




FEDERAL ELECTION COMMISSION  
Washington, DC 20463

July 7, 2004

**MEMORANDUM**

TO: The Commission  
General Counsel  
Staff Director  
Public Information  
Press Office  
Public Records

FROM: Mai T. Dinh   
Assistant General Counsel

SUBJECT: Transcript from the hearing on Political Committee Status

Attached is the transcript from the April 15, 2004 hearing on Political Committee Status.

Attachment

cc: Deputy General Counsel  
Associate General Counsel  
Congressional Affairs Officer  
Executive Assistants

ELECTION COMMISSION  
PUBLIC HEARING  
"POLITICAL COMMITTEE STATUS NOTICE OF  
PROPOSED RULEMAKING"

Thursday, April 15, 2004 9:30 a.m.

9th Floor Meeting Room 999 E Street, N.W.  
Washington, D.C. 20463

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P A R T I C I P A N T S

BRADLEY A. SMITH, Chairman

ELLEN L. WEINTRAUB, Vice Chair  
DANNY LEE McDONALD, Commissioner  
SCOTT E. THOMAS, Commissioner  
MICHAEL E. TONER, Commissioner  
DAVID M. MASON, Commissioner

ALSO PRESENT:

JAMES A. PEHRKON, Staff Director

LAWRENCE H. NORTON, General Counsel

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

CHAIRMAN SMITH: We'll go ahead and call to order this public hearing on political committee status, the Federal Election Commission. This is the second day of this hearing, which began yesterday. Yesterday we heard from four panels, and today we have four more panels and, I believe, 16 witnesses who are going to testify for us.

Those witnesses come from over approximately some 200,000 people who commented. Of course, many of those were relatively short comments and a much smaller number of more

detailed, lengthy comments. We welcome all of that input and find it helpful, and we particularly thank our witnesses for taking the time to come out and give us more detailed information by testifying before us today.

The panels, for those of you who were not here yesterday--and this is really for the four panels--we are asking you to hold opening statements to just three minutes, which is very little time, so feel free to dispense with pleasantries and greetings and that sort of thing.

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We won't feel offended if you want to cut right to it. That gives us a bit more time for questioning.

I have run this hearing with a gentle hand. That is, we do have a light system. You'll get a green flashing light when you have a minute left, and it will turn yellow when you have 30 seconds left, and then it will turn red. But we have not been overly rigorous about shutting people off. Just please be conscious of the light. When you see that red, try to wrap it up. But it is not going to be like the Supreme Court where, when the red light goes on, we're going to tell you to sit down and be quiet. We find the testimony valuable, and I would like to let people finish those key points that they may have, while recognizing that we need to move on.

Our first panel this morning, we have four distinguished practitioners in the area, and they are Robert Bauer of Perkins Coie, here on behalf of America Coming Together; Jim Bopp of Bopp, Coleson & Bostrom, on behalf of Focus on the Family, the National Right to Life Committee, and other groups

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as well; Cleta Mitchell from the firm of Foley &

Lardner, another practitioner, a long-time practitioner in the area; and Larry Noble, Executive Director of the Center for Responsive Politics and a former general counsel here at the FEC. So many of us still plan to ask Larry at the end of the meeting whether there's any exempt matters no longer entitled to--

[Laughter.]

CHAIRMAN SMITH: By habit.

And we will begin. I'll ask for opening statements that I just introduced you, so, Mr. Bauer, when you're ready to begin, why don't you do that and we'll start the day.

MR. BAUER: Thank you, Mr. Chair, Members of the Commission. I was going to be effusive with my pleasantries, but I'll limit them in the interest of time.

I have submitted--and I believe it has been distributed to you--a piece of testimony here that was meant to introduce what we were going to say. It clearly cannot be delivered in three

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minutes, and so I will abbreviate it.

Very simply, the proposed rules that we are discussing today, the entire initiative we're addressing, we're addressing on the eve of the 2004 elections. We have seven and a half months to go.

And the concern of organizations like ours, which have worked very hard to comply with existing and specific rules, is that the rules are about to be changed at the latest possible point in the cycle, and we'll develop that point a little bit further.

It does not seem to me that this is a process that is well geared to deliver a well-reasoned judgment on what are complicated issues,

keeping in mind how many issues are raised in the Notice of Proposed Rulemaking.

There is no claim on the part of people who are urging these rules that we have here an instance like the one much celebrated and addressed in BCRA and before the Supreme Court in McConnell that federal office holders are utilizing organizations like ours to obtain access to large amounts of money that are threatening to the public

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policy process. We are an independent organization, and we're engaged currently on the air and door-to-door in communicating with voters. We actually don't communicate on the air so much. We actually speak to voters directly, door-to-door and in other fashions.

We also see in this hearing a series of representations about the need for this initiative that it seems to me, when closely parsed, don't make a whole lot of sense. I've identified three: number one, that those who comply with existing law, specific rules, as we are, are somehow breaking the law; number two, aggressive new regulation is appropriate but typically for "others," for partisan adversaries and for organizations that are different from the organizations seeking the change; and, last but not least, the proposed rules or an initiative of this kind is necessitated by McCain-Feingold and, indeed, by the Supreme Court's decision in McConnell, and yet we're also told at the same time that neither that statute nor that decision has any

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bearing whatsoever on the decisions that the Commission has to make here.

So we should ask ourselves what sort of expectations should we have for a rulemaking initiative of this kind, and I've identified three: That it should be grounded in a thorough empirical understanding of the affected community. That requirement certainly hasn't been satisfied. Unlike the 1991 experience with the revision of the allocation rules, the Commission isn't engaged here in the preliminary fact

finding;

Second, that the rules be carefully designed to address harms, identified harms, and yet here we have a very complicated proposal, very varied in nature, diffuse, in fact, in quality, and the solutions appear to be scattered across the lot, very broad, very sweeping;

And, finally, that the results that the Commission produce here be consistent with the relevant constitutional and statutory framework. And as you heard from witnesses yesterday, in our view, much of what the Commission is deliberating

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on here is inconsistent with what Congress concluded was necessary in BCRA. It addressed issues before like the ones the Commission is looking at today and did not act and did not decide to strike out in the direction that some of these proposed rules would have the Commission strike out into.

We are a registered political committee, non-connected, and we're operating under specific existing rules here in the middle of an election cycle. If there is a basis, a time and a process for considering the changes the Commission is currently discussing, this is not the time and this is not the process.

Thank you.

CHAIRMAN SMITH: Thank you, Mr. Bauer.

I should note, by the way, that all of you have, of course, submitted extensive written comments, and those are in the record and have been reviewed, I am quite certain, by all of the Commissioners as well. So you can feel comfortable that your lengthier comments are there and being

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considered as well. And they're also available, by the way, on the website of the Commission for those who would be interested in looking at them in more detail.

Mr. Bopp?

MR. BOPP: Thank you very much, and thank you for the opportunity to testify.

While you all are dealing with a number of complex and detailed questions of law, I'd like to address an overview from the perspective of not-for-profit organizations and advocacy groups with respect to this rulemaking.

Now, it's quite common for not-for-profits to have a tripartite structure of a 501(c)(4) controlling a 501(c)(3) and a 527. That's because advocacy involves a mixture of education, lobbying, and political intervention, and, in fact, those activities are also mixed within these subdivisions of (c)(4), (c)(3), and 527 to varying degrees.

But what has happened over the last 20 years is the IRS has been pushing activities downstream, that is, from (c)(3)s into (c)(4)s,

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from (c)(4)s into 527s. We have seen the IRS say, for instance, that if you advocate a state ballot measure that has nothing to do candidates or political parties, but you do so with the subjective intent of influencing a candidate election, that would be political intervention.

We've now seen a revenue ruling, 2004-6, where grass-roots lobbying activities that everyone, all practitioners would have viewed as simply supporting legislation, is now to be viewed by the IRS as political intervention. Thus, this creates a situation where organizations, frankly, like the League of Women Voters, who 30 years ago when they incorporated in order to do voter registration, get-out-the-vote, and voter guides about the positions of candidates on issues, could comfortably say that



they are (c)(3) organization, would now, if they came to me, I would tell them they're a 527 organization.

Thus, we have seen the IRS move these activities further downstream, creating the idea that many activities now are political intervention

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that have been traditional (c)(3) and (c)(4) activities.

Now, it would be very tempting for me to support the proposal that is before the Commission for several reasons. One, it would be payback time. I mean, Democrats supported McCain-Feingold in order to get partisan political advantage. Liberals sat on the sidelines. Even some liberal groups like the Sierra Club supported McCain-Feingold, you know, as if you can let the dogs loose and they would only bite Republicans.

And I would love to say to them that, hey, you want campaign finance reform, I'll show what real campaign finance reform is.

[Laughter.]

MR. BOPP: Or, secondly, it would expose the hypocrisy of this thing--Democrat Members of Congress supporting McCain-Feingold when it looked like it would help the Democrats, now opposing it when it looks like it disadvantages them; George Soros funding the reform industry in support of McCain-Feingold, then cynically exploiting the

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remaining freedom that exists after McCain-Feingold in order to accomplish his political ends.

Or the temporary partisan political advantage that this rulemaking would achieve, I don't think there's any question that it would help the reelection of George W. Bush, which is my number one political goal for this election season.

But I don't support it, and I don't support it because it's wrong, because it won't work, and because of the collateral damage to our democracy. It is wrong because the Bush campaign had a political problem, the solution is a political solution. We should not encourage this tit-for-tat, this continuing downward spiral of more regulation and more regulation and more regulation in order to achieve partisan political ends. It won't work.

Part of the effort here was to shut down or intimidate Democrat leading 527s. Well, I see absolutely no prospect or no scenario where this Commission can actually shut them down prior to the convention, nor have they been intimidated. They

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seem to be more accustomed to hardball politics, willing to take greater risks. And, of course, this created a political firestorm where the Democrats are ruthlessly exploiting this rulemaking in order to generate support for the Democratic candidates.

And the collateral damage is high. One of my clients, Focus on the Family, if the prospect of attacking or opposing was applied to them at \$50,000, one broadcast by Dr. Dobson that mentioned the name of a federal candidate would result in a \$140 million religious ministry to be considered a federal political action committee under your proposed regulations. And if you tried to cut this at 527s, the collateral damage would be high.

More and more activity is considered political intervention, and more and more over time will be similarly considered political intervention. And eventually this rule will be applied to all citizens' groups. I mean, everyone knows that the reformers have simply engaged in a tactical retreat when they say don't want to

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encompass (c)(3) organizations, and that the only viable line with respect to federal election activity, a line that can actually be held, is the distinction the Supreme Court drew between political parties and all other citizens' groups. And that is that political parties nominate candidates. The citizens' groups do not.

So what is the solution? I think so much water has gone under this bridge that you do have to adopt regulations, but positive regulations. You have to give now permission to (c)(3) and 527 groups, citizens' group generally, that they can actually engage in the lawful activity that, Congress even after BCRA, permitted them to engage in. And that should include the trigger with the Express Advocacy test and the language of the Supreme Court on Major Purpose.

And if you unwisely choose the idea of cutting the baby in half between 527s and (c)(4)s, as now the RNC proposes, protecting, I suppose, (c)(4)s and (c)(3)s, I think you similarly in that circumstance have to give positive permission to

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(c) organizations and tell them that these new legal restrictions will not be applied to them. I think that's the only solution that will preserve the remnants of our democracy after BCRA.

CHAIRMAN SMITH: Thank you, Mr. Bopp.

Ms. Mitchell?

MS. MITCHELL: Thank you, and thank you for the opportunity to appear here today.

I appear here today to ask one question. It seems to me that there is a threshold the Commission has to answer before proceeding further. Does the Commission have the

statutory authority to promulgate regulations that seek to regulate political committees--that's really what we're talking about, although there has been a lot of additional discussion about 501(c) organizations. But the real question is: Does the Commission have the statutory authority to regulate political committees that have chosen not to define themselves as federal political committees within the meaning of the Federal Election Campaign Act?

If the answer is yes, that the Commission

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has the statutory authority to regulate those, then there is no need for new regulations. You either have the statutory authority or you don't. There's been no intervening Court decision since McConnell or no intervening conferral of additional authority from Congress. And so it seems to me that if you have the authority to regulate, to define a political committee that says we don't come within the Act, then just promulgating new regulations doesn't suddenly make them subject to the statute.

So enforce the existing law. If you don't have the authority, you obviously don't have the authority to promulgate new regulations. I think the real question here is whether the Commission

has the will to enforce existing law and whether or not the Commission is going to spend its time in what George Will refers to as "metastasizing regulations." And, frankly, my heart goes out to the general counsel and his staff who have spent the last seemingly 20 years, but certainly 20 years and the last two years writing proposed regulations over and over and over again. Enough already.

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Stop writing new rules. Enforce the rules that already exist.

I would suggest to you that the statute is pretty clear that a political committee that receives contributions or makes expenditures which are defined as for the purpose of influencing a federal election--that's really what we're talking about here, and that the Commission ought to decide to exercise its will and devote its time to enforcing existing law, and not have a situation, which I fear that we're engaged in right now, where it's almost like--I'm a baseball fan--we've got the National League and the American League operating under different rules. We've got the Democrats operating under one set of rules and the Republicans operating under a separate set.

I think the Commission has to enforce the law and say what are the rules so that we're all playing by the same rules this cycle.

I am not one of these people who believes the Commission should be restructured, abolished.

I think that is a terrible idea. But I also

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believe that failure to enforce existing law breeds cynicism and disrespect for the statute that the Court has interpreted in McConnell. And I would argue that what the Commission ought to spend its time doing right now is undertaking a serious examination of whether there is a need for an aggressive enforcement action to determine whether or not these political committees operating outside the parameters of the Act, whether, in fact, they ought to be operating within the parameters of the statute. And that ought to be done now.

We should not have a situation--I listened

to your tax panel in the middle of the night last night and noted--I know, "Get a life."

[Laughter.]

MS. MITCHELL: I was preparing FEC reports until the very wee hours of the day yesterday. But one of the references was that the IRS had failed to revoke--it took them nine years to revoke someone's tax status for attacking President Clinton in a campaign. I was thinking--I thought he said nine.

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PARTICIPANT: Seven.

MS. MITCHELL: But, nonetheless, I thought, well, come visit the FEC and some of the enforcement actions that we're dealing with that were two and three and four cycles ago. Enforce the law now.

So I would close by saying two things. I would like to add to the record a report that I wrote three years ago called "Who's Buying Campaign Finance Reform?" Three years ago this month. Chapter 7, okay, fine, let George Soros replace the DNC. It was not hard to figure out that wealthy individuals, we can already see what would happen under the new law. Instead of contributions to the Democratic and Republic National Committees, all of which is reported and accounted for, the funds would flow instead from wealthy donors to committees they create and causes they control. More importantly, there is little accountability in how these private committees actually spend their money.

There is nothing in BCRA that changed

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that. If people didn't know that was what was going to happen, shame on them.

And, finally, my last analogy is this is like the--this is not just a female or male

analogy. This is like a guy standing upstairs straightening his tie or a woman putting on yet another bit of blush or mascara before coming to the party. The party has started. Come downstairs and be part of the action before it's over so that the Commission can assert itself and play the role it's supposed to play and make sure that everyone, all the players in this cycle are playing by the same rules. We don't need new rules. We need enforcement of the rules we already have.

Thank you.

CHAIRMAN SMITH: Thank you, Ms. Mitchell. Did you want to end that entire report or just Chapter 7?

MS. MITCHELL: I would like to enter the entire report.

CHAIRMAN SMITH: Without objection, we'll have that added.

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I can tell this is going to be a sedate panel once the questioning begins.

[Laughter.]

CHAIRMAN SMITH: We'll hear an opening statement from Mr. Noble.

MR. NOBLE: Thank you, Mr. Chairman. Fill in pleasantries here.

[Laughter.]

MR. NOBLE: Given the time limits, I'd like to just get to some points. But I must say I find myself very much agreeing with Cleta, and it's a surprise. But I find myself very much-

PARTICIPANT: She must be wrong then. [Laughter.]

MR. NOBLE: Faced with very specific abuses of the campaign finance laws by some 527 organizations, the FEC has

put out a broad Notice of Proposed Rulemaking that raises numerous difficult issues--in fact, the issues the agency, I can tell you, has been struggling with for 25 years, and it threatens application of the law to activities and groups, including 501(c) organizations, in ways that were never contemplated by Congress and in many cases would be unconstitutional.

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We urge the Commission to abandon what can easily become and I'm afraid is becoming an excuse for inaction in this election cycle and use this expedited rulemaking to focus on the very real problems being posed by certain 527 organizations that are using soft money to influence federal elections.

In doing so, the FEC must recognize that using different standards under FECA for determining when 527 and when 501(c) organizations become political committees is mandated by the Supreme Court's resolution of the tension between the congressional intent evidenced by the plain words of FECA and constitutional concerns. A political committee is defined broadly in FECA as an organization that makes expenditures aggregating over \$1,000 in a year. An expenditure is defined is something of value for the purpose of influencing a federal election.

In Buckley, the Supreme Court dealt with its constitutional concerns regarding vagueness by limiting the term "political committee" to only those organizations the major purpose of which is the nomination or election of a candidate. When it came to the term "expenditure," the Court took a two-pronged approach. When dealing with organizations whose major purpose was the

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election of candidates, the Court felt no need for a brighter line than for the purpose of influencing an election. However, when dealing with groups which did not have as their major purpose election activity, the Court narrowed the definition of "expenditure," choosing express advocacy, as it says now, as one standard of permissible statutory interpretation.

Whether the Commission believes this two-pronged approach establishes a campaign finance scheme it finds intellectually cohesive or wise is irrelevant. It is the scheme the Supreme Court established 28 years ago and it reiterated just last December in *McConnell*. It is not based on BCRA.

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Nevertheless, some argue that using a broader standard than express advocacy to define an expenditure for 527 organizations would be a change in a longstanding interpretation of the law. This is simply not true.

As far as I can tell--and I have done some research on this and tried to explore my somewhat limited memory--it wasn't until late 1999, in the Dole and Clinton audits, that four Commissioners formally rejected the broader electioneering message standard the FEC had been using when deciding whether a political organization had made an expenditure under FECA. Their decision was based, if you read their statement, in large part on the belief that such a standard was unconstitutionally vague and overbroad under *Buckley*.

However, any doubts that this narrowing was a significant misreading of Buckley were laid to rest in December when the Supreme Court upheld BCRA's Promote, Support, Attack, or Oppose standard as applied to political organizations. In doing

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so, it did not set out a new interpretation of the law. It merely repeated what it had said 28 years before, that the same vagueness concerns do not arise when dealing with a self-defined political organization.

In order to be true to the Federal Election Campaign Act and the Constitution, the FEC should enforce the law based on the words of the statute unencumbered by an artificial narrowing based on a misreading of Buckley.

Finally--and I'll make this very quick--I want to say a few words about allocation since it hasn't been touched on very much. We have asked you to revisit the allocation rules that appear to allow groups like ACT to pay for 98 percent of its expenses for partisan voter mobilization with soft money. Yes, this would be a change of the rules in the middle of an election. But this is an absurd result that is allowing a wholesale evasion of the soft money rules as applied to political organizations. Whatever burden will be caused by changing the rules during an election are

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outweighed by the public's interest in having the laws enforced as intended.

What we ask at the bottom line is: Do not let the soft money history repeat itself. It is in danger of repeating itself on a much quicker time frame than we've ever seen before.

Thank you.

CHAIRMAN SMITH: Thank you, Mr. Noble. We will turn to questions from the Commissioners, and then the staff director and general counsel also have an opportunity to ask questions. We're allotting ten minutes, and we'll

try, again, to stay to the best of our ability within roughly that time frame.

Commissioner McDonald, you're first in the queue for this panel.

COMMISSIONER McDONALD: Mr. Chairman, thank you. I hope my ten minutes is calculated like the panel's, if it is all right. I am teasing.

As Cleta knows, being from Oklahoma, I would be remiss if I didn't exchange pleasantries.

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It's good to see Cleta, Bob, and Larry and Jim, and I appreciate all of you being here this morning. Let me make just a brief statement, which I have not done before, but Larry alluded to this and I read this in the paper. I don't want there to be any misunderstanding about the notice. The notice wasn't used as any sort of guise to obfuscate some of the issues before us. I've read that, I've heard it on the news, and that is just simply not true. You may disagree with the notice and the notice may have been overbroad and all of those other things, but I just want to be clear that people understand that that was not the intention of this Commission. And I don't want there to be a misunderstanding about that.

In relationship to the comments this morning, all very helpful--and I wish we had ten minutes with each witness because I think they're all eminently qualified to comment--I think I'll start with my old friend, Larry Noble, if I could, and read Larry a quote that I'm sure he's aware of that was read yesterday on several occasions. This

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is Senator Lieberman explaining BCRA, and his quote was: "When the Bipartisan Campaign Act and McCain-Feingold bill goes into effect, at least some of the soft money donors who will no longer be able to

give to political parties will be looking for other ways to influence our elections. Donations to 527 groups will probably top many of their lists because these are the only tax-exempt groups that can do as much election work as they would want to without jeopardizing their tax status."

Would you want to comment on that? Obviously, that is the focal point, as Cleta pointed out, of what we're all about here today.

MR. NOBLE: I have a couple of responses to that.

First of all, he does not say in there "without limitation." But even assuming that's what he was talking about, obviously there's the initial answer: That is one Senator. But also, I think you need to put this in historic perspective.

As I said, up until the late 1990s, the Federal Election Commission was using a broad

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standard, an electioneering message standard, when it was dealing with political organizations. Starting, again, as best I can tell, with the Clinton and Dole audits, there were four Commissioners finally who said, No, we're not going to do that anymore; we're going to use express advocacy.

If you look at the history of this, that is about the time that these stealth PACs, what have been called stealth PACs, the 527s, really took off because I think some very bright lawyers--some of them sitting at this table--realized that there's now a way, if you're going to use the express advocacy standard, to do a lot of what would normally

be considered campaign work through these PACs.

So you had a situation when Congress dealt with both the 527 law and dealt with BCRA where the facts on the ground were that the FEC were allowing these groups to exist without being political committees. And one of the concerns there was, with the 527 rules, was to at least get them to

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disclose. And so what Senator Lieberman was talking about and they were talking about in BCRA was a situation that existed on the ground because of what the FEC had done.

And, interestingly enough, what they did in the 527 legislation is they gave the reporting to the IRS, not to the FEC. One can wonder why that is, and I do know the FEC, there were some overtures made from the FEC to try to get that reporting requirement. I think there was a general feeling the FEC was not doing what it needed to do and had so limited the law that they were going to look for another way to get around this, and that was, one, dealing with the 527s and, two, dealing with BCRA.

What happened after that is McConnell said that what the Commissioners had said, in effect said what the Commissioners had relied on, was relying on a misreading of Buckley. And, therefore, what that takes us back to is pre- all of these statements. It takes us back to pre-1999, and it takes us back to a situation where, when

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you're dealing with an organization which has a major purpose of political activity, you can use a standard broader than express advocacy. That then would bring in all of these groups, and Senator

Lieberman's concerns would go away.

COMMISSIONER McDONALD: Thank you, Larry. I want to come back to you in just a minute because there is another real critical issue.

Bob, if I could turn to you for just a second, we were told repeatedly yesterday with great emphasis about the responsibility, of course, belonged to Congress and that we were expanding our own role in terms of BCRA and our interpretation, obviously, of McConnell. Is that kind of a fair assessment of where you see we are?

MR. BAUER: You mean that you might potentially usurp a role that's properly Congress'?

COMMISSIONER McDONALD: Right.

MR. BAUER: I certainly believe so, absolutely. Would I be transgressing decorum here if I took the occasion of your question to answer Mr. Noble here?

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COMMISSIONER McDONALD: Only if it's quick, only because I have something I really want to ask you on this point, if I might.

MR. BAUER: I simply want to say I think Larry's history, while ardent, is wrong. The fact of the matter is that the reporting function was committed to the IRS because the decision was made to have the IRS, not the FEC, exercise jurisdiction because, in fact, the decision was made that 527s acting as 527s do--that is to say, pure 527s, not registered political committees--would not register with the FEC. So the disclosure function would lie elsewhere.

The notion that somehow the FEC was discounted for that role because of questions about its performance is simply untrue. The FEC has been celebrated for the quality

of its disclosure function. And I've never heard a criticism suggested that the FEC could not administer a reporting regime.

Having said that, I'm happy to return to your question. I didn't want the record to go

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uncorrected.

COMMISSIONER McDONALD: And hopefully you haven't heard any criticisms of the Commission either, have you?

MR. BAUER: Not once, and I'm with Cleta.

[Simultaneous conversation.]

COMMISSIONER McDONALD: --Tulsa, Oklahoma, I want you to be kind to us.

MR. BAUER: As long as this hearing lasts and you're considering this matter, I want you to know I side with Cleta that nothing should be done to change the current Commission in any way.

[Laughter.]

COMMISSIONER McDONALD: In my case, it won't make any difference.

Let me ask you, because in an exchange that we had two years ago--and this is kind of to the crux of, quite frankly, some of the debate that went on yesterday. As you know, we have had a number of members respond to us this time. I asked last time why we didn't have any members respond, and they fixed that. We have more members

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responding than we can count.

Now, the only problem, of course, is we have members responding on both sides, Senator McCain saying that clearly this is a problem, and others saying, oh, no, we never intended 527s to be in this at all, as we would anticipate.

In an exchange I had with you a couple of years

ago, in talking about the Congress, it says, "In my view, this position and audit does not go to the merits of their views on various issues. Those views are to be obviously weighed very carefully"--this is referring to Members of Congress--"and very respectfully. But in my view, their views, the views of principal sponsors or any legislators, are not entitled to weight on that basis alone; that is to say, Congress intended for the Commission to make the rules, and it is well established in federal law, citing, for example, cases like the Chrysler Corporation v. Brown. The remarks of legislators and even sponsors are not controlling in analyzing the legislative history of the statute."

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You and I had a further exchange on that role. You went on to say, "Certainly post ad hoc declarations of intent do not carry matters of legislation"--or, rather, "do not carry matters of regulatory interpretation."

In a later exchange you and I had, you made clear you were--you had said that members were counting on this agency to clarify the law because they simply didn't have the time"--you might want to look, those are on page--in earlier testimony so you'll have it later--page 361 and on about page 396 or 397, I think it was.

I ask this question--and it is not a trick question. It is a frustrating issue for us, which is that, you know, two years ago we're basically told that members really in the heat of the night and rushing around and in passing the bill didn't quite understand what they were doing; and that even sponsors really didn't have necessarily a full grasp of what their colleagues were voting for, not so much themselves but what their colleagues were voting for; and that this agency should, in effect,



be responsible for this sort of activity because the Congress was really leaving it up to us.

But what we heard yesterday and what I gather I'm hearing some this morning is that, no, no, that's not right; it is that Members of Congress really need to have this back before them because that's their prerogative.

And I'm just trying to reconcile, too, because when you're sitting here as a regulator, it's kind of tough. I know you know. You've been coming here even before I arrived.

MR. BAUER: Well, I think I can help with both the context and the significance of the exchanges that you cited.

In the circumstances we were discussing, Congress had specifically in the statute committed to the Commission implementing rules to be developed to enforce the new law, and we were addressing the question of how much weight to give two or three members who told the Commission what those rules should be, that they should be one thing and, rather, not another.

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That's very different than the situation we face now. The Commission has completed its implementing work under BCRA, and now it's striking out into a wholly different direction. There is no congressional mandate whatsoever, in fact, evidence quite to the contrary, for the Commission to be taking up the issues reflected in this Notice of Proposed Rulemaking.

So this is a very different set of circumstances, which is understandable that members who voted for the original statute for which implementing rules have already been developed which express a surprise view to you that you would be striking in a direction which is very different from

the one that they charted, and, frankly, in some cases starkly inconsistent with it.

COMMISSIONER McDONALD: Real quickly, if I might, Mr. Chairman, let me just ask Cleta one question, and I apologize.

Cleta, based on your analysis in relationship to what the Commission ought to do, no more regulations, get in touch with reality, et

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cetera, what is the reality then on the major question facing us from your perspective? What would be the correct interpretation from your vantage point?

MS. MITCHELL: Well, it seems to me that the Commission ought to undertake a vigorous review of the issues before it. There is a complaint that has been filed, which I will tell you I have not read the RNC's complaint and don't really plan to. But I do think that there are questions raised and people need to know the answers, and that it isn't necessary--it should not become, which I fear it has become, frankly, that every campaign knows that you have--part of the cost of doing business is you're going to have an FEC complaint against you, incoming and outgoing, and it doesn't matter because they're going to get resolved two, three cycles down the road and we'll deal with that then.

I think it's too important. I think it's too important for the Commission to let that be, the status quo be the case now. And I would urge the Commission to say let's take a look at this.

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Are there--if people have said--I mean, I have to tell you, I was pretty--while not surprised about what George Soros has done, I have to tell you that I've been pretty surprised at how blatant it has been in terms of, well, yes, I'm giving \$15 million to defeat George Bush.

Well, it seems to me that the statute and the existing regulations are pretty clear, that if the Commission believes that a violation is going to occur or is occurring, the Commission has the authority to take action to enforce and to see if that's the case.

So see if that's the case. Put Bob Bauer to the test. And I am sure he's up to it.

[Laughter.]

MS. MITCHELL: This can be resolved, and we will find out within 60, 90 days--if the Commission takes this seriously, its enforcement authority seriously, we'll find out before the election whether these tens of millions of dollars can be spent in the fall or not. And I think that is a very important role for the Commission, and I

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urge you to take what you already have in the way of authority, exercise it, put it to the test, conduct the necessary fact finding. It should not take six years. And I would urge the Commission to do that.

That's the reality we all face. That's what everybody is watching to see. Are you serious, or are you just going to stay upstairs making rules? And I think that's the question.

And I don't know how it will come out, frankly. I will tell you that I read what Bob Bauer has written and what Lyn Utrecht has written and what Joe Sandler has written, and I agree with them. And then I read what other people have written and I agree with them.

So I'm not eager to have to make-COMMISSIONER

MCDONALD: Sounds like the same problem we're having, Cleta. We can identify with that.

MS. MITCHELL: That's your job. That's your job.

COMMISSIONER McDONALD: We know that.

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Thank you, Clea. I thank all of you.

CHAIRMAN SMITH: Thank you, Commissioner McDonald.

The next questioner will be Commissioner Mason.

COMMISSIONER MASON: Thank you.

I believe Mr. Bopp said something like that his number one political goal for this election cycle is the reelection of George W. Bush. I just wanted to caution him that by that statement he has made Bopp, Coleson & Bostrom a political committee.

[Laughter.]

COMMISSIONER MASON: I'll expect your registration statement to be filed.

MR. BOPP: That makes all my money soft money, right, when Tina thought it was hers.

[Laughter.]

COMMISSIONER MASON: I wanted to focus on the evolution of the 527 rules because there's a great surface appeal--I can see it--to saying, okay, we'll either carve out the (c)s or we'll

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ignore the (c)s for now, put them aside for now and focus on where the problem is. I understand why Larry Noble says that. But there are a couple of complications I see, and I want to try to get at them a couple of different ways.

One is the one that Mr. Bopp brought up of the evolution of the Tax Code rulings in this area, and I do want to say sort of in defense of the IRS that a lot of this has been driven by requests from

groups which suggested that they wanted to be classified as 527s because in their particular situation, either for gift tax reasons or other reasons, that was advantageous to them. And so they said, well, yes, we're doing initiative activity, but the reason we're really doing it is because we think it will help this candidate. And the IRS says, oh, well, if you think it will help the candidate, then that makes you political.

And I guess my concern about that is not so much the state of the law now. I think with even the recent revenue rulings we could write a series of exemptions that carved out state

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political committees, for instance--that would be pretty easy--and 527s that focus on the nomination of judges or other appointed officials, and, you know, so on like that. But I am a little concerned, and I'd invite anyone to comment--and maybe particularly Mr. Noble because he's urging us to go this way--about what the implications would be if we, if you will, borrowed from tax status as a marker for Major Purpose but can't rely on the tax status to stay very stable or to be enforced and interpreted for purposes entirely consistent with election law.

MR. NOBLE: Well, to a certain extent, this problem is a problem that exists in other areas of the Federal Election Commission's regulations in the sense that you rely on laws of the states for what is a corporation. You do look to other laws, properly look to other laws in terms of defining what a group is.

Now, I listened in part on C-SPAN yesterday to the tax panel, and I'm not a tax lawyer, thankfully. But this whole issue about

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ballot measures that was raised, I did look at one of the private letter rulings dealing with ballot issues. And what's very clear is that even where the IRS says that, yes, you're doing ballot measures and you can fit under a 527, they still feel the need or they still in each case connect it back to influencing elections, because what in each of those instances the requester says is we're doing these ballot measures as a way ultimately to influence the election of candidates.

So given the law the way it is now--if the law changes, you may have to change what you do. But given the way the law is now, given the definition of a 527, and the definition ultimately being that its primary purpose is the election or selection of candidates, we think it is appropriate to use that to define the Major Purpose test or use that to meet the Major Purpose test. Again, it's no different than what you do with corporations. If the

Congress changes the Internal

Revenue Code, you may have to look at something different. But the laws do fit together in that

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way.

I'd also note--now, this is a little hard for me because I disagreed with your ruling, but you looked at 501(c)(3)s and exempted them from some of the rules. I didn't agree with a broad exemption for an organization like that, but you've already done this. I think you've gone down that road, again, with corporations, with certain types of tax groups, and I don't think we're

asking anything different.

And, finally, I'd just to take the witness' prerogative, and I'll make this as a blanket statement, not just about what Bob Bauer said, but in the future I disagree with Bob.

[Laughter.]

MR. NOBLE: It will shorten this hearing. MR.

BAUER: And I'll respond to that by saying I think Larry's right most of the time. [Laughter.]

MR. BOPP: I would have two comments on your review of the matter, and you're quite correct that part of the expansion of 527 has occurred

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because people desired, positively desired to get under 527. But others of them are not at the desire of people who want to be 527s or to do political intervention. And a classic example is the recent revenue rules, 2004-6, which has now adopted a nine-point test, five of which are positive items, four of which are negative items. They don't tell you how you weigh these or compare them or how many of these you have to meet or not meet. And, of course, you have, if you're a (c)(3), the sword of Damocles over your head that if you do a grass-roots lobbying communication that under this nine-point test is deemed to be political intervention, well, then, you lose your tax-exempt status. And if the FEC piles on, you know, one letter for many groups would reach the 10,000 or 50,000 threshold, and they would now be federal political action committees.

The other thing about turning over to the IRS what is political activity is that the purposes are completely different. As the Supreme Court has pointed out, the lines that are drawn by the IRS

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are really drawn with an eye toward are we going to subsidize

through the Tax Code certain activities.

So as a result, a challenge to, you know, (c)(3)s can only do an insubstantial amount of lobbying under the First Amendment was pushed aside by the Court saying, well, it's a subsidy issue. Well, but under your jurisdiction, it's not a subsidy issue. It is a go-to-jail issue. You know, you either are permitted to do something, or you're going to be punished by fines and jail time. And so, you know, it's there where the First Amendment has its most urgent application.

So it would be actually improper, in my judgment, you know, under any constitutional analysis for you to turn over to the IRS this issue.

COMMISSIONER MASON: I wanted to also ask about the sort of tripartite structure you addressed, and I think all the panelists are familiar with it. I would even add that I think we

probably see examples of (c)(4), (c)(3), non-federal 527, and federal 527 all under sort of

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common management. And this produces for me, for instance, a puzzle under something like the Commission's affiliation rules.

We had this before us in the ABC Advisory Opinion, but I'm a little puzzled, if we're using different standards for--and this has been urged on us by many, many of the witnesses, one standard for (c)(4) or (c)(3), (c) organizations, and a different standard for political committees. And yet we have a (c) organization, 501(c) organization or organizations, and a non-federal 527, a federal 527 under common control, then how do we reconcile the problem of the fact that we have different standards for those different organizations and, say, for instance, prevent



organizations from simply moving activities from one place to another.

MR. BOPP: Well, there's nothing that would prevent them from moving activities from one to another. In fact, the reason that these segregated funds are created, with differing tax status, is to advantage, you know, themselves under various IRS benefits or lack--or more flexibility.

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(c)(4)s have more flexibility, (c)(3)s it's tax deductible, that sort of thing.

But the central feature is you have the same governing board, and they are free to move many of these activities. And when you look, for instance, at (c)(3)s, (c)(3)s aren't just education or charitable. They also do a substantial amount of lobbying. (c)(4)s, they are both education lobbying-

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COMMISSIONER MASON: If I could--

MR. BOPP: --and political intervention.

COMMISSIONER MASON: I appreciate that. I wanted to give Mr. Noble a chance to respond to this because I think he would like us to adopt, in essence, different tests and how would we deal with this problem.

MR. NOBLE: It's the problem you have had--well, it's not a problem. It's the situation you have had since FECA was first adopted. In fact, it comes about before FECA when corporations were allowed to set up separate segregated funds. The law is based on the concept that different groups

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have different rights and responsibilities under the law and different obligations. And, yes, one parent organization can have a separate segregated fund, a hard

money account; it can have a state, non-federal account; it can have a 501(c)(4). This is not something new that's just developed in the last couple of years.

And what you do is you look at each account, you look at each organization, and you decide what activity it can do. The purpose of the law is to make sure the election activity is funded with hard money. So as long as that political committee is using hard money and as long as the non-political committees are not involved in federal election activity and are not using--I don't use that as a term under BCRA, but election campaign activity, and they're not using soft money for that, then you don't have a problem.

So, again, I think we're kind of revisiting issues here that have existed for a very long time.

COMMISSIONER MASON: I appreciate this,

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and I'll just make a statement. This creates a problem for me because if we say that non-political committees are entitled to express advocacy law, and which maybe you don't support but several of the witnesses have, the political committees should be regulated as to promote, support, attack, oppose, and you have an organization that's got a (c)(4) and a political committee under common management, then I don't know why they don't just do all their promote, support, attack, oppose under the (c)(4) and only the express advocacy under the political committee and escape regulation that way, even though we have a regulation that purports to say, well, if you're a political committee, all your promote, support, attack, oppose are expenditures.

MR. NOBLE: May I quickly respond to that? There you're getting into an issue that I don't really think you can address specifically in this rulemaking, even the time

frames that you have, and that there very well may be a situation where the whole overall organization is, in fact, a political

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committee the way they're working. And I think that has come up--again, pre-BCRA, that has come up as an issue. But I think that's an issue for another time because it's a much more complicated issue.

MR. BOPP: In other words, we'll just wipe out these organizations step by step. First we will attack 527s, and then when they move things that politicians don't like, like criticizing them, into a (c)(4), which they can do political intervention, then we'll come-- you know, these people will be back and they'll say, well, now is the time to whack all the (c)(4)s. It's just a downward--and it never ends, unless you create a barrier.

MR. NOBLE: Again, this has been the law for over 25 years, and that hasn't been the effect.

COMMISSIONER MASON: Maybe we need to apply your "you disagree with everything" comment to Mr. Bopp.

[Laughter.]

MR. BOPP: I only agree with some--

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[Laughter.]

CHAIRMAN SMITH: Thank you, Commissioner Mason.

Commissioner Thomas, you're next in the queue.

COMMISSIONER THOMAS: Thank you, Mr. Chairman.

Welcome, members of the panel. I think, first, I want to direct my thoughts to comments

that Larry Noble brought to us. My recollection of what was going on back in the 1999 time frame when four Commissioners announced they had a different view of the law was that they were basically throwing over the electioneering communication standard, electioneering message standard that we were applying in the party committee context to figure out whether or not ads that party committees were paying for should be treated as some sort of coordinated expenditure subject to limits and subject to hard money requirements.

My recollection also is that in that statement they issued--that was three Republicans

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and one Democratic Commissioner--they basically said we don't like that standard, we refuse to support that standard, we're not going to proceed in this audit and in this compliance case that results against any of the ads that were run, either by the Republican Party or by the Democratic Party, because the standard was too vague.

I don't think they went beyond that and said we think that the standard that must apply is express advocacy. I have argued at the earlier stage that this Commission has never applied an express advocacy standard when trying to figure out whether or not a group qualifies as a political committee, and I cited at length last time Advisory Opinion No. 1988-12, which was issued in 1988, to the San Joaquin Valley Republican Associates. There quite clearly we made reference to communications they were going to put out that stopped short of express advocacy, and we quite clearly labeled those as expenditures that would, in fact, count toward political committee status.

So that was a majority-approved position,

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and as I see it, it is still good law. It has never been overturned. The Commission in subsequent advisory opinions that are cited in the notice that we put out, Advisory Opinions 94-25 and 95-11, both also referred to the Major Purpose test and referred to analysis of what the purpose of the organization was, but did not get into any express advocacy analysis.

So if I were looking at the state of the law as Congress addressed this when they were dealing with BCRA, for example, I would say that was the state of the law that Congress had in mind, and that is what we're trying to figure out how to apply under these circumstances.

Now, let me throw out a question. What do we do? We're sitting here. I've read into the record a few of the ads that we're seeing during this election cycle. And if we are stuck with, in essence, a magic words test, I think we have every reason to be called the Federal Stupid Commission because it doesn't take anyone with the intelligence of an advanced fern to figure out what these ads are about.

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Let me go back to the so-called man of the people ad. This is being run by a group called Citizens United. I don't know if it's being run now, but I'll just describe it again briefly. It talks about Senator Kerry's personal expenses having included a \$75 haircut, a \$1 million luxury yacht, and four lavish mansions, and it ends with, "Another rich liberal elitist from Massachusetts who claims he's a man of the people--

priceless." You know, it's a play on the MasterCard ad.

But it's very hard-edged, very hard-hitting. I don't see it as an issue ad. It's not trying to get some piece of legislation passed. It's not trying to get Senator Kerry to vote one way or another on a piece of legislation. So I see it as a hard-edged political ad, pure and simple. But it stopped short of those magic words. There's no "Vote against Senator Kerry" in there.

We also have an ad that's being put out by the Club for Growth, and I think this was put out by their PAC. It says, "Paid for by Club for

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Growth PAC." This is the one I cited: "What do I think? Well, I think Howard Dean should take his tax-hiking, government-expanding, latte-drinking, sushi-eating, Volvo-driving, New York Times-reading"--then a woman chimes in: "Body-piercing, Hollywood-loving, left-wing freak show back to Vermont where it belongs."

It's not much of an issue ad, is it?

[Laughter.]

COMMISSIONER THOMAS: So, I mean, seriously, where are we going with this stuff?

MS. MITCHELL: Sixteen-year-old daughter who pierced her belly.

[Laughter.]

COMMISSIONER THOMAS: Maybe Howard Dean has pierced his belly.

COMMISSIONER McDONALD: I'll say again, no wonder he lost.

[Laughter.]

COMMISSIONER THOMAS: So here we are.

Now, the question I throw out to you folks is: We're trying to figure out whether a group maybe

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that spends more than half of its resources in ads like those--more than half of its resources on ads like those--should be treated by us as a political committee, which would mean that for folks giving money to that organization, where its apparent major purpose is to influence the election process, those persons giving money should be subject to the federal contribution restrictions, no corporate union money and no money from individuals larger than \$5,000 per year.

So can't we develop some sort of test that says those kinds of ads do count toward a Major Purpose analysis and a group that crosses the 50-percent threshold does have to register and report to us subject to the FECA restrictions? I'd like to hear from all of you.

MS. MITCHELL: Well, I'll take the first crack at it. If the Club for Growth is paying for the ad that you just described out of its PAC, then it's complying with the federal law, and I presume that the contributions are subject to the prohibitions and limitations of the Act.

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With regard to--

COMMISSIONER THOMAS: And it should be.

Is that what you're saying? Hard money.

MS. MITCHELL: Well, it is. I mean, clearly they've decided that it must be.

COMMISSIONER THOMAS: Well, "PAC" is a

fairly generic term. There are some of these 527s, I think, that call themselves a PAC without necessarily being registered with us.

MS. MITCHELL: Well, I would argue and I would wager that the Club for Growth PAC is their hard dollar-- their federal PAC.

But, secondly, the earlier ad that you read, if you believe--as a Commissioner, if you believe that that is in violation of the statute, then my argument is don't sit here and make some more rules to try to make it illegal, because if it's already illegal, then review it, investigate it, and stop it, and let a court tell you whether or not you need more rules and regulations or whether you have the statutory authority, if indeed you don't. And if you do, do something about it.

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I am always amazed when--I'm from Oklahoma City, and when Timothy McVeigh bombed the Murrah Building in Oklahoma City, you know, I knew right off that that was illegal. And Congress' immediate reaction was to pass another set of laws. I mean, that is always what--if I'd decided to get a Ph.D. instead of a law degree, I was going to write my doctoral dissertation on how we in this society want to substitute rules for judgment. So if somebody does something, we just want to go write some more rules instead of exercising judgment to enforce the rules we have.

And so I would argue to you that if you are concerned about that, if the Commission believes that that is within the ambit of the Commission's authority, do something about it.

MR. BOPP: I would answer it this way: I cannot believe that a Commissioner of the Federal Election Commission would actually care about those silly ads. I mean, when you consider what the American people are concerned about, they're concerned about you have to pay \$100,000 in order

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to sleep in the Lincoln Bedroom. In order to have a coffee with President Clinton, you have to pay \$50,000. To go on a junket around the world with the Secretary of Commerce, you have to make a huge contribution to the DNC. I mean, that's real corruption.

You know, the Federal Government should not be in the business of worrying about ads that criticize politicians unless the Commission wants to simply be, you know, the vehicle for incumbent politicians who do not want to be criticized.

COMMISSIONER THOMAS: But, now, who's behind these ads, though, Jim? How would we know if these groups maybe aren't even reporting--maybe they're a (c)(4). I think the Citizens United group is a (c)(4), so they wouldn't be reporting their donors. Maybe they're the same kind of folks that are maybe trying to buy access, as you alluded to.

MR. BOPP: Well, then, investigate them and see if there's a bribe, see if there's access in exchange for the ad. And, of course, that's

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under your coordination rules. You can do that now. You have the rules. Not say--I mean, surely you don't want to have the job, and as you are suggesting, that you ought to sit here as a governmental agency and parse through these ads and decide that, in your judgment, well, this ad's about an issue, but, no, this one's not about an issue, and, therefore, we're going to regulate it. Regulate it like to go to jail for criticizing a public official. And, of course, that's the road you're on now. You want to take restrictions on political parties that you cannot 24/7/365 in any form of communication, you cannot attack, promote, support, or oppose

a governmental official who--and most of them are candidates. You want to seize that authority that Congress did not give you, apply it to all these citizens' groups all over the United States, and threaten them with jail time or fines if they criticize public officials? I would say that you should shrink from accepting that responsibility.

MR. NOBLE: If I can respond to

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Commissioner Thomas, the law does require you to make the judgments that Mr. Bopp doesn't want you to make. You do have to make the judgments about certain ads and about whether they cross the line. And not only does the Act require you to do that, the Supreme Court has required you to do that.

With regard to your question--and I know it's a difficult question--about what do you do with a (c)(4) that spends 70 percent of its money on promote, support, attack, or oppose ads? I think right now under the present Supreme Court jurisprudence that you cannot consider that as Major Purpose, if that's alone.

I think when you're dealing with (c)(4)s, (c)(3)s, corporations, that you have to use an express advocacy or an electioneering communications standard, which the Supreme Court has now sanctioned. The Supreme Court left open for Congress the possibility of coming up with even a different standard that would still satisfy a bright-line test. But I don't think that is for the Commission to do.

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And, by the way, I think I was very careful in my statement not saying that the Commission adopt an express advocacy test. He's actually right. What happened was they rejected the electioneering message test, and for a while there was a three-three split on what the test

would be. And it was very frustrating for everybody because nobody quite knew what the test would be, and I used to say go back to for purpose of influencing. That's what the statute says.

But, again, you are required to do this. I understand your desire to get at these groups that spend all their time promoting, supporting, attacking. I don't think the law allows you to do it. I don't think the Supreme Court would allow you to do it, unless they crossed the line of express advocacy or electioneering communication, or in some other way established their Major Purpose, such as becoming a 527.

CHAIRMAN SMITH: Thank you. We need to go on here, I think, to Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr.

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Chairman. I want to thank all the witnesses for being here this morning. We appreciate it very much.

Mr. Bauer, I'd like to start with you. Entered into part of the record is testimony that Senator Feingold submitted to the Senate Rules Committee last month, and it was provided as part of the comments submitted here. I just want to read briefly from a portion of the Senator's testimony and get your thoughts on it.

Senator Feingold indicated, and I'm quoting, "The Supreme Court's ruling in the McConnell case makes it clear that the use of an express advocacy test is not constitutionally required for organizations engaged in electoral advocacy. And now the question has returned to the FEC over how to handle 527 organizations that have clearly

proclaimed that their purpose is to influence federal elections, such as those groups formed to do voter mobilization or advertising to try to defeat President Bush."

The Senator goes on: "My view is that

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groups that claim a tax exemption because their primary purpose is to influence elections should be required to register as political committees with the FEC unless their activities are entirely directed at state and local elections. The FEC must not bless a new circumvention of the election laws so soon after we closed the last loophole it created."

How do you respond to Senator Feingold's comments here?

MR. BAUER: Well, if I can get at what I think he's getting at--and perhaps I'm substituting my notion of it in place of what he had in mind--he seems to be saying in the closing paragraphs there that it's one or the other: You're either involved as a political committee in federal elections and, therefore, you're a pure political committee, cannot raise any money other than federally permissible funds and no allocation is permitted; or, alternatively, you may be operating outside the statutory scheme altogether.

Does that seem a fair--is that how you

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took that paragraph? I want to make sure I understand what you think it is that you're asking me to respond to.

[Laughter.]

COMMISSIONER TONER: I oftentimes try to figure out what I'm asking here.

MR. BAUER: Since you're asking me a question that you have in mind, I want to make sure I'm addressing the question you have in mind.

COMMISSIONER TONER: Well, I think, one, I'd be interested in your thoughts, the upshot of the Senator's emphasis on 527s that have made clear that their purpose is to defeat certain federal candidates, including President Bush, in terms of whether the FEC has the obligation to treat those kinds of organizations as political committees, even if they don't--as the Senator indicated, even if they don't engage in express advocacy.

MR. BAUER: Two points.

Number one, there are organizations--and I may sound a little bit here like Jim Bopp, but he's actually the only person who said so far today that

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he doesn't disagree with me, so I think I'll--

[Laughter.]

MR. BAUER: --also agreed with everybody who disagreed with me, so I couldn't take 100-percent comfort from it.

But, in any event--

MS. MITCHELL: I said you're up to the task.

MR. BAUER: You did say that. Thank you.

What Jim says is absolutely correct in this respect: There is no question whatsoever that some of the dialogue about an incumbent executive branch administration is going to be hard-edged dialogue. And I'm now speaking about organizations that are 527s not registered with the FEC. Our organization, ironically, is fully registered with

the FEC, reporting and complying currently with all of its rules.

But with respect to the reference there to 527s operating outside the regulatory arena, there is still the point that Jim has raised, and I think raised correctly, that hard-edged speech directed

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toward official conduct is not only appropriate, it's constitutionally protected.

Nothing the Supreme Court said in McConnell changes that. Nothing in the statute that the Supreme Court was reviewing for constitutional purposes changes that.

And so I think we have to be very, very careful as we start to, if you will, treat in very elastic fashion this notion of promoting, supporting, opposing, or attacking a federal official who is also a federal candidate, how dangerously we're starting to intrude on pure, hard-edged political speech, which may well move voters--may well move voters--but is, nonetheless, all the same, appropriate speech directed against official action.

COMMISSIONER TONER: Is it your view legally in terms of 527s that are not choosing to view themselves as political committees and registering with the FEC, is it your view legally that the Commission is barred from treating any of those 527s as political committees unless they

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engage in express advocacy or make contributions to federal candidates?

MR. BAUER: Or are controlled and coordinating their activity specifically within the meaning of Commission rules with federal candidates and political parties.

COMMISSIONER TONER: So one of those three circumstances--

MR. BAUER: Absolutely, that has been the law, and that is the law. And I think a change is both at the moment unwise and also constitutionally defective.

COMMISSIONER TONER: As we talked about yesterday and a little bit this morning, the Supreme Court in the McConnell decision, I think in sort of the strongest possible terms, declared that the express advocacy test is functionally meaningless. What should we take from that?

MR. BAUER: First of all, I heard Larry say a few seconds ago that the Supreme Court required the Commission to do this and the Supreme Court required the Commission to do that. The

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Supreme Court is not a super-executive branch agency that is supervising your activities. It was reviewing a specific statute fashioned by Congress and addressing specific constitutional issues that were raised about that statute. And one of the problems is that the McConnell decision has become some massive jurisprudential Rorschach test in which people tend to look in there and find exactly what they want the ink blot to reflect back to them.

So the reform community, by the way, while saying that the McConnell test has nothing to do with these proposed rules, continually repeats that the McConnell case requires this, means that, and otherwise drives the Commission into a particular direction.

The Commission was reviewing the constitutionality of the 30-, 60-day prohibitions on electioneering communications, and it was addressing the

question of whether Congress on a fully developed record, under the jurisprudence that applies to the activities that direct spending

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of corporations and unions, could apply that sort of limitation. That's what the Supreme Court was doing.

I am struck by the very elastic appeals that are made to that decision when time and again the Supreme Court stresses that Congress has been very careful, very cautious, very methodical in expanding the boundaries of campaign finance regulation, building records as it goes along, and drawing significant distinctions between the types of regulation that are appropriate and that in its view would be constitutional and the types of regulation that would not be.

That does not seem to me to support the Wild West sort of theory of McConnell directing this agency now to act aggressively in a variety of different directions.

COMMISSIONER TONER: Do you agree with the McConnell court that the express advocacy test is functionally meaningless?

MR. BAUER: I think in the context in which the McConnell case reviewed it, that was the

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decision the Court reached, and that is the decision upon which--

COMMISSIONER TONER: Do you agree with--

MR. BAUER: Do I personally agree with it? I don't want to say something that Larry is going to disagree with here.



[Laughter.]

COMMISSIONER TONER: I knew it was only matter of time.

MR. BAUER: We've had a peaceful period of time here where we haven't been in dispute with each other.

MR. NOBLE: Oh, go ahead.

MR. BAUER: No, that's okay, Larry. I don't want to upset you.

COMMISSIONER TONER: Mr. Noble, I'd be interested in your thoughts on the issues I raised with Mr. Bauer also. I want to make sure I understand. Is it your view as a matter of law that, in light of the McConnell ruling but also, as you indicate, in light of FECA and the basic statutory framework we're operating on, that as a

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matter of law this Commission is obligated to read 527 organizations that spend more than \$1,000 on advertising that promote, support, attack, oppose federal candidates or express advocacy, that we're obligated as a matter of law to treat them as political committees?

MR. NOBLE: Yes.

COMMISSIONER TONER: And why is that? MR.

NOBLE: Well, I think you start with FECA. You go back to FECA and FECA has--Congress spoke in FECA, and Congress put down what was a very, very broad definition of political committee. It said that it's an organization that spends more than \$1,000 or--leave out the contribution part, but spends more than \$1,000 in expenditures, and it defined "expenditure" as something to influence a federal election.

Under what Congress said, the broad

language of Congress, you'd be dragging into political committee status a tremendous number of groups.

Well, the Supreme Court recognized that in Buckley, and the Supreme Court did say--and we're not just reading between the lines in this. The Supreme Court said that it had certain constitutional problems with that. So first it said that we're going to limit political committee to organizations whose major purpose is the election of candidates. And then with expenditures, it said if your major purpose is the election of candidates for the purpose of influencing it's fine. It's not unconstitutionally vague. However, if that's not your purpose, then we're going to go to the express advocacy standard. This is all said in Buckley.

You go to McConnell; the same thing is repeated in McConnell, in effect. I mean, they're obviously not going back and looking at FECA, but when they're looking at the promote, support, attack, or oppose section, they're saying when it applies to political organizations, it is not unconstitutionally vague. This is not new law.

So I think what you have to do is take a look at FECA as the Supreme Court has interpreted

it--and this goes back, again, 28 years--and say under that--and it was not changed, it was just underscored in McConnell. Under that, yes, you're required to take an organization that has registered itself as an organization whose major purpose is--or the primary purpose is the

election of candidates and it spends more than \$1,000 in expenditures as defined for that type of group, and, yes, you're required to say they're a political committee.

COMMISSIONER TONER: Let me follow up briefly also on the allocation side. Is it your position basically that for 527 organizations that do the kind of activities you're talking about for the purpose of influencing an election, if they operate in multiple states, four or more states, is it your view that we have a requirement to have a minimum federal percentage of 50-percent hard dollars on those types of groups? Is that your bottom line?

MR. NOBLE: Well, first let me clarify something. If it's a 527 organization that's a

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political committee, then obviously there's no allocation. But if you're talking about with groups that can allocate, we think that--what we do think is that the present situation is untenable.

COMMISSIONER TONER: Why is that?

MR. NOBLE: Well, because we have a situation where--take Mr. Bauer's client. They are saying that 98 percent of their activity is non-federal, 2 percent is federal.

I think if you look at their own mailings, it is very clear that that is just not reality. I mean, their mailings yesterday to make passing reference to state and local candidates, but their mailings are very much focused on defeating President Bush.

So what we're saying is in the allocation rules which were put into place for a different situation, for a different factual situation at a different time, if they're allowing this type of activity, then, in fact, they're violating the law. They are not consistent with the law and the FEC's mandate to stop soft money to be used for federal

election activity. We do suggest the 50-percent rule. You might be able to come up with a different line, but you did come up in the proposed rulemaking with one that's 50 percent.

COMMISSIONER TONER: You think 50 percent would be permissible?

MR. NOBLE: Yes, I think 50 percent would be permissible as a bottom line, yes. It might be higher, but I would be a minimum.

MR. BAUER: May I respond?

COMMISSIONER TONER: Please, Mr. Bauer. MR. BAUER:

First of all, I'm really

struck, years ago, in 1980 when Bill Brock was Chairman of the Republican National Committee, which would be here today to celebrate, no doubt, that memory if it had chosen to testify, the Republican National Committee was widely championed for having understood and having run a massive integrated, national operation that focused on the presidential campaign in many respects, was nonetheless intended to mobilize voters around specific issues and to achieve success across the

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entire ballot--integrated politics where the politics keys to the key figure, the presidential candidate in many respects whose policies will be debated in all corners of the country in a variety of ways, but which has a whole host of objectives--a whole host of objectives in rallying voters around specific issues and assuring that the success is not simply success in one office but in a whole host of offices.

We've now gotten away from that, and if George Bush's name is even mentioned, needless to say, for reasons that Jim Bopp referred to, those that would like to see him

re-elected become apoplectic and begin alleging that the law has been violated.

The law is not being violated because the person in this country whose policies are under review in this election and the outcome of the debate with certainly affect a whole host of races and a whole host of issues, the law is not violated by criticisms that are directed to this administration as part of an effort to mobilize

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voters on issues and to achieve success up and down the ballot for people who hold to a different view than this administration holds.

The effect of the argument that you're hearing on allocation is fairly simple. Number one, organizations that wish to do and indeed politically need to do what is being alleged that ACT does, which is criticize the President as part of a coordinated program of mobilizing voters and seeking the election of candidates of sympathetic points of view across the ballot, would be, arguably, required in future cycles to simply criticize the President less. It's going to lessen, it's going to undermine robust criticism of the President of the United States. That's an extraordinary regulatory result, certainly one that I do not believe to be healthy. Or as discussed yesterday, many registered political committees which wish to, in fact, criticize the President of the United States will abandon registered political committee status and will simply find much more flexible vehicles outside the ambit of regulation,

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which is the responsibility of this Commission, to do it.

Last but not least, the suggestion--and Larry has made it both in writing, he's made it here, and he's not alone because some of the simpatico reform organizations are going to be making it--that ACT is violating the law by complying with 106.6 of the Commission rules is simply preposterous on its face. We're complying with a specific existing rule. We're here in this agency, registered, operating under your rules, reporting, following your dictate. I might say in that respect, rather unique among the many organizations that have appeared before this agency.

[Laughter.]

MR. BAUER: So the notion that we should be on the defensive I think is telling.

And last but not least, let's take a look at some of these percentages. This is the absolute heart of arbitrary and capricious behavior that is being urged on the agency, which is to pluck

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numbers out of the air--25 percent if four states or less, 50 percent if more than five states, or more than ten states. On what basis is that judgment being made? Let's set aside the question of whether or not the judgment should be made now, seven and a half months before the election. The question is: Under this timetable can the judgment be made wisely?

And so I want to close this with an appeal that deferral is not sufficient. It's not a question of deferring a bad decision. It's making a right decision. And I don't see how you can make the correct decision in these circumstances, even if you wish to revisit the allocation regulations.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Commissioner Toner. Vice Chair Weintraub?

VICE CHAIR WEINTRAUB: Thank you, Mr. Chairman. I thank the panel. I knew this would be an entertaining panel.

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Let me start by agreeing with some--some--of what's been said here about enforcement. Ever since I've gotten to this agency--I know the general counsel will back me up on this--I have had just a bee in my bonnet about the pace of enforcement at

this agency. And I have been working very closely with the Chairman and with the general counsel and with the full support of counsel's office to move cases faster, because I agree with you, Cleta, when we don't resolve a case until two or three cycles later, it is not quite as bad as the IRS not resolving things sooner-

CHAIRMAN SMITH: May I interject, since you raised it? We have actually made substantial progress, although there is more to be done.

VICE CHAIR WEINTRAUB: We have indeed. We have already made substantial progress. We've instituted a number of internal reforms. I know this is not necessarily visible to you, but we are working it very hard. Because I agree with you, it's a scandal if we don't--you know, when resolve a case five years later and nobody can remember the

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name of the candidate anymore that we're fining, it's a little bit silly. So I agree with you. Enforcement is very important.

I find myself in a bit of a quandary on some of these issues, and I'm sure I'm not alone. And based on the testimony yesterday, I know I'm not alone. On the one hand, we have a statement from the Supreme Court that the Express Advocacy test is functionally meaningless. On the other hand, we have friends of Mr. Noble--Mr. Simon was here yesterday, strong reformer, who said let's continue to use that meaningless test for everybody except the 527s. Well, that strikes me as a rather odd result.

Now, the Congress did put in this notion of promote, support, attack, or oppose, not in the context that we are considering it now, but they put it somewhere else in the statute, and the Supreme Court said that gives clear guidance.

Well, we had a parade of witnesses here yesterday that said: It doesn't give us clear guidance; we don't know what it means.

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So I find that we have to come up with something. Whether we need to do it in this context right here and right now for this rulemaking purpose, at some point I think we need to give some content to that promote, support, attack, or oppose standard. It seems to me intuitively that it must mean something more than express advocacy, but at the same time, I don't think it should mean so much that the ad of Mr. Bopp's client that I held up last time would get drawn in, because I think it is extremely important that we preserve the right of people to criticize policies of the government.

MR. BOPP: That did get their attention. VICE CHAIR

WEINTRAUB: And I hope that

they know, Mr. Bopp, that I wasn't saying that we should regulate them. I was saying that we should not. I thought it was a great example of exactly what we shouldn't be regulating here. I don't want us to become the speech police for everybody who wants to criticize the government in any way, shape, or form.

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I don't know that I'd go as far as you would, Mr. Bopp, on saying that we shouldn't be looking at the ads at all. I think we probably have to to some degree. But the notion of us sitting here reviewing ad by ad by ad every single political ad that's going to go up this cycle is clearly untenable. So we've been tossing



around different ideas.

Now, one of the ideas that has been surfaced here--and it was in the NPRM--was this notion sort of what we call internally PASO Plus--promote, support, attack, or oppose, plus reference in the communication to a candidate as a candidate; reference to the election or the voting process, reference to the clearly identified candidate's opponent, or reference to the character or fitness for office of the clearly identified candidate.

This one I have to say makes me a little bit nervous. Every time we say--somebody says someone's a bum, we're going to be regulating them, we're going to have a big problem in Brooklyn for one thing--and I'm a New Yorker, I didn't mean that

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as a slap.

Does that help? I mean would that be a useful standard to use, or can you think of another standard that would be helpful to the regulated community, anybody?

MR. NOBLE: Let me begin. First of all, with regard to Express Advocacy being functionally meaningless, yes, the Court said that, and many people have fought that for many years. What the Supreme Court went on to say though was that it was one statutory interpretation, and that Congress could revisit it and come up with another one. Now, Congress has come up with Electioneering Communications, and the Court did sanction that, and so, yes, it's functionally meaningless but it's still there, and it is what you have to work with until Congress comes up with another standard. And so while maybe we're not happy with it, you have to work with it.

But again, I think you have to go back to the idea that the vagueness of these standards depends very much, whether you like it or not, on

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the group that's involved, and the Supreme Court has said, Promote, Support, Attack or Oppose is not vague. People of ordinary intelligence will understand what it means when they are dealing with a political organization.

VICE CHAIR WEINTRAUB: Let me stop you right there, and then I do want to hear from the rest of the panel, and I see my time's already half up. I have to say, before you were talking about how if we just look at the 527s and there inherently ought to be political committees, and you're not a tax lawyer, but hey, you spent some time last night reading a tax opinion. And I saw the tax lawyer who testified here yesterday. You can't see him from where you're sitting, but I can see him from where I'm sitting. He's in the audience behind you. And as you were saying that, he was sitting there shaking his head. This 527 stuff is a lot more complicated than a lot of people think it is. These words have become terms of art. You're a lawyer, Mr. Noble. You understand this concept. Glosses develop on words

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that, you know, if somebody on the street picks up a statute and says, "Oh, I can understand that," well, maybe they can if they're coming at it fresh. But if over a course of years the words have acquired legal meaning based on the interpretations of the IRS, we can't start from scratch. I'm sorry, I'm not going to give you a chance to respond to that because I want to hear from the other panelists about PASO and PASO Plus.

Mr. Bopp.

MR. BOPP: I would comment two ways. I would encourage you to define and provide further guidance on what those words mean. I do represent state and local political parties. I do represent state candidates that are subject to this restriction, and frankly, when the Supreme Court said that political parties and state candidates would understand when they attack, promote, support or oppose a federal candidate, it was just a laugher. I mean they're going like this, "what does this mean? Can I mention President Bush? Can I say that I worked for President Bush," in one

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case? "Can I say something good about what I did

in the White House?"

VICE CHAIR WEINTRAUB: But do you have a suggestion for me?

MR. BOPP: Well, no. I think you're on the right track. In other words, I think using those additional ones that you mentioned is on the right track and I do think it's necessary. But the other point is, but the Supreme Court, even albeit somewhat disingenuously saying that people who are candidates or political parties would understand what Attack, Promote, Support or Oppose a federal candidate means. They were clear to say that it was those people, it's not the advocacy group out here, the AIDS Awareness Council in Sacramento that wants more money for AIDS and is going to think about saying something about the President. Surely we can't expect them to understand what that is. That's just completely out of context. That is unfortunately a part of this rulemaking, which is to apply that to that.

MR. BAUER: If I may make one just general procedural point which I think would be helpful on this PASO point, which is you were asking--and I think quite correctly--what it means because it's clear to you and I think it's clear to most people in this room, it's clear to this panel that nobody knows what it means.

[Laughter.]

MR. BAUER: And yet, lo and behold, it was incorporated into the revisions that the Commission urged upon the nonexistent ABC Committee in 2000-37 Advisory Opinion. So talk about a steaming case of

the cart going before the horse. You did it. You put it in an advisory opinion to a committee that does not exist, changing the rules in the middle of the game, and you're asking us at this hearing what does it mean. That is one of the reasons why we're urging you to step back to the pre-2000-37 position and take the time, take the time to work through these issues. It cannot be done, given the complexity of the legal considerations. I take to heart, for example, your exchange with Larry Noble right now, in which clearly you don't agree at all

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with his position on the tax code. Mr. Thomas, Commissioner Thomas, didn't agree with his assessment of the electioneering message history. PASO is a term that was used in the political party context and is now being imported with great difficulty into the nonpolitical party context, and to boot, Larry said some other things about the exempt function test and its compatibility with FECA standards which I think is open to significant dispute much along the lines you suggest.

In this environment, it just seems to me that the Commission needs to slow the train down and take some time to make sure that these various parts fit together and that the proposals you offer to the regulated community have received the thought that they deserve.

MS. MITCHELL: If I might add, I will say that I was struck yesterday--or in the middle of the night, listening to the panels yesterday, about the conversations and about the testimony, and thought this is all--and it's in the wrong form because it needs to be in Congress, and I'm pleased

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that all these members of Congress are giving you all of their best advice, but I have long thought that there were many places in which the tax code and

the Commission's regulations were at odds. The only way to reconcile those two codes--these are two separate legal codes--and the only way to reconcile inconsistencies is in Congress, and I do think Congress has abandoned its responsibility if it does not take up the responsibility for sorting this out. The Supreme Court has said until Congress comes up with another standard, we need Congress to make this decision.

If I were the Commission, I would go back to the Congress and say, "We need your guidance. We need the statutory authority to move forward," because I think there are a lot of these issues that have to be resolved ultimately by Congress.

VICE CHAIR WEINTRAUB: It's your position that we need congressional guidance to define "promote, support, attack or oppose?"

MS. MITCHELL: I do. I absolutely do because I think that otherwise it is arbitrary on

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the part of the Commission trying to make something out of whole cloth.

MR. BOPP: I have a specific proposal for you.

VICE CHAIR WEINTRAUB: I'll take it. I won't necessarily agree with it, but I'm happy to hear it.

MR. BOPP: When you all defined "Expressly Advocate," you have two subsections. One is the Express Advocacy Test, but the other one has been struck down now by three courts as being well in excess of the definition

of Express Advocacy. Of course I think the Commission then-- certainly not these Commissioners--but the Commission then was trying to expand its authority to regulate non-explicit words of advocacy speech by using that Subsection B. Maybe that's no longer the place for this any more. In other words--

VICE CHAIR WEINTRAUB: You know, that thought has crossed my mind.

MR. BOPP: Yes. Even state political parties have to decide are you attacking, opposing,

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supporting, or are you expressly advocating? So I mean this is a real dilemma. You look at Subsection B, you know, it could go either way. It could be one. It could be the other. How do you know? So maybe that would be a suggestion.

VICE CHAIR WEINTRAUB: Thank you. CHAIRMAN SMITH:

Thank you, Madam Vice

Chair.

I'm next in the queue. I love the PASO. PASO's like the hot potato nobody wants. If my memory serves me right, when we had hearings on it last year, all of the reform groups and the sponsors of the Act as well came in and said, "PASO needs no further explanation. Everybody knows what it means." But when they got into the litigation, the two chief sponsors disagreed on whether a particular ad was PASO. Then the District Court said, "PASO's self explanatory, everybody knows what it means," even though the judge writing that said in an ad that was almost identical to an ad that was cited--and said it was not PASO, that was almost identical to an ad that was cited before us

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when we were writing our regs. That was by one of the reform groups, that it was declared truly, clearly was PASO, and then of course the Supreme Court got it and they said, "Everybody knows what PASO means," and nobody seems to

know what PASO means. So it's the hot potato of Federal Election Law here.

I'm not very optimistic that Congress is going to give us any help, Ms. Mitchell. I think that's why they didn't define it, was they wanted us to try to deal with that. And we tried to deal with it by going to court, and the court said, we don't know what it means either, but it's obviously clear to everybody else, so that's why we're back to you guys now, and I don't know how long this will go around like this. Eventually I think there will be some litigation and a court will have to deal with what it means in a specific context.

I want to actually speak a little bit before I ask questions because I think a lot of good questions have been asked, and I think there's a few points that I think should be made. I note,

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Ms. Mitchell, your comments at the outset--and I tend to agree. In fact, one thing that everybody here seems to have agreed on, at least all of those who are promoting this rulemaking so to speak, is that this goes back to pre-BCRA. Nothing new has happened. Essentially we have this authority anyway. At least that seems to be there. But I think our effort here was in fact to resolve this problem quickly, but to resolve it in a way where we could in fact get this kind of input. And it's worth noting, as you point out, that you read one set of comments and they're pretty convincing, and you read another set and they're pretty convincing. So the law is not so clear here. It simply doesn't do to have a committee going around saying, "These people are breaking the law." That doesn't do, and it's not so obviously true.

I also note that one of the problems here is that

prior until at least late December or January this year, I think the law was clear. That is to say, as BCRA was going through the legislative process, over and over opponents of

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BCRA said, "Here's what's going to happen if you pass this bill. It's all going to go to 527s, and they're not required to register as political committees." The supporters said, "Yeah, that's true, but this is probably the best we can get and we don't think we can regulate those groups constitutionally." And it's interesting to note that all the comments that keep being read to us from members of Congress, if they seem to suggest that 527 groups were not automatically political committees, they were made before BCRA passed, and if they seem to suggest that they are political committees, they were made within the last two months by the members of Congress who I think had always wanted to make that the case but had not been able to get that into the law that they got approved.

Maybe it's unclear only because very recently a small number of reform groups and political operatives have decided to try to make it less clear than it seemed to be to everybody as recently as November or December, as recently as

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September, when the Republican National Committee argued in the Supreme Court. I remember their very splendid attorney, Bobby Birchfield got up, and he began his argument by responding to something Justice Breyer had said earlier, and said, "Justice Breyer, what you're talking about is George Soros. If you uphold the law, it won't get rid of soft money, it will go to committees run by George Soros." And it seemed to be exactly what was intended here.

I think also that we need to be careful. We throw around this travail, the Supreme Court said Express Advocacy is functionally meaningless as if that's--and sweep that very broadly. But of course, none of us believe that, because one thing every witness to appear here so far has agreed is that it is meaningful at least when you're talking about 501(c)



organizations, which means it's not functionally meaningless because nobody has explained to me why 501(c) people just can't figure out what the heck their obligations are unless they get Express Advocacy, but 527 people are much more

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clairvoyant, and if you want to run a state 527, or if you want to run a 527 that works on judicial nominees, things that clearly have no connection to federal elections that we do not regulate, you nonetheless know what the PASO line is when you cross it and can operate it on PASO or don't need Express Advocacy.

Everybody agrees that at some level Express Advocacy remains functionally meaningful. For Commissioner Thomas to call it "the stupid test" is simply to disagree with the Supreme Court. I don't mind that. I've disagreed with the Supreme Court. Senator McCain criticizes me for it, suggests I should never do that, although I'm sure there are some decisions he's disagreed with, but there we are, you know?

[Laughter.]

CHAIRMAN SMITH: Finally, I want to make a couple points about the history before I get on to some questions. I have to say, Mr. Noble, I don't think your history's right either. You've worked in this area a lot longer than I have.

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Commissioner Thomas has as well. I first really began to get heavily into it in the 1990s, in the early 1990s, and at that time it was patently clear to me that unless you were doing Express Advocacy as a 527, you were not a political committee, or unless you were doing Express Advocacy you were not a political committee. I want to note here--by the way, this is a report that is signed by you, Mr. Noble, and by Paul Sanford of your organization, by Fred Wertheimer of Democracy 21, by Don Simon of Common Cause.

And you folks write on January 28th, 2003, "For well over a decade independent groups have made use of federal tax laws to evade the disclosure requirements and contribution limits of FECA. Cloaked as 527 groups or 501(c) nonprofit organizations, independent groups learn that by simply avoiding the magic test of Express Advocacy as defined by the courts and the FEC, they can register with the IRS as a political or nonprofit organization that does not conduct explicit campaign activity. As a non-campaign entity these groups were no longer required to register as PACs

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with the FEC and fell outside Federal Campaign finance laws."

For well over a decade--this was written January of 2003, so that would suggest that at least sometime back in 1992 it seems to have been well-settled principles. And I have to conclude--and I won't ask you for which--you can respond--that either the report that your group put out was erroneous, or the report that your group put out was a bit of a prop and should get a lot of attention generally, or that you simply kind of forgot in the last year in the excitement of this rulemaking and the excitement of reformers wanting to regulate all this that you've kind of forgotten it, or that you've looked at the history again and really changed your mind, but given your long involvement, I'm not sure that's the case.

Now, I want to finally go to--what I really want to ask questions about is the issue of--well, actually, I have one other thing first I want to ask. It was said yesterday by one of my colleagues that there's no way we're going to turn

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the Chamber of Commerce or the AFL-CIO into a political committee. But somebody said, some of the sponsors of the bill--well, 501(c)'s are not going to be regulated, people have said. "It's off the table" is the

phrase that's been used. I don't see that as being off the table at all. I've got some--this is that same report, and it notes that in the 2000 election cycle the Business Roundtable, a 501(c) group aired more than 8,000 television ads. Americans for Job Security aired more than 6,000 television ads, and that doesn't even get into the bigger groups such as the Chamber of Commerce and some of the others.

The press release that went out with that report, again issued by Common Cause, Democracy 21 and the Center for Responsive Politics, notes that the 527 disclosure law, along with the new ban on soft money to federal parties and candidates--that's BCRA--appears to be turning 501(c) nonprofit groups into the latest preferred vehicle for evading campaign finance laws. It's clear to me that what has been argued repeatedly is both, (A)

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501(c) organizations have been a problem in the sense if you view this as a problem, they've been doing this type of activity; and (B) that more of this activity is expected to start flowing into 501(c) groups.

So I'm not sure, one, how we have improved the system if we try to shut down 527s but not 501(c)'s. I understand that people are saying you can't do 501(c)'s, but I'm not sure that that's a proper reading of the Major Purpose Test. I'm not sure the court would look at it that way and not in a much more functional fashion. And I did have questions about the Major Purpose Test. I'll ask you real quick, Mr. Noble, on the Major Purpose Test, are

you advocating a categorical exemption for 501(c)'s, and if so, what would you do if a 501(c) in fact had as its major purpose influencing federal elections but the IRS just hadn't done anything about?

MR. NOBLE: No, I'm not advocating a blanket exemption for 501(c)'s. In fact, I think the FEC was wrong when it did a blanket exemption

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for (c)(3)'s. What we are saying is that under the present statute and the present Supreme Court interpretation--which I know you don't like, but it is the law--that when you're looking at organizations whose major purpose is not election activity, then you are limited to Express Advocacy of--

CHAIRMAN SMITH: Would you agree that 527s can exist doing activities on the tax code that are not regulable under the Federal Election Campaign Act, such as supporting the nomination of judicial nominees or working on state issues?

MR. NOBLE: Right. And--

CHAIRMAN SMITH: So would we have to apply a Major Purpose Test to them as well?

MR. NOBLE: Well, what we suggest is that if you have a 527 that does exclusively nonfederal activity, and one of your proposals is for this--

CHAIRMAN SMITH: How does that come from the Supreme Court? I thought you told me over and over the Supreme Court says that would be Major Purpose.

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MR. NOBLE: Right. The Major Purpose, it's a two-part test.

CHAIRMAN SMITH: Right. This is a 527 which does not have as a major purpose doing any

federal activity in fact, but you see to just change the Major Purpose to an exclusively nonfederal. That's not the test that you've been giving me. You've been giving me Major Purpose over and over.

MR. NOBLE: The major purpose is election of candidates.

CHAIRMAN SMITH: That's not in the Supreme Court opinion. Where's that in the Supreme Court opinion?

MR. NOBLE: Read the opinion. It says-CHAIRMAN

SMITH: I've read the opinion. MR. NOBLE: It says the major part--they

said that if you in fact know that your major purpose is election related, then you are dealing with a different test.

CHAIRMAN SMITH: So a candidate for the state legislature is a federal political committee,

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has 527?

MR. NOBLE: No.

CHAIRMAN SMITH: Why not?

MR. NOBLE: Because you still don't have the federal expenditures.

CHAIRMAN SMITH: What if he spends \$1,000 in which he promotes, supports, attacks or opposes President Bush because he's saying, you know, "I disagree with President Bush and I'll try to make sure that our state really is secure," or something like that?

MR. NOBLE: In that situation you're not going to turn them into a political committee.

CHAIRMAN SMITH: How are we not going to do that? You just said it's got to be exclusively nonfederal. I've just given you federal--

MR. NOBLE: Presumably they are registered as a state candidate committee.

CHAIRMAN SMITH: So?

MR. NOBLE: Yes. You can have an exemption for a state candidate committee. Now, that activity may still be federal election

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activity.

CHAIRMAN SMITH: Now, a minute ago you said it had to be exclusive. Does it have to be exclusive or not? Does it have to be exclusive or not?

MR. NOBLE: Give me time to respond. COMMISSIONER

McDONALD: Mr. Chairman, let him respond.

[Simultaneous discussion.]

COMMISSIONER McDONALD: As courtesy, let him respond.

CHAIRMAN SMITH: Commissioner McDonald, I appreciate it. Here's my question. I'm trying to get some answers. I'm already over my time. I was told repeatedly we had to use Major Purpose. Then I'm told suddenly it has to be exclusive. I'm asking for a simple question, is it exclusive or is it Major Purpose? And I think that's a two-word answer. You can use one word, "exclusive" or two words, "major purpose."

MR. NOBLE: Well, as a lawyer you know that not all answers can be given in a yes or no.

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The answer is--what I was responding to is you have a regulation that exempts certain exclusive type activities, and we've supported that regulation. Yes, there are going to be other difficult situations that arise when you have--not difficult situations--other situations that arise when you

have a state candidate who's registered under state law. No, you are not going to turn them in a federal political committee.

But I have to say, under every standard you've proposed, you'll run into those difficulties too. The bottom line problem I think--

CHAIRMAN SMITH: The Commission has proposed here--

MR. NOBLE: Well, you're saying-CHAIRMAN SMITH:

What are you referring

to? What standards are you referring to?

MR. NOBLE: Well, when you propose a standard of using only Express Advocacy you have a problem. But let me say this. I think there's a fundamental issue that's going on here. Some Commissioners do not like the idea that Express

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Advocacy is no longer the standard or is not--has never been the standard that applies across the board. You keep trying to import it in places it doesn't belong. So I would say that this idea that the law does not work without Express Advocacy as judging major purpose or judging something else, is not what the Court has said and is not what Congress has said, whether you like it or not.

CHAIRMAN SMITH: Mr. Noble, with due respect, whether you like it or not, the law also has limits. Whether you like it or not, there are limits on what the Court says. How you read the Court opinion doesn't mean you're right and I'm wrong and therefore whether I like it or not I've got to do something. It could be I'm right and you're wrong, and given your history in litigation at the FEC, I'm not sure I'm right and you're wrong.

My time has expired.

MR. NOBLE: May I respond to that?

CHAIRMAN SMITH: If somebody else wants to give you time in the next panel to--well, I guess everybody is out of time. I will give you 30 seconds to respond to that, but Mr. Noble, frankly, I don't appreciate you're coming in here, essentially coming in here with the purpose of saying, look, you don't like the law, so you're going to disobey it, and insulting me. I don't think you have a very good record, to be honest, on interpreting the law, and to be quite frank, it's very clear to me that your groups have come up with a very opportunistic interpretation of this Court decision to get where you're going to go.

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Now, I haven't kind of dumped that on people, but if that's the debate you want to have, if you want to make this a personal debate about who has been disingenuous or who refuses to follow the law, I'm prepared, as you can see, to have that debate.

Now, we're at the end of the time. If you want 30 seconds, I'll give you 30 seconds.

MR. NOBLE: With regard to the litigation record of the Commission, I would note that the Commission won an awful number of cases and the

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cases that we lost were in many respect not appealed because Commissioners refused to do them. If you want to look at a litigation record of the Commission as a whole versus what ultimately happened, when the Supreme Court finally got hold of the cases, the Supreme Court said that what many in



the Commission were saying was in fact the law, which is Express Advocacy does not apply. The Commission refused to appeal the GOPAC case. The Commission refused to appeal the Christian Coalition case. The Commission refused to get involved in the Shrink Missouri case because contribution limits at the state level had nothing to do with the FEC.

So I would suggest that the only way the Commission's record was what it was during those previous years was by in many cases a refusal to let a higher court look at these issues.

CHAIRMAN SMITH: I gave you 50 seconds there.

MR. BOPP: Mr. Chairman, I had a question. What happened to Larry's paper shredder that he had

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when he worked for the Commission, the one that would shred the paper that says "For well over a decade this has been settled law?"

MR. NOBLE: I can respond to that if you'd like. You didn't give me a chance to respond to that.

COMMISSIONER McDONALD: I want to ask at least to take a break. This is getting out of hand and it's really not very impressive.

CHAIRMAN SMITH: Let us go to Mr. Norton for questioning since our time is up. Mr. Norton.

MR. NORTON: Thank you, Mr. Chairman. Thank you all for coming today.

I want to ask a question that I don't think has been asked so far, and it may come into play whether there are rules or not, and that is whether there's any support for McConnell, any reading of

McConnell that would suggest that the Commission ought to apply the Express Advocacy test in some manner differently than it has applied it before? I've heard the argument positive, without a lot of elaboration, that there's room in

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McConnell for applying the Express Advocacy test, something beyond magic words, perhaps to the so-called Furgatch Test to the test that's codified in 100.22(b) of the Commission regulations.

I'll start with you, Larry. Do you have a reaction to that?

MR. NOBLE: I think you can read McConnell, even though it did not directly deal with the issue, I think you can read McConnell as leaving some opening to--again, for the FEC to further define or to define Express Advocacy in a slightly different way, I think you're going to be limited, and I think the B definition of Express Advocacy was still a limited definition. I don't think anything in McConnell says you can't do that. I think moving away from an Express Advocacy definition would require congressional action.

MR. NORTON: I'm struggling, I confess, to understanding completely the sort of lay of the land you've given us in terms of how to approach political committee status. If I understood you correctly, you said that where an organization's

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major purpose is election related, there's a different test, we're not confined to Express Advocacy. I was looking back at a case that I know you remember well, and is the subject of fond memories between you and Mr. Bopp, that's Christian Coalition. In the brief--and forgive me, I

don't think I'm taking this out of context--the 192-page brief that came from the general counsel said this: "Taken in isolation, some of the Coalition"--which you know was a (c)(4)--"some of the Coalition's election-related activities appear to be similar to those of nonpartisan groups which work to encourage by means of education, voter ID and GOTV, the participation by citizens in elections and government at all levels. Such Coalition activities must however be viewed against a backdrop of statements and activities that are entirely consistent with those of a traditional political committee or party. Indeed, virtually all aspects of the Coalition, from its congressional district and precinct-based structure, to its issuance of voter guides in its

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GOTV efforts, have been explicitly identified by the national leadership as tools for winning elections. Even the issues advocacy in which the Coalition engages has been acknowledged to be a tool to broaden its appeal with the goal that the organization will have an ever-increasing impact on the electoral process."

Is your argument then that this organization or an organization operating like it, because it's major purpose appears to be election related, takes the Commission out of the realm of having to even consider whether it has \$1,000 in Express Advocacy expenditures?

MR. NOBLE: No. I don't think that's the argument. I don't have the brief in front of me, but I also think that was a background section or generally discussing the Christian Coalition. I think most of the allegations in the Christian Coalition case revolved around 441(b).

MR. NORTON: Why do we need to look at--I mean if your point is that there's a different test for organizations and your major purpose is

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election related and that Express Advocacy isn't compelled, the Commission isn't compelled to look for Express Advocacy when the major purpose of the organization is election related, why do we have to look for it here and not look for it with respect to a registered 527 organization?

MR. NOBLE: When you're dealing with a registered 527 organization--let me start by saying this. Again, we have said--and we said this in our comments--that there are a lot of issues that the Commission is going to need to deal with, difficult political committee issues that the Commission has struggled with for 25 years, many of them not resolved. And, yes, you're going to have to look at a lot of those issues. What we're saying here is we're focusing on 527 organizations because we think that's where the problem is right now, and we're saying that looking at what the Supreme Court says, 527 organizations are political organizations, and looking at what the Supreme Court says, those organizations are under a different test.

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Dealing with--the Christian Coalition, it's actually a good way for me to get into a slightly broader discussion. In looking at the question of what was the law in '99 versus '92, what in fact happened, there were always several Commissioners on the Commission who did not want to use anything but an Express Advocacy test, and frankly, when you're writing briefs for the Commission--and you probably have learned this already--and when you're writing General Counsel's report, you are struggling to try to bridge certain gaps or certain differences between the Commissioners. So there are certain things you have to look at, and you put things in there that might get various Commissioners over on your side on the issues, things that you think are relevant.

But we never said in Christian Coalition that just because of that they are a political committee.

MR. NORTON: Okay. Mr. Bopp?

MR. BOPP: Thank you. Actually, what you were quoting from was the General Counsel's report

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filed at the probable cause stage.

MR. NORTON: That's right.

MR. BOPP: And in fact, at that time, the General Counsel was arguing that this Commission

should find that the Christian Coalition was a political action committee under the statute, and this Commission voted though not to find probable cause with respect to that entity under that theory and pursue it, as Larry correctly said, 441(b) issues in court.

So that just simply demonstrates one of the points I made earlier, which is I really think that you have to adopt some positive regulations here. In other words, we have a history of these expanded theories. Now we have another series of expanded theories being proposed on how (c)(4) or (c)(3) organizations can be deemed to be political committees. They are legitimately at risk. People are correctly concerned, but this Commission could fix that.

MR. NORTON: I wanted to shift gears just slightly and pick up on a point Mr. Bauer made very

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explicitly and others have touched on, which is the adequacy of the record, the empirical record for the Commission to promulgate regulations here. As you know, there is I think a dearth of evidence in the McConnell case concerning (c)(3) organizations, maybe nothing, engaged in activities that are for the purpose of influencing elections. The rulemaking here has been instigated by really a small handful of complaints. There, over the course of years, have been, as I can see, very few complaints to come to the Commission concerning the activities of (c)(4) organizations that are allegedly operating as political committees. And of course, there are a lot of questions about the appropriate allocations formula, whether we have a

grasp of 527 organizations based upon a lot of media attention to three or four organizations.

Larry, are you concerned that this is an adequate factual record for the Commission to promulgate regulations of any kind in this area? Do you have any concerns about that?

MR. NOBLE: I guess my answer to that is

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that again for what we're asking for, about 527 organizations, we think the law has been there for 28 years, and Congress made the decision 28 years ago, the Supreme Court has ruled on it now several times. That's the record you need.

I think you might want a bigger record were we proposing that you do something that is different than what has been the law for 28 years, but that's the law.

MR. NORTON: I want to turn to Ms. Mitchell in the little time I might have remaining, and pick up on your "enough already" theme.

[Laughter.]

MR. NORTON: I think it's certainly my view that it's been quite a dizzying pace for rulemaking at the Commission in the 2-1/2 years I've been here. Of course, much of it was statutorily mandated, and there was little flexibility there. But we emerged from 2002, and last year the Commission promulgated regulations in the area of travel, mailing lists, multi-candidate status, phone banks, leadership PACs and Title 26

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regulations, and we're not even halfway into 2004 and we're proposing to do this. You've raised this concern before, and so have others, that assimilating all of this is creating a burden on the regulated community, and I wonder if you could and would elaborate some as to what sort of burdens this pace of regulations has meant.

MS. MITCHELL: I think that you've identified it very well. It's very difficult to absorb and apply these changes in so many different areas, and to be able to advise individuals and entities what it is they can and cannot do, particularly when it doesn't seem to be static, it seems to be ever changing. That's why I would say your point about the factual record is very important. I would urge the Commission to think outside the box and think in terms of conducting some factual hearings, conducting some fact findings. That's why I would tell you that I believe that a better approach, if there is a concern about certain entities acting outside the law, the Commission has the authority to bring

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entities in for public hearings. There is nothing that keeps you from being able to have hearings and do a fact finding, and really, the best way for us to know what the law is and what the regulations say is to see how they're going to be applied and upheld. And continuing to promulgate yet more theories of rules and regulations results in mistakes. I find, in all honesty, references to particular provisions of the regulations, and you go to that particular provision, and it is reserve, it doesn't exist, or something has been superseded or it's been moved. I mean you cannot do it right when you do it that much, that fast, that often. So I would urge you to stop.

If there are particular wrongs you think need to be righted, focus on those. Don't just keep writing new rules.

MR. NORTON: I see my time is up. I leave it to the Chairman whether you want to let Mr. Bauer, who wanted to respond, respond to that.

CHAIRMAN SMITH: Given to where we are time wise, I think we'll pass on to the staff

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director, Mr. Penrkon.

MR. PEHRKON: Mr. Chairman, thank you. Members of the panel, thank you for appearing

today.

I'm going to follow one line of questioning that I sort of had done earlier to previous panels, and actually I'm fortunate to have Larry here today because his organization, the Center for Responsive Politics, has done a nice job of keeping track of the 527 filings.

But one of the things I'm trying to identify is that under the provisions the Commission has proposed, under the NPRM, can you sort of give us a sense as to how many entities we would be looking at having to file with the Commission? I know we have previous testimony saying there are 29,000 people who reported as 527 organizations, 600 who actually do regular filings, and then I have heard the number, there are only 74 who might fall under the rubric of having to file here. Do we have a sense anywhere as to how large a community we're talking about?

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MR. NOBLE: While we are tracking 527s, I can't give you off the top of my head how many that would actually fit under a political committee definition, but I can tell you it's not in the thousands. I mean you may be talking about thousands of 527s out there, but I think the type of organizations that we're looking at, that are actively involved or any involvement in federal elections is a much smaller subset of that.

MR. PEHRKON: Ms. Mitchell?

MS. MITCHELL: You know, I think that you raise an interesting point, and I want to make this because I did notice that you were asking this question of some of the people yesterday, and I think that this is instructive for the Commission.

Remember that the 527 legislation was what I call "legislation by headline." It was driven by news articles about stealth PACs and 527s became a brand new vehicle or entity, new only to the reporters who previously hadn't known they existed, but they had obviously been in



existence for many years. When you tell them that the Republican

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National Committee and the Democratic National Committee are both 527s, well, that was startling to them. So Congress rushes through legislation, passed in the middle of the night literally, and signed by the President in the middle of the night to cut down on these 527s. Well, guess what?

It required all of these--because it was done so hurriedly and because they really didn't pay attention or know what they were really doing, with all due respect, it caused every state candidate, committee, PACs, it requires--one of the questions you asked I think yesterday was what's the reason for the number of 8871s that are filed compared to the 8872s, which are the reporting of the--one of the reasons is, for instance, state political parties have to file 8871s, but they don't file 8872s. So Congress then came back a year or so later and started peeling back, realizing that they really hadn't meant to sweep all of these different organizations under the 527 registration requirements.

I think it is instructive that when you

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rush through regulations to try to deal with some perceived issue, problem, without taking sufficient time to analyze exactly what it is you're trying to solve, that--and the Commission should take some instruction from that, that it is very likely to end up sweeping in a lot of entities that you never meant to sweep into the parameters.

MR. PEHRKON: Mr. Bopp, I see you want to get in on this.

MR. BOPP: Yes. To answer your question, I would answer it in this way. It's a dynamic number, but will be

increasing. And to give you a specific example, this new revenue ruling, 2004-6, one of the factors that is to be considered on whether or not grass roots lobbying in favor of legislation is now considered to be political intervention, is have you done it in the past? In other words, that was one of the factors, if you can point to a history of having lobbied--the grass roots lobbying on this issue, then it's more likely that your communication will be deemed to be grass roots lobbying, not political intervention.

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Well, as organizations now look at that revenue ruling and then plan to do things they haven't done in the past, they will be considering, and some will establish, 527s because they are listening to what the IRS says, and believe that they have to conduct that activity as political intervention, and that the best way for them to do it is to put it into a separate segregated fund.

So this is a dynamic process. The IRS is continuing to push downstream this activity, and so the numbers will simply rise.

MR. PEHRKON: Mr. Chairman, thank you. CHAIRMAN

SMITH: Thank you, Mr. Pehrkon. That will wrap up our first panel. We're

only about 7 minutes--no, we're about 22 minutes behind schedule. Well, that's not so bad.

[Laughter.]

CHAIRMAN SMITH: We'll ask to hold the break to 10 minutes, and reconvene with our second panel. So we'll be in recess for 10 minutes.

[Recess.]

CHAIRMAN SMITH: And again, bring the

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gavel back into session here in the FEC Public Hearing on Political Committee Status. If we could take our seats.

Before the next panel--again we've got a number of

distinguished witnesses--two things. First, I've been meaning to remind people, please if you have cell phones, please make sure they're turned off or turned on to vibrate. Secondly, I want to briefly pause because I don't think Mr. Noble is still in the room, but maybe he'll catch this then on C-SPAN tonight. I don't think I treated him in a way which a witness deserves to be treated, and I apologize for that and apologize to the members of the audience, and I will try to do better with this panel, where I'm sure there's at least one person who will try to get me just as frustrated.

[Laughter.]

CHAIRMAN SMITH: But I do apologize for that. We should not run things in that fashion.

We have a good panel for our second panel of the morning, with four distinguished commenters.

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First will be Peggy McCormick, Counsel to the National Education Association, my father a long-time member. Trevor Potter, Chair and General Counsel of the Campaign Legal Center, former FEC Commissioner. Joe Sandler of Sandler, Reiff & Young on behalf of MoveOn.org, which some people say is the group that is pushing all of--or has prompted this rulemaking, which may or may not be true. And Lyn Utrecht from Ryan, Phillips, Utrecht & MacKinnon on behalf of the Media Fund, the other group that some say has prompted this rulemaking to take place. So it should be a good panel.

Again, panelists, we ask you to hold your opening statements to three minutes if you can. As you can see, I'm not real heavy on the light, but we try to use it as at least something to remind us that we do need to move on at some

point. With that, Ms. McCormick, I'll let you start when you are ready.

MS. McCORMICK: I think I'm ready. I wanted to thank you for inviting me to be here today, and I'm here representing the National

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Education Association, a labor organization with more than 2.7 million members working primarily in the field of public education.

What I'd like to do today rather than repeating the arguments that a number of my colleagues have made and in which we agree that these rules should be withdrawn because the Commission doesn't have the authority to issue them, and they are contrary to the intent of Congress, is to focus on one section of the proposed rules that I think have not gotten a lot of attention thus far in the hearings, and this is really a separate section from the redefinition of political committee, but it's a section I think that's really important to labor organizations and to nonprofits and to corporations for that matter, which is the redefinition of the rules for nonpartisan voter registration.

I want to start by saying that I agree with Cleta Mitchell, that I think that the Commission, particularly in this aspect of the rulemaking, is really operating in a factual

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vacuum. What these proposed rules would do is to narrow the definition of nonpartisan voter registration in GOTV. Payments for nonpartisan voter registration in GOTV, as all of you know, have been exempt from the Act since 1971 for unions and corporations and since 1974 for other organizations. The legislative history of this section of the Act reflects a very strong and clear intentional

congressional intent to ensure the unfettered right of organizations to engage in this kind of good government activity.

The current regulations define nonpartisan activity as any activity designed to register to vote or to vote if no effort has been made to determine the candidate or party preferences of individuals before encouraging them to vote. And labor organizations and corporations are subject to that restriction and to an additional single restriction on content which is that they cannot use Express Advocacy communications in connection with those drives. There are some minor other requirements. You have to let people know and you

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can't refuse services, but those are really the primary restrictions on voter registration and GOTV as it exists today.

We've been operating under these same rules for more than 30 years, and yet without any factual explanation or without any explanation that I can discern at all in the notice of proposed rulemaking, the Commission is suddenly in the middle of a presidential election year proposing to narrow the types of voter registration activity in GOTV that can be considered to be nonpartisan.

What it's proposing to do is to first add an addition to the ban on Express Advocacy, a ban on communications that promote, support, attack or oppose a candidate or a political party.

One of the real problems with this restriction, as you may or may not have thought about, is that it doesn't

require that you name a federal candidate or a political party. So suppose that you are me and you are trying to advise a

union as to the type of nonpartisan get-out-the-vote registration that it can do, and they say,

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"Well, what we'd really like to do is we'd like to do a nonpartisan voter registration drive, and we would like to say, vote today if you want to get us out of the war on Iraq." On its face it seems to me that that's a perfectly legitimate issue, communication. If people care about that issue and you can motivate them to go to the polls, I don't see that that issue tells them one way or another what party to vote for or what candidate to vote for. It doesn't name a candidate, doesn't talk about a political party. On its face it's facially neutral. Nonetheless, under the proposed regulation, all that it takes in order to make it into partisan get-out-the-vote, is that the message could be interpreted as supporting or attacking a candidate or a party.

So if in fact a national party has in its platform a position on the war in Iraq, it could be said that that particular restriction means that you are urging either support or opposition for that party based on the public position of the party. The same thing goes for a candidate. If a

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candidate is identified with one of those positions, you could be attacked for urging support of that candidate or opposition to that candidate.

The second addition is a prohibition on information being used concerning the likely party or candidate preference to determine which individuals to encourage to register and vote.

Now, I think you need to think about the fact that there is a difference between knowing individual candidate

preference and party preference, and having information that suggests that a group of individuals might vote a certain way if they happen to have voted historically in that way or for any other reason. This very vague restriction too will have a tremendous chilling effect of organizations who are trying to engage in good government, nonpartisan get-out-the-vote activities.

What if the union decides to register women to increase women's participation in federal elections? This could chill a union from doing that if there is information somewhere, either that

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the union might know or that may be common

knowledge, that women with young children might tend to vote for a certain party. There is no certainty when you pull a group of voters as to how they're going to vote, and to say that because there may be information out there somewhere, whether you know it or it's common knowledge or there's a study from 15 years ago that suggests that people might vote one way or another, makes a perfectly nonpartisan on its face voter drive into a partisan voter drive, is I think an unacceptable interpretation of what nonpartisan means, and I think you're going to find that it has a tremendous, tremendous chilling effect, because as we know, as we all know, there are many, many organizations out there who do nothing but nonpartisan GOTV and voter registration, who have never been accused of doing anything else, who do focus on certain democratic voter groups, and there may be information out there that suggests that perhaps those groups in past elections or in some elections have voted a certain way primarily, but

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that doesn't mean that the activity itself, what they go out and do, isn't entirely neutral in getting people registered and getting them out to the polls.

Finally, the proposed regs would also prohibit unions and corporations from giving dues money to organizations engaging in voter activity that don't meet the requirements of nonpartisan voter activity. I want to suggest to you that this rule too is misguided and I think has no support either in the law or in fact. In fact, the

opposite is true. Right now under BCRA a union could donate soft money, if state law permits, to the fund of the state party, and the state party could turn around and use that money, allocate in an allocated way, along with the federal share, to go out and do partisan get-out-the-vote activity.

A union itself could conduct a generic voter drive aimed at the public and could allocate the cost of that voter drive between its soft money separate segregated fund and its hard money.

So to say that a union cannot give money

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to another organization that's not a party, to do something that it itself can do and that it can do in giving to a political party makes no sense whatsoever.

In conclusion, I think that there is no factual record for changing these rules, the nonpartisan get-out-the-vote and voter registration, and there's no legal support for doing it, and I question why the Commission is doing this right in the middle of a federal election. I think it's going to be very confusing and it's going to be detrimental to what is the clear congressional intent, which is to have as many people as possible participate in federal elections.

Thank you.

CHAIRMAN SMITH: Thank you, Ms. McCormick. Mr. Potter.

MR. POTTER: Thank you, Mr. Chairman, Commissioners. It's a pleasure to be here this morning.



I'd like to start by saying that the

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comments filed by the Campaign Legal Center and the testimony that I'm going to give this morning focuses on the 527 issue. As we explained in our comments, we think that is the immediate issue before the Commission at this time, that the actions of certain 527s in what we believe to be violation of existing federal law is what the Commission ought to focus on, that the Supreme Court has treated political organizations differently from issue organizations such as 501(c)'s, and that it is therefore appropriate for both legal reasons and practical reasons for the Commission to bifurcate this rulemaking and to deal with the immediate problem immediately, and to deal with the perfectly interesting, important and complicated questions raised by much of the testimony involving the 501(c)'s in a different context and on a different schedule.

Having said that, I was struck, as I prepared for my testimony this morning, that I believe we are at a place that many of us have been before, and that place is June of 1988. In June of

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1988 you had the Dukakis campaign announcing that it was going to raise \$100,000 soft money contributions from a whole range of individuals and businesses, and it was going to spend them essentially to elect Governor Dukakis President over the course of the summer and the fall by raising this money, spending it through state parties, but for the purpose of electing the Democratic candidate. The initial reaction of the George H.W. Bush campaign and the Republican National Committee was that this was illegal, that just looking at the statute it was obviously illegal, that this was, to quote Cleta Mitchell

in a different context in the earlier panel, referring to Mr. Soros, an amazingly sort of bald and bold action in contravention of what was understood to be the federal election laws.

By August that moment had passed. By August the Bush campaign, of which I was then a lawyer, had taken the position that if the Democrats were going to do this, they couldn't afford to be left behind, and they were going to go

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ahead and raise soft money contributions in what was called Team 100 up and going by the Republican Convention that year, and they would beat the Democrats at their own game. The political calculation made, the regulatory calculation made clearly was that the FEC would not go against both candidates if they both were doing that, a calculation that appears also to have been made by the Dole campaign when soft money then leapt yet another barrier in '96, that if both sides were raising and spending soft money in presidential elections starting in '88 and then more dramatically in '96, the FEC would really have no choice but to accept that as the status quo, and that's what happened in '88. Soft money became part of the process for the next three presidential elections. That's what happened in '96 when the Commission then split and was unable to move after that election to deal with the spending by the political parties.

So I think it's important that the Commission deal with this matter at this time, not

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wait and prove itself unable to deal with it, run the risk that the other side of the political equation will use that as a justification to go forward itself, and then be faced yet again with a circumstance where the political reality has moved past you and it will be difficult to deal

with any of this after the election.

So for all those reasons, I do urge the Commission to proceed with the 527 side of this in an expeditious manner.

Now, why is this important at all? It seems to me it's important because of what the Supreme Court reminded us most recently in *McConnell*, and that is, that federal money is supposed to be spent in federal elections. There are gray areas. There are questions of which groups are regulated and not, but the core of federal election law is the concept that groups whose major purpose is to influence federal elections and would spend--sorry--to influence elections and would spend \$1,000 or more to influence federal elections, should be registering

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reporting, and the most important part, using the limited money permitted in federal elections, which means no corporate, no union and limited individual funds.

To me this does not mean that political speech is being wiped out, as an earlier panelist referred to it. What it means is that political speech is occurring with money that is permitted in federal elections. Indeed I note Justice Rehnquist in the *McConnell* decision, in his dissent, looked at everything that was going on and said, I don't really understand why this case is here, I don't understand why Congress had to pass BCRA because the existing federal election laws passed in '74 already cover expenditures, quote, "for the purpose of influencing federal elections," and that should have been sufficient.

Now, what's happened, obviously, and Justice Rehnquist is understandably detached from the day-to-day reality of the FEC and its enforcement actions, is that over time I think the FEC has become detached from the statute and from

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its own regulations, and has ended up in a situation where it is not interpreting the law the way it has been written. In particular I would say

that's another reason for this rulemaking at this point. As you know, it's the position of the Campaign Legal Center that the law in this area should already be clear. Indeed, we have publicly announced that we filed complaints, believing there are ongoing violations of this law, and I think that is the case.

However, the Commissioners have introduced an element of uncertainty here, I would say particularly going back to '99 and the statement of reasons in the Clinton and Dole audits, saying that four Commissioners would not apply the statute as I understand it in terms of what the statute says, what Buckley says, what the regs say, and what--by my count when I looked at it--seven or eight FEC AOs have said, but instead, would unilaterally decide they would require Express Advocacy by these political organizations in order to apply the FEC rules.

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CHAIRMAN SMITH: We're very far into the red on this one, if you could try to wrap up.

MR. POTTER: In that case, thank you, I will conclude by saying simply two things. One, that I don't think this is a change in the middle of the election cycle. This is a restatement of existing law, and it's a good time to do it while it will affect the election. Secondly, I know that the Vice Chairman has expressed concerns about circumvention. I think the imposition of gift tax on contributions or (C)(4)'s makes that less likely, and I'd say we don't have much evidence of it in the current context so I'd leave that for another day.

Thank you.

CHAIRMAN SMITH: Thank you, Mr. Potter.

Mr. Sandler.

MR. SANDLER: Thank you, Mr. Chairman, and I appreciate the opportunity to appear today on behalf of the MoveOn.org Voter Fund, which is an association whose mission is to enable its supporters to make their voices heard on important

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public issues.

There are 170,000 donors to the organization, to the Voter Fund, virtually all of them small donations, and to be sure, a few large donations from individuals. The Voter Fund operates independently of any federal candidate or party committee. For four basic reasons the Voter Fund opposes the proposed regulations.

First of all, they're bad policy. The large donors to the Voter Fund could as individuals pay for the same independent communications and advertisements that the Voter Fund itself does.

All they're doing by contributing to the Voter Fund is magnifying the impact of the 170,000 small donations, 10, 20, 30, 40 dollars. We submit that no good purpose would be served by preventing those small donors from having their voices heard on the national debate on these issues.

Second, BCRA was never intended to impair the ability of groups like the Voter Fund to operate in this way. BCRA did not amend one word of the definition of "expenditure" or "political

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committee", and as a matter of fact BCRA expressly permits, expressly permits groups like the Voter Fund to pay for communications promoting, attacking, supporting, and opposing federal candidates right up to election day. It's right in the electioneering communication provisions of BCRA.

Third, groups like the Voter Fund do not implicate the problem that BCRA was intended to solve which is the use of large donations to buy access to and influence over federal candidates and office holders. The 170,000 people who donate to the Voter Fund, including the very largest donors, get no access of any kind to any federal candidate or office holder. They expect and they receive no favors from elected officials, from the powerful. They know exactly what they're buying. They're buying a chance to meaningfully communicate their views about the policies and agenda of the Bush administration.

And finally, the proposed regulations in terms of this Major Purpose Test would call on this

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agency to make judgments about the subjective intent of organizations. This is an issue that has been visited and revisited many times before this agency. You can't base government regulation about people's speech, political speech on what is in their hearts, and what is in their minds. There's got to be an objective standard. That standard is already in the law. It hasn't changed. It's there. It's the one that is a limit on the Commission's authority to do anything else.

That concludes my statement. Obviously, after Lyn goes, we'll be happy to take any questions the Commissioners may have.

CHAIRMAN SMITH: Wow. Even though you were over the light, for most of our panelists, that was really good.

[Laughter.]

COMMISSIONER McDONALD: You've ingratiated

yourself.

[Laughter.]

CHAIRMAN SMITH: Thank you, Mr. Sandler. Ms. Utrecht.

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MS. UTRECHT: Thank you, Mr. Chairman.

I'll try to do even better.

I'm here today on behalf of the Media Fund, which is an unincorporated political organization under Section 527. Rather than repeating the comments that we submitted or summarizing them, I'd like to just go right in and address three points based on the discussions in the previous panels yesterday and this morning.

The first one is the Major Purpose Test.

The proponents, in urging the Commission to change the definition of "political committee" based on the Buckley Major Purpose Test, have I believe

mischaracterized and misstated what that test says, and to I think the most recent articulation of that test is found in the District Court opinion in the case that just came down recently in the Triad situation, and that court was quoting also the District Court in the GOPAC decision. In that case the judge said: even if the organization's major purpose is the election of a federal candidate or candidates, the organization does not become a

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political committee unless or until it makes expenditures in cash or in kind to support a person who has decided to become a candidate for federal office.

Thus, I believe that under that standard the Commission cannot simply create a Major Purpose Test that would apply regardless of whether the organization makes expenditures or makes contributions to candidates.

The second point I want to address is this notion that there is one definition of "political committee" for one type of organization and another definition of "political committee" for other types of organizations. That position seems to have been advanced in the previous panel and also yesterday

in that there would be a different standard that the Commission would apply that they seem to be deriving from Buckley that would say that Express Advocacy is the definition for political organizations even if they do not engage in what are contributions and expenditures under the current meaning of the law. That is a completely

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circular argument, and I think sheds no light on how the Commission could possibly expand the definition of "political committee" to organizations that do not make expenditures or do not receive contributions.

In Buckley the definition of "contribution" applies to three different things. Contributions are donations made to an entity for the purpose of that entity making contributions to candidates or for that entity to make express advocacy communications or for that entity to make coordinated activities communications with candidates. In the absence of that, a donation from an individual to an organization is not a contribution.

The third point I'd like to address relates directly to the independent organization like my client the Media Fund. Congress knew exactly that such organizations existed. They knew that after BCRA more soft money would flow into those organizations, and they knew that those organizations were going to be running issue ads

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that depicted federal candidates and made comments or suggested a point of view regarding the actions of those federal candidates.

Commissioner McDonald had previously read a quote



from Senator Lieberman, but I would like to conclude by just reading three additional statements, all of which occurred during the consideration of BCRA and particularly the electioneering communication provisions. First is Senator Kohl. "This legislation does not ban issue advocacy or limit the right of groups to their views. Rather, the disclosure provisions in the bill require that these groups step up and identify themselves when they run issue ads which are clearly targeted for or against candidates."

Senator Levin: "The bill does not prohibit such ads from being aired by non-party groups with unregulated money. It only requires disclosure of the sponsoring group's major contributions if the group spends over \$10,000 on such ads. This is a very reasonable and modest limitation on political advocacy. It is very clear

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in order to withstand charges of ambiguity."

And finally, Senator McCain: "Of course the bill's bright line test also gives clear guidance to corporations and unions regarding which advertisements would be subject to campaign finance law and which advertisements would remain unregulated."

I think it's important for the Commission to bear in mind as they go forward that this is not an accident that Congress left this activity outside the scope of the regulation of the law, and that's the state of the law as it exists right now. Thank you.

CHAIRMAN SMITH: I want to add the request, if we can make sure that those comments are in the record. I don't believe those were part of your--were those included in your written comments?

MS. UTRECHT: No, they were not.

CHAIRMAN SMITH: Then without objection, we'll ask to have those added to the record if you could supply us with a copy. Thank you, Ms.

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Utrecht, and barely over the wire, which is what we're aiming for.

I'm the first question to ask questions on this panel, and I wanted to focus back on this

major purpose issue. First, in terms of setting it up, I find this idea that the gift tax is going to make a difference just to be close to patently absurd. That's not what I heard any of the tax people say yesterday or even the 501(c) people say. What I heard them say is, well, if the IRS gives us certain advantages, that's what we'll take, but we'll do whatever system we need to do. And I note again the report I mentioned in the last panel. Just a year ago four of the major reform groups were out there worrying 501(c) nonprofit organizations were going to be the big problem. It says, while the campaign finance law encourages soft money to flow into nonprofit entities, the tax code establishes 501(c)'s as the organizations that disclose the least information, and that's why they would be preferred. The joint effect of the new laws, the 527 disclosure and BCRA, is to make a

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501(c) nonprofit group somewhat more attractive than registering as a 527.

Again, we have the data included in here noting 501(c)(3), the Business Roundtable that ran over 8,000 TV ads; the 501(c), the Americans for Jobs Security that ran nearly 6,000 ads; the Chamber of Commerce, a 501(c), \$35 million in political expenditures, and this history goes way back. So I want to explore again where we're going to be with 501(c)'s.

Mr. Potter, if a 501(c) does development a primary purpose of affecting federal elections, are they a political committee or are you offering a blanket exemption, 501(c) is your out?

MR. POTTER: I think there are two answers, and I'd

also like to address your gift tax issue.

CHAIRMAN SMITH: I don't want you to address the gift tax. You stated your opinion on that, and we just don't have time, so I'd like you to go on on the main question.

MR. POTTER: Fine. I hope for another

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Commission I'll have a chance to address it.

The answer to your question is, if they change their major purpose from being social welfare or charitable or one of the other permissible major purposes for a (c) and instead become an organization with a major purpose of influencing elections, they ought no longer to be a (c). They've become a 527, and then you would move to the question of whether they have \$1,000 in expenditures or contributions to qualify as a political committee.

CHAIRMAN SMITH: That's my problem though. What if they're just filing their 501(c) status? In other words, are we still going to investigate a group? If we get a complaint filed against a 501(c) are we going to have to investigate them to determine if they've reached the major purpose, or do we just say, hey, they're a 501(c). The IRS hasn't revoked their status. They're okay.

MR. POTTER: As I indicated in my opening comments, I think the whole issue of how you deal with (c)'s should be separated from how you deal

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with 527s. In terms of how you do that, I don't think you can resolve that in this regulation. CHAIRMAN

SMITH: I'm asking you if we have an enforcement matter brought to us next week, how am I going to resolve that?

MR. POTTER: Well, you're going to resolve it by investigating whether in fact the complaints in the enforcement matter are correct, and if the complaint is that their major purpose is to engage in political activity, which was one of the questions noted earlier was in the Christian Coalition, I would think a defense to that is that they have qualified with the IRS under (c) status. That may not be a successful defense if the evidence is entirely to the other way.

CHAIRMAN SMITH: So what you're arguing is that we would still need to investigate these groups as to what their major purpose was if we had a complaint alleging that they were violating a 501(c) status.

MR. POTTER: Whenever you have a complaint that there's been a violation of law that a group

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has not done something they're required to, you would put it in the enforcement process.

CHAIRMAN SMITH: "Yes" will suffice.

All right. So we have to go ahead and investigate these organizations and I note that-

MR. POTTER: I'm sorry, Mr. Chairman. I didn't say you have to investigate. I said you put them in the enforcement process. You may decide not to investigate them.

CHAIRMAN SMITH: But your position is, if we get an allegation that they're in violation of their 501(c) status, that this is their major purpose, we still need to do an investigation of the group; is that correct?

MR. POTTER: Not whether they're in violation of their status. The reason you would investigate them is to

determine whether they are in violation of--

CHAIRMAN SMITH: Whether it's their major purpose.

MR. POTTER: It's your responsibility. CHAIRMAN  
SMITH: Which is whether it's

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their major purpose.

MR. POTTER: That would be the initial  
question, yes.

CHAIRMAN SMITH: Okay. So we'll still  
have to investigate the 501(c)'s if they come in.  
Now, what standard should we use to determine their major  
purpose, Express Advocacy?

MR. POTTER: You would have to investigate any  
group where there was an allegation of an election law  
violation.

CHAIRMAN SMITH: So if it's a 501(c) what standard  
do we use to determine their major  
purpose, Express Advocacy, or do we then say, no, we'll look  
at all the stuff you do and determine whether or not we think  
you're in violation of your 501(c) status?

MR. POTTER: I read Buckley as saying that it is  
not sufficient to merely say that their purpose is to  
influence federal elections, unlike political organizations.  
Buckley said, therefore, we are going to save the statute by  
using Express Advocacy. In McConnell the Court said Express  
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Advocacy is not constitutionally required, so  
Congress could come up with some other formula, but they have  
not done so.

CHAIRMAN SMITH: You're giving very long answers--I  
have to be honest--to what I think are very simple questions,  
and then a lot of the answers aren't answering the question.  
But as I understand it--and I'm not going to ask you this  
because I'm not getting good quick answers--you're saying if

it's a--if we get an allegation that a 501(c) has a major purpose and has failed to register as a political committee, we need to investigate it, and the standard we would use to determine whether or not they have in fact a major purpose of influencing election, would be--

Mr. Sandler, what do you think it would be?

MR. SANDLER: I think the--

CHAIRMAN SMITH: Would we use the Express Advocacy because that's what 501(c)'s are entitled to, or would we look at their other activity on the grounds that maybe they don't deserve to be a

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501(c)?

MR. SANDLER: The problem with the whole analysis is that you're dealing with two completely different statutory schemes that serve two completely different purposes. To say that 501(c)'s should be subject to one standard under the Federal Election Campaign Act, but 527s should be subject to another standard is absurd. The tax law has nothing to do with how these groups should be treated under the Federal Election Campaign Act. It's not even--there isn't any Major Purpose Test under the tax law. It's a primary purpose test. It's completely different from what you're talking about.

CHAIRMAN SMITH: Don't we run into the same problem with 527s? That is, there are 527s that do things that are not regulated under the FECA. I think we can all agree on that. How do we determine what their major purpose is, Ms. McCormick, any ideas?

MS. McCORMICK: I think you have to use the Express Advocacy Test. I don't think you can

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have a test that's circular as any of the tests that are being proposed in this notice of

rulemaking, because the standards that you're bringing in presume that the purpose of the activity is to influence federal elections. You can't start out with a standard that presumes you're going to influence federal elections and then use it as the test for whether you're trying to do that, and that's exactly what these federal election activity and the support, attack--it all assumes because they were put into the law to govern the activities of an organization that no one questioned was a political organization, it assumes the intent of the activity is to influence a federal election. Express Advocacy is the only clean-cut test.

CHAIRMAN SMITH: Real quick for Ms. Utrecht or Mr. Sandler, or both, but I'll ask you both to be brief. Would you comment a little bit--you did some in your written comments--on the idea of using sort of intent or declared intent as a basis for figuring out major purpose? Whoever

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might want to go first. I think, Mr. Sandler, you might have commented on it more, but I don't think, Lyn, you've had a chance to speak.

MS. UTRECHT: I think intent does not work as a standard because first of all an organization really can't have intent. An organization may have a purpose, but not intent. If you're looking at intent, you then have to look at the individuals who are associated. That could include donors, it could include officers, it could include other people who are involved in organization, and what their intent may be is completely different than the organization's.

Just to give a very brief example, in the case of a charitable organization, there are many people who give money to charitable organizations and who raise money for them who may have the intent of expanding their own personal business. A stockbroker, a real estate agent, they think if they're involved in this they may get more clients. That has nothing to do with whether the 501(c)(3) has a tax-exempt purpose. That is determined

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basically only on how the charitable organization spends its money.

CHAIRMAN SMITH: I'd like to probe some of that further, but I'm out of time, so we will go to the next up, who is Vice Chair Weintraub.

VICE CHAIR WEINTRAUB: Thank you. How many minutes do I have on this one?

CHAIRMAN SMITH: Eight minutes.

VICE CHAIR WEINTRAUB: Eight minutes, okay.

Ms. Utrecht, I'm going to go back to you because I think you did a particularly effective job in your written comments, and you alluded to it briefly in your comments here today, of talking about the legislative history of BCRA and how we got to where we are today. Because several commenters have suggested that regardless of what was or wasn't regulated in BCRA, we need to go back to the '74 law and sort of read the plain words of the statute, but I think that we can't ignore what members of Congress had reason to understand was going to be the lay of the land after BCRA because

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it seems to me that a legislative deal was struck, and people agreed to regulate some conduct and leave some conduct unregulated, and I don't know whether the votes would have been there had they--had this whole issue been surfaced in that debate. Actually, I think the issue was surfaced in this debate, and it went in a different direction from the way we're going now, and I want to give you the opportunity to elaborate a



little bit on that.

MS. UTRECHT: Right. Thank you. I think actually Mr. Baron yesterday made a very persuasive argument explaining this legislative history where he noted that the ultimate result in BCRA, including the electioneering communication provision, was the result of seven years of negotiation in Congress over all of the details and exactly and precisely how far Congress intended to go. I think if you look back--and we've cited a lot of the legislative history, and there are some pertinent quotes in there in our comments--but go through what the understanding was of the members when they voted on this legislation.

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It was quite clear, I believe, that they understood that there was this area of unregulated activity out there that included the types of activities that the Media Fund, for example, engages in, that were not intended to become expenditures within the meaning of the law and that would not trigger political committee status, and I don't think that you can ignore that and go back and say, oh, well, we're going to pretend that this discussion didn't happen and we're going to go back to Buckley nearly 30 years ago, and find some rationale for defining political committees in a different way.

VICE CHAIR WEINTRAUB: Mr. Sandler, I want to give you the opportunity to talk about that, or to answer the question that the Chairman asked a couple of minutes ago about the purpose of the organization and how it should be determined.

MR. SANDLER: I think that the--again, the electioneering--let's go back and look at what BCRA did and what the Court said. In the electioneering provision Congress changed the definition--not the

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definition, but extended regulation to non-Express Advocacy communications in one limited set of circumstances, broadcast communications within 30 days of primary, 60 days of a general election mentioning a federal candidate. In all

other situations clearly the definitions of "expenditure" and therefore of political committee were left untouched.

The Court said the definition of "expenditure" remains unchanged as a matter of it's the same statute and here's how we interpreted it. In these limited circumstances, Congress has changed that definition. They moved the bar, and we find that that's okay. That leaves absolutely unchanged the definitions of "expenditure" and "political committee" that we've lived with for 25 years.

VICE CHAIR WEINTRAUB: I just want to add one quote to the quotes that you cited today comes out of your own brief, your comments. Senator Jeffords, author of Snowe-Jeffords, explaining, as you put it, that Congress did not intend to acquire

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groups that ran electioneering communications to register as PACs. Indeed it says right here, "it will not require such groups to create a PAC or another separate entity." I find that pretty persuasive coming from the guy that wrote the language.

I take it that you two--actually, I take it that you three would agree that we have to start with an expenditure of \$1,000, and then get to major purpose, that we can't start with major purpose. Major purpose would be a limiting construction once we get to the expenditure.

MS. McCORMICK: Can I give you an example of that, because I was really disturbed yesterday by the avowed purpose test that was being urged upon the Commission. Supposing that you have a labor organization that says, "We're going to put all of our resources this year into defeating George Bush," and I'm not speaking necessarily of my organization, but any labor organization.

VICE CHAIR WEINTRAUB: You're not avowing a purpose

here, are you?

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MS. McCORMICK: No. Supposing--yes, I wouldn't want to be construed as openly stating a purpose.

And supposing what they do is they take every last dollar of dues money they can scrape from any source in the budget, and they spend it all on membership communications, GOTV aimed at their members and nonpartisan voter registration. How can it possibly be that that organization, because it is engaged in those activities which are not exempted from the definition of federal election activity, could become a political committee? How could a (c) organization that says, "Send us all the money and we will use it to defeat George Bush," and then goes ahead and uses it for nonpartisan voter registration become a political committee?

You can't say that just because you say this is your purpose, that without an expenditure or a contribution you become a political committee. It turns the Act on its head.

VICE CHAIR WEINTRAUB: Mr. Potter, I don't want you to think I'm neglecting you. Yesterday it was brought up that the Campaign Legal Center, your organization, filed a brief in the 11th Circuit--I hope you won't be surprised that we're going to bring this up today and ask you about it--in which you said, "BCRA's requirements relating to the financing of electioneering communications do not cover all forms of electioneering activity. For

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instance, they will not apply to spending on non-Express Advocacy, electioneering telemarketing and direct mail communications, newspaper advertisements or Internet communications. Likewise, they will not apply to independent spending on non-Express Advocacy, electioneering television or radio advertisements that are aired more than 60 days before a general election or 30 days before a primary. Thus, even with the enactment of BCRA, Section 527 organizations will be able to conduct considerable amounts of federal campaign finance activity outside the scope of FECA, the original '74 Act."

It looks like you were saying then that

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groups like the Media Fund and the MoveOn Voter Fund-- actually, I'm not sure if you run advertisements--I guess you do. Come to think of it, I now recall that you do.

[Laughter.]

VICE CHAIR WEINTRAUB: Groups like these would be able to run ads as long as they avoided Express Advocacy and they stayed outside the electioneering communications window. And it has been suggested that you are now taking a contrary position, so I think it's only fair to offer you the opportunity to explain the difference.

MR. POTTER: I'm so pleased you did. I thank you because I was concerned by that.

First off, you will note that the brief was referring to what BCRA enacted and required, and not the underlying FECA statute from '74.

VICE CHAIR WEINTRAUB: You refer to FECA

in there.

MR. POTTER: Correct. And I would draw your attention--I won't read the whole thing given the time constraints, but I will submit for the

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record the rest of that brief, and in particular, we address this issue on page 14 of the brief in Footnote 18, where we look at the same discussion we're having today. We talked about what Buckley had said. We said, however, the Court--meaning the Supreme Court--indicated that the limiting Express Advocacy construction was not applicable to organizations that are under the control of the candidate or the major purpose of which is the nomination or election of a candidate. Although the avowed primary purpose of the Internal Revenue Code Section 527, Organizations, is to influence elections, the FEC has not appeared inclined to proceed against such organizations. And we then went on to cite Carl Sandstrom's testimony, and ended up with testimony in the hearing, saying we should not make the mistake of assuming that the FEC's inaction in this area means anything other than the fact that the FEC lacks four votes to enforce currently-existing law.

In other words, the point we were making to the 11th Circuit is the same point we're making

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today. It is the Commission's inaction that has left this area of law unenforced, not anything in the statute.

VICE CHAIR WEINTRAUB: I'm sorry. I just need to follow up with one quick question. But it says in your brief that even with the enactment of BCRA, Section 527, organizations will be able to conduct activity outside of FECA, and you

specifically mention independent spending on non-Express  
Advocacy ads before the 60-day window.

Isn't that what the organizations are doing?

MR. POTTER: Because the FEC has not  
enforced the existing law, and they did not do so  
according to Commissioner Sandstrom because they  
didn't think the FEC had the constitutional ability to do  
that. That defense has been removed in McConnell, so that's  
why we believe you are now in a position you should fully  
enforce the definition of "political committee status."  
There will still be 527s that are not registered with the FEC  
that are still engaging in non-federal election activity, but  
these groups will be registered.

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VICE CHAIR WEINTRAUB: I used up more than  
my time.

CHAIRMAN SMITH: I'd like to go on, but  
time is--I just have to note, by the way, Mr.  
Potter, in your opening comments you said you thought we were  
in June of 1998. Yesterday we were  
told we were in January of 1976. I'm not quite  
sure--

[Laughter.]

CHAIRMAN SMITH: Commissioner Toner, you're next.

COMMISSIONER TONER: Thank you, Mr. Chairman.  
Perhaps it's like Ground Hog Day, we wake up and every day is  
the same.

[Laughter.]

COMMISSIONER TONER: And we're still talking about  
what a political committee is. I suspect we may be doing so  
as well tomorrow. Thank you, Mr. Chairman.

Mr. Potter, I'd like to begin with you. Senator  
McCain, last month in testimony before the Rules Committee,  
provided testimony there that's

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been entered into the record. I'd like to read briefly from a portion of that. Senator McCain said, quote, "What the FEC needs to do now is simply force existing federal election law, as written by Congress in 1974 and interpreted by the Supreme Court in 1976. It defies the while purpose of the FEC to say that it should not enforce this law in the middle of an election year because such enforcement might affect that election. The fact that the FEC has neglected to enforce the law correctly for the last several years, because it erroneously interpreted rules for 527s, is not a reason for the Commission's continued failure to enforce it now that the Supreme Court has made it clear in McConnell that they should do so," end quote.

Do you concur with Senator McCain's observation there?

MR. POTTER: I do.

COMMISSIONER TONER: And why?

MR. POTTER: What we're dealing with here is the potential for the, I think, intrusion of

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large sums of corporate and labor money as well as unlimited individual funds into a federal election for the purpose of influencing a federal election through organizations that have self-proclaimed themselves to exist for the purpose of influencing elections. If that is allowed throughout this election cycle, I think it's very hard afterwards to put the genie back into the bottle and to say that's not permitted by law and therefore we're going to require that activity to occur through a federal political committee, which is what the '74 law said and what BCRA did not change.

COMMISSIONER TONER: I want to follow up on that

because I think there's been some good observations over the last couple days about we had a statute that was passed in the 1970s and then there was a lot of glosses that were put on it by this agency, by courts, and basically certain positions were developed over the years. You made reference to 1988 and the historical developments that occurred there, and the upshot I think has been suggested here is that if the agency

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essentially acquiesces in certain activities, that it's problematic for the agency later to change course and take a tougher view of the law, a more stringent view of the law. My sense is--and I want to make sure I understand this--is it your view that in terms of 527 organizations that do run attack ads and do partisan voter mobilization activities, is it your view that if the agency this year does not decide that that is subject to hard-dollar limits, that essentially that is going to become the law unless someone goes to court and can get the courts to overturn our position?

MR. POTTER: I think that's been the lesson we ought to draw from history, that when there have been these developments and groups have pushed beyond existing limits and the FEC has not responded in a timely manner, whatever occurs in that election becomes the new baseline, the new status quo for the next election.

So as somebody who was involved in looking at these issues as Congress passed BCRA, I think our assumption was that BCRA would only work if

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there was an active enforcement of the full existing law by the Federal Election Commission.

It was foreseeable that groups would try to get around the



law by engaging in this activity through 527s. It was also foreseeable that we would try to prevent that, and that was one of the goals of the Legal Center, by making certain that if groups qualified as political committees they only use federal funds.

So I think the history indicates that if the FEC doesn't deal with this in a timely manner, it will then refuse to go back and do so.

COMMISSIONER TONER: In later years.

MR. POTTER: Later years.

COMMISSIONER TONER: You're represented presidential candidates, and you mentioned your various clients that you've represented over the years. Is it your view, professional view, that if the FEC does not take action this year to regulate 527s, that this year and beyond Republican-oriented 527s are going to be aggressively involved in this arena, maybe match what Democratic groups are

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doing, but bottom line, that if we don't take action this year, this is going to become a bipartisan arms race in this area?

MR. POTTER: I think that's the foreseeable result. That's what we've learned from history. It won't make it legal, but it will occur.

COMMISSIONER TONER: Ms. Utrecht, I'd like to briefly follow up with you--I only have a couple of minutes--and turn to the allocation question because that's obviously another major issue.

Prior to BCRA, obviously, when the national parties ran attack ads and partisan voter mobilization activities, that there was this minimum federal percentage that in presidential election years they had to use 65 percent hard dollars for those activities. Now, as we're seeing, a lot of outside groups are doing substantially the same activities and some groups are reporting various allocation percentages. One has been reported as 2 percent federal, 98 percent nonfederal, and I'm sure there are other groups that have other allocation

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percentages. But the general observation is being made that hereafter the passage of a statute that was designed to restrict the amount of soft money spent in elections, you have outside groups that are using much greater proportions of soft money for the same activities that the national parties used to do subject to a 65 percent minimum.

As I understand from your comments--and I just want to make sure I understand--you oppose, and you don't believe it's appropriate for us to have any minimum federal percentage for nonconnected organizations that do these activities?

MS. UTRECHT: That's correct. COMMISSIONER

TONER: And why is that?

MS. UTRECHT: Because I think in the party committee context it's very different. First of all, there is a reasonable presumption that party committees are engaged in--and especially at the national level are engaged in activities that are intended to influence the election of all of the candidates of the party at the local, state and

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national level. Looking at that across the board and saying we're going to apply some minimum percentages makes sense. That in fact in some ways made things easier for party committees because they knew how to allocate and they didn't have to do it on an expenditure-expenditure basis.

But in the case of nonconnected organizations, I don't think that there is any presumption. I mean you have a completely wide range of organizations that are engaged in all different types of activities, and to arbitrarily apply a percentage to them makes no sense.

For example, you could have organizations that are engaged in, primarily engaged in state and local candidate

activity and incidentally engage in some activity that relates to a federal candidate. For example, they would do a mailing or an ad that mentions the presidential candidate, but also in the context of a gubernatorial election. Applying an allocation formula to that type of activity based on what the communication is, is very different than arbitrarily assigning to them a

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federal percentage.

COMMISSIONER TONER: And you would be comfortable if the agency concluded that when the Democratic National Committee historically did these activities and had to use at least 65 percent hard dollars, and now certain outside groups may be doing substantially similar things, that there should be no federal percentage whatsoever at all?

MS. UTRECHT: No. There's a distinction. I think if you're engaging in activity that does not expressly advocate a federal candidate and you are not an organization that has received contributions or made expenditures, that there is no allocation. In the case of an organization that has a federal and a nonfederal account, there is an allocation, but the FEC has allocation regulations that deal specifically with how you calculate the percentages in those cases, and under the current regulations that's based on the amount of money that that organization spends on behalf of federal as opposed to nonfederal activities.

COMMISSIONER TONER: And to follow up real

briefly, so in terms of generic appeals, if in citing the regulation--the section in our regulations you mention, the federal split that is determined based on the proportion of direct

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contributions to federal candidates, direct contributions to nonfederal candidates for some testimony that can easily be developed so that as long as you don't make any direct contributions to federal candidates, your federal percentage is just zero or close to zero and your nonfederal percentage is close to 100 percent or even 100 percent. You're comfortable with that in terms of this agency implementing FECA, that that's where we have to be?

MS. UTRECHT: I think that has been an allocation formula that has worked for many years.

COMMISSIONER TONER: Do you think it's sound under FECA?

MS. UTRECHT: Yes, I do.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Commissioner

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Toner.

Commissioner McDonald.

COMMISSIONER McDONALD: Mr. Chairman, thank you, and let me say specifically to the Chair, I've appreciated his comments on opening this session.

Let me--I'll go first of all to welcome all of you. All of you are long-time valued friends of mine. Commissioner Potter, I think I'll start with you if I may, because one, I want to give you an opportunity to respond to fairly serious--in regards of being patently absurd. That didn't sound too good to me. I've been accused of it. But I did want to give you a chance first of all to respond to a question earlier that I think you wanted to respond to, and I think it only fair that you have an opportunity to do that.

MR. POTTER: Thank you, Mr. Chairman. Well, I just wanted to notice that the Commission has in front of it in the comments filed in this rulemaking by Professor Frances Hill some information on the gift tax issue. On page 8 of

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her comments she notes that when the San Francisco law firm filed the initial private letter ruling dealing with 527s that expanded the understood universe of what 527s could do, that law firm specifically stated publicly and cited in Professor Hill's testimony, that one of the advantages of using 527s is that it would avoid the very onerous gift tax implications on gifts to (c)(4)'s and that therefore they anticipated that opening up 527s to engaging in this sort of activity would enable a great deal more money to flow through to 527s that would not go to (c)(4)'s because of the gift tax issue.

COMMISSIONER McDONALD: Thank you.

MR. POTTER: I appreciate the opportunity to clarify that.

COMMISSIONER McDONALD: Peggy, it's good to see you. Lyn, Joe, welcome.

Let me turn if I could--and I apologize. The only reason I'm asking for quick answers is, one, as slow as I talk, I take up most of the time.

[Laughter.]

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COMMISSIONER McDONALD: And secondly, I do want to have an opportunity because it's just a wonderful panel. I think for the audience, to read the history, as the Vice Chairman indicated, that, Lyn, you gave before, is extremely informative, and as I said to our friend Joe Sandler, seeing him out in the hall, I got a little lesson on 527s myself,

and needless to say, the comments by the other two panel members I think are extremely important and kind of round out this issue.

Peggy, I think it's safe to say that most people think American labor is very involved with the Democratic Party, wouldn't you say as a general approach that's true? If you didn't, you would be denying all of history, by the way, so say yes, if you don't mind.

[Laughter.]

MS. McCORMICK: Only if it's not an admission against me.

[Laughter.]

COMMISSIONER McDONALD: Actually, it's kind of the other way around, believe it or not.

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It's interesting. I've seen by this get-put-the-vote business, and obviously all groups, as have been testifying for the last two days, make a very serious effort to get out the vote. The leadership of any organization wants their members to reflect hopefully their thoughts, hence, that's why they're in the leadership theoretically. But I think recent history shows, at least in terms of American labor, and certainly it's true not so many years ago, about 40 percent of American labor's voting Republican. Is that not true?

MS. McCORMICK: True. And the NAA has quite a substantial number of Republican members as well as members who vote independently and Democratic.

COMMISSIONER McDONALD: I suspect, because I haven't seen the figures on that, I suspect corporate kind of can show the same thing. I would tend to think that that may be true of corporate America as much as it is labor. See, I wasn't trying to trap you. I just wanted to confirm what I thought I knew.

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Let me go to Joe real quickly. Joe, on the Malnek [ph] case, have you had a chance to look at it, and do you have any thoughts on it in the context--you or Lyn, either one--in the context of this matter today? I just saw some comments by the RNC referencing that case that I think was just settled. Do you have any thoughts about it or have you even had a chance to look at it?

MR. SANDLER: Not really a chance to analyze it specifically in the context of this rulemaking. Again, I think that we have to assume that the last word on this issue is McConnell, reaffirming the holding of Buckley, and that's where the answer to the question of what the Commission can do about this issue lies.

COMMISSIONER McDONALD: The RNC, in their comments submitted, on the bottom of page 3, the top of page 4--and I apologize, I'm not trying to take it out of context. I'm just trying to kind of sum up what they said they felt was the most important comment to Charlie Spies, who was here at the Commission for a good period of time. Says,

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just recently, just last week, March the 30th United States District Court for the District of Columbia rule that accordingly, because Triad and then Triad, Inc.'s major purpose was the nomination or election of specific candidates in 1996, and because Triad received contributions aggregating more than \$1,000 in 1996, I find that Triad and Triad,

Inc., operated as a political committee.

Their overall approach basically goes back to what some of the commenters have said, which is we don't really have to have this fight because clearly the Commission has had this ability throughout, and I just wondered if either you or Lyn wanted to comment on it, or really if you haven't had a chance to look at it, I didn't mean to blind-side you, but I thought you might have seen it.

MS. UTRECHT: Yeah. The Triad case actually is one that I read the quote from in terms of what the test is for major purpose, and that is it makes clear that you don't even look at the major purpose unless you have an organization

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that's received contributions or made expenditures. And in the Triad decision there were specific findings that the organizations involved had made Express Advocacy communications, and then the passage that you read from the RNC, of course, once there was determination they had made Express Advocacy communications, then another part of that analysis is did they also receive contributions, which in fact they had done.

But the Court clearly applied the Major Purpose Test as we've described it should be applied, which is you don't even look at that unless you have contributions and expenditures.

COMMISSIONER McDONALD: I apologize, because I think I missed that and I'm sorry.

Let me ask Commissioner Potter, if I could, quotes seem to be a favorite of the day, and I think they're fair game. Let me start with one that was submitted in Baron's testimony. It says that BCRA's admittedly limited solution



was

fundamentally the product of political compromise--and he quotes the late Senator Wellstone--aptly

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summarized the negotiation nature of Congress regulating of soft money, it is not the only problem in our campaign finance laws. It is not the only answer, but it is the answer around which a majority of members here could coalesce. Discussing proposals that did not make it into BCRA he noted, no matter how good the idea may be, if you can't muster 51 votes, a majority in this house, then it's only a good idea.

I want to turn to the other comments that he referred to yesterday which was by Senator Lieberman. When the Bipartisan Campaign Reform Act, McCain-Feingold Bill, goes into effect, at least some of the soft money donors, who will no longer be able to give to the political parties, will be looking for other ways to influence our elections. Donations to 527 groups will probably top many of their lists because these are the only tax exempt groups that can do as much election work as they want without jeopardizing their tax status.

I read you those simply because we've almost had a role reversal from two years ago about

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suddenly members are very informed or they're very uninformed--last time I think they were very uninformed, depending on who you were talking to, and suddenly now they're brilliant. It's a little hard for me to follow, as you might imagine. What is your thought about those comments, and wouldn't they be fairly relevant to this overall process?

MR. POTTER: I have a couple quick reactions. One is, it won't surprise you to know that I urge you to look first and foremost to the comments filed at the Commission by the chief sponsors of the law, who--

COMMISSIONER McDONALD: I've done such--MR. POTTER:

Who I think in this

rulemaking and the previous rulemaking are the ones most likely to be in touch with what they meant in proposing legislation. Technically, of course, the last quote that you read is correct, that 527s may engage in unlimited political activity without endangering their tax status, and of course proved nothing under federal election law as to whether they should--however, like the Republican National

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Committee and the Democratic National Committee, which engage in unlimited political activity without endangering their tax status, also register with the FEC.

I think the broader question though is the one the Commission's been wrestling with these two days, which is to what extent can the Commission accept the arguments, as been made here, that BCRA was somehow an implied repeal of portions of the Federal Election Campaign Act of '74--and I just don't think that's ultimately a serious argument. The argument that's being made is that because Congress did some things in BCRA without ever mentioning FECA, it should be assumed somehow to

have changed the underlying definition of "political committee" in FECA for the purpose of influencing a federal election as interpreted by the Supreme Court in Buckley. I think if Congress had wanted to change that status, they could have said so. They didn't, and to me the fact that BCRA comes later doesn't repeal the existing law in FECA. Most of what Congress was dealing with and

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focusing on in the reform debate was direct public communications paid for by corporations, labor

unions, associations of labor unions, Chambers of Commerce. They were focusing on that sort of soft money. Despite the statement that you quoted involving 527s, it's my experience that most of the congressional debate never mentioned 527s. It was focusing on indeed activity by corporations, unions and 501(c)'s, and that's where I think Congress left--was aiming its attention in BCRA.

COMMISSIONER McDONALD: Thank you. I appreciate all of you coming.

CHAIRMAN SMITH: Thank you, Commissioner McDonald.

Next we go to Commissioner Mason. COMMISSIONER

MASON: Thank you.

Mr. Sandler, help me. MoveOn is actually a cluster of organizations, if I understand, and could you outline what organizations are part of that MoveOn family or however you want to refer to it, and what tax and FECA status they hold?

MR. SANDLER: Sure. There are three

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entities. There is a 501(c)(4) nonprofit, the corporation, and there is MoveOn.org PAC which is a federal political committee, federal PAC with no nonfederal account or nonfederal aspect, and then the MoveOn Voter Fund, which is a political organization for tax purposes but not a political committee under FECA, which is now of course is assumed this in the vernacular called a 527 even though every political organization is also a 527. Those are the three entities.

COMMISSIONER MASON: So if the Commission were to-- I mean you've explained and other witnesses have explained that you adopt a structure such as this because of the dictates in part of tax law and because of the dictates in part of FECA requirements, and in essence it's sort of all the same to the MoveOn donors and members and so on like that. In other words, the overall purposes of the MoveOn

organizations are internally consistent, but because of tax law and FECA law you have different corporate entities that have to carry out different specific activities.

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I'm not trying to get you in trouble with IRS or us or anybody else. I'm just trying to sort of state the reality of how these things work. Is that a fair statement?

MR. SANDLER: It is not. Each of these entities serves a different purpose, and the purpose that each serves is what drives the-

COMMISSIONER MASON: But the purposes are consistent in terms of the rationale behind them. And again, I'm not--I'm going to commend Ms. Utrecht's client because he's so up front about this, and you're being too lawyerly with me and I want to discourage you from that.

Let me get at the question I'm trying to get at. If the Commission were to adopt a rule which more heavily regulated activity by the 527 component--call it that--is it not the case that you would simply shift at least some of the activity carried out by that group to the (c)(4)?

MR. SANDLER: I don't think you can say--I

don't think it's fair to conclude that at all. Again, they each serve a different purpose. It's

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not a lawyerly answer. The content of what they do is different. The voter fund does--its principal purpose is public education, is enabling its supporters to voice their opinion about the policies and the record and the agenda of the Bush administration that a (c)(4) is much more oriented towards specific legislative initiatives and grass roots lobbying. Each of them serves a different purpose. And the PAC of course engages in expressly--independent ads expressly

advocating the election or defeat of federal candidates, in this case, mostly the defeat of President Bush through the federal PAC.

COMMISSIONER MASON: I understand that. Let me go then to Ms. Utrecht and say I probably wouldn't agree with Harold Ickes about anything including where to go to lunch.

[Laughter.]

COMMISSIONER MASON: But I've always admired a certain frankness about him, and I recall, for instance, during Senator Clinton's campaign there was a controversy about coordinated

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ads, and somebody asked him if he had looked at or seen these ads run by the New York State Democratic Party, and he said of course he had, and of course had had given his input as in essence an officer of the Clinton campaign and that that was perfectly legal. I really appreciated that answer because I thought that the law was disputable at that time in that regard, but I thought his statement of the law was in fact what the Commission had been doing and was in fact permitted, and I thought it was a lot better to operate on that basis than for people to sort of pretend and hide the ball as to whether or not they had actually talked to the party that had nominated them or not, you know, about ads that mentioned that same candidate and so on like that.

But that then brings us to what he's doing now, which as I understand it, he's running an organization that he says the purpose is to defeat President Bush, and do some other things, but clearly that. And one of his major donors, Mr. Soros, says

he's given him money to defeat

President Bush. Now, defeat is one of the magic

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words of Express Advocacy, and what I don't understand--and I think for instance the Malnek Triad case supports this--is why that solicitation for funds to defeat President Bush and the donation of funds to defeat President Bush is not a contribution within the meaning of the Federal Election Campaign Act.

MS. UTRECHT: Well, first of all, the Media Fund, through the report that's filed today which covers the period to March 31st has not received any donations from George Soros.

COMMISSIONER MASON: Thank you. I certainly wouldn't want to leave a misimpression about that.

MS. UTRECHT: And that's been a misimpression that I think has been caused by some newspaper stories that weren't necessarily accurate about where the donations were going.

The Media Fund was specifically set up to comply with both the 527 requirement that it be involved, that it have a purpose that is at least indirectly related to the election of candidates,

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but not to engage in Express Advocacy under the Federal Election Law. And we looked at--in setting it up, we looked both at the IRS rule-

COMMISSIONER MASON: Could I stop you there? I appreciate that. I'm trying to focus not on the Express Advocacy side but on the contribution side, and if your organization says, "Give me money to defeat President Bush," and donors respond to that explicit appeal for money to defeat President Bush, why is that not a contribution

regardless of what the money is ultimately spent for?

MS. UTRECHT: I have two answers to that question. One is the factual answer. The Media Fund's solicitations alone do not include Express Advocacy. The Media Fund is a participant in a joint fund raising program with ACT that have both a federal account and a nonfederal account. And even after BCRA the FEC joint fund raising regulations are still in effect, and they still do permit organizations like this to engage in joint fund raising even if there is a federal--you know,

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with a federal component and a nonfederal component. So any solicitations that you're talking about would be in that context of joint fund raising.

My second response to that is that I'm going back to this definition of contributions and expenditures. I don't believe that the contributors' intent is what the law is in determining whether an organization is a political committee under the law. My reading of Buckley is that when you look at contributions and expenditures, a contribution--it becomes a contribution if a donation is used for the purpose of making contributions to candidates, or for the purpose of making Express Advocacy communications or for the purpose of making coordinated communications or activities with federal candidates. And if you don't do that, the donors' intent really is not determinative of what is a contribution.

COMMISSIONER MASON: I'm interested but my time is up.

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CHAIRMAN SMITH: Thank you, Commissioner Mason.

Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Mr. Chairman. Thank you, members of the panel.

Let me just give you a chance to follow up on that because that was an area that I was very interested in. It strikes me that we're dealing with a statutory definition of "political committee" that does seem to rely on whether or not a group has received more than \$1,000 worth of contributions, and I'm puzzled where we can look to to find legal authority for the proposition that only if the group is going to be undertaking those kinds of things do we have any way to analyze whether the group--I guess whether the contributions count toward the political committee test.

MS. UTRECHT: And that comes from Buckley at pages 77, 78 and 80, where the Court is analyzing what is for the purpose of influencing an election. In that section the Court describes the

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three types of expenditures that I'm talking about as determinative of whether an individual's contribution was in fact for the purpose of influencing an election.

MR. SANDLER: Commissioner, in fact, let me just read one sentence from Buckley, the very one that's quoted in the McConnell case, talking about the word "expenditure" in Section 431, the definitions that apply to the Act. "We construe "expenditure" to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."

COMMISSIONER THOMAS: Which word was it



being used?

MR. SANDLER: Expenditure.

MR. POTTER: Commissioner Thomas, that was for nonpolitical organizations in the preceding--I'm sorry--on page 79 in Buckley, what the Court said was: To fulfill the purposes of the Act, political committees need to only encompass organizations that are under the control of a candidate or the major purpose of which is the

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nomination or election of a candidate.

Expenditures of candidates and of political committees so construed can be assumed to fall within the core area sought to be addressed by Congress. They are by definition campaign related.

Then the Court goes on to say: But when the maker of the expenditure is not within these categories--meaning political organizations--when it is an individual other than a candidate or a group other than a political committee. The relationship may be too remote to ensure the reach of these provisions is not impermissibly broad. We construe "expenditure" for purposes of that section in the same way we have construed it for the spending limit, to reach only funds used for communications, the language Joe quoted.

So the Court set up in '79 and '80 in Buckley a dichotomy, where if you're a political organization your expenditures are presumed to be for your political purposes. If you're a nonpolitical organization than you have the advantage of the Express Advocacy Standard.

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MR. SANDLER: The statute itself says you're only a political committee if you make expenditures of more than \$1,000. That would be a completely

circular definition. First you have to figure out what an expenditure is. The Supreme Court has told us what it is. I respectfully submit the Commission has no authority to go further.

COMMISSIONER THOMAS: I think what I was getting at is the other part of the statutory definition which talks about you can become a political committee based on contributions coming in.

MS. McCORMICK: Can I just help? I'm not going to get into the legal argument on this, but I'd just like to focus you on some practical examples, sort of the host sense aspect of this dialogue, which is, for example, under the proposed notice of rulemaking, the idea is if you solicit contributions and you say that your solicitation specifically says it will be used to support or defeat a specific candidate, the idea is that the

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contributions come back in. Then you become a political committee. One example of that would be a labor organization. Labor organizations are specifically allowed, under the exemptions to 441(b), to communicate with their members on any subject, to say anything they need to, or to do whatever they wanted to solicit voluntary contributions from their members. So they make an expenditure, which is not an expenditure, exempt from the Act to solicit contributions from their members. And in that solicitation letter, they say, "We're going to use the money to defeat Senator so-and-so."

That's not a contribution when that money comes back in, right? It's coming into the federal committee, but the solicitation itself isn't a separate contribution by the organization.

Three or four more examples. You solicit the money and say, "I want to use the money to defeat this particular federal candidate," but you use the money only for a totally nonpartisan voter guide, you use the money for nonpartisan

GOTV. It

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makes no sense to separate the two concepts because if you make it a contribution and then the money is spent for something which is clearly outside the Act, all you do is end up pulling in organizations that aren't political committees because they're not making expenditures.

COMMISSIONER THOMAS: Well, I think that's the heart of the issue. I can see an argument the way you're bringing it. I can see an argument the other way, which is, look, if an organization is saying right there in all of its solicitations that this is what the money is going to be used for and people are giving it for that purpose, the way I look at the statute I see some hint that maybe Congress contemplated that we look at that side of the equation separately and say--even if they turn around and spend that money for nonpartisan activity, we nonetheless should treat that group as a political committee.

MS. UTRECHT: What if they think the way to win the election is simply to publicize an issue? I mean there's--to say that you want to influence an election--

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COMMISSIONER THOMAS: I think that's very common actually. In my heart of hearts I think that's what's going on out there.

MS. UTRECHT: --an entity. That doesn't mean it's a contribution, that they don't have the nexus to influencing an election.

MS. McCORMICK: That's why in Buckley, over these three pages the Court focused on for the purpose of influencing as relating to how the money is ultimately spent by the organization to which you donate the funds, and if that organization doesn't spend the money in one of those three ways, it's not a contribution.

COMMISSIONER THOMAS: I appreciate it. It's a good lawyer's legal dilemma. We obviously have some possible alternative approaches.

I was going to add some ammo to the Joe Sandler argument, but in a way that sort of contradicts something you said. I think you said in BCRA Congress did not in any fashion amend the definition of "expenditure." Actually, as I see it

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in two places, it did. In the 441(b) area it specifically added in electioneering communications to the definition of contribution or expenditure so that corporations and unions would be prohibited from using their resources to do electioneering communications. And also in the 441(a)(7) coordination provision, it said any coordinated electioneering communication would have to be treated as an expenditure. So in a sense there are two places where Congress did amend the definition of "expenditure." I'm leaving it to you to now say, see, that proves my point. They know how to amend the definition when they want to.

But I also want to hear from Trevor Potter about how that really doesn't answer the question, that's really begging the question, is it not, because we still have to deal with the fact that Congress must have realized that people committees are out there and it has to mean something. What does it mean and why should we be regulating these kinds of entities as political committees?

I'll let you go first. Then I want to

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hear from Trevor if I may.

MR. SANDLER: Commissioner, the fact that a law passed two years ago expressly allows a group like the Voter Fund, the MoveOn.org Voter Fund, to run ads attacking or supporting the policies and positions of federal candidates and officeholders right up to election day certainly suggests--without regulation, certainly suggests that Congress didn't intend to regulate such groups, and we believe, you know, with good reason.

MR. POTTER: Again, I go back to what I said to Commissioner McDonald, I think it's the same issue here, which is Congress was focusing on restricting the activities by corporations and labor unions communicating with the general public the whole issue ad phenomenon. It chose to do so for a period just before the election, but that was its focus was the degree to which corporations and unions can or cannot engage in these public communications without express advocacy. It wasn't looking in BCRA at the question of when an organization so engaged in election activity that

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it becomes a federal political committee and is subject then to a different regulatory regime, and I suppose a corporation could have its major purpose become engaging in federal political activity, but the presumption Congress was operating under and the Court in Buckley is that groups can to some extent take protection from what their states purpose is, that their stated purpose is to be a for-profit corporation and make money for the shareholders, or to engage in exempt charitable activity, then we will assume that is their major purpose rather than federal election activity.

What you're dealing with here under 527 is groups who have voluntarily stated--there's no IRS finding, there's

no proof--they've just voluntarily come forward to take advantage of a section of the tax code by saying, "Our major purpose is to engage in electoral activity, to engage in electing candidates, and that's where I think the Court drew the line and allowed those groups to be under a different regime and that's what Congress didn't

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upset.

COMMISSIONER THOMAS: Thank you.

CHAIRMAN SMITH: Thank you, Commissioner Thomas.

Mr. Norton.

MR. NORTON: Thank you, Mr. Chairman. I thank you all for coming today.

Mr. Potter, I'd like to start with you if I could, and I'm looking at, for your reference, page 7 of the written comments you submitted, where in the second paragraph you say: A 527 organization by definition has a principal purpose to influence elections, and therefore doesn't receive and never has received the benefit of being subject to bright line standards in defining the public communications that may be regulated by campaign finance laws. Such groups are instead subject to the statutory definition of "expenditure" as communications for the purpose of influencing a federal election. The statutory standard may be applied to such groups by using a "promote, support" test, a standard that the Court

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found adequately demarcated the speech of state parties that may be subject to regulation, and you cite Footnote 64 of the McConnell decision.

As you know, that's what Congress was dealing with in BCRA, was a regulation that applied to state parties, and indeed in Footnote 64, the Supreme Court, in suggesting that these were explicit standards for those who apply them, and they give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, the Court went on to say, "This is particularly the case here since actions taken by political parties are presumed to be in connection with election campaigns."

I guess my question is, is it your position that it is every bit as clear to organizations, to all 527s with some

limited exceptions, the intrastate ones and those engaged in judicial elections and the like, that it is equally clear to all the 527s as it is to a political party when applying that standard? Am I understanding your position correctly?

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MR. POTTER: With the exceptions that you noted for the groups that are engaged in purely state activity or purely judicial nomination, confirmation activity, that is our position, that those groups are all political organizations, they are all 527s, whether they are a national party, a state party, a state candidate, or a federal or state PAC, their primary purpose is political and that's what the Court was looking at in that footnote saying these groups can be presumed to know what their political activity is going to encompass.

I would again go back to the Buckley footnote and say it's the same theory there, where they're saying if you're a political organization and that's your major purpose, then we are going to assume that your expenditures fall within the core and are by definition campaign related.

MR. NORTON: So just to follow the thread, so your position is that the Supreme Court has removed express advocacy as constitutionally required at least in some circumstances.

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MR. POTTER: Absolutely.

MR. NORTON: And has blessed this promote-support standard in the context of political parties, and therefore, the Commission is free to apply this promote-support standard to 527s because they're situated exactly the same as political parties?

MR. POTTER: Because they are political organizations, that that's what they have self-proclaimed

themselves to be, yes.

MR. NORTON: Just to loop back for a second--I want to hear some of the other panelists

react to that--but back to some of the questions that the Chairman was asking. There's nothing of course in FECA that makes a distinction for 527s and I understand your position to advocate singling out 527s for regulation, but I would take your position to be that if we're in the enforcement context and the Commission concludes that notwithstanding an organization's (c)(4) status, its major purpose is to influence elections, that you would say that the appropriate thing for the

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Commission to do is thereto to apply the promote-support test to determining whether they've tripped the \$1,000 in expenditures, and if it's not, I'm not sure I understand what basis there would be for applying it to 527s who have an avowed or declared purpose, and another organization whose purpose is demonstrated through some other means.

MR. POTTER: I think the distinction would be that here in our view, 527s meet the major purpose test simply by being 527s. It is not clear that they are also federal political committees because then you move to the question of whether they spend \$1,000 to influence a federal election. But if you have an organization that is not a 527, then I think you have a different question as to whether they can be shown to have a major purpose.

I think it's a higher threshold. I'm not sure I know what that threshold is, which is why I've urged you not to dive into that in this rulemaking because I think it's a very complicated question. But I would draw the distinction, even in an enforcement matter, between a 527 which starts with

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a major purpose of influencing elections versus other organizations that start somewhere else.



MR. NORTON: I wanted to ask any of the other panelists who wanted to respond any answer to the first question. I guess what I'd ask you is to leave aside your argument for a moment that it's Congress and not the Commission that has the authority to act here. I'd like you, if you could, to focus specifically on this issue of whether this standard which the Court upheld as being constitutionally sufficient, surviving vagueness challenge, with respect to political parties, that we ought not take from that that the standard would be equally clear when applied to 527 organizations. What's your argument on that?

MR. SANDLER: Well, the standard--certainly it's what you said. Congress limited it for good reason to political party committees, and the Court said it's clear because we're talking about political parties in the McConnell decision. The fundamental problem with what the proponents of these rules are saying about 527s being political

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by their nature, is that what counts as political under the tax law is much, much broader than anything that could be conceivably regulated by the Federal Election Commission under the Federal Election Campaign Laws, and the reason is that what's allowed under 527 is the mirror image, is supposed to be identical with what's prohibited under 501(c)(3), and that--and there's one thing the IRS has made crystal clear with no ambiguity, it's that what's prohibited under 501(c)(3), at least in their view, goes way beyond what could ever be regulated under the Federal Campaign Finance Laws.

So there's a fundamental problem with the whole

premise of what the proponents of these rules are saying, that, hey, if you are a 527 organization, well, you're admitting that your purpose is political for purposes of a completely different set of rules that serve a completely different purpose, and that's I think what our comments were trying to--our written comments were trying to explain in some more detail.

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MR. NORTON: I see my time is very limited, and I wanted to actually hear from you, Mr. Potter, with respect to the question I asked the last panel, and that is, whether you think that there's any reading of McConnell that would suggest that the Commission ought to apply the Express Advocacy Test in a less narrow fashion than at least some Commissioners and some courts have felt ought to be applied in the past?

MR. POTTER: I think what the Court said is that Express Advocacy has proved to be a functionally unhelpful, unartful, inefficient test, that it is not constitutionally required in particular. I think from that this Commission ought to conclude that it was wrong in the Clinton and Dole audits and in some of the enforcement actions thereafter in thinking that Express Advocacy was required of political organizations in order to bring them within the regulatory framework, thus 527s. I'm not saying they were wrong at the time because I know Commissioners were expressing what they understood to be a

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constitutional position, but I think it's one that the Court has clarified in McConnell, and that thereafter therefore I don't think Express Advocacy is required in dealing with 527s or other political organizations.

MR. NORTON: I see that my time is up.

Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Mr. Norton. Mr.

Pehrkon?

MR. PEHRKON: Mr. Chairman, I have no questions for this panel.

CHAIRMAN SMITH: That's my boy.

[Laughter.]

CHAIRMAN SMITH: Can we give a rose to the staff director?

[Laughter.]

CHAIRMAN SMITH: Thank you, panelists, for a most informative panel. I'm sitting here actually feeling quite bad because I have so many more questions for people expressing the view point of Mr. Potter, and we don't have any more such panelists, because primarily they're heavily

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outnumbered in the commenters, and I would really like to explore this major purpose, but in any case, I thank you, all of you, for your time.

We will take one hour for lunch. That will bring us back at 2:30 to begin with Panel VII, Mr. Kink, Olson, Piper and Saperstein. So we'll take a one-hour recess.

[Whereupon, at 1:30 p.m., there was a luncheon recess.]

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A F T E R N O O N   S E S S I O N

(2:38 p.m.)

CHAIRMAN SMITH: We will call back into session this Public Hearing on the Political Committee Status of the Federal Election Commission on this Thursday, April 15th. We have two panels here in the afternoon, and that will wrap up two days of an awful lot of very interesting testimony.

On this panel we have Michael Kink, the Legislative Counsel of Housing Works, Inc.; Walter Olson of the Free Speech Coalition, Inc. and of a variety of other groups as well, and I understand that Mr. Olson--several other groups have signed on to the testimony he has earlier presented and we'll make sure that that is noted in the record, and that brings up a good point for the witnesses on

this panel and our next panel. If you have anything that suggests it will go in the record, that needs to be handed over to the Secretary's table there to your right. Apparently a couple of folks today asked to have things entered into the record, and we said, sure, without objection, but

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they may not have left us a copy or we had to chase after it. So you could, Mr. Olson, just leave that there and we'll make sure that it gets added properly.

Bill Piper, Interim Director of National Affairs with the Drug Policy Alliance; and Rabbi David Saperstein, Director of Religious Action Center of Reformed Judaism.

All of your written comments we have and they are part of the record. We'll ask each of you to make a brief opening statement, about 3 minutes, which is not a lot of time. As I've told all the panels, you don't need to use us all the effusive things, greetings and so on, that niceties normally require. You can get right to it. If you haven't been with us so far through the proceedings, or if you have you've noticed I've been using kind of a luminant light system. That is you'll get a flashing green light when you have a minute left. It will turn to yellow when you have 30 seconds left, and then go red, but we have not been real rigorous about shutting people off. I find that

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both I and my colleagues usually find it beneficial to hear people and hear people finish answering your question or making a point, but please do try to be aware of the light, and try to wrap it up when you see that light go red.

With that, I think we're set. We've got all six Commissioners here again, and I think we're set to go ahead. So we'll start opening statements with Mr. Kink, please.

MR. KINK: Thank you for the opportunity to testify. My name is Michael Kink. I'm Legislative Counsel for Housing Works, which is the nation's largest community-based AIDS service organization. We are both a high-quality housing services and care provider, and a militant advocacy group. From the very beginning we've done advocacy as the core part of our mission.

I want to let you know that we consider these issues that you're dealing with very important. They are life and death issues for the AIDS community. I also want to let you know that there are three signatures on the comments that we

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submitted to the FEC, my two bosses and myself, and one of those signatures, Keith Kyler [ph], is no longer with us. He died last week. He is a long-time champion in the AIDS movement, and we're here to tell you that AIDS still kills, it's still a crucial issue and it's still a life and death issue.

I wanted to speak briefly about our work, about our sources of funding, and about aspects of the notice that we think threaten to silence our work, and I'll talk very practically about what we do, but I wanted to say first briefly that we share the concerns that Chairman Smith and others had noted yesterday, about the problems which has taken the 501s off the table, and we really feel that there are problems with the substance of these rules, and if you take 501s off the table and the bad guys go scooting over to the 501s, then all of a sudden the rules are applicable to us three or four months down the road, so I think we need to look very seriously at the substance of the rules and not just at who would they apply to.

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Housing Works does advocacy both because AIDS demands it and because we deal with people who are homeless, formerly homeless people who have experienced a tremendous lack of power and control in their lives, and getting them involved in advocacy is really a healing aspect of what we do. it goes right along with medical care and housing and other services. We do voter registration and GOTV right along with medical care and the other things we do. We do advocacy at the city, state and federal levels, both lobbying with our clients week by week in the state and federal capitals, and specific issue campaigns, some of which are targeted at officials.

Last fall we ran a campaign that was targeted specifically at the Senate Majority Leader and the Speaker of the House on appropriations issues for AIDs, so a lot of what we do has to do with federal elected officials. And we do protests. We are still among the AIDs groups that do civil disobedience and direct action. In our last Senate campaign in New York, we took over the

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campaign headquarters or Hillary Clinton and Rick Lazio at the same time on the same day, to force the issue of AIDs into the debate in the election. It was within 30 days of the election, and we criticized them both on a nonpartisan basis, but the fact is that Ms. Clinton the next day made some statements on the issues that we addressed, and we a week later had a press conference to say that she had addressed those issues, and we needed Congressman Lazio to address them too. He had a very good record on AIDs when he was in the House, but we wanted to get him out.

So all of these things come together, particularly around the election. It's when people care. It's when elected officials need to stand up and be counted, and it's when the folks we serve are perhaps most engaged in the political and public processes. So limiting our ability to carry out that kind of work, particularly around the election, we think is a very serious problem.

Our sources of funding just briefly. We get a limited amount of foundation and major donor

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supports. I would love it if George Soros came around to us and gave us a couple million dollars, but he hasn't.

[Laughter.]

MR. KINK: We are increasing the number of small private donations we receive on the Internet, through e-mail and other things like that. We rely in pretty large part for our advocacy in support from our entrepreneurial businesses. We have four upscale thrift shops, a used book cafe, a number of businesses that employ our clients and that bring millions of dollars of revenue into our organization that's unrestricted, and that can be used to print flyers, to send out e-mails, to provide bail money for people at protests, and the folks that donate the materials, that shop at those stores, that donate their time to work, are contributing to the advocacy that we do. And all of those things would be limited by some of the proposals. Our companies are nonprofit corporations, and if you restrict corporation donations for PASO type activities, you are

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restricting the ability of our organization to provide self support for what we do.

Now, donors to Housing Works, I doubt that many of the folks that give us money know what soft money is, and the truth is that no one gives money to Housing Works because they've maxed out

somewhere else and they want to give us some soft money, but many of the proposals in the notice go directly to the advocacy that we do. If you're chasing George Soros and you're catching AIDS activists, your net is way too big, and you've got to look at what you're doing both the substance of to whom it applies, and the substance of the rules themselves. We're doing advocacy because it's life and death, and as Vice Chair Weintraub mentioned yesterday, we've included in our comments the history of the AIDS epidemic is a history of advocacy and free speech and intensive demands on the public process to create a response. Free speech has saved lives. Democracy has saved lives, and political activism has saved lives. We want to keep on doing that and we need you to set up rules

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that allow us to keep doing that.

Thank you.

CHAIRMAN SMITH: Thank you, Mr. Kink.

Mr. Olson.

MR. OLSON: Thank you, Mr. Chairman. I am appearing today on behalf of the Free Speech Coalition. Thank you for the opportunity for me to testify today on the proposed amendment to the definition of a political committee.

The Free Speech Coalition, which was founded in 1993, is a group of ideologically diverse nonprofit organizations. It's purpose is to protect First Amendment rights through the reduction or elimination of excessive regulatory burdens.

I filed comments for FSC on April 5th. FSC also file longer comments on April 9th. Five organizations that wanted to be included in these comments were inadvertently omitted. I want to mention them now. TREA Senior Citizens League, Law Enforcement Alliance of America, Inc., 60 Plus Association, National Center for Public Policy

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Research, and Shirley Banister Public Affairs.

First the justification for the proposed regulations appears to be at the very least questionable. The notice proposes a significant alteration of the "major purpose" phrase in the Buckley decision which was handed down in 1976, over 25 years ago, changing "the major purpose" to "a major purpose." And to apply this altered phrase, the FEC has devised four arbitrary tests. The FEC tries to justify the proposed regulations based on the definition of the term "federal election activity" taken from Section 101 of BCRA, which is entitled Soft Money of Political Parties, which would lead most people to believe that the term was meant to apply only to political parties, rather than to all entities.

The proposed rule seeks to expand the definition of "expenditures" as it currently applies to nonconnected political committees by incorporating three parts of the definition of "federal election activity" from BCRA: voter



registration activity, voter identification and  
get-out-the-vote activities, and public  
communication that refers to a clearly identified  
candidate for public office that promotes or  
supports or attacks or opposes any candidate for  
federal office. What is meant by the latter part of  
the definition of "federal election activity" is  
anyone's guess, and I suspect it will take quite a  
number of AOs to flesh out its meaning.

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In summary, the Free Speech Coalition  
believes that the Commission is without legislative  
authority to adopt these regulations which go far  
beyond its powers as set out in Section 438(a)(8) of  
Title 2 of the U.S. Code.

The Free Speech Coalition has many members that are  
a Section 501(c)(3) and 501(c)(4) organizations. The  
proposed rule does not  
expressly mention such tax exempt organizations. However, the  
notice asks whether (c)(3) and (c)(4) organizations should be  
exempt from the broad definition of a political committee.  
FSC believes that such organizations should indeed be exempt  
from the definition of a political committee for a

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number of reasons cited in our comments.

As the Commission certainly knows, a  
(c)(3) organization cannot participate to any  
degree in political campaigns, whether they be federal,  
state, local, without losing its tax exempt status. And if  
the primary purpose of a (c)(4) organization were to  
influence elections, it also would lose its tax exempt  
status. And incorporated (c)(3)'s and (c)(4)'s are already  
prohibited from making or financing electioneering  
communications.

If the FEC were to succeed in expanding the definition of the term "expenditures" as applied to such organizations, and if these organizations continue to carry on many activities which are currently permitted, many (c)(3) and (c)(4) organizations would be considered to be political committees by the FEC, which would make them subject to FECA's registration contribution limitations and prohibitions and reporting requirements, and as such, it is not inconceivable they could jeopardize their tax exempt status at

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the IRS.

Finally, I would be remiss if I did not comment on the burden of complying with these FEC regulations. The notice states that the reporting requirements are not complicated and would not be costly to complete. Obviously, this statement was not written by someone who has actually prepared FEC reports.

[Laughter.]

MR. OLSON: I have prepared FEC reports in both paper and electronic format for a number of political committees, including SSFs, nonconnected committees and a candidate committee for over 10 years. In addition, I serve as treasurer at two SFFs. I am a CPA, and in my opinion, the FEC compliance and reporting requirements are indeed complex and the reports are time consuming to prepare. As an expert witness for one of the parties in McConnell v. FEC litigation challenging BCRA, I provided a report in which I detailed the extensive burdens and significant costs of complying with FEC regulations for both SFFs and

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political candidates. The burden of determining whether an organization is engaging in an it is a political committee, would be an ongoing concern. The burden of filing reports as a political committee is enormous. In stating

that the rules impose no significant burdens, the notice is flatly wrong.

Thank you.

CHAIRMAN SMITH: Thank you, Mr. Olson. Mr. Piper.

MR. PIPER: Good afternoon. I'm Bill Piper, Director of National Affairs for the Drug Policy Alliance, the nation's leading drug policy reform organization. We're both a (c)(3) and a (c)(4). Over 4,000 of our supporters have e-mailed this Commission in opposition to these proposed rules.

At stake in this debate I think really is what it means to be an American. The foundation of our system of government is that every citizen has a right to criticize elected officials and influence their government without fear of being

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jailed or fined. And I think that these proposed rules would crack that foundation in two. America would be divided into two groups, the rich and powerful who could afford lawyers to figure out how to influence their government without going to jail, and average Americans on the other hand, who would be too afraid of organizing to influence their government for fear that they might somehow be punished.

I've spent more than a decade working to change our nation's laws. Much of this work has been toward making our political system more accessible to the average American, including reducing the power of incumbency and making it easier for citizens to put issues on the ballot to vote on. Through this work I've realized our nation's election and campaign finance laws are already complex, and enacting these proposed rules I think will only make the problem worse for the average American to be able to participate in the

electoral process.

Furthermore, I think that they give

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government officials too much power. They would replace the simple easily followed so-called bright line test, vote for or vote against, for the standard that would give federal officials too much discretion to decide for themselves which citizen group should be punished and which should not, and this not only would undermine the principles of equality under the law but could undermine the rule of law itself.

There are those in power who will use whatever means they can to silence their opposition. When I was helping to put term limit initiatives on state ballots around the country, it was common for our donors to stop giving to our campaigns because politicians would tell them in no uncertain terms that if they gave money to us, they would lose their federal contracts, they would be audited and they would find new ways of regulating their businesses. And throughout the many years I've spent promoting the initiative and referendum process, I saw citizen initiatives that challenged the political status quo be thrown off the ballot

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for technical reasons, while big business and big labor, who could afford to have expensive lawyers and lobbyists, manage to work the system so that their initiatives stayed on the ballot.

Now, I work in the drug policy reform movement, which is growing so rapidly that our opponents are desperately trying to stop us any way that they can. There have been bills introduced in Congress to take away our tax exempt status. We're barred from running pro-reform advertisement on subways, trains and buses anywhere in the country, even though our opposition can. Members of Congress have encouraged federal agencies to audit our donors. In New York the political establishment is using campaign finance

laws to try to silence Russell Simmons and others that are challenging the draconian Rockefeller drug laws up there.

I can give you a list of politicians in Congress that will happily lobby this Commission to try to stop our advocacy efforts, and I'm sure there's people out there that want to stop the pro-choice movement and pro-life movement and every other movement.

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Finally, I just want to say that I know this Commission is made up of good people, and I really do respect the important work that each of you does, but when debating these rules, please, please remember you will one day be a private citizen, and the person who replaces you might not be as fair and balanced as you are.

I know that you're under a lot of pressure to enact these rules, and it's going to be hard resisting that pressure, but I encourage you not to let short-term political concerns outweigh the best interests of our country, and I think that generations of Americans to come are depending on you to make a good decision, and I just want to thank you for inviting me to speak.

CHAIRMAN SMITH: Thank you, Mr. Piper. Rabbi Saperstein.

RABBI SAPERSTEIN: Good afternoon. I'm delighted to be here. This has been a fascinating couple of days watching from the outside, I suppose

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even more for you who have been in the midst of this.

I represent the National Reform Jewish Movement, which is the largest stream of the American Jewish community. But we stand together with a

number of national religious groups that have signed on statements that have gone to you, including the National Council of Churches, an umbrella group of over 20 mainline Protestant and Orthodox Christian denominations, United Church of Christ, Presbyterians, the Reform Jewish Movement, Conservative Jewish Rabbinical arm, Hadassah, a whole range of organizations, all of whom are gravely concerned, significantly concerned by the proposals here, for what unites Jewish and Christian faith groups, denominations and streams across theological, cultural and political differences is our sense of prophetic witness, a sense of the God commanded obligation to be a voice of justice, equality and peace in our society and in the world.

You may have noted over the years we don't

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always agree on how to do that, but we stand together believing we are mandated to speak truth to power as our religious conscience instructs us to do, and to do so not only as individuals but as organized religious communities. This proposal threatens to curtail that vital prophetic voice of religion in America.

Furthermore, as vigorous defenders of the wall separating church and state, we cherish the vision of the Founders who erected that wall in part to prevent government from interfering with religion. It has allowed religion to flourish with the diversity and strength in America unmatched anywhere in the democratic world today, but part of the goal of that was to ensure that religion could serve as a goad to the conscience of America and the moral integrity of our nation. As Dr. King has taught, the church is not the master or the servant of the state, but rather the conscience of the

state.

But how can a religious organization advocate on either side, on any issue of profound

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moral significance without addressing the appropriate legislation sponsors and opponents, who so often at the time we address them happen to be candidates for public office. Just two examples.

A few months ago I stood with the President in the Oval Office as he signed the Prison Rape Bill, one of a dozen people who had fought for this legislation, and we issued statements commending the President for his moral leadership in this area. Are we prohibited to do so? Is that a form of support for somebody who is a candidate? Or how can we talk about McCain-Feingold, as so many of us did over and over again, commending them for their inspired leadership, a Republican and a Democrat, at a time they're running for office, for the legislation they're proposing to make the system a fair, more equitable system of elections in America and more responsive to the people in America?

But when over and over again we are commending individuals for this, if it is going to be interpreted as support, it means all of us engaged in that work are in danger of having you

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formulate what we're doing as overt political work that would bring us under the new restrictions that you are proposing here.

Furthermore, we're deeply concerned about the dangerous effect in the area of voter registration. There are 350,000 houses of worship in America. Many of them have voter registration projects. Many of them serve distinct communities. Minority churches serve minority communities

that will tend to vote a particular way. Religious communities will often tend to vote a particular way. We know the statistics of what it says, yet we feel we have a moral obligation to engage people to fulfill their civic responsibility. I don't know any church that goes about that work, knowing that there are going to be people of differing viewpoints who they are engaging with, and certainly when they go to serve the broader communities in which they are physically located, there may be patterns they're aware of, but they tend to register people regardless of their views. But if they're aware of the statistics, as

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I read the regulations, they may well be able to be considered a political committee because of the political nature of what they're doing.

Now, most of them don't meet the \$50,000 limitation, although some of the denominations would run into that problem, but I will tell you from past experiences--you spoke so well about the realities here--that the very existence of rules is intimidating to many institutions that don't understand fully the rules, and just know that if they engage in some activity that could fall under restrictions, that will then require them to fill out all kinds of forms, all kinds of reports, may threaten their status, may end them up in a very controversial action with a government entity, and that will have a chilling effect on their engaging in such religiously-motivated civic work.

For the wide array of diverse faiths in America, the exercise of religion is inseparable from the obligation to engage with the issues and policies that touch a moral core of our nation. Isaiah demanded of us, devote yourself to justice,

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aid the wrong, uphold the rights of the orphan,



defend the cause of the widow. This proposed rule stifles the voice of our teachers and abdicates the prophetic vision of Dr. King.

Religious organizations, under the proposed rulemaking, will be forced to separate themselves from the community, compelled to shy away from devoting themselves to justice, to speaking to leaders of our country on the great moral issues of our time in a public manner, and scaring them into relinquishing their role as the conscience of our great country, and I urge you to reconsider these regulations, and to be cognizant of the stifling impact it can have on one of the great contributions of not only the religious, but the nonprofit community, to the quality of justice in American life.

Thank you.

CHAIRMAN SMITH: Thank you, Rabbi.

Vice Chair Weintraub, you are first up. We'll go with six minutes.

VICE CHAIR WEINTRAUB: Six minutes this  
time, okay.

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Thank you all for very powerful and persuasive presentations. Mr. Kink, let me start with you.

I spoke yesterday about how moving I thought your testimony was, and well, let me back up for a second. I don't usually speak for my colleagues, but I know that everybody here joins me in offering our condolences to you on the loss of your colleague. So let me just say that up front.

I think it really would be a travesty if

anything that we did here interfered with the important work that you're doing. We just heard a very powerful presentation from Rabbi Saperstein, but I think you too are doing the Lord's work, and we've got no business regulating somebody like you.

How specifically do you think that the regulations that we've put forward would interfere with your work?

MR. KINK: I think there are three specific things in there that jump right out. Changing from "the major purpose" to "a major

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purpose" threatens to put us deep into the bull's-eye.

Advocacy is an important part of what we do.

We do some education. We do some lobbying, but you know, promote, attack, support, oppose, that's our tools. That's what we have to steer public policy and influence decision makers. So I think that if you look at our organization, we're a big organization. We devote resources to our advocacy efforts, and it would be very easy for us to blow through a \$50,000 cap, for you to take a look at the scope of what we do and to possibly conclude that this type of public communication, certainly not electoral activity, but this type of public communications and things that are persuasive are potentially a major purpose of why we exist.

Second, and related, the definition of a political committee with a relatively low threshold of advocacy spending, I think that we've spent--we have a website that we've worked on, AIDSvote.org, that set out sort of the gold standard, global and domestic political platforms for presidential candidates. We sent out questionnaires to all the

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candidates. We graded them. We worked with the Alliance for Justice and others to make sure that it was

bulletproof, 501(c)(3) nonpartisan, but the fact is, we put a fair amount of money into it, and we put a fair amount into staffing. When we run a campaign that includes postcards and flyers and e-mails, that involves some resources. And again, you know, all of a sudden we're a political committee?

What we're doing is opening our doors to serve homeless people with AIDS and HIV, to fight the epidemic, to improve public health, and to carry out the advocacy that's necessary to do that.

The third thing is the expenditure rules and the proposed ban on corporate support for PASO-related public communications. As I said, we have entrepreneurial businesses. It's a remarkable part of what we do. You know, we've been a leader in the social venture movement. Our businesses employ clients. We have the biggest job training program for people with HIV and AIDS across the country, but they also bring in millions of dollars in

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unrestricted funding for our organization that helps pay for things like this. They are nonprofit corporations. That is, corporate support for these types of activities.

We included in our written comments a number of other things but I think those are the ones that jump right out at me as particularly important.

VICE CHAIR WEINTRAUB: And you said that you don't think that carving off the (c)(3)s or the (c)(4)s would solve your problem because you're convinced that, you know, certainly the (c)(4)s would come back on the radar screen.

MR. KINK: I'm very concerned about that. You know,

the rules are the rules, and eventually, you know, if they're not applicable to us now, then, as I said, and as was mentioned by a number of the Commissioners yesterday, it's the folks who migrate, the folks who kind of figure out where they need to go. And if the rules are bad now, you know, then they're going to be bad for us.

The other thing is Mr. Simon yesterday, a brilliant lawyer, just tossed off as an aside a potential compromise, which still included those expenditure restrictions for PASO-related communications within periods close to the election. Again, you know, that kind of compromise to us is not really a good compromise. It's going to hurt debate, public policy, vigorous contestation of public policy, the kind that you want to see happen and the kind you don't want to restrict. So I'm concerned.

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VICE CHAIR WEINTRAUB: And is your concern with the PASO standard that you don't understand exactly what it will encompass, therefore, you would shy back--it would chill speech, in effect? Or is the problem that you think you do understand it and it's much too broad?

MR. KINK: Well, I think I have one set of concerns from my organization and another set of concerns for other organizations. As many of the nonprofit folks have said up here, folks are cowed by rules. It is tough right now to bring coalitions together to help nonprofit organizations understand how they can allowably do advocacy. So it's tough.

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My organization, we always press the rules. My boss is always pressing me to be more aggressive and more adventurous. And when I talk to the lawyers at Alliance for Justice and other places, I'm telling them, you know, we don't want to be totally safe; we want to press it.

And so, you know, we're not electoral--I'm happy to see good Republicans get elected--

VICE CHAIR WEINTRAUB: I don't want to cut you off, but I want to fill in one more quick question to somebody else and my time is about to run out.

MR. KINK: Sure.

VICE CHAIR WEINTRAUB: Rabbi Saperstein, you supported, you and your organization supported McCain-Feingold, right?

RABBI SAPERSTEIN: Strongly.

VICE CHAIR WEINTRAUB: So you are reform not on in the theological sense, but you are pro-reform in the sense that we usually use the term

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around here.

[Laughter.]

VICE CHAIR WEINTRAUB: And yet you have serious concerns with this rulemaking.

RABBI SAPERSTEIN: Indeed. Many of the religious groups who signed on some of the letters that have expressed concerns were amongst the key leaders of the broad coalitional effort that brought a number of national denominations and faith groups together in favor of campaign finance reform, certainly including McCain-Feingold. But even much more broadly than McCain-Feingold, we'd like to

go further. But the particular direction this goes is very alarming for us because of the chilling impact it would have on religious groups in fulfilling their prophetic mandate, but on all groups in America in playing a role in having a free marketplace of ideas that can challenge candidates, challenge elected officials on crucial issues of the day.

VICE CHAIR WEINTRAUB: Thank you very much. Thank you, Mr. Chairman.

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CHAIRMAN SMITH: Thank you, Madam Vice Chair.

Commissioner Toner?

COMMISSIONER TONER: Thank you, Mr. Chairman. And I want to thank all the witnesses for being here and sharing not only your thoughts with us, but also your experiences. We appreciate it very much.

Mr. Olson, you indicated that you were a treasurer for a couple of political committees, and you have my deepest sympathies.

[Laughter.]

COMMISSIONER TONER: But I take very seriously your comments about the resources it takes to file with us and to comply with our requirements. I take them very seriously.

Mr. Kink, I'd like to begin with you. Page 3 of your comments, you indicated, and I'll just quote here: "Criticism of elected candidates is simply not the same as promoting candidates for election." That's what you said. I'd be interested: What do you think, in your view, is

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the key dividing line between those two activities?

MR. KINK: I don't know. I think it would be tough to say. You know, in my role, as I was

saying before, I am happy to see good Republicans get elected to office; I'm happy to see good Democrats get elected to office. I care about their positions on HIV/AIDS.

I think that I can say that the election or defeat of particular candidates is not at the core of the campaigns and the advocacy that we have carried out previously and that we hope we'll be able to carry out in the future. Our intention is to raise the issues, to get them talked about in the debate, and to the extent that we can improve the candidates' positions or communicate the facts of their positions to our community, to folks who care about those issues, that's what we're trying to do.

I would not try to get someone elected who's got a bad AIDS position because they'll be part of a larger majority elected. You know, it doesn't--so I would say that the issues are what's

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important to us. And I don't know if that's a satisfying answer to your question. I understand that it's a very difficult line to ascertain, but our intention is fairly clear in what we've done and what we hope to continue to do.

COMMISSIONER TONER: Are you comfortable with the Express Advocacy test, you know, a strict Express Advocacy test as being the dividing line?

MR. KINK: Well, it certainly sounds a lot more practical than the other things that have been thrown around here. Again, I'm not an expert, I'm not a Supreme Court litigator, as some of the folks you've talked to. But in terms of someone who is sitting in rooms trying to decide what we're going to do, how we're going to say it, it helps--it would help us to follow the rules if--you know, I've never

said vote for or vote against, you know, and that's something that, if that were the rule, would clearly allow us to keep doing what we're doing.

COMMISSIONER TONER: And following up on that, if the Commission were to take the position

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that with respect to 501(c)s, such as your organization and all the organizations here, express advocacy would be the guidepost in terms of political committee status, but with respect to 527s we took a broader approach, would that at least address some of your concerns in terms of how we might be proceeding here?

MR. KINK: Well, I guess it would address some of them, but, again, you know, I think the creep is a real authentic thing. If the rules are set up one way and all of a sudden there's migration so, you know, they apply to one set of folks and all of a sudden they're in a different category, then certainly there would be concerns.

So I would urge you to look very clearly at whatever the rules are and not necessarily rely on the fact that they only apply to one set of groups or another.

COMMISSIONER TONER: Are there any other thoughts from any of the rest of the panel on these issues that we're talking about? I'm very interested if--are you comfortable with the Express

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Advocacy test in terms of 501(c)s? Do you feel that is something that you can work with and have worked with?

MR. PIPER: It's definitely clearer to understand when you're lobbying and when you're advocating and you're working. And, more importantly, it's also easy to explain. We work with a lot of groups around the country, and when you



think (c)(3)s, (c)(4)s, there's a tendency sometimes to think of, like, the ACLU and NAACP and all these huge groups. But I work with a lot of (c)(3)s and (c)(4)s that are two people, two to three people; some of them don't have salaries; they're working part-time. And they're very concerned about what--you know, they don't want to break any laws, and they want to stay within the rules. And I think express advocacy is really easy to explain to them.

COMMISSIONER TONER: And if we made that the key test for 501(c)s in terms of political committee status, would that be progress in terms of addressing the real concerns you're expressing?

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MR. PIPER: It would for our organization. We're not interested in electing people to office. We're interested in criticizing policies and, you know, changing public policy. And so we have no interest in advocating someone to be elected. So it would be good with us. And we don't have a 527, so we're neutral on a 527.

COMMISSIONER TONER: You might be one of the few organizations in the country that does not have a 527.

Yes, I'm sorry?

RABBI SAPERSTEIN: I was going to make a couple of points.

First, all of the 501(c) organizations are already regulated to some extent by the IRS restrictions on what they can do, the ban on being involved in electoral activity and the limitations on the advocacy and lobbying activity.

When you begin to have different rules for such activity around elections it's very problematic. If legislators would stop making and implementing laws for a given period of time around

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an election, maybe you could do that.

COMMISSIONER TONER: That's a really good idea in some respects.

[Laughter.]

COMMISSIONER TONER: Shorter legislative sessions, that could--

RABBI SAPERSTEIN: To the extent that that activity continues, our obligation continues. It doesn't change one iota. And that is really problematic.

As to the 527s, again, this is just for my organization an element of fairness about that. We're far along the electoral cycle here. A lot of people have made decisions based on the rules as they are understood at this time.

There are strong arguments on both sides that we've heard in these hearings, and I would urge that you take the time in consultation with Congress after this election to try to put guidelines into effect. To try and do it in the middle of this election I think is going to wreak havoc with the entire system and is going to be

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unfair to so many people that made conscientious decisions based on the understanding of what the rules are, and you're going to end up with rules, I think, that are going to turn out to be not as wise and well thought out as the opportunity to see how the system works now, and then learning from this election, implement more thoughtful, comprehensive guidelines.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Commissioner

Toner.

Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman,  
thank you.

Let me say to all our guests this  
afternoon, many thanks, and many thanks for hanging  
in there. It's getting later in the day.

Let me ask a couple of questions. I guess I'll  
start with Michael. Michael, do you know my old friend Sandy  
Furman, by any chance?

MR. KINK: I do, Commissioner McDonald.

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Absolutely.

COMMISSIONER McDONALD: All right. You're  
already in pretty good stead. I just wanted to be  
sure.

[Laughter.]

COMMISSIONER McDONALD: Rabbi, I just  
wanted to ask you, because I am--we have had just an  
unbelievable amount of response. We're always  
talking about the fact that maybe we feel bad about  
it that no one knows about us, but apparently we may  
be wrong about that. How did you come to testify  
today? Do you follow election law and this is what  
led you here?

RABBI SAPERSTEIN: There are several paths that  
brought me here. First, we were one of the co-chairs of a  
coalition of national religious organizations on the campaign  
finance issue, helped push through McCain-Feingold, that followed  
very clearly both the implementation and the aftermath of  
this. So we've been deeply involved in ongoing coalition  
meetings about this and looked eagerly to see what the FEC  
would be doing about this.

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Secondly, I'm also an attorney and a law

professor. I teach church-state law at Georgetown Law School, and dealing with how religious groups interact with the political process and the electoral process is an issue of particular concern to me.

So both avenues brought me here to testify today.

COMMISSIONER McDONALD: You're more than eminently qualified with that kind of background.

I want to do something a little bit different simply because this panel is a little different than some of the other panels we've had. We've had a number of very learned practitioners before us. But I wanted to see, with the time circumstance as it is, if any of you would like to comment on your own on something that you didn't get to cover before or you would like to add to something you've said. Do any of you feel such a--does anyone have any comments that they want to make?

MR. OLSON: Well, I could make a few

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comments that I didn't get into.

COMMISSIONER McDONALD: Please.

MR. OLSON: I touched on the phrase "promote, support, attack, oppose," which I guess is now called PASO. To advise clients on that is going to be very difficult with the information on the record. I suspect, as I said, there are going to be a number of AOs or perhaps lawsuits trying to define what that meant.

If that means mentioning a clearly identified candidate and so forth, one of the questions is. When does the person become a candidate? Is it when he files--he or she files a Form 2 with the FEC? Or is it perhaps in January when he calls up the state party chairman and says, yeah, I think I'm going to run again for Senate? And, in effect, it

seems to me that it might extend the electioneering communication type restriction, which right now only applies to broadcast, cable, and satellite, to every form of publication. And it extends the time period from 30 days before a primary and 60 days before the general to perhaps

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the rest of the year.

So I don't know, quite frankly, the way the proposed regs stand right now, when somebody would be considered to be a candidate and what type of publication--communication that they could issue. Can they mention a candidate in connection with a law--or bill, rather, that they intend to support or oppose?

Anyway, it's going to be a lot of questions to ask in the future.

MR. KINK: I would add, Commissioner McDonald, just amplifying the discussion we had earlier, to the extent that the political committee status compromise is differentiated from the expenditure definitions, that a restriction on corporate support for PASO activities is of particular concern to us. As I've said before, we are able to generate internally funding for our advocacy, and our nonprofits businesses are businesses. They are corporations.

So, you know, if we're not a political committee but there's still significant

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restrictions on our ability to fund ourselves, the work that we do, that's still a problem for us. I know that's something that you'll consider, but I would ask you to consider it closely.

COMMISSIONER McDONALD: Sure. Let me just ask on that point, can you give us kind of a rough estimate of how much money we're talking about?

MR. KINK: I believe that our social

ventures bring in \$4 million a year, or thereabouts, in unrestricted funding to our organization, which has a total budget of about \$30 million a year. Since that funding is unrestricted, much of it goes to our advocacy work. There are not a lot of foundations out there that want to support aggressive advocacy. There are handful of donors but not enough, so that a lot of that--we don't spend all of it on advocacy. But a good chunk of it we do.

So that kind of decision we have created our businesses, and many nonprofits have, thrift stores, they have businesses. It's a growing portion of the nonprofit funding sources around the

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country and a very vibrant sector. And so organizations that create that kind of unrestricted support for themselves I think should be considered and should be allowed to make those kinds of funding decisions.

COMMISSIONER McDONALD: I see my time is up, but let me just ask, Bill, real quickly, the size of your organization. How much money are you talking about, roughly?

MR. PIPER: Probably about \$6 million a year based on all sorts of sources.

COMMISSIONER McDONALD: Thank you very much. I appreciate your being here today.

CHAIRMAN SMITH: Thank you, Commissioner McDonald.

Commissioner Mason, you're next.

COMMISSIONER MASON. Several panelists Mr. Kink in particular, and I think Mr. Piper addressed this directly, but I'll ask any of you

who want to to comment on it--talked about working issues in the context of political campaigns, in part because that was when people and politicians

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were paying attention. And I sort of took it that your position is--and you approached saying this, but I want to draw it out, if I can--that you don't really care if both contestants take the right position or the wrong--I mean, you care if they take the wrong position, but what you're interested in is the issue and the problem that you're telling us you're confronting is that the issues are involved in the campaigns, that's when they're hot, that's when they're debated. And so in the New York Senate race, for instance, in the example you gave, if both candidates had showed up at the press conference the next week, this would have been an entirely happy outcome for you. And if the effect of that--I mean, I suppose one could say probably on the margin, you know, Democrats are probably going to be more sympathetic to your set of issues than Republicans, though maybe not in New York.

But if that sort of activity had allowed a Republican candidate to differentiate his message and positioning in a way that might help him, you don't really care.

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MR. KINK: Absolutely. And my organization has been close to Republicans like Senator D'Amato and Congressman Lazio. There have been Democrats that hated us, and there are plenty of Democrats that like us, and plenty of Republicans that are averse to us. I mean, the question is the issues.

What happened in that campaign is that we felt that both candidates had the potential to be very good on HIV/AIDS issues, were not addressing them in the course of the campaign. We had asked them specifically. We had met with them, and we made the decision to turn up the heat. We took over both of their offices at the same time on the same day

in civil disobedience action. We got wall-to-wall media coverage in every newspaper, every television outlet, national cable. And the next day the First Lady came out in support of a couple of specific initiatives, including federal funding for needle exchange, which should be some good raw meat for the partisans in the house. You can file that away for the future.

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But the fact is that taking that kind of courageous stand in the middle of a campaign is particularly important, and we wanted to communicate that to our community. The next week we held a press conference to say that she was responsive, that Congressman Lazio, who still had the potential to be very strong on the issues, was still silent, and we were going to continue to dog him for the rest of the campaign.

So, again, like you said, we would have been very happy if both of them would come out with strong and comprehensive statements, but we were chasing them down on the issues. We were not chasing them down to get one or the other of them elected.

COMMISSIONER MASON: Mr. Piper, you discussed the experience of having worked with groups whose donors were politically targeted because of the unpopularity of the positions, either with established politicians or others.

Talk to me a little bit more about the special challenges that that presents to groups that may

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advocate for non-traditional or unpopular causes.

MR. PIPER: It can be problematic when you're working on an issue that a lot of people that are in positions of power are against you on. And some



of them are so against you that, you know, they'll go to any means to stop you. And so if they have to, you know, politely or not so politely tell one of our donors, you know, that you need to be careful about giving to this group because they're going to have all these ramifications, whether or not they do that directly or their staff--or in a lot of cases, we were having--this was back when I was putting some of those initiatives on the ballot. We had problems that vendors of our donors were calling and saying they were getting political heat and business with someone that was giving money to us.

So it's definitely a very serious problem, both in terms of putting pressure on the donors through, you know, the political process of saying, well, we're going to take away your federal contracts, but also, you know, in the media as

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well. For all organizations like Drug Policy Alliance, some of our donors--

COMMISSIONER MASON: I can't help you with the media, but--

MR. PIPER: Right.

COMMISSIONER MASON: In terms of--

MR. PIPER: But the politicians, I'm saying the politicians are getting the media-

COMMISSIONER MASON: Most of the time this wasn't done. I mean, most of the time ultimately some adverse action wasn't taken, and so a significant part of the threat may be that you would be investigated or that a complaint would be filed. And as I understand it, a lot of times that in and of itself was a significant factor. And even if it's something within our jurisdiction we would look at and six months later kick

out and say, well, there was no reason to have filed the complaint, that still may have harmed your organization.

MR. PIPER: Well, we'd certainly probably get negative press around it, and it probably would

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scare off some of our donors who might be scared that they're breaking the law just giving money to us. And like I said in my opening statement, there is--I can't say with all certainty that you would kick it out. I would hope that, you know, if we were abiding by the law, the Commission would find in our favor. But there's no way of saying ten years from now who is going to make up this Commission and how political it could be.

So that's our concern. If there's an easy fixed rule that we understand so we don't accidentally break it and we can explain it to all our supporters, and anyone--that's what great, you know, about the vote for/vote against. A monkey, you know, could enforce that rule.

COMMISSIONER MASON: We have six of them up here who disagree all the time.

[Laughter.]

PARTICIPANT: We've been called worse. Don't worry about it.

MR. PIPER: I mean this Commission no disrespect, obviously. But from our point of view,

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it so easy for us to understand and explain to everyone that we work with, and that's why we like it.

COMMISSIONER MASON: Thank you. Thank you, Mr. Chairman.

CHAIRMAN SMITH: That explains why we're always so bored with this job.

[Laughter.]

CHAIRMAN SMITH: Thank you, Commissioner Mason.  
Commissioner Thomas?

COMMISSIONER THOMAS: Thanks, Mr.  
Chairman.

Thank you all for coming. I have to start first with Mr. Kink. You made me a little nervous because you started out early on and you said that your organization is very militant, and I just want to know how militant are we talking today.

[Laughter.]

COMMISSIONER McDONALD: You are entitled to as much time as you want, by the way.

MR. KINK: Not today. There's a time and  
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place for everything, and I've been arrested, I've had handcuffs on, but I'm happy to have the opportunity to talk civilly.

[Laughter.]

COMMISSIONER THOMAS: Okay. I'm greatly comforted.

I kind of want to put it in perspective by asking how you folks through your various organizations or those you represent deal with the new electioneering communication restriction. It is, as I've mentioned in prior panels, a pretty amazing restriction. It says that within these time frames, 30 days before a primary or 60 days before a general election, a broadcast ad that makes any reference to a federal candidate and that reaches 50,000 of that candidate's electorate is an electioneering communication,

and that means it cannot be paid for with any corporate or union monies, and there will have to be disclosure if you go above a certain amount.

So for those organizations like yours that want to rely on corporate or union resources,

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perhaps, to pay for those kinds of communications, all of a sudden you can't do that anymore.

I'm just curious. How are you coping with that? I gather you'd probably end up having your organization, if it wants to do broadcast ads, tailor the message so that perhaps it doesn't make reference to a particular federal candidate. And I gather you probably go through the business of saying, well, all right, we're not going to do broadcast ads, we're going to resort to newspaper ads or mailings or phone banks.

But I wanted to get some sense as to how your organizations really deal with that, and if you can deal with that, could you deal with a test that the Commission came up with that was sufficiently clear about what sort of communications would cross the line short of, say, a magic words test?

MR. KINK: I'll say that we're not one of those highly integrated 501(c)(3), (c)(4), or 527 organizations either. And to the extent that we've done any broadcast advertising, it's been radio,

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it's been targeted, it's been part of campaigns. But my gut tells me that, you know, the tenor of our organization is such that if we felt the need to run a radio ad in the heat of a campaign, my boss would tell me to run it and get the lawyers ready and take it up, because it's part

of what we do and we would defend it or we would go to jail because of it.

So I don't think I'm necessarily the best person to answer your question, but--

[Laughter.]

COMMISSIONER THOMAS: Sort of back to where we started, aren't we?

MR. KINK: Now, I will say that certainly for groups that do primarily issue advocacy, that's a serious thing. And I certainly could see an instance where we were fighting hard on an issue and we might want to bring that in as part of our repertoire, and it does have the effect of silencing groups whose primary concern is issue advocacy.

MR. PIPER: I can give you a concrete

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example from this year when a Member of Congress was trying to pass legislation, actually did pass legislation that would prevent us from being able to run ads on subways, buses, and trains around the country, and we wanted to criticize him directly in his district, but he happened to be in a primary at the time. And so, you know, how do you really do that? So we were ultimately too afraid--and maybe we should hang out with you more.

[Laughter.]

MR. PIPER: To get the courage.

I think the real issue really is are you legitimately trying to raise an issue, or are you--in this case, we were legitimately trying to raise the issue to get voters to call him and say this is a bad idea. We don't want to influence the vote whatsoever. We would have preferred him not to have done it during that--

and maybe he did it, you know, purposely during this primary. But, on the other hand, he's in his primary, then he has the general. That's the whole year, practically.

MR. OLSON: Commissioner Thomas, I'm not

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sure I can shed too much more light on that. We represent a number of groups, (c)(3)s and (c)(4)s. I can at least speak on behalf of some of them that they were not in favor of the electioneering communication requirement in BCRA. But if that's the law of the land, they plan to abide by it.

Some of the (c)(4)s have SSFs, and if they choose to do a broadcast, cable or satellite, it's possible that they might pay for it out of that organization. If they had planned to use treasury funds for it, perhaps they will use an alternative form of public communication, newspaper advertisement or a mailing. So they're just coping with it.

We'll have to see. This is the first time through, especially for the general election. It's going to make probably a big difference if there's legislation being considered in the Congress, various bills that members might be interested in, either pro or against, that's going to hamper some of their activities or it's going to restrict them on what they can do. Again, not to advocate the

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election or defeat of a candidate, but they're concerned with public policy issues, legislation that is pending. The (c)(4)s, at least.

RABBI SAPERSTEIN: For most of the national religious entities in the country, very few do broadcast ads in general at any time on public policy issues. Most don't have the resources to do that. Anyone who wants to contribute to such a cause could help us shape what the policy might be. But right now we don't--you know, it's not a

realistic--we're far more concerned about the impact that this would have on membership communication. If the activity of membership communication and voluntary participation in voter participation efforts raises the threshold of a political committee and your proposed definitions did not have an exemption for membership communication, it could be a disaster in terms of the work of a lot of the nonprofit organizations. And that's where the focus of our concerns on communications has been.

COMMISSIONER THOMAS: Just very briefly, I

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hope--I've made this comment or similar comments. From my own perspective, I don't think any regulation we adopt will attempt to ignore the membership communication allowance or the ability of organizations to undertake whatever other allowance the nonpartisan voter registration and get-out-the-vote allowance is in the statute. I think we'll work very hard to make sure that all of those statutory exemptions that are in the law now apply across the board to whatever activity you or your organizations are involved with.

Thank you.

CHAIRMAN SMITH: Thank you, Commissioner Thomas.

It strikes me that when we talk about the electioneering communications and how do you live with that, of course, the electioneering communication, this is a clear, bright-line standard. You name a candidate; it's broadcast; basically you know you've got it. And that only applies for 60 days before an election, 30 days before a primary, as opposed to this would apply

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all year, and it would not use a bright-line standard but would use the promote, support,

attack, oppose standard, which is not so bright-line.

So I do think--one other issue that has come up, I have asked a lot of questions in all the panels about 501(c)s, and one other thing I want to get at or have been trying to get at is the role that they play, and I have a sense, a fairly strong sense that, A, already 501(c)s are playing a big role. I cited the report by four of the leading reform groups this morning where they said 501(c)s are where the problem is, that's what we've got to do--kind of changed their tune now because they think if they go out for 501(c)s, the 501(c)s will be able to block them, so it would be--it's kind of do one slice at a time until we get everybody, break up the alliance. But that's what they used to say, and we've got examples, we're read examples from 501(c)s of ads and so on.

Leaving all that aside, let's suppose we did exempt 501(c)s. Here's the issue I still have,

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and I think this might be best for Mr. Piper or Mr. Kink, but any of you can respond. You both represent causes that are often unpopular and, in fact, to some extent all of you do, can be unpopular in certain circles.

Mr. Kink, you note that you do these--criticism of elected officials, and it sounds like that becomes quite a bit of your group's activity. Quite a bit of your communications involve criticism of elected officials.

By the way, as I understand it, Rabbi, this communication commending George Bush for his moral leadership would be a promote, support, attack, oppose--that's how I would understand it--public



communication and would start to subject you to these restrictions.

But if we cut the 501(c)s out, now the question is--earlier today I asked a former Commissioner as to whether we would blanket 501(c)s out, in which case what do we do if they just violate their status, or would we investigate them. He said, well, you should still go ahead and

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investigate them. And that's good because that is the position he took on the Commission when he took the view that the Christian Coalition was a political committee, even though it was a 501(c).

But then we're left at the question, finally getting to it, which is--I mean, how would you handle FEC investigations? I don't know what your budget is, Mr. Kink. Your budget, Mr. Piper, is not a lot, and you say you've worked with some much smaller groups. I remember working with some nonprofits that were very small that I was on the board of that spent \$50,000 or in another case about \$300,000 as a total budget. And if we did things that would promote, support, attack, or oppose an office holder, which one of those did--and, in fact, it probably was more than half of our work in promoting, supporting, attacking the office holder as part of public education.

So then somebody files a complaint against you, and you've got to handle an investigation to justify that you are, in fact, not doing that, I mean, how do you think that would affect your

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organizations? An open-ended kind of question. Or is the answer too obvious?

MR. PIPER: We'd have to hire some high-priced lawyers, I would imagine, and defend ourselves--

COMMISSIONER McDONALD: If you hired any lawyers, they'd be high-priced.

[Laughter.]

MR. PIPER: But that's what we would do. I don't know what the smaller groups would do. They wouldn't be able to afford it. But I think that's also one of the problems with kind of loosening what the line is. Vote for/vote against, I mean, it's pretty easy to determine whether or not there's a potential case there. So you make it broader than that, I think it just makes it easier to file, you know, complaints. Plus we'd have to possibly deal with two agencies, the IRS as well.

CHAIRMAN SMITH: Let me put the question where it might have a little--Mr. Kink, as I understand it, you mentioned you do these things that are criticism of elected officials, and you

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can do that as a 501(c)(3), right? So you can do that as much as you want as a 501(c). So, conceivably, a major part of--it could be more than half of your activity, even as a 501(c)(3) could involve criticism. So if you got this complaint filed against you, then it would be the case that over half of your activity was, in fact, we would say, promoting, supporting, attacking, opposing a candidate. Where would that leave us?

MR. KINK: Absolutely, and as Commissioner McDonald mentioned yesterday about the IRS, I respect

the FEC to the extent that we have future investigations, I want to let you know how much we-

[Laughter.]

MR. KINK: It's true. I mean, you know, we do a weekly electronic newsletter that covers the AIDS issues in detail at the city, state, and federal issues. Week by week by week we're talking about appropriations bills, we're talking about particular Members of Congress that are doing good things or doing bad things. So a lot of the

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substance of what we do is calling these folks out and making what they do public and criticizing or supporting them for their positions.

And, you know, I have to say that, again, I don't think that our organization is necessarily representative. In many cases, we've been more courageous and more aggressive than a lot of organizations. The former mayor of New York City tried to put us out of business. And we incurred literally millions of dollars in legal expenses in addition to pro bono help that we got in many other cases. And we kept doing what we're doing.

So we really feel like the substance of what we're doing, we're going to keep doing it, but it's true that it would throw significant barriers at our ability to carry out our work.

CHAIRMAN SMITH: It's just what kind of occurs to me, if I wanted to shut down a 501(c) and we excluded 501(c) organizations from this, if I could file a colorable claim that, in fact, you were violating your 501(c) status, then the Commission would potentially investigate that and

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we could really produce quite a bit of harassment because we'd have to be pretty into your files to figure out if you're spending more than half your

time doing this or not. It could be quite an interesting deal.

Well, I guess that's more a statement than question, and my time is almost up, so I guess I'll just cease by noting we appreciate that you did not decide to take over our building today. And the Commission normally meets--

[Simultaneous conversation.]

CHAIRMAN SMITH: For that reason, I want to mention the Commission normally meets on Wednesdays and Fridays.

[Laughter.]

CHAIRMAN SMITH: That's an inside joke because we meet on Tuesdays and Thursdays, of course, for those who don't grasp it. Thank you, and thank you for coming.

Mr. Norton?

MR. NORTON: Thank you, Mr. Chairman. Rabbi Saperstein, you have testified that

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the Commission ought to wait until after the election before it tries to deal with the issues before us.

Mr. Potter, former Commissioner Potter, testified earlier, attempted to give us a history lesson, and he said what history teaches us is that the greatest expansions of soft money abuses begin where one party starts doing something, they get way out ahead of the other; the other responds by doing the same thing; then you've got an arm's race. And then when everybody looks back on it, they say, well, both sides were doing it and that becomes the baseline for future elections.

And so I think his concern is that we have organizations now, registered 527s who, by definition, they're entitled to their status because they say their primary purpose is to influence the selection, nomination, election, or appointment of an individual to public office. That sounds to us a lot like their major purpose is to influence federal elections.

What do you say to his argument that  
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essentially we won't be able to put the genie back in the bottle if we don't act during this election cycle?

RABBI SAPERSTEIN: I don't know whether he was being descriptive or prescriptive. I presume he was being descriptive about what the pattern has been. You can stop that prescriptively by simply saying this time we're not going to say, well, because it happened during one election cycle and we learned that it doesn't work, if that's the conclusion at the end, we're just going to let it go. That depends on what you do and what Congress does.

I would hope that the sensitivities of the American nation have been raised enough over the past decade about campaign finance abuses in a way that actually gives you political momentum to deal with this forcefully after you've had time to evaluate it, and hopefully there is more

interaction between you and Congress over this as well. And I don't know that we have to be the prisoners of a bitter and unremitting past. I

think we can be the shapers of a better and more hopeful future, and I think that's one of your roles here. But I think it needs to be based on solid evidence.

It is not clear to me--I really do believe there are arguments on both sides of the 527s. The ways that 527s function very differently on the political process than do political parties and than do candidate campaigns. The potential for corruption, the diversion of the candidate's time in terms of raising money, many of our central concerns in campaign finance reform are not really raised in the same way. On the other hand, can it be used as a loophole to get around some of the restrictions? It is possible to do. But until we see how well McCain-Feingold works as it is and how the 527s function in this election and have time to evaluate that thoughtfully and comprehensively, to rush into the gap now is both unfair to those who have made a set of decisions in good conscience based on what the widespread understanding of the rules were; and secondly, deprives you of the

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opportunity to have a really thorough and broad perspective on what the impact of the new law has been through an election cycle.

So I would still argue that you can stop the pattern that he described if you have the moral vision, which I know you do, and the political will, which you will, which I am confident that you would after this election cycle.

MR. NORTON: Thank you very much.

I have nothing further, Mr. Chairman. CHAIRMAN

SMITH: Thank you, Mr. Norton. Mr. Pehrkon?

MR. PEHRKON: Mr. Chairman, thank you. Mr. Olson,

you have had the pleasure of filling out our forms.

[Laughter.]

MR. OLSON: Yes.

MR. PEHRKON: I'd like to explore that a little bit

further. One of the things--it seems to me that there's a difference between the two communities, the 501(c) community and also the political community. People who fill out our forms

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at least know they're involved in the political process. Could you sort of talk about the distinctions between the two communities and how they would address filing the FEC forms and filling them out and the recordkeeping requirements associated with them.

MR. OLSON: Yes. Well, 501(c)(3),(4) organizations, so forth, have to complete an annual Form 990, approximately six pages. (c)(3)s have to file a Schedule A. You may have to file a Schedule B and so forth.

The report is due on the 15th day of the fifth month after the end of your tax year. So for calendar year reporters, that would be May 15th. You can get an automatic three-month extension, and if you provide a sufficient reason, you can apply for another three-month extension, maximum six-month extension on filing that report.

There are no special reports required during the year otherwise, unless you want to file an amended report or something of that sort.

Political committees are required, let's

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say SSFs, the FEC Form 3X. For quarterly filers, you would file two reports in an off-year and a minimum of five reports in an election year, and possibly, if you participate in any primary elections or have expenditures affecting that, you could file many more reports. Monthly filers, of course, don't have to file the 12-day pre-primary reports. So it's quite a few reports. Also, as a quarterly

reporter, you're required to file a report on the 15th day after the end of the quarter--that's today--for quarterly filers. Very little time to reconcile problems and so forth.

A monthly reporter can file on the 20th day after the end of the month. That gives you just a little more time to get bank statements in and so forth and to resolve questions. Perhaps a contribution came in from a political organization and you're not sure whether it's a federal PAC or a state PAC, that type of thing.

So one of the main things is that there are no extensions. The report is due on the date certain, either electronically filed or by

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certified registered mail. There are no extensions, and your administrative fines program is working wonderfully.

[Laughter.]

MR. OLSON: Because the fines are just spit out by computer if you're a day late. And, of course, they do send you an RFAI about two weeks later and say, Where's your report? But you will be fined.

In the old days, reports analysis sometimes would use some judgment on that. Maybe it's a new organization, it's so small, you know, give them a break. But now everybody gets fined. And so that's a big difference.

There are no excuses that I'm aware of. Perhaps there are that the Commission has permitted, but--

MR. PEHRKON: Many have been tried.

MR. OLSON: But they must be filed. So it is very



difficult.

Also, let me just say on the Form 990, (c)(3)s and (c)(4)s are already reporting their

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expenditures by object class, such as salaries, utilities, shipping costs, that type of thing. And you have to divide your expenditures up into program services, management in general, and fundraising. So all expenditures have to be split that way for (c)(3)s and (c)(4)s.

In addition, your program service expenditures have to be broken down by program service, such as program service A, B, C, D, and so forth. Plus, if you do any lobbying, that has to be broken out.

So if organizations, (c)(3)s and (c)(4)s, are going to have to do another set of reports, I don't think an organization of any size without significant help can do this and meet the filing requirements for, let's say, FEC Form 3X, within the periods allowed. And I think, granted, that FEC provides fee software and so forth, but that is not all that easy to use. Improvements are constantly being made.

One of the things, too, I have always--I guess they'll get around to it eventually, but as a

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political committee, your electronic file gets larger and larger and larger. There's no way of cutting it off. I've worked with some committees that start out with a very small, in terms of the storage space, report. Now they've multiplied, and as it goes on, it will increase and increase.

Anyway, I'm sorry for taking too long-MR.

PEHRKON: That's a good suggestion and we'll take it into consideration. We do appreciate that.

Mr. Chairman, I have no further questions.

CHAIRMAN SMITH: Thank you, Mr. Pehrkon.

That will wrap up this panel. I thank all four of you for coming and giving us your time today, and we will take a ten-minute recess and then start with today's last panel. Ten minutes.

[Recess.]

CHAIRMAN SMITH: We are back in session for our eighth and final panel in this two-day public hearing on political committee status.

For our final panel, batting clean-up, as it were, we have Kay Guinane, counsel for OMB

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Watch; Marv Johnson, legislative counsel for the ACLU; Elliot Minchberg, Vice President and General Counsel and Legal and Education Director, People for the American Way; and Carl Pope, the executive director of the Sierra Club.

We appreciate all of you coming out and staying with us during this long hearing, and we are running a bit late now.

I am going to ask each of you to give a brief three-minute opening statement, try to keep within that time frame, and, again, the lights are more exhortatory than mandatory, but at some point I will cut you off if people run too long in questions or answers.

I do want to point out that I've been informed that Mr. Pope does have to leave us at about 5 o'clock, so hopefully we'll be done by that time or at least hear his opening statement, and

people may want to ask him questions early if somebody--

COMMISSIONER McDONALD: Can I go with him, Mr. Chairman?

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[Laughter.]

CHAIRMAN SMITH: Yes, you may. Again, the first two Commissioners can, but after that you have to stay. But if anybody has a particular question around that time, they might just motion me to intercede and maybe we can get someone else to yield time if you have a question you specifically want to address to Mr. Pope. And it looks like we're running up against that deadline. With that, let's go ahead and get started. ms. Guinane?

MS. GUINANE: I'd like to thank the Commission for the opportunity for OMB Watch to testify before you today. We strongly support both campaign finance reform and protection of nonpartisan issue advocacy and voter mobilization efforts. And these should not be inconsistent public policy goals, but the proposed rule has managed to create an unnecessary clash between these two important priorities.

We feel this could be avoided if the FEC deferred the rulemaking until after the election

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and came at the issues from another angle. That should be the potential for corruption that independent groups might present. There can be no sensible or constitutional resolution of the issues without first identifying factors that separate groups that threaten to

corrupt the political system from those that do not. And we feel that tax-exempt categories aren't necessarily helpful for this purpose. There are other ways to slice and dice the universe of independent groups and more relevant factors that could be considered than tax-exempt status. These could include membership in governance, the degree of public support that a group has, or potentially their public interest mission versus a mission that represents private interests. All corporations aren't necessarily the same. Even at this point the regulations don't recognize much distinction.

So we believe there are many more possible approaches than those suggested in the proposed rule. Some groups could be subjected to less restrictive regulations than political parties and

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campaigns, but maybe somewhat more regulation than they are now. But these are all issues that the Commission and the Congress and the public hasn't had time to really explore, and we haven't had time for a factual record to develop on how the new system is going to work under BCRA.

So we believe that, as I said before, this particular proceeding should be deferred, not just dropped but deferred until after the election and take it up at that time.

Yesterday, I had the opportunity to spend the day with a group of low-income, community-based, nonprofit social service providers in the State of South Carolina. They wanted training on what the legal rules are in the election year for 501(c)(3) organizations so that they can step up

their voter mobilization and education efforts.

They believe that decisionmakers will be more responsive to the needs of lower-income households

if these people turn out to vote, and that getting--it

doesn't matter how they vote. The point is

that they do vote and that that's how they can get

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the attention of decisionmakers at any level. So

they are very motivated to do more work in this area and

could easily come under the political status--regulation of

the Commission. And since they're corporations and get

foundation and other forms of support, this would completely

cripple their operation.

In their discussion, they talk very passionately about the history of the struggle for equal voting rights in America, and because they are small and cash-strapped, they can't afford to hire lawyers to either seek advisory opinions or take them through the process of being investigated by the Commission. And they don't feel that they should have to risk those kinds of consequences for exercising the right to vote and encouraging others to do so. And they said it's the process of the retaliation that hurts us even though we know we'd be exonerated in the end.

They noted that the Help America Vote Act passed last year is going to change the way America votes, and they're very anxious to educate the

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people in their communities about how those changes

will affect them and make sure that they understand all these

changes. And partly because they're small, they need to pool

their resources with other groups and partner with other

organizations, and that in turn could trigger some of the

mechanisms in the proposed rule and make them subject to

regulation.

So I'll conclude with--when I told them that I would be testifying here today, one of them came up to me afterwards and said, "Please tell them we are not the problem."

CHAIRMAN SMITH: Thank you, Ms. Guinane. Mr. Johnson?

MR. JOHNSON: Thank you, Mr. Chairman, Commissioners. My name is Marvin Johnson, and I'm a legislative counsel for the American Civil Liberties Union. We are nonpartisan, nonprofit organization with approximately 400,000 members throughout the country. Our mission is to protect and promote civil liberties. We do not take positions on the election or defeat of candidates,

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but we do take positions that sometimes support or oppose candidates' positions.

The proposed rules will have a profound effect on the ability of nonprofits to contribute to the vast marketplace of ideas that has become the hallmark of our democracy. First, by redefining "expenditures" and "political committees," many nonprofits will no longer be able to make their positions known. The proposed rule will expand the definition of "expenditure" to include communications that promote, support, attack, or oppose a federal candidate or policy position of a candidate. This threatens to rip the heart out of the First Amendment. Nonprofits are already prohibited from making expenditures, so expanding the definition effectively silences them.

Likewise, "political committee" will be redefined under the proposed rule to encompass an organization that spends \$50,000 in one year on communications that promote, support, attack, or oppose the positions of a federal office holder. Thus, even though the major purpose of the

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organization is not to engage in electoral politics, the organization may be deemed a political committee and subject to burdensome regulations.

For example, if a 501(c)(3) gun advocacy organization spent just \$50,000 in advertisements this election year to criticize President Bush for not doing enough to protect gun owners, it will have engaged in an expenditure prohibited by federal law and deemed a political committee. Many nonprofits may well forego their speech rather than risk running afoul of the regulations.

Second, one of the more draconian provisions in the proposed rules allows the Commission to look back on an advocacy group's activity over the last four years to determine whether or not it qualifies as a political committee. Thus, activities that occur that were perfectly legal before McCain-Feingold may be used to determine whether or not that organization is a political committee. If the FEC determines the group qualifies, it would require the group to

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raise hard money to repay prior expenses that are now subject to the new rules. All further advocacy work by the organization would be halted until debts to the old organization were repaid. Such reclassification based on activities that were permissible under the old rules smacks of a violation of due process and could well place those groups in jeopardy.

Restricting advocacy groups will have a profound impact on the ability of individuals to engage in political dialogue, which is a core First Amendment right. There is no support either in BCRA or in McConnell for such regulation, and, therefore, we respectfully request that the Commission withdraw the NPRM and at least take a much harder look at not only 527s but 501s to make a determination if there really is even any need for regulation in this area. And we do not

believe that there is a factual basis for doing so at this point.

CHAIRMAN SMITH: Thank you, Mr. Johnson. Mr. Mincberg?

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MR. MINCBERG: Thank you, Mr. Chairman and members of the Commission, for the opportunity to testify here today, not only on behalf of People for the American Way Foundation, but on behalf more than 670 other nonprofit groups that have joined in the comments that we and others filed with the Commission.

When you look not only at those groups but at the many others that have either testified or sent comments today, it is really one of the most remarkable and diverse arrays of organizations I have seen since I've been to Washington. You've got my boss, Ralph Neas of People for the American Way Foundation, and Grover Norquist, of Americans for Tax Reform, who hardly agree on anything-

CHAIRMAN SMITH: The world as I know it no longer makes sense.

[Laughter.]

MR. MINCBERG: And they agree, they agree on this rule. You've got the--

VICE CHAIR WEINTRAUB: If you and I could agree, Mr. Chairman, maybe anything is possible.

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MR. MINCBERG: I didn't want to mention that example, but some might. You've got the Chamber of Commerce and the League of Conservation Voters. You've got the National Right to Life Committee and Planned Parenthood. You've got the Presbyterian Church and Rock the



Vote. All of them agree that these rules are wrong and should not be adopted because of the effects that they would have on issue advocacy, on nonpartisan voter participation advocacy, and even communications by nonprofits with their own members.

And the chilling effect that Commissioner Weintraub and others have expressed concern about is much more than theoretical. I have already heard concerns by people in my organization and others that are involved in fundraising for an election protection program, a nonpartisan registration and get-out-the-vote activity that we've been doing for several years, with a broad coalition of (c)(3) groups in the African American community about whether we're going to be able to raise funds, because, after all, under the rule as

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proposed, foundations couldn't fund it after July the 5th.

Just yesterday evening, on the way out of the office, I got a call from a colleague from another group in California who has heard from several small 501(c)(3)s who are saying, in light of the lookback rule, they're concerned about taking positions today on legislation. I was able to reassure her that at least as to state legislation, this FEC's rules could not affect that. But on federal legislation supported by candidates for election, I could not give her any assurance, and that chilling effect is occurring right now. It's important for this Commission to take steps to stop that.

I want to talk for just a minute or two, though, about the question that seems to be one of the focuses of this hearing, which is the notion of trying to solve the problems by limiting any rules to 527 groups. I don't think that would solve the problems for two primary reasons.

First, central to the protections of the

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First Amendment is freedom of speech concerning

public policy issues engaged in by a wide variety of organizations. For this Commission to restrict freedom of speech for 527s without specific congressional authorization, without the kind of record that Congress established in the electioneering communications rule that they established, would, I think, violate the First Amendment and would threaten other nonprofit groups.

The rationale that 527s are allegedly being used to evade BCRA legal limits could be and, in fact, as the Chairman has already pointed out, has already been raised with respect to 501(c) groups. There is simply no reason why, if today it is 527s by this Commission with no authority from Congress, tomorrow it couldn't be 501(c) groups, too. Commissioner Mason has pointed out that the law and the logic really don't offer a very good reason to separate those kinds of organizations.

If there is to be consideration of any additional restrictions on free speech by nonprofits, it

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should be by Congress.

But, second, you can't separate 527s from 501(c) groups because many 501(c)(4) groups, as you heard in more detail yesterday, have set up connected 527 funds. These funds engage in activities that may be legal for (c)(4) groups, but are better done by 527s for Tax Code reasons.

For example, a (c)(4) that has substantial investment income that does certain kinds of voter guides could be behaving illegally if it didn't

operate through a 527. But then if this Commission comes in and says that all 527s then become political committees, then they can't do that either. The result is a Catch-22 that would be created by this Commission's rules that would severely harm existing right now 501(c) groups. In short, the proposed rules threaten First Amendment rights, usurp the role of Congress, would create chaos by dramatically changing regulations on issue advocacy and voter participation in the middle of an election year, and we urge the Commission to withdraw them.

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Thank you.

CHAIRMAN SMITH: Thank you.

Mr. Pope?

MR. POPE: Mr. Chairman, members of the Commission, I've spent my lifetime in public policy advocacy. I've worked in political campaigns and run them. And I'm a lifetime advocate, as is my organization, of campaign finance reform. I and my organization have supported every major campaign finance reform initiative before the Congress. I'm a former of California Common Cause. I served on the State of California's Election Reform Commission. My organization and I supported BCRA.

I am appalled at some of the suggestions which are being made to this Commission. And if federal ethics rules allowed me to, I would give each of you a diamond-studded backplate for your name tags with the motto, "Act in haste, repent at leisure." I would urge this Commission to slow down because I don't think you have good

answers yet for three vital questions.

The first vital question is whether the protect, support, oppose standard is constitutional and whether this Commission has legal authority to implement it to any group of organizations.

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The second question is whether the flaw, which even Fred Wertheimer has admitted he finds constitutionally in that standard, can be remedied by applying it only to organizations subject to Section 527 of the Internal Revenue Code.

And the third question is: What is the abuse you are trying to remedy? And what is a constitutionally precise and specific remedy for that abuse?

I don't think the standard is constitutionally protective or legally warranted, and I'm going to offer some examples of communications which I believe would fall, as I understand this standard, under it.

This weekend, the New York Times reported that there is a used-car billboard outside Fort Campbell, Kentucky, which contains the motto, "We support our troops, our President." If they spent \$50,000 on that billboard, I believe that used-car

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dealership would, under the rule pending before this Commission, be at risk of being found to be a federal campaign committee.

In 2002, at a time when I believe Senator Craig was a candidate for public office, the Sierra Club sent its members the following e-mail:

"Please reject Senator Craig's amendment to the

Department of Interior appropriation bill. Craig's amendment exploits this summer's forest fires by increasing destructive commercial logging and gutting important environmental protections." I assure you, we were not engaged in a political campaign in Idaho to defeat Senator Craig, yet I believe that e-mail message would have qualified as a federal campaign expenditure under this test.

Finally, in the same month, in June of 2002, we sent our members a letter which said, under my name, "I urge you to vote for the Shays-Meehan campaign finance reform bill and against any poisoned-pill amendments. And please vote against the Ney-Wynn bill." I believe that some lawyers would advise me that that might be viewed as

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counting towards the \$50,000 limit because it mentions named candidates in a way which any reasonable person can clearly ascertain that Mr. Shays and Mr. Meehan are the heroes of the play.

Finally, a report in March of 2000 from Public Citizen's Congress Watch discussing the reasons and the logic behind the passage of McCain-Feingold, which discussed a series of individual named members of the United States Senate, stated that they had received campaign contributions from the GAF Political Action Committee and had then changed their votes on a matter pending before the United States Senate. I certainly believe that that report, which was part of the legislative record upon which Congress passed McCain-Feingold, would qualify as campaign spending.

Second, can you fix this by just applying it to

Section 527 organizations? I don't think so because most Section 527 organizations are part of larger organizations, like my own, which use their Section 527 organizations to comply with the instructions of the House Ways and Means Committee

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in setting up Section 527 and in the Internal Revenue Code, that when we engage in activities which are connected to federal elections, we should use a Section 527 entity. The major activities of our Section 527 are the preparation of voting guides and voter charts and the carrying out of grass-roots lobbying activity which is indistinguishable from our (c)(4) grass-roots lobbying activity, except for the fact that it occurs in close conjunction with an election. And the IRS has told us that when we do grass-roots lobbying close in time to an election, we should treat that as a Section 527, not a (c)(4) activity. I don't think the Tax Code gives you the necessary precision that you need.

And, finally, what's the crisis? We hear a lot of talk about closing a loophole. I suggest that any broad reading, not a narrow legal reading, perhaps, because I'm not a lawyer, but a broad, common-sense reading of the congressional debates on BCRA, the congressional debates on the law requiring 527s to disclose their donors, the

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Supreme Court decision in McConnell, and even the Supreme Court decision in Buckley v. Valeo, suggest that all of the parties involved in those dialogues, whether they were Justices, Senators, or Members of Congress, believed that 527 organizations would be receiving large gifts and using them to make non-express advocacy expenditures in the context of federal elections.

I don't think this is a new loophole. In fact, I think in some ways this rulemaking appears to me to be seeking a loophole through the thicket of obstacles constructed by the

Supreme Court and the Congress so that this Commission can reach a predetermined conclusion. I urge you not to do that.

CHAIRMAN SMITH: Thank you, Mr. Pope. We'll begin this round of questioning with Commissioner Toner, and we'll go five minutes. COMMISSIONER

TONER: Thank you, Mr. Chairman. I see that our allotted time is diminishing round to round, but I won't take that personally. It's a very wise action on your part.

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CHAIRMAN SMITH: I'll give myself five minutes, too, but we're using it up.

COMMISSIONER TONER: That's probably a good thing as well.

Mr. Pope, I am heartened by your observation that you're not a lawyer. We hear from plenty of lawyers all the time, and it's always great to hear from somebody outside of that society.

I want to read into the record a statement from the League of Women Voters. They urged their members to submit comments to this agency. We've heard about how over 100,000 comments were

submitted here, and the League of Women Voters generated, among those, multiple thousands. And reading from their alert, the League of Women Voters writes, "Currently, the Federal Election Commission is engaged in rulemaking to decide whether or not to regulate 527 organizations and their use of soft money. The unregulated and unlimited checks from corporations, labor unions, and wealthy individuals that has so corrupted our

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political system in the last day"--"in the last decade." And the last day. "Reformers like the League of Women Voters have fought a seven-year battle to prohibit political parties from using soft money. Now a number of 527 organizations are raising and spending millions of dollars in

soft money." And the letter goes on. "Section 527 groups are self-declared political organizations under the Internal Revenue Code and should be regulated by the FEC as such. There is a clear record of 527 organizations receiving and expending large amounts of soft money aimed at electing or defeating federal political candidates. The FEC should not ignore this record. Instead, the Commission should recognize that current regulation is inadequate, and the FEC should act immediately to close the soft money loophole for Section 527 organizations."

I wanted to read that into the record because I thought--we've received, obviously, tens of thousands of comments across the political spectrum, but I thought that those were powerful

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comments.

Yesterday, Greg Moore, who is the executive director of the NAACP National Voter Fund, basically made a similar comment that you, Mr. Mincberg, were talking about, and that is, the chilling effect of the NPRM on the pending issues. And what Mr. Moore indicated was, in terms of his organizations, the donors, that there was a clear necessity for the agency to take final action in this proceeding so people would know what the lay of the land is, what the law is.

Do you concur with Mr. Moore's judgment? MR.

MINCBERG: Well, I concur that the Commission needs to act quickly. I will say that acting quickly and badly would be much worse than delaying. I think it's critical in my view that the Commission put to rest the notion that it would seek to do some of the things that, unfortunately, the NPRM would, in fact, do.

COMMISSIONER TONER: Ms. Guinane, I'm interested in



your comments, page 6 of your comments. You talk about how a lot of 527

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organizations, or at least some, are involved in ballot initiatives and referenda activities. And I wanted to get a sense from you that if we were to issue any regulations with respect to 527s, do you think that 527s that are involved in referenda and ballot initiatives, do you think they should be exempt from any restrictions?

MS. GUINANE: Yes, I would. I don't think using the Tax Code overall is a good way to separate out these groups. But if an organization is not presenting any kind of threat of corruption to the political system, then I think they should be exempt from regulation from the Commission, and I don't see how a group working on a referendum, which are primarily at the state level, could present that kind of threat.

The federal candidates in that kind of situation may very well be challengers who are state legislators or governors or local officials who are involved in a ballot initiative, or they may be a group using--working together with a Senator or Representative on the federal level to

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help promote an issue. But in that case, they're trying to get the public to participate in the democratic process through a ballot initiative. I don't see where that presents a threat of corruption.

COMMISSIONER TONER: Do you think there's a basis for us to distinguish between 527S, as you indicate, that are involved in ballot initiatives, referenda, versus 527s that are focusing on candidate-related activities? Any basis for that kind of judgment?

MS. GUINANE: Focusing on what kind of activities?

COMMISSIONER TONER: Focusing on individuals who are running for elective office as opposed to non-elective activities like referenda and initiatives.

MS. GUINANE: I think the same threat-of-corruption standard applies. And when groups are truly independent of candidates and campaigns, I think there's a real substantive question of whether or not they present that kind of threat.

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And there hasn't been good research done or much experience yet to see to what degree they present a threat. The fact that they have a major purpose of influencing a federal election doesn't mean per se that they present a threat of corruption. I don't think one necessarily follows from the other.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Commissioner Toner. Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you, and let me thank the panel. It's always tough to appear at the end of the day, and what happens, in case you haven't noticed, is you get less time as it draws towards the end of the day, which is just, sadly, the luck of the draw. And because of that--

CHAIRMAN SMITH: Four and a half minutes.

COMMISSIONER McDONALD: And because of that, I want to let you all, rather than me, make a statement, anyone who wants to comment on

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something. Maybe it is more apt for you, Carl, in a sense, because I know you have to leave. Do you have any other comments you want to make? I want to be clear that you know that I'm not a lawyer either, so I want to protect myself.

MR. POPE: Well, I would like to comment on the reality that what Section 527 organizations do is very complicated. They're very diverse. Mine does a huge amount of voter guides and voter charts because the IRS does not allow environmental organizations to do voter guides and voter charts as the League of Women Voters can do. Others engage in voter registration. We don't do very much voter registration. Others engage primarily in advertising of the kind which is restricted by the electioneering restriction of BCRA.

And I think that it is going to be extraordinarily important in any rulemaking which this Commission undertakes that you not simply take a section of the Tax Code and say, well, everything that's in that section of the Tax Code is somehow not truly protected by the First Amendment.

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I mean, looking at the rulemaking you have before you, you could actually view it as saying that we're going to amend the First Amendment to say that Congress shall make no rule abridging freedom of speech, except with regard to candidates for public office in election years.

And that is the nature of the challenge before you. The fact that that is a possibility is not a criticism of this Commission. But I think it is an admonition to proceed cautiously.

MR. MINCBERG: If I can add one thing to that, Commissioner McDonald.

COMMISSIONER McDONALD: Sure.

MR. MINCBERG: To a certain extent--and it may not have been intended--I think Commissioner Toner's last question may have implied that there are all these 527s, and most of them are out there to help elect or defeat federal candidates, and there are a few like the ones who work on initiatives that we can somehow split out. That's not the reality of 527s, as I think Mr. Pope has just pointed out.

You would literally have to do

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an individual-by-individual analysis of just about every 527 in the country to come to the kind of conclusion that you want to come to, even putting aside the legal problems, as I and others have talked about, with doing it because what 527s are are groups that are engaged in what the IRS calls exempt activities. And that's anything that could influence the outcome of an election, even if it isn't intended or might not even have the effect of particularly working for or against particular candidates. And that's a very important point that I think was made in yesterday's tax panel and which I think we want to emphasize as well.

COMMISSIONER McDONALD: Well, I think as a practical matter how this has evolved, in no small part, gets back to whether or not--the example that obviously has gone around the table continually is the Soros matter. Now, we find out this morning apparently he hasn't given any money. Maybe that's why he's rich. I don't know. But he at least got lots of free publicity out of it. And that actually is the kind of thing that has spurred this

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on, which is it--the implication is that there's going to be hundreds of 527 groups who are going to be George Soros, and I think yesterday it was alluded to, and his pals--I'm not sure who his pals are, but whoever they are, they're going to set up these groups even though, quite frankly, they can do this independently as we now know. I think that's what really is the origin of this discussion here.

But let me say one other thing because it is real important and my colleagues all commented on it. The kinds of problems that you've raised and that have been raised for the last two days in terms of just our own preparation is one of the reasons from the outset that I have not been pleased with the schedule. I made it very clear, as I know the Vice Chairman did. And you get a lot of heat because the inference is, oh, you really don't want to do anything and it's just a stalling tactic.

No, it is really about getting it right, whatever that might be. And I think we are, quite frankly, a little bit ill-equipped, particularly on

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short notice, to go through the various sorts of things that you are talking about in relationship to the makeup of the 527s, what role they really play. And I've been a little bit frustrated because some of us are taking the heat for inferring we really would like a little more time.

But I do think we're here because the implication is that these are being set up across the country to do nothing but affect, obviously, both presidential and, as we now read, of course, senatorial and House races as well.

MR. JOHNSON: Commissioner McDonald, if I could add one thing, I think your point is well taken. You need to get it right rather than rushing in. But in getting it right, I think one of the things that I would urge all the Commission to do is look at the implicit assumptions behind what it is that you're doing, because I hear these questions about isn't soft money going to be going to 527s. And the implicit assumption is that there's something evil about soft money. You know, and I think that your point was well taken as well

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in terms of what is the potential for corruption.

If there really isn't an potential for corruption

with these organizations, do you really need to be regulating?

And so I would urge you to look behind some of the assumptions that seem to get thrown around rather than accepting that soft money is somehow evil. Look and see what is the basis of that particular assumption, because if you're going to get it right, then I think you have to make some of those questions more explicit than what's been happening thus far.

CHAIRMAN SMITH: Thank you, Commissioner McDonald.

Commissioner Mason?

COMMISSIONER MASON: Mr. Pope, I wanted to ask a couple of questions of you because your organization has been before the Commission, and I think--maybe the counsel can correct me if I'm wrong, but we had a matter with the Sierra Club that's recently released. You don't remember?

MR. POPE: Well, it is now.

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[Laughter.]

COMMISSIONER MASON: Well, I didn't say what matter it was, and I don't want to go any further if--we're getting a nod, yes, it was--it was a long time ago, and the Commission has disposed of it. So if I'm doing it early, it's not too--

MR. POPE: Okay. I was unaware--

[Laughter.]

COMMISSIONER MASON: You won't be able to help me very much, then, because I really wanted to--

MR. POPE: Well, if you ask me what the matter was, I probably will remember it. I've been around for a long time.

COMMISSIONER MASON: It had to do with a voter guide that you did in the Robb-Allen Senate race.

MR. POPE: Yes, okay.

COMMISSIONER MASON: And that came before us, and it was one of the infamous cases in which the Commission split three-three. And several of

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us thought it was not express advocacy; several of the Commissioners thought that it was. It was a pointed voter guide, and I would acknowledge that, even though I didn't think it crossed the express advocacy line. I could certainly figure out which candidate the Sierra Club favored and which it opposed, you know, from the piece. And what I was interested in--you just may not be able to answer right now--is what that cost the organization. Because you had to retain counsel, I'm sure, and it was a several-year proceeding, though I--

MR. POPE: It cost us considerably more in legal fees than it cost us in communication with the public in Virginia. I can say that with confidence.

COMMISSIONER MASON: And do you know how often that has happened?

MR. POPE: We have been fortunate that we have had relatively few of those because, in fact, we have bright-line standards for express advocacy, and, in fact, we have found the Commission's rules on voter guides and voting charts to be clear. And

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one of the things that is alarming about this rulemaking is that I would have no idea, except not to say anything except through my registered federal political

action committee, about anybody. I mean, this is so unclear that, as I said, you know, I think that billboard is probably not allowed under these rules you have before you.

COMMISSIONER MASON: So you're afraid if we adopted a promote, support, attack, oppose standard, you would not be able to issue a voter guide except through a PAC.

MR. POPE: I am actually quite confident of that, and I actually think that Mr. Simon last October said that he didn't think that standard would work for independent expenditures. And you heard from Fred Wertheimer in a letter about a month ago that he didn't think that standard would work as applied to 501(c)(3)s and 501(c)(4)s.

Well, if that standard isn't clear enough to be followed by (c)(3)s and (c)(4)s, let me tell you, there is no special wisdom which comes with Section 527 of the Tax Code which enables a 527

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organization to be able to parse that language better than a (c)(3) or a (c)(4).

COMMISSIONER MASON: Well, let me ask you also, your organization, if I understand it correctly, the Sierra Club itself is a (c)(4). MR. POPE:

Correct.

COMMISSIONER MASON: You have a foundation, Sierra Club Foundation.

MR. POPE: It is an independent foundation bearing our name.

COMMISSIONER MASON: And you have a non-federal 527.

MR. POPE: We have several, actually, because we operate in the states as well as at the federal



level.

COMMISSIONER MASON: And then you have a federal PAC.

MR. POPE: We have several--a federal PAC and a number of state PACs.

COMMISSIONER MASON: Okay. And yet for your purposes--and leave aside the foundation because you say that's independent. But these other organizations are operating for the same fundamental purposes. You want to protect the environment. It's not a trick question. I'm trying to--

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MR. POPE: I understand. Same fundamental mission. Same fundamental mission

COMMISSIONER MASON: And so the question I'm trying to get at is: If we took an approach that said, well, we're going to clamp down on 527s, it would certainly restrict certain of your activities, but would it really make a difference in terms of stopping your organization? You'd move things from one place to the other. You'd have to do more through your PAC. There would be some items you could shift back into your (c)(4). And so I'm sort of wondering what--I'm not trying to minimize the potential effect. I'm simply trying to say if we're looking at organizational structures, you know, would it be a huge effect?

If we said, well, you can't use those 527s anymore, but you've got all these other things that continue to do a lot of the same activities.

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MR. POPE: Well, if--

COMMISSIONER MASON: In other words, would

it be effective from our perspective?

MR. POPE: Well, let me describe to you what I think the consequences would be. First, right now we're very careful in our magazine not to include any express advocacy language in our magazine, even though we are allowed to expressly advocate the election of federal candidates to our members, because our magazine is also sold, about 10 percent of its circulation is to the general public. We could not possibly raise enough money into our federal political action committee to pay for the whole magazine with hard federal dollars. So we would, in effect, have to stop talking about politicians once they became candidates for public office in our magazine because we couldn't afford to do it. So a great deal of our speech would, in fact, be effectively stifled.

On the other hand--and this is a consequence the Commission may not be as happy about. I'm not saying it would be happy about that

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first consequence, but we would take a great deal of that--we now lean over backwards to do what the IRS and the Congress have urged us to do and carry out any activity which is arguably in connection with an election through a 527. It is certainly true that if you were to pass this rule we would take as much of our activity as we could legitimately carry out through our (c)(4), and we would tuck it back into the (c)(4) where it would become invisible. So we would lose speech, the public would lose transparency and disclosure. I think those are both downsides.

Another consequence for many organizations--we are a membership organizations. We, therefore, can maintain a federal PAC and raise money for it because we have members. Most 524s are not membership organizations. They would

actually not be able to set up and raise money into a federally registered political committee. So one of the consequences of this rule would be you would actually be dictating to the form of organization of a whole sector of civic society. You'd be

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saying if you want to be a (c)(4) and do advocacy about public officials, you have to organize yourself as a membership organization. That I think threatens another one of the First Amendment rights, the right of association.

COMMISSIONER MASON: Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Commissioner Mason.

Commissioner Thomas?

COMMISSIONER THOMAS: Thank you, Mr. Chairman.

Thank you all for coming.

Let me just, first of all, get you all on record, if I could. You know the Commission has on the books right now what we call Part B of our definition of express advocacy, and it's often referred to as the "reasonable person" test, but it treats as express advocacy communication--let me see if I can find it here--that, when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as

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containing advocacy of the election or defeat of one or more clearly identified candidates, because the electoral portion of the communication is unmistakable, unambiguous, and suggested of only one meaning, and reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates or encourages some other kinds of action.

I want your reaction as to whether or not we could use that definition that's in our regulations of express advocacy.

MR. MINCBERG: I'm sorry, Commissioner.

Use it for what purpose?

COMMISSIONER THOMAS: For defining express advocacy.

MR. MINCBERG: I think on that point in particular, as I understand it, a number of courts have ruled that that's problematic. Some have.

And I have to say that I confess that I think those decisions are well reasoned as I've seen them so far. It might be possible for you to try to take that definition of express advocacy, that Part B,

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as Commissioner Weintraub suggested I think this morning, and consider something like that to replace the so-called PSAO standard for some purposes. But I think it would be problematic to try to implement it now as an express advocacy definition in light of what the courts have ruled so far.

COMMISSIONER THOMAS: I hasten to inform you, last time I checked, every conference we put on, we go out and about, and we explain that, in essence, that is still part of the law. We do explain that there are some circuits around the country that have found that to be impermissible. But we suggest to the folks coming to the conference that they need to get out a map and find out which circuits are covered--or what states are covered by which circuits, and act accordingly.

Do the rest of you--

MR. POPE: Well, I guess my comment on that would be that the fact that we have differences among the circuits and that I would need to get out a map to know which federal judges

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thought that meant one thing and which federal

judges thought that meant another thing gives me some anxiety. I think that definition is clearly better than PSAO, and the definition--I mean, I have to say the electioneering communications ban is quite clear. I mean, you have a guidepost from the Congress on what it takes to achieve clarity, and it is actually modeled on the way the IRS typically establishes the--there's a very clear guidepost from the IRS on what constitutes grass-roots lobbying. And I am actually able to delegate to a talented, skilled, but non-lawyer in my organization the task of reviewing our materials to make sure whether or not they are grass-roots lobbying communications. She can do that. I could not delegate to her the test that you just described to me given the difference among the circuit. So it needs some work.

COMMISSIONER THOMAS: Any reference test is remarkably clear, but it's also remarkably broad. It picks up a communication where you might want to say, this piece of legislation will destroy

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the environment in America, it's terrible, it's awful, it is urgent that you contact your Member of Congress, your Member of Congress' name is Senator Dinglethorpe, here's his phone number, please call him. You're not attacking him. You're not promoting him. You're just saying here's his name and number, please call him, and the electioneering communication rule is going to pick that up.

MR. POPE: I understand, but it's clear. Yes, it is, but, you know, I might have written it more narrowly, Congress might have written it more broadly. I think the Supreme Court in McConnell

said Congress could have written it more broadly.

I don't think this Commission can.

COMMISSIONER THOMAS: You want the messages to be clear, I gather.

MR. JOHNSON: We would find it problematic as well. As Elliot said, and at least alluded to, the First America requires some specificity, and the more ambiguity you get, the worse it is in terms of chilling speech. And so when you've got something like a bright-line test or the express

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advocacy test that you currently have, then that's fairly simple. As Bill Piper said, a monkey can do that, not referencing the committee. But basically it's a clear, bright-line test--

COMMISSIONER THOMAS: A reasonable monkey.

[Laughter.]

MR. JOHNSON: A reasonable monkey, okay. So it's a clear, bright-line test that is able to be applied, and it's more protective of free speech. Once you start getting away from those bright-line tests, the further and further you get away from them, the worse it is for the First Amendment.

MS. GUINANE: I agree. I would only add that when there would be some kind of test that has any vagueness and is short of a bright line like the traditional express advocacy standard, that needs to be a secondary-level rule, and the primary-level needs to be something that addresses the category of organizations that meet a threshold of presenting a danger of corruption, which I may sound repetitive with that phrase, but it just

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seems to be an issue that somehow has been left out of this whole debate. And if there is no threat of corruption presented, then there really is a substantial question of whether or not any form of regulation would be

justified.

COMMISSIONER THOMAS: Thank you all. CHAIRMAN

SMITH: Thank you, Commissioner

Thomas.

My turn here. Mr. Pope, you answered one question I had, a very simple question. The Sierra Club not only has one 527, you've got a bunch of 527 accounts.

MR. POPE: That is correct, Commissioner. CHAIRMAN

SMITH: Okay. Now, Mr. Johnson, the ACLU does not have 527 accounts; is that correct?

MR. JOHNSON: That's correct, sir. CHAIRMAN SMITH:

One issue that hasn't

come up and I just wanted to cite, I guess, is nobody in the two days--we haven't talked about this famous line from the McConnell opinion, where the Court, comparing political parties to interest

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groups, says, "Interest groups remain free to raise soft money to fund voter registration, get-out-the-vote activities, mailings, and broadcast advertising, other than electioneering communications."

And the comments that were submitted by Messrs. Potter, Simon, and Noble, they say the Court specifically referenced the National Rifle Association, the American Civil Liberties Union, and Sierra Club. The Court was clearly distinguishing 501(c) nonprofit groups rather than Section 527 political organizations from political parties. And I'm trying to figure out how they got there given that I thought the Sierra Club had one of the largest 527s at one level. So I guess I just did want to verify that and get that on the record.

Mr. Mincberg, a quick question for you. Who has

greater disclosure requirements--a 501(c) or a 527?

MR. MINCBERG: I think it's very clear that it's a 527. A 527 has to disclose donors and

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contributions above a certain threshold.

501(c)(3)s and (4)s do not.

CHAIRMAN SMITH: One question that hasn't come up, and I realized suddenly I didn't know, and one of you nonprofit attorneys can tell me for sure. A 501(c) can go over the limit. A 501(c)(4) can spend over half its time doing what would be non-exempt activities and then be in trouble, right, to keep its 501(c) status, I believe.

When is that measured for the year?

MR. MINCBERG: The answer to that is there is an annual report, a tax return that you're required to file as a 501(c) organization every year. But it isn't until and unless the IRS does something about it that that would be detected.

Most of us who are responsible general counsels or advisers to 501(c)s try to make sure that we don't violate those rules.

CHAIRMAN SMITH: So let's suppose you had a 501(c)(4), then. You could be at some point of the year over the 50-percent threshold as long as you came in at the end of the year under the 50-percent threshold.

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MR. MINCBERG: It is correct that it's measured on an annual basis. That's right.

CHAIRMAN SMITH: Because I'm trying to figure out exactly how we would handle that if



someone would go over the threshold in the middle of the year if we were using a Major Purpose test, and then drop back under at some point. I'm just trying to figure out how we could conceivably handle that, and since all of you oppose that standard, I'm not sure any of you would have any suggestions for--

MR. MINCBERG: I think it's another example of some of the problems with that standard. Even if you did it on an annual basis, there would certainly be problems in administering it. And, again, as a number of us have said before, trying to use the Tax Code and the IRS as the basis for measuring is very problematic. Again, it could be many years before that issue comes up in the context of the IRS, for example.

CHAIRMAN SMITH: One more question for

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you, Mr. Mincberg. I wondered if you could give us any more specific examples. You mentioned a bit that there could be a chilling effect to these regulations, and I wonder if you had any other specific examples you'd like to raise for our attention.

MR. MINCBERG: Well, the proposals have only been out there for a month or so, so there haven't been too many others. But I will say that I have had occasion to speak about these proposals, as Kay has, to a number of groups, of nonprofit groups. And there's no question that there's an enormous chilling effect, and indeed it can be measured almost--it's almost inverse to the size of the groups. The smaller the group is, the more chilled they are, I think, by these kinds of rules because they don't have lawyers on staff, they don't have people that can guide them all the way

through.

And so, ironically, I think the result of any rule even approaching the ones that have been proposed would be to stifle the very voices that

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are the most important for the democratic process.

MR. POPE: Commissioner, I'd want to make two quick responses to those questions.

CHAIRMAN SMITH: Yes.

MR. POPE: One, I am the author of a forthcoming book which discusses the President's environmental record. We attempted to place this book for sale in Outdoor Stores, and the general manager of a large Outdoor chain wrote us back and said that she did not feel she could carry this book because of the pending rule before this Commission which might prohibit the sale of political books by non-book stores.

CHAIRMAN SMITH: She knew about the rule, pending rule?

MR. POPE: Yes.

CHAIRMAN SMITH: This did get around, didn't it?

[Laughter.]

MR. POPE: Now, I do not believe actually that the pending rule even in its present form would do that, and I reassured her of that, since I

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want to sell the book, but I do think it has a chilling effect. And with regard to the question of how you would measure the 50-percent test, it is even more complicated, I think, than Mr. Mincberg said, because one of the IRS' standards for determining whether or not certain forms of grass-roots lobbying are to be viewed as exempt or non-exempt activities

is whether or not they are routinely carried out at non-election times as well as at election times. So that an expenditure which the IRS might view in September as likely counting towards the 50-percent test, if the organization continued in the following six months to make the same kind of grass-roots lobbying expenditures, would no longer count.

So it's not just a matter of when you measure. It's what counts varies over time because the IRS uses a facts and circumstances test.

CHAIRMAN SMITH: This is going to be fun to administer. Thank you very much.

Vice Chair Weintraub?

VICE CHAIR WEINTRAUB: Thank you, Mr.

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Chairman.

I am dismayed, Mr. Pope, to learn that the IRS regulations are clear and easy to understand by comparison to ours.

[Laughter.]

MR. POPE: Your present regulations are okay. It's your pending regulations.

VICE CHAIR WEINTRAUB: Oh, thank you very much.

Mr. Pope, I want to make sure I get to you before you have to leave. You suggested that the promote, support, attack, oppose standard is unconstitutional, presumably vague and overbroad. I assume by that you mean as applied to other than party committees because the Supreme Court has pretty much settled it for--

MR. POPE: I mean as applied to other than

candidates and party committees. The Court made it clear they're different.

VICE CHAIR WEINTRAUB: And I gather that it is the consensus of this panel that all of you would recommend that we just pull this rulemaking

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back and not try to salvage any part of it or do anything with it this cycle, but to wait for a time when we can consider--maybe develop a better factual record, not be in the heat of an election cycle. Is that the unanimous opinion of this--

MR. POPE: Yes. I think that's--the only tiny exception I would draw is an issue that I don't know very much about, which is the allocation regulations.

VICE CHAIR WEINTRAUB: Oh, don't go there if you don't know much about it.

MR. POPE: I probably don't want to, but I have heard some discussion of that. They don't seem to me to involve the same problems with congressional intent in the scope of what Congress did. However, I should say that, from what I heard this morning, the complexity there may be a deterrent for the same reason.

VICE CHAIR WEINTRAUB: Ms. Guinane, your organization, OMB Watch, is a government watchdog, yes?

MS. GUINANE: Yes.

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VICE CHAIR WEINTRAUB: And you would be amongst the group of organizations that one would normally classify as reform organizations, right? MS.

GUINANE: We would be classified as? VICE

CHAIR WEINTRAUB: As a reform

organization, pro-reform?

MS. GUINANE: Yes.

VICE CHAIR WEINTRAUB: In the secular, not the theological sense.

[Laughter.]

VICE CHAIR WEINTRAUB: I think that's important to note because it was suggested yesterday that the reform community is sort of generally unified in favor of our acting, and I'm hearing from various people that they're not. So I think it's important to have somebody like yourself here to say that.

Mr. Mincborg--well, let me do something else. Mr. Mincborg and Ms. Guinane both talked about--I think I'm getting this right--the threat of corruption as a constitutional threshold, and to your minds, there isn't a record before us right

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now that would establish that threat of corruption that would justify regulation of these 527s broadly.

MR. MINCBERG: I think that's absolutely right. Certainly when you compare it with the record that was before Congress with respect to soft money, political parties, et cetera, et cetera.

VICE CHAIR WEINTRAUB: And you also mentioned, Mr. Mincborg, the complexity and the wide range of activities that are governed under--that are regulated under Section 527. So I take it that our Alternative 2-A, if you're familiar with that, which basically says that we would consider a political committee of all 527 organizations with five exceptions, those being campaign committees for non-federal office, an organization that is organized solely for the purpose of promoting, nomination, or election of candidate or candidates to non-federal office, an organization solely for the purpose of advocating elections where no candidate for federal office appears on the ballot,

one that operates solely within one state--although that one even has been suggested we should pull out--and one that is organized solely for the purpose of influencing the nomination or appointment of individuals to non-elected office or leadership positions within a political party.

I gather that saying we're going to regulate all other 527s except that, that doesn't do it for you?

MR. MINCBERG: Absolutely not, because as I said before, there are many, many 527s, particularly the ones connected with (c)(4)s, that are not, in fact, as the presumption by some appears to be, working to advocate the election or defeat of candidates for federal office, but have set up 527s to better comply with the Tax Code to do activity, for example, a totally neutral voter's guide by an environmental group--put aside the charges that were made about the one that Mr. Pope did in the Virginia election, a totally neutral one that anyone would agree--

MR. POPE: I'll accept the term "pointed."

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[Laughter.]

MR. MINCBERG: That anyone would agree is neutral, could not be done by a (c)(3), and for tax reasons should probably be done by a 527. That group is not trying, really and truly is not trying to elect federal candidates, wouldn't be covered by any of those exceptions, and would be covered under that--whatever, 2-B or whatever it

was of the rule.

VICE CHAIR WEINTRAUB: All right. Now, very quickly, because my time is about up, we talked a little bit about that section that Commissioner Thomas read. He read it in the context of what do you think of it as a definition for express advocacy. But we have another problem, which, you know, maybe we don't have to resolve in this rulemaking, but eventually I think we are going to have to resolve it, and that's defining promote, support, or oppose, which a lot of people think is vague. That's what I'm hearing from people. They don't know what it means.

Following up on the suggestion you made earlier, Mr. Minberg, I'd like to ask all of you

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if you think that might be a starting point for defining that term rather than express advocacy. MR.

MINCBERG: I think it would be a good place to start. I confess, I haven't studied it enough to give you a definitive conclusion, but it's a lot better than what you've got now.

VICE CHAIR WEINTRAUB: Anybody else, quickly?

MR. POPE: Well, I agree it's a lot better, but I think you create mischief when you propose that as the support of what is clearly a different definition, just use that as your definition. Don't say that's the definition of support--because it's not. I mean, it's clearly more restricted. So let's not use one set of words and then define them by a completely different set of English words. Let's use the different set of English word we mean as the starting place. I'd just junk the PASO test and go with the one you just discussed and then improve it.

CHAIRMAN SMITH: Thank you.

Mr. Norton?

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MR. NORTON: I'll be very brief. I really want to make what is mostly an observation and let you react to it if you want to. I was thinking about the fact that of the many witnesses who have come before us, the only witnesses who were advocating that we promulgate new regulations to deal with 527 organizations all say in their jointly filed comment that they think the Commission has authority under existing law, based on existing regulations, to deal with the handful of organizations whose activities have drawn particular attention and led in some measure to this rulemaking.

I think the written comments submitted by the original sponsors of McCain-Feingold probably come to the same conclusion, although they, I think alone, in all the comment we received, sort of the lengthier comment that I've reviewed, say that it's appropriate for the Commission to undertake in this rulemaking to regulate 527s. But I think apart from that comment, certainly none of our witnesses have suggested that the enforcement mechanisms are

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inadequate, even the witnesses who were here today suggesting if we're not going to enforce, we ought to promulgate regulations.

I wonder about your reaction to that. It seems that perhaps what the Commission may be doing is kind of approaching a fly with a sledgehammer. Is your view that the enforcement process, without making a judgment about any particular organization or how that ought to come out, is the way the Commission ought to address what it perceives to be a potential problem?

MR. MINCBERG: I think it's an excellent point. It's easy for me to say because I don't happen to work for one of the organizations that is being the target of any of those enforcement proceedings, but they presumably will have the opportunity to defend their actions in accordance with



current law when those enforcement proceedings take place. There really are, by my count, only five or six organizations at most that are being talked about in this regard. But by any calculation, including even the lower calculations

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that the staff director has attempted to do with respect to 527s, there would be hundreds of organizations that would be affected by new rules if--and, indeed, what reinforces your point, I think, is the testament I heard today and yesterday from some of the advocates who insist--insist--that it wasn't BCRA, it was FECA and the decision Buckley that justified what could be done with respect to those organizations who they contend are violating the law. If that's the case, it makes sense for the FEC to take effective action to enforce the law in accord with due process and move along, but not to do the incredible collateral damage on hundreds or, I believe, thousands of organizations, not to mention the First Amendment, that would be done by any of the proposed rules or even the reduced form of rules that have been suggested by some.

MR. POPE: Can I respond to that briefly? First, I think it is interesting to know what Senators McCain and Feingold said during the process of the development of the current laws

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which govern 527s. Senator Feingold, when the Senate was debating the disclosure requirements, said quite specifically: From now on these groups will disclose their contributions to the IRS, the public will be able to see where their money is coming from, and understand what is behind the message. Clearly, Senator Feingold envisaged that these groups would continue to operate even though they disclosed.

And in debating BCRA on the question of what the standard should be in defending the Snowe-Jeffords

electioneering communication definition,  
Senator McCain said of this definition--and I think  
he was dead on: It avoids the vagueness problem outlined in  
Buckley by instituting a bright-line test for what  
constitutes express advocacy versus issue advocacy. People  
will know if their ads are covered by this statute.

And I think that at that time, at least, the two  
authors of this bill thought that the problem was disclosure  
and the solution was precision. And I would urge this  
Commission not to

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enact regulations which take a very different role.  
With regard to the enforcement process, my  
organization has actually been before this Commission twice--  
once I just found the outcome of, the other was--

[Laughter.]

MR. POPE: The other was many years ago. It was a  
complaint filed against a fundraising mailing we did by the  
National Committee--NCPAC, which was the--whatever NCPAC  
stood for. I can't remember anymore. The Commission in that  
case found that we had violated FECA, and we now as a result  
of that have a standing agreement with the Commission that we  
will not contribute our membership list as an in-kind  
contribution to any political candidate, we will only rent it  
at fair market value. I believe we are the only applicable  
committee in the country. So governance so restricted, but I  
have to say that those two enforcement actions, while I  
didn't welcome them--I don't think anybody ever welcomes an  
enforcement action--were handled by the Commission in a way

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that was fair and that did not chill the rest of  
our activities. It told us, okay, this is where you may have  
messed up. And we've been very careful to avoid those kinds  
of problems subsequently, and that's the kind of clarity that  
I think a good enforcement process will yield and that I  
would urge the Commission to pursue.

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

CHAIRMAN SMITH: Thank you, Mr. Norton. That is one of the  
first times I've heard

our enforcement process praised by people. [Laughter.]

CHAIRMAN SMITH: I prefer that.

Mr. Pehrkon?

MR. PEHRKON: Thank you, Mr. Chairman. Welcome,  
panel.

Mr. Pope, before you run, I do have a one-MR. POPE:

All right, yes.

MR. PEHRKON: I believe you're one of the few  
people who actually file both the reports for

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527 organizations and for federal PACs.

MR. POPE: And many others.

MR. PEHRKON: Okay. But in the  
distinction, could you briefly describe for us the  
differences between the two and whether or not there are  
significant reporting differences between the two and whether  
or not there's an incremental cost difference between 527  
reporting and FEC reporting.

MR. POPE: There is an incremental cost. The FEC  
reporting is more detailed, but I would have to say I think  
the incremental cost of the routine reporting is modest. I  
could not argue that that is, for at least an organization of  
my sophistication, a major problem, although for a smaller  
organization without lawyers it might be.

However, I will point out that, with  
regard uniquely to the presidential race where any  
contribution which is made must be an independent expenditure  
campaign, and because of the fact that Congress has  
established a \$10,000 threshold over which once you engage in  
independent expenditures,

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you must file daily. It is a very huge burden.

Independent expenditure reporting rules would be  
overwhelmingly onerous for a small nonprofit. They're almost

more than we can handle, and we're relatively sophisticated. The regular reporting requirements, I would have to say they're more onerous but they're not unreasonable.

MR. PEHRKON: And do you have non-attorneys filling out your--

MR. POPE: Yes, we do have--they're reviewed by attorneys. They're filled out by non-attorneys and reviewed by attorneys.

MR. PEHRKON: Okay. Thank you very much.

MR. POPE: Thank you.

MR. PEHRKON: Mr. Mincberg, can you add anything to that? I'm not sure about your organizational structure.

MR. MINCBERG: I think in general I would agree with that. We're not doing--at least at the moment, our PAC is not doing the kind of independent expenditures that Mr. Pope refers to, so I have yet to determine how burdensome that

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would be. But we do either have an attorney do the reports or my deputy general counsel reviews them very carefully. And there is no question that that takes more time than is required with respect to IRS filings.

MR. PEHRKON: And the IRS filings you're talking about are 527 or--

MR. MINCBERG: We have only recently established a 527, which really has not been very active, so we have very little experience with the 527 filings.

MR. PEHRKON: Thank you very much. CHAIRMAN SMITH:

Thank you, Mr. Pehrkon.

That concludes our last panel of two very,

very full days, a lot of information and a great deal to consider. I thank all of you for coming.

This is a very important rulemaking. It would mark a significant expansion, I believe, in the area of regulation in this area of the law, and I trust that we will proceed carefully and wisely.

I'd like to thank our staff for their hard work, the Secretary's Office, as I mentioned, the

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data folks who had to keep the website and the e-mails running as they came in, all of the witnesses who testified. And I'd also like to thank the thousands of people, tens of thousands of people in the public who took the time to contact us with their views on this important issue.

This meeting is adjourned.

[Whereupon, at 5:10 p.m., the hearing was adjourned.]