Federal Election Commission

Public Hearing on Agency Practices and Procedures
January 14-15, 2009

Wednesday, January 14, 2009

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

COMMISSION MEMBERS:

STEVEN T. WALTHER, Chairman
MATTHEW S. PETERSEN, Vice Chairman
CYNTHIA L. BAUERLY, Commissioner
CAROLINE C. HUNTER, Commissioner
ELLEN L. WEINTRAUB, Commissioner
DONALD F. McGAHN II, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel
ANN MARIE TERZAKEN, Associate General Counsel for Enforcement
JOSEPH F. STOLTZ, Acting Staff Director

WITNESSES:
JAN WITOLD BARAN, Wiley Rein, LLP
ROBERT F. BAUER, Perkins Coie, LLP
JAMES BOPP, JR., James Madison Center for Free Speech
JOSEPH M. BIRKENSTOCK, Caplin & Drysdale
DAVID M. MASON, Former FEC Chairman
SCOTT E. THOMAS, Dickstein Shapiro, LLP; Former FEC Chairman
MARC E. ELIAS, Perkins Coie, LLP
WILLIAM J. McGINLEY, Patton Boggs, LLP
HANS A.von SPAKOVSKY, Former Commissioner
BRIAN G. SVOBODA, Perkins Coie, LLP
LAURENCE E. GOLD, Lichtman Trister & Ross, PLLC, AFL- CIO
ROBERT K. KELNER, Covington & Burling, LLP

P R O C E E D I N G S

CHAIRMAN WALTHER: Good morning. The special session of the Federal Election Commission for Wednesday, January 14 and Thursday January 15, 2009, will please come to order. I'd like to welcome everyone to this hearing on the Commission's policies, practices and procedures.

I'm Steve Walther, Chairman of the Commission. I will begin by introducing my colleagues at the table.

On my left is Vice Chairman Matt Petersen. On my right is Commissioner Cindy Bauerly. Further on the left is Commissioner Caroline Hunter and further on the right is Commissioner Ellen Weintraub, who presided over our hearing in 2003 when she was Chair of the Commission. On the far left, or far right, however you want to look at it, is the immediate past chair, Commissioner Don McGahn.

Also sitting with us on the right, the far right, is General Counsel Tommie Duncan, and on her left is Ann Marie Terzaken, from our Office of General Counsel. And on my far left is Joseph Stoltz, who is our Acting Staff Director.

The issues we are discussing today were included in a notice of public hearing and request for comments published in the Federal Register on Monday, December 8, 2008. The notice was signed by our immediate past chairman, Don McGahn, who is a strong supporter of this initiative.

The Commission plays a unique role in administering and enforcing the federal campaign finance laws and is considering this review -- conducting this review to consider issues that require reexamination or adaptation of our policies, practices and procedures.

This hearing is the second of its kind. The Commission conducted a similar review of its procedures in 2003, although narrower in scope. That particular hearing was conducted, as I mentioned, by our current commissioner, Ellen Weintraub. The comments received during the 2003 review were considered by the Commission and as a result, the Commission adopted a number of new policies and procedures, some of which are referenced in the Federal Register Notice for this hearing.

We are here today to continue that process, asking once again for feedback on how we have been fulfilling our mission and more importantly, how we can improve it going forward. The three basic questions for which we seek answers are, how can we make our process more transparent? How can we make it more fair? And how can we make it more efficient?

This hearing invites comment on the broadest scope of Commission activities since its inception over 30 years ago. It is fitting that we do this now. The Commission has the benefit of realizing how helpful a hearing can be from its previous experience in 2003.

But much has changed since then. With the passage of the Bipartisan Campaign Reform Act, the passage of the Honest Leadership and Openness in Government Act, the advent of new uses of the Internet and new ways of funding campaigns, and the welcome explosion in the number of contributors, we must constantly look at new ways to ensure our mission is being fulfilled.

The fact that we have the most new Commissioners at one time since the formation of the FEC is further reason to take a fresh look at all our operating components from A to Z. This is the start of such a process.

In addition to this exercise by which we hear from the public, I have asked Mr. Stoltz and Ms. Duncan to review our internal procedures in the areas of their respective jurisdictions within the agency so that we will contemporaneously have the benefit of our internal expertise on how to improve this agency. They readily agreed to do so and have already undertaken to form internal committees to accomplish a complete review of our

procedures. This will be done in time for consideration as part of this proceeding.

We appreciate all of the people who took the time and effort to comment and particularly those of you who are appearing here today as witnesses to give us the benefit of your expertise and experience. We are aware the timing of this initiative has been inconvenient for some and appreciate very much the time you have taken to be here today. It will make a difference.

In consideration of the issues of hardship and inconvenience, and to be assured we will be able to receive input from those who were unable to participate because of the holidays, I am asking for a re-opening of the time for written comment until midnight Wednesday, February 18, 2009. This will allow the commenters to have the benefit of the written comments received so far and an opportunity to review the transcript of these proceedings, which should be on our website by January 30.

So without objection from my colleagues, I will ask the Office of General Counsel to prepare a notice to that effect to be placed in the Federal Register as soon as possible.

We have already received pointed criticism and strong suggestions in written comments that precede this hearing and we will hear more of the same today, as we should, and we ask that no quarter be given. We also accept favorable comment whenever possible. I note that some was given, for which we express appreciation.

However, as we go forward today, let me note at the outset my view, one that I am confident is shared by all the Commissioners. We have the benefit of the most loyal, dedicated and professional staff members that any agency could ask for. There are people here who have been at the Commission their entire professional lives, ever since the days of the inception of this agency, such as Joe Stoltz. Also Scott Thomas, who only recently left the agency, is here today to help improve the Commission. Mary Dove, our Commission secretary, has been here for many years, but we are not counting them.

They love this agency. Any criticism, many of which are well deserved, or shortcomings, of which there are many, are those of the Commissioners and the Commissioners alone, not those of the staff. They operate at the direction of the Commissioners and we take total responsibility for our operation. I ask your comments today will take that into consideration.

I would like to describe briefly the format we will be following today and tomorrow. We expect a total of 16 witnesses who have been divided into six panels. Each panel will have five to ten minutes to make an opening statement. We have a light system at the witness table to help keep track of your time, but we will not use it unless our internal discipline breaks down.

The balance of the time is reserved for questioning by the Commissioners, our General Counsel and our staff director. It is our hope that the panelists will have roughly an equal amount of time to provide their views. We have a busy day ahead of us and appreciate everyone's cooperation in helping us stay on schedule.

And with that, once again, I'd like to welcome you. Thanks for being here.

I'd like to introduce our first panel, Jan Baran, Robert Bauer and James Bopp, Jr. Again, thanks for being here. We will begin alphabetically with Mr. Baran.

MR. BARAN: Thank you, Mr. Chairman, and good morning, Commissioners and Counsel and Mr. Stoltz, who I remember from my brief tenure here at the Commission back in the Stone Age. It's always been an honor to have worked at the Commission, particularly in the formative stages of the agency.

I would like to acknowledge the presence of one of my partners, Carol Laham, who also worked here at the Federal Election Commission and is part of the Wiley Rein Election Law and Government Ethics Group, which -- which submitted the comments in this proceeding.

As some of you may know, for me this is déjà vu not only having worked here, but also having testified on the subject matter six years ago when Commissioner Weintraub was chairing the proceedings. As part of that, I sort of reviewed what I said then, what subjects were covered in that proceeding, and there is an element of familiarity.

I remember there was a topic of how respondents should be designated when a complaint is received, whether the complaint should be distributed to anybody whose name was mentioned in the complaint at all or whether they ought to be a little more focused. Of course, as a result of those hearings, the Commission did adopt a new procedure focusing on who would be receiving a copy of the complaint.

Also six years ago, we talked about whether there ought to be opportunities for hearings before this agency, particularly with respect to probable cause proceedings and the Commission, in my opinion, wisely decided to experiment with that and has adopted procedures for opportunities for probable cause hearings.

A third topic that was discussed six years ago was whether to allow motions and if so, under what circumstances, and I see that that topic is covered again in the Federal Notice for this hearing. As we urged the Commission then and urge again today, there ought to be opportunities for motions to be filed before the agency.

Finally, even six years ago, we had discussions about access to the depositions and document production in the course of investigations and allowing respondents to have access to the material that the Counsel's office would be relying on for any recommendations for probable cause.

There has been progress in that area. I know that there's more access to deposition transcripts today than there was then.

A lot of the proceedings six years ago did focus also on a series of recommendations that were promulgated by the American Bar Association in 1982. Some of those may be a little outdated, may not be relevant, but I urge the Commission just to take a look at some of those issues that were addressed by the ABA Section of Administrative Law, which I note at that time was chaired by a then relatively obscure law professor by the name of Antonin Scalia, and it was his group that approved those recommendations.

Our purpose is today, I don't want to repeat, we've already submitted in our written comments. But I look forward to discussing those and answering any questions that any of the Commissioners may have on them. But we did try to repeat some of our recommendations and improve on those and also focus on some of the additional topics that were raised in the notice, particularly with respect to the Reports Analysis Division.

I look forward to your questions. Thank you.

CHAIRMAN WALTHER: Thank you, Mr. Baran. Mr. Bauer?

MR. BAUER: I'm not quite sure how this works. I'm trying to -- the microphone.

Thank you very much. I appreciate the opportunity to testify. As you know, our group, the Political Law Group at Perkins Coie, filed comments, detailed comments and I want to make a few preliminary remarks that are not duplicative, that don't go over the same material that you have before you in writing.

First of all, I want to thank the Commission for holding this hearing, commend the Commission and the staff for working hard on these issues. I note that the agenda has been -- the witnesses have been carefully and the panel carefully organized by age in descending order. I am here on behalf of the three grumpy old men to talk about our extensive experience with these issues that are before the agency.

But I did want to make a few general remarks that are not reflected in the partner submission on behalf of the Political Law Group. What I wanted to do was to try to address the view that somehow there is a tension here, sort of a fatal tension between, on the one hand, enforcement, and on the other hand, this sort of procedural reforms and due process concerns that dominate so much of the commentary before the Commission in this proceeding.

It seems to me that that is -- has to be seen in a different perspective, which is to say, I do not believe that the Commission faces a stark choice between effective enforcement on the one hand and plentiful due process protections on the other. In fact, the view that I'd like to put before you is that at the end of the day, the viability of the campaign finance regime, the sustainability of the regime for reasons that I'll just very briefly mention, really depends on very rich procedural protections and that it will enhance the Commission's enforcement effort to have those protections in place.

I received some e-mail traffic, because on my site I posted some commentary about this proceeding and some of the comments that have been filed with the Commission. I've received some e-mail traffic suggesting that by arguing due process issues, defense counsel come in here essentially with the view that they can hobble the Commission's enforcement mission, that everything here is sort of a plot to make it impossible for you to put our clients away for life, which some people believe they richly deserve. And that is --

MR. BARAN: Your clients.

MR. BAUER: Well, your clients too, frankly.

(Laughter.)

MR. BAUER: My clients only do the things that your clients have blazed a trail on.

(Laughter.)

MR. BAUER: The pioneer law breaker on my left here. And the person who then couches a defense in First Amendment terms on my right.

In any event, the long and short of it is, the agency finds itself in this difficult position where it's an administrative agency like any other which tries to fill in the gap. It takes a congressional enactment and then it applies it and stretches it and expands it as new facts and circumstances develop and new forms of conduct emerge in the political process.

But that's what makes this such a delicate task, because as we all know, campaign finance enactments really take place by wide consensus. There are always significant partisan and ideological divisions in the enactment of campaign finance reforms because they touch so actively a political nerve.

So the administrative filling-in process is necessarily contentious and it's particularly contentious because that which the regulatory community finds hard enough being delivered to it by the hand of the Congress, they find especially hard delivered to it by the hand of administrators.

And when I say filling-in, I'm not talking only about law being made by rulemaking. I'm talking about, frankly, the de facto rulemaking that takes place in the enforcement process and in the advisory opinion process, and some would say elsewhere in the operation of the agency. This filling-in takes place in areas of considerable sensitivity to the political process: fundraising and get-out-the-vote activity and issue advertising and so forth.

And so there is a natural resistance that develops to having the agency starting to move beyond what people believe the statute on its face or the regulations on their face plainly prescribe and expand the reach of the law into these delicate areas of political activity.

The only way to make that bearable, if you will, and I think that really the future viability of campaign finance regulation depends upon it, is for the agency to have a set of procedures, procedural protections, transparency protections, and due process protections that I think will ultimately make it much easier for that filling-in process to take place and be accepted by the regulated community and help the statute both grow and at the same time grow in a fashion that people believe to be fair and orderly. So I don't see a conflict between the filling-in activity on the one hand and the due process concerns that are so pronounced in this proceeding before you on the other.

There is one piece of this in particular I just wanted to address in closing, which is the piece of due process argument and the reaction to it that centers on the risk of delay. Very often what you hear is that everything defense counsel comes before you and asks for, you know, hearings and additional extensions of time, and the opportunity to file motions and whatever, means that wrongdoing gets punished late.

There is obviously in some places a tremendous hunger to see campaign finance violations, if they are perceived to be occurring, addressed immediately, if possible in the same cycle they're occurring, so that those who engage in this

conduct don't wind up getting away, if you will, with regulatory murder.

I think that that is a mistake in view of what this agency can accomplish. To the extent that the agency has been successful and the statute has been successfully administered, it is because over time in the aggregate with cumulative impact, the decisions that the agency has taken in a variety of areas, including through this filling-in process, has taken hold in the regulated community and has served to mold compliance behavior.

It may be that every now and then there is some pioneering scofflaw that you have to chase and you catch up with the scofflaw late and the penalties that you assess strike people as being too small, but you will have made your point. You have marked the ground. You will have changed the calculus, if you will, by which actors make choices about what they can or cannot do, and it does mean that, in the aggregate over time, the enforcement behavior, the enforcement program of the agency does, I think, become an effective one.

So yes, a process with oral hearings and motions and sort of more flexibility, the extensions of time and a variety of things that you see before them, will mean more time built in for the resolution of cases. But getting it right and then ultimately making the decision that you make, will mean the regulated community you're addressing will accept it more. There will be less confrontation with the agency, more acceptance of the mission and over time, the rules that you articulate, the legal standards that you are sort of broadcasting to the community and making known, will have an impact on the conduct of political actors.

Those are my few opening remarks and with that I close and thank you again for having us.

CHAIRMAN WALTHER: Thank you very much. Mr. Bopp. Thank you for coming as far as you did and glad you could be here today.

MR. BOPP: Thank you very much, Mr. Chairman, Commissioners. I appreciate the opportunity to testify today and I also particularly appreciate your willingness to consider comments and testimony regarding how this agency may better serve its important function.

Introspection is often not easy and some people interpret it as hey, come and criticize us. I don't look at it that way. I see us as trying to help you with an important -- important job and we appreciate the opportunity.

I'd like to start with first principles, not to disappoint Bob Bauer, and that is, this agency operates within the context of the First Amendment, which says Congress shall make no law abridging the freedom of speech and association and press and the right as citizens to petition the government.

Much of that activity is subject to regulation under the Federal Election Campaign Act and, of course, the courts have made clear that in order to subject that activity to regulation, it requires a compelling justification. So regulation is the exception, not the rule, under the First Amendment and so I think terminology such as regulated community or the FEC regulations permit speech or assembly or petitioning the government reflect a mindset that is not in accordance with the First Amendment and the law as the Constitution requires this agency to conduct itself.

Now it is true that we got off track with McCain-Feingold. Ninety pages of statutes, 1,000 pages of FEC regulations and their justifications, much of which was upheld in *McConnell*, suggests -- it might suggest that the regulated community and the Commission permitting certain speech may be more in accord with what the court is looking for at this situation.

I mean those were the sort of glory days of the regulators. Well, I think the court is getting back on track with a faithful interpretation of the First Amendment and the cases *Randall v. Sorell*, *Wisconsin Right to Life v. FEC* and *Davis v. FEC*. One of the statements that I think should be a watchword for this Commission and for the way we look at campaign finance regulation is a statement by Chief Justice Roberts that "the tie goes to the speaker" in this regime of the First Amendment.

Now in addition, we need to recognize that procedure is punishment. The classic example, of course, is this Commission's investigation and ultimate prosecution of the Christian Coalition in a case culminating in 1999, which during the investigation stage and ultimately the litigation stage, involved 81 depositions ranging from Ralph Reed, who was executive director of the Christian Coalition, his temporary secretary, to the then past-President of the United States, and frankly, everyone in between.

There's no question that -- and of course, ultimately the result was vindication of the Coalition in court. So in that case is a stark example of how the procedure itself is punishment.

I think derived from these first principles, a couple of operating principles, if you will, one is the Commission should apply the law only in the most compelling circumstances, and secondly, that they should take every effort to relieve the regulatory burden of the process in which the Commission subjects the people in seeking to enforce the law.

Now let me comment on investigations, rulemakings and motions. First, investigation. What I found is that there is a culture in the General Counsel's office that they take the decision of the Commission to find "reason to believe" seriously, not as an institution of an investigation, but as a mandate for the General Counsel's office now to prove that a violation has in fact taken place.

They also may approach these matters with a certain preconceived idea about a set of facts that they believe occurred in the circumstance and they set about to prove that those facts actually did occur. It seems to me the proper mindset of people who have been asked by this Commission to investigate potential violations of the law is not to act as a prosecutor during the investigation so you can prove a preconceived set of facts, but should be seeking out the truth as to what actually occurred and then apply the law to those -- to that discovered -- those discovered facts.

I think this will enhance the ability of the Commission to actually find actual violations of the law while at the same time relieving the regulatory burden on those falsely accused and of course, we all know that in -- there's a chapter in every candidate's manual on how to conduct your

campaign, which is when to file your federal election complaint and how to get the maximum advantage by the accusation.

So the Commission is often being -- attempted to be used for partisan political purposes to win elections during a campaign and as a result, many of these accusations are simply political posturing and the Commission needs to approach that with the understanding that that is something that may very well occur.

The second thing is rulemaking. Now here I think the Commission needs to take the current state of the law seriously and I think there have certainly been examples where the Commission -- and there seems to be in fact, I would say, a mindset of the Commission historically -- I'm not saying this Commission, but the Commission historically -- which is to always expand its jurisdiction, to always take court cases to -- as another opportunity to expand the jurisdiction, prepared to rest the FEC regulations on the slimmest reed of possible constitutional justification.

A classic example, of course, is 100.22(b), which has been struck down by the 4th Circuit and the 1st Circuit and the Southern District in New York. The Commission in dealing with those cases said well, we won't enforce it in the 1st Circuit and the 4th Circuit and the Southern District of New York, relying upon, of course, a 9th Circuit decision, *Furgatch v. FEC*, which you now decide to apply throughout the United States.

I mean, I wonder why -- wasn't it that they -- the 9th Circuit decision in *Furgatch* was treated as only the law in the 9th Circuit as opposed to historically. And then, of course, that error was compounded when the 9th Circuit itself explained in California Pro-Life Council that *Furgatch* required "explicit words" of advocacy of election or defeat, which the Commission just has treated as a non-case.

I mean, you have the 9th Circuit explaining that its own precedent that this Commission has relied upon requires explicit words and again, nothing happens as far as the Commission is concerned. The regulation still is sitting there being employed when I suppose some apt opportunity or possible excuse of constitutionality can be found.

Second is that the only way that this Commission can adopt a rule of law is by rulemaking. Of course, 437f(b) provides that "any rule of law which is not stated in this Act or in Chapter 95, or Chapter 96, of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to the procedures established in Section 438(d) of this title.

Now looking at many of the writings of the Commission, you would not know that, of course, is part of the law that binds this Commission, because the Commission is often through various mechanisms citing as if they are, you know, court precedents: advisory opinions; conciliation agreements; statements of reasons; Office of General Counsel reports; as if they establish rules of law that are precedent in future -- in future considerations of the Commission, and nothing could be further from the truth.

None of those are law. None of those are precedent. None of those establish law that binds anyone, including those who want to exercise their First Amendment free speech rights.

Now it is true that it is appropriate to cite an advisory opinion when we're considering -- considering one to cite a previous one and say well, the facts -- are the facts similar enough that we have already created a safe harbor for this set of facts? But -- or are the facts sufficiently different that we have a new question before the Commission? Because that's all AOs do is if the facts are materially identical, you've created a safe harbor that other people can rely upon. But it states no rules.

Now also in this regard, recent Statements of Reasons I think misdirected criticism, and the criticism was directed at some members of the Commission who apparently have voted not to, in the Statements of Reasons opinions, to continue to apply the enforcement policy on tax status that the Commission applied according to the Statements of Reasons in investigations resulting out of the 2004 election.

Now I say this is misdirected for several reasons. First, if the Commission is relying upon an enforcement policy, well then that enforcement policy is going to be changed at any time. And of course under the rules that govern this Commission, if three members decide they're not going to enforce a particular enforcement, a policy that has been enforced in the past, it's changed, and that's perfectly appropriate --

CHAIRMAN WALTHER: Mr. Bopp, you're a little over the 10-minute --

MR. BOPP: Okay, can I have one more minute?

CHAIRMAN WALTHER: Of course, sure.

MR. BOPP: Thank you.

CHAIRMAN WALTHER: Anybody that comes from Indiana --

MR. BOPP: Thank you for your indulgence. So there was nothing improper or untoward in a change in enforcement of policy that some Commissioners who have the authority to do so have in fact implemented.

But the criticism really should have been directed at the failure of this Commission to adopt PAC regulations. In other words, that was the thing that should have happened. If this Commission had adopted -- and this is one of the few times I agree with the regulators, because the Shays lawsuit was trying to get the Commission to adopt regulations in this area -- that would have been the proper way to establish an enforcement policy, would have been by establishing regulations.

Then of course those regulations would have bound all Commissioners to apply until changed. So I consider that a good example of the Commission's thinking or at least some Commissioners' thinking that rules of law have been established by conciliation agreements, by enforcement policies, rather than rely on rulemaking, which I think needs to be done.

So I'll defer other comments and I appreciate the opportunity to speak.

CHAIRMAN WALTHER: Thank you very much, Mr. Bopp. We appreciate your being here.

At this time, let me call on the Commissioners who may have questions of any of the panelists. I'm just going to suggest it is possible, but not always, but be mindful of when you're asking questions not to -- and I'd like to hear from each of the panelists -- unless it's important -- so

that we can continue to direct questions in a more precise way.

Let me start with Vice Chairman, any questions?

VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman. Mr. Baran, I'm interested in the recommendation that you had in your written comments that four additional criteria should be included in the complaint, namely that it should clearly identify each person or entity who has alleged to have committed a violation, statements not based on personal knowledge should be accompanied by an identification of the source of information, that a clear -- excuse me, a clear and concise recitation of the facts which describe a violation of a statute or regulation should be included, and that there should be documentation of the supporting facts alleged.

Currently under our regulations, those are discretionary, recommended but not mandatory, and you recommended those should be made mandatory. Addressing an issue that Mr. Bopp brought up that in order for the Commission to focus on the cases that are most compelling and also to relieve the regulatory burden, it's certainly been a concern of mine that are there -- are the resources and the time of both the Commission and respondents being wasted as a result of politically motivated and otherwise frivolous complaints?

I first of all just wanted to ask from your experience if the abuse of the complaint process through frivolous and politically motivated complaints, is it a serious, wide-ranging and extensive problem?

MR. BARAN: I think it's a serious problem. I think that there is with some regularity, and I think Bob Bauer even suggested that complaints get filed in the heat of a campaign in order to grab a headline. I mean, we've all seen that. A complaint appears on page one of the local paper and two years later the dismissal, if it appears at all, is buried in the back of the paper.

Now the fact that a complaint may be politically motivated does not necessarily mean it has no merit and our recommendations are geared towards requiring a complainant to demonstrate that there is some plausible merit to a particular complaint.

In that regard, it would be nice if they would provide the Commission and the respondent who has to respond to the complaint with some specifics, with some support, with some actual facts, and in fact, a direct allegation that a particular person is alleged to have violated the law.

We have represented clients who were the subject apparently of some complaints where the allegations were so ambiguous, so amorphous and so unsupported that it really puts the respondent and their counsel in a difficult position when responding and it puts the Commission in somewhat of a difficult position as well.

So everybody wants to concentrate on complaints that raise issues of merit. That will trigger the use of the Commission's resources. It will require respondents to pull their attention from either campaigning or whatever else they're doing, if they're not politicians, and it would be nice to tell a complainant who doesn't provide a sufficient complaint, here's your complaint, here's our requirements. If you add some more beef -- you're not rejecting it forever; you're just saying, please resubmit with the criteria that we have in our regulation.

VICE CHAIRMAN PETERSEN: If I might ask the other panelists as well, are there other suggestions that you may have or recommendations that the Commission ought to consider on how to at the outset be able to filter out those that are non-meritorious and clearly frivolous from those that really do demand Commission attention and that should proceed; are there any suggestions you have on how we -- are there any policies we may want to institute in order to filter out those more effectively and efficiently?

MR. BOPP: I do think the presumption that the Commission employs should not be that there's a violation because somebody's filed a complaint. So I do agree with Jan that there needs to be significant factual support that is verifiable that -- in order to institute an investigation.

So presumptions often help, you know, sort of positive purposes and the positive purpose of presumptions here would serve that because you filed a complaint there is not a violation. Because it would serve both the legal purpose of protecting First Amendment rights that cannot be abridged except for compelling justification and would not drag people into a process where the process itself is the punishment.

MR. BAUER: I agree with the suggestion that complainants have to be specific and it ought to be very clear that they have a responsibility to bring something before the Commission that is adequately supported by criteria that are well advertised in advance.

I also think that to the extent that a complaint kind of squeezes right through, it sort of barely passes that threshold that there is before you, at least in my experience, are relatively easily identified. And it would be helpful to the respondent to have those disposed of very quickly because I think it will be very clear which ones can be quickly disposed of and that helps with the problem that Jan suggested that the complaint gets the headline and then many years pass before it turns out that it wasn't given much credence by the agency.

VICE CHAIRMAN PETERSEN: Okay, thank you. If I can just ask another question of Mr. Bauer. In the comments that were submitted by you and your colleagues, it was repeated often that the enforcement process, the Audit process and also through RAD, that they should not be making law through those processes.

I was just wondering if you might expand upon that comment and explain to us the extent to which that's been a problem in the past?

MR. BAUER: Well, let me be very clear about one thing. What I tried to say in my opening remarks is that I think that this particular complication is built into your mission. It's just something you have to manage. I don't think that our suggestion was that people were running amuck and making law left and right everywhere without regard to what their statutory responsibilities were.

But there is and needs to be, I think -- and part of the answer of this is making sure that there are very, very clear procedures with respondents giving adequate notice of exactly what's taking place. That works in some phases of what

you do and there were some areas of where you operate, and it's probably less of an answer in others, but I do think people do have to be mindful, the various departments need to be mindful.

I believe our perception -- some of us in the defense bar who represent -- that Jim did not like -- have referred to as the regulated community, I think if you keep on saying that, people will be demanding refunds shortly, so stop. Stop.

But in any event, I think mindful that the way in which rules are made does matter. Jim says, I think correctly, that rules are supposed to be made through the rulemaking process. Now the reality is that in the world of administrative law making, there is regulatory creep from a number of directions and it's not always contained through the formal rulemaking process and it's fundamental to the way that administrative agencies operate.

But a key sensitivity to that, I think, is required and so what we're calling on the agency, in our comments, to do is to raise the awareness that we sometimes perceive expectations articulated to us that sound very much like an expansion of existing rules, so the new standards of liability are not processed in the ordinary course, as we would see it, not with opportunities for us to participate in commenting on what's emerging.

VICE CHAIRMAN PETERSEN: That's all I have for right now.

CHAIRMAN WALTHER: Thank you. Commissioner Bauerly, any questions?

COMMISSIONER BAUERLY: Thank you, Mr. Chairman. My question is, each of you commented on motion practice and the area that I'd like to discuss in a little bit more specificity is with respect to the suggestion of a motion to dismiss or some very early-on dispositive type motion.

I think it addresses one of the concerns you raised, both Mr. Bauer and Mr. Baran, about the complaint gets the headline and the dismissal comes much later. And if we're really arguing with politically motivated complaints that don't have any merit, that are only politically motivated, as opposed to perhaps politically motivated and have substantive merit, it seems to me that there is a tension there between process and the speed with which a respondent in that type of situation might want to have a matter addressed.

So I'd like some additional input on what does that option look like? Is it -- is a motion to dismiss appropriate at the time the response is due? Is it in addition to the response? Because I can envision a situation where a motion to dismiss is filed, the Commission thinks there may be a little more meat to the complaint than that and wants to look at it in the reason to believe stage and a response at that point in time would be helpful to a quick dismissal.

So yes, I'm curious as to what you -- how you envision that process would look like, if there would be alternatives, if they would be staggered -- about what that process might be.

MR. BARAN: I'll be glad to respond first. Our approach was bifurcated in the following fashion. Number one, we think that part of this problem can be addressed by adopting formally those criteria as to the sufficiency of a complaint so that you basically return a complaint that simply doesn't meet that criteria.

Now that presumably would be a very prompt response if that were the case. You get a complaint in here. Within five days you determine it's insufficient. You return it to the complainant. If need be, you make an announcement, the complaint was not accepted without prejudice.

In terms of a motion, we focused further on the process in the following fashion. Number one, the Commission under the procedures has a right to accept a complaint, review the complaint, review the respondent's response and then determine whether there's a reason to believe a violation has occurred.

We all know that that is simply a threshold decision to initiate some inquiry to get more facts. And as the Commission itself has recommended to Congress, that terminology is bad, reason to believe. In fact, it imparts to the public that there has been some formal determination of guilt and the Commission has recommended that that terminology be changed.

But let's assume that that doesn't happen. And so you have a respondent with this reason to believe finding and at some point, either because the respondent receives the explanation of the basis for the reason to believe finding, with the factual determination, and the respondent says well, this reason to believe finding was based on a misunderstood predicate. We'd like to file a motion to the Commission to reconsider that finding because they went off into this direction.

We think that a motion would be appropriate, for example, under those circumstances. And secondly, as I testified six years ago, there also is perhaps an opportunity for a motion, an appropriate motion, when the Commission, after having found reason to believe, and then for whatever reason decides to take no further action in that case, for the respondent to file an appropriate motion and say we would like you to reconsider your reason to believe finding because perhaps you have found that it's invalid, it's unsupported after acquiring some more information.

So those are two circumstances where we think it would be appropriate for a respondent to have an opportunity to file a motion and for the Commission to provide for such motions in its regulations.

MR. BAUER: I think both those suggestions are constructive. I think that there are -- there's obviously the danger, I can see, from the regulator's point of view, that you have a flood of motions coming in and it complicates the good business of actually processing a case to a conclusion and you've referred to that by saying, you know, if you give us a response, rather than filing a motion, we might be in a better position to actually get to the end of the case. So I think that is certainly the case.

But I think as with any other reform, you are going to test what works and what doesn't. And so it seems to me that beginning by identifying some types of motions that you will entertain for reconsideration, for dismissal, a motion like the one that Jan suggested actually wipes the slate clean, if there was no basis for RTB as subsequently determined, so that the respondent doesn't wind up quite frankly having that reflected in the television advertisement later, I think would be helpful and I think it would have a salutary effect on Commission practice and I think it would also reduce some of the unintended consequences of what the agency does for political actors who kind

of get bruised by this process and unnecessarily tarred by it.

MR. BOPP: I think those are very useful suggestions, but I see it as a way of cutting short an investigation during the reason to believe stage in order to reduce the situations in which the procedure is the punishment. Because right now it's really hard to stop an ongoing investigation. There's no actual direct mechanism and the direct mechanism would be a motion to dismiss or maybe more properly a motion for summary judgment, as we experience in civil procedure in federal court and state court.

In other words, it's a way to stop open-ended investigations because they are not fruitful, and of course, those motions are utilized in order for that very purpose in court. Discovery is burdensome. It can be a punishment itself. You need to pass certain thresholds in order to do that and I think that the -- I think people would benefit and the Commission would benefit by cutting short investigations that are obviously not fruitful.

CHAIRMAN WALTHER: Okay, at this time, let me call on Commissioner Hunter.

COMMISSIONER HUNTER: Thank you, Mr. Chairman. My question is for Mr. Bauer. In response to something Vice Chair Petersen asked you, you said a little while ago that it's anticipated that in administrative agencies, there will be regulatory creep, but that the agencies should have a keen sensitivity to what is emerging with respect to civil law and that sort of thing.

My question for you is, that seems to make sense particularly for the defense counsel who's involved in that matter. But what about those who aren't -- don't have a seat at the table, who weren't provided an opportunity to give comment for that issue that's emerging, should that emerging legal theory be then precedential on the rest of the so-called regulated community?

MR. BAUER: Well that's obviously one of the problems with having rules start to sort of fully develop through, for example, the MUR or the enforcement process. I remember years ago when I first practiced, as a matter of fact, it was in -- it was one of the first cases I handled before the Commission in '77 or '78, a particular theory was advanced against an early client of mine and the -- a then- member of the General Counsel's office, long departed -- by the way, not from this world, but from the agency -- said to me at the time that -- when I expressed a surprise because I didn't see any basis in the regulations for what was being argued. He said well, the conduct of your client has become grist for the regulatory mill. Those were his exact words, the conduct of your client has become grist for the regulatory mill.

And the notion was, we're educating ourselves about how people are sort of finding their way around what appears to be the barriers in the law and this enforcement process is one of the ways that we're doing that. We may come to a conclusion that we can fairly say that even though technically speaking you have a defense, it's not an adequate defense and for our purposes, we're going to try to force a settlement.

That is obviously very dangerous territory. I think when I say that -- and this is a very large topic -- the Commission has to be keenly sensitive to that. If it appears that this is what has taken place, I think the Commission has to step back and bring the entire topic up for the regulated community as opposed to, if you will, have a black market of lawmaking develop where at some point everybody wakes up and says hey, we thought that X was permissible and now it turns out through a rulemaking process -- excuse me, through an enforcement process, that actually it's prohibited, and by the way, because it emerges from the enforcement process that X is prohibited, the actual contours of the prohibition may not be terribly clear.

I mean, it doesn't emerge the way a rule does and there's an awful lot of uncertainty about how what the Commission articulates in one enforcement action is likely to be applied in future cases with similar conduct. So I think the agency needs to have a sensitivity that in a particular area, sensitivity to the possibility that it is engaged in setting to chart new rulemaking paths.

And then the second point I made was obviously for the purposes of that immediate respondent who's facing that sort of quasi-rulemaking activity around a particular enforcement action, conducted through an enforcement action, that is where this importance of due process becomes so critical.

You actually got -- delays, but it is crucial to the acceptance of what the agency is doing that there be a sense that the respondents are being fully heard and not being sort of rushed into a position where it has to accept because, for example, it doesn't wish to litigate liability based on rules that are essentially being promulgated post-hoc.

COMMISSIONER HUNTER: If I could follow up, so maybe I -- but how would that affect -- so let's assume that the agency is aware, they are keenly aware that they are in unchartered grounds, that they proceed and there is, let's assume, sufficient due process and the defense has a seat at the table and all those sorts of procedures that you have taken care of; we're still dealing with the situation that there is some law being created in the regulatory context.

MR. BAUER: Yes, and it seems to me that the Commission needs periodically to take stock of that and initiate proceedings that the entire regulatory community can participate.

COMMISSIONER HUNTER: Okay. Thank you.

MR. BOPP: Can I comment on that? I think it has to go farther that. I mean, what Bob Bauer has described is absolute antithetical to the First Amendment. And this -- as opposed to other agencies, this Commission operates under the strictures of the First Amendment because if you are being subject to a proscription by law because of your conduct that you don't know about and you're just getting hammered post -- you know, *ex post facto*, and in some cases, post-hoc as well, that chills political speech.

There's a First Amendment value that's at stake here and I think a classic example is the use of the enforcement mechanism to establish PAC status. I think that's been a classic example that this Commission -- has occurred at this Commission. And then ultimately using conciliation agreements as precedent for rules of law that are now going to be applied in 2008 and 2010 and whatever.

Number one, it chills political speech and number two is its inherent complexity, that is, people like Bob or Jan may know about this regulatory creep and can advise people, that people that don't hire them -- and of course that throws just another blanket of chill on everybody's activity.

Well gee whiz, something can be happening out there we're just not familiar with, which means we're going to be hammered further. And I know in my own practice, how can a lawyer from Terre Haute, Indiana with a 13-member law firm and I have no clients in Terre Haute? It's because people seek out experts and that itself is a burden on the First Amendment.

COMMISSIONER HUNTER: Thank you.

MR. BARAN: Can I briefly also add my two cents, which is that enforcement is the worst vehicle to create new legal principles because you're not articulating the specific standards if you do that, and number two, the object of enforcement basically on both sides is settlement.

So you have respondents, a respondent, or maybe a handful of respondents perhaps after an election, perhaps they've lost and they've got this FEC enforcement case and they're basically responding by saying what's it going to cost me to get this off my back and hopefully I have enough money in my campaign fund to pay you so you'll go away.

Now that's not a way to enunciate rulemaking and rules. The correct way is the way that Jim has articulated which is you have a rulemaking proceeding and then everybody gets to comment. Then the Commission can publish a final rule that everyone knows what the rule is.

MS. HUNTER: Thank you.

CHAIRMAN WALTHER: At this point, let me move through the Commissioners if I can. Because of time limits we only have 20 minutes left. It's moving along pretty fast. Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. It's déjà vu all over again, gentlemen. Nice to see you. I wanted to ask -- I can't resist asking you, Mr. Bauer, about your citation of *Furgatch*, which is so unusual to see someone in the bar come in and actually want to rely on *Furgatch*.

But it touches on an area that you know is near and dear to my heart, which is bringing greater transparency to the penalty system. You have recommended that drawing on *Furgatch* when imposing penalties, that we make clear how we are considering each of the four factors that are laid out in that case, the good or bad faith of the defendants, the injury to the public, the defendant's ability to pay, the necessity of vindicating the Commission's authority.

And as you also know, I've been an advocate of actually publishing the whole penalty schedule. So I'm wondering how this suggestion interacts with that. Would this be in place of publishing a penalty schedule? You think we should do this or at least do this even if we don't do that? Or would it be something that we would do in addition to that? Help me out here.

MR. BAUER: No, it's a good question. I'm not even sure all my colleagues at the firm would answer it the same way.

COMMISSIONER WEINTRAUB: I'll ask them all.

MR. BAUER: You'll have that opportunity. I think that at a minimum this makes sense, because we're dealing here with how the penalty would be applied in a particular case. I understand the agency may confront other issues in determining whether its full set of sort of formal policies and procedures for applying the penalties, the penalty schedule and the criteria for applying them sort of generically where they're making that available, is acceptable.

I know there are a whole host of issues -- articulated by Commissioners over time about publishing the penalties, the actual sort of whole process that you have internally for applying penalties. But at least in the individual case, I think having some -- and over time by the way, that will help people sort of somewhat decide for your penalty schedule, I assume, or your penalty process, I assume, having some explanation of how it was arrived at in the particular case.

I think a measure of transparency would be greatly appreciated. There are a lot of questions about how the Commission winds up arriving at one number rather than another and again, from the standpoint of shoring up the agency's credibility on these sorts of issues, just sort of having people feel the processes -- they can touch and that makes sense to them, I think that would be a useful step forward.

COMMISSIONER WEINTRAUB: And would it -- and I'll actually toss this one out to anyone who wants to answer it -- would it make it easier for us to conciliate if people actually understood the basis of the penalties, if they could see it in black and white?

MR. BAUER: In my view it might cause -- panel members here can obviously add if they will. My view is it would because anything that reduces appreciably the feeling that you are dealing, if you will, out of the shadows, is going to reduce some of the tensions that I think can complicate the negotiation and retard progress toward a settlement.

COMMISSIONER WEINTRAUB: Any of your colleagues on the panel want to comment?

MR. BARAN: I think you can look to your late filing penalty system and ascertain how respondents react to that compared to your regular process. You have the flexibility to impose these penalties. You have a very detailed regulation that says if you do X, this is going to be the penalty, this is the way we calculated it, and so there is a sense of predictability and a lack of any feeling that the Commission is being arbitrary.

Now you have to reconcile the desire of having predictable penalties with the nature of the statute which says you're supposed to negotiate and conciliate, which suggests that there is supposed to be a back and forth. It's sort of like purchasing a house, I'll offer you this, no I'm going to accept that and so forth.

But I think in general my reaction after all these years is that it would be a lot easier to have some published document that articulates what the basis is for penalties on the part of the Commission, in lieu of requiring all of us private practitioners to research all of your conciliation agreements and try and discern which cases are similar to the ones that we're involved in and how were the settlements and conciliation agreements

resolved in those other cases and try and put together a chart of what we think are comparable penalties.

I mean, that's a lot of make work. You probably have all that here internally, so you might as well --

COMMISSIONER WEINTRAUB: I hope.

MR. BARAN: -- share it with the world.

COMMISSIONER WEINTRAUB: But you raise an interesting issue which is does that then interfere with our statutory obligation to conciliate, if they publish a schedule and say well, here are the penalties and then we're forced to conciliate but we're going to have to depart from the schedule?

MR. BARAN: You can always conciliate without penalties --

(Laughter.)

COMMISSIONER WEINTRAUB: And sometimes we do.

CHAIRMAN WALTHER: Mr. Bopp, you can add to that.

MR. BOPP: No, I agree.

CHAIRMAN WALTHER: Commissioner, are you done?

COMMISSIONER WEINTRAUB: I just wanted to, one follow-up on the cost of doing business argument, which is a counter argument that is raised and has been raised by some of the commenters, at least one of the commenters of this proceeding, that if we let everybody know exactly what the penalty is, roughly what the penalty is, then they will just kind of calculate that in as a cost of doing business and it will not have -- our penalties will cease to have a deterrent effect.

MR. BAUER: First of all, it depends on what the penalty is. Some people will calculate the cost of doing business and find it high. I also think -- I don't think enough very good sort of empirical work has been done on this, but I really do think that if you have somebody who is charged with writing the history of federal campaign finance law enforcement, which Jan has indicated he would like to do in retirement, by the way, and we're looking forward to that multi-volume treatise --

MR. BARAN: Yes, exactly right --

MR. BAUER: --that you would find that it is just -- it is a popular myth to say that the agency over time doesn't have an effect on how compliance practices evolve and how organizations comply. It's simply not true.

Look at the expansion of the campaign finance law. I mean, since you have the grumpy old men in front of you, I can tell you we came to town in 1977. There's no bar. Thirty-one years later, there are a significant number of practitioners and firms in this town and what do they do? They advise people on the federal campaign finance laws.

They do so because their clients are trying to understand what the agency's expectations are and conform their expectations -- conform their conduct to those expectations. So I think this whole cost of doing business, wrongdoers try to figure out what they can get away with, they pay the ticket and then they go about doing what they're going to do, is a very primitive picture of how things operate in the real world.

I'm sure you can find examples of it, but I can give you my impression that the examples of the opposite far outweigh them.

CHAIRMAN WALTHER: Do you agree?

MR. BARAN: I agree --

COMMISSIONER WEINTRAUB: About Washington?

CHAIRMAN WALTHER: The three nods from three grouchy old men.

COMMISSIONER WEINTRAUB: I just want to compliment Mr. Bopp on his font, 14-point font, very nice.

MR. BOPP: It's the only way I can read it.

CHAIRMAN WALTHER: Commissioner McGahn?

COMMISSIONER McGAHN: Thank you. I'd like to shift topics and then come back to some of the discussion we had on RTB. But before we get to the RTB threshold, a lot of cases come out of Audit or out of internal referrals and that sort of thing and we read your comments, there's some common themes there.

Audit is a division that has to do quite a bit. It has to look at the public financing of presidential campaigns, which is one sort of standard. It also has to look at private campaigns, which some would argue may be a little bit different standard. The one theme I've seen pop out of the comments is the notion that maybe some sort of hearing in the audit stage would make sense because inevitably an audit has to audit the campaign through some sort of legal lens.

The question really isn't so much that there has to be some legal lens but who decides the legal lens and then when? And I think we've all seen situations where an audit report comes through and there's a disputable question of law. Without sort of spending all the time talking about what is the problem, I think we all see that that is something that no one really wants to have happen.

How do we correct that and -- well, first, do we need to correct it? And two, if we think we do need to correct it, how do we -- how do we ensure that Audit is not being seen as doing things other than auditing? They need to do their job and it's sometimes troubling that they get blamed for essentially doing their job on some legal framework that is fuzzy, which is much more to blame to me of others in the building, not necessarily the auditors.

So any thoughts on audit? Why don't I start with Mr. Baran, who has been through some audits.

MR. BARAN: I can tell you that from my experience, I really don't enjoy representing clients in audits. I can recall when the audit of the 1988 Bush Campaign was completed and we had a very thorough meeting with your highly professional and qualified auditors for about three hours sometime in 1989 or 1990, and after listening to all the recitation of all the issues that came out of that audit, notwithstanding our years of trying to comply with all your rules, I just got up and said, can we take a break? The one reaction I had was, thank God, we won. Because I can't imagine going through that process having lost.

In terms of the legal issues that come up in the course of an audit, my only suggestion is that if there are disputed legal issues, they really ought to be referred to the General Counsel's office for separate consideration, which I think the Commission is able to do in the course of

its powers to consider from internal information whether or not there is a violation of a legal issue that needs to be pursued. If there's a potential violation, it goes through the MUR process. If there's a disputed legal issue, it presumably goes into the rulemaking process so you can resolve the legal issue, if that's the problem.

I think the danger with trying to do it in some other fashion through the audit procedure itself is that it encumbers the audit report. It creates issues that should be resolved in other proceedings and it probably makes it much more contentious and problematic for both the Commission and the persons or organizations being audited.

MR. BAUER: I agree with those comments.

MR. BOPP: To take it a little bit further, I would say that it's almost literally impossible for any campaign or PAC to comply with FEC requirements. If they were -- and if audited to the degree that I have seen on some occasions, wanting to see every check of every donor over the last X number of years, which is often hundreds of thousands, that a -- that the rules have become so difficult and complex and the time frames so narrow and demanding that an organization that wants to conduct its activity in an efficient and cost-effective manner cannot comply, and that the cost of compliance is nearly prohibitive.

So I think what the audit process has shown in addition to your point, which is a very valid one, I think that it has demonstrated that the complexity of the record keeping and reporting requirements have reached the point where very few entities can ever be expected to pass a real thorough audit.

COMMISSIONER McGAHN: Which transitions to the step before you get to Audit, the Reports Analysis Division. Mr. Baran, you had quite a few comments about some things. Again, it hits a theme that seems to go across party lines and what law firm you're with, but the notion of -- reports and this notion of “please confirm that your report is correct as filed” and that sort of thing, could you elaborate on that a little bit?

MR. BARAN: We focused on a couple of issues. And by the way, there are many, many inquiries from Reports Analysis which correctly and reasonably point out discrepancies of somebody's report. You've got one total figure reported in one report and that figure changes in your next report, can you please explain?

That's not what our comments were directed at. What our comments were directed at were those two occasions in which RFAIs are sent out, which don't seem to be based on any discerned discrepancy with the complaint or which are sent out with an inaccurate premise. The two examples that we provided in our comments was number one, the habit of RAD, the Reports Analysis Division, sending out inquiries to all committees on some periodic basis, perhaps every year or every other year, that asks the committee repeatedly over the course of many years, please confirm that what you have said in your reports is accurate.

There's no suggestion that there's any contradiction or inaccuracy internally with the report, but just kind of please once again, that apply, that you don't have certain administrative costs, for example. So that -- we don't understand the reason for that. It alarms committees who get this in large part because the, again, regulated community -- I use that term with some trepidation having heard Jim -- knows that part of your mysterious audit criteria is RFAIs, and a number of RFAIs, they go out to these reporting committees and so the treasurers get all freaked out and they say well we're getting these RFAIs and they don't seem to be pointing to any problem in our report and they're just basically asking us to respond again, which we will gladly do with some burden or inconvenience that we have. On the record, everyone can see there is an RFAI which was not prompted apparently by any mistake.

And the second type of inquiry that we pointed out in our comments was one which was based on an inaccurate premise. In this recent election, several committees received inquiries based on the making of a contribution allegedly after the primary date of a Louisiana election, even though that Louisiana election date was subsequently postponed, as announced elsewhere on the Federal Election Commission's website, to a later date because of a hurricane.

Once the recipients of these inquiries from Reports Analysis called up their analysts and said well, our contribution is valid, it wasn't made after a primary date because the primary date was changed, so therefore, your question was inaccurate based on the Commission's own information, they were instructed, you still have to respond.

And again, the committee says well oh my God, we've got an RFAI here, it's going to be part of your audit criteria and it shouldn't have been sent out in the first place and Reports Analysis wouldn't retract the letter or the inquiry as well.

So I don't know what the resolution to any of those issues are. Perhaps calming people down and saying well, don't worry about these redundant or inaccurate requests, they don't affect whether or not you get audited is one answer. The other is, is there a procedure in which these types of inquiries can be retracted? But they are causing some alarm and confusion in the community.

COMMISSIONER McGAHN: Is there a concern that audit points are being accumulated for these sorts of requests that don't seem, based on your comments, to have a statutory or regulatory basis --

MR. BARAN: Absolutely, because the community believes that one basis for an audit is the frequency and the nature of these so-called RFAIs. That is a concern, especially when they don't believe that the inquiry is warranted in the first place.

COMMISSIONER McGAHN: What -- in your experience, what is the course of action that if you are in a situation where you feel like maybe there's been some audit points assessed that maybe shouldn't have been assessed and you end up in an audit and that sort of thing and you think that maybe there was some -- there's no procedure, motion or anything where you can actually get to the Commission currently, correct?

MR. BARAN: Correct. Well, we don't know what the audit criteria are to begin with. That's not shared. I'm not suggesting that that ought to be shared. It's not necessarily something that has to be

publicized. The Internal Revenue Service certainly doesn't.

But it seems to me that this issue is one for internal review by the Commission to examine the circumstances under which these types of letters are going out, perhaps categorize them so that they don't wind up being sent out if they are inaccurate, number one, and number two, if they are sent out, don't incorporate that into your audit criteria, whatever that mysterious standard may be.

CHAIRMAN WALTHER: I have a question. We have five minutes left. Commissioner, are you done?

COMMISSIONER McGAHN: I guess I am now, yes.

CHAIRMAN WALTHER: My questions will be short. Go ahead. Go for it.

COMMISSIONER McGAHN: Mr. Bopp --

CHAIRMAN WALTHER: -- back.

COMMISSIONER McGAHN: What's precedent and what's not precedent? Is there such a thing as a precedent in the administrative world? Let me come at it from a different perspective. I agree that merely because one settles a case should not create a binding norm on the next fellow who comes through because there's all kinds of reasons why. You can't necessarily make new rules of law that then people are supposed to know about because they go through MURs on our website, which now, post-*AFL-CIO*, should be redacted, but which contained not a lot of information.

So now looking at old MURs, or at least more recent MURs that have gone through the AFL-CIO-style scrub, sometimes is -- it's easier to sort of ascertain the future from the Quatrains of Nostradamus than figuring out what a certain MUR means because of the redactions.

But you have a situation where there is a statement of reason and you mentioned those are not -- those are not precedent. But let's say you have a situation, and I'm thinking of a couple different cases, where a certain fact pattern comes before the Commission and the Commission maybe rejects a Counsel's recommendation unanimously. I'm thinking of the case where it's a solicitation of soft money by federal officials on the website of a gubernatorial candidate.

There was a contribute link and then the solicitation actually occurred on the next page once you went through the contribute page. There's a 5-0 statement -- a 5-0 vote for -- four people joined a certain Statement of Reasons. Does that create a new rule that then the regulated community or those who are not political committees and that are not yet regulated or do not choose to be regulated so thus they're not in the regulated community, is that now a binding norm? That's actually the distinction I'm hearing.

I mean, when you argue about this on a campaign, you're a political committee already, so the regulated community tag doesn't offend. When you represent primarily grassroots organizations, you don't want to be regulated. But anyway, does that create a binding norm that now folks can rely on and say this is now a permitted course of conduct that we can act on this and this is something we can take to the bank?

MR. BOPP: No. No, and I certainly wouldn't advise a client to rely upon it, that sort of development. Under the law there's only two things you can rely upon. One is the statute and regulations and the second is if your fact pattern fits a safe harbor that has been adopted through an advisory opinion.

Those are the only things that you have legal -- you can rely upon legally. Of course, the Commission, through changes of persuasion or changes of personnel, their approach is varied on all of these issues historically and I'm, of course, aware of many of those changes.

So no, and though I do think that the Commission seems to think that we ought to view it that way to a certain extent, I think that's erroneous. I think the Commission should be very forthright in saying that they -- that these do not create precedence, that unfortunately the opposite is true.

MR. BAUER: Chairman Walther, do you mind if I --

CHAIRMAN WALTHER: Not a bit.

MR. BAUER: I apologize. I couldn't disagree with Jim more. I think if -- and that's one of the reasons why I'm worried to some extent that this whole discussion does wind up getting oversimplified.

It seems to me, number one, in the ordinary course and the course of the enforcement process, there are going to be decisions reached which may not be technically precedent, but they are going to be viewed as setting up standards of conduct or setting out for this prohibited zone, and they're going to be read that way by the regulatory community, they should be read that way by the regulatory community, they should have an impact on how they conduct themselves.

Obviously as these standards develop, the agency has to be sensitive to the potential that there's been significant new rulemaking in an area. That is to say, when I say rulemaking, I'm talking in the fashion in which you were just describing the 5-0 vote, that is to say, it has some effect on how people view where the law is going and they -- the Commission may be at that point, I think, well advised to look at -- starting to look more formally and systematically what they're doing through a rulemaking process.

But I don't see how I can't tell my clients if you reach a judgment on a relatively simple set of facts -- and by the way, I recall that MUR very clearly, because I had a client, as a matter of fact -- I commend you for your sense of decision-making in the process.

COMMISSIONER McGAHN: I was not here.

MR. BAUER: That's true. Now that I think about it, it could have turned out differently. But in any event --

(Laughter.)

MR. BAUER: But in any event, my --

COMMISSIONER McGAHN: I guess it would have been 6-0.

MR. BAUER: Exactly correct. But I think that there is something there that the Commission should prescribe to that I think is meaningful and I'll just -- I believe whether it's a 5-0 vote to enforce or a 5-0 vote to decline to enforce, it's a meaningful event and it clearly constitutes what Commissioner Hunter referred to as sort of regulatory creep we're starting to see evolve.

I close with simply a comment that Jan Baran made in my presence many years ago when Commissioner Aikens was here and the Commission decided that the Commissioners would issue Statements of Reasons, which was brand new, and we were chatting about this with Commissioner Aikens and Mr. Baran said, I'm going to open up new -- a new three-ring notebook, meaning I'm going to start collecting Statements of Reasons and putting them in a three-ring notebook.

Why would he put together a three-ring notebook? Because he was going to advise clients on the basis of what he read in the Statement of Reasons.

COMMISSIONER McGAHN: The point of my question was not the Statement of Reasons versus a new rule.

CHAIRMAN WALTHER: Our time is up too, so let's -- the answer will have to be pretty quick, because we only get a five-minute break.

MR. BOPP: I think the problem with the approach of Bob is two things. One, you do have a way of announcing a rule. If the Commission is unanimous, adopt a regulation and then everyone would know it. You wouldn't have to go searching through Statements of Reasons.

But the other thing is, is that makes -- Statements of Reasons become meaningful then in terms of future conduct of people potentially subject to the law. That makes this inside baseball. In other words, you have to hire expensive D.C. counsel in order to find out if you can mention a candidate's name. You have to hire expensive D.C. counsel if you want to talk about issues.

Let's say that you're in 2008 election and some are going to rely on this tax status thing and ran screaming from our democracy and be fearful that they'll be hammered as a PAC, but the insiders know there's been a change on the Commission or Statement of Reasons or a General Counsel report that means that actually you can do it now, as has been suggested apparently by some Commissioners that there's been a change in enforcement position.

That couldn't be a worse possible situation when you're talking about the First Amendment and the involvement of 300 million people in our political system.

CHAIRMAN WALTHER: Thank you, Mr. Bopp. We're out of time. Let me ask the General Counsel and the staff, the staff director, if you have any quick questions. We'll need to make it quick because it's important to stay on time. Ms. Duncan?

MS. DUNCAN: Thank you, Mr. Chairman. I do have just a few quick questions. Welcome to the panel.

I wanted to follow-up and explore a bit more the conversation that we've been having about motions and your recommendations to expand the Commission's motions practice. If the Commission does decide to expand its practice, given the five-year statute of limitations and the limited resources of OGC and the Commission, how would you as regular practitioners before the agency advise the Commission about preventing a culture of motions practice? And by that I mean a culture in which it becomes standard to file every motion because your clients expect you to file every motion because your colleagues are filing every motion that might be available to you?

The second part of that question, and perhaps you can answer it together, is if in fact again, the Commission adopts an expanded motions practice, would you be supportive of an aspect of that practice that required consultation between respondent's counsel and the Office of General Counsel prior to the filing of motions so as to narrow the issues or to even come to a determination that the motion is unnecessary or could be unopposed?

MR. BARAN: I would --

CHAIRMAN WALTHER: I'll remind you of time.

MR. BARAN: Yeah. I have two quick responses. One is that of course anything you try in this area I would recommend you do it on a trial basis, just like you did with your hearings for probable cause and see how it works. But secondly, I think that there would be a time for motions that could be specified in the consultation with Counsel's office, I think would be fruitful. Whether it needs to be mandatory, I would want to think about that.

CHAIRMAN WALTHER: Mr. Stoltz?

MR. STOLTZ: I'll --

CHAIRMAN WALTHER: Mr. Bopp, do you have a quick response?

MR. BOPP: Yes, a quick response. First is if you have higher standards for finding reason to believe, you're going to reduce the number of investigations in which you'll have to deal with motions. So I think those two go hand in hand.

The second thing is, is that motions do cost money to be -- by clients, so I don't see them being done frivolously. And the fact if they are successful in terminating an investigation, actually there will be time freed up rather than pursuing a fruitless investigation, that there will be time freed up by the General Counsel's office to deal with more pressing matters. I think there's cost savings on both sides of this.

CHAIRMAN WALTHER: Thank you.

MR. BARAN: Even though legal fees in Terre Haute, I understand, are as high as those in Washington.

(Laughter.)

MR. BAUER: Mr. Walther has pointed out he doesn't have any clients in Terre Haute.

CHAIRMAN WALTHER: I'm going to just -- I'm going to ask you two questions, but I'm not going to have time to get answers. One of the questions I have is we do move from investigative stage to an adversarial stage at some point. Unfortunately, the statutory guidance is not clear when that takes place. We feel -- we need to believe that privately it would be closer to the adversarial moment, but as a practice in the Commission, we're just beginning the true investigative stage.

I'm wondering if some -- written comments afterwards if you might consider when that best moment might be, whether it could be more clear notice around the adversarial stage. I can see a 12(b)(6) motion early on just to test the merits of what they're facing, maybe shortly after the response from the respondent. But then you get to the -- motion -- in an adversarial stage after the Commission has already had a chance to do some investigation. So I welcome your comments -- any comments on that.

The next question I would have is a couple of you have made motions -- to

the Department of Justice anymore than you should. There should be a lot of clarity between the relationship between the Commission and the Department of Justice. I've had the experience of meeting with the Department of Justice during my first term of 25 months and you know, there is -- time to report knowing and willful matters to the Department of Justice.

This is a big thing. What level of proof must we really have at that time? The Department would like to know as much as they can or if they can, but in fairness, when do we do this? I'd welcome your comments on that because we do need to meet again with the Attorney General and begin a fresh comment period on how to address this issue and to look at a Memorandum of Understanding that serves the test of time, that could be approved.

In my book, at that point, if we think we're about to turn it over to the Department of Justice to let the counsel for the respondent know, by the way, anything further you say may be used against you, is not here or there. I'm not sure we do a great job at that. Those are comments that I have.

Finally, I want to thank you all very much for being here. It's been a great conversation and discussion. I wish we had more time, but we don't. The written final comment period, if you've got more to say after you're here, I will listen to comments -- so thank you very much.

(A brief recess was taken.)

CHAIRMAN WALTHER: I'd like to begin. We'll resume our hearing and thank you very much for being here. We had a very good and interesting conversation with three panelists and we're going to do the same with you. It's great to have you here, our former servants of the FEC.

We have Mr. Joseph Birkenstock, former Commissioner Mason, David Mason, and Scott Thomas. I didn't tell Scott Thomas that I had the privilege to be in his office and I have the same 30-year-old lampshades when you started here, the same 30-year-old television set, the same 30-year-old couch and so if you walk in there, you'll just be like old home.

MR. THOMAS: Old home, that's good to know.

CHAIRMAN WALTHER: Let's get started. We'll start first with Mr. Birkenstock.

MR. BIRKENSTOCK: First, thanks. I certainly appreciate the opportunity to come and share some perspectives. I'm not going to go through an extensive prepared set of -- the topics, mostly just not to reiterate what I've already submitted in writing and certainly to save some time.

The areas in which I focused, I chose primarily because one of the concerns that I've had from the outside looking in with the FEC is that the etiological battles sometimes overwhelm some of the trees, so to speak. Some of the smaller items can kind of get lost a little bit, I think, in the kinds of topics that maybe Jim Bopp was kind of going through earlier.

The really large First Amendment questions, important as they are, kind of leave to the side sometimes some smaller, more technical changes that could make a lot of progress. The two that I had in mind are the two that I kind of singled out, this idea here's the advisory opinion process and a little bit of predictability, particularly at the end of an enforcement action.

Just really quickly to recapitulate, what I had in mind with the advisory opinion hearings, and those of you who have been on the practitioner side can identify with this, is really a singular experience to sit in the audience as your questions are being discussed, knowing the answers very often to some of the questions that are being posed among the Commission, and yet be in a position to be kind of --the potted plant, as Brendan Sullivan would have put it.

I think a hearing of some kind, and I'm going to reoffer at least some perspectives of what that might look like, but the overall idea is that particularly for those requests -- and I really am kind of drawing on the VoterVoter experience in particular -- there's a lot I think could be gained from real dialogue between the Commission as a group and the requester individually.

I think OGC serves a critical function and it serves it well in taking those first cracks at it, you know, the draft and the fact gathering process, but there's certainly a lot left to be discussed. I think an opportunity for questions and perspectives to be shared directly from the Commission and with the requester would only add, I think, to the process. It would make it a little more thorough, make sure that issues are not overlooked.

I think it would also help from the requester's perspective to really get near the window into the thinking of the Commission. The actual opinion that comes back is obviously what binds, but it can be a bit of a black box, frankly, to look at this from the outside and wonder why did we get the result that we got? Was it a balance of these competing pressures? Did one just overwhelm the other? What was really part of that?

I think a hearing on the record with the opportunity for other commenters to comment, disagree or agree or what have you, I think would add a lot to that process.

On the enforcement piece, there's sort of been a very technical, I actually think, kind of small scale changes that I think the Commission might not appreciate what a difference it can make to a respondent in an enforcement action. But the very end of the process, what happens in almost every instance, is that the conciliation agreement is worked out with OGC. It exists. You more or less expect that to be the outcome that you get, but it becomes kind of a black box again.

It becomes this--we just don't know. We think it will come up on this date. It may get kicked down the street a little bit. All of that process is, I think, perfectly fair. The institution needs to have the flexibility to take these things up when it gets there, but from the respondent's perspective, this is not a court. This is not the kind of thing that's out to a jury that needs to deliberate and think things over and they may come back guilty, they may come back not guilty.

More, I think looking at just a red light, green light judgment on a pending consideration agreement, the timing of that I think could be better shared with the respondent. They could get, I think, some slightly more formalized sense that we expect this conciliation agreement to come up on the Tuesday meeting. You will be notified if it doesn't.

Once it's approved, we in practice tend to get very good courtesy notices from OGC about what the conclusion is and when it's been reached. But it is a courtesy notice and I think for the business managers sometimes that represent these respondents, that just doesn't cut a lot of ice. To say listen, we expect to get this notice, is different than saying there's a policy, there's some formalized process from the Commission that will let you know.

We will give you that kind of notice. You'll not learn about this through the press or your customers won't learn about it. Your investors won't learn about it. You'll get the chance to share this news before people are finding out about it through avenues that make them think you're trying to hide something from them.

A couple other quick points that I'll make that I didn't mention in my remarks, the schedule of fines in the *sua sponte* process in particular is one that I think has left the *sua sponte* process really not very attractive. It seems to me as a practitioner that there are a lot of matters that might be best addressed through the *sua sponte* process, but without knowing what that schedule is, the business managers again or the clients are kind of left thinking, I get the upside to some degree. I get the -- we get to resolve the uncertainty. We know that this matter will come up rather than kind of waiting to see if a complaint gets filed or something.

They really can't say with real confidence exactly what that outcome is going to look like. I think a schedule would help incentivize the *sua spontes* in a way that I think would be kind of helpful.

The final point I will make is about MURs as precedent, which – the earlier panel discussed that. How did -- the dialogue about that between Jim Bopp and Bob Bauer, I find myself agreeing with Bob. The reason, I think, is that in any instance where prior Commission decisions are kind of unmoored, if they are not precedent, for example, as I took Jim to be supporting, I would find it extremely hard to offer clients a lot of confidence about whatever outcomes they could expect.

If these were kind of random data points that didn't fit into any coherent whole, if they did not, for example, have some level of persuasive precedent at least, I think the regulated community and the clients I think that a lot of us represent would -- I was thinking that as kind of going from confusion to chaos. It's difficult to know where things are going to come out in the ordinary course if these prior decisions, Statements of Reasons and no outcomes have no precedential value and I think we can be left really grasping at straws.

But I'll conclude there and move along.

CHAIRMAN WALTHER: Thank you very much. Mr. Mason, former Commissioner Mason.

MR. MASON: Thank you, Mr. Chairman and with all the other panelists, I am delighted to be here. I hope what I've written and have to say is of some assistance to you.

I had one comment about the pop culture reference I put earlier in my testimony, so I'll start with that and that is just do it. The point is that after 10 years of going through this with Commissioner Weintraub at one point and other discussions about procedural changes, looking back on that, I think you have a lot more to lose by failing to act than you do by acting, and that is, there are bad things. You could change procedures and it could increase the time it takes to process MURs or you could end up with other problems.

But the natural tendency in a bureaucracy and even more on a six-member commission where everybody's got an equal voice is to delay and to stick by precedent. I think to the extent that you can reach any consensus, you should go ahead and make changes, knowing that you can go back and change them later.

On a couple of the particular points, I want to start on motions and a couple of, I believe, Chairman Walther and a couple other witnesses already referred in some part to the Federal Rules of Civil Procedure, and what sort of occurred to me after going through the process and the questions about particular motions is that what may be more important than the particular motions you allow or provide for is the timing and procedure for any motion.

So I suggest an analogy to Federal Rule 12(b), which requires that all defenses be joined in the first reply. That stage, I think, is roughly analogous to the RTB stage and so I think if you said yes, respondents can propose to dismiss or can offer whatever other motions they want to offer and they should offer them with their reply.

And by the way, if it gets that far, you're going to have another chance at the response to the probable cause brief. By concentrating the motion practice on those areas where the Commission already has to have them out or before it, I think you avoid potentially creating procedural hurdles or barriers.

I do suggest that you leave some room for people to put in motions at other times, but you describe them as extraordinary and not try to predict every circumstance in which they might come up. I think the description of extraordinary and the notice that you would allow them will let people who aren't insiders know well, okay, you can at least try, but make it clear that those would be exceptional rather than normal.

I addressed in my testimony a suggestion for how you might consider -- handle reconsideration motions at the RTB stage by an analogy to the process that already exists for advisory opinions and I think that's a good one because it's already there in the regs, yet it was rarely used in the AO process because people who had gotten opinions realized well, they already had this before, then they considered all this stuff and I've got to change somebody's mind now and so they knew they had to have a pretty good argument. So that structure is out there.

I also think allowing for hearing at AOs is a good idea and I would really almost put it in two parts. There are some advisory opinions which almost beg for a hearing process and that is the issues are genuinely new and uncertain in allowing some kind of testimony, and perhaps even allowing commenters to come for five minutes or so and make a point might be appropriate.

There's another set that Joe just referred to which are the questions that come up at the table and why can't we just get the requesting counsel up here to the table and ask them. I think you ought to provide for both, and that is to say, I think you ought to provide for hearings in some

instances where the Commissioners think they would be useful. And in other instances I think where questions come up and the counsel is present, you ought to have a procedure where a Commissioner can just ask and have them come up and answer a question.

On penalties, I again addressed that in the written statement. I just wanted to address the cost of doing business argument because that's prominent in everyone's mind. In my experience, I don't think that is a major factor in changing people's behavior. In fact, my observation was it didn't matter how low the penalty was, a penalty of any size was very annoying to people. They didn't want to pay it for a whole lot of different reasons and so I don't think that by disclosing something about the penalty structure or schedule you would be giving people the green light to go ahead and violate in one particular area or another.

On timeliness, I want to emphasize the utility of deadlines and I suggested some particular ones for the enforcement process and also for this hearing and this structure, but in my experience thinking back to when we had statutory deadlines or judicial deadlines, they almost always worked and that would go to the AO process where we have that 60-day deadline and it's routine in that, or to BCRA, which was a big tough job, but we were able to meet that statutory deadlines, or to judicial deadlines.

If you're concerned about time limits, then the only remedy that I know of is to impose deadlines and there's going to be a certain degree of arbitrariness in terms of the precise deadline that you choose, but people will work to that deadline. If you're concerned about that, I would recommend it.

There was some discussion of RAD inquiries at the earlier procedure and I'd just make two observations about that. One is there's no reason that I know of that RAD RFAIs are published. They were published starting early in the agency's history at a time when everything was published, so pre-AFL-CIO for instance, and that was just the practice of the Commission.

But I'm not sure what purpose is served by the publication of the RFAIs. I mean, there's certainly some public -- additional public information that's put out there, but I don't think it's critical information to people understanding the process of filing. If that is one of the things that's getting in the way of reasonable resolution of those issues, then I think you ought to consider whether or not that's useful or not.

Second, and Commissioner Thomas can speak to this, if he wishes, in more detail, early in my tenure on the Commission, the Commission considered the RAD review process in detail at Commission meetings every two years. We stopped doing that at some point and I wasn't sorry, because it was a lot of work and a lot of detail.

But there again, and I don't know what's been done in the last six months or so, but that may be one procedure that you want to go through just to get a good grip on, okay, what the standards are and how they work.

I think that concludes everything that I wanted to highlight and I'd be happy to answer your questions.

CHAIRMAN WALTHER: Thanks very much. Mr. Thomas, former Commissioner Thomas.

MR. THOMAS: Thank you, Mr. Chairman, and members of the Commission, thank you for letting me come. I will apologize in advance. I have a bit of a cold I am coming off of and I had a contact lens malfunction yesterday so I am wearing my goggles that are a few prescriptions old and I can't see very well, even with them on. I may not be all that spectacular in my performance today.

You need to be congratulated for undertaking this exercise. It's always good to keep your eyes open and look for good, new, fresh ideas.

I would just make initially a point that I don't know how many times you're going to hear it. But I think if I were to rank your number one job, it would be to try to make the law clear. If you make the law clear, people will follow it as a general rule, I have found, and indeed the clients on this side of the world now, I've seen that people are pretty much afraid of the law and they do want to comply if they can just figure out what the rules are.

So that's the number one job. The number two job, though, is to actually enforce the law. You're always going to have situations where some folks don't like the law, don't respect the law, so that's your job. You here are responsible for representing the public in making these laws work.

Number three, keep in mind your role. This is something that I got into quite a bit sometimes with my colleagues, but I always felt our job as Commissioners was to enforce the law that Congress passed. Congress gets to make the laws and the courts are the places where the constitutionality is decided. So the FEC is left with the role of enforcing the law as Congress wrote it and if others want to try to have parts of the law declared unconstitutional, that's fine. They can do that as a defense in enforcement cases and in other forums, but the FEC should be ready to defend the law as passed by Congress and as written by Congress.

So that's the general philosophical approach that I always tried to apply as a Commissioner and I think it's constructive. That keeps you in a proper role.

Motions and so on to reconsider, I think if you agreed about the due process concerns, my first recommendation is to build on these kinds of motions, perhaps more so than oral hearings. I might prove the point today. Sometimes oral presentations can generate more confusion than clarity. The written word, with unlimited thought, tends to be more precise and you can, it seems to me, ordinarily get across a point with clarity better with the written word.

Oral presentations also, if you think about it, have elements of favoritism built in. Possibly you might find some folks coming in trying to intimidate you. Given their connection you might find all sorts of efforts to basically lead you astray in an oral presentation. So my preference, if you're going to focus on due process concerns, would be that you generate opportunities for these written motions for reconsideration at whatever stage you think is appropriate.

Another point I wanted to make initially is just that you're in for a lot of criticism when you take the step to have a hearing like this and I don't want you to

ever lose track of the -- sight of the fact that I don't think this agency really has any history of showing bias in its prosecution. I don't think this agency really has any sort of history of staff hiding information from Commissioners or not presenting arguments to Commissioners.

I recall on some occasions we would have an instance where it turned out that maybe inadvertently a response from the respondent had not been attached or circulated in some fashion, but generally, as you all know, the materials the respondents submit are circulated to Commissioners.

If I'm wrong, if there's a problem there, then maybe you should focus on just working out with staff to make sure that nothing is withheld from you. That would be a simple way to sort of address that concern if it's in fact legitimate, but I don't have a general sense that that is a real problem. Yet you're hearing a lot of criticism suggesting that somehow staff is trying to hide the ball from you Commissioners.

Bottom line, most of what you're doing I think is perfectly good and okay. It has developed over a long period of time and you have a lot of bright people who have come through and served as Commissioners over time and on balance you have all been very conscious of the need for due process and fairness.

That said, this is, as I said, a good opportunity to look for good suggestions. Just off the top of my head, some things that I didn't put in my little list that I've seen in other comments or just thought-- making public a compliance manual. I think that probably would be a good step, make it available to the public, something that summarizes the actual written procedures along the enforcement road or say the Audit road or the ADR road.

Most of that stuff you got up there on your website; it's fairly well explained. But things like motion procedure, if you're going to go down that road, that would be obviously something that would be very helpful to have out there, any compliance manual that's available to people trying to represent respondents.

I think maybe you could go down the road of trying when you send a letter to someone with a consuming issue, a proposal, you could probably help foster a sense of confidence that you've done something rationally. If you tried to put into those letters something that explains the general factors that went into calculating the civil penalty, I don't think there's anything wrong with that because people might appreciate knowing well, we took into account the amount of the violation, we took into account the fact that this had elements of being knowing and willful, if that's the case.

I mean, you could certainly do those kinds of things that might help in that regard. That wouldn't be the same thing as just putting out there the actual mechanical formulas for how you calculate your civil penalties; I'm not in favor of that.

There might be some other things you could do. I see from my side of the aisle or from my side of the political practice that you are kind of floating out there not knowing where a matter is at the Commission and maybe there could be something done to every, say, 30 days, have the staff have an obligation to notify respondent's counsel maybe where things are in a general sense.

I don't know if that will actually solve any problems, but there's just this sense of kind of helplessness and the clients are always wondering where is my case, where is my case and we never have the ability to sort of find out other than a phone call.

There might be something where we could sort of get a little bit more assurance and comfort level if that were built in.

But anyway, those are just some ideas. The one that I offer somewhat hesitatingly is the old system, we used to call it the MURquistion. That was a process where we basically said okay, cases aren't moving as quickly as we would like, as people on the outside would like. Let's let Commissioners identify cases that they're interested in and ask that they be brought to the table every so often. You could do this on a periodic basis, however you wanted to set it up.

At the same time, with your priority system, you would have an opportunity to have a discussion of those cases that are starting to get stale within whatever definition you use for staleness these days.

So you could sort of build in a periodic review process and that sort of helps everybody. The staff doesn't much like it, but on balance, it sort of is a vehicle for prodding everyone to bring all the enforcement cases sort of into a general sort of consensus discussion about what ought to be moved and what maybe is causing some problems in terms of delays.

So just an idea. Those are additional ideas that I have. A couple of them I haven't seen in the written comments. Thank you.

CHAIRMAN WALTHER: Thank you very much. I'm going to start -- maybe we'll start -- a different approach this time. Commissioner Weintraub?

COMMISSIONER WEINTRAUB: I had a feeling you were going to start with me. The reality is, I don't actually have a lot to ask this panel because I feel like I've had -- it's delightful to see you, but I feel like I've had so many opportunities over the years, particularly with all due respect, Chairman, with Scott and Dave, to talk through a lot of these issues.

I am gratified, though, because on the publication of the penalty schedule, David and I started out in different places, but I see you coming around to my point of view on that, that perhaps a little bit more transparency in that would be a good thing. So I appreciate that.

I think you started changing your mind right as you were about to leave, but it was too late to do me any good. I got one more vote before I could do anything with it.

I do want to -- maybe what I'd like to do right now is just take the opportunity to say just very briefly a couple of comments that arise more out of the previous panel because -- and it sort of follows off some of what you guys were saying. In the previous panel there were some comments about presumptions that -- sort of the notion that the staff all presume everybody is guilty and that their job is to prove them so.

I really -- and I know you guys know this because you've been here. That's really not what goes on. In fact, we put up on our website -- and I have a pretty color

chart that shows how often we actually do find -- take no further action or dismiss. I mean, I know for members of the bar, it's the old feeling every time your case is up there, you feel like everybody's out to get you. But in fact, there's a whole lot of cases out there that Counsel very reasonably recommends that we take no further action and usually the Commission says yeah, you're right, and the numbers are actually fairly striking on that.

I guess I'll -- Scott, you're the only person I think in the entire panoply of witnesses who's not really in favor of publishing the penalty schedule, so if you want to take on that cost of doing business argument, I'll give you your shot here.

MR. THOMAS: Argument 37.

COMMISSIONER WEINTRAUB: Right.

MR. THOMAS: Well, I won't belabor it. I think that you could have a blend, if you will, and it's sort of what I alluded to in talking about maybe the letters you send folks. If you wanted to basically let everybody know, and it's already pretty much out there in various places, but let people know what factors you take into account, the amount of money spent impermissibly. You could take into account the money that as a result was impermissibly raised. You could take into account the staleness of the matter. You could take into account whether it was a widespread practice, whether it was a repeated practice.

You could sort of let out that these are the kinds of factors that --

COMMISSIONER WEINTRAUB: Scott, I think you just did. You let the cat out of the bag.

MR. THOMAS: Did I do that? Can we have that tape? So, but anyway, I think you could go down that road and you could sort of let people have an appreciation of the factors that have gone into calculation of the penalty without going so far as to sort of show percentages and so on.

I mean, we all know that the way you have to calculate the penalties involves a lot of percentage work and so I think there's a middle ground that could be worked out, be very -- be beneficial to people out there without going too far.

CHAIRMAN WALTHER: -- Commissioner McGahn?

COMMISSIONER McGAHN: Thank you. Mr. Thomas, your comments, you mentioned maybe with respect to motions and that sort of thing, instituting a trial program on internal referrals where you actually get a chance to file a brief or do something before the RTB vote so you don't receive a package in the mail that says welcome to RTB.

Thoughts on that and if you could sort of articulate why that may be a good idea and then why there may be some downsides, what we need to look out for as far as efficiency and that kind of thing.

MR. THOMAS: Like all of these suggestions that you either build in a motion for reconsideration or an oral presentation, this is one where if you build an A step where before you get to the reason to believe determination based on a referral from RAD, you're going to give some sort of written notice to the potential respondents, it's going to slow things down, I suppose. That's the downside.

And so you're just weighing against the downside the benefits you would get from that. And I think that -- again, with a trial program, you could test it out and see. It seems to me logical that if you give someone at least just a summary notice that this is about to go to the RTB process, you might be giving notice to someone who up to that point has never even had any counsel about it, so it gives him notice that woe, this is getting worse here, yes, maybe I should get some legal advice, people who can help me figure out whether or not there's some way to address the Commission on the legal points and maybe in terms of identifying the appropriate mitigating factors that the Commission historically is receptive to.

So, at a minimum, it might give people a better chance to represent themselves and of course, there's the benefit to you. In some circumstances, it gives you a chance to understand all the surrounding mitigating circumstances. Maybe there was a lousy treasurer. Maybe there was some sort of reason that this committee fouled up.

So if you can understand that going in, it might help you fashion your initial proposal for conciliation.

MR. BIRKENSTOCK: May I add something quickly?

COMMISSIONER McGAHN: Sure. Thank you for asking.

MR. BIRKENSTOCK: On the idea of -- I understand Scott's concern about delay in the process, but I guess the perspective I think that I have is that a MUR can turn into a multi-year process. Typically it does. Probably when it's any real question or there's more contentious fact gathering, something to be done and some opportunity to have a two-week opportunity, some window within which you can do more than what I think happens in practice, which is in the back and forth with the RAD analyst, you try to kind of nudge them along to say, now look, if you're going to ask OGC about this, make sure that they know A, B, C and D and you kind of try to -- because you have no other options, you just hope and I think expect or hope really that there is going to be some extra information brought into that determination and only what RAD might understand.

I think that's worth two weeks. I understand the idea of the delay, but one, these tend to be very large matters. I think the kind of delay that this would introduce on a percentage basis would be very small and I think the bang would be worth the buck, so to speak.

COMMISSIONER McGAHN: My thought is, and see if this makes some sense. You have an internal referral. That paperwork's already done, so regardless of whether or not you allow a brief to be filed isn't going to change that work being done in that time. Counsel still has to prepare some sort of recommendation. We still vote on the RTB.

Those respondents in that situation take the language in the cover letter that says you can provide any materials within 15 days even though it really doesn't matter at that point. It matters to sort of shaping the case.

It's really just where you put the vote. If you put the vote before or after they get to file what they're going to file anyway, and it's really just moving the vote back two weeks. It doesn't seem to add time to what's already -- the work product's already going to be done regardless. It's

just when the Commission actually pulls the trigger one way or another.

Does that make sense timing wise?

MR. THOMAS: I think that that's true and so if you tailor it that way, I don't really see that it would be a problem, and I think there are enough benefits you can probably -- you can achieve it.

You don't want to lose sight of the fact, though, that if you're going to go down the road and sort of formalize the opportunity to have motions for reconsideration, there's still after the fact, I suppose, an opportunity for someone who at that point gets word that they've just had the FEC find RTB to file some sort of response. But as you point out, you're going to have -- you're potentially building in an opportunity to get in essence that kind of information beforehand and what's the harm really in trying to get that kind of information to help you if it's not going to really create an extensive delay?

COMMISSIONER McGAHN: Audits, Commissioner Mason, you commented that a committee should be given the opportunity to have some kind of presence at maybe the final stage or something. Do you think that would be helpful and if so, why?

MR. MASON: I do thank you and one of the things that came up in the first panel, I think Commissioner Weintraub addressed that and that runs through this whole -- what's underneath the discussion about due process is a desire on the part of campaigns and parties and other people who are affected by this process to feel like they're being heard.

A lot of this suspicion about well, you know, we send the brief into OGC and they kind of hide it. Well, they don't hide it. Commissioners get all of the paperwork that comes in and I made a practice of going through the files and I suspect most other Commissioners do too.

So people are heard, but it's -- I think it's relevant to the Commission's consideration that you keep getting feedback, that they don't feel like they're being heard. In the audit process where you have the Interim Audit Report, that's the opportunity for the audited party to be heard.

The legal issues that people are talking about, that's typically what comes up there. So you have Audit notifying them and you have OGC review and you have an opportunity in the response to the Interim Audit Report for the audited committee to be heard. So all this is going on but the audited committee doesn't feel like they've had a full opportunity, and I think that's where something like a hearing at the final audit stage could come in and they could then come in and present their case.

I know of at least one case that ended up in a fairly sizeable enforcement matter, and I asked the Counsel about it later on because it was obvious to me sitting on the Commission that the Commission had reviewed this twice during the audit and it had come to the conclusion twice that yeah, what the auditor said was sort of where the Commission was on it.

They sort of fought it and it degenerated into an enforcement matter and it ended up with a big penalty of something that could have been fixed in the audit process at relatively low cost. So I asked them later on, why -- you know, why did you go this far? And the answer was well because we didn't feel like we had been heard.

So that was the suggestion and again, with the -- I was a skeptic about the hearing process because I thought too many people would want hearings and they'd take too long, and I'm persuaded by the probable cause hearings that there's a way to do it where not everybody asks, where not everybody asks gets a hearing, so there's a flaw in it.

But in fact, I think it's been very beneficial and hasn't slowed the process down unacceptably and I don't know why you couldn't build that same process into the audits at the Final Audit Report stage.

CHAIRMAN WALTHER: Thanks. Commissioner, are you ready for -- Commissioner Bauerly?

COMMISSIONER BAUERLY: Thank you. I'd like to discuss the suggestion for hearings for advisory opinions and I appreciate that because in my own experience in a short -- relatively short time compared to some of the folks in this room, there have been times when it seems like we know someone knows the answer, but we'd like to hear it from them.

But I also, if we were to establish some sort of pilot, as I think the Commission's general approach is, to start with something small and see how it works and make modifications and make bigger, just thinking about the numbers of advisory opinions that we do consider each year, it fluctuates a little bit, but for example, in 2006, we had about 30. In 2007, we had about 25.

I'm trying to understand how we would fit a hearing into each of those cases. At what stage do you think it would be useful? Would it be at the public -- the open meeting where the Commission considers adopting a proposed advisory opinion or would it be earlier in the process? I'd be interested in your thoughts on that.

MR. BIRKENSTOCK: Sure, thanks. I think the first answer that I have is making sure that you wouldn't. So for all 30 or 25 or 50, whatever number that you have, it seems to me not all of those would require really open-ended kind of hour-, two-hour hearing. I think former Commissioner Mason made a great point about how if there is any opportunity just to have the respondent appear at the open meeting in which it's discussed, that seems to me to have very little time or process.

But provided if you did need to do something with respect to every AOR, that at that stage just having availability only to respond to questions perhaps but not to do an independent presentation or kind of open up process for the respondent to be proactive, but only available so to speak to answer questions from the Commission, the idea that I had or that I find more appealing is that any of those matters in that subset of those 25 or 30, or whatever it is, that really are the difficult, fully novel, heavy lifting questions, it's up to the Commission. If the Commission feels that a hearing would be helpful, well then, there you go. You have a hearing.

I think some level of open-endedness is important such that the respondent -- rather the requester is not the only person whose perspectives are sought or who are made available, but the Commission could also choose among commenters so that there could be other

people appearing at that hearing only to the extent they've already filed written comments.

And again, I think from a process perspective, you could streamline it by having some requirement in it, but the discussion at the hearing would be limited only to those topics or arguments that were already addressed in the written comments.

So someone trying to file maybe -- file is maybe an appellate court concept. But this is not an opportunity to raise brand new arguments and try to throw a wrench into the timing of the works. But you had an opportunity to address it in writing.

I think Scott's right that by and large you can give more thought to what you put into a written submission, but I think also sometimes that means you get less candor. You get kind of the finely sanded version instead of what I think can be sometimes a more productive top of the head, back and forth kind of process.

So I think to narrow that down, not every AOR needs a hearing and it should be up to the Commission to pick which ones it feels would benefit from it.

COMMISSIONER BAUERLY: Commissioners Mason and Thomas, I would appreciate your thoughts on that as well, from your perspective on both sides of the table, if you have any.

MR. MASON: I think Joe has it about right in terms -- and again, by analogy to the probable cause hearing, that not every probable cause brief gets a request for a hearing, not every hearing that's asked for is granted.

I think as a procedural matter, because of the 60-day deadline, you would probably need to have requesters ask for a hearing when they put in the request, because that's going to mean you're going to have to move the deadlines, the internal deadlines, back by 10 days or whatever is going to be necessary to get that done.

But as long as the Commission stays in control of the requests on which hearings are granted, I don't think you need to worry too much about having -- to schedule 30 hearings a year.

MR. THOMAS: I agree. I think it could be manageable and you could try it as a pilot program. I think that probably the main thing you would want to do is try to limit the opportunities, those situations where the Commission approves doing it. I don't know that I would want to open it up as a right of a requester to actually make a presentation.

But you could open up as a right, I think very easily, the opportunity for the requester to be present in the event the Commission has questions. That's kind of what I -- most amusingly, one of those instances where we would have some sort of factual question and we could see that counsel and the representative of the requester is sitting there in the audience and we sort of well, should we take a break?

Then there would be some sort of direction to the Counsel's office to go talk to the requester and the Counsel's office would then come back with, I've just gotten it on good authority, and so we would go through that little dance.

So maybe, as a pilot program, that would be a very easy thing to do, just suggest that respondents would be allowed to respond to Commissioners' questions at a meeting where the advisory opinion is discussed. I think that would be a good step.

COMMISSIONER BAUERLY: As we've been discussing, deadlines are sometimes important because it prompts actual action. There are times when we are up against that 60-day deadline, an open meeting for which the advisory opinion consideration schedule is sometimes very close to that deadline.

If we have an incidence where we allow requestors' counsel to provide us with some answers that may change the thinking on that, I would anticipate that we might need some additional time at that point. Is that, do you think, a valid reason for asking and perhaps getting an extension from requestors' counsel?

MR. MASON: Can I just point out that if requestor's counsel are there to answer questions, he would presumably -- he or she would presumably also be able to discuss an extension right then and there.

MR. THOMAS: Yes, exactly.

MR. BIRKENSTOCK: I certainly don't disagree. But one of the reasons I wanted to choose this topic was again the experience with the voter/voter advisory opinion. The client, I think I can say, was certainly pleased with the outcome and the substance of that opinion. But coming out 10 days before the election on a question that really I think my first letter went in the earlier part of July, was really not a meaningful opportunity.

That was a business that I thought had a really clever idea. It still has a very clever idea. But the time that it took to complete that request, you know, for a lot of reasons that I think are legitimate and understandable, they were left then without a meaningful outcome. They were really not given much of an opportunity to run a business this year, based on how much time it took.

I think the concern that I would have is that what I would hope to do at these hearings is shortcut that process and actually try to get within the 60 days rather than have this become something that leads to additional rounds of drafting or rethinking of things in ways that would only add time.

So I think it's fair to say that the Commission could ask for an extension as part of that process, but I guess maybe I'm just trying to kind of set out a marker that I don't think it's unfair for a respondent to say look, with all due respect, no, we just can't afford an extension. We're entitled to answers under the statute and we need one, and leave it at that.

COMMISSIONER BAUERLY: I'm sure I'm out of time, but just one comment on that. That's one of my questions about where in this process, because it seems to me given human nature, we will be considering these close to that 60-day deadline at the open meeting, so if there is a hearing opportunity, that's why I was asking about the timing of it.

It needs to happen early in the process to answer factual questions which necessarily affect -- may affect an outcome.

MR. BIRKENSTOCK: I --

CHAIRMAN WALTHER: We're going to move forward. I'm going to have to --

MR. BIRKENSTOCK: Yeah, I'm sorry.

CHAIRMAN WALTHER: Put it there quick, please.

MR. BIRKENSTOCK: Which is basically that I completely agree this should not be a fact-gathering process. Where I think this should be most useful is

in those instances where you have competing drafts, for example, and the respondent -- the requestor rather, you got a chance to make a comment about a particular draft, but that gets less and less meaningful as the back and forth happens between the Commission and OGC and some of those succeeding drafts you don't get much of a meaningful chance to offer a perspective on.

So it has to be at the -- I think, it would be most efficient in the latter stages of the process, not as a fact-gathering item. If you can clarify one or two points, that's fine. But I think it's most useful as a means to speak to some of the issues involved in these competing drafts.

CHAIRMAN WALTHER: Thanks. We'll move on to Commissioner Hunter.

COMMISSIONER HUNTER: Thank you. Quick question for Commissioner Mason. It's the same one that Commissioner Weintraub asked the previous panel, which is how do you think making the fine schedule public would affect conciliation agreements, excuse me, conciliation negotiations?

MR. MASON: The concern I had and still have to a degree, if you made everything public, which is to say, you got a list of violations categorized and percentages assigned to that and then aggravating and mitigating factors and in some areas that's far more developed than in other areas. There are problem areas that are probably never going to be fully resolved, such as how you deal with the substantive violations also triggered a reporting violation, and whether you double or stack a reporting penalty or sort of put it in as a lesser included offense or how you handle that.

But my concern about releasing every detail is that the conciliation negotiations could easily devolve into an argument over the Commission's penalty schedule and I think conciliation needs to be focused on what the respondent did in dealing with the Commission about okay, was that okay or not and how bad of a problem was it?

The suggestion I made is actually a little bit different than what a couple of the other panelists said and rather than rely on factors which are still very fuzzy in a multi-factor test, just leave the decision-maker, the court, the Commissioners, whoever it is, with a whole lot of discretion, is to go ahead and say, okay, a standard reporting violation is worth 90 percent of the maximum penalty.

That's not the number, but you get my point, that to sort of put in a rough level, and most of the time what the Commission is dealing with are mitigating factors. So most of the time the Commission is going to be content with something less than that and that would give, I think, the respondent some assurance that okay, this is -- now I understand that when I commit this type of violation, the Commission normally considers 25 percent of the amount in violation to be about the appropriate penalty and they're giving us some credit for good faith or whatever and so they're asking for 20 percent and I feel good about that.

I think that's where you want to be and that's why the suggestion that releasing the percentages that apply to different types of violations might actually be helpful in the conciliation process.

COMMISSIONER HUNTER: Thank you.

CHAIRMAN WALTHER: Thanks. Mr. Vice Chairman?

VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman. First question regards a motion for reconsideration at the opposed RTB stage. Both former Chairman -- former Commissioner and Chairman Thomas and former Commissioner Mason speak to that issue and talk about the necessity for building in procedural safeguards to make sure it doesn't turn into a delaying tactic.

But first of all, let me just ask what you think about the idea in general. Is it a good idea to have that? Just to betray my personal bias, it seems like while it’s true that a respondent has an opportunity to respond to a complaint, that may not always be sufficient because then what the Commission finds persuasive, what facts or what legal theories they find most compelling that they will then put into their factual and legal analysis, can't always be anticipated by the respondent and that once they see that analysis, and I think as brought out by Mr. Baran on the earlier panel, they may need to set the factual record straight that there may be a factual predicate in the factual and legal analysis which is incorrectly stated.

So I just wanted to get your thoughts and further opinions on having a motion to dismiss or a motion for no RTB. I think it could be styled in many different ways, but the necessity and importance of having that sort of a motion post-RTB?

MR. THOMAS: Mr. Vice Chairman, I think that on balance it is worth maintaining the practice. I think you might want to put it in a form of a pilot program. As a practical matter, I recall that even for internally generated matters, the Commission had found reason to believe the letters say something to the effect, if you wish to submit a response, please do so in the next number of days.

In a way that's a kind of a motion for reconsideration, so in the internally generated process it's kind of there, I think. But if you modified that for some reason and taken it out, then I'd say do something to allow that opportunity for a motion for reconsideration if that's what it's styled.

In the complaint context, I noted with interest a comment from the Center for Competitive Politics. I hope I got that right. Their suggestion is that the FEC is being unfair because sometimes when it gets to the reason to believe determination it is -- its staff had gone out and looked on the Internet and has looked in newspapers and has gathered some additional information to help the Commission analyze whether to find reason to believe.

There's a suggestion that that's somehow unfair, but that's the way to resolve that. Your suggestion, an opportunity to have a motion for reconsideration after the reason to believe determination I think makes that a fair process.

I would caution against the approach suggested by that commenter though because I don't want the Commission to shut itself off from common knowledge. I don't want the Commission to become known as the, I'll try to stay away from an unfortunate acronym, but the Federal Stupid Commission. You don't want to do that. You want to take advantage of information that's out there.

To be honest, the counsel for respondents, they have access to the Internet. They have access to the very same data and research. So I think it's a good balance if you build in this motion for reconsideration in the complaint process because it would alleviate that concern.

MR. MASON: I agree for pretty much the reasons that you stated, Mr. Vice Chairman, and also to go back to the point that what a lot of this is about is giving people assurance that they're being heard and the formal process is what does that and the assurance that even, for instance, if the motion is not replied to, that it goes through the Commissioners and that they made a decision on it is a beneficial to add to the process.

I do think that occasionally there's a genuine degree of surprise that a complaint was kind of vague and I agree with former Commissioner Thomas that it's fine to go out and look on the Internet or the newspaper or whatever and it's true that counsel's -- that respondent's counsel had access to that, but they may not even have put it together.

In other words, the Commission may have been making a logical link or assumption that was not clear from the complaint and so it's cases such as those where I think the motion for reconsideration could be useful, sometimes almost necessary for fairness purposes and sometimes helpful to the Commission because what you may also find is that two events or two facts that you thought were linked somehow, and there's a simple explanation out there and then it would help you in the discovery process even if it weren't enough to convince you to reconsider at the start.

VICE CHAIRMAN PETERSEN: I appreciate that last comment you made that how this -- how these can often help the Commission out. There's been a lot of concern raised, and I think legitimately so, that building in additional motions could result in delay, but on the other hand, in many cases, it may actually build in efficiencies by focusing the Commission on the most relevant, factual and legal issues that are in a particular matter. So I appreciate that comment as well.

That's all I have.

CHAIRMAN WALTHER: Thank you. Mr. Stoltz?

MR. STOLTZ: If I might explore a little bit the Audit hearing concept, which we've heard from several commenters, but I would be very interested in some observations from some folks that were here for a long time and know the process intimately.

At what point would you see it happening, before the report's released, after the report's released, more like the Title 26 hearing process or something different; if you could make some suggestions?

MR. THOMAS: Well, Mr. Acting staff director. Nice to see you. I would say, generally speaking, you reserve the hearing process for somewhere later in the link, so I would say that it's most logical that when you're coming down to it where you're at your final audit stage and you're having a deliberation on the final audit findings, that would be where you would offer someone an opportunity to send a representative in and have a discussion.

The back and forth discussion is helpful in some context. I've had some experience with that. I'm not sure that anything I said was really helpful, but if it's helpful to Commissioners, I mean, that's to me the most significant thing.

The Commissioners are the ones who have the ultimate decision-making authority. So I would say later in the process, maybe during that meeting discussion of the Final Audit Report is best if that's going to be built in.

MR. BIRKENSTOCK: I would agree that just before the final -- or after the Final Audit Report has been prepared and just before or as the Commission is considering it would be the appropriate place to build it in.

MR. STOLTZ: Thank you.

CHAIRMAN WALTHER: Anything further?

MR. STOLTZ: No.

CHAIRMAN WALTHER: Ms. Duncan?

MS. DUNCAN: Thank you, Mr. Chairman, and welcome to the panel.

Mr. Birkenstock, I wondered if we might explore a bit your recommendation about advisory opinion hearings and I wonder if you could comment on whether a hearing that might contemplate formal presentations by advisory opinion requestors might have the unintended consequence of turning what I think is now a semi-collaborative process between the Office of General Counsel and requestors into more of an adversarial process?

MR. BIRKENSTOCK: Certainly a fair question. I think in candor I would acknowledge that there's a possibility that this can become an opportunity to leave the collaborative stage and enter some kind of disagreement stage.

I think, in balance, though, my response would be that that's not unfair, that if in fact there is a disagreement between the requestor and OGC, it can be honest and legitimate and sincere. I think having an opportunity to air that and even if you engage in a back and forth in front of the Commission about that, I think is more good than bad. I think it might, as you put it, leave kind of a semi-collaborative process to the side.

But I think at bottom maybe that's the reason that this is necessary. Not to kind of go too far with it, but one of the concerns I had about the advisory opinion process is that the role of OGC is really paramount. It becomes up to OGC to get that first bite of the apple and submit its draft first and that can really, you know, load the rest the process with an initial perspective that can be hard to turn, a super-tanker kind of analogy.

Once you get the inertia moving in the direction of a draft, it can be hard to get it changed. I guess what I'm driving at is that I think for the community it would be helpful to have an opportunity to get into the engagement at that point, but again, with OGC present. This is not outside the existing process or a replacement of it; this is kind of alongside the existing process.

MS. DUNCAN: Just one follow-up to that question.

CHAIRMAN WALTHER: Sure.

MS. DUNCAN: Which is do you know whether that kind of a process would be consistent with the process that other administrative agencies use when they are considering a request for opinion and issuing opinions?

MR. BIRKENSTOCK: That's a good question. We didn't really look at what other agencies are doing. We took a

pretty hard look at the FECA itself to make sure that we weren't suggesting something to the Commission that it simply didn't have the power to do.

We concluded that the Commission does have the power to incorporate these kinds of processes. But the answer to your question is no, I really don't know what other agencies do along these lines.

MS. DUNCAN: If I might ask former Commissioner Mason one question, which is we've talked a bit more on this panel about motions at the RTB stage, but other commenters have suggested that there might be motions even during the investigative stage.

Your comment said those motions, however styled, are occasionally informative, but rarely useful. I wondered if you might elaborate on that?

MR. MASON: The two types of situations that I can recall that triggered those sorts of motions effectively during the course of investigation were a new legal development, such as the Millionaires' Amendment case and my comment as to those is the Commissioners -- the Commission is well aware when it loses a Supreme Court case and immediately goes on to consider the implications of that and so on.

So those aren't really necessary, though there's no harm certainly in allowing a respondent to submit a motion and it's possible, for instance, that there could be a case involving a state campaign finance agency or something like that that would almost fall into a notice of additional authority type of situation.

The other situation that I've seen used is where effectively there's a discovery dispute. We already have a process for motions to quash and so on like that and so perhaps those should be pushed that way, but essentially, where there's just been a contentious investigation and respondent's counsel is kind of fed up, those are the ones that I found informative also.

But again, where do you go with that because it's -- I think it's useful for respondent's counsel to have a way to present that feeling of frustration to the Commission and sometimes it may then spark a discussion about, well, how do we go ahead and get this thing over with or get it focused down?

But I don't see how the current process or the current way we've treated that has been inadequate because when people submitted those, they're circulated to the Commission so it comes to the Commissioners' attention and if they feel like there should be a discussion, there can be a discussion.

MS. DUNCAN: Thank you, and one final question for former Commissioner Thomas which revisits the area of publishing civil penalties.

You said in your -- civil penalty schedule. You said in your comment that there's an element of deterrence that comes with leaving the potential penalty somewhat mysterious and I know we've talked about this a bit, but I wonder if you could say from your point of view as a current practitioner and advisor of clients a little bit more about the notion that there is some deterrence that comes as a result of not having a fully public civil penalty schedule?

MR. THOMAS: All I have to do to say to a client that they better pay attention is refer them to the Freddie Mac civil penalty. They go nuts when they hear about the size of the Freddie Mac civil penalty, considering what was going on.

There is a very, I don't know, I call it the crazy factor maybe. But if there's an element of mystery there, I think that people are in a sense always thinking, I might end up with the Freddie Mac civil penalty.

I was thinking this was -- this hearing was coming up and I knew this was going to be a topic on the agenda, that I would -- be at a Supreme Court argument and Justice Marshall was going after someone and he was basically talking about the element of deterrence. And he said, here by the sword of Damocles, and this poor attorney didn't really have a clue where he was going at with this and he said, you know what's significant about that, sword of Damocles, it's that it's hanging there, it's just hanging in there; you never know what's going to fall down and take your head -- that's kind of the concept.

I mean, you obviously don't want to go so far with that that you just ignore providing respondents some indication of where you are on these things. But I think that that's why I've tried to suggest maybe there's a middle road where you can give people some comfort that these are the kinds of factors we take into account, but don't give them the specific penalties.

And I have been in discussions with clients where you go through this painful recitation of what the law is and then they say, okay, so what are the penalties? And there's that -- it's a frank assessment. They sort of want to get your best idea of okay, what if we want to go forward and what are we going to pay in terms of penalty?

I mean, it's real. It's -- I've seen it. So that's kind of where I'm coming from on that.

MR. BIRKENSTOCK: Can I add quickly once again? I just want -- I think it's important not to overlook in the discussion of this kind of interim rule effect of enforcement actions, that what it is that we are deterring is political activity.

There are laws that regulate that and those laws are important, but at bottom, I just think it's really critical -- lead a little bit back to the -- sort of the weightier concepts are thrown around the earlier panel. But the laws that this agency administers govern core constitutional rights and to the extent unclear or vague laws or concepts are deterring people from engaging in those activities, there's a baby being thrown out with that bath water and I just think it's very important to keep that in mind.

CHAIRMAN WALTHER: Thank you. We've got a couple questions. It came to me when somebody commented that what they'd really like to be able to do in the negotiation process, if it just looked like it wasn't quite working out, that they really thought it was a fair offer, fair to make a motion directly to the Commission, to approve a compromise.

MR. THOMAS: I think implicit in that is there is some sense that somehow this Counsel's office is not taking offers or suggestions from respondents to the Commissioners. I'm sure there are discussions where the FEC's counsel are in discussions with respondent's counsel and offers come and go and suggestions come and go and I suppose that you really should

scratch at that to see if it really is a problem.

If you think it is a problem, then maybe you could adopt some additional guidance to the Counsel's office that whatever the offer is in conciliation, let us know. Keep us apprised of what offers are out there on the table.

The Counsel's office might not much like that, but I don't think that on balance it would be something that would really undermine the process too much.

CHAIRMAN WALTHER: Any comments on that?

MR. MASON: If I might, Mr. Chairman, it was my impression that the Counsel's office generally followed a policy that if a respondent in negotiations wanted an agreement or a proposal put before the Commission, that that would be circulated.

I've seen nods from the current Commissioners, and so I'd just like to suggest that this may be simply a matter of clarifying what policies are to assure people again that they're being heard. I think the balance you want to strike is you don't want to move too quickly to where it's the six of you and not the Counsel's office on behalf of you collectively doing the negotiations, but I think to the extent that you have a policy like that, simply stating it publicly and saying when negotiations are going on at probable cause at pre-probable cause, they're going to be handled by the Counsel's office, but if a respondent wants a particular offer to be presented or circulated to the Commissioners it will be circulated.

I think that gives people the assurance that they need without -- and I think the trick to it is not causing that to trigger an automatic calendaring of that on the agenda. In other words, if it's circulated and Commissioners look at it and say that's not good enough, sorry, you shouldn't have to come to a formal Commission meeting simply because the external party submitted a motion.

I think that's the balance where you get into the -- into delaying tactics.

CHAIRMAN WALTHER: That is -- from counsel of the requestor or argument on probable cause. It takes two Commissioners before it can get on the calendar at that point. Anyways, some commenters, even I think Mr. Bopp, suggested four Commissioners before it actually counts as a motion, might be the way to do it.

I'm going to depart a little bit from the comments that you made just because of the experience you've had on the Commission and ask you because we didn't get a lot of comments in detail about our relationship with the Department of Justice and you were --

MR. MASON: What relationship?

(Laughter.)

CHAIRMAN WALTHER: There you go. Commissioner Thomas, you were probably there when that MOU was actually entered into. So I would like to tap your experience and thoughts over the years on how we can, as people say, improve the relationship, what relationship do we want to improve and how we go about it?

I had some questions about when we begin to feel a need to notify the Department of Justice, do we concurrently have to notify the respondents that we're moving in that direction because thereafter the temperature may quickly change?

MR. THOMAS: As a matter of practice, it is very awkward to be in the business of starting a civil investigation and then all of a sudden realizing that this may be something you do want to send over to Justice, we probably should let the respondents know. But there already is.

You could clarify by explaining somewhere in your Enforcement Manual, for example, that there is this interconnection. Many of these statutes are jointly enforced and you could explain, this is where the Justice Department's jurisdiction kicks in, so these are the kinds of cases that potentially they're going to be looking at. That puts people on notice.

I was thinking that this has really been a process over the years that has been self-regulating because as you probably have all experienced by now, at a certain point if a matter gets serious enough, the respondents through their counsel start saying, Fifth Amendment, FEC go away, I'm not talking to you.

So as a practical matter on a lot of those cases, it does get kicked over to the Department of Justice. So I would say that you can always try to have discussions with the Department of Justice. I think they do have a fair argument that they could change things and it did back in -- onto their platter a lot more cases that are reachable in terms of the Federal Campaign Finance statutes.

It reflected intention of Congress that they wanted some criminal enforcement of these kinds of things. So I think it would be fair to understand that particularly the bread and butter cases that Justice handles, they handle the clear-cut cases. They handle those conduit schemes that are fairly clear-cut and that require a lot of investigation sometimes.

But traditionally they have left to the FEC all of the legally complex cases, express advocacy, coordination. You don't see the Department of Justice going after those kinds of matters and so you've kind of been left with a lot of that kind of material on your platter.

I don't know if there's an answer in any of that, but it just strikes me that it never hurts to have discussions with Justice to see if you can work out a better understanding of when you notify each other and you certainly should think about whether there maybe is a step where you start notifying respondents that there are some potential legal rights here.

I'm sure you probably have researched this, but there are some cases out there that talk about the due process rights that people have at stake if the FEC starts investigating civilly using civil discovery techniques and then basically hands that information over to the Department of Justice. And it gets to be a question of well, did the FEC and the Department of Justice coordinate that in advance or not?

Anyway, that was part of the reason the FEC kept its distance when they started an investigation, because we were fearful that we might in some fashion be tainting the Department of Justice investigation if we were asked to hand over all of that information, because it sets up that easy due process defense.

CHAIRMAN WALTHER: Commissioner Mason?

MR. MASON: I think the problem that I have seen on the part of the Justice Department is that it's been difficult to get them to deal on a reciprocal basis. In

other words, they're very interested in at what point is the trigger that they're either notified or have a case turned over or whatever, and the problem that I saw from a perspective of sitting on the Commission is that a lot of times a case would go over there and nothing would happen either for a long time or ever.

The Commission retained some interest in the civil potential for the case and so I think the trick to getting somewhere with the Justice Department would be to get them to recognize in a material and an operational and genuine way that okay, yes, BCRA changed things, I agree with that, and the criminal standard was -- criminal bar was lowered some and the Commission might be able to find ways to move cases in different ways or to a different stage than they traditionally have.

But what needs to come back with that is a more robust information feedback in terms of well, yeah, we're definitely interested or not, we're not within a time frame that the Commission could then go on and pursue its interest.

CHAIRMAN WALTHER: If we did that, what would we do with the respondent at that point?

MR. MASON: I agree -- to notify the respondent. One of the other commenters was very upset about why you would find RTB or knowing and willful violation at the RTB stage, and this is precisely the reason why.

Historically speaking, the Commission's been very reluctant to make probable cause findings at RTB without first having notified them. In fact, we get the due process argument, well gosh, you've been investigating for two years and you never told us until now. But we were looking into a knowing and willful violation, so that's why the Commission has done that.

It's been my experience that counsel know unmistakably that a knowing and willful violation means the potential of criminal activity and referral to Justice. So I think that's your first trigger. In other words, if you find knowing and willful RTB, they already know that and I don't know that you need to spell that out.

In terms of the statute, the only indication I see about what you need to do about it is the actual statutory effect of the referral to the Justice Department is that you don't have to proceed with conciliation. So under the statute, once you find probable cause, you are compelled to proceed to conciliation. But if you make a referral, you are not compelled to proceed to conciliation.

So what that would suggest is that there is some sense in which that referral is protected from disclosure and normally in a criminal investigation process, you might not want to know -- the target know -- to let them know.

So I think what you may want to think about is that you may have an obligation to suspend the civil investigation at that point and Justice normally asks you to do that. But in terms of notice, the statute would seem to suggest that maybe you're not obligated to give the respondent notice for reasons that you would understand under the terms of the criminal process.

CHAIRMAN WALTHER: That's a touchy question. If you stumble along through a deposition and then all of a sudden you run across some testimony under oath that there's a clear knowing and willful violation, I think it may be treading on somewhat unclear waters to then -- but in any event, to know exactly then when you start that deposition, when you've given notice, when we talk to the Department of Justice or come back to the Commission and know that the Department of Justice wants us to refer as many as possible to them if possible, it's a mindset we've been faced with.

MR. MASON: Mr. Chairman, I don't know what your experience has been, but I've never seen a smoking gun deposition in an FEC -- you know, the indications of knowing and willful violations have come somewhere else and so while it's theoretically possible, I agree with you, and they're touchy circumstances, most of the time the information comes in an interview with a third party or in the complaint or in other material that's out there.

And so I think the problem may be a -- something like that could occur, but I think more often you're dealing with discovery of someone other than the respondent.

CHAIRMAN WALTHER: I think that's true. I didn't mean to confine it to a respondent or a deposition, just conditions that get you there.

I'm done with any questions. We have five minutes left. Anyone else have a question to ask? Any further comments that any of you would like to make on any of the topics that have been raised?

MR. BIRKENSTOCK: If we do have just a couple minutes. I won't take all five. There was a point later on when and I pick up kind of where Commissioner Weintraub started earlier about responding to the earlier panel. Among the comments that Jim Bopp made was the idea that adding additional procedural steps to the enforcement process only raises the expense of that process.

I don't disagree with that as a factual matter, and I didn't hear him acknowledge, perhaps not surprisingly, was that by definition the kinds of enforcement matters in which those steps would be used, were not talking about the individual that put a bumper sticker up and a sign without the disclaimer and so forth.

There are anecdotes where that happens. But I think the other thing that might need to be kept in mind here is that by definition, the large expensive enforcement matters, we're also talking about large expensive undertakings, you know, six, seven digits being spent on the ad and out of that pool of money, if 1 or 2 percent ends up getting spent either prospectively on counseling or after the fact on protection in the legal process, that doesn't strike me as unfair or inappropriate.

I just didn't get that recognized in the earlier panel, so I can throw that out.

CHAIRMAN WALTHER: Thank you very much. Anything further, the counsel or Commissioners? If not, I have a question. Does anybody have any tickets to the inauguration?

(Laughter.)

CHAIRMAN WALTHER: Just thought I'd try. We'll talk afterwards. If not, thank you very much and it's great to have all of you here; it certainly was.

We're in recess until 2:00.

(Whereupon, at 1:03 p.m., a luncheon recess was taken.)

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

CHAIRMAN WALTHER: We'll resume the special session of the Federal Election Commission on our policies and procedures.

You three got an e-mail. I don't know if you got it or not, but you were sent one just to let you know kind of what the policy would be as far as going forward, and we would ask each of you to make some comments in five to 10 minutes, or less if you desire, and then we'll move through the various Commissioners.

Thank you very much for being here. It's really most appreciated that you're here on such short notice. We're dealing with so many different issues that we ask you to provide information on.

We'll start, we have Marc Elias, William J. McGinley and Hans A. von Spakovsky here at the panel and I'm going to ask Mr. Elias to begin, since we're doing this in alphabetical order. Thanks.

MR. ELIAS: I will try to be brief and use less than the allotted time, which I promise every time I appear before you and I never do, but hope springs eternal.

I'm Marc Elias. I'm a partner at the law firm of Perkins Coie, and let me start by stating that comments and the testimony I'm giving are those of myself and not of any of my clients.

As you know, a number of my colleagues from Perkins Coie are testifying as well, so each of us, at least speaking for myself, I am testifying in my individual capacity and will be happy to answer any questions that you may have.

Let me first start by congratulating the Commission on doing this. It is an exceptional thing for an agency, not just the whole timely rulemakings as this agency has done now over the course of the last five years since McCain-Feingold was passed, but it is even more extraordinary for it to take the time to do a rulemaking or a hearing such as this where it looks not to define what the legal standard is externally, but it allows those of us on this side of the table to come in and tell you what we think about various ways in which the Commission itself operates.

You deserve an enormous amount of credit for that, each and every one of you. We have submitted lengthy comments that touch on a number of different areas. I wanted to emphasize three of them for you in my opening remarks.

The first is a place where I think if there is one thing that the Commission could do to improve its process and procedures I would encourage you to start and that is the manner in which audits are processed and handled by the Commission. And by the way, this is not meant to be critical of the Audit Division or the job that they do, because they are, of course, operating within a statutory and a regulatory and a traditional regime that exists.

But as I look back in preparation for this hearing, I look back and realize that though the General Counsel's office has been the focus of a lot of time and attention in reforming process and procedures, there has been relatively less emphasis or time spent on understanding how the audit process impacts the regulated community and in some respects, there are fewer committees touched by audits than are touched by complaints and notice for example. The impact that it has on the regulated community when they are audited is in time -- at times frankly catastrophic.

The FEC -- an FEC audit, for those of you who are not here and have never been through it, is equivalent to those life audits that the IRS did and drew so much criticism for. It is not "let us come in and spend a few weeks talking to you and looking at some records." It is "give us every piece of paper that the committee has ever generated over a cycle."

We will look at every check. We will look at every disbursement. We will look at every invitation. We will question everything and anything you have done during the course of this election cycle. It is extremely burdensome.

Now coupled with the burdensomeness is also what can best be described as an opaque decision-making regime whereby you sit and give and give and give information that goes well beyond what one might consider to be a financial audit, because after all, this is not an audit in what again, what most people who have not been through them would think of an audit, which is they add up the numbers to make sure that your cash-on-hand balanced.

It goes way, way beyond that into how you spent your money, whether you spent your money lawfully, unlawfully, are hybrid ads legal or illegal, are [unintelligible] -- are phone banks paid for under one legal regime or another? So these are sweeping, sweeping audits that go on for a long period of time. At the conclusion of them, the process that is afforded to you is relatively meager when compared to the process, for example, in the complaint process when as a practical matter the results are -- can be equally bad and in some cases, worse.

So I have had several experiences where an audit precedes a de facto finding that the Commission has made that my client has violated the law in a process in which I have very, very few rights to refute that. Then I am referred to the General Counsel's office as if this is now going to be a blank slate, as if now I'm going to get my opportunity to convince a Commission that has already been through a several-year process, that everything they've done so far, everything included so far is wrong.

It's simply unrealistic and I would argue it's unfair. Perhaps even more unfair is, and I've complained about this publicly before, so none of this should be new to any of you, is then the Audit Division itself at the staff level decides that one of my clients has violated the law and indeed, the Commission disagrees.

Nevertheless, the Commission has formed this odd tradition of the public record reflecting a determination that my client has violated the law. It's simply not true. When the Commission found that it would "accept" a finding that Senator Kerry's presidential campaign violated the law, I don't know what that means.

The Commission, I believe, unanimously in some certain instances, declined to find a violation of law and yet it accepted both findings from the Audit Division. It's not clear what that means that it was accepted when in fact the Commission itself voted not to find that those were violations of law.

So I think if I had one thing I could leave you with it is to do the same type of introspection on the audit process that you have already done that led to good

reforms in the MUR process, things like the opportunity for oral hearing, things like the opportunity to make sure that respondents have a chance to have their arguments heard directly by the Commission.

I would ask that -- I would suggest that those types of processes be brought into the audit process as well.

Two other small -- smaller matters. One, again, I have nothing but good things to say about the way in which the advisory opinion process works at this agency. It is a process that many of you know I make regular use of and the reason why is because it is, along with your rulemakings, the thing that works the best.

I could have -- I have MURs that sit here for near generations while I'm trying to figure out how to get it out the other end. But by golly, I submitted an advisory opinion and within 60 days, I have an answer. You guys, with one of them this summer, I think within two weeks we had an answer and the General Counsel's office and the Commission deserve a lot of credit for that. It is a process that works that things move quickly through it.

My only comment is I have several times been in a bizarre circumstance where I am sitting not 10 feet back and you all are debating what it is the requestor means or wants. I am sitting there waving saying I could tell you. I could actually -- I could actually just shout it out. I could tell you what the answer is, but then I might be removed by a guard.

So what you will do to make matters slightly odder is you will adjourn so that you can then send a staffer out into the hall to ask me the question that you could have just asked me 10 feet away from here.

So my suggestion would be that during the AO process, counsel be permitted to sit at this table with their microphones turned off, microphones turned off, but if there is a question that the Commission has, they be permitted to answer it, because I think there are times where you adjourn or have to later come back to advisory opinions that you could just simply get through if there is an opportunity for the requestor or requestor's counsel to answer questions that the Commission has.

Finally, with respect to the last thing I will mention is just motions practice that has become more and more common to file motions with the Commission. It has become somewhat informal, an ad hoc process, and I do think the Commission would benefit and the regulated community would benefit from a more regular system to know what motions are filed when and how they are -- how they are ruled upon.

That's kind of the big three I wanted to hit in my opening statement, but I'd be happy to answer any questions people have.

CHAIRMAN WALTHER: Thank you very much. Mr. McGinley?

MR. McGINLEY: Thank you, Mr. Chairman. I also appreciate the opportunity to provide some testimony on these important matters here today. Similar to Marc, I'd like to put on the record that just my comments today reflect my own experience as a practitioner before the Commission and do not necessarily reflect the views of any of my clients.

As an initial matter, I would like to express my appreciation to the Commission for opening up this round of discussions with the regulated community because I think they do bring to the forefront some important topics and some issues that have long been debated and to have this type of public airing of these issues, I think is important.

I also have sympathy for the Commission and in fact the staff of the Commission that has the important responsibilities that are outlined under the Act and the Commission regulations because they do operate at the important intersection of politics and law.

And we know that there is an important balancing act that's going to happen there, because as we all know, the Commission regulates activity that touches core First Amendment rights. It's both the speech rights and the associational rights.

It's important to remember that as the Commission begins to take a candid look at some of the enforcement matters, the audit procedures, the advisory opinion procedures, ADR and some of the other responsibilities of the Commission going forward throughout all of this.

I did not have the opportunity to submit written comments, so I will probably take a little bit more time than Mr. Elias in talking on some of these issues. But primarily --

CHAIRMAN WALTHER: -- you weren't here this morning, but we are going to extend the time for giving written comments to February 18.

MR. McGINLEY: Wonderful.

CHAIRMAN WALTHER: I'm not trying to shortcut you. I just wanted to let you know.

MR. McGINLEY: I'll take that opportunity.

CHAIRMAN WALTHER: Just what I'm trying to --

MR. McGINLEY: Thank you, Mr. Chairman. I wish -- I would like to point out that one of the things that a lot of the regulated community cries out for is clarity on the regulations. Ambiguity -- ambiguity, excuse me, in a statute or regulation really needs to go in favor of the speaker or the political participant -- is that from my microphone or somebody else's?

COMMISSIONER WEINTRAUB: Anybody that's got a Blackberry, turn it off.

MR. McGINLEY: And the Commission regulations really do need to provide clear notice on a number of these important issues. What activities are going to be prohibited? What activities are going to fall within the regulatory scheme of the Commission?

Otherwise, a lot of people are going to be left on the sidelines of the political process. I mean, you've seen a number of instances and articles from the last election cycle where people wanted to speak out on important issues. People were looking to address federal issues that touched upon federal officeholders who happened to be candidates at the time.

As we all know, the Congress does stay in session longer. It cuts deeper into the election season and in fact, there are now on a routine basis lame-duck sessions. But groups, citizens groups, trade associations, labor unions I would even add, and others are looking to address these important issues and they do need to air advertisements. They do need to be able to engage the public on a discussion of the issues which necessarily touches upon

federal officeholders who happen to be candidates.

So giving some clear guidance as to some of the rules that are governing these types of important activities I think is a premium and something that the Commission should really focus on. And this is not an effort to provide an opportunity for circumvention of the Act or the regulations. Instead it's giving people clear notice what's prohibited and what's permitted in the political sphere.

Also during the past couple of cycles, we've seen a number of court decisions where some of the Commission's most important regulations have been thrown out for one reason or another. This has happened late into the cycle. This is not something that the Commission bears responsibility for, but when the coordination rules are thrown out late in a cycle, and I have to say that the old rules are in effect, but directing the Commission or putting the Commission in the position of deciding whether to appeal this, this promotes uncertainty and confusion in the regulated community.

Also, the use of the enforcement process to make new law seems to be something that has become the focus of great debate over the past couple of years. We've seen a number of areas where people have decided that they wanted to air advertisements or engage in activities that discuss a number of important issues that also involve federal officeholders and candidates.

If the Commission wishes to make a new law, if the Commission wishes to promulgate a new regulation, the regulated community would benefit from the notice procedures and the common procedures so that everybody has clear notice as to what's going to be prohibited and what's going to be permitted under the new regulatory regime.

It also creates an unfair burden to those individuals or organizations that are the subject of the enforcement matters that are used to break new ground in the regulation of political activity. So we think that the notice and comment procedures would provide -- is the proper route to go ahead and do that.

Also we believe that respondents in enforcement matters should be afforded greater procedural safeguards. Increase the opportunities for respondents to present their case directly to the Commission without the filter of the Office of General Counsel interpreting or summarizing the arguments of the respondent.

It seems that there are a number of procedural steps where the Office of General Counsel has the opportunity to present their case directly to the Commission and they do their best and they use their best efforts to summarize the issues that the respondent believes are important in their written submissions.

But I think that the Commission would benefit from a full airing of the facts and the respondents' positions in enforcement matters so that they can reach the right conclusion in some of these matters. And it's always important to remember that during the enforcement process, even if somebody is ultimately found or to have the case dismissed, the process is the penalty.

There are many instances where going through the discovery process takes money, takes resources away from individuals and organizations that they could have devoted to political speech.

CHAIRMAN WALTHER: Your time is a little over actually. That's where written comments help, because sometimes you get the benefit of a longer speech, because you can still give us written comments.

MR. McGINLEY: Absolutely.

CHAIRMAN WALTHER: And we'll have plenty of questions, but that is the -- to move along in about a 5- or 10-minutes basis. So Mr. von Spakovsky, it's great to see you here.

MR. von SPAKOVSKY: Thank you, Mr. Chairman, the Commissioners. I appreciate being invited back to speak and I guess I could say that since I'm no longer a public official, I can finally tell you exactly what I think about things. But then Chairman --

CHAIRMAN WALTHER: Why don't you do that for a change?

MR. von SPAKOVSKY: I was going to say, Chairman Walther and Commissioner Weintraub, and I used to do that anyway when I was a public official.

I do need to make clear I'm here as a private citizen and not on behalf of the Heritage Foundation, where I am now. And I hate to say that I agree with Marc Elias because that will probably get me in trouble in some of the political circles I'm in.

But I do agree with him. When I was coming up with my written comments, I came up with probably about two dozen things that I think you could address. But your problem is you're very busy and you don't have the time to do all that.

So I narrowed it down to about seven issues, most of which involve including the due process on how you do enforcement in other matters. And while some people might think that inputting due process will slow down what you do, I actually think it improves the efficiency of what you do and can make things faster.

I think your role is made more difficult by the practical problems in enforcement because, frankly, the Federal Election Campaign Act is an overly complex, ambiguous and confusing statute which is something that most of the critics overlook.

Second, I think you should keep in mind that most of your critics from advocacy organizations have never represented any actual respondents before the FEC and enforcement actions and therefore, they have no first-hand knowledge or understanding of how the enforcement process works or how it should work. And frankly, they don't have much concern over the due process rights of respondents.

That being said, and we need to talk to about the seven issues very quickly, I always thought it was just ridiculous that when you were considering an advisory opinion at a public hearing, if we had questions about the factual circumstances which the General Counsel didn't know the answer to, we could not simply ask Marc Elias sitting in the audience to answer the question.

I think you should change your procedures so that once, as you know, what happens is the General Counsel gives a presentation on the advisory opinion and I think what you ought to do is give the requestors the option, you know, five minutes, 10 minutes, to sit here at the table and after the General Counsel has made a presentation, if the requestor wants to, they

can come up here and make a quick presentation in which they say, we completely agree with the General Counsel's view of this, or they say, we disagree with the draft AO and here's why.

The advantage of that is that it's going to give you all the full facts and information you need so that you can make an opinion, plus if you have questions that the General Counsel can't answer, the requestor or his counsel sitting out here, can answer those questions.

That is actually going to speed up the process, because as you know, in many instances, we would table the AO until the next public meeting so that those questions could get answered. Well, you won't have to table the draft AOs because you're going to have the requestor right here. I think it's an easy and quick improvement to the due process of the situation.

I also completely agree that you need to formalize the motions process. It's extremely difficult for respondents to have a frivolous case -- complaint dismissed before they unfairly incur a great deal of time, resources and attorneys fees and FEC investigation and it's virtually impossible for respondents to bring to the attention of the Commissioners a problem regarding the scope of the investigation.

If they believe -- look, I'll be the first to tell you, I think the Office of General Counsel acts in good faith in doing these investigations, but the discretionary authority on enforcement rests with you. You are the ones who are answerable to the public and to Congress, not the Office of General Counsel, and you should have a method for people to be able to file, for example, motions for protective orders, similar to what happens in federal court, if they believe that requests for information, subpoenas for documents, depositions, are trying to get information that is not relevant to the investigation, that is too broad and too voluminous.

Those motions ought to be served on both the Office of General Counsel and the secretary of the Commission so that you're made immediately aware of it and you can make a decision.

I don't think this is going to delay the enforcement process. I think it's going to speed it up because you will be able to restrict or cut down the size of investigations if you believe they're going too far afield and are too broad.

Deposition practices. As you know, the FEC used to refuse to give the depositions of respondents to respondents. You changed that. Now when you send a probable cause brief out to respondents, they are able to request from the General Counsel copies of any depositions or other documents that the conclusions of the General Counsel that you have violated the Act are based on.

Look, the enforcement process here is a -- you act like administrative law judges. It's an adjudicative process. Respondents are entitled to not just those depositions and documents, but any exculpatory information that OGC has developed and they should be able to get documents, depositions and other things that throw reasonable doubt at any conclusions they have violated the law.

You asked a question about whether you should take into account pending dates for elections when you are deciding to release information, closing of a file, filing suit. To that I think you should just say no. The FEC has a great history of making enforcement decisions on a non-partisan basis. All of you know that most of the decisions are unanimous.

There are a number of cases where you split enforcement cases of less than 1 percent and you look at the long history. I think if you start taking into account pending elections, you endanger that process. I think when you close a file, you release the documents. It doesn't matter what's happening in the outside world.

Same decision if you're going to decide to sue someone because they won't settle. You do it as soon as you make the decision. Doesn't matter what the outside world is saying.

The Memorandum of Understanding with the Department of Justice, I think that does need to be amended. You have two problems. The FEC and DOJ do not do enough work on joint investigations when there are both criminal and civil penalties, one because DOJ is often reluctant to send any information to the FEC because they say well it's privileged.

Often times by the time you find out about it and DOJ sends it over, the person's already been prosecuted, convicted and the judge has already sentenced them. And of course, us being there at the same time a judge is sentencing them is the perfect time for the FEC to be there because you can try to persuade the judge in addition to criminal penalties he should also impose civil penalties.

Also in the past, unfortunately DOJ has -- Main Justice has been extremely reluctant to move for an exception under rule 6 of the Criminal Rules of Procedure to get an exception to the grand jury secrecy requirement. There are a couple of cases in the FEC's history where the local U.S. Attorney was willing to do that and got us information that allowed the FEC to do an investigation. But for whatever reasons, Main Justice is against doing that and that frankly needs to change so that you can do joint investigations.

Settlements and penalties. I think you should cease sending out letters of admonishment. The statute is very specific on how you can penalize someone with civil penalties if they violate the law. It doesn't say anything about being issued -- being able to issue letters of admonishment.

I do not think you should be applying some kind of indeterminate penalty that is not authorized by statute. And you know, if you think someone has violated FECA, then vote that way and impose a civil penalty. If you don't think they have violated the law or you don't think a civil penalty should be paid, then close -- dismiss the case and close it. But don't send out letters of admonishment when the statute doesn't authorize it.

Sampling. The use of sampling, I would agree, is a good tool for the Audit Division to use when it is auditing campaign organizations, particularly because of the voluminous amount of the records. However, while it may be a viable tool to use when doing an audit, I do not believe it should be used to calculate the penalty that is due for a violation of the law.

If a federal law enforcement agency is determined to fine an individual, an organization that is engaged in political activity that is normally protected by the First Amendment, no penalty should be

calculated based on only a sample and an estimate of the amount of wrongdoing. It should only be based on the actual wrongdoing found by the FEC's lawyers, investigators and auditors.

Reports Analysis. The regulated community's most common interaction with the agency --

CHAIRMAN WALTHER: Excuse me, Mr. von Spakovsky, we're over your 10 minutes. I'm just wondering at this point if we shouldn't begin the questions.

MR. von SPAKOVSKY: I'll be done --

CHAIRMAN WALTHER: Sure, go ahead.

MR. von SPAKOVSKY: -- with this last -- this last item. RAD, the Reports Analysis Division, has the most contact with the regulated community everyday -- I turned my Blackberry off, so it wasn't me -- and when do they do that? Well, it's all the time when they issue requests for additional information or RFAIs.

Now they do that based on guidelines that you issue and you approve. But -- and again, I think they act in good faith when they're trying to do that. But again, the current procedures vest a lot of discretion in the RAD staff and I think that discretionary -- those determinations need to be made by the Commissioners.

What I think you should do is most people outside the agency don't know the Commissioners set up committees, two Commissioners each, to monitor major areas, litigation, regulations. You need a committee that monitors the Reports Analysis Division, meets monthly, takes a look at and has a report on all of the RFAIs that are issued and why they're being issued.

That will allow you to proactively fix problems that are occurring in the reporting area because you're going to find out about it and know about it and you'll be able to fix the problem and I think it will improve things.

That's all I have, Mr. Chairman. Thank you.

CHAIRMAN WALTHER: Thank you very much. Mr. McGahn?

COMMISSIONER McGAHN: Am I first?

CHAIRMAN WALTHER: You're up first, if you wish to be so.

COMMISSIONER McGAHN: Appreciate it. Where to begin? Where to begin? Admonishment, could that be done in conciliation, people are willing to agree to be admonished as some sort of pseudo penalty; do you think that's within the statute? It's really more to Hans.

MR. ELIAS: Go ahead.

MR. von SPAKOVSKY: Certainly when you're holding -- when you're in conciliation with a respondent you're basically holding a gun to their head. I'm not sure they're going to -- that's what you were going to say, Marc, wasn't it?

MR. ELIAS: I have to say, one of the criticisms which I left out of my oral presentation, can't we just settle cases? Do my clients have to wear scarlet letters? Do they need to stand up and give speeches before -- write on the blackboard 100 times, I will not illegally coordinate, I will not illegally coordinate, and by the way, I'll do a better job seeking best efforts?

Why do we need to admonish? Why do we need to admit and -- why can't we just settle cases? More -- I waste so much time negotiating with the staff over whether it's the Commission contends that it has enough evidence and we believe that they don't. Why can't we just settle cases?

Every other agency you go and you settle a case. The FEC, it's like a moral judgment. It's if my client doesn't admit that they are bad people. Maybe we should just have -- just begin by saying, we're bad people. Okay, we're bad people because we engaged in political speech. For that, we are sorry. We never should have done that.

We did the unthinkable, we ran for federal office. We tried to support a candidate of our choice and for that, we are eternally sorry and we're bad people. Why do we need to admonish people?

COMMISSIONER McGAHN: Marc.

MR. ELIAS: Let's just settle cases.

COMMISSIONER McGAHN: Marc, we have very limited time. I appreciate all that. It sounds like some of our executive sessions and I appreciate you reading my script.

(Laughter.)

COMMISSIONER McGAHN: But let's kind of focus on some actually concrete things we can do to get at that. We've had some testimony this morning that I think answers that question, at least in the minds of some of the commenters, right? Some of these -- there's the view that some of these MURs are precedent so you have to script the conciliation agreement a certain way so that the public has notice and that's a question that will take days to debate, whether or not that's really the case.

But talking about conciliation, if you do get in a spot where you feel like this is getting silly and you're just not communicating with counsel in a way that you think is effective, what can you do as a lawyer to move it along? Can you take it to the Commission? What's the perception out there?

It seems like there's an ad hoc way where you can maybe send an offer to the Commission, but that's not really written down anywhere. What -- as a practical matter, what can we do about all of this that you're talking about? Marc?

MR. ELIAS: Oh, yes, sorry, I thought you had heard enough from me. Yeah, there are times when we send offers directly to the Commission. I think the staff generally views that as an active, open aggression, so it is -- to say that it's frowned upon is an understatement.

COMMISSIONER McGAHN: So if we codify it somewhere, whether a policy statement or reg or something, would you think that would mitigate your perception, whether reasonable or unreasonable, that it's seen as an act of aggression? I mean, if the Commission formally says, you can do this?

MR. ELIAS: Yeah, I think that would help. I think having some mechanism for either the staff to be more empowered to settle cases or for a commissioner, maybe an individual commissioner, maybe a group of Commissioners or maybe some meeting of Commissioners, to meet to settle cases would be helpful. Because a lot of times I can settle a felony murder trial with a single prosecutor in the U.S. Attorneys Office and yet when I try to settle a $8,000 disclaimer violation, I am told "the Commission feels very strongly."

Then I'll say to the lawyer, really, the Commission really thinks very --

COMMISSIONER McGAHN: I stay up at night worrying about --

MR. ELIAS: And then it will be, well I'll check with my supervisor and then the supervisor will check with their supervisor and then they'll run it by the Commission. So having some process by which either the staff is empowered to simply settle cases or if it requires those levels of whatever, then maybe having a process where a commissioner, there's like an emergency settlement commissioner who can be brought in and who's empowered to just settle cases. But things --

COMMISSIONER McGAHN: I volunteer.

MR. McGINLEY: I'd actually like to just kind of weigh in on this and echo some of the comments that Marc made, but also say that in many instances, what you have is a situation where the respondent and the OGC have decided -- you know, they've come to an agreement on the facts of the matter and you can apply the law.

But what the difference is in the penalty amount or some of the language. I think that standardizing some type of procedure where the respondent can bring this matter or their version of events directly to the Commission would actually benefit both the Commission and the respondent because it may cut down on the resources of the Commission that get devoted to these extended and protracted negotiations, but also the -- of the respondent in trying to negotiate these types of settlement.

And one other thing that I'd like to add in addition to your admonishment, there may be situations where a matter was originally put down the enforcement matter track, but after the facts are developed and everything is looked at and if you look at the published Commission precedent, this matter is more suited for ADR where the focus is more on not only helping the respondents understand what went wrong, but what are the tools that the Commission can help provide to ensure that this doesn't happen in the future?

So you see a lot of the respondents end up in the Commission training or, you know, with an understanding that look, you're going to devote some of your resources to compliance. I think in those situations maybe the Commission or the OGC should be more flexible in putting respondents back into the ADR track because it's going to help the respondent in the long run.

COMMISSIONER McGAHN: Should respondents be able to request ADR?

MR. McGINLEY: Yes.

COMMISSIONER McGAHN: Should -- I guess the burden should be on them in some sort to explain why they should qualify for ADR? A simple request for ADR doesn't really get us anywhere.

MR. McGINLEY: That's correct and you can look at the published Commission precedent both in the ADR track, which I understand the Commission and the OGC attorneys will tell you don't -- doesn't have any precedential value. But eventually you begin to develop a body of precedent, of situations that you can look at where similarly situated respondents, it was decided that they would benefit from the education and the training and perhaps devoting additional resources to compliance as opposed to just penalizing them and doing what Marc said is make them go write 50 times on the board, I was a bad organization.

COMMISSIONER McGAHN: Speaking of writing on the board, something that Hans had talked about was that one of the positive changes from the last time the Commission had a hearing was the deposition procedures, you get a copy of your transcript. The notion of giving over transcripts at the probable cause stage probably makes a lot of sense, but the reality is, very few cases get to the probable cause stage because there's a lot of pre-probable cause conciliation.

Given that that occurs, how do we then allow respondents to get information that may be there? We just hope it's disclosed under the conciliation umbrella? Help me think through situations where it's pre-probable cause, you're trying to conciliate and you're in this -- you're in this vortex of you really don't want to go to briefs, but you think there may be a legal issue that you disagree on? Help my thinking in this.

MR. ELIAS: I do think that there remains a reticence in some quarters to share information with the respondent, whether it is deposition transcripts at certain phases. The *sua sponte* policy had an unintended negative consequence, which is we went from a circumstance where you were trying to encourage people to come in on their own to settle their own claims to now people bringing in *sua spontes* to essentially get other people in trouble.

That person who is getting in trouble doesn't get a copy of the *sua sponte* and they don't get a vote and they don't get a complaint. They don't get any of the normal process they get. I think that it's unfortunate that you wind up in some of these situations where you could facilitate cases moving quicker through the system if you just said to the respondent, obviously you're not going to share work product, you're not going to share things that are sensitive.

But there's no reason why in an enforcement context you wouldn't want to give the respondent, here's the evidence, here's why we think you violated the law. To tell me well don't worry, it's all contained in the General Counsel's report, everything you need to know is in the General Counsel's report, well with all due respect, I'd like to see the raw deposition transcripts myself rather than assume that everything that's relevant is in the General Counsel's report.

So I do think that sharing more information earlier in the process would help settle cases. To get to something that Commissioner von Spakovsky said, it actually would make it not more burdensome; it would actually make the process move more quickly.

CHAIRMAN WALTHER: Let's see -- Commissioner Weintraub?

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman, and welcome. As with the last panel, I feel like some of you I've been having these discussions with for years in other contexts, so on the AOs --

MR. von SPAKOVSKY: Except now you can outvote me.

COMMISSIONER WEINTRAUB: Well, I could always outvote you if I could talk some other

people into agreeing with me. But on the AOs we always agreed, on the notion that we needed to provide some process for you to answer the question when you're out there waving your hands around.

Before you started, Mr. Elias, I predicted that you would be more animated than your partner and you can go back and tell him that that was indeed the case.

MR. ELIAS: -- point.

COMMISSIONER WEINTRAUB: No, you never do. You never do. Motion practice, is there -- I'm trying to figure out whether there is a real reason to have a motion to dismiss at the beginning stage of a complaint, because as you know, frequently when we get the response, it will include a request that we dismiss. I mean, that's sort of what the response -- that is the best possible response for the respondent to its -- to its response is if we agree with them and say yeah, we're going to dismiss this.

Is there any other -- do we get any other benefit from having a formal motion rather than just packaging that in the way it generally is now in the response? And let me, by the way, in response to something that Mr. McGinley said earlier, you know, just because you send your brief or your argument or your response to the Counsel's office, please don't assume that we're not reading it. We really do read what you have to say.

So if that's your goal is to make sure that we're reading it, if you feel comfortable that we're reading it anyway, put that issue aside if there's some other benefit to having it by a formal motion. Anybody?

MR. McGINLEY: I would actually -- I would actually argue yes. I think that there is some benefit for providing for some type of standardized procedure for a motion to dismiss at the complaint phase. I mean, many times these complaints are filed for political reasons, for the press headlines, et cetera.

They allege a violation, but really there are no facts to back it up or the facts that are stated or the newspapers that are -- articles that are attached to the complaint really don't get you to the evidentiary threshold to initiate an investigation.

I played touch football with somebody when I was six years old who happens to be running for office, therefore there must be coordination, because we're assuming we're in constant contact. And so there's really no evidence for the coordination case to go forward in that type of fact pattern and I think that there should be some opportunity for the respondent who receives one of these complaints to have the opportunity to present to the Commission the reasons why they should not go forward with the investigation.

COMMISSIONER WEINTRAUB: Why can't you do that in the response?

MR. McGINLEY: Because we do do it in the response, but I also think that there's the opportunity where it's the question and answer session where you may have some questions that we may be able to answer.

COMMISSIONER WEINTRAUB: You're assuming that you get a hearing on your motion.

MR. McGINLEY: That's what I would advocate.

COMMISSIONER WEINTRAUB: Because that's a separate question. We could have motion practices without hearings also.

MR. McGINLEY: Do you want --

MR. ELIAS: I was going to say, I just -- I don't want this -- to narrow to just motions to dismiss. My point about motions practice was not just motions to dismiss. It's actually -- I have filed over the years, I've filed motions to quash, motions to reconsider, motions to consider new evidence, motions for summary judgment, motions to dismiss, motions for a more definite statement.

I have filed all kinds of motions and you know what, they're no place to be found in your little orange book or whatever color it is this --

COMMISSIONER WEINTRAUB: We read them all.

MR. ELIAS: Right, but wouldn't it be better than me just ad hoc filing these motions for there to actually be a system by which if I want to file a motion to reconsider, there's a process for doing so as opposed to me just putting it on a caption and firing it off?

COMMISSIONER WEINTRAUB: No, I hear what you're saying about other motions. I was just trying to figure out if they wanted to experiment with some kind of motions and not other kind of motions, is there -- is there a real need to have a motion to dismiss at the same point when you're always filing a response anyway; are we going to get something else out of that?

MR. McGINLEY: I might just add one more thing. The motion to dismiss may not just come at the complaint phase. I mean, it may come when you get the facts or legal analysis that's supposed to justify the RTB finding. So when the respondent reads that, they should -- they may be -- you may be able to standardize some type of practice where they come back to you. It may be a motion to reconsider, a motion to dismiss, or they can come before you and say, here's where we disagree with this and this is why and this is why you should not proceed with the investigation in this matter.

MR. von SPAKOVSKY: The only thing I would say about formalizing it is as you know, not everyone who appears before this Commission can afford Marc Elias, who has practiced a long time and knows he can file these kind of motions, even though there's no formal policy.

And lots of people get lawyers or on their own who don't necessarily know the procedures, unless you formalize it so they can see it up on the web and they see that they can file these kind of motions, they may not realize they can do that. So I think you should -- you should formalize it.

COMMISSIONER WEINTRAUB: The only other thing I wanted to ask you about is, and I suspect I may not be able to get anybody to budge on this, is whether there may be some benefit in some circumstances to a letter of admonishment, and maybe the problem is over the word. Maybe we could word them differently.

But let's say we get a *sua sponte*. Somebody comes in, small dollar value violation, but they found out that somebody in their organization, rogue employee was breaking the law and now they found it and they want to come to the FEC and tell us that they're going to clean up and do better.

It's not -- we don't want to issue a penalty. For one thing, because they came in on a *sua sponte* basis and we want to

give them credit for that. Or it's a low dollar amount anyway and we just don't think it's worth it. And we don't want to engage in a protracted process where they're going to have to spend a lot of money on lawyers to represent them.

We just want to have some kind of acknowledgement that yes, that's a violation of the law and we appreciate your telling us about it and we want everybody else to know that that's a violation of the law. Any value in that?

MR. von SPAKOVSKY: If the statute authorized you to do that, perhaps. But in this matter, I'm a strict constructionist because --

COMMISSIONER WEINTRAUB: I'm shocked.

MR. von SPAKOVSKY: Look, FECA, as you know from the lawsuits that this agency has fought, FECA covers an area that gets the most protection under the Constitution in the First Amendment. If you think a violation really doesn't deserve a civil penalty, fine. Vote to find that they violated FECA, but it's not sufficient to impose a civil penalty.

That's what the statute authorizes you to do. It doesn't authorize you to issue a letter of admonishment or something like that.

COMMISSIONER WEINTRAUB: Do you think that would be different -- you think that would be actually different if we voted to say there's been a violation of the law here as opposed to we're admonishing you for violating the law?

MR. von SPAKOVSKY: I think it is because you're saying it's a minor -- it's such a minor violation that we don't think a civil penalty should be paid. Again, I think it is different because as I said, the statute doesn't authorize you to issue a letter of admonishment.

CHAIRMAN WALTHER: -- at this point, Commissioner Hunter.

COMMISSIONER HUNTER: Thank you. My question is for Mr. Elias about the audit process. Could you tell -- talk to us a little bit about the Interim Audit procedures and our -- my understanding is that the respondents do have an opportunity to file a brief at that point.

MR. ELIAS: They do, but you are -- you are often times arguing over questions of law with a process that you understood, and especially at the congressional level. I mean, at the presidential level they go in knowing what's coming their way. But at the congressional level, they may hear that there's going to be an audit. They believe that what's going to happen is some people are going to come in and figure out whether or not money was embezzled, money was spent, whether the cash-on-hand is really there or whether there are in fact 50 yard signs left put up that were paid for. They think they're going to be audited and in fact, what they often times confront are Interim Audit Reports that present novel legal issues.

Yes, you are given an opportunity to respond to them, but you are responding essentially back. You're not assigned to the General Counsel's office. You're not responding to the Commission in the sense that you're going to get an opportunity to be heard. You're responding back to the Audit Division that has in whatever fashion the Audit Division makes these decisions and I have some questions about that, because Lord knows, there have been times where I've had conversations with the auditors and I might, but you know when we get to the Commission, they're not going to agree with this.

I don't know that this is our position, thinking well, how do you have a position that you know that the Commission is not going to accept? So it's a weird process. You don't -- if at the RTB stage the Commission doesn't agree with the General Counsel's office, it gets dismissed. The process just ends.

And yet, audit sort of continues along, continues along until you get this audit report, which like I said, now features the we don't agree with you, but we are going to allow them to stand its findings anyway, which is frankly, I think not only not in the statute, I think it's an affront. It's an affront to the respondent. It's an affront, I think frankly, to the Commission that there are these findings that the Commission has voted down.

You get a chance to say you're sorry, but it's not the same as in the enforcement process.

CHAIRMAN WALTHER: Is there any -- Commissioner Bauerly?

COMMISSIONER BAUERLY: Thank you, Mr. Chairman. Mr. von Spakovsky, I have a question for you that I think will help make the world right again, because I believe you disagree with Mr. Elias on this point and maybe Mr. McGinley has an opinion on this as well.

It's about the timing of releasing the Commission's conclusions, the proximity to an election which is -- which the respondent may either feel is a good or a bad thing depending on the outcome, whether opponents made or the complainant who filed the case, they feel it's a good or a bad thing, and I would like to hear a little bit more about your views on what considerations, if any, the Commission should take with respect to timing.

MR. von SPAKOVSKY: I think you should have a standard internal rule on how quickly you release to the public a closed file and you should stick to that rule and not take in anything outside going on like elections into consideration, because if you start taking that into consideration, the Commissioners are going to inevitably get into fights over this about whether it should be released or not.

Well, if the release -- if the finding was that a candidate didn't violate the law, well you know, some Commissioners may say yeah, we got to release that right away and others say well no, we probably shouldn't release it this close to the election because it may affect it.

You're going to get into -- you're going to get into all kinds of arguments about this and even if -- even if you're doing what you think is the right thing to do in the final decision, it really has no partisanship in it. The outside world may not see it that way because there are always circumstances that occur that can, as I well know from experience, it can make something that the Commissioners did entirely trying to comply with the law and people on the outside look at it and say oh, they did that for partisan reasons.

It just -- it opens up this huge Pandora's Box that I think you should avoid as much as possible.

COMMISSIONER BAUERLY: Mr. Elias?

MR. ELIAS: I do think that there are some -- that the flip side to that is that

there can be a perception, whether accurate or not, that the Commission or the Commission staff is leveraging the election in the process. There's also just some practical workload considerations.

The complaint gets filed in 2004, and the Commission staff decides that October of 2008 is a great time to decide that I have 20 days to respond. So the ethics process, as many of you know, has a moratorium around the elections where simply things don't happen, where there are not, no matter how meritorious or non-meritorious, they're just blackout periods.

I think that some consideration for both workload and also the question of whether or not there was a leveraging going on would be worthwhile for the Commission to consider.

MR. McGINLEY: I would agree with that, with Mr. Elias' comments on that point, but I would also extend it to the outer process, which would be the publication of the Final Audit Report for consideration by the Commission or the Commission in fact holding a meeting on a Final Audit Report.

Because as we've seen in the audit process, the audit process is really becoming, as Marc has pointed out numerous times here today, it's that the audit process is almost becoming the fact-finding process for initiating an enforcement action down the road. For all the procedural problems that Marc has identified, that process is not fair to the subject of the audit if they need an opportunity to respond.

You often see times in the audit process where the exit conference is going to identify certain issues and they're going to get modified in the Interim Audit Report and based upon the response of the respondent, then the Final Audit Report may go off in a completely different direction and the subject of the audit is going to want to have an opportunity to weigh in on that and they're going to start firing off letters to the auditors, cc'ing the Commission trying to get their case before consideration of the Final Audit Report.

In some instances, we've seen that the Commission has actually disagreed with the conclusions of the auditors and sent it back to them. Nonetheless, you have this piece of paper out there in close proximity to an election that says this committee did this wrong and they'll state that there's hundreds of thousands of dollars at issue even though the Commission has told them to go back and reevaluate the issue.

I think that brings up the fundamental question, and I've heard it debated in prior Commissions, is the Commission receiving an audit report or is the Commission adopting an audit report? I think that that's one of the fundamental issues that the Commission is going to have to grapple with in the audit process and determine whether the Commissioners themselves are taking ownership of that report or if they're simply receiving the report of the staff.

MR. ELIAS: I think that Mr. McGinley is 100 percent correct and I think that it is a mess currently. It is just an absolute mess. I remember during the Kerry/Edwards audit that I keep alluding to, there was some congressional candidate, I meant to go look him up. There was a Republican congressional candidate who was also going through -- was also having their audit heard that day and I remember saying to a number of people in advance, I said, as bad as I feel for John Kerry and John Edwards, he has a lawyer here who's fighting this who knows this process, who the Commissioners will -- will listen to whether they agree with me or not and that was a presidential campaign.

This poor congressional candidate doesn't stand a chance. He doesn't stand a chance. He's out in some place in America. He lost. He was a losing Republican candidate. He lost his election. A bunch of auditors came in, tore up the place, looked at every receipt, came in, sent in an audit report and my guess is the Commission -- each of the Commissioners probably spent less than 10 minutes considering whether or not that congressional candidate got a fair shake.

And that thing comes -- and I think this comes flying through the process. It is the Commission needs to own the audit report or, or, or it needs to make an audit about auditing, not about whether my clients obeyed the law, not about whether my clients followed the disclaimer requirements, but about whether or not all the money is where it's supposed to be and all the inventory is where it's supposed to be.

But if it's going to go beyond that, if it's going to go beyond an audit and it's going to go into whether or not my clients acted lawfully, then there needs to be a revised audit process where the Commissioners own it, not that they sit back and say oh geez, it's another audit report, that they own it in the same way that you own the enforcement process. You're in the innards of it and you're making decisions about what the law is and is not.

In my experience, that simply doesn't go on right now in the audit process and Bill is exactly right about that.

MR. McGINLEY: I would also just add that I think maybe the -- in reviewing the audit process itself, giving the subject of the audit an opportunity to address the Commission, whether it's at the Interim Audit Report stage before a draft final report is prepared for the Commission's review, or some other point in the process where the subject of the audit can come forward and explain their side of the story I think would be helpful to the Commission for the audit process.

I might add that if the audits are going to become part of the fact-finding for future enforcement actions, then it may be worth pulling the audits back, the final -- the consideration of the Final Audit Report from the public hearing and consider it an executive session. Then it can release the Final Audit Report after you've flushed out the facts, flushed out the legal theories and put it on the public record.

CHAIRMAN WALTHER: Thank you. Thanks --

MR. von SPAKOVSKY: I just want to say, I actually agree with this and I think at the Interim Audit stage --

CHAIRMAN WALTHER: You guys have agreed on a lot today.

MR. von SPAKOVSKY: Yeah, the campaign organization needs to have the ability to appear here at this table and argue about why they think the audit is incorrect and the findings the Interim Audit's made. Mr. Chairman and Commissioner Weintraub, remember that we had this debate when I was on the Commission about findings of the Audit

Division that the Commissioners did not agree on.

Again, I would go back to you are the interpreters of the law in whether someone has violated it or not. If you vote and believe that a recommended audit finding of a violation of law is in fact not a violation of law, that needs to disappear from the Final Audit Report, because you decided there was no violation of the law.

It is a -- it is a discredit and a discourtesy to the people being audited to have some interim report say well, we think you violated the law when in fact the people who are the auditors of this agency to make that decision say no, there was no violation of the law.

CHAIRMAN WALTHER: Thank you very much -- at this point. Okay, Vice Chairman?

VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman. On the first panel this morning, we were talking about a recommendation that was given to us by Jan Baran regarding initial complaint processing. He talked about that in 11 CFR, Section 111.4, there are four additional criteria for a complaint that -- as the language says, that a complainant should conform to.

These are discretionary at this time, but his recommendation was that these should be mandatory and this would serve as a filter at the outset so that frivolous complaints could be dealt with quickly so that they don't have to go through and go to an RTB vote, that they would be disposed of before even that time.

I just wanted to pose to you, to all three of you if you wish, what you think about this recommendation and what other suggestions you might have for the Commission, what other tools we might want to consider using to at the threshold get rid of complaints that really have no merit to them whatsoever so that not only Commission resources, but respondent resources don't get wasted.

MR. McGINLEY: Maybe you could -- maybe you could summarize his comments since we didn't have the opportunity --

VICE CHAIRMAN PETERSEN: Let me just say, in addition to the -- in addition to the statutory requirements that they be filed by a person who believes a violation of FECA has occurred and while they're signed and sworn to and notarized, in 11 CFR, Section 111.4 it says that they should -- that they should clearly identify each person or entity who is alleged to have committed a violation of the -- if statements are not based upon personal knowledge, they should be accompanied by an identification of a source of information, that there should also be a clear and concise recitation of the facts which describe a violation of statute or regulation, and that it should be accompanied by any documentation supporting the facts alleged.

As I mentioned, these are currently discretionary but not -- they're encouraged, but they're not mandatory. Mr. Baran said that if these were to become mandatory this would serve as an effective filter so that we could -- so that if a complaint didn't contain these elements, they would be returned to the complainant as not being a sufficient complaint before a General Counsel's report has to be prepared and before a respondent's counsel has to prepare a response and take the time and resources that are necessary.

So I just wanted to throw that out and see what you think about that suggestion. And as I mentioned, are there other suggestions you might have about other tools that the Commission might be able to use to -- even before we get to an RTB vote, are there are tools we could consider using to filter out frivolous complaints or ones that are just purely politically motivated and that really have no legal merit?

MR. von SPAKOVSKY: I think you should give serious consideration to doing that. Some of the complaints that come in are based on somebody just reading a newspaper story and having spent the last couple of years dealing with reporters. If a story -- if a reporter gets -- if 50 percent of what's in a story is the truth, that's pretty good. I think you should give serious consideration to that.

Also quite frankly, we have certain ways in OGC --

COMMISSIONER WEINTRAUB: The reporters are laughing at you behind you.

(Laughter.)

MR. von SPAKOVSKY: There are lawyers in OGC who deal with those complaints, but I think -- I think they have been -- that they are fearful of simply dismissing complaints that are clearly frivolous because they're afraid that the Commissioners may get upset. I think they need to be empowered more to be able to do that.

I'm not quite sure how you do that internally, but that's one of the keys to this.

MR. ELIAS: This is -- I think adding those procedures are fine, but I think people would be able to jump through those hoops and you'd still have frivolous complaints. To me the question of frivolous complaints is sort of the mirror image of how we settle cases and I don't know, having never worked at the FEC, what the internal process is.

I mentioned maybe it's the appointment of a single Commissioner. But there has to be a way. I mean, there has to be a way that some of these complaints I get, that someone in OGC or a single Commissioner or someone can, whether they contain those four elements or not, simply look at this and say you know what, this is not a -- this is going nowhere, so we're just going to dismiss this. We're just going to -- we're going to dismiss it off the top before we waste any time and energy on this.

I think that the will to do that is more important than any regulatory change.

MR. McGINLEY: I would agree with that, but I'd half jokingly state maybe we should turn the complaint process into something similar to the advisory opinion request process, where you almost get the mini discovery before the advisory opinion is accepted. Can you flesh out the facts here or what information do you have on this point that the Commission can consider and so that maybe those four points, if the staff is somehow empowered to send it back to the complainant and say well what else do you have here, I think may be a worthwhile exercise.

I think it would save Commission resources and I also believe it would save the potential respondent's resources if somebody has just filed a complaint just to file a complaint and not alleged any true violations.

VICE CHAIRMAN PETERSEN: Just one other brief question. I don't know if any of you were here on the prior panel.

Former Commissioner Mason, in speaking about requests for additional information, letters from RAD, raised the question that he didn't -- or raised the point that he didn't think that publicizing those letters really accomplished any purpose.

I wanted to get your thoughts on that and also just your thoughts on the way -- in the comments that were filed by Mr. Elias and his colleagues raised the question, of concerns about some of the bases on which letters from the Reports Analysis Division have been sent. So I wanted to give you that opportunity to talk about that general issue, but also the specific proposal about whether or not is there a purpose served by having these requests for additional information made public?

MR. ELIAS: Yeah. Since I only wanted to come with a limited number of grievances, I didn't mention the RAD letters, but since you ask. There is a somewhat ad hoc quality to them at times.

I have noted over the years that at any given time if I advise a client to include the name of a candidate or not in a joint fundraising committee between a party and a candidate, I have a 50/50 shot of either getting the following. You appear to be an authorized committee without the name of a candidate, or you appear to have included the name of the candidate improperly.

So it appears that sometimes RAD does want them in, sometimes RAD doesn't want them in. It kind of runs hot and cold. There is a -- there are times where you wind up talking to the Reports Analysis Division about why they are telling you to do something some way and you are left feeling unsatisfied.

Yet one of the reasons why I file so many advisory opinion requests is because I believe very strongly that the six of you who sit before me who have been appointed by the President of the United States, confirmed by the United States Senate, and taken an oath to administer and uphold the Federal Election Campaign Act, have the statutory obligation and right to interpret the Act.

That is not true for the folks who sit in RAD, just as it is not true for the folks who sit in the Audit Division. In both cases, you get the impression sometimes that they have decreed in RAD that we will do it this way until we tell you to do it that way.

I just wonder to what extent the Commission is voting on those decisions, because if they're not, then I think we have a problem. If they are, then it would be nice to have that be some public acknowledgement of that. But there is definitely -- there are definitely times where you're getting "advice" from RAD. Well, advice from RAD is nice except if you don't take their advice, you get a nasty letter in the public record and you get threatened with audit, which is on to the next phase of the process.

So I do have concerns about that and think that there needs to be more Commission involvement in that.

CHAIRMAN WALTHER: Thank you. I'm going to move on if that's okay at this time. Ms. Duncan?

MS. DUNCAN: Thank you, Mr. Chairman, and good afternoon to the panel. Mr. Elias, I wanted to explore a bit more with you about your recommendation or suggestion that the Office of General Counsel share more information from the investigative file before the probable cause to believe stage.

There are some immediate concerns that come to my mind about sharing substantial or large -- substantial amounts or all of the information from the investigative files and they probably come to your mind as well. Some have to do with confidentiality if we're dealing with multiple respondents. Other concerns have to do with potentially diminishing the likelihood that other witnesses will cooperate or respond to our informal discovery requests or subpoenas.

Other concerns that come to mind have to do with diminishing potentially the likelihood of interagency cooperation and I mean by that the Department of Justice sharing information with us if it's concerned that that information will then be shared with respondents.

I don't imagine that you agree necessarily on the conclusion to this, but I wondered if you would agree that those kinds of concerns have to be balanced against your suggestion, valid suggestion I think, that some information might be shared from the investigative file before the probable cause stage?

MR. ELIAS: Absolutely. I think I was responding to a question about depositions specifically and then took it somewhat broadly. But obviously there are going to be constraints on you. The most obvious one is I think the last one you mentioned where it's 6C material from the Department of Justice and there's some -- there's some restriction that it's under.

My experience with matters before the FEC is that I rarely run across circumstances where that is -- where that's an issue. But if it's an issue it's a genuine one. Multiple respondents again, that is often times worked around because obviously often times the respondents are willing to consent to it.

But there are certainly issues that have to be -- have to be addressed. I think it's more of a mindset question than it is a question of an absolute rule.

MS. DUNCAN: Thank you. Let me, if I may just ask --

CHAIRMAN WALTHER: Sure.

MS. DUNCAN: -- a question or two about the advisory opinion process. In your written comments, Mr. Bauer, you mentioned that --

MR. ELIAS: Elias.

MS. DUNCAN: I'm sorry. Did I call you Mr. Bauer twice?

MR. ELIAS: You did. No, once.

MS. DUNCAN: Oh, just once. I'm sorry.

MR. ELIAS: It's okay. I take it as a compliment.

MS. DUNCAN: We like him too. We like --

MR. ELIAS: You like him better.

MS. DUNCAN: Some days we do.

(Laughter.)

MR. ELIAS: I believe that.

MS. DUNCAN: But today it's been pretty equal.

MR. ELIAS: Most --

MS. DUNCAN: I do apologize. I do apologize. You mentioned in your written comments what we call I guess the stalking horse AOs, these situations where advisory opinion requests are used as an offensive weapon against political adversaries and they're not potentially valid requests. I just wanted to ask you and the

rest of the panel whether you think that is a -- how significant of a problem you think that is and if so, what can the Commission do to ferret out those kinds of potentially false requests and what should they do about them?

MR. ELIAS: I think it's an issue and I think it's frankly usually an issue that the Commission is aware of and makes -- because I have seen the Commission read them out when it chooses to do so and I have seen the Commission proceed where pretty much everyone in the room knows that's what's going on but there's been a decision made to let the process move forward.

I don't think ferreting it out is particularly difficult. It's usually fairly obvious to all what is going on. It's just a question of whether or not the Commission decides that that's something that they wish to entertain or not. I don't know what your perspective on this is.

MR. McGINLEY: I guess I agree with those comments. I mean I don't think it's any type of widespread problem. I do think that in those instances where it may be a possibility I think is pretty obvious on the face of the request what's happening there.

But I do believe that in some instances it really does kind of answer some questions, although I do believe that the regulatory requirements for submitting a request do seem to provide some type of filter that the Commission can use to try and ferret out those types of situations.

So I mean, it just can't be a hypothetical and it can't be a third-party request, et cetera. So if you mechanically apply those criteria, I think you're probably going to be able to weed out most of those.

MR. von SPAKOVSKY: I don't have anything to add to that other than I don't think it's that big of a problem, but there's nothing really you can do about it. I don't think there's any kind of rule you can formalize. I think the Commissioners and General Counsel will just have to use your best judgment, discretion to try to weed those out.

MS. DUNCAN: One final question about the advisory opinion process. The Perkins Coie comments also suggested that we might benefit from a publication of a transparent criteria for the completeness of requests. I just wondered, particularly you Mr. Elias, because you may have had much more experience with this, we have -- we currently have a practice of OGC informally taking draft advisory opinion requests and speaking with requestors about those drafts before they're even submitted as formal requests.

I wondered if you could comment on whether you think that's helpful and whether you think that might potentially be a substitute for the publication of criteria for completeness or at least alleviates partially the need for that?

MR. ELIAS: Yeah, I think the reason for having the criteria is that as several of you have noted, not every advisory opinion comes before you from counsel who deals with you. Reading the advisory opinion requests and the correspondence that you have, as I try to do for all advisory opinions, there is you can see that some people have an easier time navigating that process than others do.

It just struck us as we put together these comments that it might -- it might aid, much like someone commented that well I know you can file these motions even though they're not in the rules. Others will have a harder time knowing that. It just struck us that it might aid the process to have those criteria spelled out. It has not been a problem for us, but --

MS. DUNCAN: Thank you.

CHAIRMAN WALTHER: Mr. Stoltz?

MR. STOLTZ: Thank you. Mr. Elias, you and the auditors certainly have been on the opposite sides of a number of issues over the years and I guess it's no surprise we don't always agree.

Do you think it would be helpful to people who go through the audit process to understand how many points along the way that the Commission actually does get involved, for example, the responses that are filed to exit conferences are made available to Commissioners, responses to the Interim Audit Reports are made available to Commissioners, the audit procedures are approved in advance?

Is part of this a matter of just not enough information being out there?

MR. ELIAS: I don't -- with all due respect, I don't think it is. Tom Josefiak sat down, I imagine metaphorically since I wasn't in the room, with a group of auditors in 2005, and explained that the Bush/Cheney Campaign had run 40-some odd million dollars worth of hybrid advertising. Now I have no doubt that at every stage in the process, the Commissioners were alerted that this was going on.

But it was not until years later that Mr. Josefiak and the Bush/Cheney Campaign and the RNC had an opportunity to actually have the Commission vote on it, and even at that point, the finding was accepted by the Commission even though it was defeated by the Commission. I just think that that is a tension that ultimately doesn't serve anyone well.

I mean if the Commission's position was that splitting ads 50/50 is lawful, then that is something that would have benefited from an early determination, not a late one, and would have benefited from an audit report that did not reflect a finding, if in fact the Commission found -- six of them found that it was not a violation of law.

So the fact that they have access to the information I don't think -- I don't think substantively addresses the concerns that I've expressed.

MR. STOLTZ: Thank you.

MR. McGINLEY: I would also agree with that because I think there's a difference between making available the subject of the audit's response or arguments that they're presenting to the auditors versus basically putting it before the Commission and giving that party an opportunity to address the questions that the Commission may have and also to explain some of the novel legal theories that seem to be popping up more and more in the audit process.

I think that if the Commission is going to have this type of process at the probable cause phase in the enforcement matter in dealing with novel legal issues, I think because of the public nature of the audit process and the Final Audit Report, et cetera, that it would benefit the Commission to hear both sides of the issue especially where novel legal theories are presented in the audit process, such as hybrid ads or any others.

MR. ELIAS: If I could just supplement my answer with just one final statement.

MR. STOLTZ: Please do.

MR. ELIAS: I also question, and I mentioned this a few times and I think it may have been viewed as rhetorical, but it's not really rhetorical. I question whether or not the audit process ought to include that type of matter. The fact is, the Democratic Party knew that George Bush was doing this. If we believed it to be a violation of the law, we could have filed a complaint.

Common Cause, the Center for Responsive Politics, they knew that the Bush Campaign was doing this. If they believed it to be a violation of law, they could have filed a complaint. Any citizen could have filed a complaint. We just talked about frivolous complaints.

It's not clear to me why in the context of an audit where I think most people again would be shocked, most people who have not been through it would be shocked to know how legally intensive these become. It's not trying to find out whether or not the Bush/Cheney Campaign's treasurer stole money. It's not trying to figure out whether or not the Bush/Cheney Campaign really had 623 computers that they said they had, which is what I think most people envision an audit being.

It is these audits wind up quickly diverting off of audits and into questions like, are hybrid ads legal or not, and it strikes me that there is a separate track if there are concerns about those kinds of issues to be handled, but they ought not to be central to audits. But that's again, that's just another point.

CHAIRMAN WALTHER: Thank you very much. I think we've been through those hybrid ads ad nauseam and that's a very difficult question on how to balance the independence of the auditor with the opinion of the Office of General Counsel and then come to us for hopefully a resolution, which has been very difficult for us in that particular case.

It took a lot of hard thinking is the best way to work that one out. Do you have any other questions?

MR. STOLTZ: No.

CHAIRMAN WALTHER: Because I have a couple. I've been troubled by the constant view that in the early stage of the complaint how to resolve cases that cry out for perhaps dismissal and perhaps not for earlier attention at the very least. You can file a motion to dismiss, what is it, a 12(b) motion, when there's no other facts? Just -- claim, premature relief can be granted or the equivalent of FEC jargon, or is it akin to summary judgment or what?

Because we haven't even started the investigative stage yet, so it's an awkward procedure in which you entertain the motion to include the Commission. On the other hand, sometimes you know it when you see it. This is a case that needs to probably get dumped, but if you don't know exactly why and at least you want to make sure you have done a modicum of investigation.

But I'm wondering if some kind of a summary jurisdiction procedure or summary procedure might work in a given case, whether it's ADR or some other to bring this to a more quick resolution. Do you have any thoughts on that, that rather than run through the gamut of our usual procedures for the important cases whereby there could be some kind of informal discovery to verify a few facts, or not, if the law makes any kind of intelligent judgment as to where the case ought to go through some kind of a structure that might just work in other cases like that?

Any comment? Mr. Elias?

MR. ELIAS: I --

CHAIRMAN WALTHER: I know you want to work this out, figure out how to do this, but procedurally makes a difficult situation when there's not much investigation, somebody who's kind of an amateur files kind of a defective complaint, but on the other hand, you know it would have been done right by Mr. Elias or others. It would have been done right and the other elements of the violation would have been in there.

MR. ELIAS: Like I said, I keep -- I keep being drawn back to my sense, having never worked at the Commission, that it is -- it's not necessarily something that gets fixed in the rules. It's something that gets fixed in the sort of the role or the attentiveness. I mean, I think that there are, as you say, a number of these that you know it when you see it and the question is, is someone going to be empowered to know it when they see it?

If that's the case, then I think you will solve a lot of problems. You won't solve all of them, but you will solve a lot of -- you'll solve a lot of problems.

The question is right now, who is that person? Who is -- my sense is that a complaint gets filed and I don't know if it's Jeff Jordan. It used to be Jeff Jordan -- is it still Jeff Jordan? Okay.

COMMISSIONER WEINTRAUB: He's right behind you.

MR. ELIAS: Takes it and sends it out and then it goes into a pile and it sits in that pile for some period of time until it's activated, reviewed by someone. The question is, is there -- whether it is Mr. Jordan or someone else who has the authority to look at this and say you know what, this is just -- this is just nothing and we ought to just move this summarily. I think it's just the will to do that.

CHAIRMAN WALTHER: Ms. Duncan and then it will be the end of our discussion.

MS. DUNCAN: This is actually not a question, but just to shed some more light on the process and that it entails more than putting something in a pile and waiting, and that is that we do have a pretty detailed process for the review of complaints as they come in. We review them according to the regulatory criteria that the vice chairman has talked about in some of his questions.

Those criteria are not applied in a mandatory fashion, but we do review them against those criteria and a great number of pieces of paper that come into the door don't meet the minimum qualifications for a complaint and they are handled appropriately and not as a complaint.

MR. ELIAS: No, I wasn't --

MS. DUNCAN: I know and I wasn't -- I just wanted to make sure, I wasn't suggesting that you were suggesting something wrong about it, but just to get information on the record about the process and the fact that there are a good number of things that purport to be complaints that we actually don't treat as complaints and then that doesn't actually even take into account those things that are made complaints, but then are dismissed at the recommendation of Counsel's office because of the fact that

they are low rated under our EPS system or they -- or they are -- or the Commission finds no RTB at our recommendation as well.

MR. ELIAS: See, I guess that's -- I guess that's what I'm -- that's the point that I'm getting at and maybe I stated too colloquially. It is at the rating system phase stage that it seems to me that more than setting up a new process, it is empowering that if something meets a certain place in the rating, it just does. I mean, it just quickly -- we may dismiss some that were meritorious, but we're just going to -- we're just going to make a determination that someone's going to be able to rate say X, whatever -- you know, rates a seven, whatever it is.

And then it can move out the door and the Commission won't second guess it and this Commissioner won't spend a lot of time revisiting it and I think that that's probably more practical than setting up a new standard for summary judgment or dismissal.

CHAIRMAN WALTHER: Unfortunately, our time is up. Some ad hoc buzzer here.

MR. von SPAKOVSKY: Do you want a quick answer on that or not?

CHAIRMAN WALTHER: Real quick, sure.

MR. von SPAKOVSKY: Okay. The problem is, and I think the way you could solve it is, look your problem is the statute. The statute requires you to send a complaint to the target of the investigation, the respondent, even if -- as soon as it comes in, you say it's frivolous.

I think you could solve that problem by setting up a procedure so that if OGC thinks that a matter is frivolous and they quickly send a notice up to the Commissioners saying, we've gotten these five complaints, these two we believe are frivolous, you know, one paragraph summary of why, if none of you raise an objection, then when OGC sends the complaint to the respondent, they can put in the letter, by statute we're required to send you a copy of this complaint, but we want -- you should know that we believe it's frivolous and we intend -- we're going to dismiss it.

The point of that is that even if you think it's frivolous and then it comes in, when you send it to the respondent, they're going to have to hire Marc or Bill and spend the damn money to put up a response to it and wasting time and resources.

If you tell them it's frivolous, we're going to dismiss it, then they can send you a short one-sentence response saying thank you very much and they don't have to spend the time and money to do it. That's one way of getting these out of -- it gets around the statute.

CHAIRMAN WALTHER: I missed a little bit of the comment -- comments because I was looking for the statute. In 437(g) it says, before the Commission votes -- on the complaint, other than the vote to dismiss, any persons so notified shall have the opportunity to demonstrate in writing to the Commission within 15 days after the -- after notification that no action should be taken against this person on the basis for a complaint. Technically it does imply that we can rule immediately to dismiss just like that on any given case.

MR. von SPAKOVSKY: I acknowledge that, but I'm not sure that given the internal processes here that you all could get it in front of you at a meeting at the executive session to do that vote within 15 days. And so a way of doing it I think is the procedure that I just identified.

CHAIRMAN WALTHER: I understand. Ms. Terzaken, did you have any questions; it looks like you might have?

MS. TERZAKEN: No.

CHAIRMAN WALTHER: Okay. Well, thank you very much. This has been really informative. Thanks everyone for being here today.

(A brief recess was taken.)

CHAIRMAN WALTHER: We'll begin again. We're 15 minutes behind schedule so that won't detract from the other time we have, but -- we'll be asking each of you to make your opening comments from five to ten minutes, not more, and then Commissioners will have truncated questions and to the extent there's time at the end, there hasn't really been any, but then we can open it up a little more for a period of discussion.

As it turns out, pretty much by the time we're through with everybody, we're always at the end of the time.

So to begin, we have Brian G. Svoboda, Lawrence E. Gold and Robert K. Kelner. Thank you all very much for being here. Your comments were very, very interesting so we look forward to hearing what each of you has to say. We'll start alphabetically with Mr. Gold. They have opposite -- Mr. Gold, please begin.

MR. GOLD: Thank you, Mr. Chairman. I appreciate the opportunity to appear this afternoon. I appear in two capacities, one as associate General Counsel for the AFL-CIO and the other as of counsel to Lichtman Trister & Ross, where I represent a number of organizations that have business before the Commission, have been -- are regulated by the Commission and have had experience in enforcement proceedings, audits and other matters.

This is a very important undertaking and I appreciate that it has begun and really does merit a commensurate process, I think, of public comment and participation and very carefully considered Commission review.

As I said in previous writings, I think the notice and comment and hearing schedule that was announced here was rather abrupt given the scope of what is being undertaken and the timing was unfortunate, overlapping with the holidays and the like, at a time when there was really no externally imposed time table that the Commission had to respond to.

CHAIRMAN WALTHER: Forgive me for interrupting. We did decide to extend the comment period to February 18. Were you about to say that? I didn't know if you had heard that.

MR. GOLD: No. Thank you. I just heard that on the break and I appreciate that and I was going to say I think that's a good move and will give others and me an opportunity to provide, I think, more considered analyses of some of the things you're inquiring into.

I hope it also presages some additional hearings, opportunities, more focused hearings perhaps on particular issues that are of particular concern or that you really do intend to take action about in order to focus and give you more precise

information and feedback about the Commission's operations.

Then I hope you will use policy statements or rulemaking as appropriate in order to explicate new standards and explain changes in procedures as a result of this process. If at all possible, I would suggest that you aim to complete that process this year during 2009, before we're into another election year. As former Commissioner Mason noted in his comments, I think you should make changes as you go along, implement as you go along, rather than wait to the end of some process.

My written comments submitted make a number of recommendations, admittedly without much, if any, explanation due to the time constraints that I was under. What I address in just these opening comments very briefly are two topics and then I certainly look forward to responding to questions about anything that I've submitted or anything at all pertaining to the notice that issued last month.

The two areas I'd like to comment on briefly are the reason to believe process and Reports Analysis Division. RTB is the critical juncture in the enforcement process. If it issues, that's the first time a respondent gets notice of the Commission's legal thinking and understanding or analysis of the facts that have been presented, and it's inevitably accompanied of course by a subpoena, often a very broad one seeking documents and sworn answers to written questions.

So one of the most important issues there is, is what is the standard? The statute of course says that the standard at the RTB stage is reason to believe that a person has committed or is about to commit a violation of the Act and the Commission has in several enforcement cases, explicated what that means.

I would refer the Commission to a Statement of Reasons issued by all six Commissioners at the time in MUR 5141 in 2002. It stated, to summarize, that the Commission finding requires an affirmative vote of four of its members and is proper only if the complaint sets forth sufficient specific facts which, if proven true, would constitute a violation of the act.

A complainant's unwarranted legal conclusions from asserted facts would not be accepted as true and unless based on a complainant's personal knowledge, a source of information reasonably giving rise to a belief in the truth of the allegations must be identified.

The statement of policy that the Commission issued a year ago March purports in some respects, I think, to broaden what the six Commissioners unanimously stated just a few years before. That statement said that the Commission had found reason to believe in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation and where the seriousness of the alleged violation warrants either further investigation or immediate conciliation.

I think that may be an apparently settled but important change. It is not a reason to investigate standard unless Congress changes the statute and I think that's really very important.

I believe at the RTB stage the Commission should find either reason to believe and then initiate investigation reasonably and then conciliate or dismiss for prudential reasons or find no RTB. The one thing in that policy statement last year that I think really does capture the meaning of the RTB standard is the description of what a no reason to believe finding means. There are three examples, which I won't quote here, but they're on page 12546 of the Federal Register.

The -- I guess one thing I would suggest, that there should not be admonishments issued at the time of a reason to believe finding. There should be no adverse finding at reason to believe that closes the case. I think that is -- does not respect the due process rights of a respondent in the proceeding.

By the same token, just a few other points about RTB. I think complainants should be held very strictly to the obligation in the regulations to clearly identify respondents in a case under 111.4(d)(1). Only the Commission itself and not the Office of General Counsel should be able to add respondents at that stage and by the four votes required, as in other matters, and a respondent should never be advised for the first time that it is a respondent by receiving an RTB finding, and that's a circumstance that I've experienced as counsel.

Secondly, I think the Commission should formalize the motion for reconsideration process regarding RTBs, as several commenters have suggested. Finally, I believe it would be important to improve the motion to quash process. As I said, when a subpoena issues, it is well after the race is in investigation and in my experience, subpoenas are often really incredibly broad, going way beyond the four corners of a complaint, the RTB finding and anything that's reasonably related to it.

I've been in a position to file a motion to quash. They're always denied and from what I know from others is I think they are always denied or virtually always denied.

I think there should be an opportunity in appropriate cases for the respondent to present argument before the Commission on a motion to quash. The Commission ought to issue a reasoned decision on a motion to quash rather than have the Office of General Counsel, which is really an adversary party, inform the respondent that the motion has been denied. I think a fresh look ought to be taken at the discovery that is initiated with an RTB to make sure that it is commensurate with the complaint and the RTB finding.

On the Reports Analysis Division, in his comments, former Commissioner von Spakovsky said that "there's very little supervision by the Commissioners of RAD's activities." I don't know how true that is, but it seems to me that it shows in the way that RAD operates.

I think it's very important to give RAD a complete and critical review. It is the one Commission office that every regulated committee deals with and for them, in many respects, RAD is the public face of the Commission because that's the point where they have contact with the Commission regularly in filing their reports and getting feedback from them.

But I find RAD to be a very frustrating and inscrutable office. There is inadequate opportunity for informed engagement with analysts. There is a presumption often that every contact with RAD -- presumption on their part -- that every contact has to be on the record and

there's a reluctance to give advice and feedback.

The letters are often opaquely, alarmingly and poorly written and I think especially intimidating for committees that do not have regular counsel. They often do not identify the entries and reports that are at issue. They assert standards and requirements that are not found anywhere else in the Commission's regulations or formal guidance.

They sometimes suddenly assert positions about entries and manners of description that have never previously been advanced, even where a committee has done it the same way for years. And perhaps worst of all, they never substantively, I mean never, in my experience anyway, substantively respond to a legal objection or a legitimate legal contention that is raised objecting to a requirement or a request or a position that's asserted in an RFAI.

Either they ignore it and just don't pursue the matter or they will ignore it and rather robotically repeat the same request in a subsequent RFAI regarding a subsequent report without regard and without any notice at all that you have an intervening, carefully considered position to express to them.

CHAIRMAN WALTHER: Mr. Gold your time is close to up.

MR. GOLD: Okay, I just have one more point, that is that I think OGC should be engaged when there is a legal objection or a legal contention raised in response to an RFAI and OGC should engage, at least informally, with the committee at that point and there ought to be a substantive response in writing to any kind of legal objection.

I think what this speaks is that the Commission ought to really take another look at the standards for these reports, perhaps have a running of frequently asked questions portion on the website. And certainly, and final point, is that there should be no referrals from RAD to enforcement without notice to the committee and some opportunity for the committee to be engaged. Thank you.

CHAIRMAN WALTHER: Thank you very much. Mr. Kelner?

MR. KELNER: Chairman Walther, I appreciate this opportunity to testify. As others have said today, I commend the Commission for holding this hearing and taking a critical look at its own procedures.

I think it's fair to say that the FEC is the most criticized, vilified and misunderstood of all federal agencies, with the probable exception of the IRS. As you know all too well, there is a constant drumbeat of vitriol directed at this agency from the editorial pages of major national newspapers, from self-described government reform groups and from partisan political forces.

The usual critique is that the agency is paralyzed by partisanship, unwilling or unable to apply the law without regard to its partisan effect. I don't subscribe to this critique, as I think it misstates ideological conflicts rooted in serious disagreements about the scope of the First Amendment from your partisanship, but I do believe that the Commission's sometimes opaque -- a word we've heard several times today -- and unpredictable approach to its mission underlines public confidence and empowers the Commission's bitterest critics.

The Commission could do much to blunt the public criticism by revamping its procedures so as to enhance due process protections for respondents and to increase the transparency of its decision-making, while at the same time strengthening penalties for the most serious violations of the Federal Election Campaign Act. I have some specific suggestions.

First, it is time that the Commission lifted the veil of secrecy that has for so long shrouded the process by which the Commission determines the fines that are to be imposed in the enforcement cases. For years practitioners have been pondering how the Commission comes up with its initial assessment of penalties. There appears to outsiders to be little rhyme or reason to these assessments. They sometimes seem to be influenced by relative factors such as the size or prominence of the respondent or the respondent's reputational or political vulnerability than by objective quantifiable factors.

Penalties in like cases do not always appear to be consistent. Moreover, because the Commission treats its guidelines for making penalty assessments as a state secret, the incentives for regulated committees and corporations to self-disclose violations where self-disclosure is not required by law, are greatly reduced. This is so because if a respondent cannot assess with reasonable confidence the level of fine that it will receive upon making a self-disclosure, it will often decide not to self-disclose.

The Commission later -- a few years ago to formulate a policy statement on public -- on voluntary disclosures, promising a 25 to 75 percent reduction in fines for those who self-disclose. I'd be curious to learn how much of an uptick you actually saw in self-disclosures. I suspect not much, because what good is a 75 percent reduction in my fine if I can't tell in advance what dollar figure the Commission will be starting from?

If the Commission is free simply to ratchet up the initial assessment so as to offset the promised reduction, then the incentive to self-disclose under the new policy ends up being meaningless.

Other federal agencies understand this fundamental logic. Numerous agencies have published their guidelines for determining penalties. Details are provided in my written testimony, but examples include the Export Administration, OFAC, the Nuclear Regulatory Commission, the Office of the Controller of the Currency, the EPA and actually just the other day, U.S. Customs and Border Protection, which now has its own method of determining penalties.

It is sometimes said that if the FEC were to open up the black box and reveal how it determines penalties, bad actors would be able to calculate their likely penalties and simply figure it into the cost of doing business. But such conscious dealing of the system would open the respondent to a charge that he acted knowingly and willfully, triggering a possible criminal prosecution, which is a pretty strong deterrent.

Moreover, if it's felt that transparently informing the public of the penalties that it faces provided in FECA would result in insufficient deterrence, then the solution is to stiffen the penalties, not to conceal them from public view.

If you need statutory authority to stiffen penalties, then seek it. But the penalty regime itself must be transparent, coherent and predictable both for reasons of fundamental fairness and to ensure that the agency is viewed as effective.

The Commission's current approach of shrouding the penalty process in mystery encourages the public to suspect that the Commission actually has no idea how it calculates penalties, that the penalties are plucked from thin air based on what the Commission thinks it can achieve rather than based on identifiable law.

This is just the sort of thing that undermines public confidence and makes some critics think that the FEC is a quasi-political organization where penalties are handed out in a smoke-filled room guided by politics, not by law. I don't believe that's the case, but the public can't be faulted for drawing that inference from the Commission's reluctance to explain its own procedures.

Second, and relatedly, the Commission should abandon its current practice of using the early stages of the process to make findings of knowing and willful intent. I don't believe that at the RTB stage it is ever appropriate --

CHAIRMAN WALTHER: Mr. Kelner, I'm going to remind you to cease quickly and then -- one more comment -- -- questions.

MR. KELNER: Okay, if I could make one more point with respect to the DOJ's comments submitted to the FEC. I don't believe that anything in a bipartisan campaign or format necessitates changes to the relationship between DOJ and the FEC. BCRA did stiffen penalties, but Congress took no action to change the concurrent jurisdiction of the agencies or the relation of the two agencies and I would refer you for analogy to the relationship between the Securities and Exchange Commission and the DOJ, which is actually quite similar to the current relationship between the FEC and the DOJ.

In the case of SEC investigations, sometimes the SEC refers matters to Justice, sometimes not. Sometimes they do investigations jointly if SEC approves it, sometimes not. I believe that's the arrangement in effect the FEC has now and I believe it's an appropriate arrangement to continue.

Thank you very much.

CHAIRMAN WALTHER: Thank you very much. Mr. Svoboda?

MR. SVOBODA: Thank you very much, Commissioner, and thank you also to the staff who helped put this together. I'm very -- I think it's a good idea that the Commission chose to do this today. I think it's good, irrespective of how well or how poorly you think the procedures are working, from time to time to just kind of towel off and take a look with some distance at what you've been working with these past several years and see if it's working exactly the way that you would like it to work and the way in fact I think everybody intended when the Act was written and when the rules were written.

So with that perspective in mind, I thought I would relay just a few observations on some of the expectations that practitioners like myself and people like our clients I think tend to have of the agency and its procedures and as touchstones, if you will, for evaluating just how well or how poorly we're doing. Hopefully these are expectations I think that everybody in the room would share to some degree, but they're useful touchstones perhaps to evaluate how we're doing.

The first expectation I think my clients and a lawyer like me would have is that they would have the chance to be heard by the Commission before something bad happens to them at the agency level. The process, at least the enforcement process, is structured so that that happens, as is the audit process and as are other processes in the agency.

But it doesn't always work quite that way in practice and I think it's worth devoting some sustained thought to those instances where perhaps it doesn't. So for example, there are times when an entity, a political committee, a person, may get a letter from the Commission informing them that through the exercise of supervisory responsibilities, the Commission's found reason to believe that a violation has occurred and extending them the opportunity to settle at what I am sure is a low, low bargain price, discounted as Rob Kelner observed, from somewhere.

CHAIRMAN WALTHER: Sounds like you've heard that a few times.

MR. SVOBODA: It has and did happen a few times. That shouldn't be a respondent's first interaction with the agency. If there is an assertion that somebody has violated the law, the person has, I think, ought to have the ability to say in the first instance why that isn't so. I mean, to explain why the complaint, if you will, is deficient as a matter of law or as a matter of fact.

So there are those blind spots that happen from time to time in the enforcement process. They happen also from time to time in the audit process, not so much at the early stages, because the audit process works rather well in terms of having informal and direct contact between committee representatives and the auditors on the ground, so if you ever want quality time with your government, the audit process is certainly the way to go.

But particularly at the moment when the matter is just teed up to the Commission for final decision, that moment when the Final Audit Report is put on a Commission agenda or put on the public record, there are moments, for example, where a finding may emerge between the Interim Audit Report stage and the Final Audit Report stage where the finding's significantly different or there's a significant legal issue involved and then you're counsel to a respondent that is looking down the barrel of potentially hundreds of thousands of dollars, or if not millions of dollars, in potential liability, you want to scream to someone and say, stop, wait, can we figure out -- you know, can we talk this through?

But the process, and here I'm careful to say the process doesn't lend itself as neatly to that. The process is designed basically to operate in stages where comments are funneled to the staff and ultimately to the Commission and doesn't lend itself as well to the -- sort of these significant issues at the 11th hour.

So that's the first broad expectation I guess that my clients and the people like me would tend to have, which is, will we have a chance to be heard before something bad happens to us?

The second is the expectation that we would be able to present our arguments

to the Commission, directly to the Commission with the confidence that we'll be -- we'll be heard. Now informally, the agency works rather well, I think, in that regard. I mean, I get the sense as a practitioner that when I submit a brief of significance in the matter that that brief is made available to Commissioners and that Commissioners read it and that Commissioners react to it as they react to it, but that there's some cognizance that is there.

So I came to you not with a complaint, that somehow information is withheld from the Commission or the Commission lacks an adequate factual basis to see the arguments. But it's important to know that the process is not structured so that that is indeed even supposed to happen.

Again, the process is structured so that practitioners like myself and the respondents whom we represent deal in the first instance with interlocutors, if you will, who are presenting and relaying our position to the Commission. And often times these interlocutors, not because they're bad people and not because they're taking bad positions, are propounding positions that are quite different than ours. They disagree with our positions.

So would it perhaps be more appropriate for the Commission to have a process where at least formally you're guaranteed at certain stages of the process the ability to file a brief directly with the Commission that's read directly by Commissioners?

The third broad expectation, that the enforcement process, when you're facing a MUR, when you're a respondent in a MUR, is not going to be conducted through the back door, if you will. Because the Commission has different divisions and because they do different things, there are moments from time to time where these different divisions may be active in the same transaction or the same legal issue.

So you may have a client, for example, who is a respondent in a MUR and at the same time, that client has been selected for audit in that same election cycle, and so these same legal issues are being dealt with in two different forums at the same time, and that can create some moments of supreme awkwardness, I would imagine, for the agency and certainly for the respondents because it places additional burdens in terms of protecting our confidentiality rights on the Act -- under the Act. I mean a MUR process is confidential until it's concluded, but an audit process of course is public when it is concluded.

It can intersect also from time to time with RAD, which may be issuing guidance on these very same questions that are a point of very wide dispute in a MUR. So the Commission, and it's a rare event, but it happens often enough that the Commission should devote some attention to it, at least to manage this process of making sure that the enforcement process is top dog, if you will, in terms of making sure that respondents are having their rights protected and having the issue surfaced and resolved in the way that they ought to be entitled to through the protections of that process.

Then the last expectation I think that my clients and practitioners like I would have is that we're able to understand why the Commission did what it did. I talked a moment ago about the fact, for example, that we submit briefs in enforcement matters to the General Counsel, they're relayed to the Commission and then at some time we see a General Counsel's factual and legal analysis that discusses it.

One of the things though that has always struck me as odd is that the factual and legal analysis, and I think it's because of the expectations the Commission sets for the General Counsel, are they're styled as dispassionate understandings or dispassionate statements of what the law is and they seldom if ever engage directly the arguments that counsel may make in a case.

So you may have a MUR, for example, with an immensely complicated legal question like who is a political committee, what is or isn't major purpose? What is or isn't express advocacy? And you may have a firm like -- like our firm that submits a brief that argues these -- that makes the arguments on these legal issues in great detail and then you'll see a General Counsel's report or factual and legal analysis that it's as if the brief had never been submitted, the legal arguments are not engaged, they're not dealt with.

I think frankly it's because there's not an expectation that they ought to be dealt with because of the architecture of how the process is devised and the fact that basically the Commission is being presented at the end of the day dispassionately with an analysis of the issues in the case.

It would be helpful to the transparency of the process for practitioners like myself and our clients to be able to see that our arguments were read, that they were agreed with or disagreed with and why they were disagreed with, if in fact they were. It may be that there's something we hadn't thought of before. I'd like to think that's not the case, but it would be nice to see that in the process.

So those are just some basic expectations that guide at least my thinking as the Commission has this hearing and I appreciate your hearing from the last witness on the last panel of the first day. It's a daunting task and heavy responsibility. Thank you.

CHAIRMAN WALTHER: Thank you very much. Commissioner Bauerly, any questions?

COMMISSIONER BAUERLY: It's random selection here. I'm used to my colleagues on the end --

CHAIRMAN WALTHER: --

COMMISSIONER BAUERLY: The chairman is entitled to keep us all on our toes; I appreciate that. I -- we talked earlier in the day about appropriate places for opportunities to be heard and we sort of get slightly different versions from each witness depending on who is addressing the issue and in an effort to sort of get as broad of a perspective as possible, I'd like to hear your perspectives on the stages for some of these things.

I think, Mr. Svoboda, you said in an audit context you think at that final audit hearing it would be the appropriate place. I was wondering if any of the other panelists -- and if you'd like to expand on that, I'd appreciate it. Because I think -- I think we all share the view that we certainly should try to find ways for people to have more opportunities to be heard, but finding that

place in time in the process is an important consideration.

So we want to make sure we're getting that right if we do adopt some sort of pilot program or something like that. So I'd be interested in your comments on the point in time in an audit process where that would be most useful to either -- to the respondents and to the process.

MR. SVOBODA: Thank you, Commissioner. I came into the room actually as the last panel was beginning to touch on this subject. I heard Mr. Stoltz and Mr. Elias' colloquy about the information that the audit staff does produce to the Commission during the process from time to time.

So for example, I heard Mr. Stoltz say that the Interim Audit response is provided to Commissioners as well as other materials in the process. I think that's good. I'd like to be able to know as a practitioner and tell my client with certainty that those -- that those documents, the Interim Audit response and other significant documents made available in the audit on legal issues, are in fact being presented to the Commission.

I think it would be worth perhaps looking at the rules and in particular the limits on ex parte communications, which are quite broadly drawn at present, to see if there is not perhaps an opportunity formally and transparently and with the awareness of everybody on the Commission and ultimately on the public record, but to make those sorts of presentations available directly to the Commission.

To answer your question directly, I think there's --

COMMISSIONER BAUERLY: Can I just interrupt you for a second, because I want to make sure I understand? You're talking about the written submissions? Because you said -- you say directly, but I think Commissioner Weintraub mentioned earlier in the day, we get to see the -- it's not -- we don't only get the staff of this agency's view of the matter. We see it directly, so I'm just trying to make sure I understand what extra you are looking for?

MR. SVOBODA: You may see it directly. We can never know for sure that you have in fact seen it directly.

COMMISSIONER BAUERLY: Well, and you're going to have to take my word for it that I read all the footnotes too, but at some point, I'm not quite sure, but I just want to make sure I understand what will make you happy.

MR. SVOBODA: There's two moments when it's most important for me to make sure that we're communicating with you. The first is at the interim stage where we have the first crack at what the Audit Division's findings are and we agree or disagree or dispute those findings. That is where you are most likely in the first instance to see a complex legal issue. So that's the first stage.

The second is before the Final Audit Report is issued, because as we talked about earlier, audit reports are a work in progress. They continue to work on them after fieldwork's done and the interim report is done and there can be moments where a very significant issue can emerge only at the Final Audit Report stage.

Audit has been fairly decent informally about talking with attorneys like us and giving us a chance to talk with them directly about it. But there may be issues from time to time that we feel we need to communicate very loudly and clearly with you.

I had an audit. I won't say exactly which one it was, but about two or three years ago, where the big finding in the audit with the potential of a -- with a potential of a high six figure repayment and the biggest issue at the end of the day in the audit report did not come up until well after the preliminary audit report had been concluded.

That was a moment where while we had a chance to converse with staff about it, staff I think had a view of how they thought it ought to go and we had a quite different view and it was very urgent to us to be able to make sure that the Commission were aware of our views.

It was also, and this happens in audit quite a bit, there's a really complicated technical issue both of law and just in terms of making the numbers work, so having a safety valve, if you will, in that process where there's some space between when the Final Audit Report's submitted to the Commission, when a respondent has a chance to comment on it, the Commission has a chance to consider the comments and figure out what to do about it, that's conducive toward sorting through those various complicated, very technical issues.

Because I'll be blunt, if we don't have the opportunity to weigh in on those who communicate with them, you do the natural thing, which is to defer to the staff who are going to be the only other people who are going to understand these issues and the technical nature and who may be coming down in a very different place from where we are.

So to have kind of that safety valve built in there at the end of the process is very important to us.

CHAIRMAN WALTHER: We have -- go ahead.

COMMISSIONER BAUERLY: I just wanted to know if there was -- if any of the other panelists had either different approaches or anything to add?

MR. KELNER: Commissioner, I agree with Brian. I think it is at the final audit stage and it makes sense for there to be an oral appearance. But I would highlight one other point, which is that it's not just the subject of the audit who is at risk at that stage, but often there are third parties mentioned in audit reports, and I've had this experience several times, where I'm representing not the client that's being audited, but some other entity who it turns out is essentially accused of wrongdoing in an audit report, doesn't learn about it until after the audit report has been adopted by the Commission when a subsequent enforcement action begins.

So I would advocate that when there are suggestions of wrongdoing that might point to a subsequent MUR, anybody who is the target of those allegations ought to be invited to appear, and I'm talking about parties that don't even have written submissions. So this really would be their only opportunity to weigh in before the audit is actually accepted.

CHAIRMAN WALTHER: Mr. Gold?

MR. GOLD: Yeah, I generally agree that at the Final Audit Report stage, not before, I think is urgently -- the Final Audit Report stage you ought to consider some kind of pilot program that's modeled on the probable cause hearings where at the

request -- not an automatic grant of an opportunity to appear -- but at the request of the audited committee and with at least two Commissioners agreeing that it would be useful, there ought to be that opportunity to directly engage.

I accept that you're reading what is being submitted. I think that's obviously very important not just in the audit stage, but in other contexts as well. But why not consider a pilot program here and just see how it goes?

CHAIRMAN WALTHER: Thanks very much. Mr. Vice Chairman?

VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman. Mr. Kelner, during your opening statement, because of strictures of time, you were about ready to touch upon a point that you discuss in your submission which I found very interesting about knowing and willful at the reason to believe stage and I just wanted to give you the opportunity to kind of flesh out what you had started in your opening statement.

MR. KELNER: I appreciate that. The problem is that the reason to believe stage is supposed to be a stage at which the Commission is simply deciding to open an investigation. And that in fact is the position that the Commission itself has taken and several years ago it asked Congress to actually change the terminology in the statute, no longer to say reason to believe, but to say something like reason to begin an investigation.

Even though that's the case, even though everybody understands that reason to believe is simply the opening of an investigation, we do from time to time see the Commission make findings in a reason to believe letter that there's reason to believe that the respondent acted knowingly and willfully, which is Commission argot for at a minimum a substantial increase in the civil penalties but in fact a predicate for a criminal prosecution.

I think there's really no basis in law for the Commission to be making findings at that very early stage in the proceeding regarding the state of mind of the respondent.

I also think that we have more and more frequently seen those kinds of findings in a reason to believe letter used really to threaten or intimidate the respondent in pre-probable cause conciliation and to try to drive the respondent towards a generous settlement offer whereupon the language magically disappears.

I've seen that with increasing frequency. I think it's really a serious abuse of the process and more to the point, completely inconsistent with the statutory concept of reason to believe.

VICE CHAIRMAN PETERSEN: Earlier today, I don't know if you were here, former Commissioner Mason touched briefly upon the issue of knowing and willful findings at the reason to believe stage, saying that it merely is giving notice to a respondent that this could give them an indication right from the outset that they're being investigated for a knowing and willful violation.

Could that same notice be provided through some other mechanism other than through a formal finding of reason to believe that there was a knowing and willful violation?

MR. KELNER: Absolutely. For one thing, it's usually apparent from the way the reason to believe letter is crafted that the allegations are suggesting some kind of knowledge or some kind of intent. But actually, including the language you have in the Commission vote to include that language in the letter, I think creates much more of a presumption. I think also it puts something on the public record which would be permanently threatening and damaging almost regardless of what happens later on in the process.

And so I think that's highly prejudicial to innocent respondents so to speak and I frankly don't buy the notion that it's doing the respondent a favor by making sure they're fully alert. I think respondents tend to be fully alert to the exposure that they face. They can talk to their lawyers about that. I think in fact this language is used to provide leverage to the staff in pre-probable cause conciliation negotiations.

VICE CHAIRMAN PETERSEN: So from your perspective, just to reiterate, you believe that there are less formal means? Rather than voting RTB, there are all sorts of ways and that you believe from the perspective of one who's represented clients who have been the subject of such investigations, that there are other ways that they will get the message loud and clear that you are being investigated for a potential knowing and willful violation, but it doesn't necessarily need to be within the formal finding of the Commission in order for you to get that message?

MR. KELNER: I agree. It's clear from the context. It also becomes clear in oral discussions with the staff.

VICE CHAIRMAN PETERSEN: If I can just shift gears and just ask a quick question. It's been suggested that Commissioners should worry first and foremost about enforcing the law and not worrying about -- worrying less about First Amendment considerations, that that's something for the court to consider and less something that the Commissioners should be worrying about.

I just wanted to ask any of the witnesses on the panel if they would -- if they had any thoughts on what sort of considerations the Commissioners should have from a First Amendment perspective when we are making our decisions?

MR. KELNER: If I can address it. I don't really think there's much of a choice for Commissioners. I think you all probably take an oath to the Constitution when you are sworn into office. I don't think any federal officer really has a choice but to consider the constitutional implications of any governmental action, most especially an enforcement action.

VICE CHAIRMAN PETERSEN: Okay, any other thoughts?

MR. GOLD: Yes. Clearly the Commission is a creature of the Congress and the statute is a creature of the Congress and where the statute is clear you've got to follow the statute even if you harbor concerns about its consistency with the First Amendment.

But in the ordinary course of what you do day to day, whether it's in enforcement matters or in advisory opinions, or the like, insofar as there is ambiguity, which there often is as you know from some of the key concepts of the statute and in your own written -- in crafting your own regulations, I think you certainly have to take First Amendment considerations into account.

A number of Commissioners in the past have done so quite eloquently and

been also faithful to their obligation to enforce the law as written. So I think it's something that has to be at the forefront of what you consider, not only because that's your duty, but I think as a very practical matter, as you know, just about everything you do is scrutinized by all sorts of people, including practitioners, professional critics and the like, for whether you're going too far, whether it's consistent with the First Amendment and rightly so.

It should be -- it should be subjected to that scrutiny because it's a peculiarly sensitive statute and area that we're involved with here. So I think you need to be very mindful of that.

VICE CHAIRMAN PETERSEN: Thank you. Mr. Svoboda.

MR. SVOBODA: It's a difficult -- it's a difficult riddle for you because on the one hand you do, as the other commenters have said, need to be sensitive to these First Amendment issues. On the other hand, the court is not going to defer to your opinions of constitutional law.

So the question is how do you manage that and how do you bring that sensitivity to the process? I think you do it in two ways. The first is I think substantively to approach the -- to approach particularly close or ambiguous questions with restraint.

When the Commission has the opportunity on the one hand to take an expansive and imaginative and aggressive view of a vague statute on the one hand and to take a more sparing, more restrained, more narrowly focused view of that same statute on the other, I think the Constitution and those sorts of concerns are going to push the Commission in that -- in a latter direction.

That's in fact what courts say you ought to do, that you ought to be construing statutes to avoid constitutional difficulties rather than maximize them. I think it also goes, however, to the rigor of your procedures, what we're talking about here today, which is because you're dealing with such sensitive First Amendment issues, that you ought to be looking with more rigor and more care in terms of how enforcement actions get commenced, how subpoenas get issued, how these sorts of adverse actions get taken that in a very real way burden the First Amendment rights of people like our clients.

We spend money -- they spend money on lawyers like us to defend themselves that they otherwise would be spending to influence votes or to promote their issues on issues of public concern.

VICE CHAIRMAN PETERSEN: Thank you.

CHAIRMAN WALTHER: Commissioner Weintraub.

COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman. Brian, it sounds like you would just feel better if you could file your papers directly with us and send them directly to our offices; is that really what you're saying? Putting aside the issue of potentially having hearings at the -- before we issue Final Audit Reports, because I think a number of people have suggested and I think that it's a really -- it's an idea that I would support.

But am I hearing you right, you just want to send it right to us?

MR. SVOBODA: Yeah. I mean, to be honest with you. There are moments and there have been moments in audits and in MURs where a matter has come up that we felt that it was urgent to want to communicate to the Commission. It has always been a source of some internal debate in our office because we read and are aware of the ex parte rules and we want to respect those rules and we don't want to deal with this process in a way that's at all inappropriate.

But you may be dealing with -- first off, you may have such a divergence of position between our clients on the one hand and the General Counsel on the other that there is real conflict going on there. And second, you may have matters that are so important to our clients that it's important that we speak clearly and be heard. We need to be able to tell them that we've spoken clearly and have been heard.

COMMISSIONER WEINTRAUB: You always speak clearly, Brian. You can tell them I said so.

MR. SVOBODA: It also goes to a point where I think there is a difference and it's worth reflecting on it here today. There is a difference between, I think, how the agency conceives itself and how the agency is conceived by statute and how the agency actually works in actual practice.

I mean, the way this works theoretically is you are an impartial expert agency that accepts dispassionate advice from your impartial, dispassionate General Counsel and in solonic fashion makes rational decisions about the administration of campaign finance law and the deciding of particular matters.

COMMISSIONER WEINTRAUB: Always.

MR. SVOBODA: In fact however, the way it works however as a practical matter in not all MURs, but MURs involving close legal issues or complicated legal issues or charged matters, is it's an adversarial process. I mean, there is an attorney in the Office of General Counsel who believes that my client has done wrong. I have a client on the other hand who believes that they haven't done wrong.

We are arguing back and forth with each other.

The question is, how do you take -- in those circumstances, how do you account for the adversarial nature of that process and really tee up decisions for the Commission in a way that's most illuminating for the Commission's own decision making?

That's not an easy question again because you have kind of a square peg, round hole situation in terms of how the statute's devised and how it works often in practice. But it's worth thinking about and how you accommodate to some degree that reality. And you've taken some steps to do that.

The probable cause hearing, for example, process I think is one way in which that happens that really when you think about it is the first and only way that the rules or policies provide for respondent direct communication with the Commissioners, where I can write you something or look you in the eye and know that I am communicating directly with you.

COMMISSIONER WEINTRAUB: I'm glad you like it. I wrote that policy. And I said it somewhat frivolously, but I do have a track record of being in favor of these due process protections and I am without doubt the -- well easily the longest standing, but probably the most ardent advocate over the

years for more transparency, particularly in our penalty determinations.

I don't share Mr. Kelner's view that this is suddenly if we have more transparency and more due process that suddenly people are going to like us out there, particularly the editorial boards. I think it will have -- you guys might like us better, but the editorial boards will be completely unmoved by our having a more transparent and fair process.

Mr. Kelner, you raised this issue and Commissioner Petersen, Vice Chairman Petersen talked about it a little bit, about the knowing and willful at the RTB phase. Sometimes we get things where -- and traditionally I have been very loathe to making that finding at the RTB phase because I share the trepidation that someone must feel when they get a finding, even if it's explained to them that this is a very preliminary finding, that the government has made -- had made a finding, there's reason to believe that they knowingly and willfully violated the laws.

So I've always been hesitant to do that. I hear what you say that people can tell because the argument is they need the notice, that they might have criminal liability here. I'm sure they can tell if they're advised by sophisticated counsel like the three of you, but not everybody is, so I think there's that.

Sometimes we actually get a complaint after somebody has pled guilty to violating the law, to criminally violating the laws, pretty good evidence at the RTB phase that there's been knowing and willful conduct or there's evidence of concealment that they -- which strongly suggests that they knew what they were doing was wrong and they tried to bury it by having false receipts and, you know, like in a corporate reimbursement case, somebody would describe something as a bonus when it actually was a reimbursement for a campaign contribution.

Are there no circumstances where at the preliminary phase we might have reason to believe that someone knowingly and willfully violated the law?

MR. KELNER: Not unless you want to fundamentally re-conceive what reason to believe is. If in fact the Commission still takes the position it took a few years ago that this is just the beginning of an investigation --

COMMISSIONER WEINTRAUB: But sometimes we know more at the beginning than at other times.

MR. KELNER: You don't know what you know at the beginning. You shouldn't, in my view, in my humble opinion, that the outset of an investigation where you are just opening the investigation.

COMMISSIONER WEINTRAUB: You don't know that somebody's plead guilty if that's part of the complaint and we have documentation of that?

MR. KELNER: There may be very few cases like that, but I am also aware of quite a number of cases where there was no guilty plea.

COMMISSIONER WEINTRAUB: Okay.

MR. KELNER: And where there was at that stage of the investigation relatively little reason for the Commission to know definitively one way or the other. I think the danger is if you start trying to make these decisions about when it's appropriate and when it's not, there is a great incentive to include these findings at that extremely early stage of the investigation because it so facilitates OGC's position in pre-probable cause conciliation talks.

And indeed the proof of the pudding is that the knowing and willful finding sometimes magically drops away as those negotiations --

COMMISSIONER WEINTRAUB: Are we bound by it forever if once we find it we have to go forward with it?

MR. KELNER: That's exactly the point, is that you are finding it at a stage where you're really not in a position to say one way or the other because it's the outset of the investigation.

COMMISSIONER WEINTRAUB: You're suggesting that once we -- once we make that finding and suppose we have some -- we think we have enough evidence at the very outset to do it, that once we make that finding if we then are willing to negotiate over the terms of the conciliation, are willing to drop that out, but some of it is a sign of bad faith.

MR. KELNER: It's a sign of bad faith because if there was really a substantial reason to find knowing and willful intent, I wouldn't expect it to drift off so readily and easily in the course of negotiations over dollar figures, which does in fact happen.

COMMISSIONER WEINTRAUB: Because sometimes we might view it as if there's a high enough dollar figure, it represents an acknowledgement that this is a very serious violation and we recognize that it's extraordinarily difficult. But you believe there hasn't already been a guilty plea entered to get someone to admit to a knowing and willful violation of the law because they know they will have criminal liability down the road.

My point here is that I really do take fairly strong exception to some of the characterizations that you had in your testimony of us throwing in the knowing -- and willful and don't blame the staff, because we vote for it -- going in knowing and willful at the outset so that we can ratchet up your penalty or hiding the penalties so that when you come in on a *sua sponte* basis we can play bait and switch and we secretly know that we would have given you a lower penalty, but since we're going to have to honor that *sua sponte* policy now, we're going to have to jack it up at the beginning so that we can pretend to be lowering it.

We really don't play games like that with the penalties and I take -- and I'm surprised to hear you of all people say it because I know that one of your partners is very well versed in what happens internally at this building. If you believe that, I urge you to go talk to him because I'm sure that he will tell you that those things don't happen.

I understand the concerns about the lack of transparency in the penalty process and as I said, I have been the strongest advocate for making it more transparent so you can see it and understand it better.

But please do not assume that because for historical reasons it has not been transparent that there are bad motives going on and people are playing games with you and playing bait and switch and that there is bad faith in the negotiations,

because that, I can assure you, certainly on a lawyer's part, and I make a personal representation to you on behalf of every decision that I've participated in, that I have never seen that happen.

MR. KELNER: I think there's a difference between bad faith, which is not what I'm suggesting, and incentives in the system to game the system, and this goes on both sides. It goes on the side of defense counsel and it goes on the side of prosecutors or regulators.

CHAIRMAN WALTHER: We're going to have to keep moving through the Commission in order to finish up, but go ahead. I can see the colloquy is necessary still, but --

MR. KELNER: I think that when the system allows for findings like knowing and willful intent to be included at the very earliest stage in the investigation, it creates unhealthy incentives for the negotiation process that follows. I don't think you have to believe that there's bad faith to believe that human beings on one side of the negotiation or the other react to those incentives. I do believe I've seen that in the course of dealings with the Commission and other administrative bodies.

COMMISSIONER WEINTRAUB: I guess we're just going to have to disagree on that, but do go talk to your partner about it.

MR. KELNER: I will do that.

CHAIRMAN WALTHER: Commissioner Hunter?

COMMISSIONER HUNTER: Okay, I'm reluctant to summarize what anybody has said here, but I think that Mr. Svoboda and Mr. Gold said that they both believe that the Counsel's office and then to some extent the Audit Division doesn't ever address respondent's legal issues.

I think a combination of that comment and the exchange with Commissioner Weintraub, perhaps one thing that the exchange where she said is all you want some assurance that we Commissioners read your legal briefs, maybe those concepts combined that I can see where respondents don't have any assurance that we both see and read it if the legal analysis given to the Commission following their -- your briefs never acknowledge your legal arguments.

Does that make sense? Do you want me to say it again because it sort of -- and we've had good internal conversations with the General Counsel's office about this and I think that their view is they don't think that's inappropriate to address your legal arguments. I don't know why they haven't done that on paper in the past. It didn't make any sense to me when I first got here and it still doesn't.

One of the things that some people in the Office of General Counsel have suggested is that many of your arguments are responded to over the telephone. I don't know if that's accurate or if you feel it's a proper way of explaining away your legal theories. But the truth of that is we don't see records of the telephone conversations, nor do I think we want to.

So I think in my personal view, it makes me anyway less likely to rely on the General Counsel's argument because I can't see where they have addressed your legal arguments. And again, this is something that I've talked to them about. They're aware of my position and we've had productive conversations.

But I do think that would be very helpful not only to the transparency of the process, but I think it would help assure you that in fact not only have we seen your legal briefs, but we've seen the General Counsel, how they respond to your legal brief.

MR. GOLD: I'm not sure I've ever had an experience of dealing with the Office of General Counsel on the phone on the substance of a response to a complaint. I think what would be helpful is in talking about transparency is for us to know exactly when in each process the Commission does see what we submit. That's -- we know in the enforcement process it's at the RTB stage, it should be. You had motion to quash, if the Commission decides that, probable cause, the Commission decides that.

It's not so clear in other contexts and it will be helpful just to say where the Office of General Counsel gets to make the "final" decision along the path essentially without your involvement -- it would be very simple for you to just say that on the record as where that -- where that happens.

That would be very useful. What I was talking about earlier was not the Audit Division, but RAD, and I think that really is something that ought to be addressed, is that I feel it's a one-way legal conversation and obviously or hopefully RAD is consulting with the Office of General Counsel on questions on issues, but we never, never hear that.

I had a situation where we went back and forth with RAD in this almost Orwellian, frankly, circumstance because the responses -- again, it was as I said before, robotic repetition of a position about the same issue, but in a different report. And the next thing I knew, the committee was being audited for that without any real engagement or insufficient engagement, and that's not right.

MR. SVOBODA: Two quick comments on that, Commissioner. The first is with respect to Audit. Audit actually is fairly good about that, at least in the text of the audit reports. You read Final Audit Reports for example, and it's like a blow by blow. The auditors presented X to Mr. Svoboda, he sat mutely with his eyes widening as we said it in the Interim Audit Report.

(Laughter.)

CHAIRMAN WALTHER: That's automatically in the typewriter.

MR. SVOBODA: So the audit report's pretty good about that. With respect to the General Counsel's briefs and the factual legal analysis, I was speaking principally about complex legal issues where you may have a question, a first impression or a rule, a really big question like for example, is my client a political committee or not?

And I may have a very technical argument, one that I'd like to think was kind of creative perhaps where I try to argue why this or that doctrine of constitutional law might prohibit that classification from being applied to me. But you may actually read the General Counsel's report at the end of the day or the probable cause brief and not see an engagement of that.

I think your premise is correct or what I think your premise to be is correct that the process would be aided by having that sort of direct exchange, so at least if the General Counsel and thus ultimately the Commission disagrees with me, it's

clear that they have and it's clear why they did.

COMMISSIONER HUNTER: Thank you.

CHAIRMAN WALTHER: Commissioner McGahn.

COMMISSIONER McGAHN: Thank you. A couple questions. First an observation which may help. Having only recently joined the Commission, there were many things that I thought, some of them I still think, that echo what I'm hearing here and it was a confusion as to what the Commission actually reads and when it reads it, particularly in the case of Audit.

I didn't realize that the Commission sees in some instances Interim Audit Reports and that kind of thing and none of that is particularly a state secret, it's just the Commission's never really told anybody on the outside, so there's a lot of confusion out there and a lot of frustration.

I can sense it here where folks say, well gee, we filed this brief and we're not sure if you read it and folks who have been here say of course we read it, why are they saying this? Well because there's a disconnect here between the agency and the public and maybe this hearing is a first step to try to tear down that wall, so to speak.

So the folks who deal with the agency understand a little bit more about the inner workings and I think that makes -- if that happens, I think that moves the process along, because I feel when people feel like they're being heard in some form or another tend to be a little more cooperative and you can get to the heart of the matter a little bit quicker.

That's my sermon. My questions first, just briefly, because we don't have a lot of time, I don't have a lot of time. With respect to RAD, from Mr. Gold, any suggestions on how to get at this issue, because I have seen this as well? I used to represent party committees and we would always get to the RFAI that says your reports show that you have made both -- coordinated independent expenditures for the same candidate, please establish that they were truly independent.

Now that's wholly inappropriate in an RFAI. I mean, that's -- case right on point. It's a constitutional right to do both and that's mini discovery. So I'm very sympathetic to that.

How do we fix that though without the Commission micromanaging RFAIs because 99 percent of the RFAIs ask legitimate questions about the cash-on-hand, doesn't add up from the last report. How do we put something in place, if you have any thoughts on that? And if you don't have them today, the comment period is open, maybe supplement. But think about sort of proactive ways to get at these problems, because the comments seem very similar across the board.

The next step is going to be okay, so what do we do about?

MR. GOLD: I'd be glad. I think I would be glad to supplement written comments on February 18 that I don't have a total -- I don't understand enough perhaps on how you operate internally to be very specific. But it seems to me you've had committees of the Commission on different matters. Set up on a trial task force to just review what they do and task some people to look at all the RFAIs issued in a particular month, responses.

I would be glad to give you examples, possibly, probably, although it's all in the public record, of these exchanges I'm referring to where it's just again and again. It's absurd and I think it's an embarrassment to the Commission when people look at this and it's a waste of time.

I think you just set up something internally and I agree, many of the questions they'll find legitimately there has been an excess contribution. They identify the particular entry, that's easy. But so often, it's this generalized oh, and this has to do with what you reveal about union members, let's say, who break the $200 threshold and you'll get a general letter saying you haven't told us enough about what their occupations are, a fairly useless but admittedly explicit requirement.

What are you -- what's your best efforts policy here? And you've already answered that question for that -- that union has already answered that question in the last year with a written description of its best efforts policy, which it used. That's the sort of thing, just some kind of internal task force that just gets into it.

And call on -- I think you can have an informal engagement with committees, practitioners like us and just say, look we'd like to have a meeting for people and just throw it around privately for a couple of hours. I don't think that's an ex parte problem. Be creative.

COMMISSIONER McGAHN: Next question and maybe start with Mr. Kelner. There's been a lot of discussion about reason to believe and what it means. It's always struck me odd when folks talk about 12(b)(6) and what's the standard and that kind of thing. It's not really a 12(b)(6) right, because that's all the facts? You assume them to be true when there's a legal cause of action, but that's not what we do here. That's not what the statute says we do here. It's not what the reg says we do here and said facts have to be pled with some sort of specificity.
It's under oath.

The response tends to conclude affidavits or some sort of representations that the facts are not correct, so there are factual issues at the preliminary stage that sounds a lot more like the old fashioned fact pleading that still is present in some state courts.

A lot of us fancy guys in D.C. always think in terms of Federal Rules of Civil Procedure, but in state court, it's been markedly similar to sort of the speaking demurrer standard or that kind of thing that the various states have.

Any thoughts on, as a litigator, what sort of standard may really apply that we can maybe look to, already existing areas that are consistent with the statute and the regs here?

MR. KELNER: Yeah, I don't think it's a 12(b)(c) -- a 12(b)(6) question. I think it's more the nature of whether or not the well pleaded complaint. Under the Federal Rules of Civil Procedure, one needs to make specific factual allegations. In a different context the courts have sometimes even required so-called heightened pleading requirements. This is all before you really get to the 12(b)(6) stage.

COMMISSIONER McGAHN: Of rule 9, for example.

MR. KELNER: Rule 9. So I think the question here, has somebody submitted a complaint where they've made coherent factual allegations with some real apparent substance on the face of the complaint? And if not, and I think this is the point that Jan Baran was making pretty

well this morning, if not, then it's appropriate under existing regulations really for the Commission simply to return the complaint and say, this is not well pleaded, without prejudice to it being resubmitted if the complainant is able to submit a coherent and particularized complaint.

COMMISSIONER McGAHN: Any other thoughts on that from the other two? No? The other topics come up about the idea of MURs as precedent and it gets somewhat metaphysical, but the question I have is the sense out there is if the Commission in certain instances chooses not to pursue a certain kind of conduct or on its facts dismisses the case or whatnot, what is the significance of that legally not in terms of judicial precedence, but let's say Administrative Procedures Act or whatnot.

I know the FCC has had a couple court cases recently where circuit courts have said they hadn't enforced a certain kind of rule because they were being a little more cognizant of First Amendment, but then end in enforcing it. It was thrown out as arbitrary and capricious. Does that have any application here to this agency?

MR. KELNER: I think it does. Courts in APA cases have held that if there is a long period in which an agency has adopted a certain position as a practical matter in adjudications in enforcement actions, even if that position is not reflected in the regulation, not reflected in a policy statement, but where there's a consistent pattern and practice, the agency cannot suddenly depart from that practice.

And it makes logical sense because you want the regulated community to be on notice as to what the rules are. And after some indeterminate period of time where an agency has taken a particular position in enforcement actions, the regulated community comes to view that as the law.

In APA cases the courts on a couple of occasions at the circuit court level have in fact said it has become the law. It's arbitrary and capricious for the agency to depart from a long-held position whether or not embodied in regulations or a policy statement.

MR. GOLD: The statute of course says that you can only -- I'm paraphrasing -- establish rules here by regulation, that advisory -- themselves, although they are often treated as precedent as a practical matter and they're very important, is not the same thing. But we look to -- it's not -- there's not a lot of case law about a lot of issues that the Commission deals with, there just isn't.

So we do work very closely at advisory opinions and MURs. If there is a -- and we'll quote them. I think we have the right as a practical matter and you as -- in terms of enforcement, what policies, and your priorities, they're important and they are de facto precedent even if they may not be strictly -- but at some point, as Rob Kelner says, they do become -- the agency at its legal peril will suddenly reverse itself.

I think it's really important that you explain very clearly what you're doing and why you're doing it and we have a right to rely on it. Yes, it's often in basically accepting or endorsing General Counsel reports, but that then becomes the voice of the Commission. So there is a burden there.

MR. SVOBODA: I do agree with that.

CHAIRMAN WALTHER: Let me ask -- finish your question -- Mr. Stoltz?

MR. STOLTZ: I think my concerns have been covered, thank you.

CHAIRMAN WALTHER: Okay, Ms. Duncan?

MS. DUNCAN: Thank you, Mr. Chairman. Just one question. Good afternoon to the panelists. I wanted to explore a follow-up question with you, Mr. Kelner, about the relationship between *sua sponte* submissions and the publication of civil penalty formulas.

It seemed that you were saying that publicizing civil penalty formulas might be a good idea in part because respondents might take that into account with potential respondents in determining whether they would make a *sua sponte* submission and in fact that might encourage more *sua sponte* submissions.

I was just wondering whether it might go in the other direction as well in that if they see those potential penalties and they're determining whether to make a submission, if those penalties are perceived as being particularly high, could it be a discouragement to a submission?

MR. KELNER: It might have been a few years ago, but I think in conjunction with the Commission's policy on voluntary disclosures, no. My argument is that it was a good thing that the Commission adopted a policy on voluntary disclosures, offering 25 percent and 75 percent off for a voluntary disclosure, but that there is one more step that has to be taken to make that work, which is that one has to understand what the starting dollar figure is.

I think when you put those two together, that you would see -- I'm not saying everybody is going to self-disclose, but I think you will see an increase in self-disclosures. I think that's the reason that other agencies have done this. This is not a totally abstract argument. We can look at the experience of other federal agencies. You can talk to those agencies and find out what their experience has been.

I think what they will tell you is that they have seen an increase, for example, at EPA and some of these other agencies, in voluntary self-disclosures where the regulated community both understands that they will get credit for the self-disclosure and understands what the starting point is for the penalty calculation.

MS. DUNCAN: Thank you, that's helpful. With respect to other agencies, have you found agencies that are closely similarly situated to this agency that have had the experience of publicizing civil penalty formulas?

MR. KELNER: I don't think, and I'd be interested in your view, but I don't think there is something materially different about the FEC from other agencies in this context, in the context of what drives decisions about voluntary self-disclosures. I think what drives those decisions pretty much comes down to what risk do we face if we don't self-disclose? What benefits do we gain if we do self-disclose?

Again, I'm talking about a context where you don't have a legal obligation to self-disclose. That analysis I don't personally think is going to vary greatly from agency to agency, so in that respect, I don't think any of these agencies that I cite in my written testimony are materially different from this one.

Obviously there are many respects in which EPA is different from the FEC, but none that I think are material to this topic.

MS. DUNCAN: Thank you.

CHAIRMAN WALTHER: If we were to publish our civil penalties, would you suggest we do it in a range and then mention that there are factors that may adjust within the range, or how would you suggest we approach the just difficult thing that we have not been able to do over years?

MR. KELNER: Right. It's not easy, and I understand that. The way other agencies have done it typically is to identify different kinds of violations, sort of put them in buckets and then say, if you're in this bucket, here are the four factors that we will consider and here's a worksheet that actually -- some agencies actually have a worksheet that sort of gives you a diagram of how this works, and we'll give you a rating under each of these factors.

Yeah, there might be a range. It might not be a fixed starting figure. There's also usually an out. Usually the policy says this is how we'll do it unless in extraordinary cases we decide not to do it this way. So it's not sort of permanently binding, but over time, people get experience with whether the agency's actually following the policy and usually they are followed.

CHAIRMAN WALTHER: We got criticized awhile back because we took into consideration the fact that somebody couldn't pay, a group with financial hardship or the party, and the records show that an adjustment was made and the factors taken into consideration. Somebody felt it was unfair that -- of course have a higher penalty just because it had a -- do you have any thoughts on how we could approach issues like inability to pay a fine if we did have a schedule like that?

MR. KELNER: I think it's entirely appropriate to consider ability to pay and either not to impose a fine or to impose a lesser fine where there is no ability to pay. I think that's a common practice.

I know that some of the other federal agencies that have published their penalty guidelines have specifically included that factor. Certainly in the federal courts in the criminal cases under the sentencing guidelines, that is taken, accounted. I don't think it's necessarily appropriate to impose a huge financial fine on somebody's who's destitute, for example, an individual.

There are other ways of imposing penalties. So I think it's appropriate to consider and I think there are other examples of agencies that have considered it.

CHAIRMAN WALTHER: Mr. Gold, Mr. Svoboda, on those issues?

MR. GOLD: I believe you ought to publish something about the penalty standards. I also think that you ought to publish the -- what are the thresholds for your audits, what goes into the decision to audit a particular committee.

The statute does not require that to be confidential. I think that would be very helpful. In my experience, committees try to comply with the statute and the most frustrating thing is when they are suddenly confronted with something, they didn't realize the gravity of it, or they're confronted with a confusing letter, as I described in our RFAI.

I think also there's a -- it's not as if the Commission knows all this and everybody outside the Commission doesn't know it. At this point, you have a number of ex-Commissioners, ex-General Counsel, ex-staff, who do know these things and are now representing parties. They may not be disclosing that, but they do have the benefit of that knowledge.

It seems to me that that has not caused the system to crash. There are a lot of organizations that are not represented before the Commission or represented before the Commission by counsel who are not doing this as a substantial part of their practice and it seems to me that information would be -- ought to be fairly communicated to the public.

I think the net effect of it would be to bolster compliance, I really do.

CHAIRMAN WALTHER: And respect for the system. Mr. Svoboda?

MR. SVOBODA: Commissioner, I think to go to your point on whether you can take into consideration the means of the respondent, I mean, there actually is case law under the FECA that talks about that. It's the *Furgatch* case and the four factors that the court is supposed to consider when imposing penalties.

And that as a practitioner is one of the oddities I guess I find about the administrative process of trying to negotiate conciliation and trying to negotiate penalties, which is what is from time to time the seeming disconnect between what may be obtainable in a court applying those factors and what is being presented in conciliation.

And certainly, understanding the metric that is generating that number out of the Commission in the first instance is helpful to us as practitioners to understand exactly where it's coming from and what the basis is. Because there are times I think where penalties are discussed in the administrative process that probably can't be gotten in civil litigation or would have a difficult chance of being gotten.

CHAIRMAN WALTHER: This wasn't addressed in your comments, but in terms of being able to deal with situations and -- percentage wise, but it's not uncommon to find that committees have no money after elections and then our work is done, but there really is no basis to have a deterrent factor because the committee's gone and the treasurer may not still be around.

But do you think there is any merit to strengthening the liability or responsibility of those who are handling funds for the campaign and are responsible for the way that they are dealt with so that it touches people in a more personal responsibility perspective?

MR. SVOBODA: That strikes me actually as a sort of question that Congress has considered and probably ought to consider, to be real honest, because you have a statute that prescribes who respondents are and limits them to those being penalized and you have the Commission's policy statement on treasurer liability, which actually I think I and most of us in the community have found to work actually fairly well in terms of delineating when you have an individual or genuine personal risk and when you have an individual who doesn't.

I worked as a legislative aide on campaign finance issues about 10, 11 years

back and there were -- when McCain-Feingold was in its embryonic stages there were discussions about that, do you consider making campaign managers liable? Do you consider making candidates liable?

And I can tell you, that's the third rail of legislative and enforcement decision in this area of law and it strikes me as the classic sort of decision that Congress probably ought to consider.

CHAIRMAN WALTHER: Any further comments from the other panelists on the issue?

MR. GOLD: I agree it's a legislative issue.

CHAIRMAN WALTHER: We have three few minutes left if anybody has any further comments, we can sure do that. We started a few minutes late, so we're a little later than what we planned, but if there's nothing more, then we conclude this panel and also the meeting.

But thank you very much for being here. It was very educational for us and very, very helpful. We appreciate it.

And don't forget that there is some time left to make written comments to follow-up. Thanks very much.

I'd like to ask you if there are any matters that we need to -- there are no such matters. Okay, the meeting is adjourned. I take that back. I think the meeting is recessed until tomorrow morning at 10:00.

(Whereupon, at 5:03 p.m., the meeting was continued.)

CERTIFICATE OF REPORTER

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

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JENNIFER O'CONNOR

Thursday, January 15, 2009

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

COMMISSION MEMBERS:
STEVEN T. WALTHER, Chairman
MATTHEW S. PETERSEN, Vice Chairman
CYNTHIA L. BAUERLY, Commissioner
CAROLINE C. HUNTER, Commissioner
ELLEN L. WEINTRAUB, Commissioner
DONALD F. McGAHN II, Commissioner

ALSO PRESENT:
THOMASENIA P. DUNCAN, General Counsel
ANN MARIE TERZAKEN, Associate General Counsel for Enforcement
JOHN GIBSON, Deputy Staff Director, Chief Compliance Officer
ALEC PALMER, Deputy Staff Director, Chief Intelligence Officer

WITNESSES:
REID ALAN COX, Center for Competitive Politics
CLETA MITCHELL, Foley & Lardner, LLP
CLAY JOHNSON, The Sunlight Foundation

P R O C E E D I N G S

CHAIRMAN WALTHER: Good morning, everyone. We are now convening again the special session of the Federal Election Commission for Thursday, January 15. Today is a continuation of the hearing we began yesterday on the Commission's policies, practices and procedures.

I am Steve Walther, Chairman of the Commission, just to remind you of that. On the left is Matt Petersen, our Vice Chairman. To my right is Cynthia Bauerly, and to her right is Ellen Weintraub, the Chair of the 2003 hearing on evaluation of the policies and procedures. Second on the left is Commissioner Caroline Hunter, and after that left is former chairman, Don McGahn. On the far left we have John Gibson, who is sitting in for our acting staff director and head of compliance. To the far right is Ann Marie Terzaken and then Tommy Duncan, both from the Office of General Counsel.

Thank you very much for being here today, we really do appreciate it. We are looking forward to ways that we can improve the agency and its operations. We received a number of very helpful comments yesterday. We had a very full day, and we appreciate it very much. I am sorry that Whitney Wyatt Burns is not here, but she announced that she will be unable to attend because she is feeling ill today.

For those of you who weren't here yesterday, we reopened the time for written comment until Wednesday, February 18, 2009, in order to allow comments and have the benefit of the written comments received so far, and the opportunity to review the transcript of these proceedings, which should be on the Web site by January 30.

Thank you very much. We are going to hear from Alan Cox and Cleta Mitchell. We will begin with Mr. Cox.

MR. COX: Good morning. I am Reid Cox, legal director of the Center for Competitive Politics. I wish to applaud the Commission for not only engaging in this introspective project but also for making a number of improvements to its policies, practices and procedures over the last five-plus years.

There can be no doubt that the Commission was listening to the comments submitted and the remarks made when it last invited discussion of its enforcement procedures in 2003. The success of those changes since that hearing have demonstrated that additional transparency in notice and process can benefit both the Commission and those subject to its jurisdiction. However, there remain many more improvements that can be made, and I welcome the opportunity to be part of the discussion here today.

As I know you understand, the Commission plays a unique role among agencies because it regulates conduct that is not only constitutionally protected but is at the heart and forms the essential foundation of a healthy democracy, and that is political speech and association.

What is more, the Commission is often the first and last word with respect to just how fully and freely members of the regulated community can exercise their

political rights, because in the vast majority of cases, the Commission is the arbiter that ever speaks on whether someone has violated federal election law.

Here I note, and have I noted in my comments, that when Brad Smith, former Chairman of the Commission, testified before Congress in 2003, he used statistics to show that over 95 percent of cases, ninety-six percent of cases never make it past the Federal Election Commission in enforcement matters, so essentially you are going to determine the political rights of these organizations that are subject to your jurisdiction.

Thus, in making the determination of what federal election law requires, and when you do this, regardless of whether it is through enforcement, audit, reporting or advisory opinion processes, I think it is really important that both the regulated community's interest and the Commission's interest that all of the facts, arguments and law at issue be completely aired. I think it is especially important, in fact, probably maybe of ultimate importance to the Commission that it is completely aired, so that you are making your decisions with your eyes wide open.

So, that is why I really continue to believe that more transparency, more notice and more process for the regulated community doesn't just benefit the public, but benefits the Commission.

I have provided probably pretty extensive comments on what my views are to the Commission in my written comments, and I just want to highlight four areas where I think the Commission could make significant strides in providing additional notice, transparency and process.

First, I think one of the big successes that came out of the 2003 hearings was the hearing process that has been added or if possible at the probable cause stage of the enforcement proceedings. I believe that a direct contact with the Commission in its processes is important so that the Commission understands what position respondents are in and what their arguments are, not only in the enforcement process but also in the audit processes and the advisory opinion process, so my biggest suggestion would be that you expand the hearings into the audit process and into the advisory opinion process and even experiment with hearings at the reason-to-believe stage and in connection with motions in the enforcement process.

I think this does a couple of things. One, in the enforcement process, it allows respondents to make sure they get their views before the Commission on facts and law unfiltered by the Office of General Counsel, so that they really not only feel like they have the opportunity to be heard but understand that what they feel are their best arguments are really reaching the Commission's ears, and that way the Commission can really fully evaluate what the arguments are on the merits and making decisions as to whether to go forward in enforcement proceedings.

In the audit and advisory opinion processes, I think the same things are true, and as we mentioned in other parts of our comments, I think in the audit process, there has been a blurring of the line of enforcement and audit, and so this is yet another reason it would be appropriate to have a hearing on the audit processes especially when many findings state violations or say that there are purported violations of the law.

In the advisory opinion process, I think you probably more than me certainly, but there are any number of times when the person who submitted the advisory opinion request is sitting in the audience and the Commission is having a discussion and there is an obvious question that needs to be answered and it can't be answered because the person who has all of the factual information is sitting in the audience and is not being able to testify.

Second, with regard to the enforcement process, I think it is important in following up on the Commission's change after 2003 in allowing deponents access to their depositions, that at the probable cause stage when the investigation has ended, respondents need to be able to have access to all documents produced and all depositions taken as a part of the enforcement process.

This is the only way they can mount a full and fair defense, and in fact it is the only way the Commission can understand -- and this is why it is so important for the Commission going forward -- whether they should move forward with the enforcement proceeding at the probable cause stage.

I know that the Commission believes that there are obviously timeliness concerns sometimes with additional procedure. I actually think more often than not that that is a false dichotomy because in getting more information there will be efficiencies picked up in the enforcement process, but I think this is one of the reasons that access should be given at the end of the investigation and before the start of the probable-cause briefing, because if that access is given before the Office of General Counsel files its probable cause brief, that is time that can be used by the respondent in familiarizing itself with those documents and incorporating them into their response.

Third, I think the Commission needs to continue to be more rigorous, and admittedly, there have been a lot of improvements here since 2003, but more rigorous in reviewing and processing complaints. I think this was one of the comments taken up yesterday with Jan Baran at the first panel, but I really do think the four criteria, I think they are at 111.4(d), the Commission really needs to look at and return complaints to complainants when -- basically as I say in my comments, not only does the complaint need to state a claim, it needs to support the claim. So it is really more rigorous than what a 12(b)(6) standard is in civil procedure. There needs to be more there.

I think this would help on the efficiency end. One of the problems that you have on an efficiency end is people are using the complaint process as means to political ends either by filing frivolous complaints or even if they are not frivolous complaints, filing complaints that would not necessarily be filed but for wanting to get into the media and to attack their opponents. If the Commission reviews complaints more rigorously and does not allow that to happen, it will take away that incentive.

Also with regard to the complaint process, even if a complaint can meet the standard to state a claim and support the claim, if the response shows that the complaint should not move forward, the Commission needs to be more rigorous in

voting to find no reason to believe and dismissing the complaint.

Finally, I think the Commission needs to seriously consider confidentiality in the enforcement process and, quite frankly, also in the audit process. This again goes back to the idea of complaints being politically driven, and the idea here is that I think the Commission should really send a signal to complainants that under 437g(a)(12), they are essentially violating that section by publicly and --releasing their complaints publicly because, as you know, when you submit a complaint it triggers a notification from the Commission to the respondent, and is what that the confidentiality section says, and so I don't really understand why the Commission should not make it clear that complainants also should not be violating the confidentiality that should be ensured to respondents.

I am sure we have a lot to discuss here. Let me just leave it at that.

CHAIRMAN WALTHER: Thank you very much, Mr. Cox.
Ms. Mitchell?

MS. MITCHELL: Thank you, Mr. Chairman, members of the Commission. It is hard to imagine that it has been six years since we had a hearing on this previously. I remember it well, with Chairman Weintraub, and I was just thinking that if it were giving birth to a child, that child would have started school this year, but I do want to take a moment to commend the Commission -- I did in my written testimony give the Commission grades -- I went back and looked at my earlier comments and I graded the Commission, and essentially I want to say this:

I think the Commission has made yeoman strides in addressing some of the real serious, philosophical opposition to procedural due process that I thought existed at the time. I think the Office of General Counsel, with some very few but notable exceptions, the staff works very hard to try to be accommodating within the parameters, which I will talk about momentarily, but I do want to comment and commend the Commission on the progress that has been done.

There is much work to be done. Without going through all of my comments, I will just highlight a few things. I will supplement my comments, so thank you for extending the deadline. I just ran out of energy to talk about software, Web site, Web searches, so I will send you some additional comments on those things.

I want to turn my attention to four areas. The first is to reiterate that this agency is consumed with, dedicated to, and premised upon process, so talking about the procedures and practices is fundamental to this agency because this agency is responsible for oversight of what I call the rules of political engagement.

I look around the room and I see people who have been practitioners. You know that the whole issue of raising and spending money and engaging in political speech, whether it is with a campaign, an individual donor, an organization, an issue group, it all has to do with the process of being engaged in the political process, and so it is very important that the policies and practices of the Commission are attentive to the very fundamental notion that we are all about process here. The process is the substance.

So, with that, I reiterate what I said in 2003, which is that fundamental due process, notice and hearing, is vital to the proper functioning of this agency.

In that regard, I want to reiterate what I said in 2003 and what I think would solve a great many of the issues that practitioners face, and that is publication of the procedures manual, the black book that we hear about, but only when you go to work for the Commission, somehow, do you have access and are privileged to see this star chamber document. Maybe it is one of those things that once published, people will say there is not much to this after all.

It is the kind of thing that in engaging with the Office of General Counsel -- I don't know whether these procedures are also applicable to other divisions of the agency because actually I have never seen the enforcement manual, so I don't know, but I will say this, that it is frustrating to deal with the Office of General Counsel and to be told we can't do that because our manual, our procedures don't let us do that.

Well, it would be nice to know what do your procedures let you do? In terms of conciliation agreements, for example. You don't have any idea what the penalty schedule is, you don't have any idea how it is arrived at, you don't have any idea -- I love it when OGC says, well, you can't say that in your contention paragraph, and I say, well, the agency gets to say what its contentions are. Respondents should be able to say here is what we contend happened. We disagree with your analysis or your statements about what happened.

Then we are told that the agency -- we have language that we are required to use. We can't let you say that. We can't let you make that contention. My favorite then is to say, even after we have agreed on a dollar figure, arrived at in some Ouija Board manner, but if you do want say that, it will cost you. So know you will pay for sentences, pay for words if you want to say that. Well, we will have to go back and see if we can pay more, maybe we can say that. I find that a little objectionable.

The thing that I think is important, all of this, is to publish the enforcement manual so that we will know there is not this secret process somehow that exists internally and only if you have somehow worked for the agency at some period in your career do you have any idea what it is. I don't think that is fair. It is not due process. It doesn't guarantee due process to the entire regulated community and the practitioners.

In that regard, I have included in my testimony on page 4, I have copied from the Commission's Web site the chart showing the time lines of an enforcement proceeding, and you will note, as I did, in highlighting where there are several questions that the Commission has propounded with regard to time limits and response times and extension of deadlines, and the blanks that exist where the ball is in the Commission's court, so you have fifteen days to file a response to a complaint, and then for reason to believe findings and investigations, it is blank.

One of the single most aggravating things about dealing with the agency is not to have heard a word for months or years and to get a letter saying, we want you to respond, usually about two weeks before an election several cycles later, and being told you have to respond within 15 days, and we might give you an

extension. It is preposterous to say that somehow the burden of timeliness rests on the respondents.

So I would argue that, at least, respondents ought to be given some percentage of the time, if not an equivalent amount of time, that the Commission and the Office of General Counsel has had to do whatever it has done, particularly with respect to filing a brief.

I concur with the testimony and the comments of my colleagues yesterday and Mr. Cox as well, saying we should be entitled as respondents to copies of the documents on which the OGC is relying for its findings, whether it is probable cause or RTB, but it doesn't do you a whole lot of good if you are supposed to file a response within a very compressed time period when the agency has had months if not years to develop whatever it is you have just gotten in the mail.

I think that is a really serious issue in terms of timeliness. I don't think you can look at the timeliness issue and only look at extensions in times and deadlines for respondents. I think there must be some equivalent courtesies, at least, given to respondents, and the Commission is under no such time pressures.

CHAIRMAN WALTHER: I note that you have four different areas. I didn't write down one, two, three, four, but the due process concept, the enforcement manual --

MS. MITCHELL: Time lines, and then I will come to my last one.

And that is, I would urge the Commission to enter into and publish a memorandum of understanding with the Department of Justice. I was glad that Mr. Donsanto submitted comments to this effect. I have many concerns that the Commission has failed to enter into a memorandum of understanding. I am not sure why that has been the case since BCRA was enacted, but I think that it matters to know when something is or is not going to be referred to the Department of Justice.

I have had at least one experience where there was an embezzlement. There was -- as would be appropriate, the committee referred to it local enforcement, they referred it to main Justice, and we provided all of the information to the Department of Justice eventually for the DOJ case which they prosecuted, and the perpetrator -- we had been through the FBI investigation.

The defendant, not respondent, defendant had been investigated, had pled guilty and was in jail before the Commission -- before we got our first word from the Commission, and frankly, I will always believe, based on conversations, that part of the reason that the committee was subject to what I call double jeopardy because then the committee was punished because of the criminal acts that had been perpetrated upon it, and in no small part we queried about why it was that the committee went to the Department of Justice before coming to the Commission.

Now, I don't know whether there are personality problems or -- I cannot understand why the Commission has not entered into a memorandum of understanding, but there needs to be a delineation of responsibility. It doesn't mean that both agencies don't share responsibility in some regards, but frankly, I think this is a really important element with the criminalization of activities under BCRA.

With that, I will be submitting additional comments on some of the other areas. The Commission cast a very broad net for this hearing, and I appreciate very much the opportunity to be here.

CHAIRMAN WALTHER: We have a Memorandum of Understanding. It was entered into quite some time ago. It is on the Web site, but we do have a desire to put a little meat on the bones in terms of the process ourselves, and so hopefully we will be able to make some headway with that.

Yesterday I jumped over people, but if anybody is ready right now to ask questions, I will call first. If not, I will call on former Chairman McGahn and ask if he has any questions of the witnesses, and if he doesn't --

COMMISSIONER MCGAHN: I do, but it is a multiple-part question. Just demonstrating my thinking ability. Rarely do I have the answers though.

Mr. Cox, you said that the line between audit and subsequent enforcement proceedings has blurred. Is it your view from the outside that audit is a form of enforcement?

MR. COX: I think that is probably right. Certainly when final audit reports are stating purported violations of the law and you see referrals to the Office of General Counsel on the Web site, I think that is certainly enforcement. I think even probably the audit process, the way it functions, essentially functions like an investigation leading up to a reason-to-believe finding anyway so, I think the quick answer to that is yes.

COMMISSIONER MCGAHN: You also said that there is a false dichotomy between efficiency and I would say due process, but you didn't use that word. That is something I agree with, in that I find since I have been here, the more material I can read, the better I know what is going on, and that is from both sides, but could you elaborate on your views for that? I am only one person, but I found it curious that you had the same point.

MR. COX: I think from a very basic standpoint, the Commission is the decision maker, not the Office of General Counsel. The Commission is the decision maker. So it is important that there be contact directly in the enforcement process from respondents or for that matter in the audit process, from those being audited with the Commission itself and not that their positions be filtered always through the Office of General Counsel.

That is a very basic proposition of process that is not always adhered to here, so basically the outside regulated community often has to rely upon the Office of General Counsel, who has their own interests, quite frankly, and often adversarial interest to them, in making sure their positions are represented before the Commission, who is the decision maker, and I would again emphasize here as I did in my opening comments and in my written comments, it is often the only decision that the regulated community ever received on whether they violated the law or not. I think that is very basic.

The other reason I think there is a false dichotomy between process and timeliness or efficiency is that I think what the Commission will find, I am hoping, is that if they offer more process and more direct contact, and by receiving more

information, they will be able to move the enforcement process or the audit process along because the issues will be clearer at earlier points in the proceedings, and they can then make a determination, thus terminating, whether it is an investigation or making a decision to move forward to the next part of the process, without having to have months and months and months of further investigation that may be totally unwarranted, or maybe unnecessary.

COMMISSIONER MCGAHN: Ms. Mitchell, how are you?

MS. MITCHELL: Fine, thank you, Mr. McGahn.

COMMISSIONER MCGAHN: In your comments you brought up ADR, and you indicated you think that maybe respondents should be able to ask for ADR, and that is not the policy now. Why is that something that we should consider? And then, (2), if we consider it in a way that is consistent with your suggestion, what would be the criteria, if you know what the criteria would be, what kind of cases, simply dollar amount, or is it more the type of legal issues, reporting issues, any thoughts on what should go there?

MS. MITCHELL: Well, I don't want to foreclose the possibility of other criteria, but I do think that a respondent -- look, there is a process penalty. If somebody files a complaint against you which can be completely frivolous, but if it gets past the RTB stage, you are done.

As I said in my comments, I would be very curious to see some statistics -- you did them, very good -- about after RTB, how many things are ultimately -- maybe I am not privy to that, but the fact is that there is a process penalty, there is an expense, there is a time consumption, and so if there are respondents who are willing to say at the outset, I will enter into ADR and I will pay an amount to be done with this, then I don't know why that wouldn't be something that people could offer to do.

I do think that *sua sponte* kinds of issues should be available to people who admit and come in and agree they made a mistake. I think one of the egregious problems with the agency is that, as I said before, no good deed goes unpunished. I have quit advising clients to file amendments to reports because it is like points on your driver's license. Is there a way to resolve this without subjecting yourself to that?

So if there were a way for people to know, here is the process, here is what you are subjected to, again, coming back to publication of the enforcement procedures and the penalty procedures, the formula, all of those things, the more transparency, I do believe and concur with other commenters that you would have more voluntary compliance, and asking for ADR should be a part of that, that if you come in and voluntarily say, we made a mistake, and we would like to try to resolve this as quickly and painlessly as possible -- but what happens is you file an amendment, you could be subject to an enforcement action. You report a violation that was unknowing, you are in for five years of misery.

COMMISSIONER MCGAHN: There is a concern. You have reporting issues. Is it better to deal with the campaign early in some sort of corrective action, a la ADR, or is it better to refer to full enforcement? It seems it is better to get the campaigns in early rather than later.

If what you are saying is folks are so afraid to do amendments they are willing to take their chances just rolling them into the next report, whether it is reported data or is something that actually can, if you really know what you are doing, have an effect on subsequent reports, you are saying it is to the point where people are afraid to file amendments. That is not good.

MS. MITCHELL: That is not good, but that is what the system is. Even the IRS lets you file amendments, for crying out loud, and you don't always have the information, or you get the bank statement and there is something that you didn't know. Well, there is this presumption that you are supposed to know everything when you file the report. There is no opportunity for extensions until you get the additional information. It used to be I would always say file the report, we will file an amendment later. I don't say that any more because I think it is malpractice.

I think the ability to step back -- and I would urge the Commission to really think big picture, and instead of tweaking this or that, maybe think through from start to finish the interactions of the regulated community and where can you provide more transparency, more process, more opportunity for voluntary compliance.

I reiterate something I said six years ago: I never have a client that comes in and says, how can we break the law and get away with it? They say, I want to participate in the process. How do we do it within the confines of the law? I don't want to go to jail. That is what they always say. There is no intent -- maybe there is with some people, but certainly not in my experience.

So, the ways we can make this agency, which is all about process, more transparent and more palatable, I am not saying make it easier, but voluntary compliance, what are the ways we can encourage and incentivize people, if they make a mistake, admit it, come in, have the opportunity to correct that? Again, transparency should be the object here.

CHAIRMAN WALTHER: Thank you very much. I am going to ask Ms. Weintraub for questions.

COMMISSIONER WEINTRAUB: I am so glad I don't have a child entering kindergarten as a result of that hearing six years ago.

I want to thank Mr. Cox for his incredibly detailed and thoughtful comments, which were among the more thorough comments we received, and I suspect you had conversations with people who used to be in this building because you seem to be very well informed, and I appreciate that.

I think one of the lessons of this hearing is that we do need to have more transparency because there are so many misunderstandings out there, and people who had experience with us many years ago and had a bad experience still carry that around with them.

I would 100 percent agree that if we had a case that was so stale that it was sitting around two years after the complaint was filed and nothing happened, then we should dismiss it, but that has not ever happened in my tenure, and I don't think it has happened this century. Maybe in the bad old days once upon a time, I don't know.

MS. MITCHELL: I have one. I will move to dismiss it tomorrow.

COMMISSIONER WEINTRAUB: I would be interested in hearing about the details because it is my

understanding we have dramatically reduced the time on prosecuting cases. We used to have a policy on stale cases that we would kick them after 18 months.

MS. MITCHELL: We are way past that.

COMMISSIONER WEINTRAUB: I would be interested to hear about that. This is on our Web site, but I will be happy to hand it to you, data on how often we dismiss or make no reason to believe or take no further action after the reason to believe, and it is data going back to 2003.

I think there is only a couple of years where there weren't -- where that didn't happen more often than not, and in some cases it is dramatically more often. In 2007 we dismissed, had no reason to believe or took no further action in ninety-eight cases as opposed to sixty-seven cases that we actually had a conciliation agreement. It happens all the time.

I think that a lot of the people who come and testify here, the really savvy inside-Washington lawyers who are, frankly, expensive are consulted most often on the complicated cases for the big players, the ones that are less likely to just go away, because they are bigger and more complicated and they are more savvy players, so you may have a misperception based on the fact that you have more complicated cases because the people with the easier problems are not going to consult you or some of the fine practitioners we had here yesterday, so I think sometimes people have the wrong perception about that.

Many, many people have talked about wanting to get unfiltered access to the Commission. I want to assure you, and I assured people yesterday, that there is not a document in this building that we don't have access to. Commissioners frequently start with the respondent's answer or the respondent's brief because it is a good way to figure out what are the key issues in the case. We have those documents, we read those documents. I think that we might want to consider amending our practices so that they are literally filed with us, so that people will know they come into our office. They do, but apparently people don't know about it.

I think the hearings have been a big success. I take some pride in that because I pushed the policy, and it was drafted in my office and I am told that I can say that, we have had 10 requests, we accepted six, and we have had six of these hearings.

I will say that people don't always help themselves at these hearings. Not everybody has come in and really persuaded people that, wow, they were on the right side and we were wrong. So I would advise anybody in the regulated community to think about whether they will actually advance their cause in these hearings, but they have been helpful and interesting and informative, and I am certainly open to expanding them to other settings.

Like I said, there are a lot of misunderstandings out there. Some people seem to think that we keep the penalties so that it enhances our budget. It doesn't, we don't keep any of the penalties. We don't do random audits, haven't since 1979, I think. We can't fight statutes. I know there is a lot of misunderstanding out there, and that is why we need more transparency. They are a fair issue to raise, and I think we need to address that.

I am really intrigued, Mr. Cox, by your suggestion that we should somehow enforce the confidentiality provisions against the complainants. How would we do that? Do you want us to sue them?

MR. COX: Well, if you look at the statute --

COMMISSIONER WEINTRAUB: I know what you are saying. Practically speaking, getting people to not announce they have just filed a complaint --

MR. COX: The first step you could take is when someone files a complaint, you could send a letter or make it clear on the Web site, that the complaint should not be made public and you can state the statute, but one of the points here is that there is a lot of concern about confidentiality that was mentioned in questions through the notice, but clearly the very first place where confidentiality for respondents is given up is that most -- many times complainants are politically motivated, and before they send it out to you, they run to the media.

COMMISSIONER WEINTRAUB: Before they send it to us -- I think that is all we would accomplish. People would say, I am about to file this complaint with the FEC. If we said you can't say anything when you file it, you wouldn't have that press conference. I agree that many, many, many of the complaints are politically motivated. Those are the people who have incentive to be watching the other guy, but a number of them have validity anyway. It is true they are politically motivated, but sometimes they are right.

MR. COX: It is a fine line and in the comments we mention that they have a First Amendment right to obviously discuss the issue, but if the complaint process is supposed to be confidential, and if the Commission is very concerned about that, I think it does need to look at whether it shouldn't do something or at least tackle the issue of complainants essentially making public that the Commission is going to notify respondents, like the statute says, by making the complaint process public.

CHAIRMAN WALTHER: I am going to ask. We are running short on time.

COMMISSIONER WEINTRAUB: The chart in our brochure with the time lines, that is not just a statutory time line; that is a summary of what the statute says, and the statute is silent in some areas, and that is why the chart is silent. It is not a conspiracy to hide information.

MS. MITCHELL: I understand that, but I am saying that there needs to be some recognition that this is a hurry up and wait game.

COMMISSIONER WEINTRAUB: I get that.

MS. MITCHELL: And it is very distressing.

CHAIRMAN WALTHER: We will come back to these after we get through all of the commissioners. Commissioner Hunter?

MS. HUNTER: I have so many questions I don't know where to start, but I will bring up one or two quick issues.

One is, Ms. Mitchell, you mentioned you are telling people not to amend. There has to be a better way to deal with this, to balance -- the OGC would

say we have to have some kind of penalty in order for people to realize there is a consequence for not filing something, but at the same time it makes no sense for somebody not to be able to say, I made an honest mistake, I am putting it on the public record.

I am wondering if you could think more, maybe submit comments later, about what is the best way around that. Maybe it is ADR, I don't know, but I think it is fair to say campaigns don't want to admit a mistake. Nobody wants to even say my original report was filed inaccurately, and so, therefore, they have no incentive to do that. Even if they have to amend the report and file something that says, I made a mistake, that seems to be at least a step forward, to say we originally messed up. They are already admitting that they made a violation when they admit it, so why go through the whole big process of punishment and conciliation when they admitted up front that they failed to report something?

MS. MITCHELL: I am not sure that it is admitting a violation if you admit the report to more accurately reflect the information you have now that you may not have had at the time. I think that the attitude is and the conclusion is, and I have heard it many times, that that act of amendment is admitting a violation, and I think there needs to be, look, I don't know what the point schedule is for generating an audit based on how many amendments you file. That is a secret. I don't know. We can guess, but I don't know at what dollar level it generates an audit. I don't know. I am guessing. I am guessing.

But what I do know from experience is that at a certain point, it is at a certain dollar level it is deemed a serious violation that goes to enforcement or so many amendments triggers an audit somehow. That is a secret from my practitioner perspective.

I think that transparency and making that public and letting people can know so they can make a judgment and know -- and if you do make a mistake, if you do find -- look, in my experience campaigns, and maybe this is different with other people's clients, but usually whoever is assigned to do the reporting is not somebody who is basically making the big political decisions. They are trying to do the best that they can do. Campaigns devote varying degrees of resources to the whole compliance and reporting arena, and that is usually the prime determinant of what they do.

But even the best, well-oiled campaign makes mistakes. When the presidential campaign of Barack Obama is accepting contributions from O.J. Simpson and Bart Simpson, it tells me that no matter how sophisticated you are, there are going to be mistakes. Is that a violation? I don't know. This is not a good system. This isn't good. That is what I am saying.

CHAIRMAN WALTHER: Should we move on?

MS. HUNTER: Just one more comment. I like your suggestion to look at this from the big picture because often the people that are doing their part of the job, here at the agency, they are doing it the way they are supposed to. But nobody is looking at it from the big picture. I think that is a good suggestion.

CHAIRMAN WALTHER: Commissioner Bauerly?

COMMISSIONER BAUERLY: I would like to ask a couple of questions of Mr. Cox. You had detailed comments about process, and I appreciate that. I share Commissioner Weintraub's concern that there seems to be a concern about what type of information commissioners have access to. There is a gap in understanding, so we need to do a better job of letting the public know, about the fact that we do have access to the legal and factual analysis that the respondents do submit.

There is a lot of discussion about having direct access to the Commission, and if there are additional ways we can do that, if that is through a -- that is important, but I think it is important that we do a better job of letting people know of what we do have access to already.

I would like to talk about, over the last day and this morning we talked about the audit process in particular, and I am wondering if you have thoughts at what point in time -- there seems to be two logical places, the interim report and the final audit report, as to where that hearing might make some sense.

MR. COX: Let me say two things. I think it has to be before the final audit report is published, and I guess the reason I am hesitating a little bit is I think this is also one of the problems of the blurring of the line in the enforcement process and audit process.

One of our main comments with regard to the audit process is that sometimes final audit reports are made public that state purported violations when not all of the enforcement decisions have been made.

Our concern here would be that it seems to us that that should not occur, that the final audit report should not become a finalized public audit document until all the enforcement decisions that need to be made have been made.

That is why I say -- I guess I am a little confused as to -- if we are using the system that is already in place, I think you may even need a hearing after the final audit report if there is still enforcement that is ongoing, but in terms of -- it seems to me that the most important part for the hearing is that in the audit process, that hearing should be at a point at which it can affect the final product, which would have to be before the final audit report occurs.

COMMISSIONER BAUERLY: Ms. Mitchell do you have any thoughts?

MS. MITCHELL: With respect to audits and enforcement?

COMMISSIONER BAUERLY: And particularly the timing of a hearing.

MS. MITCHELL: I think as part of the stepping back and looking at the big picture, the reason the public doesn't understand what it is you have access is to because it is a secret.

COMMISSIONER BAUERLY: It is not a secret. We both just told you what it is. And people yesterday explained it. If it has been a secret until now, it is no longer a secret.

MS. MITCHELL: I have had a number of conversations with OGC and been told, we already considered that argument and rejected it. So you have a sense that you are really submitting your brief to your opposing counsel.

I don't know -- just because you have access to it, I don't know -- do you always read it, do you always read everything? That seems to me to be something that is attended to for every commissioner. You submit it to OGC and

then you wait and you wait, and then the next thing you hear is from OGC, and all of the dealings with the Commission are done by OGC. So if there is a perception that there is a filter between respondents and the Commission, it is because there is. What you have access to and what you do with that is up to you. It is a secret process.

COMMISSIONER BAUERLY: Let's follow your own logic. If you were allowed to submit directly to the secretary's office for direct circulation to the commissioners, you would have to rely on the good faith of the six people sitting before of you that we take our jobs seriously and do that. I am not sure what the difference in that process would be. You still have to trust that we are doing our jobs to the best of our ability.

MS. MITCHELL: Here is a question that I have that I do not know the answer to, and maybe you can enlighten me.

When I submit my brief to the OGC and then it goes to the Commission, does the OGC write any comments about what I write? Does it -- don't you get a memorandum of some kind arguing -- I don't know who gets the last word. Do I get a copy of everything that OGC gives to you?

COMMISSIONER BAUERLY: I do not know what you get a copy of it.

MS. MITCHELL: All I get is the RTB, factual legal analysis and then the probable cause brief. That is all I get. I don't get the documentation. You may get it. I don't get it. I don't get any commentary that OGC makes or any summaries, any memoranda that are provided to you that I don't see. That is why I think that there is this sense that there is a filter, because I think there is, I don't know that because it is a secret, but if you want me not to think that, maybe we should make it public.

COMMISSIONER BAUERLY: You asked a question about whether we see your raw document as you submit it, and we do. There is no character, there is not a cover memo that says this is a good brief or a bad brief. We see the document. You are right, OGC has provided a factual legal analysis. Their view of -- but we do not -- we do not have to rely on OGC to read the documents ourselves.

COMMISSIONER MCGAHN: But there are comments that are prepared that are put on the packet with the counsel's recommendation, which does not go public until the end of the MUR. Once the case is closed, it goes public. To sit up here and say there is not --

COMMISSIONER BAUERLY: I am not saying there is not a factual and legal analysis.

COMMISSIONER MCGAHN: This is the confusion.

COMMISSIONER BAUERLY: Ms. Mitchell asked me if there was a cover memo that characterizes what the respondents thought. There is a factual and legal analysis because they have received it. We have access to the document as it was filed by the respondent.

MS. DUNCAN: If I might try to provide some clarity on this for the public record. As you know, the general counsel's office provides respondents a brief indicating that they are -- we are prepared to recommend to the Commission a finding of probable cause to believe.

After that respondents have an opportunity to submit a brief. That brief goes directly to the Commission without any analysis done by the Office of General Counsel. The Commission is able to consider the brief. The Office of General Counsel considers the brief, and then it writes a recommendation to the Commission as to whether it recommends probable cause to believe. That recommendation takes into account respondent's brief and relies heavily on our initial brief. After the close of the case, that brief is made public as is the rest of the materials in the case. That report to the Commission recommending probable cause or not is made public.

MS. MITCHELL: It just does seem to me that since that is going to be made public, it would seem proper that the other materials of the case ought to be made public to the respondents before it is over.

CHAIRMAN WALTHER: I am going to call on John Gibson who is Director of Compliance to see if he has any questions -- Mr. Vice Chairman, I apologize.

COMMISSIONER PETERSEN: I think I should have taken that opportunity to be skipped in the order.

First of all, I commend both of our witnesses for the fine comments they have prepared and for the useful information contained within them.

I have a question for Mr. Cox. In the section dealing with motions before the Commission, you state and emphasize that -- you recommend that we expand the scope of what motions we will consider, and you say at a minimum a process should be provided for motions to quash subpoenas.

You are not the only witness who submitted comments to the Commission who has emphasized motions to quash subpoenas as being the most important one. I was wondering if you might expand on why you think that one is so vital.

MR. COX: I think one of the problems that we have in the enforcement process is the length to which it goes on, quite frankly. I actually was going to say this -- I think it was when Commissioner Weintraub was talking -- about the timeliness improvements that the Commission has made.

One response that I would make to that is if you are litigating in Federal Court, often Federal Court trial litigation doesn't go on as long as investigations go on in this Commission, even if they are complex investigations, complex cases in Federal Court, for instance in the Eastern District of Virginia where I happen to reside, is on the rocket docket. Even if you have a complex case, it goes through in a year, not two years or five years.

One of the reasons I think the motion to quash subpoenas or, for that matter, any motions involving discovery related to the enforcement process are important is it really hurts efficiency, it seems to me, and one way of dealing with this may be to allow some of those things to happen before the Commission rather than having to go to court.

Now, I guess you can say the response to that could be, well, someone could still go to court, the Commission could determine whatever they wanted and determine they might still be able go to court, but what I am thinking is if you believe that you have been heard by the

Commission and fully aired, that I think a lot of those will not go to court.

Quite frankly, I think there are also cost reasons for doing this. I imagine the cost of having a hearing on quashing or privilege, whatever it is, in discovery and investigations would be much less expensive in front of the Commission than filing an action in Federal Court. I think that is the main reason.

COMMISSIONER PETERSEN: If I can have Ms. Mitchell comment. As one who has represented several respondents in MURs, is this a motion that you support and have you had concerns about the scope of subpoenas that your clients have received in the past?

MS. MITCHELL: Yes, in the past, and there is a way to have a motion docket where you would set aside a certain time each month where there are discovery disputes or privilege issues or those kinds of things where the Commission could perhaps dispense with those on a more expedited basis, but I think stepping back and thinking about, just because the Commission has done it a certain way for a very long time doesn't mean that the Commission needs to continue these things the way it has done all these years.

Thinking in different terms, what are the things we could do to make it more transparent, to expedite, to deal with these procedural things at the Commission level so that we can dispense with some of these issues more expeditiously. I think those are all things that the Commission should undertake to do.

It is trying to deal with that while you have a train moving ninety miles an hour down the track with all of the other things the Commission has to do, but I think this is really important and I would echo Mr. Cox's comments as well as those comments I have read from my colleagues of yesterday.

MR. COX: If I could add one other thing, one of the reasons it is important to have motions dealing with discovery with the Commission is it is yet another opportunity for the Commission as a decision maker in the enforcement process to keep a tab on the cases that are in the enforcement process.

I know the Commission generally grants a broad amount of discretion in the investigation to the Office of General Counsel, but if it is hearing motions to quash subpoenas or to protect privileged documents from respondents, it is yet another time that it will come before the Commission to have a check-in of how this MUR is going.

COMMISSIONER PETERSEN: As part of this motion and other motions, how part is it from your perspective that not only you are able to file a paper with it, but you actually have access to the commissioners to have a direct exchange?

MS. MITCHELL: I just happen to think -- I think that is important, and I think setting aside some days for that kind of practice is an important thing because, again, you have a sense then that there is a neutral arbiter. The most frustrating thing is to think that the decisions are being made by your opposing counsel.

MR. COX: We have seen this exchange today about what the Commission understands it has access to and sees and does review and what the regulated community believes is being seen. I think that only emphasizes the point that, really, there is a kind of a gulf in this hearing that the regulated community understands or believes how they are being heard unfiltered by the Commission, and I think if you can actually create more opportunities so that that gulf is breached by true appearances before the commission, I think that aids everyone.

CHAIRMAN WALTHER: Thank you, Vice Chairman. Sorry I missed you there.

Mr. Gibson.

MR. GIBSON: I don't have any questions, but I do look forward to receiving your comments. I do thank you for your comments. Thank you.

CHAIRMAN WALTHER: I have a question to Mr. Cox. We heard yesterday at some length about almost pretty close to unanimous comment that we should make a public civil fines approach, and then I note that you are not in favor of that, and, of course, it has been that way in the agency for many years and I am tilting toward the publication, but I am very interested to hear both sides of the argument here at this point, and give us your best thinking on that.

MR. COX: I am kind of on the fence. I actually do believe obviously in a lot of transparency. The concern that I have about publishing the civil fines schedule would be that it would end up ratcheting up fines and not allowing the Commission enough discretion when necessary. I want to echo what Cleta had said earlier, and that is that I think my viewpoint of those members of the regulated community as a whole is they are trying to comply with the law and to the best extent they can fully and freely exercise their public rights, and so I don't see -- I understand when there is a violation, there has to be consequences to that, but I don't think that in general there should be heavy handed penalties, so my concern about publishing a civil fine schedule is it would have the effect of firming up or even ratcheting up the penalties being paid across the board by the community, and that is a concern that I have.

So, I think by not publishing it, the Commission is able to exercise discretion based on the facts and circumstances, and my hope is that if my understanding of people trying to comply with the law is correct, that often the Commission is exercising discretion downward rather than upward.

CHAIRMAN WALTHER: One of the reasons given yesterday is if we offer a discount in a certain matter, whether it is *sua sponte*, people don't know where the discount is coming from, so it is maybe not an inducement to get a discount, but you don't know what it is from exactly, so we sense that on behalf of clients there is a frustration on the part of clients that they don't know how we make it up. They want counsel to say this is where they are heading, but we have these factors, so let's take a crack at mitigation.

How do you respond to that issue about convincing someone to look into conciliation without knowing where we have a starting point? Are you on the other side of the fence now?

MR. COX: This was a tough issue for me. My initial read was let's publish everything out there, out in the sun, throw open the doors. My concern is essentially that if you publish whatever the sentencing guidelines are -- you see this in

the criminal law, this is a good analogy -- is that the criticism that happens when judges depart downward from sentencing guidelines is they are going easy on crime, and my concern is, and this is why I am on the fence, my concern is if you depart downward and in my view are having to do so often because people are really not that culpable for violations, then you are in a situation you have to be careful of what you ask for. That is what, I guess, my concern is.

MS. MITCHELL: I think that one of the ways to address that -- I don't disagree with what Mr. Cox is saying. One of the ways to address that is to say the Commission reserves the right to waive or substantially reduce a penalty in the schedule based on the following factors.

One of the factors is we can create the incentives for *sua sponte* reporting. What is the basis for arriving at the amount at issue in the first place, is it through enforcement and audit or is it through filing amendments, is it through self-reporting? I think there are ways the Commission can reserve the right to itself to waive or substantially reduce any of the penalties in the schedule if these certain factors or mitigating circumstances are present, and that encourages people to have mitigating circumstances.

MR. COX: One of the reasons I guess I am on the fence and believe that maybe it is not essential to publish the civil fines penalty schedule is that since you have indexed MURs and made them available on the Web, I think to a certain extent you can discover a range of information about where you are at by doing that. I understand that is more laborious then going to a chart and saying you are at the fifteen to $25,000 level and here you are, but I guess I prefer that because then it takes care of my other concern, which is that you then don't have this. Well, you should have been here and you only got half of that, so the Commission must be soft on election law crime or election law violations.

CHAIRMAN WALTHER: One of the issues that comes up when you consider that is one concern that I have, that you are setting up a situation where you really need an election law expert attorney to help you in a matter because if you don't know the MURs -- I know former Chairman McGahn not too long ago, we couldn't find a MUR, except that he remembered that there was a MUR out there somewhere. That is great if you have people who lived this, but for someone who wants to get some general guidance, if you don't know the MURs or you don't have a binder, you are looking at the penalty amounts as opposed to an issue on 527s or something, the average lawyer is quite handicapped without spending some money.

There seems to me some benefit to a starting point. I welcome your thoughts on that. I made a mistake of calling on Ms. Duncan. I thought she was going to ask other questions. I welcome any thoughts you have on that one point, and then we will move.

MS. DUNCAN: Thank you, Mr. Chairman. Welcome to the panel.

I have one question for Mr. Cox. You are recommending that respondents be given access to all documents produced and all deposition transcripts at the end of the investigations, even before the probable cause briefs are produced.

I ask this question recognizing the unique mission of our agency and the types of sensitive behavior or activities that we regulate, but I also ask it recognizing that there are other civil law enforcement agencies where a large percentage of the matters that come before them are resolved before the adjudicative stage, and in that way those agencies are similar to this agency.

Having said all of that, can you identify any other civil enforcement agencies that provide such liberal access to contents of the investigative file at the investigative stage as opposed to at the adjudicative stage of the resolution of matters?

MR. COX: No, I am not offhand aware of any, but I also wonder, I guess in response to your question, I also wonder whether those other agencies have such a high rate, and I mean an exceptionally high rate, over ninety-five percent, of not going to court. I understand that there is de novo review available in court, but you are essentially the adjudicative stage for everyone, and that is, I guess, my point.

MS. DUNCAN: It sounds like you think it would be worthwhile to look at those agencies if in fact they are analogous, if in fact there is such a high proportion of the matters before them being resolved before the adjudicative stage. You don't have to agree or not agree with that.

Let me ask you one other question about your recommendation here. I think in your written comments you conditioned the access to the investigative materials on not having an objection from the General Counsel, and I just wondered if you could elaborate on that as to what would be appropriate grounds on which the General Counsel might object?

I can think of concerns we would have about sharing that information that have to with confidentiality and diminishing the possibility that witnesses will cooperate, et cetera, but I am wondering what you would have in mind in terms of appropriate considerations.

MR. COX: I think some of those might be appropriate considerations that you could bring before the Commission. I think if there are other -- I know I had said after the investigation is complete, but if it could, for instance, be part of an investigation elsewhere that may not be complete but the investigation at the FEC is complete, that you are aware of, that there is another investigation going on, then maybe there are reasons attached to that, but it seems to me when the FEC has completed its job of investigating, the general rule should be that they should have access to that information to make their defense because this is the only defense they are going to get to make, essentially. I think there could be reasons of confidentiality.

I want to be clear here. When I am saying access to documents produced and testimony provided, I am not saying access to privileged materials that the Commission has developed, or materials that other government agencies have developed. It is literally the fact-based evidence from discovery.

The reason I included a provision if the Office of General Counsel objects, and in fact this is consistent with the policy that you have with regard to providing deponents with their depositions, it seems to me there does need to be an escape valve

if there is a good reason, but I don't believe that that escape valve should be used as a general rule to prevent access to factual information.

There needs to be a really good legal reason for it, or a good procedural reason for it, that there is another investigation ongoing in another agency or that -- I think in the case of MURs that have multiple respondents, you will have the issue of, well, maybe an investigation with regard to one respondent is over but an investigation with regard to another respondent is not, and they are interlinked.

Maybe the appropriate action there then is to postpone the probable cause briefing in the investigation that is completed earlier, and also therefore postpone access to the documents and depositions taken at that point until the MURs can come together at some point so that you are not compromising the investigation in those other MURs.

I think the Commission really needs to seriously consider how important it is for that access to be granted.

CHAIRMAN WALTHER: Thank you. We have seven minutes left.

Any further questions?

Any further comments you would like to make in light of the questions we have posed to you? If not, we will let you off the hook. Thank you very much for the comments and the hard work.

We will recess now for about ten minutes and then we will begin at 11:40.

(Discussion off the record.)

(Brief recess.)

CHAIRMAN WALTHER: We will now reconvene.

We have before us Mr. Clay Johnson from the Sunlight Foundation. He has proffered comments that are more technical in nature on the enforcement process, but upon taking a look at your report, it is very important to us to consider some of the points that you made.

You have the luxury that no one else has had because you are all alone, and we have allocated for this panel an hour and twenty minutes. We had a more structured approach, but I will ask you to give us a short summary of some of the highlights you would like to make, and then we were will open it up for questions and comments.

Bear in mind, none of us are experts in this technological field, so feel free to bring it down to the eighth- grade level.

MR. JOHNSON: Bear in mind also that I am not an expert in the legal field, so bring it down to the eighth-grade level for me when it comes to election law.

CHAIRMAN WALTHER: Please proceed.

MR. JOHNSON: My name is Clay Johnson. I am from the Sunlight Foundation. We are a nonpartisan organization that is dedicated to facilitating ways to make use the Internet to make information about Congress and the federal government more accessible to citizens.

Today I want to talk about two primary issues. First, I want to talk about how the FEC can make adjustments to its data and Web site to further fulfill the FEC's disclosure mandate; and second, I want to talk about ways the FEC itself can be more transparent to the American people.

My first point: Your number 1 priority in fulfilling your mandate to publicly disclose campaign finance information should be to provide high-quality and accurate data to citizens in a way that is comprehensive and understandable.

This involves three things:

1) Ensuring that the data that is being collected is accurate.

2) Publishing the data in a reliable way that is accessible.

3) Making the FEC's Web site itself more user-friendly.

The first point about ensuring that the data that is being collected is accurate can best described as garbage in, garbage out. If you are getting bad data from campaigns, then you are going to publish bad data. As long as the FEC does not enforce strict guidelines on how it receives compliance data, it won't be able to publish reliable and accurate data itself.

Right now the FEC receives filings in what is called a non-standard format that has low versatility. What that means is that when rules change in the FEC, you have to change the file format that campaigns and software vendors send data to you in.

So people who want to see those filings also have to change their stuff, and what that means is -- for instance, right now you have a vendor that we know that has been posting electronic filings erroneously to the FEC for over two years. This can be a problem for people who want to view this data.

What we recommend is a more standardized and more versatile format than the custom file format that the FEC accepts. I am happy to file, I don't know what the language is, but I can send you memos about what that stuff can be at a later time.

Second, and this is probably the most important, the FEC publishes data it receives in official versions after it has been received and gone through some form of internal process at the FEC. This is where the most need for improvement needs to come into play.

Presently there are multiple fields like name and occupation and employer, and the way you publish your data, each field has a certain number of characters that is allowed in that field, and if, say someone's occupation and employer, the length of their title and employer goes beyond the length of that field, that data is then lost. I personally take great offense to this because if you look for me in the FEC's database, it lists me as technology con, instead of technology consultant.

The answer to this is not to simply just increase the width of the fields. The answer is to use more standardized formats for publishing this data, like XML, extensible markup language, and I will give you whatever you want in terms of technical support and knowledge. My brain belongs to you as long as you want it.

COMMISSIONER WEINTRAUB: Give it to him.

MR. JOHNSON: What is happening is that data is getting lost when it is being published, so it is nearly unusable. It is inaccurate and you can't make safe assumptions.

Finally, my third point is making the Web site more user friendly. As we have seen in the last three presidential election cycles, the use of the Internet to make contributions has surged cycle after

cycle and, as such, so has the interest over your Web site and data.

Today the FEC's Web site has to be recognized as the most valuable strategic asset your agency has in fulfilling your disclosure mandate and, as such, that its Web team is more than just providing a support function. Just as attorneys are essential to the FEC's enforcement duties and accountants are critical to the FEC compliance mandate, the FEC's Web staff is instrumental to the core disclosure mission of the agency and must be provided with the skills and authority to make disclosure on its Web site equal to other critical agency functions.

Improving the Web site involves two significant changes. First, a shift in language that starts speaking to citizens and not just to lawyers and accountants. For instance, if I want to search the FEC database, my first option on the Web site right now is to search through candidate and PAC party summaries. Many people don't know what PACs are or what a summary is.

Some language -- the language on the Web site right now is highly specialized, and a recommendation is that you spend some time copywriting with a copywriter to tailor it to a broader audience.

Second, a change in technology to make the Web site itself more useful in spreading the information. For instance, right now if I do a Google search for Clay Johnson, I can take that link and then copy it and paste it in an e-mail or put it on a Web site or something like that. Right now when I search the FEC's Web site, I can't do that. I can't search for Clay Johnson as an individual contributor on FEC.gov and then e-mail that link to someone. I have to e-mail the search form to someone and tell them to type in Clay Johnson.

The second thing is to have what are called APIs, which are ways for other Web sites to query your database and put the information on their pages, so that they can say -- so that I can, say, run a Web site that says I will search for Clay Johnson and have the contributions listed on my Web site in line.

Those are my three big recommendations for you guys for your Web site.

And secondly, on a separate note, as part of the FEC's enforcement and compliance duties, senior staff and FEC commissioners routinely meet with individuals representing candidates, PACs, campaign committees, corporations or other entities that are being investigated or have possible knowledge of alleged campaign finance violations.

To address the appearance -- and I am not saying anything is going on wrong here. To address the appearance of undue influence or corruption, it is Sunlight's suggestion that the Commission should draft regulations that would require Commissioners and certain senior officials to report online within seventy-two hours any significant contact relating to a request for FEC action.

If the FEC finds that it does not have the ability to draft such regulations -- I don't know that you do -- it should design a system of voluntary reporting of significant contacts. In either case, a significant contact is one in which a private party seeks to influence any official actions, including any advisory, regulatory or enforcement action pending before the Commission.

Thank you. I will be happy to answer any questions.

COMMISSIONER WALTHER: Let's start with the commissioners. Commissioner Weintraub.

COMMISSIONER WEINTRAUB: I am completely incapable of engaging with you on the tech stuff.

MR. JOHNSON: That is not true. I am pretty charming. [Laughter.]

COMMISSIONER WEINTRAUB: I hope this will be the beginning of a dialogue between you and Alec Palmer, who is sitting at the table over there, who I am pretty confident is the only person in this room who really understands what you are talking about, and there are probably some staff people out there too. I hope -- I think you have made what sound like perfectly reasonable suggestions to me.

The only thing I really want to ask you about is the statement you said at the end: As part of our enforcement and compliance duties, senior staff and FEC commissioners routinely meet with all of these individuals that we are enforcing the law against.

What is that based on? Because we have what I consider to be pretty stringent ex parte rules that require disclosure of exactly those sorts of contacts, and as a result I think that commissioners try pretty hard to avoid doing that. Do you know something I don't?

MR. JOHNSON: No, no. Please don't take it as, hey, I know you guys are meeting with convicted felons and -- what I am saying is you meet with people about your issues, whether they are investigations or --

COMMISSIONER WEINTRAUB: No, not about investigations. We have rules against that.

MR. JOHNSON: How do you conduct investigations?

COMMISSIONER WEINTRAUB: Our staff attorneys do.

MR. JOHNSON: I see.

COMMISSIONER WEINTRAUB: I certainly would never meet with counsel to a party that had an ongoing investigation to talk about that, and if I did I would have to disclose it under our current rules. I am wondering if you know something I don't know.

MR. JOHNSON: Then you know something that I don't know. I will say that one of the things we say at the Sunlight Foundation is public means online. What that means is it is not okay to say that a document is public or that a schedule is public because it is an in a three-ring binder somewhere in this building any more. Technology has required a shift and I think Americans are demanding a shift in the way they think. If it is public, it has to go online, and you might as well consider it confidential if it is in a document in the basement here.

COMMISSIONER WEINTRAUB: That is a very fair point and I agree with that. Do you have a definition of significant contact? Is that based on a regulation of another agency?

MR. JOHNSON: That is based on what my lobbyist told me to say.

COMMISSIONER WEINTRAUB: You know what people think about lobbyists here in Washington. It sounds like it is drawn from regulatory language. I was wondering if you are suggesting there is some agency that does

this, and we should be modeling ourselves on them?

MR. JOHNSON: No.

COMMISSIONER WEINTRAUB: Okay. That is it.

CHAIRMAN WALTHER: Former Chairman McGahn.

COMMISSIONER MCGAHN: The fact that you looked at our Web site and you didn't understand what our ex parte rules were tells us that they are not prominently displayed on the Web site, which I think is the point you are making, if it is not there, someone who is not an FEC junkie is not going to know, which could raise perception issues, so maybe that should be more prominent on the Web site.

MR. JOHNSON: Sure.

COMMISSIONER MCGAHN: Believe it or not, one of my degrees undergrad was in computer applications, and once upon a time I could actually program in COBOL C, Fortran -- I could actually do all that, and my father convinced me that computers were just a fad and I should go to law school. I made a lot of good life choices, and now here I am. [Laughter.]

I was once quoted by a British academic saying, I don't understand why anyone ever would want to go on the Federal Election Commission [laughter] and something about the fox guarding the hen house, which was of course taken out of context, which actually was submitted as a comment in the hearing five years ago. That is a way of saying I sort of understand some of this, but not really.

The question I have -- I think Alec Palmer has done a great job in the last several years with the Web site compared to what the agency used to be like. The font was smaller than even the footnotes I write, but it seems to me some of the search-engine analogy type stuff is a little tough. Search words like contributions, it will come up, there are no words on contribution. I will type a respondent's name in a case I knew existed and I couldn't find it. I don't really understand how search engines work and what we can and improve that so it may give the public a better sense of what we do here and how to get access to the information.

MR. JOHNSON: It is a tough problem to solve. I used to work for a company called Ask.com or Ask Jeeves as it was known back in the day.

Right now the FEC Web site has several different ways of searching. You can search the FEC's Web site, there is a little box on the top where you can search for anything. You can search for me there. A PDF file of this meeting comes up, and then you can also go and click on search disclosure databases, and there are different methods of searching those databases, so you can search for individual contributors, committee filings and stuff like that.

The way that is done is actually fairly sufficient because you are basically limiting the scope of what things can be searched through, so because of that they are more accurate, the less needles in the haystack -- or the less hay in the haystack, the more needles you are going to find.

The problem is that the underlying data that is coming into the FEC and then the process that the FEC is using to scrub or clean up that data, you are losing data that is valuable, so when you are searching against stuff that the FEC has accidentally deleted or not publishing any more, it is the technology con problem. Who knows whether it is a technology contract or consultant?

It is worse when you have large companies and the company name comes first, so let's say the name of the company is Wal-Mart Stores Inc., and the title of the person is Director of Mid-Atlantic Stores. It is very relevant that this person is Director of the Mid-Atlantic region, but the FEC is only going to publish Director of, or Director "O," because that is the character limit. You run the problem of losing data that doesn't exist.

It is the same for names. People's names will often be truncated. Over twenty percent of occupation and employers' names that the FEC is publishing to date contains missing information, information that has been truncated in some way. That is the thing -- when it comes to search, you won't be able to search against that data because it doesn't exist any more.

COMMISSIONER MCGAHN: That is all I have.

CHAIRMAN WALTHER: Ms. Bauerly.

COMMISSIONER BAUERLY: Thank you, Mr. Chairman, and thank you for sharing your insight with us. I am sure that Mr. Palmer is gratified to hear you call on us to spend as many resources and devote as much attention to this aspect of our mission, what we do with the highly trained lawyers in OGC and the auditors as well. We do have an amazing IT staff, and one of the aspects of our Web site that you complimented us on was the map, one of those easy interfaces for the public to use.

I agree with you that adding plain language to some of the technical legal terms is an important step and perhaps a fairly easy one.

Knowing that given the budget constraints that this agency and the entire federal government is going forward, I wonder if you could prioritize what you think the first step should be in making these improvements, because I assure you that Mr. Palmer has a long list of things he would like us to spend resources on, and I think we all would like to give him as many as possible, but the Congress hasn't seen fit to give us all of the money we would like.

So, help us prioritize if you would, from your perspective, which of these changes that are identifiable would best help the public access this information?

MR. JOHNSON: Sounds like two questions. One is prioritize your list of things, and then two is what is the first step that you think we should take?

The first step you should take is to ask for help, and what that means, right, you don't have a massive budget to hire a zillion-person technology team to solve all your problems, but you do have a community of interested parties that have strong technical advice that are nonpartisan that want to help out, and opening up the process and asking for help, I think you could get a lot of expertise and maybe even some work done inside of the FEC for very little cost.

Two, in terms of the priorities, I think my second point, publishing the data in the most accurate way possible, where all of the data is published accurately and reliably is the most important point I have to make here today, the reason being, one of the organizations we give a grant to is opensecret.org, which takes FEC information and cleans it up and publishes it.

They spend a lot of time on this, but they also consistently, day after day, month after month, year after year get more eyeballs on this data than the FEC does, so one of the things we tell all branches of government is give people access to data in a reliable, secure, accurate way, make that your first point and people will generally get that data in interesting ways in front of people.

Another way you can use to -- and that is crazy, this might be crazy talk for the FEC -- but here in Washington, D.C., the CTO is named Vivek Kundra, and he came in and did something very interesting for the District of Columbia, which is he said, okay, the District of Columbia publishes all this data. The office of the CTO is going to put $50,000 out on the Internet and say whoever can do something interesting with this data wins this money, and actually created a contest for people who competed to do interesting things with it.

The office of the CTO of the District of Columbia then was able to take all of that software that was generated as its own and incorporate it into the dc.gov Web site. That kind of radical thinking might not be up the FEC's alley, but it is a way of opening up the process and getting people's participation.

At the end of the day, I want to express how interested in this particular data set I think the American public is. You see it replicated on Web sites across the Internet, and people really want to get at it. It is a phenomenal service that the FEC provides to the American public to do it, and I do not envy your technology team because they have a difficult and trying job and that is why we want to help.

COMMISSIONER WALTHER: Commissioner Hunter?

MS. HUNTER: You mentioned there was a vendor who is posting incorrect information on the Web site. Could you explain what you mean by that?

MR. JOHNSON: I can. The way that incoming filings work is that software in some form of -- some campaign uses some software to manage its contributions and then file compliance information with the FEC.

If the FEC changes a rule, then sometimes that vendor needs to go back and change their software and how it works in order to post to the Web site -- in order to post information back to the FEC, and sometimes vendors don't do that.

What is interesting is that because of the technology-con problem, most people now look to the unofficial filings that the FEC makes available before they get going through the process where there is a data loss, and then that data itself is actually not reliable because they are in different file formats over the years that require a huge burden on outside organizations in order to parse and reconcile with official FEC information. It is hard work. It is tough.

CHAIRMAN WALTHER: Mr. Vice chairman?

COMMISSIONER PETERSEN: Thank you, Mr. Chairman. My original question was going to be about recommendations that we use XML and -- but we will save that for another time.

You brought up that there are problems with the public linking to our data. In a prior life I worked up on the Hill and there were a number of times where you sent a link to somebody and then they would click on that link and it would say link expired, which would always be aggravating, so when you mentioned that I did clearly understand because I remember the frustration I had myself.

What needs to be done, how simple of a fix is that? Does that require an expensive or time-consuming overhaul?

MR. JOHNSON: I don't know. It is probably simple, but it could be not simple. It is sort of like asking me how to change the spark plugs on a car that I don't know or have never seen. I could probably figure it out, but I don't know if it has a sealed engine or not. I don't know how long I can continue with this metaphor, but the short answer is it is probably pretty easy.

I think everything that I have recommended, we are not talking about huge -- we may be talking about massive shifts in terms of technology. I don't know because I don't know much about how internally it works. I just know as a customer of your data I am not satisfied, and I want to help.

COMMISSIONER PETERSEN: I appreciated your suggestion that there should be some method, for example, in our enforcement database for citizens to be easily access classes of case, this is an excessive contribution case, prohibited source case, and, again, just following up on what Commissioner McGahn said about -- asking you about, since you have an expertise on search engines, again, is making a change where you could have -- say you wanted to look under a certain classification of enforcement case, like an excessive contribution case, to have that field as a narrowing field so that you could then put a name in and see if there are any excessive contribution cases that came up under that person's name. That does seem like that would be a user- friendly tool -- maybe not for the person being searched, but for the public as a whole.

Again, how -- and maybe this is the same answer as before, that you just don't know without having had access, but is that something that is relatively -- could that be remedied fairly simply without too much effort expended?

MR. JOHNSON: Probably. Again, I can't give you a definitive answer, but probably.

COMMISSIONER PETERSEN: I don't have too many other questions. I did greatly appreciate your remarks, and I think what you have put forward are things we need to look at very seriously, and I think you brought up an excellent point that the Web site should not be just for the election law geeks who understand all the terminology and all the raw data, but this needs to be something that the public can use a whole, so I think that point is one I appreciate you making. So thanks.

CHAIRMAN WALTHER: Thank you.

Ms. Duncan?

MS. DUNCAN: Thank you. I appreciated your written submission and comments, but I don't have any questions.

CHAIRMAN WALTHER: We have Mr. Palmer with us who is head of our technology department, so he will probably have some questions for you that will be meaningful for you.

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

Mr. Johnson, thank you very much for being here today, and I appreciate your comments. All of these are extremely

helpful because it gives us leverage to be able to try to fulfill the mission of the agency and move forward.

I want to also pass on my thanks to Ms. Miller for her taking the time to able to put that document together. I thought it was very insightful and detailed.

I want to thank the Commission for their support. They have been extremely supportive of the IT initiatives here at the Federal Election Commission and that certainly makes our job easier and it is much appreciated.

Some of the questions I have, I have maybe two or three. You talked about the Web site and how we can make it easier and simpler. You mentioned the APIs and perhaps making the language easier to understand for the common citizen. Can you share other examples, whether it is navigation techniques or things of that nature that may help us?

MR. JOHNSON: Sure. Do you mind if I get a little technical?

CHAIRMAN WALTHER: Please do.

MR. JOHNSON: Doing something like using RSS, syndication technology, for search would be extremely valuable to the community.

I also think using -- giving people -- I am a fan of one big search box. People might not know -- people don't know the difference between a PAC and -- a citizen doesn't know the difference between a PAC and other entities, a corporation or even an individual. People don't know what PACs are. I know that is hard for us all to believe, but because of that, it is a high barrier to entry to get people to figure out what it is they should be searching for.

When they know what they want to search for is Wal-Mart, or I want to know -- I want to search for my neighbors, search for my ZIP code. That is a very popular one. We found that ninety percent of the searches on Open Secrets are -- that could be erroneous statistics, but a large portion is ZIP code searches. People plug in 20036 and they want to see all of the contributions coming from that particular ZIP code.

Providing services around particular legislators and candidates, as long as you treat them as the same entity, to summarize the information is also particularly useful, and by providing summaries I mean show me a picture of Ted Kennedy and next to Ted Kennedy's name tell me the percentage of money he has received from in state and out state. Tell me the percentage of money he has received from PACs and from individuals, and start summarizing that information in ways that are easy to understand.

I always like to use the example of ESPN.com as a model for political information because at the end of the day, the sports industry is really good at providing statistics in a meaningful way. Basically what the FEC right now is providing is the play-by-play of every major league baseball game since 1975 without a single box score.

CHAIRMAN WALTHER: That is a good analogy.

MR. JOHNSON: That kind summarization I think would be really useful. I think paying attention to doing user testing, I don't know if you have done that before, but running -- I am not a huge proponent of too many focus groups because you can focus group your design to death, but running it through some audiences is also something that would be very useful.

Again, I want to stress that opening up the process can often be very rewarding, by saying, publicly, hey, we are going to redo the FEC Web site and we want some comments, not only in a hearing like this, but from people online, and I know you have taken feedback that way in the past, but to really make a big deal out of that being opened. I know Sunlight would be encouraged by that and would be excited by that.

MR. PALMER: Let me follow up on the API issue. Do you think it would of more value for us to focus on API, application program interface, rather than building multiple systems, have more APIs where people could get to the data and then use it as they see fit, do you think the effort would be better spent that way?

MR. JOHNSON: I do. It goes to my first point, one of the points, of look, the New York Times is always going to -- nytimes.com will always have more eyeballs on it than FEC.gov. I think it is your mandate, not to drive up traffic on your Web site. It is your mandate to disclose information.

To fulfill that mandate you want to disclose that information and get as many eyeballs on that information in the best way possible, and that means making it easy for outside organizations and entities to take the data off of FEC.gov and provide it to their readership and whatnot. I think the API -- building an API for FEC.gov. would be useful.

More useful, though, would be changing from the global format that you are publishing data in. It doesn't support -- if I as a developer, when I first got my hands on that, I downloaded it, put it in my database software and said why on earth did someone give 20p dollars to a candidate? Why are there 20P dollars? It turns out that the file format, COBAL, that the FEC uses doesn't support negative numbers, and the P is a code for a way to recognize a negative number, but it is completely [unintelligible].

MR. PALMER: That is a good point. That is one of our top priorities now so we can make the APIs work.

Talking about RSS, right now we currently have two feeds, one for the treasurers and one for the press. Are there any others?

MR. JOHNSON: Search. You can power most of your APIs sometimes through RSS or through Jason or other things, but in particular with RSS because people use RSS to do things like subscribe to blogs and their feeder readers, it allows for non-technical users to interface with an API technology, so they can keep an eye on contributions as they are being filed through the FEC. I can tell how many contributions you have made -- not you, but somebody has made, and when there are new contributions coming in, I can see that on the Web and be notified of that just like it would be receiving an e-mail, basically. I think incorporating RSS into search is a very easy way to almost instantly turn on a virtual API on the FEC's Web site.

MR. PALMER: Thank you very much. That is all the questions that I have. Thank you.

CHAIRMAN WALTHER: I was curious to know about the losing of the data. In what way is it lost? I gather it is

still in the bowels of our computer system, but for the public they only get the thirty-five characters or whatever we allot to information. Is there an expert that can drill down into it?

MR. JOHNSON: We have the unofficial filings that are posted to the Web site that you all make available, and then you have the data that you are publishing, the official data that is truncated and missing, and basically what experts try to do is reconcile these two data sets, and it is really hard.

What we will do is we will say this person is Joseph Smith and he lives in 30092, and this unofficial filing is Joseph Smith and he lives in 30092. The probability is high they are the same person. Let's merge these two records such that we can get the occupation and employer information or whatever missing information is in one and put it in the other. You can appreciate the danger of doing things this way because it leads to false positives when it comes to identity, especially if your name is Jim Smith or your last name is Johnson.

CHAIRMAN WALTHER: So if somebody wants that data, or New York Times or Open Secrets, they have to go through that exercise every time?

MR. JOHNSON: Yes. People like Open Secrets and the Sunlight Foundation, and the Huffington Post has done stuff and the New York Times has done stuff, they have largely done some things algorithmically, so you can basically build on top of it every time and not have to do so much, but it is still problematic because it yields to data being inaccurate. People could associate two Joseph Smiths that are not the same Joseph Smith, and then for years that could exist without anyone knowing that it had happened.

There is a preservation element to transparency that is important. The ability to search back in the FEC's data -- 30 years is what Open Secrets is providing -- is significant because it starts telling a story. If we are layering -- let's say point one percent of that data from 30 years ago is erroneous and then another point one the next cycle, it begins to add up and become scary.

Does that answer your question?

CHAIRMAN WALTHER: It does. I know that Open Secrets and other entities figure out a way to sort this. Not to put them out of business, but it seems to me for the general public, I think if we could just focus on students, academics, people that don't live this life, if they are doing research, then if we could make it understandable and get all of the information, that has to be our charter. Disclosure is no good if it is just for the people that are in the election bar.

MR. JOHNSON: I wouldn't worry about putting Open Secrets out of business with upgrading your Web site or the New York Times out of business with upgrading your Web site. Specifically what Open Secrets does is it actually adds more value to the data that FEC puts out by doing things like applying industry codes to the data so you can see candidate X receives most of their money from the banking and finance industry. And I don't think those are things that the FEC should be doing or actually has the authority or the manpower to do.

CHAIRMAN WALTHER: Could be ways we are more facile in the ways we sort our data or even legislators on the Hill, when is it coming in, amounts coming in, and I do ZIP codes too. It is a matter of inquiry for a lot of people.

I guess the question I am coming to is how can we make it more accessible and easier to sort some of this information, whether by date or by person or amount or geography over a period of time and perhaps export it to XML or something like that?

MR. JOHNSON: The first thing is publish the full data in a reliable and accurate way, and bunches of people will figure that out for you. Sunlight will be one of them. We will take that and make it sortable and do things interesting ourselves.

On your side, I can't recommend strongly enough that your first priority should be to make the data as accurate and complete as they are in the official filings, but then also, you are right, to create interactive experiences on the Web site itself, to make it so people can easily access and manipulate this information. Viewing data on a map is particularly useful. I think being able to see an individual donor and all the candidates and PACs that they have given to on a single page is particularly useful.

One thing that we really struggle with at the Sunlight Foundation, I know it would be difficult here too, would be name standardization. People are entering on a Web form or whatever their contribution and occupation from an employer. Wal-Mart is a great example, there could be so many ways to spell Wal-Mart. There is Wal-Mart Stores Inc., Wal Star Mart, Wal Star Mart Stores Inc., and then there are your casual misspellings. How do you standardize those names?

We all know everything I just said is Wal-Mart Stores Inc., that is the name of the legal entity that all of these people are employed by, but how do you make it so that you -- how do you standardize all those names so you can give me a page for Wal-Mart?

Those are really hard problems to solve. It is something we would love to think through with you guys as well. That occupation and employer field that you provide is, I think, one of the most important fields today. For citizen watchdogs to keep an eye on that, it is particularly useful.

CHAIRMAN WALTHER: The fixed formats you referred to, where we opened our comment up to February 18, and I am sure you would like to provide information on technical and non-technical matters now that you have heard some of the matters that are important to us.

We had an occasion where we had to digest a massive amount of data of contributions. We had 650,000 new contributions for just one candidate in one month, and I know that -- I don't know to what extent it strained our system, but do you have any input as to capacity?

MR. JOHNSON: I have sort of a unique perspective on that. Before going to Sunlight Foundations, I was one of the founders of Blue State Digital, which powered Barack Obama contribution system. I have been on both sides of this problem, oversight and collecting and sending, and it is not an easy problem to solve.

Our suggestion from the Sunlight Foundation is, again, come up with a standardized format to post this

information to the FEC Web site, rather than a proprietary and generally closed format that you have now, because it is difficult for vendors like Blue State Digital and others to manage that process and actually talk to the FEC. It is something that we avidly avoided because we couldn't figure out, so it was outsourced to other firms.

I am happy to discuss those problems from both sides of that issue with you and to make sure -- like I said, my brain is yours. You can use it however you like, but we are here to serve.

CHAIRMAN WALTHER: One more question from me. I was concerned about the competitors, other people in the industry who have software that may not be reporting it accurately. Is it because, from what you are saying, they are not getting information about the rule change, is it because they don't recognize it has an impact on their software, and are we -- should we --

MR. JOHNSON: It is probably all -- it is Murphy's law here, any way it can go wrong, it will go wrong. In this case some people don't update their software enough. If I was in your shoes, what I would be concerned about is if it is not coming to the FEC in the appropriate format, then it didn't come, and treat it as a missed filing. Like if I send my tax filings to the IRS on the back of a napkin, the IRS will probably audit me or assume I didn't pay my taxes.

The FEC should take, to an appropriate extent -- if you filed your campaign finance disclosure stuff electronically and didn't file it in the right format, then you didn't file it, and treat that as such. That will cause vendors to take very seriously whether or not their software is posting their stuff appropriately when the campaigns call and say why is the FEC on the phone with me saying I didn't send in my filings?

CHAIRMAN WALTHER: How do you know that twenty percent is inaccurate?

MR. JOHNSON: I opened up the database and counted and searched for every field -- I looked for every record in your database that had the maximum number of characters allotted and then looked through those and subtracted the ones that looked like it was the full title of someone. So, if it was someone like director of Wal-Mart stores and then they had other stuff -- I could be wrong, it could be more than twenty percent, but a good estimate is twenty percent has been truncated like that. That was for this cycle only, though.

CHAIRMAN WALTHER: Are there questions from others?

Alec, do you have further follow-up?

MR. PALMER: I think we will get together for lunch one day.

CHAIRMAN WALTHER: Thank you very much. It is very helpful to us.

If there is nothing further, that is the end of our hearing on this matter. We will be adjourned except that we have a hearing this afternoon, and I don't know if it is appropriate to adjourn -- we are hereby adjourned.

(Whereupon, at 12:35 p.m., the hearing was adjourned.)

CERTIFICATE OF REPORTER

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

_____

CATHY JARDIM