

FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON COORDINATED COMMUNICATIONS

Wednesday, January 25, 2006

9:40 a.m.

999 E St., N.W.
9th Floor Hearing Room
Washington, D.C.

MEMBERS PRESENT:

MICHAEL E. TONER, Chairman
 ROBERT D. LENHARD, Vice Chairman
 DAVID M. MASON, Commissioner
 ELLEN L. WEINTRAUB, Commissioner
 HANS A. VON SPAKOVSKY, Commissioner
 LAWRENCE H. NORTON, General Counsel
 ROBERT J. COSTA, Acting Staff Director

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P R O C E E D I N G S

CHAIRMAN TONER: Good morning. A special session of the Federal Election Commission for Wednesday, January 25, 2006, will please come to order. I'd like to welcome everyone to the Commission's hearing on proposed revisions to the Commission's rules regarding coordinated communications. At the outset, I'd like to note that Commissioner Walther is attending to a personal matter that has long been on his calendar and cannot be with us for the hearing, but the Commissioner is here with us in spirit and indicated he looks forward to reading the transcript of the enlightening testimony we're going to receive over the next couple of days.

Today we're going to discuss the Notice of Proposed Rulemaking on coordinated communications which was published in the Federal Register on December 14, 2005. The NPRM explored several alternative proposals for revising the content prong of the coordinated communications rules consistent with the District Court and Court of

Appeals decisions in Shays vs. Federal Election Commission.

Additional issues regarding the content prong, the conduct prong, and the payment prong of the coordinated communications rules were also addressed in the Notice of Proposed Rulemaking. I'd like to thank our staff in the Office of General Counsel for their hard work on this rulemaking and getting us to where we are today. I'd also like to thank all the people who are going to be appearing before us today and tomorrow to comment on these proposed rules. We appreciate your testimony very much and we value it a tremendous amount.

I'd like to describe briefly the format that we will be following for the next two days. We expect to have a total of 18 witnesses, who have been divided into six panels. We will hear from three panels today and three panels tomorrow. We plan to have each panel last for approximately 90 minutes. We will have a short break between the first two panels of the day, and then we will take

a lunch break after the second panel.

Each witness will have five minutes to make an opening statement. We have a light system that I will try my best not to totally screw up that will allow you to indicate -- have a sense of how much time you have remaining. The green light will start to flash when you have one minute left in your time, the yellow light will go on when you have 30 seconds left, and the red light means that you are done, well, in all seriousness, that it's time to wrap up your remarks at that time. The balance of the time is reserved for questioning by the Commission.

For each panel we will have at least one round of questions from the Commissioners, the General Counsel, and our Acting Staff Director, and there will be a second round of questions if time permits and if there's an interest in having a second round. With that, I appreciate very much the witnesses being with us and look forward to their testimony. I understand that some of my colleagues would like to make opening statements.

Mr. Vice Chairman.

VICE CHAIRMAN LENHARD: No, thank you.

CHAIRMAN TONER: Okay. Other people who would like to make an opening statement?

(No response)

CHAIRMAN TONER: Okay, great. Well, then we'll get right to it. Our first panel today consists of Jan Baran on behalf of the United States Chamber of Commerce, Bob Bauer on behalf of the Democratic Congressional Campaign Committee, and Donald Simon on behalf of Democracy 21, welcome. And I think our usual approach is to go in alphabetical order in terms of opening statements. So I think with that, we would have Mr. Baran go first, followed by Mr. Bauer and Mr. Simon. So, Mr. Baran, at your leisure.

MR. BARAN: Thank you. Mr. Chairman and members of the Commission, I appreciate this opportunity to appear before you on behalf of the Chamber of Commerce of the United States. The Chamber was founded in 1916 and is the world's largest not-for-profit business federation,

representing three million businesses, 3,000 state and local chambers, 830 business associations, and 87 American Chambers of Commerce abroad. As you know, the Chamber has a longstanding interest in the regulation of campaign finance. It previously submitted comments on October 11, 2002, in the original rulemaking, and submitted comments in this proceeding on January 13 of this year. The Chamber was one of the Plaintiffs in the *McConnell vs. FEC* and has litigated First Amendment issues on its own behalf in cases such as *Chamber of Commerce vs. FEC* regarding this agency's membership rulemaking attempts, and *Chamber of Commerce vs. Moore*, a 5th Circuit case. And most recently it filed an amicus curia brief in the Supreme Court case of *Wisconsin Right to Life vs. FEC*, which was decided earlier this week.

The Chamber has a continuing interest in the FEC's regulations, and particularly the manner in which this agency regulates so called coordinated expenditures. As we all know, an expenditure that is coordinated with a campaign or

party can become a contribution under the campaign finance laws.

Corporations, including not-for-profit corporations like the Chamber, are barred by law from making contributions. Therefore, it is essential that the FEC promulgate rules that place the regulated community on notice as to when spending is a contribution and when it is not.

Our formal and extensive comments of January 13 can be summarized as urging the FEC to do two things. First, the Chamber urges the Commission to recognize the numerous First Amendment implications of regulations in this area. Citizens and organizations including the Chamber have First Amendment rights of free speech, free association, and the right to petition government for the redress of grievances. The Chamber's major purpose is to exercise those rights on behalf of its members. Accordingly, any regulations implemented by the FEC regarding coordination must provide clear, bright lines and must be within the constitutionally permissible field of regulation.

Second, the Chamber urges the Commission to limit this rulemaking only to those changes that are necessitated as a result of Shays vs. FEC. In that regard, the question raised by the decision is whether the 120 day rule is sustainable, and if not, whether there is an alternative rule that should be promulgated.

In this regard, the Chamber recommends three options to the Commission. First, it may find in this proceeding sufficient and new justification of the current 120 day rule. Second, the FEC may consider adopting instead a rule that emulates the 30 and 60 day electioneering communications rules. Finally, the third option is that the FEC has at its disposal long standing precedent reflected in its so called polling allocation rules, which for almost three decades, without challenge, have recognized that certain campaign related information is virtually valueless after 60 days, and literally valueless after 180 days.

Whatever you do, please give us clear,

understandable rules, and I would add constitutional rules that we can comply with. I would be glad to discuss further any of these points and look forward to the Commission's questions. Thank you.

CHAIRMAN TONER: Thank you, Mr. Baran.
Mr. Bauer.

MR. BAUER: Thank you, Mr. Chair and members of the Commission. I appreciate the opportunity to appear. I have not, and this has been my custom before the Commission, I have not tried to replicate my testimony again here today in spoken form here for you. I'm here really primarily to answer questions about the comments submitted on behalf of the Democratic Congressional Campaign Committee, which as you know, were submitted jointly with the Democratic Senatorial Campaign Committee.

I would only stress a couple of points. First, unlike the Chamber, our view is that this is an opportunity not really to explain what you wish to do and to keep close to the constitutional lines

in doing it, but it's an opportunity for you to reconsider the 120 day period in the content regulation. And we believe, and the Chamber has indicated it's one of the options the Chamber supports, that emulating the period set out in the electioneering communication prohibition is an appropriate way to go. This is because those who criticize the original formulation did not believe that the 120 days were anchored at anything particularly definite or useful or related to the regulatory purpose.

Certainly, the electioneering communication provision, reviewed again recently by the United States Supreme Court in *Wisconsin Right to Life*, sets out time frames that for some period of time the reform community argued were very directly related to the kinds of activity this agency is concerned with and that Congress was concerned with in regulating electioneering communications. And so we would look in that direction. I will say Mr. Baran's suggestion that the polling regulations offer some support for that

point of view, at least at the 60 day level as a novel one, and I think it's worth pursuing and thinking about.

In any event, we would also urge, having said earlier that I hope the Commission is able to keep to the constitutional line here, that it is recognized how significantly these particular rules having to do explicitly with communications bear on fundamental constitutional rights and require the Commission to act with a view toward promulgating bright line rules.

These are, after all, communication rules. The standards we're discussing are content rules, content, that is, of communication, and for that reason, it's important that the regulated community understand, those generally involved in political speech, understand when that speech is likely to bring regulatory restrictions into play. Thank you very much.

CHAIRMAN TONER: Thank you, Mr. Bauer.

Mr. Simon.

MR. SIMON: Thank you, Mr. Chairman. This

is the third rulemaking on coordination in six years. In 2000, the Commission abandoned its coordination rule that had been in place for 25 years, since Buckley, and adopted a narrow agreement or collaboration test for coordinated activity. In Section 214 of BCRA, Congress repealed this rule and directed the Commission to try again. The legislative history of BCRA makes clear that Congress found the Commission's 2000 rule to be far too narrow a definition of coordination and that Congress intended the Commission to broaden the scope of the rule in its rewrite.

In the 2002 rulemaking that followed, the Commission did drop the language that offended Congress, the agreement of collaboration test, but then took away with one hand what it gave with the other by adding a wholly new content test for coordinated communications. This content test radically shrunk the definition of what constitutes an expenditure for coordination purposes, covering only ads that mention a candidate within 120 days of an election, and beyond that, only express

advocacy.

The Shays litigation followed. The District Court threw out the rule as contrary to law. The D.C. Circuit, on the other hand, merely held it to be arbitrary and unexplained. As the court said, although Congress abrogated the old collaboration or agreement standard, the new rule permits significant categories of expression even where formal collaboration or agreement occurs. It's hard to imagine representatives and senators voting for BCRA would have expected regulations like these. The thrust of the court's opinion is that the 120 day rule can stand, if at all, only if the Commission presents a compelling record that no substantial election related communications occur outside the 120 day window. As the appendices to our comments illustrate, this showing cannot be made. Such campaign ads do occur outside the 120 day window, and if coordinated with candidates as permitted by the current rule, would represent a major breach in the contribution limits and source prohibitions of the law.

In this rulemaking, in response to Shays, a surprising number of commenters urge you to replace the 120 day rule with a time frame test of less than half its scope, the 30/60 day rule imported from Title II of BCRA. It would be both bizarre and ironic, not to mention, I believe, illegal, for the Commission to replace a rule whose narrowness was viewed with great skepticism by the courts in Shays with a new rule that would be more than twice as narrow in scope. The D.C. Circuit did not invalidate the 120 day rule because the Commission had failed to justify why it is so broad, quite the contrary. The Circuit Court question is whether the rule is too narrow.

Now, let me make three additional points as to why it would be extremely ill advised for the Commission to adopt a 30/60 day test in this context. First, the Commission itself considered and explicitly rejected this idea in the 2002 rulemaking, saying in the E & J that this test is inappropriately under inclusive and discussing the important differences between the use of a 30/60

day test and the context of independent electioneering communications versus the context of coordinated communications. Having faulted the applicability of this test to coordinated communications, there's no rational basis for the Commission to change its analysis now.

Second, I believe this idea is foreclosed by the Shays decision. Against the attacks by Plaintiffs that the 120 day rule was too narrow, the Commission defended the rule by reference to how much more generous it is than the benchmark 30/60 day test used by Congress in Title II. The D.C. Circuit found this unpersuasive, noting that while electioneering ads, and here the court was referring to the 30/60 day test, while electioneering ads are clearly one category of communications that may count as coordinated expenditures under BCRA, nothing in the statute suggests they represent the only or even primary such category.

To use the Title II frame alone, when the court rejected time frames based on multiples of it,

would surely violate the court's reasoning.

Finally, this test would mean that express advocacy would be the only standard for coordination outside the 30/60 day window. As the Shays court noted in the context of the 120 day rule, by employing a functionally meaningless standard outside that period, the FEC has, in effect, allowed a coordinated communications free for all for much of each election cycle. If that's true for a window of 120 days, it is obviously even more so for a time frame of less than half that length. The Commission, in its 2000 rulemaking, strongly rejected reliance on an express advocacy standard for coordination. As did the District Court in the Christian Coalition case, which called that standard fanciful, untenable, pernicious, and unpersuasive. What this would mean is that a candidate could hand an ad script to a corporate spender, along with directions on where and when to run the ad prior to the first week of September in an election year, and the corporation could finance a \$100,000 ad buy so long as the ad avoided express

advocacy.

This would simply reinstate a new version of a soft money system and would eviscerate the ban on corporate contributions to candidates.

The problem is not with the use of a time frame, per se, but with the use of a time frame as an exclusive test. In our comments, we have outlined an alternative proposal, and I urge you to give it serious consideration. Thank you.

CHAIRMAN TONER: Thank you, Mr. Simon. I'll begin the questioning in our rotation. I'd like to start to see if we have consensus in at least some of the legal issues, and Mr. Baran, I'd like to start with you. Is it clear in your view after the Circuit Court ruling in Shays that the Commission can appropriately have a content standard in its coordination regulations, and as part of that, can appropriately take into account in the rules the proximity -- the closeness to an election in terms of when a communication airs? Is it clear as a matter of law in your view that that's permissible?

MR. BARAN: Yes, I believe it's clear in

reading the opinion. I don't know how my colleagues feel about it. I read the opinion as basically not overturning anything in your existing coordination rules except this 120 day issue, and even then the court said it may be valid, but you haven't explained it and you haven't justified it, so your responsibility, as I see it, is to either justify the 120 day period, and if you conclude that it cannot be justified, then provide some alternative clear bright language maybe, a shorter or a longer period of time, depending on what justification you find.

CHAIRMAN TONER: And so after the Circuit Court ruling, the Commission can and appropriately can have a - fashion a content standard that includes proximity to an election?

MR. BARAN: Yes, and I think that that's already been somewhat alluded to by the Supreme Court and the Colorado One decision which we reference in our formal comments.

CHAIRMAN TONER: Mr. Bauer, do you concur in those judgments, that in light of the Circuit

Court ruling, that really is the law of the case as it were?

MR. BAUER: Yes.

CHAIRMAN TONER: Mr. Simon, do you agree?

MR. SIMON: Well, I think there can be a content standard. I think there always has been a content standard in the coordination rule. It hasn't been in the Commission's regulations, but I think it's been in the statute, and I think the Commission has applied a content standard through advisory opinions, and some of which we cited in our comments. So the answer to that question is yes.

As to the proximity issue, the Circuit Court said that the Commission can take account of time, place, and content as indicia of whether a communication constitutes an expenditure, so I think proximity to an election is a factor that can be taken into account. And, indeed, I think, as we suggested in our comments, it should be taken into account. As I said in my opening statement, the problem we have with the existing rule is not that it uses a

time frame test, but that it uses a time frame test exclusively, both in the sense that it leaves a gap between the primary and the general period, and also that the only test prior to the primary time frame is express advocacy, and I think the Commission needs to deal with that.

CHAIRMAN TONER: In light of that, if there's general consensus that under the Circuit Court ruling, the Commission can have a content standard, and as part of that content standard, can take proximity to the election into account, then it may become an issue of what type of evidentiary record we'd need to justify that type of decision making. And, Mr. Baran, is it your view that if we decided to adopt a 30 and 60 day time dimension, that we essentially could build upon, could draw upon the congressional record that was built up in the BCRA legislation in terms of the electioneering communications rules?

MR. BARAN: I think you can refer to the congressional record. I think you can also refer to the record which was voluminous that was

developed in McConnell vs. FEC. And the intervenors in that case produced extensive evidence about the amount of non-party, non-candidate advertising that occurred in the 30/60 day period. I think they even had graphs that showed that there was essentially a flat line until you got about 60 days before an election, and then all of a sudden it rose. Now, that was pre McCain/Feingold. I think Mr. Simon and his colleagues may have unwittingly provided you with even more persuasive evidence in their submission in this proceeding.

CHAIRMAN TONER: In what respect?

MR. BARAN: Well, last night I tried to go through all of it, and I don't pretend that I have, but I did read their comments, in particular on page 26 of their comments, they referred to their Appendix 5 which contains ads by candidates, parties, and independent organizations, and they say that more than 120 days prior to the 2004 primary and general elections, there were 65 television and radio ad broadcasts that are contained in Appendix 5.

I went through Appendix 5 and those 65 ads, all but four were ads by candidates. And there were four ads by non-candidate organizations. Only three of the organizations produced four ads, and those three organizations were the Chamber, which had one ad in Alaska, the American Conservative Union, which had an ad in Pennsylvania, and the Main Street Republican organization or partnership, which is, according to their web site, an organization essentially controlled by elected officials, by candidates, including, I might add, Senator McCain and Congressman Shays, according to this organization's web site.

So therefore, you have four non-candidate ads that are in this record that occurred more than 120 days prior to an election, and of those four ads, two of them were sponsored by an organization that was controlled by candidates. So you have two non-candidate ads, more than 120 days, and that's your record here. Of course, no allegation that there was any coordination by any of these groups.

I assume that they're not suggesting that

you should promulgate a regulation prohibiting coordination by candidates with their own campaign, so therefore, the 61 ads that are part of this record do not shed any light on whether or not your current 120 day rule is ineffective. And it seems to me that the record, post McCain/Feingold, indicates that there really is not a problem with your 120 day rule.

CHAIRMAN TONER: My time has expired, but if there's time for a second round, I definitely would like to have a follow-up on this, but my time has expired. Vice Chairman Lenhard.

VICE CHAIRMAN LENHARD: Thank you, Mr. Chairman. I'd like to follow up on that question, though, because I think that the point that was raised by those examples was more subtle than whether outside groups were spending money in this environment, but rather whether outside of the 120 day time period people were engaged in efforts to influence elections.

And one of the questions that the Circuit Court asked us was whether there was a risk and if

we established a line at 120 days or, you know, an even shorter one, whether organizations or groups would use that as an opportunity to coordinate and spend money that they otherwise wouldn't be permitted to do, and my sense of that record was that they were showing that people were trying to influence elections in those time periods. Do you have a sense of if we adopt what you're suggesting, which would be a shorter time period, or even try to, you know, look at -- found a record that justified the 120 day time period, whether there is, you know, a risk that this would lead to greater circumvention of the law?

MR. BARAN: All I can do is look at what evidence has been submitted. And, of course, our first suggestion is, if you can justify the 120 day rules, I think that's what you ought to do, because it is a rule that you have in place, it's a rule that people apparently have attempted to follow. One of our recommendations is, don't rewrite your coordination rules. I mean they've been in effect for one election cycle; frankly, it seems to me

that they work. And if in future election cycles, there is evidence of some circumvention or abuse, well, then yes, based on a new record, perhaps you need to revise your regulations. But based on this record, as I understand it, there's no demonstration here either of widespread circumvention of your existing 120 day rule, let alone with respect to the minuscule number of advertisements that were sponsored by non-candidate, non-party groups, there doesn't seem to be any allegation of coordination.

So if that is the record, then it seems to me that you have quite a bit of substantiation that you could offer a court and any future challenge for your 120 day rule. If that's not satisfactory, then I think you have to look for similar justification for an alternative rule. Whether this proceeding is going to provide you with sufficient evidence to justify a 30/60 day rule, I don't know. I don't see any demonstration on how many of these types of ads were run outside of the 30/60 days, but alternatively, you could extend 120

days to some longer period of time that might encompass even those handful of ads that were run outside of the 120 days. So I think it's a matter of record.

VICE CHAIRMAN LENHARD: I have a question for either you or Mr. Bauer. What's the harm if we adopt a stringent rule in this context and regulate this? Isn't this, you know, to the degree that people are concerned about the ability to lobby, isn't this resolved simply by not communicating with parties or candidates as they sort of put together their plans on doing advertising? It doesn't seem to prohibit people from meeting with members of Congress, in their capacity as members of Congress, or even leaders of, you know, the minority leader, the majority leaders in Congress. What harm do we do by imposing these kinds of restrictions?

MR. BAUER: Well, with all due respect, from my part, I would say that's asking the wrong question. I wouldn't ask the question, what's the harm, I'd ask the question, what's the

justification, because if you're circumscribing speech, and granted, there's authority for this Commission to do so, constitutional authority that Congress exercises and has delegated to the agency, no question about it, within, of course, constitutional limits, but if you are circumscribing speech nonetheless, then you want to go about doing so in a very cautious and deliberate fashion, and the question you need to ask each time you extend the restrictions on speech is, what's the justification.

And so I don't think that the Commission should accept the notion that the justification it needs to offer is a justification for protecting speech, it needs to find a justification that's appropriate and easily articulated for some effective balance between critical speech rights that it has to nonetheless keep an eye on, as well as its regulatory authority to implement the statute. I don't mean to cut into your time, but I do want to mention one thing.

VICE CHAIRMAN LENHARD: Go ahead.

MR. BAUER: I'm not terribly -- I'm very persuaded by Mr. Baran's use of the material drawn from the comment, Democracy 21, and I'm sure we'll hear from Mr. Simon about that. I'm not persuaded by the notion that the regulated community would be unsettled by substituting a different time frame for 120 days. Some rules, if rewritten, would introduce some instability into the regulatory environment, but a simple change, if you will, in the time frame within which people have to operate doesn't strike me as an enormous challenge that would create problems for compliance in this coming election cycle.

VICE CHAIRMAN LENHARD: Thank you. I think my time has expired.

CHAIRMAN TONER: Thank you, Mr. Vice Chairman. Commissioner Mason.

COMMISSIONER MASON: Thank you. I wanted to -- I appreciate Mr. Bauer's comment about having to justify restrictions on speech, but I wanted to go back to this lobbying issue. It seems to me under some of the more expansive proposals that

what's being presented to the Chamber of Commerce or someone in that situation is a choice between talking to members on one hand and running ads targeting the members or regarding them on the other, and I just wanted to get a little understanding. I mean it seems to me that in the progression, and you know, if we could just for the moment concede there's no ill intent here and there's a legitimate lobbying purpose and that's what people are interested in, that what normally would happen is, the lobbying organization would talk to the member of Congress or staff and determine his position, and if he's solidly with them, they may decide they don't need to run ads, and if he's irretrievably against them, they might decide, and if he's in the middle, that might well be the case where they're going to run the ads, and then they might well run the ads, and then presumably, after they've run the ads and generated some phone calls, they want to come back. Is that how it works, and if it is, what, you know, what kind of problems are presented by essentially

saying, well, yeah, you can run the ads, but you can't talk to the target of the lobbying effort?

Mr. Baran.

MR. BARAN: Well, there is a tension here, and it's even reflected in the legislative history. I think we cited on page 19 of our comments some legislative statements by Senator McCain about, well, you know, we don't mean to interfere with the right of lobbying and so forth, but you can't lobby without intersecting with people who, wearing a different hat, are also candidates for reelection to the House or to the Senate, and of course, are agents of those officials under your regulations, so you're dealing with candidates and their agents. And under the current coordination rules, you know, the advice that we private practitioners offer our clients is, don't ever talk about their campaigns, whatever you do, just talk about the issues.

And yet one of the proposals from the reform community is to modify your regulations so that at some period of time in the 30/60 day period, not only would advertisements or public

communications that reference a candidate or a political party be subject to coordination rules, but ads that they call thematic ads that don't reference a party or name a candidate, so I don't know what that means.

You some, some organization was lobbying for more wheat in this country, and then subsequently, in this time period, after consulting with congressmen and senators and their staff, started public communications that say, you know, buy more wheat, where all of a sudden they've now coordinated their ad because there's a thematic dimension to it because the candidate is going to be in support of more wheat in his or her advertising.

Those types of vague concepts, if you were to extend them, would not only present a lot of constitutional issues, but you would, you know, have these types of practical implications that are particularly for people who are exercising their rights to lobby Congress.

COMMISSIONER MASON: But just to go back,

on normal lobbying practices, the normal practice is to talk to members of Congress, and that's what's fundamental about it.

MR. BARAN: Members of Congress and staff, of which there is approximately 30,000 the last time I checked --

COMMISSIONER MASON: Yes.

MR. BARAN: -- it's quite normal. And so effectively, if we cast a very broad rule that would implicate some of this content, we would be presenting you with a choice, that you would have to effectively cease the person to person lobbying activities if you wanted to do grassroots, and we would have a practical choice of forfeiting one constitutional right in favor of another one potentially, and then separately, effective organizations would have to consider doing what the reform community did to you, which is to sue you about their constitutional rights, and so, yes, it would have multiple implications --

COMMISSIONER MASON: -- face that risk anyway. Mr. Simon, I don't really have a question

about your proposal, but I do have a comment, and you may want to respond. My concern about trying to get these regulations out is to get regulations that non-attorney practitioners can understand. It may require attorneys to explain them, and you know, someone like that, but members of Congress, many of them are attorneys, but they're not practicing, they're not looking at it with a lawyer's hat on, the staff members, the people in these organizations, and so on. And so if we have simple, clear proposals, of course, we're going to run the risk between over inclusiveness and under inclusiveness and so on like that. But I just -- I frankly find the proposal laid out in your testimony sort of baffling, because the only thing I can compare it to is something like a game of three dimensional chess, okay.

We've got standards based on the identity of the speaker, political committee 527 or somebody else, I've identified at least those three, and there might be others lurking there, we've got

content standards which are the theme; clearly identified candidate; promote, support, attack, oppose; express advocacy; or the character qualifications and fitness for office. And, frankly, the PASO standard and the character standard are not well litigated or well explained. So there would be, I think, frankly, big questions about it, at least as to the borderline, you know, in those areas.

And then we have, I don't know, three or four or five different time frames, you know, and so we have this sort of three dimensional axis out there, and I guess the question is, do you really believe that that is a regulation that promotes compliance and that we could enforce with any reasonable degree of resources?

MR. SIMON: Yeah, I would like to comment on that. And then I actually would really like a chance to respond to Mr. Baran's analysis of the appendix material we submitted because I have a very different view of what that evidence stands for. You know, I don't think the rule we proposed, and we went to kind of extra length, I think, in

trying to draft it out, which may not have been advisable, rather than explain it more conceptually. I don't think it's as complicated as you portray it, and I don't think it significantly goes beyond the complexity of the Commission's existing rule.

It does require a kind of initial sorting as to whether you are a political committee or a 527 or somebody else, that's not a hard standard. And then there are simply three time frames, 30/60 day standard, 120 day standard, and beyond 120 days. And beyond that, the rule is largely based on the Commission's existing approach within that 120 day period. If you refer to a candidate and target an ad to that candidate's district, then you'll meet the content test. So really, at heart, it is built on the existing rule.

As to Mr. Baran's analysis of the ads we submitted in the appendix, I disagree with him about the relevance of the candidate ads. We deliberately searched for and submitted ads run not only by outside groups, but ads run by candidates,

as well, outside the 120 day period. And I think in a way, those ads are more probative than the ads by the outside groups themselves. In part, this was in response to a question asked by the court. I mean one of the questions the D.C. Circuit asked was, do candidates, in fact, limit campaign related advocacy to the four months surrounding elections, or does substantial election related communications occur outside the window? So one of the things the court was interested in are whether candidates themselves run ads outside the 120 day window. Now, why is that particularly important here? In terms -- and this goes to the difference between the rules for coordinated communications and the rules for independent communications.

The importance of the rules for coordinated communications is that if something is not coordinated as a matter of law because it is outside the time frame, and therefore, is outside the Commission's coordination rules, that means that an ad could be written by the candidate, as I said in my opening comments, and just given to an

outside spender, and the candidate could tell the outside spender to go use the corporate or union treasury money to run those ads.

So if you look at the ads that we've produced that are candidate ads, every one of those ads under your rules could have been funded entirely by a corporate or union spender, because absent the application of the coordination rule, there's no limit on how the candidate and the spender can interact over the content, timing, placement of the ad. And so that's why those ads are particularly relevant, because they show candidates do run ads outside the window, these ads have value to candidates, and under the existing rule, each of those ads could be funded with soft money provided by a corporation or a union, and I think that is a particularly important point.

CHAIRMAN TONER: Thank you. Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I'd like to follow up on Commissioner Mason's point, because I also find the proposal to be very complex. And I'd like to ask Mr. Baran and

Mr. Bauer, who I know spend most of their working day advising people on how to comply with our rules, whether you think this is a work -- the proposal that's put forth by Mr. Simon and his colleagues is a workable proposal that you could explain to your clients and that you could advise them how to comply with the law without running -- interfering with activities that you think are otherwise protected?

MR. BARAN: No.

MR. BAUER: No.

COMMISSIONER WEINTRAUB: Do you want to elaborate on that at all?

MR. BAUER: I think Don made a valiant effort to say, well, it builds on the Commission's rules and it's not complicated, but it is complicated, because there is a desire to reach out in a variety of directions and try to nab, if you will, various speech wrongdoers who may be trying to circumvent the campaign finance laws. And so as a result, it has more moving parts, more complexity than a rule that is streamlined for clearer

understanding and much more easily facilitated compliance, and that goes just fundamentally to a difference in approach. Don knows I believe this, we've talked about this a fair amount. I mean I think at some point, and Jan made a comment about this earlier, you have to start with a rule that you think is designed precisely, clearly, and likely to attract compliance --

COMMISSIONER WEINTRAUB: Narrowly tailored perhaps?

MR. BAUER: Pardon me?

COMMISSIONER WEINTRAUB: Narrowly tailored perhaps?

MR. BAUER: Not assumed, just because you think it's in the nature of things that it will promote wide spread evasion, and then allow a record to build to the contrary if such a record can be built. This agency is not without the authority to respond to evidence that its regulations are not working.

And so we don't have to anticipate in each instance six, seven, or eight scenarios, even

within, by the way, your constitutional authority to regulate. Let's assume that there are scenarios that you can respond to with regulation in a constitutional fashion, but you don't have to immediately assume that you can anticipate each and every kind of evasion and then build a rule that is aggressive, multi-pronged enough to catch up with all this anticipated wrongdoing. I think you start with something that's reasonable and well founded, and for the most part, as Jan pointed out, the Court of Appeals was not troubled with the way the rule, the current coordination communications rule is constructed, simply seeking additional explanation, and then there's time available for us to determine whether or not it's working the way it is. But to start now with a rule like Don's and explain it to our clients might be very enriching for Jan and myself in a -- but it would not be otherwise -- to our client.

COMMISSIONER WEINTRAUB: Well, I have to say, I have to -- actually, next week we're having an agency conference, and I get to explain

coordination, and I am completely intimidated at the prospect of having to explain this rule, I think it's very complicated. But I have a different question that I would like to pose to Mr. Simon.

Aside from the complexity of the rule, and I think there are some aspects of it which if I have more time, I'll come back and ask you about, because I'm not sure I get the point, but I'm frustrated by the situation that we find ourselves in, as I'm sure you are, all of you. Mr. Simon, you have successfully sued this agency to -- and asked courts, and they have been willing to do this, to throw out regulations based on the fact that we have improperly noticed the rule in our Notice of Proposed Rulemaking, and people didn't have adequate opportunity to comment on it.

Now, we asked our lawyers to come up with, you know, virtually everything that they could think of that, you know, might go into a good coordination rule, and I think they were pretty ingenious, but of course, they didn't think of

everything, and you guys thought of some new ideas, and that's great. But at this point, if we were to enact a rule that you suggest, I think that somebody, perhaps one of your co-panelists, would sue us on the exact same grounds that you've sued us on successfully in the past, and that they would win because we didn't have your proposal in our NPRM.

At the same time, if we were to say, well, we think this is really interesting and we would like to put ourselves in a legal position where we could enact this and not have that challenge, so we need to renotice the rule, I am fairly well convinced that if we tried to renotice our coordination rule, you would be back in court in about 30 seconds flat complaining to the judge that we were delaying the implementation of a new coordination rule. And I'd be happy to have you tell me that I'm wrong about that, but that's my sense.

So we can't really do what you want us to do, I think, and survive legal challenge. You'll

complain if we try and put ourselves in a position, you'll, I think, sue us if we try and put ourselves in a position to do that, and at the same time, my experience with your client is that if we don't enact every single suggestion, you know, some of them isn't enough, all of them have to be included in our rule, then you will not only sue us, but you will blast back every media outlet in the country talking about what personally horrible people we are, evil, and morally corrupt, reprehensible, I've lost track of all the adjectives over the years, and I just find myself in a box that I can't figure out a way out of. So my serious question to you, and I mean this really sincerely, what do you think that we can legally do without putting ourselves in a situation where, you know, they're going to sue us and it will be thrown out in court, without you running into court and complaining about what we're going to do, that you would be satisfied with?

MR. SIMON: Well, if you feel that you're in a box, I think it is, at least in part, a box of your own construction.

COMMISSIONER WEINTRAUB: Remember, I wasn't here for the last round.

MR. SIMON: No, it's not an issue of the last round, it's an issue of this round. It's been something like 15 months since the District Court in the Shays case denied the Commission's motion for a stay pending appeal and directed the Commission to have new effective rules in place for the 2006 cycle.

Now, this rule is probably the most complicated and contentious and controversial of all the rules that you had, and for reasons of your own choosing, you decided to leave this to last and to the, what I think is the eleventh hour of this litigation process, and I think, you know, that was an unfortunate choice, and I don't know why the Commission chose to organize its work that way, but I think that's part of the reason behind the dilemma that you face. Let me also observe that the proposal we suggest is, you know, very largely, if not entirely, built on concepts and proposals contained in or discussed in the NPRM. I'm just --

I think virtually every piece of what we put together is taken from one portion or one proposal in the NPRM or another.

Now, you know, whether that in itself satisfies an APA notice standard, frankly, I haven't thought through that question. I guess, you know, implicit in the fact that we made this proposal is the idea that we think you have the authority to adopt it, but I haven't specifically thought that through in reference to the question you're asking.

COMMISSIONER WEINTRAUB: Well, I'll just point out, and I know my time is up, Mr. Chairman, that the Court of Appeals decision which substantially changed the parameters of what we're doing here today was not issued until July 15, 2005. So the fact that the District Court did something 15 months ago is really not the operative date. But, you know, what I hear you saying, Mr. Simon, is that -- I'm not getting an answer to my question as to what we could legally do that would make you happy. I just don't --

MR. SIMON: Well, no, if I wasn't clear, let me be clear. What would make us happy would be to promulgate a rule along the lines of what we proposed.

CHAIRMAN TONER: Thank you. Commissioner Von Spakovsky.

COMMISSIONER VON SPAKOVSKY: Mr. Bauer, one of the things you commented on was changing the rule so that endorsement of other candidates, by candidate is not included in this. One thing you didn't talk about, and I wonder whether you have a comment on this is, does the current rule also bring in a danger of keeping candidates out of commenting on, endorsing, or being involved in popular or very unpopular ballot initiatives in a state, because if two candidates, for example, are both endorsing a particular ballot initiative which, you know, is so popular an issue that it could effect their election, is that going to be swept up into the rule?

MR. BAUER: Yes; I mean I think the principles that create the problem for candidate

endorsements create a problem for any time a federal candidate appears in an advertisement for endorsement purposes of any political communication, whether it's political communication on behalf of the state and local candidate or one on behalf of the ballot initiative.

And our suggestion was, and I just want to emphasize it here, that there are certain cases the Commission has recognized are special cases and presents a strong, independent ground for regulatory relief, and it seems to me that the difficulties presented by these regulations, by the development of the law for both candidate endorsements and, for that matter, candidate assistance to parties and other candidates in signing fundraising appeals, are examples of those special cases, and they can be addressed as special cases, which the Commission has done in other context, for example, in providing for corporations under certain defined conditions to endorse candidates.

COMMISSIONER VON SPAKOVSKY: I'll ask

another question about expenditures for coordinated communications. I mean my understanding, the way the campaign process works, and I'm wondering whether it's somehow different now, is that the vast majority of the money that's spent on political communications is done after Labor Day and the two months right before the election, that's where the vast amount of money is spent, which would be within a 60 day rule, for example.

And part of that also is, I've been in this town now four years and I know that August is the time the city basically shuts down because Congress takes a recess, and what happens is, they all go home to their districts. And for people who want to do issue advertising on specific matters before Congress that they want to lobby, the ideal time to do advertising on those issues, I think, is in August, when they're in their home districts doing all their town meetings. And again, we have a danger of sweeping into this those kind of lobbying advertisements.

MR. BAUER: I think Mr. Baran would like to

comment on that, too, maybe Mr. Simon also. I don't think there's any doubt about that, that that is an opportune time; it's an example, again, where it may well be that the advertiser thinks that the election pressures of the time will focus the office holder, even an opposing office holder with no chance of losing, but an office holder, nonetheless, that have caught up with the politics of the seasons will focus them while they're home with their constituents on the message that is meant to be communicated. So you're quite right, that is a very rich period for communicating grassroots terms with elected officials.

MR. BARAN: I think there are multiple sources of data, including your own records here at the Commission, of when political money is spent and how it's spent, there are voluminous data bases on that. I would just point out that your existing 120 day rule certainly would cover even the August period in terms of making coordination applicable.

And it seems to have worked in the one election that we've experienced under the

McCain/Feingold law. And I think that you do have a pretty clear option here of basically keeping the rule in place and seeing if it will work again, as it has in the last election, which was an even bigger election than the one we're coming up to because it had a presidential campaign involved, as well, and more money was spent as a result of that.

MR. SIMON: Let me just say in response to that, there's no prohibition on the grassroots lobbying ad in August if it's run independently of a candidate, that would be a matter that's dealt with by Title II, and at any time prior to the 60 day period before the general election the applicable test for an independent expenditure is express advocacy. In terms of coordinated expenditure, as Mr. Baran pointed out, the August period is covered by the Commission's existing rule. So if it's a problem, it's a problem that, you know, existed in the last cycle and that the Commission has already thought through in the 2002 rulemaking and decided that the balance is in favor of covering ads within the 120 day period.

COMMISSIONER VON SPAKOVSKY: Reading the testimony you submitted, I think you're unhappy with the express advocacy rule; what would you replace it with?

MR. SIMON: Well, as we suggest, we would replace it with a broader time frame test, and then outside the time frame, we recommend the suggestion made in the NPRM, about ads that refer to the qualifications, character, or fitness of the candidate. That's a test that the Commission has talked about in previous rulemakings, that the Commission has said has a more objective character to it, and I think that's a test that intuitively suggests that an ad is campaign related when you're talking about the character, qualifications, or fitness for office of a candidate.

COMMISSIONER VON SPAKOVSKY: Let me ask you a hypothetical then; it's an election year, a presidential election year, the country is involved in an unpopular war, and a group -- they fit all the other rules, but we're talking about the advocacy issues, but they run an ad showing the

President say at the White House, on the South Lawn, the military is there, and they have their saluting guns set up, and they manipulate what was previous footage so that when the saluting guns go off as the President is walking by, one of the wads comes out and hits the President, and there's a thing in the ad that says, well, it's too bad this didn't really happen because then we wouldn't have to worry about this President in November; would that fit within what you believe should be banned?

MR. SIMON: Well, first of all, we're not suggesting a ban, this is a rule about coordinated communication.

COMMISSIONER VON SPAKOVSKY: I understand, but I mean do you think it should fit within that rule?

MR. SIMON: Well, secondly, in your hypothetical, you said in this election year, and in the rule, we propose the time frame would cover from 120 days prior to the primary through the general election, so I think it would be covered as part of the rule if it refers to a clearly

identified candidate.

COMMISSIONER VON SPAKOVSKY: Well, that's very interesting, Mr. Simon, because 2008 will be the 200th anniversary of the passage of the Alien and Sedition Act, and one of the people who was convicted and fined \$100 under that Act was a man from New Jersey named Luther Baldwin, who said in a presidential election year that he wished a wad of the presidential saluting cannon might hit Adams in the ass. And you're basically telling me, I think, that we should reconstitute those acts in a way to restrict the political speech of individuals?

MR. SIMON: Well, again, the premise of the hypothetical is that we're talking about a coordinated communication, so presumably, the conduct standard is that this communication was coordinated with the political opponent of the President, the candidate running against the President or the political party of that candidate, and if there is that kind of coordination in an election year with the opponent of the candidate referenced in the election, I think the Supreme

Court doctrine is pretty clear, that can be considered as a coordinated expenditure, and the doctrine is also clear that it can be considered, therefore, as an in-kind contribution, and the doctrine is also clear that corporations and labor unions are prohibited from making contributions to political candidates or parties.

MR. BARAN: I think the lesson here is not to coordinate with Thomas Jefferson.

CHAIRMAN TONER: Mr. Norton.

MR. NORTON: Thank you, Mr. Chairman. Mr. Simon, I'd like to start with the question about your proposal. If I understand correctly, for 527 groups, you are proposing a content standard within 120 days of refer to the candidate a clearly identify candidate or party, and outside of 120 days, the PASO standard. And to pick sort of a variation on Commissioner Weintraub's question, if we find ourselves back in court, we adopt that proposal, if we find ourselves back in court in a suit filed by a 527 organization, and the court says, okay, FEC, what's your empirical basis for --

not your logical basis, I understand the argument in your papers, but what is your empirical basis for choosing 120 days and concluding that within 120 days, you're going to cover clearly identified, and outside of 120 days, you're going to use the PASO standard; what's that response?

MR. SIMON: Well, from my point of view, the problem with the time frame test, and what puts so much pressure on the time frame test in the Shays litigation was that it was essentially the only test in the content standard, and that outside the 120 days, no test applied. I mean technically express advocacy applied, but you know, the court said that's a functionally meaningless test, so essentially, there was no content standard outside the 120 days.

I think if you have some reasonable content standard outside the 120 days, it take the pressure off how precise you have to be in justifying the 120 days itself. In other words, I think you have to look at it as a package, not as separate elements. And having a PASO test, which I

think can be applied to 527 groups outside the 120 days, I think it puts less pressure on the Commission having to justify the 120 days itself. Now, let me just also add, you know, the 527 aspect here I think is part of what makes the rule complicated, and in part, that's because of where the Commission left the 527 issue and the relationship between the 527's and political committee status.

If you went back and clarified the standards under which 527's become political committees, it would simplify this a lot, and you could probably treat 527's, a lot of 527's, under the political committee part of the rule.

MR. NORTON: Mr. Baran, if I could ask you sort of a variation of the same question. You suggest the Commission ought to keep the 120 day content standard. You make the point that there isn't any evidence of wide spread circumvention of the 120 day rule. But apart from that point, if we're back in court and we retain the 120 day standard, what empirical evidence, if any, are you

aware of from which the Commission could continue to rely on a 120 day window as opposed to some other time window?

MR. BARAN: I think the empirical evidence has been submitted by Mr. Simon here.

MR. NORTON: Doesn't that just show that there are campaign ads running outside of 120 days?

MR. BARAN: Sure, but this regulation doesn't apply to campaign ads. I mean there are lots of campaign ads, not as many as there are before an election, by the way. I mean you could take that empirical data and compare it to the number of campaign ads that occur 30 days or 60 days before an election, you'll see a big spike up like this. You have examples here of candidates, mostly challengers, or somebody who's in real trouble who wants to get their name ID up and things of that sort in various places around the country, but this rule doesn't apply to that.

This rule applies to people like my clients, you know, who may have something to say about something in a non-election year, and the

question is, should coordination rules -- do coordination rules need to apply to advertising outside of that time period.

And you have two pieces of evidence here; one is that there is absolutely no demonstration that this is any sort of a problem, let alone a wide spread problem, because there's so little advertising that goes on, according to the evidence submitted here, beyond 120 days, none of which is alleged to be coordinated with any candidate, so you have no evidence of a problem.

And number two, you already have long standing regulations that acknowledge that when it comes to a campaign poll, that it's essentially worthless over some period of time, because it has no value. It may have some correlation to a campaign, obviously a poll has a correlation to campaigns, you know, it wages public opinion at a moment in time, but that public opinion changes quite rapidly and depreciates to the point where it's, under your own regulations, cannot even be an expenditure or a contribution after 120 days at

all, and I think that -- acknowledges what we all know, which is that there's a lot of stuff that goes on well before elections that is essentially worthless. So why extend your regulations to worthless activity?

MR. NORTON: Thank you. My time is up. Thank you, Mr. Chairman.

CHAIRMAN TONER: Thank you, Mr. Norton. Mr. Costa.

MR. COSTA: Yes, good morning, and thank you for your testimony. I have only one question and it's directed to Jan Baran and Bob Bauer, and it's going to wrap up, I think, this round. Are you aware of any other compliance issues which have been raised by your clients in adhering to the existing 120 day bright line rule, and if so, what are they? We have a 120 day rule out there now, it's been in effect -- are there any other things you have a forum here to let us know if there are such things.

MR. BAUER: Are you referring to compliance issues raised by the coordination rule

other than --

MR. COSTA: Yeah -- yes.

MR. BARAN: That will cut down on the time we spend on it.

MR. BAUER: No, I mean I think that -- I agree with Mr. Baran, that the rule appears to be one that the regulated community has been able to grasp, and that other than this unsettled issue, it's functioned well, and there's no reason to believe that it can't function well for another cycle.

MR. BARAN: Well, I will have to say that there's not a very clear understanding of what material contact is or material information under your conduct rule or, forgive me if I get the phrase wrong, frequent contact and things of that sort. But, you know, it hasn't come up in concrete experience.

When people read those regulations, they say, well, what does that mean, we're not really sure. And otherwise, I think you're at a stage where your existing rules have been sort of

synthesized by people like Mr. Bauer and myself to clients. I mean our summary of your rule is about ten pages long, you know, but we lay it all out and we send it out. I even have about eight pages in my book about your coordination rule.

And people go through that, and they have had an election cycle where they have become familiar with it, they seem to follow it by and large, there may be exceptions that we're not aware of, but I think it's a pretty solid start, and the Court of Appeals has basically said your rules are okay except for this 120 day issue which you have an opportunity to clarify now. And if you're able to do that, then I think you've got a set of rules that seem to be working and should continue to work until proven that they're ineffective.

MR. COSTA: Thank you.

CHAIRMAN TONER: Thank you, Mr. Costa.

Well, we have time for another round of questions, I assume that there's interest in that, so I'll begin the second round. Mr. Simon, I'd like to begin with you. The General Counsel asked you some

questions about how your proposal would work with regard to 527 groups.

I'd be interested in learning more about how your proposal would work with regard to political committees. And as I understand it, the proposals essentially say if the conduct prong is satisfied, that the content standard would look to whether or not the communication was made for the purpose of influencing a federal election.

And as I understand it, and please correct me if I'm wrong, that standard could be triggered regardless of whether or not a candidate or a political party is depicted in the communication. That standard could be triggered regardless of when the advertisement airs even if it's years before an election.

Two questions; one, is my understanding correct that that's sort of the guts of the proposed content standard for political committees; and second of all, if it is, how would that work? What does that mean for the purpose of influencing?

MR. SIMON: You know, in terms of

political committees, I think the expenditure standard, for purpose of influencing definition, is self-executing. I don't think the Commission has or needs to have any additional definition. I mean political committees recognize and report their expenditures, they allocate their expenditures, they have to be able to identify their expenditures, and they do so without any narrowing or limiting test.

CHAIRMAN TONER: But, in fairness, if you spend money and you engage in a disbursement, that's a concrete action that you're aware of, but here we're talking about certain communications that are going to be treated as in-kind contributions. If we apply the for the purpose of influencing test, what criteria would we bring to bear in making that judgment?

MR. SIMON: I think you look at the communication and decide whether it's for the purpose of influencing the election of the candidate that it was coordinated with.

CHAIRMAN TONER: Is that tantamount to

sort of we know it when we see it? Is that where we'd be in a quote potter stewart? I mean is that a fair assessment?

MR. SIMON: Yeah, I think it is a fair assessment. I don't know that --

CHAIRMAN TONER: Are you comfortable with that constitution?

MR. SIMON: Yeah -- yes, I am, because I think the Supreme Court in Buckley was very clear that the need for a narrowing interpretation of for the purpose of influencing language did not apply to candidates or political committees, that the court found the for the purpose of influencing standard, and the term contribution and expenditure sufficiently clear when applied to candidates and political committees. It was only in another context of applying to outside groups, to corporations, to labor unions, to individuals where the court said there was any need for a limiting standard. Let me also note --

CHAIRMAN TONER: But, in fairness, I don't recall the Buckley court flushing out this precise

issue of what the standard ought to be with respect to coordinated communications, just acknowledged the general principle; is that right?

MR. SIMON: Well --

CHAIRMAN TONER: It did not purport to establish a standard for that?

MR. SIMON: If the standard wasn't needed in the context of independent expenditures, and certainly I don't think it would be needed in the context of coordinated expenditures. But let me also note that this issue came up in McConnell in the sense that Mr. Baran's client challenged Section 214 of BCRA, which is the coordinated expenditure portion of BCRA, and the claims they raised included the claim that the language of the coordinated expenditure provision is not sufficiently clear, is vague, did chill speech, did lead to the possibility of discriminatory enforcement, and the Supreme Court rejected all those claims and upheld the language on its face. So, you know, particularly in the context of political committees, I just don't think there's a

need for any kind of narrow --

CHAIRMAN TONER: So -- with respect to political committees, you'd be comfortable with the agency evaluating it based on we know it when we see it?

MR. SIMON: I think this agency knows what expenditures by political committees are.

CHAIRMAN TONER: Mr. Baran, your thoughts?

MR. BARAN: Well, I think Don is correct in his reference to the Buckley case, but of course, that analysis only dealt in terms of, you know, one aspect of the expenditure issue, the issue you're raising really was addressed in Colorado One, where the Commission for many years had a regulation that said that all expenditures by political committees should be treated as coordinated.

CHAIRMAN TONER: Irrebuttable presumption.

MR. BARAN: Irrebuttable presumption, which was rejected. And as part of the case, of course, there were some arguments made that, well, those expenditures by the Colorado party should

still be treated as coordinated because the party had had some contacts with the candidates who were running in the primary, and the court made some conclusion or references saying, well, you know, this type of incidental association and intersection between party committees and candidates is not coordination, and besides, the money was spent months before the primary and things of that sort. There was even a reference to how it couldn't be coordinated because it really wasn't proximate to the election itself, I think it was less than 120 days to the primary. And really, what constitutes a coordinated party expenditure still has not been flushed out, except for your existing regulations.

So to put the parties in some other category, make them subject to other coordination regulations, I think is not justified and probably would violate the principles enunciated both in Colorado One and in McConnell that says you can't treat political parties any differently for purposes of independent expenditures than you would

treat someone else. So you have to be consistent in how you define coordination, whether it's a party committee or a third party.

CHAIRMAN TONER: If I could ask -- Mr. Bauer, do you believe that we could lawfully, constitutionally have a coordination standard that turned on the purpose of influencing?

MR. BAUER: No.

CHAIRMAN TONER: Why?

MR. BAUER: Because I mean, first of all, I'm astonished that -- I'm not astonished because I think Mr. Simon as a new parent is working through his sleep deprivation admirably --

CHAIRMAN TONER: I'm wishing him the best in that regard.

MR. BAUER: -- but I think -- extraordinarily well, but having said all of that --

CHAIRMAN TONER: We've all been there.

MR. BAUER: -- in his exchange with Commissioner Weintraub, there was obviously reference to the repeated lawsuits filed by his

client against the Federal Election Commission alleging its incompetence in a variety of respects, in some cases not incompetence, but sort of studied wrong doing, and here's Mr. Simon telling you that he'd be happy to provide you with a test in which you could sort of decide on the basis of feel and intuition whether a particular advertisement was for the purpose of influencing an election. So the compliance policy that he's articulating here, at least the regulatory theory he's articulating is hard for me to follow. Although I do admire the way he's put it.

CHAIRMAN TONER: Mr. Simon, your thought on that?

MR. SIMON: Yeah, no, I just wondered in response to what Jan said. I mean the Colorado One case was about the conduct prong, not the content prong. The result of Colorado One was that the spending at issue was an independent expenditure, not a coordinated expenditure. There wasn't an issue in the case about whether it was an expenditure of one sort or another.

CHAIRMAN TONER: Thank you. My time has

expired. Vice Chairman.

VICE CHAIRMAN LENHARD: Thank you. My earlier questions have been directed at Mr. Baran and Bauer, and I'll use this round to ask you, Mr. Simon. To your mind, as you look at the record that you submitted, how big is this problem? Do you have a sense of -- how we quantify this, the percentage of money that was spent to influence an election outside of these 120 time periods as opposed to inside?

MR. SIMON: I don't know, and I don't contest the proposition that more money is spent within 120 days than is spent outside 120 days or that more money is spent, you know, within 60 days than between 60 and 120 days, I mean I think that's not the issue. The issue in this context, not in the context of Title II where we're talking about independent expenditures which is under a different constitutional standard, the issue in this context where we're talking about coordinated expenditures which are the equivalent of in-kind contributions to candidates.

The issue is whether I think political advertising is running, whether candidates run that advertising, and whether saying that advertising run by candidates and/or outside groups can be coordinated without limit up to and including the point of having an outside spender simply pay for an ad drafted by a candidate constituting a contribution in effect, an in-kind contribution to the candidate, that is the problem I think you have to focus on. In this context, what a time frame does as the sole task is essentially put a time frame on the ban on corporate or union contributions to candidates. And although outside the 120 day window a corporate officer could not walk up to a candidate and say, here's a check for \$100,000 as a contribution, that corporate officer could walk up to a candidate and say, give me your ad text and I'll spend \$100,000 running that ad where and when you want me to. It's functionally a contribution, and the harm of the time frame test is to the extent candidates advertise outside the 120 day window, which they clearly do. You are

essentially allowing unlimited soft money contributions to be raised and spent by those candidates and I think that's impermissible.

VICE CHAIRMAN LENHARD: So your sense is that the problem isn't really the number of days we've chosen, but the views today, we couldn't pick a set number of days that would adequately capture this?

MR. SIMON: It's not 90 days versus 60 days versus 120 days, it's that there's no meaningful test whatsoever outside the time frame that you chose.

VICE CHAIRMAN LENHARD: So if we were to look at the record and find that there was a period of time in which there was no meaningful amount of spending even by candidates to influence elections and we chose that date, we would still be at a risk because presumably in the future -- I mean the court asked us to try and anticipate circumvention and people could adjust their behavior accordingly, is that --

MR. SIMON: I mean I think, you know, the

further out you go, the severity of the problem diminishes. We found what I think is a significant amount of advertising by candidates in the period outside 120 days. If it was 180 days, I don't know what would be there. I think there is generally a trend towards earlier advertising. I think certainly under the way the rule currently works, in the period between the end of the primaries, in say March or April, and the beginning of the pre-general election period in July, there's certainly a lot of advertising that takes place in that period by candidates, and at a minimum, I think you need to fill in that gap period.

But I mean we're not suggesting you should move the 120 days to 150 days or 180 days, we're saying if you want to keep that 120 days, you need to supplement it with something that will identify coordinated ads outside that 120 day period.

VICE CHAIRMAN LENHARD: And so going back to an attempt to sort of look at a, you know, a quantification or a measure of the problem, do you have a sense of, given the record that you

submitted, whether the problem really lies in the period prior to the 120 day period, prior to the primaries, is the gap period between the primary and the general, or is it all of a like kind and equally in need of regulatory --

MR. SIMON: Well, it's both in the sense that we identified I think a significant number of ads in both periods. To my mind, the problem is more acute in the gap period, because then you're talking about ads in the election year, five months before the general election, which I think is, you know, was very much the heart of the electoral season. Certainly, if you look at 2004, there was a significant amount of candidate advertising going on in the period between the end of the primaries and July.

And, indeed, one of the 527 groups, the Media Fund, was formed for the purpose of doing, of running ads in that period, after the primaries, up until the convention. They were worried about Senator Kerry, you know, being up against -- running out of money, or I think at the time they

were formed, there was still a question of whether he's going to opt into public financing and be caught by the spending ceiling. But certainly that was viewed as an important period for political advertising.

VICE CHAIRMAN LENHARD: Mr. Chairman, I see my time has expired.

CHAIRMAN TONER: Thank you, Mr. Vice Chairman. Commissioner Mason.

COMMISSIONER MASON: Thank you. I want to try to get one thing understood, and it goes back a little bit to some of these questions about Colorado and the party activity, but I want to encourage the panels to think also about BCRA and the McConnell decision in that regard. Do you think we could fairly say that if candidates don't have perhaps a right to coordinate with political parties about party committee activity, that under the statute and under the construction of the statute promulgated in McConnell, that there's an expectation that candidates will be coordinating with their own party committees about political

activity going on in the pre-election period; does anyone disagree with that?

MR. BARAN: Well, I think that operationally, in part because of the law, that will occur in many instances because parties are given an increased limit where they are permitted to --

COMMISSIONER MASON: I'm not thinking about coordinated, no, I'm thinking about things like generic party activity. And I don't mean anything where somebody is trying to be tricky or whatever, but the party has a get out the vote drive, or the party has generic ads, and it seems to me that there are implications at least in some of these decisions and in the way the statute is constructed that there's an expectation that candidates would be coordinating with parties about that activity and that that's okay.

So that brings me to then a particular question about Mr. Simon's proposal, because he was responding to the Chairman talking about purpose of influencing, and yet the proposal for political

committees is directed to voters. So I don't know any other way to read that then to say, well, if the state party committee is planning a generic ad campaign, they're not going to mention any candidates, they want to do generic advertising on behalf of the party, and they want to talk to their candidates, federal and state, about, you know, what are the best themes, you know, should we talk about corruption, should we talk about the war in Iraq, you know, what works better. And so the candidates have views on that and they express those to the parties and then the party runs an ad. Well, that ad is then directed to voters in the jurisdiction of the candidate with whom the communication is coordinated. So, Mr. Simon, have you caught up something that I think, you know, heretofore has been suspected to be an expected activity and not some sort of circumvention.

MR. SIMON: Yeah, but that question, I take it, relates to whether that spending is part of the parties for 441a(d) spending, which is an issue that, you know, the Commission used to deal with

under an electionary message test. If the ad mentioned the candidate --

COMMISSIONER MASON: But your proposal, your proposal says directed to voters, it doesn't say electionary communication, it doesn't say purpose of influencing, it says directed to voters.

MR. SIMON: It says expenditure, I believe.

COMMISSIONER MASON: Anything done by a political committee is an expenditure. Now, if you're going to tell me that the generic party advertising that says vote republican to protect us from Osama Bin Laden, or vote democratic to clean up corruption, is not an expenditure, well, that's new ground.

MR. SIMON: No, but it may not have to be attributed to the particular candidate's 441a(d) limit if it's not an expenditure for the purpose of influencing that candidate's election.

COMMISSIONER MASON: But this says expenditure directed to voters. It doesn't say, you know, and that's -- I mean that's -- because

that gets to the issue about whether a clearly identified candidate is a reasonable distinction, and you're rejecting clearly identified candidate and proposing directed to voters.

MR. SIMON: Well, maybe this is a technical draftsmanship issue. The way I would read that is, the term, expenditure, in that context, would mean expenditure for the purpose of influencing that candidate's election and directed to the voters for that candidate's electorate.

COMMISSIONER MASON: And we determine that it's for the purpose of influencing that candidate's election by whether the candidate's name is in the ad?

MR. SIMON: I think that's one of the indicators.

COMMISSIONER MASON: One of; what else?

MR. SIMON: You know, targeting and timing.

COMMISSIONER MASON: But we've already said that it's targeted to just that state. Maybe there are only three or four members of the House

and one member of the Senate, and it's right before the election.

MR. SIMON: And if it mentions that candidate's name --

COMMISSIONER MASON: And it doesn't mention that candidate's name.

MR. SIMON: If it doesn't mention that candidate's name, it probably would not be.

COMMISSIONER MASON: Probably, and that's our problem, okay.

MR. SIMON: I mean, you know, you have to develop standards on this.

COMMISSIONER MASON: So clearly identified candidate would really be better than directed to voters?

MR. SIMON: I don't know, I don't have an opinion on that.

COMMISSIONER MASON: The trouble is, we have to know.

CHAIRMAN TONER: Thank you, Commissioner Mason. Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr.

Chairman. Mr. Bauer and Mr. Baran, you indicated earlier that while you don't want us to change a lot, for stabilities sake, you think that if we change the time window, that wouldn't be a problem. Would you still hold to that view if we changed the time window to say 180 days?

MR. BAUER: No, because, first of all --

COMMISSIONER WEINTRAUB: I thought not.

MR. BAUER: -- let me start by saying I'm trying to walk Mr. Baran from 120 to 60 and I'm having trouble over the course of this hearing. He seems to be going even beyond his written testimony to stress the adequacy, maybe even the desirability of 120 days, so he and I will have coffee afterwards. But in any event, beyond that, I like to stay close to the Chamber. Beyond that, there would be no basis for coming to 180 days. The entire exercise here is to find a rational, well rounded basis for --

COMMISSIONER WEINTRAUB: I understand that, but --

MR. BAUER: -- time frame, so why would we

be happy with that?

COMMISSIONER WEINTRAUB: Well, suppose that we could, you know, we looked at all the data that's been submitted to us, and we hired a statistician, and we came to the conclusion that if you look at all the advertising that's done, you know, you really capture most of the things you're concerned about, and 180 days is an insignificant amount that goes on before that, just assume we can justify it. My question is, would you then say, contrary to what you said earlier, oh, but changing the time window is now a big problem because we're making it broader rather than narrower.

MR. BAUER: You're asking two questions. I don't think it would be difficult for me to deliver the discouraging news to my client that you had extended the time frame without justification, without an adequate supporting record, and for no obvious reason in violation of the U.S. Constitution, that's one method. The other method is, could they comply with it? Yes.

COMMISSIONER WEINTRAUB: I'm not getting

much out of this exchange so let me move on.

VICE CHAIRMAN LENHARD: Well, you got two answers.

COMMISSIONER WEINTRAUB: The Court of Appeals asked us to consider three questions, and I think that Mr. Simon and his friends have made an attempt at the first one, do candidates in fact limit campaign related advocacy to the four months surrounding elections or does substantial election related communication occur outside that window. The second question the court asked us to address, which none of you commented on that I saw, was whether we should have different standards for congressional, senatorial, and presidential races, and I'd just like to ask whether any of you have an opinion on that?

MR. SIMON: I guess my opinion is that you should not have different standards.

MR. BARAN: I don't think there ought to be different standards, but I would point out that your existing rules have different effects. I mean, you know, the Iowa Caucus is in January, I

think the first congressional primary is in Illinois in March, you know, so you have a rule that applies to all campaigns, but the effect may be different.

COMMISSIONER WEINTRAUB: Mr. Bauer, any thoughts?

MR. BAUER: No, I don't believe the standards should be different. And I apologize that I didn't answer your earlier question. I do not believe changing from 60 to 180 would be difficult to comply with. I mean changing the date, it seems to me either way can't be a problem. It's just the question of whether or not you've done what the court has asked you to do, which is to anchor it in something defensible.

COMMISSIONER WEINTRAUB: The court also asked us to address what I think is sort of, frankly, an impossible question. Perhaps most important, to the extent election related advocacy now occurs primarily within 120 days, would candidates and collaborators aiming to influence elections simply shift coordinated spending outside

that period to avoid the challenged rules restrictions? In other words, if you make it illegal here, would they do what is legal when they can no longer do what is illegal? Is there any period of time that we could come up with that wouldn't have that effect?

MR. BARAN: I think you could respond to the court by saying based on the application of our rule in the last election, the answer is no, it hasn't happened. Now, if the court wants to speculate on what behavior might be modified in the future, I mean I don't see how you could engage in speculation. What we know as a matter of fact, that that did not happen.

COMMISSIONER WEINTRAUB: Mr. Simon?

MR. SIMON: Yeah, I mean obviously that's a hard question to answer because it does call for speculation.

COMMISSIONER WEINTRAUB: That's why they pay us the big bucks.

MR. SIMON: Well, you know, I think to the extent that a time frame got pushed out more remote

from the election and the Commission could conclude that prior to the time frame candidates were not running ads, I think that could be some evidence that there is less likelihood that spending would shift outside that time frame. I don't think that's true for the 120 day.

COMMISSIONER WEINTRAUB: But what period -- do you have any theory --

MR. SIMON: I don't know, I don't have any other particular period in mind.

COMMISSIONER WEINTRAUB: Are you aware that, you know, when you were looking through all those ads that you put together for us, are you aware of coordinated advertising that went on outside of the 120 day window?

MR. SIMON: No, there's no way that we could be aware of it. I mean you can't tell from the face of the ad whether it was coordinated or not.

COMMISSIONER WEINTRAUB: Mr. Bauer has asked that we put in certain safe harbors for things like firewalls and fundraising by candidates

for party committees; you don't like those ideas, Mr. Simon, at least that's what your testimony said, your written testimony said; could you elaborate on what the problem is?

MR. SIMON: Well, you know, on the firewall issue, let me just note that in the 2002 rulemaking, the Commission considered that and said the Commission does not agree that the mere existence of an ethical screen should provide a de facto bar to the enforcement of limits on coordinated communications posed by Congress. Without some mechanism to ensure enforcement, these private arrangements are unlikely to prevent circumvention of the rules. That was the Commission's own conclusion in 2002 about the use of firewalls. And the Commission found firewalls, just accepting the assertion that a firewall exists, as an inadequate means to prevent circumvention, and I agree with that.

I don't think it's adequate just to accept the sort of facial representation, we have a firewall, it's accepting the facial representation

we didn't coordinate, and I don't think that's sufficient. I think the use of firewalls is accepted practice in law firms. I think law firms are very different kinds of entities than political committees, and I think the analogy between the two kinds of entities doesn't translate well.

COMMISSIONER WEINTRAUB: But if I could impose just one follow-up; I'm trying to figure out what the -- is it that you're afraid we're just going to accept the assertion of the firewall, or that you think no matter how they documented and provided evidence of the firewall, it still wouldn't be sufficient?

MR. SIMON: Well, I mean mostly the former, that the proposal, to me, in the NPRM seemed to say if a group sets up a firewall or has a policy of having a firewall, that would be dispositive. And I don't think without the ability to look behind that, to at least have some standards as to what a firewall consists of, what the mechanisms are for enforcing the integrity of the firewall, that the Commission should just

accept the fair representation of the adequacy of the firewall.

I also note that, in Mr. Bauer's comments, he suggests a kind of modified firewall, where you have a firewall within an organization, but the head of the organization can be on both sides of the firewall. Well, you know, that seems to me to defeat the whole point.

COMMISSIONER WEINTRAUB: My time is up; thanks.

CHAIRMAN TONER: Thank you, Commissioner Weintraub. Commissioner Von Spakovsky.

COMMISSIONER VON SPAKOVSKY: I don't have any questions.

CHAIRMAN TONER: Okay. Mr. General Counsel.

MR. NORTON: I just want to follow-up on the endorsement question which Commissioner Von Spakovsky raised. And I guess, Mr. Bauer, my question is directed to you because you were a proponent of this. As you know, there's much in the D.C. Circuit opinion about the importance of

the Commission considering the possibilities for circumvention. You make the point that endorsement ads really are for the benefit of the candidate being endorsed, and there is no evidence that they are really used in a manner that would benefit the endorsing candidate. But let me posit this example that might occur if the Commission established this safe harbor. The endorser is a publicly funded presidential election candidate who's running out of funds for the general election. Since public funding is a block grant, when the money is gone, it's gone.

The endorsee who would be paying for the ad is a highly popular governor candidate who's expected to coast to re-election in a swing state where there are no contribution limits or prohibitions. There's an ad paid for by that governor where the endorser, the presidential candidate, is on screen for 90 percent of the time talking about his priorities and accomplishments, and the tag line is, I endorse Governor X because I know he shares my goals and visions for America.

Is that a realistic concern for the Commission if it were to establish a safe harbor for endorsements, that kind of ad?

MR. BAUER: Well, I think you'll agree with me that you've loaded the hypo. But I understand that the Commission, they want to say in the explanation and justification that they're free, obviously, to determine in particular cases that rather than the normal course of these endorsement ads, the way in which we typically find them, the vast majority of them, if not all of them so far, have not really presented any issues, that there may be circumstances in which somebody would press them and say, press the Commission to determine whether, in fact, an endorsement was what it was presented to be. I'm not certain that's going to present an insuperable regulatory challenge. But let me step back and say this, it's certainly worth the effort. And why is it worth the effort, and why have we emphasized this one thing?

Because in the whole complex of practices

that we've been talking about here, endorsements, and of course, I'm here representing an organization of candidates essentially and that promotes candidacies, of all the complex practices we've discussed, the endorsement is time honored, well established, and politically vital and significant in a variety of ways.

And I don't believe that prior to the Forgy Kerr opinion, that anybody really contemplated that we would find ourselves having to struggle to make room for endorsement under the BCRA developed coordination standards, and I think the Commission should try to find a way to extricate it, because Commissioner Von Spakovsky referred to the practices or the style of debate rhetoric and whatever in the Adams period. Throughout the entire political history of this country, nothing has been more critical in ways too complicated here to describe, and not obviously within the immediate interest of the Commission, nothing has been more significant and more consistent than the desire of candidates to associate through endorsements in a

variety of ways, not to circumvent the statute, since it long pre-dates BCRA, but because it's politically so much a part of political dialogue and association of the United States. So it seems to be worth the effort for the Commission to find a way to pull that out of the melee here.

MR. NORTON: Mr. Simon, did you have anything to say on that point?

MR. SIMON: Well, you know, in some ways I agree with Bob on that in the following sense, in this sense. In the typical endorsement ad that Bob is talking about, the candidate running the ad is not making expenditure for the purpose of influencing the candidate who's doing the endorsement. So I think in the hypo you described, I think the candidate is making an expenditure for the presidential candidate.

But in the typical endorsement ad, where a candidate says I endorse, you know, so and so for the House, that's an expenditure for the purpose of influencing the candidate who's being endorsed, not for influencing the candidate who's doing the

endorsement. In terms of a non-federal candidate, it seems to me the situation is controlled by 441i(f), which is that a non-federal candidate cannot spend soft money for ads which PASO a federal candidate. So if the endorsement doesn't promote the candidate doing the endorsement, then it should be okay, but that would be the standard.

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

CHAIRMAN TONER: Thank you, Mr. General Counsel. Mr. Costa.

MR. COSTA: I have no further questions.

CHAIRMAN TONER: I have one question for the panel, and I think we have time if any Commissioners have just final questions. I'd like to follow-up on this endorsement proposal. And, Mr. Bauer, would you be comfortable if we decided we were going to fashion a way to extricate ourselves from the endorsement situation, as you put it, that it would be permissible for these endorsements to take place, wouldn't trigger any in-kind contributions, even if the endorsing

candidate consults with the makers of the communication, which makes sense, and part of the back drop I think of the AO you alluded to was the common sense recognition that happens when office holders are appearing in ads, their people are going to look at them and are likely, almost certainly going to satisfy the conduct standard. Would you be satisfied if we fashioned an endorsement provision that allowed that activity to take place, have it be exempt, as long as there was no express advocacy for the endorsing candidate? So that we would look solely at that, and provided that there was no express advocacy for the candidate doing the endorsing, it would be exempt.

MR. BAUER: I haven't considered how that would work into the totality of a rule, but nothing on the face of it troubles me on first thought.

CHAIRMAN TONER: And so, the General Counsel's hypothetical, we would evaluate whether or not there was express advocacy for the endorsing candidate in that scenario and in others?

MR. BAUER: Yes; and I can hear Mr. Baran snorting next to me. What I'm trying to figure out is exactly how the express advocacy standard would be analyzed in those circumstances, but let me --

MR. BARAN: Well, I was going to follow up and say, I believe that your own regulations have defined express advocacy as simply the name of a candidate with an exclamation mark or something, right? So --

CHAIRMAN TONER: Slogans, certain slogans, right.

MR. BARAN: Lamar, right, or whatever --

CHAIRMAN TONER: Which was a forgettable slogan, but it was one, nevertheless.

MR. BARAN: I mean 30 years ago this agency grappled with this variation of the question when then Congressman Ed Koch produced a campaign button that said Koch/Carter, and there was all of this bashing of teeth and rending of garments as to whether he was making an in-kind contribution to the publicly financed campaign of then Governor Jimmy Carter, and that eventually was resolved with

an exception, they would allow campaigns to, you know, basically promote each other. All of this has been changed by McCain/Feingold, and I assume, if Ed Koch were to run for New York mayor again, he might not be able to have that button with a more up-to-date variation, I'm sure. But it seems to me that there ought to be some accommodation. I don't know if it's going to be possible in this rulemaking or whether it's going to require some amendment to the law, but this situation does have to accommodate the reality that campaigns for state and federal office tend to endorse each other.

CHAIRMAN TONER: Thank you. Are there any other questions for this panel? Commissioner Weintraub.

COMMISSIONER WEINTRAUB: I have one follow-up to my last round of questions. On the issue of candidates soliciting for their party committees, one that's near and dear to your heart, I know, Mr. Bauer, you've made the point that it's really not to the candidate's benefit to be wandering around hat in hand for, you know,

collecting money for the party, it doesn't go to his campaign account and it can't be earmarked. Mr. Simon, you still have -- you think those should be covered by coordination regulations?

MR. SIMON: Well, with apologizes to Commissioner Mason, I guess I would still apply an expenditure test. You know, if the candidate's solicitation in an ad is not for his benefit, which is what Mr. Bauer says, it's not promoting his election, it's not for the purpose of influencing his election, then it's not an expenditure, and under the test we propose, it wouldn't be covered under the content test.

COMMISSIONER WEINTRAUB: So you're comfortable with making some kind of provision for that?

MR. SIMON: Yes, but again, you know, the other side of that is Mr. Norton's hypothetical, that, you know, just as in an endorsement ad, you could structure it in a way that it does benefit the candidate doing the endorsing, so to in a, you know, we could construct a hypothetical

solicitation ad that would also benefit the candidate doing the solicitation. So my only point is, there shouldn't be a kind of per se exception, there should be a standard, whether it's a PASO standard or for the purpose of influencing standard.

COMMISSIONER WEINTRAUB: Well, it sounds like you're moving towards a PASO standard. Mr. Bauer, do you want to respond to that?

MR. BAUER: Yeah. I've always been concerned about extending the PASO standard beyond the specific circumstances of which Congress provided for it. But let me, if I could, just make a comment about -- because we're ending here on a happy note here, where Don is slowly migrating toward the other side of the table here on some points, at least with his usual qualifications.

What I'm talking about -- what I'd like to stress in the case of the firewall, in the case of the endorsements and whatever, is that nobody is suggesting that the Commission should fashion a dumb rule, or that the Commission surrenders upon

fashioning a rule its regulatory authority or tosses its sense out the window. But what we're looking for, and this is something, it seems to me Don Simon's expenditure test repeatedly refuses to offer us is something that we, as attorneys, all three of us, can tell our clients. We'd like to tell them, this is what you can do, and this is what you cannot do, this will spare you a legal entanglement with Democracy 21, this will guarantee you a decade of it.

And I think that that is something that, by going case by case in some of these circumstances and finding specific examples, where even Don is not intuitively distressed at what we're proposing for endorsements or assigned solicitations, the Commission would do us the service of helping our clients do what you want them to do, which is to comply with the law.

COMMISSIONER WEINTRAUB: I'm gratified to hear that your clients are more concerned about entanglement with Democracy 21 than with the FEC. Thank you, Mr. Chairman.

CHAIRMAN TONER: Thank you, Commissioner Weintraub. The Commission very much appreciates the three panels being here this morning. We learned a great deal from you. We will be in recess for ten minutes, and we'll start with the second panel at the bottom of the hour.

(Recess)

CHAIRMAN TONER: Okay. Why don't we Reconvene the special session of the Federal Election Commission regarding coordinated communications. Our second panel this morning consists of Marc Elias, on behalf of the Democratic Senatorial Campaign Committee, and Paul Ryan, on behalf of the Campaign Legal Center, and Larry Gold, on behalf of the AFL-CIO.

As with the first panel today, each witness on this panel will have five minutes to make an opening statement. The green light at the witness table will start to flash when the person speaking has one minute left; the yellow light will go on when the speaker has 30 seconds left; and the red light means that it's time to wrap up your

remarks. Once again, we'll go alphabetically among the witnesses, starting with Mr. Elias, and then Mr. Gold, and Mr. Ryan. So, Mr. Elias, whenever you're ready to begin.

MR. ELIAS: Thank you, Mr. Chairman. I have two goals here, one is to use less than my full five minutes, since I know there are a lot of -- you've heard a lot of statements from a lot of people and probably have questions. Second is, I wanted to welcome, Mr. Chairman, you to the Chairman's seat, Commissioner Lenhard, you to the Commission and the Vice Chairman's seat, and Mr. Von Spakovsky, welcome to the Federal Election Commission. I'm looking forward to testifying today. I have commented in the past few rulemakings at the opening that you are largely balancing the number of angels you can get on the head of a pin, and we did that first about what the definition of agent is, and then we did it even more in some senses with less practical effect over the definition of solicit. But I understand why you had to do it, I understand it was a court order

and there was no choice. With the internet rulemaking, I think I began by saying that this was a rulemaking in search of a problem. And I also reiterated that again in the context of the agency and the solicit rulemakings. This is a very different situation you find yourselves in.

Speaking on behalf of the Democratic Senatorial Campaign Committee, the rulemaking that you all are engaged in today goes to not just real differences in approach of practical consequence and policy, but it goes to the heart of, frankly, what national party committees today do. And I say that in a mild moment of bipartisanship.

The fact is that the National Republican Senatorial Committee, like the Democratic Senatorial Campaign Committee, this cycle, as last, will run millions of dollars, most like tens of millions of dollars, in independent expenditure, public communications. So the decisions you all make in this rulemaking, unlike in some of the others, have real world consequences.

They have real world consequences for how parties operate, how parties establish themselves, how parties organize themselves, and the relationship, the fundamental, and I would say the constitutional relationship between parties and their candidates. I am reminded as I sit here of something that several of you have said in various context over the time -- said over time that with respect to the DSCC and its republican counterpart, we are talking about hard money committees. So whatever rules that this Commission may feel are appropriate with respect to 527's or other organizations, the Democratic Senatorial Campaign Committee only raises funds subject to the prohibitions and reporting requirements of the Federal Election Campaign Act and McCain/Feingold.

The DSCC does not raise, or spend, transfer, or direct soft money, a point that I have raised in the definition of solicit. It does not do anything approaching those things. So the activities that you all are regulating today go to the relationship that the DSCC will have with its

candidates, the relationship the DSCC will have with its allies, and the relationship that the DSCC will have internally, to the extent that under current Commission regulation and practice, the DSCC, like most other organizations, essentially divides itself in half as we draw closer to the elections, so that there is a part of the DSCC that is independent, and there is a part of the DSCC that is coordinated.

So I ask you to keep that in mind as you approach this from a 30,000 feet level, as you approach this from a policy level, that this is a hard money committee, a committee that is composed of democratic elected officials, where the risk of corruption I think is considerably more attenuated than in some of the other areas that you may have focused on in some of the other rulemakings. For that reason, as we review the court's order to you, to go back and re-examine this rulemaking, we have urged several specific proposals upon you, and I'm not going to list them here because you've undoubtedly read the comments, and as I said, I

don't want to take my full five minutes, I want to let you get --

CHAIRMAN TOKEN: You're well on your way, Mr. Elias.

MR. ELIAS: I'm almost done, Mr. Chairman. I'm watching the little light. All of the comments we offer fall into two categories. Number one is to deal specifically with the court's ruling on the time period and the conduct standard. The second is having -- since you are revisiting this rulemaking, having had a cycle of experience about some glitches in the law that have developed, some of the advisory opinions that have come up, we've taken this opportunity to try to help you all reflect back on how this standard has worked, how this law has worked in the real world. So those are the two things that I'm here today to answer questions about. And with that, I will conclude with at least some time left, because the little yellow light is still on.

CHAIRMAN TONER: Mr. Elias, your presentation was precise. You concluded with three

seconds remaining. Thank you. Mr. Gold.

MR. GOLD: Thank you, Mr. Chairman. I'm pleased to be here on behalf of the AFL-CIO, which has nine million members and 52 national and international union affiliates. We have a long standing concern with the Commission's regulation of coordination. We've participated in previous rulemakings for that reason. We, as you know, were a litigant in the McConnell litigation on coordination rules arising under BCRA, and we have appeared as an amicus at the District Court level, the Appellate Court level, and the Supreme Court level, most recently in the pending Randall vs. Serel case on coordination matters.

The AFL-CIO does all of this because it engages regularly with candidates and with political parties, it engages with legislators on matters of public policy and legislation, it mobilizes its members on issues and legislative matters, and it also does a great deal of public advocacy on all these matters. So we intersect with the legislative and the political world in

many different ways throughout the country.

In this rulemaking, the Commission is constrained and governed by the Constitution, by the statute, and by the directives of the Shays decision. Arising from BCRA, BCRA gave the Commission a fair degree of latitude when it repealed the previous coordination rules. Originally the statute, it should be remembered, the original proposal had a very precise and thorough and complicated proposal to regulate coordination. By the end of the legislative process, that had been abandoned in favor of repealing the regulations and essentially punting the matter to the Commission with very little guidance, and that was because it was a rather insuperable process. Without going through the history of where you are, the Shays court rejected one aspect of the coordination regulations, but in doing so, it did not accept the District Court's notion that you could have a regulation that only had a conduct standard and affirm the necessity to use time, place, and content elements in order to

find, as the court put it, an objective bright line rule that does not unduly compromise the purposes of the act, and where you should not regulate where there's only a weak nexus to an election.

The court said you must establish a rule that rationally separates election related advocacy from other advocacy falling outside FECA's expenditure definition. Truly, it is really important to construct a careful conduct standard, both in order to comply with the legal directives, but also to avoid a basic chill in associational activity in speech, to make sure that your regulation focuses on an activity that truly is election influencing and has an electoral effect, and it is necessary as a practical matter to the Commission so you have an administrable RTB standard.

Absent some kind of content guidance, you will be, as we have experienced, as I have experienced as a lawyer for organizations, you can easily be at a point where, due to circumstantial facts arising in complaints, easily tip into

opening investigations that almost always become very complex and involved unless you have a legitimate and adequate filter that will screen out cases that you just should not be devoting your resources to. And it's very necessary to protect lobbying activity and legislative engagement between groups and individuals and public officials. Indeed, both Senators McCain and Feingold explicitly acknowledged that in the course of the fashioning of BCRA, and so did the Shays court.

And I must say, one case that was not -- hasn't been referred to yet today, unless I missed it, the Supreme Court's decision this week in the Wisconsin Right to Life case, it's a fair decision, but it certainly stands for the proposition that some speech within a very narrow time frame broadcast inside a candidate's jurisdiction that refers to the candidate, some of that is constitutionally protected and cannot be captured by the electioneering communication provision. That, in itself, I think makes some of the

proposals, some aspects of the proposals by Democracy 21, Campaign Legal Center, and the like, legally unacceptable.

We have proposed, in short, that the Commission focus on fashioning a safe harbor that accommodates these concerns, and we've set that forth in our comments. The basic elements, just very quickly, are that whatever standard you adopt, it must preserve, and I see my time is up --

MR. ELIAS: You can have my three seconds.

MR. GOLD: It essentially is preserving what we believe is something that captures the legislative function and the legislative engagement communications to say that groups must be able to engage with and even coordinate with public officials. Thank you.

CHAIRMAN TONER: Thank you, Mr. Gold. Mr. Ryan.

MR. RYAN: Good morning, Mr. Chairman, Mr. Vice Chairman, Commissioners, Commission staff. It's a pleasure to be here this morning to comment on this rulemaking on behalf of the Campaign Legal

Center, which I serve as Associate Legal Counsel. The Campaign Legal Center submitted detailed written comments in this rulemaking, together with Democracy 21 and the Center for Responsive Politics.

As detailed in our written comments, we oppose the alternative revisions to the content standards of 11 CFR, Section 109.21(c), proposed in NPRM 2005-28, because none of the alternatives effectively implement FECA as amended by BCRA. We urge the Commission instead to revise the content standards in the manner set forth in our written comments, an approach which includes elements of several of the alternatives presented in the NPRM.

Federal law requires all expenditures coordinated with a candidate or political party committee to be deemed contributions to such candidate or party committee. FECA, in turn, defines the term expenditure to include payments for the purpose of influencing a federal election. Yet the Commission's current coordination regulation exempts from coverage payments for many

ads clearly intended to influence federal elections. The Circuit Court in Shays ordered this Commission to carefully consider whether candidates do, in fact, limit campaign related advocacy to the four months surrounding elections.

The court indicated that if candidates do not limit campaign activity to the 120 day pre-election time period, then the Commission's current regulation permits exactly what BCRA aims to prevent, evasion of campaign finance restrictions through unregulated collaboration.

The appendices to our written comments contain scripts of more than 200 television and radio ads distributed more than 120 days before an election which we believe the ads were clearly intended to influence, including many ads by candidates themselves which have the undeniable purpose of influencing those candidate's elections.

Under the current regulation, these ads could have been designed by a candidate and paid for by a corporation, labor union, or other entity. Consequently, the administrative record in this

rulemaking shows that the current coordination regulation does, in fact, permit exactly what BCRA aims to prevent, circumvention of the FECA restrictions on both the source and amount of contributions to federal candidates and parties. No revised explanation and justification of the current rule will change the simple fact. The task at hand for this Commission, therefore, is to develop a more inclusive content standard for the regulation of public communications made for the purpose of influencing a federal election, and our proposed regulation would accomplish this task.

Finally, despite the fact that the District and Circuit Courts expressed grave concerns that the current coordination rule is too narrow in its scope, several commenters in this rulemaking have recommended that the Commission further narrow its content standards to apply only to the 30 or 60 day periods preceding elections. We urge the Commission not to do so. Further narrowing the coordination rule will only exacerbate the problems that the courts have

ordered this Commission to remedy.

They would likewise -- in doing so, would likewise unduly compromise the intent and purposes of FECA and BCRA. Thank you for your attention. I look forward to answering any questions you might have to the best of my ability.

CHAIRMAN TONER: Thank you, Mr. Ryan. Our first questioner will be the Vice Chairman. Mr. Vice Chairman.

VICE CHAIRMAN LENHARD: Thank you, Mr. Chairman. I guess I'll start with you, Mr. Ryan. You've submitted documents that reflect that there were a number of ads that occurred outside of the 120 day time period. And the question I guess I'd like to try and get at is, how significant is this? Do you have a sense of what percentage of the money that was spent in those cycles this constitute, is this a lot or a little? Do you have any quantifiable measure of how significant this is?

MR. RYAN: Well, as a baseline matter, I think the 200 plus ads indicate that it is a significant issue. I think the --

VICE CHAIRMAN LENHARD: If I could interrupt. Do you know how many ads were run in that time period?

MR. RYAN: I do not; but we do not challenge the proposition that the majority of campaign ads are run in very close proximity to an election. But we don't believe that such affect is really the relevant question for this Commission to be asking. The Circuit Court directed this Commission to look into whether or not candidates run ads more than 120 days out, and they do.

VICE CHAIRMAN LENHARD: Okay. If I could just interrupt again. Is there any -- as we try and discern where the line should be, is there any level of advertising that would be so small or of such limited relevance that we could safely fail to regulate, or does the line have to extend every, you know, the farthest limits of the, you know, of what we might find on the record?

MR. RYAN: Well, I think with regard to the temporal limit, the 120 day line that has been drawn by this Commission in the 2002 rulemaking,

the problem with that line is that it creates a situation in which no ads outside of that line, or almost no ads, those ads that do not include express advocacy or republication of campaign materials go completely unregulated. So we don't take issue with the drawing of a temporal line, per se, and I'm not sure there would be a better line than 120 days, say 100 days, 140 days.

What we are concerned with is the complete exemption, or near complete exemption of ads running more than 120 days before an election from this Commission's regulation, and that's why we have suggested that this Commission, even urge this Commission to supplement this 120 day time frame with standards that capture ads which we believe clearly influence or are intended to influence federal elections that run more than 120 days before the election.

VICE CHAIRMAN LENHARD: Okay. And a question I asked Don Simon, I'll ask you, as well. Do you have a sense of those ads that fall outside of the 120 day time period, whether the majority,

or what percentage of those are occurring in the pre-primary period as opposed to the pre-general election period?

MR. RYAN: I think our greatest concern is with the period preceding the general election, the gap between the primary elections and the general elections. And as you all are well aware, in the 2004 presidential election, the democratic party's nominee essentially had a lock on the nomination in March. And from that time forward, it was no secret that party committees and independent groups and the candidates themselves began their national advertising campaigns and the general election. Nevertheless, because these ads were more than 120 days before the general election, the cut-off line of which was somewhere early in July, they did not fall within the scope of this Commission's regulation. So to reiterate, our biggest concern is with that gap between primary and general elections, but we are, likewise, concerned with the substantial number of ads that we found record for having run more than 120 days prior to the primary

election itself.

And this is particularly the case with regard to congressional elections, where the primary election is generally much closer to the general election than it is in a primary election campaign. So in the context of congressional ads, most of the ads in our appendices ran more than 120 days prior to the primary election simply because we had no period between the primary and general to look at because the distance between the two is less than 120 days.

VICE CHAIRMAN LENHARD: Mr. Gold, what is the harm? You know, there is a -- we're trying to decide whether to expand the regulatory scope, and you talked about lobbying and its impact on First Amendment speech, and yet the legal standard here involves coordination, and why -- is there a need to coordinate your lobbying activities with candidates or parties, or is there another element of harm that's occurring here by the imposition of these regulations?

MR. GOLD: I think there are several

aspects to harm. There is harm and there's potential harm. One is just a general chilling effect. I mean the fact is that the -- any regulations that you promulgate, they're generally not well understood by those who actually have to live under them. Their counsel have time and they're paid and it's their job to understand them. And this is not a reason not to regulate. Obviously, you have to come up with some fairly, you know, careful distinctions and sometimes complicated ones.

But there is a general sense that not dealing with -- that if you deal with a candidate, if you deal with an office holder, you've got to be very wary. There's a general chilling effect from that. And the broader the rules are, the more extensive the rules are, the more the chilling effect is.

The other is, to answer your precise question, I think the answer is yes, there are circumstances where you have to, or it's desirable to, and there's good public reason to coordinate

your advocacy with candidates when they're office holders, you know, specifically, most particularly in legislators, when you have -- you've got, you know, a common cause with them on a particular issue, whether it's for the AFL-CIO's point of view, it's blocking social security forum, it's promoting an increase in minimum wage, it's trade policy. There's regular engagement with members of Congress on this, and hopefully with an administration, a friendly administration, and you want to work with them in order to advance legislative goals. Part of that is influencing the public, which then, of course, influences Congress. So the harm is, you know, sweeping rules that prevent or can convert those contacts into a predicate for finding coordination or preclude coordination if the communications you do actually mention legislators and the like, that can be a real problem.

VICE CHAIRMAN LENHARD: Thank you, Mr. Chairman. I see my time has expired.

CHAIRMAN TONER: Thank you, Mr. Vice

Chairman. Commissioner Mason.

COMMISSIONER MASON: Thank you. Mr. Gold, I think I understand your focus on the lobbying safe harbor, and I appreciate that, and I think it's helpful and productive to sort of get us focused on to whatever degree we can exactly or inexactly say what's prohibited that for lobbying purposes might also be very useful to say what's clearly permitted.

But I'm not sure I quite grasp what your comments or suggestions are in terms of what we do with the rest of the rule. I mean you seem to say that you don't see any way to justify 120 days, you don't really see any basis to justify any of these other periods, and so do you have anything for us on that question of what's the main rule?

MR. GOLD: No, and it's a very appropriate question, because we've wrestled with, well, how do you define it. We know really what should be excluded, but what are the indicia that would fairly capture what you should cover. We haven't proposed a 120 day standard. It's not that we

wouldn't want one or even a smaller time frame. Under the Shays decision, it's difficult. I think you can craft one and try again with a better explanation and use what's in the record before you. And I don't believe what, incidentally, Mr. Ryan's groups have submitted is compelling in that matter.

So I don't have a well developed answer to you for what the rest of it should be. But certainly it should include, we believe, communications that -- the content should include references to candidates or parties, there should be a targeting aspect to it, I think we could say that it should not, if you can define it, comment on candidate type aspects.

It shouldn't refer to candidacy, it should not refer perhaps to qualifications as a candidate, fitness for office and the like, but beyond that, I think we don't venture to say. But there does have to be an absolute content that the safe harbor basically is an exception from, we acknowledge, we just haven't fully developed it.

COMMISSIONER MASON: And your proposal focuses on the content of the ad, and specifically, for instance, you suggest that we ought to make clear that by referring somebody to an 800 number or a web site, and then at either place they might get other information, maybe more directly electoral information, you think we should exclude that, the secondary sources from the scope of the rule, if I understand your testimony or your comment?

MR. RYAN: Yes.

COMMISSIONER MASON: I just wanted to ask the question, it seems to me, and you mentioned Wisconsin Right to Life, that that's potentially problematic because that seemed to be one of the issues that was specifically raised in Wisconsin Right to Life, and of course, not resolved by the court, where the factual situation that was described there was that they had a web site, and when you went to the web site, you got all this other information, and wasn't that relevant. So what do you suggest that we do about that, because,

you know, depending on how the courts ultimately come down on that issue presumably while it wouldn't, you know, be directly applicable here, it would certainly be highly suggestive.

MR. GOLD: Right; well, I think you always have this problem. You're always developing regulations in a dynamic legal environment. That's been true for years, it's certainly been true since 2002, it'll continue to be so. For the time being, you have this decision that was issued earlier this week, and it certainly stands for the proposition that an absolute ban on union and corporate paid ads within the 30/60 day periods that refer to candidates is not constitutional, that there have to be exceptions, and the court must admit exceptions that refer to legislative and lobbying type matters because that was really the context in which it was presented. How the three judge court deals with that issue eventually, and it could be a long time before they finally resolve this case, it was remembered -- it was decided on preliminary injunction.

COMMISSIONER MASON: No, I'm not suggesting we wait. Let me --

MR. GOLD: I think you're just going to have to do the best you can.

COMMISSIONER MASON: -- let me move on to one more, and it may require a quick response, and maybe I'll come back to it if I have time. Your organization has, or your organizations, the unions that are members of your federation, typically have the union, many of them have PACs, and many of them have 527 organizations that they relate to or fund or whatever. So what are the implications if we establish different standards for those three different types of entities? In other words, how do we enforce a rule that places one content standard on a 527, another one on the union, and yet a third on the PAC when, in fact, it's the same lobbyist frequently? A lot of times that's the person who's going to be touching all three, who's involved in each of the three.

MR. GOLD: Yeah, and we're not proposing that you do the kind of thing that the Campaign

Legal Center at all are proposing, we don't propose different standards for different --

COMMISSIONER MASON: What I'm asking is, wouldn't that be a problem, I mean because under the tax rules and other rules, there's no barrier to the same individual within these related organizations from doing union work, you know, paid for, you know, under the aegis the union and political work under the aegis of the PAC and --

MR. GOLD: Right.

COMMISSIONER MASON: -- and related things.

MR. GOLD: I think that's basically correct. I mean that shouldn't drive regulation to be sort of most restrictive, towards the most restrictive, or the most overtly universally political of those entities, which would be a federal PAC, you know. But it doesn't seem to me that it's appropriate to, certainly 527s, to have different standards than for other entities.

CHAIRMAN TONER: Thank you, Commissioner Mason. Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. Mr. Ryan, you have -- I forgot what I was going to ask you, isn't that awful. Oh, okay, I've got it. It goes back to something that Mr. Simon was saying earlier, but you're on the same set of comments, so I get to ask you. You've indicated that you're concerned about what happens before the 120 days, what you see as a virtual vacuum of regulation out there, and the scenario that Mr. Simon posited was, outside of the 120 days, a candidate could go up to a corporation or a union and say here's my ad, please pay for it, and that wouldn't be covered. But wouldn't a situation like that, which, frankly, I don't think is very likely to happen, I'm not aware of things like that happening too often, people tend not to be quite that blatant, but wouldn't such a situation, couldn't we capture that under 441b anyway, even without going to coordination? And the same way that if a candidate walked up to a corporation or a union and said, here, please pay my phone bill, please pay my consultant bill, here, please run my

ad, I mean can't we get at that anyway?

MR. RYAN: I'm not confident that the Commission's existing regulations would get at that. And perhaps you could point me to an advisory opinion or something to that effect that would allay my fears that that type of activity that Mr. Simon predicted could occur would not occur, you know, some guidance that this Commission has given, but I'm not comfortable --

COMMISSIONER WEINTRAUB: I mean we don't need a coordination rule to preclude the situation where the candidate says, here, pay my phone bill.

MR. RYAN: But if you determine that a public communication that meets, or fails to meet the standards that you do explicitly set forth in your regulations does not constitute an expenditure, you know, which I think is the effect of public communications not falling within your current rule, then I don't know if, you know, the phone bill may be deemed an expenditure, and consequently, the request that a corporation pay for it would be a violation. I'm not certain that,

given the way that you've structured such detailed regulations, activity that explicitly does not fall within them, but is a public -- meets the definition of public communication, but is explicitly not coordinated under your own regulations would be covered by the Commission's regulations.

COMMISSIONER WEINTRAUB: Mr. Elias, I see you leaning forward towards the mic.

MR. ELIAS: This is actually a replay of the same discussion we had about the internet. And I said then, I find myself surprisingly on the more regulatory side of the debate with the campaign -- with Democracy, I think in that case it was with Don Simon. But, you know, the Commission is, in part, doing this rulemaking against the facts as they exist, because after all, you craft rules, not in the abstract, but in the concrete to deal with real world situations.

If, in fact, the permissive interpretation were widely accepted among the regulated, why aren't we doing it? I mean I'll go back to one

example, and I'm here on behalf of the DSCC today, but as many of you know, I was the General Counsel to the Kerry/ Edwards campaign, we didn't coordinate any of those ads, inside 120 days, outside of 120 days. I mean if there were this belief that corporations and labor unions could fund on a fully coordinated basis, here's our ad, please go run it, then frankly, the two of us would spend a lot more time on the phone together, and you'd be seeing a lot more advertising saying paid for by the AFL-CIO that was supportive of democrats, and presumably Jan Baran's client, the Chamber of Commerce, you'd be seeing a lot more ads saying paid for by the Chamber of Commerce outside of 120 days.

The fact is, as a factual matter, for the record, you know, you all are using to build a new set of regulations, I think it's important to distinguish that which becomes an academic debate among campaign finance lawyers and that which is the actual practice. The fact is, there is a paucity of evidence, at least in my experience,

there is a paucity of evidence of ads run outside of these time periods, whether it's 60 days, 30 days, or 120 days, whatever it is, that are sort of handed off to outside groups and funded on that basis.

COMMISSIONER WEINTRAUB: If you could receive some assurance on that ground, would it make you feel better, Mr. Ryan?

MR. RYAN: Part of the problem is that the hypothetical that you present --

COMMISSIONER WEINTRAUB: It's Mr. Simon's hypothetical.

MR. RYAN: -- Mr. Simon's, and I think it's a valid hypothetical, it entails an interpretation of what the term expenditure means relative to a corporation or another type of separate segregated fund or corporation or labor union rather. And the Supreme Court said in Buckley that more guidance with regards to these non-political committee entities is required, and narrowly construed the term expenditure to include only express advocacy. Therefore, the types of public

communications that you're saying would quite possibly, or would, in fact, be covered by your regulations, I think a strong argument could be made and would be made by the attorneys representing those entities that, hey, this isn't even an expenditure, we don't include express advocacy, we don't meet your own regulations definitions of what's covered by 441b which are contributions and expenditures.

MR. ELIAS: Right, but I just want to go back, though, to the premise of at least what I think is most significant for you all, which is that campaign finance lawyers can sit here and debate what 441b would cover and wouldn't, and in the MUR process, you're right, it would all get hashed out back and forth. But the fact is, you all are here writing regulations against the facts of the real world, of what has actually gone on, and you have an advantage this time that you didn't have two years ago, which is, we have lived under a cycle of McCain/Feingold and under a cycle of a time period of 120 days. Now, there are those of

us who think that that's not the right time period, but we've lived under a time period. So you have some real world experience with what does that mean to how parties and candidates organize their affairs. And I would posit it again that I think that there is a real paucity of evidence out there that suggests that that kind of hard cut-off has led to the kind of wholesale ad handing off that Mr. Simon suggested.

COMMISSIONER WEINTRAUB: Time is up. Could I let Mr. Gold put in a couple of words on this, because he seemed like -- did you have something you wanted to say?

MR. GOLD: No, I think that's absolutely right, that's a critical point, and I want the record to be clear that that is the AFL-CIO's experience and my experience as a lawyer, as well, representing a number of organizations, is that it just doesn't happen. And, in fact, in one sense is a real fact, the 120 days did not matter in the last cycle, in that I don't know of anybody who was coordinating their public communications, you know,

before that in any kind of electoral sense, I just don't. And I don't believe that that's how organizations are likely to operate and candidates are likely to operate if that number were eliminated.

You know, let me -- just one other point about the so called evidence, the appendices that were presented. You know, I searched through them and I found an AFL-CIO ad. There is one AFL-CIO ad in that stack. It's an ad, it's in appendix four, page 54, it's an advertisement that the AFL-CIO ran in a number of places in May of 2004, six months before the general election, not coordinated with anybody, let me hasten to say, but regardless, it was right after -- soon after President Bush had announced his Mars plan, do you remember, they were going to spend a hundred billion dollars and go to Mars, and that was greeted with tremendous public ridicule. That was not a campaign statement, he was the President of the United States, he was running for re-election, but he was the President of the United States, we ran an ad that

interspersed little excerpts from that speech with ordinary people saying our priority should be what about jobs, what about health care, what about Medicare, a hundred billion dollars to send a man to Mars, I'm paraphrasing a bit, tell President Bush that our priorities must be closer to home.

Now, they have lively characterized that, that's the election, it's all about the election, and I don't think you should accept the premise that everything in their stack that is not out of the mouths of candidates and parties is "electoral." But that was a very legitimate public communication about what Congress should be doing, what the Executive Branch should be doing. And the fact that the President of the United States is a candidate cannot possibly disable us from having some contact with some candidate, somebody out there, a member of Congress who is pushing for Medicare or jobs programs, and the like, or is dead set against the space program expanding in the way he did it. This cannot possibly constitutionally or in any reasonable sense, I

would submit, disable us from being able to have any kind of traffic with a member of Congress about having that kind of public advocacy at that time.

CHAIRMAN TONER: Thank you, Commissioner Weintraub. Commissioner Von Spakovsky.

COMMISSIONER VON SPAKOVSKY: Mr. Elias, by the way, you passed your first test, you pronounced my name correctly, so thank you for that.

MR. ELIAS: I try.

COMMISSIONER VON SPAKOVSKY: In your testimony, you talk about the fact that, as currently written, the coordination rules could apply to communications between your organization and third parties in a state where there's no Senate candidate. And I'm wondering, give me a practical example of that, and is that going to prevent, going back to an earlier example I used, of senators, for example, getting involved in and endorsing ballot initiatives and things like that?

MR. ELIAS: It is one of these quirks of the McCain/Feingold regulations. I don't think it's compelled by the statute, obviously. But --

and it's perhaps another way of getting at the issue that Mr. Gold is raising more broadly, which is that we at the senatorial committees have to deal with the fact that because of the agency regulations, we are constantly vigilant to what is being coordinated with us because groups are talking to our members. So a group comes in and says we're going to run a minimum wage ad, and it's going to be national in scope, and I think this is right, if I'm not, I'm sure someone will correct me, but I believe as we stand here right now, the only place we are within 120 days of an election is Illinois, okay. There is no senate race in Illinois. It's not that there's no race and that there's not a competitive race, there is no senate race in Illinois.

So right now, I have to deal with the question of, what do I do if the AFL-CIO wants to come in and talk to democratic senators about running an ad in Illinois on the minimum wage. You know, the question is, well, are they agents of the national party when they're having the

conversations? Is it somehow, you know, I mean we go through the whole analysis, but to the extent that there is no senate race in that state, it strikes me that it is a pretty easy and clean and quick and I think non-controversial, although I'm sure I'll hear otherwise if it is, fixed to say, you know what, in those circumstances, we're just going to say that since it is essentially not targeted, since targeting is a component that you have built into the regs, which I think makes sense, since it is not targeted to the electorate that your committee cares about at all, we're not going to apply the coordination rules.

COMMISSIONER VON SPAKOVSKY: Mr. Gold, in your testimony, you talk, on page 16, about the safe harbor proposal and alternative, number four, and with some modifications, you recommend that to us. Tell me how you would apply that in real life to a real situation and how you think it would work.

MR. GOLD: Okay. Well, the elements of the safe harbor are essentially, you know,

communication that is devoted to a particular legislative or executive branch matter. Whether or not it is specifically pending for a specific action imminently, it is a matter that is before the legislative or executive branch urges members of the public or encourages them to contact office holder who is a candidate to take some position, to take some action, even if it does refer to some other source for further information such as a web site, does not refer to an election or candidacy.

It may refer to the record of the office holder who is mentioned or the position that's taken, that's part of what makes an effective legislative and advocacy ad. No reference to character or qualifications for office. Targeted, primarily targeted, where that the office holders jurisdiction, and we also suggest a threshold that is borrowed, if you will, from the electioneering communication rules of 50,000 persons being able to receive it.

How that would work is, it would enable, for example, the AFL-CIO to do the kinds of things

that I mentioned. If the AFL-CIO had coordinated in some manner through any of the conduct standards the Bush Mars ad, for example, with an office holder who is a candidate, a member of Congress, a member of the Senate and the like, the AFL-CIO would have known that it could do that. And the real world impact is that, you know you have a legislative and a policy agenda, you realize there's an election, you're trying to navigate through all these regulations and accomplish your issue goals, your legislative goals, you know that you can do something, and you know that there's basically no legal risk for doing so, and that is just -- it removes a layer of doubt from something that is truly legitimate, whereas absent some kind of safe harbor or some kind of affirmative standard that is sufficiently, you know, brought to include this, these questions always come up, and you always have to temper what you're doing, and you may decide on balance when you know that you're under scrutiny, especially if you are a significant organization like the AFL, that you might not do

it.

So it will have a real world effect, and it can only encourage, to me, I think legitimate advocacy and grassroots activity and engagement that is healthy.

COMMISSIONER VON SPAKOVSKY: Mr. Ryan, I take it you disagree with this kind of safe harbor?

MR. RYAN: Yes, I do disagree with it. Our organization and the comments that we submitted have been roundly criticized for being overly complicated. But the critics of our proposal submitted written comments on their own, suggesting the creation of a variety of different safe harbors that would, likewise, further complicate the coordination regulations that you have on the books. And we believe that the creation of any new safe harbors, the further narrowing of the current content standards, or conduct standards for that matter, would be entirely inconsistent with the reasoning of the Circuit Court and the District Court in Shays.

COMMISSIONER VON SPAKOVSKY: Mr. Ryan, the

kind of strict coordination rules that your group is proposing is entirely opposite of the way European politics is conducted. I mean there the parties very much still do fundraising, help run campaigns for candidates, so forth. The whole reason urged by your organizations and the other organizations that have submitted these comments is to prevent corruption, the appearance of corruption. Given that these kind of rules don't apply in European campaigns and politics, can you cite to me specific examples of corruption or the appearance of corruption within those European campaigns?

MR. RYAN: I'm no expert on European politics. I won't pretend to be one in this context.

COMMISSIONER VON SPAKOVSKY: Let me ask you another question. Your predecessor in interest, Mr. Simon, in an exchange with our Chairman, seemed to indicate that the kind of bright line rule that we were discussing was not a good way to go, it would let by too many different

kinds of communications, and seemed to be pushing us more towards the you'll know it if you see it kind of rule; I mean do you agree with that?

MR. RYAN: Well, I'm not sure which of your seven alternatives you're referring to with regards to your proposals that Mr. Simon disagreed with. But as a general matter, I think that our proposal establishes bright lines, very bright lines, within 120 days of an election, and outside of 120 days of an election, we use a qualification or a bright line that this Commission itself proposed in its 2002 regulations for non-committee, non-527 groups, which is including a character or qualifications for fitness for office provision. This is something the Commission proposed in 2002, did not adopt, but something that we supported then and we continue to support now.

COMMISSIONER VON SPAKOVSKY: Let me ask you again -- I'm sorry, is my time up?

CHAIRMAN TONER: We'll have time for a second round.

COMMISSIONER VON SPAKOVSKY: That's fine.

CHAIRMAN TONER: Thank you, Commissioner. I'd like to start with Mr. Elias. As I understand your comments, you've endorsed an exemption for solicitations, that the federal candidate and office holders might make on behalf of your client or the DNC or its senatorial committee. The first question I have for you is, would you be comfortable if we fashioned such an exemption that it would proceed and would be exempt provided that the federal office holder or candidate who signs the solicitation, there's no express advocacy in the solicitation piece on that person's behalf, but otherwise, it would be exempt?

MR. ELIAS: Sure.

CHAIRMAN TONER: You'd be comfortable with that?

MR. ELIAS: Yeah; I think that the -- again, it's one of these quirks of the rules that I don't think was intended two years ago, that read literally, again, I don't think in the spirit, and again, I don't even know if my colleagues would disagree with this, that where there is a direct

mail solicitation that is clearly aimed at raising money for the party, not at promoting the candidate.

If Ms. Clinton signs a national appeal for the Democratic Senatorial Campaign Committee, the fact that she is technically a candidate in New York, where she is, as we know, running virtually unopposed, and where the mail will be sent nationally, and yes, some pieces of it, some number of the pieces will go into New York, but its only purpose is to raise money for the DSCC, it's not to promote Mrs. Clinton's candidacy, it makes no sense.

And, frankly, I would argue that under the statute, it is not for the purpose of influencing a federal election, it cannot be regulated, and it shouldn't be regulated by the coordination rules.

CHAIRMAN TONER: And does the need for this kind of exemption arise because in the real world of politics, federal office holders who are signing these kinds of pieces, their people are necessarily going to look at the piece before it goes out, and therefore, the conduct prong would be triggered.

MR. ELIAS: Absolutely; I mean it's one of the reasons why I thought that the advisory opinion this Commission approved on -- with respect to Forgy Kerr was wrongly decided. Of course, you're not going to have a candidate who's going to sign a piece of direct mail or appear in an endorsement ad where they do not have some at least awareness and veto power over, for good taste, if nothing else, what's being said. As you know, these mail pieces tend to run fairly hot on both sides.

CHAIRMAN TONER: We sense that they -- has some volatile language. So your point essentially is that the content standard, therefore, is needed and an exemption in this area is needed or else it's going to be difficult for these candidates and office holders to sign these pieces, these fundraising pieces, for these committees?

MR. ELIAS: Right.

CHAIRMAN TONER: Do you have the same analysis with respect to the endorsement area? Would you be comfortable if we had an exemption for endorsements as long as the endorsement did not

contain express advocacy for the candidate who's doing the endorsing?

MR. ELIAS: I do, and I will say this again, as I appear on behalf of the DSCC, but as the general counsel of the Kerry/Edwards campaign, there were a few things this Commission did last cycle which made less sense than telling George Bush he could not appear in an ad to endorse a candidate in Kentucky in a special election because he was theoretically I guess facing a primary election within 120 days in that state. I mean there was no -- we never had any doubt in the Kerry/Edwards campaign that George Bush was going to be the republican nominee irrespective of what the Kentucky primary showed.

CHAIRMAN TONER: You're saying that the Kentucky primary was not going to be that exciting?

MR. ELIAS: Yeah, exactly.

CHAIRMAN TONER: Mr. Ryan, do you agree, do you feel comfortable with exemptions along these lines for solicitation pieces and for endorsements?

MR. RYAN: We don't support the creation

of a wholesale exemption in this context. We did propose in our comments that for the purpose of influencing test or the expenditure definition itself be applied to federal political committees.

CHAIRMAN TONER: What would that mean?

MR. RYAN: I think that it creates a general presumption that most of the activities by political party committees are for the purpose of influencing federal elections. And this is a presumption that was recognized by the Supreme Court in Buckley and has been repeatedly recognized by courts in Buckley's progeny. But there will be circumstances in -- the hypothetical that Mr. Norton gave in the first round of questioning was a good one, in my opinion, at illustrating the degree to which or the manner in which an endorsement could be abused and could, in fact, be for the purpose of influencing election, and if you create a carve-out for this type of endorsement without defining with a fairly high level of specificity what constitutes an endorsement that falls within your exception, you allow that type of activity to

take place and you --

CHAIRMAN TONER: Is that because you would view it as possibly promoting, attacking, supporting, or opposing the endorsing candidate, does it have the potential to do that?

MR. RYAN: It certainly has the potential to do that.

CHAIRMAN TONER: And, therefore, problematic?

MR. RYAN: Problematic, and you had suggested the incorporation of an express advocacy test as sort of filtering out those rather than a PASO test, and I think the express advocacy test, having been described by the Supreme Court as functionally meaningless, is not a standard that this Commission should continue to build its regulations upon.

CHAIRMAN TONER: In the advisory opinion we rendered a couple of years ago on behalf of Senator Bayh, who wished to endorse a local candidate in Indiana, there the Commission concluded that the added issue did not promote,

attack, support, or oppose Senator Bayh, and I don't have the ad script in front of me, but the guts of it was the Senator appearing in the spot on behalf of this candidate for Mayor of Evansville, I believe, and you know, it says these spots normally are, the Senator appeared, there was an American flag in the backdrop, and emphasized what a terrific person this local candidate was, and that he supported this person's election. Do you believe the agency erred in concluding that that ad did not promote or support Senator Bayh?

MR. RYAN: To have a definitive answer, I would have to look at the advisory opinion itself again. But generally speaking, I think the Commission's approach of using the advisory opinion process to address these questions is a good one. Was that 2004-1?

CHAIRMAN TONER: It was in that time period.

MR. RYAN: There's an advisory -- I don't think it was 2004-1.

MR. ELIAS: 2004-1 was Forgy Kerr.

CHAIRMAN TONER: Okay. There was --

MR. ELIAS: You're thinking of Weinzapfel

MR. RYAN: But the 2004-1 advisory opinion which was noted in the NPRM and discussed in some comments that were submitted to you, and I think that illustrates the right approach, this Commission applying your coordination rule and determining that the ad in question did not constitute an expenditure under federal law.

CHAIRMAN TONER: So it would be a case by case analysis where we essentially would determine what, you know, we know it when we see it kind of approach; I mean is that fair?

MR. RYAN: Yes.

CHAIRMAN TONER: And, Mr. Elias, your thoughts on that methodology?

MR. ELIAS: Let me just say that, to be clear, that advisory opinion was not sought on behalf of Senator Bayh, it was actually sought on behalf of Weinzapfel, who was a state candidate.

CHAIRMAN TONER: The local candidate?

MR. ELIAS: Right.

CHAIRMAN TONER: Okay.

MR. ELIAS: And I will tell you that I had significant reservations, although the result worked out fine.

CHAIRMAN TONER: Were you concerned that we might find that it did promote or support --

MR. ELIAS: No, I was concerned, frankly, that a United States Senator wants to endorse a mayoral candidate, and a mayoral election needs to submit not only for an advisory opinion, but then was asked, and this is not a criticism of the General Counsel's office, because they need -- once a request is in, they need complete information, they need the script, they need the story boards. I mean the idea that somehow a candidate should be coming to the federal government to seek prior approval of television ads that are aimed at endorsing non-federal candidates is a bit of a, you know, I'm not sure that that's a process that we want to deem to be the norm. I mean I understand when a --

CHAIRMAN TONER: You don't want us to just

key up the video tape and take a look at this stuff and make an assessment?

MR. ELIAS: You know, to go ad by ad would be a bit of a, you know, I understand -- there was a reason in that particular case, it was a new statute, a new regulation, needed to interpret it, but for this Commission to adopt as a regular practice that we will simply troop in each of our ads so that you all can judge whether they are or are not appropriate before they run presents both I think some constitutional concerns. It also poses, frankly, some logistical concerns, because as you know, although you move expeditiously --

CHAIRMAN TONER: We have very good audio/video equipment, we can get the ad right up there in an open session and take a good look at it. But you're saying these issues can be solved if we had an exemption for endorsements that was conditioned on the absence of express advocacy for the endorsing candidate?

MR. ELIAS: That would be acceptable.

CHAIRMAN TONER: Okay. My time has

expired. Mr. General Counsel.

MR. NORTON: Thank you, Mr. Chairman. Mr. Gold, I'd like to start with you if I could and try to run a hypothetical by you. Let's say that a candidate approaches your client five or six months, four months before the election and says, you know, I've been picking up tremendous ground on my opponent who's an incumbent, hammering away on the jobs issue, jobs going overseas, and the candidate office holder failing to do enough to keep jobs here, but it looks like I'm going to run out of money, or at least a good bit of it, and not be able to run TV. ads in the last couple of months. Is there any way you can step in and run ads attacking my opponent on this issue? And they sit and they talk about it and they fashion an ad and the tag line is going to be something like, you know, Candidate Jones, not good for workers, not good for America, there's no exhortation for the public to contact the candidate, so as I understand the safe harbor that you've embraced, it wouldn't be covered there, should that be coordination under

the Commission's regulations or should there be some exclusion for that?

MR. GOLD: Well, it doesn't fall within the safe harbor for a number of reasons. It's both really the content and the origin of it, in a sense. Even though the safe harbor talks about content and you're describing conduct, as far as the, you know, initial engagement --

MR. NORTON: Let me just interrupt you for one second. I guess the question I'm going at is, do we need a content standard to determine whether that's coordination, does it matter?

MR. GOLD: No -- well, if -- from the hypothetical, the request is specifically electoral, and it's purely in the candidate's candidate capacity, that's the approach, and it's purely for an electoral purpose. So in one sense, it doesn't matter what the content is that results from it, so I don't know that you need that. We have also -- with respect to the four to six months, you know, we haven't fixed a, you know, precise line. We're not suggesting that there is a

precise line that you need to follow a temporal line. I'm not sure I'm being responsive.

MR. NORTON: One of the proposals that appears in Mr. Ryan's comments is that if there's a request or a suggestion request to run an ad in the kind of scenario I'm describing, then under that conduct, if we've got that conduct prong satisfied, then there is no need to look at a content standard to satisfy the Commission that we have coordination. And what I'm hearing is -- do you agree with that?

MR. GOLD: Well, your hypothetical, though, is that the ad actually attack a candidate, right, that's the premise, and there is a content standard there then that is relevant. I mean there is a reference to a candidate. In response to Commissioner Mason, I suggested that whatever the affirmative standard is, it ought to include a reference to a candidate, so in that sense, I think in that hypothetical, a content standard that we would imagine would be satisfied and the safe harbor would not apply.

MR. NORTON: -- the discussion today and I'm sure well into tomorrow is all about trying to establish some distinction, whether it's temporal or it's based on a content analysis that distinguishes between lobbying and grassroots communications on the one hand and electoral communications on the other. My question to any of you, as a practical matter, is there a significant percentage of ads that really do both, that may be predominantly intended to serve let's say a lobbying purpose, stop filibustering employees, stop allowing U.S. jobs to go overseas, but also have the effect, if not some purpose, of discouraging support for the office holders? Is this a false dichotomy to be chasing here?

MR. GOLD: Well, if I can answer it, I think that since Buckley, the Supreme Court has recognized that speech and messaging can be mixed, that you can't easily separate out elections on the one hand from legislation on the other, that's a reality. And you can't -- you can err in one direction, which I think the electioneering

communication literally, read without any notion of an as applied challenge, for example, can, where you sweep everything into one side or the other. The Supreme Court clearly rejected that earlier this week.

But as a practical matter, you've got to make some practical decisions, and this goes back to what we were saying earlier. You are not going to be able to devise I think a rule that absolutely falls on some sharp line. But the Court of Appeals didn't say that you had to do it. Remember, the Court of Appeals said that you need to come up with some bright line standard that does not unduly compromise the purposes of the act, which I think was a recognition that real life is ambiguous and messy and you need to do something that is sufficiently protective, but you're not going to capture every conceivable situation.

And it also goes to the other reality that Mr. Elias and I, I think, were describing was, even in this last cycle, beyond the 120 days, the kind of free for all that the Court of Appeals mentioned

and that Mr. Ryan is suggesting, it really didn't happen, and it's not likely to happen. So I think that ought to inform your judgments on this.

MR. ELIAS: If I can just amplify that last point just very, very briefly, which is that -- and I know that no one is trying to impugn our integrity, but we are constantly being told that lawyers like Mr. Gold and I spend all of our waking moments trying to exploit loopholes on behalf of willing clients who want to do nothing other than exploit loopholes in the campaign finance laws. If, in fact, that characterization, which is often made of us and our clients is true, ask yourself, then why didn't this happen. I mean it's either because our clients are not quite as interested in exploiting loopholes as it is sometimes portrayed, or it's because these loopholes aren't really there. And I would just argue that under either circumstances, as this agency goes forward, there's been a lot of questions, and obviously you all ask the questions, you're the Commissioners, you got appointed by the President, and you know, that's

all your business, but there has not been a lot of focus on what the burden is that is placed, the institutional burdens that are placed on these organizations to comply with these rules.

And to have all of that burden, you know, there's that certification that when new rules get passed, about how, you know, there's no -- that this thing doesn't cause a big regulatory burden, I hope we don't have one of those certifications on this one, because this causes an enormous regulatory burden on the people who have to deal with it. And the fact is, if it isn't going on, you ought not to burden it.

MR. RYAN: Can I just respond briefly to Mr. Norton's question or comment? The fact that a communication may do both lobby and influence an election does not in any way create a free pass for that ad simply because it can be construed as lobbying. This Commission's actions are most certainly constrained by the statutory definition of expenditure, which means for the purpose of influencing an election. But the Supreme Court has

never indicated that expenditures related to lobbying cannot corrupt a candidate. So what we're dealing with here in the context of an ad combines both lobbying and campaign activity. The campaign activity itself, that component of the ad, can rightfully subject the ad to regulation by this Commission, notwithstanding the lobbying component. And as we've seen in the Abramoff scandal that's unfolding here in D.C., expenditures related to lobbying can likewise corrupt politicians. At the end of the day, that's not within this Commission's jurisdiction, but that's only because Congress chose to take a more balkanized approach to regulate lobbying or deciding not to regulate lobbying versus campaign activity. But it's not a constitutionally required line.

CHAIRMAN TONER: Thank you, Mr. Norton. I think we were all trying to predict when Mr. Abramoff's name would come up in this hearing and there we have it. Mr. Costa.

MR. COSTA: I have no questions at this time.

CHAIRMAN TONER: Okay. Thank you, Mr. Costa. We have ample time for a second round of questioning. Mr. Vice Chairman.

VICE CHAIRMAN LENHARD: Thank you. Just to follow up on Mr. Ryan's comment. I think the reason why Congress chose to balkanize it is because no one would want to serve on the federal corruption commission. I want to follow up a little bit on some comments Mr. Elias was making, but I want to start by asking Mr. Ryan a question. My senses from reading the materials that you submitted, and as you've described in your testimony today, that there was roughly 200 ads that occurred outside of the 120 day time period which were -- you've interpreted to be to influence an election, in large part because most of those ads were run by candidates running for office, but that there was a subset of them that were run by outside groups. Do you recall off the top of your head and, I think it's in your written submissions, I can't recall how many or what percentage of the ads were run by outside groups?

MR. RYAN: Actually, we don't specify in our comments the percentage run by nor have we calculated the percentage run by candidates versus outside groups.

VICE CHAIRMAN LENHARD: Do you know the number that was run by outside groups, the number of ads?

MR. RYAN: No, not off the top of my head, and it's not in our comments.

VICE CHAIRMAN LENHARD: Okay. Is it significant for us, as we look at this record, the degree to which outside groups are active outside of the 120 day time period?

MR. RYAN: I think it depends on the particular election cycle and the office that you're looking at. In senate and congressional races, for example, I think the vast majority of the ads in our appendices are by candidates themselves, and independent groups appear to be less likely to get involved in those races. And presidential election races, by contrast, there were a far greater percentage of independent groups

running ads.

VICE CHAIRMAN LENHARD: Okay. You've indicated both that the, depending upon the race, the involvement of outside groups varies, and depending upon the race, the degree to which people are spending before or after the primaries vary. Do you think we should have different rules for different kinds of races?

MR. RYAN: I don't think so, simply because, first off, getting back to some comments that were made in the first panel, Mr. Baran had indicated that our appendices, the material in our appendices was irrelevant, more or less, because it was candidate ads, not outside group ads, and Mr. Simon attempted to point out, and you, Vice Chairman, seemed to acknowledge that, well, you didn't go as far as Mr. Simon, but Mr. Simon argued that the candidate ads themselves were, in fact, the best evidence available, because what the Circuit Court was interested in was whether or not candidates run these ads.

If candidates do run these ads, it's

apparent that candidates find these ads useful. And what we're talking about in this rulemaking is the extent to which in-kind contributions are made to candidates. So outside groups, I think that if you were to draw those distinctions in your own regulations, outside groups versus candidates, in a manner that exempted outside groups to some extent from your regulations, or to a large extent, then you would see a migration of the ads that had previously been run by candidates then being run by outside groups, but coordinated with those candidates who have already demonstrated the value that they perceive to exist in running ads early. And this is a trend that's been growing since, you know, the '96 presidential election. It's no secret, every year you see candidate ads running earlier and earlier, and if they could get someone else to pay for it, why wouldn't they do so.

VICE CHAIRMAN LENHARD: If the outside groups aren't buying ads in these time periods outside of the 120 day window, are there reasons for it that may exist in our current regulations or

in the cultures in which they're -- I mean is it the ads aren't deemed effective, what is the barrier, why aren't they doing it?

MR. RYAN: I'm not sure I have a precise answer to that question. It may be the simple fact that outside groups often engage in a variety of activities, and as the election approaches, they become more interested in the approaching election, but we do believe that the 120 day line that excludes them if their ads run outside of it is not adequate in capturing when they start becoming interested in these ads.

And perhaps one of the most interesting examples of this included in our appendices is an ad run by an organization affiliated with Public Campaign, another form organization. I believe it ran in February of 2003, roughly a year before the presidential primaries and caucuses began. And the ad buy was only in New Hampshire and Iowa, and it was the ad buy itself that clearly evidences what the organization's intent and purpose was.

VICE CHAIRMAN LENHARD: Mr. Gold, do you

have a comment on this?

MR. GOLD: Yeah; Mr. Ryan says or perceives a trend of candidates running ads earlier and earlier, and let's say that's true, at the same time, the same political culture, non-candidate, non-party groups are not doing that apparently. Now, they relied on an extensive record that they developed, Brennan Center and the like in order to convince the Supreme Court to regulate certain ads within 30 and 60 day time frames because that's what happened.

But here before you, when there is a comparable record of nothing or virtually nothing, they say but it will happen, and therefore, you should regulate there. This is not taking a consistent approach. If they have the evidence, you've got to regulate it; if they don't have the evidence, you're going to have to regulate it anyway.

And he hasn't addressed the fact that in an entire election cycle of 120 days, there's no record of any of this happening. Leave aside coordination, just the advocacy that could be

coordinated.

VICE CHAIRMAN LENHARD: Mr. Elias.

MR. ELIAS: Let me just offer one, and I realize that picking any one race is not all that helpful to the record, but it's more helpful than nothing, I suppose, which is that, let's assume, as Mr. Gold says, that, in fact, there is a trend of candidates running earlier and earlier ads. No place would you have expected to see this more than would have been South Dakota, okay. You had a senate race, cheap media, high profile race, leader of the democratic party running against now Senator Thune, who was clearly recruited by the White House, and where the White House was interested. So if ever there was going to be the race where there was going to be that hand-off, okay, hey, AFL-CIO, it's Senator Daschle. There was no higher priority presumably within the AFL-CIO than preserving Senator Daschle's seat. Hey, DSCC, go protect your guy, here's the hand-off.

If you would have seen that, you would have seen it in South Dakota, where the barriers to

running media were very low because of cost, and the risk reward was so high because of the importance of the race, and you just didn't see it, I mean you just didn't see it.

Yes, it is true, the candidates were up on the media, they were up on media March, you know, March of '04, so they had need, they were running their own campaign ads, and they ran their campaign ads from March of '04 until election day, and if there were this problem out there, you would have expected that you wouldn't have seen the candidate ads go up in March of '04 or April of '04, you would have seen these third party groups go up, there would have been this hand-off. And, you know, I think that as you all regulate in this area, I would submit that what is most important for you all to do is to not speculate what some day might be. God knows, you'll still be around, and you'll be able to re-regulate and change your regulations to accommodate the changing times. Something I said in the rulemaking on the internet, if there becomes abuse, then file a new NPRM. The

Brennan Center, the Democracy 21, I'm sure they'll help you along, they'll say hold the new rulemaking, but where we are right now, this just isn't happening.

VICE CHAIRMAN LENHARD: I'm sorry, I have no further questions. Thank you very much.

CHAIRMAN TONER: Thank you, Mr. Vice Chairman. Mr. Elias, your comments, as I understand it, endorse the proposed exemption for the use of publicly available information, this proposed 109.21(g), which would have two dimensions, it would make clear that the conduct prongs are not triggered if outside groups or others use publicly available information in connection with making a public communication, and also, those conduct prongs wouldn't be triggered if those same groups or individuals had information conveyed to them by a candidate or his or her campaign, if that information is also publicly available.

Are you comfortable with both elements of that proposed exemption? And my specific question is, is it your view that regardless of whether or

not the information is shared by a candidate or a campaign, that the bottom line in terms of how we ought to treat it is whether it's publicly available?

MR. ELIAS: Yeah, I think that is the dividing line. The fact is --

CHAIRMAN TONER: Why is that, do you think?

MR. ELIAS: Yeah, and I'll tell you why. The fact is that I joked when you first passed your regulations and I do these briefings that there is an entire industry in Washington, D.C. of sharing the project's plans and needs, that's what you do if you're a candidate, you advertise why it is groups should care about you, you advertise why, especially if you're a challenger, you try to make -- you try to provide public information, you may hand out a poll that says, hey, look, I really am a viable candidate, I'm not a second tier candidate, I'm not a third tier candidate, I got a chance of winning, and here's what Charlie Cook has said about my race, here's what the New York Times has

written about my race, and you know, if all they are doing is distributing information that is otherwise public, you know, the party committees regularly put out these race updates where they list, you know, here is the latest in Montana, here is the latest in Michigan, and it's just a compilation of, you know, of public polls, of public quotes, and all they're doing is providing that information, you know, it strikes me that that poses little, if any, risk of violating, you know, anything that should cause anyone heartburn, that's just people trying to provide to the public information about why their race is competitive or what's going on in their race.

CHAIRMAN TONER: Does your position boil down to view that if the information is publicly available, that as a matter of law, it can't be material to the making of a communication within the meaning of our conduct prongs, and therefore, it doesn't matter if the manner in which that publicly available information is shared is through a candidate or campaign?

MR. ELIAS: I think materiality would be one way of getting at it. I hadn't thought about it in those terms, but that would be, I suppose, one way to --

CHAIRMAN TONER: Mr. Gold, your thoughts on this in terms of use of publicly available information?

MR. GOLD: Well, generally the rule on using information from a campaign or about a campaign is, it has been that it's not public, that there's something of value there that the group then uses to fashion its communication. It seems to me absent a request or a suggestion or some, you know, some kind of involvement in the communication itself, the fact that a candidate sharing public information should not be a factor in determining whether a subsequent communication is coordinated absent satisfaction of the conduct standard.

It could be if a candidate, on the other hand, says, you know, look, all this information, the Cook report, and my press releases, shows that, you know, the polling shows that I'm incredibly

weak in this portion of the state or my district, and it would be really helpful if somebody would highlight my record on X there, you know, if that's a request or a suggestion, that's another matter.

CHAIRMAN TONER: As I understand your comments, Mr. Gold, you recommend that we abolish the common vendor and former employee conduct prongs I guess on the grounds that they're overly broad and we can handle those types of actors through an agency analysis; is that your view?

MR. GOLD: Yeah, in essence, that's right. And let me say my colleague, Peggy McCormick, is going to specifically try to focus on that when she testifies tomorrow, but in a nut shell, that's right. I think one of the most problematic portions of the regulation, and this would be my answer to Commission Von Spakovsky's question about is there anything else in the standard that has caused, you know, problems for the current rules for the regulated community.

I think I might first point to this, in addition to the fact that you have a mere reference

standard within 120 days, which we think is improper. But the thing about the common vendor and former employee standard that is I think most vexing is that it's what I call non-coordination coordination. You can have coordination merely by knowledge that is used or conveyed somehow by somebody who is currently a common vendor or that may have -- is a former employee, somebody who's no longer even working for a candidate or a party, where neither side, neither party to the coordination relationship, the candidate or party here, and the group there, is even aware that this information is being passed, let alone used, and that just seems to be so far afield from any legitimate concern about corruption or the appearance of corruption, let alone resulting in something that the candidate believes has value. Remember what the Supreme Court said in Buckley about independent expenditures, that this is a good opportunity to repeal that, and we appreciate the fact that you are raising this in this rulemaking, even though it was not part of the remand.

CHAIRMAN TONER: Thank you. My time has expired. Thank you. Commissioner Mason.

COMMISSIONER MASON: Mr. Elias, you seem to say that we ought to just disregard communications, interchanges between your committee and the members of your committee, and I sort of read your testimony saying that, and I'm, in part, sympathetic, you know, along the basis that I discussed before about, for instance, generic party advertising, whether it's the NRSC or the DNC or a state party committee, whatever.

But I'm just trying to figure out under the standard you're proposing to us, how do we tell when something is a 441a(d) expenditure and when it isn't?

MR. ELIAS: Well, the question of what is a 441a(d) expenditure and is not is something that this Commission has, frankly, passed on explaining to the parties for forever. I don't know how many times it's come up as a possibility that the Commission would define. I know it has come up at least on two occasions where --

COMMISSIONER MASON: Let me then posit a standard for you. I mean have we not implicitly answered it in the coordination regulation by saying that if it's a public communication that identifies a candidate, targeted the electorate within 120 days, then that, in essence, other things might also be 441a(d) expenditures, but that at least --

MR. ELIAS: Yes -- right, fair enough.

COMMISSIONER MASON: -- that would be the operative distinction. And what I'm trying to understand is, if you have some disagreement with that, in other words --

MR. ELIAS: No, I think that's right. I think that a communication within whatever time period is prescribed under whatever rules would qualify as 441a(d), if not made independently, and otherwise, it would not.

COMMISSIONER MASON: And you don't -- and just in that context, in the context of trying to allow your committee's members to work with the committee on generic messages and generic campaign strategy, but also prevent your committee from

violating 441a(d) limits, you don't have a real problem with that standard or a standard very similar to that?

MR. ELIAS: Correct.

COMMISSIONER MASON: Okay, thank you.

That's all.

CHAIRMAN TONER: Thank you, Commissioner Mason. Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. You confused me before. You went out of order and then I was all flummoxed. Mr. Ryan, I have, as I think I've indicated, a number of concerns about your proposal. In addition to the APA issues which are really real to me, because I'm not looking to write a rule that's going to just set us up for another losing court battle.

In addition to the complexity, and you can say it's not complicated or more complicated than other proposals, but I'll just tell you that I think we're a reasonably intelligent group of people up here, reasonably well versed in the law, and we are comparing notes on how many times we had

to read it before we got what you were trying to say, and it was more than one, it was, you know, like four or five times we had to read through your proposal to figure it out. It just doesn't make a lot of sense on first go through.

It also uses the word coordinate or coordinated numerous times in the course of defining what a coordinated activity would be, which is completely, frankly, unhelpful. So I have a lot of issues with the way the proposal is drafted and what we could do with it. But I also just, on a conceptual level, I'm confused by one aspect of it. There's this tiered set of restrictions, and the most restrictions go to political committees which are, if they're federal political committees, hard money entities, and the fewest restrictions seem to pertain to the activities of corporations and labor unions which are the stereotypical soft money providers, so I don't really get that. Why do you provide more leeway for corporations and unions than you do for political committees, and then, of course, the 527

is somewhere in between?

MR. RYAN: Well, to some extent it's because of the nature of the organizations themselves and their purpose. If a political committee -- if the purpose of a political committee is to influence federal elections and the courts have recognized this, that that's the overwhelming purpose of these groups, likewise, with 527 organizations, they have a major purpose of influencing candidate elections. We believe as a result that there should be a higher level of presumption that their activities fall within the scope of the statutory definition of expenditure, which is for the purpose of influencing elections.

COMMISSIONER WEINTRAUB: But if we're trying to limit soft money, wouldn't we be more interested in the sources of soft money than the sources of hard money?

MR. RYAN: Well, limiting soft money is one of the goals of this. Another goal of this proposal is to regulate what should be considered in-kind contributions to candidates, whether hard

or soft. There are limits on the amount and source of these contributions. And, you know, so we have competing goals; one is -- I shouldn't characterize them as competing goals, we have several goals, and one is to simply define with a fairly high degree of specificity what constitutes an in-kind contribution as a result of coordination that occurred. The second is to deal with these outside organizations, persons other than political committees or 527 organizations.

The simple fact as has been stated by both commissioners in this rulemaking and commenters in the first panel on this one is that these organizations that are not self-identified as having a major purpose of influencing candidate elections engage in a bunch of different types of activity, and we try to maintain an appropriate level of latitude for these organizations to engage in activity that does not influence federal elections, but nevertheless, to capture the activity of those organizations that is intended to influence federal elections.

And getting back to the question you posed to me in the first round of questioning, I think it's a very important one, and with regard to doesn't 441b really capture this stuff absent amendments to the coordination regulation that we propose. I think the best evidence that it does not is the soft money spending that occurred prior to the passage of the McCain/Feingold law. And the McCain/Feingold law was directly targeted at addressing the problem within 30 and 60 days of an election. But the McCain/Feingold law was also specifically addressed to targeting independent activity. When you're dealing with activity that's coordinated between a federal candidate and an independent group, I think the presumptions change with regard to the degree to which that communication is likely to have value to the candidate, and therefore, holds the potential to corrupt that candidate.

And that's why the references to the Buying Time studies, I think they aren't dispositive of this issue. The fact that the

Buying Time studies focused on 30 and 60 day time frames is simply a reflection of the fact that those proponents of McCain/Feingold law that we're trying to get it passed knew that they had to demonstrate that their proposal with regard to independent spending was narrowly tailored to address a very concrete problem.

COMMISSIONER WEINTRAUB: But the question that I asked you about was this issue of somebody handing off their advertising to an outside person and having them pay for them. I'm not aware of any evidence in Buying Time or anywhere else that addresses -- that says that that was a prevalent practice then, now, or in between.

MR. RYAN: But Buying Time, again, did not look at coordinated activity.

COMMISSIONER WEINTRAUB: Right, but there's no evidence there, it didn't look at it, and there's no evidence of it --

MR. RYAN: Right --

COMMISSIONER WEINTRAUB: -- we don't have the record.

MR. RYAN: The evidence is in our appendices that these ads occur and they could be coordinated under your rule.

COMMISSIONER WEINTRAUB: They could be coordinated, but they could not be coordinated, we have no evidence that they are coordinated, that it's been a problem, that it's happened.

MR. RYAN: And given your exclusion of these types of ads, from your own regulations, we would have no way of knowing whether they were coordinated, they're not required to be reported.

COMMISSIONER WEINTRAUB: So are you suggesting that our friends here are lying? I mean they've just said it just doesn't happen.

MR. RYAN: I'm saying that it would be interesting to bring into this group, or representatives of organizations across the country who aren't political attorneys, who aren't going to sit before you and simply assert that, no, we didn't coordinate any of this stuff, and actually elicit from them information with regard to conversations they may have had with federal

candidates with regard to ads that they ran prior to elections. And in addition to that --

MR. ELIAS: I'll make a deal, if that will settle this, then done, okay. If we can agree we'll bring in Harold Ickes and we'll bring in Mary Beth Cahill, and if at the end of that they swear under oath that they didn't coordinate these ads outside of 120 days, they withdraw their proposal and we go the other way and that's a factual record, deal.

COMMISSIONER WEINTRAUB: Will you give us the time to do that?

MR. ELIAS: Because I want to see where -- I mean it's not just what we said. At the time this activity was going on, it was in the newspaper, these groups on the left, on the right, in the center, democratic, republican, they're all saying they didn't coordinate, and there wasn't any evidence that they were coordinated, that they were doing this hand-off at the time.

MR. RYAN: The reason that doesn't settle the issue is because Congress and the court in

McConnell have recognized that Congress may and this Commission should, in fact, act prophylactically to address problems that are likely to arise. The soft money loophole took 20 plus years to explode. And this is, you know, this is an area of the law, this is an exemption, a loophole, so to speak, that when given the green light, might explode in the course of one election cycle.

COMMISSIONER WEINTRAUB: Right; so we should act to restrict First Amendment activity because something bad might happen, but we have absolutely no record or evidence that it ever has happened.

MR. RYAN: What you would be restricting are communications that result from coordination with federal officials.

COMMISSIONER WEINTRAUB: Can I just -- one thing that struck me about looking at your proposal was that it's different from the proposal that you and your colleagues submitted in 2002, the last time that the Commission submitted that. And the reason that it's different, I think, is because you

looked at what happened in one election cycle, and you said aha, we've identified some problems as a result of the experience under one cycle of BCRA that we think ought to be addressed in this rule. Isn't that -- the fact that your position has changed in one cycle, and I suspect that whatever we do to the rule, you'll identify more problems.

So in the interest of our not doing a coordination rulemaking every two years, isn't that an argument for our saying let's do the minimum possible that we need to now, make the minimum change that is necessary to address the Court of Appeals concerns, and watch what happens over two or three cycles and see what actually does happen, and then we'll see what the problems are and what we need to regulate.

MR. RYAN: Your assumptions regarding why our position has changed, why our proposals in 2002 differ from those submitted in this rulemaking is incorrect. The precise reason that our proposal differs in this rulemaking is because we're attempting to work with the regulation that's

currently on the books, to work with components of the various seven alternatives presented in the NPRM, to craft something that would be acceptable to us, that would accurately interpret congressional intent in BCRA. We considered whether we should just resubmit our comments from 2002, but we chose instead to work with your existing rule and that's what we did.

COMMISSIONER WEINTRAUB: So it doesn't reflect any experience in the first cycle?

MR. RYAN: Oh, we didn't discount or ignore any experience that we had, but the primary purpose that we submitted comments that differ in this rulemaking and didn't resubmit our 2002 comments are because we attempted to work with the rule that you have on the books, for the same reasons that Mr. Baran and some of my colleagues here frequently advocate this Commission, change the rules as little as they have to. The regulated community has been living under these rules, let's get rules that work, and if we can do it based on what is currently on the books, then that may be

preferential or beneficial.

COMMISSIONER WEINTRAUB: I'm way over my time, Mr. Chairman.

CHAIRMAN TONER: Thank you, Commissioner Weintraub. Commissioner Von Spakovsky.

COMMISSIONER VON SPAKOVSKY: Thank you, Mr. Chairman. We're intruding on our lunch hour, so I'll try to limit myself to two questions, famous last words from a lawyer. Mr. Ryan, I'd like to follow up on a point made by Commissioner Weintraub, which I think was a very good point, which is if the rule that you're proposing is, frankly, so complex that, and I think I'm a fairly competent lawyer, it took a while and several times reading it to try to understand it, which to me says that the large organizations in Washington who are involved in the political process who've been represented on the panel here today and who have plenty of money and who can afford the very expensive specialists in Washington who do this kind of law are going to be able to comply with these rules, but the people who aren't going to be

able to do it are the many organizations and individuals outside of Washington, down in the grassroots, who don't have that kind of money, who can't hire expensive Washington lawyers to try to understand a very complex rule, and do you really believe that the kind of rule that you're proposing is not going to chill participation in the election and campaign process in this country?

MR. RYAN: I don't believe so, I don't believe it will chill such speech unnecessarily. I think that the rule that we propose is not as complicated as it may come across at first glance. And I can distill into a couple sentences what it does. Outside of 120 days of an election, it applies a character or qualifications test to non-committee, non-527 organizations, and a PASO test of 527 organizations. Within 120 days, it's a stricter, even more bright line test, having to do with whether the communication clearly identifies a candidate within 120 days or whether it simply meets the conduct standards within 30 or 60 days. That's not an incredibly complicated rule. And on

top of this, the 527 provisions which constitute a third of the bulk of our proposed rule, in our mind, are an unfortunate necessity in this rulemaking. We are essentially rehashing out the 527 battle in the context of this rulemaking because we refuse to punt on the issue here and let it slide.

But if this Commission were to adopt a more functional, in our opinion, definition of what constitutes a political committee, and specifically, the major test component of the Supreme Court's gloss on the statutory definition of that term, a third of this regulatory proposal could be thrown out. We would be dealing with federal political committees and other entities, and the rule would be drastically simplified.

Unfortunately, you chose, not all of you individually, but as an institution, this committee -- this Commission chose not to do so, and here we are with a slightly more complicated rule than we otherwise would have needed to have.

COMMISSIONER VON SPAKOVSKY: All right.

My final question, I was going to ask you another hypothetical, although it won't be the same one I asked Mr. Simon this morning. But the hypothetical I want to ask you about is actually something based on current events and something I actually heard, an advertisement on probably one of the more obscure radio stations I listen to. There's been a lot of criticism started in the newspapers and now has migrated its way into political advertisements of the President over the NSA Intercept Program and over the stories that broke about supposed secret CIA prisons in Europe. And I heard an ad that criticized the President, and the tenor of it was basically that he's grasping for power.

And my question to you is, that kind of an ad, which said no more than that but related those kind of events, if this were to occur in a presidential year, and the President were running for office again, if all of the other rules or the coordination provisions were met, is the content of that ad going to fall within the rule as you put it forward so that if someone did that, the FEC should

investigate, prosecute, and fine the individual organization who did that?

MR. RYAN: I think it necessarily depends on the identity or the tax status of the organization. If it's a 527 organization, promote, attack, support, or oppose test would be applied. If it's not a 527 organization nor a federal political committee, then the test that under our proposal applies is that it refers to the character or qualifications or fitness for office. If it is -- the President is grabbing power, I don't think that would be or should be construed as referring to the character or qualifications or fitness for office, and the candidate would not be -- it would not be subject to our content standard.

COMMISSIONER VON SPAKOVSKY: Okay. But you're saying there are some organizations where you think it would apply?

MR. RYAN: Possibly a federal political committee, because I think such an advertisement, if run during a presidential election year, could be construed as being for the purpose of

influencing the elections.

COMMISSIONER VON SPAKOVSKY: Okay. So under that circumstance, you think we should fine the political committee for doing that?

MR. RYAN: Quite possibly, you know, it depends to some extent on the full text of the ad, but if that's all the ad said, I think this Commission would quite possibly be within its authority to find that the ad was for the purpose -- the purpose of influencing the election and violated federal contribution limits if it did, in fact, exceed the amount limits.

COMMISSIONER VON SPAKOVSKY: Well, I hate to do this to you, Mr. Ryan, but does it give you any second thought at all that, in fact, if we were to fine an organization for doing that, we would be repeating behavior that occurred 200 years ago, when Republican Matthew Lyon became the first person with the dubious honor to be fined \$1,000 under the Alien and Sedition Acts because, due to his opposition to going to war with France, he criticized the President by saying he was continuing to grasp for power?

MR. RYAN: Well, he would not be, because he would be subject to the character or qualifications or fitness for office test, which I explicitly stated would not be subject --

COMMISSIONER VON SPAKOVSKY: I know, you just told me that we should fine someone under that circumstance, now you're backing away from that.

MR. RYAN: A federal political committee.

COMMISSIONER VON SPAKOVSKY: I see.

MR. GOLD: Can I comment on that? I mean let's take the proposal, Mr. Ryan's proposal here, and let's take that ad, and let's assume that his interpretation of character, qualifications, and fitness doesn't apply to that, some people might think it does, but let's say it doesn't.

Under their proposal for a union or a corporation or an individual or a partnership, let's say, it would fall under the standard of a public communication directed to voters that refers to a candidate, and that applies from 120 days before the first primary through the general election. The first primary is in January, so we're talking,

where are we, September of 2003 or 2007 up through the election.

We could not -- the AFL-CIO could not confer in any way that satisfies the conduct standard with the democratic leader, okay, of the House or the Senate or who's running for re-election, let's say, about doing advocacy that complains about that presidential conduct. That's what their standard would do, and that's truly unacceptable.

MR. ELIAS: And since others are commenting, let me just say that apropos what Commissioner Weintraub asked, I do find it almost surreal that a corporation and labor union gets to accuse the President of grasping for power, but if the democratic senators want to do so, then under this test, it would be out of bounds. I mean it's a weird dichotomy here. The soft money groups, they get to do it under this lower test, but if an organization comprised of the democratic senate, democratic senators, they want to do it, then, using hard money, I might add, using money that's

regulated and reported, then it's somehow a higher burden.

And I have to say, I, too, am perplexed by why it's rank ordered that way. I would think that actually the reform community would rather have it be done by a hard money committee and report it subject to limits than by a soft money committee, but you know, it's their proposal.

CHAIRMAN TONER: Thank you, Commissioner Von Spakovsky. Mr. General Counsel.

MR. NORTON: Thank you, Mr. Chairman. I'll try to be quick. Mr. Gold, you're one of the only witnesses, I think, or one of the only commenters who rejected the use of the temporal content standard, and so I feel like before you get away, I wanted to ask you if you wanted to elaborate a little bit on a comment that you made at the end of page nine of your comments to the top of ten. I'm going to paraphrase a bit to save some time. But you say if we want to use a temporal standard, the Commission needs to determine how much lobbying occurs within the periods under

consideration, and therefore, might be affected. You say not only have we failed to seek information, empirical information on that, but you are aware of none that could be used to support the existing regulation, the extent to which lobbying and similar activities may take place within any time period prior to an election, it depends entirely on the legislative calendar and may vary from year to year.

And our experience, however it is just as likely, that significant lobbying will take place within 120 days or any similar period prior to an election as they will occur outside of that period, under these circumstances there's no basis for applying a different content standard depending upon when a communication occurs.

I will say it, I've heard it different times, other arguments that so much action is sort of loaded at the end of the calendar, that that's, in fact, when a lot of lobbying is going on coincident with a lot of electioneering, and it's elections that galvanize lobbying and so on, but I

wonder if you wanted to elaborate at all on your comments?

MR. GOLD: Well, I think what we say here and what we believe and our experience is that, you know, when important legislative activity occurs, to some degree is -- to some degree elections do cause it to happen, they do, because legislators and Congress want to do things that will influence elections with legislative conduct, but that is hardly universally the case, and external circumstances, whether it's September 11, if it had been September 11, 2002 rather than 2001, you would have had the Patriot Act within 60 days of an election, for example, appropriations committees are making their final decisions during that 60 day period, every two years, because October 1 is the end of the fiscal year.

What we're basically saying here is, I think we would perhaps ideally like to have a temporal standard because it's clean, but the reality is that, and I think given what the D.C. Circuit said, is absent a record that will satisfy

them. And I'm mindful of your concern, that you don't want to litigate and lose again. That may not be the best way to approach it, it's certainly not the only way to approach it, and that's why we didn't go in that direction. We're really focusing on, we accept the conduct standards you have, and we're looking at some kind of definition of content that would not be so time sensitive, especially because lobbying legislative activity really is a year round function.

MR. NORTON: The last question I had was -- I guess I'd like to direct to you, Mr. Elias, and that's whether you can say anything in response to this concern about the so called gap, that whether we use a 30 or 60 day, as you propose, or we use the 120 day, there's this concern that with early primaries, there will be some period during the election season between the primary and the general election when there is no regulation in this area. What's the argument in response to that concern?

MR. ELIAS: Well, my argument is two-fold. At a general level, I would go back to what I said

before, which is that we just don't have -- I don't think that this Commission has before it a record of that activity taking place in any significant extent. At another -- at a more precise level with respect to the DSCC, I want to end where I began, which is to point out that the DSCC is a hard money committee, and the activity that would be engaged in would be the DSCC spending hard money, money that's raised under the limits and fully reported during those periods.

And I think that when you look at the risk that is posed to the system versus the burden, and I continue to come back to this because there is a significant burden, and some of it has been touched on today and some of it hasn't. The common vendor issue is a real burden that is placed on organizations like the DSCC. The need to set up the firewalls, the lack of a safe harbor right now for when you set up those firewalls, these are all regulatory burdens that I think in the hard money context make it a compelling argument.

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

Chairman.

CHAIRMAN TONER: Thank you, Mr. Norton.

Mr. Costa.

MR. COSTA: I have no questions.

CHAIRMAN TONER: Okay. Hearing none, then this completes our second panel today. The Commission thanks the panelists very much. And we will be in recess until 3:00 p.m. this afternoon, at which time we will hear from the third panel. Thank you.

(Recess)

CHAIRMAN TONER: Good afternoon. The special session of the Federal Election Commission will please come to order. Welcome back. We have a third panel of witnesses this afternoon to discuss coordinated communications. Just a few words on procedural matters for the benefit of some of our witnesses who were not here with us this morning. This afternoon's panel will last for one and a half hours, and each witness will have five minutes to make an opening statement.

The green light at the witness table will

start to flash when the person speaking has one minute left; the yellow light will go on when the speaker has 30 seconds left; and the red light means that it's time to wrap up your remarks. We will have at least one round of questions from Commissioners, the General Counsel and our Acting Staff Director. This morning we were able to have two rounds for each panel, and we hope to be able to have two rounds of questions for this afternoon's panel, as well. Our panel this afternoon consists of Steve Hoersting, on behalf of the Center for Competitive Politics, and Tom Josefiak, on behalf of the Republican National Committee, and Joe Sandler, on behalf of the Democratic National Committee. So if our panelists are ready, we will plan to proceed in alphabetical fashion in terms of opening statements, as is our norm. And in doing that, Mr. Hoersting will go first, and then Mr. Josefiak second, and then Mr. Sandler third. Mr. Hoersting, the floor is yours when you are ready to proceed.

MR. HOERSTING: Thanks, Chairman,

Commissioners, Mr. General Counsel, Staff Director.
Good to see you all again. I'd like to take my
five minutes, if I could, and address some items I
saw in the reformers' comments, if I could. And in
order to get it all done in five minutes, I'm going
to have to do some reading, so I hope you don't
mind.

And if I could, while I begin, if I could
direct your attention to page 28 of the reformers'
testimony. That would be fine, thank you. In the
Christian Coalition case, Judge Green believed that
any communication coordinated with a candidate met
the definition of expenditure and becomes a
contribution to that candidate through
coordination.

If any of you are reading Judge Green's
opinion as sort of a cliffs note on contact
standards, I want to put out that Judge Green made
one error by not addressing Section 431a(b)(6),
which says that before corporate activity can be a
contribution under 441b, it must first be an
expenditure. And at the time of that decision, the

Supreme Court's MCFL opinion couldn't have been clearer, that corporate communications are not expenditures unless they contain express advocacy. So when the reform lobby wrote BCRA, they considered amending 441a(a)(7)(B)(i) to say that expenditures, whether or not they contain express advocacy, made in concert with a candidate, are contributions to that candidate.

They didn't go that way, they decided instead to add electioneering communications to 441a(7). And the first prong of 441a(7) remained unchanged. So the term expenditure does have some limiting construction, and the reformers have now offered content standards for the Commission to consider, which I think is admirable.

The standards they offer, however, are beyond the bounds of law, and I'd just like to list three of them quickly. If you'll note content standard four on page 28. This standard contains in its definition the very statutory term it's attempting to define. Notice the clause "an expenditure" that appears twice in the definition.

Now, this is not a typo.

The reformers know they need this language in the definition to short circuit whole areas of prior interpretation. The definition presumes that communications by political committees are expenditures, that is, they are for the purpose of influencing federal elections. This is based on misapplication of the major purpose test by the reformers and by noting that political committees already have to report their expenditures, so what's the big deal. But this is not completely true. Political committees report receipts and disbursements which demonstrates their spending encompasses more than expenditures. And as the McConnell court did say -- and the McConnell court did not say that all national party committee spending, for example, is for the purpose of influencing federal elections.

National party committees still engage in issue advocacy, party building, and assisting non-federal candidates, even if they have to do it with hard money post BCRA. There's no reason, for

example, that the DNC could not run a hard dollar ad advocating the election of a gubernatorial candidate and still consult with the senator up for re-election in that state on how best to run that ad.

But the example I just gave you would be illegal under the reformers test, even if the ad were objectively designed to advocate the election of a non-federal candidate and couldn't be for the purpose of influencing a federal election.

In standard five, I would say quickly that if the Commission may not presume political committee spending is in every case for the purpose of influencing federal elections, it may not do so with regard to non-political committees. And my last example, standard six on page 29, the following page, is perhaps the most alarming and most telling of the difficulty the Commission would face were it to presume as the reformers ask it to that any communication close enough to an election is suspect rather than stating in clear terms, which the Commission should do, what an election influencing communication would actually

look like. Standard six, roman 1, on page 29, applies to communications paid by any entity directed to voters in the district or state of that candidate, for senators, that is, whether or not the communication mentions a candidate or a party committee. The Commission would then investigate whether the ads were coordinated with a candidate.

But if we were just a little bit later in this year, the even year, '06, wouldn't this standard cover the ad war surrounding the Alito confirmation hearings? I count five members of the Senate Judiciary Committee who are up this cycle, and the primary season is almost upon us. I believe that standard six, by its terms, would require the Commission to entertain a complaint that sought to investigate Senator Kennedy or his staff, Senators Hatch, Feinstein, Kyl, or DeWine, to ask them about ads running in their home states paid for by say Progress for America or People for the American Way to determine whether those groups coordinated their communications with those senators. This is the result of standard six.

First Amendment activity gets lost in attempts to presume the purpose of a communication largely by the nature of the entity that runs it, or to presume that any communication that reaches voters close to an election deserves an investigation. I'm glad the reformers are proposing content standards, but they need to be better defined. Thank you, Mr. Chairman. I look forward to your questions.

CHAIRMAN TONER: Thank you, Mr. Hoersting. Mr. Josefiak.

MR. JOSEFIK: Thank you, Mr. Chairman, members of the Commission. Thank you for this opportunity to be before you again today with a new group of people. I'm looking forward to a rather -- hopefully a rather articulate and lengthy debate on this issue. Cutting to the chase, to be honest with you, the concern before the Commission today and the issue before the Commission today is really a group of office holders and/or candidates sitting down with groups and discussing whatever they're going to discuss.

And the issue that we have before us under the old regulations that are currently under debate is, within 120 days of an election, everything is suspect. And what does that mean for the Commission? Obviously, the Court of Appeals in the Shays decision did not say the Commission was wrong. What the Court of Appeals said is the Commission needs to justify why 120 days means something.

Well, with due respect to the Commission, if you can figure that out, I'm all for it. The bottom line, however, is, it's pretty hard to justify something based on 120 day provision and a statute that specifically was addressing voter registration that has a direct link to elections. What we're talking about here is activity, public communications and other activity that may or may not, as Steve says, have a direct link to elections, and I think that's the concern I have. If the Commission were looking for a quick way to solve this problem, in my opinion, it would be to take what the legislators had said in the

legislative history, what's before the Supreme Court and the court record and say a 30/60 day window seems to be more justified under the record, by the record, than a 120 day rule.

Having said that, the lawyers in this room, and I'm sure the lawyers this morning all love bright lines, we've argued that for years, and so that whether you're in Washington, D.C. or whether you're sitting in some state and you're not an expert in election law, when a regulation says you can do X, Y, and Z within a certain period of time, that's pretty clear, it's a safe harbor. We all like safe harbors.

But again, referring to what Steve was talking about earlier, in thinking about this, if the Alito or the Roberts controversy was in October of '06, even though the legitimate questions were legislative questions, where would we be today? It's almost what the Supreme Court was saying in remanding the case Wisconsin back. You know, here you had Senator Feingold, who was the target of an ad campaign that wasn't talking about his election,

but was talking about being against the filibuster. It was a legislative process, not an election process. And, quite frankly, the challenge for the Commission is going to be, how do you dissect that legislative process from the election process, just like Joe and I have to dissect -- how do you dissect a member of Congress when they're doing their job for their constituency in legislation versus re-election, and that's a tough nut to crack.

But that's why, in my comments to you, I suggested something that the Commission has already been familiar with, and that's the PASO standard. And I don't know, quite frankly, what promote, or oppose, or attack, or support means, but it's something I think the Commission needs to consider and come up with some objective standards to give somebody that wants to go beyond the safe harbor, that legitimately have an impact on the legislative process to be able to do so. And so I think you've got to look at that.

And, quite frankly, the real frustration

for me, and I can tell you a personal experience in dealing with this was in the endorsement area. As the General Counsel to the Bush campaign in '04, and having dealt with the Kerr AO, and having dealt with a congressional special election within 120 days of a presidential primary, which, frankly, didn't mean anything, that what happened before 120 days and what happened after 120 days with the same language meant something was sort of ridiculous to me. And it was frustrating to know that you had a whole series of advisory opinions dealing with endorsements. As long as you didn't talk about your own election, it was okay. But in this case, it wasn't okay, because you wouldn't have, even as a lawyer, the ability to look at disclaimers without causing a problem. So I just want to raise that to the Commission's attention. And as a party person, I have to also say that when McConnell in the Supreme Court decision, based on the Commission's own argument said planning something doesn't mean coordination that's prohibited, I think you have to look at the party committees in a

different light than other organizations.

And one last note, if the reports are correct and the Commission is actively pursuing 527s for '04 activity, I would respectfully submit that instead of worrying about '04, my concern would be '06, because there are a lot of people out there, even individuals who are reluctant to get involved in legitimate campaign activity because they don't know what the rules are. And I commend the Commission for taking this opportunity to try to get some clarity to what individuals, what organizations can and cannot do when it comes to candidates and office holders with regard to coordination. So I'm looking forward to this debate this afternoon. Thank you very much, Mr. Chairman.

CHAIRMAN TONER: Thank you, Mr. Josefiak.
Mr. Sandler.

MR. SANDLER: Thank you very much, Mr. Chairman, and members of the Commission, and thank you for the opportunity to present the views of the DNC on this important issue. Our focus actually is

not on the regulation that the Commission is being required to reconsider as a result of the Shays litigation, which is the rule addressing coordination between outside groups, unions, corporations, non-profit organizations, on the one hand, and candidates and party committees on the other, but rather the regulation, the separate regulation that defines when a party's payment for a communication is deemed coordinated with its own federal candidate such that the payment counts against the dollar limits on what parties can spend on behalf of their own candidates, the 441a(d) party coordinated expenditure limits.

That regulation, that separate regulation, which is Section 109.37, worked well in 2004, we all understood how it worked, that, you know, if you did something that referenced a candidate within 120 days of an election or a convention, where that candidate was up, and if you coordinated with that candidate, it counted against the coordinated expenditure dollar limit, if you didn't, it didn't count. That rule was not challenged in the Shays

litigation, but the rule on which it was based, of course, is the one that was challenged.

We want to urge the Commission not to automatically conform this party coordinated communication regulation toward every new rule that's adopted for coordination between the outside groups and candidates, but to carefully consider the situation, the particular situation of party committees themselves. As our comments spell out in detail, there's been a lot of confusion and uncertainty over the years about what the content standard is for party coordination communications, but the one thing that's clear is that there has to be one. Some of the reform groups suggested in their proposal that if you're a political committee and you coordinate with a candidate, there doesn't need to be a content standard, so automatically a coordinated communication. That's clearly never been the rule.

Before 1996, before Colorado One, when all party communications were automatically deemed to be coordinated with their candidates, right, but

there was no such thing as party independent expenditures, the Commission still had a content standard. There was the electioneering standard, which they argued for, which your office argued for, and the solicitor general, in the Supreme Court Colorado One, and of course, they never reached that issue because they held that parties could make independent expenditures.

The electioneering standard was ultimately abandoned by the Commission, it was never really replaced. And in Colorado Two, while upholding the limits on party coordinated expenditures, the Supreme Court essentially invited as applied challenges if the content standard was gotten wrong. And then the last thing on that is that in enacting BCRA, when the -- without getting into all the gory details of the legislative history, when Congressman Meehan and Congressman Shays came up with their revised proposal after the senate bill was passed, the way the coordination standard was written, among other things, would have made generic communications, not mentioning, you know, a

federal candidate, by a party count against the 441a(d) limits if they were coordinated. I personally spoke with Congressman Meehan about this, and it was taken out of the bill. So the legislative history is clear that there needs to be a content standard. The reformers' suggestion that it's an automatic coordinated communication is simply wrong.

So what should the content standard be for party coordinated communications? We would suggest, you know, if it's not broke, don't fix it. The court did not require this one to be redone, 120 days is a reasonable standard, we believe, that distinguishes communications that are sufficiently close to an election in a cycle to present the greatest danger of circumvention of the candidate limits by donors, which is the interest recognized in Colorado Two, is justifying limits on party expenditures in the first place. And it's been one benchmark in BCRA itself, in the voter registration definition that actually applies to party committees.

In that regard, I want to make clear that in the 2004 cycle, the DNC did not run any public communications outside of that 120 day limit that referenced the federal candidate, and you know, that would have counted against 441a(d) were coordinated, but for the 120 days standard. And the examples in the reformers' appendices are all wrong. They have ad after ad after ad that's run in June and July which is within the 120 days under the current rule, within it because it's within 120 days of the convention. That's true of most of the party ads that they point to in 2000 -- not to mention primaries all over the place, they have some in June and April, so that was true of virtually all their examples from 2000 and virtually all of their examples from 2004.

And the final point I just want to make is that, and I think a number of other commenters made that, we would ask that fundraising solicitations that are signed by or reference the federal candidate, the cost of those not count as a coordinated party communication, at least in the

areas of mail and telemarketing, not asking for some kind of loophole here for broadcast advertising and the like, because it's just not the situation, again, I think that's contemplated under Colorado Two that's really an expenditure that so directly benefits the candidate, rather, when those letters are signed, it's clearly for the benefit of the party itself, fundraising for the party itself. Thank you very much, Mr. Chairman.

CHAIRMAN TONER: Thank you, Mr. Sandler.

And beginning our questioning today will be Commissioner Mason.

COMMISSIONER MASON: Thank you. Let me start off by apologizing for the Forgy Kerr AO I think I voted for it and I never liked it. But let me make one point for the benefit of the party committee counsels in particular about the coordination question there, because it was sort of presented to us as, oh, we attorneys just want to check for legal compliance, and at least from my take, when you put a candidate in the ad, a federal candidate in the ad endorsing somebody else, implicit in the

ad is their agreement to the message, and while I suppose we could try to sort of carve out and say, well, you know, if it's just a review for legal reasons, none of us believe that that is what actually goes on or that it's limited to that.

And so there was a presumption there, even though some representations were made about we need to look at it for legal reasons, that, you know, candidates in the real world aren't just going to go out there, show up at the studio, and read the script that they're put in front of them, as somebody this morning put it for, for taste reasons, if nothing else. And so, you know, that, at least for me, was sort of on the conduct standard. When you have a federal candidate sitting there reading the text or appearing on screen, that sort of, per se, meets the conduct standard, you know, for me.

Now, I am very much amenable to try to work out a way that we can do endorsements, you know, and allow you to do them, but I don't think claiming that the candidate appearing there doesn't constitute conduct that would otherwise be

coordination sort of meets where I want to go. Tom, I wanted to ask you, and forgive me for not being formal, former Chairman Josefiak, you talked about the PASO standard and how you would like that, but of course, you and I think the others wanted something that's a bright line, so what is it that PASO buys you, what are you going to do with that that you're not doing now?

MR. JOSEFIAK: Well, it's a standard that the Commission, and the reason I even raised it, the Commission has already been talking about PASO in other contexts, but it seemed to me that whether it's 120 day window or a 60 day window, whatever the Commission feels is the appropriate window, that there's more to it than that.

And going back to what Joe said, and I want to refute what I believe the legislators submitted to you with regard to, you know, the assumption that every disbursement by a political entity, including party committees, is an expenditure under the definition is outright wrong. I mean you have to look at what -- it's not

necessarily every expenditure is to influence a federal election.

One of the things that I know that the RNC does, and I'm sure the DNC does on the other side, is that once you have a philosophy, and you have a president with an agenda, and you have members of Congress that either agree or disagree with that agenda, a lot of it is going into the legislative process, and that's what I'm talking about.

COMMISSIONER MASON: I think the reformers conceded this morning that, for instance, to my example, that coordinating a generic party message that didn't mention any candidates, but went to the issue of, gee, should we say vote democratic to clean up Washington, or should we say vote republican to keep America safe, or something else, what the generic party message was going to be, that that sort of -- coordination of that sort of message was okay.

And even though their proposal suggests otherwise, I think under questioning, they sort of conceded that, yes, there were some things like that.

So I don't want to -- so what does PASO get you? You're the counsel, you know, if we say clearly identified candidate and a time frame, you know the answer, if we add in PASO, what happens?

MR. JOSEFIAK: Right, you pass it, you're within the 120 days, let's assume that it's --

COMMISSIONER MASON: Whatever time period.

MR. JOSEFIAK: -- within the 120 day window, and you're -- in dealing with the Supreme Court nominees, and you have a group of individual office holders that feel very strongly one way or another, and you sit down with the party organization, and you decide that, you know, you need to make it clear what the position is on one of the nominees, and you're urging your fellow members to support that nomination and not filibuster, whatever it is, under the old regime with 120 day window, you mention a federal candidate, and if you're coordinating and you're going back to that either district or state to urge that candidate to do something, that's going to be a problem. And what I'm saying is that, you know,

that's fine, it gets you a safe harbor, but you should have the ability, if you're willing to go and run the gambit that you're not going to be chilled in your right to make that kind of a statement without causing some angst.

COMMISSIONER MASON: But what likely scenario would you need or want to be coordinating with the candidate you mentioned? In other words, if your republican members come in and say, you know, we've got to drum up support for Alito, the presumption is, you know, they're in favor of Alito, you know, and so I'm trying to understand why it would be necessary or even likely that you would be coordinating with the candidates you mentioned. In other words, in that scenario, most likely you would be naming democratic candidates.

MR. JOSEFIK: Maybe, you never know. And

--

COMMISSIONER MASON: And if the answer is, well, then you shouldn't coordinate that ad with the opponent of that democratic candidate, it seems to me the limitation, the effective limitation is

small.

MR. JOSEFIAK: Well, I don't know. But it seems to me that one just -- when you come up with a hard and fast rule, it becomes very difficult to counter that rule.

COMMISSIONER MASON: You think we ought to allow as applied challenges?

MR. JOSEFIAK: Well, I don't think you have a choice at this point. It's coming your way.

CHAIRMAN TONER: We want to note that we're for as applied challenges here where appropriate. Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I apologize to the panel, you're getting here in the afternoon, and I sort of discharged a lot of my energy in the morning, so this may not be as spirited as this morning's debate was. Mr. Josefiak, you seem to be partial to the PASO standard. Now, would that just be for party committees or for everybody, or do you care about anybody else?

MR. JOSEFIAK: No, I think it's -- in

respect, obviously I'm a party person and I would like to see that at least for the parties, but I think, you know, as the court in Colorado said, when it came to independent expenditures, and you know, again, this was a counter to my position about some of the legislators who thought there should be a different standard, the standard is the same.

If you're going to be able to, you know, you're going to have to at some point, whether the Commission does it in a balancing act, or, in my opinion, the court's going to do it in a balancing act, there's going to be an ability for some fundamental First Amendment right to redress your legislators on various issues. And whether you're going to be referring to someone who happens to be a candidate at the same time I think is the challenge you have. In my world right now, the President is no longer a candidate, so it makes it a heck of a lot easier. But if you took some of the same issues that we're dealing with right now and you took it back a year ago, it would be

problematic.

And I don't think when you -- and I don't know what the answer is, and I know you've got a challenge, but there is a fundamental balancing act that the Commission should be at least attempting to say it's all or nothing at all is wrong, but there's got to be some balancing between your fundamental right to be able to -- to redress your government and talk about these issues when you're talking about someone who's up for election at the same time protecting, so you don't have the other extreme, where they're using the so called issue ad to have that influence, and that's where we started with this.

If you remember why we ended up with BCRA in the first place, it wasn't against the coordination issue, it was against the use of soft money to pay for it. And all of a sudden this got snowballed to the point where you can't talk to anybody. And, quite frankly, from Joe and our standpoint, we're using 100 percent hard money, so we're even more baffled of the fact that we can't

even talk to the people who are supposed to be representing us to talk about an issue that may be appropriate in that particular state if we refer to a federal candidate, either the opponent or the person who supports that position.

COMMISSIONER WEINTRAUB: Well, that's the trick, isn't it, it's figuring out the way to distinguish between the real issue ads and the sham issue ads, and that's, you know, what all of this is all about. I regret very much that you're not giving me an answer to that question.

MR. JOSEFIAK: All I'm saying is, I think you should give it a college try.

COMMISSIONER WEINTRAUB: Oh, thanks, yeah, but you're not giving me a lot to work with here. Mr. Sandler, you seem pretty comfortable with the 120 day limit, and I appreciate the sort of -- I obviously was not responsible for the 120 day limit, I can't take credit for it, can't take the blame for it, but I appreciate the sort of intuitive feel that, you know, it sounds like about the right amount of time, but the court basically

told us that, you know, we need to have some evidence for that, and particularly said that the argument that, hey, it's double the 30, 60 days, the 60 days in the electioneering communication, the court said, well, why is that relevant, and so I guess my question to you is, if you want us to keep the 120 days, do you have anything that we could provide to the court as empirical data or empirical evidence that would back it up?

MR. SANDLER: Well, first of all, I think that the data that's in the Notice of Proposed Rulemaking itself, about when these ads, the periods of time when these ads tend to be run, is certainly compelling, and then in addition to that, I think the fact that the reformers' own example show that all the ads that they cite were, in fact, within the 120 day window is also good evidence that if they believe that this is the kind of, you know, these are ads that influence an election, well, guess what, they're within 120 days, not without it, at least insofar as the ads they cite that are -- some of them they cite are run by the candidates

themselves, which are completely irrelevant, but the ones that are run by the party committees, an issue of concern to us, were within the existing window, it proves the opposite point.

COMMISSIONER WEINTRAUB: And I think we appreciate your pointing that out, that's a very helpful -- I'm sorry that there isn't anybody from the reform side on this panel that could be sitting here and respond to that because it seems to me to be pretty good --

CHAIRMAN TONER: We ran out of reformers.

COMMISSIONER WEINTRAUB: We ran out of reformers, but we got --

CHAIRMAN TONER: We would have paired them up, but we --

COMMISSIONER WEINTRAUB: We can ask Larry tomorrow, we've got one more coming.

CHAIRMAN TONER: Okay, great.

COMMISSIONER WEINTRAUB: It's hard to imagine we ran out of reformers. And I guess the flip side of that question for you, Mr. Josefiak, is, since the court explicitly said, you know, why

is the 60 day window relevant that you would double it and get to 120 days, what possible justification do we have for cutting back to the 60 day window which the court didn't seem to like very much?

MR. JOSEFIAK: Well, I think it's the legislative history, to be blunt about it, the people who supported the legislation and the studies they presented, quite frankly, said that that -- from their experience and studies, that that's -- the two months before the election is when most of these ads ran, and they were, again, looking back at the issue ad controversy and how they were using issue ads, from their perspective at least, to influence elections without the buzz words.

COMMISSIONER WEINTRAUB: Right. But we tried that argument and we lost, so how do we get there?

MR. JOSEFIAK: Well, but I think, in my humble opinion, the reason you lost is, you had 120 day window without any explanation, and instead of being able to argue the 60, I mean that was sort of, in my mind, a second tier argument, because you

already had on your face a regulation that said 120 days without an explanation as to why, and my theory is that it's, you know, if you're going to use the 120 days and you're looking for analogies in legislation, there is one. The problem with the analogy in the legislation is, it dealt with an issue that was directly related to election activity. Voter registration is directly tied to an election. You can't vote unless you're registered to vote in most places, and so there was that direct correlation, and so -- and in coming up with the 120 day rule, the legislative history was such they thought that period for direct election related activity was fair, and it would have to be 100% federal election activity after the 120 days, before that you could use, in fact, soft money to pay for a portion of it. That's I think the difference that we're dealing with here, and the kinds of conduct we're dealing with, one is party activity in the voter registration area, and one is communication, where again, their focus was public communications that didn't have the magic buzz

words of elect or defeat or oppose, but had the image of a candidate, and they were talking about things that were pretty close to the line, and I think that's where you've got to look at this and why they did what they did, and so I think there is a very legitimate distinction between the 120 days and for election activity versus 60 days for this general public communication.

COMMISSIONER WEINTRAUB: Time's up. Thank you, Mr. Chairman.

CHAIRMAN TONER: Thank you, Commissioner Weintraub. Commissioner Von Spakovsky.

COMMISSIONER VON SPAKOVSKY: Thank you, Mr. Chairman. Mr. Hoersting, I'd like to start with a few questions since you were commenting on the proposal that the reformers put in on what the rules should be. And my question to you is, one of the points we made this morning, myself and Commissioner Weintraub, was that the rule they're putting forth seems so complex, it would be extremely difficult for people to understand. In fact, someone reminded me during lunch that it might be -- that rule might make a good chapter in Charles Dickens Bleak House, where the court case

took an entire lifetime because the rules of the chancery court in London were so complex, no one could understand them; I wonder whether you would agree with that.

And the second part of the question is, the rules, frankly, seems geared towards unintentionally or intentionally to hurt challengers the most and to benefit incumbents, and I wonder whether you would agree with that?

MR. HOERSTING: For the latter half of the question, you're talking about the reformers' proposal?

COMMISSIONER VON SPAKOVSKY: Yes.

MR. HOERSTING: Certainly a virtue, Commissioner, of the content standard is that it provides a bright line, it's a cliché at this point. The virtue is, though, you start to narrow the activity in which people know they will be investigated. Three or four years ago it was sort of cool to want to ban land mines, and I think the reason that sort of resonated with people is they realize that if you're just walking around, that's

probably not enough notice, that you probably need to set up another standard. Similarly, simply speaking, is not enough of a defined line in terms to when you will be investigated. So the virtue of the content standard is, particularly when it's clear and well defined, is that anybody can follow it, whether or not they can afford good counsel.

And would I say that the reformers' proposal in terms of rules benefit incumbents? Yes, I would, because the effect of those rules is to presume a lot of activity is for the purpose of influencing an election, and therefore, regulable.

All things being equal, incumbents need to spend fewer campaign dollars than do challengers. So if the question is, how do you spend campaign dollars legally, and the harder that becomes, the more it will benefit incumbents is certainly right.

COMMISSIONER VON SPAKOVSKY: So you wouldn't have a problem with us, instead of constantly referring to reformers, to maybe changing that to the IPL, the Incumbency Protection League?

MR. HOERSTING: I would have no problem with it. We're working on it. I'm a one man band right now, but we'll get there.

COMMISSIONER VON SPAKOVSKY: Now I have a question for the whole panel and it's this. Another issue that keeps being raised with us is the IPL is very worried about ads occurring outside the time limit, whether it's 120 days or whether we shorten it to a 60/30 rule. What I wonder about this is, all the data I've seen, including polling data, indicates that the average citizen doesn't pay attention to political races and elections until shortly before the election, and that even if a rule like this were to push some of these ads outside of this time period, it really wouldn't matter because, frankly, while the TV. stations that get the ads might be happy for the money, it's just going to be burned money, wasted money for the campaigns because people that far out from the election aren't really paying attention to it, and I wonder whether you agree with that assessment?

MR. HOERSTING: I certainly do. I've not

read all the studies, and I know there are several out there, but yeah, I think that's very likely, that people just simply don't focus until about Labor Day.

MR. JOSEFIAK: Commissioner, I'm assuming that the content of your ad is such that it wouldn't really be clear to folks that it was indicating to a potential voter to vote for somebody. I'm assuming that under your scenario, it would be --

COMMISSIONER VON SPAKOVSKY: Yes.

MR. JOSEFIAK: -- what would be, for lack of a better word, an issue ad in the sense of the word, and the question is, is somebody going to look at that as opposing or supporting without the magic words is what I think you're talking about.

COMMISSIONER VON SPAKOVSKY: That is what I'm talking about.

MR. JOSEFIAK: Because that's a whole other ballgame if, obviously, if it's clear on its face of what the message is and who's giving it. But I tend to agree with that, and I can't speak

for Joe, but I think that in the era of trying to keep as much money as you can for when you need it, those kinds of wasteful expenditures are sort of not a good use of the resources that people have donated for the purpose of electing or defeating somebody and you're going to use that much more wisely than just deciding to do an ad for the sake of doing an ad, you know, six months out from an election, unless it is, in my mind, a real legislative ad. Why else would you be doing it unless there's a reason that you want to do that in the sense of a legislative proposal or an agenda proposal or a philosophical view of a party rather than a position of a candidate that's going to affect the election or re-election that early on?

COMMISSIONER VON SPAKOVSKY: Okay. I have no other questions.

CHAIRMAN TONER: Thank you, Commissioner Von Spakovsky. If I can manage this high tech equipment, which is always a challenge for me. A couple things; I've appreciated the discussion today about the Forgy Kerr AO, which I realize is not really

anyone's favorite advisory opinion, and I think the general sense, as much as I think we've all tried to forget entirely that proceeding and how we came out on it, was that the result was in large measure dictated by the current regulations, and that the regulations were not perfect, we thought there were some virtues to them when they were passed in 2002, but that the Kerr AO was difficult, because as we looked at the law as it existed then, we just didn't see a way to get out of that result. And in that regard, I'm pleased that we're putting on the table now in a rulemaking setting whether we ought to make some allowances in the rules to have a different result.

And I guess my question for all the panelists, would you be comfortable if we had an exemption for endorsements provided that the advertisement did not contain express advocacy for the candidate who's doing the endorsing? Is that something that, in general terms, you think would be appropriate for the agency to fashion; Mr. Sander?

MR. SANDLER: Yes, we would think that's

appropriate. And I think even if it was a PASO standard rather than express advocacy - still work. Endorsements ads are not promoting or supporting either nature by any reasonable standard unless they're twisted to do so, you know, the candidacy of the endorsing federal candidate.

And furthermore, again, if you look at the rationale of Colorado Two, no one is going to give their party a sort of secret earmarking to promote a candidate because they're appearing in an ad that's endorsed, you know, to help a presidential candidate that's appearing in some ad for a congressional candidate in Kentucky, it doesn't make sense. An exemption for endorsements is completely consistent with the underlying rationale for a party, the party expenditure limits as articulated by the Supreme Court in Colorado Two.

CHAIRMAN TONER: Mr. Josefiak, would you be comfortable if we had an endorsement test, again, premised on the lack of express advocacy?

MR. JOSEFIK: Maybe I should share some of the blame for the confusion that the Commission

had based on Commissioner Mason's view of what was going on here. I think we laid out a number of potential scenarios. But what was frustrating in my mind was not necessarily the candidate sitting down and taping anything, it was the ability of even taking a picture of the President and putting that on the screen and the fact that we couldn't even make sure that the disclaimers were right without jeopardizing that, or the right the picture was being used.

I mean there are pictures and there are pictures, and there are some pictures that, quite frankly, would be not the right picture to be using of the President of the United States. And so even if we weren't saying anything, or even if the President wasn't even aware of the fact that he was going to be used as an image, the fact that no one associated with the campaign could even review it without putting that 120 day window into jeopardy was what was really frustrating for us. And, you know, trying to get some feedback from the Commission as to what you could do, maybe you

couldn't do that, maybe the President couldn't sit down and say, hello, I'm George W. Bush and I want you to vote on election day for so and so and put that in the endorsement because, you know, she was such a great candidate. But just the fact of someone getting a picture that was asked for from the campaign to be able to be used, and therefore, then not being able to check it out to make sure that's the picture they were using was where we found the frustration.

CHAIRMAN TONER: Mr. Hoersting, if I could follow up. If we were to do an endorsement exemption and we had two options, one would be to condition it on the absence of express advocacy, and the other would be to condition it on the absence of PASO for the endorsing candidate, would you have a preference between those two options?

MR. HOERSTING: Absent express advocacy or the absence of PASO?

CHAIRMAN TONER: Yes, is there one that's preferable in your mind to the other?

MR. HOERSTING: Yeah, I would say absence

of express advocacy.

CHAIRMAN TONER: Why would that be?

MR. HOERSTING: Because we're talking about 441a(a)(7), which is expenditures, and PASO and expenditures have tended not to meld in BCRA. PASO is black letter law, so is expenditure, they're not easily melded. That's the reason for my preference.

CHAIRMAN TONER: Mr. Sandler, you indicated, and Commissioner Weintraub is absolutely right, we had a spirited discussion this morning on the reformers proposal, maybe the last proposal of that detail that they submit to us, but we had a spirited discussion. But, Mr. Sandler, you indicated that as you understood the reformers proposal, that with respect to political committees, that essentially there was no content standard at all. I think their view would be, yes, there is a content standard, it would turn on whether or not the communication is for the purpose of influencing a federal election. In your view, would this agency lawfully be able to adopt such a

standard?

MR. SANDLER: No, clearly that's not consistent with the -- again, under that standard, generic party communications, and Mr. Hoersting gave an example which amounts to the same thing of endorsing a governor, but if you just say, you know, vote democrat because of this, this, and this issue, and it's coordinated with a candidate, that's never been considered a coordinated expenditure and it wasn't under the Commission's electioneering standard going back to the mid '80's, the standard that they have and this Commission advocated for in the U.S. Supreme Court in Colorado One, so I don't think they lawfully, I don't think you could lawfully do that. I say that because it's also --

CHAIRMAN TONER: Is that because it's impermissibly vague? There wouldn't be sufficient contours for people to be able to comply with the standard, is that -- ?

MR. SANDLER: Well, I think that it would be impermissible because -- I mean, again, using the Supreme Court's view from Colorado Two, it's

too much of the parties own speech and not implicating enough of the concern that justifies party -- limiting party coordinated communications to begin with, for example, not even mentioning the candidate that you're coordinating with.

CHAIRMAN TONER: My time has expired. And Vice Chairman Lenhard is next up.

VICE CHAIRMAN LENHARD: Thank you, Mr. Chairman. One of the difficulties that we confront in this process is that we are engaged in writing this rule again because the Court of Appeals found that our earlier rule was not -- there wasn't a satisfactory explanation under the APA. And they have asked us to build a factual record that would support whatever rule we do adopt.

And as difficult as it may be, among the three specific questions that the Court of Appeals asked us, and one which they identified in their opinion as the most important, was the extent to which election related advocacy that now occurs within the 120 day period would move into whatever unregulated time period we had and the degree to

which this would foster circumvention of the Act. And the largest sort of concrete factual record we've received is from some groups that are advocating that we adopt a very broad standard. And principally, you know, this consists of a collection of articles from the National Journal Databank about ads that did run outside of the 120 day time period. Most of these ads are candidate ads. There are a small number of ads that were funded by groups that are not candidates or candidate committees. But the ads are to the point that there is, in fact, money spent for advertising outside of the 120 day period that is for the purpose of influencing an election, because the candidates themselves are doing this sort of spending.

I take Mr. Sandler's point, that, in fact, if we were to go back and look through these, we would find that, in fact, some of these ads do fall within the 120 day time period and they simply didn't, you know, calculate or calibrate all of the different triggering events for those windows, and

we will do that and try and discern what -- but they this morning were citing about 200 ads.

What I wanted to get a sense from any of the witnesses really who are comfortable talking about it is what record is there, what can we look to that would point to the adequacy of either the current 120 day time period or a different one that would reflect that, in fact, the kinds of spending on ads that are for the purpose of influencing an election were occurring within the time period that we would select. So anybody who has thoughts on that, I would be interested in hearing those.

MR. HOERSTING: I would say, Commissioner, I would say, Mr. Vice Chairman, I would say that the Buying Time studies are certainly relevant, those are what Congress looked at when they passed the electioneering communication provisions.

VICE CHAIRMAN LENHARD: Those were raised earlier in the day. And if I could interrupt just for a moment, my sense was, or at least one of the contentions raised this morning, and I'm not sure whether it's true or not, was that those studies

were built around studying whether the statutory period was appropriate or not. It didn't cover the breadth of time that we were dealing with under this provision of law; is that your recollection?

MR. HOERSTING: It's not my recollection. The studies speak about activity in June and July, so that's -- they talk a lot about activity 129 days out, so that's certainly not within 60 or 30. The other thing I would recommend the Commission look at is independent expenditures by national party committees, and the reason for that is, is that when the national party committees went to completely federal dollars, any dollar was just as good as any other, so that means any dollar could be used for unvarnished advocacy or defeat of an opponent.

So if you look at when the national party committees were willing to spend their IE money, I think that will be illuminating to the Commission. I also think what you should not include are expenditures by authorized committees. And the reason I think that is because in the 441a(a)(7) context, we're

really talking about other organizations who coordinate with an authorized committee and try to pay expenses on his or her behalf. And therefore, the amount of funds that authorized committees spend themselves in order to build name ID for two years really shouldn't be particularly relevant to the Commission.

And if I could say one more thing about it, with regard to AO 2004-1, I think there's a dovetail here. They talk about Blair Hull's activity in Illinois, well, he's an authorized committee, I don't think it's relevant. And dovetailing 04-01, there's no history of corruption between authorized committees, federal candidates, there just isn't.

If you look at prior Commission regulations, they've never said payments by one federal campaign committee to another federal campaign committee create a coordination problem. There's nothing in that, in the rationale of Buckley about coordination, excuse me, corruption, nothing in anti-circumvention rationales of

Colorado republican, or of McConnell. So office holder to office holder contact, particularly federal authorized committees, is not a problem that has ever been recognized by courts or Congress. So for that reason, I think authorized committee spending can be put to one side in terms of building a record.

VICE CHAIRMAN LENHARD: Mr. Chairman, I know my time has expired. Thank you.

CHAIRMAN TONER: Thank you, Mr. Vice Chairman. Mr. General Counsel.

MR. NORTON: Thank you, Mr. Chairman. Good afternoon. My first question is for Mr. Sandler and Mr. Josefiak, and I want to return to the question of an exception for endorsements. The Chairman has suggested an exception for endorsements other than ads that contain express advocacy, and I guess I have two questions. One is, in light of the court's decision in McConnell, where the court said the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad and

famously referred to express advocacy as functionally meaningless, is it appropriate for the Commission to import that concept into new areas of the law?

And second, I guess this is more directed to you, Mr. Josefiak, would you have an objection to the Commission creating an exception for endorsements, but not ads that promote, support, attack, or oppose the candidate doing the endorsing?

MR. JOSEFIK: How do you want to -- first of all, I don't think that McConnell sort of focused on the endorsement issue in the sense that it was somehow looking at the issue ad in the same way as an endorsement ad, because the very nature of an issue ad that was the genesis of all this was referring to a specific candidate and urging that candidate to do X, Y, or Z with regard to something that was coming down, or you know, we think he's a great guy and continue supporting him and that sort of thing. So there was a built-in, under what you're saying, attack, promote, support, there was

a built-in recognition that somehow you could read that into it. I think that the fact that you have a candidate that does not make any reference, and this goes back to the old advisory opinions the Commission issued, make no reference to whether or not that candidate was up for election, him or herself.

And, granted, when you're at the presidential level, people are going to know that by its very nature. But in a lot of places, if you're dealing with a senator endorsing a congressman or a congressman endorsing somebody else, they're not even going to pay much attention to what other issue may be lurking out there other than the immediate election that they're asked to endorse.

And I think that, you know, that's sort of the genesis of all this, what do we know about the person that's on the screen, what role is he playing, almost a two hat theory that we use in other context. I am a member of Congress, and I am the leader of the party, and I'm out there asking

people to support somebody at the lower level to be able to be part of the team that's going to get a legislative agenda approved.

As long as I don't refer to my election or somehow be viewed -- or there is no glowing statement made by the person who is being endorsed, that I'm doing this because I want to see that the president not only gets re-elected, but his agenda gets passed, that raised it to another level. But if you get somebody out there that has no reference back to themselves, but is only in talking about, you know, somebody else, I think there's a legitimate place for that, and I think you can use -- I don't think that the McConnell decision precludes the Commission from taking that position, the bottom line.

MR. SANDLER: We would be comfortable, I think, with the promote, attack, support, oppose standard, and to a certain extent, it would limit what can be said in an endorsement advertisement. But if you look, for example, at the Weinzapfel advisory opinion, you know, and

assume that that was one federal candidate endorsing another, I think you would conclude that the endorsing candidate, in that case it was Senator Bayh, he was not being promoted or supported, nor was his opponent being attacked, so --

MR. NORTON: Mr. Hoersting, the Circuit Court in Shays, and sort of wrapping up its coordination analysis, the record before us, however, provides no assurance that the FEC standard does not permit substantial coordinated expenditures. You point out on page seven of your comments that, according to the Buying Time study, a 60 day period would capture over 80 percent of what the Buying Time study considered coordinated electioneering ads. My question to you is, would the 60 day -- would the Commission's use of a 60 day standard satisfy -- assure the court that the regulation was not permitting substantial coordinated expenditures?

MR. HOERSTING: That's an excellent question.

MR. NORTON: Is 20 percent of uncovered ads too much?

MR. HOERSTING: I'm not sure what will persuade the court, that's a great question. If I were the court, I'd be persuaded, I think is the best way I can answer that question in fairness. But if you look --

CHAIRMAN TONER: Can we nominate you for the federal bench?

MR. HOERSTING: Do you know somebody who could do that? But within 120 days, roughly 95 percent of electioneering ads are covered. But I would like to believe that -- let me start over. The court has sent the Commission back on a fact finding mission. The Commission needs to go back and look at the Buying Time studies, needs to look at IE's by national party committees, when it does that, it will find that the record supports a 60 day standard of communications.

MR. NORTON: Let me just follow up for a second. I know you wanted to talk, Mr. Josefiak,

but my question is really for you, so you'll have a chance. You're suggesting that we ought to really equate what went into the electioneering communication rule in fashioning our coordination regulation. But it seems to me there are some meaningful differences that the electioneering communication rule was a rule generally applying to outside parties that says that, without further evidence, we can look for certain attributes in an ad, and we're going to conclude that it was for the purpose of influencing an election. In this context, we have more in front of us. I mean we've talked about the content standard is creating a suspect class of communications, but it was really intended as a filter, and the focus really has to be on was there a request for that ad, was there material discussion about the ad, and don't those kinds of things provide separate indicators for the Commission to look at in determining whether a communication was for the purpose of influencing an election.

And, therefore, to say, well, we ought to

equate the analysis here with the support for the electioneering communication rule really ignores that in this context, we have a lot of conduct to look at that might help indicate to us that we've got a communication that's for the purpose of influencing an election.

MR. JOSEFIAK: Sure, but I think you're going to look at the request for the ad is not going to come from the endorser, the request from the ad is going to come from the person who wants the endorsement.

MR. NORTON: I'm sorry, I was trying to step away from the endorsement context and speak more generally about the 60 day standard that you're advocating.

MR. JOSEFIAK: Okay. But in that, in looking at the studies and going back, the issue is, I know, and that's why I had the sidebar with Joe is, to my understanding, we were very -- not only do you have to look at when ads ran, but I think for the purposes of this regulation and whether it's 60 days or 120 days, was there

coordination? And we were taking, and I think Joe was, too, when it came to these kinds of public communications, we weren't letting anybody coordinate with anybody on these things. It was just the concept of, you know, so it's not just when ads ran, it's whether or not they would have triggered something and whether they were really independent from any sort of coordination issue, and I think that's more relevant here and not necessarily looking at when ads ran.

But I just think that, certainly it's a filter, but the question is, you know, is that the end game, and my point is, I don't think it can be an end game, it's certainly a safe harbor, but I don't think it can be the end game.

MR. NORTON: Thank you, Mr. Chairman.

CHAIRMAN TONER: Thank you, Mr. Norton.
Mr. Costa.

MR. COSTA: Mr. Chairman, my questions have been answered by the panel. Thank you.

CHAIRMAN TONER: Thank you, Mr. Costa.
Well, then we can begin a second round of

questioning, and we can begin with Commissioner Mason.

COMMISSIONER MASON: Okay. Gentlemen, help me out. The criticism about 120 day or 60 day was, in part, related to the test that we then used, and in essence, was pointed at the express advocacy test, and Steve has pointed out the problem that I fully recognize of, it's sort of a chicken and egg question about whether you have an expenditure first, and then that has to be coordinated, or does the conduct of coordinating turn something that otherwise wouldn't have been an expenditure into an expenditure. It is, by the way, I acknowledge, very hard to read the statute that way, because the statute, in 441a(a)(7)(B)(ii), starts with expenditure.

And then it says if an expenditure is coordinated, it's a contribution. And so it's very hard to jump to the end of that discussion and say, oh, well, if something is coordinated, it's an expenditure, because that precisely begs the question, you know, to be answered.

But I think the vulnerability is -- lies, in part, in the McConnell decision, and that is, how do we answer the question or the charge that McConnell, though it claimed otherwise, in fact, overturned Buckley, because they swept away the express advocacy decision as constitutionally required, and of course, it's sitting there in the statute, and definition of independent expenditures in maybe another place or two, but they seem to say, well, this is now only an exercise of statutory construction, so we could say, well, yes, it applies to everything except BCRA, everything that BCRA didn't change as a statutory matter, but then they told us it was functionally meaningless. And some discussions about constitutional standards have gone back to what if there were a constitutional standard, for instance, dealing with ghosts, because in 1789, everybody believed in ghosts, and you know, today we don't. And so how do we deal, how do we enforce a standard that the court has essentially declared to be a ghost?

MR. HOERSTING: I think there are a couple

of things here. As you know, 441a(7), particularly Roman 1, is a core FECA provision. And the Supreme Court in McConnell said that the Buckley gloss remains on FECA provisions.

COMMISSIONER MASON: But then they said, but it doesn't mean anything.

MR. HOERSTING: They said it's functionally meaningless, and then they also said, and I'm paraphrasing, we invite Congress to do more, because when they do, we'll be ready for it, that's the point. You have to look at what Congress has done thus far and what was the gloss placed on that. In fairness, the McConnell court, under jurisprudence, can only address those things that are amended by Congress. It can't put new spin on old statutes, that would be inappropriate jurisprudentially.

So 441a(7)(B)(i) is an old standard, it contains Buckley's gloss theoretically. The McConnell thing about functionally meaningless says Congress, we have no problem with electioneering communications, and when you want to send us more,

please do. Now, the problem you have, in my opinion, I'll speak very bluntly here, is, you have a District judge who doesn't really get the nuance of those arguments, and you have an Appellate Court that didn't focus on them, let's put it that way. So now you're sent back to a factual inquiry to build a record for the content standards you have already promulgated, and I wish you well in that. But if you and I were discussing the whole FECA, Buckley, BCRA, McConnell regime and what that time line looks like, then that would be my answer.

COMMISSIONER MASON: I still -- I'm not sure what your answer is, because whether it's 60 days --

MR. HOERSTING: Yeah.

COMMISSIONER MASON: -- or 120 days, we're still vulnerable to a charge that outside that time period, we're allowing explicitly election related ads --

MR. HOERSTING: Right.

COMMISSIONER MASON: -- to be coordinated under, you know, under the guise of a functionally

meaningless standard.

MR. HOERSTING: Right; two things -- I'm sorry, Tom and Joe, the last thing I'll say about this is that, oh boy, there it goes.

COMMISSIONER MASON: Let your colleagues help you.

MR. HOERSTING: Yeah, please, go ahead.

MR. SANDLER: Remember that the -- Congress could not agree on what the rule should be for coordination, and consequently left it to the, you know, to the Commission to come up with it, and the only direction was, with respect to the conduct standard, could not require agreement, you know, they're trying to overturn the Christian Coalition case with respect to the conduct standard. Again, in terms of the party coordinated communications, there was a conduct standard in place, you know, well before BCRA, Congress did nothing to address it or change it.

I think the Commission has a, you know, a good deal of leeway in determining what the appropriate conduct standard is, you know, in coordination, and is not limited to every kind of --

everything that falls under the, you know, under the definition of expenditure.

MR. HOERSTING: Now, Mr. Chairman, I apologize, may I say what I wanted to say?

CHAIRMAN TONER: Go ahead.

MR. HOERSTING: Thank you. Sorry about that. I just wanted to say that the record also supports the notion in the Buying Time studies that election, excuse me, lobbying ads run at all times during the year. So if the Commission says, yes, we have it down to 95 percent, or yes, we have it down to 80 percent, we think that's enough, because the same studies we're looking at to figure out where the 80 percent and the 95 percent outliers are, those same studies tell us that issue advocacy, genuine issue advocacy happens 365 days a year. So in terms of that balance, the Commission is going to be happy at say 80 percent, or happy at say 95 percent. But the idea -- you could now and forever stop every possible ad that someone would think is electioneering, and I think it's beyond the Commission's capacity, and I don't think a

court would hold you to that standard in the future, I really don't believe they would.

CHAIRMAN TONER: Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. As you know, I wasn't here for the first go around, so I don't know whether I would have voted for the original set of coordination rules or whether that's the all time perfect set of coordination rules.

But if I'm hearing you correctly, and I'm directing this more at Joe and Tom, you would say that you've been living with this stuff for a cycle, you understand it, your client understands it, and it's working to the, you know, as far as it goes, and you'd rather that we make fewer changes rather than more changes rather than, you know, start off on a search for the all time perfect standard, we're better off sticking closer to what we've already got.

MR. SANDLER: Well, let me address specifically the context of the national party committees and their expenditures, the question of

when their expenditures are coordinated with their presidential nominees, because my colleagues who represent the congressional senate committees have submitted their own comments, their own views, so let me limit myself to that context. Just as a factual matter, the 120 day standard knocks out essentially the entire presidential election year, except for certain narrow windows in certain states. So the early states, let's just forget Iowa and New Hampshire and let's talk about the first -- the opening of the window, and I'm not sure exactly what it's going to be, but more or less --

COMMISSIONER VON SPAKOVSKY: Different for both, but it's very close.

MR. SANDLER: Right; the beginning of March, there's a period of days, you know, in assuming -- so say it's 2008, with a party out of power, convention is going to be in mid-July, there's a period of days in that series of five or six states when you -- if the party wanted to, they could coordinate with a presumptive nominee, if there is one, and there often isn't one after the first

round, without having it, you know, without having it count against 441a(d) by virtue of the 120 day standard.

Let's look factually, did that happen in 2004? I can state unequivocally for the DNC, it did not. You will not find in these 200 ads that these reformers have had an example of that. It's outside 120 days, and it's not independent -- we didn't run any independent expenditures that early anyway. But an ad that but for the 120 day standard, would have had to count against 441a(d) and we didn't count it, it didn't happen.

MR. JOSEFIAK: It just -- it worked out, and Joe is right, from our side, because of how late the convention was, that we may have, you know, we started almost the same time in January. January was really, I can't remember exactly what the date was, but it was sometime in January of '06 where the 120 days kicked in, and then it ran all the way through for us, because we, you know, we were -- by the time we got -- and I think, on Joe's side, there may have been a two week window or

something between the convention and the -- when the 120 days would actually kick in for the general, but it was very small, I mean and nothing happened. I mean for all practical purpose in the presidential cycle, once you hit the election year, it was just -- you're within 120 days of something or other all the way through.

COMMISSIONER WEINTRAUB: Would you see any reason for having a different standard for congressional, senate, and presidential races? That's one of the questions the court wanted us to explore.

MR. SANDLER: No, I don't think that the --

MR. JOSEFIAK: I don't think so, because, you know, when you're dealing with a presidential, you're dealing with a nationwide campaign in one message. When dealing with the congressional, you're going to have multi, you know, you get some primaries that are as late as September, some early primaries, and you just -- I mean and you're talking about a specific candidate for a specific

election, you know. Senator Reid talking in terms of -- talking to Senator Reid about some race in another state isn't going to impact on Senator Reid's election in the state of Nevada and vice versa. I mean it's different running a national campaign versus running a state-wide campaign, and I don't think the rules should be any different.

COMMISSIONER WEINTRAUB: Now, one of the hypotheticals that was discussed this morning was this notion that outside of the 120 day window, there's sort of a free for all because express advocacy is functionally meaningless, and you know, this is the reformers' concern, that you get outside that 120 day window, and then a candidate or a party committee or whoever could go to an outside party and essentially say here is the ad that I would like to have run, I don't have the money for it, please run it for me. Are you aware of any instances of anything like that happening ever?

MR. SANDLER: No, I'm not aware of it. Again, from the standpoint of coordination between

parties and candidates, on the one hand, and you know, outside organizations, on the other, but again, I want to focus my remarks on coordination between a party and their own candidates, and again, the record will show that did not happen.

And I think that the Commission could also look at the, again, the factual record with respect to the Democratic Congressional Campaign Committee, the Democratic Senatorial Campaign Committee, did they run ads referencing candidates outside the 120 day window that were not independent expenditures, but that they did not report as 441a(d) by virtue of the 120 day rule for the cycle when it was in effect, '03/'04, I think you'll find the answer is no.

COMMISSIONER WEINTRAUB: I just want to get it for the transcript.

MR. JOSEFIK: Yeah, I would agree. I mean I'm not aware of anything like that. If anything, it was, you know, the concern was so great about this issue that you just -- I don't think you're going to find it. I'm not aware of it, and certainly from the party committees.

COMMISSIONER WEINTRAUB: Mr. Hoersting?

MR. HOERSTING: I'm not aware, no.

COMMISSIONER WEINTRAUB: Okay, thanks.

And one more quick question, if I could. I appreciate the record that the Chairman is trying to build for an endorsement exception that would have, you know, that would permit endorsements as long as there wasn't an express advocacy component for the endorsing candidate.

But following up on the General Counsel's question, which was almost exactly the question that I was going to ask, assume that you have a Commissioner that, having read McConnell, might be a little bit squeamish about throwing around that express advocacy phrase too much and might feel more comfortable with the PASO standard, would that still work for you if you had an exception that said you can endorse candidates, it's not going to count as coordination as long as it doesn't PASO the endorsing candidate?

MR. JOSEFIAK: And I think our comments actually reflect that. I think it's better than

nothing. I mean personally, I would love to be in the express advocacy world again, but we're not, based on McConnell, and I think that's the best we're going to do. But the challenge is to try to figure out, in looking at the six of you, as to what you're going to view as PASO and what is not, and then that's what was the beauty of express advocacy. It was clear, now we don't have that luxury anymore unless we get some new direction from the court, but until then, I think that's the best we're going to be able to do. At least it gives us some option here.

COMMISSIONER WEINTRAUB: I appreciate that. Mr. Sandler, would you agree?

MR. SANDLER: I do agree with that. As I say, you could see where the PASO standard could limit the content of an ad, I mean instead of just showing B-roll of President Bush with the candidate, if they said, you know, if the President was taped saying, well, you know, this candidate Smith will work with me, he'll be a great partner in Washington in the fight against terror, blah, blah,

blah, probably would be PASO, and therefore, if you did have such language, it would count as 441a(d) for the, you know, with the presidential, but I think that's a reasonable place to draw the line. You would have to draw those kind of content restrictions.

COMMISSIONER WEINTRAUB: You wouldn't have too much trouble drafting the text of the ad that you would feel comfortable?

MR. SANDLER: Correct, exactly. And again, you know, steering clear of that, once you steered clear of the PASO, I think you've also comfortably steered clear of implicating the interest again identified in Colorado Two and limiting a party coordinated expenditures.

MR. JOSEFIAK: At least we'd know what the limits were and we could adjust accordingly, that's better than nothing.

COMMISSIONER WEINTRAUB: Thanks.

CHAIRMAN TONER: Sometimes better than nothing is the best we can do, right? Commissioner Von Spakovsky.

COMMISSIONER VON SPAKOVSKY: I have one question, but the set up of the question is very long, so I'm going to pretend I'm a U.S. Senator and spend almost all my time asking the question.

CHAIRMAN TONER: We can extend your remarks for 20 minutes.

COMMISSIONER VON SPAKOVSKY: I want to go back to the current rule we have which would seem to obligate us to prosecute endorsements, because the way I try to look at these regulations and rules, and I'm certainly new at this because I'm new on the Commission, is to relate it to election history in how campaigns have been conducted in this country. And I mean this rule reminds me of a famous story from Georgia, you know, in 1964, Bo Callaway was elected as the first republican congressman since reconstruction, and the way he did that was that he took advantage of an interesting quirk of the politics of the time, which was that although Georgia was solidly democratic and you had to be a democrat to get elected to local or state office, Lyndon Johnson

was very unpopular, and Bo Callaway used an advertising campaign, and whenever he would get to a fair or anything else where the other candidate was, which was an incumbent democratic congressman, the first thing he would say when he stood up was, hi, I'm Bo Callaway, I'm running for Congress, and I want you to know that I'm going to be voting for Barry Goldwater for president, and then he would turn to the incumbent congressman and ask him, who are you going to vote for.

Now, the incumbent congressman was in a very tough position because if he said that he was going to vote for the democratic president, he would be in trouble with the audience, if he said he wasn't going to be, he would be in trouble with the democratic party. Finally, the very end of the campaign was the first televised debate in the history of the state, the incumbent congressman sent a staffer over to Callaway and said, the only way I'm appearing at this is if you promise at the televised debate, you will not ask me how I'm going to vote for president. Bo Callaway agreed to do

that, they televised the debate on WSB, which is still a station in Georgia, and the first thing Bo Callaway said when the debate opened was, well, I'm not going to ask my opponent who he's going to vote for for president because I promised not to do that, but I want you to know I'm going to vote for Barry Goldwater.

Now, the reason I bring this up is that my understanding of our current rules are, that if the FECA and BCRA rules had applied, then we would have to prosecute Bo Callaway for doing that kind of an endorsement in his communications and fine him for doing that, even though I see absolutely no corruption in his doing that kind of endorsement, and I don't see the appearance of any corruption. I mean what corruption is there existent in that kind of a situation that should cause us to regulate?

MR. HOERSTING: Commissioner, if I might, let's go back a little bit in time here. We had 270 days to write, and I say we, I used to work here, I shouldn't say we. The Commission had 270

days to write a raft of rulemakings, the original BCRA rulemakings. And take it from me when I tell you, what has caused all of this AO 2004-1 problem and all this endorsement problem, particularly from federal candidate to federal candidate, is the word "that", where it should have been "a".

If you're really interested in this issue, I commend page 14 of my comments to you, and you'll look at the history of this, and you'll realize that in a flurry of madness, the Commission put a payment made by someone other than that candidate, that's actually contrary to a statutory provision in BCRA, Section 214(c), which says we require the Commission to write new regulations for payments by persons other than candidates, authorized committees. So my understanding of the history is, it got missed, and the simple word "that" has created all this turmoil. And again, I commend you, page 14 of my comments, I would read the next two or three pages, and the way out of this, particularly from federal candidate to federal candidate endorsement, is to put the word "a" back

in where that used to be. You're doing a rulemaking, now is the time.

MR. JOSEFIK: The other issue, I think, first of all, you know, what we were talking about in the Kerr AO was a public communication that had all sorts of other implications to it, not somebody getting up on a podium and saying something. Hopefully there's still that First Amendment right to speak as long as it's not costing anything.

But beyond that, I think, you know, the Kerr AO was serious because it had -- you had to make a decision if you were within the 120 days whether you were going to do it or not, and the decision would have been made not to do it if were outside the -- within the 120 days, because that's not a very good way to spend money in a state that's not targeted when you know that you only have certain resources to spend. Having said that, I think more problematic, and quite frankly, speaking for the party, and I have to think in terms of not only does the RNC support, you know, federal candidates, but state and local candidates, as well, I think

this becomes much more problematic for the member of Congress that wants to go and endorse a local candidate.

And if you're going to treat that as some sort of, you know, allocable expense to that candidate, and how does that impact on the whole soft money issue when you're dealing with a gubernatorial candidate, for example, that's raising non-federal dollars and wants the endorsement of a senator from that state if the senator isn't going to pay his or her fair share of that cost based on an allocation formula and time and space.

So I think you've really got to look at this and set -- that's why I like the PASO at least, at least you can be able to demonstrate that if Senator X is out there and endorsing his or her local legislative team, that somehow that legislative team will be able to do it as long as there is no opposing or supporting or attacking the federal candidate. There's got to be some recognition of what the role is of a senior member from that state with regard to the other elections

that are going on.

CHAIRMAN TONER: Thank you. I guess I'm next up. And, Mr. Hoersting, I appreciate your testimony on the that versus a issue, and I'm going to take a hard look at your comments in that area.

MR. HOERSTING: Thank you.

CHAIRMAN TONER: And I also appreciate Commissioner Weintraub's thoughts. You know, if we're going to do these -- an exemption for endorsements or solicitations, you know, if the choice is between express advocacy and PASO, I think it is highly relevant for us to look at how the express advocacy test fared in McConnell, and that's got to be part of our decision making. And I appreciate the testimony from the witnesses, that they felt like they could work within a PASO framework. I understand, Mr. Hoersting, you kind of part company on that issue.

But I think, Mr. Josefiak, I think I heard you say at one point that another possible relevant factor in the endorsement setting is whether or not the endorsing candidate is identified in his or her

capacity as a candidate in the communication. Is that another indicia that we ought to focus on or consider in fashioning if we were to fashion an endorsement exemption?

MR. JOSEFIAK: Well, it's certainly a focus of the Commission in previous AOs, you know, looking at what context you were being perceived as as the senior party leader in the state that was trying to get someone elected, or as opposed to someone that's trying to use that to help you get re-elected, I think that was one of the indicia that was -- that the Commission looked at, so I think it is important. You know, right now, for example, we don't have the problem on the presidential side because the President isn't a candidate. So if he wants to go out and endorse everybody, that's great, we don't have that problem anymore, but, you know, again, a year ago, it was a problem.

CHAIRMAN TONER: If we looked at an indicia like whether or not a candidate is referencing his or her status as a candidate or

whether or not there's a reference to voting or the election in the communication, would that be a way for us to get out of the conundrum of having to choose between express advocacy and PASO, perhaps, in fashioning an endorsement exemption?

MR. JOSEFIAK: Well, you could, but you know, I would -- there's another way you could look at it. From Commissioner Weintraub's standpoint, that could be part of the PASO, you know, sort of check list, you know, how are you going to decide that issue, well, that's one of the indicia, is that person recognizing himself or herself as a candidate for election in their own right, and then you move from there. Somewhere along --

CHAIRMAN TONER: Are you inviting us to define PASO?

MR. JOSEFIAK: Well, somewhere along the line, and it may take 25 years, but you're going to get there, just like you did with express advocacy over the years versus, you know, express advocacy, the bright line, versus the infamous Furgatch decision, where it wasn't such a bright line. So,

you know, one way or another, the court is going to force the Commission to get there.

CHAIRMAN TONER: I'm sure we all look forward to that project with great relish. The other thing I wanted to follow up on was in terms of solicitations. There were some questions in the earlier panel in terms of a possible exemption for federal candidates and office holders who are soliciting funds for national party committees or other state party committees, and we assume that in doing those types of solicitations, those candidates and their agents are going to be looking at those pieces before they go out, making sure that it makes sense politically, what's being said in those pieces. Would you be comfortable if we fashioned an exemption in that area, again, conditioned on the absence of PASO in terms of the office holder who's signing the piece, Mr. Sandler?

MR. SANDLER: Well --

CHAIRMAN TONER: It's sort of a parallel issue with the endorsement issue except it's dealing with, you know, fundraising, solicitations

for other entities.

MR. SANDLER: The problem is that it gets to be somewhat difficult if, even in the absence of earmarking a candidate that signs a fundraising solicitation for a party committee can't refer to their own candidacy as being part of the effort, that the party is making to get its candidates elected. I think that we probably would find most practical a broader exemption, but maybe that's limited in terms of certain types of public communications. For example, I don't think the Commission would want to allow broadcast communications to be exempt from 441a(d) if they just had some fundraising pitch added to it. I think we're talking here about, you know, traditional fundraising, direct mail, and telemarketing.

CHAIRMAN TONER: Would you be comfortable with an approach that covered media that are not essentially the electioneering communications media, are not broadcast, television, radio?

MR. SANDLER: Yes, that would certainly

work.

CHAIRMAN TONER: And combined with that, are you saying essentially that you prefer some sort of -- the absence of express advocacy as a test for solicitations or that you're just not as comfortable with PASO in this environment?

MR. SANDLER: I just don't think that PASO, you know, will work in this context, and it should be --

CHAIRMAN TONER: In the fundraising?

MR. SANDLER: -- express advocacy some other --

CHAIRMAN TONER: Mr. Josefiak, your thoughts on that?

MR. JOSEFIK: Maybe my client should hire Mr. Sandler because I've been taking a very conservative view of this, and I'm sure my client would love that. But, you know, we took the position basically that, you know, if you're going to be signing a letter like that, there could be no reference, and so if the Commission is going to allow that, I'm all for it, but you know --

CHAIRMAN TONER: No reference, I'm sorry,
to --

MR. JOSEFIAK: No reference to your own
campaign.

CHAIRMAN TONER: Right.

MR. JOSEFIAK: And so that, you know, I
think that would be a great move, it would
certainly solve a lot of problems, but, you know,
that kind of clarity I think would be needed,
because I think there are --

MR. SANDLER: Right.

MR. JOSEFIAK: -- there are a number of
institutions, not only at the national level, but
when you get down the trail to the state and local
level that need to know that, because right now it
seems to be a confusing state of affairs. There is
no, in my mind, there is no distinction between a
fundraising letter that refers to a campaign versus
just a general generic letter that goes out to get
somebody to vote for somebody, because part of the
vote process is also a solicitation process, and
it's difficult to exclude them, but, you know, I'd

certainly be for some sort of an exemption that would allow that so that we wouldn't get our clients into any sort of hot water with the Commission.

CHAIRMAN TONER: Thank you. Mr. Vice Chairman.

VICE CHAIRMAN LENHARD: Thank you. If I could just go back to some comments by Commissioner Weintraub. I wanted to highlight that the reference to the express advocacy standard as functionally meaningless was also quoted by the Court of Appeals in the Shays decision that has led us all to this room today, and so it is obviously a concern. It may be a bit of an aside but Mr. Josefiak, you mentioned a couple of times today that the national parties were engaged in lobbying activity, as well as efforts to get the candidates elected, and there were some comments, I'm not sure, I think it was this morning, where people were operating under the assumption that national parties did nothing other than get their candidates elected, while it was not only their primary purpose, it was

their sole purpose. If you could just detail briefly what, if any, activities the national party is engaged in.

MR. JOSEFIAK: Sure, and I wouldn't classify it as lobbying, I'd classify it as grassroots activity, although under the most recent legislative proposals, grassroots would be lobbying. But I would look at it as the point of going back to the grassroots through the state party and through the county levels, through the email process, getting people engaged to write their congressman and senators to support the President's position on social security and to get their members to vote for that, or welfare reform, or tax cuts, or the nominations, you know, before the senate on the Supreme Court, and to try to activate the base to get out there and do something to encourage their members from a legislative standpoint.

You know, part of the deal is, you win elections, but that's not the end all of a party organization. Once you win elections, you're

responsible for governing, and part of that governing is to get what you promised across so that you can get re-elected again. But the idea is that you ran on something, it wasn't just because, you know, I'm better than Joe or Joe is better than me, that we ran on a platform of trying to do certain things, and once you get in, you want to perform on that, and there is a great deal of effort going into the process to get to encourage the electorate from the base all the way through, including independence, to go out and support the President, and to let the members of Congress know that you support a particular piece of legislation that's pending before the Congress. I think that is a vital part of what we're doing.

My Chairman likes to say, you know, not only worried about, you know, winning the elections in '06, but getting the President's agenda through, and we've got three years to do that, and it's an important part of what the national organization does, and it encourages the states to get involved, as well. It is a grassroots effort. So, you

know, the idea that everything that we do is to influence an election, I think is not to understand what a party organization is and what it's supposed to do under our own charter.

VICE CHAIRMAN LENHARD: Thank you. Mr. Chairman, if anyone else had -- I'd like to use the balance of my time if any of the other witnesses have anything to add.

MR. SANDLER: Well, there's no question the DNC runs all kinds of communication and has in recent months and weeks on issues, you know, opposing the agenda, the Bush administration, and taking the task on, you know, national security, wire tapping, opposing the nomination to Judge Alito on all kinds of things, not one of which mentioned any active candidate for office. I don't think anyone would suggest that if those kinds of communications are discussed with Senator Reid, the senate minority leader, and it's run in Nevada, that that should count as some kind of 441a(d) expenditure. I mean that's what we're talking about here.

COMMISSIONER VON SPAKOVSKY: Well, the reformers said that should be regulated this morning.

VICE CHAIRMAN LENHARD: Mr. Chairman, I have no further questions.

MR. SANDLER: It was implied.

CHAIRMAN TONER: Thank you, Mr. Vice Chairman. Mr. Norton.

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

CHAIRMAN TONER: Okay. Mr. Costa.

(No response.)

CHAIRMAN TONER: Okay. That concludes then our session today. The Commission thanks very much the three panels being with us this afternoon, and we will be in recess until tomorrow morning, when we will resume the coordination communications hearing. Thank you very much.

(Whereupon, at 4:35 p.m., the hearing was recessed, to reconvene at 9:30 a.m., Thursday, January 25, 2006.)