In The Matter Of:

FEDERAL ELECTION COMMISSION
TRANSCRIPT OF OPEN MEETING

Hearing
February 18, 2004

BETA COURT REPORTING, INC.
910 SEVENTEENTH STREET, NW
SUITE 200
WASHINGTON, DC USA 20006
(202) 464-2400 FAX: (202) 464-0999

Word Index included with this Min-U-Script®
Case 1:04-cv-01597-EGS  Document 24-2  Filed 07/15/2005  Page 2 of 27

FEDERAL ELECTION COMMISSION
TRANSCRIPT OF OPEN MEETING

[Page 2]

PARTICIPANTS:


[Page 3]

CONTENTS

AGENDA PAGE
I. Approval of Minutes 4
II. Discussion on Draft Advisory Opinion 2003-37 5

PROCEEDINGS

[Page 4]

[2] (10:10 a.m.)


[18] That motion carries unanimously. Well, it's [19] nine nice to see so many people here. It's always [20] nice to see people interested in the workings [21] of government. We have next up Draft [22] Advisory Opinion 2003-37, and we have a

[Page 5]

[1] number of late submitted documents that we [2] may want to consider. Madam Vice Chair, do [3] we want to consider these?


[16] CHAIRMAN SMITH: Well, just on that [17] point, did the Vice Chair indicate that

[Page 6]

we [18] might have confused a bunch of people out [19] there? What about up here at the table? [20] That's what worries me the most. All those [21] — we have a motion on the floor, all those [22] in favor will say "Aye".


[13] (Laughter)


[Page 7]

[1] permissible spending by these latter[2] organizations are outside the scope of the [3] request and are outside the scope of the [4] draft before you. Many of ABC's

[Page 8]

questions may be answered under the Commission's [6] longstanding, - allocation regulations that [7] apply to non-connected committees. Well, [8] some of the commissioners have raised questions [9] about whether these allocation regulations [10] are appropriate in light of McConnell. They [11] remain the applicable law and we believe the [12] Commission should not, and indeed, cannot [13] disregard them in an advisory opinion in [14] which its task is to interpret the law. Some of ABC's proposed [16] communications are commonly referred to as [17] issue ads, or at least, they were prior to [18] the McConnell decision. These are [19] Communications that refer to a clearly [20] identified federal candidate. They discuss [21] an issue or issues, and rather than expressly [22] advocating the election or defeat of a

[Page 9]


[22] The Supreme Court's decision in

[Page 10]

[16] But the historical treatment [17] importing the concept of express advocacy [18] into the definition in 431(9) of expenditure [19] has rested, we now know, on a mistaken [20] reading of Buckley. With that constitutional [21] limit eliminated, the definition of [22] expenditure must now be analyzed based on its

Page 11


Page 12


Page 13

[1] committee, as ABC has done, that [2] its major purpose is by def-


Page 14


[21] As for ABC's remaining questions, [22] we have been able to address most of them

Page 15


[8] The draft had attempted in some [9] manner to deal with every question [10] raised by ABC. However, a number of questions such as [11] those pertaining to coordination [12] are hypothetical, and a number of other questions [13] of constitutional [14] concern are not addressed.

[17] Finally, we have circulated an [18] agenda document with proposed amendments [19] to the draft, that's Agenda Document A. These [20] amendments, which are responsive to [21] several of the questions we [22] have asked, do not change the answers in the

Page 16


[17] MR. MASON: Thank you, Mr. [18] Chairman. Just briefly on the general issues [19] before us, from the tone of a lot of [20] the above comments and commentary on various sides of [21] the issue, you — we would think it was [22] almost Armageddon here. And I actually think

Page 17


Page 11 - Page 17 (4)
haps suggest.


[19] We followed that approach since [20] really before 1995, but certainly since then, [21] and I think one arrives at that simply by [22] saying that these are mixed purpose

[Page 19]


[13] We are going to have to address the [14] questions raised by the McConnell decision [15] and by BCRA in the context of the rulemaking [16] but "sufficient unto the day is the evil [17] thereof."


[19] (Laughter)


[22] Better-educated man than I am. Thank you.

[Page 20]

[1] Commissioner Mason. Vice Chair Weintraub?


[Page 18]

[19] So when I took my stab at the [20] counsel's draft, I sort of tried a blending [21] approach of 106 and the — as limited by the [22] concept of promote, support, attack, or

[Page 23]


[Page 24]

[1] everybody sang hosannas and adopted it as [2] originally drafted. It was like every other [3] piece of legislation, it was amended, people [4] had different takes on it, there was the [5] infamous Millionaires' Amendment among other [6] things that I know wasn't part of the [7] original draft. The amendments were added, a [8] lot of this was added and that's part of the [9] legislative compromise process and it's not [10] clear to me. And I think where they ended up [11] was a place that Congress felt comfortable [12] with given the framework that they thought [13] they were working under.

[14] And now it appears that we may be [15] changing that framework and I would be a [16] lot more comfortable doing that in a rulemaking [17] context. I also take note of the fact that [18] I'm you know, I'm not the first person to [19] notice that, you know, some people seem to [20] think that maybe this advisory opinion was [21] not entirely written on the up and up, that [22] it was submitted not so much with the goal of

[Page 25]

[1] guiding the conduct of the requester as [2] seeking to portray facts in a very bold and [3] in some ways negative way without any [4] explanation or justif-
The document contains legal text discussing case law and regulatory context. The text is too fragmented to provide a coherent summary without additional context from the surrounding text. The content appears to involve legal arguments and discussions about regulatory frameworks, possibly related to election law or another legal domain.

For a more accurate representation, the entire text of the document would be necessary, especially the context surrounding each section to understand the full implications of the arguments presented.
time, which is two or more [14] than I do. So I really admire her hard work [15] on this matter.

[16] At the outset, I want to emphasize [17] a couple of things. I think that I echo the [18] comments about the fact that these are [19] difficult issues and I believe that [20] reasonable people can look at them [21] differently and reach different conclusions. [22] I think a lot of the issues we face, this

Page 33


[16] And so I welcome today’s discussion [17] because I think it’s important that we begin [18] answering the questions. That being said, I [19] totally concur with the vice-chairman’s [20] comments — vice-chairman’s comments and [21] Commissioner Mason’s comments that this is [22] not a rulemaking. I think it’s absolutely

Page 34


[16] But I think that what our approach [17] is going to be to 501(c)(3) and [4] is can be [18] squarely addressed in the rulemaking. I [19] think it’s important that we tackle that [20] issue along with the 527 issue so that we [21] deal all these issues comprehensively, and [22] whatever we decide, it’s a comprehensive

Page 35

[1] approach. I think that’s very important that [2] we speak with — comprehensively in terms of [3] outside groups and

what they can do.


[22] And there is a number of different

Page 36


[17] But that is a permissible way to [18] interpret the law in terms of what political [19] committees do in spending funds for those [20] kinds of communications and it is a [21] permissible choice for us today to decide [22] that only hard dollars should be used for

Page 37


[18] But the Supreme Court has spoken [19] and they have ruled emphatically as I read [20] this opinion that it is an understandable [21] and plausible standard and that it is [22] constitutional, and I have to accept that

Page 38


[22] CHAIRMAN SMITH: Thank you.

Page 39


[3] MR. THOMAS: Thank you, Mr. [4] Chairman. Well, here we are — I think the [5] commissioners have been agonizing over this [6] and much to their credit I think they’ve been [7] trying to come up with something that can at [8] least reach a consensus for at least because [9] we really think do have an obligation to [10] try to provide guidance in this area. And I [11] appreciate the discomfort that the vice chairman [12] has noted about this particular request. It is [13] obviously is difficult.

[14] It is a toughie and it has raised a [15] whole lot of hypothetical issues, not so much [16] hypothetical but a whole bunch of proposed [17] activities and it is expecting us to rule on [18] an awful lot. And it’s — as I have said [19] from day one, it is an extremely [20] complicated, difficult issue to decide. I’ve been around this ABC for quite a while and here we are, we are still trying to

Page 40

[1] define what is an expenditure.

would have been on this side of the table for [5] many, many years. And I would just say, I [6] do, as I've said elsewhere, think that it is (7) appropriate for our flocks to bring to us [8] these kinds of questions in the advisory [9] opinion format that does force our hand to [10] some extent. But what we are expected to do [11] is simply apply the existing law to the [12] factual scenarios put forward and try to [13] interpret that law as best we can. Now, [14] sometimes we break down and we can't get a [15] consensus, and we in essence, leave some [16] questions unclear and unanswered. I hope we [17] don't end up with that posture today.

[18] I think we would be well served to [19] try to give some guidance. I think that it's [20] interesting to note, you know, this concept [21] of defining what's an expenditure has been [22] with us a long time. Going back through some

...Case 1:04-cv-01597-EGS  Document 24-2  Filed 07/15/2005  Page 7 of 27

...political activity.

[15] Expenses associated with these [16] communications constitute expenditures for [17] federal political activity within the meaning [18] of the Act so as to count toward the [19] political committee threshold and to require [20] reporting if made by a political committee. [21] Payments for these communications that are [22] allocable to federal political activity must

...be made from funds raised permissibly under [23] the Act and regs.

[3] So it was clear even back then that [4] the Commission had a perspective that these [5] kinds of activities can and should be treated [6] as expenditures under the law and even [7] without express advocacy being involved. So [8] I think that this shouldn't really be viewed [9] as a dramatic change. I appreciate that [10] there were lots of courts along the way that [11] we are starting to hint to folks that maybe [12] express advocacy was the touchstone in this [13] area but I think the Supreme Court and [14] McConnell really has sort of indicated that [15] that express advocacy test just doesn't work [16] and it certainly is not constitutionally [17] required.

[18] So I think the Commission right now [19] is sort of back to where we were certainly [20] back in 1988. In a sense, as our Counsel [21] noted, the Supreme Court we thought, or some [22] thought, for long time had put a express


[9] And to me it is helpful to put in [10] this promote, support, attack, or oppose [11] standard because, as the vice chair noted, in [12] a way it is a narrowing construction. It [13] helps everybody sort of understand that what [14] we are talking about are situations where [15] there is a reference to a clearly identified [16] candidate. And it goes so far as to promote [17] that candidate or to oppose that candidate in [18] some fashion.

[19] I think that's leaving for possible [20] opportunity situations where there isn't [21] some -- where there might be a reference to a [22] candidate but it doesn't in some fashion

...promote or support that candidate. It's


[8] I would note that there isn't a [9] fairly important distinction built into this [10] opinion request. I have been saying to some [11] folks that we must be doing something right [12] because everybody is going to be unhappy with [13] this opinion, if we prove the one that the [14] vice chair has drafted. But in a sense, as [15] the Counsel's office, noted this draft [16] doesn't go as far as I suppose the reform[17] community would like in that it's allowing an [18] organization that is registered with us as a [19] political committee to still work with our [20] existing allocation regs. And in essence, [21] pay for part of some of these kinds of [22] communications with non-federal or soft money

...funds.


...and also refers to some non-federal [2] candidates, that is under existing [3] allocation regs, the 105.1, permissible.


[15] I think the allocation issues are [16]...
very important and need to be addressed so [17] that we can, if appropriate, prevent [18] circumvention in a way that allows for abuse [19] of the prohibitions on the use of soft money [20] for federal election activity. I also know [21] that we have another request in the door that [22] is going to ask us to answer a few more tough

Page 48


[16] And I think what we are doing in [17] the draft of the Counsel’s office and the [18] draft that the vice chair has put forward [19] stays within that context. I do think that [20] in any situation while we are trying to [21] define whether something is or is not for the [22] purpose of influencing a federal election, we

Page 49

[1] have to provide some basis for how we got to [2] the answer it seems to me. And we now have [3] the benefit of the Supreme Court judgment [4] gloss that we can apply and I think that it [5] is permissible in this context.


Page 50

MCDONALD?

[17] MR. MCDONALD: Mr. Chairman, thank [18] you. First of all, the vice chair alluded [19] earlier to — she was no Brad Smith and just [20] for clarification, I know Brad Smith and [21] she’s not any Brad Smith, so let me be clear.

Page 51


about that. First, let me say that — to say [5] that it’s a tough issue is putting it very [6] mildly. I do think it is right that the [7] showdown is not today. I think that is [8] true, I think it’s further down the line. I was [9] looking through some of the comments again [10] this morning and last night and I’m [11] fascinated how time and circumstances change. [12] We have, as the vice chair alluded to [13] earlier, a letter signed by a number of [14] members of Congress about what they intended.

[15] It’s somewhat ironic and I say it [16] with the deepest respect because I take those [17] comments very seriously. But a counsel who [18] represents a number of those members was in [19] earlier during the rulemaking indicating that [20] the members really didn’t know what they were [21] doing when they passed the law. So, it’s [22] always a little bit dangerous to get into

Page 52

[1] this territory.

[2] I saw on the morning post, at about [3] five this morning, I read their editorial and [4] I thought it was a thoughtful editorial and [5] trying to come to grips with it but I [6] can remember very clearly when groups who had [7] a lot less money, who were registered, right [8] upfront political action committees, were [9] seen as special interest and obviously a lot [10] less was involved there than is involved [11] here.


[20] I think that first and foremost it [21] should be said that nobody has worked harder [22] on this matter than the chair. He has tried

Page 53


[13] I think that that’s — at this [14] juncture that’s where I am. It’s — it is a [15] very tough question and it is ironic, I

Page 54

was [16] reminded when Commissioner Thomas was talking [17] about how long he had been here and we were [18] still trying to define expenditure. And his [19] predecessor for those of you who did not have [20] the good fortune to know him was Tom Harris. [21] And we used to be located at 1325 K Street. [22] For those of you not familiar with that, that

Page 55

[1] used to be the old red light district and the [2] issue came up about the term 


[18] I don’t know whether she rated it [19] three after I embraced it or before, that [20] portion is not very, very clear to me. I [21] think that’s — at this juncture, that’s [22] where I am. It’s — it is a very tough
all the comments [5] that we have and try to analyze what has [6] taken place because as Commissioner Toner [7] said early on, it is right. We've all looked [8] at this, we've looked at it very closely, the [9] Counsel's office has spent countless hours [10] and days trying to come to grips with an [11] approach that they are comfortable with, and [12] I have spent a lot of time on it. Maybe as [13] much time as anything other than possibly the [14] rewriting of the regs a few summers ago, [15] within compliance of the new legislation.

[16] But a lot of time has been spent on [17] it. But it is a question of where we are [18] currently and I think the Vice-Chair was [19] right and she'd probably had my vote, at [20] least as the second vote. I would've [21] probably preferred not to answer it, not [22] because I don't — because it's hard, that's

[Page 56]


[11] MR. MASON: Mr. Chairman?

[12] CHAIRMAN SMITH: Mr. Mason.

[13] MR. MASON: I am inclined, unless [14] that the Chair objects, at this point to [15] propose adoption of Agenda Document 04-111-G, [16] which is the Chair's revised draft as the [17] baseline document for amendments. Just let [18] me clarify that, I, for instance have, [19] footnote 20 in the Chair's draft, it goes to [20] the issue of the amendment — the Counsel — [21] CHAIRMAN SMITH: Let me interrupt [22] that and it is in fact my intention that

[Page 57]


[3] MR. MASON: And I also —


Mr. [16] Chairman.


[Page 58]

[1] (Laughter)

[2] SPEAKER: No, can we have a break.


[5] SPEAKER: I thought you said, do we [6] want to have a vote —


[9] SPEAKER: Okay, so the motion is —


[Page 59]


[Page 60]


[17] Similarly, if federal election activities [18] were expenditures, it would be [19] unnecessary to state that state party [20] committees needed to use hard dollars to pay [21] for them, as the law specifically requires, [22] because — as BCRA specifically required.

[Page 61]


[21] Finally, if electioneering [22] communications, expenditures, corporations

[Page 62]


[19] That's a pretty unequivocal [20] statement, I think, of the Court's [21] understanding of the law. This was, I think, [22] evidenced as well in Judge Cora Roettell's

[23] statement, I think, of the Court's [21] understanding of the law. This was, I think, [22] evidenced as well in Judge Cora Roettell's

Page 66


[22] The primary respondents were a [23] GOP

Page 67


Page 68

[1] Act. Their theory was entirely that these [2] groups were regulated because in fact they [3] were established, financed, maintained or [4] controlled by a political party.

[5] Now these groups, we see a lot of [6] complaints from these groups and none of [7] these groups are shy about filing lots of [8] charges in the broadest possible terms. And [9] I think surely had they thought that the — [10] actions, the intended activities of these [11] groups violate BCRA, whether or not they were [12] established, financed, maintained or [13] controlled by the political parties, they [14] would have so alleged. I think we can safely [15] assume that they did not make that allegation [16] because that's not how they understood the [17] law. Here's another example, and this is [18] what Common Cause said to the Commission [19] during the FEC's BCRA rulemaking in the [20] spring of 2002. I would note that Common [21] Cause has not chimed in support of the [22] Counsel's draft here. But Common Cause,

Page 69


[18] A word about expanding this to [19] all 527s or non-party agencies. Here is Tom [20] Mann (?), a long-time supporter of the law, [21] prominent expert, in fact an expert during [22] the litigation for the defendants and


[22] Answer. "Yes, I see that."


[11] (Laughter)

[12] CHAIRMAN SMITH: Let me just have [13] the case fairly clear. Congress and BCRA [14] sought to sever the link between [15] officeholders and large contributions. For [16] many years, contributions directly to [17] candidate campaigns have been limited. In [18] BCRA, contributions to national parties were [19] also limited, in the belief that such [20] contributions possessed equal or at least [21] nearly equal potential for corruption. [22] But there is concern then that soft


[17] Second, they extended the soft [18] money prohibitions to groups established, [19] financed, maintained or controlled by a party [20] and required the FEC to adopt a new broader [21] standard of coordination in order to prevent [22] these groups from spending this kind of money

[1] on these kinds of "get out the vote" [2] activity, if they were closely linked to the [3] party in that way.


[16] I know that the press is reporting that [17] action along the lines that I've [18] proposed is going to benefit the Democrats in [19] 2004. It's not our place to measure the law [20] in partisanship. I have searched five pages [21] in two separate submissions from the RNC and [22] I have to say, I've searched in vain for a page 71

[1 legal argument that suggests that these [2] expenditures or these expenses should be [3] regulated.


[16] And he and Peter Lewis (?) and the [17] other people whose names I keep saying, that [18] seem to be driving certain partisans into a [19] frenzy on the Republican side, can go meet in [20] the Caucus Room today at noon, and agree that [22] they are going to establish another group [22] that's going to fund "Get out the vote"

[1] activities to elect lots of Democrats to [2] local offices across the country. And


[13] I also know that action along the [14] lines that I have proposed counter to the [15] general ideological leanings of some of my [16] colleagues. Over the past four years, I have [17] been asked more times than I can even begin [18] to say, will you enforce the law as it is [19] written or as you wish it to be. And now [20] that question, sits before my colleagues, who [21] have long preferred a more regulatory [22] approach than I.

Page 76


[17] We know that it is supported today [18] in editorials by, I think three of the — I [19] think, what are the three, of the four [20] largest circulation papers in the [21] United States. The Wall Street Journal, the [22] "conservative" Wall Street Journal, the

Page 77


[14] And now that question is squarely [15]
before you. If you think that Congress, that [10] BCRA intended to change all this, it's fine. [17] But I think the analysis is quite strong. I [18] think the case is extremely strong, that [19] is not, what was intended to be done by [20] Congress. And if it can be done under some [21] theory that it can be done simply under FACA, [22] in other words, with no reference to BCRA, it


[16] VICE CHAIR WEINTRAUB: Thank you, Mr. Chairman. I think you're very persuasive [18] and I do want to compliment you on your [19] ideological consistency. I'm going to [20] support this motion. I'm going to support it [21] largely for the reasons that you said at the [22] end there. That if we're going to depart


[14] I think that many people say that [15] this is a hard decision. It is a hard [16] decision, but that's not my objection to it. [17] My objection to it is not that it is [18] difficult or it's complicated or it's long, [19] but that it more appropriately belongs in the [20] rule-making context. And I think that the [21] analysis of the law, as set forth in — which [22] one is it? — agenda document G, is accurate.


[22] And frankly, if I had it my way I

[1] would say we ought to be encouraging anybody [2] and everybody to get out there and do GO TV in order to get more people to the polls. I [4] think that would be a very good thing if we [5] had more people voting.


[20] But if you take the office holders [21] out of that equation, if you take the sale of [22] access out of that equation, as I think


[18] I do want to point out one area of [19] disagreement in the — just emphasizing once [20] again I thought I'm no Brad Smith, I — as [21] persuasive as he is today — the Chairman and [22] I differ on the — on this whole issue of


[11] It appears that nobody is looking [12] to take express advocacy out of the equation [13] at all together. Some of our commenters have [14] mentioned that it would still apply to other [15] groups that are not political committees. [16] So, then we would be left with a dichotomy, [17] basically in the definition of expenditure, [18] where we would be defining expenditure one [19] way for political committees and in a [20] different way for other groups and I think [21] that is problematic and again, you know, [22] while not — that may be where we end up, but

[1] I think we ought to do that with the rule [2] making process and not through NAO.
[5] And I am open to looking, exploring new ways of addressing the express advocacy issue. Which, you know, I just don't find to be a terribly functional concept. But again, [7] only in the well, not only — because I'll support my own draft, if we can't get four [9] votes for this one. But I would prefer — I [10] would strongly prefer to do it in the [11] rule-making context. And while the Chairman [12] and I disagree on that aspect, I think [13] otherwise his legal analysis is very sound [14] and in adopting the Chairman's analysis we [15] would be leaving the status quo pretty much [16] until we get to the rule making.

[17] We would be adopting the view that [18] I think most members of the regulatory community thought they were operating under [20] and that would be the preferred approach. If [21] we're going to change — if we're going to [22] enact some kind of a sea change in the way

[16] people are conducting their business, again, [2] I think we ought to do that through rule [5] making. Thank you Mr. Chairman.

[4] CHAIRMAN SMITH: Thank you, Madam Vice Chair. I think at this point — first [6] of, I want to make a brief announcement, [7] referred to an editorial in the Wall Street Journal today and that editorial noted that in the past I had called "the grand poobah" and I just want let my colleagues to [11] know that I will respond to that if you [12] like to use that phrase. And then I'm going [13] to suggest that we — we are at normal [14] break time, so I'm going to suggest that we [15] take a 15-minute recess. We're being [16] recessed for 15 minutes.

[17] (Recess)

[18] CHAIRMAN SMITH: The commission is [19] back into session after a brief, but almost [20] as always slightly extended recess over the [21] announced time. We have a motion on the [22] floor from Commissioner Mason to make a


[16] MR. McDONALD: Yes. Before we vote [17] on that motion, I — would this be a time [18] that I might just look to you motion and [19] addenda and address a comment that the Chair [20] made. I would like for the counsel's office, [21] if they wouldn't mind a respond to the site [22] from the Court on page 6 the

[1] top of page 7 and ask them to comment on that [2] since that's going to be kind of a critical [3] element of what we're discussing today.

[4] SPEAKER: I'm sorry, Mr. Miller (?)


[13] I think the Chairman is absolutely [14] right, I certainly agree that many of these [12] issues, as to when an organization has to [13] register as a political committee and be [14] subject to the contribution limits are issues [15] that we will take up as part of the rule [16] making, and are not implicated here. But I think the point I would underscore is that I don't think anyone here is saying that BCRA [19] requires that the commission take a different [20] approach here. That Congress intended that [21] the rules here change, that BCRA addressed [22] this in any fashion. It did not. And the

[1] comments that were made during the rule [2] makings and the comments that were made in the complaints file by the outside organization, months and months before the [5] McConnell decision, had no reason to anticipate the breadth of McConnell and the sweep of McConnell, but I do think that it is beyond argument that McConnell said that to the extent that you are regarding the [10] express advocacy test was a constitutionally [11] required test,
you’ve got it wrong. And so [12] here we are — here we are, looking at [13] political committee spending. That is, an [14] organization’s major purpose, is the election [15] or defeat of candidates and we’re forced to [16] decide whether to continue applying the [17] that to the extent that we were applying [18] it before, we did so because we viewed it as [19] being constitutionally required. Court has [20] said, it’s not. So, the choice before the [21] commission is, do we continue to apply it [22] anyway, even though — the only other thing

Page 93

Page 94
[12] MR. NORTON: There’s no limiting [13] statement. I don’t think that the issue [14] we’re dealing with was part of what they were [15] addressing there. No, there is no limiting [16] statement.
[17] SPEAKER: The footnote 68, on the [18] other hand also does not suggest that the [19] statute can be read to, in some way make [20] these target tax exempt organizations into [21] political committees or in some way [22] what they’re prohibited from doing in BCRA

Page 95
[14] SPEAKER: I —
[18] SPEAKER: I mean, I agree with you, [19] raised this question for another day, [20] and I [21] agree with something else you said that — [22] earlier, that BCRA doesn’t mandate this and I [22] guess, that leads me back to saying, in that

Page 96

Page 97
[1] change in any direct way, what we’ve done. [2] Congress did make those changes. It [3] seems to me the Court has suggested that we [4] would have the authority to make changes in [5] the law in those areas, where people had [6] often — people used to believe, myself [7] included, that we didn’t have that au- [8] thority. [8] The Court has freed us up, they’ve freed up Congress to do more, but I just don’t see [10] why the argument is that Congress has in [11] fact, done

Page 98

Page 99


And after much prodding they sent [19] us some copy of ads but then they said, but [20] those aren’t necessarily the kinds of ads [21] that we would use so we didn’t really have a [22] specific ad in front of us. They did say that some of the ads they want us to rule on [2] (?!) would contain reference to a clearly [3] identified candidate.

So with that, we were confronted [5] with trying to address in a sort of amorphous [6] posture what about a party ad that promoted [7] the party indirectly, in the context of [8] the legislative issue. And that may or may not contain a reference to a Federal [10] candidate, wherein, it was represented that [11] that reference would not amount to an express [12] advocacy communication nor would it amount to [13] what was then a legal standard, an [14] electioneering communication which never did [15] depend on express advocacy as the standard.


And that doesn’t necessarily [6] require us to use any — the legal analysis [7] that came out of the Supreme Court’s decision [8] on that in this context. At the same time, I [9] don’t think it precludes it. I think that we [10] are permitted certainly to try to reach out [11] and try to identify some clarifying language [12] that would help people draw these lines in this context. So I think that as the [14] Counsel’s office noted, the ‘promote, [15] support, attack, or oppose” standard is one [16] that I think we can adopt for purposes like [17] this, where we are dealing with a political [18] committee that has already walked to the door [19] admitting that it is — it has to register [20] with us because in essence its major purpose [21] is to influence elections and it has crossed [22] the $1000 threshold in terms of making expenditures, or receiving contributions.


CHAIRMAN SMITH: Thank you, Mr. Thomas. So further discussion on the motion, [21] Vice Chair.

VICE CHAIR WEAVER: I think I could try once again to substitute a motion [2] that the request was improvidently granted [3] and — we shouldn’t answer it, but I don’t [4] think I would — well I got one.

SPEAKER: I got one.

CHAIRMAN SMITH: I leave that [7] decision to you.

VICE CHAIR WEAVER: All right, [9] what the heck, I will try a — with [10] absolutely no anticipation that it would win, [11] I will try a motion that we — the client to [12] answer the request as improvidently granted, [13] and address all of these issues in the [14] rulemaking context.

CHAIRMAN SMITH: The vice chair [16] offered us a motion that we decline, that we [17] dismiss the advisory request is improvidently [18] granted and that they’re trying to address [19] these issues in the already scheduled [20] rulemaking if I may, I would just ask you [21] again do you want to express the basis for [22] that argument? Obviously, when people ask an advisory opinion we have a legal obligation [2] to answer it. Well, what is the basis for [3] your saying that we don’t need to answer this [4] one?

VICE CHAIR WEAVER: The basis [6] would be the lengthy discussion that some of [7] us have been involved in, maybe all of us [8] have been involved in as to whether these [9] issues really are more appropriately dealt [10] in as to whether these [9] issues really are more appropriately dealt [10] within the rulemaking context and much as we [11] appreciate our obligation to give guidance [12] to the regulated community, I really think that [13] we do a disservice to the regulated community [14] when we give them advice with the knowledge that [15] we’re about to enter into a rulemaking [16] that may make the whole thing irrelevant. So [17] people will have to change their course of [18] conduct perhaps, in two months time.


CHAIRMAN SMITH: Yes, we do have [6] some thoughts on that — with — in fact, [7] when this request first came to us, our [8] reaction was, I think fairly similar to the [9] vice chair’s that we did not see this as a [10] specific transaction or
activity that was [11] being proposed to us as on which we could [12] opine.

[13] And we had a number of fairly [14] lengthy discussions with the requestors, they [15] did come back to us with exhibits, with [16] concrete language as to get a variety of [17] different ads would say, the TV, radio, again [18] this things for photo (7) registration, get [19] out the vote and on that basis, we [20] decided in our office that we've thought that [21] there were enough specific facts, and [22] proposed transactions that we could go

[1] forward and attempt to answer some of the [2] questions; not all of the questions.


[12] Though I will say the Commission [13] can always make a contrary decision to that. [14] It has happened occasionally in the past.


[17] MR. MCDONALD: Well, I'll just tell [18] my point in a minute I mean, I must say that [19] this, the first time through that was, [20] certainly my reaction is a great deal like [21] the vice chair's. The irony of what has [22] happened here — and I've — without being

[11] anyone's motives. We have a number of [2] questions that we are not answering, some of [3] them we are, and as a result, it seems like [4] the irony of it is — the spillover effect is [5] getting us into the rulemaking business, [6] which as the vice chair has indicated, [7] hopefully will be comprehensive and maybe [8] even illuminating.

[9] I'm not so sure I'd go that far but [10] hopefully it will at least be comprehensive [11] when we get to it. It was my reaction to [12] this and I must say I thought when I read the [13] submission that no one was really taking that [14] point of view except maybe myself.

[15] I am uncomfortable with this, I [16] think what worries me about it is not so much [17] this matter specifically but I think if we [18] get into a circumstance, where we see a lot [19] of these, we've already got another in the [20] door albeit it seems to be a little more [21] definitive. I think it's not particularly [22] good for the Commission to be in that

BETA REPORTING


[16] CHAIRMAN SMITH: That motion fails [17] by vote of 5-3, the Chair, the vice chair and [18] Commissioner McDonald in favor. [19] Commissioners Mason, Thomas and Toner [20] opposed. That puts the main motion back on [21] the table. We've had some discussion of it. [22] Is there further discussion? Okay, let's go


[22] SPEAKER: Is it your document?


[6] (Laughter)


[11] (Laughter)

[12] CHAIRMAN SMITH: I recall, I recall [13] hearing once that the — you know, that the [14] minutes were not record to what's actually [15] said it a meeting; but what Commissioners [16] wish they would've said had they thought [17] about it. So I will assume that we can [18] strike that. I mean repeat the motion [19] motion by Commissioner Mason to make the [20] — and perhaps I did say wrong, but it's to [21] make the Chair's
draft 04-11-G the base line [22] document from which we work. That’s my

[Page 115]

[16] [16] SPEAKER: I hope you’ll appreciate, [17] I’m still in last year’s mindset when I heard [18] the Chair’s — I’m sure I was thinking —
[19] [19] (Laughter)
[20] [20] SPEAKER: The immediate past Chair, [21] the penultimate Chair.
[22] [22] CHAIRMAN SMITH: That’s fine.

[Page 116]

[15] [15] SPEAKER: Subject to further [16] amendment as —
[17] [17] VICE CHAIR WEINTRAUB: Subject to [18] what I’m sure will be further amendments [19] including my own.
[20] [20] CHAIRMAN SMITH: All right, the [21] vice chair has moved that we make the base [22] line document for the remainder of our

[Page 117]

[1] discussion to be 04-11D, is that correct?
[4] [4] SPEAKER: Just to clarify, I [7] thought what we did was have a maze in [8]

motion.
[16] [16] SPEAKER: At one point something [17] was characterized as a substitute so — all [18] right.
[19] [19] CHAIRMAN SMITH: Okay, is there [20] discussion on this motion? All right, if [21] there’s no discussion we’ll go ahead and call [22] the question. All those in favor signify by

[Page 118]

[18] [18] SPEAKER: — —
[19] [19] CHAIRMAN SMITH: Why don’t we do [20] that then we would be in recess until [21] 2:00 [22] o’clock.
[22] [22] (Whereupon, at 12:20 p.m., a

[Page 119]

[1] Luncheon recess was taken.)

[Page 120]

[1] AFTERNOON SESSION
[2] (2:05 p.m.)

[Page 121]

[1] the version that I had offered to the [17] Commission —
[18] [18] (Laughter)
[19] [19] CHAIRMAN SMITH: And I do know that [20] there is always time for those on the winning [21] side and that to make a motion to reconsider. [22] And — but —

[Page 122]

[8] So this just moves the [9] electioneering communications discussion to [10] behind the — pass or amend the — and then [11] the 106 discussion is not substantive. Then [12] I also wanted to delete a couple of changes [13] that were actually originally suggested by [14] Commissioner Toner, and in the interests of [15] Committee we went a little overboard [16] and included in our draft a couple of changes and [17] I actually didn’t intend to include.

[Page 123]

[1] [1] think if we had done it last week we could’ve [2] done it on Friday the 13th too. And to add [3] that other language concerned me only because [4] there was

[15] And I think it is superfluous in [16] this, opinion I'm not quibbling whether it is [17] a statement of law, it's just that we don't [18] have a foreign national before us, asking us [19] whether they can make electioneering [20] communications or independent expenditure. [21] So in the interest of paring (?) this down to [22] what was actually asked by the requestor I

[1] wanted to take that language out again. And [2] then the other changes in here are merely you [3] know, the sort of smooth transitions from as [4] a result of that. Now we're sort of hoping is that we could just do those maybe without [6] objection.


[13] VICE CHAIR WEINTRAUB: I did. I [14] think there was a footnote issue that was [15] pointed out by Mr. Fragerlli (?) This [16] morning that maybe we ought to deal with this [17] — that issue of soliciting $5000 for the [18] Federal and then $5000 for the non-Federal — [19] you found some language in McConnell that [20] made you think that we were going the wrong [21] way on that?

[22] CHAIRMAN SMITH: What footnote is

Page 124


[16] CHAIRMAN SMITH: Okay, thank you.

[17] Madam Vice Chair, Commissioner Toner I [18] believe you had some items that you wanted to [19] raise.

[20] MR. TONER: Thank you, Mr. [21] Chairman, and those are set out in agenda [22] document 04-11-E, which offered for —

Page 126

[1] consideration of a number of amendments to the (2) base line document. We're considering — the (3) first of those, mainly a stylistic point, but [4] page 4, line 19, of the base line document (5) would recommend inserting an additional (6) sentence from the McConnell ruling which is (7) set out as the first proposed amendment in (8) the document.

[9] MR. MASON: Mr. Chairman.


[12] MR. MASON: While we are there, I [13] think this may be lifted — well, from [14] somewhere else. Counsel draft or somewhere, [15] but it's not clear to me why the language on (16) lines 9, through 14, on page 4 is in italic?

[17] CHAIRMAN SMITH: Did you mean for [18] them to be in italic, I mean, do you care, if [19] it's in italic?

[20] VICE CHAIR WEINTRAUB: I don't [21] care. I believe it was in italics in the (22) counsel's draft and I don't really care.

Page 127

[1] CHAIRMAN SMITH: Commissioner Mason, would you like to have that taken out (5) of this ally (C)?

[4] MR. MASON: It doesn't appear to be (5) a citation or act. It doesn't matter to me; (6) I just thought it looked odd.


[9] MR. NORTON: I have to confess it (9) was a piece of it I drafted myself, and it (10) inadvertently —


[13] (Laughter)

[14] MR. NORTON: We are seated on (15) or four of subsequent iterations of the draft (16) and some people thought it was actually well (17) placed — it was not in contention.

[18] CHAIRMAN SMITH: Well, then, I (19) think it'd be appropriate, I don't want to (20) speak for the moving, but I think we'll (21) put that into a regular text without objection.

[22] SPEAKER: Okay.
but, by the way this is good a time as any.

We’re often — we often thank the counsel for [14] their work especially in such a complex issue [15] and I think sometimes you forget — thank the [16] secretary’s office, which had the thankless [17] job of getting all these various blue [18] documents on to paper this morning that were [19] coming on a huge rush and then people making [20] changes to them at the last minute and so on [21] and I appreciate their effort, they did a [22] super job there. Okay, that leaves the

for the Commission to [20] require as a matter of law that all [21] communications made by political committees [22] that “promise, support, attack, or oppose” a

Page 133


[18] SPEAKER: “Conclude here that”


[20] But this is a part outside the room.

[21] (Laughter)

[22] VICE CHAIR WEINTRAUB: Is that —

Page 134

[1] let me ask legal counselor, is that in [2] accordance with our allocation, with the way [3] we are otherwise allocating expenses [4] throughout this opinion?


[21] VICE CHAIR WEINTRAUB: Yeah, does [22] this accurately reflect our decisions about

Page 135


[4] CHAIRMAN SMITH: Mr. Norton?

[5] MR. NORTON: Not exactly, I mean I [6] think we have taken the position that more of [7] the allocation regulations apply that is [8] where we have a generic communication that [9] doesn’t mention the candidate or where we [10] have a communication that mentions more than one candidate then the allocation refs 106.1 (12) and 106.6 are controlling. And so what we [15] are talking about in this draft are the [16] communications that aren’t governed by [17] applicable regulations and for which the [18] Commission is required to back to the [19] statutory definition of expenditure. So, I’m [20] not certain what Commissioner Toner is [21] attempting to achieve here or clarify and [22] that might help me, but I’m not sure this [23] clarifies it for me.

[22] CHAIRMAN SMITH: Commissioner

Page 136


[20] VICE CHAIR WEINTRAUB: So as I — [21] I’m sorry. So as I understand it now you’re [22] deleting the first part of that paragraph and

Page 137

[1] we should delete everything up until insert [2] footnote?


[16] CHAIRMAN SMITH: That’s where we’re [17] going to be and that’s in the footnote at the [18] bottom of the page.

And so everything they do is an [20] expenditure so it's difficult to answer a [21] question about electioneering communications on page 144 line 9 through 10, [7] in consultations. The phrase whether the ad is run at [8] or less or more [9] than 60 days before a general election is not [10] relevant that the vice chair's document had [11] proposed deleting that sentence and I'm okay [12] with that deletion. So I would drop my [13] proposed amendment on that. On page 21, line [14] 14 — 21, line 16 — [15] SPEAKER: Sixteen? [16] MR. TONER: No, I am sorry. This is a numerical correction. Just that it is 16 right now on page 21, line 14, we said the [17] communications in paragraph 26, 11 believe it [20] should be paragraph 52. So I have just [21] replaced 26 with 52 that will be twice as good. And then finally, Mr. Chairman, on

[1] when the entity involved cannot make them; [2] it's one of these comment runs. So I accept [3] that, so I would propose — would drop — 14 will drop that propose amendments page 17, [5] lines 9 through 12.

And on page 18, lines 9 through 10, [7] in consultations with the vice chair, that's the phrase whether the ad is run at less or more [9] than 60 days before a general election is not [10] relevant that the vice chair's document had [11] proposed deleting that sentence and I'm okay [12] with that deletion. So I would drop my [13] proposed amendment on that. On page 21, line [14] 14 — 21, line 16 — [15] SPEAKER: Sixteen? [16] MR. TONER: No, I am sorry. This is a numerical correction. Just that it is [18] right now on page 21, line 14, we said the [19] communications in paragraph 26, 11 believe it [20] should be paragraph 52. So I have just [21] replaced 26 with 52 that will be twice as [22] good. And then finally, Mr. Chairman, on

[1] when the entity involved cannot make them; [2] it's one of these comment runs. So I accept [3] that, so I would propose — would drop — 14 will drop that propose amendments page 17, [5] lines 9 through 12.

And on page 18, lines 9 through 10, [7] in consultations with the vice chair, that's the phrase whether the ad is run at less or more [9] than 60 days before a general election is not [10] relevant that the vice chair's document had [11] proposed deleting that sentence and I'm okay [12] with that deletion. So I would drop my [13] proposed amendment on that. On page 21, line [14] 14 — 21, line 16 — [15] SPEAKER: Sixteen? [16] MR. TONER: No, I am sorry. This is a numerical correction. Just that it is [18] right now on page 21, line 14, we said the [19] communications in paragraph 26, 11 believe it [20] should be paragraph 52. So I have just [21] replaced 26 with 52 that will be twice as [22] good. And then finally, Mr. Chairman, on

[1] when the entity involved cannot make them; [2] it's one of these comment runs. So I accept [3] that, so I would propose — would drop — 14 will drop that propose amendments page 17, [5] lines 9 through 12.

And on page 18, lines 9 through 10, [7] in consultations with the vice chair, that's the phrase whether the ad is run at less or more [9] than 60 days before a general election is not [10] relevant that the vice chair's document had [11] proposed deleting that sentence and I'm okay [12] with that deletion. So I would drop my [13] proposed amendment on that. On page 21, line [14] 14 — 21, line 16 — [15] SPEAKER: Sixteen? [16] MR. TONER: No, I am sorry. This is a numerical correction. Just that it is [18] right now on page 21, line 14, we said the [19] communications in paragraph 26, 11 believe it [20] should be paragraph 52. So I have just [21] replaced 26 with 52 that will be twice as [22] good. And then finally, Mr. Chairman, on...
at page 22, line 5.

ask about the previous one, just before that? [8] Would you tell me that one more
time?

[9] MR. TONER: The numerical issue?


understanding is that the text at issue [13]
should be referred to as communication 52 [14] rather than 26 be-cause it’s 52 that has that [15] generic pitch. Thank you, Mr. Chairman.

[16] CHAIRMAN SMITH: Okay, Vice Chair [17]
Weintraub?

[18] VICE CHAIR WEINTRAUB: I just want
[19] to clarify just to make sure we all know what [20] we are doing here since we did this in two [21] stages. As I understand it what we are now [22]
moveing to include — and I think will go

Page 146

through without objection, is your first [23]
insertion on page 4, line 19. We are not [24] inserting, we are not doing the strike on [4]
page 5, line 7, we are not doing the first [5] half of the page 5, line 19 change, we are [6] picking that one up at insert footnote, [7] correct? We are doing the change on page [8] five foot-

ote three, we are making the change [9] to page 12, continuation of, footnote 10, we [10] are not doing the change to page 15, line 27, [11] page 16, line 23, page 17, lines 9 through 12 [12] or page 17, lines 23 and 24. We are doing [13] the change to page 17, line 24, it’s the [14] second — the last one on the page. Sorry, [15] there were two on overlapping. We are doing [16] the change to page 17, line 27, then we are [17] not doing 1, 2, 3, 4, those four on one line [18] changes on page 18, right?

[19] CHAIRMAN SMITH: Are we doing the [20] third one, lines 18 through 20?

[21] VICE CHAIR WEINTRAUB: Oh, we are [22] doing this. Are we doing it —

Page 147

[1] SPEAKER: Third one or the fourth [2]
one?

[3] VICE CHAIR WEINTRAUB: The there are four are —

[5] CHAIRMAN SMITH: That’s correct. [6] We are not going to do page 18, lines 4 to 6. [7] He is withdrawing from the pro-
posed amendments page 18, line 9 to 10 changes, [9] keeping in page 18, lines 18 to 20.

[10] VICE CHAIR WEINTRAUB: Oh, we are [11] keeping those in?


Page 148

[1] question 7, Yes, do you — okay, if you — [2] No, okay. Because I understand the answer [3] would be ABC must pay for these funds —


[7] VICE CHAIR WEINTRAUB: Then we are [8] making the change at page 19, line 20, we are [9] making an additional change not in here, [10] on the written document to page 21, line 14, [11] that change in the paragraph number. We’re [12] making the change on page 21, line 16, page 18, line 24, and page 22 line 5. We are [13] making the change to page 21, line 18 through [15] page 21, line 2, and we are making the change [16] at page 30, line 15, and I just want to state [17] on the record a coloquy that with the [18] Commissioner Toner and I had off the record [19] about the reference on page 22, line 5 to the [20] phone bank regulation.

[21] We are not at this point deciding [22] any particular percentages. We had gone

Page 149

[1] through a 50-50 split under certain [2] circumstances in that reg. We are not say-


[19] MR. THOMAS: Thank you, Mr. Chair. [20] I just wanted to be sure — at some point I [21] was wondering whether footnote 18 has been [22] lost.

Page 150

[1] VICE CHAIR WEINTRAUB: Page?


[8] MR. THOMAS: Okay. We need to [9] attach it somewhere, I suppose?


[16] Okay, without objection that will [17] be done. Is there any other discussion of [18] the motion which remains?


Page 151


[17] SPEAKER: We can include it maybe as part of the Toner package, or have we [18] already done the Toner package?
[20] CHAIRMAN SMITH: No, that would [21] still be part of the Toner package, we still [22] have pending, I guess, and if there is an
[1] objection —
[14] And depending on other elements of [15] the context, for instance, if were [16] preceded by a description of the No Child [17] Left Behind Act, which was either very [18] favorable or very unfavorable, and then a [19] question, you know, we might look at it and [20] have a harder time.
[21] But particularly, in the context [22] of, as described here, a phone bank to
[1] define voters, it strikes me these are [2] kinds of questions that an organization might [3] want to ask to
[1] it, because I do think this one is very close [2] call.
[3] SPEAKER: I just want to observe [4] that we were assured by the code that this [5] promote, support, attack, or oppose standard [6] was clear to people of ordinary intelligence.
[9] (Laughter)
[11] (Laughter)
[14] MR. MCDONALD: And let me remind [15] Commissioner Mason, my good friend Jim Bob [16] (?) in the back has explained to me on [17] numerous occasions that you have to listen to [18] the code if the code set it, I accept it.
[19] (Laughter)
[22] CHAIRMAN SMITH: Well, again, I
[1] don't know, do you want to make a motion to [2] change that or —
[3] SPEAKER: If I would offer a [4] motion, because I'm not sort of in favor of [5] the basic framework we're working in here, (6) I'm not sure what the result would be and I'd [7] have to sort of defer to the counselor or [8] the Vice Chair. In other words if we were to [9] conclude that this communication did not [10] promote or support President Bush, but [11] would the result be to this approach?
[12] SPEAKER: Overall, they are [13] debating this —
[22] CHAIRMAN SMITH: Commissioner
Case 1:04-cv-01597-EGS     Document 24-2     Filed 07/15/2005     Page 23 of 27

[1] McDonald?
[10] (Laughter)
[11] SPEAKER: I was going to stay out [12] of this. But I think Commissioner McDonald [13] makes a good point. On the other hand I'm no [14] pollster, I am no expert, but suppose if I [15] were going to ask a poll simply seeking an [16] answer as to how people felt? One might ask [17] the question, "Do you believe your taxes are [18] too high?" You know, you might ask the [19] question, are you in favor of President [20] Bush's efforts to lower taxes at least if [21] those were part of a general effort of voter [22] identification, which is allowed separately.

[Page 161]

[6] SPEAKER: Counselor, do you want to [7] a motion or is this just kind of answering to [8] SPEAKER: I'm just trying to find [10] out from — so that council has an answer to [11] what would be the result if we were to change [12] that conclusion.

[16] (Laughter)
[17] VICE CHAIR WEINTRAUB: The reason [18] being that it's a little bit difficult to try [19] to put it into a 106.6 type of allocation [20] because it's not generic, it does mention [21] President Bush. So the other thing you could [22] do, I suppose, is you're back to saying it's

[Page 162]


[Page 163]

[1] CHAIRMAN SMITH: Mr. Toner.
[9] (Laughter)
[10] MR. TONER: And they will all be [11] looking better and better as well. I agree [12] that it is a tough issue in terms of whether [13] this particular communication promotes tax [14] support/opposes a candidate. I mean, [15] clearly in the rule making we are going to [16] have to come to grips with some of these [17] issues in terms of allocation, and also our [18] general approach in this area.
[19] I'm comfortable at this point, just [20] for these purposes concluding that it does. [21] But again I acknowledge that it's an open [22] issue, and close call, and that we clearly

[Page 164]

[1] would have the ability in a rule making to go [2] in a different direction.

[Page 165]


[Page 166]

[5] MR. MASON: If this is what I think if [6] it is, it may be important. If — is this the [7] issue of whether they can do federal and [8] non-federal fund raising in the same [9] solicitation?
[22] MR. MASON: I mean, this may have

[Page 167]

[1] been a note that was added at my [2] request, and maybe the regulatory citation is not [3] correct, but let me explain the issue that I [4] had raised here.
[5] As I understand, here we are at [6] saying, "Based on the solicitation language that they put before us, the solicitation that they put before us is a solicitation for [9] federal funds." My concern was that if [10] they also had a made a clear sol-

[22] And the reason I had suggested

(1) footnotes to deal with it was because in [2] essence, the other issue isn't before us, but [3] didn't want to confuse people or suggest [4] that we were somehow saying that it was not [5] possible or not permissible to raise federal [6] or nonfederal funds in the same fund raising [7] letter. And it was — and I had asked or [8] suggested that we add a footnote on that [9] point and if we got the wrong regulatory [10] citation that wouldn't — then we — [11] obviously we need to correct that but that [12] was the issue that I was concerned about.


[15] MR. TONER: Thank you, Mr. [16] Chairman, that makes total sense. That my [17] sense is that you are saying that it's sort [18] of embedded in the question and people would [19] want to know whether or not, whatever the [20] correct citation is, and we can look for [21] that, whether that's implicating that you [22] wanted to make clear that it doesn't apply to

Page 169

[1] this actively.


[15] VICE CHAIR WEINTRAUB: If we're [16] talking about — we may have misunderstood [17] Commissioner Mason when we had the earlier [18] conversations yes, if we're talking about [19] federal and nonfederal funds collected [20] through a joint activity by one committee [21] then that's the 106.6(d) issue. I suppose —

Page 170

[22] SPEAKER: 106. —

[23] VICE CHAIR WEINTRAUB: 6(d).

[24] SPEAKER: I would suggest that —


[27] SPEAKER: I would suggest that we [28] alter that footnote to refer to 11 CFR [29] 106.6(d).


[22] I gather we could take the approach

Page 171


[15] MR. MASON: The latter is correct, [16] what I'm not sure about, given Commissioner [17] Thomas' comments or whether or not the [18] requestors may put before us specifically the [19] question I'm suggesting we avoid.

[20] CHAIRMAN SMITH: Mr. Thomas what's [21] your opinion?

[22] MR. THOMAS: No, I was just — it

Page 172

[1] is a different setting than we had been [2] dealing with in the other context, it is fund [3] raising, but it doesn't seem to be clear [4] whether they're talking about raising funds [5] for nonfederal candidates. And in that [6] context I think we don't have the — we don't [7] have something that suggests they're in [8] track, in fact trying to raise money for [9] nonfederal candidates. And that's why I [10] thought that Vice Chairs narrowing

Page 174


[2] So now it's sort of driven to the [3] position right, in the allocation area, we [4] are kind of driven by the language of the [5] regs to the position that once you mention a [6] federal candidate and don't mention a [7] nonfederal candidate you are sort of locked in, but I don't know that we're that bound in solicitation area.


[13] (Laughter)

[14] SPEAKER: That we probably are [15] going to have to try to give clarification [16] on. I don't know that we have got the [17] kind of — I mean, they've given us some [18] hypothetical or some proposed language, but [19] to me it falls short of giving us really [20] something we would need to figure out how to [21] — whether or not to allow allocation and [22] whe
today. [10] Actually is, if you read the book, they opine [11] in explicit words of advocacy of election or [12] defeat. So I gather, we’ve gone back to that [13] original phraseology, same meaning and we can [14] have the three, three deadlocks on whether [15] somebody was explicitly advocating that [16] issue. [17] I just listened to this [18] conversation, I made some jokes about it this [19] afternoon, but in all honest, I listened to [20] this conversation, I say — I think — I’m [21] feeling like I’m being the Vice Chair, and [22] and Commissioner Mason and suggesting this [23] should be decided in a rule making, if at [24] all, maybe looking increasing wise. But [25] again I gather that nobody who is on the [26] other side of that wants to move to [27] reconsider, so... [28]

Page 178


[1] in some kind of organized format. [2] And I appreciate that the efforts [3] of the council in that regard, and in [4] particular some folks have been sitting here [5] very patiently all day, ready to answer our [6] questions which should...

[15] I would we did not include in the [16] motion any technical corrections, Madam Vice [17] Chair would you like to offer a quick motion [18] to allow what do you see, o make any [19] technical corrections that may be necessary.


[21] CHAIRMAN SMITH: All right, all in [22] favor of that motion signify by saying aye.

[5] SPEAKER: Mr. Chair?


[16] SPEAKER: Actually, to this very [17] same theater but —
[18] VICE CHAIR WEINTRAUB: Right.
[19] (Laughter)
[21] SPEAKER: Which I think is called [22] the theater of the absurd.

[1] (Laughter)
[2] SPEAKER: Mr. Pehrkon?
[3] MR. PEHRKON: Mr. Chairman, there
[4] are no administrative matters.
[7] (Whereupon, at 3:20 p.m., the [8] PROCEEDINGS were adjourned.)