FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON:

COORDINATED COMMUNICATIONS

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P R O C E E D I N G S

CHAIRMAN TONER: Good morning, the Special Session of the Federal Election Commission for Thursday, January 26, 2006, will come to order.

Welcome to the second day of hearings on the Commission's proposed rules regarding coordinated communications. Yesterday, we had three lively and informative panels and look forward to hearing from our witnesses today.

Each of today's panels will last for an hour and a half. Each witness will have five minutes to make an opening statement. We have a light system at the witness table to help you keep track of time: the green light will start to flash when you have one minute remaining; the yellow light will go on when you have 30 seconds left; and, the red light means that it's time to wrap up your remarks.

For each panel, we will have at least one round of questions from the Commissioners, the General Counsel and our Acting Staff Director. We may have time for two rounds of questions and,

actually, yesterday we were able to have two rounds of questions for each of the panels.

We'll have a short break between the first two panels this morning, followed by a lunch break before the third panel this afternoon, about a two hour break in the middle of the day to do that.

Our first panel this morning consists of William McGinley, on behalf of the National Republican Senatorial Committee; Cleta Mitchell, from the law firm of Foley & Lardner, here in Washington; and Brian Svoboda, on behalf of the Democratic Legislative Campaign Committee.

So, if the panelists are ready, we welcome you to come to the witness table and we typically proceed in alphabetical fashion. In terms of opening statements that would mean that Mr. McGinley, we would hear, first, from you, then Ms. Mitchell, and then we would hear from Mr. Svoboda. So, Mr. McGinley, whenever you're ready to begin, we look forward to your remarks.

MR. McGINLEY: Thank you, Mr. Chairman, Mr. Vice Chairman, Commissioners; thank you for the

opportunity to present this testimony on this important rulemaking. Here we go again.

The coordination rules impact, under consideration today, impact every facet of the NRSC's operations, including its relationship with its federal candidates, state and local candidates, and likeminded outside groups. They even impact which vendors the NRSC will retain for communication and political strategy services. Thus, the NRSC is providing these comments as a member of the regulated community that must operate under these rules.

It's important to note that many organizations have begun making plans for the 2006 election year, in reliance on existing rules. In fact, as of the date of this hearing, five states holding U.S. Senate elections are currently within the 120 day time window. Those states are: Texas, Indiana, Nebraska, Ohio, Pennsylvania, and West Virginia.

During the month of February, while the Commission deliberates on these rulemakings, nine

more states will enter the 120 day time period. So, the context of the testimony that we're providing today is real and we are currently struggling to understand where the Commission will be going with this and to plan accordingly for this election year.

With that in mind, the NRSC asks that the Commission expands the types of communications that are subject to coordination analysis under the rules, that you delay the effective date until after the election.

We've already made plans in reliance upon the 120 day standard. If you decide to expand that, we would ask that it take effect for the 2008 election cycle.

On the other hand, if the Commission narrows the types of communications that are subject to these analyses, that will not impact our plans, and we would ask that it take effect immediately.

Any changes to the rules must provide the regulated community with clear notice concerning

which communications will be subject to analysis. The Commission must remain mindful that these rules impact core First Amendment speech and activities and it should reject any proposed changes that create subjective, expansive, content, and conduct standards under the rules.

In addition, these rules must not be developed through the enforcement process. Investigations concerning coordination allegations are burdensome and intrusive matters for the respondents and the witnesses. These investigations have a chilling effect on participation in the political process.

Respondents and witnesses are forced to allocate resources to comply with the Commission subpoenas, rather than promoting their political agenda or candidates. This creates an opportunity for abuse in the enforcement process and is a severe process penalty for those subject to this; especially, if no violation is found.

In particular, the NRSC would like the Commission to address the common vendor standard

under the conduct standards. The NRSC supports creating a rebuttable presumption against coordination for vendors who create internal firewalls, to ensure that no material information is used or conveyed between their clients.

Vendors that take steps to preserve their Clients' confidential information, by assigning specific personnel to specific clients; requiring employees to establish and maintain protocols to protect information or other similar steps should benefit from this rebuttable presumption.

Common owners or overlapping administrative personnel, such as accounts receivable personnel or office managers or similar types of personnel, should not meet the evidentiary threshold to initiate an intrusive investigation into these matters. There must be a credible allegation or evidence concerning the use or conveyance of material information about specific communications for the Commission to find reason to believe and to initiate an investigation.

In addition, the NRSC supports reducing

the time period for the common vendor standard from the current election cycle to a shorter time period. If a week is a lifetime in politics, then the current election cycle standard is too broad.

Finally, the NRSC supports a rebuttal presumption against a finding of coordination in the case of the use of publicly available information. This safe harbor would go to the conduct standards under the coordination analysis. The use of publicly available information about a candidate or a political party committee should not satisfy these standards. The safe harbor would apply if the respondent can demonstrate that the information used in the communication was received or available from a source other than the candidate or the political party referenced in the election.

There is no secrets in politics anymore. I'd like to refer to the 2004 election cycle and see that Dan Balls had, basically, strategy memos published in the Washington Post. If people are sponsoring communications relying upon the information in these articles or press releases or

information on publicly available Web sites or summaries of newspaper articles about candidates or political parties, that is information in the public domain. It doesn't matter what type of form it takes. It should not satisfy the conduct standards in the coordination analysis. And with that, I'm happy to answer any questions you may have.

CHAIRMAN TONER: Thank you, Mr. McGinley. Ms. Mitchell, good morning..

MS. MITCHELL: Good morning, Mr. Chairman, members of the Commission. I'd like to just take one moment of personal privilege and welcome the new members of the Commission to our playground. And to tell you--to all of you, thank you for your service this--this is a fairly thankless job and I think, as Mr. Norton can tell you, and his staff. And all of this rulemaking that seems incessant, but thank you for taking the time in your lives to devote to this Commission.

I echo Mr. McGinley's comments about the need for a bright line. We have come to a point in

time where we seem to have forgotten one of the very most important principles enunciated by the Supreme Court in Buckley, which was that people have a right to know in advance what speech will be subject to government regulation and what speech will not. And, so, I urge the Commission in whatever decision you make to please enunciate bright lines.

Let people know in advance, not two years later in an enforcement action where attorneys come along and ask for every single thought process, meeting, piece of paper, that may have gone back and forth between a committee, an organization, a member of Congress, a vendor--and try to reconstruct after the fact--well after the fact, whether or not some prohibited activity may have taken place.

So, please, don't take the coward's way out: enunciate clear bright lines in the regulations and do not--do not rely on an enforcement action process for determining, like the Supreme Court once referred to as obscenity, that

you'll know it when you see it. That is not an appropriate way for the regulated community or the people of the United States to have to deal with the process of involving themselves in politics and public policy.

The second point I would make is that I would urge the Commission to adopt the 30/60 day guidelines. Congress saw fit to articulate the 30 and 60 days before an election was the appropriate timeframe in which it could be said that certain communications would be deemed to be public election-related.

And the reform community spent quite a lot of money and a number of years amassing a great body of evidence to support that proposition: that 30 days before a primary and 60 days before an election, radio and television communications could be deemed to be election-related. And the Supreme Court agreed with that. It seems to me that, Congress having decided and the Supreme Court having upheld, on the recommendation of the reform community, that election-related communications

could be presumed--communications would be election-related if they occurred during that timeframe, it seems perfectly appropriate for the Commission to adopt that view.

The third point I would make is that within that 30 and 60 day window, I would urge the Commission to do, as was suggested in one of the alternatives, to adopt some safe harbors, some specific safe harbors. In particular, a safe harbor for legitimate legislative communications.

It is clear, and I submitted in my testimony the evidence that is posted on the Web site of the U.S. House of Representatives. All of the adjournment and recess dates of the Congresses, since the beginning of the Republic--it is clear that in the last, I would say, since World War II--and, particularly, in the last 25 years, that Congress makes no pretense of adjourning and going home before the election season starts.

The earliest adjournment date of Congress in the last 25 years was October 4. Every other

adjournment date has been near or after the election, with periods of recess during the October timeframe.

That means that Congress is making important legislative decisions within what we would call the 60 day blackout period. And it is completely inappropriate not to recognize that and not to have some safe harbor provisions that would recognize that period for people to be able to engage in communications that reference members of Congress as it relates to legislation.

So, I'd be happy to answer questions, but it seems to me that these are important principles that balance the First Amendment interests of the people against whatever corruption issues may be at hand. Thank you.

CHAIRMAN TONER: Thank you, Ms. Mitchell. Mr. Svoboda.

MR. SVOBODA: Thank you, Mr. Chairman. I'd like to thank the Commission for the chance to testify and for their willingness to hear a wide range of diverse and contentious views. And that's

just from my own law firm. [Laughter.]

But that aside, I'd also like to thank the staff for helping to put this together so quickly and so efficiently.

Unlike my fellow panelists, I'm here, I guess as a bit of a "one trick pony." I'm here on behalf of the Democratic Legislative Campaign Committee and to talk, specifically, about state and local candidates and one particular way in which they are affected by the current rules and apt to be affected by the rules that you're considering. And that is: in the practice what, until 2002, had been the longstanding practice of state and local candidates paying for advertisements and communications that noted their endorsement by federal candidates.

Before BCRA was passed, this was a longstanding and, frankly, unlike so many other things in law, well understood practice, among both federal candidates and state and local candidates. The bedrock, to the extent there was one, was Advisory Opinion 1982-56, where the

Commission said that absent an indication that the communications were intended to influence the endorsing candidate's own election, their costs would not be treated as contributions to the federal candidate who appears in an ad or a direct mail piece for a state or local candidate and declares their support for that candidate.

The Commission, in that opinion, talked about a number of specific considerations that might affect that decision. They talked about whether the endorsing federal candidate was identified only as an office holder; whether there was a reference to the endorsing federal candidate's campaign; whether there was express advocacy of the federal candidate's election; or, whether there was a solicitation of funds on behalf of the federal candidate.

And these rules were pretty well understood by the regulated community before 2002. And, indeed, they were well understood, I would submit, by the Congress when it considered passage of BCRA in 2002.

The record before Congress when it took up the Shays-Meehan and McCain-Feingold bills was remarkably bereft of instances of federal candidates appearing in sham endorsement advertisements. Senator Feingold, for example, on March 20, 2002, went to the floor to assure his colleagues that the legislation would not affect the ability of state and local candidates to note the endorsement of federal candidates, absent promotion or support of the endorsing federal candidate.

And, finally, while Congress directed the Commission to consider certain subjects while drafting its coordination rules, this particular subject was not among them. So, a state legislator, a member of Congress leaving passage of the Shays-Meehan or McCain-Feingold bills, might very well have concluded that the world was going to continue, as it had before, with respect to that practice.

Comes now Jonathan Weinzapfel, who comes to the Commission in Advisory Opinion 2003-25 and

seeks permission to have Senator Evan Bayh endorse him in an advertisement. And, obviously, the critical question on Mr. Weinzapfel's mind at that time, was whether the endorsement would be construed as promotion or support of Senator Bayh that would violate the new statute of 441i(f).

And to the surprise, perhaps, of Mr. Weinzapfel and Senator Bayh and to the surprise of state legislators, like those associated with my client, the Commission not only answered that question, but, also, laid through the application of its coordination rules and the 120 day bright line standard. And the good news for Mr. Weinzapfel was, that the ad was deemed permitted in that instance. The bad news was the Commission sent a clear signal that had that ad appeared within 120 days of Senator Bayh's election, the ad would be treated as a contribution to Senator Bayh, by operation of the Commission's content standard there in place.

Comes next, President Bush and Alice Forgy Kerr, the candidate for Congress in Kentucky. And

the Commission goes through the same analysis. And the good news for Mrs. Kerr, in that situation, was that the Commission provided a process by which President Bush could, essentially, buy into the ad and pay for what was deemed to be his fair allocable share of it. But, then, in that same footnote, or in that same Advisory Opinion, in Footnote 3, the Commission expressly withheld the notion that this might be applied to candidates for state and local office. The Commission said--it reiterated that the determination about attribution in this Advisory Opinion applies only to two federal authorized committees spending entirely federal funds.

So, at this point, at the beginning of 2004, the door, as a practical matter, had been effectively closed to the practice that once had prevailed before BCRA and--I would submit--Congress had understood would continue.

This is especially ironic, given the legitimate interest that state candidates have in being able to feature federal candidates in their

endorsements. As I mentioned in my comments, state candidates are often not as well known in the community as federal candidates, they tend to need the approbation of more compelling figures.

And, I see my time has expired. And I appreciate the Commission's forbearance.

CHAIRMAN TONER: Thank you, Mr. Svoboda. Our questioning will begin this morning with Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. Brian, I'm glad you're here, because when Marc left yesterday, I had some unanswered questions about endorsements of all things. I guess the--I completely accept what you're saying. And I understand that most of these endorsements are completely innocuous. And from the standpoint of the federal office holder, it's--all the benefit flows to the endorsee, rather than the endorser.

Nevertheless, it's not that hard to come up with scenarios where the process could be abused. Envision a troubled Senate candidate who stands there and the ad shows the Senator in full

view saying, I'm Senator Jane Doe, America needs strong leaders, leaders who will stand up for family values; leaders who will stand up for this; leaders who will stand up for that; and in the last moment of the commercial, it broadens out and there's somebody standing next to Jane Doe and she says, that's why I'm endorsing state senator so and so because people like me need people like her to be in office. I mean, you can imagine scenarios where it could be abused.

So, I think there's a lot of sympathy up here for creating some kind of an endorsement exception. But the question is, how do we do it to avoid the reformers coming in and yelling at us for opening up these huge loopholes, you know they're prone to do that.

So, we've been toying with different things--

MS. MITCHELL: If that's the standard, excuse me--if that's the standard, I think you might as well give up. No matter what you do, they're going to yell at you--

COMMISSIONER WEINTRAUB: Well, that's a good point--

MS. MITCHELL: --so just do the right thing and don't worry about that.

COMMISSIONER WEINTRAUB: That is a very fair point, and we always appreciate your plain spoken comments, Ms. Mitchell [Laughter.]

We've been playing with different formulations. And it was suggested yesterday, we could say we'd allow endorsements as an exception, as long as it didn't contain express advocacy. But some of us feel that that might not hold up to judicial scrutiny, given what, not only the Supreme Court, but the Court of Appeals has said about express advocacy.

And given what Ms. Mitchell was saying about bright lines, and I, also, am a fan of bright lines, if we were to use a PASO standard, which, I have to say, it surprised me, but several people in various contexts in this hearing have been suggesting that we import PASO standards into various places.

If we said, there's an exception for endorsements, as long as they don't PASO the federal candidate who is making the endorsement, would you understand what you could say in the ad; would that be workable for you; or do you have a better suggestion?

MR. SVOBODA: Well, first off, I guess I'd observe that both Congress and the Commission have already created that standard. A state legislator, who wishes to sponsor an ad featuring a federal candidate is prohibited by 441i(f) and the Commission's implementing regulation from promoting or supporting the endorsing federal candidate.

So, that rule already exists. I would submit that in the case of legislative candidates, it serves as a significant bulwark against the concern that you raise. And it would be, accordingly, difficult, I think, for the reform community to contend that that was somehow contrary to law, since it was, in fact, the law that they, in fact, drafted and that they, in fact, through Senator Feingold on the floor, in considering

McCain-Feingold laid out as the sine qua non of state candidates touting federal candidate endorsements.

As to whether that standard is understood among the regulated community by state legislators, I would submit that, at present it is. I think that there is--a hypothetical along the lines of what you laid out, I think would obviously raise concerns for an endorsing candidate and for, certainly, the lawyer counseling that endorsing candidate.

One observation that I might make, though, is that it should be noted that the PASO standard applies, specifically, in the statute and in the regulations to state party communications, local party communications, and communications by state and local candidates. To the extent that the Commission finds utility in that standard in other contexts, elsewhere in the statute and elsewhere in the regulations, that places a lot of weight, frankly, on the regulations that already apply to state and local candidates. So, in other words,

the more widely applied a PASO test is and the more significant it is when you assess the activities of 527s; of non-profit organizations; of other types of groups, then I would suspect, over time, the range of conduct in which a state legislator might be able to engage in might narrow accordingly.

The fights, as these play out in enforcement in the interpretation process, are going to be over what is promotion and support and what is not. And I think you want to avoid a situation where you have a circumstance where endorsements are permitted, but only if the federal candidate appears in front of a blue screen with a scowl on his face for no more than five seconds.

And I fear that the more broadly a PASO standard is applied, the more difficult it will be for that type of conduct to occur.

COMMISSIONER WEINTRAUB: That was very helpful, but you used up all my time. Thank you, Mr. Chairman.

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

COMMISSIONER von SPAKOVSKY: Thank you, Mr. Chairman. Mr. McGinley, I'd like to ask you a question on an issue you raised in your written testimony, but I'd also like the response of the other two panelists on it.

You suggest, in your written testimony, that there should be a de minimis exception even if a communication meets the rest of the rule; however we come out with the end rule, there should be a de minimis exception. And you put it down, it ought to be for 500 people. So, if there is a coordinated communication, I assume, but it goes to 500 people or less, then there should be no violation.

Frankly, that seems like too small a de minimis exception. And I base that on my personal experience and census demographics. I started off in local politics a long, long time ago as a precinct chairman. I was then on an election board that regulated and ran elections in precincts. The average precinct size, I think, across the United States is anywhere between 2,000 and 3,000 people.

If we use your rule, you're saying that if somebody sends a mailing out to 1,000 people, which is half of one precinct, why, then, it's something that's so bad we should regulate it.

The demographics of this are that the average size of a congressional district--according to the 2000 census is about 650,000 people. Your 500 person standard would mean that if you go over 8/100ths of 1 percent of the population of a congressional district, why, then, you suddenly have a problem under our regulations.

I wonder whether that is not too small and whether a more appropriate standard might be, for example, the standard that Congress itself applied in the area of electioneering communications where the target electorate has to be at least 50,000? Well 50,000 persons is about 8 percent of the average size of a congressional district, at which point, you're probably just starting to actually affect voters with what you're doing. What's your reaction to that?

MR. McGINLEY: Actually, two points on

that: I think the point I was trying to get across, when I was discussing a 500 person threshold is the context where, maybe, a state candidate has a fundraiser where they invite 400 people to the fundraiser, it will list the federal candidate on there; it's going to be reviewed by the federal candidate for appropriateness and for compliance with the applicable Advisory Opinions for participation in a state candidate fundraiser. So, it wouldn't be subject to the coordination analysis.

In other words, what it would do is, it would permit federal office holders to participate in low-attended, low—-low-distribution for invitations for a state candidate fundraiser. That was the context in which I was referring to the 500, and if it didn't come across clearly, I apologize.

On the other hand, when we're talking about the distribution of communications that go beyond or--advertising campaigns that, for example, in Washington, D.C. Sometimes what people do is

they run advertisements in the D.C. media markets to get across a grassroots lobbying perspective.

If they're talking about a situation that might involve representatives from Virginia, Maryland--in some cases Pennsylvania or West Virginia--you may have some spillover into those jurisdictions, if they reference those candidates. I think a percentage basis would be a more workable rule in that situation.

In other words, where you have a spill--if you have a larger communications campaign that says call your Senator and it spills over into a neighboring jurisdiction for a Senate candidate who's up for election, but the distribution is, say 5 percent, as compared to the overall national advertising campaign? That should be incidental to the larger campaign. There's no intent to benefit that candidate. And it should be exempt from the coordination rules.

For the 500 person or less rule, we're talking about the grassroots events at the state or local level, where State Senator so and so wants

Senator McGinley to show up as a featured guest. They send out 400 invitations, it's less than 500, the benefits running to the state candidate, it's not a large distribution, and the coordination rules should not kick in in that instance.

And so, in other words, taking the standard for direct mail for phone banks and making sure that it applies to state candidate fundraiser invitations and other types of communications-- sponsored by somebody other than the candidate the political party referenced in the communication.

COMMISSIONER von SPAKOVSKY: Do you have a number in mind for the second situation you were talking about? You suggested a percentage, are you talking 5 percent?

MR. McGINLEY: Yeah, I'm talking 3 to 5 percent, something in that neighborhood where it's truly incidental, it's not a significant number. I mean, it may reach a significant number of people, but it is incidental to the overall advertising campaign.

I mean, as I pointed out in the written

comments, the Commission has used that type of methodology before in the context of restricted class solicitations. If there's an incidental distribution beyond the restricted class, it's de minimis and no one's going to be held accountable for soliciting beyond the restricted class.

The similar type of principles should apply here.

CHAIRMAN TONER: Thank you. I think I'm next up. Up. Ms. Mitchell, in your comments, you cite to, I think, an important evidentiary issue that the Commission faces. And that is, what the record evidence is in terms of the proportion of election-influencing ads that run in the last 30 or 60 days before an election versus what proportion of those types of ads might run in earlier time periods.

And, I guess, on Pages 5 and 6 of your comments, you cite to a number of expert reports that were prepared in the McConnell litigation. And one that stood put--in the middle of Page 5--, I believe it was an expert report by Professor

Goldstein of the University of Wisconsin. But you quote from that report and you indicate that Goldstein found that 78 percent of interest group ads that mentioned a federal candidate aired within 60 days of the general election. And Goldstein went on and found that 85 percent of ads mentioning a presidential candidate aired within 60 days of the general election.

I guess--and I'm going to be interested in pulling that study and looking at it--I guess the upshot of that would be that, for presidential campaigns, only 15 percent of the ads mentioning a presidential candidate aired earlier than the last 60 days before an election.

I guess my question--I've got two questions: First, in looking at the evidentiary record, do you think that this type of analysis is what the Commission should be focusing on; and, also, if we were to find that studies like Goldstein--and others that may be out there--and we found that there were percentages in about these areas, the high 70's to mid-80's in terms of the

proportion of election-influencing ads running in the last 60 days--do you think that's the kind of record that would allow the Commission to have a time dimension like the 60 day window you're advocating?

MS. MITCHELL: Absolutely. I think that's exactly it. My reading of the decision of the Court of Appeals is that that is exactly what they're looking for from the Commission. And to, essentially, what the Commission would be doing is confirming the body of evidence that has already been assembled for at least one type of communication. And it seems to me to make sense to have a consistent standard for other types of communications. I mean, that's what we're really talking about is whether they're election related. And that body of evidence has already been assembled, submitted, and accepted by the Supreme Court.

So, it seems to me for the Commission to confirm that that is appropriate for other purposes and other communications is totally appropriate for

the Commission to do. And it would seem to me exactly what the Court is looking for.

I still would argue that it is important that--I will say this--my objections notwithstanding, the Court has disagreed. But I've never understood why it is presumed we now presume--there is a legal presumption that any television or radio ad within 30 days of a primary or 60 days of a general, is election related. The law presumes that. So, I don't know why we wouldn't adopt that standard for phones, mail, other kinds--not the Internet, but--

CHAIRMAN TONER: We look forward to getting to that in the weeks ahead..

MS. MITCHELL: That's right. But I do think that the Commission, because we're now talking about an expanded definition because we're talking about coordination with members of Congress and candidates. That's really what we're talking about. And I just do not believe that we can--that the Commission can walk away from the necessity of recognizing the interaction between members of

Congress and their staffs and outside groups. I've always--that term, outside of what? I mean, people have a right under the First Amendment to be part of the process of legislation.

CHAIRMAN TONER: If I could follow up on that point. Because I think one of the things we're going to be grappling with is: Let's say we have an evidentiary record that's along the lines of what Professor Goldstein has assembled or other people may have assembled and we can point to numbers in these ranges--the 85 percent range; the high 70's range--one argument that could be advanced is: Well, if there's any election-influencing ads outside the window, then the window can't be constructed. That essentially, we have to get to 100 percent

My question would be: Do you read the law as requiring that kind of approach? And, also, to what extent as you read McConnell, even when McConnell rejected an overbreadth challenge to the Electioneering Communications Rules, the opinion, I think, was pretty clear, that there probably were

some ads within those windows that did not have an election-influencing record, still sufficient to have a bright line rule. How do you come out on that?

MS. MITCHELL: Well, I think that it is clear that the reform community would like to have no time limits and no content standards, so that--and members of Congress would love not to have people saying bad things about them, ever. They want to be the only ones who get to communicate about themselves. I just don't think the First Amendment allows that. I hate to remind them of that. But, believe me, we've all heard it. We know that what they're really over there worrying about on both sides of the aisle is that there are these pesky people out there who are saying things about them; about their voting records; about some position they've taken, and they would really like to ban that, full-time, year-around day-in and day-out.

The Commission's job, painful, though it is, is to set a bright line standard that

recognizes that this body of evidence shows that at certain times, you can legally presume that communications are election related. And outside of that, you really have to balance the interest of the rest of the First Amendment--to petition the government.

CHAIRMAN TONER: So, would it be your view that whatever test we construct, we do not have to have an evidentiary record that shows that there is no chance for any election-influencing ad to ever run outside that window, but, instead, we have to be able to show that the vast majority of the activity will be within the windows?

MS. MITCHELL: I think that the--I think--

CHAIRMAN TONER: Is that correct?

MS. MITCHELL: --I think it's exactly right and I think you can rely on the provision of Buckley that I quoted in my testimony, which is the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents

are intimately tied to public issues involving legislative proposals.

You can never totally separate it. They are, in fact, elected officials. We do want to know their positions on issues in legislation. We're not asking them who they're picking for the Super Bowl. I mean.

CHAIRMAN TONER: Although we'd be interested, but--

MS. MITCHELL: I think the record that you accumulate and put forward has to be directed toward balancing those First Amendment interests.

CHAIRMAN TONER: Thank you, my time has expired. Mr. Vice Chairman.

VICE CHAIRMAN LENHARD: Thank you, Mr. Chairman. I want to thank the panel for the time they devoted to preparing the comments for us, it is enormously helpful.

I think I share the concern that you've expressed about the need to create a standard that is sufficiently clear, that the people who are trying to comply with the law can understand it and can

comport themselves in a way that will allow them to avoid unnecessary legal entanglements.

The problem that I'm confronted with here is--derives from the Court of Appeals decision in which they struck down our rule on APA grounds. And they have instructed us to build a record that justifies whatever line we do draw. There were several specific questions that the Court guided or directed us to resolve. And one of them involved the potential or risk that by creating a bright line somewhere that we would open the door or permit people to engage in coordinated activities outside of that line. And that this presented a risk of circumvention.

The question, I guess, I had for you, given that you have an enormous amount of experience in the actual operation of the political world, is whether there is anything other than our regulations that would limit or cause not to occur, groups to engage in coordinated activities outside of whatever bright line we draw that would result in circumvention of the Act? And the specific

hypo--it's not a hypothetical, it's actually an ad that is running or has run--that was presented to us by one of the commenters involved, an advertisement that addressed Rick Santorum's qualifications as much as a human being, as anything else. And it ran, I believe it was 178 days prior to the election and described in the most abstract of terms him as a pro-tax-cutting human being and encouraged people to call and just congratulate him on his status as such.

It didn't seem to be particularly tied to any lobbying--any particular bill that was pending in Congress or any issue that was of particular public controversy. This was high--there was no evidence that this ad was coordinated, but I can easily imagine the Court of Appeals being concerned that, were we to draw a bright line, that this would permit--it would be legally lawful for the campaigns to coordinate to ask or request or suggest that outside groups fund those kinds of ads.

And, so, I go back to my question for you,

which is: Is there anything else that's going on in the world, other parts of the statute, practical realities of politics; other things that might lead us to conclude that this is not of significant concern, as we try and determine where the standard should be.

MS. MITCHELL: Well, I think the first thing is availability of resources. I mean, these--every group I've ever been involved with has had a limited amount of money. They're not unlimited. They don't have unlimited funds. They like to target their money for the issue that's most important to them at the time when it's most important to them. And sometimes that falls within the period that would be the blackout period and sometimes it doesn't. It just seems to me that, going back to the studies that I quoted in my testimony and that were presented as evidence in the McConnell case, they have all these experts who said X percent, huge percent of ads that mention a candidate within this timeframe are election related.

There is testimony, as well, that ads run outside that time period tend not to be election related. I mean, they've testified to both ends of the timetable, so I think that what we have to recognize is the realities that organizations weigh in when they think it matters because they have limited resources. And, so, they do it when it matters. And it may be we're going to restrict them within the period just prior to an election, but I just cannot fathom that we would restrict them outside of that established time period.

MR. SVOBODA: One thing that I might add, Commissioner, is that Congress made different choices with respect to different kinds of actors. And in the case of actors like my clients, they chose to treat them more harshly, they said to us that cyclewide, 120 days, 180 days, I mean, cyclewide, you may not promote or support a federal candidate in your public communications. And, to the extent that the Commission would propose to compound that by saying, you not only must comply

with that requirement in the statute and you may not distribute public communications in which they appear at all within 120 days, strikes me as, perhaps, contrary to the congressional design. That, in other words, the Commission is actually going beyond what Congress intended to permit when it constrained the practices of state and local candidates by adding an additional burden above and beyond what Congress seemed to want to require.

So, I guess my response to your question Is that it's actually a two-way street. There may be instances where the statute might permit conduct that Congress might have intended to restrict, but, in the particular instance of the people I'm here representing, the Commission has actually compounded the regulation that Congress established at the outset.

MR. McGINLEY: Can I make just three quick points on that question?

VICE CHAIRMAN LENHARD: Yes.

MR. McGINLEY: The first one is, I think the Court of Appeals may have misunderstood it. I

don't-—bright lines don't create opportunities for circumventing the purposes of the Act. I think it creates a vehicle for complying with the Act. It gives the regulated community advance notice as to what they can do and what they can't do; what will be subject to regulation as opposed to what will be free.

The other thing is that sometimes candidates and office holders themselves are a good vehicle for discussing issues. I mean, for example, I mean, how many people outside the Beltway know of the Bipartisan Campaign Reform Act? They probably don't know it by that. They may know it by McCain-Feingold. And if they happen to be on the ballot at that time, that could be PASOing those candidates if you aired in their jurisdictions.

So, I think that when we're talking about the discussion of issues versus the discussion of candidates or office holders, we need to understand that when somebody is crafting an ad, there's a particular point that they want to get across. And

that may not have anything to do with the election. But a federal candidate, himself or herself, may be the proper vehicle for educating the public about that type of issue.

Finally, the third thing is: You asked for a practical limitation on what people are doing as far as communications. The 60/30 day seems to be when the public pays attention. In the primary timeframe, they're not paying attention. There's the post-Labor Day rule for the general election, which is, typically, the last 60 days before a general election, where people really begin to pay attention.

And, if you talk to some of the communications experts, they're going to say it's going to go beyond that because we've got to deal with the World Series or the baseball playoffs. So, I mean, people really--there are practical considerations there where the public is not paying attention to it. That sometimes what it is is it is grassroots lobbying that comes up against the election timeframe. But as far as the

election communications itself, communicating with voters to educate them about who they should choose at the ballot box or the positions of candidates, 60/30 seems to be the timeframe in which people pay attention for election purposes.

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

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

COMMISSIONER MASON: Thank you. Cleta and Bill, both of you talked about, I think, a safe harbor for publicly available information. And I understand what you're trying to get at, but I sort of have a suspicion that it won't buy you as much as you think. And let me explain why and get your reaction.

You seem to be saying, well, if we can show that this was up on a Web site somewhere or in the newspaper, we're off the hook. But the problem that I see is that that doesn't mean that there wasn't a request from the candidate. All right, the campaign manager could have called the group

and said, did you see that Dan Balls' article in the Post? Are you going to do anything about it? It sure would help. I know it doesn't happen. It's very unlikely. The trouble that we have, though, is once we get a credible allegation--and that's a tough one--what's the threshold of credibility--we're sort of off and running. And so, I just want to get your reaction to that, in terms of if you really think it's going to shut down an investigation or if you intend it that way, how do we deal with the allegation that the campaign and the outside group shared information. And the fact that some of that information, maybe even most of it, may also have been available publicly doesn't really answer whether or not there was this cooperation between the campaign and the outside group.

MS. MITCHELL: I think you're mixing two different standards. Of course, obviously, it's all up for grabs, but a specific request, a specific suggestion is different from the available information. What we are talking about, I'm quite

certain what we're talking about are the situations where there is no overt request or suggestion. And in trying to extrapolate--because that's really the problem: there's no specific request or suggestion. The organization makes a communication based on publicly available information and that should be protected. What you're suggesting--

COMMISSIONER MASON: I understand, but our problem is--your problem is you want to address the RTB stage, you're looking at a standard where you can say, here was the article here was the Web site and so on.

MS. MITCHELL: And there was no request.

COMMISSIONER MASON: And, well, but that's our problem is that, most of the time, we get an allegation that says, so and so coordinated their advertising with such and such and the evidence is a common vendor. And--or the evidence is something else, they both attended Governor Norquist's meeting, all right? That's suspect in and of itself.

MS. MITCHELL: I understand that. But I think that--

COMMISSIONER MASON: --so, how does that help us get at these, frankly, vague but not totally baseless allegations of coordination?

MS. MITCHELL: Well, let me just say, I think, absent more--that's my position--absent more--absent a request or suggestion, that is, in and of itself, that meets the conduct standard. I have no doubt that the Commission will retain that because that's been the case for 30 years. So, I have no reason to think you're going to abandon that at this point. But, absent that, then what we're moving into is more murky--murkier areas. And, so, if it's publicly available; if it's a statement in a big room with a bunch of people and somebody goes out and does something, it just seems to me that as long as it's not the wink, wink, request suggestion and I just don't think you can extrapolate and say publicly available information somehow meets that standard.

MR. McGINLEY: I would simply--the way that I try to explain it is, it's the difference between private needs, strategies or projects of the

candidate or the political party that's referenced in the advertisement versus publicly available information. The analogy I like to draw is to the copyright laws. The copyright laws protect the expression of information but they don't protect the information itself. If a group or a party runs an advertisement that references a candidate, and they have a variety of information in that communication that you can point to The Washington Post, to The New York Times, to the local newspapers who have published it, that you can point to press releases that have been put out by a variety of different groups, including the candidates themselves, and that information goes into the communication, that shouldn't satisfy either the substantial discussion or the material involvement standards under the conduct portion of the regulations.

In other words, what we're trying--it seems to me that what we're trying to do is the coordination rules are designed to prevent a candidate or a party committee from externalizing

onto another party the needs that they have to fill in--the gaps in their resources to get their communications out. That goes to strategy; that goes to plans; that goes to needs; it doesn't go to information about party committees or candidates that may be referred to.

If you're referring to the voting record of a candidate, that's publicly available information. People are putting out press releases all the time on a variety of candidates and if that works it way into a communication, whether it came from the NRSC, from Americans United or any of the other outside groups that may be liberal leaning in the election process. I mean, it seems to me that, who cares, if it's out there in the public domain, it's not going to the private plans, needs, or strategies of the candidate or the party committee.

COMMISSIONER MASON: Mr. Chairman, my time's expired. I just want to make the point that I don't think any of us disagree and when you ask for a safe harbor in terms of how we have been enforcing the Act and will enforce the Act and when

you ask for a safe harbor you're asking for some insurance. My problem is, as much as I agree with you, I just am not sure that putting in even an explicit safe harbor in that regard and looking at our current coordination investigations is going to shut many of them down, because that, typically, isn't the nub of the investigation.

The nub of the investigation is, as Ms. Mitchell indicated, who did you talk to and when? That's the intrusive part. And even if you show us that all of this information was available in the public domain, if there's some evidence that there were conversations between the campaign and the outside group, we've got to inquire into that.

So, I'm just not sure how helpful that sort of an exemption would be.

MS. MITCHELL: It would be helpful.

CHAIRMAN TONER: Thank you, Commissioner Mason. Mr. General Counsel.

GENERAL COUNSEL NORTON: Thank you, Mr. Chairman and welcome to the panel. I was interested in the publicly available information

exception, too. And so, I want to try and follow up on Commissioner Mason's question, make sure I understand what you're suggesting.

Let’s say we have a situation where the facts are or at least it's alleged that a candidate approached a public interest group that was interested in an issue that the candidate was having tremendous success kind of hammering his opponent on. And the allegation is or the evidence is that the candidate said, look, I'm doing very well on this issue hammering away at my opponent, but looks like I'm going to run out of money to run radio and TV ads in about a month. That's the allegation that we receive.

And what we receive back from the respondent is an affidavit that says--doesn't address whether there were any communications with the candidate, but says, well, if you go to the FEC's Web site, you can discover that--anyone could have discovered that this candidate was running short of money and couldn't have continued running radio and TV ads and, therefore, the fact that I

began running ads at this particular time was based on information that was publicly available. Should that be the end of it at the RTB stage?

MS. MITCHELL: Well, I think it goes back to my earlier statement; absent some--absent more, yes, but it's the conversation and the communication. First of all, let me just say it goes to the 30/60 day issue, as well. Any candidate--any campaign I've ever been involved in does their media buys from election day backwards for that very reason, because you want to make sure that you're on the air and out there closer to the election. So, I hope nobody, I mean, that person's going to lose, so it's probably no big deal. But the fact of the matter is.

I want to say something else about practicalities. I don't know many campaigns that really want other speakers out there making communications. What we really have here to a great extent is fear by campaigns and candidates that somebody else is going to communicate a message that they don't think is helpful to their

own message. So, I just do not believe, as a practical matter, that there is a lot of effort put into--by campaigns and candidates going to third-party groups and saying, gee, we want you up on the air doing this. But let's set that aside.

I do think that your inquiry should be to the direct request or suggestion. I think that's the initial threshold inquiry, when you get. And, then, if they are willing to testify under oath that that did not occur, then I think that these other things are secondary and if it is publicly available information and they say, no, we never talked to anybody at that campaign. But we're not stupid, we hired our own pollster; our communications were based on our own market research. We know what issues are working and what issues are not. We hate this guy. We want to beat him. And, so we know what works and what doesn't and we have our own information or it's publicly available.

And if they can trace that they derived--that their communications are based on

publicly available information or their own private information, I do think the inquiry should stop.

GENERAL COUNSEL NORTON: Let me just try to clarify what you're saying. So, if what we received in response was an affidavit that simply said, started running ads in these last couple of months based on the fact they were running out of money, but anyone could have discovered they were running out of money. And they simply don't address whether a conversation or series of conversations occurred; whether there was a request, I guess if I'm understanding you correctly, we would need more, we would need that person to come forward and say, not only was it publicly available, but there was no request or suggestion.

And if we had all of that, then we could say no RTB?

MS. MITCHELL: Right. I think that you should ask that question.

GENERAL COUNSEL NORTON: Do you agree with that, Mr. McGinley?

MR. McGINLEY: I think the point that I would

make is that, the regulated community has operated under these rules now, for the 2004 cycle. And I think I can safely say that most federal candidates and political party officials know not to call up an outside group and ask them to come in and run an ad.

And the reason that I say that is, is because people are paranoid about getting into an investigation. I mean, people have looked at what it takes to go through a coordination investigation based upon what happened pre-BCRA, realizing what could happen now and I think they take extraordinary steps to try and avoid that. And I think that includes avoiding the request or suggestion or the substantial discussion conduct standards when it comes to advertisements that may be airing within the time periods that we've talked about for the content standards.

It seems to me that we're talking about for the use of publicly available information is inadvertently tripping up the material involvement standard or some type of similar standard. That,

somehow, you go through an investigation, you find an outside group that's been running an ad, that references a federal candidate, and in their documents you find a press release from the candidate referenced in the ad.

Well, the information contained in that press release, somehow makes it's way into one of the advertisements. That's a press release, something that's been discussed in the press that they've put out to the general public. It doesn't go to private plans, needs, or strategies, I mean it's something in the public domain. It seems to me, there should be some type of safe harbor or precedent that says that type of information or that type of activity is not going to satisfy that conduct standard.

I think that the safe harbor exception goes to the fact pattern where you don't want somebody to inadvertently get caught up in the conduct standards.

GENERAL COUNSEL NORTON: I see my time is up, thank you, Mr. Chairman.

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

MR. COSTA: Yes, thank you for coming. I had a question for Mr. McGinley. On the issue of firewalls and the use of common vendors, should the Commission require specific contract language when a party or other political committee employs a vendor who is also working on behalf of a candidate; and, would such language sufficiently insulate a political committee when a vendor fails to maintain that firewall?

MR. McGINLEY: I would actually agree with that. I mean, I think that candidates and political committees, when they contract with a vendor and they try and build firewalls into the contract, so that the vendor is bound not to use or convey information that they glean from that campaign in connection with other clients--I think if the vendor doesn't satisfy that, I think that should go toward exonerating the campaign committee.

I mean, it was pointed out in the original

E & J that just the existence of a common vendor can't be per se coordination; that there has to be something more just than the existence of that type of relationship. And it also pointed out that vendors who follow standard business practices, such as maintaining client confidences, not sacrificing one candidate's information by using it in another group's advertisements or activities that, if you follow those types of standard business practices, you're not going to have a problem under the common vendor standard.

But to your point, I think evidence of contract language, building those types of walls into the contract itself should create a presumption of compliance with the conduct standard.

MS. MITCHELL: And we have such a provision in the contracts--in the vendor contracts from the Republican Senatorial Committee, I mean, and we try to make it clear to vendors that we expect any information derived from work performed for the National Republican Senatorial Committee,

is not conveyed to any other client. And we make them list other outside groups or clients that may, in fact, that they may do work for so that we can know. We are trying and I will say, I think that consultants are pretty well, I think Bill's right, I mean, I think they're really--they're very careful about that. I think they try to be; they really try to be careful about that.

MR. COSTA: Thank you.

CHAIRMAN TONER: Thank you, Mr. Costa. Well, then we have time for a second round of questioning and we can begin with Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. Do you think that given the number of vendors that are out there, and the number of vendors who work for each side, because that's the way it works, that if we don't incorporate some kind of a provision like this that allows for firewalls that it's going to impair your ability to find the

people that you need to do the kind of work that you need to get done?

MS. MITCHELL: It's particularly a problem, Bill and I've talked about this several times. It's a particular problem for small firms. Small firms are particularly disadvantaged because it's hard to firewall yourself. And so, the big firms can do the firewalls a lot easier. So, I do think that--but it is difficult, I mean, as we know. As you say, consultants work for--you know they can't play for USC and Texas. And so, it's--and then you get down to preferences and who do you like better and who, people have vendors that they rely on and have trust in.

So, I think to the extent that there can be some specific guidelines and some protections, I think that's really important.

MR. McGINLEY: I think the short answer to your question is, yes. I think there are some practical considerations here. I mean, there are just a limited number of people who provide the services that political parties and candidates

need. And Cleta's right. I mean, it disproportionately affects smaller firms and they like to call the coordination rules the Restraint of Trade Act because it does limit the business opportunities that they may have.

COMMISSIONER WEINTRAUB: But would it be a bigger problem if you want to avoid the inside the Beltway crowd and actually hire local vendors out in your home state? I would assume that there would be an even more limited supply there?

MS. MITCHELL: That is absolutely true. And I come from a small state of Oklahoma. And trust me on this--

COMMISSIONER WEINTRAUB: We've heard a lot about Oklahoma, Ms. Mitchell.

MS. MITCHELL: Well, I have to do the Oklahoma mention, at least once, during the hearing. But that is a huge problem for candidates and the parties in a small state.

COMMISSIONER WEINTRAUB: Now, understanding you would prefer for us to move to a

30/60 day timeframe or, I guess, a 60 day timeframe, do you think that the current rule provides you with the kind of clarity that you need to advise your clients how to comply with the law?

MR. McGINLEY: I think the principles incorporated into the rule do, yes. The fact that there is a time period with which you need to be careful about who is referenced or what is referenced in the communications is helpful. And that, in addition to express advocacy, republication of campaign materials or the electioneering communication, I think that is helpful. And it allows the regulated community to know what they can and cannot do.

COMMISSIONER WEINTRAUB: Some of the other commenters have raised the prospect that outside of the 120 days right now, there's this sort of free-fire zone where a candidate could even go up to an outside group and say, hey, we're outside the 120 day window, here's my ad, please run it and pay for it. Are you--that actually was suggested yesterday. Are you aware of anything like

that ever happening?

MR. McGINLEY: No.

MS. MITCHELL: No.

MR. SVOBODA: No.

COMMISSIONER WEINTRAUB: We need a verbal answer so we can get it on the record.

MR. McGINLEY: No.

MS. MITCHELL: No, absolutely not.

MR. SVOBODA: No.

MR. McGINLEY: I think it's for the two reasons that we've discussed before: Number one, no candidate or political party wants to lose control of a message and say would you, please, go run this advertisement and then they're going to go out and say something that you didn't want them to say. So, I think there's that messaging component to it, plus the allocation of resources outside of 120 day--nobody's paying attention.

MR. SVOBODA: And I might make one point about message control. I mean, it's kind of relevant, I think to the situation of state and local candidates, insofar as when federal

candidates tend to participate in these communications, they tend to do it with the eye toward self-preservation, rather than self-promotion. I mean, the question is more kind of vetting this text and making sure that it does them no harm, such as, could you please excise the reference to returning the Panama Canal, [Laughter.] You know, rather than, gee, the picture of me is nice but could you enhance the colors of the flag to make them more vivid and such. I mean, it's just the reality is that they're trying to avoid active harm being done to them and that tends to be the reason for their participation in this process, rather than let me see if I can squeeze every ounce of mileage that I can get out of this.

COMMISSIONER WEINTRAUB: Do you--do any of you see any reason why we should have different standards or different timeframes for congressional versus senatorial versus presidential candidates.

MS. MITCHELL: No.

MR. McGINLEY: Not for the candidates

themselves. But if you were to adopt a standard that involved outside groups with the candidate or party committee, versus the party committee candidate, I think that you should have a shorter timeframe in that period, because it simply involves all hard money. I mean, from our perspective, we have no soft money. And it doesn't give an opportunity for you to get prohibited funds into the election process.

COMMISSIONER WEINTRAUB: So, you don't think that the presidential election cycle is inherently a longer period of time; you don't see it as a problem? Some of the commenters, obviously, do see it as a problem because there's this gap between the 120 days to the primary then the 120 days to the general and they think there's this gap problem where things are unregulated?

MS. MITCHELL: Heaven forbid that there would be a time that was not subject to regulation, right? We can stay up all night and think up all kinds of horrible possibilities, but the reality is, let's try to keep it as simple as we can and

applicable to federal candidates. I mean, there's nothing else in the statute that distinguishes between and among the treatment of candidates and committees other than the separate part about presidential matching funds. I mean, everything else--candidates, a federal candidate--a federal committee, a principal authorized committee is a principal authorized committee. I think that it would not be a good idea to start making those distinctions.

And the truth of the matter is on what basis would you make a distinction? Frankly, there are--percentage-wise there are more competitive Senate races every cycle these days than there are House races and I contend it's because the Senators don't get to redraw the state boundaries every ten years. So, I don't know on what basis you would actually make that distinction.

COMMISSIONER WEINTRAUB: My times up. Can I ask one more question?

CHAIRMAN TONER: [Nods yes.]

COMMISSIONER WEINTRAUB: Thank you, Mr.

Chairman. Several witnesses have commented in general terms--and I saw some of this in your written comments about the intrusiveness of investigations and the regulatory burden on your clients that results from--that is worsened--the broader our rules are the more of a burden and the more--and the greater your concerns about intrusive investigations.

And I wonder if you could just, I'm going to just give you a few minutes to talk about that a little bit more about how that impacts your clients' ability to conduct their--to get their message out to conduct their First Amendment activities?

MS. MITCHELL: Well, I'll just give an example, actually, I mentioned this to Bill the day before yesterday or yesterday. I have a small little group in Illinois that formed a 527 and had a Web site and did some ads and they're not very big. And they did it a little bit. And their plan is to come back and do some more this year as it gets close to the election in Illinois. And it's

all state candidate-related this year.

They're going to eat up whatever money they had to--for that because they get an enforcement action a year, a year and a half later. And, you know, so that's what we'll do this year. That's what they'll do this year. And, why? I mean, trying to make rules by enforcement actions is a very difficult and I think burdensome process. We need to have procedures that--I would urge the Commission to adopt some procedures whereby people can--you can't end one of these things. It's just, it's alive and you can't stop them. And you know, how it's ultimately going to end, but you still have to slog through the process. And there's no incentive to sue sponte report misdeeds.

I have, if you report something, shame on you for reporting it, because we're going to beat the living daylights out of you and you've got this with you till you die.

COMMISSIONER WEINTRAUB: I know what you're thinking.

MS. MITCHELL: Do something about--find

some ways to relieve some of the burdens from yourselves and from your staffs.

MR. SVOBODA: I'll give you an example of how that might have worked in a real world context last cycle. Let's say you had a state candidate who wanted a federal candidate to endorse them and they read the Forgy Kerr opinion and thought, well, we'll try to do it the right way. We'll have the federal candidate buy into the ad. Follow me, if you will, the fiction that the federal Candidate would actually do this.

But, nonetheless, let's assume that they had done that and the federal candidate's opponent sees the ad or the state candidate's opponent sees the ad and they say, well, this is weird, we don't know what this disclaimer means, this must be some sort of violation, so they file a complaint. And the complaint goes to the Office of General Counsel and there's the initial query about what to do with the complaint.

I file my response to the complaint saying, we followed the procedure set forth in this

Advisory Opinion, it was a reasonable thing to do. The text of the ad indicated no promotion or support of the federal candidate. But at some point, it's possible that the answer might come back from somewhere in the agency, well, the Advisory Opinion doesn't cover this situation because the Commission in Footnote 3 expressly said that it didn't. And, so, we're in a fight over whether the AO covered it or not or whether the Commission should proceed in the absence of the AO.

Now, you're working all of this out to the fifth step and if you're the federal candidate and the state candidate in the first instance, your answer to that is don't do it, I don't need the trouble, it's going to look weird; it's going to get attention, and unless this is really, really important to me, and unless I'm really, really willing to take the risk--which, by the way, federal candidates in this context seldom are--I'm not going to do it.

And, so, the reaction is, people don't do it. And you have a range of conduct that ought to

be permitted under the law in which people don't engage because of that dynamic. And it's not necessarily to suggest that the agency is somehow mishandling that dynamic or that somehow it's the agency's fault, it's just the reality of how the situation plays out and it's the reality of how a risk-averse client on the front end is going to deal with that situation.

MR. McGINLEY: It seems to me that the issue is that the process can be the penalty for some of these folks, in that, if they're ultimately there's not going to be a finding of probable cause there, they've gone through the pain and expense of the discovery process, complying with subpoenas; depositions; not to mention the fact that when it does finally come out to the public file there may be descriptions of the internal process by which they came about through these communications, so you have proprietary information that sees the light of day. And that would be the case for both the candidates, the party committees and the vendors, themselves.

And, so, when the process goes through, you'll hear from the regulated community, it seems that there's burden shifting. That once you get to the RTB stage and that an investigation is initiated, suddenly the burden's on the respondent to prove their innocence. Because in the coordination context with the conduct standards, if you've gotten past the threshold of the content standards and you work your way into the conduct standards, it seems that now all of a sudden, you have to prove your innocence, where there's the potential for that type of situation because what happens if there's an opportunity for coordination to occur? How do you prove a negative?

And, so, I think what the regulated community is asking for give us the clear lines so that we can take the steps necessary to comply with the law. It's not an effort to circumvent the law. It's an effort to comply with the law; to make sure we're not getting soft money into the federal election system. But still allow the opportunity for federal candidates to go down and support

down ticket candidates at the state and local level.

Allow political party committees to interact with their candidates. We're the National Republican Senatorial Committee, our members are the Republican members of the United States Senate. Yet, the coordination rules require us to erect walls between ourselves and the campaigns for any communications that air within the applicable time period or that have the content that triggers the coordination rules.

And so, we're already trying to go through the hoops and hurdles to comply with this law. And if you create vague standards and we find ourselves in some type of investigation context, it makes it that much more difficult to prove our efforts to comply with the law. So, we're just asking for some clear markers to get through the process.

COMMISSIONER WEINTRAUB: And, presumably, if those clear markers--the further out those clear markers are, if we're talking about time limits from the election, the more all those factors come

to play?

MR. McGINLEY: Yes.

MS. MITCHELL: Absolutely.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

CHAIRMAN TONER: Thank you Commissioner Weintraub. Other than that our rules are perfect and appropriate. Commissioner von Spakovsky.

COMMISSIONER von SPAKOVSKY: I want to go back to my initial question, because Ms. Mitchell, Mr. Svoboda, you all didn't--sort of--you all didn't get a chance to answer that. And I'd like you to tell me what you think a de minimis rule ought to be in the two situations that Mr. McGinley proposed. And I would say that he seemed to stick to the 500 in the local situation, which, to me, still seems extremely small because if we go from the average congressional district size down to the average state house district size, my house district back in Georgia was, I think, 50,000 people, well, 500 voters, as I said would have been one-fourth of one precinct or less than 1 percent

of a 50,000 person house district, which, again, just seems like such a minimal amount of people, it seems like you'd have to get much bigger before you're actually affecting the election. But, what do you two think about that?

MS. MITCHELL: Well, I would suggest that, Perhaps, because Congress has specifically articulated a standard for purposes of electioneering communications, that having--that the 50,000 voters in a targeted area in--a media market that reaches 50,000 voters in a given district or state, it seems to me that you could rely on the congressional language in that regard. I mean, Congress has already said that. So, I think to select another number may get you back into problems with the Court of Appeals, because it will not be based on--unless it's based on some particular study or something. Congress has spoken on the targeted communication of 50,000 to voters who can vote for that candidate. And I think that--I think the Commission would be wise to adhere to that particular description for a

definition.

COMMISSIONER von SPAKOVSKY: You mean you don't think the Court will recognize my personal experience as sufficient reason?

MS. MITCHELL: Well, I would, but I'm not sure the Court would, actually. I think that you could reasonably rely on congressional judgment.

MR. SVOBODA: Commissioner, there's actually an animating principle it seems to me beneath your question that I don't want to go unremarked, which is that the purpose of these rules is not to capture every communication from which a federal candidate might derive some benefit.

I recall, for example, Commissioner Weintraub's first question to me where she lays out a situation of ads that in no way would benefit a federal candidate. That's actually not the standard. For example in Advisory Opinion 1982-56, they acknowledged that endorsement ads did have a benefit for the federal candidate.

The standard is whether the ad is for the

purpose of influencing a federal election, and that's where these other exogenous factors such as the audience principle that Cleta talked about or whether it's other facts, affect the determination.

So, I think it's an important point to emphasize that the Commission's task here is not to be like the little Dutch boy putting thumbs in the dike trying to make sure that nothing leaks through that's going to inure any benefit to a federal candidate at all. The purpose here is to capture and regulate ads that are for the purpose of influencing a federal election. That's what Congress sought to do.

COMMISSIONER von SPAKOVSKY: No other questions.

CHAIRMAN TONER: Thank you, Commissioner. I'm next up. I want to follow-up on this directed-to discussion. And this question about should there be a numerical threshold for the directed-to element. Our current regulations do not identify a numerical threshold, though we've discussed various types of thresholds.

What if we decide we were going to have a numerical threshold, would it be appropriate for us not only to look at whether or not, a certain number of people in a congressional district could see the communication, but, also, that the communication aired when the candidate at issue was up for election.

So, for example: Let's say you have a Senate candidate running in Illinois and it seems like everybody in the world is a candidate as soon as they begin raising money, but the election may not be, say, until 2008. And maybe it's uncontested that more than 50,000 people could see a communication in the State of Illinois, but the person depicted is not running in 2006, and is not running until 2008.

If we had a numerical threshold for the directed-to element, do you think it would be appropriate for us to tie it to the requirement that the candidate actually be appearing on the ballot in that cycle? Ms. Mitchell?

MS. MITCHELL: Absolutely, and I think

that that is something that the Commission very badly needs to do. And I'll give you a perfect example is--goes to the issue of the Wisconsin Right To Life ads that referenced both Senator Kohl and Senator Feingold in the period of time just prior to an election. But Senator Kohl wasn't on the ballot.

CHAIRMAN TONER: Even though he was a candidate.

MS. MITCHELL: He was a candidate--

CHAIRMAN TONER: But he was not on the ballot that cycle.

MS. MITCHELL: --as defined by federal law. And the situation just this past fall where you had, and I think this is--let's assume that this had all happened in an election year when--because I think this is exactly the kind of issue that we need to address. And that is the Judiciary Committee completes its hearings on Sam Alito. And every day there are interest groups on both sides, who are working with members and staff on this--on the issue of the judicial confirmation.

They're very involved, these grassroots groups are very involved on both sides, as we all know. And, suddenly, Senator Mark Pryor is identified as an undecided. So what happens? I mean, that communication, is it from Senators and their staffs to groups on both sides of the nomination or confirmation issue and they go out and both sides start running ads and making phone calls and doing work in Arkansas to try to convince Mark Pryor to vote their way.

Now, it seems to me, that, let's take--set that in time, say that happens in October, it makes a difference whether he's on the ballot or not on the ballot, if you don't have the legislative exception or safe harbor. But it seems to me that you cannot say it is election related if he's not even on the ballot.

CHAIRMAN TONER: And Mr. Svoboda, I want to follow-up on your point because as I understand your testimony, the relevant analysis is not whether some communication at some level--some abstract level can be said to benefit a candidate,

but, rather, whether it's for the purpose of influencing that candidate's election. Would you be comfortable if we had a numerical threshold for directed-to, that it again would be tied to whether or not that person's actually on the ballot that cycle?

MR. SVOBODA: I think that certainly would be helpful in the case--

CHAIRMAN TONER: Would it be appropriate as you understand the case law for us to fashion an exemption along those lines? Would it be permissible?

MR. SVOBODA: I think it would be permissible and appropriate. I think the Commission's task here is to try, based on the guidance that Congress has provided to develop empirical criteria for determining whether particular types of communications are for the purpose of influencing or not. And questions of the audience of the size of the audience are going to be relevant to that; the content of the communications is going to be relevant.

CHAIRMAN TONER: And whether the person at issue within that relevant audience is actually on the ballot that cycle?

MR. SVOBODA: Yes, I think to try to enforce a rule in an anomalous circumstance like that, actually creates kind of the opposite risk for the Commission that its rules may at the end of the day not seem narrowly tailored and may, actually, prohibit conduct that ought to be lawful under the statute and under Congress's intent.

CHAIRMAN TONER: Well, to speak--to follow up on your point about anomalous rules. One that has been mentioned to us is the fact that under current Commission regulations, there's no directed-to or targeting element under the coordination rules for express advocacy communications, nor for republication of campaign materials. We do have the directed-to element for the 120 day rule.

And, Mr. McGinley, my question would be: Do you think it would be legally permissible for us to incorporate a directed-to element across the

board in a coordination setting, express advocacy, republication, and whatever standard we fashion in the 120 day rule?

MR. McGINLEY: I do--I do.

CHAIRMAN TONER: And what would be the basis for that?

MR. McGINLEY: I think that, at the end of the day, you'd have to direct it toward the voters who have an opportunity to vote for that candidate. And I think that there are a number of cases out there--and I'm trying to think about--I think Buckley talks in terms of express advocacy of a clearly identified federal candidate. But the issue is that if the voters don't have an opportunity to at upon that electoral advocacy, it seems to be meaningless to that candidate.

I mean, I think of the situation where we may want, the NRSC may want to put out a solicitation in California that talks about we really need a lot of money to defeat a Democratic candidate in some other state. It's not going to the voters in that state, it's going to a

completely different jurisdiction, there's no electoral benefit and it's a fundraising piece for us. I mean, it seems to me that that is something that should be permitted under the rules and that the courts, where you don't have an opportunity for the recipients to take electoral action, based upon what you're asking them to do in the communication, I think that would be permissible.

CHAIRMAN TONER: Do the other panelists agree that we ought to incorporate a directed-to element in the express advocacy area and across the board in coordination?

MS. MITCHELL: Absolutely, I included that in my comments and I absolutely believe that that should be done. That's something that would, again, and you--it's something on which people can rely, it cannot be--as Brian said, it cannot be said to influence the outcome of an election if the people cannot vote in that particular election. And we are talking about--

CHAIRMAN TONER: There appeared be an impediment of some sort?

MS. MITCHELL: --public communications, right.

CHAIRMAN TONER: Mr. Svoboda, you would agree, in the express advocacy area?

MR. SVOBODA: Yes.

CHAIRMAN TONER: Mr. Vice Chairman.

VICE CHAIRMAN LENHARD: I have no further questions, thank you, sir.

CHAIRMAN TONER: Then moving to Commissioner Mason.

COMMISSIONER MASON: Thank you. Ms. Mitchell, you've got some experience in campaigns not only advising candidates, but running yourself. And I just wanted to ask on this common vendor timeframe. In the real world of campaigning, does having the inside skinny on what a campaign is doing in August have any relevance to what's going on in October?

MS. MITCHELL: Not necessarily. Things can, I think Bill said that or someone said that it's a lifetime campaign, a week is a lifetime in a campaign.

COMMISSIONER MASON: And so, a 60 day timeframe that's reflected, for instance in our polling regulations, the point at which a poll is considered virtually without value, would be similarly appropriate for the point at which inside information could be considered without value?

MS. MITCHELL: I think that is a very good point. And the Commission having already articulated rules on the valuation of polling data and when that ceases to have value--and a sliding scale of value that could well be applied to other kinds of information, as well.

COMMISSIONER MASON: A couple of you have talked about this issue of the candidates not wanting to lose control of the debate. And that makes a lot of sense to me and there are very pointed statements in the legislative debates over McCain-Feingold about why we've got to shut down these electioneering communications and so on. So, it does seem sort of odd that there's this presumption they are running that way. Won't these people just shut up and you're suggesting that that

also goes to the outside groups; i.e., that even if it were legal, a candidate would be worried about trying to bring in an outside group because they're just not entirely sure that they're going to be all that reliable or if some question comes up about the ad that they won't say the wrong thing. They won't go off script and say, yeah, the Panama Canal really is--whatever.

But what sort of legal principle would we use to incorporate that presumption or that view into our regulatory framework?

MS. MITCHELL: I think the First Amendment might be a pretty good legal principle to rely on in that instance. And the right to petition the government which I think is seemingly lost in the discussions often. We talk a lot about free speech, but we tend to believe--

COMMISSIONER MASON: Well, that goes to the speaker which is outside group, but how do we go to the motive or involvement of the candidate? In other words, you seem to want us to build in a presumption that the candidate really doesn't want

to coordinate, he's suspicious of coordinating and as I say, I think there's some evidence for that. In their own words. But how do we build that in as a legal presumption?

MS. MITCHELL: Their fear of having outside groups involved? I think--well, I think the legal principle is that it is inappropriate to protect members of Congress and candidates from the speech of others. That's inappropriate under the First Amendment. And it is--there is ample evidence in the record in the debates on BCRA that that is, in fact, that was one of their motivations in adopting the law; was to try to silence groups with whom they disagreed and who disagreed with them.

Maybe I'm misunderstanding your question, but--

COMMISSIONER MASON: Thank you, Mr. Chairman.

CHAIRMAN TONER: Thank you, Commissioner Mason. Next up our General Counsel.

GENERAL COUNSEL NORTON: Thank you. As

you know, in McConnell, one of the many provisions challenged was the coordination provision in the statute. And what the Supreme Court said with respect to that challenge and in rejecting that challenge was this: And although plaintiffs speculate that the FEC could engage in intrusive and politically motivated investigations into alleged coordination, they do not even attempt to explain why an agreement requirement would solve that problem. That was the issue there.

Moreover, the only evidence plaintiffs have adduced regarding the enforcement of the coordination provision during its 27 year history, concerns three investigations in the late 1990s into groups on different sides of the political aisle.

Such meager evidence does not support the claim that the provision will foster arbitrary and discriminatory application.

The reason I come back to that is the point, in particular, that Ms. Mitchell and Mr. McGinley have made that without various

safe harbors, what we would have is intrusive investigations and burden shifting to respondents to prove their innocence. And I'm trying to think at a way to get it that the Court had and that the Court we may be dealing with in the future may have, about the empirical evidence that we need the safe harbor to prevent intrusive investigations.

One question I wanted to ask, starting, I guess, with you Ms. Mitchell, as one of the preeminent practitioners and someone who represents quite a wide range of clients in the area, whether you know or could estimate how many enforcement matters you've handled where the Commission found reason to believe that there was a violation of the 2002 Coordination Regulation?

MS. MITCHELL: Well, what's interesting to me is that in defending some actions, both for respondents and witnesses, with respect to the 2004 cycle, I think people took great pains to try to ensure that they didn't cross the line on coordination and worked so hard at that that now they're--the Commission has seemed to take a

different tack and, now are defending whether or not certain actions converted their entity into a political committee.

And, so, I think one of the surprises has been, in my experience, that there have not been as many coordination issues as we anticipated and I think it is because people worked very hard to try not to be guilty of violating the regulations.

So, my observation is that there have been surprisingly few violations. Now, I know that there--now, I have another client where it was alleged and information was from a publicly available source and was publicly available, it was not a--there was an allegation of coordination, but the Commission dismissed it and then had to defend in federal court the decision to dismiss.

So, I would say that my observation is that people work pretty hard to comply with those regulations.

MR. McGINLEY: Could I just make a point? I think that two of the cases that the Court was referring to and that you, may be referring to in

posing the question, they have been nicknamed the "Monster MURS."

MS. MITCHELL: Right.

MR. McGINLEY: Because even though you may not have a series of small skirmishes at the complaint phase or at the RTB phase, those two matters, if you take a look at the combined legal fees on both sides of the aisle and all those MURs were not insignificant events.

And I would also say that, probably, some of the vendors and the parties involved in those MURs are still active in politics today and learned a very hard lesson about how painful the discovery process can be. And chances are, they're probably some of the most risk-adverse people out there in the political process today.

So, I think--I would simply recharacterize, I think, the point that you may be trying to make, which is: What we don't need to do is we don't need to go out and count how many MURs have actually occurred underneath the coordination theory, whether pre-BCRA or post-BCRA.

But, instead, I think we need to take a look at, and those instances where MURs did develop into the discovery phase, what was the conduct of it? And if you take a look at how those have progressed, even if you didn't find probable cause, the respondents and the witnesses in those matters paid a very heavy price in terms of legal fees; in terms of when the matters finally were disclosed to the public, even though there was no probable cause finding. My guess is that there was quite a bit of proprietary information--both from the candidate, the party committee, the outside groups and the vendors that made itself into the light of day that they probably wouldn't want to have out there.

GENERAL COUNSEL NORTON: I don't want to debate that point with you, but the Court, I know, in McConnell, had all of that evidence before it. And--what they concluded was that three horror stories in the 27-year history was meager evidence.

MR. SVOBODA: Well, one comment I might add to that, Mr. Norton--and I don't know that it was before the Court in McConnell,

is--and I don't know, frankly, that we've had the chance to test it really, under the new coordination rules is the power of a Commission finding is inversely proportional to the size of the respondent on the other end. I mean, so for example, my son has a goldfish and was shocked to learn that when you knock on the tank it seems like an earthquake to the fish. I mean, Bill McGinley's clients may eat, reason to believe findings for lunch and respond to them routinely, but a reason to believe finding that sent will betide the state legislative candidate who receives a reason to believe finding.

And one of the things I think you've seen over the last two years and part of the reason why it hasn't been that big of an issue in the enforcement process is that legislative candidates, by and large, haven't generated those findings because they've sat out of the process. Because they've said this isn't worth it, we don't want to have to deal with the hassles of having federal candidates endorse us.

So, I don't know the extent to which the Court's consideration of McConnell can seem both predictive and necessarily wholly grasping of the potential concerns that lie out there through applications of the enforcement process.

GENERAL COUNSEL NORTON: Thank you, I see my time is up, thank you, Mr. Chairman.

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

MR. COSTA: I have no further questions, Mr. Chairman.

CHAIRMAN TONER: Okay, with that, that concludes this panels testimony. Thank you very much for appearing, your testimony was very helpful to the Commission. With that we will take a 10 minute break and we will take up the second panel at 11:15, thank you.

[Morning recess 11:07 a.m. to 11:25 a.m.]

CHAIRMAN TONER: Okay, why don't we get started. This special session of the Federal Election Commission will reconvene regarding the Commission's consideration of the Coordination

Regulations.

Our second panel this morning consists of Ellen Malcolm, on behalf of EMILY's List; Karl Sandstrom, on behalf of the Association of State Democratic Chairs; and Michael Trister, on behalf of the Service employees International Union.

The Commission would like to welcome all three witnesses this morning. 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 normally go alphabetically in terms of opening statements. That would indicate that we would start with Ms. Malcolm, and then go on to Mr. Sandstrom and, then Mr. Trister. And I understand that Ms. Malcolm has a DVD for us, as part of her opening remarks. I think what we will do when you get to the part of your remarks where you would like to show the DVD, we will then drop this

high-tech screen that we have here and watch your DVD at that point. So, Ms. Malcolm, if you're ready to go, good morning.

MS. MALCOLM: Thank you, Mr. Chairman. I appreciate the opportunity to come here. I have to tell you I got my start in politics working at Common Cause as a field organizer from 1970 to 1975 when we were trying to pass the 1974 and did pass the 1974 law, so I have been very interested in campaign finance reform for my entire career.

I should give you a caveat, I am not a lawyer. If you get into the thorny legal issues, I will defer to my right and left and Judy Corley behind me here from Perkins Coie.

When I started EMILY's List in 1985, I actually thought it was--and still believe--campaign finance reform. We found a way to bring small donors into the political process. We made certain that everything that we did was publicly disclosed. And, in fact, I jokingly ask my staff every cycle, how many feet of FEC reports we file. We are up to over 27 feet in the last

cycle.

We certainly, oddly, I think, in this world, don't lobby. We have no lawyers and lobbyists on the staff, we just completely work about elections.

And most importantly, I think, we've opened up the system and given women political power in a way that they didn't have before EMILY's list began. So, I am very concerned about making sure that women have ways to participate in the political process, whether as candidates; working in campaigns; as contributors; and as voters.

I wanted to speak for a moment about the staffing of campaigns. There is never enough good people to work in Democratic campaigns. And, in fact, in 1993, our frustration on that fact led us to begin a training program. So we now train people to do fundraising; be campaign managers; do research; do field organizing; we have a job bank that we are always trying to help people find work and make sure they go into the campaigns and try to help the campaigns find good seasoned experienced

workers.

So, the restrictions on allowing people to move from campaign to organization to campaign, I'm very concerned about because I think there are a lot of barriers to being a campaign staffer. It is tough work, you work 80, 90 hour weeks in a strange community. You have a small salary and maybe not benefits and it's hard enough to move these people around and find good people, without putting undue restrictions on their ability to find employment or putting them in any kind of political risk.

We have, since 19--since 2000, actually, begun an effort to recruit and train women to run for the state legislatures and local offices for non-federal offices. And I think it's a good example of the concerns we have about the connection of using a federal candidate in ways that don't help her in her election.

There are many ways that we try to involve our public high office holders, like senators and governors, to give credibility to women running for

office, whether they get an endorsement or to encourage them to run.

One of the things that we have found is that women hold back too much about running for office. And they tend to say to us, nobody ever asked me to run. And so, our training is a constant theme of you've been asked. We're asking you to run for office. We have little stickers that we put on them, we mention it all the time during the training. And we created a video that we use to encourage women to run for office in their first race.

In that video, we used the credibility and the sizzle, if you will, of federal candidates to get our message across. And, as we have this discussion of having to use hard money and all the issues around federal candidates, I thought it would give you a good example of what I think is a very appropriate use of a federal candidate that has nothing to do in promoting the election of the federal candidate. So, that is the video, I would love to show you, Mr. Chairman.

CHAIRMAN TONER: Terrific, well, then we will then watch Ms. Malcolm's video.

[Video played.]

VICE CHAIRMAN LENHARD: If I could interrupt, I am pleased to announce that Commissioner Weintraub has decided to run for office. [Laughter.]

MS. MALCOLM: I was just going to suggest having seen all those wonderful, victorious, federal and non-federal candidates, I hope every woman in the room is going to run for office.

CHAIRMAN TONER: Well, Ms. Malcolm, your video was, clearly, very effective.

MS. MALCOLM: Thank you.

CHAIRMAN TONER: If there's no objection, I'd like to enter into the record of this rulemaking proceeding, Ms. Malcolm's video, as part of our official record.

MS. MALCOLM: Thank you, sir.

CHAIRMAN TONER: Ms. Malcolm, any other final thoughts?

MS. MALCOLM: No, I think that's it, thank

you.

CHAIRMAN TONER: Okay. Mr. Sandstrom.

MR. SANDSTROM: Mr. Chairman, Mr. Vice Chairman, members of the Commission. I am pleased to be here, though it's somewhat unexpected. Mark Brewer was intending to testify, but for reasons I'll explain later in my testimony, was unable to make it here this morning.

But once it became known that I was going to testify, I received a request from a commissioner who will remain anonymous. It seems that earlier in the week on a festive occasion, honoring the half-century of dedicated service by two of my former colleagues, that a quote was attributed to me from Through the Looking Glass, and I admit I had a penchant, while on the Commission, for quoting from Lewis Carroll and I, on more than one occasion, I did identify with Alice. But the commissioner in question could not understand how this particular quote could ever have been relevant. But the more I thought about it, I didn't remember when I ever made--used that

quote. I used a number of other quotes. But I did discover a certain relevance for today.

So, in a slightly edited version, I will quote, use the quote and it's from--it begins with the Queen. The rule is coordination tomorrow and coordination yesterday, but never coordination today. It must come sometimes to coordination today, Alice objected. No, it can't, said the Queen. It's coordination every other day, today isn't any other day, you know.

I understand from the testimony that have been given by some groups here, that they'd be quite comfortable with such a rule. But my client would not. In fact, next week, my client is sponsoring a coordinated campaign training for all state committees. Now that is not a criminal enterprise. In fact, it's the essence of what political parties do.

But it's amazing how the word coordination loses it's legal meaning and becomes a word to chill activities or essentially the essence of what political parties do.

What the political parties do is bring people together for common public purposes. And next week the training is how do you do that successfully? And I think, maybe, that one of the best examples I could use--what political parties do--is to refer to the reasons why Mark Brewer is not here today.

Mark is the chairman of the Democratic Party--last night--of Michigan--last night, the governor had her state of the state address. His job as chairman was to coordinate the public message around that speech. So, Mark was busy distributing talking points to groups who support the governor. The two witnesses I share the panel with today, represent the type of groups who would receive those talking points.

EMILY's List was a strong supporter of the governor four years ago, I think they'll be a strong supporter in this cycle. SEIU was a strong supporter of the governor. It's interesting, the governor's message would--to the state--would actually because of the current economic situation

in Michigan, I wouldn't be surprised, though I don't have a copy of her address, that she probably called for some aid to workers who are being displaced or losing their jobs because of the layoffs in the automobile industry. And, maybe, trying to provide particular assistance to women who may be displaced and may be providing child care, expanding child care as they seek new jobs. I'm not sure if that's part of her message. But I certainly wouldn't be surprised.

The governor would be happy if those groups who believe in those programs would echo that message in their communications to the public.

That hardly can amount to coordination. So I think it's very important to understand with respect to federal candidates how important it is for the party to actually be the vehicle through a message’s echo.

When I first came on the Commission, 1998, it wasn't long after that I found myself in discussions here at the Commission whether communications by the national--the DNC more than a

year before the presidential election, trying to break the budget deadlock in Congress.

Whether those communications were coordinated and were for the purpose of influencing the re-election of the President.

Now, under the rule proposed by some of the reform community, they certainly were coordinated and there were no time limits. They certainly had been transformed into a communication. There would an in-kind contribution and would be a very substantial violation of the law. But the true intent, or the public intent, particularly, given where those ads were run, in places like Omaha, where the President was very unlikely to win the State of Nebraska. The intent was to break the budget deadlock.

So, how better to communicate that message than through a political party. And that's how the party was used, but it ended up in a massive investigation. Some have recently written books who were doing the investigating. They actually thought the investigation should have gone forward

and I think that kind of indicates why there's such a need for clear rules in this area.

There are two elements that Mark stressed in his testimony, I see the red light on is: One, parties almost always are using candidates to help them raise money. They're publicly known. That's who appears in their fundraising. New candidates are enticed by the party into running through endorsements.

And the last point that I would make is, one has to remember investigations can be punishment. And the rule should not be or the acting principle of the Commission should not be: find the facts and we will find the law. Make the law clear and, therefore we won't have to have unnecessary investigations because, at least I had one commissioner who enjoyed, Alice.

I will end with a quote from Alice that I think, again, is apropos.

There's the president's messenger. He's in prison now, being punished and the trial doesn't begin until next Wednesday. And, of course, the

crime comes last of all. Suppose he never commits the crime, said Alice. That would be all the better, wouldn't it, the Commission said.

CHAIRMAN TONER: Thank you, Mr. Sandstrom. Mr. Trister.

MR. TRISTER: Thank you, Mr. Chairman, I don't have a DVD and I don't have any poetry.

CHAIRMAN TONER: We're still very pleased to have you here.

MR. TRISTER: I will try to say something worth listening to. I'd like to focus on an issue which I don't think has gotten too much attention so far, except in some questions which Commissioner Mason raised this morning.

And that is, the impact of these rules not only on First Amendment activity, but the impact of these rules on your own enforcement process. And how they interact with your enforcement process.

The statute creates a very careful mechanism. You can't investigate a case unless you have a complaint. It has to be sworn to and, most importantly, you have to have four votes to find

reason to believe before you can even go forward with an investigation.

That was no accident. That is a reflection, I think of Congress--the original Congress, if you will, the 1974 Congress's recognition about the nature of the enterprise here, the nature of the activity that's being regulated and making it clear that only if there's a threshold can you go forward with investigations.

It's particularly an important concept where coordination is alleged. Because coordination is a fact-intensive issue. It's not decided the way many issues are based on the content of an ad or something. It is, by definition, a very intrusive and fact-intensive inquiry.

The Commission has struggled. I think if you go back to the '70s even, and read the MURs, what you see is a Commission that has struggled throughout it's history, really trying to give meaning to the concept of RTB, of what that threshold should be in the context of coordination cases.

We cite some of those cases in our

comments. There are many, many others. And you see attention, but what you see most of all is a struggle by commissioners trying to say, what does RTB mean, what is the threshold we should have before we go marching off into one of these investigations. And I think until 2000, the Commission could not really resolve that. It focused on the conduct end of the inquiry.

And in that context, as I think Commissioner Mason was alluding to this morning, it's almost impossible in most coordination cases for you not to go forward with an investigation. Because if there's a credible allegation that something happened which gives rise to what the Commission used to call an opportunity for coordination, then you have to go look and see whether there was one.

And, so the threshold never really existed on the conduct end. What you began to do--there were struggles even prior to 2000. The electioneering message effort. That was an effort to find another threshold, another way of saying are there cases we should not be going forward with?

In 2000, in the regulations, you moved in that direction--and in 2000, you moved further in that direction. The fact that the Court of Appeals has struck down a particular content standard, or at least raised questions about it, I think should not deter you from the effort because it's critical that the content standard provide that one way--not entirely--not in all cases, but in many cases, it gives you a threshold.

It gives you something that you can look for before you decide whether you're going to allocate your resources to a case. And, of course, whether you're going to require our clients to endure what's been described as a very painful process.

That effort has to go on and you cannot back away from it. We have specific proposals as to what that process should look like; what that content standard should be. But most importantly, I think you have to see what the effort was that was going on. It was an effort to define some rules that would allow you to focus at the RTB stage and

get rid of the cases that either are just on their face the kind of cases that should not be investigated or at least very unlikely to give rise to the kind of conduct that should be regulated.

And that effort, I think is critical. Thank you.

CHAIRMAN TONER: Thank you Mr. Trister. We'll begin our rounds of questioning with Commissioner von Spakovsky.

COMMISSIONER von SPAKOVSKY: Mr. Trister, on the point you just made, I mean, do you think the Commission ought to have the power to--similar to what federal courts do fine an individual who, in our opinion, after an investigation has filed or considered what is considered to be a frivolous complaint?

MR. TRISTER: It probably would be a good idea, but you don't have--I don't think you have that authority now.

COMMISSIONER von SPAKOVSKY: My other question, Commissioner Sandstrom, I'd like to focus on you because you, in fact mentioned this. But I'd be

interested if we have time and the other panelists what you think about it. I was, frankly, astonished yesterday when the representative of one of the organizations that call themselves reform organizations, which I think is a misnomer and I've come up with a new term to call them part of the IPL, which is the Incumbent Protection League, since most of the rules they're pushing, obviously, are going to hurt challengers more than they do incumbents.

But in asking him about the complexity of the rules, which they were pushing on us to promulgate, I asked him whether or not that would not chill participation in the political process, particularly for groups outside of Washington at the grassroots level who do not have the kind of money that big advocacy organizations in Washington do. And his response to that was, well, it wouldn't chill their First Amendment rights very much. And I just wonder whether you think that is a proper basis for us to use in determining what kind of regulations we should issue and how far we

can go in chilling First Amendment rights for our standards to be acceptable.

MR. SANDSTROM: I think the greatest safeguard against corruption is participation, the more people you have participating in the political process. They actually come to know the candidates, they may quit a campaign because they think the candidate they thought was truly a great person turns out to be something less than they-- because they got close, they got involved or they learned from others. So, if you really want to guard against corruption, you want to make sure you do nothing to deter participation.

The rules now are so complex, when you explain them at a training seminar, peoples' eyes glaze over. You can see people resigning as treasurers as they walk out the door. Almost all treasurers are volunteers. You get a word like coordination, which has a common meaning and you say that you can't coordinate and people then apply the common understandable meaning, coordinate, and so they don't engage in politics that they're

entitled to engage in.

And do I think there's a loss? There's a loss not only because we don't have them participate. But there's a loss to the system because they are the safeguard. You truly want in the system. People who know their candidates.

COMMISSIONER von SPAKOVSKY: Would you like to answer that question?

MS. MALCOLM: I would, actually. You know, I find that it is a full-time job trying to make sure when you're in a campaign that you're complying with the law and doing everything that you're supposed to do. I mentioned staff and how difficult it is to get staff. And they look at what happens in the campaigns now. It is certainly with EMILY's List, we've had a number of times where people have filed complaints against us.

In the last election you all heard one and dismissed it eventually. And, so, they know, the staff knows that that is a possibility. They know that they may be listed in the paper as somebody who's under investigation. And even though there's

nothing that they've ever done, there's going to be a public trail about that.

They know that they might have to hire a lawyer to help them get through what even could be a frivolous complaint. So, all this process has an impact. And I have tried to hire people who have said to me, I think what you're doing is great, but I just don't want to take the risk.

COMMISSIONER von SPAKOVSKY: Mr. Trister, would you like to respond to that?

MR. TRISTER: Well, I think that, when you referred to the reformers' proposals and there were comments yesterday from yourself, as well as others, about how complicated they are, I think they're complicated to understand, and I agree with that. But I think even once you get past it and when you actually, finally do figure it out and understand it. The real complexity will become in applying it for entities and organizations that would be subject to it.

And I say that in two respects: One is, and this was pointed out by a question yesterday, I think from the Chairman, there are many entities.

They have different rules, depending on whether you're a PAC, a 527 or something else. Well, there are many entities that are all three. And if you begin to say to yourself, how on earth is one entity like the SEIU Union, which has all three entities, how are they going to begin to try to apply three different sets of rules at the same time. Then you begin to think about complexity in the application, even if you understand what the rules are, how do you actually apply them.

Secondly, they have three different time periods in their rules. So you've got not only to know which group is doing something, but you've got to know it at one of three different periods of time and the rules may differ.

And, as was pointed out yesterday, the rules are counterintuitive, so that if it's a PAC that’s doing something then you've got one set of rules. And if you've got a 527 involved, you've got another set of rules; if you’re outside their period of time, you've got one set of rules; if you're within 120 days but not yet within the 60 days, you've

got another set of rules.

And then, finally, if you get down to the 60 days, you've got yet a third rule. That's where the complexity is in their proposals.

I can finally figure it out and I can explain it. But what I can't do is apply it and that's the real problem with their proposal.

COMMISSIONER von SPAKOVSKY: Thank you, Mr. Chairman.

CHAIRMAN TONER: Thank you. Otherwise, you support the proposal? [Laughter.] I think it was the proposal referred to yesterday as three-dimensional chess, that may have been charitable in some respect if it's only three dimensions.

I want to thank all three of the panelists being here this morning. Ms. Malcolm, I'd like to begin with you. In your comments, pages 2 to 3, you talk about your desire to have an exemption for solicitations by federal candidates and office holders. You talk about how EMILY's List has historically worked with federal candidates and office holders for them to sign fundraising pieces

for your organization, raise money and you indicate in your comments that you think those types of solicitations should be exempt as long as they're made in accordance with 2 U.S.C. 441i(e), in other words they're not soft money solicitations, just a hard money solicitation.

My question for you is: Do you think that exemption should be total? Should be categorical, that the solicitation pieces should be, at least, federal candidates and office holders should be able to sign these types of pieces regardless of the content of those communications?

MS. MALCOLM: Well, I think, if it doesn't affect their own election, I think that that would make sense. You know, I mentioned earlier the sizzle that we demonstrated with the video. We, if we're going to try to raise money for EMILY's List, as an example, and we're going to use it to both elect federal and non-federal candidates, I'm not going to get very far trying to get people to sign up to support Tillie Zilch running for state rep in Oklahoma.

I'd talk about federal candidates because they are the sizzle. They are what motivates people to get involved in politics. They are what brings small donors into the political system. And that money's going to EMILY's List. It is not going to the federal candidate's campaign, there are all kinds of restrictions on what we can do to help elect those federal candidates. But I need their achievements to interest people in getting involved in the political process.

CHAIRMAN TONER: In the discussion we've had over the last few panels in the solicitation area is if we were to fashion an exemption to allow federal candidates and office holders to solicit funds for a group such as EMILY's List, should that exemption be conditioned on that the solicitation does not promote or support the federal candidate or office holder who is signing the piece, admitting that there can be a debate about exactly what that means.

My question to you is, how comfortable would you be with that type of framework.

MS. MALCOLM: I think that that would be doable, if there are supporting organizations and the letter doesn't say give to them because this will help me get re-elected, I conceive that would make sense.

CHAIRMAN TONER: And do you have the same type of feel or approach to the endorsement area? Your comments talked about how you want a similar kind of exemption for federal candidates to be able to endorse state or local candidates, as well as other federal candidates. If we fashion that kind of an exemption, would you be comfortable with that, operating as long as, again, there was no language in the endorsement that promoted or supported the federal office holder who's doing the endorsing?

MS. MALCOLM: Yes.

CHAIRMAN TONER: Mr. Sandstrom, do you concur in those views? Was that a workable approach for the solicitation and endorsement areas?

MR. SANDSTROM: I certainly think so. I think that if you look at almost what typically occurs

in the field that something along those lines certainly should work.

The one thing about fundraising pieces, you're sending those to who are already persuaded. I mean, you talk about promote. When you send out a fundraising piece you're looking to get money from it. So, you're not sending it to a persuadable voter, you're sending it to someone you've identified as a potential contributor who is already going to be very favorably disposed to the person signing the letter or mentioned in the letter.

CHAIRMAN TONER: And, Ms. Malcolm, you appear to be dissatisfied with our common vendor and former employee standards to put it mildly. There are a number of people who are. And you advocate in your written comments that we should reduce the timeframe of those provisions to just 60 days, rather than the election cycle rule that we have now. Could you elaborate on the rationale you have for urging us to make that change?

MS. MALCOLM: Well, I think a 60 day

restriction would give sufficient time to make sure that nothing inappropriate was taking place. I think it's going to be very difficult to put those kinds of restrictions on people and still convince them that they want to get into this business as a career. The more restrictions you put on people's ability to make a living, and the more you put them at potential jeopardy and make them nervous about whether they're going to have to hire lawyers and do all those kinds of things, the harder it's going to be for me to convince anyone to get in and manage a campaign.

CHAIRMAN TONER: Is it your view that the current election cycle approach for common vendors and former employees is overly broad and--

MS. MALCOLM: Yes.

CHAIRMAN TONER: Mr. Sandstrom, do you concur in that judgment?

MR. SANDSTROM: Yes.

CHAIRMAN TONER: Thank you, my time's expired. Mr. Vice Chairman, you're next up.

VICE CHAIRMAN LENHARD: Thank you. I'd like to continue on that topic for a little while and I'm informed by the Court of Appeals acknowledgement that even bright lines can be drawn in the wrong place. And I'd like to talk a little bit about both vendors and, also, former employees, people who have left, either the campaign or the outside group. And the practical implications of these rules.

To the degree that any of the panelists have insights on the reality of the degree to which people are moving from campaigns to parties to outside groups within a single cycle; the degree to which there's a risk of circumvention, that if we draw the line too short, that prohibited information will pass or information that should trigger coordination to prevent circumvention could occur.

I mean, do we--could you sort of talk a little bit about the actual world in which these rules are being applied and the implications of our current rule and why the 60 day period is more appropriate. Anyone have--

MS. MALCOLM: Well, I think in politics, political information has a very short shelf life, for one thing. If you're involved in a primary race and you've got a competitive primary, you are totally focused on how to win the nomination. And all your polling and all the information that you're getting; all the strategy that you're working out is basically focused on how do you win that election. It is an entirely different process when you get into the general election.

It is--the information you had about a primary is--lots of it is irrelevant. And even when you're doing general election information, if you do a poll in June, say what is happening in the world in June could be very different by the time you get to October or September.

So, I think beyond the 60 days, you're not going to have a lot of relevant information that's going to make a difference anyway.

VICE CHAIRMAN LENHARD: Mr. Sandstrom, Mr. Trister, any thoughts on that?

MR. SANDSTROM: I've been around politics for longer than I care to admit to. I've not very often been privy to the secret information that campaigns employ to win, most everything they use is pretty public. You know what the weaknesses of the candidates are; what the issues are; particularly in the day of blogs and all these political blogs, you can go into any primary race and say, okay, what's happening out in Ohio on the Senate primary? What tact is Sherrod Brown taking versus Paul Hackett. And pretty much you know their strategy.

So, what is this secret information that's being passed under the table? If I were the one transmitting it, maybe I could convey to you what the danger here those who want a stricter rule envision.

But one thing about campaigns, they're pretty public, polls that are being done regularly by all sorts of groups. And they’re public. So, what is this really secret information that is being passed from hand to hand that, actually is critical to the success of a campaign?

VICE CHAIRMAN LENHARD: Mr. Trister?

MR. TRISTER: I have had one experience, I think which illustrates--not for SEIU, I should say, but for another client--that I think illustrates the kind of problems you have is that a lot of these vendors, particularly they're not always working for candidates, they work for groups and they do a lot of work for groups, organizations that are interested in various issues.

I had a client that had been working with a pollster for quite a long time. The pollster had developed an enormous amount of expertise on the issues that this particular group was involved with.

That pollster, however, then, became involved in one of the presidential races. And they had to drop him. And they lost--they could find, they were able to find another pollster, but what they didn't find is the expertise that this particular pollster had built up at their expense for many, many, many, months in the work he'd been doing for that client. And they had to get

rid of him.

Because given the choice between my little client and the work they were able to give this client and the work they were going to get out of the--the pollster was going to get from the presidential campaign, you can be sure where they came out. And so the choice was one that doesn't favor the groups, it doesn't favor the outside groups and they're going to get pushed aside and that's exactly what happened with my client. They were not happy about it.

VICE CHAIRMAN LENHARD: Thank you, Mr. Chairman, I see my time is about to expire.

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

COMMISSIONER MASON: Thank you, Mr. Trister. I appreciate your remarks and I appreciated you got to one of the issues I was trying to bring forward, but I want to ask you, particularly about SEIU on this issue of you have the union; you have the PAC; you have the 527, there probably is a (c)(4) out there that at some

time in the past the union's given money to or there's some relationship.

So. I want to try to understand, what is the enforcement value that is served by a regulation that would cause you to shift activities, I mean, assuming one of your responses would be, when your client comes to you and says, we want to do this ad. And you look at the ad and you conclude, I'm not sure how you're going to, that it addresses the character qualifications or fitness for office; or it promotes, supports, attacks, opposes, or whatever, but let's say you come to a reasonable judgment on that and you say here's the time period, the 527 can't do it, but the union can.

And, as has been pointed out, the strictest rules are as to the PAC, the regulated and disclosed money. So what's the enforcement purpose that's served by these various different rules when presumably your organization would be able, depending, in part, on tax rules and so on, to shift the activities from one shell, as it were, to another.

MR. TRISTER: Well, if you're referring to the reformers' proposal in which they would apply the hardest and harshest rules to the PAC, it's completely counterintuitive to what I've been trying to train my clients to do for years, which is, if you have a close case, use the PAC. So If you have something which may or may not be express advocacy, but you want to avoid legal problems, use the hard money.

Now, the reformers are going to come in with a proposal, in which I have to say, but not if you coordinate. Then we've got to go the other way. And that's what I meant earlier about how you can't apply those rules.

We've been going in one direction, which is to say, if you've got these close cases. If you're not sure whether it's express advocacy, and, of course, that's not a definition that always hits us in the face and you're not sure, then let's avoid the problem; let's use that hard money.

Then we get turned around and we get bitten by these rules for having used the hard money in the

first place.

So, I don't see an enforcement process. What I see is chaos, frankly, under that proposal.

COMMISSIONER MASON: And no apparent enforcement purpose?

MR. TRISTER: None that I can see.

COMMISSIONER MASON: I told Ms. Malcolm that I was probably going to ask her, and she reminded me her group doesn't lobby, so I'll just ask anyone who wants to address this. I'm a little bit bothered on the lobbying issue. And I talked with the Chamber of Commerce representative about the problem the Chamber might have if they go and lobby somebody and conclude that this person is undecided and then want to go out and do grassroots ads, and they've already talked to the target of the ads, they fall within what we would consider to be coordination or at least it would provide a basis for us to go and investigate.

And one of the problems that I see is that this applies to party committees, also. Now, if you're running an ad against somebody, you don't normally

have to coordinate with their opponent. So, that might be some sort of a limitation, but I've been thinking about the Alito example, which has been brought up. We have groups that are in favor of his confirmation; groups that are opposed. And, as Commissioner Sandstrom points out, it turns out the party committees are doing a lot of the heavy lifting, one way or the other.

And right now with 120 day, with most candidates we're okay. But what kind of situation are we going to put a group opposing the confirmation of Judge Alito in, if they have in the course of that been discussing the issue with the DNC or the Democratic Senatorial Committee, and then they go and decide to run an ad targeting Senator Snowe? Or a Senator from Rhode Island, or someone like that. Is that going to be a problem?

MR. SANDSTROM: If you could make it less of a problem in the next week, we'd appreciate it.

[Laughter.]

MR. TRISTER: Well, I've had specific problem with this exactly. And one reason it's a

problem is you refer to the party committee as if it's something out there. But the party committee is the Senators. The chairman--we had situations arising when Senator Corzine was, in fact the chair at the SEC. What hat was he wearing when you were lobbying and working with Senator Corzine, was he a Senator from New Jersey or was he the Chair of the DSCC?

If he was the chair of the DSCC, then you've got a serious problem when you go out and you target these people, because there's no question that the DSCC is going to run a candidate against Senator Snowe or Senator Collins or anybody else.

So, that's where you really begin to run into the problem and I think it's a serious one. We had it with him, what hat is he wearing.

MR. SANDSTROM: Can I just add to my too brief comment, because it really is a very important issue, because we--harken back to the day, for instance the health care campaign that the Clinton Administration ran through the Party. Now, for

most outsiders they would look and say isn't that a better way to try to promote the public policy through the party? You list, it's all fully disclosed, you're not relying on some private groups who have other legislative interests to fund it and run it. Isn't it better it come through the Party. Isn't that what the party's purpose is to bring the various groups who might support it together and let the party choose the content of those, the health care ads?

And I remember when we were debating it at the Commission, talking to some of the staff. And the staff took the view, since those--if the plan had actually passed, it probably would further the election of the President. And, therefore, you had to be concerned that it had this dual purpose.

But, of course, the Party is about a dual purpose. It wants to elect people to further its agenda.

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

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. And thank you to the panel, I really appreciate your testimony and I especially liked the video, the DVD, Ms. Malcolm, I thought it sizzled.

I understand your concerns with the former employee and the common vendor prongs, if you will of our rule. And Mr. Sandstrom has raised the question as to what rational purpose they actually serve. But, of course, as probably you all know, we don't really have a choice about that. That was something that Congress handed us and said, whatever you do in coordination--and we're not exactly sure what that should be and we can't agree on it, but do something about common vendors and former employees. So, given your, all of your experience dealing with common vendors and employees--do you have any ideas of some better approach to this, other than just shortening the time window?

MR. TRISTER: Well, we suggest in our comments that the common vendor rules essentially and the former employee rule shouldn't

be there at all and that you should treat it under an agency standard just as you would in any other case.

COMMISSIONER WEINTRAUB: But I don't think the statute gives us that option.

MR. TRISTER: Well, I really don't agree with that as a matter of law. I think it is quite clear and we quote this in our comment. Congress directed you to address the issue, it did not say what you should end up doing. And I think if there was any doubt about that point, the Shays opinion, itself, makes that very clear and we quote the language from Judge Tatel's opinion on that point. You can address--

COMMISSIONER WEINTRAUB: But didn't they give a directive to--

MR. TRISTER: --the common vendor rule by saying there's no problem with common vendors. That's addressing common vendors. They did not tell you that you had to restrict common vendors. And I think that's an error of law, frankly, that I think you made in your first set of regulations on the

point and I hope you won't perpetuate it this time.

You are not obliged by that legislative history to restrict common vendors. And if you proceed on that assumption, I think you are subject to a lawsuit not from the reformers, but from our side of the table frankly. That's an erroneous view of what the law requires.

COMMISSIONER WEINTRAUB: If you don't like the old regulation, complain to him, because he voted for it, I didn't. But aside from that, I'm not sure how you get there. I mean, do you honestly believe, as a seasoned practitioner that if we were to say, okay, we've addressed common vendors and former employees by saying we've looked at the problem, we've talked to knowledgeable people, they tell us it's not a problem and, therefore, we're just not going to have it as a criterion under coordination. Do you honestly believe that would survive judicial challenge?

MR. TRISTER: I think it won't survive judicial challenge unless you have evidence that there is a problem. I don't we assume

there's a problem and then go out and try to solve it and then come up with a rule. You need empirical evidence which Congress did not provide that there is a problem in this area. And I think that that's never been demonstrated. Not with respect to common vendors and, certainly, not with respect to former employees.

I would observe--I think they're not the same issue, by the way. I think that former employees, one could imagine that someone might want to pass rules similar to the revolving door rules, but that's not for this Commission to do. Congress is going to have to do it. If Congress wants to say that you can't work for a candidate, and then you can't go over and work for a campaign. They're going to have to say that. Not under some coordination rubric, but under some ethical standard. That's what that's all about, but as a matter of coordination, it's not proved. There's no evidence in this record or in the record that you had two years ago that there is a problem with

coordination by common vendors.

COMMISSIONER WEINTRAUB: Well, assuming that we felt that we need to have some provision on common vendors and former employees in the coordination rule, the suggestion has been made that we limit that to the 60 day window. What empirical evidence can you offer us to support a 60 day window rather than an election cycle window, anybody?

MR. SANDSTROM: First, I'd say I have more sympathy, maybe, because I've been in your position--

COMMISSIONER WEINTRAUB: You better.

MR. SANDSTROM: --and I may not be able to charge for the next 30 seconds of what I say because it's more of my reflection as a former Commissioner than it is representing my particular client here today.

Certainly, there are situations where you can't, essentially hire the same person to do the same task promoting the same candidate, and just because they're not an employee but an outside

vendor that, you can't separate them what information they use and what's available to them.

You also have to recognize that most vendors aren't in that position. You don't--and there are, like, voter file vendors, there are very few of them out there on each side of the aisle. To have a rule to essentially say you can't use the same voter file vendor mistakes what that vendor does as opposed to someone who is actually crafting your media strategy.

COMMISSIONER WEINTRAUB: Any response on the empirical evidence side of the question?

MR. TRISTER: Well, I can't give you empirical evidence as to 60 days versus 45 days or 9 days. But what you now have is a rule that applies to six years or four years. And there's no evidence to support a rule like that.

If you just look at the ethical rules on revolving doors, with people leaving Congress, it's a year. They're now debating whether to extend it to two years. That's nothing like six years. You've got a rule that says six years. So, if

you're looking for empirical evidence for 60 days, there's no evidence for a six-year rule or a four-year rule. Congress, itself, has a one-year rule. And in a different situation, but nevertheless. I don't know of a single revolving door type of situation, whether it's in professional rules or government ethics rules that has anything as Draconian as the rule you've got, which is a six-year rule, anything close to it. That's empirical evidence, I think.

COMMISSIONER WEINTRAUB: Thank you. Thank you, Mr. Chairman.

CHAIRMAN TONER: Thank you Commissioner Weintraub. Mr. General Counsel.

GENERAL COUNSEL NORTON: Thank you, Mr. Chairman. And welcome to the Panel. Mr. Trister, I wanted to go back to the opening statement you made which, of course, got me thinking about how the rules--these rules in particular, intersect with the enforcement process. And you made the statement that if you focus on the conduct end of the inquiry it's impossible not to go forward as a

way of emphasizing the need for a content standard. And I don't want to debate with you the role of a content standard, but I just wonder if you aren't understating the role of the conduct standard in a coordination enforcement matter?

It strikes me that many of these complaints, by nature, are pretty speculative, if not entirely speculative. Unless there's some insider who has come forward or someone's standing outside the door, someone's looking at circumstances from afar and attempting to draw inferences. Ms. Malcolm, mentioned, a few moments ago, an enforcement matter now closed, involving allegations that EMILY's List was coordinating with a candidate in Florida to run ads in particular markets where the candidate was not, and but beyond that, it was really just speculation.

What we received in response was an affidavit that not only asserted that there were firewalls between those running the ads and those advising the campaigns but some specificity as to how they were observed.

The Commission dismissed the complaint, it didn't turn on 120 days, it wouldn't have mattered. Earlier we were talking about the publicly available information and Ms. Mitchell said, well, I think if we came forward with an affidavit--she didn't say an affidavit, but we represented in response that we obtained that information through publicly available means and not through a request, that with nothing but speculation on the other side, that ought to be the end of it. I don't think you need a safe harbor, frankly, to get to a place where the Commission would dismiss that complaint.

So, I just wanted to get your reaction to that. Might you be understating to say that it would be impossible not to go forward if you focus on that.

MR. TRISTER: Well, impossible might have been a slight overstatement, but and I think Commissioner Mason referred to this. Most of the complaints are not idle speculation, they're not somebody coming in and saying, hey, they must have coordinated, but I don't have any evidence at all.

What they have is circumstantial evidence. A meeting took place, a telephone call may have been reported in the press. There may have been a press conference and they were at the same event. So, now you have an opportunity for coordination. And what that series of cases that the Commission struggled with, is what do you do in that situation. I've been in that case, I had to defend a case like that. There was an allegation that something--they had been together at a press conference. I came in with an affidavit that said we did not coordinate the ads that we ran after that press conference.

Commission's lawyers picked apart my affidavit. Well, they didn't say this didn't happen. They didn't say that didn't happen--they didn't say--it's proving a negative. I have to prove that no set of facts giving rise to possible coordination may have occurred. Well, I can't do that. I can't imagine every set of facts and put it into an affidavit and then have somebody deny it. And so, on goes the investigation. And I sit there and for a week we do depositions about

whether or not people in that meeting left and snuck into the back room and coordinated with the candidate. Even though everybody said they never talked to the candidate about their ads. So you--those are the cases. There's some evidence, but it's circumstantial evidence. There's rarely direct evidence. That's the other side of the problem that you have. That's why I say it's so difficult for you. Your response or at least the commissioners who debated this point in prior years, would say, well, wait a second, the complainant is never going to have direct evidence, they're not in the meetings. Well, that's right. So, all they're going to have is circumstantial evidence. And then what do you do? You go marching off and investigate. That's why I think the Commission evolved in the direction of content standards. And content standards, if they're clear, not only give us some guidance in what to do, but they also give your staff and the Commission itself a set of standards that they can filter out.

In the last E & J, you talked about the

content standards as a threshold and as a filter, as a screen. And I think there was great wisdom in that. I think that's exactly what it's about and that's what we desperately need.

GENERAL COUNSEL NORTON: I see my time is up. Thank you, Mr. Chairman.

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

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

CHAIRMAN TONER: Okay, thank you, Mr. Costa. Then we can begin a second round of questioning. And leading off the questions, Commissioner von Spakovsky.

COMMISSIONER von SPAKOVSKY: Ms. Malcolm, in your written testimony, one thing you didn't touch on and I wonder if you have any comments on is the 120 day period and whether you think that's too long, whether you think the Commission should change that to a 30/60 day period as applies in other areas?

MS. MALCOLM: I do think it's too long,

Mr. Commissioner, and I think going back, when I was talking about how difficult it is for people to participate in this process and if I can link that question with Mr. Norton's--from our perspective, the complaints that are filed and, certainly the one in Florida was nothing but a political tool.

We were in a very hard fought campaign and one of the accusations in the complaint was that the campaign manager for Betty Caster's campaign had worked for EMILY's List. Well, that is not true, she never worked for us. And, in fact, by publicly putting that in the record, all of a sudden you put tremendous personal pressure on the campaign manager at a very critical time in the campaign. You have put her name in the public domain in these press articles as if she did something difficult.

And, so, I hope you all appreciate that this is a political act on occasion. And I'm not a lawyer that can get into the wheres and whys of how you figure this out, but I do think, from our perspective, it is very difficult to deal with.

They're clearly taking a hit at us and these things.

After the campaign, they all kind of float off into the atmosphere, never heard from again, and you all have to deal with this. So, I don't know how you figure that out, but I can assure you from our perspective it has a real impact on our ability to do our work and it has a real impact on our ability to get people into this business. And so, I think the shorter the timeframe that you put any kind of burden on potential employees the better. I think, ultimately, the question is whether they're doing anything wrong not what the employment standard is.

COMMISSIONER von SPAKOVSKY: My second question to you would be to follow up again on the question I asked of the earlier panel today. And that is a de minimis exception in the coordinated communications rule. I would be particularly interested in what you think about that, given the fact that based on what you said and the presentation you made, you're really working on getting federal candidates to help you with local candidates that you're now trying to get to run for

local and state offices. And I wonder whether importing the 50,000 person rule is something that should happen.

Do you have a number or percentage in mind of what you think--

MS. MALCOLM: Commissioner, I'm sorry, you're in a land that I don't go into, I don't know--I'm not even sure what the issue is.

COMMISSIONER von SPAKOVSKY: Well, I'd be interested in hearing from the other two panelists on that.

MR. TRISTER: We addressed that in our comments in the context of the directed-to prong of the test and whether there ought to be a numerical test is beyond what's already in there in the definition of political committee--of public communications, I'm sorry. And in thinking about that and thinking about what Congress did with BCRA and the definition of electioneering communications, it seems to me the key point about what Congress did is it clearly found that the cost of running ads that only reach fewer than 50,000

people is de minimis. And it's the only way to explain that, because, otherwise it has the same impact whether it reaches 10,000 people or 100,000 people. Somehow, Congress must have made a decision.

And, so, the question, I think, when you talk about de minimis becomes one of cost. And not necessarily how many people it reaches. So, you might say what is the cost of the ads which Congress found were de minimis when it exempted electioneering communications that don't reach 50,000 people. And you come up with a number that's small markets, you find out what that is and you have some sense of what Congress chose to be de minimis. I think you can, then, convert that into other kinds of communications. So, it may be that, let's say the cost of running the ads that Congress exempted is $10,000; then you can go to mailings and say, okay, if it costs less than $10,000, that's de minimis, because Congress already said, spending $10,000 on electioneering communications is de minimis. They said that in BCRA. And they

used it, by the way--the argument will be made and I think it comes up in the E & J, well they only said it in the terms of a prohibition, not in terms of coordination.

But that's not true, they also have Section 202 of BCRA, which takes electioneering communications, the very definition that has the $50,000 [sic] limit and says, those are prohibited if they're coordinated.

So, they used the 50,000 standard, not just in the basic prohibition, they used it in the context of coordination. So you can't distinguish your situation now from the situation that Congress is facing. Congress didn't say 50,000 standard only applies, but if it's coordinated, we'll look at fewer, they used the 50,000 standard in the coordination provision in Section 202.

And that seems to me to be the standard you ought to be applying. What is de minimis? What did Congress find to be de minimis and what's the equivalent in other kinds of communications--mail, telephone banks, et cetera.

We have a footnote in our comments where we tried to figure out what the cost of sending out to even 49,000 people a direct mail piece. And it is quite small, it is probably less than what it would cost to run the ads that Congress exempted. That seems to me to be the approach that ought to be followed.

COMMISSIONER von SPAKOVSKY: I'm out of time, but can the Commissioner, would you like to answer that question?

MR. SANDSTROM: I think your dilemma is real, but I'm not sure your solution solves any problems. Your solution's going to be very complex, because how do you aggregate mail? Are you saying each mailing; every mailing that's substantially similar; over what time period? Phone calls, no, phone calls do you aggregate them by how many were made one week? Let's say another set of calls were made a month later, so do those get aggregated for the purpose of your de minimis rule? I mean, what goes into this rule seems to be public, ends up complicating as much as relieving the

burden of those who are trying to comply.

COMMISSIONER von SPAKOVSKY: Thank you, Mr. Chairman.

CHAIRMAN TONER: Thank you, Mr. Commissioner. I'm next up. Mr. Trister, I have to say I tend to share your interpretation of the statute and our obligations with respect to common vendors and former employees when you point out that the statute indicates that we are required to address those issues. And, as I understand your argument, your view is we should take a hard look at the factual record; take a hard look at the activity out there and see whether or not common vendors and former employees are adequately addressed by our other conduct provisions.

And, as I understand it, by the law of agency, is essentially your argument. And I think that's what we need to do is take a hard look at those issues and see what the record is in terms of the activity there. But I must say, I found your testimony there to be compelling.

Commissioner Sandstrom, I'd like to follow

up with you. Do you--in your judgment, having worked in the 2004 cycle, the first cycle of these rules were in place--were there any documented abuses in your view surrounding the 120 day coordination rule, any specific instances you could point to where that rule fostered corruption or was used as a vehicle to circumvent the law?

MR. SANDSTROM: I'm not sure if I would be--if I knew of some I could reveal them to you, but, no, I'm not aware of any.

CHAIRMAN TONER: You could reveal them to us on a confidential basis. I understand you have privileges to your clients. [Laughter.] But as a general matter?

MR. SANDSTROM: As a general matter, I do not know of any publicly reported cases of people violating the rule and I don't know, in fact, if any of my clients violated the rule.

CHAIRMAN TONER: Well, in the earlier panel, I don't know if you were here but there was a general discussion about what level of precision, whatever rule we adopt, has to exist with respect to

election influencing activities. And one of the earlier panelists pointed us to some expert testimony developed in the McConnell litigation, the upshot of which being that a large proportion, a vast majority of ads referencing federal candidates and presidential candidates air in the last 60 days before an election.

And my question would be, as you understand the law, the Circuit ruling here and otherwise, is that--what level of precision do we need to achieve in whatever content standard we might adopt? Does it have to be a 100 percent achievement here? Or is there some substantiality requirement we have to meet?

MR. SANDSTROM: Fortunately for me, and unfortunately for you, I don't have to try to make sense of the Court of Appeals decision or the District Court's opinion. To me, they both more than complicate your task rather than simplify it. I think they've given you very little direction of how to resolve these very difficult issues and so you're having to guess how the--what the Court, essentially, wants you to do.

Does it actually expect you to have Commission studies? Because you asked me whether--do they actually expect this Commission to go out and commission the sort of studies that were used in that litigation multi-year, multi-variable studies and to determine what is actually occurring?

So, like I say, I'm glad it's your task and not mine, because I'm not sure how you--you put something back, before potentially the same Court that will satisfy it. Because they're not easy to satisfy. I thought we did a good job.

CHAIRMAN TONER: We're learning that here. I guess my question would be a bit broader. Under your view, whatever coordination standard we might fashion here, if the record indicates, whether it be the Congressional record, in McConnell, the documentary evidence we're developing in this proceeding, the testimony in this proceeding--if the record indicates that we had a solid basis for concluding that the standard we fashion would capture the vast majority of election-influencing

activity, would you feel that, based on the law as you understand it, that would be a comfortable framework for us to operate in? It's a broad question, admittedly, but--

MR. SANDSTROM: Of course that puts me back into looking at the 120 day rule. And if all the communications they were concerned with fell within the 30 and 60 days why are they throwing out the 120 days and that reading of the opinion is rather a mystery to me, because I have, again, I'm not sure what sort of evidence will be persuasive to a reviewing court.

CHAIRMAN TONER: I guess my specific question would be, let's say when we review the record a consensus emerges that best estimate, perhaps 10 to 15 percent of the total election-influencing activity might very well take place prior to 120 days before an election or prior to 60 days before an election. In your view if that were the case, would that, nevertheless, be a sufficient basis for a standing on the rule? That's the question.

MR. SANDSTROM: I'm going to end up ducking again. I'm going to have to call upon my--

CHAIRMAN TONER: You're much better at ducking than you used to be. [Laughter.] Because that's what we're facing here is whether we need to have 100 percent precision.

MR. SANDSTROM: Alice's acquaintances--

CHAIRMAN TONER: What would Alice say about this?

MR. SANDSTROM: Memory is not particularly useful if it only works backwards. And what I think that means is, you set a rule and you change behavior and so, the 120 day rules change behavior. A 30/60 day will change behavior and then you're going to have to confront the change in behavior and have someone present that to you and say, look, we passed this rule and now we have all this coordination, all these ads running 30 days out all these ads 60 days out. So, trying to build a record here that actually will stand the test of campaigns is extremely difficult because what you do changes how campaigns are going to be run.

CHAIRMAN TONER: Because they're complying with the law that we enact?

MR. SANDSTROM: Yes.

CHAIRMAN TONER: Yes. Mr. Trister?

MR. TRISTER: Let me take a crack at this. I think that the opinion--the circuit opinion--first of all, it recognizes and accepts not only that you have an ability to have a content standard, but that you can use bright lines. Well, bright lines by definition, there is no 100 percent perfect bright line, not in anything, not in any area of the law.

So, any court that says that you can use bright lines is recognizing that 100 percent perfection isn't required. Not only that, but they quote the Orloski case and its phrase was "unduly burdened." You presented them as the Court saw the case with an easy case. You are using an express advocacy standard. The Supreme Court has said the express advocacy standard is meaningless. It was an easy case from the standpoint of the circuit, given their view of the case. They didn't have to get into marginal discussions about whether it was

60 percent or 75 percent or 80 percent because they had a case in which in their view, it was down around 20 percent.

But I don't think you can fairly read the case, it's not my job, Mr. Norton has to defend you, but I think you cannot read that case reasonably as saying that the Commission has to have 100 percent perfect rules or else it doesn't have bright line rules. And I think, particularly, if you build on that the notion that--of the importance of these bright line rules not just to the regulated community, but to the Commission itself in allocating its enforcement resources, then you've got a rationale that I think you can go to the Court with an imperfect rule, meaning one that doesn't reach 100 percent.

Now, is it 60 percent or 70 percent? I think you have to see what you think the evidence shows before you get into those questions.

CHAIRMAN TONER: Thank you, my time has expired. Mr. Vice Chairman.

VICE CHAIRMAN LENHARD: Thank you, sir.

Ms. Malcolm, I noticed when the General Counsel had raised a question with Mr. Trister, his time had expired and yet you seemed to have some thoughts on the issue. Involving, I think it was the implications of enforcement and if you'd like to speak at this point.

MS. MALCOLM: Thank you, I appreciate that. I snuck them in. [Laughter.]

VICE CHAIRMAN LENHARD: Okay. And I'll extend the same courtesy to the other members of the panel. I mean, if there are things that have been raised up until now that you really feel that there's something very important that you want to convey on the record and would like to take a few moments to do that, sure, I'd like to offer you that opportunity. If not I have questions that evolved, but I didn't want to have the structure of this proceeding prevent you from speaking on a topic that you felt was especially important.

MR. SANDSTROM: Only one, how you reconcile 109.20 and 109.21, what the areas of coverage of each is?

VICE CHAIRMAN LENHARD: Would you like to elaborate on that or do you--

MR. SANDSTROM: No, I'd like the Commission to elaborate on it. [Laughter.]

VICE CHAIRMAN LENHARD: I don't think we're going to do that today. But the, I guess, then, with the remainder of my time, I'd like to pose a problem which, again, is the Court of Appeals has asked us to build a record or to look at the record related to a number of different things including when entities are spending money to influence elections. And to look at when candidates spend those monies and whether monies are being spent outside of the 120 day time period. And some of the commenters have submitted evidence which they contend shows that I think the number bandied around was there were 200 or so ads that fell outside of the 120 day time period; the majority of which were spent ads that were purchased by candidates and candidate committees and, therefore, they infer could be for no other purpose than influencing the election, because it was part

of their campaign spending. And, therefore, they believe that our rule is insufficient to capture the kinds of activities that occur and they have a very pointed--it's not a hypothetical it's a real ad run, involving Senator Santorum, who was in the midst of a heated re-election campaign in which an outside group ran an ad that was very, very complimentary of Senator Santorum. It didn't appear, on the surface of the ad to be tied to any particular piece of legitimate lobbying, there wasn't sufficient discussion of anything pending for the Congress, but simply described him as a tax cutting kind of politician, the sort of person we'd like to keep in Washington.

And I guess my question to you is, what is the harm? Why shouldn't we simply expand our rule to make sure that we capture all of the kinds of activities that are currently occurring outside of the 120 day time period to the degree that we see evidence that this sort of thing is going on. Why shouldn't we expand our rules to regulate that kind of activity, as well. Mr. Trister.

MR. TRISTER: Well, I think our comments, basically say we are less concerned with the temporal aspect of your rules than with the content or what the rule is, even within the period. And if you have an adequate safe harbor for lobbying activities, for example, then I think there may not be as much harm, if any.

If you take a rule of the kind that you now have, which simply says refer to a candidate and target the particular district, then you're taking a rule, which in our view, is not effective to protect lobbying and other protected kind of speech, even within the 120 day period. So, if you stretch it further, you're just making things worse in our opinion--from our standpoint.

The question, and I think in this slight regard, I think what I'm saying is consistent with what the reformers were saying. It's not so much the temporal period, it's the rules that apply once you get there. And to me, that's really the heart of the matter and that's why we focused on the safe harbor part of it.

What we're trying to find is a way of excluding, at least some of the activity which needs to be excluded and protected. And if we can do that, if you then go on and extend it beyond 120 days, that's of less concern because we've got protected what we need to protect.

If you go ahead and extend the current rule, then that, to me, is just compounding the problem. So, it's more of a question of what is the rule going to be once you apply it, whether it's within the 120 days, if you take it and you apply it outside the 120 days, okay, but still what is the rule? And that's why we focused on the safe harbor part of it, rather than on the temporal aspect.

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

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

COMMISSIONER MASON: Mr. Trister, I appreciated your comments about the staff and

common vendor and sort of encouraging us to use an agency analysis. But I think for common vendors that really doesn't help very much, because if the common vendor is contemporaneous in time, then the vendor is going to be an agent of all the people who the vendor is working for. And, so then, we have to get into an inquiry of what's the scope of his agency and so on like that. And, so, in that sense, if we were to adopt a shorter time period, the benefit would be, again, you'd sort of cut it out. Because I think even if there weren't a rule and even if Congress hadn't told us to address common vendors precisely for the reason you're targeting because they are agents for some purpose, they would be suspect in terms of coordination. That is to say if it were alleged that the common vendor had been the conduit for information to flow through, we would have to look into that.

MR. TRISTER: The problem--the question to me is why don't the agency rules work when they work for everybody else? It may be a difficult inquiry in a particular common vendor case, but it

may also be, in particular a difficult inquiry in lots of other cases that don't involve--it's still the standard that you've got in the first three prongs of the conduct test. The question really is why impose almost a per se rule or an absolute liability rule which is what your rule does now. Your rule says we're going to treat common vendors and former employees differently, we're imposing a harder test, almost an absolute liability test on this group of people.

COMMISSIONER MASON: We're not doing that because we require a showing that they passed information and so on. I think the problem is that we have to conduct that inquiry. That by, the absolute part of it is we're absolutely going to open an investigation and then you're in the soup and I'm sympathetic on that point but we're not--

MR. TRISTER: I don't want to be argumentative, but--one of the problems--

COMMISSIONER MASON: But we do not apply an absolute liability test to common vendors, in fact, that is almost a problem. I mean, that's why we ask all these questions.

MR. TRISTER: Well, I think, if your rule said only convey, then your description of it might be a fair description because then you have to find evidence that the information was passed along.

But you say use or convey, and it's the use part of it which is essentially absolute liability. Because how do we know what people used. We don't know what our vendors are using. Nobody knows what they're using, they probably don't even know what they're using. That's an absolute liability test, essentially. So, you lied, if you eliminate the use part of it, then maybe it wouldn't be quite so Draconian.

But the rule we have to deal with now is a use or convey rule. If that vendor uses information that's in the back of his head, knowingly or unknowingly, not only to us, we hired him, we don't even know it, he doesn't even know it--that he’s taking into account some information that he heard at some meeting that he doesn't even, couldn't tell you who was at that meeting, that's where we have a problem.

And, so that, I think, is where the Draconian aspect of the current rule really lies.

COMMISSIONER MASON: But agency wouldn't necessarily solve that.

MR. TRISTER: Well, agency with the other standards, it would.

COMMISSIONER MASON: --well, shorter time period at least would cover this. I'm not sure anyone's going to be able to help me with this, but, in looking at these ads that the reform organizations put in, what leaps out at you is that, in fact, the early ads were run by party committees and candidates, most often in open seats. That doesn't surprise us, we understand that, it's the Minnesota Senate, this cycle was--people are up already, I think North Carolina five in the last cycle, a heavily contested Republican primary and so on. But do any of you have any observations on why it is that the early ads, where there's no limit outside 120 days. And yet the ads that are running 150 or 180 days before the elections are almost exclusively ads by the candidates and the party committees and not by outside groups.

MS. MALCOLM: I'm not sure I would say that was my experience. I seem to remember groups coming in and running ads early on.

COMMISSIONER MASON: There are some examples here, but then we have this voluminous submission covering several hundred ads and, in fact, the vast majority of them are party committees and candidates. And, I mean, if you think back, for instance, the Illinois Senate last cycle, open seat, heavily contested Democratic primary, several self-funding candidates, some other candidates who had some fundraising possibilities, they were running ads, even though there was a March primary and so 120 days got you back into 2003, they were still running ads in June before the 120 day window.

But it wasn't outside groups, at least predominantly, it was Ryan on the Republican side and Hall on the Democratic side.

MR. SANDSTROM: I don't think there's probably a great mystery here. A candidate wants to show through poll numbers, and the party does,

the vulnerability of the person they're running against. And also create their own viabilities. And, often, by doing that, you attract believers. And with believers comes money. And so, if you wanted to soften up someone or if you think you're vulnerable, you might be out there trying to protect a vote you've taken, that you know you're going to get criticized for, if you're an incumbent. And so you may be out there doing some proactive defense, be out there on the issue before your opponent is. I think I recently saw an ad run in a district in which the incumbent may be vulnerable on the stem cell issue. And there's a group out there already kind of promoting an ad that defends that vote. This particular ad didn't mention any candidate, so it's outside anyway.

But I think campaigning and particularly this--are becoming longer and longer in that sense. I mean, there is a need to create viability earlier.

CHAIRMAN TONER: Thank you Commissioner Mason, Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. Mr. Trister, earlier, you talked about the client you had who lost their pollster because a better financed presidential campaign was going to use the pollster, instead.

Do you think that kind of dynamic operates particularly to disadvantaged small organizations and non-incumbent candidates.

MR. TRISTER: Yes, that was the point I was trying to make. So, if I didn't make it, yes.

COMMISSIONER WEINTRAUB: I got it, I just wanted to clarify it for the record, since this is all about making a record.

One of our earlier witnesses suggested that part of the reason we haven't seen a flurry of coordination complaints is that a lot of non-federal actors are studiously avoiding any federal activity, because they just don't want to get enmeshed in any of this stuff. Is that your conclusion, as well?

MR. TRISTER: Well, it's certainly what Ms. Mitchell, I think it was, said this morning.

COMMISSIONER WEINTRAUB: I think it was Mr. Svoboda.

MR. TRISTER: Well, it definitely comports with my experience throughout the 2004 cycle, if you wish, the issue that was being discussed--the legal issue that was being discussed with my clients and with many, many organizations was coordination. We had meetings, we attended meetings. Everybody was struggling with how do I coordinate. Even to the point where it almost became in some cases a little bit of a joke.

People would see each other on the street and say, I can't talk to you and it was, they were all friends and they were, obviously that was an overreaction, but I saw that happen. I saw people talking. People were, in fact, wrestling with coordination more, as far as I could tell, more than any other issue in the 2004 cycle. And to that extent, I think people did back away.

COMMISSIONER WEINTRAUB: Did, either of the other, did you see that in your experience a kind of avoidance of political activity?

MS. MALCOLM: Oh, definitely, and I completely agree with Mr. Trister on the joke of the coordination. I mean, it was, as a practitioner, the 2004 election was a nightmare. We couldn't figure out what the rules were, what the standards were and spent hours and hours and hours with lawyers, trying to figure out what to do. And everybody became extremely head-shy about how to get people to vote. How to participate in the political process.

COMMISSIONER WEINTRAUB: Mr. Sandstrom, do you want to comment on that?

MR. SANDSTROM: Oh, I think in 2004, what's been related here is right on point. I mean, people essentially stayed away from being seen in the company of certain people, even when they were at the same meeting with them, just to avoid any appearance. Unfortunately, they still weren't able to avoid all the complaints that came forward, but when you have--because people don't understand. There's no way you can tell an ordinary political participant, this is how it

works, we have this conduct test; we have this content test; we have another test dealing with republication of materials. And then we have another test that deals with requests, suggestions, if it isn't this type of communication, but it's another type of political activity.

Unfortunately, that's the way people like me make a living. Answering--trying to answer questions for people who are completely confused and perplexed.

COMMISSIONER WEINTRAUB: Well, as I said, before, it's really all your fault anyway, so I have no sympathy for you. But, so you would all agree that the current coordination rules chilled political activity in the last cycle?

MR. TRISTER: Absolutely.

MR. SANDSTROM: Well, at lest redirected in ways that were probably totally unnecessary and prevented people from associating together as they have a right to do.

COMMISSIONER WEINTRAUB: Ms. Malcolm?

MS. MALCOLM: I would agree completely. I

think it made it very difficult to know how to participate in the process. And it definitely chilled the process.

COMMISSIONER WEINTRAUB: Now, some people have suggested that we should try to change as little as possible, regardless of whether those were the perfect rules that were adopted back then under the 90 day timeframes. That we should try to change as little as possible because, for better or worse people sort of understand them now and there would be even more chaos if we were to come up with an entirely new rule at this point. What's your view of that?

MR. SANDSTROM: My view is, essentially, comes from what the Supreme Court did this week . It challenged the Commission to be wiser than it apparently could summon itself to be. And to come up with rules that essentially exempted certain types of communications without telling us what types of communications are or what those standards would be. And so they mentioned the Federal Election Commission has this authority to do in the

electioneering communication area, authority to exempt certain type of communication. And I think what Mr. Trister had said, you have the authority in this area to do precisely that.

But you would have to come up, like I say, with greater wisdom on these issues than the Supreme Court was able to gather and it punted back to the District Court and it punted back to the Commission. And saying you're the experts. And that's your job.

MR. TRISTER: I would answer that question the way it was answered this morning by one of the witnesses, which is if you're going to be imposing a whole slew of new requirements on us late in the process, of course, that's going to create all kinds of confusion and all kinds of difficulties.

If what you're doing is relieving us of burdens that we now have, go for it. [Laughter.]

COMMISSIONER WEINTRAUB: And I take it as a given, Mr. Trister, that you think that the suggestions that you've made would not invite circumvention or open the door to new sham issue

ads on the content issue.

MR. TRISTER: In our proposal, I think not, because what we've tried to do is define exactly the kind of activity which Congress said needed to be protected, and which I think the Court would say needs to be protected. That is to say lobbying ads. So that, I don't see--there is no issue of sham issue ads here. We're trying to define something which is clearly outside of that area and I don't see the prospect for abuse in what we're proposing. The standards which the E & J contain for the safe harbor, I think, it's hard to see how you could meet those standards and still do a, quote, sham issue ad. It's the antithesis of a sham issue ad. It's exactly the opposite definition. And I can recall in the McConnell case deposing some of the expert witnesses for the reform side. And we would ask them about certain kinds of ads and they were saying exactly what's in your E & J, that, well if it doesn't go after qualifications and if it doesn't mention the characteristics of the individual, that's the test they were applying.

So, to me, if you adopt anything along that line, it seems, I don't see how you can be reasonably criticized for creating a loophole or another loophole.

COMMISSIONER WEINTRAUB: Mr. Chairman, could I, thank you. Just a couple more questions because this panel has such a wealth of experience.

One of the scenarios that was posited by some of our witnesses yesterday, was that because, right now with the 120 day window, there is as they see it sort of a free-fire zone outside of that 120 days. They said that given the express advocacy standard weaknesses, that it would open the door to candidates as long as they're outside that 120 day window, going to outside groups and saying here's my ad, this is what I want to see run, please run it, please pay for this and run it.

In your experience, in your vast experience with candidates, have you ever seen anything like that happen?

MS. MALCOLM: No.

COMMISSIONER WEINTRAUB: Mr. Trister?

MR. TRISTER: No.

COMMISSIONER WEINTRAUB: Mr. Sandstrom?

MR. SANDSTROM: No.

COMMISSIONER WEINTRAUB: And one last question, actually, two last questions: The first one's really quick: Any of you think we ought to have different standards for congressional, senatorial, and presidential races based on some differences in the way those races are run?

MS. MALCOLM: No.

COMMISSIONER WEINTRAUB: No.

MR. SANDSTROM: No, even though it might mean I give more advice, make more money, but, no. [Laughter.]

MR. TRISTER: No, please, no.

MS. MALCOLM: And please don't add months with “r”s in it either. [Laughter.]

COMMISSIONER WEINTRAUB: Let's see how confusing we could possibly make the rule--no, last question. Because the Court thought this was really important. They said we should consider--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?

And, I guess, my question is not only exactly that question that the Court asked, but is there--in order to use your resources wisely, is there some period of time beyond which you would say it's not worth it for me to--if I can't get close enough to the election to make an impact, I'm not going to bother. Is there such a period of time and what might it be? If you understand what I'm getting at.

MS. MALCOLM: I think it depends on what's happening in the political environment. Just making up an example today, if you had a candidate that was having ethical issues, you might want to shore him up, way in advance of the election. But, one of the things that I'm struck by is if you have an organization like EMILY's List, we are quite capable of figuring out what we want to do to mobilize women voters without the candidate telling us what to do.

We like to think of ourselves as experts in this. We do our own polling; our own research; we've done an awful lot of work for years now on understanding the dynamics of women voters and how to get them excited and how to get them to the polls.

It's not only that we don't coordinate those activities with the candidate, we have no need to coordinate those activities with the candidate.

COMMISSIONER WEINTRAUB: Final comments?

MR. TRISTER: I'm not aware of any even anecdotal information. The anecdotal information I have is to the contrary.

I'm very suspicious, actually, of studies that try to show because I think there's a chicken-and-egg problem. And I'll give you an example: I had a client which came to me and wanted to run ads in August of '04 and September of '04. I said you can run them in August, you can't run them in September. Now, if you look at the data, it's going to look like they took the

September ads and ran them in August. But that's not what happened. They would have run them in September if they were allowed to. The problem was they wanted to run them in both and they had good non-electoral reasons for doing it. But they couldn't.

So, when you start to look at the data and try to come up with conclusions about--it strikes me that you've got to have a very sophisticated set of abilities to analyze the data before you just look and say, well, we've got a lot going on in August and we don't have anything going on in September. Well, of course, under the law.

MR. SANDSTROM: Well, I think, let's say, today, in Congress there was going to be a vote on the minimum wage. Now, if you're going to run an effective issue ad on the minimum wage, you'd have, essentially, what is deemed to be an effective ad? An ad that changes the vote? And if it doesn't change the vote, makes it less likely that person will be there to vote next time it comes up.

So, you really can't separate the ads,

cleanly. But what is clear is there are people out there who have a great concern as to how that vote will come out on the minimum wage. And they'll want to influence that, because people they believe will be benefited by that or people they want to support and represent. So, they will go out and they will run ads encouraging people to vote and making it more difficult for people in marginal seats to vote against it. They may change votes so how can you, essentially, say that isn't a legitimate issue ad? Yes, I would like if that person votes wrong, that there will be a hangover from that ad that tells people they voted wrong on that issue they kept, let's say it's an ad showing a single mother who's struggling on $5.50 an hour, whose working 40, 60 hours a week. That's an effective issue ad. It's effective if it changes votes or makes it less likely that person will be there to vote against it next time.

COMMISSIONER WEINTRAUB: Thank you all so much and thank you, Mr. Chairman, for your indulgence.

CHAIRMAN TONER: Thank you Commissioner Weintraub. Mr. General Counsel.

GENERAL COUNSEL NORTON: Thank you, Mr. Chairman. And I realize it's late, but there is one thing I wanted to follow up on. There's been some discussion, I think it particularly was raised in your comments, Mr. Trister. Some questions by commissioners about creating building into the content standard a provision that would sort of exclude communications that reach a number of people where the impact isn't very great, whether that's 8 percent or 500 or 50,000.

And I was looking back at the D.C. Circuit ruling on the de minimis exemption that the Commission created with respect to Levin Funds. Where the Court said where the provision was that state and local parties could spend so-called Levin Funds on certain kinds of federal election activity, but Congress said they'd have to be allocated with hard money.

The Court actually compared that provision to the coordination regulation, saying much as with

the coordination communication issue BCRA leaves the question open. That is, rather than prescribing allocation rules itself, BCRA refers simply to regulations prescribed by the Commission.

The Court goes on to say that the case has recognized that agencies can adopt de minimis exemptions but says the rule is that they must cover only situations where the burdens of regulation yield a gain of trivial or no value. And, my question is, is that discussion relevant to the proposal you're making and the Commission may consider to establish some content standard based upon a communication reaching 500 or 50,000 or 8 percent?

MR. TRISTER: Well, I think there's a significant difference between what we're discussing today and the Levin issue, which is, I think that in the Levin context, the Commission created a de minimis exception for it's own reasons.

Here we have a direct parallel provision in BCRA where Congress did it and I think that does

change the argument substantially.

GENERAL COUNSEL NORTON: So, anything other than 50,000 we'd have to be concerned with this?

MR. TRISTER: I think, if you analyze what 50,000 is. I'm not saying 50,000 people means 50,000 letters is okay. What I tried to explain earlier, as what I tried to do was to say to me, what was Congress saying when it exempted 50,000 broadcast ads that reached fewer than 50,000. And the only thing I could come up with, because it really didn't ever explain it that I'm aware of--is that they were essentially saying that the cost of running those kinds of ads was de minimis. We are not worried about corruption at that level. And they applied it in a coordination context.

So, I, then, say to myself, well, what did it cost to run those kinds of ads, now lets take that rule, that amount, whatever it may turn out to be, and lets apply it to mail; let's apply it to telephone; let's apply it to magazines; let's apply it outside of--but the concept is still Congress's

concept, which is we don't have to worry because Congress said we don't have to--they weren't worried.

So, I think you're not riding quite in the same context on the coordination issue and communications, the combination of coordination and communications because there, Congress did speak and gave you a model, if you will, as to how to do it. And I can't think of a reason why, if Congress was not concerned about TV ads that reach fewer than 50,000 people, why it would be concerned about magazine ads that reach fewer than 50,000 people. I can't see any reason to make a distinction.

So, you don't, I don't think, have to come up with it as long as, if the cost is the same. If the cost of reaching 50,000 people in a magazine is much greater than reaching them through T.V., then I'm not sure 50,000 would be the appropriate standard. And that's why what I drifted toward was more of a cost standard than a number of people, because it may be that you could reach the cost of reaching 100,000 people through some Robo-call thing, may be the same as reaching them through radio and

TV. And, so, I wouldn't want to say 50,000 in that context. I might say 100,000 because the cost is the same.

GENERAL COUNSEL NORTON: Thank you, Mr. Chairman.

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

MR. COSTA: I have no questions.

CHAIRMAN TONER: Okay, thank you. The Commission very much appreciates the three panelists being with us here today. Your testimony is very helpful for us as we sort through these issues. And, Ms. Malcolm, I want to make sure we get a copy of your DVD today so that we can enter it into the record.

We will be in recess until 3:00 o'clock when we then will reconvene the final panel in the coordination rulemaking, thank you.

[Recess.]

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

[3:02 p.m.]

CHAIRMAN TONER: Good afternoon, why don't we reconvene the special session of the Federal Election Commission will please come to order. This afternoon we are going to hear from our sixth and final panel, last but definitely not least in terms of the Commission's reconsideration of the agency's coordination regulations. The panel will last for one and a half hours as our earlier panels have 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 remaining; the yellow light will go on when the speaker has 30 seconds left and the red light means it's time to wrap up your remarks.

We'll have at least one round of questions from the Commissioners and the General Counsel, as well as our Acting Staff Director. And we've had sufficient time in our earlier panels to have a second round of questions, which I'm sure will be a

delight for everybody.

Our panel this afternoon consists of Peggy McCormick, who's appearing on behalf of the National Education Association; Donald McGahn on behalf of the National Republican Congressional Committee; and Lawrence Noble, on behalf of the Center for Responsive Politics.

We typically go in alphabetical order in terms of opening statements, so that would mean that we will begin with you, Ms. McCormick, followed by Mr. McGahn and then, Mr. Noble. So, Ms. McCormick, whenever you're ready to begin.

MS. McCORMICK: I think I can probably begin now. Mr. Chairman, members of the Commission, I appreciate this opportunity to appear before you on behalf of the National Education Association. A labor organization with more than 2.7 million members who are employed in the field of public education.

What I'd like to do is to focus my testimony today, because I know you've heard from my colleagues Larry Gold and Mike Trister who

shared in the comments that we submitted on the conduct standards and the proposed changes that we had suggested to those.

I'd like to start by saying that I think what we would like to urge the Commission to do is to change the current conduct standards in three ways: First, we'd like you to eliminate the common vendor and former employee prong of the conduct standards. We want to ask you to do that or we ask you to do that for several reasons: One is we don't believe there's any empirical support for having that as a conduct standard.

There is no showing that I know of or that I could find, nor do I think the Commission has held hearings to find such evidence that actually there is actual coordination occurring through the use of common vendors or former employees.

Not only is there no particular reason for having this rule in terms of evasion of the Act, but I also think it's important to get on the record that this is a very burdensome rule for organizations such as NEA and other organizations

that commonly use political consultants in their campaign process.

The way the rule works now is that in order to avoid the risk of taking an FEC complaint and the possibility of a subsequent investigation--not that we would have done anything wrong, but because investigations by the Commission are enormously burdensome for the organization and intrusive.

In order for that to happen, my client and many other organizations are unwilling to employ anyone as a vendor as a political consultant, who, during the entire election cycle has worked for a candidate, a federal candidate or for a political party.

Now the election cycle is very long and the number of top-flight political consultants, especially those who sort of share the general views of my client, is very small.

So, our experience was in the 2004 cycle, it took us weeks, sometimes months to be able to hire a political consultant. Why? Because the

minute the name was brought up, we had to contact that person. We had to ask them all right, tell us everyone of your clients from the beginning of the election cycle until now. Also tell us who you think you might want to work for for the rest of the election cycle.

And it went on and on and on. So that, by the time we would be able to find a consultant, we ended up having to rule out people that had been used by the organization in a completely non-electoral context because they wanted to preserve their right to work for either a candidate or a party. People were unwilling to say we'll take your work. I mean we can't offer them a contract that covers all of their expenses and generates all of the income that they need, but at the same time, we were saying to them as long as you use--as we use you, you can't take work from a political party or a federal candidate. And it became extremely burdensome to do.

As a fallback, if the Commission chooses not to simply eliminate common vendors, and I do

think my colleague, Mike, was talking about using the agency rules, which, I think are one answer, if you choose not to do that then I think as a fallback, we would ask at least that you try and narrow the rule to make it a little bit more realistic and to avoid interfering with organizations' abilities to use consultants. And, also, I think if you called in Peter Hard and Jeff Garrett and a bunch of consultants they would tell you this is interfering with their work, as well. It's not just us.

And I think the changes we'd ask you to make is, one, remove the use standard, because we think that that is extremely chilling. It requires a consultant to have to prove a negative, in fact they have to prove that, somehow, in their mind they didn't do something, which I would find to be a very difficult burden of proof and I think they would feel the same way.

And, second, to reduce the amount of time--the time period in which someone would be considered to be a common vendor, in other words if they had worked for a candidate or party committee

120 days ago, maybe they're within the timeframe, but if they worked for them from the beginning of the cycle until up to the 120 days, they would not be treated as a common vendor.

I think those two changes would be very helpful and they would address a real need in the regulated community to be able to use the services of consultants and a real need for consultants to be able to get work. So, it would help all of us.

The second thing I wanted to talk about today is the idea of establishing a firewall as a part of the conduct provisions. Now, I know my colleagues have talked to you about the idea of having a safe harbor as part of the content provisions for lobbying activity. But I believe that that is not enough to protect organizations that lobby for the following reasons: The safe harbor that would protect lobbying activities would protect an organization that lobbies and then talks to office holders about it and goes out and continues to do lobbying communications What it doesn't help with is an organization that lobbies

and also engages in covered electoral communications.

In other words if you go up on the hill and you talk to Senator Kennedy about a bill that he is working on with your organization. And, subsequently, down the line, six months later, you run an independent expenditure, in which you name Senator Kennedy, and urge people to vote for him. Your initial meeting with Senator Kennedy creates an opportunity for coordination. And if that meeting is public knowledge, any one of your components can file a complaint and say there was an opportunity during that meeting for you to have talked to Senator Kennedy about his campaign plans.

Not that you did it but the mere fact that during the lobbying you had contact and communication with an incumbent who is also a candidate means that you create an opportunity for coordination, which, then creates the risk that somebody's going to file a complaint and say, well, we know you talked to Kennedy on this and this date; we know you ran an independent expenditure

and that and that date so you must have coordinated it.

CHAIRMAN TONER: Ms. McCormick, if you could conclude your remarks, I apologize, your time has expired.

MS. McCORMICK: Sure, I'm sorry. So, I think that's where I'd like to leave it, actually, those are the two major changes and the other change we're going to suggest is that you also create a safe harbor for public communications.

CHAIRMAN TONER: Thank you Ms. McCormick. Mr. McGahn.

MR. McGAHN: Thank you. Here today on behalf of the NRCC, a national party committee, dedicated to electing Republicans to the U.S. House. We have a vital interest in this rulemaking given the amount of independent expenditures that we make, particularly the last cycle in the post-McCain-Feingold hard money world.

By way of introduction, I guess the first thing I want to note is, having read the Shays Court opinion, the Court did not take issue with

the reg itself. I'm sure you've heard this a million times already in this hearing, but took issue with the justification--not necessarily, justification in and of itself, just didn't have enough justification, perhaps, is one way to read it.

What's interesting about that is that there's no obligation to have year-round coordination rules or anything of this sort. The Court essentially said it's okay to have some kind of time limit as to when coordination matters and when it doesn't.

Our view is that this is consistent with the statute itself. But we would suggest that 120 days is not nearly as consistent what the statute as a 30/60 day window, which is found in the electioneering communication section.

The 30 days before the primary—60 day before the general rule makes sense, really for two reasons: One, as a practical matter, it is the time when the party committees do spend their money for campaigns and elections. And it would be tailored to address what I think the sponsors of

BCRA and what the concern is. And that is evading the contribution limits or evading the coordinated expenditure limits. You don't really see party committees doing year-round independent expenditures.

And, to the extent that party committees have done issue ads and what not, they tend to be just that, issue ads designed to influence legislation, not ads designed to influence the election.

But there's more really an important reason the way 30/60 works and that is the data. I reviewed the numerous spreadsheets that were attached to the proposed rulemaking and it doesn't take a lot of reading to see that the ads occur within 60 days of the general election

One thing I do know, and I notice some dates it seemed to be in June or in January or in February, just keep in mind there are special elections and I noticed quite a few elections that were actually special elections. So, it's not that those ads were run for the general election that year, it was run for a special election. I saw

some data about advertising in probably the '02 cycle, Mike Forbes election in New York; Randy Forbes election in Virginia, those were specials and that spending was not designed to influence the November election, it was designed to influence the special and that was still, well within 60 days of that election,

The thing that struck me about the comments were the comments filed by Senator McCain and the other sponsors of BCRA, they also effectively say, some kind of time limit is appropriate. Now they want to treat different political speakers differently, part political committees one way; outside groups another way and someone else another way. We don't endorse that view but the idea that the sponsors primarily are also the people who brought the lawsuit are not opposed to some kind of time limit, I think goes a long way towards upholding any sort of time limit.

As far as specifics, the NRCC did not do independent expenditures last year until late in the cycle. The notice of the rule mentions a

variety of scholarly works and one not so scholarly speech, given by yours truly. I didn't comment on that in my comments because it just kind of would have been awkward to say the NRCC thought it was brilliant.

But I was truthful and I'm truthful now, the hot spot in the campaign was mid-September to late-September. And we see that being the hot spot, at least for the foreseeable future, this cycle and probably from hereon out for no other reason, we don't have as much money as we used to have. And we can't stretch the dollars with the overhead ratio on issue ads.

That being said, there are some other issues in addition to the TV ads and the so-called sexy stuff. Endorsements is a hot issue, very difficult to deal with because the statute says you can endorse a state or local candidate, but, yet, is that something of value now to the federal candidate who may endorse a state or local candidate, because, obviously, the state or local candidate is going to want to tell someone publicly

and they're probably going to be in that person's district.

Frankly, the federal candidate is not receiving anything of benefit in 99, 9 thousandths out of a million times, whatever the fraction is, for them using for dramatic effect, tends to be safe incumbents endorsing state or local candidates that are going to win anyway. There's nothing of value, but, yet, now they have to jump through 50 hoops to try to figure out how to do it.

The same is true of television advertising, mail pieces or whatnot, that mention candidates. I'm thinking of the Alice Forgy Kerr/George Bush AO, which on it's face, I think there was problematic language in their request about the White House's wanting to review it for content and style points and all that kind of stuff.

It would be nice if it were made clear that if you don't really want to review it for that sort of thing, but simply because you don't want to be sued for defamation or something because you're in the ad, that would not be considered an in-kind.

Candidates can work with each other in ways that are not trying to backdoor soft money in the federal elections. I think that AO goes too far, because I think the reg went too far in that respect.

Same is true of fundraising. We've had some issues with our fundraising because if you have a member of Congress signing a letter that goes into a particular district that happens to be their district and it may say, we need to elect Republicans, we need to re-elect the ones we have and the ones who are running and you sign the letter. Well, you're mentioning a candidate because there you are, you're talking about electing Republicans and re-electing Republicans. So, all of a sudden you're in a situation where that's something that looks like it may trigger some sort of coordination rule.

Common vendors, to pick up on themes raised by others, not only on this panel, but in some of the comments, there is a Chinese puzzle, so to speak, where you have to figure out what vendors

can do what. It's very cumbersome, it is what it is, I suppose. But there are some things that I think could be tweaked.

To put it in context, we sent out--we just sent out our request for proposals for independent expenditures last week. We are how many months before the election and we're already locking down our vendors to make sure we don't have coordination problems.

But there are certain kinds of vendors, like fundraisers who don't move the kind of information back and forth that we're worried about in the coordination rules and media placement vendors. I'm not talking about media production companies that also place the buy, I'm talking about people who just place the buy. Media inventory is public, it's public information. They're listed as a vendor, that could be a problem under coordination rules. They really are not a problem under coordination rules, nor should they be.

Which leads me to my final point, publicly available information. There is some confusion on

this, I think. The DCCC comments hit the mark when they say that public--there should be some sort of safe harbor for publicly available information. If you summarize publicly available information, the summary shouldn't be deemed some sort of coordination conspiracy. And this could address the media buying issue I've raised because that's public information. And with that, that's my introduction and I look forward to your questions.

CHAIRMAN TONER: Thank you Mr. McGahn. Mr. Noble.

MR. NOBLE: Thank you, Mr. Chairman, Mr. Vice Chairman, members of the Commission, General Counsel, Acting Staff Director.

I appreciate the opportunity to testify here today on the coordination rulemaking. It looks like we're coming to the end of a long and troubled effort to write rules for a law that's already been in effect for over three years.

The Court rejected the previous attempt to define coordination, saying that the FEC had not adequately justified it. But the Court, if you

look at what it said went beyond that and really questioned the justification for 120 day rules.

Coordination is not just a technical rule. And this is important to keep in mind. This is not just some implementation of a rule that has to do with a technical part of the Federal Campaign Finance Laws. Coordination goes to the heart of the Federal Campaign Finance Laws, because what it does is it defines the line between activity that is subject to a lot less regulation, which is independent activity and that which the Supreme Court says can be regulated more heavily, contributions.

Ever since Buckley, we've been living with this regime where we have to look at the difference between independent expenditures and contributions. Coordination takes what would otherwise be an independent expenditure and brings it in as a contribution. It is no different. Once you coordinate an ad it is no different than if you had given the candidate the money, him or herself to run the ad. And that's why this is so critical.

If it's independent activity, then what we're looking at is activity that can only be regulated if it's express advocacy or electioneering communication. If it's coordinated activity, it's going to fall under all the contribution limits and prohibitions.

Paying $100,000 for a campaign ad coordinated with a candidate is no different than giving that campaign the $100,000. That's why we think the Commission must adopt regulations that are consistent with the law and the intent of the law. Obviously, there's a tension between impinging on constitutionally protected grassroots lobbying, while implementing the restrictions and limitations of the Bipartisan Campaign Reform Act. Keep in mind the Bipartisan Campaign Reform Act, has been held constitutional and the government has a compelling interest in stopping real and apparent corruption. And that's what these rules go towards.

The FEC's desire to minimize the burden on the regulated community cannot override the

agency's mandate to enforce the laws as enacted by Congress.

So, far, in our view, the FEC's effort to write regulations in the coordination field have ignored an obvious reality: Election campaigns are not magically limited to 180 days before the primary; stop right after the primary and then pick up again 120 days before a general election. In fact, campaigns don't even just begin 120 days before the primaries. Campaigns are taken out long before 120 days before the primaries. And in some races, and this has been lamented by some, we seem to have a permanent campaign season.

Allowing a corporation to--or a labor union to coordinate an ad 121 days outside of the primary is no different than saying they can give a contribution 121 days outside of the primary.

The Court of Appeals in Shays rejected the FEC's earlier rule because it said there was no factual basis for picking the 120 day line.

This led the Court to a very practical question: Do candidates, and I underscore

candidates because that's the word the Court used. Do candidates, in fact, limit campaign-related advocacy to the four months surrounding elections or does substantial election-related communication occur outside that window?

That is a question that was posed to the Commission. I think the answer is obvious. We have provided examples of over 200 campaign-related advocacy ads run outside the FEC's window.

Now, let's be very clear. We are not claiming that the ads were coordinated. We have no way to know. We have not investigated the ads, but that's not the relevant question. The question wasn't whether or not coordinated ads are run outside that period, but whether or not campaign ads are run outside. Why? Because if campaign ads are run outside that period, then, in fact coordination becomes important for those ads.

This is why, by the way, in our view the proposal to limit the rule to the 30/60 day rule that some of the commenters have made, I think, would totally fail any test the Court wanted to

use. I don't think there's any relationship to the law with that test. And keep in mind that the electioneering communication standard of 30 and 60 days deals with what is in effect an independent ad, not a coordinated ad.

We have done something that is somewhat controversial and very dangerous, we proposed actual language for a rule. Knowing full well as we did so that we were laying ourselves out there. But we figure since you guys do it, maybe we should, too, occasionally.

Our rule, we think is a reasonable attempt to come up with various standards that take into account various organizations, what they do and try to capture ads that are, in fact campaign ads and bring the coordination rules into play when you do campaign ads.

I'll end on this note. Keep in mind that what we're talking about here is not rules that apply to every ad taken out. It has to be a public communication; it has to be directed to the voters in the jurisdiction of the candidate with which the

ad is coordinated; and the activity involved must meet the conduct standard of the FEC. If any of those are missing, then you will not look at the rest of the rule. So, this is not something where all lobbying campaigns are, all of a sudden, going to fall under these rules.

I don't think it can go without notice today that while we're here discussing the ability of corporations, labor unions, individuals to spend lots of money in coordination with a campaign, as a way of influencing that campaign and helping that campaign, Congress down the street is dealing with a lobbying scandal that deals with the influence buying by corporations, lobbyists and others.

It would, indeed, be ironic if the FEC opened up a new loophole for influence buying, just as Congress is looking at ways to close another loophole. I urge you not to do it and I urge you to come up with a rule that really does reflect reality in how campaigns are, in fact, run. Thank you.

CHAIRMAN TONER: Thank you, Mr. Noble, we

commented yesterday when would be the first time Jack Abramoff or a reference to his situation would appear in the record and you are the second person to make that reference, but you came close.

MR. NOBLE: It's only because you put me on last.

CHAIRMAN TONER: If you'd been here yesterday, I think you probably would have achieved that. Ms. McCormick, I'd like to begin with you. Your comments and the joint comments that you and Mr. Gold and Mr. Trister submitted draw upon the safe harbor that the agency if I can manage this electronic device--that the agency proposed with respect to Alternative 4. And there's a number of criteria that are listed in the NPRM and I understand that your joint comments support that framework with certain modifications to the framework. Could you discuss, briefly why you think that would be an appropriate way for the agency to go? It would not involve a time dimension, but, instead, would be a different cut at it. Looking at certain types of communications that, in your view, should be

shielded because they relate to lobbying activities?

MS. McCORMICK: I'd be delighted. I think, and I want to echo one of the remarks of one of the commenters yesterday, which is I think that the Commission has a very difficult balancing test here. And it's not a test that you don't have in lots of other areas, but definitely in the coordination area.

On the one hand, as a graduate of this agency, I think that you have a duty to ensure that the contribution limits of the Act are not evaded. And, certainly, as a lawyer, I support that. On the other hand, I think that Congress made quite clear when it enacted BCRA, and the Courts have made clear that there is First Amendment protected activity, such as lobbying that should not be regulated by the rules of the Commission.

So, I think what you're looking for is a test, which on the one hand, will capture a goodly amount, I guess, of content that is election related. I'm not going to say 100 percent, because

I don't believe that's the standard. And, thereby, protect the contribution limits of the Act. And on the other hand a content standard, which is going to allow organizations and individuals for that matter to engage in protected issues, speech and lobbying and other kinds of public communications that really aren't within the content that this agency should be regulating and to which people have a First Amendment right, the kind of speech they have a First Amendment right to make.

So, I think, if you proceed along a time line, you back yourself exactly into the position which we've been hearing about for the past two days. Because no matter where you set the bar, someone is always going to say, well, what about these ads? Right. Or this is either too inclusive or it's under inclusive. There's always someone that's going to argue that. So what we tried to do when we were thinking about this is to say, well, how could you do it without reference to time and, yet, still protect the rights of organizations such

as ours. I admit that we were being somewhat selfish about it but we think it includes a lot of organizations out there--to be able to engage in certain protected First Amendment activities, such as lobbying and some other things, and, yet, at the same time be able to bring in enough content that really is election-related content.

And I think we believe that creating the safe harbors that we've suggested, would allow the Commission to do that. And it would allow you to get out of the time bind.

CHAIRMAN TONER: Mr. Noble, I'd be interested in your thoughts on this. It's the criteria that the NPRM talked about and that Ms. McCormick is referring to, it was a number of things, but whether the communications devoted to a pending Legislative or Executive branch matter, whether the communication refers to a clearly identified federal candidate's record or position on issues, whether it refers to candidate's character qualifications or fitness for office; and whether it refers to an election or voting or

anyone's candidacy.

And as I understand, Ms. McCormick's argument, her view is that an exemption along these lines could be appropriately fashioned that would apply across all time, not just in the last 120 days and any other time dimension.

Your thoughts on that--do you think we could appropriately do that?

MR. NOBLE: No, I don't.

CHAIRMAN TONER: Why not?

MR. NOBLE: I think some of those standards can be used at certain time periods, but I think to apply them across the board would exempt a lot of obvious campaign activity, coordinated campaign activity.

And, again, we have to keep repeating that we're not talking about lobbying ads, that are taken out that are not coordinated with a candidate. We're talking about lobbying ads that are taken out that are coordinated with a candidate where, in fact, often they look exactly like campaign ads.

We think, for example, that when you're dealing with a political committee, virtually everything a political committee does, is campaign related. The Supreme Court has recognized that. And that's why the Supreme Court has said that you don't need as exact a standard when you're dealing with a political committee. So, to apply that type of standard for a political committee coordinating with a candidate, to us would make no sense.

Even when you're dealing with other organizations, there are a lot of ways and the Court in Shays recognizes, there are a lot of ways that you can run campaign ads, coordinate with a candidate that don't mention the candidate or that don't talk, necessarily about the candidate's qualifications for office that would still be campaign ads.

So, I just think what that would do is allow a lot of coordinated campaign ads that are illegal under BCRA.

CHAIRMAN TONER: Ms. McCormick, any response to that?

MS. McCORMICK: Yeah, I think so, I think Larry's view is sort of shaped by what I would think of as, kind of a myopic vision of the world, because his view is all about campaign finance. And he views anything that's done as having, basically an electoral--I'm sorry it's not you, your clients, all right--as having an electoral purpose, okay. So, he looks at everything that's done as having the purpose of influencing an election.

I come from a very different world. In our world people have other fish to fry. We have lobbying communications to make; we have members to serve; not everything that we do relates to or has the purpose of influencing a federal or a state or any other election.

And, so, I think the broader you make the standard, the more likely you are to capture perfectly legitimate activity such as lobbying activity and issue advocacy that we do that has nothing to do with elections.

MR. NOBLE: If I might respond to that. I

don't have that myopic view. But we are here talking about the campaign finance laws. We are here talking about the application of the prohibitions and limitations of the campaign finance laws. And the reality is that groups do take out ads that are campaign ads. And they often want to coordinate those ads with the candidates. So to say that it doesn't go on, I know Peggy's not saying that. But to say that it doesn't go on or even to look at it, it doesn't go on, it's just not recognizing reality.

Also, the rules allow lobbying campaigns. What we're talking about are certain types of ads that are coordinated with the candidate and run in the district where that candidate you've coordinated with is running.

One of the questions I think keeps popping up is if the candidate is supporting you and you are running that--and you want to run an ad, why would you run the ad in his district to lobby him to support you, if he already supported you and you've already coordinated the ad with you. So, I

think there's a lot of room out there, under these proposals for lobbying campaigns. But the reality is, Congress passed a law, the Supreme Court has upheld it, the FEC has to implement it.

CHAIRMAN TONER: Mr. Vice Chairman.

VICE CHAIRMAN LENHARD: Thank you. I would be more persuaded by your point, Mr. Noble, if the coordination regulations didn't also cover parties and if some of the candidates or some of the legislators weren't also the heads of political party committees. And, so, I have some concerns both that political parties are involved in the lobbying process as a factual matter and that a number and the leaders of some of these party committees are also prominent members of the leadership of their--in the legislature.

But my question, really, to you is about a somewhat different problem. As I understand sort of the--your concerns with the proposal and I looked a little bit at the 200 ads you give that number, I'll take you at your word, that fell outside the 120 day time period.

My understanding of your concern is in part that some of those ads fell outside the 120 day time period and therefore they create the potential for an opportunity for people to coordinate in a way that they shouldn't.

But that the remedy really wouldn't be to extend that time period to cover those kinds of ads, that you have a fundamental--that you don't believe that we should simply be adjusting the temporal time period of regulation, but that we should adopt a different regulatory scheme. And I wanted to gather a sense of whether that was true.

If we looked at all those ads and found the outer limits of the time period before an election at which these kinds of ads were run and picked that date, would that satisfy the concerns you have or does our entire temporal approach have a flaw to it?

MR. NOBLE: Well, I, we also incorporated a temporal approach in ours and--but we also added, because of concerns about the type of ads these would reach, we also then added more of a content

standard about what the ads actually did. The problem with just having a temporal approach, as the Court said in Shays, is, yes, you can set the line somewhere, but why? Why 120 days, why at 200 days and so you have to really have some justification for doing it. I think you also have to recognize that history has shown that campaigns themselves run ads, sometimes a year before. We can go back to the Clinton campaign which really started with the DNC, actually running ads early on that were in, for all intents and purposes, campaign ads. And they started running them a year in advance.

So, I think you can have a temporal approach that has to have some other elements to it and also has to adjust for who the speaker is. And just to take back--to go back to your earlier comment about the political parties. I understand what you're saying about the political parties, but as the Supreme Court has said, political parties present the least problem constitutionally, since their very purpose is to elect candidates. I know they do other things, but at the heart of their very

purpose is to elect candidates. So there's much less concern about vagueness or over breadth when you get to political parties.

VICE CHAIRMAN LENHARD: Could you describe for us what your proposal is, the alternative that you're presenting?

MR. NOBLE: Right, what we've done is we've divided it into three groups: Political committees; 527 groups and all other individuals. And I'll say at the outset that using a separate provision for 527s is in part, due to the fact that, in our view they should be considered, many of them should be considered political committees, but since they're not, we had to work with the way the Commission is presently looking at it.

VICE CHAIRMAN LENHARD: I'd like to interrupt for a second, when you say 527s, do you mean all 527 organizations?

MR. NOBLE: No, we mean 527s who are involved in federal activity.

VICE CHAIRMAN LENHARD: And how would we discern that?

MR. NOBLE: Well, now we're getting into the whole question of the 527 issue. What we would say is any public communication by a 527 which is not registered as some other type of organization. Any public communication that is coordinated or--that is coordinated with the candidate, meets the conduct standard. It does not need to refer to a party or a political party or a political candidate 30 days before the election--30 days before the primary, 60 days before the general to be considered coordinated.

So, you're looking at, these are 527s that are not political committees but they're also not necessarily gubernatorial campaigns, but if a gubernatorial campaign started getting involved in this activity, then, yes, you would treat it the same.

VICE CHAIRMAN LENHARD: So, if a gubernatorial campaign met with a senator, say the gubernatorial campaign is the re-election campaign of the sitting governor. And they met with a senator on Medicare reimbursement for the states and wanted to

run ads on that issue, would this--

MR. NOBLE: No, not in that case, in that case you would not have to apply it in that case.

VICE CHAIRMAN LENHARD: And why not? What's missing?

MR. NOBLE: Well, in that situation, if they were--if the campaign was just running. Well, let me think, I knew we were going to go through a lot of different hypotheticals. The gubernatorial campaign, they're not mentioning the candidate, correct?

VICE CHAIRMAN LENHARD: I don't know the governor hasn't decided yet, does it matter if he says Senator Smith's amendment to the Medicaid bills that would provide additional aid to the states does it change the hypothetical, then?

MR. NOBLE: Yeah, that, if in fact they are mentioning the federal candidate, then, yes, I do think you are in a different situation.

VICE CHAIRMAN LENHARD: Okay. What if they said Republicans are cutting again, important health needs for our citizens, we need your help to protect

the least advantaged among us? Does it fall within the category, do you think?

MR. NOBLE: And they met with?

VICE CHAIRMAN LENHARD: The senator--

MR. NOBLE: The senator and where is the ad shown?

VICE CHAIRMAN LENHARD: In this governor's state, the senator is from the same state. Because the senator is part of the budget committee budget process--the bill-making process on the Hill.

MR. NOBLE: These are the tough hypotheticals. It may very well have to fall under it, I'd have to think about that, it may very well have to fall--

VICE CHAIRMAN LENHARD: So, in that case the governor's meeting with the Senator, then triggers the coordination rules?

MR. NOBLE: It may very well, depending on what the ad is, yes.

VICE CHAIRMAN LENHARD: To the degree he complains about there being Republican budget cutters.

MR. NOBLE: Well, if it's not mentioning

the candidate.

VICE CHAIRMAN LENHARD: But he's mentioning the party and the party's going to have a candidate.

MR. NOBLE: The party's going to have a candidate, yeah. And I'm willing to say right up front there are obvious areas in this where we'd have to figure out the details and the application as you will in your rule. And there are some areas where it is not, you can go one way or the other on.

VICE CHAIRMAN LENHARD: I mean, the problem that we're wrestling with--a number of us up here is that assuming, presumably, the governor has good sense and good counsel, they're going to go and try to sort it out--figure out what the regs say.

MR. NOBLE: Right.

VICE CHAIRMAN LENHARD: And the best sense that we have is that it's ambiguous as to whether they would meet with the Senator or run the ad.

MR. NOBLE: Let me rephrase my answer, then. You can define that one way or the other. I

would say you have to be very careful when you're writing the rules to not have a situation where state candidate offices can be used to coordinate with the federal office and help the federal candidate.

If you can craft a rule in such a way and that would then still allow some talking over an issue and an ad to come out. Now we're talking about 30 days before a primary; 60 days before a general.

VICE CHAIRMAN LENHARD: Right.

MR. NOBLE: Then you may be able to do that. You may be able to craft it. We took a crack at crafting a rule, and we recognize in doing this that there is some, leaves open some questions.

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

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

COMMISSIONER MASON: Mr. Noble, I'm going to continue picking on you, but you're used to it. Concentrating. There's in Mr. McGahn's testimony, there's a reference to the Buying Time study and some related studies and the alleged over breadth

of those and the particular figure that's cited here that I think was in some of the Court opinions was 7 percent. This caught 7 percent of genuine issue ads. And the argument seemed to be, well, that was okay, it wasn't substantial or over breadth and, of course, now we're going to have a go around with Wisconsin Right to Life on how we deal with that 7 percent or whatever the number is.

But my question to you is: How good is good enough for us, because you come back with some ads that are outside of the 120 day timeframes and if we got 93 percent, would that be good enough?

MR. NOBLE: Well, first of all the Buying Time study went to electioneering communications, which was independent activity And when you're dealing with independent activity--

COMMISSIONER MASON: But if the answer, ultimately is, no, that's okay, tell me how much is good enough?

MR. NOBLE: I don't know how much is good enough, could you say, I mean this is a decision you have to make. But I can tell you that in

certain circumstances, I think you have to catch every ad that is coordinated with a campaign and our rule says that, for example.--

COMMISSIONER MASON: Okay, all right then that's okay. I think that's an unrealistic standard. But let's go on. Do you think that candidates should be able to coordinate with their parties regarding generic party advertising. I'm not talking about anything that mentions a candidate, I mean, just vote Republican, vote Democrat, but the issue is, should we talk about corruption in Congress or should we talk about wire tapping or should we talk about stopping terrorists? What's the issue that we give people to vote. Let's say you've got a small state and there's one senator up for election and three or four representatives and the party, gets them all in a room and says, what should the team be, should that be okay?

MR. NOBLE: It's okay, the question is does it come under the coordinated party expenditures?

COMMISSIONER MASON: Well, is it legal, then?

MR. NOBLE: If they sit down and they work out the ads, then, yes I think you have a coordinated expenditure.

COMMISSIONER MASON: So you think a completely generic ad that doesn't mention any of those candidates but because the candidates have discussed it--

MR. NOBLE: Not just discussed it. Again, you have a conduct standard, it's not just that they know the ads are being run. They have to have a material discussion about the ad--

COMMISSIONER MASON: They have a debate about what's the theme and they vote on it, come to a consensus on it and your opinion, I'm just not aware that the Commission has ever taken that position before, that a candidate's involvement with a party's generic ad turned the generic ad into a contribution to the candidate.

MR. NOBLE: No, actually, previously, in recent years the Commission has gone in the exact

opposite direction.

COMMISSIONER MASON: But you're suggesting that we ought to do that.

MR. NOBLE: Again, I, look I'm realistic about this, you're not going to go--

COMMISSIONER MASON: Well, but you put--

MR. NOBLE: No, we're putting in front what we think you should do, yes, but if you--my answer is yes.

COMMISSIONER MASON: Let me ask you--let me ask one final thing. You understand that a convention that has the authority to nominate a candidate is an election?

MR. NOBLE: Right.

COMMISSIONER MASON: And that triggers the 120 day period under these rules.

MR. NOBLE: Right.

COMMISSIONER MASON: So, why does your submission have 154 pages of general election candidate ads in Roman No. IV; that all fall within 120 days of national party conventions or of a

primary.

MR. NOBLE: Well, because the question that was asked was it a primary or a general election?

COMMISSIONER MASON: But all of these, all these ads in your submission are covered in the time period of our current regulation. Because the ones in the summer, the ones in June and July were within 120 days of the national party nominating convention. And the ones in February were within 120 days of a primary. And you've got 154 pages of them in here that you're citing as one of the reasons we need to go out and regulate more and in terms of the time period they're already covered.

MR. NOBLE: So you're saying that the 30 days before a primary and 60--

COMMISSIONER MASON: It’s 120, right now.

MR. NOBLE: Well, 120 is before a primary you're counting 120 days from the convention.

COMMISSIONER MASON: Well, the rule says, first it comes from the definition of election, but it says 120 days before a general, special or runoff election or 120 days before a

primary or preference election or a convention or a caucus of a political party that has authority to nominate a candidate.

MR. NOBLE: I'd have to look at the ads, again, we focused on the primaries and generals. But, again, I don't think it fundamentally undercuts the point that these ads do come out before the 120 days. We have many ads here that are outside that period.

COMMISSIONER MASON: But if we're not being held to 100 percent standard, and I understand that's not your position it takes out 154 pages of this submission and it gets to the issue of how much of this goes on and how much would be--is excluded under the current rule versus how much is included.

MR. NOBLE: But you would have to concede, then even under your position that the period between 120 days to the primary and the end of the primary and the end of the general there are definitely campaign ads that come out.

COMMISSIONER MASON: For a presidential election there was no gap in the last cycle.

MR. NOBLE: I'm not talking just for presidential, I'm talking about congressional elections.

COMMISSIONER MASON: Yes, but there don't seem to be any ads there, I'm talking about the volume of ads, I mean, yes, if you've got some ads that fell in a gap, in Illinois where they have a March primary, fine, I think that's a fair point. But I'm asking about these and what you're saying is you agree that that 154 pages is irrelevant--

MR. NOBLE: I'd have to go back and look at the dates, I trust you on what you're saying, the dates on them, I'll have to go back and look at the dates. But it still doesn't affect the main point that these ads are run even 120 days before the conventions. I mean I don't know how, we can provide more ads, I don't know how one can look at, probably any election in my lifetime and say that campaign ads are not run 120 days before an election. Candidates don't run ads 120 days before an election. Look at the Commission's own investigation and audit of the '96 campaign.

Ads were taken out a year and two years in advance.

COMMISSIONER MASON: But the Court question was how much does this happen? And that's one of the things we're charged with looking for and the response to the question of how much you gave us 154 pages of ads that don't fall outside the time periods.

MR. NOBLE: I'll go back and check that, but I'd also say then, could you say, could the Commission say that, well, since most contributions are made within 30 days or 60 days or 120 days of an election, we can exempt money going to a campaign more than 120 days before an election?

CHAIRMAN TONER: Thank you Commissioner Mason. Commissioner Weintraub.

COMMISSIONER WEINTRAUB: I would just point out the obvious that money going to a campaign is never going to be a lobbying communication that somebody might want to protect under the First Amendment, it's just not the same thing, you're comparing apples and oranges.

MR. NOBLE: Well, actually, the Supreme

Court has said they're exactly the same thing. Coordinated expenditures are exactly the same as contributions.

COMMISSIONER WEINTRAUB: That's not what I said. I'm talking about the lobbying--the kind of grassroots lobbying communications that Ms. McCormick is trying to protect that I think even the Supreme Court would admit there's a First Amendment interest in protecting, at least that's what I heard Justice Breyer saying very recently and what I'm telling you is that interest is not--that making a cash contribution to somebody, writing out a check does not convey the same sort of message that a lobbying communication to a member of Congress does. It's just, you're not talking about the same thing. Yes, they are both in some sense covered by the campaign finance regime, but it doesn't mean they're the same thing.

Let me see if I can get agreement on something. The, and I'm hopeful that maybe there is, at least one little thing. We talked a lot about endorsements in the course of these two days. And

there's a lot of interest in our crafting an exemption for endorsements for federal candidates of state candidates and I suppose in some context, federal candidates of other federal candidates based on the two AOs that we've issued. And believe it or not, we actually are concerned about not promoting circumvention of the law. So, we've been trying to figure out how we would go about crafting this kind of an exemption. And one possibility is that we could say endorsements don't count as long as they don't promote or support the endorsing federal candidate. I would ask all three of you whether you think that would be a permissible and useful provision to write into the regulations.

MR. NOBLE: As long as they don't promote support?

COMMISSIONER WEINTRAUB: Yeah, I assume that if you're endorsing somebody, it's not going to attack or oppose the person who's making the endorsement, but--

MR. NOBLE: What about the person doing

the--maybe I'm not understanding the hypothetical. The--

COMMISSIONER WEINTRAUB: Federal candidate endorses state candidate. State candidate wants to run an ad showing the federal candidate endorsing the state candidate.

MR. NOBLE: Right.

COMMISSIONER WEINTRAUB: As long as that ad does not promote or support the federal candidate, would that be okay?

MR. McGAHN: Yes, I can understand what that means.

COMMISSIONER WEINTRAUB: You understand what that means? Thank you Mr. McGahn.

MR. McGAHN: I understand what that means. If you're trying to back door your own advocacy for your campaign, can't do that. If it's I endorse this person in their yard, that's fine.

COMMISSIONER WEINTRAUB: Exactly.

MR. McGAHN: That makes a lot of sense, that seems to be what the statute was trying to say when it says you're allowed to endorse.

COMMISSIONER WEINTRAUB: Ms. McCormick, does that work for you?

MS. McCORMICK: I agree, it's not something that comes up for us, but I think it makes sense, yes.

COMMISSIONER WEINTRAUB: Mr. Noble?

MR. NOBLE: I'll abstain.

COMMISSIONER WEINTRAUB: Oh, come on. [Laughter.]

MR. McGAHN: Well, what's the problem with it? The statute says you can endorse right?

MS. McCORMICK: Yeah. An endorsement is Important.

MR. NOBLE: Right. That's not going to cause me major problems.

COMMISSIONER WEINTRAUB: Oh, I'm gratified.

MR. NOBLE: But you know, look, I have to say, given the attitude the Commission has towards what campaign ads are and it's consideration of 30/60 day rules now for them, you make me nervous.

MR. McGAHN: That comes from the statute the 30/60 days--it's--

MR. NOBLE: Not for coordination.

COMMISSIONER WEINTRAUB: I would just point out that the 30/60 day is--many people have come to us and asked us to consider that. Personally, I wasn't considering 30 or 60 days I'm just listening to what people have to say when they come in here. And I think I know the answer to this one, but I just want to clarify it in my own mind.

The Court said, the question that you were trying to answer with your submission was do candidates, in fact, limit campaign-related advocacy to the four months surrounding elections or does substantial election-related communication occur outside that window?

If we could, somehow, establish that substantial--and that will be the next question as to what substantial is--that substantial election-related communication does not occur outside some window of time would that be an appropriate window of time to write into our regulation?

MR. NOBLE: I would say that if you could do a study, and not just ask the lawyers from the various parties to give you their answer or even just us to give the answer, but you actually did an investigation, a research study and you came up with some empirical evidence that at some point campaign ads or a substantial number of campaign ads are not taken out--you could really develop the record then, I would think you actually have something to move on and you may be able to come up with a coherent rule on that effect.

I don't think you're anywhere close to that.

COMMISSIONER WEINTRAUB: Well, obviously, we have time constraints because there are people breathing down our necks in the litigation. But the--assuming that we could gather that kind of empirical evidence and hire a statistician who could put it together, what would substantial mean? If we could demonstrate that 85 percent of election-related communications took place within whatever window that was? Ninety percent, 95

percent? 75 percent? What is--what do you think the Court meant by substantial? And I mean that for all three panelists.

MR. NOBLE: I just want to clarify one thing I said, also, I would probably divide it out by groups. I don't think I would have that rule for political parties and political committees.

COMMISSIONER WEINTRAUB: Is there anything in this opinion that indicates we should have a separate rule for political parties and a separate rule for 527s--

MR. NOBLE: Buckley and McConnell, yeah.

COMMISSIONER WEINTRAUB: No, I'm talking about the Shays opinion that we are responding to.

MR. NOBLE: No, but Buckley and McConnell both talk about how political parties and political committees are different animals and they do not--you don't face the same restrictions--I also think that's true of 527s. Obviously the Commission disagrees but I don't think you can move away from that, Buckley and

McConnell say over and over again political committees and political parties don't--you don't fix the same problems in regulating them as you do other groups.

COMMISSIONER WEINTRAUB: Well, your proposal, actually, has a very odd approach to that, though, because you have the most restrictions on the groups that are already most heavily regulated, that is the political committees and the 527s are also to some degree, regulated now, at least they have disclosure requirements. And you have the thinnest amount of restrictions on the corporations and labor unions that are the source of evil soft money, so I don't really understand that aspect of your proposal, but I want to go back to my original question, which is; What's substantial? Anybody want to offer--

MS. McCORMICK: I'd like to offer an opinion. I think that you don't need to have 100 percent. It seems to me that the Commission has recognized de minimis standards throughout all of the regulations in the law. If you make a

communication to your restricted class you can have a de minimis number of people receive that communication. If you put out an endorsement, you can do it as long as the costs are de minimis.

So, no one is, I mean, I don't think the law has been interpreted as 100 percent law. And if you want to have a bright line, I think it's impossible.

I also want to respond, however, by saying, that you can't just look--and I understand the Court asked you to do this, that whether campaign advertising occurred during that period. What about the fact that lobbying is occurring during that period? And the Congress mandated that the campaign law not interfere with the First Amendment rights of organizations to lobby.

So, I think, just going along by Larry's standard and looking at how many campaign ads there are, only gives you part of the picture of the impact that the regulation would have if you used timing alone.

COMMISSIONER WEINTRAUB: I agree with what

you're saying, however, looking back at what the Court asked us to do--

MS. McCORMICK: Yeah.

COMMISSIONER WEINTRAUB: --what, in your opinion, what do you think substantial, in this context means, is it 75 percent? Is it 80 percent? Is it 85 percent? I assume it's more than 50 percent?

MS. McCORMICK: Yeah, I mean, I think it's a very hard question to ask. I would say substantial could be more than 50 percent or 75 percent, but I just have a hard time with that approach because I think if you're only looking at how much campaign activity is occurring in a time period, you're kind of missing the whole picture. And that's the difficulty with just using a time standard. I think that's the reason why we ultimately decided it wasn't all that useful in terms of a framework for the regulations.

COMMISSIONER WEINTRAUB: Mr. McGahn, you want to take a crack at that one?

MR. McGAHN: It's not for me to say what

is substantial, but what I can do is offer proof, anecdotes, and actual real tangible evidence that will maybe help you decide what is substantial.

COMMISSIONER WEINTRAUB: Please.

MR. McGAHN: Any rule is going to have some situations where someone somewhere is going to say gee whiz maybe that should have been covered. That's the nature of an administrative rule.

You're not going to capture every possible ad that somebody may think is really a campaign ad. Can't do it. If you try to do that, you're going to be so overly broad that McConnell or no McConnell you're going to have problems in Court, I think everyone would agree with that.

With that being said, what I can tell you is, in my own experience, primarily in my clients' experience, last cycle, first, post-McCain-Feingold cycle. Our independent expenditures occurred within 60 days of the general.

COMMISSIONER MASON: All of them?

MR. McGAHN: We may have done some early radio, but I think it may have been all. I think

September 15 was our first one for the general. So we can do a study but we've already filed FEC reports that say what we've done, it's there it's public. As far as campaign media, that's public at the stations, you don't need a study. Maybe you can go collect it and call it a study, but that's public information, you don't have to do research on that, per se. So, that's out there. If you look at it, you're going to see the campaigns not what campaign ads are being called by others, which is well, in '96, the DNC ran some ads and those are really campaign ads a year out talking about how the Republicans shut down the government—but that was really a campaign ad--that's not a campaign ad. Campaigns actually running campaign ads, party committees actually running campaign ads occur within 60 days of the general.

And you're not going to get a lot of leakage beyond that. Certainly, you don't--I don't think you get any leakage outside of 120 days, unless you start begging the question of what is a campaign ad and the whole content question again

which we've kind of been around that ring now for years. But, putting that aside, ads happen near the election, both campaigns and not. I'm reading Senator McCain's comments, it is our experience as candidates, that campaign ads are, in fact, run earlier than 120 days before an election, by parties, outside groups and by candidates themselves. Show me a campaign ad, paid for by a campaign that ran outside 120 days.

Has anyone offered anything in the record? Are we doing the same thing we've done the last time when the Court said, gee, you don't really have things in the record to back up the rule, isn't this the--I'm hearing the same kind of jive talk theory about how well the--of course there's ads. Are there? Where are they?

MR. NOBLE: Actually, even under Commissioner Mason's interpretation of our ads, there are ads outside the 120 day period.

MR. McGAHN: I'd be interested to see them to see if they're really campaign ads. Well, I'll take a look and maybe I could supplement my

comments if that's going to help the Commission, but what is substantial to me is--the data I've seen, these ads come near the election, so you're safe either way. And a percentage game is difficult for me because I'm looking at what I see 100 percent, you're covered.

CHAIRMAN TONER: Uh--

MS. McCORMICK: Can I--

CHAIRMAN TONER: We will have another round of questions, I assure you.

MS. McCORMICK: Okay.

CHAIRMAN TONER: Commissioner von Spakovsky.

COMMISSIONER von SPAKOVSKY: Thank you, Mr. Chairman. Mr. Noble, we've been talking in these rounds of questions about really the technical details of the rule, for example, you've proposed. I'd like to back away from that for a second. I've only been on the Commission for two weeks, but I'd like to make sure I understand from a much higher level, the public policy grounds behind the rule that your organization, the Center

for Responsive Politics, is pushing.

As I understand it, and correct me if I'm wrong, you said in your opening statement, coordination goes to the heart of BCRA and that the public policy grounds here behind what you think we ought to do is that if a regulated entity, like a campaign or a candidate, if they coordinate with a second organization to put out a message or, perhaps, even give them money, that the use of that kind of a conduit, basically, a second organization is corrupt and deceives the public.

I mean is that basically the public policy grounds behind the rule that you think we should put in place?

MR. NOBLE: No.

COMMISSIONER von SPAKOVSKY: Okay. What is it?

MR. NOBLE: First of all we didn't say anything about deceives the public. Second, of all, what this is based on is a prohibition that's been in the law for a very long time and held constitutional, which is that corporate and labor contributions and contributions outside the limits

embody real or apparent corruption. And Congress has a compelling governmental interest in controlling that. And that compelling governmental interest has supported the prohibitions on direct contributions and coordinated expenditures.

COMMISSIONER von SPAKOVSKY: But the heart of that goes to the fact that you have a coordinated message going on and the second organization is basically getting around the limits.

MR. NOBLE: Not just a coordinated message, but a coordinated campaign message going on.

COMMISSIONER von SPAKOVSKY: I see. You've submitted a comment in conjunction with two other organizations, Democracy 21 and the Campaign Legal Center. All of you have signed onto it and proposed this rule. My understanding is that, in fact, your organization has received at least $900,000 from the Pew Charitable Trust, Democracy 21 has received $700,000 from

the Pew Charitable Trust. Campaign Legal Center has received $2.2 million from the Pew Charitable Trust, which comes out to $3.8 million. Aren't your organizations, basically acting in exactly the same way that you want us to stop? You're delivering a coordinated message on behalf of the Pew Charitable Trust in this area?

MR. NOBLE: No, for many reasons. Let me start with, first of all, this message--this comment was coordinated between a few organizations. And I know we get grants from the Pew Charitable Trust and we did just get a $900,000 two-year grant from the Pew Charitable Trust. I don't know, specifically, the grants the others get, so I'll believe what you say on that.

These grants, these comments were not discussed with, run by, or to the best of my knowledge, anybody at the Pew Charitable Trust. So, in that sense, it's not as if there was a candidate, the Pew Charitable Trust takes the place of a candidate who we then go talk with about the comments.

But there's actually something much more fundamental about the difference that goes to the very nature of a democracy. We are private non-profit organizations, we are not elected government officials.

We hold ourselves to certain standards, I think it's perfectly fair you ask us about who we're funded by. I have no problem with that. I have no problem explaining our funding, but we were not elected to serve the government--to serve the people. We are not government servants. The elected officials are. They live under laws that we don't live under.

And to equate--I think, to equate private organizations with elected officials, really undercuts what elected officials are supposed to be all about.

COMMISSIONER von SPAKOVSKY: Tell me, Mr. Noble, were you present at a meeting in 2004 conducted by a Pew Charitable Trust individual named Sean Treglia in which he urged the grantees such as yourself to keep Pew's role in this issue a

secret, and in which he said, quote/unquote, "that the idea for all of these grants was to create an impression that a mass movement was afoot, that everywhere they looked in academic institutions in the business community, in religious groups and ethnic groups everywhere people were talking about reform," were you present at that meeting?

MR. NOBLE: I was never--I was not present at any such meeting, I don't think any such meeting, ever took place. I think, what you're referring to is, and maybe I'm wrong, is Mr. Treglia's comments at a conference of reporters where he discussed that's what he told people. And I can tell you, from my experience at the Center, I've been there since 2000 and I know Mr. Treglia, I dealt with him when he was our program officer. And from talking to others, Mr. Treglia and no one at Pew ever told us to keep quiet of their involvement.

In fact the very opposite. If you've ever worked for a nonprofit, you know that, in fact the first thing you're supposed to do every time you

appear somewhere is to say, this is funded by the Pew Charitable Trust, the Carnegie Foundation, the Ford Foundation, and we thank them for their support.

COMMISSIONER von SPAKOVSKY: Well, I hate to disagree with you, Mr. Noble, but, in fact Mr. Treglia has a video tape of him saying this very thing.

MR. NOBLE: Not to a group of grantees, it was to a reporters' group.

COMMISSIONER von SPAKOVSKY: Well, that's not my understanding of the situation.

MR. NOBLE: I've seen the video. Maybe there's another one. But anyway, I know he said that, I've seen him--that he said that to a reporters group, that he told people that. It was never told to us. As I said, the exact opposite was told to us, I don't know anybody it was ever told to.

COMMISSIONER von SPAKOVSKY: So, it's just a coincidence that the three organizations that received almost $4 million from the Pew Charitable Trust are all delivering exactly the same message

on the regulation here and you want us to regulate in a way that really shouldn't extend to a group such as yourself that is basically lobbying a federal agency on behalf of a charitable organization that couldn't lobby itself?

MR. NOBLE: Well, first, where do I begin with that? There is, we're not asking--the law--we're talking about campaign finance laws and we think the campaign finance laws should apply to us as they apply to any other group. And if we get involved in any of this activity, we think that the law should apply to us in exactly the same way. We're a 501(c)(3) organization we don't get involved in that--

COMMISSIONER von SPAKOVSKY: But the similarity is, there is an exact similarity, you want and you urge us to regulate because you believe that full disclosure, for example, is very important; full disclosure of expenditures is important because the public should see what possible influence there is on people who contribute money to these organizations, I'm sorry,

to candidates when they are making rules and passing legislation.

I've been to your Web site, there's no full disclosure there of your expenditures and your contributions. And you are engaged in very similar efforts to what elected officials do. You're lobbying government agencies such as ours to put in rules and regulations that will affect the public in the same way that elected officials put in rules and regulations that affect the public. You don't seem to want the same rules to apply to you.

MR. NOBLE: Well, first of all, I thank you, immensely, for giving us the--putting us on the same level as elected members of Congress in terms of our influence. It's not true, but I thank you for doing that.

No, I'm saying as we say throughout these rules, you treat each group differently according to what it is. And, by the way, it's not similarity between what the Campaign Legal Center, Democracy 21 and CRP has said. We signed off on the same comments. We're not trying to hide

that. Obviously, we talked about it. Obviously, we shared the drafts. Different people--actually Paul Ryan wrote most of it--but different people wrote parts of it and we agreed on it, we talked about it. We're--in fact all three of us signed it.

Maybe if a candidate and every group that coordinated on the ads all signed the ads we would have a different situation. But, frankly, I just don't see the similarity between what a member of Congress does under a federal law that has been held constitutional and what we do under a totally different law. I'm not quite sure what law you think that we come under that we're violating.

COMMISSIONER von SPAKOVSKY: Well, if you don't understand it, I'm not sure I can explain it to you.

MR. NOBLE: Well, I'm not sure it's--

CHAIRMAN TONER: Thank you Commissioner von Spakovsky. Mr. General Counsel.

GENERAL COUNSEL NORTON: Thank you. Mr. Chairman, and welcome to the panel. Larry, the District Court decision in Shays was issued

in September of '04 and I didn't check before I came up here, but I assume the record closed some months before she issued her opinion, if memory serves and so there was no opportunity and, certainly, the Court did not consider as part of the record here, anything that transpired in the '04 cycle.

Here we sit in January of '06, and something roughly, 75 percent of the complaints we've received relating to the '04 cycle, have been either conciliated or closed so they're on the public record. I think half a dozen of those are coordination complaints and, probably, all dismissals.

I know this question gets asked in different forms at different times and there's a lot of resistance to it, but I never completely understood the general objection, but I want to ask specifically here: Why isn't it appropriate for the Commission to say, look, we now have the benefit of experience, we have the 2004 cycle of complaints. We don't have any evidence in front of

us that that 120 day window was circumvented. There are no news reports or other evidence that you or anyone else has presented to us that suggest that there was rampant circumvention going on outside of 120 days, in which case we wouldn't receive a complaint, presumably or we'd be unlikely to. Why isn't it appropriate to rely, in part, on that evidence at this time and craft a coordination rule.

MR. NOBLE: Because I don't think the rule that would limit it to 120 days complies with the law. I think what it will allow--official, first of all, these laws are, also prophylactic. I think what the rule will allow is for that coordination to go on with these campaigns. And I think you will see it and the history of this field--yes the Court ruled before the 2004 election, and I know people want to go back 10 years, 20 years. But the history of this field has been that when you leave open those loopholes and the Court has recognized this, Congress has recognized this, they very quickly expand.

Soft money started out as a small minor issue, which only one or two commissioners complained about and it blew up into a very, very large industry. We saw it with the 527s and so, I just don't think that it's--even if we had looked at all those complaints and even if we agreed with you on your investigation. Although I wonder how many of them were actually investigated? I would, then say that that still doesn't give you the authority to say that coordinated ads with a campaign are not campaign ads and are not under the contributions limits and prohibitions. I just don't think you can do that.

But I would ask, I mean, how many of those are actually--were actually investigated, those that were dismissed? My suspicion is probably the majority of them were not investigated.

GENERAL COUNSEL NORTON: Well, the question is whether there was any basis for doing so.

Well, I mean you talked about the history of circumvention with respect to line drawing and

so on, but you certainly were here for a lot more of the history in this regulation for coordination regulations in one form or another than I was.

And the history, at least as I see it is there's not a lot going on. There are very few, over 25, 30 years, 25 years, probable cause findings in this area. There are a few that went to litigation. There are a few celebrated cases that everyone likes to talk about that I understood caused a lot of angst, but what evidence has there been that the coordination regulation, historically has been an area where there's been a tremendous amount of circumvention and abuse.

MR. NOBLE: That's a very good question. If you go back to, I think it's about 2000, if you look out before 2000, the coordination analysis the Commission was using was very different than what you're proposing today. The coordination analysis the Commission was using was whether it was for the purpose of influencing an election and whether there was any discussion with the candidate. It was a very broad standard. And one could argue,

turn the question back around and say for 25 years the Commission used a very broad standard, brought a couple of cases under them. Some of them weren't celebrated. There were some that settled out. But it was generally recognized as a very, very broad standard. And it didn't seem to cause a lot of problems.

And maybe that's one of the reasons there weren't a lot of cases. Because, in fact, people knew, I think that the general word was that if you talked to a candidate about an ad, you've coordinated.

GENERAL COUNSEL NORTON:

Okay. Just a quick question, Mr. McGahn give someone else an opportunity, there's been concern expressed by some of the commenters, I think Mr. Noble is one, about the so-called gap that exists, that whether you're using a 30/60 day window or a 120 day window, where you've got early primaries, you essentially go dark for a period where there's no longer an applicable window. And then a couple of months transpire between the primary and the

general election where we're not regulating at all. What's the argument for the Commission not to close that gap?

MR. McGAHN: The argument is the Commission needs to look at what actually happens. If you look at what actually happens in federal elections, you'll see that the gap is not an issue because there's very few contested primaries. You don't see an advertising wave after primaries. The vast majority, and I would say not a majority. We're talking a very high percentage of federal elections really don't get going till the general election. You can't see everything through the presidential lens, that's one election. You have all the Senate elections; you have all the House elections. And even, to a certain extent you can look at state elections and realize that the gap, I almost want to turn it around and say where's the evidence that the gap is being exploited. The so-called gap. People waiting? Well, we can't run this ad till the day after the primary, we're going to get a jump on the general? I don't see any

evidence of that happening. Vice versa, I don't see anyone saying, oh, 121st day, let's go out with our advertising, because tomorrow everything changes.

I don't see evidence of that. It's pure speculation in my view and so the argument is that if you look at what's actually happened, which sort of gets at your original question that you asked, you realize that the gap doesn't need to be closed because the gap doesn't have any meaning as far as campaign spending, any meaningful meaning.

GENERAL COUNSEL NORTON: Thank you. Thank you, Mr. Chairman.

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

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

CHAIRMAN TONER: Thank you, then I guess we'll go back to our second round and I'll begin. Mr. Noble, I just wanted to follow up on some questions in the first round. One focusing on endorsements, which--one thing that we've learned

over the last two years is our opinion in the Forgy Kerr AO was not well regarded by almost anyone in that debate. And, of course, I think some commissioners believe that we were governed by the regulations that were then in place and had to come to that result in light of the regulations so we were looking forward to getting into a rulemaking setting where we could, perhaps, make some adjustments. But I want to make sure I understand your position. Do you think it would be legally permissible under the governing law, the circuit court ruling and otherwise for the agency to fashion an exemption for endorsements as long as there was no PASO for the endorsing candidate.

MR. NOBLE: Speaking only for the Center, not for any other cosigners. I have not coordinated this answer. I think you--yes, I think you could. I'm not certain whether PASO would be the standard, but I think you could coordinate, I mean you might very well be able to come up with an exemption that would allow the actual endorsement--type of endorsement you're talking

about.

CHAIRMAN TONER: And if we drew upon, as you pointed out, the PASO standard, which is in the law in terms of--in a lot of different places, do you think all things considered that would be a permissible approach? Speaking just for yourself and your client.

MR. NOBLE: I want to think about the PASO standard whether it should be a different standard such as the, talking about the character qualification standard. But I think you can using, within that realm somewhere, I think you could carve out an exemption.

CHAIRMAN TONER: Do you feel similarly with respect to solicitations? That was another proposed exemption in the NPRM because, clearly, federal candidates and office holders often raise money for outside interest groups or for party committees.

Again, if we tailored it around the solicitations not having any language in them that promoted or supported the endorsing or the

candidate that signed the piece? Your thoughts?

MR. NOBLE: Now, we're getting into a harder problem because now we're talking about the solicitation of soft money, I assume?

CHAIRMAN TONER: No, no, no, I apologize, it would just be federally permissible funds--

MR. NOBLE: Oh, hard money.

CHAIRMAN TONER: --hard dollars where, for example, you might have Nancy Pelosi signing a piece for the Democratic National Committee or something like that. Again if we fashion the exemption as long as that piece did not promote or support Ms. Pelosi, legally permissible?

MR. NOBLE: I think you may be able to fashion a legally permissible way. I'm not saying absolutely not, no.

CHAIRMAN TONER: May be able to--

MR. NOBLE: Yeah.

CHAIRMAN TONER: --you at least feel good about it in general?

MR. NOBLE: Hmm?

CHAIRMAN TONER: You feel good about it,

in general, we're in the ballpark?

MR. NOBLE: It think it's--I understand what you're trying to get at and it's something we've struggled with trying to figure out a way to do it because we understand the issues there. And especially when you're talking about hard money across the board.

CHAIRMAN TONER: Sure, it would only be hard money.

MR. NOBLE: Then our concerns are a lot less about it.

CHAIRMAN TONER: And Mr. McGahn I want to make sure in the solicitation area and in the endorsement area would you and your clients feel comfortable if we fashion it again on the absence of PASO.

MR. McGAHN: Yes.

CHAIRMAN TONER: That would work. And Ms. McCormick, any thoughts on this? I know this is maybe a little bit, fortunately, probably for you removed from day-to-day activities, but we--

MS. McCORMICK: Yeah, we think it would be

fine.

CHAIRMAN TONER: Mr. Noble, I want to follow up. And I do appreciate you and your colleagues did submit a very detailed proposal. And it does turn, as you indicate on the nature of the speaker whether they're a political committee or a 527 or anybody else. But just focusing on the political committee rule, I just want to make sure I understand it.

The basic test would be that any public communication would be covered under that standard if it was made for the purpose of influencing a federal election, no matter when it aired and regardless of whether any candidate appeared in it. Is that--

MR. NOBLE: If it was aimed at the candidate's--the jurisdiction--right.

CHAIRMAN TONER: Directed to that, therefore, there would be no time restriction --

MR. NOBLE: Right.

CHAIRMAN TONER: --and it wouldn't matter whether a candidate appeared in the spot?

MR. NOBLE: Right.

CHAIRMAN TONER: And I guess the question I have and it's an age-old question, but it's an important one. In your view, what criteria would this agency appropriately draw upon in determining whether it's for the purpose of influencing an election? Other than, as you point to, the directed-to, you know, the targeting, I assume it's something more than that, because you indicated that was part of the test itself?

MR. NOBLE: Yeah, and I know this is not going to be a satisfactory answer, but the statute talks in terms of an expenditure. It has not been further defined when it comes to a political committee. It's something that political committees have to work with all the time.

CHAIRMAN TONER: Is it any spending, basically, do you think that's directed to these voters? I mean is that basically where you come down?

MR. NOBLE: No, I mean, there are certain disbursements political committees make

that are not considered expenditures. This is one of those metaphysical issues within the campaign finance--

CHAIRMAN TONER: But an important issue.

MR. NOBLE: It's a very important issue, but I think most things political committees do are expenditures. And I think most of the ads we are talking about, which are our central concern, no doubt that they would be for the purpose of influencing a federal election.

CHAIRMAN TONER: So, is it fair to say and people can argue and, perhaps, litigate over where to draw a line. But even you would acknowledge that even for political committees where you have communications directed to voters, there's at least some subset of those communications that shouldn't be regarded as for the purpose of influence, is that fair?

MR. NOBLE: Yeah, I'm not aware of any, but I recognize, since there is a definition for

the purpose of influencing somebody might come up with one.

CHAIRMAN TONER: Would you be able to identify one I guess is the question I have for you?

MR. NOBLE: The only ones I can think of, historically, are things that aren't public communications, such as, certain types of administrative expenses that aren't public communications. So, I'm having trouble--I'm trying to think of one right now and I'm having trouble thinking of one, but I'm not going to foreclose it.

CHAIRMAN TONER: I also want to follow-up briefly and my time's expired so I'll be very brief. Mr. Noble, firewalls has been a big issue here and I want to make sure I understand your position. This proposal that if there was a firewall established that walled off the relevant decision makers that that would be a bona fide exemption or safe-harbor that people could draw upon and, basically, would preclude a finding that the conduct prong had been breached. Are you

comfortable with that?

MR. NOBLE: No, I don't--

CHAIRMAN TONER: Why not?

MR. NOBLE: --I think firewalls in most contexts, firstly in political contexts, don't work; they're virtually impossible to enforce. I know that some political parties have said they've used them. And I just, frankly, don't think that they really have a place.

CHAIRMAN TONER: When you say they don't work, Mr. McGahn talked about some of the steps that are taken to basically put together silos of people, as they're sometimes referred to and it's very, there's a lot of overhead costs in doing that, but you basically have a separate team of people who work on IEs and then another team of people who work on the rest of the party committees' activities.

When you say they don't work, what--are you saying that even if the silo is factually set up and is not breached, it still doesn't work?

MR. NOBLE: I and with all due respect to

Mr. McGahn, I'm not questioning anything he does. I just question whether, in practice they work. whether in practice they are, in fact being followed.

CHAIRMAN TONER: In other words you question whether or not they are breached, the silos are, in fact breached?

MR. NOBLE: Yes. And whether or not it's something the Commission would ever get at.

CHAIRMAN TONER: I'm sorry get at in terms of?

MR. NOBLE: Meaning whether you have any capability of actually ensuring yourselves that the silos are, in fact working; the firewalls are, in fact working.

CHAIRMAN TONER: So if we had committees that submitted sworn affidavits and other sworn testimony indicating this is how they set things up and that the decision makers were in these silos, to you that still wouldn't be satisfactory, under oath.

MR. NOBLE: I just don't think that you should have a rule based on that, no.

CHAIRMAN TONER: Ms. McCormick?

MS. McCORMICK: I mean, I think we fundamentally disagree and I think my experience has been in the labor movement that we have been using firewalls, regardless of whether the Commission has proved them up until now. Because it's the only possible affirmative way of avoiding being hit by a whole lot of FEC complaints filed by our opponents.

I mean we have something that we have to tell our clients that they can do in order to avoid getting a complaint that alleges that because there might have been a meeting on one day where one person from the organization met and shook hands with the candidate, that an independent expenditure has been coordinated and the only thing that we've been able to come up with is to set up a firewall and I think we take it very seriously. I think it benefits the Commission. It not only benefits us because it gives us at least something to say instead of just having to prove a negative, we can say something affirmative.

But I think it benefits the Commission, because we can then say to our clients, okay, not only are we not going to coordinate, but we're going to take affirmative steps to make sure that it can't happen.

CHAIRMAN TONER: Proactive steps to reduce the opportunity for coordination, is that your view?

MS. McCORMICK: Yeah, yeah, because if we put the people, I mean, in my own experience, I'm not going to go into a lot with my own clients, but we had teams and I know a number of other organizations that had teams. And we thought very carefully about who needed to be on what team and how it should work and we, as attorneys, we made sure people did what we told them they had to do. But they realized it's for the protection of the organization.

CHAIRMAN TONER: Thank you. Mr. Vice Chairman.

VICE CHAIRMAN LENHARD: Thank you. Mr. Noble, we keep asking you a whole range of

different possible changes, in part because I think this is an opportunity for us to get a sense from you and a number of people have raised changes which they believe won't encourage circumvention of the Act but which will make the operations of their organizations more useful. And we're trying to make sure that we're not creating loopholes in an unexpected way and there may be policy disagreements we have, but we'd like to sort of try and identify those things where there aren't controversies.

I don't think you've addressed the one involving--and maybe you have--reducing the time period in which vendors and former employees would be subject to the coordination rules to 60 days as opposed to--

MR. NOBLE: I'm opposed to that.

VICE CHAIRMAN LENHARD: You're opposed. You think the election cycle timeframe is appropriate?

MR. NOBLE: Correct.

VICE CHAIRMAN LENHARD: That's true, even

in Senate races where it'll be a six-year cycle?

MR. NOBLE: Yeah.

VICE CHAIRMAN LENHARD: What, I'm struck by that.

MR. NOBLE: I mean, do you really want to make it longer.

VICE CHAIRMAN LENHARD: No, do you think that any information someone carried out of a campaign four years earlier is still useful information in any real way?

MR. NOBLE: You know--

VICE CHAIRMAN LENHARD: Four years.

MR. NOBLE: Yeah, I understand what you're saying. We were looking for a bright line that really made sure that within the same election cycle there was not going back and forth. Could you play around with that? Yeah, you possibly could, but again I get nervous when you start playing around with that because you start playing around with it and then we end up with 30/60 days. And yes, six-year election cycles are slightly different. But the truth of the matter is that even Senate campaigns run for six years now.

Yes, they're low grade at the beginning in some of them but they do.

VICE CHAIRMAN LENHARD: Yeah, I see, but, yeah, although I suspect if you looked five years out on the raised amount of money that a Senate campaign is spending on it's campaign, it's got to be incredibly small.

MR. NOBLE: But they're soliciting.

VICE CHAIRMAN LENHARD: But that's simply raising money, I'm not sure in terms of information about the campaign that might lead to an inference of illegal coordination two years, three years, four years, later, whatever one might have gleaned from participating in a fundraising event would be a threat.

MR. NOBLE: Again, I think a bright line is the election cycle. If you were to say five years out in a Senate campaign, would that be deadly, I don't know. It's a question of line drawing. I think you're cleaner if you--because then you're going to get the question of, well, why not four years? Why not three years? Why not two years? Why not, in a House campaign, one year?

VICE CHAIRMAN LENHARD: That exact problem is why we're sitting here today.

MR. NOBLE: I see.

VICE CHAIRMAN LENHARD: I think the Court said that bright lines can be drawn in the wrong place.

MR. NOBLE: That's right.

VICE CHAIRMAN LENHARD: So we're not and that's why I'm trying to get a sense and your sense is that it’s difficult and possibly impossible to identify any time period in which you can safely say, short of the cycle?

MR. NOBLE: Yeah, I wish we had a better record on it, frankly. I really wish that and I know that the Commission is limited in its ability to do this and I know you're under the gun, though this has been going on for, what 15 months now, but it would be interesting to have a discussion or have people in here and I'm not talking about in an enforcement context, I'm talking about to talk about what actually goes on.

And my sense of it from talking to some people, and I'm not testifying about this because, is that, yes, in fact, it varies by campaign. In fact some early people in the campaign do very well know what's going on. And there are strategies set very early in a campaign.

VICE CHAIRMAN LENHARD: Yeah, and I agree with that, I mean, my sense is we've had testimony over the last couple of days that those strategies change. And that a year later, whatever the strategy was has and sometime some people testified a week later the strategy is changing because the news events around the campaign are--messages are succeeding or failing, money's being raised or not, that over a much shorter time period than the cycle the strategy changes.

MR. NOBLE: Well, strategy can change a week before the campaign.

VICE CHAIRMAN LENHARD: Yes.

MR. NOBLE: That doesn't mean that the vendors can vend it a week before the campaign, in fact there's a case that the FEC had years ago out of Alaska, where in fact one of the reasons a

person left the campaign was because he disagreed with the strategy and then went out and took out ads. And the Commission said that they were not independent.

VICE CHAIRMAN LENHARD: Right. And we're looking for to try and build a time period that avoids people moving quickly out and doing that. And I'm just trying to get a sense of if there was common ground somewhere.

The second question I had is in the material you've submitted, that indicated that there were 200 ads that fell outside of the 120 day time period. Do you have a sense of what percentage of the spending in that cycle, those ads consisted of?

MR. NOBLE: No, I don't and we could probably, I could look and see whether we could figure that out.

VICE CHAIRMAN LENHARD: If you could it would be helpful to find to look to the courts.

MR. NOBLE: I don't know, I'm not going to promise that I can.

VICE CHAIRMAN LENHARD: I understand that,

but to the degree that it's possible, it would help us try and--

MR. NOBLE: Part of the problem is the way the reporting is done--this is not a criticism--but the way the reporting is done, the reporting is not done by ads, so we don't know, specifically, what ads what money is spent on what ad.

VICE CHAIRMAN LENHARD: Yeah, and my understanding is that you pulled the data from National Journal and not the FEC, so that's--there may be issues with that.

MR. NOBLE: Right, we thought about this and it's not going to match up even if we did it within time periods, but--

VICE CHAIRMAN LENHARD: But any sort of an approximation even might be helpful as we try to wrestle through this problem.

MR. NOBLE: I'll see if we can do anything about that.

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

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

COMMISSIONER MASON: Mr. Noble, just

quickly the character qualifications, fitness for office, that string of things has come up several times. The Commission has discussed it before, do you know where it came from? It's not in the statute. It's not in any court decision I'm aware of--

MR. NOBLE: I'm drawing a blank, I did yesterday because I ran across it. I know--

COMMISSIONER MASON: Well if you actually know, that would be informative—

MR. NOBLE: We can find out.

COMMISSIONER MASON: --even if you just let me know informally sometime. Ms. McCormick, if I understand, your organization has wanted some changes in NCLB? And you've lobbied Congress about that and you've done some ads about it. That raises two questions in my mind. Have you ever talked to any national party committees about your desire for changes in NCLB? Or would it be, I'm not trying to pin you down, but I mean would that be a normal thing for you to do?

MS. McCORMICK: I can't answer the question because I don't have much to do with our lobbying folks, I mean, other than. But, I don't think it would be surprising for us to have a

conversation with a party committee about that.

COMMISSIONER MASON: That's what I'm trying to understand.

MS. McCORMICK: Yeah.

COMMISSIONER MASON: So, when you're talking about a lobbying exemption part of the problem is leaving candidates aside for a minute. The DNC and the RNC have candidates everywhere in the country.

MS. McCORMICK: Right.

COMMISSIONER MASON: And so, if you've gone, in this case, probably to the DNC to talk about strategy or policy on NCLB and then you turn around and go out and run an ad anywhere in the country that names a candidate, it's either going to be a Democratic candidate, so presumably you're working with them to help or a Republican candidate. So that, in other words is why you feel like you need a lobbying exemption that says okay, what do you consider lobbying and how are we going to draw the line between lobbying and campaigning so that you know what you can do.

Similarly, I worked for a member of Congress years ago, he was a conservative Republican and the NEA was great in the sense that he was not their kind of candidate but there was a lobbyist assigned to that office and they would come by to see us and so on. And I don't remember him being the target of any ads, but, again, as to particular members, it wouldn't be unusual, it might even be normal for your lobbyist to come and talk to virtually every member of Congress about a major issue.

MS. McCORMICK: Absolutely.

COMMISSIONER MASON: All right, so then if you go out and decide to run ads naming virtually any member of Congress, you're at risk because you've already in the normal course of your lobbying before you even thought about running ads, you've already talked to him about the issue you're worried about?

MS. McCORMICK: Absolutely, I think you understand the box we're in and why we had a firewall.

COMMISSIONER MASON: And so, you came up with a firewall to try to take care of that and it would be helpful to you for us to enunciate to you some standards and whether it's character qualifications, fitness for office or whatever you'll try to work with it so that you can avoid the box you're in?

MS. McCORMICK: Yeah, because we can't stop lobbying. We can't say, oh, well, we're now 120 days from a primary or 60 days. I mean, things come up, NCLB comes up. We can't pull the lobbying staff and say don't go up there again.

COMMISSIONER MASON: Thank you.

CHAIRMAN TONER: Thank you Commissioner Mason. Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. chairman. I'm going to see if maybe there's some other small issue that we might have agreement on, I doubt it. I see you shaking your head, Mr. Noble and I'm quite sure that you're prepared to be disagreeable and you will be, but--are there any categories of vendors, we've heard some testimony

about time buyers or other vendors that don't get into content at all, they don't convey information, they're sort of administrative or ministerial vendors. Is there any category like that that you would say, yeah, we could carve out something for those guys so they wouldn't have the same set of restrictions?

MR. NOBLE: I'm pleased to say I agree with you.

COMMISSIONER WEINTRAUB: Thank you.

MR. NOBLE: Well, we used to talk about this the difference between passive and active vendors. Federal Express is a common vendor. I don't think anybody would claim just because you both use Federal Express that you have now coordinated. Yes, there are a number of what I would call passive vendors who are ministerial in what they do, administrative in what they do. Now we'll get into the definition of what's administrative and ministerial, but putting that aside, yes.

COMMISSIONER WEINTRAUB: Well, we have an

agreement in concept, anyway.

MR. NOBLE: Let’s stop right there.

COMMISSIONER WEINTRAUB: That's progress. I want to go back to--well, let me just give you an example, by the way, since you couldn't imagine and your written testimony also said the same thing the circumstances in which somebody would run an ad in the district of somebody that they had talked to because they were already supportive so why would you run the ad there? Well, suppose Amnesty International or a similar group. I don't know if they do any lobbying, I never heard of them doing it, but a group like that that's interested in those kinds of issues is working with Senator McCain on promoting a bill to prohibit U.S. military officials from engaging in behavior that some people might describe as torture.

And suppose that there are some individuals in the State of Arizona, some federal officials in the House that are not quite as devoted to this issue as Senator McCain is and the organization having discussed this issue with Senator McCain, wants to run an ad in Arizona, putting pressure on those members--the rest of the

delegation to say please support the McCain bill to prevent torture. There's your example of why you would run an ad in somebody--and let's even say that he's up, although as I recall the last time he was up for election he won with some, I'm sure gratifyingly high percentage of the vote. There's your example.

But I want to go back to firewalls which you don't seem to like very much. As I'm sure you recall, the Supreme Court has said that party committees can do both independent and coordinated expenditures. Other than by means of firewalls, what do you think the Supreme Court had in mind when they said that?

MR. NOBLE: Well, I may be wrong about this, and if I am, I'm sure someone will correct me immediately. But in both the cases that we're talking about which I assume is Colorado and McConnell, in Colorado, they were dealing with a case where there was not yet a candidate to coordinate with.

COMMISSIONER WEINTRAUB: I always wondered

why you brought that case.

MR. NOBLE: They voted for it.

CHAIRMAN TONER: There were three candidates running in the primary when the ad was at issue so there were three people to coordinate with, I guess--

MR. NOBLE: And there actually was more evidence that but we--

COMMISSIONER WEINTRAUB: Never mind.

MR. NOBLE: --don't need to rehash that case. And I also don't know how you--how you mesh Colorado One with Colorado Two, but that's a whole other story, anyway. In Colorado One, they were dealing with a specific factual situation where they said there wasn't a candidate to coordinate with and, therefore, they were saying, that, in principle, in theory a political party committee can do an independent expenditure. But you have to understand the history of that.

Going up to that point, nobody, including the lawyer for the Republican Party thought that political parties could run independent expenditures. It just--

COMMISSIONER WEINTRAUB: Right, but we know that they can.

MR. NOBLE: So now, we know that they can if there is no candidate running. In McConnell--

CHAIRMAN TONER: If I may, it wasn't that there was no candidate running, there was no nominee, there were three candidates running.

MR. NOBLE: There was not candidate running yet in the general, that's what it was.

CHAIRMAN TONER: Right.

MR. NOBLE: There was no candidate running in the general yet. And that's what they were coordinating, they were running the ad in the general, because there was a Democratic, they were running it against the incumbent in the general.

CHAIRMAN TONER: They were running it, as one of the lawyers working on the case many years ago, plus I really like the way it came out. There were three candidates running in the primaries and they aired the ads during the primaries.

MR. NOBLE: Right, but the ads were against the Democratic--

CHAIRMAN TONER: Mr. Worth, Senator Worth, yes.

COMMISSIONER WEINTRAUB: I want extra time for this.

MR. NOBLE: Anyway, details. Now, I forgot the question. Oh, and then McConnell, in McConnell, it was dealing with the situation, if I remember correctly, where the statute said you had to make a choice—

COMMISSIONER WEINTRAUB: Right.

MR. NOBLE: --and the Court said that was unconstitutional. I don't think the Court dealt with the question, has dealt with the yet, of factually what is required for a party committee to make an independent expenditure.

COMMISSIONER WEINTRAUB: But you don't contest that there is black letter law now that a party can do both at the same time?

MR. NOBLE: I don't think the Court's ever said they can do both at the same time.

COMMISSIONER WEINTRAUB: What do you think they meant in McConnell when they said it would

be unconstitutional to prohibit them from doing both at the same time?

MR. NOBLE: I thought it said--I'll go back and look at it, I thought it said it would be unconstitutional to say they had to make a choice at the beginning, which one they were going to do. That they were only going to do one and not the other. And I agree with that. So, you could do, so you could do independent expenditures and coordinated expenditures, but it doesn't necessarily mean at the same time.

COMMISSIONER WEINTRAUB: All right so, you're not doing them at the same time, but I'm still, you would have to have some kind of the silo arrangement wouldn't you? Because, otherwise the people who were working on one, even if it wasn't the same time could convey the information, right? So, it seems to me that the Supreme Court has implicitly endorsed this notice that a party committee, can have different staffs of people working on coordinated expenditures and independent expenditures, because if they don't have different staffs of people doing it, I don't know how they do it. People have to be working on it in order to

get it done. The question that I'm trying to get at is that if it's okay for the party committees, why isn't it okay for the NEA or for any of the other folks that have come in here to testify as well as many folks who didn't bother?

MR. NOBLE: I'm not sure, again, I'm not sure I accept the proposition that the Court has gone as far as to say that, in fact, they can do them at the same time, but rather that McConnell, what the Court said--

COMMISSIONER WEINTRAUB: What difference dos it make what time they do it?

MR. NOBLE: --,rather, what the Court said in McConnell is that you can't make them make a choice at the beginning, but putting that aside. All right, we can debate that, but putting that aside, I still, I must tell you, I still don't feel comfortable with the idea of these silos. If you decide to do it, I hope that you come up with very strict rules. I hope it doesn't just rely on the affidavits of people saying that, yes, I complied with the law.

COMMISSIONER WEINTRAUB: Because you don't believe him when he says they have separate people doing it and they don't talk to each other?

MR. NOBLE: No but I've seen numerous examples of when people say I complied with the law that they are being honest as to their interpretation of the law.

COMMISSIONER WEINTRAUB: Well, let me just end with one final thought. You said, Mr. noble, that you were trying to reflect reality in the way campaigns are run. Would it give you any pause at all if I were to tell you that over the course of the last two days we've had testimony from numerous witnesses representing decades of experience actually running campaigns that your proposal is completely unworkable, does not reflect the reality of the way campaigns are run and they couldn't begin to explain it to their clients and get them to comply with it?

MR. NOBLE: I've heard that before and then they go out and explain it to their clients. Now, look, I do think there's a difference

between having the lawyers in here talking to you about--

COMMISSIONER WEINTRAUB: There were no lawyers.

MR. NOBLE: Okay, well, maybe they're slightly more credible. I think there's a difference between having some officials in here and the Commission actually doing a real inquiry into what goes on.

But I've got to say if they are saying, be that between that at the end of the primary until 120 days that we have an early primary state, until 120 days before the general election, no campaigning is going on.

COMMISSIONER WEINTRAUB: That's not what I said. What they're saying is that this three-tiered system on top of our already three-prong system that we set up with 120 days here and 60 days there and this kind of group does this and that kind of group does that and there are organizations that are more than one kind of group under their umbrella is just completely unworkable in practice.

And it would particularly disadvantage smaller organizations that don't have access to the kind of lawyers that have been in here testifying, but you know are trying to operate out there in the world.

MR. NOBLE: And I am sympathetic to that and as I said, I think in my opening statement, we did do something very controversial, which nobody else did, we actually proposed the rule and it's probably the last time we'll do that. From now on we're sticking to general principles.

But because I know from having been here, it's hard to write the rules and you've got an excellent staff capable of writing the rules and capable of trying to simplify them if possible and smoothing out the rough edges of it. I fully agree that we even saw problems as we were doing this, but when I was here when we wrote regulations and even he regulations the Commission passed, we were fully aware and the Commission was fully aware in many instances there were some problems with the regulations and how they would be and how they all fit together.

And having said that, what we were trying to do was accommodate a variety of different interests. I don't think--if, in fact, you think that you can't do a tiered approach; if, in fact you think that this is too complicated and you're going to go for simplicity, then I think the message of the Court is, if you're going to go for simplicity, it can't be under inclusive. You can't just then go for the simplicity that allows what are in reality coordinated campaign ads to get by.

And, yes, lobbying needs to be protected. But also, the fact that lobbying exists in a campaign ad, does not mean the campaign ad is not regulated. Lobbying does not trump everything else. And so, I think if you're going to try to do a rule that is much simpler than this. I don't think it's that complicated, I have to tell you. Looking at the rule it actually breaks out pretty easily. But and it's far less complicated than a lot of the rules on the books.

But if you think you can come up with a simpler rule, come up with a simpler rule. But I

don't buy into the argument that campaigns now that we have some sort of parliamentary system that campaigns are announced 120 days before the election and that's it, prior to that there's no campaigning going on. Because that's not reality.

COMMISSIONER WEINTRAUB: Well, unfortunately, the reality that everybody talks about is both that the campaign goes on nonstop and that nobody pays attention until Labor Day. So, I just don't—-what the reality is.

MR. NOBLE: Well that second part, that may be right--that second part is irrelevant. Whether or not the campaigns are wisely using their money is irrelevant to whether or not it's a contribution or expenditure.

COMMISSIONER WEINTRAUB: Well, I think it does bear on the issue of whether people are actually going to spend their money, because we've had testimony from people who said, they don't want to waste their money. They're not going to spend it at a time when it's not going to do them any

good.

MR. NOBLE: I agree that you're out of time both now or I'm out of time with this rulemaking, but it would be interesting, there's a lot of historical data or, at least, testimony, in books and such about previous campaigns and strategies used in previous campaigns It would be interesting some day to get some of those people in here to talk about the strategies starting two years in advance.

COMMISSIONER WEINTRAUB: I am way out of time, Mr. Chairman.

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

COMMISSIONER von SPAKOVSKY: Well, Commissioner Weintraub you asked the question I was going to ask.

COMMISSIONER WEINTRAUB: That's not the first time, and it's very alarming.

COMMISSIONER von SPAKOVSKY: That's right, so I'll just kind of conclude by saying that Mr. Noble, you know, you're the only person, plus the

other members of your co-organizations that are saying this is a simple rule. Everybody else has come in here and said this is a very complex rule. And you say, well, you're sympathetic, but what, clearly comes out of your testimony is that you really don't care. I mean, you all don't care that you have put forward a rule that is so complex that it will clearly chill participation of groups, such as Ms. McCormick's and the other grassroots organizations out there.

You cannot credibly assert to us that the grassroots volunteers who make up 95 percent of campaign organizations and grassroots organizations throughout the country are going to be able to understand this very complex rule that you have put out.

And, quite frankly, the arguments you keep making about this remind me of a quote from Abraham Lincoln, who once said after the Lincoln/Douglas debates and in talking about the arguments that Douglas was making to support his view that Douglas's arguments were as thin as a bowl of soup that was

made by boiling the shadow of a chicken that had been starved to death. And there's just no way that your rule is workable in the real world. and I haven't heard anything from you that would simplify that rule so that the vast majority of people who participate in the election process, which is not the very expensive campaign lawyers in Washington, people like the principals in your organization, they are the only ones who can really understand this, not the vast majority of people who are out in the election process. And that's all I've got, thank you.

MR. NOBLE: If I may respond, just briefly, I know we're out of time, but with all due respect. I just absolutely disagree with you. We do care very much about democracy; about grassroots activity; about and about the average person being able to understand the rules. But the reality is the average grassroots person is not going to come under these rules. They're not even going to be involved in them. What I'm afraid that some on the Commission don't accept is that Congress passed

a law barring corporate labor activity, large contributions to candidates; that law has been held constitutional and has to be implemented.

And it's not the job of this Commission to keep sitting as Judge Kollar-Kotelly said, as a super legislature deciding that the laws Congress passed really aren't good laws and, therefore, we won't enforce them; and, therefore will write exemptions to them.

COMMISSIONER von SPAKOVSKY: Mr. Noble, I don't need a lecture from you on my duties at this agency. I took an oath and I intend to enforce the law. But, you know, Mr. Lenhard--Commissioner Lenhard in his first round of questioning gave you a hypothetical and asked you to apply your rule to it. And you were unable to give him a conclusive answer as to whether under his hypothetical the behavior that would have been done whether it would be legal or not under your rule.

You've got almost 30 years of experience working at this organization and in this field. You wrote this rule and you couldn't tell us

definitively whether this hypothetical would be legal under your rule or not. And everyone else is supposed to be able to understand it?

MR. NOBLE: Well, I would suggest that if the standard for a rule at any agency was that the people who wrote it had to be answer every hypothetical that came up immediately, that no rule would ever survive scrutiny.

COMMISSIONER von SPAKOVSKY: I don't have any other questions, Mr. Chairman.

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

GENERAL COUNSEL NORTON: Nothing further, Mr. Chairman.

CHAIRMAN TONER: Mr. Costa. Okay. Thank you. I want to thank the three panelists very much, I appreciate you being with us today. This concludes our second and final day of hearings on the Commission’s Coordination Communications. And I'd like to thank all six panels and all the panelists who were here with us over the last two days. And

with that, this hearing is adjourned.

[Whereupon, at 4:50 p.m., the hearing was adjourned.]