FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON

THE DEFINITIONS OF "SOLICIT" AND "DIRECT"

Tuesday, November 15, 2005

9:35 a.m.

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

PRESENT

Chairman Scott E. Thomas
Vice-Chairman Michael E. Toner
Commissioner David M. Mason
Commissioner Danny Lee McDonald
Commissioner Ellen L. Weintraub

Lawrence H. Norton
General Counsel

Robert J. Costa
Acting Staff Director

C O N T E N T S

P R O C E E D I N G S

CHAIRMAN THOMAS: The special session of the Federal Election Commission for Tuesday, November 15, 2005, will please come to order. I would like to welcome everyone to today's hearing.

Today we will discuss the Notice of Proposed Rulemaking on the definitions of "solicit" and "direct" which was published in the Federal Register on September 28, 2005. The NPRM explored several possible modifications to the definitions of "to solicit" and "to direct" so that they would be consistent with the District Court and Court of Appeals decisions in Shays v. FEC.

Thank you to all of the people who took the time and effort to comment on the proposed rules, and in particular those who have come here today to give us the benefit of their practical experience and expertise on issues raised by the proposed rules. I would like to briefly describe the format we will be following today.

This morning we have a total of seven witnesses who have been divided into two panels.

The first panel will have four witnesses and will last for an hour and a half. We will have three witnesses on the second panel, and that panel will last an hour and 15 minutes. We will have a short break between the two panels.

Each witness will have 5 minutes to make an opening statement. We have a light system at the witness table to help you keep track of your time. I am told, after some debate, that there will be a yellow light that goes on when you have 30 seconds left, and the red light means that your time is up and we would like you to wrap up quickly.

The balance of the time is reserved for questioning by Commissioners and our Staff Director and General Counsel. There will be a second round if time permits. I would like to remind my colleagues that we are not required to use our entire questioning time, although it is brief in each case, given that we have a need to go through everyone. We have a busy morning ahead of us. I would appreciate everyone's cooperation in helping

us to stay on schedule.

With that, I will open it up for any opening remarks. Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I just wanted to make three points.

As you all know, I wasn't here in 2002, so I really have no stake in promoting, supporting, attacking, or opposing the regulation that's currently on the books. Having said that, obviously I have read and I will try to comply with the Court's order.

I never personally, speaking as somebody who was outside the process, read the word "ask" as narrowly as the Court did. The particular hypotheticals that were thrown out in the litigation, about a Senator who would go up to a donor and say, "The party needs you to make a $100,000 donation," I just don't know in what universe both the donor and the Senator wouldn't understand that the Senator was asking for money.

That was my intent in interpreting the rule. That's how I understood it. I understand

from the comments we received that a lot of the folks in the regulated community understood it that way, and that's probably why we haven't had much of a problem. I don't think we've seen any complaints posing that kind of scenario.

And it's a little bit frustrating because in a sense I feel like we're having a hypothetical argument over hypothetical scenarios, and in fact there is probably substantial agreement amongst all the stakeholders over what the rule would cover. Obviously there are differences around the edges, but it seems to me that part of what the Court was trying to convey to us was that if your definition doesn't cover these kind of scenarios, then it's not worth the paper that it's written on, and I would completely agree with that statement. It's just that I always thought that it was covered.

So having said that, however, that brings me to point three, and this is really the kicker. I don't think that we're writing on a blank slate here today. I don't think we can pretend the last three years never happened. I don't think that we

can just have a do-over and say, "Okay, you know, start fresh."

I think that if we were to reissue the same regulation or substantially the same regulation that we issued in 2002, it would be challenged in court, and I believe that Judge Kollar-Kotelly would strike it down, probably with some fairly uncomplimentary things to say about us in the process, and I think that it would probably be upheld, her decision would be upheld on appeal if that happened.

And given that, that that's my belief, I think it would be irresponsible of me as a regulator, as an administrator, to commit this agency to another year or two, or however long it would take, of relitigating the definition of one word. I would really like us to move on and be able to get to some of the agency's other priorities.

And I think that we can do it. I think that we can write a definition that will withstand judicial scrutiny, and I'm hopeful that we can do

it in a way that is clear and specific enough to provide guidance to the regulated community so they will know what we're talking about, and that is where I hope the commenters will focus their comments, on the real world. Let's try to bring it back from the world of hypotheticals to the real world of actual concerns that people have about the way the new proposed rule would work, if you have any, and help us make it better if it needs improving.

Obviously my mind is open. I am willing to listen to what anybody has to say here today, but that's what I would find most helpful. I don't fault the commenters who said, "Go back to the old rule and just re-do the explanation." I think that we put that out for comment. I personally don't think there is anything that we could put in the explanation and justification that would satisfy the Court that that particular definition of the word "solicit" as "ask" was sufficient, not after everything else that we've been through.

So I thought that since I might be

perceived as a wild card up here, since I haven't voted on this before, it would only be fair to the witnesses to let them know sort of where I was leaning going in the door and what I would find most helpful. I appreciate the opportunity to have done so, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you. I just want to be fair to the witnesses as well, because actually Commissioner Weintraub reminded me she wasn't here in 2002, I will not be here when this is moved forward, I have a suspicion, in 2006. So I am eager to hear what the witnesses have to say, but I think in some of these rulemakings it's a little awkward for some of us.

CHAIRMAN THOMAS: Any other opening remarks?

Very well. The first panel I would like to step forward. We have Marc Elias. He is representing the Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign

Committee. We have William McGinley who is representing the National Republican Senatorial Committee. We have Joseph Sandler who is representing the Democratic National Committee, and Donald Simon who is representing Democracy 21. I would suggest you go in the alphabetical order, which would put Mr. Elias first.

Before we have anyone say a word, we do have to note that we have an opportunity today. It happens to be one of the panelist's birthday, and I'm told that Joe Sandler decided to come here and spend his birthday with us.

COMMISSIONER McDONALD: It just doesn't get any better than this, does it, Joe?

[Laughter.]

CHAIRMAN THOMAS: So we have an entire morning where we can berate him for reaching the grand age that he has reached.

VICE-CHAIRMAN TONER: Mr. Chairman, which is?

CHAIRMAN THOMAS: Well, that's going to be after the first--

VICE-CHAIRMAN TONER: That will probably be the first question.

CHAIRMAN THOMAS: We're not going to put him under oath.

COMMISSIONER WEINTRAUB: Mr. Chairman, I have to admit that I was desperately trying to get here through the traffic, and I almost ran over Mr. Sandler, who was walking down the middle of the street to avoid the construction. Now that I know it's his birthday, I'm so glad that I didn't.

[Laughter.]

CHAIRMAN THOMAS: Well, it may not seem like a happy birthday by the end of this, but we wish you a happy birthday.

MR. SANDLER: Thank you.

CHAIRMAN THOMAS: Mr. Elias, please proceed.

MR. ELIAS: Mr. Chairman, members of the Commission, thank you for hearing us out on this today. Commissioner Weintraub, thank you for giving us a sense of where you're leaning, at least.

I am here today speaking on behalf of the Democratic Senatorial and Congressional Campaign Committees, and I want to seize initially upon something that both you, Mr. Chairman, and Commissioner Weintraub both emphasized is important in this rulemaking, which I agree, is the opportunity for people with, to use Ms. Weintraub's words, "real world experience," and to use the Chairman's words, "practical experience," to sit before you and give you an assessment of (a) how the current rule has worked and (b) what the obstacles are that the Commission has going forward.

So at least just speaking for myself, rather than having this be a discussion of the law and various rules of construction and dictionary definitions and what the Article I power is versus the Article III power and all of those other things that these hearings so often devolve into, I really today want to speak and make a clear factual record, one that you can understand and one that hopefully, if this does wind up in litigation, the

courts can turn to.

As someone who is here representing 44 United States Senators and several hundred members of the Congress through their organizing campaign committees, the Democratic Senatorial Campaign Committee which has a membership of U.S. Senators, and the DCCC which has a membership of House members, I want to take the opportunity to say that the current rule has worked.

Members of the House and Senate do not raise or spend soft money, and however you define that, they don't do it. They don't raise it, they don't spend it, they don't touch it, they don't transfer it. They don't even know what some of the terms mean. They just know they don't do it. They don't have anything to do with soft money.

That has been my experience on the Democratic side, and it has been my experience, frankly, watching the Republican side. And no one watches Republican lawmakers and whether or not they are raising and spending soft money more closely than the Democratic Senatorial and

Congressional Campaign Committees.

Because if there was an epidemic of soft money raising or soliciting or directing, or whatever terms of art you want to use for today's hearing, I would know about it. And in fact you would know about it, because I would have brought it to your attention with great fanfare. And I am sure Mr. McGinley can speak at least for the Senate side, and Mr. McGahn later today for the House side, that if there was an epidemic on the Democratic side, of raising or spending or directing or transferring or otherwise having too much to do with soft money, you would be hearing about it from them.

So I'm here to say that just as a factual matter, not telling you what your obligations are under court, not saying whether the slate is clean, that right now the system works. The members of the House and Senate don't understand every nook and cranny of McCain-Feingold, but they understand this much: They may not solicit soft money.

And they don't know, most of them, whether

"solicit" includes "suggest" or involves an objective standard or a subjective standard. They don't understand any of that. They just know one thing: They don't have anything to do with raising soft money. Okay? And I don't know how much clearer a factual record this Commission needs.

The hypotheticals that were presented in court I think frankly represented a misunderstanding on someone's part. Maybe it was on the part of the Commission, maybe it was on the part of the Court. Maybe it was frankly on the part of my clients. But I can tell you one thing: Our clients wouldn't have done, the members of the DSCC and the DCCC wouldn't do anything close to what is in those hypotheticals the Court suggested. It simply doesn't happen.

In fact, many of this Commission's toughest Advisory Opinions over the course of the last two years have involved members putting before the Commission the outer reaches of raising and spending soft money. Inez Tenenbaum wanting to know what can she do with her former state campaign

account. Jon Corzine, for goodness sake, wanting to know if he can spend his own money, or whether spending his own money would somehow violate McCain-Feingold. And I hate to bring up an open sore for many of you on the Commission, the various Advisory Opinions that have dealt with the issue of ballot initiatives and initiative or referendum committees.

So the fact is, the regulated community has been extremely cautious and has moved very, very gingerly in this area, and has avoided doing anything that could be constituted to be raising or spending soft money.

Now, with that sort of background, let me just add a couple of other points. Number one, the Advisory Opinions that you all have issued, Cantor and the others that have been asked about, have been extremely helpful, because one of the things that has clearly troubled many members of the House and Senate Democratic Causes have been the rules that govern, the complicated rules that govern their ability to attend--not solicit, but to

attend--events for state candidates. And also the rules that govern their ability to solicit for state PACs, state parties, and state candidates.

I note with no glee, but simply as a point of information, that Allison Hayward's blog recently noted that Senator McCain, of all people, had sent out an e-mail solicitation, soliciting money without a Cantor disclaimer for a state candidate in South Carolina whose web site accepts corporate money. Now, I'm sure that Senator McCain did not intend to violate McCain-Feingold or the Cantor Advisory Opinion, and I'm sure that he probably, in his subjective mind, was only soliciting hard money. Under an objective standard maybe he was doing something else. I don't know. My guess is, since he was soliciting only a list of individuals and soliciting low dollars, it probably only raised hard money, so it was probably all fine.

But my point is that it's important that--these rules are very complicated, and to the extent that as part of the rulemaking you can simplify some

of these by codifying the Cantor disclaimer or by codifying other types of things that make it clear how our members can still do politics, they can still go to events, they can still send out e-mails, they can still do basic grassroots politics in their states and their districts without running afoul of McCain-Feingold, it would be very helpful to get that kind of clarification.

So I'm not going to use all of my time, but I just wanted to make those points, that I think having clear rules on the state and local candidate and state and local party and PAC piece of this would be incredibly helpful, very, very useful for the regulated community, but that on the basic question of whether or not there is mass non-asking soliciting going on in the regulated community, it isn't happening, or if it's happening, I'm not seeing it and the House and Senate Democrats are not seeing it.

Thank you.

CHAIRMAN THOMAS: Thank you.

Mr. McGinley?

MR. McGINLEY: Thank you, Mr. Chairman, Mr. Vice-Chairman, Commissioners. The NRSC appreciates the opportunity to provide some comments today on the Notice of Proposed Rulemaking. Initially what I would like to do is, I would like to cover some thematic points, and then talk, as Commissioner Weintraub asked, about some practical impacts of the definitions that we are discussing today and possibly proposing to amend.

As I stated, I am here on behalf of the National Republican Senatorial Committee, which was established by the Republican members of the United States Senate and is registered with the Commission as a political committee. All monies raised by the NRSC must comply with the amount limitations and source prohibitions of the Act, and we disclose our receipts and disbursements to the Commission in its periodic reports.

I say this to note that we are inside the bubble with these definitions. We are the ones who have to live with these definitions and must comply

with the Commission regulations. These are not comments that are proposed, by Mr. Elias or myself or Mr. Sandler, on the outside looking in, weighing in on hypotheticals. These are practical, real world experiences that we'll be discussing today about how federal candidates, federal officeholders, political party officials have to live with the rules that you are thinking about changing today.

The NRSC opposes any changes to the regulations that create new ambiguities or unnecessary restrictions that may chill the interaction between Republican Senators, federal candidates, and constituent or grassroots organizations. Any changes to the definitions that the Commission makes today should provide the regulated community with clear notice about the communications and activities that constitute a solicitation.

Federal candidates and officeholders should be permitted to communicate with community organizations and engage in community activities

without fear that someone could misinterpret their speech or attendance at an event, particularly a state or local event, as an impermissible solicitation. Determining what constitutes a solicitation should be governed by the plain words of the request, even for indirect or implied requests.

Attendance at an event, in our view, is not a solicitation. Gestures should not be a consideration in determining whether a solicitation has been made. Making policy speeches at issue conferences should not be considered solicitations, even if the organization that sponsors the issues conference later on, at a separate date, at a separate time, as a separate component of the same event, holds a fundraising event.

Federal officeholders and candidates and party officials should be held accountable for the words they speak. They shouldn't be held accountable for somebody's misinterpretation of the words that they have said, or the fact that they have attended an issues conference where they may

not have asked anybody to make a donation or directed anybody to make a donation.

For this reason, the NRSC urges the Commission to adopt Alternative Two. You should retain the current wording of the definition but clarify the explanation and justification to make clear that indirect and implied requests are covered by the definition.

The NRSC agrees with Commissioner Weintraub. Nobody believed or nobody interpreted the current definition to preclude that a solicitation was made in the examples in the Court's opinion. And I agree with Mr. Elias that whether it was a misunderstanding on somebody's part or somebody just got it wrong, I don't know, but nobody interpreted--in the regulated community we are not aware of anybody interpreting the definition of "solicitation" to mean what it said in the Court opinion.

The NRSC also urges the Commission to approach this rulemaking with the goal of preserving stability in the regulatory regime.

There have been so many changes over the past three years. The regulated community has operated under the current rules for an election cycle and is finally becoming familiar with how they work.

For example, candidates and party officials are becoming accustomed to the new rules governing state and local candidate fundraisers or events and state and local party committee events. As stated in prior testimony, in most instances the money for the state and local election fundraising events has already been raised before the event takes place.

So when a candidate or an officeholder or somebody else shows up, appears at the event, it's not a solicitation in functional terms. Typically what they are doing is, the federal officeholder or the candidate is interacting with the grassroots activists of the party or the grassroots or constituent activists at an officeholder event.

These appearances simply energize the grassroots. They are not an effort to evade the soft money prohibitions. They are not an effort to

get corporate money into federal elections. They are not an effort to flood the system with shadow groups or any type of stealth PACs.

Rather, what they are is, they are an opportunity for federal candidates or officeholders and in some instances party officials to interact with the people who actually make elections work, the people who stuff envelopes, who make phone calls, who volunteer for campaigns, who volunteer for party committees. Or it may be an opportunity to hear the side of constituent or grassroots organizations and what they feel about a particular issue: a chamber of commerce, a union meeting, something else where an officeholder or a candidate can get down there and actually mingle and interact with the people whose lives are affected by the laws they pass.

And in many instances they also hold fundraisers in connection with those types of events. They have policy conferences, they have panel discussions, they educate people about issues that affect them, but maybe later on in the same

conference, as a separate component, there is a fundraiser. The candidates or the officeholders should not be held to, should not be deemed to have made a solicitation simply because they showed up and talked about a particular issue. They should only be held accountable for the words they speak.

Vague and overly broad definitions will have a disproportionate impact on low-dollar grassroots events and activities, not on high-dollar events. The ultimate victims of an overly broad and vague definition in the regulations will be the low-dollar events. It will be the grassroots events. It won't be the large meetings with the large corporate donors or (c)(6) or a union or some large (c)(4).

No, what it's going to be is, it's going to hurt the grassroots, because at the end of the day what the candidates and the officeholders are going to do is, they are going to come to counsel and ask, "Can I go to this event?" And people are going to have to ask, "Is this a fundraising event?"

And if it is, and we don't know what the solicitation is going to be, then we're going to have to follow the Advisory Opinions. And if you rescind the Advisory Opinions, as I'm about to discuss, that's going to chill the activities of federal officeholders and candidates at the state and local level.

For these reasons, the NRSC believes that the Commission should not disturb Opinions 2003-3 and 2003-36, that it should keep them in place. These AOs provide specific guidance for federal candidates and officeholders and their agents, and provide them with the legal protections they need to continue to participate in state and local election events. In fact, the NRSC favors incorporating the guidance in these AOs into the Commission regulations to make them uniform.

Each state's contribution limits for state and local parties or candidates are different. Some states have lower limits than those under federal law, while others permit higher limits. Federal candidates and officeholders need a uniform

rule on solicitations for state and local events.

And, as stated in prior testimony I would encourage you to take a look at the state and local caucus committees. In some instances those are part of the party committee structure. In other instances they are not; they are considered a state and local PAC. Codifying the RGA Advisory Opinion will give the federal officeholders and candidates the protections they need to continue to engage in these grassroots activities.

I'm sorry. I see my time is up.

CHAIRMAN THOMAS: There will be time later on, I'm sure. Thank you very much.

Mr. Sandler?

MR. SANDLER: Thank you very much, Mr. Chairman and members of the Commission. We appreciate the opportunity to testify today in this rulemaking on behalf of the Democratic National Committee. With me today is Amanda LaForge, also the Chief Counsel of the DNC.

The DNC generally supports the proposed rule, and we commend the Commission for developing

and Mr. Norton and his staff for developing the proposal, which we believe does strike the proper balance between meeting the requirements of the Shays-Meehan litigation and creating a workable and practical standard for party committees and their offices and staff.

In keeping with the request of Commissioner Weintraub, our principal concern is a practical one, as explained in our comments. Governor Dean and other national party officers--we have five vice-chairs, secretary-treasurer, national finance chair--and our staff appear frequently at two kinds of events.

They appear at fundraising events for state and local party committees, obviously all kinds of fundraising events, including fundraising events at which non-federal money is being raised, which would necessarily be the case with local party committees, few of whom are registered with the FEC. Secondly, they appear at non-fundraising events, non-fundraising events for a wide variety of nonprofit organizations, political

organizations, advocacy groups, state and local candidates and the like.

We basically want to be sure of two things: Number one, that the mere expression of support for the work or activities of an organization, a nonprofit organization or a local party committee or a state or local candidate is not construed as a solicitation of funds in these circumstances. Secondly, that the mere appearance of a national party officer at a state or local party event is not automatically construed as a solicitation.

We think there are four, I want to make just four quick points about the specific rulemaking proposal in that regard. We believe the proposal should be adopted as proposed, except that in Alternative Two, the language that the Commission--that appears in the Notice of Proposed Rulemaking, that says, requires that the E & J, I guess, would make clear--explanation and justification--would make clear that solicitation requires an actual request for funds and does not

in any way apply to other types of political speech, such as statements of political support for an organization. That is a useful and, we believe, important and necessary clarification, and should be included as proposed in the, I guess, second half of Alternative Two.

Secondly, the examples provided in the Notice of Proposed Rulemaking of both what would and would not constitute a solicitation, we believe are extremely useful and accurately illustrate what should be the proper scope of the proposed rule, and we urge that those be included either in the explanation and justification or in the language of the rule itself.

Third, we do not support the addition of an open-ended conduct element, the idea of the language that is suggested, of just throwing the word "conduct" in there and we just don't have any idea what that means and how it would be applied, or whether the party counsel are supposed to start coaching our national party officers on their body language, or what in the world that is supposed to

mean.

And, finally, we would not support any new rule, and there is nothing that is proposed but there is a reference to it in the comment of some of the reform groups, that would automatically deem any appearance at a fundraising event as a featured speaker to be a solicitation. In the case of state and local party fundraising events, obviously that is not possible. In terms of national party officers, it is not what the law says. It's clearly not what the law means, and we would urge that such a presumption not be included in any new rule.

And with that, I thank you for the opportunity to present these views, and certainly look forward to answering your questions at the appropriate time.

CHAIRMAN THOMAS: Thank you very much.

Mr. Simon, please proceed.

MR. SIMON: I appreciate the opportunity to testify on behalf of Democracy 21, and let me join in wishing Joe a happy birthday.

In the 2002 rulemaking on this issue, the General Counsel proposed a definition of the term "solicit" to include any statement that requests or recommends that a contribution be made. The Commission rejected that proposed rule, with Commissioners saying that it was too broad and too subjective. As a result, the Commission adopted a rule that defines "solicit" to mean only to ask that a donation be made.

This deliberate narrowing of the definition obviously caused concern among supporters of the law. It raised the question, for instance, of whether the Commission would treat as a solicitation a statement by a federal officeholder to a potential donor, "I suggest that you contribute $100,000 to the state party." Now, while this may seem absurd, what other meaning could there have been to the Commission's deliberate decision to excise the word "suggest" from the proposed definition? So the sponsors brought suit.

Although the Commission subsequently made

efforts to reinterpret its deliberate narrowing of the definition and to claim it was not in fact intended to be so narrow at all, it lost this point with the Shays court, which held that the rule did have a narrow meaning and covered only an explicit, direct request for money, and thus did not cover what the Court called more nuanced forms of solicitation, such as indirect statements, coded statements, or in the words of the D.C. Circuit, "winks, nods, and circumlocutions."

The Circuit Court called the Commission's narrow definition an absurdity that violated Congress' language and intent in BCRA under the Chevron step one test, and therefore held the regulation invalid, as had the District Court. Given this, I believe the Commission has no option but to adopt a new rule. There is no saving interpretation to be made of a rule that flunked the Chevron step one test.

I think the Commission is very much on the right track with the rule proposed in the NPRM, which would make clear that "solicit" does include

indirect as well as direct, implicit as well as explicit requests. We also support the approach taken in the proposed rule that whether something is a solicitation is a question that should be judged in context.

Now, most of the context obviously does depend on the language used, but conduct is as much a part of context as the language itself, and it's artificial to exclude considerations of conduct from this determination. Now, by conduct we don't mean that the Commission should look for solicitations done by pantomime. Rather, the D.C. Circuit expressly noted--expressly noted--that winks and nods can be part of how solicitations are made, and the Commission should not by rule disable itself from even considering such cues in an appropriate case simply because they might be nonverbal.

Now, let me also point out this is not a radical concept to the Commission. In both the Cantor AO, 2003-3, and 2003-36, the RGA AO, the two major AOs that deal with the solicitation rule, the

Commission said in both of them, the scope of a covered individual's potential liability under Section 441i(e)(1) must be determined by his or her own speech and actions in asking for funds, and those of his agents, but not by the speech or actions of another person outside of his or her control.

So even under the existing rule the Commission considers actions or conduct, as well you should. So words of general support for a candidate or party in one context, a fundraising event, for instance, might very well convey a different message than the same words in another context, such as at a policy forum or seminar. Again, the Commission should be free to judge the meaning of the words by considering all elements of the context.

Now, finally, the Commission should not be dissuaded from adopting such a rule by an argument that candidates and officeholders will be unduly restricted from speaking or even attending events for fear of slipping over some sort of indistinct

line. The key point I think is this:

Federal candidates and officeholders are not prohibited from soliciting. They are prohibited from soliciting non-federal funds. Federal candidates and officeholders can solicit for state candidates and state parties. They just must make clear that their solicitations are limited to asking for donations subject to federal rules.

In the rules developed by Advisory Opinion, the Commission has provided a safe harbor to ensure compliance with the law. Federal candidates need only make clear by disclaimer that their solicitations are so limited. The disclaimer can be oral or written, preplanned or spontaneous.

Given this, it should be relatively simple for Federal candidates and officeholders to ensure compliance with the solicitation rules simply by making clear to their audience that any solicitation they might make is limited to Federal funds. If they follow the guidelines set out by the Commission in the disclaimer Advisory Opinions,

they should have little to fear from the Commission's redefinition of the term "solicit."

Thank you.

CHAIRMAN THOMAS: Thank you very much, one and all. Well, we will move into the questioning phase. I will start off the first panel here.

I guess first off I'm most intrigued with this issue of whether or not to incorporate conduct. I think if we were to borrow the Court's language and incorporate the word "circumlocution" in a regulation, we probably would be the first and only government agency to use that word anywhere in a regulation, so that has some appeal to me.

But I think I'll focus just on whether or not maybe it would be helpful for us to incorporate in the list of examples perhaps something that would demonstrate what we might mean if we were to include the concept of conduct. I'm thinking of something where we say that the words used would be, "I would never think of asking you for a corporate check," and then there would be the wink, wink, suggesting that actually I mean just the

opposite. Another example might be, "Would I be asking you for a corporate check?" followed by a nod.

I mean, that type of conduct it seems to me we all in daily life see, joking comments or conduct like that. but we understand the meaning. So I'm just curious whether the panel would find it appropriate if we were to focus our reference to conduct on a couple of examples like that, and put those into that list of examples that we already have crafted. Any or all. Mr. Simon?

MR. SIMON: Well, I'll start it out. I mean, I do think one way or the other, the Commission should enable itself to take into account conduct, in making the determination called for by the proposed rule about whether in context a reasonable person would understand that there is a solicitation being made. And I think that conduct may not often be part of the situation, but I think it occasionally could be part of the situation.

I think it is important that the D.C. Circuit expressly flagged this issue for the

Commission, and I think it would be very questionable under the ruling for the Commission to simply disown that concept or not take account of the Court's decision.

CHAIRMAN THOMAS: Anyone else?

MR. SANDLER: I think that the example that you cite, Mr. Chairman, is clearly covered by the language of the proposed rule as proposed. It is, you know, construed as a reasonable person would understand it in context and would be covered without throwing in an open-ended term like "conduct."

It should be noted in the Shays District litigation the plaintiffs offered a whole host of examples, and I think this was impressive to the Court, of situations that they believed were not covered by the Commission's then existing regulation. Not a single one of those examples involved physical, nonverbal conduct. To the contrary, they were all communications that clearly referenced contributing or amounts of money or something that a reasonable person would understand

is solicitation.

So I just can't see throwing in an open-ended concept like "conduct" when the current situations you're talking about I think are embraced by the language of the rule as proposed.

MR. ELIAS: If I can just expand on that, just for one quick second, I think there is a reason. Although I was not privy to the plaintiffs' motives or strategy, I suspect there was a reason for that, which is that the hypothetical, with all due respect, Mr. Chairman, that you lay out simply doesn't happen. I mean, members of the House and Senate simply don't do that.

And the concern that I have, and those of you who have worked on Capitol Hill are familiar with the practice, there is a common practice now where members will not meet alone, without staff present, with lobbyists, not uniformly but generally. And the reason is that in the era of scandals and ethical allegations, you always want to make sure you have a witness present, to make

sure that there was not something that went on behind closed doors with the members that no one is privy to.

I can imagine your scenario where you have a member who solicited hard money, actually told someone, "I can't solicit corporate money," but the donor is insisting on giving a corporate check and the member is saying, "No, no, really, I can only solicit hard money. I can't solicit corporate checks."

And then we have the member who is beholden to whether or not the person who is insisting on making the corporate contribution thinks that the member really meant it or didn't really mean it, or they saw a flicker in their eye or they thought that they nodded their head. I mean, at some point a member has to be able to say, "I told them I don't raise corporate money," and that that's good enough.

And it can't be that it becomes this kind of he said, she said, of "Well, did you really mean it when you said you couldn't take corporate money,

or was there an intonation in your voice? Did you sort of glance the other way when you said it? Did you give less emphasis to that than you gave to other things?"

I mean, the conduct standard is fraught with turning what are genuine--there are a lot of confused people out there about McCain-Feingold. There are a lot of people out there who don't know they can't give corporate money to national party committees. They gave corporate money to national party committees for years and years.

And when our chairmen say, "No, no, really, we only take hard money, I can't take money from a corporation," my golly, I don't want them to have to have a witness present to make sure that there is someone who saw that there was no wink, there was no nod, it was just an honest-to-God statement.

MR. McGINLEY: The only thing that I would add to what Mr. Elias and Mr. Sandler said is that I think that your struggle to come up with an example of where conduct would constitute a

solicitation kind of illustrates the problem. I mean, it becomes too subjective of a standard.

And really what we're saying there is that even though your words said "No, I'm not going to take soft money," what you're doing is, you're interpreting what they did based upon the actions of somebody else, because if somebody does give soft money, then you're asking the question, "Well, why did they?" Even though the person was saying no, was there a wink or a nod or anything like that?

I mean, federal officeholders should be governed by what they say. They should be governed by what they say, not what somebody else interprets them to do through their actions or anything else. We don't need a subjective standard. What we need is some clear guidance as to what the Commission is going to look at as a solicitation.

CHAIRMAN THOMAS: We'll move on. I have other questions, but I'll get to those later. Thank you.

Vice-Chairman Toner?

VICE-CHAIRMAN TONER: Thank you, Mr. Chairman. I appreciate all the witnesses coming in today, particularly Mr. Sandler on your birthday. Happy birthday. I won't ask you how old you are, but I don't think you look at day over--well, I won't finish the sentence.

[Laughter.]

But thank you for coming. I appreciate very much Commissioner Weintraub's thoughts at the outset in terms of the key issues from her perspective in terms of this rulemaking. I just want to briefly note sort of where I'm going to come from on it.

My view is that we have an obligation to interpret the law as we think is right, as we think is appropriate. And for me, I'm not really going to be guided by what I think Judge Kollar-Kotelly may think we're required to do or the federal courts are required to do. I'm going to be guided by what I think is right, in reading the statute, and come to the conclusions that I think are appropriate.

There is no question that people in this country then have a right to go to federal court and litigate that, and that's fine. It's the way the system works. But I think I'm just not going to focus on whether whatever we do may lead to additional litigation, because if we did that around here, there really wouldn't be much we could accomplish.

So for me, I really do take it as a de novo review, particularly when Congress did not define the statutory term "to solicit," which I think is extremely important. They clearly could have defined the term. They did not. Instead, they delegated that important issue to this agency. So for me it really is a de novo assessment about what is the appropriate way to interpret the statute.

With that, I'll have some questions. I want to focus on one thing that Mr. Sandler indicated, which was that he thought it was important that whatever we do, we make clear that the regulation, or in the explanation and

justification indicate that the solicitation restrictions do not apply to speech that has no relationship to fundraising, political statements that have no relationship to fundraising. And I just want to establish first whether we have agreement on that.

Mr. Simon, do you agree that if you've got other types of political statements that do not relate to fundraising, in no way restricted by the soft money solicitation ban?

MR. SIMON: It depends. I think a policy speech, a pure policy speech at a non-fundraising event, is not a solicitation. If a candidate or officeholder gives a speech as part of the program at a fundraising event, I think that is a solicitation. I think being part of the program at a fundraising event, where the message of the event, the purpose of the event is to raise funds, being part of the program constitutes a solicitation. Now, that doesn't mean--

VICE-CHAIRMAN TONER: No matter what is said?

MR. SIMON: No matter what is said. Now, that doesn't mean that the candidate or officeholder can't do that. It just means that they have to touch the bases laid out in the Commission's Advisory Opinions about how to make the proper disclaimers.

VICE-CHAIRMAN TONER: But if I understood, I thought your view was, and please correct me if I'm wrong, that the Advisory Opinions, the Cantor AOs and others, were wrongly decided and that we should repeal those.

MR. SIMON: No. We said in our comments that we agree generally with the framework of the disclaimer provisions in the AOs. There are certain rulings made in the AOs that I think are grounded on the Commission's unduly narrow definition of "solicit" that it was working with at the time.

But the concept of allowing candidates to make solicitations at events where non-federal funds are raised, but to clarify, by the disclaimer mechanism laid out in those advisory opinions, that

he is only soliciting for money complying with federal rules, is a process that I think, as I said in my opening remarks, provides a clear and readily available safe harbor, such that candidates can go to non-federal fundraising events, can participate in those events, can speak at those events, but still do so in a way that complies with the statute.

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

MR. SANDLER: Well, in the case of national party officers and staff acting in that capacity, the mere appearance at a fundraising event for a state or local party committee clearly, you know, should not be considered a solicitation.

VICE-CHAIRMAN TONER: Should not be?

MR. SANDLER: Should not be. We don't believe that's what the law says, and we don't believe that's what the law could possibly mean. That doesn't mean--it means they don't solicit funds there. They don't ask for money. They comply with the definition of the proposed rule,

not suggest or recommend or in any way indicate that people there should give money, unless it was a completely federal hard money event. But the mere appearance of a national party officer at a state or local party fundraiser is not a solicitation. I think the law is clear on that, and that's how the sponsors interpreted it.

MR. SIMON: Could I just interject in response to Joe's comment? I don't want to use up more than my fair share of time. But state party fundraising events are different because there is a specific provision of the law that governs state party fundraising events.

VICE-CHAIRMAN TONER: For federal candidates and officeholders. What about national party officials that are not covered by that statutory provision?

MR. SIMON: Okay. Well, fair point. Then I would say that party officials going to such events would be subject to the disclaimer provisions in the Advisory Opinions.

VICE-CHAIRMAN TONER: Mr. Elias, you

indicated in your comments that you supported Alternative Number Two that we had in the NPRM, which basically would reaffirm the current regulation but would add language in the reg making clear that it relates to, it applies to indirect pitches for money as well as direct ones. Could you explain the rationale for your position on that?

MR. ELIAS: Yes, and I think it goes back again to my opening statement, which is that I'm not going to get baited into a discussion of what the Court can or can't require you to do, or what the Court did or didn't. I mean, that's--

VICE-CHAIRMAN TONER: Reasonable on your part.

MR. ELIAS: I think way too often, and I think this case was a good example of it, way too often you all wind up in a situation where the factual record of the hearing on the rulemakings is a bunch of lawyers bickering about what the law is. And I want to be here today, and I want to be very clear about this, I am here today to help flesh out

a factual record for you.

So the reason why we supported that alternative is based on the experience of the Democratic Senatorial Congressional Campaign Committee, which, may I point out, consists of a number of the sponsors and cosponsors of the legislation, obviously not all of them, including I assume Congressman Meehan. And I assume Senator Feingold would agree with all of the comments that I offer today, or perhaps many of the comments.

But understand that when Mr. Simon says that the current rules cause "concern" among the supporters of the law, my caucuses are the supporters of the law. This law passed with the overwhelming support, and the cosponsors and support of the Democratic House and Senate, and of the DCCC and the DSCC and its members.

So when we say we support Alternative Two, it is not because we're looking for a loophole in the law, but it is rather because we have seen a provision of the law that has frankly worked, that has prevented Republicans from raising and spending

soft money, that has stepped our members back from a line of raising and spending soft money. And it is place that they are, right now they are familiar with the rules, they understand the Cantor disclaimers, they understand what they are allowed to do and not to do, and clarity in a very complex regulatory regime is something that this Commission ought to seek to promote.

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

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Well, I love clarity. I wish I could find some. Maybe you can help me. Let me start with Marc and Bill. Joe thinks our proposed rules--

MR. ELIAS: You're very informal today.

COMMISSIONER WEINTRAUB: Well, we're all friends, right? If you prefer, I'll refer to you as Mr. Elias, just to show you how much I respect you.

Joe thinks that the proposed rule provides

him with workable guidance and he understands what it means, and you two say it doesn't. What does he know that you don't know? I mean, how come he understands it and you don't?

MR. McGINLEY: Marc, go ahead.

[Laughter.]

MR. ELIAS: I have learned over time to never disagree with Joe, so let me just say that it might be a slight difference in perspective. The House and Senate committees have a large number of members who are covered by this rule, and who have agents who are covered by this rule.

So I think some of it may be that what is workable for a national party committee, what is workable frankly for the DSCC's own staff, where they have lawyers like me who can provide regular, ongoing training and monitoring and compliance, is maybe a little different than when we get down to the membership level of these committees, which I think is something that Bill and I also have to contend with, where you have large numbers of members of the House and Senate who are being asked

on a weekly, and sometimes more often, basis to be involved in doing drop-bys of state candidate events or, you know, swinging into a state PAC event.

So I think that some of the differences may just be a difference in perspective; that the DNC, which has an institutional set of concerns as a national party committee, the primary candidate that it worries about is the presidential candidate; that generally has its own legal staff that is able to also make sure that that campaign is hopefully obeying the law.

It's a little bit harder--these changes I think will have a greater negative impact at the House and Senate level than it will--and frankly at the candidate level, the first-time candidate level--than it will at the--

COMMISSIONER WEINTRAUB: But why? What is it about the proposed rule that you don't understand or that you don't think is clear?

MR. ELIAS: Bill, I took the first one.

COMMISSIONER WEINTRAUB: Real world

examples, remember. What kind of scenarios do you envision that, you know, just befuddle you?

MR. McGINLEY: Well, I think that the reasonable person standard, if I remember correctly, is the proposed--you know, who is the reasonable person? Is it going to be the six Commissioners judging? Is it going to be the OGC staff investigating? Is it going to be us advising? Or is it going to be the candidate who shows up?

MR. ELIAS: Is it a reasonable candidate or is it a reasonable donor?

MR. McGINLEY: Right.

COMMISSIONER WEINTRAUB: Well, what's the alternative? I mean, if we don't have a reasonable person standard, which is put in there to try and guarantee some sense of objectivity, surely you don't want us to go and interview every donor and every candidate and say, "Now, what did you really mean by this?"

And what are we supposed to do, give them lie detector tests to find out what they really,

really intended, or what they really, really understood, if we don't just sort of look at their face and say, you know, "What would somebody normally understand these words to say?" What's our alternative here?

MR. McGINLEY: Well, this also gets into the problem of context and conduct, in that, you know, for example--you wanted a real world example--there are local Republican clubs all across the nation, I mean. And many times, as Marc said, Senators and Congressmen operate closer to the ground than sometimes the presidential candidates, and will receive more frequent invitations to go to these types of events.

These types of events don't pay for themselves. Many of these clubs aren't registered with the Commission as a political committee. They're not a federal PAC. So when a federal officeholder or candidate shows up at local club events where they ask for donations to help pay the cost of the meals, is that a fundraising event? And if the federal candidate or officeholder shows

up, is that a solicitation at those events? What if it's in the State of Virginia, where you have a $12 meal and somebody writes it out of their business account? I mean, it's these types of situations.

Now, the officeholder or the candidate may not believe that they just made a solicitation by simply showing up at this low-dollar event. What they're doing is, they just want to get together and talk to people who may be precinct captains or women, and find out what's happening on the ground in their district or state.

But when somebody gives money in connection with that event, we want the officeholders to be judged by the words they speak. In other words, if they didn't go out and ask businesses to sponsor the event, if they didn't go out and ask for people to pay for the lunches or to support the organization, but instead just showed up to have a conversation with constituents or grassroots activists, and they say, "This is a great organization, thank you for all you do," we

don't want that to be misinterpreted as some type of solicitation simply because, you know, an impermissible source sponsored the event without any connection to the officeholder's activity.

COMMISSIONER WEINTRAUB: But that really goes to something that Mr. Simon has asked us to put into the proposed rule. I'm asking about the proposed rule as it is, you know, as we put it out there. What is it about that that you find--

MR. ELIAS: Let me take a shot at an example, and it's something that we face, probably Bill and I at least face every week or at least every month, which is what to do when some over-eager state candidate has sent out a solicitation that includes a federal candidate without their permission. Now, I now have a flyer for a fundraiser raising corporate money--okay?--for a state candidate, and it's got a federal officeholder's name on it.

Under an objective standard, a reasonable person--well, depending on who the reasonable person is, it may be that my candidate just

unwittingly violated McCain-Feingold solicitation rules. Now, if the reasonable person is the reasonable candidate, to me solicitation has a volitional component to it. It is--

COMMISSIONER WEINTRAUB: Suppose we put that in? Suppose we said you've got to have some kind of participation in it?

MR. ELIAS: Well, more than some kind of participation. It has to be a volitional act. One should not be able to do an inadvertent solicitation, and inadvertent solicitations happen all the time now, because candidates just pluck the names of federal candidates and they stick them on their flyers and they send them out, saying that so-and-so is--

COMMISSIONER WEINTRAUB: Suppose we put an E & J that if the candidate had nothing to do with it and didn't approve it, didn't consent to it, and his name shows up somewhere and it's totally beyond his control, that we're not going to hold him responsible for it. Does that solve your problem?

MR. ELIAS: Well, it solves that

particular problem, but it goes to the question of what a reasonable person is. If you want to say that it is a reasonable officeholder, a reasonable candidate, a reasonable person covered by McCain-Feingold, that's something to talk about. But if the reasonable person is a reasonable third person who is hearing the solicitation, that's a very different kettle of fish.

MR. McGINLEY: That's right.

COMMISSIONER WEINTRAUB: Well, it seems to me that you are--I'll stop in one second because I see my time is up--but it seems to me that you are imposing a subjective test on top of an objective test; that you're saying that the problem with the reasonable person standard is that the reasonable person standard would be interpreted subjectively, and what we're trying to do is come up with an objective test.

MR. ELIAS: But, Commissioner, Weintraub, with all due respect, that's inevitable. As you probably know, I don't practice much outside of the political law context, but my understanding is, in

other areas of the law like employment discrimination this has actually been the source of some considerable litigation.

In sexual harassment cases, is it conduct that's offensive to a reasonable woman or a reasonable man, or a reasonable boss or a reasonable subordinate? And there becomes a lot of litigation about exactly from whose perspective it is reasonable.

And I'm just saying that if you're going to put a requirement of reasonableness into the law, it ought to be from the folks who are being regulated by it. It ought to be a reasonable person who is running for office, a reasonable person whose name is being used all the time and they don't know about it, a reasonable person who is being jerked from one event to another during a night, a reasonable person who is being handed remarks as they walk on stage that say, "Support the Democrats," a reasonable person who doesn't know what the state law is in the state about how much a city councilman can--

COMMISSIONER WEINTRAUB: All right.

MR. ELIAS: That should be the reasonable person.

COMMISSIONER WEINTRAUB: Okay. Could I just ask Mr. Simon? I know I'm over my time, but I would be very curious to know whether Mr. Simon would be willing to go along with a reasonable candidate standard.

MR. SIMON: No.

COMMISSIONER WEINTRAUB: I didn't think so.

CHAIRMAN THOMAS: Let's move to Commissioner Mason.

COMMISSIONER MASON: I want to start with a question for Mr. Simon because there were a lot of--the terms "objective" and "subjective" were thrown around in the opinion, and to a certain degree in our proposal, and some in your testimony, and as Commissioner Weintraub suggested, there is a little confusion about what that means.

But as I understand it, the principal difference in the law is as to whether we can go to

someone's state of mind. The subjective standard goes to state of mind, and therefore the potential donor, for instance, could file a complaint with us saying, "The officeholder did X, Y and Z, and I felt like I was being asked for a corporate contribution," and his statement that "I felt like I was being asked" by itself would carry weight.

Now, obviously a complaint is going to come in with other descriptive elements, but I want to see first if you agree with that being the principal distinction between an objective and a subjective standard, and assuming you do, if you're comfortable with us adopting an objective standard, however it might be expressed, "reasonable person" or whatever.

MR. SIMON: I think it's not an issue of what that one individual subjectively thought, in terms of whether that particular individual thought he or she was being solicited. I think it's a question of whether a reasonable review of the situation, of the context, of the words, would lead the Commission to conclude that there was a

solicitation. Let me just point out one--

COMMISSIONER MASON: As you understand it, in legal terms, does that mean an objective test?

MR. SIMON: Yes, that's my understanding.

Let me just point out one other thing which I think is also somewhat helpful to Commissioner Weintraub. In the E & J on the 2002 rule, the Commission said, and this was quoted by the D.C. Circuit, "The definition of `solicit' is intended to include a palpable communication intended to and reasonably understood to convey a request for some action."

So, you know, this debate about whether to include a reasonable person test in the rule or not, I think it's a little bit of a kind of false dilemma, because I think inevitably the Commission is going to construe its regulations by a reasonable understanding of what the words mean, and I think it said that about the 2002 rule. And whether you put it in the rule or not, I think that's essentially the only sensible way to go about it.

COMMISSIONER MASON: I suspect Commissioner Toner has attended the Foxfield Races.

VICE-CHAIRMAN TONER: Oh, very fondly. It's an old tradition.

COMMISSIONER MASON: It is, and occasionally the Albemarle County Republican Committee will hold a fundraiser in connection with the Foxfield Races, and this is where I want to get to this dilemma for federal candidates. I've worked for federal candidates who attended that fundraiser.

There is no program. I suppose we could have tried to maneuver a federal candidate up to the head of the table while people were picking the ribs. It wouldn't have been a very popular way to proceed. And so I'm wondering, if we impose this disclaimer requirement, what do we do there? I think that becomes the practical issue.

You've got this local party event. I understand there's a big problem with events that may not be advertised as fundraisers, but funds end up being raised. But, you know, are we going to

extend our disclaimer requirements there and say just because the federal candidate dropped by, didn't make a speech, we're going to have to put out the cards that say, "Hey, I'm not asking for federal money." Is that the way we should construe the rule?

MR. SIMON: Are you asking me?

COMMISSIONER MASON: Sure.

MR. SIMON: No, I don't think--I mean, I guess where I would draw the line is that for a federal officeholder to attend an event is not, in and of itself, a solicitation. Just attending an event is not a solicitation.

MR. ELIAS: Finally, a point of agreement.

MR. SIMON: Maybe we can build on that.

COMMISSIONER MASON: But you said being part of the program, so for instance if the federal officeholder is listed somewhere, and the program--it won't consist of the invitation. I think we've made it fairly clear that if the federal officeholder's name is on the invitation, that would bring in the requirements of the law. But

what if there is a poster at the event that simply lists some of the notable attendees?

MR. SIMON: Well, then, I think if non-federal money is being solicited, I think the poster has to have a written disclaimer on it for that federal officeholder.

COMMISSIONER MASON: I want to ask--well, I'll go ahead and wait and hope we have a second round. I want to get into a different topic. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you.

First of all, Joe, how old are you? Or how young are you?

MR. SANDLER: Well--

COMMISSIONER MASON: Joe is not answering, on the grounds that it might--

MR. SANDLER: --I'm old enough to remember in 1986 when our Chairman of the DNC, on the occasion of the introduction of the Byrd-Boren

bill, asked, "What is this soft money, and what do we care about it?" We won't get into that.

[Laughter.]

COMMISSIONER McDONALD: Well, however old you are, you're a lot younger than I am, so be grateful, for gosh sakes.

I thank all of you for being here. This is, in some sense it's almost kind of a--I don't know how to describe it--almost an odd rulemaking in a way. I mean, we are confronted with the fact, the results of what the Court said, and we cannot kid ourselves about that, and we're going to have to have some resolution.

Let me just go back and pursue a minute, and then I'm going to kind of yield the balance of my time to--well, I'll start with that, and then I'll ask a question. Bill, you in your opening remarks indicated that you had more to say. Would you like to say more at this juncture?

MR. McGINLEY: Sure.

[Laughter.]

COMMISSIONER McDONALD: I never knew a

lawyer that would turn down time, as a general rule.

MR. McGINLEY: Never pass up an opportunity. What I wanted to say is that part of the NPRM is whether the Commission--and the Court also highlighted this--whether the Commission should go the route with these definitions that they do in the corporate and union political activity context. And I was just going to say our position is that we advise against that.

We don't think that these definitions should be developed through the Advisory Opinion context or through the enforcement process, and that the definition of "solicit" in the corporate political context is very broad because it serves different purposes. I mean, there you have issues of coercion, and you don't want reprisal, the employment reprisals for superiors who may be approaching subordinates about contributing to a political action committee or another context.

Whereas here what we're talking about is the context of fundamental First Amendment rights.

Here what we're talking about is, we're talking about officeholders operating in a representational capacity, candidates and party officials going out and seeking to build grassroots support at low-dollar events by giving speeches to constituent organizations or grassroots organizations.

And so in that context I think we need to have a bright line definition of "solicit" and "direct," and we urge the Commission to avoid referring to or going to the corporate political context for the definition of "solicit," as the Court raised, and that was also raised by the Commission in the NPRM.

COMMISSIONER McDONALD: Thank you. Anyone else have any other comments they want to make on my time? Joe?

MR. SANDLER: I did want to just follow up Commissioner Weintraub's question about the difference between the comments of the national party committees and the national congressional campaign committees. Keep in mind that the rules under BCRA for officers of national party

committees acting on behalf of the national party are much stricter than for federal candidates and officeholders. Usually these ambiguities don't come up.

The Chairman of the DNC cannot appear at a fundraising event for a state candidate. Period. End of story. No disclaimer cures it. It doesn't come up. Or a fundraising event for another non-federal organization, you know, as a speaker acting on behalf of the party. These situations and some of the ones that Marc raised, where state candidates are putting federal candidates on invites, don't even come up for national parties.

COMMISSIONER McDONALD: Anyone else?

Well, then, let me go back to the issue about the party officials a minute, and the issue of disclosure, because I know Don was indicating that he felt like that there needed to be a disclosure for party officials, and Joe was very vigorously nodding his head "no" earlier. Did either one of you want to comment on that or pursue that for just a minute?

MR. SANDLER: With respect to party events, state and local party events, we just don't believe--well, we believe that clearly the law does permit, and has been interpreted to permit, and the sponsors have said it permits national party officers to appear as featured speakers at hose events, even though non-federal money may be raised. It's not a question of a disclaimer.

Remember that technically national party officers acting on behalf of the national party cannot solicit any funds that are not subject to the reporting requirements of the Act, and consequently it doesn't matter if it's for the American Red Cross, if they're acting on behalf of the party, they cannot solicit one time technically. And that's clear enough in the case of nonprofit organizations, be it the Red Cross or anything else.

But with respect to state and local party committees, we just do not believe that was--even though you could technically read it that way, it's clear that wasn't the intent of the law, and I

don't think it's necessary for the Commission to address this. We just don't believe--it's clear that the national party officer, even acting on behalf, was intended to be allowed to speak at, for example, a local party fundraising event.

COMMISSIONER McDONALD: Don, do you want to pursue that a minute?

MR. SIMON: Well, you know, the term "solicit" I think has a common meaning throughout 441i, so I don't know that you can interpret the term "solicit" different in the two sections. To the extent Congress treated national party officers and agents differently than federal candidates and officeholders, I think you have to give effect to that and follow the lines drawn by Congress.

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

CHAIRMAN THOMAS: Thank you. Mr. General Counsel, Larry Norton?

MR. NORTON: Thank you, Mr. Chairman.

Good afternoon, or good morning, Mr. McGinley. It feels like afternoon. I'd like to

start with you, if I can. In your opening remarks you said that our regulation ought to turn on the plain words, and that candidates or officeholders should only be held accountable for the words they speak, or write, I guess.

I was interested in your reaction to our Example No. 9 in the Notice of Proposed Rulemaking, which I'll read to you, I won't make you find. The example is a written communication that provides a method of making a contribution or a donation regardless of the text of the communication, for example, providing an addressed envelope and a reply card, allowing contributors to select the dollar amount of their contribution or donation.

In your view, should that be covered by our regulation? And do you think it is covered by the current regulation?

MR. McGINLEY: Well, what's interesting about this is that most donor reply cards actually contain a solicitation. I mean, at the top it's not simply, you know, a dollar amount in a vacuum with give us the best efforts information or give

us whatever information is required by state law. I mean, most donor reply cards are going to have a top line that says, "Yes, I will support you by making out a check payable to," blank, blank, blank, and then gives the options of the dollar amount.

So actually I would add some text to No. 9 to clarify that donor reply cards typically do contain a solicitation. I mean, typically when a fundraising package goes out, you'll have the cover letter that makes an explicit ask, and then you'll have a donor reply form that at the top is going to make a second solicitation.

So really what you have here, then, is you have a federal officeholder or a candidate making statements in connection with a solicitation. There, if the federal candidate, as you said in 2000-3 or 2000-36, if the federal candidate is reviewing this package, if they're taking a look at the letter that the people are asking them to sign, it has a donor reply card that contains a solicitation on the top, then yes, that is a

solicitation.

But if it's simply going to be, you know, a federal officeholder or a candidate gives somebody a quote to put in a letter that they are drafting, and without the knowledge of the federal officeholder or candidate somebody puts a donor reply card in there, then no, I mean, because that's not something that's done in connection.

MR. NORTON: Mr. Simon, in your written testimony you indicated that you didn't prefer one of the alternatives, which was to repeal the current regulation and provide no replacement definition for the term. Just to clarify, though, if the Commission were to take that course, would it be consistent with the Circuit Court ruling in Shays?

MR. SIMON: Well, I don't think--in other words, leave the term "solicit" completely undefined?

MR. NORTON: Through regulation. On a case-by-case basis, through Advisory Opinion and enforcement.

MR. SIMON: I think that would not be inconsistent with the court ruling.

MR. NORTON: Not be inconsistent?

[Laughter.]

MR. NORTON: Mr. Simon, let me stay with you for a moment. You have testified that the Commission ought to, and indeed is obligated to require a conduct component, or at least not to take conduct off the table through regulation. And all the examples we have discussed today are in connection with fundraising events, with the exception I think of a couple of the hypotheticals that the Chairman mentioned.

Are there circumstances that the Commission ought to concern itself with as it works its way through considering a conduct standard, outside of the context of participating in a fundraising event? Are there examples? I don't see any examples in your written testimony. Are there circumstances you're concerned about?

MR. SIMON: Well, first of all I think it's the best, fairest reading of what the D.C.

Circuit said. Secondly, I think it's consistent with what the Commission itself has said in the Advisory Opinions, that it does consider actions or conduct by the candidate. Thirdly, I think, you know, there are the, perhaps admittedly unlikely, but there are possibly the situations that the Chairman laid out before, where conduct could in context be part of a solicitation.

So I think for all those reasons, by far the better course is not to, as I said in my opening remarks, not to disable the Commission from taking those kinds of potential non-verbal cues into account in the contextual determination it makes about whether something constitutes a solicitation.

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

CHAIRMAN THOMAS: Mr. Acting Staff Director? No questions?

MR. COSTA: No.

CHAIRMAN THOMAS: Well, let me start again here, see if we can clear up one thing that has me

somewhat puzzled, this idea of possibly utilizing the Cantor Advisory Opinions and the law that has been established through that line of opinions, about solving some of these concerns about federal officials or perhaps even national party officials being in a situation that could be deemed a solicitation because of their attendance and perhaps being a featured guest. And you can get around that by incorporating some sort of notice that's distributed at the event, that would indicate in essence the candidate or federal official or national party official is only there soliciting monies that would be federally permissible, and I guess in the case of the national party officials if they went this way, money that is in some fashion going to have to be federally reported, I guess through some federal account.

I wanted to sort of get clear whether there is a consensus that we would only apply that in the context where it's apparent that the person was sort of invited there in advance. I keep

hearing the hypothetical, "What if someone just kind of drops in without having had any sort of preplanning or formalized invitation?" Is that a valid distinction for us to try to build in, if we want to work in these rules?

COMMISSIONER McDONALD: Yes. I'm not sure it's the only distinction, but I think it gets at--I'm not sure if that's the right line, but it gets at a line that I think has to be drawn. The fact is that candidates campaigning for president in Iowa are not going to drive around with a placard in the back seat, so that when they go to the local VFW hall for local County Commissioner Smith's fundraising barbecue, they haul it out and they have a staffer who stands there and follows the candidate around with a little Cantor sign. It just doesn't make any sense.

I mean, the fact is, very often in these, whether it's presidential races or competitive House and Senate races, you literally have candidates who are going event to event to event. They're going to a labor picnic. They're going to

a candidate--probably, Mr. Toner, your candidates never went to a labor picnic.

[Laughter.]

VICE-CHAIRMAN TONER: We'll work on that for 2008.

MR. ELIAS: They go to, they may go to a local horse race, less often in my experience, but touche. And you're not going to have staffers with these signs walking around, because the fact is the members or the candidates in that case aren't soliciting anything. They're working the crowd. They're shaking hands.

And frankly, to have those signs or have those disclaimers I think would not only be a bit odd, but it might actually be a bit jarring to the contributors, because most of these people have already given their contribution. They've already given their corporate check. They've already given their labor check. They've given their non-federal contribution. And now all of a sudden they see some guy who they probably don't even recognize, walking around with some guy behind him with a

sign. I mean, it's nonsensical.

So the Cantor disclaimer makes sense in a situation where you have an invitation, where the draw is the elected official or the candidate, where they are, as you say, part of the program that there is advertisement for. But to have it be that anyplace the candidate goes where someone else may be raising money, it just doesn't make any sense.

MR. SIMON: Let me disagree with that. I don't think that's a valid line, you know, distinguishing the application of the Cantor rules only to situations where there is a kind of preplanned invitation, versus a candidate showing up more spontaneously, getting up in front of the crowd and, in effect, soliciting money.

I think under the AOs the disclaimer can be either written or oral, and I think if a candidate is going to get up in front of a crowd at a non-federal fundraiser and make a solicitation, you know, "Give whatever you can, help this candidate out," then I think he has got to make

clear in his oral remarks, if there is no written disclaimer, in his oral remarks he has to make clear that he is soliciting only federally compliant funds.

MR. ELIAS: Commissioner, I know this would be a bit unorthodox, but could I just pose a hypothetical to Mr. Simon that maybe will help clarify this?

Let's assume, though, that the candidate goes and does a drop-by and stands up in front of the crowd and says, you know, "I'm glad to be here today. This a great county. You are great people. We love you." You know, "Smith is going to make a great city councilman. I hope everyone here is helping Smith. Go out and support Smith." And then he gets back in his car and he drives off to the next event.

Now, it would be bizarre for him to end it by saying, "Everyone support Smith, and by the way, when I say that, what I mean is everyone should contribute not more than $2,100 per election from federally permissible funds, which means no funds

from corporations, labor unions, or"--I mean, would you require it in that circumstance?

MR. SIMON: Yes.

CHAIRMAN THOMAS: I'm out of time, but I want to be clear because I think this is very important. Mr. Sandler, at some point I hope you can come back to this issue of what about the national party officials going, say, to local party events. You seem to have interpreted the law to, in essence, allow them to do that without Cantor type notifications, and I'm just wondering why you take that approach, and also how imposing a Cantor-type notice requirement would affect that.

MR. SANDLER: The Cantor disclaimer is irrelevant to the national party committees because you can't disclaim something into being the federal reporting requirements. I'll give the example of New York City.

An officer of the DNC, acting on behalf of the DNC, could not solicit one thin dime for the nominee for Mayor of New York City, Fernando Ferrer, even though it's the strictest public

financing system in America and you can't give more than $4,900 from an individual and so forth, and it's all matched publicly, and reformers love it.

Doesn't matter. It's not a federal account, and you can't have a federal account, and they don't accept federal money, and not one time of federal hard money is legal in New York City or New York State. So the disclaimer is not relevant, and consequently we do not--and there is nothing the Commission can do about it with respect to, you know, state and local candidates, I mean, and nonprofit organizations and the like.

Now, with respect to local party committees, let me explain why I believe that the law can't be reasonably interpreted to prevent a national party officer from appearing at a local party fundraiser, even though the vast majority of the local parties are not registered with the FEC and consequently, by definition, it's not subject to the reporting requirements of the Act.

In his deposition in the McConnell litigation, Senator McCain was asked this exact

question under oath. Counsel for the plaintiffs said, "There is a provision in the statute, Senator, that allows federal officeholders and candidates to appear at fundraising events for state and local parties." There's the Lincoln Day dinner receptions, there's the Jefferson-Jackson Day in our case, if you will. "Why can't Mark Rosco," who was then chairman of the RNC, "appear at one of those dinners?"

Senator McCain said, "I think Mark Rosco can appear at one of those dinners. He can't ask for money." But a federal officeholder can't ask for money. A federal officeholder can appear, but the federal officeholder cannot solicit money. I mean, that's the common--that's how we interpret it, just like Senator McCain.

CHAIRMAN THOMAS: Thank you. That's very helpful. In light of your position and who you represent, I thought it was important to make sure we covered that.

Vice-Chairman?

VICE-CHAIRMAN TONER: Thank you, Mr.

Chairman. I would like to follow up because I think it's an important issue, and as Mr. Sandler points out, the safe harbor at 441i(e)(3) is not available, on its face, anyway, to national party officials, but only to federal candidates and officeholders, so that the issue of what is solicitation I think has a higher importance in some respects for national party officials for that reason.

I would like to work with a hypothetical. Mr. Simon, I would like to get your thoughts on this. The Chairman of the Democratic National Committee appears at a widely attended political event, not a fundraising event, a political event, for the Virginia Democratic Party, which of course is permitted under state law to accept soft money donations as a legal matter for non-federal purposes. Governor Dean is introduced as Chairman of the DNC, so he appears in his official capacity as party chairman.

During the course of the speech, Governor Dean makes the following statement to the audience:

"Thank you for your continuing financial support of the Virginia Democratic Party." In your view, is that a solicitation?

MR. SIMON: Yes.

VICE-CHAIRMAN TONER: Must be treated as a solicitation by the FEC?

MR. SIMON: Yes.

VICE-CHAIRMAN TONER: So would that be, then, across the legal line in terms of Governor Dean saying that at that event?

MR. SIMON: I think so. You know, Congress did make what may seem like an odd distinction between 441i(a) and 441i(e), but there is a distinction, and I think you have to give effect to the distinction just as a matter of statutory language. You know, that's up to Congress to fix, if they want to give 441i(e) rights to national party officers.

VICE-CHAIRMAN TONER: Mr. Sandler, in your view, do you think the statement, "Thank you for your continuing financial support of the Virginia Democratic Party" is an illegal statement?

MR. SANDLER: No, but I don't think that--

VICE-CHAIRMAN TONER: You don't?

MR. SANDLER: I don't, but--

VICE-CHAIRMAN TONER: Why not?

MR. SANDLER: That's not really the issue that you would confront. I mean, nobody is asking for national party officers to be able to use words of solicitation or asking for financial support. We are asking that they be able to say the work of the state party or the local party.

VICE-CHAIRMAN TONER: So thank you for your continued support of those--

MR. SANDLER: Support.

VICE-CHAIRMAN TONER: But I want to be clear here. In your view, do you think it would cross the line if the Chairman indicated--which would not be an unnatural thing to do, some of these guys I think just are programmed to say some of these things--"Thank you for your continuing financial support"? That in your view would not cross the line?

MR. SANDLER: No.

VICE-CHAIRMAN TONER: Mr. Elias, your thoughts on this?

MR. ELIAS: I don't think it would cross the line.

VICE-CHAIRMAN TONER: Why?

MR. ELIAS: Because, first of all, it's a statement that is looking back in time. It is a retrospective statement, not a prospective statement.

VICE-CHAIRMAN TONER: "Thank you for your continuing financial support of the Virginia Democratic Party."

MR. ELIAS: It is not suggesting--and we no longer use the word "ask"--that someone make a contribution going forward. When I hear, "Thank you for your," it sounds like these are people who already paid to be in the room.

VICE-CHAIRMAN TONER: Right.

MR. ELIAS: I mean--

VICE-CHAIRMAN TONER: I said this is a political event, not a fundraiser.

MR. ELIAS: Right. It's not a fundraising

event. No one is being asked for money. It's--

VICE-CHAIRMAN TONER: There is that term again.

MR. ELIAS: No one is being suggested to give money, no one is being requested to give money, no one is winking or nodding to give money. They're in a political event, and he is--

VICE-CHAIRMAN TONER: And he says this: "Thank you for your continuing financial support."

MR. ELIAS: Yes.

VICE-CHAIRMAN TONER: It shouldn't be unlawful, in your view?

MR. ELIAS: I don't believe so.

VICE-CHAIRMAN TONER: Let me ask you, is it your view that, given the potential penalties that exist for federal candidates and officeholders or national party officials for making soft money solicitations, is it your view that if there is any ambiguity whatsoever in terms of whether a solicitation has occurred, that there should be no such finding?

MR. ELIAS: It is.

VICE-CHAIRMAN TONER: That is your view?

MR. ELIAS: It is my view, and just to amplify that, it is especially my view in light of the agency rules.

VICE-CHAIRMAN TONER: Do you think that it would be appropriate for the agency, in its final rules, to incorporate in the rules a statement along the lines that a solicitation must be clear and unambiguous for it to be made?

MR. ELIAS: I would support that.

VICE-CHAIRMAN TONER: Mr. Simon, your thoughts on that?

MR. SIMON: I think that the proposed rule which encompasses both indirect and implied solicitations is what is required by the Court's ruling.

VICE-CHAIRMAN TONER: Do you think, on balance, whatever standard we adopt, that it is appropriate for us to make clear that the solicitation has to be--it has to be clear that a solicitation has taken place; that any ambiguities that may exist should cut against a finding of

illegal activity, or no? Do you think that actually ambiguities should be resolved in favor of finding a legal violation?

MR. SIMON: I don't know how to square your suggestion with the language in the proposed rule, that solicitations encompass implicit requests or suggestions for money. I mean, it seems to me those two statements are pulling in opposite directions, and I think you're required to go with something along the lines of the proposed rule.

VICE-CHAIRMAN TONER: So is it fair to say that in your view, if there are ambiguities, actually we do have room to find that a solicitation has taken place? In fact, we need to?

MR. SIMON: I think you have to apply a test of whether the conduct and language in the situation would reasonably lead you to believe that it's a solicitation.

VICE-CHAIRMAN TONER: And ambiguities resolve in favor of finding, making a finding--

MR. SIMON: I don't know that I would put

a presumption one way or the other on it.

VICE-CHAIRMAN TONER: Mr. Sandler, your thoughts on this? Do you support the thought that it needs to be clear and unambiguous?

MR. SANDLER: It does need to be clear, and I want to emphasize that nobody is asking, at least from the DNC, that national party officers be allowed to solicit non-federal money at any event--

VICE-CHAIRMAN TONER: I understand.

MR. SANDLER: --at any time, in any circumstances.

VICE-CHAIRMAN TONER: And I agree with that. Duly noted.

MR. SANDLER: And we don't--you know, the "reasonable person" standard works for us in that regard, that you not use language, the Chairman of the DNC or any other officer acting on behalf should not use language, will not use language reasonably construed to be asking for non-federal money.

The suggestions that we have go to making this a clear and workable standard in terms of

general--and not really your example, but general support. You show up at a--

VICE-CHAIRMAN TONER: "Thank you for your support of the Virginia Democratic Party."

MR. SANDLER: Yes, or the state candidate is worthy of support, just campaigning for a state candidate. There may be donors and others. Not a fundraising event. Not a fundraising event, but just saying, "This candidate is worthy of support." It should be clarified that that's not a solicitation.

VICE-CHAIRMAN TONER: One final question, Mr. Chairman. Thank you.

Since what is reasonable is a prominent theme here this morning, in your view would it be reasonable for the agency to require, for a solicitation to be made, that it be unambiguous, that it have taken place unambiguously? Is that, in your view, within our discretion to do?

MR. SANDLER: Yes.

VICE-CHAIRMAN TONER: And do you support that type of approach?

MR. SANDLER: That is be unambiguous?

VICE-CHAIRMAN TONER: Yes.

MR. SANDLER: I think that's appropriate.

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

CHAIRMAN THOMAS: Commissioner Weintraub, follow-up?

COMMISSIONER WEINTRAUB: The longer I listen, the more confused I get. Joe, do you think that something can be both implied and unambiguous?

MR. SANDLER: Yes, I think that, you know, people--and again, I think the suggestion that we look to the specific audience who we're talking about here, possibly, rather than the general public, makes sense--but people know when, and this is what the reformers told the Court, people know when people are asking for money. You know, it's understood.

If there is such ambiguity that you're really not sure, it's not a solicitation, and I don't think it's a solicitation under the language of the Commission's proposed rule. If a reasonable

person wouldn't understand it in context to be a solicitation, it's not a solicitation.

COMMISSIONER WEINTRAUB: Well, I'm sure everybody at the table thinks they are reasonable people, and we seem to have some differences of opinions.

Don, if somebody shows up, either a candidate or a party official shows up at--well, let's stick to candidates for the time being. A candidate shows up at a fundraising event and says, "Thanks for being here" to everybody who in order to be there, they had to make a contribution, and it's a soft money event. Is that a solicitation?

MR. SIMON: Yes. I mean, again, where I would draw the--

COMMISSIONER WEINTRAUB: Yes?

MR. SIMON: Yes.

COMMISSIONER WEINTRAUB: I mean, but--

MR. SIMON: I was just going to say that I draw the line, and the way I resolve these close call questions in the context of a fundraising event, not a non-fundraising event but in the

context of a fundraising event, I think if a candidate shows up, mingles with the crowd, shakes hands, that's not a solicitation per se. I mean, obviously in a one-on-one conversation he could be making a solicitation, but just his presence there is not a solicitation. If he gets up and addresses the crowd, that's a solicitation.

COMMISSIONER WEINTRAUB: Anything he says?

MR. SIMON: Yes, in the context of a fundraising event.

COMMISSIONER WEINTRAUB: So if he just stands up and says, "Hi. Thanks for inviting me. It's really great to see you all."

MR. SIMON: Yes. I mean, you know, part of this is, I think people frequently say they want bright lines to resolve hard situations. I think that's a reasonable line that separates out behavior, that to me makes sense. Because once you become part of the program, once you become part of the kind of official list of speakers--

COMMISSIONER WEINTRAUB: Well, what if you're not? What if you just show up?

MR. SIMON: Once you get up in front of the crowd and address the crowd, I think you're part of the program, I think you're part of the message of the event, and I think the message of a fundraising event is to raise funds.

COMMISSIONER WEINTRAUB: So the candidate could show up and talk to people individually and not make a speech, and that would be okay?

MR. SIMON: Well, I mean, either one is okay. One is making a solicitation and one is not making a solicitation. He can make the solicitation. He just has to use the disclaimers under the Commission's rules.

COMMISSIONER WEINTRAUB: And honestly, those disclaimers really make that big a difference? I mean, don't you think that in some--

MR. SIMON: Well--

COMMISSIONER WEINTRAUB: I mean, to some degree don't you think it's a distinction of form over substance?

MR. SIMON: It is. It is, and I think the Commission developed it in the context of the

Advisory Opinions, to try to make the statutory scheme work. You know, I said in the hearing that was held on the state party fundraisers that there is something of an awkward balance in this scheme, but I think it's a not unreasonable approach, and that officeholders can solicit in state party races as long as they are soliciting for funds that comply with federal rules. I think using the approach laid out in the Cantor AO is a reasonable way to give effect to that language.

COMMISSIONER WEINTRAUB: Marc, you're leaning towards the mike. Are you--

MR. ELIAS: Yes. You probably anticipate that I don't agree with that, so for the record, I don't. I am struck, and it may just be my own limitations, but I don't understand how one can solicit retrospectively.

I mean, if you have an event where everyone has already given money, and they all gave corporate checks to walk in the door, but all that money is gone. It is bagged, it is tagged, it is batched, it is deposited, it is gone. It's out of

the room. So now the federal office holder walks into a pristine, clean, no soft money, no corporate money in the room environment, and he stands up and says, "Hey, everyone, great to be here today," and then sits down, I don't understand how that can be a solicitation. I mean, under just the--I think the Court, and I promised I wasn't going to talk about the Court opinion, but didn't it talk about dictionaries? I want to see a dictionary that says that's a solicitation.

COMMISSIONER WEINTRAUB: Let me go back to conduct. Outside of this issue of showing up at events or being a featured guest at an event or doing something at an event, what other conduct are you trying to capture, Don, when you recommend that we put conduct into the rule?

MR. SIMON: Well, that's actually most of it. I mean, I do think, again, there are these odd cases along the lines of what the Chairman suggested, which the Court did reference, but my major thinking about conduct is in the context of a fundraising event.

COMMISSIONER WEINTRAUB: Despite the fact that the Court did talk about winks and nods, my sense from the expression on your face when you were talking about it earlier is that you don't actually think that we ought to literally incorporate winks and nods into our rules and say, you know, "Don't wink, don't nod."

MR. SIMON: No, but I think you should incorporate the concept of conduct, which would encompass that.

COMMISSIONER WEINTRAUB: And if we did that, if we could deal with it--I'm not convinced that we can, actually, based on what happened earlier this year, when you may recall I tried to bring in some of that conduct and didn't have the votes to do it, and I doubt if I have attracted any more votes since then.

But putting that aside, if we could somehow address that in the context of context, you know, as a reasonable person would understand it in context, including suggesting--you know, the language of this rule, if we--let's say we were

able to get the votes to put that in the E & J, that that would include being a featured guest at a non-federal fundraiser. Would that solve the problem for you?

MR. SIMON: Well, it's my less preferred way of going about it, but it's better than nothing at all. I worry about if the Commission expressly considers putting conduct in the rule and votes not to do so, then the interpretation that will be made is that conduct is out and can't be considered.

Now, if you can ameliorate that by saying in the E & J that conduct still will be considered as part of context, you know, that's an improvement. But I think the Commission in the rule ought to be clear about what it's saying, and if it thinks conduct should be considered as part of context, it should put that in the rule itself.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Mason?

COMMISSIONER MASON: I just want to say as a prelude that I think we got a very bad court

opinion. I disagreed with it. I didn't like it. I think the plaintiffs got away with constructing a straw man, and had this been brought in the context of an actual Commission decision or refusal to make a decision or something, then we could have played some of this out.

But for Mr. Elias and Mr. McGinley, you suggested we keep the regulation as it stands. I would love to do that, but I do have difficulty understanding how, given the Court's reading, we would do that. So I want to go back to something that counsel asked about, that would at least take care of a lot of problems, and that is this written solicitation.

When counsel asked about it, Mr. McGinley immediately started elaborating, and I want to caution you against that and suggest that that proposal was an effort to avoid getting enmeshed in somebody else's hypotheticals. What Mr. McGinley is suggesting is, no one would write a fundraising solicitation in certain ways.

In other words, there are articles in the

fundraising literature about the importance of the "ask." And you know what? It turns out if you don't ask for money, you don't get money. All right? And it's critical, it's an absolute fundamental element of fundraising.

But we're beyond that, and so a lot of the discussion in the court case, I think way too much, was involved in hypotheticals, not actual fundraising solicitations, because I think you would have had very little difficulty, with real direct mail fundraising solicitations, in determining whether or not it was a solicitation, but with hypothetical language that nobody would have used.

And thus our suggestion that, hey, if there is a reply device that is just the right size for a check, and an address to send it back to, and any kind of indication about financial support, that's a solicitation. And the purpose of that kind of a rule was to give something that was easily reviewable for you guys, easily understandable for federal officeholders, and so

on, and at least to try to put to one side a lot of the hypotheticals.

And I am just wondering about your level of comfort with that rule, because it seems to me we're going to have to do something, and that that would be a rule that was pretty easy to understand, pretty easy to administer. And do you think it would be a good idea, or at least an acceptable way for us to proceed? This is for Mr. McGinley and Mr. Elias, who don't want us to change the rule.

MR. McGINLEY: Getting into the--I mean, I think that your question is centering on the "reasonable person." Did I understand you correctly?

COMMISSIONER MASON: No, no. My question is centering on a reply device. Okay? If there is a reply device, if there a piece of mail with a reply device, which means something to send back a check in, that's a solicitation. We don't have to look at the text. Okay? It could say "Please send money" or it could have pictures of starving orphans. Okay? And nothing else, just pictures,

and a reply device. Okay? But the reply devices makes it a solicitation.

COMMISSIONER McDONALD: I tried that in college and didn't get any money.

[Laughter.]

MR. McGINLEY: Given that, okay, I will, yes. If that's where the Commission needs to go, then yes, that will be a solicitation, providing the means to make the contribution or to make the donation. Yes, a donor reply card with a letter that may not explicitly ask for the donation would be a solicitation.

COMMISSIONER MASON: Mr. Elias?

MR. ELIAS: I would agree with that. I wouldn't want it to bleed into the provision that allows someone to explain the law and not have it be a solicitation, but that example, I agree with you.

COMMISSIONER MASON: I want to ask Mr. Simon about winks and nods, and I don't know if it includes shrugs or pats on the wallet or other sort of things, but specifically in this context the

concern that I have is that normally where that sort of standard is applied is in criminal law, where there is an underlying criminal activity. A bribe is being paid and a public official is present, and he's just present, and that sort of would be enough.

Here we're in a situation where the illegality is not the underlying activity, in other words, not the contribution that may be made to a local political party or a state candidate, but rather is the federal candidate's participation in that. And I'm wondering if in that context you think there is any difference or any way we ought to treat this idea of winking and nodding to account for the fact that the fundamental activity is legal, it's just the inducement to it by the federal officeholder that's illegal.

MR. SIMON: I guess that strikes me as not an important distinction. I understand what you're saying, but I just don't think that's a basis on which to set aside winks and nods.

To me it's interesting that this concept

of winks and nods is starting to have a place in the election law jurisprudence, in the sense that in Colorado Two, I believe, the Supreme Court specifically referred to winks and nods as a mechanism of coordination, and now the D.C. Circuit has referred to winks and nods as a method of solicitation. It seems that courts, at least, think that those kinds of non-verbal cues are something the Commission should take into account in administering this law.

MR. ELIAS: If I can just add just one thing to that, and I don't want to fight court opinion for court opinion, but my concern is not with what Mr. Simon is suggesting. I go back a little bit further than Colorado Two, to Christian Action Network, where this Commission hired an expert in subliminal messaging--subliminal messaging--to determine whether or not an ad was actually intended to influence voters, rather than looking at the objective text of the ad. And the 4th Circuit not only found that subliminal messages were not the standard that the agency ought to use

to judge these ads but, as I recall, awarded attorney's fees to the Christian Action Network.

Now, whatever else you may think about the jurisprudence of that case or the issue ads that then spawned from there, there is something that is mildly concerning once the Commission takes a step down this road, that winks and nods become glances, they become pauses, they become intonations. And before long I'll be sitting in depositions--it's not going to decrease the number and the intrusion of the enforcement process--I'll be sitting in depositions and there will be all kinds of, "Well, you know, did the candidate glance a certain way when he said it? Did he seem to mean it when he said it?" And we'll be in litigation with experts about, you know, voice tenor and how voice tenor changes when someone actually means this versus that. I just think it's a slippery slope that the Commission ought to not go down.

CHAIRMAN THOMAS: Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you.

Two quick questions, one for Marc and Bill, maybe, and one for Don. Marc, you opened up your comments by saying that what you really felt like the Commission ought to come to grips with is what goes on in the real world.

The example you just gave, of shrugs and nods and whatever else, inflections, you've been around this Commission a long time. You cited the Christian Action Network, but of course we're not here because of that. We're here for a more updated ruling. And lawyers sat at that very table where you are and explained to us, in fact, that McCain-Feingold, etcetera, clearly wasn't, surely it wasn't going to be the law of the land, and it turned out that that was not the case.

You don't genuinely think--I had a colleague who used to serve with me here, and he would go on and on about we would be in the churches monitoring what people said. Now, I've been here a while. I'm just not familiar with any circumstance in 24 years where these kind of scenarios play out. So I think our problem--and

I'm not being critical of your examples--but I think our problem is a more fundamental problem about what really goes on and what the Commission really does.

We're not in churches. We don't run around. We have a huge agency, as you know, of about 400 people. It would be about the size of one Pentagon closet, I suspect. So as a practical matter, whatever we come up with in relationship to what the Court has said to us, I don't think that that helps us a great deal, being candid with you, because that's not something we're going to be doing either.

It's fair game, I'll grant you, to kind of make fun of the process. But we're not in that kind of a position. Our position is that we have to resolve this in some way that we hope is both practical and also lends itself to clear credence in relationship to the court decision.

So just as a kind of a practical matter, per se, you don't genuinely think we'll be out there, and you don't really think you'll be

counseling people on those kinds of activities, do you?

MR. ELIAS: Well--

COMMISSIONER McDONALD: Based on the years of experience with this agency? We've not been noted for proceeding vigorously in a lot of areas, as you may know.

MR. ELIAS: Well, a few observations. The first is, you're right. I prize, in this process, the Commission to focus on the real world, and as I said before, the shrugs and winks and nods simply do not happen, in my experience. Candidates are quite concerned. Officeholders are quite concerned.

As I pointed out, the DSCC and the DCCC and its membership were both overwhelmingly supportive of this law. They remain overwhelmingly supportive of this law. They are not looking for loopholes. They are here because they believe in this law, and they believe that they are not to raise soft money, and they don't raise soft money.

They don't wink about soft money, they

don't nod about soft money. They have nothing to do with soft money. They don't spend it, they don't raise it, they don't transfer it, they don't solicit it, they don't direct it. They don't know what all those individual terms necessarily mean, but they know one thing. They don't have anything to do with soft money. When they have a question, they come to this agency and ask for an Advisory Opinion.

So let me just start with the real world by laying that predicate. My concern is that we do live in a world in which, as you know, unfortunately a lot of FEC complaints get filed for partisan reasons. Okay? They get filed because one side believes that they can gain the advantage over the other side.

And unfortunately, although the General Counsel deserves a tremendous amount of credit, I think he's doing a wonderful job in moving the docket and weeding out frivolous complaints, the fact is, McCain-Feingold for the first time means that I tell a candidate, "It's not your treasurer,

it's not your committee, it's you. When the complaint gets filed, if soft money was solicited, you broke the law. Your treasurer didn't break the law, your committee didn't break the law, you broke the law."

So whether it is a short administrative MUR process or a long administrative MUR process, it's an unwelcome process, and the fact is--with all due respect to the General Counsel's office because, like I said, I think they're doing a fabulous job, and I do think they're moving the docket and they're moving the--you know, the MUR process does move more quickly, and we don't bog down in some of these things.

It is still, nevertheless, an unwelcome situation for an officeholder to find themselves in, where he has to explain whether someone else in the room thought that what they heard or what they saw was different from what he actually said.

COMMISSIONER McDONALD: Thank you, Marc.

Do you want to comment? I do want to ask--

MR. McGINLEY: I'll just say I agree with what Marc said. I mean, as he was saying on the Democratic side, Republicans aren't in the soft money business either. We've been precluded, and as Marc said in the beginning of his statements, we're happy to do the compliance function of monitoring their activities, and they're happy to let the Commission know when that does happen.

However, that being said, you know, there is a process penalty for getting into politics, and as Marc said, complaints are filed for political reasons, not necessarily by candidates and committees, but others in the process as well. You know, when people get bogged down in the discovery process and the MURs aren't dismissed right away, even though there is an ambiguity in the law, that does have an impact on the political process. It chills participation.

And so what we're trying to do today by saying these are the real world examples, the local clubs where a candidate may stop by, you know, state and local events where they may be raising

non-federal funds, you know, the Chamber of Commerce or some of the other issue organizations where a candidate or a party official may want to stop by, attendance at the event should not create a violation of the law.

I mean, that's what we're trying to prevent, because we don't want people to be held to a standard because of what other people think about what they did. We want people to be held accountable for what they actually did and the words that they speak. So whatever clarity we can get on the front end is going to help the enforcement process, clear the docket.

You know, people aren't trying to evade the law. They're not trying to get out there and find some way to get soft money into the system. I mean, if you notice, a lot of the examples that we're talking about is where a state candidate is trying to raise money for his or her campaign, and a federal candidate just wants to show up and lend their support.

That money, by the rules, can't get into

the federal election process. And if the state candidate tries to run an ad that PASOs--promotes, attacks, supports or opposes--the federal candidate who showed up, they have to use all federal funds that are reported to the Commission.

So when you're talking about people showing up at a state candidate fundraiser, they're not evading the soft money ban. They're showing support for state and local politics.

COMMISSIONER McDONALD: Well, that helps me a lot. And I do want to ask Don one thing very quickly, but let me just say one other thing, because it has been said here all morning, and it must be a different world than I grew up in.

Functions that are formal functions, I have never known a federal candidate, and particularly an officeholder, just to drop by. They have the kind of clout that I can assure you, if they want to be on the program, they can be on the program. If they ask to say a few words, they'll get to say a few words. As a practical matter, I have spent time working for candidates,

as well as some of my colleagues, and I can assure you that they have some pretty good clout, by the nature of either who they're going to be or who they are. I'm talking about in the formal sense, now.

But I want to go and ask Don a question that has troubled me, that Marc raised earlier, and I think maybe others as well. On the solicitation end, Don, you go to an event. The money has already been raised. As Marc points out, it is in fact after the fact as a practical matter.

How do you reach the point that you're getting a solicitation at that event, when in fact the checks have already been turned in, the replies are back, the money has been counted? In fact, they may even tout how much money they have raised at the event. You know, some do and some don't. But it has always kind of troubled me when the money is already there. What is your thought on that?

MR. SIMON: Well, you know, in a sense the program at the event, the speakers at the event are

what the donation was made for. They're part of the inducement for the donation.

COMMISSIONER McDONALD: I understand.

MR. SIMON: And the federal officeholder may be promoted as an incentive for making the donation. You know, "Give $1,000, give $5,000, and hear Senator Smith speak." You know, I think in that context the federal officeholder is part of the fundraising message, part of the fundraising appeal, and that should be considered a solicitation.

COMMISSIONER McDONALD: And if they're not part of the appeal for the solicitation, but in fact become part of the program because of who they are, what would you think on that, in that relationship?

MR. SIMON: You know, as I said before, I would treat that the same way because I just think there is an important distinction at a fundraising event, and an event where either money has been raised in order to attend the event or an event in which money is being exchanged at the event, at the

door. Once somebody gets up in front of the crowd and addresses the crowd, they are part of the event and the message of the event, and the Commission should just treat that as a solicitation.

COMMISSIONER McDONALD: Thank you. I thank all of you for coming.

CHAIRMAN THOMAS: Mr. Norton?

MR. NORTON: Nothing further.

CHAIRMAN THOMAS: Mr. Costa?

MR. COSTA: No.

CHAIRMAN THOMAS: Thank you, one and all. I just want to say that I agreed with everything that each one of you said, and for the record, I am winking. Thank you very much.

COMMISSIONER McDONALD: Shouldn't we sing to Joe?

[Laughter.]

CHAIRMAN THOMAS: We will take a shorter break than we had planned, just because I've got us about 15 minutes behind. Let's try to take a 10-minute break and we'll get underway at 20 minutes before 12:00 Thank you.

[Recess.]

CHAIRMAN THOMAS: Let us get underway again. We are going to start with the second panel of our hearing for today. We have Donald McGahn, who is here representing the National Republican Congressional Committee. We have Lawrence Noble here, representing the Center for Responsive Politics. And we have Paul Ryan, representing the Campaign Legal Center.

We will ask you to make a 5-minute opening statement, and we have our little light system. I gather than amber light will start going when you have roughly 30 seconds left. So we appreciate you helping us with time specifications.

We'll start with Mr. McGahn. Please proceed when you're ready.

MR. McGAHN: Thank you, Mr. Chairman, members of the Commission. I appreciate the opportunity to be here to testify on behalf of the NRCC. I had thought about attempting to testify only through conduct, but I couldn't find the words, so here we are. I thought about

interpretive dance, perhaps pantomime was referenced in the earlier thing. I could maybe musically, we could have interpretive dance with the music.

That being said, to put aside the very bad humor, there seems to be quite a bit of agreement in this rulemaking for two reasons. One, I think the culture inside the beltway has changed to the point where people realize BCRA is the law, post-McConnell. The grand theories of what may happen have kind of subsided.

And, two, there also seems to be agreement, particularly from the Commission, that the Shays court case is somewhat odd. From my point of view it was odd in that the examples cited as loopholes, non-solicitation things, to me, I thought those were solicitations. I thought the current rule covered that. The two cited particularly in the notice are what I'm thinking of.

And it frustrates me because I didn't realize that I had a chance to really advise my

clients just to go to town and do all kinds of things that I had been telling them for two, almost three years now, was actually illegal and you're probably going to get yourself in a lot of trouble if you do that.

Ultimately, though, what I'm here to say on behalf of the Republican House members, the NRCC, is that there is a need for a very workable rule here, and I see the Commission's notice really addresses that and hits many of the issues that need to be addressed. There is not a lot of theory in the notice. A lot of questions are asked. They're very good questions, and they're questions that maybe can be answered, maybe they can't be answered. If they can't be answered, then that maybe means that that's where the line will be drawn.

But we really need workable rules really for three reasons: One, so covered officials, whether it's a federal candidate or a federal officeholder or an agent thereof, knows what they can and can't do, so they can plan accordingly.

Second, so everyone else knows what's legal and not legal: the general public; outside groups; the media, who seem to be continually confused about what the law is, whether it's House ethics rules or whether it's campaign finance rules or whether it's state election law rules. It would be nice to be able to have them understand the law without having to explain it 50 times over, and then they still get it wrong half the time.

And then, third, so it can be enforced. It does no one any good to have some subjective, after-the-fact, if it feels like a solicitation, kind of, sort of, then maybe we'll take some depositions standard. It would be nice to have a bright line. Really I would rather have a bright line, if I had the choice between fighting over where the line is versus having a line, I would choose a line, which is somewhat odd until one thinks of where this could go in the enforcement context.

My clients are not concerned so much about what the Commission may do with a reasonable person

standard or what the Office of General Counsel may do, but what if an elected official has himself in trouble on the other side of the street? Which of course is the federal prosecutor. So imagine someone who is being accused of taking a bribe or soliciting a gratuity.

Inevitably the soft money solicitation ban will work its way into the vernacular at the Department of Justice. This reasonable person standard really as proposed, the way I read it, could kick the decision as to whether or not it was a solicitation to a jury, who will substitute themselves as the reasonable person and create essentially an issue of fact. It's not an objective standard at that point.

This may sound like a doom and gloom scenario, but it's very possible that when others read what the Commission does, they may not read it the way the Commissioners read it themselves. And of course, although this Commission may understand what it means, future Commissions may not. Future General Counsels may not. Past General Counsels

may disagree with current General Counsels. Who knows? We're not going to put words in everyone's mouth. But when you get into reasonableness, there's a lot of different definitions of "reasonable."

A solicitation, this is something that came up in the earlier sessions, I think we need--our position is that it needs to be about fundraising. General political speech--and the Notice of Proposed Rulemaking does draw this distinction, and it's a very important distinction to draw, because I can say my clients do get concerned about, "What if I show up at some policy thing, or I just give a speech about cutting taxes, the usual stuff, is that going to be a solicitation?"

Other than some going off the tracks at the end of the first hearing on hypotheticals, it seemed like there was pretty much agreement that showing up is not really the issue. It's how you present the showing up, were you involved in raising money in conjunction with the showing up,

and that kind of thing.

But then that begs the question of what is even a fundraiser. There is a difference between a fundraiser where you show up, bring your checks and hand them at the door, versus a fundraiser where there is a solicitation that goes out ahead of time, the money is collected, people show up, so there is no solicitation at the time.

And then there are these fulfillment events, where you may have major donors, say for a political action committee or a state party committee, where for a larger contribution level, whether it's your own or because you have raised money or you are on the finance committee or what not, you go to other events where there is really no money at all. There is not a fundraiser per se.

Now, this is an issue that really, unless you're in the culture, you don't understand that it's a fundraiser for House ethics rules purposes. It's a political event but it's not really a fundraiser, and that gets confusing as to whether or not that's actually a fundraiser.

So if a candidate goes to, a federal candidate goes to say a state party fulfillment event, the finance division of the state party does that, but you ask them is it a fundraiser, they will say no, it's a fulfillment event. So even within the culture of fundraising, people draw arbitrary distinctions.

I see the red light is on, so I will wait for the questions and answers, and I thank the Commission.

CHAIRMAN THOMAS: Thank you.

Mr. Noble?

MR. NOBLE: Thank you. Good morning, Mr. Chairman, Vice-Chairman, members of the Commission, General Counsel, Acting Staff Director. I am pleased to be here with you today on behalf of The Center for Responsive Politics.

We are here today because the Court did reject your solicitation regulation, and I understand the Vice-Chairman's comment and frustration with the Court, having been in a situation where I have often felt frustration with

court rulings. However, the Court did say that your solicitation regulation violated Chevron One, and therefore you do have to do something about it. I don't think you can just say, "We can ignore the Court," or you can ignore the Court. I don't think it's the appropriate role for the agency to ignore the Court. And I think you really do have to abide by the Court's decision.

I don't think the solicitation rulemaking is frankly one of the most complicated or difficult that you're facing in BCRA, though it may be one of the most important, because much of the Act hinges around the solicitation of soft money and the banning of the solicitation of soft money. And so this is one of those cases where a relatively simple rule carries a tremendous amount of weight.

Now, listening this morning was interesting. I was very encouraged earlier this morning when Mr. Elias started off by saying, "We have absolutely no intention of violating the soft money rules. We don't plan to solicit soft money. None of my people want to solicit soft money." I

was really encouraged until then later on he started talking about his definition of soliciting soft money.

And I think that's really the whole issue here, is that nobody wants to violate the law, of course, as long as you narrow the law to the point where they can do what in most contexts is seen as a solicitation. And that's the problem that the Court had, was that you were defining, you appeared to be defining out of the word "solicitation" what most people in most contexts in fact see as a solicitation.

And let me say something here about this frustration some Commissioners feel with the idea that you didn't mean that "ask" meant just "ask." To quote our President, I think we have to be careful of revisionist history here, because in fact at the hearings there were comments made about wanting a bright line, like we're hearing today. There were comments made about not wanting to guess at what somebody meant, like we're hearing today. There were comments about anything that is

ambiguous should not be considered as solicitation.

I think it's against that background, when you then rejected General Counsel's proposal broader than "ask," and then end up with "ask" that people, including the Court, fairly say that you really intended to narrow this. This wasn't just a misunderstanding here. You really did intend to narrow this, though I am encouraged now by the fact that people do feel that you do need a broader definition of "solicitation."

I'm also hearing about nobody gets soft money into the system, and we hear a lot about how nobody has pointed out any problems in 2004. I want to point out a couple of things.

One, I do remember in the late '70s that some people said there would be no problem with certain soft money Advisory Opinions, though there was one Commissioner who did raise the flags on those. And for a long time we heard about how there was going to be no problem with soft money, though people and some organizations raised issues with it, until we reached the point in the early

2000's when approximately 50 percent of one political party's money was soft money.

And so we do have a history here, and the Court recognized this. We do have a history, a very natural, human urge to try to push the lines and try to see where you can go. And I think we already did see some of that in 2004. Now, 2004 was somewhat of a unique year, but there were stories.

And we haven't talked about 527s here today, or really soliciting much for other groups, but there were stories about officeholders showing up at 527 events and looking like, at least from the newspaper stories--and we do have to be careful--looking like they were doing solicitations. And so just by the fact--also, frankly, none of us know what complaints you have in house about that type of thing.

But just because so far we haven't seen a massive attempt or there doesn't seem to be any evidence of a massive attempt to get around the law, it doesn't mean that people aren't going to

try to push the limits. It doesn't mean that people aren't going to try to gain every advantage. And so that's where I think you have to be careful here.

Now, I think fortunately the Notice of Proposed Rulemaking, with some slight modifications, as we say in our comments, does take care of most of the problems. I do think that you do need generally a broad definition of "solicitation." I think in many contexts with a candidate or an officeholder, a disclaimer will work. I do think there are going to be some odd hypotheticals that come up, or odd situations that come up in real life, and as always you will have to deal with them, and that's just the nature of the beast.

And I see the yellow light is on. My final point is this: We all live under the laws. We all have to make judgments about the laws. We all have to make judgments about what a reasonable person would do, how the law will be interpreted. And I think that while we all are frustrated when

we have to do that, that's the nature of society, and I think candidates and federal officeholders have to do the same thing.

Thank you.

CHAIRMAN THOMAS: Thank you.

Mr. Ryan:

MR. RYAN: Good morning, Mr. Chairman, Mr. Vice-Chairman, Commissioners, Commission staff. It's a pleasure to be here this morning testifying in this rulemaking on behalf of The Campaign Legal Center. The Campaign Legal Center submitted detailed written comments jointly with Democracy 21 and The Center for Responsive Politics.

As detailed in those comments, we urge the Commission to adopt the proposed definition of "solicit" presented in Section 2(a) of the NPRM, incorporating the conduct element proposed in Section 2(c) of the NPRM. We also urge the Commission to reject the alternative proposals to the definition of "solicit" and to adopt a modified version of the proposed definition of "direct" presented in the NPRM.

The Supreme Court in McConnell upheld BCRA soft money provisions as a constitutionally permissible means of preventing real and apparent corruption and avoiding circumvention of contribution limits. The Commission's NPRM and several commenters on the NPRM raised questions regarding the intersection of solicitation and policy-making speeches.

The McConnell Court spoke directly to this issue, finding that BCRA soft money provisions show "due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or particular views." The Court reasoned, "The fact that party committees and federal candidates and officeholders must now ask only for limited dollar amounts or request that a corporation or a union contribute money through its PAC, in no way alters or impairs the political message intertwined with the solicitation." And the Court concluded that rather than chilling speech, BCRA soft money restrictions tend to

increase the dissemination of information by forcing parties, candidates and officeholders to solicit from a wider array of potential donors.

The District Court and the Court of Appeals in Shays invalidated the Commission's regulations defining "solicit" and "direct" on Chevron grounds, holding that the definitions of the term should not be limited to the verb "ask," and ordered the Commission to rewrite the definitions. In order to comply with District and Appellate Court decisions, the Commission has proposed to revise the definition of "solicit" to include not only the verb "ask" but also the verbs "suggest" and "recommend." We support this proposed definition of "solicit" with the addition of the conduct element proposed in the NPRM.

As recognized by the Court in Shays, solicitation includes not only verbal expressions but also nonverbal expressions. The Commission also proposes five alternatives to this definition of "solicit," and for the reasons detailed in our written comments, which I won't get into here, The

Campaign Legal Center believes the proposed alternatives would not comply with the Shays court order, and on these grounds we oppose all five alternatives.

And, finally, the Commission proposes to revise its definition of "direct" to mean "to guide a person who has expressed an intent to make a contribution." The Campaign Legal Center believes that the phrase "who has expressed an intent" should be deleted from the proposed definition, because including that phrase in the definition impermissibly narrows it to apply only when the person receiving the direction has affirmatively stated a prior intent to make a contribution. The Campaign Legal Center supports the proposed definition of "direct" with this modification, and opposes the alternative approaches described in the NPRM.

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

CHAIRMAN THOMAS: Thank you, Paul.

We'll start with Vice-Chairman Toner.

VICE-CHAIRMAN TONER: Thank you, Mr. Chairman. I want to thank all the witnesses for being here today. It seems like an endless number of hearings that we've been doing in this area, Mr. Chairman, and I guess we just have one more after this, so we are making progress.

I appreciate Mr. Noble's comments about the Commission's obligations under the Shays decisions, and I agree that we have an obligation to take those rulings into account, that they need to inform what we do here. But I want to make very clear that in my view we, as an independent agency, have not only the ability but the obligation to independently interpret the law and to determine what we think is appropriate in terms of the scope of "solicit," particularly where, as here, Congress has not defined the term.

But I think your point is a good one, that we are obligated to be cognizant of these rulings and to have them inform our deliberations, but I don't in any way view our hands as tied in terms of

how we interpret the statute. And of course people are free, if they are dissatisfied with our activities, to go back to court. That is absolutely appropriate. But I don't think, in my view, we should be in a position of acquiescing in terms of our interpretive function. I think that's a fundamental job for this agency.

I would like to begin, Mr. Noble, with you, following up on a discussion from the earlier panel, this idea, if you've got a political speech that doesn't in any way connect or touch on fundraising, doesn't have a fundraising element, are you comfortable with the view that, look, solicitation only relates to fundraising speech, fundraising activities? Purely political types of expression, like "appreciate your support of the Virginia Democratic Party" or something like that, that that is in no way restricted? And if you do agree with that, would you be comfortable with us placing that in the regulations?

MR. NOBLE: As with Mr. Simon before me, the answer is, it depends. I think I agree with

the idea that if you are at a fundraiser, it is a solicitation. If a federal officeholder attends a fundraiser, it is a solicitation regardless of what he or she says.

VICE-CHAIRMAN TONER: Per se.

MR. NOBLE: Per se, yes.

VICE-CHAIRMAN TONER: How about if it's not a fundraiser, if it's a political--

MR. NOBLE: A pure political speech--

VICE-CHAIRMAN TONER: Let's just set aside the donor maintenance events that Mr. McGahn referenced, but let's just say a rally, a GOTV rally, something of that nature.

MR. NOBLE: A pure political policy speech at an event where no fundraising is taking place, and it is not a fundraising event, is not a solicitation, assuming they don't try to solicit money.

VICE-CHAIRMAN TONER: And assuming that the rest of their remarks do not in any way touch on fundraising, it's purely political, statements of political support, that kind of thing, you would

be comfortable making clear, look, that's not restricted.

MR. NOBLE: Right. Again, you always have to look at the context, but yes.

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

MR. RYAN: I do, reiterating Mr. Noble's comments regarding context. Context and conduct are critical elements of this regulation.

VICE-CHAIRMAN TONER: Mr. McGahn, there was some debate in the earlier session about what do we do if there's ambiguities? What do we do if reasonable people disagree about whether solicitation has taken place? And I think we've all been around the track long enough to realize that that can occur, that can and does occur. My question to you is, if reasonable people can disagree about whether solicitation has taken place, if at the margin it is somewhat ambiguous, in your view should we make clear in these regulations that that is not a solicitation?

MR. McGAHN: Yes.

VICE-CHAIRMAN TONER: Why?

MR. McGAHN: Because of what I alluded to in my earlier opening comments. It's not, the concern is not so much what the Commission does down the road. It's what others will do down the road. And if you leave things to be somewhat loosey-goosey, you don't know where that's going to lead. It would be very helpful for the Commission to state something along the lines that you have suggested, where it at least provides some sort of buffer so that others do not read the regs in a way that they were not intended to be read, which as you know happens from time to time.

VICE-CHAIRMAN TONER: I understand from your written comments that you support, Mr. McGahn, Alternative Number Two, which would retain the current rule but add regs language, regulations language to make clear that it reaches implicit statements, and there wouldn't be the "suggest" or "recommend" regulations language, and there wouldn't be the "reasonable person" standard. Why do you support Alternative Number Two?

MR. McGAHN: It seemed to strike a balance between addressing what the federal court ruled, without doing violence to what the current regulated community believes to be what they can and can't do.

VICE-CHAIRMAN TONER: Is that because it would make clear that it's covering indirect statements, implicit statements?

MR. McGAHN: Right. It reaches the indirect conduct, which is where the Court I think had an issue, but it does not open up the rule to all sorts of other interpretations and far-reaching scope.

The flip side is, given BCRA has been in place for three years, the folks covered by BCRA, particularly the solicitation rule, they have it in their head, so to speak, what they can and can't do. And if you all of a sudden start throwing in "reasonable person" terminology and other things, it will only confuse people more than they already are confused.

But to me, Alternative Two furthers the

goal of being true to the statutory language and being true to the Court case, as opposed to the other alternatives. I'm not saying I necessarily oppose some of the other alternatives. Just Alternative Two seemed to be the balance that made the most sense.

VICE-CHAIRMAN TONER: I would like to know each of your thoughts, following up on what I asked Mr. McGahn, in terms of situations where it is ambiguous, and I recognize that can be at the margins. But in your view, when statements are made and it could be at the margins ambiguous or uncertain about whether a solicitation has taken place, in your view is that something we really do need to capture?

MR. NOBLE: I don't think you should put in the regulation anything that would say that if it's ambiguous, it is not considered a solicitation. I think the reasonable person test gets you where you want to go.

I also think that ambiguous, using a phrase such as "ambiguous" is going to really open

up a Pandora's Box in terms of everybody arguing everything is ambiguous. There is a limitation in the English language, and the Court has noted this, to being exact and specific. And I'm sure anybody can say something is ambiguous.

CHAIRMAN THOMAS: Ambiguous is ambiguous.

MR. NOBLE: Thank you. Ambiguous is ambiguous. There you go. And I just think you are going to buy so many problems by adding that type of provision into the regulation.

VICE-CHAIRMAN TONER: Do you agree that at least on the margin, in difficult cases, reasonable people, whoever they may be, can disagree?

MR. NOBLE: Absolutely, wherever you put the line.

VICE-CHAIRMAN TONER: And if that is the case, whether we view the reasonable person standard as grounded around the eminently reasonable people at this table or reasonable people outside the agency, if reasonable people can disagree about whether a particular utterance is a solicitation, in your view is it most appropriate

for us to treat it as not being a solicitation under those circumstances? Or no, is it to the converse, that actually we do need to treat it as a solicitation? That's what I meant.

MR. NOBLE: If you are around the edges, so you're not in any--

VICE-CHAIRMAN TONER: At the margins.

MR. NOBLE: If you're around the edges, and you cannot say that a reasonable person would find it is solicitation, then under that standard it would not be a solicitation.

VICE-CHAIRMAN TONER: And is there another way of concluding that, look, given the sanctions of this law, given the importance of these issues, that the rule in practical application requires it to be unambiguously a pitch for money?

MR. NOBLE: No, I think they're two totally different things.

VICE-CHAIRMAN TONER: In what respect?

MR. NOBLE: Because I think something can be ambiguous, but given everything, people are--a reasonable person would say that's a solicitation.

Sure, somebody may raise some questions about really what the subjective intent was or how people understood it, but reasonable people looking at it would say no, that was a solicitation. So I think ambiguity and reasonableness are two different things.

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

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

I can't wait to see the reasonable decisions that will flow when we have Commissioner Noble and Commissioner McGahn working together to come up with a consensus.

MR. NOBLE: If you're placing bets, I'd go with that one.

COMMISSIONER WEINTRAUB: You never know. Mr. Ryan, you could be next.

Mr. Noble, you talked about reading about officeholders doing things that looked like they were doing solicitations. Could you give me the

specifics? What are you concerned went on that shouldn't have been going on?

MR. NOBLE: Yes. I think when an officeholder shows up at an event--and again I want to be careful here, because these are newspaper articles that I saw during the campaign, and I would probably have to go back and research them, but my impression was that you had situations where officeholders were showing up at 527 events, where fundraising was going on at the 527 events, and they were speaking in part of the event. And I think that's the type of problem that we have already started to see creep into the system.

COMMISSIONER WEINTRAUB: And other than this issue--I'll ask you the same question I asked earlier--other than this issue of officeholders showing up at events of one kind or another, what other conduct are you worried about?

MR. NOBLE: I think conduct is a way of saying, another way of saying context. I think it is the showing up at the events. Again, this is going to sound like what Mr. Simon said before. I

think the Chairman raised some issues about how you may get strange conduct in strange situations. The real true wink and the nod, those are going to be very unusual. But in most cases I think conduct is really going to just be part of the context, this type of thing of standing up at the event and speaking at the event, if you're part of the event, you know. But there may be other things.

COMMISSIONER WEINTRAUB: So if we have a rule that says what would be understood reasonably in context, why do we need to add the conduct element?

MR. NOBLE: Because I think the conduct element makes it clear that you're not just looking at language. I think the conduct element makes it clear that there may be situations where your being there, the conduct that you have undertaken at the event, is going to be considered a solicitation.

COMMISSIONER WEINTRAUB: Mr. McGahn, I'll go back to reasonable people. You don't like the reasonable person standard.

MR. McGAHN: I like it for negligence law,

but I don't like it in FEC regulations.

COMMISSIONER WEINTRAUB: As you undoubtedly know, it was an attempt to ensure that we would have an objective standard.

MR. McGAHN: I understand that.

COMMISSIONER WEINTRAUB: I assume that you want us to have an objective standard?

MR. McGAHN: Yes, yes.

COMMISSIONER WEINTRAUB: But you think we have an objective standard without saying that? We would have a more objective standard if we didn't incorporate it?

MR. McGAHN: When you introduce the reasonable person standard in the way the proposed rule has introduced it, it's not objective. It could be, if it's rephrased, maybe. It depends how you come at it, and I think as part of the earlier discussion Commissioner Mason kind of raised the point.

If you come at it from the point of view where, "Gee, whiz, we need some kind of objectivity, because if one person in the room

somehow thinks it was a solicitation, therefore that's a solicitation," the Commission seems to be saying already in the proposed rule that that's not a solicitation, that's not what we're worried about. So how do we address that?

Well, we put a reasonable person standard in there that sounds kind of objective. It gets rid of the subjective people on the fringes saying, "I felt kind of like there was a solicitation. I wasn't really sure." The problem, though, is if you come at it from the other end, it doesn't really get at any sort of objective bright line.

The reasonable person standard was something really developed by courts way back when in the negligence context, where the person who was actually acting, who would be the defendant in the modern, you know, lawsuit, whether or not that person could conform his or her conduct to the reasonable person standard. It wasn't the ordinary person. It wasn't the average person who makes mistakes. It was a reasonable person of prudent conduct and all that. So the person who was being

sued for negligence had a chance to control his or her conduct, and the question is whether his or her conduct comported with that standard.

By injecting the reasonable person standard into the audience, that's not the same thing, because the person who is making the alleged solicitation cannot necessarily control what the audience hears. So to insert a reasonable person standard to be more objective, I would think you would have to tie it to the person making the solicitation, not the other way around.

COMMISSIONER WEINTRAUB: So a reasonable--

MR. McGAHN: And that would make it objective, because then--

COMMISSIONER WEINTRAUB: --a reasonable person making that statement would have understood that they were making a solicitation.

MR. McGAHN: Thought that they were making a solicitation. Then to me that sounds a lot more objective than putting it into the audience.

COMMISSIONER WEINTRAUB: And would we have to narrow that to a reasonable officeholder or

candidate?

MR. McGAHN: I think so, yes. I think you would. I think you would have to put somebody in similar situations, because as you know from your experience, elected officials can say things--on the one hand they can say things without saying them, but they can say exactly what they mean.

For example, when you go as a lobbyist to meet with an elected official and he says, "I really would like to be with you on this bill," half the people leave and think, "Man, we got his vote." But you know that that means uh-uh. That's a no, but you came away thinking, "That was a great meeting. We really convinced him."

COMMISSIONER WEINTRAUB: And, Mr. McGahn, I really would like to agree with you on this rulemaking, and you can take from that what you want, but--

MR. McGAHN: Precisely, and I would love to agree with you as well.

COMMISSIONER WEINTRAUB: I'm sure we would all love to agree with each other.

MR. McGAHN: I would say I want to agree with Mr. Noble, but that may be deemed ambiguous.

[Laughter.]

COMMISSIONER WEINTRAUB: You know, we haven't had enough humor at this Commission since--

MR. McGAHN: Since the last time I was here.

COMMISSIONER WEINTRAUB: So that is, you know, a promising sign.

MR. McGAHN: So it's not the notion of interjecting "reasonable person." The objective standard, we appreciate what you're trying to do. And having listened to the morning session and read the other comments, it seems like a lot of people are saying--they think they're saying the same thing, but they're using different words.

If you look at Alternative Three, prong two, "must be reasonably understood in context to be asking another person to make a contribution or donation," that's different than a reasonable person standard, even though the word "reasonable" still appears there.

COMMISSIONER WEINTRAUB: Do you like it better? Which one do you like better?

MR. McGAHN: It's all ambiguous.

COMMISSIONER WEINTRAUB: Well, we'll come up with another formulation. It is terribly ambiguous.

Recognizing it's not your first choice, do you have anything you would like to improve, other than the reasonable person standard, or clarify to make it more helpful to your clients, in the proposed rule?

MR. McGAHN: Well, the suggestion would be the one we alluded to earlier, in which you tie the objectivity to the person who is actually doing the alleged solicitation.

COMMISSIONER WEINTRAUB: Putting that issue aside--

MR. McGAHN: Whether or not the person who is accused of doing something wrong has some control over--

COMMISSIONER WEINTRAUB: No, no. The words of the proposed rule.

MR. McGAHN: Okay.

COMMISSIONER WEINTRAUB: "Request," "recommend," "suggest," I think is what it says, are you generally okay with that, other than this reasonable person issue?

MR. McGAHN: Generally, I mean, you know, but it's awkward for me because I thought the current rule covered almost everything that the plaintiffs in the Shays case said the rule didn't cover.

COMMISSIONER WEINTRAUB: I agree with you.

MR. McGAHN: As do my clients.

COMMISSIONER WEINTRAUB: I completely agree with you.

MR. McGAHN: To sort of invoke the specter of Mr. Elias earlier, not all of my clients voted for BCRA, but there are members of the NRCC who are Republican, who did vote for it, and none of them are here commenting, so we're the best you have when it comes to what people may or may not think. But I'm not looking for subjective thought. I'm just--the advice was not what the Court assumed it

was. That's just not the practice. So it's tough for me to say what you should do to fix something that I didn't think was necessarily broken.

COMMISSIONER WEINTRAUB: Okay. Thanks.

CHAIRMAN THOMAS: Thank you.

Next we go to Commissioner Mason.

COMMISSIONER MASON: Thank you.

Mr. Noble, just quickly I wanted to clarify something. Mr. Simon seemed to be saying that if you attended a fundraiser but didn't speak, weren't part of the program I think was the term he used, then that wasn't a solicitation. And I thought I heard you say that just attending a fundraiser constituted a solicitation.

MR. NOBLE: If I did, I misspoke. Attending and participating in a fundraiser.

COMMISSIONER MASON: Attending and participating?

MR. NOBLE: Yes.

COMMISSIONER MASON: So you are more or less like Mr. Simon, that if you stand up to make a speech--that if you just show up and mingle, that

that by itself wouldn't be a solicitation?

MR. NOBLE: Right.

COMMISSIONER MASON: Okay. I want to then ask you about the disclaimer rule and how that would work at a $10,000 per person event.

MR. NOBLE: A $10,000 per person event, to a--

COMMISSIONER MASON: This is for a 527 organization, a state party--excuse me, a state candidate. The $10,000 might, depending on how we interpret it, be within the national party limit. But, in other words, the cost of the event is in excess of any applicable federal contribution limit. They pay $10,000 to get into the VIP reception.

MR. NOBLE: Then I don't think they can do it. I don't think the disclaimer works, because I think you run into a situation there where the disclaimer cannot inoculate you against an obvious solicitation for soft money. And that is--

COMMISSIONER MASON: Well, there's a question about whether it's an obvious

solicitation, but that's what I wanted to clarify, that in other words if--I doubt somebody would have a corporate-only event or a union-only event, but they might well have an event--

MR. NOBLE: Minimum paid, $10,000.

COMMISSIONER MASON: --at which the minimum price of admission was higher than any applicable federal limit, and so there would be no way you could solve that with a disclaimer. I just wanted to clarify that that's your position.

I would like to also ask that you maybe come back to us, because it's important as a factual matter, on this officeholders looking like they were doing solicitations.

And let me specifically say I have a recollection of 527 organizations that had federal accounts and non-federal 527 accounts, and I read accounts of the federal officeholders going to raise federal money at the federal event and sort of laying on their hands. And I thought that was kind of cute, and arguably in violation of the spirit of the law, but they were at a hard money

fundraiser, raising hard funds. It was just that 90 percent of the organization's activity was somewhere else.

So if there was actually conduct where officeholders showed up at 527 events, not raising federal funds, or spoke and so on, I would genuinely be interested in seeing it, in part because I don't recall. I was watching the way you were, and I don't recall any such activity.

MR. NOBLE: I will go back and look and do research, and see what I can come up with and submit it to you.

COMMISSIONER MASON: Thank you.

Mr. McGahn, I asked about the reply device rule in the previous panel, and I just want to get your opinion about that. I mean, does that provide sort of workable guidance for you, your committee, your clients, and help? I mean, the aim here is to just take the written solicitations, and while the general rule would still apply, to essentially fix it so that most of the written solicitations are really not arguable, in terms of we don't have to

get into the hypotheticals about what the language would say. Does that work for you?

MR. McGAHN: It sounded fair to me.

COMMISSIONER MASON: Thank you.

And then, Mr. Noble and Mr. Ryan, you have talked about, we have all talked about fundraising events, and I'm concerned about the real world where candidates are going around, particularly during their reelection periods but also at other periods in the fall, and they do drop-bys, and they have on the schedule a local candidate fundraising event, a local candidate event or a party event.

And in my experience with political practice, there isn't quite as neat a distinction between a fundraising event and an event where no fundraising is going on. I'm a little worried about that. It would be one thing to submit a rule where it's called a fundraiser and there is a gate price and so on, but as I think you are aware, a lot of times at a local party committee meeting, just a regular monthly committee meeting, they may

do a treasurer's report and indicate that they are had up for funds and pass the hat, and that may be something spontaneous. And at local candidate rallies, likewise.

So I want to get your thoughts on what sort of rule ought to apply to a federal officeholder or other covered official in a situation like that, where it's not billed as a fundraising event but where in fact some fundraising takes place.

MR. NOBLE: I think there are always going to be cases that are around the edges. There are always going to be cases that you're going to have to use prosecutorial discretion on, that you're just going to say cut a certain way, and it's really going to be very fact-dependent.

So if the federal officeholder just shows up at a local party event and it's not billed as a fundraiser, and somebody happens to stand up and say, "Listen, we really could use some money"--and, by the way, it's not the federal officeholder who is doing it--then I think you can say that that was

not intended to be a fundraising event, it didn't really become a fundraising event. On the other hand, if it's standard practice and procedure at those events that that is what goes on, then I think you can consider it a fundraising event.

And as always, and I think everyone here knows this, there will be times you will look at ones that will be tough calls, and you'll exercise prosecutorial discretion on, just say it's not worth doing anything about. That always happens.

COMMISSIONER MASON: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you. I want to thank all the witnesses for coming. It's a good discussion and it's a tough discussion, I think, in lots of ways.

Let me ask--I'll start with Don, if I may. He might want to address this first. I gather you had said one of the problems that you felt was that it's real easy to get into kind of--I think this is

paraphrasing you fairly close--a loosey-goosey kind of arrangement which is not very satisfactory, and I think I join you. We have had some of those arrangements, and I want to be clear I'm for clarity and opposed to ambiguity. I want to get all this down.

But in that context for a second, that being the case, what would be wrong with the approach that Larry indicated earlier, and of course Don had indicated before, where you did have a bright line test? And in fact if a candidate came, a federal candidate, and in whatever circumstance there had been money raised, whether he was formally part of the program or not, why not have a bright line test and get away from, you know, kind of the loosey-goosey problems that we've all alluded to, and rightfully so, that they are hard to figure out? Would that not be more along the lines of what would be helpful to candidates?

MR. McGAHN: Well, let's not confuse the need for a bright line with simply saying, "Let's ban everything." I mean, you could obviously make

it all illegal, and that's pretty clear, make it illegal just to show up.

But I think we may both agree that regardless of what one may think of the subjective intent, of whatever was going through the minds of individual congressmen when they voted for BCRA, I think it would be very tough to make the argument that the House, the Senate, and the President enacted something into law that would have prohibited them from simply showing up at events. There is absolutely no indication that that's the case.

Even in the wild rhetoric of banning negative ads or breaking the link between soft money and elected officials, even if you take those as the operating assumptions, saying you can't show up doesn't further those goals. So it simply seems implausible to go that far, although it certainly would be a very clear rule. You're simply not allowed to show up. It just defies any sort of political--

COMMISSIONER McDONALD: In terms of a

fundraiser. You're certainly allowed to show up to numerous events. You just wouldn't be able to show up to a fundraising event.

MR. McGAHN: Well, see, but how do you know if it's a fundraiser until it's too late?

COMMISSIONER McDONALD: Can I ask you about that? I'm glad you brought that up. Again, and my experience may be different than some of my colleagues, I just never knew any of these folks that did not know whether it was a fundraiser or not. I'll grant you that Dave's point, that Commissioner Mason's point is right, that I've been to places where they have passed the hat, and it wouldn't get to the level we would worry about. I can assure you of that.

But as a practical matter, in this day and time, with communications being what they are, and with every candidate measuring every minute, they don't willy-nilly drop by, as you know.

MR. McGAHN: Correct.

COMMISSIONER McDONALD: It's not unusual for a candidate to go to five events on the Hill,

for example, but they know exactly where they're going, they know how long they'll be there, they know who they're going to say hello to, and then they leave. I mean, that's a fact.

And it's usually even more applicable where the candidate has to spread themselves out. That is to say, maybe they'll be up at the--what was that event called, the horse--

VICE-CHAIRMAN TONER: Foxfield.

COMMISSIONER McDONALD: Yes. I haven't been there, but I would love to go. But I have been to Laurel. Is it kind of the same?

VICE-CHAIRMAN TONER: No.

COMMISSIONER McDONALD: That's what I was afraid of.

But as a practical matter I think you know, as a general rule, at least in my experience, and it's much more limited than yours, but candidates have a pretty good idea of how they're going to spend and measure their time. Now, if they inadvertently wander in, there is a good chance they won't be a prominent player for long,

if they do it often, because my guess is--

MR. McGAHN: If they're that clueless, probably not, if they're not savvy.

COMMISSIONER McDONALD: I'll ask you a different question. In relationship to Alternative Two, and in relationship to this term "ambiguous," which I have decided that most terms are ambiguous because lawyers are involved--and I mean that with respect, good lawyers are involved on all sides--the term "indirect" seems pretty ambiguous to me, or at least I think you could make an argument it is. What's your thought, any of your thoughts on that? Don, you want to go first?

MR. McGAHN: I'm actually still hung up on the non-question, on whether people will know they're in fundraisers or not. And what jumped into my head was Al Gore and the Buddhist temple. He said with a straight face he didn't know it was a fundraiser. Maybe that's true.

But there are many situations, and in the modern world you go to so many events, and because there is so much detail and so much information,

the details get lost. And there are times where people do go to events and they don't realize it's a fundraiser. But we need to differentiate. I think a critical thing, and this has been alluded to even by Mr. Simon on the first panel, there is nothing illegal about raising hard money.

COMMISSIONER McDONALD: That's right.

MR. McGAHN: So showing up shouldn't be a problem. It's are you raising hard money or soft money? And you don't necessarily know that because, let's say you're in a state where you're not sure what the local candidate limits are, or let's say it's a place where an assembly candidate has a different limit than a state senate candidate. Not common, but it certainly happens.

COMMISSIONER McDONALD: Sure.

MR. McGAHN: So--

COMMISSIONER McDONALD: --and the law, don't you think?

MR. McGAHN: Pardon?

COMMISSIONER McDONALD: I mean, you'll get a shot at it. I mean, that's why we sit up here.

Those are fact-specific, and if we were so clear and so well-reasoned and wise, we wouldn't have Advisory Opinions.

We wouldn't have a multitude of MURs that we very seldom ever find anyone knowing and willful. You can count, probably on two hands, knowing and willful violations over the years, so you have to assume that there is ambiguity involved, and that is why in fact those cases come before us, because if they're not knowing and willful violations--I'm just trying to get some sense of how to attack it. I don't know the answer, and I don't claim to know the answer, but I do know that we have been kind of directed to proceed.

MR. McGAHN: Well, cases do turn on their own facts. I don't think anyone is going to dispute that. Different facts mean different results, but the rule ought to stay the same.

What my client is suggesting is, we don't want a situation where it's an after-the-fact analysis not only of the facts, but the rule kind

of changes depending on the facts. It maybe depends on who the respondent may or may not be.

Now, we do know that within the Commission there's different priorities, and just the whole tracking system of the MURs. Certain things are seen as more important than others. Those judgments get made all the time, but the rule ought not change.

COMMISSIONER McDONALD: Agreed.

MR. McGAHN: And this is why we encourage the use of examples in the E & J. I would suggest that some of the examples showing what is a solicitation be clarified and put in factual terms that actually make sense, i.e. distinguish between a hard money solicitation and a soft money solicitation.

Some of them are a little bit too broad to really be helpful, because I think it will cause more panic than it will solve. But the examples I think are very good, because at least then you have, as opposed to having to wait for 10 Advisory Opinions to come down, you've got 10 mini Advisory

Opinions, 9, rather, as to what you can't do.

COMMISSIONER McDONALD: I think it's an excellent point. I know my time is up, and I apologize, because I do think you have made an excellent point there. One of the problems we have had historically around the table--all of us being reasonable people, mercifully me more reasonable than others--but as a practical matter what has happened to us is that if we in fact haven't alluded to those examples, then what has been said frequently in enforcement matters is, "Well, we don't give that example. Therefore, we shouldn't be in that area."

So I am in total agreement with you, which could well end your political career, I might say. But I--

MR. McGAHN: Or jump start it. You never know how things play out.

COMMISSIONER McDONALD: Then you're in pretty bad shape. I agree with you. I always thought the more examples you had, the better, but I also didn't think that those examples in and of

themselves were exhaustive of whatever the rule or regulation might be.

MR. McGAHN: Not necessarily exhaustive, but as a practitioner, when I see "reasonable person" and the audience is the reasonable person, the reasonable person becomes me as the lawyer reviewing it, and then it puts me in a spot where the Commission becomes the reasonable person and second-guesses. Where at least the examples give me, and Mr. Elias and Mr. Sandler or Mr. McGinley and others who have to advise these folks, something that we can rely on that provides some sort of guidance, as opposed to--

COMMISSIONER McDONALD: I agree with you. I thank all of you very much.

CHAIRMAN THOMAS: Thank you. Let me ask a couple of questions.

First of all, let me just start off again with the hypotheticals that I threw out. We were sort of interested, on the conduct side of things, if we were to either include the reference to conduct being a relevant consideration, or just

clarify that when we talk about context being a relevant consideration, we could somehow clarify that there are certain elements of conduct that would satisfy the context approach.

The hypotheticals I raised were, what about someone saying either, "I would never think of asking you for a corporate check?" and then winking, or alternatively, "Would I be asking you for a corporate check?" and then an affirmative nod. I just wanted to go down the panel quickly. Would any of you have a problem with including those as examples of something that would constitute solicitation under whatever definition you are recommending that we work with today?

MR. McGAHN: No. Those are solicitations.

MR. NOBLE: I agree.

MR. RYAN: Agreed.

CHAIRMAN THOMAS: Okay. Now let me move to this area which, you know, we talked about it a lot, but it really is an interesting and problematic area for me. We have heard from counsel for the DNC that national party committee

officers are stuck with what is in essence a tougher solicitation rule than, say, federal candidates and officeholders.

In essence, they can't be involved in anything that is a solicitation unless the funds not only would be subject to federal restrictions but also would be subject to federal reporting requirements, and so that puts them in a real bind, they say. But it's interesting, they said the approach they have taken is that they advise those party officers not to attend non-federal candidate fundraising events, but they say it's okay, I guess, to attend party committee non-federal fundraising events, as long as they stop short of soliciting at the event.

And what I'm trying to get at, and I know we sort of hooted at the rationale from Mr. Sandler, I was going to ask Mr. Noble and Mr. Ryan, do you have some advice on how we can get out of that?

Is it in your mind just sort of bottom line, we have to tell the national party officials

that their only options are to either be involved in a hard money solicitation when they're attending something, and even in the context of a non-federal candidate, they would have to work something out with the non-federal candidate to actually require that the money be reported to the Federal Election Commission?

Or is the only alternative to just say, "In that situation you're going to have to make sure that it's not a fundraising event," and the solution is to basically ask in advance, "Is this event I'm attending going to be a fundraising event? If it is, I simply cannot attend." I mean, in that range of options, I'm curious where you two think the Commission ought to go.

MR. RYAN: I think what you've described as the options are in fact the options, the regulatory regime that's established by BCRA. BCRA treats candidates and officeholders differently from national party officials. They have more restrictive actions because they have the reporting requirement tacked on. It's not that they are

prohibited from engaging or attending the events, but some arrangement for reporting of the funds raised at that even would need to be somehow arranged.

MR. NOBLE: I agree with that, and it is interesting because the statute really does deal with officeholders and party officials differently. Because you do have for officeholders that exception, if you will, that as long as the money is raised under the limits and prohibitions of the law, then it's okay, and you don't have that for party officials. So I do think those are the options that they now have.

CHAIRMAN THOMAS: Mr. McGahn, just to sort of follow up, I was just curious. On your side of the aisle, do you take a similar construction of the law, that it's one thing for your national party officials to be attending say a non-federal candidate's event versus attending perhaps a party event?

MR. McGAHN: I don't represent the RNC, so I'm not sure where they come down, although I know

there is some sort of distinction. I just don't deal with them on a day-to-day. In my context, the congressional committee, our chairman is also a Member of Congress who is also a candidate, and they get into the wearing different hats sort of thing.

And I think the distinction that came to my mind with what Joe Sandler said this morning was, it's one thing to show up as the Chair of the DNC. It's another thing to show up as the former Governor. I think it depends how you're held out. That's kind of how I think we are reading the rules, but I don't really want to get into what the RNC does because I really don't know.

CHAIRMAN THOMAS: Okay. Thank you. Now, I didn't start my clock until late, so I'll pass on to the next person. The General Counsel, Mr. Norton?

MR. NORTON: Thank you, Mr. Chairman.

Mr. Noble, if I could start with you, you mentioned earlier the scenario of federal officeholders or candidates showing up at 527

events, but I'm going to leave that aside for a second because, as you know, 527 groups can and do raise money other ways. In fact, some of the largest amounts are not raised through fundraising events.

And so I'd like to talk about a private meeting, and the meeting is attended by a potential donor and two of the 527's principals and a federal officeholder. This is a donor who has previously given money to the federal officeholder, and is known to be sympathetic to the group's causes and has given money to similar causes.

And they sit down in a room and they talk about what a great group this is, and that conversation goes on for a while, and one of the group's founders says to the donor, "I'd like to talk to you about how you can help," and the federal candidate says, "Let me step out now." And presumably what transpires is some discussion about money. Is that a solicitation by the federal officeholder?

MR. NOBLE: I will answer the question,

but I will say in one sense I really think these hypotheticals are dangerous, because there are always more facts around them than what we come up with in the hypothetical. They rarely are that clean.

But if in fact there was no discussion prior or any understanding that there would be fundraising going on--I mean, "I'm shocked to see there is fundraising going on here"--then there is a possibility it would not be a solicitation. But on the other hand, in most contexts if it was understood that part of the meeting was about raising funds, then I think the mere stepping out of the officeholder may not then take him out of the solicitation.

MR. NORTON: So potentially the conduct--

MR. NOBLE: Right. Yes, that's where conduct may come in, and you really want to know what was the purpose of the meeting, how was it set up. On the other hand, if they were told the meeting is just really to discuss an issue and we want to discuss an issue, and the federal

officeholder thought that, and the federal officeholder then says, "All right. Listen, I've got to get to the floor. I'm leaving. Goodbye." and then after he leaves somebody starts raising funds, you may have a different situation there.

MR. NORTON: Mr. Ryan, those are the only facts you know. What's your take on that?

MR. RYAN: I agree with Larry. And I would attempt to define or identify that meeting as a fundraising event, and I would identify or define a fundraising event as an event in which either it costs money to get in, funds are solicited as an exchange for entry, or where solicitation is planned.

And as Larry described, if going into this meeting the federal officeholder knew well that there was a plan to solicit a contribution or a donation from this individual, then I think what you have described would be a solicitation. If by contrast there was no plan to ask this particular individual for money, then you're dealing with a different situation and perhaps a solicitation has

not occurred.

MR. NORTON: So one of the things our investigation would focus on would be whether the federal officeholder knew well what would be discussed at the meeting?

MR. RYAN: I think that's right, and I think that a similar situation could occur in any public event. So changing the facts of the hypothetical slightly, a federal officeholder shows up at a public event that for all that official knows, was slated as being a policy sort of event, a non-fundraising event. And after that elected official leaves the event, someone asks for big contributions, soft money contributions, non-federal funds. That would not necessarily be a solicitation. The event would not necessarily have been a fundraising event, unless going in this federal official knew that that was precisely what was going to occur.

MR. NORTON: Mr. McGahn, I'll give you a chance if you want to respond to the hypothetical.

MR. McGAHN: It's more of a question than

a response. When does the solicitation actually occur, if it is a solicitation? What point in time is there a solicitation? You would think time moves at a continuum. At some point there is no solicitation. All of a sudden there is, and then from that point on, in the rear view mirror, I have been solicited. Where is the solicitation there, temporally?

MR. NORTON: Yes. You know, I think you're right, that's the question, and part of what I am attempting to address is this notion of conduct being something the Commission needs to take into account. And all the questions have focused on fundraising events, but I wanted to move into a realm where an awful lot of fundraising goes on and the federal officeholder could have a role, and determine whether that kind of participation, limited as it was in my hypothetical, would constitute conduct soliciting non-federal funds. In other words, just being part of that meeting.

MR. McGAHN: It's not a solicitation, in my view, and moreover it also needs the right

context, to put it into context. BCRA doesn't prohibit solicitations in and of themselves. It's just soft money. So again, it depends on what the group is. And things do turn on their facts, but based upon the facts that you laid out, that's not a solicitation.

MR. NORTON: Yes. I should have said, you know, let's assume that that's all the group raises.

MR. McGAHN: A hundred percent soft money group?

MR. NORTON: Yes.

MR. McGAHN: Still not a solicitation.

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

CHAIRMAN THOMAS: Mr. Costa?

MR. COSTA: I have no questions.

CHAIRMAN THOMAS: Follow-up? Anyone want to go back through? Mr. Vice-Chairman?

VICE-CHAIRMAN TONER: Thank you, Mr. Chairman. I just wanted to follow up. I think Mr. Noble makes a very good point that federal

candidates and officeholders have a bit more latitude than national party officials by virtue of 441i(e)(3), which makes clear in the statute that federal candidates and officeholders can attend and speak and be a featured guest at state party fundraising events, but the statute does not speak of that for national party officials.

So in some respects the scope of "solicit," the stakes are even higher for national party officials when they're appearing in their capacity as a national party chairman. I have to be honest with you, I think that's going to be 99 percent of the time, particularly when they are introduced as the Chairman of the RNC or Chairman of the DNC.

But I want to follow up, Mr. Noble, with you, because Mr. McGahn talked about donor fulfillment events or donor maintenance events. I think that is an important area of the law. These are events where there is no fundraising that takes place at the event. Not a dime is collected. But at the same time it is part and parcel of the

broader fundraising program of the political party. Specifically, major donors are permitted to go to these kinds of events if they have given certain ranges of money.

And so if we have a donor maintenance event for a state party which is accepting soft money, and donors are able to go to that event if they have contributed $100,000 or whatever it may be, is it your view that a national party chairman wouldn't be able to go to that type of event because it is part and parcel of fundraising activity?

MR. NOBLE: Yes, in most circumstances. I'm trying to think of where it wouldn't be. But in most circumstances, if the donor maintenance event is part of the fundraising, which it is--

VICE-CHAIRMAN TONER: Which it is. That's part of the framework.

MR. NOBLE: Yes. And you're raising money that is not hard money.

VICE-CHAIRMAN TONER: Right.

MR. NOBLE: Yes, then I think that is the

answer.

VICE-CHAIRMAN TONER: So that the Howard Dean or Ken Mehlman would be barred from even going to an event, even though not a dime is being raised there? I just want to be clear on that.

MR. NOBLE: Well, again we're going back to the going to the event, what you asked or Commissioner Mason asked me about earlier, the attendance versus being part of the event. I mean, a part of the donor maintenance event is that "and then the Chairman of the RNC or the DNC will be there to talk to you, and you can talk to him about your problems, etcetera."

VICE-CHAIRMAN TONER: Sure. Absolutely.

MR. NOBLE: Then yes.

VICE-CHAIRMAN TONER: About issues or whatever may be.

MR. NOBLE: Whatever, right.

VICE-CHAIRMAN TONER: No matter what is said at that event, no matter what the nature of their participation?

MR. NOBLE: If in fact it's a donor

maintenance event and fundraising was done around the event, yes.

VICE-CHAIRMAN TONER: Total prohibition?

MR. NOBLE: That's the way I read the statute, yes.

VICE-CHAIRMAN TONER: Mr. Ryan, you agree?

MR. RYAN: I agree.

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

CHAIRMAN THOMAS: Thank you.

Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Just one more conduct-related hypothetical, drawn from today's headlines, and I won't go into the details of the article because I'm quite sure there are some details missing. But I am reminded of another popular fundraising technique, and that is those "grip and grins."

If a federal officeholder shows up at an event--and I'm pretty sure I know what Mr. Ryan and Mr. Noble are going to say about this, because by

definition he has already shown up, so there you go--but he shows up at an event, and at this event let's say remarkably enough he has laryngitis. He doesn't say a word, but people who have contributed $10,000 get their picture taken with the federal officeholder. Is that kind of conduct, is that a solicitation?

MR. NOBLE: Before I answer that, let me clarify something, and I hoped I had clarified this when Commissioner Mason asked me a question. I have not said that just showing up is a solicitation. If you walk in on an event and you are not part of the event, you are not listed on the fundraising material, and you just show up, no, we're not saying that is a solicitation. That's an important distinction.

COMMISSIONER WEINTRAUB: Okay. I appreciate that clarification.

MR. NOBLE: But yes, if in fact--and we've seen this, where part of the fundraising is, at a certain level of giving you will get your picture taken with the officeholder, yes, then I think

that's part of the solicitation.

COMMISSIONER WEINTRAUB: Mr. Ryan?

MR. RYAN: I agree.

COMMISSIONER WEINTRAUB: Mr. McGahn?

MR. McGAHN: Disagree.

COMMISSIONER WEINTRAUB: Because?

MR. McGAHN: I don't see the solicitation. Again, let's say the idea of the "grip and grin" is a picture line, for example. The public official is wheeled into the picture line. He is not going to know who gave hard money and who gave soft money, unless he says--

COMMISSIONER WEINTRAUB: Well, let's say that he does. Let's say they tell him in advance. They say, "Mr. Senator," whoever it is, "we would like you to come to this event. We know you have laryngitis, you can't talk to anybody, but we would like you to come to this event because we would like to advertise that people who give $10,000 can get their picture taken with you, and we think that would bring in money." Do you think that's a solicitation?

MR. McGAHN: Well, is that on the actual solicitation for people to come to the event, asking for money?

COMMISSIONER WEINTRAUB: Yes.

MR. McGAHN: Come and meet this person?

COMMISSIONER WEINTRAUB: Come and get your picture taken.

MR. McGAHN: So the person's name is on the solicitation itself?

COMMISSIONER WEINTRAUB: Yes. You get your picture taken with Senator so-and-so if you make this dollar level of contribution.

MR. McGAHN: Isn't that what Commissioner Mason suggested with the idea of the response card? If it says, "Give us money," and the name is on it, it's a solicitation at that point?

COMMISSIONER WEINTRAUB: I mean, I think it is, but I'm just--

MR. McGAHN: Well, I think I have already agreed with that.

COMMISSIONER WEINTRAUB: All right.

MR. McGAHN: That's different, though,

than your original hypothetical.

COMMISSIONER WEINTRAUB: Okay. So if it just sort of happens without it being pre-advertised, then you think it's not a solicitation?

MR. McGAHN: Right. I think there's a distinction there.

COMMISSIONER WEINTRAUB: He sort of wanders in and they say, "Oh, great. Come on over here. We want you to shake hands and get your picture taken with some of our high donors." No problem.

MR. McGAHN: No, that's not a problem. Well, it's not a solicitation.

MR. NOBLE: I may have more of a problem with that, not surprisingly.

COMMISSIONER WEINTRAUB: I suspected you would.

MR. NOBLE: I also want to make a point. In many of these situations, it has been said before, in many of these situations disclaimers will get them out of a problem. And so if you're having a planned event and there is going to be--and we're

talking about a federal officeholder, a disclaimer about what the federal officeholder is allowed to raise will get out of a problem and the event can go on.

COMMISSIONER WEINTRAUB: Although, going back to what Commissioner Mason suggested, you know, if it's $10,000, that is--

MR. NOBLE: Right. That's where you can't do it, correct.

COMMISSIONER WEINTRAUB: Like there is no way you can disclaim that away, I think.

VICE-CHAIRMAN TONER: And there's no way that a national party official can use the disclaimer.

MR. NOBLE: Right.

VICE-CHAIRMAN TONER: They're done.

MR. NOBLE: And that's from the statute.

CHAIRMAN THOMAS: Commissioner McDonald, do you want to jump in?

COMMISSIONER McDONALD: Well, I just want to follow up on that, and maybe I should ask the Vice-Chairman. I just want to incorporate it into the

question, but I wasn't sure when he was asking the question that I had it totally in my mind.

In relationship to the party maintenance, if you will, would the solicitation, for example, say "Meet Howard Dean," that would be one of the gifts that you would get throughout the year. Say you had "Come four times to meet party officials." Included would be Howard Dean, Chairman of the Democratic Party, and then, you know, maybe--I wasn't sure. I just wanted to be sure I was getting the--

VICE-CHAIRMAN TONER: Sure. What I was envisioning was a donor maintenance event at which there is no such communication like that--

COMMISSIONER McDONALD: There is not.

VICE-CHAIRMAN TONER: --because the people have already given whatever it takes to be a major donor, and then they have the right, then, to go to an event where Governor Dean is.

COMMISSIONER McDONALD: So the right to be a major donor would be based on something else, maybe generic party--

VICE-CHAIRMAN TONER: Based on what they have already given, you know, if you give $100,000 or whatever it may be.

COMMISSIONER McDONALD: I got you. Thank you. It's helpful.

CHAIRMAN THOMAS: Commissioner Mason?

COMMISSIONER MASON: I wanted to play with the General Counsel's hypothetical a little bit, Mr. Noble and Mr. Ryan. What if an officeholder simply makes a call and says to their friend, financial supporter, "There's a new organization in town you won't have heard about, but the people organizing it are wonderful, and so-and-so is going to call you soon, and I think you ought to meet with them." And the organization has a federal account and a non-federal account.

Does that constitute a solicitation on the part of the officeholder?

MR. NOBLE: And if you want to say, you know, what else he knows or might know. In other words, does he have--

COMMISSIONER MASON: That would have been

done by arrangement with the organization.

MR. NOBLE: Right.

COMMISSIONER MASON: So he knows there is going to be fundraising going on. Now, does he have to say, "Well, if I call, are you only going to ask for hard money, or are you only going to ask for hard money at the first event?" In other words, what does he have to do in that circumstance where he doesn't want to make the pitch? He doesn't want to make the hard money or the soft money pitch, you know, but he wants to issue a generic endorsement of the organization.

VICE-CHAIRMAN TONER: Just say no.

MR. NOBLE: I think in that situation, if he or she knows that it is part of a fundraising effort, and that they have been asked to call to raise funds, and they know--and then you have to ask what else they know about it.

If they in fact know that hard money is also going to be raised there, then they can use the disclaimer. They can say, "Look, I want you to call them. I want you to understand I'm not asking

you to give, I cannot ask you to give any more than," you know, blah, blah, blah, the limits.

If on the other hand they know that this group does not have any--is only raising money that would not be permissible under the hard money limits, then I would say they can't do it. It's a solicitation. I think it's part of an element.

COMMISSIONER MASON: I don't think that's likely. But, in other words, in that case you would extend the disclaimer. And so if they're making that introduction, I mean even if there is no federal account, the officeholder still could directly, himself, solicit up to $5,000 per person, and so that sort of disclaimer would get him there.

MR. NOBLE: I think that's right, yes.

MR. RYAN: Yes, I agree that the disclaimer would be a requirement.

COMMISSIONER MASON: And I want to ask Mr. McGahn about the disclaimer. Mr. Elias was very funny with the placard and like that--

MR. McGAHN: He's a funny guy.

COMMISSIONER MASON: --but advance men are

pretty efficient, and I'm sure the NRCC could print up Cantor cards for all the Republican members to carry around in their coat pocket, or have their staffers carry around or whatever. But to talk about that, in other words, what if we said, "Okay, if it's a fundraiser and if you speak, you've got to do the disclaimer." And so it will be like the old police show where they pull out the Miranda card.

MR. McGAHN: Right. Miranda rights for donors.

COMMISSIONER MASON: Yes.

MR. McGAHN: You have the right to hold onto your wallet. Anything that touches your wallet will not be taken as--

COMMISSIONER MASON: I'm not advocating it and I'm sure you don't want it, but would that be workable in the actual world?

MR. McGAHN: No, it would not, not in the way you said it, because you're making the disclaimer part of the affirmative case in chief. What it sounds like, based upon what you actually

said there, if you didn't do a disclaimer it would be a violation in and of itself. Our comments that we filed--

COMMISSIONER MASON: Well, that's the case. I understand that, and I'm saying you disagree, but essentially what the other organizations testifying here have said is that if you show up at a fundraising event and make a speech, then that's a solicitation.

And so I'm asking, well, okay, if we adopted that rule, would it be possible for you to brief your members up and give them materials and so on like that, and would it sort of work in the real world, that they would just get used to saying it and they would get up and near the beginning of every pitch they would say, "I'm not asking."

MR. McGAHN: I don't think it would be workable because it would become a joke in and of itself, and it would become rote. And then you open yourselves up from the other point of view, where you're doing something that would then wink and nod that you really are asking for soft money

because you're telling people you're not asking for soft money. And it would get to the point where it becomes high Catholic mass, and everybody kind of knows, it becomes that kind of singsong--

COMMISSIONER MASON: Careful.

MR. McGAHN: I'm very experienced, as a former altar boy, on how to drone on at length.

[Laughter.]

MR. McGAHN: But the point is, if you force a disclaimer at every instance, even when it doesn't fit, you're going to cause more mischief than you solve, because you're going to confuse the donor, and donors really then are going to think they are being asked for soft money, which is really going to frustrate the central purpose of BCRA. So even though we mean well by saying we put the disclaimer, you're going to end up swallowing the rule that you're trying to enforce.

COMMISSIONER MASON: Mr. Noble, do you buy that? In other words, you know, does it sort of become like the cigarette warning label, which I don't think ever persuaded anybody, that if they

stand up every time and--

MR. NOBLE: I would.

MR. McGAHN: What about the mattress tag?

COMMISSIONER MASON: Actually I don't rip it off.

MR. McGAHN: That figures.

COMMISSIONER MASON: But if we have this, and then officeholders start standing up and saying, "Well, Federal Election Commission regulations require me to tell you that"--

MR. NOBLE: I understand the problem, and actually I was thinking, as you were going back and forth on this, that the irony of it is you may very well have a situation where an officeholder stands up originally intending just to give a policy speech at a fundraiser, and then figures, "Oh, what the heck, I might as well solicit money, since I'm going to give a disclaimer anyway."

And that's fine. I mean, that's the world that we live in. The law has disclaimers in it. We are seeing now, and this was in Virginia, but we're seeing on the ads, "My campaign paid for this

ad." We do live in a world of disclaimers in both politics and outside of politics, and they do serve a purpose. And yes, there's a possibility that they will become rote, but I think given the options, I think that having a disclaimer is a better option.

Having said this, I would say this. The Commission created the disclaimer, the Cantor rights, if you will. You know, you have the right to give money, but not above the federal limits. But the Commission created it, and I guess you could say, "No, forget it. The disclaimer is not going to work. You just can't do this." And so we have said, "All right, we think the disclaimers can work." But it's not in the statute. You can just say no.

CHAIRMAN THOMAS: Commissioner McDonald?

COMMISSIONER McDONALD: No mas, no mas.

CHAIRMAN THOMAS: I'm trying to think of which horse we haven't beaten to a pulp here.

COMMISSIONER McDONALD: That was "mas," not "mass," by the way.

CHAIRMAN THOMAS: I'm just curious about, I guess in the world of solicitation there is still a little bit of ambiguity about what role say a Member of Congress can have in pre-event materials. I think we have tried to say that it's okay to make reference to the fact that a federal candidate will be a featured guest, in a separate kind of mailing that is not in itself a solicitation.

We have said that if the material sent out is going to be used as a solicitation for funds, then if the candidate's name is used and the candidate has authorized use of the name, there would have to be something that would specify that the federal candidate's role is only seeking federally permissible money. I'm just curious.

But we have sort of gotten clogged up a little bit about whether--going beyond having a federal candidate basically authorize their name to be used as a host of an event, which we implied would involve a type of solicitation--merely authorizing that their name be put on a committee's, a non-federal candidate's letterhead

as say part of the ongoing financial steering committee or finance committee, that we wouldn't necessarily--we haven't necessarily opined on whether that rises to the level of a form of solicitation.

I'm wondering if any of you have any views on where the lines ought to be there. Mr. Ryan?

MR. RYAN: Yes. My recollection of the Cantor opinion is that the opinion explicitly stated that the Commission could not reach any agreement with regards to the latter scenario described, meaning the federal candidate or officeholder's name is on the letter, perhaps on the letterhead, but not in a way that is clearly affiliated with a fundraising event.

The Campaign Legal Center believes that any time a federal official, a federal elected officeholder or candidate's name appears on a mailing in relationship to a fundraiser, regardless of whether they are listed as part of the host committee or simply as a candidate on the letterhead of the committee that happens to be

hosting the fundraiser itself, a disclaimer is required. So we would urge the Commission to expand the disclaimer requirements as set forth in the Cantor AO in this specific respect.

CHAIRMAN THOMAS: Any alternative approach?

MR. McGAHN: I do not.

CHAIRMAN THOMAS: Any follow-up questions? Mr. General Counsel?

MR. NORTON: I do not, Mr. Chairman.

CHAIRMAN THOMAS: Mr. Acting Staff Director?

Well, we thank you, and we thank the other panelists, and we certainly appreciate the time you have taken to help us on this. We will attempt to make sense out of this. We will attempt to come up with a, shall we say, reasonable rule, and we will do it with as much dispatch as we can. But again, thank you for coming.

This special session is now adjourned.

[Whereupon, at 1:00 p.m., the hearing was adjourned.]