July 7, 2004

MEMORANDUM

TO:

The Commission
General Counsel
Staff Director
Public Information
Press Office
Public Records

FROM:

Mai T. Dinh
Assistant General Counsel

SUBJECT:

Transcript from the hearing on Political Committee Status

Attached is the transcript from the April 14, 2004 hearing on Political Committee Status.

Attachment

cc:

Deputy General Counsel
Associate General Counsel
Congressional Affairs Officer
Executive Assistants
FEDERAL ELECTION COMMISSION
PUBLIC HEARING ON POLITICAL COMMITTEE STATUS

NOTICE OF PROPOSED RULEMAKING

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

Wednesday, April 14, 2004

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

COMMISSION MEMBERS PRESENT:

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

<table>
<thead>
<tr>
<th>Agenda Item</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Opening Statements</td>
<td>6</td>
</tr>
<tr>
<td>II. Panel I</td>
<td>34</td>
</tr>
<tr>
<td>- Jan Baran, Laurence Gold,</td>
<td></td>
</tr>
<tr>
<td>Donald Simon, William Kirk</td>
<td></td>
</tr>
<tr>
<td>III. Panel II</td>
<td>144</td>
</tr>
<tr>
<td>- Nan Aron, Richard Clair,</td>
<td></td>
</tr>
<tr>
<td>Craig Holman</td>
<td></td>
</tr>
<tr>
<td>IV. Panel III</td>
<td>209</td>
</tr>
<tr>
<td>- Edward Foley, John Pomeranz,</td>
<td></td>
</tr>
<tr>
<td>Donald Tobin, Michael Trister</td>
<td></td>
</tr>
<tr>
<td>V. Panel IV</td>
<td>300</td>
</tr>
<tr>
<td>- Michael Boos, Wade Henderson,</td>
<td></td>
</tr>
<tr>
<td>Greg Moore, J. Ward Morrow</td>
<td></td>
</tr>
</tbody>
</table>
CHAIRMAN SMITH: The open session of the Federal Election Commission Hearing on Political Committee Status of Wednesday, April 14, 2004 is in session.

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

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

I'd like to welcome everyone generally
to this rulemaking. These proposed rules were
included in a Notice of Proposed Rulemaking
published on March 11, 2004. The rules address the
Commission's definition of a political committee
and, consequently, whether organizations that have
not previously been required to report and register
with the Commission should now be required to do
so.

Related to the central element are
proposed revisions to the Commission's definitions
of expenditures as well as revisions to the
Commission's allocation regulations. The
Commission has received over a 150,000 comments in
response to this Notice of Proposed Rulemaking.
I'd like to thank, very briefly, our
staff and the Office of General Counsel for their
hard work on the rulemaking, and also in particular
our data people who worked overtime to keep the
E-mail accounts and web site up as they were hit
with large numbers of comments and submissions. We
appreciate generally the willingness of commenters
to assist in this effort by giving us their views
on these proposals and in particular those who have
taken the time to come here today to give us the
benefit of their practical experience and expertise
in this area today and tomorrow.

    I would like to briefly describe the
format that we will be following today. First,
each witness will have just a three-minute opening
statement. We do have a light system at the
witness table, and we'll give you a flashing green
light at the end of two minutes and a yellow light
at the end of two and a half minutes, and then
you'll get a red light at the end of your three
minutes, and we would ask at that point that you
try to conclude your opening statements. Three
minutes, of course, is not a lot of time to develop
an argument in depth, probably more just to set out
a few salient points or high points, and the
benefit is that we'll allow more time for questions
and us to try to probe the things that we find that
we feel will be most helpful from the written
testimony that you have submitted that we'd like to
probe more.
For each panel, we will have at least one round of questions from commissioners, the general counsel, and the staff director. There will be a second round only if time is permitted. I do remind my colleagues you're not required to use your entire questioning time, although it is brief in each case, given that we need to go through six commissioners, general counsel, and the staff director. There will be a short break between the first two panels, a one-hour lunch break, and then two more panels in the afternoon, and we'll be operating in the same format tomorrow. So we've got two full days, and we will try to stay on schedule as best we can.

I. OPENING STATEMENTS

CHAIRMAN SMITH: I understand that some of my colleagues wish to make brief opening statements. I'm not going to put a light on you, but again, because we're already behind, I would ask you to go ahead and be brief, and I will recognize my colleagues for that purpose. I will also note at this time that Commission McDonald has
now joined us here at the dias. So we have a full complement of commissioners.

Commissioner Mason.

COMMISSIONER MASON: Thank you, Mr. Chairman.

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

We can do business today, but I certainly appreciate the help everyone in the Commission and everyone else has already offered or
been able to give to us, and I certainly look forward to the statements and discussions today. The rulemaking topic is very important, and forgive me if I'm slightly distracted.

CHAIRMAN SMITH: Thank you, Commissioner Mason.

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

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

Thank you.

CHAIRMAN SMITH: Thank you, Commissioner McDonald.

Commissioner Thomas.
COMMISSIONER THOMAS: Thank you, Mr. Chairman.

Well, I will pass on the chance to say how happy I am that everyone is safe and sound in the Mason household, except to say that. I just wanted to very briefly do a little bit of setting the stage here. I know we're going to have a lot of interesting discussion, and I'm delighted that we've gotten such an expression of interest in what we're looking at, and I think a fair amount of time will be spent on whether the Commission really has some sort of authority to go into new rules that might regulate the so-called issue groups or some of the so-called 501[c] groups to regulate what they do as being an expenditure under the Federal Campaign Finance laws or possibly treating some of those groups as a political committee under the Federal Campaign Finance laws.

And I just will be noting on several occasions that we by statute as an agency do have congressionally-authorized rulemaking authority in three different places in the statute. Congress
has authorized us to undertake rulemaking. The statute says: "The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to this Act." It also says: "The Commission has the power to make, amend, and repeal such rules as are necessary to carry out the provisions of this Act." And also it says: "The Commission shall prescribe rules, regulations, and forums to carry out the provisions of this Act."

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

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

The Supreme Court created, also, for corporations what we call the MCFL exemption. There are certain kinds of nonprofit ideological corporations that can spend as much as they want for express advocacy communications. Also, the statute allows corporations and unions to spend as much money as they want communicating to their own restricted class. For corporations, that's usually their shareholders and their executives, and for
unions, that's in essence their members. An
unlimited amount of money can be spent for that.
Also, the statute specifically exempts
non-partisan voter registration get-out-the-vote
activity. Organizations can spend as much as they
want as long as it's not partisan in nature. Also,
the Commission, by its own regulations, has
exempted 501[c][3] entities from its electioneering
communication rules that we'll be talking about
quite a bit. On top of that, individuals can spend
as much as they want independently from their own
pockets to expressly advocate the election or
defeat of candidates, as much they want, no limit
whatever. Also, individuals can contribute for
Federal election purposes $95,000 every two years.
Individuals can provide unlimited amount of support
of candidates through volunteering.

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

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

Thank you.

CHAIRMAN SMITH: Thank you, Commissioner Thomas.

Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr. Chairman.

At the outset, I want to personally thank every person who took the time and effort to submit comments to the Commission. As the Chairman indicated, over 100,000 people from across the country filed comments with us, which is the most
this agency has ever received in any proceeding in
its history. I may not agree with every comment we
received, but I do respect the views of everyone
who submitted comments and who is here today.

For over 20 years, the presence or
absence of express advocacy in an organization's
activities has been a major part of the
Commission's test for whether an organization is a
political committee that must register with the FEC
and abide by the contribution limitations and
prohibitions of the Federal election laws.

However, in McConnell v. FEC, the Supreme Court
ruled that the express advocacy test is not
constitutionally mandated. The Court further
stated, in the bluntest possible terms, that the
express advocacy test is functionally
meaningless—"that's a direct quote from the
Court—in the real world of politics. The Court
noted that many commercials aired by campaigns do
not contain express advocacy and that many campaign
consultants have concluded that using terms such as
"Vote for Bush" or "Vote Against Gore" are not
effective in moving voters. The Court also
observed that political parties and interest groups
for years have aired hard-hitting advertisements
that do influence voters, but that do not contain
any words of express advocacy.

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

The promote, support, attack, oppose
standard—we're going to hear a lot about that in
the next couple days—is one such possible
alternative standard. That, in many ways, I think,
is the major defining issue in this rulemaking. In construing the permissible reach of the Federal election laws and in determining which organizations may legally be treated as political committees, the Supreme Court has made a fundamental distinction between organizations that are electorally oriented and those that are not. In Buckley v. Valeo, the Court ruled that organizations may be treated as political committees if in addition to meeting the statutory $1,000 contribution and expenditure test, they are either, quote, under the control of a candidate or the major purpose of which is the nomination or election of the candidate, end quote. The Supreme Court quoted this controlling phrase from Buckley ten years later in the Massachusetts Citizens for Life case, holding that organizations may be regulated as political committees if, again, quote, their major purpose may be regarded as campaign activity, end quote. In both Buckley and MCFL, the critical dividing line was whether an organization's major purpose is electoral politics.
The McConnell ruling did not alter this major purpose test. As the various comments made clear, Section 527 organizations exist for the purpose of influencing the nomination, election, or appointment of any person to public office. Given that that is the fundamental nature of 527 organizations, I think a very strong argument exists that 527 satisfies the Supreme Court's major purpose test per se as a matter of law. I look forward to hearing more from the commenters on this question.

Moreover, in McConnell, the Court upheld BCRA's promote, support, attack, oppose standard against a constitutional vagueness challenge, ruling that the statutory provisions provide explicit standards for those who apply them and, quote, give the person of ordinary intelligence reasonable opportunity to know what is prohibited, end quote. In doing so, the Court stressed that the promote, support, attack, oppose standard provides reasonable notice as applied to political parties since, again quoting from the Court,
actions taking by political parties are presumed to be in connection with election campaigns, end quote. Similarly, I think a very strong argument exists that the same can be said of 527 organizations, given that 527 operate by law by the purpose of influencing the nomination, election, or appointment of any person to public office.

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

There has been considerable debate about whether any new rules the Commission might issue should be effective for the 2004 election. I strongly believe they should be; otherwise, the Commission will be effectively exempting the upcoming election from fundamental aspects of the law. However, I have decided that I will vote for
regulations based on the law as I understand it
even if they are not effective until after this
election. That is not my preferred course, and I
will continue to fight to make whatever the
Commission decides effective for 2004. And I think
that is the appropriate course, but I think it's
more important for the Commission to get the law
right in this undertaking that it is to weigh
short-term political interests one way or the
other, and I'm going to vote accordingly.

Thank you, Mr. Chairman

CHAIRMAN SMITH: Thank you, Commissioner

Toner.

Vice Chair Weintraub.

VICE CHAIR WEINTRAUB: Thank you, Mr.

Chairman.

Recently I had the opportunity to
participate in a conference addressing global
political corruption. Thirty-four countries were
represented, many of them emerging democracies
struggling to establish democratic institutions.
Corruption has a bolder, uglier face in some of
these place than that we see in this country. One
gentleman spoke of the many times he had been
jailed for speaking out when his government did not
want to hear. A woman told of the assassination of
her husband, a journalist, who dared to write
critically about his government's policies. She
and her children had to be spirited out of the
country to save their own lives.

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

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

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

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

It is not just our privilege in a
democracy to challenge our government to do the
right thing; it is our obligation. And I thank
everyone who has tried to do that in this
proceeding.

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

I have always been an advocate for rules
that are simple, clearly written, and easily both
to understand and administer. The proposed rules
do not come close. We must also acknowledge that we are dealing with complicated legal terrain here. In the quest for simplicity, our answers must not become simplistic.

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

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

In upholding BCRA, the Supreme Court
emphasized the corruption or appearance of
corruption that stemmed from the direct involvement
of office holders in raising and spending soft
money. That link has been broken appropriately by
BCRA. The Court said: "To be sure, mere political
favoritism or opportunity for influence alone is
insufficient to justify regulation. As the record
demonstrates, it is the manner in which parties
have sole access to Federal candidates and office
holders that has given rise to the appearance of
undue influence."

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

I am very pleased with the diversity of
experiences and viewpoints that our witnesses will
bring to this hearing. You have the opportunity to
make a real contribution to our understanding, and
while it may not make for scintillating TV drama, I
encourage you to wade into the details of specific
proposals. I have attached to my written statement
a list of questions that are under active
consideration and hope that the witnesses can help
the Commission evaluate the pros and cons of these
particular ideas. I'm not endorsing any of these
proposals, but I think they will help witnesses to
know what's on the table, and there should be
copies of my written on the table outside and they
will go off on the web site as well.

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

Wayne Clark from Durham, Maine asked us
to please remember what Robert Kennedy said: "We
must not only tolerate dissent; we must encourage
Pamela Cook of Spencer, Indiana wrote of her daughter's work with Rock the Vote to register other high school students. The notion of reclassifying this kind of voter registration as if it is a political committee, Ms. Cook writes, sounds pretty fishy to me; I am against it. Ms. Cook, I am with 8 you.

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

CHAIRMAN SMITH: Thank you, Madam Vice Chair.

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

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

As Commission Thomas noted, we had proposed a spectrum of alternatives to obtain useful comments on how to proceed. One of the aspects we received comment on was whether charitable and social welfare groups, that is 501[c] organizations, should be distinguished from a group organized under Section 527. The proposed rule should not be read as a Commission conclusion on this or other questions, but I have to say that
for my part, I do not see 501[c] groups as being at
all taken off the table, and I do not consider at
all a campaign of disinformation that people are
suggesting the 501[c]s may be regulated by the
proposals.

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

I'm not certain as to why a group
organized under Section 501[c], which is not
required to disclose its donors, would be allowed
to spend $10 million in soft money on political
activity, which a group organized under Section
527, which is required to disclose its donors, would be barred from spending any soft money for the exact same purpose. Similarly, we know that many umbrella organizations have both kinds of accounts, that is many groups have both 501(c) and 527 accounts. If 527 accounts are limited, it would seem quite easy for such groups to simply move their activity into 501(c) accounts.

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

Second, I want to note that thousands of E-mails came from people imploring the Commission to, quote, crack down from what they insisted was, quote, illegal spending on soft money activities of 527 groups. Some of them referred to the groups as John Kerry's soft money special interest groups; yet thousands of other commenters opposed what they called the, quote, attempt by the Republican
1 National Committee to crush the FEC into issuing
2 rules that would punish groups that dare to
3 criticize President Bush or, quote, another
4 partisan attempt by the Republicans to ensure that
5 liberal and minority voices are not heard, or,
6 quote, an effort to silence opposition to Bush
7 policy.
8
9 To the second group of writers, I point
10 out that the political advantage created by the
11 rule is one factor that we simply cannot weigh in
12 our deliberations. Rather, we sit here today
13 debating whether the activities of outside groups
14 are, in fact, violating the laws as written by the
15 Congress and interpreted by the courts. To the
16 first group of letter writers, I point out that
17 this is not such a simple question. Were the
18 activities of, quote, John Kerry's soft money
19 special interest groups, unquote, so clearly
20 illegal, then the Republican National Committee
21 would not have had a reason to ask us to issue a
22 rule on the matter.
23
24 Along these lines, it would have been
expansion in this area since the congressional amendments in 1974 to the Federal Election Campaign Act, and if history is any guide, these rules will be in place for many campaigns. So I want to assure those letter writers who accuse us of attempting to silence particular views that this is not an exercise in partisanship. This is a very serious rulemaking. We have a great deal at stake that will go well beyond this election and that will affect conservatives as well as liberals.

II. PANEL I

CHAIRMAN SMITH: With that, I'd like to call up our panel, and as they come up to the microphones, that panel consists of Jan Baran on behalf of the Chamber of Commerce of the United States. Mr. Baran is from the firm of Wiley, Rein & Fielding. By the way, I'm going to ask you for your opening statements in this order as well, alphabetic orders. Also on the panel are: Laurence Gold, Associate General Counsel of the AFL-CIO; Don Simon of Sonosky, Chambers, and others, on behalf of Democracy 21; and William Kirk
useful, I think, for a representative of the RNC to
testify, as probably none of other commenters, at
least of what I would call the detail commenters,
were so enthusiastic for these proposed
regulations; therefore, it would have been
particularly educational, I think, for everyone to
hear answers to some of the questions that have
been raised by others about the RNC's views and
views that I think will be poorly represented
without then here.

Perhaps more importantly, for the second
group of letter writers who accuse the GOP as
seeking merely to silence criticism of President
Bush, it would have been valuable for the RNC to
use this forum to put to rest the accusation that
there is a strategy of short-term political
advantage. Any rule we adopt will apply as equally
to conservatives as it will be liberals, to
environmentalists and feminists, but also to school
choice advocates and property right groups, in
fact, to any group of concerned political people.
The RNC, as I understand it, is arguing
that the soft money activities of certain groups,
whatever their ideology, constitute knowing
and willful violations of existing laws subject to
criminal penalties. This position, as I read it,
does not discriminate upon ideology, and it might
have been useful for them to publically confirm in
this forum. Under the RNC's proposals, not only
supporters of John Kerry criticize George Bush, but
also conservatives who engage in criticism of John
Kerry or Tom Daschle or Democratic leaders, would
be subject to possible criminal prosecution.

I do hope that some of the many groups
of letter writers who were so concerned about this
approach of censorship, however, will think again
about past support that some of them may have had
for restrictions on political speech under the form
of campaign finance reform. This underscores my
final point: What we're doing here is not a
political partisan game. We are enacting rules
that some of them, if adopted, would constitute a
very significant regulatory expansion. In my view,
it would be the most significant regulatory
expansion in this area since the congressional amendments in 1974 to the Federal Election Campaign Act, and if history is any guide, these rules will be in place for many campaigns. So I want to assure those letter writers who accuse us of attempting to silence particular views that this is not an exercise in partisanship. This is a very serious rulemaking. We have a great deal at stake that will go well beyond this election and that will affect conservatives as well as liberals.

II. PANEL I

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

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

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

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

The Chamber opposes these proposed
rules, basically has two major concerns: First,
the proposals represent the usurpation of
congressional authority by effectively
renegotiating the legislative bargain that is the
essence of the Bipartisan Campaign Reform Act,
which I will refer to as BCRA, B-C-R-A. Second, even if the Commission were empowered to do what it proposes in these rules, they are fatally flawed in their overbreadth and vagueness. If adopted, and we hope none are, any rule should be delayed until after this election cycle and it should specifically exempt non-party groups organized under Section 501[c] of the Internal Revenue Code. The Chamber, like the vast majority of witnesses at these hearings, believes that the Commission lacks the authority to adopt these rules, and in addressing Commissioner Thomas' point, we don't say that the Commission doesn't have rulemaking authority. We just say it doesn't have the authority to adopt these particular rules. The legislative history of BCRA demonstrates that Congress set out to solve a particular problem that some saw in the campaign finance system, and that was corruption and the appearance of corruption. Though many groups, including the Chamber, challenge the constitutionality and wisdom of BCRA, there was never any doubt that the solution
contained in this legislation was the end product, for better or worse, of deliberation and compromise by Congress.

This legislation was the culmination of seven years of political negotiation. It represents Congress' resolution for the first time in a generation of divergent rights and obligations in the conduct of political advocacy. The so-called reformers sought sweeping changes.

Opponents of the law, both legislators and the regulated community, fought to defeat or modify the law. Neither side got all that it wanted, but each shaped the final compromise. As the Supreme Court has recently stated in Ragsdale v. Wolverine Worldwide, Inc., quote: Courts and agencies must respect and give effect to these sorts of compromises, unquote.

In BCRA, Congress carefully regulated national and state party soft money and electioneering communications by certain groups at specific times. Congress did not change the definition of political committee or the more
general definition of expenditure. Congress neither left gaps nor did it instruct the Commission to address those provisions that I just cited, even though Congress ordered FEC rulemaking in many other areas.

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

In addition, this rulemaking threatens to cast into doubt the legality of the numerous nonpartisan voter outreach activities. The Chamber, like many non-party membership groups, sponsors voter registration education and get-out-the-vote activities across the Nation. Like most non party organizations with limited resources, the Chamber must tailor these activities to certain geographic areas and demographic groups. The proposed rules
provide no concrete guidance as to the criteria
that could transform legitimate nonpartisan
activities into illegal expenditures and generally
a political non-party groups into so-called
political committees.

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

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

In sum, these proposed rules exceed the
constitutional and statutory limitations on
government regulation of advocacy by nonpartisan

groups. The Commission's attempt to expand

regulation in our view is unauthorized and

ill-advised. As Senator Wellstone observed during

the floor debate over McCain-Feingold, he said, and

I quote: No matter how good the idea may be, if

you can't muster 51 votes here and a majority in the

House, then the idea is only that. It is a good

idea, but it lacks the ability to build the

necessary majority support for the idea to become

law, unquote.

The proposed rules, whether they are a

good idea or a bad idea, could not have been made

law by Congress in McCain-Feingold, and they should

not be made law here.

Thank you.

CHAIRMAN SMITH: Thank you, Mr. Baran.

Mr. Gold.

MR. GOLD: Thank you, Mr. Chairman.

I appear today on behalf of the AFL-CIO,

the national labor federation that represents 13

million working men and women throughout the United
States. We filed comments jointly with the
Building and Construction Trades Department of the
Co. AFL-CIO and with the Independent National
Education Association, whose representative will
testify separately.

We have also embraced important comments
filed last Friday, April 9th, by six national
unions representing nearly half of the AFL-CIO's
membership. These were filed electronically, but I
fear may have been lost in the sea of the 150,000
comments that the Commission has received in this
sprawling and complex rulemaking. The fact that
those comments have been filed, and I'm not sure if
the Commission or the general counsel has had a
chance to review them, is emblematic of a reckless
compression of this process, and certainly a few in
the regulated community will have read those
comments, given the nature of the Commission's web
site and the inability to access anything on it. I
know that I have not had an opportunity to read
many, many important comments in order to prepare
for this hearing. I just learned of the Vice
Chairman's list of questions, which were not on the
table when I arrived shortly before the hearing
began, and I'm afraid--I feel and I think all the
other witnesses here will be at a disadvantage and,
more importantly, the Commission will be at a
disadvantage for a process that is so haphazard and
so rushed.

I would like to just make a few
substantive points in addition to that before we
proceed to questions. The first, following from
what I just said, is I believe the Commission and
the AFL-CIO believes that the Commission has
engaged in a profoundly disruptive exercise. We
are 17 months into an election cycle. The general
election, the general presidential election, many
other Federal elections for all intents and
purposes are upon us already. Many thousands of
political committees and other organizations have
spent tremendous sums of money and efforts and
resources to come to grips with the far-reaching
amendments of BCRA. Many are still learning that
statute. Millions of organizational members,
contributors, candidates, and ordinary citizens
have had to master that statute and the dense new
regulations that the Commission adopted during 2002
and 2003. All of that activity reflected the first
major overhaul of the Federal Election Campaign Act
in nearly 30 years.

Now, unexpectedly, and in the absence of
any congressional command or even any judicial
direction in the McConnell decision, the Commission
has launched perhaps the most ambitious rulemaking
of its history, eclipsing even what Congress did
command in BCRA and without any coherent
explanation as to why, let alone why now.

So the Commission is proposing to
redefine what is an expenditure, what is a
political committee, what is partisan activity,
what is nonpartisan activity, and how should
political organizations and others allocate their
expenses between Federal and non-Federal accounts.

With all due respect, the Commission is bringing up
now far, far more than we out here can bear or that
we should be asked to bear, especially at this
time. This rulemaking should be withdrawn, and the revised law that Congress did write should be allowed to operate for the balance of this election cycle in order to give the Commission, Congress, and everybody who is regulated by it an opportunity to evaluate what happened and what, if anything, needs to be done. Dramatic revisions now of longstanding rules that Congress did not disturb in BCRA would be deeply unfair and utterly contrary to all reasonable expectations and reliances by those effected.

Second, with all due further respect, the Commission simply does have the authority to undertake certain core proposals in this rulemaking. For example, redefining the term "expenditure" to include categories of conduct first recognized in BCRA itself, but for wholly different purposes and actors. This comports with no recognizable congressional intent or delegation, let alone any reasonable expectation by millions of organizations and individuals. Also, redefining political committee to capture untold numbers of
non-Federal Section 527 organizations contradicts Congress' limited and specific treatment of them in BCRA itself and in two other recent congressional enactments, one in June 2000, just before BCRA, and one in November 2002, just after, that regulated such organizations by disclosure alone.

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

In sum, we believe--

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

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

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

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

CHAIRMAN SMITH: Thank you.

Mr. Simon.

MR. SIMON: Thank you, Mr. Chairman.

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

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

In our view, the Commission has two key problems before it: First, the spending of tens of millions of dollars of soft money explicitly for the purpose of influencing Federal elections by Section 527 groups that are not registered as political committee and that are, therefore, operating outside the Federal campaign finance laws. Second, the egregious manipulation of the Commission's existing allocation rules for
non-connected political committees in order to license the spending of almost exclusively soft money for voter mobilization activities clearly aimed at influencing the Presidential election.

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

The NPRM is a recipe for failure because it maximizes the danger that this rulemaking will succumb to paralysis, deadlock, and inaction generated by a complexity and controversy inherent
in the proposal. This is especially true in the context of an expedited proceeding, in trying to resolve too much too fast, the Commission runs the serious risk of resolving too little too slowly or indeed nothing at all.

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

As a law enforcement agency, you should deploy your resources to those topics that most clearly and immediately threaten to subvert adherence to the law. The two problems I mentioned before are the questions that require urgent resolution on an expedited basis for this election cycle. The many other issues raised in the NPRM
should in some instances be dropped entirely and in others deferred for later consideration.

Thank you.

CHAIRMAN SMITH: Thank you, Mr. Simon.

You're doing the best so far on time.

Mr. Kirk.

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

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

I think the best way for me to describe this is just to tell you a little bit about this
organization so you can focus on what it does and
see how what we believe this rule, proposed rule,
will have a chilling affect on our activities.
First of all, the Institute is not controlled by
any federally-elected official. It is not
controlled by members of the Congressional Black
Caucus. It is not controlled by, affiliated with,
or directed by any political party, Democrat,
Republican, or other. The CBC is not a trademark
name, and the private sector citizens who formed
this organization and recruited certain members of
the Congressional Black Caucus to join with us on
the board, that was a deliberate attempt for us,
because if you're going to go out, and I've been
discussing on purpose, and try to educate, motivate
civic participation among the African American
community, it is logical that you'd like to have
some of the leaders of that community involved in
your activities.

So I wanted to make it very clear that
I'm not speaking on behalf of the Black Caucus or
on behalf of any other organization related to the
Black Caucus such as the Black Caucus Foundation.

We are a 501(c)(4). We are a D.C. nonprofit. We have organized ourselves to operate as a social welfare organization. We've applied to the IRS under that basis. We've submitted all of the supporting materials to the IRS with regard to the standards of a 501(c)(4) organization. We are not a 527 organization. We do not engage in the activities of a 527 organization, and it is not our intention to do so in this current election cycle.

So we are not in the business of trying to support one candidate, oppose another candidate, to overtly influence the outcome of a particular election. As I said, the purpose of this organization is to conduct and support research on public policy issues that are uniquely affecting the African American community, to promote civic participation, including participation in the electoral processes, but in order to do that, we have to understand those processes, and to support training opportunities for people in the private sector, those who want to be in public service and
those are interested in the political process. So
that is what we do, and our statement talks about
some of the activities that I'll be happy to
elaborate upon them in the Q and A, if there is
any.

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

The other thing I would like you to
focus in on is that the rule, as we understand it,
if adopted, has a chilling affect even if--even
if--you do not specifically sweep in 501[c][4]
organizations. We believe it would have a chilling affect on our ability to raise the resources that are needed to carry out the work we do. There would be all kinds of questions as to whether or not if you have a forum and a member of Congress comes to this forum, if you discuss a policy that's pending before the Federal Government, all kinds of questions from potential donors and contributors as is political activity, are we now going to be making a political campaign contribution.

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

CHAIRMAN SMITH: Thank you, Mr. Kirk. We'll go to questions. In the first concession to time already, I'm going to reduce unilateral decisive move commissioner question time just to ten minutes on the round. We'll begin with Commissioner Thomas.

COMMISSIONER THOMAS: Not just my time?

CHAIRMAN SMITH: Let's go on.
COMMISSIONER THOMAS: Every time I speak up, I get reduced more. Thank you, Mr. Chairman.

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

But there was behind these 150,000 comments, obviously, a very concerted effort by the organizations most likely impacted to generate these kinds of comments, and that's not taking anything away from the folks who felt the urge to follow up. I think it is important to note, however, that the number of comments we received was really the product of an amazing effort, an
organized effort, to generate comments coming into
the agency, and it's something we should all keep
in mind as we're going through this.

The questions I want to get to initially
involve trying to identify what is the Government's
interest. Here we are talking mostly about
organizations that otherwise are operating
independently of candidates and the party committee
operatives. They're not coordinating, in other
words, with candidates of party committee
operatives; and the question that I kind of wanted
to get at is do you all agree that the articulated
governmental interest in this area is not
necessarily just the prevention of the appearance
of corruption that is generated by the traditional
quid pro quo situation you get when a contribution
is made to a candidate, but what we're talking
about here is what the Supreme Court has
articulated as the desire to prevent the
independent groups, which are in many cases sources
of aggregated wealth, from having a way to distort
the political marketplace in a way that basically
forces the average citizen out of the political
market place? Do you also at least acknowledge
that that is the stated rationale for Government
regulation in this area?
MR. SIMON: Well, let me jump in.
CHAIRMAN SMITH: Mr. Simon.
MR. SIMON: I think you're right,
Commissioner Thomas. I think it goes beyond that
though. I think Congress over a long period of
time, starting almost a hundred years ago, has step
by step constructed a regulatory regime, and the
Supreme Court in multiple opinions has upheld that
regime to regulate money for the purpose of
influencing Federal elections. Now, there are
different forms of regulation. There are different
constitution limitation on money that's spent by
making a contribution to a candidate or spending in
coordination with a candidate than there are that
pertain to money spent independently of a
candidate, but money spent independently of a
candidate or party, as you suggest, is subject to
regulation. It's subject to principles of
disclosure. It's subject to a prohibition on the
spending on union and corporate treasury funds, and
that question and the compelling interest behind
those regulations were upheld in the Austin case
and was restated again in the McConnell case, and
that money, I believe, is also subject to
contribution limits to groups that make such
independent spending.

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

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

CHAIRMAN SMITH: Mr. Baran.

MR. BARAN: I think that Commissioner
Thomas' question and Don Simon's response is more
appropriate for a congressional hearing, not for an agency hearing, because the issue here is not how to pass a new law. The issue is whether or not this proposed regulation or these regulations are consistent with the law that Congress did pass and that you are responsible for implementing. I would submit that Congress did not suggest that the AFL-CIO and U.S. Chamber of Commerce are political committees or are likely ever to be political committees. They knew full well who we were.

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

If you wanted to regulate beyond what Congress said it wanted to regulate, which is independent public advertising that satisfies the definition of electioneering communication or express advocacy, then that ought to be part of your legislative proposals to Congress or to Don
Simon's proposals to Congress that they ought to pass additional laws to regulate more of this active.

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

Mr. Baran and I sat together in the Supreme Court's Chamber last September when the culmination of year's litigation with enough of a record to fill the entire space between me and the commissioners and the general counsel was filled with evidence and argument, documents and the like, all about just what BCRA itself regulated, just the steps that Congress took, the very limits that
Congress took with respect to limiting, restricting independent expression by independent groups, and it was a tremendous effort by Congress to enact it, and it was a tremendous effort by the Commission and the sponsors to defend that constitutionally. But the fact is that's all that Congress has done, and the Commission here is to embark on a further rumination about what is in the public interest and how further the AFL-CIO or the Chamber of Commerce or independent 527 organizations ought to be regulated is just a place where the Commission simply can't go. We're not saying the Commission has no authority, or at least I'm not saying the Commission has no authority, to issue regulations on statutory terms, but it certainly has to be mindful of lines clearly drawn by Congress both in BCRA and in the amendments, again, the amendments in the Internal Revenue Code in 2002 that directly dealt with the independent Section 527 organizations and Section 527 organizations sponsored by the Chamber of Commerce and the AFL-CIO and other Section 501[c]
organizations, which this rulemaking would completely re-fashion.

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

COMMISSIONER THOMAS: Thank you. I have to say up front that I don't think any of the commissioners here coming into this rulemaking have any concept of trying to treat the AFL-CIO or the Chamber of Commerce as a political committee. I think we can just say that's off the table. What we're trying to get at is the balance, if you will. On the one hand, there are some groups out there that are certainly entitled to not be treated as political committees, but by
the same token, there appear to be groups out there
that are undertaking as their primary mission
trying to influence elections, and Congress did not
through BCRA take off the books the definition of
expenditure, which is in the statute and has been
for many, many years. It defines expenditure as a
payment for the purpose of influencing Federal
election; nor did Congress through BCRA take off
the books the definition of political committee,
which itself depends on using that term
"expenditure" in terms of how to define it.

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

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

Let me move on. With regard to how we
deal with these terms that are in the statute for
the purpose of influencing, I gather that at least
with respect to some organization, Mr. Simon, your
argument is that we can apply in essence a
for-the-purpose-of-influencing test, but for other
kinds of organizations, the 501[c] groups, we
should step back and use the expressed advocacy
test.

MR. SIMON: That's right, and that view,
that distinction is grounded directly on the
Supreme Court's discussion of the Buckley case
where it addressed this very question about how do
you construe and apply this statutory language for
the purpose of influencing, and the Court drew what
I think is for purpose of this discussion a
critical distinction. It basically applied a gloss
to the statutory language. It said when you have
groups that are essentially in the business of
politics whose mayor purpose is to the seek
nomination or election of candidates, whose primary
activity is campaign activity, those groups fall,
in the Court's words, in the core area sought to be
regulated by Congress. Their spending is by
definition campaign related, and for those kinds of
groups, the statutory language is sufficiently
precise and tailored to cover their activities. So
their activities are controlled by a
for-the-purpose-of-influencing test.

For all other groups, groups whose major
purpose is not to influence elections, 501(c)
groups, corporations, trade associations, labor
unions, all those sorts of other entities out there
who are not primarily in the business of campaign
activity, they because of constitutional concerns
about vagueness in the statutory language, those
groups are entitled to have a bright line
distinction separating what campaign activity they
engage in that is subject to regulation from their
other activities and their issue discussion, which
is not subject to regulation.

Now, in Buckley, the Court as a judicial
gloss as a matter of statutory construction, not as
a matter of constitutional limitation, but as a
matter of statutory construction, developed the
express advocacy test, and for those group, those
non-major purpose groups, only their spending that contained express advocacy is subject to regulation under FECA. Now, what BCRA added was an additional test, the electioneering communication test, but what was important about that is that Congress as a constitutional matter had to adhere to the same principles of creating a clear bright line non-vague test.

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

For all of other groups, Mr. Baran's group, Mr. Gold's group, all the 501(c)s out there, my group, those groups are subject to the bright
1 line test of expressed advocacy and electioneering
2 communication. Congress could, I suppose, adopt
3 additional tests. I think they would have to meet
4 the same bright line standards, but until Congress
5 acts, those are the only applicable tests that
6 constitute regulable expenditures.

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

But I think it's very interesting to
note that in McCain-Feingold, there was no change
of any of those fundamental concepts, even though
this agency has conducted a ruling during this
legislation in 2001--the Chamber submitted comments
in that ruling three years ago--it ceased that
ruling as saying we'd like to see what Congress
passes; we'd like to see if there's any more
judicial opinion. And Congress spent a lot of time
on your statute, and what did it do? It didn't
change the definition of political committee or
anything like that. It added a concept of
electioneering communication, which I think is
significant not only because it expands your
regulation, but it's doubly significant because an
electioneering communication is not an expenditure.
It didn't even amend the definition of expenditure,
and it was included in the prohibition on
corporations and unions as another type of activity
that's prohibited, but not a contribution or
expenditure.

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

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

CHAIRMAN SMITH: Okay. We'll move on.

Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr.

Chairman.

Mr. Simon, following up on earlier
comments, you were focusing on a major purpose test as you understood it, and I took from your comments that you see it as making a fundamental distinction between those organizations that are electorally involved or electorally oriented and those that aren't. Do you think that—in additional, you do have the statutory $1,000 test that has to be met, but in terms of just the major purpose test, do you think there is a strong argument that 527 organizations necessarily meet the major purpose test per se?

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

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

Let me just add one more quick point.

The Commission--this is not a new concept. The
Commission has repeatedly over the course of the
last 20 years in advisory opinions cited a group
status as a 572 as an indicator, as evidence, of
its major purpose status. I mean, I looked
yesterday, and I found about eight or ten AOs where
the Commission cited 527 as indicating the group
had a major purpose.

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

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

Now, there is a lot of discussion about
that promote, support, attack, oppose standard.
That standard—and I think this is where the
Commission's proposed regulations go badly off track, because that standard, I believe, cannot be applied to corporations, to 501(c)s, to labor unions, but it can be applied to 527s precisely because those are major purpose organizations.

COMMISSIONER TONER: Is the reason you don't believe they can be applied to 501(c)s and corporations because of the constitutional command of the major purpose test?

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

COMMISSIONER TONER: I'd be interested in anybody else's views on these issues.
MR. BARAN: The only problem I see with this analysis by Mr. Simon is that it is flatly contradicted by the Internal Revenue Code Section 527 and its legislative history, and a 527 itself has been on the books since the 1970s. It has been amended twice in the last four years. In July of 2000, Congress passed a law that required 527 organizations to disclose their receipts and expenditures for the first time, and then after the passage of BCRA, Congress revisited 527 again.

And we cite in our comments that were submitted in this rulemaking the statement by Senator Lieberman who supported the new Section 527, and this is what is said, quote: When the Bipartisan Campaign Reform Act, the McCain-Feingold bill, goes into effect, at least some of the soft money donors who will longer be able to give to political parties will be looking for other ways to influence our elections. Donations to 527 groups will probably top many of their lists, because these are the only tax-exempt groups that can do as much election work as they want without
1 jeopardizing their tax status, unquote.
2 Now, if these organizations are
3 automatically political committees under the
4 campaign finance law, this legislation, this tax
5 legislation would be irrelevant. It would
6 redundant. Why would you need to have this bill
7 that requires disclosure if disclosure was
8 automatically required under the Campaign finance
9 Reform Acts? You know, this underscores the fact
10 that both in BCRA and in Congress' consideration of
11 Section 527, they expected 527 groups to exist.
12 They expected them to file reports. They expected
13 them to spend money on public advertising as long
14 as it satisfied all of the other campaign finance
15 requirements of not making contributions, not
16 containing express advocacy, and not engaging in
17 electioneering communications.
18  COMMISSIONER TONER: Mr. Simon, your
19 thoughts?
20  MR. SIMON: Well, you know, I think
21 there is an explanation for why Congress passed the
22 disclosure law in 2000, and I think it relates to a
kind of constitutional fog that--

MR. BARAN: This quote was 2002. I just

want to make it clear.

MR. SIMON: Let me get to that. It

relates to a kind of constitutional fog that,

unfortunately, the Commission itself created about

the role of 527s and the status of 527s in various

advisory opinions, statements of reasons and murs.

The Commission started adopting the position that

express advocacy was as a constitutional matter

required to make a 527 into a political committee.

Probably the best known and perhaps in a sense the

one that was most confusing to the development of

the law was the mur that involved Republicans for

Clean Air where we had a 527 that was engaging in

campaign activities. The general counsel

recommended that the Commission dismiss the

complaint on the ground that the 527 did not engage

in express advocacy and, therefore, was not a

political committee. The Commission deadlocked 3-3

on that, therefore in a sense creating no law and I

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

Now, the final point is something
significant has changed since the passage of the
2000, since the passage of BCRA, since the passage
of the subsequent law relating to 527. What has
changed is the McConnell opinion, which is a
definitive Supreme Court ruling on precisely these
constitutional questions, the key one of which is that express advocacy is not a constitutional barrier. So the whole notion that 527s can't be regulated as political committees because they don't engage in express advocacy, which is a view that the commission had for many years, was wrong, and I think that clears the path for the Commission to properly implement the pre-existing law.

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

MR. GOLD: Yeah. I believe that is also flatly incorrect with respect to the McConnell decision. What the McConnell decision did was say the express advocacy line is not constitutionally required. It did so in constructing a statute by Congress. It did not revise a statute. Whether or not that--whether or not Congress could go further, it hasn't gone further, and there was a lot of--if we thought--if anybody can credibly--nobody can credibly say that going into the McConnell litigation and going to the McConnell decision, that if the plaintiffs prevailed on their position
that the electioneering communications provision,
the only exception to express advocacy were
regulations of independent speech in 30 years,
nobody can credibly say that if they prevailed on
the point, which they did, that that was going to
open up this entirely new regulatory landscape for
this Commission to go through or to appropriate a
phrase from one portion of the Act, promote,
support, attack, or oppose, and then graft it upon
organizations in another section of the Act,
everybody would have been absolutely shocked.
This is sort of a colossal bait and
switch approach to Federal election law and
constitutional law, and it's not fair.
One of Mr. Simon's co-commenters at the
Campaign Legal Center filed an amicus brief last
year in the Eleventh Circuit case that was faced
with the question about whether those 527 reporting
requirements were constitutional. And what was
their argument? They made a very strong argument
that it was critical that that law be upheld
because, they said:
"BCRA will deliver greater transparency in the conduct of elections and enhance the integrity of our political system; however, its enactment does not obviate the need or justification for Section 527[j], the new 527 disclosure provisions. Indeed, BCRA's requirements relating to the financing of electioneering communications an not cover all forms of electioneering activity. For instance, they will not apply to spending on non-express advocacy electioneering telemarketing, direct-mail communications, newspaper advertisements, or internet communications. Likewise, they will not apply to independent spending on non-expressed advocacy electioneering television or radio advertisements that are aired more than 60 days before a general election or 30 days before a primary, i.e., during the majority of an election cycle. Thus, even with the enactment of BCRA, IRC Section 527 organizations will be able to conduct considerable amounts of Federal campaign finance activity outside the scope of FECA. As such, IRC
Section 527[j] continues to be a critical mechanism for campaign finance disclosure."

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

One of the fundamental flaws in the argument that we're hearing is to mush together all political activity. Everything is now Federal. Section 527 says influence—a primary purpose to influence elections. That's elections at all levels. The Federal Election Campaign Act can only regulate entities that either do a $1,000 in expenditures, a statutorily-defined term and Mr.
Baran has described, or make $1,000 in contributions to candidates, also a familiar term. The major purpose gloss that the Supreme Court imposed or clarified, which neither Congress nor the Commission has ever encoded in the statute in regulations, is an effort to limit the reach of the statute, not to expand it.

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

Mr. Simon just said if you spend $1,000 to promote, support, attack, or oppose a Federal candidate, and your tax form is Section 527, then your major purpose has been proven and your Federal political committee status has been proven. That
cannot be the law. That isn't the law.

CHAIRMAN SMITH: Vice Chair Weintraub.

VICE CHAIR WEINTRAUB: Thank you, Mr. Chairman.

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

Mr. Simon, I'll start with you sort of following up on some of the debate that has been going on. In the past, sometimes you've been here
on behalf of Common Cause. Today you're here on behalf of Democracy 21. We're always glad to see you whoever you're representing.

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

So even among the reform community there is not unity of position as to what we should do here, and you and I have had this debate for months now. Before McConnell, when we appeared on panels
together, I raised the argument, and I certainly wasn't the first one, as Mr. Gold and Mr. Baran pointed out, to say this, that one of the unintended consequences of BCRA was that we might end up losing disclosure, which I thought was not necessarily a good thing, because I'm generally a disclosure advocate, because a lot of the soft money would flow from the parties to 527 organizations.

People knew this was going to happen.

They knew it when they passed BCRA. And when I raised this issue with you in the past, the answer that I believe I recall getting from you was it wasn't an unintended consequence; we took what we could get, because it narrowly tailored law; and we just didn't intend to go there, either because we couldn't get the votes or people--other members of Congress were concerned about the constitutionality of it; we just didn't do that; that wasn't the goal of BCRA. Instead, we have this narrowly-tailored approach, and everybody knew that other things would continue to happen, and now since McConnell
has opened this new area of where it seem like there
is the potential for more legislation or
regulation, more than people thought there was
before, now all of a sudden the arguments have
changed.

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

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

You know, I do think in the comments
filed in this proceeding, contrary to what you're
suggesting, there's actually remarkable unanimity
within the reform community, and comments filed by
Democracy 21, by the Campaign Legal Center, by the
Center for Responsible Politics, by Common Cause,
by the Brennan Center, by the League of Women
Voters, by Public Citizen, if you look at that list
of the leading reform community organizations, I
think they all are saying pretty much the same
thing, which is there's a problem with these 527
groups that are engaged in Federal election
activity. The Commission should address that
problem. There is a problem with the gaming, the
manipulation that's going on by other political
committees in kind of jimmying the allocation rules
to allow enormous amounts of—an enormous
percentage of soft money to be used for Federal
activities. The Commission should address those
rules.

The Commission should not, however, in
this rulemaking get into the broader question of
501(c)s. So I just think that when you get the
opportunity to look at the range of comments filed
by reform organizations in this proceeding, you'll
see that convergence of views.

Now the second point. I think what you're doing is basically mixing apples and oranges in your analysis, and let me explain it this way:

In BCRA, Congress addressed the problem of what sort of speech, what sort of regulation, what sort of communications can be subject to regulation under the campaign finance laws by non-major purpose entities, by groups like corporations and like 501[c]4s. Congress took the position, which was subsequently validated by the Supreme Court, that it could write a bright line test that went beyond express advocacy to bring a greater scope of public communications within the campaign finance laws; and, therefore, 501[c] groups are subject to the electioneering communications test, but they're not subject to some broader promote, support, attack, or oppose standard.

They're not subject to such promote-support kinds of communications outside the 30-day and 60-day windows. Those communications by 501[c] groups, by corporations, by labor unions,
are not covered by the campaign finance laws.

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

Now, the Supreme Court along in Buckley and said that's incredibly broad, that's too broad, we're going to limit it to groups that have a major purpose of a campaign activity and then have some sort of Federal nexus, Federal spending limit, that low threshold in the statute, over $1,000 in Federal expenditures. But for reform organizations--and let me also say, as I indicated
before, that the problem that developed was I think
the Commission's view in the late 1990s, that the
express advocacy test, which applied to
non-major purpose groups, somehow also should be
applied to major purpose groups. So the Commission
started administering the law as if there were this
express advocacy limitation on spending by a 527.
That was wrong, and McConnell shows
that's wrong. So I think all we're saying is this
isn't a matter of BCRA. This is a matter of FECA.
Now that the Supreme Court has made this ruling,
you have the obligation to correct your mistakes
and to properly implement FECA as construed by the
Supreme Court in Buckley and in McConnell in its
application to 527s. 501(c)4s are subject to
BCRA. They are subject only to regulation on their
spending on express advocacy and electioneering
communication, not on the promote, support, attack,
or oppose ads.

VICE CHAIR WEINTRAUB: So we're stuck
with express advocacy even though the Supreme Court
said it's functionally meaningless?
MR. SIMON: Well, the Supreme Court ruled on express advocacy two different dimensions.

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

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

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

MR. BARAN: I think statutorily, as Don Simon just said, the major purpose would have to be defined by contributions and expenditures. Those terms are defined in the Act currently and interpreted by Supreme Court decisions.
VICE CHAIR WEINTRAUB: So express advocacy?

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

VICE CHAIR WEINTRAUB: Okay.

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

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

So if your organization has said that
they are going to spend $40 million to defeat
Federal candidates, why shouldn't we regulate you?

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

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

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

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

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

Under the proposed rule, and even under the restrained interpretation that's being advocated by Mr. Simon, all of a sudden those groups of individuals who clearly were contemplated
as being allowed to make electioneering communications, would become political committees and they could no longer give more than $5,000 to this 527 organization. That's simply is flatly inconsistent with what Congress had in mind when it passed BCRA.

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

COMMISSIONER THOMAS: That is only one vote.

MR. GOLD: I don't know what table it's off. I've got this on my table, which is the NPRM, and we're deeply affected by this and by concepts that permeate the statute, such as expenditure.

But here is a problem: Let's look at 527 organizations, and unfortunately--and this is driven in part by the superficiality of the public reporting on it. 527 organizations take many
forms. One of the forms they take is they
sponsored by organizations such as the AFL-CIO and
the Chamber and thousands of unions and 501[c][4]
groups, 501[c]5s, 501[c]6s, and why do they do
that? They do that because the tax code says that
in order to avoid tax on certain expenditures under
a very broad and sometimes unclear facts and
circumstances test, the only way you can do certain
kinds of spending that might influence elections is
to do it through a separate fund; otherwise, you're
going to be subject--you, tax exempt organization,
are going to be subject to a tax.

Any definition, any capturing by the
Commission, it seems to me, on 527 groups is going
to affect 527 groups sponsored by these
organizations. You know, there may be this claim,
don't worry about the 501[c]s, we can exempt them,
but what about the 527 accounts that they have to
set up for very practical purposes and the tax code
has encouraged them to set up for 30 years and that
Congress has subjected, fine, to disclosure over
the last three years? It gives organizations that
sponsor these funds, that maintain these accounts, the following choices under this proposed rule:
First, either these funds themselves become political committees, in which case they lose their utility; they're all hard money PACs. Everything that could be done through a 527 account now can only be done as the Federal PAC with all the restrictions. That's one unpalatable option.
Number two, the organizations themselves do it out of their regular treasury without a separate fund and they become political committees under some of the formulations suggested in the NPRM, or they just do it out of—they spend for these purposes from their unsegregated general treasuries. They don't satisfy some major purpose test, but they're shocked with a tremendous tax.

Now, I submit that that is a course that would be—that I don't think the Commission has the authority to take, but certainly would be very foolish to say. The idea that there is some neat way, it seems to me, to separate out 501[c] organizations from Section 527s, it's a false
I suppose one of the reasons we're all here is George Soros, and I wanted to ask about—-I think it was Mr. Baran who brought it up, but I wanted to ask Mr. Simon, because I think it's more a problem for his position. It's pretty clear that George Soros can spend as much of his own money as he wishes expressly advocating the election of a candidate or promoting, supporting, attacking, or the opposing the election or defeat of a candidate, and his other friends as well can do that.

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

MR. SIMON: Well, I suppose the flip answer to that is because the Supreme Court said so. In other words, the Court in starting with Buckley in a frame work it developed there and has maintained every since has drawn a sharp distinction between the permissible scope of
regulation and contributions from the regulation of expenditures. When George Soros or any other individual wants to go out and engage in direct spending, that's an expenditure that in the Supreme Court's view is entitled to a very heightened form of First Amendment protection. When George Soros or any other individual donates money to a group, a political committee, that in the view of the Supreme Court is indirect spending. It's speech by proxy, and it's subject a much, much lesser stringent form of First Amendment protection and can be regulated.

Now, there's obviously a lot of criticism about that distinction. You know, you probably don't like part of it. I don't like part of it, but, you know, for better or worse, that is clearly the constitutional doctrine, and even though you can come up with hypotheticals where the doctrine seems not to make a lot of practical sense, I think for better or worse, the Commission is really obligated to live with those distinctions.
I think on this point, something that's interesting and is oft unnoticed is that in a footnote in McConnell, the Court really addressed this very question about whether it is permissible to limit contributions to groups that make only independent expenditures, and it's sort of re-interpreting the Cal-Med decision, which also addressed a version of this question. Let me just read one sentence. The Court said:

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

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

COMMISSIONER MASON: I know other panelist disagree, and I think I understand that.
So I'll leave that, but I did want to get discussion.

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

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

MR. SIMON: Well, I guess don't--I'm not sure I see it as a problem. I think the entity can decide which spending it wants to deduct through
its (c)[4] arm and which spending it wants to
conduct through its PAC. A (c)[4] can do promote,
support, attack ads so long as they're not
electioneering communications.

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

MR. SIMON: Well, a couple of points.

First of all, there are, as Mr. Gold was pointing
out, differing tax implications for the group that
may affect its choice as to which arm it wants to
engage in the standing. There are tax law
restraints on how much electioneering a (c)[4] can
do. It's limited to the extent that it can't
become a primary purpose. There are gift tax implications where the money given to a 527 is not subject to give tax.

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

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

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

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

COMMISSIONER MASON: I'd appreciate that.

MR. SIMON: But, assuming it's right,
then money contributed to a 527 is not subject to a
gift tax. Money contributed to a [c][4] is.

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

COMMISSIONER MASON: I have no more
questions.

CHAIRMAN SMITH: Thank you, Commission
Mason.

Commissioner McDonald.

COMMISSION MCDONALD: Mr. Chairman,

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

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

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

Let me start, if I could, and just make a very brief statement that I can kind of am suffering from the same thing that Larry Gold alluded to early on. We have been absolutely inundated with comments. I'd like a lot more time to reflect on what is before us, because I do think it is of monumental consequence, and I just state at the outset that I'm very uncomfortable not having had more time to fashion this in a better light than we are, and I appreciate what everybody is trying to do under very tight guidelines.
Jan, if you don't mind, I'll start with you. Like the Chairman, I'm kind of surprised the RNC did not appear, but I'll go over to one of our former employees who did submit a comment on behalf of the RNC, and he refers to a court case on March 30th, I guess about two weeks ago, the United States District Court of Columbia in the Triad case, and let me just read what he says and see what your thought on it is. He concludes by using the Court comments accordingly:

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

Obviously, he references us in a case and indicates what has been indicated by some that--I guess it would be Mr. Simon in particular for your panel--that the law is the law and that BCRA didn't change the law and the problem is we're not enforcing it, and to prove his point, he cites
this court case two weeks ago. Would you want to
reflect on that a minute for us?

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

COMMISSIONER MCDONALD: Easy now. I'm
sensitive about that.

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

COMMISSIONER MCDONALD: That's a pretty
good recovery.

MR. BARAN: But, for that reason I'm
little uncertain as what exactly all the arguments
were in the case. I did not have an opportunity to
review either the defendant's pleadings or the
Commission's pleadings for that. My reaction to
the opinion is that it seems to be somewhat
inconsistent with the decision in the GOPAC case,
which was another decision a few years in the same
court here in the District of Columbia which did a
similar analysis, but instead of focusing on money
coming into the organization, it was focusing on
what I think was the more appropriate analysis of
how was the money spent, and it may very well be
that the defendant in that case could still be
debemed a political committee under the GOPAC
analysis, but the fact that somebody contributed
the money to an organization does not in itself, in
my view, turn the organization into a committee.
It's more important to see what does this
organization do, does it make contributions to
candidates, does it expend money that would meet
the definition expenditure under the Act in
addition to the other criteria.
So I find that decision to be of limited
use in terms of answering the question that you're
confronting here in this rulemaking.

COMMISSIONER MCDONALD: I appreciate
that. I thought it was of great interest because
it is fairly timely and it was submitted by the
RNC. Also, I appreciated your quick recovery about
us non-lawyers. I'm reminded of the old Johnson
story: My father would have appreciated it and
mother would have believed it. So I appreciate
that very much.

Let me go to Mr. Simon, if I could.

Don the quote that's been referred to before, but
it's a fairly important quote--there's actually
two in there. They're cited in Jan's testimony.
One, of course, was the Wellstone quote about what
they were able to achieve, and he indicated there
that felt like it didn't cover all the flaws of
campaign finance law, and more directly and right
on point, it appears to me, the Lieberman exchange.
Can you amplify on that?

Let me go back and be sure we're in
agreement on the Lieberman exchange. It says here:
"When the Bipartisan Campaign Reform Act and the
McCain-Feingold bill goes into effect, at least
some of the soft money donors will no longer be
able to give to political parties and will be
looking for other ways to influence our elections.
Donations to 527 groups will probably top many of
their list because they are the only tax-exempt
groups that can do this, as much election work as
they want without hurting their tax status."

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

What's changed is not--this, as I've
said, isn't a matter of BCRA. What has changed os
the Supreme Court's interpretation and construction
and restatement and clarification of the background
constitutional principles that apply to the FECA
and that I think mean, require, in this rulemaking
the Commission conformance administration of the
law to a correct understanding of the Constitution
as articulated by the Supreme Court, and if the
Commission does that, then it would change the
background reality that Senator Lieberman was
referring to.

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

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

COMMISSIONER MCDONALD: Yes.

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

COMMISSIONER MCDONALD: How about a generic question about it?

MR. GOLD: Sure. But generically, the issue of allocation formulas, the predicate for that is what the statute and the regulations provide for now and what the regulated community has been used to for many years. The current allocation formulas, of course, were adopted by the Commission 14 years ago, and the national party committees and the independent organizations and the like have all operated under those formula. If they are to be changed, then the Commission ought to engage in a deliberative process, full engagement with those affected by it to discuss that.
This isn't that process. This one of many monumental proposals in an NPRM that, as I said at the beginning, is being proposed in a--very deep into an election year with a great clamor that all these things have to be changed for waning weeks or months of this election. Anything the Commission might do on allocation formula ought to be--it seems to me ought to be a separate proceeding where people can focus on it properly, and it certainly ought not go into effect immediately when we have organizations that have made plans and have legitimate expectations and legitimate reliances on the law as the Commission has announced it over many years. So that's my general comment about allocation formula.

If I can draw back for a moment about, you know, what is being suggested here across the board, 501[c] organizations, 527 organizations, they're all defined, and, in fact, Federal political committees, are all defined under the law in one way or another with the concept of a primary purpose or a major purpose. They can all do things
almost without exception. They can all do things
that the others can do, but at some point, they
rest at a particular provision of the tax code or
under the Federal Election Campaign Act. That's
certainly true of the 501[c]5s who have to have the
major purpose as promoting the interests of those
who work, to promoting the interests of labor, and
yet the AFL-CIO or a union can engage in all sorts
of activities that a [c][3] can do and a [c][4] can
do and a 527 can do, Federal, non-Federal.
The tax code assigns particular
designations to groups according to what they
principally are involved in. What this proposal
would do is kinds of--would take a bar and sort of
strike through all of these organizations and
impose standards and definitions that would utterly
change the ability of all these organizations to
undertake these activities, federalize all of them,
make them all hard money operations, and really
fundamentally disrupt what they're doing. That is
not what the Federal Election Campaign Act was
designed to do. It is not designed, in effect, to
override the tax code and made all sorts of
organizations Federal political committees who have
to use hard money for ways that they never
conceived.

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

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

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

I did want to get Mr. Kirk involved.

One thing you said, a couple quotes, Mr. Kirk, in
your opening comments that struck me, and I would
just like you to elaborate on it. You used a
couple times the phrase that you thought these
rules had the potential to have a chilling affect
on your organization's activities. I wonder if you
would elaborate on that.

MR. KIRK: Sure. In answering that, let
me just piggyback on what Mr. Gold said in response
to Commissioner McDonald. I guess the major point
that we are trying to make today is not to--as
important as it is, is to understand the
intricacies of the Federal election laws, etc., and
I'm an attorney. I'm not a Federal election law
attorney. So I understand how important it is to
understand statutory construction, etc., but I'm
trying to bring the view, the practical view, on
the ground of what this implies.

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

This year, it's supposed to go on small
business and how can the development of small
business help to create wealth in the African
American community. Now, on the panels there,
we're going to have members of Congress there.
We're going to have private sector citizens there. If the past is any measure of the future, we'll have been identified, self-identified, as Democrats, self-identified as Republicans. We'll have Republican office holders, Democratic office holders, Federal elected officials, State elected officials, all talking about this.

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

Our concern is is it, in fact, Congress' intent for that kind of activity engaged in by a group like us to somehow now be treated as the activities of a political committee. Now, a second one, which may get closer to what some people might be more concerned about: Last year, for the first year, we held what we called a boot camp. It's
really a public policy and a campaign school, very similar to what I believe it done at American University, what's done at other universities around the country. We decided to do it with a historically black college or university, Morgan State University.

With the agreement of their board of trustees, the endorsement of their president, the active participation of their faculty, we put together this school. We invited about 50 kids from various walks of life. It didn't matter to us how they self-identified. They went through this school. With the advice of counsel, we looked at the curricula. We made sure it was nonpartisan. We looked at the presentations and what not, not trying to censor what the faculty was going to do, but we looked at the presentations and so forth, all the writings, to make sure it was nonpartisan. It talked about the nuts and bolts of campaigns, the nuts and bolts of polling, the nuts and bolts of doing focus groups, all of those kinds of things and then did some role playing and actually had--it
was a week long, and they actually lived on campus for the week, and they actually at the end developed into groups and had to deal with a real live campaign situation.

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

If you adopt anything similar to what I've seen in this proposed emporium, I think we're going to have an inordinately hard time getting
those folks to take that hurdle and to say, okay, I
understand, I accept, because the risk of not
getting it right, to them, might mean to them,
Look, I just don't want to do this. Now, also,
when we're a [c][4], a [c][4] contribution is not
treated like a [c][3]. It is not a charitable
contribution. So they're not necessarily getting a
charitable contribution deduction for giving to us.
They have to--we have to make the case as to why
this is good public policy, good for the,
quote-unquote, social welfare, and why you should
do it.

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

CHAIRMAN SMITH: It sounds as though
while express advocacy may have been, in the words
of the Court, serve no meaningful function for the
listener, it might for the potential donor or for
the potential speaker. Giving them a clear bright
line, there might be potential reasons why Congress
would want to leave that in tact.

MR. KIRK: Exactly.

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

MR. BARAN: Yes.

MR. GOLD: Yes.

CHAIRMAN SMITH: And Congress is well
aware of that?

MR. BARAN: Yes.

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

MR. BARAN: That is correct.

MR. GOLD: They did.

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

MR. GOLD: Plainly so.

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

MR. GOLD: No.

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

Just real quick, I want to say on the Triad case, I'm not sure how much import it has. As I read the Triad opinion, it's kind of vague. It appears, in my recollection of the case, of course, that the defendant, who Mr. Baran notes was pro se, conceded that she had made expenditures or
contribution and was basing her defense entirely on
the major purpose, that she was a for-profit
business, which the Court dismissed, I think,
without a great deal of difficulty.

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

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

MR. SIMON: Well, let me--I guess let me
answer it this way: First of all, let me correct
some locution of yours. We're not banning the
527s. We would just have a rule that 527 status
under the tax code is a determinative proxy for the major purpose test under FECA. But this is a question that the Vice Chairman has made before about, well, if you turn the 527s into political committees, the activity will just go into [c]4s. I guess here is the way I look at that: It's true that 527 activity is disclosed and [c][4] activity is not disclosed, but, to me, the 527, which should be political committees because they meet the statutory and constitution test and which, therefore, should be restricted in the receipt and spending of corporate and union funds and should be limited to the contributions that they can accept from individuals, to allow that illegality to continue in the name of disclosure is a poor justification.

CHAIRMAN SMITH: That's not my question. The question is basically are be going to have a more sensible and coherent system by having the money go into 501[c]; is there going to be any less appearance of corruption when 501[c]s are spending $20 million, just what's your judgment?
MR. SIMON: I think it's a more coherent legal regime.

CHAIRMAN SMITH: Okay.

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

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

Thank you.

COMMISSIONER NORTON: Thank you, Mr. Chairman, and thank you all for coming today. Mr. Simon, I guess I'd like to start with you. You said in your opening remarks that one of the two key problems the Commission needs to address is that there are organization out there spending millions of dollars to influence Federal elections, and as I see it, the legal question
before the Commission is whether that as a matter of law, among those millions of dollars, we can find a thousand dollars that satisfies the definition of expenditure, which is the test in the statute. You've said, I think in response to questions from Commissioner Toner, that the Commission could comfortably use to promote, support, attack, oppose standard with respect to 527s, which is a category that includes political party committees, but it's a whole lot broader than that.

My question is really an effort to unpack the legal argument. I mean, the Supreme Court in McConnell was only addressing the application of that standard to political party committees, and in relatively terse description, it upheld that standard and it said we think that the test is not vague, particularly here since actions taken by political parties are presumed in connection with election campaigns. So I guess my question is, is your legal argument that all 527s stand precisely in the same shoes as party
committees and, therefore, that standard that the Supreme Court said is constitutionally sufficient can be applied with equal force to all 527s.

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

MR. NORTON: Let me just follow up with you quickly. I am inclined to agree that there is not much light shed by BCRA itself on the inquiry before the Commission today, but in BCRA, Congress did use the standard that you're urging the Commission to use with respect to 527s, that is the promote, support, attack, or oppose standard to establish when party committees are acting in connection with an election, but it applied a
different test to all other persons in defining
electioneering communications and even in crafting
a backup definition which would have sprung into
effect had the first definition been struck down.
Congress decided that the promote-support standard
itself wasn't enough, that it not only had to
be—that the communication not only had to promote,
support, attack, or oppose, but that it also would
have to be suggestive of no plausible meaning other
that an exhortation vote for or against a
clearly-identified candidate of a political party.
Is there anything we can draw from that language,
and does the fact that Congress considered that to
be something more than promote-support to be
minimally sufficient to pass constitutional muster;
does that establish a floor for us in defining an
expenditure?

MR. SIMON: Here's the way I look at
that question. I don't view what I would be
advocating as a matter of statutory construction to
be a kind of direct statutory application of the
promote-support standard to major purpose entities
like Section 527 groups. As I've said many times, I think the standard that applies to them is for the purpose of influencing. Now, the Commission has the discretion and in the past has exercised the discretion to come up with sorts or proxies or ways to describe that statutory standard.

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

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

MR. GOLD: Yeah. The notion that--you know, I think what you've raised is very useful,
the fact that already in the statute in the backup
definition that's not in effect, Congress had a
very limiting definition of what could be
regulated, but promote, support, attack, oppose,
that formulation is in the provision of
electioneering communications that did survive as a
limitation on the exceptions that this Commission
can by regulation promulgate.

Now, why is that? It's that the
Congress, you know, very carefully and to a limited
extent defined the degree to which it was going to
regulate, and, therefore, the Commission could
regulate speech by independent organizations,
wholly no authority whatsoever to expand that term
which you correctly applies to state and local
party committees and applies to groups across the
board. With respect to the constitutional
limitation that Mr. Simon described, the fact is
that the Mr. McConnell has is very clear--I have
the slip opinion, page 97. It may be that there is
no constitutional line anymore for express advocacy
under certain circumstances, and how far that goes,
we'll only know if Congress or a state legislature
goes further with the electioneering cases and it's
tested. But McConnell certainly confirmed
explicitly that it's a matter of statutory
construction, this statute. Express advocacy is
the definition of what is an expenditure when comes
to speech. It may not be constitutionally
required, but they confirmed the statutory
construction in Buckley, MCFL, and Austin.

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

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

MR. NORTON: I'd like to follow up with
you, Mr. Baran and Mr. Gold. You said repeatedly
that Congress actually understood these issues and
chose not to address the issues the Commission is
trying to address in BCRA. Of course, this major
purpose test has been around since 1976, and
certainly for as long as I've been here and for
many years before, members of the Commission and
members of the regulated community were saying
things like Commissioner Elliott and Aikens
said more that eight years ago in their
statement of reasons in Christian Coalition,
which is absent regulation, issue-oriented
groups like the
Christian Coalition--which I believe is a
[c][4]--are not on sufficient notice of the
Commission's interpretation of the major purpose
test and cannot identify with ascertainable
certainty the standard which we expect such groups
to conform.

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

MR. BARAN: Well, I think the argument
is that Congress not only didn't help you in
further defining political committee, but it
clearly said certain things about certain concepts
that you're raising in this rulemaking which flatly
contradict the approach that you propose to take
here. Promote, support, attack, or oppose is a
concept that Congress very carefully considered in
extremely limited context, and they applied it only
to state and local party committees, did not change
the definition of expenditure to include that
concept. In fact, the effect of changing the
definition of expenditure to include this notion of
spending money to promote, support, attack, or
oppose would change the scope of the prohibition on
corporation and unions, and when Congress wanted to
change the scope on prohibitions of corporations
and unions, it did so very consciously, very
narrowly, and it added that term "electioneering
communication", which also, they decided, was not
going to be part of the definition of expenditure.

So part of the problem here, I think, is
not that, you know, you may have some allowance to
try and come up with a clear, unvague standard to
define major purpose and political committee. The
problem is that the standards you're proposing in
this rulemaking are inconsistent with the Act.
That's not the way that the Congress wanted you to
proceed, and it's too bad that they didn't help
you in other ways, but maybe that's the reason for
the Commission to write the Congress and say do
something here; we've had two rulemakings on this
and we can't come up with a solution, so change
the law and maybe you could change the law by
changing the definition of expenditure or change
the law by changing the definition of political
committee, but we can't change law; we're an
agency; you're Congress.

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

MR. GOLD: By the same token, something
that hasn't come up this morning I'm sure will in
later panels, part of this proposed rulemaking, as
far as redefining what is an expenditure and
therefore defining the conduct that a, quote, political committee would engage in is, quote, Federal election activity, another statutory concept that under the statute applies only to party committees and yet deals with voter registration, voter identification, get-out-the-vote messages, party promotion messages, a whole range of voter mobilization activity, that is vital to our civic society, partisan, nonpartisan. It's all captured by that concept, and the proposal is somehow this is going to define what a political committee is, what an expenditure is, and any organization that engages in so much as $1,000 of that activity, which during a Federal election year is going to be--either have to pay for that with hard money or will have to reconstitute as a political committee.

That is the thrust of alternative 2[a].

That is what Mr. Simon and his colleagues are advocating, and that is plainly neither what Congress dictated, nor good public policy.

CHAIRMAN SMITH: Mr. Pehrkon.
MR. PEHRKON: Thank you, Mr. Chairman.

Mr. Gold, Mr. Baran, Mr. Simon, Mr. Kirk, welcome to the Commission. I'm going to have a little different tack than some of the other questions that have come today. So they're going to be more practical in a sense, but I'm really trying to get a handle on how many people you anticipate would actually be affected by this. I know Mr. Gold's testimony had some estimates in there. He gave numbers such as hundreds of thousands. Mr. Baran, I'd like yours. Many, I think was the term you used. But what I'm really looking for, particularly from Mr. Gold, is could you go through and describe to us how you arrived at that hundreds of thousands and talk about that a little bit?

MR. GOLD: Sure. If you're re-defining activities that organizations engage in and re-defining it to become Federal political activity regulated by this statute and only payable through hard money or a separate segregated fund, then you are potentially applying this standard 30,000 labor
organizations, 138,000 501(c)(4)s, 900,000
501(c)(3)s, and registered to day with the Internal
Revenue Service, 30,000 Section 527 organizations
that are not also political committees under the
Federal Election Campaign Act.

I'm not saying all of them would be
affected by this, but I think it's fair to say,
given the scope of what's being suggested, that
hundreds of thousands of them could be; and
certainly picking up from the question of chilling
affect, we've already--I can tell you as a
practitioner who spends all his time representing
organizations and individuals under this statute,
that BCRA itself has had a tremendous chilling
affect on organizations and individuals. Some of
it will play out over time because it's new, but
the standards there about what is regulated and
what isn't, the dense regulations that the
Commission has promulgated, very difficult for
lawyers to engage in, almost impossible for lay
people to engage in, and you come up with new rules
that redefine voter mobilization activity and sort
of opinionated messages about people who hold
Federal office and recharacterize that as regulable
activity, I'm not sure what distinctions you can
build in there, but it's going to have a tremendous
chilling affect on these organizations and on the
donors, as Mr. Kirk said, individual donors as well
as wealth donors.

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

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

MR. PEHRKON: Mr. Simon.

MR. SIMON: Well, I just want to say
that I think for precisely the reasons that are
being cite--I mean, I started out in my opening
statement saying the NPRM was improvidently
overbroad, and I think this is why the Commission
should not be in the business of trying to convert
all unions, all trade associations, all
corporations, all 501[c] nonprofit groups into
political committees, nor should it be in the
business of applying a promote, support, attack, or
oppose test to their political spending. What I've
been talking about is a much more limited approach,
which I think is much more targeted to the actual
problems that the Commission faces, which is how to
deal with the activities of 527 groups engaged in
spending that affects Federal election and how to
improve its obviously flawed regulation governing
allocation for political committees.

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

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

MR. SIMON: I think there are, as best I
can tell, some technical differences. I believe
the reporting threshold for expenditures under the
FECA is $200 and the reporting threshold under the
527 law is $500. I believe there is some
additional detail required under FECA for transfers
and certain other kinds of receipts, but I think
the differences are pretty minor by margin.

MR. PEHRKON: Mr. Chairman, thank you.
CHAIRMAN SMITH: Thank you, Mr. Pehrkon.

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

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

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

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

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

MS. ARON: Thank you. I'm pleased to be
here. Thank you very much.

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

Today, I will focus on the real world implications this rulemaking will have on nonprofit advocacy. In needlessly attempting to regulate a handful of groups, this rule cuts a swath across
the entire nonprofit community. Nonprofits often
speak for those who cannot, the underrepresented
and neediest in our society. During an election
year, a time in which artful politicians react more
to polls than policy, the voices of nonprofits fill
the void on many critical issues. These new
rules issued now will silence these voices.

By classifying nonprofits as political
committees, these rules impose a de facto gag that
will impoverish a debate on public policy, diminish
civic engagement, and force many nonprofits to
choose between the lesser of two evils:

ceasing their normal operations or facing
restrictions on the fund-raiding. These rules
are flawed on a number of grounds. In
addition to our staunch position that there is
need or authority to impose these new
rules, they lack clarity.

The rulemaking fails to define exactly
what promote, support, oppose, or attack means.

Would placing an ad in the newspaper criticizing
Representative Don Young from Alaska for adding
over a billion dollars to the transportation bill
be seen as opposing his candidacy? This leads
nonprofits to a conundrum. How can any nonprofit
know whether its activity meets this standard if
the rulemaking fails to define it?
The proposed rules will also reclassify
nonprofits as political committees if they engage
in nonpartisan voter registration or
get-out-the-vote activity. The Commission's own
web site posts our countries appalling national
voter registration and turn-out statistics.
Without the involvement of nonprofits, these
disheartening numbers will drop even further. The
Civil Rights movement was only possible in this
country because of the wonderful work of
foundations and nonprofits coming together.
I haven't talk even talked about the
most draconian of these proposals, and that is the
look back rule. This could jeopardize the survival
of a vast number of nonprofits who would be forced
to pay off an unknown debt with small individual
contributions for activities from four years ago
that are now subject to these new rules. Political
committee status would harm the financial livelihood of nonprofits who often rely on foundation grants and large individual contributions, which are prohibited fund-raising sources for political committees. Although the FEC has certified that the proposed rules would, quote, not have a significant economic impact on a substantial number of small entities, closed quote, it is impossible to imagine that their financial livelihood will not be impaired.

Finally, I would like to turn to the timing of this rulemaking. The rules governing election year advocacy should be in place prior to the election year and not change in the heat of an election season. I whole heartedly agree with Commissioner Weintraub's statement that any rulemaking should be made thoughtfully after thorough consideration of the issues and with due notice to the regulated community. We should not silence the noisy, contentious, and necessary debate that makes up the public discourse. Our democracy works best when Americans participate at
every level of government, when they are confident
that their voices will be heard despite their
differences.

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

Thank you very much.

CHAIRMAN SMITH: Thank you, Ms. Aron.

Mr. Clair.

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

CHAIRMAN SMITH: Yes, without objection.

MR. CLAIR: Section 501[c][4]
organizations, like the Committee epitomize citizen
involvement in the marketplace of ideas, the
quintessential exercise of First Amendment rights
to speak and associate to the promotion of causes
and to petition the government for redress of
grievances. As educational lobbying organizations,
they are consistently speaking to and hearing from
the public on their issues, and, yes, the public
even includes candidates.

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

The only consequence of establishing
such funds as far as the Commission is concerned is
that the [c][4] would have to file reports if it
spends more than $10,000 in a calendar year for the
direct cost of producing and airing the
communications. Those separate funds are not under
the statute, being political committees, are not
required to register as political committees and
are not required to file periodic reports to the
Commission. In addition—

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

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

These separate funds for electioneering
communications are not little to the amount they
can receive from any one individual. The only
obligations is a reporting obligation. I could go on there, but let me get to my next point, and that is 501(c)(4) organizations is a large group of organizations characterized under the Internal Revenue Code by IRS as social welfare. IRS judges them on a primary purpose test, that is where they spend the majority of their activities. To us, that means more than 50 percent of their resources or activities. I submit that the Commission should follow the same approach, and if there are cross-over activities, we can deal with that in other ways, creation of a Federal PAC, which we have, by the way, or other mechanism. The mechanisms are there, but let's not go overboard in the regulatory projects.

CHAIRMAN SMITH: Thank you, Mr. Clair.

Mr. Holman.

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

I represent Public Citizen. We're mostly a 501(c)(4) nonprofit group that spends a
great deal of its promoting or attacking, mostly
attacking, candidates and office holders. So we
tend to be very protective of the right of 501[c]
nonprofits in order to conduct legitimate advocacy
work; however, when we're talking about the
regulation or the proposed regulation that's before
us, the focus—and we should always keep in mind
the focus—is on Section 527 groups, and they are
quite a different animal from the 501[c] nonprofit
community.

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

When the Section 527 part of the tax
code was first drafted by Congress, Congress never
imagined that it would be used as a means to evade
Federal election campaign law, and it wasn't really
until about the mid-1990s when the Sierra Club, I
believe was the first with Karl Pope setting up a
Section 527 as a means to conduct electioneering
without having to disclose contributors or
expenditures, and it flourished thereafter. The
Section 527 was popularly known and accurately
known as stealth PACs, because it was a means of
evading the campaign finance law.

What has happened with the McConnell
decision, and not with BCRA, but with the McConnell
decision, is that it returns Federal campaign
finance law, the meaning of who applies to, back to
the original purposes of FECA, and that is the
activity that affects Federal elections applied to
groups that have as their major purpose
electioneering for or against candidates. What
BCRA added was a second concept of electioneering
activity, and that applies to other entities,
501[c] nonprofits in particular, that use activity
in a very narrow, narrow scope, and that is
electioneering communications or express advocacy. So we have a bifurcated system of regulation as to who the Federal Election Campaign Act applies to, and that is what the Public Citizen is asking the FEC to recognize, recognize there is this bifurcated system and develop two different definitions of expenditure activity that would be subject to FECA regulations. One would be the broader definition that the original FECA intended. I would call it political expenditures, and that would apply just to entities that had as their major purpose electioneering for or against candidates, and the second would be a very narrow definition of electioneering expenditure that would be the magic words standard and electioneering communications applying to entities that do not have as their major purpose electioneering. That is what Federal election campaign law would seem to call for and certainly would be consistent with the McConnell decision.

CHAIRMAN SMITH: Thank you, Mr. Holman.

Commissioner Toner.
COMMISSIONER TONER: Thank you, Mr. Chairman.

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

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

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

MR. HOLMAN: Yes, indeed. Section 527, I would define as political committees that would be subject to the entire regulatory frame work of FECA.
COMMISSIONER TONER: And you indicated that prior to McConnell, there were very strong views that the express advocacy test was a constitutional barrier against doing what you're advocating, but is it your view that after McConnell, that is no longer the case and we're obligated to do what you're asking us?

MR. HOLMAN: That is my view, yes.

Prior to the McConnell decision, it was not only the viewpoint of the FEC, but generally widely assumed that the magic words standard was the constitutional standard that we had to abide by in defining expenditure. We now know why the McConnell decision, that is too narrow of a focus, applies especially to political committees.

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

MR. HOLMAN: That is correct. I'm here
to ask the FEC to revise its regulations in order
to implement FECA as defined by the McConnell
decision.

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

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

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

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

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

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

COMMISSIONER TONER: My condolences.

MR. HOLMAN: I've run into at least five
different formulations of the allocation ratio, and
it would appear that groups are relatively free to use whichever one they want to try to justify the lowest need of having legal money used in their activities. And so from what I've seen of the allocation methodology and the allocation ratio of the FEC, it appears to be a mess, and it allows groups to do almost freely whatever they want to do. If you choose not to get rid of the allocation ratio, it would certainly be a healthier improvement to at least come out with some sort of fixed percentage, that is a clear bright line test of how much illegal money can be used in Federal elections.

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

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

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

MR. HOLMAN: Yes.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Commissioner Toner.

Vice Chair Weintraub.

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

VICE CHAIR WEINTRAUB: Five minutes, okay.

Ms. Aron, I think you said you were here on behalf of 527 as well as 501[c] organizations. So if we were to carve out all the 501[c]'s as some people have suggested, just take them off the
table, it doesn't solve your problem, does it?

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

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

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

So it's not that all 527s are political
committees, but I guess the central reason why I
think there should not be a carve-out is that there
is no problem. No problem was presented to
Congress when it wrote and enacted McCain-Feingold,
and so far, now that we're having a chance, an
opportunity to see how BCRA is being played out, I
think there is a way to deal with any problems that
may arise, and that is people can file a complaint
with the FEC.

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

MS. ARON: I think they have, but there
no demand, there is no record in this instance that
suggests that 527s should be treated differently or
that [c]3s should have a carve-out here. I think
it would be wrong, and I just think you would
postponing a look at this issue for a couple
months, because no sooner would the organizations
set up [c]4s, then you'd be back asking the [c]4s
to talk about what they're doing and what their
activities are, so on and so forth. So we strongly
oppose a carve-out.
VICE CHAIR WEINTRAUB: Would it impair the work of the organizations that you represent if we did limit 527s along with one of many formulas that we've proposed?

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

VICE CHAIR WEINTRAUB: Thank you.

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

MR. HOLMAN: Yes.

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

MR. HOLMAN: That's right.

VICE CHAIR WEINTRAUB: But if a 527 does it, you think that's different, they have to use a
different pot of money. Isn't that sort of
self-serving on your part, we should be able to
criticize the Government, but they shouldn't?

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

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

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

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

VICE CHAIR WEINTRAUB: Which means that
they're PACs and they're already regulated by all
of our regulations.

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

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

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

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

VICE CHAIR WEINTRAUB: Thank you, Mr. Chairman.
CHAIRMAN SMITH: Thank you, Madam Vice Chair.

Commissioner Mason.

COMMISSIONER MASON: Thank you.

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

MR. CLAIR: Yes.

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

MR. CLAIR: Well, certainly if there are blanket exemptions for 501[c] organizations, I think I can leave the hearing room. I tend to think that's not going to happen. This sort of ties into the last question that was asked.
COMMISSIONER MASON: Well, I'd be
interested in why you think that's not going to
happen.

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

COMMISSIONER MASON: Thank you.

Mr. Holman, you say in your testimony on
page 5, at one point at the top, you say BCRA did
not change the definition of expenditure, and few
paragraphs later, you say BCRA changed the
definition of expenditure in 441[b], and it seemed
to hinge on a lot of your argument for more
regulation on that, but do you want to consider
that statement or that assertion? Did, in fact,
Congress change the definition of expenditure in
441[b]?

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

COMMISSIONER MASON: This is what I was
asking about. My point is simply this as brought
up by the earlier panel: There is a definition of
expenditure in 441[b][a], and the electioneering
communications restriction are in, I believe,
441[b][c], and as previous commenters have
suggested, they rather willfully did not use the
term "expenditure" there. I think rather
complicates the case for redefining expenditure in
the way that you're talking about. We might not be
able to do it, but I don't think that they're a
straight path.

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

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

COMMISSIONER MASON: So are you
suggesting that this Commission should hire panels
of college students to make distinction? I'm not
joking. I am not joking.

MR. HOLMAN: I'm not joking either.

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

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

CHAIRMAN SMITH: Thank you, Commissioner
Mason.

Commissioner Thomas.
COMMISSIONER THOMAS: Thank you, Mr. Chairman.

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

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

CHAIRMAN SMITH: Without objection,

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

The other thing I wanted to do is note that in the real world, the reason we're here is largely because this Commission has been unable to reach a consensus on what is to be considered express advocacy. Someone alluded earlier to the 3-3 vote the Commission had in the case involving ads that were one run during the Republican Presidential primaries by a group called Republicans for Clean Air. The Commission split three to three of whether those were express advocacy communications, but more recently, the Commission split in a couple of cases. One involved some ads that were critical of Tom Cain, Jr. who was running in 2000. The ad said:
"Until he decided to run for Congress, Tom never paid property taxes, no experience. Tom Cain moved to New Jersey to run for Congress. New Jersey faces some difficult problems, schools, keeping taxes down, fighting over development and congestion. Pat Morrissey, his opponent, has experience dealing with important issues. It takes more than a name to get things done. Tell Tom Cain, Jr. New Jersey needs New Jersey leaders."

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

So we move on to the present context, and now we're seeing on our airways we're bombarded with ads. Here is one that like that was actually paid for, as near as I can tell, with a hard money source. Now, I'm not sure. I could be they used soft money to pay for this, but they wrote in part, we've got a fellow saying: "Well, I think Howard Dean should take his taxing-hiking, government-expanding, latte-drinking, sushi-eating,
Volvo-driving, New York Times reading—and then a
woman interjects—body-piercing, Hollywood-loving,
left wing freak show back to Vermont where it
belongs.

COMMISSIONER MCDONALD: No wonder he
lost.

CHAIRMAN SMITH: Here, here.

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

Well, I don't know if—that was paid for
by a group that is described as Citizen United. I don't know if they used hard money for that, but I think they're a 501[c] organization, at least part of it. We'll be finding out more about that later. Those are the kind of things we're up against.

Now, if a group, whether it's a 25, 27, and 501[c][4] or a 501[c]3, sort of just ignores all the tax rules and spends 75 percent of its resource putting out those kinds of ads, shouldn't we treat that as a political committee under our law?

MR. CLAIR: May I respond?
COMMISSIONER THOMAS: Please.
MR. CLAIR: I would say no, not necessarily. To me, that is issue discussion material on its face. I think it also can come within the definition of Federal election activity, not necessarily electioneering communications unless it comes within the time frame specified there. Then it probably would. So I think you have look at other facts, not just the statement, to see if it's something that would make it a political committee or would be an expenditure
under the act.

MS. ARON: I would just want to add that

I feel your pain in some says.

COMMISSIONER THOMAS: Thank you.

MS. ARON: But two points: One is I

would agree that that is issue advocacy, but more

importantly, the fact that it's difficult to make

these decisions, it seems to me, shouldn't give us

a green light to take a whole other standard used

in some other context of a political party and

apply it to a set of organizations and a set of

activities. We will only create more confusion and

more chaos, because the standard that has been set

out in these proposed regulations, propose, support

attack, whatever. Propose, support, attack,

whatever, whatever.

COMMISSIONER THOMAS: No. It's not that

general, I assure you.

MS. ARON: Propose, attack.

VICE CHAIR WEINTRAUB: Propose, support,

attack, or oppose.

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

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

MR. HOLMAN: Could I add very briefly? I believe that that ad would be electioneering; however, whether or not it should be subject to FECA regulations would be what does the group as an
entity, does it do that as its major purpose. If it does that as its major purpose, it should be subject to the facts and circumstances evaluation of the IRS and basically pushed out of the 501[c]3 nonprofit community and into the electioneering category, which is where it belongs. Once it goes there, then the entity should be subject to the regulations.

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

CHAIRMAN SMITH: Thank you.

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

"These two men have been given top grades by the National Rifle Association. One is George Bush. The other might surprise you. It's Howard Dean. That's right. In Vermont, Dean was endorsed eight times by the NRA and got an "A"
rating from the National Rifle Association because he joined in opposing common sense gun safety laws.

So if you think Dean had a progressive voting record, check the facts, and please think again."

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

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

It's time to confirm Justice Priscilla Owen to the Federal Fifth Circuit Court of Appeals."

Now, which one of those was funded by a 527 and which one of those was funded by a 501(c)? Does anybody know off the top of their head?

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

But, I mean, why is one of those corrupting if paid for with soft money and the other is not? Is it because the 501(c) doesn't have to disclose its donors and therefore nobody in Washington will really know who's paying for it so
they won't feel beholden? Or is there some other
reason why? Because I don't suspect that's it. I
think you probably favor disclosure of donors. So
why is that? Do you favor disclosure of donors?
MR. HOLMAN: Not of the 501[c] ad.
CHAIRMAN SMITH: Does your group
disclose its donors?
MR. HOLMAN: We do not disclose our
donors. We file our Form 990s, and those are
disclosed.
CHAIRMAN SMITH: Yeah, but they don't
disclose nearly what 527s have to do, let alone
what political committees have to do.
MR. HOLMAN: That's right.
CHAIRMAN SMITH: So why is it that ad
that could have been run by your group or some
other 501[c], why is that not a problem if it's run
by a 527?
MR. HOLMAN: Because it's not our major
purpose to seek the election or defeat of a
candidate.
CHAIRMAN SMITH: Was does that have to
do with corruption or the appearance of corruption, which is the constitutional basis for regulating this?

MR. HOLMAN: The corruption standard applies to when the Federal Election Campaign Act should be applicable. When you start talking in terms of what sort of electioneering activity can be done, that's when the corruption standard applies, and so that would apply to political committees and justifies FECA. It is not applicable to try— it does not apply to the educational activities or perhaps even occasional incidental election activities by 501(c)s.

CHAIRMAN SMITH: Why is it less corrupting if the exact same ad is run by 501(c) than if it's run by a 527?

MR. HOLMAN: It is not the major purpose of the 501(c).

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

Now--

MR. HOLMAN: I mean, there are two
standards here in terms of what is to be determined
a political committee, and one is the
electioneering standard. The other is the major
purpose standard, and it's important to keep both
of those.

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

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

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

MR. HOLMAN: Yes.

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

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

CHAIRMAN SMITH: So you disagree with
the Supreme Court on the idea that express advocacy is functionally meaningless. You think it is meaningful, at least if you're a 501(c)?

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

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

MR. HOLMAN: 501(c) does not have as a major purpose the electioneering.

CHAIRMAN SMITH: Why is that relevant, is what I keep going at, and you don't tell me why that is relevant. You just keep repeating it. Is it just because you think the Supreme Court said that so it is, or is there a rationale behind it that would lead the Supreme Court to extend that in
a situation where a 501[c], such as Mr. Baran suggested the Chamber can do, as spending millions of dollars on this type of activity?

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

CHAIRMAN SMITH: I'm out--

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

CHAIRMAN SMITH: I'm out of time. I can't figure out why 527s are not citizen groups and I can't figure out why their speech is not doing the same thing, and I'm not at all sure there is any basis, as the D.C. Court of Appeals held in Akins, which is predicated on standing grounds later, by the D.C. Court held that, you know, this
major purpose is vastly misunderstood, that it's not just—you have to tie it to what was the constitutional basis, and I'm not sure I see any basis why a 501[c] should be excluded from regs that a 527 would face or why a 501[c] finds clarity in express advocacy, but a 527—or cannot find clarity short of express advocacy, but a 527 can find clarity with the promote, support, attach, oppose standard.

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

I notice my time is up. So I would say I would say I think Ms. Aron is exactly right. If
we exempt 501(c)s, first, I don't think there's any
basis for it. I think we probably—at least that's
my gut sense. I haven't a reason why we wouldn't.
Maybe we'll get it in the next panel.

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

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

Next on our questioning rotation is
Commission McDonald.

COMMISSIONER McDonald: Mr. Chairman, I
trust I get as much time.

CHAIRMAN SMITH: You can. You can.

COMMISSIONER McDonald: Actually, I'm
going to send my staff out. I feel somewhat behind
the curve here because I don't have any ads to
read. I'm really hurting about the whole thing.

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

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

Ms. Aron, you said at the outset, and
being an old election--local election
administrator, I'm somewhat empathetic. In fact,
I'm very empathetic with the issue about voter
turnout really being a problem. However, I must
say that what can only be considered a fairly
wide-open system over the years in terms of record
amounts of money being raised and in relationship
to the effort put out by numerous groups, all
rightfully so, the truth of the matter is that the
voting process seems to be getting worse, and an argument that has been made, of course, is it is because of the very nature of the sort of things that we're hearing here this morning, that, in fact, we've not educated the public at all with dominating the airways, but what we've really done is we've turned them off and that, in fact, they're not as appreciative of all these ads that are out there in the political process.

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

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

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

COMMISSIONER MCDONALD: You indicated

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

MS. ARON: They cannot.

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

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

COMMISSIONER McDONALD: Let me just be
sure that I understand. I share the frustration of
the Chairman in relationship to these differences,
and I guess I share them not only because I think
his concern is legitimate one, but, ironically, and
being a fairly active and avid supporter of 501[c]s
in the past in and outside of this agency, the
irony of it is if--as you know, we debate this
major purpose test all of the time. If the end
result is that we're not having reporting from the
501[c]s, who in essence do, for lack of a better
term almost the same as a 527, we might end
up --you could make the case at least that we could
end up with the worst of all possible worlds.

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

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

COMMISSIONER MCDONALD: Why is that?

MR. HOLMAN: The 501[c], many of them
get involved in very controversial issues. It may
have a chilling impact on some contributors or
sources of funds if they thought they would be
identified to the public as supporting a certain
nonprofit entity. That isn't true for most, but
certainly for some.

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

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

By the way, as a little side note, when
it comes to trying to disclose, for instance, the
bundlers to the Bush campaign, Public Citizen has
put up a web side disclosing all these bundlers,
and we actually get phone calls from bundlers who
say, Hey, our name isn't up there; please put our
name up there. So some people really do want to be
disclosed.

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

COMMISSIONER McDonald: I apologize, Mr.
Chair. I just want to be clear about one thing.
In relationship to the IRS, and I do
want the record to reflect you have a different
viewpoint about them than I do. I find them very
competent, and I want to be very clear about that.

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

COMMISSIONER MCDONALD: And particularly I want to be sure they know that now.

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

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

MR. HOLMAN: I have even been told by staff members of the IRS that the exempt division that would be responsible for this doesn't bring in
much money. So they tend to get shunned by the
entire rest of the Revenue Service. This is a
problem, and it's something that I have been
complaining to the IRS about and Public Citizen and
other groups have been complaining. It's a fairly
new front for them. The IRS has never really
wanted to look at political groups or do
disclosure. It's not their bag, really.

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

So I think they're going to learn.

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

Thank you very much.

CHAIRMAN SMITH: Thank you, Commissioner
Counsel Norton.

MR. NORTON: Thank you, Mr. Chairman.

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

Now, that MCFL was a [c][4]. The 527 rules were on the books for about 12 years. There's no suggestion that the Commission needs to
wait for the IRS to do anything. The Commission, in fact, could determine that a [c][4] under certain circumstances could be registered as a political committee. Can the Commission exempt [c]4s consistent with the language in MCFL? In other words, would it be consistent with MFCL to create a flat exemption for [c]s?

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

I don't know if that addresses your question.

MR. NORTON: Let me ask a slightly different question and I'll open it up to the whole panel. I heard you and certainly we're going to hear a lot from other panels about distinctions the
Commission ought to draw based on Internal Revenue Code distinctions. There's certainly no mention of that in MCFL. The concepts the IRS uses, the facts and circumstance test alluded to different--earlier is very different than tests that the Commission, bright line tests that the Commission attempts to use in determining political speech. The objectives of the IRS are very different than the objectives of the Federal Election Commission, and the enforcement mechanisms and strength is perhaps very different.

Commissioner Thomas alluded to the GAO report. There was an article in the New York Times this past Monday reporting an independent analysis of IRS data that show that tax enforcement has fallen steadily during the present Administration with fewer audits, fewer penalties, and few prosecutions. On what practical basis or on what legal basis does the Commission promulgate regulations in this area that are predicated on Internal Revenue Code distinctions? I throw that open to anyone on the panel.
MR. HOLMAN: I would certainly like to start, if I could. When it comes to groups that are classified as Section 527s, it's due to their own declaration that their primary purpose is electioneering, and so that provides a self-defining distinction right there to draw a line between a certain class of the nonprofit community, Section 527s versus the 501(c)(4) and (c)(6)s.

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

So I don't see this wholesale migration into the 501(c) category, but there will be some,
and of that that does occur, you know, the FEC certainly could step in if it had some convincing evidence of a certain particular group was really an electioneering shadow group hiding under the 501[c] category, but I would presume in my most cases, the FEC would rather defer to the agency that is supposed to be monitoring and administering and interpreting the tax code for those purposes. So I would think in most cases, you would want to perhaps request the IRS do a facts and circumstances analysis of a particular group to see if they are legitimate or not.

MR. NORTON: Mr. Clair?

MR. CLAIR: Yes, if I may. I see a lot of compatibility if the Commission approaches it from a primary purpose of point of view. That's the purpose IRS is going to use. Yes, their test is somewhat different, but if the Commission adopts a primary purpose test, I don't think most organizations are going to have a problem with that, and I think this even can overflow into 527 area. And I notice the third question that
Commission Weintraub put down in her set of
questions ask what about non-Federals 527s or PACs,
you know, do we use a primary purpose there, and I
say yes, and I think this example could apply to
either a [c][4] or a 527 that is an unincorporated
association.

So if I may offer it for you, let's take
an organization with $100,000 in its budget. It
contributes $5,000 to a PAC, which I understand it
can because it's unincorporated. It contributes
2,000 to a candidate, again because it's
unincorporated, I understand it can do that. Maybe
I'm wrong. And then let's say it spends 13,000 on
electioneering communications. Now, the PAC will
report the receipt of the contribution. The
candidate will report the receipt of the
contribution. The organization will have to file
the electioneering expenditure report because it
went over $10,000. The other $80,000, the
organization spends on, say, state electoral
activities, or if it's a [c][4], on [c][4]
activities.
Now, that's not a political committee in
my judgment. So I think it can all be reconciled
with the primary purpose test.

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

MS. ARON: I guess I would just add that
your questions assumes that there's a need for
further regulation in this area, and I would just
say that during the weeks that Congress was
considering BCRA, there was no really no record of
corruption, of problem with the [c]3s, the [c]4s.
BCRA took care of coordination. It took care of
electioneering communications, but there is no
need. There has not been massive corruption or
difficulty under the current system that would justify, it seems to me, any changes whatsoever.

CHAIRMAN SMITH: Thank you.

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

MR. PEHRKON: Thank you, Mr. Chairman.

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

And if I understood you properly at the start, you said you were representing some 400 or 500 different organizations.

MS. ARON: Right.

MR. PEHRKON: Do you have a sense of what the split is between 527s and the 501(c)s?

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

MR. PEHRKON: What I was sort of trying to figure out is the size of these organizations.
I mean, they run the gamut. How many of them actually budgets that--

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

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

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

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

MS. ARON: I think it's impossible to
give you that figure right now. I think there may be some organizations that are considering as we speak 527s, but certainly I think a good number might well have to file with the Commission.

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

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

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

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

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

[2:02 p.m.]

CHAIRMAN SMITH: We will call back to order this public hearing on Political Committee status of the Federal Election Commission on this Wednesday, April 14th.

It seems that we have the heating and cooling system figured out, at least it seems to be cooler for the time.

Anyway, we have a couple of what I think will be informative afternoon panels for us as well. I appreciate the folks coming and I appreciate that we're running a little bit late.

III. PANEL III

CHAIRMAN SMITH: Our first panel is four distinguished members: Edward Foley, an old friend of mine is a Professor of Law at Ohio State University; his colleague, Donald Tobin, Assistant Professor Law at Ohio State; John Pomeranz from the firm of Harmon, Curran, Spielberg & Eisenberg; and Michael Trister from the firm of Trister & Ross.

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

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

MR. FOLEY: Thank you, Mr. Chairman.

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

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

MR. FOLEY: Is that better?

CHAIRMAN SMITH: That's better.
MR. FOLEY: Okay. I represent no client, no firm, no group, and my views do not necessarily represent the views of the Ohio State University.

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

MR. FOLEY: Someone who works in the field.

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

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

I'd like highlight two substantive points from the comments I submitted earlier, and those two points I think lead to a procedural conclusion that the Commission should act now rather than later. The two substantive points both concern the argument that we heard today that the express advocacy test is a limitation on the definition of political committee. That argument
is incorrect, in my view, because it's a misreading
of the Buckley opinion.

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

The Buckley court said that if you know
that a group has the major purpose of influencing a
Federal election, then it's spending is by
definition campaign related, and you can know that
major purpose in different ways. A group could, in
fact, register voluntarily as a political
committee, and it would be entitled to do so even
if it never engaged in express advocacy, because
once its made the declaration that it does have
that major purpose. It's a political committee.
It's regulated as such and then its spending is
within the scope of FECA even if it's not the
express advocacy test, and a group can make that
public declaration either by voluntarily
registering or by on its web site or in a press
conference or otherwise been emphatic about what
its overriding objective is. And, again, this
should be a test that surprises any group. I agree
with the notion that no group should be caught by
surprise that is subject to FECA regulation, but if
a group does make clear what its own mission is and
that mission is electoral, then its spending gets
regulated without regard to the express advocacy
test, and Buckley is clear on that point.

Secondly, the major purpose test,
Buckley says is a functional test. The Court used
that term "major purpose" to say that it was,
quote, fulfilling the purposes of the Act, closed
quote. So it's supposed to be a functional test,
and the only way to make it work as a functional
test with respect to those groups that don't have a
public declaration about their purpose is to look
and to see what that group does in practice; and to
refer to an earlier question from this morning, if
a group is in engaged, 75 percent or more of its
activities, in attacking the candidate or
supporting a candidate, then it is acting as a
political committee. It's acting with the clear
objective to influence the election, and it should
be regulated as a political committee.

A group acts that way is not going to be
surprised by being regulated under FECA, and here
the key difference is the regulation of a single
communication versus the regulation of the totality
of a group's activities. Obviously the express
advocacy test makes sense when you examine one
broadcast at a time, and the Court adopted that
test with a goal of making sure that no group--and
it used the term an "issue group"--would be caught
by surprise and subject to FECA regulation based on
a single message unless it met the express advocacy
test. But with respect to a group that spends over
50 percent or 75 percent, etc., etc., on public
messages that attack candidates or promote candidates, then that group would not be surprised to be regulated; therefore, it does not get the benefit of the express advocacy test.

Finally, very quickly, these two points come straight from Buckley and solely from Buckley, and it's for that reason--we can explore this further in response to questions--that I think it's appropriate for the Commission to act now since it's derived solely from the Buckley case and from FECA and not from BCRA. These would be implementation standards that the Commission would need to adopt in an adjudicatory proceeding as well as a rulemaking, and as I understand it, the purpose of this rulemaking should be and should solely be to clarify what comes out of the Buckley case, and it is true, as others have said, there is a lot of other things that have been put on the table that should not be part the final rule, i.e., there should be not re-writing the definition of expenditure with respect to groups that do not meet the major purpose test, and there shouldn't be the
kind of $50,000 threshold that is in I think the proposed rules. The major purpose test is a percentage idea. It should be confined as such based on Buckley, and with that limitation, no [c][4] or [c] organization should feel in any way threatened by the proper implementation of Buckley.

Thank you.

CHAIRMAN SMITH: Thank you, Mr. Foley.

Mr. Pomeranz.

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

As you know, I'm here representing the law firm of Harmon, Curran, Spielman & Eisenberg.

At the outset, let me state that we share the concerns that you heard from a lot of commenters about the threat that the proposed rules create for all sorts of nonprofit advocates; however, both in our comments and then here today in my testimony, I want to specifically address the Commission's proposal to regulate independent organizations that have come to be know as 527 organizations. In particular, I want to discuss the ill-advised
attempt to apply the tax code's vague definition of
a 527 organization to the election law.

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

The tax law definition of Section 527
will not survive constitutional analysis under
election law. The heart of the matter is the
fundamentally different ways in which the courts
look at election law restrictions and tax law
restrictions. Tax law restrictions are a trade.
They're an organization accepting sweeping
regulations and restrictions on their activities in exchange for the valuable benefit of the tax-exempt status. Election law restrictions, however, have to survive strict scrutiny under the First Amendment. Any restriction that this Commission hopes to enforce must be necessary to achieve a compelling governmental interest.

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

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

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

CHAIRMAN SMITH: Thank you.
Professor Tobin.

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

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

MR. TOBIN: Just a law professor.

COMMISSIONER MCDONALD: I notice the Ohio State guys are getting more time.

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

One of the questions that the Commission asked in the proposed rulemaking is whether or not they should exempt 501(c) organizations from the proposed rule, and I think it is a serious mistake for the FEC to exempt 501(c) organizations. I know that's not a popular position. In my view—well, I don't have to run for office. So I'm in good shape.

In my view, legitimate 501(c) organizations are not and should not be concerned—and should not be considered—excuse me—political committees. Any rule you adopt should be crafted so that it does not ensnare legitimate 501(c) organizations, but exempting 501(c)s from these regulations is a different story. Not all 501(c) organizations act within 501(c) guidelines. The FEC should not rely on the IRS to enforce campaign finance laws. It is not—the IRS is not well-suited today do that. Exempting 501(c) orgs from this rule is the same as saying that with respect to 501(c) organizations,
the IRS, not the FEC, will police their campaign
activities.

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

In addition, it's more of a technical
legal point, but you don't get to bring a complaint
to the IRS about Branch Ministries. You don't have
standing, at least according to the IRS. It's not
fully litigated yet. So I, like the FEC, I can't
make a complaint and say go audit 501[c][4]s, and
you shouldn't be able to. You don't get to tell
the IRS who they get to audit.

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

And, finally, which I will not talk
about because I'm out of time, I have some views
about the timing of the regulations, and that's in
my written testimony. I think that though I've
obviously been advocating major purpose test for
some time, I think that the rules and regulations
we're talking about today are significant enough
that it would be more appropriate to implement
those rules and regulations in a new election
cycle. So my comment on that are in my testimony.

CHAIRMAN SMITH: Thank you, Mr. Tobin.
And, finally, Mr. Trister.

MR. TRISTER: Thank you, Mr. Chairman.
I am one of the authors of the comments
that were signed by the 415 nonprofit organizations
and joined by another couple of hundred later on.
I have just really two points I'd like make at the
outset.

The first is we've heart a lot of talk
this morning in particular about how the reason you
can look to 527 as the test for what is a political
committee is that when groups sign up as a 527,
they are declaring that their purposes are
political. This is not true. It is not correct.
It is not accurate. What you do when you file Form
527 to say you are a 527 is you declare that your
primary purpose is to conduct "exempt function
activities" as that phrase is defined in the
Internal Revenue Code and has been construed by the Internal Revenue Service over a period of many, many years. That is a far cry from saying that you are a Federal political committees, that you are a--that your purpose is to elect people to office. It is saying nothing more than that you are an entity that meets the definition of exempt--whose primary purpose is exempt function activities, and as that term has been defined, Mr. Pomeranz's comments and his testimony illustrates it is a much, much, much broader concept than anything that this Commission has ever looked to to define what a committee is. That's point number one. Point number two, I had a feeling this morning that I was in an Alice in Wonderland situation, that we were sitting not in the year 2004, but we were sitting in 1976 and the Supreme Court has just described Buckley and this Commission has gotten together to decide how to implement the primary purpose test as the Court said in Buckley. But that's not the case. We've had 28 years since Buckley, and there's been an
awful lot of water gone under the bridge.

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

Secondly, they saw the problem of stealth PACs as a problem of disclosure and
disclosure only. There is not a word in the legislative history about corruption. There is not a word about stopping these groups, shutting them down, or stopping them from using soft money. What they said is we have to deal with these groups by disclosure. And, thirdly, they rejected a proposal, voted down a proposal to apply these new reporting requirements to 501(c)s. This was not something that somebody in this Commission has dreamed up. They had a proposal. It was on the floor. It was voted down. This Commission cannot ignore that history.

We cite in our history, just in conclusion--in our comments the Food and Drug Administration case involving tobacco regulations, and the Supreme Court in that case had exactly the situation before as it has here. The FDA after many years of asserting that it did not have jurisdiction over tobacco now said we do have jurisdiction, and what the Court said was it's too late; Congress has acted in this area; Congress has made these decisions; and Congress has decided that
you're not going to have jurisdiction. We are not sitting in 1937 in that particular case, construing the Food and Drug Administration Act. We are construing it in the year 2000 based on all of the efforts that Congress has had, and you're in exactly the same situation.

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

CHAIRMAN SMITH: Thank you, Mr. Trister.

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

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

CHAIRMAN SMITH: Laughing with me then.

VICE CHAIR WEINTRAUB: Laughing with you. It's just hard to keep track of when I have
seven minutes and when I have nine minutes. I just
used up 30 seconds.

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

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

Mr. Pomeranz, I found your comments in
particular to extremely helpful, because I think--I
had the misfortune before I came to the Commission
to occasionally dabble in this area of the law, and
have--while I don't claim to be nearly the expert
that you or Mr. Trister is, I got a sense of just
how complicated it is, and I think that this
morning you did get a sense for the fact that there
are a lot of people that think this is a very easy,
cause Oh, okay, we just, you know, carve of the
[c]3s and the [c][4], get rid of the [c] organizations and use the 527s, and they discuss 527s as if it's one thing, there is one unitary entity, a 527; it's always the same thing.

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

MR. POMERANZ: Well, thank you, first of all. I'm glad that you found it useful. I have to say that 527—I sometimes have to go talk to groups about tax law, which is worse than having to read it, I assure you, and I sometimes describe 527 as sort of the—almost the kitchen junk drawer.

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

MR. POMERANZ: Exactly. Right. Where you've got all this stuff that you know you need,
you need to have it handy, so you've got to put it somewhere. Well, that's that situation that Congress found itself when it enacted Section 527. It's the catchall category for entities engaged in this stuff that seems political, and as Mr. Trister indicated, that is not the same as political committee. They are--political parties are 527s, State and Federal. Hard money Federal PACs registered with this Commission are political committees, whether connected or independent.

State political committees are 527s, connected organizations of [c]4s and [5]s and [6]s created to avoid certain tax consequences such as the 527[f] tax or the gift tax, which assuredly does not apply to 527s and does apply to [c][4]s and [5]s, and I'd be happy to provide a cite for that.

All of those things were put together because the IRS needed to understand how to treat them for tax purposes, to what degree were they taxable. So Congress did them that favor at their request and passed a law. So, yes, they are a diversity of things all bundled together, very few
of which, frankly, fall within the scope of this
Commission's regulatory authority.

VICE CHAIR WEINTRAUB: Thank you.

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

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

MR. POMERANZ: Yeah. I have to say I've read with a great deal of interest Professors Foley and Tobin's arguments on this, and I think they're very interesting, but the fact of the matter, it seems to me like it's a circular argument.

Assuming that you can take these slender bits of language from Buckley and from MCFL and turn them into some sort of political test, major purpose?

You know, major purpose in itself is going to have to be defined, and if the Supreme Court, as it has said in Buckley and reiterated in McConnell says that there is this scope of protected speech, then attempting to define major purpose without reference to the current understanding of express advocacy, that necessary construction the Supreme Court found, seems to me to be just a mechanism to shove organizations that wouldn't ordinarily be regulated as political committees into that category. So the circularity disturbs me.

VICE CHAIR WEINTRAUB: Mr. Trister, do you want to add anything to that?
MR. TRISTER: Well, another problem is it seems to be a suggestion that the word "expenditure" means one thing for the primary purpose test and means something entirely different in the statute when it says a thousand dollars worth of expenditures. Again, that's not how Congress tends to legislate. It tends not to use not only in the same statute, but here we're talking about the same definition. It's using the same word different ways, and I don't see how you can find that in what Congress intended, and I think there's a serious problem.

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

MR. TRISTER: Exactly.

VICE CHAIR WEINTRAUB: And I can see that I've gone to yellow. This is really more of a comment than a statement: Professor Foley, you say we could implement your ideas and put them into
effect tomorrow, basically, and nobody would be
surprised. I read—I don't know if you read, but I
read the comments of the other 28 or 27 witnesses
who are going to be today and tomorrow. There's
not a single one of them, including, I have to say,
your coauthor, who agrees with you in every respect
about what the state of the law is today or what it
should be. Given that you're the only one that
seems to have this correct, as you term it,
interpretation of Buckley, how could the regulated
community not be surprised if we were going to put
that into effect immediately?

MR. FOLEY: A couple of points in
response: I think in many respects, my analysis of
Buckley—I think this is a very straightforward
reading of Buckley, which—and it is based on the
statutory language of for the purpose of
influencing. What Buckley does is it says we've
got the statutory language, which is extremely
broad from the original FECA, that simply says for
the purpose of influencing. Now we have to deal
with that and narrow it, and we're going to narrow
it in two different ways for two different
purposes. First, we're going to narrow it in so
far as that for the purpose of influencing effects
of the definition of political committee. We're
going to narrow it by putting on the gloss of the
major purpose test.

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

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

MR. FOLEY: As was--the phrase that came
up this morning was constitutional fog, and I think
that that's a--I use the term "cloud" in my written
comments, and whether you call it cloud or fog, I think it's the same idea. When I used the term "surprise" earlier this afternoon, I meant on a case-by-case basis in terms of a group being surprised if the--that it is regulated. Now, the question--

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

MR. FOLEY: No. I think a lot of the comments that have been received with the hundreds of thousands of comments obviously concern this incredibly broad hundred-page notice that went out that involves not the major purpose test as it comes from Buckley, but instead rewriting the definition of expenditure for organizations that aren't within the major purpose test or, alternatively, this $50,000 approach that is not a percentage approach. So I can understand why all these organizations are up in arms.
VICE CHAIR WEINTRAUB: But you think everybody that will fit into your definition already knows they're a political committee and presumable has already filed with us therefore?

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

VICE CHAIR WEINTRAUB: Okay.

CHAIRMAN SMITH: Thank you, Madam Vice Chair.

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

COMMISSIONER MCDONALD: Again?

CHAIRMAN SMITH: Professor Tobin, you mentioned that it has taken the IRS up to seven years to revoke a tax-exempt status. I want to ask you a couple of basic questions on tax law. My understanding is a 527, if you want to be a 527, you just basically file the form and you're a 527.
MR. TOBIN: You file a form, but you 
have to make an assertion about your exempt 
function activity.
CHAIRMAN SMITH: But as soon as you do 
that, you're in?
MR. TOBIN: That's generally the case.
CHAIRMAN SMITH: Now, the 501(c), 
doesn't it work that you actually have to get--I 
mean, you can file, but eventually you get a letter 
or something granting you status?
MR. TOBIN: That's right.
CHAIRMAN SMITH: How long can that take?
MR. TOBIN: I really don't know. I 
thankfully teach it and don't have to file for 
501(c)(c3) status very often, but I don't know how 
fast they turn those out.
CHAIRMAN SMITH: Mr. Trister thinks he 
does.
MR. TRISTER: I have to do this for a 
living. First of all, it's only 501(c)(3)s that 
actually have to apply to the IRS. There's been 
some dispute within the Service, but it's now
pretty well settled that 501(c)(4)s do not have to apply and 501(c)(5)s and so on. In terms of 501(c)(3)s, what I'm telling my new clients is you have to expect about three months if it goes through in a routine way.

CHAIRMAN SMITH: Three months, okay.

The reason I was asking, I was thinking this morning as Mr. Kirk was speaking from the Black Caucus Education Leadership Institute. It sounded to me like their organization had not yet received their approval from the IRS. I was thinking again about the point you were making, Professor Tobin, as to what would we do if we were to grant a blanket exemption for 501(c) organizations or just 501(c)(3). When does that kick in? When you get your letter? When you organize? When you set up? It strikes me as a problem similar, although apparently not nearly so severe, as the one you raised about what if they violate their status and they're having it revoked. Perhaps there's no more need to comment on that than that.

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

But I don't know why the standard is
unconstitutionally--why is it not
unconstitutionally vague for 527s? This is to say
suppose that you're organizing to oppose judicial
nominees or suppose that you're organizing to
engage in a state activity or any of the number of
other things that are outlined in Mr. Pomeranz's
comments, and you don't want to trip that Federal wire. How do you know what to do? You seem to say, well, since you're a political committee, the promote, support, attack, oppose frame work is not overly vague, but that's exactly what they want to know, are we a political committee yet? How do we get around that circularity?

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

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

MR. FOLEY: So then the question, as I understand it, is that what sort of activities do you look at to count whether you've got 50 percent of them, and that is an important question, and I do think that both Buckley and McConnell tell us that the constitutional standard to address here is one of vagueness and one of notice; but the point, the key point, is that vagueness and notice with respect to the totality of a group's activities is
different than vagueness and notice with respect to any single instance of activity.

So the reason why looking at promote, support, attack, and oppose is appropriate with respect to the totality of a group's activities is for the reasons the Court suggested in McConnell, that that is enough of a standard with respect to a group that is routinely involved in political activities. So if a group, again, spends more than 50 percent of its time or is getting close to that line on communications, which arguably could be labeled as attack messages, that group is on notice, and there may be a question as to whether any particular ad that it spent money for is an attack ad, and because there is a question with respect to one ad, that one ad could not get regulated under the proposed standard. It would only get regulated under the express advocacy standard as a single ad, but when there's lots of ads to look at from a particular group, you don't have to worry about the marginal case as to any one ad, and you can say, well, that group is spending
an awful lot of money and a high percentage of its
own money on these sorts of ads, and that's enough
notice under the Constitution.

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

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

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

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

This Commission should not impose FECA regulations on any group unless the Commission is
confident that that group is unambiguously a political committee. When in doubt, leave it out, don't regulate, but there are--it's important, also, in order to the fulfill the purposes of FECA--that's the language from Buckley--to fulfill the purposes of this Act to regulate where there is no doubt. So when you have a situation that has no ambiguity and you have a group that is operating as a political committee, the Commission needs to regulate, and the test for whether you have ambiguity or not with respect to a group is different than whether you have ambiguity or not with respect to a single ad, and it's incumbent upon this Commission to enforce FECA, that it has regulations, that has enforcement proceedings, and that reach those groups that are unambiguously campaign oriented in nature.

CHAIRMAN SMITH: Thank you. I'll just say that I've found since I've been here it seems like everything is ambiguous. Also, I just to say, since I don't have time to let Mr. Pomeranz talk, anybody that's trying to get a handle on what
exactly is 527, is kind of puzzled about that, really should read the comments that he has submitted. It's a wonderfully clear exposition of how they fit into the overall tax frame work.

Next in our lineup is Commissioner McDonald.

COMMISSIONER MCDONALD: Mr. Chairman,

thank you.

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

Michael, if I could ask you, because I thought you made a very important point in laying out what 527s are doing when they are filing for that status, and you're the first witness to really kind of us get us to focus on that, along with
John's dissertation on it as well. Do you envision a circumstance where someone can be a 527, but by the very nature of their own activity, they might, in fact, evolve into a political committee, or is it by the very nature of the filing itself they simply could not be taking on a political committee status even inadvertently?

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

COMMISSIONER McDONALD: You're right.

MR. TRISTER: So they certainly could and they can certainly evolve into one if they were not—if they were a soft money entity and they started to contributions or coordinated expenditures or independent expenditures. They become a political committee.

COMMISSIONER McDONALD: I'm asking it wrong. I apologize. Let's proceed. Let's take the George Soros example, if we might, because that gets lots—it's had a rather robust following. If
a group specifies that their goal to defeat the
President of United States and they want to spend
$18 million, how would you assess that yourself?

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

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

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

COMMISSIONER MCDONALD: Have you looked
at the recent court case, the one that was resolved
on March 30th, the Melnick case?

MR. TRISTER: Yes, I have.

COMMISSIONER MCDONALD: Could you make
an assessment of that in this context?

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

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

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

COMMISSIONER MCDONALD: That's right.

MR. TRISTER: But more importantly, I
think that she acknowledged and the court
acknowledged when it applied the primary purpose
test that she had engaged in expenditures,
expenditures as defined as independent expenditures
as involving express advocacy. There's a footnote
in that opinion that lays out document after
document in which she had done that. So I don't 
read that opinion in any way either contrary to 
GOPAC or contrary to what I'm saying here today.

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

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

MR. FOLEY: Money. I think money is 
the--as to the 50 percent rule, I think it should 
be measured in terms of expenditures or 
expenditures understood in the political committee 
context, which goes back to the statutory 
definition of for the purpose of influencing.

COMMISSIONER MCDONALD: Expenditures of
what? Just so I'll be clear that I understand. If
a group operates in an overall budget of a hundred
millions dollars or more, what are we talking
about? I just want to be sure I understand the
frame work, I guess.

MR. FOLEY: My understanding would be
any disbursement by the group that would count as
an expenditure without regard to express advocacy,
because it's under the major purpose test. So it
could be for political broadcasts. It could be for
get-out-the-vote activities, but it has to be
partisan in nature. Here, I do any think, again,
it would be inappropriate to import the Federal
election activity definition of BCRA. So
mechanically, without regard to the
context--because this is not a BCRA point. This is
the point about implementing FECA and the Supreme
Court interpretation, and it's obviously true that
the Supreme Court when using the major purpose test
both Buckley and in MCFL did not elaborate on that
test. That's absolutely fair to say, but that
doesn't mean, as it seems to be suggested, that the
Commission can ignore it. That now is part of the statute by virtue of the Supreme Court gloss.

So I think the Commission has to, you know, do its best to reasonably follow the instructions of the U.S. Supreme Court. So I would say it would be to look at the totality of a group's disbursements in any given year, and if 50 percent of them are election oriented in a broader sense than just express advocacy, but looking at the totality of a group's expenditures, you can say over 50 percent are unambiguously campaign related, that would count under the test.

COMMISSIONER MCDONALD: I appreciate it.

Just real quickly, I gather you don't agree with your colleague about the notice issue in terms of making something effective immediately.

MR. FOLEY: Correct. That is a point that we differ on.

COMMISSIONER MCDONALD: Couldn't you have resolved that before you got here?

MR. FOLEY: You know, academic freedom.

COMMISSIONER MCDONALD: Thank you for
coming.

CHAIRMAN SMITH: Thank you, Commissioner McDonald.

Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr. Chairman. It's great to have so many terrific tax experts here with us. We're certainly learning a lot. I'm very glad we've perhaps found an area of law, Mr. Chairman, more complex and difficult to discern than the Federal election laws. I know it was a matter of time. I'm sure it's very easy for you to discern it, but thank you for being with us.

I want to follow up on a couple of points that some of my colleagues developed, starting with you, Mr. Trister. I take it your view is that group's avowed purpose public declaration should be irrelevant to our analysis of political community status, and my sense of your testimony is that really we are limited to express advocacy in terms of what counts as an expenditure for the statutory test. What, if anything, should we make of the McConnell court's conclusion that
the express advocacy test is functionally meaningless? What should we take from that?

MR. TRISTER: Well, what you should take from it is that Congress when it tried to deal with the fact that the test is functionally meaningless, it did it in a very narrow way. It did it by adopting electioneering communications. Congress adopted that. It did not—and it said at the time that unincorporated entities may spend unlimited amounts of money on electioneering communications, soft money. Now, they made that decision. You are now—if you turn a group that spends all its money on electioneering communications or, worse, on promote, support, attack, or oppose communications, you're saying that Congress when it said you could spend all this soft money on those kinds of communications, you're going to say, no, you can't because we don't like it, because we found there's a problem that Congress didn't consider.

But Congress did consider it. Congress had before it the issue, and Congress legislated in it, and Congress dealt with he problem that you're
addressing. Maybe it is meaningless, but it dealt
with it in a very limited and discrete and targeted
way, and this Commission can't say, well, we don't
like--Congress didn't go far enough, Congress
should have done some other things. It's for
Congress to deal, not this Commission.

MR. TONER: Do you agree that the
express advocacy test functionally meaningless?

MR. TRISTER: I think it's--it's not
functionally meaningless. I try to defend it,
because it reflects First Amendment values much
better than any other standard.

MR. TRISTER: Do you disagree with the
McConnell ruling?

MR. TRISTER: I do, yes.

COMMISSIONER TONER: Mr. Pomeranz, I
thought your comments were very helpful. I'm
interested in your view of the gift tax area. I'm
not a multimillionaire, no I've never really had to
grapple with it, but whether or not I might face a
gift tax--

VICE CHAIR WEINTRAUB: Maybe some day.
MR. TONER. Maybe some day.

CHAIRMAN SMITH: You're in the wrong line of work.

COMMISSIONER TONER: My wife is concerned it's going to be quite a long time from now.

MR. POMERANZ: The statute that creates the gift tax imposes the gift tax on any single year's contributions, gratuitous gifts of, at this point 11,000. It's an indexed number.

COMMISSIONER TONER: It still might be some years away for me.

MR. POMERANZ: Yeah. I look forward to that day myself. The statute says that there are certain gifts to certain organizations that are exempt, but you only get that exemption if it's statutorily provided. It's provided for a gift to a 501[c]. It's provided in statute for a gift to a 527, and that's it.

COMMISSIONER TONER: Is it not provided for a 501[c][4]?

MR. POMERANZ: Exactly. Not a [c][4],
not a [c][5], not a [c][6], none of those.

COMMISSIONER TONER: We heard some suggestions this morning that if the Commission took action with respect with 527s, we would have sort of an overnight migration to 501[c][4]s, that, you know, a lot of the organizations that are operating as 527s would become 501[c][4]s. In your professional judgment, do you think that's an accurate assessment in light of gift tax issues?

MR. POMERANZ: I don't know whether it's going to go to [c][4]s or whether wealthy individuals are going to make independent expenditures or whether people are going to create unincorporated for profit corporations or create MCFL organizations or more traditional [c][4]s and [5]s. I mean, I could go on. I get paid to go on.

COMMISSIONER TONER: You clearly are a lawyer. I mean that as a compliment.

MR. POMERANZ: But I do think that while there may not be a migration to [c][4]s, people who wish to spend their money to accomplish activities, whether it's as benign as encouraging civic
1 participation and get-out-the-vote activities or  
2 perhaps their dislike of a particular candidate or  
3 support of another, are going to find ways to do  
4 it.        COMMISSIONER TONER: Again, in your  
5 practical and professional judgment, do you think  
6 there are practical paper barriers to move from a  
7 527 to a [c][4]? We've talked a little about the  
8 tax issue. Would there be other practical barriers?  
10        MR. POMERANZ: Indeed. I think the  
11 creation of 527 organizations engaged in this sort  
12 of non-Commission regulable activity was driven by  
13 some of those considerations, I think not only the  
14 gift tax, but also the primary purpose requirements  
15 or issues until Congress acted on this in 2000  
16 related to disclosure. I think there are all sorts  
17 of tax law strategic issues that drive people to  
18 one form or another. The point is that there is a  
19 form available to them other than a 527. Which  
20 form they choose depends on their circumstances.  
21        COMMISSIONER TONER: Mr. Foley, my time  
22 is elapsing, but I just want to follow up with you.
Is it fundamentally your position that, as has been
outlined here in terms of whether an organization
is a political committee, we've got two separate
tests that have to be satisfied. First, it has to
spend more than a thousand dollars in contributions
or expenditures, and again there's a key issue
about what constitutes an expenditure, and then
secondly, for organizations that are not controlled
by candidates, that the organization's major
purpose must be electoral activities. Is that
a fair assessment of how you see the legal test?

MR. FOLEY: Correct.

COMMISSIONER TONER: And focussing on
the second part of that test important, because I
think this is important, is it your view
that--we've talked a lot about--we've heard from
the witnesses about what 527s organizations are or
not, but is it your view that 527s, because of the
way they're constituted, do necessarily meet the
major purpose test?

MR. FOLEY: No.

COMMISSIONER TONER: Why not?
MR. FOLEY: Because as has been suggested, there are lots of 527s that do not have the major purpose of influencing Federal elections as opposed to state elections or judicial nominations. So I do believe that this Commission needs to implement a major purpose test without regard to tax status.

COMMISSIONER TONER: This is important.

Do you think, then, that the major purpose test in Buckley and MCFL is meant to distinguish between Federal electoral activity and non-electoral activity, or do you think it's meant to distinguish between electoral activity and non-electoral activity?

MR. FOLEY: I think the court primarily had the latter in mind, but I think under the statute and the term of the statute that it was providing interpretative gloss for both are essential, so that the consequence of adopting a major purpose test in light of the statute that that's a gloss of means the only thing that's inside the statute is major purpose of influencing
Federal elections, and outside the statute are organizations that have a major purpose of influencing state elections or organization that have the major purpose of engaging in issue-oriented activities as opposed to electoral activities of any kind.

COMMISSIONER TONER: Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Commission Toner.

Next is Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Mr. Chairman. Thank you all for coming.

Again, let me start out by sort of regurgitating a little background, and then we'll get your reaction. It's interesting, because I think if we're looking legally whether or not we should be groping towards some of sort major purpose test and how that might be construed, it's interesting, I think, to look at one of the other provisions in the statute to get some sense that Congress probably had this concept in mind from day
one. If you look at the exemption in the statute
for the definition of expenditure or communications
for--internal communications to a membership
organization, it talks about how those kinds of
communications are an exemption from the definition
of expenditure if such member organization or
corporation is not organized primarily for the
purpose of influencing the nomination or election
of any individual to Federal office. So what you
have right there strikes me as another indication
that this construction we're working toward in this
rulemaking might have some congressional backing,
because that concept has already been built into
our statute in other areas, and it's tinkering with
the definition of what is an expenditure, I would
note.

The other point I was going to raise is
that, you know, even if the Commission is going to
in some sense adopt an express advocacy test for
purposes of figuring out what kinds of expenditures
by groups should qualify as an expenditure that
would perhaps trigger the political committee
status and trigger the major purpose status, we're

going to have to figure out how do we apply an

express advocacy test, and I would curious--Mr.

Trister, Michael, you've been doing this for many

years. I vaguely remember at one point you were

actually interested in becoming a commissioner. So

you thought better of that or someone thought

better of that.

MR. TRISTER: No. I don't think so.

COMMISSIONER THOMAS: You're doing much

better on the outside. But help me. How would you

have dealt with that hypothetical--actually, it

wasn't a hypothetical, the case that I referred to

where it was an ad basically attacking Tom Cain,

Jr., and it actually was comparing him unfavorably

against his opponent. Do you remember my reading

that at an earlier session?

MR. TRISTER: Right.

COMMISSIONER THOMAS: And the Commission

split three to three on whether that was express

advocacy.

MR. TRISTER: Right.
COMMISSIONER THOMAS: You said you don't like the magic words concept for purpose of avowed purpose concept. Do you like magic words in the context I'm raising?

MR. TRISTER: I think it's the best test that anybody has come up with to protect First Amendment values.

COMMISSIONER THOMAS: So you're magic words all the way?

MR. TRISTER: Right. Yeah. Now, Congress saw the problem that you're raising, and Congress dealt with it. Congress dealt with it by creating a new category called electioneering communications, but it also did not say that you are a political committee when you electioneering communications, and that's what this proposal does.

COMMISSIONER THOMAS: I think you're right. I don't think anybody at the table here is probably going to fit electioneering communications as a broad concept into the definition of expenditure. That was put out for comment. I know it's part of the proposal, but you needn't get
exercised about that, I don't think.

CHAIRMAN SMITH: Let's speak for everybody.

MR. TRISTER: Can we move the question?

COMMISSIONER THOMAS: So another point that was raised, and that was there's maybe some circularity to the argument that Professor Foley has brought to us, but I'm going to offer him the chance to make the pitch that circularity goes the other way. I mean, if an organization can never become a political committee unless its major purpose becomes express advocacy communications, we could tell all the committees that are—a lot of the committees that are reporting with us, party committees, a lot of the national party committees, perhaps state party committees, you don't have to register with us anymore because you can't--there's no indication that the major purpose is express advocacy. Would you like to follow up on that?

MR. FOLEY: If that's directed to me, candidate committees as well. I'm looking, again, directly at the language from Buckley, and, I mean,
this Commission has obviously read, reread Buckley probably many more times than I have, but the text of what the Supreme Court was saying it starts out--again, it says we've got the statute that says for the purpose of influencing. That's going to create a problem with respect to issue groups. So a couple lower courts have adopted a narrowing construction, which we like and we're going to hereby adopt, and that's good because that fulfills the purposes of the Act. That gets at what the Act needs to get to, and it's got to get to those groups, but doesn't have to get to any other groups.

Then it says expenditures of candidate and political committees so construed can be assumed to fall within the core area sought to be addressed by Congress. So there are, by definition, campaign related. Then the very next sentence--it's a new paragraph--says but when the maker of the expenditure is not within these categories, not an individual other than the candidate or a group other than a political
committee, then you've got to have the express advocacy test. So you only have the express advocacy test as to the disbursements of a group that's not a candidate date or a committee.

So I think that progression gets you out of the circularity problem by saying that a candidate is by definition campaign oriented. So you don't have to worry about whether its expenditures meet the express advocacy test. A political party by definition is campaign oriented. You don't have to worry about whether its expenditures are express advocacy in each and every instance. A political committee under the statute, as long as its limited to those organizations that have the requisite major purpose, is by definition campaign oriented. Therefore, next paragraph, you don't have to worry about those groups as to each and every one of their expenditures.

So I hope that's responsive to the question or the comment, but Buckley gives us the road map on how to proceed, and that's a way to avoid the circularity problem.
COMMISSIONER THOMAS: Just, also, I'm not sure, Michael, if you want to finish up on all, but also I'd like some comment on whether or not, indeed, the Commission for political committee analysis has, in fact, as an agency adopted an express advocacy test. I look at our advisory opinions where we've tried to deal with whether something is or is not a political committee. I see several four vote advisory opinions where express advocacy does not seem to be the standard. I do see some 3-3 vote situations, maybe in compliance cases, where we seem to split over whether you would need to have--comply with express advocacy.

I'd like some discussion about that, where the Commission's law is.

MR. FOLEY: That's my understanding as well, that to my knowledge there's never been a rule or rulemaking proceeding or an official promulgation of this Commission that says express advocacy test is embedded within the definition of political committee. As you said, there have been
a lot of AOs over the years, and a lot of activity
and some 3-3 votes and some misunderstanding,
unfortunately, premised on the notion that express
advocacy is this sort of inexorable constitutional
command that kind of governs everything, but that
obviously hasn't been removed by McConnell. So
that takes us back into the question of, you know,
what does Buckley mean, what does the statute as
interpreted by Buckley mean, and I don't believe
the Commission has ever taken the position that the
statutory interpretation analysis engaged in in
Buckley with respect to major purpose and political
committee is embedded in the express advocacy, and
if the Commission had done that, which I don't
think it does, I would say that the Commission
wasn't entitled to do that because the Commission
is not entitled to disregard the Buckley court's
authoritative interpretation of the statute.

MR. POMERANZ: You know, I have to step
in for a second. A lot of the people supporting
this proposed regulation keeping setting up this
straw man, that somehow McConnell has overturned
this longstanding provision in Buckley that express
advocacy was a constitutional requirement, and, of
course, Buckley never said that. Buckley said that
there is a constitutional requirement to avoid a
vague and overbroad law, and they offered the gloss
of express advocacy to do that. Congress, acting
within its authority, attempted to carve out more
activities that were regulable within the scope of
the first amendment, and as Mr. Trister has
indicated, that led to the electioneering
communications.

Further, this Commission has regulated
coordinated expenditures in reliance on Buckley.
These are all activities that pass muster to not
overstep the bounds of First Amendment speech, and
it sort of say that somehow we have had this vast
sea change is not the case, and I wish that Mr.
Holman had answered the question that was asked of
him this morning, because while it may be that
there are commissioners on this commission who
think that express advocacy perhaps isn't the
standard, everyone else seems to, and I would add
and include within that the very reformers who are now seeking this rule who have changed their tune.

So maybe express advocacy isn't the rule, but organizations have been acting in reliance on that not rule for 20 years, as Commissioner Toner indicated in his opening statement.

MR. TRISTER: I would add to that that whether there's been confusion or lack of uniformity within the Commission's decisions, all that matters is what did Congress think when it passed the 527 legislation in 2000, when it had BCRA in front of it and when it re-passed the 527 legislation in 2002, and there is no question about it. It thought that it was an express advocacy test. There is no question about it. Read the Joint Committee on Taxation's report to both Houses of Congress. Read the statements on the floor. They weren't sitting around say, Oh, the constitutional fog and therefore we have to do something. They were sitting around saying we have a problem; there is a loophole. The loophole is
that these groups are not political committees
under the FECA.

The argument that's being made on the
other side is that they were wasting their time,
notwithstanding the fact that Senator Feingold came
in and said this is the first serious campaign
reform in 20 years. We are now being told they
didn't even have to bother.

CHAIRMAN SMITH: We need to move on, but
I'll give Professor Tobin a moment since he's been
so quiet on the panel.

MR. TOBIN: But the problem with your
argument is it fails to go back to the beginning
and to FECA. I mean, Congress may have intended
something in 527s. It may have intended something
when it passed BCRA, but it also intended something
when it passed FECA. It intended for FECA to be a
very broad regulation.

Now, the Supreme Court--you keep talking
about Congress' intent. Congress intended FECA to
be broad. The Supreme Court limited Congress'
intent. Then it came back with 527 language to try
to do something, and then they came back with BCRA to try to do something, and then we learn, hey,
maybe you've been--you know, maybe you haven't accepted as brought an interpretation of FECA as
you might be able to, and what Professor Foley and I have argued is there is a part of FECA--there's a
part of Buckley that didn't limit FECA as much as,
yes, the campaign communities arguments it did.
Well, it's in their advantage to argue it did,
because it avoids regulation by your Commission.
Maybe they should be regulated.

So the point is that FECA provides a basis for understanding that major purpose test creates a political committee, and then we should regulate them as political committees.

MR. TRISTER: And my point is you're testifying before the wrong body. You should be testifying--28 years ago, and you're ignoring what's happened since then. You're pretending that there was no 527 legislation. Just a little tinkering, I think was the word.

MR. TOBIN: I certainly didn't say 527
was tinkering.

MR. TRISTER: Well, Professor Foley did, actually, in his comments. He said they were tinkering. They weren't tinkering. They were writing the first major campaign reform legislation in 20 years. They had a problem. It's the same problem we are here to discuss today, and they dealt with it.

MR. TOBIN: As best they could with their understanding of the law.

MR. TRISTER: Right.

MR. TOBIN: As best they could with their understanding of the law.

MR. TRISTER: And if you now have a better understanding of the law, go to them and tell them they have more authority.

MR. FOLEY: And none of those subsequent laws were repeals of FECA. They couldn't have been. Two of them were amendments to the tax code, which is precisely why the reference to the tobacco and FDA's situation is completely inapposite, because you can't amend FECA by silence or silence
plus amending the tax code. There may have been
confusion in Congress at the time BCRA was adopted
or the 527 laws were adopted. I don't dispute
that. Some of the Senators and Representatives who
voted may have had a sense of, you know, maybe
express advocacy does limit it. Even if that's
true, it is not legislative repeal of FECA.

So I'm not ignoring, we're not ignoring,
the subsequent law, but they don't take off the
books the original law that needs interpretation.

CHAIRMAN SMITH: Thank you. I've kind
of let that go because I was just looking, and it
seemed like most of my colleagues were finding that
useful. I find it useful. The Vice Chair pointed
out who would have thought our tax panel would be
the most exciting one today. But, actually, I did
find that to be a very helpful exchange.

It does seem that there's general
statutory interpretation authority for the notion
that when Congress acts to amend the statute and
does not change interpretations of the court, as in
GOPAC, for example, that it can be viewed as a
ratification.

In any case, we move on to our last commissioner here, Commissioner Mason.

COMMISSIONER MASON: Thank you.

Mr. Trister, I think you're letting yourself off a little easy on the avowed purpose question, but I think you would concede that the phrase "defeat President Bush" is express advocacy, would you not?

MR. TRISTER: Yes.

COMMISSIONER MASON: So why is it any harder for us to adjudicate a particular communication, which is, let's say TV ads, Defeat President Bush, than it is for us to examine--let's leave aside for a minute perhaps stray statement of an official, and let's say a fund-raising pitch, which has presumably been reviewed by the lawyer, which says, Please send us money to defeat President Bush, and we examined that along with perhaps other similar statements of the organization to determine whether or not this is the organization's express purpose? Why is one any
harder than the other?

MR. TRISTER: Because when you're using express advocacy, you're looking to the four corners of the message and you're saying does it expressly advocate one way or another. When you saying what is the purpose, it's more than the words. They're making statements. It's not just defeat Bush, it's that our primary purpose is something, and I'm saying that you're going to have a devil of a time coming up with magic words that express that in a way that is both useful, if you think it's useful, and that people will understand and will have a bright line.

The question is here not what is express advocacy. The question here what is the, quote, major purpose of an organization and can you tell it from a single statement that they make about what their purpose is. The issue is not what express advocacy is what is your purpose.

COMMISSIONER MASON: Okay.

MR. TRISTER: It's what your purpose.

COMMISSIONER MASON: So what is the
consequence of an organization, whose major purpose
is undetermined, who sends out a fund-raising
message that says please send us money to defeat
President Bush?

MR. TRISTER: Nothing.

COMMISSIONER MASON: What's illegal?

Nothing?

MR. TRISTER: Nothing. Why should it
be? You don't know anything about how they do it.

What if it's a 501[c][3] organization that's
prohibited from doing anything but nonpartisan
activities.

COMMISSIONER MASON: You'll see where
I'm going. The purpose--the consequence would seem
to be that a direct mailing is a public
communication, and a public communication that
expressly advocates the defeat of a candidate has
to have a disclaimer.

MR. TRISTER: They may have the
disclaimer, but that doesn't make it its major
purpose.

COMMISSIONER MASON: But they don't, but
this is where I'm trying to get, and if it were not
coodinated with one of President Bush's opponents
in this example, it would be an independent
expenditure.

   MR. TRISTER: And it might be illegal,
but it's not turning it into a political committee
that cannot accept soft money. That's the issue
here, and the fact--they may spend all their money
on voter registration that's nonpartisan voter
registration and that's how they think they're
going to defeat George Bush, and it's completely
nonpartisan. It's permitted under the Act. It's
permitted under your regulations, and you're saying
they're a political committee because they said we
want to defeat George Bush.

   That may be illegal if they say it--they
use express advocacy terms. They may have to
include a disclaimer, but it doesn't make them into
a political committee.

   MR. POMERANZ: Commissioner, we may have
saved this rulemaking. I mean, if, in fact, you're
saying that 441[b] or the independent expenditure
requirements or the disclosure requirements all
would apply to this very narrow definition of some
statement by the organization, then so be it.
We're done. We don't need a rule at this point.
You have existing enforcement power to look at
express advocacy communications and handle those as
you sit see fit, but we don't need to put the fear
of God into every advocacy organization from here
to Hawaii and run up our legal bills trying to get
us to look at every piece of paper as to whether it
might promote, support, attack or oppose.

COMMISSIONER MASON: Thank you. I
wanted to get to promote, support, attack, oppose,
actually with Professor Foley, because--and, first,
correct what I think is a misstatement, at least in
part, on the use of that phrase in BCRA, because,
for instance, BCRA says that when a state candidate
makes communications that promotes, supports,
attacks, or opposes a Federal candidate, it has to
be paid for with Federal funds, a communication,
and the presumption there is the major purpose of
the state candidate is to re-elect the state
candidate.

So, similarly, when political parties make communications that promote, support, attack, or oppose, that has certain consequences. So I don't think—I thought I heard you suggesting that, well, promote, support, attack, oppose was sort of a general standard, but, in fact, it appears to me, that BCRA does apply the promote, support, attack, oppose standard to particular communications, and the consequence being how those have to be paid for, not what the status of the group is, because it applies sometimes to state candidate committees and other times to political party committees.

So the question I really wanted to get you to try to address is what do you mean when you say—what's your definition of unambiguously campaign related or election oriented, which are two different phrases you used to say, Well, gosh, if it's unambiguously campaign related, then now they're a political committee and this different standard applies? How do we know unambiguously campaign related?
MR. FOLEY: Well, as to the first part of it, which is the avowed purpose part, it's does seem to me that if group puts on its web page for all the world to see that our primary objective this year is to feed a particular Federal candidate, we can take that group at its word. That would be an example of something that's unambiguous, and even though that particular group hasn't chosen to register as a political committee voluntarily as some other 527s have and said that they're already committees, that group would have to do so because of what it said on its web page. That would count as unambiguous on the avowed purpose part of---avowed declaration part of the major purpose analysis.

COMMISSIONER MASON: What is Mr. Someranz and Mr. Trister are advising them and they're wise enough not to say that on their web page?

MR. FOLEY: I do think that some groups perhaps have not been so careful in their statements. I haven't looked at the web pages of
particular groups. So maybe not all of them have
as good legal advice as we're hearing today and
have to accept the consequences of what they've
told the world already, but I don't have a view on
the particular--of any group that's out there.

As to groups that are careful not to
make such public declarations of their primary
objective, I mean, there's a list of the functional
equivalents of major purpose, you know, that would
be like no 52 of this standard, central admission,
overriding objective, core function, and we could
go on and on with that.

COMMISSIONER MASON: No. I really
want--I'm sorry. I really want to leave that aside
completely. Forget their statements. Look at
their activities. We do an audit. We see what
they spend money on, and we now say was this
unambiguously campaign related, and we have a range
of activities, and we put some of them on one side
and some on the other. What's the test to
determine unambiguously campaign related?

MR. POMERANZ: Could I actually--
COMMISSIONER MASON: No. I want Mr. Foley to answer it. It's his idea. I want him to answer it.

MR. FOLEY: Thank you. I think that one starts with the notion that comes from Buckley--excuse me--McConnell that the concept of public messages that support or attack a candidate, that that's not a hopelessly-based standard, that adds clarity to it, sufficient clarity as long as it doesn't apply to ad, but when you look at lots of messages.

COMMISSIONER MASON: But we're looking at particular ads.

MR. FOLEY: But there's a difference between looking at one ad and saying to a group got you on that one ad, whereas you look at, you know, the totality of a group's activities, lots of spending, and you see that again and again and again and again they're attacking a candidate or supporting another candidate. Now, I do think that in the crucible of litigation, not in the rulemaking context, but in an adjudication, whether
that adjudication occurred without the benefit of
the rule or that adjudication occurred under a
newly-promulgated rule. One would have to look at
a group's activities and as to a particular ad
would have to say that this ad that mentions a
candidate and perhaps is a negative statement of
the candidate, is that really an attack on the
candidate, and I'm not suggesting that we go back
to the Fergech test or anything exactly like it,
but I think this Commission, which is obviously
sensitive to First Amendment values and sensitive
to the need to--I mean if this Commission does
split 3-3 on occasion, as we've discussed, it's not
going to be overzealous in enforcement.

And so if there is in a particular
context some doubt as to whether or not a group has
really crossed that 50 percent threshold and you're
having a debate amongst yourselves on that group
and whether they've crossed that 50 percent
threshold, become some of the ads you're not sure
they really count as attack ads, you will be able
to sensitively apply a kind of when in doubt
standard, and when it doubt, you won't regulate.

But if there is a firm conviction based not on any
single thing a group does, but on all that the
group does, that this group is really in the
business of elections again and again and again,
they're out there promoting a candidate or opposing
a candidate date, then you will be firmly convinced
that that group is operating as a political
committee. It's operating with the major purpose
of achieving electoral outcome, and then you will
be entitled to, indeed have the duty, to regulate
that group under FECA.

I hope that's responsive. I think
that's probably--I mean, this Commission well knows
that there are going to be line-drawing tasks.
There is going to be sensitivity. There is going
to be no--there's not going to be a perfect rule,
whether adopted in rulemaking or adopted from a
series of communications. So I cannot tell you
today that any test is self-defining, not even the
magic words test is self-defining. It needs to be
implemented by human beings sensitive to the
totality of all that goes on in an electoral context, and you will be sensitive to the First Amendment. You will be sensitive to for the needs for [c][4]s that are legitimate [c][4]s not to get caught up in this, but you will also be sensitive to the need to regulate those groups that really are operating as political committees, and you should not ignore those groups that are blatantly engaged in that sort of activity and are pretending that they are outside the scope of FECA jurisdiction just because they don't do express advocacy, even though everything they do or virtually everything they do is designed to win elections.

CHAIRMAN SMITH: Thank you.

Let's go to Counsel Larry Norton.

MR. NORTON: Thank you, Mr. Chairman, and thank you all for coming today.

I guess I want to follow up on the same line of questioning as Commissioner Mason and ask you to tease out your theory a little bit more, Professor Foley. I don't know whether you're
familiar with the Revenue Ruling in 2004 that the
IRS issued to 501[c] organizations that we cited in
the Notice of Proposed Rulemaking, but I was
looking through a number of the situations they
posit to try to assist 501[c] organizations in
determining whether they've trespassed on 527
exempt activity, and there is one in there
involving a trade association that runs full-page
ads in newspapers with large circulations shortly
before a Senator is up for re-election, and the ad
says there's this bill pending in the Senate and it
would provide manufacturing subsidies to certain
industries to encourage export of their products.
The ad says that several manufacturers in the state
would benefit from the subsidies, but the Senator
has opposed similar measures supporting increased
international trade in the past. Then the ad ends
with the common statement call or write Senator so
and so and tell him to vote for whatever the bill
is.

The IRS says, well, they've got this ad
and it identifies the Senator and it appears
shortly before an election and it's stipulated that
it targets voters in that election, but the IRS
says, however, the ad specifically identifies the
legislation the Congressman--the Senator, rather,
is supporting and appears immediately before the
Senate race--it appears, rather, immediately before
the Senate is scheduled to vote on that
legislation, and therefore we find that is not an
exempt function under 527.

And so what I'm wondering is if we have
an organization that doesn't make any expressions
of avowed purpose, but spends 60 percent of its
money on this, does that make it a political
committee?

MR. FOLEY: The Revenue Ruling--

MR. NORTON: Just a minute. You know,
what you said is that [c][4]s shouldn't feel
threatened if this is implemented correctly. Well,
[c][4]s have now been told by the IRS you can do
this, this is not exempt 527 activity. It's now
tossed in the lap of the Federal Election
Commission. We look at it and see this how they
spend 60 percent of their money. What do we do with it?

MR. FOLEY: Okay. With respect to the Revenue Ruling in particular and sort of the tax angle on it, I will defer to Professor Tobin, because when I learned of that, I walked down the hall and said, Hey, this is a tax matter; you take it. But if the question--I take the import of the question is without regard to--without automatically deferring to the IRS, how should the election law deal with the same sort of advertisement or a group that spends 60 percent of funding on that kind of thing?

MR. NORTON: Then why shouldn't a [C][4] feel threatened having received this Revenue Ruling. If it does 60 percent of this, why should the [C][4] worry that it might be characterized as a political committee under your analysis?

MR. FOLEY: Well, I did not--I have not read that example, but in listening to it, I did not hear anything that attacked the Senator. Let me be clear about this, because lobbying and urging
Senators to do this or that, you know, that's not opposing a Senator or promoting a Senator. If an ad says there is an important piece of legislation before the Senate and we want the Senator to agree with us on it, the text of that 30-second or 60-second ad by itself is not attacking the Senator or supporting the Senator. It's merely urging the Senator to do something.

Now, I think earlier today, there was in reference to an ad that said, you know, in previous votes on this sort of issue, you know, Senator so and so did a totally wrong thing by raising taxes or voting against the environment, and we urge you to call him so he or she can correct that egregious mistake. Well, that ad is--now, I think, falls within the zone of an attack, but merely urging a Senator to do something is not support or attack, and so doing 60 percent of lobbying activities is not doing 60 percent campaign or electoral activities. You do need to look at the text of the ads to make those sorts of judgments. I think that's unavoidable, but I did not hear in this
example--maybe I missed it--the language of an
attack or a support.

MR. NORTON: Let me ask you, Mr. Trister, in your comments earlier, you said that
that you didn't see how the Commission could
consider or use the promote-support test to
establish what an expenditure is in the context of
political committee status when it didn't do so in
the coordination regulations. I don't think our
explanation and justification for the regulations
explain why we rejected that standard, but one
might hypothesize that there were some concern
about whether it would survive constitutional
scrutiny. It did,

and why isn't the answer to the dilemma you present
that if the Commission uses the promote-support
standard here, that it ought to conform its
coordination regulations to make that an
expenditure there?

MR. TRISTER: Well, as you pointed out,
it survived constitutional scrutiny only in the
context of political committees, and it remains
quite an open question whether or not that standard
can survive the scrutiny of the courts under the First Amendment in any other context, whether it would be coordination or it be the definition of political committee. One of the things I wanted to mention earlier is in McConnell litigation, of course as you mentioned earlier, there was the backup definition, and part of that backup definition is the promote, support, attack, or oppose language, and Floyd Abrams, who was representing one of the groups of plaintiffs, deposed Senator McCain and Senator Feingold and showed them an ad and said does this promote, support, attack, or oppose. They disagreed on the same ad.

So you're telling us we don't need standards? You're telling us we can do this without standards? Now, maybe in the context of a political committee. That's what the Supreme Court said. Maybe in that context, but it said nothing about any other kind of entity.

MR. NORTON: I have no further questions, Mr. Chairman.
CHAIRMAN SMITH: Thank you, Mr. Norton.

Mr. Pehrkon.

MR. PEHRKON: Thank you, Mr. Chairman.

Thank you all for coming here today.

Mr. Pomeranz, I'd like you to help me out a little bit with the tax code here at 527s. One of the things that was presented in earlier written Commission testimony indicated that 527 organizations had filed something like 29,000 Form 8871s, yet the IRS reports on other side that there are only 600 entities which are reporting their receipts and expenditures on the Form 8872. Why is that?

MR. POMERANZ: There are organizations that are required to register under--using Form 871 that are not required under the statute to regulate--to file 8872s.

MR. PEHRKON: Okay. So that, you believe, would account for--help me understand a little bit better about the discrepancy, the difference between them?

MR. POMERANZ: Um-hum.
MR. TOBIN: Could I make a comment there? There's two reasons why they might not be filing. One is if they file with you, they're not required to file with the IRS, and the second is that if they don't spend more than $25,000, they're not required to actually report their expenditures and contributions.

MR. POMERANZ: Also state.

MR. TOBIN: And they can be involved in states. So there is not a direct--everybody doesn't have to file.

MR. PEHRKON: Okay. Mr. Trister, you're representing a number of organization here today, and one of the things I'm trying to better understand is you've got 600 or 400 organizations you're representing; how many of them would actually be affected by this, do you think, and would be required to file?

MR. TRISTER: I heard your question to Ms. Aron this morning, the same question, and I'm not really sure. If the proposal on the table is the proposal you're asking about, it reaches
virtually every 501[c] organization in the country, and I think Larry Gold is one who quoted you what those numbers are. There are hundreds of thousands. So that's one possibility in terms of who would be affected. If you're narrowing it to 527s, then the number is somewhere between the 600 and the 29,000, and we don't really know where because the 600 are only those groups, as Professor Tobin says, that reaches the threshold.

The definition in this NPRM has no threshold. So the smallest file 527s, even those that do not have to report to the IRS with 8872s would be covered by this definition as it's proposed in the NPRM. That would include 527s set up by the smallest unions in the country, local unions, 527s set up by the smallest chapters of the national organizations. Any group would be covered because there is no threshold in this proposal with respect to 527s. And so the number in somewhere in there, and I don't think anybody can give you a more precise answer.

I do have one thing I want to say,
though, because one of the things that we have seen in recent years is a trend. I think that those of us who practice in the area, what has become the model of choice, if you will, for advocacy organizations, groups that are interested in advocating on public issues is a model of 501(c)(3), 501(c)(4), and 527s, and that is increasing every day of the week, and that is what you're aiming at in these proposals. So where it is today is not where it will be six months from now. There will be many, many more groups, 501(c) groups with 527s because that has a lot of tax advantages, and that's what's pushing it, and that's what's driving it.

MR. PEHRKON: Thank you.

Mr. Pomeranz?

MR. POMERANZ: I was just going to briefly mention that Mr. Gold's numbers, as big as they were this morning, actually understated the case, because he mention all the 501(c)(3)s that aren't required to seek recognition or file Form 990s, and that would be all the churches and other
houses of worship in this country and the smaller 501[c] organizations. So there are ten of thousands, probably hundreds of thousands more entities beyond even those appallingly high numbers he cited this morning.

MR. PEHRKON: Mr. Chairman, thank you.

CHAIRMAN SMITH: Thank you, Mr. Pehrkon.

I thank the members of the panel for a most educational and very stimulating conversation.

It was very informative and helpful to us. Thank you all. Thank you for coming from Columbus.

And we will take a ten-minute recess, and then we'll have our last panel today. Ten minutes, please.

[Recess.]

CHAIRMAN SMITH: I'm going to call us back in session here. We're trying to finish up and let the staff go home today at a reasonable hour and also let our witnesses get back to their schedules.

IV. PANEL IV

CHAIRMAN SMITH: So we have Panel IV for
today here now, and we have again four individuals
to testify for us, and I didn't get a chance to
meet them beforehand. So I'm not exactly sure who
is who, but we have Michael Boos, who is testifying
for Citizens United as vice president of that
organization; Wade Henderson, who is Executive
Director for the Leadership Conference on Civil
Rights; Greg Moore, Executive Director of the NAACP
Voter Education Fund; and Ward Morrow, Assistant
General Counsel of the American Federal of
Government Employees.

All right. Again, gentlemen, we have
just three minutes set aside for opening
statements, and I'll ask you to—you can skip
pleasantries and try to be brief, and if you've
been throughout the day, you've seen we're not
being particularly mean spirited about the lights,
like the Supreme Court where we tell you shut up
and sit down as soon as the red light goes on,
because you're already seated, but actually if you
would just watch the lights and please try to
operate. To my colleagues up here as well, we will
try to see if we can't wrap this up in the hour and
15 minutes allotted.

We'll begin with the opening statement
from Mr. Boos.

MR. BOOS: Thank you, Chairman Smith,
Members of the Commission. My name is Michael
Boos, and I'm the Vice President and General
Counsel of Citizens United, and I'm actually
substituting for our president today who took ill,
David Bossie.

Citizens United is a conservative grass
roots advocacy organization with more than 50,000
members, and what I really want to do today is
really zero in on that aspect of the Notice of
proposed Rulemaking without would have the greatest
impact on Citizens United, and that is really the
definitions of political committee and the major
purposes test that's been put forth, in particular
two aspects of that, one being the 50,000, slash
10,000 thresholds that are proposed and also as
well as the application of the 50 percent threshold
if the Commission is going to look at what has been
defined as Federal election activities. I can state that Citizens United has a project that's been going on for several years called Citizens United for the Bush Agenda, and that project is designed primarily to promote legislative and policy initiatives that have been--that are supported by the President, and we speak out effectively on those issues; however, in the course of doing that, we're almost by definition going to be making statements that are supportive of the President. Indeed, the project name has his name in it, which would be prohibited if the organization were a political committee under the existing rules.

But that aspect of the proposed rulemaking, this major purposes test, would really have a devastating impact on organizations such as Citizens United precisely because we're intimately involved in issue advocacy which is tied and wrapped around certain political candidates and elected officials. We have already had to alter some of our planned activities in light of BCRA.
For example, last spring, we ran a series of
television ads featuring former U.S. Senator Fred
Thompson which were supportive of President Bush's
prosecution of the war on terror. We can't run
those ads right now in a number of areas, simply
because they would be qualified as electioneering
communications.

If the major purposes tests were adopted
as proposed or basically any of the proposals here,
we would be in danger of being classified as a
political committee based on those of type of
activities. It's a very serious threat to the
501[c][3] community, and we're extremely concerned
about it, and we would caution you to move very
cautiously in that area.

CHAIRMAN SMITH: Thank you, Mr. Boos.

Mr. Henderson.

MR. HENDERSON: Thank you, Mr. Chairman.

Good afternoon, Members of the Commission.

I'm Wade Henderson, the Executive
Director of the Leadership Conference on Civil
Rights. The Leadership Conference is the Nation's
oldest, largest, and most diverse civil and human
rights coalition with more than 180 national
organizations representing persons of color, women,
children, organized workers, individuals with
disabilities, older Americans, major religious
groups, gays and lesbians, and civil liberties and
human rights groups. The Leadership Conference is
one of the confounders of the coalition to save
nonprofit advocacy.

I'm here today because of the profound
care concern in the civil rights community about the
nature and timing of the Commission's Notice of
Proposed Rulemaking regarding the political
committee status of nonprofit organizations. We
worry that in a rush to resolve what is a perceived
problem, the Commission will fundamentally weaken
our democracy. Groups we represent include
501[c][3] and 501[c][4] not for profit
organizations, some of which have connected 527
groups. Some of our member organizations supported
passage of the Bipartisan Campaign Reform Act.
Others did not. Nonetheless, we all engage in a
broad range of currently protected activities which
would now run afoul of the Commission's proposed
rule.

We strongly believe that the proposed
rule threatens First Amendment rights of free
speech and association for all of us. The need for
these protections can't be overstated. Without the
constitutional guarantees of the First Amendment,
for example, there would not have been a civil
rights movement. Is it really the intent of the
Commission to strike broadly at the values we all
hold dear of the foundations of American democracy?
We think not.

The leadership conference and the
organizations that we represent work in a
bipartisan manner to make the dream of equal
protection of the law a reality for all Americans.
We work closely with members of Congress and
administrative appointees. To accomplish our
goals, we must advocate to, persuade, and sometimes
criticize elected officials. Several of our member
organizations encourage citizens to register to
vote and to participate in elections, particularly African Americans, Latinos, Asian Americans, persons with disabilities, newly enfranchised citizens, and the Nation's voter-eligible youth, and we educate voters on a full range of civil rights and civil liberties issues. We do this not because we have a parochial concern for particular candidates, but rather because we care about issues that office holders have the power to impact.

Now, as we understand it, the following activities would not be allowed under the Commission's proposed rules: For example, in order to educate Americans about the importance of the Federal courts and the threats posed by some of President Bush's most extreme judicial nominees, the Leadership Conference has used print and multimedia ads. One such video ad criticized President Bush's nomination of a right-wing ideologue, Charles Pickering, and was distributed by way of the web to activists across the country. Now let's look at the use of voting records, for example. At the end of each session of Congress,
the Leadership Conference produces a nonpartisan voting record that tracks how all 535 members of the House and Senate have voted on all LCCR priority issues. The voting record is distributed widely to our 180 member organizations, the media, members of Congress, the grass roots and other interested parties. The Leadership Conference voting record is an important tool to educate citizens on the full range of civil rights issues that have been considered by members of Congress in the proceeding session.

Yet under the redefinitions of expenditures in the FEC's proposed rule, these activities would be prohibited altogether or transform our organizations into political committees bound by the donation regulations of Federal election laws. Such a transformation could be crippling not only to our organizations, but also to our democracy. Now, the proposed rules would serious undermine the constitutional guarantees on which the leader conference organizations depend to carry out their missions,
and we sincerely hope you reconsider the rulemaking
deedor in which you are engaged.

Thank you for this opportunity to appear
before you.

CHAIRMAN SMITH: Thank you, Mr. Henderson.

Mr. Moore.

MR. MOORE: Thank you, Mr. Chairman and
Members of the Commission and Counsel. I want to
thank you for the opportunity to speak.

My name is Greg Moore. I serve as the
Executive Director of the NAACP National Voter
Fund, which is 501(c)(4) arm of the NAACP and one
of the lead organizations in the Coalition to
Protect the Nonprofit Advocacy.

The National Voter Fund was formed by
the NAACP in 2000 to engage in advocacy and
election-related activities that could be
potentially inconsistent with the 501(c)(3) status
of the NAACP. Rather than take the risk of
jeopardizing the status, the NAACP created the
Voter Fund, and the Voter Fund in turn created the
Americans For Equality, a 501--I'm sorry--a Section 527 organization, and when the Voter Fund created AFE, it did it so to ensure that the Voter Fund would not inadvertently place its tax-exempt status at risk by engaging in more political activity than is permitted under the 501[c][4] organization guidelines. Such caution is necessary because of the vague IRS standards for both what constitutes political activity and what constitutes primary activity of a Section 501[c][4] organization. AFE is not registered as a political committee and it carefully monitors its activities to ensure that it does not engage the activities that would be required it register as a political committee.

The Voter Fund and AFE have been involved in a wide variety of advocacy and voter participation activities. These activities have included advocating for election reform, the re-enfranchisement of ex-offenders, educating voters about civil rights issues, urging individuals to register to vote, and encouraging voters to go to the polls on election day. These
activities have both--involved both Federal and
non-Federal elections, and through these efforts,
both organizations have together had the success of
increasing voter participation among African
American and other disenfranchised groups.

We are very similar. Both entities use
civil rights issues to motivate individuals to
register to vote. Both entities have referenced
candidates' position on these issues, and the
choice of which entity to use has primarily
depended on whether the National Voter Fund is
approaching its limits for activity that could be
viewed by the IRS as political activity. Also, it
depends sometime on which entity has sufficient
funds to carry out those activities, but there is
justification for treating AFE differently from the
National Voter Fund for election law purposes. The
ability of the NAACP to create the National Voter
Fund and of the National Voter Fund to in turn
create AFE is an inherent part of the Federal tax
system.

It is also a means by which Congress,
the IRS, and the courts have addressed the
constitutionality and practices, issues raised by
the vague IRS standards in this area. To suddenly
and arbitrarily treat the National Voter Fund and
AFE as very different creatures under Federal
election law would be illogical and
unconstitutional in our view. It would also threat
the ability of the NAACP, Voter Fund, and AFE to
increase participation of African Americans and
other historically disenfranchised groups in the
most fundamental part of our democracy, and that is
voting, a right that only takes place one day of
the year.

I, therefore, urge the Commission to
withdraw the notice of proposed rulemaking.
Changing of the magnitude and novelty being 17
proposed by the Commission should first be
considered by Congress, and in other course would
exceed the Commission's authority, in our view, and
would usurp power and the proper role of Congress
in this area.

Thank you for your time. I look forward
to more questions.

CHAIRMAN SMITH: Thank you, Mr. Moore.

Mr. Morrow.

MR. MORROW: Ward Marrow from American Federation of Government Employees. I'm Assistant General Counsel. I want to thank the Commission and actually also some of the presenters. I've sat through most of the day, and I think we've heard from people who are the real experts in the field. I found this morning, reading through the comments of the Vice Chair, it seemed to mirror some of my feelings in coming to this presentation. This is very, very difficult material for a lot of the regulated community to go through, and I had great difficulty in going through it, to be honest. I'm glad to see the Commission had some of that same difficult.

A lot of my difficulty in trying to advise my client, the union, falls into the questions that was brought up by the last panel by Mr. Norton, and that particularly would be as a representative of Federal employees, unlike the
private sector unions and perhaps unions that you're generally considering, we represent individuals for whom the Administration and members of Congress are our bosses. These are the individuals in a labor relations context, which is different from simply a political context. So when I hear the words "promote, support, attack, and oppose", what I hear is, for instance, transportation screeners. If there is a policy that says we will contract out members that we represent, we may well support, attack, oppose those policies. We do that every day, not just 30 days before an election, not just 60, not 120, not just at certain parts of the election cycle. We do that all year long. We do that with all Administrations. We do that for every Administration. We do that with both parties. We do that with people that we might support through our political action committee and people that we oppose. We may support somebody, but oppose a particular policy. We may run ads similar to the ad that was being discussed saying don't contract
out transportation screeners. That vote might occur in October. We might end the ad with saying call these members of Congress; they've supported or opposed this in the past; encourage them to vote favorably on this in the future, thank them if they voted favorably in the past.

Would we then be brought before the Commission for attacking certain members of Congress because we're close to an election? Are we supporting members of Congress based on those past votes? Not necessary. Our 527 is used as a representation function. We represent in the labor relations context transportation screeners. Those policies are covered to a large extent by Federal law. You'll see in my written presentation I refer to Title V extensively. It was not clear to me how some of these regulations might implicate our ability as a labor relations representative and with charges under the statutes in Title V to deal with some of these regulations.

Would we be barred once an election cycle kicks in in how we say certain issue-oriented
presentations? Would we not be allowed to refer to candidates because they're elected officials in urging people to support our position?

For instance, if a Veterans Administration hospital is understaffed and we wish to get the community concerned about that and contact members of Congress, would we not be allowed to do that 30 days before an election because it might have an impact on the election? Would we be brought in and would that be covered by this regulation? I was intrigued early on, taking some of this off the table, and I hope that you would, but keep in mind that there are certain areas—and I think our union—our issues would be some of them—that these regulation might impact, and we have great concern.

Thank you.

CHAIRMAN SMITH: Thank you, Mr. Morrow.

We will turn to questioning. We will give each commissioner five minutes and figure the run-over time, which has worked out reasonably well. We'll begin with Commission Mason this
round.

COMMISSIONER MASON: Thank you.

Mr. Moore, I'm intrigued that you represent an organization that has this [c][3], [c][4], 527 structure that we discussed at some of the earlier panels, and you may not have been here, but I asked a question at one of the earlier panels about how that would work in the context of a rulemaking such as this with one if, for instance, we were to somehow deem or rule the 527 component of your organization or similar organization to be a FECA political committee, what then would be the implication of you off-loading activities back and forth, and you've said fairly frankly that there is some play in the IRS rules, and depending on the current interpretations of the IRS rules and the financial situation of your organization, you may well perhaps one month conduct an activity through your [c][4] and perhaps the next month conduct the identical activity through your 527. Is that correct?

MR. MOORE: That's not exactly correct,
and also, I do not represent the NAACP. That's the 501(c)(3), and I'm the executive director of the [c][4] which was created by the 527. So I can speak for those two, but not for the NAACP.

COMMISSIONER MASON: Okay.

MR. MOORE: In the instance of what we create and what entity we use, it has a lot to do with availability of resources, of course, but it also has to do with whether or not activities we're undertaking are particularly designed to affect the outcome of a particular election as opposed to having a broad scope voter registration drive in a number of states based on African American unregistered totals in that particular state or jurisdiction. The 527 might very well have the ability to go out and put a particular piece of paper or an ad out that talks about the candidate and why both candidates may have different points of view, and so we would do that activity under the 527 law.

If that were no longer available, it would curtail the ability of this institution to
actually extend its rightful duty to involve itself
in elections under the current tax code that we
have. So we think we're following in the spirit of
the law, and to take this away from us in the
middle of a campaign cycle not only threatens our
work, but the work we do in coalitions with other
organizations that are 527s as well.

COMMISSIONER MASON: So let me
understand this. One of the points you're trying
to make is that you feel that you have been pushed
by the tax code into forming a 527 organization to
do certain things that you want to do, and from
your organization's perspective, you don't care
whether you do them through a [c][4] or a 527?

MR. MOORE: Well, we--

COMMISSIONER MASON: The tax structure
causes you to have these dual organizations and to
conduct some of the activities one place and some
the other?

MR. MOORE: Well, we're clearly
exercising what's in the existing tax code and
following the letter of the law as it was created
and as it was amended in 2002, and so there are
different steps we do take to make sure that we
keep those activities separate. And so it just
takes—in other words, we're a member of work and
with a number of 527 entities, and we don't want to
have that ability taken away from us simply because
the rules change in the middle of the game.

COMMISSIONER MASON: I understand. So
what I'm asking is the reason you've adopted that
structure is because the tax code has pushed you to
adopt that structure.

MR. MOORE: It's within the tax code,
and we follow the structure based on the protection
of the entity that we are most concerned with,
which the NAACP and that name.

COMMISSIONER MASON: Okay.

MR. MOORE: So we pushed those
activities to the AFE so we wouldn't unnecessarily
jeopardize the NAACP's name in that regard.

COMMISSIONER MASON: Okay. Now, is it
your position as long as AFE does not engage in
express advocacy, doesn't give money to Federal
political candidates or the Federal accounts of
political parties and doesn't engage in coordinated
contributions, that it should not be required to
register as a FECA political committee?

MR. MOORE: No, because it will restrict
the ability of donors to give certain grants to the
degree where we can make an impact, and it also
opens the door to a chain reaction of restrictions
that may very well impact the [c][4] and its
ability to restrict what--

COMMISSIONER MASON: I understand that,
but I'm just saying that there are some things your
527 might do, which I think you would acknowledge,
that would cause it to have to register, and you
want to avoid that.

MR. MOORE: Yes.

COMMISSIONER MASON: I'm trying to
ascertain your position about what that list ought
to be. In other words, if you started giving money
to Federal political candidates, that would cause
you have to have to register.

MR. MOORE: Of course, but we don't do
COMMISSIONER MASON: And you don't do
that--I'm trying to understand the list of things
that you could avoid that would keep you out of the
political committee status, contributions of
candidates, express advocacy, coordinated
contributions, and my question is do you avoid
those things because, as you understand the law,
you don't have to register with the Federal
Election Commission?

MR. MOORE: We usually hire good
attorneys that help us answer these questions, and
they're not here right now.

COMMISSIONER MCDONALD: And does that
help you or hurt you?

MR. MOORE: It's my worst nightmare.

COMMISSIONER MASON: I'm completed, Mr.
Chairman.

CHAIRMAN SMITH: Thank you, Commissioner
Mason. I note that Commissioner Mason may have to
leave us a bit early in this panel due to other
obligations, and we've run over here, but he has
all the written comments, of course, and has
reviewed them or will do so for those he has not.

Commissioner McDonald.

COMMISSIONER McDonald: Mr. Chairman,

thank you.

Mr. Boos, Mr. Henderson, Mr. Moore, and
Mr. Morrow, welcome. You've done double duty.

It's always tougher at the end of the day to try to
kind come before this panel. In fact, I'm going to
do something a little bit different, which because
of kind of the compressed schedule, here in just a
second, I want to just basically ask you all if
there's other things that you would like to add,
since I think you've more than covered the
questions.

But I do want to point out something
that Mr. Morrow said in relationship to 30 days, 60
days, 90 days, 120 days. I'm thinking about in
legislative recommendations saying that you can't
attack the Federal Election Commission 60 days
before a hearing. Do you think I'd have any chance
at all? Maybe even 30. My mother may be watching.
So I'm hoping you all would consider that. I'm not sure that you really would, but I'd be ever hopeful.

The voter matter is exceedingly important to me as I was the election secretary of the Tulsa County Election Board for years, and it was something that I held near and dear to my heart, and we worked on it pretty much around the close because it's so fundamental, this whole process, and that goes back to about 1974.

Needless to say, we've had mixed and somewhat discouraging results in a way. We hadn't done nearly as well as we would like to do, and that's with a great deal of effort.

I'm wondering in relationship to just your own experience--you've seen all the comments and you understand all the controversy that's going on--if the GOTV aspect of it, which is certainly a major aspect of this whole area, were severed from other aspects that are before us, what would be your thought about that? I mean, in some cases, particularly--Mr. Henderson, you made a very strong
point, I thought, on this issue. To your way
thinking, is that the major component of what's at
stake, or is that just a piece of it?

MR. HENDERSON: No. No, Commissioner

McDonald. First of all, thank you for your
question. I do not see it as a minor or incidental
element of the proposal before us. I do think it's
important to step back for just a minute, and for
organizations like our own, and we are part of that
broad nonprofit community of organizations that
advocate issues in a public policy arena, and for
us, voting really is the language of democracy, and
we think that it is the best way for the citizens
of a democracy to express their views. An informed
electorate is really central to the kind of
democracy that we now enjoy.

We think that by, you know, using the
protections of the First Amendment, which indeed
was designed for this purpose to protect the speech
of all Americans in the political process, is
really what we're about. I have concerns about the
proposal beyond those that I've already stated, and
they go to even the issue of trying to segregate out
GOTV issues from the remainder of other issues
under consideration, and I think when a commission
and this commission or any other seeks to enact
proposals that would limit protected speech, it
really has exceeded its traditional role and
ventured, I think, into a role that should only be
left to Congress, one that can only be pursued
after extensive documentation and review, and then,
even then, only most reluctantly.
Congress had the opportunity to enact
these provisions when it considered BCRA and chose
not to. To now have the Commission seek to go
beyond what Congress itself was unwilling to do in
an area where protected speech would now be at
risk, it seems to be jeopardizes the fundamental
tenets of our democracy, and that exceeds whether
we're talking about GOTV issues or not. We use the
total year to educate our constituency about the
role of members of Congress and voting on issues
that affect all Americans, and we do it in a
nonpartisan way. Everyone is subjected to the same
standard, and we think that is the best protection
of the interests we serve, and we think that when
efforts are made to circumvent or curtail that
role, we think it's a real problem.

COMMISSIONER MCDONALD: Let me play the
devil's advocate and follow up for just a second.
I apologize for not getting to the rest of the
panel. I think it's an extremely interesting group
of practitioners. Obviously, as you know, when
this fight started, and it's been going on for
years, not so much the McConnell aspect of it, but
campaign finance in general, the issue was whether
or not--the First Amendment has always been an
issue, and I don't know anybody that's not for the
First Amendment. I want to be real clear. It's
kind of like I have this strong personal belief in
the IRS and what a fine group they are. I want to
make that clear.

But, obviously, we were told this going
into the McConnell matter. We heard it repeatedly,
and clearly the Court listened to reams of
testimony about this area, and for whatever reason
and no matter what interpretation you have, they clearly had a more restrictive theory than was announced by a number of practitioners who obviously in good conscience participated against us in a lawsuit. So realizing fully what you say, I'm just always cognizant of that as kind of a general fact, because it seems like there's always kind of the little things being a catch-all when the Court has indicated that obviously there are bounds to even First Amendment concerns.

MR. HENDERSON: No. I think you're right, Commissioner. I guess I would respond in the following manner. As a coalition, the Leadership Conference did not take a position on the McCain-Feingold. We did not take a position largely because we had members on both sides of the question. Even those, I should point out, that may have opposed the law have stated concerns and support some form of campaign finance reform in the broadest, without trampling on instance or issues of the First Amendment. On the other side, some organizations that supported the law felt it was a
reasonable restriction on protected speech.

We now find ourselves in the unusual position, however, of having to address the issue of regulation through this Notice of Proposed Rulemaking that would seek to implement some aspects of the law even though we had not taken a position on the broad package. I say because it looks as if the regulations from our perspective are broad, that, you know, organizations that engage in the simple exercise of their rights under the First Amendment to bring their political views, often on behalf of individuals and interests that would not otherwise have their views presented, and we represent a constituency of individuals regardless of race and gender and sexual orientation or age or disability status that for the most part have difficulty in getting their views presented in the chambers that make decisions that affect their lives.

That's what we have been tasked to.

That's what we have been given some additional support by way of the tax code to help support, and
when we encounter proposals that would seek to restrict what we consider to be that broad range of otherwise permissible activity that in no way involves speaking to specific issues of campaign activity in a given year, we think that that really goes well beyond certainly what Congress intended and what the Constitution permits. So what we would say is that in addition to the ill-timed nature of this proposal, which has been addressed by many speakers, we think that it really does exceed what is the appropriate bright line test of where a commission would seek to restrict what would otherwise be protected activity.

COMMISSIONER MCDONALD: Thank you very much.

CHAIRMAN SMITH: Thank you, Commissioner McDonald.

Next in the queue is yours truly. So I'm going to start, Mr. Morrow, with a question for you. You make a point in your testimony, your written testimony, that you think that this rulemaking could interfere with the—conflict with
5 USC 7103. That's the kind of thing I think—and perhaps the hurried schedule contributes to that.

We're purportedly here for our expertise in election law and not labor law. I'm not really familiar with 5 USC 7103, and it wasn't exactly clear to me. How is it exactly that you think your ability to carry out things you're authorized to do by statute would be interfered with by these rules?

MR. MORROW: As a representative, part of what we do is take our case to the boss, so to speak, in labor relations. You've probably seen recently with the strike in California with the supermarkets, for instance, there were a lot of television ads that talked about what was going on.

CHAIRMAN SMITH: By boss, you mean the public generally, the taxpayers?

MR. MORROW: The employer.

CHAIRMAN SMITH: The employer, okay. So the Government.

MR. MORROW: The Government as the employer as Giant or Safeway would be the employer for food and commercial workers. In those
instances, there were a lot television ads asking
people and explaining to people what was going on.
The employer put out those ads as well. Our
concern would be as elections come close, with the
Government as the employer, members of Congress as
the employer, in our representation function as the
exclusive agent—we're the bargaining agent for
these people—they would have concerns that in a
traditional private sector sense, you might go to
the corporate president, the board of directors,
that sort of thing.

For our instance, this is Congress, this
is the Presidency. We would name those individuals
by name. When I hear certain words that would come
to be a concern to the Commission, using a
candidate's name in an ad, well, they are our
employers. They are the individuals that vote our
wages, working conditions, salaries, staffing
levels. Those people would be named in those
communications, not in an election context, though
there might be something that leads—

CHAIRMAN SMITH: You think it could
actually create a conflict then--

MR. MORROW: With the statute.

CHAIRMAN SMITH: With the statute.

Okay. Mr. Boos, nobody has asked you any questions. So let's get you involved here.

You're a 501(c)(4). Right?

MR. BOOS: That's correct. Citizens United is a 501(c)(4).

CHAIRMAN SMITH: And you run these ads.

Do you think the ads would be much more effective if you were a 527 running the same ads?

MR. BOOS: No.

CHAIRMAN SMITH: You think they'd be more likely to corrupt members of Congress?

MR. BOOS: No, in no way, shape, or form.

CHAIRMAN SMITH: You don't think so?

Just because the content is the same and the area is the same?

MR. BOOS: The ad is going to say the exact same words. The ads do not expressly advocate the election or defeat of any candidate
for political office.

CHAIRMAN SMITH: Let me ask a question.

What exactly would you say you're trying to do?

Are you trying to support President Bush, or are you trying to support the Bush agenda?

MR. BOOS: We are promoting the President's agenda and specific aspects of the President's agenda.

CHAIRMAN SMITH: Are you supporting it because it's the President's agenda, or is it simply an agenda that the President has adopted that you happen to support?

MR. BOOS: It's an agenda that's consistent with the organization's goal and mission, which is limited government, strong national defense, respect for traditional American values.

CHAIRMAN SMITH: So if President Bush were to decide that the deficit is getting out of control and propose a major tax increase, would you continue to run ads supporting the President's agenda, do you think?
MR. BOOS: We would not run ads supporting a tax increase, I can tell you that much.

CHAIRMAN SMITH: What I'm trying to get at is how would we determine your major purpose in running these ads if you're going to base this on some kind of major purpose test? Is your major purpose going to say to support a bunch of ideas which just happen to be associated with Bush, or is it to support the President? Do you think that talking about, for example tax cuts--and I don't know if you ran ads when the tax bills were being debated, but had you, do you think that referring to the tax cuts as President Bush's tax cuts made them more identifiable or would make them more identifiable to voters at that time?

MR. BOOS: It absolutely does. I think whenever you have a political issue, you by the very nature, in order to get the attention of the American public of legislators of the news media, tend to generate that publicity and get the attention when you can identify a policy with the
people that support it and, vice versa, when you identify a policy you oppose with the people that are supporting it or opposing it. It definitely works as a catalyst for public attention, and it's crucial in getting the message out, and it's crucial to generating public support or public opposition for a particular policy or piece of legislation.

CHAIRMAN SMITH: Okay. I don't know if I can cram in a question for Mr. Henderson just briefly. I wonder if you could comment a little more on page 12 of your prepared comments. You talk a little bit about whether or not this is really a problem, and you suggest that these shadow party stories are based on more hype than fact, and I wonder if you would just comment briefly on that.

MR. HENDERSON: Yes, Mr. Chairman. I think as we have entered into the public debate surrounding the Notice of Proposed Rulemaking, some of us have made an effort to determine the extent to which the problem which has been identified, which is to say expenditures related to specific
campaign activities that are perceived to run afoul
of what the Commission has now deemed appropriate
limits, and the fact has been borne out by some
empirical analysis related to this. I think there
is certainly anecdotal concern about whether, in
fact, some of the 527 organizations that are
engaged in activity attempting to, of course, bring
issues to the public domain have done so in an
inappropriate way.

We acknowledge and note that I believe
the Republican National Committee filed a suit
against some of the independent 527s alleging there
has been inappropriate coordination of activities
with the Kerry campaign. There are, however, a
number of other organizations--and we don't speak
to that issue one way or the other. Quite frankly,
I do not know enough about it to speak in an
informed way. Having said that, however, I do know
that as an organization, we may address issues that
involve policies that are pursued by the
Administration that we deem to be harmful to the
interests we represent.
I cited an example involving a particular judicial nominee who was to have served on the Fifth Circuit Court of Appeals, and we believed that that nominee, because of his record in public office, was not a choice that we could support and, in fact, would do harm to the interests that we represent, and we are prepared to say that. That should not be perceived as a partisan jab at the individual or rather the power that nominated that individual to the bench even though we recognize that there is only way for that nomination to go forward. That is not to say that, you know, one could not think of instances where comments could easily have run afoul of what we think is the bright line test.

My point here, Mr. Chairman, is that there are too many instances where anecdotal references, hyperbole, assumptions behind the intent of a particular communication, advertisement, or other form of expression are somehow related to a particular objective of getting an individual elected to office when, in
fact, that is not the case. It could be merely to
inform the public at large about policy positions
taken by elected officials and that by providing an
informed electorate with the information they need,
we feel we are serving the fundamental interests of
democracy.

And so, you know, I think that's the
basis for our concerns.

CHAIRMAN SMITH: Thank you, Mr.

Henderson. Thank you. I'm not going to ask Mr.
Boos if your group ran ads in favor of the
nomination of the sensibly moderate Mr. Pickering.
I will turn things over to Vice Chair
Weintraub.

VICE CHAIR WEINTRAUB: Wasn't it the
last panel that we thought would end with boxing
gloves? Let's not start that again.

I want to thank you all for coming. In
some ways I feel that the Commission has done a
disservice to a great many organizations who do
very good work in this country by putting out an
NPRM that was so broad that it needlessly perhaps,
I hope, alarmed a great many organizations and forced them to spend a lot of their resources which really should have been devoted to better purposes than coming here and testifying and sending us comments to try to talk us out of making a big mistake. I suppose the upside of that is hopefully you will have accomplished that goal.

I'm going to address, initially, by questions to Mr. Henderson and Mr. Moore, because I am very, very concerned about the voter drive aspects of this rulemaking, and I think it would be an appalling result if anything this Commission did had the result of impeding the work that your organizations and other organizations are doing to increase minority participation in the voting in this country. Do you believe that that would be the effect? That it would interfere with your voter drive work if we passed these regulations?

MR. HENDERSON: Absolutely, Madam Vice Chair. Again, I think that we look at the United States of America as it enters the twenty-first century, and we have great deal to be proud of. We
really are the world's largest and most diverse
representative democracy, and we've done something
in this country that many other countries have
attempted and failed. We've taken diversity with
the most diverse population ever, and we forged
that diversity into a national unity around certain
democratic values, and we believe that our
democracy is served when every eligible American
has the opportunity to vote, and it seems to us
that in the interest of furthering the collective
support that all share for democracy, it's
important that the kind of voter education efforts
that the NAACP Voter Fund or organizations
affiliated with the Latino community or the Asian
community or others, do what they and do it well,
and that should really, we think, be protected.

So I'm here today in part to speak on
behalf of that broad coalition of organizations,
and we appreciate, by the way, your understanding
of how the Notice of Proposed Rulemaking did send
alarm through many organizations that are engaged
in non-controversial public education activities of
which I suspect the Commission in its support. So I do see it as a problem.

VICE CHAIR WEINTRAUB: Mr. Morrow?

MR. MOORE: I have to echo those thoughts. In fact, there's a lot of different components of this proposed rule that has been interpreted many different ways. For instance, there are people who believe that because you are targeting African American voters for registration, that you are partisan and it violates one of the provisions, that it could virtually lead to a group that is identified as voting on one likely way, and then you get into the whole stream of checks to whether or not this is something that would launch an FEC investigation into your decision-making process of targeting certain African American voters in certain states. That's one impact.

The second impact, which is what this has done, is diverts our attention away from what we should be doing right now, which is registering voters with a limited staff and limited resources. I was at a fund-raising event in New York a couple
of days ago and had a donor right where you want
him, where he's about to, you know, make a decision
to fund you, and he talked about this FEC rule.
He's in New York. He doesn't know much about it,
but he knew enough about it to know that he was not
writing any checks until you guys made up your mind
what you're going to do.
That's had the effect on a lot of
people, not just him. I happened to have had him
right in front of me, but there are several donors
who have slowed up what they're doing, waiting for
this deliberation to play out, and when you take
away March, April, May, and maybe you get around to
it, you know, before the 4th of July by the time
Congress gets its 30 days at it, half the season
over and then the rules may change. So you're
absolutely correct. It's having a devastating
impact on us.

VICE CHAIR WEINTRAUB: So the provisions
in our nonpartisan voter registration,
get-out-the-vote activities proposed regulation
that would include within the definition of a
political expenditure voter drive activity that
could be construed as promoting, supporting,
attacking, or opposing a Federal or non-Federal
candidate or political party, you would say they're
overbroad?

MR. HENDerson: Absolutely.

MR. MOORE: Absolutely.

VICE CHAIR WEINTRAUB: And the
additional provision about information concerning
likely party or candidate preference not having
been used to determine which individuals to
encourage to register to vote or not to vote is
equally problematic?

MR. HENDerson: That's equally
problematic.

VICE CHAIR WEINTRAUB: And I gather from
what you were saying before, Mr. Henderson, that
you would also say that the promote, support,
attack, or oppose standard in general is so
overbroad as to impede your efforts to create an
informed electorate and help them go to the voting
booth and vote, not just get to the voting booth,
but to know what they're doing when they get there?

MR. HENDERSON: Absolutely, Madam Vice Chair. How do we define those terms in practical ways that we can communicate effectively to people who know little about the underlying subject matter and who, indeed, are fearful that steps that they take may run them afoul of existing election law or new election law.

VICE CHAIR WEINTRAUB: Wouldn't you all agree that the promote, support, attack, or oppose standard leave you unclear as to what you're allowed to do and what you're not?

MR. HENDERSON: To say the least.

MR. BOOS: Very briefly, it really depends on the audience. One message to one audience could be viewed as promoting a candidate, but to another audience could be viewed as attacking the candidate. So it's really difficult to tell. I guess it could be attacked as both supporting and attacking the candidate, but it's really a very broad standard. At least within the definition of electioneering communications, the
real definition focuses on the time of the
communications as opposed to more vague terms.

MR. MOORE: I think the score card which
Wade mentioned that the Leadership Conference has,
and the NAACP has been print score cards for
decades, it really undermines our ability to look
at that score card and say, Hey, here is somebody
who has voted a hundred percent for civil rights
without being fearful that that might somehow
endanger the tax status of the organization. So
again, it is a very big concern.

VICE CHAIR WEINTRAUB: And just to
reiterate, what we're doing here today is impeding
your ability to raise funds just to do even the
things that are unquestionably within your rights
to do. Things that we're not even touching in
our rulemaking, by virtue of doing this rulemaking,
we're interfering with your fund-raising. That is
extremely unfortunate.

Well, I thank you all for coming here
today. I really appreciate your time.

Thank you, Vice Chair Weintraub.
Commissioner Toner.

COMMISSIONER TONER: Thank you, Mr. Chairman.

Thank you all for coming. It's been a long day, but we really appreciate your being with us and sharing your views today on these issues. Following up on some of the testimony, we've heard an awful lot, obviously, about voter mobilization activities and groups on the left who historically target those activities in area that might register a greater number of democrats than other types of voters, and obviously voters--conservative-oriented groups of have done sort of the contrary, mobilizing their activities in areas of the country that are likely to result in more Republican voters.

I ask this question of all the panelists: Is it your view that whether these activities are conducted by group on the left or the right, whatever results arise from those activities in terms of whether Democrats are registered or Republicans registered, is it your
view that basically as a matter of law, unlimited
soft money should be allowed for those activities
no matter what type of group in the 501(c) or 527
area is doing them and no matter what the outcome
of those activities? I ask that--is their
unanimity on that, that really there should be no
restrictions on soft money being used for those
purposes?

MR. BOOS: I think so.

MR. MOORE: That's in the letter of their
law. The Constitution backs it up as well as the
Supreme Court, and the more message, the more
communication, the better for the informed
population.

MR. HENDERSON: But, Commissioner Toner,
I do want to add just one additional point, which
is that the assumption that one can know the likely
voting patterns of perspective individuals that you
register, it seems to me is a bit overstated and
can be inappropriately simplistic. I would take
the Latino community, which is much more evenly
divided among its voting electorate than would
allow you to make the assumption that because an
organization that is, quote, perceived to be
progressive is engaged in voter individual
registration, that the individuals they bring into
the voting electorate may somehow vote for one
particular party candidate over another.

I think they tend to--individuals tend
to vote their interest as they perceive them. I
think in some communities, those interests can be
perceived in lots of different ways, and I think
that our organizations are committed to pursue the
goal of strengthening our democracy without regard
to the likely outcome of those voters as they
participate. That's a secondary and, quite
frankly, often an irrelevant consideration when
those of us who are really interested in empowering
the communities we represent seek to bring new
voters in the rolls.

COMMISSIONER TONER: I think that's an
important point. Is it because of the difficulty
of assuming or knowing how any one particular voter
is going to vote, if you successfully register one,
does that support your fundamental view that really
soft money, corporate funds, union funds, any type
of soft money should be allowed for these types of
purposes across the board?

MR. HENDERSON: Well, I tend not to make
the underlying judgment on the merits about whether
that is the right thing. I think it is certainly
permissible under the existing law. I think we
should be able to do so.

COMMISSIONER TONER: If we took that
position, would you be comfortable with it?

MR. HENDERSON: Well, I think that
certainly our view, yes, we would be quite
comfortable with it, but, you know, again, I want
to make certain that I'm keeping my comments to
those issues before us now. But, yes, absolutely.

COMMISSIONER TONER: Mr. Morrow, do you
concur?

MR. MORROW: I do. In fact, I'd like to
thank the Commission, I guess promote and support
you all in your efforts to do voter registration on
your web site. We found those materials very
useful. I don't know whether the Commission may need to now register itself, but we certainly found that material very helpful, and I thank the Commission for doing that.

COMMISSIONER TONER: Well, we don't get a lot of thanks every day, Mr. Chairman. Eight hours into the session, and there we go. It's something to hope for for tomorrow.

Likewise, and I ask this of all the panelists, is it your view, basically, as a matter of law that in terms of regulating outside groups and whether they are political committees under our law, that basically we have no choice but to employ the express advocacy test as matter of constitutional and statutory law? Is that the view of everybody here?

MR. HENDERSON: Yeah.

MR. MORROW: I think so.

COMMISSIONER TONER: And that we're obligated to do that even if the Supreme Court or other people may have some doubts about whether the test has a any practical significance in the
political world, but your view is, look, in terms
of providing fair notice to groups, people know
exactly what's allowed and not allowed, but we have
no choice as an agency but to use that test?

MR. BOOS: Could I speak briefly on
that?

COMMISSIONER TONER: Sure.

MR. BOOS: I think Congress, when they
enacted the BCRA amendments, enacted those
amendments with the express advocacy standard in
mind, and so you really--it's not just our reliance
on it. It's also Congress' reliance on that
express advocacy standard, and the Supreme court
did not overrule Buckley on that. It just simply
said that Congress could go a little further than
the express advocacy standard and it chose to go a
little further in terms of electioneering
communications and narrowing some of the activities
that political parties can engage in, but they're
already political and they're already registered
with the Commission anyway.

It's really the question of assuming
jurisdiction over other activities and other
entities, and I would encourage the Commission to
really go and read the FDA v. Brown and Williamson
decision in terms of long-time standing rules, then
a huge switch when there's been legislation enacted
in the meantime which really--really, if you make
some of the switches and don't go by the
longstanding interpretation of these terms, some of
the things that have been proposed in this Notice
of Proposed Rulemaking don't make sense, and I
really think, for example, the provision with
respect to electioneering communications, if you
were to adopt a rule that makes an organization a
political entity by spending $10,000 a year on
electioneering communications, you really create
the whole provision for reporting electioneering
communications a nullity, because that's where the
reports are required to come in.

And so you really need, I think, to
stick with that express advocacy standard.

COMMISSIONER TONER: Thank you, Mr.
Chairman.
CHAIRMAN SMITH: Thank you, Commissioner Toner.

Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Mr. Chairman.

Gentlemen, thank you. I want to sort of lay out for you the possibility that there is a legal argument that works the other way. As you know, Congress passed this electioneering communication statutory provision, and it is very broad in its impact. It says, in essence, the communication via broadcast contains any reference to a Federal candidate and that is run within X number of days of an election and reaches the targeted audience is going to have to be treated as subject to the Federal campaign finance restrictions. No soft money can be used, limits on--I'm sorry--disclosure and no soft money, and so it's breathtaking if you think about it in its reach, any reference, and so I guess in a way, I'm thinking of coming back to something that would be in a way less encompassing.
When we're trying to figure out what was
left once Congress got through their electioneering
communication business, what was left for us to try
to find as an expenditure, and if you look also at
the electioneering communication legislation, it's
specifically says that something was count as an
expenditure is not an electioneering communication,
and the logic there is if you've got some group
that is a political committee, performs what it is
putting its money out for is an expenditure, and
that money will have to be soft--I'm sorry--hard
money to begin with. So you don't have to worry
about it so.

So I'm laying out for you that if you
look at what was going on with the electioneering
communication legislation, there is a pretty good
argument, it strikes me, that what Congress was
regulating was things that being done by groups
other than a political committee, and it was
leaving, in essence, for the Commission to continue
to try to decide what is a political committee,
what is an expenditure by a political committee.
So let me put it in practical terms.

Mr. Boos, your organization, we read--and I read it into the record earlier--was putting out some pretty fun ads, I thought.

MR. BOOS: Thank you.

COMMISSIONER THOMAS: I doubt Senator Kerry thought they were so funny, but these are the ones that refer to the $75 haircut, the $1 million luxury yacht, and four lavish mansions, and then it language saying another rich, liberal elitist from Massachusetts who claims he's a man of the people, priceless. So what's up with that? If you spent 75 percent of your resources on those kinds of ads, would you expect a call from the IRS? Would you not expect the Federal Election Commission perhaps to jump in and say it looks to us like that's designed to influence an election? How does that go along with your stated agenda as a [c][4] organization?

MR. BOOS: We don't spend anywhere near 75 percent of our resources on that type of an ad, and I can tell you the resources we put into it are
far in excess of the $50,000 threshold that was
listed as one of the determinations of a major
purpose; however, that ad—we will spend on those
type of add probably a very small percentage of the
organization's annual revenue. So that type of an
ad is not the major purpose of an organization. It
is an ad that would be an electioneering
communication if it was run in the markets within
the 60- and 90- and I think maybe even 120-day
thresholds. It would be an electioneering
communication. We made sure that we did not run
that ad in any of those particular markets, and
sometimes it's not that easy to determine exactly
where you can run an ad, especially during a
primary election campaign season.

But that's not the primary purpose of
Citizens United, to run those type of add. That
ad, we think would definitely fit within the
definition of a Federal election activity, although
it does raise the question that I asked earlier.
Depending on who was hearing that ad, they might
have thought it was favorable to Kerry. If you
were a liberal elitist from Massachusetts, you
might have viewed that as favorable.

COMMISSIONER THOMAS: Nice try.

Let me just--Mr. Henderson, I did want
to take this moment just to--I watched your
testimony before the Civil Rights Commission the
other day, and I thought it was very insightful.

MR. HENDERSON: Thank you.

COMMISSIONER THOMAS: You obviously are
deeply committed, as I hope we can we all are, to
trying to get more people involved in the political
process, get them out to vote, get them excited
about the process and participate. And I just
wanted to compliment you, because I thought your
presentation there was very helpful and good.

MR. HENDERSON: Thank you.

COMMISSIONER THOMAS: We, I think, want
to make sure that people go away from this
proceeding with an assurance that this group
doesn't have any interest in trying to step over
obvious statutory allowances that have been there
for years. Organizations are allowed to undertake
nonpartisan voter registration and get-out-the-vote activity. It will never be treated by this agency as an expenditure, and so that kind of activity is absolutely protected by the statute and by Congress for years, and this Commission will adhere to that. So I want to assure you on that, but just was hoping that maybe you could give us a little bit of the flavor for how your various organizations, to the extent you do get involved in voter registration or get-out-the-vote activities, how you do avoid any sort of label as being partisan in nature.

MR. MOORE: Well, it's a little difficult for us, because we're part of a lot of coalitions. For instance, we are part of the Campaign for Communities for Earth Day on the 22nd of April. We may be doing voter registration activities with environmental groups that may be opposed to the policies of the President for his environmental work. So when you combine civil rights concerns with environment, there is an immediate perception that that's partisan; however,
it simply to us is making allies with the people
who have similar agendas and similar things to
bring to the table.

We may have people who are trying to
eliminate poverty or trying to bring about a
different economic policy for our country.
Those--that's that just natural coalition-building
efforts that have always taken place. Under this
environment that we're in, it's putting I guess the
fear of God in a lot of these groups that used to
do this. We've had ministers who used to easily
invite people to come to the pulpit who are running
for office who are now pausing a little bit.

So the impact this is having is very
widespread, and all we can do is say this is what
we've done for the last 20 years as a voter
registration campaign; we reserve the right to have
candidates come. I mean, we had a situation where
we were afraid to have candidates who were Federal
office holders speak about Earth Day on Earth Day
because it might give the impression that we were
somehow coordinating with them. So it's changed
the rules quite a bit, and I really liked the old
days where you basically went around, you had
clipboards, and you registered whoever you could.
We worked real hard with you guys--I'm sorry--with
the Commission on motor voter. That passed. It
changed, it revolutionized our ability to do grass
roots, hands-on registration in all 50 states
through the mail-in system. That wasn't the case
until 1995.

So on one hand, there is an extension or
right to extend our abilities to do registration,
and on the other hand, there are these restrictions
that make it hard to raise money, make it hard for
people to coordinate with like-minded groups. So
as soon as this is resolved, it will settle things
back down again, but every day that we're not at
our business taking care of that work, it is
undermining the efforts that have already been set
by this Commission to make it easier for people to
register and easier for people to participate.

COMMISSIONER THOMAS: Thank you.

CHAIRMAN SMITH: Thank you, Commissioner
Mr. Norton.

MR. NORTON: Thank you, Mr. Chairman.

Mr. Moore, as Commission Thomas points out, our own statute exempts from the definition of expenditure nonpartisan activity designed to encourage individuals to vote, and at the same time, your group had the misfortune, as I imagine you now, of finding yourself cited in footnote to the McConnell decision, and I wanted to ask you a couple of questions about that, and not necessarily the legal impact, but some of the factual suppositions. What the court wrote is:

"The record shows that many of the targeted tax-exempt organizations engage in sophisticated and effective electioneering activities for the purpose of influencing Federal elections, including waging broadcast campaigns, promoting or attacking particular candidates, and conducting large-scale voter registration and GOTV drives. For instance, during the final weeks of the 2000 Presidential campaign, the NAACP's
National Voter Fund registered more than 200,000
people, promoted a GOTV hotline, ran three
newspaper print ads, and made sever direct
mailings. The NAACP reports that the program
turned out one million additional African American
voters and increased turnout over 1996 among
targeted groups by 22 percent in New York, 50
percent in Florida, and 140 in Missouri."

COMMISSIONER THOMAS: What was that
percent in Florida?

MR. NORTON: Fifty. "The effort, which
cost $10 million was funded primarily by a $7
million contribution from an anonymous donor."

My question is do you think that
characterization of that activity by the Supreme
Court is accurate as a factual matter, that is it
was sophisticated and effective electioneering
activity for the purpose of influencing Federal
elections? Is that a fair characterization?

MR. MOORE: Well, a lot of the facts of
that whole statement are incorrect. They were
taken from a lot of different sources that weren't
all accurate. So there's a lot of things that are
not factual. The results of what we did, the fact
that it was historic, that it did have a major
impact on elections is true, because the African
American turnout was historic for a lot of reasons.
A lot of the people at this table were involved in
a number of coalitions in making that happen.

But I'm not sure what part of it is--

MR. NORTON: The Supreme Court's
classification of the activity as sophisticated
and effective electioneering activity for the
purpose of influencing a Federal election, that's
the characterization.

MR. MOORE: Well, it was sophisticated
and it was something that heightened the ability of
the civil rights organizations to bring new
methods, some technology into polling and research
and targeting that helped create a better
coordinated organized registration drive. That
much is true. I don't think the other
characterizations, that we were trying to influence
a political campaign per se, we did runs ads that
talked about not just the Governor of Texas, but also many other members of Congress and compared their records on gun control and other things; but I think sometimes people may take one ad and run it and blow it out of proportion and make it seem as if that was the only activity that was being involved.

But there were 8,000 volunteers on the ground doing a lot of different things from canvass operations as well as door-to-door registrations, get out the vote on a number of issues in a number of places to impact the turnout of African American in general. I think that's how I would describe that and characterize it.

MR. NORTON: Do you have any idea--it's been a number of years. They talk in terms of broadcast campaigns promoting or attacking candidates. Do you have any rough sense as to what percentage of your spending that would have represented in an election year, in that election year or any other election year?

MR. MOORE: Very small percent, because
so much of the resources were used for
on-the-ground grass roots activities, and the
ad--you know, we only had one television ad that
never ran after one or two days, and everything
else was radio and print. So mostly it was a very
small percentage.

MR. NORTON: I don't have any further
questions. Thank you very much.

CHAIRMAN SMITH: Thank you, Mr. Norton.

Mr. Pehrkon.

MR. PEHRKON: Mr. Chairman, thank you.

Gentlemen, well it's close to the end of
the day, and I hope to be very brief on this.

Mr. Boos, you were one of the few people
who actually talked about the cost of complying
with the reporting requirements of the Federal
Election Campaign Act, and I think your PAC spends
somewhere around five to twelve thousand a dollars
a year in complying, for administrative expenses.

MR. BOOS: That's correct. Do you want
me to elaborate on that?

MR. PEHRKON: Well, what I want you to
do is compare that to your estimated cost for what it would cost for your 501(c)(4) organization. I think you estimated that cost to be somewhere between 100 and 250 thousand dollars.

MR. BOOS: That's correct, and the primary reason is because there is so many more transactions that need to be reported with respect to the 501(c)(4) organization. If it were a political committee, the need would be there to file at least quarterly reports, if not--our PAC actually files monthly reports, but the need would be there to file at least quarterly reports, detailed quarterly report.

Our PAC right now in any given year has never raised or spent more than 50,000. It's never reached the threshold to be required to file electronically, but if Citizens United itself were require to file, it would be reporting millions of dollars in transactions that would entail a lot of different entities. We're very direct mail oriented, and we use different direct mail firms to assist us with our mailings that are caged at
different locations throughout the country. All of
those transaction would need to be reported. We
would need to hire additional staff. We would need
one to pay the escrow companies, the caging
companies that were involved in the process,
additional funds in order to set up and report
transactions, individual gifts. Any time someone
contributed more that $200, that check would have
to be compiled for purpose of reporting. All those
transactions would, of course, cost us additional
funds in terms of staff time, my time.
Right now, with respect to the PAC, the
reporting, I basically handle our PAC reporting.
There is no way I, as an individual, could possibly
handle all the transactions entailed to cover
somewhere between probably three and a half and
five million dollars worth of transactions per
year, which is the size that Citizens United has
really grown to in the last couple years. It's
just a huge undertaking from our standpoint.

MR. PEHRKON: One other question I have,
and maybe I obviously don't understand this, I
would have thought for your solicitation groups,
you would capture much of the same information as
to who made the contribution, how much, and when
they made it, so you could go back and solicit
again for your Citizens United organization.

MR. BOOS: We capture that information,
but part of the problem are the time constraints
with respect to reporting by the Federal Election
Commission, and maybe we're not as efficient as we
probably ought to be, but it takes a lot of time
for a lot of the information to trickle basically
to our office where it would be reported for
Federal Election Commission purposes. We have
other entities that capture that information, that
put it on computer files, and use it for putting
out direct mail correspondence. The additional
administrative costs would be incurred, one, in
putting it in a format that would be acceptable to
with respect to the Federal Election Commission and
reviewing--

MR. PEHRKON: What is the overall total
dollar amount that we're talking about here?
MR. BOOS: The size of the organization, I think last year for 2003, and we haven't completed all of our financial audits at this point, it's about three and a half million dollars.

MR. PEHRKON: Okay. Thank you.

Thank you, Mr. Chairman.

CHAIRMAN SMITH: Thank you, Mr. Pehrkon.

Mr. Moore, Mr. Boos, Mr. Henderson, Mr. Morrow, thank all of you.

Mr. Commission McDonald?

COMMISSIONER McDonald: Mr. Chairman, just one observation before the panel leaves, because they really have been endure greatly, I just wanted to observe what a great thing the Commission has done, which is we've been able to unite some fairly diverse groups together, and I think we should be applauded for that.

CHAIRMAN SMITH: I thank you for your input and, all of our panelists today, it has been a very full day. It's been very informative. We have another very full day tomorrow with 16 witnesses. We will begin tomorrow morning at 9:30
with the first panel to start at 9:35.

Commissioners and staff, please look sharp, and, again, thank you. We'll be in recess until 9:30 tomorrow morning.

[Whereupon, at 5:03 p.m., the hearing was recessed to reconvene at 9:30 a.m. on Thursday, April 15, 2004.]