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FEDERAL ELECTION COMMISSION

PUBLIC HEARING

ON

ELECTIONEERING COMMUNICATIONS

Pages 1 through 270

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FEDERAL ELECTION COMMISSION

PUBLIC HEARING

ON

ELECTIONEERING COMMUNICATIONS

- - -

Wednesday, August 28, 2002

9:36 a.m.

COMMISSIONERS PRESENT:

DAVID M. MASON, Chairman
KARL J. SANDSTROM, Vice Chairman
BRADLEY A. SMITH, Commissioner
MICHAEL E. TONER, Commissioner
SCOTT E. THOMAS, Commissioner
DANNY LEE McDONALD, Commissioner

ALSO PRESENT:

LAWRENCE H. NORTON, General Counsel
ROSEMARY SMITH, Associate General Counsel
JAMES A. PEHRKON, Staff Director
MARY DOVE, Commission Secretary

9th Floor Conference Room
999 E Street, N.W.
Washington, D.C.

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P R O C E E-D I N G S

CHAIRMAN MASON: The special meeting of the Federal Election Commission for Wednesday, August 28, 2002, will please come to order.

We are missing one Commissioner and one witness, and we note in the Commissioner's case due to travel-related delays, and we hope the same is true for Mr. Shor. But we're going to go ahead and get started because we have a fairly busy two-day agenda and Mr. McDonald and Mr. Shor can join us as soon as they get here.

I'd like to welcome everyone to the Commission's hearing on the notice for proposed rulemaking on electioneering communications. The proposed rules that we're discussing today were included in a Notice of Proposed Rulemaking published on August 2, 2002.

These rules address certain changes to the Federal Election Campaign Act under Title II of the Bipartisan Campaign Reform Act of 2002 which defines a new term "electioneering communications," and adds restrictions and prohibitions on the

sources of funds that may be used to finance such communications, and imposes certain reporting requirements with respect to such communications.

The NPRM addresses major areas: first, the definition of and exemptions to the definition of electioneering communications; second, the role of the Federal Communications Commission in assisting this Commission, the Federal Election Commission, in carrying out its statutory obligations with respect to electioneering communications; third, who may and who may not fund electioneering communications; and, finally, reporting requirements with respect to electioneering communications.

We appreciate the willingness of the commenters to assist us in this effort by giving us their views on these proposals. We want to thank particularly the witnesses for taking time today, and will do so tomorrow, to give us the benefit of their experience and expertise in this area.

For the format for today's hearing, each witness will have time to make a five-minute

opening statement. We do have a light system at the witness table. That will give you a flashing green light at the end of three minutes and a yellow light at the end of four minutes and a red light at five minutes, and we would ask you at that point to please conclude your opening statements.

For the first panel and other panels with three persons, Commissioners will have ten minutes initially to--Commissioners and General Counsel and Staff Director, to ask questions. With two-person panels, we'll have an initial five-minute round and we'll go to a second round of questions, time allowing.

Our first panel--well, before introducing the first panel, I'd like to recognize any of my colleagues who wish to be recognized to make opening statements of their own.

There are none. We're talked out from our previous hearing.

Our first panel this morning consists of Michael Malbin, representing the Campaign Finance Institute; Donald McGahn, representing the National

Republican Campaign Committee; and Glen Shor, representing the Campaign and Media Legal Center.

We follow the alphabet. We have the unusual circumstance of persons whose names begin with "M" going first. So I'm delighted, unless you've worked out something else, Mr. Malbin.

MR. MALBIN: Thank you, Mr. Chairman. I'm pleased to be here today.

The Campaign Finance Institute is a non-partisan, non-profit institute affiliated with George Washington University. It takes no position on pending legislation and it took none on BCRA.

However, about two years ago, the Institute appointed a distinguished task force on disclosure that wrestled with many of the same questions you're considering today. My comments, a longer version of which you have, draw from two aspects of the task force's work. The first part is about definitions and exemptions, and the second is about the proposed FCC database.

First, on definitions and exemptions, after some months of thought and going back and

forth, the approach of the task force ended up being similar to Snowe-Jeffords, but the longest discussions were about over-breadth and we focused on two types of concerns.

The first was about speech that nobody wanted to regulate. Our paradigm that we kept going back and forth on in the task force was the late-night comedy monologue. Other people have mentioned documentaries, public service announcements, although there is apparently some disagreement about that. But all of these issues are still problems in BCRA.

Our solution was not to create an endless list of exemptions. Rather, we defined electioneering in terms of paid advertising. You ask in your notice whether you should take a similar approach and this task force would have said yes.

If you limit the coverage to paid advertising, then public service announcements, documentaries, and entertainment all automatically would be excluded. In this regard, I would note

that the hypotheticals that were marshaled in the various written comments that were critical of this or that draft exemption almost all were examples of paid ads.

You also asked, in the alternative, whether there should be an exemption for entertainment, drama, or other non-news programming, and the task force also recommended those kinds of exemptions.

Jay Leno and Comedy Central are paid out of corporate funds. If BCRA were interpreted to regulate their monologues, I don't see how it could possibly survive a First Amendment challenge. The First Amendment requires that means be drawn to fit legitimate ends. It's just hard to see what legitimate purpose this would fit.

Now, on the negative side of having an entertainment exemption, it's not clear whether that kind of exemption would create as bright a line or reach everything that you want to reach as well as a paid advertising rule, an affirmative paid advertising rule. Of all the proposed

exemptions, one or the other of these I consider to be the most important.

The task force's second concern was to find more protection for lobbying or issues speech. We considered and rejected several of your alternatives, such as the exemption for an ad that refers to the popular name of a bill or law. Unfortunately, there is no such thing as a popular name or legal popular name. By definition, it's popular, and the popular name may vary from place to place as people tack on the local districts who happen to be cosponsors of bills.

Under the exemption as worded, one could easily imagine district-specific advertising that praises or attacks a Member's bills in the Member's home district, as, for example, Shays-Meehan-Morella, or any other cosponsor.

To get at this, the task force added one additional criterion, which was targeting, and under that approach if an ad were to use a sponsor's name in a uniform manner in advertising across the country, then it would not have counted

in its definition as electioneering because it would not be targeted.

Unfortunately, although BCRA picked up the word "targeting," it doesn't have a real targeting test. The law says that a message is considered targeted if it is a completely untargeted national ad.

We thought you should exempt uniform ad buys that name a bill's sponsors, not a popular name, but specifically sponsors, without bearing the names across districts. I would still argue that that would be good policy, but I'm not sure you have the legal option.

On the next question--does there need to be some additional protection for lobbying along the lines of 303(d)--we didn't think so, and therefore didn't discuss anything like the alternatives you have.

Two final items under the exemptions.

First, you thought about an exemption for initiatives and referendums. I think that's a bad idea. There are lots of cases in California where

you have candidates essentially supporting their own campaigns through initiatives and referendums campaigns.

May I go on for a few--never mind. I won't.

CHAIRMAN MASON: Go ahead and finish your statement.

MR. MALBIN: Thank you.

CHAIRMAN MASON: I'm not going to chop your words off.

MR. MALBIN: Well, there are two other items that are left.

CHAIRMAN MASON: Summarize.

MR. MALBIN: Thank you.

Now, should there be a blanket exemption for non-profits? We think that it's very important to consider the potential damage to charitable institutions, but the single most important way to protect them is through limiting coverage to paid advertising; that is to say if an organization does paid ads that target somebody in a district, then that organization ought to be covered.

On FCC disclosure, we note that what you did was to create a database, which we think is fine, that is meant to protect potential spenders.

We think you ought to take advantage of the opportunity here to require all information that is gathered under BCRA to be sent from local stations to the FCC and posted on the database, because the fundamental purpose of disclosure is to inform voters and having all these little slips of paper in individual stations simply fails to do the job.

Thank you.

CHAIRMAN MASON: Thank you.

Mr. McGahn.

MR. McGAHN: Good morning. I'd first like to thank the Commission for having us here today and giving us the opportunity to testify, and I'd also like to thank the Commission for what has been a daunting task, both with the first rules that were promulgated, as well as these rules. I have found it to be a very fair and open process, albeit expedited.

I would also like to thank the Commission for doing their job in the face of what seems to be a relentless media barrage of articles, at least one day, claiming loopholes being treated and all sorts or things, when, in fact, your first regulations, in essence, tracked the language of the statute where you could.

In this situation, perhaps this will be a little bit of an easier task because having reviewed the comments, it seems that many commenters agree on many of the main issues.

One interesting difference, though, is between the so-called government groups and the sponsors of the legislation. I do read some differences in their views, which may be where the decisions are going to be for the Commission, but for the most part I see most of the issues that I've addressed are not out of the mainstream and certainly within the realm of what others have suggested.

To digress a minute and talk about the constitutionality of the whole provision, again

that is an issue that has to be foremost in the Commission's mind, although you are not a court and ultimately the courts will decide this.

There is a fall-back position in the statute in case part of the other statute is found to be unconstitutional. So, obviously, to the extent that the sponsors want to say they are confident of the constitutionality, why is there a fall-back if they are so confident?

Obviously, everybody knows there are some problems here and the courts are going to carve this up to a certain extent. The real question before the Commission is do you, in essence, give effect to the actual language of the statute and let the folks who passed this live with the results in court or do you try to help it along and carve out exceptions and do all sorts of contortions to try to have this be saved in court?

To the extent you want a rule that you may be able to enforce, you may want to carve out some exceptions. On the other hand, if they intended exceptions, you would think they would have put

them in the statute.

My final point is more of an anecdotal point to illustrate the potential absurdity of the application of some of this. We are within 30 days of primaries in certain States with certain Members whose names would be in the popular title of the legislation which you are now promulgating regulations under.

On September 10, New Hampshire is going to hold a primary. On September 17, Massachusetts holds a primary. So I will not mention the Congressman's name whose name is in bills, the popular title, because I would fear running afoul of the spirit of what we're doing here.

At the risk of sounding trite, it is a very real concern. Mr. Meehan's primary is in Massachusetts soon. We are within 30 days of that primary, and here we are on TV mentioning his name. You can imagine if we were doing advertisements regarding regulations to try to sway you with grass-roots advocacy. They may run afoul of this law.

I illustrated this point in my comments using the Presidential primary system, the idea of Massachusetts media markets spilling over into New Hampshire. But the truth is this affects everyone up and down the ticket. This just isn't about Presidential elections; this is about Congressional campaigns and Senatorial campaigns and State elections and local elections and all sorts of elections. And that is in large part why I'm here.

This affects every campaign in America and I hope that I can assist the Commission in answering questions on specific proposals.

Thank you.

CHAIRMAN MASON: Thank you.

Mr. Shor.

MR. SHOR: Thank you. Can everybody hear me?

I wanted to first of all thank the Commission for--

CHAIRMAN MASON: If you'll pull the microphone that is on your left a little more?

MR. SHOR: Is that better?

CHAIRMAN MASON: Yes.

MR. SHOR: First of all, I do want to thank the Commissioners and all the members of the staff for inviting me to testify today to present the views of the Campaign and Media Legal Center on the electioneering communications draft rules.

Let me also take this opportunity to thank the Commissioners and their staffs for their considerable work on this particular rulemaking and on the other rulemakings.

The draft electioneering communications rules clearly reveal careful and detailed thought and analysis by the Commissioners and by the Commission, and we agree with many components of those draft rules.

As our comments indicate, we strongly support BCRA's provisions relating to electioneering communications. We believe they are a carefully drafted and targeted response to a coincidence of campaign finance practices and legal developments that have resulted in the effective deletion of laws long on the books and laws upheld

by the Supreme Court restraining certain corporate and labor expenditures.

We are confident that these provisions will pass constitutional muster. However, in making our organization's position known today, I'm not endeavoring to convince the Commissioners to feel likewise. Rather, I only ask the Commission today to understand the policy choices made by Congress and the circumstances which occasion those choices, and even if you don't agree with those choices, to implement these provisions faithfully to that legislative intent. Surely, the constitutional issues will get a full airing in the courts. There, as you know, are not shortage of litigants to raise every conceivable claim related to these issues.

There is authority in BCRA--and Mike Malbin has addressed that--for the Commission to promulgate exceptions to the definition of what constitutes an electioneering communication. It's fair to assume that in providing that authority, the Congress expected that it would be used.

However, there are considerable statutory constraints on the exercise of that authority, most significantly that it cannot be used to exempt communications that promote, support, attack, or oppose named federal candidates.

Congressman Shays in his comments on the House floor--and this was fully subscribed to by Senator Feingold--emphasized that that was a very, very high bar for the exercise of this exception authority. And I urge the Commission to be cognizant of that bar and act with the utmost of care and judiciousness in exercising that exception authority.

I note that this is not the only occasion upon which the Commission can exercise that authority, and indeed there isn't a rush, given that the electioneering communications provisions will not take effect until sometime in 2004.

Along these lines, carving out exceptions based on speculation and theories about what communications might occur and what communications that might occur might constitute electioneering

communications, absent, you know, the presence of a full factual record and a full understanding concerning the nature and extent and likelihood of any problem, strikes me as unnecessary.

And let me also emphasize that it could indeed be quite dangerous. This weekend, I picked up the Washington Post on Sunday and I immediately saw an article about how the political parties and big-time party players are hard at work trying to figure out how to essentially recreate the soft money system and essentially get around BCRA's Title I soft money ban.

I suspect that there will be a similar instinct on the part of entities that currently finance electioneering communications with respect to these particular provisions. So when I think about the Commission's potential exercise of the exception authority, I keep on thinking of this phrase from this movie "Field of Dreams": "If you build it, they will come." And I think that the Commission, in exercising the exception authority, must be very, very cognizant of this, and again act

with extreme judiciousness and care.

Thank you.

CHAIRMAN MASON: Thank you.

I've distributed a question rotation which I think my colleagues are aware of and we'll follow that with the various panels, and so we will start with Vice Chairman Sandstrom.

VICE CHAIRMAN SANDSTROM: Thank you, Mr. Chairman. I want to thank all the witnesses for appearing here this morning.

I particularly thought it was appropriate that Mr. Malbin lead off because from my perspective he has raised the threshold issue; that is, what communications are we going to cover and whether there should be an exemption for non-paid advertising or for non-paid programming.

Mr. Shor, I understand, would oppose such an exception. Is that correct?

MR. SHOR: We would oppose a blanket exemption for unpaid advertising, yes.

VICE CHAIRMAN SANDSTROM: How about with respect to entertainment programming?

MR. SHOR: I think that entertainment programming, such as Jay Leno, would be covered by the media exception, which is already provided for in BCRA.

VICE CHAIRMAN SANDSTROM: Then is Jay Leno a news story?

MR. SHOR: A commentary.

VICE CHAIRMAN SANDSTROM: A commentary?

MR. SHOR: I think it's appropriately characterized as commentary.

VICE CHAIRMAN SANDSTROM: So any appearance during entertainment programming would be commentary, too?

MR. SHOR: Any entertainment programming that fell within the proper scope of the media exception, which requires, I believe, if I understand it correctly, the presence of a press entity exercising a legitimate press function.

VICE CHAIRMAN SANDSTROM: I'm somewhat confused by that because I'm not sure what that covers. So does a show like "The Agency," in which a picture of the President may appear on the walls

of the CIA, fall within the exemption?

MR. SHOR: I believe it does.

VICE CHAIRMAN SANDSTROM: Because that is-

MR. SHOR: I believe that--again, I may not possess sufficient expertise about the media exemption, but it was my understanding that that would fall into the media exemption.

VICE CHAIRMAN SANDSTROM: So that the media exemption now covers essentially all entertainment programming? We should interpret the media exemption to cover all entertainment programming, but not public service announcements?

MR. SHOR: I think the concern that we have expressed about a per se exception for public service announcements is based on trends that we have seen regarding public service announcements. And the issue there is that observers maybe a little less jaded than I have concluded that in many cases public service announcements featuring candidates are used by candidates to promote themselves.

And it is quite conceivable that if there were a blanket exemption for public service advertisements, you would have corporations and unions paying potentially fairly extensive production costs of public service advertisements that case candidates in an extraordinarily favorable light.

And, again, it takes me back to the nature of the Commission's authority to promulgate exceptions. It may not promulgate exceptions for communications that promote, support, attack, or oppose federal candidates. And because of the considerable threat of public service advertisements doing so insofar as they mention federal candidates, a blanket exemption of that nature would not be appropriate.

VICE CHAIRMAN SANDSTROM: Mr. Shor, are you familiar with our regulations on the media exemption?

MR. SHOR: I'm familiar with some, but I don't consider myself to be an expert on the issue.

VICE CHAIRMAN SANDSTROM: Can I read it to

you with respect to the qualification, what you need to do to qualify?

"A news story which represents a bona fide news account communicating the publication of general circulation or on a licensed broadcasting facility and which is part of a general pattern of campaign-related news accounts."

Do you think Jay Leno qualifies under that?

MR. SHOR: My understanding is that Jay Leno falls under the news media exception.

Mr. Commissioner, you asked what our concern was with respect to construing the electioneering communications provisions to cover only paid advertising. The examples that we encountered in testimony submitted by--written comments, you know, very well-thought-out written comments submitted by other organizations, focused on public service advertisements and documentaries.

And, again, we perceive problems with limiting this solely to paid advertising so that you essentially have a per se exception for public

service advertisements and certain types of documentaries, and that is--again, I expressed the concerns with respect to a blanket exception for public service advertisements, and that is among the reasons we have a concern about scaling this back to public--

VICE CHAIRMAN SANDSTROM: Could I get Mr. Malbin's comments in this regard? Are you also of the mind that Jay Leno and David Letterman are news programs?

MR. MALBIN: I must say the paradigm we had was there was Jay Leno, but I also was remembering sometime ago a play that ran on Broadway and was thinking about running on television called "McBird" during the Vietnam War, which was harshly critical of the President at the time.

But it was a satire, it was a political satire, and what we asked was whether it was the intention to cover paid programming that was political satire, that wasn't news. And if that's the intention of the Act, I think it's going to

have troubles in court. If it's not--that is, if it's appropriate to have an exemption--I think that that sort of exemption is important.

VICE CHAIRMAN SANDSTROM: How about even the payment for--and I'll give you an example, a recent example. A movie that not too many people saw recently was "Master of Disguise," with Dana Carvey. If anybody saw the advertising, there was a clear reference to "W," and you saw someone, Dana Carvey, imitating during this advertising George W. Bush.

To me, it was a clear reference, and it was also a form of satire. It was advertising satire that was to be found in the movie. So that's even paid advertising. Should that be covered?

MR. MALBIN: Are you asking me?

VICE CHAIRMAN SANDSTROM: Yes, and then I'll ask Mr. Shor. I'm doing this debate, so--

MR. MALBIN: I think wherever you draw a line, you are not going to have perfect surgical clarity where absolutely everything on one side is

election-related and absolutely everything on the other is not.

The question is whether you can have a clear, bright line that, A, in your case is faithful to the law, and, B, that rationally separates objects that ought to be separated.

VICE CHAIRMAN SANDSTROM: Mr. Shor, could I advertise a satire movie or play on television if the satire was a political satire?

MR. SHOR: You would be advertising a movie that was a political satire and it mentioned a federal candidate during--

VICE CHAIRMAN SANDSTROM: Yes; for instance, the recent advertisement of "Master of Disguises."

MR. SHOR: Well, this takes me to a broader question, Mr. Commissioner. The question on the table is whether to say that anything that does not constitute paid advertising shall be taken essentially off the table. And we have identified in the context of--again, reading the comments that I've seen on this issue, there has been a focus on

public service advertisements, and documentaries was mentioned.

And we have identified that basically saying that anything that doesn't constitute paid advertising would not be covered by the electioneering communications provisions would result in significant potential for abuse because it would open the door for--again, the example that immediately comes to our mind is public service advertisements featuring a candidate, very, very deliberately designed to cast that candidate in a favorable light.

As the Commission grapples with some of the advertisements and potential advertisements that you have mentioned--and I'm sure there will be other examples today--I think the Commission needs to proceed extremely carefully for this reason.

And I am skeptical of many attempts to just say--because one potential advertisement triggers a problem, to say then we need a per se exception, you know, dealing broadly with a very, very broad category because of the potential for

abuse.

VICE CHAIRMAN SANDSTROM: Mr. Shor, because my time is about to run out, because you use this in other places in your testimony, we can't have per se, what is the alternative to having a per se exemption?

Is it for the Commission to judge after the fact whether a particular advertising violated the law and is potentially a felony? Don't we need these exclusions to be per se in order to provide people with clear notice of what they can put on the television or radio without violating the law?

MR. SHOR: In our testimony, what we expressed an opposition to was an per se exception for public service advertisement, for the reasons that I have described before in the testimony before the Commission.

The Commission can certainly exercise the exception authority to sketch out the parameters of the type of communication that would not be covered so long as there were realistic and clear assurances, given the drafting of the exception,

that it did not permit any communications that promote, support, attack, or oppose federal candidates.

VICE CHAIRMAN SANDSTROM: I'm confused, Mr. Shor, how that would not be a per se exemption, but my time is expired.

CHAIRMAN MASON: Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr. Chairman.

Thank you, gentlemen. I appreciate all of your written comments. I'll just say I think most of the questions I have, I'll go ahead and tell you in advance, will also be for Mr. Shor. So we'll kind of turn this into the Glen Shor Show, and I hope you don't mind. It's just that you've raised some of the most--

MR. SHOR: I am at your disposal.

COMMISSIONER SMITH: I just want to start with a few quick questions to lay some groundwork, I guess.

First, it is fair to say that your group supported passage of this law, is it not? The

group at least supports the general principles and objectives of the law?

MR. SHOR: Yes, I think it's fair to say that the Campaign and Medial Legal Center supports BCRA and the principles embodied by the legislation.

COMMISSIONER SMITH: Okay. Now, I note that in your written testimony you make a point of noting that the electioneering communication restrictions are not a black-out on speech, that there is still speech that can go on. And I think that's an important point to make.

Clearly, if people are willing to give up a right to privacy, if they're willing to operate as a PAC or equivalent to a PAC, and so on, they can continue to speak. So I prefer to think of it as sort of a brown-out rather than black-out. They can speak; they will just be restricted and limited in doing so.

But that editorial commentary aside, my understanding from your testimony is that you agree that the brown-out period in Presidential primaries

only applies in those States where the primary is coming up within 30 days. In other words, it does not translate to a nationwide black-out simply because there's a primary, a Presidential primary, coming up in one State. Is that correct?

MR. SHOR: I think that I still resist the term "black-out"--

COMMISSIONER SMITH: I meant to say "brown-out."

MR. SHOR: --"brown-out," "green-out," and the other color that might be employed. I do think that there--

COMMISSIONER SMITH: The limitations on speech that are included in the Act do not apply nationwide?

MR. SHOR: The limitations with respect to the financing of certain advertisements--I think the Commission correctly understood the intent behind the legislation and the logic of it in proposing alternatives there that limited the coverage to the primary ad within 30 days in the particular State.

COMMISSIONER SMITH: You do not agree with the position that was very, I think, eloquently articulated by my colleague, Commissioner Thomas, at the time of the Notice of Proposed Rulemaking that the statute did not give us that authority to target in that way? You do not agree with that?

MR. SHOR: I think that Commissioner Thomas raised a fair point. However, I think that the intent in this instance of the legislation is manifest. I have scanned the legislative history and I certainly don't see any indication whatsoever that Congress intended that no targeting provision apply with respect to the ads in the primaries.

So, again, I think that the two alternatives presented by the Commission work correctly, though we have a preference for one correctly understood the legislative intent.

COMMISSIONER SMITH: You also agree, or you recommend that the Commission not attempt at this time to include in its regulations anything working or implementing the fall-back provision on electioneering communications. Is that correct?

MR. SHOR: That's correct. We don't think that would be prudential, given that it won't take effect until--

COMMISSIONER SMITH: You do not share the concerns of Robert Alt, who I think will testify to this later this morning, or Commissioner Thomas that were voiced at our Notice of Proposed Rulemaking that we should address the alternative definition now in the interest of sort of judicial economy?

MR. SHOR: I'm not familiar with the perspectives of either on that particular issue, but I think that it is--the Commission would be proceeding judiciously only in addressing the basic provision. The fall-back will only take effect in the event that the basic 60-, 30-day bright line test was struck down by the courts.

COMMISSIONER SMITH: Now, to change topics a little bit, the statute does not include the Internet in its definition of public communication, nor in its definition of electioneering communication. As I believe Mr. Alt will later

testify, and we explained in our earlier rulemaking on soft money, I believe that well-settled rules of statutory construction suggest that the statute cannot be read to include the Internet.

But, nevertheless, I note that in our prior rulemaking on soft money aspects of the bill Senator McCain and Senator Feingold and Representative Shays and Representative Meehan urged us to regulate the Internet and e-mails.

And I note that in their written comments on this rulemaking, Senator McCain and his colleagues have again urged us to regulate the Internet, despite the absence of any statutory reference.

Now, your testimony is silent on the issue and I'm curious. Do you agree with Senator McCain and Senator Feingold, your former employer, Representative Meehan, and Representative Shays that we should, in fact, regulate the Internet?

MR. SHOR: Okay, let me again begin by emphasizing that, yes, Congressman Meehan is my former employer, but I obviously speak only for the

Campaign and Media Legal Center.

What I think is notable here is that the State party soft money provisions contained in Title I covered general public political advertising, which the Commission in the context of disclaimers had said included the Internet.

Along those lines, we had taken the position in the context of the soft money rulemaking that because of the presence of that general public political advertising language that, you know, your State party's, you know, typical website and why they distributed e-mails were covered.

But what's notable here is that the general public political advertising language is not present in the context of Title II. I think that counsels a very, very different treatment of the Internet in Title II, which again would not cover, you know, the regular website, the widely distributed e-mails of an organization.

COMMISSIONER SMITH: So you would not agree with the comments of the bill's sponsors,

Senator McCain, Feingold, et al?

MR. SHOR: Well, I wouldn't say that. I think the sponsors recognized that fact. I think the sponsors basically said, if I am correct, that, well, you know, there is a concern about circumvention in the event that the Internet essentially becomes the functional equivalent of television. And I think the sponsors have put their finger on a thorny issue there and I don't disagree with their comments in that area.

COMMISSIONER SMITH: Okay. Well, they argue on page 5 that they disagree with an exception for the Internet and the Commission should leave open regulating communications over the Internet. So I'll take that accordingly.

Now, also, in their written comments Senator McCain and Feingold, and Shays and Meehan, approvingly cite and include a comment by Representative Shays made during the floor debate in which Representative Shays indicated that if a church regularly broadcast its services, the sermon and any other comments made during that service

would be subject to regulation by the FEC under the Act.

And I'm wondering, you know, do you, speaking for the Campaign and Media Legal Center, agree with Representative Shays that this Act gives us the authority regulate the content of church services?

MR. SHOR: No, I don't think that this, as I stated in the beginning of our statement--and I'm sure that that is what the Congressmen were meaning--this is not legislation that regulates the content of speech. This is regulation--this is, excuse me, legislation which deals with the financing of speech and essentially attempts to restore life to provisions long on the books that said that corporate and labor treasury money could not be used for certain types of speech.

COMMISSIONER SMITH: But if a church has a history of paying to have its services broadcast over the air waves, it regulates what people can then say in those communications. That's my understanding. I think Representative Shays made

very clear in his comments that, in fact, that's what they say is being regulated.

MR. SHOR: I think the mention of that there is--I think it's in the context of elaborating on the Commission's use of the exception authority and spelling out the parameters for its use of the exception authority and suggesting that potentially that may be one type of communication that the Commission may want to address in exercising its exception authority.

COMMISSIONER SMITH: I think that's a good point because Representative Shays, in fact, did make that point. But here's the problem I have: The sponsors go on and they tell us that--and I'm quoting from their testimony here--"Any proposed exception that is subject to abuse or provides a potential loophole through which an organization can circumvent the clear intent of Congress in enacting Title II would be inconsistent with the Commission's statutory authority."

They go on to say that they are skeptical, as the Vice Chairman noted, of any broad exception

that covered a theoretical problem, in the absence of strong evidence that such an exception would present no opportunity for abuse.

Now, don't you think this could be abused? Preachers could say in their comments, "We pray for you, President George W. Bush, in your brave and valiant fight in the war against terrorism. We pray for our Senator, Senator X, in his, you know, brave and valiant fight in the war against terrorism."

Isn't there potential for abuse here? And if so, doesn't that put us right out of what the sponsors, and really you in your earlier comments in response to Commissioner Sandstrom are saying we can't do when you said, you know, avoid these kinds of things without strong evidence?

Shays went on. He said it has to be wholly unrelated to an election--wholly, no mixed purpose--and does not in any way promote or support a candidate, or oppose his opponent. So this would go to almost all the exceptions we're talking about.

Basically, what I'm hearing here is every time one of these alleged horror stories comes up, the response is, well, you can exempt that. But every time we propose an exemption, we're told you cannot propose an exemption unless there's absolutely no possibility for abuse. And I can't figure out how to write this exemption to let church services be unregulated by the FEC without opening up a possibility for abuse.

MR. SHOR: Okay. Is there a question?

COMMISSIONER SMITH: Well, I'll move on. We're short on time, so let me ask you, Professor Malbin, a couple of quick questions here.

You mentioned that national advertising would be exempt if you were running an ad nationally that mentioned, for example, the McCain-Feingold bill or something like that nationally.

How would that be administered if, for example, the ad were being run in the districts of 10 swing votes or 20 swing votes or 5 swing votes, or whatever it might be?

MR. MALBIN: You know, when the light came

on, I'm not sure if I got to the end of a paragraph, but you ask a hard question and it's a fair question.

The task force said that something per se or by definition can't be targeted if it goes to everybody. Then it started asking, okay, what if it goes broadly? Well, it ended up writing "national" because that's easy to identify. If it goes broadly, then you're into the business of coming up with definitions. We didn't offer one. We don't propose to offer one.

The last sentence of the paragraph was that I'm not sure whether--although we prefer that, whether you have the legal authority to change the targeting rule, which is that is what you would be doing. So I think that lawyers and people of goodwill could figure out a way to define broad coverage. But, no, I don't think you can do it precisely and I'm not offering an idea for you.

COMMISSIONER SMITH: Thank you.

CHAIRMAN MASON: Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Mr.

Chairman.

Gentlemen, thank you for being here. This is tough going in some sense because you can always come up with some pretty interesting hypotheticals that make application of any law seem, shall we say, difficult, and there are some odd results.

I was just initially going to say that I think that what we're going to see here is another sort of debate about the philosophy of this law and whether or not it was a good idea to try to regulate this kind of activity.

Obviously, there have been lots of groups that have done a lot of hard work and they have basically analyzed ads that have been used in recent campaigns and they have pointed out what I think is almost most telling, and that is that candidates themselves don't even use ads that contain the so-called magic words kinds of phrases.

Candidates themselves don't say "Vote for me." They say something else much more subtle to make the viewer like them, but that's the whole point. With the express advocacy test that was

created by the Supreme Court many years ago, we saw a gentle erosion of the lines that everyone thought existed.

And corporations and labor organizations were ultimately in a posture where they could pour unlimited amounts into these hard-hitting ads right in the heart of the election season, obviously designed to influence the elections. As I have said at some point, we got to the point where we had--all that was left was what we could call the Federal Regulation of Stupid People Act.

You would have to be pretty stupid to use express advocacy, when you could easily get by putting out ads that just trashed a candidate and that had the desired effect without using the magic words. So that's what this is about.

And I think that all of that philosophy aside, what we now are confronted with is a statute that does have some fairly broad language. It does try to establish bright line tests so that the Supreme Court will be satisfied that this is a test that the average person out there will understand

going into the campaign season and they will know what to put in their communications and what to leave out if they want to steer clear of any violations.

In that regard, I think that the Commission has tried to put out some suggestions for areas where, within our statutorily authorized authority to create exceptions, there might be some leeway. And I'm most interested, I think, personally in the attempted exception that would allow for some sort of continued grass-roots lobbying advertising. I think that's the item of greatest concern.

We were subjected several years ago to a massive lobbying campaign, the Harry and Louise ads, and, you know, for the most part that was really a lobbying battle back and forth and back and forth.

So we have to, it seems to me, allow for organizations to use whatever resources that are permissible to undertake true, legitimate lobbying. And what I would like to ask the panel, each of

you, to address is whether or not you could be satisfied with a test that the Commission put out in its various alternatives in the Notice of Proposed Rulemaking.

In particular, the one that I thought was perhaps the best would say that we would except a communication where it concerns only a pending legislative or executive matter and the only reference to a federal candidate is a brief suggestion that he or she be contacted and urged to take a particular position on the matter and there is no reference to the candidate's record, position, statement, character, qualifications, or fitness for an office, or to an election, candidacy, or voting.

In a way, it sort of turns the express advocacy test on its head. It says for purposes for building an exception, you're basically going to have to be involved in expressly advocating the passage or defeat of a particular piece of legislation and confine your communication to that. The only reference that you could have to a

candidate would be something like "contact the President and urge him to support this," or "contact the Senator and urge him to vote for or against this."

How do you on the panel react to that? We'll start with you, Mr. McGahn. You've been horribly neglected.

MR. McGAHN: I was feeling somewhat left out, but I don't take it personally.

You raise a good point. To a certain extent, the proposed exception does turn the express advocacy test on its head, and that's why probably the courts will right it and put it back on its feet, I would hope.

I'm not so sure we're talking about hypotheticals and possible situations where, God forbid, some speech escapes that is not regulated by the Commission. I don't think we need to get into far-fetched hypotheticals. I don't really have to go any farther than the Campaign and Media Legal Center's own comments to show the problems with what they're proposing.

I read their comments with great anticipation because I thought I would finally learn what a sham issue ad really is, and I'm still looking for a good example of one because I do not see one in their comments.

COMMISSIONER SMITH: An ad run by the other guy.

MR. McGAHN: Well, do you define a sham issue ad as one that criticizes an incumbent when you happen to be the incumbent and you just don't like that because it's near your election? That's the cynical view of looking at it and I was hoping to get more of an enlightened view, but what I see is an example of an ad talking about a fellow named Bill Yellowtail who was running for Congress, but we don't even mention that Mr. Yellowtail is a candidate. We don't mention his party, we don't mention the election. We mention none of that, but yet all of a sudden that is now a sham issue ad.

The other example they give is on the Dingell-Tauzin legislation, which I thought of it because you mentioned the grass-roots advocacy.

There was a massive national ad blitz on that piece of legislation. Simply because you run it in John Dingell's district, all of a sudden now you can't run the ad. That's silly.

To draw the conclusion, as they do in their comments, that that attacks Mr. Dingell, I think, is an absurd proposition. It does not attack Mr. Dingell. I review a lot of ads, I look at a lot of ads. I know ads that attack people personally and ads that attack legislation. That ad attacks legislation. If you want me to write an ad that attacks Dingell, I can certainly do that for you. That's not one that does it.

But to turn the express advocacy test on its ear brings up a bigger question, which is Commission involvement in speech. Are you going to expect outside groups and parties and anyone else out there who wants to run ads that happen to mention candidates and officials to come to the Commission and prove after the fact what they were doing and that their ad somehow complies with the speech code? I don't think that's a practical

rule, I don't think it makes a lot of sense, and to me it is the worst form of regulation.

MR. MALBIN: Could Glen go next and I'll go third?

MR. SHOR: Thank you. Mr. Commissioner, I think that the example or the alternative that you were referring to is alternative 3-B among the alternatives that were included in the draft rules relating to what we'll call lobbying communications.

We certainly thought that 3-B was the closest to a carve-out that met constitutional standards and also, you know, complied with the command that no exception permit communications that promote--well, you know, no exception cover communications that, in fact, promote, support, attack, or oppose.

We did have concerns with the fact that the potential that it allowed for mentioning a party and mentioning the name of the candidate could, together, actually work to promote or attack a given candidate. And that's why we proposed a

slightly modified form of 3-B which precluded a reference to political parties or party affiliation, and also in that instance said that the reference would have to--it would have to culminate in something to the effect of "call your Member of Congress," "call your Senator," rather than referencing a particular name in order to further safeguard against promotion or opposition to a candidate.

But I think the Commission--I mean, I think that--well, I've spoken.

MR. MALBIN: First, I want to make it clear that examples like this didn't exist when the task force was working. I'm speaking on my own and not referencing the task force.

I think it would be clearly okay to run an ad that had no mention of a candidate that said "this is a lousy Democratic idea" or "a lousy Republican idea," or something of that nature. So what Mr. Shor is saying is that if you put the phrase at the end of that, "this is a lousy Democratic idea, call your Member," that that

brings it in your ambit.

If it did, I imagine people wouldn't bother because I don't think "call your Member" gets you very much. I think, in fact, you stimulate more action if you tell people where to write and not just "call your Member." If you tell people where to write and, in addition, say "it's a lousy Democratic idea, call Mr. Dingell," you know, that's a tough line-drawing. Yes, I think it can get pretty close to being an ad that criticizes the sponsor or criticizes the person.

COMMISSIONER THOMAS: Well, I appreciate it. Just to finish up the thought, it's probably the toughest of the issues that we have to confront, as I see it, trying to contemplate some sort of allowance for true grass-roots lobbying efforts.

I think the Commission is not here in the business of trying to demand that everyone come here to get permission in advance. In fact, just the opposite. That's why we are trying to articulate these tests that will be bright line

tests that go along with the intent of the legislation, and yet they will allow people to know in advance where they cross the line and where they don't.

Thank you.

CHAIRMAN MASON: I'm delighted that Commissioner McDonald has safely joined us, and just in time for his question period, for which I know he's fully prepared.

Commissioner McDonald.

COMMISSIONER McDONALD: Mr. Chairman, thank you, and my apologies both to my colleagues and the panel. "Safely" is an accurate term as it turns out. I do apologize for missing your opening remarks.

I guess I'll start with Mr. McGahn. One of the things you mentioned that I'm just kind of interested in in a more generic sense--you mentioned this Pennsylvania case some 20 years ago, I gather, that you referred to, and the issue, I gather, was one in terms of pre-censorship.

Could you amplify a little bit on that and

how that works? I mean, I always thought censorship was in relationship to not allowing something to go forward, and I wasn't sure in looking very quickly at that what the circumstances were there. Could you tell me a little bit more about it?

MR. McGAHN: It's an old case. It's from 1980-81, I think, from Pennsylvania, and it was, in essence, a person failed to report some political speech that they were about to engage in. And it was unfortunately put through the mill of--I believe it was criminal. Eventually, the statute was struck down.

The lesson there is that the notion of a prior restraint on speech--and the court never did squarely reach the prior restraint, which is sort of a different series of cases.

COMMISSIONER McDONALD: That's kind of what I was interested in.

MR. McGAHN: Yes, but prior restraint basically says that you don't--anything the government does that would restrain speech prior to

the speech being made may have constitutional problems. I mean, that's sort of the layperson describing the rule.

Where it comes up here is the notion of when do you report these electioneering communications? Do you have to report them before you air them or after you air them? It seems to me most of the comments fell down on the side of after you air them makes the prior restraint issue, I think, moot in a lot of ways.

To me, is the public in any different position the day the ad airs or the day before the ad airs as far as disclosure? I don't think they're in any different position. If the notice comes 24 hours after the ad is aired, to me, the public is still fully informed of who is paying for the ad.

If, however, you require notice before the ad goes on the air, that gets into, I think, some very serious speech implications. What could possibly be the reason? The public really wouldn't be any more informed 24 hours before the ad would

go up. The only people who would probably be informed would probably be the incumbent who is going to be mentioned in the ad and tip them off that it's coming. To avoid those sorts of thorny issues, I would suggest that the reporting be after the ad actually airs.

The other issue I raised on it is the complexities of getting an ad on the air, and if you try to get someone to report before it goes up, since we all have a movie theme, there's a movie, "Minority Report," where I guess Tom Cruise is the star and he's being convicted of a crime he didn't commit yet. It seems very similar to that.

COMMISSIONER McDONALD: Okay, I appreciate that. I couldn't quite follow--I understood what you were saying about the prior restraint piece of the puzzle, but I am glad you cleared it up. You don't really see that as kind of the cornerstone of this debate?

MR. McGAHN: No, it's not a cornerstone--

COMMISSIONER McDONALD: Okay.

MR. McGAHN: --particularly when the

comments almost universally said that reporting after the ad goes up is an acceptable way to do things. It moots the issue I raised.

COMMISSIONER McDONALD: Okay, fine. I wanted to be sure I was following you on that.

In relationship to your very distinguished task force that you have, can I ask you about the issue, Mr. Malbin, in terms of this fourth component that you talked about, kind of the new component in relationship to what your task force--if you've already commented on this, I apologize, but would you mind commenting a little more on that for me?

MR. MALBIN: Are you referring to targeting?

COMMISSIONER McDONALD: Yes.

MR. MALBIN: Yes. Again, this was before the context of this debate. I think, in fact, that we might have--I don't know; Mr. Shor would know, but we might have been one of the sources of the concept on the Hill.

But what the task force wanted to do would

be to allow organizations who wanted to comment on issues to go ahead and do it. And how would we know when they're doing it for legislative as opposed to quasi-electoral reasons?

We look at many, many content-based tests-- and they all seemed to be highly intrusive--to try to figure out what is really legislative versus what is sort of political. And then we realized that people don't run political ads and waste their money by running them across the country without mentioning the people who are supposed to be affected. They run them in the districts of the people whose electoral outcomes you're trying to influence.

So we said, well, let's say if an ad is targeted at the people named--namely that a substantial portion of the ad buy runs in the district--then that's a good marker for indicating. And the purpose was to tailor the legislative response to the goal, to the purpose.

We thought there were clearly worse advertisements that were influencing an election

that were naming Members in their election district. Okay, so they said targeting means substantially in the election.

Then they said, okay, what does that mean, a significant number of potential voters reached? And that's a significant portion of the total ad buy. Then we had a hard time and we said what does it mean, a--what if you're in 50 districts and you name one?

And we said, well, the easy case is national, or sometimes you buy on a block of stations in a region, but not just a single broadcast area. So they said that as an easy case. Would that have been a sufficient one? Could we come up with a smaller or better definition? Honestly, the task force did not go through that technical effort.

But somehow the logic of it is that something that's national by definition wouldn't be targeted. However, the statute does define national as targeted and you're stuck with the statute.

COMMISSIONER McDONALD: Yes, we are. Thank you.

Mr. Shor, the comments made about the Yellowtail ad are interesting and obviously they're the kind of stuff that we're trying to grapple with. One of our former colleagues used to have a list of flash cards, actually, that he would bring in and show to people and say, you know, does such-and-such beating his wife--please call him and ask him to stop, please stop stealing, harassing young children, and so on and so forth, maybe going back to you wouldn't run an ad unless there was a purpose for running that ad.

The criticism, I gather, on the panel--you and one of your distinguished colleagues--is it doesn't mention the party, nor a particular campaign. Well, what about that? What about the criticism that your ad really does not get to some of the other problems that you might have? Or maybe conversely, what if it did mention the party and a campaign? Do you have any comment on that?

MR. SHOR: Mr. Commissioner, are you--just

so I answer the question to give you the information you need, are you asking about my opinion with respect to whether the Bill Yellowtail ad is a sham issue ad or what--

COMMISSIONER McDONALD: Or what else might it take to make it one if it is not, or is there enough information there, I guess?

MR. SHOR: I think the Bill Yellowtail ad is just fine on its own as a sham issue ad. Actually, I think I just--maybe I'll just read it.

COMMISSIONER McDONALD: What about the criticism that was leveled just a moment ago that as a practical matter it doesn't mention a party, it doesn't mention--I believe you said the campaign. Am I correct?

MR. McGAHN: No reference to the election whatsoever.

COMMISSIONER McDONALD: I'm just wondering about the counter to that because it is a good question to bring up and the kind of thing that we're dealing with and Mr. Malbin talked about.

MR. SHOR: Here's the ad: "Who is Bill

Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail's response? He only slapped her. But her nose was broken. He talks law and order, but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments, then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."

Yes, I guess this doesn't mention a political party. I think it is a patent campaign ad. I think it was intended as such. It was--I think if you look at the origins and the nature of the organization that funded it, it only confirms that fact, and I think it illustrates the phenomenon probably--it's probably one of the most egregious examples of what's going on right now and the deliberate and utter evasion of 441(b).

COMMISSIONER McDONALD: And can you tell me about what was the timing of the ad in relationship to the election?

MR. SHOR: I think it was--I actually

don't have that right here, but if I recall correctly, it was highly proximate to an election. I think it was in October and--

COMMISSIONER McDONALD: Okay. I didn't see that, but I assume that may be the case.

MR. SHOR: I'll confirm that for you if I'm incorrect.

COMMISSIONER McDONALD: Fine, thank you.

Thank you, Mr. Chairman.

CHAIRMAN MASON: Thank you.

I apologize for skipping over Commissioner Toner in my relief at having Commissioner McDonald with us.

Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr. Chairman.

Coming into this proceeding, it seemed to me the three biggest issues that we had to focus on--and you've touched on some of them--one is this nationwide black-out or brown-out issue in terms of the electioneering communications that mention Presidential candidates, the second being whether

or not there was going to be a requirement of prior disclosure of an electioneering communication before an ad ever aired, and, third, what, if any, exemptions would exist on electioneering.

I get a sense from this panel that everybody here agrees that we should not adopt a nationwide black-out period with regard to Presidential communications.

Mr. Shor, do you agree with that?

MR. SHOR: Again, with the sole qualification that I don't subscribe to the term "black-out," "brown-out," but I think we're in agreement on the basic substance of this.

COMMISSIONER TONER: Okay. And, Mr. Malbin, I think you indicated earlier you agree that that would not be an appropriate reading of the statute either.

MR. MALBIN: No. We didn't discuss that. The task force didn't discuss that.

COMMISSIONER TONER: Okay. What is your--

MR. MALBIN: I mean, actually the task force probably would have included Presidential,

but I can see the argument for not.

COMMISSIONER TONER: Well, in terms of reading the statute--and you made a fair point; we have the statute as it is given to us--would you think it's appropriate that there be a nationwide application on electioneering communications?

MR. MALBIN: I'm certainly going to defer to the authors of the statute about what the words say, but it looks to me as if it does cover Presidential nationally.

COMMISSIONER TONER: Even when a primary has already been held in a State and an ad is aired after the primary occurs?

MR. MALBIN: The definition of targeting applies--no, I shouldn't say that. The definition of targeting applies only to House and Senate elections. But since that seems not to be relevant to this issue, so--

COMMISSIONER TONER: Okay. And, Mr. McGahn, you agree?

MR. McGAHN: I agree. I'd like to add it is relevant to House and Senate elections, however,

because if you do want to mention the President or your party's nominee in your ad simply to either coat-tail or distance yourself, you are impacted. So it's very relevant to not only the Presidential election; this is about all elections. But I agree, yes.

COMMISSIONER TONER: And the second major issue is this question of whether there is a prior disclosure obligation before an ad ever airs.

Mr. Shor, what's your view on that?

MR. SHOR: Our view is reflected in our comments, and actually I think we're going to have an issue on which we agree here. We understand the concerns that the Commission has raised, and ultimately I think it's the correct construction of the statute.

You know, it is triggered by disbursements on electioneering communications, and the fundamental issue is whether you can deem something to be an electioneering communication prior to its airing as an electioneering communication. And there are a number of contingencies that sort of

preclude a very solid conclusion to that effect prior to its airing.

So we think that the airing of the electioneering communication is what is going to trigger the disclosure requirements, and that the prior spending on it for direct costs of production and airing and any obligated amounts under existing contracts would have to be disclosed at that time.

COMMISSIONER TONER: And I take it that, Mr. McGahn and Mr. Malbin, you concur in that?

MR. MALBIN: Yes. The equivalent of lust in your heart is not covered.

COMMISSIONER TONER: Not covered. We can have an exemption for that. Okay, we'll work right on it.

Then I think that brings us to the third major issue, and that is whether we're going to have any exemptions which are appropriate. And, Mr. Shor, I thought your comments were very interesting. You indicated in your papers that the "promote, support, attack, oppose" statutory language, in your words, doesn't provide a bright

line for non-candidates and non-party actors.

Could you elaborate on what your thought was on that? Are you saying that it's potentially vague in application to those types of entities?

MR. SHOR: What I'm saying is the Supreme Court has laid down an extremely exacting standard for the degree of guidance that must be given to non-party, non-candidate entities, and it is a more exacting degree of guidance than is required for the degree of guidance to be given to parties and candidates who are inherently electioneering entities, and that we have concerns that in terms of imparting guidance to non-party, non-candidate entities, "promote, support, attack, or oppose" may run into--with respect to those particular entities may just not meet the constitutional standards required for clarity of guidance.

COMMISSIONER TONER: And in that vein, would it be your view that if we attempted to enforce "promote, support, attack, oppose" to those types of entities, non-candidate, non-party, without anything more, that we'd run the risk of it

being found impermissible? Is that your view?

MR. SHOR: I think the application to those entities may present constitutional difficulties. I do not believe that the application to State parties and candidates would present the same problems.

COMMISSIONER TONER: And what's interesting about this is--and you pointed out earlier in your discussion of exemptions--is Congress has instructed us that if we provide any exemptions, it must not allow for any communications that promote, support, attack, oppose.

And if, in a sense, that standard is potentially impermissible as applied to certain organizations, how would we craft any exemptions that satisfy this edict that we not allow a communication that promotes, supports, attacks, opposes?

MR. SHOR: I think this is what we're saying: With respect to an exception applicable to non-party, non-candidate entities, we don't

anticipate, and think it would be a good idea to reiterate the "promote, support, attack, or oppose" standard in such an exception, you know.

What we anticipate in terms of exceptions are exceptions that don't use those terms, but describes types of communications in a very clear way that do not, in fact, promote, support, attack, or oppose federal candidates. Again, that's the standard.

The exception itself is not going to--a proper exception would not reiterate those terms, again, insofar as applicable to the non-party, non-candidate entities. But it must meet that standard. The exception as drawn by the Commission, which will hopefully not employ those terms with respect to non-party, non-candidate entities, must still not, as it's written out, permit communications that promote, support, attack, or oppose named federal candidates.

COMMISSIONER TONER: And I think you made a very clear argument in terms of your position in terms of public service announcements, the

potential for abuse, in your words.

MR. SHOR: With a per se exception, yes, sir.

COMMISSIONER TONER: With a per se exception, and you made a similar comment in terms of, I think, 501(c)(3), blanket exceptions for them.

MR. SHOR: Yes, and I think that was clearly rejected by Congress.

COMMISSIONER TONER: Would you take the same position in terms of charitable messages? You know, for example, if, in the aftermath of September 11, a charitable message was aired in New York with Mayor Giuliani if he was still running for Senate, that would be impermissible for us to exclude those types of charitable messages?

MR. SHOR: I think that in drawing any particular exception, the Commission, you know, must be very careful to comply with the statutory and constitutional standards. It has to provide sufficient clarity under the constitutional standards, and under the statutory standard it must

not create an exception which applies to communications which promote, support, attack, or oppose federal candidates.

I think that maybe there is the potential to do something. I guess one example that comes to my mind may be, well, if there was some sort of a charitable event that was thoroughly non-political and a Member of Congress was going to be among the many present and the communication wanted to potentially note the presence of the Member of Congress with other safeguards, well, maybe there is some potential there, if properly constructed, for an exception which did not cover a communication which promoted, supported, attacked, or opposed a federal candidate.

I do wonder to what extent we are actually seeing federal candidates during that time period, the narrowly defined time period covered by the electioneering communications, appearing in advertisements on behalf of charity in their districts.

I certainly urge the Commission, before

moving forward on any exception of this nature, to take a hard look at what is actually going on out there, and to again proceed very carefully within the statutory standards.

COMMISSIONER TONER: Let me see if I get this clear. If there were a charitable message about September 11 featuring Mayor Giuliani and he had been running for the U.S. Senate, which he was doing earlier in the cycle, would it be your view that that type of message to raise funds for victim relief in New York City would not promote, support, or attack his candidacy and therefore we could exempt it?

MR. SHOR: I would have to know more about the communication. I mean, I hesitate slightly just to say that a charitable message involving a federal candidate, even if it's a very good cause, necessarily does not promote, support, attack, or oppose the federal candidate.

I think many of the entities--I think there are obviously many great charitable works and charitable organizations. It think at the same

time, you know, a blanket exception in this regard could create the possibility for abuse.

I mean, I note that many organizations that do charitable work also may be engaged in political work and electoral work, and you can see a nexus that is potentially troubling. Again--

COMMISSIONER TONER: Abuse from raising funds for September 11?

MR. SHOR: No, I'm not saying that that's abusive at all, and that's not the example I was citing. What I'm saying is that I think the Commission, in terms of dealing with issues of Members soliciting funds for charity or being involved with charity, must proceed very carefully.

I mean, I think per se exceptions for Members being involved with charity could potentially be problematic, but perhaps there's also a way for the Commission to draw this exception narrowly so that it does not include communications that promote, support, attack, or oppose a federal candidate.

COMMISSIONER TONER: Thank you.

CHAIRMAN MASON: I wanted to use some real-life example. I think Mr. Shor or someone suggested not looking at theoretical problems, but I'm not going to pick on Mr. Shor, at least not to begin with. I'll start with Mr. Malbin because I very much appreciate his middle-of-the-road approach, though I recall I have sometimes been admonished that there's nothing in the middle of the road but a yellow line and a few dead animals.

So it's a problem sometimes, and I genuinely appreciate your suggestions here, but I want to explore how we might apply them. And one gets to the distinction you're suggesting as to paid advertising versus others, and I think I'm correct in recalling that you said the task force sort of discussed this issue of infomercials and how we would distinguish between a kind of Ross Perot style 30-minute campaign ad, 60-minute campaign ad, whatever it was, and something else.

And so I want to sort of describe for you an actual complaint we had here at the Commission which is now all closed out, but I think

illustrates a problem, and it involved Pat Robertson and the Christian Broadcasting Network long after he had been a Presidential candidate. So his candidacy wasn't an issue.

But a person who had seen this program called in and complained, and the gravamen of his complaint interestingly was that he innocently tuned into this and only after 15 or 20 minutes did it dawn on him that this person had an axe to grind.

Now, why it took him that long or why he didn't just shut the program off is not quite clear to me, but it turned out that this was Pat Robertson's regular--I can't remember the name of the program, but his regular talk show that he broadcasts on CBN. But in this particular case, he had paid a commercial television station to broadcast it for an hour, and this is a way that some of these sort of small stations, cable outlets, and so on like that, sometimes distribute their programming either to get their message out, or I suppose there may have been some profit in him

turning around and reselling the advertising time in that or boosting his viewer numbers or something. I don't know.

But how would you suggest we handle a situation such as that where you have what generally speaking looks to be like a very opinionated, but nonetheless legitimate sort of talk show, but the network involved paid to have it aired?

MR. MALBIN: We'll start with my disclaimer that I'm not a specialist in communication law.

CHAIRMAN MASON: Yes.

MR. MALBIN: But I think the thrust of what we're saying is that if you pay to put it on, it should be covered. And if the station chooses to put it on because it chooses to--that is, it picks it up and syndicates it--if the station is running your show in the course of its ordinary thing and paying ordinary license fees, that would come under programming. And if you're paying what you pay to run a 30-minute ad, then you're covered.

I believe that there is a way of distinguishing this.

CHAIRMAN MASON: I understand there's a way of distinguished it. I'm just trying to get at what the offense is here, what the difference is. If this program is a regular part of CBN's broadcasting and it's carried all over the country on hundreds of cable networks, and yet because they're not carried on San Francisco cable and they want to reach that audience they choose to pay a broadcasting station to carry the identical programming, how do we justify in the one case saying, well, gee, it's fine, no problem, and in the other case saying, well, if you paid more than $10,000 to produce and air this program which happened to include a federal candidate, you have violated the law?

MR. MALBIN: You justify it by saying that it doesn't matter where you draw the line. I guarantee you that you will find one or two examples that you're not going to like on one or the other side. And you say that the nexus is a

corporation or a labor union paying to put on something that has or is about a federal candidate.

And if it's part of the ordinary broadcasting or ordinary that it's not being paid, then you say no. It is not going to be--

CHAIRMAN MASON: To prove this, though, if CBN always, every week, pays the San Francisco station for that time on the outlet, how do we then--that's part of the broadcaster's regular operations. How do we make that distinction?

MR. MALBIN: The broadcaster normally buys time on a cable outlet?

CHAIRMAN MASON: Every week, 52 weeks a year, it buys this one-hour block of time from the San Francisco television station.

MR. MALBIN: Again, it probably ought not to be covered. That's winging it without discussion and without having good communications people with me, but it probably ought not to be covered.

The kinds of things we were thinking about when we said infomercial were not regular

programming events. They were special events that were paid for by--to put a person or a candidate on.

CHAIRMAN MASON: So the issue might not be the payment, per se, but might be the scheduling of it or the episodic nature of it?

I want to open up one other topic, unless my time is gone.

MR. MALBIN: It's some definition of programming as opposed to advertising, and within advertising of paid versus non-paid.

CHAIRMAN MASON: Mr. Shor--and the other panelists may want to address this as well--we've talked something about public service announcements and documentaries, other things, and so on like that.

Now, the statute here is cast in terms of disbursements and I think all of us are kind of thinking about in-kind contributions or something like that. But let's assume for a moment that an organization is able to tape and distribute a public service announcement for less than $10,000,

the production side of it, and they now send it out to hundreds of television outlets and the television outlets then choose to run the documentary or the PSA. Who has made the disbursement?

MR. SHOR: Well, the corporation--is it a corporate or a labor entity that has made the production disbursement?

CHAIRMAN MASON: Let's assume it's an incorporated organization which produced the public service announcement. They spent less than $10,000 on it.

MR. SHOR: Yes, sir.

CHAIRMAN MASON: They distributed it. Now, a television station airs it at no cost, a free spot.

MR. SHOR: Understood.

CHAIRMAN MASON: Who has made a disbursement?

MR. SHOR: There has been a corporate disbursement for the direct cost of the production of the advertisement. And the $10,000 threshold--

though this may be under $10,000, the $10,000 threshold is not a 441(b) threshold. It is a threshold for triggering disclosure of spending on electioneering communications. There is no de minimis exception to 441(b). So in that case, whatever the disclosure implications, that would be covered by 441(b).

CHAIRMAN MASON: And if it's never aired?

MR. SHOR: Well, if it's never aired, then you get to the question of whether--and this takes me back to something that I was talking about with Commissioner Toner. If it's never aired, I mean you get into the question of whether it constitutes an electioneering communication.

There are so many criteria for determining what constitutes an electioneering communication, such as where it's aired, when it's aired. It's a little bit hard to--

CHAIRMAN MASON: So in this case you have an organization which created, produced, a public service announcement outside of a 30- or 60-day window. They distribute it. Someone else, a media

organization, chooses to air it inside the 60-day general election window. Who has made the impermissible disbursement?

MR. SHOR: There has been a corporate--the organization that produced this, I think, has made a corporate disbursement on an electioneering communication.

CHAIRMAN MASON: But at the time they produced it, they produced it outside of the window and they simply distributed it to television stations, let's say, 90 days before a general election, or 120 days before a general election. The television station then chose to broadcast that PSA within the 60-day window. Who made the electioneering disbursement?

MR. SHOR: The corporation did. The corporation made a disbursement of something that constituted--the corporation has spent money to--

CHAIRMAN MASON: So we're to hold the corporation liable for the television station's decision to broadcast the PSA within the electioneering window?

MR. SHOR: Well, I think if the corporation has significant concerns about this, it could reach an arrangement with the television stations to which it distributed the PSA and say, look, you know, this is a corporate disbursement, this can't be distributed within--this can't be aired within a particular window.

CHAIRMAN MASON: I think we're--yes, we do have time for another round of questions. Excuse me. I don't want to skip the General Counsel and the Staff Director, so we'll go to them at this point.

MR. NORTON: Thank you, Mr. Chairman.

I think I'm correct that all three of you subscribe to the view that's in the proposed NPRM that it ought to be the airing of the communication that is the trigger requirement for disclosure. And I ask this question to all of you, but maybe particularly Mr. McGahn, who may be more familiar with these things than I am, and that is whether media contracts actually specify the exact date and time that an ad will be aired, and even when they

do, how closely do broadcasters adhere to the schedule?

And what I'm getting at is will it be difficult for organizations as a practical matter to comply with the 24-hour disclosure requirement if the date or time is not specified in the contract and if, even when it's specified, it could be run at a different date or time?

MR. McGAHN: Very good point. Assuming, arguendo, that all this is constitutional, I agree with the other two on when the disclosure ought to occur. I don't want to disappoint anyone.

Usually, contracts are specific, but sometimes they're not. It really depends on the nature of where you're buying. You can specifically buy news-adjacents, for example, which are, of course, the ads run up against the news. You could buy at two o'clock in the morning, if you really wanted to, to get the night owls. You could do the soap opera swing either in the afternoon or the morning, all sorts of things. And the stations will allow you to do that. It probably is going to

cost you a little bit more than if you just say run it sometime in the morning.

The flip side of that is cable. Cable, you're not nearly as precise as to when you air it. Cable, even the big cable like, you know, the Discovery Channel and Home and Garden and all those, they don't even--aren't necessarily sure what ads are running when. You buy in a block sort of in the afternoon and you sort of say, I want it between one in the afternoon and five in the afternoon.

Well, you don't know if it's on at one or five unless you actually watch TV and catch all of it. So you could actually run afoul of the 24-hours because you just didn't realize your ad ran at one o'clock. You caught it at four o'clock and didn't realize that your buy had started before you thought it was going to start. So you do raise a very real concern.

I had thought originally that the sort of rolling clock, 24 hours, would make sense. But now that you raise that, maybe the "close of business"

standard or something a little more objective would make sense.

But in terms of the broadcast, I guess my closing is when it comes to broadcast, you can be pretty precise; cable, you can't. But it is possible that you don't even realize your 24-hour clock is running, even though you're the one that made the buy.

MR. NORTON: Is it even possible that the ad could run a day or two before the day you expected it to run or the day that was specified in the contract?

MR. McGAHN: That's unlikely, but I guess it is possible. I have seen situations with advertising where a station will call and say, gee, we made a mistake, we ran this other ad by mistake, is that okay? And usually it is. I've had stations call and say--this was last cycle and this is just for anecdotal humor if nothing else--they called and said, gee, that Democrat ad that you're calling about and saying, you know, is really defamatory, we never aired it.

Well, why didn't you? Well, we ran the Al Gore ad instead and now we have their buyer calling and asking what's going on. So the station had put the wrong ad in traffic, and everyone had thought that a certain ad was airing and it wasn't airing. They ran the other guy's ad.

You raise a very good point. It can get very confusing when you're dealing with media buyers and station managers and the sub-culture of stations as to who actually green-lights an ad.

MR. NORTON: Thank you.

Do any of the other panelists want to take a run at that?

MR. SHOR: Are there 24-hour reports required for independent expenditures? I'm correct. Wouldn't the same issue be there? And I think probably it has been deemed manageable in that context.

MR. NORTON: Okay. I wanted to ask you, Mr. Shor, about your proposal concerning how the Commission ought to determine whether a communication has reached 50,000 persons, which, of

course, is a key element of whether we have an electioneering communication.

In your submission, you say the Commission should use--that the unit of scrutiny should be a discreet airing or a simultaneous airing over a single outlet rather than an aggregation of simultaneous airings over various outlets. And I want to present you with two examples and ask you whether these would be treated differently under the regime that you're proposing and whether they ought to be treated differently.

The first is that an entity enters into three separate contracts with separate broadcast stations in a particular State and each of which of those stations reaches 40,000 persons.

MR. SHOR: Forty thousand distinct persons?

MR. NORTON: Forty thousand persons, however we decide to count them.

In the second example, the entity enters into one contract with a network that includes all three of those stations and then runs the ad on all

three. Should the Commission treat in the second case this is three separate broadcasts of 40,000 each or one of 120,000?

MR. SHOR: So the question is in the case of the network, the contract with the--I think our testimony indicates that if there's a contract with one entity and then it's distributed over the network's affiliates, in that instance aggregation would be appropriate.

MR. NORTON: So if there's a contract with one cable company and the ad is shown on multiple channels on the cable system, CNN and MTV and A&E--

MR. SHOR: Simultaneously?

MR. NORTON: Simultaneously. Forty thousand subscribers watch each station. Should those be aggregated? Should we count the same subscriber to the cable system twice?

MR. SHOR: I hadn't considered the example of the multiple stations and I would have to think about that.

MR. NORTON: What is the difference to you whether the ad runs simultaneously or it runs

within the same hour or the same day? Why should that be a distinction with any meaning?

MR. SHOR: I think because the statute refers to electioneering communication and the idea of a discreet communication is that you're going to have multiple communications when they air at multiple times, but one communication when they air simultaneously.

MR. NORTON: Mr. Shor, in your comments, you, and I think the sponsors in their written comments suggest that the lobbying exemption, the so-called lobbying exemption that would address advertisements that concern pending legislative or executive matters should be permitted in part if they don't mention the candidate's name, but you would references to "your Congressman."

I would note, as I'm sure you're aware, that under the Commission's regulations for what establishes "clearly identified," those kinds of references would satisfy the Commission's regulation and indeed could constitute express advocacy.

I'm trying to understand what the point of that suggestion is. It would seem to be based upon the premise that many of the viewers won't know--for instance, if there's a Senate candidate on the ballot in November or there's a single candidate in the State, they won't actually know who the Senate candidate is. Otherwise, what's the practical difference?

MR. SHOR: No, I actually don't think that's precisely it. I mean, basically what we have said is that, first, insofar as the Commission construes the term "clearly identified candidate" for purposes of getting you in under the overall test, it should do so consistently with how it has done so in the past, which would include a reference to "your Member of Congress."

Then we propose--once you're under a test, we do propose an exception that would permit, subject to many safeguards, a lobbying communication that culminated in "contact your Member of Congress and ask him to take a stand on a particular piece of legislation."

I think the omission of the name is not premised so much on the idea that the viewers won't know who their Member of Congress is, but rather that it diminishes personalization and is thus an additional and meaningful safeguard against candidate promotion or opposition.

MR. NORTON: Mr. Malbin, if I could take a moment to follow up on your paradigm for a distinction between paid and unpaid communications, your task force suggests use of the term "advertisement," which you define as any paid advertisement.

MR. MALBIN: Right.

MR. NORTON: One of the things I'm trying to get at is, of course, as you know, BCRA uses the term "communication" and it isn't clear to me whether use of the term "advertisement," which I don't think the task force really defines, and it isn't defined by the FEC--whether you're talking about something other than a communication or simply using another term.

MR. MALBIN: No. It's a subset of the

term "communication."

MR. NORTON: And is the reason that you think PSA would be excluded under this definition--or your aim is to exclude things like entertainment and PSA, is that a PSA is not an advertisement, but rather it's a communication? Or is it that if the costs for production of a PSA are made by a corporation, that doesn't constitute paying for the communication? What's the reason that PSAs would fall outside of your definition?

MR. MALBIN: First, I would say that the thrust of the discussion had to do with the programming and advertisement distinction, not with the PSA example. And the main thing that people wanted to do was essentially to read programming, read entertainment, drama, satire--read all of those things out. And it was trying to make sure that in the course of doing so, the Ross Perot half hour was not given an exemption.

MR. NORTON: So are PSAs in or out?

MR. MALBIN: No. The PSA was not a matter that the task force discussed, to be perfectly

honest.

MR. NORTON: Thank you, Mr. Chairman.

CHAIRMAN MASON: Jim Pehrkon.

MR. PEHRKON: Thank you, Mr. Chairman.

Professor Malbin, Mr. McGahn, Mr. Shor, I want to thank you all for coming today and for your comments. Professor Malbin, in particular I was very intrigued by your comments of suggesting that disclosure be enhanced with 504 provisions, and I'd like you to sort of, if you'd like to, take that a little bit further and tell us what the benefits of that would be or what you see them to be.

A couple of other questions, if you could sort of touch on that as you're going through, is you propose that much of the information be placed out on the website that is maintained by the local TV and radio stations, and one of the questions I had--under the 504 provision be reported, and is there a frequency of reporting you're suggesting on that?

MR. MALBIN: Actually, I think our idea was that it should be reported to the FCC,

centralized, and then all of this should be put together under the FCC and, through that, to an FEC outlet, not that people will have to go to thousands of different stations, but to their individual websites.

MR. PEHRKON: No, no. If I gave that impression, I didn't mean to. In other words, they would report it to the FCC. The FCC would then bundle it together, but they would be required to report it to the FCC.

MR. MALBIN: Yes, yes.

MR. PEHRKON: And is there a frequency or timing aspect that you would want them to--or suggest that they should report to the FCC?

MR. MALBIN: Our recommendation was that you take the information that has to be collected anyway and whenever--I mean, you would set regulations as you do now for electronic disclosure. You would say that within a time frame you deem to be reasonable--and I would hope it would be short--these things be transmitted and entered into a database and put up.

How fast is fast? The statute doesn't say.

MR. PEHRKON: The statute doesn't say and that's--

MR. MALBIN: It's up to you to designate.

MR. PEHRKON: And do you have any suggestions in that area?

MR. MALBIN: I would want technical guidance before I said. I think I would be--when you're dealing with candidates who can be given pre-cooked software, you can expect things within 24 hours. In order to get anything close to that in this kind of situation, again you'd have to have standardized software and distribute it to make it happen that quickly.

MR. PEHRKON: You weren't looking or suggesting post-election report?

MR. MALBIN: I'm not looking at post-election reporting.

MR. PEHRKON: Much more timely than that?

MR. MALBIN: I'm looking at reporting that is appropriate to the purpose of election

disclosure, which is to inform the voters within a relevant time frame, which means quickly.

MR. PEHRKON: As you were developing the suggestion, you had the opportunity to work with any of the stations or get any input from radio and television stations as to--

MR. MALBIN: Have we had the opportunity? No, but should the Commission wish to pursue this, we would be delighted and pleased to try to get that kind of counsel and to report to you.

MR. PEHRKON: Thank you.

Mr. Shor, one of the questions that I had on one of your comments is you talked for a second about that the Commission requires under 11 CFR 114.14(d) that a person demonstrate through a reasonable accounting method that no corporate or labor funds were used to pay for any portion of an electioneering communication.

MR. SHOR: Yes.

MR. PEHRKON: You then suggest that the definition of "a reasonable accounting method" should be more precise. Have you guys anything to

suggest in that area?

MR. SHOR: We didn't include a suggestion in our commentary. I did note in one other set of commentary that industry-accepted accounting methods be used, and that struck me as appropriate.

MR. PEHRKON: Those are all the questions. Thank you.

CHAIRMAN MASON: We are going to have time for a second round of questions from Commissioners. I think we're going to in the time do it at about six minutes and that should take us right until noon.

Commissioner Sandstrom.

VICE CHAIRMAN SANDSTROM: Thank you. In my earlier questioning, I probed the exemption that Professor Malbin suggested with respect to non-paid programming and paid advertising. The reason I'm probing and I had a fairly lively exchange with Mr. Shor is that's an area I sought comment because I thought the proposal was a very sensible one.

So my questioning now will actually go to another exemption that I feel fairly strongly about

and that is with respect to State and local candidates, and I'll give you an ad, a potential ad that is being run, let's say, in Nevada today.

Let's say someone who is a candidate is running as a Republican for attorney general and he runs an ad that says, "I stand with Senator Ensign and Senator Reid against Nevada becoming a nuclear wasting dump for the country. I oppose the President on this issue. I will oppose him in court as your attorney general and I will remind him that the people of Nevada do not forget."

Would that ad have to be reported within 24 hours to the Commission, Mr. Shor?

MR. SHOR: Commissioner Sandstrom, that's an ad that runs today.

VICE CHAIRMAN SANDSTROM: Yes.

MR. SHOR: And that's an ad that mentions Senators Ensign, Reid, and President Bush. Are Senator Ensign or Reid up in 2002?

VICE CHAIRMAN SANDSTROM: If they have accepted money, they would be a candidate.

MR. SHOR: Yes, but it's only a

communication that refers to--

VICE CHAIRMAN SANDSTROM: If either of them are up this year, or let's say a similar ad runs by a local candidate two years from now, would that promote, support, attack, or oppose?

MR. SHOR: Yes, it certainly would promote, support, attack, or oppose the President. I would say that I think right now, based on my recollection, Senator Reid is not up, the President is not up, and Senator Ensign is not up. So, accordingly, it would not be covered right now.

There is--as you know, it's not just a reference to a clearly identified--oh, excuse me. I'm incorrect here and I have to correct myself. The State party soft money provisions are not time-bounded and the State candidate soft money provisions under Title I are not time-bounded.

So the question is basically whether these communications promote, support, attack, or oppose the mentioned federal candidate. And while I don't remember precisely what you said, it struck me as you read it that that did, because it was--it said

"I oppose the President," and I think that that makes it a communication that does--

VICE CHAIRMAN SANDSTROM: Even though he would support his reelection? He's running as a Republican. What he opposes is the President using Nevada as the dumping ground for nuclear waste, or at least proposing that to Congress.

So even though he's a strong supporter of the President, he is attacking the President by opposing a policy and therefore is subject to 24-hour reporting to the Federal Election Commission. And if he has any corporate or labor money in his account, he would be violating the law. Is that correct?

MR. SHOR: Whatever his motives may be, I think on the face of that communication it does oppose the President and I think that it is accordingly covered by Title I which--

VICE CHAIRMAN SANDSTROM: Mr. Malbin, do you find that disturbing?

MR. MALBIN: This is not the kind of example we discussed. We never talked about State

elections, so I--

VICE CHAIRMAN SANDSTROM: Mr. McGahn, do you find that disturbing?

MR. McGAHN: It's outrageous.

VICE CHAIRMAN SANDSTROM: Let's probe it. I have another legal question, so we'll leap from Mr. Malbin out of this one, because I'm just curious about our authority.

What authority under the law do we have for punishing anyone for violation of this Act? Mr. Shor, do you know?

MR. SHOR: What authority--

VICE CHAIRMAN SANDSTROM: Yes.

MR. SHOR: --under the law do you have for punishing--

VICE CHAIRMAN SANDSTROM: Punishing anyone for a violation of the electioneering provisions.

MR. SHOR: Well, I'm not a constitutional scholar regarding, you know, the ultimate authority for the Commission to punish violators.

VICE CHAIRMAN SANDSTROM: No. This is a statutory question. Under the statute, what

authority--are you aware of any authority this Commission has for punishing anyone for a violation of this Act with respect to the electioneering message? Are there any provisions in this law--

MR. SHOR: Is there any inherent authority? I don't know, Mr. Commissioner. Is it 437(g)?

VICE CHAIRMAN SANDSTROM: There is no contribution or expenditure with respect to most electioneering messages. So under 437(g), there is no civil penalty, since they all are tied to the definition of contribution or expenditures.

This is not a surprise question. It's in our comments and our Notice of Proposed Rulemaking on which we seek comments, and it's one that has plagued me and I'm just wondering if--Mr. Shor, I guess, doesn't necessarily know.

MR. SHOR: I haven't given it any thought.

VICE CHAIRMAN SANDSTROM: Mr. McGahn, do you know of any authority we have for punishing anyone for a violation?

MR. McGAHN: Maybe I missed it, but I

think I see your point if it's not there.

VICE CHAIRMAN SANDSTROM: The point is that there is much discussion in here that there's a penalty of perjury. We don't have the ability to prosecute anyone for perjury here at the Commission. Our authority is set forth in 437(g), as Mr. Shor said, and that's all tied to the making of contributions and expenditures and reporting of these.

Since most of these groups will be neither receiving contributions nor making expenditures--and the reason I bring it up now is maybe to alert future witnesses who may be here or may be listening to this that I would personally like someone to enlighten us if they believe there is such authority because I'm having trouble identifying where that authority resides.

It would be nice to have it, and maybe this needs a technical amendment to provide it to us. But I don't see that the Commission currently has any authority to punish anyone for violation of any of these provisions.

CHAIRMAN MASON: Commissioner Smith.

COMMISSIONER SMITH: Yes. I have to come back, Mr. Shor, to a point you made that I honestly don't get. In talking with Commissioner Toner, we had put out as one alternative for an exemption under 3-A that something that would urge somebody to contact a public official about an issue without mentioning the candidate's position and without promoting, supporting, attacking, or opposing a candidate.

And you suggested that those terms may be too vague to be used, but when we had a hearing a couple months ago on soft money rulemaking, the general counsel for your group, Trevor Potter, sat here and said those terms were not vague and they needed no further explanation. And the sponsors at that time, Senator McCain, et al, wrote "The meaning of these statutory terms is clear."

Now, I understand that you might be arguing that there's a different constitutional standard under which parties operate than under which other groups operate. But what I don't

understand is how can these terms be clear to party lawyers but not clear to other lawyers.

It seems to me, I mean Mr. McGahn here represents parties, and your general counsel, Trevor Potter, in his private practice represents non-profits. And you seem to be saying that if I work for a political party and I go in to Don McGahn and I say, can we run this ad, does it promote, support, attack, or oppose a candidate, he'll know the answer. But if I go in to Trevor Potter and I say, I work for a non-profit, can we run this ad, does it promote, support, attack, or oppose a candidate, he won't know the answer.

And I'm trying to square that testimony. The only answer I can figure is that you don't think that former Commissioner Potter is as smart as Mr. McGahn, and I don't think that's really the answer that we want. I mean, I don't square this, I don't square that.

MR. SHOR: Commissioner, I have a very, very, very high estimation of Trevor Potter's intelligence and abilities.

COMMISSIONER SMITH: I'm sure you do, and I say that facetiously, but I'm serious about how do you square these two bits of testimony. We're told this is clear language and everybody can understand what it means, and today you come in and you tell us this is possibly unconstitutionally vague language and people can't tell what it means.

MR. SHOR: I feel like--I remember like a Presidential candidate was in the debate and he looked at his watch at some point. I sympathize.

Mr. Commissioner, I didn't indicate that, I don't believe, and I certainly don't believe that promote, support, attack, or oppose are vague. What I said was, and just to be very clear on this, is that the Supreme Court has required a very, very highly exacting degree of guidance that must be given to non-party, non-candidate entities, and that was made clear in the Buckley decision.

It was also made clear in the Buckley decision that a different standard as to the degree of guidance was applicable for guidance given to parties and candidates. And what I am solely

saying here is that "promote, support, attack, or oppose" runs the risk of being deemed by the Supreme Court not to meet that very, very, very, very, very high standard set forth in Buckley with respect to non-party, non-candidate entities, but that it is--

COMMISSIONER SMITH: I understand that, but the law allows parties to make ads as long as they don't promote, support, attack, oppose. So somebody has got to understand what that term means. And before we were told that people could understand that term, and now we're told that they can't understand that term, at least not enough to meet the exacting standard of the Supreme Court.

I mean, you're trying to say it's because there's a different standard. I accept there's a different standard. What I'm trying to figure out is why Don McGahn can understand those terms when he advises a party and Trevor Potter cannot understand those terms when he advises a non-profit.

MR. SHOR: I think that people who can

advise the parties can understand those terms. What I am saying, however, is the Supreme Court seems to feel that bright-line guidance must be given to non-party, non-candidate entities, and that's why this legislation, now law, contains a 60-, 30-day bright line test.

COMMISSIONER SMITH: So generally when parties come up, then, we should be pretty lenient in interpreting that phrase because I mean how else do they now what they can run or not?

MR. SHOR: I don't understand what you're--

COMMISSIONER SMITH: We seem to be saying vagueness is okay for parties. It's constitutional to give parties.

MR. SHOR: No, I didn't--

COMMISSIONER SMITH: But then my question is why do we even have that in the law.

MR. SHOR: Well, I didn't say vagueness was okay for parties, and I will repeat what I said.

COMMISSIONER SMITH: Well, I don't think

that's necessary, because I'm running out of time and I want to ask Mr. Malbin a couple questions.

Professor Malbin, you mention that there is no perfect demarkation line, and I agree there's no perfect demarkation. Here's the issue I have: Isn't your experience as a political scientist that people alter their behavior in response to the legal system and to other things that happen in campaigns, events, in other words, around them?

MR. MALBIN: Yes.

COMMISSIONER SMITH: Do you believe in sort of a static analysis? No. You say yes. Well, isn't the probability that wherever we draw the line, people are all going to then jump over to the other side of it?

MR. MALBIN: No. People will alter their behavior. Their behavior will be constrained by where the lines are and by the opportunities and the costs and benefits of various courses of behavior. Where you put a line will affect where people come out, but they will nevertheless try to achieve their interests.

Is it permissible--may I ask if I can respond to your last question?

COMMISSIONER SMITH: Yes. Well, I do have one other point I want to make before we close, so if I can have an extra 30 seconds, Mr. Chairman, after he's done.

MR. MALBIN: Okay. The Commission had proposed a regulation that was essentially the reasonable person test. No reasonable person could see this in any other way than, and that's a perfectly intelligent way of looking at it "promote, attack, support, or oppose," but not constitutionally adequate for non-party groups.

COMMISSIONER SMITH: I think both of you are missing the point of my question, which is that the words--whether it's a constitutionally viable standard or not, the words seem to be understandable to some and not to others.

MR. MALBIN: No reasonable person could interpret something in any other way.

COMMISSIONER SMITH: In any case, the other thing I just want to say, Mr. Shor, and I'm

very sincere in this, it would be very helpful to us--you know, at the end of the last time when we were running out of time, I was asking about this regulation of churches and you sort of in the end shrugged your shoulders and said "so what's your question?"

What my question really comes down to is it would be very helpful if, before the cut-off for written comments next week, perhaps your group would address do we have the authority to write exemptions that are subject to abuse, because I keep reading from the sponsors and your comments today that we could not write an exemption that creates the possibility for an abuse. That's a quote from you today.

But I can't figure out how to write an exemption for a church that does not create the possibility for an abuse. I can't figure out a possibility to write any exception that does not create a possibility for abuse.

If that is not your belief that we cannot write exceptions that create subject for abuse,

then I wish you would give us an example of how one might write an exception for this particular problem, or alternatively go ahead and put in writing, because it would be helpful, that you agree that church services, the content of church services, should be regulated if the church has a tradition of broadcasting those over the air waves. And that would be very helpful for me to get your written follow-up to that because that's--I really don't know. I keep hearing you say, yes, there might be exceptions, but you're not giving us any basis on how we're going to write them.

And I keep looking at what the sponsors say, saying any exception that's subject to abuse you have no authority to write. And I can't square all these, so I need your help on that and I would appreciate it.

CHAIRMAN MASON: I believe--here we are. Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Mr. Chairman.

Well, I want to point out that the

Commission is obviously facing some difficult decisions and line-drawing. Many of these hypotheticals that are being thrown at the panel are real-life situations.

I think the church example is a very interesting one and it probably would behoove us to try to address something like that. I think that we can do it. I think that we've got enough talent here that we can come up with something like that.

We at the Commission are, I think, exercising a fair amount of, shall we say, flexibility in interpreting the statute as written. I have expressed a lot of concern about how the Commission interpreted the statute at the soft money rulemaking phase. It seemed that we were reading the statute in a way that was undermining its application as intended by the sponsors.

Here, I think we have to be careful of doing the same thing. We don't want to interpret the statute to carve some exceptions that will allow people to basically continue to do exactly what they have been doing, contrary to the obvious

intent of the people who voted for this legislation.

One issue we haven't talked about is one of the exceptions that the statute specifically allows for, and that's anything that qualifies as an expenditure under the existing Federal Election Campaign Act. The Commission, I think, is exploring whether we should basically say that any time a registered federal political committee pays for something that would otherwise qualify as an electioneering communication and that that payment would qualify as an expenditure, we aren't going to be treating that as an electioneering communication that would trigger all of the separate and distinct reporting requirements for an electioneering communication.

That seems to work for those kinds of currently reporting entities that report their expenditures to us. There is, however, a large body of organizations out there that are claiming they are not federal political committees. They say sometimes "we're a registered (c)(4) tax-exempt

organization." Sometimes, they are claiming that they are a 527 organization, which is a political organization under the tax code provisions that doesn't have to register and report to the Federal Election Commission, because in their analysis they haven't been putting out express advocacy communications.

Well, my question is as to those kinds of entities that aren't reporting to the Federal Election Commission and aren't disclosing their payments for these kinds of ads as expenditures, do we have some problem whereby those organizations are now going to claim, oh, gosh, we are willing to treat this as an expenditure, but we still won't have to register and report as a federal political committee because our major purpose isn't influencing elections?

And they're going to basically say, we'll be happy to treat this as an expenditure. It won't be the major purpose of our disbursement activity. Therefore, we can continue to avoid, I guess, disclosure of any of our activities.

So the question have is, is there a way for us to reconcile these approaches so that we can, in fact, for those organizations that are not reporting anywhere under the theory they are not registered federal political committees--can we reach that kind of communication under this new electioneering communication law?

Mr. Shor?

MR. SHOR: Commissioner Thomas, I think you raise an excellent point, and I remember that you raised this when the Commission approved the draft rules. And there were two alternatives that the Commission proposed and basically I think what we supported was a little bit of an amalgamation of the two which said that, yes, it is expenditures and independent expenditures which are excepted from the definition of an electioneering communication, but what we are talking about here are expenditures, hard money expenditures and independent expenditures that are subject to pre-existing FECA reporting requirements.

What that would do would be avoid the

scenario where you had a 527 that is not a federal political committee spending money on electioneering communications and certainly avoiding disclosure requirements by characterizing those as expenditures, and yet at the same time avoiding political committee status because of the "major purpose" test.

COMMISSIONER THOMAS: Did either of the other of you have any comment on that?

[No response.]

COMMISSIONER THOMAS: How am I doing on my time?

CHAIRMAN MASON: You've got one minute.

COMMISSIONER THOMAS: One minute. Well, I'll just leave it at that point. I want to again thank the panel. This has been very helpful, very informative. We have a lot of debate to go.

I guess I would close. It was noted earlier that I had outlandishly, I guess, suggested that the statute didn't provide for targeting for Presidential candidates. I would just like to read into the record the language of the statute. It

says that electioneering communications means "a broadcast, cable, or satellite communication which refers to a clearly identified candidate for federal office, is made within 60 days before a general or 30 days before a primary, and in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."

Poor, simple me. I thought that that meant that targeting did not apply to Presidential candidates. Just to show that the Commission is willing to sort of work with the statute and try to give it a more common-sense reading, we are coming up with some interpretation in this rulemaking process that probably will go down the road of saying that even for Presidential ads in the primary phase, we are going to incorporate, in essence, a targeting test.

So I just want to get that out there on the record. It's not that it's such an outlandish idea. Most of the commenters are suggesting that indeed we should adopt a targeting concept in the

Presidential primary area as well. I'm not saying it's a bad idea. All I was saying was, gee, reading that statute, you never would have guessed it.

Thank you.

CHAIRMAN MASON: Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr. Chairman.

Following up on Commissioner Thomas' questions about reporting--and I want to thank everybody for being here. It was an excellent panel. And, Mr. Shor, you have certainly had a spirited morning here with us, and thank you, also.

Starting with Mr. Shor--as usual--is it fair to say that in terms of federal candidates you would take the position that they should not have to report electioneering communications because they only use hard dollars and they're reporting already?

MR. SHOR: I would take that--I would just clarify my position. The Commission in its commentary indicated that hard money expenditures

from--I think they're called authorized committees of federal candidates, are by definition expenditures. And obviously they are hard money; they are subject to pre-existing FECA reporting requirements and they are, by definition, expenditures. And in that case, they fall squarely under that exception.

COMMISSIONER TONER: So that would be yes, they would have to report electioneering communications?

MR. SHOR: Right. They wouldn't be subject to the Title II reporting requirements because these are expenditures.

COMMISSIONER TONER: Would you take that same position with regard to national parties, given that they no longer will be able to raise or spend soft money?

MR. SHOR: If a national party undertakes a hard money expenditure or independent expenditure that is subject to pre-existing FECA reporting requirements, then that would fall under the exception.

COMMISSIONER TONER: Would the same position be true with federal PACs, because again they would be making expenditures on the hard-dollar side?

MR. SHOR: If a federal PAC was making a hard money expenditure or independent expenditure, and the scope of that definition, subject to pre-existing FECA reporting requirements, then I think it would fall under this exemption and it would not constitute an electioneering communication.

COMMISSIONER TONER: And the same would be true of State parties when they ran advertisements within the federal election activity rubric where they have to use a hundred percent federal dollars for that?

MR. SHOR: Well, yes. I mean, I think that if a State party--I don't have to repeat it again. I mean, I think you know my position.

COMMISSIONER TONER: So it seems like the big issue is what we're going to do with other entities that are not otherwise reporting with us and are not using a hundred percent federal

dollars. That's really the gist of it.

Does the rest of the panel concur with that analysis? Mr. Malbin, do you concur?

MR. MALBIN: I haven't worked through this.

COMMISSIONER TONER: You're fortunate enough not to be involved in this minutia.

Mr. McGahn, do you concur with that?

MR. McGAHN: I understand what you're saying and I agree with your point that that's really the issue.

COMMISSIONER TONER: Okay. I just wanted to follow up on two things. Mr. Shor, you noted in your testimony the idea of direction or control; you know, the statutory issue in terms of individuals who exercise direction or control over entities that make electioneering communications and the obligation to disclose them.

MR. SHOR: Yes, sir.

COMMISSIONER TONER: Is it your position that we should require disclosure of anyone who has any direction or control over the activities of the

organization, or that we should limit that disclosure to individuals who have input into particular communications?

MR. SHOR: Again, without subscribing to the "any person" issue, I think the statute, if I'm correct--and unfortunately I don't have it in front of me--seems to speak pretty clearly that what it's looking for is for information regarding who is directing or controlling the entity making the communication, as opposed to persons particularly involved in the crafting, dissemination, et cetera, of the electioneering communication.

COMMISSIONER TONER: Mr. McGahn, what is your view on that?

MR. McGAHN: Could you repeat the question? I'm sorry.

COMMISSIONER TONER: Yes. The issue of direction or control, individuals who have direction or control over the activities of an organization that makes an electioneering communication--the statute talks about the need to disclose that and what we're confronting is should

we require a disclosure of anyone who has input into the activities of the organization very generally, or should we limit it to individuals who have input into the communications, the electioneering communications, which would be a narrower sub-set of issues.

MR. McGAHN: Having not thought it through and shooting from the hip, I would say the more narrow construction would make more sense, because merely because you may be in control in some broader sense, that doesn't necessarily mean you have anything to do with the particular communication.

And what we're really getting at, to the extent we're getting at anything, is the actual communications that are being made. So I would--

COMMISSIONER TONER: You represent a large organization. How difficult would it be for you to identify all the people who have input into the NRCC?

MR. McGAHN: It would be impossible if you read it in the broadest sense.

COMMISSIONER TONER: And how many people on a day-to-day basis believe they have direction or control over the NRCC?

[Laughter.]

CHAIRMAN MASON: Two hundred and thirteen.

MR. McGAHN: Oh, quite a few, at least probably--well, every Republican member. Probably some of the Democrats think they have a say, as well. You know, I'm sure there are editorial boards that think they have a say in what we do, and don't forget the folks who call up from--who give us $25 and want to put in their proverbial two cents. So it's an infinite number of people who, if you would ask them, do you have any sort of say in what goes on at the national party--oh, absolutely, I'm dialed in, I know what's going on.

COMMISSIONER TONER: And they would say so without hesitation?

MR. McGAHN: Without hesitation, yes.

COMMISSIONER TONER: And real quickly because I have about a minute left, Mr. Shor, we also have an issue in terms of contributor

liability in terms of individuals who contribute funds to organizations on the understanding that they wouldn't be used for electioneering communications; their funds wouldn't be used for electioneering communications. And the organization ends up running electioneering communications anyway. And we actually sought comment on this issue, which is a fairly significant issue for people.

Do you think we should not hold liable contributors who contribute to organizations when they don't intend those funds to be used for electioneering communications?

MR. SHOR: I would like to have a better understanding of the example in which this would come up, you know. When I read the question about contributor liability in the comments, I thought it referred to basically under what circumstances would a corporation or a labor union--if it transferred its treasury funds to another, let's say, unincorporated organization and that unincorporated proceeded, in violation of law, to

spend those funds on an electioñeering communication, under what circumstances would the corporation or union itself incur liability.

And, again, the Commission elaborated a purpose test and we weighed in on how to assess purpose. And I wasn't basically thinking about the issue of individual contributions, and so I'm not prepared. I would like to think that through a little bit.

In many cases, I would think that in certain cases if an individual provided funds to an organization and those funds were kept separately and then those funds were spent on an electioneering communication, I don't think there would necessarily be a problem.

COMMISSIONER TONER: So at the very least, it's an issue we should study and carefully look at?

MR. SHOR: Oh, yes, absolutely, I think it's an issue that requires scrutiny by the Commission. Again, as I understood this in the commentary, I understood it to be a question for

comment about what the Commission had laid out in terms of when a corporation or union that made a disbursement basically to another organization that ultimately uses the corporate or labor funds for electioneering communications--under what circumstances would the corporation or union be ultimately liable, the original one? But maybe I misunderstood, so I haven't really considered this.

COMMISSIONER TONER: Thank you.

CHAIRMAN MASON: Commissioner McDonald.

COMMISSIONER McDONALD: Mr. Chairman, thank you. First of all, let me also thank the panel for appearing. I don't think my mother would ever forgive me if I didn't thank the panel members, and I appreciate you all being here and it is a very spirited discussion and one that I'm glad we're having.

Mr. Shor, first of all, let me assure you that you have already undergone more scrutiny than any of us have done in our confirmation hearings and you've held up very well. I don't know you, but I'm impressed that you have held up under fire.

MR. SHOR: Thank you.

COMMISSIONER McDONALD: There are a couple of matters that I think it's just really important to have on the record. We just simply can't get away from this. Commissioner Thomas alluded to them in the opening round of his remarks, which is our responsibility as Commissioners and what our assignment is.

First of all, we cannot cover every scenario, and we all know that. And it is popular to create a parade of horribles so that it looks like the Commission is interested in doing outlandish things.

I'm a little bit like my friend, Mr. McGahn. He says here that they would have made more comments, but the NRCC has limited resources.

We would be happy to take just a small percentage of those for our budget, but we're in a similar posture as my friend.

Let's be clear. We're not only not going to be monitoring Jay Leno and the church pews. We have enough trouble as it is. I've been here for

over 20 years. Our problem isn't that we have a great deal of staff to run around and monitor speech. That's just simply something that has not happened.

So I think the danger is not in relationship to that.

When the Chairman and I were in Congressman Bob Ney's office about a year ago discussing the budget, one of the things that he said to this, and I hope the Chairman recalls it--I not only recall it; I wrote it down as soon as I returned--was his concern about unidentified groups attacking him in his district.

Now, the interesting thing is that this law is bipartisan in nature in terms of how it affects the public and how it affects candidates. And there's always this debate, as Commissioner Thomas, I think, alluded to earlier on, about the key component, whether we're using the Bill Yellowtail ad or whatever we are doing.

The Commission is going to be faced with some difficult choices. We will not be able to

answer all the questions today, and we've put on the panel pretty well and that's good. I think that's healthy, but everybody has neglected to mention we have an advisory opinion process.

And what happened when the law was first constituted some years ago was there were questions like come before us today and people have to ask to determine where those lines should be drawn. Professor Malbin indicated that he thought line-drawing was helpful. History seems to indicate he's probably right. Whether it's in the area of civil rights, age discrimination, sex discrimination, women's right to vote, the list is endless in terms of what the country has done in relationship to areas that it felt like that there should be action taken.

I have no idea, and don't under any circumstance pretend to know the constitutionality. This will all be resolved, I think, in the court process. But I must say I appreciate the panel. I thought the Vice Chairman's examples were very good in relationship to the kind of difficult problem we

may have in the scenario he has outlined and the example in relationship to the question about Nevada.

Those are questions that hopefully outside parties will come to us and ask about. They are certainly well-schooled. This panel is an example of people who are very well-schooled. It is not newsworthy that people who have spent a lot of time in this area have differences of opinion. That doesn't mean that one side or the other suddenly has the right answer. We don't know.

But we're under the obligation, it seems like to me, to issue advisory opinions. The law grows each and every day, and because we have a new, massive change in the law, I'm hopeful that people will avail themselves of the advisory opinion process.

But it's important to state--and I just couldn't let it pass because there's too much at stake in a hearing like this to infer that the Commission is going to either want to or ever has gone out and rampantly charged out to dissuade free

speech.

One of the ways you get people to speak in our country is tell them they can't. I'm telling you, you talk about a backlash. It would be something that would be unprecedented. So we have some difficult lines here that we're going to have to come to grips with, our panel members, all of them very, very distinguished, one of them poorer than I had anticipated, but nevertheless very distinguished.

And I am of the opinion that we've had a real good exchange this morning and I appreciate it very much. I do again very seriously want to apologize to the panel because in going over their remarks, they were all very thoughtful and they represent the kinds of problems that we're going to have to come to grips with.

But I thank you again. I do hope people understand that we're not going to be able to resolve all these issues. We're not going to resolve them when we issue the final rules. The Commission make-up will change over time. The

theory about what constitutes the law will change, and the courts, of course, may change all of it as well.

But, again, I thank all of you for coming. And picking up on a point Commissioner Smith made, certainly any other comments you'd like to make we would like to have.

Thank you.

CHAIRMAN MASON: Thank you.

Don and/or Michael, if you want to respond, I wanted to go back to this PSA question that I was bothering Glen about before, but it really has a purpose to it, and that is try and explore--I think the concept of distinguishing between paid advertising and regular programming is perhaps a useful one.

One of the problems we have is that's not quite the way the statute is set up. The statute talks about certain news programming, and so on. And interestingly it says "distributed through the facilities of the broadcasting station," you know, and we actually have at least one court opinion

that comments on that.

But the sort of question I was getting at is whether it would be reasonable on our part to make a distinction based on whose decision it is to broadcast or air the ad, so that, in essence, if it's the broadcasting station's decision to broadcast, let's say, a documentary, then we're not really concerned about who made the documentary, who may have paid for it and the fact that a candidate appears, or likewise with a PSA.

In other words, might that be a way to sort of, if you will, put into appropriate regulatory language this distinction between paid and unpaid?

Bob, Michael, any thoughts?

MR. McGAHN: I'm trying to recall the example--I'm just trying to think the example you used was the public service announcement that was produced outside of the 30 or 60--

CHAIRMAN MASON: Which was made by a non-profit corporation and distributed.

MR. McGAHN: Right, and the station airs

it.

CHAIRMAN MASON: And the station airs it, and my question really was who has made the disbursement when the station decides to air it, and what I was suggesting is--

MR. McGAHN: You certainly couldn't come back and blame the people who produced the ad for the fact that the station aired it within the brown-out, black-out, no-fly zone time of 30 or 60 days.

So to the extent that we're going down that road of exceptions and exemptions and what not, I think it would be perfectly reasonable to concern yourself with who actually is in the decisionmaking seat.

MR. MALBIN: I don't think that works, with all due respect, Mr. Chairman, because--

CHAIRMAN MASON: I'm sorry, Michael. I'm not hearing you.

MR. MALBIN: I don't think that works because I think--again, I may be wrong, but I think that stations in general have the discretion to

accept or reject ads.

CHAIRMAN MASON: Except for campaign ads, yes, actually.

MR. MALBIN: Right, right, but we're not talking about campaign ads. So that distinction won't cut it, I don't think; that is, who has the decision authority ultimately--I mean, it really is first we're going to get who pays. The decision authority is the station's, except in certain rare cases.

CHAIRMAN MASON: But if no one pays or, in essence, the station takes it, you know, for free, what I was suggesting is there's no disbursement being made and therefore nothing to regulate, unlike the main statute where we're working with the concept of anything of value being a contribution. Here, we have a different legal term; we have "disbursement." And if there's no money changing hands, I'm suggesting there may be no disbursement to regulate.

MR. MALBIN: Then your definition is turning on the disbursement, really, which is what

I was suggesting earlier.

I do want to say in terms of what is in the statute, if you were to grow an exemption out, which means you're looking at programming--that is to say the law covers everything except the following--that is a different logical status than from saying we add a new definition on or a new requirement on, which is the law will only cover paid ads.

So the exemption in some way is easier if you're doing a negative than a double negative.

I'm sorry. Having said that--I'm sorry. I'm going to pass. If I can come back to this again, I had another--

CHAIRMAN MASON: That's fine. I want to make a comment myself on another subject, and it goes back to something that Commissioner Smith was asking about and that's this vagueness question.

Just to make a note, my concern--and, Glen, it goes somewhat to the Supreme Court in Buckley saying, well, gee, campaigns and parties are inherently campaign-related. And I understand

that, and clearly there are some different standards that can be applied.

The problem we face is that when we take that logic which applies fairly easily to, say, a federal campaign and we transfer it to a State campaign, as the Vice Chairman was suggesting, we start to have some problems.

Yesterday, we were sitting with an enforcement matter involving county political parties and one of the problems we were, you know, dealing with was, well, you know, these county parties have part-time leadership, no legal advice, you know, not to speak of, the fancy Washington attorneys.

And so, you know, in the world as we apply this that is simply sort of saying, well, gee, the court has said if you're a political party, you kind of fall into a different analytical category, doesn't quite get us there when we're moving out of the federal arena and the national party arena, and even the State party arena, down to local candidates.

We've also had cases with, for instance, the coat-tail exemption, where local candidates are very anxious to identify themselves with their party's Presidential nominee, and the Act sets up ways they can do that. But we're now entering a new regulatory regime where we're saying, well, they still may be able to do that, but they might have to pay for it with hard money. And getting the local candidate for the State legislature to comprehend that and understand what the rules are may be somewhat difficult.

I'm not asking any of you for a response, but just an observation about our--

MR. SHOR: I hope you're not suggesting that I'm a fancy Washington attorney. My mother would like me to be one, but I know I've disappointed her.

CHAIRMAN MASON: Commissioner McDonald.

COMMISSIONER McDONALD: Now, does that help them or hurt them to have this kind of representation?

CHAIRMAN MASON: Well, I don't know.

Larry Norton.

MR. NORTON: Thank you, Mr. Chairman. I just wanted to briefly touch on one point that follows up a bit on a point that Commissioner Smith was making earlier.

As you know, when we were promulgating soft money regulations, we were faced with the question in connection with defining federal election activity whether we should attempt to define "promote, support, attack, or oppose," and we were advised by, I think, the Campaign and Media Legal Center and others, including the sponsors, that we shouldn't do that then.

Now, of course, we've got the same term cropping up in the alternative definition and the advice we're getting is the same. And we have even a third shot at it if we want to try to define it, and that is with respect to crafting exceptions.

And I ask you about how we should handle that, in part, based upon the suggestion Commissioner McDonald made that we're likely to get advisory opinion requests, regardless of what

exceptions we craft that will come to us either through an advisory opinion or in the enforcement process.

And the question we'll be faced with is, well, we have a real-world example that seems to satisfy the exception we've crafted, but one could argue that at the same time it promotes, supports, attacks, or opposes a candidate for office.

And so my question is, with this third opportunity, should we still defer from attempting to define for ourselves and define for purposes of the regulation what the term "promote, support, attack, or oppose" means so we can apply these exceptions to real-world examples that come before us.

MR. SHOR: I don't think we're calling here for an overall definition of "promote, support, attack, oppose." What we anticipate and may be acceptable in certain circumstances are exceptions which don't necessarily contain an overall definition of "promote, support, attack, or oppose," but apply those terms in particular

contexts to permit certain--to exempt from the definition of electioneering communications certain types of communications that do not, in fact, promote, support, attack, or oppose a federal candidate.

MR. NORTON: That's all I have, Mr. Chairman. I want to thank the panel, too.

CHAIRMAN MASON: Jim Pehrkon.

MR. PEHRKON: Mr. Chairman, I have no additional questions. Thank you.

CHAIRMAN MASON: That leaves us finishing a whole minute early.

[Laughter.]

CHAIRMAN MASON: I also want to thank the panel, and in particular Mr. Shor. Having moved from a staff job into other positions myself, welcome to the club. And as Commissioner McDonald noted, you've held up quite well and we do appreciate your views and the views of all the panelists.

We will be in recess until 1:30.

[Whereupon, at 12:00 p.m., the proceedings

were recessed, to reconvene at 1:30 p.m., this same day.]

AFTERNOON SESSION

CHAIRMAN MASON: The special meeting of the Federal Election Commission for August 28, 2002 will reconvene. This is our public hearing on electioneering communications, round two here in the afternoon.

And we're going to have two panels this afternoon, each of which is going to have two panelists, and so we're going to run them at an hour each. We will give the panelists five minutes to make an opening statement and then turn to questions from Commissioners, General Counsel, and Staff Director for approximately five minutes each.

My two panelists this afternoon are probably familiar with our light system. What my card tells me is different than what appears to be happening, but I think you'll get a yellow light at a minimum when you have about one minute left to go. And if you would attempt to stay with us on the time, that will help keep us on schedule.

This panel is a particular delight for me. I have Robert Alt, from the Claremont Institute,

and Robert, I believe, is the only person who has ever worked for me more than one time. Robert worked for me at the Heritage Foundation and then I prevailed upon him last year to come back and work for me here at the Commission during the summer, and so welcome, Robert. We're delighted to have you.

Heidi Abegg, many of my colleagues know, is the spouse of my former executive assistant and I'm particularly delighted to have her, too. And so Heidi is here today representing the American Taxpayer Alliance.

And we've set up the panel in alphabetical order. So, Mr. Alt, you will go second--unusual circumstance for you, I'm sure.

Heidi, the floor is yours.

MS. ABEGG: Thank you, Mr. Chairman, and Mr. Vice Chairman and Members of the Commission.

Is this picking up?

CHAIRMAN MASON: You pull that microphone, the long-necked one, closer--there you go.

MS. ABEGG: I appreciate the opportunity

to testify today on behalf of the American Taxpayer Alliance. As noted in ATA's written comments, ATA is a Section 501(c)(4) organization dedicated to government reform through grass-roots organization and public education and discussion of the issues.

One way in which ATA lobbies, educates, and discusses issues is through the use of television and radio ads. ATA frequently takes positions on issues that generate strong and often controversial and adverse reactions from the government and the public.

Indeed, ATA is currently being sued in California state court to force disclosure of its donors solely because of its critical views on Governor Davis' handling of the energy problem in California.

ATA and its donors highly value the ability to contribute to an organization that espouses positions and advocates change on controversial issues, while remaining free from disclosure and the attendant risk of threats, harassment, and reprisal from those who disagree

with its position.

ATA strongly believes that because the majority of the Bipartisan Campaign Reform Act is unconstitutional, regulations cannot be adopted that will not be destructive of citizens' right to participate in the political process and therefore able to survive constitutional scrutiny.

Nevertheless, if the Commission believes that it has the responsibility, irrespective of the constitutionality of the Act, to adopt regulations, ATA would urge the Commission to adopt regulations that minimize infringements upon, and respects and protects the rights or privacy, freedom association, and freedom of speech to the greatest extent possible.

To attempt to implement regulations that are as consistent with the First Amendment as possible is not, as some have argued, to create loopholes. The First Amendment is not a loophole.

Furthermore, the legislative history clearly demonstrates that Congress itself did not intend to limit non-profits' First Amendment rights

to lobby, both direct and grass-roots, on legislation, or more generally to change public opinion on an issue.

Therefore, to the extent possible, the Commission must craft exceptions which clearly and unambiguously permit this type of speech. In implementing regulations, the Commission should not err on the side of over-breadth and consequently restrict First Amendment rights in an attempt to avoid being labeled a hostile FEC that undermines the law.

Therefore, first and foremost, the Commission needs to exercise the discretion given to it by Congress in Section 434 and adopt constructions and exceptions which permit the greatest amount of speech. In doing so, the Commission should use clear and unambiguous language that avoids placing the power in the hands of government bureaucrats to arbitrarily decide what an ad's true purpose is.

Is it an issue ad or it is a so-called sham issue ad because it promotes, supports,

attacks, or opposes a candidate? To avoid rendering any exceptions useless, the Commission must also define the vague terms used in Section 431, namely "promote, support, attack, or oppose."

ATA submits that there are at least three principles that the Commission should have in mind when promulgating final regulations.

One, non-profit issue advocacy organizations strongly and vehemently disagree with allegations that the majority of issue ads broadcast 30 and 60 days before an election are so-called sham issue ads.

As elucidated in other comments, the studies cited in support of this allegation have serious methodology problems. Therefore, ATA cautions the Commission not to accept these studies as definitive proof that there is no over-breadth problem.

Two: ATA would like to stress that commenting or attacking ideas or issues is not the same thing as promoting or attacking a candidate. Issues and candidates are not so intertwined that

an attack on one, per se, becomes an attack on the other. The Commission should draft exceptions that permit non-profits to comment or lobby on the issues of the day.

Three: Although the task of creating exceptions that are least hostile to the First Amendment while remaining consistent with the Act is admittedly a difficult, and ATA submits an impossible one, the Commission should not fail to exercise its discretion and instead simply say "form a PAC." This would put many (c)(4)'s between a rock and a hard place.

From a tax standpoint, it is not necessarily easy for a (c)(4) to form a 527 PAC that will be exempt from tax to engage in the type of communications that the organization could ordinarily do were it not for the 30- or 60-day ban.

For example, under the Internal Revenue Code, a PAC that lobbies substantially can fail to qualify as a 527 political organization, and a PAC that lobbies to any extent can have taxable income

as a result of failing the segregated fund requirement that the fund be used solely for an exempt function.

I see my time is up.

CHAIRMAN MASON: Mr. Alt.

MR. ALT: Thank you, Mr. Chairman and Members of the Commission. I'd like to begin by thanking the Commission for its hard work in passing these--putting out this proposed rulemaking and enacting the former regulations. Anyone who was here during the last set when you all went to, what was it, midnight, I recall, on one evening, couldn't question the dedication.

Notwithstanding this, of course, those regulations were met by the press and by the sponsors with all the warmth of an SEC investigator at Martha Stewart's door. So I would like to begin with just a few words with regard to the process of putting this out and how the Commission should view the external comments that they're receiving.

First of all, there have been a lot of statements made about the spirit of BCRA, or the

McCain-Feingold bill, and what impact that should have on the issuing of exceptions or regulations. I would put forward that the guiding principle in terms of issuing regulations should be to follow the plain language of the text.

If the plain language permits an exception, that should be done. If not, it shouldn't. Simply stating, for instance, that a particular exception might permit more soft money or more money generally into the political process should not be sufficient to answer the question, particularly where that exception expands free speech rights.

I would move that in such a case where it's consistent with the language of the statute to permit more money into a particular area or, more accurately, to permit speech, that that should be done.

Second, with regard to the comments that have been made by sponsors and proponents to the regulations, I would put forward that it's a general theory of legislative history and of

legislative intent and interpretation that sponsors' statements or statements of legislators that are issued after the enactment of legislation are given very little probative weight.

They are essentially given no more weight than any other expert that might come before this Commission and testify. So to say that Mr. McCain, Mr. Feingold, or any of the other sponsors have said that they believe that the statute says thus and such is simply to say that that is their personal belief and carries no more weight. Obviously, they're not able to speak for the entire Congress.

A case in point is a recent press story about closed-session meetings with Hilary Clinton and other Democrats about what to do about the last set of regulations, in which she objected to a particular interpretation of Mr. Feingold. It's quite obvious that Members of Congress voted for this Act for different reasons and had different interpretations of what it means. So no one should be given exclusive weight on that particular

question.

Getting to the particular regulations at hand, I would like to suggest a couple of things. First of all, you have suggested that you would like to pass on the alternative definition of electioneering communication at this time.

I would suggest that to the extent that it's practical that you should actually go ahead and issue a regulation on that at this time, in part because of the litigation posture of those who are seeking to uphold the law. They have alleged mootness and some other issues which might potentially be involved.

It's possible that a court could look to the fact that regulations haven't been issued and that could delay some of the judicial proceedings, as well as it might create undue administrative expense and another hearing on that particular matter. So I would say, for administrative and judicial efficiency, it would be good to issue a regulation on that at this time, as well.

Second of all, while I certainly do

commend you for the exceptions that you've made particularly for MCFL-type corporations, I fear that the Wellstone amendment seems to cover these fairly plainly, and to the extent that it does, this Commission cannot issue a regulation which contradicts the plain language of the statute.

Nonetheless, of course, that regulation or that particular provision clearly violates MCFL. I would recommend that, due to that, this Commission should exercise its duty to interpret the Constitution by not enforcing that provision against MCFL-type corporations.

I see my time is quickly expiring. I just wanted to make one last point with regard to several pieces of the legislation mention ads which attack, oppose, or support particular individuals. I'd like to just bring the Commission's attention to some statements that were made by Senator McCain when an amendment was offered by Senator Bingaman to offer free air time for those who--for candidates who had ads opposing or attacking them aired.

He said, "First of all, who would determine if an ad was indeed a negative ad? Is there going to be a censorship board? Is there going to be a group of Americans who say, okay, watch all of these ads and see which one is negative and which one is not? Is an ad that says 'call your Senator,' which I have seen many times, 'and ask him or her to save Social Security' a negative ad or a positive ad?" I couldn't say it better myself. The term is vague, the term is over-broad, and the term should not be used to limit speech.

Thank you.

CHAIRMAN MASON: Commissioner Smith is first in the question order this afternoon.

COMMISSIONER SMITH: We're going to begin with five minutes, Mr. Chairman?

CHAIRMAN MASON: Five minutes.

COMMISSIONER SMITH: That's not a lot of time, so we have to get right down to work and skip the pleasantries.

By the way, Mr. Chairman, I think you have

to recuse yourself from this panel, don't you?

[Laughter.]

COMMISSIONER SMITH: I'll try to be quick. It's not a lot of time.

Ms. Abegg, I wanted your opinion. I don't know if you've had a chance to read the other testimony that has been submitted. Of course, it's fairly voluminous, but let me--I don't know if you've seen it. One proposed exemption to us that was suggested wrote, "None of the exemptions we've proposed would work, but this would work." And I want to know what you think, if this would allow the kind of groups you work with to do what they need to do.

An ad would not be an electioneering communication if it met all of the following criteria: the communication concerns only a Legislative or Executive Branch matter; the communication's only reference to a clearly identified federal candidate is a statement urging the public to contact the candidate and ask that he or she take a particular position on the

Legislative or Executive Branch matter; the communication refers to the candidate only by the use of the term "your Congressman," "your Senator," "your Member of Congress," or similar reference, and does not include the name or likeness of the candidate in any form, including as part of an Internet address; and the communication contains no reference to any political party; and, further, the communication cannot contain any reference to the candidate's record or position on any issue, or the candidate's character, qualifications, or fitness for office, or the candidate's election or candidacy.

If we were to draft an exemption that narrow, do you think that that would accomplish the kinds of things that you've indicated to us we should be looking to do?

MS. ABEGG: It's a start, but I don't think it totally gets us there. For one, just by stating "your Congressman," sometimes non-profits lobby on bills that are pending before a committee. So if you just say "your Congressman," that doesn't

tell you which Congressman is on that committee that's considering the bill.

Secondly, not being able to comment on the Member's position--part of the definition of lobbying under the Internal Revenue Code requires you to encourage the recipient to take action, and part of that is identifying the legislator who is opposing the bill or is undecided, or the Representative that will consider the bill. So it's difficult to encourage the recipient to take action without identifying the legislator who's going to be taking action on that bill.

COMMISSIONER SMITH: Mr. Alt, I want to ask you a quick question. The sponsors of the bill have urged us in the prior rulemaking to include in our regulations the Internet. They want us to regulate the Internet. And again in this rulemaking, they have urged us to regulate the Internet, even though the statute makes no reference to the Internet either as a form of public communication or as a form of electioneering communication.

I take it from your written comments your view is that it would be wise for the Commission to exempt the Internet.

MR. ALT: I would, although I would generally say that even if you didn't, the plain language of the statute just simply doesn't cover it. Congress, when they wanted to include issues about the Internet, did so in this bill. The Internet appears with regard to posting of information, requirements upon the Federal Election Commission.

And yet when it comes to the list of broadcasting, and so forth, they used a list--broadcasting, cable, satellite. They were quite clearly capable of putting forward what they meant with some detail and specificity, and yet they excluded Internet.

I think it would be going perhaps beyond the statute. The duty of this Commission is to carry out the statute. It would be perhaps beyond the authority of this Commission, pursuant to the statute, to issue a regulation which would include

the Internet.

COMMISSIONER SMITH: So you would say even if we did not specifically exempt the Internet, what Senator McCain and Senator Feingold and Congressman Shays and Congressman Meehan want to do is prohibited by the statute. They didn't put it in and we don't have the authority to regulate that.

MR. ALT: I would say that standard canons of interpretation would say that it's not covered and this would be an expansion of the bill. This would be essentially trying to use this Commission to enact something which is not in BCRA, and that would be arguably beyond the scope of this Commission's authority under BCRA, yes.

COMMISSIONER SMITH: Thank you. I see my time is up, so I'll waive my last few sentences.

CHAIRMAN MASON: Commissioner McDonald.

COMMISSIONER McDONALD: Mr. Chairman, thank you.

I welcome both of you. Heidi, I'll take back the things I've said about John. Now, has he

taken you to the rock? That's the first thing I want to know.

MS. ABEGG: We've been there once.

COMMISSIONER McDONALD: All right. I just want to be sure I've cleared this up before we go any further.

Welcome to both of you. Well, Mr. Alt, let me just ask you first, maybe to follow up on that last point by Commissioner Smith, a couple of things that come to mind.

I'm not sure. Am I to take the McCain remarks as something I should follow or I shouldn't follow?

MR. ALT: I simply offer them as illustration that even the proponents of the statute--as I said, you know, there are statements. In this case, it was a floor statement. So, generally speaking, if you're going to look to legislative intent, it's accorded some weight, more so than, for instance, a post-enactment statement would be given.

But it certainly does point out, I think,

in vivid detail the problems associated with what does it mean to oppose. The term is quite frankly so broad, it would seem to capture everything. I think it's quite a problem for the Commission in terms of trying to come up--BCRA permits exceptions so long as they're compliant with another provision of the Code which details, you know, the ads can't oppose or support a particular candidate. What precisely does that mean?

To be quite frank, as he said, you know, the non-sham issue ads, even those that would seem to be covered under the Buying Time 2000, arguably could be said to promote or oppose. It's clear that this would have a chilling effect on speech.

I mean, it basically goes back to the standard sort of rule standards debate that you have in law schools across the country as to how it is that you enforce a particular provision. It's clear that they've tried to implement sort of a broad, vague standard.

The problem is where you've got a First Amendment right at issue, the effect of having a

broad, vague standard is that unless you want to potentially violate the law, you need to take a giant step backwards and make sure that you don't sort of do anything that might--

COMMISSIONER McDONALD: Let me comment on a couple of observations you've made both here and in relationship to another aspect of the process for just a second.

You know, the Constitution, according to a number of constitutional scholars--the strength is that it is vague in its most important places. And I was thinking when you were commenting on the Internet as an example not set out in the law--and you've quoted on several occasions other substantial Americans involved in the constitutional process which I think everyone would admire, but I don't think they--if the foundation is the Constitution, which it certainly should be, as a practical matter there are numerous things, as you indicate, that you can't always anticipate that we may have a responsibility over. And I think maybe that's where the issue will finally be worked

out in terms of what this Commission can or can't do.

I don't want to sit there and not get down to--one other quick thing in relationship to that. Are you of the opinion that--you cite one example where there is not a definition and you cite another example in relationship to the Internet not being mentioned.

Because all of these matters are going to be utilized and taken up in the political process, and because it is our responsibility to regulate in these areas, how would you kind of differentiate there? Again, would you want a particular cite for the Internet itself, as an example?

MR. ALT: In terms of, if I understand your question--

COMMISSIONER McDONALD: We know it's going to be in the political process and used on a fairly substantial basis. According to every report I've read, it's the fastest growing medium there is, other than maybe the telephone, which is part and parcel of it in some respects.

Do you think that we should ignore it on the basis that it was not cited in the statute, given your other propensity about the statute in general?

MR. ALT: I would offer a couple of reasons. One, it's not cited in the statute. Two, rather than simply comparing the statute to the Constitution in terms of vagueness, on this particular point it's relatively precise. The enumeration of a list would tend to bring in canons such as the inclusion of one thing excludes another--sort of a common way that judges look at issues such as this which I think is actually useful when examining that particular question.

But, finally, I think, you know, if you take a step back and think, you know, under what authority does Congress have the ability to regulate political speech, under Buckley it's only in cases where there's corruption or the appearance of corruption. And this generally deals with the expenditures or the aggregation of funds.

With the Internet, it's quite clear that

Congress may not have intended to actually reach it simply because a lot of Internet communication is, quite frankly, cheap. A mass mailing in real space may cost thousands of dollars. A mass mailing in cyberspace may cost almost nothing. At that point, regulating the second is actually far more simply a regulation of speech without any particular basis, you know, in recognized law for doing so.

So I think in addition to the fact that the statute seems pretty clear in excluding it in a way that would seem to actually even perhaps excise this Commission's authority to pass upon it, as a matter of legal policy it's questionable whether or not this is something that should be regulated, given the First Amendment concerns.

COMMISSIONER McDONALD: One real quick question of Heidi because I think my time is up.

Heidi, let me just ask, on page 4, under the reach and the definition of electioneering communication, you talk about the 30-day and 60-day proviso. You say, "Assuming funds are available, ATA's issue advertisements are driven by whether

the issue is being debated, about to be debated, or should be debated by Congress."

Is there anything left? "Should be, about to be, or is being"--pretty well covers the waterfront, doesn't it?

MS. ABEGG: Well, "should be debated" would just involve issues that the organization is concerned about, so there would be other issues that they don't think should be debated which they would remain silent on.

COMMISSIONER McDONALD: Thank you. Thank you very much.

CHAIRMAN MASON: Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr. Chairman.

It seems from our discussions thus far today a number of Commissioners are very interested in possible lobbying activities. And, you know, we're struggling with if we're going to have an exemption for lobbying activities, how would it work and what the exact language is.

Ms. Abegg, I'm impressed by the fact that

you represent an organization that actually engages in grass-roots lobbying activities. You know, everyone here can talk about what that means, but it seems to me the folks you work with actually do this stuff everyday, and so I'm interested in your view in terms of your organization's history in doing this.

Do you think that in terms of using public communications as part of your lobbying activities--and you make, I think, a very strong argument that the Internal Revenue Code not only contemplates that, but provides rules for doing that--do you think that you can effectively engage in grass-roots lobbying through public communications if you can't discuss the legislative record of government officials?

MS. ABEGG: I don't think so. I think part of the grass-roots lobbying is telling the public what the Members' positions on the bill is. And if you can't talk about that, it's difficult to tell the public how they should lobby and how they should vote.

COMMISSIONER TONER: Do you take the same position in terms of would you be able to effectively lobby at the grass-roots level if you couldn't refer in your communication to the name of the legislation by its actual name, bill name?

MS. ABEGG: I think you could do some, but I think for some types of legislation it would be very difficult.

COMMISSIONER TONER: Would it be fair to say that it would seriously undermine your ability to lobby effectively?

MS. ABEGG: Yes, yes.

COMMISSIONER TONER: You sort of have to play hide the ball. You know, I'm talking about a certain piece of legislation, but, of course, I'm prohibited from actually naming it.

MS. ABEGG: Right. I think it would result in confusion, as well.

COMMISSIONER TONER: And would it make it more difficult to lobby at the grass-roots level if you couldn't actually air certain communications in those parts of the country where the officials

actually live?

MS. ABEGG: Definitely.

COMMISSIONER TONER: And air those communications in the areas of the citizens whom they represent?

MS. ABEGG: Definitely.

COMMISSIONER TONER: And we've heard--

MS. ABEGG: That's the whole purpose of doing it.

COMMISSIONER TONER: We've heard some discussions about proposals where you could, of course, run public communications and discuss issues, but you couldn't run them in the States where the public officials actually resided.

Would you recommend that your organization engage in that kind of lobbying?

MS. ABEGG: I wouldn't legally or from a business standpoint. I think they would be throwing their money away.

COMMISSIONER TONER: It might not make much sense?

MS. ABEGG: Right.

COMMISSIONER TONER: Right. Similarly, how difficult would it be to lobby at the grass-roots level if you couldn't refer to or reference any initiatives or referenda?

MS. ABEGG: Extremely difficult, particularly in States that are very active and frequently have many issues on their ballot. It would definitely hamstring those organizations that are active in ballot initiatives and referendums.

COMMISSIONER TONER: Well, in terms of your background, if we're serious about having an exemption for legislative lobbying that actually could be used by groups that are trying to do this at the grass-roots level, do you think that we've got to include the types of activities we've discussed, or if we don't include them, it's not just not going to be effective?

MS. ABEGG: No. I think we definitely have to include these types of organizations--or these types of activities.

COMMISSIONER TONER: These types of activities. I was struck by the point you were

making and I just wanted to have you elaborate on it. It seemed to be the point that the Internal Revenue Code strictly regulates grass-roots lobbying and it requires certain things to be done, namely that when you're doing public communications to lobby, you actually have to seek action, you have to seek government action, and that you were making the argument that it's difficult to do that if you can't identify an official.

Is your point that there's a danger that we could place organizations in the cross-hairs, as it were, between our regulations and the Internal Revenue Code and that we should avoid that kind of thing? Is that one of the arguments you're making?

MS. ABEGG: Definitely, because the organization would be--I mean, be between a rock and a hard place. You know, if the communication meets the definition of grass-roots lobbying, but it's prohibited under the Bipartisan Campaign Reform Act, then they're not going to be able to do it.

COMMISSIONER TONER: And in terms of your

professional judgment, representing a grass-roots organization, do you think it's possible that if we didn't provide certain exemptions like we've talked about for grass-roots lobbying that an organization such as yours could violate our regulations and satisfy the IRS Code? Or in the alternative, if they met our regulations, they could be violating the Internal Revenue Code and could have issues with the Internal Revenue Service?

MS. ABEGG: Definitely.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN MASON: Vice Chairman Sandstrom.

VICE CHAIRMAN SANDSTROM: Thank you.

As you probably know, sort of sitting under the hot lights, we're being covered here by C-SPAN. Later tonight, probably around 10:30 or 11:00, we may have a show on "Booknotes" that will be covering essentially a book promotion that's occurring out at Borders or Barnes and Noble--"Politics and Prose."

Anne Coulter may be the person who has the

podium there. She might mention candidates during the course of that. It could be James Carville, who has also written books. He could be on talking about, from a different political perspective, his view of certain candidates. They both are known for being rather bold in their statements.

Without an exemption for such programming--or do you see that the statute would cover such programming and the provision of that sort of programming over C-SPAN would be covered by this statute?

MS. ABEGG: I'm not completely familiar with the media exemption, but I--

VICE CHAIRMAN SANDSTROM: It deals with a news story. The media exemption deals with news stories. These are book promotions. I mean, they're run by the various presses. They pay for their authors to go out. They hope C-SPAN covers it. They hope other people give them an opportunity to go on their programming to promote their books.

But the one on C-SPAN is essentially the

author themselves being given a period of time, an hour, to just discuss their book and their views. And I can assure you they wonder onto a lot of political subjects and a lot of political candidates are discussed. And I was just wondering if that sort of programming would be covered under the statute.

MS. ABEGG: I think it's a stretch to read the media exception, news or commentary, to encompass that, or even entertainment shows such as Jay Leno or "Saturday Night Live" skits.

VICE CHAIRMAN SANDSTROM: Mr. Alt, do you have a vote?

MR. ALT: Similarly, I fear that it could be interpreted to be that broad as to cover that and many other things, I mean, be it, you know, ads that have nothing to do, for instance, with campaigns at all, the infamous post-September 11 ad with George Bush talking about travel being a key example that would be something completely non-political.

VICE CHAIRMAN SANDSTROM: I understand the

constitutional concerns, but we're drafting exemptions here. I'm just trying to first determine whether that sort of programming under your understanding of the statute would be covered and whether an exemption would be appropriate, and I will ask some other witnesses similar questions.

With respect to constitutionality, because I am somewhat limited in whether we should deal--how we could deal with areas in which there seems to be a constitutional problem. I want to take a moment to talk about the 501(c)(4)'s and 527's when they're incorporated. Of course, you can be a 527 organization or a 501(c)(4) and not be incorporated.

Is there a constitutional basis for distinguishing the two if the sources of their funds are identical?

MR. ALT: There wouldn't seem to be, no, and it would seem to be sort of quite bizarre to treat two similarly situated organizations which receive funds from the same sources differently. Of course, it would also seem to be quite odd, as

the statute appears to do, to permit independent expenditures by MCFL corporations, but not electioneering communications.

VICE CHAIRMAN SANDSTROM: That was going to be my follow-up question. Doesn't this really require us to come up with an exemption for an MCFL type of corporation, since it's just a matter of incorporation that distinguishes it from an identical organization and the incorporation is just to insulate them from liability?

MR. ALT: I agree with you that the distinction is illogical, that it is contrary to law as it has been interpreted by the Supreme Court. But, unfortunately, it appears to be fairly plain that that's what Congress intended to do by the plain language of the statute, I should say.

I mean, the Wellstone amendment actually seeks to specifically cordon in 501(c)(4) and 527 organizations. Previous to the Wellstone amendment, you know, there was an exception for those organizations. It's very difficult, I think, to read the statute any other way than to say that

those are captured by that exception.

I believe that it's contrary to law, and I would urge this Commission not to enforce the provision against MCFL-type corporations. But I think it's beyond the authority of this Commission to issue an exception where Congress has plainly spoken to say that they want to capture it.

Why did Congress do this? I mean, perhaps they want to try and challenge the MCFL ruling. I don't know. The capturing of it is so plainly contrary to law, it's difficult to fathom what meaning they could have had.

That said, this Commission has limited authority in carrying out the statute, and by issuing the exception I fear that this Commission would actually be saying that "x" is not "x" for the purposes of the statute, which I fear that they cannot do.

VICE CHAIRMAN SANDSTROM: Thank you very much.

CHAIRMAN MASON: It's now my turn for questions.

Robert, I wanted to follow up on that last point because, as you know, I'm, of course, with you on the coordinate branch construction theory. But I'm not sure I can follow you through in terms of what we do when we conclude there's a constitutional problem.

And let's start with the easy case, which is when the Supreme Court has already enunciated. Take the MCFL decision itself which was never codified by Congress. It was codified by this Commission in regulation, though I personally think too narrowly, but we have a regulation on the books.

And assuming that that was appropriate--that is, we've got the Supreme Court decision that says, well, there is a class of corporations which should be permitted to make expenditures, at least, in federal elections--arguably, contributions--even though Congress never got around to amending the law, what's wrong with our putting that in regulations?

Or even to put it a different way,

wouldn't we be left with giving people a rather uncertain guide to follow if we failed to issue regulations, because we issued the regulations, of course, to the exact scope and extent of the Supreme Court's ruling or holding in MCFL and how that might apply in other factual situations is unclear, is still being debated?

By putting out regulations, we allowed people to, if they wanted to be safe and comply with the regulations, or if they didn't like them, to challenge them, and so on. So it seems to me in that particular case we would have been doing everyone involved a disservice by saying, well, of course, we will comply with the Supreme Court ruling, but we're not going to exactly tell you how we interpret it.

MR. ALT: I think it was appropriate to do it in that situation. The distinction I would draw here--and I think that was under sort of your general regulatory power to issue regulations, to enforce the election law.

In this particular situation, my

understanding is that the regulatory proceeding is pursuant to BCRA itself to carry out the provisions of BCRA. And so that's where I think that there's--you know, if the question sort of raises the potential issue of, you know, why would it be sort of permissible to issue a regulation that corresponds to MCFL there and not here, I fear that it might be simply because here--there, you're carrying out sort of general election law and the interpretation of the Supreme Court.

Here, you have what appears to be a plain statement by Congress that they intend to capture these organizations which is issued after the Supreme Court has issued its opinion. And so therefore they're fully cognizant of the Supreme Court's interpretation of this, and so I think that adds a layer of difficulty and questions the authority to actually issue a regulation exempting those at this time.

CHAIRMAN MASON: So it has less to do with our authority per se than with your reading of the intent of Congress, and that where, in essence,

Congress intends to make a challenge, as it were, we ought to stand aside and allow them to do it?

MR. ALT: Either that or also just, I think, the sort of general powers of the regulatory proceeding under which you're acting, which is specifically to carry out BCRA and to the extent that BCRA is plain.

I mean, also I think it is sort of worth note that in this particular case it's post-MCFL. So they're clearly aware of it, whereas previously you could make the assumption--I mean, the general assumption is that Congress doesn't enact unconstitutional laws. I don't know how exactly that works, given the number of proponents who have said that this is an unconstitutional law, but it's an assumption which we generally hold to.

CHAIRMAN MASON: Heidi, I wanted to go back to your point--and if the witnesses for the next panel are in the audience, I may well ask them the same--about the mix between IRS regs and our regs.

And let me preface it by saying that I'm

not persuaded that it's necessarily a good thing for us to just sort of adopt the IRS standards, for a number of different reasons, one of which is I don't know how we enforce them.

In other words, if we say we're going to follow the IRS standards and then somebody files a complaint with us, how are we then to construe the IRS regs and determine whether somebody has violated our regs that copy IRS?

However, I do very much agree that we shouldn't put organizations in a crack, as it were, and I think you've described one that if we require (c)(4)'s to form PACs, 527's, but then the 527's are doing what the IRS characterizes as lobbying expenditures and therefore they fail their major purpose test, that becomes a problem. I don't know if you've got any suggestions for how we work our way out of that, but I think that's something we need to pay attention to.

And the other thing I wanted to ask--I don't know a whole lot about your organization, but it was recommended to us that we look at real-world

examples of ads and this issue of sham issue ads, and so on. And if there are other ads that your organization has run other than the ones you mentioned concerning Governor Davis that you could share with us, I think it would be helpful for us to see some real-world examples out there and stack them up against the potential exemptions we're considering.

MS. ABEGG: I would be happy to provide those.

CHAIRMAN MASON: Thank you.

Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Mr. Chairman.

Thank you both for coming. First, I can't resist, Mr. Alt. Your plain-meaning suggestion that we go with the plain meaning of a statute in the first instance--help me with this example that I referred to in the earlier session where the definition of electioneering communication says "Any broadcast, cable, or satellite communication which refers to a clearly identified candidate for

federal office is made within 60 days of a general or 30 days of a primary, and in the case of a communication which refers to a candidate for an office other than President or Vice President is targeted to the relevant electorate."

How can we at the Commission come up with a targeting concept for Presidential candidates under that approach?

MR. ALT: Yes, Godspeed to you. No. I mean, generally speaking, you know, I suggest to you what is the prevailing mode of statutory interpretation before the Supreme Court at this point, which is that you don't necessarily have to completely disavow any sense of legislative intent. However, you should always look to the text first, and the intent can't trump the text.

If, for instance, as happened in the last rulemaking, an exception is carved out to permit federal candidates to appear at State functions, then the FEC issuing a regulation pursuant to that--even if the spirit of the law is seen as limiting soft money fundraising, the plain text of the law

permits it. So you shouldn't allow the spirit of the law to trump the plain text. That's essentially where I would be going in terms of that.

COMMISSIONER THOMAS: Well, thank you. You know how I came in on the other one. I say the plain text of the language prohibited us from allowing folks to solicit contributions at fundraising events, but my colleagues went just the opposite direction of that.

The questions I have for you, Ms. Abegg, center more around this issue of what to do about 501(c)(4) organizations. Again, I guess sort of all alone, I had interpreted the statute, specifically what's referred to as the Wellstone amendment, as suggesting that only communications which are targeted would be prohibited under 441(b) if done by a (c)(4) or a 527 that would otherwise be restricted under 441(b), the corporate prohibition.

And I should think that (c)(4) organizations in the situation of yours would jump

at the chance to have us interpret the law that way because that means, at least with regard to non-targeted electioneering communications in the Presidential area in particular, that's going to allow them to put out communications that although they are electioneering communications, they are not prohibited.

And your organization would be able to do that. You would have to basically be able to show that you were only using money that came in from individuals to pay for that portion of your organization's expenses, but you don't seem to want to go that way. Tell me why.

MS. ABEGG: Well, I think part of the problem with it is targeted. A lot of what they do is on TV and radio and is going to fall under the definition of targeted because it's going to reach more than 50,000 people. So they're precluded, I mean--

COMMISSIONER THOMAS: You're saying you'd still have the problem with regard to, say, House and Senate situations where targeting is

applicable, clearly?

MS. ABEGG: Correct.

COMMISSIONER THOMAS: Why would our allowance that we've put out for comment that would allow grass-roots lobbying ads as long as the reference to the federal candidate is simply that that candidate be contacted and urged to vote for or against the legislation not be an adequate allowance for your organization's needs?

Our draft regulation wouldn't have required that there be some amorphous reference to "your Congressman" or "your Senator." It could be an actual reference to the name of that person, again as long as these other cautions were taken. Would that not be enough to help your organization? Isn't that better than the example, say, that Commissioner Smith was reading which was more confined?

MS. ABEGG: It's a good start, but it still doesn't permit them to do all the types of communications that they're currently allowed to do.

COMMISSIONER THOMAS: It's not perfect from your organization's perspective?

MS. ABEGG: No, it's not.

COMMISSIONER THOMAS: But it's a good start. I'll take that as--

MS. ABEGG: It's a good start.

COMMISSIONER THOMAS: I see I have just a little time left. Could I just inquire, in your own organization's situation, would it be an option to maybe form an unincorporated entity that would not be subject to 441(b)'s restraints and that would allow you to work with this approach whereby you could undertake electioneering communications as long as you used monies from individuals? Does that seem a viable option?

MS. ABEGG: I think they would certainly consider it, but I don't know whether it would be feasible.

COMMISSIONER THOMAS: Your organization, I gather, does take in some money from individuals and it's not all money from corporations or unions.

MS. ABEGG: Correct, it's a combination.

COMMISSIONER THOMAS: Thank you.

CHAIRMAN MASON: Larry Norton.

MR. NORTON: Thank you, Mr. Chairman.

Mr. Alt, I just want to make sure I understand the proposition you've advanced about the limiting plain language of the statute. You said, I think, early on that the guiding principle ought to be the plain language of the statute and we ought to particularly look at that with respect to crafting of exceptions.

And yet we have this language in the statute that specifically authorizes the Commission to promulgate any exceptions that cover any other communication so long as the exception meets the requirements of this paragraph and doesn't promote, support, attack, or oppose.

Doesn't that give the Commission some license here to craft exceptions even where the exceptions aren't specifically provided for in the statute?

MR. ALT: It certainly does. However, the devil is in the details; I mean, the "promote,

support, attack, or oppose." I mean, quite frankly, if you look at the Wellstone amendment, it seems to look at what potential exception that has been offered.

In that particular area, I think first of all you run into an interesting problem because there an amendment is offered to specifically address the type of communications that you're seeking to exempt, which is to say previously a (c)(4) organization could have issued an electioneering ad and there was an amendment made to eliminate that exception. That's a fairly strong indication and it would seem to suggest that any action would be potentially inconsistent with the Act.

But, furthermore, how are we to determine that these ads aren't going to promote, support, oppose, or attack? It seems that would be very, very difficult if you use a standard MCFL-type exception to say that it would comply with that particular requirement. And so that's why I say I think because of that requirement that's added as

an addendum to any exception must meet makes it very difficult, if almost impossible, to craft appropriate exceptions.

MR. NORTON: I think the approach the Commission is proposing with respect to MCFL is not so much through that authority, but as the Chairman suggested, through the dictates of existing Supreme Court case law.

And if I'm understanding your position correctly with respect to MCFL, the law itself would have had to specifically refer to MCFL and its progeny or expressly state that it was subject to MCFL and its progeny for MCFL to apply to this statute?

MR. ALT: No. I mean, obviously--or not exactly. I mean, obviously MCFL applies to the communications irrespective of whether or not Congress made mention of it. My point was simply that unlike the prior rulemaking which was made in a Congressional vacuum--Congress had not spoken--here you're dealing in an area where presumptively your executive power is somewhat ebbed insofar as

Congress has specifically spoken post the MCFL decision, one, and, two, has given you a directive that you're acting pursuant to to issue regulations pursuant to that specific piece of legislation which seems to flatly contradict MCFL.

Quite frankly, I think they've put you in a very bad spot, and the only way I can see to get out of it legitimately is, once again, you certainly have the Article II power not to enforce the provision. But I fear that you may not have the power, given the limitations of Congress, to issue this exception.

MR. NORTON: Mr. Alt, you mentioned early on the impact of the Commission's declining to try to promulgate a regulation for the alternative electioneering communication on the litigation. I think what you said was there were mootness arguments at play, and I suspect what you may have meant was ripeness arguments.

MR. ALT: I apologize. Yes, that's correct.

MR. NORTON: Okay. Isn't it possible that

in the event the court were to strike down the principal definition of electioneering communication and that were to be upheld by the Supreme Court that the Commission might get some guidance in the course of those rulings that would inform its effort to promulgate a regulation for the alternative definition?

MR. ALT: Certainly, it would be possible. However, the alternative is possible as well, which is to say by promulgating a rule at this particular time, the Commission could grant to the courts the Executive's view, this Commission's view, on the proper application of the secondary definition.

So I mean there are obviously reciprocal benefits. If you wait, then you get to know what the court has to say. My recommendation is just the flip, that if you do it now, the courts may get to know what you have to say.

MR. NORTON: I presume the court would get to an issue that it doesn't need to get to, but I want to just ask one question at the close of Ms. Abegg to make sure I am reading your written

comments correctly.

You had written on page 10, towards the bottom in your conclusion, that "Although the Commission is constrained to implement the BCRA, there exist opportunities for the Commission to exercise its discretion and remove some of the constitutional deficiencies of the Act."

I wanted to clarify that. Were there particular proposals that you have made here that, in your view, would render some portions of the Act constitutional?

MS. ABEGG: I think by including exceptions it would remove some of the problems because then the Act would not apply to lobbying communications and other issue ads.

MR. NORTON: And therefore render the Act constitutional?

MS. ABEGG: Not totally constitutional, but would remove that problem.

MR. NORTON: Thank you. Thank you, Mr. Chairman.

CHAIRMAN MASON: Mr. Pehrkon.

MR. PEHRKON: Mr. Chairman, thank you.

Mr. Alt, Ms. Abegg, thank you for coming before the Commission today. I have a quick question for Ms. Abegg and it's in part because I'm not familiar with your organization. And I was wondering if you could sort of elaborate a little bit more on what your organization does, and what I'm looking for is in terms of how do you see--in terms of number, how many election communication messages would you anticipate sort of having to report during an election period? Have you had a sense of that or have you looked at it from that perspective yet?

MS. ABEGG: I haven't, but I mean part of it would depend upon what was going on in Congress at the time. If Congress was in recess for the entire 60 days before the election, then there may not be much to report. But if Congress was in session up until the election, then there probably would be quite a bit.

MR. PEHRKON: In terms of "quite a bit," are we talking about hundreds of reports or tens,

twenties? Do you have a sense for that? I'm not just familiar with your organization.

MS. ABEGG: Well, part of it would also depend on whether they would have to report for each ad or whether those would be aggregated on different networks. So I don't know. I would hate to hazard a guess, but I would say maybe at least close to 50.

MR. PEHRKON: Part of my dilemma is trying to figure out what we're going to have to plan for here.

Thank you very much. Thank you, Mr. Chairman.

CHAIRMAN MASON: Thank you.

Unless we have a burning desire for follow-up questions, I think we'll probably be best advised to take a 5- to 10-minute recess before the next panel. Does that suit my colleagues?

We'll be in recess for ten minutes. Thank you very much.

[Recess.]

CHAIRMAN MASON: The special session of

the Federal Election Commission for Wednesday, August 28, 2002, will reconvene. This is our public hearing on electioneering communications, and our third and final panel for today--we have with us Lloyd Mayer from Independent Sector, and Tim Mooney from Alliance for Justice, both organizations umbrella organizations for a number of non-profit advocacy and education organizations.

We're delighted to have you both here. In case you weren't here at the beginning of the previous panel, I'll just briefly say that you'll have five minutes to make an opening statement. We do have the light system in front of you. You get a green flashing light after four minutes and a yellow light--excuse me--green flashing light after three minutes, a yellow light after four minutes, and a red light at five minutes. We will then go to a five-minute round of questioning from each of the Commissioners, the General Counsel, and the Staff Director.

We very much appreciate you being here this afternoon and appreciate the testimony that

you've already submitted in writing. And, of course, your complete statements will be a part of our hearing record.

We've been going in alphabetical order, and so by a nose, as it were, that would make Mr. Mayer first today.

Mr. Mayer.

MR. MAYER: Good afternoon, Mr. Chairman, Members of the Commission. Thank you for the opportunity to testify today on behalf of Independent Sector. I serve as outside counsel to Independent Sector.

The comments we have submitted are also submitted on behalf of the following members of Independent Sector: the Alliance for Children and Families, the American Cancer Society, the American Foundation for AIDS Research, the American Heart Association, the National Council of La Raza, the National Council of Non-Profit Associations, the Otto Bremer Foundation, and the Peter C. Cornell Trust.

Independent Sector is a non-profit, non-

partisan coalition of more than 700 national organizations, foundations, and corporate philanthropy programs collectively representing tens of thousands of charitable groups in every State across the nation.

Its mission is to promote, strengthen, and advance the non-profit and philanthropic community to foster private initiative for the public good. Independent Sector's comments are designed to promote the principles of the Bipartisan Campaign Reform Act that aim to bring greater integrity to the electoral and democratic processes, while also preserving non-profit advocacy rights.

Independent Sector believes the rules on electioneering communications need to meet two important goals. First, they should be as clear as possible to ensure that the many non-profit organizations which cannot afford legal counsel can comply with them easily. Second, they should contain appropriate exceptions to avoid unnecessarily restricting non-profit advocacy and education.

Achieving these two goals is not only in the best interests of the organizations Independent Sector represents, but is also needed to avoid vagueness and over-breadth. All of our comments are shaped by these goals, but there are several specific points in our written comments that I would like to emphasize.

Independent Sector believes that the rules need to include an exception that would cover public service announcements, documentaries, entertainment shows, and other kinds of non-political, non-partisan communications that happen to refer to a person who is a federal candidate.

The best way to address this concern is to provide an exception for unpaid communications. Failure to provide such an exception would force every organization that engages in such communications, including every public television and radio station in the country, to review all materials scheduled to be shown within the electioneering communication time frames for even the slightest mention or picture of a current

federal candidate--an enormous and unnecessary task.

Independent Sector also believes that an exception is needed for communications designed to encourage the public to contact their elected officials about pending legislative and executive matters. For example, many critical issues are considered by Congress in the days leading up to primary and general elections.

Of the proposed alternatives, Independent Sector supports alternative 3-B, modified as detailed in our written comments, as the alternative best addressing this concern and for also being consistent with BCRA.

There has been much discussion in the comments filed to date relating to the proposed exception referring to the popular name of a bill or law. Independent Sector believes that such an exception is necessary to allow non-profit organizations and others to engage in effective advocacy and education about such bills or laws. We agree with the critics of this exception,

however, that a clear definition of "popular name" is needed both to prevent abuse and to provide clear guidance.

Finally, Independent Sector supports the clarification of the proposed rules that print and certain other types of communications are not electioneering communications. We particularly support the clarification that communications over the Internet are not electioneering communications as long as they are not also distributed by broadcast, cable, or satellite stations.

Many non-profit organizations use the Internet as a means of providing access to large volumes of information, and to require all these organizations to vet all of their online information to ensure there's not a single reference to a person who is a federal candidate would be unnecessarily onerous.

Thank you for your consideration.

CHAIRMAN MASON: Thank you.

Mr. Mooney.

MR. MOONEY: Thank you, Mr. Chairman.

Thank you to Members of the Commission.

The Alliance of Justice is an association of about 50 different non-profits that focus on advocacy work. The two things I'm going to talk about today are found within our written comments. I'm going to focus in on two, however. The first is a broad exemption for 501(c)(3) organizations, and the second is an exemption regarding lobbying and other types of matters.

Before I get into those two, I'd like to make an aside about the constitutionality of the statute. A lot has been talked about today about the constitutionality and we know that obviously the Commission is not the ultimate arbiter of the constitutionality. That's up to the courts.

However, the court that is going to be at least the preliminary arbiter of this, the D.C. Circuit, in a recent order has said that it's looking to the Commission in its determination as to the constitutionality, because presumably the Chevron doctrine will be at issue here and the expertise of the Commission is going to be weighed

heavily by the court.

Electioneering communications, as we've talked about, are intended to stop the sham issue ads, the so-called sham issue ads, and I think the framers have been pretty up front about that they intended to draw a bright line rule to avoid vagueness problems.

Unfortunately, they've gone a little bit too far in a lot of instances, some of which the Commission noted in the NPRM. It's over-broad, it covers too much. The Commission can save the law in these areas by using their exemption authority in Section 434 that is explicitly granted by Congress to pull it back into the constitutional realm in those areas where there are interpretations both constitutional and unconstitutional.

So let me start by going to the two areas that I'd like to talk about today, the first being the 501(c)(3) exemption that the Alliance suggests that the Commission undertake.

Any statute that purports to regulate

speech, particularly political speech, has to have some kind of a compelling interest involved of the government, and any regulation has to be narrowly tailored to only fit within that compelling interest.

Here, the electioneering communications provisions fail the second prong in a number of different areas. It even covers the activities of 501(c)(3) organizations in many instances. 501(c)(3) organizations are absolutely prohibited by definition from engaging in any activity that gives any indication, explicitly or implicitly, that it is for or against any candidate for office, federal or otherwise.

There are a host of different ways that 501(c)(3)'s are regulated in this manner all through the tax code. First and foremost, any violation of this standard creates a revocation of the tax test. It's the death penalty for these organizations. But it does even further than that, down to personal liability to the managers of the organizations that are found to violate this

standard, which I'd like to note for the record is broader than what the electioneering communications standard is. So it goes further than that.

At an earlier panel this morning, there was the suggestion that 501(c)(3)s are acting in this area, getting into political areas. The Alliance would dispute that; the Alliance would dispute that completely. There are no examples that we are aware of of 501(c)(3) organizations that are engaging in sham issue ads. They simply are not existing, to the best of our knowledge.

Yet, BCRA, in the electioneering communications section, goes further than all that. It actually prohibits, in a sense, lobbying, educational, and public service broadcasts that are captured within the regulation. So BCRA's application to 501(c)(3)'s, in particular, prohibits activity that is already forbidden, plus it goes into activity that should not, and indeed cannot be banned by the Constitution.

The second area that I'd like to address here in the testimony is regarding the lobbying

exception, the so-called lobbying exception that we've been discussing through most of the panels today.

Again, this is an area where BCRA is over-broad. It includes lobbying activity which falls outside of what the compelling interest of government is, and we've talked about what that compelling interest is. It's to ensure that elections are free from the appearance of corruption. Lobbying falls outside of that.

Sham issue ads, yes, are absolutely captured in BCRA. However, it also captures legitimate, protected lobbying activity. As a result, there are a host of problems that disenfranchise non-profits which I'll go through really briefly as my time is going out here.

Legislative issues often peak during the 60-day window that BCRA becomes effective, right before elections. That's when a lot of laws are going to be at their most compelling point. Indeed, there might be room for abuse by certain Members of Congress who would like to push laws

during that 60-day window to avoid having non-profit organizations or other organizations to do some lobbying during that time, to shut down that kind of aspect of the debate.

Mentioning office-holders is critically important to focus in on key swing votes, and that's why the exception is extremely important to be able to mention office-holders. Organizations face a choice, in a sense, under this, if this goes through. They either don't lobby or they lobby in an ineffective way.

And I see that my time is up. If you don't mind, I could continue going. Thank you very much.

The Alliance would like to push for alternative 3-C, which is a different one that Independent Sector is asking for, most importantly to talk about historical votes of office-holders. It is critically important to be able to tell the general public, when engaged in a grass-roots lobbying effort, what the past history is of an elected official. It shows what the propensity for

that elected official will be to vote on the pending legislation at hand. That's absolutely critical to lobbying and it's something that the Alliance is absolutely intent on pushing for.

Just to conclude, Professor Malbin this morning in an earlier panel suggested that we somehow need to save the non-profit sector from itself, that we need to make sure that we kind of pull back so that the non-profit sector is not smeared, in a sense, by having the ability to lobby in this area. I'd suggest that's counter-intuitive to protect the non-profit sector by taking away some of their lobbying rights.

And with that, I'm happy to take any of your questions.

CHAIRMAN MASON: Commissioner Thomas is first in the questioning order this afternoon.

Commissioner Thomas.

COMMISSIONER THOMAS: Thank you. Thank you both for coming. I first have to note that the Alliance for Justice has recently retained the services of an exceptional individual and I will

not name her. Her last name is Flynn, but I wanted to pass word on to her that she is a superstar.

Your comments--I'll start with comments of the Alliance for Justice--suggest that we ought to allow for an exception for (c)(3) organizations, and you allude to the fact that the Internal Revenue standards are tougher. So just to be clear, what you're saying is although we have an electioneering communication standard, you would, for (c)(3)'s, want to defer to the Internal Revenue Code standard, which is tougher. Is that where we're going?

MR. MOONEY: In a sense, yes, Commissioner. It's just to note the fact that 501(c)(3)'s are already subject to stricter definitions.

The issue that we have regarding the (c)(3) exemption is the fact that the electioneering communications standard actually goes beyond certain areas. It goes into areas that (c)(3) organizations are able to do right now that are protected--educational activities, things along

those lines that frankly are not electoral in nature. There is an absolute prohibition to engage in any electoral activity whatsoever, and that is what is stricter about the tax code compared to what BCRA actually ends up regulating.

COMMISSIONER THOMAS: How about lobbying, though? (c)(3)'s are not absolutely prohibited from lobbying, are they?

MR. MOONEY: That's correct. They're able to engage in a limited amount of lobbying under the tax code, which is separate and distinct from the absolute prohibition on electoral activity which is found in section 501(c)(3).

COMMISSIONER THOMAS: So what would the Internal Revenue Service do with an ad that in essence says the--let's say we're getting close to the 2004 Presidential election and the Alliance for Justice runs an ad that says something like "President Bush consistently has appointed judges who do not reflect America's values. President Bush has consistently acted against the interests, if you will, of people who support a moderate

approach to judicial construction of the law. Contact President Bush and tell him to stop his judicial activism," if you will, something like that.

Would a (c)(3) be in a posture of doing something like that as a lobbying effort and would it be something where the Internal Revenue Service would say that crosses their line?

MR. MOONEY: The way that the Service analyzes such a situation is based on a facts and circumstances analysis. The prohibition is absolute. So on a facts and circumstances analysis, if the Service determines that there is some sense of electioneering that is coming about on that, in the unlikely instance where the Alliance would take out an ad like that, the Internal Revenue Service would actually enforce that as an electioneering statement.

However, that being said, the Service looks to all of the facts that are involved there. If there is, in fact, a judicial nomination that's going on at the time, that's actually considered

lobbying, dealing with judicial nominations. If there is a nominee that's active right there, the IRS takes that into account and it would look at it as much of a lobbying communication. So, indeed, the Service actually does take a look at all the facts in making the determination.

COMMISSIONER THOMAS: So you're more comfortable with that approach?

MR. MOONEY: I think that, in fact, since it's more restrictive, in a sense, than anything that the Federal Election Commission would be considering in any of the regulations here, it's certainly going to stop any (c)(3)'s from engaging in sham issue ads. For instance, if that ad as you described is a sham issue ad, yes, the IRS will come in, will intervene and make sure that the organization is held accountable for it.

COMMISSIONER THOMAS: I have very little time. I'm not going to ask a question of you only because I think your comments are very helpful and you mentioned you promote recommendation or proposal number 3-B, which is my favorite of the

ones we've put out. So I'm not going to question you about that.

I did want to ask a question, though, about again Mr. Mooney's testimony, written testimony, on page 7. You talk about how you would suggest BCRA's electioneering communications ban does not apply to unincorporated (c)(4) organizations.

I just want to be clear there. What you're talking about is just the ban. You concede that the other parts of the electioneering communications rules--i.e. the disclosure provisions--would still apply to unincorporated (c)(4)'s.

MR. MOONEY: I believe that is the case, but I will supplement if, upon further analysis, I disagree with that.

COMMISSIONER THOMAS: I have a little time left. If anything I've asked gives you a chance to comment, feel free.

MR. MAYER: No, I have no comment on this.

COMMISSIONER THOMAS: I will finish by

noting we've heard a lot about how people have to make reference to a candidate. Keep in mind when you're attacking the administration, you can say "the administration" without saying "the Bush administration." You can, I think, use a lot of creative techniques to make clear, very clear, that you are opposed to a particular piece of legislation and why, and you can lay out all the arguments as to why it's a miserable piece of work and then follow up with just a pitch to contact Member of Congress X. And you can still, I think, have a very effective lobbying piece.

So I think this idea we're working toward is developing a set of bright line rules so people will know, in essence, what they can and cannot put in a communication. And then I think what we have in mind is people can go on about their business in a constitutionally fair and open way.

Thank you.

CHAIRMAN MASON: I'm second in the order this round and I also wanted to ask questions of Mr. Mooney. And I agree with a lot of what you

have to say, but as I suggested in the first panel, I'm not quite there on a blanket, follow-the-IRS policy for a couple of reasons.

One is that we've got an independent responsibility to enforce the law and if we were just to defer and say, well, gee, whatever is fine with the IRS is fine with us, and then as you described, the IRS applies the facts and circumstances test, we get a complaint that someone has violated the law. The Vice Chairman isn't sure that we can penalize anybody about that. That's another issue.

But how are we then to determine--in other words, the IRS applies a very fact-specific--and I'm somewhat familiar with it, less so than you are. Are we to render our own judgment about what the IRS might conclude based on those facts and circumstances?

You can see how that gives us a problem when we have our own separate enforcement mechanism. So my reaction is that the better course is to try to harmonize or de-conflict, if

you will, but--and I'd invite you to try to convince me otherwise if you think you have something to say, but I don't see us--and let me give you an additional reason that I think in this particular case that a simple deferral is insufficient, and that is that we have a law that clearly sets out a different standard.

The law just says if you mention a candidate within the, you know, relevant periods, you're caught and then there's some exemption authority. But it looks hard to me to construe that exemption authority to be just a total default to the IRS.

MR. MOONEY: You raise a lot of points, Mr. Chairman, so I'll try to address them all here. The suggestion that the Alliance would have first and foremost would be that in an instance where the IRS is acting or not acting that the Federal Election Commission would actually defer to the decisionmaking of the IRS in that instance. Understandably--

CHAIRMAN MASON: Why, why?

MR. MOONEY: Because the IRS has the expertise in that particular area. However, that being said--

CHAIRMAN MASON: The IRS is more expert in elections than the Federal Election Commission?

MR. MOONEY: Oh, no, I'm sorry. I clearly was not being lucid there. Pardon me. My suggestion is that regarding that particular standard, with the facts and circumstances analysis, I would say that the IRS does have expertise in the area, that it's possible that the Commission could choose to defer to that.

That being said, the Commission can draft the regulation however it wishes. There is a possibility that the Commission could choose to draft a regulation that uses the same language and just use its own independent authority in its enforcement activities to follow that particular standard. The world is your oyster, as it were, in terms of creating regulations for that. Our suggestion would be to, first and foremost, defer to the Service on that.

The second aspect, I think, was one of authority, whether or not the Commission has authority to promulgate such a regulation. I think it's pretty clear that Section 434 does give you that authority.

First and foremost, it says "to ensure proper implementation of the law." That's some aspect of Section 434's authority that you have that I haven't heard expressed today. "To ensure proper implementation" to me and to the Alliance means to ensure that there's a constitutional application of the statute, in addition to the other section of 434 that says that no exemption that's created under that section can have anything that supports, attacks, or opposes candidates.

Here, Section 501(c)(3) organizations, as I've already talked about--and I go into more detail in the written comments--they simply just cannot do it by definition, support, oppose, or attack candidates for public office, any public office, much less federal. So I think that the authority for the Commission to promulgate this

regulation is clearly there in Section 434.

CHAIRMAN MASON: I also wanted to ask you, in suggesting, if you will, this 501(c)(3) exemption, help me try to understand the basis for that and if there's any--I mean, you've given me a pretty good argument based on the substance, but there seemed to be a suggestion in your testimony that there was some different constitutional status or other status of 501(c)(3) organizations that required or favored their separate treatment.

MR. MOONEY: I don't think that there's any--I think it's more of a general constitutional analysis. In any situation where government is intending to limit or curtail speech in any instance, you have to go through the compelling interest, narrow tailoring analysis.

And here there's already regulation. In fact, there's more regulation of 501(c)(3)'s in this area through the tax code. They are already prohibited from engaging in the types of activity that BCRA's electioneering communication sections contemplate--the sham issue ads, the so-called sham

issue ads.

The BCRA sections go further than that, however, and that's I think where there's some possibility for some constitutional problems related to 501(c)(3)'s in terms of application of BCRA, which is why the Alliance suggests that the exemption has a constitutional basis as well as a policy basis.

CHAIRMAN MASON: Thank you.

Commissioner McDonald.

COMMISSIONER McDONALD: Mr. Chairman, thank you.

Welcome, both of you. You've hung in there throughout the day and that's quite an accomplishment. Let me ask each of you if you wouldn't mind giving us an example of what--since you've looked at it from various perspectives, what you see as a so-called sham ad.

Mr. Mooney, would you like to be first? You had indicated earlier that you didn't know of anyone that did such a thing, but if you could figure one out, what would it be?

MR. MOONEY: When I said that I wasn't aware, I wasn't aware of any 501(c)(3) organizations that have engaged in that.

What is a sham issue ad to me? I think we've heard earlier in testimony some examples. Questions about the Bill Yellowtail one, I believe, was one example that was used in a prior commentary. It's clear--

COMMISSIONER McDONALD: Now, would you see that as one on that particular matter? I think that was Mr. Shor's testimony.

MR. MOONEY: I believe you're right.

COMMISSIONER McDONALD: And from your vantage point, would you see that as a sham ad?

MR. MOONEY: I think it's difficult to make the determinations, which is I think one of the problems with the statute as written. There is an attempt to make this a bright line test, absolutely. However, I think in some circumstances there is a bit of vagueness involved and I think it is difficult. As I recall--and, of course, this is going back several hours and my memory fades, of

course--I think that that would be one that might be considered.

COMMISSIONER McDONALD: Let me refresh your memory.

MR. MOONEY: Thank you.

COMMISSIONER McDONALD: It's "Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail's response? He only slapped her. But her nose was broken. He talks law and order, but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments, then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values."

MR. MOONEY: It seems to me that that does appear to be much more of a sham issue ad. Now, that being said, the reasoning is because it doesn't mention policy matters to any real great sense, which is I think one of the difficulties with this particular area.

It's possible that with a few different

changes, that actually might end up being a lobbying communication. That being said, this one clearly seems to cross that line. The lobbying communication exemption that the Alliance favors would clearly not cover that kind of an ad, and I think that that's one of the areas that I suspect that you're asking about.

COMMISSIONER McDONALD: I have no doubt that the Alliance wouldn't do such a thing.

MR. MOONEY: Indeed, no, and thank you.

COMMISSIONER McDONALD: Mr. Mayer, do you want to comment on that ad?

MR. MAYER: Well, I think we would take the position that an ad along those lines broadcast shortly before an election where Bill Yellowtail was running would constitute what has been referred to as a sham issue ad.

I think it's the combination of the timing of the ad, as well as the fact that the ad clearly, you know, applauds or denigrates a particular candidate who is running that makes it a sham issue ad.

Having said that, we do support, as already has been noted, alternative 3-B for the lobbying communication which would allow an organization to mention public policy issues that are pending, mention by name the name of a candidate, and our modification to 3-B, provide contact information for that candidate, assuming that they were already in a policy position to influence that issue.

But we actually chose, after looking at all the alternatives, 3-B because it did not allow what the Alliance for Justice and other commentators support, what's called a bad vote ad, laying out the position of the candidate on that issue, having already promoted or explained why that issue is, you know, terrible.

And we think that in the time frame shortly before an election, the combination of promoting or opposing a particular issue with laying out the candidate's position on the issue could become a shame issue ad and create a problem.

COMMISSIONER McDONALD: I believe--and I

don't know if this was dispositive--I believe they did indicate this was in October of an election year.

Heidi Abegg had mentioned a point that always interested me and I was sorry I didn't have an opportunity to follow up with her. In relationship to lobbying, for either of you, one of the things that we see happen, of course, is that a number of Members are cited or there is an implication concerning a number of Members who may not, in fact, be even remotely close to the legislation at that point. And let me give you an example.

If you take up a health care matter and are lobbying on a health care matter and you cite an individual shortly before an election, and maybe there's not even a pending piece of legislation or maybe it's going to be in committee or whatever, we always have difficulty trying to come to grips with these kinds of matters, as well, where the individual might be on a committee or it's just universal across the Congress because ultimately if

the bill comes out of committee, obviously that Member would have an opportunity to vote on it.

Do either of you have any thoughts about that?

MR. MAYER: Our thinking on that is that when a broadcast, cable, or satellite communication--that's what's relevant here--is done shortly before an election, the way to ensure that a communication directed at a Member of Congress or to encourage the public to contact that Member is not a sham issue ad, is not a veiled attempt to affect the upcoming election, is to ensure that as much as you can say about the issue, that particular health care issue in the ad, you do not characterize that Member of Congress' position on that issue.

We think once you've done that, the only reason to make a communication like that is because you're concerned about the issue, not about the election of that particular Member.

COMMISSIONER McDONALD: Thank you. Thank both of you for coming.

CHAIRMAN MASON: Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr. Chairman. Thank you, gentlemen.

I want to ask you about a question that hasn't gotten too much attention today, and that pertains to the reporting requirements for organizations. I wondered if both of you, or at least either of you, if you don't care to, but I'd like to get your thoughts on how burdensome some of these reporting requirements can be, particularly for some of your smaller members, perhaps, if they are burdensome, if there's anything that we can do or should do to lessen them in terms of interpreting the statute and that we can do.

And I'd ask one more somewhat specific question within that. Several groups have suggested that under the provision of the Act that requires the reporting of any person making the disbursement or any person sharing or exercising direction or control over the activities of such person, we should include--you know, so you don't just list the name of the group, but some broad

list of all the people who might have sort of had anything to say or do with that.

And I wonder how that strikes you, if that creates other reporting problems or other types of problems in terms of preferred anonymity for certain groups or people, or just the difficulty of figuring out who exactly you would call, particularly if one of your umbrella groups themselves were, for example, to run ads. If the Alliance for Justice's 50 members were to run ads, who would you decide was a person sharing direction or control of your books?

So that's an issue I wonder if each of you could comment on a bit, whether that's a problem or not, and if it is a problem, how it might be addressed.

MR. MOONEY: The Alliance didn't specifically make too many comments on the reporting requirements. However, as a general rule, clearly the Alliance would want to make it so that the reporting is done in as least burdensome manner as possible.

When it comes to some of the rolling requirements versus every $10,000 disbursement question, I'll defer to our written comments on that, where we have said that there should be a one-time requirement for reporting after the electioneering communication is made.

When it comes to your question regarding the extent to which, I suspect, donors and other organizations are regarding umbrella organizations, there's already some Supreme Court precedent regarding releasing names of membership organizations in situations where those organizations are in, shall we say, a little bit more controversial subject matter areas.

I believe the case that I'm thinking of off the top of my head has to do regarding affiliation with the Communist Party, also with some civil rights groups, as well. There are many instances of several organizations and subject matters which I won't get into where there are threats of violence, threats of violence against individual members or organizations themselves.

And I'd suggest that any reporting requirements reflect that Supreme Court precedent to ensure that organizations that are in that kind of subject matter area do not have to reveal the identities of people when that could put them at risk.

COMMISSIONER SMITH: Mr. Mayer, any thoughts?

MR. MAYER: Independent Sector chose not to comment on the reporting requirements because we believe that most of our members, the vast majority of them, regardless of what the financial definition is of electioneering communications, will not engage in whatever those communications are, in part because of the burden of the reporting requirements and in part because of the comment that Mr. Mooney just made that the reporting requirements, of course, require reporting about donor information. And that is considered a very sensitive issue for many of our members and that alone might cause some concern, some reason to avoid engaging in electioneering communications

even if they were otherwise permitted to do so.

COMMISSIONER SMITH: So I would read your comment as saying that that makes it all the more important that we craft careful exemptions so that your members can engage in certain types of activity that are not so-called sham electioneering, but in fact is lobbying activity.

MR. MAYER: That is correct. I mean, one major concern we have with the regulations and with BCRA in general is the potential chilling effect on our members. As I noted earlier, many of our members, many non-profit organizations cannot afford legal counsel to advise them on the details of these rules, cannot afford to hire legal counsel to seek advisory opinions from the Commission.

So they are forced to get a very plain understanding of the rules either from publications or groups like Independent Sector or Alliance for Justice produce, or from information available on the Commission's website. And unless the rules are very clear, they are going to steer as far away as possible from anything that could get them into

trouble with the Commission.

COMMISSIONER SMITH: Okay, and just real briefly, I believe both of your groups, if you would just confirm this--and I believe this is contrary to what Senator McCain and others are urging on us--both of your groups favor an exception for unpaid ads and for public service announcements. Is that correct?

MR. MOONEY: That's correct, Commissioner.

MR. MAYER: That is correct.

COMMISSIONER SMITH: Thank you very much.

CHAIRMAN MASON: Vice Chairman Sandstrom.

VICE CHAIRMAN SANDSTROM: Thank you. Let me follow up briefly on Commissioner Smith's questions. You both represent a number of organizations that fall under the umbrella of the Alliance and Independent Sector. Are a number of those democratic in structure?

MR. MOONEY: As in for voting rights for the organization?

VICE CHAIRMAN SANDSTROM: The members. Do members have a right to participate in who gets

elected to be the officers and make the final decisions? These organizations, do they start at some level where someone is determined to be a member and they then have voting rights in determining who gets elected to the next level or who gets to be the chief operating officer or chairman or president? Do they have a democratic structure in that way?

MR. MOONEY: Not exactly. Speaking for the Alliance, not exactly the way that you describe. There is representation on our board of directors.

VICE CHAIRMAN SANDSTROM: No, I'm not asking about--just more a familiarity with the organizations that make up yours. Do they have--not your organization, but the organizations that make up the membership, do they have democratic structures?

MR. MOONEY: I think generally speaking, yes, but it would be hard to speak for all of them. There are over 50 members for the Alliance.

MR. MAYER: I'm not familiar with the

governing structure of most of the members. I can think of one off the top of my head that does have a democratic structure in that some members of the board are selected by the members, and I suspect there are many others.

VICE CHAIRMAN SANDSTROM: The reason I ask is it was urged on us earlier today that if someone exerts direction or control, then they are to be listed as part of the report. But if you have a democratic structure, essentially every member exerts direction or control and so they all would have to be listed.

If you had a labor PAC, since most labor unions have a democratic structure, everyone who is a member of the union who has voting rights would conceivably have some direction or control. And we need to narrow that in some way.

In looking at the statute--and I don't want to surprise you here because you may not have looked at this particular issue--did you see where there was any personal liability on the part of any officer of your organization if they engage in

electioneering communications and failed to comply with the Act, or is the liability only on the part of the organization?

MR. MOONEY: Actually, I don't know the answer to that, Mr. Vice Chairman. I'm unaware of any personal liability, but that doesn't mean it's not there.

MR. MAYER: I am also unaware of any personal liability, but I have not thoroughly researched the issue.

VICE CHAIRMAN SANDSTROM: Now, it isn't clear under the statute who's required to file these reports, other than often an abstract entity, a person, such as Alliance for Justice which--who do you believe, for instance, in the Alliance for Justice or in Independent Sector is responsible for filing these reports? What person, individual, live natural person?

MR. MOONEY: Well, I would suspect that it would be whoever is in charge of the recordkeeping for the organization on any of a variety of different issues. Speaking for the Alliance, I

mean we report to the IRS in any number of different ways.

But to the Federal Election Commission in this instance, I would suspect it would be the same person. However, that would change from organization to organization, unless the statute or the regulations specifically dictate a particular person. But I'm unaware of anything--

VICE CHAIRMAN SANDSTROM: But someone is supposed to, under the penalty of perjury, attest to the accuracy of the reports. I'm just curious who assumes that responsibility in organizations for doing so.

It's sometimes hard for me to get around the concept of how does a non-natural person, an entity, commit perjury.

MR. MAYER: We would assume that each organization in its own structure would determine who would be responsible for that, as well as many other legal filings that the organization needs to make. I don't know off the top of my head who that person would be at Independent Sector.

VICE CHAIRMAN SANDSTROM: That person would only have a part of the information, right? He may not know who was all involved in the direction or control. Could that person conceivably, on incomplete knowledge, be held guilty of perjury?

MR. MAYER: I believe perjury statements, though I'm not familiar with the Commission's forms that would be used in this case, generally say "to the best of my knowledge." So they would only be held liable to the degree that their knowledge was contrary to what they said in the statement.

MR. MOONEY: That's my understanding as well. I think you raise a very interesting point, though, regarding the perjury issue.

VICE CHAIRMAN SANDSTROM: Well, if the person who signs it is just the designated dunce in the organization, they could never be held liable for perjury.

CHAIRMAN MASON: Or if it were Enron, it could be the CEO.

[Laughter.]

COMMISSIONER SMITH: The first Enron reference of the day.

CHAIRMAN MASON: Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr. Chairman. "Designated dunce." Perhaps that could be a new term of art in our agency. It might have broad application.

I wanted to follow up on a discussion that Commissioner Thomas developed earlier and that deals with this tough issue of electioneering communications that mention Presidential candidates. And he quoted at length from the statute in terms of the targeting requirements as applied to Presidential and Vice Presidential candidates, namely that there isn't a targeting requirement in the statute.

And, of course, there's another statutory phrase that talks about how an electioneering communication isn't an electioneering communication unless it is made within 30 days of a primary. And some people believe that that would be the statutory phrase that we would rely upon to

conclude that there isn't a nationwide black-out period for communications that discuss Presidential candidates, and specifically that there isn't a prohibition or restriction in those States after a primary has taken place, unlike a nationwide black-out period approach.

I just wanted to confirm, Mr. Mooney, do you agree with that view that we should not adopt a nationwide restriction on Presidential communications?

MR. MOONEY: That's correct, Commissioner. We do believe that there are two proper interpretations of the law and the Commission at least in the Notice of Proposed Rulemaking, in adopting the one that avoided the nationwide black-out, was the preference choice. And both were reasonable to make.

COMMISSIONER TONER: Do you think that's well-grounded in the statutory language?

MR. MOONEY: That's the Alliance's position, yes.

COMMISSIONER TONER: Mr. Mayer, your view?

MR. MAYER: We agree with that position, also.

COMMISSIONER TONER: I'm impressed, Mr. Mooney, that, you know, you represent the Alliance and also Sierra Club, joined in joint comments, and obviously these organizations do an awful lot of grass-roots lobbying. And we seem to be struggling with, if we're going to craft an exemption for lobbying, what do we have to do for it to actually be effective so that people could actually lobby.

I understand that you support alternative 3-C in the NPRM. What is about 3-C that causes you to support that particular proposal?

MR. MOONEY: The thing that distinguishes--and just for purposes of the record, I'm here today representing just the Alliance for purposes of the testimony.

The one segment of alternative 3-C that distinguishes it from the others is the ability of organizations to mention past voting records. This, we deem to be critically important for grass-roots lobbying communications, for reasons that

have already been articulated earlier today on other panels as well, that mentioning the past records of office-holders is critically important to show their propensity to be voting in a particular way on the pending legislation that's the subject of the grass-roots lobbying.

To avoid having that, to go with one of the other alternatives, would essentially tie one arm around the First Amendment's back. It would stop organizations from being as effective as they can be, and that's why the Alliance chooses alternative 3-C in its support.

COMMISSIONER TONER: Given that you represent an organization that does an awful lot of grass-roots lobbying, is it your professional view that if we adopted an exemption that did not allow such groups to mention the voting and legislative records of officials, that that would hamstrung any effective grass-roots lobbying they could do?

MR. MOONEY: I think that it certainly would take away a tool, a very important tool of most grass-roots lobbying efforts. In the vast

majority of cases that I've at least taken a look at regarding grass-roots lobbying, mentioning the past voting record of a particular office-holder is a critical piece of that. So, yes, I think it would hamstring them.

COMMISSIONER TONER: Do you feel the same way if we were to adopt a rule that restricted the ability of organizations such as yours to actually air the spots where the officials reside that would prohibit that, namely that you wouldn't be able to air it in the areas of the country where they actually live?

MR. MOONEY: Yes. I think that goes toward the targeting analysis, and again I think that would create additional problems. I mean, just as a general rule regarding the Alliance's comments, we'd like the Commission to come up with an alternative that makes sure that they restrict the least amount of speech possible. And I think any of the variety of different comments that come from the Commissioners today, I think, should reflect our point of view on that.

COMMISSIONER TONER: I'm interested in-- and in the NPRM, we haven't really touched on this. We talk about the FEC website and the information that is there in terms of whether or not a communication reaches 50,000 people or not. And I'm wondering whether not, in both of your views, it should be an absolute defense if a group such as yours relies on that FEC website and indicates that a certain communication does not reach 50,000 people, whether that should be an absolute defense for liability under this statute.

Mr. Mayer, do you have a view on that?

MR. MAYER: Yes. We definitely believe it should be an absolute defense. We believe that many non-profit organizations, the only source of information they will have that's reliable on whether they're reaching 50,000 people with their particular communication will be the FEC website.

And to require them to seek out some sort of other source of information to confirm that the FCC information is correct and reliable, we believe, would be unnecessary and prohibitively

expensive for many of our members and other non-profit organizations. So, yes, we believe you should be able to rely on it absolutely.

COMMISSIONER TONER: Mr. Mooney, do you share that view?

MR. MOONEY: We concur with that.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN MASON: Larry Norton.

MR. NORTON: Thank you, Mr. Chairman. And thank you for coming this afternoon.

I wanted to follow up on, I think, the last question Commissioner Smith asked and that is with respect to the view that I think both of you proposed today, which is that unpaid ads and PSAs should be exempted.

That's a correct characterization of both of your positions?

MR. MOONEY: Yes, that is.

MR. MAYER: That's correct.

MR. NORTON: Okay. I'd like to understand a little bit more about what that's about. It's an

interesting concept. It has come up earlier in the afternoon, and I guess what I want to be clear on is that when you say exempt unpaid ads, what you are talking about are communications where you don't actually pay for the airing. So you might pay for the production, but if you're not involved in paying for the airing, then that's what we would consider to be unpaid.

MR. MOONEY: That's correct.

MR. NORTON: That's right?

MR. MAYER: That's our position as well.

MR. NORTON: So if a third party were to pay for the advertisement or communication that you produced, would the third party then be making the electioneering communication if the third party paid $10,000 or more?

MR. MAYER: I think our position would be--well, first, our position in our comments is that the air time is unpaid for by any person. It wouldn't be simply the person that paid for the production of the ad. So I think our view would be that if an organization paid for the production of

the ad or the particular piece of communication and then a third party purchased the air time that allowed the communication to be aired, both the third party and the organization that paid for the initial production costs would be making an electioneering communication.

Now, I think we would also agree that if this was a situation where the original production piece was paid for and produced and was just available on the shelf and there was no communication between the third party that purchased the air time and no agreement between them and the person that produced it and it was simply taken off the shelf and then put on the air that only the person that was responsible for paying for the air time would be making an electioneering communication, since they had the only control over the timing of the communication, which would bring it within the scope of the electioneering communications definition.

MR. NORTON: Would you agree with that?

MR. MOONEY: Our analysis didn't really

extend it to that level of detail on this particular subject. Our point of view is that production costs--whoever takes on the production costs, that shouldn't matter in this analysis. If the air time is free, then this exemption should apply, but beyond that we haven't taken any other position.

MR. NORTON: So both of you would agree, then, that if you took care of the--you had an arrangement with the public service channel and the arrangement was that your organization would handle all of the production costs and that the public access cable channel, let's say, would then run the communication. That shouldn't constitute an electioneering communication. That should be exempt under this unpaid/paid distinction?

MR. MAYER: Yes.

MR. MOONEY: That's correct.

MR. NORTON: You also mentioned that PSAs ought to be included as part of the exemption. And I confess as I sit here I'm not entirely sure what's a PSA and what distinguishes a PSA from an

issue ad. Is it something that we should try to define? Is a PSA distinguished by the subject matter if it concerns giving blood or reading to your children? Is that the difference between a PSA and an issue ad? How would we flesh that one out?

MR. MAYER: I think that if an exception is adopted for unpaid communications along the lines we've just discussed, that would encompass PSAs, since the air time for PSAs generally is granted free.

Beyond that, as we stated in our comments, we support an exception for PSAs and we agree that some definition of PSAs would be required, but our comments didn't extend to providing a specific definition.

MR. NORTON: Do you want to add anything, Mr. Mooney?

MR. MOONEY: No. I think that's pretty much our position as well.

MR. NORTON: A last question for you, Mr. Mayer, and again I'm curious more than anything

else about this. You've talked about the IRS'--or you both have actually talked about the IRS' prohibition on 501(c)(3)'s promoting or supporting or opposed candidates. And one of the penalties for that is revocation of an organization's tax-exempt status.

Is that something that occurs very often?

MR. MAYER: My understanding is--and I should note that revocations are public information, but penalties short of them generally are not made publicly available. Unlike the Commission proceedings, IRS proceedings are generally confidential.

The revocations are relatively rare, but that's because violations are relatively rare. The threat to a 501(c)(3) organization of losing its tax-exempt status is, as I believe Mr. Mooney already noted, a death knell for that organization. That makes the organization no longer eligible for tax-deductible contributions. It may cause problems with the organization with the State attorney general. It basically ends the

organization's existence.

And so most organizations that I know of--virtually all of them that are 501(c)(3) organizations do everything they can to stay about ten feet away from the prohibition on engaging in political activity under the Internal Revenue Code.

MR. NORTON: Well, thank you very much, and thank you, Mr. Chairman.

CHAIRMAN MASON: Jim Pehrkon.

MR. PEHRKON: Mr. Chairman, thank you. Mr. Mayer, Mr. Mooney, thank you for appearing today.

Mr. Mayer, you started off and you initially said you represent a rather large number of organizations and I wasn't sure if you said 700 or 7,000.

MR. MAYER: It's 700.

MR. PEHRKON: Seven hundred. I was trying to increase that by ten-fold right off the bat.

MR. MAYER: But I should note that many of these organizations are national organizations with local and State chapters. So, collectively,

Independent Sector does represent tens of thousands of actual entities.

MR. PEHRKON: Thank you for that.

Part of the question I had was I wasn't sure whether or not all of these organizations would, in fact, be engaging in electioneering communications. And did you give some indication during your testimony as to how pervasive these organizations were?

MR. MAYER: I did not, and we have not attempted to survey our members to determine how many of them engage in electioneering communications as it's defined under BCRA.

MR. PEHRKON: So you would have no sense as to how many communications might actually take place during an election period?

MR. MAYER: I do not have any definite figures, no.

MR. PEHRKON: Mr. Mooney, your group represents not quite as many organizations--

MR. MOONEY: That's correct.

MR. PEHRKON: --but many of which are

rather large. Do you have a sense?

MR. MOONEY: Unfortunately, no. Similarly, we did not poll our membership to find out to what extent they engage in what would be covered as electioneering communications.

MR. PEHRKON: Thank you.

MR. MAYER: I would note that I believe another organization, OMB Watch, cites in its comments a study by Tufts University on communications by 501(c)(3) organizations that I believe constituted lobbying that might fall under the definition of electioneering communications. You might want to ask them about that in their testimony tomorrow.

MR. PEHRKON: I think we'll try to do that. Thank you.

CHAIRMAN MASON: I do have one follow-up question I wanted to ask. I don't know if other Commissioners do. I certainly want to recognize Commissioner Thomas first if he has any.

COMMISSIONER THOMAS: No. My limited opportunity would be to just say for the record

poor Bill Yellowtail. If nothing else, though, he should serve as an example of someone who brought the entire world together for the proposition that those ads were run in that race as sham issue ads. He did serve a helpful purpose there, so that's my only comment.

Thank you.

CHAIRMAN MASON: Commissioner Smith.

COMMISSIONER SMITH: I just have one quick follow-up here, and actually you may not want to comment on it or you might just want to submit written comments. But I just want to make a few quick comments now for you, Mr. Mooney.

You suggest in your written testimony two things that I like as policy matters, but I'm not sure that the authority is there under the statute and I'm curious as to whether you could address either now or in written comments, or both, where that authority might come from.

The first is your preference for exemption 3-C in talking about a lobbying exemption, and I wonder if that doesn't run afoul, however, of the

admonition in the statute that the ads cannot promote, support, attack, or oppose a candidate, since at least I think it's a pretty good argument that that exception would allow that. So I'm curious if you think that can be made to work.

Your other suggestion was that organizations would only have to report one time. In other words, they would cross that $10,000 threshold, they'd run the ad, they'd report once and that was it. But I wonder if that can be squared with 434(f)(4), the definition of disclosure date, which I think seems to suggest that you have disclose again each time you make more communications since the last disclosure report each time you cross $10,000 aggregating, although I suppose maybe if someone defined it as a different electioneering communication or something, that might work.

That's something I wonder if you have time, like I say, either now or in the next week to put them in written comments, if you could perhaps address those because as a policy matter I like

them, but it's a matter of what is our authority at this point. I'm much less sure.

MR. MOONEY: As far as the first question you had regarding the authority to adopt that particular exemption, yes, there is a possible interpretation that talking about an office-holder's past record could be construed as supporting, attacking, or opposing.

I think in that context, however, it's going to be regarding legislation only and any kind of criticism in that vein would not be supporting, attacking, or opposing regarding a candidacy. It would be supporting, attacking, or opposing regarding legislation. I think that is a distinction with a difference that allows the Commission to promulgate that regulation as is.

Regarding the second point you raised, I would have to supplement that with written remarks further on down the road.

COMMISSIONER SMITH: Thank you.

CHAIRMAN MASON: I wanted to ask Mr. Mayer about affiliation, because you raised it and it's

important. And I know a lot of non-profit groups are structured in such a way they have a (c)(4) and a (c)(3), and sometimes now a 527, and so on.

And I just wanted to raise the concern that I see that and I'm certainly sympathetic, but it strikes me it runs somewhat counter to some of the language we see from the sponsors, including some pre-enactment statements, regarding the absolute corporate ban where, you know, the argument has been put forward, for instance, that, no, corporations can't spin off non-federal PACs to take unlimited individual contributions for electioneering communications because that would be indirectly controlling the activities of these organizations.

And so I don't--this is an area where again the IRS structures say, in essence, as long as business affairs are separate, we're not really worried about the fact that the same group of people may be running two organizations sometimes with very similar names for almost identical purposes.

We have an affiliation rule that works quite differently and if you have overlapping boards of directors, and so on like that, you may be lumped together for certain purposes. And so I just want to sort of flag that for you and offer you the opportunity to comment further if you wish on this affiliation concept and what you view as the necessity for allowing organizations to have, as it were, lobbying arms, education arms, and continue to perform all of these functions under rules appropriate to each.

MR. MAYER: I believe this is another area, and there have been several that have been touched on today, where the constitutional requirements would obligate the Commission to create an exception or create rules that would acknowledge those constitutional limitations in interpreting BCRA.

In this particular area, as I believe is detailed more in some other comments that have been filed, the Supreme Court has acknowledged the limitations under the federal tax code on speech

done by Section 501(c)(3) organizations as permissible, but only because those organizations are free to create 501(c)(4) affiliates, and those (c)(4)'s in turn are allowed to create 527 affiliates.

And the key requirement is, as I believe would be consistent with our comments, that the money flows be such that the monies are kept separate, so that the (c)(3) funds, which in the tax context are pre-tax dollars, do not go to fund the activities of the (c)(4) which the (c)(3) couldn't conduct itself, and the same way relations between the (c)(4) and the 527.

So I believe that that constitutional analysis would also apply in this context. Again, we're talking about speech restrictions such that if you have two entities, one permitted to engage in electioneering communications subject to disclosure rules and one not, that as long as the monies are accounted for appropriately such that the non-permitted organization's funds are not used by the permitted organization for electioneering

communications, that you have to allow the affiliation to exist if the money is kept straight.

CHAIRMAN MASON: Thank you.

Vice Chairman Sandstrom.

VICE CHAIRMAN SANDSTROM: Much of the discussion today seems to me to suggest a false dichotomy. There are these sham issue ads, or issue ads, and then there are true candidate ads.

Isn't it true your organizations spend a good portion of your time trying to force office-holders and candidates to take a position on an issue? There may not even be a pending vote, but you want them to take an issue and one of the times they're most vulnerable is just before an election.

And if they take an issue favoring your organization, you will applaud them. If they fail to take a position or they take a position against you on this, you want that generally to be known to the electorate so that can factor into the electorate's decision within that 60 days, at the end of that 60 days, on who is going to return.

I mean, if someone is strongly opposed to

your position on the issues, you're not indifferent to whether they're going to be elected or not. In fact, the reason you try to force them to take a position on the issue is because you're deeply interested in what position they're going to take, and particularly if they're elected.

MR. MOONEY: I think under the fact pattern that you just described, if a 501(c)(3) organization engaged in that activity, it would be at risk for losing its tax status.

VICE CHAIRMAN SANDSTROM: No. Remember, this is the activity. I'm not talking about your 501(c)(3). I'm just saying with respect to your elections, if you are doing lobbying, you would like the candidate to publicly announce whether they embrace the issues that you are in favor of or not, and that you're often trying to force people to take that position, one, because you're trying to build some legislative momentum, build votes in the legislative body.

And if they're going to be for you, you want to know it. If they're going to be opposed to

you, you want your members to know that. And you expect, with that knowledge, your members will either, you know, vote for the person or vote against them, depending on what public position they've taken on the issue on which you're lobbying.

It seems to me that the world isn't divided into issues and candidates. From your position, it seems to me that you're fairly indifferent to who the personality in that office is and you're most interested in how they're going to vote on issues and not, you know, whether they're good people or have a good family, whether they're interested in issues that you care about.

MR. MAYER: We agree, though, with the principle underlying BCRA that there is a spectrum of communications from the ads designed to cause a policyholder to change their positions through getting the public to call their office and complain or applaud them for taking a certain position, to ads that are designed to influence whether the public, when it goes into the polls,

into the election booth, votes for that particular person or not when they're running for reelection.

And we support the principle underlying BCRA that it is possible to at some point distinguish when you're in the election side of that communication as opposed to the lobbying side.

VICE CHAIRMAN SANDSTROM: And I would submit that wherever we draw that line, it's somewhat artificial and it has nothing to do with what you want to be the outcome, you know, from your ads. Where you want the outcome is whether it's achieved by having a person elected who will promote your views when they're in the legislative body or having their opponent elected.

You know, that's instrumental in getting your views passed. I mean, just the airing of your views is not what you're after. You're after having members in that legislative body who share your views, either through persuasion or by rejection at the polls for your opponents.

And, yes, there is a spectrum, but wherever we draw the line, it has to be remembered

it's an artificial line because there is no, in the real world, sharp distinction between issue ads and candidate ads. And so the line we draw, I hope, will be reasonable, but I don't think it comes from, you know, you have one purpose while a 527 organization has another. You know, you both probably share the same purpose; that is, getting people elected who will implement the views that you promote.

And that's a little speech at the end. I appreciate it.

CHAIRMAN MASON: Other Commissioners or the General Counsel?

If not, we will adjourn for today and reconvene at 9:30 tomorrow. Thank you.

[Whereupon, at 3:50 p.m., the proceedings were adjourned, to reconvene at 9:30 a.m., Thursday, August 29, 2002.]