FEDERAL ELECTION COMMISSION

PUBLIC HEARING

Tuesday, May 17, 2005

10:00 a.m.

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

COMMISSION MEMBERS PRESENT:

SCOTT E. THOMAS, Chairman
MICHAEL E. TONER, Vice Chairman
LAWRENCE H. NORTON, General Counsel
ELLEN L. WEINTRAUB, Commissioner
DANNY LEE McDONALD, Commissioner
DAVID M. MASON, Commissioner
BRADLEY A. SMITH, Commissioner
ROBERT J. COSTA, Deputy Staff Director for Audit and Review

AGENDA

PANEL I Public Hearing on Candidate Solicitation of State, District and Local Party Fundraising Events

PANEL II Public Hearing on Candidate Solicitation of State, District and Local Party Fundraising Events

AGENDA (CONTINUED)

PANEL III Public Hearing on the Definition of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures

PANEL IV Public Hearing on Payroll Deductions by Member Corporations for Contributions to a Trade Association's Separate Segregated Fund

P R O C E E D I N G S

CHAIRMAN THOMAS: Good morning, everybody. This special session of the Federal Election Commission for Tuesday, May 17th, 2005 will please come to order.

I would like to welcome everyone to the Commission's hearing on three sets of our rules. The first relates to candidate solicitations at state, district and local party fund-raising events. The second relates to the definition of "agent" for BCRA regulations. And the third relates to payroll deductions by member corporations for contributions to a trade association's separate segregated funding.

Each of the proposed rules that we're discussing today was included in a notice of proposed rulemaking that the Commission recently published in the Federal Register. The Commission issued the proposed rules regarding candidate solicitations and the definition of "agent" in response to the District Court's decision in Shays v. FEC. The Commission issued the proposed rules on payroll deductions for contributions to a trade association's SSF in response to a petition for rulemaking filed by America's Community Bankers, one of the witnesses appearing today.

I'd like to thank very briefly our staff and the Office of General Counsel for their hard work on these rulemakings. I'd also like to thank 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 rule.

I would like to describe briefly the format that we will be following today. The witnesses have been divided into four panels. The first two panels will focus on the proposed candidate solicitation rules. A third panel will focus on the definition of "agent", and the fourth panel will focus on payroll deductions.

Each panel will last for one hour. Each witness will have 5 minutes for his or her opening statement. We have a light system at the witness table to help you keep track of your time. The green light will start to flash when you have, I am told, 34 seconds left. The yellow light will go on when you have 30 seconds left, and the red light means that it's time to wrap up your remarks. The balance of the time is reserved for questioning by the Commission.

For each panel we will have at least one round of questions from the Commissioners, the General Counsel and our Staff Director. There will be a second round only if time permits. I would like to remind my colleagues that we're not required to use our entire questioning time, although it is brief in each case, given that we need to go through Commissioners, the General Counsel and the Staff Director.

There will be a short break between the first two panels, followed by a lunch break with the last two panels this afternoon. As you can see, we have a full day ahead of us, and we would appreciate everyone's cooperation helping us to stay on schedule.

So Panel I, if you can please step forward. Our first panel consists of William McGinley, who is General Counsel to the National Republican Senatorial Committee; Lawrence Noble, Executive Director of the Center for Responsive Politics; and Paul Ryan, who is with the Campaign Legal Center. We will work with the alphabet system here, unless you gentleman have decided otherwise? Mr. McGinley, you can proceed first, and then we'll go with Mr. Noble and then Mr. Ryan.

Mr. McGinley, when you're ready, please begin.

MR. McGINLEY: Mr. Chairman, Mr. Vice Chairman, Commissioners, I want to thank you for the opportunity to speak on the Commission's notice of proposed rulemaking regarding Federal candidates and office holders attending and speaking at State and local party fund-raising events.

The NRSC supports retaining the existing rule which permits federal officeholders and candidates to speak at these events without restriction, and amending the explanation, the justification supporting the rule to satisfy the court's concerns.

The NRSC supports retaining the existing rule for the following reason. Contrary to how these events are portrayed by some members of the regulated community, state and local party fundraisers are by and large not large dollar events. Rather, many of these events are low dollar fundraisers that constitute gatherings of grass roots volunteers and activist who are so important to the political parties' operations. These are the people who volunteer their time to stuff envelopes, man the phone banks and perform the literature drops for the party and its candidates.

In addition, these events are unique opportunities for federal officeholders and candidates to interact with a large number of volunteers and grass roots activists at one event. In this sense they facilitate communication between volunteers and grass roots party supporters and candidates and officeholders. In short, I've heard these events described as unique opportunities for interaction and characterized as "watering the grass roots."

Number two, in most instances the benefit from these events flow to the state and local parties. The benefit does not flow to the federal candidate or the officeholder. Therefore, the argument that these events are a vehicle for circumventing the soft money ban is not availing. State and local parties receive the financial benefit in some instances at a cost to the federal officeholder who must come to the same people for contributions to his or her campaign committee. In this sense there may be a real tradeoff for the federal officeholder or candidate's appearance, which does not necessarily work to his or her benefit.

Moreover, the participation of a federal officeholder or candidate energizes the activists

and the volunteers. This differentiates these types of event from appearances before single-issue local nonprofit organizations. Party activists and volunteers are motivated by hearing from the party's leaders such as United States Senators. They are not motivated by the single issues, but instead support the candidates of the party. In short, these events promote a sense of political party identity.

Third, in most instances the money for the event has already been raised. Therefore, the candidate or officeholder's appearance and speech is not a solicitation. Rather, they typically ask for continued general support for the political party, thank the people in attendance for their past and present support of that party.

As the Commission points out in the draft amendments to the Rules E&J candidates and officeholders are barred from soliciting nonfederal dollars in pre-event publicity such as direct mail or phone calls. In fact, the original E&J goes so far to state that candidates and officeholders are not permitted to serve on host committees for these types of fundraising events that raise nonfederal dollars.

Accordingly, the current regulation and exemption serves as an important purpose by reassuring federal officeholders and candidates that participating in state and local party events will not expose them to legal jeopardy. This protection also serves to preserve the important relationship between local and grass roots party volunteers and federal candidates and officeholders.

The NRSC also opposed any change to the rules that will chill the interaction between federal officeholders, candidates and grass roots supporters and volunteers. Specifically, the NRSC believes that the rules should provide the regulated community with clear notice concerning which activities are permitted and which ones are prohibited. If the Commission adopts a proposed rule change, there is too much opportunity for someone to second guess and misinterpret a speech made at this type of event. Limiting the candidate/officeholder protection to the ability to "attend, speak or be a featured guest" may chill participation in such events by candidates and officeholders.

As the Commission is aware, painfully aware I'm sure, the current definition of "solicit" is on appeal and therefore uncertain. Assuming the

definition changes, what will constitute a solicitation? Many speeches contain informational political persuasion and requests for support. At which point will such a speech cross the line if given at a state or local party fundraiser? Are these examples of solicitations: "Thank you for your continued support." "The state party plays a crucial role that can only be fulfilled with your support." Are these statements solicitations?

The question here for this type of rule is not whether the candidate knows when he or she is going to make a solicitation. Rather the question is whether we're going to have a rule that allows candidates and officeholders to be placed at the mercy of those who would misinterpret or mischaracterize the speech they give at these types of events.

The NRSC urges the Commission to retain the bright line exception for candidates and officeholders in the current rule.

In addition, we also ask the Commission to take into consideration that each state's contribution limits are different, but not federal accounts of state parties. Some states have more restrictive rules than the federal rules. Will candidates and officeholders then be permitted to

show up and speak at these types of events, as opposed to those states, such as Virginia or Illinois, where unlimited corporate contributions are permitted? Federal candidates and officers need a uniform rule to give them guidance on what they can do and what they can't do.

It's also important to remember that many county parties do not maintain federal accounts. This means that federal candidates and officeholders would not have an opportunity to ask for financial support for county parties subject to the federal limits and prohibitions. If the law is vague or if it provides an opportunity for someone to misinterpret a candidate for officeholder's remarks, they may stay away from these types of events.

Finally, the NRSC would like to take this opportunity to ask the Commission to codify the holdings in AO 2003-3 and 2003-35. The NRSC believes there should not be a barrier between federal candidates and officeholders and candidates running for state and local office. Codifying these AOs will ensure that federal candidates and officeholders can attend and speak at events benefiting associations of state and local candidates or officeholders.

In some states these organizations are part of the party structure, and therefore arguably covered by the rule. In other states, however, these organizations are not part of the party structure and may be considered analogous to a state PAC. In those instances the NRSC would appreciate the opportunity to have this rule clarified and applied on a uniform basis instead of just to the holdings of the AOs. This will facilitate interaction between federal and state candidates and officeholders, which the NRSC believes is good for the political process.

Finally, there was a question in the NPRM about the court's interpretation of Levin funds and whether those monies are subject to FECA's limitations, prohibitions and reporting requirements. The NRSC would agree that the position that the federal candidates and officeholders should be permitted to raise such monies for state and local party committees if it adopts the court's interpretation of that issue.

With that, Mr. Chairman, I would be happy to take your questions.

CHAIRMAN THOMAS: Thank you. You will be punished severely later.

[Laughter.]

CHAIRMAN THOMAS: That was very helpful.

Mr. Noble?

MR. NOBLE: Mr. Chairman, Mr. Vice Chairman, General Counsel, staff, Mr. Deputy Staff Director--I see you drew the short straw today--I am pleased to have the opportunity here to testify on this rulemaking. Since we did submit comments and I will be available for questions, I'm going to try to keep my opening statement short.

One of the essential provisions of BCRA is the prohibition on candidates and federal officeholders soliciting soft money contributions. While broad, the ban does have two exceptions, one explicitly allowing solicitations for contributions for 501(c) organizations and another allowing soliciting nonfederal funds if the candidate or federal officeholder is running for nonfederal office, and both of these make sense.

The statute also makes clear that the ban does not prohibit a federal candidate from appearing and speaking at a state party committee fundraiser. It is in interpreting this last section that I think the FEC made a wrong turn. Rather than reading this exception as allowing what it said it allowed, appearing and speaking at a state party committee fundraiser, the Commission decided that it would

read the provision as allowing the federal candidates to also solicit soft money at the event. In our view this runs contrary to the statute, its goals, and undermines a core provision of BCRA. We are here now because the D.C. Court struck down this attempt to open a new soft money loophole. As the Commission points out in the NPRM the court found that the FEC's interpretation violated the Administrative Procedures Act because there was not a sufficiently reasoned analysis justifying the rule.

We urge the FEC to take this opportunity to correct the rule and give full meaning to the congressional ban on soft money fundraising by candidates. This means adopting the alternative proposal and making it clear that federal candidates cannot solicit, receive, direct, transfer of any nonfederal funds, even at state party committee events.

The statutory path to this result is clear. 441i(e) provides a broad ban on candidates' solicitation of soft money. Section (e)(3) provides that this does not prevent them from appearing and speaking at the event. What is notable about this is unlike the exception for soliciting for 501(c) organizations, any exception that allows them to

solicit for their own nonfederal campaigns, this section does not mention solicitation.

I would also note--and this is going back to the older FECA--that Congress does know how to write broad exceptions. If you look at 441(b) and the permission or the exemption from the definition of contribution or expenditure for communicating with what's called the restricted class, Congress said they can communicate with them on any subject. You do not have that here. Congress did not use that type of language.

Given the goals of BCRA this makes perfect sense. Without (e)(3) candidates would not be allowed to appear at a state party committee event where soft money was raised. However, in recognition of the federal candidate's relationship to the state party, congress avoided that result with (e)(3). But it did not give permission to candidates to use state party events as a forum to digging back into the soft money fundraising and neither should the Commission.

Let me, in closing, address the fact that the court did say that your interpretation of the law may in fact be permissible under Chevron. If the court is saying that you may be able to come up with a rationale that justifies your interpretation

of the law, your regulation, I think the rationale you've put forward misses that mark by a very wide margin because I think all you have done is in effect restated what you said before, that you think this strikes a balance.

But at best all the court was really saying to you was you have a choice. You can either continue to enact rules that carve little loopholes in the law, or you can enact rules that truly serve the laws and goals. You may get away with the former, but at what cost? In so doing, you not only undermine the law and further undermine the public's faith in the Agency, but you feed the public cynicism about this being an insider's game, that no matter what rules Congress passes, the FEC will try to find a way to let members of Congress do what they want to do.

We urge you not to take that road, and we urge you to use this opportunity now to really correct a past mistake and enact a regulation that does follow the statute.

I would note--I don't have any lights at all, so let me tell you what I did this summer.

[Laughter.]

MR. NOBLE: Thank you.

CHAIRMAN THOMAS: We were trying to figure this out. I didn't even hit the right button apparently. So you got the former employee special allowance on that one I think.

MR. NOBLE: Thank you.

CHAIRMAN THOMAS: Mr. Ryan?

MR. RYAN: Good morning, Mr. Chairman, Commissioners, Commission staff. It's a pleasure to be here this morning commenting on this proposed rulemaking. As the Chairman noted, I am representing the Campaign Legal Center, which I serve as Associate Legal Counsel.

I am here today to strongly urge you to adopt the proposal to replace current section 300.64 with a new rulemaking clear that federal candidates and officeholders are prohibited from soliciting or directing any nonfederal funds, including Levin funds while attending or speaking at state, district or local party committee fundraising events.

As noted in the written comments submitted jointly by the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics, the existing regulation which allows candidates and officeholders to speak at state party fundraising events without restriction or regulation is both inconsistent with

the framework of BCRA and also contrary to the purposes of BCRA soft money prohibition.

BCRA's prohibition on federal candidate and officeholder solicitation of nonfederal funds contains only two exceptions: BCRA allows a federal officeholder who is a candidate for a state or local office to solicit nonfederal funds solely in connection with the state or local election; BCRA also allows a federal candidate or officeholder to solicit nonfederal funds for a 501(c) organization under certain circumstances.

These two exceptions to the general prohibition on federal candidate of officeholder solicitation of nonfederal funds both explicitly used the term "solicitation" to make clear that these provisions do indeed create an exception to the general ban on candidate or officeholder solicitation of nonfederal funds.

By contrast, the adjacent BCRA provision found at 441i(e)(3) permitting federal candidates to attend, speak or be a featured guest at a fundraising event for a state, district or local party fundraising event, neither mentions nor permits candidates solicitation of nonfederal funds at these events. Instead the fundraising event provision found at (e)(3) creates a safe harbor for

candidates to be present at and to speak at, but not to solicit soft money at state party fundraiser events.

In short, Congress used the term "solicitation" in (e)(2) and (e)(3) where it intended to permit solicitation of nonfederal funds and omitted the term solicitation--I'm sorry. Congress used the term "solicitation" in (e)(2) and (e)(4), where it intended to permit solicitation of nonfederal funds, but Congress omitted the term "solicitation" in (e)(3), where it did not intend to permit solicitation of nonfederal funds.

The District Court in Shays stated, "The Commission's interpretation likely contravenes what Congress intended when it enacted the provision, as well as what the Court views to be the more natural reading of the statute."

Nevertheless, the Court in Shays indicated that the existing regulation, 300.64, might be valid if and only if the Commission formulates an explanation and justification for the current regulation that meets the APA's requirement for reason analysis.

The NPRM offers a new three-paragraph E&J for the current rule, but the Campaign Legal Center believes that this proposed new explanation and

justification fails to meet the APA's reasoned analysis requirement.

For these reasons, along with the reasons elaborated upon in our written comments, the Campaign Legal Center urges you to adopt the proposed new Rule 300.64, making clear that federal candidates and officeholders are prohibited from soliciting or directing any nonfederal funds including Levin funds when attending or speaking at state, district and local party committee fundraising events.

Thank you for your time and I'll look forward to your questions.

CHAIRMAN THOMAS: Thank you.

I will start the questions. Let me see if I can get this rolling. I'm going to try to give myself less than 5 minutes because I had to give the opening blather at the beginning, took up some of our time.

Let me ask you, Mr. McGinley, you would like us to take the approach of just modifying the E&J to better explain what we were doing when we passed the reg. the way it currently exists. Do you think we've done a good enough job explaining the difference between candidates or officeholders appearing at party-related events versus their

appearances and assistance, say, with nonfederal candidates? It seems to me we may have to do a better job if we that way of trying to somehow rationalize why they would have sort of an open-ended allowance at party-related events, but yet when they go over and deal with a nonfederal candidate, trying to help a nonfederal candidate raise nonfederal funds, we would, at least as things stand now, try to impose those kind of conditions that we set out in say the Cantor Advisory Opinion and so forth? Can you help me with that?

MR. McGINLEY: Sure. I think what was discussed as far as the statutory construction and the "notwithstanding" phrase is a broad exception to the ban on soft money. One of the reasons why the NRSC is also advocating codifying AO 2000-03 is because we believe that federal officeholders and candidates should be permitted to show up at those events. Those types of events that are raising state permissible monies for state candidates that can only be used in connection with state and local elections that by the very regulations we're talking about, they can't use it for advertising, that PASO federal candidate, that there is no influence on a federal election with those types of monies, and therefore the regulations should not prohibit or bar

the candidates from appearing at those types of events.

Would the conditions laid out in the Advisory Opinion be unacceptable to the NRSC? As I stated in my comments, we would like the ability for federal candidates and officeholders to speak without restriction at these types of events. It's not a question of whether the candidate or the officeholder believes or intends to be soliciting the money. What we're trying to avoid is the opportunity for either political opponents or for regulators after the fact to misinterpret the intent and the effect of what they say at these types of events to cause them to become solicitations covered by the soft money ban. Parties occupy a unique role in the political process. They're not single-issue entities. They are often coalitions, a broad spectrum of issues that bring the people together to coalesce behind the local, the state and the federal candidates. We believe that that relationship and that type of unique entity, its relationship with the federal candidates and officeholders, there's not the opportunity for corruption that might otherwise be present in some of the single-issue fundraisers that you see for the nonprofit groups that are exempted under the statute.

CHAIRMAN THOMAS: Thank you.

Let me ask Larry and/or Paul if you would respond sort of on the same topic. I noted that in the comments of the chief sponsors of the legislation, they very clearly state that they think the Commission has erred in the Advisory Opinion issued to Cantor and others, in which it does seem to allow federal candidates or officials to actually appear at a nonfederal candidate's fundraising event where soft money would be raised, perhaps by persons other than the federal candidate appearing. But the mere appearance in the view of the sponsors, I gather, is a form of solicitation that would cross the line if indeed there were nonfederal funds actually being raised at that event.

Are you bringing that argument to us here today as well?

MR. NOBLE: Yes, we are, and obviously, we don't speak for the sponsors. When the RGA advisory period was up before the Commission we did file a comment saying that the appearance at the event, if there were proper disclaimers, would not in and of itself be a solicitation, but we made it clear in the opening statement that we disagreed with the overall rule, but given this overall rule, in

effect, you are dealing with the hierarchy of what you can do at various events.

And so our view is that if you start from scratch, which you now have a chance to do, and set the rule in such a way that at the state party event the candidate can appear but cannot solicit contributions. Then at the nonparty events, if you will, the candidates should not be allowed to attend if there's solicitation of nonfederal money going on.

CHAIRMAN THOMAS: Okay, thanks.

MR. RYAN: The Campaign Legal Center agrees with Larry and the Senators' approach. We believe that the two Advisory Opinions at issue are likely consistent with the existing regulation, but to the extent that these opinions permit federal candidates and officeholders to participate in nonparty soft money fundraising events, they misinterpret BCRA's soft money prohibition.

And to that extent they should be superseded by a new rule that makes clear that federal candidates are permitted to attend, but not solicit, at state party, state, district and local party fundraising events, and are not permitted to attend nonparty soft money fundraising events.

CHAIRMAN THOMAS: All right. I just wanted to be clear on your position. Thank you.

Vice Chairman Toner, you're up.

VICE CHAIRMAN TONER: Thank you, Mr. Chairman.

Mr. Noble, Mr. Ryan, Mr. McGinley, thank you for being here. I appreciate it very much. It appears we're going to have a number of rulemakings in the next few months to deal with a number of these issues.

Mr. Ryan, I'd like to begin with you. You indicate in your written comments that the current rule has the potential for abuse, as you put it, and you describe the current regulation as opening an obvious loophole in the law. The question I have, is there any evidence thus far, while the rule's been in effect for the last three years, that there have been any abuses, that any candidate or officeholder has sought to undermine the soft money ban while this rule's been in place. Is there any evidence of that?

MR. RYAN: I don't know of any particular instances that I can point to, but I do know that Congress, in enacting BCRA soft money ban, was concerned about and sought to prohibit federal

candidate and officeholder solicitation and receive soft money.

The Supreme Court in McConnell took this congressional concern very seriously, recognized that soft money posed a significant threat of corruption or the appearance of corruption.

In this proceeding we believe it's the responsibility of the Commission to justify what we interpret as the opening of a loophole that will reinstate potentially this flow of soft money. The fact that it may not have been--the loophole may not have been used or abused up until this point is by no means dispositive of the issue or the fact that we urge the Commission to close the loophole before it's exploited.

VICE CHAIRMAN TONER: So to be clear, at this point you don't have any advice at hand that the current regulation has been abused.

MR. RYAN: Correct.

VICE CHAIRMAN TONER: Mr. Noble, Mr. McGinley made the point that in his view, when people go to these state party fundraising events, these state candidate events, oftentimes money's already been given and they're going after that fact. And Mark Brewer, the Chairman of the Association of State Democratic Chairs made a

similar point in his written comments, and I'll read from Mr. Brewer. He says, "It is difficult to identify any regulatory benefit to be derived by additional restrictions on what a candidate might say to an audience that has already chosen to attend and contribute." What do you say about that?

MR. NOBLE: Well, I think this is missing the point of BCRA and the ban on candidates soliciting soft money. Actually, you can go to your previous question. Congress said that there is a harm in having candidates solicit soft money, period. The Supreme Court upheld that, adding knowledge that there was a harm found. The harm in itself is the soliciting of the soft money. So whether or not the money has already been solicited, having a candidate appear at a soft money event, state party event, and then further solicit soft money, in and of itself is a violation of the law, in and of itself is an abuse. And so I don't think you have to show anything beyond that.

So regardless of whether most of the solicitation went on in advance of the event, regardless of whether people are showing up there, whether or not--because the federal officeholders there are showing up for some other reason, whether or not there has been any appearance of a quid pro

quo in a specific contribution is all irrelevant. The fact is what Congress wanted to do was break the pattern of having candidates, federal candidates federal officeholders soliciting soft money. And they also have that prohibition for state party committee events. The only exception is it allows them at least to appear at state party committee events.

VICE CHAIRMAN TONER: Do you concur with Mr. Ryan that thus far there hasn't been any evidence that any candidate or officeholder has abused the current rule?

MR. NOBLE: Well, as I said, it depends on what your definition of abuse is. I don't know for a fact whether or not any federal candidates have solicited soft money at party events. If they have, then, yes, I think there has been abuse of the statute, not of the rule, of the statute. I think the rule abuses the statute. And so I think that is a problem. If nobody has done it, then it doesn't mean that your rule is valid. It just means that nobody's taking advantage of it.

VICE CHAIRMAN TONER: And I understand that you wouldn't view that conclusion as controlling even if everyone agreed that there hadn't been any instances thus far. I was just trying to get a

sense of whether you thought there had been any documented instances.

And I also wanted to follow up--and I understand you don't speak for the sponsors--but in reading their comments, as I understand it, in their view, in terms of state candidate fundraising events of state PAC events it would, in their view, it should be illegal for any federal candidate or officeholder to even go to those events where soft money is being raised, no matter how the event is structured and no matter what is said there. Do you agree with that?

MR. NOBLE: Yes. I mean I think that, again, the exception is for state party committee events, speaking at state party committee events. When you get beyond that, then I think there's a ban on them being involved in soft money fundraisers.

VICE CHAIRMAN TONER: So Harry Reid or Bill Frist, it would unlawful for them to go to a Democratic Governors Association event or an RGA event where soft money is being raised, no matter how that event is structured, no matter what was said there?

MR. NOBLE: Yes. When you say no matter what it said there, I'm trying to think whether there are variations on it, but, yes, generally yes.

VICE CHAIRMAN TONER: And, Mr. Ryan, you concur with that?

MR. RYAN: Yes. To the extent that the event in question meets what is articulated in the statute as a fundraising event. I think this raises a point that the Commission may consider adopting a regulation defining "fundraising event" to give more definite bounds to where this--and that does and does not apply.

VICE CHAIRMAN TONER: They would be totally prohibited from going, no matter how it's structured.

MR. RYAN: Yes.

VICE CHAIRMAN TONER: Okay, thank you.

CHAIRMAN THOMAS: Thank you.

Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

I'd like to follow up a little bit on that last one, because it seems to me there's a fairly obvious way that one could structure it where it would be not a problem, particularly in light of Mr. McGinley's testimony that a lot of these events are low dollar events anyway. If it's set up so that they're asking for all the solicitations in connection with the event solicit federally

permissible funds, funds that would fall under the limits that a federal officeholder could raise anyway. In that instance, wouldn't you agree that a federal officeholder could attend?

MR. NOBLE: If there was no raising of soft money, which means that there was no raising of money outside the limitations and prohibitions of the federal law. Then you get into a question of whether in fact soft money is being raised at the event but the money is not going to a hard money account. It is in fact still raising of soft money.

COMMISSIONER WEINTRAUB: So you would say that even if it was a $25--because, you know, you're losing me here, Mr. Noble. You had me before and you're losing me. Even if it was a $25 fundraiser for a local candidate, where, you know, it's somebody house. Let's say former staffer--because this happens all the time--former staffer for a member of Congress decides to run for office. They're having a local event, $25 a head, and they invite their former boss to come just to show his or her support. You're saying the boss couldn't show up at that?

MR. NOBLE: You could carve--I'm reluctant to say this because every time I end up saying you could carve out an exception, there it goes. But I

understand your point about basically setting it up structurally so in fact what they're doing is raising hard money. And that's something I'd want to think about further, about whether or not you could set up in that way.

My concern about that, to be very honest about it, is every time you set up something like that it immediately crosses over the line, and you have them raising in fact soft money. But if they set up a limit--obviously they could appear at an event where hard money is being raised. There's no doubt about that. So if you set--

COMMISSIONER WEINTRAUB: The definition, if you're running for state office it's not technically hard money.

MR. NOBLE: Hard money, right, right.

COMMISSIONER WEINTRAUB: But if it's federally permissible, what's the problem?

MR. NOBLE: I think in that case you might be able to do that. I'd have to think further about it. I mean I don't I don't want to lose you.

COMMISSIONER WEINTRAUB: Don't--

MR. NOBLE: It's so rare that I--

COMMISSIONER WEINTRAUB: You're right. I'm telling you, you had me before, so please, don't get out there.

[Laughter.]

COMMISSIONER WEINTRAUB: Mr. McGinley, let me ask you. You've raised the constitutional argument, and of course, that often gets raised in this context, understandably, and let me say that I'm very sympathetic to your views about how important it is for federal office holders to be able to have interactions with people who are active in party and state politics, and local politics, at all levels of the organization. But haven't we already sort of crossed the rubicon on the constitutional argument? The fact is that federal officeholders and candidates aren't allowed to raise soft money in a variety of contexts. Why is it more unconstitutional in the context of a state party fundraiser than it would be anywhere else where they're subject to the limits?

MR. McGINLEY: Well, briefly, I think I would say that it--you know, the party fundraisers and the party gatherings, one point I would like to make that I didn't include in my comments is that in many instance, state party or local party conventions themselves double as fundraisers. Federal candidates and officeholders showing at these types of gathering, talking where they may be collecting donations at the door to help defray the

expenses, those monies, if they're going to the nonfederal account, may satisfy some of the commenters' definition of soft money, because it's raised outside the rubric of federal law. In that instance, we don't want to bar federal officeholders from speaking at these types of conventions. Their comments are associational. They implicate the right of association.

COMMISSIONER WEINTRAUB: Well, wouldn't that be true anyway they show up, that they're associating with somebody?

MR. McGINLEY: Yes, yes. But the law says that they can't and we're not going to--

COMMISSIONER WEINTRAUB: Well, that they can be there.

MR. McGINLEY: Right. Being there is one thing. Soliciting money is another. And I think one of the points to make about--and maybe going back to what Mr. Chairman asked me earlier--is that the AOs go to the solicitation of the money. It talks about what types of monies that they can raise. I mean part 300.62 talks about the ability of federal officeholders or candidates to raise money in connection with state and local elections that are consistent with the limitations or prohibitions under the act. It doesn't require them

to be subject to the reporting requirements under the act as well.

So in other words, a state and local candidate isn't required to set up a federal PAC in order to have a federal officeholder show up. A county party conceivably could have a federal officeholder to show up to raise otherwise federally permissible money.

COMMISSIONER WEINTRAUB: I'm running out of time. Let me try one more. I'm going to interrupt you so I can throw one more question at the other side of the panel.

And that is, what can you say to reassure Mr. McGinley and others who might be concerned the federal officeholders just won't show up at these events at all because they'll be worried that something that they say will be misconstrued?

MR. NOBLE: I understand the concern. Obviously there's a concern anytime you're talking about possible federal investigation. But I think the reality is that every day they have to be concerned about what they say and how they abide by certain laws. I think if they follow normal precautions they're not going to have trouble. I think that if they go to an event and they do not solicit--from a state party committee event now--do

not solicit a soft money contribution, they're fine. The Commission in another context is going to have to define what solicitation is.

And by the way, just to try to get you back all the way, I realize now that if you look at (e)(1)(B)(i), it does say that if the funds are not in excess of the amounts permitted with respect to contributions to candidates, to federal officeholders. So if they do raise money I think you could base it on that and say, in your previous question, if they do in fact raise money that is under the federal limits and within the federal prohibitions, that they can do it. Do I have you again?

[Laughter.]

CHAIRMAN THOMAS: Thank you.

Next we go to Commissioner Mason.

COMMISSIONER MASON: Thank you, Mr. Chairman, and thank you, witnesses.

I want to try to do something that for lawyers may be an unnatural act, and that is to try to get you to give me a yes or no answer to the question of, I think let's take the one that looks most obvious to me, the agreement to serve as the featured guest at a fundraiser. If a federal candidate makes that agreement and knows this is

going to be publicized in connection with invitations to the fundraising event, does that constitute a solicitation within the meaning of 441i(e)? Mr. Ryan?

MR. RYAN: Not necessarily. But again, this hinges, the answer hinges on the regulation that you have already adopted.

COMMISSIONER MASON: I'm asking you to construe the law though. We're talking about what the regulation ought to be. So what should our regulations say?

MR. RYAN: In this context of (e)(3), no. Being a featured guest is not a solicitation.

COMMISSIONER MASON: Being a featured guest is not a solicitation.

MR. RYAN: In the context of (e)(3).

COMMISSIONER MASON: So why is the rule different for an organization other than a political party?

MR. RYAN: Because (e)(3) is what applies in the context of state, district and local party fundraising events. It's very explicitly stated, and we need to work within the statutory test, and the statute explicitly permits a federal candidate or officeholder to attend, speak or be a featured guest at one of these fundraising events.

COMMISSIONER MASON: But if it's not a solicitation it's not barred by 441i(e) to begin with.

MR. RYAN: Which is why I stated that it's not a solicitation in the context of (e)(3), in the context of fundraising events by state, district and local party committees.

COMMISSIONER MASON: Well, what you're doing is trying to use the exception to draw the limit or the context of the original ban. I don't think you're turning the statutory interpretation upside down. If solicitation--if appearing or speaking or being a featured guest is a solicitation you don't need the exception. If that exception applies to a solicitation ban it would seem to me those three activities don't constitute solicitations, at least standing on their own.

I don't understand how you can turn this upside down and say we're going to define the basic prohibition based on the exception. Can you help me with that?

MR. NOBLE: I don't think you're defining the prohibition based on the exception. I think what you're looking at is seeing how broad the exception is. And since I'm no longer required to give a yes or no answer, I think in part if depended

what the solicitation said, what the original invitation said, the idea being that the officeholder, the federal officeholder can attend and be at the event, but it's clear that they cannot do pre-events soft money solicitations. And so you're in a different situation when you're dealing with state party committees than you are in dealing with nonstate party committees or other types of committees.

COMMISSIONER MASON: And I'm trying to understand why it's different.

MR. NOBLE: Because you have an explicit exception, (e)(3), for them being able to appear and speak at an event.

COMMISSIONER MASON: But the exception is to the ban on solicitation.

MR. NOBLE: Right.

COMMISSIONER MASON: And so are you saying that simply being a featured guest for a fundraising event, an understanding that will carry with it some sort of advertising or publicity, not that they would agree. In other words, let's say the candidate strictly says "All I can do is agree to be a featured guest. I can't do anything else. You can't mix me in with the host committee or any of

that other stuff, but, yes, I can do that. Does that or does that not constitute a solicitation?

MR. NOBLE: Under (e)(3) it doesn't because Congress said they can appear, so then by doing that what Congress in effect said was that's not going to be considered a solicitation.

COMMISSIONER MASON: Would it otherwise constitute a solicitation under (e)(1)?

MR. NOBLE: Depending on what the document you're talking about said, yes, it could very well.

COMMISSIONER MASON: Well, depending on what? Let's say it's the simplest case and the most plain vanilla, innocent limited featured guest--

MR. NOBLE: And it's a soft money event.

COMMISSIONER MASON: And it's a soft money event.

MR. NOBLE: Then it's a solicitation for the soft money event, yes.

COMMISSIONER MASON: And so (e)(3) is an exception to the solicitation ban?

MR. NOBLE: It is--I would say it's a partial exception to what would otherwise be considered a solicitation because it says "appear." It doesn't say they can solicit money. It says "appear." I understand there's some overlap there, yes.

COMMISSIONER MASON: And so I'm still trying to understand if--why this is different for state parties than for anybody else. In other words, why is the definition in (e)(1) changed for organizations which are not mentioned in the exception in (e)(3)?

MR. NOBLE: Because in (e)(3) Congress carved out a special exception for state party committees, recognizing the relationship that federal candidates have with state party committees. So it gave them a certain amount of leeway when dealing with state party committees that it did not give in any other context, because there is no other--well, there are two other context where it explicitly says you can solicit. But outside those three contexts, you don't have that same leeway.

CHAIRMAN THOMAS: Thank you.

We'll move on to Commissioner McDonald.

COMMISSIONER McDONALD: Mr. Chairman, thank you. Thank all of you for coming this morning.

I'll start with you, Mr. McGinley. Are you--well, let me ask you first of all, you like to be called William or Bill?

MR. McGINLEY: Bill is fine.

COMMISSIONER McDONALD: If you don't mind, I'm not too interested in these last names.

Bill, let me ask you this. You said in your opening remarks--and this is always kind of a discussion we've had for years around here--that most of these monies are really small fundraisers. I think Commissioner Weintraub alluded to it as well. What can you tell me about that? I mean do you have something that reflects that, and what would you constitute as a small fundraiser, just out of curiosity?

MR. McGINLEY: I think that a lot of these fundraisers, especially in the context of county or local organizations, not the statewide organizations, are designed for two purposes. I think the first is, is to provide financial support to the local party, which means you want to get as broad a participation as possible, so we're talking 25, 50, $100, state-regulated money permissible under the state laws. We're not talking unregulated 527s.

The second thing is, is they're designed to broaden the volunteer base, to build the list of people that these local parties can energize, motivate and deploy on or around election day to perform the valuable party operations of getting out the vote, voter identification, voter registration,

all those types of activities that we think are valuable to the process.

COMMISSIONER McDONALD: Let me just follow if I might, going back to kind of a theme that Vice Chairman Toner used, which is--and I agree with you because I started out in county politics and I was county secretary of the election board, so I certainly concur with what you're saying. But I was just trying to think about the empirical data. Do you have something that kind of reflects that? I mean I'm sure you all have probably taken a pretty good look at what's going on out there. Do you have some empirical data in relationship to the counties as opposed to the states, for example, what kind of money we are talking about, how many events there are and so on?

MR. McGINLEY: One of the problems is, is that it's going to vary by state. I mean some states have extremely low limits that are lower than the federal limit. And in those cases, I mean, those type of limits are going to probably skew the data and maybe overtake some of the states, like I said, Virginia or an Illinois where it permits--unlimited contributions are permitted.

As far as empirical data, I can't point to anything right now. I am confident that I can go

back and dig up some type of data to get you an average contribution size to a political party.

Now, if it's anything like the federal level, given the volume of people who contribute and the types of dollars and the types of response mechanisms that are employed to get these donations, I would suspect that it's a fairly low dollar amount. I would be very surprised if it was over $250. I can't point to anything concrete, but that is simply a guesstimation by my part.

COMMISSIONER McDONALD: No, and I appreciate that. It's a tough question. I'm just trying to get some sense of it because when we are talking about those kind of things, obviously, the first thing that comes to my mind is what is the definition so we can have something to work with, but I can appreciate the dilemma.

Let me if I could just a minute, say to Larry that one of the reasons that the Chairman didn't turn the light on of course was you didn't acknowledge the other four commissioners, and we were very hurt.

[Laughter.]

MR. NOBLE: I apologize.

COMMISSIONER McDONALD: I noticed that immediately. Was it something I had said?

Let me ask about the thing that maybe strikes me as the most tricky, which is if you have a Democratic Governors Association program going on, and as an example, on one day there's an effort to raise money--I think all these are tied in some sense to trying to raise money--but the next day there are a panel of federal officials, for example, that want to come in and maybe they want to talk about reapportionment, maybe they want to talk about Social Security, maybe they want to--you know, whatever it might be.

What is your view of that? I mean is there--going back to a point Ms. Weintraub made about structuring possibilities, is it inclusive in say a 3-day event, for example, or would it be--I'm just trying to figure out what you would normally do. I'm trying to think logically of how you would approach this, and if I came in and spoke on day one about Social Security, that on day two, or maybe to close out, possibly the other way around, money was being raised. What would be the logistics there and what would you anticipate I would need to do about that to be in safe harbor, for lack of a better term, or would there be one?

MR. NOBLE: That's a very fact-intensive question. I mean you would have to look at the

event and see how the event structured. Was the whole event structured as a fundraising event with several days? Were there separate events going on? I mean I can think of a variety of different scenarios where if somebody would say the whole event was a soft money fundraising event and it lasted for several days, and not every moment were they saying, "Make contributions," but the whole tenor of the event, for 3 days, for a week, was a fundraising event. There may be others where there were separate events going on in the same place.

There are going to be a lot of factual questions in these.

COMMISSIONER McDONALD: The reason I wanted to have something fact-specific as much as I could is that the other side of it is, going back to the Vice Chairman's point and my colleague's points about kind of a vagueness in information--and I take your point. I'm just saying that as a practical matter I think that's one of the things that comes to mind, and I go back to something Mr. McGinley, Bill, if I may, said early on, which is, I don't want to see people inadvertently get in trouble. That I don't want to see because I think that would really be kind of putting things up on its head it seems like to me.

MR. NOBLE: But if I may, Mr. Commissioner, right now they have to figure out--prior to BCRA they had to figure out was it a fundraising event because they'd have to cost their fundraising events, and allocating it they would have to figure out what was the fundraising event? So they're used to doing that.

COMMISSIONER McDONALD: Very good point.

CHAIRMAN THOMAS: Commissioner Smith?

COMMISSIONER SMITH: Thank you, Mr. Chairman.

I have a question for either Mr. Ryan or Mr. Noble. I guess we'll ask Mr. Ryan because we've just seen you less here.

Mark Brewer, writing for the Michigan Democratic Party notes that any sophisticated big dollar contributor's decision to contribute is highly unlikely to turn on whether the candidate speaker has expressly solicited continuing support for the party committee. If the candidate's objective is to encourage nonfederal contributions, speaking favorably of the importance of the state party at her election achieves that objective. The candidate is unlikely to raise more money because she endorses her--or reduces her endorsement of the

state party activity to an express request for additional financial support.

In light of those comments, I guess, would you disagree and think that that is not true, and assuming that we felt in our experience, in our expertise, that it is true, would it be your opinion then that a federal candidate could not appear at one of these state fundraisers or local fundraising events, and speak favorably of the importance of the state party to his or her election?

MR. RYAN: I think that it's again a fact-intensive inquiry, and it touches in part on what constitutes speaking favorably. If speaking favorably also entails mentioning money and the need to donate, supporting by donating, then that would constitute a solicitation in my mind.

Congress drew a line in the sand here. Congress drew a line to prohibit the solicitation of soft money for reasons that we're all familiar with. The fact that there may be some gray areas or some difficult areas in which one might question the potential of a particular transaction to corrupt a federal party or a federal elected official, a candidate, does not change the fact that Congress drew this line in the sand and said in most cases these are going to be much easier questions. It's

the job of the Commission to appreciate and respect the line that Congress drew, and to prohibit the solicitation of soft money, notwithstanding these situations in which one might doubt the corrupting effect of the exchange of money.

COMMISSIONER SMITH: See, here's the problem I have. Congress drew a line in the sand. If so, at a minimum they drew it down below the tide line and it was washed over many times and I think they knew that that would be the case.

I was not wild about this provision when I voted for it a couple years ago, but I've actually become more supportive of the current reg. for many reasons that have come out at this very hearing. Nobody can say so far--we're early, but nobody can say that there's any evidence of any abuses, and I haven't seen any. And the analysis I get just seems very conclusory. Well, Congress drew a line in the sand. Well, what line exactly did they draw? It was said at one point that they had carved out two exceptions and only two exceptions.

Well, no, I think part of the issue is did they carve out two exceptions or three exceptions? And that's precisely the issue. If Congress were here--Congress's intent was to sever this connection. That's a line in the sand. But their

intent was also to allow officeholders, obviously, to speak at these events, and I think they were balancing many intents between local and state party activity and other activity. My experience is that Mr. McGinley is correct when he says that there is the possibility of a great deal of chilling at these events otherwise. That's what I've noticed and that's how I think the system seems to work. One intent of Congress obviously was to strike a balance.

So I just feel like the analysis I get is awfully conclusory, like I'm sort of being yelled at. This is what Congress did, you must do X, when it's not clear that that's what Congress did. As the court noted in the case, that the regulation we passed in fact passed as a Chevron Step 1.

In any case, I probably only have got a minute or so left, but what I notice at these things is we've got one set of comments from several groups, and they get to bring up three speakers for one set of comments, which seems to me to run the risk of drowning out other speakers who only get one speaker for one set of comments.

So, Mr. McGinley, whatever time I have left, if there's anything else that you want to

address here as we close out this panel, or respond to, I'll give you that time.

MR. McGINLEY: Thank you, Commissioner Smith. I would simply want to make three points, just to follow up on some of the testimony. The first is, is that these types of state and local events are not insider games. I mean these truly are the events where the state party, the local party volunteers and grass roots activists gather to support and hear what's happening here in Washington from the federal officeholders or candidates. So in that respect I don't think that these are as an end run around the soft money ban.

Number two, we keep talking about soft money. Well, we need to define what soft money is. Soft money is money raised outside the limitations and prohibitions of federal law. It doesn't have to be reported to the Commission. Therefore, something is permissible under state law, is permissible in amount, is permissible in source under state law, it seems that a federal officeholder or candidate should be permitted to solicit it. The corrupting influence seems to rise above the amount limitations or from the prohibited sources. We don't have the corrupting influence from these low dollars events. These are grass roots activists.

Finally, I would urge the Commission to take into consideration codifying once again the association of state and local candidates and officeholders. In many states there's an NRSC equivalent for state senators at the local level. These may or may not be part of the party structure. It seems it would be some benefit to the grass roots activists, to the volunteers, and to the other people who actually do the ground games there to be able to hear from the federal officeholders and candidates at the types of events where these people gather. It facilitates communication between state and local officeholders and candidates and federal officeholders and candidates, and energizes the volunteer base of the parties.

CHAIRMAN THOMAS: Thank you.

Mr. General Counsel.

MR. NORTON: Thank you, Mr. Chairman, and thank you to the panel for coming.

The brief that was filed by Congressmen Shays and Meehan in the pending litigation argues, with respect to the definition of "solicit" that it ought to be defined to be more than simply to ask, but instead to seek eagerly or actively to seek to effect or to induce or persuade, and the Court cites Justice Scalia from the Wrigley case, who said,

"Solicitation includes not just explicit verbal requests but also any speech or conduct that implicitly invites the desired result. Thus, a salesman who extols the virtue of his company's product to the retailer of a competitive brand is engaged in solicitation even if he does not come right out and ask the retailer to buy some."

Mr. Ryan, I know this isn't your brief, but you're a signer of an amicus brief in the litigation and I assume you'd support the argument there. What if an officeholder is at a state party event that's raising nonfederal funds and the officeholder gives a foreign policy speech about the importance of homeland security, and concludes by praising the important work of the state party chairman to keep open the state's largest Air National Guard base? That seems to me analogous to extolling the virtues of the product to the retailer who's selling your competitor's brand. Would you say that under those circumstances a federal officeholder would be soliciting at a state party event?

MR. RYAN: I would say that likely they were not, and I would point to Judge Tatel's comments at the Appellate Court hearing last Thursday on this issue. And Judge Tatel pointed out, in questioning the Commission's attorney, that

what is at issue here with regards to the solicitation is whether there is any indication of suggestion related to money. And the product at issue in the context of the prohibition on solicitation of soft money is soft money. Is there any indication or suggestion--is there any extolling of the virtues of soft money contributions as part of this particular federal elected official or candidate's comments or not? And this will be a fact-intensive inquiry. And when it is suggested that--

MR. NORTON: I'm giving you the facts. I mean that was the speech and that was the sum-up line at the end of the speech. The speech was all about policy and homeland security, and the speech concludes with the line, "I'd like to praise the important work of the state party chairman in fighting to keep open the state's largest Air National Guard base."

MR. RYAN: I think that most likely would not be a solicitation.

MR. NORTON: What about, picking up on Mr. McGinley's comments earlier, the officeholder concludes by saying something like, "I'm grateful to those of you who have supported the party in the past. You're helping us to get the party's message

to our communities and remain accountable to the public we serve." Is that without "more" a solicitation?

MR. RYAN: I think that's moving towards the line of solicitation, but perhaps not in and of itself a solicitation, but moving towards the line.

MR. NORTON: Is it moving towards the line in large part because the officeholder is giving a speech at a fundraising event as opposed to being in some other context?

MR. RYAN: It's moving towards the line because there seems to be--there is a well known implication that "supported" often equates to funds, contributions, and the context this comment is being made and the context to a fundraiser, as you've noted.

MR. NORTON: So it's relevant that the candidate is making the comment at a fundraiser?

MR. RYAN: I think that's one factor that may be part of an agency's inquiry into whether or not this constitutes a solicitation.

MR. NORTON: Doesn't that in part demonstrate the difficulty that a candidates faces in preparing to speak at a fundraiser and in the difficulty the Commission faces in monitoring speech? What you're talking about is someone

standing up, speaking to a group of people who are there because the party is seeking donations from them. And so the candidate, it seems to me, runs a risk, without the regulation that's in place now, that any statement could be construed in that environment as fundraising. Isn't the risk increased in that environment because it's a fundraising event?

MR. RYAN: I think that the Commission in drafting the advisory opinions that are at issue in this particular rulemaking engage in the activity of trying to draw some lines about recognizing the context of a fundraiser, and determining within that context what may and what may not reasonably interpret it as a solicitation. In doing so, the Commission has recognized, (A) that it is possible to create such guidelines, and (B) that it is necessary not only in the context of fundraisers, but in candidate activity more generally to create those guidelines.

MR. NORTON: Mr. Noble, would you agree that the line is mentioning money, or would you say that a general expression of support thanking the attendees for their support might constitute a solicitation if made at a fundraising event?

MR. NOBLE: I agree with Paul. I think if you're at a fundraising event and you start talking about supporting the party, then you are getting close to that line, and the Commission's going to have to draw that line. I'm not sure there's going to be--I mean, you know, I think everybody agrees that when you get close to the line there's going to be debate about where, which side you fall on the line, and the Commission is going to have to draw some lines there and try to say what's---try to describe what's going on and why it feels that way.

But I do think when you're talking about a fundraising event and you start mentioning supporting the party, "I'm glad you're all here to support the party today," that, yes, then you are coming very close to the fundraising line. If on the other hand you talk about foreign policy and homeland security, then, no, you're not involved in a solicitation.

MR. NORTON: Thank you very much.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Mr. Deputy Staff Director Bob Costa.

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

CHAIRMAN THOMAS: Very well.

Do any of my colleagues have an absolutely emergency question that they need to inquire of this panel, even a non-emergency question? Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Just one. I just wanted to seek some clarification from Mr. Ryan and Mr. Noble, who seem to endorse the view that if one is actively soliciting money at one of these events, that that would be a bad thing. I'm not sure I understand what it means to actively solicit, as opposed to passively solicit? I mean I'm just not sure what it means.

MR. NOBLE: I think what that addresses is the idea that Congress, in (e)(3), carved out an exception to allow them to appear at a fundraiser. One could argue--and the argument had been made previously--that the mere appearance at a fundraiser is in and of itself a solicitation, and in the other contexts I think it would be a solicitation or maybe a solicitation.

Here what it is saying is that the mere appearance at the fundraiser. The state party committee fundraiser does not make it a solicitation.

VICE CHAIRMAN TONER: If I could follow up on that question?

CHAIRMAN THOMAS: Vice Chairman Toner.

VICE CHAIRMAN TONER: Mr. Noble, I just want to make sure I'm clear. The General Counsel had a hypothetical talking about homeland security and an officeholder attends that, speaks on that topic, and it is at a fundraising event, soft money is being raised. It's your position that if in the speech there is any phraseology talking about the importance of people there to support the party, that that would be unlawful?

MR. NOBLE: No. And I said that might be misconstrued. No, it depends the context it's said in. So, for example, if you're talking about the context "It is important to support the party and let Congress know that we need this bill passed," or "Let Congress know that the base in our state should not be closed down," then you're dealing with a different context.

VICE CHAIRMAN TONER: So using the phraseology of support the issues discussed, not a problem, but if there was any statement that said, "Hey, it's important for you to support the Florida Democratic Party," that that would be unlawful?

MR. NOBLE: Again, this is very fact-intensive depending on what's going on around that.

If it's a soft--it's a large soft money fundraiser, yes.

CHAIRMAN THOMAS: Commissioner Smith.

COMMISSIONER SMITH: Thank you, Chairman Thomas. I know we want to get this done, but this just raised--so let's vary the circumstances a little bit. Let us suppose that the federal officeholder is there appearing, and the featured speaker at what is billed as a fundraising event, and the person introducing him not a federal candidate or officeholder, says, "And now Senator Jones is going to tell you why your continued financial support of the party is so important." Does the Senator then have to say, "I'm sorry, I'm going to have to pass on this one?" I mean what does he do?

MR. NOBLE: Well, also keep in mind--and I apologize for not mentioning this before--that there are ways that they can then give a disclaimer about what they're talking about.

COMMISSIONER SMITH: So if he then gets up and says, "Now, I want you to be clear that despite what State Rep. Smith just said, in fact, I'm not asking you to give any money to the party."

MR. NOBLE: Or "I'm not asking giving money outside the federal prohibition thing." That's the rules you have.

COMMISSIONER SMITH: What does that accomplish? I mean what person doesn't get the message there?

MR. NOBLE: Well, whether or not Congress was wise in carving out this exception is another point. I mean I'm bothered by the exception, but they did carve out an exception that does require you to draw certain lines. Now if Congress had said in (e)(3) "and may solicit contributions at that event," you wouldn't have this issue. They didn't say that.

COMMISSIONER SMITH: But if it doesn't say, if it doesn't make any sense, then why shouldn't-- isn't the better interpretation the one that the Court agreed could be a permissible interpretation, that they intended to allow the person to simply speak and not worry about it?

MR. NOBLE: No, I disagree because I didn't say it doesn't make any sense. I said there's some very hard questions in this.

A lot of this depends on which end of the telescope you're looking at it. If you're looking at it from the end that you're trying to ban the

solicitation of soft money by federal officeholders, then this makes perfect sense, which is it is banned, you can't do it. Congress carved out two exceptions--and by the way, when you said before two exceptions versus three exceptions I think what I was very clear about is there are two exceptions that mention the word "solicit." There's a third exception that allows him to appear at a fundraiser.

COMMISSIONER SMITH: Because we're over time, I want to get back--

MR. NOBLE: No, but I think it's important for this. That if you look at it from that level, what the Congress is doing is carving out certain exceptions. One of them allows them to appear but they can't solicit contributions.

COMMISSIONER SMITH: Well, we're over. I do think there are two ends in the telescope and one is whether you think people ought to be allowed to generally speak, and the other is whether you come at it from the position that those rights aren't so important.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you panel. We will move along. We are planning to get our next panel underway at 11:15. So that gives us, as near as I

can tell, about 7 or 8 minutes. That should be enough for bathroom breaks, et cetera.

Thank you.

[Recess.]

CHAIRMAN THOMAS: Let us get underway. I am getting a signal we can proceed.

Our second panel we will take up now. We are going to reconvene, the second part of our triple header. It consists of Robert Bauer of the Perkins Coie law firm; Thomas Josefiak, chief counsel to the Republican National Committee and a former Commissioner; and Donald Simon of Sonosky, Chambers, Sachse, Endreson & Perry, here on behalf of Democracy 21.

Once again, we'll go alphabetically. Mr. Bauer will go first, followed by Mr. Josefiak, and then Mr. Simon, unless you have worked out some other arrangement. Mr. Bauer, please proceed. Good morning. Good to see you.

MR. BAUER: Good morning. I will be very, very brief. I have submitted comments, and I assume that the Commissioners are most interested in asking questions and developing a dialogue. So I would organize my few introductory remarks around two questions: What is the gain of changing the rule the Commission originally adopted? And what is the

cost of the change if the Commission were ultimately to make it?

On the question of the gain, I would hypothesize there really isn't any. As I indicated in my comments, the sponsors of BCRA and those who are pleased with the progress of the statute have said that it successfully severed the link between office holders and soft money fundraising. It does not appear in any of their commentary that they believe differently because of the operation of the fundraising exemption as the Commission originally interpreted it in its promulgating regulations, its implementing regulations. So I'm not drawn to the notion--I don't know why anybody would be--that this change is needed to effect an improvement in the enforcement of BCRA.

Also, it's not clear to me what we gain when, in fact, the rule itself anticipates that the office holder will be invited to a fundraising event as a fundraising event, as a draw for those who are invited to come to give money. And so I'll come back to this point when I mention what I think some of the costs here are, but it seems to me it's not clear at all what we're arguing about here. I mean, the office holders are being invited, featured in pre-event publicity, otherwise promoted in their

attendance to assist the party in raising money. And it isn't clear that this agency, by promulgating speech-based rules, is going to change the fact that's indeed why they're there, why they've been invited, and what they're expected to do.

So then what is the cost if there is no obvious improvement in the enforcement of BCRA public policy purpose to be served by changing the rule the Commission originally adopted? And the costs are, first of all--and I'll just mention them briefly--speech restrictions. I think it puts the agency in the difficult position of drawing distinctions between speech and solicitation in this context. I heard Commissioner Weintraub in the earlier panel try to determine what it meant to say that somebody was actively soliciting as opposed to passively soliciting. It puts the agency in the very difficult position of making those determinations, with, I think, significant consequences for speech.

Secondly, I think it breeds cynicism about the law. Everybody knows the office holder is there to support the party in its fundraising efforts, so why are we slapping all sorts of restrictions on the occasion to try to persuade people otherwise? It's a strange thing, it seems to me. Every possible

harm that could flow from the office holder's presence is, frankly, achieved by the office holder's presence, and nothing in the alteration of the office holder's speech is going to make any difference whatsoever to the harms that people see flowing from that presence.

Thirdly, I would mention complexity. I heard somebody--I heard my friend Larry Noble say that these were hard questions. I'm terrified by hard questions. I know that hard questions lead to complicated answers, and the more hard the question it is, the more labored the answer is likely to be, and the less accessible to people who are trying to understand what this statute is supposed to mean.

And last, but not least, I'd like to mention something on behalf of the regulated community that I think has worked very hard over the last two years to adapt to these rules, understand how they operate, and conform their conduct to them. I assume that they deserve some part of the congratulations visited upon the statute by its sponsors, because the statute wouldn't work if the regulated community were not currently attempting to comply with it. And this experience has been gained over these two years by trainings, by reading the statute, following the Commission's meetings,

absorbing the teachings of its advisory opinions, absorbing enforcement cases as they have developed. And I think that rules ought not to be changed at this stage, implementing rules under BCRA, unless there is a compelling reason to do so because a huge investment has been made in the compliance effort.

And those are my comments. Thank you.

CHAIRMAN THOMAS: Thank you.

Mr. Josefiak?

MR. JOSEFIAK: Thank you, Mr. Chairman, members of the Commission, and staff. Thank you for this opportunity.

I should learn my lesson not to come early and listen to other comments because I am being unfocused in my own presentation right now. But my attempt this morning was to respond directly to your request in the Notice of Proposed Rulemaking, the four questions you basically ask there.

Number one, should the regulation be changed? And I think it's obvious what my position is on that one. The answer is no. But also understanding that if the regulation is not going to change, the Commission has some work to do; that the court requires the Commission to explain itself better in the explanation and justification.

And I appreciate what the Commission has already done, talking about the balancing between the appearance of corruption and the role of candidates and office holders in the political party process. I think Mr. McGinley talked about that a little bit, and I agree with that. There is a role to play.

And I would not underestimate when Congress was looking at this, every member that was dealing with this issue, particularly the exemption, understood what they were doing at these events. I don't think any of them thought that anything was going to change with their ability to go to these events and handle themselves the same way they had in the past. They don't, in the sense that we talk about solicitation, solicit soft money or any money at these events. But the question that I think we have to address is: What is solicitation for the Commission's purposes?

One of the thoughts I had this morning just listening to the complexity of the questions and the answers, if we can't agree on what it is how do we expect the members to understand whatever we agree to? I mean, it's difficult enough--and Commissioner McDonald raised the issue about the RGA. It's

difficult enough to know there are three different categories we have to deal with right now--

COMMISSIONER McDONALD: That was DGA.

[Laughter.]

MR. JOSEFIAK: Three different categories: candidate events, 527 non-federal events like--

COMMISSIONER WEINTRAUB: Don't go there.

MR. JOSEFIAK: --DGA or RGA. And then party events. And they all have different processes under the current regulations, so it's difficult enough to understand the nuances when you're mixing apples and oranges together, and I'll talk a little bit about that later with Cantor and the RGA opinion.

But I think I'm very supportive and appreciative where the Commission is, and I'm supportive and appreciative of how the Commission is trying to justify in its explanation and justifications not only the balancing but also the constitutional issue about what is a solicitation. And I think Larry Norton talked about that and raised the questions of what is a solicitation in this regard. "Thank you for your support"--does that meet it? "Thank you for your continued support, past and present"? Or "Thank you for your

continuing support," is that in and of itself going to be viewed as a solicitation for the future?

Those are the kinds of things--and I can guarantee you that any of us who have dealt with trying to script whether it is the introduction or whether it is the member and what they can say, there's going to be an ad lib. And if something says "support" or "continued" or "past support," it is going to go to "continuing" whether you like it or not. Those things are going to happen.

And it's not only what the Commission is going to do. If there is any thought process in place where it's questionable, there may be the loyal opposition who is going to go and say, "I'm going to file a complaint against this Member of Congress because there is an issue here." And whether at the end of the day the Commission finds it a solicitation or not a solicitation, that in itself is a chilling effect on whether a member is going to do something. So I think you've got to be very cautious about that.

But in the process of explaining your position, you talk about 441(e)(1)(A) as the restriction. You also talk about some of the exceptions, the ability of a federal candidate who is running for a non-federal office to raise non-

federal funds, that's okay. And also the ability to raise 501(c) monies under certain circumstances, and that's okay, sort of exceptions to the general rule, the prohibition.

But what I think the Commission should do is also talk about what something happened here with Larry Noble and talking about Section 441(e)(1)(B) that permits, even in the context of a party organization, a federal office holder to go raise what would be considered clean money under federal law, even though it's going to a non-federal account.

So there is already the ability to raise soft money under the FEC standard for a party committee. So I think that is another rationale that you could use to justify why have a restriction under 441(e)(1)(A), a permission under 441(e)(1)(B), and then an exemption under Section 3. So I think you should look at that.

Also, abuse. Is there abuse? I don't see any. I don't see how there could be abuse because any of the money that's raised here can't be used for federal election activity. And if you're talking about Levin money, you're talking about limited money in the first place. So I don't see the opportunity that critics would find for abuse.

The AOs, I don't think you need to go back on the AOs. Should they be codified? Perhaps, but not in this context unless you're going to adopt the alternative and treat all of the events the same, whether they're party events, 527 events, or party committee events. If you're going to do that, then I think you need to codify it now. If not, it should be codified later in a different set of rulemaking.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

Mr. Simon? And by the way, I think somehow I've mandated to bollix the timer. I think the amber light now comes on basically at a minute rather than whatever I was saying, 30 seconds. So rest assured you have a whole minute when you start seeing that amber light.

MR. SIMON: Thank you, Mr. Chairman. I think I will play the role of minority voice on this panel. I appreciate the opportunity to testify on behalf of Democracy 21. The Commission should take the hint given by the district court in the Shays case. Although the court did not strike down the existing regulation on so-called Chevron grounds as fatally inconsistent with the statute, it certainly cast doubt on the validity of the rule, finding that

it "likely contravenes" what Congress intended when it enacted Section 441i(e), as well as "what the court views to be the more natural reading" of the statute.

Additionally, the court found there can be little doubt that this provision creates the potential for abuse.

It would be the wrong move for the Commission, nonetheless, to stubbornly cling to a plainly flawed provision which allows federal candidates and office holders to treat any state party fundraising event as a soft money solicitation free-fire zone.

The existing rule not only contravenes the more natural reading of the statute, as the district court found, but is also contrary to the structure and intent of the statute. Section 441i(e)(1) imposes a flat ban on federal candidates soliciting soft money. When Congress intended to create an exception to this rule, it did so specifically; thus, the statute says that federal candidates can solicit non-federal funds for tax-exempt groups under the limited circumstances. And it says that federal candidates can solicit non-federal funds for themselves if they are also candidates in non-federal races.

In both instances, in Section (e)(2) and in Section (e)(4), Congress authorized such exception of solicitation by specifically using the word "solicitation." It did not do so in Section (e)(3). There it merely clarified that notwithstanding the ban on solicitation, a federal candidate can attend, speak, and be a featured guest at a state party fundraiser.

"To speak" and "to solicit" are very different terms. If Congress had intended to authorize federal candidates to solicit soft money at state party events, it could have and would have said so, just as it did in the provisions immediately before and immediately after this provision.

As to Congress' broader intent, you need look no further than Senator McCain's floor statement on this provision: "The rule here is simple. Federal candidates and office holders cannot solicit soft money funds for any party committee, national, state, or local."

A rule which nonetheless permits federal candidates to solicit soft money for state and local parties simply cannot be reconciled with this clearly stated legislative intent.

The rule proposed by the NPRM solves the problems with the rule invalidated by the district court. It correctly draws the line between the federal candidate attending and speaking at an event on the one hand and that candidate soliciting soft money at that event on the other.

There are many things federal candidates can speak about at state party fundraisers without soliciting soft money. That is the distinction made in the statute and correctly embodied in the proposed new rule.

The alternative approach of redrafting the Commission's E&J simply falls short and promises only to embroil the Commission in additional litigation.

The Commission proposes three new paragraphs for its E&J, but this new language does not provide the reasoned analysis and support of the rule that is required by the APA. The first paragraph is simply background exposition. The second paragraph argues there's a legitimate and appropriate role for federal candidates to play in raising party funds, and that is certainly true. But as the Supreme Court correctly identified in McConnell, the extent of that role was to allow federal candidates to solicit funds for state

parties that comply with federal rules, not to solicit soft money funds that violate those rules.

The third paragraph attempts to ground the existing rule on a constitutional rationale, but again falls short in exactly the manner identified by the district court. It does not explain how these constitutional concerns are any more of an issue at state party events than they are when examining comments made by federal candidates in other venues. This portion of the proposed E&J in essence argues simply that regulation of candidate solicitation raises constitutional concerned, but this argument is foreclosed by McConnell, which upheld Section 441i(e) in its entirety.

The Commission should resist the impulse to simply tidy up the explanation for a fundamentally flawed approach; rather, it should adopt a perfectly sensible, perfectly practical proposed rule, the one that, as the district court said, comports with the natural reading of the law.

Thank you.

CHAIRMAN THOMAS: Thank you. We'll start this panel with questioning by Vice Chairman Toner.

VICE CHAIRMAN TONER: Thank you, Mr. Chairman.

Mr. Simon, I'd like to begin with you. I'd like you to assume that Senator Harry Reid is the keynote speaker this summer at a fundraising event in Richmond for the Virginia Democratic Party, at which unlimited individual, union, corporate donations are raised. Obviously there's a very active gubernatorial election going on this fall in Virginia. And further assume that Senator Reid delivers the keynote speech for this state party fundraising event, and he delivers the speech beneath a large banner that reads "Support the 2005 Democratic Ticket in Virginia Tonight."

My question is: If the Commission adopts the new regulations in the NPRM, under the BCRA statute, as you understand it, would that appearance by Senator Reid be unlawful, regardless of what the Senator said? And, again, the banner reads "Support the 2005 Democratic Ticket in Virginia Tonight."

MR. SIMON: Well, you know, I think actually the Commission has already figured out the answer to that question, and I think it figured it out in the context of AOs 2003-03 and 2003-36, and I think you have got, you know, sort of developed body of rules about how federal candidates can speak at fundraising events without running afoul of the prohibition at those fundraising events on

soliciting soft money. And your body of rules involves disclaimers and waivers and statements and so forth, and I would say if Senator Reid at the state party fundraising event complies with the rule set out in those two advisory opinions, he would be fine.

VICE CHAIRMAN TONER: Let me ask you, are you saying then that he would have to issue a disclaimer at the state party event? Let's say he did not. Are you saying he would be legally required to do so if the banner read "Support the 2005 Democratic Ticket in Virginia"?

MR. SIMON: I'm trying to recall how the Advisory Opinion deals with that specific question. I think that under the Advisory Opinion he would be required--or certainly I think he would be well advised to have the kinds of disclaimers that are suggested by the advisory opinion.

VICE CHAIRMAN TONER: And the Advisory Opinions dealt with the state candidates, state PAC event.

MR. SIMON: Right.

VICE CHAIRMAN TONER: You're saying that you would import them into the state party event.

MR. SIMON: Exactly, and--

VICE CHAIRMAN TONER: And are required to.

MR. SIMON: Exactly, and I think that's the way to solve the problem--

VICE CHAIRMAN TONER: Disclaimers.

MR. SIMON: --that people are talking about. In other words, to use the methodology that the Commission developed in the context of non-state party fundraising events and apply that methodology to state party fundraising events. The problem with the current rule is that it allows Harry Reid to say, I ask you to give--each of you to give $100,000 to the state party. The current rule allows a specific explicit solicitation of soft money to the state party. I think that's the problem, and I think the way to solve that problem is along the lines that the Commission has already suggested.

VICE CHAIRMAN TONER: Let me ask you, do you agree with the earlier panel that there's been no evidence thus far, while the current rule is in effect, that there has been any such abuse? Do you agree with that?

MR. SIMON: I do, but I'm--

VICE CHAIRMAN TONER: Do you think--

MR. SIMON: --confident we'll see it.

VICE CHAIRMAN TONER: Do you think that's relevant?

MR. SIMON: No.

VICE CHAIRMAN TONER: It's not relevant.

MR. SIMON: It's not relevant. I mean, it would be--I think there would be a more urgent case to adopt a different rule if there were evidence of abuse, but I don't think the fact that in one election cycle we're not aware of any specific problem gets the Commission off the hook from the need to adopt a new rule.

VICE CHAIRMAN TONER: Thank you.

Michael Bassett, the Chairman of the Ottawa County Democratic Party, filed comments here, and, Mr. Bauer, I would be interested in your thoughts on this. I'll just read one paragraph from the comments of Mr. Bassett. He says, "I fear the outcome if a middle ground is adopted wherein federal office holders and candidates could attend fundraisers but not use words that might be deemed solicitation for money. This would, first and foremost, open up a whole new battleground in politics as every statement made by a Congressman at his party's Jefferson-Jackson Day dinner or Lincoln Day dinner will be scrutinized to see if it complies with legal requirements." And then the Chairman goes on: "BCRA has made life for local parties difficult enough. The Commission should not make

further regulations that will further insulate them from the federal process."

Do you agree with that sentiment?

MR. BAUER: I do.

VICE CHAIRMAN TONER: Why?

MR. BAUER: Because it seems to me that it complicates any invitation to an office holder. It complicates the decision of the office holder to accept the invitation. To what end? For the office holder then it becomes yet another instance of a legal problem that has to be addressed, and some office holders will have different appetites for legal problems. Some will choose not to do it. There are likely to be mistakes. There will be, I think as Tom Josefiak said a few minutes ago, complaints.

And if I may, if I could close my response by getting to your banner hypothetical, here again is the question I raised at the beginning: What precisely are we accomplishing here? The banner says, as I understand, "Support the 2005 Democratic Ticket in Virginia Tonight." So Senator Reid naturally will turn to an attorney or to a staff person who speaks to an attorney and say, "Now what should I do?" And the answer is that Senator Reid apparently should tell people, "I do support the

democratic ticket in 2005 in Virginia, but I want you to be aware that, to the extent that you're making a contribution to the party for that purpose, I'm not seeking any contribution that exceeds the federal law limits."

That intention that he's expressing in words--

VICE CHAIRMAN TONER: Which I'm sure would be very eloquently delivered.

MR. BAUER: Eloquently delivered, absolutely.

[Laughter.]

VICE CHAIRMAN TONER: Very prominent.

MR. BAUER: One day we'll have all of these Cantor type notes structured into something like the Gettysburg Address.

VICE CHAIRMAN TONER: Does that achieve anything from a legal perspective or a policy--

MR. BAUER: But on top of everything else, the statement is patently--by the way, let me take this out of Senator Reid's mouth for a minute and simply use a hypothetical. The statement is patently insincere and untrue.

[Laughter.]

MR. BAUER: So why would the law require him to make it? Everybody knows why he's there, why

he was invited, why he agreed to come, and yet he has to dance this ritual of denying that he's there for fundraising purposes and telling people that he has only the desire to attract people to the event. There may be few in the room, in fact, who meet the description who have given within federal law limits.

VICE CHAIRMAN TONER: But let me ask you, in your experience--and it seems like you represent the better part of the United States Senate these days, at least on the Democratic side.

MR. BAUER: The minority side.

VICE CHAIRMAN TONER: And perhaps the Republican side as well. I don't know. But, anyway, in your experience, is the mere fact that a federal candidate or office holder is attending a state party fundraising event in and of itself a solicitation or at least the fact that he's there is support for the fact that that money is being raised?

MR. BAUER: Absolutely. I mean, let me be very clear. Occasionally they're invited because they make a stunning appearance and deliver an effective speech. And occasionally they go because they find the food appetizing. For the most part,

however, it's an attempt to build on the fundraising prospects of the event.

VICE CHAIRMAN TONER: Do you think that should inform our interpretation of the statutory grant that allows them to go? The fact that in your view their presence there is inherently a pitch for money, do you think that should inform the way we interpret the statutory grant that allows them to go?

MR. BAUER: I think unless you want to lapse into complete institutional psychosis, yes.

[Laughter.]

VICE CHAIRMAN TONER: We always try to avoid that. We're not always successful, but we always try to avoid it.

MR. BAUER: That's obviously the reason the exemption was crafted, and that's the reason office holders go to these events. That's the reason that they're invited. So if you want to disregard all those facts and make the rules in a vacuum, then, you know, you will just be kind of talking to yourself on the street corner.

VICE CHAIRMAN TONER: Which we've been known to do.

[Laughter.]

VICE CHAIRMAN TONER: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. I appreciate the humor of the panel. I miss that sometimes. Let me follow up on some of the Vice Chairman's comments.

I very much appreciate the earlier comments about the need for clarity and the need to avoid complexity. I would much prefer for us to have simple rules and readily understandable rules. And I am afraid that I have contributed to perhaps the over-complexity of them in the search for compromise in some of the questions that have been presented to us. But it seems to me that given what you've said--and I think it's obviously true that anytime an office holder shows up at a fundraiser, he's there to help the fundraising--or she. Wouldn't the simplest rule, the simplest way to implement this statute be to say, okay, fine, we were right the first time, you can--and this isn't what I was thinking when I walked into the room. You can show up at any of these state party events because the statute says you can and you can say whatever you want. But you can't show up at any other soft money fundraising event; any other fundraising event that

you do outside of the specific grant in the statute for showing up at state party events, since we know the only reason you're showing up is to raise money anyway, you can only go to another event, whether it be for a state candidate or a state party--not a state party--or for a 527, whatever it is, if it's specifically limited to raising federally permissible funds. Wouldn't that be the simplest rule to implement? And I'm directing that to Mr. Bauer and Mr. Josefiak.

MR. JOSEFIAK: Do you want me to go first? I'd be happy to go first.

MR. BAUER: Go ahead. You represent the majority.

[Laughter.]

MR. JOSEFIAK: Yes and no. I mean, I was just thinking about that in a different context earlier when I was thinking about whether you were going to prevent Senator Lautenberg going to a gubernatorial event in New Jersey or Governor Allen going to a gubernatorial event for a candidate in Virginia by the fact of merely appearing there is going to be a violation of the soft money ban is nonsensical, ridiculous, and I'd like you to tell the Senator that they can't go to this kind of an event.

So I think there are different qualities and degrees of what you're talking about here. What you have done in--

COMMISSIONER WEINTRAUB: Let me be clear on that. You want me to tell the Senator he can't go to that event.

MR. JOSEFIAK: I'd be happy if you would tell him he can't go, because I'm not going to tell him.

COMMISSIONER WEINTRAUB: Well, I know you're not going to tell Senator Lautenberg. He's not your client.

MR. JOSEFIAK: But even Senator Allen or Senator Lautenberg could be my client by the end of the day at this point.

[Laughter.]

MR. JOSEFIAK: But I think that this is the problem, that there are different degrees and different rules that apply to different kinds of events. And what we have a tendency to do in trying to come up with conclusions and answers is try to put everything together and that you can't. You can't under the statute because you have a solicitation allowance for certain things under the statute. And you can't when you're dealing with party activity when you can go to an event. The

question is: What does that mean? Does it mean it's an exemption from the general solicitation rules, which I think we're arguing in support of, that this is an exemption rather than something you have to worry about, that in a practical world what Mr. Simon is worrying about, that someone is going to ask at the event for someone to give $100,000 in soft money doesn't in practical terms happen. What happens is more like what we were talking about. What is going to trigger an innocent statement being construed as a solicitation when you're actually making a presentation. The ask has already been made, as I believe Mr. McGinley said earlier this morning. The people are already there. They are motivated to be there. They're motivated to be there for lots of reasons.

COMMISSIONER WEINTRAUB: I'm going to interrupt you because I've got more questions, and I want to give Mr. Bauer a crack at this.

MR. BAUER: And by the way, I know I can't ask him directly, but I'd like to hear also Mr. Simon's response to your question about whether those Advisory Opinions ought to be changed, in other words, whether you ought to have the more restrictive rule.

I don't think the goal of simplicity ought to be pursued in a vacuum. In other words, simply telling people not to do things because that's the simplest way for the law to read does not strike me as a suitable pursuit for the Commission. There are a variety of reasons why federal office holders who are invited to non-party events, in the Cantor opinion to events for state candidates who are raising money for, you know, ticket-wide activity or for their individual candidate purposes, I don't see any reason in the name of simplicity, particularly in the absence of abuse, to adopt a rule to prohibit that. Those Advisory Opinions are in place. They're understood. I believe the community is complying with them. And I think it's appropriate to keep them in place.

COMMISSIONER WEINTRAUB: Let me ask one more question. I actually would like to hear Mr. Simon on that, but I'm going to ask you one more question and we'll see if I have any time. If we wanted to stick with the current rule, Mr. Simon has basically told us that he's going to sue us again if we do that based on the E&J that's in the NPRM. So do you want to add anything that you think we ought to throw into the NPRM if we were to go down that road? Into the E&J that is, sorry.

MR. BAUER: Well, I think this would be an occasion to ask him not to sue you.

[Laughter.]

COMMISSIONER WEINTRAUB: I don't think he'll listen to me.

MR. BAUER: No, I can't think of anything that could prevent him from continuing to be litigious.

[Laughter.]

COMMISSIONER WEINTRAUB: I was asking for language suggestions. No suggestions on any other E&J language that would help?

MR. BAUER: I believe that the explanation you provided in this NPRM would be suitable even under the Kollar-Kotelly opinion in the district court.

MR. JOSEFIAK: And I think, just as I said earlier, expressing a little further the exemption for candidates and office holders to actually raise money at these events under the federal limits shows that there's another element. You really have three areas where solicitation is allowed, and then you have the fourth area, which I interpret as being an exemption from the entire definition of solicitation for that particular event--not for the ask. If you're going to send out a letter, a member cannot

sign a fundraising letter that says please give money to a state party, non-federal, but they can from the perspective of going to the event and making statements that would otherwise be construed as a solicitation under the "to ask" definition or even a broader definition, as may be the case after all is said and done in the courts.

So, you know, that's part of the problem you have: What is going to be the definition of a solicitation? What is going to be the definition of direct when all is said and done? And I think that's really a concern that should be of utmost concern to the Commission when it's looking at this reg, because what it says here could be tremendously impacted on what happens down the road.

MR. SIMON: Could I--

COMMISSIONER WEINTRAUB: I am out of time.

CHAIRMAN THOMAS: Mr. Simon, if you want to finish up quickly, that would be fair.

MR. SIMON: I know Commissioner Weintraub is out of time. I just wanted to make two quick points.

One is in response to a point Commissioner Weintraub raised with the first panel about low-donor state party fundraising events, and I think that's fine under 441i(e)(2)(B), which as Mr. Noble

said allowed federal office holders and candidates to solicit non-federal funds subject to federal limits and source prohibitions. So the extent state parties are conducting low-donor events, there's no problem at all with the federal candidate not only attending and speaking but soliciting those funds.

The second point is, you know, this discussion about the Cantor AO, I heard people say--you know, sort of argue both sides of the coin. On the one hand, Bob and Tom are arguing, well, this is, you know, a very kind of silly regime to impose on activity at state party fundraisers because it's all very artificial and everybody knows really what's going on and it's just making people kind of dance through meaningless, psychotic hoops.

On the other hand, they're saying, well, you should keep those AOs for non-state party fundraising events. And it seems to me that that's not a terribly consistent principle.

COMMISSIONER WEINTRAUB: Should we keep the AO?

MR. SIMON: No.

CHAIRMAN THOMAS: Let's move to Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr. Chairman. Thank you, gentlemen, for coming.

I like the phrase, Mr. Bauer, about institutional psychosis, and I'm glad that you don't want us to go there, but I'm afraid that ship may have sailed.

[Laughter.]

COMMISSIONER SMITH: But, in any case, as I indicated earlier, I have not been overwhelmed by what seemed to me to be sort of conclusory analyses as to why the rule needs to change, just sort of, well, it has to change because the statute says that; nor by the fact that nobody seems to be able to suggest that there has been any particular corruption or abuse.

Mr. Bauer, in particular, you had suggested in your opening comments a number of reasons why we might not want to change it, that people know the rule, what's the problem.

I guess the question I would have, since I'm sitting here and finding myself leaning that we should simply rewrite the E&J, but tending to agree with some of the other commenters that the new E&J is not really sufficient either in truly explaining what we're doing. I wonder, Mr. Josefiak and Mr. Bauer, if the two of you would care to kind of tell me. So what do you think is the correct justification and explanation for this? What should

we--what are we trying to say that we somehow failed dramatically to get through to the judge in the first round and that we may be failing to get through again?

MR. BAUER: I don't know--obviously in her place, I would have ruled differently, so I don't know what you did that wasn't persuasive. She displays a certain degree of irritability with this agency, so I can't--

COMMISSIONER SMITH: So do I, so that's not-

[Laughter.]

MR. BAUER: For very different reasons, it turns out. For very different reasons. But I believe that you could expand--perhaps that's what's most critical, to expand on the explanation originally given so it's clearer why it is that this agency believes that the position that you took in the original regulation is more fully consistent with apparent congressional intent. I don't accept, although I admire Don Simon's construction of the statute and why it compels the results that he favors, I don't believe it is correct and I don't think it's a better argument. So I think you can make the case that this is actually consistent with the most natural reading of the exemption; and that,

in fact, it does lead, if you go otherwise, if you choose the opposite course, it does lead to a whole series of results which are either undesirable or absurd.

And I want to mention, just as I close on this point, we hear from the reform community continually that the one thing that this agency ought not to do is abide what it calls winks and nods. The result it's urging on you is the institutionalization of the wink and the nod. It's absolutely inconsistent with the position that they've taken in a whole host of other regulatory measures. That Harry Reid should stand under that banner invited for that purpose in front of that audience and say he's there for an entirely different reason, whether he's actively winking or passively winking, it is a wink and a nod, which is precisely what those like--sorry, that was not a swing in Don's direction--precisely what those like Don have said that this agency should not countenance.

COMMISSIONER SMITH: Mr. Josefiak?

MR. JOSEFIAK: Yes, I would agree with Mr. Bauer that maybe just more meat on the bones here, getting into more examples of what we're talking about, talking about some of the examples that Mr.

Norton raised about solicitation, and then really emphasizing what you have in the statute. You have a general restriction. You have specific permissions for certain kinds of solicitations. And then what I would argue is you do have an exemption for these party events, where the Commission was in the first place.

But I think if you explain it a little more and talk about what you're talking about--what people here that were supportive today have talked about, the role of the candidates and office holders with regard to political parties, the thought process that these candidates and office holders were going to these events, that this seems to be something that was added on that didn't comply with the rest of the rules, they didn't use this as part of a normal soft money solicitation/BCRA prohibition, that these members were still going to be allowed to go to party events, whether it's a state party convention where fundraising was going on, whether it was a fundraising event itself, whether it was, in our party, the Lincoln Day county dinners that happen all over the place that are continuing to happen now where the draw is a Member of Congress, either a Congressman or a Senator, that those things were going to take place and they

didn't have to worry about going to the event. They understood they could no longer send out a letter saying, you know, please give money to the state party, non-federal account, but they could go to the event, be the headliner at the event, knowing that that would be used, the publicity could go out there without having all this gobbledygook that other kind of publicity has to have about, you know, this is only federal money and all of that sort of thing, in a state where there may be no restrictions at all and totally confusing the people who are getting these solicitations, by the way. You don't know how many times when you get a solicitation like this and it has all this language on there, people don't know whether they can give or not. In a state where there is a history of the ability of giving more than the federal limits or from a different source than the federal limits, you get a piece like this, and no one knows what it means.

And that's sort of the common reality, but I think if you explain in a clearer fashion and give examples of why you're coming to this conclusion, even though the court may not agree with you, it would not be able to overturn the explanation and justification rationale.

COMMISSIONER SMITH: Thank you.

CHAIRMAN THOMAS: Next we go to Commissioner McDonald.

COMMISSIONER McDONALD: Is Commissioner Smith yielding his time to me?

COMMISSIONER SMITH: I think I gave you about 12 seconds there. Use it wisely.

COMMISSIONER McDONALD: Well, I appreciate all of you coming, and I want to apologize to Bob. I missed just a fraction of your opening comments, and I'm sorry. I was running behind a little bit.

Just a couple of questions. First of all, in relationship to a fair and balanced Commission today, I want to point out that Don is in the same position Bill was earlier; that would be two against one. And I think it is only fair that we cover that from both sides to get that out on the table.

I guess the thing that strikes me most, I want to try to ask everybody a real quick question. Bob, I don't think you know any peer in terms of how adroit you are and engaging. You're the best I've seen.

Having said that, your overall analysis of BCRA, at least in the testimony before us, didn't turn out to be how the court saw it, I think it's fair to say. Do you not think that's an accurate assessment?

MR. BAUER: My assessment of its constitutionality?

COMMISSIONER McDONALD: Yes.

MR. BAUER: Absolutely, that's a correct assessment.

COMMISSIONER McDONALD: Well, let me ask you, because in a response to Commissioner Weintraub, you indicated that the problem with her suggestion was that it was really--simplicity wasn't in and of itself particularly valuable. But in your opening comments, you had indicated that complexity was the problem that you had heard in the opening panel. And I'm just trying to figure out where that leaves us. I mean, what do you think that means for us in terms of how we would handle that/

MR. BAUER: Well, I think it is a consideration. The law is already very complex. We could start from scratch if we were treating that as our primary concern. Then we would have done with the whole thing. I mentioned it on a list within a number of other considerations--speech restrictions, breeding cynicism in the public, respecting the experience the regulated community has already developed in complying with the statute. So I'm not suggesting that the sole beacon to be followed by the agency is avoiding complexity.

COMMISSIONER McDONALD: It is helpful, because as you know and I know, after looking back at some of your earlier testimony, those are common themes, not necessarily just from you but a number of people about the agency, and that's certainly legitimate. But I think in large measure, the court, quite candidly, ignored that.

Let me ask Don on the other side. However, if your theory is right about how we should interpret what the judge had to say, why didn't the judge just go ahead and strike this down in relationship to other things that were done? I'm very puzzled at what the rationale would be from your perspective in terms of that.

MR. SIMON: Well, you know, we certainly made the argument that--

COMMISSIONER McDONALD: Yes, I had heard that.

[Laughter.]

MR. SIMON: --the regulation should be struck down as inconsistent with the statute under what's called Chevron grounds. You know, she found the statute was susceptible of two different interpretations, one of which was our interpretation, one of which was the existing regulation. And because of that ambiguity on the

face of the statute, she sustained it under Chevron but, nonetheless, did find the regulation to be arbitrary and capricious.

If I could reclaim 12 seconds of Commissioner Smith's time, I would just like to say that I think the effort to fix the E&J to justify existing regulation really is akin to putting lipstick on a pig. I think at the end of the day it just won't work because I think it--my view is that it really does dis-serve the language, the structure, and the purpose of the statute.

COMMISSIONER McDONALD: Well, Don, I understand you're reciting, rightfully so, what transpired. But why do you think that happened?--I guess is what I'm really asking. I understand what the judge did, but what do you think the thought process is? Is there something there that we're missing? It just looked like to me it would be much simpler, if she was that concerned about it, to strike that down.

MR. SIMON: You know, you have good lawyers. I mean, they made effective arguments that there was a reading of--on the face of the statute, there was a reading of these provisions we're talking about that can support the regulation. So, you know, she found that she could not, based on

those arguments, strike it down under Chevron grounds.

COMMISSIONER McDONALD: Well, I'll give you credit. You did reasonably well, I would have to say, based on what transpired overall.

Let me turn to my friend Tom. Commissioner, welcome. I just want you to have the last word. I would feel bad if I didn't get to ask you a question. Any other things that we should know?

MR. JOSEFIAK: No, I am just following up on what Bob had said about the complexity. I mean, the Cantor AO I think was an attempt by the Commission to tell the regulated community in that case, all right, the statute allows you to solicit, but you're going to an event, you're going to be at events, you're going to do solicitations where money can be raised outside of the limits. How do you handle that? How do you balance between what the law allows you to do under the federal rules and what you would be allowed to do if left to your own devices under state law? And how would you do that?

I think the Commission did a good job of explaining and came up with this idea. But, again, what applies to those candidate events doesn't necessarily have to be applied to the party events

when you could take the position, like you have in the first round of regulations, that the event itself is an exempt event, you don't have to go through that nonsense and jumping through hoops for that particular event and that particular event only.

COMMISSIONER McDONALD: I thank all of you. It's good to see you.

CHAIRMAN THOMAS: Commissioner Mason?

COMMISSIONER MASON: Thank you, Mr. Chairman. And I thank all members of the panel.

Mr. Simon, I want to just probe a little bit on how you think we ought to enforce these various provisions that allow candidates to raise federally permissible money, which they can clearly do, and then there appears to be something different that they can show up at events, presumably, where non-federally permissible money is being raised. I don't see any way I can read (e)(1)(B) and (e)(3) together, other than saying they have to mean something different. Would you agree with that, first, that there's one rule or one type of exception that allows them to raise federally permissible money for non-federal entities, and a separate rule that seems to allow them to attend, speak at, and be a featured guest at state party

fundraisers and that those would seem to mean at least somewhat different things?

MR. SIMON: At state party fundraisers, federal office holders can attend; they can solicit federally permissible money at the--and the event can be an event to raise soft money. That soft money can't be solicited by the federal office holder in attendance.

COMMISSIONER MASON: Well, let's go back to this Virginia example, and I will use Senator Allen as a hypothetical. I don't want to pick on Senator Reid.

What if the Virginia state party is holding an event at which they hold out the opportunity for their big donors to attend a special private reception with the featured guest, Senator Allen, and the price of getting into the private reception is $25,000, corporate, individual--heck, the Virginia Republican Party would even take labor money if they could get it.

[Laughter.]

COMMISSIONER MASON: And Senator Allen does nothing but make small talk. He's been told by the lawyers that you can't even say anything nice about the party, but, you know, the whole point of the thing, as Tom says, the ask has been made, and the

goody, the payback, is your private meeting with Senator Allen. And we put a tape recorder on him, and he does nothing but small talk. Or he talked about the legislative interests of the contributors and the people show up, and they say, well, we're all from the Bankers Association and we'd like you to do this, that, or the other, no word about contributions.

If that's allowed--and I assume it is. If you think that's not allowed, please tell me. But if that's allowed, what are we protecting with these, well, speech restrictions?

MR. SIMON: You know, I think Section (e)(3) strikes a pretty awkward balance, and I think in many ways it's an unsatisfactory balance, and I think that it would have been cleaner if Congress had not created this exception in terms of simple hypotheticals to administer the law.

But, you know, Congress I think did strike this awkward balance, and, you know, I remember when this issue, this (e)(3) issue came up during the course of the legislative process, and there was a sentiment that came up on the Senate side, as I recall, where a number of Senators said we need to be able to go to state party fundraisers, that's

important to us. And that sentiment was the origin of this exception.

I think it is fairly awkward, but, you know, I think you have to do the best you can with it. I think what it does not permit is explicit solicitation of soft money.

Now, you know, there may be no point to that, or it may seem like a silly point, but I think that is the correct reading of the law and the correct interpretation of the line drawn by Congress.

Let me just say, there's one line in the McConnell case that I think does go to this, which I think is important for you to keep in mind, and the court said--and this is in the context of upholding the constitutionality of 441i(e) in general, solicitation prohibition. The court said: Similarly, 323(e)(1)(B), which is the provision that allows federal office holders to solicit non-federal funds subject to federal rules, 323(e)(1)(B) and 323(e)(3), the state party fundraising provision, preserved the traditional fundraising role of federal office holders by providing limited opportunities for federal candidates and office holders to associate with their state and local colleagues through joint fundraising activities.

I think the way the court talked about that by invoking (e)(1)(B), the right to solicit non-federal funds subject to federal rules, in the context of (e)(3), invoking those two provisions together, suggests where the line is. They can associate. They can go to state party fundraisers. They can solicit non-federal funds subject to federal rules. And that provides what the court referred to as the limited opportunities available to federal office holders and candidates.

COMMISSIONER MASON: But we're trying to search for a rationale here, and if your position is that it's silly or pointless, I'm trying to understand what it is--in other words, you're the one who's appealing to us, frankly, to try to enforce the spirit of the law. And if the spirit here is irrational or pointless, what do we--

MR. SIMON: Well, I mean, I think there's a difference between an explicit solicitation where a federal candidate says, "I ask you to give $25,000 or $100,000 to the state party," on the one hand, and that candidate's mere attendance at a fundraising event, even if the donor--

COMMISSIONER MASON: That you have to pay that much money to get into.

MR. SIMON: Yes, I--

COMMISSIONER MASON: It's advertised as the payback.

MR. SIMON: I do think there's a difference where the federal office holder personally takes, in a sense, responsibility and ownership of the actual soft money solicitation by personally making that solicitation himself.

CHAIRMAN THOMAS: Thank you. Well, it's interesting. I have been trying to think through a good example, but I'm just thinking of the way kids' minds work. If you go to some kid and say, "Give me a piece of candy," and the kid gives you the piece of the candy, then the kid is going to say, "Aha, I did you this favor because you asked me." But if you don't ever ask the kid for the candy, the kid hasn't got anything on you. He can't say, "I gave you the piece of candy because you asked for it." And so there's less expectation of a favor in return.

Isn't that a fair, simple analysis of the distinction that we're talking about here? Anybody?

MR. SIMON: Well, I agree with that, in the sense that I do think the overall point of the section we're talking about is to get federal office holders and candidates out of the business of directly personally soliciting soft money. I think

(e)(3) is a limited exception that allows them to show up at state party events and talk, but not to solicit.

MR. BAUER: It may be because my children were raised by campaign finance lawyers, but they have a much more sophisticated view of the operation of quid pro quo than the hypothetical--

[Laughter.]

MR. BAUER: You know, I don't think it's nearly quite that linear, frankly. And, furthermore, most of the audience at these state and local party events are, in fact, considerably older and do view things very differently. I just don't think--and keeping in mind, again, how the political process has been portrayed by the reform community with a view toward how insidious corruption is--I'm now referring to McConnell, obviously, how corruption is so hard to detect and it works in serpentine ways and that sort of thing, I just think it's realistic to believe the agency has accomplished anything by telling a group of sophisticated donors that they're off the hook, if you will, and that there's no concern with the potential perception of a bargain merely because a specific request or a specific solicitation has not been made. I just don't think anything in the

literature on reform suggests that that's a distinction anybody, quite frankly, would rely on here.

CHAIRMAN THOMAS: It just struck me as kind of common sense.

Let me ask a little bit about the ease or the option of maybe working with the Cantor type of protections that we've developed in the non-party context. We've sort of said, well, if somebody wants to, as a federal candidate or office holder, attending some non-federal candidate's event and there is going to be soft money raised, we say, of course, they can't get involved in actually soliciting in the fundraising materials in advance, but actually at the event, there we say you're not to solicit as well for non-federal funds. And we say that there are ways that you can basically protect yourself, use of this disclaimer and so on.

I'm just asking for your experience, those of you who have been advising folks out there. Isn't that a fairly straightforward, simple sort of approach to sort of give these people guidance the way we have sort of set it up in the Cantor context?

MR. JOSEFIAK: Well, I think in the candidate area, it's not simple. It takes some instruction to make it clear to people what has to

happen and make sure it does happen, because these invitations and these pieces are not prepared by the member, the office holder, or the candidate. They are prepared by the individual hosting the event. So there's a lot of back and forth and back and forth to make sure they get it right. But, again, you are talking about the ability of a member/candidate to go out and solicit soft money based on the legal limits for a non-federal candidate, and so that is a way that you have come away with how you deal with that issue of being able to do it but under certain restrictions which the law required.

I guess my question back is: Why would you want to do that in the area of party committees when you don't have to, that you have the ability based on your current regulation with a modified, hopefully modified explanation and justification to say that you don't have to jump through all of these hoops for every county committee, for every state party committee, for every local committee that these members are going to be talking to. And it just seems to be an added burden to groups and organizations to try to comply with something and the mistakes that will happen when they don't comply

and the possible enforcement actions when they don't comply when it doesn't have to happen.

I think there is a clear mechanism to deal with the party events versus a very difficult situation where you're trying to deal with candidates based on the various state laws that these candidates are operating under, and I think you have reached a balance with the Cantor AO when it comes to candidates, but you don't need to go and be that complex when it comes to party organizations.

CHAIRMAN THOMAS: Don, could I just ask you quickly, if you've come up with anything other than the examples that we now see in the responses or the comments so far? I think you've pointed out one example where the law basically already draws a distinction between someone speaking at some sort of political event and them soliciting on the other hand. That's in the area of the Hatch Act. And I think the sponsors of the legislation in their comment, they make reference to a Senate ethics rule that seems to in some sense also go along those lines, it's okay for a member to be in attendance at a certain kind of event, but they're not supposed to be soliciting. Any other examples you can think of?

MR. SIMON: Well, you know, one that has been in the news of late, there's also a House ethics rule that prohibits a member from soliciting a gift or travel. You know, members talk to lobbyists all day, but they can't solicit a gift from a lobbyist. They actually can't solicit a gift from anyone. And the Hatch Act is another example, and obviously the concept of solicitation is in FECA, in 441b.

So, you know, the notion of having to draw a line between speech in general and a solicitation as something that's prohibited is familiar in the law, not only in the election law but in the law generally. And I think the examples from the congressional ethics rules show that it's a concept that's familiar to Members of Congress as well.

CHAIRMAN THOMAS: Okay. Thanks. My time is up.

Mr. General Counsel?

MR. NORTON: Thank you, Mr. Chairman, and thank you to the panel for coming.

Mr. Simon, I wanted to start with you and go back to Vice Chairman Toner's hypothetical. I think, if I heard you correctly, your response to his hypothetical, sort of standing under the banner--and it says "Support the 2005 Democratic Ticket in

Virginia Tonight"--was that one of the things that Senator Reid could say is to offer the disclaimer that the Commission adopted in the Cantor Advisory Opinion. And I guess my question is: If that will cut it, then doesn't that really read the distinction out of the statute between state party events and other events?

MR. SIMON: That's why AO 2003-03 and 2003-36 are wrongly decided.

MR. NORTON: And so if the Commission were to conclude that they're wrongly decided, next to the hypothetical, is there anything Senator Reid could do at the fundraiser in your view that wouldn't be--that would sort of insulate him from liability for soliciting?

MR. SIMON: Well, let me draw a distinction here just to make sure I'm being clear.

At a state party fundraising event where I think a federal office holder or candidate can attend and speak, the Commission has to draw a line between that attendance and speech, on the one hand, and soliciting soft money, on the other hand.

What I would suggest is that you use the rules developed in this other context of a non-state party fundraising event to draw that same line between speaking and soliciting, and you just take

those rules and import them to the state party fundraising context.

Now, I think that having those rules and having the Cantor AO is wrong, and as the NPRM suggests, the Commission by implication would be declaring those AOs to be wrongly decided in this rulemaking because it makes 441i(e)(3) surplus language in statute. If the statute says a federal office holder or candidate can attend and speak at a state party fundraising event, there's no authority in the statute for them to do the same at any other kind of fundraising event. And so I think applying--essentially you're sort of recalibrating the permission that you give for solicitation. You're allowing the candidates to do at state party fundraising event--you should be allowing them to do at state party fundraising events what you had said they could do at just state candidate fundraising events.

MR. JOSEFIAK: Could I just--

MR. NORTON: Sure.

MR. JOSEFIAK: I just don't understand why you would even consider that to be a solicitation by Senator Reid in that standpoint. He didn't create the sign. He wasn't responsible for the sign. He's up there giving a speech. He's under a sign. He is

not saying a damn thing. Yet all of a sudden he's soliciting?

I think you've got to reach a point--and this is where I was going with the definition of "solicitation." I don't know what it's going to be at the end of the day when all is said and done. I know what it says now, and that to me is not an ask by Senator Reid in any way, shape, or form because he's standing under a sign that was created by the state party of Virginia urging people to support and thanking them for being there. That is not the words of Senator Reid in any way, shape, or form.

So even under the current reg and even under the current position that Mr. Simon takes, I just don't see how the Commission could ever find that to be a solicitation.

MR. NORTON: Let me turn to Mr. Bauer for a moment. I wanted to give you a chance to address a comment Mr. Simon made earlier. You have advocated that the Commission retain the Cantor Advisory Opinion because, I think you said, it's in place and the community understands it and it's complying with it. And as Mr. Simon pointed out, you made the point that that recitation is patently insincere and untrue. That sounded to Mr. Simon like a contradiction, and I confess it sounded a bit like

that to me, too, and I wanted to give you an opportunity to explain.

MR. BAUER: I was going to mention this to Don afterwards.

[Laughter.]

MR. BAUER: It's not a contradiction at all. It's all you're giving me, so why would I give it up? I mean, the fact of the matter is if you want to take those disclaimers out so we don't have to go through this silliness and allow our candidates to show up at RGA and Cantor events, trust me, no complaint from me. Only Simon will sue you.

[Laughter.]

MR. BAUER: But if that's all I can get, if these requirements are built into the Cantor and RGA opinions and that's what I have to live with in order to have that limited relief for candidates to appear at those events--and, of course, I'll accept the conditions that you put on them. I don't have any choice in the matter.

So I think he misread and, therefore, believes there was an inconsistency in my position.

MR. NORTON: Okay. Thank you.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Vice Chairman Toner has asked for another question, but, Bob Costa, let me give you a shot if you have any questions.

MR. COSTA: I have no questions.

CHAIRMAN THOMAS: Vice Chairman Toner?

VICE CHAIRMAN TONER: Thank you, Mr. Chairman.

Mr. Simon, I just want to follow up and make sure I understand your position. Is it your view that it is illegal for Senator Reid or Senator Allen or any federal candidate to go to a Democratic Governors Association fundraising event or an RGA event where soft money is being raised no matter how the event is structured and no matter what is said there? Is that your view?

MR. SIMON: Yes, with the exception that if the event is structured to raise money that may be solicited by federal office holders pursuant to 441i(e)(1)(B), then--I mean, this really goes to Commissioner Mason's question earlier. Then the attendance at a fundraiser is a form of solicitation that the statute does not permit.

And let me just say, you know, this is not a completely hypothetical issue in the sense that, you know, fundraisers--we're talking about fundraisers held, for instance, by 527 groups, and

when you have federal office holders attending, you know, fundraisers by 527 groups raising huge amounts of soft money that are going to be spent, clearly spent in federal elections, whether under the Commission's view they're technically for the purpose of influencing a federal election, I think that's a real problem, and I think that really is contrary to what Congress intended to have federal office holders participate even by attendance in fundraisers by 527 or groups like that.

VICE CHAIRMAN TONER: So under BCRA, a total legal prohibition on them attending an RGA or DGA event at which soft money is being raised, no matter how that event is structured, a total prohibition?

MR. SIMON: With the proviso that it's structured to raise federally permissible amounts.

VICE CHAIRMAN TONER: Okay. And how do you respond to Mr. Bauer's point that, in his view, most of the money has already been raised by the time the fundraising event takes place?

MR. SIMON: You know, as the first panel suggested, I don't think that's relevant here.

VICE CHAIRMAN TONER: Not relevant at all?

MR. SIMON: I think if it's a fundraiser, then the federal candidate should not participate in the solicitation of soft money.

VICE CHAIRMAN TONER: Thank you.

CHAIRMAN THOMAS: Since it's been raised, just to be clear, if the DGA or the RGA were having other meetings that had just policy discussions going on--

MR. SIMON: Right. That would be fine.

CHAIRMAN THOMAS: --federal officials can, of course, go to the DGA meeting or the RGA meeting and participate in those panels and so on. What you're talking about is some event that is part of the--

MR. SIMON: Yes, I'm talking about a fundraising event, and that's--I mean, the statute uses the term "fundraising event" in the context of (e)(3), so it's clearly something that Congress thought was a definable phenomenon. And I think when you have a fundraising event for a state party, the federal office holder can go. When you have a fundraising event for a 527 group, he can't go.

CHAIRMAN THOMAS: Thank you. Any other follow-up?

[No response.]

CHAIRMAN THOMAS: Thank you one and all. I'm sorry it got so hot in the room. We'll see if we can--I guess for the next panel, see if we can keep it a little bit cooler. But thank you one and all for coming, and we will now take a break, and I guess the next panel is supposed to fire up at 2 o'clock, so we'll see if we can keep to that schedule.

[Whereupon, at 12:25 p.m., the proceedings were recessed, to reconvene at 2:00 p.m., this same day.]

AFTERNOON SESSION

[2:03 p.m.]

CHAIRMAN THOMAS: This special session will please come to order again. We welcome our next panel. We're going to address now the definition of "agent" for BCRA purposes, and the next panel will address the Commission's proposed rules regarding payroll deductions by member corporations' contributions to a trade association's separate segregated fund.

In case you missed the earlier recitation of our procedures--I guess three of the folks have already heard this--we're going to work with the light system, and you basically are going to have a 5-minute opportunity to make an opening statement. And we'll try, as best as possible, to stick to that. We're not being horribly mean on this, but we'll try to stick with that.

This panel we have Lawrence Noble, Executive Director of the Center for Responsive Politics again. We have Paul Ryan of the Campaign Legal Center. We have Karl Sandstrom of Perkins Coie and, I would note, a former Commissioner; he is here on behalf of the Association of State Democratic Chairs. We have also Donald Simon of

Sonosky, Chambers, Sachse, Endreson & Perry, here on behalf of Democracy 21.

We've been working with an alphabetical rule here, so it looks like, Mr. Noble, you get to go first, unless you all have another plan. Please proceed.

MR. NOBLE: Thank you, Mr. Chairman, Mr. Vice Chairman, members of the Commission--

[Laughter.]

MR. NOBLE: --including Commissioner Weintraub, Commissioner McDonald, Commissioner Mason, Commissioner Smith, Mr. General Counsel, and Mr. Deputy Staff Director.

COMMISSIONER McDONALD: The older you get, the more sensitive you get. I just want to note that.

MR. NOBLE: I just blanked out there.

Once again, on behalf of the Center for Responsive Politics, I'm pleased to be able to testify on the definition of "agency," and I want to start by applauding the FEC for facing what the court said in Shays and now offering up a proposal that does adopt apparent authority as one of the rules in the regulation.

The definition of "agent" is critical to several core sections of Title 1 and Title 2 of

BCRA, including the prohibition on national party committees raising or spending soft money, state party committees spending soft money on federal election activity, and the prohibition of federal candidates raising or spending soft money. It's also an important component of the rules regarding when coordination with a candidate will turn an expenditure into a contribution.

In the first go-round for these regulations, the FEC promulgated a definition of "agency" which included only those acting with actual authority, rejecting the common principle that an agent also includes one acting with apparent authority.

My papers are stuck together.

As you know, the Shays court rejected this rule, again finding that the agency did not adequately explain why it has excluded apparent authority from the definition of "agent." What is clear from the original rulemaking--and it's clear even from some of the comments filed in response to this Notice of Proposed Rulemaking--is that many of the objections to using apparent authority are based on a misunderstanding of what it means.

Much has been said and written about the fear concerning some unwitting volunteer being found

to have violated the law as an agent of a campaign because of something the candidate said to a third party about which the volunteer knew nothing or had no knowledge. Likewise, there seems to be this belief that the mantle of apparent authority may come to rest on someone because of some misunderstanding of a third party absent any acts of the principal or the candidate. Neither of these things is true.

First, no one has ever suggested a person can be found to be liable for violations of the law as an agent of a principal where the person has no knowledge of and has not consented to being an agent. This is true whether we are talking about actual or apparent authority.

Second, all questions of agency are fact-based, and some of the scenarios offered by some of the commenters have nothing to do with any real-life application of the law to the definition of "agency." The classic situation covered by apparent authority and previously excluded by the Commission's now invalid rules is where someone with their knowledge is held out to a third party as an agent of the campaign, with the authority to undertake certain acts. Under the previous rules, if you could not show the agent had actual authority

to undertake a given act, the campaign was not responsible, no matter what trappings of authority the campaign bestowed upon the agent.

Let me give you a specific and a very common example. If a campaign bestows the title of fundraising Chair on a big giver, advertises the person's position in the fundraising appeals, and urges that person to raise funds, the campaign should not be able to escape responsibility for the agent's raising of soft money by claiming it was only an honorary title and the person had never been given specific authority to solicit soft money.

The concept of apparent authority is one that most businesses have to deal with every day. It is a principle that serves an important purpose. It requires people to take responsibility for their actions and the perceptions they intentionally create. It is intended to stop someone from benefiting from the actions of their agents as long as it suits them and then deny liability when the actor and the actions they have set in motion cross the lines of what is permissible.

Some commenters have argued that the concept of apparent authority doesn't apply in the campaign finance area the same way it does in the commercial area because there are no real injured

third parties who rely on apparent authority to their detriment. First, that's actually not even always true in the specific case. Ask the contributor who believed that the contribution being sought must have been lawful since it was the candidate's fundraising agent who asked for it and he, of course, would never have asked for it if it was illegal.

But there is a more important point there. There is a class of people who are directly harmed by the game-playing and flaunting of the law when a regulation shelters the candidate and campaigns from liability for their actions, and that is the public. That is who in the end the law was intended to benefit. And just because a member of the public may not in some cases suffer a constitutionally cognizable harm sufficient to give them right to challenge a candidate's action, the failure to protect them from those actions still causes harm.

I would like to close with one final thought. By finding that your rule reflected a permissible interpretation of the law, once again you have a choice. Again, I am pleased that so far it looks like you are taking the choice of adopting an apparent authority standard. This is, I think, an important step. I think it will lead to a

common-sense rule, and I think people will understand what it means. Of course, it will be fact-intensive. You will have to answer questions about it. But that's the nature of the beast.

I'll be glad to try to answer any questions you have.

CHAIRMAN THOMAS: Thank you.

I think, Mr. Ryan, you come next.

MR. RYAN: Good afternoon, Mr. Chairman, Vice Chairman, Commissioners, Commission staff. It's a pleasure to be here this afternoon to make comment with regards to this rulemaking.

As the Chairman noted, I am representing the Campaign Legal Center, which I serve as Associate Legal Counsel. I am here today to strongly urge you to adopt the rules proposed for Sections 109.3 and 300.2(b) to include apparent authority in the definition of "agent."

As noted in the written comments we've submitted, the Commission has for many years correctly relied on the concept of apparent authority to determine whether federal candidates and party committees have complied with federal campaign finance laws. The Commission has presented no valid explanation or justification from departing from this longstanding practice.

Much of the objection to the Commission's proposed use of apparent authority stems from a misunderstanding of the concept of agency. During the 2002 rulemaking on this issue, concerns were raised that the incorporation of apparent authority into the regulations would unfairly impose liability on federal candidates and national party committees for the actions of rogue volunteers. The district court in Shays made clear that such concerns are unfounded and not supported by the law of agency. A rogue volunteer cannot create apparent authority resulting in the imposition of liability on federal candidates and party committees. Instead, apparent authority can only be created through manifestations made by a federal candidate or party committee to a third party.

Similarly, during this rulemaking, some have raised unfounded concerns that incorporating apparent authority into this regulation would unfairly impose liability on unwitting volunteers by making agents out of them. This concern is likewise not supported by the law of agency. Apparent authority does not make an agent out of an unwitting volunteer. Instead, a person is an agent only when such person consents to act on behalf of a principal and subject to that principal's control and such

person's consent to act as an agent is met with a manifestation of consent by the principal.

In other words, in order to be held liable as an agent, the agent must consent to enter an agency relationship. Within the context of an agency relationship, the concepts of actual authority and apparent authority establish the scope of an agent's power to legally bind the agent's principal. Actual authority stems from the principal's manifestations to the agent while apparent authority arises from the principal's manifestations to third parties.

The determination of the scope of an agent's power and the principal's related liability will be directly impacted by your decision to include or not include apparent authority in the regulatory definitions of "agent." Should you choose not to include apparent authority in the definitions of "agent," federal candidates and party committees will easily evade BCRA soft money and coordination restrictions by limiting their agent's actual authority while granting their agents apparent authority to violate the law.

The district court in Shays indicated that the existing definitions of agent, omitting apparent authority, might be valid if and only if the

Commission formulates a valid explanation and justification for its omission of apparent authority from the regulations. The NPRM suggests that the omission of apparent authority from the definitions might be justified on the grounds that BCRA's purposes of preventing corruption in circumvention of the act differ so substantially from the purposes of other laws that employ the concept of apparent authority. However, there is no evidence from the Commission's past reliance on the concept of apparent authority that the body of campaign finance law is so unique as to warrant the omission of the concept of apparent authority from this Commission's regulations.

The Campaign Legal Center believes that this proposed explanation and justification in the NPRM would fail to meet the Administrative Procedures Act's reasoned analysis requirement, and for these reasons, along with the reasons elaborated in our written comments, the Campaign Legal Center urges you to adopt the proposed rules incorporating apparent authority into the regulation.

Thank you for your attention, and I look forward to your questions.

CHAIRMAN THOMAS: You didn't use nearly enough time on that. Thank you.

Next, Commissioner Sandstrom, I'm going to call on you. Welcome.

MR. SANDSTROM: Thank you, Chairman. I want to thank all the members of the Commission for the opportunity to come back and visit with you a little bit today. As witnesses go, I'm probably more sympathetic to your plight than most. You know, it seems to me that here at the Commission it often takes all the running you can do to stay in the same place. That's from one of my favorite philosophers, Lewis Carroll, and I'm here to urge you essentially to stay in the same place and not make the change being proposed in the Notice of Proposed Rulemaking and include apparent agency.

The foremost obligation of the Commission from my perspective is to provide people with fair notice of what's legal and what is not. What political acts can you engage in freely without worrying that you're violating the law?

As a practitioner, I want to know what the practical consequences are of a rule or of a rule change. In this case, I think it's really relevant to determine what are those practical consequences.

The first question I'd ask, because the Commission did have to grapple with the notion of apparent agency or agency in an advisory opinion

issued to Commissioner Reid of Nevada. And the question is: Would adopting a definition of including apparent agency in the definition of "agent" reverse that decision?

Now, according to three Commissioners who wrote separately in a concurring opinion, they said the only basis they could find would be--to find Commissioner Reid an agent is an apparent authority argument. And I quote from that opinion: "To now apply a broader and different rule to Mr. Reid would go beyond the considered judgment of the Commission as reflected in the final rule and would add an arbitrary and unpredictable character to our decisions in this area."

So would Commissioner Reid be an agent of Senator Reid last year? And if he would, then the question becomes: Would Jeb Bush, who raised a lot of money for his brother during the primary season, when he raised money for the Florida Republican Party in the fall, would he be an apparent agent? He was Chairman of the campaign in Florida.

Today I was greeted by an article in the Washington Post which made me think whether Andrew Blunt would be--had to choose between his father and his brother in raising money because one's a federal candidate and one's a state candidate. Would he

have to be concerned that in a particular election cycle that if he had taken on the title in his father's campaign that he couldn't take on a title in his brother's because taking on a title would be a clear sign that he is now an agent.

The question then becomes: In this spectrum of volunteers out there, we begin with a ranger, a pioneer, or a precinct chair, which title is sufficient to make you an agent and subject to the rules that you cannot raise money for state elections or so-called soft money, non-federal dollars?

Last year, it was very easy to be authorized to raise money for a presidential candidate. This went out to millions of people. It was to hold a house party for Howard Dean. Bush campaign held house parties. I have others I'd like to submit for the record. House parties by the Gephardt campaign. So literally millions were asked to raise money. Tens of thousands agreed to do so. Are they all agents? Are they all now restricted? Or is this going to be a fact and circumstances test, as urged by some? So you come to an answer on each case trying to distinguish between a Rory Reid and a Jeb Bush, an Andrew Blunt and a Matt Blunt,

between a ranger and a precinct chair, or somewhere in between, a pioneer?

Titles are given out regularly in campaigns. Clearly, an apparent agent is not an agent, or else it would fall within the definition. But because it will only appear as such, they lack one of the elements of agency.

I know I'm running out of time here. What the Commission in my view should do is spell out those elements of agency in its rule to make clear that people are free to raise money for others. The volunteers are not--because they raise money for one person are not barred from raising money for other causes and candidates.

CHAIRMAN THOMAS: Thank you.

Don Simon, please.

MR. SIMON: Thank you, Mr. Chairman. I appreciate the opportunity to again testify on behalf of Democracy 21.

The NPRM takes the right approach. We support the proposed rule to include the concept of apparent authority in the definition of "agent." Let me make four points to elaborate on this.

First, it's fundamental to this discussion to understand what apparent authority is and is not. There's a clear common law definition of the concept

as set forth in the various treatises and restatements of agency law. As the NRPM correctly states, apparent authority is created only where the principal by his own words or conduct, reasonably interpreted, causes a third party to believe that the agent is operating on the principal's behalf. Actual authority, by contrast, is created by a principal's words or actions to the agent himself. But in both cases, control over the creation of the agency relationship lies with the principal.

The difference is only that actual authority focuses on the relationship between the principal and the agent, while apparent authority focuses on the relationship between the principal and the third party.

As the NPRM states, the common law definition of "agent," including apparent authority, limits a principal's liability for a would-be agent's actions to situations where the principal has taken specific action to create authority, either actual or apparent, in a person. Thus, the rationale used by the Commission in the 2002 rulemaking to exclude apparent authority was based on a mistake of law. The 2002 E&J explained the rule as intended to avoid placing the definition of "agent" in the hands of a third party. But as the

district court said in Shays, this rationale is simply incorrect.

The court said the Commission's main concern in excluding apparent authority from the definition is not supported by the law of agency and, therefore, is not a rational basis for the agency's decision.

Second, the concept of apparent authority is a familiar one to the Commission and prior to 2002 was a longstanding part of the Commission's rules. As we've set forth in our written comments, the Commission has relied on the apparent authority analysis in several enforcement matters, including, ironically, one that took place in 2003 after the Commission actually deleted the concept from its rules.

There's no showing that the use of apparent authority over the many years that the Commission has included the term in its rules or applied it in enforcement matters had any adverse impact on political activity or caused any of the harms feared by some. The concept has also been used by the courts in various campaign finance cases, as we also discuss in our comments.

Third, including apparent authority in the definition of "agent" will plainly promote goals of

better compliance with the law and enforcement of the law. When a candidate or party publicly holds out a person as operating on its behalf, whether by conferring a title on them or by statements made to others about their authority, the principal properly should be held to ensure that the agent is trained in the rules of the law and is supervised in his or her activities on behalf of the candidate or party. Such training and supervision will promote compliance.

As to enforcement, a review of the MURs cited in our comments will show the utility of apparent authority in past enforcement matters. MUR 4843 from 1999 is a particularly good example, where the actions of a finance Chair, even if he lacked actual authority, were imputed to a campaign committee because, in the words of the general counsel's analysis, the committee "placed him in a position where he had apparent authority to act on its behalf and subsequently was negligent or reckless in its supervision of his activities."

There are often practical difficulties in proving actual authority because it depends on a showing of what transpired between a principal and an agent; whereas, apparent authority is often easier to establish because it's based on an

objective reasonable-person test of what manifestations had been made to the public.

As Chairman Thomas has pointed out, there are likely to be situations where we will not be able to prove actual authority because witnesses will not recall and documentary evidence is absent, yet apparent authority might be shown.

Finally, including the concept of apparent authority is by far the better interpretation of the statute. It represents the longstanding practice of the agency that Congress was familiar with when it enacted BCRA. It has, in the words of the Supreme Court, "long been the settled rule in the federal system" and it is a familiar and well-developed part of the common law of agency.

The Commission's default position, as a matter of statutory interpretation, should be to conform with the settled federal rule, with accepted common law definition, and with your own longstanding past practice.

For all these reasons, we support the adoption of the proposed rule set forth in the NPRM. Thank you.

CHAIRMAN THOMAS: Thank you. I didn't hit the button to start the timer, so I was just

deciding to give you the red button just for the fun of it.

MR. SIMON: Okay.

[Laughter.]

CHAIRMAN THOMAS: I'm never going to master this thing.

First, Commissioner Weintraub, would you like to start the questioning?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. Boy, you know, you give somebody the power over the buttons, and it just goes to his head.

CHAIRMAN THOMAS: I asked Commissioner McDonald at lunch if he would take over this awesome responsibility, and then he started explaining to me his technical skills.

COMMISSIONER WEINTRAUB: All right.

COMMISSIONER McDONALD: It would have been even worse.

COMMISSIONER WEINTRAUB: Now you are on my green button time, so I'm going to have to charge right in with my questions. Commissioner Karl, you are outnumbered here, so I'll start with you.

Let's talk about somebody who is--one of the issues that's presented here is, you know, who would be agents, and you raise some of these issues.

You know, how low in the totem pole do you go down before you decide somebody has apparent authority? But let's start at the top to make it easier.

Let's say somebody is a paid finance Chair of a federal candidate and there's no question that the candidate is telling everybody, "This is my fundraising guy," and that person goes out and breaks the law, why shouldn't the candidate be responsible for that?

MR. SANDSTROM: What did he do to break the law?

COMMISSIONER WEINTRAUB: Raise soft money.

MR. SANDSTROM: Is the suggestion that if you are a paid finance Chair for one candidate, if you are raising money for another and you're not representing that you're doing it on behalf of the candidate who is paying you, that you're barred from doing that?

COMMISSIONER WEINTRAUB: I'm not suggesting that. I'm just asking--

MR. SANDSTROM: See, I thought the premise of the question was that he was breaking the law, and that's one of the--where I'm troubled. I wanted to know essentially what acts would put him in violation of the law. Just merely raising soft money would not put him in violation of the law. He

would have to be raising money at the direction of the candidate on behalf of the candidate, subject to the candidate's control, then yes, he's an agent. The--

COMMISSIONER WEINTRAUB: All right. Let me try this one on you. Suppose the candidate says, you know, puts it out there in the world, he says, okay, you know, when you hear from John, it's just like a request from me, he is my guy. Then John goes out and says, you know what? The state party is going to be doing a lot of stuff that's going to help Senator So-and-so's campaign, and we would appreciate it if you would give--we're in Virginia--the maximum amount that you can give, that you can afford to give, because there are no limits, because this money is going to help the campaign not only of everybody in the state who's running at the state level, but also of Senator So-and-so, and you know I'm his guy because he told you.

MR. SANDSTROM: Two things there. First, I'm not sure the candidate hasn't violated the law themselves by soliciting soft money, by saying do what this person suggests you do. But if you look at a typical, for instance, presidential campaign, where the general election candidates take public funds, it is the tradition--and I don't see anything

wrong with that tradition--that all the fundraising operation breaks up and goes out and raises money now for state parties and for the national committee.

Now, are they still acting as an agent of the presidential candidate for whom they had worked for the prior six months or year or two years? I think not. You don't fit within the definition of "agent."

Now, if that person has been instructed by that candidate to go out and ask someone for soft money, he is operating at the direction and under the control of the candidate. So I think that instance that the candidate and the person he has directed to do that would be liable for violations of the law.

COMMISSIONER WEINTRAUB: All right. Mr. Ryan, your testimony, your written testimony, says that all--let's see if I can find it. Here we go. "Any paid employee of a political party or committee or campaign should be held to be an agent for purposes of the act." "Any paid employee." That is a much broader standard than the Commission has ever adopted before, which only extended, as you undoubtedly know, to individuals who were authorized to make expenditures. And your standard would

presumably include clerical employees and all sorts of people who are not in a decisionmaking role within the party hierarchy, but might be active in local politics.

Are you sticking to that, any paid employee should be an agent?

MR. RYAN: I would clarify that by saying that the threshold question is to establish the extent to which this person is an agent of the principal, an agent of the candidate or of the committee and to do so by investigating whether or not they have consented to act on behalf of this particular person. If they have accepted a job with a campaign, then they likely meet that question, that threshold question.

COMMISSIONER WEINTRAUB: So your answer is yes, any paid employee?

MR. RYAN: But the second question is to examine the scope of their authority, and there are two sources of the scope of an agent's authority: one is actual authority and the other is apparent authority. And I would say that depending on the job responsibilities, that person may or may not have actual authority to raise money on behalf of a candidate or a committee.

Depending on the actual job title, there could be apparent authority vested in that individual as a result of the bestowment on that individual of a particular job title that implies to the average person that this is a fundraiser, this is a fundraising position. And it is in instances where either there is actual authority to this individual to raise money or there is apparent authority, representations made by the campaign to the general public that this person is in a position to raise funds, that yes, they are an agent of the candidate and they are prohibited from soliciting or receiving soft money on behalf of that candidate.

COMMISSIONER WEINTRAUB: I'm sorry. Can I just get a yes or no? A clerical employee, the secretary who answers the telephone at the party headquarters, is that person under your definition an agent?

MR. RYAN: I wish I could provide a yes or no answer. But it depends on whether within that campaign clerical employees solicit contributions, whether they do any fundraising. If, for example, a volunteer walks in off--

COMMISSIONER WEINTRAUB: All right. My time is up. I'll yield.

CHAIRMAN THOMAS: Well, Commissioner McDonald and I blathered through part of your time. If you want to follow up, feel free.

COMMISSIONER WEINTRAUB: I would like to follow up, but not on that question.

CHAIRMAN THOMAS: Mostly Commissioner McDonald.

COMMISSIONER WEINTRAUB: I'd like to ask Mr. Noble--yes, you. I'm troubled also by the concept that Mr. Sandstrom raised of somebody who wears multiple hats. You know, that could be a professional fundraiser who raises money for more than one candidate, some state, some federal. Or one that I have always been sort of puzzled by is this line from McConnell: "Party officials may also solicit soft money in their unofficial capacities."

Can you help me out with this? What do you think the court meant by that? What does all this--if we adopt the apparent agency regulation, what is that going to mean for people who are professional fundraisers and raise money for--or non-professional fundraisers--raise money for more than one candidate? And how do you interpret that line from McConnell? When can a party official raise money in an unofficial capacity?

MR. NOBLE: There may be situations where it's very clear that you are raising money for another purpose, for another principal, if you will, and that's clear and, therefore, you are wearing a different hat. And this goes back to Paul's answer to your question. I know why you're frustrated and everybody would like a yes-no answer. But especially with agency, it's very fact-specific. So you can be an agent for certain purposes, not an agent for other purposes. You can be an agent on certain days when you're working for somebody and not an agent on other days.

And then you have the question of once you decide somebody's an agent, what's their authority to do what they did? That's where you get apparent authority and actual authority.

In your case, I think what the Supreme Court may have been referring to is not foreclosing the normal concept that if it's very clear, people can play different roles at different times. But the reality in most of the situations that we're dealing with is that it's not clear, it's that they're sent out as an agent of the campaign or agent of the party, and then they try to switch hats. But it's not--later on they try to switch hats or they make it very unclear who they're

working for at a time. We saw it in the Christian Coalition case where Pat Robertson, one of the--I believe it was Pat Robertson and Ralph Reed who tried to argue they had switched hats, and the court said, no, you can't do that, in that case you still represented the Christian Coalition, you were still acting as agents of the Christian Coalition.

So I think that's all that's recognizing, is that there are a variety of factual situations. I don't think anybody here is talking about holding somebody liable when it is very clear that they are acting in a totally different capacity. If you are a party leader and you are raising money for your church or your synagogue, I don't think anybody here is claiming that, oh, no, now that's soft money. Technically it's soft money.

CHAIRMAN THOMAS: Commissioner Mason?

COMMISSIONER MASON: Mr. Noble, on this agent thing, Sean Connery or Roger Moore?

[Laughter.]

MR. NOBLE: Sean Connery.

COMMISSIONER McDONALD: Not even close.

COMMISSIONER MASON: All right.

COMMISSIONER WEINTRAUB: We agree again.

COMMISSIONER MASON: I knew you'd give me an answer to that question, and I appreciate it.

What I want to ask is maybe a little bit more focused question. The problem I have in grappling with apparent authority is a problem that was brought up in, I believe, Ms. Harmon's comments, one of the people who commented and who is not here today to testify, about whether or not our guidance is effectively available to people out there. And the problem I think you are all acknowledging with actual and apparent authority is these are common law doctrines and the reading that I've tried to do on this since the court decision, one of the problems seems to be that they're not even incredibly settled doctrines, unlike, say, something like Chevron where, yes, you could disagree on the particulars and the application of it. Actually, you can go down and get a pretty linear analysis, and that just isn't there.

So my question is: If we are persuaded to return to some version of an apparent authority doctrine, why would we not revive the former 109.1(b)(5) definition of "agency" which focuses specifically on campaign titles, which a couple of you brought up, perhaps with the addition--in that case, it was limited to making expenditures and, of course, now under BCRA we're looking at fundraising. Would that be perhaps a more targeted way to build

in the concept you're concerned about but also communicate to campaigns and to people outside that, as you suggested, the campaign is still in charge, it's just a question of to whom they give titles?

MR. NOBLE: I think titles clearly are one way you set up agency and either apparent or real authority. The problem with limiting it that way is it's too easy to get around, because then what you're going to have is them not handing out a title but making it very clear to somebody this--you know, Don Simon doesn't have a title in my campaign, but, you know, he is my closest associate here and he knows what is going on, so listen to him. And then he says--

COMMISSIONER MASON: But if part of your argument was that Congress must have been relying on the subtle definition that the Commission had, it seems like reviving that definition with the addition of fundraising would fit right into that context.

MR. NOBLE: But, again, I don't think it serves--I understand what you're saying. I don't think it serves the purposes of the act. I think it just leaves open too large of a loophole for people just not to hand out titles, but still very

expressly--still deal with it in a way that anybody else looking at it would say that's an agent.

COMMISSIONER MASON: Okay. But you said that part of the reason is Congress was relying on our interpretation before. Mr. Simon has cited the past enforcement cases that we brought under that regulation. And it seems like on both planks reviving that regulation would satisfy that. And I'm trying to figure out what it was we were losing before that, you know, we wouldn't fix by simply reviving the prior regulation.

MR. NOBLE: And leaving out the expenditure part?

COMMISSIONER MASON: No. Putting in expenditure and adding fundraising, because the prior regulation simply said that title--had been placed in a position within the campaign or organization where it reasonably appeared in the ordinary course of campaign-related activities that he or she may authorize expenditures.

MR. NOBLE: Right.

COMMISSIONER MASON: I think in the BCRA context you would have to add "or raise funds." But, you know, with that significant addition, to deal with the BCRA, I'm just wondering why that might not be a more targeted response that would get

the concept without the vagueness of simply relying on common law, would build back in some of the Commission's prior records, Congress' presumptive reliance on that in a way that's structured and, as Mr. Ryan suggests, leaves the campaign in charge of who is an agent.

MR. NOBLE: I guess I'd have to answer it is a halfway point. I see what you're talking about there, that you're then focusing on the expenditures and on the fundraising. I'd want to think about that because I do think you still leave--you potentially leave open areas where somebody is not so designated as a fundraiser. But, I mean, I think it's clearly better than totally excluding apparent authority.

COMMISSIONER MASON: Mr. Simon? Mr. Ryan?

MR. SIMON: Yes, I guess I have something of the same reaction. I think doing what you're proposing is certainly better than staying with the existing rule. I think it's not as good as the proposed rule, and I think really the difference comes down to this: that essentially apparent authority is created in an agent by the principal holding the agent out to the world as having the authority, whatever his actual authority is or whatever the limitations on the actual authority is.

Now, bestowing a title is kind of a subset of holding somebody out with a certain authority. It's one way to hold someone out as having that authority. So if you have the rule limited to bestowing of titles, you're capturing that practice, but you're not--

[Simultaneous conversation.]

COMMISSIONER MASON: --too narrow and it may have been my fault. But the old regulation says "has been placed in a position within the campaign organization where it would reasonably appear that he or she may authorize expenditures."

MR. SIMON: Yes, you know, I guess that can include something more than conferring official titles.

COMMISSIONER MASON: My point is we would agree that under that rule a title would do it.

MR. SIMON: Yes.

COMMISSIONER MASON: Director of Fundraising or, you know, something like that.

MR. SIMON: Yes. As I said, I think going back to at least that former rule under which, as I said, the Commission has employed the concept of apparent authority in a number of enforcement actions is certainly better than the existing rule.

CHAIRMAN THOMAS: Thank you. I'm next up.

Mr. Sandstrom, Commissioner, I'm trying to get a grasp on the concept that you referred to in your opening remarks and in response to a question. It's not simply a matter of whether or not the principal has provided some sort of indication to third parties that this person may carry authority, but you have pointed out that you still have to have a situation where there is an element of consent on both sides, there has to be an indication of consent on the part of the principal and an element of consent on the part of the agent.

So I'm wondering if your test goes that far where there has to be some element of consent on the part of the principal and the agent, you've really pretty well protected yourself against situations where somebody is going to be unfairly brought in, say, on a coordination charge as a result of some representations of this person who is in the apparent agent role. There has to have been the consent element as well all the way through in order to prove the agency. Haven't we pretty well protected ourselves?

MR. SANDSTROM: As I indicated, there are three elements to an agency relationship. One or more are missing when you're talking about apparent agency. Not only is there consent, there must be

control. And beyond control, they have the acting on behalf of.

Now, if the Commission saw fit to spell out each of these elements in its regulation, my concern with respect to apparent agency would drop because it's making clear that the person has to at that time be acting on behalf of. The suggestion, for instance, that a mere title demonstrates you're acting on behalf of someone I find somewhat disturbing, that you have to be more than a title because that title relates to what you're doing in that campaign.

If you look at how money is raised, okay, if you took, for instance, Bush's initial campaign, he relied on a lot of people who raised money for Governors. He gave them titles. They then continued to raise money for Governors because that's where their bread was buttered. They were very active in state politics. To say that now they're going to be removed from that because they'll be given a title, and so, yes, you could consent to be--why would I resist being given a title? In fact, it looks good on my résumé to be given a title.

So consent isn't sufficient. Yes, I will consent to be your pioneer. But that's not enough.

CHAIRMAN THOMAS: So in order to bring in some--well, I guess maybe in the solicitation context, to bring liability upon President Bush in the last campaign cycle, the actions of Jeb Bush in those circumstances where he had been given that title and so on and where he had exhibited that consent to be a pioneer, what next element would you think would be sufficient to bring him within an agency role that would cause liability?

MR. SANDSTROM: Now, with respect to raising money for the Bush campaign, he can be an agent. The example I used is after the primary he goes out and raises money for the Florida Republican Party. He's the titular head of the Florida Republican Party. It's the role he has assumed, and it seems totally appropriate for him to do so as long as he isn't going to a contributor and saying, "My brother asked me to ask you for money." Then he's doing it at the direction of his brother.

CHAIRMAN THOMAS: That's kind of what I was getting at. There are a set of facts where you would say, okay, you crossed the line, and that would be an example.

MR. SANDSTROM: And that's the typical example when one's acting as an agent. You're doing something at the direction of someone else and to

their benefit. You actually have a duty to your principal.

CHAIRMAN THOMAS: But under those circumstances it was really, as you described it, the actions of this agent who really caused the transactions to go across the line because he was saying to these folks, all right, I want you to give me some money for my brother's presidential campaign effort, basically.

MR. SANDSTROM: Yes.

CHAIRMAN THOMAS: Okay. Thank you.

Just a second or two here. Are we at a point where we can clearly delineate between implied authority versus apparent authority? Talking about our former regulation, it was pretty much in terms of the principal puts someone into a position in the organization where a reasonable person would expect this person to have certain kinds of authority. In a way, that to me sounds like it's pretty close to what we've traditionally called implied authority where the principal is actually doing something vis-a-vis the agent that would create actual authority of some sort.

Are we talking about in this context maybe something where we want to also maybe cover where someone puts someone on the fundraising committee

without even letting them know and that that somehow causes representations to outside persons that this person is somehow speaking on behalf of the candidate? I'm just trying to get the distinction between the implied authority that you'd get by actually as a principal putting this person on a fundraising committee versus what we would consider apparent authority where it's a matter of what is being represented to third parties. Is there some distinction that I can work with here?

MR. RYAN: Implied authority is a subset or a variety of actual authority within the common law of agency. And as a result, or as a reflection of that, it results from communications between the principal and the agent, and there are instances in which the scope of an agent's authority--the scope of an agent's actual authority, whether it be implied or explicit, is identical to the scope of their apparent authority. And the situation you've described seems to be one in which that might be the case, but that is not always the case. It's easy to imagine scenarios in which a principal would, for very understandable reasons, reasons limiting their own liability, if they're only held to the scope--actual authority scope, if their agents were only held to the scope of their actual authority, they

would limit that agent's actual authority in a very explicit manner by giving them a letter saying you are only permitted to do X. And then this principal goes and tells the world that this individual, their agent, is allowed to do far more than X, X plus Y.

And in that instance, the agent himself has actual authority only to the extent that it was bestowed upon him by the principal. But the agent can bind the principal, legally bind the principal for actions taken consistent with the apparent authority that was created by the manifestation of the principal to the world.

So sometimes they're consistent and identical, and sometimes the apparent authority exceeds the scope of the actual authority. And implied doesn't get us there.

CHAIRMAN THOMAS: Okay. Thank you.

Commissioner Smith?

COMMISSIONER SMITH: Thank you, Mr. Chairman. And thank you, gentlemen, for returning, Commissioner Sandstrom for coming in. Just a couple of preliminary points.

Some people are very good at kind of packing their arguments with little phrases that attempt to frame the terms of the debate and the argument, sometimes maybe just give themselves a

little rhetorical boost. And I just have to point out a couple things.

Mr. Noble, you said our regulation was a now invalid rule. Of course, that's not true. It is valid. The court specifically held it remains in place while we go through this process, and the court did uphold it under Chevron, so, of course, we could enact the same rule again, provided we can justify it more thoroughly.

Similarly, it was suggested, Mr. Simon, that we had deviated from settled common law principles, and I just want to read from the court's opinion that causes us to be here today: "The plaintiffs' position does not support the notion that the common law definition of `agent' necessarily includes those acting with apparent authority. In fact, Black's Law Dictionary provides that the term in its normal parlance does not include those acting with apparent authority." And a bit later: "Accordingly, the court concludes that the term `agent' does not have a settled common law meaning that includes those acting with apparent authority."

But having said that, I'm really very sympathetic to the notion that we should include apparent authority. This rule was passed. It was

one of the 90-day rules. When you have that many rules to pass in such a short time, it can create some problems. And I think that perhaps what we were really trying to get at was apparent authority.

For example, to use one of the examples found in the statement from Mr. Noble and Simon and Ryan's group in their joint statement, they cite MUR 4843 involving Mr. Zinn and apparent authority from his position as finance chairman. And I felt, for example, that that was exactly what we had intended our rule normally to get, and that would be gotten under implied authority.

So my question for you, Commissioner Sandstrom, is really along the lines of--you know, you've cited some problems relating to the ability of people to wear multiple hats. But if we could solve that problem, is there really an issue with apparent authority? To take a variation of a question that we asked a couple times this morning, can you show me anything that happened in the last cycle where the use of apparent authority would have been a particularly bad thing?

MR. SANDSTROM: I think that's a very good question. The question I began with is what changes. Would the Rory Reid Advisory Opinion change if apparent authority was included? As I

said earlier, if you were going to include all the elements of agency in your definition, expanding it to be apparent agent would not be quite as disturbing, except for you're punishing someone. You're punishing a principal. And are you going to punish the principal if the apparent agent did not abide by the various duties that are imposed upon agents?

If you look at the restatement of agency, there are a whole list of duties, including loyalty and following the instructions of the principal. So if you're going to impose all those duties by making them an agent, I have a little problem reaching out and including apparent agency, because what you have done then is include all the elements of agency, including the person that has to be operating at the direction of the candidate.

COMMISSIONER SMITH: So you're not so opposed to apparent authority; you just really want it spelled out clearly exactly what the rules are going to be, something along the lines of old 109.1--

MR. SANDSTROM: But, see, I would go a little bit further than that, because if you're going to make someone an agent, you have to then impose upon them all those duties of agency before

you hold the principal liable for their acts. So if that person is not acting loyally, is not acting pursuant to the instructions given, then the principal cannot be held liable. And so if you're going to go down the road of the law of agency, you also have to then include, particularly with apparent agency, all the duties that are owed by the agency to the principal.

COMMISSIONER SMITH: I want to get into a quick question for your colleagues, and it's the same kind of question from the opposite side that we heard this morning. Can any of you point to any situations in the past three years where the lack of apparent authority has created circumvention or major problems under the act?

MR. SIMON: I don't know of any specific situation.

COMMISSIONER SMITH: Nobody else? All right. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Did you want to--

MR. SANDSTROM: Yes, one further--

CHAIRMAN THOMAS: In the last 23 seconds, Commissioner Sandstrom would like to add to that, if that's all right.

COMMISSIONER SMITH: That would be fine to use my time for Commissioner Sandstrom.

MR. SANDSTROM: I have a practical problem. I have to tell people what these words mean. So I have to tell people, the clients, whether they're an apparent agent or not and what restrictions would apply to them.

If the term is left unclear, then people will not engage in activity that they're otherwise permitted to do.

CHAIRMAN THOMAS: Thank you.

Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you. Thanks to all of you for coming.

I suppose what I want to ask, Commissioner Sandstrom--we had quite an interesting exchange when he was on this Commission about this very matter, and I'm sorry to report that some of us were on the short end, but that's how life works.

I read the Roy Blunt article this morning, since Roy's an old friend of mine, and I was interested in his son's success, and others' as well. I suppose what I don't really quite understand from your perspective is that--is it your position that if you are in one campaign you by necessity can't be in another campaign? I'm just not sure I follow this.

MR. SANDSTROM: I think there's a good reason you might not follow it, because I think it's very unclear.

COMMISSIONER McDONALD: No, your position. I know I can understand it. How about your position?

MR. SANDSTROM: In this regard is that advising people--for instance, we've heard discussions of titles, can Jeb Bush--you know, if he raises money in the campaign and does at the direction, subject to the control of the campaign, then also raise money for the Florida Republican Party? I would say yes. So, in fact, yes, you can wear multiple hats, and you're only restricted with respect to your activity is when you're acting as an agent, and there are three conditions that would have to be satisfied to be acting as an agent.

COMMISSIONER McDONALD: Do you think that Jeb Bush is just not smart enough to realize the various roles that he might take, one for Presidency maybe and one for the party of the state? I mean, I'm just trying to understand what the problem is there.

MR. SANDSTROM: I think one of the problems I had pointed out in my comment is that, in fact, the regulation doesn't go far enough, that you

actually should spell out in the regulation that conclusion that you seem to come to, that, yes, Jeb Bush is free to raise money on behalf of the Florida Republican Party when he is not doing so at the consent and control and on behalf of his brother. He otherwise is free. Even if everyone out there knows or believes he's doing it to further the political interests of his brother.

COMMISSIONER McDONALD: Well, I grant you that it's tough, but I'm always puzzled by--I like your position, and I always--it's one of the positions that I did share with you, is that I think notice and certainly clarity are wonderful goals, and we all announce that that's what we intend to do. It doesn't make any difference what program it is, whether it's Social Security or welfare reform or FEC. That's a laudable goal.

But I do think that putting out parameters that get the process going are beneficial and that there's always going to be debate. I don't see the Commission--in my 24 years, I've never seen anything crafted that basically gave the position that was clear that lawyers would not argue over. I just don't think I'm going to live that long. I think my actuarial table will run out before that happens. So I don't consider that necessarily a problem.

I think I'm kind of where I gather Commissioner Smith was in how to try to get at this, and I don't know whether there will be votes to change where we are, and I'm not even sure myself what to craft. That's the whole point in having the panel here.

Does anyone else on the panel have any other thoughts about it, about what we should do, or the other three members are satisfied with the proposed rule? Is that basically your position?

MR. SIMON: Yes.

COMMISSIONER McDONALD: Am I right about that? I gather that's true?

MR. SIMON: Yes, I mean, I guess my point is that the proposed rule is sufficient and appropriate. You know, there's no doubt that the law of agency is incredibly complicated, and there are lengthy, mind-numbing restatements and treatises written to explicate it. And, you know, that's true whether or not you adopt the concept of apparent authority. I mean, that's true just simply in implementing the concept of actual authority, which are already in the rules and which you really have no freedom not to implement because Congress mandated that in the statute.

So, you know, as was said this morning, that ship has already sailed. I mean, you are in the job of having to implement, you know, a very, very complicated doctrine of law around what is an agent and when is an agent operating on behalf of a principal and what are the obligations that run through all the various parties.

You know, I think in a sense that will be explicated by you over time and in the course of enforcement actions and in the course of advisory opinions. But, you know, in terms of apparent authority, I think the regulation in the NPRM is the correct way to go.

MR. NOBLE: If I may just add something here--and this is actually almost more in the nature of a response to Commissioner Smith's question from this morning, which I thought was a fair question, and this afternoon: Are we aware of any cases, and how much actually has to be put in the regulations?

You know, off the top of our heads or the top of my head, I'm not aware of any cases. But as we know, the way elections work, I don't know what's before the agency right now. I don't know whether or not we're going to see in the next year or two cases come out that are going to turn on the question of whether there was apparent authority or

not. That's something that you're going to have to deal with. I know during the time I was here, those questions did come up about apparent authority.

CHAIRMAN THOMAS: Commissioner Sandstrom?

MR. SANDSTROM: Thank you.

CHAIRMAN THOMAS: Last gasp.

MR. SANDSTROM: I just wanted to quickly recite what the duty of the agent is to the principal: the duty of good conduct, the duty to obey, the duty to indemnify the principal for loss caused by misconduct, the duty to account, the duty of care and full disclosure, and the duty of loyalty.

So if your position is that no principal will be held liable if any of those duties are broken, then, you know, dealing with apparent agent is much easier. But if the apparent agent breaks any of those duties, then the principal should not be held liable.

COMMISSIONER McDONALD: Like we do every other aspect of the law.

CHAIRMAN THOMAS: Vice Chairman Toner, you're up.

VICE CHAIRMAN TONER: Thank you, Mr. Chairman. Well, there's no better way to spend an afternoon than discussing law of agency.

[Laughter.]

VICE CHAIRMAN TONER: I'm sure there's no place any of us would rather be.

COMMISSIONER SMITH: Unless it's discussing the law of solicitation.

[Laughter.]

COMMISSIONER SMITH: That can be delicious as well.

VICE CHAIRMAN TONER: We have that another afternoon. Thank you, Mr. Chairman. I want to thank the panelists for being here today.

Commissioner Sandstrom mentioned a hypothetical involving Jeb Bush, and if he were the Chairman of the President's campaign in Florida, and obviously also the Governor of Florida, the question would be if the agency adopted an apparent authority theory in the regulations, apparent authority standard, would Jeb Bush be prohibited from raising soft money for the Florida Republican Party? And, Mr. Simon, I'd like to start with you. What are your thoughts on that? Would that then be illegal?

MR. SIMON: I think if he's not raising the money in his capacity as an agent of the presidential campaign, the answer would be no.

VICE CHAIRMAN TONER: So that Jeb Bush could be the Chairman of the President's campaign in

Florida, and yet still be able to raise soft money in Florida even if we adopted an apparent authority concept?

MR. SIMON: Well, yes, I think that's right. I think in that situation there would be an obligation on him to make clear that he's not operating on behalf of the presidential campaign.

VICE CHAIRMAN TONER: So if he in his fundraising pieces signed letters indicating, you know, obviously you have a close presidential election in Florida, I am the Chairman of the President's campaign in Florida, he would have to indicate in that piece that, by the way, I'm not asking for soft money?

MR. SIMON: Something--I mean, I guess, you know, it's probably analogous to what we were talking about this morning in terms of not being able to--when you're in the position of being a federal candidate or office holder, not being able to solicit non-federal funds, and you have to make clear that you're not doing so.

VICE CHAIRMAN TONER: So if we adopted an apparent authority concept in regulations, the thing that would change is that Jeb Bush might be able to continue raising money for the Florida party, but only hard money. Is that fair?

MR. SIMON: Well, he certainly would be able to continue to raise hard money.

VICE CHAIRMAN TONER: And be prohibited from raising soft money as the Chairman of the President's campaign in Florida.

MR. SIMON: Yes.

VICE CHAIRMAN TONER: And, Mr. Noble, another hypothetical that I'm interested in is, as Commissioner Sandstrom mentioned, it's been a long practice that the finance leaders of presidential candidates after the primary season go to the national committees, go to state parties, and raise hard and soft money for ticket-wide activities in the fall. If you had the finance leaders of a presidential nominee go ahead and do that and move over from the presidential campaign to state parties, and the FEC adopted an apparent authority rule, would it be unlawful for them to raise soft money, in your view?

MR. NOBLE: No, and I think you would have to look at how they did it. But I think if they made it clear at that point they were now working for the state party committee and they were raising soft money for the state party committee, then that's fine.

On the other hand, in going back to your other hypothetical with Governor Bush, if Governor Bush sends out a letter saying I am the Florida Chairman of the President's reelection campaign and I need you to help support the President's reelection campaign, then I think he has--that looks like he is raising money for the presidential election campaign, even if it's going to the state party. That's where the authority comes in.

VICE CHAIRMAN TONER: And that raises some questions that we had this morning. If Jeb Bush, to go back to that hypothetical, was sending out letters for the Florida Republican Party and he's doing so as the Chairman of the President's campaign in Florida, isn't it necessarily the case that that's what he's doing, that he's raising those funds for the President and for the ticket in Florida?

MR. NOBLE: Is it necessarily the case? I think based on those specific facts, that's what it looks like, yes. You know, then you get into questions of whether or not there are other disclaimers in the letter, but based on those facts, yes.

On the other hand, if he writes a letter saying, "I am Chairman of the Florida Republican

Party and I'm raising money," then you may have a different situation. And you made a very good point about once the President moves into the general election--or I guess Mr. Sandstrom made the point—in the general election, then the question of authority changes, what they're actually an agent of.

VICE CHAIRMAN TONER: Mr. Ryan, I'm interested in--you cite the Karl Rove & Co. case, a case near and dear to my heart, where Mr. Rove recovered against a certain Senate candidate in Pennsylvania who was a little delinquent in paying his campaign obligations. But you note in your comments at page 8 that the district court granted relief for Mr. Rove on an actual authority theory, but then the court of appeals, in affirming that judgment, relied exclusively on an actual authority theory and did not find it necessary to rely on an apparent authority theory. And my question to you is: Does that indicate, at least in that case, that actual authority can be broad enough to include liabilities in a number of areas, at least it was broad enough in that particular case to establish liability?

MR. RYAN: Certainly. I mean, I would not make the argument that actual authority is meaningless, nor would I argue that actual authority

does not sometimes provide sufficient basis for finding liability on the part of principals. But I can likewise point to instances in which it's not sufficient and where apparent authority should be relied upon and under common law could be relied upon to establish such liability.

VICE CHAIRMAN TONER: Is actual authority, in your view, strengthened when it includes implied actual authority as well as express actual authority as our current regulations do so?

MR. RYAN: Not particularly, and the reason that it isn't necessarily strengthened by the inclusion of those two types is that inevitably actual authority requires some smoking gun. You need some evidence of how that authority was created. You need some insight into the communications or the manifestations made from the principal to the agent. And perhaps the--let me rephrase that. Implied authority, depending on how it's interpreted, depending on what is required by an agency such as yours in order to demonstrate whether or not there was implied authority, it may slightly expand the scope of actual, but not to the same breadth that apparent authority would--

VICE CHAIRMAN TONER: Well, it's clear you don't need magic words or express actual authority,

right? Implied authority can be inferred from the circumstances.

MR. RYAN: Right. I think it's just a more limited set of circumstances, and the circumstances arise from the relationship between the principal and the agent as opposed to arising from manifestations from the principal to the general public.

VICE CHAIRMAN TONER: Thank you.

CHAIRMAN THOMAS: Mr. General Counsel.

MR. NORTON: Thank you, Mr. Chairman. Thank you, panel. I wanted to ask some questions about something that was in your testimony, Mr. Noble and Mr. Ryan, your oral testimony. And it has come up a few times since, and that is, in order to have apparent authority, you testified, there must be consent of the agent. Mr. Noble, you said must be consent of the agent or there's no agency relationship.

I thought I understood this coming in today, but I don't see anything in the law that requires that. What the law requires is that the third party reasonably believes that the person is authorized to act for the principal, and the principal must either intend--must intend to cause the third party to believe that the agent is

authorized to act for him, or he should realize that his conduct is likely to create such belief. And your written testimony on page 6 cites a couple of cases for the proposition, the black letter proposition, "A principal may be held liable based on apparent authority even if the agent's acts are unauthorized, or even illegal, when the principal placed the agent in the position to commit the acts." And, again, there you cite the Richards case and you cite it again--you're citing me, I think, in the MUR 4843.

So I'm confused by that. It also doesn't seem consistent with another point that you make and that the sponsors make, that the notion of apparent authority makes enforceability easier because it requires something less intrusive and fact-specific.

So I don't want to walk away with a new area of confusion, and I'd like to know if you can address that.

MR. NOBLE: Yes, and I apologize if I added to the confusion. I think what's happening here is that we're all to a certain extent throwing around agency and authority and apparent agency and apparent authority. And they're actually different things.

What I actually said was that nobody has ever been held to be an agent without their knowledge that they're an agent--I'm sorry. Nobody has ever been held liable for acts they have undertaken as an agent if they have no knowledge they're an agent. It doesn't mean that you can't have apparent authority. What you then talked about was an agent who is held to have apparent authority where they didn't know they had that authority because of what the principal said to a third party. That is possible. You still have an agent.

MR. NORTON: You and Mr. Ryan both used the term "consent," and that's what confused me. What I wrote down you said was "must be consent of the agent or there's no agency relationship." I thought Mr. Ryan said the same thing. I don't read that requirement in the law of apparent authority.

MR. RYAN: That's not what I had said. I said in order for there to be liability in the agent, there must be an agency relationship. The agent must be an actual agent, not an apparent agent. And I think that in this discussion, as Larry had mentioned, the concepts of apparent agent and agent have been conflated, and they're two very different things. And the difference results in a different imposition of liability.

Under apparent agency, the agent may not know that they're an agent, and they have no fiduciary duty to the principal under the Second Restatement of this concept. Nevertheless, the principal under such circumstances, when the principal holds a person out to be their agent, when they create apparent authority in an individual, the principal himself or herself may be held liable.

What I had actually said was, in other words, to be held liable as an agent, the agent must consent to enter an agency relationship, and I was very careful not to imply--well, I hoped not to create the implication that principals could not be held liable under the theory of apparent authority.

MR. NOBLE: And if I may just for the record, because it's one of the reasons I read this word for word, because I know it's complicated. First, no one has ever suggested a person can be found to be liable for violations of the law as an agent of a principal where that person has no knowledge of and has not consented to being an agent, but the principal may be liable.

MR. NORTON: Well, let me follow up on another thing and make sure I didn't get this wrong, too. You were talking about the concept of apparent authority, and as you suggested this morning, you

said it's going to depend a lot on facts and circumstances, it's going to be very fact-specific.

As I said earlier, I am attracted to one of the virtues of apparent authority--and I think you make the point in your comments; I know it's in the sponsor's comments--that it's much easier to establish because it's based on an objective and a reasonable-person standard, and it doesn't require proof or the kind of intrusive investigation that would be necessary to determine what transpired between two people.

Is it going to be very fact-specific such that an intensive investigation is always necessary? Or does it have the virtue of simplifying the Commission's work in this area?

MR. NOBLE: It will be fact-specific, but I think it's one of those situations where the facts are much more readily available to you than the facts involved in proving actual authority, because apparent authority, you may just need the facts based on what was said in a letter, a fundraising letter, or the title and what was described as the person's position. That deals much more with how people are held out than what might possibly go on as private discussions.

I'm very sympathetic with the desire to have bright-line rules. Life would be much simpler if we all had bright-line rules in everything we were working with. But as we know from the express advocacy history, bright-line rules sometimes just don't work, and agency is one where there's a whole body of law and the reason we're all having such a great time discussing it, is because there's a whole body of law of agency and it is fact-specific.

MR. NORTON: Let me get in one question to Commissioner Sandstrom before my time expires. The court, as you know, said that while the Commission provided an explanation for why agency principles supported the current definition, it did not make any effort to note the change in its view, referring to the former regulation under the coordination standard, let alone explain the advantages of the new definition over the old.

My question to you is whether you're aware of any evidence that past reliance on the concept of apparent authority, either in the coordination or other context, impaired political discourse or interfered with a candidate's or a party's ability to interact with their volunteers.

MR. SANDSTROM: I would invite you over to any campaign committee, and you'd see the person who

writes checks is greatly limited. You don't allow many people to write checks from a campaign to incur liability for the campaign. So in that context of making expenditures, finding people who have that authority to make expenditures responsible is very different than in the fundraising context where you invite thousands, literally, as I said, millions of people to raise money for you. There is no way on Earth, you want grass-roots fundraising, you can control their acts. Are they--have they been given authority to raise money? By God, they've been begged to raise money.

Remember, this isn't--on the expenditure side, it's more like the traditional master-servant relationship. On the fundraising side, it's reversed. The master here are the people you beg to raise money, the people you beg money from. They're in control. They can walk away anytime. You're courting them. You know, so it's very different from controlling how you spend money trying to control how you raise it, because you essentially want chaos to reign. You want those meet-ups at the Barnes & Noble. You want the Bush side to have those 10,000 house parties and give them all a title when they come, give them a DVD, so when people come they think that you are important. And so you can

give titles. But you--just please send in the money, because--you know, please raise the money. So it's very different.

I would expect, if federal judges had to run for office and raise money, the view of the agency may be expanded, not only this agency but the term "agent," because they would see that they, too, would have to go out and beg people to raise money for them.

MR. NORTON: Thank you.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: A follow-up question, Vice Chairman Toner?

VICE CHAIRMAN TONER: Thank you, Mr. Chairman. I only wish I could have attended those thousands of house parties. I'm sure they were fascinating on both sides of the aisle.

But I just wanted to follow up on one point. Commissioner Sandstrom, you mentioned the impact on volunteers, and AFSCME filed comments with us, and I just want to read briefly from their comments and get your thoughts. Reading from the AFSCME comments at pages 2 to 3, it says: "Unlike commercial activities where individuals are paid for their work on behalf of the organization, political campaigns rely extensively on volunteers." And

AFSCME goes on: "Challengers rely more heavily on volunteers because they frequently lack the fundraising capacity to staff their campaigns with paid employees" and frequently rely on titles such as Steering Committee or Executive Committee, various titles--liaison, honorary titles. And then AFSCME concludes: "All these acts are designed to give the appearance that particular individuals play a central role in the campaign."

Here's my question. Is it your view that if we establish an apparent authority regulation, that could have a disproportionate impact on those campaigns or causes that rely to a larger extent on volunteers that rely on these kinds of titles to involve people?

MR. SANDSTROM: Absolutely.

VICE CHAIRMAN TONER: Why?

MR. SANDSTROM: Because people do not want to believe--one, there are a finite number of people in any community who are willing to ask their neighbors for money. Everyone relies on the same people's money. And if there is a possibility there's going to be a federal investigation into your conduct, whether you--because you were the Montgomery County Chairman for the Kerry campaign and you now want to raise money at the same time for

someone running for Montgomery Count Executive, that if there is some danger that you will be held liable, why would you take on this duty? You're not making anything from it. You're doing it as a volunteer.

When you take this concept about how you allocate profit and loss among private parties and then take it over to how--who do you punish for raising political dollars, there is a--you best do it in a way that's very prudent and careful, or else you're going to drive people from politics.

VICE CHAIRMAN TONER: And do you think, just to conclude, that an apparent authority concept in the rules would have a disproportionate impact on volunteer-based campaigns including challenger campaigns?

MR. SANDSTROM: If I had to go out and explain to any potential fundraising volunteer the conversation that has taken place here this afternoon--

VICE CHAIRMAN TONER: Good luck to you.

MR. SANDSTROM: --and say you have apparent authority, you're an apparent agent, you're an implied agent, you're an actual agent with express authority, you're going to lose people. Remember, most of these thousands of people who volunteer do

it because they're civic-minded. Why would you want to prevent them from changing races and raising money for them? What you want to prevent is the principal from violating the act, and that's what this is--and they shouldn't be responsible for an agent who is not acting at their direction. This is punishment. This is not allocating profit and loss. This is punishing someone.

VICE CHAIRMAN TONER: Thank you.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: I'm not sure who is next. Commissioner McDonald?

COMMISSIONER McDONALD: Mr. Chairman, thank you. I would just be remiss--let me say a couple of things, and I didn't want to, to be honest about it, but in view of the last comments by the former Commissioner, I take his point. And we certainly don't--we're not interested in punishing people who inadvertently get themselves tied up. And I think that certainly can happen.

But let me just say this: For years I have been told how the process is--this action and that action will have a chilling impact on the political process. Records amount of money are raised each and every time. That has just always been the same

argument. It has just simply not materialized in the 24 years I have been here.

My good friend said one time, not only at a meeting with us but in a seminar I watched him later, about the speech police and the FEC was going to be in the churches. I don't even get to church on Sunday myself, and there ain't no speech police running around.

So I always want to be careful. I hope what we do, wherever we come out on this particular matter--and it's a tough one. I'd take that and realize we're all trying to grapple with it. But I do always want to be a little bit careful about using terms that will I think unduly put the fear of God in people. Commissioner Sandstrom says if you told people in the general public today what was going on here, they would be in shock. That's true. I couldn't agree more. If you told them on any day what we were doing here, they'd be in a state of shock. This is not a unique day, and I know he knows that.

So I just want to be sure that we're all kind of on the same page here, because that's not unusual. And that still begs the question of how we have to handle this particular matter.

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

I feel a little bit like our General Counsel. I thought I understood things, and then I find I'm a little bit more confused at the end of the day than I was at the beginning.

I'm very perplexed by the answer that you gave to our General Counsel, because it sounded to me like what you were saying was you could have an apparent--you could have an agent with apparent authority who wouldn't know he had apparent authority because he didn't have actual authority, and the agent wouldn't be liable but the principal would.

But it strikes me that if that is--and I see the General Counsel nodding, so that's what he understood also. That strikes me as a recipe for imposing liability because if the agent who has the apparent authority doesn't know he's got the apparent authority, then of course he's going to go out and violate the law because he doesn't know he's not supposed to be doing these things that he is only not supposed to be doing because he is perceived as an agent of the principal.

So I have a problem with that, and I also want to just kind of raise this general concern that

I have because I know that you all are concerned about winking and nodding. There's always a lot of talk about winking and nodding, that somebody is going to be--get actual authority to do something, but with a wink and a nod the principal is somehow going to convey that even though I am actually limiting your authority, you know and I know that I'm really not, and I want you to go out and raise this soft money.

And I'll tell you, my experience, I dealt with office holders in a variety of contexts. I've counseled them as an ethics committee staffer, somebody that didn't work for them, I've represented them, and I've investigated them. And my impression is that, yes, there are some people out there that are capable of winking and nodding. I won't deny it. But there are also a lot of people out there that don't want to get anywhere near that wink or that nod, and they are very, very concerned about always behaving with the most upright conduct.

So, you know, let's say you're Senator John McCain, and you say to your staff, your fundraising staff, "It would be so embarrassing for me of all people to have somebody out there raising soft money who would be construed as my agent. I want to be 100 percent clear. I do not want you to do this."

And one of his agents, somebody that he's out there representing to be one of his agents, then goes and says, "You know what? I know he said that, but I'm sure that it would help him if I raised this soft money, so I'm just going to go against what he explicitly told me and raise soft money for a state party organization in a way that's going to help his campaign. I'm going to tell people it's going to help his campaign, and that's why they've got to give to the state party, because I'm so devoted to Senator McCain."

And my question is: How does an office holder who really wants to obey the law and instructs all of his people that he wants them to obey the law protect himself? Because once you say that, what else can he do to protect himself against somebody who then goes out and, for whatever misguided reason, breaks the law? So there's two questions in there.

MR. NOBLE: Let me start. First of all, I don't believe I today used "wink and nod." I'm not sure anybody on the panel--

COMMISSIONER WEINTRAUB: Well, it's in your written--

MR. NOBLE: I'm talking about today. I thought you said today. And there's a reason,

because I do think that what we're talking about is, for today, much more core activity. And, again, let me try to explain again my response to the General Counsel.

There has been concern--and I think Mr. Sandstrom raised it. There has been concern about whether somebody who did not know they were connected to the campaign would be held liable for some act because of what the principal said to a third party. And what we're saying is you can't be an agent, an actual agent, unless you know you're an agent, unless you've agreed to be an agent. I can't go out and say something to Don Simon later on that makes Larry Norton an agent of the Center for Responsive Politics. That's what we were saying. So you don't have to worry about the person who doesn't know what's going on here.

In the situation, what apparent authority allows is getting at that situation either where there is--I will now say it--a wink and a nod or whether or not it's set up in such--

COMMISSIONER WEINTRAUB: Really, you wanted to say it.

MR. NOBLE: I didn't. I really didn't. Anyway, or where we're dealing with a situation where the candidate or the campaign has set it up in

such a way as to leave the impression the person has the ability to do the activity that they're doing.

You raise a very good question. I think in the case where a candidate says there's no way any of you are going to raise soft money for the state party committee, that is not within your authority and I'm making it clear that all you guys can do is raise money for me, I don't want to see you working for the state party committee, I think there's an argument--and I'll defer to Paul here because he's actually read far more on this than we have. I think there's an argument that the person has exceeded the scope of any of their authority at that point.

MR. SIMON: Let me try to answer the same question by giving you two hypotheticals where I think liability should be imposed on the principal and--

VICE CHAIRMAN TONER: That's only fair given all the hypotheticals we've thrown at you today.

MR. SIMON: Well, I'm not going to pose it as a question, though. Two cases where I think liability should be imposed on a principal, one where it should not.

The first case--and you actually alluded to this problem earlier--is where the principal tells an agent, "You're my guy, you're my fundraiser, I'm going to hold you out to the world as the chief fundraiser of this campaign," privately says to that agent, "Of course, you can't raise soft money," but holds him out to the world as a chief fundraiser, then the agent goes and raises soft money, and when the Commission comes back to the principal and says--to the campaign committee and says, you know, your agent, your apparent agent was raising soft money, he says, "I told them not to do it, there was no actual authority for him to do it, so I'm not liable."

In other words, the problem is that if the principal just--

COMMISSIONER WEINTRAUB: Should he be? Should he be liable?

MR. SIMON: Yes, I think he should in that situation, because he can get--you know, it's a kind of get-out-of-jail-free card if he just says, you know, just don't violate the law.

VICE CHAIRMAN TONER: Even though he privately said don't raise soft money, you think there should be liability?

MR. SIMON: Yes, if that's all he does. If that's all he does.

The second situation--and the reason is because in every instance, just by giving the agent a private one-line disclaimer he immunizes himself from any responsibility, and I don't think that's correct.

The second situation really is the situation that was presented in MUR 4843. What the General Counsel's analysis said there is that the campaign committee may be held civilly liable for Mr. Zinn the agent's actions because it placed him in a position where he had apparent authority to act on its behalf and subsequently was negligent or reckless in its supervision of his activities.

And I think where the campaign committee puts an agent out there, represents that person to the world as having plenary fundraising authority to operate on behalf of the campaign, and then just doesn't monitor, doesn't supervise, doesn't train, doesn't take any steps to make sure that its agent complies with the law when he's operating on the campaign committee's behalf, I think that kind of situation of negligence or reckless behavior is a proper one and to impose liability on the principal.

Then the third situation is, I think, something--to me, the situation you posed where there really is evidence that the campaign committee took reasonable steps to train, supervise, monitor their agents to let them know what the rules are and to have some system in place to ensure that people operating on behalf of the campaign are complying with the law.

I think in that situation if an agent engages in illegal activity, I think the campaign committee should not be held liable.

COMMISSIONER WEINTRAUB: But I'm still confused as to what the campaign is supposed to do. Are they supposed to say, "Here, tape record all of your conversations so that I can review them and make sure that you're not being bad"? I mean, if you tell them, you instruct them don't raise soft money, whatever you do don't raise soft money; this is what soft money is, don't raise it, and they provide them with--you know, I don't know what you mean by training. I'm trying to figure out what is the candidate supposed to do. What is a careful, conscientious candidate supposed to do to ensure that they're not going to end up liable?

MR. SIMON: It seems to me a conscientious candidate should have systems in place to ensure

that people operating on behalf of the campaign know what the rules are and some mechanism to ensure that the campaign's agents are operating properly.

COMMISSIONER WEINTRAUB: What are those systems and mechanisms? That's what I'm trying to get at. What are they supposed to do?

MR. SIMON: You know, I think they're supposed to provide them with the rules. I think they're supposed to make sure they understand the rules. I think there should be, you know, some compliance training for agents.

Again, you know, it depends. It's not one size fits all. I think the guy who's the finance Chair of the campaign pretty much ought to know what's in 11 C.F.R. You know, the person who is the Montgomery County local precinct potluck house party fundraiser doesn't have to have that level of knowledge. But, you know, the principal fundraising agents for the campaign ought to be held to know what the law is and the candidate ought to ensure that people operating on his behalf, you know, are sufficiently trained to perform their responsibilities.

MR. NOBLE: If I can add to this, this is something that the Commission has been dealing with for 25 years. You hold campaigns liable for

receiving excessive contributions even when they've been told--even when the people said don't accept excessive contributions. I mean, there's a certain level at which you do hold campaigns liable for their activities.

But I also think there's a distinction here, as long as we're throwing out hypotheticals, in the situation where the candidates says, "I'm telling you I don't want you to raise soft money for the state party committee," and then the candidate sends big donors over to the--says, "Why don't you go talk to my fundraiser? He can tell you how the state party is going to help me, and you can give the state party--you can really help me through the state party where we won't be limited," then I think, yes, they should be held responsible for that.

COMMISSIONER WEINTRAUB: In that case you don't need to go to the agent. The candidate has already broken the rules.

MR. NOBLE: Well, it depends on your definition of "solicitation." You're right--

VICE CHAIRMAN TONER: You also have there liability under implied actual authority.

MR. NOBLE: Right, I'm saying--

VICE CHAIRMAN TONER: You don't need apparent authority for liability there.

MR. NOBLE: Okay, the apparent authority in that situation would be just saying, "Go to my fundraiser, and he is going to--and he is working for the state party committee now, he's going to help you." And then the fundraiser turns around and says, "The way you can help is writing a $100,000 check to the state party, which we're going to use to help Senator McCain."

CHAIRMAN THOMAS: Well, I think we've gone past our time. We've talked about a lot of hypotheticals. We have the labor movement and the trade association movement waiting anxiously in the wings, and so we best move on.

We will take a 5-minute break only, just so we can try to get a little bit back on track, and we'll start our next panel in 5 minutes. Thank you.

[Recess.]

CHAIRMAN THOMAS: We are going to take up again. We have our last panel for the afternoon. This panel will address the Commission's proposed rules regarding payroll deductions by member corporations for contributions to a trade association's separate segregated fund.

The witnesses are Diane Casey-Landry, who is President and CEO of America's Community Bankers, the petitioners in this rulemaking; Laurence Gold, Associate General Counsel of the AFL-CIO; and Pamela Whitted, Vice President of Government Affairs at the National Stone, Sand & Gravel Association.

We're working with a 5-minute rule here. We're going to ask you to make an opening statement that doesn't exceed 5 minutes. We have a light system. We, unfortunately, do not have a Chairman who knows how to make it work properly, but you'll have to bear with me. We'll try to reserve the balance of time for this hour's gathering to have questioning by the Commissioners.

We're going to go alphabetically, so Ms. Casey-Landry, if you would like to begin, please feel free.

MS. CASEY-LANDRY: Thank you. Good afternoon, Chairman Thomas, Vice Chairman Toner, Commissioners Mason, McDonald, Smith and Weintraub.

America's Community Bankers welcomes the opportunity to testify at this hearing in support of the Federal Election Commission's proposed rulemaking to permit payroll deductions by member corporations to its trade association political action committee.

As you said, I'm Diane Casey-Landry. I'm President and CEO of ACB, and we're the trade association for the nation's community banks.

First, we strongly support this proposal and we urge the Commission to adopt the rule as proposed as quickly as possible. ACB petitioned the Commission to undertake this rulemaking. Because of the representative of community banks, we understand how much has changed in the payment habits of consumers since this 29-year-old prohibition was enacted in 1976.

Today payments by individuals, employees and small businesses increasingly are automated. A key factor in this change is the ever-expanding use of the payroll deduction as a preferred method of making payments. Why? There's three key reasons to that. First, consumers are demanding more convenience and greater control when it comes to their finances; second, convenience comes in the ability to have payments and deposits completed quickly, conveniently and more safely; and third, the use of payroll deduction is viewed as a painless way to spread payments out over a year.

Taking more control of one's finances is also a key component in what we term improved financial literacy, something that is important to

both community banks as well as members of Congress and both the current and former administrations. By including a schedule of regular payments as part of the budget, consumers are better able to manage their finances.

The change in consumer payment habits has been very dramatic. Americans have adopted electronic payments as the preferred means of completing financial transactions at a rapid pace. Today 135 million people in the United States utilize direct deposit for their paychecks, while more than 50 million American households make at least one monthly payment electronically.

Later this year the Federal Reserve Bank of Boston is hosting a conference to study the changes in the payments behavior of consumers. Payroll deductions have become a preferred method of making payments because they allow the consumer to better manage their payments over time. Payroll deductions have increased the number of people participating and making contributions, and that's whether to a charitable organization, a retirement account or to another recipient.

If you even consider the Combined Federal Campaign fundraising efforts, the introduction of payroll deduction enabled the CFC to grow, both in

the number of contributors and in the amount of their contributions. More than 90 percent of the CFC's raised funds come through payroll deductions today.

In the case of my association and our affiliated PAC, when we offered our employees the ability to contribute by payroll deduction, we saw a significant increase in the participation levels as well as in the overall dollars that were contributed to the PAC.

American Community Bankers represents community banks of all sizes, yet most of our members do not have their own PAC. For many individuals and employees of small businesses, a trade association PAC often is the only vehicle, other than through a single contribution, that enables the individual to add their voice to the political process. In adopting this rule, the Commission will provide the opportunity for many individuals, employees and small businesses to make voluntary contributions in a very convenient manner. Increased participation in the electoral process is a goal that we can all support.

Throughout this rulemaking process the Commission has received overwhelming support for its

effort, and we appreciate the AFL-CIO's support in making PACs more widely accessible.

We also believe that the proposed change that the AFL-CIO has suggested will confuse the necessary and important distinctions in the rules between trade associations and corporations. A corporation can be a member of a trade association and provide prior approval for its employees, while its parent corporation can be a member of a different trade association and provide prior approval for their employees. Each trade association is limited to soliciting the executive and the shareholders of the member corporation. It cannot go up or down the corporate chain. Trade association rules allow only to solicit the member corporations restricted class to be solicited, and you cannot do the subsidiaries or divisions of the member.

We believe the AFL-CIO's proposals would undermine the importance and necessary distinctions in the rules for trade associations and corporations.

The Commission has drafted a straightforward simple rule that permits members of trade associations to provide for a payroll deduction of a check-off system for voluntary

contributions by its solicitable class of employees. We believe the proposed rule accomplishes what the Commission set out to do and should be adopted as proposed.

We thank you for the opportunity to testify today and we look forward to a final rule in the very near future.

Be pleased to answer any questions when you're ready. Thank you very much.

CHAIRMAN THOMAS: Thank you very much.

Mr. Gold, nice to see you.

MR. GOLD: Thank you, Mr. Chairman. I appreciate the opportunity to testify today on behalf of the AFL-CIO and its 57 national and international unions. I'm here to raise a single, and I hope relatively straightforward point, although I recognize that many things are not straightforward, and I'll be pleased to respond to the points just made.

Our basic proposition and the reason we submitted comments and why I'm here today is to ask that the proposed regulation be revised to reflect the text of Section 441b(b)(6), that is, that any instance where under the regulation a trade association payroll deduction by a corporation utilizes a payroll deduction method be extended to

the unions that represent not only at the corporation, but in the words of the statute, "its subsidiaries, branches, divisions and affiliates." The regulation right now refers only to the corporation itself, whereas 441b(b)(6) pretty uniquely in the statute extends to the other corporate affiliations.

441b(b)(6) is not confined to the employees of the--it does not confine itself to a corporation's solicitations, just to its own separate segregated fund. And we believe that the text of the statute itself is dispositive of our request, that in any instance where payroll deduction is permissible by a corporation that there be parallelism provided to the labor organization.

We would also point out that a union can only utilize a payroll deduction method that it acquires as a result of a corporation providing it to its own restricted class, or that including on behalf of a trade association where the union itself represents workers, where it has bargaining units throughout the corporation. It is not some blanket proposition enabling it to solicit anybody, and that provides a certain degree of parallels in fact to the trade association regulation that was referred to a few minutes ago.

We'd also point out that what the statute provides and assures to labor organizations here is not any kind of extension of restricted classes and it's not a subject of the degree to which a particular corporation or its subsidiaries actually do extend payroll deduction or offer it. It's the trigger by any organization, any affiliate within the corporation for that measure, and it provides the labor organization with an equivalent measure. But it's not really with regard to the degree of use by the corporation itself.

I guess what I would finally point out, that different corporate entities do belong to different trade associations, trade associations for many corporations. It's the proxy PAC for many corporations. The fact is there are only a few thousand I believe corporate PACs and there are, I believe, over several million corporations in the United States. We recognize that these corporations, especially over time with consolidations and the like, are very complex enterprises, may belong to many different trade associations and may be involved in many businesses.

The same sort of phenomenon is not--it just simply doesn't exist within the labor movement where you have unions, and all they are is unions. They

represent, obviously, different kinds of enterprises, but they are--a single national union will have its affiliate subject to the conditions, affiliation regulation and statutory affiliation rule. And there is only one national labor federation, the AFL-CIO. That was the case when the act was enacted 30 years ago, and it is the case now. So there are substantial differences.

In any event, we believe the statute itself dictates how the regulation ought to be written in this regard, and we would just ask you to make that change.

Thank you.

CHAIRMAN THOMAS: Thank you.

Ms. Whitted?

MS. WHITTED: Good afternoon, Mr. Chairman and members of the Commission. My name is Pamela Whitted, Vice President of Government Affairs for the National Stone, Sand & Gravel Association, also known as NSSGA.

Thank you for this opportunity to testify today on the notice of proposed rulemaking regarding contribution to trade associations' political action committees from restrictive class employees of member corporations through payroll deduction.

NSSGA represents the crushed stone, sand and gravel producing industry, collectively referred to as aggregates. Our member companies produce 90 percent of the crushed stone and 70 percent of the sand and gravel consumed annually in the United States. We are the largest mining association by volume in the world according to the U.S. Geological Survey.

Our members' products are ubiquitous. Thirty-three percent of our market is in residential construction; 31 percent is roads and highways; 36 percent is public works such as airports, water treatment plants and schools. A small portion of our products also go into the manufacture of grass, paint, pharmaceuticals, cosmetics, chewing gum, household cleaners and many other consumer goods.

NSSGA member companies have operations in approximately 70 percent of the nation's counties and virtually every congressional district is home to an aggregate's operation. The Department of Commerce classifies at least 70 percent of our industry as small businesses.

NSSGA strongly supports the reforms that the Commission is considering today to current FEC regulations governing the ability of trade associations to utilize payroll deduction as a means

of collecting contributions for their PACs from eligible employees of their member companies.

The primary role of a trade association is to allow businesses with similar interests, some large, but many small, to pool their resources to further their collective interests. A trade association's PAC is integral to this role.

The overwhelming majority of NSSGA members do not have their own PACs. It simply makes no sense for them financially or politically to have a PAC when they can pool their resources with those of their peers to have greater impact.

Rock PAC, NSSGA's PAC, provides them with this opportunity, and it is a principal avenue for their political participation at the federal level. Even among NSSGA's large company members that have federal PACs of their own, there's a significant number of eligible individuals who participate to some degree in our association's PAC. These individuals recognize that NSSGA's reach as a nationwide association extends far beyond their own company's locations and represents the industry on a truly national scale.

The current prohibition on payroll deduction unfairly penalizes businesses that belong to trade associations. Nothing in the Federal

Election Campaign Act requires such an exclusion, and it is time to place these companies on the same footing that unions and corporations have enjoyed since 1977. In doing so, it will increase the ease of participating in the political process for every single person who wants to get involved and support the industry's political interests financially.

As noted in the written comments that NSSGA submitted, whatever policy rationale may have existed for placing this payroll deduction restriction upon trade associations in the late 1970s has disappeared with the advent of new technologies that have changed the way that people handle their day-to-day financial transactions.

FEC advisory opinions over the years have rushed to catch up with these advances that by their very nature are reactionary. This is an opportunity for the FEC to be proactive and to obviate the need for additional advisory opinions in this particular area. It will also correct the discriminatory policy that sets apart individuals who work for corporations that belong to a trade association from those who are members of a union or whose corporations have strong PAC programs of their own.

Thank you for your consideration of our position. We look forward to working with the

Commission to institute the sensible reforms on payroll deduction that are currently before you. I'll be happy to respond to any questions.

CHAIRMAN THOMAS: Thank you very much one and all. I'll start with Commissioner Smith, who I will note for the record is the primary mover on this particular rulemaking. He should be given credit where credit is due.

COMMISSIONER SMITH: Thank you, Mr. Chairman. I appreciate that. I have been supportive of this and have tried to get this ball rolling last year when I occupied the august seat in the center of the table. I appreciate all of you for coming out and giving us your comments, both in writing and here this morning and this afternoon.

But I am, I think not really going to ask any questions. We have about 35 comments that were received. All of them are in favor of the change. I haven't seen any comment opposed. The only comment I think that indicated any reservations--and I'm not even sure those would be called reservations--was Mr. Gold's comment, and the comments submitted by Mr. Gold on behalf of the AFL-CIO are typically concise and to the point. I think I understand them, and I really have no questions.

So we'll move things along, and I'll yield my time. Thank you.

CHAIRMAN THOMAS: Thank you. This is going to be a big disappointment to the next questioner.

Commissioner McDonald?

COMMISSIONER McDONALD: It actually is not because once again, I might point out, I am agreeing with Commissioner Smith, as has been the case quite often. I would say this though, particularly to Pamela and Diane, and not taking away from Larry. It's always good to see you, Larry. And he's been here on several occasions.

I do think if there are other thoughts that you would want to put on the record--although I think you were very concise, I'd be happy to let you do so simply because I gather from both of you this is the first time here. It's the first time I remember seeing you. Maybe I'm wrong about that. But do you have any other things that you'd like to say?

MS. CASEY-LANDRY: Let me just say thank you very much. Yes, it is my first time here. Thank you very much for the opportunity, and we very much appreciate the support of Commissioner Smith and also Toner, who have seen us and heard from us

several times in the past regarding our desire to move this forward.

COMMISSIONER McDONALD: We'll still try to be for you, by the way. We won't try to--

MS. CASEY-LANDRY: No. I just hadn't had an opportunity to meet with all of the Commissioners. The community banks we represent are across the country, but we also have some uniqueness in our membership, and I just wanted to draw this out to you because it does answer the question. We think that the rule was done correctly, and we think it strikes a good balance between the interest of the trade association and the interest of the corporation, and we think it's important that we don't actually--we blend those.

I mean in my membership today I have some, what are called diversified holding companies, and in those diversified holding companies I have--I can give one example of a member that is affiliated with our PAC and it's a financial institution in Hawaii, but it's owned by a power company. We cannot solicit to the power company and we cannot do anything with respect to that, nor can the power company solicit down into the bank.

The power company has chosen not to affiliate in this instance with any PAC, and so

therefore, they don't provide the direct deposit option, although, you know, to their employees. We wouldn't want to see that happening. I'm very concerned about blending up between--up and down the corporate chain because in the banking system--and we didn't contemplate this until I had heard this--we have a highly regulated environment, and in the banking arena, which is different from other trade associations, but banks are highly regulated and there's rules that prohibit the bank from doing anything with the parent or going down into their subsidiaries. They're separate legal entities and those rules are structured, meaning that if a bank undertakes something it has to be a separate decision, and particularly when you're dealing with diversified financial holding companies, which we still have some of those in this country.

So we would just like to see the rules apply in terms of the entity that is affiliated with the PAC, and think the Commission struck the right balance and it got it right in the rulemaking. So thank you very much.

MS. WHITTED: This is my first time for testifying before the Commission. And I would just like to add I think that there's three basic reasons that we see why this change makes sense. One is

that we, as the association, went to the payroll deduction this year and saw a real increase. Sixty percent of our employees decided to do the payroll deduction. We think that it will increase political participation in the process which is what we all want to see happen. It's a question of fairness. We should be on the same footing as corporations and unions, and finally, in today's world it just makes a lot of sense.

COMMISSIONER McDONALD: I apologize. You probably said it. How many employees are you talking about?

MS. WHITTED: Well, we're not talking about a huge number, 28. Of that, 20 are eligible to participate in the PAC, and we had 10 take advantage of that.

COMMISSIONER McDONALD: Okay. I thank you. I may have more time. I don't know. The chairman, I notice he keeps pushing the button when it's my turn. I'm very suspect.

MR. GOLD: I want to make just a brief comment in response to Ms. Casey-Landry. I take the description of the structure of the banking industry to be connected to a point that the regulation is written as proposed ought to stay as written and not be modified as we propose. But I think it's a fact

that the act itself contemplates and includes all sorts of corporate structures regardless of any other laws, state laws peculiar to particular industries that may dictate particular requirements for corporate function or approval or relationships between organizations.

What the Commission is concerned with is the affiliation rules under the act, and a corporation, I think, regardless of the different kinds of circumstances that may exist in the banking industry or others, the corporate affiliation rule under the Federal Election Campaign Act still applies, and that is the premise of our request that Section b(b)(6) itself explicitly makes a provision that was part of the bargain that the Congress reached 30 years ago and that hasn't changed. Simply we just ask that that be reflected in the new regulation if it's adopted.

COMMISSIONER McDONALD: Thank you. Thank all of you.

CHAIRMAN THOMAS: Next we go to Vice Chairman Toner.

VICE CHAIRMAN TONER: Thank you, Mr. Chairman. I want to thank all the panelists for being here this afternoon, and, Ms. Casey-Landry,

it's great to see you again. Thank you for joining us.

Mr. Gold, I just want to follow up on a couple things. As I understand your testimony, it's your view that there's nothing in the act that requires the prohibition on payroll deductions for trade associations in this circumstance?

MR. GOLD: Right. I think our premise is labor organizations have a longstanding familiarity and use of the payroll deduction mechanism for dues, for PAC contributions and for other matters. And the act itself does not prohibit the extension of that method of deduction to trade associations and we don't believe that where the act lacks a prohibition or one that is reasonably or necessarily construed, that it's there, and that is why we have not opposed the principal aspect of the regulation itself.

VICE CHAIRMAN TONER: And if we adopted the regulation with the modifications you suggest, you'd view that as an appropriate action?

MR. GOLD: I do.

VICE CHAIRMAN TONER: And in terms of what you would do with this 114.8(e)(4) proposed regulation, would you be comfortable if we basically inserted language from current 114.5(k)(1), you

know, to get to this affiliate question, would you be comfortable with that kind of an approach?

MR. GOLD: Yes. I think what we suggested was that the same phraseology be used, a corporation including its subsidiaries, branches, divisions of affiliates, which is currently in 114.5(k), and as my written testimony said, we would suggest that the same language be used here so that there is a parallelism in the regulations which are longstanding as well.

VICE CHAIRMAN TONER: I'm interested, Ms. Whitted, you indicated--I want to get your thoughts on this--that obviously some corporations are not large enough to have their own political action committees, and so oftentimes it's working through trade associations that really is their key to involvement in federal elections. I'd like you to talk about that and whether you think in your view the current regulations have a disproportionate impact on smaller companies that do not have the resources to have their own PAC.

MS. WHITTED: I think that--changing the rules, I think that these smaller groups would--their participation would increase, and yeah, I do think it has kind of a--it affects smaller companies more. We want to do whatever we can to foster their

participation in the process, and in smaller companies they just don't have the mechanisms, and so they are, you know, stuck there with having to put in a lump sum contribution and oftentimes they don't want to do that or they don't have the ability to do that. It would facilitate their participation, and, yes, we would anticipate it would increase their activity in the process.

VICE CHAIRMAN TONER: Ms. Casey-Landry, do you agree that if we adopted the proposed new rule that it would further facilitate federal activity by these smaller companies?

MS. CASEY-LANDRY: Oh, absolutely. That's why ACB petitioned the Commission 2-1/2 years ago for this rulemaking. It came about from one of my board meetings, which is made up of small banks. Only--of the 45 member institutions on my board, only one has its own PAC. The others did not. And the bankers themselves requested this. They thought it would be easier to facilitate for their solicitable class of employees in their institutions that they could offer payroll deduction. They said point blank, somebody can write me a check for $50 or they can give me $5 a pay period. Five dollars a pay period could be $120. But 120 can be a lot more cumbersome.

And we are also working very closely, as I mentioned earlier, on the financial literacy, and we're trying to convince people of the need to budget and the need to spread out payments. We think the payroll deduction is a much, much better way to make sure people understand what it does to their monthly budget, as opposed to one lump sum contribution. So we think it would both increase participation and make it easier for the consumer and for the individual and the small business.

VICE CHAIRMAN TONER: And you mentioned, your organization's written comments that for the first time in 2003 the Federal Reserve found that the number of electronic payments actually was larger than the number of check transactions, paper check transactions. Could you just briefly discuss that?

MS. CASEY-LANDRY: Well, for years we've been talking about the elimination of checks as we've all moved more to electronics. And as you said, in our comment letter we noted that for the first time it finally happened. And last year Congress passed Check 21 that went to the issue of check truncation so you're not getting your checks back in the mail now, you're getting images. And all of this is going about for the changes in the

payment system as more people are opting to go electronic. I mean we can all look to--we pay our mortgages through a direct debit. We can give our contributions to the CFC. We can get our payroll direct deposited. We try to get Social Security benefits direct deposited. The government has a great push for electronic benefits transfer. They're trying to push all electronic benefits out to individuals.

So we thought that this was really current. I mean the rule was passed in 1976. We also agree there is no statutory basis for the prohibition. And we think when you look at what's happening with the payment system 29 years later, you know, people just aren't writing as many checks, and you're going to see even fewer checks as people realize they can rely more on card technology, and it's safer and more convenient.

VICE CHAIRMAN TONER: Thank you. I want to thank everyone for coming here today.

MS. WHITTED: Let me--just another comment. I mean there's nothing to prohibit us now from our member companies bundling checks and sending them in. And there's also--if we could put it in place, we could take a contribution out of their--if we're authorized--out of their personal savings account.

Now, doesn't this make a lot more sense? I mean that would be a nightmare. So it just is a lot of common sense here.

VICE CHAIRMAN TONER: Thank you very much. Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

I'll direct the first question to Ms. Whitted and Ms. Casey-Landry. You think you can raise more money for your PACs this way, right?

MS. CASEY-LANDRY: I hope so.

COMMISSIONER WEINTRAUB: And that's really what this is all about. It's raising more money for our PACs.

MS. CASEY-LANDRY: Well, it's actually providing better access for my smaller members. I mean if I have a $50 million bank it's going to make it a lot easier for them to solicit their senior management, which might be three people, and they might want to be able to provide that over--I can offer it to my own employees today, my solicitable employees, and most of them have increased it. By going to smaller dollar amounts, we can go down as low as one dollar per pay period versus one check. I mean it makes it a whole lot easier for the

employee. Why would we want to take away that convenience and the ease for the person who wants to make the contribution?

You still want to give me $25, or you can give me one dollar over 24 pay periods and give me 24, but one dollar is a lot less painful.

COMMISSIONER WEINTRAUB: How many of your PAC members contribute one dollar a pay period?

MS. CASEY-LANDRY: My PAC members, or you mean my own staff? We only use direct--right now we allow payroll deduction for the ACB staff, and so we have, of our members of the staff, most of my staff today that's solicitable uses the payroll deduction.

COMMISSIONER WEINTRAUB: How many of them do in one dollar increments?

MS. CASEY-LANDRY: I believe we have two.

COMMISSIONER WEINTRAUB: Two.

MS. CASEY-LANDRY: Those are those big contributors.

MS. WHITTED: While we hope we increase the amount of money that's contributed to the PAC, I think our primary motivation is we want to increase participation in the political process, and this is a way that our member companies can participate to a greater degree in the process. Plus their dollar

goes further because it is combined with others with similar interests.

COMMISSIONER WEINTRAUB: But an individual can make contributions to any number of organizations. There are many people that aren't associated in any way, shape or form with a trade association, and those people still have political rights. They can make contributions to party organizations. They can make contributions to candidates. They can make contributions to groups that are non-connected that they feel represent their viewpoints. I note that the community bankers spent over $2 million on lobbying in 2003, and we only have the numbers for the first half of 2004, but it's $680,000, and that is a fairly substantial amount of money on your lobbying.

It seems to me that the major advantage of contributing to a trade association PAC is that you get to connect your political participation with a lobbying effort.

MS. CASEY-LANDRY: I don't dispute that. I mean since 1990 there's been 881 new regulations placed on the banking industry. So I would think that for my members to be involved in the political process it's absolutely critical. We're facing a crushing regulatory burden and we are trying to get

our members more involved. But we're also trying to make it convenient. And today if a payroll deduction makes it more convenient for them and they want to be able to offer their employees the right to make a contribution as opposed to $100 check, and they want to divide is up over pay periods, and the technology permits it today, and most people are going to that kind of--why would you not want to allow that to happen?

COMMISSIONER WEINTRAUB: Mr. Gold, do you have any concerns that for a corporation that has its own PAC, that allowing payroll deduction for both the PAC and the trade association is going to be quite--I don't want to say double dipping, but the end result is going to drown out the voice of labor?

MR. GOLD: Well, sure, I have some concerns about it on a policy level, but as with other matters, the Commission is guided by the statute, and the statute does make the provision in (b)(4)(d) with respect to trade associations. And I think for the same, the policy reasons that you're suggesting though, the fact is that there are many, many more corporations than labor organizations, and that was true 30 years ago as well. And the fact is that Congress understood that, and part of the bargain

again in passing the act 30 years ago was to provide some parallels and at least with respect to the methods of soliciting contributions from the restricted classes of corporations and labor organizations.

And it was very explicit, as I said before, with respect to the corporate affiliations and how that would impact on the labor organizations' ability to have access to the same ability to solicit and raise PAC money for itself.

And we believe that it is very important in that this regulation should only be promulgated if (b)(5) and (b)(6) are reflected, (b)(6) in particular should be reflected in this regulation.

So of course we have concerns about it, but we're not before Congress here. We're before the Commission.

COMMISSIONER WEINTRAUB: And do you think that we can make the change that you have advocated, based on the NPRM that we've put forward?

MR. GOLD: I think so.

COMMISSIONER WEINTRAUB: Without running into APA problems?

MR. GOLD: I don't see any problems. You specifically asked in the NPRM for comments about extending a provision to labor organizations. The

fact that you did not specifically ask the question about subsidiaries and the like I think does not remove or undermine the notice that you gave. You specifically asked how it should be done, whether it should be done. We addressed it. It's been addressed here today. I don't think you should have any APA concerns about it.

COMMISSIONER WEINTRAUB: Thank you.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Mason?

COMMISSIONER MASON: Thank you.

Ms. Casey-Landry, let me start off by saying I am in favor of doing this, but I'm not understanding your concerns about Mr. Gold's proposal, and let me put a little context on that. We don't enforce banking laws. Much to my consternation and puzzlement, there is a rule in the Federal Election Campaign Act about bank loans to campaigns, which apparently does not correspond to any rule that we've been able to discover that bank regulators use to determine about credit worthiness of loans or any normal commercial practice or whatever, and so we've got the FECA doing for us and the FECA has this rule on bank loans, and we do the best we can. And frankly, we sort of look at it and at least try to find analogies.

Now, under FECA--I don't know about this problem in Hawaii you mentioned, but under FECA a corporate subsidiary or parent can solicit up or down if there's some rule in the Bank Holding Company Act or some other statute that prevents that, that may be the case, but again, we're construing FECA. And so we have two provisions here that Mr. Gold is pointing to, and one has to do with a separate segregated fund of a corporation, and so there I think you might have a pretty good argument that if the SSF only solicits from a particular subsidiary, that the union could only go to the employees of that subsidiary, if we could look at it that way.

But the second provision says any corporation including subsidiaries, branches, divisions and affiliates that uses a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method on written request, and on a cost sufficient only to reimburse the corporation, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions and affiliates.

Now I don't understand how we get around that provision of the law. I understand your policy

concern. Let me say General Motors owns a bank or two. General Electric owns a bank or two. And I can understand that if the General Motors affiliated bank or one of them is a member of your trade association, and you go--that may create issues or problems in terms of how General Motors deals with United Auto Workers, and they may already have payroll deduction there and it may all be fine. So I can understand how it would be a problem for you in utilizing this authority, but I'd like you to help in looking at the legal provision that we've got to construe here as to how we can get around this very explicit requirement that refers twice to subsidiaries, branches, divisions and affiliates, how in the face of that language we can run and allow you to say, well, if only one division or one affiliate or one subsidiary is involved, that we're simply going to ignore that and not allow the union that represents employees of a different division to utilize the same payroll deduction method.

MS. CASEY-LANDRY: With the caveat then I'm not a lawyer and I will be pleased to provide follow up correct legal citations to this, I'll give you where we believe this goes from a policy perspective.

We thought the Commission drew the appropriate distinction between the trade association rules for solicitation and what the corporation rules are, they are distinct legal entities.

In the case of the institution I had referenced just as an example, if you have a member bank in my case that is affiliated with my PAC, and they are owned by a parent company that has chosen not to offer a PAC, first of all, their payroll systems are distinct, that we cannot solicit in our PAC up to the parent today through the trade association rules--

COMMISSIONER MASON: For?

MS. CASEY-LANDRY: For the bank PAC.

CHAIRMAN THOMAS: The trade association.

MS. CASEY-LANDRY: The trade association cannot solicit up to the parent corporation today.

COMMISSIONER MASON: Under whose rules?

MS. CASEY-LANDRY: The FEC rules.

COMMISSIONER MASON: Okay.

MS. CASEY-LANDRY: Under the FEC rules we cannot solicit. We can only solicit the member institutions solicitable class of employees, and that's what we do. So if the bank provides the direct deposition option and their parent

corporation chooses not to provide that option because they have not affiliated with any PAC, then by the bank making that option I can't solicit up to the parent, but then that could force the parent to turn around and offer that solicitation mechanisms to the union.

It's not saying we don't want the unions. What I don't want to do is to force the system if the parent company or the subsidiary company has made a separate legal decision because they're a separate legal entity, today the Commission's rules treat trade association PACs and corporations discretely and differently. And that's what we are saying. You've got it right. We like what you did in this proposed rule. We think it works and it doesn't provide any dislocations.

Today if a parent corporation offers direct deposit for their own PAC, the union also gets the direct deposit option for their PAC. It's an equal access. What we don't want to do is, is we want to keep a proper allocation between the equal access in terms of the PACs, and if the bank would make a decision--because they're affiliated with us--a trade association to do something, it could affect the parent and in that case the parent could say, well, we're not going to offer this option, so then

the bank cannot do it either. We just think it melds up and confuses the situation.

We will be pleased to follow up with where we think the legal distinctions are, but unfortunately, I'm not a lawyer and I wouldn't profess to start quoting you legal cites. I apologize for that, but I think I'd get it wrong.

COMMISSIONER MASON: No, I appreciate that.

I would appreciate the Chairman, if he would leave the record open for anything they may want to submit and anything Mr. Gold may want to submit as well, because I think he's raised a fair point, and upon first reading I think he's got a valid point, and I understand the policy issue you're raising, and that may be a concern. But I think we've got to reach the correct statutory result even if it doesn't get 100 percent of the policy you'd like because I think the premise behind the basic thrust of making this available is we're going to try to give you as much space under the act as we can. And if we had been misconstruing the act for 25 years or construing it too strictly, we don't want to make a perhaps smaller but nonetheless similar mistake vis-a-vis the unions here.

CHAIRMAN THOMAS: Could I just quickly ask counsel's office, is there a problem with having one

of the witnesses submit a follow-up pursuant to a specific request for further follow-up on a legal point?

MS. SMITH: There is precedent for that.

CHAIRMAN THOMAS: There is precedent, so without objection that will be permissible.

MR. GOLD: Mr. Chairman, will there be a time for this? We may want to comment on what is submitted. I appreciate the comments and I understand the thrust of it, but--

CHAIRMAN THOMAS: You would kind of like to see it?

MR. GOLD: Well, I would like to see it. Plainly and understandably, Ms. Casey-Landry's going to turn this over to counsel for ACB to come up with a rationale for what she's been describing, and we'd appreciate an opportunity to comment on it very quickly. We certainly don't want to delay anything.

CHAIRMAN THOMAS: Again, without objection, we will make that available, and you as part of this conversation can provide a response as well.

MR. GOLD: Appreciate it.

COMMISSIONER MASON: Mr. Chairman, we want to set a reasonable time, 10 days or something like that, and that way we can close off our--

MS. CASEY-LANDRY: Ten days is fine.

CHAIRMAN THOMAS: If you can have your comment to us within 10, and we will ask yours to be in within, say, a week after that?

MR. GOLD: That's fine.

CHAIRMAN THOMAS: Seven days.

MR. GOLD: Okay, fine. Thank you.

CHAIRMAN THOMAS: I guess I'm last in line here. I don't know that--in light of Commissioner Mason's very thorough analysis--and we're going to get a little bit of follow up it sounds like on the legal nuances here that are raised by this question of how broadly the opportunity would extend within a corporation's organizational structure--I won't go down that road.

I just wanted to, for those of you who are about to perhaps embark on this new adventure of payroll deduction, I want to take this time to give you a little bit of caution, and I think Mr. Gold can probably help emphasize this point. When you go down the road of payroll deduction, one thing that we've run into is that sometimes organizations don't keep very good track of the payroll deduction authorizations.

And so what we're saying here is that it's a good idea to make sure you keep those payroll deduction authorizations, because under the current

law as we interpret it, you have to keep that kind of information as it relates to any payroll deductions if they're going to be showing up on your reports, and for information on contributions that's showing up on your campaign finance reports, you're going to have to be able to demonstrate that you still have the payroll deductions. And they may get pretty old and moldy if you're successful with this and it goes on for many years. That's a problem that we have run into in other contexts. So we hope you'll keep that in mind.

I don't really have any questions. Any of my colleagues want to do follow up? Commissioner Smith?

COMMISSIONER SMITH: Thank you, Mr. Chairman.

I just want to add one thing briefly, and it plays up something that I think both Ms. Casey-Landry and Ms. Whitted implied if not stated directly. But it goes to my own experience years ago running the Small Business Association of Michigan. And that is that this kind of measure really is a populist measure that helps smaller businesses and small companies here. You know, the really big outfits can do it all the time anyway. It's the smaller corporations that need to

participate, whose employees participate through the trade associations, and that's one reason why I have favored this approach. I think it's important not to lose sight of that or not to try to dress this up as this is something that's really going to benefit General Motors or something like that.

So I'm glad that that point was raised by our witnesses today and I'm looking forward to seeing this rulemaking move forward.

Thank you.

CHAIRMAN THOMAS: I apologize. Mr. General Counsel, did you have a question?

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

CHAIRMAN THOMAS: Mr. Deputy Staff Director?

MR. COSTA: No questions.

CHAIRMAN THOMAS: You have been released from your bondage. Thank you for coming. It's always helpful to have people come and help us figure out what to do and how to do it.

We are done for the day. Our quadruple-header, I guess it was, is over. We will adjourn. Thank you.

[Whereupon, at 4:30 p.m., the proceedings were adjourned.]