FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON

(1) THE DEFINITION OF FEDERAL ELECTION ACTIVITY;

AND

(2) STATE, DISTRICT AND LOCAL PARTY COMMITTEE

PAYMENT OF CERTAIN SALARIES AND WAGES

Thursday, August 4, 2005

10:06 a.m.

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

C O N T E N T S

P R O C E E D I N G S

OPENING REMARKS

CHAIRMAN THOMAS: Good morning, one and all. Let's get underway. The Special Session of the Federal Election Commission for Thursday, August 4, 2005, will please come to order.

I would like to welcome everyone to today's Commission hearing. This morning, we will be discussing the Notice of Proposed Rulemaking on a definition of Federal election activity, which was published in the Federal Register on May 4, 2005. The NPRM explored possible modifications to the definitions of voter registration activity, get out the vote activity, and voter identification so that they would be consistent with the District court's decision in Shays v. FEC.

I would like to thank all of the people who took the time and effort to comment on the proposed rules, and in particular those who have come here today to give us the benefit of their practical experience and expertise on issues raised by the proposed rules. I also want to thank our

staff for working hard to get this hearing ready.

Let me briefly describe the format we will be following today. This is what we have been doing a lot recently. We have this morning a total of six witnesses with regard to this particular rulemaking. We have divided them among two panels. Each panel will last for one hour. Each witness will have five minutes to make an opening statement. We have a light system at the witness table to help you keep track of your time. The green light will start to flash when you have one minute left. The yellow light will go on when you have 30 seconds left. And the red light means it is time to wrap up your remarks.

The balance of time is reserved for questioning by the Commission. For each panel, we will have at least one round of questions from Commissioners, the General Counsel, and our Staff Director, and then there will be a second round if time permits.

We will have a short break between the two panels, and after a lunch break, we will conduct a

separate hearing on a separate issue. We have a busy day ahead of us and would appreciate everyone's cooperation in helping us to stay on schedule.

Let us begin by hearing from any of my colleagues who might wish to make an opening statement. Anybody?

[No response.]

CHAIRMAN THOMAS: Well, that makes this easy. We're ahead of schedule.

[Laughter.]

COMMISSIONER McDONALD: Already a bonus.

PANEL 1: FEDERAL ELECTION ACTIVITY

CHAIRMAN THOMAS: Our first panel consists of Larry Noble, who is appearing on behalf of the Center for Responsive Politics; Paul Ryan, who is appearing on behalf of the Campaign Legal Center; and Brian Svoboda, who is appearing on behalf of the Democratic Legislative Campaign Committee.

Please take a seat and proceed when you are ready. We will go alphabetically, I suppose, and Mr. Noble would start us off.

MR. NOBLE: Mr. Chairman, Mr. Vice Chairman, members of the Commission, Mr. General Counsel, staff, on behalf of the Center for Responsive Politics, I want to thank you for the opportunity to testify before the Federal Election Commission on Federal election activity. I have only a few brief comments and then will be glad to try to answer any questions that you have.

This hearing is part of the continuing saga of the rulemaking. BCRA represents the most comprehensive reform legislation in 25 years, and writing the rules implementing the new law has been, I think, a long and often contentious undertaking. We are here today because the U.S. District Court rejected the FEC's attempt to define several of the component parts of the definition of Federal election activity. Specifically, we are dealing with the rules defining voter registration and get out the vote activity, voter identification, and the phrase in connection with an election in which a candidate for Federal office appears on the ballot.

In some cases, the court held that the agencies rules did not comport with the clear language of the statute, while in others, the court held that the regulations violated the APA because of a lack of proper notice. And even in some of those cases, the court left open the question of whether the underlying rule was within the agency's discretion.

Regardless of the reason the regulation was sent back, we urge the Commission to use this opportunity to adopt regulations that implement the law in a manner consistent with the Congressional intent to ban the use of soft money to influence Federal elections rather than just looking for new ways to limit the reach and effectiveness of BCRA.

Of course, the Commission must consider the impact its rules will have on the regulated community, but the FEC's desire to minimize the burden on the regulated community cannot override the agency's mandate to enforce the law as enacted by Congress.

Ultimately, whether you think BCRA was

sound public policy or not, this is a law of limits and prohibitions which, by its very nature, restricts how certain campaign activities may be funded. Trying to move as many of those activities as possible out of the reach of the law will not only undermine BCRA, but will undermine the credibility of the agency. If you believe provisions of BCRA were a mistake or not working in the way you intended, you can make that case to Congress, but BCRA is the law of the land and should be administered in a way that is consistent with the purposes and goals and the FEC's mandates.

With these thoughts in mind, we urge the Commission to do the following. Amend the proposed rule regarding voter registration to include efforts to encourage individuals to register to vote. Amend the proposed rules regarding get out the vote activity to include efforts to encourage individuals to vote and eliminate the 72-hour time period limitation on the definition. Adopt the proposed rule to eliminate the association exception for get out the vote activity and voter

identification. Include voter list acquisition in the definition of voter identification. And reject the adoption of any exception to the existing Federal election time periods for the definition of a term in connection with a Federal election.

Again, I thank you for this opportunity to testify and will be glad to answer any questions that you have.

CHAIRMAN THOMAS: Thank you. We are just racing ahead of schedule here.

Next, I guess, Mr. Ryan. Good morning. Welcome.

MR. RYAN: Good morning, Mr. Chairman, Mr. Vice Chairman, Commissioners, and Commission staff. It is a pleasure to be here this morning testifying in this rulemaking.

As Mr. Chairman noted, I am here testifying on behalf of the Campaign Legal Center, which I serve as Associate Legal Counsel. The Campaign Legal Center has submitted detailed written comments on this rulemaking, together with Democracy 21 and the Center for Responsive

Politics. Due to the large number of legal and policy issues raised by the NPRM for this rulemaking, I will not repeat all the points made in my written comments, but instead will address the issues considered by the Campaign Legal Center to be most important.

With regard to voter registration activity, the regulation proposed in this rulemaking is identical to the existing rule. The Campaign Legal Center objects to readoption of this rule on the ground that the rule includes only individualized efforts to assist voters to register. We ask that the Commission amend the rule to include encouraging or urging voters to register.

In the present NPRM, the Commission noted its concern that adoption of a definition of voter registration activity that includes encouraging people to register to vote, quote, "could overrun the administrative and enforcement capacity of the Commission," unquote. This concern seems unwarranted given the fact that the Commission

already regulates such activity under Sections 106.7(c)(5) and 100.133 of the Code of Federal Regulations.

Regulation 106.7(c)(5) requires State parties to use at least some hard money to pay for voter drive activities that, quote, "urge the general public to register or vote," unquote, but do not qualify as Federal election activity.

Regulation 100.133, which implements an exemption from the definition of the term "expenditure" describes voter registration and get out the vote activities as, quote, "designed to encourage individuals to register to vote or to vote," unquote.

Just as the implementation of Sections 106.7(c)(5) and 100.133 have not overwhelmed the administrative and enforcement capacity of the Commission, nor would adoption in this rulemaking of a voter registration regulation that includes activity encouraging or urging voters to register.

With regard to get out the vote activity, the Campaign Legal Center supports the Commission's

proposal to eliminate the association exception from the current rule as the only acceptable means of complying with the District Court decision in Shays.

For the reasons just stated with regards to voter registration activity, we further ask that the Commission amend the proposed get out the vote rule to include activity encouraging voters to get out and vote.

We also urge the Commission to eliminate the 72-hour time period reference from the proposed get out the vote rule. BCRA covers all get out the vote activity in connection with a Federal election. Such activity can and does occur in the weeks and months prior to an election, particularly in the 27 States that permit early voting. As Attorneys Sandler and Reiff noted in their written comments, the existing regulations' reference to a 72-hour time period led many committees to mistakenly believe that any get out the vote activity outside the 72-hour window did not qualify under the regulation as get out the vote

activities. For these reasons, the Commission should eliminate the 72-hour time period reference.

With regard to voter identification, the Campaign Legal Center again supports the Commission's proposal to eliminate the association exception from the current rule as the only acceptable means of complying with the District Court decision in Shays.

We likewise support the Commission's proposal to include the acquisition of voter lists in the definition of voter identification, but further urge the Commission to include the use of voter lists in the definition of voter identification. Under such a regulation, State party committees would be required to use Federal funds to pay for any voter list acquired or used within the time period defining what constitutes activity in connection with a Federal election. This regulatory language would prevent a State party committee from gaming a system by acquiring a voter list outside of the time period but using a list within the time period.

The Commission seeks comment with regard to voter list acquisition on whether the regulation should include an exception for the acquisition of voter lists if the party committee does not actually use the voter list in connection with any election where a Federal candidate appears on the ballot. We oppose the creation of any such exception because, in the words of the Shays court, inherent in the acquisition of such a list is the identification of voters.

Finally, the Commission has taken this opportunity to propose several amendments to a regulation not challenged in the Shays litigation, Section 100.24(a)(1), which defines the phrase in connection with an election in which a candidate for Federal office appears on the ballot. The Campaign Legal Center supports the Commission's proposal to extend the coverage of Section 100.24(a)(1) to even year special elections.

However, we oppose the creation of any exceptions to the existing Federal Election Commission time periods established by this

section. The proposed exception would create large periods of time in which State and local party committees would be permitted by the Commission to freely spend soft money in a manner that undeniably influences Federal elections and, consequently, unduly compromises the soft money ban.

Thank you for your attention. I look forward to answering any questions you might have to the best of my abilities.

CHAIRMAN THOMAS: Thank you.

Mr. Svoboda, thank you.

MR. SVOBODA: My name is Brian Svoboda. I am counsel to the Democratic Legislative Campaign Committee and I want to thank the Commission for the opportunity to testify and also thank the Commission staff for the time and effort they have put in choosing a convenient date for everybody.

I am here for the particular purpose of talking about how this rulemaking might affect organizations like my client and like non-party legislative caucuses across the country that engage in the support of State and local candidates and

some things that the Commission perhaps should consider both as legal and practical matters in developing these rules and applying them to these types of organizations.

There's two basic things that the Commission might want to consider about organizations like these as they proceed with these rulemakings or with this rulemaking. The first is that organizations like the DLCC, organizations like legislative caucuses at the State level that are organized outside the party structure, are fundamentally different from other types of organizations that are regulated by BCRA, and in particular, they pose a--in particular, they present considerations that make expanded Federal regulation and the imposition of complex rules perhaps inadvisable in this context.

So for example, it is well acknowledged that groups like caucuses and like the DLCC have had a longstanding and historical interest in supporting specifically State and local candidates. In the case of my client, they are monomaniacally

focused on the election of State legislators, and this is something that, in fact--I mean, the sponsors of BCRA in the most recent 527 legislation, H.R. 513 that was reported out of the House Administration Committee, acknowledged. Faced with the task of trying to decide what universe of 527 organizations ought to face the requirement to register as a political committee with the Commission, the sponsors and the House Administration Committee adopted an exemption that would apply to organizations like these to the extent that they do not refer to Federal candidates in their communications or otherwise manifest signs of being actively involved on behalf of Federal candidates or Federal political parties.

So we start from kind of the baseline that these sorts of organizations present a fundamentally different sort of case for regulation, that they are focused on State and local candidates and some measure of respect should be afforded to their State and local election activities.

The second consideration that organizations like these face is that they are not, frankly, historically accustomed to having to comply with Commission regulations, particularly regulations as complex as these. Indeed, given their focus on candidates at the State and local level and the absence of a focus on Federal candidates, they have had--they would have had, before passage of Shays-Meehan, little reason to suspect that their activities might be affected by the operations of this agency or by the regulations of this agency. And when the Federal election activity regulations, in fact, were adopted at the end of 2002, most entities like this complied with them in a very simple way. They chose not to conduct Federal election activity.

Their principal concern as an operational matter was can we urge voters to go out on November 2 and vote for State Senator X? And fortunately, at that time, there were Commission regulations in place that essentially allowed them to do that, the regulation that the Commission is now being called

upon to revise as a result of the Shays District Court's opinion that created an exemption for State and local committees that were active solely in State and local elections.

So the idea that these organizations are prepared, as a practical matter, or focused, as a practical matter, on conducting allocation or using reasonable accounting methods to determine the sources of funds that they are raising, spending, and using for their State election activities is an assumption that warrants some careful review. I mean, we at the DLCC have taken some effort during the last cycle to educate caucuses on the requirements of Federal election activity, we think with some fruit. But by and large, I think it needs to be supposed by the Commission that most people at the State and local level are not aware of how these rules might affect their activity and that that problem would be compounded if these rules become more complex or more onerous.

So where, in our view, does that leave the Commission at the present moment? You have a

statute that at its core is ambiguous. I mean, for example, under the term that would seemingly apply to my client, the a-

association of State or local officeholders or of State and local candidates, is undefined by Congress or in the regulation. We assume it applies to us and we think that that is the best assumption, but it's not defined, and similarly, the court in the Shays case said that the basic elements of Federal election activity were undefined by Congress, such as get out the vote, voter registration, and voter identification. That suggests that the Commission has some room to interpret these statutes and to apply them in a way that is consistent with Congress's purpose.

What was Congress's purpose as it passed this statute? With respect to organizations like ours, Congress was almost silent. I found one line of legislative history on the subject. It's in a section-by-section analysis that Senator Feingold introduced on the floor saying basically that the purpose of the restriction was, quote, "to close

the State party loophole." Their fear, and frankly, I think, it was the fear that was echoed by the sponsors in the Shays litigation at the District Court level, was that organizations like State caucuses thought to have a relationship with State parties or with national parties might serve as a Trojan horse for the conduct of Federal election activities and, thus, the purpose of imposing the restrictions on them was to prevent that sort of circumvention.

Obviously, what the court did in the Shays case was to reject the notion that the Commission could take two components of the Federal election activity definition, the voter identification and get out the vote provisions, and exempt caucuses and associations entirely from those restrictions.

So what can the Commission do now? One possible avenue might be for the Commission to review the GOTV and voter identification definitions and come up with exemptions that are more narrowly tailored toward the purpose of the statute, and here again, H.R. 513 and the position

taken by the sponsors of the legislation in the 527 bill might provide some guidance. For example, they make exemptions for political committee status for certain types of non-Federal organizations contingent on a series of circumstances--whether they comply with State law, whether Federal candidates, Federal officeholders, national parties or their agents participate in the operations of the organization or raise money for them, whether they make direct contributions to Federal candidates.

Perhaps the Commission could adopt an approach to the GOTV and voter identification question for organizations like ours that would allow them to conduct those activities so long as they met those sorts of conditions. That, to us, would seem to meet the concerns that the sponsors had addressed, which was essentially to make sure that organizations like ours did not function as Trojan horses for party or candidate activity.

We respectfully suggest that the facts from the past election cycle suggest that that has

not happened, but should the Commission wish to guarantee that that not happen in a way that is consistent with the statute, that might be one possible approach.

And again, I appreciate your forbearance and the opportunity to testify today and I'm happy to answer your questions.

CHAIRMAN THOMAS: Thank you.

QUESTIONS AND ANSWERS

CHAIRMAN THOMAS: I'll start off the questioning. The opposition put forth by Mr. Noble and Mr. Ryan is that we ought to, at least in some of our definitions, for example, for GOTV type of activity, move into including--encouraging people to get out the vote, but I think we have to concede there are some, I guess, complications about what that would then bring in. I suppose you've probably seen the comments submitted by Mark Brewer of Michigan Democratic Party, but if you haven't, on page four, he throws out a few hypotheticals. He thinks that if we move into this attempt to cover encouraging voter registration through

improved responding to a voter calling in--I'm sorry, calling his local party headquarters and asking where he or she could register, it would also bring in placing a stack of voter registration cards at the front desk. It would also pick up perhaps the cost of a party website where registration materials are available.

Those are the kinds of hypotheticals that have been thrown out, and I'm just curious how you would react to whether those kinds of activities should be covered by a modified definition that would add in encouraging people to get out the vote.

MR. NOBLE: Obviously, with any of these rules, you're going to have to draw certain lines, and off the top of my head, I would say that responding to a voter calling in, if that's all it is, a random call, then, no, that doesn't have to be looked at as an activity that was out there encouraging voters. However, if you took out an ad encouraging voters to call in and find out how they could--where they can vote or find out why they

should vote, then yes, that would.

I think you really would encourage--what we're saying here is, don't limit it to actually physically or in some ways assisting individual votes. But anything that encourages them that is meant to get them to get out, to tell them to go out and vote should be covered. Placing cards on the front desk, probably not. I'm not sure just the act of placing them. But telling people, come in and we have cards for you to register to vote, yes.

CHAIRMAN THOMAS: Any--

MR. RYAN: The only thing I would add is that I would encourage the Commission to rely on the expertise that has developed in years of implementing Regulation 106.7(c)(5), which seems, in my reading of it, to require state parties to allocate between Federal money and--hard money and soft money, any activities that urge voters to either register or vote. The Commission has experience implementing this type of regulation.

MR. SVOBODA: Mr. Chairman, if I may, I might offer one comment on the foregoing, and that

is there is no doubt that there are some things that the Commission is going to have to change in the FEA rules as a result of the Shays opinion. I mean, that just is what it is.

But from the perspective of clients like mine and State caucuses, there--our perspective would be that the Commission really should put some thought in making the changes as minimal as possible, and I'll tell you why, which is that, A, these rules are rules that people at the State and local level have spent two years trying to become accustomed to, trying to figure out and trying to figure out how to comply with, and the second is that these rules are very complicated. I mean, they just are.

I mean, the classic case during the last cycle was the calls we would get from clients saying, "I want to send a mailing saying, be sure to vote for the Democratic candidate on November 2," or Candidate X on November 2 as that Federal election activity, and, well, it is providing the date of the election, specific information that

might assist them in voting, and there's a risk it's GOTV.

So you already have a level of investment and complexity in dealing with these rules and one fear, I think, that the regulated community perhaps has is that if the rules change again and if the rules become more complicated again, it may actually retard the ability to comply effectively with the rules.

Understandably, I can see the desire to try to move the ball forward to prevent additional opportunities for evasion or for circumvention, but the flip side of that is that if the rules change so quickly and become so complicated that, particularly people at the State and local level don't understand them, there's a serious question as to how they will be brought to comply. And again, that's something that organizations like the DLCC can and have made a difference. We try to educate our clients as best we can about these issues.

It's, frankly, a subject on which the

Commission would need to make, I think, some significant investment, because the way the situation is right now, without some aggressive outreach to these organizations, changes in the rules have the effect of essentially planting land mines across the country, but somebody trips on it years from now and blows themselves up without any idea that they're there. So that is the fundamental issue that we would raise about a lot of these restrictions and perhaps the direction that the Commission should take in revisiting subjects that perhaps the Shays court did not require them to address.

CHAIRMAN THOMAS: I don't have much time left. I was just going to try to get clarification. In the comments of the Campaign Legal Center and the Center for Responsive Politics and Democracy 21, there seems to be the impression that if we don't bring some of these voter registration and GOTV activities into the FEA definition, that somehow that leaves these State and local parties free to pay for the costs 100

percent with soft money. I just want to get some clarification.

MR. NOBLE: I apologize. Actually, I meant to address that in the opening statement. That was a mistake on page seven of our comments, if that's what you're referring to, the first full paragraph, where we say contacting and encouraging voters to register will be exclusively soft money. That actually was an error. That would be a mix of hard and soft money.

CHAIRMAN THOMAS: So even if we don't--

MR. NOBLE: Right.

CHAIRMAN THOMAS: --bring this into the FEA realm, there would still have to be some allocation--

MR. NOBLE: Allocation, yes, sir.

CHAIRMAN THOMAS: Okay, thanks.

Next, we're going to go to Vice Chairman Toner.

VICE CHAIRMAN TONER: Thank you, Mr. Chairman. I want to thank the witnesses for being here today helping us. It used to be that August

was kind of a quiet time in Washington. I miss those days, but thank you for being here.

I want to follow up with another hypothetical. The Chairman mentioned a hypothetical that Mr. Brewer offered, and Mr. Noble, I'll begin with you. Three months before next year's mid-term elections, let's say the Ohio Democratic Party invites Reverend Jesse Jackson to travel to Columbus, Ohio, to be the keynote speaker of a large voter registration rally the party is sponsoring there. Hundreds of thousands of people attend the rally in Columbus and Reverend Jackson makes the following comments. Quote, "It is critical that all of you here today register to vote. Remember Florida in 2000? Remember Ohio in 2004? If everyone here registers to vote, we will not be denied again. The Democratic Party is on the brink of taking back control of Congress. With your help, we will be successful in November."

And my question is, in your view, are Reverend Jackson's remarks voter registration activity under BCRA? Would they meet the

"encouraging individuals to register to vote" standard that you're proposing?

MR. NOBLE: Yes.

VICE CHAIRMAN TONER: And so, therefore, in your view, would that means that all the event costs for this event would have to be paid for with federally permissible or Levin funds?

MR. NOBLE: Yes.

VICE CHAIRMAN TONER: No soft money whatsoever for any of these--

MR. NOBLE: If that is the event, yes.

VICE CHAIRMAN TONER: Mr. Ryan, do you concur?

MR. RYAN: Yes.

VICE CHAIRMAN TONER: Okay. Mr. Svoboda, what are your thoughts on that?

MR. SVOBODA: Well, Commissioner, I'm not sure that I agree with the foregoing analysis. I mean, for one thing, as a practical matter, I mean, that sort of activity, absent more detail from your question, would make the line item of any party committee or party organization's voter

registration budget. I mean, they have an intuitive sense of what voter registration is and the mechanics in terms of how it's conducted. It involves reaching out to people, providing them with voter registration materials and, to the extent permitted by State law, collecting the registration materials, bringing them back to the registrar and making sure that they get on the rolls. It's a much more focused activity than that and I'm not sure that a party organization would view it as necessarily a wise investment in voter registration simply to have people come to a rally, be told they ought to register, and then go home whether they register or not.

So absent those additional facts, I mean, anecdotally, I don't think it's something that a political organization would regard as voter registration activity. Whether it qualifies as such on the rules, under the current rules, I think clearly it does not. I mean, there has to be some sort of action taken to assist the voter in the act of voting--

VICE CHAIRMAN TONER: Under the proposed rules of encouraging people to vote, register to vote--

MR. SVOBODA: I think it very well could.

VICE CHAIRMAN TONER: Mr. Noble?

MR. NOBLE: I wanted to add one thing, and I think Brian raises a good point. In practical terms, I'm not sure you're going to see many of those where there aren't actually then attempts made to register the voter.

VICE CHAIRMAN TONER: You certainly won't if your proposed regulation is adopted.

MR. NOBLE: I'm not sure you see them right now.

VICE CHAIRMAN TONER: That is my point. I am just saying the mere exhortation to register to vote, in your view, ought to be Federal election activity.

MR. NOBLE: Right.

VICE CHAIRMAN TONER: Without anything more.

MR. NOBLE: Right.

VICE CHAIRMAN TONER: Yes, Mr. Svoboda?

MR. SVOBODA: I apologize for interrupting. My follow-up was going to be that follow-up activity, that going and visiting the people who attended the event, encouraging them to vote, that might very well be classified as voter registration under the current rules and those costs captured.

VICE CHAIRMAN TONER: And Mr. Ryan, if as a result of--if we were to adopt that kind of position and voter registration rates fell off, would that be just sort of an unfortunate byproduct of the law? We really don't have any discretion in the area, and that's just something we'd have to live with?

MR. RYAN: I wouldn't expect voter registration rates to fall off--

VICE CHAIRMAN TONER: If hard dollars had to be used for mere exhortations to register to vote?

MR. RYAN: Correct. I think that the last election cycle showed, at least with respect to the

national parties, that the ability to raise hard dollars has in no way been impeded by the implementation of BCRA, that parties are raising more money than ever under the BCRA limits, under the hard money limits, and I think they would continue to engage in the activity.

I think the fundamental question here is not whether or not this Commission is going to regulate the activity you have described, because it seems to fall within the current regulations requiring allocation between hard and soft money. What will change is instead of using some soft money, the Commission will now have to use either Levin funds or all hard money as part of that allocation, depending on the nature of the communication.

VICE CHAIRMAN TONER: So the position is that State parties will be able to have enough hard money to cover this activity, and if they don't, well, that's just--we really have no discretion to deal with that.

MR. RYAN: Yes.

VICE CHAIRMAN TONER: Congress has spoken, even though they didn't have a regulatory standard.

MR. RYAN: In enacting BCRA, Congress changed the presumption that State party activities may not influence Federal elections to a presumption which all State party activities do--are presumed to influence Federal elections. Congress was pretty clear in doing so, I believe, and I think this Commission has the responsibility to implement that purpose and intent of BCRA.

VICE CHAIRMAN TONER: So any State party event at which a speaker merely urges someone to register to vote would be Federal election activity when done in the last 120 days before an election with no exceptions.

MR. RYAN: Within--yes, within the specified time periods.

VICE CHAIRMAN TONER: Any State party event whatsoever where anyone said, "Hey, it's important that you register to vote, do your civic duty"--

MR. RYAN: You know, I think you need to

look at the nature of the event. You've described--your hypothetical event is a voter drive type of event.

VICE CHAIRMAN TONER: Voter registration drop-by.

MR. RYAN: If that's the nature of the event, then yes.

MR. SVOBODA: Commissioner Toner, may I make some more comment on your question? If we accept the premise that we teased out here, which is that these costs could be captured as voter registration under the rules, then the same logic will apply to local organizations and not simply to State party committees. So, for example, if I am the slate of city council candidates in San Francisco County and I bring Reverend Jackson to give that exact same speech, then at a minimum, I am going to have to look at my bank account and see if I have sufficient federally-eligible funds on hand through a reasonable accounting method to determine whether I have the funds to pay for that event, and that for local candidates and local

organizations could be a significant burden.

VICE CHAIRMAN TONER: Do you think that a local organization is likely to sponsor such an event if that were the standard?

MR. SVOBODA: Depending on the circumstances--if that were the standard? To the extent they were aware of it, I think they would be scared to do it.

VICE CHAIRMAN TONER: Thank you. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

Next, we move to Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Mr. Svoboda--

MR. SVOBODA: Yes, ma'am.

COMMISSIONER WEINTRAUB: You were never so polite to me when we worked together.

MR. SVOBODA: Not true.

[Laughter.]

COMMISSIONER WEINTRAUB: I just want to prove that I know how to pronounce your name.

CHAIRMAN THOMAS: Now, now, don't be mean.

[Laughter.]

MR. SVOBODA: I should note that the chairman came closer than 99 percent of the people who call my house.

[Laughter.]

COMMISSIONER WEINTRAUB: All right. I'm wasting my time here. I hear what you're saying about the investment that people have in the current rules because they've finally figured them out and you finally convince them that they need to abide by them and what they mean. The problem is, the rule was struck down and struck down in not very complimentary terms. We have gone through at least one level of appeal and we didn't get a terrific result at that level, either.

I don't think we have much of a choice here. The District Court said Congress has spoken directly on this question and the Commission's exemption for associations or similar groups of candidates for State or local office or of individuals holding State or local office runs

contrary to Congress's clearly expressed intent and cannot stand. The sponsors who--you know, you say they've introduced other legislation that seems to be more accommodating to organizations like yours, submitted comments to us on this rulemaking in which they said, we agree with the proposed rule that the statute requires associations of State and local candidates to use hard money for all of their GOTV activities when a Federal candidate is on the ballot.

My concern as a Commissioner, you know, is an institutional one. I agree that we could do what you suggest and try a minimalist approach and try and tweak the rules a little bit, but I suspect if we did, we'd end up back in court again and then we might end up having to rewrite the rules again and then you might have to re-teach them again to your clients, which goes against the interest that you said you were concerned about. From the institution's perspective, I don't want this institution to spend the next ten years rewriting the same regulations over and over again, going

back into court, trying to defend them, then coming back and writing them--I just--I'm hoping this is the last time we're going to have to do this.

COMMISSIONER McDONALD: Now, now.

COMMISSIONER WEINTRAUB: No, I've only got another couple of years here, so I--but I'd like to think that by the time I leave, maybe when Commissioner Noble is here, that he won't have to be still rewriting the same regulation.

COMMISSIONER McDONALD: You beat me to it.

COMMISSIONER WEINTRAUB: So, you know, I'll give you an opportunity--it's not really a question, but I'll give you an opportunity to comment on that.

MR. SVOBODA: A few comments. I mean, the first is I assume from your question you were talking particularly about the exemptions for GOTV and voter ID that apply to associations of State officeholders and State candidates, and I think it's important to be precise about what Congress's purpose was in enacting that restriction from what we know, from what little we know, and what the

court's reasoning was in invalidating the rules in place.

Congress's purpose, as we talked about earlier, was basically to prevent these organizations from serving as Trojan horses for State parties, for national parties, and for Federal candidates, to prevent them from being the new vehicle by which a Senate candidate's GOTV program is going to be run. That's the best inference that we can draw from the legislative history.

Now, the court's problem in Shays, the District Court's problem in Shays, as I read Shays, was not simply that the Commission chose to provide some measure of relief for purely non-Federal activities from these definitions. It is that the Commission chose to offer blanket exemptions from these definitions of GOTV and voter identification based on the class of the organization when the statute expressly applied the restrictions to that same class of organization. That was the Shays court step one problem, that Congress, on the one

hand, couldn't regulate the voter ID and GOTV activities of associations, and have the Commission then say, well, we're not going to regulate the voter ID and GOTV programs of the committees. Plus, the Explanation and Justification for these rules initially didn't really provide reasoning for the exemptions other than the Commission's nervousness about going where Congress had signaled it had intended to go.

So the question that that raises is, does that permit the Commission to go and try to review the application of these rules to associations, which the Commission has some discretion to do, in a way that's actually consistent with the Congressional design and informed by the Congressional design.

Now, I understand the Commission's concern about the prospect of additional litigation. It should be noted that, I mean, that, frankly, was a prospect that runs in both directions. I say that not on behalf of my client or anyone my client knows, but on behalf of many other State and local

organizations who five years from now may find themselves a respondent, you know, being presented with a conservation agreement that they don't sign and they'll say to the Commission, come serve us in Federal Court, and the first affirmative defense is that the regulation is unconstitutional under the First Amendment of the United States Constitution, and we all know that this particular actual situation here is not one that was reviewed in detail by the Supreme Court in McConnell and it was not reviewed in detail by the District Court in McConnell.

So, I mean, there's room for that sort of constitutional argument, and to get to Commissioner Toner's hypothetical again, if the slate of city council candidates in Alameda County has Jesse Jackson come to a rally urging people to register to vote and they're sued in Federal District Court by the Commission for having paid for it with corporate funds under California State law, it's entirely possible that they may have a challenge to the Commission's regulations and that the

Commission may be forced to rewrite those regulations as a result.

So all of that's a way of saying that the risks here run both ways. Just as you have a risk of being insufficiently faithful to the statute, you have a risk of infringing the legitimate rights of other organizations, and just as litigation may result from your inability to remain faithful to the statute, litigation may result from being too aggressive in its enforcement. And so this difficult job, I don't envy you.

[Laughter.]

COMMISSIONER WEINTRAUB: Well, at least nobody's circulating your name for Commissioner, so you won't have to be faced with that. I was hoping to ask a question of the other side, but I guess maybe I'll have a chance later.

CHAIRMAN THOMAS: We go now to Commissioner Mason.

COMMISSIONER MASON: Thank you, Mr. Chairman.

I'll try not to spend too much time on it,

but Mr. Noble, I'm familiar with your resume and I don't think you ever worked for a State or a local party or a State or a local campaign.

MR. NOBLE: Actually, when I was--

COMMISSIONER MASON: A long time ago--

MR. NOBLE: --19 years old, I worked for a mayor for New York.

COMMISSIONER SMITH: Not to date you, but would that be pre-faker or post-faker?

[Laughter.]

COMMISSIONER MASON: Mr. Ryan, do you have any experience working on--for State or local campaigns or political parties?

MR. RYAN: I have limited experience working for State and local candidate campaigns. I have never worked on behalf of a party.

COMMISSIONER MASON: Because I just wanted to, I guess, quarrel with the premise that Mr. Noble stated in response to Commissioner Toner's questions regarding whether this activity about encouraging people to vote goes on, because I was a candidate for State office myself. I have been

involved in local political committees and State committees for a long time and I have a hard time recalling a campaign event at which someone didn't encourage people to vote, not necessarily to register, but--and so one of the concerns that we had in crafting the regulation is that encouragement to vote and then sometimes specifically to register, or to register and to vote, in fact, is virtually a throw-away line just incorporated in the normal exhortations at every party event.

MR. NOBLE: I didn't say it doesn't go on. I said what I thought, at most party events aimed at solely having somebody speak to register to vote, I said I thought there would probably be some effort there to also have registration material.

COMMISSIONER MASON: I understand. Well, yes, and that presents a relative easier case. But I just want to say that's my concern, that if we throw this net too broadly, in essence, this sort of, again, routine electioneering of any sort is going to be constrained to be wholly Federal simply

because it's just in the nature of political appeals to encourage your supporters to vote. It happens all the time, every day in campaigns, and so that--

Let me ask a little more specifically, two things. One is, I think Mr. Ryan said something about the acquisition versus the use of voter lists and this was a concern to us and one of the reasons for some of the complications in the proposals before you. Exactly what did you mean by that, and more specifically, assuming there are windows of FEA and non-FEA for, for instance, voter list acquisition, what are you proposing if, for instance, we use an even number/odd number year approach and leave aside any special elections for the moment, that a political party acquires a voter list in an odd-numbered year and then uses it in some fashion in the even-number year, what are you suggesting would be the result in terms of how they have to pay for the cost of the acquisition of the voter list?

MR. RYAN: I think the result would be

that they would need to pay with hard money, with Federal funds, and the comment--that point in our written comments was made specifically in response to the Commission's concern that limiting the regulation only to acquisition may open the door for State party committees to, we might call it game the system by saying, okay, we want to use it in the Federal election time period but we don't want to pay for it with entirely hard dollars, so we're going to buy it a month before the time period kicks in and then we're going to use it in the period and we'll say, hey, we didn't acquire it during the Federal election time period. It's not FEA.

COMMISSIONER MASON: And so you're saying any use whatsoever would then result in a reach-back and make it 100 percent Federal?

MR. RYAN: I think that would be a bright-line rule that would certainly be within the Commission's discretion to adopt.

COMMISSIONER MASON: So, effectively, there would be no window where they could apply. I

mean, I just can't quite imagine the situation--I mean, I suppose in a very constricted circumstance where they had an off-year election, they could buy it and use it and dispose of it. But that's not the way committees normally use it. So Mr. Noble is nodding affirmatively that--

MR. NOBLE: Yes, I agree, and I think it fits into the purposes of the Act, which is that since that voter list is going to be used for Federal elections ultimately, because the hypothetical that you're using, it has to be paid for by hard money. I think that's the goal of the Act and that's what they did.

And we do know from history that whether you want to call it gaming the system or just exercising your rights as far as you think you can push them, that we've seen a lot of instances where, when there are these types of lines, that the party committees and others will try to get outside the line by doing part of the activity in such a way, whether it be using volunteers or having the passing of the hands by the volunteers

or buying something for a time period, they'll do that to try to maximize the use of soft money. I think BCRA was aimed at getting at that, and so I think that is a result.

COMMISSIONER MASON: I wanted to ask a little more about State and local candidate associations. I should say, in Virginia, where I came up in politics, municipal elections are held in the spring of even-numbered years and this introduces a number of problems. Sometimes in May, they'll have municipal elections at which there are no Federal candidates on the ballot, followed in June by a primary in which there are Federal candidates on the ballot.

In a number of municipalities in Virginia, there's a tradition of nonpartisan local elections and there are associations in Richmond--one of them is called the Team for Progress and they run a slate for city council. I guess one of my general concerns is that an organization of that sort might be somehow caught up in this FEA definition because they're doing GOTV for their candidates in May,

within the window before the June primary.

I don't know if any of you have any specific comments on that hypothetical, but I just wanted to drive home that there are some real-life examples out there of organizations which I think are genuinely nonpartisan, aren't intending to help one party or the other, in fact, it's integral to their mission and their way of operation that they're reaching out across normal party lines and I don't know if you have any thoughts on how we would craft exemptions that would continue to allow that activity not to be federalized.

MR. NOBLE: I think that's a very difficult--as we pointed out in our comments, it's a very difficult issue. In a sense, those type of elections may take place during a Federal election period and I looked at it as almost like a cloak of invisibility over the activity that goes on there and I'm not sure you can do that. We understand that in certain instances, this is going--

COMMISSIONER MASON: Why would that activity be in connection with an election at which

a Federal candidate is on the ballot?

MR. NOBLE: Well, if it's taking place--if the municipal election is taking place in the middle of, let's say, a primary campaign for a Federal office, then the get out the vote activity, that type of activity is going to have an impact on the Federal election. And the danger there is, and I know we keep talking about the worst case scenarios and the danger, the danger there is that that then becomes an avenue for people to funnel money in to increase the get out the vote activity--

COMMISSIONER MASON: And how does encouraging people to vote in May affect the election in June?

MR. NOBLE: Well, it may very well. I mean, you can have activity in May that is encouraging people to get out and vote. In certain districts, it could be encouraging people to register, depending on how late the registration is, and that may very well affect the election in June.

I think the view the Commission had that

any type of efforts that aren't right up to the election day, I think was much too narrow of a rule because, in fact, we do see elections going on, or get out the vote activity going on earlier, and some States have elections open for a month. They have long time periods for elections. So you can't just say anymore it's on one day that you're talking about.

Again, I recognize that there are some applications of this that may seem overbroad in certain respects, but ultimately, I think the rule serves a purpose of stopping the flow of soft money in a way that will influence Federal elections.

MR. SVOBODA: Excuse me, Commissioner, if I might make one observation on that, I think it's important to note that that same issue can be raised not simply in the context of your hypothetical May election, but in myriad ways, as well. I mean, for example, we just talked about the acquisition of voter lists. If that same organization acquired a voter list and that voter

list was used later in the organization's activities, they'd be subject to the same restrictions. So it's a question not simply of trying to figure out how to protect the May 5 activities, so to speak, but also to realize that there may be things that they're doing for those same non-Federal candidates even in connection with an election on the first Tuesday after the first Monday in November that nonetheless is entirely non-Federal in its focus and intent.

I heard the concerns about the others on the panel about the efforts to game the system and I'm reminded a bit about the story of the little girl who sees W.C. Fields on the train reading the Bible and asks him what he's doing and he says, "I'm looking for loopholes." I mean, the flip side of gaming the system is complying with the law, and the question is, what conduct is going to be prohibited and what is not?

I think it's also worth noting that there are other restrictions in the Commission rules that prevent--that weigh against the same sort of

circumvention. For example, your association hypothetically, or my client would be unable to coordinate public communications that referred to the Democratic Party with the Democratic Party Committee. They would be unable to coordinate communications that referred to a Federal candidate with the Federal candidate. They would be curtailed in their ability to have a Federal candidate raise money for them. They would be absolutely barred from having a national political party committee raise funds for them. So there are other safeguards in the system that weigh further toward preventing the avenues for circumvention, the gaming of the system, that others might fear.

CHAIRMAN THOMAS: Thank you.

We move to Commissioner McDonald.

COMMISSIONER McDONALD: Mr. Chairman, thank you. Larry, Paul, and Brian, many thanks for being here this morning.

I'm a little bit like my good friend, Commissioner Mason, and I had some very early experience and actually quite a bit of experience

with State and local candidates. One that was dearest to me was my own candidacy, which I lost and I'm still mad about, I might point out.

[Laughter.]

COMMISSIONER McDONALD: I am worried. I take, and I say this very seriously, I take both sides' presentation, as all my colleagues do, seriously, and it is tough. I don't think it's unfair to say that, and we've seen this more and more at this Commission, that State and local parties have a very difficult time complying. I think that's an accurate assessment.

And I honestly believe, more often than not, they're not trying to game the system. Now, that doesn't mean there aren't some that are, because we certainly have those with a long distinguished record who appear before us quite frequently. Actually, they're either trying to game the system or they're just never going to get it. I don't know what the answer to that is. That's a different question.

But I would like to just take a minute and

just see, I mean, let me just pick out a group, for example, the League of Women Voters. What do you take for a group like that? Would they be restricted in any way, do you think, if they held a voter drive just before an election, weeks before the election or months before the election?

MR. RYAN: The statutory provision, the relevant statutory provision applies to an association or similar group of candidates for state or local office.

COMMISSIONER McDONALD: All right.

MR. RYAN: I think Mr. Svoboda made a very good point when he said that current Commission regulations do not define what constitutes an association or group of candidates for State or local office. The Commission should consider perhaps adopting a regulation that defines with greater specificity what that phrase of the statute means.

Off the top of my head, I would say that the League of Women Voters does not constitute an association or group of candidates for State or

local office. They typically distance themselves from individual campaigns, to my knowledge.

Nevertheless, I would need more time to think precisely what would be the boundaries of a definition of association of candidates for State or local office. In preparing for this hearing, I was focusing my attentions on the inclusion or exclusion of associations and groups and have not paid very much attention to what the exact parameters would be. But I would be happy to think about and write about with my colleagues, if you choose to leave the record open, or to initiate another rulemaking on the contours of that term.

COMMISSIONER McDONALD: I would, of course, be for both those, but given my status, it really--I'd be delighted to leave it open and you can have another rulemaking. Yes?

MR. SVOBODA: Commissioner, with respect to your question about the League of Women Voters, I think the answer would be it would depend on who's on the League of Women Voters. I'm not sure that--

COMMISSIONER McDONALD: That's the reason I'm asking the question.

MR. SVOBODA: I'm not sure that a definition--for purposes of my client and for purposes of the State caucuses with which my client works, I'm not sure a definition is necessary. I think we pretty much are in agreement that if anyone's in it, it's us. But I can see situations where it might raise issues.

For example, the National Council of Mayors, the nonpartisan organizations that engage in policy development, the National Governors Association, groups like that, I don't know to what extent they do nonpartisan GOTV, but might fall within the exemptions under Part 114. I just don't know that as a factual matter. But I think it's worth noting that there are certain types of groups out there that are not thought of in this context that brings us here today, but yet nonetheless can be contended to fall within that definition in the statute.

COMMISSIONER McDONALD: I think, to me,

it's a concern. I realize that there's going to be exceptions to every rule and that we may have an opportunity to try to carve this out, but clearly, groups even like the League, who I did an extensive amount of work with when I was secretary of an election board in Tulsa, Oklahoma, one of the things that they took great pride in, of course, was registering voters. Well, there were a number of other groups that did the same thing. There were a number of, let's see, which groups can I say--there were a number of groups who took an interest, and that was one of their claims to fame, one of the things they did. The League solicited the positions of the candidates. They reproduced the positions of the candidates so that people would be better informed. This was one of the things that the League looked at with great pride.

I think there's a number of groups who try to do that, and if they are clearly trying to do it in a time frame that is consistent with maximizing their own ability to have an impact on the process, I was just curious if anyone had any thought about

them--

MR. NOBLE: I think--again, when you think about it further, I think they'd fall under 114. I mean, I think you have a corporation of nonpartisan voter registration drives.

COMMISSIONER McDONALD: And you don't think that would be a problem?

MR. NOBLE: No. Again, as long as it's not an association of candidates.

MR. SVOBODA: One question that that would raise, however, Commissioner, is what if it was an association of officeholders? I mean, every State has a League of Municipalities. Every State has a League of County Officials. And again--

COMMISSIONER McDONALD: That is a good question. IACIOT [sp.], for example, is a very active county group, and what would be the thought on that, from either Larry or Paul, either one? What do you think about that county association, for example?

MR. NOBLE: It probably would fall under it.

COMMISSIONER McDONALD: Okay.

MR. RYAN: Under federal law, office holders are grouped together with candidates. States go different ways. They go both ways on the issue. Some States explicitly include, or write their laws with reference to candidates and officeholders. Some do not, but they have adopted regulations, including within the definition of candidate officeholders. I think the better practice is certainly to include officeholders with candidates, because the potential of corruption or appearance of corruption that is sought to be eliminated by Federal campaign finance laws and campaign finance laws of States and local governments stems from contributions to candidates and officeholders and not from whether or not the candidate has already won office.

COMMISSIONER McDONALD: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

Next, we move to Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr.

Chairman.

I want to go back to a hypothetical, I think, or a question I think the Chairman posed at the outset. He suggested, if I got this right, what if somebody called a county party office and asked the question, you know, where do I go to vote or something like that. My question would be, wouldn't that already be covered as individualized means of assisting a voter? You're talking to a voter individually and asking a specific question or answering a specific question, telling him either how to register to vote or where to go to vote. Isn't that individualized means, assisting somebody in the act of voting?

MR. NOBLE: You could look at it that way, and maybe we ought to look at it that way. I was thinking in terms of if you had a random phone call to somebody in the office and just said, "I'm looking for my place to vote. Where is it?" and no program set up to do that type of thing, whether or not there would be an exemption for that. But I understand your point. If you're looking at a very

broad rule, your present regulation might very well cover that.

COMMISSIONER SMITH: But you suggested that you think that should not be covered.

MR. NOBLE: Well, I said that there's obviously going to be areas--there's going to have to be judgments made in terms of where the line is. I know the Commission is looking for bright lines in all of this, but even in the proposals you had out there, there are a lot of, well, we ought to take care of some of these issues on a case-by-case basis.

So I'm saying that encouraging people to register to vote needs to be covered. There may very well be passing conversations where somebody says, and by the way, you should vote, which is a practical matter, and end up not being covered. Where that exact line is will have to be determined on a case-by-case basis.

MR. SVOBODA: Commissioner, if I might add a thought to that, I don't think the current regulation would extend to that conduct. The

definition applies to contacting registered voters to assist them in the act of voting. In the hypothetical the Chairman described, I didn't contact anybody. They contacted me. The E and J also suggested some level of proactivity on the part of the party committee or on the association is required.

So, for example, it talks about activities, quote, "ultimately directed to registered voters," and here again, we're not talking about an activity that's directed at anyone. We're talking about a wholly passive range of conduct. So I think that illustrates the difference between the current rule and the new rules under consideration and how the new rules might have a significantly more expansive effect.

COMMISSIONER SMITH: And this would, I think, address the second hypothetical that was raised right after that. I believe Mr. Noble suggested that if you had voter registration material out on the desk and people came in and took it, that would be okay. But if you actually

told people that you had it out on the desk, that would be a problem. It seems to me, in other words, if you're totally sort of passive and they contact you without you doing anything to let them know that you might be a good source of information, you're okay. But if you kind of advertise it, call us if you need to know where to vote, call us if you need to get voter registration materials, and they then call, at that point, you're--

MR. NOBLE: What I'm trying to distinguish is the individual walking in and just getting some information to vote versus a plan, a project, an effort by the party to go out there and register voters or encourage voting. And the reality is that--and I know those who have to actually explain it to the parties, this may not be considered a good response, but the reality is, there are a lot of things that go on that just never rise to the level of having to deal with it and that's why the world works as well as it does, because, in fact, you can avoid a lot of these specific issues.

I think that that will probably go on. The Commission will never become aware of it. But if you see somebody pouring a lot of money into saying, come into our office and register to vote and get the cards, then you're dealing with a very different situation.

And one thing I wanted to say before is one thing the Commission has done after every one of these--I think after every one of these regulations has gone into effect, it has done one of its training sessions and goes out there and does an excellent job of training people. And I think one of the things that happened in 2004, from at least people I've talked to, is people were uncertain of what the rules were because people who were aware of what was going on understood that a lot of things were still in a state of flux.

And I think once the dust settles on this, and hopefully sooner rather than later, the Commission will have to go out and will have to train people and talk to people, and the last time the Commission--when the Commission changed its

soft money regulations, I remember two things happened. Everybody in the regulated community was upset about it, and then once the Commission went out and trained them, when the Commission talked about changing it again, they said, no, no, leave them where they are. We finally figured this out. We may not like them. Leave them where they are. And that's just the reality.

COMMISSIONER SMITH: Those are good points. They're not points I want to discuss--

[Laughter.]

COMMISSIONER SMITH: Let me just ask, and shifting gears a little bit, do you think BCRA has been a success?

MR. NOBLE: I think BCRA has been a success, yes.

COMMISSIONER SMITH: Can you point to instances in which the definitions of voter registration, or Federal election activity that the Commission adopted were problems in the 2004 election cycle and have been problems in the 2006 election cycle?

MR. NOBLE: No, BCRA is much broader than that and I haven't taken a comprehensive look at it, and often, I don't know what cases you have right now dealing with that issue.

COMMISSIONER SMITH: Let me ask you a different question. Do you believe that there should be no further regulation of campaign finance, that BCRA has kind of--we've got it now. There's nothing more that needs to be done. Or are there other things you would like to see Congress do?

MR. NOBLE: Well, I get to say, since our group actually did not support BCRA, we don't lobby on legislation, we're going to take a position on that. I will say this as a general proposition. I don't think there's an end game in democracy. I don't think there's a point at which you say you're done figuring out how to regulate this. It's a dynamic process, and that's good--

COMMISSIONER SMITH: But how about right now? In other words, is there anything, Mr. Ryan--your group does, I think, take more of a position--that you guys

think should be done, that's not been done by Congress that you think ought to be regulated?

MR. RYAN: Well, I think one of the reasons--you asked specifically whether I knew of any instances in which this particular aspect of BCRA was used to circumvent your regulations, and I think one of the reasons that we don't know of any particular examples is because there was another avenue for soft money. Soft money went to 527 organizations. There are several legislative proposals pending in Congress to address the 527 issue. This Commission has explored the issue extensively. I would like to see greater regulation of 527s, or greater clarity, I should say, in determining their status, I mean, what constitutes a political committee under Federal law.

COMMISSIONER SMITH: Okay. So we're in agreement that at least some people at the Campaign Legal Center don't agree with the current law. They think there should be a different law than

there currently is.

MR. RYAN: No, I wouldn't say that. That's not a fair characterization.

COMMISSIONER SMITH: In other words, you don't want any changes to--you guys want--the only changes that you would enact now to Federal campaign finance regulation, even one--

MR. RYAN: I think given this--

COMMISSIONER SMITH: It would be more regulatory--

MR. RYAN: Given this Commission's inaction in defining what constitutes a political committee in such a way that it would regulate some 527 organizations that went unregulated in the last election, absent action in the near future by this Commission to do so, we might support efforts in Congress to do so.

COMMISSIONER SMITH: I'll take that as a yes, but it's a good effort to kind of give yourself some room for the future.

I raise this point for a reason, and because we reopened--the comments submitted by

Senators McCain and Feingold and Representatives Shays and Meehan, and your opening statements, particularly yours, Mr. Noble, have very much a sort of a look. You guys don't want to enforce the law, and that's the only problem with this law. And we went around about this about a year ago and I kind of exploded up here at the table after you made those exact same allegations. You specifically addressed some, and then you said, the problem is that you don't want to enforce the law, and I don't know, but I lost my temper, and inappropriately so.

But in any case, the point I want to make is that I think we recognize that BCRA is the law of the land. I think we want to implement it effectively. I think our goal is to do that in the regulations, and I have seen repeated comments from Senators McCain and Feingold and Representatives Shays and Meehan that the law has worked magnificently, except for the 527 issue that Mr. Ryan raises and that I have said before the law was passed, this is the problem you are going to have.

I mean, a lot of people predicted that problem.

But as far as the Commission's regulations, there's not been anybody out there saying, boy, this is--the law's not working because of these regulations. And we've gone through a couple of these hearings. I only keep asking the question, can you give us any example of where this law is not working because of these regulations, and we keep getting this answer, well, no. Sometimes different reasons are given for that, but the basic answer still comes out, no.

But I guess for you guys down in the press, I want to point out--pay attention there, Ken, Jim--

[Laughter.]

COMMISSIONER SMITH: --that we keep hearing, when we get lectured how the court rebuked the Commission and all this kind of stuff, you know, for soft money rules that Trevor Potter helped pass, things like that, and I get this kind of sense when I hear those, you know, if you look at what the plaintiffs argued in the Shays

litigation and what they said were impermissible constructions of the law, they lost at least as often as the FEC did because the court repeatedly said they upheld some of the regulations and many of the regulations they struck down, they struck down not because of impermissible interpretations of the law but for reasons that, because given the 90 days we had to write the rules and so on, we may not have explained as well as we might have.

And I mention that to say that there are legitimate grounds for disagreement here and I think that we would all benefit a great deal, and I think your own comments would be much more effective--these are kind of my parting, perhaps, words of wisdom to you as I prepare to leave the Commission--if you would begin these sessions with a presumption that everybody is acting in good faith and is attempting to properly carry out their duties as they understand them.

Mr. Chairman, I'm well over my time. Thank you.

CHAIRMAN THOMAS: Thank you.

We move to our General Counsel, Mr. Norton.

MR. NORTON: Thank you, Mr. Chairman. I just have a couple of questions.

Mr. Noble, I just wanted to follow up for a second on the scenario Commissioner Mason addressed in Virginia, that is the May, purely local, municipal election and then the June election where the Federal candidate is on the ballot. You pointed out that with the proximity of those elections, part of what BCRA was after is stopping the flow of soft money that could be used to influence the Federal elections and it's not always easy to tease those apart, I took to be your point.

But varying the example just slightly, if the local party committee or the organization Commissioner Mason described was involved in paying to literally transport people to the polls for that local election, for that purely local election, is the fact that that may have to be paid for with hard dollars just kind of tolerable over-breadth?

MR. NOBLE: That's a good hypothetical and that may be one, if there's a way to figure out how to tease that out, and I like your expression, how to tease that out, where what you're doing on that day is taking people to the polls and that's all you're doing, there may be some way to do that. But the problem is, in trying to tease those things out, it's often hard to draw those lines and not have all the entanglement with everything else, but it's something you could take a look at.

MR. NORTON: I was hoping you could help me with that.

Mr. Ryan, in your joint comments, you expressed concern that the current voter registration rules would encourage State parties to bifurcate, was your word, the voter registration efforts to a two-stage operation. The first, there would be contacting and encouraging voters to register, and then that would be followed up at some later time with individualized assistance, and that would be a way of using allocated funds for activity that you think ought to be paid for

entirely with hard dollars. So my question is, are you aware of any evidence from the 2004 cycle that that's what State and local party committees were doing?

MR. RYAN: The Campaign Legal Center has not looked specifically for any evidence, any such evidence, and no, I don't know of any. But I would repeat what I said moments ago in response to Commissioner Smith, which was there was another large avenue for soft money to flow into this election. If or when that avenue is closed, we may see the development of other soft money loopholes. The soft money loophole that was closed by BCRA took nearly 20 years to develop, and the court in McConnell said very explicitly that the Commission and regulators, Congress, could act proactively to prohibit or prevent such circumvention of existing laws.

MR. NORTON: Mr. Svoboda, could I ask you whether you're familiar with that bifurcation occurring during the last election cycle as a way of funding certain encouragement with allocated

dollars rather than hard dollars?

MR. SVOBODA: I am not. Speaking for the circumstances of my practice, if I were aware of a Republican organization doing it, I would probably be looking for a notary in the hallway.

[Laughter.]

MR. SVOBODA: But I think the point also bears noting that particularly in regard to my client and clients like mine, I noted, for example, the warning that the sponsors gave in the brief in the Shays District Court litigation saying that if the GOTV and voter identification exemptions for associations of State officeholders and State candidates were allowed to stand, it would provide a vehicle for evasion, and I think the record suggests that in the 2004 cycle, that was not the case. And again, I would emphasize that there are other aspects of BCRA and of Commission regulations that help guard against that being the case.

MR. NOBLE: If I could just add something here, one other thing the Shays court said was that Congress also made a prediction and the prediction

was that there would be attempts to get around the rules, and I think that is a factually-based prediction, because that's a history of not only campaign finance laws, but many regulatory schemes. So just the fact that you can point to one election, which has not been fully examined yet, and say, can you show that something happened, doesn't mean that the rule isn't a good rule, doesn't mean that the rule isn't necessary. I think really the burden isn't on us now to show that the law stops something or didn't stop something. Rather, the burden is on the Commission to show that its regulations comply with the law.

So this idea of--you can go down a litany of things and say, well, did this happen? Did that happen? One, we don't know yet because there were other factors at play. And two, just because it didn't happen in one election doesn't mean it won't happen in another and doesn't mean that Congress can't tell you to have prophylactic rules to stop it from happening.

MR. NORTON: On the all, I would say that

is that I think it's your prediction, not the Commission's, in your comments that this would be an effect of the rule, and I think it's at least fair to look at the last election cycle, and it's now been two election cycles that we've had the rules, and ask whether it's occurred.

Thank you very much. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Mr. Staff Director? Gee, you look much better, younger--

MR. SCOTT: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: --more vitalized.

MR. SCOTT: I'm sitting in on behalf of the Staff Director today, and I appreciate the opportunity--

COMMISSIONER WEINTRAUB: Someone get that man a real nameplate.

MR. SCOTT: I note that Commissioner Smith was not interested in taking up his time talking about our outreach effort, but not surprisingly, I am interested in taking some time to talk about that. I notice that Mr. Svoboda and Mr. Noble

both mentioned the need for us to get out there, whatever rules are passed, and try to make it clear to the regulated community what it is they're facing. And I guess, first of all, I'm looking for your ideas of ways to do that effectively, and also in terms of how these regulations might be modified to make them clearer. Do we need more definitions of terms? How do you draw bright lines that are easy for people to understand but at the same time have the reach that you need to cover all of the activity we want to cover?

MR. SVOBODA: I would make, myself, two observations on that. The first is, I mean, there's always a tension between--one, speaking as a practitioner who represents regulated clients, there's always a tension between seeking exemptions on the one hand and wanting less complexity on the other. The more and more exceptions you layer on, the more and more kind of pyramidical they seem, the harder and harder it becomes to understand when they apply and when they don't.

If I were to urge the Commission to enter

a particular sort of mindset as they took these rules back, I would be thinking less in terms of what exemptions can we graft on, how can we surgically alter little bits here and there, and try to think conceptually about what the focus of the rules ought to be and what conduct Congress actually wanted to see constrained.

In terms of education, at least at the State and local level, I think the daunting reality that the Commission faces is that there are, despite the efforts of the Commission and despite the efforts of groups like my client, there are still myriad organizations that just have no idea that these rules are out there, and to the extent they are, they're like in the first stage of the stages of grief, you know, anger that the Federal candidate cannot endorse them on the flyer that's being sent on election day.

So there is a lot of--so there is a lot, I think, that the Commission needs to do, and it raises one idea that came up earlier in the testimony, the idea that there might be low-level

violations here and there that the Commission can be well advised to ignore. I don't think that's an effective strategy to educate or enforce the law. I really, truly do not. I think that to the extent the Commission kind of winks at low-level noncompliance at the county party or city council level organization, I think the harder time it is going to have credibly enforcing the statute as a whole.

So I think it is important, A, to adopt rules that are carefully tailored and that make sense, and B, to aggressively educate people about them, because otherwise, the enterprise, I think, that all at the table here would seek will not work.

MR. NOBLE: I am not advocating letting go low-level violations. I was just explaining the reality, that it happens.

Also, I think a lot of those are gray area issues. But I do think the Commission has in the past done an excellent job of outreach. I think it has to increase that job, may want to work with

others, as you've done in the past. And I remember when the Commission passed the soft money regs. There was a tremendous amount of hostility. People's lives were threatened when they went out to actually talk and try to educate about the regs, but it eventually worked and people started to understand it. I think there has to be a lot of effort put into that.

As far as making regs clearer, that's a constant battle because there are limits, as is often said, limits to the language or what you can do in the language, and if you make a bright-line rule, then you have a problem that is it over-broad or under-inclusive. I think you just have to keep struggling to come up with as clear language as you can, but always keep looking back at the statute, whether we agree on not on what the statute says, but look back at the statute and see, is it serving the purpose of the statute? You have the 800 number. You have a lot of ways to get information out there, and I think you just have to really keep up with those efforts. It maybe requires Congress

to give you more money to do those efforts, but I think those efforts really do work. And when we go out there and hold those conferences that we hold, we run into a lot of people who have been to the FEC programs and really speak highly of them.

MR. SCOTT: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: We have already gone past the slotted time, but--or the allotted time or the slated time, I guess. Are there any Commissioners who have a question they feel they just absolutely desperately must ask? Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Sorry, Mr. Chairman. I only talked to Mr. Svoboda before and I really wanted to ask a question of Mr. Noble and Mr. Ryan. Mr. Brewer in particular, but some of our other commenters have pointed out that, particularly at the local party level, although we've seen a lot of disorganization at the State party level, and I'm sure you recall that from your days here, Mr. Noble, we're dealing with organizations that are not very well organized.

They're run by volunteers. They don't have federally-permissible funds. They're not set up that way. They don't have access to fancy lawyers and accountants who can organize them into different pots of money and tell them how to do all this stuff.

So if we have broad regulations, then basically they are either put out of business or put out of what they see as a key part of their business, things like telling people to get out and vote, which I actually think is a pretty good thing, to have a lot of people out there telling other people to get out and vote. Should we be concerned about that?

MR. NOBLE: Yes. I think everybody should be concerned about that, frankly, and one of the things I was going to say in answer to one of the other questions is this whole issue of what you do to get out the vote is much broader than the Federal Election Campaign Act and the educational efforts that are needed to get people out to vote, and that may be something that you should approach

Congress about. But yes, it is very much a concern. However--

COMMISSIONER WEINTRAUB: But should we be concerned about the impact on local party organizations and on associations like the ones that Mr. Brewer and Mr. Svoboda represent?

MR. NOBLE: Right. I do think you should be concerned about it. However, that concern can't override what I see as the requirements of BCRA.

COMMISSIONER WEINTRAUB: So it's basically, we're concerned, but too bad?

MR. NOBLE: Well, we're concerned. We will take that into account, but we have a law to comply with and maybe it is something that Congress needs to take a look at in the future.

COMMISSIONER WEINTRAUB: Comment, Mr. Ryan?

MR. RYAN: I don't have anything to add to Mr. Noble's comments.

COMMISSIONER WEINTRAUB: Thank you for your indulgence, Mr. Chairman.

CHAIRMAN THOMAS: Any other questions?

[No response.]

CHAIRMAN THOMAS: Well, Mr. Svoboda, let me first of all, before we break, apologize for getting your name wrong. I want you to appreciate that I live with that all the time. I'm usually Mr. Scott, or if I'm with my wife, I'm Mr. King, so at least you're much closer--

MR. SVOBODA: That was very well done. I'll have to buy you a rumza.

[Laughter.]

CHAIRMAN THOMAS: We have reached the end for this particular panel. We will take a, let's call it a ten-minute break--I'm sure that the other panelists are all here--a ten-minute break and we will come back at, according to my calculations, 11:35.

[Recess.]

PANEL II: FEDERAL ELECTION ACTIVITY

CHAIRMAN THOMAS: Let's get underway so as not to get too far behind schedule. We're already a little bit behind.

We're going to have our second panel now

on this particular rulemaking that deals with certain Federal election activity definitions. We have Mr. Mark Brewer, who is appearing on behalf of the Association of State Democratic Chairs. We have Mr. Joe Sandler, who is appearing in his individual capacity as an acknowledged expert in the field. And we have Mr. Don Simon, who is appearing on behalf of Democracy 21.

Going with our alphabetical order concept, let's start with Mr. Brewer. We ask, again, that you try to limit your opening remarks to five minutes, and we have a light system to embarrass you in case you don't want to work with that, but please proceed.

MR. BREWER: Thank you, Mr. Chairman. I'll try to go as quickly as possible.

First of all, thank you for the opportunity to testify. I am Mark Brewer, the Chairman of the Michigan Democratic Party and also President of the Association of State Democratic Chairs, which represents the collective interest of 56 State, territorial, the D.C., and Dems abroad

parties.

A little bit about me, in terms of my background and expertise, I was first elected Chair of the Michigan Democratic Party in 1995. I'm in my 11th year in that capacity. I have nearly 30 years experience in State and local politics in Michigan. In Michigan, we organize our party along county, Congressional district, club, and caucus lines, and I've been active at all levels, and in many cases chair or an officer of all of those types of organizations, starting with my Democratic club and up through the county and Congressional district level.

Our party engages in a wide variety of election activity, a lot of nonpartisan election activity, a lot of State and local election activity in both odd and even years. As a matter of fact, this year, we're involved, for example, in 20 nonpartisan municipal elections in the State of Michigan. So that overall in Michigan in any given election season, the number of contested Federal races pales in comparison to what's being done in

terms of party activity at the State and local level.

We have found that the Federal regulatory scheme is so complex for us that I have two full-time staff who do nothing but attempt to comply with that scheme as well as having the assistance of lawyers and accountants, and that burden went up considerably under McCain-Feingold, so much so that, for example, as to the so-called Levin funds, we found the regulation so complex, so difficult to comply with that we did not attempt to raise or use Levin funds last year, even though we were a Presidentially-targeted State.

I also want to indicate, of course, that at our local party level in Michigan, as in virtually every other State, all of our party officers and activists are volunteers. Even before McCain-Feingold, we had great difficulty finding people to fill those jobs, particularly the job of treasurer, in terms of complying with the law. that difficulty has increased since McCain-Feingold has passed. We have found that we have had to do

even more training under Federal law. My compliance director spends up to 20 percent of her time every week answering Federal legal questions about compliance issues from local parties, and a lot of times I'm pulled into that, as well, and that's simply about the Federal regulatory scheme, not about the other aspects of her job.

Let me turn very quickly and specifically to the Federal election activity about which we're talking here this morning. As I understand it, the rules were struck down primarily for procedural reasons, not necessarily substantive ones. We believe that the rules should essentially be repromulgated with the procedural defects corrected.

Compared to the proposed alternatives, the rules that we operated under last cycle were relatively easy to understand. They did, I think, to a great degree take into account the practicalities and realities of how State and local parties actually operate. The proposed alternatives would add to the complexity and the

burden of complying and further deter volunteer political activity.

I would also like to point out that when the initial rules were promulgated, we were speculating. There were a lot of hypotheticals involved. We now actually have an election cycle under our belts and so now we need not engage in speculation about purported evils, things that might occur. We can look at the actual record and see if anything actually occurred.

Specifically as to voter registration, you've asked us for comment on whether we would add some direction requirement included in the definition. We would not do so. We would stay where we are right now. Let me just give you a couple examples of how this might play out in practical effect.

This is county fair season in Michigan, and all around the State at 80-odd county fairs, Democrats, Republicans at the local level, all volunteers, are staffing booths at those county fairs, and it's very common to have a pile of voter

registration forms at those booths. I realize this is not an election year, but these fairs occur every year. Again, it's a very common activity for that to happen. Now, if we're to expand the definition of what voter registration activity consists of so that providing those kinds of forms for somebody to pick up as they're walking through the displays at a county fair in Michigan, what's going to happen is when I tell my local party people that, they're going to say, fine, no more voter registration forms.

Similarly, at both the State party and our local parties, it's very common for people to drop in the office or make a phone call and ask questions about how to register to vote, and if the definition is expanded in such a way that at that point, the person has to go mute and say, basically, under penalty of Federal law, I can't answer your question because we don't have enough Federally-permissible funds to pay for my salary and the activity connected with that, those folks are going to stop answering those questions.

It's often easier in a lot of States to talk to a party person about registering to vote than it is to find a bureaucrat in the Secretary of State's office or the Department of Motor Vehicles who is willing to answer your question. So taking away that option, I think would be very, very detrimental, and I've got to tell you, the reaction of an ordinary person who walks in off the street to a local party office and is told, "I can't answer your question about voter registration," they're going to shake their heads and say, "What's wrong with our political system? How inane has it become that I can't go into a party office and ask for some direction about how to register to vote?"

Turning quickly to GOTV, and then I'll wrap up with voter ID, we would not add to the list of GOTV activities in your rule. We believe you should make the list exhaustive. It's a relatively good and clean rule as it was originally promulgated.

In terms of voter ID, the proposal to broaden it to cover acquisition information about

potential voters completely misunderstands what party databases are and what they are used for. Let me just give you some examples currently.

We're using our voter file right now for fundraising via telemarketing, direct mail, door-to-door events to raise money just to operate the party. I'm not raising a single penny right now to help any candidate, State or Federal, next year. We're also using the voter file to assess interest in State and local ballot questions or in issue concerns of voters in Michigan. We're using it to recruit volunteers, precinct delegates, local candidates. Why should any of that activity come within the ambit of what should be considered FEA? So we think that the status quo in terms of the voter ID rule should remain.

I'm sorry for exceeding my time, but I'll stop there.

CHAIRMAN THOMAS: Thank you.

Mr. Sandler?

MR. SANDLER: Thank you very much, Mr. Chairman and members of the Commission. I

appreciate the opportunity to testify today, which I do not on behalf of any specific client but as a practitioner, together with my colleague, Neil Reiff, who represents or gives Federal campaign finance advice to more than 30 of the State Democratic parties.

Two key points I would just emphasize at the beginning, and you have heard some of this this morning. First of all, with respect to the Commission's definitions of voter registration and GOTV, other than the exception for State and local officeholders, it's clear the District Court said the Commission's construction of the statute is permissible, period. No requirement of any kind that the Commission change substantively what it has done with these rules.

Secondly in that regard, one looks in vain at the comments of the so-called reform groups and the sponsors of the legislation for any evidence that there is any abuse or any problem with the operation of the Commission's rules this past cycle. To the contrary. We've been through an

election cycle. The reformers said, it was wonderful. BCRA works. Mr. Simon and his colleagues have been out writing op-eds, making speeches to that effect for months now. This is not a record, factual record on--which seems to indicate, let alone mandate, some substantive change in terms of tightening the Commission's definitions.

A couple of quick points on two of the definitions. With respect to the definition of GOTV, we believe that it should be, in a sense, both broadened and narrowed. The time, 72-hour, reference is not particularly helpful one way or the other because there are activities that can occur outside of that which should be considered GOTV. On the other hand, the examples that the Commission has given have unnecessarily broadened and led to confusion about the scope of the GOTV definition, particularly activities that, or communications that merely provide information to voters about polling hours, location of polls, and the date of the election should not be considered

GOTV.

We believe that GOTV should be limited to physically assisting voters with respect to providing--picking up absentee ballots or ballot applications, providing rides to the polls, offering rides to the polls, or election day operations that actually tell people where or how to vote.

The other thing the Commission should do, consistent with the representations made by the agency to the United States District Court is make clear that mail is not an individualized communication or means of assistance for purposes of this rule.

Secondly, with respect to the voter ID definition, and, of course, the court did require that acquisition of voter lists be included as part of the definition of voter ID, we believe this is a practical matter. Any rule that turns over when the information or list is used is completely unworkable and impractical. The rule has to turn on when payment is made for acquisition of a voter

list. The attempt by the reformers to de facto eliminate the Federal election activity window is--not only would lead to impractical and absurd results, but also is contrary to the finding of the Supreme Court itself in the McConnell case.

And I would call the Commission's attention to Footnote 63 of that decision, which says that with respect to GOTV, voter identification and other generic campaign activity, the FEC has interpreted Section 323(b) to apply only to those activities conducted after the earliest filing deadline for access to the Federal election ballot. Any activities conducted outside of those periods are completely exempt from regulation. And it goes on to say the facial challenge doesn't present the question of the FEC's constitutionality--timely reminders, Mr. Svoboda said, that lawsuits can be brought from the other direction--but the fact that the statute provides this basis for the FEC reasonably to narrow Section 301(20)(A)(ii) further calls into question plaintiff's claims of facial overbreadth. Clearly,

the FEA--the very law was upheld partly on the basis that the FEC unreasonably constricted the time period, so an attempt to reach back makes no sense.

The final point just on voter identification, we believe the rule should be clarified to make clear that list maintenance activities, not the acquisition, but data hygiene and maintaining a list and so forth, does not constitute voter identification activity. We make that suggestion because of misunderstanding and misapprehension on the basis of RAD in terms of picking up on some of these expenses in reports filed by State parties.

Thank you very much, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

Mr. Simon?

MR. SIMON: Thank you, Mr. Chairman. I appreciate the opportunity to testify on behalf of Democracy 21. I want to make three points in my opening remarks.

First, I think it's a misreading of the

District Court opinion in Shays to say that the Commission's existing rules on voter registration and get out the vote activity were upheld by the court on Chevron grounds and struck down only on APA notice grounds. In fact, the court said it could not tell the scope of the existing rules, which are limited to State party activities that assist voters. The court noted that the exact parameters of this language are subject to interpretation and that it's possible that encouragement, coupled with direction of how one might register, could constitute assistance under this provision. Such an interpretation, the court said, could remedy what might otherwise be a regulation that unduly compromises the Act in violation of the Chevron Step 2 test.

Now, the court did not decide this point because of ripeness, given that it found facial ambiguity in the scope of the existing regulation, but the implication of the analysis, I think, is clear. If the existing rule is interpreted to encompass only affirmative assistance in

registering and does not extend beyond that to include, for instance, encouragement coupled with direction of how to register, the court said it might hold that the current regulation does compromise the Act and is, therefore, invalid under Chevron.

The same is true for the definition of get out the vote activity. But I do not think it's permissible for the Commission to simply assume it has only to cure a notice problem here and reenact the same regulations if those regulations only narrowly cover assistance activities. At a minimum, I think the Commission needs to clarify that the regulation covers more or runs the serious risk of having the regulations once again invalidated, this time under Chevron.

Second, in limiting voter registration and GOTV activity to exclude efforts to encourage voters to register to vote, these FEA definitions are strikingly inconsistent with other Commission rules. In three other existing FEC regulations, voter registration and GOTV activities are

expressly defined to include activities to encourage registration and voting. That's the case with 100.133, which is titled "Voter Registration and Get Out the Vote Activities"--it's the same terms used in BCRA--and encompasses, quote, "any activity designed to encourage individuals to register to vote or to vote."

That's the case with Section 106.6(b), which defines allocable activities for non-connected committees and encompasses, quote, "generic voter drives, including voter identification, voter registration and get out the vote drives, or any other activities that urge the public to register or vote."

And most ironically, that's also the case with Section 106.7(c)(5), which requires State parties to allocate voter drives that are not FEA and defines those to include voter identification, voter registration and get out the vote drives and any other activities that urge the general public to register or vote. Thus, the State party allocation rules already cover activities to urge

or encourage voters to register and vote, so there can't be any definitional problem in using those broader terms.

The only issue, really, is whether these activities are paid for with Federal funds as FEA or with allocated Federal and non-Federal funds as voter drive activities that are not FEA. The statute, we believe, requires the former, the use of Federal or Levin funds.

Final point, the touchstone for analysis here are the language and purposes of the statute. State party activities, particularly voter drive activities, were deliberately covered by Congress in BCRA because they were perceived to be an essential mechanism of the soft money system that Congress intended to end.

The Supreme Court in McConnell upheld the provisions of BCRA that apply to State parties because, it said, State committees function as an alternative avenue for the same corrupting forces as national parties. The court said that the State party provisions of BCRA were narrowly focused on

regulating contributions to State parties that posed the greatest risk of corruption, those, quote, "that can be used to benefit Federal candidates directly." It then went on to note that a party's efforts to register voters sympathetic to the party directly assists the party's candidates for Federal office.

It is equally clear, the court said, that Federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls. Accordingly, the court concluded that, quote, "because voter registration, voter identification, GOTV, and generic activity all confer substantial benefits on Federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption."

This understanding of BCRA applies just as much to State party activities that encourage registration and encourage voting as it does to activities that assist them.

The Commission, I believe, is wrong and

inconsistent in excluding these activities from the definition of FEA and it should reconsider its position. Thank you.

CHAIRMAN THOMAS: Thank you.

We will begin our questioning with Vice Chairman Toner.

QUESTIONS AND ANSWERS

VICE CHAIRMAN TONER: Thank you, Mr. Chairman. I want to thank all the witnesses for being here during the August recess, particularly Mr. Brewer. I very much appreciate you coming. It's always, I think, important for us to hear from people who are comfortably outside the Beltway, not that this is not the real world, but it may not be quite as real as your world, particularly if you're having all the county fairs and everything that's going on in Michigan, so I very much appreciate you coming.

I want to note at the outset that I am concerned about the potential impact of the regulations for us on voter registration and GOTV efforts that are undertaken by State parties, and I

personally think that it is appropriate for us to fashion rules that are designed to protect that kind of activity, particularly whereas here Congress has provided no definitions of these concepts and has delegated these issues to this agency. So I, for one, am very comfortable focusing on these kinds of issues. I think, actually, that's our mandate to do so. I recognize that people can disagree about how best to strike that balance, but I'm very comfortable doing so when Congress has delegated these questions to us.

Mr. Simon, I'd like to begin with you because I think you were here for the earlier panel when there was a hypothetical I asked involving Reverend Jackson. I'll just requote what that would involve, a voter registration drive in Columbus, Ohio, a couple of months before next year's mid-term election in which Mr. Jackson says, "It is critical that all of you here today register to vote. Remember Florida in 2000. Remember Ohio in 2004. If everyone here registers to vote, we will not be denied again. With your help, we will

be successful in November."

Do you agree with the earlier panelists that this should be viewed as voter registration activity and, therefore, could only be payable with Federal money?

MR. SIMON: Yes, I do. I would also note that, even apart from that, I think it is within the scope of the 106 allocation rules, so already it is Federalized, regulated, subject to Federal funding, at least in part. We were just talking about which pages of the CFR apply to that activity, not whether Federal law applies to that activity at all. But for the reasons I stated, I do think it should be considered Federal election activity.

VICE CHAIRMAN TONER: So that all of the event costs associated with any event which a State party sponsors in which a public official urges people to vote should be Federalized and payable only with hard dollars?

MR. SIMON: Well--

VICE CHAIRMAN TONER: That's your view?

MR. SIMON: Yes. I mean, your hypothetical was that this was a voter registration rally--

VICE CHAIRMAN TONER: Right.

MR. SIMON: --and that is, I think, voter registration activity and under BCRA should be payable with hard dollars or with an allocated mixture of hard dollars and Levin funds.

If I could just expand on that for one minute, because I think there's a theme that's running through here which is an important theme about the concern that you have and Commissioner Weintraub and I'm sure all of our Commissioners have about the impact on voter registration.

I think, obviously, that's a legitimate concern. I do think, however, you are relatively fettered in your discretion to do much about it--

VICE CHAIRMAN TONER: Even though Congress did not define these terms?

MR. SIMON: But Congress--

VICE CHAIRMAN TONER: And delegated it to the agency?

MR. SIMON: Congress paid a lot of attention to this question--

VICE CHAIRMAN TONER: There's no statutory definition.

MR. SIMON: But let me tell you what Congress did do to deal with this, and this was done very deliberately to address precisely this concern. It did two things. One, it raised, it increased the hard money contribution limits to State parties and it was precisely for this reason that we're talking about, to give State parties more resources to do these voter drive activities.

But then that wasn't even enough, because there was real concern on the floor that State parties still would not be able to do voter drive activities, and that's the genesis of the Levin amendment. Now, maybe you like the Levin amendment, maybe you don't, maybe you think it works, maybe it doesn't--

VICE CHAIRMAN TONER: Wouldn't we all agree that it really hasn't? There hasn't been a lot of activity in the Levin amendment area. I'm

not saying that's good or bad, but wouldn't we all agree that--

MR. SIMON: I would, and I think that may be a legitimate point for Congress to hold hearings on and for Congress to decide whether the additional room it gave to State parties was adequate.

VICE CHAIRMAN TONER: Given that there hasn't been a lot of Levin activity, wouldn't that at least be a potential aspect that we should take into account in fashioning these rules?

MR. SIMON: I don't think it's a reason--I don't think it's an adequate reason for you to change the statute. It may be an adequate reason for Congress to change the statute. But I think you have to work within the statute Congress gave you and you have to work within the parameters of the balances Congress struck--

VICE CHAIRMAN TONER: But again, Congress did not define these terms. They delegated it to this agency.

MR. SIMON: Yes, but there are canons of

construction about the discretion an agency has to define statutory terms, and I think if you narrow the scope of these activities to address what you perceive as policy problems with the statute that Congress dealt with differently, then I think you run the risk of having your narrowing interpretations invalidated.

VICE CHAIRMAN TONER: Mr. Brewer, let me ask you, you are a State party chairman and my question is this. If the agency adopts the regulations that have been proposed by a number of commentators that basically would include as Federal election activity any effort to encourage individuals to register to vote, is your State party going to be prepared to undertake those kinds of activities?

MR. BREWER: No.

VICE CHAIRMAN TONER: Why not?

MR. BREWER: No, simply because, again, at that point, where you're going to have to raise more Federal money to do what we're already doing. I would also point out, too, that the common

understanding among State parties and local parties on what voter registration is, like, okay, we're going to organize a voter registration drive on a particular day at a particular place and whatever. We're going to go out and register voters. Nobody has a common understanding that voter registration activity consists of a pile of cards sitting on our front desk or at a county fair or any of the other kinds of things that would be brought within the scope of this rule. So if you're talking about trying to figure out what voter registration activity is, why don't you ask the people who actually do it, and when we do it, it's a drive. It's a concerted program. It's an effort. It's not these kinds of things that could be dragged in within this broadened rule.

VICE CHAIRMAN TONER: And what would your view be if we took the position that any party event that your party sponsored at which a public official urged people to register to vote would be Federal election activity, you had to pay for with hard money or Levin money? What would be your

reaction to that?

MR. BREWER: I'd say it's absurd.

VICE CHAIRMAN TONER: Do you think you would be undertaking those kinds of activities?

MR. BREWER: Well, we certainly wouldn't be undertaking them, but on the other hand, too, I mean, that's a common part of speeches that I give, and I'm traveling the State all the time now, even though it may be an off year. A standard part of my presentation whenever I'm talking to folks is, register to vote.

VICE CHAIRMAN TONER: Would it have the impact of Federalizing an awful lot of your appearances?

MR. BREWER: Yes.

VICE CHAIRMAN TONER: Thank you, Mr. Chairman.

COMMISSIONER SMITH: Do we have an exemption from this for appearing at a Federal Government thing, when he makes that kind of statement? Are you here on Federal dollars today?

MR. BREWER: I urge all of you to register

to vote.

[Laughter.]

CHAIRMAN THOMAS: Next, we move to Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

You know, I was thinking about this because I know during 2003 and 2004, every time I gave a speech, the last thing I would say to anybody that I talked to was, don't forget to vote, so I don't know. Maybe I'm in violation of the law, too.

Mr. Simon, I'll ask you the same question that I asked earlier to Mr. Ryan and Mr. Noble because I think it's really important. Should we be concerned about, and can we take those concerns into account about the kind of information we're getting from Mr. Sandler and Mr. Brewer that we are basically, by having broad rules, we are telling State party committees that they can't do voter registration activities because they don't have Federally-permissible funds? They're not organized

that way.

MR. SIMON: Well, you know, as I said to Commissioner Toner, I do think you should be concerned about it, but I think you are relatively constrained in what you can do about it. I really--

COMMISSIONER WEINTRAUB: So like the earlier witnesses, the answer is, we're concerned but we can't do anything about it.

MR. SIMON: I think that's right, and if there's evidence that the impact of BCRA is to unduly constrain State party efforts to register voters and to depress voter registration rolls, I am confident the State parties will be very effective in bringing that evidence to the attention of Congress and in advocating for amendments to BCRA to address that problem. It's like the 1979 amendments to FECA.

COMMISSIONER WEINTRAUB: But as you know, Mr. Simon, when people start to try to amend BCRA, all sorts of things tend to get added on and sometimes you end up in a very different place than

where you started.

MR. SIMON: I'm not advocating reopening BCRA. I'm just saying that's the remedy for the problem you're expressing.

COMMISSIONER WEINTRAUB: I want to be sure that I'm clear about this. Is it your position that there should be no time limit on GOTV activities?

MR. SIMON: We haven't--we didn't contest in the Shays case, I don't think, the definition in connection with a Federal election.

COMMISSIONER WEINTRAUB: That's not actually what I asked you. I asked you whether it's your position that we should have no time limits at all?

MR. SIMON: Oh, the 72-hour--

COMMISSIONER WEINTRAUB: Well, the 72-hour, as you know, is not exhaustive, 72 hours or any other limit.

MR. SIMON: I think that the only temporal limit should be the limit that's contained in the existing rule defining in connection with a Federal

election. I don't think the 72-hour rule should remain and I don't think there should be any other time limit.

COMMISSIONER WEINTRAUB: So if we stick to the current in connection with regulation, for example, activities that the State parties are undoubtedly conducting today in New Jersey and in Virginia to update their voter lists and to engage in GOTV planning, all that stuff for this year's election of Governors, they can do all that with non-Federal funds?

MR. SIMON: Yes.

COMMISSIONER WEINTRAUB: And if those voter lists, if they don't throw away the voter lists but they subsequently use them as the basis for more GOTV next year, then what?

MR. SIMON: I think--your question was about GOTV, but then your hypothetical included voter ID and I think those are two different cases. I think the GOTV activity is constrained by the existing rule. As we said in our comments, the voter ID, I think should be acquire or use. Now,

if you're talking about maintenance, I think that may be a different case. But if they acquire--

COMMISSIONER WEINTRAUB: What do you think about maintenance--

MR. SIMON: Well, let me--

COMMISSIONER WEINTRAUB: I'm sorry--

MR. SIMON: If I could just finish the answer to the first question, if they acquire a list now but they use it in the election in 2006, then I think it should be Federal election activity.

COMMISSIONER WEINTRAUB: So they have to throw it away or pay for it with Federal--

MR. SIMON: Or pay for it with Federal funds or a combination of Federal and Levin funds.

COMMISSIONER WEINTRAUB: Is it realistic to expect them to put a lot of effort into developing a voter list and then telling them they have to--their choices are either throw it away or take all the effort you put into your Gubernatorial race and pay for it all with Federal funds?

MR. SIMON: I think it's what the law

requires.

COMMISSIONER WEINTRAUB: So that's what I get for asking my questions too quickly.

[Laughter.]

COMMISSIONER WEINTRAUB: Mr. Sandler, you represent a lot of State and local organizations. Do you concur with Mr. Brewer that if we broaden these rules, we're going to be discouraging grassroots activity by these organizations to register and get people out to vote?

MR. SANDLER: Yes, absolutely, I do, and particularly local county parties which have difficulty enough understanding how the BCRA rules affect them and when they have to use Federally-permissible funds and what they have to do to avoid altogether getting caught up in this registered, you know, being required to register and report as political committees to the FEC.

COMMISSIONER WEINTRAUB: Let me just close with a quick comment on something that's in, Mr. Simon, your written testimony, and I think you repeated it here today, that we shouldn't narrow in

any way what BCRA has set out in the statute when we do our regulations.

I think that we have a problem as a Commission. I mean, we could just repeat the words of the statute in our regulations and then nobody could say we're either narrowing it or broadening it, but we wouldn't really be providing a lot of guidance. We wouldn't be doing much to fulfill our obligation to interpret it.

If we use any different words at all, then we are subject to the criticism that we're either overreaching and broadening it beyond what Congress intended, or we're narrowing it, and Congress didn't intend that. I mean, we've got to--if we're going to provide regulations, some of them might be narrower, some might be seen as narrowing, some of them might be seen as broadening, but we've got to use some words to provide some guidance to the regulated community. Otherwise, we might as well not issue the regulations at all.

MR. SIMON: If I can just respond, I agree, but I don't think broadening or narrowing

are the only two options. I mean, there are a lot of regulations that, in the Shays case, we didn't challenge because we thought they were--

COMMISSIONER WEINTRAUB: We appreciate that.

MR. SIMON: Well, we thought that they were permissible clarifications and interpretations of the statutory language.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Smith?

COMMISSIONER SMITH: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Or is that "Smythe"?

COMMISSIONER SMITH: That is "Smythe." For four years, I've been--five years--too much of a gentleman to correct anybody--

[Laughter.]

COMMISSIONER SMITH: --but from now on, I would appreciate--

[Laughter.]

COMMISSIONER SMITH: Mr. Brewer, I

appreciate your coming in from out of town in particular. A fair amount of your testimony seems to relate to the 25 percent rule, but really, that is one that the court actually did strike down on Chevron grounds, so we really don't have much leeway on the 25 percent rule.

MR. BREWER: It's my understanding that's the subject of this afternoon's panel.

COMMISSIONER SMITH: Okay. So I'm ahead of the game. All right.

MR. BREWER: I've got testimony on that, but for this afternoon.

COMMISSIONER SMITH: All right. Well, I'll come back to you and we'll try to get to it.

The other question I have here, we seem to be talking, the main issue is this question of encouraging people to vote. I find it kind of hard to believe that Congress really intended that if you had, to use an example that Mr. Svoboda--I can't say it either, now--Brian, the gentleman from Perkins Coie gave in the first panel, that if Jesse Jackson came to speak at a rally for the

mayoral candidate sponsored by the local party, that that would have to be paid for with Federal funds if he urged people to vote. I can't see that most people in America would have supported that, or that most members of Congress who have supported efforts to limit the ability of people campaigning for State or local office in accordance with State or local law to encourage people to vote.

We also, when I asked a little bit, I mean, we saw that there is some question. Maybe the current reg would cover a lot of the scenarios that are questionable, or maybe it wouldn't. I think there's a lot of difficulty. Mr. Noble said, well, maybe you could read your reg to cover handing out voter registration cards in the local party headquarters or answering the phone and telling somebody where they could go to vote that day.

We seem to be given two alternatives here. One is to add the word "encourage," which I think has very little meaning and I would guess, Mr. Brewer, is probably difficult for local officials

to know exactly what that means, unless it means pretty much everything mentioning voting, or to keep the current rule, which the court didn't like very much, although again, it appears that we could reenact that, but Mr. Simon says, no, he doesn't really think we could and it would be a terrible thing if we did, anyway.

And that's a very long introduction to saying, does anybody have any kind of middle ground? Is there some way to capture this, because it strikes me that we're almost talking about any of the rules being one that's going to lead to certain ridiculous results. It's going to have a certain amount of real ambiguity. And that nobody really seems to be able to give me any demonstrative evidence that it really has much effect anyway, so I'm not quite sure what all the hullabaloo is about. So given that, maybe there's some interim ground, and I don't know if anybody has any suggestions. Anybody want to try that?

MR. BREWER: I'm not going to offer a middle ground, just a couple of observations, if I

may, Mr. Smith. First of all, I think the rule worked this last election cycle. I don't think there's any evidence that anybody abused it or otherwise took advantage of it. And I would say if you talk to elected officials, including the elected officials who voted for this statute, if you asked them what a voter registration activity is, they would think of the classic kind of voter registration drive and this regulation captures that, that you are affirmatively going out and trying to register people as a party organization.

COMMISSIONER SMITH: Let me ask you a question. Okay, let's say we have a big rally, you know, and they urge people to vote and then they tell everybody in the big group, and at the back, here's all the registration materials you need and you can do it. Have they provided individualized assistance?

MR. BREWER: No.

COMMISSIONER SMITH: So you've spent a lot of money on that, urging people to vote and telling them, here's the information you need to do it and

get that all out to them, but that would not be individualized assistance and, therefore, would not be covered?

MR. BREWER: No.

COMMISSIONER SMITH: Mr. Simon, what if we just took out the word "individualized"? Would you be happier then? Would that do it for you?

MR. SIMON: Moving in the right direction. In terms of your middle ground, it's not something that I'm advocating, but it is something that the District Court expressly discussed, which is this notion of there's assistance, there's encouragement, and then in the middle there's encouragement coupled with direction. I think Judge Kollar-Kotelly was saying, well, that's the middle ground. I don't know if the existing rule covers that or not, and she's--I think she said it should cover that and it may be that the Commission will construe it to cover that. And as I said in my opening remarks, I think, at a minimum, you should make clear that you do construe it to cover that, because I think absent that, she might have

been inclined to strike it down on Chevron grounds. That, to me, is a middle ground here. I don't think that goes far enough in and of itself.

I think the outlier here is this FEA regulation, and I think what you ought to do is conform it with three other existing regulations on exactly the same terms that do expressly encompass activities to urge registration or voting. I think that is the solution.

COMMISSIONER SMITH: "Direct" is the term used in the court opinion, as you point out, which sounds to me like, really, what we are talking about is instruct. So what about instruction? What about contact with individuals to assist or instruct them, or something like that? Would that be something anybody could live with? That, does that do? Isn't that really what Judge Kollar-Kotelly was getting at?

MR. SIMON: I think that is what she was getting at. I think that's right. She didn't go as far as we were urging her to go, but I do think that is what--

COMMISSIONER SMITH: --get a complete and total rebuke of the Commission?

[Laughter.]

MR. SIMON: No, not complete and total. But substantial and important.

[Laughter.]

MR. SIMON: I think that is what she was getting at, and I think that, you know, if you're looking for a middle ground, that would be in the nature of a middle ground.

COMMISSIONER SMITH: Mr. Sandler, you're shaking your head. I'll ask the Chairman to give you 30 seconds.

MR. SANDLER: I think this has become vastly over-complicated. There is no doubt--I agree with Chairman Brewer--what members of Congress had in mind when they saw this stuff initially is people going door to door or standing in a shopping center, assisting voters to register to vote. I defy Mr. Simon to find one word in the legislative history that suggests that in a million years members of Congress would think that a rally

or a party meeting--which, by the way, party meetings are exempt altogether from Federal election activity, Congress is very clear about that--becomes Federal election activity because they have cards at the back of the room. It makes no sense. I think there's no need for any middle ground here. The court opinion doesn't require it, common sense doesn't require it. That is not what the intent of Congress was.

MR. SIMON: Well, if I could just respond to that, I think what Congress had in mind was the existing Commission regulations defining voter registration by party committees in the form of 106.5, which, like the current rules defining voter registration at 106.6 and 106.7, included activities to urge people to register.

COMMISSIONER SMITH: I'm out of time. Thank you.

CHAIRMAN THOMAS: Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you. Mark, it's particularly good to see you again. It's been quite a while, I must say, and

Joe, as always, and Don, thank you all for being here.

I've been here so long that Commissioner Smith has become the voice of reason and compromise. I'm very glad to hear that. And I take his point, by the way--

COMMISSIONER WEINTRAUB: He thinks he always was.

[Laughter.]

COMMISSIONER McDONALD: Now, I don't want lightning to strike, even on a clear day. But I do take his point and I think it's kind of one of the interesting and frustrating things that all of us are trying to grapple with because I think both sides have made really fairly compelling presentations and trying to figure out what we can do in this area.

Let me just try to be the devil's advocate on both sides. Don, I'll start with you first, if you don't mind. Now, Mark opened up with the example about the county fairs that are up and running now, and this is true out in Oklahoma, as

well, or just about to be, another month, I guess. What is your assessment of that? How do you look at that, where the parties are operating a booth along with a number of other groups, registering people to vote. How do you see that example on the practical side?

MR. SIMON: I mean, I guess I see it as within the existing rule as an individualized effort to assist voter registration. In a sense, I think that's off the table in the sense that it's already covered.

COMMISSIONER McDONALD: And Mark, is that how you see the existing rule?

MR. BREWER: Not at all, because it's passive. The pile's just sitting there. Anybody can come by and pick it up, and then the local party people don't have to have anything to do with whether that voter completes it, fills it out. They don't give them instructions. It's simply sitting there, something that they can passively pick up, just like they'd find in the party office, they'd find in our party office if they dropped by.

COMMISSIONER McDONALD: It's good to have the exchange because it certainly clears it up for us.

[Laughter.]

COMMISSIONER McDONALD: Let me ask on the other side, though, and Commissioner Weintraub asked this question earlier this morning, we have been confronted now with what under any other circumstances I think would be characterized as fairly direct rebukes, for lack of a better word, of some of our approaches in these court matters. And her point earlier was to the first panel that, like it or not, you ca make a pretty compelling argument, which I think Don has made, in relationship to where we're being directed to go. What is your thought about that, either of you, either Joe or Mark?

MR. SANDLER: I do not agree with Mr. Simon. I think that the basic idea of Chevron deference is that this Commission has the expertise to interpret and give practical meaning to these rules. In this situation, while there may be

rebukes and other subjects that are the subjects of other rulemakings, the court held that these were permissible constructions of the statute under Chevron Step 1 and Step 2, and in spite of, particularly from this court, I think that's a pretty strong endorsement for the approach the Commission already chose in its discretion and the exercise of its expertise to take with respect to the definition of voter registration.

MR. BREWER: I guess the only thing I would add to that would be that, and one of the reasons I'm here today is to talk about facts, because that's what this is based on. This is based on how this works. So you can have all the testimony you want from all the well-qualified lawyers about what it means, but you're a fact-finding agency. You base your regulations upon facts, and I think I'm the only fact witness you're hearing from. So I urge you to look at the facts, and I think if you make the careful factual findings that I think the predicate has been provided for between written and verbal testimony,

that you can promulgate regulations which will withstand court scrutiny.

COMMISSIONER McDONALD: And you did not, if memory serves me right, you testified earlier you did not use Levin funds at all, is that right?

MR. BREWER: No, because between the statute, what the reformers did to the statute and to what Carl Levin intended to do, compounded by the regulations, with all due respect, it was just far too complex to deal with, and so we did not raise or spend Levin funds last year.

COMMISSIONER McDONALD: Were you responsible for the creation of the Levin fund?

[Laughter.]

MR. BREWER: Senator Carl Levin deserves all the credit for that idea. He understands the importance of grassroots politics. The monstrosity--

COMMISSIONER McDONALD: Anyway, you've held your job a long time. That's--

MR. BREWER: The monstrosity that it became was not his doing.

COMMISSIONER McDONALD: Yes.

MR. BREWER: It was not his doing. In fact, I think it's a shame that they're still called Levin funds because what that has become is not what Senator Levin intended.

COMMISSIONER McDONALD: Can I pursue that for just a second? What do you think he did intend, then?

MR. BREWER: Well, and again, this is faded from me, but look at the original amendment before it got, I believe in the House, radically amended.

COMMISSIONER McDONALD: Okay.

MR. BREWER: I think that that captured the essence of what grassroots activity is about and that was what Senator Levin intended to do, and I applaud him for that effort and to the extent I provided any assistance to that effort, I'm glad to be part of it, but not what resulted. You cannot lay that at Senator Levin's door.

COMMISSIONER McDONALD: I find that a strong disclaimer.

Let me real quickly, Don, go back and ask you, one of the things that strikes me is that years ago, there was a book written called No Final Victories by Larry O'Brien, and Larry O'Brien told the story about being out in Ohio, and he was in a county commissioner's office, and we'll say it was your office, and he said, "Don, if you back Jack Kennedy, you're going to have your picture taken on the front steps of the White House with the President." And according to Larry O'Brien, this county commissioner put his feet up on his desk and his hands behind his head and he said, "Hell, Larry, down here people think I'm the President."

The reason I tell you that story is that as a practical matter, and this was certainly true where I grew up, you know, Federal elections were obviously very important, but the real importance to us was the State and local activity. The thing I suppose that troubles me the most about what we've been hearing, albeit I think very good, is that as a practical matter, and this is certainly true in Oklahoma in, for example, the municipal

elections, the example given in the first group today was you have a race in April or May that's a local election and then in June you may have a Federal primary. In Oklahoma, it's a little bit later than that, but the principle is still the same.

I don't know how you could take a voter drive that occurred before that election at the beginning of the year and apply that to the Federal. Are you of the opinion, like the first panel, that you could and you should because it's within the same, what, six months or year, maybe? I'm just trying to be sure I'm stating it correctly.

MR. SIMON: Yes. I am basically of that opinion. I mean, I think Commissioner Mason raises a good hypothetical--

COMMISSIONER McDONALD: Absolutely--

MR. SIMON: --that is--

COMMISSIONER MASON: Can I just clarify it, because it's been referred to as a hypothetical in the first panel and here. It is not a

hypothetical. It is an actual, real world, every two-year election cycle practice.

MR. SIMON: I think Commissioner Mason raises a good problem with that application, and if the Commission in a very narrowly tailored way wanted to address that problem, you know, that may be a worthwhile effort, to deal with that practice.

I think what was proposed in the NPRM as a way of dealing with that problem is way overbroad and would have the effect of just scissoring out huge, potentially huge swaths of time from the definition of Federal election activity and I don't think that's the correct way to deal with the problem. I think it would have to be a much more narrowly, carefully focused and tailored solution to that problem.

COMMISSIONER McDONALD: Thank you. I thank all of you for coming. It's good to see you.

CHAIRMAN THOMAS: Commissioner Mason?

COMMISSIONER MASON: Thank you. Mr. Sandler, when we're construing provisions of the law or the regulation and we have a series of

terms, do we normally collapse the series of terms such that there's no distinction among a list that we have?

MR. SANDLER: I'm not sure I understand the question.

COMMISSIONER MASON: Well, Mr. Simon has referred us to 106.7 and 106.6, and both of those refer to something called generic, or, excuse me, something called voter drives, which weren't addressed in BCRA as such, or at least not as Federal election activity, and both include under the term voter drives voter registration, voter identification, get out the vote efforts, and other efforts to encourage the public to vote or to register to vote. It seems to me that Mr. Simon is suggesting that somehow because this list of things under voter drives includes voter registration, that what's included, or one of the sub-components of that necessarily incorporates the other, and I don't think that's the way we normally interpret laws and regulations, that the list is--as it were, there's no separate identity there. So I just

wanted to get your comment on that, because what he's suggesting is that because we have this list of four things that are associated in one part of the regulations and we have two of those things, voter registration and get out the vote somewhere else, that both sections of the regs mean the same thing.

MR. SANDLER: Right. I agree with you. Not only does Mr. Simon's view violate normal canons of statutory construction, I really do feel it's at odds with Congressional intent, at least in terms of how I think, really, the overwhelming majority of Democratic members who supported this bill understood these terms.

First of all, there's nothing in legislative history that suggests that they were importing this regulation wholesale into the terms and that's what it was supposed to mean and that everything was allocated is now going to be defined as Federal election activity. If Congress had meant that, obviously, it could have said it with a lot more clarity.

Furthermore, I think I'd just come back to the fact that the members of Congress who voted for this, and I would respectfully suggest on the Republican side, as well, understood what these terms mean and it was basically voter registration drives when you go door to door or stand on the street corner or shopping center and register people to vote. That's what members of Congress understand it to mean. It's basically that simple.

COMMISSIONER MASON: Mr. Simon, you talked about voter list acquisition. Of course, we have the court language on that. But we're all aware of examples where parties, other organizations, buy voter lists at a particular time, sometimes for a particular use, but I have to say I'm a little bit bothered by what I take as your suggestion of sort of a taint theory along with a reach-back. In other words, it's also a common practice for parties to have a voter list which they maintain over a long period of time and use for all of their activities, and I'm trying to understand where we have a law that's focused on particular time

periods, why we would then say that if it's used within that time period, that we now are going to go back and catch costs that were outside the time period.

MR. SIMON: Because I think the statute regulates activities conducted in the time period and if--I think the use of the voter list constitutes such an activity. I think--you know, I agree--

COMMISSIONER MASON: For instance, why wouldn't that be captured by assessing what the value of the use was at that particular time?

MR. SIMON: In other words, you mean the sort of discounted value of the acquisition?

COMMISSIONER MASON: Well, there are a variety of ways that we might be able to do it, but I'm just trying to understand why these total--

MR. SIMON: Yes, that might be fine, and I think that's a good suggestion--

COMMISSIONER MASON: Allocation.

MR. SIMON: Well, potentially. I think the point here is the point raised in the NPRM that

if the rule focuses solely on the date of purchase, you could have a lot of voter lists purchased on December 31 and then that would be totally outside the scope of the rule and I think that's a problem. That would be a way to evade the meaning of the law.

COMMISSIONER MASON: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Well, I'm next up. I'm going to use some statistics here, just because I want to sort of try to look into one of the underlying issues here, which is what impact these kinds of rules have on party committees. I bear in mind the admonition that, there's a great line, some people use statistics like a drunk uses a lightpost, more for support than illumination. So I'm willing to admit going into this that sometimes, you get a little less illumination than you might like.

But just scratching at some of the numbers that we pull off of our reports and that we've seen other groups report, if you look at our own press

release on party activity, you can see that in overall terms in the 2000 cycle, the Democratic State and local parties reported about $140 million in Federal disbursements, and in the 2004 cycle, they increased that amount by about $14 million to a total of $153.7 million.

Now, in its recent report, the Center for Public Integrity reviewed overall receipts of State parties--that would be Republican and Democratic and it would be Federal plus non-Federal money--and they noted that State and local parties took in what appears to be $65 million less in the 2004 cycle than in the 2000 cycle. But once you start backing out the money that came from the national party committees, in other words, if you take into account the reductions that occurred because of BCRA in national party transfers, it looks like State parties overall, again, Republican plus Democrat, increased their fundraising by about $82 million when you move from the 2000 to the 2004 cycle. So it looks like they were, overall, when you account for Federal plus non-Federal, a pretty

significant increase in their fundraising.

Just looking at Michigan, the State Democratic Party reported spending about, as I calculate it, about $10.7 million for Federal activity in the 2000 cycle, but increased that to a level of about $13.8 million for the 2004 cycle. The CPI report I talked about, which again adds both Federal and non-Federal activity and adds Democratic and Republican activity, shows that Michigan parties raised about $28 million for the 2002 cycle, but increased that to receipts of about $35 million in the post-BCRA 2004 cycle.

So I'm trying to give you some numbers that suggest, at least on the outside looking in, that it looks like there was some pretty vigorous fundraising going on and a lot of money was being made available, and there certainly doesn't appear to be a decrease.

Now, by the same token, if you try to just measure the impact on voter registration activity or voter drive activity, party building activity, the CPI report looks at this activity, and again,

comparing 2002 cycle and 2004, it indicates that spending for this voter registration, voter ID, and GOTV activity increased from about $44 million in the 2002 cycle to $71.4 million in the 2004 cycle.

And then last, with regard to local committees, I know in your commentary, you expressed greatest concern about impact on local party committees. But looking again at the Federal reports, in the 2000 cycle, we identified about 24 Federally-registered local Democratic Parties in Michigan that reported a total of about $3.1 million, and that's the Federal disbursement activity plus the non-Federal share of allocable activity, during the 2000 cycle, but 34 Federally-registered Democratic local parties in Michigan reported a total of about $6 million during the 2004 cycle. So we saw an increase in Federally-registered local party committees apparently in Michigan and we also saw almost a doubling of the amount of Federal disbursement activity plus the non-Federal share of allocable activity for those committees.

And I'll put all of this into the record so that we can have the benefit of going over it, but I just lay that all out for you.

You're here. Those numbers suggest that even working under the BCRA hard money rules, it looks like you were able to sort of increase your resources, so I'm giving you a chance to explain. What happened?

COMMISSIONER McDONALD: Giving you a chance to deny your success, is what he's telling you.

[Laughter.]

MR. BREWER: Well, first of all, I think I would point out, I think you mentioned there are 34 Federal committees at the local level in Michigan, is that the statistic you just used? That means that two-thirds of our local committees don't have Federal committees. Why? Because the statute and the regulations are so complex that they're deterred from doing that. So we can talk about we may have done better in terms of fundraising, but two-thirds of those committees can't see their way

clear to comply with the law, so they're just out of the business. They're just out of the business. And I think it increased maybe by ten since 2000, so it would be a nominal increase, if any.

I think in terms of fundraising, certainly when one avenue of fundraising is closed, you have to increase in other ways, and the DNC, for example, did a great job of increasing small donor fundraising and we tried to focus on that, as well. In Michigan, though, for example, we had a great advantage in 2004 in terms of fundraising we didn't have in 2000, a Democratic Governor named Jennifer Granholm. So there's lots of different ways and explanations about why fundraising, either Federal or non-Federal, would increase. I think it's very difficult to compare from cycle to cycle other than the obvious that we knew that so-called soft money was no longer available to us for a lot of activities and had to be compensated for by raising hard money. Beyond that, if you have a specific question, I don't know if there's anything else I can add.

CHAIRMAN THOMAS: In terms of trying to actually conduct what we would all acknowledge was voter registration activity, whether it involved encouragement or actually assisting voter registration efforts and get out the vote efforts and so on, did you really have a sense that, overall, your resources were greatly reduced when you compared the 2000--

MR. BREWER: Oh, no. Those numbers indicate what we call our coordinated campaign, which is our effort in the fall, generally, for the whole ticket. There's no question, the budget went up. The DNC was very generous to us in terms of transferring hard dollars, but we also raised more money in Michigan to do that. It was a very competitive State. The President tried very hard to take it and we fought back. We got matching funds and pretty much dollar-for-dollar and effort-for-effort.

CHAIRMAN THOMAS: And what was the result, by the way?

MR. BREWER: We carried Michigan for the

fourth time in a row, which we're very proud, thank you.

CHAIRMAN THOMAS: Okay. Well, I really just kind of wanted to lay out those numbers because I think it's important for us to sort of try to keep things in context. Obviously, these rules are complicated at a certain level and certainly if we change them, it's going to send a lot of folks out there having to reinstruct party folks and you're going to have more and more angry party folks and you might have some that say, listen, I'm so sick of this stuff, I'm just not going to do anything anymore.

But by the same token, I mean, if there's a way that we can sort of work toward implementing the statute in a way that seems to reflect Congressional intent and it leaves party committees enough breathing room so that, over time, once everybody gets the rules set and everybody understands them, you can work with them and you can raise enough money to be effective, I mean, I think that's a very laudable goal, as well.

MR. BREWER: If I may, Mr. Chairman, I would just disagree with your characterization of "some." I mean, 34 committees in Michigan engaging in Federal activity is a small percentage of all the committees that could do so and that don't do so because of the burdensome regulations and potential criminal penalties that they face.

CHAIRMAN THOMAS: Just before we finish that point, we do have an interesting rule that says that just because you're undertaking what is now labeled as Federal election activity--it could be voter registration work, it could be get out the vote work, it could be voter ID work--it doesn't mean that that's going to trigger registration. Even though it's labeled Federal, it doesn't necessarily cross over into being an expenditure, which is the kind of term that you have to work with in terms of registration requirements.

So again, we come back to the fact that there may be a lot of leeway for local party committees to go ahead and work with these rules and avoid actual Federal registration and

reporting, but there is still, obviously, the requirement that they live with the funding and sourcing requirements. You probably have a lot of party committees out there, local party committees that are not registered and reporting with us, but they are, in fact, I guess, digging in a little bit to the rules on what happens if this is Federal election activity and how do we have an accounting system that can demonstrate we have sufficient permissible monies.

MR. BREWER: When I mention the words "accounting system," they go away. I mean, it all goes back, Mr. Chairman. It just doesn't work that way. You start talking about accounting systems and Federally-permissible funds and all those kinds of things, it just does not happen. I'm grateful for some of the exemptions and things that you've talked about in terms of some wiggle room for parties, but that belies the reality for the Oscoda County Democratic Party in Michigan. It just doesn't work that way, and no number of phone calls to me or my assistants or my lawyers are going to

persuade them that they can engage in this activity.

CHAIRMAN THOMAS: Well, my time is up. We have our General Counsel, Mr. Norton.

MR. NORTON: Thank you, Mr. Chairman.

Mr. Simon, I wanted to follow up for a moment on the Vice Chairman's hypothetical about the Jackson rally just to make sure I understood your response. In response to the Vice Chairman, you said--or you called it a voter registration rally and he said, "That's right," and you said, "Well, in that case, it's covered." I just wanted to make sure I understand what you're saying.

I mean, let's suppose it wasn't nominally a voter registration rally but it was a rally for a candidate or for a couple of candidates or it's one of any number of events, campaign events, Mr. Brewer attends. Is your position that if at that event there is a call to register, then it's voter registration activity so that the costs of that event need to be funded with Federal dollars?

MR. SIMON: You know, I think that's a

hard question and I guess I would treat that differently than the Vice Chairman's hypothetical. When you've got something that's set up and operated as a voter registration rally or a GOTV rally, I think it should be treated as such. If it's just a State and local candidate campaign rally, then I don't think a sort of incidental mention of voter registration activity would convert the whole rally into Federal election activity.

MR. NORTON: Well, I don't know how incidental you mean, but if Jackson is one speaker among three or four or five and gives the speech that Commissioner Toner read earlier, is that--

MR. SIMON: I guess I would use something in the nature of a substantiality test or materiality test. I mean, it's not a bright line and it may be something that the Commission needs to kind of work through in terms of advisory opinions or further flesh out, but I think there is a difference between a voter registration rally and a candidate rally.

MR. NORTON: Did you want to respond, Mr. Sandler?

MR. SANDLER: Yes. I think that--and this also gets back to a point that was raised in the panel this morning when Mr. Noble said some of these things have to be decided case-by-case, it doesn't work that way. When you're going to pay the costs for this hypothetical rally and you have to cut the check to the hall, you've got to know how to pay for it. They have to book it a certain way and you have a certain time to make an allocation transfer or to pay for it all Federal. And the idea that you sort of sit there and listen and think, is this material or substantial, it's absolutely absurd. We need bright-line, practical rules in this regard and it doesn't work to try to evaluate these things case-by-case after the fact.

MR. NORTON: Mr. Simon, just to come back to you for a second, I want to make sure we're reading the court's opinion the same way. The District Court suggested that it's clear that mere encouragement doesn't fall within the scope of the

Commission's current regulation, but it's possible that encouragement coupled with the direction of how one might register could constitute assistance and that that interpretation might remedy her concerns about the statute.

I assume that you would agree, but I want to make sure, that if the Commission were to interpret its regulation in that fashion or to change the regulation so that it covered encouragement coupled with the direction of how one might register, that it would not cover the kind of events we're talking about, the Jesse Jackson event.

MR. SIMON: Yes. I mean, I think Judge Kollar-Kotelly was referring in what she, I think, was posing as the middle ground case, or that interpretive question, was referring to something other than mere encouragement. So if you did clarify the rules to cover encouragement plus direction, then that was the rule, I think that would address what she was raising as a potential Chevron problem. I think if you said, no, no, no,

this is just pure assistance, then I think, in her mind, there would be a Chevron problem.

MR. NORTON: Okay. Thank you. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Mr. Scott?

MR. SCOTT: Thank you, Mr. Chairman.

I will again take this opportunity, I note particularly that Mr. Sandler and Mr. Brewer remarked about confusion among the regulated community in terms of what's permissible, what's not permissible, a lot of the local units opting out of the process altogether, which really piques my interest in terms of steps that we could either take either through the regulations or through things that my office, that information does, to get those people back in the process and make these rules easier for them to understand and comply with.

MR. BREWER: Well, fewer and simpler rules, like I've heard here this morning. I think, frankly, over the last couple of years, I'll be candid, a lot of people have contacted the

Commission looking for guidance, haven't gotten much because I think there's confusion, with all due respect, on your own staff about what things mean. And so the people we naturally turn to to give us advice as to what this means, because of the litigation and all these other things, there's been a lot of uncertainty there and that just increases our fear of doing anything.

I think you do a very commendable job within the constraints of your budget and everything to provide information and good materials and training, but given the tens of thousands of local party committees out there, I think it's a Herculean task. It's beyond your means at this point. So remedying at that end, I think, is futile. It needs to be remedied at the front end, which are simple, clear rules which don't discourage people from engaging in political activity.

MR. SCOTT: Mr. Sandler?

MR. SANDLER: Yes. Again, we definitely--State parties, of course, share Mr. Brewer's view

that the Commission has done an outstanding job with the training and outreach with respect to these rules, but there are two points I would add to that.

First of all, training RAD. That's where the rubber meets the road for the State parties. There are too many staff within RAD that do not apply the regulations that the Commission has actually enacted. It's the Commissioners who get to make the law here, not the staff.

Secondly, just to echo Chairman Brewer's point, the court has not required the Commission to change the rule. To continually revise and complicate and so forth, that's the heart of the problem. I think the reformers' whole position doesn't add up.

On the other hand, BCRA was wonderful. It was great. It was a great success. On the other hand, you have to trash all the rules under which we operated and finally got the State parties to understand and realize. And I understand that you're constrained by court decisions, but not on

this rulemaking and we would urge you to take that into account. Thanks.

MR. SIMON: Well, I mean, we're still in the kind of shake-down cruise of the new statute which clearly added complexity to the law and clearly imposed new obligations and burdens on State and local parties and it's going to take time for them to adjust to that and I think the shake-down cruise is being prolonged by the problem with the initial rules that the Commission promulgated, and that's unfortunate, but I don't think that simple and clear rules, as valuable as they are, can come at the degradation of the statutory goals that Congress enacted in the language of the law.

MR. SCOTT: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

Any follow-up? Mr. Vice Chairman?

VICE CHAIRMAN TONER: Thank you, Mr. Chairman. I'd like to follow up on the General Counsel's question.

Mr. Simon, I want to make sure I understand your position. Reverend Jackson comes

to Columbus and he says, "It is critical that all of you here today register to vote. Remember Florida in 2000? Remember Ohio in 2004? If everyone here registers to vote, we will not be denied again." It's your view that Reverend Jackson could say that, the State party could pay for that event, and it wouldn't be voter registration as long as the event is not called a voter registration--

MR. SIMON: No, no, that's not my position. If they have an event where Reverend Jackson is the featured speaker and he gives a voter registration speech, I think it constitutes Federal election activity.

VICE CHAIRMAN TONER: So that statement that Reverend Jackson makes in Ohio would then be Federal election activity?

MR. SIMON: Yes.

VICE CHAIRMAN TONER: No matter how else the event is structured, no matter who else might appear there?

MR. SIMON: I think if Reverend Jackson

comes to an event of the nature you described and gave that speech, it would be Federal election activity.

VICE CHAIRMAN TONER: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you.

First of all, I'd like to urge the Vice Chairman to refrain from keeping mentioning 2000 and 2004. They're just all so painful to me.

This is just a kind of a factual question. Mark, what size of paid staff do you all have, just out of curiosity?

MR. BREWER: My current paid staff, between elections, 15. We're one of the larger State parties in that regard. Many State parties have one or none, none now.

COMMISSIONER McDONALD: And when do you ramp up to increase your payroll, roughly, as a general rule?

MR. BREWER: The summer before an even-year

election that would start, and the big numbers would come in the fall.

COMMISSIONER McDONALD: Just one other question, going back. You said to the Chairman, and I take your point, but it also kind of gets to the underlying theme of BCRA, it seems like to me, you said that a number of the local party committees have just dropped out because of the statute. Am I right about that? Am I--

MR. BREWER: Well, they just haven't been to participate. I mean, 34 out of well over 100 committees don't participate at the level that would require registration.

COMMISSIONER McDONALD: And how many was it before? Did they all--I mean, was it 50, 75?

MR. BREWER: I couldn't tell you for sure. I don't dispute the Chairman's statistics that it did go from 24 to 34, that I recall, but it's never been at a very high level at all despite our encouragement, all of our training and everything else that we do.

COMMISSIONER McDONALD: So, then, as a

practical matter--just so I'm sure about this, because it's a kind of important point--as a practical matter, then, you wouldn't necessarily say that there was a dampening effect due to that, just based on your own observation of history in your own State?

MR. BREWER: Well, I think the dampening effect, the one I mentioned in my testimony, was trying to get local officials to even participate in the local party organizations because they see this array of regulatory issues. So even assuming you can get them to volunteer to be a treasurer or a local party chair, getting them to go beyond that and do Federal election activity and above the threshold level is just not going to happen. It's impossible.

They don't have--back to the Chairman's point, I think nationally, in Michigan and other State parties, we had a lot of success with small donors. A lot of that was done over the Internet and so forth. That's not a fundraising tool that's available to the local party. We're begging our

local parties to get on the Internet now along with all these other things, go into the 20th century when we're in the early part of the 21st. And again, it's no disrespect to them. They're volunteers. To expect them to have the resources to raise more hard money, to find a lawyer--there's probably only two or three lawyers in the whole State of Michigan who have any concept of what the Federal election law and BCRA are about. So it's just an impossible task to try to get them to that level.

COMMISSIONER McDONALD: One last thing, if I might. But as a practical matter, if part of the argument--just being the devil's advocate, I mean, I just want to pursue this because Don's taken his share of shots and held up pretty well, I think--I just want to be clear, though. One of the themes which kind of runs through this, and it has great appeal to me because I really grew up on local and State politics, not on Federal politics, but one of the things that strikes me, and it sure would be true in Oklahoma, first of all, out of 77 counties,

there would be three counties that would really get into any big activities. There would be Tulsa County, Oklahoma County, and probably Cleveland County. It just depends. I mean, there could be a couple more, depending on what's at stake.

But if the converse theme is that local participation, we shouldn't concern ourselves because basically this is about local participation and we're unwittingly getting people under the guise of Federal activity, which is a real concern and I'll confess that, but if the theory is that most of these groups are very small to begin with and they are volunteers and they don't get involved in this activity, it just seems kind of incongruous to me. I mean, if my pitch on one hand is I'm testifying that State and local politics is every bit as important as Federal, which it is where I'm from, a lot more important, as it turns out, most of the time, you can't very well turn around and say, well, the real problem is that you're knocking us out of the Federal activity which we've already stipulated is not really that important to us to

begin with.

MR. BREWER: Well, let me take the example of last year's election in Michigan. Why, in a highly-targeted State like Michigan, with the stakes as high as they were in that Presidential election, why are three-quarters of my local committees, you know, we've had more activity in those local committees than we've had in 30 or 40 years. People are coming forward. They know the stakes in the Presidential election. Why won't those committees raise the Federal money, get involved in the Federal system for the most important election on the ballot? Because they're scared by the complexity of the regulations and they're scared of the criminal penalties.

COMMISSIONER McDONALD: And they were--

MR. BREWER: If there was ever a time where those local committees were going to form Federal committees and get involved, it would have been last year's Presidential election, but they're scared because of the complexity of the law.

COMMISSIONER McDONALD: And they were

doing it before?

MR. BREWER: No. What I'm saying is if there ever was a time to be motivated to do it, it would have been the last election.

COMMISSIONER McDONALD: Okay. I take your point, and it's a very good point, but I did want to be clear that I got the impression that they weren't doing it before, as well. I mean, 2000 was a fairly important race, as well, and I think you could make a pretty compelling case for it.

MR. BREWER: Well, I can just tell you, again, from our--we did not see the kind of outpouring of activity and people who hadn't been active in politics in Michigan in 30, 40 years come out in 2004 that we saw there. So even with all that and everybody knowing the stakes at the Presidential level, a minor increase in the number of Federal committees.

COMMISSIONER McDONALD: I thank you very much.

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr.

Chairman.

Mr. Simon, I've got to go back to you and this Jesse Jackson example again because I thought I was clear and I'm not.

Do we agree that--I mean, would you be comfortable, let me put it this way, would you think it was consistent with the law if we had something in our E and J that said that you've got--if there's an event that everybody agreed was not generally a voter registration event or a GOTV for Federal purposes, it's a State candidate event or whatever, you know, let's assume that everything else about the event is purely State and local and all that happens at that event that is arguably FEA is that one or more speakers, in addition to everything else they say, has a tag line either at the beginning or the end of their speech where they say, "Don't forget to vote," or "Please register to vote." If we had something in our E and J that said just that, just that mere exhortation, "Don't forget to vote" or "Please register to vote," is it enough to bring you into FEA? Would that pass

muster, in your view?

MR. SIMON: If the underlying rule was that the rule included efforts to urge or encourage voter registration, yes, with the explanation that an incidental reference would not be within the scope of that rule.

COMMISSIONER WEINTRAUB: And if Jesse Jackson made that speech at--

MR. SIMON: I don't think that's an incidental reference.

COMMISSIONER WEINTRAUB: That's not an incidental reference?

MR. SIMON: No.

COMMISSIONER WEINTRAUB: What's an incidental reference?

MR. SIMON: Sort of a tag line on the speech.

COMMISSIONER WEINTRAUB: But if you put it in the context of what happened in the previous election cycle, it's no longer a tag line?

MR. SIMON: Well, I mean, the example is a speech about voter registration--

COMMISSIONER WEINTRAUB: No, no, no. It's not a speech about voter registration. All he says about voter registration is that one paragraph that Vice Chairman Toner quoted.

MR. SIMON: Well, I mean, this is kind of a moving target in terms of this discussion--

COMMISSIONER WEINTRAUB: I know it's a moving target. I'm trying to try a couple of different scenarios to see where you are.

MR. SIMON: Fair enough. I mean, it starts out as a voter registration rally. Then it--

COMMISSIONER WEINTRAUB: I'm not asking about--

MR. SIMON: I know, but I'm just saying, in this discussion over the course of the morning, this has moved substantially to the hypotheticals we're dealing with. My position is, to the extent I've thought through exactly all these permutations, is that voter registration activity includes efforts to encourage voter registration, and that's been--that's reflected in existing

Commission rules. I guess I would want to be informed by how the Commission has construed and implemented its existing language about efforts to urge voter registration--

COMMISSIONER WEINTRAUB: That's what I'm trying to ask you, is given--assume that nothing else happens at this event that you would consider to be FEA and all that happens is, in the course of this event, Jesse Jackson gets up. He makes a speech about policy, and at the end of the speech, he puts that paragraph in. Is it FEA?

MR. SIMON: And that's the only thing that happens at that rally?

COMMISSIONER WEINTRAUB: That's the only thing.

MR. SIMON: And it's that one paragraph? Maybe that falls in the incidental category, but, you know, we started with a hypothetical about a voter registration rally or the hypothetical of a speech devoted to the importance of voter registration. I think that is FEA.

COMMISSIONER WEINTRAUB: Thank you, Mr.

Chairman.

CHAIRMAN THOMAS: We are quite a bit behind schedule. We planned to bring the other panel on at 2:00 in the afternoon, so we have kind of eaten into our own lunch, so to speak. But we thank you very much for coming here. Your expertise is most invaluable and we will try to make sense of this and do it in a way that at least makes some people happy. No one is going to be perfectly happy.

I do want to state, I think for purposes of making sure any additional comments or statements can be added to the record, I think as we did in some of our recent rulemakings, without objection, we will leave the record open in this particular rulemaking for, let us say, one week, so that if people have any additional statements or comments they want to add, they can do so.

Very well. We are done with this particular session. Thank you very much.

VICE CHAIRMAN TONER: What time are you resuming?

CHAIRMAN THOMAS: Well, I'm happy to start later, but I was thinking that if we start on the scheduled time, it's in everybody's interest. Let's take it up at 2:00. That leaves us little time.

[Whereupon, the proceedings were recessed, to reconvene at 2:00 p.m., this same day.]

A F T E R N O O N S E S S I O N

[2:00 p.m.]

PANEL III: STATE, DISTRICT, AND LOCAL PARTY COMMITTEE PAYMENT OF CERTAIN SALARIES AND WAGES

CHAIRMAN THOMAS: Let us get underway. I know that one of my colleagues is not far away. The Special Session of the Federal Election Commission for August 4, 2005, will please come to order. Welcome to everyone.

This hearing concerns a Notice of Proposed Rulemaking on State and district local party committee payment of Federal wages and salaries. The NPRM was published in the Federal Register on May 4, 2005. It included several proposals for allocating the salaries and wages of employees who spend 25 percent or less of their compensated time on Federal-related activity.

Since our panelists appeared before us earlier today, I can dispense with the tedious description of our format and light system. We will, I guess, still go with our alphabetical system. Please try to stay with an opening

statement of about five minutes and the rest of our time will be on question and answer.

We have, again, Mr. Mark Brewer here on behalf of the Association of State Democratic Chairs. We have Mr. Paul Ryan, who is here on behalf of the Campaign Legal Center. Mr. Joe Sandler, who is here in his individual capacity. And Mr. Don Simon, who is here on behalf of Democracy 21.

Chairman Brewer, please begin.

MR. BREWER: Thank you, Mr. Chairman. I'll incorporate by reference my remarks of this morning in terms of my background and the context in which State and local parties operate.

Let me start by responding to Commissioner Smith's concern expressed this morning. The Court of Appeals opinion at page 62 specifically allowed the Commission--

COMMISSIONER SMITH: My staff informed me that I'd forgotten that, so thank you.

MR. BREWER: Sure. I just wanted to address that, first of all. And we would urge you

to do so.

The court analysis and the criticism of this rule focused on a hypothetical, speculative possibility that somehow, State and local parties would spread Federal work over several less than 25 percent employees, if I can call them that, thereby using non-Federal funds to pay for Federal work. Frankly, this hypothetical evil was clearly conjured up by somebody who has never actually run a State or local party and I think who has spent far too much time inside the Beltway.

Here's the factual reality in terms of how this would work out there. First of all, the vast majority of State and local party organizations don't have enough employees to even attempt such a jujitsu maneuver.

Second, you now don't need to rely upon speculation that such abuse would occur under this rule. We now have an entire election cycle of actual experience under our belt and nobody has come forward to point out a single example of where this alleged abuse occurred. And let me give you

an example, and I'll use my own State.

If there was a State where this would have occurred, you would think it would have been Michigan, a highly-targeted State. As I mentioned this morning, we ended up with over 150 people on our payroll, but let me describe how they were paid. We had 152 total employees last year. One-hundred-and-twenty-three of those, or 81 percent of them, were paid 100 percent with Federal funds because they were above the 25 percent threshold, even though, frankly, for many of them, they certainly didn't come close to performing 100 percent FEA-type activity. Twenty-nine of our employees, or 19 percent of them, were paid 100 percent non-Federal because not only were they below that 25 percent threshold, but all of their work, every bit of their work was on State legislative races.

So we could have abused this rule in two ways, I guess, had we wanted to, or could have. We could have manipulated the workload of those 123 employees to keep some below the 25 percent

threshold, ostensibly to save Federal hard money, but we didn't. Why? Because anybody who's ever managed campaigns and managed people know that you cannot micromanage somebody's time to do that. I mean, we have enough to do in a campaign to get voters registered, among other things, get the vote out, and so forth without attempting this accounting task of trying to micromanage somebody's time so they stay under this 25 percent threshold. It's impossible to do, even if you had a lot of employees to do it, and we certainly don't have that kind of management folks available to us to do that.

I suppose the other thing we could have done was that we could have used the 29 employees who fell under that threshold to do some FEA, but we didn't. I mean, the fact was they were working 100 percent of the time on those State legislative races and were paid with non-Federal money as a result.

So I think you can, again, look at Michigan as an example of where we could have

abused it, so to speak, if we had chosen to. We certainly had every, quote, "incentive," I guess, to do so, right--save Federal money, circumvent the rules, abuse the rules, but we did not because you, just as a practical matter, can't. It's just a management impossibility.

As a matter of fact, I would offer that under the rule, Michigan and many other States like us, in fact, overpaid in terms of using Federal money to pay for these employees because many of those 123 employees weren't working 100 percent of the time on Federal races. I mentioned earlier today, we had one major Federal race in the State of Michigan last year. It was the Presidential. We also had State legislative races. We had supreme court races. We had lots of local races. There were very few, if any, of those 123 employees who actually spent 100 percent of their time. So I think in actuality, we overpaid in terms of Federal money.

Finally, just one thing. I noticed in the Court of Appeals opinion that, somehow, they

speculated that wealthy donors would be willing to swallow the costs of paying workers to work 75 percent non-Federal if they could somehow get this 25 percent Federal squeezed out of them. With all due respect to the court, I've dealt with thousands of wealthy donors over the years, and if I told a wealthy donor that I need to waste, essentially, from their perspective, 75 percent of your money to get this 25 percent, they're going to walk away. They're not going to give me a penny. So, again, with all due respect to the court, that's just not a reality when it comes to the real world.

So we would urge you to repromulgate the rule because there now exists a record of actual experience which demonstrates, proves that all the speculation about abuse was just that, idle speculation that has no basis in fact. Thank you.

CHAIRMAN THOMAS: Thank you.

Mr. Ryan?

MR. RYAN: Good afternoon, Mr. Chairman, Vice Chairman, Commissioners, Commission staff. It's a pleasure to be here this afternoon to

testify before you in this rulemaking on behalf of the Campaign Legal Center.

I am here today to urge you to adopt the proposed rule establishing 25 percent as the fixed minimum percentage of Federal funds that a State, district, or local party committee must use to pay the salaries, wages, and fringe benefits of employees who spend some of their compensated time, but not more than 25 percent per month, on Federal-related activity.

FECA, as amended by BCRA, requires that any State, district, or local party expenditure for Federal election activity be made using hard money, or under limited circumstances using a mixture of hard money and Levin funds. Under no circumstances may State parties pay for Federal election activity using soft money.

Congress included in the definition of Federal election activity services provided by a State, district, or local party employee who spends more than 25 percent of his or her time on activities in connection with the Federal election.

In doing so, Congress was aware that under longstanding Commission allocation regulations, employees spending 25 percent or less of their time on Federal-related activities had to be paid with at least some hard money. Nevertheless, the Commission in 2002 adopted a regulation permitting State, district, and local party committees to use entirely soft money to pay the salaries and wages of State party employees who spend 25 percent or less of their time performing Federal election activities.

This regulation was challenged and invalidated by the District Court in Shays under so-called Chevron Step 2 analysis on the grounds that it compromised the purposes of BCRA, creates the potential for gross abuse of BCRA, and thus constitutes an impermissible construction of the statute. This rulemaking follows the District Court's decision in Shays.

The NPRM for this rulemaking acknowledges that State party committees are required under FECA to use at least some Federal funds to pay the

salaries and wages of employees spending 25 percent or less of their time in connection with Federal elections. The Commission's proposed rule to establish a fixed 25 percent Federal funds allocation minimum for State party committees' payment of salaries of 25 percent or less employees would ensure that only Federal funds are used to finance Federal election activity.

We strongly urge the Commission to adopt this proposed rule, which not only best comports with BCRA's soft money prohibition, but also has the significant advantage of providing a clear and readily administered rule.

The NPRM also proposes two alternatives to a fixed 25 percent minimum approach. The Campaign Legal Center opposes both alternatives. One alternative, treating salaries and wages for these employees as administrative expenses subject to the allocation ratios in Section 106.7(d)(2), is flawed because it would allow State party committees to use soft money to pay a portion of the salary of such employees during any year in which a

Presidential candidate is not on the ballot.

The Commission proposed as another alternative establishing an allocation percentage directly proportional to the amount of compensated time these employees spend on Federal-related activities. While this alternative allocation method would, in principle, comport with BCRA's soft money prohibition and with the District Court's opinion in Shays, we do not support this alternative because it would be unnecessarily complicated and difficult to enforce.

The Commission also seeks comment on whether the allocation method chosen by the Commission for salaries and wages should likewise be applied to committee payment for the costs of employee fringe benefits. We urge the Commission to make clear that the cost of fringe benefits falls clearly into the category of compensated time and to require that such fringe benefit costs be paid in the same manner as salaries and wages.

Specifically, the Commission should require the cost of fringe benefits of State party

employees who spend more than 25 percent of their time on Federal election activities to be paid entirely with hard money, Federal funds. The cost of fringe benefits of State party employees who spend 25 percent or less of their time on Federal-related activities should be paid according to the 25 percent Federal funds fixed minimum allocation method.

And finally, in a matter unrelated to the District Court decision in Shays, the Commission seeks comment on whether Regulation 106.7(c)(4) should be revised to state that Federal funds raised by a State party at an event where the costs of the event are allocated between Federal and non-Federal accounts may be used to fund Federal election activity. We oppose this revision of Section 106.7(c)(4). The current regulation is consistent with and mandated by FECA Section 441i(c), which provides that an amount spent by a State party, quote, "to raise funds that are used in whole or in part for expenditures and disbursements for Federal election activity shall

be made from hard money."

FECA requires that hard money and only hard money be used to pay the costs of a fundraiser if the funds therein raised are used in part to pay for Federal election activity. Section 106.7(c)(4) properly implements this statutory requirement and any alteration of this requirement would undermine the statute.

Thank you for your attention. I look forward to answering your questions to the best of my ability.

CHAIRMAN THOMAS: Thank you.

Mr. Sandler?

MR. SANDLER: Thank you, Mr. Chairman and members of the Commission. Again, I appreciate the opportunity to appear again this afternoon, not on behalf of any specific client, but as a practitioner advising a number of State Democratic Party committees on the Federal Election Campaign Act and the Commission's rules.

We certainly agree, and I won't repeat the testimony of Chairman Brewer as to why the

Commission does not need to, under the Court of Appeals opinion, revise the statute. But if--or revise the regulation. But if the Commission chooses to revisit this issue, there are some specific provisions we would suggest to--one in principle, and then some more technical that would improve the operation of this regulation.

First of all, we believe the Commission should amend the regulation to conform to the statute with respect to what kind of employee activity we're talking about here. The statute says in connection with a Federal election, not Federal election activity, which is much broader than the established meaning of in connection with a Federal election. Consequently, the statute is clear that if somebody spends 50 percent of their time on generic voter registration or GOTV, their salary should be, under the Court of Appeals rule, it should be allocated, not paid 100 percent Federal.

Secondly, we believe that State parties should have the option of treating payments for

fringe benefits as administrative expenses rather than as salary payments. As a practical matter, often, fringe benefit payments have to be made on a different schedule or in advance of payroll payments in such a way that it is very difficult to figure out how much that employee is going to work that money, and so it would give a necessary and practical flexibility to State parties to have the option of treating them either as salary and wages or as administrative expenses.

Third, we believe that the Commission should provide some mechanism for allowing State parties to adjust payroll payments that have already been made based on what employees actually did that month. In other words, if they guess wrong one way or the other, there's no mechanism now for correcting that in arrears.

And finally, we believe, and this is also detailed in our written comments, that the Commission should make clear that where an employee spends 100 percent of their time on non-Federal races in a particular month, they can still be paid

100 percent with non-Federal money, and that, of course, is a real situation particularly, for example, this year when we have 30-plus Governors' races up and certain State party employees do nothing but devote their time to Governors' races. Similarly, where State legislative caucuses are part of the State party structure and those employees devote 100 percent of their time to the State legislative races and zero percent to activities in connection with a Federal election or even Federal election activity.

Thank you very much.

CHAIRMAN THOMAS: I forgot to do the clock for you. I apologize, but you were spectacular, very close to five minutes, I'm sure.

Mr. Simon?

MR. SIMON: Thank you. Good afternoon. I'm testifying once again on behalf of Democracy 21.

We support the rule proposed in the NPRM that would establish a simple two-part test for payment of State party workers. Those who spend 25

percent or more of their time working on Federal matters would be paid entirely with Federal funds. Those who spend up to 25 percent of their time on Federal matters would be paid with an allocated mixture consisting of 25 percent Federal and 75 percent non-Federal funds. This proposal is consistent with the statute and relatively simple to administer.

The Commission's existing rule is a clear departure from the law. In strengthening the law to require full Federal funding of certain specified mixed activity, nowhere did Congress in BCRA say that other previously allocable mixed activities could be funded entirely with soft money. It did not do so for administrative expenses, for fundraising expenses, or for non-FEA voter drive expenses. Nor did Congress do so for salaries paid to State party workers who spend up to one week per month on Federal election matters.

Yet although the Commission correctly continued to require allocation for these other forms of mixed activities, in this one area of

State party salaries, the Commission implausibly read BCRA to weaken by implication the preexisting requirements.

The District Court in Shays found this weakening regulation violated the statute and was, thus, invalid under Chevron. The D.C. Circuit affirmed the District Court's invalidation of the regulation, holding that the rule was, in its words, particularly irrational given the FEC's recognition that costs for voter registration, get out the vote drives, and generic party advertising, all matters, like salaries, that the FEA definition specifically addresses, may require allocation even when the activities do not qualify as FEA. The court said the Commission's rule, again, in the court's words, makes no sense in light of the justification offered for it and, thus, is arbitrary and capricious.

Now, it's true that the D.C. Circuit, unlike the District Court, rested its invalidation on APA, not Chevron, grounds. The court noted that, technically, the Commission is thus free to

repromulgate the rule with a better explanation. We urge you not to do so.

The D.C. Circuit said that, given the statutory framework, it was, again, the court's words, skeptical that there is an adequate explanation to be had for why, in this one instance, continued allocation is not required when for all other statutorily similarly situated mixed activities, allocation is still required.

Further, no explanation that the Commission could provide would ensure that its current rule would not become a vehicle for abuse. It's certainly not implausible for a State party to assign an employee to work on Federal electioneering matters one week per month and then pay that employee entirely with soft money. By extension, the State party could functionally create a full-time job devoted to Federal electioneering and funded entirely with soft money by rotating the Federal tasks among four workers on a weekly basis. For the Commission to stubbornly cling to what the court called a particularly

irrational rule that was invalidated by two courts with simply an indication to prolong litigation and keep the law unsettled.

Let me comment briefly on the two other topics raised in the NPRM. The Commission, in an Advisory Opinion, 2003-11, took the position that fringe benefits for State party workers should be paid on the same basis of salaries instead of as administrative expenses. The Commission gave not one, but four reasons why employee-specific fringe benefits are like salaries and wages and should be treated similarly, including the fact that the Commission has always done so, that BCRA speaks broadly of compensated time, not salaries, and that it would, in the Commission's words, be an anomalous result to have different allocation treatment for the various components of the compensation package given to the same employee.

We agree and think the Commission should make clear here that fringe benefits for State party workers should be paid entirely with Federal funds for 25 percent and more workers and paid with

25 percent Federal funds for others.

Finally, we oppose amending Section 106.7(c)(4). That regulation is directly based on Section 441i(c) of BCRA and correctly implements it. It would be a facial violation of the statute to allow the costs of fundraising to be allocated on the funds-received method where the Federal funds raised are to be spent for Federal election activity. Section 441i(c) simply does not permit this. In this laborious series of rulemakings to remedy past misreadings of BCRA, the Commission should not reach out to create a new one.

Thank you.

CHAIRMAN THOMAS: Very good.

QUESTIONS AND ANSWERS

CHAIRMAN THOMAS: We are ready for questioning. Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

First, for Mr. Simon and Mr. Ryan, would you agree with Mr. Sandler that there are some employees of State parties that do 100 percent non-Federal

work and they can be paid 100 percent with non-Federal funds?

MR. SIMON: Yes.

COMMISSIONER WEINTRAUB: So we could clarify that in the regulations and you wouldn't have a problem with that?

MR. SIMON: No.

COMMISSIONER WEINTRAUB: Okay, good. One we won't get sued on.

Mr. Brewer, it's not that I don't believe you, but Mr. Simon is correct. The court is very skeptical that--maybe the court just doesn't know what it's talking about. Maybe Mr. Simon doesn't know what he's talking about. Maybe you're in a better position because you've actually been in this business. Nonetheless, if we're going to do what you want us to do, according to this court, should the FEC--the appellate court, should the FEC wish to adhere to its current view in future rulemaking, it must summon more substantial support than the conclusory assertions presented to us.

I have a feeling that if we say, but Mark

Brewer said this isn't the way it works, that that probably is not going to satisfy the Court of Appeals. So I'll let you respond to it if you want to, but to the extent that we have any leeway on this, I think that if you want to try in the next week to summon some more support that we could use in our E and J should the Commission, and I'm not guaranteeing that we would do that, want to go down that road, I don't think we can do it just based on your testimony.

MR. BREWER: Thank you. I guess two responses. First of all, it's not Mark Brewer, it's the only factual witness in front of you--

COMMISSIONER WEINTRAUB: I understand that.

MR. BREWER: What amazes me about this panel and all these proceedings today, I feel like I'm back in law school where we had the luxury of sitting in an office in D.C. and speculating endlessly about what might happen. One of the reasons I was so glad to get out of law school and start to practice law was to go out where people

actually--there are facts and there are actually events that are occurring.

I don't have the luxury of sitting here in D.C. like people from the reform organizations and speculating endlessly in the comfort of my office as to what I might do. I have a party to run and I'm not going to spend my time trying to evade rules because I've got more important things to do.

But beyond that, if you want a more factual record, everything I've said here today can be confirmed if you go on the road and talk to State and local party people--

COMMISSIONER WEINTRAUB: But I can't do that. I mean, in terms--

MR. BREWER: Why not?

COMMISSIONER WEINTRAUB: In terms of this rulemaking, that's not going to happen. I'm not going to go on the road and start interviewing people. We're going to do it based on the record that's presented to us in this hearing and the other comments that have been submitted. That's the way we do these things, and--

MR. BREWER: Why not get outside the Beltway, with all due respect, and talk to some real people who run real parties in the real world? All of them are not as fortunate as I am that I was able to take a day and spend the money to come be with all of you. They've got a lot of important things to do. Go see them and learn from them and I think they will confirm everything that I've said.

COMMISSIONER WEINTRAUB: It's not that I disbelieve you, it's just that the practical reality is that we've got a lot of rulemakings to do and this particular issue, I've got to tell you, is probably not the most significant one that we're going to confront. So the Commission is not going to spend six months on the road. I mean, that's just the reality. Maybe my colleagues are going to disagree with me, but I think that's the reality. We're not going to go out there--

COMMISSIONER McDONALD: I'll have some time--

[Laughter.]

COMMISSIONER WEINTRAUB: --and do that. So I think the onus is on you guys. If you want to collect some stuff from some of your colleagues and other State party organizations, maybe reach across the aisle, all I'm saying is that I don't see any way, honestly, that we can do what you want us to do without more support. I don't think it'll pass the test of this court, and that's what we have to do. As much as we might be sympathetic to you and as much as we might think that you are the only fact witness and the best person to opine on this, I hear what you're saying and it's not that I don't credit that. It's just that I need to support the rulemaking and I need to do it in the context of everything else that I have to do here.

So that's just my invitation to you. You want to get us some more support? We'd be happy to look at it. But that might be the best that I can offer.

Let me ask a question of Mr. Ryan. I like simple rules, too, and I think that was our decision, that this straight 25 percent rule would

be the simplest way to go. But one of the other commenters suggested that we ought to give State parties the option and let them decide whether they think it's too complicated or not. If it's worth it to them to be able to use ten percent hard money to pay somebody who's really only working ten percent on Federal races and they're willing to go through what they have to go through to document that, why shouldn't that be their option? Maybe we should put that into the rule. It's their choice. They can do 25 percent or they can do an actual allocation based on time spent if they can document it.

MR. RYAN: I think, of the proposed alternatives, I think the actual ratio, allocation ratio, is the second most desirable only to the flat 25 percent and the only reason I would prefer the flat 25 percent over the actual ratio is for simplicity's sake.

If you were to go with one of the alternatives other than a flat 25 percent rate, I would say that that option, leaving that option

open to parties, allowing them to allocate precisely the percentage of time spent, you know, to pay for that amount in Federal funds, that would be acceptable under BCRA and under the court's decision.

The other alternative proposed, which is using the administrative expenses allocation ratios, is far less desirable because it would permit some activities in connection with the Federal election to be paid with soft money in non-Presidential election years.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Mason?

COMMISSIONER MASON: Mr. Brewer, you were talking about your employees essentially were, all but the set who were devoted exclusively to State legislative campaigns were 100 percent Federal last year. What's your situation this year?

MR. BREWER: Well, we're paying people under the administrative provisions.

COMMISSIONER MASON: And so your

assessment of your employees' activities this year are that they are less than 25 percent in connection with Federal elections, and how do you make that judgment in any given month? I mean, let's take ourselves forward to January of next year.

MR. BREWER: Well, in order to cope with the complexity of this rule, one of the things we did, we altered our time sheets so that I make each of my employees certify for every weekly time sheet they turn in how many hours of this activity they engaged in, and then we hold periodic instructions of them as to what falls into that category, and then you're to report how many hours you spent in that particular week on that category.

So I think we've more than complied with the Commission's requirements that we be able to document how we reach those conclusions. It's a pain in the neck, but we do it.

COMMISSIONER MASON: And so as you move into the election year, and particularly the Federal election year, what you're saying is just

through experience, you're finding that by perhaps December of the year before, or--I'm not trying to tie you down to some particular month, but January, February, March, some time in there, these people start tripping over the 25 percent threshold.

MR. BREWER: Yes. There might be a shift, depending on what the person does. Sometimes I change a person's job. They may shift over to full-time campaign work from a more regular staff job. But yes, we keep an eye on that, and like I said, we do these regular trainings. We monitor what our employees are doing, and when we think it's appropriate, switch over.

COMMISSIONER MASON: And how do you handle the sort of central and administrative staff, I mean, people such as yourself, you probably have a receptionist, you probably have--you mentioned accounting, assistants, you know, that are essentially services or are connected with the operation of the whole organization?

MR. BREWER: Again, that would vary from person to person. I think I recall at some point

last year, I switched myself over. I mean, what we did here, and this is completely consistent with what I talked to you about, we weren't trying to be cute and play games and maximize use of non-Federal money. If it was even close, we switched over. That's why all those employees were being paid with 100 percent Federal money, and I think I'm fairly typical of State parties and local parties in that regard. We're not playing games with this because the penalties are too severe. If it was even a close question, we switched over to 100 percent Federal.

COMMISSIONER MASON: And these employees who you had who were devoted to the State legislative races, was that an arrangement you had typically had before, or did you for that category of employees change any responsibilities or operations, in essence, to keep them 100 percent non-Federal?

MR. BREWER: Those were not employees who were on the party staff pre-election. They were added for the purpose of those State legislative

races, and we have always had people on our payroll who were devoted exclusively to State legislative races. The number may vary from cycle to cycle, but those were not preexisting staff. They were hired exclusively for that purpose.

COMMISSIONER MASON: Mr. Sandler, I see your point in connection with the Federal election versus Federal election activity. Can you tell me what you would expect to be the difference?

MR. SANDLER: Yes, absolutely. The generic voter registration, generic activity in get out the vote that does not reference a Federal candidate is Federal election activity, of course, under the Commission's definitions under BCRA. It is not activity in connection with a Federal election as that term has been defined by the courts over the years. Consequently, the first problem is the Commission's existing regulation is vastly too broad, sweeps in work by State party or takes into account work by State party employees that the statute does not permit as written to be taken into account and is vulnerable to challenge

on that ground.

COMMISSIONER MASON: And so at least one of the principal effects would be, for instance, to allow a State party to have an employee designated to generic, that is to say, non-candidate-specific voter drives to fall out of this 100 percent Federal category.

MR. SANDLER: Right, or just how that time is accounted for, you know, is counting towards the 25 percent or not.

COMMISSIONER MASON: And how does that match up with the requirement that the Federal election activity be paid Federally or with a Federal-Levin mix, which doesn't really exist many places?

MR. SANDLER: I think--

COMMISSIONER MASON: In other words, since that generic voter drive is FEA in and of itself, then the expenses of that, presumably including the expenses of an employee devoted exclusively to it, would need to be Federal for reasons other than the employee time rule.

MR. SANDLER: Well, I think the fact that the statute specifically addresses how employee time is supposed to be accounted for, separate from the other activities, and the fact that Congress has used the term--decided specifically not to use the term "Federal election activity" basically trumps the other--treating it as one of the other categories.

COMMISSIONER MASON: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you. It looks like I'm next up.

Let me follow up on this same issue. I, frankly, hadn't focused on that aspect of our regulation that seems to define what's covered in the wages reg, not just in terms of in connection with a Federal election, but also Federal election activity. I note that at a couple of other places in the statute that deals with all of the soft money restrictions coming out in Section 441i, it appears in a couple places where there's a reference to expenditures or disbursements in

connection with an election for Federal office, including expenditures or disbursements for Federal election activity. That kind of phraseology appears twice in 441i and I'm just curious--I gather your read is that since that same kind of qualifier doesn't appear regarding the wages provision in the statute, that we wouldn't construe the statute that way? Is that--

MR. SANDLER: Exactly right.

CHAIRMAN THOMAS: Here's your chance. Tell me how that differs from your perspective.

MR. SIMON: I think it's a clever argument. I think it's utterly implausible. You know, I think the whole concept of the statute is that the "in connection with" standard is the sort of umbrella standard and the Federal election activities are kind of specific forms of activity under that umbrella. The whole premise of requiring--I think Commissioner Mason was going to this point, which I think is a correct point, that the whole premise of requiring Federal funding for Federal election activities is that those

activities are Federally related. They're in connection with Federal elections. That's the basis on which Congress determined that generic activities, for instance, should be Federally funded. I think the legislative history is just replete with observations that generic activities do impact Federal elections and that is the basis for requiring Federal funding of them.

So Federal election activities, I think, are, as a statutory matter and as a matter of the sort of underlying premise of the statute, activities in connection with a Federal election.

CHAIRMAN THOMAS: What canon of construction do you bring to us so that we can say, well, they include the parenthetical phrase including Federal election activity in a couple places, but didn't in the other--

MR. SANDLER: I mean, I guess what I would rely on is simply the words themselves in connection with an election being the broader applicable standard here. I mean, I could go research your specific question in Sutherland and

provide you something next week if you want.

CHAIRMAN THOMAS: You can always find something in Sutherland, can't you?

Just to come back to you, Mr. Sandler, in your comment on page eight, you talk about--you say, in connection with a Federal election is a legal term of art that covers only activities that directly influence a Federal election, such as an activity that expressly advocates the election or defeat of a Federal candidate or activities that result in an in-kind contribution to a Federal candidate.

Obviously, if you just limit it to those concepts, it could greatly constrain the reach of the salary part of this FEA definition. Do you have in mind that that was just kind of an inclusive description and that there might be, for example, other things, like activities that relate to generating communications that promote, support, attack, or oppose that wouldn't necessarily involve express advocacy?

MR. SANDLER: Well, that's an interesting

twist on it. I mean, I think we have more in mind the question of whether it was intended that that portion of the State party employees' work that is by its nature generic and not related to specific Federal races, whether that should be counted towards the 25 percent, and would respectfully suggest that the reformers can't have it both ways, read the statute exactly for what it says when it serves their purposes and not when it doesn't.

Here, it doesn't say Federal election activity. It says, in connection with a Federal election. It means something different. There are dozens of court cases on it.

CHAIRMAN THOMAS: Okay. With regard to the real world, while we've got you here, you talked about how you implemented some systems to try to keep track of people's time. I guess from your perspective, you're telling us that you would prefer to have perhaps use of the general allocation rules for administrative expenses to fall back on, say, for fringe benefits and so on, but I'm just curious, since you're already out

there keeping track of time on, it sounds like a weekly basis, why not go with a system that gives you sort of like maximum flexibility?

You could just have the percentages in the below 25 percent area reflect what people actually do. If they do zero Federal, you could put them at zero, obviously. But if they do five percent Federal, you could have five percent of their expenses, and so on, paid for that way. I mean, it's a flexible sliding scale that lets you actually compensate them Federal/soft according to what they're really doing.

MR. BREWER: Beware of government agencies bearing gifts. That flexibility also entails--means that we have to keep additional records to justify the flexibility. So I would prefer clean rules that are simple to follow over an excess of flexibility which requires us to keep additional paperwork to justify the decision we made.

CHAIRMAN THOMAS: I would have to just quickly, on my own initiative, I suppose, if left the decision to do it myself, I think I would

probably go with let's just treat this below 25 percent category as administrative and let you work with those same percentages, because that lets you deal with this problem of not knowing in advance necessarily how things are going to work out. You can plan, at least, with that kind of a formulation.

MR. BREWER: Yes. If you don't repromulgate the rule, something like that would be good--better--than having to deal with each employee individually on an ongoing basis.

CHAIRMAN THOMAS: Thank you. Commissioner Smith?

COMMISSIONER SMITH: Thank you, Mr. Chairman.

Mr. Simon, Mr. Ryan, the $64,000 question, can you give us any examples that you believe that would indicate abuse of this provision in the last election cycle?

MR. SIMON: No, and let me explain. I mean, this is an issue that comes up at every hearing--

COMMISSIONER SMITH: Right.

MR. SIMON: --and let me give you my kind of world view on that question, which is that I don't think that the onus is on us to show that in the last election, there was, in fact, an abuse that we have identified and that we know about, that we bear the burden of showing that in order to get the Commission to write a rule that correctly reflects the statute.

You know, Mr. Brewer said, and I respect him for this, that he's not trying to be cute and play games and maximize the use of non-Federal money, and I believe him. But when he says there's no historical record here, I don't agree with that. I think there is a historical record here and I think there's a historical record that shows the State parties did try to be cute and play games and maximize the use of soft money, and that is the story of what happened to the soft money system in the 1990s, when the State parties became integral parts of the mechanism for funneling soft money into Federal elections, when national party soft

money funds were transferred down to the State parties. I think as the Congressional Record shows and as the record in McConnell shows, those transfers were made for the specific purpose of playing games and gaming the Commission's allocation rules and maximizing the use of soft money to influence Federal elections.

Therefore, I think Congress, when it wrote and enacted the statute, was justifiably suspicious of what kinds of games would be played in the future, and I think Congress intended, and the Supreme Court construed the statute as a prophylactic statute, because even if there weren't certain evasions going on today, if Congress could look forward and suspect that evasions might take place in the future and that very creative lawyers might devise new mechanisms for maximizing soft money, that it was entirely legitimate for the statute to reach out and cover those situations.

And therefore, because something didn't happen in 2004, I think is no guarantee that it won't happen in 2006 or 2008 or somewhere down the

line.

COMMISSIONER SMITH: Mr. Ryan, anything to add, or ditto, or--

MR. RYAN: The only thing I would add is that, as was mentioned in this morning's panel, we don't know what types of enforcement actions are pending with this Commission and we may not know for several years. So for all we know, there may have been abuses. Those abuses may be under investigation right now--

COMMISSIONER SMITH: Okay. I mean, that's not even--but we would know what cases are up. I guess--I agree with Mr. Simon. Obviously, the burden is not on witnesses to prove that there have been abuses in order to get a correct rule under the statute. On the other hand, you don't have a court ruling suggesting or stating that the rule we adopted is incorrect under the statute. That's what the whole question is, again. We're back to what is the correct interpretation of the statute, and we know that oftentimes there can be a couple of interpretations because Congress leaves certain

things sort of up in the air and they don't tie down--in fact, they intentionally often will send things over to an agency known for its expertise.

And I do think that--well, obviously, when we adopted the rule, we didn't know exactly what would be the case in the next couple of years. I do think the fact that over three years, the Commission's determination seems to have been proved correct should probably be evidence as we now consider repromulgating the rule or changing a rule. And I think it's perfectly legitimate for the Commission to look, as well, and say, maybe there were abuses of the soft money prior to BCRA, but a lot of the potential for those is not here in this case.

For example, just the example you use, obviously, national parties aren't transferring soft monies down to the states anymore because they're not raising soft money. But it might be decided that there are various other things on this particular rule.

So I think the point is well taken, but I

guess I think at the same time, as we look at this--and I guess I'd say to my colleagues, sure, I'd go around the country. Why not? I'm not going to be here. It does sound, in a way, kind of silly, but I'm sure that--

COMMISSIONER McDONALD: We're like a team coming on here--

COMMISSIONER SMITH: Yes. I'm sure you'd like to be in San Diego in January. But more seriously, one of the problems we see with most of these regs, they were not struck down as being contrary to law. They were struck down because the Commission, under a very, very tight statutory deadline--I don't know why the deadline was set so tight. I mean, I have reasons. I remember at one time advising the former President of Common Cause way back, Ann McBride, it was a real mistake to always be putting these deadlines and the immediate court challenges on it and that reformers themselves always complained that Buckley was decided in such a hurry. We didn't have a lot of time, and maybe we should really take the time and

get it right.

Commissioner Weintraub, if you're kind of thinking this, it sounds like maybe you are, that our original rule, for which you weren't here, but you're kind of thinking, it's a pretty good rule, but we're not sure you've got enough of an evidentiary basis in light of the court's skepticism, well, maybe we should take the time and get it right so that we're not back here again, because we see these things come down to judgment calls. There's no promise not to sue us. It strikes me a lot of what we're looking at is almost semantics.

I mean, it seems to be agreed that a lot of the times, it's going to come down to the Commission making a judgment call on the particulars of a factual case, and what I keep hearing from some people is, but we don't want you to tell anybody what those particulars are going to be in advance. We want to keep that secret until you get there, and I'm not sure that's right, but if we need to build a factual record to get it

right, that's exactly why Congress delegates agencies like this.

And if we determine that State agencies can't afford to get out here, State and county parties, they don't have multi-million-dollar foundation budgets like the Campaign Legal Center, what should they do? Well, maybe we should take the show on the road and go out there and say, we need to hear from local parties and the only way we can do this is if we go out to them. Our statute authorizes us to meet anywhere in the country. It might be a great idea.

So with that, I hope that was not too terribly unconstructive. Thank you, Mr. Chairman.

COMMISSIONER WEINTRAUB: I don't want to disagree with you, Commissioner Smith. I'm happy to go to every State in the Union. Sounds like a blast.

COMMISSIONER SMITH: We don't need to do that, but--

CHAIRMAN THOMAS: All right. Commissioner McDonald, Ambassador McDonald, as you were once

known, speaking of travel.

COMMISSIONER McDONALD: Thank you. Well, first of all, I'm really put out with Commissioner Smith. I mean, why didn't he think of this a year ago so he and I could be on the road? It's a little late now, for God's sake.

I do want to address that for a minute, the business about input from real players. I take Mark's point for sure, without any question. Hubert Humphrey was once asked--he was being interviewed by a number of small-town journalists, as it was characterized on an hour interview, and some guy got up and just railed and railed against Humphrey and inside the Beltway and so on and so forth, whereupon Humphrey said, "Do you have any idea where I'm from?" And, of course, Humphrey was from, I'm told, a very small town. And he said, "Do you know where most of my colleagues are from?"

And I'm always struck, because it's just so--I take certainly you at your word and I can think of many examples that exemplify what you say, but it always makes me a little nervous. The

Chairman, I think, is from the big town of, it seems like Buffalo or someplace. Is that where you're from, Wyoming? I'm from Sand Springs, Oklahoma, which was about the size of this room when I was growing up.

I take your point, but I also think, and I can't speak for all my other colleagues, but you do try to factor those things in and what Commissioner Weintraub said is absolutely right. As a practical matter, it's going to be hard to do in this day and time, particularly given the time and expense, and that's why I think it really is good that you could come. But in this day and time, it's awful easy to send e-mails to the Commissioners. It's awful easy--it's much easier than it used to be to get the information that the Commission is putting out there.

And it may well be that if the results are not satisfactory in the final analysis, that the State party chairs are going to have to band together and constructively put forward their thoughts to us. I mean, I think we'd want to

engage them and vice-versa any way we could. I think we really do. I mean, the goal is not to say, gotcha. The goal is just to try to figure out what will work and what the law, as Don has pointed out, is, and we can have disagreements over that.

One of the things that some party officials could do, which wouldn't be true in your case, but you might know some, is take a 25 percent rule, for example, then rail against it and be for it. You can say, well, obviously, you're really only working only ten percent on a project, but it just shows you how screwed up the Federal Government is and you're delighted if you have a bright line test. That's not unheard of. People do that kind of stuff all the time.

And so at the end of the day, I really do take your point, and I think it's a very good one. But if the issue is giving information to us about what is going on, the parties can do that, and they don't have to come to town to do that. They really can do that.

You and I were talking about a mutual

friend of ours at the break. I can assure you, he can avail himself of it. I've been in his law office probably a thousand times in my life--and he owns the building, by the way, so he's probably able to get online and give us the kind of information. He's been county party chairman and State party chairman of the party in Oklahoma.

But I take your point and I think it's a very good one, but I would say if the discontent level is high, which it will be no matter what this Commission does, focus is on a lack of information to this Commission. I would hope that you could encourage folks to get the information to us, because if it means that much to them, I think they've got to want to do that, it seems like to me, because I think what Commissioner Weintraub said is right. No matter how much we would like to do X, Y, and Z--I'd just say something else about the law, in general.

The law is passed by people from all over this country, from rural America, from major cities, from every aspect and walk of life, and

they are a pretty good reflection of their constituencies. There are a number of reasons why people are overwhelmingly elected or reelected, and we could talk about money or we could talk about gerrymandering or anything else, but in the final analysis, they are very representative of what goes on.

I hope that this Commission will be looked at the same. But we have tried, I think, very diligently over time to at least get the comments and the different points of view.

Thank you, Mr. Chairman.

MR. SANDLER: Commissioner, I don't think the issue is about the experiences of the Commission or of an inside-the-Beltway mentality. It goes with the question that Mr. Simon raised about the burden.

The scenario that the courts put out about, you know, maybe this will happen and the people will split up the time and so forth, that is not part of the record, this extensive factual record on which BCRA was built. The question is,

is there a factual basis for that in this case, and I do feel often I'm living in, in administrative law terms, an Alice-in-Wonderland when you appear before this Commission. I mean, if environmental groups came before the Administrator of the Environmental Protection Agency and said, we have this great new change in the primary source rule. We would impose $2 billion of new costs on the industry, but we don't have any evidence that there's any problem. We just think it's something--it's ridiculous, right?

The burden should be--this agency is entitled to Chevron deference because of its expertise, and if nobody comes forward with any evidence, or they tell you they're not aware of any and they don't have a single shred of evidence that this abuse, this hypothetical abuse that these courts are speculating about, is anything more than a paranoid fantasy, why isn't that entitled to deference under fundamental principles of administrative law? That's what this is about, not questioning a Commissioner's, you know, obviously,

expertise and experience and--

COMMISSIONER McDONALD: Oh, I didn't take it personal, Joe, I really didn't. My point was that, as a practical matter, and I think Mark made a very good point. My point is that the Commission is not without at least cogitating about that and trying its dead level best to at least get the comments and to make the framework. That's my point.

MR. BREWER: Certainly, Commissioner McDonald, my Beltway reference wasn't aimed at any of you individually. You all come from outside the Beltway. It was as Joe indicated--

COMMISSIONER McDONALD: I've been accused of a lot worse than that, Mark. Don't worry about it. I've done it, too, but--

MR. BREWER: But the premise here is that my 111 colleagues are represented here today by me, in my written testimony, in my verbal testimony. I mean, I don't know, will our friends from the reform community stipulate that if all 111 of them were here, they would say the same thing I would

say, because I can guarantee you they would. If you want to hear them say it, come to our State chairs' meeting next month in Phoenix and we'll arrange for all of you, or one representative of the Commission, one of your staffers, to go through all this again. We'll give you whatever record you think is necessary to back up what you've heard from me, both in written and verbal testimony. And that's what associations are for--

COMMISSIONER McDONALD: Sure.

MR. BREWER: --so that all those people don't have to come here and you don't have to hold a week of hearings and hear the same testimony over and over and over again.

COMMISSIONER McDONALD: Commissioner Smith and I will be available.

CHAIRMAN THOMAS: Okay. Let's move to Vice Chairman Toner.

VICE CHAIRMAN TONER: Thank you, Mr. Chairman.

I appreciate Mr. Sandler's comments about the Chevron deference authority. The Environmental

Protection Agency, going forward, if we could have the same level of deference, I think we'd be in good shape at the EPA.

[Laughter.]

VICE CHAIRMAN TONER: I guess we all came and worked at the wrong agency. The next time, we'll go be the Administrator at the EPA and have Chevron deference afforded there. Thank you, Mr. Chairman.

Mr. Simon, I'd like to begin with you, and it is this 106.7(c) issue. We have a lot of issues that we have to deal with because of the Shays ruling and then we have this issue on top of it. As I understand your position, 441i(c) basically, in your view, prohibits a State party from using Federal funds that are raised at events at which soft money is also being raised when the funds-received methodology is used, that 441i(c) bars a State party from using those kinds of Federal funds for any FEA.

And as I understand it, the outgrowth of that approach would be that basically there would

be two kinds of Federal funds, one set of Federal funds that could be used for FEA as well as to make contributions to Federal candidates to do coordinated expenditures, those kinds of things, and then sort of a lesser class of Federal funds that could be used, again, to make contributions for Federal candidates and coordinate expenditures but could not be used for FEA.

And my question is, first of all, am I accurate in terms of what your position is, and second of all, wouldn't it be kind of an anomaly where Federal funds raised at events where soft money is also being raised could be used to make contributions to candidates, direct contributions to Federal candidates, but couldn't be used for FEA?

MR. SIMON: I can't figure out any other way to read 441i(c). I mean, whether you think it's good policy or bad policy, to me, this is as clear a Chevron Step 1 issue as anything we've talked about all day, and that if you do what you're proposing to do, I think that's really a

serious problem under the statute.

Now, let me just point out one other thing. I mean, I was struck that in the NPRM, in talking about this problem, the discussion failed to even mention 441i(c), which is the statute that is underlying the current regulation, and to talk about changing the regulation without even trying to justify that change in the context of the statutory language struck me as a fairly weak proposal.

But it's not just 106.7(c)(4). I found three other regulations that stand for the same proposition and I think you have to deal with all of them. It's 106.7(e)(4), as well as 300.32(a)(3) and 300.33(c)(3).

VICE CHAIRMAN TONER: We'll just tack those on for good measure.

MR. SIMON: Well, I mean, you know, you--I think here's an instance where you've correctly implemented the statutory language on its face and you've put it kind of throughout these regulations. And to say, well, this has some anomalous results,

therefore we're going to just assume we're free to ignore the statute, strikes me as not smart. I mean, if it's a problem, then I think this is precisely what your legislative recommendations should be about.

VICE CHAIRMAN TONER: So just to be clear, we've historically viewed Federal funds that are raised under the funds-received method to be fully Federal funds--

MR. SIMON: Yes. Yes.

VICE CHAIRMAN TONER: After all, there is no soft money subsidizing the raising of the Federal funds, because after all, Federal funds are being used in exactly the same proportion to pay for the fundraising event. But it is your view that for whatever reason, Congress in BCRA disturbed that approach--

MR. SIMON: Yes.

VICE CHAIRMAN TONER: --and, therefore, that money can't be used for FEA.

MR. SIMON: I think that's right.

VICE CHAIRMAN TONER: As a matter of law,

we have no discretion?

MR. SIMON: As a matter of law, you have no discretion.

VICE CHAIRMAN TONER: Mr. Sandler, do you agree with that?

MR. SANDLER: I think you really have to go back and look at the Advisory Opinion where the Commission addressed this--

VICE CHAIRMAN TONER: Two-thousand-four-twelve--

MR. SANDLER: Exactly, and the question is, if that Advisory Opinion was correctly decided, then the answer is no.

VICE CHAIRMAN TONER: But as you read 441i(c), are we legally required to take that position?

MR. SANDLER: No. To take the position Mr. Simon suggests?

VICE CHAIRMAN TONER: Yes.

MR. SANDLER: No.

VICE CHAIRMAN TONER: I'd like to follow up. Mr. Sandler, at page seven of your comments,

you talk about a couple things, if I can find my notes here. You say that--you recommend, as I understand, a possible safe harbor, where if you've got a State party who thought that an employee was going to be over the 25 percent rule but ends up in a given month, ended up working less than 25 percent on Federal activities, an effort really to sort of recoup the Federal money by reimbursing the appropriate account within a certain period of time?

MR. SANDLER: Right, and vice-versa--

VICE CHAIRMAN TONER: And vice-versa.

MR. SANDLER: --so in a situation where they thought an employee would work less than 25 percent on activities in connection with the Federal election, in fact, they worked more and they would then have to make up that.

VICE CHAIRMAN TONER: Would you view that as sort of analogous to the current 70-day period that we have for the paying of joint Federal/non-Federal expenses, where we allow those reimbursements to occur after the fact?

MR. SANDLER: Yes, exactly.

VICE CHAIRMAN TONER: Mr. Simon, what are your thoughts on that? Is that something that you think we should focus on? Again, let's assume that they tried to act in good faith, but the employee ended up not working on those Federal activities--

MR. SIMON: I don't have a problem with some remedy mechanism, which I think is what Joe was suggesting. I think that's reasonable.

VICE CHAIRMAN TONER: Okay. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

Mr. Norton, all yours.

MR. NORTON: Mr. Sandler, I wanted to come back to your point earlier about the Commission regulation that assists in determining when a staff member's time exceeds 25 percent, and your point was that it's overbroad because it covers both Federal election activities and in connection with the Federal election. I was looking at the statute as we sit here, and I'd understand if you'd want to think about it further. I'm looking at 441i(e),

which is the prohibition on Federal candidate soft money, and there the prohibition reads, shall not solicit, receive, direct, et cetera, or spend funds in connection with an election for Federal office, including funds for any Federal election activities.

MR. SANDLER: Right.

MR. NORTON: And then this similar provision applying to tax-exempt organizations and that the raising of funds for tax-exempt organizations, it says that, under certain circumstances, funds can't be raised for an organization that makes expenditures or disbursements in connection with an election for Federal office--

MR. SANDLER: Right.

MR. NORTON: --including Federal election activity. Does that provide enough of an indication that Congress considered Federal election activity a subset of in connection with the Federal election?

MR. SANDLER: No. I think that the

normal--the proper way to read that is when Congress wanted to include Federal election activity for purposes of defining class of activity, it knew how to say so and did so in all of those cases you mentioned.

MR. NORTON: Okay. Thank you.

CHAIRMAN THOMAS: Mr. Scott?

MR. SCOTT: Thank you, Mr. Chairman.

My questions really go toward practicalities in terms of implementing really any of the three allocation proposals that are in our current regulation. I noted that Mr. Ryan and Mr. Simon were both advocating the fixed 25 percent method, whereas Mr. Sandler seemed to favor the administrative allocation rules we currently have now. And I just wondered, in terms of practical application, if you see advantages or disadvantages to the particular methods that are proposed in the rules.

MR. BREWER: As I indicated, I think in response to the Chairman's question, if you're not going to repromulgate the rule, I'm with Joe in

terms of the administrative expense because that's something that the parties have been using for years, so it's not a new, yet another formula or regulation we've got to deal with. Let's go back to what we're used to dealing with.

MR. SCOTT: Did I understand you correctly that, in fact, you're using that method now--

MR. BREWER: I misspoke. We're using the 25 percent rule. We're paying 100 percent non-Federal when we're under that threshold. Thank you. I misspoke. Thank you.

MR. SCOTT: Okay.

MR. SIMON: I thought I was in the position, unusual for me, of advocating actually the simplest methodology. I'm rarely in that position--

[Laughter.]

MR. SIMON: --but I was just picking up on what the NPRM had suggested, which is that the flat 25 percent rule for 25 percent and under employees was the simplest way to address the problem.

MR. SCOTT: That's all I had. Thank you.

CHAIRMAN THOMAS: Anybody have any follow-up questions? Vice Chairman Toner?

VICE CHAIRMAN TONER: Mr. Sandler, you noted in your comments that you thought we should think about allowing State parties to create a payroll account--

MR. SANDLER: Right.

VICE CHAIRMAN TONER: --to alleviate some of the practical problems in, I guess, the administration of payroll under the current rule. Could you just elaborate on what those challenges have been and what you think would be achieved if we did that?

MR. SANDLER: Yes. It has to do with, and this also relates to the payment of fringe benefits, that basically, when the payments have to be made to a payroll company, estimating in advance, estimating after the fact, separate payments for the fringe benefits, it would just make it easier if we could have an account into which the proper amounts could be put so that one check could be--we could always--

VICE CHAIRMAN TONER: Would this be similar in your view to sort of an allocation account--

MR. SANDLER: Yes, exactly.

VICE CHAIRMAN TONER: --where funds could be moved into it, great, they sit there, and then when you know from your payroll company how things play out, you can debit off of that?

MR. SANDLER: That's exactly the idea.

VICE CHAIRMAN TONER: Okay. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Could I just move a little bit off the immediate target here? I'm coming out of these two different sets of hearings today somewhat concerned. I mean, I've been hearing this for quite some time, but I'm somewhat concerned that party committees are taking the position that the rules related to raising and using Levin funds to pay the non-Federal share are just so difficult to deal with that they are just opting not to use that option. I mean, I had thought that the Levin fund rule was actually, on

balance, a fairly good way to deal with this reality, but I have to agree with you that in terms of the various qualifications that attach, it does become somewhat difficult.

I would urge all of you to put some energy into not only focusing directly on Congress any suggestions for revision, but if you could find a way to recommend to us what we should recommend to Congress, I mean, every year, we have an opportunity to recommend legislative changes to streamline the law, there might be a way to basically hold the line so that we don't have a system where big, unlimited soft money donations from prohibited sources are being applied for these kinds of party-building activities that affect Federal elections and yet there would be some way to work within the basic contours of the Levin amendment so that these kinds of things could be continued in using funds that come in in amounts of no larger than $10,000.

I mean, maybe there's a sort of a concurrence that we can all reach in terms of a

better way to deal with it so that party committees can at least avail themselves of some of these kinds of resources. I think Congress contemplated that there would be a way to use them. Obviously, some folks have decided it just isn't worth it.

But, as I said, that's a little bit afield from the focus of our hearing. Any further comments, questions?

[No response.]

CHAIRMAN THOMAS: Jokes? No?

Well, thank you again for coming. It's been a helpful day for us. It's been long and difficult for you, I suppose, but anyway, we do appreciate it, and thank you for helping us out.

[Whereupon, at 3:12 p.m., the proceedings were adjourned.]