FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON COORDINATED COMMUNICATIONS

Wednesday, March 3, 2010

999 E Street, N.W.
9th Floor Meeting Room
Washington, D.C.
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ALSO PRESENT:

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JESSICA SELINKOFF, Office of General Counsel
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CHAIRMAN PETERSEN: Good morning. This Special Session of the Federal Election Commission for Wednesday, March 3, 2010, will come to order. Today is day number two of the Commission's hearing on proposed rules regarding coordinated communications. We had, I believe, very good discussions and very helpful testimony from the witnesses yesterday, and I think that there is no reason to believe that we are not going to have the same thing today.

We have a very distinguished panel of witnesses that will be testifying today. Each witness will be given five minutes to give an opening statement. We have a little lighting system there to help you keep track of time. When the green light starts blinking, that means less than a minute; yellow light, less than 30 seconds; and then when the red light flashes, that means that the five minutes is up.

Then following our opening statement of
witnesses, then the questions from the Commissioners will proceed. So, we have slotted an hour and a half for this panel, so we are looking forward. So why don't we have our witnesses take their spots at the table? We have Marc Elias on behalf of the Democratic National Committee, Democratic Senatorial Campaign Committee and Democratic Congressional Campaign Committee, and it seems like forever since we last saw you.

Next, we have Paul Ryan on behalf of the Campaign Legal Center; also Lawrence Gold on behalf of the AFL-CIO; and Steve Hoertsting on behalf of the Center for Competitive Politics.

We will start with Mr. Elias and then work our way down the table. Whenever you are ready, feel free to begin.

STATEMENT OF MARC ELIAS, ON BEHALF OF THE DNC, DSCC, DCCC

MR. ELIAS: Thank you, Mr. Chairman, and thank you members of the Commission for giving me the opportunity to testify before you today on
what has been a seeming marathon of a topic for this Commission to deal with. As our comments reflect, the Democratic Senatorial and Congressional Campaign Committees first filed a petition for rulemaking on the question of party coordination in 1996. I am sure someone on the dais will correct me and say it in fact goes back further than that, but at least since '96 the parties have been seeking guidance on the proper standard for coordination for party coordinated communications. And in the wake of McCain Feingold this Commission made a grave error, and it is not one that I think was done purposely or was done with ill-intent. I think it was done in the rush to deal with the flood of regulations that had to be passed in the wake of McCain Feingold given the breadth of topics that needed to be addressed and the need to regulate whole areas of political activities that had before that not been regulated, and what the Commission did was took a statute which required it to pass new rules for communications sponsored by
entities other than candidates and parties and instead wrote a rule that covered communications sponsored by parties, and it essentially, in contravention of the plain text of the statute and the intent of the statute, the legislative intent of the statute, it wrote rules that treated for the first time party communications on the same footing as communications by other unregulated entities, whether they be corporations, labor unions, non-profit organizations. It took parties and rather than following the statute's intent and plain text of the statute, it threw parties in there.

This needed to be remedied since then and it most urgently needs to be remedied now. The Commission asked in its supplemental notice what does Citizens United mean for this rulemaking. One thing it means is that it is more vital than ever now as this Commission grapples with what coordination means for -- or independence means for corporate and labor expenditures, it is more vital now that this Commission make abundantly
clear, crystal clear, without-any-doubt clear, that the rules that apply to those outside groups that spend soft money do not apply to communications sponsored by political parties. How ought it do it? It ought to do two things: One, it ought to in every phase, in every step of the process it is currently engaged in, from the comments at the dais today to the rules you propose to the text of every section, make clear that it does not -- whatever you do, does not apply to parties, does not apply to ads sponsored by parties or public communication sponsored by parties.

Number two, the Commission ought to, either as part of this rulemaking or on an emergency basis strike down the -- repeal the existing regulations governing party public communications and revert back to where the law was prior to McCain Feingold rules being promulgated by the Commission, which was where Congress intended them to be. Congress had a state of play in 2003 and told the Commission to
more strictly regulate communications sponsored by entities other than parties and candidates and the Commission ought to revert back to that point and start a rulemaking from that point with respect to party communications.

That is the thrust of what I am urging today is that, A, nothing that is being done with respect to the Shays litigation, which had nothing to do with party communications, have any collateral effect on the parties; and number two, the Commission on as expedited a basis as possible, whether it is part of this rulemaking or a separate rulemaking, in fact repeal the existing party coordinated communication regulations and put in place a more sensible regime which is consistent with the statute and the history of this.

Thank you.

CHAIRMAN PETERSEN: Thank you, Mr. Elias.

Mr. Ryan?

STATEMENT OF PAUL RYAN, ON BEHALF OF THE CAMPAIGN LEGAL CENTER
MR. RYAN: Thank you, Chairman Petersen, Vice Chairman Bauerly and members of the Commission for inviting me here this morning.

Now we are in the midst of the fifth election cycle post-BCRA in which we still don't have effective coordination rules and I am hoping this rulemaking proceeding will change all of that, perhaps, going into the sixth post-BCRA election cycle.

I am going to begin with the most recent twist in this rulemaking and then go back from there and that is comments with regard to the Citizens United decision. I think it is ironic, to say the least, that many of those who believe that Citizens United and Wisconsin Right to Life before Citizens United should prevail in their lawsuits precisely because the activity they were engaged in was being conducted independently of the candidates and parties and therefore cannot corrupt them, are now arguing that the rationale of those decisions should be imported into this rulemaking and require the Commission to stay its
hand in the regulation of coordinated activities. I think, to put it bluntly, I think that is nonsensical. It is the view of Campaign Legal Center that the Citizens United decision does not impact this Commission's rulemaking or the necessity of this Commission complying its coordination rules with the Shays III decision. If anything, the Citizens United decision emphasizes the need for strict and strong and effective coordination rules to protect against the type of corruption that can result from direct contributions to candidates, which is precisely how coordinated expenditures have for decades been treated under federal law. If the Commission, by lax or ineffective coordination rules, allow or permit spending that is of value to candidates to be coordinated in fact but treated as independent in law, I think the Commission will be allowing exactly the kind of pre-arrangement and coordination that the Citizens United court recognized could result in in-kind contributions that may corrupt public
officials.

Citizens United decision does not alter the Campaign Legal Center's view that the PASO standard is the best of the alternatives on the table for dealing specifically with the content prong of the coordination rule. The Supreme Court in McConnell considered the PASO test, albeit with respect to party committees, because that was the statute before the court, but the Court found it to be a sufficiently clear standard so as to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."

The Court was not referring specifically to parties and their specialized involvement in elections. A person of ordinary intelligence can understand what PASO means and for that reason we oppose as unnecessary the promulgation of rules further defining the terms that make up the PASO standard. If the Commission nevertheless decides to define those terms, we strongly oppose the alternative B option because it would undermine
the umbrella rule itself. We do not oppose, however, the alternative A option for defining constituent terms of PASO.

With respect to two of the other alternatives on the table, both the express advocacy content standard and the modified Wisconsin Right to Life content standard, we elaborated in our written comments why we believe that the express advocacy standard and any functional equivalent of that standard is inapplicable in the context of coordinated activities.

In a nutshell it is because the express advocacy test stems from the Buckley court's consideration of disclosure of independent expenditures and spending limits applicable to independent expenditures. The Court said in Buckley when you are dealing with candidates and parties and other major purpose groups, they don't have the constitutional benefit of an express advocacy test. In this rulemaking we are dealing with candidates in particular and their
activities coordinated with others and we believe under Buckley, the express advocacy standard has no import in this rulemaking.

With respect to the conduct standard time period we oppose the retention of the 120-day time period, but we support the two-year proposal and we would not oppose the longer election cycle proposal on the table either, but we would certainly be comfortable with the two year time period option on the table.

And finally, with respect to the safe harbors, we have in the past and we continue to oppose in safe harbor for 501(c)(3) organization communications because we believe it would open the door for candidates to coordinate with 501(c)(3) groups in ways that are definitely intended to and do have the effect of influencing their elections in a positive manner. By contrast we do not oppose the creation of a safe harbor for certain business activities that are put forth in the NPRM.

I will stop there. I am happy to answer.
any questions to the best of my ability and thank you very much for having me today.

CHAIRMAN PETERSEN: Thank you, Mr. Ryan.

Mr. Gold?

STATEMENT OF LAURENCE GOLD, ON BEHALF OF THE AFL-CIO

MR. GOLD: Thank you, Mr. Chairman, and thank you to the Vice Chair and the Commissioners, for allowing the AFL-CIO to appear today. The AFL-CIO is a federation of 57 national and international unions representing 10 million working men and women. And the AFL has participated in each of the four coordination rulemakings that have taken place over the last 10 or 11 years. We have done so because the AFL and its constituent unions and their members and officers and the like, regularly engage with officeholders and candidates in lawful ways, with officeholders regarding legislation and policy; with candidates regarding their elections, what they ought to be doing, what positions they ought to be taking, how they ought to be running their
campaigns and in a lawful coordinated manner with respect to how union members themselves participate in elections and work with their supported candidates in order to assist their election. Unions and other groups need clear and reasonable standards about their public advocacy when it comes to engaging with lawmakers and candidates so that they can do so in a way that they are confident they are complying with the law when they deal with legislation and policy and when they deal with elections. They need to know where clear lines are so that insofar as they engage in independent activity in support of candidates, either through their PACs or now, post-Citizens United, with regular treasury funds, they need to know where those lines are and their ability to engage with officeholders in particular on legislation and policy is not compromised by those electoral activities so the opposite is also true.

The framework that the Commission is operating under is, in summary, sort of cabined
by the following: 441a(a)(7) states that coordinated, quote, expenditures or contributions, 431(9) defines an expenditure as anything of value for the purpose of influencing any federal election. There is a lot of case law about what an expenditure is in the statute, what that means, and then Shays III, of course, stated that the Commission can create, prior to the 90 and 120 day window periods, a content standard that is less broad than that which the Commission adopted for that period itself.

The Court said that the standard beyond those periods need only rationally separate election related advocacy from other speech and the Commission can strike a balance that does not unduly compromise the Act's purposes. These are, of course, broad statements, but I think they give the Commission some flexibility here.

The framework I think also includes Citizens United and the Wisconsin Right to Life cases, which emphasize the need for clarity and the avoidance of undue complexity in defining
regulated speech.

Let me make one point about Citizens United. The case held, of course, that the organizations can use their treasury funds for electioneering communications and for independent expenditures. And the current content standards by the Commission already include all of those communications at all times. There is no dispute that the current regulations and whatever you do in revising them will capture all electioneering communications and all express advocacy and therefore, in that respect, Citizens United does not require the Commission to broaden its content standards in creating coordination rules.

Additionally, the conduct standards except for -- insofar as the Commission deals with common vendors and former employees and independent contractors, are not even at issue in this rulemaking.

As to content, I want to reiterate the main point I think we made in our comments both before and after Citizens United. It is really
critical that the content standard beyond the
window periods be clear and not over broad. The
so-called PASO standard which was introduced in
the statute in BCRA for other reasons is very
difficult to comprehend. We think it is a de
facto refer standard which is broader than where
the Commission should or even can go beyond the
window period, and notwithstanding the footnote
in McConnell, that in a very conclusory fashion
stated that, as Paul Ryan quoted, a person of
ordinary intelligence can understand it, we
believe that is incorrect. We do not believe
that if revisited, especially in this context,
not dealing with parties, but dealing with
organizations, we do not believe that that
standard would survive judicial challenge and
that challenge would be inevitable if the
Commission were to adopt it.

Given the imperfect choices available and
the fact that the Shays III court did direct that
the Commission adopt a content standard beyond
the windows that was broader than express
advocacy, we believe that the appeal-to-vote test that was fashioned in the Wisconsin Right to Life decision is the best of the available choices because it is a reasonably bright line. It is not a perfect bright line. Only express advocacy approaches perfection and even there, there is obvious disagreement, but we believe the PASO standard is hopelessly vague and over-broad and we would point out that -- the Commission itself has had a great deal of difficulty on the few occasions it has had to deal with it in applying it.

I look forward to your questions. Thank you.

CHAIRMAN PETERSEN: Thank you, Mr. Gold. Mr. Hoersting?

STATEMENT OF STEVE HOERSTING, ON BEHALF OF THE CENTER FOR COMPETITIVE POLITICS

MR. HOERSTING: Chairman Petersen, Vice Chair Bauerly, Commissioners, thank you for the opportunity to testify today on behalf of CCP.

I agree with Mr. Gold, the functional
equivalence test is probably the best of the alternative possibilities here. Even as you see the error in Judge Tatel's opinion, you are, of course, bound to follow it. The McConnell court did say the express advocacy test is not constitutionally required and not constitutionally required for coordination but the Court did so to uphold coordinated electioneering communications which is one specific content standard provided by statute. Along the way the Court also underscored that express advocacy is the gloss that applies to core FECA terms like “expenditure” throughout the Act. Nonetheless, as I have mentioned, you are obliged to follow the Tatel opinion and to construe expenditure as somehow reaching beyond express advocacy.

I believe that the functional equivalent standard is the best of bad options for following Judge Tatel's opinion. It is true that the two part, 11-prong test of 114.15 was disfavored by the Supreme Court. There is no question about
that. But whether or not you employ that test for the functional equivalent standard has to do with the number of votes on the Commission. That is always the reality of what you can do in terms of votes on the Commission.

Speakers have already used this test in a previous cycle and a functional equivalence test employed 365 days a year is already imperfect and will already be imperfect in light of WRTL too. But again, Tatel's command is unavoidable and functional equivalence is the best option.

Now, a couple of other points before I turn to the comments of Mr. Elias. Safe harbors, revised or new are fine for (c)(3)'s and candidate businesses. If the Commission is searching for a new standard on the shelf-life of material information passed on by common vendors or former employees, let it be two years at the outside and probably 180 days would be good.

A non-exhaustive list of examples and ads in the E and J of examples of ads that are in and ads that are out would be beneficial as long as
it is not exhaustive. With regard to what Mr. Elias has said, if you are going to turn your attention back to BCRA Section 214, at some point it would be nice to do away with the idea that one candidate can corrupt his fellow candidate or that one officeholder as candidate can corrupt another officeholder. That is where the payment prong of 109.21(a) is right now. It says, payment by a person other than “that” candidate. It should have been, payment by “a person” rather than “a candidate.” There is really no basis for saying one candidate can corrupt another candidate for purposes of campaign finance law or one officeholder corrupts another officeholder or that the President corrupts his back-benchers or that the back-benchers corrupt the President somehow. There is really no basis for the FEC to be regulating in that area and if you do go back to BCRA Section 214 you will see that the Commission really was never supposed to regulate in that area. Mr. Elias is right, it is unfortunate that the Commission did that, but it
Thank you.

CHAIRMAN PETERSEN: Thank you, Mr. Hoersting.

We will now open it up for Commissioner questions and we will start with Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Mr. Hoersting, I think you were here when that mistake was made and none of us were. But I won't hold it against you because you didn't have a vote.

MR. HOERSTING: I kick myself -- well, not so frequently any more but there was a time.

COMMISSIONER WEINTRAUB: Thank you all, gentlemen, it is a pleasure to see you all. I think, Mr. Ryan, I am going to start with you because you are out-numbered both on this panel and in general amongst our witnesses. If we were to take a vote amongst all of the folks who testified, it is pretty clear what the answer
would be, the overwhelming majority of our commenters prefer the Wisconsin Right to Life test, the Roberts test, the appeal-to-vote test, however you want to call it, to the PASO test.

The argument has been made that PASO is vague, over-broad, it interferes with rights of free speech, free association and the right to petition the government for redress of grievances and since you are out-numbered, I would like to give you the first opportunity to respond and I want to in particular ask you, you say in your comments that it is a fair premise to assume that if a spender coordinates with a candidate on an ad that promotes that candidate or attacks his electoral opponent, the spending is done for the purpose of influencing the candidate's election.

And you have provided a number of examples, both now and in previous rulemakings and I think it would be easy to come up with examples where you and I would agree, that ad promoted and supported the candidate or attacked the opponent and was, I think you and I would
agree, I wouldn't say everyone would agree, but I think you and I could agree, was for the purpose of influencing the election.

But is it possible there could be an ad, because this is the concern that has been raised by a number of other commenters, is it possible that there could be an ad that PASOs -- that meets the conduct standard and PASOs a candidate, promotes or attacks a candidate and is not for the purpose of influencing an election?

I give you the opportunity to respond in general to what other folks have said about PASO and particularly to answer that question.

MR. RYAN: Sure. With respect to the PASO standard generally speaking, I think that something that has been lost to some extent in this rulemaking, at least to the extent that others have filed comments in this rulemaking is that this is not a free-floating PASO standard. This is a PASO standard, a content standard, that will be coupled with conduct standards. So all of this activity obviously, but it bears
repeating, is going to occur in the context of interaction between the spender and a candidate. Specifically, the regulations have presently have six different conduct standards. They include things like request or suggestion by the candidate that the ad be run, material involvement by the candidate in the running of the ad, substantial discussion between the candidate and the spender, not just the use of a common vendor but the use of a common vendor who in turn uses or conveys information that is material to the creation and production and distribution of the ad, or a former employee who does the same thing.

I just want to put that out there on the table to make clear that we are not in the universe of independent expenditures in Buckley and the unsophisticated person who has no involvement in politics and they are just writing an ad. We are in the universe of a person who chooses to communicate with a candidate about ads, not just about issues, about ads.
That being said, to answer your question specifically, are there ads that result from this type of conduct, actual coordination conduct between an outside spender and a candidate that promote or oppose or support or attack a candidate that are not meant to influence an election? I would say no, in a word.

COMMISSIONER WEINTRAUB: Mr. Hoersting, you want non-exhaustive examples. We actually provided some examples in our NPRM and nobody took the bait so I am going to ask all of you the same thing that I asked the panels yesterday, if you would like to, I think it would be helpful to us, to go back to the NPRM, we are going to reopen the comments for what, 10 days after the close of the hearing, which will give people an opportunity to submit further written comments. We just can’t get enough comments. We invited comments, we invited supplemental comments and now we are inviting supplemental comments.

If you would like to go through that list of examples and give us your views on whether you
think they meet the PASO test, whether you think
they meet the appeal-to-vote test, I think that
would be helpful to us in coming up with such a
list of non-exhaustive examples which I agree
would be helpful and one of the witnesses
yesterday also focused on the call to action, but
a number of these ads have either no call to
action or an ambiguous call to action so I think
that the analysis of why an ad would fall into
one category or another would be helpful to me.

Mr. Ryan, you also raised the issue of
definitions and obviously we tried to provide
some elaboration in our Wisconsin Right to Life
rulemaking. The Court was not too happy with
what we did. I think that can be fairly said.
That is fine. And you point out that when you
define terms, you, by definition, you define them
with other terms, and then the question arises,
well, what do those terms mean. I suppose that
is true but I don't know what else we can use
besides words. Commissioner McGahn sometimes
talks about interpretative dance. Other than
using other words, I don’t know how else we can define terms. Without definitions, do we have the clarity that so many witnesses have asked for, how can we provide that clarity?

I ask you all, and Mr. Elias and Mr. Gold, I know you are here on behalf of clients, but if you feel more comfortable taking off that hat and giving us your personal opinion, we would be happy to have that. You are experienced practitioners. How do we provide that clarity? Are definitions useful in this context or in other contexts and without any kind of elaboration, if, for example, we were to choose either PASO or Wisconsin Right to Life as the standard, can we just do it without elaboration and will you have the clarity that you need? That is for any and all of you.

MR. GOLD: I think you put a finger on the problem. In post-Wisconsin Right to Life the Commission tried to define the functional equivalent of express advocacy. The AFL-CIO and many others participated in that. We respect the
effort that went into that because it was in our
view a necessary task to do it. We proposed, the
AFL did, to the Commission, we proposed to the
Court when it was considering Wisconsin Right to
Life, some elaboration of what an adequate
standard might be and in Citizens United, the
majority disparaged the multi-factor test, I am
paraphrasing, but disparaged the effort and said
it was unduly complex.

We were not completely happy, the AFL was
not completely happy with the standard that the
Commission came up with in its regulations
post-Wisconsin Right to Life but felt that it was
reasonably workable. It was certainly better
than bare language. Now in our comments we have
said that maybe what the Court is saying here is
you have to go back to bare language. A lot of
this is counter-intuitive and somewhat
contradictory because bare language is open to
greater interpretation. If you have a
multi-factor test, then at least you have some
guideposts, guideposts that can be more easily

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dealt with I think by more sophisticated
lawyer-represented organizations than ordinary
people.

Now let me take issue with a couple of
things Mr. Ryan said. I will say, the Court in
its decision said something to the effect that
campaign finance law should not require one to
hire a campaign finance attorney -- kind of an
appalling concept --

MR. ELIAS: I want to say I agree with
Larry in my individual capacity.

MR. GOLD: But, you know, the notion
that -- Mr. Ryan's response to your question
about, is there any PASO, assume we know what
that mean, anything that PASOs that is not for
the purpose of influencing an election, and he
says, no, to me that is just so wrong. That is
an all or nothing view. It does not respect the
reality of engagement by organizations with
officeholders. We are talking about long periods
of time. They want to extend, I believe, and
others want to extend the period of time when you
would have even a broad content standard way beyond these windows into well before even primaries. That is just incorrect. It is very unforgiving and leaves organizations basically in a position -- and individuals in a position where they can't comfortably deal with candidates and they don't even know it or officeholders and they don't even know it.

I think if the court's decision means you have to do something -- have a standard here that does not have a lot of regulatory elaboration, then I guess that is what you need to do, but we would prefer something that was more specific because really clarity is critically important here.

COMMISSIONER WEINTRAUB: Well, you have the clarity you need. What we will have, if you don't have any further elaboration, is the words the Court used and if we were to take the Wisconsin Right to Life example, hypothetically speaking, if we were to adopt that, we have two examples, we've got the ads in Wisconsin Right to
Life that we know are not the functional equivalent of express advocacy and we've got "Hillary: The Movie" that we know is the functional equivalent. Does that give you enough to go on?

MR. GOLD: Not really.

COMMISSIONER WEINTRAUB: And, if not, what should we do?

MR. GOLD: I don't want to pretend that it does. One advantage of the appeal-to-vote test is the phrase that it is susceptible to no other interpretation other than as. Certainly it is not -- that essentially directs an either/or conclusion. If it is only electoral, let me put it that way, then it is subject to it because it is not subject to a reasonable interpretation otherwise. If it is, then that trumps it. One thing that the Court said in Wisconsin Right to Life and I think repeated in Citizens United, maybe not, is the notion the tie goes to the speaker. That I think is a very important guidepost in crafting this.
I am not sure Citizens United means you cannot elaborate by some definition what that phrase means. If it does, it is not that helpful.

COMMISSIONER WEINTRAUB: Do you have suggestions as to what we might be do that would be helpful? If we could add something to it, what would be helpful?

MR. GOLD: Off the cuff, no. In our comments we didn't attempt to go back to 114.15 and try to refashion it. We would certainly be open to trying to assist you in doing that, but, again, there is an obvious risk that the Court didn't like what you came out with.

COMMISSIONER WEINTRAUB: Anybody else?

MR. HOERSTING: With regard to functional equivalence, the good thing about that test is that clearly it would have to address what Judge Tatel was speaking about. I forget the exact language. You could probably recite it back to me. It must be able to divide or divine between this and that --
COMMISSIONER WEINTRAUB: Rationally --

MR. HOERSTING: It would definitely solve that for Judge Tatel because he gets his express advocacy is functionally meaningless from McConnell and it is the functional equivalence doctrine that comes out of McConnell. So if you adopt a functional equivalence test addressing the same Supreme Court case that Tatel was looking to when he directed you to go beyond magic words express advocacy. So that will help the Commission in that sense.

In terms of what you can do to actually make people understand what functional equivalence is, that points up the problem really with the Tatel opinion. First let me say, it shows why expenditure means express advocacy. So many courts have said that, I won't repeat it here. That is the problem with the Tatel opinion, but now that you have the Tatel opinion and must follow it, I think people will understand that if you do something like 114.15, maybe not exactly, but something like that, or do
a non-exhaustive list of examples of ads that would be in and ads that would be out, I think for purposes of this rulemaking and getting through this rulemaking and dare I say, before the next lawsuit, that is one way you could go and I really think functional equivalence, as I stated in my written comments, I won't re-state them here, functional equivalence is the best test for the Commission given the other options.

COMMISSIONER WEINTRAUB: Nothing, you have nothing for me, Marc?

MR. RYAN: I will just reiterate what is in our comments, which is that in this particular instance, we think the constituent terms of PASO are self-explanatory. We have never taken the position that definitions are not needed in law. In some contexts they are and are very valuable. In this context we agree with the Supreme Court, the McConnell court's view that persons of ordinary intelligence understand what PASO means and it would not benefit from elaboration in regulation in terms of definition.
MR. HOERSTING: There are many -- do you mind if I speak about this? There are many problems about PASO. Let's start with the fact that it is its own black letter term and it is not expenditure. Let's go next to the fact that the McConnell court was construing PASO with regard to state party committees. And while I can't recite it for you, if you read that section of the opinion, you can tell that the Court is talking about state party committees' ability to know what will promote a candidate and what will oppose a candidate.

The back-up definition of electioneering communication was never adjudicated by the Court so that means the Court had no opportunity to determine whether PASO is constitutional for a regular person, a regular political actor. There are many problems with PASO. If earlier Paul meant to say that any ad that promotes, supports, attacks or opposes a candidate must be for the purpose of influencing an election --

COMMISSIONER WEINTRAUB: With the
MR. HOERSTING: If he meant that, then he must be looking at an intent -- if he is saying that -- if the intent of the person is to promote, support, attack or oppose, then it is for the purpose of influencing, I would agree with his statement. The problem is intent has no place in First Amendment jurisprudence. When you look at vagueness and over-breadth, PASO provides the would-be speaker no idea of when he or she will be subject to an investigation or will not be subject to an investigation.

I grant you functional equivalence is not much better, but it is a little bit better and it has the benefit of being something the court has spoken about, something that dovetails with the Tatel opinion, and something that is not contradictory to the expenditure definition in the statute.

COMMISSIONER WEINTRAUB: I want to be sure I heard you right. You believe that any ad that PASOs a candidate, all of them, they are all...
made with the intent of influencing elections?

MR. HOERSTING: What I am saying is if Paul Ryan is saying that any ad that promotes, supports, attacks or opposes a candidate must be an expenditure under federal campaign law, then Paul is looking at the intent of the person who promotes, who intends to support, who intends to oppose a candidate and intent has no basis in campaign law. That is precisely what Chief Justice Roberts was talking about in WRTL II. We are not going to look to the intent. In order to prevent vagueness and over-breadth, you look to the four corners of the ad itself with limited reference to context.

COMMISSIONER WEINTRAUB: I must give you an opportunity to respond since he is characterizing your words.

MR. RYAN: We did not in our written comments, and I am not here today, telling you that I think this should be an intent-based test. I agree, you have to look at the ad itself. If the communicative element of the ad itself
promotes, attacks, supports or opposes a candidate, then it is covered. Combined with the conduct standards, I believe it meets the statutory definition of expenditure for the purpose of influencing, which is the applicable definition of expenditure, not express advocacy which was a test devised solely with respect to independent activity.

COMMISSIONER WEINTRAUB: I am sure I have gone overtime, Mr. Chairman. Thank you.

CHAIRMAN PETERSEN: Thank you.

Commissioner McGahn?

COMMISSIONER MCGAHN: Thank you, Mr. Chairman. I would like to pick up on that point with Paul Ryan.

I think we all agree that a speech is independent, the government can't regulate it. If it is coordinated, then we can. And that is what we are here to decide, the difference. And when I hear you talk about Citizens United, I hear you saying somehow that Citizens United stands for the proposition that we need to have a
strict coordination rule or something and I also hear Colorado Republicans cited for this proposition and I come away thinking I need to poll the opinions and see who won, because the way Citizens United has been portrayed by some, either you or folks who advocate the same position, I don't think you want Citizens United, and I don't think there was anything about coordination in Citizens United. There was no facts, there was no issue in Citizens United about anything that was coordinated at all. Isn't that correct?

MR. RYAN: I definitely concede there were no facts about coordination. There were multiple references to the longstanding point of law that when coordination occurs, the potential for corruption exists and the Court used that as the counterpoint to its conclusion, and, yes, my side did not win that case, but there is a conclusion that if there is no coordination, then there is no corruptive potential.

COMMISSIONER MCGAHN: But it assumes
coordination, right? Citizens United doesn't give us anything as to what is coordination and nor does Colorado Republicans where they upheld the coordinated limits on parties because it was assumed in that case it was coordinated. Colorado Republican Party went to court and said, we are going to coordinate this but we don't think there should be limits for the arguments they articulated and the Court said, well, if it is coordinated, then we can put limits on it.

But factually that doesn't answer the question we are here to decide today, right?

MR. RYAN: Correct.

COMMISSIONER MCGAHN: Okay. But what Citizens United does do is it does talk about what is corruption or the appearance of corruption. I think we agree that it is what we are here to -- it is our benchmark. It is not equalization of speech or any of this other stuff. It is corruption or appearance of corruption, and when the Supreme Court says, the
fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.

The Court goes on, the reliance on generic favoritism or influence theory is at odds with standard First Amendment analysis because it is unbounded and susceptible to no limiting principle. The appearance of influence or access furthermore will not cause the electorate to lose faith in our democracy. All of this language is from Citizens United.

So it seems to me what Mr. Gold says about the need to have some breathing room makes some sense, doesn't it?

MR. RYAN: In the independent expenditure context, yes. But what Citizens United court also said repeatedly was contributions to candidates do pose a threat of corruption, a threat of corruption that the Court had long viewed as a justification for limits on contributions and it is also a well-established point of law that coordinated expenditures are
treated for legal purposes and have the effect of in-kind contributions.

So independent expenditures can't corrupt, but if you are going to talk to a candidate about devising an ad campaign that promotes that candidate or attacks that candidate's opponent and then you go out and run those ads, it is the view of the Campaign Legal Center those type of communications do pose precisely the threat of corruption that contributions were recognized by the Citizens United court as posing.

COMMISSIONER MCGAHN: Let me turn to your comments, your written comments. You state -- at one point you say, when expenditures are coordinated with a candidate or party, they are legally indistinguishable from expenditures made by a candidate or party, which is essentially what you just said.

On one hand, I can see why you are saying that, because for -- constitutionally, that is really how, for us to regulate it, they have to
be treated. But in the case of party committees and really non-party committees who are trying to criticize the government or speak their mind, I am not sure that is really true in all instances. For example, let's assume there is something in the ad that is provably false and it is made with actual malice or reckless disregard, so there is a defamation suit filed. Who ends up being sued in that case? Not the candidate. It would be the sponsor of the ad, and I hope maybe anybody on the panel can confirm that, but my understanding is in that case it is the person actually making the speech that is responsible for its content, not the candidate who maybe had some say in its content. Is that a fair assessment?

MR. RYAN: I am not an expert in that area of the law, but it would surprise me --

COMMISSIONER MCGAHN: That is interesting because it is governed by New York Times versus Sullivan which is a First Amendment case.

MR. RYAN: It would surprise me if a
candidate, for example, would write the text of that ad and hand it to the spender, which is fully permissible under existing regulations, so long as that ad is outside of the timeframe and avoids express advocacy, that the candidate would not similarly be liable in a defamation lawsuit. Candidate writes an ad containing lies, hands it to someone else, and the someone else actually makes the ad buy, I don't know, I would have to do some research to see whether as an actual point of law the person that wrote the ad content and collaborated with the spender is likewise liable.

COMMISSIONER MCGAHN: At another point in your comments you talk about -- on page 33 and 34, thus with respect to candidates and groups which have a "major purpose of influencing elections, the Buckley court held that FECA's for-the-purpose-of-influencing definition of expenditure, raises no constitutional vagueness concerns and no need of a narrowing express advocacy construction because money spent by
these entities is by definition campaign related.

Next page you make a similar statement about how the express advocacy test does not apply to limit the definition of an expenditure when spending is done by a candidate or party.

Again, I am not sure that is true. Parties spend all sorts of money that is not deemed an expenditure. Isn't that true, Mr. Elias?

MR. ELIAS: It is.

COMMISSIONER MCGAHN: Can you give me some examples?

MR. ELIAS: Of where they spend money that is not expenditure on behalf of candidates?

COMMISSIONER MCGAHN: Right. Or just expenditures in general. You have disbursements, have expenditures. Just a basic reporting distinction, but seems to me if you do an ad that doesn't contain express advocacy, you're not going to file an independent expenditure report.
MR. ELIAS: That would be correct.

COMMISSIONER MCGAHN: So the Buckley construction of the term expenditure does apply to party committees?

MR. ELIAS: I am not following in what sense --

COMMISSIONER MCGAHN: Mr. Ryan is trying to say under Buckley, unless you are not a political committee or candidate, the construction of the term expenditure has no import, no relevancy, just doesn't apply. It is how he gets around Buckley and how they defined expenditure and what I am saying is, that is not true --

MR. ELIAS: Because party committees do both.

COMMISSIONER MCGAHN: Right. They do all kinds of spending that is not expenditures.

MR. ELIAS: And historically the Commission, pre-McCain-Feingold had recognized a series of ways in which parties do communicative expenditures. I am not sure if it is 1985-14 or
1984-15, I can never keep those two straight, but where the Republican party wanted to do ads on the balanced budget perhaps or the Reagan budget --


MR. ELIAS: That sort of led to a series of practices where parties would spend money to influence the public policy debate and promote an issue agenda.

COMMISSIONER MCGAHN: But even beyond issue ads, you do all kinds of spending that are not expenditures, and you don't report that as independent expenditures. For example, fund-raising mail, because there is no express advocacy for a candidate. Otherwise everything you do would be deemed an expenditure. Not you, your clients here today because, of course, post-McCain-Feingold much of it is hard money, but I am thinking more state parties -- but actually your clients do do all kinds of things that are not expenditures, right?
MR. ELIAS: Not to hijack your question in a slightly different question but you mentioned fund-raising mail, there is nothing in the history of McCain-Feingold that suggests that if the National Republican Congressional Committee wishes to do a direct mail piece to raise money for themselves, and in the course of it, within the windows, they put out a mail piece, now let's start with the fact that that mail piece has probably on its letterhead the name of the chair of the committee who is himself a candidate -- so theoretically every piece of letterhead that goes out of any of the congressional committees within 90 days of an election has the name of a candidate and is more than 500 pieces.

So let's just start with the fact that that is over-broad in and of itself, but there is not a reason why the NRCC shouldn't be able to do a mail piece that is coordinated in the way in which everyone is talking about it today with their candidates to raise money for the NRCC.
Why can't they say, give us money and we will help elect candidates like candidates A, B, C, D, and E because they would make great candidates? They make great officeholders, and there is nothing in this book that says that should be regulated. In fact, if you turn to page 64 of this book -- I picked up a copy outside because I wanted to make sure I didn't bring my copy of the book, So I got one of yours. Page 64 of yours --

COMMISSIONER MCGAHN: You can keep it though.

MR. ELIAS: It says specifically that what the Commission's job is to write coordination rules that don't cover communications by parties and yet, here we are. So, I agree with you, there are all kinds of things that the parties do that don't trigger independent expenditure reports under the current rules and there are even more things that currently are treated as independent expenditures that were not historically and which Congress didn't intend should be.
COMMISSIONER MCGAHN: So Mr. Ryan's contention that the Buckley construction of the term expenditure doesn't apply to party committees, that is just not true.

MR. ELIAS: I agree.

COMMISSIONER MCGAHN: Mr. Hoersting?

MR. HOERSTING: That is not true.

Everyone thinks that --

COMMISSIONER MCGAHN: Meaning you agree with me. What I am saying is not true -- what he is saying --

MR. ELIAS: What I am saying is true or not.

MR. HOERSTING: I agree with Mark and Commissioner McGahn.

MR. ELIAS: That is twice today.

MR. HOERSTING: Historically the reason everyone thinks that everything a party committee does is an expenditure is because of the source prohibition of McCain-Feingold where they took away non-federal dollars and now all of a sudden everyone thinks that because it doesn't matter,
in a sense, what is said with what is funded, that everything must be an expenditure, but of course that is not at all the case.

COMMISSIONER MCGAHN: Just to be clear, Mr. Ryan, I appreciated your comments. I read them. I like the fact that you talk a lot about case law and you do it not in footnotes. I could learn something from that. You lose a lot of that in text.

But turning to page 36, here is another one I would like to discuss: For the same reason, the Supreme Court's decision in Wisconsin Right to Life, a decision regarding a provision of federal law applicable to the independent activities of non-major-purpose groups, has no application to the regulation of expenditures coordinated with candidates and political parties.

I am not sure I agree with that because there are all sorts of language in Wisconsin Right to Life that talks about no rough and tumble of factors, little, if any, discovery.
Citizens United echoes the same thing, the idea of the process being the penalty. FEC investigations can in and of themselves chill speech.

Are you suggesting that that sort of language from Wisconsin Right to Life and presumably Citizens United has no application to what we are doing here today?

MR. RYAN: Can I respond to your comments characterizing the earlier section of our comments?

COMMISSIONER MCGAHN: Sure. I just read them verbatim, but you can certainly modify them.

MR. RYAN: What our view is is that the definition of expenditure in the statute, for the purpose of influencing, that is the definition that applies to parties as well as candidates under Buckley. We have not made the argument that everything a party does is an expenditure. Our view is that when a party spends money for the purpose of influencing an election, under the statute that is an expenditure and --
COMMISSIONER MCGAHN: But can I ask a question on that statement to be sure we are all clear. I don't want to mischaracterize your views.

When does a party spend money that is not for the purpose of influencing an election? Can you think of any examples that you might agree where parties are not influencing an election, other than redistricting?

MR. RYAN: Redistricting, in my own personal view, and this is not something we have kicked around at the Campaign Legal Center, that is for the purpose of influencing elections as well as much as anything else a party does.

COMMISSIONER MCGAHN: So everything the party does is for influencing an election, right?

MR. RYAN: Perhaps.

COMMISSIONER MCGAHN: Not perhaps. Is it or is it not?

MR. RYAN: Not having given it thought prior to having the question be posed, I would say, yes, everything a party does is to influence
an election.

COMMISSIONER MCGAHN: So everything is an expenditure then?

MR. RYAN: I think it is quite possible that the FEC itself, through the course of promulgating regulations on disclosure over the years and categorizing certain uses of party money as disbursements versus expenditures, perhaps has erred, but one of the reasons that has never been challenged by a group like the Campaign Legal Center is because all of that money, since the Campaign Legal Center has been in existence, has been hard money, and I don’t really care if party money gets reported as a disbursement or as an expenditure as long as hard money is used and we get the disclosure information about it.

The only court that I know of that has looked specifically at this question, the Buckley major purpose test and the applicable definition of expenditures, is the Shays II court in which there is a several paragraph section of the
opinion in which the Court characterizes this Commission's view on the application of the express advocacy test versus the for-the-purposes-of-influencing test as being a misconstruction of Buckley. That was an opinion in the context of whether to regulate 527 organizations.

So, when this issue, when the for-the-purpose-of-influencing definition applies versus when an express advocacy definition applies, has mattered to the Campaign Legal Center. Unfortunately, we have been at odds with the majority of the Commission and it has been most poignantly explored in the 527 group context in 2007 through the Shays II litigation where the only court that ruled on this question agreed with us and viewed the FEC's construction of the statute as incorrect, but nevertheless, one of the reasons I don't really care --

COMMISSIONER MCGAHN: So, now I hear you probably want Emily's List and Unity '08 as well, both of which talk about regulation of 527's.
MR. RYAN: We weren't parties in those cases.

COMMISSIONER MCGAHN: No. I think you filed amicus briefs, didn't you?

MR. RYAN: Yes, we did.

COMMISSIONER MCGAHN: If we could go back to the question that is actually on the table, and I appreciate all of that, but the current question is, you state in your comments on page 36 that Wisconsin Right to Life has no application to the regulation of expenditures coordinated with candidates and party committees, and my question goes to the language in Wisconsin Right to Life and similar language in Citizens United talks about avoiding factors and prolonged investigations and discovery and all that.

Does that have any application to what we are doing here today or is your position that that language has no application, as your written comments suggest, to what we are doing here?

MR. RYAN: Our position is it has no application. The Court was not considering what
types of investigations of candidates and those that they are interacting with to make expenditures is appropriate.

COMMISSIONER MCGAHN: Mr. Gold, do you agree with that?

MR. GOLD: I don't. I think that is kind of a piece of saying that any ad that promotes, supports, attacks, opposes a lawmaker or a candidate is for the purpose of influencing an election, no matter what the circumstances or the timing prior to the window. It is just an all-or-nothing view that I think is really unhelpful. It has been my experience --

COMMISSIONER MCGAHN: And you have had some with coordination investigations, as I recall.

MR. GOLD: This is what I would like to address. From my experience, both in the huge investigation I think you are alluding to, which involved the AFL-CIO and other organizations arising from the 1996 campaign, and some other coordination cases as well before the Commission
and just day-to-day advising organizations, clients of all kinds about how to deal with these, the notion of an investigation on coordination is a very serious matter, and I think you can't just cabin off what Wisconsin Right to Life said and Citizens United said in those contexts because their concerns about investigations and about complexity of rules -- but let's just talk about investigations and the prospect of facing it. That is common to everything the Commission does.

Of course, you have got in 437(g), you have got procedures that apply no matter what the substantive issue is that is being raised in the Commission in a particular case, and if the coordination standards are such that it is very easy to trip RTB, reason to believe, and have an organization confront an investigation, which always starts with a fairly elaborate subpoena and interrogatories and the like, it often, in a coordination context, feeling you have to prove a negative, I feel that is a pretty relevant
factor, and I think the Court would approach it that way.

COMMISSIONER MCGAHN: Thank you. If I could -- one final question on the point about whether Wisconsin Right to Life and cases since apply. Tie goes to the speaker, not the censor. Does that apply here, Mr. Ryan? Or does that only apply to corporate speech within 60 days of a general election? Because that is what that case dealt with on its facts.

MR. RYAN: I will go with your latter.

COMMISSIONER MCGAHN: Really? Mr. Elias.

MR. ELIAS: I will take my second shot in two weeks in trying to argue that it applies at least to parties.

COMMISSIONER MCGAHN: Got it, and maybe others.

MR. ELIAS: And perhaps others, but let's not forget about them.

COMMISSIONER MCGAHN: My final topic is the PASO or PAS0 standard. I have heard it pronounced both ways, and I think I don't really
care how we pronounce it. I don't like Washington, D.C. acronyms, so we know what we are talking about.

I would like to give some hypotheticals, and since it is a -- it has been suggested that it is a clear standard that doesn't need any further elaboration, I am sure that these will be easy hypotheticals, and some of them were asked of the panel yesterday. But the first is, let's assume you have a member of Congress, and let's say his name is Jones and the ad says, Congressman Jones voted against abortion funding three times. That is what the ad says. Does that promote, attack, support or oppose Congressman Jones?

MR. RYAN: No.

COMMISSIONER MCGAHN: No. Does the panel agree with that? Anyone disagree with Mr. Ryan on that point?

MR. GOLD: I agree.

COMMISSIONER MCGAHN: Okay. Thank you. Let's say the ad says that and it also
says, Call Congressman Jones and thank him for his stance on these issues?

MR. RYAN: That does PASO.

COMMISSIONER MCGAHN: Why?

MR. RYAN: Because it expresses a view that the congressman has to be thanked, that this is a good thing.

COMMISSIONER MCGAHN: So “this is a good thing” is the PASO standard?

MR. RYAN: That is a promotion or supporting of the candidate who has been identified in the ad.

COMMISSIONER MCGAHN: But the Shays III court, it told us we need to separate election speech and other speech, so you are saying that that falls along the line of election speech, not other speech?

MR. RYAN: Yes, when combined with the conduct prong of the test that the court in Shays III was issuing its decision in light of, yes.

To put it differently, if that spender talks to his candidate about running these ads,
materially involves the candidate or any of the other conduct prongs, and then goes out and runs the ads using the text that you have just used, then, yes, I think the combination of those two factors meet a coordination test that includes within it a PASO standard.

COMMISSIONER MCGAHN: So, in all cases, that is a campaign ad?

MR. RYAN: In all cases in which -- under the coordination rules, yes.

COMMISSIONER MCGAHN: Let's assume the congressman announced he is retiring and he is not going to be on the ballot. You said it is a campaign ad in all instances. Still a campaign ad in all instances?

MR. RYAN: Well, the individual is still subject to federal candidate campaign finance laws, so, yes, I think it still falls within the scope of that.

COMMISSIONER MCGAHN: He has terminated his re-election campaign, no steps to obtain ballot access, not a candidate.
MR. RYAN: Then, no, I think that ad under those circumstances is not for the purpose of influencing an election, if that individual is not a candidate in an election.

COMMISSIONER MCGAHN: That is a different answer than you gave. So, one is promoting attacking, supporting, opposing; one isn't, even though it is the same exact ad. So, the content of the ad hasn't changed, but your answer has changed depending on --

MR. RYAN: If the law is going to apply to candidates, and there is no election, this person is not a candidate in an election, then, no, I don't think it is a campaign ad.

COMMISSIONER MCGAHN: Let me add a couple more hypo's and then I will ask Mr. Hoersting a specific question in a minute.

Let's assume Chairman Petersen decides he is going to run for Congress, and let's say someone decides to run an ad and it says, Chairman Petersen while on the FEC ruled in favor of special interests and allowed more money in
politics, candidate for Congress. Let's assume that his opponent had some say that triggers the conduct standard. Let's assume the conduct standard is met in every hypothetical. Is that something that we can regulate?

MR. RYAN: Yes.

COMMISSIONER MCGAHN: Why?

MR. RYAN: Because it is an ad opposing his candidacy.

COMMISSIONER MCGAHN: How? It doesn't mention his candidacy.

MR. RYAN: It mentions Petersen, Commissioner Petersen, right?

COMMISSIONER MCGAHN: So, PASO is a reference standard?

MR. RYAN: No. It is the content of an ad which is critical of a candidate.

COMMISSIONER MCGAHN: Is it critical? Because I think that is a positive statement.

MR. RYAN: That comes down to who is more ordinarily intelligent.

COMMISSIONER MCGAHN: We can agree that
neither one of us are ordinarily intelligent.

MR. RYAN: I would say that I am probably ordinarily intelligent and you are extraordinarily intelligent.

COMMISSIONER MCGAHN: Thank you.

Mr. Hoersting, though, he can cite regulations. He is on the scale of sort of PASO.

MR. RYAN: But because I am only of ordinary intelligence and you are of extraordinary intelligence, it is my view that controls under the Supreme Court's interpretation of the PASO test in McConnell, so, yes, that is definitely PASO.

COMMISSIONER MCGAHN: Let's say -- wait a second. The ad that said -- let's change the facts, and I don't know Chairman Petersen's views on any particular issue other than election law, but let's assume -- let's say he is already a congressman, and it says, Matt Petersen voted to deny abortion funding three times, and that is all it says. We already agreed that is not PASO. But Congressman Petersen voted while he was on
the FEC to allow more money in politics, that is?

MR. RYAN: Well, you used the term special interest money in politics, for starters. I think that is an important modifier because I don't think -- I don't know a person of ordinary intelligence who thinks more special interest money in politics is a good thing.

COMMISSIONER MCGAHN: So all this is clear from the words promote, attack, support and oppose, right?

MR. RYAN: Yes.

COMMISSIONER MCGAHN: Let's say the ad says Matt Petersen voted against abortion funding three times, and then the question is, call and tell him what you think about that.

MR. RYAN: With nothing else, I would say, no, that is not PASO. There has been no expression within the communication itself.

COMMISSIONER MCGAHN: Let's say the ad includes, those are not Utah values.

MR. RYAN: That is PASO.

COMMISSIONER MCGAHN: Are those Utah
values?

MR. RYAN: I am going to go with no. It does not PASO.

COMMISSIONER MCGAHN: Let's say the ad concludes Matt Petersen voted against abortion funding three times. Vote against Matt Petersen.

MR. RYAN: That is express advocacy. That is covered by the rule.

COMMISSIONER MCGAHN: That is something different than are those Utah values, the question?

MR. RYAN: Yes, definitely.

COMMISSIONER MCGAHN: So it has a different meaning?

MR. RYAN: Yes.

COMMISSIONER MCGAHN: But then how can the express advocacy test be functionally meaningless if you just told me it has a different meaning? It is not really functionally meaningless now, is it?

MR. RYAN: You are using the Court's words, which I like and I piggybacked on, but --
COMMISSIONER MCGAHN: We are going to blame them.

MR. RYAN: But the context in which the Court stated that the test is functionally meaningless is because it is so easily evaded, not because there is no way to conjure up hypothetical examples, one of which clearly falls within the express advocacy test and others which do not. That was not the context in which the Supreme Court issued it. The Supreme Court was discussing how easily evaded that test is.

COMMISSIONER MCGAHN: They were using it as a way to explain why express advocacy doesn't reach all that much and Congress could have another chance to regulate, and they tried with the electioneering communication ban, which now we know is no longer on the books. So, is that whole discussion in McConnell about functionally meaningless still relevant?

MR. RYAN: Yes.

COMMISSIONER MCGAHN: Do you agree with that, Mr. Hoersting?
MR. HOERSTING: My understanding is with regard to 203, none of it is relevant as a matter of case or controversy doctrine. The problem is it also applies to the disclosure provisions which have been upheld. Therefore, much said in McConnell about functional meaninglessness did apply to disclosure and it is still with us.

COMMISSIONER MCGAHN: For purposes of disclosure.

MR. HOERSTING: For purposes of disclosure.

COMMISSIONER MCGAHN: One more hypo. Let's assume Chairman Petersen is elected President of the United States, and let's assume it is his second term.

MR. ELIAS: So he is re-elected.

COMMISSIONER MCGAHN: Re-elected.

MR. ELIAS: Pretty good.

COMMISSIONER MCGAHN: Pretty good. And let's assume the ad says he opposed abortion funding three times, call him and thank him for that. What is the answer to that? Does that
promote, attack, support or oppose?

MR. RYAN: Again, it seems to be a variation on the same hypothetical where this individual is not a candidate. I am going to take the opportunity to submit additional written comments and I will fully explore these multiple hypotheticals that you have put forth.

The whole purpose of campaign finance law in my view is to prevent the corruption of candidates and officeholders and candidates as prospective or future officeholders, that is to say, decisions being made in office as the result of the largesse of their supporters and in that context, the reasons that we have these anti-corruption laws on the books apply with full force even to a lame duck officeholder, and I think that is probably why the campaign finance laws continue to apply to officeholders once they are elected even though they haven't launched their official re-election campaign.

I know that your next remark may be, as in the previous hypothetical saying, well, the ad
doesn't change. The only thing that changes is whether or not this individual is a candidate for public office, but that is one of the few contextual issues that the Supreme Court in Wisconsin Right to Life in the independent --

COMMISSIONER MCGAHN: Which you already said doesn't apply to what we are doing here today.

MR. RYAN: Right. I am just reading the opinion.

COMMISSIONER MCGAHN: You say it doesn't apply. Tell us what it says.

MR. RYAN: A contextual factor of whether or not the individual identified in the ad is actually a candidate. That is something that is permissible because it is necessary for the application of the statute in the most basic level.

I am certainly going to take you up on the opportunity to kick your hypotheticals around, and I think they are very thoughtful hypotheticals, and I know that there have been
some chuckles, but they have been challenging.

COMMISSIONER MCGAHN: Here is my concern. You are claiming that promote, attack, support, oppose is an appropriate standard, and if it is coordinated, then that allows us to reach it.

On one level, I can see the logic of that, and Mr. Hoersting sort of had this discussion earlier with Commissioner Weintraub, but again, that begs the question because to get to that point you are assuming coordination, just like the Court did in Citizens United, just like the Court did in Colorado Republican, but to get to that point could be very, very muddy.

Mr. Gold has had this experience in protracted coordination regulations which at the end of the day yielded I don't think much in the way of violations of the law, and the same was true with the Coalition MUR, and the Christian Coalition MUR ended up in court and, well, we know what happened there.

So, although they are hypotheticals and they may seem cute, these are very real world ads
that happen all the time, and it is the sort of
thing that confronts people every day, and I come
back to my point about Wisconsin Right to Life
doesn't apply. All that language in those court
cases about rough and tumble factors and
investigations, I would suggest that has to
apply, and I see Mr. Hoersting nodding, so I will
start with him. How do we square this circle?

MR. HOERSTING: It all fits together. We
can make it a circle, but we can't square the
circle. You are exactly right. Let's go back to
what Paul was saying. Paul is using, as you just
said, Commissioner, the certitude of knowing that
something was conduct coordinated. He is looking
in the rear-view mirror at all of these problems
and saying, well, five years after an
investigation if we find out that of course they
are working hand-in-glove and of course the
candidate would be grateful for that, so, yes, we
can tell in hindsight that promote, attack,
support, oppose was there --

COMMISSIONER MCGAHN: But Citizens
United, though, speaks to that point, doesn't it, the idea that ingratiatio
nation and feeling good about somebody, that is not corruption or appearance of
corruption.

MR. HOERSTING: I am glad you mentioned that. It is an excellent footnote, but what I am
-- that is a really good point. But what I was getting at is this. Paul is not considering the
possibility of a speaker who has not coordinated, they have not coordinated, and yet they are
running an ad they believe is issue advocacy, and they can't tell whether it is issue advocacy or
not under Paul's test, respectfully, there is no way to know under your PASO test. You don't even
know, with respect, so what you have is a chilling of that speech before those persons have
even spoken, and that is precisely what the Chief was talking about with regard to a
rough-and-tumble of factors.

The content test here is when can you be investigated? When can you be investigated? The
conduct test is when we investigate you, what
will we be looking for? But you have to have that jurisdictional predicate, was this an expenditure? Is it express advocacy or, now because of Tatel's command, the functional equivalent of express advocacy?

What I would say to you is do your best to make functional equivalence as bright as you possibly can so that people can know, I am going to be investigated if I run this ad, and we won't be investigated if we run that ad. That, respectfully, is a roundabout way of saying what I think is wrong with Paul's entire approach, which he presumes ingratiation, which the Commissioner pointed up doesn't matter in any event. He presumes ingratiation because of coordination to say that the jurisdiction applies that this speech is for the purpose of influencing through the rear-view mirror, post hoc, and that is a problem. You need to create a bright content standard as best you can under Tatel's direction, and I wish you luck.

MR. RYAN: Can I just make one brief
comment? And it is that the trickiness of your hypothetical, to my view, is not about the substance of the ad. It is about the question of when the individual, the candidate, the individual who is candidate/officeholder may not be a candidate. It is not about what the content of the ad says and whether or not the ad itself promotes, attacks, supports or opposes an individual. It is the secondary level, is that individual a candidate? And consequently, is the ad for the purposes of influencing an election.

COMMISSIONER MCGAHN: But what I am hearing you say, though, that it is not the content -- to determine the difference between election speech and other speech, as the Shays III court said we need to come up with a basis to do that, rational basis I think to do that, not a metaphysically certain basis. We need to draw a line here. If it is not the content, then how does that square with what the Supreme Court has said in Wisconsin Right to Life and beyond? I can't square those two, and it makes me ask the
question that I asked yesterday, which is given what the Supreme Court has said in Wisconsin Right to Life and since, and really from Buckley through today -- I have heard Mr. Gold give speeches and I think he is right, not much has changed, we have just stripped some of the jurisprudence of outliers, and it has really been Buckley the whole time, but can you really square going beyond express advocacy, and even in the coordination context, as the Shays III court suggests, with what the U.S. Supreme Court has said, setting aside Shays III, and it is my final question, and I would like to hear Mr. Hoersting, can you do both?

MR. HOERSTING: I think in the written comments I say no, but may I have the question again?

COMMISSIONER MCGAHN: The question is can you comply with Shays III and with what the U.S. Supreme Court has said?

MR. HOERSTING: No -- if you had direct statements from the Supreme Court on this very
case or controversy, the answer would be obvious, you would follow the Supreme Court. That is not what you have here.

You have the Court shining the light in one direction as clearly as it possibly can, and you have, respectfully, may he be listening, a D.C. Circuit judge who doesn't get that direction or doesn't see that direction who has now ordered this Commission to go beyond express advocacy for the statutory term expenditure. That is incorrect as a matter of constitutional law. It is nonetheless his opinion. It is not going to be granted cert. That is the opinion. You are a regulatory agency. Follow him to the best you can. I hope that answers the question.

COMMISSIONER MCGAHN: I have taken enough time for everyone. I apologize. Thank you for your indulgence.

CHAIRMAN PETERSEN: After your useful hypotheticals, I guess I have a whole new career trajectory ahead of me, so a bright future indeed.
COMMISSIONER WALTHER: Thanks very much. I would like to get into that conversation, but I just think that it will take a lot more time off, so maybe I will come back to it in a minute, but I would like to just ask Mr. Elias a couple of questions if I might, and they may be just from your personal capacity.

With respect to the party issues that you are so passionate about, I take that seriously and I am wondering, in this rulemaking we were prepared to do something like that in that regard, and we haven't had any input on what that might be, but would you elaborate a little bit on how we would approach a quick “take a look” at the situation and what factors would be ones we should consider in terms of considering a party versus other organizations?

MR. ELIAS: Sure. Let me start with something that I think is very important, and I don't want to mischaracterize Mr. Ryan's testimony. He can correct me.
I don't believe there is any opposition to the position that I offered today. In fact, several years ago, and I believe, Mr. Petersen, you may have been at the Senate Rules Committee at the time, there was actually a hearing in which several representatives of the reform community testified for the wholesale repeal of the 441a(d) limits in their entirety.

So, I don't believe that the proposition that I am offering today has any opposition, and I don't believe you have received any comments insofar as you posed the question about treating parties differently. I don't believe you received any comments in opposition, and I would dare say that in the Shays litigations, in each of them, as contentious as they have been, the courts have never reflected any concern about the parties.

So, I think that in some respects, if you are looking for a consensus place for the Commission, the regulated community and the reform community, it might very well be around
this set of issues, so let me address your
question directly, though.

If you were to look at the state of the
Commission's precedent and regulations such as
they could be harmonized at that time on the eve
of McCain-Feingold, what you would have found is
a case out of the D.C. District Court known as
the Christian Coalition case. It was a Judge
Kessler opinion -- no, Joyce Hens Green opinion,
and it set forth basically a standard that was
then embodied in the Commission's regulations
over when ads would be deemed coordinated.
Though it involved outside -- that involved an
outside group, those rules essentially governed
both outside group coordination and party
coordination.

Importantly, in 1996, and I apologize for
giving you maybe more than you wanted, but in
1996 there was a bit of a controversy over issue
ads run by parties, and for those of us who were
before the Commission at the time in hearings
like this, it was widely reported and understood
that both Bob Dole and President Clinton were in fact involved in writing the ads that their parties were running. The only controversy, the only controversy, in all of that was the question of whether or not soft money could be used, and the question of whether or not soft money could fund a portion of those ads or not fund a portion of the ads was the only controversy. It was widely understood that these ads, though, were fully coordinated with their candidates and indeed in some instances were beyond coordinated with the candidates, where the candidate's involvement was very central.

You have the Christian Coalition opinion that comes out, and the Commission tries to grapple with this question of coordination and comes up with a rule that basically says as long as it doesn't rise to the level of control by the candidate or joint venture with the candidate, then we are not going to worry about it, coordination is not a problem.

Congress didn't like that, and that is
where you get this provision. You get -- the change in McCain-Feingold is a negative reaction to the Christian Coalition rulemaking that this Commission did. But Congress only didn't like a part of it, they didn't like the permissive, we will call it, the permissive coordination rule. They didn't like it with respect to outside groups, but they specifically exempted ads run by parties and candidates.

To Mr. Hoersting's point, you are right, I am here talking about the party piece, but you are right, it is ads sponsored by a candidate or a party. Those were not seen by Congress in McCain-Feingold as a problem, so Congress didn't choose to disturb those rules. The Commission in its haste, again, after the passage of McCain-Feingold to just implement it, swept up the parties into the revised rule.

So, where would I recommend the Commission go from here is to realize that the rules that it promulgated that paralleled the rules that you are talking about now, that those
rules were just in error, they were an administrative -- they were an error due to the fact that the Commission had to do something very, very quickly on a lot of fronts. It felt like it needed to do party rules, and you now have the time to have reflected back on that, and either through this rulemaking, to the extent that since you are offering another 10 days, perhaps you could extend that 10 days for people to comment on this as well, and if you receive no negative comments, it is quite simple what you do, you repeal the current coordination rulemakings on parties and either go back to the status quo or you simply reenact some version of what existed prior to McCain-Feingold, which would allow parties to run ads so long as they have final control and were not joint ventures with the campaigns.

Whether that Christian Coalition case, given how old it is and how much jurisprudence there has been along the way, I will let others speak to whether that is exactly the right line
or near the right line. I don't think it would be a particularly controversial rulemaking. I think all the parties would come in on the same side and basically help you in an expedited basis. I have not heard a single -- and I have spoken informally -- I have not spoken to Mr. Ryan. I have spoken, though, to many members of the reform community. I have not heard a single dissenting voice around the fact that this fix causes no concern of corruption, it poses no risk to the process, it is all hard money, and I would strongly urge the Commission to do so.

COMMISSIONER WALTHER: Let me ask you that then. If you have limits on what can be made to -- contributed to a candidate, how does that square with some kind of conduct relaxation where you can coordinate more than maybe outside entities?

MR. ELIAS: Well, The fact is that this Commission and Congress since the passage of the original campaign finance -- the FECA in 1971, have recognized parties' roles with candidates
are different.

Let me just say as someone who has sat at this table and at times urged upon you a series of things in which you said, yes, but your relationship with parties is different, we don't get to raise soft money, let's start with that. We don't get to spend soft money, let's start with that. We are under a whole set of reporting regimes that outside groups are not subject to.

So, there is acknowledged a difference between parties and other forms of outside groups, and with the bad, it strikes me, there must be some good, and one of it is that we operate in a fully regulated hard money role and pose at best an attenuated, if any, risk of corruption, I would argue. We don't corrupt our candidates, but at best it is a more attenuated risk. I think even the reform community would say it is a more circuitous concern, but as a practical matter, and this goes to what I think was the colloquy that was going on about expenditures, the budgets of the national party
committees are in the hundreds of millions, so let's be clear.

   Everything they spend on is not an expenditure because if it were, you would have -- if IE's that equaled X and coordinated expenditures equaled Y, that would be the total pot. The fact is the parties spend money on all kinds of things that don't count against the 441a(d) limit, and indeed in the original legislative history it wasn't intended that everything the parties spend on that is coordinated with a candidate that helps their campaign will be a 441a(d) campaign expenditure.

   There are all kinds of things that parties historically have spent money on that don't count as 441(a)(d) expenditures, so I don't think it is a stretch. In fact, as I mentioned, throughout the '90s the parties were spending large sums of money, hard money and soft money, in coordination with candidates, and the only controversy, and I think this is important for the Commission as you think about what your
mission and charter is, which is to implement Congress's law faithfully, Congress looked at that state of affairs and said, we don't want parties in the soft money business, so they banned it, and we don't want outside groups in the coordination business, so they banned it.

What didn't they do? They didn't do the middle piece, which is what the Commission then, I would say in good faith error, did, which was to knock out the – which was to then overregulate the parties with respect to coordination. Congress took care of their concerns about parties in McCain-Feingold through the soft money ban, and the Congress didn't see a need to rope them in on the coordination front, and there is, frankly, with all due respect, there is no legislation to support the current rules. You don't have a statutory basis for your current rules. Indeed, if you were to be challenged on the current rules, all the plaintiff would have to do to strike down your current rules is point to the plain text of the statute. There is no
statutory basis for what the Commission has done, and I think it can undo it in a constructive way, in a way that I think the reformers will support, in a way in which I think the regulated will support and in a way that I think will take off of the table one of the more nettlesome things or one of the more disconcerting things in a world in which we now have more soft money coming in from corporations and labor unions after Citizens United.

COMMISSIONER WALTHER: Quickly, let me ask you this. In a public funding situation, the President runs taking public funding, how would the parties relate at that point, could they coordinate with unlimited money? I am just asking.

MR ELIAS: Again, this is not a –

COMMISSIONER WALTHER: I am just asking. We don't have a lot of time left so I just would like to run that by you quickly.

MR. ELIAS: Very quickly. This is not a repeal of 441(a)(d). It has to do with what the
content and the conduct standard is for coordinated communications, and that standard would be the same just as it was every publicly financed presidential campaign until Senator Kerry took public funding in the primary and --

COMMISSIONER WALTHER: There has been no end of the debate among us over hybrid ads, for example, as you know.

I am going to have to give others the opportunity to ask questions at this point, but thank you very much. I do want to ask quickly, Mr. Ryan, do you generally agree with that overall comment that Mr. Elias has made? He is saying that you do.

MR. RYAN: I will reiterate what we said in our written comments, that we would definitely participate in a rulemaking should the Commission launch one to explore how coordination should be dealt with with respect to parties.

COMMISSIONER WALTHER: Thank you. I will hand it over.

CHAIRMAN PETERSEN: Thank you,
Commissioner Walther.

The hearing to which Mr. Elias referred, I was at the Rules Committee at that time and there was a proposal on the table to repeal the 441(a)(d) limits, and it was an interesting panel of witnesses in that you do remember correctly that Michael Malbin from the Campaign Finance Institute and Tom Mann from Brookings both supported repealing that, so a lot of bloody wars get fought over these issues regarding campaign finance, but that one did not seem to be as hot of a war as others, so as we go forward, I certainly appreciate the suggestions you have on that, and we will have to really think over those very carefully.

I want to turn for a moment to the somewhat less sexy but still somewhat important common vendor, former employee conduct standards because the Shays III court did address those and we have to address that in our rulemaking.

Mr. Ryan, in your statement on page 44, you say some types of campaign information, for
example, polling data, campaign strategy, advertising purchases, slogans, graphics, mailing lists, donor lists or fund-raising strategy clearly maintain their value to a campaign for a period of time longer than 120 days. What is the basis for that conclusion?

MR. RYAN: Agreement with the Shays III court that there are some things out there that retain their value beyond 120 days, and common sense, to put it bluntly. I have been involved in campaigns before I got into a non-partisan, non-profit work in this field, and we would certainly develop a campaign strategy in more than 120 days. I guess I will just leave it at that. We would develop campaign strategy, fund-raising strategy more than 120 days out, and the sharing of that information -- free sharing of that information outside of 120 days would pose a threat of corruption that we are concerned about here.

In contrast, the two-year period, in my own personal experience, I haven't been involved
in any campaign that more than two years out we are developing a master plan. I think there are campaigns where that happens, potentially in the presidential context specifically, but the Commission has to draw a line somewhere. We would also support the full election cycle, the old rule, but we would be happy with two years.

CHAIRMAN PETERSEN: Yesterday we heard testimony from former general counsels of presidential campaigns, former general counsel of a political party campaign committee, and when going through each of those elements, polling data, especially in this day and age, are the polling regs that are currently in 11 CFR were written about 30 years ago, and even under those, after 60 days polls lose 95 percent of their value, and that was then. Now, in the day and age of nightly rolling polls, you could argue that the shelf life of a poll is even shorter than that.

Campaign strategy, even though it may be developed at the outset of a campaign, as it was
explained, campaigns evolve so rapidly and there is so much give and take in the course of a political campaign, that what may be developed at the outside of a campaign, even a 50-state strategy may be great until the first shot is fired, and then everything changes as events take over, and it was also mentioned that campaign strategies are often -- and overall strategy documents are for one thing often not confidential but public and often are actually developed for consumption by the press, so the comment was that those sorts of documents, to the extent that they are valuable, they are not valuable for very long just because campaign strategy evolves in such radical ways once events take over.

With respect to ad buys, that information is public through stations. It may be a little difficult to get to it, but you can find out what your opponents, for example, are doing with respect to the ads they are purchasing. And then it was also mentioned that mailing and donor
lists are assets that are closely guarded by a campaign. Those are not freely given out by a campaign, whether it is a candidate, whether it is a political party. If there was a former employee or a vendor who had those lists and were using them to aid them in the running of ads, that we have a bigger problem than potential coordination, that we have theft of a very valuable campaign asset, and it was also mentioned to us that the most valuable piece of information that a former employee might have or that a vendor could have about a campaign is about what sort of resources they have and what they are planning to -- what sort of purchases they are going to make, but since that sort of information is going to be disclosed, even if a vendor took that information or a former employee took that information, that information eventually is going to be disclosed in a timely manner on disclosure reports to the FEC.

That was what was presented to us yesterday, which I thought was very interesting,
and as I read the Shays III court, the court was looking and saying, okay, you are drawing a 120-day line. You haven't justified that line. I thought that that testimony was very responsive to that question about why is 120 days -- why is that a rational line drawing, and so I -- I found that very interesting and I wanted to make -- get your response, and then also ask Mr. Gold, you also talked about this conduct standard in your testimony as well, and I wanted to get your thoughts on the line as it is drawn right now and whether or not -- you brought up a very interesting argument from the perspective of kind of the empirical backing for this whole enterprise. Maybe I can ask that question of you first since you weighed in on this in your comments.

MR. GOLD: I think in the several rulemakings including this one that have addressed this issue, the Commission has not acquired good empirical information about any of the matters that you just described. I think it
is very hard to amass that information. I am not sure that there are independent studies that provide it. If there were, I am sure the Commission is always free to look at the social science literature and what is out there and see. I am just not aware of it.

The position that we are suggesting here is that common vendors and former employees and independent contractors really not be treated any differently than anybody else, and you get the coordination standards right and that they be captured by them. We think that is the simplest approach.

As it stands now there is -- I have always found since the current regulations were enacted, or a form of them were enacted, after BCRA, that this notion of information, availability of information, whether something was conveyed or used, to be really very difficult even to know. It is very difficult for anybody to know who is involved in it. It is coordination without coordination in some
instances where neither side of the equation, neither the candidate nor the organization, even knows necessarily that this coordination is happening, so it is very difficult to monitor as a practical matter by organizations and candidates that are primed to comply, and I want to underscore that in my experience, people and organizations are very mindful of the fact that there are coordination rules, want to comply with them. This is an aside but an important one. The standards that are in the windows are applied as a practical matter even beyond the windows by almost everybody I have ever come in contact with. That is an aside.

Back to common vendors. We think the simpler thing would be to apply the same standards to them as you apply to others. Of course, BCRA directed that the Commission address it, but it did not direct it to address it in any particular way, and one way you could address it is by considering it, looking at the experience you have had through now three rulemakings and
deciding, let's just treat them as we treat others.

If you are to do a standard, a temporal standard, from what I understand of the testimony yesterday and from what I have seen, I think the 120 days is -- I think a brief period of time, generally speaking, is a better monitor because things change all the time. They just do change all the time, and that is not an insignificant period in itself, but I think two years, four years, six years, is so far beyond the reality of campaigns, campaign planning responding to dynamics and the like.

I also think one thing to look at is the regulations do talk about different kinds of vendors, and some of these vendors, I have never really understood why some of these particular services here would even be included at all because they don't engage in any kind of public communications and the like. I think they have had in a way no effect. So if it is unnecessary, I would excise them.
CHAIRMAN PETERSEN: Mr. Hoersting, you have been former general counsel of a party committee. In your experience, would you agree or disagree with the testimony that we heard yesterday about the value and the shelf life of those particular bits of data.

MR. HOERSTING: I very much – I would agree with it, and I agree with everything Larry just said as well. Two things operating. You are right, it is difficult to come up with this empirical evidence to present to Judge Tatel in a way that he would find satisfactory, not that I presume to know what he would find satisfactory, but my understanding and opinion, it is not as good as yours, is that you have to justify 120 days now, and if you need my added testimony to that, I would gladly say, yes, those things have a quick shelf life, they go quickly. They have very little value beyond three or four months. So, I would say 120 days is fine there.

With regard to a temporal limitation, I think if the Commission can agree upon one and
wants to keep one, in a way it is a safe harbor if you think about it because for regulatory counsel, it allows them to say, yes, we can bring on this vendor because this much time has elapsed. So if you see no harm in keeping it, I think that is one reason to keep it.

CHAIRMAN PETERSEN: Mr. Elias, you also are second to no one in terms of your experience, not only in representing parties, but candidates. What would you add in terms of the shelf life of -- the Court addressed specifically the grand, kind of the master strategy plan that is made at the outset of a campaign, that is something that might retain value for a longer period of time, and also donor lists and lists of supporting voters, and just from your experience, what is the shelf life on those items?

MR. ELIAS: Well, I agree -- let me start by saying I agree generally with your characterization of it. Before I address that, though, let me just say that if the Commission is going to do anything here, it should absolutely
not extend. You are not ordered to extend it beyond 120 days for party sponsored public communications. The Commission shouldn't -- as you know, I believe you should repeal it with respect to party communications, but you certainly should not parallel any extension with respect to the parties.

Honestly, if you think about what we are all talking about, we are really talking mostly about ads, so what are you worried about with ads? You have the content. Let's set the content over here for a second.

Now you have the volume, the placement and the timing. Everyone always thinks there is coordination going on because they will say, but look, candidate went up in these two markets and the party went up in that market. That is because you don't need to coordinate to know that. In fact, you don't even need to wait for the FEC report, as the Chairman suggested. You get the information from the television stations. When you buy time, when you reserve time at a
television station, that is a public act. The stations know who has bought time and they will share that information. When you buy the time, it becomes part of the station records and the time buyers know who has placed time. I am sure when Mr. Hoersting was at the NRSC, he would hear, oh, I hear the DSCC has reserved time, and oftentimes it is a long time out, I have heard they reserved time for three weeks from now or two months from now.

So, in some respects it does operate as a safe harbor because the fact is that the most vital information outside of content is otherwise public information that is available to everyone and does not rely, wouldn't rely on a common vendor anywhere. The shelf life of polling, I think you are right, the regulations, not to tell you to rewrite another regulation, but two-month-old polls are not worth five percent.

CHAIRMAN PETERSEN: Also, the specific example of a campaign master plan at the outset which was addressed by the Court, what is your
thought on that?

MR. ELIAS: My experience is that campaigns, they may have a master plan in some very generic sense, but let's say two years out, to use the two-year window. Two years out from the 2010 election cycle would be day after the 2008 election.

Now, just think, whether or not a plan of what issues you would run on, how you view swing voters in your state, whether you think your state leans more Democratic or Republican, whether you think tying yourself to this issue or that issue is good or bad, obviously things have changed, things change throughout the election cycle. Things that you think will be net plusses become net minuses and vice versa.

So, in my experience at least, I don't see a lot of master planning at the level of detail that is really going to influence what ads you are going to run or where you are going to run them or timing, placement, volume, content, those kinds of things. They may affect your
early efforts in sort of how you staff yourselves, how you position yourselves in terms of personnel, but it will not affect the public communications which typically come at the end of the election cycle. That kind of planning is going to be done much later in the cycle.

CHAIRMAN PETERSEN: Mr. Ryan, I started with you and I feel it is only fair to give you another chance to weigh in. I don't know if you had a chance to listen to the testimony from yesterday, but you mentioned you also have experience on campaigns, so in terms of the shelf life -- I am hearing from a lot of people involved that beyond 120 days, it looks like, for much of it, especially polling, it sounds like it is dead much before that, but that in terms of master plans, four months is still a long time.

I mean, I even looked back, what did the landscape look, just from a political amateur looking at it, what did the world look like 120 days ago from a national perspective, whether it is looking at Senate races, House races, you
know, what did the world look like two weeks before the Massachusetts special election versus two weeks after. I mean Things change so rapidly that is 120 days -- that is a substantial period of time, but I wanted to get your further thoughts on that.

MR. RYAN: I will just reiterate that we were of the view that 120 days is too short, but I also want to add to it the point that this section of your regulations only applies if and when the material -- if and when the information that is used is material to the creation of the ad itself. To the extent that there is information out there related to a campaign that is stale after 20 days, 30 days, it is hard to envision how that would be material to the creation of an ad, and therefore even under a two-year time period is not going to be covered by the common vendor, former employee provision. It is only when the information is material, which is why we view this as a safeguard and an important safeguard and that the time period
should be more than 120 days for actual instances when the information used is material to the creation of the ad, meaning it is not stale, obviously, it is being used, and without the extension of this time period from 120 days to some longer period, we are of the view that there is a free-for-all on using information that is clearly not stale because they are using it, they are thinking it is of value, they are thinking this is information that is wisely incorporated in material to the formulation of this ad campaign and it won't be covered by your regulations -- it is not covered today, which is one of the reasons we are here.

CHAIRMAN PETERSEN: Any final thoughts?

MR. GOLD: One comment about that. What is the point -- and I think Paul Ryan is raising a good point, but I would address it this way.

If in fact information gets stale pretty quickly, which I think it does, then the point of the purpose of a 120-day standard has to be looked at as a screen. Let's talk about what we
were referring to a little while earlier. When
the Commission is enforcing the statute and
entertaining complaints and deciding whether or
not to find reason to believe, your rules when
they specify certain time periods, certain
objective standards that have to be satisfied,
this could be an important screen. Something
that happened two years ago, which is extremely
unlikely but might in a remote situation involve
information that was material long time after, it
is nevertheless a good screen for the 99 percent
of the instances where that would not occur, and
as an agency that is trying to rationally make
decisions, and rational is an important word in
the Shays III opinion, I think, trying to make
rational distinctions so that the statute is
administrable, knowing that it will not be
perfect in any sense, I think that kind of line
is useful for that reason.

CHAIRMAN PETERSEN: Thank you.

Vice Chair.

VICE CHAIR BAUERLY: Thank you, Mr.
Chairman. Just one follow-up in that area.

Does material, does it matter whether it is publicly available, as to whether it is material in this context? Because it seems to me that there is a lot of this information, you said, let alone ad buying, but disclosure, we have a Web site, you know who a candidate's donors are. You might not know within the first 60-some days, but by 90 days out from a donation, you would definitely know any significant donation, and I asked about the donor list because it was one of the items that the Court mentioned, so I would be curious to know whether there is a publicly available limitation on this idea of materiality.

MR. RYAN: You obviously know your own regulations better than I do, but my understanding is that this section of your regulation specifically states that if the information is publicly available, if it is obtained from publicly available sources, this regulation doesn't apply.
VICE CHAIR BAUERLY: So to the extent that campaign strategy is either publicly available because a campaign might put it out itself or in the media about what strategy a campaign is using or is just sort of discernible by looking at what the campaign is doing, it seems to me that we could make an argument about that becoming publicly available, and how long, really, is any secret held in modern campaign world.

I am curious about -- I saw some nodding about the part of campaigns promoting their own strategy. We have a 50-state strategy, we have a targeted strategy, even in a presidential context, which is probably the longest approach to a campaign.

MR. GOLD: I think that is a critical element of the regulations because it is publicly available, and these are coordination regulations, so that is what we are talking about, and if an organization is deriving information from a public source, whether it
is the campaign itself revealing it or from a
media report or from -- anything that is
public and independent of a campaign by
definition can't be a coordinated matter by
itself when they go off and do something as a
result of that. You should certainly retain
that. I never heard of any dispute about that.

VICE CHAIR BAUERLY: I wasn't aware of
any either. I was simply going through the
Courts III identified, I guess, examples of
things that it thought might have a longer shelf
than 120 days. It mentioned campaign strategy,
which the Chairman covered, and donor lists and
also then mailing lists, which may not become
public in the way that some of these other things
may become, but I would like some comment and
your thoughts on how useful they are in and of
themselves as opposed to in combination with
information about messaging strategy or targeting
or some of the other information -- we have heard
testimony about changes very quickly, the
strategy and communications efforts because, of
course, the news cycle with the advent of technology is either four hours or barely 24 hours any more.

MR. HOERSTING: It is certainly true that names on a list become stale, but I don't recall when that happens. You would have to speak with a direct-mail person, or I would, to give you some idea of that. I know that names become stale. Lists are constantly cleansed, but the timeframe in which that happens, I am not prepared to answer today. Sorry.

MR. ELIAS: For a combination of the reasons Paul suggested and Larry suggested, I actually don't understand the fund-raising list. I think I am just dense about this. They are clearly of value, so there is a question of whether or not they would be an in-kind contribution if they were given or if they are stolen, you are right, they are a thing of value. It never worried me all that much. It goes to the point of why some of these people are listed in the regulation. It has never been clear to
me.

So, you are an independent expenditure effort and you now have a donor list. What is that going to tell you? It might tell you who to solicit for money, but it is not going tell you -- unless there is something I am missing, I am not sure what it would have to do with the coordination of a message unless you were going to message to the donors which presumably since they gave money to the candidate are fairly safe, fairly unpersuadable.

VICE CHAIR BAUERLY: That was the gist of my question, how useful is a list of particular voters or particular donors --

MR. ELIAS: Voters is a different thing.

VICE CHAIR BAUERLY: Absent also knowing about a messaging strategy in order to be useful in -- whether in a coordinated communication context, because that is where we are.

MR. ELIAS: Right. Mailing lists are a different thing. But for a donor list, let's say
you did know the messaging strategy. These are people who gave money to the candidate, so what are you going to message, you ought to vote for the person you wrote a check to?

VICE CHAIR BAUERLY: Anyone else?

MR. GOLD: I think voter lists and mailing lists, that is all they are referred to in the regulations. Maybe there is something in the explanation or justification I am not remembering, but if the campaign has a voter list, if it is just the same voter list that everybody is buying, that is not particularly enlightening. If it is a list that they have devised that has tags and candidate preferences and other things, that has some value and enduring value. It degrades over time and I am not an expert in exactly how -- somebody mentioned the mail vendors know that sort of things, but those lists certainly have some staying power, and I suppose one can coordinate if one knows that these are the identified supporters of a candidate, if one can then
reduce -- you can be more economical in not reaching out to them, but that may not benefit the candidate, that may or may not benefit the candidate. They may need reinforcement, who knows.

One of your questions was the time value of some of these things, and I think certain things like that do have -- I would be surprised if a good mailing list or a voter list only has 120-day shelf life overall. I would think it would go beyond that. What the significance is for them, I am not sure, but I think that is a fair answer.

MR. HOERSTING: May I make a point by asking a question? Is it your understanding of the opinion that there is a time period for this question, where Judge Tatel would not make you justify it?

VICE CHAIR BAUERLY: I assume since the challenge was -- it was an arbitrary and capricious kind of analysis, I think we would have to justify any line we would draw, and my
only point of these questions is the Judge pointed to these particular items as examples of things that may retain some value after, so while that may not be the only way to draw the line, I think in order to be responsive and perhaps provide a justification that will allow us to have a line that can be upheld, which is the goal here, to not be back here at some point, we are looking for help from people in the field, because I agree with you, I don't think -- I don't know of any studies that have addressed this, and part of the challenge is the types of employees, the types of vendors, the type of information is incredibly varied, so it is hard to draw one line, but if we were to draw one line, we need your help in supporting where to draw the line, and that is what I have been trying to do, is figure where we can build that record. We started that path yesterday, but I think one of the challenges may be that we have to -- if we ignore the particular examples in the Judge's order, we may run into some trouble.
MR. HOERSTING: I was sitting here thinking, if you have to justify any line, then maybe you can add that question to the 10-day supplemental as well, not that I want to create work for people.

VICE CHAIR BAUERLY: And I am not sure that -- we put three alternatives out there to see what people thought was the appropriate line. A lot of people came in and supported the 120-day line, and from those people, at least, we are trying to understand why, why is that the justifiable line for us to draw.

If I might move on to one other area that we haven't talked a lot about in the last day and a half. The Court also in discussing why our previous standard was unacceptable to it noted a particular example about this explicit agreement that was made between a candidate and someone who was going to run an ad, and the overwhelming, I guess, at best, lack of support for that alternative and, at worst, opposition to that alternative in the NPRM suggests that that is not
a standard that there is a lot of support for adopting from commenters, but I would like to ask, particularly Mr. Gold, because in your comments you did say that you thought that adopting the functional equivalent standard would largely address the Court's concern, and I would like to hear a little bit more on that if you would.

MR. GOLD: Sure. Our concern about the explicit agreement standard, our main concern is that it is divorced from any concern about context or the content of what is being coordinated, and we think the functional equivalent standard is a standard that fairly, if imprecisely, captures content that is indisputably -- that is the -- inherent in the definition of it, indisputably concerns the election and may well serve, I think the key phrase in what the Shays III court, and it was the three judges, it wasn't just Tatel, but the Shays III court said, which is that the standard need only rationally separate -- it is an
interesting word, separate -- election-related
advocacy from other speech.

Well, the appeal-to-vote standard does
separate election-related advocacy from other
speech, and even though that
case incomprehensibly does not refer to WRTL when
I think it had some bearing on it, nonetheless it
does postdate WRTL, and WRTL is still good law,
and I think that would address it. I am not sure
I was responsive.

VICE CHAIR BAUERLY: While the Court
didn't use that example in explaining what
standard we should set, it used it to explain why
the current standard was faulty in its view, so I
think one of the questions I would like to know
is will that same hypothetical be thrown back at
us when we adopt functional equivalence, and to
what extent should we be concerned about that and
to what extent can we mitigate?

MR. GOLD: I remember the hypothetical,
but again, what the Commission has to do is it
has to draw some line, and the explicit agreement
standard is just too much. It may satisfy the Shays court, but it may not satisfy the Constitution. The Commission is in a very difficult posture. I totally appreciate. Because of the inherent difficulty of crafting these standards and all these very critical courts coming on and scrutinizing and finding fault in just about everything that the Commission does.

The Commission was dealt a bad hand by Congress by basically saying, you do something, we can't figure it out, the coordination standards, but I think that the functional equivalent standard is one that, at best, among all the circumstances even in light of that hypothetical in the Shays III opinion, satisfies the task you have before you.

MR. HOERSTING: I will largely agree. It is possible that the New York Times front page hypothetical may be thrown back at you, but I really don't think it will. This functional equivalent test you may be applying, I don't want
to presume anything, but were you to apply it, it would apply 365 days, and you could tell that to this panel at the D.C. Circuit.

Plus, the functional equivalent test is derived, as I mentioned earlier, from the very McConnell opinion that made Judge Tatel and his colleagues say express advocacy, magic words, are functionally meaningless, so if you are drawing from the same source as he is and reaching dovetailing provisions, I think he has to let you go, particularly in light of the Citizens United opinion and recent events. I think he is going to say, we have got the ceiling here, this is as much as even I am going to get -- Tatel speaking to himself.

VICE CHAIR BAUERLY: Not to presume what the judge might say to him. That may well be coordination, speaking to oneself.

I don't want to preclude. Mr. Ryan, do you have a view on whether Wisconsin Right to Life or perhaps PASO, because of course we know about the agreement in this hypothetical, we
didn't hear much about the content, so it is not
clear to me whether would, even under your view
as you have explained it today, PASO.

MR. RYAN: The hypothetical, if I am
remembering it correctly, was that the front page
New York Times says we have agreed to run ads for
the purpose of influencing an election, and as
long as the ads avoid express advocacy, it is
fully permissible under your rules. The Court
found fault with that.

The hypothetical most certainly could be
thrown back at you if you rely on the functional
equivalent of express advocacy. I can envision a
court saying -- the term functional equivalent is
quite revealing. How much different are these
two? They are the equivalent. You look in the
dictionary for the definition of equivalent and
it means more or less the same.

The closer you get to encompassing what
constitutes for the purpose of influencing -- and
as we have discussed in detail here, our view is
that the PASO standard is far more comprehensive
than the modified WRTL standard -- the less force that hypothetical is going to have.

VICE CHAIR BAUERLY: Mr. Elias, do you care to comment, other than to say that you think we should engage in a party coordinated rulemaking?

MR. ELIAS: No, but I think you should engage in a party coordination.

VICE CHAIR BAUERLY: Thank you, Mr. Chairman. I think I will stop there.

CHAIRMAN PETERSEN: Thank you.

Commissioner Hunter.

COMMISSIONER HUNTER: Just to clarify something that Commissioner Walther brought up with Mr. Elias about the party coordinated rulemaking, it sounds like -- your answer to one of his questions was you would go back to the version of the rule pre-BCRA, so the Christian Coalition rules for the parties, and it sounds like we could just put out a NPRM sort of proposing that and see where that takes us. We could probably do that fairly quickly. Is that
what you are proposing?

   MR. ELIAS: That is correct. Again, I am not wedded to the exact formulation of the Christian Coalition. It was a District Court judge. It was a rule written on the basis of a single opinion from a District Court judge, but it was clearly Congress's intent to raise the bar on soft money on parties and not raise the bar on coordination as the law then stood on parties, and then to raise the bar on coordination for non-parties and candidates.

   COMMISSIONER HUNTER: My next question is a little bit following up on what Commissioner Weintraub was talking about earlier. It seems like many moons ago. The potential WRTL standard. Several panelists said yesterday and several of you said today that it would benefit by adding some additional clarity to the standard as we put out in the NPRM, and I just want to talk a little bit more about what kind of clarity that we could insert, and it would be helpful, I agree with Commissioner Weintraub, that if you
had time to give us additional comments to that end, not only on the examples but in addition to any language that you think would be helpful.

A couple of ideas -- I will read something that we thought of. It is similar to something that was proposed in the comments by Lyn Utrecht, and that is, in addition to what we put out in the NPRM something along the lines of a communication contains an appeal to vote for or against a clearly identified federal candidate if it contains any content that has a clear and unambiguous nexus to a federal candidacy.

I think that “any content” could encompass just about anything and includes a lot of the different indicia that are covered in the old rule, 114.15, and the different things that are discussed on page 8 of the Citizens United opinion, including qualifications, fitness for office, policy preferences and that sort of thing. That is one idea.

Another idea somebody had yesterday was to include a call to action, and I realize that
might not really cover all hypotheticals, but that was one of the ideas. Another idea is to add something, in addition to what I just discussed, add something about -- putting something in there that encompasses the tie-goes-to-the-speaker concept, and I am not sure exactly how that would read, I can't read you a specific proposal right now, but something on those lines.

So, I would be interested in anybody's comments along those lines right now or in the written testimony. Thank you.

CHAIRMAN PETERSEN: All right.

COMMISSIONER WALTHER: I would just add to Commissioner's Hunter's comments, for those of you who are interested in the PASO standard and it applies if we need to have a bright-line rule and something can be done to improve upon what is considered to be vague, comments on that are welcome as well, as opposed just to WRTL, I think.
CHAIRMAN PETERSEN: General Counsel.

GENERAL COUNSEL DUNCAN: Thank you, Mr. Chairman.

I wanted to ask one question about a topic we haven't touched on today, and that topic is the safe harbor proposals that we have, and in particular, Mr. Ryan, I wanted to ask you about the one that would apply to 501(c)(3)'s.

I believe in your written comments you said that you opposed that as currently drafted. If that is the case, and if the proposed safe harbor in your view is too broad, is there a way to craft a safe harbor that would allow candidates to participate in PSA's but also deal with your concern about possibly having candidates use those to advocate or promote their actual candidacy?

MR. RYAN: In terms of crafting a safe harbor, I haven't given it any thought. We opposed a similar proposal for a 501(c)(3) safe harbor in the electioneering communications rulemaking years ago. I would point you -- I
think the safeguard to allowing participation by elected officials -- let me take one step back.

What we are really talking about in terms of safe harbor is really only relevant within the pre-election timeframe, 90- and 120-day timeframes. Outside of those timeframes, I think the standard should be PASO. If there is one example, I think it is the Dish network example given in the NPRM that, if I am recalling correctly, was the only of the listed examples in the NPRM that struck me as not being PASO. That would be an example outside of the timeframes of the type of thing a candidate or officeholder could do in terms of 501(c)(3) organization advertising.

Within the 120 or 90-day timeframes, I think the solution is, for those short windows, to have these nonprofit organizations find other spokespersons.

GENERAL COUNSEL DUNCAN: Let me ask also in that regard, is there any concern, I guess on the part of any of the witnesses, that a safe
harbor as written has any potential conflict with the Internal Revenue code's restrictions on the activities of 501(c)(3)'s which prohibit them from participating in or intervening in an election? Is there any possibility that there may be some conflict there, that some activity that we would allow in the safe harbor would not be permissible from the IRS's point of view? Perhaps, Mr. Gold, you would be well-positioned to answer that.

MR. GOLD: I think there is a lot that is permissible under the Federal Elections Campaign Act for 501(c)(3)'s that is impermissible for them if they want to retain their (c)(3) status, and Citizens United is an excellent example of that because essentially any organization can use express advocacy using its general treasury. That includes 501(c)(3)'s but none would come anywhere close to it. I am not sure that is really the question. The question is -- it is not the whole question.

The question is: Is there something that
a safe harbor would permit that would raise a real risk that a (c)(3) would be doing something that would violate its tax status, and I don't see it myself, that happening. I think (c)(3)'s are -- and I represent several, are really vigilant, and the IRS is -- the IRS does not, at least up to now, operate with neat boundaries and neat definitions and has a fairly chilling kind of regime itself, and (c)(3)'s stay far away from that in my experience. I think any (c)(3) is very wary about dealing with a candidate who is not an officeholder and very wary about dealing with officeholders if there is any notion that they are doing so in the officeholder's capacity as a candidate.

GENERAL COUNSEL DUNCAN: Would any other witnesses like to comment on that?

MR. HOERSTING: I just agree with that. I was just basically going to say that it is the threat of losing tax-exempt status that allows the Commission to write its safe harbor somewhat in a carefree manner. You don't have to
overthink this one because the jeopardy, as Larry mentioned, is so high on the tax side. So long as you think you have it pretty much right, there is no reason to overthink it or overthink it or overthink it. I agree with Larry.

GENERAL COUNSEL DUNCAN: Okay. Thank you.

As my final question, I would like to revisit the debate about PASO versus the functional equivalence test.

Mr. Hoersting, the way I have read your comments is that you argue that PASO should be rejected primarily because you believe it is inappropriate to conflate PASO with expenditure and to import the one into the other context, and inappropriate, I think, primarily as a doctrinal matter because it would do violence to the Act, and then you express a slight preference, I think, for the functional equivalence test, in part, because that phraseology has been adopted by the Supreme Court.

What I would like to ask you to do,
though, is to expound more specifically as a practical matter, in terms of practical application, how the functional equivalence test is clearer, more objective, a brighter line than the PASO test, not from a point of view of the doctrinal issues that we have been discussing, I think it has been a very interesting conversation, but in terms of practical application.

MR. HOERSTING: Sure. I know exactly what you are asking. I am trying to think of the words to answer you. You are right -- if I may review PASO before I answer your question directly. You are right, there is the black letter problem with putting PASO into expenditure. Those are separate legal concepts and they should not be conflated.

Plus you also have the Supreme Court's construction of PASO with regard to state parties only and not people, not other actors. As I mentioned earlier, the backup definition of electioneering communication was never reached by
the Court, so we don't know if there would be problems with that.

The other thing, too, is we know with functional equivalence, is that it was given the NORIOT gloss, no other reasonable interpretation other than.

Here is why I was struggling for words earlier. The whole momentum of that opinion is to say that express advocacy is a certain type of speech, and anything that reasonably could not be that has to be protected, so it is a very speech-protective construct that the Court came up with, and it is limited to four corners of an ad and context, and while I grant you that any time you have the word reasonable in a test, it is going to have some fuzzy edges, at least the whole purpose or the whole thrust of that provision is giving the tie to the speaker, whereas PASO is frankly no content standard at all. It is so vague, let alone so overbroad, that it is to say -- it is effectively saying anything coordinated is a contribution, anything
coordinated is a contribution, and here is why I come back to the black letter conflict again.

If you look at 441(a)(a)(7), it says expenditures coordinated are contributions. Electioneering communications coordinated are contributions, and re-publication, of course, coordinated is a contribution. Those are very specific things Congress laid out, and the expenditure definition is the one that is giving us all the problem here.

First, let's not conflate the statutory problems which you mentioned, Tommy. And then second of all, let's look to what the Court has done with regard to expenditure and that is express advocacy and at best functional equivalent expressed advocacy.

GENERAL COUNSEL DUNCAN: That is helpful. Let me just clarify that the statutory problems I mentioned, I was merely reiterating your written comments.

MR. HOERSTING: Fair enough.

GENERAL COUNSEL DUNCAN: I don't want to
take credit for that analysis.

MR. HOERSTING: Sure.

GENERAL COUNSEL DUNCAN: Would anyone else on the panel like to address that?

Thank you very much.

CHAIRMAN PETERSEN: Thank you. Anything from the Staff Director?

STAFF DIRECTOR PALMER: Thank you, Mr. Chairman. I have no questions at this time.

CHAIRMAN PETERSEN: Any final comments or questions from anyone on the Commission.

COMMISSIONER MCGAHN: I hate to do this, if you could indulge me for two questions. Simply because I asked similar questions yesterday. I am assuming everyone is familiar with Wisconsin Right to Life II and the ads at issue in the case that concern essentially judicial nominations, filibustering and the like. Let's assume that ad was run 65 days before the general election, not within 30 days of the primary, so it is outside of the statutory electioneering communication window, and let's
assume that whatever went on behind the scenes meets the conduct standard. Okay?

Is that the sort of ad that we should regulate under a coordination regime?

How about Mr. Ryan?

MR. RYAN: Yes, that is a PASO ad, and I believe, yes, it is, and largely for the same reasons that this Commission argued to the Court. Not only that PASO wasn't the standard. The much narrower standard of functional equivalent of express advocacy was the standard. The Commission lost that argument, but I certainly think the ad PASO's the candidate.

COMMISSIONER MCGAHN: So, even though there is no reference to campaign candidacy, election, merely a future vote of a current U.S. Senator regarding a judicial nomination, that nonetheless is, to use the Shays III court's line, on the campaign side of the line, not on the other speech side of the line?

MR. RYAN: Yes, I think it opposes a candidate who is clearly identified in the ad.
COMMISSIONER MCGAHN: Anyone on the panel agree with that?

MR. ELIAS: Can I just ask a clarification?

COMMISSIONER MCGAHN: Yes.

MR. ELIAS: It would be within the 90-day window, so it wouldn't test a mere reference under the current, right?

COMMISSIONER MCGAHN: I was thinking House campaign. Sorry. Let's take it outside the relevant window for Senate races. Let me change my hypothetical. I am assuming that doesn't change the answer.

MR. RYAN: That is right.

COMMISSIONER MCGAHN: Final question. Let's assume Congressman Petersen, once we do all these elections, before he becomes President and re-elected President, let's assume --

MR. ELIAS: Where is the library being built?

COMMISSIONER MCGAHN: In Utah. Next to the bobsled run, at the Olympic
training facility. Because that is an objective sport, you time that.

He sits down and has a long interview with an author who writes a book that even I agree promotes, attacks, supports or opposes his candidacy, talks a lot about campaign, so we have PASO. A lot of chit-chat. Talks about campaign needs, strategies and plans. So the content standard is met and the conduct standard is met, and it is a book.

Is that something we regulate here?

MR. RYAN: What expenditure has that individual made?

COMMISSIONER MCGAHN: He published a book that promotes, attacks, supports, opposes a candidate, and it was done with consultation, coordination, you name it, with the subject of the book who is a candidate for federal office.

MR. RYAN: If there is a payment made and it meets the PASO test and if there was material involvement, it sounds like, then, yes, it certainly meets the regulation.
COMMISSIONER MCGAHN: Let me follow up on this. Let's say it is not a book, but it is Stu Rothenberg or, say, Charlie Cooke. In Cooke's report, Stu Rothenberg's report, they sit down with candidates all the time and they write nice little summaries all about the needs, plans and strategies of campaigns, and they handicap who is going to win or lose and they go into great detail as to the strengths and weaknesses of campaigns. So, even I -- we will take the "even I" standard -- even I think that is campaign related. They sit down one-on-one, they publish it. Let's assume Stu promotes, attacks, supports and opposes under the "even I think it is PASO standard." Fully conduct standard satisfied.

Is that something subject to our regulation?

MR. RYAN: Existing, yes, if you are using the PASO standard as one of the content standards. One other thing --

COMMISSIONER MCGAHN: Let me ask the question. Is it something we should in this
rulemaking cover? Is that something that would be covered under existing jurisprudence and -- or contemplating here, as far as regulation, something that should be covered?

MR. RYAN: I think the Commission has raised a really good question that is not raised in the NPRM, but I think perhaps the Commission should solicit additional comment on whether there should be some media exemption as there is in the straight-up expenditure context in the coordinated expenditure/contribution context.

COMMISSIONER MCGAHN: Your position is there is no media exemption currently, and it is not before us today with respect to coordination?

MR. RYAN: I would need to look carefully at the existing regulation that outlines the media exemption to see if the plain language of it applies or whether it would need to be altered in some manner to apply in the coordinated communication context.

COMMISSIONER MCGAHN: Thank you, Mr. Chairman.
CHAIRMAN PETERSEN: I want to thank our panel of witnesses. We knew coming in today that we would be speaking to and hearing from some of the titans of the campaign financing realm, and I don't think any of us has been disappointed. For me it has been gratifying because I got to contemplate for a moment a two-term presidency, so I guess I better start working on my memoirs.

Again, thank you very much for your written submissions, for your willingness to take questions and give us, I think, very thoughtful and very useful information, and as we mentioned, the record will be open for 10 days. If there is additional information you think you would like to submit before the Commission as we try to finalize this rule, that will be much appreciated.

Again, thank you for all of you being here. With that, the meeting is adjourned.

(Whereupon, at 12:29 p.m., the hearing was adjourned.)
CERTIFICATE OF REPORTER

I, CATHY JARDIM, the officer before whom the foregoing testimony was taken, do hereby testify that the testimony of witnesses was taken by me stenographically and thereafter reduced to a transcript under my direction; that said record is a true record of the testimony given by the witness; that I am neither counsel for, nor related to, nor employed by any of the parties to the action in which this testimony was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in the outcome of the action.

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CATHY JARDIM