances" of those activities taken together "tend to show" a violation. In other words, the process is completely subjective.

Not surprisingly, this subjectivity makes the auditing process vulnerable to political pressure. And since taking control of Congress in 1995, the GOP has done its best to frighten the IRS away from snooping around. In 1998, Senate Republicans, hoping to galvanize the anti-tax vote for the upcoming elections, staged an elaborate series of hearings featuring horror stories of abusive behavior by IRS agents. A review by the General Accounting Office would later conclude that "no evidence was found of systematic abuses by agents." But by then Congress had passed legislation that hamstrung the agency's enforcement efforts. "IRS audit activity fell off dramatically across the board" after the hearings, notes Marcus Owens, a former director of the IRS's Exempt Organizations Division. "While it has recovered somewhat for individuals and corporations, it has not recovered for tax-exempt organizations."

When the IRS does try to step up to the plate, the agency usually gets smacked down. During the late-1990s, the IRS decided to revoke the tax exemption of a charity run by former Republican congressman Newt Gingrich, after finding that Gingrich had used it as a slush fund for his political action committee. But later, under pressure from a GOP member of Congress, the IRS reopened the case and restored the group's tax exemption.

Cop out

It may not be surprising that, with President Bush in the White House and Congress run by his fellow Republicans, the IRS isn't going after the GOP's shadow party. A greater mystery is why the press and campaign finance groups haven't blown the whistle, even as they pound away at the Democrats' 527s. One reason is that--as with most things--the GOP "won the early game to define the issue," observes Simon Rosenberg of the New Democratic Network, a 527 which runs electioneering ads. "They convinced reporters that this was only about 527s." Another reason is that reformers in Washington are often like the drunk who looks for his keys not where he thinks he dropped them, but under a streetlamp, where the light is better. Because 527s must disclose their donors and expenditures every quarter, it's easier for political reporters and watchdog groups to blow the whistle on them in real time, issuing reports and press releases about the latest soft-money outrage. The 501(c)s disclose virtually nothing--and by the screwy rules of Washington, no data, no foul. "When it comes to 501(c)s, the information is so sparse that hardly anyone has ventured into this area," says Craig Holman of Public Citizen, one of the few groups that tries to keep tabs on 501(c) political activity.

Holman suggests that a first step towards minimizing this abuse is to require

501(c)s to be at least as transparent as 527s: They should disclose their donors and electioneering expenses quarterly, and the IRS should make that information available on the Web. This disclosure solution probably makes more sense than what the FEC seemed to be contemplating in April: Banning all 501(c)s from using any soft money for any political purpose, a move that might have, for example, made it impossible for nonprofits to run non-partisan voter registration drives. Not surprisingly, the FEC has backed off that idea and now seems inclined to take no action against either 501(c)s or 527s, at least until after Election Day. That's good news for the Kerry campaign, though the GOP's campaign of harassment may well have scared off some liberal donors. But it's great news for the Bush campaign, since it means that groups like AJS can continue to work their magic under the radar with far less oversight than Democratic 527s.

Should the Republican shadow party give Bush the extra artillery he needs to prevail against Kerry, the newspaper editorialists and good-government activists may someday regret the fact that they decried the Democratic shadow party while blithely ignoring the Republican version. Not because it may help get Bush reelected (what do they care?) but because it will drive the whole soft-money political economy deeper underground. Should Kerry lose, the Democratic operatives running 527s may conclude that there's little value in declaring themselves openly as electioneering outfits. Instead, they'll likely transmogrify their groups into 501(c)s. Nobody will be able to see how much money George Soros gave this quarter, or figure out who sponsored that $500,000 ad campaign in the St. Louis suburbs. Soft money won't disappear. It will just become invisible.

Additional reporting for this article was provided by Jason Stevenson and Kathryn Williams.

Mr. LARSON. 527s are named after a section of the Internal Revenue Code that specifies the tax treatment accorded political organizations and tax-exempt organizations which make political expenditures. Congress, as was pointed out by the Chair, addressed 527s twice in the last 4 years. In 2000, we passed legislation that required all 527s that expect to have gross receipts of over $25,000 during a taxable year to register with the Internal Revenue Service within 24 hours of their formation. They were not required to report to the FEC. These 527s are then subject to the public disclosure and review requirements of the IRS, and if they meet additional requirements, they are subject to public disclosure and review requirements of the FEC as well.

I note that our distinguished colleague Mr. Doolittle has just arrived, and Roll Call on May 17, he said, I appreciate today's FEC decision which applied a strict constructionalist approach to the law and rendered this decision in a fair and impartial manner.

I agree with Mr. Doolittle.

He went on to say, the ruling did not attempt to make law as the petitioners had sought, but instead followed the law as it was written by Congress. He then added, as abysmal as that law may be.

Mr. DOOLITTLE. Which it definitely is.

Mr. LARSON. I just want today to make sure I gave you full credit, but I wanted you to know that in the spirit of what you had to say, I was in agreement, not necessarily with your final comment.

But in 2002, we passed legislation which was intended, among other things, to reduce unnecessary and duplicative Federal reporting by certain State and local political committees where the information was already required to be reported and be publicly disclosed under the State law.

Federal courts have not been silent on the matter of 527 disclosure requirements. On Christmas Eve of last year, the U.S. Court of Appeals for the Eleventh Circuit unanimously reversed the district court ruling. In Mobile Republican Assembly v. U.S., the court of appeals held that the disclosure requirements do not impose an unconstitutional penalty on 527s. The disclosure requirements are merely a condition precedent to receiving a Federal subsidy by way of a voluntary tax exemption.

Last December in McConnell v. The Federal Election Commission, the Supreme Court clearly stated that placing limits on raising of unregulated corporate, union and large individual contributions donated by organizations and individuals with general or specific legislative objectives would not have the same application to broader citizen-based interest groups. Any entity that believes, feels that these disclosures requirements are too severe may choose to organize differently. While they may be subject to higher corporation taxes and additional regulations, it is their choice.

Congress is free to impose additional regulations on 527s if it can be clearly demonstrated that these groups have the same corrosive influence on the electoral process.

I would encourage a cost approach to the imposition of additional restrictions. Political free speech, as has been noted by the Chair, is the lifeblood of any vibrant democracy. Congress should not restrict individuals from donating money to groups like the NRA for

use in publishing a legislative report card on the voting records of Members of Congress, nor restrict the National Association For the Advancement of Colored People from spending contributed funds to conduct voter registration drives. Arguably these types of activities amount to public service functions, and Congress should encourage these citizen-based activities and not stymie groups from informing the public about their position or from getting more citizens to participate in our democracy.

I supported BCRA because it severed the link between undisclosed and unregulated political contributions known as soft money and the corrosive effect such contributions have on the credibility of government, on Federal officeholders, on candidates and their parties.

To say that the law, as the Chairman pointed out, is difficult to interpret and gray and vague in many areas is an understatement and, too, I think, further complicates the task that the FEC has at hand, but, again, is why I would urge caution in moving forward.

The FEC voted unanimously last week to accept the general counsel's recommendation to act within the next 90 days. I am interested in hearing from the Commissioners on what will happen in that time frame, and if that is enough time to issue any changes.

I would like to bring to the Commission's attention that when Congress enacted BCRA, we chose to defer the effective date to the following election cycle. This decision allowed all affected groups and parties to have sufficient time to transition from existing rules to the new rules under BCRA without distorting the electoral process in midcycle, where we find ourselves currently.

The FEC should continue to take whatever time is needed to adequately consider and craft any proposed changes, but with an eye toward avoiding disruptions during the present election cycle which would affect political committees, organizations and candidates.

I look forward to hearing how the Commission reached their decisions and what the future may hold for 527s. Thank you, Chairman.

The CHAIRMAN. I want to thank the Ranking Member.

[The statement of Mr. Larson follows:]

Oversight Hearing on the Federal Election Commission and the 527 Rulemaking Process

May 20, 2004
4:00 PM
1310 Longworth House Office Building

REP. JOHN B. LARSON'S OPENING STATEMENT

I want to thank the Chairman for holding this oversight hearing to review the Federal Election Commission (FEC) rulemaking process regarding 527 groups.

The news media has been able to focus on 527s because they have disclosure requirements which make information readily available. But some groups are using their 501 (c) status as a way not to disclose their donors or activities. And these groups may be a bigger influence on the election than 527s are perceived. One group, Americans for Job Security by all appearances is raising millions of non-federal dollars for the sole purpose of defeating Democrats.

This is done without the same donor disclosure rules that 527s follow. While we are here to talk about the FEC's rule making process, I am interested in hearing from the witnesses how we can bring these groups that have been called the "Shadow Republican party" out into the light. I would like to submit this article for the record.

527s are named after a section of the Internal Revenue Code that specifies the tax treatment accorded political organizations and tax-exempt organizations which make political expenditures. Under Section 527, all political organizations are tax-exempt for purposes of federal tax law. Section 527 was added to the Tax Code in 1975, thus 527s have been legally constituted operating entities for nearly 30 years.

Congress has addressed 527s twice in the last four years.

In 2000, we passed legislation requiring that all 527s that expect to have gross receipts of over $25,000 during a taxable year, register with the Internal Revenue Service (IRS) within 24 hours of their formation, if they were not required to report to the FEC. These 527s are then subject to the public disclosure and review requirements of the IRS, and if they meet additional requirements, they are subject to the public disclosure and review requirements of the FEC as well.

In 2002, we passed legislation, which was intended, among other things, to reduce unnecessary and duplicative Federal reporting by certain State and local political

committees, where the information was already required to be reported and to be publicly disclosed under State law. Thus, most state and local political organizations are exempt from registering, reporting their contributions and expenditures, and filing disclosure forms with the IRS.

The Federal Courts have not been silent on the matter of 527 disclosure requirements. On Christmas Eve of last year, the U.S. Court of Appeals for the 11th Circuit unanimously reversed the district court ruling in *Mobile Republican Assembly v. U.S.*, No. 02-16283. The Court of Appeals held that the disclosure requirements do not impose an unconstitutional penalty on 527s. The disclosure requirements are merely a condition precedent to receiving a Federal subsidy by way of a voluntary tax exemption.

Last December, in McConnell v. Federal Election Commission, the Supreme Court clearly stated that placing limits on the raising of unregulated corporate, union, and large individual contributions, donated by organizations and individuals with general or specific legislative objectives, would not have the same application to broader, citizen-based interest groups:

> "...BCRA imposes numerous restrictions on the fundraising abilities of political parties, of which the soft-money ban is only the most prominent. Interest groups, however, remain free to raise soft money to fund voter registration, GOTV {Get-Out-The-Vote} activities, mailings, and broadcast advertising (other than electioneering communications)." *McConnell v. Federal Election Commission, 540 U.S. ____ (2003)(slip op. 80), {bracketed words added}.*

Any entity that believes that these disclosure requirements are too severe, may choose to organize differently. While they may be subject to higher corporation taxes and additional regulations, it is their choice. The 527 disclosure and other requirements are a very small price to pay for tax favored status.

Congress is free to impose additional regulations on 527s, if it can be clearly demonstrated that these groups have the same corrosive influence on the electoral process, and on Federal policy formulation and implementation, that unions and corporations have had in the past by giving large amounts of undisclosed and unregulated dollars to politicians, whose livelihood and continuance in office often became dependent upon such contributions. However, I don't believe that the case has been made yet.

I would encourage a cautious approach to the imposition of additional restrictions. Political free speech is the lifeblood of any vibrant democracy. That is why our Federal courts closely scrutinize any effort to limit such speech. Our citizenry-at-large should be encouraged to become involved in matters of importance to them, and to speak out freely on such matters. For example, I believe that Congress should not restrict individuals from donating money to groups like the National Rifle Association for use in publishing a legislative report-card on the voting records of Members of Congress, nor restrict the National Association for the Advancement of Colored People from spending contributed funds to conduct voter registration drives. Arguably these types of activities amount to

public service functions, and Congress should encourage these citizen-based activities, and not stymie groups from informing the public about their positions, or from getting more citizens to participate in our democracy.

I supported BCRA because it severed the link between undisclosed and unregulated political contributions (known as "soft money"), and the corrosive effect such contributions have on the credibility of government, on federal officeholders, on candidates, and on their parties. I believe that the drafters of BCRA struck a very careful balance between a much needed enhancement in campaign finance regulation, and the protection of Constitutional free speech and associational rights of the citizenry-at-large.

The FEC voted unanimously last week to accept the general counsel's recommendation to act within the next 90 days. I am interested in hearing from the Commissioners what will happen in that time frame, and if that is enough time to issue any changes.

I would like to bring to the Commission's attention that, when Congress enacted BCRA, we chose to defer the effective date to the following election cycle. This decision allowed all affected groups and parties to have sufficient time to transition from the existing rules to the new rules under BCRA, without distorting the electoral process in mid-cycle. The FEC should continue to take whatever time is needed to adequately consider and craft any proposed changes, but with and eye toward avoiding disruptions during the present election cycle that would affect political committees, organizations, and candidates.

I look forward to hearing how the Commissioners reached their decision, and what the future may hold for 527s.

The CHAIRMAN. Mr. Mica.

Mr. MICA. Thank you, Mr. Chairman. I thank you for holding this meeting. We talked about it very shortly after the decision of the Federal Election Commission not to further regulate the 527s. I was disappointed by their action, because I have always viewed the Commission as being responsible for Federal elections, and they all seem to act in the past in the best interest of the electoral process.

I did not support the so-called campaign reform legislation basically because of what some of us predicted would happen, and unfortunately in our worst nightmarish dreams we couldn't have predicted a greater distortion of the Federal election process. So therefore, I am very disappointed.

I don't know if the Members have been blindfolded and kept in a dark room and fed mushrooms in the past few months, but—and just my background, I come from a bipartisan family. I have a brother who served as a Democrat for 10 years, he was an aide here for 10 years; another brother a Democrat, aide to Lawton Chiles. I have been around the process for 40 years, and I have never, ever seen anything like this, such an undermining of the Federal elections process. The campaigns have started with the 527 in the most vicious approach, and people are just totally dismayed, not just people in politics, but the average person on the street, by what has taken place.

We did not regulate soft money. We moved it around, and we have created a horrible vacuum and undermining of the process. I have never seen, again, anything like what we are experiencing now, totally out of control, and then a third more money—I read the other day a third more money into congressional races, so pouring more money in soft monies by finding circuitous routes and the Federal election process being made a sham.

I share some of the sentiments of Mr. Doolittle. The only thing you can really do is have full disclosure, and we have less disclosure of huge amounts of money being spent already. The 527s have made a complete joke of the process and the attempts to curtail soft money.

We were shown some charts here of the predicted expenditures, and I thought a half a billion dollars might be far-fetched, but I am told now that it may reach a half a billion dollars, which is absolutely outrageous, and the people do not have a clue as to where these funds are coming from. The disclosures—and if they aren't involved in a Federal election, somebody wake me up and tell me it isn't so. Again, I can't totally blame the Federal Election Commission, even though you have responsibility for regulating and overseeing the elections and also interpreting your responsibility.

I would have voted for a stricter approach to regulation without a—I can't tell you how disappointed I am. It may be too late for the 2004 elections. That is the sad part of this. And the worst part about all of this is I think that the so-called reform measure and your actions to not take a stricter approach to regulation of an out-of-control chase and display—blatant display of unregulated money in a Federal election, the worst part about this is this is undermining people's faith in our democratic process, and that is the

saddest part about what Congress has done and what you haven't done.

So with that, I yield back.

The CHAIRMAN. I thank the gentleman.

The gentleman from California, do you have an opening statement?

Mr. DOOLITTLE. You know, Mr. Chairman, I really came to hear the Commissioners, and I will make any statements I have in the context of the back and forth.

The CHAIRMAN. Thank you.

The gentleman from New York.

Mr. REYNOLDS. No, thank you.

The CHAIRMAN. Thank you.

I want to thank again all the Members and Commissioners for coming.

Today we have the Honorable Michael Toner, Commissioner, Federal Election Commission; the Honorable Scott E. Thomas, Commissioner, Federal Election Commission; the Honorable Ellen L. Weintraub, Vice Chair, Federal Election Commission; and the Honorable Bradley A. Smith, Chairman of the Federal Election Commission.

And with that I guess it is like Marvin Gaye's song "What's Going On." [Laughter.]

We will start with you, Mr. Toner.

STATEMENTS OF MICHAEL TONER, COMMISSIONER, FEDERAL ELECTION COMMISSION; SCOTT E. THOMAS, COMMISSIONER, FEDERAL ELECTION COMMISSION; ELLEN L. WEINTRAUB, VICE CHAIR, FEDERAL ELECTION COMMISSION; AND BRADLEY A. SMITH, CHAIRMAN, FEDERAL ELECTION COMMISSION

STATEMENT OF MICHAEL TONER

Mr. TONER. Thank you, Mr. Chairman, Mr. Ranking Member, members of the committee. Thank you for inviting us to testify. It is always a pleasure to be here.

Under the Federal election laws, a political committee is defined as any group that receives more than $1,000 of contributions or makes more than $1,000 of expenditures in a calendar year.

Prior to the Supreme Court's ruling in McConnell, many people believed that for independent groups not controlled by candidates, expenditures for political committee status were limited to those that were made for express advocacy, communications that on their face expressly advocate the election or defeat of a clearly identified Federal candidate.

The Supreme Court concluded in *McConnell* that the express advocacy test is not constitutionally mandated. The Court further concluded that the express advocacy test in practical application is functionally meaningless in the real world of politics, and the Court emphasized that political consultants long ago shaped political advertisements with no consideration of express advocacy; that many campaign commercials paid for by Federal candidates did not contain express advocacy; and that political consultants had generally

agreed that express advocacy was not the way to move voters in America.

Despite all of this, for over 20 years the express advocacy test has played a major role in the Commission's determination of whether an organization is a political committee that must abide by the hard-dollar limits of Federal law.

In this rulemaking the Commission is confronting the basic question of whether we are going to continue to use a legal test that has largely been discredited by the Supreme Court or whether the Commission is going to develop a regulatory test that might actually be effective and might have meaning in the political world.

I strongly believe the Commission should take the latter course, and it was in that spirit that Commissioner Thomas and I sponsored a set of regulations that would have turned on a different regulatory test for 527 organizations, namely whether they promote, support, attack or oppose a Federal candidate in their public communications.

This promote, support, attack, oppose standard was crafted by Congress and enacted into law in BCRA. The standard currently applies to public communications made by State and local political parties and candidates. The standard was upheld as constitutional in *McConnell* against a vagueness challenge. The Court concluded there 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."

The Court further went on and indicated that this standard provides clear notice as applied to political parties since, "every actions they take are presumed to be in connection with election campaigns."

We believe political parties—Commissioner Thomas and I do—that political parties and other campaign organizations and 527 groups have many of the same characteristics, particularly because 527 groups operate as a matter of law for the purpose of influencing or attempting to influence the selection, nomination, election or appointment of individuals to Federal, State or local office.

527 organizations voluntarily choose to organize under section 527 of the Code. They gain substantial tax benefits as a result of that voluntary choice, and they also hold themselves out as operating to influence elections to public office. Given this, it is very clear that 527 organizations are fundamentally partisan political organizations, which is fine, but the conclusion that flows from that is that they are very synonymous with the types of groups that the Supreme Court has made clear are appropriate for campaign finance regulation.

In *McConnell* the Court made clear that in terms of 527 organizations, the Court views them as organized for the express purpose of engaging in partisan political activity and, "by definition engage in partisan functions."

With all of this, Commissioner Thomas and I believed it was appropriate for the Commission to develop a broader standard for political committee status that did not turn on express advocacy in terms of 527 groups, but instead turned on several key elements: first, whether or not they are running commercials that promote or attack Federal candidates. In our view, if they do, they clearly are

for the purpose of influencing a Federal election and, therefore, should be required to be classified as a political committee and abide by the hard-dollar limits of Federal law.

Second of all, our proposed regulations would have made clear that 527 organizations that engage in partisan voter mobilization activities, activities that include communications that attack or promote Federal candidates, also should be treated as political committees required to abide by the hard-dollar limits. In our view that is the scope of a practical, meaningful set of regulations for 527 groups that, after all, at bottom are partisan organizations.

We also strongly believed that it was critical that the agency take action for the 2004 election. The *McConnell* case came down in December of 2003, and so the timing of these questions arising was not of our choosing, but the magnitude of the issues is enormous.

A Presidential election is going to be conducted in 6 months, and there is no question that hundreds of millions of dollars are going to be spent by 527 organizations on activities that will directly affect the Presidential election. With all of that in mind, Commissioner Thomas and I sought to develop a narrowly tailored approach that would have effectively regulated this type of conduct.

With that, Mr. Chairman, I see that my 5 minutes has elapsed, and I will yield back my time.

The CHAIRMAN. Thank you.

[The statement of Mr. Toner follows:]

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.

The CHAIRMAN. Commissioner Thomas.

STATEMENT OF SCOTT E. THOMAS

Mr. THOMAS. Thank you, Mr. Chairman and members of the committee. I will try to pick up to deal with the latter part of the proposal that Commissioner Toner and I cobbled together. It relates mostly to the so-called allocation issue.

For groups that cross the political committee threshold, the FEC's Federal/non-Federal allocation regulations have long required the use of a funds-expended formula under which a share of the groups' administrative expenses and generic voter driving expenses must be paid for from federally restricted funds. The Federal share is determined by dividing the amount contributed to or otherwise spent on behalf of specific Federal candidates by the total Federal and non-Federal disbursements for specific candidates. The formula can be easily manipulated if only contributions and express advocacy are counted as candidate-specific outlays.

For example, a group could contribute $1 to a Federal candidate and $99 to a non-Federal candidate and avoid express advocacy and thereafter work with a 1 percent Federal, 99 percent non-Federal ratio for all applicable expenses. Indeed, we have seen evidence of political committees seemingly focused on the current Presidential race treating the vast majority of funds raised and spent as non-Federal, nonrestricted dollars. If the news accounts are close to accurate, tens of millions of dollars are likely to be spent by these groups to influence the upcoming Federal elections outside the Federal funding restrictions.

Part of the Toner-Thomas proposal that would have modified the allocation rules really had two purposes. First, for purposes of calculating the funds-expended ratio, political committees involved in both Federal and non-Federal elections were to use the promote, support, attack or oppose standard for calculating funds disbursed for candidate-specific purposes. This would assure that a public communication by a political committee saying, "Bush is wrong" or "Kerry is right," would count as an expense on the Federal side of the formula. No longer would registered political committee agents be able to claim that only the cost of "defeat Bush" or "elect Kerry" messages count toward the Federal portion. This legal approach, by the way, already had been approved by four members of the Commission in Advisory Opinion 2003–37.

Second, this proposal was designed to prevent the same kind of gamesmanship that seems to have emerged using the contribution and independent expenditure concepts when calculating the Federal share. A group that really wants to focus vast soft money resources on a Presidential race could simply include nominal references to several non-Federal candidates in its communications and thereby skew the ratio.

The Toner-Thomas proposal builds in a 50 percent minimum for the Federal share in the allocation ratio to prevent such a result. It was similar to the 65 percent minimum Federal percentage that has been applied for years to the parties' House and Senate campaign committees.

With my remaining time, I will take a crack briefly at just addressing some of the most obvious concerns that have been noted.

Really, there is a valid concern about getting involved in the middle of an election cycle, but I come back to the basic proposition it is really entirely dependent on how big of a problem we are facing. Here, after BCRA's passage, new groups sprang up or expanded greatly and began openly raising and spending tens of millions of dollars to influence Federal elections outside the Federal campaign finance rules. Their Web sites and other communications sometimes state expressly they are designed to defeat a particular Federal candidate. Hard-hitting attack ads or lofty messages of praise regarding candidates seem to be their only function in some cases.

These groups are being run in many cases by well-connected political operatives with easy direct or indirect access to elected officials. The major purpose of these groups seems to be influencing elections and use of the express advocacy shield, and weak FEC allocation regulations seems to be leading them to use huge donations to influence Federal elections.

That is what the political committee rules are designed to prevent. Only by acting quickly could the FEC hope to stop this problem before possibly hundreds of millions more were going to be raised and spent this way.

Now, there are some problems, in essence, that you don't want to wait on. I like to use the analogy these days, if I have a fire that is starting in my house, I am not going to wait 90 days to call the fire department. To me and to Commissioner Toner, we felt that the problem we had seen was concrete, it was present, and it was something we needed to address sooner rather than later.

With that, I will cut off. I see my time is up. Thank you.

The CHAIRMAN. I thank the gentleman.

[The statement of Mr. Thomas follows:]

Statement of Commissioner Scott E. Thomas

May 20, 2004

Before the Committee on House Administration

United States House of Representatives

Mr. Chairman and members of the Committee, I hope this can be a constructive lialogue. The FEC's deliberations regarding how to define its regulatory reach rarely :voke such excitement. Not only did the FEC generate two straight days of C-Span live :overage for its hearings, C-Span actually came back to cover, albeit in tape-delayed 'ashion, our meeting on May 13 where we considered a final rule proposal. I can only ıpologize to the C-Span viewers for those programming decisions.

I vaguely recall that in its infancy the agency was called before Congress to :xplain proposed regulations that would have applied campaign finance restrictions to so :alled 'office accounts' of Members of Congress. Those regulations didn't last very ong. Here, it seems, the failure to muster four votes for a regulation that would have :larified and tightened the scope of the term "political committee" has generated concerr \s one who urged passage, I suppose I should hope Congress wields the same persuasive ›owers now. In fact, I hope only that the Committee will gain a better understanding of he workings of the FEC and of the many cross-currents that affect a decision like this.

I gather the Committee would like some sense of why the Commission came to he 2-4 vote for the proposal that Commissioner Toner and I put forward on May 13 affectionately known as the T & T proposal). I can only speak for myself, of course, bu will try to provide some insight regarding the overall process.

Let me begin with noting that this is a matter of great importance. If a group is a 'political committee" under the Federal Election Campaign Act (FECA), it not only mus egister and report to the FEC, it must live with restrictions on its funding. Non-party 'political committees" must accept contributions of no more than $5,000 per year from ny permissible source, and must not accept any contributions from corporations or labo ›rganizations. Those groups that have resisted "political committee" status are most oncerned about those funding restrictions, no doubt. We have seen reports of several ınregistered groups spending tens of millions of dollars in the aggregate on hard hitting ommunications attacking particular presidential candidates, yet *none* of the funds used re being subjected to federal contribution limits or prohibitions.

For groups that cross the "political committee" threshold, the FEC's federal/non-ederal allocation regulations have long required use of a 'funds expended' formula unde vhich a share of the groups' administrative expenses and generic voter drive expenses ıust be paid for with federally restricted funds. The federal share is determined by ividing the "amount contributed to or otherwise spent on behalf of specific federal andidates" by the "total federal and non-federal disbursements . . . for specific andidates." 11 CFR 106.6(c)(1). The formula can be easily manipulated if only ontributions and "express advocacy" are counted as 'candidate specific' outlays. For xample, a group could contribute $1 to a federal candidate and $99 to a non-federal andidate, avoid "express advocacy," and thereafter work with a 1% federal/99% non-ederal ratio for all allocable expenses. Indeed, we have seen evidence of "political

committees" seemingly focused on the current presidential race treating the vast majority of funds raised and spent as non-federal, non-restricted dollars. If the news accounts are close to accurate, tens of millions of dollars are likely to be spent by these groups to influence the upcoming federal elections outside the federal funding restrictions.

There is an IRS disclosure regime apart from the FECA regime that sweeps in many '527 groups' ("political organizations" under the Internal Revenue Code) not reporting to the FEC or to some state-level authority. But that separate reporting regime does not get to the question of funding sources. Only a campaign finance statute like FECA regulates the size and source of contributions. Further, that separate reporting regime does not define what groups should be regulated as "political committees" under FECA and how "political committees" should allocate their federal and non-federal activity. That is a matter that falls squarely in the lap of the FEC. No one should argue seriously that Congress envisioned letting groups simply choose which regulatory scheme they want to follow.

It is sometimes noted that the groups receiving so much press are operating independent of any candidates, and that the opportunity for 'quid pro quo' is diminished. In essence, the argument of some is that this is no big deal. My first response is that the statute passed by Congress does not extend the contribution restrictions only to political committees that coordinate with candidates. For a mere commissioner at the FEC, that should be enough. Second, even if constitutional concerns about governmental interests are raised, the Supreme Court already has indicated there is no basis for such doubts. The Court has approved contribution limits for "political committees" regardless of whether they spend independently or in coordination with candidates. *See McConnell v. FEC*, 124 S.Ct. 619, 665 n. 48 (2003). This stems from the Court's interpretation that "political committees" regulated by the FEC will have as their "major purpose" influencing elections. It is this type of vehicle—organized and run by well-connected political insiders—that donors will use to try to get a message to an elected official. That message, crudely stated, is: "My money got you where you are and it can be used to help your opponent next time." Third, I would note that Congress itself has expressed a willingness to restrict the sources of funds used for independent candidate support efforts. So-called "independent expenditures" that use express advocacy must be paid for exclusively with non-prohibited source funds, and, under BCRA, non-coordinated "electioneering communications" must be paid for without use of corporate, labor, or foreign funds. Bottom line: there is potential for the corruption of the political process even with independent spending, and this potential is at its zenith where the intermediary is a group set up and controlled by Washington insiders with easy access to elected officials.

There is no perfect solution to the question of defining which groups qualify as "political committees." The Commission has long struggled with the concept. Working only with the statutory definition, one would have to conclude that any group that raises more than $1,000 "*for the purpose of influencing a federal election*" or that spends more than $1,000 "*for the purpose of influencing a federal election*" is a "political committee."

On its face, this would reach a law firm partnership that gave a $2,000 primary contribution to one of you. Not a great result.

Mercifully, as noted before, the Supreme Court greatly improved the jurisprudence by construing the term "political committee" to reach only those groups under the control of a candidate or the *major purpose* of which is the nomination or election of candidates or campaign activity. *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 n. 6 (1986). In 1996, through an advisory opinion, the FEC formally adopted by majority vote a legal approach combining the statutory and Supreme Court analysis. Advisory Opinion 1996-3 (Breeden-Schmidt Foundation), available at www.fec.gov. Since then, in my view, the 'law of the land' has been that a "political committee" is a group with the major purpose of influencing elections or campaign activity that receives or spends more than $1,000 "for the purpose of influencing a federal election."

Things couldn't be that simple, of course. Some argue that the cited advisory opinion does not have the effect of 'law;' some say later 3-3 votes in enforcement cases by different FEC commissioners have had the effect of undoing the earlier majority vote; some say the major purpose test mentioned by the Supreme Court is not valid law even if endorsed by the FEC; and some say the FEC must apply "express advocacy" analysis to any "major purpose" or "purpose of influencing a federal election" query.

Since this latter argument took up most of the oxygen during our two days of hearings, I'd like to briefly note my view. *Buckley v. Valeo* applied the "express advocacy" construction to persons and groups that did *not* have influencing elections as their major purpose. In determining the independent expenditure disclosure provision (former § 434(e)) constitutional, the Court noted:

> The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," [footnote omitted] and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. [footnote omitted] To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.
>
> But when the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a "political committee" [footnote omitted]—the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of § 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construed the terms of § 608(e) [the former $1,000 limit on

> independent expenditures] to reach only funds used for communications that expressly advocate [footnote omitted] the election or defeat of a clearly identified candidate. [424 U.S. 1, 79-80 (1976)]

The Court could not have been clearer that the "express advocacy" test is not needed for groups whose major purpose is the nomination or election of candidates.

The proposal put forward by Commissioner Toner and myself attempted to work with the major purpose concept. It specifically incorporated this test into the regulation, something that had not been done in all these years since *Buckley v. Valeo*. Second, using the tax laws relating to 527 organizations, it built in a presumption that certain 527 organizations would be deemed to have influencing elections as their major purpose. This was justified, we believed, by the fact that groups voluntarily selecting 527 tax status must adhere to the definition of "political organization" in the IRC: "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated *primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for* an exempt function" (which is separately defined as "the function of *influencing or attempting to influence the selection or 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 . . . .*").

Our proposal specifically backed out of the 527 major purpose presumption non-federal candidate committees and committees not involved *at all* in federal candidate elections. For groups that expended some resources on federal elections and some on non-federal elections, the proposal specifically referenced the longstanding allowance for separating out non-federal account activity at 11 CFR 102.5.

The T & T proposal also attempted to clarify that for 527 groups whose major purpose was influencing elections, "express advocacy" would not be a protective shield to avoid having made more than $1,000 in "expenditures" (i.e., payments for the purpose of influencing a federal election). The proposal said that voter drive efforts (voter registration, voter identification, and get-out-the-vote) involving public communications that "*promote, support, attack, or oppose*" a clearly identified candidate or a political party would count toward the $1,000 threshold. Similarly, such public communications undertaken outside the voter drive context would count. We took this position because the record is now full of examples of 527 group ads and mailings stopping short of "vote for" or "defeat" phrases, but nonetheless containing hard-edged attacks or glowing praise of federal candidates.

This effort to borrow a BCRA concept, even for groups whose major purpose is influencing elections, met with a howl of protest. Many commenters wanted to remain in the welcoming arms of an "express advocacy" test. Yet, the "express advocacy" test had just been derided by the Supreme Court as "functionally meaningless"—even in the context of independent spending by persons whose major purpose was *other than* influencing elections! *McConnell v. FEC,* 124 S.Ct. at 689. Moreover, Congress clearly

felt comfortable using the "promote, support, attack, or oppose" test in the context of independent spending by outside groups, since the FEC is given authority to develop exceptions to the "electioneering communication" rules as long as the exceptions do not extend to communications that promote, support, attack, or oppose a clearly identified candidate. 2 U.S.C. § 434(f)(3)(B), relying on 2 U.S.C. § 431(20)(A)(iii).

To Commissioner Toner and myself, there seemed to be ample legal justification for declaring that the "express advocacy" standard would not apply to the "expenditure" analysis for groups that had crossed the major purpose line. Also, the "promote, support, attack, or oppose" test is a distinct improvement. It is more objective than a "for the purpose of influencing federal elections" test, and it avoids the charade of "express advocacy" precedent.

The T & T proposal attempted to compromise on the question of when other groups, like 501(c)(3) or (c)(4) tax exempt groups, would be deemed political committees. (Perhaps the loudest din during the comment period was caused by groups of this sort fearful that the FEC was going to saddle them with a "promote, support, attack, or oppose" standard.) Language was incorporated saying these groups would be subject to the "major purpose" and "expenditure" analysis in place *under applicable law*. The intent was to let the whole existing body of law on this question be applied on a case-by-case basis, preserving the *status quo*.

Given that existing tax law essentially prohibits 501(c)(3) groups from "intervening" in politics at all and provides that 501(c)(4) groups cannot have a "primary purpose" of influencing elections (*see Election Year Issues* by Judith Kindell and John Francis Reilly, www.irs.gov at 335-387, 433-446), this seemed a reasonable approach. Expecting non-527 groups to adhere to 'existing applicable law' seemed a good way to assure that the law would be no more onerous for these groups, while assuring that everyone remained free to make legal arguments they felt appropriate as cases arise. In the entire history of the FEC, I can only recall two instances of any significance where the FEC analyzed whether a 501(c) group crossed the "political committee" line (Matters Under Review 2804 (AIPAC) and 4940 (Campaign for America). In neither did the FEC proceed. Thus, the specter of FEC overregulation was remote under the T & T proposal.

As for the part of the T & T proposal that would have modified the FEC's allocation rules, the purpose was twofold. First, for purposes of calculating the 'funds expended' ratio, political committees involved in both federal and non-federal elections were to use the "promote, support, attack, or oppose" standard for calculating funds disbursed for 'candidate specific' purposes. This would assure that a public communication by a political committee saying, "Bush is wrong" or "Kerry is right" would count as an expense on the federal side of the formula. No longer would registered political committee agents be able to claim that only the cost of "Defeat Bush" or "Elect Kerry" messages count toward the federal portion. This legal approach, by the way, already had been approved by four members of the Commission in Advisory Opinion 2003-37 (Americans for a Better Country), available at www.fec.gov.

Second, the proposal was designed to prevent the same kind of gamesmanship that seems to have emerged using the "contribution" and "independent expenditure" concepts when calculating the federal share. A group that really wants to focus vast soft money resources on the presidential race could simply include nominal references to several non-federal candidates in its communications and thereby skew the ratio. For example, take a message saying, "President Bush's policies are a disaster for America, and State Senators like Washington, Adams, Jefferson, and Madison are fools for not fighting against them." This would result in only 20% of the cost being attributable to the federal part of the 'funds expended' formula. The group involved could use this type of calculation to justify spending $800,000 in soft money for every $200,000 in hard money when paying for administrative expenses and generic voter drive costs. The T & T proposal built in a 50% minimum for the federal share in the allocation ratio to prevent such a result. It was similar to the 65% minimum federal percentage that has been applied for years to the parties' House and Senate campaign committees. 11 CFR 106.5(c)(2).

There is the possibility the 50% minimum might force a group that had expended 80% of its candidate-specific outlays on non-federal candidates to nonetheless pay 50% of its allocable expenses with federally restricted funds. Commissioner Toner and I believed that in the context of the current presidential cycle, there was relatively little likelihood of this happening among the non-party political committees that would be covered by the new rule. At least for the current cycle, where evidence abounds of 527 groups focusing on the presidential race without applying reasonable amounts of federally restricted funds, a 50% federal minimum would be a simple, balanced fix.

So, what is the fate of the world without the T & T proposal? I defy anyone to pronounce with certainty whether clamping down on some of the existing 527 practices during the post-convention phase would have hurt Democrats more than Republicans. I have been offering my hunch that from this point on, Republican-leaning groups will get into the 527 game and out spend and out attack the Democratic leaning groups. And this won't be limited to just the presidential campaign. This may amount to hundreds of millions of dollars raised and spent outside the federal campaign finance restrictions. But that is just a hunch.

For those who predict that under the T & T proposal the 'pols' who set up 527 groups would just open up 501(c)(4) groups to do the same thing, I offer three responses. First, there seem to be gift tax consequences looming for gifts to the latter groups. Second, there are 'political activity' tax issues for 501(c) groups pursuant to 26 U.S.C. § 527(f). Third, if problems develop with 501(c) groups crossing over the "major purpose" line, the FEC and Congress can take yet another look to see if further regulatory clarity is in order. There is no reason to simply pass on the problem we know we do have.

While the new "electioneering communication" restrictions (no corporate, union, or foreign funds) will cover groups that do not deem themselves "political committees," those rules only apply to broadcast ads within 30 days of a primary or within 60 days of a general. Kerry bashers will have until June 29 to run attack ads, and Bush bashers will

have until August 3. Then, the Kerry bashers will have another window from June 30 through September 2 to beat the tar out of the Democratic nominee without "electioneering communication" restraints. Moreover, those rules don't cover mailings, newspaper ads, phone banks, and all the traditional 'ground force' expenses involved in modern voter persuasion. Thus, a boatload of money probably will pass through 527 groups to influence federal elections with no need to adhere to even the source prohibitions applicable to "electioneering communications."

In closing, I want to assure the Members I have no axe to grind here. I have voted to strictly apply the campaign finance laws since my first day on the job. I have a string of statements for the record, dissenting opinions, law review articles, and speeches to hang myself with. I consider myself a loyal Democrat in my personal capacity, but I leave that role behind when I walk into the office.

My position on the T & T proposal stemmed from my simple desire to make the laws passed by Congress work. These laws are designed to free you elected officials from the awkward situations where campaign supporters come calling for favors. They are designed to provide the voting public with some hope they too have a fair chance of getting the ear of their representatives in Washington. And these laws still allow plenty of breathing room for individuals and groups to get involved in supporting candidates. Individuals can contribute $95,000 in the aggregate every two years to federal political committees, can make unlimited independent expenditures acting on their own, and can undertake unlimited volunteer activity to support the candidate or party of their choice. PACs can raise $5,000 per year from individuals, can make contributions of up to $5,000 per election to federal candidates, and can undertake unlimited independent expenditures.

To me, the system of limits, prohibitions, and disclosure Congress has passed has great merit, but it will only work if the FEC as well as Congress has the will to make it work. It was in that spirit I signed onto the T & T proposal, and it is in that spirit I will sign on again if the opportunity arises.

The CHAIRMAN. Commissioner Weintraub.

STATEMENT OF ELLEN L. WEINTRAUB

Ms. WEINTRAUB. Thank you, Mr. Chairman and Ranking Member Larson and members of the committee. Thank you for inviting us. I have always found that our discussions have been productive.

I did not support the Toner-Thomas proposal. I had a lot of substantive problems with it. I respect the efforts of my colleagues. Maybe that was the best proposal that could be put together on the time line that they insisted on following, but I don't think it was a realistic time line. I never believed that it was. We received tens of thousands of comments. We haven't had adequate time to take all of them into consideration.

The proposal was not based on any elaborate—or any developed factual record at all. It wasn't supported by our general counsel. It wasn't supported by the recommendations of the tax experts who testified before us, and I think it embodied oversimplified notions of tax law.

Albert Einstein once said everything should be made as simple as possible, but not simpler, and I think that is what this proposal attempted to do. It lacked key definitions. The allocation formula lacked any supporting data other than an impressionistic reaction to what a couple of well-publicized committees are doing, but we have to remember that when we are regulating political committees and political organizations across the country, there are thousands of them, and they are all going to be subject to the same rules. This isn't an enforcement action.

We received some very persuasive testimony from tax experts as to the differences between the tax law and the election law and how they have been construed over decades by courts and by agencies. The IRS is unconstrained by first amendment concerns that we have to take into account, and 527 was described by one of our tax experts as the kitchen junk drawer of regulations. The IRS just sort of piles all sorts of things into it.

Another one in written comments pointed out that it is meant to be sort of a mirror image of 501(c)(3), and the IRS drew a very wide circle around 501(c)(3) activities, because those you get a tax deduction for, and they didn't want anything that was remotely political to come under 501(c)(3). So anything that was even tangentially political got dumped into 527, and it encompasses a lot of activities that this agency has not traditionally regulated and that I think a lot of people don't think we ought to be regulating.

There were concerns that were expressed by the nonprofit community as to how this would affect them, and I think that they were valid concerns. There is a legitimate role for people to criticize the government. A lot of nonprofit entities use criticizing elected officials close to the election as a primary form of advancing their legislative and policy agenda, and they have the first amendment right to do that, and we have to be very, very careful if we are going to be intruding in those areas.

Now, while my concerns about some of the specifics of the proposal could be addressed given the extra time that our general counsel has asked for, perhaps as Congressman Larson has suggested, perhaps even more time, there is one problem that is sort

of fundamental, and I just am having a hard time working around that, and that is the fact that Congress has acted in this specific area. Congress passed legislation directly addressing the problem of unregistered 527 organizations, 527 organizations that didn't register with the FEC. And what Congress decided to do in 2000, and again they amended the law, you amended the law in 2002 after BCRA was passed, and the route that you chose was to have disclosure to the IRS.

A proposal was suggested. A bill was introduced in the Senate that would have gone along very similar lines to what Commissioners Thomas and Toner have proposed in terms of making 527 entities, for the most part, into political committees. That was not the proposal that was enacted into law, and if we were to adopt this proposal, we would substantially nullify the law that Congress actually did pass.

I would think that you guys would be kind of angry at us if we did that. It would be like the FEC saying to Congress, you had various policy options in front of you when you decided to act legislatively on the 527 issue. You chose one route. We think you made a mistake. You should have chosen this other route, and that is the one that we are going to apply.

As an administrator, I don't see how I can—maybe it is my background as a House staffer years ago that I just can't quite shake these "deferential to Members of House" instincts of mine, but I think that you guys would probably be kind of upset with us if we tried to initiate the kind of choice that Congress made.

I also paid very close attention to the letter that Chairman Ney alluded to from 128 House Members. We got a similar letter from 19 Senators as to what they intended when they passed BCRA. Mr. Larson, you signed that letter, and I read it very carefully, and I paid a lot of attention to it. It was very persuasive to me. I don't see how we go and do something in interpreting a law that the Members of Congress who voted for it have told us was not their intention.

There are definitional problems in this proposal that I think are very, very troubling. There is no definition of major purpose. There is no definition of promote, support, attack or oppose. I know the Supreme Court has upheld the latter standard with respect to political parties, but we had reams of testimony from members of the regulated community that they don't understand what it means, and I don't want to push forward any kind of regulation that is going to confuse the regulated community.

People in the regulated community need to understand what the rules are so they can comply with them. I want them to comply with the rules, but they have to understand them. And I don't think we ought to be shooting from the hip just to put some kind of a quick fix out there without adequately considering what the impact is going to be on the regulated community.

I see my time is up, so I will stop.

The CHAIRMAN. Thank you.

[The statement of Ms. Weintraub follows:]

Testimony of Ellen L. Weintraub,
Vice Chair of the Federal Election Commission,
Before the Committee on House Administration
May 20, 2004

Chairman Ney, Ranking Member Larson, and Members of the Committee:

Thank you for inviting me here today to discuss the Federal Election Commission's recent actions concerning entities organized under section 527 of the tax code and efforts to redefine the term "political committee."

Last week, the Commission, on a bipartisan 4-2 vote, rejected a hastily conceived proposal to change the definition of "political committee" in the middle of the election year. Instead, we approved the recommendation of our General Counsel to give ourselves another 90 days in which to gather further facts, give some thought to the tens of thousands of comments we received in response to our Notice of Proposed Rulemaking, and allow the Counsel time to formulate a considered action plan. The proposed regulation put forward by Commissioners Thomas and Toner did not have the support of our General Counsel and was not supported by any factual record. Although purportedly based on imported concepts from the tax law, a subject in which the Federal Election Commission has scant expertise, the proposal was also not supported by the testimony of any of the tax experts who appeared before us at our April hearing on this subject.

Albert Einstein once said: "Everything should be made as simple as possible, but not simpler." As appealing as it might be to envision a regulatory scheme in which the tax and election laws embody the same principles, decades of administrative and judicial construction of those two different bodies of law tell a different story. In my view, this proposal was based on oversimplified notions of tax law, and would have effectively nullified a law passed by Congress to address precisely the same issue, that is, activity by entities organized under section 527 of the tax code which do not register as political committees with the FEC. The proposed regulation also lacked key definitions that would have made it comprehensible to the regulated community. And the proposed allocation formula lacked any supporting data.

At our hearing last month, the four tax experts who testified did not agree on much, but they did all agree that 527 status under the tax code should not be the determining factor in adjudging political committee status under the Federal Election Campaign Act. I found the testimony of John Pomeranz, a respected tax practitioner here in DC, to be particularly helpful and illuminating on the scope of section 527. I have attached his written comments to my testimony.

Mr. Pomeranz pointed out that the IRS, unconstrained by the First Amendment concerns underlying much of campaign finance jurisprudence, has long construed section 527 so broadly that he described it as the regulatory equivalent of a "kitchen junk drawer." IRS rulings have included within section 527's scope organizations engaged in activities far from the traditional domain of campaign finance regulation, e.g.:

- an organization created to "elevat[e] the standards of ethics and morality in the conduct of campaigns for political office" by seeking candidate commitments to the organization's code of fair campaign practices;

- an organization that published ads to promote a particular state ballot measure where the effort would likely bring out voters who tended to support a federal candidate running for reelection on the same ballot;[1]
- an organization devoted to improving the quality of elected officials by rating and publishing qualifications based on nonpartisan criteria; in many cases all candidates shared same "qualified" rating.

The hastily constructed Thomas-Toner proposal does not appear to me adequately to take into account the myriad types of organizations covered by section 527. Mr. Pomeranz commented that campaign finance and tax law "begin from different policy rationales, meet in seemingly similar concepts, but then proceed to wildly different legal destinations."[2] He opined that "the inherent uncertainty created by [the tax law's] contextual, subjective standard [for determining 527 status] renders it wholly inadequate to the task of providing a predictable standard for those required to comply with federal election law."[3] In his view, importing that standard into campaign finance regulation would infringe on constitutionally protected political speech.

Moreover, the Thomas-Toner proposal is inconsistent with the law that Congress actually did pass to regulate non-political committee 527 organizations. In 2000, Congress considered a variety of legislative proposals to address the issue of so-called "stealth PACs," organized under section 527 but not registered with the FEC. One of those proposals, embodied in S. 2582, suggested an approach quite similar to that of the Thomas-Toner proposal: that with certain, again quite similar exemptions, any entity that wished to take advantage of section 527's tax exempt status would have to register as a political committee with the FEC. That bill did not pass into law. Instead, Congress opted to require 527 organizations to disclose their financial activity to the IRS. The House report described the law as follows:

> [T]hese enhanced disclosure and reporting rules are intended to make no changes to the present law substantive rules regarding the extent to which tax exempt organizations are permitted to engage in political activities. Thus the Committee bill is not intended to alter the involvement of such organizations in the political process, but rather is intended to shed sunlight on these activities so that the general public can be informed as to the types and extent of activities in which such organizations engage.[4]

Thus, Congress made a choice. It could have subjected 527 organizations to the FEC's regulatory regime in 2000, or in 2002 (when it amended the 527 legislation after

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[1] The Toner-Thomas proposal contains an exclusion for organizations "organized solely" for the purpose of influencing state ballot initiatives, but it is not clear whether that exclusion would apply under these facts.
[2] Comments of Gail Harmon and John Pomeranz, at 1 (April 5, 2004).
[3] *Id.* at 3.
[4] House Ways and Means Committee, Report on H.R. 4717, 106th Cong., 2d Sess. 18 (2002).

the passage of BCRA), but did not. Congress still could make that choice by amending that law again. For the FEC to adopt the Thomas-Toner proposal, however, would be to remake that choice for Congress, to reject the statutory plan enacted and substitute one of the Commission's choosing. It is not clear that we have the authority to do that, and I'm not sure you would want us to if we did.

I take very seriously my responsibility to administer the law that Congress wrote, as Congress intended it to be interpreted. Thus, I cannot ignore the view of 128 House Members and 19 Senators that "the proposed rules before the Commission would expand the reach of BCRA's limitations to independent organizations in a manner wholly unsupported by BCRA or the record of our deliberations on the new law. . . . There has been absolutely no case made to Congress, or record established by the Commission, to support any notion that tax-exempt organizations and other independent groups threaten the legitimacy of our government when criticizing its policies."[5]

You were one of the signers of that letter, Congressman Larson. And I want to assure you that I listened carefully to what you and your colleagues had to say.

In upholding BCRA, the Supreme Court emphasized the corruption or appearance of corruption that stemmed from the direct involvement of officeholders in raising and spending soft money. That link has been broken, appropriately, by BCRA. The Court said: "To be sure, mere political favoritism or opportunity for influence alone is insufficient to justify regulation. . . . As the record demonstrates, it is the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence."[6]

Independent groups cannot sell access to officeholders. This was recognized during Congressional debate over BCRA. As Senator Levin pointed out:

> Will contributors of these large sums want to buy access to the Sierra Club or the National Rifle Association? Dubious. Will they be able to buy access to us through these unlimited contributions to third parties? No.[7]

Similarly, Senator Snowe argued:

> Some of our opponents have said that we are simply opening the floodgates in allowing soft money to now be channeled through these independent groups for electioneering purposes. To that, I would say that this bill would prohibit members from directing money to these groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived 'quid pro quo.'[8]

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[5] Comments dated April 9, 2004, from Sen. Daschle, *et al.*, Comments dated April 5, 2004, from Rep. Pelosi, *et al.*

[6] *McConnell v. FEC*, 124 S. Ct. 619, 666 (Stevens, J. and O'Connor, J., Opinion for the Court).

[7] 148 Cong. Rec. S2116 (Mar. 20, 2002) (statement of Sen. Levin).

[8] 148 Cong. Rec. S2136 (Mar. 20, 2002) (statement of Sen. Snowe).

BCRA's goal was to sever the connection between Federal officeholders and soft money. The Supreme Court understood that. It stated: "Interest groups . . . remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)."[9] Congress understood that. During the pendency of the ABC advisory opinion, 8 Members of the Senate (seconded by 58 House Members) wrote to us to emphasize that Congress knowingly chose to address the raising and spending of soft money by parties and officeholders, and not to "aim similar restrictions at political organizations or tax-exempt groups that are neither controlled by, nor coordinated with, parties or candidates."[10]

That soft money would continue to be spent by 527 organizations, even after the passage of BCRA, was well-understood and left unaddressed in BCRA, in an effort to piece together a majority vote in Congress and to craft a narrow proposal that would withstand constitutional scrutiny by the Supreme Court (it turned out to be an extremely effective strategy). Senator Feinstein bluntly stated:

> Meanwhile, one of the effects of McCain-Feingold is that as we ban soft money, which I am all for, the field is skewed because one has to say: Can you still give soft money? Some would say no. That is wrong. The answer is: Yes, you can still give soft money. But that soft money then goes toward the independent campaign; into so-called issues advocacy.... It is likely that spending on so-called issue advocacy, most of which is thinly disguised electioneering, probably is going to surpass all hard money spending, and very soon.[11]

This view was seconded by Senator Murray:

> This bill also has the potential to give a disproportionately larger role in elections to third party organizations."[12]

Senator Jeffords disclaimed any intent to force new entities to register and report to the FEC:

> Now let me explain what the Snowe-Jeffords [electioneering communications] provision will not do:
> -The Snowe-Jeffords provision will not prohibit groups like the National Right to Life Committee or the Sierra Club from disseminating electioneering communications;

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[9] *McConnell*, 124 S. Ct. 619, 686 (2003).
[10] Letter dated Feb. 12, 2004, from Senator Daschle, *et al.*, to Commissioners. *See also* Letter dated Feb. 10, 2004, from Representative Pelosi, *et al.*, to Commissioners.
[11] 147 Cong. Rec. S3011-12 (March 28, 2001) (Statement of Sen. Feinstein).
[12] 147 Cong. Rec. 3236 (April 2, 2001) (Statement of Senator Murray).

-It will not prohibit such groups from accepting corporate or labor funds;
-It will not require such groups to create a PAC or another separate entity;
-It will not bar or require disclosure of communications by print media, direct mail, or other non-broadcast media;
-It will not require the invasive disclosure of all donors; and
-Finally, it will not affect the ability of any organization to urge grassroots contacts with lawmakers on upcoming votes."[13]

Thus it does not appear that BCRA attempted to address the issue of unregistered 527s, or that regulating those entities would be a necessary outgrowth of that law.

Even if I believed that the Thomas-Toner proposal was not inconsistent with Congressional action on section 527 organizations, I would have substantive problems with the proposals details. First, it extends the Commission's regulatory reach to entities whose major purpose is the nomination or election of *non-Federal* candidates. I am not convinced we have jurisdiction over such entities.

Second, it incorporates into the definition of "political committee" a "major purpose" test (that is, a political committee must have, as its major purpose, "the nomination or election of one or more Federal or non-Federal candidates"), but provides absolutely no definition or other explanation as to the meaning of the term. It is a mystery to me how an entity can be expected to understand whether it is regulated or not if we provide so little guidance. Moreover, adopting such ill-defined concepts is an invitation to arbitrary enforcement. If we cannot agree on the parameters of basic definitions in the relatively dispassionate arena of rulemaking, we are unlikely to find greater common ground when individual fates hang in the balance.

The Supreme Court warned, in *Buckley v. Valeo*, that "vague laws may not only 'trap the innocent by not providing fair warning' or foster 'arbitrary and discriminatory application' but also operate to inhibit protected expression by inducing 'citizens to "'far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked."'"[14] These concerns were echoed in comments submitted on behalf of the NAACP Legal Defense and Educational Fund, Inc.: "Not only does the NPRM fail to offer guidance that will permit charitable organizations to conform their future conduct to the requirements of BCRA and FECA (to the extent they apply to such organizations), but it also provides little protection against arbitrary – because standardless – application of its provisions."[15]

This rulemaking was prompted by concerns about the activities of two or three organizations. We are now proposing to regulate thousands. The proposed allocation formula, establishing a new minimum threshold of 50% hard money for all political committee disbursements, does not appear to be based on anything more substantial than

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[13] 147 Cong. Rec. S2813 (March 27, 2001) (Statement of Sen. Jeffords) (emphasis added).
[14] Buckley v. Valeo, 424 U.S. 1, 41 n.48 (1976) (*citing* Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (*quoting* Baggett v. Bullitt, 377 U.S. 360 (1964))).
[15] Comments of Norman J. Chachkin, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc., at 6 (April 5, 2004).

an intuitive response to the allocation formula adopted by one committee. Assuming for the sake of argument that the proposed regulation guesses right for that one committee, there is no indication that 50% is the right threshold for any other committee. Imagine a grassroots organization almost exclusively focused on promoting responsive candidates for school board, that spends 5% of its activities advocating for a favored Congressional candidate. Why should that organization have to pay for its activities with 50% Federal funds? Moreover, recall that the Commission ruled earlier this year that a political committee that makes a communication that promotes, supports, attacks or opposes only a clearly identified Federal candidate must pay for that communication with 100% hard dollars.[16] With tough standards like those on the books, it is not clear that the allocation rules are in such dire need of adjustment that we cannot wait 90 days to gather some data.

The Commission's rulemaking on political committee status has the potential to subject vast numbers of entities to new restrictions on their political speech, and it has the potential to mask from public view reams of information that are currently being disclosed. We must balance the need to craft a rule that is not capable of easy evasion with the requirement that we not be so overbroad as to impede legitimate advocacy.

If the Toner-Thomas proposal were adopted, it could result in entities dropping off our radar screen, for one of two reasons. First, an entity might argue, even though it has raised contributions or made expenditures of over $1,000, that it need not register and report because its major purpose is not influencing elections. In addition, if we had adopted that proposal, some entities currently spending funds and disclosing that spending through a 527 organization would, I believe, re-organize and continue substantially the same activities through 501(c)(4) or (6) organizations, which do not have the same disclosure obligations. This is not a frivolous or hypothetical concern. Some of our witnesses, representing multi-faceted organizations with both 501(c)(4) and 527 components, frankly told us that they would do just that. We could end up with a net loss of disclosure about the funding of political activities. I do not believe that result would serve the purposes of reform.

The proposals under consideration could influence citizens' willingness and ability to support or oppose not only candidates, but also issues and policies. In the midst of an election year, it is easy to forget that not every criticism of the government has an electioneering purpose. Many commenters tried to bring that point home to the Commission. I was particularly moved by the example provided by Housing Works, Inc., a non-profit organization that helps homeless New Yorkers living with AIDS and HIV, and people living with HIV/AIDS all over the world. This witness wrote:

> Over the course of the AIDS epidemic, one of the most persistent truths has been that democracy and free speech have saved lives. Advocacy has saved lives. Criticism of elected officials for their inaction on HIV/AIDS has spurred remarkable public and private responses to the epidemic. These responses have literally saved millions of lives all over the world.[17]

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[16] *See* Advisory Opinion 2003-37, at 9.

[17] Comments of Housing Works, Inc., at 1 (April 2, 2004) (attached hereto).

The non-profit advocacy community has been justifiably concerned about the ramifications of this rulemaking. I attach to my testimony the comments submitted by a coalition of over 600 nonprofit organizations in response to the Notice of Proposed Rulemaking. Several of these same organizations sent further comments (also attached) addressing the Thomas-Toner proposal, and noting that their concerns were not alleviated by it. Nor should they be. The proposal may not target 501(c) organizations, but neither does it exempt them. And Commissioner Thomas has forthrightly acknowledged that there are circumstances in which he foresees that the Commission would investigate 501(c) organizations to determine if they are acting "properly" and consistently with their tax status. He correctly notes that the FEC has investigated 501(c) organizations in the past, and offers as an example the AIPAC case, which has embroiled the respondent in litigation with the agency for almost two decades. I doubt that that example will provide much comfort to the nonprofit community.

I return to an example I offered at the beginning of this process. Earlier this year, I saw a full-page ad in the Sunday Washington Post. It was paid for by FRCAction, the 501(c)(4) legislative action arm of the Family Research Council (itself a 501(c)(3) organization). According to the organization's website, it was part of a $2 million ad campaign to appear in 22 newspapers across the country, including the New York Times, Los Angeles Times, Miami Herald, Dallas Morning News, Chicago Tribune, and Atlanta Journal-Constitution. The ad proclaimed:

> DEAR MISTER PRESIDENT:
>
> WE ARE DEEPLY GRATEFUL
>
> We deeply appreciate your long-standing and deep-seated commitment to the preservation of the family. We especially thank you for the decision you have announced to support and work for the passage of the ***Federal Marriage Amendment*** . . .
>
> WE APPLAUD YOUR COURAGE
>
> * * *
>
> WE PLEDGE TO YOU
>
> We will do everything in our power to inform and to educate our constituents about the importance and urgency of this issue both for the preservation of the family in America as well as the right ordering of our government. . . .

The ad compared the President to Abe Lincoln and contained what might be considered a tacit commitment to spread the good word about George W. Bush throughout sympathetic communities. Does it promote or support a clearly identified candidate? I think it does. Is this the kind of communication that the Federal Election Commission should be regulating? I think not. Yet if ads like these take up the "major" portion of FRCAction's budget this year (whatever that means), FRCAction could be determined to be a political committee under the Toner-Thomas proposal. I don't know that that would happen, because the "major purpose" test is totally undefined in the proposal, but it's a plausible reading.

I strongly objected to proceeding with an NPRM so full of complicated, convoluted questions on such a fast track, especially in the middle of an election year. Some misread my concern as an unwillingness to enforce the law in an election year. Let me reiterate that I am fully prepared to enforce the law in an election year or any other time. What I am not prepared to do is to change the basic definitions of who gets regulated and who doesn't in the middle of an election year.

Both Congress and the courts have shown sensitivity to the disruptive effect that new rules can have in the midst of an election cycle. As we all know, BCRA passed in the spring of 2002, but its effective date was delayed until the day after the 2002 election. Thus, Congress intentionally allowed the corruption and appearance of corruption that it considered inherent in the pre-BCRA regime to continue until the law could be implemented in an orderly fashion at the beginning of an election cycle. Even the District Court, which labored for months to construe BCRA, agreed to grant a stay of its own opinion in *McConnell* and declined to subject the regulated community to a new set of rules in the middle of a cycle.

In the Commission's brief to the court requesting that stay, the Commission warned the court of the "tumultuous consequences for the Nation's federal electoral system," and the "significant confusion for the FEC and those subject to its regulation" that would arise from mid-cycle changes to the regulatory regime.[18] We noted in particular: "Many political organizations already have restructured their operations and planned their activities for the 2004 elections in compliance with BCRA's scheme."[19] We urged the court "[t]o minimize the potential chaos to which the Nation's campaign-financing system is subjected in the critical period leading up to the 2004 elections."[20]

We just went through one exercise in hopelessly confusing the regulated community, when we issued the ABC advisory opinion,[21] on a related topic, an opinion variously described as "almost incomprehensible" (by a liberal West coast law professor) and an "exquisite opacity" (by a conservative East coast commentator). I would like to think that we would have learned something from that experience. My colleagues say they want to codify that opinion, but the draft they produced goes beyond the issues that we decided there, and, at the same time, does nothing to clarify the points of confusion. In particular, their draft does not define the term "promote, support, attack, or oppose" the parameters of which (outside the context of political parties), according to numerous comments we received, are unclear to the regulated community.

It is irresponsible to issue a rule that will not provide clear guidance to the regulated community, but rather, will leave members of that community more confused after its issuance than they were before. I reject the notion that we must act in haste or forbear acting for all time. I'd rather do it right than do it fast. I would like to have the advice of our counsel when we do act, and not just shoot from the hip. If we do enact new regulations, our model should be the simplicity and clarity of the electioneering communications provision of BCRA. We cannot expect compliance if we shirk the hard

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[18] *See* Memorandum of Points and Authorities in Support of the Government Defendants' Motion for Stay of Final Judgment Pending Appeal to the Supreme Court of the United States at 4, 5, *McConnell v. FEC* (No. 02-582).
[19] *Id.* at 5.
[20] *Id.* at 13.
[21] AO 2003-37.

and sometimes time-consuming work of writing clear regulations in favor of a quick, but ill-considered fix.

I appreciate your interest and attention and would be happy to answer any questions.

HARMON, CURRAN, SPIELBERG EISENBERG LLP

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April 5, 2004

Ms. Mai T. Dinh, Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463
BY ELECTRONIC MAIL

Re: Treatment of IRC Section 527 Organizations in Notice of Proposed Rulemaking on Political Committee Status (Notice 2004-6)

Dear Ms. Dinh:

The law firm of Harmon, Curran, Spielberg & Eisenberg, LLP, submits these comments in response to the Commission's proposed rules related to political committees.[1] We have many concerns about these proposed rules and their potential consequences for the democratic process. However, others – including a number of our firm's clients – are filing comments detailing the many issues raised by the NPRM.[2] Instead, our comments focus on a more specific issue: the proposal's attempt to regulate the entire class of organizations that are exempt from federal tax under Section 527 of the Internal Revenue Code (IRC). There is a great deal of confusion about these organizations that undermines the foundations of this rulemaking. We write today to offer the Commission a better understanding of the nature and obligations of Section 527 organizations and to identify some of the problems associated with any attempt to use the tax code as a template for election law regulation and enforcement.

Harmon, Curran, Spielberg & Eisenberg, LLP specializes in providing legal advice to nonprofit organizations and individuals in the areas of nonprofit organization tax law, election law, employment law, and environmental law. For more than 25 years, we have successfully served the legal needs of a wide variety of nonprofit organizations, citizen groups, political action committees, and individuals. Our clients engage in a variety of activities – some election-related, some not. Frequently we have had to guide our clients through the often confusing intersection of tax and election law, a crossroads created where the two roads – tax law and election law – begin from different policy rationales, meet in seemingly similar concepts, but then proceed to wildly different legal destinations.

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[1] Federal Election Commission Notice of Proposed Rulemaking on Political Committee Status, Notice 2004-6, 69 Fed. Reg. 11736 (March 11, 2004) (NPRM).

[2] In addition to the concerns we raise here, we express our general agreement with other comments that question this proposal's constitutionality, statutory authority, and timing. The Commission should not read our focus here on 527 organizations as an assent to regulation of 501(c)s and other independent organizations.

We hope that our experience in helping our clients with these issues will be of some aid to the Commission as well. Because we believe that the Commission should have a full understanding of the underlying tax law in this area, we request an opportunity for John Pomeranz, an attorney with our firm, to present testimony on this point at the Commission's planned hearing on this rulemaking.

COMMISSION REGULATION OF ALL 527S IS UNCONSTITUTIONAL

Laws governing electoral activity must survive a significantly higher constitutional standard of review than the law governing tax-exempt organizations

Government restrictions on speech, particularly core political speech, face a far more stringent constitutional standard than the standard that applies to restrictions on political activities of tax-exempt organizations.

As this Commission certainly knows, the courts have often been reluctant to approve restrictions on core political speech under federal election law. In general, any such government restrictions must survive strict scrutiny by the courts – they must be necessary to achieve a compelling government interest. Hence in *FEC v. Massachusetts Citizens for Life* ("MCFL") the Supreme Court held that a tax-exempt organization was exempt from the Federal Election Campaign Act (FECA) restrictions on express advocacy communications because "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."[3] The Court has been similarly protective of political speech on numerous occasions. In *Buckley v. Valeo* ("Buckley") the Court reminded us that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[4] The Buckley Court went on to cite other cases in which the Supreme Court viewed restrictions on political speech with a skeptical eye.[5]

In contrast, tax-exempt organizations voluntarily assume restrictions far more onerous than those that the government may generally impose because the organizations accept these restrictions in exchange for the grant of certain tax benefits. As explained in a key case upholding the restriction on political activities by 501(c)(3)s:

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[3] 479 U.S. 238, 265 (1986).

[4] 424 U.S.1, 14 (1976), *citing* Roth v. United States, 354 U.S. 476, 484 (1957).

[5] *Id.* at 14-15 ("[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates . . . ." Mills v. Alabama, 384 U.S. 214, 218 (1966); "debate on public issues should be uninhibited, robust, and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); "it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office," Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

> In light of the fact that tax exemption is a privilege, a matter of grace rather than right, we hold that the limitations contained in Section 501(c) (3) withholding exemption from nonprofit corporations do not deprive [the organization] of its constitutionally guaranteed right of free speech. The taxpayer may engage in all such activities without restraint, subject, however, to withholding of the exemption or, in the alternative, the taxpayer may refrain from such activities and obtain the privilege of exemption.[6]

There are, of course, limits on the ability of the government to impose restrictions on constitutionally protected activities as a condition of a grant of tax benefits,[7] but generally the courts have been willing to allow limits on the otherwise-protected activities of tax-exempt organizations.[8]

The tax-law definitions of political activity are too vague to survive constitutional review as standards under federal election law.

The Internal Revenue Code (IRC) and its accompanying regulations offer several different tests for what constitutes political activity for tax-exempt organizations (including 527 organizations), but all of these tests boil down to a vague "facts and circumstances" standard. While constitutionally adequate (although by no means ideal) for the enforcement of tax laws, the inherent uncertainty created by such a contextual, subjective standard renders it wholly inadequate to the task of providing a predictable standard for those required to comply with federal election law.

IRC Section 527(e) and the Concept of "Exempt Function"

Section 527 governs taxation of organizations that exist primarily 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..."[9] Section 527 refers to these activities as "exempt functions" – a term that creates a great deal of confusion because it describes as "exempt" political activities that are prohibited or limited for most types of tax-exempt organizations. Organizations primarily engaged in these political "exempt functions" – including not only political committees, but also political parties and

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[6] Christian Echoes National Ministry v. U.S., 470 F.2d 849, 857 (10th Cir. 1972).

[7] *See, e.g.*, Speiser v. Randall, 357 U.S. 513 (1958) (overturning a law requiring anyone seeking a property tax exemption to declare that he or she did not advocate the forcible overthrow of the Government of the United States).

[8] *See, e.g.*, Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) (upholding restrictions on lobbying by 501(c)(3)s).

[9] 26 U.S.C. § 527(e)(2). Congress passed Section 527 in 1975 to address a concern raised by the IRS. Until that time, no section of the IRC explicitly exempted political parties, candidate campaign organizations, and political committees from taxation on the funds they received. Judith E. Kindell & John Francis Reilly, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002, "Election-Year Issues" 387 (2002) (hereafter "Election-Year Issues"). In light of this legislative silence, the IRS proposed a solution in 1973 to exempt contributions to political organizations from taxation but to subject their investment income to taxation. Announcement 73-84, 1973-2 C.B. 461, restated in Rev. Rul. 74-21, 1974-1 C.B. 14, (modified and clarified in Rev. Rul. 74-475, 1974-2 C.B. 22). However, the IRS indicated that it would not enforce this policy until Congress had time to consider this issue. Congress acted by passing Section 527.

candidate campaigns – pay federal income tax any investment income but not on contributions they receive. Furthermore, contributions to 527 organizations are exempt from the federal gift tax usually imposed on donors that that make gifts in excess of an indexed annual threshold (currently $11,000).[10]

Not only does the IRC definition of political "exempt function" determine which organizations qualify for this tax treatment under Section 527, but it also determines which activities of other organizations are subject to tax on political activities under Section 527(f). Section 527(f) makes 501(c) organizations subject to federal income tax on an amount equal to the lesser of expenditures they make for "exempt functions" defined under Section 527(e) and the amount of investment income the 501(c) organization has received in that year.[11]

501(c) "Campaign Intervention" Standard: "Exempt Function" by Another Name[12]

Organizations operating under Section 501(c)(3) of the IRC are prohibited from "participat[ing] in, or interven[ing] in ... any political campaign on behalf of (or in opposition to) any candidate for public office."[13] The IRS evaluates each possible instance of 501(c)(3) electoral intervention based on a review of all of the "facts and circumstances."[14] A small number of revenue rulings as well as non-precedential guidance such as private letter rulings, indicate that relevant facts include the content and timing of any message, the breadth of the issues addressed in a communication, the organization's history of engaging in similar activities, the intended audience for any message, and many other factors.[15]

501(c) organizations other than 501(c)(3)s may engage in political activities under federal tax law, but these organization do face limits on such activities, and they use the same definition of political activity that applies to 501(c)(3)s. 501(c)s other than 501(c)(3)s must be primarily engaged in the activities that justify their tax-exempt status – the "social welfare" activities of 501(c)(4)s, the efforts on behalf of laborers of 501(c)(5)s, the efforts of 501(c)(6)s to promote a trade or profession, and so on. IRS regulations indicate that partisan political activity does not promote these tax-exempt purposes.[16] For example, the regulations governing 501(c)(4)

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[10] 25 U.S.C. § 2501(a)(5).

[11] This terminology often creates confusion: 501(c) organizations are subject to *taxation* on so-called "*exempt* function" expenditures. 501(c)s face increased tax liability the more they engage in "exempt functions." It is important to remember that the exemption referred to is the exemption for political committees, not 501(c) organizations.

[12] Much of the following analysis is distilled from the draft report of the Task Force on Section 501(c)(4) and Politics, produced by the Subcommittee on Political and Lobbying Organizations and Activities of the American Bar Association's Section on Taxation Exempt Organizations Subcommittee. This report is available from the Task Force co-chair Greg Colvin of the San Francisco law firm of Silk, Adler and Colvin. As a draft, this report should not be read to reflect the final thinking of the Task Force. Furthermore, the American Bar Association has not approved the report, its analysis, or any of its recommendations.

[13] 26 U.S.C. § 501(c)(3).

[14] Election-Year Issues at 339.

[15] *See* Rev. Rul 78-248, 1978-1 C.B. 154, Rev. Rul. 80-282, 1980-2 C.B. 178.

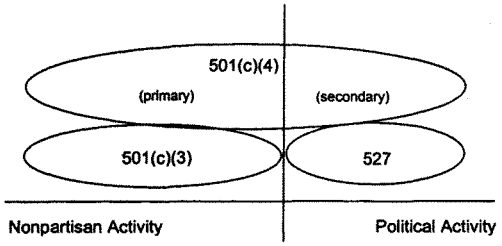
[16] *See*, Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (restriction on 501(c)(4)s), G.C.M. 34233 (Dec. 3, 1969) (restriction on 501(c)(5)s and 501(c)(6)s). Note that if they continue to meet the "primary purpose test" through their core activities, these 501(c) organizations, unlike 501(c)(3)s, may engage in a limited amount of political activity.

organizations provide that "the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office"[17]

As indicated by the similar language prohibiting 501(c)(3) and restricting 501(c)(4) political activity, the IRS has made clear that the activities that would be considered prohibited campaign intervention for 501(c)(3) organization are the same as activities that constitute political activity for 501(c)(4) organizations. In at least one revenue ruling, the IRS has cited existing revenue rulings on 501(c)(3) political activity to describe activities that would constitute political activities for a 501(c)(4).[18] Non-precedential guidance from the IRS has been more explicit that the line for political activities by 501(c)(3)s is the same as that for other 501(c)s.[19]

The IRS has likewise linked the definition of political activities for 501(c)s to the definition of "exempt function" activities under Section 527. In particular, a series of private letter rulings from the late 1990s addressed organizations seeking to have activities declared "exempt function" activities under Section 527. In these rulings, the organizations that sought be qualify as 527 political organizations echoed language used to describe activities held to be prohibited 501(c)(3) political activity. For example, one of these rulings described a proposed voter guide highlighting the candidates' positions on issues selected not based "their importance and interest to the electorate as a whole" but on "their expected resonance with the public."[20] Furthermore, the voter guide that would be targeted geographically based on the organization's political interests and timed to coincide with political campaigns.[21]

There are some areas in which the definitions of "exempt function" under 527 is not perfectly congruent with the definitions of political activities for 501(c)(3)s or other 501(c) organizations.[22] However, it is in large part true that the IRS regulation of political activities by tax-exempt organizations can be summarized by the following simple illustration:



[17] Treas. reg. § 1.501(c)(4)-1(a)(2)(ii).
[18] Rev. Rul. 81-95, 1981-1 C.B. 332.
[19] *See, e.g.*, PLR 9652026 (October 1, 1996). *See also*, Election-Year Activities at 433 (treating as similar the definition of political activities for 501(c)(3) and other 501(c) organizations).
[20] *Compare* Rev. Rul. 78-248, 1978-1 C.B. 154, Situation 2 *with* PLR 9652026 (Oct. 1, 1996).
[21] PLR 9652026 (Oct. 1, 1996).
[22] See, e.g., GCM 39694 (Feb. 1, 1988) (expenditures to oppose federal judicial nominee are both "exempt function" under 527 and permissible lobbying activity for 501(c) organization).

The Vagueness of the Tax Standard as Applied for FECA Purposes

The apparent simplicity of the tax law's definition of political activity and the seeming consistency of the regulatory scheme encompassing different types of tax-exempt organizations masks the fundamental problem with the system: its inherent vagueness and subjectivity.

FECA regulates core political speech and imposes criminal penalties for violations. Thus, FECA is especially intolerant of vague standards. As the Court explained in Buckley:

> Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed. Where First Amendment rights are involved, an even 'greater degree of specificity' is required.[23]

Even in the context of the tax law, the "facts and circumstances" test employed by the IRS creates vast uncertainty for tax-exempt organizations seeking to comply with the law.[24] The IRS has consistently refused to provide a comprehensive list of the criteria it will use to evaluate political activities.

The problem is exacerbated by the relative lack of guidance from the IRS (particularly precedential guidance) to help tax-exempt groups.[25] The IRS Private Letter Ruling process (unlike the Commission's own Advisory Opinion process) does not permit similarly situated organizations cite previous letter rulings as precedent.[26] When the IRS does release precedential guidance in the form of a Revenue Ruling, it often enumerates an explicitly non-exhaustive list of facts and circumstances and then provides discreet examples rather then generally applicable rules.[27]

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[23] Buckley at 77, *citing* United States v. Harriss, 347 U.S. 612, 617 (1954) and Smith v. Goguen, 415 U.S. 566, 573 (1974).

[24] *Cf.* United Cancer Council v. Commissioner, 165 F.3d 1173, 1179 (7th Cir. 1999) (Judge Posner, considering use of the "facts and circumstances" standard to evaluate appropriate costs of fundraising for 501(c)(3)s: "'facts and circumstances'... is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS").

[25] On several occasions, the American Bar Association Section on Taxation and its various committees and subcommittees have urged the IRS to address the lack of guidance in this area. *See, e.g., Commentary on IRS 1993 Exempt Organizations Continuing Professional Education Technical Instruction Program Article on 'Election Year Issues,' prepared by individual members of the Subcommittee on Political and Lobbying Activities and Organizations of the Committee on Exempt Organizations of the Section on Taxation, American Bar Association*" (Feb. 21, 1995), reprinted in 11 EXEMPT ORGANIZATION TAX REVIEW 854 (Apr. 1995). While the IRS has provided some welcome additional guidance in recent months (see, e.g., Rev. Rul. 2004-6), tax-exempt organizations and those who represent them continue to engage in what is little more than an educated guessing game in this area.

[26] Compare 26 U.S.C. 6110(k)(3) ("may not be used or cited as precedent") with 11 C.F.R. § 112.5(a) (an AO may be relied upon by any person engaged in an activity materially indistinguishable from that described in the AO).

[27] An analogy may help the Commission to understand the inadequacy of the available guidance on the tax-law definitions of political activity: If the Commission provided guidance on FECA at a level equivalent to the level of guidance the IRS has provided on political activities under the IRC, the Commission would have issued no new regulations and perhaps half a dozen Advisory Opinions in the past twenty years. While such an output would

Given the strict scrutiny with which the courts would view any general restriction on political activity, no court could possibly find that the IRS definition of political exempt-function activities for 527 organizations would provide the necessary "adequate notice" to survive a constitutional challenge for vagueness.

Treating all 527s as political committees would be unconstitutionally overbroad.

An effort to bring all 527 organizations under FECA's restrictions on political committees, as suggested in the NPRM and by some submitting comments,[28] would regulate a wide range of activities protected under the First Amendment and, at least until now, exempted from regulation by the Commission. The IRS has long recognized that its standards for identifying political activity by tax-exempt organizations captures far more activity than is regulated under federal election law.[29] Many examples exist of legitimate activities that would be swept into the Commission's regulatory net if all 527s are treated as political committees under FECA. Because this proposal goes far beyond the range of 527 activities that might affect the compelling state interest that justifies FECA, the proposal is unconstitutionally overbroad.

At the outset, it should be obvious to the Commission that any attempt to regulate *all* 527 organizations would exceed the Commission's federal jurisdiction. Many organizations that qualify for tax exemption under IRC Section 527 are not primarily engaged in influencing federal elections. These 527 organizations operate, in whole or in part, to influence state or local elections or to influence nominations for appointed offices (such as judicial nominations).[30]

Even in the context of races for federal elective office, there are numerous activities that the tax code recognizes as 527 "exempt function" activities – activities that could lead the IRS to classify an organization as a 527 – that are beyond the Commission's statutory and constitutional reach. Some 527s engage in activities related to federal election activities that fall within this gap, making per se treatment of them as federal political committees inappropriate. Each of the following examples describes an organization that the IRS would consider to be a 527 organization that under this proposal would be subject to FECA restrictions.

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certainly have reduced the workload of the Commission, it would hardly have provided sufficient assistance those seeking to comply with the law.

[28] *See,* NPRM at 11741 and Letter from Democracy 21, *et al.,* to FEC (March 16, 2004).

[29] The IRS has recognized that its congressionally granted authority to restrict political activities of tax-exempt organizations is appreciably greater than the Commission's authority to regulate political speech more generally. In its training manual for IRS examiners and other staff, the IRS states that, "[t]he language of IRC 501(c)(3) indicates a much broader scope to the concept of participation or intervention in a political campaign." *Id.* at 349 (contrasting the ruling of the court in FEC v. Christian Coalition (52 F. Supp. 2d 45 (D.C.D.C. 1999)) in which the court held that a narrow definition of political activity was constitutionally necessary under federal election law.)

[30] The NPRM's Alternative 2-B would regulate all 527s, but Alternative 2-A acknowledges and exempts 527s that engage in some of these purposes other than influencing races for federal elective office. Yet even Alternative 2-A would only exempt 527s engaged "solely" in these non-federal activities. It is possible that a 527 might engage in some federal election activities but be primarily engaged in efforts to influence state and elections. For example, a 527 organization might dedicate 20% of its efforts and resources to federal election activities with the remainder going to non-federal "exempt function" activities. Yet under Alternative 2-A, the slightest taint of activity related to federal elections would force the 527 to operate under the restrictive rules governing federal political committees.

- The sole activity of a 527 created to "elevat[e] the standards of ethics and morality in the conduct of campaigns for political office" is seeking candidate commitment to the organization's "code of fair campaign practices" The organization produces materials that list the names of candidates who support the code. The IRS has ruled that an organization that approaches all candidates for office and asks that they sign or endorse such a code has engaged in an activity that "constitutes participation or intervention in a political campaign."[31] Under current federal election law, this activity would not be an "expenditure"; it would not require federal "hard money."[32] Yet under the proposal, a 527 engaged solely in this activity would be treated as a federal political committee.

- The sole activity of a 527 is to publish advertisements to promote a particular state ballot measure. None of these advertisements refer to a candidate for elective office, but the 527 has evidence that the effort will likely bring out voters who tend to support a federal candidate running for reelection on the same ballot. The IRS has ruled that this organization would qualify under as a 527 organization and would not qualify as a 501(c) organization.[33] Under current federal election law, this activity would not be an "expenditure"; it would not require federal "hard money."[34] Yet under the proposal, a 527 engaged solely in this activity would be treated as a federal political committee.

- The sole activity of a 527 devoted to improving the quality of elected officials is rating the qualifications of all candidates for Congress and publishing the results prior to an election. The ratings are not based on political ideology but rather on nonpartisan criteria including the candidates' prior governmental experience, a survey that asks public officials (such as state legislators, governors, mayors, and other members of Congress) and members of the press to identify those candidates who are "effective," and an evaluation of the candidates' responsiveness to constituent requests for assistance. In many cases, the ratings do not indicate the preferred candidate in a particular race because all candidates for that race share the same rating. Faced with a tax-exempt organization that conducted a similar nonpartisan rating project for state judicial candidates, the IRS ruled that the organization had "intervened" in an election, and the court considering an appeal from the IRS decision stated that although this activity was nonpartisan and in the public interest, it nevertheless constituted participation or intervention in a political campaign.[35] Under current federal election law, this activity would not be an "expenditure"; it would not require federal "hard money."[36] Yet under

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[31] Rev. Rul. 76-456, 1976-2 C.B. 151 (modifying Rev. Rul. 66-258, 1966-2 C.B. 213).
[32] *See* 11 CFR 114.4(c)(5)(i). (For purposes of this and all subsequent examples, we assume that there is no issue of coordination with candidates.)
[33] *See* PLR 199925051 (March 29, 1999) (effort to support ballot measure is "exempt function" activity if organization has evidence to show that work would support or oppose a candidate for elective office). Because the IRS has ruled this to be an "exempt function" activity, it could not be conducted by a 501(c)(3) nor could it be the sole activity of any other 501(c) organization.
[34] The communication contains no reference to a candidate for federal office is not coordinated with a candidate.
[35] Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989).
[36] *See* 11 CFR 114.4(c)(5)(i).

the proposal, a 527 engaged solely in this activity would be treated as a federal political committee.

- The sole activity of a 527 is publishing a voter guide for its members and others concerned with environmental issues. The guide compiles incumbents' voting records on selected environmental legislation of importance to the organization and provides a factual, objective summary of the the policy issues that underlie each bill. The guide contains no express statements in support of or in opposition to any candidate. The guide is widely distributed among the electorate during an election campaign. In analyzing a similar example as a 501(c)(3) activity, the IRS stated that "while the guide may provide the voting public with useful information, its emphasis on one area of concern indicates that its purpose is not nonpartisan voter education."[37] In a later private letter ruling, the IRS confirmed this analysis, suggesting that a voting record distributed during the election season and focusing on selected issues of importance to the organization would be an "exempt function" activity under Section 527 of the IRC.[38] Under current federal election law, this activity would not be an "expenditure"; it would not require federal "hard money."[39] Yet under the proposal, a 527 engaged solely in this activity would be treated as a federal political committee.

THE COMMISSION LACKS THE STATUTORY AUTHORITY TO REGULATE ALL 527S

FECA, even with the amendments of BCRA, does not empower the Commission to regulate all 527 organizations. In fact, just the opposite is true: Congress has clearly known about 527s for quite some time, and it has made other choices – in BCRA, in the tax law – to regulate these organizations short of the sweeping authority the Commission seeks to assert here. Furthermore, several provisions of FECA make no sense unless Congress anticipated that some 527s were beyond the reach of the Commission. Indeed, even the Supreme Court in the case upholding BCRA recognized that these independent groups would continue to exist outside of the restrictions on political committees.

Congress has chosen to regulate 527s in different ways.

Congress has not empowered the Commission to regulate 527s, despite the fact that it has had ample opportunity and impetus to do so. In passing BCRA, the most sweeping revision to FECA in the history of the Act, Congress included no amendment that regulates 527 organizations as a class.

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[37] Rev. Rul. 78-248, 78-1 C.B. 154. Several IRS rulings suggest that failure to cover a broad range of issues in a voter guide (*id.*), a legislative scorecard (*id.*), or a candidate debate (Rev. Rul. 86-95, 1986-2 C.B. 73), will cause the IRS to treat the activity as political. As a result organizations that focus on a single issue and that wish to engage in these activities as the organization's primary purpose must be organized as 527 organizations.
[38] PLR 980837 (Nov. 21, 1997).
[39] *See* 11 CFR 114.4(c)(5)(i).

There is no doubt that Congress was aware of the so-called "soft" 527s. When Senator John McCain, a chief sponsor of BCRA (or, as it was better known, the "McCain-Feingold" law) sought the Republican nomination for President in the year 2000, he was targeted by a 527 organization known as "Republicans for Clean Air." Later discovered to be funded by two supporters of then-candidate George Bush, Republicans for Clean Air was widely credited with doing serious damage to McCain's campaign.

In the wake of public outcry about Republicans for Clean Air, Congress did act to regulate 527s, passing legislation in the year 2000 requiring all 527 organizations to disclose their contributions and expenditures.[40] Significantly this new law did not restrict these 527 organizations or require that they be treated as political committees under FECA.

BCRA is inconsistent with Commission regulation of all 527s

In passing BCRA, Congress had another opportunity to expand regulation of the soft 527s. Not only did Congress demur, but there are also provisions in BCRA that only make sense if Congress anticipated that there would be independent organizations engaged in election-related activities that fell short of the Commission's regulatory authority.

For example, BCRA explicitly permits federal candidates to raise funds for an organization that is principally engaged in "federal election activity" as long as the candidate solicits only individuals and the amount solicited does not exceed $20,000 per year. Because only organizations that are not federal political committees, such as soft 527s, could accept contributions greater than $5000 per year, Congress must have intented that some 527s not be classified as political committees.

Similarly, Title II of BCRA (the new limits on "electioneering communications") exists because the Congressional sponsors of BCRA assumed that a more sweeping attempt to regulate issue advertising would not pass constitutional muster.

In Buckley, the Supreme Court rejected a constitutional challenge to FECA's restrictions on expenditures only by limiting the restriction to those communications "containing express words of advocacy of election or defeat."[41] Subsequent court rulings affirmed that FECA could only limit independent communications that included words of express advocacy.[42]

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[40] Pub.L. 106-230, 114 Stat. 477 (July 1, 2000). In 2002, after the passage of BCRA, Congress again had the opportunity to expand regulation of 527 organizations when it amended the law. Pub.L. 107-276, 116 Stat. 1929 (Nov. 2, 2002). Despite this chance to address any problems left unresolved by the original law and BCRA, Congress again chose not to grant broad authority to the FEC to regulate soft 527s.

[41] Buckley at 44 n. 52.

[42] *See, e.g.,* Maine Right to Live Committee v. FEC, 98 F.3d 1 (1st Cir. 1996), *cert. denied,* 118 S.Ct. 52 (1997); FEC v. Christian Action Network, 110 F.3d 1049, 1055 (4th Cir. 1997) (holding for narrow definition of "express advocacy"); *but see* FEC v. Furgatch, No. 83-0956-GT(M) (S.D. Cal 1984), (unpublished opinion), *rev'd,* 807 F.2d 857 (9th Cir.), *cert. denied,* 484 U.S. 850 (1987) (upholding broader interpretation of "express advocacy").

In light of these rulings, BCRA's sponsors sought a new way to restrict so-called "sham issue ads," and they created the concept of "electioneering communications" – broadcast ads featuring federal candidates that ran within a certain window of time before an election.[43] The content of the ad (apart from the fact that it featured a clearly identified federal candidate) was irrelevant. This bright-line test, the sponsors believed would survive constitutional scrutiny. They were correct.[44]

The question, for the purposes of this NPRM, is why Congress enacted this central provision of BCRA if it believed that existing federal election law gave the Commission the authority to regulate 527s as a class and other organizations engaged in activities that tended to "promote, support, attack, or oppose" federal candidates. Indeed, it was the lack of such authority that led Congress to enact BCRA's electioneering communications provisions.

The Supreme Court has recognized that Congress left 527s beyond Commission control.

To end any lingering doubt about whether Congress gave the Commission any authority to regulate 527s, we need only look to the Supreme Court opinion in *McConnell*. In that case, the Republican National Committee argued that BCRA violated the Constitution's Equal Protection Clause because it allowed nonprofits, including their 527 accounts, to raise large soft money contributions for electoral activity while prohibiting the parties from doing so. The record before the Court also included examples of stand-alone 527 organizations that raised soft money for electoral activity. Nonetheless the Court understood that Congress intended to leave 527 organizations unmolested, acknowledging that "[i]nterest groups...remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising."[45]

SPECIAL REGULATION OF 527S UNFAIRLY IGNORES EQUIVALENT EFFORTS OF OTHERS

Singling out 527s for regulation in this rulemaking treats activities that are indistinguishable from an electoral standpoint differently simply because they are conducted by a 527 rather than a 501(c) organization (or, for that matter, a wealthy individual). The tax-planning rationales that may lead people to engage in political activities through a 527 are irrelevant to the Commission's task. An attempt to single out 527s creates internal contradictions in the law and would merely add to the level of uncertainty as prudent organizations and their advisors would anticipate later regulation of similar activities by other organizations.[46]

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[43] 2 USC 441b(c).

[44] McConnell v. FEC, No. 02-1674, slip op. at 87 (Sup. Ct. 2003). As the Court said, "the definition of 'electioneering communication' raises none of the vagueness concerns that drove our analysis in *Buckley*." *Id.* at 87.

[45] *Id.* at 80.

[46] We note that although the comments filed by Democracy 21 and other campaign-reform organizations urge the Commission not to regulate 501(c)s in this rulemaking, they also urge the Commission take up this issue at some later date. *See*, comments filed by Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics, posted on the website www.moresoftmoneyhardlaw.com.

As described above, there is no substantive distinction between the activities of 527 organizations and the political activities of 501(c) organizations, and thus there is no reason to regulate them differently. A 501(c) (other than a 501(c)(3)) can conduct any activity that a 527 can conduct.[47] 527s have become more popular only because their use solves specific strategic problems entirely unrelated to the political nature of their activities:

> *Primary Purpose Test:* As discussed above, organizations exempt from federal tax under Section 501(c) of the IRC (except for 501(c)(3)s) may engage in efforts to influence elections as long as such activities do not become the "primary purpose" of the organization. Organizations that wish to engage in additional partisan election-related activity may, however, create a "separate segregated fund" to conduct such activities. These separate segregated funds are treated as separate organizations, exempt from tax under Section 527.[48]
>
> *Tax on Political Activities:* Even when the political activities of a 501(c) organization do not threaten to become the primary purpose of the organization, many organizations choose to create a separate segregated 527 organization to reduce the organization's tax liability under Section 527(f). As described above, 501(c) organizations pay a tax on an amount equal to the lesser of their political expenditures and their investment income.[49] Because 527s can conduct political activities without being subject to tax, 501(c)s that have investment income often choose to put all of their political activities in 527s. Indeed, Congress, in passing Section 527, anticipated that most political activities of 501(c) organizations would be conducted by sister 527 funds for this reason.[50]
>
> *Gift Tax:* Recent popularity in the use of 527 organizations has also been driven by the fact that contributions to most 501(c) organizations are subject to the gift tax but contributions to 527s are not.[51] Thus, donors wishing to contribute more than the annual gift-tax exclusion (recently raised from $10,000 per year to $11,000), may wish to make

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[47] Much has been made of the fact that 527 organizations exist for the primary 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." As described above, that language from the tax code is not determinative that all 527s must be treated as federal political committees. We note in passing similarly "damning" language that describes at least one other type of tax-exempt organization – the so-called "qualified nonprofit corporation." Section 114.10(c)(1) explains that the "only express purpose" of such an organization "is the promotion of political ideas." Of course Section 114.10(b)(1) explains that the "promotion of political ideas" includes "issue advocacy" and other activities "expressly tied to the organization's political goals." One might assume that those eager to regulate 527s would be likewise eager to regulate this special class of 501(c)(4)s. How fortunate for them that the Supreme Court stands in the way. *See generally* MCFL.

[48] 26 U.S.C. § 527(f)(3).

[49] 26 U.S.C. § 527(f)(1).

[50] S. REP. No. 93-1357 (1974).

[51] *See* Rev. Rul. 82-216, 1982-2 CB 220 ("gratuitous transfers to persons other than organizations described in section 527(e) of the Code are subject to gift tax absent any specific statute to the contrary, even though the transfers may be motivated by a desire to advance the donor's own social, political, or charitable goals"). For a more detailed discussion of the applicability of the gift tax to 501(c) organizations, including arguments against application of the gift tax to 501(c)s *see* B. Rhomberg, "Law Remains Unsettled on Gift Taxation of Section 501(c)(4) Contributions," TAXATION OF EXEMPTS, Vol. 15, No. 2 at 62 (Sept./Oct. 2003).

their contributions to 527s rather than, for example, a 501(c)(4) or 501(c)(6).[52]

There are strategic issues that argue *against* use of the 527 form as well. For example, the choice to engage in political activities through a 527 rather than another type of organization will require disclosure of all contributions and expenditures in support of the effort. A 501(c) organization would not have to disclose this information. A single individual with sufficient wealth could make unlimited expenditures to make the types of communications that this NPRM seeks to regulate while avoiding both disclosure and all of the other problems mentioned above as well.[53]

In short, we see no reason for the Commission to impose a more stringent regulatory regime on 527 organizations than on other organizations engaged in exactly the same activities.

PUBLIC POLICY SUPPORTS CONTINUED ROLE OF 527S

In addition to the legal arguments, sound public policy urges the Commission to reject proposals to classify 527s as political committees. Not only do 527s engage in important activities that promote civic engagement, they also serve as an essential balance to other forces that seek to influence the political process.

In an era in which nearly half of all eligible Americans do not exercise their right to vote, the 527 organization is an essential tool to reconnect our citizens with our political process. 527 organizations are the only type of independent organization that can focus effectively on efforts to engage the public in the political process. Unlike 501(c)(3)s, 527s can use election-related messages that resonate with the public: messages that focus on a single issue that motivates a community, messages that explicitly address whether a candidate supports the policy aspirations of a group, messages that target a district lulled into apathy by the apparent invulnerability of a long-time incumbent, messages that – unlike bland exhortations of civic duty – actually succeed in increasing voter involvement. Unlike other types of 501(c) organizations, 527s can exist solely to engage in this type of effective civic engagement work. If a community or a cause only needs a political solution, then only a 527 can help them.

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[52] Until recently, the possibility of avoiding disclosure was another reason to engage in political activity through a 527. Donors wishing to impact elections while remaining anonymous created so-called "soft" 527s. By engaging in activities that were designed to influence elections but that were not subject to regulation by the Commission or state election agencies, donors could avoid public disclosure of their contributions. However in the year 2000, Congress passed a law (Pub. L. No. 106-230) mandating full disclosure of contributions and expenditures by 527 organizations, eliminating this strategic advantage of 527 organizations.

[53] As this unlimited opportunity for independent communications by individuals makes clear, the greatest impact of these proposed rules would not be on wealthy individuals currently making contributions to 527 organizations. Even if these regulations take effect, they will simply engage in these activities on a personal basis. The real impact of these proposed regulations will fall on relatively smaller donors to 527s who need to aggregate their contributions to engage in the types of activities they wish to support.

527 organizations fill an important niche in the political process to balance other centers of political power:

- 527s are the only effective way to aggregate sufficient resources to compete with wealthy individuals who engage in unlimited independent expenditures.
- 527s are the only effective way to compete with corporations and unions that have an unlimited ability to attempt to influence their shareholders, employees, and members.
- 527s can offer a diversity of viewpoints that we may be losing with the increasing consolidation of our nation's media.
- 527s can be an independent voice on an issue – abortion, gun rights, affirmative action – too politically "hot" for poll-driven politicians to bring before the voters in a forthright manner.
- 527s can also offer a *less* strident voice in the political process. For example, a 527 organization committed to ethical behavior by elected officials could present information about impropriety by politicians of all ideologies. That impartiality allows the organization to give voters information they need to make an effective choice without the appearance of opportunism that would taint similar disclosures by the political opponents of the transgressors.

Realistically, 527s could not fulfill these roles if the Commission forced them to become federal political committees. Prohibiting contributions from unions and corporations (including charities) and limiting contributions from individuals to amounts of $5000 or less would prevent most 527s from aggregating sufficient resources to compete in the media or engage in nation-wide efforts.

Even if the Commission could regulate 527s, policy grounds alone urge it not to do so.

CONCLUSION

It is understandably tempting, but misguided, for the Commission to want to regulate 527 organizations as a group. A simplistic look at the nature of the organization under the tax laws, could lead one to think that the Commission would want to regulate organizations that exist primarily for the purpose of "influencing elections." The current media attention to several prominent 527 organizations leads to inevitable cries that the Commission must "do something." Yet a clearer understanding of the nature and obligations of 527s and a careful examination of the Commission's constitutional and statutory authority inevitably must lead the Commission to reject the unfortunate proposals made in the NPRM.[54]

[54] The legal and policy arguments we make here in opposition to this NPRM apply as well to the Commission's recent Advisory Opinion for "Americans for a Better Country." Advisory Opinion 2003-37 (Feb. 19, 2004). In the course of considering that AO, Commissioner Weintraub, at least, indicated that the Commission's ruling might be reconsidered in the course of this rulemaking. We urge the Commission to do so, adopting an opinion similar to that proposed by Chairman Smith.

Thank you for this opportunity to comment on the NPRM. We look forward to providing whatever additional assistance we can provide as the Commission considers this proposal.

Sincerely,

Gail Harmon

John Pomeranz

May 20, 2004

Via Electronic Mail and Hand Delivery

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comments and Request to Testify Concerning Notice of Proposed Rulemaking on Political Committee Status

Dear Ms. Dinh:

The 415 undersigned civil rights, environmental, civil liberties, women's rights, public health, social welfare, religious, consumer, senior and social service organizations submit these comments in response to the Notice of Proposed Rulemaking on Political Committee Status issued by the Federal Election Commission on March 11, 2004 (hereinafter "NPRM").[1] In addition to these comments, the following organizations request an opportunity to testify as representative panels at the hearings scheduled on April 14-15, 2004:

Nan Aron, Alliance for Justice
Wade Henderson, Leadership Conference on Civil Rights
Elliot Mincberg, People For the American Way Foundation

Greg Moore, NAACP National Voter Fund
Carl Pope, Sierra Club
Michael Trister, Lichtman, Trister & Ross, PLLC (on behalf of the undersigned commenters)

The organizations signing this letter are organized as nonprofit corporations under state law and are exempt from federal income taxation under sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code ("IRC"). Several organizations operate as qualified nonprofit corporations under 11 C.F.R. §114.10. A number of the signatories have established separate segregated funds that are registered with the Commission as political committees; many also maintain nonfederal political organizations established under IRC §527(e)(3) that are not registered with the Commission. Some of the groups represented in these comments supported the passage of the Bipartisan Campaign Reform Act ("BCRA") and other campaign finance reform legislation. Our shared interest is that we regularly seek to educate the public and to

advocate positions on legislative and policy issues, including the positions taken by federal officeholders with respect to these issues. In addition, many of us carry out extensive voter participation activities aimed at encouraging under-represented communities to participate in the democratic process by registering and voting. All of the undersigned groups firmly oppose the rules proposed in the NPRM.

This is no ordinary rulemaking. If adopted in anything like the form in which they have been proposed, the proposals in the NPRM would cause countless nonprofit organizations to drastically curtail their current programs or significantly alter the way in which they raise funds and conduct their activities. The proposed rules would seriously impair vigorous free speech and advocacy, as well as voter participation now and in the future. They would double, triple, or even quadruple the number of citizen organizations whose activities are subject to pervasive regulation by the Commission. Most importantly, the NPRM is an ill-conceived attempt to fit a square peg (nonprofit organizations) into a round hole (the rules applicable to political party committees) that not only vastly exceeds the FEC's authority but also would usurp Congress' proper role in this area. The Commission should **withdraw** the NPRM.

I

The NPRM Would Have A Devastating Impact on the Issue Advocacy, Voter Participation and Membership Activities of Nonprofit Organizations.

The draconian proposals in the NPRM will have a devastating effect on three critical and constitutionally protected areas of nonprofit activity: issue advocacy, voter participation, and internal membership communications.

1. The NPRM Will Seriously Impede the Ability of Nonprofit Organizations to Engage in Issue Advocacy.

Nearly 40 years ago, the Supreme Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[2] Thus, "[s]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[3] The proposals in the NPRM ignore these well-established principles by restricting the ability of nonprofit organizations to mention the names of federal officeholders while speaking out on public issues, a practice long approved by the Internal Revenue Service ("Service")[4] and now ingrained in the fabric of political discourse in this country. Several specific proposals in the NPRM suffer from this as well as other related defects.

(A) The NPRM would expand the regulatory definition of "expenditure" to include any public communication that refers to a clearly identified candidate for federal office, and promotes or supports, or attacks or opposes any candidate for federal office, or promotes or opposes any political party.[5] Because nonprofit and other corporations are prohibited by existing Federal Election Campaign Act ("FECA") rules from making "expenditures," the result could be to exclude nonprofits from significant public debate and advocacy. For example, under the

proposed rules, nonprofits would be virtually prohibited from criticizing or praising President Bush until after the November election

Insofar as this provision would expand the FECA's prohibition on corporate expenditures to include communications that do not expressly advocate the election or defeat of a clearly identified candidate, it is completely unauthorized by the statute, which for twenty plus years has been limited to communications that in express terms advocate the election or defeat of a clearly identified federal candidate.[6] Moreover, contrary to the suggestion in the NPRM, nothing in *McConnell v. FEC,* 124 S. Ct. 619 (2003), requires or even permits the Commission to prohibit corporate communications merely because they support, promote, attack or oppose a candidate or political party.[7]

Apart from the facial invalidity of this proposal, it raises other critical problems. For example, the NPRM makes no effort to define the "promote, support, attack or oppose" standard,[8] a failure which will make it impossible for the regulated community and the agency itself to understand the kinds of communications that are prohibited and could have a significant chilling effect and other constitutional problems as applied in this context.[9] In BCRA, Congress permitted the Commission to promulgate exceptions to the definition of "electioneering communication," so long as such exceptions did not allow corporations to promote, support, attack or oppose a candidate.[10] The Commission recognized the unlimited scope of this standard, however, when it rejected numerous such exceptions proposed because they would have protected *some* communications that fell within this broad standard.[11] As the Commission stated, "[a]lthough some communications that are devoted exclusively to pending public policy issues before Congress or the Executive Branch may not be intended to influence a Federal election, the Commission believes that such communications could be reasonably perceived to promote, support, attack, or oppose a candidate in some manner."[12]

In issuing regulations on coordinated communications as directed in BCRA, the Commission similarly considered a "promote, support, attack or oppose" content standard, but rejected it "[a]fter considering the concerns raised by the commenters about overbreadth, vagueness, underinclusiveness, and potential circumvention of the restrictions in the Act and the Commission's regulations ...."[13] Since the Commission's stated goal in defining the content standards for coordinated communications was "to limit the new rules to communications whose subject matter is reasonably related to an election,"[14] it is difficult to explain how its earlier determination that the "promote, support, attack, or oppose" standard was unworkable should not apply with equal force here.

(B) Even if the Commission were to drop the "promote, support, attack or oppose" standard from an expanded definition of "expenditures," the definition of "political committee" proposed in the NPRM would also have a devastating impact on issue advocacy conducted by nonprofit organizations. By importing the definition of "federal election activity" from BCRA's provisions regulating political party committees, the NPRM incorporates the "promote, support, attack or oppose" standard for determining whether a nonprofit organization is a federal political committee.[15] While not as far-reaching as the blanket prohibition on corporate expenditures that promote, support, attack or oppose a federal candidate, the definition of political committee could force many nonprofits either to raise and spend funds in accordance with the source and

amount limitations of the FECA, which would be next to impossible,[16] or to forego or significantly curtail the kinds of issue advocacy that would cause them to be treated as political committees.

Furthermore, the other elements of the expanded definition of political committee are so expansive that a huge number of IRC §501(c) organizations are likely to be so categorized and thus brought within the FECA's rules. For example, an IRC §501(c)(3) or (c)(4) organization which takes out a single full-page ad in the *New York Times* urging President Bush to withdraw American troops from Iraq would, at current rates, likely qualify as a political committee under the proposed $50,000 threshold.[17] So would an organization which runs a single set of television ads urging Senator Kerry to vote in favor of tax cut legislation pending before the Senate if the ads referred to the Senator's votes on earlier tax cuts. And so would a good-government organization which spends more than $50,000 to research and publish a report listing the Members of Congress who accept campaign contributions from corporations, unions or other disfavored sources. In each such instance, it would be of no consequence under the NPRM's proposed rule that the organization in question had never endorsed any candidate for federal office and never maintained a federal political committee to make contributions or expenditures in support of candidates.

(C) By treating all IRC §527 organizations as "political committees" regardless of the nature of their activities, the NPRM would present nonprofits with a classic catch-22 dilemma in which they would be required to create a separate segregated fund ("SSF") in order to protect their federal tax exemption[18] or to avoid paying federal income tax on their permissible campaign related activities,[19] only to have the SSF treated by the Commission as a federal political committee because of its tax status alone.[20] These non-federal SSFs currently may receive and spend soft money contributions, including transfers from their connected IRC §501(c) organizations, as long as they do not make contributions or independent expenditures as defined under the FECA. Under the NPRM, however, such connected 527 entities would be prohibited from accepting soft money from any source, including their own sponsoring organizations, and would be required to register and report to the FEC. The result would be to seriously impede the sponsoring 501(c)(4) organization.

The NPRM suggests that, with certain exceptions, all IRC §527 organizations should be treated as political committees because under the tax code such organizations must be organized for the primary purpose of accepting contributions or making expenditures for an "exempt function," which in turn is defined in part as the "function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual" to federal, office.[21] However, this argument ignores the fact that the IRS broadly construes the term "exempt function" activities in IRC §527(e) to include campaign-related activities that have never been regarded as triggering political committee status under the FECA, including activities in connection with ballot measures and grassroots lobbying, as long as the activities "are related to and support the process of" influencing the selection and nomination of a candidate to public office.[22] Indeed, under the facts and circumstances test followed by the IRS in making determinations under IRC §527, this may mean nothing more than that the organization has certified that its purpose in undertaking certain activities is to influence elections.[23]

In addition to the broad meaning of "exempt function" as construed by the IRS, the IRS' definitions of political campaign activity do not as a general rule provide appropriate standards for enforcement of federal election law. The language of the tax code dealing with political campaign activity is much broader than the language of the FECA.[24] Moreover, because the tax law provisions dealing with political campaign activity merely determine the conditions under which organizations may receive the benefits of particular tax exemptions, Congress has greater leeway in defining these activities than in defining the political activities *prohibited* under the FECA.[25] Because an organization which violates the tax rules on political campaign activity is not subject to civil or criminal penalties, the IRS has taken the position that its policies in this area are not subject to constitutional limits of vagueness and overbreadth.[26] The Commission should not rely on standards developed by the IRS to define "political committees" regulated by federal election law.

Finally, the suggestion in the NPRM that IRC §501(c) organizations could be exempted from the proposed definition of political committee,[27] would provide little relief to many such organizations as long as the Commission adopts a *per se* rule for IRC §527 organizations. As explained above, and as illustrated by the structures of many of the signatories to this letter, nonprofit organizations frequently maintain connected non-federal SSFs under IRC §527(f)(3) in order to protect their tax-exempt status and to avoid paying tax on their campaign-related activities -- a practice that has become more common throughout the nonprofit community as a result of the broad definition of "exempt function" developed by the IRS. IRC §§501(c)(4), (c)(5) and (c)(6) organizations also establish non-federal SSFs in order to take advantage of the favorable gift tax treatment of IRS §527 organizations, which allows them to raise large contributions from individual donors.[28] Non-federal IRC §527 organizations are already subject to more stringent reporting requirements than IRC §501(c) organizations, and, to the extent that the Commission were to conclude that it is unnecessary or inappropriate to regulate IRC §501(c) organizations as "political committees," there is no legitimate reason to regulate the SSFs that are established, financed and controlled by such IRC §501(c)s.[29]

2. The NPRM Will Restrict the Ability of Nonprofit Organizations to Conduct Nonpartisan Voter Participation Activities.

Since before the civil rights movement of the 1950's and 60's, nonprofit organizations have undertaken extensive activities to encourage citizens to participate in the democratic process by registering to vote and voting. In 1969, Congress took note of these activities and approved them.[30] In the past, the Commission has also recognized the benefits of voter participation activities by expressly approving nonprofit corporations to engage in them. Indeed under an earlier version of its regulation, the Commission determined that for-profit corporations and unions could only support voter participation activities if they were conducted jointly with nonprofit organizations.[31] The proposals in the NPRM would significantly curtail, if not eliminate, these invaluable voter participation activities.

(A) The NPRM includes an amended definition of nonpartisan voter registration and get-out-the-vote activity which would bar almost all forms of voter participation activity now undertaken by nonprofit organizations. In contrast to the current regulation, under which voters

may be encouraged to register or to vote using any message that does not expressly advocate the election or defeat of a federal candidate,[32] the proposed amendment would prohibit any voter participation activities in which the message "promotes, supports, attacks, or opposes a Federal or non-Federal candidate or that promotes or opposes a political party."[33] Since, in this instance, the regulation does not even require a reference to a clearly identified candidate, virtually any message that urges citizens to vote out of concern for a particular issue could violate the FECA's ban on corporate expenditures if the message might be construed as promoting or opposing a federal candidate in some fashion.

In addition, whereas under the current regulations, corporations and unions have been prohibited from determining the party or candidate preferences of *individuals* before encouraging them to register to vote or to vote,[34] the NPRM proposes to add a new section prohibiting groups from using any information "concerning likely party or candidate preference" to determine who it will encourage to register or vote.[35] Under this proposal, a nonprofit organization may no longer be able to target its voter participation activities on particular communities or demographic groups, including African-Americans or Hispanics, even though such groups have historically been excluded from participating in the democratic process, if data showed that such groups were "likely"[36] to prefer the candidates of one party or another. They similarly may not be able to target their voter participation activities by gender, even though women have been under-represented in the democratic process and may be more likely to support issues of concern to some organizations, if data showed that one gender is more "likely" to prefer, for example, a female candidate, a younger candidate, or a married candidate.

Finally, under this proposal, groups that are concerned with particular issues, such as protecting the environment, reforming our tax laws, or eliminating poverty, may not be able to target voters who have indicated support for these issues, if data shows that individuals who favor, or disfavor, such issues are more likely to prefer candidates of one party or the other or one candidate over another. In each of these instances, under the NPRM, as long as data is available showing "likely" voting preferences by particular groups, an organization could not safely undertake a voter participation program aimed at such groups without risking a full FEC investigation into whether it was aware of such information and took it into account in making decisions about its program, an investigation which would involve the most sensitive details of the organization's decision-making process and in which the organization would always be faced with proving a negative. Few nonprofit organizations will be willing or able to take this risk.[37]

(B) As in the case of issue advocacy, even if the Commission were to drop the new definition of nonpartisan voter registration and get-out-the-vote from the definition of prohibited "expenditures," the NPRM's proposed definition of "political committee" would nevertheless make it virtually impossible for nonprofits to engage in voter participation activities, no matter how nonpartisan they may be. Under the Commission's existing regulations, any "voter registration activity" conducted in the period beginning 120 days before a regularly scheduled primary or general election and ending on the date of the election falls within the definition of "federal election activity."[38] In addition, "voter identification," "generic campaign activity," and "get-out-the-vote activity," in connection with any election in which one or more candidates for federal office appears on the ballot fall within the definition of "federal election activity" if such activities are conducted at any time after January 1 of an even-numbered year or after the date of

the earliest filing deadline for access to the primary election as determined by state law.[39] These definitions apply whether or not the voter participation activities are conducted in a strictly nonpartisan manner. While these rules were adopted by Congress only for state and local political committees, the NPRM would apply them to independent, non-party groups by incorporating them into the definition of federal "political committee."[40] The result would be to require that virtually all voter participation activities, whether undertaken by IRC §501(c) organizations or IRC §527 organizations, be financed entirely with hard money.

Since many nonprofits rely on grants from private foundations and large donations from individuals to support their voter participation activities, such a rule would virtually put them out of business. For example, even a foundation-funded nonpartisan voter registration drive conducted by the League of Women Voters beginning on July 4, 2004, less than 120 days before the election, would be illegal under the proposed rules.

3. The NPRM Will Restrict the Ability of Nonprofit Organizations to Communicate With Their Members on Legislative and Political Subjects.

In *United States v. C.I.O.,* 335 U.S.106, 121 (1948), the Supreme Court ruled that, under the First Amendment, labor unions may not be limited in their communications with members on matters of legislation and politics. When Congress enacted the FECA, it responded to these constitutional concerns by expressly allowing unions and other membership organizations to communicate with their members and their families "on any subject," notwithstanding the statute's general prohibition on corporate and union contributions and expenditures.[41] The ability of nonprofit corporations or labor organizations to communicate with their members under the FECA may not be unduly restricted because of the First Amendment values at stake.[42] The NPRM, however, burdens membership communications by nonprofit organizations in several important ways.

(A) The NPRM eviscerates the benefits of the FECA's membership exception by treating as a federal political committee any nonprofit organization whose membership communications and voter participation activities reach prescribed thresholds. This is because three of the proposed alternative definitions of "political committee" rely in part on the FEC's definition of "federal election activity," which contains no exception for membership communications.[43] Not only is this limitation very clearly unconstitutional, it is another example of the way in which the NPRM's wholesale incorporation of rules enacted by Congress to regulate political party committees makes no sense in the context of independent, non-party organizations.

(B) The NPRM also limits the ability of nonprofit organizations to urge their members to support or oppose specific candidates when these messages are joined with a solicitation for funds. Prop. Reg. §100.57 provides that any gift made in response to a communication that includes material expressly advocating a clearly identified federal candidate "is a contribution to the person making the communication." Since the proposed regulation contains no membership exception, if a nonprofit organization were to urge its members to contribute to a candidate endorsed by the organization, which the FECA permits it to do, all contributions made to the

endorsed candidate would be treated as "contributions" to the organization and cause it to become a "political committee" in its own right. Similarly, if a nonprofit organization were to urge its members to contribute to the organization's own federally registered separate segregated fund in order to support or defeat specific candidates, which it is also permitted to do, the organization itself could become a "political committee" for federal election law purposes. Since nonprofit organizations cannot operate as political committees for both fiscal and administrative reasons, they will have no choice but to limit their membership communications to avoid political committee status.

II

The Expansive Proposals In the NPRM Far Exceed the FEC's Regulatory Authority or Capability and Usurp Congress' Proper Role.

Under the FECA, the Commission has been delegated authority only to "prescribe rules, regulations, and forms *to carry out the provisions of this Act* . . . ."[44] This provision not only grants authority to the Commission, it also serves as a limitation on the scope of that authority, for any regulation that is not authorized by the Act itself is beyond the power delegated to the agency by Congress. As shown above, the NPRM's proposal to abandon the express advocacy definition of "expenditure" and replace it with the "promote, support, attack or oppose" standard is not authorized by the FECA as authoritatively and consistently construed by the Supreme Court. The other proposals in the NPRM are similarly beyond the Commission's authority or capability. Congress has spoken to the core issues raised in the NPRM and has stopped well short of enacting the kinds of broad rules under consideration. Furthermore, even if the agency were acting on a blank legislative slate, which it is not, it does not have the administrative tools and has allowed itself insufficient time to examine properly the complex issues underlying the NPRM. Finally, in a government characterized by the constitutional separation of powers, Congress and not the Commission is the proper institution to balance the competing political interests at stake in the NPRM.

1. Congress Has Addressed the Core Issues Raised in the NPRM and It Stopped Far Short of the Radical Proposals Now Being Considered.

As the Supreme Court recognized in *McConnell*, under the BCRA, "[i]nterest groups ... remain free to raise soft money to fund voter registration, GOTV activities, mailings and broadcast advertising (other than electioneering communications)."[45] Congress' decision to stop short of applying its soft money regulations to independent interest groups forecloses the far-ranging proposals in the NPRM.[46]

Questions about the application of federal election law to independent nonprofit interest groups are not new and have been addressed on numerous occasions by both the courts and Congress. In *FEC v. Nat'l Right To Work Comm.*, 459 U.S. 197, 201 (1982), for example, the Supreme Court noted that in enacting the FECA §441b, Congress had allowed "some participation" by nonprofits in the federal electoral process by allowing them to establish and pay for separate segregated funds which may be used for political purposes. And, in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 93 (1986), the Court found that certain nonprofit

"political associations" do not pose the same danger of corruption as business corporations, and it held, therefore, that even when incorporated, such groups constitutionally may not be barred from using their treasury funds to expressly advocate the election or defeat of federal candidates.[47] Finally, in its recent decision in *McConnell,* in considering the application of BCRA's ban on electioneering communications to nonprofit corporations, the Court found that the nonprofit exception adopted in *MCFL* was part of the background on which Congress enacted BCRA and that it was presumed to have incorporated the special treatment of such entities into the specific provisions which it adopted.[48]

Protection of *MCFL* entities is not the only way in which BCRA addresses nonprofit interest groups. The Thompson Committee investigation that provided the empirical basis for the BCRA reforms had touched on the activities of certain nonprofit organizations during the 1996 federal elections,[49] and Congress responded to the Committee's findings in a number of limited ways. In a section entitled "Tax-Exempt Organizations," for example, BCRA provides that no political party committee and no agent acting on behalf of a political party committee may "solicit any funds for, or make or direct any donations to," an organization established under any provision of section 501(c) of the Internal Revenue Code that makes expenditures or disbursements in connection with an election for federal office, or to any non-party political organization established under IRC §527 organization other than a registered political committee.[50] Similarly, although BCRA generally prohibits federal candidates and officeholders from soliciting or spending soft money for any purpose,[51] the statute expressly permits candidates and officeholders to make general solicitations of soft money without limitation for any IRC §501(c) organization other than one whose principal purpose is to conduct certain federal election activities, and even to make limited specific solicitations of soft money to support such election activities by these organizations.[52]

Nonprofit organizations were also addressed in BCRA's provisions dealing with electioneering communications. While the Snowe-Jeffords amendment initially excepted both IRC §501(c)(4) and §527 entities from the ban on corporate and union electioneering communications,[53] the Wellstone amendment eliminated this exception, but only with respect to certain "targeted communications."[54] And, the Commission itself has recognized that the purposes of these provisions are not served "by discouraging charitable organizations from participating in what the public considers highly desirable and beneficial activity, simply to foreclose a theoretical threat from organizations that has not been manifested....".[55]

Two conclusions relevant to the pending NPRM are evident from these provisions. First, in enacting BCRA, Congress was concerned with the activities of nonprofit entities primarily as they related to the larger issue of soft money contributions to federal candidates and political party committees. Congress evidently did not believe that the election-related activities of IRC §501(c) and 527 organizations presented the same risk of soft money abuse as had been documented for political parties, and it stopped short of prohibiting nonprofit entities from engaging in such activities. Indeed, Congress recognized that nonprofit interest groups would continue to engage in campaign-related activities and it expressly permitted candidates and officeholders to assist such groups in raising funds to support these activities, albeit subject to new limitations.

Second, the debate over the Snowe-Jeffords and Wellstone amendments makes clear that Congress understood the role of nonprofit entities in sponsoring issue advertisements and, while it prohibited many of them from disseminating the narrowly defined category of broadcast communications, it again stopped far short of prohibiting nonprofit organizations from engaging in a much wider range of public communications. The distinction between political parties and interest groups was fully aired. Indeed, it was the continuing ability of independent interest groups "to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications),"[56] on which the political party plaintiffs in *McConnell* based their equal protection challenge to the statute.[57] While the Supreme Court acknowledged "this disparate treatment,"[58] it nevertheless rejected the equal protection argument because Congress "is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation."[59]

In addition to its treatment of nonprofit organizations generally in BCRA, Congress has twice enacted legislation specifically addressing the issue of IRC §527 organizations, on both occasions stopping far short of the radical measures proposed in the NPRM. During the 2000 election cycle, the media reported extensively on the existence of so-called "stealth PACs" which were not registered with the Commission as political committees but which reportedly were spending large sums to influence the outcome of the upcoming federal elections.[60] Congress responded to these reports by amending the tax code to require any organization established under IRC §527 that does not file reports with the Commission to register with and report their contributions and expenditures to the Internal Revenue Service.[61] In October 2002, only six months after passage of BCRA, Congress again amended IRC §527 in order to clarify that the registration and reporting requirements imposed in 2000 were not applicable to entities that conduct state and local political activity and report to state agencies.[62] Congress thus clearly stopped short of treating all 527 organizations as hard-money entities,[63] and instead adopted enhanced disclosure provisions to ensure that the public had access to extensive information about these groups.[64]

In sum, the Commission is not considering the current NPRM on a blank slate. Both in BCRA and in specific legislation addressing IRC §527 organizations, Congress has recently considered the extent to which it is willing to limit the campaign-related activities of independent nonprofit interest groups and in each instance it has stopped far short of the radical proposals in the NPRM. The Commission cannot ignore these judgments and proceed on a course that Congress itself has refused to take.

2. The Commission Lacks the Administrative Tools To Examine the Issues Raised in the NPRM and, in Any Event, There Is Insufficient Time To Carry Out this Examination Under the Current Expedited Schedule.

Even if Congress had not spoken to the issues raised in the NPRM and stopped far short of the far-ranging provisions now before the Commission, the Commission lacks the administrative tools to examine these proposals properly. As the Supreme Court described in *McConnell*, Congress adopted the BCRA reforms only after receiving a six-volume report summarizing the results of a year-long investigation into campaign practices in the 1996 federal

elections.[65] As described in the Thompson Committee's 9575-page report, the committee's hearings occupied 32 days over a period of three and one-half months and included testimony from 72 witnesses.[66] The Committee also subpoenaed and received thousands of pages of documents from 31 different organizations and conducted interviews with numerous other individuals.[67] In contrast, the Commission has no power to hold evidentiary hearings, compel the production of documents and witnesses, or take the other steps necessary to consider adequately the factual issues raised in the NPRM. In addition, the few reports filed with the Commission and the IRS since BCRA took effect at best provide only a partial glimpse at the activities which the NPRM addresses; and the Commission itself has virtually no enforcement experience in this area.[68]

The lack of adequate administrative tools has been compounded by the Commission's decision to complete its work on the NPRM on an expedited schedule that will leave it only a few weeks to consider the voluminous comments likely to be submitted by the public. There is insufficient time for the Commission to conduct even a truncated investigation into the need for the reforms it is now considering under this schedule, and there is no need for it to rush to do so. Congress has not mandated that the Commission reconsider its policy on political committees,[69] let alone that it do so by a date certain. Furthermore, even under the Commission's expedited schedule, any new regulations the Commission may decide to issue will not take effect until the middle of the current federal election season, forcing the Commission either to choose between delaying the effective date of its regulations or changing the rules in the middle of the campaign.[70]

The inability of the Commission to compile a full empirical record regarding the issues in the NPRM has critical legal consequences. Most importantly, because the proposed regulations impact directly on freedom of speech and freedom of association, the Commission must be able to demonstrate that its rules are required by a compelling governmental interest and are narrowly tailored to serve those interests.[71] As the Supreme Court noted in *McConnell*, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty or the plausibility of the justification raised."[72] Here, the notion that independent groups with no connection to federal candidates or political parties are subject to the same risk of corruption as party committees is not only novel and implausible, but, as discussed above, it also disregards Congress' own recent legislative judgments on the same subject. The Commission cannot attempt to meet this constitutional burden with little more than "mere conjecture,"[73] which is all it can possibly offer on the record before it.

In addition to these constitutional concerns, the Commission must also create an adequate empirical record to meet its obligation under the Regulatory Flexibility Act,[74] to demonstrate that the proposals in the NPRM will not have an unnecessary impact on small entities, including small nonprofit organizations. The NPRM does not include an initial regulatory flexibility analysis because the Commission concluded that the rules will not have a significant economic impact on a substantial number of small entities.[75] This conclusion was based, however, on the specific finding that "all but a few of the 527 organizations that may be affected by the proposed rules have less than $6 million in average annual receipts and therefore qualify as small entities under the North American Industry Classification System."[76] The NPRM did not, however, indicate the empirical basis for this finding, which so far as can be determined has no basis

whatsoever in the public record. Moreover, in assessing the impact on small entities, the NPRM only considered the impact on non-federal 527 organizations which would be reclassified as federal political committees under the NPRM, without taking into account the hundreds, if not thousands, of other nonprofit organizations that also would be classified as political committees under the proposed definition. In addition, in assessing the impact of the NPRM, the Commission erroneously stated that organizations will not be economically impacted by the new rules because, while the rules "limit the types of funds that may be used to pay for certain activities," organizations can still spend unlimited amounts on those activities that do not fall within the expanded definition of "expenditure." This conclusion ignores the fact that most nonprofits will not be able to raise hard money at all and they are prohibited from engaging in many of the other activities that do fall within the definition of expenditures. Unless the Commission demonstrates a good faith effort to consider these issues on the record, the entire NPRM will be subject to challenge by the numerous small nonprofit organizations that will be affected by its proposals.

Finally, although the issues raised in the NPRM have received some limited attention in the media, these reports, which consist largely of a few, oft-repeated anecdotes about a tiny number of so-called 527 entities, are insufficient to satisfy any of these legal requirements. At least one of the groups mentioned in the media already appears to be covered by the rules announced very recently in AO 2003-37.[77] And the limited information about the other groups mentioned in these new stories hardly amounts to an empirical record on which to base important policy decisions. As Thomas E. Mann and Norman Ornstein recently wrote, "[m]ost of the reports about shadow political party organizations reeling in large soft money donations from corporations, unions and wealthy individuals – money that previously went to the parties – *are based more on hype than fact.*"[78] This observation has special force because Mann and Ornstein are well-recognized social scientists who have studied the impact of campaign finance regulations for many years and who helped develop the factual record supporting BCRA before Congress and in the courts.

In sum, it will be impossible for the Commission to conclude on the basis of the record to be compiled in this truncated rulemaking that BCRA's provisions are being routinely circumvented by the activities of independent interest groups, let alone that the drastic remedies proposed in the NPRM are necessary or practical. The editorial writers at the *Washington Post* were clearly correct when they recently wrote, "[b]efore [Congress] -- or the FEC – take another [step], it would be wise to wait and see how the new system operates in practice."[79]

3. Congress And Not the Commission Is the Appropriate Institution To Resolve the Delicate Political Issues at the Core of the NPRM.

Even if Congress had not already spoken to the issues raised by the NPRM, and even if the Commission were able to compile an adequate empirical record to evaluate those proposals in the limited time available, and even if the new rules would not risk serious disruption in the middle of an election year, the Commission is not the proper institution within our government to resolve the issues at stake. The proposals in the NPRM pose, at their core, fundamental policy questions concerning the appropriate role of independent interest groups in our political system.

Just as the role of corporations, unions and political action committees was central to the original legislative debates over the FECA, and the relative role of political party committees was central to Congress' consideration of BCRA, determining the appropriate role of independent, non-party groups in our political system requires a delicate balancing of deeply felt and competing interests which is beyond the mandate or competence of this Commission.[80]

These observations have even greater power here because the NPRM involves the regulation of protected forms of speech and association. Since any rule adopted by the Commission regulating the campaign-related activities of nonprofit organizations will necessarily burden First Amendment rights, it is critical that the rule be based on choices made by Congress and not by the Commission acting without any legislative guidance. As Professor Kenneth Culp Davis, one of the country's most respected students of the administrative process, has written, "[g]overnmental action at the borderland of constitutionality can reasonably be held unconstitutional if the basic determination is made by anyone but Congress."[81] In our constitutional system of shared governmental powers, it is Congress and not the Commission which should decide whether there is a compelling governmental interest in limiting fundamental constitutional rights and, if so, how such limits should be tailored to serve only those and no other ends.[82]

Conclusion

The proposals in the NPRM conflict with existing law and go far beyond Congress' legislative determinations on three recent occasions. They would improperly and drastically impede the ability of nonprofit organizations to undertake vital issue advocacy, member communications and nonpartisan voter participation activities. Furthermore, the Commission does not have the administrative tools and has left itself insufficient time to conduct the full empirical inquiry required by the First Amendment and other legal requirements. Finally, the NPRM raises important policy issues regarding the role of independent interest groups in our political system which should be resolved only by Congress. For these reasons, the Commission should withdraw the NPRM without further action.

Respectfully submitted,

Alliance for Justice
Leadership Conference on Civil Rights
League of Conservation Voters
NAACP National Voter Fund
NARAL Pro-Choice America
Planned Parenthood Federation of America
People For the American Way Foundation
Sierra Club

See below for additional signatories.

20/20 Vision
A Territory Resource Foundation
Access4All
Adelante Mujeres
Affordable Housing Coalition of San Diego
Affordable Housing Consultant to the NLIHC
Agenda for Children: A Voice for Louisiana's Children
AIDS Action
AIDS Action Committee
AIDS Housing Association of Tacoma/Three Cedars
AIDS Legal Council of Chicago
AIDS Project Los Angeles
AIDS Research Alliance
AIDS Services of Dallas
AIDS Taskforce of Greater Cleveland
Alamo Area Mutual Housing Association, Inc.
Alliance for Retired Americans
Alliance of Cleveland HUD Tenants
American Association of People with Disabilities (AAPD)
American Association of University Professors
American Association of University Women
American Civil Liberties Union
American Council of the Blind
American Friends Service Committee
American Jewish World Service
American Lands Alliance
American Library Association
American Rivers
Americans for Democratic Action
Anchorage Neighborhood Health Center
Animal Protection of New Mexico Animal Protection Voters
Animal Protective Association of Missouri
Ann Arbor Area Committee for Peace
Arab Community Center for Economic and Social Services
Arizonans for Gun Safety
Asian & Pacific Islander American Health Forum
Asian American Legal Defense & Education Fund
Association for Documentary Editing
Bailey House
Beldon Fund
Birmingham Public Library
Bradford Environmental Research
Brady Campaign to Prevent Gun Violence
Brain Injury Association of America
Brattleboro Area Affordable Housing Corporation
Bread and Roses Community Fund
Bronx AIDS Services
Campaign for Community Change

California Coalition for Rural Housing
California Housing Partnership Corporation
California Women Lawyers
Canaries Foundation, Inc.
Canoochee Riverkeeper
Casa Esperanza Homeless Center
Cascade AIDS Project
Center for American Progress
Center for Civil Justice
Center for Community Solutions
Center for Democracy and Technology
Center for Impact Research
Central City Concern
Citizen Action of New York
Citizen Action/Illinois
Citizens Action Coalition of Indiana
CitizensTrade Campaign
Clean Air Trust and Clean Air Trust Education Fund
Clean Water Action
Coalition for the Homeless (NY)
Coalition of Religious Communities (Utah)
Coalition on Homelessness & Housing in Ohio
Coalition to Stop Gun Violence
CODEPINK:Women for Peace
Columbus AIDS Task Force
Committee for New Priorities, a committee of Chicago Jobs With Justice
Community Action Commission
Community Coordinated Child Care (4-C)
Community Economics, Inc.
Community Enterprises Corporation
Community Food Security Coalition
Community HIV/AIDS Mobilization Project (CHAMP)
Community Recovery Services
Community Shares of Greater Milwaukee
Community Toolbox for Children's Environmental Health
Concerned Friends of Ferry County
Connect for Kids
Connecticut Housing Coalition
Consumer Federation of California
Council for a Livable World
CT Against Gun Violence, CT Against Gun Violence Education Fund
Defenders of Wildlife
Direct CareGiver Association
Disability Rights Center, Disability Rights Education and Defense Fund, Inc.
Eckerd Youth Alternatives
Economic Policy Institute
Eden Housing, Inc.
Education Law Center

Elders in Action
Episcopal Migration Ministries
Equal Justice Foundation
Equality State Policy Center
Every Child Matters
Executive Alliance
Exponents
Fair Housing Resource Center, Inc.
Families USA
Family AIDS Coalition
Family Planning Association of Maine
Family Planning Health Services, Inc.
Family Pride Coalition
Federally Employed Women
Feminist Majority
Florida Coalition for the Homeless
Food Research & Action Center
Foundation Communities
Freedom Fund of Planned Parenthood of Greater Iowa
Friday Night Dean Club
Friends Committee on National Legislation
Gastineau Human Services Corporation
Gay and Lesbian Community Center of Southern Nevada
Gay, Lesbian & Straight Education Network (GLSEN)
Georgia Rural Urban Summit
Global Exchange
Goddard Riverside Community Center
Grantmakers Without Borders
Grassroots Fundraising Journal
Greater Upstate Law Project
Hadassah, the Women's Zionist Organization of America
Harm Reduction Coalition
Heartland Alliance for Human Needs & Human Rights
Hepatitis Education Project
HIV Community Coalition
HOME Line
Hoosiers Concerned About Gun Violence
Housing & Community Development Network of NJ
Housing Association of Delaware Valley
Housing Initiatives, Inc.
Housing Opportunities Made Equal, Inc.
Housing Preservation Project
Housing Rights Committee of San Francisco
Housing Works, Inc.
Howard Brown Health Center
Human Services Network
I Am Your Child Foundation
Idaho Community Action Network

Illinois Planned Parenthood Council
Immigrant Hope Network
Immigrant Legal Resource Center
Inglewood Neighborhood Housing Services
Institute for Agriculture and Trade Policy
Interfaith Housing Center of the Northern Suburbs
Interhemispheric Resource Center (IRC)
Intermountain Fair Housing Council
Iowa Citizen Action Network
Iowa Head Start Association
Iowa Planned Parenthood Affiliate League
JEHT Foundation
Jewish Alliance for Law & Action
Jewish Community Housing for the Elderly
Just Harvest
Kansas City Anti-Violence Project
King County Coalition Against Domestic Violence
Kirkpatrick Family Foundation
Labor Council for Latin American Advancement
Lambda Legal Defense and Education Fund
League of United Latin American Citizens (LULAC)
Legal Community Against Violence
Lesbian, Gay, Bisexual & Transgender Community Center - New York
Lesbian/Gay Rights Lobby of Texas
Lifelong AIDS Alliance
Living Earth: Gatherings for Deep Change
LLEGÓ, The National Latina/o Lesbian, Gay, Bisexual, and Transgender Organization
Loaves & Fishes
Lorain County Coalition of Citizens with Disabilities
Low Income Housing Institute
Lower Cape Cod CDC
Lutheran Advocacy Ministry in Pennsylvania
Lutheran Network for Justice Advocacy
Lutheran Social Services of Illinois
Magdalena Area Arts Council
Magnolia Charitable Trust
Maine Center for Economic Policy
Mental Health Association of Oregon
Merck Family Fund
Mercy Housing, Inc
Mercy Services Corporation
Metropolitan Interfaith Council on Affordable Housing
Mexican American Legal Defense Fund
Michigan Partnership to Prevent Gun Violence
Midwest States Center
Mimbres Region Arts Council
Minnesota Housing Partnership / HousingMinnesota
Minnesota Religious Coalition for Reproductive Choice

Missouri Religious Coalition for Reproductive Choice
Montana Fair Housing, Inc.
Montana People's Action
Montpelier Housing Task Force
Mow & Sow
NAACP
NARAL Pro-Choice New Jersey
NARAL Pro-Choice New York
National Alliance of HUD Tenants
National Association of Criminal Defense Lawyers
National Association of Social Workers, South Dakota Chapter
National Association of Social Workers, California Chapter
National Association of Social Workers, Missouri Chapter
National Association of Social Workers, Washington State Chapter
National Coalition for the Homeless
National Community Capital Association
National Congress for Community Economic Development
National Council for Community Behavioral Healthcare
National Council of Churches in the USA
National Council of Jewish Women
National Fair Housing Alliance
National Gay and Lesbian Task Force
National Head Start Association
National Health Law Program, Inc.
National Housing Trust
National Immigration Project of the National Lawyers Guild
National Law Center on Homelessness & Poverty
National Low Income Housing Coalition
National Parent Teacher Association
National Priorities Project
National Resources Defense Council Action Fund
National Urban League Institute for Opportunity and Equality
National Women's Political Caucus of Pennsylvania
National Youth Advocacy Coalition
Nazareth Housing Services
NC Justice Center's Health Access Coalition
Nehemiah Corporation
Nevada Conservation League
New Jersey Citizen Action
New Mexico Coalition to End Homelessness
New Mexico Wilderness Alliance
New York City Coalition to End Lead Poisoning Inc. (NYCCELP)
New York City Employment & Training Coalition
New York City Gay & Lesbian Anti-Violence Project
New York State Child Care Coordinating Council
New Yorkers Against Gun Violence Education Fund
North Carolina Community Action Association
North Carolinians Against Gun Violence Education Fund

North Dakota Fair Housing Council
Northeast Missouri Client Council for Human Needs, Inc.
Northeast Ohio Coalition for the Homeless
Northern Adirondack Planned Parenthood
Northwest Federation of Community Organizations
Northwoods Wilderness Recovery
November Coalition
NOW Legal Defense and Education Fund
NY Metro Religious Coalition for Reproductive Choice
Ohio Coalition Against Gun Violence
Ohio Empowerment Coalition
Oil & Gas Accountability Project
Older Women's League (OWL)
Orange County Healthy Start Coalition
Oregon Action
Oregon Center for Public Policy
Oregon Food Bank
"Oregon PeaceWorks, Inc. & Oregon PeaceWorks
Foundation"
Oregon Toxics Alliance
Organization of Chinese Americans
"Parents, Families and Friends of Lesbians and
Gays (PFLAG)"
Park Foundation
Peace Action and Peace Action Education Fund
Phinney Neighborhood Association
Physicians for Social Responsibility (PSR)
Planned Parenthood Advocates of Wisconsin
Planned Parenthood Affiliates of California, California Planned Parenthood Education Fund
Planned Parenthood Affiliates of Michigan
Planned Parenthood Affiliates of Washington
Planned Parenthood Blue Ridge Action Fund
Planned Parenthood Chicago Action
Planned Parenthood Health Services of Southwestern Oregon
Planned Parenthood Heart of Illinois
Planned Parenthood Los Angeles, Planned Parenthood Los Angeles County Advocacy Project
Planned Parenthood Mar Monte
Planned Parenthood of Central PA
Planned Parenthood of Central PA Advocates
"Planned Parenthood of Connecticut and
Planned Parenthood of Connecticut Public Policy Fund "
Planned Parenthood of Delaware
Planned Parenthood of East Central Illinois
Planned Parenthood of Greater Iowa
Planned Parenthood of Greater Northern New Jersey
"Planned Parenthood of Houston and Southeast Texas, Inc.
Planned Parenthood of Houston and Southeast Texas Action Fund, Inc."
Planned Parenthood of Metropolitan New Jersey

Planned Parenthood of Nassau, County and Planned Parenthood of Nassau County Action Fund
Planned Parenthood of New Mexico
Planned Parenthood of New York City
Planned Parenthood of North Central Ohio
Planned Parenthood of Santa Barbara, Ventura & San Luis Obispo Counties, Inc.
"Planned Parenthood of South Central New York, Inc. &
Planned Parenthood Action Fund of Broome and Chenango Counties, Inc. "
Planned Parenthood of Southern Arizona, Planned Parenthood of Southern Arizona Action Fund
Planned Parenthood of the Inland Northwest, Idaho Planned Parenthood Action League
Planned Parenthood of the Mid Hudson Valley
"Planned Parenthood of the St. Louis Region &
Planned Parenthood of the St. Louis Region Advocates, Inc. "
Planned Parenthood of the Susquehanna Valley & Planned Parenthood of the Susquehanna Valley Action Fund
Planned Parenthood of the Texas Capital Region
Planned Parenthood/Chicago Area
Planned Parenthood: Shasta-Diablo & Planned Parenthood: Shasta-Diablo Action Fund
Plymouth Housing Group
Population Action International
Presbyterian Church (USA)
Progressive Leadership Alliance of Nevada
Progressive Majority
ProTex: Network for a Progressive Texas
Public Policy and Education Fund of New York
Rabbinical Assembly
Regional Center for Independent Living
Religious Coalition for Reproductive Choice & Religious Coalition for Reproductive Choice Educational Fund
Rhode Island Housing Tenants Association
Richmond Neighborhood Housing Services
Riverkeeper
Rockland Coalition for Democracy and Freedom
Rockland Immigration Coalition
Rose Foundation for Communities and the Environment
RPJ Housing
Rural California Housing Corporation
Rural Opportunities
Rural Organizing Project
San Diego Housing Federation
San Francisco AIDS Foundation
Sargent Shriver National Center on Poverty Law
Scenic America
Scott County Housing Council
Seattle Alliance for Good Jobs & Housing for Everyone
Seattle Human Services Coalition
Seattle Indian Health Board
SmokeFree Wisconsin, Inc.
Social Justice Education.Org, Inc.

Southwest Environmental Center
Southwest Youth and Family Services
SPIN Project
Spokane AIDS Network
St. Jude's Ranch for Children
St. Louis Area Jobs with Justice
Staten Island AIDS Task Force
Statewide Poverty Action Network
Supportive Housing Network of New York
Temple Kol Tikvah
Texas Association of Planned Parenthood Affiliates (TAPPA)
Texas Freedom Network & Texas Freedom Network Education Fund
The Advocacy for the Poor
The Arc of the U.S. and United Cerebral Palsy
The Arlington Community Temporary Shelter
The Bauman Foundation
The Coalition for the Homeless, Inc.
The Colorado Religious Coalition for Reproductive Choice
The Four Corners Institute
The General Board of Church and Society of The United Methodist Church
The Gruber Family Foundation
The Home Connection
The Interfaith Alliance of Rochester
The John Merck Fund
The McKay Foundation
The Neighborhood Partnership Fund
The Oceanview Foundation
The Pegasus Foundation
The Salem/Keizer Coalition for Equality
The Sexuality Information and Education Council of the United States (SIECUS)
The Shared Earth Foundation
The Virginia League for Planned Parenthood
The Wilderness Society
The Wisconsin Council on Children and Families
The Wisconsin Partnership for Housing Development, Inc.
Tides Foundation, Tides Center, & Groundspring.org
Tillamook Rainforest Coalition
Transition House
Triangle Foundation
Tri-Rivers Planned Parenthood, Inc.
Triumph Treatment Services
TuscoBus, Inc.
Union of Concerned Scientists
Unitarian Universalist Association of Congregations
Unitarian Universalist Service Committee
Unitarian Universalist Veatch Program at Shelter Rock
United Church of Christ, Justice and Witness Ministries
United Food Commercial Workers

United for Justice with Peace
Universal Health Care Action Network (UHCAN)
Upper Hudson Planned Parenthood of Albany, New York
USAction
Utah Progressive Network
Vervane Foundation
Violence Policy Center
Wallace Global Fund
Washington Citizen Action
Washington State Coalition for the Homeless
Waterkeeper Alliance
Welfare Rights Organizing Coalition
Western States Center
Westgate Housing Incorporated
Whidbey Environmental Action
Whole Systems Foundation
Wilburforce Foundation
Wild Salmon Center
Will-Grundy Center for Independent Living
Wisconsin Citizen Action
Wisconsin Family Planning and Reproductive Health Association
Wisconsin Mfd. Home Owners Association, Inc.
Women & Social Work, Inc.
Women Employed
Women Organizing Resources, Knowledge and Services (W.O.R.K.S.)
Women Work! The National Network for Women's Employment
"Women's International League
for Peace and Freedom"
Women's International League for Peace and Freedom (Boston Branch.)
Women's League for International Peace and Freedom
WomenVote PA
YouthLink

ENDNOTES

[1] 69 Fed. Reg. 11736.

[2] *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

[3] *Connick v. Myers,* 461 U.S. 138, 145 (1983) (interior quotation marks omitted). *See also First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765 (1978).

[4] For example, both IRC §501(c)(4) and IRC §501(c)(3) organizations are permitted to make expenditures for lobbying communications that also frequently refer to federal officeholders by name and which may be found to "promote, support, attack or oppose" those officeholders who are federal candidates. The Service has also long recognized that IRC §501(c)(4) organizations may engage in political campaign activities so long as they do not constitute the organization's primary activity. *See* Rev. Rul. 81-95, 1981-1 C.B. 332. Under the NPRM many such organizations would be forced to forego such activities or become political committees under the FECA, thereby restricting the sources and amounts of funds that they could receive. Even IRC §501(c)(3) organizations are permitted to engage in a wide-range of voter education activities, including publishing voting records and voter guides which, while nonpartisan under the facts and circumstances test applied by the IRS, could be found to "promote, support, attack or oppose" candidates under the proposals in the NPRM.

[5] *See* Prop. Reg. §100.116.

[6] *See FEC v. Massachusetts Citizens For Life, Inc.,* 479 U.S. 238 (1986) ("*MCFL*"). The NPRM asks whether the proposed definition should incorporate the criteria described by the Internal Revenue Service in Rev. Rul. 2004-06 for determining when public communications by IRC §501(c) organizations constitute taxable exempt function expenditures under IRC §527(f). *See* 69 Fed. Reg. at 11742-43. The short answer to this question is that, insofar as they reach communications that do not expressly advocate the election or defeat of clearly identified candidates or constitute electioneering communications, the IRS criteria are no more permissible under FECA than the "promote, support, attack or oppose" standard proposed in the NPRM. Furthermore, as we discuss *infra*, standards developed by the IRS with respect to federal tax exemptions are generally not appropriate in the election context because of their breadth and vagueness. The "facts and circumstances" test outlined in Rev. Rul 2004-06 and other similar IRS pronouncements do not provide clear standards to guide nonprofit organizations in their campaign-related activities and should not be incorporated into the Commission's definition of expenditures.

[7] While the Supreme Court in *McConnell* held that the express advocacy limitation "was the product of statutory interpretation rather than a constitutional command," 124 S. Ct. at 688, it made clear that this was, and after BCRA still is, the meaning of the statutory term: "Since our decision in *Buckley*, Congress' power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates has been firmly embedded in our law... Section 203 of BCRA amends [FECA] to extend this rule, which previously applied only to express advocacy, to all "electioneering communications" covered by the definition of that term in amended FECA...." *Id.* at 694. Although much more can be said on this point, we leave it to others to elaborate on the clear meaning of *McConnell* in this regard.

[8] Although the "promote, support, attack, or oppose" standard is unduly overbroad and vague with respect to communications regarding candidates, it is virtually unintelligible with respect to political parties because it does not even require a reference to a "clearly identified" party. *See* Prop. Reg. §100.116(b). Thus, a nonprofit corporation's issue communication that does not mention a party by name

but critically addresses an issue with which a party has become identified (such as a pro-Choice or a pro-Life message) could be found to violate FECA.

[9] In *McConnell,* the Supreme Court concluded that the "promote, support, attack, or oppose" standard was not unconstitutionally vague in the context of state and local political parties. *See* 124 S.Ct. at 675, n. 64. In reaching this conclusion, however, the Court specifically noted that "actions taken by political parties are presumed to be in connection with election campaigns," *id.,* which cannot be said of nonprofit interest groups. Thus, while clarifying regulations may not have been required in applying the "promote, support, attack or oppose" standard to political parties, they are essential in helping nonprofit groups to distinguish between prohibited election-influencing communications and constitutionally-protected issue communications.

[10] *See* 2 U.S.C. §434(f)(3)(B)(iv).

[11] *See* Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200-03 (Oct. 23, 2002).

[12] *Id.* at 65202.

[13] Final Rule, "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 428 (Jan. 3, 2003).

[14] *Id.* at 427.

[15] *See* Prop. Reg. §§105.5(a)(2)(i)(C), (a)(2)(ii)(C), (a)(2)(iii)(C) (incorporating 11 C.F.R. §100.24(b)(3)).

[16] Many IRC §501(c)(3) and IRC §501(c)(4) organizations could not exist without the large grants and contributions from foundations, corporations and individuals that are prohibited under FECA. Even organizations that operate federal political committees are able to raise relatively small amounts from their members for these purposes - amounts that would not support the extensive educational and advocacy programs we have conducted for many years.

[17] The NPRM's proposal to treat an organization as a political committee where it spends only $10,000 on federal election activities if the organization's written materials, public pronouncements, or any other communications demonstrate that its major purpose is to nominate, elect, defeat, promote, support, attack or oppose a clearly identified candidate or the candidates of a clearly identified political party, *see* Prop. Reg. §105.5(a)(2)(i), is even more problematic. What if the organization has issued contradictory pronouncements? What if the individual who made the pronouncements was acting outside of her or his authority? Or what if the pronouncements were hyperbole and did not reflect the organization's actual program in any way? ("We must elect [defeat] George W. Bush at all costs.") This standard is particularly troubling because it will allow an organization's political opponents, merely by filing a complaint with the Commission, to instigate a debilitating investigation into all of the organization's inner workings. Furthermore, because the rule relies on expenditures made at any time during the current or previous four years, once an organization qualifies under the test, it would be treated as a political committee for four subsequent years regardless of whether it has changed its purpose or its activities.

[18] An organization that is exempt under IRC §501(c)(4) may engage in political campaign activities, as defined by the IRS, as long as these activities do not constitute its primary purpose. *See* Rev. Rul. 81-95. The same rule applies to labor and other organizations exempt under IRC §501(c)(5) and business,

trade and professional associations exempt under IRC §501(c)(6). Because the IRS has never defined the contours of the primary purpose test, many nonprofit organizations risk the loss of their tax-exempt status if they unwittingly conduct too much political activity. Out of an abundance of caution, such organizations frequently establish nonfederal SSFs under IRC §527(f)(3) in order to preserve their tax-exempt status under IRC §501(c).

[19] An organization exempt from federal taxation under IRC §501(c) may be subject to income tax at ordinary corporate rates on its "exempt function" activities, *see* IRC §527(f)(1), unless it establishes a SSF to conduct those activities under IRC §527(f)(3).

[20] Although the NPRM states, *see* 69 Fed. Reg. at 11736, n. 2, that it is not intended to reach "separate segregated funds," it appears that the NPRM is using this term as it appears in FECA §441b(b)(2)(C) to apply only to federally registered political committees and not to a connected IRC §527 SSF which is not a federal political committee.

[21] *See* 69 Fed. Reg. at 11758.

[22] *See, e.g.,* Technical Advice Memorandum 9130008 (Apr. 16, 1991)("The fact that an activity may constitute grassroots lobbying (or direct lobbying) ... does not preclude a finding that it may constitute political campaign activity and, thus, exempt function activity for purposes of section 527 of the Code.").

[23] *See* Technical Advice Memorandum 9249002 (June 30, 1992); *see also* PLR 9808037 (Nov. 21, 1997); PLR 9725036 (June 20, 1997); PLR 9652026 (Oct. 1, 1996).

[24] *See* Judith E. Kindell and John Francis Reilly, "Election Year Issues," IRS Exempt Organizations Division, Continuing Professional Education Test for Fiscal 2002, 349.

[25] *See Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983). *See also The Association of the Bar of the City of New York v. Commissioner,* 858 F.2d 876 (2d Cir. 1988).

[26] *See Nat'l Fed'n of Republican Assemblies v. United States,* 218 F. Supp. 2d 1300 (S.D.Ala. 2002), *rev'd on other grounds,* 353 F.3d 1357 (11th Cir. 2003).

[27] *See* 69 Fed. Reg. at 11749.

[28] *See* IRC §2501(a)(5).

[29] This is not to suggest that it is either appropriate or necessary to regulate non-connected IRC §527 organizations as political committees. In contrast to the image of non-connected 527 organizations put forth by the media and some campaign reform groups, many such organizations engage in the same kinds of issue advocacy and nonpartisan voter participation activities as IRC §501(c) organizations, and these groups frequently work closely with IRC §501(c) organizations in carrying out these programs. Treating non-connected IRC §527 organizations as political committees will make it extremely risky for IRC §501(c) organizations to coordinate their own advocacy and voter participation programs with such entities, even though this is frequently the most efficient and effective means to serve their communities and achieve their goals. Many of the arguments against regulation of IRC §527 organizations as political committees set forth in these comments are equally applicable to both connected and non-connected entities.

[30] *See* IRC §4945(f).

[31] *See* 11 C.F.R. §114.4(c), (1)(A)(1995).

[32] *See* 11 C.F.R. §114.4(d)(1).

[33] Prop. Reg. §100.133(a).

[34] *See* 11 C.F.R. § 114.4(d)(3).

[35] Prop. Reg. §100.133(c).

[36] One of the many problems with this proposal is that it fails to define the term "likely." Given that data showing voter preferences is now available over many years time, and is generally reported using sophisticated sampling and other statistical techniques, a voter participation group that relies on such data will have no idea whether a group or community is "likely" to prefer a candidate or political party to the degree and over the period of time required under the regulation. For example, numerous studies have expressed conflicting studies about the voting preferences over time of so-called "soccer moms," "under-20s," or "over-50s." At what point would an organization violate FECA if it took into account the candidate, party or issue preferences of these groups?

[37] The NPRM states that the proposed changes to 11 C.F.R. §100.133 are intended to "achieve more harmony" between the Commission's position and the approach of the IRS to issues regarding nonpartisan voter participation activities. *See* 69 Fed. Reg. at 11740. As any tax practitioner will attest, since the IRS relies on the totality of the facts and circumstances presented in each case in determining whether campaign-related activities are nonpartisan, it is a serious error to attempt to discern the IRS' "approach" to an issue from a single, nonprecedential ruling. Thus the ruling cited in the NPRM, PLR 9925051 (March 29, 1999), relied on a variety of facts in reaching its conclusions about the organization's voter participation activities, including the fact that the organization had consciously designed its activities to fall within the definition of exempt function activities under IRC Section 527. The organization not only represented to the IRS that its overall purpose in carrying out all of its voter participation activities was to influence the outcome of the elections, but that its decisions as to timing, targeting and other key elements of the program were all designed with this purpose in mind. In other contexts, where the totality of the facts and circumstances have not been so obvious, the IRS has consistently ruled that nonprofit organizations may conduct voter participation activities targeted to specific populations as long as these programs are made available without regard to an individual voter's political preference. *See* Milton Cerny, "Campaigns, Candidates and Charities: Guideposts for All Charitable Institutions," *New York University's Nineteenth Conference on Tax Planning for 501(c)(3) Organizations,* §5.04[2] at 5-14 (1991)(stating that IRS has explicitly approved aiming voter registration or GOTV drives at sub-groups defined by generic criteria, like race, gender or language, economic circumstances, like poverty, unemployment, or education level, or other criteria such as "students," "business people," or "farmers.").

[38] *See* 11 C.F.R. §100.24(b)(1).

[39] *See* 11 C.F.R. §§100.24(a)(1)(i), 100.24(b)(2).

[40] *See* Prop. Reg. §§100.5(a)(2)(i)(C), (a)(2)(ii)(C), (a)(2)(iii)(C)(incorporating 11 C.F.R. §100.24(b)(1) and (b)(2)).

[41] *See* 2 U.S.C. §441b(b)(2)(A).

[42] *See Chamber of Commerce of the United States v. FEC,* 69 F.3d 600 (D.C.Cir. 1995), *amended on denial of rehearing,* 76 F.3d 1234 (D.C.Cir. 1996); *see also Toledo Area AFL-CIO Council v. Pizza,* 154 F.3d 307 (6th Cir. 1998).

[43] *See* Prop. Reg. §§105.5(a)(2)(i)(C), (a)(2)(ii)(C), (a)(2)(iii)(C)(incorporating 11 C.F.R. §100.24(b)(1) through (b)(3)). Similarly, by defining a political committee's "major purpose" by reference to "the organizational documents , ... similar written materials, ... or any other communications" of the organization, *see* Prop. Reg. §100.5((a)(2)(i), the NPRM suggests that an organization can become a political committee based on its partisan membership communications, even though such communications are excluded from the definition of "expenditure."

[44] 2 U.S.C. §438(a)(8) (emphasis added).

[45] 124 S. Ct. at 686.

[46] In *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000), the Supreme Court considered the Food and Drug Administration's assertion of jurisdiction to regulate tobacco products as drugs after many years of inaction on this issue. Acknowledging "that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States," 529 U.S. at 161, the Court nevertheless held that the agency's action was not "grounded in a valid grant of authority from Congress," *id.* , because it extended "'the scope of the statute beyond the point where Congress indicated it would stop.'" *Id.* (quoting *United States v. Article of Drug . . . Bacto-Unidisk,* 394 U.S. 784, 800 (1969), quoting *62 Cases of Jam v. United States,* 340 U.S. 593, 600 (1951)).

[47] *Cf. FEC v. Beaumont,* 539 U.S. 146 (2003).

[48] *See* 124 S. Ct. at 699.

[49] *See* U.S. Senate, Committee on Governmental Affairs, "Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns," S. Rept. No. 105-167, Vol. III, 105th Cong. 2d Sess., 3993.

[50] *See* 2 U.S.C. §323(d)(1)-(2).

[51] *See* 2 U.S.C. §323(e)(1).

[52] *See* 2 U.S.C. §323(e)(4)(A)-(B).

[53] *See* 2 U.S.C. §441b(c)(2).

[54] *See* 2 U.S.C. §441b(c)(6).

[55] Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200 (Oct. 23, 2002) (explaining exemption in 11 C.F.R. §100.29(c)(6) for any electioneering communication paid for by an IRC §501(c)(3) organization).

[56] As discussed below, two years before Congress enacted BCRA, it amended the Internal Revenue Code to require registration and reporting by IRC §527 organizations. In a brief submitted to the United

States Court of Appeals for the Eleventh Circuit, an organization that had supported BCRA and assisted in its development noted that the new provisions were necessary because "even with the enactment of BCRA, IRC §527 organizations will be able to conduct considerable amounts of federal campaign finance activity outside the scope of FECA." *See* Brief *Amicus Curiae* of Campaign Legal Center, *Mobile Republican Assembly v. United States,* No. 02-16283, pg. 27.

[57] *See* 124 S.Ct. at 686.

[58] *Id.*

[59] *Id.* It is also important to note that, apart from the provisions it enacted, Congress did not even direct the Commission in BCRA to reconsider and review its current definition of "political committee" as it did with respect to the definition of "coordinated public communications." *See* Pub. L. 107-155, 116 Stat. 81 (2002), §214(c). If Congress was dissatisfied with the Commission's policies in this area, or if it only considered that the issue was of great importance, it surely would have directed the Commission to consider the issue along with the other issues in the post-BCRA rulemakings. It did not do so.

[60] *See, e.g.,* "McCain Camp Files FEC Complaint Charging Clean Air Ads Violate Law," *BNA Money & Politics Report* (March 7, 2000); Ruth Marcus, "Hidden Assets; Flood of Secret Money Erodes Election Limits, *Washington Post,* A1 (May 15, 2000).

[61] *See* Pub.L. 106-230, 114 Stat. 477 (2000) (codified as IRC §527(i) and (j)).

[62] *See* Pub.L. 107-276, 116 Stat.1929 (2002).

[63] Indeed the premise of the registration and reporting requirements imposed on these groups was that they were not political committees under federal election law; political committees under FECA were expressly exempted from the new requirements. *See* IRC §§527(i)(6), 527(j)(5)(A). Virtually every supporter of the 527 amendments enacted in 2000 explicitly recognized that the new registration and reporting requirements represented a limited approach to regulating soft money political organizations and that further restrictions on these entities' activities, if any, would require action *by Congress* as part of comprehensive campaign reform legislation then being blocked by a Senate filibuster. *See, e.g.,* 146 Cong. Rec. H5284 (daily ed. June 27, 2000) (Statement of Rep. Houghton) ("This is not the end. It is the first step and a big one; and we still need to move forward on better disclosure, but that will come."); *id.* at H5285. 146 Cong. Rec. S5994 (daily ed. June 28, 2000) (Statement of Sen. Feingold) ("Tomorrow will be a historic day. For the first time since 1979, the Congress is going to pass a campaign finance reform bill. The bill we are going to pass is by no means a solution to all the problems of our campaign finance system but it is a start -- and an important start -- because it will close the loophole that was opened at the intersection of the tax laws and election laws that allows unlimited amounts of completely secret contributions to flow into our campaign finance system and to influence our elections.") As discussed above, however, when Congress considered comprehensive reform legislation only two years later, the provisions it adopted with respect to tax-exempt organizations and IRC §527 groups were very narrow; and when Congress again considered IRC §527 organizations specifically following BCRA, it took no steps to extend these limited rules in the manner now proposed in the NPRM.

[64] Although some have argued that the NPRM's treatment of IRC §527 organizations is merely a restatement of existing law with respect to the definition of political committees, *see* Letter submitted by Democracy 21, Campaign Legal Center, and Center for Responsive Politics to the Commission Re: Rulemaking on Political Committees, 1 (March 16, 2004) ("At the outset, we want to state that the law as written already requires section 527 groups whose major purpose is to influence federal elections to

register as federal political committees and to comply with federal campaign finance laws."), this argument could only be correct if Congress engaged in a pointless exercise when it twice amended IRC §527 to require the same kind of registration and reporting that, in these commenters' view, were already required under existing law. In point of fact, the Congressional sponsors of the 527 amendments hailed them as the first major campaign finance reforms in more than two decades precisely because soft money IRC §527 organizations were not then subject to the restrictions of FECA.

[65] 124 S.Ct. at 652 (2003).

[66] *See* Committee on Governmental Affairs, U.S. Senate, "Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns," S. Rept. No. 105-167, Vol. I, 105th Cong. 2d Sess., 20.

[67] *See id.* at Vol. III, 3994.

[68] The most significant, if not the only, complaint raising the core issues presented in the NPRM is, presumably, not even at the investigation stage. *See* Compliant filed by Democracy 21, Campaign Legal Center and Center for Responsive Politics against America Coming Together, The Leadership Form, and The Media Fund (January 15. 2004).

[69] *See supra* note 17.

[70] We do not address in detail the questions raised in the NPRM concerning the possible effective date of new regulations because we believe that the proposals under consideration are so fundamentally flawed that they cannot provide the basis for regulation even if, as suggested, they were not to become effective until the next election cycle. It is evident, however, that applying another set of new rules in the middle of an election cycle would be unfair to organizations which have already spent considerable sums attempting to comply with the new BCRA rules, and would be disruptive in the extreme. Moreover, since it can be expected that any new regulations will raise present numerous unresolved questions requiring clarification through the advisory opinion process, any effort to apply the new rules to the current election cycle would result in confusion and uncertainty. Finally, to the extent that the proposed definitions of political committee rely on activities conducted during the current and the previous four years, making them effective without a lengthy phase-in period would pose serious issues of due process as well as fundamental fairness.

[71] *See, e.g., Republican Party of Minn. v. White,* 536 U.S. 765, 774-75 (2002); *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 657 (1990); *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978).

[72] 124 S.Ct. at 661 (quoting *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 371, 391 (2000)).

[73] *Nixon,* 528 U.S. at 392.

[74] 5 U.S.C. §§601 *et seq.*

[75] *See* 69 Fed. Reg. at 11755-56.

[76] *Id.*

[77] *See* AOR 2004-04 submitted on behalf of America Coming Together.

[78] Thomas E. Mann and Norman Ornstein, "So Far So Good On Campaign Finance Reform," *Washington Post*, A19 (March 1, 2004) (emphasis added).

[79] "Soft Money and the FEC," *Washington Post*, A18 (Feb. 18, 2004).

[80] *See, e.g., Hampton v. Mow Sun Wong,* 426 U.S. 88, 116 (1976); *United States v. Robel,* 389 U.S. 258, 276 (1967) (Brennan, J. concurring) ("[F]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people.") In BCRA, Congress ultimately determined that state and local political parties be allowed to raise limited amounts of soft money to conduct federal election activities, rather than prohibiting soft money entirely for such purposes. Similarly, Congress permitted candidates and officeholders to raise limited amounts of soft money for IRC §501(c) organizations, rather than prohibiting them from having any role in raising money for these organizations. The Commission does not have authority to craft such compromises because it must act within the scope of the statute as written by Congress.

[81] 1 Davis, *Administrative Law Treatise,* §3.13 (2d ed. 1978).

[82] *See Kent v. Dulles,* 357 U.S. 116 (1958); Tribe, *American Constitutional Law,* § 5-17, 285 (1st ed. 1978) ("The open-ended discretion to choose ends is the essence of legislative power; it is this power which Congress possesses but its agents lack.").

May 10, 2004

Via Electronic Mail and Hand Delivery

Vice Chair Ellen L. Weintraub
Federal Election Commission
999 E Street, NW
Room 924
Washington, DC 20463

Dear Vice Chair Weintraub:

As civil rights, environmental, civil liberties, and other nonprofit organizations that submitted comments on April 5 on the FEC's March 11 Notice of Proposed Rulemaking on Political Committee Status ("NPRM"), including several that testified at the Commission's hearings on April 14 and 15, we are writing with respect to the proposed final regulations submitted by Commissioners Toner and Thomas on April 30 ("4/30 proposal"). Although the scope of the 4/30 proposal is certainly reduced compared to the NPRM, the 4/30 proposal raises a number of the same concerns. Most notably, despite efforts to reduce the scope of the proposed regulations, 501(c) groups remain potentially subject to the definition of political committee in the 4/30 proposal, and other serious potential harm to nonprofit groups remains. The proposal appears to be the result either of an inadequate understanding of the impacts of such rules on the nonprofit community or, conversely, a disregard for the testimony of April 14 and 15 that highlighted the effects of the proposed rules on nonprofit advocacy. We respectfully submit that neither the NPRM nor the 4/30 proposal should be adopted by the Commission.

As with the NPRM, the 4/30 proposal would harm many nonprofits by creating a catch-22 dilemma. To comply with federal tax law they would be required to create a separate segregated fund ("SSF") under section 527 of the Internal Revenue Code in order to protect their federal tax exemption or to avoid paying federal income tax on permissible election-related activities. But the 4/30 proposal could cause the resulting SSF to be subject to regulation by the FEC as a federal political committee regardless of the scope of activity. Many activities by such 527 SSFs sponsored by 501(c)(4) groups, such as grassroots lobbying and distribution of voters guides focused on specific issues, are not in fact designed to promote the election of federal candidates. These activities could nonetheless transform such connected 527 SSFs into federal political committees under the 4/30 proposal. As explained at page 4 of our April 5 comments, the result would be to seriously impede the sponsoring 501(c)(4) organizations.

In addition, as with the NPRM, the 4/30 proposal would threaten nonpartisan voter participation activities by nonprofits by altering the definition of such activity. In particular, the 4/30 proposal would effectively prohibit voter participation efforts in which the message urging people to register or vote violates the so-called "psao" (promote, support, attack, or oppose) standard or "promotes or opposes a political party." As explained at page 3 of our April 5 comments, the "psao" standard is vague and overbroad particularly as applied to nonprofits, as the Commission itself has recognized in other contexts. The prohibition on any message that "promotes or opposes a political party" is even broader, and could be construed to ban virtually any communication that urges citizens to vote out of concern for a particular issue on which the parties differ.

As with the NPRM, the 4/30 proposal represents an attempt in the middle of an election year to change the rules and have the FEC take actions exceeding its regulatory authority and capability and usurping Congress' proper role. As explained in our April 5 comments at pages 8-10, Congress made a series of deliberate decisions in enacting

recent campaign finance laws, including decisions to subject independent interest groups to very different requirements than those in the NPRM and the 4/30 proposal. The Commission can and should take appropriate enforcement and other actions this year to implement the laws passed by Congress. It should not, however, create new rules never authorized by Congress by adopting the regulations in the NPRM or the 4/30 proposal.

Respectfully submitted,

Alliance for Justice
Leadership Conference on Civil Rights
League of Conservation Voters
NAACP National Voter Fund
NARAL Pro-Choice America
Planned Parenthood Federation of America
People For the American Way Foundation
Sierra Club

cc: All other Commissioners
Office of the General Counsel

April 2, 2004

RECEIVED
FEDERAL ELECTION
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OFFICE OF GENERAL
COUNSEL
2004 APR -5 P 1:27

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Ms. Dinh:

Housing Works, a not-for-profit organization established under §501 (c) (3) of the Internal Revenue Code, wishes to express strong opposition to the proposed rules outlined in Notice of Proposed Rulemaking 2004-6, published by the Commission in the Federal Register of March 11, 2004.

We also request the opportunity to testify in opposition to these rules at hearings scheduled for April 14 and 15, 2004. Michael Kink, our Legislative Counsel, will testify on the potential impact these rules would have on Housing Works and on AIDS advocacy in the United States.

While Housing Works is a non-partisan organization and never promotes candidates for elected office, we strenuously object to the proposed rule, which, if adopted, would place significant restrictions on our work as an advocacy and direct-service organization helping homeless New Yorkers living with AIDS and HIV, and people living with HIV/AIDS all over the world.

Housing Works engages in public discourse on many issues and relies to a great degree on donations from individuals, foundations, and corporations. We also support our organization through entrepreneurial ventures, including thrift stores, a used book café, a food service unit and other subsidiary corporations.

Limiting our ability to utilize these resources will effectively silence our voice and the voices of our clients and supporters in the serious debate over HIV/AIDS, homelessness and poverty at home and around the world.

Over the course of the AIDS epidemic, one of the most persistent truths has been that democracy and free speech have saved lives. Advocacy has saved lives. Criticism of elected officials for their inaction on HIV/AIDS has spurred remarkable public and private responses to the epidemic. These responses have literally saved millions of lives all over the world. Silencing the voices of AIDS activists is not the proper function of the FEC, and yet your proposed rules threaten to do just that.

We believe the proposed rule, as outlined in the NPRM, goes well beyond the spirit of any statute or other authority in this area. Our objections, which are detailed below, include:

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320 West 13th Street
4th Floor
New York, NY 10014

Phone 212 645-8111
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* The proposal to shift from a focus on certain political activity as "the major purpose" of an organization to the more expansive, "a major purpose" of an organization is overly broad.

* The proposed expansion of the definition of a "political committee" -- under which organizations will be deemed as having election of candidates as "a major purpose" simply if they meet a very low threshold of advocacy spending – would have a dramatic chilling effect on organizations wishing to assist disadvantaged populations in being heard.

* The proposed definition of the term "expenditure," which would in some cases be applied to an organization not deemed a "political committee," would also impair, or perhaps end, efforts directed toward assisting people in asserting fundamental rights.

Major Purpose Characterization

We believe the Commission proposal to consider altering the political committee criteria to embrace organizations that have federal official election as "a major purpose" rather than "the major purpose" will seriously threaten the advocacy work of organizations such as ours.

As the NPRM notes, the Supreme Court has spoken in terms of using the definite article "the" when modifying the terms "major purpose" (See Buckley v. Valeo, 424 US 1, 79; see also FEC v. Massachusetts Citizens for Life, Inc.. 479 US 238, 262).

We are not aware of a compelling reason for the Commission to expand upon the parameters of those decisions and now classify all types of organizations whose actions may touch upon federal election campaigns in a tangential way as political committees. It is quite possible for an organization to engage in issue advocacy, for instance, without having election of any specific federal candidate as "the major purpose" of the organization. Yet, the Commission's proposed rulemaking might well classify that organization as a political committee despite the absence of support or opposition for any candidate for office.

We believe that the Supreme Court was exercising sound reasoning in using the definite article "the" to modify its major purpose language to avoid having to make fine distinctions for organizations that present "grey areas" when their purported political activities are being appraised. Simply put, requiring candidate selection as "the" major purpose avoids the ambiguities and subjective interpretation that would result were only "a major purpose" to become the standard.

Political committee definition

This objection is related to the "major purpose" objection outlined above.

It is proposed that the "major purpose" provision of the definition of a "political committee" will be met if an organization's activities are within new, expansive criteria. Among these is the criterion that an organization is deemed a political committee if it spends more than $50,000, during the current year or any of the previous four years, on communications promoting, supporting, attacking or opposing a candidate or political party, or on non-partisan voter registration or mobilization activities.

This definition and its extremely restrictive threshold – one that would apply regardless of an organization's overall budget – would effectively transform not-for-profits of all kinds into organizations deemed to have election of specific candidates or parties as a "major purpose."

This type of expansive definition will have a palpable chilling effect on organizations such as Housing Works, which, in addition to providing housing, medical care, job training and supportive services for homeless people living with AIDS and HIV, must necessarily advocate for and against the positions espoused by candidates for office in order to assert fundamental rights of people living with HIV/AIDS in New York, in America, and around the world.

Our efforts also include voter registration and "get-out-the-vote" drives targeted to homeless people and people living with HIV/AIDS – a group that has suffered many illegal attempts to hinder its rights to register and vote. The proposed definition looms as a severe impediment to the democratic process and the ability of a most vulnerable population to receive assistance in exercising fundamental rights. We strongly object to any rulemaking that would impose such a burden.

While Housing Works never promotes candidates for federal office (or any office), and we do not spend more than half of our resources for voter mobilization, we do assess the policies of elected federal officials – whether or not they are candidates for office at a given time. We have at times spent more than $50,000 doing so, and we should not be subjected to such a limit merely because a federal official happens to be running for re-election or for another federal office.

Criticism of elected federal officials is simply not the same thing as promoting candidates for election. Again, the history of the AIDS epidemic in America and

around the world has been marked, again and again, by legitimate criticism of elected officials for inaction or improper action that has resulted in lost lives.

Inherent in such advocacy, and for the sake of clarity in our public education efforts, is the need to identify by name or title the person or body that has promoted or effected a change in federal policy, for better or for worse. Whether we are addressing federal policy directly, or addressing its effects at the State or local level, we firmly believe that our right to free speech and our ability to honor the targets defined by our donors and by our Board of Directors for self-generated funds could be so impaired by this rule as to eviscerate one of the three major missions of our organization: to provide housing, services and advocacy to homeless people living with AIDS and HIV in order to end the twin crises of AIDS and homelessness.

Moreover, the voter mobilization provisions contained in the rulemaking put organizations on dangerous ground that could lead to political committee status and the resulting impairments of function and fund-raising. In our own case, because the HIV/AIDS and homeless communities in New York and around the nation are largely African-American and Latino, we fear that we could face limitations on our right to raise funds to engage in voter mobilization if there is a determination that African-American and Latino voters, or homeless people or people with HIV/AIDS generally, tend to vote for candidates of a certain party in Federal elections, regardless of our own non-partisan stance. This, too, is a disservice to the democratic process of a fundamental nature.

Prohibition on Advocacy Communications

Advocacy organizations that do not fall under the new definition of political committee would nevertheless also have their advocacy activities severely curtailed. The proposed rulemaking contains a new definition of the term "expenditure" that would prohibit any corporation – including a nonprofit corporation – and labor organizations from sponsoring any public communication that refers to a candidate for federal office and "promotes or supports, or attacks or opposes" the candidate.

We note that the rulemaking provides no guidance on the meaning of these terms, but wonder, for example: Would the rule prohibit us from characterizing a change in federal policy proposed or supported by a federal office-holder running for re-election that would cause rising homelessness or increased HIV/AIDS as irresponsible?

Again, while Housing Works is a non-partisan organization, an important part of our mission is to inform the public on issues relating to HIV/AIDS, health care, housing, welfare benefits, disability and LGBT rights and many others.

A prohibition against using any of the funds obtained from the sources referenced by the rulemaking would severely undermine our efforts, which although not directed toward the promotion or opposition of a specific candidate for office, could be at odds with, or in agreement with, the positions of people who happen to be candidates for office. We again do not see the value in limiting this sort of public discourse through limiting the ways in which undesignated or self-generated financial support may be used in the course of our work. In fact, we see something quite the opposite: A rule that limits public discourse in such a way that all citizens are done a disservice.

Given the substantial and, perhaps, unintended broad consequences of the proposed rulemaking, Housing Works strongly objects to its adoption and urges the Commission to reject rules that would have such an adverse impact on the ability of under-served populations to be served and heard.

Simply put, campaign finance reform should not be used to silence AIDS activists. We do not find any authority for such a result in the new Bipartisan Campaign Reform Act, nor do we think any was ever intended.

Thank you very much for the opportunity to comment on the Notice of Proposed Rulemaking.

Yours very truly,

Charles King	Keith Cylar	Michael Kink, Esq.
Co-President & CEO	Co-President & CEO	Legislative Counsel

cc: The Honorable Charles Schumer, The Honorable Hilary Rodham Clinton
Members of the New York Delegation to the U.S. House of Representatives

The CHAIRMAN. Chairman Smith.

STATEMENT OF BRADLEY A. SMITH

Mr. SMITH. Thank you, Mr. Chairman, members of the committee.

I have to say I don't know that I have ever seen so much excitement over a decision which simply maintains it is status quo, because that is what the Commission did. The law has long required that a group must engage in express advocacy before it is considered a political committee. Now, some have argued that that interpretation of the law is incorrect, but they have admitted that it is the interpretation of the law.

For example, in January 2003, 10 months after BCRA was passed, 2 months after it took effect, representatives of Public Citizen, Democracy 21, Common Cause and the Center for Responsive Politics wrote to the IRS, quote, for well over a decade, independent groups learned that by simply avoiding the magic words of express advocacy as defined by the courts, these groups were no longer required to register as PACs with the FEC and fell outside of Federal campaign finance laws.

Now, in BCRA Congress did not change the definition of political committee, nor did it change the definition of expenditure or contribution, which are the predicates for defining a political committee.

In the regulations that we considered, not once did any witness come before us and say, if you are going to properly implement this law, you need to address the definition of political committee or expenditure. In a lawsuit that the House sponsors filed against our regs saying they didn't properly implement the bill, they did not suggest anywhere in that lawsuit that we should have changed or added new definitions for expenditure, contribution or political committee. The legislative history, I think, shows very clearly that Congress understood this definition when it passed BCRA, and it understood the activity would gravitate to 527 groups.

My written testimony, as with the written testimony of the Vice Chair, includes a large number of quotes primarily from Senators, but there were also many Members of the House who understood this, including members of this committee. For example, Congressman Linder said, "Shays-Meehan is merely diverting and channeling soft money into an ever-growing number of parties, while allowing corporations and unions to spend unlimited and unregulated dollars on electioneering. This does not and will not change the amount or type of money in the system, and it certainly does not alter the ability of outside groups to influence elections."

Or, Congressman Reynolds, you, too, anticipated exactly this result. You said, "we would be fooling ourselves if we believed the notion that the Shays-Meehan legislation represents a complete ban on soft money. Let us be honest. In this bill there is no such thing as a ban on soft money. This bill creates even bigger loopholes than before, loosening even further the loopholes that allow party committees to shift their current soft money over to nonprofits, who in turn could use 100 percent soft money for issue advocacy."

And Representative Shays, when they were amending the 527 disclosure bill that the Vice Chair referred to a few months later,

said, quote, the one thing we know with our campaign finance reform bill is 527s are going to proliferate. We know that. Special interests will have a greater say. We know that. That is what people on both sides of the aisle argued for. Let Americans have their say.

In response to this argument, supporters of the bill tended to argue four things. First, if a committee of a 527 were established, financed, maintained or controlled by a party, it would be treated like a party.

Secondly, they required us to write a tougher definition of coordination, making it tougher for these groups to work with candidates and parties.

Third, they prohibited Members from soliciting funds for these groups with one exception that is somewhat important that we may get a chance to talk about later.

And fourth, they put on the electioneering communications ban, which you are aware of: the ban on an ad 60 days before an election.

By the way, this argument was also made by the Republican Party before the Supreme Court. Its very able litigator Bobby Birchfield, began his oral argument by pointing out to the Court—he said, if you uphold this law—I am not quoting him, but he said, if you uphold this law, here is what is going to happen. George Soros is going to give millions to 527s, and all same activity is going to continue. They did not say, if you uphold this law, it is going to limit the speech of all these 527s. They said exactly the opposite.

Now, how did the Supreme Court respond to this? Well, the Supreme Court said, if I can find these quotes here—the Supreme Court said, "BCRA imposes numerous restrictions on the fundraising abilities of political parties of which the soft money ban is only the most important. Interest groups, however, remain free to raise money to fund voter registration, get-out-the-vote activities, mailings and broadcast advertising other than electioneering communications."

The Supreme Court also noted in response to the argument of the Republican Party that—they said, well, that argument is wrong, and they said, you might as well say it is overinclusive. They said, reform can take one step at a time. And here is what they wrote: "One might just as well argue that the electioneering communication definition is underinclusive because"—here is the point I want you to hear—"because it leaves advertising 61 days in advance of an election entirely unregulated." And they continue, "the record justifies Congress's line-drawing."

Now, the Toner-Thomas proposal would have regulated advertising 61 days in advance of the election, thereby making nonsensical this Court's statement.

So as I see it, the comments about what the Court said in McConnell and so on are very interesting. They might be interesting if I were a Member of Congress and I had asked for a report as to what it might be constitutional for me to do, and I might weigh those factors in, but they are not very relevant to us on the Federal Election Commission because it was not what was passed by Congress. The Court did not say that you can apply "support, promote, attack, oppose" to nonparty groups because it wasn't in

the law. They didn't have a reason to discuss that issue, and, therefore, again, it is not really relevant to us.

Ultimately, then, this is an issue that is for Congress. There are still some constitutional restraints out there, which is one of the reasons it is better that Congress attempt this expansion of regulation than that we do it. As my time is up, I would urge you to simply refer to my lengthy written statement for a detailed explanation of this legal analysis. And, of course, I am happy to take your questions. Thank you.

[The statement of Mr. Bradley A. Smith follows:]

House Committee on House Administration
Oversight Hearing on the Federal Election Commission and the 527 Rulemaking Process
Testimony of Bradley A. Smith, Chairman
Federal Election Commission
May, 20, 2004

Introduction

Thank you for the opportunity to testify today about the Commission's interpretation of political committee status under the Federal Election Campaign Act of 1971, as amended (the Act), and our regulations. While prominent members of Congress have cautioned that we should not consider the proximity of an election when engaged in rulemaking, this matter has the interest it has with the public and the Hill precisely because a presidential election is less than five months away. Apart from whatever partisan interests may be at play, it is certainly a cause for anxiety among all political activists whenever the agency governing them contemplates a major change in the rules of engagement, resulting in a substantial expansion of its regulatory reach. Therefore, I want to offer an overview of the political committee issue before offering my views on the proper role of the Commission. To understand where we are, we need to look at where we have been, since none of us – not Congress, and certainly not the Federal Election Commission, write upon a blank slate.

I. Definition of "Political Committee"

Let us begin with the standard for "political committee" in the Act. Under the Act, once a group becomes a political committee, it must register, report, and follow the contribution limits and prohibitions set forth in other sections of the Act. That is, it may accept contributions of $5,000 or less from permissible donors in a year, and may not take funds from corporations, labor organizations, foreign nationals, or government contractors. Once it meets the requirements of a multicandidate committee, it may contribute $5,000 per election to candidates and other committees, and $15,000 to national party committees. A group of persons becomes a committee when it receives contributions or makes expenditures of over $1,000 in a calendar year. This seemingly straightforward rule becomes more complex, however, when we consider the definitions of "contribution" and "expenditure." For both, the Act requires the payment be "for the purpose of influencing any election for Federal office."

The complexity in the analysis results not so much from the statute enacted by Congress, but from the judiciary's interpretation of those words. Prior to the passage of the Bipartisan Campaign Reform Act ("BCRA"), courts, including the Supreme Court, repeatedly held "for the purpose of influencing any election for Federal office" was unconstitutionally vague unless applied only to "express advocacy" of the election or defeat of a clearly identified candidate.[1] Because of this construction, groups only become political committees if they engage in express advocacy.

The judge-created standards do not stop at "express advocacy." Courts have also concluded that a group may only be regulated as a federal political committee if, in addition to meeting the statutory threshold, its "major purpose" is to influence federal elections.[2] The courts have not decreed a clear standard for determining major purpose. The major purpose "test" comes into play only to determine whether a group that otherwise meets the statutory definition may yet be exempt from political committee status.

BCRA changed none of these fundamental terms, nor did it articulate a different scope of interpretation.

The definition of "political committee" and "expenditure" have been understood by activists and practitioners for many years, and that understanding included interpreting "expenditures" to be "express advocacy," even after the effective date of BCRA. For example, in January 2003, 10 months after passage and two months after BCRA's effective date, several campaign finance reform groups wrote the IRS asking it to more rigorously police disclosure requirements for 527-exempt and 501(c) exempt groups.[3] In that letter, the reform commenters stated that "for well over a decade" the law had not made 527s and 501(c)s become political committees, unless they accepted contributions or made expenditures for express advocacy. Thus, they were not required to disclose their receipts to the FEC, even thought they engaged in issue advocacy, voter registration, get-out-the-vote and other activities.

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[1] *Buckley v. Valeo*, 424 U.S. 1, 44 (1976); *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 249 (1986), *Virginia Society for Human Life v. FEC*, 263 F.3d 379, 383 (4th Cir 2001); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 389 (Vt. 2000), *North Carolina Right to Life Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999); *Brownsburg Area Patrons Affecting Change*, 137 F.3d 503, 506 (7th Cir. 1998); *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d. Cir. 1995); *see also Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359 (11th Cir. 2003) (*Buckley* "effectively eliminated disclosure requirements for anything other than express advocacy").

[2] *Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 252 n.6.

[3] Comment of Public Citizen, Center for Responsive Politics, Common Cause & Democracy 21, IRS Announcement 2002-87 (Form 990) January 28, 2003.

This was not the first time that campaign finance reform efforts turned to the IRS. Alarmed by the increase in issue advertising by groups that did not qualify as political committees, Congress in 2000 enacted legislation requiring 527s to file disclosure reports with the IRS.[4] Under that law, groups that are not political committees already required to register and report with this Commission or with state or local regulators, and that have receipts of over $25,000 per tax year, must file disclosure reports with the IRS. In enacting this law, Congress intended to regulate such groups by requiring disclosure. It did not choose to alter the law so that they would be considered political committees under FECA. That such a change was not made is important. One of the catalysts for the legislation was the expenditures made by Republicans for Clean Air for advertisements critical of presidential candidate John McCain in the context of the 2000 presidential primary, in which Senator McCain was running against President George W. Bush. That group, it was discovered, had been funded by two ardent Bush supporters. Although the perceived threat posed to the system by Republican for Clean Air in 2000 seems similar to that attributed to certain groups active in 2004, Congress concluded in 2000 that disclosure, not regulation as a political committee, was the appropriate remedy. It did not reconsider that choice when it enacted BCRA.

II. BCRA and Political Committee Status

BCRA prohibited national parties and federal officeholders and candidates from raising or spending nonfederal funds. It placed strict restrictions upon state and local party committees' use of nonfederal money. It also barred the use of corporation or labor funds for "electioneering communications" during the 30 days before a primary, caucus or convention and 60 days before a general election. In doing so, Congress did not change the definition of "expenditure" or "political committee," although it was well aware of the restrictive judicial and regulatory interpretation applied to these key concepts. It is beyond question that, at the time BCRA was enacted, the Commission was applying express advocacy to determine whether activities were "expenditures" and Congress did nothing in BCRA to modify this approach.

Numerous comments made during the debate indicate that members understood BCRA's limited reach, and conceded that fact:

[4] Pub. L. 106-230, 114 Stat. 477 (July 1, 2000); technical amendments Pub. L. 107-276, 116 Stat. 1929 (Nov. 2, 2002).

> Senator Murray, a supporter, noted that it "also has the potential to give a disproportionately larger role in elections to third party organizations."[5]
>
> Senator Jeffords, in describing the electioneering communication provision he coauthored with Senator Snowe, stated "it will not require such groups to create a PAC or another separate entity."[6]
>
> Senator Hutchison, a critic of the reform legislation, observed that it allowed "unregulated special interest groups to raise and spend unlimited amounts of soft money without any real reporting requirements. . . we have elevated the status of groups such as that by curtailing the ability of our political parties . . . we are limiting the amount of soft money that can go to the political parties while outside groups are not limited at all."[7]
>
> Senator Snowe defended the measure as adequate to stem the corrupting influence of soft money : "Some of our opponents have said that we are simply opening the floodgates in allowing soft money to now be channeled through these independent groups for electioneering purposes. To that, I would say that this bill would prohibit members from directing money to these groups to affect elections, so that would cut out an entire avenue of solicitation for funds, not to mention any real or perceived 'quid pro quo.'"[8]

A number of other Senators made similar comments indicating that they understood BCRA to contain some compromises, but that it was nevertheless worth supporting.[9]

After the passage of BCRA, the Commission entered an extensive round of rulemakings to implement that law. There, as here, we received extensive comments from all sides, including comments from the authors and key reform supporters of BCRA. During the rulemaking, BCRA's authors noted in a comment to us that "funds provided to entities that are not political committees [for electioneering communications] are not contributions and do not in themselves trigger political committee status."[10] At no time did <u>any</u> commenter during the regulation process suggest that the Commission needed to change its definitions of "political committee" or "expenditure" in order to put BCRA into effect. After the regulations were adopted, they were challenged in Court by the lead House sponsors of BCRA, for failing to properly implement

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[5] 147 Cong. Rec. S3236 (April 2, 2001).
[6] 147 Cong. Rec. S2813 (Mar. 27, 2001).
[7] 148 Cong. Rec. S2096 (March 20, 2002). Senators Stevens and Nichols voiced similar concerns. *Id.* at S2106.
[8] 148 Cong. Rec. S2136 (March 20, 2002).
[9] *See* Senator Wellstone, 148 Cong. Rec. S2098; Senator Dodd at S2099; Senator Boxer at S2101; Senator Feingold at S2105.
[10] Comments of Senators McCain, Feingold, Snowe and Jeffords and Representatives Shays and Meehan, Notice of Proposed Rulemaking (Electioneering Communications) August 23, 2002.

BCRA.[11] However, neither that complaint, which is still pending before the trial court, nor any of the briefs filed in support of its arguments allege that the Commission should have redefined "expenditure," "contribution," or "political committee" to properly implement the law.

III. The Effect of *McConnell v. FEC* and Political Committee Status

A. The Court's Decision

In December 2003, the Supreme Court decided *McConnell v. FEC*.[12] The Court rejected plaintiffs' arguments that any standard other than express advocacy was unconstitutional. However, the Court did not – and could not – apply that law more broadly than enacted by Congress.

In *McConnell*, the Supreme Court said one thing that has attracted great attention in the present matter. It observed that the "express advocacy" standard, to the extent it required use of magic words, was "functionally meaningless," both because advertisers could easily evade their use, and would seldom choose to use them even if permitted.[13] Moreover, the Court observed that an advertisement lacking express advocacy could be clearly intended to affect an election. The Court said that speech beyond express advocacy could be regulated by Congress if the law was neither vague nor overbroad. It held the electioneering communication standard in BCRA, limiting broadcast ads that named a federal candidate within 60 days of an election, unlike "for the purpose of influencing," was neither vague nor overbroad.[14]

Significantly, the Court then went on to conclude that the electioneering communication law was also not underinclusive, rejecting the Plaintiffs' contention that the law should also include print media and the Internet. The Court reacted: "One might just as well argue that the electioneering communication definition is underinclusive because it leaves advertising 61 days in advance of an election entirely unregulated."[15] The Court understood that "60 days in advance of an election," an independent group could run advertising that promoted, supported, attacked or opposed a candidate. The recent proposal before the FEC would regulate exactly such speech as an "expenditure," rendering the Court's observation here nonsensical.

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[11] *Shays v. FEC*, No. 02-1984(CKK) (D.D.C.).
[12] 124 S. Ct. 619 (2003).
[13] *Id.* at 689.
[14] *Id.*
[15] *Id.* at 697.

Similarly, the Court held that the phrase to "promote, support, attack or oppose" a candidate was not unconstitutionally vague, as applied to candidates and party committees. That is because "actions taken by political parties are presumed to be in connection with election campaigns."[16] Again, despite the apparent breadth of this pronouncement, its scope is limited. The Court did not address the phrase as applied to non-party committees with complex policy agendas – that issue wasn't before the Court, since BCRA itself does not apply the standard to non-party committees. The Court's contention that the phrase "promote, support, attack or oppose" ("PASO") is clear in the party context is just that. The Court did not and could not consider it as applied to other groups, because the statute does not apply it to other groups. In our 2002 BCRA rulemakings, however, commenters that now ask us to apply PASO broadly to nonparty groups told the Commission that the phrase required additional definition before it could be constitutionally extended to independent groups. They told us that, while it was sufficiently clear in the context of "inherently electioneering entities (i.e. parties and candidates)," it was not sufficiently clear when used in the context of other persons or groups.[17]

B. Reaction to *McConnell*

Even given *McConnell's* limited scope, in its wake some began to argue that if "express advocacy" is not a constitutional prerequisite for regulating political activity, then the Commission should, or at least could, fashion a new definition of "political committee" or "expenditure." Others argued that *McConnell* itself had the effect of changing the definition of expenditure articulated in previous cases.

Some ramifications of BCRA and *McConnell* in this area were addressed in an Advisory Opinion request submitted by Americans for a Better Country, AO 2003-37. In an effort to address any remaining uncertainties, the Commission in January 2004 began planning a Notice of Proposed Rulemaking ("NPRM") on the issue.[18] An aggressive schedule was adopted, along with the Notice, at a March 4, 2004 open meeting. The schedule called for hearings on April 14 and 15, required commenters who sought to testify to submit comments by April 5, and set a target date for a final vote on May 13. In response to the NPRM, the Commission received over

[16] *Id.* at 675 n. 64.
[17] Comment of the Campaign and Media Legal Center re: Notice of Proposed Rulemaking (Electioneering Communications) August 21, 2002.
[18] Political Committee Status; Notice of Proposed Rulemaking, 69 Fed. Reg. 11,736 (March 11, 2004).

150,000 comments.[19] While many thousand were mass emails, many thousand more were individualized comments, and hundreds involved substantive and non-duplicative analyses of the law and the policy before us. During the hearings, we took testimony from 31 witnesses. The vast majority of those witnesses opposed the FEC's proposed rule.

After the hearing, a majority of Commissioners agreed that the May 13 target date should not dictate a pace that would preclude considered judgment. However, Commissioners Toner and Thomas drafted their own proposal and, following Commission procedures, asked to have it placed on the agenda for May 13.[20] At that meeting, the Office of the General Counsel presented its recommendation that the Commission take no action at that time, while the Counsel continued to analyze the scope and effect of the proposed rules, their legal basis, and the comments related to them – all necessary measures if the rule we adopt is to withstand legal challenge and not be found "arbitrary and capricious." The proposal presented by Commissioners Toner and Thomas, which has been described in detail elsewhere, was defeated 2-4, with a majority of both Republican and Democratic Commissioners opposed to it. An alternative, that would put forward only the allocation portion of their proposal, was defeated by another bipartisan vote by 3-3, with Commissioner Mason joining Commissioners Thomas and Toner in favor. A third alternative, which would present the original proposal with an effective date after the 2004 election, failed by a bipartisan 2-4 vote. The Commission then adopted the General Counsel's recommendation by a unanimous vote of 6-0.

With additional time, I expect that the Counsel's recommendation and the Commission's consideration will be better informed, tailored to the situation before us, supported by a well reasoned Explanation and Justification, and appropriately within our administrative discretion. The irony of the present focus upon the "delay" is that, given Congress's review of regulations under the Congressional Review Act and the Regulatory Flexibility Act, it is unlikely that any rule promulgated on May 13 would have been in effect for much of the election cycle in any event.

Many critics assert that our decision will set off a frenzy of activity, which is puzzling. The Commission has not changed any rule. The rules remain as they have been, and as both supporters and opponents of the Toner/Thomas proposal clearly understood them to be through

[19] Comments are available at http://www.fec.gov/pdf/nprm/political_comm_status/comments.html.
[20] Agenda documents for the May 13 hearing are available at http://www.fec.gov/agenda/agenda20040513.html.

the end of 2003, when this new proposed interpretation was first raised. Our coordination and allocation rules still apply, and we remain actively pursuing complaints in this area under our enforcement procedures. We are still able to answer questions about the Act when asked through Advisory Opinions, such as the one issued to Americans for a Better Country. In this highly technical area of campaign finance law, and with uncertainty about the proper scope of BCRA and *McConnell*, maintaining consistency and regularity in our rules would seem to be the only responsible course for the Commission.

IV. The Commission Must Defer to Congress

The General Issue: While the Commission has chosen to review the matter further, speaking for myself I have become increasingly skeptical that the Commission enjoys discretion to rewrite the scope of such fundamental terms as "political committee" and "expenditure" without action from Congress. As you know, any agency's power to promulgate regulations is limited to the authority delegated it by Congress.[21] Administrative agencies like the Commission shall give effect to Congress's expressed intent. If Congress has left an interpretive gap to fill, and the agency has been expressly delegated the authority to promulgate regulations that fill the gap, then the agency may write such rules provided they are not arbitrary, capricious, or contrary to law.[22] In any case, regulations must be consistent with the statute under which they are promulgated.[23] The question is whether the "statutory scheme as a whole justifie[s] promulgation of the regulation."[24] Rules of the type proposed are not, in my view, gap-filling but instead a rewriting of the Act. A useful analysis that also concluded that the Proposed Rule is not within our regulatory power was submitted to the Commission by the United States Chamber of Commerce, and that relevant portion is attached to this Statement.

Courts have considered the extent to which regulatory agencies can promulgate rules after Congress has acted in an area. They have concluded that to the extent Congress relied upon or wrote a statue incorporating a regulatory interpretation, the agency lacked discretion to revisit that interpretation. Essentially, the administrative gloss on the law becomes Congress's, and

[21] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).
[22] *Chevron v. NRDC*, 467 U.S. 837, 843-44 (1984).
[23] *United States v. Larionoff*, 431 U.S. 864 (1977); *see also INS v. Chadha*, 462 U.S. 919 (1983).
[24] *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158 (1967).

may no longer be susceptible to regulatory tinkering by the agency.[25] Additionally, legislation is often the product of compromise, and the Supreme Court has held that agencies "must respect and give effect to these sorts of compromises."[26] I do not believe that the core proposals in the Toner/Thomas proposal, or in the Proposed Rule, are allowable interpretations of the Act given Congress's apparent willingness to work with and around existing FECA concepts in the 527 disclosure law passed in 200, and in BCRA, as outlined above.

Allocation: Similarly, Congress did not revise the manner in which entities already registering and reporting under the Act – like ACT and MoveOn.org -- fund their mixed activities. The Commission has in place a pre-BCRA framework to allocate mixed activities of non-party federal committees with non-Federal accounts, and this general framework was not changed by the passage of BCRA. Much public attention has been focused on one group which has claimed a 98% non-federal allocation ratio. In that regard, I note that the Commission of course remains able to examine the basis for that ratio and compel filers to revise them as well as to pay penalties if we find they have made impermissible use of nonfederal funds.

"Promote, support, attack or oppose" messages as "expenditures": Congress articulated PASO as a standard applicable only to certain entities. BCRA defined a new term "Federal Election Activity" (FEA) as, among other things, public communications referring to a clearly identified candidate that promote, support, attack or oppose a candidate.[27] FEA – and by extension, PASO -- is applied in only two parts of the Act as amended by BCRA. It first appears in the section devoted to "state, district and local committees" of political parties. FEA also appears in the act in relation to solicitation restrictions on parties and Federal candidates and officeholders. Parties are prohibited from soliciting or directing funds to a 501(c) organization that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for FEA). Federal candidates and officeholders are prohibited from soliciting or directing funds in connection with an election for Federal office,

[25] *FDA v. Brown & Williamson*, 529 U.S. 120 (2000); *Assoc. of Am. Physicians & Surgeons v. FDA*, 226 F. Supp. 2d 204 (D.D.C. 2002).
[26] *Ragsdale v. Wolverine Worldwide Inc.*, 535 U.S. 81, 94 (2002).
[27] 2 U.S.C. 431(20).

including for any Federal election activity, unless the funds are subject to the Act.[28] PASO is not applied to other groups, such as independent 527 groups.

BCRA's sponsors had reasons for selecting party committees for special treatment. As explained in the Brief of Intervenors before the District Court, "[u]nlike interest groups, which pursue an issue-based agenda that transcends the election of candidates, parties are primarily and continuously concerned with acquiring power through electoral victory. Parties never engage in public communication without regard to electoral consequences."[29] Accordingly, BCRA's sponsors selected party committees for special regulation: "BCRA's state party provisions are carefully tailored to strike a balance between Congress's anti-corruption and anti-circumvention interests and the states' interest in controlling their own elections. That balance is reflected in the definition of 'federal election activity' which confines the effect of BCRA to those state party activities that most clearly affect federal elections . . . ."[30]

The Supreme Court in *McConnell v. FEC* also explicitly recognized that Congress could treat some groups differently from others without running afoul of constitutional equal protection guarantees. In so doing, it recognized that independent groups would remain free from restrictions placed upon parties. The Court stated:

> BCRA imposes numerous restrictions on the fundraising abilities of political parties, of which the soft money ban is only the most prominent. Interest groups, however, remain free to raise money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications).

124 S. Ct. at 686. The Court continued:

> Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. . . . Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional

[28] BCRA permits these individuals to make specific solicitations for voter registration, voter identification and get out the vote, as defined in the first two prongs of the FEA definition, if the solicitations are made only to individuals and do not exceed $20,000 in a calendar year. 2 U.S.C. 441i(e)(4)(B).
[29] Brief of Defendant-Intervenors (Excerpts-Redacted) at I-58 (quoting Green Expert Report at 17 n. 19).
[30] *Id.* at I-54, *see also id.* at I-59 (discussing application of "promote, support, attack, or oppose" standard to party committees).

> leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group.

Id. (citation omitted).

Moreover, the evidence produced in *McConnell* shows that during that litigation it was expected that BCRA imposed regulations upon political parties that would not be imposed upon "interest groups." *See McConnell v. FEC*, 251 F. Supp.2d 176, 520-22 (Kollar-Kotelly) (summarizing evidence about effect of BCRA on interest group activity).

Voter Registration as "expenditures": The Thomas/Toner proposal would consider certain voter registration expenses to be "expenditures" counting toward political committee status. Yet this would appear to conflict with BCRA. BCRA contains a provision that allows federal candidates and officeholders to solicit funds for voter registration, identification and get-out-the-vote in amounts up to $20,000 from individuals.[31] This is well over the $1,000 trigger for political committee status or the $5,000 political committee contribution limit. Yet, if such voter registration activity renders a group a political committee, this exception has no effect and makes no sense.

V. Effect on 2004 Election

Contrary to the claims of many, I do not see the Commission's restraint in the matter as opening a "loophole." From the legislative history, it seems clear that the shift of activity we are witnessing to outside groups is what both supporters and opponents of McCain-Feingold predicted. Moreover, I do not think this undermines BCRA. The avowed goal of the legislation was to remove officeholders and parties from "soft money" fundraising.

Today, even without a rulemaking, BCRA would be violated of a federal officeholder, candidate, or party representative solicited or directed corporate and labor funds to these groups, or if these groups came under the control of a party or candidate, or even if they coordinated with parties or candidates.

[31] 2 U.S.C. 441(i)(e)(4)(B).

At the same time, adopting a rule that limited only 527 organizations would simply drive the much independent activity into 501(c) organizations, accomplishing nothing.[32] In fact, 501(c) organizations have even fewer disclosure requirements than do 527 organizations.

The interpretation set forth above, then, is supported by the clear terms of the law, its legislative history and the compromises and policies behind it, and norms of statutory construction.

Conclusion

I find no Congressional grant of rulemaking authority to support the Proposed Rule of the NPRM or the Thomas/Toner proposal. I leave open the possibility that, with the research and analysis forthcoming from the General Counsel, there may be an opportunity to revisit some aspects of our regulations, such as those that govern the allocation of federal and nonfederal funds by committees with nonfederal accounts. This may seem like an arcane area, but it is an important aspect of our jurisdiction, and one where courts have expressly held we enjoy some discretion.[33] If activities of so-called "shadow parties" are to trigger political committee status by considering PASO communications to be "expenditures" -- which would lead to mandatory compliance with the Act's reporting requirements, limits and prohibitions -- Congress must so declare. Whatever the Commission promulgates, I am confident it will be challenged by talented legal counsel on behalf of politically active groups and individuals. There is no profit in our releasing a Rule hastily when our power to rewrite the fundamental definition of "expenditure" and "political committee" is so uncertain.

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[32] *See* Craig Holman, Larry Noble, Fred Wertheimer et al., *The Shroud of Secrecy Over the Electioneering Activities of Non-Profit Groups: Recommendations to the IRS for Improved Disclosure*, Letter to IRS, Jan. 29, 2003, p. 2, http://www.citizen.org/congress/campaign/issues/nonprofit/articles.cfm?ID=8890 ("The joint effect of these two new laws [the 527 disclosure law of 2000, and BCRA] makes registering as a 501(c) non-profit group somewhat more attractive than registering as a Section 527.") *See also* Eliza Newlin Carney et al., *New Rules of the Game*, National J., Dec. 19, 2003 (quoting Professor Frances R. Hill, "This [501(c)(3) and 501(c)(4) organizations] is where, ultimately, scandals will erupt.")

[33] *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987).

Excerpt from Comments of the Chamber of Commerce of the United States, in response to the Federal Election Commission's *Notice of Proposed Rulemaking, Political Committee Status*, 69 Fed. Reg. 11,736 (March 11, 2004)

III. UNDER WELL SETTLED PRINCIPLES OF ADMINISTRATIVE LAW, THE FEC LACKS AUTHORITY TO ADOPT THE PROPOSED RULES

The FEC would exceed its authority if it adopted the proposed rules. Agencies are not empowered to craft whatever rules they might deem in their considered judgment to be good policy; rather, they are limited by the terms and structure of the statutes they are charged with enforcing. More specifically, agencies can only proceed where there is an ambiguity or gap to be filled, and "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear . . .." MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 229

(1994). In this case, Congress left no gaps for the FEC to fill in the definition of "political committee" or the more general definition of "expenditure" as they pertain to nonparty groups. In the BCRA, Congress spoke with deliberation, clarity and circumspection; it labored to develop a "carefully crafted compromise," 147 Cong. Rec. S3097 (daily ed. Mar. 29, 2001) (statement of Sen. McConnell), that could pass both houses of Congress and survive inevitable court challenges.[1]

The foundation of modern administrative law is the familiar Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), which outlines the contours of permissible agency action. Under Chevron, courts and the implementing agency ask first whether Congress has left any ambiguity or gap to fill. If Congress has spoken with clarity to the issue in question, the court or agency should give effect to the expressed intent of Congress; where Congress "explicitly left a gap for the agency to fill," and there is "an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation" the agency may act. Chevron, 467 U.S. at 843-44. In such circumstances, agencies are empowered to undertake gap-filling rulemakings so long as they are not "arbitrary, capricious, or manifestly contrary to the statute." Id.; see also Aid Ass'n for Lutherans v. U.S. Postal Serv., 321 F.3d 1166, 1174 (D.C.Cir. 2003). This two step analysis is critical to evaluating an agency's actions. Though the FEC's interpretation of campaign finance laws deserves "considerable deference,"

[1] The original version of the BCRA was introduced in the 104th Congress as S. 1219 on September 7, 1995. This bill was significantly more restrictive than BCRA eventually turned out to be; that bill was defeated and Senators McCain and Feingold thereafter introduced a modified version of that bill in each session of Congress. In some years, the House of Representatives succeeded in passing a version of campaign finance, but Senate sponsors failed to break a filibuster on the Senate version. Finally, in the 107th Congress, the latest McCain-Feingold iteration of the bill survived numerous amendments and passed in the Senate, 59-41 on April 2, 2001. After the House failed to consider versions of the bill pending in committee, House supporters finally succeeded in forcing a floor vote and on February 7, 2002, the House approved H.R. 2356. The Senate approved an identical bill on March 22 to avoid a conference committee, and President Bush signed the bill into law on March 27.

American Federation of Labor & Congress of Industrial Organizations v. FEC, 333 F.3d 168, 175 (D.C. Cir. 2003), under the first step of Chevron, courts "only defer to an agency interpretation if a statute or regulation is unclear." In re Sealed Case, 237 F.3d 657, 669 (D.C. Cir. 2001) (citations omitted).

A. This rulemaking is inconsistent with the BCRA's text, structure and purpose

The proposed regulations do not resolve an ambiguity or fill a "gap" left by Congress in the definition of "political committee" or "expenditure." Congress spoke with remarkable precision in crafting its legislative response to the problems perceived in the system of election financing. The justification offered by the government and accepted by the Supreme Court for almost every provision of the BCRA, was the "sufficiently important governmental interests of avoiding corruption and its appearance." McConnell v. FEC, 124 S. Ct. 619, 675 (2003). In addressing these problems, Congress had before it the full panoply of legislative responses to the perceived inadequacies in the campaign finance regulatory regime, but focused on two specific and related areas: national and state party soft money, and "electioneering communications," a narrowly tailored term of art used to describe a specific class of communications by particular entities.

The principal articulated rationale for BCRA's regulation of national and state party soft money was to stop circumvention of the campaign finance laws. "Title I is Congress' effort to plug the soft-money loophole." Id., at 654. Congress' "conclusion, based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. Rather, state committees function as an alternate avenue for precisely the same corrupting forces." Id., at 672. The rationale for Title II's regulation of "electioneering communications" was the same: circumvention of the soft

money ban. "As with soft-money contributions, political parties and candidates used the availability of so-called issue ads to circumvent FECA's limitations, asking donors who contributed their permitted quota of hard money to give money to nonprofit corporations to spend on 'issue' advocacy." Id., at 652 (citations omitted). The Congressional Record is replete with references to the vital role the BCRA's restrictions on electioneering communications would play in ensuring "real and meaningful campaign finance reform" by preventing circumvention of the law.[2]

Campaign finance reform is an "area in which [Congress] enjoys particular expertise" and over which there were "lengthy deliberations leading to the enactment of BCRA ...." McConnell, 124 S. Ct. at 657. Congress was aware of and debated all manner of regulation aimed at eradicating the pernicious effect it perceived played by soft money before enacting limited reform in the BCRA. Senators debating the regulation of electioneering communications remarked on the BCRA's intentionally narrow scope. To comply with constitutional limitations and achieve consensus, Congress deliberately did not bring all nonparty groups under the watchful eye of the federal campaign finance laws; Congress was "trying to make distinctions between true issue advocacy and election ads. . . . It is carefully crafted to make sure we have a narrow provision identifying the time period of 60 days and 30 days. We ban only union and corporation money. So the entities know which provisions affect them in the election." 147 Cong. Rec. S3035 (daily ed. Mar. 28, 2001) (statement of Sen. Snowe) (emphasis added); see id. at S3033 (statement of Sen. Jeffords) ("We also worked to make our requirements sufficiently

[2] See e.g., 147 Cong. Rec. S3036 (daily ed. Mar. 28, 2001) (statement of Sen. McCain); id. at S3041-42 (statement of Sen. Wellstone) ("[W]hat we want to make sure of is when we do the prohibition on soft money to the parties, all of a sudden that money ... doesn't just shift to these sham issue ads where a variety of existing groups and organizations ... will just take advantage of a loophole and just pour all of their soft money into these sham issue ads which are really electioneering."); id., at S3072 (statement of Sen. Feingold) ("Snowe-Jeffords gets at the heart of the issue ad loophole.").

clear and narrow to overcome unconstitutional claims of vagueness and overbreadth.") (emphasis added).

The BCRA's admittedly limited solution was, fundamentally, the product of political compromise.[3] Senator Wellstone aptly summarized the negotiated nature of Congress' regulation of soft money: "It is not the only problem in our campaign finance laws. It is not the only answer. But it is the answer around which a majority of Members here could coalesce." 148 Cong. Rec. S2099 (daily ed. Mar. 20, 2002) (statement of Sen. Wellstone) (emphasis added). Discussing proposals that did not make it into the BCRA, he noted, "[no matter how good the idea may be, if you can't muster 51 votes here and a majority in the House, then the idea is only that: it is a good idea, but it lacks the ability to build the necessary majority support for the idea to become law." Id. Senator Daschle agreed that the BCRA "does not address every flaw in our campaign system. . . . it curbs some of the most egregious injustices in that system." 147 Cong. Rec. S3244 (daily ed. Apr. 2, 2001) (statement of Sen. Daschle).

Given the range of legislative solutions available, it is notable what Congress did not do. In combating soft money and sham issue ads, Congress could have regulated in the manner now proposed by the FEC, but Congress did not amend the definitions of "expenditure" or "political committee" to include "electioneering communications," except when coordinated, in which case the spending becomes a "contribution." See 2 U.S.C. § 441a(a)(7)(C). This omission from such a comprehensive bill, debated for so long, supports a "sensible inference" that Congress

[3] "There are people who would not be for this legislation, I dare say, if they thought the Snowe-Jeffords legislation on money being spent on sham ads right before the election were not restricted in this bill." 147 Cong. Rec. S3097 (daily ed. Mar. 29, 2001) (statement of Sen. McConnell). Sen. McConnell stated, "[a]ll of the ingredients are essential to the compromise" which he characterized as "carefully crafted" to resolve the "controversial, complicated, emotional issue of how we handle campaigns in this country." Id. (emphasis added).

deliberately did not act. Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73, 81 (2002).[4] Indeed, prior to the passage of the BCRA, the FEC had begun to clarify the definition of a political committee. See Definition of Political Committee, 66 Fed. Reg. 13681 (FEC Mar. 7, 2001). "After receiving comments on the ANPR, the Commission voted on September 27, 2001, to hold that rulemaking in abeyance pending changes in legislation, future judicial decisions, or other action." Political Committee Status, 69 Fed. Reg. 11736, 11737 n.3 (FEC Mar. 11, 2004). Subsequently, and presumably well aware that the FEC was considering such amendments, Congress enacted explicit reform legislation that did not alter the concepts the FEC sought, and now seeks, to redefine.

Nonparty groups intentionally were left free to engage in issue advocacy (except express advocacy or electioneering communications) at all times outside the 30 and 60 day blackout periods and even during the blackout periods in other media (e.g. newspapers, direct mail, billboards, etc.). "As long as those are genuine issue ads and it is not electioneering, they have all of the freedom in the world to do that - period." 147 Cong. Rec. S3041 (daily ed. Mar. 28, 2001) (statement of Sen. Wellstone). Senator Hatch reinforced this conclusion, arguing the BCRA would lead to a variety of unintended consequences because soft money would shift to

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[4] In light of the particularity of Congress's solution, guidance can be taken from the ancient canon of statutory construction: *expressio unius est exclusio alterius*, "the mention of one thing implies the exclusion of another."

> The maxim's force in particular situations depends entirely on context, whether or not the draftsmen's mention of one thing, like a grant of authority, does really necessarily, or at least reasonably, imply the preclusion of alternatives. That will turn on whether, looking at the structure of the statute and perhaps its legislative history, one can be confident that a normal draftsman when he expressed "the one thing" would have likely considered the alternatives that are arguably precluded.

Shook v. D.C. Fin. Responsibility & Mgmt. Assistance Auth., 132 F.3d 775, 782 (D.C. Cir. 1998) (emphases added).

advocacy groups, "[t]he problem with such a result is that these non-party groups are completely unregulated, as they should be." Id. at S3243 (April 2, 2001) (Statement of Senator Hollings).

Not only is it contrary to congressional intent, the extrapolation of fundamental definitional elements, such as FEA, beyond their designated place violates a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989). For the agency to redefine these fundamental elements of campaign finance law, thereby subjecting previously unregulated nonparty groups to intrusive and unnecessary regulation, is to legislate where Congress did not. Congress not only did not legislate new definitions, it did not indicate that changes were needed through new FEC regulations, as it did in other contexts. BCRA mandated certain new rules and imposed deadlines on the FEC. See BCRA § 214 (c), codified at 2 U.S.C.A. 441a note; BCRA § 402(c)(1)-(2), codified at 2 U.S.C.A. 441a note. None of these mandated rules pertain to the definition of "political committee" or the expansion of FEA to nonparty groups. While some of the FEC rules provoked complaints from congressional sponsors and a lawsuit, Shays v. FEC, No. 02-CV-1984 (D.D.C. filed Oct. 8, 2002), there were no suggestions that the FEC has failed to implement BCRA by excluding regulations of the sort proposed in this rulemaking.

Indeed, after passing the BCRA Congress itself has attempted to address some of the unintended consequences the FEC seeks to address in this rulemaking. Congress passed amendments to Section 527 of the Internal Revenue Code, Pub. L. No. 107-276, 116 Stat 1929 (2002), which complemented the BCRA by taking the limited step of amending the disclosure requirements applicable to nonparty organizations. Congress did not subject nonparty groups to the FECA's definitions of "expenditure" and "political committee" which would have

significantly burdened their operations by exposing them to all of the FECA's regulations and restrictions. To the contrary, Senator Lieberman explained that when enacting the BCRA, Congress anticipated the continued existence of nonparty organizations in their current form:

> [W]hen the Bipartisan Campaign Reform Act—the McCain-Feingold bill—goes into effect ... at least some of the soft money donors who will no longer be able to give to political parties will be looking for other ways to influence our elections. Donations to 527 groups will probably top many of their lists, because these are the only tax-exempt groups that can do as much election work as they want without jeopardizing their tax status.

148 Cong. Rec. S10779 (daily ed. Oct. 17, 2002) (statement of Sen. Lieberman). Fully cognizant of the BCRA and its implications for nonparty organizations, Congress only attempted to regulate them by improving disclosure of their activities and not by altering their ability to operate or redefining fundamental elements of campaign finance law. If this is true of § 527 organizations, it is more so with regard to other types of tax-exempt groups like the Chamber, a § 501(c)(6) organization.

The FEC's proposed rules thus ignore the circumspect and deliberate choices Congress made to address particular problems it perceived in the system of election financing. While the FEC is empowered to regulate in order to give substance to otherwise ambiguous provisions, "[a] regulation, however, may not serve to amend a statute, or to add to the statute something which is not there." Iglesias v. United States, 848 F.2d 362, 366 (2d Cir. 1988) (holding regulation amended statute because it altered the scope of the statute) (citations and quotations omitted). A regulation that does not implement the will of Congress, "but operates to create a rule out of harmony with the statute, is a mere nullity." Id. at 366-67 (quotation omitted); see also Comm'r v. Acker, 361 U.S. 87, 92-94 (1959) (holding regulation invalid when it added restriction for which the law did not provide); City of Tucson v. Comm'r, 820 F.2d 1283, 1290 (D.C. Cir.1987)

(rejecting regulation that "forged, not a reasonable implementation of the legislative mandate, but rather an impermissible enlargement by an unnatural construction of the statutory language").

The FEC's proposed rules are, in light of the text, structure, and legislative history of the BCRA, a substantive addition that is "out of harmony" with the narrowly tailored regime enacted by Congress. See Iglesias, 848 F.3d at 366-67. The BCRA cannot be construed as ambiguous with respect to the principal substantive definitions left intact by Congress; the FEC should not adopt rules fundamentally inconsistent with the compromise forged by Congress. By regulating nonparty groups, the FEC's proposals run afoul of the Supreme Court's admonition: "Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000) (quotation omitted).

B. The McConnell decision provides no independent authority for the FEC's proposed expansion of the reach of campaign finance law

Though the Supreme Court in McConnell appeared to suggest the Court's view that *Congress* could constitutionally broaden the definition of regulated activities, the Supreme Court cannot expand the authority of the FEC to regulate beyond that which Congress has authorized. Even with the purported blessing of the Supreme Court, the FEC is powerless to exceed the scope and reach of the substantive laws that Congress has enacted as part of its careful compromise in addressing this complex and contentious issue. The FEC does not have a mandate to expand the scope of regulation simply because the Supreme Court may have "recognize[d] additional activities that may be constitutionally regulated by Congress ...." See

69 Fed. Reg. at 11738; see generally, Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 170 (D.C. Cir. 2002). The FEC should heed the intent of Congress; no matter how desirable it finds a proposed rule, if it exceeds the scope of its delegated authority and clearly conflicts with the considered judgment of the Congress, it is properly taken up only by Congress.

The CHAIRMAN. Well, I thank everyone for their testimony.

I am going to keep my questions brief and under the time, because I want everyone to have a chance. And if we have a little bit more time I will allow more questions, but if not, I will submit it for the record.

I want to go to the role of the FEC. Considering the important constitutional freedoms at stake, when you as FEC Commissioners are making rules or carrying out your responsibilities that impact speech and associational rights, how broadly or how narrowly do you believe you should interpret the law? Broadly, narrowly or in between?

Mr. THOMAS. Well, I will jump in first, Mr. Chairman. I guess I've had somewhat of a philosophical disagreement with some of my colleagues over the years. I am someone who feels like the words Congress puts in the statute are my direction. Those are what I am supposed to follow, those are what I am supposed to defend, and those are what I am supposed to try to make work. And I have over the years tried to discourage my colleagues from trying to anticipate what constitutional battle might emerge if we adopt a certain construction of the statute. I have tried to encourage my colleagues to try to implement the statute as Congress intended it.

And it is interesting in this particular dispute, because as I see it, what we have got here is a question about interpreting statutory provisions Congress passed back in the 1970s about what is a political committee. That term is a term of art that has been there since the 1970s, as has the word expenditure. And so when I see arguments that, well, the effort to amend the legislation to require IRS disclosure of some 527s in 2000 or the BCRA legislation in 2002 somehow was a signal that the Commission should steer clear of getting into this issue we have in front of us today, I go back and say, look, the statute has been there for years and the FEC is supposed to figure out what is supposed to be, what is required to be regulated as a political committee. So I feel like I am trying to adhere to Congress's wishes when I go back and apply the entire statutory scheme.

The CHAIRMAN. Also, as a follow-up point, how do you determine intent? What was your intent? You determine just what was written in the law or the opinions of those who voted for it? Now, we have talked about this letter with 140 Members stating what they thought the intent of BCRA was, but you have the authors of the bill of the Senate and the House (the two authors respectfully, Mr. Shays and Senator McCain) saying, that wasn't our intent.

Do you go with the 140 because there are more numbers to decide intent, or do you go with the two who wrote the bill, or is it not a factor?

Mr. THOMAS. Well, any expression of congressional intent by a Member of Congress is relevant to me, but I would say that the dispute that we see coming from these alternative constructions from Members themselves demonstrates that it is an almost impossible question for the FEC to resolve, what was the intent. And so it is in my mind, again, better to go back and really try to opine and make the statutory words work and function together.

The CHAIRMAN. Yes, Commissioner.

Ms. WEINTRAUB. Mr. Chairman, if I might, I think that we all try to interpret the words of the statute. I don't think Commissioner Thomas is alone in that. We also need to take into account what courts have said about the statute, as indeed Commissioner Thomas did when he tried to import a major purpose test into his regulatory proposal, because that is not part of the statute anywhere. That is strictly coming out of Buckley v. Valeo and the MCFL decision. So that is entirely a judicial construct. And we have to take into account if the Supreme Court says something is unconstitutional, that is obviously something we have to pay attention to.

In terms of intent, I think it is entirely plausible that different Members of Congress had different intent when they voted for the law, but I suppose that I do find some weight in numbers, in that, as you know, you need a certain number of votes to get a law passed, and if more of the people who voted for that law who provided that majority had one view of the law, that I think is somewhat influential to me. We go back to the legislative history, look at what was said on the floor when people were debating, what was their understanding at the time. I think all of these factors are important.

The CHAIRMAN. Any other opinions?

Mr. SMITH. Well, I would echo the Vice Chair that all of us, I think, attempt to apply the statute. I know that 4 years ago I appeared before the other body at my confirmation hearing, and the point I made at that time, I promised Members, was that I would attempt to apply the law that they had written and not to apply my own preferences, and that is a vital consideration for us.

I feel that part of the reason I was appointed to the Commission was because of a sense of many Members that the Commission had frequently overreached in the past, that it had far too often found its interpretations of the law struck down as unconstitutional by the Court or as being contrary to the statute by the various courts.

And so I think one should not make the mistake of thinking that following the law involves constantly trying to push the envelope to the furthest possible limit. I think following the law means looking at the language of the statute, looking at the relevant court decisions that interpret that language, looking at what Members of Congress said at the time and what they might say in comments, and other expert witnesses, and applying that in a consistent way and in a way that does not step on the prerogatives of Congress.

The CHAIRMAN. Gentleman from Connecticut.

Mr. LARSON. Thank you, Mr. Chairman. And let me start by saying, again, the profound respect that I have for the difficulty of the task that you have at hand as witnessed by the testimony and the answers that you all have given. I find it interesting, too, that the four of you represent Republican, Democrat, Democrat, Republican as well, and I do believe that the task at hand is a very difficult one and provides caution.

I was struck by what Mr. Thomas had to say about wanting to go in and put out a fire, but I wanted to ask you, what kind of a fire do you think is raging with respect to 501(c)(3)s? And if we are going to put out a fire, shouldn't we put out the entire fire?

Mr. THOMAS. Congressman, that is a great point, and I think we should, if we find the same kind of abuse in the 501(c) area, basically apply the same legal analysis ultimately. If the major purpose of the organization could be shown based on reasonable objective analysis to be influencing elections, then I say you can apply the same tests.

Now, Commissioner Toner and I in our proposal were attempting to focus initially on the 527 phenomenon, because those folks under the tax laws have that special "for the purpose of influencing" kind of construct that they have to follow in the first place.

But we were intending for these other groups, the 501(c) groups, to allow for appropriate regulation either by the IRS or by the FEC, based on a whole body of current applicable law. So I hope you will appreciate that we are hoping to be vigilant in that area if the case arises.

Mr. LARSON. Well, I think the reason I raise that and there strictly in looking at the broader picture, and again this is a task that you have as well, but it does occur to me that in this article that I have asked to be introduced for the record, they talk about, well, look let's be honest about this. If you really pare down these issues, aren't we talking, you know, the term "shadow Democratic party," the shadow Democratic party and shadow Republican party, I suppose you could apply to 527s or 501(c)s, depending upon how you look at these organizations and their intent.

I want to read you a comment that the author makes. I thought it was kind of profound. He said should the Republican shadow party give Bush the extra artillery he needs to prevail against Kerry, the newspaper editorialists and good government activists may someday regret the fact that they decried the Democratic shadow party while blankly ignoring the Republican version. Not because it may get Bush elected, but because it will drive the whole soft money political economy deeper underground. Should Kerry lose the democratic operatives running 527s may conclude that there is little value in declaring themselves openly as electioneering outfits. Instead, they will likely—that is a good word—transmogrify their groups into 501(c)s.

Nobody will be able to see how much money George Soros gave this quarter under that scenario, or figure out who sponsored that $500,000 ad campaign in the St. Louis suburbs. Soft money would disappear, or rather it would just become invisible. And isn't that the equally troubling problem that we face that will probably require legislation. My broad question is, what kind of remedy and I am particularly sensitive to the fact that both the chairman and vice chairman have said from a definitional standpoint what do we have to be working at in terms of definition that will both be broad enough to not want to override or prevent the free speech concepts that we have talked about, but one that will provide more disclosure, more light shedding on both 527s and 501(c)(3)s.

Ms. Weintraub.

Ms. WEINTRAUB. Congressman, if I knew the answer to that question, we could have passed a regulation last week. I think it is in part because it is such a difficult task of line drawing that our counsel asked for another 90 days in participate to take a stab at it. We—the 501(c) issue raises, I think, some very troubling

issues that are the ones that you alluded to. That there is—if we pass this kind of a regulation, there is going to be real pressure to push a lot of this activity into 501(c)s, and there will be no disclosure. Congress acted to obtain disclosure from 527s and we would be defeating that purpose by sort of pushing that whole area underground. And people say oh, no, no that is got going to happen for this reason or that reason.

We had testimony from some sophisticated players, political players and they said, you know, we have complicated organizations. We have 501(c) aspects. We have 527 aspects. We have been using the 527s, but you know if that doesn't turn out to be a good deal anymore, we will just shift as much of this as we can into the 501(c)s and there won't be that kind of disclosure. At the same time, we have to be very sensitive to the advocacy needs of nonprofit community who are clearly very alarmed at some of the proposals that were put forward, as well as the sort of voter registration activities that the chairman alluded to earlier, which I am equally concerned about.

The Congressional Hispanic Caucus sent us a letter expressing are their concern about the need to mobilize voters in their communities and how that is affected by 501(c) organizations, and they don't want to see limits to that activity and frankly, beyond what is in the current law, I don't either. We have barely a majority of people who vote now who are eligible to vote, and that is a very troubling phenomena in and of it self. I would like to raise one other point on the fire issue, though, on how big the fire is. I think to some degree a lot of this has been hyped. And you don't have to take my word for it.

Read Tom Mann and Tony Corrado in today's Roll Call. Hundreds of millions of dollars are being raised in perfectly legal disclosed hard money contributions to the two major presidential candidates and to their parties. Hundreds of millions of dollars. It is a fund-raising operation, the likes of which has never been seen before. It is clearly going to be the most expensive election ever known in the history of the world. Some people think that is a good thing. Some people think that is a bad thing. But the amount of money that is being raised in the few organizations that people seem to be most concerned about I think is really going to be a drop in the bucket. And that was the perspective of Professor Mann and Corrado as well.

Mr. LARSON. I did read the article and I thank you. Yes.

Mr. TONER. Mr. Ranking Member, just two brief points. I think it is a critical question you raise. There is no doubt under the *MCFL* rulings that a 501(c)(4) organization under extraordinary circumstances could be a political committee. The Supreme Court there was dealing with a plaintiff group that was a (c)(4). The upshot of the opinion was if that organization did enough campaign-related activities, that it became its major purpose, the Court indicated it could become a political committee.

So I think you are absolutely right, that the law has not precluded a 501(c) from becoming a political committee. I think that being said, it would be extraordinary because the primary purpose of those types of organizations cannot be politics. If they do cross the line, I think the *MCFL* decision makes clear that jurisdiction

could exist. But I think it would be extraordinary. The other thing I want to note for the record is that Mr. Larry Norton, the FEC's general counsel, did not oppose the proposal that Commissioner Thomas and I advanced. I think he really adopted a stance of neutrality. He didn't oppose the proposal, nor did he advocate its passage, but instead indicated that he would like to have some more time, he and his staff, to examine the factual record, read the comments and then come back to us with recommendations. So I think it really is a stance of neutrality in terms of our general counsel in terms of this proposal.

Mr. LARSON. Is it neutrality or caution?

Mr. TONER. I think it is probably both. And I think rightfully so. These are major issues that we are dealing with here. My fundamental point is that the test that we have used for determining political committee status has turned on express advocacy. I think the law has changed after *McConnell.* Before *McConnell,* I think a very strong argument existed that the express advocacy test was required in this area and I respected that for many, many years. But I don't believe that is the law any longer, and I think we either engage in this issue and develop a new framework that could actually be effective or we push on based on how we have handled this in the past. I don't think that is a pathway for effective action.

Mr. LARSON. Well, I know the chairman is going to—want everyone to ask some more questions. I am not an attorney, but I am so impressed by what all of you had to say and the sharpness of your arguments. I am just reminded of Judge Leonard Hand's comment that liberty and freedom is that which leaves you not too sure you are right.

The CHAIRMAN. The gentleman from Florida, Mr. Mica.

Mr. MICA. Just a couple of quick questions. If, in 90 days, I guess there is an 90-day review period, is there a likelihood of—if the counsel comes back and says that we can go down this path, of further regulating, is that still possible? The two dissenting—I saw an affirmative head, Ms. Weintraub.

Mr. SMITH. Well, it seems as chairman, perhaps it would be most appropriate for me to answer that I guess.

Mr. MICA. Well, she already nodded in the affirmative. I want her to say it on the record. Would you say that on the record, Ms. Weintraub?

Ms. WEINTRAUB. Yes, absolutely.

Mr. MICA. Okay. Sir, you are recognized.

Mr. SMITH. I think there would be a possibility, but I would add a couple of caveats on that. First, I think even had we acted on May 13 it would have been highly unlikely, given the legislative calendar and the procedures for enacting regulations that any regs would have had effect for much of this cycle. If we act in August, I think it is highly unlikely that any regulation could be effective in the 2004 election.

Secondly, speaking for me, I have pretty much reached a conclusion. I am open if somebody comes up with an argument. But the sense I have got is I have heard their best shot, and I just can't find anything that suggests to me that when Congress passed BCRA, they thought—you thought—the majority that voted for it thought—and the minority that didn't vote for it thought that this

was a good idea to regulate 527s in this way or that the bill would. I think the legislation, the legislative history is overwhelming that it was understood that if BCRA passed these 527 groups would remain largely unregulated, as I noted in my opening comments, and that it is not really appropriate for us then to jump in and suggest that you should have done something else.

Mr. MICA. But if the majority of you voted to get into this area you could do that.

Mr. SMITH. If my colleagues were to reach that decision or something came that were to convince me that, you know, things have been wrong, but, you know, that is something we will have to see.

Mr. MICA. All right. Sounds like, Ms. Weintraub, you were influenced by this 119. I have looked through this. I didn't see any Republicans. It looks like all Democrats. If I send you a letter with 120 Republicans, will that influence you?

Ms. WEINTRAUB. It might. But I have to—I am not sure you could find 120 who actually voted for the law that could tell me what their intent was on that.

Mr. MICA. Well, here's the sponsors. Today Senators McCain and Feingold issued this statement on FEC. Today the FEC proved once again why it is necessary to fundamentally restructure that ineffective and irresponsible bureaucracy. I am quoting him. I didn't say that.

Ms. WEINTRAUB. I appreciate that.

Mr. MICA. By refusing to take action today on the soft money activities of 527 groups, the Commission has failed to close a loophole that dangerously undermines the purpose of the Federal Election Campaign finance laws. I didn't write the bill. It is authored by—I thought—maybe we are not in the same world because we are maybe not watching the same TV that has all this stuff on it dealing with Federal elections. But this is McCain and Feingold. I think they were involved. Then I have got this statement with Shays because I have heard sometimes Shays mentioned as a sponsor, regardless of what side of the campaign finance reform debate you are on, everyone agrees that the FEC decision will only encourage the continued proliferation of so-called 527 groups and the soft money will continue to influence—he goes on here.

So you know, maybe I will get 120 Republicans. And you have heard from these two. And, I mean, and, you know, we try to put faith in institutions to act in the best interest of the public in the elections process. And subjectively, you could go forward and do something about a situation that is obviously out of control. Where do you live Ms. Weintraub?

Ms. WEINTRAUB. Maryland.

Mr. MICA. Okay. Well maybe I just—I turn the TV on in Orlando and it is day and night, night and day and has been so. I have seen them up here too, but——

Ms. WEINTRAUB. I am not in a swing State. I guess I don't get that much advertising.

Mr. MICA. Somehow I believe that these folks are, in some way, trying to influence the Federal elections process.

Ms. WEINTRAUB. Congressman, I think that it would be a mistake and an effort to, you know, put a finger in the dike to go forward with the regulation that I think is fundamentally flawed. I

really don't know how people would comply with the regulation as drafted by my colleagues. I know they gave it their best shot. I think some of the terms in there are undefined because they couldn't agree amongst the two of them as to what should go into a major purpose test for example. If we are going to look—we put forward four different proposals in the notice of proposed rulemaking, and none of them are incorporated in this proposal. I have been told that it would use a 51 percent test, but I don't know what goes into the 51 percent.

Mr. MICA. Well, that is why we have you all to figure it out and to try to make the process work and try to keep faith in the Federal elections process. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you. The gentleman from California.

Mr. DOOLITTLE. Thank you, Mr. Chairman. Let me express to the commissioners in person what I did in my press release. Thank you for following the law in your decision. You see, it is my belief that McCain and Feingold and others wanted to regulate 527s when they passed their horrid law, but they didn't have the votes to include them within their law and have the law pass both Houses. So they had to leave them out, and then they are hoping you will be dumb enough to get a letter signed by 127 or whatever it is, and use that as congressional intent.

I mean, congressional intent has got to be discerned from the statute itself, first and foremost. I mean if you give any weight whatsoever to extraneous matters, and if you do, it should be very carefully considered because people are doing all kinds of things to achieve a certain result, and the truth sort of falls by the board sometimes.

When I first came here to the Congress, I was elected in 1990 and it was the ridiculous position the Republican party at that time, at least in the House, that we should ban PAC contributions. Why? Because Democrats were in the majority and they got more PAC contributions than Republicans did. Now, there's a great principle. And that is the problem with this law, with the whole history of campaign finance regulation in my opinion. Principle or truth has almost no bearing whatsoever. The law has been used right from the beginning as a way by one partisan group to gain advantage over the other.

Right now the Democrats succeeded in hood winking a few Republicans into voting for this disastrous McCain-Feingold that has become the law. And they should feel good about that. I congratulate them. They have always been great at acquiring and maintaining power. They are better than we are at that, and you know, you must have had a good laugh behind the scenes about how dumb we were. You know, we control, as the Republicans, the House and the Senate, and yet Congress put this law out and a Republican president signed it. I mean, is this a wonderful world or what? I deliberately put out that press release and I am complimented you quoted from it, Mr. Larson.

And I meant what I said. It was a fair-minded decision. And anything other than that, in my opinion, would have been making law. It is quite clear, this is 30-some pages of relative fine print in this McCain-Feingold 527s aren't in here. And I tell you why I believe they are not in there. There was no—they didn't forget about it.

You heard somebody quote Mr. Shays earlier that you know he openly acknowledged that they were not intending to include 527s. So you did the right thing. I guess what I would like to ask you is a question, just as an American, with a particular familiarity with how all this stuff works, since you are FEC commissioners, do you really believe that our campaign law has reduced the influence of special interests in the election? I would invite any of to you respond.

Mr. SMITH. Well, Congressman Doolittle, I—I think sometimes it is important to go back and perhaps look at first principle. Sometimes this debate gets so tied up that nobody stops and says is what we are doing working. I won't try to answer that question directly, but I will say this. I sometimes note that some states, for example, Maryland, have fairly complex laws, versus Virginia which allows unlimited corporate contributions, they just have to be disclosed. New Mexico allows corporate contributions. Arizona has all taxpayer-funded campaigns pretty much now.

I don't know anybody that thinks that when you drive across the Potomac going south, all of a sudden the mountains are barren of trees, or everything's been strip-mined, people have their teeth falling out from scurvy. I mean, I don't see anything that indicate that States that do not apply these rigorous regulations are more poorly governed as a general matter or more prone to political scandal than others. Now that is a very simplistic analysis. But I just think on the face of it, one might look and not see, if we look at the States as laboratories, where we are gaining a whole lot by the general approach. Obviously, however, our job at the Commission is to enforce what Congress passes. But I think it is always good for Congress to go back and not try to keep building on what is there, but sometimes look back and say do we want this edifice at all and consider starting over.

Ms. WEINTRAUB. Congressman——

Mr. DOOLITTLE. Please.

Ms. WEINTRAUB. In the first place, thank you for your comments, I think about our decision. You know, I think that BCRA had some laudable goals, but I echo what Congressman Larson said. The goal was to sever the link between office holders and raising these huge chunks of money, this soft money. Does that solve all the problems? No, it doesn't, but I think a lot of people think that is does serve a good purpose and it creates at least—it serves at least the goal of eliminating the appearance that Congressmen or other office holders are being influenced by those very, very large dollar contributions.

I also think that the electioneering communications provision is simple. It is clear, it is going to be a dream to enforce. I am really looking forward to it. And I am looking forward to seeing how it works. I think it is too soon to tell whether exactly what BCRA accomplished because we haven't even been through one whole cycle with it yet. And I think maybe we ought to wait until the end of the cycle at least before we decide.

Mr. DOOLITTLE. Yes, but do you believe—and I don't just mean BCRA, but I mean the campaign—you could even answer without reference to BCRA. Do you believe personally, based on your knowledge and experience that campaign finance regulation law

has reduced the influence of special interests? I don't mean the appearance of this or that. That is such a phony absurd standard in Buckley versus Vallejo. Throw that out completely. I just want to know your personal opinion. When you go home at night and talk to your family, you know, do you feel like you are more—we are more secure in our republic because of all this campaign regulation, that it has somehow reduced the influence of special interests?

Ms. WEINTRAUB. I try not to talk to my family about things like this.

Mr. THOMAS. Well, Congressman, briefly, I come from the perspective that these campaign finance laws are effective. They do really improve the body politic. I think my philosophy has always been that we are all sort of weak soldiers. If you dangle something that we really want in front of us, chances are we will be willing to do a favor for you down the road. And that is natural human nature.

And so I think these laws, to the extent they do put some reasonable limits and prohibitions on sources of huge amounts of money, will insulate elected officials and other players in the political process from that natural human kind of, set of transactions. And so I do think that these laws are making things, in essence, better than they would be without them. I think that the prohibitions on corporate and union contributions do stop some folks from putting money into the process, the election process and I think that BCRA restraints on Federal officials being involved in raising soft money are helpful. My view. My philosophy.

Mr. DOOLITTLE. My time is up, but I would love to ask you why you think it is better under the present system than it would be if corporations and unions got directly involved. Let's really go back. Let's go right back to good old Republican Teddy Roosevelt, who signed the first piece of campaign regulation. Why is that such a great hallmark of wisdom? What is the matter with corporations and unions getting involved?

Mr. THOMAS. Well, again, my view is that it sets up that awkward situation where those folks who are trying to get something accomplished through government will use their ability to influence elections or to help elected leaders get elected, to basically secure those kinds of governmental ends. And——

Mr. DOOLITTLE. And they are not doing that now?

Mr. THOMAS. Well, they are certainly restrained significantly by the current set of laws in my opinion.

Mr. DOOLITTLE. I really wish we could have. I would love to have a lengthy discussion, but I will be infringing on the other members' time.

Mr. SMITH. Congressman, if I may just briefly add, since you brought it up——

The CHAIRMAN. We will have to hurry because I do want to get to Mr. Ehlers, and then we will go through another round.

Mr. SMITH. I do note that Teddy Roosevelt was elected with large corporate contributions, unlike, say, George Wallace, who was elected with small individual contributions.

The CHAIRMAN. Mr. Ehlers.

Mr. EHLERS. Thank you, Mr. Chairman. I am sorry that my colleague from California was so restrained in his comments. If I said

what I really thought, I might be more outspoken, Mr. Doolittle. But—and I will be honest. I voted against the law. I voted for all the alternatives that were presented to us because I thought they were better. But I knew that what has happened would happen under the law that we passed. And I think it is the height of idiocy that we prohibit these types of contributions going to political parties, which for centuries have been the political force in this country, and have the responsibility to do this precisely, to express opinions and to get people elected. You say no, you can't do that. But at the same time we have this back door open, the back doors I should add.

There are other ways of doing it, which we knew existed and which, in fact, now have come into play. And I am very sorry that we passed the law. I felt that way when it passed. I voted against it as I said, because I knew it was unworkable. It would not accomplish the goals and I thought it was a reasonable goal to limit soft money. I think everything should be accounted for and traced. And that is fine with me.

But what a cobbled up mess we have ended up with now. The law, per se, I think, might work well in certain areas, but certainly restricting the ability of political parties to do what political parties are supposed to do, I thought was terrible. But we did it. And then we opened back doors, as I said, which would allow people to do other things. I would also mention that one of you in the comments a moment ago, mentioned the Arizona law, which provides public financing. And I find it fascinating that that proposal was a referendum by the people. That was going under big time until Mr. Soros anteed up huge amounts of money, using the existing campaign law and solely because of that, it was passed.

And that seems to be precisely counter to what the advocates, including Mr. Soros, are trying to do when they passed that law. So he certainly doesn't have clean hands on this matter either. I just think it is most unfortunate. I hope that we have the ability and the sense to pass another law clarifying this, whether it is Mr. Doolittle's approach of anyone can contribute anything they want as long as they report it, or an approach I have suggested, that we have some limits on contributions, but no cash, everything reported, names addresses phone numbers, everything and so that we have a detailed record of who contributes to what.

And I would also impose the limits, whether it is contributions to the 527s or the—any other form or to the political parties. We have got a horrible animal out there now and it is an artifice that seems to mislead people into thinking that they have accomplished their goals and they haven't. They have made the situation worse with this law that has been passed. With that, Mr. Chairman, I will yield back.

The CHAIRMAN. Thank you. We will go to a second round of questions. I wanted to answer Mr. Doolittle's question for a second real quickly. And the most disturbing thing is we can pretend that—the question of influence and money, and I understand, under the United States Constitution, you can't tell a person with independent wealth that they can't spend their money. I understand that. But we have told people they can't counter that. So what we are creating is a millionaires club; and you are a self-funder and

you can put in 50 million. You know what, money is money is money in the elections. So somebody can put in 50 million dollars of their own money, but you know, you can't go out and, you know, have union or corporate contributions. In my opinion, it has done nothing except consolidate power in this country into the hands of a few. Right now, it happens to be that there are a couple of Democrats leaning toward supporting 527s. Hopefully we will find a Republican like George Soros who can do so as well. But anyway, I think it consolidates power into the hands of a few. And it really guts the fairness in our election system—and I think what you are seeing happen has happened.

So to answer your question, I think BCRA just took influence and said here it is for a few people at the table. Also, I still think that clarifications will be needed down the road. I still think that it will be needed, because now it is a winding road where we have the money in our campaign accounts (all of us do) to have the necessary assets and tools to ask the questions of the attorneys.

Now, if you are a regular challenger to a member of Congress, you know, you'd better get an attorney, an accountant and a bail bondsman. I think that is what this system has evolved to, so I just want to express my answer, I think to your question: it is consolidated power in the hands of a few. I have got a quick question on legality of 527 activities. In February of this year, the FEC approved an advisory opinion, I think you call it the ABC advisory opinion, that related to Federal political committees that also have 527s that raise to spend soft money. I just want to ask a few questions about that advisory opinion.

First of all, the group that requested that opinion was a political committee, with both Federal and non-Federal, in other words, soft money accounts. That is correct, right?

Ms. WEINTRAUB. Well, that is what it said. It actually has not yet raised or spent any money so we are not exactly sure.

Mr. SMITH. But that was the condition of the——

The CHAIRMAN. That was the condition.

Mr. SMITH. It would not apply in a group that was not in that situation.

The CHAIRMAN. Is the scope of that opinion limited to other political committees that also have both Federal and non-Federal accounts?

Mr. SMITH. It is limited to committees that are Federal—that are already Federal political committees. It is not an opinion that is relevant to the determination of whether you become a Federal committee.

The CHAIRMAN. Whether you become one. In its advisory opinion request, ABC asked whether it could use soft money to pay for voter registration and get-out-the-vote public communications that promote, support, attack or oppose a Federal candidate. I believe the Commission answered that only hard money could be used to fund those communications. Is that correct?

Mr. SMITH. Yes.

The CHAIRMAN. Okay. That is correct. I believe the Commission also concluded that solicitations that promote, support, attack or oppose a Federal candidate may not be used to raise soft money even if the voter drive activities eventually financed by those funds

do not mention a Federal candidate. I think that is correct, isn't it?

Mr. THOMAS. That was—yes on the contribution side that was the analysis.

Ms. WEINTRAUB. I believe that the opinion said that if the solicitation stated that it was going to be used for promoting, supporting, attacking, or opposing that candidate, that there was a sort of a fine legal point, that they had to actually say that in the solicitation.

The CHAIRMAN. In the solicitation. The reason I am asking this is because, ironically, part of Belmont County, Ohio where I live, is the 18th district, and part is the sixth district. And in the sixth district, America Coming Together has a horrific controversy, which I had nothing to do with. These are all Democrats. And they are raising questions about the organization. ACT has now fired one set of the coordinators. They then turned around and fired another coordinator, and specifically, two former employees are claiming that they were required to sign a confidentiality agreement stating they would not reveal any information they learned as part of the job.

But one of the employees said that ACT's attacks were partisan and they were asked to do political activity that they couldn't talk about because they signed that they wouldn't. Based on the conclusions the FEC reached in its ABC advisory opinion, I am concerned that maybe we will find out that ACT Ohio may be funding, almost exclusively with soft money, particular vote drive activities that should be funded, frankly, with hard money. Now, if someone were to file a complaint about this matter, would it be before the FEC or the Justice Department? That is my question. Where would they file the complaint, FEC or Justice Department?

Mr. SMITH. You would normally file the complaint at the FEC. If the FEC determined that it was a knowing and willful violation at the appropriate juncture based on the evidence as it became available to us, we could defer it to the Justice Department for criminal prosecution as well. But the FEC is the primary enforcement agency.

The CHAIRMAN. Are there any normal time frames by which this would be resolved, or is there an expedited procedure, or is there a certain time frame?

Mr. SMITH. We don't have any formal expedited procedure. The commission activates cases as resources allow. You know we talked about that last fall. We continue to make great progress in that area. And you know, if a case seems important enough, it will be activated more quickly. Typically the median case now is activated within 23 days, so it would happen fairly quickly, much, much faster than it was just a few years ago.

Ms. WEINTRAUB. Mr. Chairman, if I might qualify something that we said before. It occurs to me that the rule that you have to use, that a political committee has to use hard money for a communication that promotes, supports, attacks, or opposes a clearly identified Federal candidate is modified by the principle that that is only the case if that Federal candidate is the only person mentioned. So if it promotes, supports, attacks, or opposes a number of candidates, some of whom are Federal and some of whom are non-

Federal, then the expenses could be allocated between Federal and non-Federal accounts.

The CHAIRMAN. Soft money and hard money, you mean?

Ms. WEINTRAUB. Yeah.

The CHAIRMAN. Well, Ohio's case would be—the State doesn't allow soft money, corporate contributions. Or would it be allowed in this case, because they were going to use it for voter registration? Is that what you are saying, depending on the State law?

Mr. THOMAS. Depending on State law, yes. The non-Federal share would be subject to whatever restrictions State law had.

The CHAIRMAN. Okay. Yes. Mr. Larson.

Mr. LARSON. Thank you very much, Mr. Chairman. I feel compelled to say a good word about my colleague, Mr. Shays. And you guys still including McCain as one of yours? But I do feel inclined to say that at the heart of their proposal, would it be that any piece of legislation was handed down to us from Mt. Sinai and might be different than legislation constructed by humans intent in the kind of atmosphere that we exist in in coming to compromise. Or as Mr. Bismarck is quoted as saying, two things shouldn't be observed; sausage being made and a bill becoming law. That is our job, to perfect as we go forward. Mr. Thomas, I appreciated your comments as well.

And I do think that there is a corrosive nature of the influence of money in government. And if we go back to the first attempt to regulate this, it was called the corrupt policy act, again, trying to eliminate the corrosive nature and the impact that that has in the potential for that impact it has on legislation. It is certainly a debate that is rich and one that we should have more often. And I agree with Mr. Doolittle on that. I want to ask just a few quick questions here. One is just a practical one.

In your dealings, and that is what is the practical implication of adopting a new rule mid cycle for these organizations? Care to respond? We will start with the chairman and work right down.

Mr. SMITH. Well, let me—I will let those who supported that notion I guess respond to how it practically would have worked out. I think it would have, at least for some groups, at least caused some chaos because they would have been allocating expenses for example over a lengthy period of time, and some would have to shift some of those allocation rules. But I want to use that concern to address something that I think hasn't really been made clear.

And Congressman Ehlers mentioned a little bit about clarity, and Congressman Mica was talking about could we come back in August and do something. I voiced my opinion that nothing that would be done would be effective this cycle. And I think it might be worthwhile for the point of clarity that everybody seems to want to get at to see if my colleagues agree with me that nothing is going to change in this cycle, just as nothing changed on May 13. The rules that everybody understood were going to be in effect right up to December or January.

Mr. LARSON. That is an excellent point. Is that the agreement of the——

Mr. THOMAS. I think as a practical matter we are now basically stuck, for lack of a better word, with the mish mash of the law as it exists without the Toner-Thomas proposal.

Mr. TONER. And I think that is a very important point because I believed it was critical that the agency make an affirmative decision on what the law will be for 2004 and we have done that. I didn't agree with the decision, but I accept it and respect it. And so now, I think in the 90-day period that has been alluded to, we are going to have to take up what the law is going to be for the 2005–2006 cycle. And I think that is what we are working on now.

Mr. LARSON. And you say that that holds true for both 527s and 501(c)s?

Mr. TONER. Yes, I believe the legal status quo will be in place for this cycle, yes.

Mr. LARSON. Madam Vice Chair.

Ms. WEINTRAUB. I agree with that, and I appreciate the opportunity to clarify that, because I said in response to an earlier question that we could pass a regulation in 90 days when our counsel comes back with a recommendation. But I don't believe from a practical standpoint that we could put it into effect for this election cycle. I mean, if you count the days, we would have to let it sit for 30 or 60 legislative days, after we approved it, and after it was published in the Federal Register. And I think, given the congressional calendar, you just can't get there from here. And for myself, I am not terribly troubled by that because I think that the regulated community needs notice. They need to be able to make plans. They need to know what the rules are in advance of when they are enacted.

That is why BCRA didn't go into effect until the next—the beginning of the next cycle and it wasn't because the people who voted for it were happy with the status quo then. But you do need to provide notice to the regulators.

Mr. LARSON. I am struck by how all of you are struggling with definitions. And if minds of your capability are struggling with these definitions, and I mean no disrespect to the minds assembled up here, then in terms of making—and I understand in 90 days you are going to take another shot at it, but I take it from the Chair's comment, that even in taking a shot like that, given the cycle that we are in and given the practical application of that, that any recommendation would probably be put off for legislative consideration in the next session. Is that the intent of this?

Mr. SMITH. I think that is right. And Congressman, if I may use the opportunity to go on a bit. Nobody, prior to December or January past, was saying that any changes here were required. Everybody understood that 527s were going to run wild in this campaign. That was known. And when this issue first came up, we have moved very, very quickly to handle it. We have had, in 3 months, to get comments. People need time to submit comments as you well know. They had—we had—over 150,000 comments. We had a 2-day hearing with over 30 witnesses, the vast majority of whom argued that these rules were improper and should not be enacted.

I mean, we have moved very rapidly on this as it is, and I want to point out that this has not come up all of a sudden because the Commission was just sitting around for 2 years. It has come up all of a sudden because until January nobody—you know, Shays wasn't saying anything. Senator McCain wasn't saying anything. Congressman Meehan wasn't saying anything. None of these peo-

ple were sitting there saying, "why you are not addressing the 527 issue," and they weren't saying that because Congress did not address it in BCRA, and everybody understood that.

The CHAIRMAN. But they are saying it now, are they not?

Mr. SMITH. They are saying it now. But it is a January 2004 invention.

Mr. TONER. And if I might, I think Chairman Smith makes a very good point about the fact that this agency considered these major issues on an expedited basis. And any suggestion that the agency didn't use due diligence, didn't aggressively look at these issues, so it could make a decision on time, I just don't share. I didn't agree with the decision on May 13, but I really appreciate all the effort that was made within the agency to make a decision in an expedited manner as these issues required.

Mr. LARSON. And I share that. I share your opinion. I want you to know that. I do. I think that you have given it due deliberation, and I am impressed.

Mr. THOMAS. Well, Congressman, I was just going to add that I think there would have been some folks who would perhaps have had some difficulty feeling comfortable with imposition of what I refer to as the "promote, support, attack or oppose" test. That was really the heart of the proposal. But I would just note that the Commission already adopted that approach in the advisory opinion. And four of us at least felt comfortable back then saying, look, the Supreme Court's indicated this is pretty clear.

And we are talking about groups, the major purpose of which is to influence elections. So although there might have been some folks who would have kicked and screamed, I think most of the players out there we are aware of that are in the news all the time, could have fairly quickly adhered to "promote, support, attack or oppose" standards. So I would have been willing to give it a go.

Mr. LARSON. Madam Vice Chair.

Ms. WEINTRAUB. Thank you. I would like to address that point because I introduced the draft that we—with some amendments from Commissioner Toner that we ultimately ended up adopting in that advisory opinion. It wasn't my first choice, but it was the best choice that I thought we could get four votes for. And in response to that, there was an outcry, not just from, you know, whiny people that didn't want to have to comply with it, from people who are dispassionate observers of the process, George Will on the right, Rich Hazen who is a fairly liberal law professor in Los Angeles.

Mr. SMITH. I think I know Rick better than you do. He is very liberal.

Ms. WEINTRAUB. You probably do. I won't contest that. And I don't think he would be insulted by the appellation either. But people on both sides of the political spectrum who were dispassionate observers of the process said that advisory opinion did not give clear guidance. So now that we know that and we have heard this from a wide, wide range of people, I think it would be irresponsible for us to just glom onto that and say okay, we already voted for one thing that we have been told is confusing to people.

Now let's put it into a regulation without giving it further clarification. I am not opposed to codifying it, but I think we have to define it and clarify it.

Mr. LARSON. Thank you.

The CHAIRMAN. Before we go on to Mr. Mica, Mr. Doolittle and Mr. Ehlers, I do want to say one thing about the FEC. I think Commissioner Weintraub and Commissioner Smith have been attacked and I know we have heard statements from the authors of the bill and the Senator and the House Member, and I know people fought for your appointment that might not be happy with you now, but might be more happy with you and your decision, Commissioner Toner. So it is a strange, wild world. You have an R and a D, and an R and a D in opposite directions. So I guess it is kind of good at the end of the day. But on this reform bill—and I just want to go on the record on this. If you looked at it, I think most of you couldn't serve, although, I think Commissioner Smith could serve, although you didn't—you——

Mr. SMITH. Well, had the law been—had this bill been in effect when I was nominated, I would have been eligible for appointment, whereas I think Commissioner Weintraub would not, Commissioner Toner would not have been. I think that is——

The CHAIRMAN. But you didn't agree with the author of the bill on their terms and they have been attacking you. But I guess with the reformation bill, you would be the only one sitting here. So I find this all ironic. I, in no way, think that this whole, now, movement, because of a decision you made or you didn't make or by not making the decision you made a decision on an obviously bipartisan basis, it is nonsense to think that you have to have a reformation bill of the FEC because you had your own free thoughts. I just wanted to state for the record, I think that is all nonsense, and after all, the only one who would be here is the one they are mad at for not making a certain decision. So I just thought I would add that.

Mr. Mica.

Mr. MICA. Well, I don't really have a question. I will just wind it up. I am disappointed because I can be as partisan as anybody. I will show you some of my wild partisan statements and—but I think that we empower certain individuals and here the Federal Election Commission to put in place the rules for conducting the Federal elections. And maybe Congress did not address this properly. But at least two of the commissioners could subjectively determine and maybe they didn't have all of the approaches that needed to be taken, everything defined. But I think there are things that transcend politics, and I think there are things that should be done for the good of the political process and for the country.

And I think that people in your position don't have to listen to the George Wills or the others, or the Members of Congress, but just to do the right thing. I disagreed with the law. I knew there would be loopholes. But I don't think you did the right thing. I think two of you did, and—in this case, but this whole mess, again, the worst part of this is that it further undermines people's faith in this electoral process because it has gotten worse instead of better. The whole purpose everyone thought of making Feingold or Shays-Meehan, whatever you call it, was to regulate soft money and to try to get this process out of control under some control and make some sense out of it.

So I am saddened really that again there is further loss of faith in this most important process, and I just think that people need to do the best thing, regardless of who is saying what when you are given a charge as important as yours. No question, just sort of my final comment.

Mr. EHLERS [presiding]. The gentleman from California, Mr. Doolittle.

Mr. DOOLITTLE. Thank you. Well, Justice Scalia, I think in his dissent in the McConnell case said it pretty well. This is the first act, referring to BCRA, of a long series of acts in a tragedy. I mean it is only going to continue to get worse. Look at this. Mr. Larson's party figured out early on that the 527s couldn't be in this. They were going to organize, get those up and running and they are ahead of us, way ahead of us in this election. So that is a short-term advantage for the Dems.

We have gotten clarification today from all of you, which I appreciate. It is clear that in 90 days, nothing is going to change for this election. I hope everyone listening to this hearing on the Republican side will immediately instruct their lawyers to form 527s and to raise as much money as possible. And by the way, the testimony we heard today was that we are spending more money in this election than in any election before.

So I mean it is not like all this wonderful regulation we have already got has reduced the influence of special interests. It is greater than ever. And we will get our 527s and we will be ready for the election where it is really going to count, which is 2006 where we won't have our own incumbent president running, we will be naked, carrying the load by ourselves and it will really be an interesting test of the process, whether the Republican party can survive or not. I predict they will, but we are going to have to work hard to catch up with the Democrats. We have got to quit using the law as a partisan club against each other. We have got to base this on principle.

And the principle ought to be, in my judgment, that free speech is important in this country and should be encouraged and rewarded, not discouraged by regulation like we have now. This should be unconstitutional. But it isn't. And I think increasingly it won't be. Some day, somebody's going to go after 527s and after they go after 527s and the decision makers go for that, they will go after the 501(c)s and they will keep going in this quixotic pursuit of perfection, trying to weed out this special interest money.

The problem is, as long as we have any semblance of a constitution, you will never achieve that utopia that they desire and you will just drive the so-called unregulated money, or soft money, you will drive it deeper and deeper and deeper into the system. I would just like to observe and then get your reaction for my question on this, increasingly, the effect of campaign regulation is to move speech away from the candidates and the parties, the entities that have the most accountability, shall we say in our system and to push it farther and farther out into less accountable groups. We are not talking about 527s.

Down the road, if those are regulated it will be something else. Is this desirable in your minds? Why isn't it better to have the candidate doing the speaking? It is the candidate that wants your vote.

He has some self-imposed constraints because he can't offend the voter as he seeks your vote. So truth will be a little more important and not saying the horrible things that can't be verified will be a little more important. When some funny 527 over here that nobody's heard of starts doing its thing and making these claims, they are not asking for anybody's vote really. Doesn't this trouble you that we are basically creating incentives and moving the focus of the campaign away from candidates and parties and more into these third party special interest groups?

Ms. WEINTRAUB. I will take a stab at that one. I think that I disagree with some of your premises. I think that if your premises were correct, then you would be right to be very troubled by that and I would share that. But there is—I think if anything this election cycle is proof that candidates have a lot of money available to them to get their message out. It is hard for me to imagine that there is any group out there that could drown out the $200 million that the President has raised in absolutely legal hard money contributions fully disclosed to get his message out. And Senator Kerry has also raised, last—I haven't looked at the numbers lately, but I read it was in the range of $100 million. That is an awful lot of money to get a message out.

Mr. DOOLITTLE. What happens, do you think, next time though, after this election, when we don't have a presidential election? Then how do you think it is going to work?

Ms. WEINTRAUB. Well, I think that there could be a little bit of a shift there. I think you are right. I think the presidential election does normally draw a lot more contributions than perhaps congressional candidates would have available to them. But I do think that when the electioneering communications provisions there is going to be more disclosure of all communication. So if there is an organization out there that is running ads within 60 days of the election, you are going to know who is running it and you are going to know who their backers are because that information is going to have be disclosed. And that is a positive affect of BCRA.

Mr. SMITH. Congressman if I could—obviously I share more of your premises, but at some level, of course, that is not that important, at least to my job. If you are asking me, as an expert witness like I used to come before this and other committees as a law professor, I would say one thing. But now my job is to enforce what you and your colleagues, your colleagues over your objection, enact into law.

Mr. DOOLITTLE. It is a very sad job. I am sorry for you.

Mr. SMITH. I do think though it is a matter of considering the proposal that was before us on 527s. You raise an important issue because to the extent that 501(c)(3)s would have been given more play—and by the way, they would not have been excluded by the proposal—I think they would have had potential problems and a great deal of uncertainty. But to the extent that they would have been driving activity into 501(c)s I don't think we would be accomplishing anything. We would keep continuing to drive it one step further at each stage.

I also want to mention or comment on just one other issue that you raised and that your colleague from Florida had raised just in

his last comments relating to the loss of faith and certain levels of partisanship and I do think it is a problem.

One thing that has caused some loss of faith here from the thousands of comments we got was a lot of people viewed this as a blatantly partisan effort to silence their political opponents. Now that is something I have said is often a problem with campaign finance regulation, but in this particular case—and there may have been some truth to that. I do want to point out that it was a bipartisan majority, a majority of both the Republican and Democratic commissioners that voted against the Toner-Thomas proposal. I also would note that the proposal that was there, that was being urged on us by the RNC, for example, would not only hit Democratic groups.

I mean, it would have impacted Republican groups like the Republican Lawyers Association and the College Republicans and the Federation of Republican Women. It would have affected all kinds of conservative groups as well and limited their ability to participate in politics as well. And sometimes that wasn't being put out there. Some of the folks who were supporting it, I think, were actually trying to drum up partisan passions. I think it is worth noting that in the end, the Commission, I think, did not act on partisan grounds and I think, you know, we—I think we pushed those to the background and I think all of us including those of my colleagues with whom I disagreed on this issue attempt to do what we think is right and correct as a matter of interpreting the law and where we have leeway as a matter of good policy.

Mr. TONER. Congressman, if I might, I agree with Chairman Smith. I think he makes a very important point. It was a bipartisan two of us who offered the proposal and it was a bipartisan four of us who voted against it. I think that is important. This is not a situation in which three Republicans were opposing three Democrats which has occurred over the years occasionally at our agency. I think that is an important point. But in terms of the partisan fallout, if the proposal would have been adopted, I thought that that was one important reason why I wanted to make clear that I would vote for the regulations for this cycle.

But I would also vote for them for the 2006 cycle, not knowing whether the George Soroses of the world are going to be out there, or the Republican equivalent of George Soros, doesn't really concern me. I viewed this approach to the law to be the appropriate approach for 2004 and for 2006, and not based on short-term political gain perceived one way or the other. [But I think the other point you made was a very fundamental one concerning the fragmentation of our politics. There is no question it is occurring.]

And so we have national parties that are financed by hard dollars. And they are doing fairly well raising those types of funds. But now we have parallel organizations that are doing the exact same things the national parties used to do with unlimited soft money funds run by operatives who are very sophisticated, such as Mr. Ickes and others who used to work at the Democratic National Committee and now interestingly are not working there, but are doing a lot of the same things that used to occur there.

And so I think you are absolutely right. You are seeing a fragmentation of politics and the question is when organizations are

doing the exact same things that national committees used to do, what type of money is appropriate for them to underwrite their activities? I think it is a major issue. It obviously is something that we are grappling with at the agency. It may be something that Congress decides that they want to try to address. But I think your point is absolutely right. We are seeing a fragmentation of politics.

Mr. LARSON. Would the gentleman yield?

Mr. DOOLITTLE. Yes, sir.

Mr. LARSON. Just for a quick comment. Only that it seems in listening to you, that only Democratic operatives are—have this expertise and strategy that somehow Republicans are babes in the woods, and that they have not applied any of these strategies, whatsoever. Or is it outrage that Democrats discovered 527s because 501(c)(3)s have been in effect for so long and so successful. I mean, that is what, you know——

Mr. TONER. I think you make a very good point and I think Republicans are hardly babes in the woods, and I think they have been and will get into this arena aggressively, given how we have come out on this. And I think you are going to see a dramatic escalation of Republican-oriented organizations you mentioned and you read into the record an organization that is out there. And that is why I think it is critical to be clear that under current law, and under the Supreme Court precedent, 501(c)(4)s can be political committees. And to argue that they should be exempt as a matter of law from being a political committee, I don't think adds up under Supreme Court precedent.

Admittedly that might be an extreme case. But you make a very good point. Republicans, I believe, will aggressively be in this arena. Who could blame them if there is going to be wide running room here, I think it is only to be expected.

Mr. LARSON. This isn't a place to make wagers, but if I were a wagering man, which I am not, I think if we totalled up what the 501(c)s have been able to raise, but of course we wouldn't know that because of disclosure, I think you would find the Democrats dramatically dwarfed, but that is a discussion for another day.

The CHAIRMAN. Well just to comment before we move to Mr. Ehlers. You know, I think after no decision, which is in a sense a decision, fortunately the babes are going to mature into adults very quickly. Mr. Ehlers.

Mr. EHLERS. Thank you, Mr. Chairman. I was going to make a remark something to the same effect. And the issue, Mr. Larson, I just want to get this in quickly before I make my comments. The issue is not that so much as the perceived duplicity of the party that fought very hard to get this passed and the majority of whose members voted for it, immediately began forming the 527s, whereas the party that I think was more responsible on this thought it was improper and waited for a ruling. So I guess I resent the aspersion that somehow your hands are perfectly clean. Let me just comment——

Mr. LARSON. If I made that, I didn't mean to.

Mr. EHLERS. I am not yielding time. We have spent enough time on that. I do have to respond to a couple of things first and then a question. Several times, including your comments, Madam Vice Chair, about the money raised by the presidential candidates im-

plied somehow that money is evil. And I am a charter member of Common Cause, and it has always bothered me that they seem to regard campaign money as illegal. And I hear it from the public, too. All that money. All that money. And I simply remind them that if you add together all the campaign money spent by every candidate in the United States, from dog catcher through President in an election campaign, it is less money than is spent advertising aspirin, Tylenol and other pain killers.

Mr. EHLERS. You have to keep this into perspective. General Motors, when they try to sell a car, they spend an average of $300 for every car that they sell on advertising. Multiply that by the 15 some million cars sold per year, you realize what kind of money is spent on advertising.

The point is political advertising is a very small part of the mix, and it is not a corrupting part. And that is, again, where I disagree with Common Cause.

I have been a charter member and sometimes I am ashamed of the membership because of the information they send out. But I have stuck with it, and I am just curious why we haven't heard more of them, at least I haven't, about the use of 527s, which I think totally negates what they were trying to achieve and what the sponsors of the bills were trying to achieve through the passage of the law, which is to get rid of soft money.

It is the lack of accountability that is the issue. It is not the amount of money that is out there, and that is what is disappointing about your opinion, simply because there is a—there was a possibility there of saying, look, the bill intended to impose accountability, and we now have some organizations that are not accountable, you don't know where the money is coming from and how much was given. And I understand the legal arguments, and as Mr. Toner said, I accept your decision, but unlike him, I cannot respect it because I think it was contrary to the intent of the law.

I hope that we can write another law, and I just want to comment, too, about the sponsors of the bill. Their names have been pulled into this fairly regularly, and I think they are very disappointed with what happened to the law. At the same time, I know from conversations with them during the course of it that they were very disappointed at how the law emerged, and they just had to give to this group and to this group and to that group in order to get the law passed and they thought it would be better to have something passed than nothing.

I just frankly think it is a disappointment for all of us, including myself, who really wanted to get rid of soft money. That was the real objective, and we should have centered in on that and not done some of the other foolish things.

I would just like to ask you—and this does not—you can just take off your FEC hats, if you will, and just express your opinion as citizens. What is the best means by which we can bring full accountability and get rid of soft money? Just bring—full accountability of the money, both for the benefit of the candidates or parties and for the citizens of this country. What approach would you take? You know a lot about campaign law, so take your FEC hats off and say what—if you wanted us to write a law, what do you think it should emphasize?

Mr. THOMAS. Well, I will start if you would like, Congressman. I think that this approach that Commissioner Toner and I were working toward was an effort to try to really put a clearer standard out there so that people would know what should be deemed political activity and what should not, and the idea would be that only the political activity should fall subject to these limits and prohibitions and campaign finance disclosure requirements.

I think that would be very helpful, because we do need to make these kinds of distinctions, it seems. We do have to acknowledge that there are some organizations that are going to be very interested in an upcoming piece of legislation and they are going to put out ads that say, "This is a very terrible bill that is going to be very harmful to us as Americans. Call your elected Representative and tell him to vote no." We have got to allow that kind of communication, but we have got to find a way, maybe, the "promote, support, attack or oppose" standard, to make that delineation. But once you come up with a clear standard like that I think that you can apply it pretty much across the board, and people will know. And you can apply the limits, the prohibitions and the disclosure requirements based on that one clear standard.

We have a mess right now, I will concede. We have got language in the statute that talks about whether something is "in connection" with an election. We have got language that turns on whether it is "for the purpose of influencing" an election. We have got the "electioneering communications" standard now that talks about whether it makes reference to a Federal candidate within flat time frames before the elections. I think it would be very helpful, ultimately, if Congress wanted to back up and take another run to try to develop one clear objective standard and apply it across the board.

Mr. EHLERS. That is a very important comment, I really resent a law that puts incredible restrictions on my ability to endorse colleagues or individuals in my State or to work on their behalf, which is what this law does, and yet someone else can give $20 million to influence that election.

I can in fact go to jail under this law for misbehavior, and George Soros certainly has not gone to jail. Anyone else want to respond? Ms. Weintraub.

Ms. WEINTRAUB. I would like to respond to what you had initially said, because if I conveyed the impression to you that I think that a lot of money being spent on political advertising is evil, that was not my intent. My point was just to convey that the amount of money that is being raised by these 527s has to be seen in the context of how much other money there is in the system.

I think that a lot of people have gotten more involved in politics this year. There has been an awful lot of new donors created, and that is a good thing. It is good to have people involved in politics. I hope we are going to see a lot more voters this year, too, but it is certainly not my position that a lot of people making legal hard money contributions is in any way a bad thing.

I take issue with what my colleague said. If I thought that his proposal provided clarity I might have voted for it. Unfortunately, I didn't think that it did. I thought it would muck it up even more and confuse people even more, but people can disagree on that. I

think that the more disclosure that we have, the better, and we have to make sure that we don't do—take actions that would have the effect that Congressman Doolittle alluded to of driving the money underground to where it is not disclosed at all. I think that would be the worst possible result.

Mr. EHLERS. Any other comments?

Mr. SMITH. I would say only, Congressman, that I have written a book on it, literally.

Mr. EHLERS. Maybe we should send copies to the sponsors.

Mr. SMITH. I think people have, and I don't think they got much attention. My general sense in the end is that to some extent this is just a dog chasing its tail. You say what can we do to get rid of soft money. People always ask me what is soft money, and I say, well, soft money is just unregulated money. Any money that is not regulated is soft money, because that is the only way you can really define it. That is why it has been—you know, when people say the purpose of BCRA was to get rid of soft money, well, soft money to whom? Just to political parties? To State political parties? That was spent by 527s? That is spent by individuals?

Nobody has even talked about the fact that if we ban 527s George Soros could just go hire all these guys, put them on his personal payroll and keep doing the same thing. And at some level again, you know, people have to participate in politics, and it could be that there is some limit. I mean, I have argued that we shouldn't have limits on contributions, but I am not unduly concerned about certain limits on contributions if they are set at high enough levels.

I am concerned now we have ridiculous parts of the law, like if a wife gives money to the husband, that is considered corrupting and we can't have that, and, you know, there are a lot of elements like that. We have disclosure requirements so low that if the college Republicans have a couple of car washes and raise $300 and run some radio ads in your district supporting you, they have got to start filing reports with the Federal Election Commission. I think that kind of thing suffocates grassroots politics. So I don't think anybody is going to be corrupted by a $2,500 corruption. Maybe you are. I don't think you are.

I like to note to students that their parents will spend $80,000 to send them to college, but if 3 years after graduating from college they decide to run for Congress and their parents offer to give them $5,000 they can go to jail. I think we could address some of those things that would sort of loosen the rules for true grassroots politics, while maybe still keeping caps on the really big donors. It would be something, perhaps, not dissimilar along the lines suggested by the Ney-Wynn bill but also maybe loosening some of the disclosure requirements.

Sometimes people say we need to know every penny, instantly on the Internet. Well, we don't. We don't need to know every penny spent. We don't need to know it instantly. We don't need to know if some kid gives some money. You know, one thing—one of the few parts of McCain-Feingold that was struck down was the ban on minors giving. Kids now can give money, and I think that is a much more important first amendment right than adults giving money, and what I liked about it was that bill taken literally, which I pre-

sume it was intended to be taken literally, had the court upheld that ban would have meant that if, for example, the county Democratic Party set up a booth at the county fair selling cotton candy it would have made it illegal for a child to go buy cotton candy from them. It had to be an adults-only zone, you know.

So I think we need to go back and look at these laws and quit taking this approach that everything is a loophole and start looking at it as, you know, let's be realistic here and talk about what is really creating a potential problem.

Mr. EHLERS. I very much appreciate that comment, because I think that is the real issue here, and that is why I was so disappointed in this bill. We strained so mightily at it for several many years and came out with something that is a long ways from what you have just described.

And I want to add something I have observed in the last 5 years. We are developing a new generation of young people who have a much deeper interest in politics than the previous generation, whether it is the generation X or something, and I hope we can encourage that because that is really the future of our country. These are good kids, well-meaning kids, really working hard, and for the first time in my life it looks like I am going to have as many volunteers as I need on my campaign, largely of young people, and I think that is absolutely wonderful.

I shouldn't say this publicly, I am not sure I even need that many volunteers, but I am very happy to put them to work and make them part of the process, and that is what America is really all about. And I wish we could develop—and maybe this committee has to develop it jointly, jointly develop a bill that would help encourage that and regulate the things that we really believe have to be regulated.

And I just want to thank you very much for being here. I hope we didn't beat up on you too much because we shouldn't do it. You are trying hard to do a difficult job, and I am sorry we handed you a law that is so hard to administer. Thank you.

I yield back, Mr. Chairman.

The CHAIRMAN. Other questions or comments?

Mr. LARSON. Thank you, Mr. Chairman, and again thank you for your insight and leadership in this area and my other colleagues as well. I have enjoyed immensely the discussion this afternoon, especially thanks to the panelists. There is much work to be done always in a democracy that needs constant pruning and attention.

Mr. Chairman, I would ask that the—because two of my colleagues had conflicts with legislative business of their own, if the record could be kept open to enable them to send questions to the Commissioners so that you might be able to respond to their questions and other questions that any member may not have had a chance to get to. I know that is always your practice and procedure, and I just again wanted to thank you and the Commissioners for your thoughtful deliberation.

The CHAIRMAN. With that, I would ask unanimous consent that members and witnesses have 7 legislative days to submit material into the record and for those statements and materials to be entered in the appropriate place in the record. Without objection, the material will be entered.

I want to thank Congressman Larson, his staff, our staff, members that participated in this and, most importantly, the Commissioners. And also I would like to ask unanimous consent that staff be authorized to make technical and conforming changes on all matters considered by the committee in today's hearing. Without objection, so ordered.

Having completed our business, the committee is adjourned. Thank you.

[Whereupon, at 6:40 p.m., the committee was adjourned.]

ADDITIONAL STATEMENTS FOR THE RECORD

TESTIMONY OF CONGRESSMAN CHRISTOPHER SHAYS

The Federal Election Campaign Act of 1974 (FECA) requires 527 groups whose major purpose is to influence federal elections, and who spend more than $1,000 for this purpose, to register as federal political committees and comply with federal campaign finance laws.

The Federal Election Commission (FEC), however, has for 30 years improperly interpreted FECA to allow 527 organizations to spend millions of dollars to influence federal elections without complying with federal campaign finance laws.

Since the Bipartisan Campaign Reform Act (BCRA) was passed and signed into law in 2002, certain 527 groups have actively exploited the loophole created by the FEC's interpretation of FECA, spending millions of dollars to influence federal races.

This upsurge of outside groups expressly created to support or oppose candidates for federal office has magnified the long-standing lack of regulation that has allowed 527 groups to operate beyond the realm of federal campaign finance law, and has underscored the need to substantially reform the FEC.

On May 13, the FEC met to consider new regulations for 527 groups. They had an opportunity to bring 527 groups under federal election law by adopting a proposal put forward by Commissioners Michael Toner and Scott Thomas to correct long-standing misinterpretations of the 1974 FECA, but instead they voted to do nothing.

The Commission had a clear obligation to act on this issue and it failed.

Their inaction tacitly endorsed continued abuses of federal election law and opened the flood gates for the raising and spending of millions of soft money dollars to influence this year's federal elections.

Commissioner Toner got it right when he said, "Delaying a decision is making a decision—namely, that we are not going to issue any regulations for the 2004 elections. We are going to see a new 'soft money' arms race for the 2004 election."

During our seven-year battle to pass BCRA, most Democrats supported our law and many Republicans resisted reform—but, until last week, the Democrats were operating outside the law and the Republicans were trying to abide by it. Justified by last week's decision, Republican groups will now use the same tactics in seeking to defeat Democratic candidates for federal office.

We will see huge amounts of soft money flow back into the political process, despite the intent of Congress in passing the Bipartisan Campaign Reform Act (BCRA), President Bush's intent in signing it, and the Supreme Court's intent in upholding the law.

To ensure free and fair elections, it is essential that federal election law is fully implemented and fairly enforced. It is imperative that the FECA execute the will of Congress with respect to all campaign law, but they have consistently failed to do so.

The bottom line is, groups on both sides of the aisle primarily seeking to influence federal elections should be regulated by federal election law.

We need to overhaul the inefficient, ineffective FEC and replace it with a reliable enforcement body, and we have introduced legislation to do so.

The Federal Election Administration Act would replace the existing six-member Commission with a three-member Federal Election Administration. By improving the way the campaign law enforcement body operates, this legislation will ensure federal election law is fairly implemented and fully enforced.

The FEC is charged with enforcing election law, but has failed to do so. It is time to rethink their fitness for the job.

ANSWERS OF CHAIRMAN BRADLEY A. SMITH, VICE CHAIR ELLEN L. WEINTRAUB, COMMISSIONER SCOTT E. THOMAS, AND COMMISSIONER MICHAEL E. TONER TO WRITTEN QUESTIONS SUBMITTED JUNE 1, 2004

We are in receipt of your letter dated June 1, 2004, and appreciate the opportunity to clarify further some of the issues that we discussed during our oversight hearing before the House Committee on Administration. We will address each of your questions in turn.

527 Fundraising by Federal Officeholders and Candidates

You have asked whether the FEC's regulations should be amended to reflect statutory language that you believe indicates that federal officeholders and candidates may solicit up to $20,000 from individuals on behalf of 527s.

You correctly note that 2 U.S.C. § 441i(e)(4)(B) provides that officeholders and candidates may make explicit solicitations for donations aggregating up to $20,000 per donor per year for funds to carry out voter registration, voter identification, get-out-the-vote, and generic campaign activity or for an entity whose principal purpose is such activity. As you further note, FEC regulations at 11 C.F.R. § 300.52 contemplate such solicitations only where the funds are for entities organized under 501(c) of the tax code. Although not explicitly excluded by the regulation, entities organized under § 527 of the Internal Revenue Code are not included. Your concern is that the Commission's regulations may misinterpret that statute.

Your question arises out of a discrepancy in the statutory language between paragraphs (A) and (B) of § 441i(e)(4). Paragraph (A), permitting certain general solicitations, is specifically limited to 501(c) organizations, while paragraph (B), permitting certain specific solicitations, is not. It can be argued, therefore, that the Commission's regulation, in restricting the specific solicitation provision to 501(c) organizations, is inconsistent with the plain language of the statute.

Alternatively, the regulation can be seen as giving effect to Congressional intent that the 501(c) restriction be read to encompass both paragraphs. This intent is evidenced by floor statements during the BCRA debates by Senator McCain, who said:

"Proposed new section 323(e)(4)(B) of the Federal Election Campaign Act authorizes the only permissible solicitations by Federal candidates or officeholders for donations to a 501(c) organization whose principal purpose is to engage in get-out-the-vote and voter registration activities described in new section 301(20)(A)(i)&(ii) of the Federal Election Campaign Act. The new section also authorizes the only permissible solicitations for a 501(c) organization that can be made by Federal candidates or officeholders explicitly for funds to carry out such activities.

"In these instances, a Federal candidate or officeholder may solicit only individuals for donations and may not request donations in an amount larger than $20,000 per year. Section 323(e)(4)(B) applies only to 501(c) organizations. The section does not authorize any such solicitations for other entities, and it does not authorize solicitations for funds to be spent on so-called 'issue ads.' [1]"

The apparent tension between the regulation and the statute is addressed in the Commission's Explanation & Justification for the regulation, which states that the Commission intended for the regulation to be read to limit the described solicitations to 501(c) organizations, citing the views of BCRA's sponsors and one other commenter.[2] Regardless of one's view as to whether the regulation represents the best possible interpretation of the statute, officeholders are put on notice that the Commission did construe both paragraphs (A) and (B) of § 441i(e)(4) as limited to solicitations for 501(c) organizations.

You also expressed concern that only 527s appear to fit the description of an entity whose principal purpose is to conduct voter-drive activities. However, a 501(c) would qualify as long as its voter-drive activity were non-partisan.

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[1] 147 Cong. Rec. S2140 (daily ed. Mar. 20, 2002) (Statement of Sen. McCain) (emphasis added). See also id. ("Finally, the purpose of section 323(e)(4) is to permit only individual candidates or officeholders to assist, in limited ways, section 501(c) organizations. This permission does not extend to an officeholder or candidate acting on behalf of an entity—including a political party.")

[2] "BCRA's sponsors and the same public interest commenter also pointed out the proposed 11 CFR 300.52(b)(2) . . . did not make clear that the specific solicitations permitted for Federal election activity or organizations principally engaged in such activities applies only to 501(c) organizations and not to other tax exempt organization, such as 527 organizations. The Commission agrees. Accordingly, the introductory language in the final rule specifically states that the requirements for solicitations in the rule apply to 501(c) organizations." *Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money,* 67 Fed. Register 49081, 49109 (Jul. 29, 2002).

Coordination

We have not seen a copy of the memorandum written by Larry Gold which you reference as a predicate for your second question. We cannot and do not draw any inferences as to the legality of any activities of the "Grassroots Democrats."

As a general matter, our coordination regulations are set forth at 11 C.F.R. § 109.20(a) et seq. These regulations set forth both conduct and content standards that must be met for a communication to be considered a "coordinated" communication. Assuming all other criteria for finding illegal coordination are met, coordination is generally defined, in pertinent part, as activity that is made "in cooperation, consultation, concert with, or at the request or suggestions of a candidate, candidate's authorized committee, or their agents, a political party committee, or its agents." More specifically, 11 C.F.R. § 109.21(e)(1)(ii) states that a communication may be deemed to be coordinated it it "is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, political party committee, or agent of any of the foregoing, *assents to the suggestions.*" (Emphasis added.)

The Commission's investigation into coordinated activity have been legally complex and highly fact intensive. Whether or not a candidate, authorized committee, or political party, or agent of the foregoing, had "assented" to a suggestion would have to be determined based on specific facts.