

FEDERAL ELECTION COMMISSION
NOTICE OF PROPOSED RULEMAKING
ON THE DEFINITION OF FEDERAL ELECTION ACTIVITY

Wednesday, December 16, 2009

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

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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

DAVID ADKINS, Office of General Counsel

ROSEMARY SMITH, Office of General Counsel

JOHN GIBSON, Deputy Chief and Compliance Officer

WITNESSES:

KARL SANDSTROM, on behalf of the Association of State
Democratic Chairs

PAUL S. RYAN, on behalf of the Campaign Legal Center

BRIAN SVOBODA, on behalf of the DLCC

NEIL P. REIFF, Sandler Reiff & Young, P.C.

JOSEPH E. SANDLER, Sandler Reiff & Young, P.C.

RON NEHRING, on behalf of the Republican State
Chairmen's Committee of the RNC and the
California Republican Party

JOHN PHILLIPPE, on behalf of the Republican State
Chairmen's Committee of the RNC and the
California Republican Party

P R O C E E D I N G S

(9:37 a.m.)

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3 CHAIRMAN WALTHER: Good morning, everyone. This
4 will convene the special section of the Federal Election
5 Commission for Wednesday, December 16, 2009. I'd like to
6 welcome everyone here for today's hearing.

7 This morning we will be taking testimony on the
8 Notice of Proposed Rulemaking on the definition of federal
9 election activity, which was published in the Federal
10 Register on October 20, 2009. The NPR will explore possible
11 modifications to the definitions of voter registration
12 activity and get-out-the-vote activity in response to the
13 decision of the U.S. Court of Appeals for the District of
14 Columbia Circuit in Shays III.

15 I'd like to thank all the people who took the time
16 and effort to comment on the proposed rules and in
17 particular those who will appear as witnesses at the hearing
18 to give us the benefit of your practical experience and
19 expertise on the issues raised by the proposed rules.

20 I'd like to describe briefly the format we will be
21 following today. We expect to have a total of seven

1 witnesses who have been divided into two panels. Each panel
2 will last for roughly one and a half hours. We'll probably
3 take a short break between the two panels. Each witness
4 will have five minutes to make an opening statement.

5 We have a light system at the witness table to
6 help you keep track of your time. The green light will
7 start to flash when you have one minute left. The yellow
8 light will go on when you have 30 seconds left and the red
9 light means it's time to wrap up your remarks. The balance
10 of the time is reserved for questioning by the Commission.

11 For each panel we will have one round of questions
12 from the commissioners, the General Counsel and the Staff
13 Director, for the second round, only if time permits. I
14 would like to remind my colleagues that we're not required
15 to use our entire questioning time. We have a busy morning
16 ahead of us and we appreciate everyone's cooperation in
17 helping me to stay on schedule.

18 Our first panel consists of Karl Sandstrom on
19 behalf of the Association of State Democratic Chairs; Paul
20 Ryan, on behalf of the Legal -- Campaign Legal Center; and
21 Brian Svoboda, on behalf of the Democratic Legislative

1 Campaign Committee.

2 We will follow the alphabet, which means unless
3 you've arranged otherwise, Mr. Ryan will go first, following
4 Mr. Sandstrom and Mr. Svoboda. You have an opening comment,
5 Commissioner Weintraub, and then we'll begin.

6 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
7 I'll be very brief. I just wanted to thank the witnesses
8 and ask them that as they tell us what their concerns are,
9 if you could give us a sense of your priorities. If there
10 is one take-away message that you want us to walk out of the
11 room with, if you could let us know that, that would be
12 helpful to us as we are sorting through afterwards and
13 trying to figure out -- you know, we may have to balance
14 various perspectives and various concerns and so it would be
15 helpful to know if one thing is more important to you than
16 another and if you can tell us that, that would be useful.

17 Thanks.

18 CHAIRMAN WALTHER: Thank you. Mr. Ryan?

19 MR. RYAN: Good morning, Commission. Thank you,
20 Chairman, Walther. Thank you, the rest of you for inviting
21 us to testify today. I am here on behalf of the Campaign

1 Legal Center. The sole purpose of this rulemaking, in my
2 view, is to address the concerns and remedy the problems
3 identified by the D.C. Circuit Court in the Shays III
4 decision.

5 The circuit court identified two distinct
6 loopholes that the court wants to see closed, first being
7 loopholes with respect to the current regulations defining
8 GOTV activity and voter registration activity. The current
9 rules require assistance, and thus, exclude encouragement of
10 these activities which the court deems should be included
11 within the definition of these rules.

12 The second issue is that the current rules require
13 contact by individualized means, thus excluding mass
14 communications, which the circuit court deemed should be
15 with -- included within these regulations.

16 The proposed rules fixed these two problems by
17 first defining GOTV and voter registration activity to
18 include encouraging or assisting people to register to vote
19 and to vote, and secondly, by eliminating the individualized
20 means requirement. The Campaign Legal Center supports both
21 of these proposed fixes to the concerns identified by the

1 circuit court.

2 The Legal Center, however, opposes a couple of
3 things put forth in the NPRM. First, the Campaign Legal
4 Center opposes any expansion of the exhortations exemption
5 to communications other than spontaneous statements at live
6 events. The Campaign Legal Center also opposes any
7 exemption for a public communication that refers solely to
8 one or more clearly identified candidates for state or local
9 office and notes the date of the election.

10 Any such communication that meets one of the
11 provisions within the definition of federal election
12 activity should be covered by the rules, in our view. These
13 two -- I'm going to mention one more proposal that we
14 opposed, but speaking directly to Commissioner Weintraub's
15 request that we identify our priorities, these two I would
16 identify as our most significant or highest priorities in
17 terms of opposing some things that were put forth in the
18 rules.

19 But third, making permanent the now expired
20 interim rule exempting certain federal election activities
21 that take place in close proximity to federal and non-

1 federal elections occurring on separate dates. We would
2 like to see that rule not made permanent, but we've been
3 through this before and we've lost this battle a couple of
4 times and it's the third time that we filed comments,
5 perhaps the fourth time we've filed comments on this
6 particular issue.

7 So realistically speaking, if I had to choose the
8 battles to lose, I would continue with my loss in that one
9 and fight hard to prevent any expansion of the exhortation
10 exemption and likewise to oppose the exemption for public
11 communications that only identify state or local candidates
12 and the date of the election.

13 I'll leave it at that. I will look forward to
14 answering any questions you might have to my best -- best of
15 my abilities and again, I appreciate the opportunity to be
16 here.

17 CHAIRMAN WALTHER: Thank you very much. Mr.
18 Sandstrom?

19 MR. SANDSTROM: Mr. Chairman, Mr. Vice Chairman,
20 Commissioners, distinguished General Counsel, and John.

21 [Laughter.]

1 MR. SANDSTROM: I'm not suggesting John isn't
2 distinguished. John distinguished himself as the finest
3 shortstop the Federal Election Commission ever produced.
4 Unfortunately, I was playing on another team regularly.

5 I am -- I'm pleased to be here to celebrate with
6 you on Groundhog's Day. I think I've been here before on
7 this very issue. In what is quite remarkable, the
8 discussion, I don't think, has advanced very far. We're
9 still struggling with the very same issues that the
10 Commission was struggling with seven years ago.

11 Unlike Bill Murray in the movie, you don't have a
12 script to follow. You've just been given instructions to do
13 it right, go back and get it right this time. Now of
14 course, the legislation doesn't provide you with the
15 definition and the court didn't provide you with a
16 definition of get-out-the-vote or voter registration.

17 They said you needed to get it right. You needed
18 to do what Congress intended for you to do and the court was
19 quite confident in their judgment that you hadn't done that.
20 Well let's look at what Congress intended you to do in
21 trying to craft what you should do on a going forward basis.

1 Let's first identify that the purpose of BCRA clearly was
2 not to depress voter registration activity. The purpose was
3 not to depress get-out-the-vote activity.

4 If that were the purpose, the Court would have
5 found in McConnell the Act to be unconstitutional. In fact,
6 a number of -- the purpose is not even to prevent non-
7 federal or soft money from being used to get-out-the-vote
8 and voter registration activity. State political committees
9 can use non-federal funds. I'm not referring to party
10 committees, just other non-connected state committees.
11 State candidates, as long as they don't get together, can
12 use non-federal funds, and non-profits, in fact, Paul's
13 organization, can take unlimited soft money to do voter
14 registration and get-out-the-vote.

15 So the purpose clearly was not to prevent these
16 funds from being used. The purpose was prophylactic. What
17 motivated Congress was that maybe the ban on federal
18 candidates raising soft money might -- excuse me, be
19 secretly circumvented by not having to the back door money
20 pouring in to these committees maybe late at night through
21 the back door with a wink and a nod by federal candidates

1 who would then be corrupted by the fact this money is now
2 going into get-out-the-vote and voter registration activity
3 that may benefit them.

4 The Commission is not regulating without
5 experience. This harm, this injury to the Act has never
6 occurred. There is no evidence after two presidential
7 elections that the nightmare scenario that motivated this
8 lawsuit has come to fruition. What we have is the system is
9 working precisely as designed. You do not find federal
10 candidates and their agents raising unlimited soft money to
11 engage in these activities.

12 There are literally tens of thousands of potential
13 conduits out there. You have evidence of not a single one
14 being used by any federal candidate to get around the ban on
15 their receipt and solicitation of non-federal funds.

16 When we talked about those tens of thousands of
17 committees -- I'm here representing the Association of State
18 Democratic Chairs. The association comprises the chairs,
19 the vice chairs of all the state party committees and
20 represents the interests of state and local committees
21 throughout the country. Most of those committees consist of

1 volunteers. You -- most of those committees you would find
2 it very difficult to go about and locate their headquarters
3 because they're just volunteers.

4 Their headquarters may be the family room in a
5 volunteer chair's home. We're now going to say when will
6 they be subject to federal regulation? When will -- their
7 activities may have to be monthly reported to this
8 Commission? When will their activities hold a sufficient
9 threat to the integrity of this law that you need to take
10 further measures to ensure that that does not happen? That
11 you have to cut off their mere -- their organizational
12 activities, their activities intended to encourage people to
13 get out and vote because in the materials we submitted with
14 our testimony, I think it's clear what these committees do
15 on a daily basis.

16 They organize. They bring people together. Why?
17 To make sure, as the advertisement on the web page of the
18 Texas Party indicates, we want precinct chairs and we want
19 county chairs and what do we want them to do? Organize
20 people, because come Election Day we were going to employ
21 them to get people out to vote. Does that mean all the

1 organizational activity of every county, every city, and
2 every state committee is going to be brought into these
3 regulations?

4 No, I think that – get-out-the-vote and voter
5 registration for people who practice politics is a term of
6 art. You would never put in your budget get out a voter
7 registration and cover -- think that covers having voter
8 registration forms on the desks in the party headquarters.
9 Nobody would ever budget for that.

10 Nobody would think that answering a few questions
11 about voter registration by volunteers in the office is
12 voter registration activity. Nobody would think that
13 telling people to vote on November 2 next year alone is get-
14 out-the-vote. You would fire a campaign manager, who said,
15 oh that was our get-out-the-vote activity. The people who
16 passed this law had a very good idea what it was and it is
17 facilitated --

18 CHAIRMAN WALTHER: Mr. Sandstrom, your time is
19 getting close. Actually, it's expired, but go ahead. Just
20 a reminder here.

21 MR. SANDSTROM: Yeah, I ran over a lot of times,

1 even when I took five minutes to answer your question. So
2 in fact, much of what I'm discussing today, I am happy to
3 expand upon it with questions. But get-out-the-vote and
4 voter registration to the people who practice in this field
5 have a meaning and it isn't an open-ended meaning which
6 would include any exhortation to do one or the other.

7 CHAIRMAN WALTHER: Thank you very much. Mr.
8 Svoboda?

9 MR. SVOBODA: Thank you, Mr. Chairman. Thank you
10 to members of the Commission for having me here today and to
11 the staff for helping make this possible. I am always
12 pleased to yield time to Mr. Sandstrom, so I'll try to be
13 brief.

14 Commissioner Weintraub asked for the take-away
15 message and I guess my take-away message is this. You're
16 here regulating two very different types of entities and
17 that needs to be upfront in your mind as you write and
18 finalize these rules. The first, which you're going to talk
19 about at length today, are principally state party
20 committees. They were talked about at length in McConnell.

21 They have the availability to spend Levin funds to

1 pay for a portion of their federal election activity that
2 doesn't refer to federal candidates. That's going to be
3 what's driving the bulk of your discussion. But also, these
4 rules are equally going to impact what the statute calls
5 associations or similar groups of candidates or state or
6 local office or of individuals holding state or local
7 office. Rolls off the tip of the tongue.

8 But that's who I'm here on behalf of today, on
9 behalf of the Democratic Legislative Campaign Committee, the
10 non-party legislative caucuses across the country whom they
11 support in their activities. And there's many other types
12 of entities besides who could fall into this category that
13 as yet the courts and the Commission haven't had much
14 occasion to think about.

15 So for example, New Jersey law permits the
16 creation of joint candidate committees. If you're running
17 for freeholder and you're running for assembly, you can pool
18 your money together into one bank account. You could have
19 the Svoboda-Ryan Committee putting up yard signs all over
20 Newark. You could have --

21 CHAIRMAN WALTHER: Let's see if that happens.

1 MR. SVOBODA: You never know. Excellent.
2 Notionally it could apply to a governor or lieutenant
3 governor running as a ticket out of the unified committee.
4 It's not a subject you've had occasion to discuss yet, but
5 if you look at a literal reading of the statute, it could
6 apply to that.

7 It could apply to candidates who have formed slate
8 committees to run for school board or to run for other non-
9 federal office. So you have a statute that applies equally
10 to state parties and to an entire group of actors that the
11 courts haven't thought much about and the Commission hasn't
12 thought too much about, that are engaged entirely in non-
13 federal activities.

14 And one of the problems you bring to this process,
15 not of your own making, but imposed on you by the Shays I
16 court, is you have a court opinion saying that you basically
17 have to write one-size-fits-all rules to cover these sorts
18 of actors. You tried, or more accurately Commissioner
19 Sandstrom and his colleagues tried in 2002 to create an
20 exemption for GOTV and voter I.D. activities paid for by
21 associations that refer solely to state and local candidates

1 and the Shays I court, at the behest of Mr. Ryan, told you,
2 you couldn't do that, that, you know, voter -- get-out-the-
3 vote is what get-out- the-vote is, whether it's the city
4 councilman in Laguna Beach that's doing it or whether it's
5 the Iowa Democratic Party that's doing it. So that's one of
6 the pieces of the puzzle that you're going to have to
7 address as you write these rules. And there are, moreover,
8 burdens that the Commission has yet to confront, and that
9 the courts have yet to confront in the imposition of these
10 rules on these actors.

11 Let me give you just a couple of examples. The
12 first is, the Supreme Court upheld the imposition of the
13 federal election activity restrictions on state parties in
14 McConnell. But it said "state committees can take advantage
15 of the Levin amendment's higher contribution limits to fund
16 any activities that do not specifically mention a federal
17 candidate. The prohibition on the use of soft money in
18 connection with these activities is therefore closely drawn
19 to meet the sufficiently important governmental interest of
20 avoiding corruption and its appearance."

21 Well the people I represent, the people my clients

1 are interested in, we don't have access to Levin funds.
2 Clearly whether you have that sort of tailoring that would
3 be sufficient to support these sorts of descriptions, again,
4 it's a subject that hasn't come up in the courts so far.
5 And it's important for you because you have to draft rules
6 here, or presumably you want to draft rules that are going
7 to survive across the board, is the challenge.

8 CHAIRMAN WALTHER: We'd like that.

9 MR. SVOBODA: -- whether by Mr. Ryan and his
10 clients, or whether by the slate of city council candidates
11 that find themselves as respondents in a MUR and find
12 themselves in litigation against you. So these are
13 important. What it means is as you draft these terms,
14 particularly voter registration and GOTV, which at bottom,
15 everybody does, they have to be defined with precision so on
16 the one hand you're capturing what you want to capture with
17 respect to the state party committees, and yet on the other
18 hand, you're allowing sufficient freedom for that genuinely
19 non-federal activity by clients like mine.

20 And so that brings me to an example -- I brought
21 reading materials here today, The Selling of the President

1 in 1968 by Joe McGinnis. Read it when I was in college.
2 Had a happy ending, I guess, for some people. But there was
3 in the book a newspaper ad that was prepared by one or
4 another of the consultants working for Richard Nixon in
5 1968. It was going to appear in newspapers across the
6 country.

7 I'll read you just an excerpt of the ad, because
8 I'm short of time. But the ad read -- the headline of the
9 ad was going to be Tuesday and the ad read:

10 It will be quiet on Tuesday. No speeches. No
11 motorcades. No paid political announcements. It's a very
12 special day just for grownups. America votes on Tuesday.
13 We'll vote for one of three middle-aged men, all ordinary
14 enough looking, each with a set of mannerisms and beliefs
15 and strengths and weaknesses.

16 And we're not doing anybody any favors when we
17 choose them. It's a terrible job. Our choice isn't
18 difficult. There is no choice. We're going to vote for
19 Richard Nixon. His years of high office, his moments of
20 defeat, and his vital, almost forgotten rests from the pace
21 of public life have blended into the mature judgment that

1 this nation desperately needs.

2 We choose Mr. Nixon with the full knowledge that
3 America will not live happily after November 5. The next
4 four years will test this nation's belief in itself more
5 than any other period in history. On Tuesday, the shouting
6 and the begging and the threatening and the heckling will be
7 silenced. It's very quiet in the voting booth. Now it's
8 your turn.

9 So this is a newspaper ad, presumably ran in 1968.
10 Let's replace America with Maryland. Let's replace Nixon
11 with O'Malley or Ehrlich and let's say that the ad was run
12 by the Republican Governors Association. Is that ad federal
13 election activity? Is that GOTV activity?

14 Under the proposed rule, I think it is. It
15 encourages to vote and it informs the reader by local means
16 of the date of the election, Tuesday, November 5. Would it
17 be federal election activity under what Mr. Ryan's presented
18 today? It would be. I understood his testimony to expose
19 the expansion of the exclusion for state or local candidates
20 for exhortations to other media like newspaper ads, and also
21 expansions to include informing the date of the election.

1 So that in -- that is an example of the sort of
2 communication you may capture with this rule. How do you
3 avoid -- first off, do you want to avoid capturing it? I
4 think you do for the vitality of the statute and the
5 regulation once it obtains judicial review -- how do you do
6 it?

7 I think you have to look perhaps less
8 formalistically at the languages that were used by the court
9 in Shays III and I think you have to use your expertise as
10 those familiar with how people do GOTV, with how they do
11 voter registration to capture those spheres of activity that
12 genuinely are intended to mobilize, not simply to persuade
13 people to vote for a state or local candidate, because at
14 bottom, this whole business is about getting people to vote
15 on Election Day, everything they do from beginning to end,
16 but looking at that special subset of activity that's
17 actually directed toward voter mobilization. That, I think,
18 is the way you can capture what Congress intended when they
19 passed the statute while protecting the interests of these
20 local committees that have neither the purpose or effect of
21 influencing federal elections and yet nonetheless, would be

1 equally subject to whatever you decide to do here.

2 And I appreciate your indulgence on me running
3 late and I'll be happy, as the others, to answer questions.

4 CHAIRMAN WALTHER: Thank you very much. At this
5 point, we will turn to questions from the commissioners.
6 I'll start with Mr. Vice Chairman.

7 VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman.
8 Thank you for your testimony. It's not an easy task that
9 we've been asked to undertake here. We are having to thread
10 the needle. We have the court decision in Shays III which
11 did -- which basically said go back and try again and as Mr.
12 Sandstrom pointed out, it didn't give us extensive direction
13 as to how we're supposed to do it. But we know that we have
14 to have a broader definition than the one that we had
15 earlier.

16 At the same time, we have to figure out how to do
17 that in such a way that we're not going beyond what the
18 statute permits us to do and enter into -- and federalize
19 state and local party activities that we're not authorized
20 to regulate under the statute.

21 So I guess my question to start off, and I -- at

1 least I know what the one-word answer is, but I hope each of
2 you could flesh out your answers. Under the -- under the
3 Shays decision, does the Commission have any choice other
4 than to go the route of defining voter registration
5 activities and GOTV by incorporating the words "encourage"
6 or something similar? And if we don't have to go that broad
7 under the Shays III decision, what are some alternative
8 narrow definitions that would comport with the decision, but
9 that don't go maybe as far as encourage and create the sorts
10 of issues that I know that Mr. Svoboda and Mr. Sandstrom
11 brought up?

12 So that's my first question, it's can we go
13 narrower than encourage and if so, what would be some of the
14 narrowing constructs that we can place on that language so
15 that we wouldn't create the issues that you raised? I guess
16 we could start with Mr. Ryan and go down the table.

17 MR. RYAN: No, you can't do anything short of
18 including encourage and still satisfy the concerns of the
19 circuit court and that's my simple answer, but also complete
20 answer, I think. I don't really think there's any need or
21 grounds to elaborate on how I would do it differently if you

1 were to decide to do it differently. I like the rule as
2 proposed.

3 MR. SANDSTROM: I think it's important to pay
4 close attention to what the court did and why it did it.
5 Yes, I think you can go narrower. I don't think, as you go
6 -- try to discover how to do that, you do not have to limit
7 yourself to hearing testimony from witnesses. You can go
8 out and discover how these terms are actually used in
9 practice.

10 The people who passed this law had something in
11 mind, we would have been -- we would have been better off if
12 they had actually defined the terms. But in every campaign
13 people know what is meant by voter registration. People
14 know what was meant by get-out-the-vote. And part of your
15 job, I think, is to go out and discover that. And you can
16 do that by making inquiries, doing your own independent
17 investigation. You do not have to rely upon witnesses to
18 tell you precisely what those mean.

19 What the court -- no, unfortunately, federal
20 judges don't run for office. It's not a line item in their
21 budget. And so when they're faced with terms which they --

1 there is no legislative history on, in which scenarios are
2 thrown out, that this would be an opportunity for -- to
3 influence federal elections. Of course it's an opportunity
4 when there's a successful governor get-out-the-vote campaign
5 in the same year of a presidential election in that state it
6 will likely influence the outcome.

7 But that was not what was sought to be regulated.
8 What was sought to be regulated is to look at these terms
9 and as they're used in politics. So like I said, I would
10 encourage the Commission to identify how these terms are
11 used in politics. We've offered how we believe they're
12 used. They're used with respect to facilitation and
13 assistance. But others in practice -- and overwhelmingly I
14 think you'll discover that those people will tell you the
15 same thing, what is meant by voter registration, get-out-
16 the-vote when they budget for it.

17 MR. SVOBODA: I think the word "encourage" in the
18 Shays opinion was actually a flashpoint for the broader
19 concern that the court had, which was that the Commission in
20 the court's view, had not tailored the rules sufficiently to
21 capture the range of activities that Congress intended when

1 it sought to regulate voter registration or get-out-the-vote
2 activities.

3 So I think less significant perhaps than the term
4 “encourage” was the actual examples that Shays presented to
5 the court in litigation, and also, the example in the Long
6 Beach advisory opinion that the court seized onto as it
7 considered its opinion. From that I think you have data
8 points and the sorts of activity that the court felt fairly
9 ought to be -- ought to fall within the definition of
10 federal election activity.

11 I think though the court signaled some openness, I
12 mean, not a huge amount of openness. It's plain that the
13 court was -- it had difficulties with what the Commission
14 had done, but signaled some openness to the exercise of
15 agency expertise to try to flesh out these terms and create
16 a more narrowly tailored proxy.

17 So for example, we know from the first two Shays
18 opinions that it's going to be difficult to support the
19 definition of GOTV that's strictly time limited, I mean,
20 certainly to the 72 hours. We know that. But the fact of
21 the matter is, I mean from my clients' experience, and I

1 assume Mr. Sandstrom's clients' experience, I mean, most of
2 what is -- most of what operatives would budget as a GOTV
3 expense, most of what they would do is what they would
4 discuss as a GOTV program. Most of what members would have
5 been familiar with as GOTV when they're writing the
6 regulation is something that happens in a fairly short
7 window of time before the election.

8 The bulk of it happens in the days or weeks before
9 the election. Very, very little of it happens a year out.
10 So I think that's a factor that you're able to consider as
11 you flesh out these rules. And also I think the court may
12 be open to a distinction between fleshing out encouragement,
13 if you will, to capture what Mr. Sandstrom talked about as
14 mobilization. I mean, not simply telling someone, gee we
15 want you to vote Bob Ehrlich. We really hope you do it on
16 Tuesday, but those more affirmative means that are actually
17 going to result in increasing turnout at the polls.

18 And paid advertising, paid communications is kind
19 of a -- it's an example of perhaps -- it's the clearest
20 example of where the rule may be most over inclusive. And
21 it's a special concern for state and local candidates

1 because you have a statutory exclusion that's designed to
2 allow associations to do that for them so long as it doesn't
3 take up other -- so long as it doesn't otherwise qualify as
4 federal election activity. So that's one of the real
5 dilemmas that the Shays II court didn't think about at all
6 and unfortunately you have to think about now.

7 CHAIRMAN WALTHER: Thank you.

8 VICE CHAIRMAN PETERSEN: Just one follow-up
9 question. When does -- I guess we're all struggling with
10 the definition, is when does something fall from being a
11 persuasive communication? You draw the distinction in your
12 comments about differences between persuasive communications
13 and GOTV -- GOTV communications.

14 At what point do we trip the threshold and enter
15 from the one realm into the other? Is it once where you
16 mention the date of an election, once we mention the date
17 and polling place? Does it have to be date, polling place
18 and hours of operation at the polling place? At what point
19 -- and again, I know that these are difficult distinctions
20 to make, but from the agency's perspective, as we're
21 grappling with how to write rules, what are your thoughts on

1 when does a communication translate into a GOTV
2 communication other than you just kind of know it when you
3 see it?

4 MR. SVOBODA: I think it's not simply just the
5 date, because there's many circumstances where the date's
6 included in a candidate's, for example, own general media
7 track or just in kind of general creative work in political
8 communications. So I could imagine a number of
9 circumstances where they communicate the date the week
10 before the election, but it's not for the purpose of
11 mobilizing. It's for the purpose of promoting the candidate
12 in that particular contest in which the candidates run.

13 I think the line is when you go beyond persuasion,
14 simply trying to encourage popular support for the
15 candidate, but you're trying to do it at any point in the
16 cycle and you're actually taking steps beyond that to
17 mobilize. So, for example, you're putting together an
18 office that's designed to help pick up people on Election
19 Day and get them to the polls. You're doing calls on
20 Election Day to ask people if they voted and to remind them
21 to go vote and to tell them the polling places. Those are

1 just some examples and it may be difficult to codify an
2 exhaustive list, but it points a basic distinction, which is
3 between encouraging popular support and mobilizing.

4 MR. SANDSTROM: Communications cost money. When
5 I'm getting out the vote, I'm getting -- trying to get out
6 my vote, not the other person's vote. And so your message
7 is on a get-out-the-vote campaign and your activities are
8 designed to, as my colleague said, to mobilize a particular
9 segment of the public to action, that is, voting, not to
10 persuade them which way to vote, but to mobilize them to
11 action.

12 And that's why most of it occurs when that action
13 is about to occur, before Election Day. Sometime it may
14 have even been on an absentee ballot campaign. But you're
15 not wasting your money a month out saying don't -- vote on
16 November 2 so that it -- to actually mobilize that person to
17 do anything other than to be fairly disposed to your
18 candidate. And so I know it's -- you know, where --
19 persuasion, which turns into action, is not an easy line to
20 draw. You have to look at how in politics people draw that
21 line, because I'm not sure what other experience you look

1 to.

2 CHAIRMAN WALTHER: Commissioner Bauerly?

3 COMMISSIONER BAUERLY: Thank you, Mr. Chairman.

4 I'd just like to follow-up a little bit on what the Vice
5 Chair was discussing, what you're discussing. And while
6 there may be communications that easily fall into one of
7 these categories, are -- it seems to me there are also -- it
8 might also be possible for communications to fall into both
9 categories of persuasion and have the information necessary
10 that you would -- that I think "mobilizes" is the word that
11 you are using.

12 So while there may be time frames at which it's
13 clearly one thing or the other, as we get closer to an
14 election, would it be possible for those communications to
15 do both? And in that instance, what's your view on where
16 the -- where they shall fall on the line?

17 MR. SVOBODA: I think it is possible for
18 communications to do both. I mean clearly the statute is
19 constructed to recognize that they can. In the case of
20 associations, for example, they say you may spend soft money
21 to promote or support a candidate for state or local office

1 as long as it does not otherwise qualify as FEA, but that
2 means you have to be -- if that exception is going to mean
3 something to state and local candidates, it means you have
4 to be sparing in some degree in defining the other aspects
5 of FEA.

6 It tends not to be a problem so much for state
7 parties because if they're going to -- typically if they're
8 going to do a voter registration or get-out-the-vote and
9 they can mention the federal candidate whom they are wishing
10 to support, they will mention the federal candidate whom
11 they are wishing to support. The law gives them avenues to
12 do that, for example, volunteer exempt activities. But
13 that's captured through another section of FEA, right? I
14 mean, public communications that promote, support, attack,
15 and oppose the candidate for federal office are going to be
16 caught there.

17 So associations face kind of a unique situation.
18 We've got more desire to talk about federal candidates. We
19 don't worry about that first prong of FEA. So the question
20 is, well we're trying to encourage popular support for our
21 own candidates. Are we finding ourselves tripped up under

1 FEA restrictions in a way that ironically a state or local
2 party typically wouldn't do? And so I think that counsels
3 for, in this context, being careful and sparing in defining
4 what GOTV and voter registration mean.

5 And one last point, to follow-up on what Karl said
6 a moment ago. He raised a point which I hadn't thought of
7 before which I think is interesting, which is the targeting
8 of activities could be a significant proxy for
9 distinguishing GOTV and mobilization from encouraging
10 popular support.

11 Nobody's going to run a GOTV program by taking out
12 million dollar ads in the New York Times and saying please
13 vote on Tuesday. You're as likely to get my father-in-law
14 to vote as you are to me and that's not going to do anybody
15 any good. If you're running a GOTV program, you're going to
16 know who your voters are. You're going to have modeled them
17 and have a sense of what their political attitudes are and
18 their propensity to vote. You're going to know something
19 about the voter history.

20 You're going to know - you're probably going to
21 have I.D.'d them under separate financing descriptions, the

1 I.D. restrictions, and you're going to know how they're
2 going to vote and you're going to have a communication
3 that's basically going to make sure that those people and
4 only those people go out and vote. So that actually is
5 something that the Commission hasn't done before that may be
6 worth considering in these rules, which is targeting as a
7 proxy for distinguishing mobilization from encouraging
8 popular support.

9 MR. SANDSTROM: I'll add a loop to that. Take an
10 example that Brian used, Governor O'Malley. When does the
11 Commission think he can stop and start limiting the
12 persuasive messages that Governor O'Malley and his
13 lieutenant governor on the ticket used to get -- to persuade
14 their people to vote for them? When does the Commission
15 think they can step into that election when there may not be
16 any truly contested federal elections and limit the message
17 they used to try to win an election?

18 So I think Congress could have attempted, whether
19 it would be constitutionally successful or not, to limit the
20 sorts of money that Governor O'Malley can raise so you won't
21 have to live by federal contribution limits. You have to

1 abide by all the federal limits and prohibitions on
2 corporate and labor funds. Over in Virginia, the same
3 thing. They didn't do that. They said the danger was a
4 particular type of activity and that's all we were seeking
5 to regulate.

6 And so if they wanted to take the bigger step,
7 they could have. For you to take the bigger step without
8 clear direction from them I think would be a mistake.

9 MR. RYAN: My understanding of the law is that
10 we're not here to talk about what Governor O'Malley can do,
11 what kind of money he can raise and spend through his
12 campaign committee. We're talking about party committees
13 here and state party committees, local party committees in
14 particular. I do believe that it is in fact possible and
15 even likely that a particular communication will fall into
16 both categories of persuasive and get-out-the-vote type of
17 activity.

18 But Congress was clear that those types of
19 communications, if they constitute get-out-the-vote
20 activity, they're covered by these provisions of BCRA. The
21 Supreme Court was equally clear that they would be covered

1 and the Supreme Court, I think, in its decision in
2 McConnell, gave this Commission the guideposts and the
3 explanation for why Congress could and did constitutionally
4 cover these types of activities.

5 On pages 167 and 168 of the Supreme Court's
6 decision in McConnell, the Court wrote: Common sense
7 dictates, and it was undisputed below, that a party's
8 efforts to register voters sympathetic to that party
9 directly assists the party's candidates for federal office.
10 It is equally clear that federal candidates reap substantial
11 rewards from any efforts that increase the number of like-
12 minded registered voters who actually go to the polls. Any
13 efforts that increase the number of like-minded registered
14 voters who actually go to the polls.

15 The types of arguments that you've received in
16 written form that Mr. Sandstrom had made today that Congress
17 didn't want to or didn't intend to regulate state party
18 activities dealing with state and local candidates, I think
19 it's just not the case. These arguments were made before
20 Congress in the years leading up to the passage of the
21 McCain-Feingold law.

1 Congress addressed these concerns with two very
2 specific provisions in the McCain-Feingold law. Congress
3 doubled the limit on contributions, hard money contributions
4 to state parties from \$5,000 and \$10,000. And Congress
5 included the Levin amendment that allows parties to -- state
6 parties to raise another \$10,000, up to another \$10,000, to
7 engage in precisely these kinds of activities, recognizing
8 again that any efforts to turn out voters will benefit
9 federal candidates and present this potential for
10 circumvention of the federal hard money limits applicable to
11 the national parties.

12 So -- and then the Court -- so we had Congress
13 address this issue. These arguments were made to Congress.
14 They addressed. And the arguments were made to the Supreme
15 Court in *McConnell*. The Supreme Court rejected them in
16 *McConnell* and explained why the limits were permissible as
17 applied to GOTV and voter registration activities. And
18 these arguments were made to the D.C. District Court and the
19 D.C. Circuit Court in *Shays I* and in *Shays III*. And in
20 *Shays III*, we're here to discuss today, the circuit court
21 decision, the court again rejected these arguments that

1 Congress didn't mean to or Congress could not have touched
2 or regulated these state and local party get-out-the-vote
3 activities.

4 They're covered. I think the law is clear. It's
5 established. We've been having this argument now for seven
6 years and I think it's time for you to adopt the regulation
7 that you proposed because it makes sense and it complies
8 both with congressional intent with the Supreme Court's
9 decision in McConnell and with the circuit court's decision
10 in Shays III.

11 MR. SANDSTROM: Chairman, a remark on that,
12 because my colleague, Brian, doesn't have to be here, I
13 guess, because we were just instructed that this only
14 applies to state parties, that this doesn't apply to
15 candidates running together as a group, as an association.

16 So I think you -- since we now know clearly that
17 this law was to -- not to cover them and was to cover state
18 committees -- my colleague can exit the room. And what he
19 quoted from the quote was totally unremarkable. I'm not
20 sure what -- yes, when you have an election simultaneously
21 occurring for state and federal office, voter registration

1 and get-out-the-vote activity is done on behalf of state
2 candidates, by state candidates, by organizations, by state
3 committees, will influence the outcome.

4 And if he -- if Mr. Ryan is suggesting that
5 everything a state party does that actually will help -- you
6 know, get the favorable outcomes on Election Day, is voter
7 registration or get-out-the-vote activity, then you have now
8 federalized tens of thousands of local party committees who
9 are not now currently registered with you and you best tell
10 them that.

11 MR. RYAN: I'd just like to -- one minute to make
12 clear that --

13 CHAIRMAN WALTHER: Okay, I want to be able to make
14 sure all the commissioners get the opportunity to answer --
15 ask some questions, so we need to keep moving through the
16 commissioners and then come back, I think, with a little
17 more free ranging conversation.

18 MR. RYAN: If I may just --

19 CHAIRMAN WALTHER: Sure, go ahead.

20 MR. RYAN: I just want to make clear; the Campaign
21 Legal Center understands that the statute covers

1 associations of state and local candidates. We believe that
2 rules should cover those candidates. I understood Mr.
3 Sandstrom's earlier comments to be with reference to a
4 single gubernatorial candidate, not associations of
5 candidates.

6 CHAIRMAN WALTHER: Commissioner Bauerly, do you --

7 COMMISSIONER BAUERLY: Yes, if I might. I hope it
8 will fully -- briefly, if we can, so my colleagues will have
9 some time.

10 Mr. Svoboda, you -- I liked your characterization
11 that maybe we should think about these less formalistically
12 and I think you were using the word "mobilize." And that
13 leads me to think that heaven forbid we need another
14 definition in these regulations. But I'm trying to -- I was
15 thinking through what the difference between encourage and
16 mobilize is, because I'm assuming you're not suggesting
17 physical force to move voters to the polls.

18 I assume it's something slightly less than that,
19 although I recognize rides to the polls and things like that
20 are obviously included. So I'm curious as to if you can
21 perhaps help me understand a little bit about what you mean

1 by mobilize that is different from encourage.

2 MR. SVOBODA: Well maybe the best way to go at the
3 question is to talk about what in my experience -- how
4 political committees think about this. They will have --

5 COMMISSIONER BAUERLY: I'm going to interrupt you
6 because I want to be -- perhaps I wasn't clear. I'm not --
7 I think we understand what the activities are. I'm
8 wondering what the -- what the words on the page need to
9 look like so that people aren't sitting in living rooms and
10 wondering, and yet we're still being responsive to the
11 court.

12 So is that defining encourage in a way that
13 perhaps is more limited? And again, I'm loathe to suggest
14 another definition, but what is shortcoming -- what, in your
15 view, is the shortcoming of encourage and what's the
16 specific language that would need to be in this regulation,
17 unless it's a laundry list and perhaps that's your proposal?

18 MR. SVOBODA: Perhaps one way to go about it is to
19 frame it almost as like a specific intent standard. So in
20 other words, if you have a committee that has undertaken
21 funds for the specific intent of ensuring that people whom

1 they have identified as potential supporters and here I
2 lapse a little into the colloquial -- with the acts taken
3 with the specific intent of ensuring that those people go to
4 the polls and vote whether on Election Day or through early
5 voting or through absentee ballot.

6 And then I would distinguish that between
7 communications that are primarily intended simply to
8 encourage popular support for a candidate. I toss this out
9 without a moment of reflection beforehand, so please take
10 this with a shaker of salt. But it takes you in a direction
11 I think that's perhaps safer ground, a more precise ground
12 than the encouragement standard, because the problem with
13 encouragement is that -- if I'm running in 2010, November
14 2010, I'm encouraging people to vote for me today.

15 The question is, is that GOTV? I don't think that
16 is GOTV. What you're trying to do is to capture those
17 activities that are actually specifically taken to get
18 identified voters to go and vote. And you can adopt perhaps
19 a similar standard with respect to voter registration.
20 Voter registration is a little more of an easy call because
21 unlike GOTV, it's not as -- I mean, it's easy to tell when

1 an activity -- or it's easier to tell perhaps when an
2 activity applies to voter registration.

3 But GOTV is the most troublesome concern because
4 there's a line between, again, that encouragement of general
5 popular support and mobilization. And that's just one
6 thought I think we're getting toward that, but I do wonder
7 whether it ought to be more of a specific intent standard.

8 CHAIRMAN WALTHER: Thank you. Commissioner
9 Hunter?

10 COMMISSIONER HUNTER: Thank you. I think your
11 comments have all been very helpful and it is very difficult
12 to draw the line here. I think what we -- the NPRM, was
13 trying to do is, -- well, I appreciate the arguments that it
14 is quite broad in the definition of encouragement. I think
15 that the examples are probably narrower than the word
16 "encourage."

17 I was wondering if maybe there's a possibility to
18 submit additional comments, if the record could be open for
19 a few days, to take a look at the examples in particular and
20 maybe they -- hopefully they do a better job of covering the
21 kind of mobilization activity that we were talking about.

1 That was, at least, I think the intent there.

2 And also, I understand sort of your distinction
3 between the mobilization and the persuasion efforts and I
4 think that the idea that Mr. Sandstrom talked about, the
5 targeted -- who's being targeted by the activities is a very
6 good way of looking at it. And what I think some of us were
7 trying to get at in the get-out-the-vote activity exemption
8 for public communications referring only to one identified
9 state candidate, was that was sort of meant to cover a sort
10 of broad category of persuasion communications.

11 So instead of exempting the kinds of get-out-the-
12 vote voter registration activities that we've been talking
13 about, it was meant to exempt this sort of other side of the
14 coin. And structurally, it's probably not the best way of
15 doing it. I think it probably is better to say that should
16 never be included in any kind of definition of voter
17 registration activity or get-out-the-vote activity.

18 I think that's harder to do, but I think we should
19 take a look at attempting to do that based on some of the
20 comments that we've heard today. And I think if people can
21 take that either now or at a later point, look at the

1 examples, and maybe there is a way of sort of putting into
2 paper, as my colleague Commissioner Bauerly is suggesting,
3 coming up with something that better tracks the line between
4 the two.

5 Because I think it's true that encouraging is
6 quite broad and I'm not -- I'm not sure I'm convinced that
7 the court required us to pick that word. The court
8 suggested it, but there's nothing in the court's opinion, in
9 my view, that requires us to pick that word. So I think if
10 anybody wants to comment on the examples now that would be
11 helpful.

12 MR. SANDSTROM: I wouldn't know with respect to
13 the example that was used, the advisory opinion, the, Long
14 Beach. They were not robocalling the other person's
15 supporters. They were robocalling because they had
16 identified with phone numbers their supporters, and that's
17 why you could argue that that was get-out-the-vote.

18 General political messages that are aimed at the
19 entire electorate generally are persuasive. They are
20 intended much like the New York Times ad that Brian quoted,
21 to persuade people, and they're given to the people who

1 haven't made up their minds yet. When you get down to get-
2 out-the-vote, it's aimed at those who have made up their
3 mind.

4 MR. SVOBODA: Commissioner, I think part of the
5 reason you haven't heard many comments perhaps on the list
6 of examples is because of the broad standard that's created
7 at the beginning of the section and the fact that they are -
8 - it's included, but not limited to those examples.

9 I mean, the examples that are listed I think are -
10 - I think fairly reflect GOTV activities. In the case of
11 GOTV, the problem for someone like my client is, well what
12 else out there is going to qualify as GOTV because there's
13 an infinite number of possibilities based on the wording of
14 the regulation that could qualify.

15 COMMISSIONER HUNTER: Do you think it's possible
16 that we could come up with an exhaustive list? I think this
17 list -- you know, I have to think about it a little bit
18 further. But do you think that that's possible and that's
19 something that people would know the universe?

20 MR. SANDSTROM: Provided you don't use the word
21 "but not limited to."

1 COMMISSIONER HUNTER: Right.

2 MR. SANDSTROM: That just -- then your examples
3 become fairly useless. It suggests that these are start
4 cases, but there are others that may be undertaken or fall
5 into the same category.

6 COMMISSIONER HUNTER: Right. My question was
7 meant to -- it just -- it would be an exclusive list. It
8 wouldn't be anything else besides the list.

9 MR. RYAN: My view is that it would not be
10 possible to craft a truly exhaustive list that would be
11 acceptable to the Campaign Legal Center. We strongly
12 support the inclusion of the prefacing phrase, "but is not
13 limited to," before the list of examples that are given in
14 these two proposed rules for both -- defining both terms.

15 The examples make sense to us, but again, with the
16 caveat being we want to see retained the inclusion of the
17 phrase, "including, but not limited to."

18 COMMISSIONER HUNTER: Mr. Ryan, are you able to
19 give me or provide at a later date another example of
20 something that's not covered that you're envisioning should
21 be covered in the examples?

1 MR. RYAN: I certainly have to give it some
2 thought.

3 COMMISSIONER HUNTER: Okay, that would be very
4 helpful. Thank you.

5 CHAIRMAN WALTHER: Any further questions?
6 Commissioner Weintraub?

7 COMMISSIONER WEINTRAUB: Thanks, Mr. Chairman. I
8 guess I'm a little frustrated by some of this because I feel
9 like some of the comments and some of the discussion, people
10 are trying to reargue this case, which we lost. I mean, I
11 know -- I know that you two don't agree with him, but his
12 side won in court and we've got a decision to comply with.

13 Honestly, the court decision I think is pretty
14 clear in saying that we created a loophole when we used the
15 word "assist" and not "encourage." I don't -- if we don't
16 use the word "encourage," I really don't know what to do,
17 what to say when we go back to court if we get sued again
18 and try and say well gee, we didn't think you meant it, Your
19 Honor, when you said it opened up a loophole not to use the
20 word "encourage."

21 I just -- I don't know how to frame that. I don't

1 know what to tell my litigators to say to defend a rule that
2 doesn't use the word "encourage." Part of my concern about
3 what you've been suggesting as alternatives is that they
4 both, you, Brian and Karl, both of you seem to be drawing on
5 intent-based standards. Brian, you specifically said go by
6 the specific intent and Karl's comments talk about
7 communications that are not primarily aimed at facilitating
8 the act of voting.

9 That doesn't seem to be an administrable standard
10 to me where we would have to get into the intent behind the
11 communication. I just -- I'm not sure how we would -- what
12 kind of guidance does that provide your clients?

13 MR. SANDSTROM: Intent often is objective. You
14 can look at activities and determine that a reasonable
15 person would conclude that the intent of that is actually to
16 mobilize the voters to get up off their duffs and go out and
17 vote, okay, that a reasonable person can make that
18 conclusion.

19 So I don't think intent is always subjective.
20 It's what a reasonable person who engaged in politics
21 considers to be get-out-the-vote, and that is intended to

1 move people to mobilize and activate and to vote. With
2 respect to what the court -- yes, it's rather troubling what
3 the court in fact said in many places in that decision. The
4 court essentially said, we don't know what this means, but
5 the Commission should be free to determine what it means in
6 enforcement.

7 I don't think that's what you want to do in a
8 First Amendment area, saying that we want to determine
9 whether this is get-out-the-vote by enforcing the law
10 against somebody that we conclude violated it because the --

11 COMMISSIONER WEINTRAUB: That's not -- that's not
12 the section I'm talking about. That's not the section that
13 I asked about. The court said, the FEC's definitions create
14 two distinct loopholes. First, both definitions require
15 that the party contacting potential voters actually "assist"
16 them in voting or registering to vote, thus excluding
17 efforts that actively encourage people to vote or register
18 to vote, and dramatically narrowing which activities are
19 covered. You have to deal with that language.

20 MR. SANDSTROM: If you deal with that language
21 then, if you think the court was sufficiently, no, gave you

1 almost no leeway, okay then you need to cover everything
2 that encourages people to vote from -- and if you encourage
3 everything that gets covered, you've completely federalized
4 the system.

5 The court did not, frankly, think this through as
6 deeply and it is not reflected --

7 COMMISSIONER WEINTRAUB: I'm sorry, Your Honor, I
8 don't think you thought this through?

9 MR. SANDSTROM: No, I'm not saying that's your
10 response. It's that for the Commission instead to think it
11 through, to go out and gather sufficient -- you know,
12 evidence to support its regulation and support it with okay,
13 what would a reasonable person in politics consider to be
14 get-out-the-vote, not what the judge did, because he said
15 that's not his job. The panel, that's not their job to do
16 this.

17 But you didn't do your job adequately. Go back
18 and do your job and discover what people in the field
19 consider to be get-out-the-vote.

20 MR. SVOBODA: Commissioner, let me take a whack at
21 it of my own. If I'm the Maryland Democratic Party and I

1 send direct mail to my voter file, say in August of the
2 election year, and it says you really ought to vote for
3 Martin O'Malley, am I committing FEA under the draft rules?
4 Am I required to pay for it with federal money?

5 I think I am. I am encouraging potential voters
6 to vote. I'm saying, you ought to vote for Martin O'Malley.
7 So what that means is the Commission, if it's going to go
8 with an encourage standard, has got to decide what encourage
9 means and how to flesh out that term so you're
10 distinguishing the encouragement that's going to qualify as
11 GOTV and the encouragement that's not.

12 I think -- the way I read the Shays case, the
13 court, I think, was frustrated that the Commission -- or
14 that the Commission --

15 COMMISSIONER WEINTRAUB: We all are.

16 MR. SVOBODA: -- a series of activities that it
17 thought fairly were characterizable as GOTV and voter
18 registration and yet the regulations didn't cover them. I
19 think it was -- it's choosing the word "encourage" in this
20 context. I think it's expressing its frustration that
21 there's a range of activity that in its view seemed fairly

1 captured by these terms that should have been there.

2 I don't think that the Shays III court would have
3 taken the example I just did, the direct mail on Mr.
4 O'Malley, or the example I gave in the beginning of my
5 testimony. I don't think the Shays III court would have
6 found either of those to be GOTV.

7 One other point. Karl's talked frequently about
8 federalizing the process. I want to come at that from a
9 different angle. It's really a statutory problem for you
10 all because you have a statute on the one hand that says
11 that state parties, local parties and associations are free
12 to sponsor public communications that promote, support,
13 attack or oppose solely local candidates so long as they
14 don't otherwise qualify as FEA.

15 So Congress actually had a statute where it tried
16 to protect even the rights of state parties to be active
17 solely in non-federal contexts. It conditioned that,
18 however, by saying that they can't otherwise qualify as FEA.
19 So the question is, do you define these terms in a way so
20 that they swallow the exception and basically take it away?
21 And that's a very acute problem for associations because we

1 don't have Levin funds. We don't mention federal candidates
2 or promote or support them.

3 And if the definition of GOTV is so vast as to
4 vitiate that exemption, then we really are violating
5 congressional intent. I mean, it's -- I don't want to put
6 the -- I don't want to talk about it in terms of
7 federalizing the system because I'm not here to second guess
8 what Congress did eight years ago. But it's a question of
9 statutory interpretation for the Commission that as yet has
10 not been teed up, or at least squarely in the Shays
11 opinions, and is something that we nonetheless need to be
12 mindful of here.

13 CHAIRMAN WALTHER: Thank you.

14 COMMISSIONER WEINTRAUB: And I just wanted to --

15 CHAIRMAN WALTHER: Yes.

16 COMMISSIONER WEINTRAUB: -- for Mr. Ryan. I know
17 you said this wasn't your top priority, but I'm still
18 interested in this concept of the elections that don't take
19 place, the non-federal elections that don't take place on
20 the Election Day, on the federal Election Day.

21 I'm wondering if you see a distinction between

1 voter I.D. and GOTV because it seems -- whereas it seems to
2 me that getting people out, activities that are designed to,
3 for example, drive people to the polls on a date when no
4 federal officeholders or candidates are on the ballot, I'm
5 not seeing how that has any impact on the federal election
6 that takes place two months later as opposed to maybe voter
7 I.D. does.

8 So I'm wondering if you see any distinction
9 between those two activities and whether there is some
10 period of time, some cooling off period that would dissipate
11 the effect, is it worse, if it's -- I mean, we've actually
12 seen some elections that are a week before the election, the
13 federal election, as opposed to three months before the
14 federal election or six months before the federal election.
15 Is there some period of time over which this effect
16 dissipates?

17 MR. RYAN: You mentioned voter I.D. versus GOTV.
18 You didn't comment specifically with respect to voter I.D.
19 My view is that the problem is most acute with respect to
20 voter I.D. because the products, the results of voter I.D.
21 efforts have more lasting effect perhaps. Getting directly

1 to your question about GOTV, I think it depends entirely on
2 the specifics of the GOTV effort, as well as whether or not
3 you're operating in a state that allows early voting, or
4 whatever the state calls it.

5 If you can -- if it's a vote by mail state like
6 Oregon, if it's an early voting state, if they call it vote
7 by mail but you don't need any excuse to do it, or even if
8 you do need an excuse to do it, if the window for voting is
9 open and you're permitted to engage, use soft money to
10 engage in get-out-the-vote efforts, I think it's a problem.
11 I think it should not be permitted.

12 I think it's less of a problem if you're operating
13 in a universe where there is no early voting, there's no
14 possibility that getting out the vote efforts by a state or
15 local party will actually encourage. If you cannot be
16 voting for federal candidates at the time when those efforts
17 are made, then the problem is less -- or it's less of a
18 problem, I should say.

19 So there are variables beyond simply voter I.D.
20 versus GOTV and GOTV obviously encompasses activities far
21 broader than driving people to the polls. If we're talking

1 about driving people to the polls on a day when there's no
2 federal election going on, I'm not concerned about that
3 context. But we're talking about much, much more than that
4 in terms of how the Commission regulates get-out-the-vote
5 activities generally.

6 COMMISSIONER WEINTRAUB: And you think that we
7 should just switch a little bit -- gears a little bit? You
8 think that we should regulate differently the communication
9 that goes out and says all sorts of wonderful things solely
10 about state and local candidates, same communication. One
11 mentions the date of the election. One doesn't mention the
12 date of the election. You think that's a distinction that
13 we should formalize in our regulations as one needs to be
14 done with federal funds and one doesn't?

15 Presumably the one that doesn't even mention the
16 name of the election and only talks about federal -- non-
17 federal candidates. There's no reason to pay for that with
18 non-federal -- with federal funds, sorry. I'm getting my
19 terms all backward.

20 MR. RYAN: I think it -- if it were to say --
21 mention a bunch of state and local candidates, not mention

1 the specific date of the election, but say vote in November
2 and both elections are in November, I think that is close
3 enough to have it qualify as federal election activity. If
4 the state party's spending a bunch of money to say vote in
5 November, it falls within the realm of the Supreme Court's
6 concerns that any efforts to get like-minded voters to the
7 polls, if that -- I think that should be your guide star.
8 And if you hold that up as your --

9 COMMISSIONER WEINTRAUB: Pages on non-federal
10 candidates and then one line on the bottom that says don't
11 forget to vote, don't forget to vote November, don't forget
12 to vote on November 2.

13 MR. RYAN: If it's a printed communication, I
14 think it should be covered, yeah.

15 CHAIRMAN WALTHER: Thank you. Commissioner
16 McGahn?

17 COMMISSIONER MCGAHN: Thank you, Mr. Chairman. I
18 want to thank the commenters for their efforts. It takes a
19 lot of time to put this together and coming here is for some
20 a repeat performance, others a repeat performance and
21 others, I was there when you were up here. So it's deja vu

1 all over again in a different way, I suppose. But I
2 appreciate the effort.

3 I'd like to explore two areas that others have
4 already touched on, but maybe drill down a little bit
5 farther into the details and pick up on something Mr. Ryan
6 sort of concluded with that the any efforts language in
7 McConnell should be our guide star. Are you saying that
8 that should guide us, not the statute?

9 MR. RYAN: No, I'm saying you look at the statute
10 and the statute should obviously be the baseline. But to
11 the extent that questions arise about the statute, the
12 Supreme Court's interpretation of the statute I think should
13 be taken very seriously by this Commission.

14 COMMISSIONER MCGAHN: So a facial challenge is
15 actually a construction of the statute in McConnell, that
16 actually construes the statute and that tells us what the
17 statute means and when it's applied to specific facts?

18 MR. RYAN: I think it's very instructive about
19 what the statute means when applied to specific facts.

20 COMMISSIONER MCGAHN: I'll take that as a no, it's
21 not -- that's not what McConnell does. What I want to get

1 at in the statute is there are certain things covered using
2 terms like "voter registration," "voter identification,"
3 "get-out-the-vote," "generic campaign activity," but there
4 are certain things that are excluded. So any effort to help
5 federal candidates -- any effort that may help a federal
6 candidate is not the standard. It's the statute, and there
7 are exclusions.

8 And what I'd like to try to explore is the
9 difference between those, which as Mr. Svoboda has called
10 it, the difference between persuasion materials and the FEA
11 materials. And let's take -- let's take the example that
12 Mr. Svoboda offered in his opening, the newspaper article,
13 or the newspaper ad. Let's assume that you do change the
14 name of Nixon to O'Malley and let's say it's Maryland. Now
15 is that -- is that FEA?

16 Let me ask Mr. Svoboda first.

17 MR. SVOBODA: No, I don't think it is.

18 COMMISSIONER MCGAHN: Mr. Sandstrom? State party
19 -- let's assume -- let's assume it's a local party. Let's
20 flesh out a hypothetical. Let's assume the local party pays
21 for a newspaper ad that has that kind of language for a

1 gubernatorial candidate.

2 MR. SANDSTROM: It certainly should be FEA. I'm
3 afraid -- Mr. Ryan suggests it should be. Maybe it needs
4 one of those kinds of disclaimers, this is not intended to
5 encourage you to vote. And so anything that state
6 candidates put out together, they put on a disclaimer, this
7 is not intended to encourage you to vote. It just --

8 COMMISSIONER MCGAHN: Like the Canter A0 soft
9 money language?

10 MR. SANDSTROM: It becomes a little -- absurd
11 because of course you just leave it as encouraging someone
12 to vote -- everything parties do are directed at that
13 activity, all their organization is directed at encouraging
14 people to vote.

15 COMMISSIONER MCGAHN: Mr. Ryan?

16 MR. RYAN: I don't remember the specifics of the
17 ad that Mr. Svoboda gave.

18 COMMISSIONER MCGAHN: Let's pull it out. Can we,
19 Brian?

20 MR. SVOBODA: Sure.

21 COMMISSIONER MCGAHN: Let's actually talk about a

1 specific example because when we talk about this generic
2 lawyer language and all this theory, that doesn't help. I
3 need to see examples.

4 MR. SVOBODA: Let the record reflect Mr. Ryan's
5 reading 104 -- pages 147 and 148 of The Selling of the
6 President 1968, the paperback edition of --

7 COMMISSIONER MCGAHN: The record will so reflect.
8 I'm sure he'll cite it in his --

9 MR. RYAN: Just having skimmed it, I believe that
10 yes, it does qualify as federal election activity, GOTV
11 activity and if I'm not mistaken, I want to be clear about
12 whether the answers that have been given by my colleagues
13 here on the panel are theoretical or under the proposed
14 rule. And if I'm remembering correctly, Mr. Svoboda, did
15 you not say or conclude your opening remarks by saying that
16 this --

17 COMMISSIONER MCGAHN: Hang on. I appreciate that.
18 Let's let the Commissioners ask the questions. I don't want
19 to step on the chairman's toes when we're in the meeting.
20 But let's not ask each other questions on my time.

21 MR. RYAN: Okay.

1 COMMISSIONER MCGAHN: But for the sake of
2 argument, we know where his question's going, Mr.
3 Svoboda, but let's clarify it.

4 MR. SVOBODA: My view is that it would not qualify
5 as FEA under a fair reading of the statute, but that it
6 would qualify as FEA under the proposed rule.

7 COMMISSIONER MCGAHN: Let me ask this then.
8 Sticking with that hypothetical, Mr. Ryan, what could the
9 state party do if they wanted to do something like that and
10 not have it be FEA?

11 MR. RYAN: I think an ad that simply said vote for
12 X for governor, I think that type of direct express advocacy
13 without a more generalized encouragement or a suggestion to
14 get out to vote generally would not be federal election
15 activity under the proposed rules or under the statute.

16 COMMISSIONER MCGAHN: So that would come within
17 the exclusion in the statute, (B)(i) -- because it refers
18 solely to a clearly identified state candidate. Would that
19 come -- or just not be subject to the FEA definition in the
20 first part.

21 MR. RYAN: Just not be subject to the FEA

1 definition of the first part. I think there's a drafting
2 problem with the exemption in (B), sub (B), in that it
3 appears to me to be quite circular. It seems to me to say
4 in short it's not FEA unless it's FEA.

5 COMMISSIONER MCGAHN: That's my concern. That's -
6 - I actually -- the only document I have in front of me
7 other than the comments is the statute itself. I thought
8 that would be simpler than to go through years of regs and
9 Shays III and all that. So I'm not wrong to say that the
10 exclusion in (B) could easily be swallowed by (A), but we
11 would have to give life to the exclusion of (B), right? We
12 couldn't just go into that circle? We'd have to give that
13 life.

14 MR. RYAN: I think that the problem with the
15 drafting is that either the exemption swallows the larger
16 rule or the rule swallows the exemption because of the poor
17 drafting. In other words, if you -- you know, if you read
18 that section of the statute to say that if it -- it's not
19 federal election activity unless it's federal election
20 activity, I don't see any other way out of it other than to
21 have the rule swallow the exception and the exception

1 swallow the rule.

2 COMMISSIONER MCGAHN: So what do we do in that
3 instance where we agree, for the sake of argument, the
4 statute's poorly drafted; we just cross (B) out?

5 MR. RYAN: Well I certainly don't think Congress -
6 - I would speculate that Congress didn't intend to have the
7 entirety of the rule be swallowed by an exception that takes
8 up one small subsection of it.

9 COMMISSIONER MCGAHN: They certainly didn't intend
10 for the FEA rule to swallow the exception either, right?
11 There has to be some limit on what's FEA structurally in the
12 statute; it seems to be what Congress is doing, right?

13 MR. RYAN: Well the limits are given in the
14 definition. It's limited to, for example, voter
15 registration, get-out-the-vote activity, voter I.D., PASO
16 communications. Once you're moving outside of those defined
17 categories of what constitutes FEA, you're no longer talking
18 about FEA. I think that's -- they are the limits to what
19 constitutes FEA in the statute.

20 COMMISSIONER MCGAHN: Let me follow up on that.
21 The comments of Mr. Sandstrom and Mr. Svoboda rang -- rang

1 true with me insofar as we're dealing with terms in the
2 statute that have a meaning, or at least a meaning to
3 political operatives and presumably those who voted in favor
4 of this law. Voter registration, voter I.D. get-out-the-
5 vote, these are terms that existed before BCRA. They
6 existed after BCRA. These are not hieroglyphics on the
7 Egyptian pyramids. These are words that people know what
8 they mean.

9 Something I don't think the Commission's done
10 before is just ask a very simple question and the question
11 in a way answers Mr. Sandstrom's question to us, that we
12 need to figure out what these words mean. That's what we're
13 here to do today, I think.

14 So whether we can assume that let's say you're
15 teaching a class of soon-to-be campaign managers or just
16 giving a public talk, if someone were to ask you the
17 question, what is voter registration, what would a layman's
18 definition of that term be? How is that term understood by
19 those who deal in this world?

20 I'm trying to help make the record on what these
21 terms mean and whether there's agreement among folks as to

1 what they mean or not.

2 MR. SANDSTROM: I think it's generally targeted
3 communications, whether directed in person or through some
4 other -- through a form of mass communication that is
5 intended to, I would say mobilize or activate your
6 supporters to vote.

7 COMMISSIONER MCGAHN: You say your supporters.
8 You're talking to a certain universe of people?

9 MR. SANDSTROM: Yeah, the people you have
10 identified. That's where it kind of fits into voter I.D.
11 and that's what they're trying to capture. There are people
12 you have identified as more likely than not, your
13 supporters. It isn't perfect art. You rank them in your
14 get-out-the-vote efforts. You know whether they're a five
15 or four or three to determine whether you're going to -- it
16 depends on what the polling shows you, which of these groups
17 are you actually going to try to get to the polls.

18 It's activities that is targeted to a segment of
19 the population that you're trying to get to the polls at a
20 time in which it makes sense to get them to the polls. And
21 if you have early voting, then maybe earlier than Election

1 Day. Generally it's around Election Day.

2 MR. SVOBODA: If I could --

3 COMMISSIONER MCGAHN: Let's just do get-out-the-
4 vote. Let's get-out-the-vote.

5 MR. SVOBODA: What you'll typically see is a
6 campaign with an identified universe of the people who they
7 think are likely to vote for them, either based on
8 identification data that they've collected, a state party
9 voter file, other lists that they've acquired, or perhaps
10 modeling scores or other data about likely voter
11 preferences.

12 And then it's you - (a) take steps to make sure
13 people are aware, that those people, the identified people,
14 are aware of when the election is and the steps that they
15 need to take in order to vote. You provide them with the
16 information or resources that they need that you can provide
17 them under state law -- and it varies from state to state --
18 that will allow them to cast their votes.

19 And then you go through the process, whether for
20 an early vote process, or an absentee chase process or on
21 Election Day, to verify that they have in fact voted. So

1 for example, in the case of -- in the case of absentee
2 voters, you develop a list of people who you've identified
3 as likely to support your candidate. You send them
4 applications for absentee ballots. You assist them in
5 submitting the applications if state law will let you do
6 that. You verify that the applications have been received
7 and that they've received their ballot. You might call the
8 voter to see if they've received their ballot.

9 You then pester the voter to turn in their
10 ballots. If state law lets you come and collect the ballot
11 and bring the ballot back to the polling place you do that.
12 If state law lets you drive them to the polling place -- and
13 turn in their ballot, you do that as well. And then you
14 take steps otherwise to verify that they've cast their
15 ballots.

16 So it's a series of sequential steps. It's
17 basically a process to ensure that people know what they
18 have to do in order to vote, that you're helping them to the
19 extent that you can then take the steps that they need to
20 take in order to vote and then you verify that they in fact
21 voted, and you're doing that with a targeted universe of

1 people.

2 CHAIRMAN WALTHER: I want to say, we got about
3 nine minutes left. I think Commissioner McGahn, you want to
4 follow up quickly? I know that eventually the General
5 Counsel, Ms. Duncan, is here to ask some questions.

6 COMMISSIONER MCGAHN: I'd like to hear Mr. Ryan's
7 answer to the same question.

8 MR. RYAN: I'd be happy to answer the second
9 question. On page seven of our written comments -- I'll be
10 brief here, but we -- in six to seven in our written
11 comments we explained that the Commission has for years had
12 on its books definitions of get-out-the-vote activity, voter
13 registration activity.

14 It's specifically now been moved, but it's section
15 100.133 of the Commission's regulations and it defines voter
16 -- it defines get-out-the-vote activity as voter
17 registration - get-out-the-vote activities as actions
18 designed to encourage individuals to register to vote or to
19 vote. I think that's a common sense explanation or
20 definition of what the terms means. I think it's good that
21 it's been in the Commission's regulations for years and I'm

1 not sure why the Commission ever departed from that
2 understanding of what those terms mean.

3 COMMISSIONER MCGAHN: Thank you. If I could
4 follow-up on that. You have a hypo in your comments, page
5 20-21. It wasn't in your briefs in Shays III and I wanted
6 to -- I know, Mr. Ryan, your views because it's in your
7 comments, but the hypo says -- it's trying to illustrate
8 that the proposed rule may not go far enough. And I read
9 the hypo and I thought gee, kind of looks like get-out-the-
10 vote to me.

11 And it says imagine a mass mailing of more than
12 500 pieces that says, we urge all Democrats to get out to
13 vote on November 4 between the hours of 6 a.m. and 6 p.m. at
14 your polling station at, address of polling station, so you
15 can support candidates like Mayor Smith. If you need a ride
16 to the polls, call us at, phone number.

17 Is that get-out-the-vote?

18 MR. SVOBODA: I think if it's targeted it is,
19 yeah.

20 COMMISSIONER MCGAHN: Assuming it's going to
21 people they want it to go to?

1 MR. SVOBODA: Yeah.

2 COMMISSIONER MCGAHN: Okay.

3 MR. SANDSTROM: The one thing that you might take
4 from your question is you have one person on the panel, my
5 colleague, who is a political operative and that's the sort
6 of -- his description of what get-out-the-vote is a -- is
7 sort of a description you should seek to confirm and build
8 into your definition.

9 CHAIRMAN WALTHER: We have to move on.
10 Commissioner, let's see, are you -- do you have anything
11 more?

12 COMMISSIONER MCGAHN: I'm not done, but if you
13 want to move on, we can move on.

14 CHAIRMAN WALTHER: Let me continue so we can get
15 everybody, including myself and Mr. Gibson, just to make
16 sure we're touching bases before the time is up. Ms.
17 Duncan, do you have any questions?

18 MS. DUNCAN: I just have one brief question.
19 Thank you, Mr. Chairman.

20 Mr. Svoboda, in your comments, you propose that
21 the Commission ought to limit the definitions to cover only

1 those activities that are primarily aimed at voter
2 registration or turnout. And during the conversation during
3 the hearing, I think you've put a finer point on that and
4 articulated it as activities that are intended to mobilize,
5 and then more specifically, as things that have -- you've
6 articulated as specific intent standard.

7 I think, Mr. Sandstrom, you have indicated your
8 agreement with that. I want to just follow-up a bit on
9 Commissioner Weintraub's questions about the
10 administrability of such a standard and ask it more
11 specifically in the context of enforcement, because once
12 rules are adopted, obviously we have the unfortunate
13 responsibility also in some instances of having to enforce
14 them.

15 How would you suggest that the Commission would
16 actually go about determining whether these activities are
17 specifically intended to mobilize or whether they are
18 primarily aimed at registration and turnout and wouldn't
19 that put potential respondents in some instances in a
20 detrimental position where they may have to prove the
21 negative that something was not in fact intended to mobilize

1 turnout?

2 Can you give us more specific comments on that
3 question?

4 MR. SVOBODA: Sure. In both my written comments
5 and my colloquy with Commissioner Weintraub, I was trying to
6 get at basically the same point, which was trying to flesh
7 out the universe of activities. And when I laid -- when I
8 argued, for example, for a specific intent standard, it was
9 way -- it was not a way of inviting you to look at the
10 subjectivity of the respondent, but to look at what they did
11 and see what you can infer from what they did about what the
12 purpose of the activity is.

13 And so how do you evaluate that as a general
14 matter? I think you would look to the sorts of things that
15 I discussed with Commissioner McGahn a moment ago. You
16 know, were these sorts of things done as part of this
17 process in order mobilize voters?

18 I mean one significant element at the outset being
19 were the communications targeted. I do fear issues with
20 administrability through enforcement. I think your rule
21 obviously needs to provide sufficient guidance. I think one

1 of the difficulties with the proposed rule is that you have
2 the same problems of administrability. We have three people
3 on the panel, for example, and we've got disagreement about
4 whether this newspaper ad, for example, would qualify as
5 federal election activity.

6 So I think that's an uncertainty we're going to
7 buy in any event. I think your best solution is to craft a
8 definition, whatever the standard is, that is narrowly kept
9 tailored to capture what parties and associations actually
10 do to mobilize voters and is as clear as possible in that
11 regard.

12 MS. DUNCAN: I'd welcome the comments of the other
13 panelists on that question as well.

14 MR. SANDSTROM: I think if you look at a
15 reasonable person who is engaged in campaign management,
16 what they would consider to be get-out-the-vote and you
17 identify what factors are to be considered, whether it was
18 targeted, whether it was done at a time where it was
19 possible to – that voting was taking place or was eminent,
20 you could sketch out how that test would be applied, and
21 give respondents a whole lot more comfort than a test that

1 relies on the word "encourage."

2 MR. RYAN: I think the proposed rule would be much
3 more easily administered. I think you should stick with it
4 rather than getting into an intent-based test.

5 CHAIRMAN WALTHER: Mr. Gibson, do you have any
6 questions? Okay, for me, I would say just briefly because
7 we don't have much time, I want to -- there's two minds here
8 that we need to satisfy, our collective mind on how we're
9 going to administer this matter, and, you know, we have
10 diverse views here and the less there is for us to quibble
11 over the nuance of a meaning, the better off it's going to
12 be for us to administer and for our staff.

13 So it's on my mind that I not only want to be
14 clear to the people that have to abide by it, but one that
15 we will find, one that we can move forward to enforce. And
16 then secondly, we can come up stuck or whatever, different
17 points of view on the upcoming decision, but we're stuck
18 with some fairly specific words here, and to go beyond those
19 I think would be fairly daring.

20 I'm not too inclined to get us back in court
21 because we didn't follow some of the language of the court

1 fairly closely and I would say, Mr. Sandstrom you mentioned
2 that maybe we should go out into the sea of information
3 that's there and try and shore up our reasons why we can use
4 -- maybe vary from the word "encouragement," for example.
5 Correct me if I'm wrong, but I'm not sure procedurally how
6 we could do that and then pass APA Standards. I was curious
7 to know how you would suggest that we do that.

8 MR. SANDSTROM: The General Counsel can correct me
9 if I'm wrong. The Commission can essentially seek
10 independent information on its own outside to bolster what -
11 - questions that are raised during the course of hearings.
12 Your independent investigation trying to -- I think other
13 agencies do this fairly regularly -- to try to determine
14 what the facts are, what is -- and what -- so I think in
15 going out and seeking additional information, objective - in
16 an objective fashion that's open and made part of the
17 record, would not violate the APA.

18 CHAIRMAN WALTHER: I need to commission somebody
19 because we are having these public hearings, we had public
20 comment, to go back and then try and - get particular
21 individuals to give us input given the way we do our process

1 here. I was wondering -- I work here, so I'm just wondering
2 in this particular case.

3 MR. SANDSTROM: I think agencies rely upon expert
4 judgment gathered outside the hearing context.

5 MR. SVOBODA: Commissioner, if you start with the
6 premise that you're stuck with the word "encourage," you do
7 have under the APA the discretion to decide what encourage
8 means through a rationale process. I think you know from
9 the Shays III opinion some of the things that they thought
10 to be encouraging. They discuss them at length from the
11 example presented by Mr. Shays in the Long Beach advisory
12 opinion. I don't think that we know from the opinion
13 necessarily all of the things that they would find to be or
14 to -- not to be encourage.

15 So I think your task is to take -- you know, if
16 you're going to start with that word, I think your task is
17 to flesh it out and see, first off, in the exercise of our
18 expert judgment as an agency, what we think that means, and
19 second, evaluate it up against what the court said in Shays
20 III, and make predictive judgments as to whether we think
21 the court would agree with that, you know, realizing that

1 there is also a peril in the opposite direction.

2 I mean, every two or three years, the Commission
3 considers federal election activity rules knowing that Mr.
4 Shays, rest his soul, may challenge them. But the
5 possibility exists that you may face challenge from another
6 avenue as well and that's a particular vulnerability with
7 associations and groups of state or local candidates where
8 the McConnell language is thin at best on that.

9 So the Commission faces the dilemma it's faced in
10 other contexts, which is, you can regulate to the Nth
11 degree, but if you pull that rubber band as far back as it
12 can go, you know that there's some risk it may come back and
13 snap you and undo the whole exercise.

14 CHAIRMAN WALTHER: Well, we're here because of a
15 Supreme Court -- because of a court decision. We're looking
16 to the Supreme Court to make the decision to try and move
17 forward in a way that won't find us back in court and we'll
18 substantially comply with the intent of that decision. So
19 that is a balancing act and I just wanted to -- really for
20 Mr. Sandstrom to take a look at what he would suggest we
21 would do to meet the APA requirements at this point.

1 The question can be, can we ignore the word
2 “encourage” only if we go out and get more supportive
3 language than in our opinion? What would be the reason for
4 it? We’ve heard a lot of testimony back in forth, varying
5 degrees of how it might be interpreted or defined,
6 redefined.

7 MR. SANDSTROM: The court did not put the word
8 “encourage” into the statute. It identified activities that
9 it was concerned about that might not be covered. It used,
10 for example, the Long Beach example, where robocalls were
11 made to encourage people to get out and vote.

12 I can encourage -- this is a very flexible word.
13 I can encourage the Commission to do a good job. I can also
14 encourage it to go out and gather additional information.
15 There’s very different ways that I’m using that word. One
16 is just a general use – to tell you to do what the job
17 requires and in others I’m encouraging to actually taking
18 particular action. So that word, one, is not in the
19 statute. The court is not in a position to put it in the
20 statute. It’s not in the position to put it in the
21 regulations.

1 It can tell you that there is certain activity
2 that it identified that it believed was covered by the
3 statute, such as the activity in the Long Beach advisory
4 opinion -- and I think you can cover that because that was -
5 - what they sought there was robocalls being made on
6 Election Day to motivate people to vote. They were sent to
7 a targeted audience.

8 CHAIRMAN WALTHER: Thank you. Commissioner
9 McGahn, would you like to finish up, a brief question?

10 COMMISSIONER MCGAHN: Actually, I want to follow-
11 up with Mr. Ryan on our hypothetical, on the newspaper
12 article where I think we agreed that there is a way for them
13 to do it if they only do advocacy for O'Malley.

14 I think that's where we left off. I don't want to
15 put words in your mouth. Is that - is my recollection
16 correct, that we came up with a way that a state party could
17 do that kind of ad, but it's a stripped down version that
18 would not be FEA?

19 MR. RYAN: Yes, as long as it isn't encouraging
20 people generally to get out to vote, instead simply
21 advocating that people vote for a specific candidate.

1 COMMISSIONER MCGAHN: What if it includes the date
2 of the election, would that change your answer?

3 MR. RYAN: No, again provided that it's not a get-
4 out-to-vote general exhortation.

5 COMMISSIONER MCGAHN: Wait a second, the
6 "provided" threw me. Would it or wouldn't it be? Assume
7 you're -- assume you're a lawyer for a state party and they
8 prepared this piece and it has go vote for O'Malley on
9 Election Day, November -- well it's not going to be --
10 whatever the election date would be in our hypothetical,
11 November whatever, whatever year, would that be FEA?

12 MR. RYAN: The addition of the go vote for I think
13 would bring it within the realm of getting -- you know, get-
14 out-the-vote encouragement of getting out to vote versus
15 vote for O'Malley.

16 COMMISSIONER MCGAHN: Well it says go vote for
17 O'Malley. You're telling me that there's a difference
18 between go vote for O'Malley and vote for O'Malley?

19 MR. RYAN: I think under the statute, yes,
20 particularly a difference between get out to vote for
21 O'Malley and vote for O'Malley.

1 COMMISSIONER MCGAHN: Why?

2 MR. RYAN: Congress decided to cover get-out-to-
3 vote type communications and Congress did not decide to
4 cover pure straightforward express advocacy for a single
5 candidate.

6 COMMISSIONER MCGAHN: But when you say vote for
7 O'Malley, isn't that encouraging you to go vote?

8 MR. RYAN: It may be, but I think the line exists
9 somewhere and in my view that's where the line exists.

10 COMMISSIONER MCGAHN: But they could include the
11 date of the election so long as it simply said vote for
12 O'Malley? But if you say go vote for O'Malley, as a lawyer
13 you'd have to cross out go and then it wouldn't be FEA. You
14 could use state money to pay. But if it had go, you'd have
15 to use all hard money?

16 MR. RYAN: I think that would be compliant with
17 the statute, yes.

18 COMMISSIONER MCGAHN: That's at least a line,
19 okay.

20 CHAIRMAN WALTHER: This will have to be very
21 quick, because we're running into the time for the other

1 panel now.

2 MR. SVOBODA: One quick footnote on your exchange.
3 The state party would be able to pay for that communication
4 with a mix of hard and Levin funds. An association, like the
5 DGA, would have to pay for it entirely with federally-
6 eligible funds.

7 COMMISSIONER MCGAHN: And an outside group that's
8 not a party could use all soft.

9 MR. SVOBODA: Correct.

10 COMMISSIONER MCGAHN: Right. One -- if I could,
11 Mr. Chair, just one more follow-up. Let's change -- let's
12 just put another fact in the hypothetical. Let's assume
13 it's the local party doing this piece and there is no
14 presidential election, there is no senatorial election. And
15 for whatever reason this local Democratic Party was unable
16 to field a nominee for Congress. So there is a Republican
17 on the ballot, but no Democrat and they want to put out a
18 piece that says go vote for O'Malley on November -- Election
19 Day; does that change your answer?

20 MR. RYAN: I'd want to look more closely at the
21 statute and the proposed regulation to give it a definitive

1 answer. I don't know if there's leeway within the statute
2 to make a distinction about which party's candidates are on
3 the ballot. I believe the language is an election in which
4 federal candidates are on the ballot, but I would need to
5 review it.

6 My instinctual response, not having done that
7 review, is it's still covered under the statute.

8 COMMISSIONER MCGAHN: Common sense-wise, since
9 we've invoked common sense per the Supreme Court, it would
10 seem that the Democratic Party, if they say go vote for
11 O'Malley, they're not getting out the vote for a Republican
12 Congressional campaign. They can't possibly be really
13 urging that. So there's got to be some kind of line. And
14 if you could, I'd like you to reflect upon it in answering
15 my question perhaps.

16 CHAIRMAN WALTHER: Perhaps we could have a written
17 answer, if you want to give five days to have people provide
18 further comment. But we have to have a hearing.

19 MR. RYAN: Is that the same deadline for the
20 response to Commissioner Hunter's --

21 CHAIRMAN WALTHER: I was just thinking of the same

1 thing. We'll see what the commissioners think --

2 COMMISSIONER MCGAHN: Thank you, Mr. Chairman, for
3 your indulgence.

4 CHAIRMAN WALTHER: Two weeks. Is there a calendar
5 handy with the date? Commissioner Weintraub?

6 COMMISSIONER WEINTRAUB: If we're giving people
7 two weeks, I'd like to hear if people have any other verbs
8 they want to offer. They don't like encourage, they want to
9 try another verb, I'd be happy to hear it. Or if you have
10 actual wording suggestions for how you think we could cabin
11 in the word "encourage" so that it would not raise the
12 problems that you are currently concerned about, I'd be
13 happy to hear that too.

14 CHAIRMAN WALTHER: Let me see if I can pick a
15 date.

16 MR. SVOBODA: I didn't realize I'd be getting
17 homework. This will teach me to raise my hand in class.

18 CHAIRMAN WALTHER: Really, that's what you get.
19 If we pick two weeks, we're looking at the 30th, so why
20 don't we pick the 4th of January? That's a Monday. Any
21 objections? If not, it will be the 4th of January for

1 comment.

2 COMMISSIONER WEINTRAUB: Do you want to give them
3 until the sixth so that they don't necessarily have to work
4 over New Year's weekend?

5 CHAIRMAN WALTHER: Well New Year's is a Friday, so
6 -- but sure. Wednesday the 6th it is.

7 Thank you very much for appearing. We appreciate
8 it very much. We look forward to your comments and it's
9 been very edifying for all of us. Thanks.

10 (A brief recess was taken.)

11 CHAIRMAN WALTHER: We are now convening the second
12 panel for the public hearing on the definition of federal
13 election activity. Thank you very much for being here. I
14 apologize because we're late in getting started, but it's
15 kind of the nature of the beast sometimes when we get
16 started on matters.

17 I want to thank Neil Reiff and Joseph Sandler, Ron
18 Nehring and John Phillippe for being here. I've talked to
19 them both -- all of you before this and as I understand it,
20 you're only looking at one statement for the two of you, so
21 we will do it that way. But let's figure just five to 10

1 minutes on each and we'll flexible about that.

2 So we'll just begin with that. So, Mr. Reiff and
3 Mr. Sandler?

4 MR. REIFF: We'll be brief.

5 CHAIRMAN WALTHER: All right. Thank you.

6 MR. REIFF: Mr. Chairman, Commissioners, thank you
7 for the opportunity to appear today to provide oral
8 testimony in connection with this rulemaking regarding the
9 Commission's definition of voter registration and get-out-
10 the-vote. I'll be making a short opening statement on
11 behalf of both Joe Sandler and myself.

12 We appear here today on behalf -- on our own
13 behalf. Our views are based on our experience as counsel to
14 over 35 Democratic state party committees and several
15 associations of state and local candidate organizations, but
16 we are not speaking for any specific client today.

17 This rulemaking is required due to the D.C. Court
18 of Appeals decision in Shays v. FEC. In that decision, the
19 court instructed the FEC to amend its regulations regarding
20 the definition of voter registration and get-out-the-vote
21 due to the court's concerns that the Commission's current

1 rules created two distinct loopholes. Without much
2 elaboration, the court was concerned that the Commission's
3 current rules regarding individualized contacts and the
4 requirement of such activities assist a voter in order to be
5 subject to the regulations.

6 We believe that both of these concerns can be
7 addressed without a vast federalization of non-federal
8 campaign activity. We believe that virtually all campaign
9 activity that benefits federal candidates are already
10 required to be paid for with federal funds, such as the rule
11 that requires any public communication that promotes or
12 supports or attacks or opposes a federal candidate be paid
13 for exclusively with federal dollars, as well as the fact
14 that most generic campaign activity is already covered under
15 the current FEC rules.

16 So as a practical matter, what we are essentially
17 considering here today is how much non-federal campaign
18 activity will be subject to federal regulation. We believe
19 the Commission can satisfy the court's concerns with modest
20 changes to its regulations and providing clear guidance on
21 what constitutes voter registration and get-out-the-vote.

1 To that end, we have provided specific proposed
2 regulatory language in our written comments. Our proposed
3 language addresses the court's concerns first by eliminating
4 the concept of individualized contacts and replacing it with
5 specific types of communications that are commonly used to
6 directly communicate with the voters, such as mail, phones,
7 in-person contact, as well as e-mail and text messaging.
8 Our proposal would also include calls made right before an
9 election that are designed solely to remind voters to get
10 out the vote.

11 Second, we suggest that the Commission replace the
12 assist standard with what we refer to as a facilitation
13 standard. This would make it clear that the Commission's
14 regulations do not cover those communications that are
15 merely designed to encourage registration in voting and
16 include those activities that help bring the desired
17 activity about.

18 This clearer standard can be fleshed out with the
19 proposed examples in our written comments. During this
20 rulemaking process, the Commission should be mindful that
21 the Shays court undertook its task in what appears to be a

1 political vacuum, devoid of empirical evidence and a
2 realistic understanding of how the challenged regulations
3 operated in the larger regulatory scheme.

4 Thus, it is imperative that the Commission adopt a
5 standard short of mere encouragement. To do so would
6 essentially federalize all campaign communications and
7 activities undertaken by party committees and non-federal
8 associations. This is clearly not what Congress had
9 intended, and we predict that it would lead to considerable
10 confusion and uncertainty in the regulated community and
11 thus undermine rather than further the interests of
12 consistent compliance with the law.

13 Thank you for your consideration of our oral and
14 written testimony. We would be happy to take any questions
15 for you.

16 CHAIRMAN WALTHER: Thank you very much.
17 Appreciate it. Ready for Mr. Nehring?

18 MR. NEHRING: Mr. Chairman, Mr. Vice Chairman,
19 members of the Commission and staff, I'd like to thank you
20 for the opportunity to testify before you today. I'm here
21 in my capacity as chairman of the Republican State

1 Chairman's Committee of the Republic National Committee. To
2 my right is Mr. John Phillippe, chief counsel of the RNC,
3 who will be asked to -- available to answer questions as
4 well.

5 It's a privilege to be part of this bipartisan
6 panel. In reviewing the other comments submitted for this
7 rulemaking, I was really struck by a few things. First,
8 almost all of the commenters who weighed on the merits of
9 the proposed rules expressed a strong belief that the
10 Commission's proposals would go too far. Second, several of
11 the commenters are from my home state of California, where
12 I'm chairman of the state Republican Party. And third, most
13 of the commenters are Democrats.

14 So these are the same people whose candidates and
15 causes I'm often working against as I've worked to elect
16 Republicans across California in my role as -- and in my
17 role as chairman of the state chairman's committee for the
18 state party, or for the national party across the country.

19 But today I'm pleased to join with my Democratic
20 colleagues in urging the Commission to protect state and
21 local political activity and speech, put another way, to

1 protect the rights of Americans to participate in voter
2 registration and get-out-the-vote activity through political
3 parties.

4 State and local parties are primarily concerned
5 with electing state and local officials. I say this based
6 upon my experience not only as state party chairman in
7 California, where I have served in that role for three
8 years, but also for 5.5 years as the county Republican
9 chairman in San Diego, California.

10 The national party committees, such as the RNC,
11 the National Republican Senatorial Committee, and the
12 National Republican Congressional Committee, and their
13 Democratic counterparts, take the lead on electing federal
14 candidates. In internal discussions at our state party, I
15 always refer to the NRCC as the lead agency on congressional
16 races and the NRSC is the lead agency on the U.S. Senate
17 race in California.

18 Our state and local parties are focused on
19 electing state and local candidates primarily through
20 grassroots activities and in states such as California.
21 We're also greatly interested in state ballot measures,

1 propositions, initiative, referendum.

2 Voter registration and turnout programs make up a
3 substantial part of our operations both at the state party
4 level as well as our county committees throughout
5 California. Should the Commission adopt the proposed
6 regulations, a large portion of our grassroots activities
7 supporting state candidates, local candidates, and ballot
8 measures would suddenly be federalized and restricted.

9 I'm deeply concerned about the effect the proposed
10 regulations will have on our grassroots non-federal activity
11 primarily for two reasons. First, the proposed regulations
12 sweep in large amounts of purely non-federal activity.
13 While I understand the Commission must adopt broader
14 definitions than the existing ones, the proposed regulations
15 capture basically all voter registration and GOTV activity
16 during the FEA time frames regardless of the type of
17 candidate they were intended to support.

18 There are only two exceptions to the proposed
19 rules for mere exhortations during political speeches or
20 events and for public communications directed solely in
21 referencing the non-federal candidates. Both of these

1 exceptions appropriately exclude purely non-federal
2 activity, but the exception is very limited.

3 I ask the Commission to consider creating a formal
4 safe harbor that extends the mere exhortation exception to
5 all grassroots activity and speech. The Commission could
6 easily create a clear, safe harbor by adopting a time and
7 space ratio as it has with other regulations. Extending
8 this exception would allow a greater amount of purely non-
9 federal activity to remain non-federal while accomplishing
10 BCRA's stated purpose of preventing soft money from
11 influencing federal elections.

12 Second, the proposed regulations will deter
13 grassroots activities. BCRA's restrictions have already
14 dramatically curtailed grassroots activities that I've seen
15 firsthand. For example, the California Republican Party,
16 along with its local county committees, registered on
17 average 300,000 new Republican voters each year for the 15
18 years preceding BCRA's enactment through times that were
19 both good for our party and bad, but on average 300,000 new
20 Republicans a year regardless of 15 straight years.

21 Since BCRA, our state party and our county

1 committees together have registered fewer than 300,000 of
2 Republican voters each of the years since its enactment. I
3 fear that the proposed regulations will make it even more
4 difficult for state and particular local parties to engage
5 in grassroots activity such as voter registration and voter
6 turnout activity.

7 In some small states that are not competitive at
8 the federal level for our party, but are competitive at the
9 state level, requiring more of their grassroots activity to
10 be funded with federal dollars will suffocate those state
11 parties. And unregistered local parties with robust voter
12 registration and GOTV programs will now have to worry about
13 complying with more extensive federal laws.

14 State and local parties often have only a few
15 full-time staff members. Many local party committees have
16 no full-time staff members at all and are primarily
17 volunteer driven. We need clear and simple regulations to
18 follow, such as a clear time and space ratio.

19 But even if you're not convinced that ours is the
20 best approach, I do think there's a great deal of merit to
21 some of the other approaches recommended by the -- to the

1 Commission by the other commenters and I look forward to
2 discussing those with you today as well.

3 CHAIRMAN WALTHER: Thank you very much. We'll
4 begin, Mr. Vice Chairman?

5 VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman.
6 I'd like to pick up a point that Mr. Nehring brought up in
7 his remarks and that Mr. Sandler brought up in your written
8 remarks about this mere exhortation and whether or not we
9 could expand this beyond a speech at an event or at a rally.

10 The language that's used in the Shays court is
11 that a definition could surely be crafted that would exempt
12 such routine or spontaneous speech and any exhortations
13 without opening a gaping loophole permitting state parties
14 to use soft money to saturate voters with unlimited direct
15 mail and robocalls that unquestionably benefit federal
16 candidates.

17 So I guess a couple of questions to ask is do --
18 under the court's direction, do we -- do we have the
19 latitude in which to craft a rule that would allow for
20 exhortations, mere exhortations to other types of
21 communications? And is there anything that the court

1 identifies here? Is there anything unique about a speech at
2 a rally or at an event where an exhortation would be okay,
3 but are there qualities in other types of speech where it
4 would create the sorts of problems that the court was
5 seeking to -- well the court identified that -- the
6 legislation was trying to stamp out.

7 Is there any reason why we would want to just
8 limit it just to speeches or events or do you think that we
9 have the latitude to apply it across the board to all sorts
10 of communications?

11 MR. SANDLER: Commissioner, we do believe that the
12 Commission does have the latitude to do that and that the
13 reference to routine exhortation was not intended to be
14 limited to one particular -- the medium of a rally as
15 opposed to some other means of communication. But you would
16 interpret that precisely to mean, at least as the court did
17 -- and they were quoting the brief of the plaintiffs there -
18 - to mean that kind of expressions we were talking about
19 before, get out and vote for Smith for governor today, get
20 out and vote today, without more, is a routine exhortation
21 and can and, we would submit, should be excluded from the

1 scope of the definition of federal election activity and
2 that we don't believe the court -- Shays court intended that
3 to be conditioned on a particular means of communicating
4 that routine exhortation.

5 MR. PHILLIPPE: Yes, we would agree with that,
6 Commissioner. The -- I think the court was really just
7 addressing that because that was the Commission's stated
8 rationale. There is something in between just having that
9 one exemption and allowing a gaping loophole that allows
10 saturation of voters. So, I think that's the challenge for
11 the Commission, is to find out where that line should be
12 drawn. But it's certainly -- certainly somewhere beyond
13 just that speech exemption.

14 VICE CHAIRMAN PETERSEN: If I could just ask
15 another question. Through the first panel, we've all been
16 talking about the difficulty in drawing lines, when does --
17 when does speech go from being just a mere exhortation under
18 the policy that you're advocating, that you would like to
19 have that applied across the board, when does a mere
20 exhortation cross the threshold and become get-out-the-vote
21 communications?

1 Where -- what sort of criteria should the
2 Commission consider when attempting to draw the line between
3 what is a mere exhortation that should be permitted without
4 triggering federal funding requirements and when it would
5 cross the line where federal funding requirements would then
6 be in place?

7 MR. REIFF: I think our view is that using the
8 concept that exhortation is really not the way to go
9 generally speaking, that you're just going to get caught in
10 too many kind of logical traps if you just limit it to when
11 does an exhortation draw the line?

12 So what you really need to do for this to kind of
13 stand the test of time is to make this a functional
14 definition. So what we have proposed in our written
15 comments is a functional definition. We used the concept of
16 what we like to call facilitation. Facilitation is
17 obviously more than just mere exhortation. It is
18 exhortation plus something that will bring the act of
19 voting. I guess, going back to the word "assist" again here
20 for a second, but I don't want to fall into that trap per
21 se, but it's more than just saying how to vote, more than

1 saying vote for someone or go vote for someone.

2 What our written comments presents is a definition
3 that's realistic, that accounts for the things that we
4 believe really do kind of facilitate a vote and I think you
5 really need to have a functional definition.

6 MR. PHILLIPPE: Yeah, we -- I absolutely agree
7 with that and as Mr. Nehring said at the outset, we've put
8 forth a specific proposal that would involve a time/space
9 ratio to determine what actually constitutes get-out-the-
10 vote activity beyond -- certainly beyond mere exhortation.
11 I agree, the exhortation framework, it's fairly unworkable.

12 And I would say that beyond just the ratio, there
13 needs to be some content requirement. Even the one
14 commenter, or the one witness who spoke in favor of
15 including mere encouragement as get-out-the-vote activity
16 admitted there needs to be a line -- a line drawn somewhere.

17 So I think again it's about finding where that
18 line is drawn. I think it's well beyond mere exhortation
19 and given that, I would suggest jettisoning that exhortation
20 framework and having a separate -- coming up with a rule
21 under a different framework and whether it's ours with the

1 time/space ratio, whether it's theirs, as well as the other
2 commenters who suggested some kind of facilitation standard,
3 I think those are both very workable and appropriate
4 standards.

5 So I would suggest moving in that direction.

6 MR. NEHRING: If I may add to that, as I reviewed
7 this issue, I found there to be a great irony in that as
8 someone who is a state Republican chairman now and served as
9 a county Republican chairman for 5.5 years, I drew up a lot
10 of budgets and we never spent -- in 5.5 years as county
11 chairman of San Diego, we never spent one dollar on
12 broadcast media whatsoever for get-out-the-vote purposes.

13 But the irony is that the proposed regulations
14 would classify all types of broadcast messages as get-out-
15 the-vote activity when in fact we would never choose to
16 engage in broadcast media for that purpose because it
17 doesn't work.

18 What we have found to be the most effective means
19 of turning voters out is individualized contacts, such as
20 visiting someone in person at their door. We built a large
21 precinct organization in San Diego specifically for that

1 purpose. When we sought to maximize turnout among our
2 members, we did not turn to any broadcast means. We turned
3 to a large in-person voter contact organization.

4 And so the irony is that all types of messaging
5 that really in effect have nothing to do with turnout and is
6 not intended to have anything to do as turnout, would be
7 federalized and treated as such under these proposed rules,
8 which I think justifies expanding that mere exhortation,
9 that safe harbor in one of the manners that have been
10 proposed.

11 CHAIRMAN WALTHER: Commissioner?

12 COMMISSIONER BAUERLY: Thank you, Mr. Chairman.
13 I'd like to return to a big topic from this morning and I
14 think something you may have just described, Mr. Nehring,
15 and Mr. Phillippe, is the content part of your standard
16 about you use the word, I believe, "active encouragement,"
17 which sounds different than encourage, but could also have
18 the similar elements.

19 So I would like you to -- and I appreciate that
20 both sets of our commenters have come up with proposals and
21 I'd like to explore each of those. So if you could provide

1 us with a little more context of what that means,
2 particularly in terms of GOTV sorts of efforts. Obviously
3 if you're standing at someone's door, that might be an
4 active activity, but there might be other types of contacts
5 that are less active.

6 So I'd like to get your thoughts on that and then
7 I'll turn it over to Mr. Sandler and Mr. Reiff to talk a
8 little bit more about why facilitate isn't assist.

9 MR. NEHRING: If I may, what struck me here is
10 that we may engage in all types of broadcast communications,
11 for example, concerning state ballot measures, for instance,
12 or particularly in our upcoming June primary. Our June
13 primary in California, for example, by rule we are not
14 permitted to take sides in any of those primary elections
15 that will take place. We do not pre-primary endorse at the
16 California Republican Party.

17 But we are intensely interested in some of the
18 ballot measures which will be on that ballot. So we may
19 engage in broadcast advertising or other means of
20 communication which would be swept in under the current
21 definitions, the current rules as they are proposed as

1 somehow federal activity in some way and therefore would
2 have to be funded with -- out of our federal account as
3 opposed to state accounts when clearly, those ballot
4 measures are only -- they are clearly state business and not
5 federal activity by any conventional definition, but yet the
6 unintended consequences would sweep that in.

7 So I think a different definition is required to -
8 - as we classify that, because otherwise we're going to get
9 into the position where we can't engage in speech on purely
10 state matters under the proposed definitions because they
11 get swept up in all this. I think that that's unfair and not
12 practical in any sense.

13 COMMISISONER BAUERLY: And I appreciate that. I
14 think that's the line we're trying to draw. But I'm trying
15 to understand how adding "actively" in front of "encourage"
16 narrows that in a way that prevents you from being able to
17 participate in ballot measures. What makes it different
18 than encourages, is what I'm trying to understand.

19 MR. PHILLIPPE: And we're not even necessarily
20 suggesting that the language in the regs should say simply
21 actively encourage, unless you do want to define that. The

1 broader point is that some kind of encouragement, whether it
2 includes a specific facilitation element or not, some kind
3 of encouragement the court was concerned about that we're
4 not capturing it. We're excluding encouragement. That
5 doesn't mean we need to include all kinds of encouragement.

6 And even the earlier witness who said
7 encouragement should be included said don't include all
8 kinds of encouragement. So what we suggest is the line
9 should be drawn closer. There should be a nexus between
10 where the line is and what the Shays III appeals court
11 actually said. And that was, it needs to be something more
12 than assist.

13 So given where that standard is, we would suggest
14 a standard for encouragement that is certainly one that
15 facilitates or provides specific information with the
16 encouragement. If we're going to apply the standards to
17 direct mail, it would be something certainly that doesn't
18 say just go vote November 6. But it would say, go vote
19 here, the polling location, here are the polling hours, that
20 sort of thing. If you need a ride to the polls, call us at
21 this number.

1 It would be the same thing with the phone banks,
2 calling up people and making an active specific reference
3 and encouragement to going and voting. Because -- and I
4 think you hit on this earlier today, and we'll probably get
5 into this discussion a little bit, somewhere there needs to
6 be a line between persuasion and get-out-the-vote. And
7 frankly, every campaign communication is in one sense a get-
8 out-the-vote communication. You could construe it that
9 broadly under some of the theories being advanced.

10 Nobody's -- you're not persuading voters. You're
11 not attempting to persuade voters to like or dislike a
12 candidate. You're trying to persuade them to go out and
13 vote for or against a candidate. So there just needs to be
14 some kind of active, specific element that's added so state
15 parties and local parties know where that clear line is.

16 COMMISSIONER BAUERLY: Thank you. And if just to
17 follow-up on sort of the -- perhaps the more concrete
18 examples that go with encouragement, but I did want to
19 understand how you were proposing the idea of facilitate to
20 be something -- obviously, whatever vacuum the court decided
21 the last -- the most recent decision we're referring to, it

1 is the decision that we must deal with and I appreciate your
2 sympathy towards that, but -- and yet we have -- it's a
3 reality we have to deal with.

4 So whether it's a vacuum -- it was done in a
5 vacuum and whether we think that the judges knew everything
6 they needed to know, this is what we're left with, these
7 particular words in this particular decision.

8 MR. SANDLER: We agree with that and we're
9 respectful and mindful of the concerns that were expressed
10 by the Campaign Legal Center and Commissioner Weintraub. It
11 is not the occasion to re-litigate the case and the
12 Commission's job is to come up with something that won't be
13 challenged again in court ideally, and if so, it will be
14 sustained.

15 There's no magic I think in the word
16 "facilitation." The concept we're trying to get at here I
17 think was actually articulated by the court in the Shays III
18 appeal decision and it's quotation in turn from the
19 McConnell decision. They're saying the -- they're trying to
20 ban the use of soft money for efforts by state and local
21 parties that increase the number of like-minded registered

1 voters who actually go to the polls.

2 So there's got to be something beyond the mere
3 sort of persuasion value in a candidate's specific message
4 and in a non-candidate specific message that actually
5 accomplishes -- you know, by some objective measure, will
6 increase the number of like-minded voters. So for example,
7 to take the obvious one, a T.V. ad that just says go vote
8 next Tuesday, it's broadcast to the whole media market.
9 It's not -- it's GOTV. It's not going to increase the
10 number of like minds because it's not targeted in any way.

11 The -- actually the concept we're trying to get at
12 here and any kind of information or activity that's actually
13 helpful to the voter in terms of encouraging the act of
14 voting beyond the mere -- the mere exhortation, which the
15 court indicated could be excluded, is what we're trying to
16 get at and I think the examples given in the language we
17 proposed draw the line where the court would think it
18 appropriate to do so.

19 CHAIRMAN WALTHER: Thank you very much.

20 Commissioner Hunter?

21 COMMISSIONER HUNTER: Thank you and thank you

1 again, as Commissioner Bauerly said, for both your
2 constructive ideas on how to deal with this.

3 I wanted to ask a question of Mr. Sandler and Mr.
4 Reiff, about your proposal. And in the first one about
5 voter registration activity, I think you took out one of the
6 examples that was in there, preparing and distributing
7 information about registration and voting.

8 MR. SANDLER: That's probably unintentional,
9 right?

10 COMMISSIONER HUNTER: I think it was an example of
11 --

12 MR. REIFF: I think that example probably is
13 subsumed within our examples that we have, so we may have
14 done that just because it was duplicative. I don't think it
15 was -- that it's intentional in anyway.

16 COMMISSIONER HUNTER: Okay, I just wanted to see
17 if there was something in that example in particular or you
18 just thought it was --

19 MR. REIFF: No, we try to streamline and have our
20 proposed regulation as being self-sustaining. To the extent
21 it might have been duplicative to some language we included

1 on our own, that would be the reason we would have deleted
2 it. I don't think you should read anything more in to that.

3 COMMISSIONER HUNTER: Okay. And then on the other
4 definition, get-out-the-vote activity, you changed around
5 the example A just a little bit, just sort of nothing
6 substantive, but added in examples D and E, which I think
7 gets to a little bit more of what you've been all talking
8 about, facilitating or encouraging specific people to do
9 something, to vote.

10 I was wondering if you could -- if you could
11 comment on whether those two last examples, what if -- what
12 if the campaign, it was a state campaign and they were
13 contacting people to vote for either a state candidate or a
14 state ballot initiative and they mentioned -- they mention
15 the state candidate and they mention the date of election
16 and they're calling specific voters who they think will vote
17 for their state candidate and they're reminding them to vote
18 on Election Day?

19 MR. REIFF: An association with state candidates I
20 suppose would be a good example since they are covered by
21 these rules. Again, in presenting our functional

1 definition, as Joe kind of laid out the standard for
2 McConnell, we were trying to adhere to that standard. And
3 we would concede that that reminder call right before an
4 election, within two or three days -- and again, the four
5 panelists here, we have years of campaign experience, so I
6 think we could call ourselves experts in the types of
7 techniques that are used to do those activities that the
8 McConnell Court was talking about.

9 That reminder call, three days, two days, one day
10 before the election without any persuasion element to the
11 call, I think we would concede, and our definition concedes
12 is the kind of activity that the Commission could consider
13 GOTV, even if it only mentioned a non-federal candidate.
14 And I would compare that to perhaps -- again, you're
15 correct. That would be the kind of call that would be
16 targeted towards someone you have already identified as a
17 likely voter for either your party or your candidate.

18 And I would contrast that with perhaps you need a
19 few more votes and you're on the margins of getting 50
20 percent to win the election and you need to reach out to
21 some undecided or persuadable voters. And you have script

1 three days before the election and you're not sure how that
2 person's going to vote, but you spend two minutes, three
3 minutes on persuasion script where you're trying to convince
4 the voter why this candidate should be elected or why you
5 should vote for that candidate.

6 It could even be someone who might be identified
7 as a ticket splitting voter and you just -- they might vote
8 Democratic in certain elections and Republican in others and
9 you're trying to bring them over. So that's another
10 possibility. I would not consider that type of call a GOTV
11 call.

12 So again, we're trying to get at those activities
13 we believe are facilitating that -- what the court's
14 addressing.

15 CHAIRMAN WALTHER: Thank you. Commissioner
16 Weintraub?

17 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman,
18 and also thank the witnesses for their concrete suggestions.
19 That's always appreciated. And I particularly want to
20 welcome Mr. Nehring and Mr. Phillippe. I don't think we
21 have seen you here as witnesses before, so it's nice to see

1 new faces, not that it isn't also nice to see you.

2 Joe and Neil, I'm having a hard time figuring out
3 what the difference is between assist, facilitate, and
4 encourage and why you think facilitate is a far superior
5 word to encourage and what you think it encompasses that
6 assist doesn't? And I'm assuming and hoping that you didn't
7 pick that out by going to a thesaurus and looking up assist
8 and trying to come up with another word that maybe the court
9 wouldn't be so offended by. And --

10 MR. REIFF: In our defense, we actually use the
11 word "facilitate" when we filed comments in the 2005
12 rulemaking after Shays I. We actually introduced the
13 concept of facilitation in those comments. It's not a new
14 concept for us.

15 COMMISSIONER WEINTRAUB: Oh, okay, that's
16 encouraging in and of itself, if I may use the word
17 "encourage." And it's interesting to listen to you guys
18 struggle to not use words like "assist" and "encourage" as
19 you're talking about this. I'll just fess up, my prejudice
20 upfront. I hate the word "facilitate." I just don't like
21 the word, because I like plain, Anglo-Saxon type words that

1 people understand more easily.

2 But tell me what you think the differences are?

3 MR. REIFF: Well let's start with the problem of
4 the court's decision, because I think that's where the real
5 problem lies. There's just very little guidance in the
6 decision.

7 COMMISSIONER WEINTRAUB: We're stuck with it.

8 MR. REIFF: Yes, you're stuck with it, but you
9 shouldn't be so reactionary that you just go all the way to
10 the other side and say okay, everything that encourages is -
11 - we believe the court says everything that encourages is
12 now covered under the definitions, so you've got to find
13 something functional and something that is realistic and
14 something that works with the regulated community that's not
15 overbroad.

16 So we went back to the drawing board and we --
17 again, we did not -- I don't believe we -- although we did
18 put a footnote where we did define the words, we believe the
19 word "facilitation" is a much more active word than
20 "assist." Assist -- and the court again did not really
21 elaborate on this so we really don't know necessarily what

1 they were thinking.

2 But we kind of started from -- we started over.
3 We wiped the slate clean, as the Commission is trying to do
4 here, and we've tried to think of a word that really
5 captured what we believe was a realistic approach to this.
6 And we thought facilitate, just as we did in 2005, we still
7 believe that that word encapsulates the proper
8 characterization of what the Commission should capture in
9 the rules.

10 COMMISSIONER WEINTRAUB: But you're not helping me
11 out here in trying to find the difference between
12 facilitate, assist, and encourage.

13 MR. REIFF: Well, I am not an English major, but
14 maybe someone else on the panel can do that.

15 COMMISSIONER WEINTRAUB: Joe, you want to try?
16 It's your word.

17 MR. REIFF: Want to take a shot at it?

18 MR. SANDLER: Again, we don't think there's
19 necessarily any magic to the word "facilitation" and I'm not
20 sure that the court was trying to say don't use the term
21 "assist" at all costs. They were trying to get at the

1 concept that something that actually again, beyond the
2 persuasion message. The whole idea of GOTV is you're trying
3 to turn out people to vote other than by just saying go out
4 and vote for our candidate, just get them to the polls,
5 either vote for the ticket or without mentioning the name of
6 the candidate, even though that comes into play when you go
7 to define it.

8 And that's the -- that's the concept. So the mere
9 -- merely say -- when you say get out and vote for Smith for
10 Governor or vote for Smith for Governor, that doesn't rise
11 to the standard that the court has in mind here. It's got
12 to be something more.

13 And you can say, what's the difference? But I
14 think the court is prepared to accept the definition, which
15 involves some information or activity that will actually
16 increase the likelihood that somebody goes to vote beyond
17 again, just a candidate specifically, persuasion message,
18 something that tells them something about -- that will
19 actually increase the likelihood that they go to vote for
20 some reason other than that they like the candidate.
21 Because you've told them what day it is, the time of it, and

1 make it easier in some way for them to do it. And the idea,
2 well that sounds like assistance, we don't think that's the
3 touchstone of the court's -- court's opinion was.

4 COMMISSIONER WEINTRAUB: And you've talked about
5 this notion of targeting, which the earlier panel also
6 talked about, targeting your likely voters and getting them
7 out to vote, which makes sense to me. But I'm not sure
8 where I see that in your proposed rule.

9 MR. SANDLER: The proposed definition -- again, we
10 think that a rule should be as clear and detailed and
11 comprehensive as possible to avoid further confusion and
12 litigation. The idea is that you had -- the means of
13 communication we talk about in here are inherently targeted.
14 It's something other than a medium that hits everybody in a
15 certain area, like broadcast or newspaper.

16 COMMISSIONER WEINTRAUB: Let me ask the folks on
17 the other side of the table so that they don't feel left
18 out. What would we base -- a time/space? I hesitate to use
19 the word "allocation." We haven't done so well on
20 allocation regs recently, but what would we -- what would we
21 base the time/space -- I can't use another word --

1 allocation on? I mean, do we just pick a percentage that
2 sounds good to us, I don't know, 10 percent, 5 percent, 2
3 percent, 25 percent?

4 How do we -- how do we figure out what would be an
5 appropriate time/space ratio?

6 MR. PHILLIPPE: I'll say I'm here largely in a
7 supporting role for Mr. Nehring, but I'm happy to weigh in
8 on some of these -- some of these legal issues and
9 particularly the standard we presented.

10 The Commission has a lot of experience in dealing
11 -- one of the reasons we proposed this was because this is
12 something that you've used in other contexts. You know,
13 there's a couple ways -- there's a couple ways to slice it,
14 I think. The first is what -- really thinking in terms of
15 what the campaigns, and specifically in this context, what
16 do parties actually do? So starting from a get-out-the-
17 vote, say a postcard that's nothing except go out and vote.
18 It drops three days before the election. Go out and vote.
19 Here's your polling place. Here are the polling hours. One
20 hundred percent facilitation we'll call it.

21 I'm happy to weigh in on the facilitation aspect

1 too, because in my mind that's encouragement plus specific
2 information, making it more likely and easy for the person
3 to go vote. It's something other than individualized
4 assistance. But it's an encouragement, plus -- and I think
5 that you can frame it in that language. That will certainly
6 address your concern about using encouragement in terms of
7 going back to court and having an encouragement element
8 there.

9 But on the other hand, certainly a pure persuasion
10 piece that says nothing about going out and voting would
11 surely be -- would surely be not included. So I mean I
12 would suggest the Commission could actually -- and perhaps
13 we could submit more comments -- but the Commission could
14 also look at some examples of these. What kind of mailers
15 are sent -- sent out? To what -- when does that GOTV
16 element of a communication or a call cross that threshold?

17 I don't know what the specific threshold is. And
18 if I had a clear idea of that, we probably would have
19 suggested that. But as Mr. Reiff pointed out before, a
20 call, for instance, to voters the day before the election in
21 a close race that's primarily aimed at persuasion and then

1 say you're successful in persuading that person at the end,
2 and you tell them where the polling place is, that's still
3 probably a persuasion call because it's only -- it might be
4 10 percent get-out-the-vote at the end.

5 Clearly that's not enough, but a call to
6 identified supporters that might even have a small
7 persuasion piece as sort of that extra motivation to go --
8 to go vote. Go vote on Tuesday or your taxes are going to
9 go up and your poll is located at this location, that
10 probably would count.

11 So I don't know where exactly that line is, but
12 given that the Commission does have experience in time/space
13 ratios, I would suggest that you could find a proper one.

14 MR. NEHRING: If I may add?

15 COMMISSIONER WEINTRAUB: I appreciate your
16 confidence.

17 MR. NEHRING: If I may add to that. I think that
18 Democrats and Republicans can agree that there is a clear
19 need for a bright line definition that folks can take a look
20 at and clearly identify. Absent that, we're left with this
21 gray area which will no doubt have a chilling effect on

1 state and local campaign activity.

2 Just one example that I would cite is that in city
3 or county -- Republicans in my county make -- have a big
4 emphasis on voter turnout. It's the biggest, most expensive
5 program that we engage in, zero broadcast ads and no radio
6 ads, no T.V. It's all aimed at in-person contact
7 supplemented to some degree by mail.

8 But if I have a local school board candidate who's
9 engaged in a precinct walk and he also wants to walk the
10 county party door hanger, which lists a variety of different
11 candidates on that, and it may or may not have a label that
12 indicates the polling place, if there's any question as to
13 whether or not that is legal for him to distribute or not,
14 then he's going to default to not distributing at all and
15 not getting that information out.

16 When you take that type of decision and multiply
17 that across hundreds of thousands of races, it does create a
18 chilling effect for candidates who are not intended to be
19 addressed by BCRA.

20 CHAIRMAN WALTHER: Thank you. Commissioner
21 McGahn?

1 COMMISSIONER MCGAHN: Thank you, Mr. Chairman. I
2 want to thank the commenters like I did the first panel, for
3 your time, particularly Chairman Nehring for coming because
4 it's rare for someone who is not a practitioner in the area,
5 but instead a political operative to come and testify. And
6 given the opportunity that that presents, I'd like to ask
7 you a few questions that are similar to what I asked the
8 previous panel.

9 There's words in the statute, one word in
10 particular, get-out-the-vote, that we are trying to put
11 legal terms on. But I think it might help to have a
12 political operative definition to the extent you could
13 describe what you think is get-out-the-vote, maybe
14 contrasting what is not get-out-the-vote. That would help
15 at least some of our thinking as to how -- produce a rule
16 that actually allows for folks to know what is and what is
17 not permissible.

18 MR. NEHRING: I think that's an excellent
19 question, because what I see is a tremendous gap between
20 what is considered get-out-the-vote activity in hearing
21 rooms in Washington versus what get-out-the-vote activity is

1 out in the field.

2 And as we were discussing this internally leading
3 up to the hearing, and there were discussions of ads and
4 such, we're not going to run ads in order to drive turnout
5 up. That's not going to fall under my get-out-the-vote
6 definition whatsoever, because it won't work. I would
7 recommend to you the book Get Out the Vote by Harvard
8 University's Donald Green and Alan Gerber, which lists every
9 means of -- that campaigns and political parties may engage
10 in in order to maximize turnout and the two methods that are
11 repeatedly -- that are mentioned most often in rooms like
12 this, which are broadcast ads and robocalls, are completely
13 ineffective in terms of driving turnout.

14 When I became county leader in San Diego in 2001,
15 we sought to maximize Republican turnout. We immediately
16 started building a Republican precinct organization where we
17 would recruit volunteers and ask them to visit their
18 Republican neighbors with a piece of campaign literature, a
19 door hanger that the county party would provide listing all
20 of our candidates from the top of the ticket to the bottom
21 and knocking on doors, not just doing the lit drop, but

1 knocking on doors, ringing the doorbell and handing the door
2 hanger to someone, because that demonstrably has the
3 greatest impact on turnout.

4 So when I think about turnout, I think about
5 programs that have a practical impact on turnout, not those
6 that are simply when you're sitting in a conference room and
7 watching an ad on T.V., yep that's a turnout ad. It's not,
8 because it doesn't work to that effect.

9 My concern is when questions are raised such as
10 well if the door hanger includes the polling place or it
11 doesn't include the polling place, that's the FEA or not
12 FEA. This just -- and it drives people out in the field
13 crazy because while we may have a situation in California
14 where my state party is going to provide all the door
15 hangers for the entire GOTV operation throughout the state,
16 but my county party may come along and put a label on it
17 indicating that the polling place for the household where
18 this door hanger's going to be delivered is at this place.

19 Well is the total door hanger now federal
20 activity? Is only the label -- does the Avery label that
21 comes out the laser printer, does that have to be paid for

1 with federal dollars or does the state party now have to re-
2 report all that as federal activity? You're dealing with
3 volunteers out in the field who are just trying to get their
4 Republican neighbors out to vote and it goes into all of
5 these various other questions that when we were federalizing
6 all of this -- all of this activity.

7 So my answer is, it's programs that we engage in
8 that have a practical impact on increasing turnout when
9 executed, and that is overwhelmingly in-person contact that
10 is highly personalized.

11 COMMISSIONER MCGAHN: Let's follow-up to that.
12 When a party, and I think both parties do this and they call
13 it different things, but when a party puts together whether
14 it's its victory plan or its coordinating campaign plan,
15 whatever it may be called on the other side of the aisle,
16 you have various line items budgeted in and you have maybe
17 state candidate advocacy and you have GOTV and voter I.D.

18 I want to try to explore from your perspective as
19 someone who is an operative, not a practitioner of the law,
20 but a practitioner of the ground game. Flesh out, if you
21 could, a little bit more the distinction between what Mr.

1 Svoboda characterized as persuasive mail on the first panel
2 and get-out-the-vote and things that could be federal
3 election activities. It's the same theme we've all hit, but
4 as an operative, what's the difference between the two?

5 MR. NEHRING: I think there's a difference in
6 terms of what means is used to deliver what message. First,
7 I would define persuasive communications to be
8 communications that are intended to influence how someone
9 would vote if they choose to turn out to vote. So that's
10 persuasion.

11 Get-out-the-vote activity is to effect the
12 decision of whether or not that individual chooses to vote
13 at all, recognizing that the world is run by those who show
14 up and not those who are merely registered to show up. And
15 so what we have found is that from an efficacy standpoint,
16 persuasive messages are best delivered through broadcast
17 media and mail and perhaps some telephone advocacy, although
18 not as a primary measure, while the methods used to maximize
19 turnout have -- are those which are individualized in-person
20 contacts.

21 And I can't tell you how many times we've had to

1 have -- we don't have discussions internally in terms of
2 what's the best type of T.V. ad in order to maximize
3 turnout? The practical issues that we have to walk through
4 are how do we visit people in gated communities? How do we
5 recruit someone from inside a particular neighborhood? Is
6 it more effective for me to recruit a pool of precinct
7 walkers and disburse them into targeted districts or recruit
8 volunteers out of targeted districts to make sure that's
9 covered, because there's a difference when you visit -- when
10 you're visited by your neighbor versus when you're visited
11 by some random person or someone who's paid to do that.

12 We find that recruiting members of the party to
13 visit their -- their neighbors of that party is the most
14 effective means of doing that. So there's a distinction in
15 terms of intent, persuade if they're going -- how they would
16 act if they choose to turn out and vote. But there's also a
17 difference in terms of methodology that's used to carry that
18 message.

19 So the notion of classifying broadcast television
20 ads or radio ads as turnout activity to me represents a
21 total disconnect from what's happening in the field.

1 COMMISSIONER MCGAHN: I'd like to ask you a
2 question about voter identification. I've heard it argued
3 that voter I.D. done in an off-year election or non-federal
4 election somehow is still in connection with a federal
5 election because that voter I.D. data is still going to
6 exist.

7 You being from California, first at the county
8 level, now statewide as chair, I think of ballot initiatives
9 and how you I.D. for ballot initiatives or how you would
10 I.D. for state candidates. Could you explain to us what
11 correlation, if any, there is between voter I.D. in an off-
12 year for a ballot initiative and a federal candidate?
13 Because I could think of 10 examples off the top of my head
14 that demonstrate there's no correlation, but there is this
15 argument that somehow voter I.D. carries over to all
16 elections.

17 MR. NEHRING: The notion that voter I.D. data is
18 going to carry some lasting benefit beyond a couple of
19 months or a year is simply impractical. Politics is
20 dynamic. Just look at -- look at how different the
21 political environment is today compared to how it was 12

1 months ago. I guarantee you that the voter I.D. data that
2 was conducted in last year's presidential election is
3 meaningless today among those voters who would be most
4 interested in, which is independent voters and those who are
5 generally not strongly aligned with a political party.

6 COMMISSIONER MCGAHN: Can I ask you why? Maybe a
7 specific example, maybe an issue that you would have tested
8 last cycle that is no import to this cycle and vice versa?

9 MR. NEHRING: Well I would say that certainly
10 given the current economic climate, that we see a rise in
11 prevalence of issues related to job creation and taxation
12 and the like and those issues that are more on the
13 regulatory side drop.

14 We've seen in California a lot of talk about the
15 need for job creation in our state. We have an unemployment
16 rate that's 2 percent above the national average right now
17 and we have a tremendous number of people who are fleeing
18 our state for jobs in other states. So simply voter I.D. in
19 terms of -- let's go one step level. Voter I.D. might
20 indicate placing calls to someone to determine what's the
21 most important issue to them?

1 Well if you've lost your job since that voter I.D.
2 question was asked, chances are the issues that are most
3 important to you have changed and you may be more interested
4 in something that's going to generate jobs as opposed to
5 well, passing that tax increase because it's for some good
6 cause, or something to that effect.

7 The issues matrix is very dynamic and therefore,
8 when you key your voter I.D. questions off of some of those
9 issues, then the data becomes old very, very quickly. I
10 would never rely upon, for example, issue questions that
11 were 12 months old in order to determine my persuasion --
12 persuasion or GOTV messages because it's not going to be
13 accurate. It's not going to be a good investment of my time
14 or money.

15 COMMISSIONER MCGAHN: So timing matters.
16 Proximity to that election in your experience is a critical
17 distinction?

18 MR. NEHRING: It's absolutely critical.

19 COMMISSIONER MCGAHN: That would also be true of
20 get-out-the-vote, right? You don't do get-out-the-vote in
21 September. You do it around the election, which kind of

1 echoes Mr. Sandler's, Mr. Reiff's proposed rule. They have
2 one prong, 72 hours within the election.

3 MR. NEHRING: Right. Well in our state, voting
4 takes place during the final 30 days. You can vote by mail
5 and it's very easy, unlike New York, for example, which
6 would be the extreme opposite example where it's very, very
7 difficult to vote by mail, in California it's very easy. In
8 fact, you can register as a permanent absentee voter. We'll
9 just mail your ballot to you regardless of whether you have
10 a local polling place or not.

11 We do not engage in get-out-the-vote activity
12 until the last possible moment. For example, we will engage
13 in one round of get-out-the-vote activity just before
14 absentee ballots are dropped into the mail so that the
15 contact is in the closest proximity to when the decision
16 will be made, that the pen goes onto the ballot and
17 decisions are made and that another round of GOTV in the
18 window just before Election Day itself, which by the way,
19 underscores the fact that when you create a national
20 standard that will apply, that may or may not be rational in
21 some states.

1 For example, having a 30-day get-out-the-vote
2 window in New York wouldn't make sense where 95 percent of
3 voters are going to cast their ballot on Election Day as
4 opposed to California, where half of our ballots are going
5 to be cast before Election Day.

6 COMMISSIONER MCGAHN: One final question, Mr.
7 Chairman.

8 CHAIRMAN WALTHER: We do have some time here.

9 COMMISSIONER MCGAHN: The -- I think you were both
10 here for the first panel and I asked about a hypothetical, a
11 newspaper ad that references a state candidate for governor
12 and says vote for, let's say Schwarzenegger just as a
13 hypothetical. Right. Mr. Reiff, we don't want you to get
14 too excited, just a hypothetical.

15 MR. RIEFF: He's termed out.

16 COMMISSIONER MCGAHN: My sense is that there's
17 consensus that that's not get-out-the-vote. If you add the
18 date of the election, that's not get-out-the-vote, but if
19 you say go vote for Schwarzenegger, there's a distinction in
20 some minds between go and just voting. It seems to me if
21 one goes to lunch versus lunch, it's kind of the same thing.

1 But as an operative, do you see a distinction
2 between the two?

3 MR. NEHRING: First, no. But let me also add to
4 that that -- and this underscores the point. You provided a
5 perfect example, even a better example than mine. In my
6 view, you --

7 COMMISSIONER MCGAHN: Thanks.

8 MR. NEHRING: You can write a newspaper ad that
9 advocates -- express advocacy for a clearly identified
10 candidate. You can list the election day, when the polls
11 will be open and provide a map to the polling place and in a
12 practical sense, that newspaper ad is not get-out-the-vote
13 activity because it will have no impact on turnout
14 whatsoever. Zippo.

15 COMMISSIONER MCGAHN: Why do you say that? Do you
16 have a basis, whether it's your expert experience or
17 background or any kind of something we could have for the
18 record? Because a lot of times we get caught up. People
19 make those statements, but we don't really flesh out --

20 MR. NEHRING: Sure. And I believe that if you're
21 engaged in regulating get-out-the-vote activity, which is

1 clearly what's taken place here, then you're in a similar
2 position to where I was when I became county leader in San
3 Diego in 2001, and that we had not run a voter turnout
4 operation in a decade in my county before I became chairman.

5 So I was not wedded to a particular approach when
6 we -- we knew that we wanted to maximize turnout. We didn't
7 know how we wanted to do that, so we went out and looked and
8 tried to find some empirical data to show us what's the best
9 way to do it. Should we take out newspaper ads? Should we
10 knock on people's doors? Should we do phone banks?

11 Phone banks would be the normal -- the path of
12 least resistance to do that. But we opted not to do that
13 because it's ineffective based upon the research of Mr. --
14 Professors Green and Gerber at Harvard. They had not
15 published their book at that point. They have since
16 published a book. It's now in its second edition, which I
17 would recommend to everyone.

18 In fact there is summary data for each voter
19 turnout methodology and even broken down by how many dollars
20 per additional vote based upon the studies that they've
21 compiled. And so I don't believe any rational political

1 organization would engage in GOTV activities through
2 newspaper ads.

3 Now when you're in the business of making rules,
4 perhaps someone's going to be in a conference room and look
5 at something and say, well this says get out the vote, this
6 says the date of the election, it has a map to the polling
7 place, where you can call for information, it even has the
8 phone number for the county registrar of voters. That's not
9 rational get-out-the-vote activity.

10 COMMISSIONER MCGAHN: In your world, that's just
11 not get-out-the-vote?

12 MR. NEHRING: It's not because it won't work.

13 COMMISSIONER MCGAHN: How about Mr. Sandler and
14 Mr. Reiff, you want to agree or disagree with that or
15 elaborate?

16 MR. SANDLER: There's two issues involved in the
17 definition. One is the medium of communication, one is the
18 content of communication. We didn't see the whole
19 hypothetical from the last panel, but if you're talking
20 about a newspaper ad, that clearly makes it an easy
21 hypothetical because the medium of communication doesn't

1 meet the test of the Shays court that encourages like-minded
2 voters and makes it more likely for like-minded voters to
3 get out and vote, because it's addressed to everybody.
4 That's just not sufficiently individualized.

5 So in that hypothetical, I don't think you even
6 reach the issue of content. It's not GOTV.

7 MR. REIFF: Plus you couldn't do a newspaper ad
8 giving instructions on where to vote because presumably that
9 advertisement would be seen by people voting in multiple
10 precincts, so it's almost impossible to craft a newspaper ad
11 that could be so informational to assist in that vote.

12 MR. NEHRING: We've got some pretty small
13 newspapers in some of our of our rural outreaches.

14 MR. REIFF: It probably costs about \$1 to put it out.

15 COMMISSIONER MCGAHN: Thank you.

16 CHAIRMAN WALTHER: Ms. Duncan, any questions?

17 MS. DUNCAN: No, Mr. Chairman, we don't. Thank
18 you.

19 CHAIRMAN WALTHER: Mr. Gibson? I'd like to go
20 back to Commissioner Weintraub's question and see if we
21 could flesh it out a little bit, the difference between your

1 proposal where we move between assist and encourage, in
2 between we find something like facilitate.

3 What is -- what is in encourage that's so broad
4 that facilitate would narrow? In other words, there's an
5 aspect of encourage that we were told in the previous panel
6 that you can either bifurcate it or sliver off aspects of it
7 that should not be included in the definition you end up
8 with.

9 I understand your use of the word "facilitate" to
10 try and help us get there. What example -- what examples
11 could you give us in your opinion that would be left off of
12 the word, that constitutes encouragement in the general
13 definition, but would be excluded if we were just to say
14 facilitate?

15 MR. REIFF: I think the primary example that we
16 talked extensively about in our comments are vote for
17 Senator -- well Governor Smith in this example -- on
18 November 7. Clearly, in our view, and I think we've seen
19 this in a lot of the other written comments, merely giving
20 the date of an election would be clearly an example. And I
21 think the Commission acknowledged that themselves in their

1 examples, that we actually omitted from our proposed
2 regulations because it's subsumed already within our
3 proposed definition.

4 But something might -- merely giving the date of
5 the election is something that we would not see as something
6 that would facilitate a vote. And I'm sure Chairman Nehring
7 could probably talk extensively about how little GOTV
8 effect, merely getting the date of the election, provides.
9 That would be definitely one example.

10 So in terms of -- there are types and modes of
11 communications that are more likely to easily be seen as
12 GOTV than others. The in-person contact, you may have a
13 form with you where you're trying to collect a ballot or
14 give a ballot or give an absentee ballot or collect a mail
15 ballot. These things are so evidently and obviously GOTV
16 that -- the reminder phone call.

17 So there are types of communications that are more
18 obvious that would be GOTV. Then there are ones that are
19 obviously not GOTV that we've discussed here. And that's
20 why we kind of went away from -- and I think this is where
21 the Commission got caught up with the court, is this concept

1 of individualized contact is really where you fell into a
2 problem. And the advisory opinion that they had before
3 them, there was some logical leaps, I would admit, in that
4 opinion that I could see why the court would have some
5 concerns.

6 That's why we believe you should redirect back to
7 the modes of communication. The obvious modes of
8 communication that shouldn't be GOTV, T.V., radio,
9 newspapers, mass communications, then there is the one that
10 probably falls in the middle that's the most difficult to do
11 with is mail because with mail you have the opportunity to
12 do a lot of things. You can merely provide a persuasive
13 communication and there's really no time element.

14 We talked about the phone call where you could
15 spend three minutes trying to persuade a voter or you could
16 spend 15 seconds reminding them to vote. So even within
17 phone you can draw a line. So the one -- the one type of
18 communication I think you will possibly struggle with is
19 mail because mail gives you the opportunity to merely
20 provide persuasive information, plus adding the date of the
21 election, plus an absentee ballot or a phone number. That's

1 the one I think that you will probably have to spend the
2 most time dealing with when you craft your final regulation.

3 So in our proposal, again we try to give you
4 examples of things we believe wouldn't cross that line, and
5 again, being mindful of the court's directive. So if you
6 have a mailing that gives the date of the election, plus the
7 time when the polls are open, the location of a polling
8 place and a mailing, because again, a mailing can be highly
9 targeted. We create a functional definition and we think
10 that's the way to go and those are the types of examples and
11 that's how you should draw the line.

12 CHAIRMAN WALTHER: In the modern world, especially
13 our kids who are living by texting and it came up in
14 conversations, but of course you I can see a situation where
15 you get a texting, "Just a reminder about the election," and
16 then press here and then all of a sudden you have a way to
17 get from where you are on your GPS to the polling place.

18 MR. REIFF: Absolutely.

19 CHAIRMAN WALTHER: I can see --

20 MR. REIFF: This was not addressed in the Shays
21 decision and I believe we're the only commenters who even

1 addressed the issue. We even included our proposed
2 definition, text messaging as an example of mode of
3 communication, and as well as e-mail.

4 CHAIRMAN WALTHER: Facebook, YouTube, kind of
5 analyze the ways of communicating. We're going to be
6 looking at how to -- some of these areas, I suppose.

7 Any further comments from any other commissioners?
8 Anything further any of you would like to add to your
9 comments?

10 MR. PHILLIPPE: Could I just -- you know, because
11 the timing element I think is important and it was hit on a
12 couple of times and I just want to give another specific
13 example of why timing is important and why we've always
14 thought it was -- you know, from the RNC perspective in
15 working with state parties, 2000 -- in the 2000 election,
16 our presidential candidate lead all the polls quite
17 convincingly in the days leading up to the elections and
18 lost the popular vote by two million votes.

19 In the state elections of Virginia and New Jersey
20 next year, we undertook something called the 72-hour Task
21 Force. We didn't undertake the 60-day Task Force or the 90-

1 day Task Force. We undertook the 72-hour Task Force to
2 figure out why was it that we couldn't get our voters to the
3 polls in the numbers that we thought they'd show up and the
4 numbers that the polling reflected based on persuasive
5 communications leading up to that.

6 And out of that came state level get-out-the-vote
7 programs called the 72-hour Project, again, the days leading
8 up to the election. It just underscores the point that
9 facilitating a vote and turning out the vote is a time
10 bracketed activity and content bracketed. We didn't look at
11 -- nothing came out of that that lead us to change how we
12 advertise or run different kinds of newspaper ads. It was
13 the grassroots phone and precinct walking activities that
14 came out of that.

15 And so I just want -- I want to emphasize that
16 timing element because I think it's something that wasn't
17 addressed much in the NPRM and was addressed by our
18 colleagues here in their comments. But I do encourage -- I
19 do encourage you to consider -- consider that element more
20 fully.

21 CHAIRMAN WALTHER: Commissioner Weintraub?

1 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
2 Just one follow-up, because -- I mean, you talk about the
3 timing element and your 72-hour program, which makes perfect
4 sense to me. But as you probably know, we tried a 72-hour
5 limit and that got tossed out in court. And you said
6 robocalls are not an effective way of getting out the vote.
7 But that was exactly what they were using in that L.A.
8 advisory opinion that we issued and we were hammered for not
9 covering that.

10 So I mean, it's not that -- I think what you're
11 saying makes a certain amount of sense. It's just that I
12 think we've tried some of these things before and they
13 haven't worked out very well for us.

14 MR. REIFF: I'll just make one quick comment about
15 that 72-hour requirement and the past attempts. In our
16 proposal, again bringing you back to that -- we do include
17 robocalls, again, going back to just the mode of the
18 communication, not worrying about targeting, keeping it to
19 the simple methodology.

20 And I would note that that's the only -- although
21 we did reintroduce the 72-hour element, we were being very

1 limited in this application. I think the Commission's
2 problem was the implication of their original regulations in
3 2002, was that the 72-hour element was across the board
4 applicable, which I think is troubling. And of course, we
5 don't adhere to that and it's only in that one limited
6 aspect do we introduce the 72-hour requirement.

7 MR. SANDLER: Four days out you give some
8 information about the polling place, clearly that's GOTV and
9 the court in Shays I, that's what they were focusing on.

10 MR. NEHRING: My concern here is in the chasm that
11 exists between the -- what has to take place in terms of
12 rulemaking process here in Washington and what happens out
13 there in the field. It is enormous. In the -- I would just
14 stress, in the upcoming June primary election, I'm intensely
15 interested in one particular ballot measure that will appear
16 on that June ballot.

17 I don't care about any federal candidate who will
18 appear on that ballot whatsoever, yet I have to deal with
19 the federal election activity window leading up to that date
20 and under the proposed rule, my mail, persuasion mail, on
21 that ballot measure, if it mentions an election day and

1 related information, it is going to be considered federal
2 election activity under this proposed rule. I don't care
3 about any federal candidate on that ballot.

4 COMMISSIONER WEINTRAUB: I hear you, but it
5 certainly is not unknown for individual groups to introduce
6 a very controversial ballot measure in order to drive
7 turnout of voters who will care about that ballot measure
8 because they think that this will also help their federal
9 candidates. I mean, we have seen this happen. This is a
10 real -- this is not a hypothetical. We've seen it happen in
11 a number of elections and I've seen it happen in a number of
12 different states.

13 So are we supposed to -- how are we supposed to
14 write a rule that says well okay, I get you, that one, you
15 don't care about any federal race; you are only focused on
16 the ballot measure? But what about the one where they
17 actually do care about the federal race and they think wow,
18 what a great idea? We are going to get all of our pro-life
19 voters out by putting this measure on the ballot or all of
20 our gun people out by doing that measure. I mean, these
21 things do happen.

1 MR. NEHRING: I think the principle to recognize
2 is that BCRA was not intended to federalize the state and
3 local activity, but yet that is the effect. That is what
4 you will be doing if you adopt the rule as it is proposed.
5 I'll give you an example. I'll come back to my example
6 about June.

7 The measure that I care about was put on the
8 ballot by the legislature and the governor, who was not put
9 on the ballot by any type of political group and so on, and
10 is one that I care about because it is the Washington
11 State's top two primary measures that will be on the ballot
12 in California.

13 I'm intensely interested in defeating that ballot
14 measure. And so this wasn't intended to drive some turnout
15 or anything like that, but yet my ability to communicate on
16 that purely state issue is going to be inhibited by the
17 proposed rule here and that's why a narrowly -- more narrow
18 construction is necessary. And I don't often agree with the
19 Los Angeles County Democratic Central Committee, but I am
20 happy to do in this particular case, as well as the
21 California Democratic Party, which provided comments.

1 A narrower construction is necessary because the
2 long list of state and local activity that you will be
3 restricting through the rule as proposed to me is
4 inappropriate and inconsistent with the intent of BCRA to
5 leave such activity alone.

6 CHAIRMAN WALTHER: Are there any further
7 questions? If not, I want to thank all of you, both groups.
8 You really had a lot to offer, I think. We really
9 appreciate the specific information you offered for us and
10 as well as on the grassroots, here's how it really gets
11 done, type of approach.

12 So thank you very much.

13 MR. SANDLER: Thank you, Mr. Chairman

14 CHAIRMAN WALTHER: We'll adjourn this meeting.

15 (Whereupon, at 12:40 p.m., the hearing was
16 adjourned.)

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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 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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