

FEDERAL ELECTION COMMISSION
PUBLIC HEARING ON POLITICAL COMMITTEE STATUS

NOTICE OF PROPOSED RULEMAKING

999 E Street, N.W.
Ninth Floor Hearing Room Washington,
D.C. 20463

Wednesday, April 14, 2004

The hearing convened, pursuant to
notice, at 9:05 a.m.

COMMISSION MEMBERS PRESENT:

BRADLEY A. SMITH, Chairman
ELLEN WEINTRAUB, Vice Chair
DAVID M. MASON, Commissioner
DANNY McDONALD, Commissioner
SCOTT E. THOMAS, Commissioner
MICHAEL E. TONER, Commissioner
LAWRENCE H. NORTON, General Counsel
JAMES E. PEHRKON, Staff Director

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

2 CHAIRMAN SMITH: The open session of the
3 Federal Election Commission Hearing on Political
4 Committee Status of Wednesday, April 14, 2004 is in
5 session.

6 We currently have all of our
7 commissioners here except for Commissioner
8 McDonald, who I understand will be joining us in
9 just a minute, and since we're already behind
10 schedule, I thought we could go ahead and try to
11 get going at least with some administrative
12 matters.

13 First, I want to note for people in the
14 audience, it is a bit warm in here now. The air
15 conditioning broke this morning. Of course, we
16 have the TV lights in. So we will try to get that
17 fixed and keep it cool. For those of you in the
18 press, please don't note the beads of sweat
19 breaking out and say a tense commission under
20 pressure. If it's doing that, it's just because of
21 the A.C.

22 I'd like to welcome everyone generally

1 to this rulemaking. These proposed rules were
2 included in a Notice of Proposed Rulemaking
3 published on March 11, 2004. The rules address the
4 Commission's definition of a political committee
5 and, consequently, whether organizations that have
6 not previously been required to report and register
7 with the Commission should now be required to do
8 so.

9 Related to the central element are
10 proposed revisions to the Commission's definitions
11 of expenditures as well as revisions to the
12 Commission's allocation regulations. The
13 Commission has received over a 150,000 comments in
14 response to this Notice of Proposed Rulemaking.

15 I'd like to thank, very briefly, our
16 staff and the Office of General Counsel for their
17 hard work on the rulemaking, and also in particular
18 our data people who worked overtime to keep the
19 E-mail accounts and web site up as they were hit
20 with large numbers of comments and submissions. We
21 appreciate generally the willingness of commenters
22 to assist in this effort by giving us their views

1 on these proposals and in particular those who have
2 taken the time to come here today to give us the
3 benefit of their practical experience and expertise
4 in this area today and tomorrow.

5 I would like to briefly describe the
6 format that we will be following today. First,
7 each witness will have just a three-minute opening
8 statement. We do have a light system at the
9 witness table, and we'll give you a flashing green
10 light at the end of two minutes and a yellow light
11 at the end of two and a half minutes, and then
12 you'll get a red light at the end of your three
13 minutes, and we would ask at that point that you
14 try to conclude your opening statements. Three
15 minutes, of course, is not a lot of time to develop
16 an argument in depth, probably more just to set out
17 a few salient points or high points, and the
18 benefit is that we'll allow more time for questions
19 and us to try to probe the things that we find that
20 we feel will be most helpful from the written
21 testimony that you have submitted that we'd like to
22 probe more.

1 For each panel, we will have at least
2 one round of questions from commissioners, the
3 general counsel, and the staff director. There
4 will be a second round only if time is permitted.
5 I do remind my colleagues you're not required to
6 use your entire questioning time, although it is
7 brief in each case, given that we need to go
8 through six commissioners, general counsel, and the
9 staff director. There will be a short break
10 between the first two panels, a one-hour lunch
11 break, and then two more panels in the afternoon,
12 and we'll be operating in the same format tomorrow.
13 So we've got two full days, and we will try to stay
14 on schedule as best we can.

15 I. OPENING STATEMENTS

16 CHAIRMAN SMITH: I understand that some
17 of my colleagues wish to make brief opening
18 statements. I'm not going to put a light on you,
19 but again, because we're already behind, I would
20 ask you to go ahead and be brief, and I will
21 recognize my colleagues for that purpose. I will
22 also note at this time that Commission McDonald has

1 now joined us here at the dias. So we have a full
2 complement of commissioners.

3 Commissioner Mason.

4 COMMISSIONER MASON: Thank you, Mr.
5 Chairman.

6 I just wanted to take a moment. All of
7 my colleagues, staff, most of the members of the
8 audience are aware that we had a fire at my house
9 last week, and the house burned to the ground in
10 the middle of the night. I was able to get out
11 safely with all of my family uninjured, and that is
12 a genuine blessing, and we're working through the
13 rebuilding process. I've already had expressions
14 of condolences and offers of help from many, many
15 people, including many in the audience, and so I
16 just wanted to say thanks to everyone who has said
17 something already, and please don't feel detained
18 in your individual three-minute opening statements
19 to say that again.

20 We can do business today, but I
21 certainly appreciate the help everyone in the
22 Commission and everyone else has already offered or

1 been able to give to us, and I certainly look
2 forward to the statements and discussions today.
3 The rulemaking topic is very important, and forgive
4 me if I'm slightly distracted.

5 CHAIRMAN SMITH: Thank you, Commissioner
6 Mason.

7 Commissioner McDonald, did you wish to
8 make an opening statement?

9 COMMISSIONER McDONALD: Mr. Chairman,
10 that really was why I wanted to make opening
11 remarks, because I think the things that
12 Commissioner Mason has had to endure the last week
13 to ten days, I think all other things that some of
14 us have been through pale in comparison. We're
15 delighted he's here and his family is safe, and
16 just to thank the commenters who are here today and
17 do as the Chairman did as well, acknowledge the
18 great work of the staff.

19 Thank you.

20 CHAIRMAN SMITH: Thank you, Commissioner
21 McDonald.

22 Commissioner Thomas.

1 COMMISSIONER THOMAS: Thank you, Mr.
2 Chairman.

3 Well, I will pass on the chance to say
4 how happy I am that everyone is safe and sound in
5 the Mason household, except to say that.

6 I just wanted to very briefly do a
7 little bit of setting the stage here. I know we're
8 going to have a lot of interesting discussion, and
9 I'm delighted that we've gotten such an expression
10 of interest in what we're looking at, and I think a
11 fair amount of time will be spent on whether the
12 Commission really has some sort of authority to go
13 into new rules that might regulate the so-called
14 527 groups or some of the so-called 501[c] groups
15 to regulate what they do as being an expenditure
16 under the Federal Campaign Finance laws or possibly
17 treating some of those groups as a political
18 committee under the Federal Campaign Finance laws.

19 And I just will be noting on several
20 occasions that we by statute as an agency do have
21 congressionally-authorized rulemaking authority in
22 three different places in the statute. Congress

1 has authorized us to undertake rulemaking. The
2 statute says: "The Commission shall administer,
3 seek to obtain compliance with, and formulate
4 policy with respect to this Act." It also says:
5 "The Commission has the power to make, amend, and
6 repeal such rules as are necessary to carry out the
7 provisions of this Act." And also it says: "The
8 Commission shall prescribe rules, regulations, and
9 forums to carry out the provisions of this Act."

10 So we do clearly have
11 congressionally-authorized authority to undertake
12 this kind of a rulemaking to try to interpret the
13 existing provisions of the statute, and two terms
14 that are in the statute and that have been in the
15 statute for many years are what is an
16 expenditure--that is the term of art under the
17 statute--and also, there is this concept of
18 political committee. That is a statutorily-defined
19 term, and those are the main concepts we'll be
20 battling about throughout this rulemaking
21 proceeding, can the Commission in some fashion
22 issue some sort of new interpretation of those

1 longstanding statutory provisions.

2 Second, I wanted to note that although
3 the Commission is embarking on this project, it
4 should be borne in mind that the statute does,
5 nonetheless, allow a great deal of flexibility, if
6 you will, to organizations and individuals to carry
7 out their political expression. For example, the
8 statute allows corporations and unions, if they
9 want, to set up a political action committee. They
10 can basically pay for the cost of running this kind
11 of PAC, and they can through that PAC carry out
12 direct electioneering as explicit as they want to
13 be in terms of supporting or opposing candidates.

14 The Supreme Court created, also, for
15 corporations what we call the MCFL exemption.
16 There are certain kinds of nonprofit ideological
17 corporations that can spend as much as they want
18 for express advocacy communications. Also, the
19 statute allows corporations and unions to spend as
20 much money as they want communicating to their own
21 restricted class. For corporations, that's usually
22 their shareholders and their executives, and for

1 unions, that's in essence their members. An
2 unlimited amount of money can be spent for that.

3 Also, the statute specifically exempts
4 non-partisan voter registration get-out-the-vote
5 activity. Organizations can spend as much as they
6 want as long as it's not partisan in nature. Also,
7 the Commission, by its own regulations, has
8 exempted 501[c][3] entities from its electioneering
9 communication rules that we'll be talking about
10 quite a bit. On top of that, individuals can spend
11 as much as they want independently from their own
12 pockets to expressly advocate the election or
13 defeat of candidates, as much they want, no limit
14 whatsoever. Also, individuals can contribute for
15 Federal election purposes \$95,000 every two years.
16 Individuals can provide unlimited amount of support
17 of candidates through volunteering.

18 So I just wanted to sort of get that
19 said and out there. What we're dealing with is one
20 aspect of the Commission's statutory regulatory
21 authority, but there is still an awful lot of
22 flexibility and freedom given to participants in

1 the political process.

2 My last point would just be that I hope
3 we bear in mind throughout this proceeding that
4 this is an effort to move toward a final rule, but
5 we have not made up our mind yet. We're
6 approaching this with an open mind. And with that,
7 I turn it back to the Chairman. I hope we'll all
8 keep that in mind as we're going through this.
9 There has been no decision reached yet. The
10 purpose of this hearing is to get input to help us
11 decide that very thing.

12 Thank you.

13 CHAIRMAN SMITH: Thank you, Commissioner
14 Thomas.

15 Commissioner Toner.

16 COMMISSIONER TONER: Thank you, Mr.
17 Chairman.

18 At the outset, I want to personally
19 thank every person who took the time and effort to
20 submit comments to the Commission. As the Chairman
21 indicated, over 100,000 people from across the
22 country filed comments with us, which is the most

1 this agency has ever received in any proceeding in
2 its history. I may not agree with every comment we
3 received, but I do respect the views of everyone
4 who submitted comments and who is here today.

5 For over 20 years, the presence or
6 absence of express advocacy in an organization's
7 activities has been a major part of the
8 Commission's test for whether an organization is a
9 political committee that must register with the FEC
10 and abide by the contribution limitations and
11 prohibitions of the Federal election laws.
12 However, in *McConnell v. FEC*, the Supreme Court
13 ruled that the express advocacy test is not
14 constitutionally mandated. The Court further
15 stated, in the bluntest possible terms, that the
16 express advocacy test is functionally
17 meaningless--that's a direct quote from the
18 Court--in the real world of politics. The Court
19 noted that many commercials aired by campaigns do
20 not contain express advocacy and that many campaign
21 consultants have concluded that using terms such as
22 "Vote for Bush" or "Vote Against Gore" are not

1 effective in moving voters. The Court also
2 observed that political parties and interest groups
3 for years have aired hard-hitting advertisements
4 that do influence voters, but that do not contain
5 any words of express advocacy.

6 Given the Supreme Court's treatment of
7 the express advocacy test in *McConnell*, the
8 Commission is now deciding whether it's appropriate
9 to continue using that test for helping to
10 determine political committee status. In short, I
11 think what we're doing today boils down to the
12 Commission deciding whether it's going to use this
13 legal test, which has received somewhat severe
14 criticism from the Supreme Court, in defining what
15 a political committee is or whether we're going to
16 try to develop another test that might actually be
17 effective and might have meaning in the political
18 world.

19 The promote, support, attack, oppose
20 standard--we're going to hear a lot about that in
21 the next couple days--is one such possible
22 alternative standard. That, in many ways, I think,

1 is the major defining issue in this rulemaking.

2 In construing the permissible reach of
3 the Federal election laws and in determining which
4 organizations may legally be treated as political
5 committees, the Supreme Court has made a
6 fundamental distinction between organizations that
7 are electorally oriented and those that are not.
8 In *Buckley v. Valeo*, the Court ruled that
9 organizations may be treated as political
10 committees if in addition to meeting the statutory
11 \$1,000 contribution and expenditure test, they are
12 either, quote, under the control of a candidate or
13 the major purpose of which is the nomination or
14 election of the candidate, end quote. The Supreme
15 Court quoted this controlling phrase from *Buckley*
16 ten years later in the *Massachusetts Citizens for*
17 *Life* case, holding that organizations may be
18 regulated as political committees if, again, quote,
19 their major purpose may be regarded as campaign
20 activity, end quote. In both *Buckley* and *MCFL*, the
21 critical dividing line was whether an
22 organization's major purpose is electoral politics.

1 The McConnell ruling did not alter this
2 major purpose test. As the various comments made
3 clear, Section 527 organizations exist for the
4 purpose of influencing the nomination, election, or
5 appointment of any person to public office. Given
6 that that is the fundamental nature of 527
7 organizations, I think a very strong argument
8 exists that 527 satisfies the Supreme Court's major
9 purpose test per se as a matter of law. I look
10 forward to hearing more from the commenters on this
11 question.

12 Moreover, in McConnell, the Court upheld
13 BCRA's promote, support, attack, oppose standard
14 against a constitutional vagueness challenge,
15 ruling that the statutory provisions provide
16 explicit standards for those who apply them and,
17 quote, give the person of ordinary intelligence
18 reasonable opportunity to know what is prohibited,
19 end quote. In doing so, the Court stressed that
20 the promote, support, attack, oppose standard
21 provides reasonable notice as applied to political
22 parties since, again quoting from the Court,

1 actions taking by political parties are presumed to
2 be in connection with election campaigns, end
3 quote. Similarly, I think a very strong argument
4 exists that the same can be said of 527
5 organizations, given that 527 operate by law by the
6 purpose of influencing the nomination, election, or
7 appointment of any person to public office.

8 The extraordinary volume of comments we
9 received in this rulemaking underscores that the
10 Commission is grappling with critical issues
11 that go to the of the Federal election laws in
12 this country. We may disagree about what
13 action the Commission should take here, but I
14 don't think there is any question that these
15 issues are fundamental and must be decided.

16 There has been considerable debate about
17 whether any new rules the Commission might issue
18 should be effective for the 2004 election. I
19 strongly believe they should be; otherwise, the
20 Commission will be effectively exempting the
21 upcoming election from fundamental aspects of the
22 law. However, I have decided that I will vote for

1 regulations based on the law as I understand it
2 even if they are not effective until after this
3 election. That is not my preferred course, and I
4 will continue to fight to make whatever the
5 Commission decides effective for 2004. And I think
6 that is the appropriate course, but I think it's
7 more important for the Commission to get the law
8 right in this undertaking that it is to weigh
9 short-term political interests one way or the
10 other, and I'm going to vote accordingly.

11 Thank you, Mr. Chairman

12 CHAIRMAN SMITH: Thank you, Commissioner
13 Toner.

14 Vice Chair Weintraub.

15 VICE CHAIR WEINTRAUB: Thank you, Mr.
16 Chairman.

17 Recently I had the opportunity to
18 participate in a conference addressing global
19 political corruption. Thirty-four countries were
20 represented, many of them emerging democracies
21 struggling to establish democratic institutions.
22 Corruption has a bolder, uglier face in some of

1 these place than that we see in this country. One
2 gentleman spoke of the many times he had been
3 jailed for speaking out when his government did not
4 want to hear. A woman told of the assassination of
5 her husband, a journalist, who dared to write
6 critically about his government's policies. She
7 and her children had to be spirited out of the
8 country to save their own lives.

9 Their stories were a dramatic reminder
10 that the first condition for democracy is ensuring
11 the right of the people to speak truth to the
12 government. Without this right, one cannot have
13 free elections, because potential candidates cannot
14 effectively challenge those in power. Without this
15 right, one cannot require disclosure of political
16 activity, because people will be afraid to be
17 identified as supporters of the opposition.

18 I am grateful to live in a country where
19 the right to criticize the government without fear
20 of reprisal is guaranteed in the very First
21 Amendment to our Constitution. Whenever we
22 contemplate restricting that right, we must tread

1 with extreme care.

2 The proposals under consideration here
3 today will influence citizens' willingness and
4 ability to support or oppose not only candidates,
5 but also issues and policies. In the midst of an
6 election year, it's easy to forget that not every
7 criticism of the Government has an electioneering
8 purpose. I want to thank the commenters who tried
9 to bring that point home to the Commission. I was
10 particularly moved by the example provided by
11 Housing Works, Inc., a nonprofit organization that
12 helps homeless New Yorkers living with AIDS and
13 HIV. This witness wrote:

14 "Over the course of the AIDS epidemic,
15 one of the most persistent truths has been that
16 democracy and free speech have saved lives.
17 Advocacy has saved lives. Criticism of elected
18 officials for their inaction on HIV and AIDS has
19 spurred remarkable public and private responses to
20 the epidemic. These responses have literally saved
21 millions of lives all over the world."

22 It is not just our privilege in a

1 democracy to challenge our government to do the
2 right thing; it is our obligation. And I thank
3 everyone who has tried to do that in this
4 proceeding.

5 This rulemaking was prompted by concerns
6 about the activities of two or three organizations.
7 We are now proposing to regulate thousands. The
8 Commission has received over 150,000 comments,
9 discounting for a little bit of spam. That is a
10 hundred times--that's still a hundred times the
11 number of comments this agency has ever received
12 before. Our staff has not had time to analyze all
13 those comments, a project that will take at least
14 another couple of weeks to complete. Yet, driven
15 by the unrealistic schedule the Commission has set
16 for itself, before the staff had read the comments
17 or heard the testimony, they had already begun to
18 draft the final rules. We are putting the cart way
19 before the horse here.

20 I have always been an advocate for rules
21 that are simple, clearly written, and easily both
22 to understand and administer. The proposed rules

1 do not come close. We must also acknowledge that
2 we are dealing with complicated legal terrain here.
3 In the quest for simplicity, our answers must not
4 become simplistic.

5 There has been a lot of confusion about
6 whether any of the proposed rules are required by
7 or supported by BCRA or by those who voted for
8 BCRA. Some have argued that the fact that BCRA did
9 not amend the statutory definitions of "political
10 committee" or "expenditure" is dispositive, and
11 others say it's irrelevant. The latter group
12 argues that the 1974 law provides authority for the
13 Commission to regulate additional activity by
14 independent groups. There is irony in using a law
15 that was passed in response to the excesses of
16 President Nixon to just regulations that could
17 stifle criticism of government year-round. But
18 putting that aside, I question whether any of the
19 proposed rules approach the narrow tailoring of the
20 BCRA provisions that withstood constitutional
21 challenge in *McConnell v. FEC*.

22 I take very seriously my responsibility

1 to administer the law that Congress wrote as
2 Congress intended it to be interpreted; thus I
3 cannot ignore the view of 128 House members and 19
4 Senators who wrote to us saying that the proposed
5 rules before the Commission would expand the reach
6 of BCRA's limitations to independent organizations
7 in a manner wholly unsupported by BCRA or the
8 record of our deliberations on the new law.
9 Moreover, I am reluctant to impede the important
10 voter registration and mobilization work discussed
11 in separate comments submitted by the Congressional
12 Black Caucus Political Education and Leadership
13 Institute and 15 members of the Congressional
14 Hispanic Caucus.

15 In upholding BCRA, the Supreme Court
16 emphasized the corruption or appearance of
17 corruption that stemmed from the direct involvement
18 of office holders in raising and spending soft
19 money. That link has been broken appropriately by
20 BCRA. The Court said: "To be sure, mere political
21 favoritism or opportunity for influence alone is
22 insufficient to justify regulation. As the record

1 demonstrates, it is the manner in which parties
2 have sole access to Federal candidates and office
3 holders that has given rise to the appearance of
4 undue influence."

5 Independent groups cannot sell access to
6 office holders. You can call a group a shadow
7 party organization, but that doesn't mean it gets
8 to select slates of candidates, determine who serve
9 on legislative committees, elect congressional
10 leadership, or organize legislative caucuses, all
11 factors that the Supreme Court found significant in
12 upholding greater regulation of party organizations
13 than other groups.

14 I am very pleased with the diversity of
15 experiences and viewpoints that our witnesses will
16 bring to this hearing. You have the opportunity to
17 make a real contribution to our understanding, and
18 while it may not make for scintillating TV drama, I
19 encourage you to wade into the details of specific
20 proposals. I have attached to my written statement
21 a list of questions that are under active
22 consideration and hope that the witnesses can help

1 the Commission evaluate the pros and cons of these
2 particular ideas. I'm not endorsing any of these
3 proposals, but I think they will help witnesses to
4 know what's on the table, and there should be
5 copies of my written on the table outside and they
6 will go off on the web site as well.

7 Finally, I would like to thank all the
8 commenters for expressing their views to the
9 Commission. These were not just form letters that
10 we received. A lot of people took time and care to
11 voice their concerns and offer the benefit of their
12 common sense. We heard from teachers and students,
13 social workers and mail carriers, not to mention
14 Fat Mike of Punk Voter, a coalition of punk bands,
15 musicians and record labels which aims to educate
16 and energize the Nation's youth about the political
17 process and inspire them to become involved in that
18 process to change the society and shape the future
19 of our Nation. Rock on, Fat Mike.

20 Wayne Clark from Durham, Maine asked us
21 to please remember what Robert Kennedy said: "We
22 must not only tolerate dissent; we must encourage

1 it.

2 Pamela Cook of Spencer, Indiana wrote of
3 her daughter's work with Rock the Vote to register
4 other high school students. The notion of
5 reclassifying this kind of voter registration as if
6 it is a political committee, Ms. Cook writes,
7 sounds pretty fishy to me; I am against it. Ms.
8 Cook, I am with 8 you.

9 Perhaps one good thing to come out of
10 this whole process is to remind us of the vital
11 role that citizens can play in participating in
12 their own government. So to all the witnesses and
13 commenters, I say thank you. Keep on speaking your
14 truths, and don't forgot to vote.

15 CHAIRMAN SMITH: Thank you, Madam Vice
16 Chair.

17 I also just want to add a few comments,
18 knowing that this is going to put us behind on our
19 first panel. But, first, the couple hundred
20 thousand comments we may receive, I'm told even
21 exceeds what they got, the FTC got, on its Do Not
22 Call list. So we've entered the realm of the big

1 boys here.

2 In particular, a lot of comments have
3 urged us to exempt the 501[c] and nonprofit groups.
4 The Senators who authorized or who co-sponsored the
5 bill suggest that the idea that we would regulate
6 501 [c] organizations was based a campaign of
7 misinformation and encouraged their colleagues,
8 nonetheless, however, they felt they should tell
9 their colleagues to urge us to limit our rulemaking
10 to 527s. In fact, it's true that the proposed
11 rules could affect any group that engages in
12 activities that promote, support, attack, or oppose
13 candidates and Federal officials.

14 As Commission Thomas noted, we had
15 proposed a spectrum of alternatives to obtain
16 useful comments on how to proceed. One of
17 the aspects we received comment on was whether
18 charitable and social welfare groups, that is
19 501[c] organizations, should be distinguished from
20 a group organized under Section 527. The proposed
21 rule should not be read as a Commission conclusion
22 on this or other questions, but I have to say that

1 for my part, I do not see 501[c] groups as being at
2 all taken off the table, and I do not consider at
3 all a campaign of disinformation that people are
4 suggesting the 501[c]s may be regulated by the
5 proposals.

6 As I listen to the panel today, I want
7 to know how it is that we could treat the conduct
8 of one group differently than the same conduct done
9 by another group. We know from past experience
10 that similar political activities are engaged in by
11 some 501[c] groups as are engaged in by some 527
12 groups, and it's not clear to me that the tax
13 status of the group should drive our campaign
14 finance analysis rather than simply considering the
15 potential of the activities to result in corruption
16 or the appearance of corruption, which are the
17 constitutional bases for regulation.

18 I'm not certain as to why a group
19 organized under Section 501[c], which is not
20 required to disclose its donors, would be allowed
21 to spend \$10 million in soft money on political
22 activity, which a group organized under Section

1 527, which is required to disclose its donors,
2 would be barred from spending any soft money for
3 the exact same purpose. Similarly, we know
4 that many umbrella organizations have both kinds of
5 accounts, that is many groups have both 501[c] and
6 527 accounts. If 527 accounts are limited, it
7 would seem quite easy for such groups to simply
8 move their activity into 501[c] accounts.

9 So it could very well be the case that
10 an incremental approach, i.e., owned regulated
11 527s, is simply a set-up for regulatory failure and
12 provides the justification in and of itself to seek
13 additional regulation of 501[c] accounts in the
14 future.

15 Second, I want to note that thousands of
16 E-mails came from people imploring the Commission
17 to, quote, crack down from what they insisted was,
18 quote, illegal spending on soft money activities of
19 527 groups. Some of them referred to the groups as
20 John Kerry's soft money special interest groups;
21 yet thousands of other commenters opposed what they
22 called the, quote, attempt by the Republican

1 National Committee to crush the FEC into issuing
2 rules that would punish groups that dare to
3 criticize President Bush or, quote, another
4 partisan attempt by the Republicans to ensure that
5 liberal and minority voices are not heard, or,
6 quote, an effort to silence opposition to Bush
7 policy.

8 To the second group of writers, I point
9 out that the political advantage created by the
10 rule is one factor that we simply cannot weigh in
11 our deliberations. Rather, we sit here today
12 debating whether the activities of outside groups
13 are, in fact, violating the laws as written by the
14 Congress and interpreted by the courts. To the
15 first group of letter writers, I point out that
16 this is not such a simple question. Were the
17 activities of, quote, John Kerry's soft money
18 special interest groups, unquote, so clearly
19 illegal, then the Republican National Committee
20 would not have had a reason to ask us to issue a
21 rule on the matter.

22 Along these lines, it would have been

1 expansion in this area since the congressional
2 amendments in 1974 to the Federal Election Campaign
3 Act, and if history is any guide, these rules will
4 be in place for many campaigns. So I want to
5 assure those letter writers who accuse us of
6 attempting to silence particular views that this is
7 not an exercise in partisanship. This is a very
8 serious rulemaking. We have a great deal at stake
9 that will go well beyond this election and that
10 will affect conservatives as well as liberals.

11 II. PANEL I

12 CHAIRMAN SMITH: With that, I'd like to
13 call up our panel, and as they come up to the
14 microphones, that panel consists of Jan Baran on
15 behalf of the Chamber of Commerce of the United
16 States. Mr. Baran is from the firm of Wiley, Rein
17 & Fielding. By the way, I'm going to ask you for
18 your opening statements in this order as well,
19 alphabetic orders. Also on the panel are:
20 Laurence Gold, Associate General Counsel of the
21 AFL-CIO; Don Simon of Sonosky, Chambers, and
22 others, on behalf of Democracy 21; and William Kirk

1 useful, I think, for a representative of the RNC to
2 testify, as probably none of other commenters, at
3 least of what I would call the detail commenters,
4 were so enthusiastic for these proposed
5 regulations; therefore, it would have been
6 particularly educational, I think, for everyone to
7 hear answers to some of the questions that have
8 been raised by others about the RNC's views and
9 views that I think will be poorly represented
10 without then here.

11 Perhaps more importantly, for the second
12 group of letter writers who accuse the GOP as
13 seeking merely to silence criticism of President
14 Bush, it would have been valuable for the RNC to
15 use this forum to put to rest the accusation that
16 there is a strategy of short-term political
17 advantage. Any rule we adopt will apply as equally
18 to conservatives as it will be liberals, to
19 environmentalists and feminists, but also to school
20 choice advocates and property right groups, in
21 fact, to any group of concerned political people.

22 The RNC, as I understand it, is arguing

1 that the soft money activities of certain groups,
2 whatever their ideology, constitute knowing
3 and willful violations of existing laws subject to
4 criminal penalties. This position, as I read it,
5 does not discriminate upon ideology, and it might
6 have been useful for them to publically confirm in
7 this forum. Under the RNC's proposals, not only
8 supporters of John Kerry criticize George Bush, but
9 also conservatives who engage in criticism of John
10 Kerry or Tom Daschle or Democratic leaders, would
11 be subject to possible criminal prosecution.

12 I do hope that some of the many groups
13 of letter writers who were so concerned about this
14 approach of censorship, however, will think again
15 about past support that some of them may have had
16 for restrictions on political speech under the form
17 of campaign finance reform. This underscores my
18 final point: What we're doing here is not a
19 political partisan game. We are enacting rules
20 that some of them, if adopted, would constitute a
21 very significant regulatory expansion. In my view,
22 it would be the most significant regulatory

1 expansion in this area since the congressional
2 amendments in 1974 to the Federal Election Campaign
3 Act, and if history is any guide, these rules will
4 be in place for many campaigns. So I want to
5 assure those letter writers who accuse us of
6 attempting to silence particular views that this is
7 not an exercise in partisanship. This is a very
8 serious rulemaking. We have a great deal at stake
9 that will go well beyond this election and that
10 will affect conservatives as well as liberals.

11 II. PANEL I

12 CHAIRMAN SMITH: With that, I'd like to
13 call up our panel, and as they come up to the
14 microphones, that panel consists of Jan Baran on
15 behalf of the Chamber of Commerce of the United
16 States. Mr. Baran is from the firm of Wiley, Rein
17 & Fielding. By the way, I'm going to ask you for
18 your opening statements in this order as well,
19 alphabetic orders. Also on the panel are:
20 Laurence Gold, Associate General Counsel of the
21 AFL-CIO; Don Simon of Sonosky, Chambers, and
22 others, on behalf of Democracy 21; and William Kirk

1 from the Congressional Black Caucus Political
2 Education and Leadership Institute.

3 Gentlemen, I thank all of you for
4 coming. Remember it's going to be a very short
5 opening statement, just three minutes. You don't
6 have to use all of that time if you're not so
7 inclined. After the opening statements, each
8 commissioner will have 11 minutes for questioning.

9 Mr. Baran, when you are ready, you may
10 proceed.

11 MR. BARAN: Thank you, Mr. Chairman and
12 Members of the Commission. I do want to
13 acknowledge that Steve Beaucamp, the general
14 counsel of the Chamber of Commerce is also sitting
15 behind me and was the coauthor of the comments that
16 we submitted in this proceeding.

17 The Chamber opposes these proposed
18 rules, basically has two major concerns: First,
19 the proposals represent the usurpation of
20 congressional authority by effectively
21 renegotiating the legislative bargain that is the
22 essence of the Bipartisan Campaign Reform Act,

1 which I will refer to as BCRA, B-C-R-A. Second,
2 even if the Commission were empowered to do what it
3 proposes in these rules, they are fatally flawed in
4 their overbreadth and vagueness. If adopted, and
5 we hope none are, any rule should be delayed until
6 after this election cycle and it should
7 specifically exempt non-party groups organized
8 under Section 501[c] of the Internal Revenue Code.

9 The Chamber, like the vast majority of
10 witnesses at these hearings, believes that the
11 Commission lacks the authority to adopt these
12 rules, and in addressing Commissioner Thomas'
13 point, we don't say that the Commission doesn't
14 have rulemaking authority. We just say it doesn't
15 have the authority to adopt these particular rules.
16 The legislative history of BCRA demonstrates that
17 Congress set out to solve a particular problem that
18 some saw in the campaign finance system, and that
19 was corruption and the appearance of corruption.
20 Though many groups, including the Chamber,
21 challenge the constitutionality and wisdom of BCRA,
22 there was never any doubt that the solution

1 contained in this legislation was the end product,
2 for better or worse, of deliberation and compromise
3 by Congress.

4 This legislation was the culmination of
5 seven years of political negotiation. It
6 represents Congress' resolution for the first time
7 in a generation of divergent rights and obligations
8 in the conduct of political advocacy. The
9 so-called reformers sought sweeping changes.
10 Opponents of the law, both legislators and the
11 regulated community, fought to defeat or modify the
12 law. Neither side got all that it wanted, but each
13 shaped the final compromise. As the Supreme Court
14 has recently stated in *Ragsdale v. Wolverine*
15 *Worldwide, Inc.*, quote: Courts and agencies must
16 respect and give effect to these sorts of
17 compromises, unquote.

18 In BCRA, Congress carefully regulated
19 national and state party soft money and
20 electioneering communications by certain groups at
21 specific times. Congress did not change the
22 definition of political committee or the more

1 general definition of expenditure. Congress
2 neither left gaps nor did it instruct the
3 Commission to address those provisions that I just
4 cited, even though Congress ordered FEC rulemaking
5 in many other areas.

6 For the Commission now to forge ahead to
7 reach conduct and organizations left unregulated by
8 Congress will expand the law beyond what Congress
9 did or could have done in BCRA itself. Such action
10 threatens not only the rights of the non-party
11 groups subject to these regulations, but the
12 fundamental separation of powers protected by the
13 Constitution.

14 In addition, this rulemaking threatens
15 to cast into doubt the legality of the numerous
16 nonpartisan voter outreach activities. The
17 Chamber, like many non-party membership groups,
18 sponsors voter registration education and get-out-
19 the-vote activities across the Nation. Like most
20 non party organizations with limited resources, the
21 Chamber must tailor these activities to certain
22 geographic areas and demographic groups. The
proposed rules

1 provide no concrete guidance as to the criteria
2 that could transform legitimate nonpartisan
3 activities into illegal expenditures and generally
4 a political non-party groups into so-called
5 political committees.

6 We noted in our comments the importation
7 of the concept of promote, support, attack, or
8 oppose, and this came from the Federal election
9 activity definition in the statute which is applied
10 only to party activity. Our written comments
11 identify two examples in the proposed rules and
12 object to their use there in proposed Sections
13 100.116 and 100.133, but no aspect of the general
14 definition of expenditure should be expanded in
15 this manner.

16 Another significant flaw is the
17 re-definition of political committee. As with the
18 attempt to expand the definition of expenditure,
19 the Commission's major purpose test as proposed is
20 vague and overinclusive.

21 In sum, these proposed rules exceed the
22 constitutional and statutory limitations on

1 government regulation of advocacy by nonpartisan
2 groups. The Commission's attempt to expand
3 regulation in our view is unauthorized and
4 ill-advised. As Senator Wellstone observed during
5 the floor debate over McCain-Feingold, he said, and
6 I quote: No matter how good the idea may be, if
7 you can't muster 51 votes here and a majority in the
8 House, then the idea is only that. It is a good
9 idea, but it lacks the ability to build the
10 necessary majority support for the idea to become
11 law, unquote.

12 The proposed rules, whether they are a
13 good idea or a bad idea, could not have been made
14 law by Congress in McCain-Feingold, and they should
15 not be made law here.

16 Thank you.

17 CHAIRMAN SMITH: Thank you, Mr. Baran.

18 Mr. Gold.

19 MR. GOLD: Thank you, Mr. Chairman.

20 I appear today on behalf of the AFL-CIO,
21 the national labor federation that represents 13
22 million working men and women throughout the United

1 States. We filed comments jointly with the
2 Building and Construction Trades Department of the
3 Co. AFL-CIO and with the Independent National
4 Education Association, whose representative will
5 testify separately.

6 We have also embraced important comments
7 filed last Friday, April 9th, by six national
8 unions representing nearly half of the AFL-CIO's
9 membership. These were filed electronically, but I
10 fear may have been lost in the sea of the 150,000
11 comments that the Commission has received in this
12 sprawling and complex rulemaking. The fact that
13 those comments have been filed, and I'm not sure if
14 the Commission or the general counsel has had a
15 chance to review them, is emblematic of a reckless
16 compression of this process, and certainly a few in
17 the regulated community will have read those
18 comments, given the nature of the Commission's web
19 site and the inability to access anything on it. I
20 know that I have not had an opportunity to read
21 many, many important comments in order to prepare
22 for this hearing. I just learned of the Vice

1 Chairman's list of questions, which were not on the
2 table when I arrived shortly before the hearing
3 began, and I'm afraid--I feel and I think all the
4 other witnesses here will be at a disadvantage and,
5 more importantly, the Commission will be at a
6 disadvantage for a process that is so haphazard and
7 so rushed.

8 I would like to just make a few
9 substantive points in addition to that before we
10 proceed to questions. The first, following from
11 what I just said, is I believe the Commission and
12 the AFL-CIO believes that the Commission has
13 engaged in a profoundly disruptive exercise. We
14 are 17 months into an election cycle. The general
15 election, the general presidential election, many
16 other Federal elections for all intents and
17 purposes are upon us already. Many thousands of
18 political committees and other organizations have
19 spent tremendous sums of money and efforts and
20 resources to come to grips with the far-reaching
21 amendments of BCRA. Many are still learning that
22 statute. Millions of organizational members,

1 contributors, candidates, and ordinary citizens
2 have had to master that statute and the dense new
3 regulations that the Commission adopted during 2002
4 and 2003. All of that activity reflected the first
5 major overhaul of the Federal Election Campaign Act
6 in nearly 30 years.

7 Now, unexpectedly, and in the absence of
8 any congressional command or even any judicial
9 direction in the McConnell decision, the Commission
10 has launched perhaps the most ambitious rulemaking
11 of its history, eclipsing even what Congress did
12 command in BCRA and without any coherent
13 explanation as to why, let alone why now.
14 So the Commission is proposing to
15 redefine what is an expenditure, what is a
16 political committee, what is partisan activity,
17 what is nonpartisan activity, and how should
18 political organizations and others allocate their
19 expenses between Federal and non-Federal accounts.
20 With all due respect, the Commission is bringing up
21 now far, far more than we out here can bear or that
22 we should be asked to bear, especially at this

1 time. This rulemaking should be withdrawn, and the
2 revised law that Congress did write should be
3 allowed to operate for the balance of this election
4 cycle in order to give the Commission, Congress,
5 and everybody who is regulated by it an opportunity
6 to evaluate what happened and what, if anything,
7 needs to be done. Dramatic revisions now of
8 longstanding rules that Congress did not disturb
9 in BCRA would be deeply unfair and utterly contrary
10 to all reasonable expectations and reliances by
11 those effected.

12 Second, with all due further respect,
13 the Commission simply does have the authority to
14 undertake certain core proposals in this
15 rulemaking. For example, redefining the term
16 "expenditure" to include categories of conduct
17 first recognized in BCRA itself, but for wholly
18 different purposes and actors. This comports with
19 no recognizable congressional intent or delegation,
20 let alone any reasonable expectation by millions of
21 organizations and individuals. Also, redefining
22 political committee to capture untold numbers of

1 non-Federal Section 527 organizations contradicts
2 Congress' limited and specific treatment of them in
3 BCRA itself and in two other recent congressional
4 enactments, one in June 2000, just before BCRA, and
5 one in November 2002, just after, that regulated
6 such organizations by disclosure alone.

7 Finally, the Commission proposes so much
8 with so little study or time to reflect and so
9 little opportunity by those of us who care about
10 the statute and care about the Commission and care
11 about political activity to even come before you
12 with an informed presentation that it cannot
13 possible evaluate the practical consequences of
14 what it is proposing, including how the many, many
15 elements of the proposal would operate together
16 with the Federal Election Campaign Act, with BCRA
17 as BCRA has rewritten it, and with the Internal
18 Revenue Code itself that governs the 501[c] and 527
19 organizations that would be so fundamentally
20 affected.

21 In sum, we believe--

22 CHAIRMAN SMITH: Thank you.

1 MR. GOLD: I'd be glad to summarize. I
2 think the summary of our comments and our views is
3 that the rulemaking should be withdrawn, the
4 Commission should take the necessary time to
5 evaluate the 150,000 comments have been provided to
6 it, and let's do something in an orderly fashion,
7 if anything needs to be.

8 COMMISSIONER McDONALD: Mr. Chairman, if
9 I may, I would allocate any of my time to anyone
10 that comes so that they would have more time to
11 speak, because I think it's critical, and I realize
12 we're really under the gun, but Larry and anyone
13 else, they can have part of my time.

14 CHAIRMAN SMITH: Thank you, Commissioner
15 McDonald. You see I'm not being particularly rude
16 at this point. Please try and--

17 COMMISSIONER McDONALD: I thought you've
18 been very good myself.

19 CHAIRMAN SMITH: Thank you.

20 Mr. Simon.

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

22 I'll see if I can take the three-minute limit

1 seriously.

2 I appreciate the opportunity to testify
3 this morning on behalf of Democracy 21. This
4 rulemaking may be one of the most important
5 proceedings in the history of the Commission. At
6 issue is whether the Commission has the capacity
7 and the will to deal with overt and massive ongoing
8 efforts to circumvent and undermine the Nation's
9 campaign finance laws. Yet, the Commission has
10 badly miscalculated in defining this rulemaking,
11 and in so doing has unnecessarily generated a storm
12 of confusion and controversy that serves to mask
13 the real issues before you.

14 In our view, the Commission has two key
15 problems before it: First, the spending of tens of
16 millions of dollars of soft money explicitly for
17 the purpose of influencing Federal elections by
18 Section 527 groups that are not registered as
19 political committee and that are, therefore,
20 operating outside the Federal campaign finance
21 laws. Second, the egregious manipulation of the
22 Commission's existing allocation rules for

1 non-connected political committees in order to
2 license the spending of almost exclusively soft
3 money for voter mobilization activities clearly
4 aimed at influencing the Presidential election.

5 Rather than focusing on these two
6 critical issues, the Notice of Proposed Rulemaking
7 instead broadly overreaches and proposes new rules
8 that extend far beyond what is necessary to deal
9 with the immediate problems. In so doing, this
10 rulemaking threatens to sweep into political
11 committee status a whole range of nonprofit groups
12 and potentially other types of organizations that
13 have not been and cannot be subject to this kind of
14 regulation. Predictably, this overbroad rulemaking
15 has generated enormous controversy, and,
16 predictably, the Commission is now being told by a
17 range of voices not to do anything at all or not to
18 do anything now.

19 The NPRM is a recipe for failure because
20 it maximizes the danger that this rulemaking will
21 succumb to paralysis, deadlock, and inaction
22 generated by a complexity and controversy inherent

1 in the proposal. This is especially true in the
2 context of an expedited proceeding, in trying to
3 resolve too much too fast, the Commission runs the
4 serious risk of resolving too little too slowly or
5 indeed nothing at all.

6 We urge you to focus and prioritize your
7 rulemaking efforts in light of the most apparent
8 and serious problems that are now manifested. It's
9 important that the Commission not permit
10 controversy about the proper regulation of Section
11 501[c] groups to become a distraction from or an
12 excuse to block action on very different questions
13 about the proper regulation of Section 527 groups
14 and about the Commission's allocation rules for
15 political committees.

16 As a law enforcement agency, you should
17 deploy your resources to those topics that most
18 clearly and immediately threaten to subvert
19 adherence to the law. The two problems I mentioned
20 before are the questions that require urgent
21 resolution on an expedited basis for this election
22 cycle. The many other issues raised in the NPRM

1 should in some instances be dropped entirely and in
2 others deferred for later consideration.

3 Thank you.

4 CHAIRMAN SMITH: Thank you, Mr. Simon.

5 You're doing the best so far on time.

6 Mr. Kirk.

7 MR. KIRK: Good morning to the
8 Commission, and hopefully I can meet Mr. Simon's
9 record here.

10 I'm appearing--my name is William Kirk,
11 Bill Kirk, and I'm appearing as a board member of
12 the Congressional Black Caucus Political Education
13 Leadership Institute. I'm not here to talk about
14 the particular fineries of Federal election law,
15 particular fineries in the distinctions of
16 definitions in the Commission's rules per se. I'm
17 here as a representative of an organization that we
18 believe would be, unfortunately, swept into
19 what--unfortunately swept into the definition of a
20 political committee.

21 I think the best way for me to describe
22 this is just to tell you a little bit about this

1 organization so you can focus on what it does and
2 see how what we believe this rule, proposed rule,
3 will have a chilling affect on our activities.
4 First of all, the Institute is not controlled by
5 any federally-elected official. It is not
6 controlled by members of the Congressional Black
7 Caucus. It is not controlled by, affiliated with,
8 or directed by any political party, Democrat,
9 Republican, or other. The CBC is not a trademark
10 name, and the private sector citizens who formed
11 this organization and recruited certain members of
12 the Congressional Black Caucus to join with us on
13 the board, that was a deliberate attempt for us,
14 because if you're going to go out, and I've been
15 discussing on purpose, and try to educate, motivate
16 civic participation among the African American
17 community, it is logical that you'd like to have
18 some of the leaders of that community involved in
19 your activities.

20 So I wanted to make it very clear that
21 I'm not speaking on behalf of the Black Caucus or
22 on behalf of any other organization related to the

1 Black Caucus such as the Black Caucus Foundation.
2 We are a 501[c][4]. We are a D.C. nonprofit. We
3 have organized ourselves to operate as a social
4 welfare organization. We've applied to the IRS
5 under that basis. We've submitted all of the
6 supporting materials to the IRS with regard to the
7 standards of a 501[c][4] organization. We are not
8 a 527 organization. We do not engage in the
9 activities of a 527 organization, and it is not our
10 intention to do so in this current election cycle.

11 So we are not in the business of trying
12 to support one candidate, oppose another candidate,
13 to overtly influence the outcome of a particular
14 election. As I said, the purpose of this
15 organization is to conduct and support research on
16 public policy issues that are uniquely affecting
17 the African American community, to promote civic
18 participation, including participation in the
19 electoral processes, but in order to do that, we
20 have to understand those processes, and to support
21 training opportunities for people in the private
22 sector, those who want to be in public service and

1 those are interested in the political process. So
2 that is what we do, and our statement talks about
3 some of the activities that I'll be happy to
4 elaborate upon them in the Q and A, if there is
5 any.

6 All of our activities have been
7 conducted in a nonpartisan manner. This Commission
8 is considering an expansion of the definition of a
9 political committee. In our view, it is very
10 troublesome that activities of a [c]4 organization
11 such as ours, by our reading of the proposed
12 rulemaking, would be swept into the definition of a
13 political committee. We think that is troubling.
14 We think the IRS standards are very clear of what
15 is permissible activity by a social welfare
16 organization. We comport ourselves with regard to
17 those standards. In the interest of time, I won't
18 go into the specifics standard here.

19 The other thing I would like you to
20 focus in on is that the rule, as we understand it,
21 if adopted, has a chilling affect even if--even
22 if--you do not specifically sweep in 501[c][4]

1 organizations. We believe it would have a chilling
2 affect on our ability to raise the resources that
3 are needed to carry out the work we do. There
4 would be all kinds of questions as to whether or
5 not if you have a forum and a member of Congress
6 comes to this forum, if you discuss a policy that's
7 pending before the Federal Government, all kinds of
8 questions from potential donors and contributors as
9 is political activity, are we now going to be
10 making a political campaign contribution.

11 So we are very much in support of the
12 notion that the Commission should step back, take
13 its time, and look at these issues in a more
14 considered fashion.

15 CHAIRMAN SMITH: Thank you, Mr. Kirk.

16 We'll go to questions. In the first
17 concession to time already, I'm going to reduce
18 unilateral decisive move commissioner question time
19 just to ten minutes on the round. We'll begin with
20 Commissioner Thomas.

21 COMMISSIONER THOMAS: Not just my time?

22 CHAIRMAN SMITH: Let's go on.

1 COMMISSIONER THOMAS: Every time I speak
2 up, I get reduced more. Thank you, Mr. Chairman.

3 Gentlemen, thank you for coming. I'll
4 just start by noting something I didn't when I
5 spoke up initially. I have been amazed by the
6 process of seeking comment in this rulemaking and
7 the response that was obtained by the agency, and I
8 have to acknowledge the efforts of my tireless Aunt
9 Betty down in Miami Beach who periodically would
10 send me one of the E-mails that one of the groups
11 involved had sent her urging that she immediately
12 contact the Federal Election Commission and tell
13 them what she thought or what the organization
14 thought, as the case may be.

15 But there was behind these 150,000
16 comments, obviously, a very concerted effort by the
17 organizations most likely impacted to generate
18 these kinds of comments, and that's not taking
19 anything away from the folks who felt the urge to
20 follow up. I think it is important to note,
21 however, that the number of comments we received
22 was really the product of an amazing effort, an

1 organized effort, to generate comments coming into
2 the agency, and it's something we should all keep
3 in mind as we're going through this.

4 The questions I want to get to initially
5 involve trying to identify what is the Government's
6 interest. Here we are talking mostly about
7 organizations that otherwise are operating
8 independently of candidates and the party committee
9 operatives. They're not coordinating, in other
10 words, with candidates of party committee
11 operatives; and the question that I kind of wanted
12 to get at is do you all agree that the articulated
13 governmental interest in this area is not
14 necessarily just the prevention of the appearance
15 of corruption that is generated by the traditional
16 quid pro quo situation you get when a contribution
17 is made to a candidate, but what we're talking
18 about here is what the Supreme Court has
19 articulated as the desire to prevent the
20 independent groups, which are in many cases sources
21 of aggregated wealth, from having a way to distort
22 the political marketplace in a way that basically

1 forces the average citizen out of the political
2 market place? Do you also at least acknowledge
3 that that is the stated rationale for Government
4 regulation in this area?

5 MR. SIMON: Well, let me jump in.

6 CHAIRMAN SMITH: Mr. Simon.

7 MR. SIMON: I think you're right,
8 Commissioner Thomas. I think it goes beyond that
9 though. I think Congress over a long period of
10 time, starting almost a hundred years ago, has step
11 by step constructed a regulatory regime, and the
12 Supreme Court in multiple opinions has upheld that
13 regime to regulate money for the purpose of
14 influencing Federal elections. Now, there are
15 different forms of regulation. There are different
16 constitution limitation on money that's spent by
17 making a contribution to a candidate or spending in
18 coordination with a candidate than there are that
19 pertain to money spent independently of a
20 candidate, but money spent independently of a
21 candidate or party, as you suggest, is subject to
22 regulation. It's subject to principles of

1 disclosure. It's subject to a prohibition on the
2 spending on union and corporate treasury funds, and
3 that question and the compelling interest behind
4 those regulations were upheld in the Austin case
5 and was restated again in the McConnell case, and
6 that money, I believe, is also subject to
7 contribution limits to groups that make such
8 independent spending.

9 Although the limits cannot be applied to
10 the amount of independent spending by a group, the
11 contributions, the money that goes to the group,
12 has been subject to limits. Those limits are
13 reflected in the Commission's regulations, and I
14 believe those limits are constitutional.

15 So all that money, even though it comes
16 into the system through independent spending, is
17 appropriately subject to regulations based on
18 compelling interest that the Supreme Court has
19 acknowledged.

20 CHAIRMAN SMITH: Mr. Baran.

21 MR. BARAN: I think that Commissioner
22 Thomas' question and Don Simon's response is more

1 appropriate for a congressional hearing, not for an
2 agency hearing, because the issue here is not how
3 to pass a new law. The issue is whether or not
4 this proposed regulation or these regulations are
5 consistent with the law that Congress did pass and
6 that you are responsible for implementing. I would
7 submit that Congress did not suggest that the
8 AFL-CIO and U.S. Chamber of Commerce are political
9 committees or are likely ever to be political
10 committees. They knew full well who we were.

11 You know, it's a little bit like having,
12 you know, the Shi and the Sunies here before you,
13 but we do have a common view that this is clearly
14 inconsistent with the law, whether we're talking
15 about BCRA or the 1974 Federal Election Campaign
16 Act.

17 If you wanted to regulate beyond what
18 Congress said it wanted to regulate, which is
19 independent public advertising that satisfies the
20 definition of electioneering communication or
21 express advocacy, then that ought to be part of
22 your legislative proposals to Congress or to Don

1 Simon's proposals to Congress that they ought to
2 pass additional laws to regulate more of this
3 active.

4 MR. GOLD: I endorse everything that Mr.
5 Baran has said about this point. I think the
6 colloquy between Commissioner Thomas and Mr. Simon
7 encapsulates the fundamental problem here.
8 Governmental interests are for Congress to decide,
9 and Congress clearly has made decisions about what
10 the governmental interest is in regulating the
11 activities, the independent activities of
12 independent groups. It did in FECA and it did it
13 in BCRA and it limited it to express advocacy and
14 electioneering communication.

15 Mr. Baran and I sat together in the
16 Supreme Court's Chamber last September when the
17 culmination of year's litigation with enough of a
18 record to fill the entire space between me and the
19 commissioners and the general counsel was filled
20 with evidence and argument, documents and the like,
21 all about just what BCRA itself regulated, just the
22 steps that Congress took, the very limits that

1 Congress took with respect to limiting, restricting
2 independent expression by independent groups, and
3 it was a tremendous effort by Congress to enact it,
4 and it was a tremendous effort by the Commission
5 and the sponsors to defend that constitutionally.

6 But the fact is that's all that
7 Congress has done, and the Commission here is to
8 embark on a further rumination about what is in the
9 public interest and how further the AFL-CIO or the
10 Chamber of Commerce or independent 527
11 organizations ought to be regulated is just a place
12 where the Commission simply can't go. We're not
13 saying the Commission has no authority, or at least
14 I'm not saying the Commission has no authority, to
15 issue regulations on statutory terms, but it
16 certainly has to be mindful of lines clearly drawn
17 by Congress both in BCRA and in the amendments,
18 again, the amendments in the Internal Revenue Code
19 in 2002 that directly dealt with the independent
20 Section 527 organizations and Section 527
21 organizations sponsored by the Chamber of Commerce
22 and the AFL-CIO and other Section 501[c]

1 organizations, which this rulemaking would
2 completely re-fashion.

3 MR. KIRK: I'd associate myself with Mr.
4 Baran and Mr. Gold's comments and say that I would
5 agree, the Institute would agree, that the body
6 that is to make the determination of what is the
7 governmental interest in this area beyond what was
8 in BCRA is the legislative body, and I would agree
9 that I don't believe the congressional intent was
10 to regulate the activities, the traditional
11 activities, of 501[c][4] social welfare
12 organizations.

13 COMMISSIONER THOMAS: Thank you. I have
14 to say up front that I don't think any of the
15 commissioners here coming into this rulemaking have
16 any concept of trying to treat the AFL-CIO or the
17 Chamber of Commerce as a political committee. I
18 think we can just say that's off the table.

19 What we're trying to get at is the
20 balance, if you will. On the one hand, there are
21 some groups out there that are certainly entitled
22 to not be treated as political committees, but by

1 the same token, there appear to be groups out there
2 that are undertaking as their primary mission
3 trying to influence elections, and Congress did not
4 through BCRA take off the books the definition of
5 expenditure, which is in the statute and has been
6 for many, many years. It defines expenditure as a
7 payment for the purpose of influencing Federal
8 election; nor did Congress through BCRA take off
9 the books the definition of political committee,
10 which itself depends on using that term
11 "expenditure" in terms of how to define it.

12 And we also have the Supreme Court twice
13 telling us that we have to apply a major purpose
14 test in figuring out whether a political committee
15 exists or not.

16 So I think what we're striving for is
17 how do you draw the line and try to reach the right
18 kinds of groups and regulate those as political
19 committees. That is a congressional direction.
20 That's statutory language still on the books.

21 Let me move on. With regard to how we
22 deal with these terms that are in the statute for

1 the purpose of influencing, I gather that at least
2 with respect to some organization, Mr. Simon, your
3 argument is that we can apply in essence a
4 for-the-purpose-of-influencing test, but for other
5 kinds of organizations, the 501[c] groups, we
6 should step back and use the expressed advocacy
7 test.

8 MR. SIMON: That's right, and that view,
9 that distinction is grounded directly on the
10 Supreme Court's discussion of the Buckley case
11 where it addressed this very question about how do
12 you construe and apply this statutory language for
13 the purpose of influencing, and the Court drew what
14 I think is for purpose of this discussion a
15 critical distinction. It basically applied a gloss
16 to the statutory language. It said when you have
17 groups that are essentially in the business of
18 politics whose mayor purpose is to the seek
19 nomination or election of candidates, whose primary
20 activity is campaign activity, those groups fall,
21 in the Court's words, in the core area sought to be
22 regulated by Congress. Their spending is by

1 definition campaign related, and for those kinds of
2 groups, the statutory language is sufficiently
3 precise and tailored to cover their activities. So
4 their activities are controlled by a
5 for-the-purpose-of-influencing test.

6 For all other groups, groups whose major
7 purpose is not to influence elections, 501[c]
8 groups, corporations, trade associations, labor
9 unions, all those sorts of other entities out there
10 who are not primarily in the business of campaign
11 activity, they because of constitutional concerns
12 about vagueness in the statutory language, those
13 groups are entitled to have a bright line
14 distinction separating what campaign activity they
15 engage in that is subject to regulation from their
16 other activities and their issue discussion, which
17 is not subject to regulation.

18 Now, in Buckley, the Court as a judicial
19 gloss as a matter of statutory construction, not as
20 a matter of constitutional limitation, but as a
21 matter of statutory construction, developed the
22 express advocacy test, and for those group, those

1 non-major purpose groups, only their spending that
2 contained express advocacy is subject to regulation
3 under FECA. Now, what BCRA added was an additional
4 test, the electioneering communication test, but
5 what was important about that is that Congress as a
6 constitutional matter had to adhere to the same
7 principles of creating a clear bright line
8 non-vague test.

9 So the bottom line, I think, in the
10 state of the doctrine when you put the statute,
11 both the FECA and the BCRA together with the
12 Supreme Court's interpretation, is that you have in
13 a sense a bifurcated definition of the term
14 "expenditure". For major purpose groups of all
15 sorts, political parties, candidate committees,
16 non-connected committees, and I would argue Section
17 527 groups, for those groups, they are subject to
18 the statutory definition of expenditure as payment
19 for the purpose of influencing election.

20 For all of other groups, Mr. Baran's
21 group, Mr. Gold's group, all the 501[c]s out there,
22 my group, those groups are subject to the bright

1 line test of expressed advocacy and electioneering
2 communication. Congress could, I suppose, adopt
3 additional tests. I think they would have to meet
4 the same bright line standards, but until Congress
5 acts, those are the only applicable tests that
6 constitute regulable expenditures.

7 MR. BARAN: I would say that 527
8 organizations, and the Chamber is not such an
9 organization, but a 527 organization is like any
10 other non-political committee until it satisfies
11 the definition of a political committee, and in
12 order to do so, it has to have its major purpose to
13 influence election as defined elsewhere in terms of
14 the definition of expenditure, and we have the
15 Court's decisions in Buckley and MCFL that
16 essentially say that an expenditure must contain
17 express advocacy or the group must be making
18 contributions, another highly-defined term means
19 that they're either giving money to Federal
20 candidates and Federal Committees or they're
21 spending money in coordination with those
22 candidates and Federal committees; and if they're

1 doing that and their major purpose is satisfied
2 under those defined terms, then they become a
3 political committee, and everything that they spend
4 under the statute is, quote, an expenditure.

5 But I think it's very interesting to
6 note that in McCain-Feingold, there was no change
7 of any of those fundamental concepts, even though
8 this agency has conducted a ruling during this
9 legislation in 2001--the Chamber submitted comments
10 in that ruling three years ago--it ceased that
11 ruling as saying we'd like to see what Congress
12 passes; we'd like to see if there's any more
13 judicial opinion. And Congress spent a lot of time
14 on your statute, and what did it do? It didn't
15 change the definition of political committee or
16 anything like that. It added a concept of
17 electioneering communication, which I think is
18 significant not only because it expands your
19 regulation, but it's doubly significant because an
20 electioneering communication is not an expenditure.
21 It didn't even amend the definition of expenditure,
22 and it was included in the prohibition on

1 corporations and unions as another type of activity
2 that's prohibited, but not a contribution or
3 expenditure.

4 Did they do that with concepts like
5 promote, support, attack, or oppose? No. You
6 know, we're all still permitted to engage in
7 non-electioneering communications, non-express
8 advocacy, public communications that might refer to
9 a candidate, and whatever medium that someone might
10 interpret as promoting, supporting, attacking or
11 opposing a candidate, and that is not an
12 expenditure. It's not a contribution if it done
13 independently. It not prohibited.

14 So you're trying to import these new
15 concepts and basically change the structure of the
16 statute which Congress decided it wasn't going to
17 do.

18 CHAIRMAN SMITH: Okay. We'll move on.
19 Commissioner Toner.

20 COMMISSIONER TONER: Thank you, Mr.
21 Chairman.

22 Mr. Simon, following up on earlier

1 comments, you were focusing on a major purpose test
2 as you understood it, and I took from your comments
3 that you see it as making a fundamental distinction
4 between those organizations that are electorally
5 involved or electorally oriented and those that
6 aren't. Do you think that--in addition, you do
7 have the statutory \$1,000 test that has to be met,
8 but in terms of just the major purpose test, do you
9 think there is a strong argument that 527
10 organizations necessarily meet the major purpose
11 test per se?

12 MR. SIMON: Yeah, I do. I think the
13 simplest way to get to that is simply read the
14 statutory language defining the 527, which is: "A
15 group organized and operated primarily for the
16 purpose of directly or indirectly accepting
17 contributions or making expenditures." So by
18 statutory definition, a 527 group is organized and
19 operated primarily for the purpose of influencing
20 elections. I do think that meets the major purpose
21 prong of the political committee test.

22 Now, we support the alternative, 2[a],

1 of the Commission's proposed regulation that has
2 some per se exemptions for 527s that are clearly
3 non-Federal, a state candidate committee or a group
4 that's devoted solely to influencing state
5 elections. Those are 527s as, indeed, is a group
6 that's devoted to influencing appointed offices or
7 nominations. Those are also 527s, but they
8 shouldn't be subject to the political committee
9 rules. But I think the proposed rules have crafted
10 appropriate exemptions. Apart from those
11 exemptions, I think just on the face of the statute
12 groups that are 527s meet the major purpose test.

13 Let me just add one more quick point.
14 The Commission--this is not a new concept. The
15 Commission has repeatedly over the course of the
16 last 20 years in advisory opinions cited a group
17 status as a 572 as an indicator, as evidence, of
18 its major purpose status. I mean, I looked
19 yesterday, and I found about eight or ten AOs where
20 the Commission cited 527 as indicating the group
21 had a major purpose.

22 COMMISSIONER TONER: Following up, is it

1 your view that with the exemptions you're talking
2 about, the regulation option that would treat 527s
3 as satisfying the major purpose test, is it your
4 view that if the 527 spent more than \$1,000 on an
5 ad that promoted, supported, attacked, opposed a
6 Federal candidate, it would be your view that that
7 type of organization should be under the law of a
8 political committee?

9 MR. SIMON: Yes, because based on the
10 analysis I gave you before. As a 527, it's a group
11 whose major purpose by definition is campaign
12 activity; therefore, it's not subject to the bright
13 line narrowing gloss that the Court in Buckley put
14 on the definition of expenditure. It's subject to
15 the statutory definition of expenditure. Money it
16 spends for the purpose of influencing a Federal
17 election is an expenditure, and that includes money
18 spent promoting, supporting, attacking, or opposing
19 candidates.

20 Now, there is a lot of discussion about
21 that promote, support, attack, oppose standard.
22 That standard--and I think this is where the

1 Commission's proposed regulations go badly off
2 track, because that standard, I believe, cannot be
3 applied to corporations, to 501[c]s, to labor
4 unions, but it can be applied to 527s precisely
5 because those are major purpose organizations.

6 COMMISSIONER TONER: Is the reason you
7 don't believe they can be applied to 501[c]s and
8 corporations because of the constitutional command
9 of the major purpose test?

10 MR. SIMON: That's right, because of the
11 distinction that the Supreme Court drew in Buckley.
12 So, again, to get to the bottom line, if we have a
13 527, but statutory definition, that group has a
14 major purpose to influence elections. That meets
15 the first prong of the political committee test.
16 Then the question is has it spent \$1,000 in
17 contributions or expenditures. If it has under the
18 statutory standard or for the purpose of
19 influencing, that meets the second prong;
20 therefore, it's a political committee.

21 COMMISSIONER TONER: I'd be interested
22 in anybody else's views on these issues.

1 MR. BARAN: The only problem I see with
2 this analysis by Mr. Simon is that it is flatly
3 contradicted by the Internal Revenue Code Section
4 527 and its legislative history, and a 527 itself
5 has been on the books since the 1970s. It has been
6 amended twice in the last four years. In July of
7 2000, Congress passed a law that required 527
8 organizations to disclose their receipts and
9 expenditures for the first time, and then after the
10 passage of BCRA, Congress revisited 527 again.

11 And we cite in our comments that were
12 submitted in this rulemaking the statement by
13 Senator Lieberman who supported the new Section
14 527, and this is what is said, quote: When the
15 Bipartisan Campaign Reform Act, the McCain-Feingold
16 bill, goes into effect, at least some of the soft
17 money donors who will longer be able to give to
18 political parties will be looking for other ways to
19 influence our elections. Donations to 527 groups
20 will probably top many of their lists, because
21 these are the only tax-exempt groups that can do as
22 much election work as they want without

1 jeopardizing their tax status, unquote.

2 Now, if these organizations are
3 automatically political committees under the
4 campaign finance law, this legislation, this tax
5 legislation would be irrelevant. It would
6 redundant. Why would you need to have this bill
7 that requires disclosure if disclosure was
8 automatically required under the Campaign finance
9 Reform Acts? You know, this underscores the fact
10 that both in BCRA and in Congress' consideration of
11 Section 527, they expected 527 groups to exist.
12 They expected them to file reports. They expected
13 them to spend money on public advertising as long
14 as it satisfied all of the other campaign finance
15 requirements of not making contributions, not
16 containing express advocacy, and not engaging in
17 electioneering communications.

18 COMMISSIONER TONER: Mr. Simon, your
19 thoughts?

20 MR. SIMON: Well, you know, I think
21 there is an explanation for why Congress passed the
22 disclosure law in 2000, and I think it relates to a

1 kind of constitutional fog that--

2 MR. BARAN: This quote was 2002. I just
3 want to make it clear.

4 MR. SIMON: Let me get to that. It
5 relates to a kind of constitutional fog that,
6 unfortunately, the Commission itself created about
7 the role of 527s and the status of 527s in various
8 advisory opinions, statements of reasons and murs.
9 The Commission started adopting the position that
10 express advocacy was as a constitutional matter
11 required to make a 527 into a political committee.
12 Probably the best known and perhaps in a sense the
13 one that was most confusing to the development of
14 the law was the mur that involved Republicans for
15 Clean Air where we had a 527 that was engaging in
16 campaign activities. The general counsel
17 recommended that the Commission dismiss the
18 complaint on the ground that the 527 did not engage
19 in express advocacy and, therefore, was not a
20 political committee. The Commission deadlocked 3-3
21 on that, therefore in a sense creating no law and I
22 think leaving a great state of confusion.

1 Now, what Congress did in 2000 was say,
2 Look, there are lots people, including many members
3 of the Federal Election Commission, who are saying
4 we can't regulate 527s as a political committee
5 because of this constitutional barrier, the express
6 advocacy test, so let's at least get disclosure.
7 And Congress passed the disclosure law, I think,
8 without taking any position on whether or not they
9 should be political committees, and I think the
10 best illustration of that is Congress did that
11 without amending the campaign finance laws. It 12
12 didn't amend FECA. It amended the tax code and
13 made disclose a condition on a 527's tax exemption,
14 which was clearly constitutional, and didn't get
15 into all the constitutional questions relating to
16 expressed advocacy.

17 Now, the final point is something
18 significant has changed since the passage of the
19 2000, since the passage of BCRA, since the passage
20 of the subsequent law relating to 527. What has
21 changed is the McConnell opinion, which is a
22 definitive Supreme Court ruling on precisely these

1 constitutional questions, the key one of which is
2 that express advocacy is not a constitutional
3 barrier. So the whole notion that 527s can't be
4 regulated as political committees because they
5 don't engage in express advocacy, which is a view
6 that the commission had for many years, was wrong,
7 and I think that clears the path for the Commission
8 to properly implement the pre-existing law.

9 COMMISSIONER TONER: Mr. Gold, you had
10 some comments?

11 MR. GOLD: Yeah. I believe that is also
12 flatly incorrect with respect to the McConnell
13 decision. What the McConnell decision did was say
14 the express advocacy line is not constitutionally
15 required. It did so in constructing a statute by
16 Congress. It did not revise a statute. Whether or
17 not that--whether or not Congress could go further,
18 it hasn't gone further, and there was a lot of--if
19 we thought--if anybody can credibly--nobody can
20 credibly say that going into the McConnell
21 litigation and going to the McConnell decision,
22 that if the plaintiffs prevailed on their position

1 that the electioneering communications provision,
2 the only exception to express advocacy were
3 regulations of independent speech in 30 years,
4 nobody can credibly say that if they prevailed on
5 the point, which they did, that that was going to
6 open up this entirely new regulatory landscape for
7 this Commission to go through or to appropriate a
8 phrase from one portion of the Act, promote,
9 support, attack, or oppose, and then graft it upon
10 organizations in another section of the Act,
11 everybody would have been absolutely shocked.

12 This is sort of a colossal bait and
13 switch approach to Federal election law and
14 constitutional law, and it's not fair.

15 One of Mr. Simon's co-commenters at the
16 Campaign Legal Center filed an amicus brief last
17 year in the Eleventh Circuit case that was faced
18 with the question about whether those 527 reporting
19 requirements were constitutional. And what was
20 their argument? They made a very strong argument
21 that it was critical that that law be upheld
22 because, they said:

1 "BCRA will deliver greater transparency
2 in the conduct of elections and enhance the
3 integrity of our political system; however, its
4 enactment does not obviate the need or
5 justification for Section 527[j], the new 527
6 disclosure provisions. Indeed, BCRA's requirements
7 relating to the financing of electioneering
8 communications an not cover all forms of
9 electioneering activity. For instance, they will
10 not apply to spending on non-express advocacy
11 electioneering telemarketing, direct-mail
12 communications, newspaper advertisements, or
13 internet communications. Likewise, they will not
14 apply to independent spending on non-expressed
15 advocacy electioneering television or radio
16 advertisements that are aired more than 60 days
17 before a general election or 30 days before a
18 primary, i.e., during the majority of an election
19 cycle. Thus, even with the enactment of BCRA, IRC
20 Section 527 organizations will be able to conduct
21 considerable amounts of Federal campaign finance
22 activity outside the cope of FECA. As such, IRC

1 Section 527[j] continues to be a critical mechanism
2 for campaign finance disclosure."

3 Well, now everybody is shocked to
4 discover that there are Section 527 organizations
5 out there engaging in political activity. The very
6 statute that Congress enacted in 2000 and amended
7 in 2002 after BCRA to regulate by disclosure
8 Section 527 organizations was done against a
9 background of all sorts of publicity, testimony,
10 evidence about so-called stealth PACs. This is not
11 some new problem so to speak. This is not some new
12 phenomenon, and it's not a problem. It's
13 independent organizations being able to do what the
14 tax code and Federal election law say they can do.

15 One of the fundamental flaws in the
16 argument that we're hearing is to mush together all
17 political activity. Everything is now Federal.
18 Section 527 says influence--a primary purpose to
19 influence elections. That's elections at all
20 levels. The Federal Election Campaign Act can only
21 regulate entities that either do a \$1,000 in
22 expenditures, a statutorily-defined term and Mr.

1 Baran has described, or make \$1,000 in
2 contributions to candidates, also a familiar term.
3 The major purpose gloss that the Supreme Court
4 imposed or clarified, which neither Congress nor
5 the Commission has ever encoded in the statute in
6 regulations, is an effort to limit the reach of the
7 statute, not to expand it.

8 And, you know, this alternative 2[a]
9 this is buried in these proposals that Mr. Simon
10 has endorsed, that doesn't even purport to
11 recognize any kind of major purpose test. It's an
12 any purpose test. All 527s, according to it, are
13 Federal political committees, something that truly
14 is shocking, unless it satisfies one of four or
15 five exemptions, none of which--none of which--have
16 anything to do with Federal elections, any purpose,
17 any spending.

18 Mr. Simon just said if you spend \$1,000
19 to promote, support, attack, or oppose a Federal
20 candidate, and your tax form is Section 527, then
21 your major purpose has been proven and your Federal
22 political committee status has been proven. That

1 cannot be the law. That isn't the law.

2 CHAIRMAN SMITH: Vice Chair Weintraub.

3 VICE CHAIR WEINTRAUB: Thank you, Mr.

4 Chairman.

5 Where to begin? Thank you all for
6 coming, and, Mr. Gold, I apologize for not getting
7 you the questions earlier. I was still working on
8 them earlier, and that's why they weren't out
9 there. I too have been a little bit stressed by
10 the rapid pace of everything that we're trying to
11 do here and having received as many comments as we
12 did and trying to go through them all and trying to
13 help you all in trying to figure out where we are
14 on this, because I personally don't think--and I
15 said this when we put this out on the public
16 record. I don't think anybody can read the NPRM
17 and figure out what they're supposed to comment on,
18 because there is so much in, and I voted against it
19 for that reason back then, and I still regret it.

20 Mr. Simon, I'll start with you sort of
21 following up on some of the debate that has been
22 going on. In the past, sometimes you've been here

1 on behalf of Common Cause. Today you're here on
2 behalf of Democracy 21. We're always glad to see
3 you whoever you're representing.

4 The reform community is not united on
5 this issue. You know, we got a letter from the
6 Brennan Center, normally a very strong pro-reform
7 group, saying we should hold off. It was the same
8 position that the editorial page of the Washington
9 Post took, that, you know, we've had so much
10 regulation; it's not clear that these 527 present
11 the same kind of issues. When were considering the
12 AO, the ABC AO earlier this year, Common Cause and
13 the Brennan Center wrote to us jointly, said among
14 other things: "It is not clear that 527 political
15 committees offer the same opportunities for
16 corruption of office holders or carry the same
17 appearance of corruption that soft money donations
18 to political parties demonstrably did."

19 So even among the reform community there
20 is not unity of position as to what we should do
21 here, and you and I have had this debate for months
22 now. Before McConnell, when we appeared on panels

1 together, I raised the argument, and I certainly
2 wasn't the first one, as Mr. Gold and Mr. Baran
3 pointed out, to say this, that one of the
4 unintended consequences of BCRA was that we might
5 end up losing disclosure, which I thought was not
6 necessarily a good thing, because I'm generally a
7 disclosure advocate, because a lot of the soft
8 money would flow from the parties to 527
9 organizations.

10 People knew this was going to happen.
11 They knew it when they passed BCRA. And when I
12 raised this issue with you in the past, the answer
13 that I believe I recall getting from you was it
14 wasn't an unintended consequence; we took what we
15 could get, because it narrowly tailored law; and we
16 just didn't intend to go there, either because we
17 couldn't get the votes or people--other members of
18 Congress were concerned about the constitutionality
19 of it; we just didn't do that; that wasn't the goal
20 of BCRA. Instead, we have this narrowly-tailored
21 approach, and everybody knew that other things
22 would continue to happen, and now since McConnell

1 has opened this new area of where it seem like there
2 is the potential for more legislation or
3 regulation, more than people thought there was
4 before, now all of a sudden the arguments have
5 changed.

6 And I want to give you the opportunity
7 to respond to the sense that I think a lot of
8 people have that some people, not all of them, some
9 people in the reform community are just sort of
10 saying, Wow, now we've got a new opportunity; we
11 got BCRA under our belt, and now we can grab some
12 more territory that people weren't even thinking
13 about in BRCA and that specifically was left
14 unregulated.

15 MR. SIMON: Well, let me first respond
16 to your observations about the reform community,
17 and I am, let me emphasize, here on behalf of
18 Democracy 21, not on behalf of any other
19 organization.

20 You know, I do think in the comments
21 filed in this proceeding, contrary to what you're
22 suggesting, there's actually remarkable unanimity

1 within the reform community, and comments filed by
2 Democracy 21, by the Campaign Legal Center, by the
3 Center for Responsible Politics, by Common Cause,
4 by the Brennan Center, by the League of Women
5 Voters, by Public Citizen, if you look at that list
6 of the leading reform community organizations, I
7 think they all are saying pretty much the same
8 thing, which is there's a problem with these 527
9 groups that are engaged in Federal election
10 activity. The Commission should address that
11 problem. There is a problem with the gaming, the
12 manipulation that's going on by other political
13 committees in kind of jimmying the allocation rules
14 to allow enormous amounts of--an enormous
15 percentage of soft money to be used for Federal
16 activities. The Commission should address those
17 rules.

18 The Commission should not, however, in
19 this rulemaking get into the broader question of
20 501[c]s. So I just think that when you get the
21 opportunity to look at the range of comments filed
22 by reform organizations in this proceeding, you'll

1 see that convergence of views.

2 Now the second point. I think what
3 you're doing is basically mixing apples and oranges
4 in your analysis, and let me explain it this way:
5 In BCRA, Congress addressed the problem of what
6 sort of speech, what sort of regulation, what sort
7 of communications can be subject to regulation
8 under the campaign finance laws by non-major
9 purpose entities, by groups like corporations and
10 like 501[c]4s. Congress took the position, which
11 was subsequently validated by the Supreme Court,
12 that it could write a bright line test that went
13 beyond express advocacy to bring a greater scope of
14 public communications within the campaign finance
15 laws; and, therefore, 501[c] groups are subject to
16 the electioneering communications test, but they're
17 not subject to some broader promote, support,
18 attack, or oppose standard.

19 They're not subject to such
20 promote-support kinds of communications outside the
21 30-day and 60-day windows. Those communications
22 by 501[c] groups, by corporations, by labor unions,

1 are not covered by the campaign finance laws.

2 What we're talking about here is
3 something different. What we're talking about here
4 is speech by groups whose major purpose is campaign
5 activity, not by 501[c]4s. Those groups--and this
6 is a question--I mean, there's a lot of discussion
7 about what BCRA didn't do this; BRCA did something
8 else. I agree. BCRA didn't do this. FECA did
9 this. The definition of political committee is in
10 FECA, and it says any group that spends \$1,000 in
11 contributions or expenditures. That's incredibly
12 broad. That's what Congress wanted. That's the
13 best indication of congressional intent, the actual
14 statute Congress passed on this subject.

15 Now, the Supreme Court along in Buckley
16 and said that's incredibly broad, that's too broad,
17 we're going to limit it to groups that have a major
18 purpose of a campaign activity and then have some
19 sort of Federal nexus, Federal spending limit, that
20 low threshold in the statute, over \$1,000 in
21 Federal expenditures. But for reform
22 organizations--and let me also say, as I indicated

1 before, that the problem that developed was I think
2 the Commission's view in the late 1990s, that the
3 express advocacy test, which applied to
4 non-major purpose groups, somehow also should be
5 applied to major purpose groups. So the Commission
6 started administering the law as if there were this
7 express advocacy limitation on spending by a 527.

8 That was wrong, and McConnell shows
9 that's wrong. So I think all we're saying is this
10 isn't a matter of BCRA. This is a matter of FECA.
11 Now that the Supreme Court has made this ruling,
12 you have the obligation to correct your mistakes
13 and to properly implement FECA as construed by the
14 Supreme Court in Buckley and in McConnell in its
15 application to 527s. 501[c]4s are subject to
16 BCRA. They are subject only to regulation on their
17 spending on express advocacy and electioneering
18 communication, not on the promote, support, attack,
19 or oppose ads.

20 VICE CHAIR WEINTRAUB: So we're stuck
21 with express advocacy even though the Supreme Court
22 said it's functionally meaningless?

1 MR. SIMON: Well, the Supreme Court
2 ruled on express advocacy two different dimensions.

3 VICE CHAIR WEINTRAUB: I understand
4 that, but in the context of some organizations. We
5 can't get rid of express advocacy.

6 MR. SIMON: As a matter of statutory
7 construction, the express advocacy test still
8 survives. As a matter of constitutional
9 limitation, the express advocacy test is dead.

10 VICE CHAIR WEINTRAUB: Let me ask you,
11 Mr. Baran, because I could just debate with Don all
12 day. You have advocated a major purpose test that
13 would set a 50 percent threshold, you have to have
14 a least half of your activity or more than half of
15 your activity would have to be--would have to be
16 what? That's my question. What would go into that
17 50 percent?

18 MR. BARAN: I think statutorily, as Don
19 Simon just said, the major purpose would have to be
20 defined by contributions and expenditures. Those
21 terms are defined in the Act currently and
22 interpreted by Supreme Court decisions.

1 VICE CHAIR WEINTRAUB: So express
2 advocacy?

3 MR. BARAN: So express advocacy. Now,
4 Congress can change that.

5 VICE CHAIR WEINTRAUB: Okay.

6 MR. BARAN: The electioneering
7 communications provision, for example, could be
8 changed.

9 VICE CHAIR WEINTRAUB: Let me ask--I'm
10 running out of time here. You represent the
11 Chamber. The Chamber reportedly is planning to
12 launch an aggressive \$40 million campaign to defeat
13 State and Federal candidates who oppose their
14 pro-industry agenda, starting with Senate Minority
15 Leader Tom Daschle. I'm reading from Roll Call,
16 Monday, February 2nd. And the head of the
17 political of arm of the Chamber says, basically,
18 it's great that the 527s might get regulated
19 because, quote, anytime the 527 groups are
20 weakened, our position is strengthened; we're still
21 going to be able to communicate.

22 So if your organization has said that

1 they are going to spend \$40 million to defeat
2 Federal candidates, why shouldn't we regulate you?

3 MR. BARAN: Well, you might ask Mr.
4 Simon. He's the one who wants to regulate some
5 groups and perhaps not others. He's already said
6 that he would exempt all 501[c] organizations, and
7 the Chamber is a 501[c][6] like the AFL-CIO is a
8 [c][5].

9 Let me say that I can't speak on behalf
10 of the political director of the Chamber of
11 Commerce, but I think if I heard the quote
12 correctly, he does, perhaps inadvertently, raise a
13 relevant point for this purpose, of this
14 rulemaking, which is that organizations like ours,
15 which obviously have major purposes. The major
16 purpose is something other than electioneering,
17 however you want to define that. The Chamber of
18 Commerce is a major trade association representing
19 American business. One of the major lobbying
20 institutions in this town, the AFL-CIO, has an
21 equally broad agenda on behalf of its members.

22 We receive hundreds of millions of

1 dollars from our supporters and members. We could
2 spend \$50,000. We could spend a million dollars.
3 We could spend \$50 million for activities that you
4 or Congress may sort of redefine as coming within
5 the definitions of contributions and expenditures,
6 and we still probably would not meet the definition
7 of a political committee, because that will never
8 be our major purpose.

9 So this rulemaking has the perverse
10 effect, if it's ever adopted in a form resembling
11 what has been proposed, of basically telling groups
12 that decide to operate as political organizations
13 under tax law, file reports, disclose their income,
14 disclose their expenditures, perhaps spend a few
15 million dollars, it would turn them into hard money
16 operations while the result would be that large
17 organizations with millions of members whose
18 primary objective is something other than
19 influencing elections, however that is defined,
20 will be able to continue reporting and not be
21 political committees.

22 So there is an illogic here. There is

1 also an illogic with respect to how electioneering
2 communications would be treated here. Congress
3 clearly anticipated that, notwithstanding the ban
4 on soft money and the ban on corporate and union
5 funding of electioneering communications, that
6 wealthy individuals could still do that. And, in
7 fact, it contemplated that wealth individuals can
8 do it not only on their own, but they could do it
9 collectively, that there would be a group of
10 wealthy individuals pooling their resources; and
11 the way that they're doing it under the law
12 currently is that they're forming a 527
13 organization in order to make these
14 electioneering communications, and the BCRA
15 requires them to file a report with this agency
16 disclosing every group that spent more than
17 \$10,000 and the identity of every individual
18 contributor over \$1,000.

19 Under the proposed rule, and even under
20 the restrained interpretation that's being
21 advocated by Mr. Simon, all of a sudden those
22 groups of individuals who clearly were contemplated

1 as being allowed to make electioneering
2 communications, would become political committees
3 and they could no longer give more than \$5,000 to
4 this 527 organization. That's simply is flatly
5 inconsistent with what Congress had in mind when it
6 passed BCRA.

7 MR. GOLD: There is a related dilemma
8 here. I was struck by Commissioner Thomas' comment
9 that the AFL-CIO, the Chamber, all that is off the
10 table, which I think comes as tremendous news and
11 not necessarily assuring news, because I really
12 don't know what that means.

13 COMMISSIONER THOMAS: That is only one
14 vote.

15 MR. GOLD: I don't know what table it's
16 off. I've got this on my table, which is the NPRM,
17 and we're deeply affected by this and by concepts
18 that permeate the statute, such as expenditure.
19 But here is a problem: Let's look at 527
20 organizations, and unfortunately--and this is
21 driven in part by the superficiality of the public
22 reporting on it. 527 organizations take many

1 forms. One of the forms they take is they
2 sponsored by organizations such as the AFL-CIO and
3 the Chamber and thousands of unions and 501[c][4]
4 groups, 501[c]5s, 501[c]6s, and why do they do
5 that? They do that because the tax code says that
6 in order to avoid tax on certain expenditures under
7 a very broad and sometimes unclear facts and
8 circumstances test, the only way you can do certain
9 kinds of spending that might influence elections is
10 to do it through a separate fund; otherwise, you're
11 going to be subject--you, tax exempt organization,
12 are going to be subject to a tax.

13 Any definition, any capturing by the
14 Commission, it seems to me, on 527 groups is going
15 to affect 527 groups sponsored by these
16 organizations. You know, there may be this claim,
17 don't worry about the 501[c]s, we can exempt them,
18 but what about the 527 accounts that they have to
19 set up for very practical purposes and the tax code
20 has encouraged them to set up for 30 years and that
21 Congress has subjected, fine, to disclosure over
22 the last three years? It gives organizations that

1 sponsor these funds, that maintain these accounts,
2 the following choices under this proposed rule:
3 First, either these funds themselves become
4 political committees, in which case they lose their
5 utility; they're all hard money PACs. Everything
6 that could be done through a 527 account now can
7 only be done as the Federal PAC with all the
8 restrictions. That's one unpalatable option.
9 Number two, the organizations themselves do it out
10 of their regular treasury without a separate fund
11 and they become political committees under some of
12 the formulations suggested in the NPRM, or they
13 just do it out of--they spend for these purposes
14 from their unsegregated general treasuries. They
15 don't satisfy some major purpose test, but they're
16 shocked with a tremendous tax.

17 Now, I submit that that is a course that
18 would be--that I don't think the Commission has the
19 authority to take, but certainly would be very
20 foolish to say. The idea that there is some neat
21 way, it seems to me, to separate out 501[c]
22 organizations from Section 527s, it's a false

1 concept.

2 CHAIRMAN SMITH: Commissioner Mason.

3 COMMISSIONER MASON: Thank you.

4 I suppose one of the reasons we're all
5 here is George Soros, and I wanted to ask about--I
6 think it was Mr. Baran who brought it up, but I
7 wanted to ask Mr. Simon, because I think it's more
8 a problem for his position. It's pretty clear that
9 George Soros can spend as much of his own money
10 as he wishes expressly advocating the election of
11 a candidate or promoting, supporting, attacking, or
12 the opposing the election or defeat of a candidate,
13 and his other friends as well can do that.

14 So why does the terrain all of a sudden
15 change when George Soros and two or three of his
16 billion buddies get together and do the same thing?

17 MR. SIMON: Well, I suppose the flip
18 answer to that is because the Supreme Court said 19
so. In other words, the Court in starting with
20 Buckley in a frame work it developed there and has
21 maintained every since has drawn a sharp
22 distinction between the permissible scope of

1 regulation and contributions from the regulation of
2 expenditures. When George Soros or any other
3 individual wants to go out and engage in direct
4 spending, that's an expenditure that in the Supreme
5 Court's view is entitled to a very heightened form
6 of First Amendment protection. When George Soros
7 or any other individual donates money to a group, a
8 political committee, that in the view of the
9 Supreme Court is indirect spending. It's speech by
10 proxy, and it's subject a much, much lesser
11 stringent form of First Amendment protection and
12 can be regulated.

13 Now, there's obviously a lot of
14 criticism about that distinction. You know, you
15 probably don't like part of it. I don't like part
16 of it, but, you know, for better or worse, that is
17 clearly the constitutional doctrine, and even
18 though you can come up with hypotheticals where the
19 doctrine seems not to make a lot of practical
20 sense, I think for better or worse, the Commission
21 is really obligated to live with those
22 distinctions.

1 I think on this point, something that's
2 interesting and is oft unnoticed is that in a
3 footnote in McConnell, the Court really addressed
4 this very question about whether it is permissible
5 to limit contributions to groups that make only
6 independent expenditures, and it's sort of
7 re-interpreting the Cal-Med decision, which also
8 addressed a version of this question. Let me just
9 read one sentence. The Court said:

10 "The \$5,000 limit on political
11 committees restricted not only the source and
12 amount of funds available to political committees
13 to make campaign contributions, but also the source
14 and amount of funds available to engage in express
15 advocacy and numerous other non-coordinated
16 expenditures."

17 The Court essentially has upheld that
18 contribution limit. So I think, you know, in your
19 hypothetical, as a practical matter it may not make
20 sense, but it really is, I think, the law.

21 COMMISSIONER MASON: I know other
22 panelist disagree, and I think I understand that.

1 So I'll leave that, but I did want to get
2 discussion.

3 The other question I have is related to
4 this discussion that Mr. Gold was just engaging in,
5 but it's really for all members of the panel, and
6 that is how we deal conceptually with the fact that
7 under tax law and, as I understand it, under
8 various constitutionally-based decisions, we're
9 going to have to continue to allow association
10 among political--FECA-registered political
11 committees and 501[c][4] organizations in some kind
12 of linkages and to a certain degree--I'm thinking,
13 for instance, of the Pierce Creek decision, which
14 was a D.C. Circuit decision. It was a church that
15 engaged in express advocacy, and the D.C. Circuit
16 said, yes, they violated their tax status, okay,
17 fine, they lose their tax status, but went on to
18 say that this reading or this limit was permissible
19 only because the [c][3] could have a [c][4], and a
20 [c][4] could have a PAC, and that if, in essence,
21 the church, members of the church, wanted to go out
22 and raise political funds subject to hard money

1 limits, they could do that.

2 And so my question is if we take the
3 fairly broad readings of encompassing political
4 activity, in other words, once you've tripped over
5 the major purpose test and everything you do,
6 express advocacy no longer relevant, and I
7 understand that conceptually, but then how do we
8 distinguish between what everybody would agree
9 would be legitimate [c][4] activity when the [c][4]
10 is linked to a PAC? Am I describing the problem in
11 a way that you can get your hands around? In other
12 words, that there are some things that a [c][4] can
13 do which would trigger political committee status,
14 and we would all--probably all of us agree on some
15 of those things, which, if done by a political
16 committee would constitute an expenditure. So how
17 do we solve the problem of when you've got a
18 political committee and [c][4] linked together;
19 which side of the ledger so those funds go on?

20 MR. SIMON: Well, I guess don't--I'm not
21 sure I see it as a problem. I think the entity can
22 decide which spending it wants to deduct through

1 its [c][4] arm and which spending it wants to
2 conduct through its PAC. A [c][4] can do promote,
3 support, attack ads so long as they're not
4 electioneering communications.

5 COMMISSIONER MASON: If I can interrupt
6 you, that's a useful answer. So doesn't that then
7 defeat the purpose of trying to capture this
8 promote, support, attack, oppose activity? In
9 other words, if you can have a 527 and a [c][4]
10 that are joined at the hip, and we're saying, well,
11 if the 527 promotes, supports, attacks, opposes,
12 that's an expenditure, but if the same group of
13 people with the same fund-raising base do it
14 through their [c][4] arm, it's not, what have we
15 accomplished?

16 MR. SIMON: Well, a couple of points.
17 First of all, there are, as Mr. Gold was pointing
18 out, differing tax implications for the group that
19 may affect its choice as to which arm it wants to
20 engage in the standing. There are tax law
21 restraints on how much electioneering a [c][4] can
22 do. It's limited to the extent that it can't

1 become a primary purpose. There are gift tax
2 implications where the money given to a 527 is not
3 subject to give tax.

4 COMMISSIONER MASON: Could you provide a
5 citation on that point?

6 MR. SIMON: I can in writing. I don't
7 have--

8 COMMISSIONER MASON: I would appreciate
9 that, because I have asked that question and I have
10 yet to be able to find an authoritative citation.
11 It's important it's being said in public. I want
12 to make the point that I have inquired and I don't
13 doubt your sincerity in making that statement, but
14 I don't want a misimpression on that point to be
15 spread.

16 MR. SIMON: I mean, I've seen a fairly
17 extensive written analysis to reach that
18 conclusion. I'd be happy to supplement written
19 comments with that.

20 COMMISSIONER MASON: I'd appreciate
21 that.

22 MR. SIMON: But, assuming it's right,

1 then money contributed to a 527 is not subject to a
2 gift tax. Money contributed to a [c][4] is.

3 But, you know, ultimately, I think the
4 answer to your question is, again, that's just the
5 way the law works. In other words, there are
6 differing forms of regulation that apply to
7 differing kinds of entities. The election laws are
8 going to apply to the spending of a political
9 committee. They're going to apply differently to
10 the spending of a [c][4]. Where you've got a
11 political committee and a [c][4] linked, it's going
12 to be up to the organization as to what kind of
13 spending it wants to direct through which of its
14 arm depending on those kind of intersection of the
15 application of the tax law and election law.

16 COMMISSIONER MASON: I have no more
17 questions.

18 CHAIRMAN SMITH: Thank you, Commission
19 Mason.

20 Commissioner McDonald.

21 COMMISSIONER McDONALD: Mr. Chairman,
22 thank you.

1 CHAIRMAN SMITH: I remind you of your
2 pledge to feed back some time.

3 COMMISSIONER McDONALD: I was hoping you
4 would forget, and I was hoping we would do this on
5 a per word basis. As slowly as I speak, I think I
6 should be allowed 20 minutes.

7 Larry, Jan, Don, and Mr. Kirk, thank you
8 for being here. Mr. Kirk, first of all, I
9 apologize because I don't think you get as much
10 time because we're used to kind of having these
11 exchanges with your other panelists up there.

12 Let me start, if I could, and just make
13 a very brief statement that I can kind of am
14 suffering from the same thing that Larry Gold
15 alluded to early on. We have been absolutely
16 inundated with comments. I'd like a lot more time
17 to reflect on what is before us, because I do think
18 it is of monumental consequence, and I just state
19 at the outset that I'm very uncomfortable not
20 having had more time to fashion this in a better
21 light than we are, and I appreciate what everybody
22 is trying to do under very tight guidelines.

1 Jan, if you don't mind, I'll start with
2 you. Like the Chairman, I'm kind of surprised the
3 RNC did not appear, but I'll go over to one of our
4 former employees who did submit a comment on behalf
5 of the RNC, and he refers to a court case on March
6 30th, I guess about two weeks ago, the United
7 States District Court of Columbia in the Triad
8 case, and let me just read what he says and see
9 what your thought on it is. He concludes by using
10 the Court comments accordingly:

11 "Because Triad and Triad, Inc.'s major
12 purpose was the nomination or election of specific
13 candidates in '96. Because Triad received
14 contributions aggregating more than a thousand
15 dollars, I find that Triad and Triad, Inc. operated
16 as a political committee in '96."

17 Obviously, he references us in a case
18 and indicates what has been indicated by some
19 that--I guess it would be Mr. Simon in particular
20 for your panel--that the law is the law and that
21 BCRA didn't change the law and the problem is we're
22 not enforcing it, and to prove his point, he cites

1 this court case two weeks ago. Would you want to
2 reflect on that a minute for us?

3 MR. BARAN: Well, I did read that
4 opinion, Commissioner McDonald. I also noted that
5 the defendant in that case was unable to afford
6 counsel, apparently, and represented herself, and
7 I'm sure she attempted to be, you know, a lawyer
8 without a law degree, but--

9 COMMISSIONER McDONALD: Easy now. I'm
10 sensitive about that.

11 MR. BARAN: And we all know how
12 effective they can be, Commissioner.

13 COMMISSIONER McDONALD: That's a pretty
14 good recovery.

15 MR. BARAN: But, for that reason I'm
16 little uncertain as what exactly all the arguments
17 were in the case. I did not have an opportunity to
18 review either the defendant's pleadings or the
19 Commission's pleadings for that. My reaction to
20 the opinion is that it seems to be somewhat
21 inconsistent with the decision in the GOPAC case,
22 which was another decision a few years in the same

1 court here in the District of Columbia which did a
2 similar analysis, but instead of focusing on money
3 coming into the organization, it was focusing on
4 what I think was the more appropriate analysis of
5 how was the money spent, and it may very well be
6 that the defendant in that case could still be
7 deemed a political committee under the GOPAC
8 analysis, but the fact that somebody contributed
9 the money to an organization does not in itself, in
10 my view, turn the organization into a committee.
11 It's more important to see what does this
12 organization do, does it make contributions to
13 candidates, does it expend money that would meet
14 the definition expenditure under the Act in
15 addition to the other criteria.

16 So I find that decision to be of limited
17 use in terms of answering the question that you're
18 confronting here in this rulemaking.

19 COMMISSIONER McDONALD: I appreciate
20 that. I thought it was of great interest because
21 it is fairly timely and it was submitted by the
22 RNC. Also, I appreciated your quick recovery about

1 us non-lawyers. I'm reminded of the old Johnson
2 story: My father would have appreciated it and
3 mother would have believed it. So I appreciate
4 that very much.

5 Let me go to Mr. Simon, if I could.
6 Don the quote that's been referred to before, but
7 it's a fairly important quote--there's actually
8 two in there. They're cited in Jan's testimony.
9 One, of course, was the Wellstone quote about what
10 they were able to achieve, and he indicated there
11 that felt like it didn't cover all the flaws of
12 campaign finance law, and more directly and right
13 on point, it appears to me, the Lieberman exchange.
14 Can you amplify on that?

15 Let me go back and be sure we're in
16 agreement on the Lieberman exchange. It says here:
17 "When the Bipartisan Campaign Reform Act and the
18 McCain-Feingold bill goes into effect, at least
19 some of the soft money donors will no longer be
20 able to give to political parties and will be
21 looking for other ways to influence our elections.
22 Donations to 527 groups will probably top many of

1 their list because they are the only tax-exempt
2 groups that can do this, as much election work as
3 they want without hurting their tax status."

4 MR. SIMON: You know, my
5 interpretation of that quote is that Senator
6 Lieberman was talking about the practical political
7 reality at the time he made that comment, which was
8 the Commission was taking the position that there
9 was an express advocacy limitation on turning 527
10 into political committees; therefore, the law as it
11 was being administered by the Commission was
12 allowing those 527 groups to take that kind of
13 money, which is, I think, what explains the quote
14 from the Campaign Legal Center brief that Mr. Gold
15 cited before.

16 What's changed is not--this, as I've
17 said, isn't a matter of BCRA. What has changed is
18 the Supreme Court's interpretation and construction
19 and restatement and clarification of the background
20 constitutional principles that apply to the FECA
21 and that I think mean, require, in this rulemaking
22 the Commission conformance administration of the

1 law to a correct understanding of the Constitution
2 as articulated by the Supreme Court, and if the
3 Commission does that, then it would change the
4 background reality that Senator Lieberman was
5 referring to.

6 COMMISSIONER McDONALD: Larry, if I
7 might ask you--thank you, Don.

8 Let me ask you: I'm trying to play the
9 devil's advocate with all of you because we have so
10 little time, and, quite frankly, we could and I'd
11 like to be able to spend hours, because I think
12 it's that important, and I think all of you have
13 done an excellent job. I do think Commissioner
14 Mason was right when he suggested that George Soros
15 seemed to get everyone's attention. I think that
16 would be--we'd be hard pressed not to acknowledge
17 that. Also, obviously I think what got everyone's
18 attention was the allocation formulas that we've
19 seen, and in the testimony that--I believe it was
20 Mr. Simon, but I may be incorrect about that, but
21 certainly some people have alluded to a 98-2
22 formula. Any comment that you'd want to make on

1 that?

2 MR. GOLD: You're referring to a client
3 of mine that I'm not representing here.

4 COMMISSIONER McDONALD: Yes.

5 MR. GOLD: So I'd actually prefer to
6 defer that to the lawyer who will be representing
7 that client.

8 COMMISSIONER McDONALD: How about a
9 generic question about it?

10 MR. GOLD: Sure. But generically, the
11 issue of allocation formulas, the predicate for
12 that is what the statute and the regulations
13 provide for now and what the regulated community
14 has been used to for many years. The current
15 allocation formulas, of course, were adopted by the
16 Commission 14 years ago, and the national party
17 committees and the independent organizations and
18 the like have all operated under those formula.
19 If they are to be changed, then the Commission
20 ought to engage in a deliberative process, full
21 engagement with those affected by it to discuss
22 that.

1 This isn't that process. This one of
2 many monumental proposals in an NPRM that, as I
3 said at the beginning, is being proposed in a--very
4 deep into an election year with a great clamor that
5 all these things have to be changed for waning
6 weeks or months of this election. Anything the
7 Commission might do on allocation formula ought to
8 be--it seems to me ought to be a separate
9 proceeding where people can focus on it properly,
10 and it certainly ought not go into effect
11 immediately when we have organizations that have
12 made plans and have legitimate expectations and
13 legitimate reliances on the law as the Commission
14 has annunciated it over many years. So that's my
15 general comment about allocation formula.

16 If I can draw back for a moment about,
17 you know, what is being suggested here across the
18 board, 501[c] organizations, 527 organizations,
19 they're all defined, and, in fact, Federal
20 political committees, are all defined under the law
21 in one way or another with the concept of a primary
22 purpose or a major purpose. They can all do things

1 almost without exception. They can all do things
2 that the others can do, but at some point, they
3 rest at a particular provision of the tax code or
4 under the Federal Election Campaign Act. That's
5 certainly true of the 501[c]5s who have to have the
6 major purpose as promoting the interests of those
7 who work, to promoting the interests of labor, and
8 yet the AFL-CIO or a union can engage in all sorts
9 of activities that a [c][3] can do and a [c][4] can
10 do and a 527 can do, Federal, non-Federal.

11 The tax code assigns particular
12 designations to groups according to what they
13 principally are involved in. What this proposal
14 would do is kinds of--would take a bar and sort of
15 strike through all of these organizations and
16 impose standards and definitions that would utterly
17 change the ability of all these organizations to
18 undertake these activities, federalize all of them,
19 make them all hard money operations, and really
20 fundamentally disrupt what they're doing. That is
21 not what the Federal Election Campaign Act was
22 designed to do. It is not designed, in effect, to

1 override the tax code and made all sorts of
2 organizations Federal political committees who have
3 to use hard money for ways that they never
4 conceived.

5 When Congress did that, they've done it
6 in a limited specific way. They did it with
7 express advocacy, in the definition of expenditure,
8 and did it with much strum and drum with
9 electioneering communications last year, and that's
10 all that's happened. If there are further changes
11 to be made in this area, again, that is for
12 Congress to do. The allocation formula may be
13 something that Congress really ought to take a look
14 at, but if the Commission is going to do it, and
15 the Commission certainly has exercised discretion
16 in this area, it really has to do it in a
17 deliberate way with notice and with care.

18 COMMISSIONER McDONALD: Mr. Chairman, thank
19 you. I know my time is up. I hope you will call
20 on Mr. Kirk, because I wanted to give him some
21 time.

22 CHAIRMAN SMITH: I was going to do that,

1 because I had a question. Mr. Simon and I could go
2 at it all day, but he's got two other cosigners to
3 his testimony. So I'm going to probably save my
4 questions for them and see if they do as good a jog
5 as I know you would do.

6 I did want to get Mr. Kirk involved.
7 One thing you said, a couple quotes, Mr. Kirk, in
8 your opening comments that struck me, and I would
9 just like you to elaborate on it. You used a
10 couple times the phrase that you thought these
11 rules had the potential to have a chilling affect
12 on your organization's activities. I wonder if you
13 would elaborate on that.

14 MR. KIRK: Sure. In answering that, let
15 me just piggyback on what Mr. Gold said in response
16 to Commissioner McDonald. I guess the major point
17 that we are trying to make today is not to--as
18 important as it is, is to understand the
19 intricacies of the Federal election laws, etc., and
20 I'm an attorney. I'm not a Federal election law
21 attorney. So I understand how important it is to
22 understand statutory construction, etc., but I'm

1 trying to bring the view, the practical view, on
2 the ground of what this implies.

3 Maybe the way I can explain to you, let
4 me give you two activities that our group engaged
5 in last year that we want to engage in this year
6 that we think would be adversely impacted on this
7 and have a chilling affect on our ability to get
8 the resources to carry them out. For the last
9 three years or so, in the first week of June in
10 Charleston, South Carolina, we hold a major public
11 policy forum. It's usually around some issue that
12 is deemed to be an important issue of over the
13 course of the existence of the organization, and we
14 had one on trade, how does the African American
15 community--public policies is related to trade.
16 We've had it on health care. We've had it at
17 historically black colleges and universities.

18 This year, it's supposed to go on small
19 business and how can the development of small
20 business help to create wealth in the African
21 American community. Now, on the panels there,
22 we're going to have members of Congress there.

1 We're going to have private sector citizens there.
2 If the past is any measure of the future, we'll
3 have been identified, self-identified, as
4 Democrats, self-identified as Republicans. We'll
5 have Republican office holders, Democratic office
6 holders, Federal elected officials, State elected
7 officials, all talking about this.

8 Inevitably, they're going to talk about
9 what is the Congress doing, what legislation is
10 pending, all of the things that somehow within the
11 broad definition, the broad sweep of,
12 quote-unquote, influencing an election or
13 influencing the outcome of a particular candidate's
14 candidacy. Inevitably, those things are going to
15 be discussed.

16 Our concern is is it, in fact, Congress'
17 intent for that kind of activity engaged in by a
18 group like us to somehow now be treated as the
19 activities of a political committee. Now, a second
20 one, which may get closer to what some people might
21 be more concerned about: Last year, for the first
22 year, we held what we called a boot camp. It's

1 really a public policy and a campaign school, very
2 similar to what I believe it done at American
3 University, what's done at other universities
4 around the country. We decided to do it with a
5 historically black college or university, Morgan
6 State University.

7 With the agreement of their board of
8 trustees, the endorsement of their president, the
9 active participation of their faculty, we put
10 together this school. We invited about 50 kids
11 from various walks of life. It didn't matter to us
12 how they self-identified. They went through this
13 school. With the advice of counsel, we looked at
14 the curricula. We made sure it was nonpartisan.
15 We looked at the presentations and what not, not
16 trying to censor what the faculty was going to do,
17 but we looked at the presentations and so forth,
18 all the writings, to make sure it was nonpartisan.
19 It talked about the nuts and bolts of campaigns,
20 the nuts and bolts of polling, the nuts and bolts
21 of doing focus groups, all of those kinds of things
22 and then did some role playing and actually had--it

1 was a week long, and they actually lived on campus
2 for the week, and they actually at the end
3 developed into groups and had to deal with a real
4 live campaign situation.

5 Again, we are concerned that somehow the
6 activities like that could now be viewed as the
7 activities of a political committee. That's the
8 practical side of all of this that we're talking
9 about today. Now, how does it get to the chilling
10 affect? It gets to the chilling affect because I
11 personally as an attorney and on the board have
12 had to get counsel to write the opinion to a
13 corporate donor to say that if you give money to
14 support this public policy session that we're
15 having in Charleston, South Carolina, you are not
16 going to be deemed as making a political
17 contribution, and having to go through all of the
18 standards that now exist--that now exist--under the
19 FEC rules and regulations.

20 If you adopt anything similar to what
21 I've seen in this proposed emporium, I think we're
22 going to have an inordinately hard time getting

1 those folks to take that hurdle and to say, okay, I
2 understand, I accept, because the risk of not
3 getting it right, to them, might mean to them,
4 Look, I just don't want to do this. Now, also,
5 when we're a [c][4], a [c][4] contribution is not
6 treated like a [c][3]. It is not a charitable
7 contribution. So they're not necessarily getting a
8 charitable contribution deduction for giving to us.
9 They have to--we have to make the case as to why
10 this is good public policy, good for the,
11 quote-unquote, social welfare, and why you should
12 do it.

13 Now, the donors, whether they're
14 corporate donors, they may have all kinds of
15 motivations, but that's not our--we make that case.
16 We show them what we're doing. That's kind of what
17 I mean by that.

18 CHAIRMAN SMITH: It sounds as though
19 while express advocacy may have been, in the words
20 of the Court, serve no meaningful function for the
21 listener, it might for the potential donor or for
22 the potential speaker. Giving them a clear bright

1 line, there might be potential reasons why Congress
2 would want to leave that in tact.

3 MR. KIRK: Exactly.

4 CHAIRMAN SMITH: Let me ask a couple of
5 questions, because I want to make sure--since I
6 have Mr. Gold and Mr. Baran here, you can answer.
7 I just want to be sure. To me, this is the crux of
8 your testimony, and I want to make sure I've got
9 it. Congress was well aware, as Mr. Simon
10 suggested, that issue advocacy was being limited or
11 was only being limited to issue ads if they
12 included express advocacy. They were well aware
13 that you could do issue ads that ran right up to
14 express advocacy without regulation. Is that
15 correct?

16 MR. BARAN: Yes.

17 MR. GOLD: Yes.

18 CHAIRMAN SMITH: And Congress is well
19 aware of that?

20 MR. BARAN: Yes.

21 CHAIRMAN SMITH: And they acted on that
22 in BCRA, did they not, by passing electioneering

1 communication?

2 MR. BARAN: That is correct.

3 MR. GOLD: They did.

4 CHAIRMAN SMITH: Now, Congress was well
5 aware, also, of the definition that was being used
6 for some time regarding political committees, that
7 they had engaged in express advocacy. Would you
8 think of that as correct based on the Congress
9 record?

10 MR. GOLD: Plainly so.

11 CHAIRMAN SMITH: But they did not act to
12 change the definition of political committee?

13 MR. GOLD: No.

14 CHAIRMAN SMITH: Okay. That's what I
15 understood to be the key element and I think it's
16 important.

17 Just real quick, I want to say on the
18 Triad case, I'm not sure how much import it has.
19 As I read the Triad opinion, it's kind of vague.
20 It appears, in my recollection of the case, of
21 course, that the defendant, who Mr. Baran notes was
22 pro se, conceded that she had made expenditures or

1 contribution and was basing her defense entirely on
2 the major purpose, that she was a for-profit
3 business, which the Court dismissed, I think,
4 without a great deal of difficulty.

5 I would ask one quick question. I'm
6 trying to be short so we can get back on schedule.
7 I'll ask you, Mr. Simon, one quick question here.
8 Mr. Baran has said that if you ban 527s, a group
9 like his, the Chamber is so big, they're going to
10 be able to do just tons of stuff anyway through a
11 501[c][4], and I can imagine other 501[c]4s we've
12 seen in the past, perhaps the Christian Coalition
13 and some others, that operate that way. I just
14 want to ask you--I understand the constitutional
15 argument. I just want to ask you a question.

16 Does pushing this activity, then, to
17 501[c]s with few disclosure requirements make for a
18 more coherent or sensible system in your view?

19 MR. SIMON: Well, let me--I guess let me
20 answer it this way: First of all, let me correct
21 some locution of yours. We're not banning the
22 527s. We would just have a rule that 527 status

1 under the tax code is a determinative proxy for the
2 major purpose test under FECA.

3 But this is a question that the Vice
4 Chairman has made before about, well, if you turn
5 the 527s into political committees, the activity
6 will just go into [c]4s. I guess here is the way I
7 look at that: It's true that 527 activity is
8 disclosed and [c][4] activity is not disclosed,
9 but, to me, the 527, which should be political
10 committees because they meet the statutory and
11 constitution test and which, therefore, should be
12 restricted in the receipt and spending of corporate
13 and union funds and should be limited to the
14 contributions that they can accept from
15 individuals, to allow that illegality to continue
16 in the name of disclosure is a poor justification.

17 CHAIRMAN SMITH: That's not my question.
18 The question is basically are we going to have a
19 more sensible and coherent system by having the
20 money go into 501[c]; is there going to be any less
21 appearance of corruption when 501[c]s are spending
22 \$20 million, just what's your judgment?

1 MR. SIMON: I think it's a more coherent
2 legal regime.

3 CHAIRMAN SMITH: Okay.

4 MR. SIMON: If there's a problem--let me
5 just finish. If there is a problem with the
6 activity of 501[c]s, then Congress can, pursuant to
7 the constitutional guidelines that would be
8 applicable, can decide whether additional steps
9 should be taken.

10 CHAIRMAN SMITH: Okay. Thank you. I'm
11 going to keep myself tight to the lights and turn
12 things over to our general counsel, Mr. Norton, and
13 also briefly give the gavel to the Vice Chair.

14 Thank you.

15 COMMISSIONER NORTON: Thank you, Mr.
16 Chairman, and thank you all for coming today.

17 Mr. Simon, I guess I'd like to start
18 with you. You said in your opening remarks that
19 one of the two key problems the Commission needs to
20 address is that there are organization out there
21 spending millions of dollars to influence Federal
22 elections, and as I see it, the legal question

1 before the Commission is whether that as a matter
2 of law, among those millions of dollars, we can
3 find a thousand dollars that satisfies the
4 definition of expenditure, which is the test in the
5 statute. You've said, I think in response to
6 questions from Commissioner Toner, that the
7 Commission could comfortably use to promote,
8 support, attack, oppose standard with respect to
9 527s, which is a category that includes political
10 party committees, but it's a whole lot broader than
11 that.

12 My question is really an effort to
13 unpack the legal argument. I mean, the Supreme
14 Court in McConnell was only addressing the
15 application of that standard to political party
16 committees, and in relatively terse description, it
17 upheld that standard and it said we think that the
18 test is not vague, particularly here since actions
19 taken by political parties are presumed in
20 connection with election campaigns. So I guess my
21 question is, is your legal argument that all 527s
22 stand precisely in the same shoes as party

1 committees and, therefore, that standard that the
2 Supreme Court said is constitutionally sufficient
3 can be applied with equal force to all 527s.

4 MR. SIMON: Right. The answer is yes
5 for the reasons I described before, which is that
6 the Court in Buckley drew this line between major
7 purpose entities and non-major purpose entities,
8 and for the major purpose entities, the statutory
9 standard for an expenditure is money spent for the
10 purpose of influencing an election, and I think
11 there's no question that 527s are on the major
12 purpose side of that line, while the 501[c]s and
13 other entities are on the other side.

14 MR. NORTON: Let me just follow up with
15 you quickly. I am inclined to agree that there is
16 not much light shed by BCRA itself on the inquiry
17 before the Commission today, but in BCRA, Congress
18 did use the standard that you're urging the
19 Commission to use with respect to 527s, that is the
20 promote, support, attack, or oppose standard to
21 establish when party committees are acting in
22 connection with an election, but it applied a

1 different test to all other persons in defining
2 electioneering communications and even in crafting
3 a backup definition which would have sprung into
4 effect had the first definition been struck down.
5 Congress decided that the promote-support standard
6 itself wasn't enough, that it not only had to
7 be--that the communication not only had to promote,
8 support, attack, or oppose, but that it also would
9 have to be suggestive of no plausible meaning other
10 that an exhortation vote for or against a
11 clearly-identified candidate of a political party.
12 Is there anything we can draw from that language,
13 and does the fact that Congress considered that to
14 be something more than promote-support to be
15 minimally sufficient to pass constitutional muster;
16 does that establish a floor for us in defining an
17 expenditure?

18 MR. SIMON: Here's the way I look at
19 that question. I don't view what I would be
20 advocating as a matter of statutory construction to
21 be a kind of direct statutory application of the
22 promote-support standard to major purpose entities

1 like Section 527 groups. As I've said many times,
2 I think the standard that applies to them is for
3 the purpose of influencing. Now, the Commission
4 has the discretion and in the past has exercised
5 the discretion to come up with sort or proxies or
6 ways to describe that statutory standard.

7 For many years, starting in 1984, it
8 used an electioneering message test. That was
9 nowhere found in the statute, but that was a test
10 developed by the Commission as a proxy, as a way of
11 applying the statutory standard of for purpose of
12 influencing. I think you could go back to that
13 test, to the electioneering message test, or you
14 could by reference, by analogy to the statutory
15 standard apply a promote-support test; but in
16 either event, what you're doing is applying the
17 statutory for the purpose of influencing test to the
18 spending by a major purpose entity.

19 MR. NORTON: I'd ask Mr. Gold or Mr.
20 Baran if they wanted to respond to that.

21 MR. GOLD: Yeah. The notion that--you
22 know, I think what you've raised is very useful,

1 the fact that already in the statute in the backup
2 definition that's not in effect, Congress had a
3 very limiting definition of what could be
4 regulated, but promote, support, attack, oppose,
5 that formulation is in the provision of
6 electioneering communications that did survive as a
7 limitation on the exceptions that this Commission
8 can by regulation promulgate.

9 Now, why is that? It's that the
10 Congress, you know, very carefully and to a limited
11 extent defined the degree to which it was going to
12 regulate, and, therefore, the Commission could
13 regulate speech by independent organizations,
14 wholly no authority whatsoever to expand that term
15 which you correctly applies to state and local
16 party committees and applies to groups across the
17 board. With respect to the constitutional
18 limitation that Mr. Simon described, the fact is
19 that the Mr. McConnell has is very clear--I have
20 the slip opinion, page 97. It may be that there is
21 no constitutional line anymore for express advocacy
22 under certain circumstances, and how far that goes,

1 we'll only know if Congress or a state legislature
2 goes further with the electioneering cases and it's
3 tested. But McConnell certainly confirmed
4 explicitly that it's a matter of statutory
5 construction, this statute. Express advocacy is
6 the definition of what is an expenditure when comes
7 to speech. It may not be constitutionally
8 required, but they confirmed the statutory
9 construction in Buckley, MCFL, and Austin.

10 MR. NORTON: Mr. Baran, did you want to
11 add anything to that?

12 MR. BARAN: No. I just agree that the
13 McConnell simply settles some constitutional issues
14 as to what Congress could legislate. The question
15 in this rulemaking is did Congress legislate
16 anything that approximates these proposal rules.

17 MR. NORTON: I'd like to follow up with
18 you, Mr. Baran and Mr. Gold. You said repeatedly
19 that Congress actually understood these issues and
20 chose not to address the issues the Commission is
21 attempting address in BCRA. Of course, this major
22 purpose test has been around since 1976, and

1 certainly for as long as I've been here and for
2 many years before, members of the Commission and
3 members of the regulated community were saying
4 things like Commissioner Elliott and Aikens
5 said more that eight years ago in their
6 statement of reasons in Christian Coalition,
7 which is absent regulation, issue-oriented
groups like the
8 Christian Coalition--which I believe is a
9 [c][4]--are not on sufficient notice of the
10 Commission's interpretation of the major purpose
11 test and cannot identify with ascertainable
12 certainty the standard which we expect such groups
13 to conform.

14 I understand the objections to the
15 timing and the pace of the rulemaking, but I'm less
16 sure I understand the argument as to why Congress's
17 decision not to address political committee status
18 in BCRA forecloses the Commission from attempting
19 through regulation to interpret the major purpose
20 test and the FECA regulations defining political
21 committee.

22 MR. BARAN: Well, I think the argument

1 is that Congress not only didn't help you in
2 further defining political committee, but it
3 clearly said certain things about certain concepts
4 that you're raising in this rulemaking which flatly
5 contradict the approach that you propose to take
6 here. Promote, support, attack, or oppose is a
7 concept that Congress very carefully considered in
8 extremely limited context, and they applied it only
9 to state and local party committees, did not change
10 the definition of expenditure to include that
11 concept. In fact, the effect of changing the
12 definition of expenditure to include this notion of
13 spending money to promote, support, attack, or
14 oppose would change the scope of the prohibition on
15 corporation and unions, and when Congress wanted to
16 change the scope on prohibitions of corporations
17 and unions, it did so very consciously, very
18 narrowly, and it added that term "electioneering
19 communication", which also, they decided, was not
20 going to be part of the definition of expenditure.

21 So part of the problem here, I think, is
22 not that, you know, you may have some allowance to

1 try and come up with a clear, unvague standard to
2 define major purpose and political committee. The
3 problem is that the standards you're proposing in
4 this rulemaking are inconsistent with the Act.
5 That's not the way that the Congress wanted you to
6 proceed, and it's too bad that they didn't help
7 you in other ways, but maybe that's the reason for
8 the Commission to write the Congress and say do
9 something here; we've had two rulemakings on this
10 and we can't come up with a solution, so change
11 the law and maybe you could change the law by
12 changing the definition of expenditure or change
13 the law by changing the definition of political
14 committee, but we can't change law; we're an
15 agency; you're Congress.

16 MR. NORTON: I don't have any additional
17 questions, and I see my time is about up, but, Mr.
18 Gold.

19 MR. GOLD: By the same token, something
20 that hasn't come up this morning I'm sure will in
21 later panels, part of this proposed rulemaking, as
22 far as redefining what is an expenditure and

1 therefore defining the conduct that a, quote,
2 political committee would engage in is, quote,
3 Federal election activity, another statutory
4 concept that under the statute applies only to
5 party committees and yet deals with voter
6 registration, voter identification,
7 get-out-the-vote messages, party promotion
8 messages, a whole range of voter mobilization
9 activity, that is vital to our civic society,
10 partisan, nonpartisan. It's all captured by that
11 concept, and the proposal is somehow this is going
12 to define what a political committee is, what an
13 expenditure is, and any organization that engages
14 in so much as \$1,000 of that activity, which during
15 a Federal election year is going to be--either have
16 to pay for that with hard money or will have to
17 reconstitute as a political committee.

18 That is the thrust of alternative 2[a].
19 That is what Mr. Simon and his colleagues are
20 advocating, and that is plainly neither what
21 Congress dictated, nor good public policy.

22 CHAIRMAN SMITH: Mr. Pehrkon.

1 MR. PEHRKON: Thank you, Mr. Chairman.

2 Mr. Gold, Mr. Baran, Mr. Simon, Mr.

3 Kirk, welcome to the Commission. I'm going to have

4 a little different tack than some of the other

5 questions that have come today. So they're going

6 to be more practical in a sense, but I'm really

7 trying to get a handle on how many people you

8 anticipate would actually be affected by this. I

9 know Mr. Gold's testimony had some estimates in

10 there. He gave numbers such as hundreds of

11 thousands. Mr. Baran, I'd like yours. Many, I

12 think was the term you used. But what I'm really

13 looking for, particularly from Mr. Gold, is could

14 you go through and describe to us how you arrived

15 at that hundreds of thousands and talk about that a

16 little bit?

17 MR. GOLD: Sure. If you're re-defining

18 activities that organizations engage in and

19 re-defining it to become Federal political activity

20 regulated by this statute and only payable through

21 hard money or a separate segregated fund, then you

22 are potentially applying this standard 30,000 labor

1 organizations, 138,000 501[c][4]s, 900,000
2 501[c][3]s, and registered to day with the Internal
3 Revenue Service, 30,000 Section 527 organizations
4 that are not also political committees under the
5 Federal Election Campaign Act.

6 I'm not saying all of them would be
7 affected by this, but I think it's fair to say,
8 given the scope of what's being suggested, that
9 hundreds of thousands of them could be; and
10 certainly picking up from the question of chilling
11 affect, we've already--I can tell you as a
12 practitioner who spends all his time representing
13 organizations and individuals under this statute,
14 that BCRA itself has had a tremendous chilling
15 affect on organizations and individuals. Some of
16 it will play out over time because it's new, but
17 the standards there about what is regulated and
18 what isn't, the dense regulations that the
19 Commission has promulgated, very difficult for
20 lawyers to engage in, almost impossible for lay
21 people to engage in, and you come up with new rules
22 that redefine voter mobilization activity and sort

1 of opinionated messages about people who hold
2 Federal office and recharacterize that as regulable
3 activity, I'm not sure what distinctions you can
4 build in there, but it's going to have a tremendous
5 chilling affect on these organizations and on the
6 donors, as Mr. Kirk said, individual donors as well
7 as wealth donors.

8 MR. PEHRKON: Mr. Baran, would you like
9 to add anything to that?

10 MR. BARAN: I have not checked the IRS
11 for the number of trade associations that are
12 registered there, but it surely will be several
13 thousands of trade association who would be
14 affected by this rule.

15 MR. PEHRKON: Mr. Simon.

16 MR. SIMON: Well, I just want to say
17 that I think for precisely the reasons that are
18 being cite--I mean, I started out in my opening
19 statement saying the NPRM was improvidently
20 overbroad, and I think this is why the Commission
21 should not be in the business of trying to convert
22 all unions, all trade associations, all

1 corporations, all 501[c] nonprofit groups into
2 political committees, nor should it be in the
3 business of applying a promote, support, attack, or
4 oppose test to their political spending. What I've
5 been talking about is a much more limited approach,
6 which I think is much more targeted to the actual
7 problems that the Commission faces, which is how to
8 deal with the activities of 527 groups engaged in
9 spending that affects Federal election and how to
10 improve its obviously flawed regulation governing
11 allocation for political committees.

12 Those are the two problems that the
13 Commission should be addressing in this rulemaking.
14 These other proposals really are too overbroad
15 because they do involve the number of organizations
16 that are being discussed.

17 MR. PEHRKON: Do you see any difference
18 between a 527 organization reporting to the IRS and
19 reporting to the FEC as far as what is being
20 reported and the frequency of reports?

21 MR. SIMON: I think there are, as best I
22 can tell, some technical differences. I believe

1 the reporting threshold for expenditures under the
2 FECA is \$200 and the reporting threshold under the
3 527 law is \$500. I believe there is some
4 additional detail required under FECA for transfers
5 and certain other kinds of receipts, but I think
6 the differences are pretty minor by margin.

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

8 CHAIRMAN SMITH: Thank you, Mr. Pehrkon.

9 Well, we are behind schedule, but we're
10 alive. I'm going to ask us to hold this break to
11 ten minutes rather than the fifteen scheduled, to
12 11:45, ten minutes from now, actually. As soon as
13 ten minutes, and four Commissioners are in the
14 room, I'm going to gavel us in. So don't be late
15 unless you take two of your fellow Commissioners
16 with you. [Recess.]

17 CHAIRMAN SMITH: I'm going to gavel back
18 into session the public hearing on Political
19 Committee Status. The break was about 15 minutes,
20 as originally scheduled. I was going to chop it
21 too. It's not too bad. We'll cut into our lunch a
22 little bit, but hopefully we can keep this panel on

1 in its entirety.

2 II. PANEL II

3 CHAIRMAN SMITH: I'd like the panelist to
4 come on up for our second panel, another very
5 distinguished panel. We'll have Nan Aron,
6 President of the Alliance for Justice; Richard
7 Clair, Corporate Counsel for the National Right to
8 Work Committee; Craig Holman, Legislative Counsel
9 for Public Citizen. Is Ms. Aron here?

10 Okay. And we had--I don't know if you
11 three were before, but there is a light system.
12 The flashing green will mean you've got a minute.
13 The yellow will mean you've got 30 seconds, and we
14 are asking the opening comments to be held to just
15 three minutes, which is very short. It gives us a
16 bit more time for questioning and a chance,
17 perhaps, to expound some on that time. So we'll
18 try to keep it very short.

19 With that, I think we're prepared to go,
20 and, Ms. Aron, I'm going to call on you first
21 because we'll go alphabetically.

22 MS. ARON: Thank you. I'm pleased to be

1 here. Thank you very much.

2 My name is Nan Aron, and I'm president
3 of the Alliance for Justice, a national association
4 of over 65 member organizations representing
5 environmental, civil rights, mental health,
6 women's, children's and consumer advocacy
7 organizations. The Alliance for Justice collates
8 the Coalition to Protect Nonprofit Advocacy, a
9 coalition formed by 501[c]s and 527 organizations,
10 representing every state in the country, large and
11 small nonprofits, public and private foundations,
12 and countless issues, areas from both the left and
13 the right. More than 672 of these organizations
14 joined us in our comments filed with the Commission
15 last week opposing this rulemaking. On behalf of
16 the Coalition and the Alliance for Justice members,
17 I strongly reaffirm the opposition and ask that the
18 Commission vote against adopting these rules.

19 Today, I will focus on the real world
20 implications this rulemaking will have on nonprofit
21 advocacy. In needlessly attempting to regulate a
22 handful of groups, this rule cuts a swath across

1 the entire nonprofit community. Nonprofits often
2 speak for those who cannot, the underrepresented
3 and neediest in our society. During an election
4 year, a time in which artful politicians react more
5 to polls than policy, the voices of nonprofits fill
6 the void on many critical issues. These new
7 rules issued now will silence these voices.

8 By classifying nonprofits as political
9 committees, these rules impose a de facto gag that
10 will impoverish a debate on public policy, diminish
11 civic engagement, and force many nonprofits to
12 choose between the lesser of two evils:
13 ceasing their normal operations or facing
14 restrictions on the fund-raiding. These rules
15 are flawed on a number of grounds. In
16 addition to our staunch position that there is
17 no need or authority to impose these new
18 rules, they lack clarity.

19 The rulemaking fails to define exactly
20 what promote, support, oppose, or attack means.
21 Would placing an ad in the newspaper criticizing
22 Representative Don Young from Alaska for adding
23 over a billion dollars to the transportation bill

1 be seen as opposing his candidacy? This leads
2 nonprofits to a conundrum. How can any nonprofit
3 know whether its activity meets this standard if
4 the rulemaking fails to define it?

5 The proposed rules will also reclassify
6 nonprofits as political committees if they engage
7 in nonpartisan voter registration or
8 get-out-the-vote activity. The Commission's own
9 web site posts our countries appalling national
10 voter registration and turn-out statistics.
11 Without the involvement of nonprofits, these
12 disheartening numbers will drop even further. The
13 Civil Rights movement was only possible in this
14 country because of the wonderful work of
15 foundations and nonprofits coming together.

16 I haven't talk even talked about the
17 most draconian of these proposals, and that is the
18 look back rule. This could jeopardize the survival
19 of a vast number of nonprofits who would be forced
20 to pay off an unknown debt with small individual
21 contributions for activities from four years ago
22 that are now subject to these new rules. Political

1 committee status would harm the financial
2 livelihood of nonprofits who often rely on
3 foundation grants and large individual
4 contributions, which are prohibited fund-raising
5 sources for political committees. Although the FEC
6 has certified that the proposed rules would, quote,
7 not have a significant economic impact on a
8 substantial number of small entities, closed quote,
9 it is impossible to imagine that their financial
10 livelihood will not be impaired.

11 Finally, I would like to turn to the
12 timing of this rulemaking. The rules governing
13 election year advocacy should be in place prior to
14 the election year and not change in the heat of an
15 election season. I whole heartedly agree with
16 Commissioner Weintraub's statement that any
17 rulemaking should be made thoughtfully after
18 thorough consideration of the issues and with due
19 notice to the regulated community. We should not
20 silence the noisy, contentious, and necessary
21 debate that makes up the public discourse. Our
22 democracy works best when Americans participate at

1 every level of government, when they are confident
2 that their voices will be heard despite their
3 differences.

4 To quote from Frederick Douglas, "those
5 who profess to favor freedom and yet depreciate
6 agitation are those who want rain without the
7 thunder and lightening."

8 Thank you very much.

9 CHAIRMAN SMITH: Thank you, Ms. Aron.

10 Mr. Clair.

11 MR. CLAIR: Good morning Chairman Smith
12 and Members of Commission. The National Right to
13 Work Committee appreciates this opportunity to
14 speak before you, and we will speak primarily as a
15 501[c][4] organization. And I will say that I do
16 have written copies of my comments. I'm going to
17 abbreviate them. I would like to introduce the
18 entire set, if I may, for the record.

19 CHAIRMAN SMITH: Yes, without objection.

20 MR. CLAIR: Section 501[c][4]
21 organizations, like the Committee epitomize citizen
22 involvement in the marketplace of ideas, the

1 quintessential exercise of First Amendment rights
2 to speak and associate to the promotion of causes
3 and to petition the government for redress of
4 grievances. As educational lobbying organizations,
5 they are consistently speaking to and hearing from
6 the public on their issues, and, yes, the public
7 even includes candidates.

8 Among other things, the Commission is
9 contemplating whether to use Federal election
10 activity and electioneering communications as part
11 of the test for determining whether an organization
12 becomes a political committee. We submit the
13 Commission should not do so, because these types of
14 activities are not prohibited to incorporated
15 501[c][4] organizations. There is absolutely no
16 prohibition on the expenditure of corporate
17 treasury funds for Federal election activity, and
18 incorporated [c]4s are permitted to establish and
19 raise funds for separate accounts to be used for
20 non-targeted electioneering communications.

21 The only consequence of establishing
22 such funds as far as the Commission is concerned is

1 that the [c][4] would have to file reports if it
2 spends more than \$10,000 in a calendar year for the
3 direct cost of producing and airing the
4 communications. Those separate funds are not under
5 the statute, being political committees, are not
6 required to register as political committees and
7 are not required to file periodic reports to the
8 Commission. In addition--

9 CHAIRMAN SMITH: Mr. Clair, if I may,
10 there's a request that you try to speak a bit more
11 into the microphone.

12 MR. CLAIR: Nothing in this subparagraph
13 allowing these types of funds is to be construed as
14 a prohibition on the use of funds in the segregated
15 account for any purpose other than electioneering
16 communications. The statute specifically provides
17 that any remaining funds may be used for the
18 [c][4]'s regular corporate expenditures and
19 activities.

20 These separate funds for electioneering
21 communications are not little to the amount they
22 can receive from any one individual. The only

1 obligations is a reporting obligation. I could go
2 on there, but let me get to my next point, and that
3 is 501[c][4] organizations is a large group of
4 organizations characterized under the Internal
5 Revenue Code by IRS as social welfare. IRS judges
6 them on a primary purpose test, that is where they
7 spend the majority of their activities. To us,
8 that means more than 50 percent of their resources
9 or activities. I submit that the Commission should
10 follow the same approach, and if there are
11 cross-over activities, we can deal with that in
12 other ways, creation of a Federal PAC, which we
13 have, by the way, or other mechanism. The
14 mechanisms are there, but let's not go overboard in
15 the regulatory projects.

16 CHAIRMAN SMITH: Thank you, Mr. Clair.

17 Mr. Holman.

18 MR. HOLMAN: Good morning, Mr. Chair,
19 Members of the Commission. Thanks for letting me
20 address you.

21 I represent Public Citizen. We're
22 mostly a 501[c][4] nonprofit group that spends a

1 great deal of its promoting or attacking, mostly
2 attacking, candidates and office holders. So we
3 tend to be very protective of the right of 501[c]
4 nonprofits in order to conduct legitimate advocacy
5 work; however, when we're talking about the
6 regulation or the proposed regulation that's before
7 us, the focus--and we should always keep in mind
8 the focus--is on Section 527 groups, and they are
9 quite a different animal from the 501[c] nonprofit
10 community.

11 The original campaign finance law, FECA,
12 endorsed the regulation of any activity that
13 affects Federal elections, and that was narrowed
14 down, as we all recognized, by the Buckley court to
15 be limited, one part, to a magic words express
16 advocacy test, and the second part to groups,
17 entities that have as their major purpose
18 electioneering for or against Federal candidates.
19 That opened up a massive loophole in the tax code
20 known as Section 527s.

21 When the Section 527 part of the tax
22 code was first drafted by Congress, Congress never

1 imagined that it would be used as a means to evade
2 Federal election campaign law, and it wasn't really
3 until about the mid-1990s when the Sierra Club, I
4 believe was the first with Karl Pope setting up a
5 Section 527 as a means to conduct electioneering
6 without having to disclose contributors or
7 expenditures, and it flourished thereafter. The
8 Section 527 was popularly known and accurately
9 known as stealth PACs, because it was a means of
10 evading the campaign finance law.

11 What has happened with the McConnell
12 decision, and not with BCRA, but with the McConnell
13 decision, is that it returns Federal campaign
14 finance law, the meaning of who applies to, back to
15 the original purposes of FECA, and that is the
16 activity that affects Federal elections applied to
17 groups that have as their major purpose
18 electioneering for or against candidates. What
19 BCRA added was a second concept of electioneering
20 activity, and that applies to other entities,
21 501[c] nonprofits in particular, that use activity
22 in a very narrow, narrow scope, and that is

1 electioneering communications or express advocacy.

2 So we have a bifurcated system of
3 regulation as to who the Federal Election Campaign
4 Act applies to, and that is what the Public Citizen
5 is asking the FEC to recognize, recognize there is
6 this bifurcated system and develop two different
7 definitions of expenditure activity that would be
8 subject to FECA regulations. One would be the
9 broader definition that the original FECA intended.
10 I would call it political expenditures, and that
11 would apply just to entities that had as their
12 major purpose electioneering for or against
13 candidates, and the second would be a very narrow
14 definition of electioneering expenditure that would
15 be the magic words standard and electioneering
16 communications applying to entities that do not
17 have as their major purpose electioneering.

18 That is what Federal election campaign
19 law would seem to call for and certainly would be
20 consistent with the McConnell decision.

21 CHAIRMAN SMITH: Thank you, Mr. Holman.

22 Commissioner Toner.

1 COMMISSIONER TONER: Thank you, Mr.
2 Chairman.

3 Mr. Holman, following up on your
4 thoughts, is it your view that 527 organizations
5 necessarily meet the Supreme Court's major purpose
6 test because they are fundamentally
7 electoral-oriented organizations?

8 MR. HOLMAN: Yes, the section 527 that
9 would be exempted under the proposed regulations.
10 I mean, we are talking about Section 527s that have
11 as their primary purpose Federal election activity,
12 and by definition, yes, they would meet the Supreme
13 Court standard of major purpose.

14 COMMISSIONER TONER: In terms of 527
15 organizations that, as you say, have as their focus
16 Federal elections, is it your view that if those
17 types of organizations air commercials that attack
18 or promote candidates, that they meet that test? 19

 MR. HOLMAN: Yes, indeed. Section 527,
20 I would define as political committees that would
21 be subject to the entire regulatory frame work of
22 FECA.

1 COMMISSIONER TONER: And you indicated
2 that prior to McConnell, there were very strong
3 views that the express advocacy test was a
4 constitutional barrier against doing what you're
5 advocating, but is it your view that after
6 McConnell, that is no longer the case and we're
7 obligated to do what you're asking us?

8 MR. HOLMAN: That is my view, yes.
9 Prior to the McConnell decision, it was not only
10 the viewpoint of the FEC, but generally widely
11 assumed that the magic words standard was the
12 constitutional standard that we had to abide by in
13 defining expenditure. We now know why the
14 McConnell decision, that is too narrow of a focus,
15 applies especially to political committees.

16 COMMISSIONER TONER: Is it your view,
17 again, with respect to 527s that have the
18 characteristics you're talking about, would it be
19 your view that if we don't follow that course,
20 we're not implementing FECA, we're not implementing
21 the Federal election laws; is that your view?

22 MR. HOLMAN: That is correct. I'm here

1 to ask the FEC to revise its regulations in order
2 to implement FECA as defined by the McConnell
3 decision.

4 COMMISSIONER TONER: I wanted to follow
5 up on one aspect of your comments regarding
6 allocation. As I understand your comments, and I
7 want to confirm that I read the accurately, is it
8 your view that any political committee, that is an
9 outside organization, that there is no basis under
10 FECA for any allocation whatsoever?

11 MR. HOLMAN: To tell the truth, the way
12 I--I've read the law over and over, and I cannot
13 imagine where the Federal Election Commission came
14 up with the justification for an allocation ratio
15 to warrant the use of soft money, money that should
16 be illegal under FECA, for the purpose of political
17 committees, for their activity that affects Federal
18 elections. I cannot imagine a justification for
19 the allocation ratio, and I know I've come out with
20 a stronger statement than most other organizations
21 have, but quite frankly, I see nothing in FECA that
22 would justify an allocation ratio as applied to

1 political committees, and I would reverse that
2 regulation that justifies that.

3 COMMISSIONER TONER: Is your view of
4 that grounded in your understanding of FECA as
5 opposed to BCRA or any other subsequent
6 congressional action?

7 MR. HOLMAN: The allocation ratio
8 justification came out of FECA and Buckley's
9 decision and the regulations that the FEC
10 developed, yes. It wasn't addressed by BCRA.

11 COMMISSIONER TONER: Let me ask you,
12 briefly, if we do not prohibit allocation outright,
13 but instead considered requiring a minimum 50
14 percent hard dollar threshold, would you be
15 supportive of that?

16 MR. HOLMAN: It certainly would be an
17 improvement over the existing allocation ratio that
18 I've seen. I've been running through the FEC
19 regulations in an effort to comprehend.

20 COMMISSIONER TONER: My condolences.

21 MR. HOLMAN: I've run into at least five
22 different formulations of the allocation ratio, and

1 it would appear that groups are relatively free to
2 use whichever one they want to try to justify the
3 lowest need of having legal money used in their
4 activities. And so from what I've seen of the
5 allocation methodology and the allocation ratio of
6 the FEC, it appears to be a mess, and it allows
7 groups to do almost freely whatever they want to
8 do. If you choose not to get rid of the allocation
9 ratio, it would certainly be a healthier
10 improvement to at least come out with some sort of
11 fixed percentage, that is a clear bright line test
12 of how much illegal money can be used in Federal
13 elections.

14 COMMISSIONER TONER: Wouldn't that be
15 sort of similar to our minimum 65 percent
16 requirement that we had for national parties when
17 they were able to use soft money?

18 MR. HOLMAN: Of which I did not support
19 at all. As you know, what the national parties did
20 is they pumped their money down to the state
21 parties where they could use a much higher ratio of
22 soft money, and they directed and conduct

1 television advertising campaigns by the state
2 parties.

3 COMMISSIONER TONER: So the bottom line
4 from your perspective, our current allocation
5 regulations for these organizations are contrary to
6 law; that's your bottom line?

7 MR. HOLMAN: Yes.

8 COMMISSIONER TONER: Thank you, Mr.
9 Chairman.

10 CHAIRMAN SMITH: Thank you, Commissioner
11 Toner.

12 Vice Chair Weintraub.

13 By the way, I just want to announce we
14 get five minutes for questioning in this round.
15 That's why it's going to go by even quicker than
16 before.

17 VICE CHAIR WEINTRAUB: Five minutes,
18 okay.

19 Ms. Aron, I think you said you were here
20 on behalf of 527 as well as 501[c] organizations.
21 So if we were to carve out all the 501[c]s as some
22 people have suggested, just take them off the

1 table, it doesn't solve your problem, does it?

2 MS. ARON: It certainly does not. We
3 would be very dissatisfied with a carve out for
4 just the [c] organizations. I think, in fact, it
5 was you in your statement--

6 VICE CHAIR WEINTRAUB: Thank you for
7 quoting me, by the way. It's always nice to know
8 somebody is listening.

9 MS. ARON: It talks a lot about the
10 effect of a carve-out. For one, it would certainly
11 create evasion. Organizations that are 527s would
12 simply set up [c]4s to be able to carry out their
13 activities. Number two, why is a voter
14 registration effort done that's done within 120
15 days of an election a hard money activity if it's
16 carried out by 527, but not a hard money activity
17 if it's carried by a [c][4]? Many 527s do lots of
18 different kinds of advocacy, voter registration.
19 Some do some lobbying, as you'll hear from some of
20 the witnesses later this afternoon. Some 527s do
21 some work on ballot measure work.

22 So it's not that all 527s are political

1 committees, but I guess the central reason why I
2 think there should not be a carve-out is that there
3 is no problem. No problem was presented to
4 Congress when it wrote and enacted McCain-Feingold,
5 and so far, now that we're having a chance, an
6 opportunity to see how BCRA is being played out, I
7 think there is a way to deal with any problems that
8 may arise, and that is people can file a complaint
9 with the FEC.

10 VICE CHAIR WEINTRAUB: They have been
11 known to do that.

12 MS. ARON: I think they have, but there
13 no demand, there is no record in this instance that
14 suggests that 527s should be treated differently or
15 that [c]3s should have a carve-out here. I think
16 it would be wrong, and I just think you would
17 postponing a look at this issue for a couple
18 months, because no sooner would the organizations
19 set up [c]4s, then you'd be back asking the [c]4s
20 to talk about what they're doing and what their
21 activities are, so on and so forth. So we strongly
22 oppose a carve-out.

1 VICE CHAIR WEINTRAUB: Would it impair
2 the work of the organizations that you represent if
3 we did limit 527s along with one of many formulas
4 that we've proposed?

5 MS. ARON: I think there's no question
6 but that it will, and I think you're going to hear
7 over the next day and a half from a number of
8 organizations that do have [c]3s, [c]4s, 527s, and
9 they will certainly be able to give you a very
10 cogent reason why it will impair their function.

11 VICE CHAIR WEINTRAUB: Thank you.

12 Mr. Holman, you're a [c][4]. You
13 represent a [c][4].

14 MR. HOLMAN: Yes.

15 VICE CHAIR WEINTRAUB: And you'd like to
16 be able to criticize the Government, but you want
17 to be able to attack, as you put it, candidates
18 who, for example, don't support campaign finance
19 reform.

20 MR. HOLMAN: That's right.

21 VICE CHAIR WEINTRAUB: But if a 527 does
22 it, you think that's different, they have to use a

1 different pot of money. Isn't that sort of
2 self-serving on your part, we should be able to
3 criticize the Government, but they shouldn't?

4 MR. HOLMAN: They are two very different
5 entities. This isn't just a carve-out of one group
6 versus another. There are two very different
7 entities defined by tax code, and one is an entity
8 that has as its primary purpose electioneering or
9 affecting elections. The other is an entity whose
10 primary purpose is educational or lobbying activity
11 or pushing for issues.

12 We are very different from Section 527s.
13 Public Citizen has long been critical of the
14 Section 527 loophole, and we've well-documented
15 abuses of Section 527s.

16 VICE CHAIR WEINTRAUB: Well, some of
17 their abuses, though, had to do with what you call
18 politician 527s. Are those leadership PACs?

19 MR. HOLMAN: A lot of them were
20 leadership PACs.

21 VICE CHAIR WEINTRAUB: Which means that
22 they're PACs and they're already regulated by all

1 of our regulations.

2 MR. HOLMAN: For about 40 percent. We
3 identified--out of a pool of about 19,900 Section
4 527s in 2002, there was a pool of about 200 major
5 Section 527s who were involved in Federal
6 elections. Forty percent of those were essentially
7 leadership PACs. Sixty percent of those,
8 accounting for about \$107 million of spending in
9 the 2002 election, focused on electing or defeating
10 Federal candidates.

11 VICE CHAIR WEINTRAUB: Let me ask you
12 one other question, because you want us to attack
13 the tax code to some degree by saying we should
14 regulate 527s differently than 501[c][3]s and
15 [c]4s, so basically let the IRS make the call as to
16 whether the organization gets regulated under our
17 rules, but then you also said in your comments that
18 we should write to the IRS and tell them that they
19 ought to change their definitions of political
20 activity and they ought to be on the lookout for
21 [c]4s that are violating law, and what I'm
22 confused about here is who is running the show.
23 Are we going to

1 be referring to the IRS or should they defer to us
2 or what's the standard?

3 MR. HOLMAN: When it comes to defining
4 and applying the major purpose standard to
5 nonprofit groups, I would initially recommend
6 deferring to the IRS. The reason why I also
7 recommend and Public Citizen recommended that the
8 FEC at least put the IRS on alert as to the
9 potential for danger here is that the IRS has
10 historically done a miserable job at monitoring the
11 Section 527 abuses or even the abuses of groups
12 that have hid in the shelter of 501[c] tax status.

13 So the IRS has not done a very effective
14 job at monitoring the extent of political
15 activities within the nonprofit community, and I
16 was hoping that with the discussion that's going on
17 here today, that the IRS would take a second look
18 at their activity when it comes to monitoring
19 political shadow groups that are hiding within the
20 tax code.

21 VICE CHAIR WEINTRAUB: Thank you, Mr.
22 Chairman.

1 CHAIRMAN SMITH: Thank you, Madam Vice
2 Chair.

3 Commissioner Mason.

4 COMMISSIONER MASON: Thank you.

5 Mr. Clair, you indicate at page 5 of
6 your testimony that a major purpose test should be
7 adopted, especially with respect to non-527
8 organizations.

9 MR. CLAIR: Yes.

10 COMMISSIONER MASON: And I note that
11 there are differences about it from the earlier
12 panel in particular, and I think Mr. Holman as
13 well, are advocating focusing on 527s alone and
14 essentially taking 501[c] organizations out of the
15 category organizations that might be considered
16 political committees. Would that satisfy your
17 concerns?

18 MR. CLAIR: Well, certainly if there are
19 blanket exemptions for 501[c] organizations, I
20 think I can leave the hearing room. I tend to
21 think that's not going to happen. This sort of
22 ties into the last question that was asked.

1 COMMISSIONER MASON: Well, I'd be
2 interested in why you think that's not going to
3 happen.

4 MR. CLAIR: Well, I don't think that the
5 Commission is necessarily precluded from examining
6 an organization's activities independently of IRS,
7 and the public policy considerations may be quite
8 different. In fact, the Commission may find that
9 an organization is improperly classified by IRS.
10 Whether there's any referral possibilities, I don't
11 know in terms of recommending a re-look by IRS. I
12 tend to think that IRS is not as derelict in its
13 duties as another member of the panel here. But I
14 don't think that process is necessarily foreclosed,
15 but certainly if there is a blanket exemption,
16 good-bye.

17 COMMISSIONER MASON: Thank you.

18 Mr. Holman, you say in your testimony on
19 page 5, at one point at the top, you say BCRA did
20 not change the definition of expenditure, and few
21 paragraphs later, you say BCRA changed the
22 definition of expenditure in 441[b] , and it seemed

1 to hinge on a lot of your argument for more
2 regulation on that, but do you want to consider
3 that statement or that assertion? Did, in fact,
4 Congress change the definition of expenditure in
5 441[b]?

6 MR. HOLMAN: What I meant to saying in
7 writing is that the standard definition of
8 expenditure earlier--I think it's 437 or something
9 of the code--was not changed by BCRA. What BCRA
10 did do is it added a second definition of
11 expenditure in 441[b] by adding the expenditure
12 activity for electioneering communications
13 specifically there.

14 COMMISSIONER MASON: This is what I was
15 asking about. My point is simply this as brought
16 up by the earlier panel: There is a definition of
17 expenditure in 441[b][a], and the electioneering
18 communications restriction are in, I believe,
19 441[b][c], and as previous commenters have
20 suggested, they rather willfully did not use the
21 term "expenditure" there. I think rather
22 complicates the case for redefining expenditure in

1 the way that you're talking about. We might not be
2 able to do it, but I don't think that they're a
3 straight path.

4 I don't know if you have a quick answer
5 to this since the light is blinking already, but
6 you refer to "legitimate issue advocacy". What is
7 legitimate issue advocacy and how do we distinguish
8 that from illegitimate issue advocacy?

9 MR. HOLMAN: I get asked that question a
10 lot, illegitimate issue advocacy. It's easier to
11 identify the illegitimate issue advocacy. For
12 instance, in this buying-time study that I did,
13 analyzing television commercials, I identified one
14 501[c] non profit, Americans for Job Security, as a
15 hundred percent of their television ads were viewed
16 by my panel of students as electioneering for or
17 against Federal candidates. I would consider that
18 not legitimate issue advocacy. They're not working
19 for an issue. They're not working for the purpose
20 of their group. They are working to elect a class
21 of candidates or defeat candidates.

22 COMMISSIONER MASON: So are you

1 suggesting that this Commission should hire panels
2 of college students to make distinction? I'm not
3 joking. I am not joking.

4 MR. HOLMAN: I'm not joking either.

5 COMMISSIONER MASON: You know, we have
6 to write regulatory distinctions that people can
7 administer, and if the test is what a panel of
8 college students thinks, then I suppose
9 commissioners can retire and the general counsel
10 can impanel grand juries of college students.

11 MR. HOLMAN: Well, that distinction is a
12 facts and circumstances distinction that would be
13 applied by the IRS, and the IRS has laid out a
14 whole series, roughly about a dozen different
15 criteria in which they'd look at, and certainly if
16 I would submit my buying-time studies, that would
17 be one piece of evidence that they would look at in
18 judging the facts and circumstances as to whether a
19 nonprofit group is abusing their tax status.

20 CHAIRMAN SMITH: Thank you, Commission
21 Mason.

22 Commissioner Thomas.

1 COMMISSIONER THOMAS: Thank you, Mr.
2 Chairman.

3 I'm going to try to use my time a little
4 bit to fill the record with important points, and
5 I'll ask for your feedback when I put some comments
6 in the record. First of all, with regard to the
7 IRS and its oversight capability, I hope that you
8 all considered part of the record the reports of
9 the General Accounting Office on the IRS oversight
10 of tax-exempt organizations. It's a 2002
11 publication, also the GAO report on IRS oversight
12 of political organizations like the 527
13 organizations, and these are documents that were
14 submitted as exhibits in the ongoing litigation
15 over the adequacy of FEC's regulations that
16 exempted 501[c]3 organizations for electioneering
17 communication rules.

18 But they point to concerns about the
19 adequacy of IRS oversight, and I think that they
20 would support the argument that--

21 CHAIRMAN SMITH: Without objection,
22 we'll have those entered.

1 COMMISSIONER THOMAS: --those are not
2 necessarily as clear as they should be. I think
3 the IRS is trying to improve, but it may well be
4 that they will never get to the point where they
5 can focus as much resource as the Commission might
6 on whether groups are, in fact, transgressing the
7 rules in terms of undertaking political-oriented
8 activity.

9 The other thing I wanted to do is note
10 that in the real world, the reason we're here is
11 largely because this Commission has been unable to
12 reach a consensus on what is to be considered
13 express advocacy. Someone alluded earlier to the
14 3-3 vote the Commission had in the case involving
15 ads that were one run during the Republican
16 Presidential primaries by a group called
17 Republicans for Clean Air. The Commission split
18 three to three of whether those were express
19 advocacy communications, but more recently, the
20 Commission split in a couple of cases. One
21 involved some ads that were critical of Tom Cain,
22 Jr. who was running in 2000. The ad said:

1 "Until he decided to run for Congress,
2 Tom never paid property taxes, no experience. Tom
3 Cain moved to New Jersey to run for Congress. New
4 Jersey faces some difficult problems, schools,
5 keeping taxes down, fighting over development and
6 congestion. Pat Morrissey, his opponent, has
7 experience dealing with important issues. It takes
8 more than a name to get things done. Tell Tom
9 Cain, Jr. New Jersey needs New Jersey leaders."

10 We couldn't agree on whether or not that
11 rose to the level of being express advocacy for the
12 election or defeat of a clearly identified
13 candidate.

14 So we move on to the present context,
15 and now we're seeing on our airways we're bombarded
16 with ads. Here is one that like that was actually
17 paid for, as near as I can tell, with a hard money
18 source. Now, I'm not sure. I could be they used
19 soft money to pay for this, but they wrote in part,
20 we've got a fellow saying: "Well, I think Howard
21 Dean should take his taxing-hiking,
22 government-expanding, latte-drinking, sushi-eating,

1 Volvo-driving, New York Times reading--and then a
2 woman interjects--body-piercing, Hollywood-loving,
3 left wing freak show back to Vermont where it
4 belongs.

5 COMMISSIONER McDONALD: No wonder he
6 lost.

7 CHAIRMAN SMITH: Here, here.

8 COMMISSIONER THOMAS: That's one kind of
9 ad we've have got flying out and around these days.
10 Here is another one put out by a group that calls
11 itself Citizens United. We'll be hearing from one
12 of their representatives a little later, but it's
13 entitled--it imitates MasterCard's priceless
14 campaign. The ad opens with a list of some of
15 Kerry's personal expenses, including a \$75 haircut,
16 a \$1 million luxury yacht, and four lavish
17 mansions. It has a photograph of Kerry standing
18 with fellow Senator Kennedy. He appears on the
19 screen. The announcer concludes the spot by saying
20 "Another rich liberal elitist from Massachusetts
21 who claims he's a man of the people, priceless."

22 Well, I don't know if--that was paid for

1 by a group that is described as Citizen United. I
2 don't know if they used hard money for that, but I
3 think they're a 501[c] organization, at least part
4 of it. We'll be finding out more about that later.
5 Those are the kind of things we're up against.
6 Now, if a group, whether it's a 25, 27, and
7 501[c][4] or a 501[c]3, sort of just ignores all
8 the tax rules and spends 75 percent of its resource
9 putting out those kinds of ads, shouldn't we treat
10 that as a political committee under our law?

11 MR. CLAIR: May I respond?

12 COMMISSIONER THOMAS: Please.

13 MR. CLAIR: I would say no, not
14 necessarily. To me, that is issue discussion
15 material on its face. I think it also can come
16 within the definition of Federal election activity,
17 not necessarily electioneering communications
18 unless it comes within the time frame specified
19 there. Then it probably would. So I think you
20 have look at other facts, not just the statement,
21 to see if it's something that would make it a
22 political committee or would be an expenditure

1 under the act.

2 MS. ARON: I would just want to add that
3 I feel your pain in some ways.

4 COMMISSIONER THOMAS: Thank you.

5 MS. ARON: But two points: One is I
6 would agree that that is issue advocacy, but more
7 importantly, the fact that it's difficult to make
8 these decisions, it seems to me, shouldn't give us
9 a green light to take a whole other standard used
10 in some other context of a political party and
11 apply it to a set of organizations and a set of
12 activities. We will only create more confusion and
13 more chaos, because the standard that has been set
14 out in these proposed regulations, propose, support
15 attack, whatever. Propose, support, attack,
16 whatever, whatever.

17 COMMISSIONER THOMAS: No. It's not that
18 general, I assure you.

19 MS. ARON: Propose, attack.

20 VICE CHAIR WEINTRAUB: Propose, support,
21 attack, or oppose.

22 MS. ARON: Are incapable, incapable, of,

1 I think, clarification. I mean, even the Chairman
2 said that just a couple of weeks ago. How does a
3 nonprofit make that determination as to whether
4 their activities fall within that definition? Is
5 it the purpose? It is the major purpose? It is
6 just a purpose of an organization? I don't know
7 how you make those decisions, and nonprofits, 527s,
8 will not be able to make those decisions.

9 I would say that express advocacy
10 probably for nonprofits--and 527s is a standard
11 we're used to. We've lived by the words "express
12 advocacy" now, and to lift a whole new standard
13 will only create massive confusion, but I think
14 even more seriously, it will virtually put the
15 nonprofit community to the standstill. They will
16 just stop doing any kind of issue advocacy
17 altogether for fear that it could be subsumed
18 within this new definition.

19 MR. HOLMAN: Could I add very briefly?
20 I believe that that ad would be electioneering;
21 however, whether or not it should be subject to
22 FECA regulations would be what does the group as an

1 entity, does it do that as its major purpose. If
2 it does that as its major purpose, it should be
3 subject to the facts and circumstances evaluation
4 of the IRS and basically pushed out of the 501[c]3
5 nonprofit community and into the electioneering
6 category, which is where it belongs. Once it goes
7 there, then the entity should be subject to the
8 regulations.

9 But judging from just the one ad you
10 cite, I do not know if that's the purpose of that
11 group.

12 CHAIRMAN SMITH: Thank you.

13 I'm next in the questioning queue, so I
14 like Commissioner Thomas, I want to read a little
15 bit. I want to read two advertisements, two
16 advertisement scripts. This first one reads like
17 this:

18 "These two men have been given top
19 grades by the National Rifle Association. One is
20 George Bush. The other might surprise you. It's
21 Howard Dean. That's right. In Vermont, Dean was
22 endorsed eight times by the NRA and got an "A"

1 rating from the National Rifle Association because
2 he joined in opposing common sense gun safety laws.
3 So if you think Dean had a progressive voting
4 record, check the facts, and please think again."

5 Here is the other ad. This is also a
6 quote:

7 "A new gang is riding into Texas,
8 gunning for one of our judges. President Bush
9 wants to put twice elected Texas Supreme Court
10 Justice Priscilla Owen on the Federal Bench, but
11 liberal special interests--I think that's you, by
12 the way--liberal special interests held up her
13 nomination for over a year. Bill Clinton, Hillary
14 Clinton, Tom Daschle, and group like People for the
15 American Way want to bury the nomination of Judge
16 Owen, and now they're being helped by one of Texas'
17 own. At first, Ron Kirk--as you may recall, Ron
18 Kirk was a Senate candidate at this time--said the
19 Senate needs to confirm judicial nominees. Then he
20 met the liberal gang at fundraisers in Washington
21 and New York, took their money and changed his
22 mind. Called Mr. Kirk and tell him to support Texas
23 and

1 stop listening to the liberal East Coast gang.
2 It's time to confirm Justice Priscilla Owen to the
3 Federal Fifth Circuit Court of Appeals."

4 Now, which one of those was funded by a
5 527 and which one of those was funded by a 501[c]?
6 Does anybody know off the top of their head?

7 I'm curious, and again, I just sort of
8 ask this question with a bit of tongue in cheek,
9 but the thought of my question is serious, Mr.
10 Holman. You say we should exempt 501[c]s, and I'm
11 wondering is it because--and, by the way, one of
12 those was by a 527, and that was the first. The
13 second was by a 501[c], although, arguably, the
14 501[c] ad would have been proper for a--could have
15 been done by a 527 without being Federal election
16 activity since 527s can do the election and
17 nomination of judges and so on.

18 But, I mean, why is one of those
19 corrupting if paid for with soft money and the
20 other is not? Is it because the 501[c] doesn't
21 have to disclose its donors and therefore nobody in
22 Washington will really know who's paying for it so

1 they won't feel beholden? Or is there some other
2 reason why? Because I don't suspect that's it. I
3 think you probably favor disclosure of donors. So
4 why is that? Do you favor disclosure of donors?

5 MR. HOLMAN: Not of the 501[c] ad.

6 CHAIRMAN SMITH: Does your group
7 disclose its donors?

8 MR. HOLMAN: We do not disclose our
9 donors. We file our Form 990s, and those are
10 disclosed.

11 CHAIRMAN SMITH: Yeah, but they don't
12 disclose nearly what 527s have to do, let alone
13 what political committees have to do.

14 MR. HOLMAN: That's right.

15 CHAIRMAN SMITH: So why is it that ad
16 that could have been run by your group or some
17 other 501[c], why is that not a problem if it's run
18 by a 527?

19 MR. HOLMAN: Because it's not our major
20 purpose to seek the election or defeat of a
21 candidate.

22 CHAIRMAN SMITH: Was does that have to

1 do with corruption or the appearance of corruption,
2 which is the constitutional basis for regulating
3 this?

4 MR. HOLMAN: The corruption standard
5 applies to when the Federal Election Campaign Act
6 should be applicable. When you start talking in
7 terms of what sort of electioneering activity can
8 be done, that's when the corruption standard
9 applies, and so that would apply to political
10 committees and justifies FECA. It is not
11 applicable to try--it does not apply to the
12 educational activities or perhaps even occasional
13 incidental election activities by 501[c]s.

14 CHAIRMAN SMITH: Why is it less
15 corrupting if the exact same ad is run by 501[c]
16 than if it's run by a 527?

17 MR. HOLMAN: It is not the major purpose
18 of the 501[c].

19 CHAIRMAN SMITH: It's not that it's less
20 corrupting. It's that it's not your major purpose.

21 Now--

22 MR. HOLMAN: I mean, there are two

1 standards here in terms of what is to be determined
2 a political committee, and one is the
3 electioneering standard. The other is the major
4 purpose standard, and it's important to keep both
5 of those.

6 CHAIRMAN SMITH: Now, for a 501[c],
7 could they ever have a major purpose of electing
8 someone?

9 MR. HOLMAN: Yes. I have cited the
10 Americans for Job Security.

11 CHAIRMAN SMITH: Okay. They're a
12 501[c]?

13 MR. HOLMAN: Yes.

14 CHAIRMAN SMITH: Now, let's suppose a
15 501[c] does expressed advocacy. Do you think
16 that should be a criteria for determining if a
17 501[c] becomes a political committee?

18 MR. HOLMAN: Not as to whether they
19 become a political committee, but they would be
20 subject to FECA's regulations at that point for the
21 express advocacy.

22 CHAIRMAN SMITH: So you disagree with

1 the Supreme Court on the idea that express advocacy
2 is functionally meaningless. You think it is
3 meaningful, at least if you're a 501[c]?

4 MR. HOLMAN: It is meaningful for
5 non-political committees, yes.

6 CHAIRMAN SMITH: If you're a 527 and you
7 are trying to nominate judges, which is a lawful
8 527 activity, but you don't want to get caught up
9 in this other Federal election activity, for them
10 it's a clear standard and they can understand what
11 it means, but if you're a 501[c] and you don't want
12 to get caught up in this, it's somehow a vague
13 standard that they can't understand. Are 501[c]
14 managers dumber than 527 managers?

15 MR. HOLMAN: 501[c] does not have as a
16 major purpose the electioneering.

17 CHAIRMAN SMITH: Why is that relevant,
18 is what I keep going at, and you don't tell me why
19 that is relevant. You just keep repeating it. Is
20 it just because you think the Supreme Court said
21 that so it is, or is there a rationale behind it
22 that would lead the Supreme Court to extend that in

1 a situation where a 501[c], such as Mr. Baran
2 suggested the Chamber can do, as spending millions
3 of dollars on this type of activity?

4 MR. HOLMAN: Chairman Smith, it is
5 because both the Supreme Court said it and because
6 of the rationale behind the Supreme Court
7 reasoning. That rationale is that it did not want
8 to start impinging upon legitimate advocacy work by
9 nonprofit groups even though they do, on occasion,
10 tread into the electioneering category. We need to
11 protect the right of the citizens and of the public
12 groups to advocate specific issues.

13 CHAIRMAN SMITH: I'm out--

14 MR. HOLMAN: Even if it does relate to
15 elections on occasion.

16 CHAIRMAN SMITH: I'm out of time. I
17 can't figure out why 527s are not citizen groups
18 and I can't figure out why their speech is not
19 doing the same thing, and I'm not at all sure there
20 is any basis, as the D.C. Court of Appeals held in
21 *Akins*, which is predicated on standing grounds
22 later, by the D.C. Court held that, you know, this

1 major purpose is vastly misunderstood, that it's
2 not just--you have to tie it to what was the
3 constitutional basis, and I'm not sure I see any
4 basis why a 501[c] should be excluded from regs
5 that a 527 would face or why a 501[c] finds clarity
6 in express advocacy, but a 527--or cannot find
7 clarity short of express advocacy, but a 527 can
8 find clarity with the promote, support, attach,
9 oppose standard.

10 To just say, Well, the Supreme Court
11 says that, I think, A, it takes a throw-away line
12 from Buckley, a single mention--it's almost tossed
13 away--and a couple brief lines from Massachusetts
14 Citizens for Life. They're using that to actually
15 restrict the exemption from the Act for certain
16 groups that really do a lot of this stuff and
17 suddenly makes the--you know, you basically got the
18 tail wagging the dog. The statute doesn't provide
19 anything about major purpose, and if we're looking
20 at what is going on--let me put it this way.

21 I notice my time is up. So I would say
22 I would say I think Ms. Aron is exactly right. If

1 we exempt 501[c]s, first, I don't think there's any
2 basis for it. I think we probably--at least that's
3 my gut sense. I haven't a reason why we wouldn't.
4 Maybe we'll get it in the next panel.

5 The other issue on that is if exempt--I
6 think Ms. Aron is right, that if we were to exempt
7 them, within months I suspect that a lot of people
8 would be back saying you've got to stop 501[c]s
9 from doing that, because that's exactly where all
10 the same activity is going to go.

11 I'm way past my time. I just don't buy
12 that argument that because it's there, which is
13 what I'm hearing, the argument as having too much
14 validity.

15 Next on our questioning rotation is
16 Commission McDonald.

17 COMMISSIONER McDONALD: Mr. Chairman, I
18 trust I get as much time.

19 CHAIRMAN SMITH: You can. You can.

20 COMMISSIONER McDONALD: Actually, I'm
21 going to send my staff out. I feel somewhat behind
22 the curve here because I don't have any ads to

1 read. I'm really hurting about the whole thing.

2 I must say that the ads that
3 Commissioner Thomas read and that the Chairman read
4 actually really are kind at the crux of what this
5 is all about. It really is. Let me say, first of
6 all, Ms. Aron, Mr. Clair, Mr. Holman, thank you all
7 for coming. I appreciate it very, very much.

8 Again, I prefer to play the devil's
9 advocate role with each of you, because, otherwise,
10 we won't have much fun, and we want to be sure we
11 can have a little fun and resolve some very
12 serious problems simultaneously.

13 Ms. Aron, you said at the outset, and
14 being an old election--local election
15 administrator, I'm somewhat empathetic. In fact,
16 I'm very empathetic with the issue about voter
17 turnout really being a problem. However, I must
18 say that what can only be considered a fairly
19 wide-open system over the years in terms of record
20 amounts of money being raised and in relationship
21 to the effort put out by numerous groups, all
22 rightfully so, the truth of the matter is that the

1 voting process seems to be getting worse, and an
2 argument that has been made, of course, is it is
3 because of the very nature of the sort of things
4 that we're hearing here this morning, that, in fact,
5 we've not educated the public at all with
6 dominating the airways, but what we've really done
7 is we've turned them off and that, in fact, they're
8 not as appreciative of all these ads that are out
9 there in the political process.

10 Any thoughts along those lines? And
11 then I'll get to the 527s specifically.

12 MS. ARON: Well, I think two fold: One
13 is I don't know, really, how many nonprofits in
14 this country know that they have a right to engage
15 in voter registration, voter education, candidate
16 education. These are, I think we would all agree,
17 critically important activities, and I think you'd
18 surprised to know just how many people across this
19 country have no idea that they can get together and
20 engage in these wonderful democratic activities as
21 get out the vote, voter registration.

22 But having said that, I would say that

1 if these new definitions go into effect, they will
2 only exacerbate the current problem, which is we
3 would agree that not enough people are going to the
4 polls on election day and pulling that lever. I
5 think equally important, these rules are going to
6 make it much more difficult for the kinds of people
7 that we desperately want to come vote to maintain a
8 pluralistic, diverse democracy. We want to make
9 sure that everyone votes, African Americans are
10 coming to the polls, Latinos are coming to the
11 polls. The effect of these rules, I think will
12 deter those kinds of very important voter
13 registration activities from taking place, and
14 particularly now when organization are gearing up
15 to do this kind of work, to have the FEC at this
16 moment come out with a whole new set of definitions
17 that will cause people to question their meaning
18 and then to question whether they can even do it is
19 going to be totally harmful to turnout and to our
20 process.

21 COMMISSIONER McDONALD: You indicated
22 that one of the reasons you felt like you were

1 here, and I think you make a pretty compelling case
2 that you're certainly right, is that this is a
3 result of the few in terms of media, but it's also
4 the result of massive amounts of money, at least in
5 those stories being reported. Do you see any
6 scenario where under 527s that someone would, in
7 fact, create a political committee status, or is it
8 your position across the board by the very nature
9 of who they are in relationship to the IRS that
10 they simply cannot?

11 MS. ARON: They cannot.

12 COMMISSIONER McDONALD: Mr. Holman, it's
13 good to see you.

14 MR. HOLMAN: It's good to see you,
15 Commissioner.

16 COMMISSIONER McDONALD: Let me just be
17 sure that I understand. I share the frustration of
18 the Chairman in relationship to these differences,
19 and I guess I share them not only because I think
20 his concern is legitimate one, but, ironically, and
21 being a fairly active and avid supporter of 501[c]s
22 in the past in and outside of this agency, the

1 irony of it is if--as you know, we debate this
2 major purpose test all of the time. If the end
3 result is that we're not having reporting from the
4 501[c]s, who in essence do, for lack of a better
5 term almost the same as a 527, we might end
6 up --you could make the case at least that we could
7 end up with the worst of all possible worlds.

8 How do we get to that problem or is
9 there a way to get to that problem? I'm a little
10 uncomfortable--or are you a little uncomfortable,
11 it would be fairer to ask you, I guess, that you do
12 not disclose your contributors? Does that bother
13 you or do you think that's just an inherent
14 advantage that by the nature of the group, it's
15 better, or what's your thought along those lines?

16 MR. HOLMAN: The essential nature of the
17 501[c] nonprofits, I do not want to see disclosure
18 of contributors.

19 COMMISSIONER McDONALD: Why is that?

20 MR. HOLMAN: The 501[c], many of them
21 get involved in very controversial issues. It may
22 have a chilling impact on some contributors or

1 sources of funds if they thought they would be
2 identified to the public as supporting a certain
3 nonprofit entity. That isn't true for most, but
4 certainly for some.

5 COMMISSIONER McDONALD: Isn't that kind
6 of--I don't mean to interrupt, but isn't that
7 across the board kind of criticism? For the 23
8 years I've been here, the most used term, I guess,
9 is "chilling affect". Isn't that practically the
10 same case with 527s or anyone else? Obviously
11 they're going to have to report, but this have
12 always been kind of a concern. So disclosure has a
13 chilling affect, you think?

14 MR. HOLMAN: It can to a certain degree.
15 I mean, no one can just simply ignore the fact that
16 some people don't want to be disclosed to the
17 public, and so when it comes to something like
18 advocacy work, you really don't want to try going
19 into the realm that would impinge about their work.

20 By the way, as a little side note, when
21 it comes to trying to disclose, for instance, the
22 bundlers to the Bush campaign, Public Citizen has

1 put up a web side disclosing all these bundlers,
2 and we actually get phone calls from bundlers who
3 say, Hey, our name isn't up there; please put our
4 name up there. So some people really do want to be
5 disclosed.

6 When it comes to political committees
7 and political organizations like 527s, they haven't
8 had much of a problem in terms of the disclosure
9 having a chilling impact. The 527s now are well
10 disclosed in terms of their contributor data base,
11 and that doesn't seem to be much of a problem. The
12 advantage for groups hiding within the 527 tax code
13 rather than under FECA is the evasion of the
14 contribution limits and the source prohibitions
15 under the FECA regulatory regime. That's the
16 advantage going on there. The disclosure is not
17 the problem.

18 COMMISSIONER McDONALD: I apologize, Mr.
19 Chair. I just want to be clear about one thing.

20 In relationship to the IRS, and I do
21 want the record to reflect you have a different
22 viewpoint about them than I do. I find them very

1 competent, and I want to be very clear about that.

2 MR. HOLMAN: It's tax day. I know.

3 COMMISSIONER McDONALD: And particularly
4 I want to be sure they know that now.

5 But as a practical matter in terms of
6 trying to ascertain whether someone, in fact,
7 violates their 501 status, in terms of them trying
8 to analyze it, I read every day the newspaper that
9 the IRS, and I'm sure it's true of a number of
10 agencies and we can certainly take that position of
11 our own agency, have very few resources at a very
12 difficult time as it is, and I've always just been
13 kind of curious in relationship to how they are
14 going to be able to analyze, if you will, a
15 political assessment of a number of these groups
16 just by the very nature of the time they have and
17 what kind of expertise.

18 Do you have any sense of what kind of
19 expertise they have in that area?

20 MR. HOLMAN: I have even been told by
21 staff members of the IRS that the exempt division
22 that would be responsible for this doesn't bring in

1 much money. So they tend to get shunned by the
2 entire rest of the Revenue Service. This is a
3 problem, and it's something that I have been
4 complaining to the IRS about and Public Citizen and
5 other groups have been complaining. It's a fairly
6 new front for them. The IRS has never really
7 wanted to look at political groups or do
8 disclosure. It's not their bag, really.

9 It's becoming a new phenomenon for them
10 ever since the Brady-Lieberman law, the Section 527
11 disclosure laws. Now they've got to start doing
12 this disclose work, monitoring political
13 organizations, and they're not good at it yet, but
14 I think they're going to learn, because there are a
15 lot of people that are highlighting certain abuses
16 that are going on within some of these tax groups.
17 So I think they're going to learn.

18 COMMISSIONER McDONALD: I appreciate it
19 very much. I just want to make it clear one more
20 time that I have no problem with the IRS.

21 Thank you very much.

22 CHAIRMAN SMITH: Thank you, Commissioner

1 McDonald.

2 Counsel Norton.

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

4 Mr. Holman, I think if I heard you
5 correctly in response to some of the hypotheticals
6 that Commissioner Thomas--well, not hypotheticals.
7 He was talking about ads, but his hypothetical was
8 that if certain [c][4] groups were to run ads that
9 you conceded were ads to designed to influence
10 Federal elections, that if it got to 70, 75
11 percent, it ought to be pushed into 527 status and
12 then they would be regarded as political
13 committees. And the question I had for you is kind
14 of reconciling that interim step with MCFL where
15 the Supreme Court said should MCFLs' independent
16 spending become so extensive that the
17 organization's major purpose may be regarded as
18 campaign activity, the corporation would be
19 classified as a political committee.

20 Now, that MCFL was a [c][4]. The 527
21 rules were on the books for about 12 years.
22 There's no suggestion that the Commission needs to

1 wait for the IRS to do anything. The Commission,
2 in fact, could determine that a [c][4] under
3 certain circumstances could be registered as a
4 political committee. Can the Commission exempt
5 [c]4s consistent with the language in MCFL? In
6 other words, would it be consistent with MFCL to
7 create a flat exemption for [c]s?

8 MR. HOLMAN: Well, first of all, not
9 being an attorney, I'm not clear on the certain
10 legal ramifications of the MCFL exemption, but it
11 certainly it makes sense to me that the Commission
12 can take a look at how the tax code has been
13 drafted and how the tax code has been interpreted
14 by the courts to then provide for the exemption for
15 [c]4s. That is what I have been advocating here
16 today.

17 I don't know if that addresses your
18 question.

19 MR. NORTON: Let me ask a slightly
20 different question and I'll open it up to the whole
21 panel. I heard you and certainly we're going to
22 hear a lot from other panels about distinctions the

1 Commission ought to draw based on Internal Revenue
2 Code distinctions. There's certainly no mention of
3 that in MCFL. The concepts the IRS uses, the facts
4 and circumstance test alluded to different--earlier
5 is very different than tests that the Commission,
6 bright line tests that the Commission attempts to
7 use in determining political speech. The
8 objectives of the IRS are very different than the
9 objectives of the Federal Election Commission, and
10 the enforcement mechanisms and strength is perhaps
11 very different.

12 Commissioner Thomas alluded to the GAO
13 report. There was an article in the New York Times
14 this past Monday reporting an independent analysis
15 of IRS data that show that tax enforcement has
16 fallen steadily during the present Administration
17 with fewer audits, fewer penalties, and few
18 prosecutions. On what practical basis or on what
19 legal basis does the Commission promulgate
20 regulations in this area that are predicated on
21 Internal Revenue Code distinctions? I throw that
22 open to anyone on the panel.

1 MR. HOLMAN: I would certainly like to
2 start, if I could. When it comes to groups that
3 are classified as Section 527s, it's due to their
4 own declaration that their primary purpose is
5 electioneering, and so that provides a
6 self-defining distinction right there to draw a
7 line between a certain class of the nonprofit
8 community, Section 527s versus the 501[c][4] and
9 [c]6s.

10 Now, when it comes to trying--if I could
11 back up a little bit, if this agency were to, in
12 fact, include Section 527s with FECA's regulatory
13 regime, I do not see a mass flood of these shadow
14 political operatives trying to become 501[c][4]s to
15 suddenly evade all the regulatory constraints. I
16 believe some of it would happen, but it's a lot of
17 work to try to convince the IRS that your primary
18 purpose is educational and lobbying when all, in
19 fact, you're out trying to do is defeat George
20 Bush.

21 So I don't see this wholesale migration
22 into the 501[c] category, but there will be some,

1 and of that that does occur, you know, the FEC
2 certainly could step in if it had some convincing
3 evidence of a certain particular group was really
4 an electioneering shadow group hiding under the
5 501[c] category, but I would presume in my most
6 cases, the FEC would rather defer to the agency
7 that is supposed to be monitoring and administering
8 and interpreting the tax code for those purposes.
9 So I would think in most cases, you would want to
10 perhaps request the IRS do a facts and
11 circumstances analysis of a particular group to see
12 if they are legitimate or not.

13 MR. NORTON: Mr. Clair?

14 MR. CLAIR: Yes, if I may. I see a lot
15 of compatibility if the Commission approaches it
16 from a primary purpose of point of view. That's
17 the purpose IRS is going to use. Yes, their test
18 is somewhat different, but if the Commission adopts
19 a primary purpose test, I don't think most
20 organizations are going to have a problem with
21 that, and I think this even can overflow into 527
22 area. And I notice the third question that

1 Commission Weintraub put down in her set of
2 questions ask what about non-Federals 527s or PACs,
3 you know, do we use a primary purpose there, and I
4 say yes, and I think this example could apply to
5 either a [c][4] or a 527 that is an unincorporated
6 association.

7 So if I may offer it for you, let's take
8 an organization with \$100,000 in its budget. It
9 contributes \$5,000 to a PAC, which I understand it
10 can because it's unincorporated. It contributes
11 2,000 to a candidate, again because it's
12 unincorporated, I understand it can do that. Maybe
13 I'm wrong. And then let's say it spends 13,000 on
14 electioneering communications. Now, the PAC will
15 report the receipt of the contribution. The
16 candidate will report the receipt of the
17 contribution. The organization will have to file
18 the electioneering expenditure report because it
19 went over \$10,000. The other \$80,000, the
20 organization spends on, say, state electoral
21 activities, or if it's a [c][4], on [c][4]
22 activities.

1 Now, that's not a political committee in
2 my judgment. So I think it can all be reconciled
3 with the primary purpose test.

4 In terms of--I also think, and does
5 happen, if circumstances arise, hit the media where
6 it's becoming obvious someone is abusing a status,
7 the [c][4] status, you know, their opponents are
8 going to document that and submit a complaint to
9 IRS and say, IRS, why don't you audit this
10 organization and revoke their [c][4] status. So I
11 see it all as very compatible if you use the
12 primary purpose and craft your definitions
13 carefully.

14 MS. ARON: I guess I would just add that
15 your questions assumes that there's a need for
16 further regulation in this area, and I would just
17 say that during the weeks that Congress was
18 considering BCRA, there was no really no record of
19 corruption, of problem with the [c]3s, the [c]4s.
20 BCRA took care of coordination. It took care of
21 electioneering communications, but there is no
22 need. There has not been massive corruption or

1 difficulty under the current system that would
2 justify, it seems to me, any changes whatsoever.

3 CHAIRMAN SMITH: Thank you.

4 Staff Director Pehrkon, do you have
5 questions for this panel?

6 MR. PEHRKON: Thank you, Mr. Chairman.

7 Once again, welcome, and hopefully we'll
8 be out of here for lunch shortly, but I have just
9 one set of questions. This is primarily for
10 Ms. Aron.

11 And if I understood you properly at the
12 start, you said you were representing some 400 or
13 600 different organizations.

14 MS. ARON: Right.

15 MR. PEHRKON: Do you have a sense of
16 what the split is between 527s and the 501[c]s?

17 MS. ARON: I don't. I know that some
18 have 527s clearly among the 627 groups, but I
19 don't. You will hear from some of them later
20 today, I think, or tomorrow.

21 MR. PEHRKON: What I was sort of trying
22 to figure out is the size of these organizations.

1 I mean, they run the gamut. How many of them
2 actually budgets that--

3 MS. ARON: They do run the gamut, and
4 it's no one size fits all when you're looking at a
5 527.

6 MR. PEHRKON: Do you have sense of what
7 range is of the size of the organization or the
8 budget?

9 MS. ARON: You mean total budget? No.
10 I know that the range of budgets, generally
11 speaking of groups that signed on to the comments,
12 vary, range from 25,000 to 15, 16 million, but I
13 don't know any more than that.

14 MR. PEHRKON: What I'm trying to sort of
15 focus on is if people had to start filing with the
16 Commission, what numbers could we expect to see?
17 In other words, since you represent some 600
18 organizations, would I expect to see all 600 of
19 them filing under this scheme or I could expect to
20 see some other number? I was looking for some
21 assistance.

22 MS. ARON: I think it's impossible to

1 give you that figure right now. I think there may
2 be some organizations that are considering as we
3 speak 527s, but certainly I think a good number
4 might well have to file with the Commission.

5 MR. PEHRKON: Mr. Chairman, I don't have
6 any other questions, and the light is still green.

7 CHAIRMAN SMITH: Thank you, Mr. Pehrkon.
8 You're the man we count on to move us along.

9 I would like to thank the members of
10 this panel. Again, as with the first panel, I
11 would love to have had much more time to actually
12 get into some of these issues, but I think it's
13 been very helpful.

14 We will resume--after the lunch break,
15 we'll resume at two o'clock sharp with our third
16 panel of the day. So we will recess for
17 approximately one hour until two o'clock sharp.

18 [Whereupon, at 12:53 p.m., a lunch
19 recess was taken, to reconvene at 2:00 p.m. this
20 same day.]

21

22

1 minutes for opening statements. So please try to
2 keep them brief. You can dispense with the
3 pleasantries and get right down to raising one or
4 two key points you want to make, and then we will
5 have a round of questions in which each commission
6 will have eight minutes for questions. While I
7 have not been ruthless about cutting people off at
8 their lights, I do ask both commissioners and
9 witnesses to try to be aware of the lights and wrap
10 it up when you see the lights go red.

11 And with that, we now have all our
12 commissioners present, and we'll go ahead and start
13 with Mr. Foley.

14 MR. FOLEY: Thank you, Mr. Chairman.

15 My testimony today is based on my
16 academic writing in the field of election law.

17 CHAIRMAN SMITH: One thing, let me ask
18 all witness please be sure to speak into the mikes,
19 including these long ones. That's where we get it
20 for the official record. Thank you.

21 MR. FOLEY: Is that better?

22 CHAIRMAN SMITH: That's better.

1 MR. FOLEY: Okay. I represent no
2 client, no firm, no group, and my views do not
3 necessarily represent the views of the Ohio State
4 University.

5 CHAIRMAN SMITH: So you're here as an
6 expert.

7 MR. FOLEY: Someone who works in the
8 field.

9 MR. McDONALD: A clear disclaimer, I
10 might add.

11 MR. FOLEY: And I have submitted or I
12 have prepared a written version of my testimony for
13 this afternoon. I ask that that be made part of
14 the record.

15 I'd like highlight two substantive
16 points from the comments I submitted earlier, and
17 those two points I think lead to a procedural
18 conclusion that the Commission should act now
19 rather than later. The two substantive points both
20 concern the argument that we heard today that the
21 express advocacy test is a limitation on the
22 definition of political committee. That argument

1 is incorrect, in my view, because it's a misreading
2 of the Buckley opinion.

3 So, first, consider a group that
4 publicly declares and unabashedly declares that its
5 overriding objective is to defeat a particular
6 Federal candidate. They're absolutely clear about
7 this. According to that argument that we heard
8 this morning, despite that emphatic declaration of
9 their own purpose, they would not be classified as
10 a political committee if they did not make \$1,000
11 of expenditures that met the express advocacy test,
12 but that's inconsistent with what the Buckley court
13 said.

14 The Buckley court said that if you know
15 that a group has the major purpose of influencing a
16 Federal election, then it's spending is by
17 definition campaign related, and you can know that
18 major purpose in different ways. A group could, in
19 fact, register voluntarily as a political
20 committee, and it would be entitled to do so even
21 if it never engaged in express advocacy, because
22 once its made the declaration that it does have

1 that major purpose. It's a political committee.
2 It's regulated as such and then its spending is
3 within the scope of FECA even if it's not the
4 express advocacy test, and a group can make that
5 public declaration either by voluntarily
6 registering or by on its web site or in a press
7 conference or otherwise been emphatic about what
8 its overriding objective is. And, again, this
9 should be a test that surprises any group. I agree
10 with the notion that no group should be caught by
11 surprise that is subject to FECA regulation, but if
12 a group does make clear what its own mission is and
13 that mission is electoral, then its spending gets
14 regulated without regard to the express advocacy
15 test, and Buckley is clear on that point.

16 Secondly, the major purpose test,
17 Buckley says is a functional test. The Court used
18 that term "major purpose" to say that it was,
19 quote, fulfilling the purposes of the Act, closed
20 quote. So it's supposed to be a functional test,
21 and the only way to make it work as a functional
22 test with respect to those groups that don't have a

1 public declaration about their purpose is to look
2 and to see what that group does in practice; and to
3 refer to an earlier question from this morning, if
4 a group is in engaged, 75 percent or more of its
5 activities, in attacking the candidate or
6 supporting a candidate, then it is acting as a
7 political committee. It's acting with the clear
8 objective to influence the election, and it should
9 be regulated as a political committee.

10 A group acts that way is not going to be
11 surprised by being regulated under FECA, and here
12 the key difference is the regulation of a single
13 communication versus the regulation of the totality
14 of a group's activities. Obviously the express
15 advocacy test makes sense when you examine one
16 broadcast at a time, and the Court adopted that
17 test with a goal of making sure that no group--and
18 it used the term an "issue group"--would be caught
19 by surprise and subject to FECA regulation based on
20 a single message unless it met the express advocacy
21 test. But with respect to a group that spends over
22 50 percent or 75 percent, etc., etc., on public

1 messages that attack candidates or promote
2 candidates, then that group would not be surprised
3 to be regulated; therefore, it does not get the
4 benefit of the express advocacy test.

5 Finally, very quickly, these two points
6 come straight from Buckley and solely from Buckley,
7 and it's for that reason--we can explore this
8 further in response to questions--that I think it's
9 appropriate for the Commission to act now since
10 it's derived solely from the Buckley case and from
11 FECA and not from BCRA. These would be
12 implementation standards that the Commission would
13 need to adopt in an adjudicatory proceeding as well
14 as a rulemaking, and as I understand it, the
15 purpose of this rulemaking should be and should
16 solely be to clarify what comes out of the Buckley
17 case, and it is true, as others have said, there is
18 a lot of other things that have been put on the
19 table that should not be part the final rule, i.e.,
20 there should be not re-writing the definition of
21 expenditure with respect to groups that do not meet
22 the major purpose test, and there shouldn't be the

1 kind of \$50,000 threshold that is in I think the
2 proposed rules. The major purpose test is a
3 percentage idea. It should be confined as such
4 based on Buckley, and with that limitation, no
5 [c][4] or [c] organization should feel in any way
6 threatened by the proper implementation of Buckley.

7 Thank you.

8 CHAIRMAN SMITH: Thank you, Mr. Foley.

9 Mr. Pomeranz.

10 MR. POMERANZ: Thank you, Mr. Chairman
11 and Commissioners.

12 As you know, I'm here representing the
13 law firm of Harmon, Curran, Spielman & Eisenberg.
14 At the outset, let me state that we share the
15 concerns that you heard from a lot of commenters
16 about the threat that the proposed rules create for
17 all sorts of nonprofit advocates; however, both in
18 our comments and then here today in my testimony, I
19 want to specifically address the Commission's
20 proposal to regulate independent organizations that
21 have come to be know as 527 organizations. In
22 particular, I want to discuss the ill-advised

1 attempt to apply the tax code's vague definition of
2 a 527 organization to the election law.

3 I fear that the Commission's confusion
4 about the true nature and obligation of 527
5 organizations has undermined the proposed
6 regulations, and as detailed in the comments that
7 we filed, the Commission's attempt to regulate 527s
8 as a class violates longstanding constitutional
9 principles, exceeds and may even conflict with
10 this Commission's statutory authority, ignores
11 indistinguishable activities conducted by
12 individuals and other independent organizations,
13 and undermines some of the important public policy
14 reasons that support the existence of these
15 independent 527 organizations.

16 The tax law definition of Section 527
17 will not survive constitutional analysis under
18 election law. The heart of the matter is the
19 fundamentally different ways in which the courts
20 look at election law restrictions and tax law
21 restrictions. Tax law restrictions are a trade.
22 They're an organization accepting sweeping

1 regulations and restrictions on their activities in
2 exchange for the valuable benefit of the tax-exempt
3 status. Election law restrictions, however, have
4 to survive strict scrutiny under the First
5 Amendment. Any restriction that this Commission
6 hopes to enforce must be necessary to achieve a
7 compelling governmental interest.

8 When the IRS looks at whether electoral
9 activity is going on, they look at all of the facts
10 and circumstances to sniff out any hint of
11 electoral bias. Regulation under this test might
12 be acceptable in exchange for 501[c]3 status, but
13 it's not going to pass muster under the strict
14 scrutiny test for imposing the burdens of political
15 committee status under the Federal Election
16 Campaign Act. The Supreme Court has upheld Federal
17 election laws as necessary to effectively prevent
18 political donors from buying elected officials, but
19 we don't see the corruption or appearance of
20 corruption that justifies restrictions on the types
21 of activities that this proposal would ban.

22 And just to take a few examples, you've

1 got perhaps a civil rights organization that's
2 created solely to get out the African American vote
3 in a politically divided state or a voter guide
4 distributed by a 527 organization of a pro-life
5 organization that compares two Federal candidates
6 on that single issue or a campaign reform
7 organization that publicly tries to get all
8 candidate to sign a pledge favoring a public
9 financing system for campaigns or a 527 fund
10 affiliated with a land conservation organization
11 that runs newspaper ads encourage registered voters
12 who support the protection of a local wilderness
13 area to go vote on election day, but doesn't
14 mention the name of any candidate or identify any
15 candidate. None of these activities threaten to
16 corrupt the political system, and yet all of them
17 would be effectively banned if this Commission
18 treats all 527s as political committees.

19 So, in short, we urge the Commission to
20 reject this ill-advised and, frankly, poorly-timed
21 rule.

22 CHAIRMAN SMITH: Thank you.

1 Professor Tobin.

2 MR. TOBIN: Chairman Smith, Vice
3 Chairman Weintraub, and Members of the Commission,
4 thank you for providing us with this opportunity
5 today to talk to you about this issue. I, like
6 Professor Foley, am not advocating for nor do I
7 represent any organization or group, and I too am
8 just a law professor at Moritz College of Law at
9 Ohio State University.

10 CHAIRMAN SMITH: Don't say just a law
11 professor.

12 MR. TOBIN: Just a law professor.

13 COMMISSIONER McDONALD: I notice the
14 Ohio State guys are getting more time.

15 MR. TOBIN: But I also come at it from a
16 little different issue because I'm a tax professor,
17 and so I don't have as much experience in election
18 law as some people, but I've come at this, I think,
19 from a different angle and hope that some of those
20 comments are helpful. In that light, I'm going to
21 concentrate on some of those comments and also some
22 things that were not included in the article that

1 Professor Foley and I wrote.

2 One of the questions that the Commission
3 asked in the proposed rulemaking is whether or not
4 they should exempt 501[c] organizations from the
5 proposed rule, and I think it is a serious mistake
6 for the FEC to exempt 501[c] organizations. I know
7 that's not a popular position. In my view--well, I
8 don't have to run for office. So I'm in good
9 shape.

10 In my view, legitimate 501[c]
11 organizations are not and should not be
12 concerned--and should not be considered--excuse
13 me--political committees. Any rule you adopt
14 should be crafted so that it does not ensnare
15 legitimate 501[c] organizations, but exempting
16 501[c]s from these regulations is a different
17 story. Not all 501[c] organizations act within
18 501[c] guidelines. The FEC should not rely on the
19 IRS to enforce campaign finance laws. It is
20 not--the IRS is not well-suited today do that.
21 Exempting 501[c] orgs from this rule is the same as
22 saying that with respect to 501[c] organizations,

1 the IRS, not the FEC, will police their campaign
2 activities.

3 I brought today, which I understand has
4 been mentioned, but since ads have become popular,
5 I have one today from a 501[c][3] organization.
6 It's cited in a case, Branch Ministries. So it's not
7 exactly written, but I understand the case was
8 mentioned this morning. But the advertisement
9 cited various biblical passages and stated that
10 Bill Clinton is promoting policies that are in
11 rebellion to God's laws. It concluded with the
12 question how, then, can we vote for Bill Clinton.
13 Now, there may be a question whether that's express
14 advocacy or not. Maybe there's not a question, but
15 it still was run by a 501[c]3 organization. It
16 took the IRS seven years to finally revoke Branch
17 Ministries 501[c]3 status.

18 In addition, it's more of a technical
19 legal point, but you don't get to bring a complaint
20 to the IRS about Branch Ministries. You don't have
21 standing, at least according to the IRS. It's not
22 fully litigated yet. So I, like the FEC, I can't

1 make a complaint and say go audit 501[c][4]s, and
2 you shouldn't be able to. You don't get to tell
3 the IRS who they get to audit.

4 The other problem with this idea that
5 the IRS can be a good enforcement mechanism is that
6 the IRS has a boss, the Secretary of Treasury and
7 the President of the United States. So to the
8 extent that it's the President of the United States
9 who is complaining about something, it's a real
10 problem. Is the President supposed to go to the
11 IRS and say, Hey, audit my opponents? We had a big
12 problem about that in this country. So it seems to
13 me that you have a serious and significant
14 responsibility here and that you need to craft a
15 rule that allows you to enforce it in a fair and
16 reasonable way among organizations.

17 And, finally, which I will not talk
18 about because I'm out of time, I have some views
19 about the timing of the regulations, and that's in
20 my written testimony. I think that though I've
21 obviously been advocating major purpose test for
22 some time, I think that the rules and regulations

1 we're talking about today are significant enough
2 that it would be more appropriate to implement
3 those rules and regulations in a new election
4 cycle. So my comment on that are in my testimony.

5 CHAIRMAN SMITH: Thank you, Mr. Tobin.

6 And, finally, Mr. Trister.

7 MR. TRISTER: Thank you, Mr. Chairman.

8 I am one of the authors of the comments
9 that were signed by the 415 nonprofit organizations
10 and joined by another couple of hundred later on.
11 I have just really two points I'd like make at the
12 outset.

13 The first is we've heard a lot of talk
14 this morning in particular about how the reason you
15 can look to 527 as the test for what is a political
16 committee is that when groups sign up as a 527,
17 they are declaring that their purposes are
18 political. This is not true. It is not correct.
19 It is not accurate. What you do when you file Form
20 8871 to say you are a 527 is you declare that your
21 primary purpose is to conduct "exempt function
22 activities" as that phrase is defined in the

1 Internal Revenue Code and has been construed by the
2 Internal Revenue Service over a period of many,
3 many years. That is a far cry from saying that you
4 are a Federal political committees, that you are
5 a--that your purpose is to elect people to office.
6 It is saying nothing more than that you are an
7 entity that meets the definition of exempt--whose
8 primary purpose is exempt function activities, and
9 as that term has been defined, Mr. Pomeranz's
10 comments and his testimony illustrates it is a
11 much, much, much broader concept than anything that
12 this Commission has ever looked to to define what a
13 committee is. That's point number one.

14 Point number two, I had a feeling this
15 morning that I was in an Alice in Wonderland
16 situation, that we were sitting not in the year
17 2004, but we were sitting in 1976 and the Supreme
18 Court has just described Buckley and this
19 Commission has gotten together to decide how to
20 implement the primary purpose test as the Court
21 said in Buckley. But that's not the case. We've
22 had 28 years since Buckley, and there's been an

1 awful lot of water gone under the bridge.

2 The first thing is that Commission has
3 construed that term "primary purpose" to mean
4 express advocacy and contributions and coordinated
5 expenditures, and that's what it has meant for 28
6 years. Secondly, we have had three pieces of
7 legislation by Congress in recent years in which
8 they proceeded on the basis of that interpretation.
9 You've heard an awful lot today about BCRA. I
10 won't focus on BCRA. I'd like to direct your
11 attention to the 527 legislation that was passed
12 initially in 2000 and was changed in 2002, and if
13 you look at that legislative history, you see three
14 things. First of all, Congress completely
15 understood. Rightly or wrongly, they had not yet
16 had the benefit of Professor Foley's analysis of
17 Buckley. They understood that these stealth PACs
18 were not political committees, and you cannot read
19 the legislative history and reach any other
20 conclusion.

21 Secondly, they saw the problem of
22 stealth PACs as a problem of disclosure and

1 disclosure only. There is not a word in the
2 legislative history about corruption. There is not
3 a word about stopping these groups, shutting them
4 down, or stopping them from using soft money. What
5 they said is we have to deal with these groups by
6 disclosure. And, thirdly, they rejected a
7 proposal, voted down a proposal to apply these new
8 reporting requirements to 501[c]s. This was not
9 something that somebody in this Commission has
10 dreamed up. They had a proposal. It was on the
11 floor. It was voted down. This Commission cannot
12 ignore that history.

13 We cite in our history, just in
14 conclusion--in our comments the Food and Drug
15 Administration case involving tobacco regulations,
16 and the Supreme Court in that case had exactly the
17 situation before as it has here. The FDA after
18 many years of asserting that it did not have
19 jurisdiction over tobacco now said we do have
20 jurisdiction, and what the Court said was it's too
21 late; Congress has acted in this area; Congress has
22 made these decisions; and Congress has decided that

1 you're not going to have jurisdiction. We are not
2 sitting in 1937 in that particular case, construing
3 the Food and Drug Administration Act. We are
4 construing it in the year 2000 based on all of the
5 efforts that Congress has had, and you're in
6 exactly the same situation.

7 We are not sitting in 1976 construing
8 the Buckley case as if it had just come down. We
9 are sitting here in the year 2004 based on three
10 specific efforts by Congress to address these
11 issues, and you are limited by what they did in
12 those pieces of legislation.

13 CHAIRMAN SMITH: Thank you, Mr. Trister.

14 We're going to need to go with seven
15 minutes per commissioner here. The Vice Chair is
16 laughing at me. Seven minutes, and the Vice Chair
17 will get to go first.

18 VICE CHAIR WEINTRAUB: I would never
19 laugh at you, sir. It's just--

20 CHAIRMAN SMITH: Laughing with me then.

21 VICE CHAIR WEINTRAUB: Laughing with
22 you. It's just hard to keep track of when I have

1 seven minutes and when I have nine minutes. I just
2 used up 30 seconds.

3 CHAIRMAN SMITH: Just go until the red
4 light is on and another three or four minutes.
5 That seems to be the rule.

6 VICE CHAIR WEINTRAUB: Thank you, Mr.
7 Chairman, and I want to thank the panel. I've been
8 really looking forward to this panel, because here
9 we finally have the tax experts in front of us.
10 We've had an awful lot of discussion about tax law,
11 and now we've finally got somebody who knows what
12 they're talking about sitting in front of us.

13 Mr. Pomeranz, I found your comments in
14 particular to extremely helpful, because I think--I
15 had the misfortune before I came to the Commission
16 to occasionally dabble in this area of the law, and
17 have--while I don't claim to be nearly the expert
18 that you or Mr. Trister is, I got a sense of just
19 how complicated it is, and I think that this
20 morning you did get a sense for the fact that there
21 are a lot of people that think this is a very easy,
22 cause Oh, okay, we just, you know, carve of the

1 [c]3s and the [c][4], get rid of the [c]
2 organizations and use the 527s, and they discuss
3 527s as if it's one thing, there is one unitary
4 entity, a 527; it's always the same thing.

5 I thought that your comments were
6 particularly useful in elaborating on the wide
7 range of activities that go on under the heading of
8 527, and if you could elaborate a little bit on
9 that here for us, I think that would be very
10 helpful.

11 MR. POMERANZ: Well, thank you, first
12 of all. I'm glad that you found it useful. I have
13 to say that 527--I sometimes have to go talk to
14 groups about tax law, which is worse than having to
15 read it, I assure you, and I sometimes describe 527
16 as sort of the--almost the kitchen junk drawer.
17 You know how you've got that drawer in your
18 kitchen?

19 VICE CHAIR WEINTRAUB: I've got several
20 like that.

21 MR. POMERANZ: Exactly. Right. Where
22 you've got all this stuff that you know you need,

1 you need to have it handy, so you've got to put it
2 somewhere. Well, that's that situation that
3 Congress found itself when it enacted Section 527.
4 It's the catchall category for entities engaged in
5 this stuff that seems political, and as Mr. Trister
6 indicated, that is not the same as political
7 committee. They are--political parties are 527s,
8 State and Federal. Hard money Federal PACs
9 registered with this Commission are political
10 committees, whether connected or independent.
11 State political committees are 527s, connected
12 organizations of [c]4s and [5]s and [6]s created to
13 avoid certain tax consequences such as the 527[f]
14 tax or the gift tax, which assuredly does not apply
15 to 527s and does apply to [c][4]s and [5]s, and I'd
16 be happy to provide a cite for that.

17 All of those things were put together
18 because the IRS needed to understand how to treat
19 them for tax purposes, to what degree were they
20 taxable. So Congress did them that favor at their
21 request and passed a law. So, yes, they are a
22 diversity of things all bundled together, very few

1 of which, frankly, fall within the scope of this
2 Commission's regulatory authority.

3 VICE CHAIR WEINTRAUB: Thank you.

4 It's been suggested that we should look
5 first to the major purpose test as outlined in
6 Buckley, and I hate to correct you, Mr. Trister,
7 but you were talking about the primary purpose.
8 That's from tax law, where Buckley says it's major
9 purpose, and maybe they mean the same thing and
10 maybe they don't. I don't think anybody really
11 knows. Some have suggested that we look first to
12 the major purpose test, although it's nowhere in
13 the statute, and the statute, it seems to me,
14 sets--it tells us what a political committee is.
15 It's an entity that spends a thousand dollars, and
16 in defining what the thousand dollars has to be
17 spent for, that's how we define what a political
18 committee is.

19 Would you agree--and I'm looking to this
20 side of the table now--that we have to start with
21 statutory definition and then secondarily go to the
22 major purpose as a limiting construction, not as a

1 broadening construction on the statutory language?

2 MR. POMERANZ: Yeah. I have to say I've
3 read with a great deal of interest Professors Foley
4 and Tobin's arguments on this, and I think they're
5 very interesting, but the fact of the matter, it
6 seems to me like it's a circular argument.
7 Assuming that you can take these slender bits of
8 language from Buckley and from MCFL and turn them
9 into some sort of political test, major purpose?
10 You know, major purpose in itself is going to have
11 to be defined, and if the Supreme Court, as it has
12 said in Buckley and reiterated in McConnell says
13 that there is this scope of protected speech, then
14 attempting to define major purpose without
15 reference to the current understanding of express
16 advocacy, that necessary construction the Supreme
17 Court found, seems to me to be just a mechanism to
18 shove organizations that wouldn't ordinarily be
19 regulated as political committees into that
20 category. So the circularity disturbs me.

21 VICE CHAIR WEINTRAUB: Mr. Trister, do
22 you want to add anything to that?

1 MR. TRISTER: Well, another problem is
2 it seems to be a suggestion that the word
3 "expenditure" means one thing for the primary
4 purpose test and means something entirely different
5 in the statute when it says a thousand dollars
6 worth of expenditures. Again, that's not how
7 Congress tends to legislate. It tends not to use
8 not only in the same statute, but here we're
9 talking about the same definition. It's using the
10 same word different ways, and I don't see how you
11 can find that in what Congress intended, and I
12 think there's a serious problem.

13 VICE CHAIR WEINTRAUB: So you too
14 would say that if we were going to go with per se
15 test, that all 527s are per se political
16 committees, that it would not only be without
17 statutory basis, but without constitutional basis?

18 MR. TRISTER: Exactly.

19 VICE CHAIR WEINTRAUB: And I can see
20 that I've gone to yellow. This is really more of a
21 comment than a statement: Professor Foley, you say
22 we could implement your ideas and put them into

1 effect tomorrow, basically, and nobody would be
2 surprised. I read--I don't know if you read, but I
3 read the comments of the other 28 or 27 witnesses
4 who are going to be today and tomorrow. There's
5 not a single one of them, including, I have to say,
6 your coauthor, who agrees with you in every respect
7 about what the state of the law is today or what it
8 should be. Given that you're the only one that
9 seems to have this correct, as you term it,
10 interpretation of Buckley, how could the regulated
11 community not be surprised if we were going to put
12 that into effect immediately?

13 MR. FOLEY: A couple of points in
14 response: I think in many respects, my analysis of
15 Buckley--I think this is a very straightforward
16 reading of Buckley, which--and it is based on the
17 statutory language of for the purpose of
18 influencing. What Buckley does is it says we've
19 got the statutory language, which is extremely
20 broad from the original FECA, that simply says for
21 the purpose of influencing. Now we have to deal
22 with that and narrow it, and we're going to narrow

1 it in two different ways for two different
2 purposes. First, we're going to narrow it in so
3 far as that for the purpose of influencing effects
4 of the definition of political committee. We're
5 going to narrow it by putting on the gloss of the
6 major purpose test.

7 It's not in the--the word "major
8 purpose" obviously is not in the language of the
9 statute, but it's in Buckley, the Supreme Court
10 opinion which is authoritative, and it says
11 that--so we're constraining what we mean by for the
12 purpose of influencing with respect to those
13 organizations that, as was said this morning, are
14 in the business of election campaigns.

15 VICE CHAIR WEINTRAUB: I'm sorry. I
16 don't mean to interrupt you, but my red light is
17 on. I understand that that is your theory of
18 Buckley. Is that your understanding of what the
19 understanding of the regulated community is today?

20 MR. FOLEY: As was--the phrase that came
21 up this morning was constitutional fog, and I think
22 that that's a--I use the term "cloud" in my written

1 comments, and whether you call it cloud or fog, I
2 think it's the same idea. When I used the term
3 "surprise" earlier this afternoon, I meant on a
4 case-by-case basis in terms of a group being
5 surprised if the--that it is regulated. Now, the
6 question--

7 VICE CHAIR WEINTRAUB: Do you think the
8 groups that are out there that haven't filed as
9 political committees really think they are
10 political committees; they just forgot to file the
11 form?

12 MR. FOLEY: No. I think a lot of the
13 comments that have been received with the hundreds
14 of thousands of comments obviously concern this
15 incredibly broad hundred-page notice that went out
16 that involves not the major purpose test as it
17 comes from Buckley, but instead rewriting the
18 definition of expenditure for organizations that
19 aren't within the major purpose test or,
20 alternatively, this \$50,000 approach that is not a
21 percentage approach. So I can understand why all
22 these organizations are up in arms.

1 VICE CHAIR WEINTRAUB: But you think
2 everybody that will fit into your definition
3 already knows they're a political committee and
4 presumable has already filed with us therefore?

5 MR. FOLEY: Well, I do think there are
6 organizations they attempt to evade FECA. That's
7 been historically true since FECA was adopted and
8 one of the reasons why McConnell said that FECA
9 needs to be enforced, because groups are going to
10 try to play outside the rules.

11 VICE CHAIR WEINTRAUB: Okay.

12 CHAIRMAN SMITH: Thank you, Madam Vice
13 Chair.

14 I'm next in the order of the
15 questioning. So set the clock for 27 minutes.

16 COMMISSIONER McDONALD: Again?

17 CHAIRMAN SMITH: Professor Tobin, you
18 mentioned that it has taken the IRS up to seven
19 years to revoke a tax-exempt status. I want to ask
20 you a couple of basic questions on tax law. My
21 understanding is a 527, if you want to be a 527,
22 you just basically file the form and you're a 527.

1 MR. TOBIN: You file a form, but you
2 have to make an assertion about your exempt
3 function activity.

4 CHAIRMAN SMITH: But as soon as you do
5 that, you're in?

6 MR. TOBIN: That's generally the case.

7 CHAIRMAN SMITH: Now, the 501[c],
8 doesn't it work that you actually have to get--I
9 mean, you can file, but eventually you get a letter
10 or something granting you status?

11 MR. TOBIN: That's right.

12 CHAIRMAN SMITH: How long can that take?

13 MR. TOBIN: I really don't know. I
14 thankfully teach it and don't have to file for
15 501[c][c3] status very often, but I don't know how
16 fast they turn those out.

17 CHAIRMAN SMITH: Mr. Trister thinks he
18 does.

19 MR. TRISTER: I have to do this for a
20 living. First of all, it's only 501[c][3]s that
21 actually have to apply to the IRS. There's been
22 some dispute within the Service, but it's now

1 pretty well settled that 501[c][4]s do not have to
2 apply and 501[c][5]s and so on. In terms of
3 501[c][3]s, what I'm telling my new clients is you
4 have to expect about three months if it goes
5 through in a routine way.

6 CHAIRMAN SMITH: Three months, okay.
7 The reason I was asking, I was thinking this
8 morning as Mr. Kirk was speaking from the Black
9 Caucus Education Leadership Institute. It sounded
10 to me like their organization had not yet received
11 their approval from the IRS. I was thinking again
12 about the point you were making, Professor Tobin,
13 as to what would we do if we were to grant a
14 blanket exemption for 501[c] organizations or just
15 501[c][3]. When does that kick in? When you get
16 your letter? When you organize? When you set up?
17 It strikes me as a problem similar, although
18 apparently not nearly so severe, as the one you
19 raised about what if they violate their status and
20 they're having it revoked. Perhaps there's no more
21 need to comment on that than that.

22 Professor Foley, I also am concerned

1 about the--first, I think the simplicity in the
2 approach you've taken in saying the major purpose
3 test applies to everybody, you know, whatever your
4 status, is the one that to me makes sense,
5 particularly given, again, the constitutional
6 justification for it all, corruption or the
7 appearance of corruption. I don't see any less
8 corruption from a 501[c] doing something. It
9 strikes me the only argument one can make is, well,
10 501[c]s need the added protection of express
11 advocacy. It's funny how many reformers think that
12 is a meaningful standard that would be very helpful
13 to an organization in knowing whether or not they
14 are within the system and they need added
15 protection.

16 But I don't know why the standard is
17 unconstitutionally--why is it not
18 unconstitutionally vague for 527s? This is to say
19 suppose that you're organizing to oppose judicial
20 nominees or suppose that you're organizing to
21 engage in a state activity or any of the number of
22 other things that are outlined in Mr. Pomeranz's

1 comments, and you don't want to trip that Federal
2 wire. How do you know what to do? You seem to
3 say, well, since you're a political committee, the
4 promote, support, attack, oppose frame work is not
5 overly vague, but that's exactly what they want to
6 know, are we a political committee yet? How do we
7 get around that circularity?

8 MR. FOLEY: Well, I think the virtue of
9 the 50 percent rule, at least as to that component
10 of the test, it's mathematical and helps define a
11 bright line.

12 CHAIRMAN SMITH: But how do they know if
13 they're doing that or not?

14 MR. FOLEY: So then the question, as I
15 understand it, is that what sort of activities do
16 you look at to count whether you've got 50 percent
17 of them, and that is an important question, and I
18 do think that both Buckley and McConnell tell us
19 that the constitutional standard to address here is
20 one of vagueness and one of notice; but the point,
21 the key point, is that vagueness and notice with
22 respect to the totality of a group's activities is

1 different than vagueness and notice with respect to
2 any single instance of activity.

3 So the reason why looking at promote,
4 support, attack, and oppose is appropriate with
5 respect to the totality of a group's activities is
6 for the reasons the Court suggested in McConnell,
7 that that is enough of a standard with respect to a
8 group that is routinely involved in political
9 activities. So if a group, again, spends more than
10 50 percent of its time or is getting close to that
11 line on communications, which arguably could be
12 labeled as attack messages, that group is on
13 notice, and there may be a question as to whether
14 any particular ad that it spent money for is an
15 attack ad, and because there is a question with
16 respect to one ad, that one ad could not get
17 regulated under the proposed standard. It would
18 only get regulated under the express advocacy
19 standard as a single ad, but when there's lots of
20 ads to look at from a particular group, you don't
21 have to worry about the marginal case as to any one
22 ad, and you can say, well, that group is spending

1 an awful lot of money and a high percentage of its
2 own money on these sorts of ads, and that's enough
3 notice under the Constitution.

4 CHAIRMAN SMITH: I have a question I'm
5 hoping to get to, but I'll let Mr. Trister and Mr.
6 Pomeranz--

7 MR. TRISTER: I just want to make one
8 brief point about the promote, attack--support,
9 attack, oppose standard. When this Commission was
10 writing its regs on coordination after BCRA, it
11 considered whether or not to make part of the
12 content standard, the so-called content part of
13 that regulation be promote, support, attack, or
14 oppose, and it rejected that because it did not
15 provide a bright line. It did not give people
16 enough notice about what kind of communications
17 would be subject to the coordination test. I
18 don't see how you can reach that result in the
19 coordination context, which was also beyond the
20 political committee context, and reach a different
21 result here today.

22 CHAIRMAN SMITH: Let me squeeze in one

1 more question for Professor Foley. You say valid
2 purpose. That's easy if they come register with
3 us. What if they don't come register with us? How
4 do we determine valid purpose? When? Statements
5 by whom? What if they're disavowed? What if they
6 say one of our major purposes is to defeat George
7 Bush, but they offer others? How would you have us
8 sort through those issues, in 20 seconds?

9 MR. FOLEY: You may be surprised, but it
10 would be something like an express declaration
11 standard, not express advocacy, but I do think
12 clarity is important under the avowed purpose
13 prong. I don't think we should be caught by
14 surprise and capture, oh, you made some ambiguous
15 statement and maybe that's your real purpose. I
16 think you need--Buckley uses the phrase
17 "unambiguous campaign activity", and that notion is
18 important here, both with respect to the avowed
19 purpose prong and with respect to the 50 percent
20 rule in terms of looking at the totality.

21 This Commission should not impose FECA
22 regulations on any group unless the Commission is

1 confident that that group is unambiguously a
2 political committee. When in doubt, leave it out,
3 don't regulate, but there are--it's important,
4 also, in order to the fulfill the purposes of
5 FECA--that's the language from Buckley--to fulfill
6 the purposes of this Act to regulate where there is
7 no doubt. So when you have a situation that has no
8 ambiguity and you have a group that is operating as
9 a political committee, the Commission needs to
10 regulate, and the test for whether you have
11 ambiguity or not with respect to a group is
12 different than whether you have ambiguity or not
13 with respect to a single ad, and it's incumbent
14 upon this Commission to enforce FECA, that it has
15 regulations, that has enforcement proceedings, and
16 that reach those groups that are unambiguously
17 campaign oriented in nature.

18 CHAIRMAN SMITH: Thank you. I'll just
19 say that I've found since I've been here it seems
20 like everything is ambiguous. Also, I just to say,
21 since I don't have time to let Mr. Pomeranz talk,
22 anybody that's trying to get a handle on what

1 exactly is 527, is kind of puzzled about that,
2 really should read the comments that he has
3 submitted. It's a wonderfully clear exposition of
4 how they fit into the overall tax frame work.

5 Next in our lineup is Commissioner
6 McDonald.

7 COMMISSIONER McDONALD: Mr. Chairman,
8 thank you.

9 Let me welcome Professor Foley and
10 Professor Tobin, John, and Michael. We appreciate
11 you all being here. I too am from OSU. That's
12 Oklahoma State University. I'm sure you knew that,
13 of course. It is a tough area, as I think all of
14 concede right up front, and as I've indicated to
15 other panelists, I'd kind of like to try to play
16 the devil's advocate with as many of you as I have
17 time.

18 Michael, if I could ask you, because I
19 thought you made a very important point in laying
20 out what 527s are doing when they are filing for
21 that status, and you're the first witness to really
22 kind of us get us to focus on that, along with

1 John's dissertation on it as well. Do you envision
2 a circumstance where someone can be a 527, but by
3 the very nature of their own activity, they might,
4 in fact, evolve into a political committee, or is
5 it by the very nature of the filing itself they
6 simply could not be taking on a political committee
7 status even inadvertently?

8 MR. TRISTER: No. There are 527s that
9 are political committees. All of your
10 federally-registered political committees are 527s
11 under the tax code .

12 COMMISSIONER McDONALD: You're right.

13 MR. TRISTER: So they certainly could
14 and they can certainly evolve into one if they were
15 not--if they were a soft money entity and they
16 started to contributions or coordinated
17 expenditures or independent expenditures. They
18 become a political committee.

19 COMMISSIONER McDONALD: I'm asking it
20 wrong. I apologize. Let's proceed. Let's take
21 the George Soros example, if we might, because that
22 gets lots--it's had a rather robust following. If

1 a group specifies that their goal to defeat the
2 President of United States and they want to spend
3 \$18 million, how would you assess that yourself?

4 MR. TRISTER: If you're asking me
5 whether this so-called--this notion of avowed
6 declaration should be enough, the first point, it
7 has not been enough under this Commission's
8 practice for 20-some-odd years. Secondly, it is
9 not the position of the District Court here, the
10 only court that really has considered this
11 seriously in the GOPAC case; but, most importantly,
12 you're creating a monster, and you would have
13 to--how on earth are we going to know from avowed
14 statements? I was thinking about one of my clients
15 goes out and makes a statement, says our purpose is
16 to defeat George Bush, that's our major purpose,
17 and I call him up and I say you can't say that. He
18 says, Okay, I won't say it anymore. Now, is that
19 his avowed purpose? Is that his avowed purpose?
20 How are we going to know? How are we going to know
21 whether he changed his mind?

22 But that's what you're beginning to look

1 for when you start that. It sounded to me from
2 reading Professor Foley's comments is he's looking
3 for a new magic words test. We're going to have a
4 magic words test in which if you say our avowed
5 purpose, our avowed major purpose, is to defeat
6 George Bush, then you're a political committee, but
7 if you say our avowed major purpose is to defeat
8 George Bush within the limits of the Federal
9 election laws and the federal tax laws, then what's
10 the story? Have we passed the magic words test?
11 Have we said the wrongs thing at that point? How
12 are we going to know?

13 What about a group that puts out a
14 statement that says if you would like to defeat
15 Senator X, give us lots of money? Is that saying
16 that their avowed purpose is to defeat Federal
17 candidates. That doesn't have any of the magic
18 words. Are we going to have another magic words
19 test? I think you're heading in a direction which
20 would cause--we'll all spend years digging
21 ourselves out of that one.

22 COMMISSIONER McDONALD: Have you looked

1 at the recent court case, the one that was resolved
2 on March 30th, the Melnick case?

3 MR. TRISTER: Yes, I have.

4 COMMISSIONER McDONALD: Could you make
5 an assessment of that in this context?

6 MR. TRISTER: Well, I would agree with
7 what Jan Baran said this morning. I think the only
8 way to read that case is that it was brought--it
9 was defended pro se.

10 COMMISSIONER McDONALD: But actually she
11 had a number of lawyers, by the way, throughout the
12 process. So let's be sure we're right about that.

13 MR. TRISTER: Okay. She was pro se in
14 the court.

15 COMMISSIONER McDONALD: That's right.

16 MR. TRISTER: But more importantly, I
17 think that she acknowledged and the court
18 acknowledged when it applied the primary purpose
19 test that she had engaged in expenditures,
20 expenditures as defined as independent expenditures
21 as involving express advocacy. There's a footnote
22 in that opinion that lays out document after

1 document in which she had done that. So I don't
2 read that opinion in any way either contrary to
3 GOPAC or contrary to what I'm saying here today.

4 COMMISSIONER McDONALD: The reason I
5 asked is I think I indicated earlier this was a
6 document that the RNC had sent us in reference to
7 that, and that was, not surprisingly, their
8 interpretation of that.

9 If I could, I'd like to ask Professor
10 Foley: I'm not quite following, and I want to
11 follow it because I think it's fairly important.
12 Are you saying that time is a deciding factor or
13 money is the deciding factor in relationship to a
14 major purpose test, or could it be combination
15 thereof? It just wasn't very clear to me.

16 MR. FOLEY: Money. I think money is
17 the--as to the 50 percent rule, I think it should
18 be measured in terms of expenditures or
19 expenditures understood in the political committee
20 context, which goes back to the statutory
21 definition of for the purpose of influencing.

22 COMMISSIONER McDONALD: Expenditures of

1 what? Just so I'll be clear that I understand. If
2 a group operates in an overall budget of a hundred
3 millions dollars or more, what are we talking
4 about? I just want to be sure I understand the
5 frame work, I guess.

6 MR. FOLEY: My understanding would be
7 any disbursement by the group that would count as
8 an expenditure without regard to express advocacy,
9 because it's under the major purpose test. So it
10 could be for political broadcasts. It could be for
11 get-out-the-vote activities, but it has to be
12 partisan in nature. Here, I do any think, again,
13 it would be inappropriate to import the Federal
14 election activity definition of BCRA. So
15 mechanically, without regard to the
16 context--because this is not a BCRA point. This is
17 the point about implementing FECA and the Supreme
18 Court interpretation, and it's obviously true that
19 the Supreme Court when using the major purpose test
20 both Buckley and in MCFL did not elaborate on that
21 test. That's absolutely fair to say, but that
22 doesn't mean, as it seems to be suggested, that the

1 Commission can ignore it. That now is part of the
2 statute by virtue of the Supreme Court gloss.

3 So I think the Commission has to, you
4 know, do its best to reasonably follow the
5 instructions of the U.S. Supreme Court. So I would
6 say it would be to look at the totality of a
7 group's disbursements in any given year, and if 50
8 percent of them are election oriented in a broader
9 sense than just express advocacy, but looking at
10 the totality of a group's expenditures, you can say
11 over 50 percent are unambiguously campaign related,
12 that would count under the test.

13 COMMISSIONER McDONALD: I appreciate it.
14 Just real quickly, I gather you don't agree with
15 your colleague about the notice issue in terms of
16 making something effective immediately.

17 MR. FOLEY: Correct. That is a point
18 that we differ on.

19 COMMISSIONER McDONALD: Couldn't you
20 have resolved that before you got here?

21 MR. FOLEY: You know, academic freedom.

22 COMMISSIONER McDONALD: Thank you for

1 coming.

2 CHAIRMAN SMITH: Thank you, Commissioner
3 McDonald.

4 Commissioner Toner.

5 COMMISSIONER TONER: Thank you, Mr.
6 Chairman. It's great to have so many terrific tax
7 experts here with us. We're certainly learning
8 lot. I'm very glad we've perhaps found an area of
9 law, Mr. Chairman, more complex and difficult to
10 discern than the Federal election laws. I know it
11 was a matter of time. I'm sure it's very easy for
12 you to discern it, but thank you for being with us.

13 I want to follow up on a couple of
14 points that some of my colleagues developed,
15 starting with you, Mr. Trister. I take it your
16 view is that group's avowed purpose public
17 declaration should be irrelevant to our analysis of
18 political community status, and my sense of your
19 testimony is that really we are limited to express
20 advocacy in terms of what counts as an expenditure
21 for the statutory test. What, if anything, should
22 we make of the McConnell court's conclusion that

1 the express advocacy test is functionally
2 meaningless? What should we take from that?

3 MR. TRISTER: Well, what you should take
4 from it is that Congress when it tried to deal with
5 the fact that the test is functionally meaningless,
6 it did it in a very narrow way. It did it by
7 adopting electioneering communications. Congress
8 adopted that. It did not--and it said at the time
9 that unincorporated entities may spend unlimited
10 amounts of money on electioneering communications,
11 soft money. Now, they made that decision. You are
12 now--if you turn a group that spends all its money
13 on electioneering communications or, worse, on
14 promote, support, attack, or oppose communications,
15 you're saying that Congress when it said you could
16 spend all this soft money on those kinds of
17 communications, you're going to say, no, you can't
18 because we don't like it, because we found there's
19 a problem that Congress didn't consider.

20 But Congress did consider it. Congress
21 had before it the issue, and Congress legislated in
22 it, and Congress dealt with the problem that you're

1 addressing. Maybe it is meaningless, but it dealt
2 with it in a very limited and discrete and targeted
3 way, and this Commission can't say, well, we don't
4 like--Congress didn't go far enough, Congress
5 should have done some other things. It's for
6 Congress to deal, not this Commission.

7 MR. TONER: Do you agree that the
8 express advocacy test functionally meaningless?

9 MR. TRISTER: I think it's--it's not
10 functionally meaningless. I try to defend it,
11 because it reflects First Amendment values much
12 better than any other standard.

13 MR. TRISTER: Do you disagree with the
14 McConnell ruling?

15 MR. TRISTER: I do, yes.

16 COMMISSIONER TONER: Mr. Pomeranz, I
17 thought your comments were very helpful. I'm
18 interested in your view of the gift tax area. I'm
19 not a multimillionaire, no I've never really had to
20 grapple with it, but whether or not I might face a
21 gift tax--

22 VICE CHAIR WEINTRAUB: Maybe some day.

1 MR. TONER. Maybe some day.

2 CHAIRMAN SMITH: You're in the wrong
3 line of work.

4 COMMISSIONER TONER: My wife is
5 concerned it's going to be quite a long time from
6 now.

7 MR. POMERANZ: The statute that creates
8 the gift tax imposes the gift tax on any single
9 year's contributions, gratuitous gifts of, at this
10 point 11,000. It's an indexed number.

11 COMMISSIONER TONER: It still might be
12 some years away for me.

13 MR. POMERANZ: Yeah. I look forward to
14 that day myself. The statute says that there are
15 certain gifts to certain organizations that are
16 exempt, but you only get that exemption if it's
17 statutorily provided. It's provided for a gift to
18 a 501[c]. It's provided in statute for a gift to a
19 527, and that's it.

20 COMMISSIONER TONER: Is it not provided
21 for a 501[c][4]?

22 MR. POMERANZ: Exactly. Not a [c][4],

1 not a [c][5], not a [c][6], none of those.

2 COMMISSIONER TONER: We heard some
3 suggestions this morning that if the Commission
4 took action with respect with 527s, we would have
5 sort of an overnight migration to 501[c][4]s, that,
6 you know, a lot of the organizations that are
7 operating as 527s would become 501[c][4]s. In your
8 professional judgment, do you think that's an
9 accurate assessment in light of gift tax issues?

10 MR. POMERANZ: I don't know whether it's
11 going to go to [c][4]s or whether wealthy
12 individuals are going to make independent
13 expenditures or whether people are going to create
14 unincorporated for profit corporations or create
15 MCFL organizations or more traditional [c][4]s and
16 [5]s. I mean, I could go on. I get paid to go on.

17 COMMISSIONER TONER: You clearly are a
18 lawyer. I mean that as a compliment.

19 MR. POMERANZ: But I do think that while
20 there may not be a migration to [c][4]s, people who
21 wish to spend their money to accomplish activities,
22 whether it's as benign as encouraging civic

1 participation and get-out-the-vote activities or
2 perhaps their dislike of a particular candidate or
3 support of another, are going to find ways to do
4 it.

COMMISSIONER TONER: Again, in your
5 practical and professional judgment, do you think
6 there are practical paper barriers to move from a
7 527 to a [c][4]? We've talked a little about the
8 tax issue. Would there be other practical barriers?

MR. POMERANZ: Indeed. I think the
11 creation of 527 organizations engaged in this sort
12 of non-Commission regulable activity was driven by
13 some of those considerations, I think not only the
14 gift tax, but also the primary purpose requirements
15 or issues until Congress acted on this in 2000
16 related to disclosure. I think there are all sorts
17 of tax law strategic issues that drive people to
18 one form or another. The point is that there is a
19 form available to them other than a 527. Which
20 form they choose depends on their circumstances.

COMMISSIONER TONER: Mr. Foley, my time
22 is elapsing, but I just want to follow up with you.

1 Is it fundamentally your position that, as has been
2 outlined here in terms of whether an organization
3 is a political committee, we've got two separate
4 tests that have to be satisfied. First, it has to
5 spend more than a thousand dollars in contributions
6 or expenditures, and again there's a key issue
7 about what constitutes an expenditure, and then
8 secondly, for organizations that are not controlled
9 by candidates, that the organization's major
10 purpose must be electoral activities. Is that
11 a fair assessment of how you see the legal test?

12 MR. FOLEY: Correct.

13 COMMISSIONER TONER: And focussing on
14 the second part of that test important, because I
15 think this is important, is it your view
16 that--we've talked a lot about--we've heard from
17 the witnesses about what 527s organizations are or
18 not, but is it your view that 527s, because of the
19 way they're constituted, do necessarily meet the
20 major purpose test?

21 MR. FOLEY: No.

22 COMMISSIONER TONER: Why not?

1 MR. FOLEY: Because as has been
2 suggested, there are lots of 527s that do not have
3 the major purpose of influencing Federal elections
4 as opposed to state elections or judicial
5 nominations. So I do believe that this Commission
6 needs to implement a major purpose test without
7 regard to tax status.

8 COMMISSIONER TONER: This is important.
9 Do you think, then, that the major purpose test in
10 Buckley and MCFL is meant to distinguish between
11 Federal electoral activity and non-electoral
12 activity, or do you think it's meant to distinguish
13 between electoral activity and non-electoral
14 activity?

15 MR. FOLEY: I think the court primarily
16 had the latter in mind, but I think under the
17 statute and the term of the statute that it was
18 providing interpretative gloss for both are
19 essential, so that the consequence of adopting a
20 major purpose test in light of the statute that
21 that's a gloss of means the only thing that's
22 inside the statute is major purpose of influencing

1 Federal elections, and outside the statute are
2 organizations that have a major purpose of
3 influencing state elections or organization that
4 have the major purpose of engaging in
5 issue-oriented activities as opposed to electoral
6 activities of any kind.

7 COMMISSIONER TONER: Thank you, Mr.
8 Chairman.

9 CHAIRMAN SMITH: Thank you, Commission
10 Toner.

11 Next is Commissioner Thomas.

12 COMMISSIONER THOMAS: Thank you, Mr.
13 Chairman. Thank you all for coming.

14 Again, let me start out by sort of
15 regurgitating a little background, and then we'll
16 get your reaction. It's interesting, because I
17 think if we're looking legally whether or not we
18 should be groping towards some of sort major
19 purpose test and how that might be construed, it's
20 interesting, I think, to look at one of the other
21 provisions in the statute to get some sense that
22 Congress probably had this concept in mind from day

1 one. If you look at the exemption in the statute
2 for the definition of expenditure or communications
3 for--internal communications to a membership
4 organization, it talks about how those kinds of
5 communications are an exemption from the definition
6 of expenditure if such member organization or
7 corporation is not organized primarily for the
8 purpose of influencing the nomination or election
9 of any individual to Federal office. So what you
10 have right there strikes me as another indication
11 that this construction we're working toward in this
12 rulemaking might have some congressional backing,
13 because that concept has already been built into
14 our statute in other areas, and it's tinkering with
15 the definition of what is an expenditure, I would
16 note.

17 The other point I was going to raise is
18 that, you know, even if the Commission is going to
19 in some sense adopt an express advocacy test for
20 purposes of figuring out what kinds of expenditures
21 by groups should qualify as an expenditure that
22 would perhaps trigger the political committee

1 status and trigger the major purpose status, we're
2 going to have to figure out how do we apply an
3 express advocacy test, and I would curious--Mr.
4 Trister, Michael, you've been doing this for many
5 years. I vaguely remember at one point you were
6 actually interested in becoming a commissioner. So
7 you thought better of that or someone thought
8 better of that.

9 MR. TRISTER: No. I don't think so.

10 COMMISSIONER THOMAS: You're doing much
11 better on the outside. But help me. How would you
12 have dealt with that hypothetical--actually, it
13 wasn't a hypothetical, the case that I referred to
14 where it was an ad basically attacking Tom Cain,
15 Jr., and it actually was comparing him unfavorably
16 against his opponent. Do you remember my reading
17 that at an earlier session?

18 MR. TRISTER: Right.

19 COMMISSIONER THOMAS: And the Commission
20 split three to three on whether that was express
21 advocacy.

22 MR. TRISTER: Right.

1 COMMISSIONER THOMAS: You said you don't
2 like the magic words concept for purpose of avowed
3 purpose concept. Do you like magic words in the
4 context I'm raising?

5 MR. TRISTER: I think it's the best test
6 that anybody has come up with to protect First
7 Amendment values.

8 COMMISSIONER THOMAS: So you're magic
9 words all the way?

10 MR. TRISTER: Right. Yeah. Now,
11 Congress saw the problem that you're raising, and
12 Congress dealt with it. Congress dealt with it by
13 creating a new category called electioneering
14 communications, but it also did not say that you
15 are a political committee when you electioneering
16 communications, and that's what this proposal does.

17 COMMISSIONER THOMAS: I think you're
18 right. I don't think anybody at the table here is
19 probably going to fit electioneering communications
20 as a broad concept into the definition of
21 expenditure. That was put out for comment. I know
22 it's part of the proposal, but you needn't get

1 exercised about that, I don't think.

2 CHAIRMAN SMITH: Let's speak for
3 everybody.

4 MR. TRISTER: Can we move the question?

5 COMMISSIONER THOMAS: So another point
6 that was raised, and that was there's maybe some
7 circularity to the argument that Professor Foley
8 has brought to us, but I'm going to offer him the
9 chance to make the pitch that circularity goes the
10 other way. I mean, if an organization can never
11 become a political committee unless its major
12 purpose becomes express advocacy communications, we
13 could tell all the committees that are--a lot of
14 the committees that are reporting with us, party
15 committees, a lot of the national party committees,
16 perhaps state party committees, you don't have to
17 register with us anymore because you can't--there's
18 no indication that the major purpose is express
19 advocacy. Would you like to follow up on that?

20 MR. FOLEY: If that's directed to me,
21 candidate committees as well. I'm looking, again,
22 directly at the language from Buckley, and, I mean,

1 this Commission has obviously read, reread Buckley
2 probably many more times than I have, but the text
3 of what the Supreme Court was saying it starts
4 out--again, it says we've got the statute that says
5 for the purpose of influencing. That's going to
6 create a problem with respect to issue groups. So
7 a couple lower courts have adopted a narrowing
8 construction, which we like and we're going to
9 hereby adopt, and that's good because that fulfills
10 the purposes of the Act. That gets at what the Act
11 needs to get to, and it's got to get to those
12 groups, but doesn't have to get to any other
13 groups.

14 Then it says expenditures of candidate
15 and political committees so construed can be
16 assumed to fall within the core area sought to be
17 addressed by Congress. So there are, by
18 definition, campaign related. Then the very next
19 sentence--it's a new paragraph--says but when the
20 maker of the expenditure is not within these
21 categories, not an individual other than the
22 candidate or a group other than a political

1 committee, then you've got to have the express
2 advocacy test. So you only have the express
3 advocacy test as to the disbursements of a group
4 that's not a candidate date or a committee.

5 So I think that progression gets you out
6 of the circularity problem by saying that a
7 candidate is by definition campaign oriented. So
8 you don't have to worry about whether its
9 expenditures meet the express advocacy test. A
10 political party by definition is campaign oriented.
11 You don't have to worry about whether its
12 expenditures are express advocacy in each and every
13 instance. A political committee under the statute,
14 as long as its limited to those organizations that
15 have the requisite major purpose, is by definition
16 campaign oriented. Therefore, next paragraph, you
17 don't have to worry about those groups as to each
18 and every one of their expenditures.

19 So I hope that's responsive to the
20 question or the comment, but Buckley gives us the
21 road map on how to proceed, and that's a way to
22 avoid the circularity problem.

1 COMMISSIONER THOMAS: Just, also, I'm
2 not sure, Michael, if you want to finish up on all,
3 but also I'd like some comment on whether or not,
4 indeed, the Commission for political committee
5 analysis has, in fact, as an agency adopted an
6 express advocacy test. I look at our advisory
7 opinions where we've tried to deal with whether
8 something is or is not a political committee. I
9 see several four vote advisory opinions where
10 express advocacy does not seem to be the standard.
11 I do see some 3-3 vote situations, maybe in
12 compliance cases, where we seem to split over
13 whether you would need to have--comply with express
14 advocacy.

15 I'd like some discussion about that,
16 where the Commission's law is.

17 MR. FOLEY: That's my understanding as
18 well, that to my knowledge there's never been a
19 rule or rulemaking proceeding or an official
20 promulgation of this Commission that says express
21 advocacy test is embedded within the definition of
22 political committee. As you said, there have been

1 a lot of AOs over the years, and a lot of activity
2 and some 3-3 votes and some misunderstanding,
3 unfortunately, premised on the notion that express
4 advocacy is this sort of inexorable constitutional
5 command that kind of governs everything, but that
6 obviously hasn't been removed by McConnell. So
7 that takes us back into the question of, you know,
8 what does Buckley mean, what does the statute as
9 interpreted by Buckley mean, and I don't believe
10 the Commission has ever taken the position that the
11 statutory interpretation analysis engaged in in
12 Buckley with respect to major purpose and political
13 committee is embedded in the express advocacy, and
14 if the Commission had done that, which I don't
15 think it does, I would say that the Commission
16 wasn't entitled to do that because the Commission
17 is not entitled to disregard the Buckley court's
18 authoritative interpretation of the statute.

19 MR. POMERANZ: You know, I have to step
20 in for a second. A lot of the people supporting
21 this proposed regulation keeping setting up this
22 straw man, that somehow McConnell has overturned

1 this longstanding provision in Buckley that express
2 advocacy was a constitutional requirement, and, of
3 course, Buckley never said that. Buckley said that
4 there is a constitutional requirement to avoid a
5 vague and overbroad law, and they offered the gloss
6 of express advocacy to do that. Congress, acting
7 within its authority, attempted to carve out more
8 activities that were regulable within the scope of
9 the first amendment, and as Mr. Trister has
10 indicated, that led to the electioneering
11 communications.

12 Further, this Commission has regulated
13 coordinated expenditures in reliance on Buckley.
14 Those are all activities that pass muster to not
15 overstep the bounds of First Amendment speech, and
16 to sort of say that somehow we have had this vast
17 sea change is not the case, and I wish that Mr.
18 Holman had answered the question that was asked of
19 him this morning, because while it may be that
20 there are commissioners on this commission who
21 think that express advocacy perhaps isn't the
22 standard, everyone else seems to, and I would add

1 and include within that the very reformers who are
2 now seeking this rule who have changed their tune.

3 So maybe express advocacy isn't the
4 rule, but organizations have been acting in
5 reliance on that not rule for 20 years, as
6 Commissioner Toner indicated in his opening
7 statement.

8 MR. TRISTER: I would add to that that
9 whether there's been confusion or lack of
10 uniformity within the Commission's decisions, all
11 that matters is what did Congress think when it
12 passed the 527 legislation in 2000, when it had
13 BCRA in front of it and when it re-passed the 527
14 legislation in 2002, and there is no question about
15 it. It thought that it was an express advocacy
16 test. There is no question about it. Read the
17 Joint Committee on Taxation's report to both Houses
18 of Congress. Read the statements on the floor.
19 They weren't sitting around say, Oh, the
20 constitutional fog and therefore we have to do
21 something. They were sitting around saying we have
22 a problem; there is a loophole. The loophole is

1 that these groups are not political committees
2 under the FECA.

3 The argument that's being made on the
4 other side is that they were wasting their time,
5 notwithstanding the fact that Senator Feingold came
6 in and said this is the first serious campaign
7 reform in 20 years. We are now being told they
8 didn't even have to bother.

9 CHAIRMAN SMITH: We need to move on, but
10 I'll give Professor Tobin a moment since he's been
11 so quiet on the panel.

12 MR. TOBIN: But the problem with your
13 argument is it fails to go back to the beginning
14 and to FECA. I mean, Congress may have intended
15 something in 527s. It may have intended something
16 when it passed BCRA, but it also intended something
17 when it passed FECA. It intended for FECA to be a
18 very broad regulation.

19 Now, the Supreme Court--you keep talking
20 about Congress' intent. Congress intended FECA to
21 be broad. The Supreme Court limited Congress'
22 intent. Then it came back with 527 language to try

1 to do something, and then they came back with BCRA
2 to try to do something, and then we learn, hey,
3 maybe you've been--you know, maybe you haven't
4 accepted as brought an interpretation of FECA as
5 you might be able to, and what Professor Foley and
6 I have argued is there is a part of FECA--there's a
7 part of Buckley that didn't limit FECA as much as,
8 yes, the campaign communities arguments it did.
9 Well, it's in their advantage to argue it did,
10 because it avoids regulation by your Commission.
11 Maybe they should be regulated.

12 So the point is that FECA provides a
13 basis for understanding that major purpose test
14 creates a political committee, and then we should
15 regulate them as political committees.

16 MR. TRISTER: And my point is you're
17 testifying before the wrong body. You should be
18 testifying--28 years ago, and you're ignoring
19 what's happened since then. You're pretending that
20 there was no 527 legislation. Just a little
21 tinkering, I think was the word.

22 MR. TOBIN: I certainly didn't say 527

1 was tinkering.

2 MR. TRISTER: Well, Professor Foley did,
3 actually, in his comments. He said they were
4 tinkering. They weren't tinkering. They were
5 writing the first major campaign reform legislation
6 in 20 years. They had a problem. It's the same
7 problem we are here to discuss today, and they
8 dealt with it.

9 MR. TOBIN: As best they could with
10 their understanding of the law.

11 MR. TRISTER: Right.

12 MR. TOBIN: As best they could with
13 their understanding of the law.

14 MR. TRISTER: And if you now have a
15 better understanding of the law, go to them and
16 tell them they have more authority.

17 MR. FOLEY: And none of those subsequent
18 laws were repeals of FECA. They couldn't have
19 been. Two of them were amendments to the tax code,
20 which is precisely why the reference to the tobacco
21 and FDA's situation is completely inapposite,
22 because you can't amend FECA by silence or silence

1 plus amending the tax code. There may have been
2 confusion in Congress at the time BCRA was adopted
3 or the 527 laws were adopted. I don't dispute
4 that. Some of the Senators and Representatives who
5 voted may have had a sense of, you know, maybe
6 express advocacy does limit it. Even if that's
7 true, it is not legislative repeal of FECA.

8 So I'm not ignoring, we're not ignoring,
9 the subsequent law, but they don't take off the
10 books the original law that needs interpretation.

11 CHAIRMAN SMITH: Thank you. I've kind
12 of let that go because I was just looking, and it
13 seemed like most of my colleagues were finding that
14 useful. I find it useful. The Vice Chair pointed
15 out who would have thought our tax panel would be
16 the most exciting one today. But, actually, I did
17 find that to be a very helpful exchange.

18 It does seem that there's general
19 statutory interpretation authority for the notion
20 that when Congress acts to amend the statute and
21 does not change interpretations of the court, as in
22 GOPAC, for example, that it can be viewed as a

1 ratification.

2 In any case, we move on to our last
3 commissioner here, Commissioner Mason.

4 COMMISSIONER MASON: Thank you.

5 Mr. Trister, I think you're letting
6 yourself off a little easy on the avowed purpose
7 question, but I think you would concede that the
8 phrase "defeat President Bush" is express advocacy,
9 would you not?

10 MR. TRISTER: Yes.

11 COMMISSIONER MASON: So why is it any
12 harder for us to adjudicate a particular
13 communication, which is, let's say TV ads, Defeat
14 President Bush, than it is for us to examine--let's
15 leave aside for a minute perhaps stray statement of
16 an official, and let's say a fund-raising pitch,
17 which has presumably been reviewed by the lawyer,
18 which says, Please send us money to defeat
19 President Bush, and we examined that along with
20 perhaps other similar statements of the
21 organization to determine whether or not this is
22 the organization's express purpose? Why is one any

1 harder than the other?

2 MR. TRISTER: Because when you're using
3 express advocacy, you're looking to the four
4 corners of the message and you're saying does it
5 expressly advocate one way or another. When you
6 saying what is the purpose, it's more than the
7 words. They're making statements. It's not just
8 defeat Bush, it's that our primary purpose is
9 something, and I'm saying that you're going to have
10 a devil of a time coming up with magic words that
11 express that in a way that is both useful, if you
12 think it's useful, and that people will understand
13 and will have a bright line.

14 The question is here not what is express
15 advocacy. The question here what is the, quote,
16 major purpose of an organization and can you tell
17 it from a single statement that they make about
18 what their purpose is. The issue is not what
19 express advocacy is what is your purpose.

20 COMMISSIONER MASON: Okay.

21 MR. TRISTER: It's what your purpose.

22 COMMISSIONER MASON: So what is the

1 consequence of an organization, whose major purpose
2 is undetermined, who sends out a fund-raising
3 message that says please send us money to defeat
4 President Bush?

5 MR. TRISTER: Nothing.

6 COMMISSIONER MASON: What's illegal?
7 Nothing?

8 MR. TRISTER: Nothing. Why should it
9 be? You don't know anything about how they do it.
10 What if it's a 501[c][3] organization that's
11 prohibited from doing anything but nonpartisan
12 activities.

13 COMMISSIONER MASON: You'll see where
14 I'm going. The purpose--the consequence would seem
15 to be that a direct mailing is a public
16 communication, and a public communication that
17 expressly advocates the defeat of a candidate has
18 to have a disclaimer.

19 MR. TRISTER: They may have the
20 disclaimer, but that doesn't make it its major
21 purpose.

22 COMMISSIONER MASON: But they don't, but

1 this is where I'm trying to get, and if it were not
2 coordinated with one of President Bush's opponents
3 in this example, it would be an independent
4 expenditure.

5 MR. TRISTER: And it might be illegal,
6 but it's not turning it into a political committee
7 that cannot accept soft money. That's the issue
8 here, and the fact--they may spend all their money
9 on voter registration that's nonpartisan voter
10 registration and that's how they think they're
11 going to defeat George Bush, and it's completely
12 nonpartisan. It's permitted under the Act. It's
13 permitted under your regulations, and you're saying
14 they're a political committee because they said we
15 want to defeat George Bush.

16 That may be illegal if they say it--they
17 use express advocacy terms. They may have to
18 include a disclaimer, but it doesn't make them into
19 a political committee.

20 MR. POMERANZ: Commissioner, we may have
21 saved this rulemaking. I mean, if, in fact, you're
22 saying that 441[b] or the independent expenditure

1 requirements or the disclosure requirements all
2 would apply to this very narrow definition of some
3 statement by the organization, then so be it.
4 We're done. We don't need a rule at this point.
5 You have existing enforcement power to look at
6 express advocacy communications and handle those as
7 you sit see fit, but we don't need to put the fear
8 of God into every advocacy organization from here
9 to Hawaii and run up our legal bills trying to get
10 us to look at every piece of paper as to whether it
11 might promote, support, attack or oppose.

12 COMMISSIONER MASON: Thank you. I
13 wanted to get to promote, support, attack, oppose,
14 actually with Professor Foley, because--and, first,
15 correct what I think is a misstatement, at least in
16 part, on the use of that phrase in BCRA, because,
17 for instance, BCRA says that when a state candidate
18 makes communications that promotes, supports,
19 attacks, or opposes a Federal candidate, it has to
20 be paid for with Federal funds, a communication,
21 and the presumption there is the major purpose of
22 the state candidate is to re-elect the state

1 candidate.

2 So, similarly, when political parties
3 make communications that promote, support, attack,
4 or oppose, that has certain consequences. So I
5 don't think--I thought I heard you suggesting that,
6 well, promote, support, attack, oppose was sort of
7 a general standard, but, in fact, it appears to me,
8 that BCRA does apply the promote, support, attack,
9 oppose standard to particular communications, and
10 the consequence being how those have to be paid
11 for, not what the status of the group is, because
12 it applies sometimes to state candidate committees
13 and other times to political party committees.

14 So the question I really wanted to get
15 you to try to address is what do you mean when you
16 say--what's your definition of unambiguously
17 campaign related or election oriented, which are
18 two different phrases you used to say, Well, gosh,
19 if it's unambiguously campaign related, then now
20 they're a political committee and this different
21 standard applies? How do we know unambiguously
22 campaign related?

1 MR. FOLEY: Well, as to the first part
2 of it, which is the avowed purpose part, it's does
3 seem to me that if group puts on its web page for
4 all the world to see that our primary objective
5 this year is to feed a particular Federal
6 candidate, we can take that group at its word.
7 That would be an example of something that's
8 unambiguous, and even though that particular group
9 hasn't chosen to register as a political committee
10 voluntarily as some other 527s have and said that
11 they're already committees, that group would have
12 to do so because of what it said on its web page.
13 That would count as unambiguous on the avowed
14 purpose part of--avowed declaration part of the
15 major purpose analysis.

16 COMMISSIONER MASON: What is Mr.
17 Pomeranz and Mr. Trister are advising them and
18 they're wise enough not to say that on their web
19 page?

20 MR. FOLEY: I do think that some groups
21 perhaps have not been so careful in their
22 statements. I haven't looked at the web pages of

1 particular groups. So maybe not all of them have
2 as good legal advice as we're hearing today and
3 have to accept the consequences of what they've
4 told the world already, but I don't have a view on
5 the particular--of any group that's out there.

6 As to groups that are careful not to
7 make such public declarations of their primary
8 objective, I mean, there's a list of the functional
9 equivalents of major purpose, you know, that would
10 be like no 52 of this standard, central admission,
11 overriding objective, core function, and we could
12 go on and on with that.

13 COMMISSIONER MASON: No. I really
14 want--I'm sorry. I really want to leave that aside
15 completely. Forget their statements. Look at
16 their activities. We do an audit. We see what
17 they spend money on, and we now say was this
18 unambiguously campaign related, and we have a range
19 of activities, and we put some of them on one side
20 and some on the other. What's the test to
21 determine unambiguously campaign related?

22 MR. POMERANZ: Could I actually--

1 COMMISSIONER MASON: No. I want Mr.
2 Foley to answer it. It's his idea. I want him to
3 answer it.

4 MR. FOLEY: Thank you. I think that one
5 starts with the notion that comes from
6 Buckley--excuse me--McConnell that the concept of
7 public messages that support or attack a candidate,
8 that that's not a hopelessly-based standard, that
9 adds clarity to it, sufficient clarity as long as
10 it doesn't apply to ad, but when you look at lots
11 of messages.

12 COMMISSIONER MASON: But we're looking
13 at particular ads.

14 MR. FOLEY: But there's a difference
15 between looking at one ad and saying to a group got
16 you on that one ad, whereas you look at, you know,
17 the totality of a group's activities, lots of
18 spending, and you see that again and again and
19 again and again they're attacking a candidate or
20 supporting another candidate. Now, I do think that
21 in the crucible of litigation, not in the
22 rulemaking context, but in an adjudication, whether

1 that adjudication occurred without the benefit of
2 the rule or that adjudication occurred under a
3 newly-promulgated rule. One would have to look at
4 a group's activities and as to a particular ad
5 would have to say that this ad that mentions a
6 candidate and perhaps is a negative statement of
7 the candidate, is that really an attack on the
8 candidate, and I'm not suggesting that we go back
9 to the Fergech test or anything exactly like it,
10 but I think this Commission, which is obviously
11 sensitive to First Amendment values and sensitive
12 to the need to--I mean if this Commission does
13 split 3-3 on occasion, as we've discussed, it's not
14 going to be overzealous in enforcement.

15 And so if there is in a particular
16 context some doubt as to whether or not a group has
17 really crossed that 50 percent threshold and you're
18 having a debate amongst yourselves on that group
19 and whether they've crossed that 50 percent
20 threshold, become some of the ads you're not sure
21 they really count as attack ads, you will be able
22 to sensitively apply a kind of when in doubt

1 standard, and when it doubt, you won't regulate.
2 But if there is a firm conviction based not on any
3 single thing a group does, but on all that the
4 group does, that this group is really in the
5 business of elections again and again and again,
6 they're out there promoting a candidate or opposing
7 a candidate date, then you will be firmly convinced
8 that that group is operating as a political
9 committee. It's operating with the major purpose
10 of achieving electoral outcome, and then you will
11 be entitled to, indeed have the duty, to regulate
12 that group under FECA.

13 I hope that's responsive. I think
14 that's probably--I mean, this Commission well knows
15 that there are going to be line-drawing tasks.
16 There is going to be sensitivity. There is going
17 to be no--there's not going to be a perfect rule,
18 whether adopted in rulemaking or adopted from a
19 series of communications. So I cannot tell you
20 today that any test is self-defining, not even the
21 magic words test is self-defining. It needs to be
22 implemented by human beings sensitive to the

1 totality of all that goes on in an electoral
2 context, and you will be sensitive to the First
3 Amendment. You will be sensitive to for the needs
4 for [c][4]s that are legitimate [c][4]s not to get
5 caught up in this, but you will also be sensitive
6 to the need to regulate those groups that really
7 are operating as political committees, and you
8 should not ignore those groups that are blatantly
9 engaged in that sort of activity and are pretending
10 that they are outside the scope of FECA
11 jurisdiction just because they don't do express
12 advocacy, even though everything they do or
13 virtually everything they do is designed to win
14 elections.

15 CHAIRMAN SMITH: Thank you.

16 Let's go to Counsel Larry Norton.

17 MR. NORTON: Thank you, Mr. Chairman,
18 and thank you all for coming today.

19 I guess I want to follow up on the same
20 line of questioning as Commissioner Mason and ask
21 you to tease out your theory a little bit more,
22 Professor Foley. I don't know whether you're

1 familiar with the Revenue Ruling in 2004 that the
2 IRS issued to 501[c] organizations that we cited in
3 the Notice of Proposed Rulemaking, but I was
4 looking through a number of the situations they
5 posit to try to assist 501[c] organizations in
6 determining whether they've trespassed on 527
7 exempt activity, and there is one in there
8 involving a trade association that runs full-page
9 ads in newspapers with large circulations shortly
10 before a Senator is up for re-election, and the ad
11 says there's this bill pending in the Senate and it
12 would provide manufacturing subsidies to certain
13 industries to encourage export of their products.
14 The ad says that several manufacturers in the state
15 would benefit from the subsidies, but the Senator
16 has opposed similar measures supporting increased
17 international trade in the past. Then the ad ends
18 with the common statement call or write Senator so
19 and so and tell him to vote for whatever the bill
20 is.

21 The IRS says, well, they've got this ad
22 and it identifies the Senator and it appears

1 shortly before an election and it's stipulated that
2 it targets voters in that election, but the IRS
3 says, however, the ad specifically identifies the
4 legislation the Congressman--the Senator, rather,
5 is supporting and appears immediately before the
6 Senate race--it appears, rather, immediately before
7 the Senate is scheduled to vote on that
8 legislation, and therefore we find that is not an
9 exempt function under 527.

10 And so what I'm wondering is if we have
11 an organization that doesn't make any expressions
12 of avowed purpose, but spends 60 percent of its
13 money on this, does that make it a political
14 committee?

15 MR. FOLEY: The Revenue Ruling--

16 MR. NORTON: Just a minute. You know,
17 what you said is that [c][4]s shouldn't feel
18 threatened if this is implemented correctly. Well,
19 [c][4]s have now been told by the IRS you can do
20 this, this is not exempt 527 activity. It's now
21 tossed in the lap of the Federal Election
22 Commission. We look at it and see this how they

1 spend 60 percent of their money. What do we do
2 with it?

3 MR. FOLEY: Okay. With respect to the
4 Revenue Ruling in particular and sort of the tax
5 angle on it, I will defer to Professor Tobin,
6 because when I learned of that, I walked down the
7 hall and said, Hey, this is a tax matter; you take
8 it. But if the question--I take the import of the
9 question is without regard to--without
10 automatically deferring to the IRS, how should the
11 election law deal with the same sort of
12 advertisement or a group that spends 60 percent of
13 funding on that kind of thing?

14 MR. NORTON: Then why shouldn't a [c][4]
15 feel threatened having received this Revenue
16 Ruling. If it does 60 percent of this, why should
17 the [c][4] worry that it might be characterized as
18 a political committee under your analysis?

19 MR. FOLEY: Well, I did not--I have not
20 read that example, but in listening to it, I did
21 not hear anything that attacked the Senator. Let
22 me be clear about this, because lobbying and urging

1 Senators to do this or that, you know, that's not
2 opposing a Senator or promoting a Senator. If an
3 ad says there is an important piece of legislation
4 before the Senate and we want the Senator to agree
5 with us on it, the text of that 30-second or
6 60-second ad by itself is not attacking the Senator
7 or supporting the Senator. It's merely urging the
8 Senator to do something.

9 Now, I think earlier today, there was in
10 reference to an ad that said, you know, in previous
11 votes on this sort of issue, you know, Senator so
12 and so did a totally wrong thing by raising taxes
13 or voting against the environment, and we urge you
14 to call him so he or she can correct that egregious
15 mistake. Well, that ad is--now, I think, falls
16 within the zone of an attack, but merely urging a
17 Senator to do something is not support or attack,
18 and so doing 60 percent of lobbying activities is
19 not doing 60 percent campaign or electoral
20 activities. You do need to look at the text of the
21 ads to make those sorts of judgments. I think
22 that's unavoidable, but I did not hear in this

1 example--maybe I missed it--the language of an
2 attack or a support.

3 MR. NORTON: Let me ask you, Mr.
4 Trister, in your comments earlier, you said that
5 that you didn't see how the Commission could
6 consider or use the promote-support test to
7 establish what an expenditure is in the context of
8 political committee status when it didn't do so in
9 the coordination regulations. I don't think our
10 explanation and justification for the regulations
11 explain why we rejected that standard, but one
12 might hypothesize that there were some concern
13 about whether it would survive constitutional
scrutiny. It did,
14 and why isn't the answer to the dilemma you present
15 that if the Commission uses the promote-support
16 standard here, that it ought to conform its
17 coordination regulations to make that an
18 expenditure there?

19 MR. TRISTER: Well, as you pointed out,
20 it survived constitutional scrutiny only in the
21 context of political committees, and it remains
22 quite an open question whether or not that standard

1 can survive the scrutiny of the courts under the
2 First Amendment in any other context, whether it
3 would be coordination or it be the definition of
4 political committee. One of the things I wanted to
5 mention earlier is in McConnell litigation, of
6 course as you mentioned earlier, there was the
7 backup definition, and part of that backup
8 definition is the promote, support, attack, or
9 oppose language, and Floyd Abrams, who was
10 representing one of the groups of plaintiffs,
11 deposed Senator McCain and Senator Feingold and
12 showed them an ad and said does this promote,
13 support, attack, or oppose. They disagreed on the
14 same ad.

15 So you're telling us we don't need
16 standards? You're telling us we can do this
17 without standards? Now, maybe in the context of a
18 political committee. That's what the Supreme Court
19 said. Maybe in that context, but it said nothing
20 about any other kind of entity.

21 MR. NORTON: I have no further
22 questions, Mr. Chairman.

1 CHAIRMAN SMITH: Thank you, Mr. Norton.

2 Mr. Pehrkon.

3 MR. PEHRKON: Thank you, Mr. Chairman.

4 Thank you all for coming here today.

5 Mr. Pomeranz, I'd like you to help me
6 out a little bit with the tax code here at 527s.
7 One of the things that was presented in earlier
8 written Commission testimony indicated that 527
9 organizations had filed something like 29,000 Form
10 8871s, yet the IRS reports on other side that there
11 are only 600 entities which are reporting their
12 receipts and expenditures on the Form 8872. Why is
13 that?

14 MR. POMERANZ: There are organizations
15 that are required to register under--using Form
16 8871 that are not required under the statute to
17 regulate--to file 8872s.

18 MR. PEHRKON: Okay. So that, you
19 believe, would account for--help me understand a
20 little bit better about the discrepancy, the
21 difference between them?

22 MR. POMERANZ: Um-hum.

1 MR. TOBIN: Could I make a comment
2 there? There's two reasons why they might not be
3 filing. One is if they file with you, they're not
4 required to file with the IRS, and the second is
5 that if they don't spend more than \$25,000, they're
6 not required to actually report their expenditures
7 and contributions.

8 MR. POMERANZ: Also state.

9 MR. TOBIN: And they can be involved in
10 states. So there is not a direct--everybody
11 doesn't have to file.

12 MR. PEHRKON: Okay. Mr. Trister, you're
13 representing a number of organization here today,
14 and one of the things I'm trying to better
15 understand is you've got 600 or 400 organizations
16 you're representing; how many of them would
17 actually be affected by this, do you think, and
18 would be required to file?

19 MR. TRISTER: I heard your question to
20 Ms. Aron this morning, the same question, and I'm
21 not really sure. If the proposal on the table is
22 the proposal you're asking about, it reaches

1 virtually every 501[c] organization in the country,
2 and I think Larry Gold is one who quoted you what
3 those numbers are. There are hundreds of
4 thousands. So that's one possibility in terms of
5 who would be affected. If you're narrowing it to
6 527s, then the number is somewhere between the 600
7 and the 29,000, and we don't really know where
8 because the 600 are only those groups, as Professor
9 Tobin says, that reaches the threshold.

10 The definition in this NPRM has no
11 threshold. So the smallest file 527s, even those
12 that do not have to report to the IRS with 8872s
13 would be covered by this definition as it's
14 proposed in the NPRM. That would include 527s set
15 up by the smallest unions in the country, local
16 unions, 527s set up by the smallest chapters of the
17 national organizations. Any group would be covered
18 because there is no threshold in this proposal with
19 respect to 527s. And so the number is somewhere in
20 there, and I don't think anybody can give you a
21 more precise answer.

22 I do have one thing I want to say,

1 though, because one of the things that we have seen
2 in recent years is a trend. I think that those of
3 us who practice in the area, what has become the
4 model of choice, if you will, for advocacy
5 organizations, groups that are interested in
6 advocating on public issues is a model of
7 501[c][3], 501[c][4], and 527s, and that is
8 increasing every day of the week, and that is what
9 you're aiming at in these proposals. So where it
10 is today is not where it will be six months from
11 now. There will be many, many more groups, 501[c]
12 groups with 527s because that has a lot of tax
13 advantages, and that's what's pushing it, and
14 that's what's driving it.

15 MR. PEHRKON: Thank you.

16 Mr. Pomeranz?

17 MR. POMERANZ: I was just going to
18 briefly mention that Mr. Gold's numbers, as big as
19 they were this morning, actually understated the
20 case, because he mention all the 501[c][3]s that
21 aren't required to seek recognition or file Form
22 990s, and that would be all the churches and other

1 houses of worship in this country and the smaller
2 501[c] organizations. So there are ten of
3 thousands, probably hundreds of thousands more
4 entities beyond even those appallingly high numbers
5 he cited this morning.

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

7 CHAIRMAN SMITH: Thank you, Mr. Pehrkon.

8 I thank the members of the panel for a
9 most educational and very stimulating conversation.
10 It was very informative and helpful to us. Thank
11 you all. Thank you for coming from Columbus.

12 And we will take a ten-minute recess,
13 and then we'll have our last panel today. Ten
14 minutes, please.

15 [Recess.]

16 CHAIRMAN SMITH: I'm going to call us
17 back in session here. We're trying to finish up
18 and let the staff go home today at a reasonable
19 hour and also let our witnesses get back to their
20 schedules.

21 IV. PANEL IV

22 CHAIRMAN SMITH: So we have Panel IV for

1 today here now, and we have again four individuals
2 to testify for us, and I didn't get a chance to
3 meet them beforehand. So I'm not exactly sure who
4 is who, but we have Michael Boos, who is testifying
5 for Citizens United as vice president of that
6 organization; Wade Henderson, who is Executive
7 Director for the Leadership Conference on Civil
8 Rights; Greg Moore, Executive Director of the NAACP
9 Voter Education Fund; and Ward Morrow, Assistant
10 General Counsel of the American Federal of
11 Government Employees.

12 All right. Again, gentlemen, we have
13 just three minutes set aside for opening
14 statements, and I'll ask you to--you can skip
15 pleasantries and try to be brief, and if you've
16 been throughout the day, you've seen we're not
17 being particularly mean spirited about the lights,
18 like the Supreme Court where we tell you shut up
19 and sit down as soon as the red light goes on,
20 because you're already seated, but actually if you
21 would just watch the lights and please try to
22 operate. To my colleagues up here as well, we will

1 try to see if we can't wrap this up in the hour and
2 15 minutes allotted.

3 We'll begin with the opening statement
4 from Mr. Boos.

5 MR. BOOS: Thank you, Chairman Smith,
6 Members of the Commission. My name is Michael
7 Boos, and I'm the Vice President and General
8 Counsel of Citizens United, and I'm actually
9 substituting for our president today who took ill,
10 David Bossie.

11 Citizens United is a conservative grass
12 roots advocacy organization with more than 50,000
13 members, and what I really want to do today is
14 really zero in on that aspect of the Notice of
15 Proposed Rulemaking without would have the greatest
16 impact on Citizens United, and that is really the
17 definitions of political committee and the major
18 purposes test that's been put forth, in particular
19 two aspects of that, one being the 50,000, slash
20 10,000 thresholds that are proposed and also as
21 well as the application of the 50 percent threshold
22 if the Commission is going to look at what has been

1 defined as Federal election activities.

2 I can state that Citizens United has a
3 project that's been going on for several years
4 called Citizens United for the Bush Agenda, and
5 that project is designed primarily to promote
6 legislative and policy initiatives that have
7 been--that are supported by the President, and we
8 speak out effectively on those issues; however, in
9 the course of doing that, we're almost by
10 definition going to be making statements that are
11 supportive of the President. Indeed, the project
12 name has his name in it, which would be prohibited
13 if the organization were a political committee
14 under the existing rules.

15 But that aspect of the proposed
16 rulemaking, this major purposes test, would really
17 have a devastating impact on organizations such as
18 Citizens United precisely because we're intimately
19 involved in issue advocacy which is tied and
20 wrapped around certain political candidates and
21 elected officials. We have already had to alter
22 some of our planned activities in light of BCRA.

1 For example, last spring, we ran a series of
2 television ads featuring former U.S. Senator Fred
3 Thompson which were supportive of President Bush's
4 prosecution of the war on terror. We can't run
5 those ads right now in a number of areas, simply
6 because they would be qualified as electioneering
7 communications.

8 If the major purposes tests were adopted
9 as proposed or basically any of the proposals here,
10 we would be in danger of being classified as a
11 political committee based on those of type of
12 activities. It's a very serious threat to the
13 501[c][3] community, and we're extremely concerned
14 about it, and we would caution you to move very
15 cautiously in that area.

16 CHAIRMAN SMITH: Thank you, Mr. Boos.
17 Mr. Henderson.

18 MR. HENDERSON: Thank you, Mr. Chairman.
19 Good afternoon, Members of the Commission.

20 I'm Wade Henderson, the Executive
21 Director of the Leadership Conference on Civil
22 Rights. The Leadership Conference is the Nation's

1 oldest, largest, and most diverse civil and human
2 rights coalition with more than 180 national
3 organizations representing persons of color, women,
4 children, organized workers, individuals with
5 disabilities, older Americans, major religious
6 groups, gays and lesbians, and civil liberties and
7 human rights groups. The Leadership Conference is
8 one of the confounders of the coalition to save
9 nonprofit advocacy.

10 I'm here today because of the profound
11 concern in the civil rights community about the
12 nature and timing of the Commission's Notice of
13 Proposed Rulemaking regarding the political
14 committee status of nonprofit organizations. We
15 worry that in a rush to resolve what is a perceived
16 problem, the Commission will fundamentally weaken
17 our democracy. Groups we represent include
18 501[c][3] and 501[c][4] not for profit
19 organizations, some of which have connected 527
20 groups. Some of our member organizations supported
21 passage of the Bipartisan Campaign Reform Act.
22 Others did not. Nonetheless, we all engage in a

1 broad range of currently protected activities which
2 would now run afoul of the Commission's proposed
3 rule.

4 We strongly believe that the proposed
5 rule threatens First Amendment rights of free
6 speech and association for all of us. The need for
7 these protections can't be overstated. Without the
8 constitutional guarantees of the First Amendment,
9 for example, there would not have been a civil
10 rights movement. Is it really the intent of the
11 Commission to strike broadly at the values we all
12 hold dear of the foundations of American democracy?
13 We think not.

14 The leadership conference and the
15 organizations that we represent work in a
16 bipartisan manner to make the dream of equal
17 protection of the law a reality for all Americans.
18 We work closely with members of Congress and
19 administrative appointees. To accomplish our
20 goals, we must advocate to, persuade, and sometimes
21 criticize elected officials. Several of our member
22 organizations encourage citizens to register to

1 vote and to participate in elections, particularly
2 African Americans, Latinos, Asian Americans,
3 persons with disabilities, newly enfranchised
4 citizens, and the Nation's voter-eligible youth,
5 and we educate voters on a full range of civil
6 rights and civil liberties issues. We do this not
7 because we have a parochial concern for particular
8 candidates, but rather because we care about issues
9 that office holders have the power to impact.

10 Now, as we understand it, the following
11 activities would not be allowed under the
12 Commission's proposed rules: For example, in order
13 to educate Americans about the importance of the
14 Federal courts and the threats posed by some of
15 President Bush's most extreme judicial nominees,
16 the Leadership Conference has used print and
17 multimedia ads. One such video ad criticized
18 President Bush's nomination of a right-wing
19 ideologue, Charles Pickering, and was distributed
20 by way of the web to activists across the country.
21 Now let's look at the use of voting records, for
22 example. At the end of each session of Congress,

1 the Leadership Conference produces a nonpartisan
2 voting record that tracks how all 535 members of
3 the House and Senate have voted on all LCCR
4 priority issues. The voting record is distributed
5 widely to our 180 member organizations, the media,
6 members of Congress, the grass roots and other
7 interested parties. The Leadership Conference
8 voting record is an important tool to educate
9 citizens on the full range of civil rights issues
10 that have been considered by members of Congress in
11 the proceeding session.

12 Yet under the redefinitions of
13 expenditures in the FEC's proposed rule, these
14 activities would be prohibited altogether or
15 transform our organizations into political
16 committees bound by the donation regulations of
17 Federal election laws. Such a transformation could
18 be crippling not only to our organizations, but
19 also to our democracy. Now, the proposed rules
20 would serious undermine the constitutional
21 guarantees on which the leader conference
22 organizations depend to carry out their missions,

1 and we sincerely hope you reconsider the rulemaking
2 endeavor in which you are engaged.

3 Thank you for this opportunity to appear
4 before you.

5 CHAIRMAN SMITH: Thank you, Mr.
6 Henderson.

7 Mr. Moore.

8 MR. MOORE: Thank you, Mr. Chairman and
9 Members of the Commission and Counsel. I want to
10 thank you for the opportunity to speak.

11 My name is Greg Moore. I serve as the
12 Executive Director of the NAACP National Voter
13 Fund, which is 501[c][4] arm of the NAACP and one
14 of the lead organizations in the Coalition to
15 Protect the Nonprofit Advocacy.

16 The National Voter Fund was formed by
17 the NAACP in 2000 to engage in advocacy and
18 election-related activities that could be
19 potentially inconsistent with the 501[c][3] status
20 of the of NAACP. Rather than take the risk of
21 jeopardizing the status, the NAACP created the
22 Voter Fund, and the Voter Fund in turn created the

1 Americans For Equality, a 501--I'm sorry--a Section
2 527 organization, and when the Voter Fund created
3 AFE, it did it so to ensure that the Voter Fund
4 would not inadvertently place its tax-exempt status
5 at risk by engaging in more political activity than
6 is permitted under the 501[c][4] organization
7 guidelines. Such caution is necessary because of
8 the vague IRS standards for both what constitutes
9 political activity and what constitutes primary
10 activity of a Section 501[c][4] organization. AFE
11 is not registered as a political committee and it
12 carefully monitors its activities to ensure that it
13 does not engage the activities that would be
14 required it register as a political committee.

15 The Voter Fund and AFE have been
16 involved in a wide variety of advocacy and voter
17 participation activities. These activities have
18 included advocating for election reform, the
19 re-enfranchisement of ex-offenders, educating
20 voters about civil rights issues, urging
21 individuals to register to vote, and encouraging
22 voters to go to the polls on election day. These

1 activities have both--involved both Federal and
2 non-Federal elections, and through these efforts,
3 both organizations have together had the success of
4 increasing voter participation among African
5 American and other disenfranchised groups.

6 We are very similar. Both entities use
7 civil rights issues to motivate individuals to
8 register to vote. Both entities have referenced
9 candidates' position on these issues, and the
10 choice of which entity to use has primarily
11 depended on whether the National Voter Fund is
12 approaching its limits for activity that could be
13 viewed by the IRS as political activity. Also, it
14 depends sometime on which entity has sufficient
15 funds to carry out those activities, but there is
16 justification for treating AFE differently from the
17 National Voter Fund for election law purposes. The
18 ability of the NAACP to create the National Voter
19 Fund and of the National Voter Fund to in turn
20 create AFE is an inherent part of the Federal tax
21 system.

22 It is also a means by which Congress,

1 the IRS, and the courts have addressed the
2 constitutionality and practices, issues raised by
3 the vague IRS standards in this area. To suddenly
4 and arbitrarily treat the National Voter Fund and
5 AFE as very different creatures under Federal
6 election law would be illogical and
7 unconstitutional in our view. It would also threat
8 the ability of the NAACP, Voter Fund, and AFE to
9 increase participation of African Americans and
10 other historically disenfranchised groups in the
11 most fundamental part of our democracy, and that is
12 voting, a right that only takes place one day of
13 the year.

14 I, therefore, urge the Commission to
15 withdraw the notice of proposed rulemaking.
16 Changing of the magnitude and novelty being 17
proposed by the Commission should first be
18 considered by Congress, and in other course would
19 exceed the Commission's authority, in our view, and
20 would usurp power and the proper role of Congress
21 in this area.

22 Thank you for your time. I look forward

1 to more questions.

2 CHAIRMAN SMITH: Thank you, Mr. Moore.

3 Mr. Morrow.

4 MR. MORROW: Ward Marrow from American
5 Federation of Government Employees. I'm Assistant
6 General Counsel. I want to thank the Commission
7 and actually also some of the presenters. I've sat
8 through most of the day, and I think we've heard
9 from people who are the real experts in the field.
10 I found this morning, reading through the comments
11 of the Vice Chair, it seemed to mirror some of my
12 feelings in coming to this presentation. This is
13 very, very difficult material for a lot of the
14 regulated community to go through, and I had great
15 difficulty in going through it, to be honest. I'm
16 glad to see the Commission had some of that same
17 difficult.

18 A lot of my difficulty in trying to
19 advise my client, the union, falls into the
20 questions that was brought up by the last panel by
21 Mr. Norton, and that particularly would be as a
22 representative of Federal employees, unlike the

1 private sector unions and perhaps unions that
2 you're generally considering, we represent
3 individuals for whom the Administration and members
4 of Congress are our bosses. These are the
5 individuals in a labor relations context, which is
6 different from simply a political context. So when
7 I hear the words "promote, support, attack, and
8 oppose", what I hear is, for instance,
9 transportation screeners. If there is a policy
10 that says we will contract out members that we
11 represent, we may well support, attack, oppose
12 those policies. We do that every day, not just 30
13 days before an election, not just 60, not 120, not
14 just at certain parts of the election cycle. We do
15 that all year long. We do that with all
16 Administrations. We do that for every
17 Administration. We do that with both parties. We
18 do that with people that we might support through
19 our political action committee and people that we
20 oppose. We may support somebody, but oppose a
21 particular policy. We may run ads similar to the
22 ad that was being discussed saying don't contract

1 out transportation screeners. That vote might
2 occur in October. We might end the ad with saying
3 call these members of Congress; they've supported
4 or opposed this in the past; encourage them to vote
5 favorably on this in the future, thank them if they
6 voted favorably in the past.

7 Would we then be brought before the
8 Commission for attacking certain members of
9 Congress because we're close to an election? Are
10 we supporting members of Congress based on those
11 past votes? Not necessary. Our 527 is used as a
12 representation function. We represent in the labor
13 relations context transportation screeners. Those
14 policies are covered to a large extent by Federal
15 law. You'll see in my written presentation I refer
16 to Title V extensively. It was not clear to me how
17 some of these regulations might implicate our
18 ability as a labor relations representative and
19 with charges under the statutes in Title V to deal
20 with some of these regulations.

21 Would we be barred once an election
22 cycle kicks in in how we say certain issue-oriented

1 presentations? Would we not be allowed to refer to
2 candidates because they're elected officials in
3 urging people to support our position?

4 For instance, if a Veterans
5 Administration hospital is understaffed and we wish
6 to get the community concerned about that and
7 contact members of Congress, would we not be
8 allowed to do that 30 days before an election
9 because it might have an impact on the election?
10 Would we be brought in and would that be covered
11 by this regulation? I was intrigued early on,
12 taking some of this off the table, and I hope that
13 you would, but keep in mind that there are certain
14 areas--and I think our union--our issues would be
15 some of them--that these regulation might impact,
16 and we have great concern.

17 Thank you.

18 CHAIRMAN SMITH: Thank you, Mr. Morrow.

19 We will turn to questioning. We will
20 give each commissioner five minutes and figure the
21 run-over time, which has worked out reasonably
22 well. We'll begin with Commission Mason this

1 round.

2 COMMISSIONER MASON: Thank you.

3 Mr. Moore, I'm intrigued that you
4 represent an organization that has this [c][3],
5 [c][4], 527 structure that we discussed at some of
6 the earlier panels, and you may not have been here,
7 but I asked a question at one of the earlier panels
8 about how that would work in the context of a
9 rulemaking such as this with one if, for instance,
10 we were to somehow deem or rule the 527 component
11 of your organization or similar organization to be
12 a FECA political committee, what then would be the
13 implication of you off-loading activities back and
14 forth, and you've said fairly frankly that there is
15 some play in the IRS rules, and depending on the
16 current interpretations of the IRS rules and the
17 financial situation of your organization, you may
18 well perhaps one month conduct an activity through
19 your [c][4] and perhaps the next month conduct the
20 identical activity through your 527. Is that
21 correct?

22 MR. MOORE: That's not exactly correct,

1 and also, I do not represent the NAACP. That's the
2 501[c][3], and I'm the executive director of the
3 [c][4] which was created by the 527. So I can
4 speak for those two, but not for the NAACP.

5 COMMISSIONER MASON: Okay.

6 MR. MOORE: In the instance of what we
7 create and what entity we use, it has a lot to do
8 with availability of resources, of course, but it
9 also has to do with whether or not activities we're
10 undertaking are particularly designed to affect the
11 outcome of a particular election as opposed to
12 having a broad scope voter registration drive in a
13 number of states based on African American
14 unregistered totals in that particular state or
15 jurisdiction. The 527 might very well have the
16 ability to go out and put a particular piece of
17 paper or an ad out that talks about the candidate
18 and why both candidates may have different points
19 of view, and so we would do that activity under the
20 527 law.

21 If that were no longer available, it
22 would curtail the ability of this institution to

1 actually extend its rightful duty to involve itself
2 in elections under the current tax code that we
3 have. So we think we're following in the spirit of
4 the law, and to take this away from us in the
5 middle of a campaign cycle not only threatens our
6 work, but the work we do in coalitions with other
7 organizations that are 527s as well.

8 COMMISSIONER MASON: So let me
9 understand this. One of the points you're trying
10 to make is that you feel that you have been pushed
11 by the tax code into forming a 527 organization to
12 do certain things that you want to do, and from
13 your organization's perspective, you don't care
14 whether you do them through a [c][4] or a 527?

15 MR. MOORE: Well, we--

16 COMMISSIONER MASON: The tax structure
17 causes you to have these dual organizations and to
18 conduct some of the activities one place and some
19 the other?

20 MR. MOORE: Well, we're clearly
21 exercising what's in the existing tax code and
22 following the letter of the law as it was created

1 and as it was amended in 2002, and so there are
2 different steps we do take to make sure that we
3 keep those activities separate. And so it just
4 takes--in other words, we're a member of work and
5 with a number of 527 entities, and we don't want to
6 have that ability taken away from us simply because
7 the rules change in the middle of the game.

8 COMMISSIONER MASON: I understand. So
9 what I'm asking is the reason you've adopted that
10 structure is because the tax code has pushed you to
11 adopt that structure.

12 MR. MOORE: It's within the tax code,
13 and we follow the structure based on the protection
14 of the entity that we are most concerned with,
15 which the NAACP and that name.

16 COMMISSIONER MASON: Okay.

17 MR. MOORE: So we pushed those
18 activities to the AFE so we wouldn't unnecessarily
19 jeopardize the NAACP's name in that regard.

20 COMMISSIONER MASON: Okay. Now, is it
21 your position as long as AFE does not engage in
22 express advocacy, doesn't give money to Federal

1 political candidates or the Federal accounts of
2 political parties and doesn't engage in coordinated
3 contributions, that it should not be required to
4 register as a FECA political committee?

5 MR. MOORE: No, because it will restrict
6 the ability of donors to give certain grants to the
7 degree where we can make an impact, and it also
8 opens the door to a chain reaction of restrictions
9 that may very well impact the [c][4] and its
10 ability to restrict what--

11 COMMISSIONER MASON: I understand that,
12 but I'm just saying that there are some things your
13 527 might do, which I think you would acknowledge,
14 that would cause it to have to register, and you
15 want to avoid that.

16 MR. MOORE: Yes.

17 COMMISSIONER MASON: I'm trying to
18 ascertain your position about what that list ought
19 to be. In other words, if you started giving money
20 to Federal political candidates, that would cause
21 you have to have to register.

22 MR. MOORE: Of course, but we don't do

1 that.

2 COMMISSIONER MASON: And you don't do
3 that--I'm trying to understand the list of things
4 that you could avoid that would keep you out of the
5 political committee status, contributions of
6 candidates, express advocacy, coordinated
7 contributions, and my question is do you avoid
8 those things because, as you understand the law,
9 you don't have to register with the Federal
10 Election Commission?

11 MR. MOORE: We usually hire good
12 attorneys that help us answer these questions, and
13 they're not here right now.

14 COMMISSIONER McDONALD: And does that
15 help you or hurt you?

16 MR. MOORE: It's my worst nightmare.

17 COMMISSIONER MASON: I'm completed, Mr.
18 Chairman.

19 CHAIRMAN SMITH: Thank you, Commissioner
20 Mason. I note that Commissioner Mason may have to
21 leave us a bit early in this panel due to other
22 obligations, and we've run over here, but he has

1 all the written comments, of course, and has
2 reviewed them or will do so for those he has not.

3 Commissioner McDonald.

4 COMMISSIONER McDONALD: Mr. Chairman,
5 thank you.

6 Mr. Boos, Mr. Henderson, Mr. Moore, and
7 Mr. Morrow, welcome. You've done double duty.
8 It's always tougher at the end of the day to try to
9 kind come before this panel. In fact, I'm going to
10 do something a little bit different, which because
11 of kind of the compressed schedule, here in just a
12 second, I want to just basically ask you all if
13 there's other things that you would like to add,
14 since I think you've more than covered the
15 questions.

16 But I do want to point out something
17 that Mr. Morrow said in relationship to 30 days, 60
18 days, 90 days, 120 days. I'm thinking about in
19 legislative recommendations saying that you can't
20 attack the Federal Election Commission 60 days
21 before a hearing. Do you think I'd have any chance
22 at all? Maybe even 30. My mother may be watching.

1 So I'm hoping you all would consider that. I'm not
2 sure that you really would, but I'd be ever
3 hopeful.

4 The voter matter is exceedingly
5 important to me as I was the election secretary of
6 the Tulsa County Election Board for years, and it
7 was something that I held near and dear to my
8 heart, and we worked on it pretty much around the
9 close because it's so fundamental, this whole
10 process, and that goes back to about 1974.
11 Needless to say, we've had mixed and somewhat
12 discouraging results in a way. We hadn't done
13 nearly as well as we would like to do, and that's
14 with a great deal of effort.

15 I'm wondering in relationship to just
16 your own experience--you've seen all the comments
17 and you understand all the controversy that's going
18 on--if the GOTV aspect of it, which is certainly a
19 major aspect of this whole area, were severed from
20 other aspects that are before us, what would be
21 your thought about that? I mean, in some cases,
22 particularly--Mr. Henderson, you made a very strong

1 point, I thought, on this issue. To your way
2 thinking, is that the major component of what's at
3 stake, or is that just a piece of it?

4 MR. HENDERSON: No. No, Commissioner
5 McDonald. First of all, thank you for your
6 question. I do not see it as a minor or incidental
7 element of the proposal before us. I do think it's
8 important to step back for just a minute, and for
9 organizations like our own, and we are part of that
10 broad nonprofit community of organizations that
11 advocate issues in a public policy arena, and for
12 us, voting really is the language of democracy, and
13 we think that it is the best way for the citizens
14 of a democracy to express their views. An informed
15 electorate is really central to the kind of
16 democracy that we now enjoy.

17 We think that by, you know, using the
18 protections of the First Amendment, which indeed
19 was designed for this purpose to protect the speech
20 of all Americans in the political process, is
21 really what we're about. I have concerns about the
22 proposal beyond those that I've already stated, and

1 they go to even the issue of trying to segregate out
2 GOTV issues from the remainder of other issues
3 under consideration, and I think when a commission
4 and this commission or any other seeks to enact
5 proposals that would limit protected speech, it
6 really has exceeded its traditional role and
7 ventured, I think, into a role that should only be
8 left to Congress, one that can only be pursued
9 after extensive documentation and review, and then,
10 even then, only most reluctantly.

11 Congress had the opportunity to enact
12 these provisions when it considered BCRA and chose
13 not to. To now have the Commission seek to go
14 beyond what Congress itself was unwilling to do in
15 an area where protected speech would now be at
16 risk, it seems to be jeopardizes the fundamental
17 tenets of our democracy, and that exceeds whether
18 we're talking about GOTV issues or not. We use the
19 entire year to educate our constituency about the
20 role of members of Congress and voting on issues
21 that affect all Americans, and we do it in a
22 nonpartisan way. Everyone is subjected to the same

1 standard, and we think that is the best protection
2 of the interests we serve, and we think that when
3 efforts are made to circumvent or curtail that
4 role, we think it's a real problem.

5 COMMISSIONER McDONALD: Let me play the
6 devil's advocate and follow up for just a second.
7 I apologize for not getting to the rest of the
8 panel. I think it's an extremely interesting group
9 of practitioners. Obviously, as you know, when
10 this fight started, and it's been going on for
11 years, not so much the McConnell aspect of it, but
12 campaign finance in general, the issue was whether
13 or not--the First Amendment has always been an
14 issue, and I don't know anybody that's not for the
15 First Amendment. I want to be real clear. It's
16 kind of like I have this strong personal belief in
17 the IRS and what a fine group they are. I want to
18 make that clear.

19 But, obviously, we were told this going
20 into the McConnell matter. We heard it repeatedly,
21 and clearly the Court listened to reams of
22 testimony about this area, and for whatever reason

1 and no matter what interpretation you have, they
2 clearly had a more restrictive theory than was
3 announced by a number of practitioners who
4 obviously in good conscience participated against
5 us in a lawsuit. So realizing fully what you say,
6 I'm just always cognizant of that as kind of a
7 general fact, because it seems like there's always
8 kind of the little things being a catch-all when
9 the Court has indicated that obviously there are
10 bounds to even First Amendment concerns.

11 MR. HENDERSON: No. I think you're
12 right, Commissioner. I guess I would respond in
13 the following manner. As a coalition, the
14 Leadership Conference did not take a position on
15 the McCain-Feingold. We did not take a position
16 largely because we had members on both sides of the
17 question. Even those, I should point out, that may
18 have opposed the law have stated concerns and
19 support some form of campaign finance reform in the
20 broadest, without trampling on instance or issues
21 of the First Amendment. On the other side, some
22 organizations that supported the law felt it was a

1 reasonable restriction on protected speech.

2 We now find ourselves in the unusual
3 position, however, of having to address the issue
4 of regulation through this Notice of Proposed
5 Rulemaking that would seek to implement some
6 aspects of the law even though we had not taken a
7 position on the broad package. I say because it
8 looks as if the regulations from our perspective
9 are broad, that, you know, organizations that
10 engage in the simple exercise of their rights under
11 the First Amendment to bring their political views,
12 often on behalf of individuals and interests that
13 would not otherwise have their views presented, and
14 we represent a constituency of individuals
15 regardless of race and gender and sexual
16 orientation or age or disability status that for
17 the most part have difficulty in getting their
18 views presented in the chambers that make decisions
19 that affect their lives.

20 That's what we have been tasked to.
21 That's what we have been given some additional
22 support by way of the tax code to help support, and

1 when we encounter proposals that would seek
2 restrict what we consider to be that broad range of
3 otherwise permissible activity that in no way
4 involves speaking to specific issues of campaign
5 activity in a given year, we think that that really
6 goes well beyond certainly what Congress intended
7 and what the Constitution permits. So what we
8 would say is that in addition to the ill-timed
9 nature of this proposal, which has been addressed
10 by many speakers, we think that it really does
11 exceed what is the appropriate bright line test of
12 where a commission would seek to restrict what
13 would otherwise be protected activity.

14 COMMISSIONER McDONALD: Thank you very
15 much.

16 CHAIRMAN SMITH: Thank you, Commissioner
17 McDonald.

18 Next in the queue is yours truly. So
19 I'm going to start, Mr. Morrow, with a question for
20 you. You make a point in your testimony, your
21 written testimony, that you think that this
22 rulemaking could interfere with the--conflict with

1 5 USC 7103. That's the kind of thing I think--and
2 perhaps the hurried schedule contributes to that.
3 We're purportedly here for our expertise in
4 election law and not labor law. I'm not really
5 familiar with 5 USC 7103, and it wasn't exactly
6 clear to me. How is it exactly that you think your
7 ability to carry out things you're authorized to do
8 by statute would be interfered with by these rules?

9 MR. MORROW: As a representative, part
10 of what we do is take our case to the boss, so to
11 speak, in labor relations. You've probably seen
12 recently with the strike in California with the
13 supermarkets, for instance, there were a lot of
14 television ads that talked about what was going on.

15 CHAIRMAN SMITH: By boss, you mean the
16 public generally, the taxpayers?

17 MR. MORROW: The employer.

18 CHAIRMAN SMITH: The employer, okay. So
19 the Government.

20 MR. MORROW: The Government as the
21 employer as Giant or Safeway would be the employer
22 for food and commercial workers. In those

1 instances, there were a lot television ads asking
2 people and explaining to people what was going on.
3 The employer put out those ads as well. Our
4 concern would be as elections come close, with the
5 Government as the employer, members of Congress as
6 the employer, in our representation function as the
7 exclusive agent--we're the bargaining agent for
8 these people--they would have concerns that in a
9 traditional private sector sense, you might go to
10 the corporate president, the board of directors,
11 that sort of thing.

12 For our instance, this is Congress, this
13 is the Presidency. We would name those individuals
14 by name. When I hear certain words that would come
15 to be a concern to the Commission, using a
16 candidate's name in an ad, well, they are our
17 employers. They are the individuals that vote our
18 wages, working conditions, salaries, staffing
19 levels. Those people would be named in those
20 communications, not in an election context, though
21 there might be something that leads--

22 CHAIRMAN SMITH: You think it could

1 actually create a conflict then--

2 MR. MORROW: With the statute.

3 CHAIRMAN SMITH: With the statute.

4 Okay. Mr. Boos, nobody has asked you

5 any questions. So let's get you involved here.

6 You're a 501[c][4]. Right?

7 MR. BOOS: That's correct. Citizens

8 United is a 501[c][4].

9 CHAIRMAN SMITH: And you run these ads.

10 Do you think the ads would be much more effective

11 if you were a 527 running the same ads?

12 MR. BOOS: No.

13 CHAIRMAN SMITH: You think they'd be

14 more likely to corrupt members of Congress?

15 MR. BOOS: No, in no way, shape, or

16 form.

17 CHAIRMAN SMITH: You don't think so?

18 Just because the content is the same and the area

19 is the same?

20 MR. BOOS: The ad is going to say the

21 exact same words. The ads do not expressly

22 advocate the election or defeat of any candidate

1 for political office.

2 CHAIRMAN SMITH: Let me ask a question.

3 What exactly would you say you're trying to do?

4 Are you trying to support President Bush, or are

5 you trying to support the Bush agenda?

6 MR. BOOS: We are promoting the

7 President's agenda and specific aspects of the

8 President's agenda.

9 CHAIRMAN SMITH: Are you supporting it

10 because it's the President's agenda, or is it

11 simply an agenda that the President has adopted

12 that you happen to support?

13 MR. BOOS: It's an agenda that's

14 consistent with the organization's goal and

15 mission, which is limited government, strong

16 national defense, respect for traditional American

17 values.

18 CHAIRMAN SMITH: So if President Bush

19 were to decide that the deficit is getting out of

20 control and propose a major tax increase, would you

21 continue to run ads supporting the President's

22 agenda, do you think?

1 MR. BOOS: We would not run ads
2 supporting a tax increase, I can tell you that
3 much.

4 CHAIRMAN SMITH: What I'm trying to get
5 at is how would we determine your major purpose in
6 running these ads if you're going to base this on
7 some kind of major purpose test? Is your major
8 purpose going to say to support a bunch of ideas
9 which just happen to be associated with Bush, or is
10 it to support the President? Do you think that
11 talking about, for example tax cuts--and I don't
12 know if you ran ads when the tax bills were being
13 debated, but had you, do you think that referring
14 to the tax cuts as President Bush's tax cuts made
15 them more identifiable or would make them more
16 identifiable to voters at that time?

17 MR. BOOS: It absolutely does. I think
18 whenever you have a political issue, you by the
19 very nature, in order to get the attention of the
20 American public of legislators of the news media,
21 tend to generate that publicity and get the
22 attention when you can identify a policy with the

1 people that support it and, vice versa, when you
2 identify a policy you oppose with the people that
3 are supporting it or opposing it. It definitely
4 works as a catalyst for public attention, and it's
5 crucial in getting the message out, and it's
6 crucial to generating public support or public
7 opposition for a particular policy or piece of
8 legislation.

9 CHAIRMAN SMITH: Okay. I don't know if
10 I can cram in a question for Mr. Henderson just
11 briefly. I wonder if you could comment a little
12 more on page 12 of your prepared comments. You
13 talk a little bit about whether or not this is
14 really a problem, and you suggest that these shadow
15 party stories are based on more hype than fact, and
16 I wonder if you would just comment briefly on that.

17 MR. HENDERSON: Yes, Mr. Chairman. I
18 think as we have entered into the public debate
19 surrounding the Notice of Proposed Rulemaking, some
20 of us have made an effort to determine the extent
21 to which the problem which has been identified,
22 which is to say expenditures related to specific

1 campaign activities that are perceived to run afoul
2 of what the Commission has now deemed appropriate
3 limits, and the fact has been borne out by some
4 empirical analysis related to this. I think there
5 is certainly anecdotal concern about whether, in
6 fact, some of the 527 organizations that are
7 engaged in activity attempting to, of course, bring
8 issues to the public domain have done so in an
9 inappropriate way.

10 We acknowledge and note that I believe
11 the Republican National Committee filed a suit
12 against some of the independent 527s alleging there
13 has been inappropriate coordination of activities
14 with the Kerry campaign. There are, however, a
15 number of other organizations--and we don't speak
16 to that issue one way or the other. Quite frankly,
17 I do not know enough about it to speak in an
18 informed way. Having said that, however, I do know
19 that as an organization, we may address issues that
20 involve policies that are pursued by the
21 Administration that we deem to be harmful to the
22 interests we represent.

1 I cited an example involving a
2 particular judicial nominee who was to have served
3 on the Fifth Circuit Court of Appeals, and we
4 believed that that nominee, because of his record
5 in public office, was not a choice that we could
6 support and, in fact, would do harm to the
7 interests that we represent, and we are prepared to
8 say that. That should not be perceived as a
9 partisan jab at the individual or rather the power
10 that nominated that individual to the bench even
11 though we recognize that there is only way for that
12 nomination to go forward. That is not to say that,
13 you know, one could not think of instances where
14 comments could easily have run afoul of what we
15 think is the bright line test.

16 My point here, Mr. Chairman, is that
17 there are too many instances where anecdotal
18 references, hyperbole, assumptions behind the
19 intent of a particular communication,
20 advertisement, or other form of expression are
21 somehow related to a particular objective of
22 getting an individual elected to office when, in

1 fact, that is not the case. It could be merely to
2 inform the public at large about policy positions
3 taken by elected officials and that by providing an
4 informed electorate with the information they need,
5 we feel we are serving the fundamental interests of
6 democracy.

7 And so, you know, I think that's the
8 basis for our concerns.

9 CHAIRMAN SMITH: Thank you, Mr.
10 Henderson. Thank you. I'm not going to ask Mr.
11 Boos if your group ran ads in favor of the
12 nomination of the sensibly moderate Mr. Pickering.

13 I will turn things over to Vice Chair
14 Weintraub.

15 VICE CHAIR WEINTRAUB: Wasn't it the
16 last panel that we thought would end with boxing
17 gloves? Let's not start that again.

18 I want to thank you all for coming. In
19 some ways I feel that the Commission has done a
20 disservice to a great many organizations who do
21 very good work in this country by putting out an
22 NPRM that was so broad that it needlessly perhaps,

1 I hope, alarmed a great many organizations and
2 forced them to spend a lot of their resources which
3 really should have been devoted to better purposes
4 than coming here and testifying and sending us
5 comments to try to talk us out of making a big
6 mistake. I suppose the upside of that is hopefully
7 you will have accomplished that goal.

8 I'm going to address, initially, by
9 questions to Mr. Henderson and Mr. Moore, because I
10 am very, very concerned about the voter drive
11 aspects of this rulemaking, and I think it would be
12 an appalling result if anything this Commission did
13 had the result of impeding the work that your
14 organizations and other organizations are doing to
15 increase minority participation in the voting in
16 this country. Do you believe that that would be
17 the effect? That it would interfere with your
18 voter drive work if we passed these regulations?

19 MR. HENDERSON: Absolutely, Madam Vice
20 Chair. Again, I think that we look at the United
21 States of America as it enters the twenty-first
22 century, and we have great deal to be proud of. We

1 really are the world's largest and most diverse
2 representative democracy, and we've done something
3 in this country that many other countries have
4 attempted and failed. We've taken diversity with
5 the most diverse population ever, and we forged
6 that diversity into a national unity around certain
7 democratic values, and we believe that our
8 democracy is served when every eligible American
9 has the opportunity to vote, and it seems to us
10 that in the interest of furthering the collective
11 support that all share for democracy, it's
12 important that the kind of voter education efforts
13 that the NAACP Voter Fund or organizations
14 affiliated with the Latino community or the Asian
15 community or others, do what they and do it well,
16 and that should really, we think, be protected.

17 So I'm here today in part to speak on
18 behalf of that broad coalition of organizations,
19 and we appreciate, by the way, your understanding
20 of how the Notice of Proposed Rulemaking did send
21 alarm through many organizations that are engaged
22 in non-controversial public education activities of

1 which I suspect the Commission in its support. So
2 I do see it as a problem.

3 VICE CHAIR WEINTRAUB: Mr. Morrow?

4 MR. MOORE: I have to echo those
5 thoughts. In fact, there's a lot of different
6 components of this proposed rule that has been
7 interpreted many different ways. For instance,
8 there are people who believe that because you are
9 targeting African American voters for registration,
10 that you are partisan and it violates one of the
11 provisions, that it could virtually lead to a group
12 that is identified as voting on one likely way, and
13 then you get into the whole stream of checks to
14 whether or not this is something that would launch
15 an FEC investigation into your decision-making
16 process of targeting certain African American
17 voters in certain states. That's one impact.

18 The second impact, which is what this
19 has done, is diverts our attention away from what
20 we should be doing right now, which is registering
21 voters with a limited staff and limited resources.
22 I was at a fund-raising event in New York a couple

1 of days ago and had a donor right where you want
2 him, where he's about to, you know, make a decision
3 to fund you, and he talked about this FEC rule.
4 He's in New York. He doesn't know much about it,
5 but he knew enough about it to know that he was not
6 writing any checks until you guys made up your mind
7 what you're going to do.

8 That's had the effect on a lot of
9 people, not just him. I happened to have had him
10 right in front of me, but there are several donors
11 who have slowed up what they're doing, waiting for
12 this deliberation to play out, and when you take
13 away March, April, May, and maybe you get around to
14 it, you know, before the 4th of July by the time
15 Congress gets its 30 days at it, half the season
16 over and then the rules may change. So you're
17 absolutely correct. It's having a devastating
18 impact on us.

19 VICE CHAIR WEINTRAUB: So the provisions
20 in our nonpartisan voter registration,
21 get-out-the-vote activities proposed regulation
22 that would include within the definition of a

1 political expenditure voter drive activity that
2 could be construed as promoting, supporting,
3 attacking, or opposing a Federal or non-Federal
4 candidate or political party, you would say they're
5 overbroad?

6 MR. HENDERSON: Absolutely.

7 MR. MOORE: Absolutely.

8 VICE CHAIR WEINTRAUB: And the
9 additional provision about information concerning
10 likely party or candidate preference not having
11 been used to determine which individuals to
12 encourage to register to vote or not to vote is
13 equally problematic?

14 MR. HENDERSON: That's equally
15 problematic.

16 VICE CHAIR WEINTRAUB: And I gather from
17 what you were saying before, Mr. Henderson, that
18 you would also say that the promote, support,
19 attack, or oppose standard in general is so
20 overbroad as to impede your efforts to create an
21 informed electorate and help them go to the voting
22 booth and vote, not just get to the voting booth,

1 but to know what they're doing when they get there?

2 MR. HENDERSON: Absolutely, Madam Vice
3 Chair. How do we define those terms in practical
4 ways that we can communicate effectively to people
5 who know little about the underlying subject matter
6 and who, indeed, are fearful that steps that they
7 take may run them afoul of existing election law or
8 new election law.

9 VICE CHAIR WEINTRAUB: Wouldn't you all
10 agree that the promote, support, attack, or oppose
11 standard leave you unclear as to what you're
12 allowed to do and what you're not?

13 MR. HENDERSON: To say the least.

14 MR. BOOS: Very briefly, it really
15 depends on the audience. One message to one
16 audience could be viewed as promoting a candidate,
17 but to another audience could be viewed as
18 attacking the candidate. So it's really difficult
19 to tell. I guess it could be attacked as both
20 supporting and attacking the candidate, but it's
21 really a very broad standard. At least within the
22 definition of electioneering communications, the

1 real definition focuses on the time of the
2 communications as opposed to more vague terms.

3 MR. MOORE: I think the score card which
4 Wade mentioned that the Leadership Conference has,
5 and the NAACP has been print score cards for
6 decades, it really undermines our ability to look
7 at that score card and say, Hey, here is somebody
8 who has voted a hundred percent for civil rights
9 without being fearful that that might somehow
10 endanger the tax status of the organization. So
11 again, it is a very big concern.

12 VICE CHAIR WEINTRAUB: And just to
13 reiterate, what we're doing here today is impeding
14 your ability to raise funds just to do even the
15 things that are unquestionably within your rights
16 to do. Things that we're not evening touching in
17 our rulemaking, by virtue of doing this rulemaking,
18 we're interfering with your fund-raising. That is
19 extremely unfortunate.

20 Well, I thank you all for coming here
21 today. I really appreciate your time.

22 Thank you, Vice Chair Weintraub.

1 Commissioner Toner.

2 COMMISSIONER TONER: Thank you, Mr.
3 Chairman.

4 Thank you all for coming. It's been a
5 long day, but we really appreciate your being with
6 us and sharing your views today on these issues.
7 Following up on some of the testimony, we've heard
8 an awful lot, obviously, about voter mobilization
9 activities and groups on the left who historically
10 target those activities in area that might register
11 a greater number of democrats than other types of
12 voters, and obviously voters--conservative-oriented
13 groups of have done sort of the contrary,
14 mobilizing their activities in areas of the country
15 that are likely to result in more Republican
16 voters.

17 I ask this question of all the
18 panelists: Is it your view that whether these
19 activities are conducted by group on the left or
20 the right, whatever results arise from those
21 activities in terms of whether Democrats are
22 registered or Republicans registered, is it your

1 view that basically as a matter of law, unlimited
2 soft money should be allowed for those activities
3 no matter what type of group in the 501[c] or 527
4 area is doing them and no matter what the outcome
5 of those activities? I ask that--is their
6 unanimity on that, that really there should be no
7 restrictions on soft money being used for those
8 purposes?

9 MR. BOOS: I think so.

10 MR. MOORE: That's in the letter of their
11 law. The Constitution backs it up as well as the
12 Supreme Court, and the more message, the more
13 communication, the better for the informed
14 population.

15 MR. HENDERSON: But, Commissioner Toner,
16 I do want to add just one additional point, which
17 is that the assumption that one can know the likely
18 voting patterns of perspective individuals that you
19 register, it seems to me is a bit overstated and
20 can be inappropriately simplistic. I would take
21 the Latino community, which is much more evenly
22 divided among its voting electorate than would

1 allow you to make the assumption that because an
2 organization that is, quote, perceived to be
3 progressive is engaged in voter individual
4 registration, that the individuals they bring into
5 the voting electorate may somehow vote for one
6 particular party candidate over another.

7 I think they tend to--individuals tend
8 to vote their interest as they perceive them. I
9 think in some communities, those interests can be
10 perceived in lots of different ways, and I think
11 that our organizations are committed to pursue the
12 goal of strengthening our democracy without regard
13 to the likely outcome of those voters as they
14 participate. That's a secondary and, quite
15 frankly, often an irrelevant consideration when
16 those of us who are really interested in empowering
17 the communities we represent seek to bring new
18 voters in the rolls.

19 COMMISSIONER TONER: I think that's an
20 important point. Is it because of the difficulty
21 of assuming or knowing how any one particular voter
22 is going to vote, if you successfully register one,

1 does that support your fundamental view that really
2 soft money, corporate funds, union funds, any type
3 of soft money should be allowed for these types of
4 purposes across the board?

5 MR. HENDERSON: Well, I tend not to make
6 the underlying judgment on the merits about whether
7 that is the right thing. I think it is certainly
8 permissible under the existing law. I think we
9 should be able to do so.

10 COMMISSIONER TONER: If we took that
11 position, would you be comfortable with it?

12 MR. HENDERSON: Well, I think that
13 certainly our view, yes, we would be quite
14 comfortable with it, but, you know, again, I want
15 to make certain that I'm keeping my comments to
16 those issues before us now. But, yes, absolutely.

17 COMMISSIONER TONER: Mr. Morrow, do you
18 concur?

19 MR. MORROW: I do. In fact, I'd like to
20 thank the Commission, I guess promote and support
21 you all in your efforts to do voter registration on
22 your web site. We found those materials very

1 useful. I don't know whether the Commission may
2 need to now register itself, but we certainly found
3 that material very helpful, and I thank the
4 Commission for doing that.

5 COMMISSIONER TONER: Well, we don't get
6 a lot of thanks every day, Mr. Chairman. Eight
7 hours into the session, and there we go. It's
8 something to hope for for tomorrow.

9 Likewise, and I ask this of all the
10 panelists, is it your view, basically, as a matter
11 of law that in terms of regulating outside groups
12 and whether they are political committees under our
13 law, that basically we have no choice but to employ
14 the express advocacy test as matter of
15 constitutional and statutory law? Is that the view
16 of everybody here?

17 MR. HENDERSON: Yeah.

18 MR. MORROW: I think so.

19 COMMISSIONER TONER: And that we're
20 obligated to do that even if the Supreme Court or
21 other people may have some doubts about whether the
22 test has a any practical significance in the

1 political world, but your view is, look, in terms
2 of providing fair notice to groups, people know
3 exactly what's allowed and not allowed, but we have
4 no choice as an agency but to use that test?

5 MR. BOOS: Could I speak briefly on
6 that?

7 COMMISSIONER TONER: Sure.

8 MR. BOOS: I think Congress, when they
9 enacted the BCRA amendments, enacted those
10 amendments with the express advocacy standard in
11 mind, and so you really--it's not just our reliance
12 on it. It's also Congress' reliance on that
13 express advocacy standard, and the Supreme court
14 did not overrule Buckley on that. It just simply
15 said that Congress could go a little further than
16 the express advocacy standard and it chose to go a
17 little further in terms of electioneering
18 communications and narrowing some of the activities
19 that political parties can engage in, but they're
20 already political and they're already registered
21 with the Commission anyway.

22 It's really the question of assuming

1 jurisdiction over other activities and other
2 entities, and I would encourage the Commission to
3 really go and read the FDA v. Brown and Williamson
4 decision in terms of long-time standing rules, then
5 a huge switch when there's been legislation enacted
6 in the meantime which really--really, if you make
7 some of the switches and don't go by the
8 longstanding interpretation of these terms, some of
9 the things that have been proposed in this Notice
10 of Proposed Rulemaking don't make sense, and I
11 really think, for example, the provision with
12 respect to electioneering communications, if you
13 were to adopt a rule that makes an organization a
14 political entity by spending \$10,000 a year on
15 electioneering communications, you really create
16 the whole provision for reporting electioneering
17 communications a nullity, because that's where the
18 reports are required to come in.

19 And so you really need, I think, to
20 stick with that express advocacy standard.

21 COMMISSIONER TONER: Thank you, Mr.
22 Chairman.

1 CHAIRMAN SMITH: Thank you, Commissioner
2 Toner.

3 Commissioner Thomas.

4 COMMISSIONER THOMAS: Thank you, Mr.
5 Chairman.

6 Gentlemen, thank you. I want to sort of
7 lay out for you the possibility that there is a
8 legal argument that works the other way. As you
9 know, Congress passed this electioneering
10 communication statutory provision, and it is very
11 broad in its impact. It says, in essence, the
12 communication via broadcast contains any reference
13 to a Federal candidate and that is run within X
14 number of days of an election and reaches the
15 targeted audience is going to have to be treated as
16 subject to the Federal campaign finance
17 restrictions. No soft money can be used, limits
18 on--I'm sorry--disclosure and no soft money, and so
19 it's breathtaking if you think about it in its
20 reach, any reference, and so I guess in a way, I'm
21 thinking of coming back to something that would be
22 in a way less encompassing.

1 When we're trying to figure out what was
2 left once Congress got through their electioneering
3 communication business, what was left for us to try
4 to find as an expenditure, and if you look also at
5 the electioneering communication legislation, it's
6 specifically says that something was count as an
7 expenditure is not an electioneering communication,
8 and the logic there is if you've got some group
9 that is a political committee, performs what it is
10 putting its money out for is an expenditure, and
11 that money will have to be soft--I'm sorry--hard
12 money to begin with. So you don't have to worry
13 about it so.

14 So I'm laying out for you that if you
15 look at what was going on with the electioneering
16 communication legislation, there is a pretty good
17 argument, it strikes me, that what Congress was
18 regulating was things that being done by groups
19 other than a political committee, and it was
20 leaving, in essence, for the Commission to continue
21 to try to decide what is a political committee,
22 what is an expenditure by a political committee.

1 So let me put it in practical terms.

2 Mr. Boos, your organization, we
3 read--and I read it into the record earlier--was
4 putting out some pretty fun ads, I thought.

5 MR. BOOS: Thank you.

6 COMMISSIONER THOMAS: I doubt Senator
7 Kerry thought they were so funny, but these are the
8 ones that refer to the \$75 haircut, the \$1 million
9 luxury yacht, and four lavish mansions, and then it
10 language saying another rich, liberal elitist from
11 Massachusetts who claims he's a man of the people,
12 priceless. So what's up with that? If you spent
13 75 percent of your resources on those kinds of ads,
14 would you expect a call from the IRS? Would you
15 not expect the Federal Election Commission perhaps
16 to jump in and say it looks to us like that's
17 designed to influence an election? How does that
18 go along with your stated agenda as a [c][4]
19 organization?

20 MR. BOOS: We don't spend anywhere near
21 75 percent of our resources on that type of an ad,
22 and I can tell you the resources we put into it are

1 far in excess of the \$50,000 threshold that was
2 listed as one of the determinations of a major
3 purpose; however, that ad--we will spend on those
4 type of add probably a very small percentage of the
5 organization's annual revenue. So that type of an
6 ad is not the major purpose of an organization. It
7 is an ad that would be an electioneering
8 communication if it was run in the markets within
9 the 60- and 90- and I think maybe even 120-day
10 thresholds. It would be an electioneering
11 communication. We made sure that we did not run
12 that ad in any of those particular markets, and
13 sometimes it's not that easy to determine exactly
14 where you can run an ad, especially during a
15 primary election campaign season.

16 But that's not the primary purpose of
17 Citizens United, to run those type of add. That
18 ad, we think would definitely fit within the
19 definition of a Federal election activity, although
20 it does raise the question that I asked earlier.
21 Depending on who was hearing that ad, they might
22 have thought it was favorable to Kerry. If you

1 were a liberal elitist from Massachusetts, you
2 might have viewed that as favorable.

3 COMMISSIONER THOMAS: Nice try.

4 Let me just--Mr. Henderson, I did want
5 to take this moment just to--I watched your
6 testimony before the Civil Rights Commission the
7 other day, and I thought it was very insightful.

8 MR. HENDERSON: Thank you.

9 COMMISSIONER THOMAS: You obviously are
10 deeply committed, as I hope we can we all are, to
11 trying to get more people involved in the political
12 process, get them out to vote, get them excited
13 about the process and participate. And I just
14 wanted to compliment you, because I thought your
15 presentation there was very helpful and good.

16 MR. HENDERSON: Thank you.

17 COMMISSIONER THOMAS: We, I think, want
18 to make sure that people go away from this
19 proceeding with an assurance that this group
20 doesn't have any interest in trying to step over
21 obvious statutory allowances that have been there
22 for years. Organizations are allowed to undertake

1 nonpartisan voter registration and get-out-the-vote
2 activity. It will never be treated by this agency
3 as an expenditure, and so that kind of activity is
4 absolutely protected by the statute and by Congress
5 for years, and this Commission will adhere to that.
6 So I want to assure you on that, but just was
7 hoping that maybe you could give us a little bit of
8 the flavor for how your various organizations, to
9 the extent you do get involved in voter
10 registration or get-out-the-vote activities, how
11 you do avoid any sort of label as being partisan in
12 nature.

13 MR. MOORE: Well, it's a little
14 difficult for us, because we're part of a lot of
15 coalitions. For instance, we are part of the
16 Campaign for Communities for Earth Day on the 22nd
17 of April. We may be doing voter registration
18 activities with environmental groups that may be
19 opposed to the policies of the President for his
20 environmental work. So when you combine civil
21 rights concerns with environment, there is an
22 immediate perception that that's partisan; however,

1 it simply to us is making allies with the people
2 who have similar agendas and similar things to
3 bring to the table.

4 We may have people who are trying to
5 eliminate poverty or trying to bring about a
6 different economic policy for our country.
7 Those--that's that just natural coalition-building
8 efforts that have always taken place. Under this
9 environment that we're in, it's putting I guess the
10 fear of God in a lot of these groups that used to
11 do this. We've had ministers who used to easily
12 invite people to come to the pulpit who are running
13 for office who are now pausing a little bit.

14 So the impact this is having is very
15 widespread, and all we can do is say this is what
16 we've done for the last 20 years as a voter
17 registration campaign; we reserve the right to have
18 candidates come. I mean, we had a situation where
19 we were afraid to have candidates who were Federal
20 office holders speak about Earth Day on Earth Day
21 because it might give the impression that we were
22 somehow coordinating with them. So it's changed

1 the rules quite a bit, and I really liked the old
2 days where you basically went around, you had
3 clipboards, and you registered whoever you could.
4 We worked real hard with you guys--I'm sorry--with
5 the Commission on motor voter. That passed. It
6 changed, it revolutionized our ability to do grass
7 roots, hands-on registration in all 50 states
8 through the mail-in system. That wasn't the case
9 until 1995.

10 So on one hand, there is an extension or
11 right to extend our abilities to do registration,
12 and on the other hand, there are these restrictions
13 that make it hard to raise money, make it hard for
14 people to coordinate with like-minded groups. So
15 as soon as this is resolved, it will settle things
16 back down again, but every day that we're not at
17 our business taking care of that work, it is
18 undermining the efforts that have already been set
19 by this Commission to make it easier for people to
20 register and easier for people to participate.

21 COMMISSIONER THOMAS: Thank you.

22 CHAIRMAN SMITH: Thank you, Commissioner

1 Thomas.

2 Mr. Norton.

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

4 Mr. Moore, as Commission Thomas points
5 out, our own statute exempts from the definition of
6 expenditure nonpartisan activity designed to
7 encourage individuals to vote, and at the same
8 time, your group had the misfortune, as I imagine
9 you now, of finding yourself cited in footnote to
10 the McConnell decision, and I wanted to ask you a
11 couple of questions about that, and not necessarily
12 the legal impact, but some of the factual
13 suppositions. What the court wrote is:

14 "The record shows that many of the
15 targeted tax-exempt organizations engage in
16 sophisticated and effective electioneering
17 activities for the purpose of influencing Federal
18 elections, including waging broadcast campaigns,
19 promoting or attacking particular candidates, and
20 conducting large-scale voter registration and GOTV
21 drives. For instance, during the final weeks of
22 the 2000 Presidential campaign, the NAACP's

1 National Voter Fund registered more than 200,000
2 people, promoted a GOTV hotline, ran three
3 newspaper print ads, and made sever direct
4 mailings. The NAACP reports that the program
5 turned out one million additional African American
6 voters and increased turnout over 1996 among
7 targeted groups by 22 percent in New York, 50
8 percent in Florida, and 140 in Missouri."

9 COMMISSIONER THOMAS: What was that
10 percent in Florida?

11 MR. NORTON: Fifty. "The effort, which
12 cost \$10 million was funded primarily by a \$7
13 million contribution from an anonymous donor."

14 My question is do you think that
15 characterization of that activity by the Supreme
16 Court is accurate as a factual matter, that is it
17 was sophisticated and effective electioneering
18 activity for the purpose of influencing Federal
19 elections? Is that a fair characterization?

20 MR. MOORE: Well, a lot of the facts of
21 that whole statement are incorrect. They were
22 taken from a lot of different sources that weren't

1 all accurate. So there's a lot of things that are
2 not factual. The results of what we did, the fact
3 that it was historic, that it did have a major
4 impact on elections is true, because the African
5 American turnout was historic for a lot of reasons.
6 A lot of the people at this table were involved in
7 a number of coalitions in making that happen.

8 But I'm not sure what part of it is--

9 MR. NORTON: The Supreme Court's
10 characterization of the activity as sophisticated
11 and effective electioneering activity for the
12 purpose of influencing a Federal election, that's
13 the characterization.

14 MR. MOORE: Well, it was sophisticated
15 and it was something that heightened the ability of
16 the civil rights organizations to bring new
17 methods, some technology into polling and research
18 and targeting that helped create a better
19 coordinated organized registration drive. That
20 much is true. I don't think the other
21 characterizations, that we were trying to influence
22 a political campaign per se, we did runs ads that

1 talked about not just the Governor of Texas, but
2 also many other members of Congress and compared
3 their records on gun control and other things; but
4 I think sometimes people may take one ad and run it
5 and blow it out of proportion and make it seem as
6 if that was the only activity that was being
7 involved.

8 But there were 8,000 volunteers on the
9 ground doing a lot of different things from canvass
10 operations as well as door-to-door registrations,
11 get out the vote on a number of issues in a number
12 of places to impact the turnout of African American
13 in general. I think that's how I would describe
14 that and characterize it.

15 MR. NORTON: Do you have any idea--it's
16 been a number of years. They talk in terms of
17 broadcast campaigns promoting or attacking
18 candidates. Do you have any rough sense as to what
19 percentage of your spending that would have
20 represented in an election year, in that election
21 year or any other election year?

22 MR. MOORE: Very small percent, because

1 so much of the resources were used for
2 on-the-ground grass roots activities, and the
3 ad--you know, we only had one television ad that
4 never ran after one or two days, and everything
5 else was radio and print. So mostly it was a very
6 small percentage.

7 MR. NORTON: I don't have any further
8 questions. Thank you very much.

9 CHAIRMAN SMITH: Thank you, Mr. Norton.
10 Mr. Pehrkon.

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

12 Gentlemen, well it's close to the end of
13 the day, and I hope to be very brief on this.

14 Mr. Boos, you were one of the few people
15 who actually talked about the cost of complying
16 with the reporting requirements of the Federal
17 Election Campaign Act, and I think your PAC spends
18 somewhere around five to twelve thousand a dollars
19 a year in complying, for administrative expenses.

20 MR. BOOS: That's correct. Do you want
21 me to elaborate on that?

22 MR. PEHRKON: Well, what I want you to

1 do is compare that to your estimated cost for what
2 it would cost for your 501[c][4] organization. I
3 think you estimated that cost to be somewhere
4 between 100 and 250 thousand dollars.

5 MR. BOOS: That's correct, and the
6 primary reason is because there is so many more
7 transactions that need to be reported with respect
8 to the 501[c][4] organization. If it were a
9 political committee, the need would be there to
10 file at least quarterly reports, if not--our PAC
11 actually files monthly reports, but the need would
12 be there to file at least quarterly reports,
13 detailed quarterly report.

14 Our PAC right now in any given year has
15 never raised or spent more than 50,000. It's never
16 reached the threshold to be required to file
17 electronically, but if Citizens United itself were
18 require to file, it would be reporting millions of
19 dollars in transactions that would entail a lot of
20 different entities. We're very direct mail
21 oriented, and we use different direct mail firms to
22 assist us with our mailings that are caged at

1 different locations throughout the country. All of
2 those transaction would need to be reported. We
3 would need to hire additional staff. We would need
4 one to pay the escrow companies, the caging
5 companies that were involved in the process,
6 additional funds in order to set up and report
7 transactions, individual gifts. Any time someone
8 contributed more that \$200, that check would have
9 to be compiled for purpose of reporting. All those
10 transactions would, of course, cost us additional
11 funds in terms of staff time, my time.

12 Right now, with respect to the PAC, the
13 reporting, I basically handle our PAC reporting.
14 There is no way I, as an individual, could possibly
15 handle all the transactions entailed to cover
16 somewhere between probably three and a half and
17 five million dollars worth of transactions per
18 year, which is the size that Citizens United has
19 really grown to in the last couple years. It's
20 just a huge undertaking from our standpoint.

21 MR. PEHRKON: One other question I have,
22 and maybe I obviously don't understand this, I

1 would have thought for your solicitation groups,
2 you would capture much of the same information as
3 to who made the contribution, how much, and when
4 they made it, so you could go back and solicit
5 again for your Citizens United organization.

6 MR. BOOS: We capture that information,
7 but part of the problem are the time constraints
8 with respect to reporting by the Federal Election
9 Commission, and maybe we're not as efficient as we
10 probably ought to be, but it takes a lot of time
11 for a lot of the information to trickle basically
12 to our office where it would be reported for
13 Federal Election Commission purposes. We have
14 other entities that capture that information, that
15 put it on computer files, and use it for putting
16 out direct mail correspondence. The additional
17 administrative costs would be incurred, one, in
18 putting it in a format that would be acceptable to
19 with respect to the Federal Election Commission and
20 reviewing--

21 MR. PEHRKON: What is the overall total
22 dollar amount that we're talking about here?

1 MR. BOOS: The size of the organization,
2 I think last year for 2003, and we haven't
3 completed all of our financial audits at this
4 point, it's about three and a half million dollars.

5 MR. PEHRKON: Okay. Thank you.

6 Thank you, Mr. Chairman.

7 CHAIRMAN SMITH: Thank you, Mr. Pehrkon.

8 Mr. Moore, Mr. Boos, Mr. Henderson, Mr.
9 Morrow, thank all of you.

10 Mr. Commission McDonald?

11 COMMISSIONER McDONALD: Mr. Chairman,
12 just one observation before the panel leaves,
13 because they really have been endure greatly, I
14 just wanted to observe what a great thing the
15 Commission has done, which is we've been able to
16 unite some fairly diverse groups together, and I
17 think we should be applauded for that.

18 CHAIRMAN SMITH: I thank you for your
19 input and, all of our panelists today, it has been
20 a very full day. It's been very informative. We
21 have another very full day tomorrow with 16
22 witnesses. We will begin tomorrow morning at 9:30

1 with the first panel to start at 9:35.

2 Commissioners and staff, please look sharp, and,
3 again, thank you. We'll be in recess until 9:30
4 tomorrow morning.

5 [Whereupon, at 5:03 p.m., the hearing
6 was recessed to reconvene at 9:30 a.m. on Thursday,
7 April 15, 2004.]

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