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P R O C E E D I N G S

CHAIRMAN THOMAS: Let's go ahead and get started. I know that one of our colleagues is here but just hasn't quite wound his way here, but we can get started.

The special session of the Federal Election Commission for Wednesday, June 29, 2005, will again please come to order. Welcome to the second day of hearings on the Commission's proposed rules for Internet communications. We heard from three panels yesterday, and we will hear from three panels today. Each of today's panels will last for an hour and a half. Each witness will have five minutes to make an opening statement. We have a light system that basically will move to orange when you've got about 30 seconds left. When it hits red, please try to wrap up.

We will have at least one round of questions from Commissioners, the general counsel, and our staff director, and there will be a second round if time permits. We will have a short break between the first two panels followed by a lunch

break after the second panel. The hearing will resume after lunch, with the third panel beginning at 2:15.

So, let us get underway. Our panel this morning consists of Robert Bauer of the Perkins Coie law firm; Reid Cox, who is general counsel of the Center for Individual Freedom; and Laurence Gold, who is associate general counsel of the AFL-CIO.

We'll work with the alphabet again. Let's start with Mr. Bauer; then, we will go to Mr. Cox; and then, we will finish up with Mr. Gold. Mr. Bauer, welcome. Please proceed.

MR. BAUER: Thank you, Mr. Chairman, and thank you, Members of the Commission for inviting this testimony, holding these hearings. I have filed comments, as you know, and so, I will let the comments speak for themselves, and I will take very little time here.

I just wanted to make two quick observations, one of which echoes my comments, and that is, as you know, in those comments and in the blogosphere, I had hoped that the Commission would

consider taking this occasion to produce a statement of policy so that people understand what the regulatory perspective on this issue of the agency is, and I would suggest that you have the makings of one, at least in draft, and that is the statement that Commissioner Toner issued yesterday.

Second, I wanted to make a comment about the distinction that I know yesterday was drawn repeatedly between individuals on the one hand and other users of the Internet on the other. For legal purposes, in a variety of contexts, I think that distinction is very important, to be sure. It also corresponds to fundamental intuitions people have about the interests that are really at stake here in many ways.

I'm also worried, however, that the distinction will lead us to a very narrowed view of what the individual interest here really is. The individual interest, the fabled Internet user at her desk in the basement, perhaps not even finished the first cup of coffee of the morning has an interest in the Internet as a full and unrestricted public space.

That is also the interest, not merely that he or she can bang away without restriction on the computer, devise ads, send them out, set up a Website, but that he or she, in using his or her computer there in the basement alone, can connect to politics in its most vibrant and diverse form, with the full range of voiced represented in Internet political dialogue.

So I would hate to see the individual interest here treated as a very isolated interest that enables the agency to create some reserved space for individual activity while busily restricting other forms of political speech on the Internet because I believe individuals have an interest in that other speech as well. That is what makes it a democratic space, and that is also very much of an individual interest.

Thank you.

CHAIRMAN THOMAS: Mr. Cox.

MR. COX: Good morning. Given where I am, although I am not running for office, I think it is

appropriate for me to introduce myself by saying I'm Reid Cox, and I've approved this message.

In all seriousness, I am the general counsel of the Center for Individual Freedom. The Center is a nonpartisan, nonprofit advocacy group dedicated to protecting and defending individual rights and freedoms in the legal, legislative and educational arenas, and the Center is incorporated in the Commonwealth of Virginia and is tax-exempt under Section 501(c)(4) of the Internal Revenue Code.

Perhaps the cornerstone of the Center's advocacy has been and continues to be a vigorous exercise and defense of free speech, press, and association rights. Indeed, we at the Center are not only concerned about our own First Amendment rights but also that those same freedoms are enjoyed by all Americans regardless of their political persuasion or ideological outlook.

Quite simply, we believe that all Americans should enjoy and are constitutionally entitled to speak, publish, and associate concerning the issues concerning our neighborhoods, communities, states and

country as well as our representative government at all levels.

So let me begin with a couple of first principles. The freedoms of speech, press, and of association protect all Americans equally. The First Amendment draws no distinction between the individual who sets up his soapbox in a town square and the network news anchor who sits down each night at a studio in New York City. The Constitution does not value the newspaper sold at newsstands nationwide any more than the leaflet handed out at a local intersection.

In other words, neither the amount of money expended nor the number of people reached has ever been a test for whether speech should be free under the Constitution. Moreover, today, neither of those factors is a barrier to anyone thanks to the Internet. The Internet is quite simply the most powerful and most democratic communications medium the world has ever known.

Over the Internet, an individual or group of individuals can set up their own printing press,

television or radio station and mailing center at virtually no cost, and they can communicate to the whole world, a single person, or any size audience in between, doing so in real time, asynchronous time, or both.

On the other end of the communication, receivers have more power to determine what they read, hear, and see on the Internet than they do on any other medium. Thus, though anyone can publish via Internet, the receiver generally has to take some affirmative step to receive those communications, and while the Internet allows the publisher to reach anyone across any boundary, it gives just as much power to the audience not to be reached. And these features make it the perfect public forum, empowering both speakers and listeners alike.

All this is my long way of wondering aloud why the Commission's proposed media exemption should not protect all news stories, commentaries, and editorials published on the Internet, regardless of who publishes them. While we have been trained to understand that the media is the institutional press,

this is no longer the case in the information age, and I want to use the Center for Individual Freedom as an example.

Each and every week, the Center publishes news stories, commentaries, and editorials that are read by millions of readers each year, and just like any other periodical publisher, the Center distributes its content to tens of thousands of subscribers each Friday in a publication named the Lunchtime Liberty Update.

It happens that the Center's periodical is published exclusively on the Internet, not because that's the only way we can do so but because it's cost-effective, and because it enables the Center to publish quickly and retain content control. Otherwise, the Center's publications are just like those you might receive from the mainstream press. I would cite as examples the Weekly Standard or the New Republic.

I should note parenthetically that the reasons that the Center publishes on the Internet are the same reasons that the Weekly Standard, the New

Republic, and other traditional publications have shifted large portions of their content exclusively to the Internet. So the question for the Center and countless other groups and individuals is why aren't our news stories, commentaries, and editorials exempt under the Commission's safe harbor for media?

Returning to first principles, it can't be because we don't own an old-fashioned printing press, nor can it be because we don't hold an FCC broadcasting license. The First Amendment again protects the town crier and pamphleteer just the same as the daily newspaper and evening newscast, and thus, the distinction for the Commission seems to turn on how it defines the word media.

As I explained in my written comments, such preferential treatment to the institutional press not only raises the specter of the Government picking and choosing who can speak; it also threatens the speech of those with the least means. Indeed, while it may be true that the First Amendment protects everyone equally, it does so only at the price of extraordinary transactions costs in the form of legal

fees and legal time, especially when the speaker finds himself or his speech at the margins.

Thus, in practice, any careful speaker, especially one with limited means, must weigh the consequences of speaking before uttering even the first word. A blanket exemption would counteract this chilling effect by clearly ensuring a safe harbor for those who are included, but for those who are excluded, remain left out in the cold. As a result, if the Commission is to protect free speech, press, and association rights of all Americans, individuals, groups, publishers, what have you, it must do so by expanding the media exemption to clearly and explicitly include every publisher, online and offline, big and small, new and old.

I thank the Commission for allowing me to submit written comments and testify today, and I welcome your questions on either the media exemption or any of the other proposed rules.

CHAIRMAN THOMAS: Thank you.

Mr. Gold.

MR. GOLD: Thank you, Mr. Chairman. I appreciate the opportunity to testify today on behalf of the AFL-CIO. And we do appreciate the evident intend in the draft regulation to exercise some restraint in the sensitive areas, but we are concerned that the Commission or at least the draft proceeds somewhat incautiously in this area.

BCRA did not regulate or purport to authorize or command the Commission to regulate the Internet. It was well known at the time of the passage of the McCain-Feingold law that the Internet was a very vibrant and widely used forum for political communications, and yet, nowhere did Congress purport to extend its regulation there.

Of course, the Commission is considering the rules before it as a result of the Shays v. FEC case, but as Commissioner Toner pointed out in his statement yesterday, nonetheless, this rulemaking, both its timing and its content, are largely voluntary on the part of the Commission, and we believe that you may have proceeded unnecessarily beyond even what meeting the issue raised in the

Shays case would command, namely, the concern in the case that excluding per se the Internet from the definition of public communication, at least for the purpose of the coordination regulations, was impermissible under the act. For example, as we point out in our comments, to add to the Section 114 regulations a specific reference to Internet use for incidental use of corporate or union facilities seems to us to be gratuitous, confusing, and possibly even chilling, let alone reasonably enforceable.

We suggest that, and I think it is plain from the comments that you have received and just the overall atmosphere, that there really is no clamor out there for the Commission to wade in certain of the areas that the draft suggests it might. There is no record of corruption or its appearance or of abuse of the Internet to date, let alone of the apparently boundless and rather novel notion of circumvention of existing law.

That reality, I think, belies some of what I would respectfully refer to as the overwrought language in the Shays decision, namely that the

exemption of the Internet from coordinated communications would severely undermine the act and would, quote, permit rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption. I just don't see any evidence that that's truly the case.

Another factor that I think the Commission ought to consider, and I'm sure it is, is the very practical one of how do you go about enforcing this? Whatever you do, how does the Commission monitor and enforce? Granted, much of what you do or most of what you do in the enforcement area is in response to complaints, but in a world where you have I think I read in one of the comments an estimate of a million blogs to begin with, and certainly, hundreds of millions of people using the Internet globally but certainly, in the United States, at least 100 million people using the Internet its ubiquitous nature, the leveling nature of it, the disproportionality of expense and result or expense and readership, if you will, on the medium, I think that the more you wade into this area, especially when you don't have to,

you're asking for a great deal of demands on your resources that may itself be disproportionate to its value in enforcing the law and vindicating its intent.

And finally, with respect to that, a point that I raised, I think, throughout the comments of the AFL-CIO is insofar as you do get into this area, it's really important that there be some mechanism to quantify what it is that the Internet costs. The act, of course, is about regulating money, not speech, or at least it should be, and this is something that we have wrestled with, the AFL-CIO has wrestled with, and I know others have over the last seven or eight years is how do we quantify, insofar as we believe or consider that what we do over the Internet does have some--is regulated in some manner and has to be accounted for, how do we quantify the cost of what we're doing?

There's nothing in the regulations that addresses that; there's really no guidance in the advisory opinions. I have asked informally staff on a couple of occasions just over the telephone, you

know, how do you go about doing this and have never really gotten a satisfactory response.

This is a pretty important point. If you're going to be dealing with thresholds, or if you're going to be dealing with reporting, or if you're going to be dealing with suggestions that certain expenditures or contributions or expenditures that themselves could implicate and result in penalties, there has to be some way for people to understand how it is they're supposed to value what they're doing.

I know that this was not really discussed in the NPRM. My survey of the comments at least of those who are testifying, there is virtually no reference to it, and I would suggest that if the Commission decides to do anything that it might want to elicit yet another round of comments on that issue.

And with that, I welcome your questions.

CHAIRMAN THOMAS: Thank you very much.

Our questioning, we're going to start this panel's questioning with Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr. Chairman. I thank our witnesses for their comments.

Mr. Gold, would I be correct in saying, I mean, do you think we could comply with the Shays-Meehan decision by, for example, amending the coordinate reg, 109.21, to simply say for purposes of this section, public communications could include communications over the Internet?

MR. GOLD: That they will not? I'm sorry.

COMMISSIONER SMITH: That for purposes of this section, a public communication includes communications over the Internet.

MR. GOLD: That would plainly be one way to respond, and that would be leaving aside the--that at as a matter of policy, I think that that would be responsive in itself to the decision, and the Commission would not have to do anything else. I don't think that would be an appropriate response as a policy matter, but as a legal matter--

COMMISSIONER SMITH: Well, that is sort of my next question. And it's to preface, one of the things that I think has come up through this is that

a lot of people, I think, would just never even dream that their Internet activity could, in fact, be subject to the law, that if they were an incorporated site doing express advocacy, that they might be violating the law, or if they were, you know, republishing campaign material on their site; they might be accused of coordinated contributions, or if they were doing a whole host of other things.

And now, suddenly, people are aware, oh, you mean this does apply to us? Which I do think will mean there will be probably more complaints filed next time around, and so, I mean, the question is at this point, you know, should we do more than would be required merely to address the Shays-Meehan decision?

And let me ask you a bit more than on policy: where would you go generally speaking? And in particular, I'll ask, just to make sure you can't follow the question, one thing I'd like your opinion on in particular is would your organization, would you be comfortable with an exemption that allowed individuals to use their work computers so long as

it's in accordance with the work policy, workplace policy and that is not based on content so that if, you know, the company says look: here is your PC, your laptop, and you can use it for whatever you want just as long as you're doing your work. You know, would you be comfortable with that kind of--

MR. GOLD: Well, addressing different parts of your question first, should the Commission do more than is strictly required by the decision, assuming that it needs to do anything, given that there is an appeal in process, I think that the Commission is--what I gather from the NPRM is that the Commission is trying to do some things in a positive way in the sense of giving regulatory assurances, if you will, and as I said in my opening statement, I appreciate that sentiment, but I think that it may raise more questions and concerns than it allays, and I think Mr. Bauer's comments address that notion as well.

Were it to go elsewhere at this point, I think--and one of Mr. Bauer's colleagues, Marc Elias, submitted comments talking about fraudulent use of the Internet that may be captured already and covered

already by the existing statute and regulations just applied to that area, but that is certainly an abuse. That's certainly an abuse that implicates the campaign finance laws way more than a lot of the other things that have been raised

With respect to a union or a corporation policy or the regulation of the ability of employees or staff to use corporate facilities, union facilities, Internet facilities for different things, I think our view is this: any organization, union or corporation, is going to have policies that control that, that restrict that in order for it to do its ordinary business. And I think you can leave it to these organizations acting sensibly that they are not going to have a workplace where anyone can, to an unlimited amount, certainly on the job, use their facilities for private pursuits, political pursuits, anything unrelated to the organization's mission.

At the same time, I think that certainly, it would be improper for a union or corporation to be able to coerce employees to use the equipment to do certain things, especially off hours, in a political

realm, and I think it's very unlikely that that's going to happen, and I think that the law already takes care of that.

But again, you've had these incidental use regulations, the Commission has, for a long time, and they have not been specific as to what it is we're using. It's the facilities and the equipment of the enterprise. To add a specific reference to the Internet just seems gratuitous. These regulations, I'm really unaware of much, if any, enforcement of these regulations. They're cautionary. I know there is a value sometimes in regulations just setting a standard, even if there is never an instance of enforcement.

But in this, in particular, I think, again, I think it's just gratuitous and unnecessary, and I think that you can trust that practices out there are not going to create problems.

COMMISSIONER SMITH: It was suggested by some of the witnesses yesterday that the use, the regulation of incidental use was problematic and that the one hour-four hours is effectively the maximum

rather than the safe harbor because it's the only way people can do it and know they won't have complaints.

I see our yellow light is on, so I will just ask quickly either Mr. Bauer or Mr. Cox, would you agree with that assessment that that is not a very effective regulatory mechanism, at least not as applied to our topic today?

MR. COX: Yes, I think working for a 501(c)(4), where obviously, a lot of the employees have interests in politics and do their own political work on their own, the one hour, four hour safe harbor being the bright line that we can identify, it's very difficult for us, you know, a lot of us work at all hours of the day, and it's very useful to be able to use the computer at the office for some of our personal work as well, whatever that may be, if it involves politics or not.

And so, four hours is just such an extremely limited amount of time; if that's the key, it's basically just forcing people to kind of live an abnormal life, I would say; to basically--my advice to my colleagues at the Center would be, look, you

have a four hour limit, and then, you can't use the computer at the office anymore; that just seems a little bit ridiculous to me.

COMMISSIONER SMITH: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Next, we have Commissioner McDonald.

COMMISSIONER MCDONALD: Mr. Chairman, thank you; Bob, Reid, Larry, welcome this morning, and thank you all for coming.

Let me Bob first, and Bob, you're not under oath. Can you truthfully say that you anticipated that the Nationals would be doing better than the Orioles at this point in the season?

[Laughter.]

MR. BAUER: Truthfully, absolutely not, and I'm frustrated about it.

[Laughter.]

COMMISSIONER MCDONALD: Well, we'll get to that later.

Thank all of you for coming. Let me try to at least play the devil's advocate, because

otherwise, I thought we were getting ready to take a vote yesterday; people were out there so quickly that I didn't think we were going to have any fun at all, which just seems a little odd, since we're supposed to be hearing what you all have to say first.

But nevertheless, let me just ask a couple of questions: Reid, if I could ask you first of all, and this came up quite a bit yesterday, and it's a very important question, and I don't claim to know the answer, but do you envision any scenario where someone who would hold themselves out to be part of the media, is there a scenario where that simply wouldn't be the case, or can virtually anyone just come forward and announce that they really are entitled to a media exemption because they have an opinion, if you will?

MR. COX: Well, I mean, I think it is a complex line drawing problem, but I think it's a complex line drawing problem that occurs in a lot of areas with regard to the First Amendment. I think, you know, I've been involved recently in some reporters' privilege cases which, as you may know, if

you know any First Amendment law, involves whether newsgatherers are entitled to a privilege to protect their confidential sources from grand jury subpoena or discovery, and the courts have a hard time there drawing the line of what is a reporter and what is not a reporter.

But in general, it seems to me and it seems to the courts they are very careful in trying to not define the institutional press as what is a reporter or what is entitled to the journalist privilege. There is currently a case out in California that, in fact, the California Supreme Court just took that involves bloggers, where Apple has subpoenaed bloggers, and the California Supreme Court has taken the case.

Presumably, the lower court decision was that there was not a privilege, and the California Supreme Court has now granted review, and so, that tends to suggest that maybe, they might reverse.

COMMISSIONER MCDONALD: Let me ask you your opinion. The reason I'm asking is, and I'm going off of your statement, and of course, there was a story

about reporters this morning who had a little bad luck, as it turns out. But from your perspective, I'm just curious. I'm not looking for a right answer or a wrong answer. Is there a scenario that you yourself would see that if someone came forward and gave their opinion, either we were told yesterday and rightfully so that it shouldn't be confined just to bloggers--

MR. COX: Sure.

COMMISSIONER MCDONALD: --but the whole area itself; if someone in fact enunciates that they are for all practical purposes entitled to the press exemption, can you foresee a scenario where they couldn't do that?

MR. COX: I guess, you know, nothing is coming to mind to me that would say they couldn't, but I think you still have a case-by-case approach. I mean, I still think there are people that whatever their content is that wouldn't--and I should say, I use the language in my comment in my oral testimony very carefully. I stole the language from your proposed rule of news story, commentary, or

editorial. I'm not saying that the whole realm of speech is necessarily protected.

COMMISSIONER MCDONALD: We're always delighted when someone will use our material.

[Laughter.]

COMMISSIONER MCDONALD: I apologize; I'm not trying to cut you off, but I want to get to Larry for just a second.

Larry, yesterday, obviously, Carol Darr and others but I think Carol hit on the Tillman Act, obviously, of 1907 and the tension about where American politics stands, and the scenario that was posed by other witnesses yesterday ran kind of like this, which is that if I spent $20 million, the AFL-CIO or General Motors, in relationship to a number of formats out of their general treasury funds, obviously, there would be a problem.

On the other hand, running basically the same message on the Internet using the same type of funds under at least some of the witnesses' positions, they would be totally exempt regardless. What's your thought about that? What is the

difference? I mean, the question about trying to monitor 100 million people is certainly a legitimate question. It's like trying to monitor drugs, however. I mean, you don't quit simply because thousands of people are apparently more successful at acquiring them than I suspected, if I can get this right.

But what is your thought about that and the tension that obviously comes forward, and that's what everybody is really looking at? They're not looking at these great scenarios where people are going to out and pick on people. We were criticized this morning, the statement was the FEC never rushes in to do anything. I was listening to that driving in, so I find it ironic that the witnesses think we're ahead of the ballgame. But just quickly, what do you think about that as a comment from the other commenters?

MR. GOLD: I think that points out, you know, really one of the most difficult questions, you know, granted. But when I think about your example, how could the AFL-CIO, for example, spend $20 million on the Internet, on an Internet message, I am hard

pressed to figure out how the AFL-CIO could do that, I mean, what would comprise that cost if you're talking about the AFL-CIO's own Website?

I just cannot imagine why whatever the AFL-CIO would want to do on the Internet could cost that much. If you're talking about the AFL-CIO purchasing space on somebody else's site, that may be qualitatively a different matter, and the proposed regulations do make that kind of distinction in trying to draw some lines, and as we've said, we think that may be a fair line, although again, with the fundamental concern about how do you quantify any of this in order to have some kind of equal understanding about it, and fair enforcement and standards that actually, you know, can be applied.

COMMISSIONER MCDONALD: It's almost like any in-kind analysis, is it not?

MR. GOLD: Right, but when you're talking about an organization's own Website, and granted, you know, there are ways to spend money to do very fancy things and to put video on and do all sorts of things, you know, some of which we know from now;

some of which a year from now will be novel; and a lot of what costs a lot now probably will cost very little in a year. I mean, that's the other thing about this: it's so ephemeral, kind of how we approach costs.

So I just think there is something really, really different about how we approach this medium in that respect and the access of it. I know it has almost become a cliche dating back to the Reno case, but I think those really are important principles that you have to consider. And it's not just a--I just don't think it's a simple matter of equating, you know, numbers here, numbers there in the real world and especially given how things are changing.

COMMISSIONER MCDONALD: Thank you.

CHAIRMAN THOMAS: Commissioner Toner, Vice-Chairman Toner.

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

Mr. Gold, I'd like to start with you. As you alluded to in your opening comments, on page 2 of your written comments, you indicate that in your

view, the Shays ruling has not levied any particular command on the agency was the phrase you used and that you would counsel us to resolve any doubts in favor of declining regulation. Of course, if you asked 10 lawyers what their view of the Shays decision is, you get 10 nuanced answers, but I'm going to ask you as a lawyer: is it your view that, as a matter of law, Shays does not require this agency to regulate the Internet?

MR. GOLD: I think as a matter of law, well, given that the Commission did not appeal, the Commission has, unfortunately, I think, boxed itself in in having to respond in some manner.

VICE-CHAIRMAN TONER: We're appealing standing, however.

MR. GOLD: Excuse me?

VICE-CHAIRMAN TONER: We are appealing standing.

MR. GOLD: You are appealing standing; that's true, so it is potentially an issue, and that's why I said earlier that it's a voluntary effort, to some degree, to do anything until the

appeal is resolved. The merits of what she struck down or purported to strike down, of course, were not separately appealed.

I think that the Commission just has a great deal of discretion. Leaving aside the appeal, let's pretend there's no appeal whatsoever, okay? Given that there's an appeal, I don't think that the Commission has to do anything. If that's your question, given that there still is an appeal that could result in overturning her decision on the Internet point even on a procedural ground, you don't have to do anything as a matter of law. I do believe that.

Assuming that you lose standing, and the decision stands; that is, it is not changed by the Court of Appeals, then, plainly, the Commission has to do something to address to what degree, what circumstances the Internet should be considered a form of general public political advertising.

VICE-CHAIRMAN TONER: Is there any doubt in your mind that Congress did not intend for this

Commission to regulate the Internet when it passed McCain-Feingold?

MR. GOLD: Well, I think that there certainly was no affirmative attempt to do it. This was a heavily debated bill in both houses stretched over a year, and I think that the legislative history is pretty well devoid of discussion about whether or not to regulate the Internet. At the same time, everybody knew and had known for years, and the Commission had already issued, you know, a number of advisory opinions in this area, and people knew its significance.

I think that is significant. Is there any doubt? Well, you know, absent--you know, it would be more helpful, I suppose, if there had been specific proposals, and I don't recall any, specific amendments to regulate the Internet that were voted down. That would be very helpful. I don't believe that happened. I could be incorrect. But I think that it's extremely unlikely. Certainly, there's no command; certainly, there's no suggestion that Congress wanted the Internet regulated.

VICE-CHAIRMAN TONER: Would it be surprising if they did intend to regulate the Internet, but they didn't include the Internet in the definition of public communication, even though they included a wide variety of other media?

MR. GOLD: Yes, I do agree with that, really because again, because the Internet was so well-known and so much publicity about it, so much concern about it as a form of political communication, the fact that they codified, you know, a public communication standard and listed many media and not that, despite the fact that there is a catchall, you know, I think, you know, it is one thing for the catchall to be promulgated, say, 20 years ago when nobody had the Internet in mind; it's quite another thing for a catchall to be promulgated at the time when an Internet is a premier form of communication and the Internet not be mentioned. And I think, you know, that is perhaps the strongest single indicator that there was no intent to regulate the Internet itself.

VICE-CHAIRMAN TONER: Mr. Bauer, I'm interested in this proposal on a statement of policy that you outline in your comments, and as I understand it, you would want the agency to make clear that this is not the beginning of Internet regulation but rather the end of regulation, if we do issue regulations, and as I understand it, you believe that these principles that the Center for Democracy and Technology have drawn upon, that we should draw upon those principles.

My question is do you think that we should do this statement of policy concurrently with this rulemaking? Is this something we should be doing on parallel tracks? How would you envision it?

MR. BAUER: I would envision that as appropriate, it be done on parallel tracks. I think that, for example, in response to the question of Commissioner Smith to Mr. Cox about how you would deal, for example, with including Internet communications within the definition of public communication; once you've done that, the natural

question people will ask is, well, what does that mean?

And you could respond to that a couple of ways, one of which is then to produce a slew of regulations that explain will be construed and not be construed to be a coordinated Internet public communication. I would vastly prefer the Commission not elect that course. I think that it could provide guidance about what all of that means in a statement of policy that I think would be reassuring to the regulated community and also provide a meaningful guidance.

As I have, I think, said before, it is self limiting also on the part of the agency. It means that you subscribe to a certain view of Internet politics, and I think you subscribe to it in a way that is more compelling than what you would produce in an explanation and justification.

VICE-CHAIRMAN TONER: Do you think the statement of policy ought to make clear that the agency is not going to pursue further regulation of the Internet?

MR. BAUER: I don't know that the Commission could make a statement like that in a statement of policy and particularly bind itself.

VICE-CHAIRMAN TONER: Right.

MR. BAUER: Something could develop that none of us, I think, on this panel could foresee that would change your collective mind about it, but I think that it would be clear from the statement of policy just precisely how you view things; what it is that the regulated community--excuse me, at the moment unregulated, possibly soon to be regulated community can expect about your future actions.

I think that there is a significant amount of uneasiness that whatever you produce, even if it is presented as a modest response to the Shays case represents, if you will, the first step toward a much longer and more painful journey. And of course, if you look at the development of campaign finance regulation, at least in the 20th Century, it's hard to argue that a step one has taken is not followed by other steps. It typically is.

VICE-CHAIRMAN TONER: Would it be something where we could perhaps create a presumption in the statement of policy that we are not going to further regulate the Internet absent record evidence, as the witnesses have talked about?

MR. BAUER: That would be extraordinarily helpful, in my judgment. I mean, as Larry mentioned in his opening remarks, you know, there really isn't any record. There's no claim here. This is a very abstract debate, and for that reason, I think particularly menacing to the Internet community, and so, I think that the Commission could make the statement that it is going to require more than abstract policy debate and hypotheticals and hypothesized harm to proceed with restrictions on Internet politics.

VICE-CHAIRMAN TONER: And you recommend we should do this statement of policy when we do this rulemaking.

MR. BAUER: That is my view, and my view is also I don't know that it calls upon the agency to do something dramatically different; that is to say, in

the way of thinking through the issue that it would have to do to arrive at a decision about the rules, so I don't think it's a diversion. I think it's something that can be efficiently accomplished with the production of rules, and I think it would be extraordinarily well received.

VICE-CHAIRMAN TONER: Thank you.

CHAIRMAN THOMAS: Thank you.

Next, we have Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Bob, let me suggest that you use that other mike, because the one you're using doesn't seem to be working that well.

Larry, let me start with you. I was sort of surprised. As I understood your comments, when we talked about public communications by labor unions, you seemed to be open to including communications on password protected sites, and that would obviously also apply to corporations, and I was--if that is indeed your view, I may have misread it. That sort

of surprised me, because it doesn't seem like a very public communication.

So I wanted to ask you if I'm misreading you or--

MR. GOLD: Right; I'm not sure I did comment on--my comments in my written comments or this morning?

COMMISSIONER WEINTRAUB: No, the written comments.

MR. GOLD: If there's anything in the written comments that password protected Internet communications ought to be regulated, that's not what I was suggesting.

COMMISSIONER WEINTRAUB: I just clarified that.

MR. GOLD: Protected to the restricted class; I think that--just like any other medium.

COMMISSIONER WEINTRAUB: Right, right, okay. Thanks.

I think that one thing that--well, let me talk about this issue of incidental use of computers. We've had a lot of testimony about that, and people

have basically seemed to feel pretty unanimously that it's just not very practical. If we were to take that piece out of it, would it be worthwhile to say, to affirmatively state, because some people seem to want an affirmative statement; in some sense, Bob seems to want an affirmative statement.

Would it be worthwhile to say that among the things you can use on an incidental basis, and by that, we mean, you know, whenever your boss doesn't need you to be using it for some other purpose are computer facilities?

MR. GOLD: Well, the incidental use regulations have been there. They preceded the Internet. I believe they're there. And I'm just not aware of anybody being concerned about it particularly.

It's not that people are violating it necessarily. I think the truth is that most people, in fact, are rather oblivious of them, and I just think that's the reality of it. But at the same time, there's no abuse out there. And one thing that's different about a lot of equipment we're

talking about is its mobility. When the regulation was written, and it talked about facilities and equipment, I think largely that had to do with, you know, in office or in plant or in location equipment and services and the like that people would use, not mobile equipment that could communicate.

That just didn't exist. It exists now. People routinely take laptops that are issued by their employers, whether it's a union or a corporation.

COMMISSIONER WEINTRAUB: Or Blackberries.

MR. GOLD: Pardon?

COMMISSIONER WEINTRAUB: Or Blackberries.

MR. GOLD: Or Blackberries and cell phones, which now can do it all, and they use it for all sorts of things. Nobody's going to quantify that.

COMMISSIONER WEINTRAUB: Okay.

MR. GOLD: There is just no abuse there. And why say anything more about it?

COMMISSIONER WEINTRAUB: So you don't think that by having suggested that we would include that and then pulling it back, people would then say, oh,

now, it's not included? We've sort of put it out there, and now, I'm a little afraid about pulling it back.

MR. GOLD: You did, and I think I maybe want to give a little more thought about how--

COMMISSIONER WEINTRAUB: We put it out with good intentions.

MR. GOLD: I understand that, and I said so. I think I acknowledged that there was a lot of, you know, good intent here, what I called regulatory assurances, but the risk is that you open up something, and then, if you're trying to walk back from it, you know, what does that mean? And I want to give a little more thought to it.

I think Bob Bauer's notion of a statement of policy generally is salutary, and maybe that's how you address this.

COMMISSIONER WEINTRAUB: Let me ask anybody about another issue where I think we have to walk back from our regulations. We have, and I'm sure they are widely disregarded, and everybody is oblivious of them, but we have on the books currently

a regulation that says if you send out 500 unsolicited substantially similar emails expressly advocating for a candidate, it needs a disclaimer. And I am sure that is violated all the time, and it is ridiculous for us to have a rule like that on the books.

So we thought about making it better by adding this notion of you've got to have a commercial purchase of a list in order to trigger that. But should we just repeal the regulation altogether? I mean, I feel uncomfortable just leaving it out there, because I don't like having a regulation on the book which means that people are violating the law with no bad intent and a rule that we would never actually enforce literally.

MR. COX: If I could comment on that, actually--

COMMISSIONER WEINTRAUB: Sure.

MR. COX: I actually do agree with you. I think you should just repeal the reg. And the reason I think that is that the definition that you have now

proposed for unsolicited I think raises all kinds of other problems that would need to be clarified.

I mean, I always try to draw the analogy between U.S. postal mail and email, and it's very much the same in the sense that, I mean, when did they buy the list? I mean, as often happens, organizations like mine and the AFL-CIO and everyone else will rent a list, but then, people will decide look: we like this organization; we want to be in communication with them.

Does that mean that four months down the line, when we've been having ongoing communication that because we rented the list originally, and the name was produced through a rented list that that then means we have to put a disclaimer on email to them? There are separation problems if you have some people who were rented or that you purchased their name from at some point, and you have people who found you by the grace of God on the Internet, on the vast, wide, Internet that now, you have to keep two separate lists to make sure you don't violate the Commission's regulation.

I just think that there is a lot of clarification that would need to be done, and I guess also, unlike with U.S. postal mail, there are also cost issues. I mean, it really doesn't cost anything to send out email, and so, as you say, people are a little bit more oblivious to it, and so, there could be just any number of violators. So it would be very difficult to enforce the rule in any consistent sense across the whole variety of people who would be emailing out information that would be subject to it.

COMMISSIONER WEINTRAUB: I didn't mean to ignore you, but I'll get back to you in the next round because my red light is on.

CHAIRMAN THOMAS: Thanks.

Commissioner Mason.

COMMISSIONER MASON: Thank you.

I think I agree with all three of you on the philosophical basis, and so, I wanted to ask you a couple of questions about how we get there.

First, Mr. Gold, just to try to establish a basis here, there has been some concern raised about employers and unions coercing employees, and is it

your belief that generally speaking, employees, labor unions representing employees would complain if that happened, if an employer were coercing employees to do political activity?

MR. GOLD: Oh, without question.

COMMISSIONER MASON: And is it your experience that union employees will complain if they feel like they are being coerced by their union?

MR. GOLD: Yes, it is.

COMMISSIONER MASON: Mr. Gold and Mr. Bauer have both criticized the specifics of our occasional use proposal, and I understand that, but you've both sort of suggested that one hour a week, four hours a month is kind of restrictive. Do you have any specific ways of clarifying that? What should we do? Should we repeal one hour a week, four hours a month? Would that be better? Or any suggestions?

MR. BAUER: Well, the specific reference to the Internet, that is to say, whether or not you would include, I mean, the larger rule presents a separate question, obviously, about all corporate facilities. To speak now about corporate laptops, I

would, as Commissioner Weintraub expressed it, walk back from the suggestion that that rule would be applied to the use of the employer-supplied computer for personal purposes.

I believe, not wishing to overhawk the suggestion that it can be addressed in the statement of policy the reasons why you're walking it back. It can be explained as part of the Commission's overall regulatory view of the Internet. As to the larger rule, are you asking whether the larger rule makes any sense? Because it doesn't make any more sense in the other context than it does in this one. So if you were going to, you know, really go for the gold here and get rid of that rule, too, you have my blessing.

COMMISSIONER MASON: Mr. Cox, you referred a little bit to the Internet as a public forum.

MR. COX: Yes.

COMMISSIONER MASON: And I assume you're echoing or thinking about a number of judicial decisions regarding public fora. Can you give us any guidance as to how we might apply that line of cases

to this rulemaking? What implications would it have? What tools would you use?

MR. COX: I guess the first thing I would say is that it's important, I mean, in public fora in general, the Commission's regulation of speech wouldn't be existent, and I guess the difficulty here is, and this is why I focus my comments on the media exemption, is it seems to me that the Commission has really done a disservice to those of us who aren't members of the institutionalized press by what seems to be a media exemption that only touches the institutionalized press. And so, we're left wondering--

COMMISSIONER MASON: Let me try to make, since you're focused on that, that question a little more specific. You know, our problem is we have to use the tools we have. The tool we have is the statute. The news story, commentary, or editorial you quoted actually comes ultimately from the statute. The statute also refers to these things have to be through the facilities of a broadcasting station, newspaper, or other periodical publication,

and that is why we feel a little bit restricted in terms of you talk about the institutional media.

The suggestion in the statute is that there is a thing, a definable class of entities that are broadcasting stations, newspapers, or other periodicals, and it's very obvious to everyone that some things that are on the Internet obviously do qualify as other periodical publications, but the question is does everything on the Internet qualify?

And so, the question I raised yesterday and I would raise to you is is there any way that we could justify and say that the Internet itself qualifies as the facility of a periodical publication such that any news story, editorial, or commentary on the Internet would fall within the media exemption?

MR. COX: Well, I certainly think you get a long way using the word periodical publication. I mean, I think, for one, a lot of groups like us that do publish regularly; blogs tend to publish regularly, as well, updating maybe not at a constant rate of, you know, we're going to update the blog

every day at 9:00 a.m. but in terms of constant posting.

And so, I think periodical publication gets you to protecting quite a bit of information on the Internet. As for the rest, I think that, you know, I guess it seems to me that I obviously am between a rock and a hard place here in the sense that I really wish that the Commission had appealed the decision so I'm hopeful that--

COMMISSIONER MASON: So do I, but we're not there.

MR. COX: We aren't there. And so, I guess I would stress, I would say that whatever you can do to expand the media exemption as far as it could possibly extend, that would at least give people the clarity that they would not be subject to regulation by the Commission.

COMMISSIONER MASON: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you. Excuse me.

I started out yesterday noting that it's fairly apparent that the Internet is becoming a much

more popular vehicle for political advertising and political activity and that a significant amount of money actually is being utilized for Internet activity. Just in terms of overall advertising, I also want to note a recent report on CNN.com shows Jupiter Research projecting that Internet advertising will grow 27 percent to $10.7 billion in 2005.

Now, obviously, political advertising is going to be just a part of that. But numbers I was pulling off of our own FEC reports, just using purpose disclosed terms like Web or Internet or email, came up with about $25 million showing up just on Schedule B, and then, we did some research of 527 organizations, and we basically--just looking at eight different 527 organizations came up with over $2.2 million worth of disclosure disbursements that fell into categories like that.

And I noted, for example, the largest spender in this area, Progress for America, showed about $900,000 being paid for email list services; over $158,000 for Website services, and over $213,000 for Internet banner ads. So we're starting to see, I

think, potential for some significant spending in these areas, but granted, it's only a part of what shows up in terms of Federal election spending, I suppose.

But I just raise that at the outset because we have started down this road using the concept of advertising, paid advertising on somebody else's Website as where we want to kind of focus. But I will start with you the same way I did yesterday: we're sort of saying if a candidate coordinates with somebody in terms of having an ad produced and put on some person's Website other than the payor, we're going to run that through our coordinated communication rules; what about a situation where a candidate's campaign basically decides they want to build a million person plus email list, and they want to basically have the techware available so that they can send emails out whenever they want to, and they also develop the potential to attach some nice streaming videos, some nice hard-hitting ads to those email messages, and let's say that an organization

has, an organization has $900,000 available to spend on that kind of email list sending.

If it's fully coordinated with the candidate, the candidate sort of does all the preparation, production and so on and then goes to a corporation or a union and says will you pay the bill, should that be regulated as an in-kind contribution? Are we, in other words, with our proposal, in a sense, being a little bit unfair? We're saying we would treat it as a coordinated communication if we're talking about a paid ad that they want to place on someone else's Website, but we don't seem to be interested in treating it as an in-kind contribution if what we're talking about is a significant email effort that might cost a lot of money.

There's a question in there, I think. Anyone?

MR. BAUER: If I may by default, I think I understand the component parts of the question, and there's one piece of this that I may be wrongly breaking out and that I want to focus on for a

minute, and that is that the corporations that spend a huge amount of money and for that matter unions under 441(b) for Federal election related activity are restricted, in that you've posited a situation where they're spending an enormous amount on something that is intended of public use. It's not the transmission over the Internet, it seems to me, that triggers the material question under the campaign finance laws.

I say that simply because there may be other ways to worry through that issue should it become a question, which comes to my second point, which is I'm very worried about the construction of hypotheticals, which have an anxiety-inducing component to them, corporations which are spending millions of dollars to produce streaming videos, and they're coordinating with people who are putting them on their Websites or whatever it is for candidates; I may not have followed precisely who was who in your hypothetical.

And I'm unaware that any of that is happening. And so, I think that it is not at the

moment a comfortable platform on which to build a regulatory position. It goes to the point that Larry made earlier that we don't have a record.

So if I may summarize, because I actually took the answer in two different questions, first of all, I don't still think in your hypothetical that restrictions on Internet transmission per se are called for to deal with the problem that you've identified, but secondly, I'm not sure that the problem you've identified is anything other than a hypothetical one.

MR. GOLD: I think, again, that the question you raise is a very important question, and currently, of course, we have a regulation that has been operative for a couple of years now that exempted, I believe, your hypothetical from regulation.

I'm also unaware of--not that I would know, necessarily, of course, but I'm not aware of coordinated Internet communications having taken place in the last election cycle as you described. It certainly didn't happen with respect to the AFL-

CIO or any union that I'm aware of, which is not to say that that's for all time reason not to address it.

In listening to the figures you proposed from the research and Schedule Bs and the 527 reports and the like, which I take were the 872s to the IRS and the breakdown for Progress for America, my first thought was I wonder how they quantified that. I wonder what they included in that. To what degree was there overhead paying vendors, you know, construing certain expenses as applied to that in some kind of an overall overhead breakdown?

I don't know. These are the kinds of issues that we have been trying to deal with now for years, as I mentioned in my opening statement.

You know, plainly, I think, if there is, you know, some truly overt effort to do a substantial in-kind contribution over the Internet, that may be fairly subject to coordination standards, but there has to be a threshold. There has to be a means to quantify, and we still have to look at it a bit differently than we look at it in other contexts in

that there is, unlike, I think, purchasing broadcast time or newspapers, you're dealing with a medium that inherently, what's put into it may be utterly disproportionate to its impact, to its readership, to its value, and it just may be. It's just so different in that respect.

So I don't have a facile answer, but I think, you know, it's something that clearly has to be, you know, thought through very carefully here, but proceed very cautiously. I'm not sure that's a very satisfactory answer, but it's a start.

MR. BAUER: Mr. Chair, since you control the clock, can I take an additional 30 seconds?

CHAIRMAN THOMAS: But of course.

MR. BAUER: Thank you. Again, I want to stress this point, thinking about the numbers involved here, I don't know that that hypothetical you suggest calls for restrictions on Internet communications. It doesn't seem to me, if a candidate is coordinating with a corporation over the development of an ad for $900,000, whatever the number is, because I realize part of your

hypothetical would be spent for the development of an email list, it still seems to me that the Commission has options other than intervening in the regulation of the Internet.

So I may be somewhat less alarmed than Larry that if such a situation should come to pass, and in my judgment, it hasn't, and in my judgment, it's unlikely to, but should such--for a variety of reasons having to do with the Internet itself--but should such a situation come to pass, I believe the Commission has other alternatives available to it in studying the question and devising a regulatory response.

CHAIRMAN THOMAS: Okay; I'm out of time. Maybe we can come back to what those other alternatives would be.

Larry Norton.

MR. NORTON: Thank you, Mr. Chairman. I want to thank the members of the panel for coming.

Mr. Bauer, I want to follow up with another anxiety producing hypothetical that has been presented in some of the comments, and it's similar

to the one I think the Chairman raises, and this one concerns the wealthy individual. There is a--one of the commenters says under the Commission's proposed regulations, a wealthy individual could set up a Website and then spend very large amounts of money in coordination with a candidate on the professional creation and production of campaign materials, as the Chairman was discussing: campaign videos or other ads, which are then disseminated through the Website or by email.

Under the proposed regulations, that would not be considered a public communication, because it would not be a distribution for a fee on another person's Website and therefore would fall outside the coordination rules. And the commenter says this is precisely the kind of loophole that Shays indicated should not be permitted.

Whether that's so or not, I anticipate if it were exempted, we would find ourselves in District Court defending it, and my question to you is do you think that that scenario is also largely hypothetical, and to the extent that it is, does that

cut in favor of exempting it through rule at this time?

MR. BAUER: You mean providing that the Commission won't reach that activity?

MR. NORTON: Do you think that it would be appropriate for the Commission to exempt that activity by regulation, to establish through regulation that that sort of activity would not constitute a coordinated communication?

MR. BAUER: Yes, I would favor that. I do not have--first of all, I'm always uncertain about a number of terms that are used in hypotheticals like that; for example, wealthy individual. Frequently, we talk about wealthy individuals. Sometimes, we talk about the amount of money actually spent on the development of a Website, on a particular project.

And some people who, by some people's measure, are not particularly wealthy may choose, because they are very motivated to spend what others would think would be an insane amount of money pursuing a political project. And so, I don't think we should confuse the two.

But I also think in that contrast lies the nub of the problem, which is that I don't think we should be worried about that kind of individual activity on the Internet. I don't think we should be worried about an individual who, committed in that fashion, may communicate with a campaign before setting out to produce an advertisement like that at his or her own expense.

I don't think we have anything to fear from it. I don't think that there is any evidence that it is going to have a corrupting effect. I think it is an expression the power of the Internet to draw people into direct expression, into direct expression, not through the campaign, not speech by proxy in the classic sense that Buckley meant it but through expression on the Internet that he or she funds out of his or her personal resources.

So I certainly would welcome some Commission action to assure people that merely because they choose to commit money to a project like that and communicate with a campaign in whatever form that communication may take--when you talk about

communicating with a campaign, it may mean having a conversation about the presentation of an issue with somebody who is at a very junior tier or level of a campaign organization in one state out of a 50-state Presidential campaign.

And that is perfectly appropriate. In fact, that kind of local communication is something we presumably would want to encourage.

MR. NORTON: One of the other scenarios that was discussed yesterday was in connection with the Commission's proposal to exempt individual activity, and you've addressed that in your early comments. But one question it opens up is what happens when individuals get together, and in particular, how does it intersect with our political committee rules?

And so, if you have a group of individuals who get together, and their stated purpose is to reelect Congressman Jones, and they establish a Website, and all of their activity is conducted through the Internet, and the Website contains express advocacy communications and videos that are

produced that contain express advocacy, and they're all about reelecting Congressman Jones, would it be appropriate for the Commission, by rule, to establish that those communications would not constitute an expenditure, so that they, for instance, if the activity is conducted exclusively over the Internet, you could not be regarded as a political committee?

MR. BAUER: I absolutely think so. I believe that one of the most lamentable sort of trends in the campaign finance laws has been to devalue association in a variety of forms and to cast the argument purely in terms of individual speech, not that I want Mr. Cox to be distressed with that formulation. I'm all in favor of individual speech, too, but where individuals choose to aggregate or associate for a common political purpose, the right of assembly, as it is termed, the law also ought to be very protective.

I think we have an opportunity now precisely on a hypothetical like the one you describe where that association occurs around this democratized, very cost-efficient medium to extend a

hand of protection to it, and I think the Commission hospital do so.

MR. NORTON: Thank you very much.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Staff Director Jim Pehrkon.

MR. PEHRKON: Thank you, Mr. Chairman, and welcome to the panel.;

Mr. Cox, early on, if I understood you properly, you indicated that the Internet provided sort of unique capabilities that allowed individuals to either view or not view or accept or reject communications and information. And if you could, could you elaborate on what the specific techniques or characteristics are that do that?

MR. COX: Sure; I mean, I think that, you know, I think that one of the problems that the Commission has is that the Internet has so many different platforms that are a part of it, and so, I think each one of them have their own characteristics.

With regard to email, you only receive an email if your address is known to someone else, and so, that tends to be a characteristic that you've consented to getting that email to begin with, or even if you get an unconsented email in your inbox, you're certainly not coerced to open it up.

With regard to the Web, generally, the characteristic is that you actually go out in search of information, or even in the context of banner advertisements on sites, the banner advertisement is in general very small, and to really convey any amount of information, you would have to click through and be able to open it up.

And so, the receiver, it seems to me, is more than any other medium really in control of what information and what communication is being received. If they don't want to receive a communication, they simply don't have to. They either don't have to go in search of it; they don't have to open it up. And so, that's very different than, for instance, a television station or a radio station, where, to a certain extent, other than turning it off, you're a

captive audience, and what you receive is what you receive, and you don't have any choice in the matter other than to turn it off. The same with respect to a newspaper: if you open up a newspaper, unless you just close it, you're kind of a captive audience there as well.

And so, I would say that the Internet, and moreover, I guess, it's the amount of information and the way that the receiver is initiating on the World Wide Web, for instance, a search or has initiated conversation with another email user or has signed up for a listserv or whatever, that's oftentimes not the same as with regard to a radio station or television station.

MR. PEHRKON: I'm actually disappointed in your answer, because I hoped you were going to tell me how to get rid of all my popups.

[Laughter.]

MR. PEHRKON: Mr. Gold, yesterday, one of the questions that came up or some of the comments were that particularly, bloggers are very low-cost activities. I think we had Mr. Moulitsas yesterday

who has probably one of the better known blogging sites out there. And he indicated his level of activity or expenditure during a year was approximately somewhere around $150,000, and he indicated he thought he was one of the largest operators out there.

In addition to that, many of the other folks seem to indicate that many of these blogging sites ran in the range of $1,000 to $2,000 a year, sometimes less, sometimes a little bit more. You had indicated that the AFL would not be spending millions and millions of dollars on its Website or didn't so far.

Could you give us a sense as to what the general range is of how much does it cost to build and operate your Website?

MR. GOLD: Right, good question, and there is an answer somewhere. I'm not sure what it is off hand. I probably should know, but perhaps one reason I don't know is because the AFL-CIO's Website is, I think it would be fair to say, 99 percent, the content is 99 percent not related to electoral

matters, and where it is, the PAC pays for it, and we make an effort to quantify that and report it as an independent expenditure.

The AFL-CIO may be different than other institutions or different individuals in that it is a complicated institution with a lot of constituent organizations and covers a lot of territory. And so, again, when you're talking about trying to quantify some of these things, there's a sunk cost, certainly, in purchasing the equipment, maintaining the equipment and the like which may or may not be fairly attributable to any particular addition by a keystroke of particular content.

And that's why, again, I think if you wade into this at all, you really need to look at that carefully. Again, what the Commission's concern should be is about expenditure of money: what expenditure of money is truly relevant here? And that's--

MR. PEHRKON: Actually, sort of what I'm trying to drive at is what is the outside parameter, if you have a sense of that? The overall expenditure

for the Website that puts a cap on where it is because--

MR. GOLD: Right, it would, and you're talking about what are the components? It's, you know, the purchase of equipment, which has already occurred. It's the maintenance of equipment. It's the staffing of the Website. It is, I guess, any production costs that are uniquely related to the Website.

A lot of content that goes on the Internet was created for other purposes. It's just--you copy it, you paste it, and that's that. You know, what do you count? Why should, to what degree should we, the AFL or anybody, but put to the task of trying to figure all that out and spend the time and effort to come up with those figures in order to report that? It's so random, to use a favorite term these days; okay, to do it, and that's one of the things that I think the Commission really has to think through very carefully before it issues anything that's going to send a lot of people scurrying to do things.

MR. PEHRKON: I see my time is up.

Thank you for your comments.

CHAIRMAN THOMAS: We have a little less than 20 minutes left. We'll take a run at sort of going backwards through the list of Commissioners, and I'll take about three minutes here. See if we can keep track of that.

I just wanted to get your response. You talked about how in theory, the Commission could just respond to the court's decision by modifying the definition of public communication as it relates to coordinated communications. But I'm not sure that we can. Don't we also have to deal with the fact that public communication is a term of art used with respect to the state and local party FEA, Federal election activity, rules, and don't we also have to deal with the part of the Court's decision that dealt with the generic campaign activity definition, which also relies, because of our regulation approach, on the term public communication? And that's another concept that applies in the area of party, state and local party spending, so I just want to quickly get your assessment of whether we don't also have an

obligation to deal with those aspects of the reach of the term public communication.

Larry? Closest to the microphone.

[Laughter.]

MR. GOLD: My mistake.

[Laughter.]

MR. GOLD: I'm not sure that you do have to do that. The route that the court took was looking at coordinated communications and its incorporation of the definition of public communication. I think that's where it got to, why the issue was raised there. It may be that you can make distinctions between public communications depending on the speaker. I'm not sure, and the party issue and the generic campaign issue is a bit outside of the strict realm of the concerns of the AFL-CIO in this proceeding, so I'm speaking more personally here perhaps.

But I'm not sure that's the case. I follow the logic of it, of what you're saying, that it's a definition, and it's a definition for all purposes, which is another reason why you need to proceed very

carefully, if that's how it's going to be, and further distinctions are not going to be made in a regulatory framework.

CHAIRMAN THOMAS: Let me throw out another question and Bob, you can either answer the first or this question.

We seem to have developed this--what I consider to be another total carveout in our current regulation for any sort of activity that is on the Internet in coordinated communication rules. It seems to suggest that if it's Internet communication under the current rule, it won't be analyzed as an in-kind contribution, and therefore, you can coordinate it, and you can pay for it.

I guess we have this odd situation where, therefore, you've got this carveout in the area of coordinated activity, but you don't have a parallel carveout in the area of noncoordinated activity. So as I see it, someone working with an Internet communication, if they're not coordinating with a candidate or party committee, let's say with a candidate, and they undertake express advocacy, we

sort of have this awkward situation where they're potentially subject to more regulation in the sense that they do have to somehow keep track of the cost of an express advocacy communication even though we're talking about Internet-related communication.

So we have proposed in this rulemaking to specify in the definition of expenditure that we're going to apply what's typically called the individual volunteer activity allowance in the statute to noncoordinated activity as well, that you wouldn't necessarily have to be volunteering with a candidate's campaign and coordinating with the campaign, but you can be working totally independently, and this is our effort to sort of use this opportunity to clarify that we want to undo that tension, that awkward concept that we're describing.

Any comment on whether we should use this opportunity to do that or not?

MR. BAUER: Well, I certainly support the protection of the uncoordinated individual expression. I couldn't agree with that more.

CHAIRMAN THOMAS: Well, I've used up my time. Let me just very quickly say I love your point about how Internet may have a little bit more ability to sort of shut it off or disregard, but, you know, I'm pretty good with my remote control on TV. I can move off those commercials like nobody's business. Radio, I don't even listen to stations anymore that have commercials on them. Letters, mail, junk mail, I do the same thing. I read the stuff that I want to read, but I just throw in the junk, the other stuff, so it's fairly analogous even in other settings. I'm not quite sure we can build our distinctions on that, but I certainly appreciate that the unique nature of the Internet, the low cost nature. I think that is probably the most distinguishing factor.

Commissioner Mason.

COMMISSIONER MASON: Thank you. Mr. Bauer, Mr. Gold, we had some testimony yesterday that if we stay with this concept that okay, we're only going to address payments to somebody else for putting content on their Website, and that, by the way, gets us over the threshold of, well, how much is it worth, because

the question is, generally speaking, how much you paid for it.

There was still some concern about needing a threshold, and the example was given of the small blogs where, you know, you get as low as $5 an ad. By the way, that's not unique. There are some markets in which you can buy a radio ad for $5.

And my question is, looking at the statute or other tools we might have, what should the threshold be? And the one we see in the statute that might have some application appears to me to be the $200 itemization threshold; in other words, if the disclosure purpose is one of the lowest thresholds, and if committees don't have to disclose the donor information for contributions or disbursements of under $200, what would be the purpose of having them go through this regulatory rigamarole for a $5 blog ad?

So my question is really twofold: is that or anything else in the statute or regulations you can point to a good basis for at what level we would say even though we're regulating these purchases,

we're going to still establish a minimum threshold, and is that one high enough to be useful?

MR. GOLD: High enough to be useful?

COMMISSIONER MASON: Well, we had these, you know, people throwing out, well, maybe it should be $25,000 or something else, and one of the problems I have is I don't see any $25,000 thresholds in the statute. They're all, as you know, incredibly low, $1,000 and, you know, so on.

MR. GOLD: Well, you know, the initial distinction you make does solve some problems, I suppose. If you've paid for something, that's some measure of what the value is, unless, I suppose there will always be the question raised is that really, or is there some kind of reduction that implies some other contribution; we go down that road, but leaving that aside, again, I have an overriding concern with quantification that I have raised in this proceeding: if somebody is paying for something, as I acknowledged in my comments, that may be the way you quantify it and may be that you don't treat it any differently.

If it's reportable, it's reportable, and the fact that it's on the Internet makes it no different. That is perhaps, you know, the one sensible approach to take.

The statute, you know, again, not having been written to perceive this medium just doesn't--as you're finding, I know, in trying to deal with all sorts of things, the media exemption, the like; how do you apply it here? You know, what sense does it make? And when you step back, you say, well, there is a certain logic. A lot of you think that there is a certain logic to it that you can apply: will it make sense for this and not for anything else?

And as the Chairman just said, you know, maybe it isn't really such a matter that you have to search it out and maybe we do have as much control over that medium as others.

But then, when you step back, there seems to be a consensus, I think, that it's just silly to apply some of these concepts nonetheless to this medium the same formulaic, formulistic way, and that's difficult for you to wrestle with, because

you've got the statute, and you've got the statute, and you do have to deal with that, and you've got a statute, and you've also got people out there ready to pounce on you and sue you if you don't do it the way they like, and it's perhaps inevitable.

But ultimately, Congress, I think, is going to have to deal with this or not; perhaps deal with it in the way that the Reid bill suggests and basically just say look, forget about it. So a bit of a longwinded answer but--

COMMISSIONER MASON: I just want to get an answer from Mr. Bauer, if you have one: is $200 enough to make any difference in this context of paying, again, paying for something on somebody else's site, and if not that, is there something else we could hook ourselves on in the statute?

MR. BAUER: Real quick question: are you talking about purchasing a paid advertisement?

COMMISSIONER MASON: Purchasing a paid ad.

MR. BAUER: Or content that is generally coordinated--

COMMISSIONER MASON: Let's just limit it right now to just purchasing a paid ad. I go to DailyKos, and, you know, it's $1,000 for a margin ad. I go to another site, it's $10 for a margin ad. And some people have said look, these little sites are so little, we need to kind of not let them worry and not let people worry, and, you know, should we have an exemption for that?

MR. BAUER: With respect to the question of a disclaimer? Just a disclaimer?

COMMISSIONER MASON: No, this would be for reporting purposes, coordination purposes, everything.

MR. BAUER: I'm afraid I'm going to have too complicated an answer for the time permitted, and it's probably a function of muddled thinking, so I'll say I don't know where you will find a better benchmark than the one that you've cited, but I will give it some additional thought, and I will blog my response.

[Laughter.]

COMMISSIONER MCDONALD: And to help Commissioner Mason, we know that it might cost $1,000; they might ask for $1,000, but they would take $10. You learned that. We learned that yesterday as well.

CHAIRMAN THOMAS: Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Bob, I owe you a question. Let me start by asking you to put on your state party lawyer hat. The suggestion was made yesterday, and it was in the written comments, that we should ask state parties to allocate the cost of their Websites on a time space method based on the number or size or something of PASO communications of Federal candidates. And I'm concerned, A, that we don't have statutory authority to do that, since public communications by state parties are by definition not allocable, and B, if we tried to ask them to allocate that sort of thing on a dynamic Website where things go up, things go down that this would just not be feasible for them to do. Do you want to comment on that?

MR. BAUER: I agree. It isn't. And I think in my written comments--as I say, I don't have them in front of me, but I recall in my written comments, I said I thought that we ought to protect the use by parties of their own site and not attempt to impose a complicated methodology for the use of their own Web.

COMMISSIONER WEINTRAUB: Let me also ask about republication of campaign materials. This is sort of a knotty problem on the Internet, because it doesn't really have any cost. Numerous people have told us, you know, to do a cut and paste or a link, and yet, there it is in the statute that we're supposed to, you know, that's part of our coordination analysis that we are supposed to take into account republication of campaign materials. Can we get around that by virtue of the fact that there's no cost attached to it or by some other means that you clever people can come up with?

MR. GOLD: I think this is, again, this is exactly the kind of instance, as you know, where the statute precedes the technology, and the application

is foolish. It just is, because of the cost involved, and everybody does this. Everybody--I mean, what is the Internet? It's passing messages around easily, quickly.

COMMISSIONER WEINTRAUB: I agree with you, but how do we get around the statute?

MR. GOLD: Well, I think maybe you do--

COMMISSIONER WEINTRAUB: Not how do I get around the statute. How do we deal with the statutory language?

MR. GOLD: Right, right.

[Laughter.]

COMMISSIONER WEINTRAUB: I don't want to--

[Laughter.]

COMMISSIONER SMITH: How do we craft a regulation that comports with the statute and meets your goal.

[Laughter.]

MR. GOLD: Right, that's my answer.

[Laughter.]

COMMISSIONER MCDONALD: I hope you establish that the media is listening.

MR. GOLD: Perhaps come up with a de minimis standard. I know that sometimes, the Commission has not entirely been successful at having it pass judicial review, but in this area, you might succeed. Given the volume and the ease of its use and the lack of quantifiability, I see that as the approach.

COMMISSIONER WEINTRAUB: Bob, any thoughts?

MR. COX: You know, I agree with Larry that a de minimis use would be useful, but I also think that republication raises just a variety of issues, one of which is, you know, is there knowledge of republication? I mean, one of the problems with the Internet is that you get lots of passed on messages and so on, and so, it may be that you are republishing without even knowing that it was campaign material to begin with.

And then, I think the de minimis test brings up Larry's point again as to how do you quantify? And so, I think that's very difficult. I mean, I know from the Center's point of view, I can tell you that, you know, if you include all of the

cost of development of a Website and the development of an email list and, you know, your Web guy, however many hours he's put in, you're talking thousands and thousands of dollars. But to actually just post a single post on the Internet takes all of five minutes of our Web guy in house. So which do you use?

I mean, you have the Website; that single post never would have been put up if you didn't have the Website development to begin with but--

COMMISSIONER WEINTRAUB: Bob?

MR. BAUER: I embrace the comments of my co-panelist.

COMMISSIONER WEINTRAUB: Very pithy. Thank you.

One last question: here and in previous panels, the argument has been made, and I think it's very compelling, that, you know, commentary on the Internet, commentary by anybody should be treated as commentary by the established press. And this goes to, you know, whether the media exemption is limited to the established press or to anybody who has an opinion. And the counterargument, as you know, is

that that, if we were to broaden the exception that wide, it would swallow the rule; there would be nothing left in campaign finance regulation, because everybody would be a member of the media.

So I would like to invite each of you to respond to that argument.

MR. COX: My pithy response really quick is that swallowing the rule would not necessarily be a bad thing in my mind so--

MR. BAUER: I am very ambivalent about this whole question, as Mr. Cox said earlier, to which I'm generally sympathetic of extending the media exemption, but of course, when you say expand the media exemption, that means that it's a claim. It's a claim that the Commission itself can review. It's a claim that the Commission reviews on the facts of every individual case.

So what you've done is you've not so simply extended the exemption; you've extended the community of individuals and organizations conceivably operating sites who actually are dependent on the government for approval, if you will. I think that

is overstating the case but certainly for permission to proceed as a media related entity subject to regulatory protection.

And so, I, on the one hand, don't agree that some of the organizations identified in the NPRM like Slate and so forth would qualify for the media exemption by all sort of intuitive standards.

COMMISSIONER WEINTRAUB: You don't agree that they would?

MR. BAUER: No, I would agree that they would. Please, don't clutter my email box.

[Laughter.]

COMMISSIONER WEINTRAUB: I know you didn't mean it.

MR. BAUER: But I also believe that we ought to try to find a way without overworking that exemption to provide protection to the blogging community, because I don't think they ought to be worrying about filing advisory opinion requests or having themselves, having their activities challenged under the fact specific conditions of achieving that exemption.

COMMISSIONER WEINTRAUB: So to protect the blogging community is--

MR. BAUER: Statement of policy.

COMMISSIONER WEINTRAUB: A statement of policy.

MR. COX: If I could just have 30 seconds.

CHAIRMAN THOMAS: Ten.

MR. COX: Ten; okay.

COMMISSIONER MCDONALD: I'll yield my time.

MR. COX: The problem with not extending the media exemption is that if we don't have a clear blanket rule, organizations like mine from the Commission, we find ourselves--sure, we are worried about having to go case-by-case through the courts, which is no easier.

COMMISSIONER WEINTRAUB: I'd like to ask Mr. Gold for comment, and I will forfeit time on the next panel.

MR. GOLD: Just a few seconds, then. I don't have an easy answer to that difficult question, but I will say it's certainly perplexing for the AFL-CIO, which has a Website and does have news on it,

news that it views--it's particular news, but it's broad range but limited. How is that different from any other Internet publication put out that may be the online arm of an offline publication that is also a specialty publication, let's say?

The range of it, the ease of it, you can construct something that is just as sophisticated and has just as much comment as the online version of that specialty publication, even though you are a union or a business corporation, not a media corporation, and certainly, it's not satisfactory to say the media exemption protects some and not others, but it's very thorny.

CHAIRMAN THOMAS: Vice-Chairman Toner.

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

I think this has been an interesting discussion, because I'm very open to this idea of some type of spending threshold, and Mr. Gold, you talked about a de minimis concept, and yet, we attempted that in the Levin funds area, and it was struck down by the district court. And we've had a

good discussion, I think, about this paid advertising versus unpaid advertising, and of course, we attempted something analogous to that in the electioneering communications area, and it was struck down by the district court.

And as we go on with this rulemaking, if we do issue regulations, those are going to be some of my concerns, that as a policy matter, this may make a lot of sense. And yet, we may find ourselves in the same judicial problem that we face ourselves today.

MR. GOLD: On the other hand, you do have a de minimis rule for unions and corporations announcing endorsements and putting out press releases and that sort of thing. I don't believe that's ever been challenged. But it's been there for a long time and does not seem to cause a lot of consternation, and that is somewhat analogous.

There, the analogy is this, and I'll be quick, because I know there is limited time: a de minimis expense for, you know, press releases and the announcement, I think in part the rationale for that is largely whatever the transmission of it, it's

being done by the media. It's media attention. That's the transmission of it. And the organization itself is not expending to communicate the message except just to issue that release, and then, it's up to the press, whatever that is, to decide what to do with it.

The Internet, obviously, there is an obvious analogy in putting something on a Website, and I do believe there is a passivity there that is unique, and the question is how many people come visit it.

VICE-CHAIRMAN TONER: And I'm very open to that, considering that on a policy level.

Mr. Bauer, I wanted your thought, because I understand that you would prefer that we not further expand regulation on the Internet, and I agree with that. But the core concept in the NPRM is focusing on paid advertising placed on another person's Website, and my question to you is do you think if we are going to proceed with regulation, are you comfortable with that kind of framework?

MR. BAUER: I'm comfortable with the notion that if someone uses the Internet the way they use a newspaper, and they pay for an advertising, you know, paying the price, generally published, available to everybody, to use that site for promotional purposes that a disclaimer is appropriate in the circumstances, and I don't have any fundamental objection to that at all.

VICE-CHAIRMAN TONER: And no problem with that being treated as a coordinated communication if coordination takes place.

MR. BAUER: No.

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

MR. COX: Yes; I mean, in the end, the disclaimer, as long as you know that you need it, is probably not all that big a deal. I guess my question is how many people are actually going to know that they need it? I think that, you know, there are lots of groups like the Center that are probably even smaller than the Center and are working on a shoestring budget that quite frankly just won't

have any idea, and so, it's going to come 120 days or whatever the standard is before the election.

VICE-CHAIRMAN TONER: I'm always shocked that people don't read all 500 pages of our regulations. They are a really good read.

[Laughter.]

MR. COX: Yes, what's going to trigger it is they're going to send out a solicitation campaign over their email list, and they're not going to have a disclaimer, and I just don't see how you're going to enforce that rule in any fair way to them.

VICE-CHAIRMAN TONER: Well, perhaps we'll be at 520 pages of our regulations when we finish this proceeding.

Mr. Gold, just real briefly, fundamentally, you feel comfortable with this paid advertising concept, again, if we choose to go forward that it can work?

MR. GOLD: If the Commission chooses to go forward, it's a reasonable way to draw a line as opposed to all of the others. I'm not all that enthused about it, but there's a certain logic, there

again, it's doing something affirmative. It's an affirmative reach out that has maybe a more easily quantifiable cost more directly analogous to things that happen in other media than other aspects of Internet use.

VICE-CHAIRMAN TONER: And real quickly, if we went forward with that concept, do you think we would also, for the logic that you indicate, have to include situations where people are getting advertising below market value and basically treat them as in-kinds? Do you think that's required for the concept to work?

MR. GOLD: It probably does follow, and again, I suppose over time, the market value will be more easily ascertainable on the Internet than it is now, but it certainly seems to be pretty--

VICE-CHAIRMAN TONER: Inherent in the architecture of the rule?

MR. GOLD: It is--inherently, I suppose you need to go there. I don't know enough about how the valuation is on the Internet for advertising to be able to comment further, I think.

VICE-CHAIRMAN TONER: Mr. Bauer, would you agree? Would in-kinds have to be included?

MR. BAUER: I'm not prepared to make that concession yet. Obviously, thinking about it, when you say it's inherent in the architecture of the rules, you know, we can redraw the blueprint. We can change the plan. But I will agree with you that this is a problem of stepping in this direction. This is the reason why I share Mr. Cox's and others' anguish that the Commission didn't appeal, but as Commissioner Mason said, we are where we are.

There is a certain logic in regulation. You take a certain step, and you are compelled ultimately by the alleged logic of regulation to take the next step. So I understand the question you're raising, but I'm leery of making a concession on the record.

VICE-CHAIRMAN TONER: Because if a $1,000 ad that's actually paid for is covered by regulation, but another company doesn't charge for it as a gift, and we don't cover it--

MR. BAUER: I think that's right. I think you are clearly headed in that direction. It is not a hypothetical I have given enough thought to, and so, I didn't want to neglect the possibility, to quote Commissioner Weintraub, that I could comport with the statute and still get to the result that I want.

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

CHAIRMAN THOMAS: Commissioner McDonald.

COMMISSIONER MCDONALD: Mr. Chairman, thank you.

Well, a couple of observations and one quick question. Let me go back, and I appreciate Commissioner Mason's comments that we are where we are. Let me just say to Reid, first of all, about the appeal process, oh, if I had a nickel for every time my colleagues turned down an appeal I wanted, I could probably be a Republican. I'd have that much money.

[Laughter.]

COMMISSIONER MCDONALD: I went to my colleagues and asked them to develop a process so that we might automatically get into an appeal position one way or the other that we would take a stand, and being the senior member of this Commission, my opinion was so valued, I lost 5-1. I reached the point where I thought about voting against myself, it was looking so bad.

But I think we ought to develop a position, and I hope this Commission does some day, where it's great to talk about a case-by-case basis, but a lot of times, procedurally and structurally, it creates problems for this Commission.

What I'm interested in, though, is I want to go back to your point if I could, Reid, for just a second about the difference between TV, newspaper, radio, and the Internet. When I pick up the newspaper every morning, the first thing I do, as Bob can tell you, is I go to the sports page. That's usually the second and third thing I do, too, by the way. And I can pick up that sports page, or I have purchased the newspaper because I assume that it's

something I'm interested in. I could go to the business section if I wanted to read about crime in America, but I prefer to go to the sports page first.

On TV, I don't have to turn off the television. I don't have to turn the television on. When I turn it on, there are hundreds of stations I can view, 11 and 12, by the way, for ESPN and ESPN-2, where I--I guess again, I'm having trouble seeing this great distinction that people are talking about. I went on the Web the other day to look up a political matter, and it said I could refer to 6,437 sites or something like that. I have trouble focusing on one site, so 6,437 seems a little bit more than I was prepared to do.

I guess what I'm trying to explore with you just for a second, and I take the point that the Minority Leader, Senator Reid, may well be able to press ahead, and he may well be right, and Congress may well take care of this problem for this Commission. I would submit to you that they may start taking a different view if routinely, in their own states and districts, they start getting beaten

to death, because then, it's not as much fun as it used to be, and this has happened in other areas of the law.

But I really don't see the difference, frankly, going back to what some of the witnesses said yesterday about spending money for a radio ad and an ad on the Internet. I truly, I guess I just don't see it. I take the point that you're voluntarily doing something, but in every medium that I'm aware of, short of loudspeakers, maybe, coming into the neighborhood, again, it's determined by me.

I don't know what they're going to say when I turn on the evening news. You know, they may take this position or that, and I may go from CNN to ABC to CBS to Fox--it's not as likely, but I could. But wherever you're going, I think the principle is still the same, and I guess I just--if you wouldn't mind amplifying on that a little bit, it would help me.

MR. COX: Commissioner, I take your point. I guess the point that I guess I would put back to you is that the difference is that the scarcity with regard to whether that's newspaper or television or

radio broadcast is not the same as with regard to the Internet.

And so, while the way that you're envisioning just digesting media is that you always have a choice, your choices with regard to all of the other scarce media are limited to those media, those media that are available and what they choose to print. That's not the same case with the Internet, and moreover, when you interact with the Internet, it's much more self directed than with regard to a newspaper.

I mean, the newspaper has decided to put whatever ads that they have on the page along with your sports story about the Nationals or, for you, the Orioles, it sounds like, and on a radio, if you're listening to a program, it's going to be interrupted with an advertisement. On the Internet, you can go as you said, you found more than 6,000 sites on a political issue that you wanted to do, and you can go to the site, or you cannot go to the site.

COMMISSIONER MCDONALD: But out of those 6,000, when I pick one, the one I pick, I'm still

getting the opinion of whoever put that forward, am I not?

MR. COX: Well, but you're choosing, before you even go there, to--

COMMISSIONER MCDONALD: Absolutely. I couldn't agree with you more.

MR. COX: When you're listening to the radio, when that ad comes on, they're not saying here's an ad for the Orioles come on; choose to turn on or turn off your radio, and moreover, we're going to tell you when you need to turn it on to get to the program that you were listening to.

COMMISSIONER MCDONALD: More like the popup that the staff director alluded to earlier, I gather.

MR. COX: But I think it's that characteristic of the Internet combined with the fact that it's just not a scarce resource. I mean, you have so many more choices, and the person who is interacting with the Internet, the receiver, is the one who is actually making those choices as opposed to the broadcaster making those choices.

COMMISSIONER MCDONALD: Have you had a chance to think, are there any exceptions to the rule since I first asked you when we opened up, do you know of a scenario? I wanted to give you more time.

MR. COX: Well, and this is one of the things that I think the Commission needs to consider as they consider all of these rules is that it's very hard for me to talk about the Internet, because there are so many different facets of it. There's email; there's listservs; there's the World Wide Web; there's streaming video, audio, and that's why, in the regulations, I think the Commission needs to be very clear as to are the rules a fit-all, or do they only fit certain formats on the Internet that are involved?

COMMISSIONER MCDONALD: I thank you.

Thank you very much.

CHAIRMAN THOMAS: Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr. Chairman.

It strikes me, talking about the press exemption, if we extended it broadly, would the

exception swallow the rule? And I found myself thinking why would that matter? What would be the problem? As it stands now, if you have lots of money, you can get the press exemption. You can buy a newspaper; you can buy a radio station; you can buy a broadcast station. So in theory, the exception has already swallowed the rule for the rich, the really rich, I mean, the big, big money, not the merely wealthy individuals that Mr. Bauer refers to.

If we extend it to the press exemption, suddenly, we're saying that people with very little money can participate in that way. And I thought that was the purpose of the law. So I'm not sure why I would be concerned that all of a sudden, we'd have all kinds of small groups of citizens or individual citizens spending very little money to participate in the politics. I don't know why that would be swallowing the rule; I think that would be fulfilling the rule, in a sense.

And I mention that noting that, you know, a lot of the blogs that are most successful, as was noted for us yesterday by the witnesses; I mean, it's

true: if you look at a site like DailyKos, very successful site, one of the most successful sites. Technology, from a technological standpoint, they are very, very primitive. They are basically just text sites. They don't do the streaming video, they don't do much else, and they don't require a lot of money.

That's a kind of a lead-in to say that I have been surprised by what I sensed throughout this hearing has been something of a resistance to the idea that the press exemption should be widely extended, or that that wouldn't solve a lot of the problems. And I appreciate, Mr. Bauer, your point that it does, nonetheless, it expands the universe of people who now have to come to us and find out, do they get the press exemption?

On the other hand, for the most part, it's worked pretty well. I mean, there are complaints every cycle filed against CBS and, you know, a variety of big networks and station owners and so on, but for the most part, I don't think those are a big problem. They're fairly readily, fairly easily dismissed, and so, I really wonder that putting in a

good, making clear that Internet operations get the press exemption would not, in fact, solve a lot of the problems.

And along those lines, I want your instant lawyering here with some help on how do we deal with something that Commissioner Mason raised, which is how do we fit that into a statute that doesn't actually talk about the press as what you're putting out but talks about the press exemption going to the fact that it is put out by the facilities of a publisher or a broadcaster.

Could we say, for example, just or by a person, you know, for Internet activity or something like that, how do we kind of again fit that into the statute, which doesn't talk about the activity but actually gives it to the fact that you're a broadcaster or a publisher? And if people want to comment on my earlier kind of long intro to that, they're free to do that, too.

MR. BAUER: I'll be very brief: first of all, I think--I'm very sympathetic to your view that the media exemption protects big money and that we

shouldn't be concerned about working the interpretation of the media exemption so it admits smaller actors, smaller publishers. I completely agree with that, and I agree with you that the Commission has, on balance, though I can't recall each and every instance, and I'm sure if I could, I would be offended by some, that the Commission has by and large made the right call on the specific cases put before it.

Having said all of that, I think in principle, it's a high price of admission to the community of media organizations to have to come to the Government in any event. I mean, maybe the result is a good one, but the process is troublesome. But that's more in the nature of banging my fist on the table than probably being very helpful.

Item number two, I think that Commissioner Mason's suggestion that you could work with the term facilities is a reasonable one. For some reason, and it's something that we ought to all give some thought to, or at least I should. I don't think this is an insurmountable technical problem, that is to say,

working with the tool that you have, the statute, to find a way to execute upon a defensible, that is to say, immune from challenge choice of language or interpretation that would permit Internet facilities to be treated as broadcast facilities for purposes of the exemption. I just don't think that's going to be a huge problem.

COMMISSIONER SMITH: Let me just ask Mr. Cox, then, to comment, because most of his comments were directed to the media exemption, but I think--I mean, again, this won't be a standing alone provision; in other words, this would be part of efforts to, I think, create, perhaps, for example, broad exemptions for personal use of activity, computers for, you know, individual bloggers, maybe something, as Commissioner Mason has tried to get, some de minimis threshold.

So I would view it as one of a panoply of rules that would hopefully provide people with some protection in the sense that they can go ahead. And you're right: they would end up having complaints filed; they might have to come to the Commission, but

at least people would always have that defense, and I think it would make it a much more manageable situation. I wouldn't view this as the sole prop for trying to protect the Internet, but it strikes me as a very important one that people seem somewhat reluctant to use.

Mr. Cox, any thoughts on that?

MR. COX: I mean, I guess I would reiterate my previous comment, which I think the problem, the constraint that the statute still imposes on you, if I can be so bold as to suggest my own plain read of the statute is that it seems to me that individuals or groups of individuals would be covered as long as they're engaging in a periodical publication.

The difficulty is if they're engaging in something less than a periodical publication, and so, I guess my answer to that is certainly, I appreciate the broadest interpretation of periodical publication, meaning that it doesn't necessarily have to come out every week at exactly the same time or every day at exactly the same time, but it seems to

me that the facilities of a periodical publication could be, for a blogger, someone's living room.

COMMISSIONER SMITH: But the odd issue there is that I think, well, I know the Commission has, I don't think consistently has but has in some cases seemed to extend the press exemption to movies and books, which don't fit periodicals either.

MR. COX: Sure.

COMMISSIONER SMITH: So clearly, and I haven't heard anybody even in the reform community squealing about that, that they want to censor movies. So I think that clearly, they would give us some leeway to say well, you know, maybe it's not a classical periodical but--

MR. COX: I had to look at the statute again, because the way that you were talking earlier in terms of any publisher, I mean, if that is the language, and it doesn't appear to be, actually; it appears to say periodical publication, but if it's publisher, to me, there are a lot of analogies in defamation law or privacy law where publication is simply the minute that you tell someone else, that

that seems to me to be a definition that you could take, and you could say it would apply to an individual or to anyone.

But if it is periodical publication, then, maybe relying on some of the Commission's earlier rulings with regard to movies and so on, that periodical is a very broad term.

COMMISSIONER SMITH: Does the Chairman--

MR. GOLD: I agree, as a legal, technical matter, the way to use the press exemption here is that phrase, other periodical publication. And there certainly seems to be consensus, I think, that Slate, Salon qualify here. They can only qualify since they are only online, they can only qualify as an other periodical publication. That is the only way to fit them into that phrase.

And I think if they were to change content, they could change content, I think, many times during the course of the day. I think the notion of periodical could be adjusted to meet the unique needs of the Internet. It's not like a newspaper; you know, a broadcast facility is also a continuous

mechanism. That is a different word in the statute, but why should that be treated differently?

So I guess there is a root there, but again, the question would then be, you know, where do you draw the line even on the Internet? What is periodical, what isn't. You could take a pretty broad view and go pretty far along to fix it without changing the statute, I suppose.

COMMISSIONER SMITH: Thank you.

CHAIRMAN THOMAS: Well, we have already gone about 20 minutes beyond, 22 minutes beyond where we planned to be, but we have such distinguished guests with such expertise, I wanted to make sure that everybody had a chance to ask all of the questions they felt appropriate. I apologize to the succeeding panel. We'll see if we can sort of get back on track.

Let's take a break. It looks to me like we've got about seven minutes before 11:30 comes, so we'll see if we can get started. I'll gavel in at 11:30 sharp, and we'll only be 15 minutes behind schedule. Thank you again for coming.

[Recess.]

CHAIRMAN THOMAS: The second panel this morning consists of Jim Boulet--is it Boulet?

MR. BOULET: Yes, sir.

CHAIRMAN THOMAS: Thank you; executive director of English First; Mr. Mark Jaskulski--is that right?--student at Widener University School of Law; Kristinn Taylor?

MR. TAYLOR: Yes.

CHAIRMAN THOMAS: Of Free Republic.

MR. TAYLOR: Yes.

CHAIRMAN THOMAS: Thank you one and all.

Unfortunately, Mr. Charles Marshall, who was scheduled to testify with this panel on behalf of the North Carolina Association of Broadcasters was unable to make it today, but we will carry on. You probably have been waiting in the wings, and as you probably know, we're trying to keep opening statements to five minutes, and that little light will turn to an orange light when you've got about 30 seconds left.

So we'll go alphabetically, and Mr. Boulet, please proceed.

MR. BOULET: All right; I have a statement that I prepared. Then, I was listening to the first panel, and so I'm going to try to combine the two in my allotted time.

In one sense, I don't really belong here. I'm not an attorney, though I do play one on TV from time to time. But what I am is a practitioner and someone who has fiddled with the Internet and its various forms for a long time. So I like to think of myself as an English-speaking translator of computer speak.

There's so many things that go into my statement. I've been doing politics since 1976 in one fashion or another and seeing the technology change. In 1976, to use a computer required a trip to the computer center in the hopes of finding an unoccupied keypunch machine. Some of you may remember that. To some of you, I have just talked about the days when dinosaurs roamed the Earth. Now, you go to Starbucks; you sit in front of a free

wireless network; and you can do 10 times what I could do 30 years ago.

During the late 1980s and early 1990s, we would upload files to bulletin boards run by volunteer sysops, system operators, at the then-breathtaking speed of 14.4 fax modem capability. Sometimes, those files would be transmitted by the phyto network, within 24 hours, and we were stunned.

I built the first English First Internet site myself in 1996. I added a blog in 2002. And I hope that because of this--that's why I asked for your time today. I've seen some of these things, and if I could persuade the Commission of only one thing today, it would be this: regulating the Internet would be in no way similar to its experience or its expertise in regulating political campaigns or political mail in any way, shape, or fashion.

Say I wish to campaign against a Presidential candidate. If I commission advertising and purchase time for that advertising, I'm out real money long before I've reached the eyes or ears of a single voter. It is quite easy for the Commission to

easily identify every detail of those expenses I've incurred and determine how and by whom they're paid.

The amount of money at stake is substantial. Yet a few--we just saw this last month--a few unhappy Ohio Republicans could throw up an Internet Website in mere hours because they were made at Senator Voinovich. It cost very little. Probably done by College Republicans. I was a College Republican. You have a lot of time on your hands. Very little cost; the ability to identify the details of the expenses, to regulate that as some kind of in-kind campaign contribution is very limited. The amount of money at stake is nickles and dimes.

The Commission has so much work on its plate that the idea of chasing nickles, dimes, and pennies--what we will do, at English First, I pay a lawyer, I pay an accountant to do my PAC work. We will comply, whatever it takes. But is that the best use of everybody's resources to figure out how much, how to allocate 2,000 emails, say, that go out on behalf of something that's arguably political? If I put a disclaimer on there, and it is then stripped

out by a third party who forwards the email to his own list, there is just no way to cost that out that I can see.

The other problem in the email area that is something that really hasn't been discussed is that email doesn't work like postal mail. There is a certain guarantee that postal mail will get through, even if the address is mangled. Yet email, if you have one character wrong, a capital U, it won't go through. And what has happened is that people are finding out that it's not worthwhile to rent an email list, because half of them are no good; they've got old addresses on them. So you're much better off in developing an opt-in list.

Now, let's say--I'm trying to remember who it was; I believe it was you, Mr. Chairman, talking about a campaign sending out an email with a video attached that people could then watch. If I were to put out such an email, it would kill my list, and the reason is well, the press, many government agencies, Congress, has--my time has expired a long time ago--has broadband access, most people don't. And so,

when a friend sends me 10 pictures of her cat, it's 30 minutes to download it. I will not download video.

So we also have the concept, and I'll, you know, enter the rest of my statement into the record and just say the other area that hasn't been discussed is called spam-blockers. If I get an email from a strange campaign, I couldn't even--and I have this, which I'll give to the Secretary for the Commission--to try to order a product I wanted to buy, my email was blocked until I used his spam-blocker to tell him I was a real person, and I wanted to buy his product.

As that technology, you have the Mozilla browser that blocks popup ads, most of the ads, most of the things we talk about today if people hate them are blocked. And people really see their email box as something far more private than their postal box, so that regulation in this area, really, the people are going to take care of it much more than any campaign will.

I thank the Commission for its time today.

CHAIRMAN THOMAS: Thank you.

Mr. Jaskulski.

MR. JASKULSKI: I just want to begin by thanking the Commission for allowing me this chance to participate in the hearings this morning. I appreciate it.

As the Internet continues to blossom into a tool utilized by most of the key players in politics, the decision this Commission is about to make will no doubt have an effect on the elections of our future. Let me begin by telling you a little bit about my background and how I ended up sitting at this table today. It was a little over a year ago that the word blog became a part of my everyday vocabulary. I was preparing to attend my third national Presidential political convention last summer, and I wanted to have a place where some of my friends and family could keep abreast of my trials and tribulations, because when you attend a Presidential convention, you never know who you are going to run into.

In the past, I had some interesting stories and photos to share, but for the most part, I decided

to keep them to myself. That was before I started my Website and had a place where people all over the world could see what was happening in my life and what I thought of certain things that were occurring.

I started a Website on Blogger so that people could see these stories and pictures I uploaded. And it got me thinking, and I wanted to delve into this issue some more. Currently, I am a law student one semester away from graduating from Widener University School of Law, and election law is an area I find extremely interesting, but that did not happen recently.

The issue regarding the struggle between the modern day media and politics has been something that has interested me for years. For example, I can remember when I was in high school, and I was probably the only teenager excited about a new startup called MSNBC. I remember rushing home from school the day the channel began to broadcast, because in my heart, I thought the concept of a channel melding technology and politics and news was

intriguing. I find it amazing that almost 10 years later, we are still struggling with this issue.

Last fall, I took a class that covered election law, and that is how I ended up studying this topic that I speak about today, the media exemption and its relationship to bloggers. Over the past year, I've developed some strong opinions about how I think this Commission should approach this: bloggers should remain free from regulation, and the best way, I believe, to do this is by allowing bloggers to employ the media exemption.

Two-fifths of Americans who are online have read a political blog, and more than a quarter read them once a month or more. As the number of blogs and those reading them continues to increase, the amount of people commenting and reporting on political stories will also grow. In order for people to maintain this newfound role on the American soapbox, the FEC needs to extend the media exemption for all members of the blogosphere.

There are several reasons why I hold this belief: to begin, bloggers continue to gain

credibility in media circles and should be considered journalists who can employ the media exemption. For example, bloggers were out in front of the mainstream media and their reporting on such tarnished public figures as Senator Trent Lott, former CBS News anchorman Dan Rather, and CNN Chief Ethan Jordan.

In a scandal-ridden political society, America needs the bloggers to continue the work they do, unfettered by concerns of complicated campaign finance laws. Bloggers are journalists covering stories that the mainstream media are afraid to cover or stories traditional journalists simply do not have the time or resources to cover. Without bloggers, many big news stories that started on a whim would have been passed over.

In the years to come, America will increasingly rely on bloggers to do this dirty work, but any changes to campaign finance laws without a media exemption for bloggers will discourage their efforts. As news organizations have trimmed their budgets and avoided complicated stories, bloggers

have stepped in to provide coverage of many ignored areas.

However, one major issue clouding any vision of political bloggers as traditional journalists for purposes of the media exemption is the fact that many bloggers operate without formal ethical guidelines or a code of conduct. On the one hand, there are mainstream newspapers, network TV news and cable channels like Fox News touting their objectivity and promising coverage that is not tainted by partisan politics, and on the other, bloggers are reporting opinion news, news that reflects the individual blogger's own beliefs and preferences and tends to filter out dissenting views.

There are arguments on both sides when it comes to adopting a so-called bloggers' standard of care. So far, many bloggers resist any notion of ethical standards saying individuals ought to decide what is right for them. They consider blogging synonymous with a conversation, and you cannot develop a code of conduct for conversations.

In much the same fashion, longtime bloggers have circulated their own sets of guidelines that call for disclosing any conflicts of interest, publicly correcting any misinformation and linking to any sources of materials referenced in their posting.

It may be some time until bloggers adopt a uniform set of standards, but bloggers already have informally adopted norms that go beyond what traditional journalists do. Many people who argue that bloggers should not have the same rights as "authentic" journalists focus their attention, and you talked about this earlier, examining the fact that many bloggers opine more than they report.

The reality that many bloggers dedicate a good number of their postings to personally remark on the hot topic of the day should not disqualify them from the media exemption. In fact, this gives credence to the comparisons between traditional media and bloggers. Bloggers are simply taking advantage of advances in new technology to tell their story, and their passages resemble online editorial pages, similar to ones found in many newspapers today.

It seems hardly unfounded to allow the media exemption for editorial and opinion divisions of a newspaper while disallowing it for bloggers who do much the same thing on a daily basis. For purposes of the media exemption, the FEC should not go down the road, picking and choosing which people are and are not journalists, as technology changes the way news, information, and opinion is delivered.

The newspaper editorial pages supply commentary on a story on which their paper has reported on preceding pages. Editors and news directors traditionally have the job of sorting through possible leads and deciding which they are comfortable reporting. In much the same approach, bloggers usually refer by hyperlink to an online story or other blogger they find interesting, while explaining an issue and supplying their own editorial comments.

One of the only differences between the two is the fact that bloggers are oftentimes not doing the conventional reporting. The entry of bloggers into the opinion marketplace is a good thing for both

democracy and the press itself, and it should not be changed. More views are being represented; more subjects are being examined in detail, and that means more sunlight shines into institutions of all kinds.

As the numbers of voices speaking about various topics proliferates, the issue of credibility of a specific blog will also come into question. Be it proper or not, readers generally know what to expect from editorial pages of the New York Times or the Washington Times, and the same can be said for blogs. Depending on their political outlook, a reader can judge for himself or herself who has the more fitting analysis.

To simply say that blogs cannot be afforded the journalistic media exemption because they engage primarily in opinions is just not suitable. I thank you once again for your time and attention. I look forward to answering any questions.

CHAIRMAN THOMAS: Thank you.

Mr. Taylor.

MR. TAYLOR: Thank you.

My name is Kristinn Taylor. I am here speaking on behalf of James C. Robinson, founder, president, and principal owner of FreeRepublic LLC, which owns the electronic bulletin board known as FreeRepublic.com. I ask that the following statement and supporting documents be entered into the record.

FreeRepublic.com is a news analysis and activism Website. It is one of the most popular and influential politically oriented sites on the Web, with over 200,000 registered accounts, some inactive or revoked, and many times over that number of people who freely read the site without posting to it.

FreeRepublic.com is read by officials at the highest levels of government in all branches. It is also read by major political parties, the media, talk show hosts, Americans all across the country, and people from around the world. FreeRepublic.com is a living embodiment of what the founders had in mind when they enshrined the First Amendment in the Bill of Rights. FreeRepublic is dedicated to advancing conservatism and defending the Constitution of the United States.

To that end, Mr. Robinson issued a statement on March 22, 2004, to make clear to all who visit and wish to participate on his Website his goals and principles, excerpts from which I will quote. In our continuing fight for freedom, for America, and our Constitution and against totalitarianism, socialism, tyranny, terrorism, et cetera, Free Republic stands firmly on the side of right, i.e., the conservative side.

Free Republic is private property. It is not a Government project, nor is it funded by Government or taxpayer money. We are not a publicly owned entity, nor are we an IRS tax free nonprofit organization. We pay all applicable taxes on our income; we are not a part of or funded by any political party, news agency, or any other entity. We sell no merchandise, product, or service, and we offer no subscriptions or paid memberships.

We accept no paid advertising or promotions. We are funded solely by donations, non tax deductible gifts, from our readers and participants. We aggressively defend our God-given

and First Amendment guaranteed rights to freedom of speech, freedom of the press, free exercise of religion and freedom to peaceably assemble and petition the Government for redress of grievances. We also aggressively defend our right to freedom of association as well as our Constitutional right to control the use and content of our own personal property.

Despite the wailing of liberals and others who do not share our purpose, we feel no compelling need to allow them a platform to promote their repugnant and obnoxious propaganda on our forum. FreeRepublic.com is not a liberal debating society. We are conservative activists, dedicated to defending our rights, defending our Constitution, defending our republic, and defending our traditional American way of life.

Our God-given liberty and freedoms are not negotiable. May God bless and protect our men and women in uniform fighting for our freedom, and may God continue to bless America, signed by Jim Robinson.

Let me repeat, our God-given liberty and freedoms are not negotiable. We do not come here on bended knee begging Federal masters for relief. We do not come here to pledge our fealty to Lord John McCain, nor to Lords Feingold, Shays, and Meehan. We do not come here to bow before the black robes of Her Majesty Kollar-Kotelly. No, we come here to say hands off the Internet, hands off the First Amendment, and hands off Free Republic.

We are here because our system of checks and balances has failed. Congress passed a law they knew to be unconstitutional. President Bush signed the law, knowing it was unconstitutional. The Supreme Court, in its ruling, threw out the Constitution, once again reaffirming the principle that the plain language of the Constitution does not mean what it says but only what five justices in black robes say it means.

While this Commission has commendably tried to minimize the impact of BCRA on the Internet, even this modest proposal by the Commission is a proverbial camel's tent under the tent. Groups like

FreeRepublic.com and our members do not have the resources to fend off attacks by the Government and lawyers who wield the law as a weapon of political intimidation and control

Recently, the Communist government of China has tightened its grip on the Internet. All China-based Websites must register with the Government. All Internet cafes must register with the Government. Major Websites must sign a code of conduct approved by the Government. Incredibly, the American company Microsoft has kowtowed to the Communist Government of China by blocking words like freedom, democracy, and human rights from its blog hosting service in China.

Surely, this Commission does not want to be known as the agency that followed the lead of the Communists in China by restricting political speech on the Internet.

Thank you.

CHAIRMAN THOMAS: That was pretty close to five minutes precisely. Very good. Thank you one and all.

We are going to run the questioning first with Commissioner Mason.

COMMISSIONER MASON: Thank you.

Mr. Jaskulski, you discussed in your testimony the need for--I think you put it the need for ethical guidelines or a code of conduct, and I wanted to try to understand, are you suggesting that the Government needs to mandate ethical guidelines or a code of conduct, or just what relevance would that have to our proceeding here?

MR. JASKULSKI: I guess a way of--I talked about this with Carol Darr. I talked to her on the phone, I spoke with her. And she said that the way that--there is no way for this Commission to sit down and look through and do exactly what you had said.

I'm just saying that that's a way for people who run a blog that if they want to gain some type of--I guess, like an opinion page on a newspaper, they're going to have their own guidelines that should be followed, and I guess I'm saying that to gain some credibility, rather than any blogger putting anything what they want out there, and I

think that may be something for you to look at; I don't know how this Commission would implement it, but that might be something that could be looked at.

I don't know if I answered your question.

COMMISSIONER MASON: Well, I think just to make it clear, you're not suggesting that we draw up a code of conduct which--

MR. JASKULSKI: No.

COMMISSIONER MASON: --we would impose or which we would use to say, well, because somebody has followed this code of conduct, then, they are media, and they get the exemption, but if they don't follow a particular code of conduct, they aren't.

MR. JASKULSKI: I guess from my studies of this, there is some type of a code that has to be followed in order to be able to employ the media exemption, in order--you have to be in the ordinary study of--in the reporting of news. I don't know what the exact wording is. And so what I'm saying is that maybe that might be a way to connect that with blogs, that you cannot be just--with the NRA News, they had what they were trying to do there, and they

had to, in order to do that, they had to do both sides.

They have to be equal access, and that's kind of what I'm saying. I'm not saying equal access purchase words, but they have to allow for both--they have to actually be a legitimate news source is what I'm trying to say, and I guess that's going to be kind of hard for a blog to do that, when most of them are very partisan, and I know that's what most of them would say.

COMMISSIONER MASON: Are you suggesting, then, that it's your opinion that most blogs shouldn't be covered by the media exemption? I don't mean to be hard on you, but you came, and you volunteered, and these are the questions we need to have answered, and so, you know, I'm asking your opinion about that.

MR. JASKULSKI: No, I completely understand that. I would consider bloggers journalists, and I guess that they should be allowed the media exemption. And I guess the code of conduct is

something that--I don't know how to respectfully answer your question; I'm sorry.

COMMISSIONER MASON: Mr. Taylor, I'm against the ChiComs, too. My question is in terms of your activities, you don't take advertising. Part of our proposal has to do with that, so you seem to be okay.

MR. TAYLOR: But we have run a banner ad or two from, I think, one exploratory campaign and maybe from some others--

COMMISSIONER MASON: But that was your choice to do that.

MR. TAYLOR: Voluntarily, yes, yes, there was no money exchanged.

COMMISSIONER MASON: So Mr. Robinson or whoever was in charge of the content on the site decided there was a candidate that he liked, and so, he would put that candidate's banner up.

MR. TAYLOR: Yes.

COMMISSIONER MASON: But it seems to me in other respects, you've described something which, arguably, would fit within the media exemption, that

is, you have a publisher, Mr. Robinson; you have contributors, and the genius of the Internet is instead of having 20 writers, you have 200,000 writers.

But I just want you to think about your activities and think about the specifics of our proposal as you understand them, and to say do you understand that if properly applied, the media exemption and/or the individual volunteer exemption, which would cover a lot of your individual contributors, would combine to protect your site against regulation?

MR. TAYLOR: We understand that, but on the other hand, we also have a problem with the whole idea of political speech and activity falling under regulation of the Federal Government, especially when it comes to the right of the people to influence the makeup of that government.

Now, campaign finance reform laws have been referred to as incumbent protection acts, and the proof is in the pudding, with the reelection rates of incumbents. And it is very difficult for unknowns to

get noticed without having lots of money or having ways of publicizing their campaigns. You know, we will take whatever exemption is given us, but on the other hand--

COMMISSIONER MASON: I appreciate that, and I just want to make a comment, because I know my time is up. But to the extent that your complaint is with Congress or the Supreme Court, I probably join you, all right? And so, what I do want to make sure we focus on is what we're doing, and if there's something wrong with our regulatory proposal, you know, then, let's hear it. We're open to it. But don't mistake us for having been the ones who passed the law or issued the judicial decisions construing it.

MR. TAYLOR: I thought I made that in my statement, where I commended the Commission for their restraint so far.

CHAIRMAN THOMAS: Commissioner McDonald.

COMMISSIONER MCDONALD: Mr. Chairman, thank you. Jim and Mark and Kristinn, thank all of you for coming today.

I will be brief. I want to go back and pursue just a moment the questions by Commissioner Mason. Earlier, my valued friend Commissioner Smith pointed out, and I take his point, by the way, because my goal is not to agree with the panelists on any side. My goal is to try to pose some questions so that we can have a dialogue.

He pointed out in the last panel that it may not be all bad that the press exemption be extended wide and far, and that may well be true, by the way. But in the same exchange, Commissioner Mason pointed out we're still confronted with some statutory constraints, and I realize, taking Kristinn's point, that I gathered from what you said you may not be too enamored with either the FEC law or the Supreme Court, and you may not be the only person who has that point of view, although I can't imagine anyone not liking us, but if that's the case, I'll accept it and go on.

But for any of you, and I really am just trying to get at this, because going back to the point made by Commissioner Mason just now, first of

all, it's important to remember why we really are here, and I want to clarify that we're not responsible for the start of World War II either, so we're just trying to get at a very narrow area.

And do any of you see in the press exemption--maybe I'll start with you, Mark, as a new lawyer to be and someone who has taken a great interest in this area--is there a scenario that you see that someone, by just the mere pronouncement that they are indeed journalists, would not be able to avail themselves of the press exemption? Not passing, by the way, on whether that's good or bad; I'm just trying to figure out if there is any scenario that you would see that that would be the case.

MR. JASKULSKI: I've read some things about this where they had said, like, to be a lawyer, you have to pass the bar; to be a doctor, you have to pass--to be a journalist, there is nothing that you have to do. And I think that what I was trying to say is--

COMMISSIONER MCDONALD: This will be news to the journalists, the mainstream journalists, but nevertheless, I take your point.

MR. JASKULSKI: Well, I was a journalism major, so I spent four years doing it.

COMMISSIONER MCDONALD: I take your point. Wow, this is getting tougher by the moment; all right.

MR. JASKULSKI: What I'm trying to say is that a code of conduct, while you most likely would not be able to employ that, may be a way for them to either, if Congress were to approach this issue or if the bloggers on their own were to approach this issue, that might be a way for them to sort of raise their standing, I guess a little bit of it. And I don't know if I'm stating it quite the proper way, but I think that a code of conduct would sort of-- there's people like the editor of DailyKos versus somebody who has just started a blog this morning who is just posting random things; there's a difference between the two, and they've gained some credibility. He's been doing it for years.

So I think that's all I'm trying to say, and as opposed to he's going to follow a different ethical standard versus somebody who's just--that can be an 11-year-old child doing it on their summer vacation.

COMMISSIONER MCDONALD: Absolutely, but let me pursue that for a second. But he had to start out at the same spot as whoever started this morning.

It goes back to the incumbent question. I would point out to Kristinn that incumbents long before the FECA came into effect, I might point out, were routinely winning reelection. This is not peculiar. I'm not arguing whether it may not be--I would submit maybe reapportionment has more to do with success than anything else, but whatever it might be, this is not particularly newsworthy, and I might also say--

COMMISSIONER SMITH: I just want to go on the record. I think it's the quality of the incumbents.

[Laughter.]

COMMISSIONER MCDONALD: And I just want to go on record whether--

COMMISSIONER SMITH: Who are the ones who laugh?

COMMISSIONER MCDONALD: And I just want to go on record with my good friend that I couldn't agree with him more; once again, bipartisan support.

But the fact of the matter is that all incumbents were either challengers at one time, or there was an open seat. I mean, no matter who is sitting in Congress, they were a challenger, or at least they weren't the incumbent. And so, I guess I kind of get back to square one about this, in terms of I take your point about establishing yourself over time, and that certainly enhances your credibility.

But if you start today, and you have at least the same standards, whatever those might be, maybe it's ethics; maybe it's background or so on and so forth, I guess my question is still the same: are you, by the nature of announcing you are a journalist, would that make you one in terms of the

press exemption, I mean? Not arguing whether it's good or bad. I'm just trying to understand what--

MR. JASKULSKI: I guess the product that you produce would make you a journalist. Anybody can sign up and can go to journalism school. And I went to journalism school and found out I wanted to be a lawyer, so it's, you know, anybody can go through school. It's the fact of when you finish, or even if you didn't go to school--many journalists didn't even go to school--it's the fact of what you produce and whether it's--you're going to lose your credibility; I mean, you see stories every day of journalists, not every day, but, you know, Jason Blair and other journalists who I would say most people would say they're not journalists now because of the things that they've done. They've lost credibility. I mean, he's not going to get hired somewhere; and then, he writes a book, but that may answer your question. I mean, everybody writes a book.

COMMISSIONER MCDONALD: Lawyers and doctors, too, by the way. No, I take your point.

I thank you.

CHAIRMAN THOMAS: Let's move on to Vice-Chairman Toner.

VICE-CHAIRMAN TONER: Thank you, Mr. Chairman. I want to thank all the panelists for being here today. I particularly admire Mr. Jaskulski, you coming, being in law school and sharing your time with us, and I guess you've earned the right to critique journalists, having sat through four years of that curriculum, and we understand your point of view on that.

Mr. Boulet, I'd like to begin with you. On page 6 of your comments, you talk about the challenge of regulation focusing on spamming, and you say at the top of page 6, the Commission's efforts to regulate unsolicited email in any way will inevitably founder. This is because the true spammers set up shop outside the jurisdiction of American law just like the online gambling sites do.

I'd like your thoughts, if you could elaborate on that, and is it basically your view that any type of effort to distinguish between unsolicited and solicited email is going to be problematic

because the truly sophisticated actors are just going to go offshore?

MR. BOULET: That is one of my points there, and I'd amplify this way as a practitioner, as somebody with a Website, with an opt-in mailing list. I have no way of telling where that name came from other than that it purports that I'd like to receive your mail.

Now, if I wanted to destroy some other group, you know, you have an intern just sit there and type in email addresses to people, and then they're your people, and then, they email and say I've received this unsolicited email. There's just--in this area, I marvel every time that I put out a legislative alert that I get email back saying take me off your blankety-blank list.

Well, you were never on my list, but you were forwarded, and depending on what people do, if you're aggressive and--once, as we know, money and politics will, if someone feels a need to use political spam, the gambling sites have shown that; you set up a Russian site; you set up a site in

India. There's really no way to curtail speech in this area.

VICE-CHAIRMAN TONER: Is it your concern that if we were to proceed in that fashion, it would be the people who are in this country, the people who are not as sophisticated, who might be subject to restriction, whereas, those who have the means to be offshore, who are more sophisticated, would go free?

MR. BOULET: That's precisely my point. I think that the one overarching thing we have here is regulation in this area is much more likely to trap Uncle Joe and Aunt Minnie than me.

VICE-CHAIRMAN TONER: I don't know who Uncle Joe is, but I'm confident we don't want to trap him.

MR. BOULET: He's an ordinary citizen.

COMMISSIONER MCDONALD: That was an old Russian term, actually.

[Laughter.]

VICE-CHAIRMAN TONER: Uncle Joe.

COMMISSIONER MCDONALD: In Moscow.

MR. BOULET: But yes, also, touching on the journalism area, which I can't help myself--

VICE-CHAIRMAN TONER: Please, you can pile on the journalists as well.

MR. BOULET: No, actually, I think I are one, because I contribute to National Review Online from time to time, and I've been identified as a "lesser Cornerite." The curious thing is National Review Online has a much better readership than my own blog, but under the media exemption as I understand it, if I contribute to National Review Online, it's protected free speech. Yet, that identical posting on my own blog might be questionable.

Yet, my own mother doesn't read my blog. So you have the odd thing of trying to regulate that which is read the least, regulating the people who know the least, whereas those who have legal advice will take it.

VICE-CHAIRMAN TONER: We deal with that from time to time here, and we've heard from plenty of lawyers today who represent people.

I want to get a sense on your thoughts in terms of blogs and whether or not it's your view that, look, blogs have come to the fore in the last couple of years, and there could be an argument that they should be within the press exemption but that we should be technologically neutral in whatever we do, because there are a lot of other online activities that are not blogs. What are your thoughts on that?

MR. BOULET: I had the chance to listen to the last panel, so I've had more time to compose my thoughts than some others have had. I think if your Web pages rather than--because a blog is just a Web page--if it's a Web page on the Internet, however defined, it's a free speech. It's a public communication by definition.

VICE-CHAIRMAN TONER: Is it your recommendation that the most technologically neutral and encompassing term we could use is Web page?

MR. BOULET: It's my thought today. I would give that more thought. You need to somehow capture that anything on a Website has to go up with certain code, whether it's--you know, and so, if you

say a Web page, that won't protect email; Internet communications, which include Web pages, email.

There's a dialogue feature on FreeRepublic and some; that those should be protected. We don't want FreeRepublic or me--I don't allow feedback on our blog or on our Website, because some nut posts something, and I'm busy doing something else, and it's my fault that it's there. So we don't--but they take some responsibility. That should be protected. We really need more discussion of politics in this country rather than less.

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

CHAIRMAN THOMAS: Thank you.

Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Well, I wish that a journalistic code of ethics would prevent journalists from misquoting me. I'm sitting here, and I see I was misquoted on C-NET as having asked yesterday what's the best way for us to regulate bloggers, when, in fact, what I asked was

what's the best way for us not to regulate bloggers? So, all those C-NET readers out there, don't send me your complaints. I didn't ask that. I don't want to regulate bloggers.

Anyway, I want to just briefly talk about email. And that is we have a regulation on the books right now, which I did not--wasn't here when it passed that says that if you send 500 substantially similar emails advocating the election or defeat of a clearly identified Federal candidate, you have to have a disclaimer on it. That strikes me as a very silly rule, one that is probably widely ignored to the extent that anybody even knows it exists, and it's kind of silly for us to have such a silly rule on the books.

Now, what we had proposed to do was to add a layer to that and say only if you buy an email list and sort of root out all of the people who just kind of have big address books, and they want to, you know, get excited about the election and say hey, everybody should vote for my candidate, or vote against the other guy, who's a bum.

But a number of people have indicated that they have various concerns with that approach. And I'm beginning to think that the better way of doing this would just be to repeal that regulation altogether. Are there any circumstances that we should be worried as a Commission about regulating people's email?

MR. TAYLOR: No; just let it go. As Mr. Boulet said, you know, it will be a nightmare to enforce.

COMMISSIONER WEINTRAUB: I agree with you. It's been on the books for two years, by the way.

MR. TAYLOR: And nobody knows about it. I didn't know about it, you know. And, you know, as someone said yesterday, the people putting yard signs up, going door to door, they don't think about the FEC when they're doing those things, and they shouldn't. And people that are sending emails around, they shouldn't worry about it, either.

You know, the purpose of the Commission and the laws is to root out the evil influence of big money, you know? You know, big money is still out

there. Little people shouldn't have to worry about it, and I really don't even think big money ought to be regulated that much. Just let people exercise their freedom of speech and, you know, let the public decide.

And the public is not stupid, and they're not that gullible, and they're not that easily swayed. We have a vigorous political debate in this country going on every election cycle, and it's more people are getting involved, and I think the more regulations we put on people and corporations and labor unions, for that matter, the less robust the dialogue is; the less people feel free to participate if they have to think, well, gee, is there some regulation out there that I'm going to fall afoul of?

So when it comes to email, just let it go.

MR. BOULET: I would agree, and I would just add this, briefly: in an era of spam filters, which we've arrived at, I didn't get the bill for my Internet renewal, because the spam filter said--so, I think the chances of unsolicited political email getting through are getting less and less, I mean, to

the point where, as I say in my remarks, the utility of mailing an email list for political purposes is zero.

COMMISSIONER WEINTRAUB: And following up on some of your comments in your opening statement, Mr. Boulet, some people have expressed concern about, well, what if the email has an attachment, and the attachment has a slick video, and it's, you know, and it's very expensive, and somebody puts a lot of money into it? I gather that your view would be we really don't have to worry about that, because, a, people aren't going to download it, because it will take up too much--it will take too long for most people. I know I have--sorry to admit this--dialup at home, and it takes me forever to download, as I say, five pictures of somebody's cats. And I'm a dog person, so I would never do that.

MR. BOULET: Thank you.

COMMISSIONER WEINTRAUB: But I gather you don't think that's a problem we need to be terribly concerned about.

MR. BOULET: Especially, browsers are now moving to where the email product I use lets me see what's on the server, and if I don't recognize the name, and it's some big whopping file, it don't get downloaded, it doesn't get downloaded. And more people are going to that.

COMMISSIONER WEINTRAUB: Any disagreement?

MR. JASKULSKI: I think one other thing I wanted to add is what's the difference between if somebody writes it in an email versus if they put it on their blog? If they write the same thing on their blog, and they email it out to 501 people, they shouldn't be able to do that versus if they put it on their blog, it's allowed. I mean, that's kind of not fair, I guess, would be the word.

COMMISSIONER WEINTRAUB: And I want to be clear that right now, even now, in this rule that we've never actually enforced against anybody to my knowledge, it's only a disclaimer requirement. It doesn't ban these kind of things. But I think it is kind of silly.

I yield back the balance of my time, Mr. Chairman.

CHAIRMAN THOMAS: You didn't have any to yield.

[Laughter.]

COMMISSIONER WEINTRAUB: Oh, did I?

CHAIRMAN THOMAS: You were right on the money.

Let me just scratch a little bit at this media exemption concept. You know, the media exemption is phrased in a way that suggests that if you've got some sort of media entity and use of facilities, it can't enjoy the press exemption if it's something that's owned or controlled by a candidate or a party committee.

And one issue that's come out is, you know, what about the hypothetical, I guess it is, it's sort of based on what happened in the South Dakota Senate race, but what about the hypothetical where you're starting to see bloggers being paid by candidates to basically put up friendly commentary?

And I suppose the question, the media question is should there be some sort of disclaimer requirement there, and to put it in the legal context, right now, the statute says that if someone basically puts out--basically makes a disbursement or expenditure for some form of general public political advertising that in the case of a candidate's own political committee, if it's paying, there does have to be a disclaimer saying that the candidate's campaign organization paid for it.

If it's put out by someone other than a candidate's own committee, some sort of political committee entity, then, there would have to be a disclaimer if the message contains express advocacy or solicits contributions for some under Federal election concepts.

So I guess my question is given the way the media exemption is built with this idea of it doesn't apply where a candidate or party committee owns or controls the facility in question, does there come a point where payments from some candidate's campaign or maybe from a party committee to a media entity

constitute that level of control such that we'd say, all right, at that point, you don't get the media exemption; at that point, we're going to consider you a controlled entity of the paying candidate or party committee; and at that point, basically, what's happening is the candidate or party entity is paying for that service, so there has to be a disclaimer?

Any reaction to all that sort of stepping through the legal boundaries we've got?

MR. JASKULSKI: I think that the disclaimer is something that needs to be done, and Professor Rick Hassan, who writes the election law blog, has written a lot about this, and he has said that you need to put a disclaimer on every page of a blog, you know, each link of a blog, each entry into a blog can be linked to, and you don't see the rest of it.

So if you're just putting a disclaimer on the main page, then, somebody who is going directly to somebody who's written, you know, their third entry on, you know, June 15, they may not see a disclaimer. And that's something that needs to be

done. I think you need to put a disclaimer on every single entry just like you would every email.

CHAIRMAN THOMAS: In a sense, no matter how much has been paid, no matter whether the payment might just be a relatively small part of, say, the operating budget of some Website?

MR. JASKULSKI: I think most people would want to know if what they're reading is really the words of that person or whether they're getting paid to write something for that. Most people would want to know that. Americans would want to know that. And what's the harm on just telling somebody this person is employed by such and such or being paid by such and such candidate? I don't think there's any harm with that.

It's not saying don't read it or whatever; the person has a choice to read it, just the same as if somebody who doesn't want to--a person who is a former Congressperson who is working on a TV station, they're going to get paid for their thing; obviously, they're not an elected official anymore, but they're still--people would want to know they're getting paid

as a contributor versus just somebody on, say, somebody who goes on Fox News, and, you know, Joe Scarborough, for example, has a TV show on MSNBC, people would want to know that he's getting paid by MSNBC versus if he's just going on there and giving a comment.

I don't know if I said that clearly enough.

MR. BOULET: I see our light is on, but let me say I couldn't disagree with my friend more, for a couple of reasons: you need bright lines in the law. That's what this Commission should be about. And it should also be about laws that are enforceable. Now, right now, if a campaign makes a payment to English First, you know, they don't, but, and that's solicited, so you have something to track.

But if money is contributed by a third party on behalf of--it becomes just a real nest of--I mean, to my mind, there are some days when I read the Washington Post, and I think it should have a disclaimer paid for by the Democratic Party. And, you know, others would look at the Washington Times and say there should be a disclaimer on that, too.

I also think that it's a distinction; I think most people would be surprised if Joe Scarborough wasn't paid to be on TV. I just really think that the South Dakota thing, the press will take care of that in any election: any Website, any blog that becomes rah-rah one guy, they'll be looking into it.

MR. JASKULSKI: The whole issue, that came out through a blog with the whole South Dakota thing, so if it wasn't for the blogs, and if they weren't allowed to do what wanted to do and report, being unfettered, they wouldn't be able to go out there and do that.

CHAIRMAN THOMAS: Okay; I've used my time. Thank you.

Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr. Chairman.

Okay; Mr. Taylor, I want to first make sure I've got this. So Free Republic is an incorporated entity, an LLC.

MR. TAYLOR: Yes.

COMMISSIONER SMITH: And it relies for income on gifts from people who read the site or account holders at the site.

MR. TAYLOR: Right.

COMMISSIONER SMITH: Can I ask how much the site costs a year to run?

MR. TAYLOR: As stated on the home page of FreeRepublic, the annual budget is about $260,000.

COMMISSIONER SMITH: About $260,000. So basically, we've got--how many people donate? Can I ask that? Do you know that number?

MR. TAYLOR: It's probably in the low thousands.

COMMISSIONER SMITH: Okay; so we've got a few thousand people donating money to a site, and what is the mission of Free Republic?

MR. TAYLOR: To advance the cause of conservatism and to defend the Constitution of the United States.

COMMISSIONER SMITH: Does that often entail getting into people discussing and posting about political campaigns?

MR. TAYLOR: Every day.

COMMISSIONER SMITH: And specifically saying who they want to win or lose those campaigns?

MR. TAYLOR: Yes, sir.

COMMISSIONER SMITH: So we've got a couple of thousand people contributing money to an organization whose primary goal is to advance conservative policies, and on a regular basis, they advocate for or against particular candidates that they think will do that.

MR. TAYLOR: Yes.

COMMISSIONER SMITH: I don't mean to be sanguinous or to take away from the sanguine attitude of my colleague, Commissioner Mason, but that sounds a lot to me like a political committee under the FEC's regulations. So then, and that would be a big problem for you, I would suggest.

MR. TAYLOR: Yes; it would not only be a problem for us; it would be a problem for the Democratic Underground site.

COMMISSIONER SMITH: That's right; it would be a problem for a number of groups.

Now, we've talked a lot, and one thing I think some of the commenters have said is don't focus on blogs, per se. Or as Mr. Boulet said, Websites or something else. I do think to some extent, we've used blogs as shorthands for sort of the whole array of types of Websites, but it is a point that I've had about groups like Democratic Underground and Free Republic.

Even if we used the press exemption and extended it to the Internet, to Websites, could we extend it broadly enough to cover an organization such as Free Republic? I mean, unlike, say, Slate or Salon, Free Republic doesn't really look like a newspaper, or unlike, you know, NewsMax, doesn't really look like a newspaper, and it doesn't really carry news stories other than reprinting things that I guess people post up there.

MR. TAYLOR: If I could say, sir, there is regularly independent reporting being done on Free Republic. You know, I've written independent reporting stories myself; other people, like the man who just whispered in my ear, John Armour, has done

so. You know, as I mentioned and submitted testimony, we broke the story that there was trouble with the Space Shuttle a couple of years ago.

Political news is broken on Free Republic. So, you know, we do a lot of news, but, you know, we also, you know, have a definite political point of view. Mr. Robinson's position is he wants to advance conservatism. And if by electing more Republicans covers that goal, fine. If Republicans won't do the job, then, you know, we'll look to somebody else to advance the cause of conservatism.

So it's not, you know, blindly supporting one party. It's supporting people who share the same ideology.

COMMISSIONER SMITH: But either way, a lot of that results in direct political advocacy.

MR. TAYLOR: Unfortunately so. We are Americans, and, you know, we do believe in exercising our rights. And like I say, you know, it's unfortunate that, you know, you're bringing that up here like, you know, are we a committee that has

escaped that notice or the tentacles of the Federal Government. That is very disturbing.

COMMISSIONER SMITH: It may have been a dangerous thing for you to appear here today.

MR. TAYLOR: Yes, it is, you know?

COMMISSIONER SMITH: Well, I don't want to--but I think it just suggests to me that either a site such as yours, Democratic Underground, and I know some other basically forum sites would have real problems unless the press exemption were to cover them, and that would require us making sure that when we define anything like that that we made sure that we were defining the press exemption quite broadly, because I don't think it's obvious to a lot of people that a Free Republic or a Democratic Underground would fit in there.

I think, again, my colleague, Commissioner Weintraub, said yesterday that some sites just feel more like, and I think that's kind of true, a Salon or a Slate or a NewsMax, but, you know, there could be some problem, and we have to address that.

COMMISSIONER WEINTRAUB: I don't think I said anything like that, just to correct the record.

COMMISSIONER SMITH: I wrote it down in my notes, but in any case--on the disclaimer issue, Mr. Boulet, you said nobody pays you anyway, no campaign pays you, but if some campaign were giving money to English First, right, and you went on CNN or C-SPAN or MSNBC, you wouldn't have to have a disclaimer that, oh, by the way, I'm paid by the campaign, would you?

MR. BOULET: Not that I'm aware of.

COMMISSIONER SMITH: That's not my understanding of the law, either. So to require a blogger to put that kind of disclaimer on would actually be an expansion of the law to bloggers that doesn't apply to other people who are using the press.

MR. BOULET: I hadn't thought of that. You're exactly right.

COMMISSIONER SMITH: Okay; well, I see I'm out of time, so I won't try to pursue that line of questioning. Maybe we'll get back to it.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: General Counsel Larry Norton.

MR. NORTON: Thank you, Mr. Chairman. I don't have any questions.

CHAIRMAN THOMAS: Jim Pehrkon, staff director.

MR. PEHRKON: Yes. Thank you, Mr. Chairman, and welcome to the panel.

I'm trying to get an idea: we've got a sense of the Free Republic Website and the sort of scope of their operations in dollar terms.

CHAIRMAN THOMAS: Microphone, Jim.

MR. PEHRKON: In terms of the other organizations and the other sites, could you give us a quick sense of how much money do you spend each year? How many employees? What's your operating budget and the type of things that you actually do?

MR. JASKULSKI: I do mine completely free. $8 just to update the domain name; that's all I do, and it's just me doing it, and it's pretty much just

pictures of, you know, the things that I've done and everything.

MR. BOULET: I need to talk to your domain provider.

[Laughter.]

MR. BOULET: The one thing that I've definitely seen is the Internet can be a money pit, and as consultants come in offering to do things for me, I find that their prices are very high, and the sites look really nice and take forever to download.

I've built a site with commercially available software. Let's say that over the time that it's been up, since 1996, I've probably spent about $1,000 for software, my time. We rent all of the space on a provider. It's $14 a month. The domain is--I'm doing this from memory--$70 for three years.

MR. PEHRKON: So less than $1,000 a year.

MR. BOULET: That would be fair.

MR. PEHRKON: That's the only question I have.

CHAIRMAN THOMAS: We'll go back through.

Commissioner Smith, I believe.

COMMISSIONER SMITH: Well, as we try to get back on schedule, I guess I'll just say I appreciate--I'll just let things go at this point. I appreciate your coming in again. It's nice to see some people who aren't in the usual circuit and especially Mr. Jaskulski, I appreciate your coming down. I didn't see it anywhere in your comments; if it's there, I missed it. What's your blog site?

MR. JASKULSKI: Readtheblog.com

COMMISSIONER SMITH: Readtheblog.com. All right; there is your plug. I'll look at it.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Thank you.

I have no additional questions. I do want to thank you all for coming. I think it's very important that we get the perspective of people who are working in this area and have very practical experience with all of these rules that we here are dealing with, and in some sense, we have an obligation to deal with, but we, I think, this helps

us appreciate the difficulties. Thank you. Let's see.

Commissioner Weintraub? Anything more?

Vice-Chairman Toner? Nothing more?

Commissioner McDonald, I don't think, has anything more.

Commissioner Mason, nothing more?

Any other questions?

Well, thank you all, then, one and all for coming.

Any last comments or thoughts? I guess I should offer up a last chance.

MR. TAYLOR: I appreciate Mr. Smith pointing out a potential problem for groups like Free Republic and others. We, unfortunately, are stuck with the laws that we have and the orders of the court, and, you know, we vigorously disagree. We believe that the First Amendment belies what it says and that it is absolute.

And I would hope that if any Commissioner who sits here as a Constitutional officer finds that the laws and the orders of the court violate the

Constitution and their conscience that rather than disobeying that they would resign in protest. They would not be the first person to resign from the Government when they feel that the Government has gone too far.

CHAIRMAN THOMAS: You're the only one who has suggested that.

[Laughter.]

COMMISSIONER SMITH: Senator McCain has suggested that to me several times.

[Laughter.]

CHAIRMAN THOMAS: That's true. I guess today, you're the only one.

Again, thank you all for--

MR. BOULET: We want to break for lunch, but could I make Commissioner Weintraub feel a little better? A couple of things when we talk about journalists: you know, UNESCO has refused to define one, because they said once you define a journalist, you can regulate them, and they're against that, so we even have international law on your side.

But I found that when I talk to a real journalist about a story I participate in, I can go through the article and play count the mistakes. Yet when I read a story about you, I know every word of it must be true so--

[Laughter.]

COMMISSIONER WEINTRAUB: I've had the same experience.

MR. BOULET: And this is where the Internet and the blogs are so useful as a corrective for that sort of thing. And I thank you all for your time today.

CHAIRMAN THOMAS: Thank you. We will recess, unless Commissioner McDonald wants to ask any more questions.

We will recess. We will take up again on schedule, if possible, and we will gavel back at 2:15.

[Whereupon, at 12:36 p.m., the hearing was recessed, to reconvene at 2:19 p.m., this same day.]

A F T E R N O O N S E S S I O N

[2:19 p.m.]

CHAIRMAN THOMAS: Good afternoon one and all. Our special session will please come to order. Welcome back from lunch.

We have one more panel of witnesses to hear from this afternoon. For those who haven't already witnessed our little process, we're asking opening statements to be about five minutes. We've got a little light system there that we will work with to give you a reminder. You start getting a little orange light at about 30 seconds left. And we're going to try to arrange it so that we can go around the table, and Commissioners can have about five minutes of questioning of witnesses after your opening statements, and then, we will make another round if we have some time.

The panel this afternoon consists of Michael Bassik of the Online Coalition. I remember fondly being served with a letter by Mr. Bassik at a conference where I spoke not too long ago. Mercifully, it was just a letter; Duncan Black, who

is the founder of the Weblog Eschaton--I'm not sure I'm going to get that right.

MR. BLACK: Eschaton.

CHAIRMAN THOMAS: Eschaton; my apologies; and also, we have Trevor Potter, of the Campaign Legal Center. He is a former Commission chairman. And we have Karl Sandstrom, also a former Commissioner, on behalf of OMB Watch.

We are planning to go alphabetically, unless you all have a better idea, so Mr. Bassik, please feel free to start.

MR. BASSIK: Chairman Thomas and distinguished members of the Federal Election Commission, thank you for the opportunity to testify today. I am pleased to represent the Online Coalition during these proceedings.

I plan to focus my attention today on the proposal to add the term paid advertisements on the Internet to the definition of public communication. Over the past decade, the Internet has grown into a political powerhouse. As a result, organizations, political parties, and candidates are now taking

advantage of the growth of the Internet by building robust Websites to disseminate information, organize volunteers, and solicit contributions.

Many have also begun to experiment with paid advertisements on the Internet. Republicans and Democrats alike have started to integrate online marketing into their overall paid media strategies, spending more than $14 million last year to purchase billions of advertising impressions on over 100 leading Websites, blogs, and search engines.

Now, while this number pales in comparison to the $1.3 billion spent on television, tens of millions spent in direct mail, and estimated $51 million spent on newspaper ads, this is a significant number and represents a 3,000 percent increase over online advertising expenditures during the 2000 election cycle.

Dr. Michael Cornfield, who is in the audience today, recently wrote that it is plausible to project further online ad spending growth as the Internet continues to develop into the medium of choice for political research and organizing. And I

would have to agree: as one of the few professional online media consultants in the country and after serving as the online advertising agency of record for John Kerry and the Democratic National Committee in this past election cycle, I am intimately aware of the potential for growth in this area and also aware of the consequences of adding the term paid advertisements on the Internet to the definition of public communication, and truthfully speaking, I see no real consequences to this change in the rules.

Few, if any, individuals, lawyers or consultants set out to take advantage of the ability to coordinate freely with respect to paid advertising in 2004. I estimate that 99 percent of political banner advertisements on the Internet carried proper disclaimers, and despite the presence of what many would consider to be a gaping loophole created by the FEC, not one single state or local party spent any soft money online for the purpose of influencing a Federal election.

It has been argued that no one abused these advantages of the Internet, because no one knew they

existed. This, however, is no reason to change the existing rules based on what amounts to a hunch: that abuse and corruption may one day befall the online advertising industry.

It appears, however, that we have no choice. We realize that it was a court and not the FEC that brought about this NPRM. So what are we to do? The best course of action seems to be the one that you have charted already: to be the expansion of the definition of public communication to include paid advertisements on the Internet.

We arrive at this conclusion reluctantly. After all, the growth of the Internet as a political information, fundraising, and marketing tool has been fueled in part by the Federal Election Commission's hands off approach to online political communication and advertising. We do, however, have a few additional comments and suggestions.

The Internet has effectively put the power of advertising communication into the hands of every citizen. For the same price as a yard sign or a handful of bumper stickers, anyone can design and

purchase a small amount of advertising on the Internet. Ads on blogs, for example, cost as little as $10 per week, and ads on search engines such as Google can cost just 10 cents per click. Should we really be treating inexpensive ads purchased by individuals the same way we treat multimillion dollar television buys?

We would argue no. We believe that there should be a spending threshold that must be surpassed before paid advertisements on the Internet would be subject to disclaimer and reporting requirements, especially if these advertisements were purchased by individuals. The minimum to run a banner ad campaign on most newspaper Websites and major portals is roughly $5,000. As such, we think that the threshold for reporting and disclaimer requirements on paid advertisements on the Internet should be no less than $5,000.01.

In addition, the Commission should clarify when disclaimers are required on paid advertisements on the Internet and how they should appear. For example, disclaimers are not currently required on

bumper stickers, buttons, pens, sky writing and similar items upon which the disclaimer cannot be conveniently printed.

In the past, the Commission has applied this principle to certain digital advertisements. You have held that text messages sent to cellular phones did not require disclaimers because the size of the message rendered these disclaimers inconvenient and impractical. The Commission should follow these precedents in only requiring disclaimers on ads that are large enough to provide proper ID without rendering the ads useless. We hope you would agree.

Thank you.

CHAIRMAN THOMAS: Mr. Black.

MR. BLACK: Good afternoon. My name is Duncan Black. I run the Weblog Eschaton, which is located at atrios.blogspot.com. Feel free to visit. And I appreciate the opportunity to contribute my remarks to this very important process.

I'd like to use my brief time to address one of the central issues: are bloggers entitled to

the media exception, because I believe that many people have been asking the wrong questions about this issue. Frequently, the question is raised regarding whether or not bloggers are journalists, quote unquote, journalists, the implication being that if the answer is no, the media exception should not apply.

However, this takes a very narrow and incorrect view of what media exception is applied to currently and a very narrow definition of what comprises our modern media. We hear it said that bloggers should not be entitled to the media exception for a variety of reasons. The reasons given include: bloggers don't do much original reporting; bloggers are overly opinionated, ideological or partisan; bloggers engage in activities such as fundraising or candidate advocacy; bloggers are irresponsible because they engage in hyperbolic or nasty speech; bloggers have received money from campaigns for direct advertising or on a few occasions for consulting services; bloggers publish a lot of misinformation.

I won't defend bloggers against any of these descriptions. Each is true to a greater or lesser extent depending on the blogger, and it's only the potential for misinformation which I consider to be a potential flaw, although it is not a flaw unique to blogging. What I would like to point out is that all these features are pervasive throughout our modern media and have not generally been raised as reasons to deny other outlets the media exception.

The media exception doesn't simply apply to what we would call, quote, responsible, balanced journalism. The media exception applies, for example, to talk radio hosts, who do little original reporting, are opinionated, sometimes engage in fundraising activities on and off the air; certainly engage in hyperbolic and nasty speech, and may receive money to consult for campaigns without any legal on air disclosure requirements, and as my affiliation with a media watchdog organization allows me to attest, regularly and repeatedly broadcast misinformation, deliberately or not.

But it isn't limited to talk radio. Highly ideological and opinionated magazines exist all over the political spectrum. Tabloid newspapers are generally much more opinionated than broadsheets and frequently use less than polite rhetoric. Cable news is filled with partisan hosts and guests, sometimes in a, quote, fair and balanced fashion; sometimes not. Guests who are identified as political strategists or political consultants are almost never asked to disclose their political clients on air, even while discussing them. Some with consulting firms have even been hosts or co-hosts of their own television shows. James Carville and Paul Begala were Kerry campaign advisors while hosting CNN's Crossfire, and while this was occasionally disclosed, it wasn't legally mandated.

Broadsheet newspapers have opinionated editorial pages, and endorsement of candidates by their editorial boards is standard practice for most of them.

What I do is not dissimilar to any of this. For my readers, I occasionally provide scoops or

original reporting; I provide a lot of commentary and opinion. I engage in some forms of activism and fundraising, though no third party money has ever passed through my hands or through my bank account. It all goes through a link to the candidate directly.

The only money I have ever received from campaigns was for paid advertising, which anyone is free to buy. I encourage you to do so--

[Laughter.]

MR. BLACK: --subject to my approval about its appropriateness.

I have published incorrect information at times inadvertently, most of which I hope I have corrected promptly, and I am therefore no different than what much of our modern media consists of today.

My site receives about 100,000 visitors per day. Over the roughly three-year period I have operated the site, my out of pocket expenses aside from maintaining a working computer and maintaining an Internet connection have probably been under $150. Some bloggers spend more on their sites, but the point I am making here is that nobody has to.

Let me offer the following illustration: consider the case of Joe Trippi, formerly of the Howard Dean campaign: a political consultant and at times a regular media presence. During the 2004 campaign season, he was consulting for Congressional races through his consulting firm. He was also a regular contributor on MSNBC television. He wrote regular blog entries for their companion Website msnbc.com.

The media exception means that none of those activities would face scrutiny by the FEC. However, he also operated a personal Website, joetrippi.com, on which he talked about news and politics.

I am concerned that while his appearances on television and on NBC's Website do not face scrutiny, his activities on his own personal Website would face scrutiny, and that seems strange. Our campaign finance laws were enacted to limit the disproportionate impact of big money on the political system. While I understand that medium specific regulations may be necessary, I am troubled by the

fact that participants in this emerging medium, which allows anyone the opportunity to participate in the national discourse at a minimum cost, would face stricter regulation and stronger scrutiny along with the potential for ruinous legal expense than would participants in media outlets owned by corporations such as Time Warner, General Electric and Disney.

I do not believe such a discrimination would be tolerated under the First Amendment, and I thank you for this time and opportunity.

CHAIRMAN THOMAS: Mr. Potter.

MR. POTTER: Thank you, Mr. Chairman, Commissioners.

I am pleased to be here this afternoon, and thank you for the invitation. I'm representing the Campaign Legal Center, which has submitted comments, and knowing that you have covered a lot of this ground over the last two days, I thought it would be helpful maybe just to hit two points that I think bear repeating and then leave the rest of the time to everyone else.

I think it goes without saying, but in this setting, I ought to say that the Internet clearly is a magnificent tool that we have and haven't had before that benefits our political system; that encourages citizen involvement in politics. I, myself, have represented Internet companies and nonprofits interested in political activity on the Internet for almost the last 10 years, so I can assure you I don't approach this subject callously or without an appreciation of what the Internet does.

I've heard over the last two days the statement that this rulemaking opens the possibility for the FEC to begin to regulate the Internet, and I think everybody in this room who has followed Federal election laws knows that that is simply not an accurate characterization of where we are. The FEC has been regulating the Internet since 1995. There have been numerous advisory opinions issued by the Commission telling people what they can and cannot do on the Internet and with which funds and who can do it and who can't.

I've represented requestors in some of those advisory opinions asking for exemptions where the Commission made it clear that nonpartisan activity could be engaged in by corporations but that partisan activity could not. In 2000, there was a lengthy advisory opinion from the Bush campaign listing a range of potential individual activity and asking whether or not that could permissibly be engaged in under the Federal election laws.

So I think what the Commission is doing here is important, but it is useful to put it in the context of saying that it is not questioning whether to regulate the Internet; it is operating on the fact that it has regulated it for 10 years, and it is questioning, and I think correctly, whether everything it has said in the past is how it ought to view the Internet.

The trigger for this rulemaking, of course, is the question of public communications on the Internet, and again, that is an issue that was raised by the Commission's rulemakings, where the Commission did not take the view proposed by the Congressional

sponsors of the Bipartisan Campaign Reform Act and instead created a flat exemption for public communications on the Internet, specifically communications by party committees including paid advertising.

That was something that the Congressional sponsors felt opened the potential for a significant problem in terms of spending, including paid advertising by corporations, unions, coordinated with, controlled by, political candidates or parties. That, I believe, should remain the focus of this rulemaking.

The Commission has raised other Internet-related issues. Some of them were leftover from the rulemaking the Commission began but did not complete a couple of years ago on the Internet. Some of them are related to questions that arose in the 2004 election; for instance, the media exemption was a focus of some controversy in 2004, relating not directly to the Internet but whether it applied to documentaries, commercial films, et cetera.

So my suggestion to the Commission would be that at least you deal with the one area that I think you have to deal with now, which is the public communications question, and that the rest of this rulemaking, you consider whether it needs to be concluded now or whether it should be rolled into your previous Internet rulemaking or whether, for instance, the media exemption ought to have a rulemaking all its own, given the questions that Mr. Black raised and a number of the other commenters about exactly how the media exemption functions even without the Internet.

So I don't think all of that needs to be resolved in this rulemaking. That's not to say you couldn't, but if you feel that you've bitten off more than you can chew, then, I would urge you to focus on the public communication issue.

Thank you very much.

CHAIRMAN THOMAS: Mr. Sandstrom.

MR. SANDSTROM: Good afternoon, Mr. Chairman, members of the Commission. Being last

reminds me of a remark that Congressman Udall once made. He said, but not everyone has said it.

I hope to introduce something new and different today. I am very pleased to be here on behalf of a terrific organization, OMB Watch, which is dedicated to open government and to civic participation, and I would like permission to enter into the record some evidence of those efforts; one, an unsolicited electronic newsletter; two, a blog from someone whom I'm not sure whether they're a foreign national or not but you could regularly find on their site; their news page, which looks an awful lot like a press page to me, and their home page, where they tend to be rather critical of certain sitting officeholders.

For OMB Watch and for many, the Internet is not just a means to an end. It is an instrument of participation. It actually is what the organization is about. It is a way people participate. If the press is the fourth estate, the Internet should be considered the fifth estate. It is as different from the press--and that is why I will argue it shouldn't

be considered part of the press exemption--as the nobility were from the commons.

I think this is a lesson of ACLU v. Reno, which really gave extraordinary protections to the Internet, protections I'm not sure are reflected in the court decision that Trevor was referring to. And I think that in this hearing, that uniqueness needs to be recognized. When my children were young and at the beach, their favorite pastime was creating walls of sand to keep the ocean back. The waves came around and over the top, and they wiped them away.

This rulemaking is somewhat reminiscent of my child's efforts. Many of the walls that the Commission has been urged to create are easily breached. To try to create categories of bloggers seems to me a rather futile endeavor. Are we going to have foreign national bloggers? Government contract bloggers? Bloggers in the name of another?

Similarly, trying to fit this into the press exemption makes little sense. The press exemption speaks of news stories, editorial, and commentary. That may make some sense when you're

talking about how the news division at ABC is different from the commercial division or when you're selling advertising at the New York Times and contrasting it with what's on the editorial page, but it doesn't make a whole lot of sense when applied to the Internet.

Frankly, the Internet is not your dad's Reader's Digest. For those of you who remember the Reader's Digest case, that sort of analysis essentially breaks down when you try to apply it to the Internet. Even the difference between what is advertising and what is sponsorship; if I sponsor a site like the fine gentleman's site here, am I advertising on the site? Or is it more like a PBS sponsorship? How are you going to make these distinctions between what is advertising and what is sponsorship, what hat they're wearing that particular day? For example, I thought there was a wonderful example about Joe Trippi. Do we determine what hat he's wearing that day to determine what rights he's entitled to?

So instead of going down that route, I offer a modest proposal that would be a major victory for participation in this country: that is, treat everybody who emails and everybody's Website the same. And how do you do that? Through recognizing that actually, the means of communication should be valued at zero, and what's really valuable on the Internet is the content, the persuasiveness of the content.

And how would you accomplish this result? It's fairly simple: you would write into the act, into the regulations, when you're trying to determine what's of value, saying exempt from the definition of contribution and expenditure, postings made on your Website, and emails that you undertake.

To try to do it any other way, I think, is going to be in the end a foolhardy effort, because it won't succeed. Now, there are some who will say that this will somehow create some huge loophole. If a loophole is created, I think it is largely going to be a loophole through which information is given to the public to help them make informed decisions about

the most important public decisions they make. And I doubt it is going to be some sort of loophole that will allow corruption to seep into our election process.

So I will conclude my remarks by saying do what's easy: just exempt the value. Value it as zero; treat everyone the same.

CHAIRMAN THOMAS: Thank you.

We are going to start our questioning with Vice-Chairman Toner.

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

Mr. Potter, I would like to begin with you and get your thoughts on some aspects of the core proposal in the NPRM, this treatment of paid advertising on someone else's Website, page 12 to 13 of the joint comments that you filed. At footnote 10, you talk about production costs, and as I understand it, your view is that the regulation that we--if we pass regulations would include the production and creation costs of online activities, and at the end of the footnote, you indicate that if

the production costs are treated as outside the coordination rules, this could lead to a large loophole in the rules on coordinated campaign spending, precisely the kind of loophole that the court in Shays indicated should not be permitted.

My first question is do you think that legally, we're required to include production costs in any rule that we issue?

MR. POTTER: I think what you were commenting on here is that the rule is unclear, first of all, how you're treating production costs. I think that is important to note. Secondly, there is a distinction between costs that are typically incurred and I think are intended by the rule to be covered that are incurred by individuals themselves versus paying others to engage in activity.

And the question that this footnote raises is what happens in a situation where, for instance, you have a large, several hundred thousand dollar payment to a production agency? Is that within or without this distinction? I think what you are required to do and should do is to be clear about how

you're accounting for these costs and where the line is.

VICE-CHAIRMAN TONER: Do you think we would be on safer ground legally if we did include the production costs when they are obtained through, as you indicate, payments to third parties?

MR. POTTER: Yes; I think payments to third parties move away from the direct individual activity that you have sheltered here.

VICE-CHAIRMAN TONER: And on page 13 of your comments, you raise an issue that actually, in the morning panels, we had some discussions about, and that is the question of essentially in-kind contributions. If we adopt a rule that talks about paid advertising on the Internet on someone else's Website being a public communication, what happens if no payment is made, because the space is given to a candidate or a political party, what in other areas of the law, we would treat as an in-kind contribution. Do you think that in terms of any rules we're considering, we need to fashion a rule that includes in-kind activity?

MR. POTTER: Well, you already have, as I understand it, covered in-kind contributions; for instance, in general, if a corporation or union were to give something in-kind to a candidate or party committee, that would be valued. What our comments have suggested is that you focus on that sort of activity and not on activity by individuals or bloggers, people who are not in the business of selling the space or the content.

VICE-CHAIRMAN TONER: And in terms of any rules that we fashion, if we adopted a rule that focused on paid advertising on someone else's Website, and for whatever reason, a Website owner that was incorporated provided that space for an ad without charging anybody; therefore, there wouldn't have been any payment, but something of value obtained, in your view, is that something that should be in the scope of regulation?

MR. POTTER: I think there are two separate issues that are raised by that question. One is the question of whether a Website or individual should be covered merely because they're incorporated. And as

you know, in our comments, we have suggested that you consider the sort of exemption you have for political committees that are incorporated solely for liability purposes, the sort of exemption that you have granted in some circumstances to LLCs to deal with a circumstance where the corporate entity is there for liability purposes, but they are not a for-profit making entity, and they are not in the business of selling advertising.

And I think the second part of the answer goes to the question of whether the entity is in the business of selling advertising.

VICE-CHAIRMAN TONER: Let's say it is. Let's say that it is in that business.

MR. POTTER: If, you know, hypothetically, the NewYorkTimes.com sells advertising to political candidates and then chooses to give it to one party, I don't see under current theories of election law why that wouldn't be an in-kind contribution of the obvious market value of what they have charged the opponent but not the recipient of the free advertising.

VICE-CHAIRMAN TONER: Even though there isn't any money that's changed hands, it's still something of value that was provided.

MR. POTTER: Well, there is something of public value in that that advertising is advertised at a rate of, let's say, $1,000, and is sold to other people at that rate. I think that is clearly different from a circumstance in which a Website is not in the normal business of selling advertisement, and so, you'd be saying is there something of value just because space was given for free.

VICE-CHAIRMAN TONER: Mr. Chairman, I see my time has expired. I might seek your forbearance, perhaps, on another round of questioning, but thank you.

CHAIRMAN THOMAS: We'll get back to more questioning later.

Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

Karl, I like simple ideas. I appreciate the suggestion. I take it you are suggesting that we

do that and nothing else and abandon all of our other proposals.

MR. SANDSTROM: Yes, because simply, you'll get all the fear of having to register and reporting to the FEC, drive it all away.

COMMISSIONER WEINTRAUB: But will it be responsive to the court's order?

MR. SANDSTROM: Will it be responsive to the court's order, I think this hearing is responsive to the court's order.

COMMISSIONER WEINTRAUB: I'm sorry. I can't hear you.

MR. SANDSTROM: I think this hearing is responsive to the court's order, and I think any regulations that come about will become a full record for the judge to review, and I really do think, and I know the Commission did not appeal this; my personal view is the judge was wrong and failed to recognize the unique character of the Internet and that the law doesn't just go to how valuable something is; it goes to the potential for corruption, and to rest her

decision on the basis she did I thought was rather weak.

COMMISSIONER WEINTRAUB: Well, I'm not surprised that you disagree, because you voted for the regulation that she struck down. But I would be interested in the other panelists' views on Karl's suggestion of how we address this issue.

MR. BASSIK: Just briefly, I think, I come to this with a realistic perspective. Would I have liked the FEC to have appealed the decision? Absolutely, but I think you've kind of been handed your hand. And--

COMMISSIONER WEINTRAUB: No, I meant the substance of, you know, what he's suggesting that we do, that we simply exempt the cost of establishing, operating, and maintaining a Website and the cost of emailing from our definitions.

MR. BASSIK: I would agree with Mike Krempasky's comment yesterday that, yes, that would be a favorable outcome, but I would also say that I think the FEC might fall into the trap of being too specific in its rulemaking that every time a new

medium would come about, the same thing that Markos mentioned yesterday, we would have to go back and have a new rule. What's next on the horizon? Wireless? Or is it text messaging? We have no idea; no one could have predicted that blogging would have even been the topic of conversation today.

So, yes, that would be an ideal outcome, but I would also say that there should be a little more broad exemption.

MR. BLACK: I would tend to agree, yes; I don't really have anything else to add on that.

COMMISSIONER WEINTRAUB: I bet you do.

MR. POTTER: I was unsure how Karl's proposal dealt with the issue of paid advertising.

MR. SANDSTROM: Paid advertising essentially goes to the person who is paying, whether that is an expenditure. It seems to me that is an expenditure.

MR. POTTER: So the exemption that the Commission gave for public communications over the Internet would not apply to paid advertising over the Internet; is that correct?

COMMISSIONER WEINTRAUB: Go ahead. Yes, have a dialogue.

MR. POTTER: Just trying to figure out how the proposal works.

MR. SANDSTROM: The proposal essentially talks about what you do on your own site and the emails you send, being whoever the sender is, whether it's an individual, an entity, that they can send out email and not be considered having incurred an expenditure. They can host something on a Website without that being considered an expenditure. They can republish a candidate's material on their Website without that being considered an in-kind contribution to the candidate.

MR. POTTER: So taking out paid advertisement or coordinating with someone who takes out paid advertisement would be an expenditure.

MR. SANDSTROM: Of course, when someone writes out a check to somebody, they're making an expenditure.

COMMISSIONER WEINTRAUB: With that clarification, are you okay with that, Mr. Potter?

MR. POTTER: That certainly in my view would not be what the Commission did in its initial rule and would address a number of the issues in this rulemaking. The comments we have submitted have urged the Commission to put paid advertising within the definition of public communication, even if it occurs over the Internet if it's by a state party or coordinated with a candidate or party.

COMMISSIONER WEINTRAUB: So, Karl, your position is that it's implicitly there anyway; we don't have to specify it?

MR. SANDSTROM: I always thought there was a great confusion about the regulation, and at least from my perspective, that has been confirmed here today. Certainly, that's an expenditure. The only concern I would have is that with respect to republication, that not be considered an in-kind contribution, because people are constantly republishing information they get from others, including from candidates, and that's healthy on the Internet.

COMMISSIONER WEINTRAUB: I agree with you. I think that the republication issue is a big problem on the Internet with our trying to regulate it in any way.

I have more questions, but I see my red light is on, so I'll wait for another round.

COMMISSIONER SMITH: I just want to interject here. People were talking. I noticed that Markos Moulitsas is like Cher now. He's just Markos. He's got a name, and it just carries the day.

COMMISSIONER WEINTRAUB: It's even shorter than that. It's just Kos.

[Laughter.]

CHAIRMAN THOMAS: Next, Commissioner Mason.

COMMISSIONER MASON: Thank you. Also known as Mase.

[Laughter.]

COMMISSIONER MASON: All right; Mr. Black, I asked Mr. Moulitsas yesterday about a section of your jointly submitted testimony, and he seemed like he didn't--he wasn't very familiar with it, so maybe this is yours, so he should have been familiar with

it, because it's the section entitled payment to bloggers. And what it says is it should make no difference to the FEC in granting the protections of the media exemption whether a blogger is compensated for editorial content or advertising revenues.

Now, what I want to understand is whether you're talking about that in terms of how these rules would apply. In other words, to the extent that there seems to be a consensus that we either wholly or largely want to protect what the blogger or any other Internet publisher writes on his own but that we want to regulate advertising, I want to understand where that leaves someone who pays you, Mr. Moulitsas, or anyone else for editorial comment, not for banner ads, not for pop-ups, not for margin ads, but if a blogger takes a payment for an article that's on the main site, what would be the regulatory status of that?

MR. BLACK: Well, my understanding of the regulatory status of that should be that disclosure requirements should apply to bloggers as disclosure requirements currently apply across the media

spectrum, that the disclosure requirements should be on the candidate or campaign or party that is making the payment, and while, you know, I certainly would find it, you know, kind of unethical if bloggers are getting paid to write nice things about candidates and not disclosing it, we have people getting paid to say nice things about lots of people and not disclosing it all the time.

And so, if we're concerned about disclosure issues, you know, that we don't want bloggers writing nice things about candidates when they're getting paid for it and people don't know about it, if we are concerned about that, then, the simple thing, really, to do is to one way or another speed up disclosure requirements on candidates and campaigns. To kind of put the disclosure requirements on bloggers when nobody else in the media has to make those disclosures legally, ethically, it always sounds nice. More information is better; more disclosure is better. But to put the disclosure requirement--

COMMISSIONER MASON: I understand that, but what I'm struggling with is how I draw a distinction

between that and an ad; for instance, you have said you will reject some ads because you think they're inappropriate. Now, I suppose the advertiser could come back and say, well, okay, maybe that is a little over the top. Would you take this instead? And you might well say yes.

Now, if the campaign is paying, I won't say you, because probably, you don't do it, but if the campaign is paying a blogger for, in essence, an editorial on the blog, and they're going back and forth about what the campaign would like to have said and maybe what the blogger is comfortable saying under his or her byline, why isn't that as much a communication by the campaign, which would require a disclaimer, because it's the campaign's message?

MR. BLACK: I mean, let's say I was hired officially as a political consultant. That's what I was being hired to do, and part of my job as a political consultant was to fan out through the media and through any outlets I could, whether radio--I make regular radio appearances; maybe on television. So if my job were to fan out into the media,

including my blog, and hand out the candidate's message, it seems strange to me that I would be required to disclose it on my blog but not when I went onto the radio or when I went on television and gave the same message.

COMMISSIONER MASON: I guess the problem I'm having with that is that if we put it over into the magazine context, if someone works for a magazine, is paid to do these various things, yes, but I think the Commission might well have a little enforcement case if we discovered that a payment was made to a publication for an article and there was no disclaimer on the article.

In other words, it's precisely because the payment is made to, in essence, the publisher, the person responsible, that you seem to transform or reach the difference that I think the statute lays out between editorial comment, which is your own, and advertising, which is someone else's. And I'm trying to understand the difference between an editorial that someone pays for and advertising. For instance,

the Mobil Corporation used to run these things called advertorials. The NEA still does them.

And, you know, if those were political, if they were express advocacy, the disclaimer rules would clearly apply, even though the form of them is like an editorial, and they would apply because payment was made and because the ideas that the content, the words, are not actually those of a publisher; they're those of someone else. I'm trying to understand how that works, not in all these other situations but when the Internet publisher takes a payment from a campaign for something on the site.

MR. BLACK: Just to get back, I mean, you were comparing it to newspapers or to magazines, but sort of the framework you're setting up doesn't really seem to apply to television or to radio in precisely the same way; that is, people appear on programs all the time to give a certain message, and I just don't see the distinction.

COMMISSIONER MASON: The point is the payment to the publisher. For instance, on some radio programs, you have a commercial that sounds

like a commercial; the programming breaks and so on. But also, you will hear on talk radio programs, the host says, you know, I love such and such kind of juice. I drink it every day. It's great for my health. That's also an advertisement.

And so, and whether that, and the point is not when you're paid to go on somebody else's publication, but when you're paid for your own publication, why is that any different from an ad?

MR. BLACK: I mean, I sort of understand the point, and you know, there's often not a distinction between the blogger, that is, the person who writes for a Weblog and blogger as the publisher, since they're often the same person, but I'm not incorporated. You could take the case of DailyKos LLC, which has hired as its blogger Markos, the payment is not to Markos; the payment is to the DailyKos LLC, right? So the payment is to his corporation, in a sense, right?

COMMISSIONER MASON: So what I am trying to understand is if the payment is made for this content on the blog, why does it make a difference whether

it's a banner or the margin or in the body of the blog? Why does it make a difference, as a legal construct, payments made by the campaign, wherever it's placed, and why isn't it treated the same?

MR. BLACK: I think it should be treated the same.

COMMISSIONER MASON: All right; so, in that particular case, there would be a requirement for the campaign to have a disclaimer on it, because the campaign paid for that placement.

MR. BLACK: If it would have disclaimer requirements, then, yes.

COMMISSIONER MASON: Thank you.

CHAIRMAN THOMAS: Thank you. My turn, I guess.

Following up on disclaimers, because I think we haven't touched on it quite as much in this process, the proposal basically says that any communication put out by a political committee should have a disclaimer in a non-Internet area, but if it is in the Internet area, we would only require a

disclaimer where it is some form of a paid ad that is placed on someone else's Website.

Now, for the nonpolitical committees, the proposal would be in essence only if we're talking about email sent to more than 500 folks where it is unsolicited in the sense that they purchased an email list to send it and it rises to the level of express advocacy or solicitation of contributions, would there be a disclaimer requirement.

So I guess what we've been hearing is that, with regard particularly to the situation we've got for individuals or other people who are not a political committee would have to live under this 500 rule plus the concept of having purchased this list and having to deal with any express advocacy or solicitation/contributions setting that we're still being too onerous.

So I'm just curious if you can help us maybe with some sort of alternative basis on how to deal with the disclaimer situation, and Karl, I don't see something about the disclaimer rule in your approach, and I'm not quite sure how just modifying

the definitions of contribution and expenditure would address the disclaimer situation, and especially since we've kind of gone at the disclaimer situation in terms of something being a public communication.

And by the way, as you know, the disclaimer provision in the statute deals with not only just an expenditure having been made but also maybe a disbursement so--

MR. SANDSTROM: I think there's actually--if you're making a solicitation, for instance, let's say that you just had a banner ad. There's actually no asking for money on there. You click it, and you fill out the form to give money. You have a disclaimer on there.

Often, that will be at the site controlled by the candidate; proper placement of the disclaimer. Forget it on the banner ad. The information has gotten out to the potential contributor who they're contributing it to. That seems to be--with respect to having disclaimers on blogs, if they're not public communication, we don't have to have a disclaimer on them. And I would trust a blogger based on their

content and whether I can verify what they're saying is true, or whether it confirms my prejudices, and accept it or reject it. I don't need the disclaimer.

If the candidate actually gets to the point where they're actually--it's their editorial content, it's actually their communication, I think it's a fairly poor use of a blogger, because it's certainly going to change the style, but I really don't think it advances much of a public policy. I think it's probably a useless regulation at that point, and by exempting them from public communication, we get them out from under having to have that disclaimer.

MR. POTTER: I listened with interest yesterday to Commissioner Weintraub's discussion of her voluminous email list, and I think she's got a point. The 500 pieces is imported from the direct mail context, where it is presumably far less likely that an individual was going to write or even mail 500 personal letters, and the Internet context, there may be two ways to look at it.

One would be to say should that number simply be higher, and the other is to import the paid

notion to it so that it dealt with--and it still could be higher--but sending emails to names that have been purchased as opposed to the individual activity of somebody sending email to friends and acquaintances, which I think by definition are not purchased emails.

MR. SANDSTROM: I think that is a rather wrong approach. Do you really want to inquire about where a student got the 500 emails they're working with to try to encourage people to get out to vote? Does the Government really want to come in and say what is the source of your emails? How many do you have? I have spam filters. I can keep the stuff off of my computer. If I get anonymous, unsolicited email, and I want to read it, let me read it.

MR. POTTER: The point here obviously is not to deal with the reader and spam. The point here is to deal with large sums spent on the Internet by entities to affect Federal elections, whether it's corporations, unions, or people in coordination with candidates. And that's why I think the purchase issue is relevant.

In the hypothetical, the other end of the lane, it's not the student. The hypothetical is going out to a list vendor and spending $1 million to buy the names of all the voters in the first five primary states and then working with the candidate to make sure those people get regular emails. It's not that it's a bother to the recipient; it's that it's clearly something of value to the candidate and a world of difference from Commissioner Weintraub or anyone else emailing her friends.

CHAIRMAN THOMAS: I'm at the end of my time, I'm sure. I didn't start the clock, as I should have, so if you want to follow up on that, then, we'll move on.

MR. BASSIK: I'll just make a really quick comment about banner ad disclaimers. I think we've purchased well over 1 billion ad impressions on behalf of Democratic candidates last election cycle, and I would say that when I mentioned during my speech that about 99 percent of our ads had disclaimers, I would think it was almost accidental regulation, because the Website publishers had no

idea what the rules were on disclaimers. Some required boxes; some required addresses; some didn't require any at all.

So for the ease of just creating one version of the ad, we created them all with very large, 10-point font disclaimers. There was a tremendous amount of widespread confusion as to what disclaimers should be, so I just wanted to reemphasize that I believe that disclaimers are important, but for small expenditures, especially by individuals, to have to force an individual to go and look through documents and pages and maybe hire a lawyer to find out what type of disclaimer should I have would be, you know, really counterproductive. So, you know, I just emphasize that I believe if there is a disclaimer requirement, it should be based on a spend threshold not necessarily an arbitrary number of emails sent or just based on the fact that a $10 ad was purchased.

CHAIRMAN THOMAS: Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr. Chairman.

Mr. Sandstrom, Commissioner Weintraub already, I guess, had largely the conversation I would have had with you, and it's interesting to note that you and I had, I guess, the same interpretation of the regulation that was passed, but when I raised that interpretation at the NPRM stage two months ago, Commissioner Mason indicated no, that wasn't his understanding. He thought it did exempt paid advertising, and we didn't have to worry about it.

So I think that was a problem if that was the case, and I'm not sure whether we would be on strong legal ground to go back essentially with something that would do the same thing, like putting a definition of contribution and expenditure rather than public communication.

That leads me to ask--you raise, on page 5 of the testimony, your prepared comments--how we just can't really shoehorn these folks into the press exemption; any attempt to categorize bloggers based on an existing business model or something would be unsatisfactory. But why would that be so if, you know, in the past, the Commission has adopted its

regs to say the facilities of a cable broadcaster. What would happen if we just added the facilities of the Internet? In other words, something not based on whether you're a blogger or a forum or, you know, trying to figure out what you are, but just say if, you know, if it's through the Internet facilities, it qualifies for the press exemption.

Now, there would still be questions that would arise, just as there are now under the press exemption, but essentially, you know, it would blanket it without regard to the particular form a site takes or an activity takes.

MR. SANDSTROM: For example, I am here today representing an organization that doesn't claim to be a press outlet.

COMMISSIONER SMITH: But we're going to make you one.

[Laughter.]

COMMISSIONER SMITH: You will after this. That's the point.

MR. SANDSTROM: I really think that the Internet is rather unique. I mean, are we going to

say, then, if you are a--are we going to have to apply some sort of test, whether this is a news story, whether this is a commentary, whether this is an editorial? Does that capture everything someone would do on the Internet? And if I send out a newsletter--

COMMISSIONER SMITH: Well, those are questions, I guess, the Commission has to deal with now in other formats, and it seems to me that we've been able to deal with those in a way that's generally satisfactory to people.

MR. SANDSTROM: I think the Commission in recent years started to struggle with the press exemption as applied to things like documentaries. I think it's, you know, and how they're distributed. I think it's started to struggle with in house publications by organizations that are not traditionally considered part of the traditional media, be it commercial outlets and such.

And you have to go back, as I recall, and I may be wrong, back in the fifties with respect to the ban on union contributions that dealt with the

newsletter. And so, yes, you'd want to expand the press exemption, but you're going to take the same standards you used to expand the press exemption and apply it to you know, the traditional media, the fourth estate, as I want to categorize them. Then, you're going to find that press exemption is going to permit far greater activity than I think you anticipated.

COMMISSIONER SMITH: Thank you.

Mr. Bassik, I wanted to ask you a question: basically, as I understood your opening comments, you're suggesting that limits on paid advertising, in effect, have significant effect on bloggers. Do I grasp that correctly?

MR. BASSIK: Rephrase the question, I'm sorry.

MR. BLACK: I would ask the same question.

COMMISSIONER SMITH: As I understood you to say that if we began to regulate paid advertising on the Internet, that would, in fact, affect the blogger community significantly. That's how I sort of read your opening comments.

MR. BLACK: My take in my opening comments, my basic point is that what would significantly affect the blogging community is if requirements were placed on bloggers that are not required for other members of the media, okay? Now, if, for example, you know, there's a disclosure requirement for paid advertising, that disclosure requirement should fall on the campaign itself. And, now, if we think that the disclosure requirement should also be, you know, added into editorials, say, that, you know, a paid editorial crossed the line into paid advertising, then, it would still be the responsibility of the campaign to ensure that the blogger has the disclaimer on it.

COMMISSIONER SMITH: Let me try to rephrase my question, and I'll ask Mr. Bassik here, because it was really more his comments that I think addressed it: what was the point, let's put it this way: what was the key point of your opening comment? You tell me again.

MR. BASSIK: I think that I wanted to first focus on public communication, which is really the

only area that the court really, I think, required or requested the FEC to act upon. Within that statement, I was trying to express that paid advertising is growing, and it's important, and it's impactful, but we should not be requiring individuals who are advertising online to have to all of a sudden start understanding the intricacies of the FEC.

COMMISSIONER SMITH: Because some of the ads are so inexpensive.

MR. BASSIK: They're so inexpensive, and the one thing that I believe is that the definition of public communication was intended to apply to million dollar or large dollar advertisements that were impossible for an individual like myself to purchase. I could not purchase a magazine ad or purchase a billboard, the average citizen. But on the Internet, you can. So the point is that with small ads such as small tiles that go on blogs or within Google ads that have 95 maximum characters, there shouldn't be disclaimers; and then, also, the--

COMMISSIONER SMITH: The question that Commissioner Mason asked this morning of a witness.

Do you think that if we were to adopt, which we may or may not be able to do, sort of a $200 threshold, that would solve a lot of that problem?

MR. BASSIK: I think that's a bit low. I'm not sure the FEC has the ability to go and create a really high threshold. I think this is part of the activities of the FEC where you suggest to Congress what different thresholds they should change. $200 seems quite low. For example, you know, a week on, for example, Markos' blog is more than $200. But I would think that more along the lines of $5,000 would be a really realistic threshold.

COMMISSIONER SMITH: I'm out of time. I hope we'll get back to the people, and I hope I should get a second round.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Commissioner Smith, our tradition has been that we then go back through the order in reverse sequence. You're up next. I beg your pardon. I beg your pardon. Counsel's office. You'll get your chance in just a moment.

I'm sorry; Larry Norton, please.

MR. NORTON: Thank you, Mr. Chairman.

Mr. Bassik, I wanted to follow up on a statement you made, and I hope I jotted it down right. That was that no state or local party spent soft money online for Internet advertising. I hadn't heard that statement before, and I wondered what the source of your support was for that.

MR. BASSIK: Sure; I guess it involves a little bit of bragging, in that no individual in the country placed more advertisements on blogs or Websites or search engines than myself, and I also have access to a lot of reporting data from Nielsen that literally trolls the Internet for banner advertisements, and I can search for political ads and pull up every single ad impression that has been placed on the Web.

I saw some placed by the Pennsylvania State Democratic Party, and I had inquired as to the origin of funding of those, and they assured me it was not soft money. And I have been speaking with colleagues of mine who also placed advertising campaigns for Republicans; for example, the Pericles agency. They

have also assured me it was all spent with hard dollars and none from state parties.

MR. NORTON: Thank you.

A question for former Commissioners Sandstrom and Potter: BCRA's principal sponsors submitted comments, and they wrote, in part, one of the major problems with the per se exclusion and the Commission's original rule was that it would have let state party committees spend unlimited soft money on Internet communications designed to influence Federal elections. The proposed rule only addresses this problem to the extent that state parties buy advertising on the Websites of others.

The question is whether you think that this rule, the proposed rule that exempts only paid ads on the Internet leaves a major problem unaddressed, and if you do, why? Mr. Potter, maybe you could take that one.

MR. POTTER: I think the problem there is that political party committees are spending increasing sums of money on Internet activities as a way of reaching voters, potential voters. Those sums

of money include purchases of email addresses and thus mass emailing to voters, potential contributors, et cetera, highly sophisticated Websites, solicitations for contributions. The concern that I have with that is that those funds, I think, ought to be governed, those activities ought to be governed by the Federal election laws and not exempt solely because they occur on the Internet.

MR. NORTON: Mr. Sandstrom.

MR. SANDSTROM: I don't know how the sponsors came to the views that they have come to. It seems to me that any local party cannot spend millions of dollars of soft money on the Internet any more than they could spend it on television. I don't, you know, I don't fault the legal logic to get to the position that the sponsors came to.

Could I just backtrack for a moment? One quick--

MR. NORTON: Sure.

MR. SANDSTROM: This is cnn.com. I don't know how you have a disclaimer on it.

MR. NORTON: I'm going to ask Mr. Bassik and Mr. Black a question. We've had testimony, I think, in part your testimony and other testimony about this rulemaking and some of the issues that we've raised, and some of the points that have been raised were that we're asking about hypothetical problems. It's sort of a rulemaking in search of a problem. There isn't a demonstrated record of abuse from the last election. Technology is rapidly changing, and what we're looking at today and concern with bloggers and so on may look very different a year or two from now.

Are all of these arguments for the Commission not tackling the media exemption and not taking on any issues other than the issues that it has to take on by virtue of the court decision?

Let's start with Mr. Bassik.

MR. BASSIK: Well, you know, I think the Commission would be justified if they just dealt with the definition of public communication, but I think it would leave a huge area unaddressed, and that's an area that Commissioner Smith brought up in the coming

of the apocalypse or crackdown on blogging. I think that these areas do need to be addressed. But keeping in mind that not to go too far.

I mean, the Commission should really be focused on areas where there is corruption, or there is the appearance of corruption, and I think that's why I was, you know, satisfied by the Commission's decision just to include in the definition of public communication paid advertisements on the Internet and not to go further, because I think that satisfies what the Court might be looking for, but there's really no corruption anywhere else, so I would caution against regulating in that area.

MR. NORTON: Mr. Black, I'm going to ask you the same question.

MR. BLACK: Yes, I mean, I agree that the Commission would be justified in going no further, as you say, but I also agree that, I mean, I think that just leaves a whole nest of issues still out there. And whether that, of course, those issues don't have to be addressed through this particular process right

now. They could be shunted for a future date, but my guess is they will come back.

MR. NORTON: Thank you.

Thank you, Mr. Chairman.

CHAIRMAN THOMAS: Mr. Pehrkon.

MR. PEHRKON: Mr. Chairman, thank you.

Mr. Bassik, Black, former Commissioners Potter and Sandstrom, welcome, and I know it's been a long day. Mr. Black, particular question for you: you indicated that your operational expenses for your site are rather minor. I don't remember right now what the number was you--

MR. BLACK: I said over the lifetime, aside from maintaining a computer and Internet access, I've probably spent under $150 in direct expenses.

MR. PEHRKON: Okay; over maintaining the computer.

MR. BLACK: Right.

MR. PEHRKON: How much has your revenue been during that period of time?

MR. BLACK: I operated the site for about a year and a half earning first no revenue and then, I

would say, minimal revenue, a couple hundred dollars a month, and just recently, over the past, say, since this calendar year, I've probably averaged about $5,000 a month in gross revenue.

MR. PEHRKON: Commissioner Sandstrom, under your proposal, one of the things I'm trying to get a handle on, because I clearly do not quite understand it. But could you sort of explain to me how this would affect your organization that you're representing, OMB Watch? Or would it?

MR. SANDSTROM: Since anything they post on their site would have a zero value, if they republished materials, they carried a public debate, that they would be valued at zero. There would be no question whether they made any sort of in-kind contribution. They're a 501(c)(3), and so, they're very concerned that nothing they do be seen to be intervening in a campaign.

But they are getting information out, sometimes quite critical about candidates. And certainly, they don't want to be subject to a complaint. They certainly don't want these issues to

be raised, and the best way, I think, to do that is to essentially value their republication activities at zero.

MR. PEHRKON: Is there any instance where there would be any value to the content, that it could be attributed to a dollar cost for developing the content?

MR. SANDSTROM: I guess the idea behind my proposal is the communication has no value; the content has extreme value. And therefore, its only valuable because it persuades. It informs. And you shouldn't put a dollar value on that. I think it would be wrong, you know, for the system to do that. I think the strength of the Internet is it is out there; ideas are battling, and that's what's valuable. But it's not the dollar value.

MR. PEHRKON: But if you had production costs, because that's not--in order to develop a message, where do you put that?

MR. SANDSTROM: I don't need to put it anywhere under my proposal, because this proposal,

those production costs would be valued at essentially zero, too.

MR. PEHRKON: Okay; I'm trying to imagine a situation where you would ever have any expenditures.

MR. SANDSTROM: For most bloggers, there would be no expenditures.

MR. PEHRKON: How do you imagine which bloggers or sites would have expenditures? Could you give me an example?

MR. SANDSTROM: None.

MR. PEHRKON: Okay. Thank you very much.

CHAIRMAN THOMAS: Thank you.

Commissioner Smith.

COMMISSIONER SMITH: Thank you, Mr. Chairman.

Taking up a bit on thinking about this threshold, Mr. Potter, you had in your comments, your joint comments, suggested that the Commission should consider whether it has the authority to establish by rule a reasonable dollar threshold, e.g., $25,000 for spending by an individual on production costs for

materials to be disseminated via the Internet. So what do you think? Do we have that authority or not?

MR. POTTER: We carefully said the Commission should consider it, get the advice of its General Counsel, have a reasoned opinion from them, because we don't know.

COMMISSIONER SMITH: Well, I guess, he would probably like your advice, too. I mean, here's the thing--

[Laughter.]

COMMISSIONER SMITH: --your organization has no members, so as far as I can tell, the only basis you have for being up here is your expertise. And you've kind of suggested this, and I'm asking for your opinion now. Is it yes or no? What do you think? Give me your best guess. Do we have this authority or not?

MR. POTTER: I don't think you do.

COMMISSIONER SMITH: So in other words, you're suggesting, well, we could save the bloggers a lot of problem, but actually, we probably really

couldn't. And it would have to be enforced until Congress acted on it.

MR. POTTER: No, I'm suggesting that all of you should take a look at it and see whether you think that is defensible.

COMMISSIONER SMITH: If we decided to do it, would you sue us, you having just said you don't think we have that authority?

[Laughter.]

MR. POTTER: I have said that I don't think I see it. If you decide that you do based on a reasoned recommendation from the General Counsel's office, I assume you would act on it. If you decide that you're unsure, you would put it in your recommendations to Congress, which I think is the other approach that's worth doing here.

COMMISSIONER SMITH: I don't think that's very helpful, but with due respect, I appreciate the thought that we should consider things.

We have another thing that came up. Now, I note, and I've noted repeatedly, that nothing in-- I've read the plaintiffs' brief in this case many

times, and nothing in that brief suggests that their only concern was paid ads. It just never is raised; never do they say that paid ads are what they are concerned about and only paid ads. And nothing in the court opinion limits the reach of the opinion to only paid ads.

Thus, I was delighted when after my CNET interview in March, your organization came out very aggressively and said this is only about paid ads and nothing else. And so, what I want to get down is if we come out with a rule that exempts everything but paid ads, are you going to promise that you won't sue us?

[Laughter.]

COMMISSIONER SMITH: And can you promise that Senator McCain won't sue us, whom you've represented as a client many times?

MR. POTTER: I would never be ill-advised enough to make promises on behalf of Senator McCain, who has his own mind on all of these things. I was very interested to learn really just today that it is the view of former Commissioner Sandstrom, who voted

for this rule, and I gathered from your exchange earlier, perhaps your view, that the rule already covered paid advertising and hear at least Commissioner Sandstrom say he thought it covered party Websites and email purchase costs, et cetera.

If the Commission wanted to make that clear in its rule, I think that would go a long way towards addressing the concerns at least that the Campaign Legal Center had.

COMMISSIONER SMITH: It won't go all the way.

I just want to know what Mr. Bassik and Mr. Black should be preparing for and whether they should have any doubts, because that has been a big issue, because to be blunt about it, your group has actually cast aspersions here on my honesty in raising these things and said I'm intentionally raising things that aren't true, and so, I'm trying to pin you down. Is that the case, or not, or are there maybe some problems other than paid advertising lurking out there?

MR. POTTER: Oh, Commissioner Smith, I wouldn't be callous enough to cast aspersions on your honesty and I apologize if you thought I did cast aspersions on your honesty. Honesty isn't what was involved. What I suggested was that--

COMMISSIONER SMITH: Hold on. Hold it:

Commissioner Smith's interview does a good job of providing misinformation on the subject, and then, it says: As it was obviously intended to.

MR. POTTER: Yes, I think it was intended to cast attention towards the blogging community, and the suggestion that what the court had ordered here, which can only be remedied by Congress was the suggestion of the interview, was the wholesale regulation of the Internet. I don't think that's what the court ordered here. It ordered that the Commission review the definition of public communication and come up with something other than a flat exemption for public communication for all activity on the Internet.

Paid advertising, party Websites, email purchases are, I think, as I indicated, the vast bulk

of that concern, and to complete my answer, the only other concerns I would have are those laid out in our written comments.

COMMISSIONER SMITH: Thank you, Mr. Chairman.

CHAIRMAN THOMAS: I guess it's me.

Just to be clear, the issue that I keep coming back to with the various panels is that--I jokingly refer to it as a total carveout, because that's the term that's been used in another context in one of the rulemakings that we're working on. But in the coordinated communication area, I guess I had been assuming we didn't have any wiggle room. I had been assuming that when we say that it's a communication, you've got to figure out whether it's regulated as a coordinated communication according to our regulations.

And in essence, if it doesn't fit as a coordinated communication under our regulations, then, you don't have to worry about it being an in-kind contribution. And so, I sort of assumed that if you had established and coordinated, it was a

dynamite way to work through those regulations and find a way to say we're not covered, and therefore, we can do it.

So, it's very problematic, obviously, from the perspective of the folks who brought the Shays litigation, and it's problematic from my perspective to say that someone could basically pay in coordination with the candidate and have a limited amount of money for, shall we say, paid ads on somebody else's Website and not have that be treated as an in-kind contribution no matter how much was spent, no matter what the source.

I also have raised, though, that, you know, the reach of our proposal is to just try to bring back into coordinated communication analysis paid ads, but we do have some fairly identifiable large expenditures showing up that deal with extensive Internet efforts. And I guess, while I've got you here, Mr. Bassik, let me just inquire: we saw news stories, and I'll include them for the record suggesting that the Kerry campaign, among others, developed a huge mailing list, and they were

undertaking some what I gather they thought were important emailings to their sizeable email list, and they were including some video clips.

I think they were responding to the one that was put out, I guess, by the Bush campaign which made some reference to Adolf Hitler and a few Democrats in the same breath. But I'm just curious: if a campaign could basically put together that kind of an effort and then basically ask someone else to pick up the tab, don't we have a similar problem? Aren't we talking about, all things said and done, some pretty significant expenditures being put into a campaign like that?

MR. BASSIK: I disagree. I think in that instance, it's communication. It's written words but this time in a video format. They have not made an expenditure. They have not placed any advertising, and instead, organizations who are covered under the media exemption have provided air time or space for that communication from the campaign that was equal to, you know, John Kerry making a speech or releasing

a press release or, in this case, designing a Web video.

But I think if you look at the definition of public communication, it specifically mentions advertising, and I wasn't dictionary shopping. I looked up the term advertising in about a dozen dictionaries, and it all involved a payment and a business. Advertising is an industry. I would venture to say that what was going out in those emails was not part of the advertising industry; it was part of providing the written word or in video format just what Kerry was feeling.

CHAIRMAN THOMAS: So just to be sure I'm clear, you're saying you see the focus of what we're doing here to be limited to something that we could all characterize as advertising as distinguished from what might be going on through an email, a massive email effort.

MR. BASSIK: Yes; I would think when it comes to the online advertising perspective, that--I mean, the definition of public communication, unless I'm incorrect, has the term advertising in it, I

believe. So, yes, I would define advertising as the purchasing of ad space to promote a business, service or in this case a candidate or an issue.

CHAIRMAN THOMAS: Okay; for those who are also familiar with the issue in the context of what is a coordinated communication, and hence, what is a contribution or maybe what is an expenditure, does the expense going into a very helpful, obviously, email effort not also pose problems if it is coordinated and paid for by some third party?

MR. SANDSTROM: If I may ask, it may help clear up my confusion; maybe the same confusion Commissioner Smith has been operating under, that I never thought the terms in-kind contribution and coordinated communication were synonymous. I mean, I could come over and give you a piece of furniture for your campaign. That's an in-kind contribution even though you didn't pick out the furniture.

CHAIRMAN THOMAS: What if it's a communication, though? That's--

MR. SANDSTROM: But the coordination reg goes to public communication, and that's what the

Internet was exempted from. They weren't exempted and did not permit you to go pay a vendor an obligation that a candidate had incurred.

MR. POTTER: But if the obligation incurred by the candidate was Internet advertising--

MR. SANDSTROM: There's still an obligation to the candidate. Someone else has paid.

MR. POTTER: Even though it's on the Internet?

MR. SANDSTROM: Even though it's on the Internet.

MR. POTTER: I wish that had been said in the E&J. It would have been somewhat helpful.

MR. SANDSTROM: I'm not sure it would have been helpful. I think we probably still would have been used.

CHAIRMAN THOMAS: Well, it does point to an obvious difference of opinion that's existed for quite some while. So to the extent that it is a total carveout, I think, Commissioner Sandstrom, you're off base, but if it's not a total carveout and

all these other rules notwithstanding, the language of the coordinated communication can somehow attach. Maybe there's some work that can be done there to sort of repair that impression I think a lot of us have.

VICE-CHAIRMAN TONER: Mr. Chairman, but the total carveout which I really like was with respect to the state party fundraising events, which we preserved.

[Laughter.]

CHAIRMAN THOMAS: Commissioner Mason.

COMMISSIONER MASON: Thank you.

Commissioner Potter, in discussing with several witnesses to whom I was very sympathetic with their appeals to keep all this unregulated, I reminded them that we had certain tools we had to work with. The principal one was the statute.

And I want to start off sort of the same way with you. You seem to be positing a structure where we say, well, for most people, when we're dealing with the Internet, we're only going to reach where they pay to place, presumably, an express

advocacy ad on somebody else's site. But for political party committees, everything they do on the Internet, their own Internet sites, the emails of whatever number and wherever the addresses are derived are all going to be regulated.

The problem I see with that is that the statute defines both of those activities as general public political advertising, and that phrase comes up in 441d on disclosure, where party committee is or disclaimers, excuse me, where a party committee is required to put a disclaimer on--and it goes through this list of things--and general public political advertising.

Any other person who engages in express advocacy is required to put a disclaimer on, and it runs through, and general public political advertising. And the same tension comes up in the combination of 431(20) and (22), where the definition of public communication, including general public political advertising, is worked back into Federal election activity.

So the question is how can we read 441d requiring disclaimers with using the identical parallel language and the same paragraph in the statute as applied to political parties to mean Websites and any email but as applied to individuals to not include their Websites, to not include emails, to not include a whole lot of other activity?

MR. POTTER: I'm not sure I've got the question, so let me try to answer it, and tell me if I'm off base. First off, the statute clearly regulates parties and political committees in different ways and to a much greater extent than individuals. Specifically, it governs--the phrase Federal election activity has a variety of legal meanings for political party committees, including the requirement for hard money spending, and that's what we've addressed in our comments here.

I agree that if an individual purchased paid advertising, they need to put a disclaimer on their paid ad that is run somewhere else.

COMMISSIONER MASON: How about their own Website that includes express advocacy?

MR. POTTER: I was going to say that I don't think that what they write on their own Website is general public political advertising.

COMMISSIONER MASON: Then why is a political party committee's own Website general public political advertising?

MR. POTTER: It's a public communication.

COMMISSIONER MASON: Public communication. Is it defined as direct mail, television, broadcast or other form of general public political advertising? That's what I'm saying. The precise same words are used in the same paragraph of the statute to address political parties and to address other persons. How do we read them differently?

MR. POTTER: Because the party committee is engaged in Federal election activity.

COMMISSIONER MASON: We're talking about disclaimers. I think you reach a later complication in Federal election activity, but just in the disclaimer statute, just in that one little paragraph, 441d, that uses the precise same language,

how does it mean one thing for party committees and something else for individuals?

MR. POTTER: I suppose what you could do is decide that you were going to exempt individuals from what you thought to be the same language. I'm just not sure that I read the statute the same way.

COMMISSIONER MASON: Let's open it up. I mean, you're the former Commissioner. Whenever a political committee makes a disbursement for the purpose of financing any communication through a broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing or any other type of general public political advertising, and it goes on and states the disclaimer requirements.

It's all in the same sentence. How do I read general public political advertising to read one thing in the first part of the sentence and a different thing in the second part of the sentence?

MR. POTTER: The first comment is, as we've said in our written comments, we do not believe that the general public political advertising language covers individuals on their own Websites. I think, in all due respect, I'd like to think about your question of how it is covered for party committees and respond to that in writing, if I may.

COMMISSIONER MASON: Fine.

CHAIRMAN THOMAS: Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you.

A couple of points: I think that this issue of setting a threshold for the ads, which has been brought up by several witnesses, and, you know, I didn't know until we started to receive comments that in fact, you could place an ad for $5 on the Internet. So for that alone, the hearing has been useful, and the comments have been useful, and I

agree with you that that's a subject of great concern.

And I like these ideas that people have tossed out about $5,000, $25,000; I'm sympathetic, but I come back to the same problem that Commissioner Smith had, which is I'm not sure we have the statutory authority to do it; you know, Mr. Potter, under duress, says that he doesn't think we have the statutory authority to do it. Mr. Simon, his co-signer, who is another very experienced campaign lawyer also doesn't think we have the statutory authority to do it, and I'm not sure even if we asked our very fine General Counsel's office to come up with an opinion that they would come to a different conclusion.

And if we ask Congress to do it, I'm not averse to doing that, but I suspect that if Congress acts in this area, it's not going to be to set a $25,000 threshold; it's going to be to exempt the whole thing. So I think that that suggestion that we go ask Congress to do it may backfire on you, former Commissioner Potter. It may end up--I'm not averse

to doing it, but I think you're going to end up with a result that you weren't necessarily anticipating on that.

But I think we need to think about whether we have some flexibility under the statute to set some kind of threshold so that we don't catch the $5 ads and the $10 ads.

As far as disclaimers are concerned, I don't see any reason why that little CNN ad on your Blackberry there wouldn't be covered by the same rule we have for bumper stickers and pens and other things where it's just impractical. Give me a sec. The only reason we're talking about disclaimers on emails at all is because we've got a regulation on the books that I think you might have voted for, Commissioner Sandstrom--I know it was before my time--that says if you send out 500 substantially similar emails expressly advocating somebody's election, you've got to put a disclaimer on it.

I think it's a silly rule. And that's why we tried to add something into it to make a it a little less silly, and what we came up with was this

notion of buying the mailing list, that maybe that would put it in a different category and at least get individuals off the hook who generally don't buy email lists.

But a lot of people have raised issues with that, and I am open to just repealing that particular provision of the rules. I invite your comments on that as a solution.

MR. SANDSTROM: I certainly would recommend it. Whether I voted for it or not--I'm not sure if I did--but I certainly think it's a wise proposal.

COMMISSIONER WEINTRAUB: Anybody? Do you have a problem with it, Trevor?

MR. POTTER: Yes, as I said, I think my suggestion would be to look at either a higher threshold or to look at a purchase requirement in there for the purchase of email addresses.

COMMISSIONER WEINTRAUB: Well, that's what we've got now, and various people have suggested that really doesn't quite cut it.

MR. SANDSTROM: Commissioner?

COMMISSIONER WEINTRAUB: Yes.

MR. SANDSTROM: Could I just quickly respond to it? What if someone gives them to me, and they have purchased them?

COMMISSIONER WEINTRAUB: Well, I mean, that's one of the many problems that people have raised with it, that, you know, and how do you know which ones are purchased? And this goes to something that we alluded to before, Trevor, which is this issue of, you know, it's a very different thing to put 500 pieces of paper into an envelope and stamp them and lick them and send them in the mail than to press one button and say, you know, to everybody in my address book, boom, I've just now sent out an email, and it took one second and didn't cost me a thing.

So, I think we have to deal with this, but similarly, this issue of republication of campaign materials on the Internet, and it just doesn't seem like it's a good fit. And I'd be interested particularly in your view, Trevor, not to ignore anyone else, on how we should interpret that given that people cut and paste things and link things on

the Internet all the time, and it generally just doesn't cost anything.

And, you know, I don't like us being in a situation where we have rules on the books that people are violating throughout the country on a daily basis, and nobody pays any attention to them. I think that undermines respect for all of our rules if we allow rules like that to just sit there.

MR. POTTER: That is not the purpose of the republication requirement, which was enacted in an era of hard copy printing, so that the assumption was--

COMMISSIONER WEINTRAUB: But isn't that in BCRA? It's in BCRA, isn't it? That we're supposed to consider that in the coordinated communication context.

MR. POTTER: Correct.

COMMISSIONER WEINTRAUB: So they knew there was an Internet out there when they did BCRA.

MR. POTTER: But you're starting with a Federal Election Campaign Act, which had republication on the assumption that you are going to

a printer, and often, campaigns' principal expense or one of their major expenses was printing. So to say to someone, the campaign doesn't want to pay $50,000 for fliers--

COMMISSIONER WEINTRAUB: Right; what do we do now in the Internet context?

MR. POTTER: I think you can look at the Internet context, and in the example you've given, where you're cutting and pasting, say there is no cost to it, and therefore, we're not regulating it if it is by an individual.

COMMISSIONER WEINTRAUB: So you would be comfortable with our saying that for the purposes of coordinated communications, to the extent that people link to campaign materials or cut and paste campaign materials and republish them in that format, as long as there is no cost associated with it, we don't have to worry about it.

MR. POTTER: By individuals, absolutely.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.

COMMISSIONER MASON: By corporations?

MR. POTTER: Well, since corporations aren't supposed to be engaging in advocating the election or defeat of a Federal candidate, you then get back to the question of a link, which was one of the things Commissioner Weintraub mentioned, by a for-profit corporation. There, the Commission in the past has taken the view that in some circumstances, that could be a contribution. If it's on a partisan basis just to one candidate, then it is effectively an endorsement of that candidate.

COMMISSIONER SMITH: So the point we've heard many times in the last couple of days, well, if no money is spent, you don't have to worry about it isn't quite true, then, because the link might not really cost anything, but now, you're saying yes, it is still going to be a problem.

MR. POTTER: A corporation can't endorse a Federal candidate to the general public even if it doesn't spend any money.

COMMISSIONER SMITH: Okay; so there are issues, and by the way, this goes to various other things where the Commission applies that approach as

well. The Commission does not only value a contribution or an expenditures when money is actually spent. It is the Commission's position that something that has value, even if it has a subjective value we have to determine, will be valued at that basis, and that is one of the things that has concerned me consistently about this rulemaking, when I suggested early on that people would have to be-- you know, one of the issues here would be links: how do we value links?

What we've done in other circumstances is we've said, you know, the equivalent of if you have a link, you spend three cents on it, a candidate raises $30,000 from it, the value to the candidate was $30,000. You've got a big violation on your hands. That's the approach we've taken in other contexts, and that is the approach I think we want to make sure we don't take here. As I understand it, the position of the Campaign Legal Center is that is not what we should do.

MR. POTTER: The position of the Legal Center as stated in the written comments is you

should not consider links by individuals to be a contribution.

COMMISSIONER SMITH: Okay; thank you, Mr. Chairman, for letting me hog a bit more time.

CHAIRMAN THOMAS: Okay; it's no problem. That just came out of the Vice-Chairman's time. I'm sure he won't mind.

[Laughter.]

CHAIRMAN THOMAS: Vice-Chairman Toner.

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

I want to follow up on Mr. Potter. We talked earlier about the production of Internet materials issue and then the in-kind contribution scenario, and earlier, we talked about state party Websites and under current rules, the idea that if any portion of that Website has communications that promote or attack a Federal candidate under current law, they can still use soft money to pay for those types of communications. It doesn't federalize the Website, but if I understand your written testimony to be that we should change course in that area, and

at least a portion of the Website, if it promoted or attacked a Federal candidate, should be considered Federal election activity.

Is that a fair assessment?

MR. POTTER: Yes; we don't think that state parties should engage in Federal election activity solely with soft funds.

VICE-CHAIRMAN TONER: And is your position not that the whole site thereby would then become federalized but only whatever portion of the site, whatever page views contain the promoting or attacking of a Federal candidate?

MR. POTTER: I would respectfully, Commissioner Toner, disagree with the term federalize.

VICE-CHAIRMAN TONER: For dollar requirements or however we want to put it.

MR. POTTER: I think it should be covered by the requirements established in BCRA and by the Commission in terms of the use of hard and soft money.

VICE-CHAIRMAN TONER: But in terms of how much of the site would have to be covered with hard money, would it be your position that the whole site would have to be or only whatever portion of it contains the material promoting or attacking a Federal candidate?

MR. POTTER: I don't know the answer to that. I think that's something worth looking at.

VICE-CHAIRMAN TONER: Okay; the other thing is, and this hasn't been discussed; I want to make sure I understand your written comments. At pages 20 to 21, you talk about another aspect of the rulemaking, considering generic campaign activities. And as I understand the critique of the current rule limiting generic campaign activities to public communications; and the proposal, as I understand it, on page 21 of your comments that basically, generic campaign activities ought to encompass all generic activities of a state party, not just those that are public communications.

And you mentioned that perhaps it should apply to, for example, phone banks directed to fewer

than 500 people or mailings that maybe reach fewer than 500 people. I just want to make sure I understand the concern. Do you believe that we're legally required to take that position?

MR. POTTER: Well, I think the Counsel was right in noting that this was a pretty clear requirement in BCRA and that it's important that it include all types of generic activity. So I think yes, it is something, as we said in our comments, that we urge the Commission to look at this issue and to see whether it is covering everything it ought to cover, was intended to cover.

VICE-CHAIRMAN TONER: So if a state party sent out 300 mail pieces promoting a party, you know, vote Republican in November or whatever other type of generic activity, the view would be that that would be Federal election activity?

MR. POTTER: Yes, just as any other activity would be that's of a generic party nature at that time in the election cycle.

VICE-CHAIRMAN TONER: With no numerical threshold, no need that it be 500 pieces or 500 phone calls?

MR. POTTER: I think our point in the comments is that we don't see such a threshold in the statute itself.

VICE-CHAIRMAN TONER: That's something that we struggled with in terms of whether we have the legal ability to establish any of the thresholds we've talked about.

Mr. Chairman, just one final question. I wanted to ask Mr. Black, on pages 4 to 5 of your comments, you talk about the challenge of keeping up with sophisticated Internet users, and I just want to read briefly from your comments, that you say: The architecture of the Internet is such that enforcement of regulations on all of the proposed areas may be quite difficult, even futile, and the FEC should be aware of the ways in which certain of its efforts might be evaded.

Almost all these proposed regulations have the potential to drive bloggers underground in order

to avoid potential complaints. You talk about offshore accounts and all of the other activities that I guess people of significant means enjoy. And then, you say on page 5, as such, it will be those bloggers who post under their real names who will bear the brunt of the regulations, not those truly seeking to use the medium in nefarious ways. Could you elaborate on your concerns?

MR. BLACK: Well, the concern is that if, you know, bloggers who are operating with sort of the maximum of transparency about who they are and what their agenda is are the ones who would in a sense face the kind of scrutiny that they could potentially face, while anyone who is wishing to engage in nefarious activity could do so quite easily, and it would be very difficult, you know, if this were a more widespread practice, it would be very difficult, in a sense, to track them down. They could be doing it offshore. As I said, they could be doing it anonymously, and there's nothing wrong necessarily with anonymity, per se.

They could essentially be hiding their identity for the purposes of evading scrutiny, they could successfully do so, and they would be able to at least often successfully do so.

VICE-CHAIRMAN TONER: Let me ask you more bluntly.

MR. BLACK: Sure.

VICE-CHAIRMAN TONER: Do you believe that if we pass proposed regulations in this area, it may create an incentive for people to go offshore with their Internet activity that affects politics?

MR. BLACK: Yes, and going offshore wouldn't necessarily make it impossible to track down the users; I mean, there's two senses they may go offshore: they may physically move to France.

VICE-CHAIRMAN TONER: Must be nice. Not France but--

MR. BLACK: Essentially, the servers would be located in a country where it would be difficult to get all the information law enforcement would need to get in order to essentially--

VICE-CHAIRMAN TONER: Difficult for this agency to--

MR. BLACK: Yes.

VICE-CHAIRMAN TONER: --as much as we'd like to go to Bermuda and places like that.

MR. BLACK: Right, exactly.

VICE-CHAIRMAN TONER: Mr. Bassik, your thoughts on that? Do you think there's the potential for that type of evasion if we pass regulations in this area?

MR. BASSIK: Yes; the Internet is an extremely easy medium to have a major presence on it.

VICE-CHAIRMAN TONER: Offshore.

MR. BASSIK: The thing about television, for example--

VICE-CHAIRMAN TONER: Unlike television and radio.

MR. BASSIK: Somebody in France can't really buy television in the U.S. to impact the election here. Someone cannot engage in that activity. But it's just as easy for someone in Canada or someone in the States to use an offshore

server to create a whatever dot com that is accessible here in the U.S.

VICE-CHAIRMAN TONER: The email still comes, or the site is still accessible, as if it were in the United States.

MR. BASSIK: Exactly, and to the layperson or even to the experienced individual, you would not be able to tell the difference. Absolutely.

VICE-CHAIRMAN TONER: Thank you.

MR. SANDSTROM: Could I answer that?

It shows essentially the futility of this effort. You will shut down the local ward committee, but the local ward chairman as an individual can set up the same site. We'll shut down the ward committee in Chicago, but across the border in Toronto, someone could have that site. We will prevent people, you know, and party committees engaging in all these activities where someone in a cave in Afghanistan, if we don't have our devices up to try to locate them, can actually be broadcasting over the Internet to the U.S.

What are we essentially accomplishing? It just reminds me: when my children were young, they used to have me come in and check whether there was a monster under the bed. I used to come in; no monster under the bed. Each time, there was no monster under the bed. Right now, with respect to the Internet, there is no monster under the bed.

COMMISSIONER SMITH: It's called the appearance of corruption.

COMMISSIONER WEINTRAUB: The appearance of a monster under the bed.

COMMISSIONER SMITH: Not really one, but people think there is one, so we need to stop it.

MR. POTTER: Well, there is, of course, underlying all this a significant distinction in our laws and our constitutional jurisprudence between something that is done by a party committee and something that is done by an individual that goes not to the appearance but perhaps directly to corruption, which is who's spending the money? Who's giving them the money?

If the individual does it out of their own funds, the Supreme Court has found that that is not corrupting. If, on the other hand, the individual gives the money to the party committee, and they spend it on the Website, it is corrupting or potentially corrupting if it is a huge contribution. So you are back where you started, which is it does make a difference who's doing it in terms of where the money is coming from and who is soliciting the money and whether it is being given to a party committee that is, in the words of the Supreme Court, going to show gratitude for that contribution.

COMMISSIONER SMITH: Mr. Chairman, could I have one point clarified?

CHAIRMAN THOMAS: Commissioner Smith?

COMMISSIONER SMITH: And it took me--I wanted to double check, and I may still be missing something, but Mr. Potter, you said corporations cannot make endorsements. I'm not even sure this matters, but when we talk about somebody spending money, I think it does. And I think that's wrong. You either point me--I'm either ignorant, and you

need to point me to the statute or the reg. As I understand it, corporations can make endorsements. They can certainly make them and even spend money to advertise them to the restricted class, but they can make them even generally so long as they don't spend any money. What is prohibited is spending any expenditure.

Now, one could take the position, I suppose, that a corporation cannot do that without spending money. If the board meets and they pass a resolution, they've spent, you know, even if they don't debate it, they spent a minute of time, and, you know, they've got 20 people who are worth, you know, $800 an hour, and that adds up. So I guess--am I missing something there, or is that not--

MR. POTTER: No, I don't think you are. That goes to the definition of expenditure. The Commission has, and the statute allows, a corporation to do certain things, as you've pointed out, to its restricted class, such as endorse candidates. And it doesn't say they can endorse candidates to the general public.

COMMISSIONER SMITH: Well, but they could if they didn't spend any money doing it.

MR. POTTER: That gets to the perhaps theological question of can you do it without spending money.

COMMISSIONER SMITH: That was my question.

MR. POTTER: The Commission has taken the view, for instance, that using corporate letterhead is an expenditure, however difficult it is to define that, and thus, something of value.

COMMISSIONER SMITH: And Mr. Chairman, if I could, I wanted to make one other suggestion. One of the good things about this hearing is there have been a number of comments made, particularly on technology and how people use the Web and things that I think our expertise needs this kind of commentary.

And I was hoping that we might leave the record open for a couple of days if any of the witnesses wanted to submit things, particularly on how they used the Web or anything they felt there might have been some confusion or misunderstanding on our part that they didn't have a chance to answer on

their panel, or it came up on a later panel. I'm particularly concerned about the technology, because I think all of us, that's where sometimes, we're finding ourselves grappling a little bit exactly how people are doing it.

So may I make that suggestion and--

CHAIRMAN THOMAS: Let me ask our Counsel's office, is there a problem with saying that witnesses have an opportunity, and I hope also Commissioners, who, as I have said, I've made reference to articles and so on; I think we should be putting those in the record to the extent we feel it's appropriate so that it's sort of available for everyone; they've been referenced and so on.

Is there a problem with doing that?

MS. SMITH: I believe, Mr. Chairman, that we have had a practice of doing that on occasion in the past. I would just suggest that we set a time, a certain amount of time so that everyone knows how much they have.

COMMISSIONER SMITH: I would hope we keep a pretty short deadline on that so we can keep this, you know, that phase moving forward.

CHAIRMAN THOMAS: We'll say without objection we will allow the witnesses and Commissioners to add additional explanatory material to the record for one week.

COMMISSIONER WEINTRAUB: Mr. Chairman, I wonder if I could ask your indulgence to ask a couple of quick follow-up questions to the Vice-Chairman's questions.

CHAIRMAN THOMAS: While we've got them.

COMMISSIONER WEINTRAUB: Thank you. I appreciate it.

I'm concerned about this issue of people going offshore and underground, and we tried very hard not to cover bloggers in our proposed rule, so which aspects of the proposed rules that we put out for comment do you think would drive people offshore, underground?

MR. BASSIK: I would say the obvious one would be incorporated bloggers who do not receive the media exemption would be the most--

COMMISSIONER WEINTRAUB: What if we put something in that said that they could incorporate for liability purposes, and it wouldn't be an issue?

MR. BASSIK: If those same exact people were also given an individual or a group of individual exemption as an extension of the volunteer exemption--

COMMISSIONER WEINTRAUB: That would solve the problem?

MR. BASSIK: Yes, I believe so.

COMMISSIONER WEINTRAUB: Because I think that's doable.

And I wanted to ask one quick follow-up for Trevor on this issue of the state party Websites, because I think this is very important. As I read our regulations interpreting correctly, I think, the statute, a state party can't allocate the cost of a public communication, so if we bring their Website in as a public communication, they're not going to be

able to, as long as there is a PASO reference to any Federal candidate anywhere on the Website or any generic campaign activity on the Website, they're going to have to pay for the whole thing with hard dollars. Do you have a different understanding of that? Because you have suggested in your written comments that they can use time/space, which I think presents logistical difficulties anyway but--

MR. POTTER: That's why I said I wasn't sure of the answer to Commissioner Toner's question, because he's taking the other assumption, which is that the public communication is that page or that reference, not the entire Website.

COMMISSIONER WEINTRAUB: Well, what's your position?

MR. POTTER: Well, I'm not sure. In our comments, we have said that we think you can allocate the cost. If you'd like, I'd be happy to give you a more considered response to that.

COMMISSIONER WEINTRAUB: I would appreciate that greatly. Just a second; let me ask one more question of Trevor, and that is logistically, I used

the example yesterday of the Arizona State Republican Party Website, which a few months ago, when I looked at it, had a nice montage of all of their candidates including Senator McCain and President Bush and a lot of their state candidates on their front page.

And if you go to it now, most of those pictures have disappeared, and now, they've got a picture of President Bush, so the Websites are dynamic; they change on a regular basis. How exactly are we to do or are the state parties to do this time/space allocation when you are looking at something that changes over time and, you know, regularly?

MR. POTTER: I would be happy to incorporate that in my answer, because I think it's the same general issue.

COMMISSIONER WEINTRAUB: I would appreciate that.

Commissioner Sandstrom?

MR. SANDSTROM: Trevor's answers assume far more formality and structure to much of the political parties than there actually is. People get elected

precinct chair, or there may be a precinct committee or a ward committee or a county committee, and it's a very volunteer-based structure. They are not determining, and I know that we were sued because we tried to put a threshold on when you have to register and report to even make it de minimis.

The people who objected to that said that would introduce corruption. So the idea that even down to the precinct level that these entities would have to register and report and only use Federal dollars is a rather preposterous notion, since they could actually go wear another hat and do it as an individual.

If the party were this formal structure that it seems to, you know, be the cause for all this concern, and I share the concern, but that is not the party I know.

COMMISSIONER WEINTRAUB: Well, I know our experience in auditing numerous state party committees is that they're not quite as well organized as maybe they ought to be.

Mr. Chairman, I thank you very much for the--

CHAIRMAN THOMAS: And I'm sure the same lack of organization is on the other side of the aisle as well. It's not just that we're Democrats, I hope.

COMMISSIONER WEINTRAUB: That's not our experience as--

MR. POTTER: That was Will Rogers' belief.

CHAIRMAN THOMAS: I think that brings us to the end.

Vice-Chairman Toner, did you want to follow-up?

VICE-CHAIRMAN TONER: If I could follow-up, please, I want to follow-up on Commissioner Weintraub's questioning. I want to make sure I understand: bloggers, it's your position that as long as bloggers were, per se within the press exemption, then, the offshore issue would be solved.

MR. BLACK: I believe so, yes.

VICE-CHAIRMAN TONER: But if we took a case-by-case approach to bloggers, it could be a totally different story.

MR. BLACK: Well I mean, a case-by-case approach to bloggers would essentially put undue burdens on people; you know, I mean, I have a big blog, and I earn money. But, you know, lots of bloggers who earn $10 a month or no money at all. And so, if, in fact, you know, by simply setting up a Website and posting your opinions about things including Federal candidates on your Website would potentially, you know, bring the scrutiny of the Commission to you, especially if, you know, that puts an undue burden, it would really have a chilling effect on Internet speech.

VICE-CHAIRMAN TONER: And regardless of what we do on bloggers, in terms of the paid advertising on corporate paid advertising avenues, there still would be the offshore component of that, would there not?

MR. BLACK: Can you repeat the question? I--

VICE-CHAIRMAN TONER: Sure; any paid advertising on the Internet that you might place on a corporately-owned facility that is outside the United States.

MR. BLACK: Yes; I think I understand what you're saying. You're basically saying that if I place an ad on--

VICE-CHAIRMAN TONER: Yahoo UK.

MR. BLACK: Yahoo UK--

VICE-CHAIRMAN TONER: --that can be obtained here.

MR. BLACK: Or even on Yahoo US if their servers happen to reside in Bermuda that this.

VICE-CHAIRMAN TONER: Or any other search engine or Web construct that it is outside the United States.

MR. BLACK: Yes.

VICE-CHAIRMAN TONER: Thank you.

MR. BASSIK: You can do that, but I think it would still be an expenditure.

VICE-CHAIRMAN TONER: Right; but how are we going to police it? As much as I would like to go to Bermuda.

MR. BASSIK: Well, I imagine it wouldn't be any different. I mean, the policing right now is based on who is making the expenditure, not on the media entity, so I don't see that changing, actually.

VICE-CHAIRMAN TONER: Thank you.

Thank you very much, Mr. Chairman.

CHAIRMAN THOMAS: Well, I hope that not everybody is just going to move offshore, and none of this will be relevant to anybody in any context.

We will bring this to a close. I want to--Commissioner Mason, I'm sorry; did you want to--

COMMISSIONER MASON: Commissioner Potter, this question about disclaimers that I was asking is, I think, closely related to the question you were just asking, and so, I think the answers at least will be closely related, and I want to emphasize I really think, just as it's a statutory problem for us to say we'd all love to get a $5,000 exemption, and maybe all of us here and all the witnesses could

agree that would be a perfectly acceptable number, we just might not have the tools to do it.

I just want to emphasize that I think it's a real problem that the distinctions you raise are ones that are reasonable, and in sort of the spirit of the statute might make sense, but I'm very concerned that the statutory tools may not allow us to do that, and so, I would appreciate it if you would take a close look at the language of the statute and present to us if you think there really is a way to get where you're suggesting we go.

MR. POTTER: I indeed will and have made those notes and am always happy when the Commission is concerned with the language and the spirit of the statute.

CHAIRMAN THOMAS: Well, unlike a certain Chairman who recently stormed out and didn't let his colleagues go on beyond what we were going to otherwise go on, I am delighted that we took a little extra time and let everyone ask the questions they felt appropriate, and I thank the witnesses; very helpful. I thank all of the witnesses who came in

helping this proceeding, and no further business appearing, this special session is adjourned.

Thank you.

[Whereupon, at 4:12 p.m., the hearing was concluded.]