

FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON COORDINATED COMMUNICATIONS

Wednesday, March 3, 2010

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

JARDIM REPORTING ASSOCIATES
(703) 867-0396

COMMISSION MEMBERS:

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

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel
ALEC PALMER, Acting Staff Director
ROSEMARY C. SMITH, Associate General Counsel
JESSICA SELINKOFF, Office of General Counsel

C O N T E N T S

WITNESSES	PAGE
MARC ELIAS, on behalf of the DNC, DSCC, DCCC	231
LAURENCE GOLD, on behalf of the AFL-CIO	241
STEVE HOERSTING, on behalf of the Center For Competitive Politics	246
PAUL RYAN, on behalf of the Campaign Legal Center	235

P R O C E E D I N G S

(10:06 a.m.)

1
2
3 CHAIRMAN PETERSEN: Good morning. This
4 Special Session of the Federal Election
5 Commission for Wednesday, March 3, 2010, will
6 come to order. Today is day number two of the
7 Commission's hearing on proposed rules regarding
8 coordinated communications. We had, I believe,
9 very good discussions and very helpful testimony
10 from the witnesses yesterday, and I think that
11 there is no reason to believe that we are not
12 going to have the same thing today.

13 We have a very distinguished panel of
14 witnesses that will be testifying today. Each
15 witness will be given five minutes to give an
16 opening statement. We have a little lighting
17 system there to help you keep track of time.
18 When the green light starts begins blinking, that
19 means less than a minute; yellow light, less than
20 30 seconds; and then when the red light flashes,
21 that means that the five minutes is up.

22 Then following our opening statement of

1 witnesses, then the questions from the
2 Commissioners will proceed. So, we have slotted
3 an hour and a half for this panel, so we are
4 looking forward. So why don't we have our
5 witnesses take their spots at the table?

6 We have Marc Elias on behalf of the
7 Democratic National Committee, Democratic
8 Senatorial Campaign Committee and Democratic
9 Congressional Campaign Committee, and it seems
10 like forever since we last saw you.

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

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

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

20 MR. ELIAS: Thank you, Mr. Chairman, and
21 thank you members of the Commission for giving me
22 the opportunity to testify before you today on

1 what has been a seeming marathon of a topic for
2 this Commission to deal with. As our comments
3 reflect, the Democratic Senatorial and
4 Congressional Campaign Committees first filed a
5 petition for rulemaking on the question of party
6 coordination in 1996. I am sure someone on the
7 dais will correct me and say it in fact goes back
8 further than that, but at least since '96 the
9 parties have been seeking guidance on the proper
10 standard for coordination for party coordinated
11 communications. And in the wake of McCain
12 Feingold this Commission made a grave error, and
13 it is not one that I think was done purposely or
14 was done with ill- intent. I think it was done
15 in the rush to deal with the flood of regulations
16 that had to be passed in the wake of McCain
17 Feingold given the breadth of topics that needed
18 to be addressed and the need to regulate whole
19 areas of political activities that had before
20 that not been regulated, and what the Commission
21 did was took a statute which required it to pass
22 new rules for communications sponsored by

1 entities other than candidates and parties and
2 instead wrote a rule that covered communications
3 sponsored by parties, and it essentially, in
4 contravention of the plain text of the statute
5 and the intent of the statute, the legislative
6 intent of the statute, it wrote rules that
7 treated for the first time party communications
8 on the same footing as communications by other
9 unregulated entities, whether they be
10 corporations, labor unions, non-profit
11 organizations. It took parties and rather than
12 following the statute's intent and plain text of
13 the statute, it threw parties in there.

14 This needed to be remedied since then and
15 it most urgently needs to be remedied now. The
16 Commission asked in its supplemental notice what
17 does Citizens United mean for this rulemaking.
18 One thing it means is that it is more vital than
19 ever now as this Commission grapples with what
20 coordination means for -- or independence means
21 for corporate and labor expenditures, it is more
22 vital now that this Commission make abundantly

1 clear, crystal clear, without-any-doubt clear,
2 that the rules that apply to those outside groups
3 that spend soft money do not apply
4 to communications sponsored by political parties.

5 How ought it do it? It ought to do two
6 things: One, it ought to in every phase, in
7 every step of the process it is currently engaged
8 in, from the comments at the dais today to the
9 rules you propose to the text of every section,
10 make clear that it does not -- whatever you do,
11 does not apply to parties, does not apply to ads
12 sponsored by parties or public communication
13 sponsored by parties.

14 Number two, the Commission ought to,
15 either as part of this rulemaking or on an
16 emergency basis strike down the -- repeal the
17 existing regulations governing party public
18 communications and revert back to where the law
19 was prior to McCain Feingold rules being
20 promulgated by the Commission, which was where
21 Congress intended them to be. Congress had a
22 state of play in 2003 and told the Commission to

1 more strictly regulate communications sponsored
2 by entities other than parties and candidates and
3 the Commission ought to revert back to that point
4 and start a rulemaking from that point with
5 respect to party communications.

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

18 Thank you.

19 CHAIRMAN PETERSEN: Thank you, Mr. Elias.

20 Mr. Ryan?

21 STATEMENT OF PAUL RYAN, ON BEHALF OF THE
22 CAMPAIGN LEGAL CENTER

1 MR. RYAN: Thank you, Chairman Petersen,
2 Vice Chairman Bauerly and members of the
3 Commission for inviting me here this morning.

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

10 I am going to begin with the most recent
11 twist in this rulemaking and then go back from
12 there and that is comments with regard to the
13 Citizens United decision. I think it is ironic,
14 to say the least, that many of those who believe
15 that Citizens United and Wisconsin Right to Life
16 before Citizens United should prevail in their
17 lawsuits precisely because the activity they were
18 engaged in was being conducted independently of
19 the candidates and parties and therefore cannot
20 corrupt them, are now arguing that the rationale
21 of those decisions should be imported into this
22 rulemaking and require the Commission to stay its

1 hand in the regulation of coordinated activities.
2 I think, to put it bluntly, I think that is
3 nonsensical. It is the view of Campaign Legal
4 Center that the Citizens United decision does not
5 impact this Commission's rulemaking or the
6 necessity of this Commission complying its
7 coordination rules with the Shays III decision.
8 If anything, the Citizens United decision
9 emphasizes the need for strict and strong and
10 effective coordination rules to protect against
11 the type of corruption that can result from
12 direct contributions to candidates, which is
13 precisely how coordinated expenditures have for
14 decades been treated under federal law.

15 If the Commission, by lax or ineffective
16 coordination rules, allow or permit spending that
17 is of value to candidates to be coordinated in
18 fact but treated as independent in law, I think
19 the Commission will be allowing exactly the kind
20 of pre-arrangement and coordination that the
21 Citizens United court recognized could result in
22 in-kind contributions that may corrupt public

1 officials.

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

14 The Court was not referring specifically
15 to parties and their specialized involvement in
16 elections. A person of ordinary intelligence can
17 understand what PASO means and for that reason we
18 oppose as unnecessary the promulgation of rules
19 further defining the terms that make up the PASO
20 standard. If the Commission nevertheless decides
21 to define those terms, we strongly oppose the
22 alternative B option because it would undermine

1 the umbrella rule itself. We do not oppose,
2 however, the alternative A option for defining
3 constituent terms of PASO.

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

13 In a nutshell it is because the express
14 advocacy test stems from the Buckley court's
15 consideration of disclosure of independent
16 expenditures and spending limits applicable to
17 independent expenditures. The Court said in
18 Buckley when you are dealing with candidates and
19 parties and other major purpose groups, they
20 don't have the constitutional benefit of an
21 express advocacy test. In this rulemaking we are
22 dealing with candidates in particular and their

1 activities coordinated with others and we believe
2 under Buckley, the express advocacy standard has
3 no import in this rulemaking.

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

11 And finally, with respect to the safe
12 harbors, we have in the past and we continue to
13 oppose in safe harbor for 501(c)(3) organization
14 communications because we believe it would open
15 the door for candidates to coordinate with
16 501(c)(3) groups in ways that are definitely
17 intended to and do have the effect of influencing
18 their elections in a positive manner. By
19 contrast we do not oppose the creation of a safe
20 harbor for certain business activities that are
21 put forth in the NPRM.

22 I will stop there. I am happy to answer

1 any questions to the best of my ability and thank
2 you very much for having me today.

3 CHAIRMAN PETERSEN: Thank you, Mr. Ryan.
4 Mr. Gold?

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

7 MR. GOLD: Thank you, Mr. Chairman, and
8 thank you to the Vice Chair and the
9 Commissioners, for allowing the AFL-CIO to appear
10 today. The AFL-CIO is a federation of 57
11 national and international unions representing 10
12 million working men and women. And the AFL has
13 participated in each of the four coordination
14 rulemakings that have taken place over the last
15 10 or 11 years. We have done so because the AFL
16 and its constituent unions and their members and
17 officers and the like, regularly engage with
18 officeholders and candidates in lawful ways, with
19 officeholders regarding legislation and policy;
20 with candidates regarding their elections, what
21 they ought to be doing, what positions they ought
22 to be taking, how they ought to be running their

1 campaigns and in a lawful coordinated manner with
2 respect to how union members themselves
3 participate in elections and work with their
4 supported candidates in order to assist their
5 election. Unions and other groups need clear and
6 reasonable standards about their public advocacy
7 when it comes to engaging with lawmakers and
8 candidates so that they can do so in a way that
9 they are confident they are complying with the
10 law when they deal with legislation and policy
11 and when they deal with elections. They need to
12 know where clear lines are so that insofar as
13 they engage in independent activity in support of
14 candidates, either through their PACs or now,
15 post-Citizens United, with regular treasury
16 funds, they need to know where those lines are
17 and their ability to engage with officeholders in
18 particular on legislation and policy is not
19 compromised by those electoral activities so the
20 opposite is also true.

21 The framework that the Commission is
22 operating under is, in summary, sort of cabined

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

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

19 The framework I think also includes
20 Citizens United and the Wisconsin Right to Life
21 cases, which emphasize the need for clarity and
22 the avoidance of undue complexity in defining

1 regulated speech.

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

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

20 As to content, I want to reiterate the
21 main point I think we made in our comments both
22 before and after Citizens United. It is really

1 critical that the content standard beyond the
2 window periods be clear and not over broad. The
3 so-called PASO standard which was introduced in
4 the statute in BCRA for other reasons is very
5 difficult to comprehend. We think it is a de
6 facto refer standard which is broader than where
7 the Commission should or even can go beyond the
8 window period, and notwithstanding the footnote
9 in McConnell, that in a very conclusory fashion
10 stated that, as Paul Ryan quoted, a person of
11 ordinary intelligence can understand it, we
12 believe that is incorrect. We do not believe
13 that if revisited, especially in this context,
14 not dealing with parties, but dealing with
15 organizations, we do not believe that that
16 standard would survive judicial challenge and
17 that challenge would be inevitable if the
18 Commission were to adopt it.

19 Given the imperfect choices available and
20 the fact that the Shays III court did direct that
21 the Commission adopt a content standard beyond
22 the windows that was broader than express

1 advocacy, we believe that the appeal-to-vote test
2 that was fashioned in the Wisconsin Right to Life
3 decision is the best of the available choices
4 because it is a reasonably bright line. It is
5 not a perfect bright line. Only express advocacy
6 approaches perfection and even there, there is
7 obvious disagreement, but we believe the PASO
8 standard is hopelessly vague and over-broad and
9 we would point out that -- the Commission itself
10 has had a great deal of difficulty on the few
11 occasions it has had to deal with it in applying
12 it.

13 I look forward to your questions. Thank
14 you.

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

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

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

22 I agree with Mr. Gold, the functional

1 equivalence test is probably the best of the
2 alternative possibilities here. Even as you see
3 the error in Judge Tatel's opinion, you are, of
4 course, bound to follow it. The McConnell court
5 did say the express advocacy test is not
6 constitutionally required and not
7 constitutionally required for coordination but
8 the Court did so to uphold coordinated
9 electioneering communications which is one
10 specific content standard provided by statute.
11 Along the way the Court also underscored that
12 express advocacy is the gloss that applies to
13 core FECA terms like "expenditure" throughout the
14 Act. Nonetheless, as I have mentioned, you are
15 obliged to follow the Tatel opinion and to
16 construe expenditure as somehow reaching beyond
17 express advocacy.

18 I believe that the functional equivalent
19 standard is the best of bad options for following
20 Judge Tatel's opinion. It is true that the two
21 part, 11-prong test of 114.15 was disfavored by
22 the Supreme Court. There is no question about

1 that. But whether or not you employ that test
2 for the functional equivalent standard has to do
3 with the number of votes on the Commission. That
4 is always the reality of what you can do in terms
5 of votes on the Commission.

6 Speakers have already used this test in a
7 previous cycle and a functional equivalence test
8 employed 365 days a year is already imperfect and
9 will already be imperfect in light of WRTL too.

10 But again, Tatel's command is unavoidable and
11 functional equivalence is the best option.

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

20 A non-exhaustive list of examples and ads
21 in the E and J of examples of ads that are in and
22 ads that are out would be beneficial as long as

1 it is not exhaustive. With regard to what Mr.
2 Elias has said, if you are going to turn your
3 attention back to BCRA Section 214, at some point
4 it would be nice to do away with the idea that
5 one candidate can corrupt his fellow candidate or
6 that one officeholder as candidate can corrupt
7 another officeholder. That is where the payment
8 prong of 109.21(a) is right now. It says,
9 payment by a person other than "that" candidate.
10 It should have been, payment by "a person" rather
11 than "a candidate." There is really no basis for
12 saying one candidate can corrupt another
13 candidate for purposes of campaign finance law or
14 one officeholder corrupts another officeholder or
15 that the President corrupts his back-benchers or
16 that the back-benchers corrupt the President
17 somehow. There is really no basis for the FEC to
18 be regulating in that area and if you do go back
19 to BCRA Section 214 you will see that the
20 Commission really was never supposed to regulate
21 in that area. Mr. Elias is right, it is
22 unfortunate that the Commission did that, but it

1 did.

2 Thank you.

3 CHAIRMAN PETERSEN: Thank you,
4 Mr. Hoersting.

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

8 COMMISSIONER WEINTRAUB: Thank you, Mr.
9 Chairman.

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

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

16 COMMISSIONER WEINTRAUB: Thank you all,
17 gentlemen, it is a pleasure to see you all. I
18 think, Mr. Ryan, I am going to start with you
19 because you are out-numbered both on this panel
20 and in general amongst our witnesses. If we were
21 to take a vote amongst all of the folks who
22 testified, it is pretty clear what the answer

1 would be, the overwhelming majority of our
2 commenters prefer the Wisconsin Right to Life
3 test, the Roberts test, the appeal-to-vote test,
4 however you want to call it, to the PASO test.

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

17 And you have provided a number of
18 examples, both now and in previous rulemakings
19 and I think it would be easy to come up with
20 examples where you and I would agree, that ad
21 promoted and supported the candidate or attacked
22 the opponent and was, I think you and I would

1 agree, I wouldn't say everyone would agree, but I
2 think you and I could agree, was for the purpose
3 of influencing the election.

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

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

14 MR. RYAN: Sure. With respect to the
15 PASO standard generally speaking, I think that
16 something that has been lost to some extent in
17 this rulemaking, at least to the extent that
18 others have filed comments in this rulemaking is
19 that this is not a free-floating PASO standard.
20 This is a PASO standard, a content standard, that
21 will be coupled with conduct standards. So all
22 of this activity obviously, but it bears

1 repeating, is going to occur in the context of
2 interaction between the spender and a candidate.
3 Specifically, the regulations have presently have
4 six different conduct standards. They include
5 things like request or suggestion by the
6 candidate that the ad be run, material
7 involvement by the candidate in the running of
8 the ad, substantial discussion between the
9 candidate and the spender, not just the use of a
10 common vendor but the use of a common vendor who
11 in turn uses or conveys information that is
12 material to the creation and production and
13 distribution of the ad, or a former employee who
14 does the same thing.

15 I just want to put that out there on the
16 table to make clear that we are not in the
17 universe of independent expenditures in Buckley
18 and the unsophisticated person who has no
19 involvement in politics and they are just writing
20 an ad. We are in the universe of a person who
21 chooses to communicate with a candidate about
22 ads, not just about issues, about ads.

1 That being said, to answer your question
2 specifically, are there ads that result from this
3 type of conduct, actual coordination conduct
4 between an outside spender and a candidate that
5 promote or oppose or support or attack a
6 candidate that are not meant to influence an
7 election? I would say no, in a word.

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

21 If you would like to go through that list
22 of examples and give us your views on whether you

1 think they meet the PASO test, whether you think
2 they meet the appeal-to-vote test, I think that
3 would be helpful to us in coming up with such a
4 list of non-exhaustive examples which I agree
5 would be helpful and one of the witnesses
6 yesterday also focused on the call to action, but
7 a number of these ads have either no call to
8 action or an ambiguous call to action so I think
9 that the analysis of why an ad would fall into
10 one category or another would be helpful to me.

11 Mr. Ryan, you also raised the issue of
12 definitions and obviously we tried to provide
13 some elaboration in our Wisconsin Right to Life
14 rulemaking. The Court was not too happy with
15 what we did. I think that can be fairly said.
16 That is fine. And you point out that when you
17 define terms, you, by definition, you define them
18 with other terms, and then the question arises,
19 well, what do those terms mean. I suppose that
20 is true but I don't know what else we can use
21 besides words. Commissioner McGahn sometimes
22 talks about interpretative dance. Other than

1 using other words, I don't know how else we can
2 define terms. Without definitions, do we have
3 the clarity that so many witnesses have asked
4 for, how can we provide that clarity?

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

18 MR. GOLD: I think you put a finger on
19 the problem. In post-Wisconsin Right to Life the
20 Commission tried to define the functional
21 equivalent of express advocacy. The AFL-CIO and
22 many others participated in that. We respect the

1 effort that went into that because it was in our
2 view a necessary task to do it. We proposed, the
3 AFL did, to the Commission, we proposed to the
4 Court when it was considering Wisconsin Right to
5 Life, some elaboration of what an adequate
6 standard might be and in Citizens United, the
7 majority disparaged the multi-factor test, I am
8 paraphrasing, but disparaged the effort and said
9 it was unduly complex.

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

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

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

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

12 MR. GOLD: But, you know, the notion
13 that -- Mr. Ryan's response to your question
14 about, is there any PASO, assume we know what
15 that mean, anything that PASOs that is not for
16 the purpose of influencing an election, and he
17 says, no, to me that is just so wrong. That is
18 an all or nothing view. It does not respect the
19 reality of engagement by organizations with
20 officeholders. We are talking about long periods
21 of time. They want to extend, I believe, and
22 others want to extend the period of time when you

1 would have even a broad content standard way
2 beyond these windows into well before even
3 primaries. That is just incorrect. It is very
4 unforgiving and leaves organizations basically in
5 a position -- and individuals in a position where
6 they can't comfortably deal with candidates and
7 they don't even know it or officeholders and they
8 don't even know it.

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

16 COMMISSIONER WEINTRAUB: Well, you have
17 the clarity you need. What we will have, if you
18 don't have any further elaboration, is the words
19 the Court used and if we were to take the
20 Wisconsin Right to Life example, hypothetically
21 speaking, if we were to adopt that, we have two
22 examples, we've got the ads in Wisconsin Right to

1 Life that we know are not the functional
2 equivalent of express advocacy and we've got
3 "Hillary: The Movie" that we know is the
4 functional equivalent. Does that give you enough
5 to go on?

6 MR. GOLD: Not really.

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

9 MR. GOLD: I don't want to pretend that
10 it does. One advantage of the appeal-to-vote
11 test is the phrase that it is susceptible to no
12 other interpretation other than as. Certainly it
13 is not -- that essentially directs an either/or
14 conclusion. If it is only electoral, let me put
15 it that way, then it is subject to it because it
16 is not subject to a reasonable interpretation
17 otherwise. If it is, then that trumps it. One
18 thing that the Court said in Wisconsin Right to
19 Life and I think repeated in Citizens United,
20 maybe not, is the notion the tie goes to the
21 speaker. That I think is a very important
22 guidepost in crafting this.

1 I am not sure Citizens United means you
2 cannot elaborate by some definition what that
3 phrase means. If it does, it is not that
4 helpful.

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

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

15 COMMISSIONER WEINTRAUB: Anybody else?

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

1 COMMISSIONER WEINTRAUB: Rationally --

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

12 In terms of what you can do to actually
13 make people understand what functional
14 equivalence is, that points up the problem really
15 with the Tatel opinion. First let me say, it
16 shows why expenditure means express advocacy. So
17 many courts have said that, I won't repeat it
18 here. That is the problem with the Tatel
19 opinion, but now that you have the Tatel opinion
20 and must follow it, I think people will
21 understand that if you do something like 114.15,
22 maybe not exactly, but something like that, or do

1 a non-exhaustive list of examples of ads that
2 would be in and ads that would be out, I think
3 for purposes of this rulemaking and getting
4 through this rulemaking and dare I say, before
5 the next lawsuit, that is one way you could go
6 and I really think functional equivalence, as I
7 stated in my written comments, I won't re-state
8 them here, functional equivalence is the best
9 test for the Commission given the other options.

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

12 MR. RYAN: I will just reiterate what is
13 in our comments, which is that in this particular
14 instance, we think the constituent terms of PASO
15 are self-explanatory. We have never taken the
16 position that definitions are not needed in law.
17 In some contexts they are and are very valuable.
18 In this context we agree with the Supreme Court,
19 the McConnell court's view that persons of
20 ordinary intelligence understand what PASO means
21 and it would not benefit from elaboration in
22 regulation in terms of definition.

1 MR. HOERSTING: There are many -- do you
2 mind if I speak about this? There are many
3 problems about PASO. Let's start with the fact
4 that it is its own black letter term and it is
5 not expenditure. Let's go next to the fact that
6 the McConnell court was construing PASO with
7 regard to state party committees. And while I
8 can't recite it for you, if you read that section
9 of the opinion, you can tell that the Court is
10 talking about state party committees' ability to
11 know what will promote a candidate and what will
12 oppose a candidate.

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

22 COMMISSIONER WEINTRAUB: With the

1 conduct, he did qualify that.

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

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

20 COMMISSIONER WEINTRAUB: I want to be
21 sure I heard you right. You believe that any ad
22 that PASOs a candidate, all of them, they are all

1 made with the intent of influencing elections?

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

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

18 MR. RYAN: We did not in our written
19 comments, and I am not here today, telling you
20 that I think this should be an intent-based test.
21 I agree, you have to look at the ad itself. If
22 the communicative element of the ad itself

1 promotes, attacks, supports or opposes a
2 candidate, then it is covered. Combined with the
3 conduct standards, I believe it meets the
4 statutory definition of expenditure for the
5 purpose of influencing, which is the applicable
6 definition of expenditure, not express advocacy
7 which was a test devised solely with respect to
8 independent activity.

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

11 CHAIRMAN PETERSEN: Thank you.

12 Commissioner McGahn?

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

16 I think we all agree that a speech is
17 independent, the government can't regulate it.
18 If it is coordinated, then we can. And that is
19 what we are here to decide, the difference. And
20 when I hear you talk about Citizens United, I
21 hear you saying somehow that Citizens United
22 stands for the proposition that we need to have a

1 strict coordination rule or something and I also
2 hear Colorado Republicans cited for this
3 proposition and I come away thinking I need to
4 poll the opinions and see who won, because the
5 way Citizens United has been portrayed by some,
6 either you or folks who advocate the same
7 position, I don't think you want Citizens United,
8 and I don't think there was anything about
9 coordination in Citizens United. There was no
10 facts, there was no issue in Citizens United
11 about anything that was coordinated at all.
12 Isn't that correct?

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

22 COMMISSIONER MCGAHN: But it assumes

1 coordination, right? Citizens United doesn't
2 give us anything as to what is coordination and
3 nor does Colorado Republicans where they upheld
4 the coordinated limits on parties because it was
5 assumed in that case it was coordinated.
6 Colorado Republican Party went to court and said,
7 we are going to coordinate this but we don't
8 think there should be limits for the
9 arguments they articulated and the Court said,
10 well, if it is coordinated, then we can put
11 limits on it.

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

14 MR. RYAN: Correct.

15 COMMISSIONER MCGAHN: Okay. But what
16 Citizens United does do is it does talk about
17 what is corruption or the appearance of
18 corruption. I think we agree that it is what we
19 are here to -- it is our benchmark. It is not
20 equalization of speech or any of this other
21 stuff. It is corruption or appearance of
22 corruption, and when the Supreme Court says, the

1 fact that speakers may have influence over or
2 access to elected officials does not mean that
3 these officials are corrupt.

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

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

15 MR. RYAN: In the independent expenditure
16 context, yes. But what Citizens United court
17 also said repeatedly was contributions to
18 candidates do pose a threat of corruption, a
19 threat of corruption that the Court had long
20 viewed as a justification for limits on
21 contributions and it is also a well-established
22 point of law that coordinated expenditures are

1 treated for legal purposes and have the effect of
2 in-kind contributions.

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

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

20 On one hand, I can see why you are saying
21 that, because for -- constitutionally, that is
22 really how, for us to regulate it, they have to

1 be treated. But in the case of party committees
2 and really non-party committees who are trying to
3 criticize the government or speak their mind, I
4 am not sure that is really true in all instances.
5 For example, let's assume there is something in
6 the ad that is provably false and it is made with
7 actual malice or reckless disregard, so there is
8 a defamation suit filed. Who ends up being sued
9 in that case? Not the candidate. It would be
10 the sponsor of the ad, and I hope maybe anybody
11 on the panel can confirm that, but my
12 understanding is in that case it is the person
13 actually making the speech that is responsible
14 for its content, not the candidate who maybe had
15 some say in its content. Is that a fair
16 assessment?

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

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

22 MR. RYAN: It would surprise me if a

1 candidate, for example, would write the text of
2 that ad and hand it to the spender, which is
3 fully permissible under existing regulations, so
4 long as that ad is outside of the timeframe and
5 avoids express advocacy, that the candidate would
6 not similarly be liable in a defamation lawsuit.
7 Candidate writes an ad containing lies, hands it
8 to someone else, and the someone else actually
9 makes the ad buy, I don't know, I would have to
10 do some research to see whether as an actual
11 point of law the person that wrote the ad content
12 and collaborated with the spender is likewise
13 liable.

14 COMMISSIONER MCGAHN: At another point in
15 your comments you talk about -- on page 33 and
16 34, thus with respect to candidates and groups
17 which have a "major purpose of influencing
18 elections, the Buckley court held that FECA's
19 for-the-purpose-of-influencing definition of
20 expenditure, raises no constitutional vagueness
21 concerns and no need of a narrowing express
22 advocacy construction because money spent by

1 these entities is by definition campaign related.

2

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

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

11 MR. ELIAS: It is.

12 COMMISSIONER MCGAHN: Can you give me
13 some examples?

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

16

17 COMMISSIONER MCGAHN: Right. Or just
18 expenditures in general. You have disbursements,
19 have expenditures. Just a basic reporting
20 distinction, but seems to me if you do an ad that
21 doesn't contain express advocacy, you're not
22 going to file an independent expenditure report.

1 MR. ELIAS: That would be correct.

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

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

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

15 MR. ELIAS: Because party committees do
16 both.

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

19 MR. ELIAS: And historically the
20 Commission, pre-McCain-Feingold had recognized a
21 series of ways in which parties do communicative
22 expenditures. I am not sure if it is 1985-14 or

1 1984-15, I can never keep those two straight, but
2 where the Republican party wanted to do ads on
3 the balanced budget perhaps or the Reagan
4 budget --

5 COMMISSIONER MCGAHN: Probably. Tax
6 cuts. Some radical policy like tax cuts.

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

11 COMMISSIONER MCGAHN: But even beyond
12 issue ads, you do all kinds of spending that are
13 not expenditures, and you don't report that as
14 independent expenditures. For example,
15 fund-raising mail, because there is no express
16 advocacy for a candidate. Otherwise everything
17 you do would be deemed an expenditure. Not you,
18 your clients here today because, of course,
19 post-McCain-Feingold much of it is hard money,
20 but I am thinking more state parties -- but
21 actually your clients do do all kinds of things
22 that are not expenditures, right?

1 MR. ELIAS: Not to hijack your question
2 in a slightly different question but you
3 mentioned fund-raising mail, there is nothing in
4 the history of McCain-Feingold that suggests that
5 if the National Republican Congressional
6 Committee wishes to do a direct mail piece to
7 raise money for themselves, and in the course of
8 it, within the windows, they put out a mail
9 piece, now let's start with the fact that that
10 mail piece has probably on its letterhead the
11 name of the chair of the committee who is himself
12 a candidate -- so theoretically every piece of
13 letterhead that goes out of any of the
14 congressional committees within 90 days of an
15 election has the name of a candidate and is more
16 than 500 pieces.

17 So let's just start with the fact that
18 that is over-broad in and of itself, but there is
19 not a reason why the NRCC shouldn't be able to do
20 a mail piece that is coordinated in the way in
21 which everyone is talking about it today with
22 their candidates to raise money for the NRCC.

1 Why can't they say, give us money and we will
2 help elect candidates like candidates A, B, C, D,
3 and E because they would make great candidates?
4 They make great officeholders, and there is
5 nothing in this book that says that should be
6 regulated. In fact, if you turn to page 64 of
7 this book -- I picked up a copy outside because I
8 wanted to make sure I didn't bring my copy of the
9 book, So I got one of yours. Page 64 of yours --

10 COMMISSIONER MCGAHN: You can keep it
11 though.

12 MR. ELIAS: It says specifically that
13 what the Commission's job is to write
14 coordination rules that don't cover
15 communications by parties and yet, here we are.
16 So, I agree with you, there are all kinds of
17 things that the parties do that don't trigger
18 independent expenditure reports under the current
19 rules and there are even more things that
20 currently are treated as independent expenditures
21 that were not historically and which Congress
22 didn't intend should be.

1 COMMISSIONER MCGAHN: So Mr. Ryan's
2 contention that the Buckley construction of the
3 term expenditure doesn't apply to party
4 committees, that is just not true.

5 MR. ELIAS: I agree.

6 COMMISSIONER MCGAHN: Mr. Hoersting?

7 MR. HOERSTING: That is not true.

8 Everyone thinks that --

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

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

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

16 MR. ELIAS: That is twice today.

17 MR. HOERSTING: Historically the reason
18 everyone thinks that everything a party committee
19 does is an expenditure is because of the source
20 prohibition of McCain-Feingold where they took
21 away non-federal dollars and now all of a sudden
22 everyone thinks that because it doesn't matter,

1 in a sense, what is said with what is funded,
2 that everything must be an expenditure, but of
3 course that is not at all the case.

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

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

19 I am not sure I agree with that because
20 there are all sorts of language in Wisconsin
21 Right to Life that talks about no rough and
22 tumble of factors, little, if any, discovery.

1 Citizens United echoes the same thing, the idea
2 of the process being the penalty. FEC
3 investigations can in and of themselves chill
4 speech.

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

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

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

14 MR. RYAN: What our view is is that the
15 definition of expenditure in the statute, for the
16 purpose of influencing, that is the definition
17 that applies to parties as well as candidates
18 under Buckley. We have not made the argument
19 that everything a party does is an expenditure.
20 Our view is that when a party spends money for
21 the purpose of influencing an election, under the
22 statute that is an expenditure and --

1 COMMISSIONER MCGAHN: But can I ask a
2 question on that statement to be sure we are all
3 clear. I don't want to mischaracterize your
4 views.

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

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

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

17 MR. RYAN: Perhaps.

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

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

1 an election.

2 COMMISSIONER MCGAHN: So everything is an
3 expenditure then?

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

18 The only court that I know of that has
19 looked specifically at this question, the Buckley
20 major purpose test and the applicable definition
21 of expenditures, is the Shays II court in which
22 there is a several paragraph section of the

1 opinion in which the Court characterizes this
2 Commission's view on the application of the
3 express advocacy test versus the
4 for-the-purposes-of-influencing test as being a
5 misconstruction of Buckley. That was an opinion
6 in the context of whether to regulate 527
7 organizations.

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

20 COMMISSIONER MCGAHN: So, now I hear you
21 probably want Emily's List and Unity '08 as well,
22 both of which talk about regulation of 527's.

1 MR. RYAN: We weren't parties in those
2 cases.

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

5 MR. RYAN: Yes, we did.

6 COMMISSIONER MCGAHN: If we could go back
7 to the question that is actually on the table,
8 and I appreciate all of that, but the current
9 question is, you state in your comments on page
10 36 that Wisconsin Right to Life has no
11 application to the regulation of expenditures
12 coordinated with candidates and party committees,
13 and my question goes to the language in Wisconsin
14 Right to Life and similar language in Citizens
15 United talks about avoiding factors and prolonged
16 investigations and discovery and all that.

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

21 MR. RYAN: Our position is it has no
22 application. The Court was not considering what

1 types of investigations of candidates and those
2 that they are interacting with to make
3 expenditures is appropriate.

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

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

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

17 MR. GOLD: This is what I would like to
18 address. From my experience, both in the huge
19 investigation I think you are alluding to, which
20 involved the AFL-CIO and other organizations
21 arising from the 1996 campaign, and some other
22 coordination cases as well before the Commission

1 and just day-to-day advising organizations,
2 clients of all kinds about how to deal with
3 these, the notion of an investigation on
4 coordination is a very serious matter, and I
5 think you can't just cabin off what Wisconsin
6 Right to Life said and Citizens United said in
7 those contexts because their concerns about
8 investigations and about complexity of
9 rules -- but let's just talk about investigations
10 and the prospect of facing it. That is common to
11 everything the Commission does.

12 Of course, you have got in 437(g), you
13 have got procedures that apply no matter what the
14 substantive issue is that is being raised in the
15 Commission in a particular case, and if the
16 coordination standards are such that it is very
17 easy to trip RTB, reason to believe, and have an
18 organization confront an investigation, which
19 always starts with a fairly elaborate subpoena
20 and interrogatories and the like, it often, in a
21 coordination context, feeling you have to prove a
22 negative, I feel that is a pretty relevant

1 factor, and I think the Court would approach it
2 that way.

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

11 MR. RYAN: I will go with your latter.

12 COMMISSIONER MCGAHN: Really? Mr. Elias.

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

16 COMMISSIONER MCGAHN: Got it, and maybe
17 others.

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

20 COMMISSIONER MCGAHN: My final topic is
21 the PASO or PASO standard. I have heard it
22 pronounced both ways, and I think I don't really

1 care how we pronounce it. I don't like
2 Washington, D.C. acronyms, so we know what we are
3 talking about.

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

16 MR. RYAN: No.

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

20 MR. GOLD: I agree.

21 COMMISSIONER MCGAHN: Okay. Thank you.
22 Let's say the ad says that and it also

1 says, Call Congressman Jones and thank him for
2 his stance on these issues?

3 MR. RYAN: That does PASO.

4 COMMISSIONER MCGAHN: Why?

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

8 COMMISSIONER MCGAHN: So "this is a good
9 thing" is the PASO standard?

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

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

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

21 To put it differently, if that spender
22 talks to his candidate about running these ads,

1 materially involves the candidate or any of the
2 other conduct prongs, and then goes out and runs
3 the ads using the text that you have just used,
4 then, yes, I think the combination of those two
5 factors meet a coordination test that includes
6 within it a PASO standard.

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

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

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

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

20 COMMISSIONER MCGAHN: He has terminated
21 his re-election campaign, no steps to obtain
22 ballot access, not a candidate.

1 MR. RYAN: Then, no, I think that ad
2 under those circumstances is not for the purpose
3 of influencing an election, if that individual is
4 not a candidate in an election.

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

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

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

18 Let's assume Chairman Petersen decides he
19 is going to run for Congress, and let's say
20 someone decides to run an ad and it says,
21 Chairman Petersen while on the FEC ruled in favor
22 of special interests and allowed more money in

1 politics, candidate for Congress. Let's assume
2 that his opponent had some say that triggers the
3 conduct standard. Let's assume the conduct
4 standard is met in every hypothetical. Is that
5 something that we can regulate?

6 MR. RYAN: Yes.

7 COMMISSIONER MCGAHN: Why?

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

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

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

14 COMMISSIONER MCGAHN: So, PASO is a
15 reference standard?

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

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

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

22 COMMISSIONER MCGAHN: We can agree that

1 neither one of us are ordinarily intelligent.

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

5 COMMISSIONER MCGAHN: Thank you.
6 Mr. Hoersting, though, he can cite regulations.
7 He is on the scale of sort of PASO.

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

14 COMMISSIONER MCGAHN: Let's say -- wait a
15 second. The ad that said -- let's change the
16 facts, and I don't know Chairman Petersen's views
17 on any particular issue other than election law,
18 but let's assume -- let's say he is already a
19 congressman, and it says, Matt Petersen voted to
20 deny abortion funding three times, and that is
21 all it says. We already agreed that is not PASO.
22 But Congressman Petersen voted while he was on

1 the FEC to allow more money in politics, that is?

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

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

11 MR. RYAN: Yes.

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

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

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

21 MR. RYAN: That is PASO.

22 COMMISSIONER MCGAHN: Are those Utah

1 values?

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

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

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

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

12 MR. RYAN: Yes, definitely.

13 COMMISSIONER MCGAHN: So it has a
14 different meaning?

15 MR. RYAN: Yes.

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

21 MR. RYAN: You are using the Court's
22 words, which I like and I piggybacked on, but --

1 COMMISSIONER MCGAHN: We are going to
2 blame them.

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

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

20 MR. RYAN: Yes.

21 COMMISSIONER MCGAHN: Do you agree with
22 that, Mr. Hoersting?

1 MR. HOERSTING: My understanding is with
2 regard to 203, none of it is relevant as a matter
3 of case or controversy doctrine. The problem is
4 it also applies to the disclosure provisions
5 which have been upheld. Therefore, much said in
6 McConnell about functional meaninglessness did
7 apply to disclosure and it is still with us.

8 COMMISSIONER MCGAHN: For purposes of
9 disclosure.

10 MR. HOERSTING: For purposes of
11 disclosure.

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

16 MR. ELIAS: So he is re-elected.

17 COMMISSIONER MCGAHN: Re-elected.

18 MR. ELIAS: Pretty good.

19 COMMISSIONER MCGAHN: Pretty good. And
20 let's assume the ad says he opposed abortion
21 funding three times, call him and thank him for
22 that. What is the answer to that? Does that

1 promote, attack, support or oppose?

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

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

21 I know that your next remark may be, as
22 in the previous hypothetical saying, well, the ad

1 doesn't change. The only thing that changes is
2 whether or not this individual is a candidate for
3 public office, but that is one of the few
4 contextual issues that the Supreme Court in
5 Wisconsin Right to Life in the independent --

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

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

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

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

19 I am certainly going to take you up on
20 the opportunity to kick your hypotheticals
21 around, and I think they are very thoughtful
22 hypotheticals, and I know that there have been

1 some chuckles, but they have been challenging.

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

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

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

21 So, although they are hypotheticals and
22 they may seem cute, these are very real world ads

1 that happen all the time, and it is the sort of
2 thing that confronts people every day, and I come
3 back to my point about Wisconsin Right to Life
4 doesn't apply. All that language in those court
5 cases about rough and tumble factors and
6 investigations, I would suggest that has to
7 apply, and I see Mr. Hoersting nodding, so I will
8 start with him. How do we square this circle?

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

22 COMMISSIONER MCGAHN: But Citizens

1 United, though, speaks to that point, doesn't it,
2 the idea that ingratiation and feeling good about
3 somebody, that is not corruption or appearance of
4 corruption.

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

20 The content test here is when can you be
21 investigated? When can you be investigated? The
22 conduct test is when we investigate you, what

1 will we be looking for? But you have to have
2 that jurisdictional predicate, was this an
3 expenditure? Is it express advocacy or, now
4 because of Tatel's command, the functional
5 equivalent of express advocacy?

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

22 MR. RYAN: Can I just make one brief

1 comment? And it is that the trickiness of your
2 hypothetical, to my view, is not about the
3 substance of the ad. It is about the question of
4 when the individual, the candidate, the
5 individual who is candidate/officeholder may not
6 be a candidate. It is not about what the content
7 of the ad says and whether or not the ad itself
8 promotes, attacks, supports or opposes an
9 individual. It is the secondary level, is that
10 individual a candidate? And consequently, is the
11 ad for the purposes of influencing an election.

12 COMMISSIONER MCGAHN: But what I am
13 hearing you say, though, that it is not the
14 content -- to determine the difference between
15 election speech and other speech, as the Shays
16 III court said we need to come up with a basis to
17 do that, rational basis I think to do that, not a
18 metaphysically certain basis. We need to draw a
19 line here. If it is not the content, then how
20 does that square with what the Supreme Court has
21 said in Wisconsin Right to Life and beyond? I
22 can't square those two, and it makes me ask the

1 question that I asked yesterday, which is given
2 what the Supreme Court has said in Wisconsin
3 Right to Life and since, and really from Buckley
4 through today -- I have heard Mr. Gold give
5 speeches and I think he is right, not much has
6 changed, we have just stripped some of the
7 jurisprudence of outliers, and it has really been
8 Buckley the whole time, but can you really square
9 going beyond express advocacy, and even in the
10 coordination context, as the Shays III court
11 suggests, with what the U.S. Supreme Court has
12 said, setting aside Shays III, and it is my final
13 question, and I would like to hear Mr. Hoersting,
14 can you do both?

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

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

21 MR. HOERSTING: No -- if you had direct
22 statements from the Supreme Court on this very

1 case or controversy, the answer would be obvious,
2 you would follow the Supreme Court. That is not
3 what you have here.

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

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

19 CHAIRMAN PETERSEN: After your useful
20 hypotheticals, I guess I have a whole new career
21 trajectory ahead of me, so a bright future
22 indeed.

1 Commissioner Walther.

2 COMMISSIONER WALTHER: Thanks very much.
3 I would like to get into that conversation, but I
4 just think that it will take a lot more time off,
5 so maybe I will come back to it in a minute, but
6 I would like to just ask Mr. Elias a couple of
7 questions if I might, and they may be just from
8 your personal capacity.

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

19 MR. ELIAS: Sure. Let me start with
20 something that I think is very important, and I
21 don't want to mischaracterize Mr. Ryan's
22 testimony. He can correct me.

1 I don't believe there is any opposition
2 to the position that I offered today. In fact,
3 several years ago, and I believe, Mr. Petersen,
4 you may have been at the Senate Rules Committee
5 at the time, there was actually a hearing in
6 which several representatives of the reform
7 community testified for the wholesale repeal
8 of the 441a(d) limits in their entirety.

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

19 So, I think that in some respects, if you
20 are looking for a consensus place for the
21 Commission, the regulated community and the
22 reform community, it might very well be around

1 this set of issues, so let me address your
2 question directly, though.

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

17 Importantly, in 1996, and I apologize for
18 giving you maybe more than you wanted, but in
19 1996 there was a bit of a controversy over issue
20 ads run by parties, and for those of us who were
21 before the Commission at the time in hearings
22 like this, it was widely reported and understood

1 that both Bob Dole and President Clinton were in
2 fact involved in writing the ads that their
3 parties were running. The only controversy, the
4 only controversy, in all of that was the question
5 of whether or not soft money could be used, and
6 the question of whether or not soft money could
7 fund a portion of those ads or not fund a portion
8 of the ads was the only controversy. It was
9 widely understood that these ads, though, were
10 fully coordinated with their candidates and
11 indeed in some instances were beyond coordinated
12 with the candidates, where the candidate's
13 involvement was very central.

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

22 Congress didn't like that, and that is

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

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

19 So, where would I recommend the
20 Commission go from here is to realize that the
21 rules that it promulgated that paralleled the
22 rules that you are talking about now, that those

1 rules were just in error, they were an
2 administrative -- they were an error due to the
3 fact that the Commission had to do something
4 very, very quickly on a lot of fronts. It felt
5 like it needed to do party rules, and you now
6 have the time to have reflected back on that, and
7 either through this rulemaking, to the extent
8 that since you are offering another 10 days,
9 perhaps you could extend that 10 days for people
10 to comment on this as well, and if you receive no
11 negative comments, it is quite simple what you
12 do, you repeal the current coordination
13 rulemakings on parties and either go back to the
14 status quo or you simply reenact some version of
15 what existed prior to McCain-Feingold, which
16 would allow parties to run ads so long as they
17 have final control and were not joint ventures
18 with the campaigns.

19 Whether that Christian Coalition case,
20 given how old it is and how much jurisprudence
21 there has been along the way, I will let others
22 speak to whether that is exactly the right line

1 or near the right line. I don't think it would
2 be a particularly controversial rulemaking. I
3 think all the parties would come in on the same
4 side and basically help you in an expedited
5 basis. I have not heard a single -- and I have
6 spoken informally -- I have not spoken to
7 Mr. Ryan. I have spoken, though, to many members
8 of the reform community. I have not heard a
9 single dissenting voice around the fact that this
10 fix causes no concern of corruption, it poses no
11 risk to the process, it is all hard money, and I
12 would strongly urge the Commission to do so.

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

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

1 are different.

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

10 So, there is acknowledged a difference
11 between parties and other forms of outside
12 groups, and with the bad, it strikes me, there
13 must be some good, and one of it is that we
14 operate in a fully regulated hard money role and
15 pose at best an attenuated, if any, risk of
16 corruption, I would argue. We don't corrupt our
17 candidates, but at best it is a more attenuated
18 risk. I think even the reform community would
19 say it is a more circuitous concern, but as a
20 practical matter, and this goes to what I think
21 was the colloquy that was going on about
22 expenditures, the budgets of the national party

1 committees are in the hundreds of millions, so
2 let's be clear.

3 Everything they spend on is not an
4 expenditure because if it were, you would have --
5 if IE's that equaled X and coordinated
6 expenditures equaled Y, that would be the total
7 pot. The fact is the parties spend money on all
8 kinds of things that don't count against the 441a
9 (d) limit, and indeed in the original legislative
10 history it wasn't intended that everything the
11 parties spend on that is coordinated with a
12 candidate that helps their campaign will be a
13 441a(d) campaign expenditure.

14 There are all kinds of things that
15 parties historically have spent money on that
16 don't count as 441(a)(d) expenditures, so I don't
17 think it is a stretch. In fact, as I mentioned,
18 throughout the '90s the parties were spending
19 large sums of money, hard money and soft money,
20 in coordination with candidates, and the only
21 controversy, and I think this is important for
22 the Commission as you think about what your

1 mission and charter is, which is to implement
2 Congress's law faithfully, Congress looked at
3 that state of affairs and said, we don't want
4 parties in the soft money business, so they
5 banned it, and we don't want outside groups in
6 the coordination business, so they banned it.

7 What didn't they do? They didn't do the
8 middle piece, which is what the Commission then,
9 I would say in good faith error, did, which was
10 to knock out the - which was to then overregulate
11 the parties with respect to coordination.
12 Congress took care of their concerns about
13 parties in McCain-Feingold through the soft money
14 ban, and the Congress didn't see a need to rope
15 them in on the coordination front, and there is,
16 frankly, with all due respect, there is no
17 legislation to support the current rules. You
18 don't have a statutory basis for your current
19 rules. Indeed, if you were to be challenged on
20 the current rules, all the plaintiff would have
21 to do to strike down your current rules is point
22 to the plain text of the statute. There is no

1 statutory basis for what the Commission has done,
2 and I think it can undo it in a constructive way,
3 in a way that I think the reformers will support,
4 in a way in which I think the regulated will
5 support and in a way that I think will take off
6 of the table one of the more nettlesome things or
7 one of the more disconcerting things in a world
8 in which we now have more soft money coming in
9 from corporations and labor unions after Citizens
10 United.

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

17 MR ELIAS: Again, this is not a -

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

21 MR. ELIAS: Very quickly. This is not a
22 repeal of 441(a)(d). It has to do with what the

1 content and the conduct standard is for
2 coordinated communications, and that standard
3 would be the same just as it was every publicly
4 financed presidential campaign until Senator
5 Kerry took public funding in the primary and --

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

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

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

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

22 CHAIRMAN PETERSEN: Thank you,

1 Commissioner Walther.

2 The hearing to which Mr. Elias referred,
3 I was at the Rules Committee at that time and
4 there was a proposal on the table to repeal the
5 441(a)(d) limits, and it was an interesting panel
6 of witnesses in that you do remember correctly
7 that Michael Malbin from the Campaign Finance
8 Institute and Tom Mann from Brookings both
9 supported repealing that, so a lot of bloody wars
10 get fought over these issues regarding campaign
11 finance, but that one did not seem to be as hot
12 of a war as others, so as we go forward, I
13 certainly appreciate the suggestions you have on
14 that, and we will have to really think over those
15 very carefully.

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

21 Mr. Ryan, in your statement on page 44,
22 you say some types of campaign information, for

1 example, polling data, campaign strategy,
2 advertising purchases, slogans, graphics, mailing
3 lists, donor lists or fund-raising strategy
4 clearly maintain their value to a campaign for a
5 period of time longer than 120 days. What is the
6 basis for that conclusion?

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

21 In contrast, the two-year period, in my
22 own personal experience, I haven't been involved

1 in any campaign that more than two years out we
2 are developing a master plan. I think there are
3 campaigns where that happens, potentially in the
4 presidential context specifically, but the
5 Commission has to draw a line somewhere. We
6 would also support the full election cycle, the
7 old rule, but we would be happy with two years.

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

21 Campaign strategy, even though it may be
22 developed at the outset of a campaign, as it was

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

17 With respect to ad buys, that information
18 is public through stations. It may be a little
19 difficult to get to it, but you can find out what
20 your opponents, for example, are doing with
21 respect to the ads they are purchasing. And then
22 it was also mentioned that mailing and donor

1 lists are assets that are closely guarded by a
2 campaign. Those are not freely given out by a
3 campaign, whether it is a candidate, whether it
4 is a political party. If there was a former
5 employee or a vendor who had those lists and were
6 using them to aid them in the running of ads,
7 that we have a bigger problem than potential
8 coordination, that we have theft of a very
9 valuable campaign asset, and it was also
10 mentioned to us that the most valuable piece of
11 information that a former employee might have or
12 that a vendor could have about a campaign is
13 about what sort of resources they have and what
14 they are planning to -- what sort of purchases
15 they are going to make, but since that sort of
16 information is going to be disclosed, even if a
17 vendor took that information or a former employee
18 took that information, that information
19 eventually is going to be disclosed in a timely
20 manner on disclosure reports to the FEC.

21 That was what was presented to us
22 yesterday, which I thought was very interesting,

1 and as I read the Shays III court, the court was
2 looking and saying, okay, you are drawing a
3 120-day line. You haven't justified that line.

4 I thought that that testimony was very
5 responsive to that question about why is 120
6 days -- why is that a rational line drawing, and
7 so I -- I found that very interesting and I
8 wanted to make -- get your response, and then
9 also ask Mr. Gold, you also talked about this
10 conduct standard in your testimony as well, and I
11 wanted to get your thoughts on the line as it is
12 drawn right now and whether or not -- you brought
13 up a very interesting argument from the
14 perspective of kind of the empirical backing for
15 this whole enterprise. Maybe I can ask that
16 question of you first since you weighed in on
17 this in your comments.

18 MR. GOLD: I think in the several
19 rulemakings including this one that have
20 addressed this issue, the Commission has not
21 acquired good empirical information about any of
22 the matters that you just described. I think it

1 is very hard to amass that information. I am not
2 sure that there are independent studies that
3 provide it. If there were, I am sure the
4 Commission is always free to look at the social
5 science literature and what is out there and see.
6 I am just not aware of it.

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

14 As it stands now there is -- I have
15 always found since the current regulations were
16 enacted, or a form of them were enacted, after
17 BCRA, that this notion of information,
18 availability of information, whether something
19 was conveyed or used, to be really very difficult
20 even to know. It is very difficult for anybody
21 to know who is involved in it. It is
22 coordination without coordination in some

1 instances where neither side of the equation,
2 neither the candidate nor the organization, even
3 knows necessarily that this coordination is
4 happening, so it is very difficult to monitor as
5 a practical matter by organizations and
6 candidates that are primed to comply, and I want
7 to underscore that in my experience, people and
8 organizations are very mindful of the fact that
9 there are coordination rules, want to comply with
10 them. This is an aside but an important one.
11 The standards that are in the windows are applied
12 as a practical matter even beyond the windows by
13 almost everybody I have ever come in contact
14 with. That is an aside.

15 Back to common vendors. We think the
16 simpler thing would be to apply the same
17 standards to them as you apply to others. Of
18 course, BCRA directed that the Commission address
19 it, but it did not direct it to address it in any
20 particular way, and one way you could address it
21 is by considering it, looking at the experience
22 you have had through now three rulemakings and

1 deciding, let's just treat them as we treat
2 others.

3 If you are to do a standard, a temporal
4 standard, from what I understand of the testimony
5 yesterday and from what I have seen, I think the
6 120 days is -- I think a brief period of time,
7 generally speaking, is a better monitor because
8 things change all the time. They just do change
9 all the time, and that is not an insignificant
10 period in itself, but I think two years, four
11 years, six years, is so far beyond the reality of
12 campaigns, campaign planning responding to
13 dynamics and the like.

14 I also think one thing to look at is the
15 regulations do talk about different kinds of
16 vendors, and some of these vendors, I have never
17 really understood why some of these particular
18 services here would even be included at all
19 because they don't engage in any kind of public
20 communications and the like. I think they have
21 had in a way no effect. So if it is unnecessary,
22 I would excise them.

1 CHAIRMAN PETERSEN: Mr. Hoersting, you
2 have been former general counsel of a party
3 committee. In your experience, would you agree
4 or disagree with the testimony that we heard
5 yesterday about the value and the shelf life of
6 those particular bits of data.

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

21 With regard to a temporal limitation, I
22 think if the Commission can agree upon one and

1 wants to keep one, in a way it is a safe harbor
2 if you think about it because for regulatory
3 counsel, it allows them to say, yes, we can bring
4 on this vendor because this much time has
5 elapsed. So if you see no harm in keeping it, I
6 think that is one reason to keep it.

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

18 MR. ELIAS: Well, I agree -- let me start
19 by saying I agree generally with your
20 characterization of it. Before I address that,
21 though, let me just say that if the Commission is
22 going to do anything here, it should absolutely

1 not extend. You are not ordered to extend it
2 beyond 120 days for party sponsored public
3 communications. The Commission shouldn't -- as
4 you know, I believe you should repeal it with
5 respect to party communications, but you
6 certainly should not parallel any extension with
7 respect to the parties.

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

13 Now you have the volume, the placement
14 and the timing. Everyone always thinks there is
15 coordination going on because they will say, but
16 look, candidate went up in these two markets and
17 the party went up in that market. That is
18 because you don't need to coordinate to know
19 that. In fact, you don't even need to wait for
20 the FEC report, as the Chairman suggested. You
21 get the information from the television stations.
22 When you buy time, when you reserve time at a

1 television station, that is a public act. The
2 stations know who has bought time and they will
3 share that information. When you buy the time,
4 it becomes part of the station records and the
5 time buyers know who has placed time. I am sure
6 when Mr. Hoersting was at the NRSC, he would
7 hear, oh, I hear the DSCC has reserved time, and
8 oftentimes it is a long time out, I have heard
9 they reserved time for three weeks from now or
10 two months from now.

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

20 CHAIRMAN PETERSEN: Also, the specific
21 example of a campaign master plan at the outset
22 which was addressed by the Court, what is your

1 thought on that?

2 MR. ELIAS: My experience is that
3 campaigns, they may have a master plan in some
4 very generic sense, but let's say two years out,
5 to use the two-year window. Two years out from
6 the 2010 election cycle would be day after the
7 2008 election.

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

17 So, in my experience at least, I don't
18 see a lot of master planning at the level of
19 detail that is really going to influence what ads
20 you are going to run or where you are going to
21 run them or timing, placement, volume, content,
22 those kinds of things. They may affect your

1 early efforts in sort of how you staff
2 yourselves, how you position yourselves in terms
3 of personnel, but it will not affect the public
4 communications which typically come at the end of
5 the election cycle. That kind of planning is
6 going to be done much later in the cycle.

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

18 I mean, I even looked back, what did the
19 landscape look, just from a political amateur
20 looking at it, what did the world look like 120
21 days ago from a national perspective, whether it
22 is looking at Senate races, House races, you

1 know, what did the world look like two weeks
2 before the Massachusetts special election versus
3 two weeks after. I mean Things change so rapidly
4 that is 120 days -- that is a substantial period
5 of time, but I wanted to get your further
6 thoughts on that.

7 MR. RYAN: I will just reiterate that we
8 were of the view that 120 days is too short, but
9 I also want to add to it the point that this
10 section of your regulations only applies if and
11 when the material -- if and when the information
12 that is used is material to the creation of the
13 ad itself. To the extent that there is
14 information out there related to a campaign that
15 is stale after 20 days, 30 days, it is hard to
16 envision how that would be material to the
17 creation of an ad, and therefore even under a
18 two-year time period is not going to be covered
19 by the common vendor, former employee provision.
20 It is only when the information is material,
21 which is why we view this as a safeguard and an
22 important safeguard and that the time period

1 should be more than 120 days for actual instances
2 when the information used is material to the
3 creation of the ad, meaning it is not stale,
4 obviously, it is being used, and without the
5 extension of this time period from 120 days to
6 some longer period, we are of the view that there
7 is a free-for-all on using information that is
8 clearly not stale because they are using it, they
9 are thinking it is of value, they are thinking
10 this is information that is wisely incorporated
11 in material to the formulation of this ad
12 campaign and it won't be covered by your
13 regulations -- it is not covered today, which is
14 one of the reasons we are here.

15 CHAIRMAN PETERSEN: Any final thoughts?

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

19 If in fact information gets stale pretty
20 quickly, which I think it does, then the point of
21 the purpose of a 120-day standard has to be
22 looked at as a screen. Let's talk about what we

1 were referring to a little while earlier. When
2 the Commission is enforcing the statute and
3 entertaining complaints and deciding whether or
4 not to find reason to believe, your rules when
5 they specify certain time periods, certain
6 objective standards that have to be satisfied,
7 this could be an important screen. Something
8 that happened two years ago, which is extremely
9 unlikely but might in a remote situation involve
10 information that was material long time after, it
11 is nevertheless a good screen for the 99 percent
12 of the instances where that would not occur, and
13 as an agency that is trying to rationally make
14 decisions, and rational is an important word in
15 the Shays III opinion, I think, trying to make
16 rational distinctions so that the statute is
17 administrable, knowing that it will not be
18 perfect in any sense, I think that kind of line
19 is useful for that reason.

20 CHAIRMAN PETERSEN: Thank you.

21 Vice Chair.

22 VICE CHAIR BAUERLY: Thank you, Mr.

1 Chairman. Just one follow-up in that area.

2 Does material, does it matter whether it
3 is publicly available, as to whether it is
4 material in this context? Because it seems to me
5 that there is a lot of this information, you
6 said, let alone ad buying, but disclosure, we
7 have a Web site, you know who a candidate's
8 donors are. You might not know within the first
9 60-some days, but by 90 days out from a donation,
10 you would definitely know any significant
11 donation, and I asked about the donor list
12 because it was one of the items that the Court
13 mentioned, so I would be curious to know whether
14 there is a publicly available limitation on this
15 idea of materiality.

16 MR. RYAN: You obviously know your own
17 regulations better than I do, but my
18 understanding is that this section of your
19 regulation specifically states that if the
20 information is publicly available, if it is
21 obtained from publicly available sources, this
22 regulation doesn't apply.

1 VICE CHAIR BAUERLY: So to the extent
2 that campaign strategy is either publicly
3 available because a campaign might put it out
4 itself or in the media about what strategy a
5 campaign is using or is just sort of discernible
6 by looking at what the campaign is doing, it
7 seems to me that we could make an argument about
8 that becoming publicly available, and how long,
9 really, is any secret held in modern campaign
10 world.

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

17 MR. GOLD: I think that is a critical
18 element of the regulations because it is publicly
19 available, and these are coordination
20 regulations, so that is what we are talking
21 about, and if an organization is deriving
22 information from a public source, whether it

1 is the campaign itself revealing it or from a
2 media report or from -- anything that is
3 public and independent of a campaign by
4 definition can't be a coordinated matter by
5 itself when they go off and do something as a
6 result of that. You should certainly retain
7 that. I never heard of any dispute about that.

8 VICE CHAIR BAUERLY: I wasn't aware of
9 any either. I was simply going through the
10 Courts III identified, I guess, examples of
11 things that it thought might have a longer shelf
12 than 120 days. It mentioned campaign strategy,
13 which the Chairman covered, and donor lists and
14 also then mailing lists, which may not become
15 public in the way that some of these other things
16 may become, but I would like some comment and
17 your thoughts on how useful they are in and of
18 themselves as opposed to in combination with
19 information about messaging strategy or targeting
20 or some of the other information -- we have heard
21 testimony about changes very quickly, the
22 strategy and communications efforts because, of

1 course, the news cycle with the advent of
2 technology is either four hours or barely 24
3 hours any more.

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

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

1 me.

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

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

15 MR. ELIAS: Voters is a different thing.

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

21 MR. ELIAS: Right. Mailing lists are a
22 different thing. But for a donor list, let's say

1 you did know the messaging strategy. These are
2 people who gave money to the candidate, so what
3 are you going to message, you ought to vote for
4 the person you wrote a check to?

5 VICE CHAIR BAUERLY: Anyone else?

6 MR. GOLD: I think voter lists and
7 mailing lists, that is all they are referred
8 to in the regulations. Maybe there is something
9 in the explanation or justification I am not
10 remembering, but if the campaign has a voter
11 list, if it is just the same voter list that
12 everybody is buying, that is not particularly
13 enlightening. If it is a list that they have
14 devised that has tags and candidate preferences
15 and other things, that has some value and
16 enduring value. It degrades over time and I am
17 not an expert in exactly how -- somebody
18 mentioned the mail vendors know that sort of
19 things, but those lists certainly have some
20 staying power, and I suppose one can coordinate
21 if one knows that these are the identified
22 supporters of a candidate, if one can then

1 reduce -- you can be more economical in not
2 reaching out to them, but that may not benefit
3 the candidate, that may or may not benefit the
4 candidate. They may need reinforcement, who
5 knows.

6 One of your questions was the time value
7 of some of these things, and I think certain
8 things like that do have -- I would be surprised
9 if a good mailing list or a voter list only has
10 120-day shelf life overall. I would think it
11 would go beyond that. What the significance is
12 for them, I am not sure, but I think that is a
13 fair answer.

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

19 VICE CHAIR BAUERLY: I assume since the
20 challenge was -- it was an arbitrary and
21 capricious kind of analysis, I think we would
22 have to justify any line we would draw, and my

1 only point of these questions is the Judge
2 pointed to these particular items as examples of
3 things that may retain some value after, so while
4 that may not be the only way to draw the line, I
5 think in order to be responsive and perhaps
6 provide a justification that will allow us to
7 have a line that can be upheld, which is the goal
8 here, to not be back here at some point, we are
9 looking for help from people in the field,
10 because I agree with you, I don't think -- I
11 don't know of any studies that have addressed
12 this, and part of the challenge is the types of
13 employees, the types of vendors, the type of
14 information is incredibly varied, so it is hard
15 to draw one line, but if we were to draw one
16 line, we need your help in supporting where to
17 draw the line, and that is what I have been
18 trying to do, is figure where we can build that
19 record. We started that path yesterday, but I
20 think one of the challenges may be that we have
21 to -- if we ignore the particular examples in the
22 Judge's order, we may run into some trouble.

1 MR. HOERSTING: I was sitting here
2 thinking, if you have to justify any line, then
3 maybe you can add that question to the 10-day
4 supplemental as well, not that I want to create
5 work for people.

6 VICE CHAIR BAUERLY: And I am not
7 sure that -- we put three alternatives out there
8 to see what people thought was the appropriate
9 line. A lot of people came in and supported the
10 120-day line, and from those people, at least, we
11 are trying to understand why, why is that the
12 justifiable line for us to draw.

13 If I might move on to one other area that
14 we haven't talked a lot about in the last day and
15 a half. The Court also in discussing why our
16 previous standard was unacceptable to it noted a
17 particular example about this explicit agreement
18 that was made between a candidate and someone who
19 was going to run an ad, and the overwhelming, I
20 guess, at best, lack of support for that
21 alternative and, at worst, opposition to that
22 alternative in the NPRM suggests that that is not

1 a standard that there is a lot of support for
2 adopting from commenters, but I would like to
3 ask, particularly Mr. Gold, because in your
4 comments you did say that you thought that
5 adopting the functional equivalent standard would
6 largely address the Court's concern, and I would
7 like to hear a little bit more on that if you
8 would.

9 MR. GOLD: Sure. Our concern about the
10 explicit agreement standard, our main concern is
11 that it is divorced from any concern about
12 context or the content of what is being
13 coordinated, and we think the functional
14 equivalent standard is a standard that fairly, if
15 imprecisely, captures content that is
16 indisputably -- that is the -- inherent in the
17 definition of it, indisputably concerns the
18 election and may well serve, I think the key
19 phrase in what the Shays III court, and it was
20 the three judges, it wasn't just Tatel, but the
21 Shays III court said, which is that the standard
22 need only rationally separate -- it is an

1 interesting word, separate -- election-related
2 advocacy from other speech.

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

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

20 MR. GOLD: I remember the hypothetical,
21 but again, what the Commission has to do is it
22 has to draw some line, and the explicit agreement

1 standard is just too much. It may satisfy the
2 Shays court, but it may not satisfy the
3 Constitution. The Commission is in a very
4 difficult posture. I totally appreciate.
5 Because of the inherent difficulty of crafting
6 these standards and all these very critical
7 courts coming on and scrutinizing and finding
8 fault in just about everything that the
9 Commission does.

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

18 MR. HOERSTING: I will largely agree. It
19 is possible that the New York Times front page
20 hypothetical may be thrown back at you, but I
21 really don't think it will. This functional
22 equivalent test you may be applying, I don't want

1 to presume anything, but were you to apply it, it
2 would apply 365 days, and you could tell that to
3 this panel at the D.C. Circuit.

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

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

19 I don't want to preclude. Mr. Ryan, do
20 you have a view on whether Wisconsin Right to
21 Life or perhaps PASO, because of course we know
22 about the agreement in this hypothetical, we

1 didn't hear much about the content, so it is not
2 clear to me whether would, even under your view
3 as you have explained it today, PASO.

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

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

19 The closer you get to encompassing what
20 constitutes for the purpose of influencing -- and
21 as we have discussed in detail here, our view is
22 that the PASO standard is far more comprehensive

1 than the modified WRTL standard -- the less force
2 that hypothetical is going to have.

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

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

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

11 CHAIRMAN PETERSEN: Thank you.
12 Commissioner Hunter.

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

1 what you are proposing?

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

12 COMMISSIONER HUNTER: My next question is
13 a little bit following up on what Commissioner
14 Weintraub was talking about earlier. It seems
15 like many moons ago. The potential WRTL
16 standard. Several panelists said yesterday and
17 several of you said today that it would benefit
18 by adding some additional clarity to the standard
19 as we put out in the NPRM, and I just want to
20 talk a little bit more about what kind of clarity
21 that we could insert, and it would be helpful, I
22 agree with Commissioner Weintraub, that if you

1 had time to give us additional comments to that
2 end, not only on the examples but in addition to
3 any language that you think would be helpful.

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

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

21 Another idea somebody had yesterday was
22 to include a call to action, and I realize that

1 might not really cover all hypotheticals, but
2 that was one of the ideas. Another idea is to
3 add something, in addition to what I just
4 discussed, add something about -- putting
5 something in there that encompasses the
6 tie-goes-to-the-speaker concept, and I am not
7 sure exactly how that would read, I can't read
8 you a specific proposal right now, but something
9 on those lines.

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

13 CHAIRMAN PETERSEN: All right.

14 Commissioner Walther?

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

1 CHAIRMAN PETERSEN: General Counsel.

2 GENERAL COUNSEL DUNCAN: Thank you,
3 Mr. Chairman.

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

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

18 MR. RYAN: In terms of crafting a safe
19 harbor, I haven't given it any thought. We
20 opposed a similar proposal for a 501(c)(3) safe
21 harbor in the electioneering communications
22 rulemaking years ago. I would point you -- I

1 think the safeguard to allowing participation by
2 elected officials -- let me take one step back.

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

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

20 GENERAL COUNSEL DUNCAN: Let me ask also
21 in that regard, is there any concern, I guess on
22 the part of any of the witnesses, that a safe

1 harbor as written has any potential conflict with
2 the Internal Revenue code's restrictions on the
3 activities of 501(c)(3)'s which prohibit them
4 from participating in or intervening in an
5 election? Is there any possibility that there
6 may be some conflict there, that some activity
7 that we would allow in the safe harbor would not
8 be permissible from the IRS's point of view?
9 Perhaps, Mr. Gold, you would be well-positioned
10 to answer that.

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

22 The question is: Is there something that

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

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

18 MR. HOERSTING: I just agree with that.
19 I was just basically going to say that it is the
20 threat of losing tax-exempt status that allows
21 the Commission to write its safe harbor somewhat
22 in a carefree manner. You don't have to

1 overthink this one because the jeopardy, as Larry
2 mentioned, is so high on the tax side. So long
3 as you think you have it pretty much right, there
4 is no reason to overthink it or overthink it or
5 overthink it. I agree with Larry.

6 GENERAL COUNSEL DUNCAN: Okay. Thank
7 you.

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

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

22 What I would like to ask you to do,

1 though, is to expound more specifically as a
2 practical matter, in terms of practical
3 application, how the functional equivalence test
4 is clearer, more objective, a brighter line than
5 the PASO test, not from a point of view of the
6 doctrinal issues that we have been discussing, I
7 think it has been a very interesting
8 conversation, but in terms of practical
9 application.

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

18 Plus you also have the Supreme Court's
19 construction of PASO with regard to state parties
20 only and not people, not other actors. As I
21 mentioned earlier, the backup definition of
22 electioneering communication was never reached by

1 the Court, so we don't know if there would be
2 problems with that.

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

7 Here is why I was struggling for words
8 earlier. The whole momentum of that opinion is
9 to say that express advocacy is a certain type of
10 speech, and anything that reasonably could not be
11 that has to be protected, so it is a very
12 speech-protective construct that the Court came
13 up with, and it is limited to four corners of an
14 ad and context, and while I grant you that any
15 time you have the word reasonable in a test, it
16 is going to have some fuzzy edges, at least the
17 whole purpose or the whole thrust of that
18 provision is giving the tie to the speaker,
19 whereas PASO is frankly no content standard at
20 all. It is so vague, let alone so overbroad,
21 that it is to say -- it is effectively saying
22 anything coordinated is a contribution, anything

1 coordinated is a contribution, and here is why I
2 come back to the black letter conflict again.

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

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

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

21 MR. HOERSTING: Fair enough.

22 GENERAL COUNSEL DUNCAN: I don't want to

1 take credit for that analysis.

2 MR. HOERSTING: Sure.

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

5 Thank you very much.

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

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

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

12 COMMISSIONER MCGAHN: I hate to do this,
13 if you could indulge me for two questions.

14 Simply because I asked similar questions
15 yesterday. I am assuming everyone is familiar
16 with Wisconsin Right to Life II and the ads at
17 issue in the case that concern essentially
18 judicial nominations, filibustering and the like.

19 Let's assume that ad was run 65 days
20 before the general election, not within 30 days
21 of the primary, so it is outside of the statutory
22 electioneering communication window, and let's

1 assume that whatever went on behind the scenes
2 meets the conduct standard. Okay?

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

5 How about Mr. Ryan?

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

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

21 MR. RYAN: Yes, I think it opposes a
22 candidate who is clearly identified in the ad.

1 COMMISSIONER MCGAHN: Anyone on the panel
2 agree with that?

3 MR. ELIAS: Can I just ask a
4 clarification?

5 COMMISSIONER MCGAHN: Yes.

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

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

14 MR. RYAN: That is right.

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

19 MR. ELIAS: Where is the library being
20 built?

21 COMMISSIONER MCGAHN: In Utah. Next to
22 the bobsled run, at the Olympic

1 training facility. Because that is an objective
2 sport, you time that.

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

11 Is that something we regulate here?

12 MR. RYAN: What expenditure has that
13 individual made?

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

19 MR. RYAN: If there is a payment made and
20 it meets the PASO test and if there was material
21 involvement, it sounds like, then, yes, it
22 certainly meets the regulation.

1 COMMISSIONER MCGAHN: Let me follow up on
2 this. Let's say it is not a book, but it is Stu
3 Rothenberg or, say, Charlie Cooke. In Cooke's
4 report, Stu Rothenberg's report, they sit down
5 with candidates all the time and they write nice
6 little summaries all about the needs, plans and
7 strategies of campaigns, and they handicap who is
8 going to win or lose and they go into great
9 detail as to the strengths and weaknesses of
10 campaigns. So, even I -- we will take the "even
11 I" standard -- even I think that is campaign
12 related. They sit down one-on-one, they publish
13 it. Let's assume Stu promotes, attacks, supports
14 and opposes under the "even I think it is PASO
15 standard." Fully conduct standard satisfied.

16 Is that something subject to our
17 regulation?

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

21 COMMISSIONER MCGAHN: Let me ask the
22 question. Is it something we should in this

1 rulemaking cover? Is that something that would
2 be covered under existing jurisprudence and -- or
3 contemplating here, as far as regulation,
4 something that should be covered?

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

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

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

21 COMMISSIONER MCGAHN: Thank you, Mr.
22 Chairman.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

CERTIFICATE OF REPORTER

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

CATHY JARDIM