

FEDERAL ELECTION COMMISSION

PUBLIC HEARING ON ENFORCEMENT PROCEDURES

10:01 a.m.

Thursday, June 11, 2003

9th Floor Hearing Room

999 E Street, N.W.

Washington, D.C. 20463

A T T E N D E E S

Commission Members Present:

Ellen L. Weintraub, Chair
Bradley A. Smith, Vice Chairman
David M. Mason, Commissioner
Danny Lee McDonald, Commissioner
Scott E. Thomas, Commissioner
Michael E. Toner, Commissioner

General Counsel's Office Present:

Lawrence H. Norton, General Counsel
James A. Kahl, Deputy General Counsel
Rhonda J. Vosdingh, Associate General Counsel

Staff Present:

James A. Pehrkon, Staff Director
Roberta J. Costa, Deputy Staff Director

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P R O C E E D I N G S

CHAIR WEINTRAUB: Good morning. This Special Session of the Federal Election Commission for Wednesday, June 11th, 2003, will please come to order. I'd like to welcome everyone to the Commission's hearing on enforcement procedures. The issues we are discussing today were included in a Notice of Public Hearing and Request for Public Comments on Enforcement Procedures, published on May 1st, 2003, in the Federal Register.

The Commission is currently examining its enforcement practices and procedures to determine whether internal directives or practices should be adjusted, and we're also considering whether a rulemaking in this area is advisable. I'd like to briefly describe the format for the testimony today. Each witness will have five minutes to make a presentation, and we are going to be using lights. You get a green light when you start, a yellow light at four-and-a-half minutes, and after five minutes the red light goes on, and the floor opens up underneath you, and we do have, well, maybe not, but we do have a long day, and we would appreciate everyone's cooperation in trying to not make it into a long night, as well.

We are going to have questions from all of the Commissioners, and the General Counsel and the staff director after the witnesses have an opportunity to make their opening statements. Each Commissioner will also get

five minutes on the same light system, and I have rigged the floors underneath their chairs here. No, I haven't.

[Laughter.]

CHAIR WEINTRAUB: We are going to see three panels of three to four witnesses today. The first panel will begin at 10:15 and run till noon. We'll take a 1-hour lunch break, have another panel from 1:00 to 2:45, and the third panel will testify from 3:00 to 4:45. So it is going to be a very long day.

We appreciate the willingness of the commenters to assist in this effort by giving us their views on these issues, and we want to thank particularly the witnesses who have taken the time today to give us the benefit of their experience and expertise in this area.

When I came to the Commission six months ago, switching over from being one of the regulated to being one of the regulators, I noticed that there was an occasional disconnect between the way the agency perceived itself and the way the outside world perceived the agency.

Of course, there are disconnects between the way various sectors in the outside perceive what the agency is doing and what direction it ought to be moving in. One of our commenters has been quoted as describing the investigatory process here as akin to having bright lights shining on you and being interrogated by the Shining Path guerrillas.

Then, there are other commenters who appear to disagree with that analysis, but appear also to think that maybe that is what we should be doing.

[Laughter.]

CHAIR WEINTRAUB: That was never my experience or my bias that that's or my bias that that's what we should be doing, and I think there was some trepidation, internally perhaps, that we were opening ourselves up to having people come in here today and throw tomatoes at us all day long.

I am pleased to note that I don't see a single produce bag anywhere in the room, but I have authorized the Staff Director to confiscate any that I missed.

[Laughter.]

CHAIR WEINTRAUB: I actually am, on a more serious note, very pleased with the tenor of the comments that we've received, which have been very constructive and very positive. It was not our intention to open this up to allow people to come in and kvetch about their least-favorite attorney in the office, and I am gratified that the commenters perceived where we were going with this and have given us a lot of positive, constructive, process-oriented comments.

We won't take all of them. We'll listen to them all. We'll consider them all. We obviously won't follow them all. In fact, we couldn't follow them all because some of them contradict with others.

But I do think that, for the agency, there is nothing but upside in our engaging in a dialogue with the regulated community, and the reform community, those who have been out there for years following very closely what the agency does, I think have a lot to offer us in terms of their experience and their perspective on how we could do our job better, and that's really our goal here is to, as my daughter would say, "Make us the best FEC that we can be."

I want to thank, again, all of the participants, all of the commenters, all of the people who have submitted written comments and all the people who have agreed to come here and testify and subject themselves to our questioning today.

I particularly want to thank the General Counsel for his cooperation and participation in this agreement to spend this entire day doing this, today, on his birthday. I want to thank all of my colleagues for their willingness--

COMMISSIONER McDONALD: He'll be more than one year older after this.

[Laughter.]

CHAIR WEINTRAUB: I want to thank all of my colleagues for engaging in this introspective exercise, and I particularly want to acknowledge the efforts of the Vice Chairman in pushing to get this on the agenda. I am very pleased to be able to convene this hearing, and I am looking forward to a very interesting day.

I now turn it over to the Vice Chairman, who I know also has an opening statement.

VICE CHAIRMAN SMITH: Well, thank you, Madam Chair. Thank you for your comments, and I share many of your thoughts, particularly about the willingness of the General Counsel and the Counsel's Office to engage in this type of self-examination and review, which always does carry some possibility of the brickbats being thrown in. I think you forgot to congratulate the security guards on the no fruit that you were commenting about.

[Laughter.]

VICE CHAIRMAN SMITH: I do want to note that I think that if the mere appearance of corruption can cause citizens to lose confidence in government, then surely the appearance of unfairness or unequal administration of the law can cause citizens to lose confidence in government. And a sense that the process is fair and understandable is essential if the public is to have confidence in and support for the law.

In 1983, the Chairman of the American Bar Association Section of Administrative Law testified before a congressional committee that the FEC's enforcement process was unduly prolonged and could be criticized as "operating in a 'star chamber' style," going on to note that those who are investigated are not clearly apprised of what it is that they are alleged to have done, and they are never given the

opportunity to plead their cases in the way that most of us, as lawyers, are accustomed to, by addressing the decisionmakers.

There were several other issues raised, and I think we may hear about some this morning. But 20 years later, virtually all of those procedures that sparked those criticisms remain in place at the FEC and have not been examined in any comprehensive manner that would allow for public input. So I think today's hearing is an important first step in reviewing these enforcement procedures for the first time, literally, in decades.

An agency such as ours is always going to be subject to criticism, and it's to be expected that there will be friction between the regulators and the regulated, but this can't simply be an excuse to avoid any kind of change. Lawyers with whom I speak who do not practice before us are regularly shocked by some of the procedures that are operative at this agency.

Similarly, I note that a substantial majority of those commenting have urged the Commission to substantially strengthen the due process protections of those brought before the Commission. Three commenters defend the status quo basically on the grounds that the Constitution does not require such added protections, but the Constitution sets only minimum standards that people have a right to demand

from their government, and it never sets the most that government can or should do.

Just to take two examples, it's difficult for me to see how the government justifies or gains--the government being us, the Commission--by denying respondents the rights to copies of their own depositions, something routinely granted by other administrative agencies. Similarly, once the Counsel's Office has filed a probable cause brief, it's hard to understand why it is fair or what is to be gained by denying respondents access to documents potentially relevant to their defense, given that we have closed our investigation at that point.

Unfair, arcane, or mysterious procedures should not be confused with robust enforcement of the law. There is no need for us to fear added, unfairness, procedure or process, and when those who are regulated feel they are treated unfairly is when they are most likely to be least cooperative, more determined to raise every possible legal defense and challenge, and least likely to conciliate short of a major court battle. As we know, our statute is based on the idea that most cases should, in fact, be conciliated rather I think than drawn into court.

I often hear it said by those who claim we need tougher enforcement that the FEC takes too long to adjudicate cases. But a system that has the confidence of

the regulated community will cut delays in enforcement by encouraging trust and cooperation.

Additionally, there are claims that the Commission favors powerful actors and parties, but a system that is open and readily understood by all I think, with publicly available procedures and penalty guidelines, can help assure that all parties are treated equally, and thereby boost the public's confidence in the agency's impartiality.

The Commission regularly reviews its audit procedures. In the past three years, we have inaugurated two innovative programs, the Administrative Fines Program for reporting, and the Alternative Dispute Resolution Program, and both of these have recently been reviewed by the Commission.

As we enter a new statutory and regulatory regime, it is more than appropriate that we similarly review the procedures of our core enforcement function, which is how we handle what we call matters under review.

So, again, I'm pleased by the support that the Commissioners, the Counsel's Office and the staff have brought to the process. I think that many of the changes can be made without formal rulemaking, but getting public input in an organized forum is vital to our efforts. Thus, I thank, in advance all of those who will be appearing here today and those who submit comments, but are unable to appear.

Thank you.

CHAIR WEINTRAUB: Thank you, Mr. Vice Chairman.

Commissioner Thomas?

COMMISSIONER THOMAS: Thank you, Madam Chair.

Well, I, before we get too far into it, wanted to at least get on the record that, from my perspective, having been here over the years, we have had a very fruitful self-analysis going on over the years, and we have adopted many changes and revisions over the years to streamline and improve our enforcement process.

I view it as an ever-ongoing process, but I can remember when I was in the Counsel's Office, we adopted early on, because we were concerned that cases weren't getting monitored adequately, we adopted an internal tickler system, and a case status report system, and that was in the early '80s.

Over the years, we have attempted three times to adopt a computerized MUR tracking system that will enable us to better monitor the enforcement process and the status of cases and how much resources are going into the various cases for management purposes. And now we do have a pretty good system in place, I would say. It has taken a lot of hard work and a lot of dedicated staff, but that is now in place.

We developed early on a MUR index system that is computerized that helps people to research MURs. That is

available in our Public Records Office. We have, in 1993, when I was Chairman, we rolled out our enforcement priority system, which was a very significant change at this agency. It really was a system that objectively analyzed cases to figure out which ones should get the use of our limited resources.

It allowed us to focus on what we viewed as the most significant cases, it built in a very objective rating system for cases and allowed for prompt dismissal of those cases that fell to the bottom that were viewed as less significant.

We adopted procedures to remove extra layers of review in the Counsel's Office, a lot of reports that didn't end up having to go to the General Counsel's Office, and that was a way to speed up some of the review, if they were not so significant that they needed to bother him.

We started offering pre-probable cause conciliation in most of our MURS. That is a way to greatly speed up the resolution of most of our compliance cases. We adopted procedures to use informal discovery, rather than the formalized subpoena process in many of our compliance cases.

We developed an Office of General Counsel Enforcement Procedures Manual that enables the staff to be able to know what form letters to use and what civil penalty guidelines to work with.

We have sent many of our staff to NITA courses when appropriate and when we have funds available to help them learn how to take depositions and handle enforcement matters.

We have worked with internal training programs ourselves. We periodically find this room very full of OGC staff, learning about various provisions of the law. We have modified the law in certain cases where appropriate because we have learned that some parts of the law basically gum up our enforcement process. For example, we recently revised the rules on redesignating and reattributing contributions because we were finding that in many excessive contribution cases we were handling enforcement matters that really didn't warrant that kind of severe treatment.

We have, over the years, sought more staff. I have always been a proponent for the basic proposition that if you've got a bigger, and bigger, and bigger workload, you're going to need more and more staff to handle it. In one of my Statements of Reasons, in one of my cases a couple years ago, I wrote a little analysis. I noted that in fiscal '98 we had basically 21 line attorneys available to handle enforcement matters, and they were able to resolve 68 cases that fiscal year.

In 2001, a few years later, we had moved it up to 29 enforcement line attorneys, and they were able to resolve 117 cases. So it seems to me that that is a fairly basic

proposition that if the workload is ever-growing, we need to be honest and ask for the kinds of resources necessary to deal with that.

I would, at the outset, note that we are working with some assumptions or some assertions that we have to be fairly careful with. Indeed, with regard to letting witnesses review depositions, we do let witnesses review their deposition transcripts. We have, I guess, a policy that some folks are objecting to about letting witnesses actually walk away with the transcript thereafter. I guess we can happily debate about that. I am happy to look at that as an issue.

We do also let respondents get evidence that we have used in a General Counsel's brief. We perhaps can work on procedures for better identifying what process to use in making that happen, but we have been very forthcoming, I think, in terms of trying to make the evidence available to help the respondents work on their response brief.

But I wanted to get all of that out on the record at the outset because I think it's important that we keep all of this in some perspective. I think those of us that have been here for a long time have worked very hard to make the process work well, and we are anxious to go through this process here today to see if we can continue that goal.

Thank you.

CHAIR WEINTRAUB: Thank you, Commissioner Thomas.

Commissioner Toner?

COMMISSIONER TONER: Thank you, Madam Chair.

I want to thank everyone at the outset for being here today. I know how busy all of the lawyers are in town with the constitutional case going to the Supreme Court and how difficult it is to make time to deal with other matters these days. I really appreciate very much all of the comments, everyone being here.

As has been noted previously, the Commission has never systematically and publicly examined its enforcement policies, at least in as public a setting as we're doing today. I welcome this critical self-examination and look forward to considering how the Commission can provide greater due process rights to respondents without undercutting its enforcement function.

In an early case involving the FEC, the Second Circuit Court of Appeals observed that the Commission has the weighty, if not impossible, obligation to exercise its powers in a manner harmonious within a system of free expression. The court's comment reflects the fact that the FEC, unlike virtually any other federal agency, regulates core political speech that is protected by the Bill of Rights.

Concerns about the Commission's enforcement policies are not new. As early as 1982, an American Bar Association Task Force published a report that detailed what

they perceived to be many procedural shortcomings and urged the Commission to make major changes to its enforcement procedures.

This ABA Task Force, which was bipartisan and was advised by a former Chairman of the FEC, recommended that respondents be given full access to all of the information from the agency's investigation, including any exculpatory information that may exonerate a respondent before the Commission decides whether the law has been broken.

The ABA Task Force concluded that such access "will afford the respondent notice of the evidence upon which staff is relying and will allow the respondent an opportunity to rebut certain factual allegations that are erroneous or incomplete."

The task force further concluded that such access would guarantee that the Commission has more information available to it at the time it makes a decision on whether a person has violated the law.

The 1982 ABA Task Force also recommended that respondents be given access to all General Counsel's reports that are submitted to the Commission and that respondents be given a right to oral argument before the Commission, as the General Counsel is allowed to do. Interestingly, Common Cause strongly concurred with the latter recommendation, concluding that "The FEC should make greater use of oral arguments."

Now, 20 years later, many of these enforcement concerns have yet to be addressed. I approach our examination of the Commission's enforcement procedures with two basic premises.

First, I do not believe that providing respondents with due process rights in any way compromises the Commission's effectiveness in enforcing the law. People charged with breaking the federal election laws, in my view, should not have to go to federal court to get due process, particularly when First Amendment rights of free expression are at stake.

I believe the FEC can, and should, do everything in its powers to ensure that respondents are given due process and that doing so will enhance, not reduce, the Commission's enforcement effectiveness.

Secondly, I also strongly believe that the General Counsel's Office today has a much greater sensitivity and commitment to these issues than ever before in treating respondents fairly and providing due process. I believe the current Commission shares that view, which has made today's hearing possible.

I look forward, Madam Chair, to receiving testimony on these issues and to continue to work towards making the Commission's enforcement procedures as fair and as effective as is possible.

Thank you.

CHAIR WEINTRAUB: Thank you, Commissioner Toner.
Commissioner McDonald?

COMMISSIONER McDONALD: Madam Chair, thank you. I am not going to read a prepared statement. I will only say to the witnesses I appreciate you all coming. I read very carefully your comments, and I am interested to get into some of these things that have been raised. I have been here since 1982. I must say I do think that the Commission has done a number of things, some that were outlined by Commissioner Thomas.

I think what we had maybe that helped as much as anything since I've been here is the PricewaterhouseCoopers assessment of this Commission because it was done independently, not from lawyers who practice before us or by the Commissioners, and I thought it was a good test of this Commission.

The Commission, prior to that, had been audited a couple of years earlier by the Congress. The Commission has been looked at on numerous occasions, needless to say. Disinterested third parties that make an assessment of a Commission, whether it is this Commission or the one that Cleta and I were familiar with in Oklahoma, the Oklahoma Corporation Commission, where you would come in and have someone that is disinterested make an assessment of the process in relationship not only to the agency that is being

examined, but in relationship to like agencies, I think is very constructive.

We went through a very long process. There are a number of matters that I would refer everyone to who has an interest in what was asked of the Commission and what the Commission did to follow up on the performance audit of the agency. And I thought it was a good marker in relationship to what not only the concerns were by a vested interest, but also to try to make an independent assessment of where we were.

So I look forward to hearing from the practitioners. We have a very distinguished group. I was just looking at that group on the front row, if we could, their income alone could cover, hopefully, a number of these positions that we need. I look forward to seeing all of them. They're all friends, and I'll be delighted to hear what they have to say.

Thank you, Madam Chair.

CHAIR WEINTRAUB: Thank you, Commissioner McDonald.

Commissioner Mason?

COMMISSIONER MASON: Thank you, Madam Chair. As many of my colleagues know, when I was Chairman last year, I had attempted to schedule roughly this hearing almost exactly one year ago, and then something called BCRA happened. As I recall, we spent a number of late evenings,

and even late nights, in June writing those regulations, and so I think it's very timely to get to this, and I appreciate the Chair's scheduling it, and I appreciate the Vice Chairman's continuing advocacy of doing this.

As most of my colleagues have said, I appreciate the comments, the tenor of the comments, and I am eager to hear from the witnesses and ask them some questions.

CHAIR WEINTRAUB: Thank you very much, Commissioner Mason.

I would like to invite the first panel of witnesses to come on down and take a seat. We have Cleta Mitchell from Foley & Lardner, Jan Baran from Wiley, Rein & Fielding, and playing musical chairs now, Bob Bauer and Marc Elias from, what's the name of that--Perkins Coie, that's it.

[Laughter.]

CHAIR WEINTRAUB: I still remember how to pronounce it, though.

Ms. Mitchell, would you like to start us off?

MS. MITCHELL: Thank you, Madam Chair.

I would like to echo my compliments to the Chair and to the Vice Chairman for proceeding to hold this hearing and allowing us to make comments. I, personally, really appreciate the opportunity to be here.

I want to take a moment of personal privilege on the occasion of Mr. Norton's birthday to say that I

certainly did not--I meant to say this anyway, and now that it's your birthday I have to say this, that any comments directed to the Office of General Counsel are not directed toward you, personally. So happy birthday.

[Laughter.]

MR. NORTON: Thank you.

COMMISSIONER McDONALD: I'd go for cover immediately.

[Laughter.]

MS. MITCHELL: As a baseball fan, this process, when I was reading through the comments, reminds me of two sets of people who are allowed to participate in criticizing the umpires. Ballplayers can't argue balls and strikes and can be ejected for saying ugly things to the umpires, as can managers and even organ players who play "Three Blind Mice" after a particularly bad call.

However, fans can say whatever ugly things they want to say about the umpires, and unless they actually move onto the field or throw something that could hurt somebody physically, they're allowed to say whatever they want.

And in reading the comments, I will tell you that I have a sense that there are two sets of commentaries about Commission enforcement procedures. Those of us who do represent people before the Commission, who have been engaged in the political process in some form or fashion and then are accused of having violated some provision of law,

and I'll tell you, I was talking with a new treasurer, a new fundraiser for a campaign, yesterday.

She's never raised money under the federal law, and when I'm explaining these things to her, she finally said, "This is so complicated? How can I possibly keep from violating the law?"

And I said, "Well, we'll try to help you with that."

[Laughter.]

MS. MITCHELL: But it is very overwhelming to people who come into the process, and there are differences in perspectives, depending on whether you have experienced representing respondents before the Commission, as opposed to the criticism that we often hear, which is really all we ever read in the paper, which is that the Commission is a toothless tiger, and even reading those comments from the reformers who would like to abolish the Commission and invest all authority in some super speech czar.

I think that it's important to give us, those of us who appear before the Commission, on behalf of the people, the opportunity to tell you a few things, and I appreciate that opportunity.

Four things I want to say quickly, and then be happy to respond to questions, and those were really included in my opening comments. First, this notion of due process, it was really the most startling thing to me, as

somebody who used to conduct and teach CLEs on Administrative Procedures Act in Oklahoma before the state bar association and practice before a lot of different government agencies, it was really startling to me to learn some idiosyncrasies, shall we say, of the FEC with respect to due process and to actually find that there is not a general agreement that due process is the primary principle under which the Commission's enforcement actions and procedures will be carried out.

I thought maybe it was just me until I read the comments submitted by the Campaign Legal Center quoting the former General Counsel to the Commission. So it is documented that the former General Counsel once indicated, during a symposium on the Commission's performance in enforcing Federal campaign finance law, asking the due process question is really just opening the discussion and doesn't give you any answers. Because in talking about due process, then you have to decide, well, what process is due them, and that answer depends very much on what is going on.

That principle, if I make no other plea to you, I would urge the Commission to set down a marker and adopt the principle that due process is the most important principle here in this agency, and that everything in the enforcement procedure should be measured by whether or not due process is being afforded. I think that that guiding principle

would be a huge departure, adopting that principle would be a huge departure from prior procedures of the Commission.

Secondly, as part of that, make the Enforcement Procedures Manual public. There shouldn't be--I was startled to learn, when I was practicing law in Norman, Oklahoma, one of our biggest clients was a bank. Well, the reason our biggest client was a bank--oh, I can't tell you that. I have to stop.

[Laughter.]

MS. MITCHELL: But enforcement, make the Enforcement Procedures Manual public.

COMMISSIONER McDONALD: I can.

[Laughter.]

CHAIR WEINTRAUB: Thank you, Ms. Mitchell, and thank you for respecting our lights, which I think I can reset here.

Mr. Baran?

MR. BARAN: Thank you, Madam Chairman, Commissioners. I appreciate this opportunity to testify. I do have some prepared remarks, a copy of which I have given to your staff, and I will not read it through it, obviously, because I would violate your five-minute rule, but I want the Commissioners to be aware that I did try and prepare something in writing for today's hearing, and I hope it will be introduced into the record, if there is no objection.

I know it may be hard to remember for some folks, although I hope Commissioner Thomas and Staff Director Jim Pehrkon recalled that I did used to work at this agency back in the medieval times of 1977 and 1979, and I do have a perspective on what goes on in an executive session of this agency, and since 1979, I have the outsider's perspective, having spent 24 years representing literally hundreds of clients before this agency.

I want to hastily note that sometimes the reason I represent such larger numbers of clients is because of some of your enforcement procedures, such as designating respondents upon receipt of a complaint.

I don't think that the Commission needs to be defensive about this issue. I, for one, do not come here with the intent to criticize you for what you do. I'm here, as I think I was 20 years ago at the House Administration Committee with the American Bar Association trying to point out a few things that ought to be considered.

And when we testified in Congress, led by then-Chairman Bill Allen, we basically said, "Look, we're just here to say that there have to be some administrative procedures that promote efficiency and fairness, and I think you need to approach this in two ways. One is obviously you have to comply with the law. So whatever is legally required, you have to incorporate into your procedures, but, secondly, whatever is not legally required, you may want to

adopt some procedures that promote both efficiency, which presumably will save you resources, as well as respondents, and a sense of fairness for those who have to deal with this agency.

And it is in that spirit that I would briefly comment on some of these issues that were in your notice for this hearing.

First, with respect to designating respondents in the complaint, I think that the history is that you're making too much work for everybody, including yourselves. I mean, you ought to do what courts do, which is tell the complainant, who's the complaint against, and then send the notice to that person, as opposed to going through the complaint and trying to find every person or individual that might be identified and then send them a notice, and then require them to respond.

I note that there is this issue of what happens in the course of an investigation, where you determined that someone who is not already a respondent may have to be a respondent. Well, you could adopt some procedures for that contingency.

You might treat it either the way you do now, which is like an internally generated matter, where you just find reason to believe and send out a notice or it might be useful to adopt a procedure that would send out a notice and

give the new potential respondent 15 days to respond before you make a reason to believe determination.

This is not required by the statute, but there is nothing to prevent you from doing that, and it might provide some efficient and orderly approach to those types of investigations.

With respect to appearances before the Commission, this is an issue that's come up, obviously, for decades. Respondents have no sense of the decisionmakers. You are as remote as the Wizard of Oz. They think that you are insulated and don't understand what is going on.

We all know that's not true, but people who deal with your agency don't know that, and there should be, I think, at least an experiment with oral hearings of some sort, and I'm not talking about a trial. I'm not talking about production of evidence and all of that because I'm assuming that all of the facts, and all of the legal arguments are stipulated and agreed to between the General Counsel's Office and the respondents.

I also encourage the Commission to permit motions, and my prepared comments will discuss that. In my short time remaining, I want to just say that when it comes to depositions and document production at probable cause, obviously, I would encourage the agency to formalize what Commissioner Thomas, in his opening statement, said you already do. And if you do have some sort of a process to

provide this type of information, then incorporate it into your regulations.

Sorry I can't comment on all of your issues, but I'm prepared to do so in the course of questioning, and I very much appreciate the opportunity to be here this morning with you.

CHAIR WEINTRAUB: Thank you, Mr. Baran.

Mr. Bauer?

MR. BAUER: Thank you, Madam Chairman, members of the Commission. I'll be brief because we have submitted written comments.

First of all, I want to distinguish between those issues which I would call internal management issues and due process issues. Internal management issues that might bear on questions of how quickly the Commission turns over cases and so forth are ones that we all have a great interest in, but frankly relatively little control over.

We urge you to continue to work on the most expeditious handling of the matters before you, but due process is what I'd like to emphasize or procedural issues that really do genuinely affect respondent's actual or perceived rights are the ones that we have emphasized in our testimony.

Second, as to the question, and by the way I should say I don't want another counsel to trump me here today in wishing the General Counsel a happy birthday. This

is a tricky business, and Cleta, once again, trying to steal the competitive march, delivered a sentimental tribute to Mr. Norton, which I now join on a bipartisan basis.

[Laughter.]

MR. NORTON: I feel like I need a plea to stop all of this. Thank you.

MR. BAUER: As a matter of fact, my office will be delivering a tactful and inexpensive present to you later today.

[Laughter.]

MR. BAUER: In any event, moving right along, as far as due process--

CHAIR WEINTRAUB: The ethics of this place have gone downhill--

MR. BAUER: It's his birthday. We're very sentimental at our firm about birthdays.

The other thing I want to mention is that on the question of the scope of due process, I don't think, as we look at some of the issues that we've raised here, identifying for respondents the reasons why they've been named, providing people with adequate access to their deposition transcripts or to the evidence the General Counsel has relied upon in a probable cause hearing.

These are not issues that are going to require the Commission to test the outer boundaries of constitutional due process jurisprudence. You will be not going boldly

where no one has ever traveled before. So before we show too much anxiety about what you're being asked to do, I think we ought to put it in the perspective of due process doctrine and the least that people expect in practicing before the agency.

Further, I wanted to comment briefly about hearings. We expressed some concerns about trial type hearings. I want to make it very clear that I don't disagree that an appropriate set of rules to provide for oral argument in appropriate cases wouldn't be welcome.

Our office actually commented adversely on the ex parte rules that were adopted many years ago because it was our view that the Commissioners were, frankly, receding too far into the background of the enforcement process, and there were too many barriers being put between those who have matters before the Commission and the Commissioners themselves.

There was many years ago an ugly rumor circulating in the regulated community, which I'll share on the public record because, A, I don't believe it to be true, and, B, it probably isn't true any more that many Commissioners relied on bench memos from the General Counsel's Office rather than actual hard copies of the responses provided by respondents in evaluating compliance matters.

And that is probably more an indication of paranoia, I'm sure, than reality, but I think it underscores

the concern that Jan expressed that you, as Commissioners, might be too far removed from respondents and the actual compliance process to give respondents the feeling that they are actually being heard on matters that are obviously very important to them.

So we would certainly support a carefully tailored process to allow for oral argument in certain appropriate instances.

And last, but not least, I do want to say, and I want to echo something Vice Chair Smith said about some of the innovative programs the Commission has adopted in recent years. We believe that both the Administrative Fines Program, and particularly the alternative Dispute Resolution Programs represented to the regulated community a genuine effort on the part of the Commission to streamline their process and also to provide people with the feeling of a ventilated, but efficient, procedure for hearing certain types of cases. It was extremely well received and, in our experience, it worked rather well.

In conclusion, I would like to point out to Chair Weintraub that the light is still green, and I am concluding.

[Laughter.]

CHAIR WEINTRAUB: And I appreciate that because we Commissioners ran on a little bit longer in our opening statements, and we have time to make up here.

Mr. Elias, do you have an opening statement?

MR. ELIAS: At the risk of not repeating everything else everyone else has said, I just wanted to point out two quick things at the outset. Whatever processes you adopt, whatever reforms are made or are not made, if there is one thing that I hope the Commission leaves with, the impression, which is actually an underlying theme I think of most of the comments, even some of the comments made by the reform community, is the need for greater transparency as to what those rules are.

One of the questions that has come up is who gets named as respondents. We have submitted comments on that. I share many of the concerns that others have expressed on this, but whatever the process is, if the process is, as I suspect it is, that someone goes through and looks for any proper noun, whatever proper noun is found in the complaint gets a letter that they are a respondent, then there ought to be published someplace that all proper nouns will be named as respondents.

If, in fact, documents are provided at the pre-probable cause stage, as they are in some cases in some number, in some amounts, then there ought to be some policy that is stated that says these are the documents you get, and these are the documents you don't get, before you submit probable cause briefs.

One of the great problems with this process, the way it has worked, note that someone who has represented people before the Commission and MURs and, frankly, as someone whose law firm has, on occasion, brought lawsuits against the FEC for failure to act on other complaints, is that there is just a complete mystery and lack of transparency as to why certain decisions are made, procedural decisions, not substantive decisions, but just procedural decisions, extensions of time.

Sometimes they are very easy to get. Sometimes they're nearly impossible to get. Sometimes pre-probable cause, getting copies of depositions that would be useful to prepare a probable cause response are very easy to get. Other times you can have excerpts of some of them.

If nothing else from this process came through, if there was simply a set of rules that were set down so that the regulated community knew this is what you're entitled to at the various stages, I think that would be very, very useful.

Also, as long as we're here, some of the Commissioners, one of the Commissioners mentioned the MUR index, and the MUR index is incredibly helpful. A number of you post on your website statements of reasons from some MURs.

Having some greater system, of having, again, allowing the regulated community to know this is what

Commissioners have said on these related topics, would again just add to the overall transparency of the system, allowing you to know that this is what's happened in advisory opinions, this is what's happened in past MURs, this is what's happened in cases where there have been statements of reasons.

So my plea is beyond the substance of the comments, which we have submitted comments on, and the others have spoken about in their opening statements. I just wanted to put in a word for, at the end of the day, having some transparent system that allows people to know what decisions you all reached as a result of these hearings.

CHAIR WEINTRAUB: Well, thank you very much. Thank you, again. You came in under your green light. It didn't even go to yellow.

MR. ELIAS: I think mine was actually shorter than Bauer's. If someone had a stopwatch--

CHAIR WEINTRAUB: Sorry. We're not timing it quite that closely. You'll have to put your competitive nature a little bit under control there.

[Laughter.]

CHAIR WEINTRAUB: And in the interest of fairness, I have to start it on myself.

I want to thank you all for your comments and let me just say that I agree with many of them. One of the

first things I did when I came here was starting to ask people about, "Gee, an Enforcement Manual. Could I get a copy of that?" And then, "Can we put that on-line?"

And so I want to assure you, Ms. Mitchell that that is under consideration, some either putting the actual thing on-line or looking into some summarized version that would provide you with the kind of guidance that I know you're seeking. Because having sat on your side of the table, I know how excited I was to see, wow, you know, there it is. There's all of that stuff I was always wondering about.

And on the transparency issue, I also am, as a former ethics attorney, I'm very big on transparency, in general, and we are in the process of--I'm reluctant to say this out loud--can I say it out loud, Mr. Staff Director? We are hoping that by the end of the year we will have begun a process of putting all of the MURs on-line, including the statements of reasons and all of the public documents.

I hope, now that I have said it publicly, I hope that we are going to be able to make that commitment. We are going to have all of them on-line by the end of the year, but we are going to start the process and fill in over time, and eventually, because I think you're right, we do need to get that information out there so that not only those of you who can, if need be, walk on over here and plow through our records in the Public Records Office, but people

who are out in the hinterlands and don't have access to these kinds of attorneys will have that available to them.

But I'm burning up all of my time, and I haven't asked a question yet. Let me ask you about respondents. Several of you have mentioned this issue of how we name respondents, and I think that a lot of people have concerns about that.

I guess my question is, and let me direct this first to Mr. Baran, if we don't name everyone in the complaint who we think could have committed some violation at the outset, do you think we are, in a sense, violating the due process of those people because we're actually sort of digging into their activities, and we're not putting them on notice that we're even looking at them at that point, and they may, down the road, face an investigation?

MR. BARAN: Well, I don't think so, and I think my suggestion sort of addresses that concern because what you want to do is you want to comply with the statute, which requires you to notify every potential respondent in a complaint within the specified time period, and what my suggestion is, and it seems to be consistent with your existing rules is that it's the complainant's burden to specify who the complaint is against.

Maybe this can be addressed with some formalized rule that says that you have to name the respondents in your complaint, if you're filing a complaint with this agency.

That's what you have to do when you file a complaint with the federal court. You've got to say, "My complaint is against this person or these three people," and therefore you then send out the notice to the people named specifically and unambiguously in the complaint.

That isn't really technical notice pleading, because even in federal court, you've got to identify who you're suing, if you're going to be suing somebody, and I think that's what's missing here. You're sort of putting yourselves in the minds of the complainant and saying, well, who is this complaint really against?

And you're sort of reading through these letters that may be rambling and mention lots of different people and institutions, and then you decide, well, we better cover ourselves and send letters to everybody. That's my sense of what your process is now.

CHAIR WEINTRAUB: I think it's probably not quite that way.

Did you want to comment on that, anybody else on the panel, the issue of fairness to the respondents?

MR. BAUER: No, the only thing I'd point out--it's not an objection. I agree with you on--but then of course, if that is indeed the rule, it's going to encourage complainants to name everybody under the sun as respondents.

And so we're going to have to suck these poor people into the process anyway, which I think puts some

pressure on the Commission then, as I think its current rules already provide that if there's actually no basis whatsoever for somebody to be named in the complaint, if the person named is not, in fact, implicated in any activity that could be said on the facts to violate the statute, then of course an early dismissal, a prompt resolution of the matter is in the interests of the people who found themselves in that position.

CHAIR WEINTRAUB: I have, well, I have practically no time. Go ahead. I'll let you--

MS. MITCHELL: Well, I was just going to say that I think that Jan's suggestion about a little more guidance to filing a complaint, you maybe should, I mean, the regulations on complaint filing basically restate the statute, and so it wouldn't hurt to come with a little more guidance as to the form, as to letting people say here who--define what a respondent is, in layman's terms, and maybe allow people to list witnesses, possible witnesses who may have information so that even at the complainant level, at the very outset of the filing of the complaint, a complainant can distinguish between witnesses and respondents.

CHAIR WEINTRAUB: I have used up my five minutes, and true to my five-minute rule, I pass the baton to the Vice Chairman.

VICE CHAIRMAN SMITH: Thank you, Madam Chair.

I want to just note on a couple of comments that Mr. Bauer you made about the perceived insularity of the Commission, and I think it's worth noting here that, to my knowledge, at least four of the Commissioners, and that includes myself, have never represented a client before the FEC, and at least three of the Commissioners, not including myself, have never represented any client before any administrative agency.

I don't think that makes them bad Commissioners. It only makes me a bad Commissioner on the one criteria. It's good that we come from different walks of life. It's probably good that we're not all lawyers, for example, but I think it does show the importance of getting a formalized procedure like this where we can get some good input from those who do represent people in these kinds of hearings.

Not to waste more of my time, pick up a little bit on the Chair's questioning. I see the issue, Mr. Bauer, that you raised about Mr. Baran's comment, that then what if respondents name everybody under the sun. I suppose we could just delete some of those people on our own, but I thought that your written comments were somewhat helpful. I wonder if you wanted to perhaps elaborate on them a little bit.

You suggest that the criteria should basically be whether or not the facts in the complaint state a complaint against that person; is that correct?

MR. BAUER: That's correct.

VICE CHAIRMAN SMITH: And so the answer would be we wouldn't really have a notice problem if we weren't naming other people respondents because we wouldn't, I mean, why would we be looking into their background anyway as potential witnesses?

MR. BAUER: That's right. In other words, if they just happened to be in the vicinity, but taking the facts of the complaint, it's true, it wouldn't make out a violation against them. Their receiving a letter from the Federal Election Commission doesn't really make any sense.

VICE CHAIRMAN SMITH: Well, I think that might be some way that we can work, but I do agree with Mr. Baran that perhaps sometimes demanding that folks, if you meant this person to be a respondent, you should have named them as a respondent would be helpful as well.

But, Mr. Baran, I want to ask you a very general question because we're at the beginning of the day, and I do want to raise this argument about this sort of due process required, and the arguments were, and a couple of you have addressed this a little bit, well, we can always do more, but the arguments that have been made as well, the Commission, the person can always go through the whole investigation, and then spend their money and go to court, and it has to be de novo. So then they'll get the process if they're willing to do all of that.

And I'm directing this to you, Mr. Baran, because that was addressed, I don't know if your memory works this finely, but it was addressed by Mr. Allen in his testimony before Congress, and to some extent in the bipartisan report that the ABA prepared some 20 years ago. I just wondered if you wanted to address that argument more directly as to the importance of the Commission decisions on respondents.

MR. BARAN: Well, I have two comments in that regard.

Number one, as you noted in your opening statement, this agency's mandate from the statute, and presumably its primary enforcement goal is to settle cases, to conciliate and to get people to end the process here at the agency.

And as we all know, it's much less expensive and time-consuming to do that here than it is in court. And to the extent that you can adopt procedures that sort of promote that, I think you would be not only promoting your statutory mandate, but you'd probably, in the long run, will be saving some resources, and that's the spirit in which a lot of these recommendations I think are being made. You know, what's wrong with having a hearing if it may lead to settlement?

None of us can guarantee that because we've never experimented with a hearing. We don't know how it's going to work, but we do know that--I know, from my own personal

experience, that I've handled cases here that should have been settled, but went to court, and it could have been because there were principles that were involved or intractable demands for high civil penalties or because the client simply just didn't feel that they got a fair shake here.

So let's go to a judge, and depending on the case, if you have an exorbitant civil penalty demand, it's usually less expensive to litigate. Maybe those concepts will come through in an oral hearing and will give not only the respondent a sense that they've gotten a fair shake, but it might give you an insight, because of your insularity, as to what's driving that particular case, and you will see an avenue possibly for settlement with that particular respondent.

VICE CHAIRMAN SMITH: Thank you.

CHAIR WEINTRAUB: Time is up. Thank you, Mr. Vice Chairman.

Commissioner Thomas?

COMMISSIONER THOMAS: Thank you, Madam Chair, and thank you all for coming. I guess I'll start with the "naming of respondents" issue. This issue has surfaced here, as some of you may be painfully aware, a few times. I think perhaps the most difficult instance, there was an enforcement case where Senator McConnell was named as a respondent, and he was sent a copy of the complaint early

on, and his counsel I think was very upset that he had been even named as a respondent and sent that complaint.

Some of the Commissioners I think have felt that the Counsel's Office, in that particular matter, overstepped and that even resulted in our then-General Counsel responding to the Statement of Reasons that they issued on that issue, but I think it was kind of interesting.

This is for you, Ms. Mitchell. Our General Counsel responded, "At this stage, one of our major concerns is to ensure that all relevant persons be given their due process notification, as required by statute."

So, I mean, I hope you appreciate that we're sort of caught betwixt and between. I can recall a matter where Ben Ginsburg was representing a lot of clients, and his major concern was that we had not treated a bunch of folks as respondents who should be sent a copy of the complaint early on, and he asked that we rescind our internal generation Reason to Believe notifications because we hadn't properly sent the complaint at the outset.

So it's not a perfectly easy system. I think the use of proper noun system is not the way to go. I think the way that Bob Bauer describes it is pretty close to the way that we actually do it. Our mental process is we're trying, as best as possible, to opine who has been alleged by the statements in the complaint to have possibly violated the law? We want to give them notification so they will be

brought in and given a chance to respond all through the process.

Any comments?

MS. MITCHELL: Well, I have one comment, having represented someone who was named as a respondent through internally-generated and administrative consolidation, and the only information provided was a copy of the complaint.

Well, I think the important thing, it comes back to, when we're talking about due process, notice and hearing. Notice. Not just a piece of paper just to be able to say that you sent somebody something, but if there are facts on which a person is now to be named a respondent, making certain that that person has the facts on which the Commission is relying to name the person as a respondent, if the person is not named at the outset.

And so I think coming back to that I can just say none of these kinds of hurdles are insurmountable, if you operate from a principle of providing ample notice of the facts which have swept someone into the process, and giving people, and I do think giving complainants the opportunity to distinguish between respondents and witnesses, because right now that's not possible.

So I think that there are certainly some I think relatively simple steps that you can follow to try to come to a solution or at least a change in the process, but again if you operate from the principle of providing notice and

making it transparent, I think that some of these other things will fall into place. And once you make a change, it doesn't have to stay that way forever. You can make additional changes. It's hard for us to make recommendations, and we don't even know what your process is.

MR. ELIAS: I just wanted to add one thing to that. I thought that the standard that the Vice Chairman and Mr. Bauer discussed about actually stating a cause of action is very sensible, from everyone's perspective.

Sitting at this table are not just people who defend FEC MURs, but they are people who initiate them. And it is not a secret that if I wanted to cause trouble, I could say, you know, and obviously, forgive me, Cleta, I could say, you know, "Cleta Mitchell set up the following 527 that's raising and spending illegal corporate money." Now, Cleta, she'll be a respondent, the organization will be a respondent.

And then if I simply go on to say, "And this is not unlike other organizations that have done this in the past like the XYZ organization, the ABC organization, the DFE organization and the HIJ organization," I promise you ABC, CDE, HIJ will all get named respondents as well.

So it's not just that the Commission is taking a--the current process takes a value-neutral approach to this. It actually, in some respects, encourages the exact concern

that one of the Commissioners was expressing about how do you, you know, how do you make sure that you're not sweeping up too much and encouraging people to sweep up too much.

The current system actually does incentive sweeping up too much because it is so easy to cross the threshold. When you draft a complaint, it's so easy to cross that threshold to know that you're going to generate a lot of respondents, for whom you're actually, when you read the complaint, you're not actually saying they did anything.

So I think that the standard that the Vice Chairman laid out I think is one that most accurately strikes that middle ground.

CHAIR WEINTRAUB: Commissioner Toner?

COMMISSIONER TONER: Thank you, Madam Chair.

I want to start by asking just a couple of issues, practical questions. Does everyone on the panel concur that the agency should have formalized procedures to provide to the respondents the full factual record prior to a probable cause determination? Is there consensus on that?

MS. MITCHELL: Well, at the very least, as in a motion for summary judgment, the facts on which the Commission is relying or the Office of General Counsel is relying to make their probable cause recommendation, at the very least, all of those facts, and the supporting evidence support for those facts.

COMMISSIONER TONER: And should that be done regardless of whether the respondent requests it. It's an across-the-board procedure that's available to everyone?

MS. MITCHELL: I think so.

COMMISSIONER TONER: Do you think that we should also produce to respondents any exculpatory information that may exist?

MS. MITCHELL: Yes.

MR. BARAN: Yes.

MR. BAUER: Yes.

MR. ELIAS: Yes.

COMMISSIONER TONER: Is there any good reason not to do that, in your mind?

MS. MITCHELL: No.

MR. BAUER: No, but I think that it is only too instructive that it's a question that has to be asked at this hearing.

COMMISSIONER TONER: The other sort of practical issue that's been talked about a lot in the comments is access to deposition transcripts by witnesses and respondents. Do you believe that we should make the judgment that, as in district court or any other legal proceeding, witnesses and respondents should be able to retain copies of their sworn testimony?

MR. BARAN: Absolutely.

MS. MITCHELL: Absolutely.

MR. BARAN: Well, I would say that providing deposition transcripts at the probable cause stage is absolutely necessary, but there are investigative justifications for not providing a transcript to a witness immediately after the testimony and during the course of the investigation.

Of course, the witness will not sign any transcript during that period of time because they don't have access to it or don't have the access in a way that is convenient or justified, but once the investigation is over, the reason for withholding deposition disappears.

I mean, the reason for depositions not being provided is to discourage certain consultations and conspiracies, although it's not unusual in any sort of defense situations to have mutual defense agreements, and that's perfectly appropriate, but whatever the reason is for not providing a deposition transcript immediately after a deposition disappears by the time the investigation is over.

And the Commission is now relying on the General Counsel's Office for a recommendation of probable cause based on the facts, as the General Counsel sees them, that have been accumulated during the course of the investigation. At that point, all of those facts should be provided to the respondent in order to provide a defense.

COMMISSIONER TONER: Well, as has been noted previously, the current practice being that respondents and

witnesses can come to the Commission and look at their sworn testimony, but aren't able to take it with them. What, if anything, do you think is lacking in that process?

MR. BARAN: Well, I think it's unnecessarily inconvenient. I mean, it's as inconvenient to respondents as it would be for all of those deposition transcripts to be in my office and require your General Counsel to come over and take a look at them in order to prepare his probable cause brief. I mean, I don't understand the reason for that.

MR. BAUER: I should point out with this, with the regulated community, I speak only for myself--I don't think, Marc, you would disagree--we don't view it only as an inconvenience, we view it as a matter of principle, and in most instances, we tell our clients not to come. We just tell them don't do it.

I mean, fundamentally, we view that as an offense against their rights. It's actually fairly demeaning that they have to travel across town and allowed only restricted access to their own testimony. So, as a matter of principle, we simply advise them not to do it.

MR. ELIAS: Right. And it is particularly the case, just to add, in the case of people who are merely witnesses. You know, they receive a subpoena that tells them they have to come to Washington, D.C., to give a deposition.

Typically, it comes with a cover letter that says, "You are not a respondent. You are only a witness in this investigation," and then they are being told that if they want a copy of what it is they have said under oath, they can't have it, but that they are welcome, at some point in the next 30 days, they'll be contacted, and they can fly back to Washington, D.C., to review this deposition transcript.

I think, you know, I am actually surprised, at one point I had a dialogue with one of the members of the General Counsel's staff, some number of years ago, when I first heard about this, I was flabbergasted that no one had ever gone to subpoena enforcement, I mean--

COMMISSIONER TONER: On this issue.

MR. ELIAS: I will just speak for myself. If ever you have opportunity to subpoena me, personally, to be a witness in something, if I didn't get--I would never give a deposition.

COMMISSIONER TONER: You'll go to district court.

MR. ELIAS: I'd go to district court and let you explain it to the judge why it is I don't get a copy of the deposition that I've just given.

COMMISSIONER TONER: Let me ask you, do you think, in your professional estimation, that if witnesses and respondents were provided across-the-board access to their transcripts that they could take with them, that they might

be more cooperative, might be more forthcoming with relevant information?

MR. ELIAS: Yes.

COMMISSIONER TONER: Does the rest of the panel concur in that judgment?

MR. BAUER: Yes. I don't disagree, but I would say, even if it's true that some would not be, it shouldn't matter.

MS. MITCHELL: Right.

COMMISSIONER TONER: Thank you.

MR. BAUER: This isn't a tactical issue; it's a due process issue.

MS. MITCHELL: Right.

CHAIR WEINTRAUB: Thank you, Commissioner Toner. Commissioner McDonald?

COMMISSIONER McDONALD: Madam Chair, thank you again. I thank all of you for coming. The Vice Chairman and I had a discussion just prior to the session that one of the frustrating things is there is so little time and so many things we'd like to ask and follow up on, but I'll try to just ask a few fundamental questions and try not to go over necessarily the ground people have already covered.

I think one of the things I'm really interested in, because it was alluded to earlier about the Alternative Dispute Resolution and what a wonderful program it's been, and we certainly have very capable and fine people running

the program, but there was a kind of a constant theme throughout these comments that the Commission spends its time on a lot of cases that really it shouldn't be spending its time on, and that's not a new criticism of us. That's been a criticism that has gone on for a long time, even longer than I've been here.

AUDIENCE PARTICIPANT: [Off microphone.]

[Inaudible.]

COMMISSIONER McDONALD: I heard that.

[Laughter.]

COMMISSIONER McDONALD: I guess what I wanted to ask you all because, you know, it's a no-fault system, and we understand that, and we spend well over a half-a-million dollars on this process, maybe more now, maybe more next year.

The very nature of the cases are cases that this Commission has really deemed, for all practical purposes, as unimportant. I mean, that's the issue. That's what we are confronted with. And so I guess one of the questions I'd like to ask is--to any of you who would care to answer--what's the downside in taking those cases, and rather than putting them in a process and spending that kind of money, maybe, and it's an internal issue, but it's also a legal matter, and turning those resources to something else.

And so we, by our own admission, say, "Look, this just isn't something we're particularly interested in"?

Would somebody care to comment who thinks positively about it?

MS. MITCHELL: Well, I actually do think that the Commission needs to have some criteria, some available criteria, of which we have notice of what the criteria is, for distinguishing, and I think that there is nothing wrong with that. Because all complaints are not equal, all violations are not equal.

Systemic violations that can be addressed expeditiously--we're moving into an election cycle. If there are things that are unfolding that appear to be systemic violations of law, it seems to me the Commission has an obligation to take note of that and attempt to deal with that now, sooner, rather than later; you know, rather than four years after the election, when the statute is about to run, and the witnesses have died, and now you're trying to deal with something way later, after everybody's forgotten.

So I do think that there is a value in that, but again I come back to give us notice of what the criteria is that the Commission has adopted with regard to Category A, Class A felonies versus Class B misdemeanors. I mean, it's a common type of practice.

COMMISSIONER McDONALD: Then, like in our MUR dump, Cleta, for example, obviously, we determine a lot of cases that we simply either can't get to or are unimportant

vis-a-vis everything else because of the priority system we set up.

I guess I am asking that, in your own experience, with your own clients, do you think that there's just not a diminishing return at some point, where, you know, you kind of get a traffic ticket, but--

MS. MITCHELL: Well, that's right. But you can always do what the EEOC does, which is give the complainant the letter of Right to Sue. I mean, if people feel as though they have not gotten whatever they need from you guys or from this Commission, they can take it to court if they think they can make their case, but I think that it's important to try to distinguish and to try to deal with some systemic problems early, if you can.

COMMISSIONER McDONALD: Anyone else want to comment on that particular--

MR. BARAN: Well, my sense is that there have been several developments since this 1982 ABA report that addresses two things:

One is the undue length of time of investigations and priority of resources. Since that report, you have not only the Alternative Dispute Resolution, but you've got your Enforcement Priority System, and of course Congress passed an Administrative Fine System.

So a lot of the pressures that existed 20 years ago I think have been alleviated, plus the Commission has

recognized that it, like any prosecutorial agency or prosecutor, you can't go after everybody, and you have to prioritize, and you have to distribute resources.

And when it comes to Alternative Dispute Resolution, which is something I have not personally studied in terms of how it has developed and what its caseload is over the last couple of years that you've had this system, I'm assuming that that is an efficient use of your resources to handle a relatively large number of low-priority cases. And if you didn't have that, you presumably would be substituting two things:

One, perhaps a couple of cases at the margin that would be handled through your normal enforcement process, and the rest of them would be dismissed through your EPS system.

COMMISSIONER McDONALD: Or maybe just the latter, which is my concern.

MR. BARAN: It could be.

COMMISSIONER McDONALD: Thank you.

CHAIR WEINTRAUB: Commissioner Mason?

COMMISSIONER MASON: Thank you, and thank all of the members of the panel.

I wanted to start with Mr. Baran. You raised a concern about I'll call it the "reputational impact" of Commission findings, which I am sympathetic to. And I want to ask, recognizing it would take statutory change, whether

a significant amount of that, to the extent that we have to find RTB to open an investigation, and by definition, we don't know, when we open an investigation, whether somebody broke the law or not. That's what we're trying to find out.

And then we conclude, well, either they didn't break the law or we probably didn't break it or we can't find the evidence that they broke it, and we end the investigation, and then everything is closed out.

To what degree would your concerns be addressed if we simply changed that terminology or even almost made the formal motion disappear and changed the statute to say that the Commission can't open an investigation without this vote, and simply leave it at that; so that we then wouldn't issue a press release that said, not a press release, but a statement that said the Commission had found reason to believe, but had taken no further action?

MR. BARAN: That would certainly be an alternative to take seriously and look at. I'm trying to think whether that has, in fact, been recommended either by this--

COMMISSIONER MASON: The Commission has recommended it repeatedly. If you all agree that it would be a good thing, we might get a hearing on Capitol Hill for doing that.

MR. BARAN: Well, as one, I would endorse that type of a recommendation and legislative change so that the commencement of a formal investigation is not seen as a

finding of guilt, even though you don't intend it to be, for the reasons you just stated.

COMMISSIONER MASON: I want to ask for all of the panel whether that concern about the reputational impact and other concerns that I think come through mostly in some of the written testimony about the Commission's conclusions and what it is we've concluded might be addressed by a more frequent use of the dismissal motion.

I don't know if any of you have noticed, but we have, occasionally, in recent times, used a motion to dismiss, which is mentioned in the statute. In other words, would it be a more satisfactory outcome to you, rather than reason to believe, no further action and close the file if the Commission concluded a significant number of its cases with a motion to dismiss?

MR. BARAN: Well, if the Commissioner means that the press release and the record will then say that the case was dismiss, yes, that would be very helpful on this point.

MR. BAUER: I concur.

MS. MITCHELL: I agree.

COMMISSIONER MASON: A couple of people have already commented on the respondent notification. Again, I can share those concerns, and I see sort of two ranges; a problem, if you will, in simply allowing the respondent to bound the case.

If we get a respondent who complains that a corporation has made an impermissible contribution to a named political committee, a candidate, party committee, I think you would all agree, but let me know if you don't, that in that circumstance we sort of need to name the recipient campaign as a respondent, even if we don't have any information about whether the campaign knew because they're necessarily involved, and we need to know. We need to point them on notice at that point.

On the other end of the range is Marc's example of this campaign did something and a whole lot of other people are doing it too.

And I wonder if you might try to be a little more specific between those two ranges as to when it is we would name respondents who may not be specifically captioned in a complaint, but who are clearly involved.

MS. MITCHELL: Well, I think that this goes to one of the points I made in my comments, which is a little bit round-about-way of answering your question, but I think the Commission, particularly with the new enhanced criminal and civil penalties under BCRA, I think the Commission needs to define more specifically the potential, not only the duties of the treasurer of a political committee, but also the potential liability of various people with regard to the political committee.

The new statute specifically provides for penalties for the candidate, but it's hard to tell at what point the candidate really has liability or culpability. And so I think if you define some of those roles more specifically, it will help determine, help the Commission determine who, and when, in a complaint certain parties are named as respondents.

CHAIR WEINTRAUB: Thank you, Commissioner Mason.

Mr. General Counsel, your turn.

MR. NORTON: Thank you, Madam Chair.

Thank you, panel, for coming, for your well wishes.

I wanted to raise a couple of concerns or questions that have been raised about this idea of having a hearing at the probable cause stage and ask if you could react to some of these.

One point that's been raised is that, in the last few years, we looked at how many cases in conciliation we've settled pre-probable cause and post-probable cause. And the figures that I have are 75 percent have been settled pre-probable cause. So one concern that's been raised is that providing the opportunity for hearing would provide an incentive to go to hearing and a disincentive to resolve the case before that opportunity.

A second point or concern that's been raised is that providing an oral hearing would provide a significant

benefit to those respondents with D.C. Counsel or the burden perhaps and even a disadvantage to a co-respondent who doesn't have D.C. counsel.

And the third or a third is kind of what we do in multiple respondent cases, where we have confidentiality obligations, and respondents may have diverse or even opposing interests, and it seems to me we could face the specter of having multiple hearings in order to accommodate those interests.

And so I think all of you have suggested a hearing would be a good idea. How would you address--maybe I'll start with you, Ms. Mitchell--how would you address some of these concerns about having hearings at the probable cause stage?

MS. MITCHELL: Well, I think that the reason that you settle 75 percent or conciliate 75 percent at the pre-probable cause stage is because people probably thought that there was a reason to do that, it was cost-effective, and I don't think that will change because it is an added expense to go further in the process.

So, it seems to me, that coming back to the guiding principle, as I said, at the outset, if the guiding principle is due process, that means notice, that means hearing. And either the Office of General Counsel should not be allowed to present its arguments to the Commission at

the probable cause stage or both sides ought to be able to present argument to the Commission.

And with that said, if that's the principle and that's the decision, then I think that you just have to figure out a way to deal with all of this, and if it takes more time, these details, that due process is that pesky little thing that probably is a little more cumbersome. It would be a lot easier to just issue an edict, but I don't think that any of those concerns are sufficient to warrant not providing the opportunity for hearing.

MR. NORTON: Mr. Baran?

MR. BARAN: I would approach the question from a different perspective. I wouldn't start with an analysis of all of your existing probable cause and pre-probable cause conciliation. I would start with all of your cases that you filed and work backwards, and look at all of the cases that you filed in court and analyze your questions in that context.

How many of them would have asked for a hearing? Were there multiple parties that would have created confidentiality issues? And would there have been a possibility of a settlement as a result of a hearing which would have avoided you having to go and file that lawsuit?

I haven't done that analysis myself, but obviously one of the objectives, other than the due process argument supporting an oral hearing is will this save you some time

and resources? Will there be fewer cases you'll have to file if you provide these types of additional opportunities in the administrative process?

I don't know the answer to that, but I think that's the analysis I would make.

MR. NORTON: Mr. Bauer?

MR. BAUER: Well, I would like to bring still a different perspective to it, which is that I don't think the question of whether the hearing should be provided should hinge on the overall management benefits to the Commission, which is to say, if you add an instrumental evaluation to the discussion, and you say, well, if we don't provide the hearings, then we are going to improve our ability to settle cases quickly, in my judgment, you've contaminated the due process principle with a series of considerations which I called instrumental, but they're management related.

And while I don't think those are unimportant, I understand you have an agency to run, it has a very sort of sour ring to my ears, that my due process rights will hinge on the success rate you have in settling your cases.

Secondly, I wouldn't trouble terribly about providing incentives to people to hire D.C. counsel. I think that's fine.

[Laughter.]

MR. NORTON: Well, I suspected that may have been the case.

MR. BAUER: Thirdly, as far as the way in which the thing could be structured, I agree with Cleta that you can find a way, it's going to take some time. I'm not certain, however, that you can't make some rough cuts about the availability of a hearing process, and sort out when they'd be made available on a rational basis and when they wouldn't:

Those, for example, who have to defend against a knowing and willful violation which, by the way, they may be the respondents who are least likely to want a hearing, by the way, I should mention, but nonetheless you could say knowing and willful cases are ones where respondents have a significant incentive to seek the ear of the Commissioners;

Level of dollar violation;

Implication of core violations of the statute. I don't think somebody who has a nonfiling issue before the Commission should presumably need a hearing, and I'm using a bad example, but there are other sort of more trivial cases where you could easily see devising criteria that would exclude them from the hearing process.

So I think there is a way to do this, and I'm not suggesting--we haven't designed it for you, and in that sense I'm arguing something to you that I probably don't have moral authority to argue. We don't have something in front of you showing you the path to that goal. But it's

hard for me to imagine, at the moment, that it would not be feasible.

CHAIR WEINTRAUB: Mr. Staff Director?

MR. PEHRKON: Madam Chair, thank you. And in response to your question earlier as to whether or not we would have a system available for the textual search of MURs, by the end of the year, the answer is, yes, and we will start putting this information up this year, and we will continue for the time--for earlier periods of time. So that is on the boards for being accomplished.

So welcome to the panel. Thank you all for being here today. Many of my questions have already been answered, but I was intrigued by Ms. Mitchell, in one of her comments very early on about the treasurer she has been speaking to, and the complexity of the filing and the difficulty of following all of these rules.

One of the things that we see from our end is many of the same participants are back again, whether it be in the audit process or the MUR track process or the complaint process.

So one of the questions I have to you is how do we go about addressing these issues, solving them, particularly with the players who are ongoing? An area of particular concern--

MS. MITCHELL: Repeat offenders, you are saying.

MR. PEHRKON: Yes.

MS. MITCHELL: Well, I think it is worth the Commission's while to devote some time and attention to thinking about the whole range of establishing some written guidelines and procedures for responsibilities and liabilities of treasurers, candidates, vendors.

And I would see nothing wrong with having some, as part of this effort that Commissioner McDonald made reference to, repeat offenders. If you are seeing some certain individuals or entities which continually violate or flaunt the law and maybe view the fines as a cost of doing business, I mean, that's not acceptable. And there's nothing wrong with the Commission including that as part of some guidelines on part of the enforcement, as part of the enforcement process. So, at some point, a repeat offender, it seems to me, crosses over to knowing and willful.

But, again, I want to make some reference that, again, publishing the Enforcement Procedures Manual would be very helpful. I mean, maybe you have some things contained in that that I don't know, and talking about D.C. counsel versus outside D.C., there are already, as I mentioned in my comments, two classes of respondents: those who have seen the "Holy Grail" Enforcement Manual and those of us who have never worked here and haven't seen it. I was shocked to learn that there was such a thing.

COMMISSIONER McDONALD: How did you learn that?

[Laughter.]

MS. MITCHELL: Someone who used to work here.

COMMISSIONER McDONALD: I was going to ask you did Paul give you a good understanding of it?

[Laughter.]

MS. MITCHELL: Exactly. But--

MR. ELIAS: I just wanted to follow up with one quick sentiment, which echoes, in part, what Cleta is saying and something that Mr. Bauer actually said in his opening statement.

There are two categories of entities that wind up before the Commission, and I think it's important to treat them separately, and this may actually go slightly beyond the mandate of today, and frankly into some of the ex parte rule issues.

One of them is the chronic violator. They are a treasurer for a House committee in Tulsa, Oklahoma, they violate the law, and then they become the treasurer of a PAC in Tulsa, Oklahoma, it's someone who is a chronic violator.

The other, though, which many of us here have represented, are ongoing entities. These are entities, they may be state parties, they may be national parties, they may be officeholders or PACs that have ongoing existence, and they are chronic in the sense that they're repeat, but they're not chronic in the sense that they are, by volume of their activity, oblivious to the law or ignorant to the law or don't take proper steps to comply.

In fact, they are oftentimes the ones who have the most robust compliance operations, but yet because they are so active so often, and so visible so often, they more often wind up before you.

And one of the things, which is what I wanted--

CHAIR WEINTRAUB: You keep defending your clients, though, Mr. Elias.

MR. ELIAS: Well, one of the things I have put in a plug for in the past to some of you, I promise none in the ex parte context, is I was struck the other night--I saw Mr. Toner's, something Mr. Toner said before Mr. Bauer reminded me of this--I was struck the other night, I saw Commissioner Powell on giving a TV interview about the FCC recent rulemaking, and one of the things he said struck me.

He said we spend more of our time talking to various interested parties who we regulate, that we actually have to cut that back a little bit; because we do so much of it that we don't have enough time to actually sometimes think about the rules we want to promulgate.

And I thought, boy, what an idea; the idea that the Commissioners actually talk to the people that regulate it.

One of the ways to deal with, at least the institutional interests that wind up before the Commission would be for your all staff or OG, for your staff, to interact with the regulated, the regulated to interact with

you, for them to understand what it is you don't like about what they're doing in an informal way, not through the MUR process, for them to educate you about why they're doing it and why they see life in that way, and try, in that way, to actually take out of the enforcement process entirely certain categories of things which are simply institutional interpretations of the law.

And I think to get back to something Cleta said, you're going to see more of that now with BCRA. You know, the Democratic National Party may interpret it one way, the Republican National Party may interpret it a slightly different way, and the General Counsel's Office may interpret the same provision a slightly different way, and having dialogue on some of those things might actually prevent the enforcement process from getting bogged down with some of those BCRA cases.

MR. BAUER: May I move for an addendum to that comment, since this panel has been exceptionally disciplined, and it's only 11:30? This is a very important point.

I recognize, from your end, and one of your number once explained to me this in vivid terms, and we understand perfectly. While we come before you right now bristling with outrage about due process principles and whatever, and I understand our clients don't always behave terribly well, and I understand that we don't always behave terribly well,

we're defense lawyers, we get frustrated, we don't like to lose, we ask for something that is denied to us. We find that unacceptable, and so we revert to infantile behavior, and we apologize, in advance, for all of those episodes of improper behavior.

MS. MITCHELL: Is this confession?

[Laughter.]

MR. BARAN: It's his life story.

MR. BAUER: I just will not grow up.

CHAIR WEINTRAUB: He knows I've heard all of his tirades anyway.

[Laughter.]

MR. BAUER: And so I want to say, and I really mean that, because we've reflected on that, and we all understand that sometimes it's hard for us to see what you have to do and how you approach us.

On the other hand, I do want to say that I do think it is surprising the degree to which your side doesn't understand an awful lot about what our side does for a living; I don't mean the lawyers now, I mean our clients.

CHAIR WEINTRAUB: Right.

MR. BAUER: We know only too well what we do for a living.

Our clients engage in activities that sometimes, in colloquies with the General Counsel's Office, in an informal level, comes to them as an immense surprise.

We've been asked questions by very capable people who have been open to the answers--this is not a criticism, it's an observation--questions about Get Out The Vote activities, and ground operations, and why we spend money on television that reflect genuine lack of familiarity with the political process and a certain degree, if I might say, of media-inspired suspicion.

CHAIR WEINTRAUB: That's right.

MR. BAUER: And I don't think that having a "back and forth" would necessarily make them full-throated supporters of the partisan political process, but it would reduce the opportunities for the sort of misunderstanding at an empirical level that I think does sometimes make it difficult for us to appreciate what you do and for you to fully understand, as you make your decisions, what it is that we do.

CHAIR WEINTRAUB: And I appreciate that, and I am hopeful that today is not a one-time event where, you know, okay, we'll invite you all in, you can talk to us today, and then we're never going to talk to you again. I really do think that we need to establish a better dialogue.

COMMISSIONER McDONALD: We've got to talk to them again?

[Laughter.]

CHAIR WEINTRAUB: Well, maybe not you, Commissioner McDonald.

MR. BARAN: If you adopt our recommendation for a hearing, you will.

[Laughter.]

MS. MITCHELL: If I might add just one quick, it's in my comments, but I would direct the Commission to look at that because I want to echo what Bob has just said.

Any of us who have ever been in a campaign know, we know that lots of what happens is not intentional violation of the law, it's just trying to win an election, and it is not--

CHAIR WEINTRAUB: By whatever means necessary?

MS. MITCHELL: Well, you know, to do my job, and not having any clue about that little purple book of regulations somewhere.

And I do think I've had the same experience with, I was thinking of this when Commissioner Thomas was speaking about the staff training, it wouldn't hurt the staff to spend a little time in a campaign to at least understand the difference between--reporters don't do it, and certainly members of the staff sometimes simply do not have an idea about why it is that people wear these funny pins and hats and do this stuff just because they really do believe in the process.

And I think that's a pretty important type of background and training, and I would urge you to dispatch some of the staff to some campaigns, with the promise that

they can't come back and institute Commission complaints by things that they've seen.

[Laughter.]

CHAIR WEINTRAUB: We're not doing as well on time as you think we are because we have another whole round of questions to go through.

[Laughter.]

CHAIR WEINTRAUB: Since I'm up next, I guess I'll follow up on that.

I felt that was a very interesting suggestion when I saw it in your written comments. My concern there is how could we possibly eliminate the appearance of bias, then, when our own staff are out there working on campaigns? I mean--

MR. BAUER: We will not object. You put as many as you want into Cleta's campaigns, no problem.

[Laughter.]

MR. ELIAS: I think Cleta's suggestion is a very good one, but let me restate it much more modestly, much, much more modestly. Simply having a dialogue, an opportunity for the Office of General Counsel staff for Commissioners, for Commissioner staff, to talk to Democratic Party staff, have them talk to Democratic campaign staff, Republican Party staff, Republican campaign staff.

You all have had, and I know this is not supposed to devolve into discussions of particular cases, but you've

had MURs that have revolved around an understanding of nomenclature. What does it mean when the Democratic Party says it has a coordinated campaign?

Well, it's not a secret. I mean, I'm here talking about it in public. I'm sure Jan Baran and Cleta Mitchell know what a Democratic coordinated campaign is. And I dare say that there would be a benefit to having, even if they didn't work on the campaign, at least having some kind of dialogue so that, and besides it's free information for the Commission.

I mean, if the Commission decides, for no other reason, it's a free look into how the regulated work, but I do think, from the enforcement context, it would take some of the mystery out of some of the more complicated complaints that come in because a lot of the complicated complaints that come in are simply lawyers making very, very routine things sound awfully sinister, and if this dialogue went on, you all might get through those a lot quicker.

CHAIR WEINTRAUB: Let me switch topics here. Marc and Bob, you had talked about or wrote to us about releasing documents or filing suit before an election, and obviously this is a concept that I'm familiar with from my years as an ethics person that, you know, the Ethics Committees have this blackout period right before the election, but it is uniquely true of campaign finance violations that they do tend to happen very close to the election.

And if we were to impose some kind of blackout period right before the election, in terms of publicizing complaints that are filed, we would, in a sense, I think be doing a disservice to the public because if somebody is out there rampantly violating the laws right before the election, doesn't the public have the right to know about it?

It's on Page 12 of your comments.

And you also refer to the Commission should not run the risk of influencing the outcome of an election by the public release of the results of an investigation and talk about it as an unresolved matter.

Once we've concluded the investigation, I'm not sure in what sense it's unresolved or why we shouldn't make that public. So I want to let you, offer you the opportunity to talk about that, and also if you wish to comment on the Department of Justice guidelines that you so tantalizingly alluded to in your comments.

MR. BAUER: Well, let me just begin by saying I don't think you need to worry about publicizing a complaint before an election. That will be taken care of by the free political market amply without your participation.

Our concern here, and, Marc, kindly turn to Page 12 where the comment appears, is with the Commission releasing the results of the investigations on the eve of

elections when a party to the matter that is being publicized is also involved in the election.

And I don't believe, given the typical set of circumstances that dictate the timing, that the Commission is necessarily well advised to be in that spot. It is obviously something that respondents who file complaints ardently hope for the moment they file them, that the results will be timely, if you will, and that they will be timed with the political process in a way to have maximum impact.

But we want to put before the Commission that if the concern is with the politicization of the Commission's work, which, by the way, is inevitable, which is why I mentioned the publicizing of the complaint in the first instance, there are circumstances, like the ones we describe here, where the Commission can limit its apparent active involvement in that politicizing process.

On the DOJ guidelines, I want to let Marc, who has taken a keen interest in this, also, comment, but it is a significant issue. Now, there is enormous confusion at the moment in the regulated community about the effect of the enactment of the new law on the standards for sorting out what would be civilly treated and what would be criminally prosecuted.

MR. ELIAS: Yes. I think what we had in mind was that the Department, both through, in some areas in written

policy, for example, in the case of voter intimidation investigations and the like, where they have a written policy about not conducting those kinds of investigations during the course of an election, and in other instances I think more prudential guidelines, where there is a general directive that they are not to do things that would ensnare them into partisan political elections.

Other than the case where you were up against a five-year statute of limitations, and even then there are ways of doing it through tolling, it isn't self-evident to me why a case has to get resolved--because, remember, the five years will typically happen in the off-year--why you would have to have, for example, a congressional campaign in a situation where it is being sued in late October.

I mean, just as a prudential matter, I think the Department of Justice takes some efforts to avoid doing things that look like they were timed to benefit one side or the other, and it seems to me a relatively minor--it doesn't impose a great burden on the Commission. I don't see how it sets the Commission's enforcement back at all, and it keeps them out of the suggestion that what they're doing is being timed to benefit one candidate or another.

This is particularly sensitive, in some cases, because the Commission has this longstanding policy of suing people in their district. So tied with the fact that they didn't bring a lawsuit in Washington, D.C., where they'd

also have jurisdiction, but rather did it back in the state shortly before an election, it might not be a bad thing for the Commission to look at.

CHAIR WEINTRAUB: Mr. Vice Chairman?

VICE CHAIRMAN SMITH: Thank you.

I just want to take a moment to note that since the Chair and the Staff Director have mentioned some revamping of our data availability and MUR indexing, that I'm pleased to hear that we're still on target for at least the end of the year. That's been set back recently due to a person being hired to perform that task, among other things, who the day before his hire told us, well, he wasn't going to come after all.

CHAIR WEINTRAUB: I think it was the day after he was hired.

VICE CHAIRMAN SMITH: But, anyway, I'm pleased that--

COMMISSIONER McDONALD: Based on money.

VICE CHAIRMAN SMITH: I want to ask about something we haven't talked about before and, Mr. Bauer and Ms. Mitchell, you both mentioned this in your comments, and this relates to the Commission's use of the confidentiality procedures.

I have heard, on many occasions, that the Commission uses those offensively, rather than to protect respondents. In particular, I'm going to go back, this is a

MUR that's not too old--it's since I've been on the Commission. It is before the time of our present General Counsel--in which the respondent notes that he was unable to get certain witnesses to speak to him and that they would not do so because what they told him was they had been told by the Counsel's Office that they were not allowed to speak to the respondent.

And he writes, "The staff's admonitions to these material witnesses, whether clear or ambiguous intentionally or merely inadvertent, have directly and materially hampered our ability to prepare a defense. In particular, we were prevented from obtaining copies of key documents at a time when the documents were in the possession of vendors and had not yet been destroyed or turned over to the Commission in their original form."

It then goes on, "We wrote to the General Counsel to report the staff's apparent effort to dissuade witnesses from speaking with us."

And then we eventually have a response from the then-General Counsel, which after a great deal of verbiage, saying, Well, you know, that's just how we do things, concludes--they asked him to specifically tell these witnesses that you can talk to this respondent, and he concluded, "I do not believe any further action, in response to your allegations, is warranted," and the witnesses refused to talk to the respondent.

I just wonder if you have had similar problems with this, and I do then have a follow-up question as to how this might be handled.

MR. BAUER: We have experienced that, there is no question about it, and we have tended to be able, in my recollection, and Marc may recall other cases where that has not been the case, but we have been able to work through it, typically, but it is absolutely true that comments like that made to respondents or to witnesses have often significantly affected, adversely affected their willingness to share information that would be necessary, we believe, to the representation of our client.

So, yes, that's one of the reasons we raised it here is because we think that's unfortunate, and it ought not to happen. That is not what the confidentiality provisions of the statute were designed to accomplish, nor would anyone have had any thought of drafting a provision with that notion in mind, quite frankly, and we don't think it's appropriate or helpful, ultimately, to the quality of advocacy before the Commission.

MS. MITCHELL: Well, and just to echo that, the reason I raised that as one of the four principal things I hope the Commission will look at is taking a different view of the purpose of confidentiality. The confidentiality provisions are to protect respondents, not to punish them,

and to impair their ability to mount a defense to alleged violations of law.

And I think, again, specifically under BCRA, when you have these increased civil and enhanced criminal penalties, it is absolutely imperative that the Commission rethink the use of the confidentiality provisions, and to realize and to adopt the view that it is for the purpose of protecting respondents, not punishing them, and that has been perverted over the years, in my view, by the Commission and the OGC, prior to the existing OGC.

VICE CHAIRMAN SMITH: My follow-up question for both of you, though, this is a potential problem. Is there a problem if we don't provide the confidentiality advisement or how we do it, as it would relate to multi-respondent cases? In other words, is there a problem of Respondent A or a witness telling Respondent A about Respondent B or something like that?

You're shaking your head, Mr. Elias. Do you want to address that?

MR. ELIAS: I don't think so. My assumption is that the confidentiality provision should operate akin to Rule 6(e) in criminal cases, grand jury secrecy, which is about as strict a confidentiality rule as there is in federal law.

And witnesses are routinely told that they need not discuss their testimony with anyone. The prosecutor is under an

obligation, the grand jurors are under an obligation that it will not be disclosed, it cannot be leaked, but that the witness can share with whomever they wish their own recollection of events.

I mean, if you have someone who is involved in a campaign, and they were involved in organizing a use of a corporate airplane, the mere fact that they were asked questions by the FEC, during a deposition, about the use of a corporate airplane doesn't mean that now their understanding of what happened, their recollection of what happened with the use of the corporate airplane is now somehow barred from being discussed with other people, whether they're co-respondents or not.

VICE CHAIRMAN SMITH: But they would be limited, I presume, under 437(g), from noting that they'd been deposed, for example, by the Commission, because that would trigger the notice that there is an investigation going on.

MR. ELIAS: I'm not sure that that's what 437(g) is intended to get at. I mean, I think 437(g) is meant to shield the, is meant to say that the Commission and the Commission staff are not permitted to disclose this.

I don't think it is intended, it was meant to protect the respondents, not as something that inhibits the respondent's ability to talk to people who were interviewed.

VICE CHAIRMAN SMITH: Thank you. I realized, just as I finished that last question, that my red light was on, and I apologize.

CHAIR WEINTRAUB: That's okay. I realized too late myself, so I can't punish you for that.

Commissioner Thomas?

COMMISSIONER THOMAS: Thank you, Madam Chair.

I sort of wanted to deal with two points; one was touched on just briefly. The existing relationship between the FEC and the Department of Justice, I see in Bob Bauer's comment you've got a phrase, "Consequently, the Commission should do whatever it can to assure that its role in enforcement is not diminished under BCRA." I'd just like to get the sense of the panel about what, if anything, the Commission should do, in terms of reworking the existing understanding with the Department of Justice, which currently stated leaves them only with dealing with substantial knowing and willful violations and, in theory, leaves us with the rest.

And then the other point, and I'll just get it out here, and you can use whatever time you have to deal with that, I had asked that the 3-3 split issue be included. I don't know that it was phrased in a way that really gets at the kinds of things I was most interested in. But you all have filed complaints, and you may have been the victim of a 3-3 split when the complaint failed to go forward.

The Commission has been remarkably successful, in the standing doctrine area, at kicking complainants out of court because they can't follow through with their right to file a suit challenging the FEC's failure to go forward.

Any ideas you have about whether there's anything the Commission can do to strengthen the right of complainants who file complaints and who meet a 3-3 deadlock situation?

MS. MITCHELL: Well, I do think that it's worth pursuing and, if necessary, seeking a statutory change. I think that granting, after the Commission has either declined to pursue a matter or dismissed a matter as not meeting the criteria for investigation, to consider the possibility of right to sue, letters of right to sue. The EEOC does that.

I do not recommend jury trials, and plaintiff's and attorney's fees, treble damages, but I do think that most of these things will not proceed, but I think it is something that ought to be available because we're talking a lot about respondents. Complainants also have rights, and I think it's important for the Commission to review what the possibilities are in that regard, even if it means seeking a statutory change.

MR. BARAN: I guess I have to respectfully disagree. I think complainants have great rights, if that's an accurate characterization. I mean, anyone can file a

complaint with this agency, and then you have to trigger your administrative process. I mean, you don't even have a standing issue when it comes to starting the complaint process here.

And once there is a Commission deliberation, which may lead, as it does infrequently to a 3-3 determination, I mean, there has been a review of the merits of that complaint, and no resolution.

I don't think that then is a good basis for encouraging people to then file subsequent lawsuits in circumstances where they have no Article 3 standing in the courts. I mean, there are alternatives. If the case is really that serious, the Justice Department can review it, and if the issue happens to be a troublesome issue that has led to a resolution on the Commission's part, you can make recommendations to Congress to change the law.

I am not one of those people who thinks that the Commission acts in a partisan fashion, and I'd like to say that you trample on the rights of everybody in a very bipartisan fashion.

[Laughter.]

MR. BARAN: So, you know, enough is enough, it seems to me. If something leads to a 3-3, then that's it.

COMMISSIONER THOMAS: Any other thoughts on that point?

MR. BAUER: On the first point, I do believe, and I think we say so, that there is likely to be some confusion. There is, indeed, some confusion about exactly what BCRA means for the 1975 negotiated MOU on the allocation of responsibility between the Agency and the Justice Department, and I think that it would be helpful for the Commission, at some point, to address the question of what, in fact, for referral or other purposes, the change the law means for the continued significance of that MOU.

Secondly, I was listening to Jan. He's persuasive. I was sort of leaning in his direction. But then, at the end of the day, I must say that if the Commission ultimately deadlocks and is not able to produce a result, I don't, quite frankly, think the republic will be shaken to its foundations if somebody is entitled to take their complaint to a federal district court--some will, some won't.

But at the end of the day, I do believe that some continued right, I guess you'd call it, a statutorily conferred right to pursue the complaint in another forum, in a judicial forum, is appropriate.

COMMISSIONER THOMAS: Thank you.

CHAIR WEINTRAUB: Commissioner Toner?

COMMISSIONER TONER: Thank you. Thank you, Madam Chair.

I want to talk briefly about treasurer liability and, Mr. Bauer, Mr. Elias, you submitted some comments talking about those issues. Actually, on Page 16 of your comments, I thought you actually had a very powerful statement, and I'll just read it briefly.

Starting on Page 16 you say, "The Commission should never name a current treasurer as respondent in their personal capacity unless the treasurer is responsible for the acts that constitute the alleged violation."

You go on, "One can hardly overstate how emotionally, and even financially, disruptive it can be for an innocent individual to be named as a respondent in a matter in which he or she had absolutely no involvement."

And you go on and you say, "Imagine the position that such an individual is placed when filling out an application to refinance their home and are confronted with the question whether they are party to any legal proceeding. Do they answer truthfully and risk not qualifying for a loan to pay for a child's education?"

And you conclude, "The Commission's answer to this question should serve as sufficient justification for the Commission to change its policy."

If you could just elaborate on your concerns there, and specifically do you think that, in terms of how we've handled treasurers in the past, we've made some errors in judgment in how we've proceeded?

MR. ELIAS: Let me take a shot at this.

There are two issues that I think come up with treasurer liability or naming a treasurer which has caused extreme consternation and concern, in my experience in dealing with treasurers.

The first is the idea that they are named. I think probably everyone who has sat at this table, and those of you in private practice, have at one time or another dealt with whether it's the White House appointment process, whether it is refinancing a home, they get stigmatized.

They get put on this pleading and, in fact, even if there is a conciliation agreement, whereby they are not--the committee they are treasurer for is not ultimately found to have violated the law, they still remain in the conciliation agreement.

So it will say, you know, there is a conciliation agreement between, say, five committees, only one of which is a party to the conciliation agreement. The recitation paragraph will still say, "On XYZ, the Commission found reason to believe that blah, blah, blah, and its treasurer, So and So, violated the law."

Now, the Commission may have then gone on to dismiss that, and this a little bit akin to the discussion you were having before about what to do when you take no further action, but it is a very traumatizing thing that

they are named in the--they are treated by the Commission as a respondent, their name is put in every document, and--

COMMISSIONER TONER: Do you think we should just name the entity?

MR. ELIAS: Yes, unless there is reason to believe that the treasurer, themselves, did something wrong, which gets to the second problem, which is treasurer liability.

It is very difficult to tell a treasurer, either at the front end of a treasurer coming in the door, at the front end of a MUR, or at the front end of a lawsuit, whether the treasurer has any personal liability for what has happened. You know, are they simply a placeholder, like the Secretary of Interior is named as the Secretary, not personally, but as the Secretary of Interior? Well, in some documents you get from the FEC, it says, you know, "So and So, as treasurer."

But it's very, very difficult to know that and, frankly, it's not just disruptive, and disheartening, and difficult for the treasurers personally, but it's difficult, frankly, as their lawyers, because if I represent a campaign, and the treasurer has personal liability, that treasurer may need their own lawyer. That treasurer may have, that treasurer may not be entitled to the, when we were talking about confidentiality, there may be adversity--

COMMISSIONER TONER: Because of conflict of interest between the treasurer and the committee?

MR. ELIAS: Yes. If the treasurer is truly liable in their personal capacity, there may be a conflict between that, and the Commission doesn't spell this out.

COMMISSIONER TONER: Do you think we lose anything, from an enforcement perspective, by just naming and focusing on the committee, as opposed to the treasurer?

MR. ELIAS: No, I think you gain. I think you actually would settle more cases pre-probable cause because I think, taken with the policy that the Commission has, in general, of requiring an admission as part of the settlement, I think I have seen many times that the obstacle to those settlements, in a case where there has to be an admission, is that the treasurer, who didn't do anything, they may not have even been the treasurer at the time that the violation took place. They don't want their name on a document admitting that the law was broken.

So not only don't I think you lose anything, I think you'd actually gain.

COMMISSIONER TONER: Do any of the other panelists have thoughts on this subject, treasurer liability?

MS. MITCHELL: Well, I've mentioned it twice. I'll mention it a third time. I think this is very important because I can't tell you how many times somebody says to me, "If I'm the treasurer, what does that mean?" And it's impossible to say, with certainty, what that means, and I think carving out those specific roles, and

responsibilities, and liabilities of the candidate, the treasurer and the committee itself, I think it's vital in these enforcement procedures.

COMMISSIONER TONER: I understand it can be difficult to recruit treasurers these days.

MS. MITCHELL: Yes.

COMMISSIONER TONER: Maybe this would be a step towards greater cooperation within the investigatory process.

Thank you, Madam Chair.

CHAIR WEINTRAUB: Thank you, Commissioner Toner. Commissioner McDonald?

COMMISSIONER McDONALD: Thank you.

It's been very enlightening. I must say I've got so many pages of notes.

I'll start with the treasurer. Cleta mentioned early on, and I couldn't help but think, I always say to people, they say, "Who do you think would make a good treasurer?"

And I always say, "Somebody that you never want to speak with again once they--"

[Laughter.]

COMMISSIONER McDONALD: And I've given that same advice for twenty-some years because I do think it's very difficult, under any set of circumstances. I mean, I do

think it's the nature of the process, and it's been a very vexing problem for us.

There are so many things I'd like to comment on. I suppose maybe I would come at a comment made by the Vice Chairman earlier the other way around, which was he suggested, rightfully so, that at least three of us may not have appeared before a body like this, and it may well be that a number, not all, but a number of our witnesses may not have sat where we need to sit either. So I take Marc's point that exchange of ideas is good.

Bob and I have been in some sessions, and he remembers them because I have them all marked down, in which actually there wasn't an exchange of ideas, as I recall, but nevertheless that's some history we can get to later.

On the due process side, you know, I think all of us take the point very seriously--I was going to kid Cleta simply because she and I have been friends for more years than we can count. When I was reading her remarks, I couldn't help but remember I hadn't seen this criticism of due process since she and our friend, Speaker Draper, used to pass the appropriations bills without anyone's input but their own.

That wasn't a fair criticism, of course, but I know that people made that comment, and not fairly, I have no doubt.

I'm really interested in this business about the extensions of time issue. And, Marc, you kind of touched on the timing of a problem. I know Bob remembers a very prominent case we had in relationship to a timing issue, taking action against a substantial candidate.

What happens to us sometimes, and I wonder where the cutoff point would be, I'm trying to run a little survey, I'm trying to get our office to put together how many extensions of time have been asked in various and sundry cases because I think it might be helpful to have a better sense of it.

What do you do in the scenario where maybe you're a year out, maybe a year-and-a-half out--we went through this, so it's fairly clear--we keep getting a request for an extension of time to delay a particular case. Lo and behold, the Commission has to come to grips with the system can't be gamed so at some point you've got to do something, and you get down to an internal mechanism that says we've gone as far as we can go. The case, as you pointed out earlier, could come at a very vital time in a campaign.

What do we do in a case like that, from your perspective?

MR. ELIAS: I think there are two scenarios in this:

One is where you're up against the statute of limitations, and it's election season, and that's I think I

said that would be a situation where I think you could rightfully ask someone to toll.

As a general matter, if it's simply a question of extending time, as opposed to dealing with the election, which is immutable, I frankly would look at why you are where you are. I mean, in all honesty, if there was a complaint filed in 1998, in November of 1998, and the Commission waited three years to find reason to believe, and then another year to get its probable cause brief together, and then you get out of the blue, as a lawyer, as a private lawyer, a brief that says they're now recommending probable cause, and then you go and say, "Okay. Well, now, first, I need to remember what this case is about."

And then you refresh your recollection of what the case is about, and it says, well, you have 15 days to respond. Touching on what we talked about earlier, you don't have any of the depositions, you don't have any of the underlying documents. So you make that request.

"Well, we'll check with the General Counsel and we'll see what we can give you."

So now you have 10 days, and you've gotten excerpts of some depositions, you've gotten excerpts of some of this, in that case, I think an extension of time is appropriate, frankly, irrespective of what it means for the statute of limitations.

COMMISSIONER McDONALD: But what if that's not the scenario?

MR. ELIAS: If it's a scenario where you feel like you're being gamed by the process, then obviously you should take that into account. But one of the ways you can deal with someone gaming the process is by providing them, if you provided someone, at the outset, all of the information that they could possibly anticipate, all of the deposition transcripts, all of the underlying documents, the exculpatory documents that we discussed earlier, it's going to be a lot harder for them to make a compelling case that they actually need the extension of time.

The situation we face now is very often that you actually genuinely need the extension of time because of these other factors. So I don't think tolling is the answer, in most cases. I'm not saying it's never the answer, but I don't think it's the answer in most cases.

COMMISSIONER McDONALD: Thank you.

CHAIR WEINTRAUB: Commissioner Mason?

COMMISSIONER MASON: I'd like to reveal to the members of the panel who are not aware of this that in the Enforcement Manual there is a series of schedules of standard penalties for different violations of the law.

And I would like to ask whether you think it would assist in conciliation negotiations for us to publish that schedule, whether it would make it easier or more difficult

to settle cases, and particularly in cases where there's more or less a concession, yes, a reporting violation occurred or, perhaps, grudging, but acknowledgment that if you did take it to court, you'd probably lose, even though you think you might be right, would then having the Commission's standard penalty schedule assist in conciliation?

MR. BARAN: Well, I think so. I think the combination of knowing what the penalty range is and having access to your MUR files to corroborate that those penalties have been applied within those ranges consistently in other cases is very helpful to a practitioner because then we turn around to our client and say, look, you're not being treated any differently than these other folks, and you're within the range.

At the current time, if a client gets to that stage, I ask associates to go and "scrummage" through your files, just find closed cases that we might think are comparable. And then the General Counsel's Office will say to us, "Well, we've got other cases that we think are more comparable than your cases, and we're not sure what the range is," it's a much more ad hoc, time-consuming and, for clients, expensive proposition and to be able to give them some more definite information that's easily available.

I think you see that in your Administrative Fines Program. It's right there in your regulations. So if a

client comes to me and says, "Well, you know, I've got this notice of this late filing," I point him to the regulations. I tell him what their odds are if they wanted to appeal.

If they have a good reason, we'll discuss the good reason, and then they make an economic decision, usually, even if they have a good reason; you know, should I pay a \$3,000 late filing or do I want to go through the administrative process or even court to vindicate myself? There are a few that do that, but most people just pay the fine because it's appropriate, and it's economically justified.

MS. MITCHELL: I agree.

MR. BAUER: I think, consistent with the principle of transparency here, which I think really would assist everybody, I think it would make the regulated community more comfortable with the Commission's approach, and I think it would aid some of the practices, some of the negotiations in a successful direction.

There is sometimes, to me, an unaccountable fear of what it means to provide information to the regulated community. I had a conversation some years ago with an employee of this institution in which we discussed, and I mention this story not to eat up your time, I hope you won't hold this against Commissioner Mason, but I think it's an important point because it reflects on a difference of

perspective between the Commission and the regulated community.

And the question was, why doesn't the Commission tell us what their enforcement priorities are?

And the representative of this agency told me, in a very cooperative spirit, that if they told the regulated community what their enforcement priorities were, members of the regulated community would not violate the provisions that the Commission cared about, they would simply focus on violating the provisions that the Commission didn't care about.

That struck me as probably not a bad result, if people violated the provisions of law that you didn't care about, but it also reflected a view of people in the regulated community looking for provisions they could violate, that that's why they violated the law. They were in the business of doing that, and their goal would be to find the ones they could violate without being pursued by the Commission.

I thought this was quite remarkable, and I think it just misconstrues the way that kind of information would be used in the regulated community. I think all to the good, quite frankly, it would be used.

COMMISSIONER MASON: Let me try to get in one more question just to say I'm a little bit disturbed by the suggestion that the treasurer, and the candidate, and

everybody else involved in the campaign shouldn't be liable. And I know all of you would agree that there are circumstances when the treasurer or the candidate or other particular people should be personally liable for violations when they materially committed them.

What bothers me, however, about the institutional nonliability is the lack of incentive. If you say, "Well, gee, the treasurer is not responsible, and the candidate is not responsible," you know, then who's the cop on the campaign? And some of you have said to me the difficulty you have in getting your clients to pay attention, and if we give people too much of a free pass aren't we kind of not building in the right incentive structure to people in the campaign to make them want to know about the law and comply with it?

MS. MITCHELL: I don't want you to misconstrue my suggestion about defining very specifically the liabilities of each player, the roles and the responsibilities or the responsibilities and liabilities of each role as suggesting that they shouldn't be responsible or held to some degree of accounting.

What I am saying is tell us what that is. Be specific. And particularly in light of BCRA, I think it is incumbent upon the Commission to be more specific because BCRA makes specific reference to violations by candidates and their agents.

Well, that is nowhere in the regulations, as near as I can find. What does that mean? And so carve out, I mean I'm saying be specific.

MR. ELIAS: Yes, and that's exactly I hope what I was understood to have said before.

The rationale, in my view, for not naming the treasurer in every case is that, then, they think they're, in fact, named in no case, and that's the problem is that by naming them in every MUR, no matter whether they were involved or not involved, there can be this false sense of security that, in fact, it's just a formality.

And maybe it is just a formality. It could be, but if what you want to do is make sure there is a cop on the beat, then you would do exactly what Cleta said, is you'd say, "Okay, treasurer, here are your responsibilities. Here's what you can be held liable for."

And then, in those instances where there is evidence that that treasurer did not meet those liabilities, they get named as a respondent. But then they know they're being named as respondent for a reason, and it's not just because they happen to fill some technical requirement.

CHAIR WEINTRAUB: Just for the record, the red light was on. I didn't penalize him for your story, Mr. Bauer.

Mr. General Counsel?

MR. NORTON: Thank you, Madam Chair.

Mr. Elias, I hope I can follow up with just one question on this treasurer liability because I think the proposal in your written comments is more nuanced than you described it in response to questions by Commissioner Toner.

What you suggested was that, in the ordinary case, the current treasurer would be named in a representational capacity or official capacity. We would be clear about that, and I think our reasons for doing that are that it's clear that the treasurer is in a position to bind the committee, and moreover the treasurer is probably authorized to follow through on the relief that's authorized, including payment of the penalty. So that's the current treasurer.

And then in other circumstances where the treasurer was personally involved in violating the Act, we would be clear in the findings that the treasurer was named in a personal capacity. And where that changed over the course of the investigation, we would make that clear, too.

Is that still the proposal?

MR. ELIAS: That is the proposal. I was responding to a specific question the Commissioner asked. If you want to name the treasurers and make it absolutely crystal clear, so that when they go to the home mortgage, they can say this was representational only, that's fine. If you wanted, for administrative purposes, to drop them entirely, I think that would be fine, too.

MR. NORTON: Let me ask about something entirely different. The proposal was made I think 20 years ago in the ABA study that the Commission ought to get legislative authority to allow OGC to follow up with respondents for particular information prior to the RTB stage.

And we, I would say not infrequently, have circumstances where there is something that is really left ambiguous or unaddressed in the response, and we say to ourselves, with additional clarification on that point, it may well tip our recommendation towards a finding of no reason to believe.

I am not at all certain that the current statute constrains us from that follow-up, but I want to ask you, Mr. Baran, do you think legislative authority is really required, and as a matter of policy, it would be good policy if we did that sort of limited follow-up, which of course would be requesting information on a strictly voluntary basis as a matter of clarification pre-RTB?

MR. BARAN: Yes. My recollection is that the position of the General Counsel at that time was that the statute prohibited you from doing that type of contact. We disagreed, but in light of the disagreement, we said, well, okay, then ask for legislative authority to do that.

If your position is, and I think it should be, that you're not constrained to go ahead and do that type of consultation, then you don't need legislative authority.

I would say that this agency does a variation of that type of consultation frequently every day through your Reports Analysis Division. You're constantly sending letters to committees all over the country saying, "We notice this, we notice that. You know, respond in 15 days or you'll get another letter like this," and so on.

I mean, that's really the same principle at stake here, and at that time, as I said earlier, things have changed in 20 years, there was a position at this agency that that type of informal fact-gathering was not possible under the statute.

MR. NORTON: Mr. Bauer, you answered some questions earlier about the release of the results of an investigation before an election, where the respondent is running for election, but I wouldn't say this is a common circumstance, but it sometimes comes up where it's in the interest of that respondent because the Commission, as Judge Kessler would put it, exonerated the candidate for election, and it's in the interest of that respondent for the Commission's disposition to get on the public record to make that disposition clear.

I think the policy of simply taking things as they come is to get out of the business of making a judgment, whether it's in the respondent's interests or not, but rather, when we complete the matter, we put it out on the public record.

Does that other circumstance concern you?

MR. BAUER: I think that the Commission shouldn't act in any way that allows its results to be claimed for good or bad by any party involved. Yes, in some cases, you're going to have some, no doubt, good averted by a policy like the one we propose; that is to say, somebody looking for exoneration and ready to claim it will be denied it. But I think, on balance, still, the Commission, and Marc discussed the Department's policy in this matter, simply ought not to put itself in a position where its results could be interpreted one way or the other.

MR. NORTON: Mr. Bauer, I'm going to try to use the remaining little bit of time I have to ask you to address something that you raised at a conference you and I both spoke in some months ago, and that's about sua sponte submissions. And you expressed some concern at the time that there not only wasn't an incentive, but there were perhaps disincentives for parties to come forward and make what we call sua sponte submissions.

And I wonder what you think we ought to do as a matter of policy in treating those kinds of submissions, to create an encouragement, rather than a discouragement.

MR. BAUER: For years, I think it's been fair to say that, in the general sense, and I'm not speaking because it's been a while since I've discussed it with counsel on my right here, and certainly I've discussed it with Marc a

number of times, counsel have concluded that there isn't any palpable advantage.

I'm not suggesting that they, nonetheless, recommend on it, that, on that basis alone, they recommend against it, but there is no palpable advantage, because that's a question clients naturally ask, for clients to come forward with a particular problem.

Again, as I said, they may do it anyway. We may even recommend that they do it, but we cannot tell them, if they ask us, that it is going to be obvious to them when they compare their circumstances here with that of a respondent unwillingly brought in, they will not necessarily find that either the outcome or, indeed, even the experience of the process will be noticeably or favorably better or different for them.

I don't know quite how to address the question. It would be obviously nice if the Commission could think through this problem and provide some encouragement to the regulated community to believe that making it easier on you will provide some better result for them. After all, it spares you time, it spares you energy, it spares you resources, and presumably, if somebody is prepared to come in and say, yes, I have to admit a huge mistake was made, and I'm prepared to account for it, that should count for something.

But right now, I will tell you that in my experience, and if Cleta and Jan disagree, I will really be concerned about partisan balance, in my experience, our clients do not come away, in those circumstances, believing, and we don't, from our own empirical review, believe that anything fundamentally was different than if the complaint had been filed against them.

MR. BARAN: Yes. Even the U.S. Sentencing Commission has downward adjustments for cooperation and things of that sort, and now that we know that you do have some secret list of ranges of penalties--

[Laughter.]

MR. BARAN: --you might want to incorporate the sua sponte nature of a case into your penalty deliberations, assuming they are that systematic.

MR. BAUER: That's good. And you could, in fact, if somebody comes in and tells you there's something horrible that they did, and you feel it's so horrible, in fact, that it needs to be dealt with openly in a particularly aggressive way, the discount, if you will, might be considerably more modest than in other circumstances. In other words, there's a way for accounting still for the severity of the violation even under a discount program.

CHAIR WEINTRAUB: Thank you.

Mr. Staff Director?

MR. PEHRKON: Madam Chair, thank you.

There's been a long discussion today over the issue of transparency of process, and I'd like to follow up on one of the questions raised by the General Counsel, which is transparency of the information placed on the public record.

And in not what specific documents or what specific information should be placed on a public record, but rather what should be the purpose of placing the information on the public record and what message should we be trying to get out there. Should it be a question, should we be trying to explain the case? Should we be more concerned about the process? How should we be addressing this? What should we be looking at from your perspective, and is there a difference in the type of cases that we're dealing with?

MR. BARAN: Well, I think you're going to be constrained considerably by whatever the law is, and of course that's under review right now in the court of appeals here.

[Laughter.]

MR. BARAN: But assuming that you have some flexibility on this issue, then you will probably want to revert back to your older procedures of providing access either through the public record or under FOIA.

But I suspect that the result is going to be much more limited than that, and therefore you're going to then have to put on the public record, first, what you are permitted to put on the public record. But one thing that I would encourage you to consider putting on the public record is any final statements by the respondent.

I mean, speaking from personal experience, I know of cases that have been through the "reason to believe" stage and extensive investigation, and then there was a decision by the Commission to take no further action. So we never got to probable cause.

But then on the public record pops up a 50-page report from the General Counsel's Office outlining all of the facts and theories of the investigation, which report was never presented to the respondents, was not made available to them. It was based on an investigation in which they didn't have rights of sitting in on witness's depositions or cross-examination or access to all of the documents, and what is a respondent left to do?

Well, other than shriek and complain, they can try and submit something for the closed file, which again, in my personal experience, I have done, but noticed that those submissions are not included in the public file.

[Laughter.]

MR. BARAN: So you might want to reexamine that aspect of the public file.

MR. PEHRKON: Would anyone else like to sort of add to that?

Mr. Elias, you mentioned transparency of the process earlier.

MR. ELIAS: Yes. I think one of the things that it's a little bit different approach than the one Jan is taking. Jan is looking at it from the perspective of the person whose complaint has just been put on the public record.

From someone who tracks what the agency does and helps advise clients how not to break the law as interpreted by you all, the more you put on the public record that articulate general, as opposed to specific statements of law, and now I know you are constrained in terms of the advisory committee process and what MURs stand for and the like, it is very helpful.

And I mentioned statements of reason. Some of them were helpful statements of law or policy or whatever you want to call them that I have, over time, that has helped, over time, me shape the advice I give to clients has been what the Commissioners have written.

And those kinds of things, to the extent that they are encouraged to be shared openly and systematically, as opposed to on an ad hoc basis, I think is helpful.

MR. PEHRKON: Thank you.

CHAIR WEINTRAUB: Thank you, Mr. Staff Director.

I know that all of us would be happy to engage you all day long. We seldom have such a distinguished and knowledgeable panel in front of us, but at this rate, we would never get done.

MR. BARAN: May I ask whether--

MR. ELIAS: The light is still green. So Jan should get--

MR. BARAN: I was just going to ask, before concluding--

CHAIR WEINTRAUB: Yes, but that was the Staff Director's--

MR. BARAN: --because I sense you are concluding, whether my prepared statement will be made a part of this record.

CHAIR WEINTRAUB: Yes, I believe it will.

MR. BARAN: Thank you very much.

CHAIR WEINTRAUB: I want to thank you all again for taking all of the time here this morning. I am planning on catching up the time, so we're going to take a quick lunch and come back at 1 o'clock, as scheduled.

[Whereupon, at 12:21 p.m., the proceedings were adjourned, to reconvene at 1 p.m., later the same day.]

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

1:04 p.m.

CHAIR WEINTRAUB: We are back in session.

I want to thank the witnesses for agreeing to show up and help us out today. For those of you who weren't here this morning, we're operating on a five-minute light system. Each of the witnesses will have five minutes to make their opening statements. Then, the Commissioners, the General Counsel, and the Staff Director will each have five minutes for questions and then another round of five minutes of questions. We have, we're starting off with James Bopp, Don McGahn, and Larry Noble, all well-known practitioners in this area.

Mr. Bopp, why don't we start with you?

MR. BOPP: Thank you very much, Madam Chairman and fellow Commissioners. I appreciate the opportunity to testify, and I'm sorry that I could not present written testimony, but litigation demands really precluded that.

As you all know, I have an election law and FEC practice. And one of the cases that I think demonstrates the need for reform by the Commission in how they conduct their business is one of those cases, and that is the Christian Coalition versus Federal Election Commission. That was a case, of course, involving a number of allegations, primarily of coordination between the Coalition

and candidates, resulting in alleged, unlawful corporate contributions to their campaigns.

The investigation and subsequent enforcement action went for some seven years involving 81 depositions, hundreds of thousands of pages of documents produced by numerous witnesses, including the Coalition, and then resulted in the Christian Coalition winning nearly every one of the claims that were brought against it.

I think this case is an example of problems that the Commission needs to address. One is that it involved an enormous expense by the Commission of its resources with respect to a case in which the law was quite unsettled.

I think, secondly, the General Counsel's Office, in my judgment, from the get-go, acted as the prosecutor, including during the period of time of the investigation, in other words, took a view that a violation had occurred, and it was just their job of ferreting it out, as opposed to a more impartial examination of the facts and circumstances to determine whether or not a violation had occurred.

It also involved enormous expense and damage to the organization, even though they ultimately won the case and were vindicated.

And, finally, the investigation involved, and targeted, core First Amendment activities of issue advocacy primarily, and the investigation was quite intrusive, and, finally--finally, finally--to really a partisan result

because there are quite a few organizations that do just this type of activity, did so at the time, and of course they were uninvestigated. So one actor, with one point of view, was severely adversely affected, even though they ultimately won the case, while others, conducting the same kinds of activities, you know, got off scot-free, if we could say it in that way.

Now, I agree with the, I understand that this hearing does not involve personnel, but I do want to make a statement about your staff. I think that they are extremely dedicated and professional, and many of them are quite talented, and I think you should be proud of them. I think that they do their job in a really fine fashion, and I have appreciated my workings with them over the years.

I do think, though, that there's a problem here, and when you look at the questions that have been or the areas that you are asking for statement about, you need to really kind of come back from that, come above that, and to a more general view of the agency because each one of these or the vast majority of these questions really involved, what kind of due process protections should we afford to people that are subject to investigations within the agency?

I think that question arises because of the heart of the problem. The heart of the problem, in my judgment, is that the General Counsel's Office, in conducting investigations, acts as prosecutor. In other words, they

act as if the Federal Election Commission is an adjudicatory agency; that is, you ultimately adjudicate campaign finance violations.

Now, that is not true. This is not adjudicative agency. It is an agency that ultimately acts as a prosecutor, and so, in my judgment, the heart of the problem here is that you need, in your investigatory process an attitude, a culture, if you will, where the people that conduct those investigations do so without any preconceived notions of whether or not a violation has occurred or not, but seek to objectively evaluate whether or not a violation has occurred, and then make that objective recommendation to you, and then you decide whether or not you're going to act as a prosecutor.

I think, if that were so--

CHAIR WEINTRAUB: Mr. Bopp, time is up.

MR. BOPP: I am sorry. If that were so--

CHAIR WEINTRAUB: Your time is up, although I appreciate your persistence. I am sure that's part of what makes you a good advocate.

Mr. McGahn, over to you.

MR. MCGAHN: Thank you. Thank you. Good afternoon. I appreciate the opportunity to testify here today. It's somewhat of a unique hearing. Self-analysis is sometimes difficult, sometimes helpful, and hopefully I can be of some assistance here from my perspective, which is one

of someone who primarily defends folks accused of things, although I have filed complaints from time to time, sometimes more often than others.

[Laughter.]

MR. McGAHN: So I have seen--Commissioner, it wasn't really that funny.

[Laughter.]

MR. McGAHN: So I, to a certain extent, have that perspective as well, seeing complaints I've filed go through the system, and what comes out on the other end, as well as being on the response side, seeing the two different perspectives.

To say that the Commission is simply an agency that investigates and ultimately, if you want to go to court, you ultimately can, so therefore we don't really need to concern ourselves with due process, and open hearings. And that sort of thing I think oversimplifies the modern day concerns, although it is true that the Commission cannot enforce the law on its own. It would have to go to court. The process here can be quite daunting, and we have all heard many times that the process can be, and sometimes is, the penalty.

I heard part of the testimony this morning and there was talk of reputational injury and that sort of thing. That is very true. It has gotten to the point where people are taking RAD letters and making them in the

campaign ad, saying this person, you know, the FEC has sent a letter saying this appears to be a violation, and they make it sound very bad.

Those of us who know what RAD letters are know that if you simply respond and amend, they are not really all that big a deal, but they can be construed into something that they are not.

So although we can say much of this doesn't really have an impact on respondents because ultimately they may be cleared, and it was just a misunderstanding, the process can be very painful and costly.

To run through some of the issues that others have run through, the issue on complaints as to who was a respondent, that is a thorny issue. Let's not throw out the baby with the bath water. I want to say at the threshold here there's a lot of good things that the Commission does, and there are a lot of procedures that do work, and there are, for the most part, things that are predictable and notwithstanding folks like me who screech about things routinely, there are some good things out there.

However, there are some problems, and there are some consistent themes that I think could use some work, and the first is who's a respondent in a complaint.

There doesn't seem to be any clear standard as to who really is a respondent. The obvious test would be did the complaint mention the person as a respondent, but that

doesn't necessarily get you to where you need to go because the person may not have artfully drafted the complaint. There may be an allegation that is screaming out in there for investigation. Simply because the person was not named as a respondent, that doesn't mean the Commission ought to turn a blind eye.

On the other hand, there have been cases that have resulted in a somewhat bizarre service of complaints. There was a MUR, I recall, where someone had accused someone of taking excessive contributions, unencumbered by the fact that at the time the limit was \$1,000 per election. They had thought it was \$1,000 per cycle, so anyone who gave them more than \$1,000 was named as a respondent and got a copy of the complaint.

So there were hundreds, in this case, of people who got complaints, and donors, and they were less than thrilled to be sent a letter that says, "We have received a complaint that says you may have violated federal law."

The same is true of a complaint I filed once, where someone had executed an affidavit and received a copy of the complaint saying he may have violated Federal law. Obviously, he didn't. He was the factual predicate for the complaint.

I've also heard stories of people who are the complaint filers themselves get the complaint back because they had alleged some wrongdoing that they witnessed, and

now therefore they may have some information. So they are both a complainant and a respondent. It's tough to do, but apparently it has happened.

The discovery process at the Commission is, at times, equally ad hoc. The Commission is at a disadvantage because its subpoena power is not self-enforcing. You'd have to go to court to enforce a subpoena. So what has really arisen is I think an understanding that we will comply with subpoenas, but ultimately you would have to go to court to enforce the real tricky stuff.

So there is this sort of what I think is a good system, where it is not overly strict, and time limits and the like are not ironclad, as they are in federal courts. That's one of the positive things I see. Because, ultimately, because the subpoena power is not self-enforcing, we, the defense bar, could effectively say, We're not complying with any subpoenas, take us to court, every time and grind the process to a halt.

That hasn't happened. I'm not saying it will happen, but if we firm up too much in the subpoena power, that could result.

I see I'm on the yellow light, so I'm going to breeze through the other topics.

Other things in discovery, conduct of depositions and the like, it's routine to be told that things like the Federal Rules of Civil Procedure and Federal Rules of

Evidence do not apply, although there doesn't seem to be much of a justification for it because, again, the Commission would have to go to court to bring a case, and those rules would apply.

I'm going to cut off now because the red light is there, and I'll happily answer questions and try to further assist the Commission.

CHAIR WEINTRAUB: Thank you, Mr. McGahn. I appreciate your cooperation. After all, it wouldn't be fair to Mr. Bopp if I let you go on into the red light, after I made him stop.

Mr. Noble?

MR. NOBLE: Thank you very much, Madam Chairman. I think there is a "sword of Damocles" in the form of a clock hanging over my head, but that's fine.

Madam Chair, Mr. Vice Chairman, members of the Commission, General Counsel, Staff Director, thank you for the opportunity to testify. Today, I'm testifying on behalf of the Center for Responsive Politics and its FEC Watch Program.

Unlike other witnesses here today, I think unlike any other witness here today, I bring to the table the view obtained from 23 years of trying to enforce the federal election campaign laws, 13 of which, as you know, I spent as General Counsel.

And I understand, this morning, your present General Counsel or able General Counsel has been assured several times that all of the nasty comments being made by the General Counsel were not being actually made about him. So I take that as a point of honor, frankly.

[Laughter.]

MR. NOBLE: It's because of the experience I had, and it's because of what I've seen since I left the agency that I want to take a few moments to make a couple of observations.

We have filed more detailed comments, and I'm not going to go over our detailed comments. I assume I will get questions on it.

First, let me state what should be obvious, but from reading the comments of others, may not be obvious. The FEC is a law enforcement agency. First and foremost, the FEC is here to enforce a law. It was created to civilly enforce the Federal Election Campaign Act. In that role, it serves as both an investigator and prosecutor. So does the General Counsel's Office. It serves as an investigator and prosecutor. That is what Congress created.

Its mandate is not to make sure that both political parties have the same opportunity to fund-raise; rather, your mandate is to deter violations of the law and seek punishment for those who do violate the law.

The FEC owes its main duty to the victims of campaign law violations which, in some cases, are opposing candidates or opposing political parties, but in all cases they are citizens who have the right to demand that the laws of the land are enforced fully and fairly.

Let me submit to you that campaign finance law violations are not victimless crimes. Citizens who have a right to have their laws enforced, who have a right to clean campaigns are the victims of these campaign finance violations

This commitment to enforce the law is not lessened because there's a law dealing with the activities of candidates, officeholders or others who control the levers of power in this country. It is also not lessened because you may have doubts about the wisdom or the constitutionality of the law.

Second, the FEC's present procedures comply with the requirements of due process. Outside the administrative fines area, and some Title 26 matters, no matter what procedures the FEC puts into place, no matter how many hearings or so-called due process rights it gives respondents, the FEC cannot impose a penalty or order anyone to take action. It does not sit as a court, a judge or a jury.

The closest analogy I was ever able to come up with when I was here is a civil grand jury. It sits as a

body that is here to decide whether a case should be brought forward, whether a case should be prosecuted in court.

At the end of the day, if the FEC cannot settle a matter, it must bring an action into the court, where, as we are all painfully aware, the burden falls upon the agency, as it should, to prove its case de novo.

The fact that the FEC is not an adjudicatory agency is central to the question of what due process rights are owed respondents. As has been said many times by the Supreme Court and lower courts, due process is that process which is due, given the circumstances. Not only did Congress not provide for trial-type hearings or the right to cross-examine witnesses before the agency, nothing in the Constitution, nor any statute, requires it.

In fact, Congress already gave respondents far more rights than constitutionally required when it created the statutory enforcement process, with its numerous steps and cumbersome procedures.

Finally, while the views of those subject to enforcement actions are an important element in this review of the enforcement procedures, their comfort and satisfaction with the process should not be your main focus.

Frankly, I think it is somewhat odd for an enforcement agency to be almost solely focused on what those who are subject of the enforcement actions think.

The review of the agency's enforcement proceedings should focus on how to make the process more efficient and more likely to serve the goals of law enforcement. What best served the public interest in effective law enforcement is the question that should frame this inquiry.

Now, I don't want to get into--and I see I'm, I don't have a yellow light yet--I don't want to get into a debate with Mr. Bopp at this point, but I know feelings run strong about certain cases. I would note very quickly that in the Christian Coalition case, the district court issued an opinion, which if you look at the ruling in the case, it expected to be appealed.

It knew it was writing on a clean slate, and it was coming up with new law, and it expected to be appealed. The Commission could not appeal the decision. So to decide what was going to happen in that case, you can't do right now.

The other thing I note, with some reluctance, but since Mr. Bopp has a problem with the way the staff of the FEC, under my supervision, handled that case, I would note, when we got to court, one party was, in fact, sanctioned for discovery abuses, and that was the Christian Coalition.

Thank you.

CHAIR WEINTRAUB: Thank you, Mr. Noble.

I just want to clarify that we are not solely focused on making the respondents happy. It is just that

when we put out the Notice of Inquiry, you were the only one on your side of the issue who was willing to come in here and testify, and we are very happy to have you.

MR. NOBLE: I couldn't turn it down.

CHAIR WEINTRAUB: I'm glad to hear it.

Commissioner Thomas?

COMMISSIONER THOMAS: Thank you, Madam Chairman.

Thank you all for coming.

I think I'll work with Mr. Bopp's comments to sort of frame my question.

We all have grappled, for years, with this difficult question of where do we draw the line in terms of what cases we take off on, what cases we want to find reason to believe on and start an investigation.

Maybe I could ask you all to sort of comment on what you think the "reason to believe" standard is or should be. Some have suggested that we would basically work with a standard that, well, if the complainant has alleged facts that, if true, would constitute a violation, that we better go off on the investigation.

Others have suggested that, well, it's more complex, that you need to evaluate the credibility of the complainant's allegations and factual assertions and weigh that against the credibility of the respondent's response, when they reply to the complaint.

Give me some help here. What do you think? How do you think we should work with that standard, given you've got six wild and crazy Commissioners who don't usually agree on much of anything anyway?

CHAIR WEINTRAUB: Speak for yourself.

[Laughter.]

MR. BOPP: I think it's a really difficult question, Scott. I really do, and I know that it's difficult for you all in dealing with it. I think there's sort of various considerations that I would take into account.

I think one is the, well, a couple would be that I think Don is right when he talks about the, as the Christian Coalition case is an example, that the process can be the punishment.

Secondly, that we are dealing with core First Amendment rights. Even with laws that, of course, have been upheld as consistent with the Constitution, they have been upheld, in the vast majority of cases, even though they impact First Amendment rights, because there are compelling interests.

And I think our presumption in a democracy is that the people should decide as a result of the election, not the bureaucrats as a result of levying fines and investigating the actors.

I think one other factor is that the likelihood that the Commission is going to be used for or attempted to be used by people outside of the Commission for partisan purposes. If you can entangle your political opponent in an investigation, you've accomplished something, all right, in terms of their ability to participate in our democratic government, if they're entangled in an investigation and you're not.

Now, I think I would probably use a prima facie case standard. In other words, I would take the complaint, and if there is a response, I think you have to take the response also, and evaluate whether or not there's a prima facie case stated, and if there's a prima facie case, then it's worthy of an investigation. And it's really up to the respondent to come forward and affect that consideration, in terms of making a response, as you invite them to do. If they choose not to, then all you've got is the complaint.

COMMISSIONER THOMAS: Do we have a response from either of the other panelists?

MR. McGAHN: RTB I always see or maybe it ought to be, I don't know if it actually is, but a three-part analysis:

First is does the complaint state a legal claim? I think part of some of the atmospherics around the Christian Coalition MUR, and then a couple of other MURs that occurred soon thereafter where the Christian Coalition

MUR was cited as the legal predicate, was that as a matter of law there wasn't a violation.

Now, I'm not going to get into the whole "issue ad versus express advocacy" debate. We can rehash that forever. But there was, in a sense, that is there a predicate legal violation on its face or is this something where we're going to do a factual inquiry first before we see, as opposed to looking at the content of the speech?

The second area would be the facts, and I think there does need to be some showing of some credible facts. Now, of course, complaints have to be under oath, so you would think that means there are credible facts. That being said, newspaper articles from weeklies and cryptic references from news sources and things that really are hearsay probably ought not support a finding of RTB. Where the bright line is, is for the Commission to decide on really case-by-case bases, I think.

But I think you do have to keep in mind that people can say just about anything and put it under oath, and still be okay with telling the truth because it's based on information, and belief, and the like, and those sorts of things. I think you have to be careful in moving forward on complaints that are based on speculation.

Third, is Commission resources and the like, is it the sort of violation that the Commission wants to investigate or is this something that may go to ADR sooner

or is this something that perhaps can be conciliated quickly?

Do we need an RTB finding to move this along. Is this the sort of thing that we really want to prioritize or not. I mean, that's sort of the intangibles that, sitting out here, I'm not really sure of the details of the Commission's thinking on those sorts of intangibles, but to me that's a three-step process, at least how I see it.

CHAIR WEINTRAUB: Well, even though the red light is on, I feel it would not be fair not to give you a chance, if you want to make a quick response, Mr. Noble.

MR. NOBLE: A quick response. I always view the RTB finding as close to a motion to dismiss, which if the allegation stated would be a violation of law, there is reason to believe, recognizing that in the exercise of prosecutorial discretion, and having gotten a response, there may be those cases where the allegations are just so clearly wrong from the response as a factual matter that you would not find reason to believe. But as a practical matter, I think in most cases, the question is does it state a violation of the law.

CHAIR WEINTRAUB: Thank you.

Commissioner Toner?

COMMISSIONER TONER: Thank you, Madam Chair.

I want to thank each of the panelists for being here. Particularly, with the extraordinary time pressures

that you face with the McConnell v. FEC constitutional challenge, I really appreciate you making the time to be here.

Mr. Noble, I would like to begin with you. You indicate at Page 5 of your comments that release of relevant depositions and evidence to the respondent may have some benefit, I think you say on Page 5, and that the FEC should establish a minimum baseline of what will be released to respondents.

At the morning panel, I think a consensus emerged that the FEC should seriously consider providing across-the-board access to the investigatory file that the Commission develops to respondents prior to probable cause and that respondents and witnesses should have access to their deposition transcripts, as they do when they're in court.

I'm wondering what are your thoughts on that? Do you concur in that judgment?

MR. NOBLE: No, but I'm not surprised that there was actually uniform thought about that this morning.

No, I think, again, the FEC is an investigatory agency. I think, as with all investigatory agencies, you have a right to keep investigations or parts of investigations from the respondents so that they cannot destroy documents, they cannot modify testimony, they cannot coordinate testimony. I know that's shocking to think that

people will do it, but I can tell you, in the 23 years I was here, we were aware that people were doing it.

So I think that you have to balance the need for moving the investigation along, making sure that you're getting what you need with what may be fair to the respondents. And what I suggested is, and I think this happened while I was here, is that when you reach probable cause to believe, it may help the investigation, it may help the agency at that point, to release information to the respondent so they can reply to it.

However, since it's still at the investigatory stage, and still, and since the Commission could still send the Office of General Counsel back to continue an investigation, I think it would be wrong, as a practical matter or as an across-the-board matter to release the investigatory file at that time.

When the Commission goes to court, then all of the Federal Rules of Civil Procedure will kick in, and they will have access to everything they need.

COMMISSIONER TONER: Let me try to get a sense of where you are. Do you think it's appropriate, prior to probable cause, for the agency to release the factual record that it's relying upon and making those recommendations to the respondent, so they can have that in hand?

MR. NOBLE: I don't think there's any requirement to release or you should release the whole, as a matter of

course, the whole factual record. I think you can take a look at it and decide what you think would be helpful to be released at that point.

For example, I don't think it's necessary to release information about other respondents. I understand why they want to see their own deposition, and I think at probable cause to believe that may make sense, but going beyond that--

COMMISSIONER TONER: You think that might make sense?

MR. NOBLE: Yes. I'm not bothered by that. I can see reasons, in specific cases, not to, I should say, also, but the rules deal with that.

But I would be opposed to releasing the whole file across-the-board unless, unless the Office of General Counsel and the Commission made a decision, in a particular case, that they wanted to do it because they thought it would promote the resolution of that particular case.

COMMISSIONER TONER: Do you think that the Commission, whether it's required by the Constitution or not, should provide the respondent, prior to probable cause, any exculpatory information it may have in hand?

MR. NOBLE: What's one person's exculpatory information is another person's incriminating information.

No, I don't think there's any requirement to do that. Again, I think--

COMMISSIONER TONER: Do you think we should do it, though, as a policy matter?

MR. NOBLE: No, I think the Office of General Counsel has a duty to bring forward, and we always looked at it at this way, exculpatory information to the Commission.

But I will tell you there were years I was there that we thought brought forward all exculpatory information, and some Commissioner would find something that they thought was exculpatory that we thought wasn't exculpatory. So you get into those debates.

COMMISSIONER TONER: Would that cut towards providing all of the information in the file? You would avoid that type of debate?

MR. NOBLE: Who, the Commissioners?

COMMISSIONER TONER: Right.

MR. NOBLE: No, the Commissioners have to have access to all information in the file. All I'm saying is deciding what should be called exculpatory is sometimes not an easy process, but--

COMMISSIONER TONER: Sure. And what I'm suggesting is if you provide the entire factual record to the respondent, you avoid having to make that judgment.

MR. NOBLE: Right, but you also may undermine the investigation.

COMMISSIONER TONER: Do the other two panelists have any reactions to these issues?

MR. BOPP: Well, I think that the Commission is ill served by General Counsels' approach to their investigations; that they approach them as a prosecutor. Because I think that then deprives the Commission of information, arguments, et cetera, that would benefit the Commission in deciding whether or not to proceed with a violation.

I think as long as the General Counsel's Office acts as a prosecutor in the investigatory stage, then you ought to, as a policy matter, provide as much due process as you can because it will benefit you--

COMMISSIONER TONER: Do you think we should provide exculpatory information?

MR. BOPP: Yes.

COMMISSIONER TONER: Do you think we should provide the entire factual record?

MR. BOPP: Yes. Because--

COMMISSIONER TONER: Do you think that might aid in settling cases or having them be disposed of?

MR. BOPP: It will aid in settling cases, and it'll aid the Commission in deciding whether or not they should proceed to probable cause. But I guess my overall suggestion was, though, that the problem here I think is the approach of the General Counsel's Office and that flows, in part, from the fact that he has too many hats.

In other words, if I were to make a recommendation on how you would deal with this, I mean, I would divide the staff; in other words, I would have one staff, you know, and maybe have them under the Staff Director or someone else.

You know, one staff, you do have one staff, but they all answer to the General Counsel. In other words, one staff that is charged with investigating which would be to provide you, and we all know this as lawyers, you talk to clients, you provide objective legal advice, in other words, of what the law is, what the facts are and then the client gets to decide.

That is a much different presentation than it is as a prosecutor or as an advocate. And my problem that I think has caused problems with the Commission and has victimize respondent is that the General Counsel acts as a prosecutor when they are talking to you in the context of an investigation.

And I think if you would take a look at the General Counsel report in the Christian Coalition case, which I think is a classic example of a prosecutorial document as a result of an investigation, and if you take a look at that and compare it with the General Counsel's report on the investigation of the AFL-CIO, which I consider to be an objective legal advice-type document, you will see the difference.

And I think, unfortunately, too often the Counsel's Office is acting as the prosecutor.

COMMISSIONER TONER: Thank you.

CHAIR WEINTRAUB: Thank you, Commissioner Toner. Commissioner McDonald?

COMMISSIONER McDONALD: Thank you, Madam Chair. Thank you, Jim, Don, Larry. Good to see you.

I maybe will take the last point first and ask you, Jim, the bottom line, I mean, you described something at the outset that I think every agency like ours is confronted with. I look at the morning news, and I see that a gentleman is going to get seven years for insider trading, if he flips somebody, he may get less, I'm told. The news can't say that that might--it seemed a little harsh in relationship to other penalties.

When you were discussing the culture, and I'm speaking from having been here and on the inside, it wasn't a culture I guess that I saw. It was kind of ironic. You drew a kind of a conclusionary comment about what the culture was inside. Now, I'm not debating you saw it that way, and don't misunderstand, but it wasn't a culture I saw, and I must say it's not that one that we strive to project on either side.

But I'm just wondering how we parcel this out. I mean, we're going to have cases that we proceed on that four Commissioners think that they ought to proceed on. There's

going to be a lot of people that get off. Your point was very well taken. I mean, that's just a fact of life.

This morning there was a guy pulled off the road on Indian Head Highway that was going over at least 55. Since all of us were driving about 70, I assume he might have been going 75 or been somewhat unlucky, I don't know.

It just strikes me that I don't know how we combat this. When we go up, and we testify before the Congress, if I'm after a member of Congress, I'm a nitpicking bureaucrat. If I'm not after their opponent, I'm soft on crime. This is the kind of thing I've seen, and it's never changed since I've been here.

And I'm wondering what you think we could do, as a practical matter, to get at that. I mean, we're always going to have the kind of problems, I thin, that you've alluded to with anybody that has a client before us; do you not think that's true or not? Am I just way off-base?

MR. BOPP: Well, I think that lawyers understand the different role. I mean, they understand that it's one thing to be an advocate for a position, and it's another thing to give your client objective legal advice. I think in too many, in cases that, you know, too many that I'm aware of, I think that the General Counsel is acting as a prosecutor within the context of investigations, when I believe he should be acting as a lawyer giving objective legal advice to his client.

And I agree completely that this is not unique to any particular federal agency that's in a position like yours. I think it's--and that's why I talked about it really as a culture; in other words, as an understanding of the role that the particular lawyers serve in carrying out the responsibilities with the Commission.

And if you all insist, and the supervisors insist, that they act as that kind of lawyer, then my concerns about due process, not as constitutionally required, but as a policy matter, are lessened. But as long as that you have an approach to investigations as a prosecutor, then I'm in favor of as much due process as you could swallow because it'll serve you better. Because if you're not getting objective legal advice, then you need the advocacy on both sides.

COMMISSIONER McDONALD: Well, I must confess, obviously, if you start with that premise that you're not getting, that that's--your point is well taken. I'm not so sure I would concur that I didn't, at least I didn't think, and apparently four Commissioners didn't think they were getting objective legal advice, but maybe that's so.

Do these terms ring a bell--coordination, potential for coordination? Did those ring true in that?

MR. BOPP: Oh, yes.

COMMISSIONER McDONALD: And those are out of the AFL-CIO case, by the way, the General Counsel's report. I

just want to be clear that it wasn't necessarily just in one area, but those were the same kind of phrases that were used in the GC report for the AFL-CIO.

MR. BOPP: And I guess my follow-up to that would be, in terms of how you conduct your business, I think that you should minimize the times in which you use enforcement actions to deal with areas in which the law is unclear. I think that is fundamentally unfair to the respondents that are the--you know, they end up on the receiving end, when others don't who are doing the same thing.

I think it jeopardizes First Amendment values because while you pursue one theory, it may be the Constitution requires another one as, of course, has occurred in some cases, and that rather than deal--and I think the Christian Coalition case was an example of using an enforcement action to try to create or clear up or make certain or whatever what was very uncertain law with respect to coordination.

I think you are well advised to use rulemaking for that purpose; in other words, come up with a rule. You know, there is an unclear area here. Don't use an enforcement action, right? Maybe this will be the impetus for a rulemaking. Then, you have an established legal standard that applies to everyone, and also it's subject to review by the courts on whether or not you've come up with the right one.

And then it can be enforced, I think, in a way much more consistent with all of the values at stake.

COMMISSIONER McDONALD: Thank you. I want to follow up, and I'll do it next round.

CHAIR WEINTRAUB: Thank you, Commissioner McDonald.

The Vice Chairman?

VICE CHAIRMAN SMITH: Thank you, Madam Chair. I thank all of you for coming.

I think in this round of questioning, I'm going to direct my questions I think primarily to Mr. Bopp and Mr. McGahn, and in the next round probably to Mr. Noble, but we'll see.

I guess, Mr. Bopp, I want to know, first, or I just want your thoughts. You mentioned you talked some about the Christian Coalition and the extent of the investigation and so on. You talked a little bit about First Amendment rights.

Although the organization was ultimately, in your view, largely exonerated of the charges, what would you say was the impact of the litigation on the organization or other organizations or people and their willingness to participate in what were, based on the court decision, legal campaign practices? Do you think it had a detrimental effect?

MR. BOPP: Very detrimental, certainly to the organization, in terms of time, money, reputation, and attention to the activities that they were founded to do. It had a severe effect on the organization. It had a partisan effect on the system because they were subject to an investigation for activities that many other organizations were conducting at the very same time and suffered none of those effects of the investigation and subsequent suit.

And I think it is chilling, and the irony is, it's chilling with respect to activities that were, at the end, found to be perfectly lawful. But the prospect of being subject to this kind of investigation and this kind of cost and reputation damage is chilling, and it's a terrible result, and surely all would agree it's a terrible result if that ultimately was unjust, that the organization didn't commit any legal violations.

I mean, the advantage of rulemaking is that it would provide a standard, rather than try to establish a standard in the context of litigation, that people can obey prospectively and that would be applicable to everyone. So I think that's a better route, in many cases.

VICE CHAIRMAN SMITH: Do you have any numbers, I don't know if you can provide them if you do, do you have any sense of the total cost to the respondent in that case, to the Christian Coalition, not just legal fees, but their

total cost of responding to that investigation or would you care to put an estimate on it?

MR. BOPP: I don't know. No one that I have ever heard of has been involved in a case with 81 depositions. I mean, that's just unbelievable that an organization would have to suffer that size of a case.

VICE CHAIRMAN SMITH: Do you find it at all alleviating that if we'd appealed the case, you would have gotten to go further through the court system?

MR. BOPP: Well, no.

[Laughter.]

VICE CHAIRMAN SMITH: I didn't think so. It's an interesting debate.

MR. BOPP: And I think the Commission is entitled to look at--well, I think the Commission should respect decisions and that they should, if they believe that they are correctly decided, they shouldn't force respondents to win at all levels.

VICE CHAIRMAN SMITH: Let me ask you and Mr. McGahn both, to close out this round. Neither of you submitted extensive written comments in advance. Do either of you have proposals you would make that you think would be beneficial that would not slow down the process, and indeed might even speed up the process? Or do you think that in certain cases granting more process might help to speed up actually the enforcement process?

MR. McGAHN: I think there's many instances where granting more process would actually speed the process up, although that may seem counter-intuitive to some, in my experience it wouldn't necessarily be so. There was discussion this morning about oral argument and appearing before the Commission and the like. It is amazing how many folks come to me with an FEC problem and they want to know what I'm going to argue before the Commission, and I have to explain to them that's not the way it works. It's briefs. General Counsel's Office presents them to the Commission. And it seems very counter-intuitive to people. They sort of picture their champion standing before the Commission and making these eloquent points.

I'm not going to suggest you need oral argument in every case, but there may be a system where parties may request oral argument, and there may be times where certain Commissioners or more than one Commissioner may want oral argument because something simply isn't clear from the brief.

VICE CHAIRMAN SMITH: Are you suggesting that without some of those things, respondents are less cooperative, perhaps or--

MR. McGAHN: Absolutely. Certainly, the culture feeds into itself, where, for example, you're in a deposition and your client is being asked a series of questions and you know something is coming up, and you'll

ask the counsel, "Is there a document that you are talking about," and they will ignore you and they will not answer the question. Now, under the Federal Rules of Evidence or the rule in Queen Caroline's case and common law, there are well-established rules, when you ask for documents, they need to make a good faith showing to what it is, but there's this "gocha" mentality, and it's happened in depositions, and not just happened once. It's happened time and time again. So then from the deposition process your client leaves thinking, "Gee, these guys aren't playing straight." Then they find out there's no oral argument. Then they think, "Is this a rigged system? Why don't I get my day to say what's on my mind?"

And I'll close with the thought that it is amazing how when people get to say what's on their mind or present their case, how much happier they are with the result, even if it's the same result. And they're much quicker to accept the ultimate problem if they feel like they've been heard, and simply talking to me and me saying, "This is kind of what's going on, and then we submitted this brief," there isn't that sense of closure and that sense that they have been heard. Then when the only option is to go to Federal District Court, that's not really an option for most people, and as we know, very few cases really get to court, except for the more larger cases or if somebody really wants to prove a point.

So I think opening up the process would actually expedite the process in so many ways.

VICE CHAIRMAN SMITH: Thank you.

CHAIR WEINTRAUB: I have some sympathy for you, Mr. McGahn. As you were telling that story I had a recollection of a client of mine who himself wanted to personally come and make his argument before the Commission and was totally convinced that if he could have done that, he surely would have swayed them. I'm not so convinced myself, but in any even, we'll never know.

And I also have a lot of sympathy for Mr. Bopp. I understand how you feel, that the agency, that the agency functions, in your perception, with a prosecutorial mindset. I never represented anybody before this agency that didn't feel that they were being singled out and treated unfairly, that other people were getting off easier. I had some who were very industrious about finding examples of other people who had done equally or in their mind worse things, not just equally bad, and you know, got off with lesser penalties. In my experience here, I have to say that I think that you are wrong in your assumptions about how OGC functions.

In my experience here there have many times when they come to us and say, "We are recommending that you do not find--that you do not proceed against this. We've done an investigation. We don't think there's anything to go on." In fact sometimes I find myself challenging them, and

saying, "What do you mean we don't have reason to believe? You know, clearly this guy ought to be investigated."

So I know it feels that way when you're on the other side, but I don't think that that's actually how it goes on.

But let me turn my attention to Mr. Noble because you are the only person representing your perspective that we get to hear from all day long.

There are obviously many times when we find ourselves in a position where we have to err on one side or the other, either erring on the side of providing respondents with more due process rights, which will make them feel better about the process, make them feel, and perhaps others feel that it is a more fair process, or pursuing our investigatory and law enforcement agenda, and you have to make a call which side you're going to come down on. You seem to come down on a different side than everybody else here today.

I'm going to read to you one of the comments of one of our later panelists, or two of them actually. It comes from Mr. Sandler and Mr. Reiff. They say, "If the success of a particular Commission investigation depends on keeping the evidence secret from the target of the investigation even at the probable cause stage, in violation of"--what they term--"every fundamental principle of due

process, that should be a pretty good indication that there is something wrong with the investigation."

And I ask you for a response to that because I have a feeling you don't agree with them.

MR. NOBLE: No, I don't. First of all, and I want to kind of, in a sense, back into that to answer the question because there's a premise there, and it is premising what Mr. Bopp said and what Mr. McGahn said, which I don't accept, which is the premise is that being a prosecutor and being objective are two different things. I don't believe they are. I think as a prosecutor you have an ethical duty to look at the evidence and make a decision as to whether or not you think it's something that should be prosecuted. And as the Chair noted, on why it was here, it was true, that there were times when we'd would come up to the Commission and say, "We do not think there's reason to believe," or "We do not think there's probable cause to believe," and we'd be sent back, and to look again. Or we would be chastised by certain Commissioners to how blind we were to the evidence there.

I always viewed my role here, and I think the staff when I was here viewed their role as being objective as possible, looking at the evidence, looking at the law, and making a decision whether there should be a recommendation as to a prosecution.

Given that, when you get to the end of the probable cause to believe stage, I still approach the whole thing from the perspective that we're not talking about an adjudication here. Everything everybody is talking about is an adjudication. I would pose it a different way. How many law enforcement agencies go through a "reason to believe", "probable cause to believe" stage, are required by statute to try to settle, must have the General Counsel put forth a brief explaining his or her position in the matter before they can decide to prosecute a case. There aren't many of them. We've looked. There may be a few, but there aren't many of them.

And in a sense I think what has distorted this process so much is all of the, quote, "rights" that Congress has already given the respondents. What Congress effectively did--no surprise because they're subject to these laws--what Congress effectively did was give as close to adjudicatory rights to the respondents as they could, without giving the Commission any of the rights that go along with it or any of the powers that go along with that.

So my answer on the probable cause to believe is there is no obligation. I don't think it means anything about what the Commission feels or the staff feels about its case, but frankly, if I wasn't worried about the fact that the Commission may very well send the Office of General Counsel back, or that the respondent would later come in

with more evidence that was constructed after the fact to deal with what the Office of General Counsel had in the investigation, I wouldn't be as concerned about it. But the reality is--and I know the light's off--the reality is we'd all like to believe that all the lawyers out there want to cooperate, and, "Given another chance, I'm sure I can convince you and if I can't I'll walk away happy." I've never seen it happen.

And I will tell you that one of the reasons there are 81 depositions in the Christian Coalition case, as the Court noted, was because--and they were sanctioned for this--they withheld documents. So every time more documents would come--and this was in the litigation--the Office of General Counsel would have to go out and take more depositions or redo depositions and--

CHAIR WEINTRAUB: Well, I don't want to relitigate the Christian Coalition case here.

MR. NOBLE: I'm just saying that--but my point I'm making here is that, yes, it's very easy to sit here, and I've never met a lawyer who didn't come into the investigation and say, "My client wants to fully cooperate, and I'm sure after you see all of this, you will agree my client is innocent," and I've never seen a lawyer do anything but that.

And it's not going to help you to give them more rights. It's going to slow you down and it's going to even make you less effective than you are today.

CHAIR WEINTRAUB: I have more questions, but you used up all my time, so I will pass it along to the General Counsel--oh, I'm sorry--Commissioner Mason. That's what I happen when I scramble the order. I confuse myself here. Commissioner Mason. Sorry.

COMMISSIONER MASON: It's all right. I kind of want to continue this discussion because frankly I agree with you in substantial part on the theory that this is a civil law enforcement agency and our obligation is to define the law, as Mr. Bopp suggested, through regulation, and to enforce it, and so our obligation is to the public. To note what the Chair said, that I appreciate you coming and I wish some of the other people who more or less agree with you had come.

But what I want to probe is the question about whether what you're suggesting really works the way you're suggesting it does, or whether a little more openness might actually promote settlements. And I'll start with an area where I agree with you, and I've said so, and it's quoted in something else here, and that is our enforcement priority system, where we have Tier 1, serious matters; Tier 2, not so serious matters. And the reason we have Tier 2 is so that people who commit sort of middling violations of the

Act are at some risk of having enforcement action. I think that's a good idea, that we not be bound strictly by that. So that's an area where I sort of agree with you, that, as it were, hiding that ball a little bit promotes enforcement, and if handled right, isn't unfair. I mean there is going to be an aspect of some things get enforced and others don't.

But when we get more or less to the end of the process, the probable cause, I sort of question that because of this sense of unfairness on the part of respondents, that we have something that we're not showing them that's secret and so on like that. And I really do see respondents very often responding the way these other counsel have described it. So I wanted to sort of give you an opportunity to think about--you've come some way already in terms of depositions and so on--whether it might not be at least possible that giving some people an opportunity to respond at that stage or an opportunity to see a fuller recitation of the facts--though I agree with you there are certainly going to be some cases where we don't want to give them everything--might not actually promote a settlement by giving them a sense of closure and a sense of fairness.

MR. NOBLE: Absolutely. And while I was here I think that was done on a case-by-case basis. Yes, there are times you're sitting across the table from somebody and you--obviously it's going to move things along to say, "Look,

let me tell you what we have here. What we have is six witnesses who are going to testify they saw him take the contribution or testify they were reimbursed for the contribution" Sure, in individual cases it may. But all I'm suggesting is it should not be the rule that you have to turn over the whole file, because what that leads to is the expectation at that point that, "Well, the next thing we get to do is put on witnesses to counter what you just turned over." And while that also might in some abstract way aid the finding of the ultimate truth if it's out there, that's not what an investigatory agency is about. If you get that--one of the things that I think might come from this, hopefully--

COMMISSIONER MASON: But why not?

MR. NOBLE: Because in the end that's not your job. You can't adjudicate the truth. You don't have the power to do that.

COMMISSIONER MASON: No, but if--

MR. NOBLE: You have to make a judgment of whether a case should go forward.

COMMISSIONER MASON: Yes, I understand, but if providing a respondent with some of the evidence against it might provoke them to provide responsive materials that would give us a fuller picture, isn't that a part of our investigative process?

MR. NOBLE: Sure. I think what we're leaving out of this is if there's a probable cause to believe brief, which often lays out most of the evidence and provokes responses, and provokes disagreements. Again, I mean, that's a rather unique situation where a prosecutorial agency sends out a brief putting forward its position on the matter, and so I don't want to paint this as that they are kept in the dark. In fact, considering most prosecutorial agencies, respondents are given far more information during an investigation than most subjects of investigation are given.

But if you get to the case of probable cause to believe, where you think it is worth giving out more evidence and it will help the case, it will help the enforcement, then, sure, make that decision and give it out. But what very quickly happens at this Commission, and maybe it's changed in the 2-1/2 years I've been gone, is that there's a one-way ratchet. When you give it out to some people, the next person is going to come in and say, "You gave it out to them. I want it now." And then it's going to become, well, since we're giving it out to six people, we might as well give it out to everybody. And then you're stuck in a procedure that's going to take you far longer because you're giving out evidence that they're not required to have, may not be helpful and it's just going to further debate on the issues and for that process.

COMMISSIONER MASON: Mr. Noble, my time is about up and I want to let other people go on, so I'll give you another opportunity if you're not able to come back to it in response to somebody else's question. I appreciate your acknowledgement, and I guess I just have to say I'm a little less concerned about the generic sorts of responses than you are, but I appreciate your acknowledgement that at least sometimes coming forward with this information could promote settlement, and that in essence that's what we are about in a lot of the cases.

Thank you, Madam Chair.

CHAIR WEINTRAUB: Thank you, Commissioner Mason, and again I apologize for not going to you in your appropriate area there.

Now, Mr. General Counsel.

MR. NORTON: Thank you, Madam Chair, and welcome to the panel.

Mr. Noble, I wanted to get your reaction to a concern that occurs to me about a policy of releasing the entire file, and that is the privacy interests of third-party witnesses. I don't have anyone here who is representing those interested today, but as you well know in the FOIA context there's an exemption when a record was compiled for a law enforcement purpose and where the invasion of personal privacy, resulting from release, would outweigh the public interest, and courts have talked about-

-this is grounded in the fact that being identified as part of a law enforcement investigation can subject people to embarrassment and harassment. There's obviously strong public interest in encouraging witnesses to participate in future investigations.

I was wondering if you think that if we were to have a policy of releasing the file, it would be appropriate or indeed we would be compelled to make those kinds of evaluations about third-party witnesses and how we would respect those rights?

MR. NOBLE: Absolutely. I think you would have to be concerned about that. You also get into the unsettled issue of the confidentiality provision, where they are multi-respondent cases and you're giving out information about other respondents, and sometimes in factual scenarios in the same case that aren't really directly connected to the factual scenario in one particular brief. So I think you have to deal with all of those issues.

MR. NORTON: You made the point earlier, semi-facetiously, that you were one of I think 11 people who are testifying who bring a different perspective, and indeed we have 10 or 11 people who have responded to our notice of inquiry, who do bring the same or a similar perspective and almost the same recommendations.

Someone referred recently to the FCC rule making debate, and part of the aftermath of that debate were

accusations about who listened to whom, and that there were town meetings in fact where the Chairman didn't attend and perhaps didn't get the full picture from interested parties. I wonder what you think we could do or should do as a way of rounding out the inquiry and informing ourselves. If what we are going to do is undertake a reevaluation and changes in enforcement procedures, how can we ensure ourselves that we're looking at things we ought to look at, we're talking to the people we ought to look at?

MR. NOBLE: Well, one of the things I said in our comments, and I would reinforce here, I think it is very important--you may have already done this--to go to other law enforcement agencies, and not rely on what either I or other witnesses tell you other law enforcement agencies do.

I found it helpful when I was here to--either myself or have staff go and talk to other agencies, and you come from another agency, and find out from them what they do in less, shall we say, less politically charged, or some less politically charged atmospheres, and what they do when they are trying to enforce the law. And I think that's a very good starting point. You don't have to always reinvent the wheel.

Also I think if you don't feel that you're getting sufficient input from across the board, you may want to open this up again. Even the people who--some of the people who are missing on, if you will, my side, are some of the other

watchdog groups. But there are other people out there. There are candidates who have filed complaints. There are people who filed complaints at the agency and feel they haven't gotten a fair shake. There are people who sat through campaigns where they feel that the law was violated by the other side and nobody did anything about it. So I think that there's a way to reach out to those people. I think that's important. I mean what we have here is what I often refer to as the usual suspects, and I'll put myself in that group, the same 12 lawyers that basically do this stuff, but there are other people out there.

And I have one other point to make on this, is that I was sympathetic, and I remain sympathetic to the impact of being investigated, but the courts have often said that's one of the prices we pay for living in a society of laws, is that, yes, people will be investigated, yes, they will have to pay for lawyers and such, and that cannot determine the whole system. It's a fact of life.

But I would urge you to go out and get more information from other agencies and also from other people who may not have the resources or even know this is going on.

MR. NORTON: You were the one commenter, Mr. Noble, who opposed the idea of making our civil penalty formula public or more transparent. Could you explain? I think what you said in your comments was, so long as we're

negotiating penalties, it would be counterproductive. I'm just wondering what you meant by that.

MR. NOBLE: Well, I think that it comes in part from some very personal experiences here, and I will tread lightly because I still always respect my attorney/client privilege obligations here. First of all I think the civil penalty is set forth in the statute, the kind of the parameter for the civil penalty is set forth in the statute. The FEC then has to negotiate the civil penalties.

I know there was--I think Jan Baran and Bob Bauer years ago put out a newsletter where they tried to figure out what the civil penalties were in enforcement cases by looking at various cases. My concern there is it always comes out as a starting point of negotiation, and the Commission is then going to be asked to move down from there. So if you say, "X violation we're going to start at \$1,500," well, you're at 750 as a practical matter, unless--and this is where it gets personal--unless the Commission was to hold the line, which some agencies do. I can't speak for this Commission because I wasn't here when some of you were here. But my previous experience was not only did the Commission not hold the line, it was notorious on the outside for making final offers that it would then come down from, and would then negotiate against itself.

So it would make a final offer of let's say \$5,000, and when the other side said no, it would say,

"Okay, how about 4? How about 3? All right, we're going to drop the case." And there are specific instances of that, and as long as you're going to do that, I think putting out any lowered guideline is just going to exacerbate that problem. You're just going to keep ratcheting it down, and that's why I was opposed to it in that case.

MR. NORTON: Thank you, Mr. Noble.

Thank you, Madam Chair.

CHAIR WEINTRAUB: Thank you both.

Mr. Staff Director.

MR. PEHRKON: Thank you, Madam Chair.

Welcome, Mr. Noble, Mr. McGahn, Mr. Bopp. It's a pleasure to have you here today.

My question is directed toward Mr. McGahn, who earlier you had made a comment with respect to the RAD letters that go out, and that they give at least some people the impression that the Commission has decided that a violation has occurred. Could you elaborate on that for me? And what--is this a problem? And if it is, do you have a suggested solution?

MR. MCGAHN: I have seen from time to time people go through the RAD files, pull RAD letters and try to make them into something that they're not. I'm not sure what the solution is to that other than people being a little bit more intellectually honest with themselves when they try to spin these RAD letters into something they're not.

The RAD letters are form letters. There may be a way to rework the form letter a little bit--and they're not all form letters; don't let me assume that they're all form letters--but there are general boilerplate that goes out for certain reporting errors or whatnot. There may be a way to caveat it to make clear that this is not a Federal offense or that sort of thing where somebody can take it and do something different.

The same is true with some other form letters, particularly the ones that accompany complaints, where it says, "The Commission has received a complaint, indicates you may have violated the Federal Election Campaign Act." That's a sentence that always terrifies people, and that sentence can be used down the road to say, "Well, the Commission sent you a letter saying you may have violated federal law. Obviously, there must be some basis for this," when in fact there really isn't other than your name is mentioned in a complaint somewhere. So perhaps it may be wise to take a look at some of the form letters. I'm not sure particularly with the RAD letters how you can inoculate them any more than they already are. I just said it more to let you know that it's gotten to the point where people are even taking RAD letters and trying to make something out of them.

MR. PERHKON: Thank you. I have no further comments.

CHAIR WEINTRAUB: Thank you, Mr. Staff Director.
And back to you, Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Madam Chair.

Let me go to a topic that at least for me is one of the most important that we have to deal with in the enforcement process, and that's the timeliness, the speed with which we can get cases resolved, and it's been alluded to with regard to say the Christian Coalition case. I haven't gone back to sort of parse how much time was devoted to the investigation at the administrative level versus how much time was taken up with litigation. I think both of them took a pretty long stretch of time, to be honest.

And I would note that there are some cases that just by their very nature, involve some very complicated fact patterns. I was involved years ago as a staff attorney with the AMPAC investigation. It was a broad nationwide investigation, and it was a matter of basically whether state PAC organizations should be viewed as affiliated with AMPAC here in Washington and I guess in Chicago, and very complicated. We did lots of depositions all around the country. I was also involved in the draft Kennedy Committee case which involved all sorts of depositions all around the country because there were draft Kennedy Committees set up, and we had to go around and basically try to figure out whether they should all be viewed as affiliated with one another, very tough factual investigation. You really have

to dig from the enforcer perspective for the kind of evidence that would prove out whether the allegations were true or not.

Just wanted to get the reaction of all of the panel members. At a certain level, isn't this agency responsible, perhaps above all else, for asking for enough staff resources in order to timely investigate these matters? Would that perhaps have been a helpful matter in trying to more quickly resolve the allegations that were involved in cases where you have all had responsibility?

MR. NOBLE: I can go first if you'd like, because I can tell you this--and I'll make this one short--when we were doing the investigation of the '96 election with both sides, the issue ads, and the Department of Justice was doing the same thing. What always surprised me was--and I don't remember the exact details. I have them somewhere in my files. I had somebody look into it. The Department of Justice had over 120 people investigating the '96 violations. We had 7. The Office of General Counsel had 120 something people to do all nationwide enforcement of law, all audit related work, advisory opinions, regulations and all else.

I didn't hear anybody complain at the time the Department of Justice had too many people, not to mention the fact that a Department of Justice investigation in many cases drags on for years. Independent counsel of special

counsel investigations drag on for years with far more people than the Office of General Counsel has.

I've always felt that one of the basic problems in this system is that there are not enough resources for serious law enforcement.

MR. BOPP: Well, I think one of the--again, this is a difficult and complicated question you're asking, and I think one of the reasons the Coalition case took so long, it is true that there were a number of allegations regarding different campaigns that certainly were being investigated, but one of the factors was that the law was unclear, and so the Counsel's office I think was kind of in the process of formulating a theory of the law, while at the same time--and then seeing whether or not the facts supported the theory. And I think that complicated the case and I think it made it longer and more difficult.

And I think, and as I've urged, I would urge you to do rule making as opposed to investigations as a mechanism to clarify the law. And I also felt that the Coalition's case was well staffed from the FEC perspective. In other words, my impression of it was there was definitely an adequate number of lawyers to conduct the kinds of investigations that they were trying to do, but I think those factors, the multiple allegations involving multiple campaigns, and the unclearness of the law, both made--came together to make it as long and as difficult as it was.

MR. McGAHN: I'm not so sure it's purely a question of resources, and I am not entirely familiar with how many lawyers are assigned to particular cases, so I can't speak to that. But what I can say is that in my experience there are times where I feel that things could move quicker from the General Counsel's Office. It's tough for a defense lawyer to say this when there's a 5-year statute of limitations, to say, "Gee, could you move it along?" Because you could obviously pass the ball around for a while and try to run out the clock, but 5 years is a long time, regardless of the complexity of the case. And I have had letters that sort of seem to go away for a while, and then I get a response, a little bit more time than ought to have passed.

Depositions are somewhat unique here in that virtually every deposition where I have defended someone, there have been multiple lawyers from the Office of General Counsel, sometimes 3, sometimes 4. There was one where there was 5. One fellow sort of dozed off at the end of the table. When I mentioned it on the record, he went ballistic as you can imagine. But that's the sort of thing that makes me think do we really need more resources or do we need more targeting of the resources that exist?

Compare this to the public integrity section, which I don't visit often but occasionally have to go for someone who's not a target, of course, merely a witness or

the like. There's the prosecutor and there's one FBI agent. And maybe others have had other experiences, but in my experience it is a much tighter ship notwithstanding what I assume to be accurate numbers proffered by Mr. Noble. Justice is quite large and they certainly have ample people to do ample things. But in my experience the perception is depositions and meetings, and there tends to be a lot of OGC people there that seem to be somewhat redundant.

COMMISSIONER THOMAS: If wee could trade stories on sleeping attorneys, I think we would see it in every walk of life. A lot of attorneys work very long hours and they end up sleepy at the wrong times.

MR. McGAHN: It happens.

CHAIR WEINTRAUB: And I frequently look out when I'm conducting one of these hearings and find people nodding off very often, so it happens here too. Although I must say that the fact that we sent 4 or 5 attorneys to go up against you, Mr. McGahn, is clearly a tribute to your fearsome reputation.

MR. McGAHN: I don't know if that was it. Just as an aside, the fellow--it wasn't just a nap. It was sort of a dramatic--

[Laughter.]

MR. McGAHN: It's funny now, but it was quite disturbing to the witness who was actually trying to answer

questions and thought he was in some trouble, and meanwhile this guy is sort of dozing off.

CHAIR WEINTRAUB: I would think the witness would have been comforted by that.

It's Commissioner Toner's turn.

COMMISSIONER TONER: Thank you, Madam Chair. I am shocked to hear that sleeping is occurring at the Federal Election Commission. Got to stamp that out immediately.

[Laughter.]

CHAIR WEINTRAUB: We need to provide free coffee around here.

COMMISSIONER TONER: Clearly, and the high-test variety. Forget this decaf stuff.

Mr. Noble, in your comments on page 7 you talk about how you recommend that the Commission should revisit its memorandum of understanding with the Department of Justice, and I was wondering, while you were in General Counsel here, what your appraisal was of the MOU with DOJ and how it worked vis-à-vis the Commission? And also, do you think BCRA introduces any new elements that we ought to look at?

MR. NOBLE: I think since BCRA increases the criminal penalties and makes criminal prosecutions maybe just slightly more possible or probable, I don't think it's as bad as other attorneys think it is in terms of all the

criminal prosecutions that may come from it, but I do think you do need to revisit it.

The memorandum of understanding I think is '77 or '79.

COMMISSIONER TONER: 1977, that's right.

MR. NOBLE: And it served its purpose at that time. It really became outdated over time. And what happened was we actually did upon occasion approach the Justice Department, but it never really went anywhere. And it was a moving target in one sense, because as the Department of Justice in the '90s got more active--for a long time they stayed out of a lot of these cases--as they got more active, we really had to feel our way around with the Department of Justice of what's the best way to handle criminal and civil investigations at the same time, concurrent investigations. So things would come up that occasionally require us or make us think that we should go to the Department of Justice, but it was always difficult. There are obviously different interests involved in it, and so we kind of muddled along, and at various times had very good relations with the Department of Justice, some cases not such good relations with the Department of Justice.

But I would urge the Commission, I think you're almost required now after BCRA, to go back to them and say, we're dealing with a 25-year-old memorandum of understanding. We need to look at it again.

COMMISSIONER TONER: Do you recommend, even if we go through that process and conclude that the division of labor that's set out in that 1977 MOU should remain the same and there really aren't any other major changes that need to be made, would you recommend nevertheless that we execute a more contemporary document, you know, sometime this century, as opposed to relying on, I think as I understand that you're saying, is a good document, a good structure, but there's been some stresses on it over the years?

MR. NOBLE: Yes. And I think any time you look at something that's 25-years-old and you see the law has been amended in between that time and procedures have changed, you wonder how relevant it is. So I think, yes, you should--even if you decide not to make a lot of changes in it, you should re-enter into a memorandum of understanding.

COMMISSIONER TONER: Mr. McGahn, I'm interested on following up on a concept that was discussed this morning, and that is downward adjustment. As I think was noted, the U.S. Sentencing Commission regulations do provide for downward adjustments for defendants that volunteer information sua sponte. I was wondering--and I recognize it's a perennial issue--if we were to have downward adjustments here to define what is a sua sponte submission, as opposed to somebody who comes in 12 hours before the New York Times, is going to run an article outlining their problems, and that is an issue. But what I'm really

interested in is, do you think if we sought to develop this kind of policy here, it would have a practical impact among your clients? Would people be willing, more willing to come forward, to cooperate fully, provide information, if we had a downward adjustment policy?

MR. McGAHN: My instinct is that the answer is yes. If it is in someone's interest to come forward early, often and come clean, and that is seriously going to be considered by the Commission when it comes time to conciliate the matter, I think that's a very strong encouragement. Today I can't promise clients that if they come forward it's going to matter. I think in certain cases it has. In other cases it hasn't. But to me, I don't perceive a consistency, but again, all this presupposes what exactly warrants a so-called downward adjustment, and now we do know there is something to adjust from, at least internally something to adjust from.

It's easy to drop a footnote in your response brief that says, you know, we are interested in pre-probable cause conciliation. We all do that. It's another when you actually do have a situation where it was an innocent mistake and the client is dying to come in and tell somebody they did something wrong. The advice right now is let's be real careful about doing that, because we're not really sure that's the prudent way to go.

COMMISSIONER TONER: Mr. Bopp, do you have thoughts on this subject, downward adjustment something we should look at, or not enough bank for the buck?

MR. BOPP: Nothing more than what's been said.

COMMISSIONER TONER: Mr. Noble, do you have any thoughts on that?

MR. NOBLE: I don't think it's a bad idea, and I think it was done informally, or more formally, when I was at the Commission. It didn't always look that way and there are a lot of variables in it, but people were given the benefit if they came in, if they were truthful, if they cooperated. Sometimes their version of cooperation was not necessarily the Commission's version of cooperation. But I think that should be taken into account. I think it does speed settlements along.

COMMISSIONER TONER: Thank you.

Thank you, Madam Chair.

CHAIR WEINTRAUB: Commissioner McDonald?

COMMISSIONER McDONALD: Is it my turn?

CHAIR WEINTRAUB: It's your turn.

COMMISSIONER McDONALD: I was just resting my eyes while--no, I'm kidding.

I want to go back just a minute. Let me finish up a thought that Larry had, and I had conveyed this to Commissioner Toner at the break as well, we did have that policy in terms of sua sponte matters, and I think the

example I gave was my own self. Now, if my wife's been talking to one of my friends and I inadvertently stayed out a little late more than I should have, and she finds out before I am able to tell her, sua sponte on my part is really not as compelling as it might have been otherwise, I believe is the example I used, and I have been in that position. I think last night was the last time I can recall.

[Laughter.]

CHAIR WEINTRAUB: Commissioner McDonald, we don't want to hear about that here.

COMMISSIONER McDONALD: Well, you never know.

I think it is a good point and I think we certainly have tried to do that over the years if it genuinely was sua sponte, particularly in a case where someone might be taking over a corporate structure, in which in routine investigation they found out that in fact somebody has done something that was not quite beneficial to their cause.

I want to go back, if I could, Jim, not to ruin your career, but I'm going to have to agree with you. I think you are absolutely right in terms of rule making process as opposed to pursuing a matter and making law in the context of pursuing a matter.

But one of the things that's troubling to me about it is--not that I don't agree with you--but, you know, it

reminds me of a lot of concurring opinions. We don't always derive our decisions based on what we all philosophically uniformly agree to or even 4 of us, but that we might find a conclusion that is satisfactory. And it goes back to the point you made early on about clear, when it is clear. I would submit to you that nothing is clear at this agency. I mean you can have lawyers that can fight over anything at any time, and they do. But I would also submit to you that in the context of not so much--I don't much want to rehash a particular case, but in relationship to any case where there are four affirmative votes, for whatever reason, the commissioners thought there was enough to go forward, I think that's the only thing that I would pose to you, is that we did think it was clear.

Now, we may not have all agreed on every dotting every "i" about what we wanted to do, and I would rather not focus on the Christian Coalition case as opposed to any other case that might come up, whether it was the AFL-CIO or anybody else. But you find yourself as a Commissioner in a difficult spot. If you say we ought to do it in a rule making and the rule making ought to be clear, and we all agree what the rule making is, we like to do that, we want to do that. But what I found over time is where 4 Commissioners agree on something, as diverse a group as this is, they do think it's clear, in a manner of speaking in terms of the statute to go forward. I just wondered if you

don't think it's about the only conclusion, as sitting here I'm talking about, that we can come to, because otherwise we can't see to function it seems like to me.

MR. BOPP: Well, I think you should just consider this in the balance. In other words, that where the law is not clearly established, that your preference would be to do rule making as opposed to establishing the law that is not clearly established in the context of an enforcement action, and I do think it's fair to say that the Coalition case was a classic example of that. It was the first, you know, coordination case that you had. There were no regulations on it. You know, there's a statute and there's accepted views about in-kind contributions, which I agree with, but the General Counsel's Office theory was if you had an opportunity to coordinate, meaning you had a discussion with the candidate in question about anything, that was coordination. That was their theory.

COMMISSIONER McDONALD: Not quite that way, but that's all right

MR. BOPP: And it doesn't matter whether or not there was actual coordination, doesn't matter what was said. I think surely most would agree that that law wasn't established, was it?

COMMISSIONER McDONALD: Well, you could include a number of laws that are established over time.

MR. BOPP: And this is a judgment call.

COMMISSIONER McDONALD: I understand. I'm just curious.

MR. BOPP: It's just something that ought to be in the balance because I think when the law is unclear or uncertain, that there's a lot of unfair results that flow from that, that do have partisan effects, and that the agency should endeavor to prevent that from happening. That's all.

CHAIR WEINTRAUB: Mr. Vice Chairman.

VICE CHAIRMAN SMITH: Thank you, Madam Chair.

Mr. Noble at the start of the day I noted that if people believe that the enforcement of the law is unfair or unequal, it can create a loss of confidence in government, a loss of confidence and support for the law and unwillingness to comply with the law. Would you agree with that statement or not?

MR. NOBLE: I agree with it as far as it goes. I would add to it that if people feel that the law is not being enforced at all--

VICE CHAIRMAN SMITH: That would also create it.

MR. NOBLE: Yes.

VICE CHAIRMAN SMITH: But we agree. Now, with that, I note in your comments, both here and in your written comments, and the notice is very clear that we asked people to comment on any aspect of enforcement you want, you do not make a single suggestion for anything that could be changed

or improved at the Commission, other than that there are certain things we should ask Congress for.

Is it your belief, is there nothing you think that the Commission has the power to do that would improve our enforcement process?

MR. NOBLE: With all due respect, that's not true. I said that you--

VICE CHAIRMAN SMITH: That was a question, in the statement, and said, Is there nothing? So what is there?

MR. NOBLE: In my comments.

VICE CHAIRMAN SMITH: I didn't see anything that was different. They were kind of just like, well, you can talk to other agencies and see what they--

MR. NOBLE: No. I'll give them to you right now. I went beyond that. We said that basically you should take extensions of time more seriously, not just give out routine extensions of time, and the bigger one--

VICE CHAIRMAN SMITH: So that's due process.

MR. NOBLE: I don't view it--I don't view that as due process.

VICE CHAIRMAN SMITH: I understand.

MR. NOBLE: The big ticket one for me was ask for more resources.

VICE CHAIRMAN SMITH: That's asking someone else, which I said, is there nothing we can do with what we have?

MR. NOBLE: Yes. You can ask for more resources, which you don't do.

VICE CHAIRMAN SMITH: Okay. We can ask--yes, we would all like more.

I've got to tell you--and I'm going to close I guess with what's more of a little talk, and then I'll give you a chance to respond to it.

You made much when you came in of your 23 years experience, and that's valid. I think it's fair to say that even 2-1/2 years after you left the agency, you're one of the reasons that the agency enjoys the reputation it has today.

MR. NOBLE: I don't know if that's a compliment or not.

VICE CHAIRMAN SMITH: I would say that the people in the ABA section on administrative law know a little bit about administrative law as well, and I go back--I disagree. I mean you made a point of saying over and over you disagree with almost all the other commenters either here or not here, on how you look at it. But the ABA also disagrees with you, and I think it's worth reading a small part of the comments of William Allen, the Chair of the ABA at the time that they examined this agency. Admittedly, it's 20 years ago, but again, virtually nothing has changed in those procedures. And he writes, he says, "There are avenues for going to court ultimately, but the statute places a premium

on conflict resolution through conciliation. The fact is that the overwhelming majority of election law cases are resolved administratively for a variety of reasons. The cost of going to court is prohibitive in a lot of cases, and a lot of entities that are subject to regulation are mere temporary enterprises and their useful lives limited to a single election, and litigation is simply not worthwhile in those circumstances." And I would note it's probably not worthwhile for the government, nor does it speed the enforcement process which is a big concern.

He goes on, he says, "Accordingly, the procedures of this agency are of very great importance, practical importance in the disposition of a lot of matters having to do with enforcement of the election laws. In the administrative process that the Federal Election Commission engages in, it acts as complainant sometimes, internally-generated matters and respondents, as investigator, as prosecutor, and in a sense ultimately as judge and jury."

And I think that more accurately describes what really goes on here. I have never, ever heard anybody on the other side say, "Well, you know, we didn't mind that the process of the Commission seemed to us really unfair, because we always knew we would get our day in court." I have never heard anybody on the other side express a desire to go to court rather than to settle, and I am shocked that--I mean even for example, you can't even accept the notion-

-You say on the one hand the Commission should not make its penalty schedule public, and yet because--and yet you complain that Commissioners deviate from the schedule too much. Well, making it public, wouldn't that keep people from deviating? It's not so much that you disagree, it's that thought never seems to have occurred to you.

And I would conclude by saying I want to congratulate you. Very honestly, I have talked over the years with a number of prosecutors, commissioners at other agencies, staffers at other agencies, and I don't think I have ever heard a public official voice such open hostility for fairness and ideas of due process for whatever basis, and very honestly, I congratulate on that, and it's only fair that I give you some chance to respond. I hope maybe the Chair will let you go over your red light a bit.

[Laughter.]

MR. NOBLE: Well, I assume because of fairness and due process rights I'll be allowed to go over the red light a bit.

CHAIR WEINTRAUB: Yes, within reasons.

MR. NOBLE: Your sarcasm aside, I do put a lot of weight--

VICE CHAIRMAN SMITH: It is not sarcasm, by the way.

MR. NOBLE: Your congratulations. I do put a lot of weight on fairness and due process. I'm a very big

believer in fairness and due process. I just don't think this agency has in any way, shape or form reached that stage where this is a serious debate about whether it's an aggressive enforcement agency.

What shocks me, with all due respect, is the number of Commissioners here, who in other contexts talk about the importance of law enforcement. What shocks me, that Congress, that is willing to talk about the importance of law enforcement, the importance of making sure laws are enforced and crimes rooted out, but when you get to this area, it's really not that important. I mean, we've got our First Amendment rights. I mean we're burdened by this.

I think one of the things that I'm shocked that's left out of this debate, are all the candidates and political committees who abide by the law, who don't end up before this agency because in fact they're not trying to push the envelope, they're not trying to see where they can get the Commissioners to split 3-3 so they can go ahead and do it. They are out there. They are out there in the multitudes and I think this Commission does them a disservice when in fact it constantly answers to the same 12 people. And I don't remember who was on that ABA committee, but I suspect some of the same people who testified this morning were involved in writing that report. So you're going back to the same voice over and over again, and you're saying, "Well, it's speaking by the thousands."

I am concerned about due process but--and frankly, I would make recommendations in the way the agency can be changed to help everybody, but again, the reality that I saw in 23 years here, is that while there were cases that I thought maybe the agency went too far, that I thought people may have been unfairly gone after, the vast majority of cases, I thought that not only was the agency bending over backwards, that the agency was often taking the position, and the Commissioners were taking the position of the respondents, and saw themselves in an advocacy position to advocate for the respondents, and so given all of that, I just think we're very far away from the danger zone that you and the other people see here today.

VICE CHAIRMAN SMITH: I think we're very far away from having served on the same Commission.

CHAIR WEINTRAUB: I said I'd give him more time. I didn't say I'd give you more time.

COMMISSIONER McDONALD: I was starting to say I want some time.

VICE CHAIRMAN SMITH: There are a number of assumptions in there that I just find close to bizarre. And I appreciate that once again you expressed that hostility toward due process and fairness.

MR. NOBLE: Again, I'm not hostile to due process. I'm hostile to this, some certain Commissioners' view of due process.

CHAIR WEINTRAUB: Okay.

MR. NOBLE: Other than that, we agree.

CHAIR WEINTRAUB: Other than that, indeed. I don't want to suggest that--everything that the Vice Chairman said, and I certainly don't want you to feel that you're too much under attack here, Mr. Noble, but I am a bit concerned that some of what you express is somewhat dismissive of some fairly important concerns. I mean just now you were saying, oh, well, you know, people say they want law enforcement, but then they go complaining that their First Amendment rights are being intruded upon as if that is a minor concern. I mean people take their First Amendment rights seriously in this country.

Wait, wait, I'll give you a chance. Just wait.

And I find it disturbing that you can just blithely dismiss them in that fashion. Similarly, in your comments, in your written comments, throughout them there is this notion that, hey, we don't have to worry about due process, there actually isn't any process that's due because--and I'll quote you--"The FEC does not have the power or authority to declare that anyone has violated the law, impose any penalties, or order any remedial action."

I mean you make it sound like what we do here is nothing, which, you know, sort of makes me wonder why you stayed here for 23 years if you felt that way.

MR. NOBLE: I felt this way before.

CHAIR WEINTRAUB: But I think that most respondents before this agency--I mean, certainly there's a diversity of viewpoints on this panel, if nowhere else today, certainly on this panel, but I think that most respondents often do feel badgered by this agency, oppressed by this agency, that their First Amendment rights are being threatened, and that they--and that serious penalties are being imposed upon them by this agency. Now, it's true that it's by conciliation. You know, otherwise we could go to court over it, but people sometimes feel that the costs of going through litigation and being embroiled in the court system for another umpty-ump years before they resolve this is not worth it to them. They tend to be political actors who have political concerns, and they want to get on with their political lives.

I want to give you an opportunity to respond, but it does seem to me that you diminish the significance of what this agency does and how it affects people in exercising their First Amendment rights and in participating in the political process.

MR. NOBLE: First, I'm not at all dismissive of First Amendment rights. What I am sometimes dismissive of is how every issue in this agency turns into a First Amendment issue, that as the court said in a different context, just because somebody comes into a court wearing an overcoat doesn't mean there's a chill. Just because

somebody says, "My First Amendment rights are being violated," doesn't mean their First Amendment rights are being violated.

But I do recognize--

CHAIR WEINTRAUB: Who's to decide that?

MR. NOBLE: Sorry?

CHAIR WEINTRAUB: But I mean, you know, are you going to be the person who's going to decide--

MR. NOBLE: The courts are ultimately going to decide that, and that's always the way it's been. But, you know, I would note that we always took into account First Amendment rights. The statute takes into account First Amendment rights, and one of the things we were always very quick to say is that the Federal Election Campaign Act implicates First Amendment rights. Virtually all of it does. However, Congress and the courts and the Supreme Court in a number of cases, has said that the interest behind the law is sufficient to justify the burden in First Amendment rights. It seems though that certain people on the Commission don't accept that. They think that the First Amendment rights in those cases have to block all attempts at enforcement and--

CHAIR WEINTRAUB: I can't imagine who you're talking about.

MR. NOBLE: I'm not talking about any in particular. And have to be controlling in the situation.

And maybe one of the reasons I come across as adamant about this as I am, is because--I didn't count the number of witnesses--but because all you generally hear about or hear from are the people who are complaining about the process being too burdensome. In the 23 years I was here I think I can remember one letter that the staff got from somebody who was the subject of investigation, who said, "Thank you very much. You did a great job." In 23 years I think that happened once, maybe more, maybe I wasn't told about it.

But the reality of it is, when you're dealing in law enforcement, you're not going to be liked by everybody out there. That's the truth. You know, when I get pulled over by a cop--not that this has ever happened--for speeding--

[Laughter.]

MR. NOBLE: --I'd like to say, "This is really upsetting to me. This is really upsetting to me, and you know, my son is in the car with me and this is embarrassing, and now I have to explain to my son why I was pulled over for running that stop sign. Don't you think you should go away?" That's the world we live in. I'm not dismissive of this, and it's because I'm not dismissive of the law and the importance of the law that I feel so strongly about this. I think that, yes, consider these rules, consider whatever rules you want, but keep in mind that ultimately you're a law enforcement agency. That's what I think is missing from

the equation, is this belief, this culture, that this isn't about making things fair between the political parties, this isn't about making sure that all the candidates know absolutely in advance what the law is, because nobody in this country knows absolutely in advance how the law is going to be applied in a given position.

CHAIR WEINTRAUB: I have to dispute that this agency is solely concerned with equalizing things between the political--

MR. NOBLE: It's one of the concerns. It's been expressed on the record.

CHAIR WEINTRAUB: Well, you know, what may have been expressed in the last 23 years on the record in your experience may or may not reflect the current concerns of the Commission.

I do think that it is a fair concern for the Commission to be concerned with whether people feel that their due process rights are being violated and whether they're being treated in a different way before this agency than they are before other agencies that are out there.

But my red light is on, so I am--who do I go to now? Commissioner Mason. Let me get this right this time.

COMMISSIONER MASON: Thank you, Madam Chair.

Mr. Bopp, I was inquiring of Mr. Noble before about the possibility that being more forthcoming with the

record would promote, tend to promote settlements, and I think you wanted to say something about that.

And on a related point, you may have addressed in your testimony, and Mr. McGahn, feel free to respond as well, I had asked the earlier panel if they thought that publishing the recommended fine schedule would also promote settlements.

MR. BOPP: I think it would be very helpful to the Commission, and I think that it would be a salutary step for the respondents in their belief that they're being treated fairly if they had access to the investigatory information in making their, you know, in filing their brief at the probable cause stage with the Commission. It would provide an additional opportunity for the evidence that is there to be presented to the Commission, so that it would be helpful to you. It would have a salutary effect, in my judgment, on the General Counsel's Office. My view is you should encourage them to give you objective legal advice, and to the extent that another person, you know, with an interest in this is going to look at the record and present exculpatory information will have that effect.

And I don't understand, frankly, Larry's opposition to this. I mean, his position as General Counsel was when the case was dismissed, all this goes public. All of it goes public to the world. But at the probable cause stage we shouldn't give it to the respondent under a

confidentiality agreement? And secondly, if suit is filed the respondent gets it too. You know, we just file a discovery request, we get the whole thing.

So it seems to me, you know, the respondent or the world is going to get it one way or the other, and why not let the respondent have it at a time when it could be helpful to you in your deliberations.

COMMISSIONER MASON: And I assume that you would agree that it probably is a little oversimplified to say we should give them a complete file, in essence, if there are respondents who might have divergent interests or--for instance, we recently dismissed a case where the respondents were the Democratic State Party's organization and the Leadership Forum which is a Republican affiliated organization. Now, we didn't do an investigation, but if we had investigated, it's very clear that there may have been different facts and very different interests.

MR. BOPP: Yes, and so I--

COMMISSIONER MASON: I want to state something I think you assume is obvious, but--

MR. BOPP: Evidence there is pertinent to that respondent.

COMMISSIONER MASON: But that the rules should be to give them more or less everything and have reasons for exceptions as opposed to have reasons to give them the evidence.

MR. BOPP: And I think it should be under a confidentiality agreement because I do agree with the District Court in the AFL-CIO case that this, you know, you should not be making willy-nilly this information available to the general public when you dismiss, and so I think that would be a safeguard that you might consider.

COMMISSIONER MASON: Mr. McGahn?

MR. MCGAHN: To the extent I can remember the multiple questions, the last question you asked was about the fine, sort of internal fine schedule. Although on the one hand I understand the concern that that's out there, it somehow takes away the mystery and maybe allows people to calculate cost of doing business or the like, or there's other reasons why you may want to keep it secret. The fact of the matter is, is if you study the MURs that come out in the conciliations, you can sort of, kind of guess where you're going to be fine wise. So simply releasing this to the public isn't necessarily going to give away the farm, or it's the secret weapon of the Commission or somehow cause people to start doing things differently than they're already going to do. But by keeping it secret, it's yet another example of the sort of closed door of the Commission, yet another thing that the public is unaware of, so I would think releasing it would be a benefit to moving matters along, making people feel as if they're being treated fairly and ultimately that will result I think in

more enforcement not less, prompter enforcement, not slower enforcement.

COMMISSIONER MASON: Thank you.

CHAIR WEINTRAUB: Wow, not even using up your red light. There it is, close.

Mr. General Counsel?

MR. NORTON: Thank you, Madam Chair.

I wanted to ask you a question, Mr. Bopp. I don't think it's really a novel proposition that the administrative agencies and regulatory agencies seek to develop and clarify the law through the enforcement process, and I respect that there can be different views about this agency or any other's approach to that endeavor and how aggressive in trying to develop the law in that manner. But I think one of the things you and one of our former Commissioners suggested is that we ought to do is tell people what the law is, and that rule making and to some extent, an advisory opinion route is the more appropriate thing for us to do. And we spent the better part of last year doing just that. We're about to attempt to resolve fairly significant rule making in the Title 26 area. We are talking about any number of other possible rulemakings for the balance of the year. And I wonder about the balance of that process and whether it could indeed reach the point where we are promulgating so many rules and revising so many existing rules, that we sow confusion through that process,

in fact, perhaps in a greater manner than we might by dealing as incrementally as we do through the enforcement process.

MR. BOPP: Well, yeah, I agree that that's a danger. I mean I--that's one of the reasons that I have a strict view of what, you know, the amount of law there ought to be that applies to the First Amendment. In the face of the First Amendment it says, "Congress shall make no law." But I guess what I am saying is that this should be something in the balance, a consideration. In other words, as you're looking at a particular matter, let's say you have a pending possible enforcement action, and you're looking at that. One of the considerations I think you should take into account is wouldn't it be better to handle this in a rulemaking, you know, because of the things that I've mentioned. So it's just a factor. I mean I'm not advocating a bright line. You should always do this or always do that, as a factor.

And I agree that that is a danger as well.

MR. NORTON: I want to respond briefly, I hope, to the point you made very early on about the proper function of the office, because I agree wholeheartedly. I'm not sure I could have said it much better. I think in our investigative capacity it is our role to develop a full record, that we ought to focus on potential violations, that we ought not have preconceived ideas, that our role is to

objectively evaluate evidence. I don't think we win in any sense when the Commission finds reason to believe or probable cause. I don't think it's our job to sell the Commission. I don't agree that it's an adversarial process at that stage between this office and respondents, and I think that's part of the circumstances that ought to be taken into account, into determining what process is due. I don't have any doubt that sometimes people are too zealous. I see it. I also have no doubt that sometimes people need to be more skeptical. I see that too.

But I wanted to ask you about your observation about the structure of the office, and I think the Vice Chairman touched on it a bit in terms of the structure of the Commission, that there was this problem of dual hats. And as you know, at other regulatory agencies the SEC, the FTC, for example, they litigate in federal court, but they also have administrative law judges, and they serve as the appeal. They adjudicate appeals from the ALJs. So what are they adjudicating? They're adjudicating matters that they handled in the enforcement track previously, and made a recommendation to send it into litigation.

My question is, is there something about the structure of this Commission, the multiple hats that the Vice Chairman referred to, the dual roles of the General Counsel's Office that warrants greater process than that--

MR. BOPP: Warrants greater process?

MR. NORTON: Warrants greater process, procedural rights, due process rights to respondents, than agencies where you literally have the Commission acting in both an adjudicative capacity and in an investigative capacity.

MR. BOPP: I've described the problem, and I'm not talking about it being necessarily current or with you or any person--

MR. NORTON: A number of disclaimers here?

MR. BOPP: As many as I can come up with.

But I'm just talking about what it is, you know, in 25 years of experience in dealing with the agency, and certainly the statement that you've made is a wonderful statement about the ideal that I would like to see the General Counsel's Office conduct themselves, and I do know that there are cases when they do do so, even before your tenure, as I mentioned.

And I did describe it, I believe, as a cultural problem or a cultural phenomena. I don't think there's any structural magic bullet, you know, that you can structure in a certain way and then as a result this culture flows, because I do think it's attitudinal, you know. But I do think the FEC is different. That was your question I think.

The FEC is different than the SEC. It is different than the vast majority of government agencies because this one uniquely regulates the First Amendment, and the core activities that govern our representative

democracy. So in that respect I think there needs to be more protections, because I see the heavy hand of government as the problem in this area, much more than anything else.

And so that to the extent that we can lift the heavy hand of government by focusing on doing things where there are clear legal violations as opposed to questionable ones, and providing information that may not be routinely shared in other agencies, I think that promotes that, and that's why.

MR. NORTON: Thank you, Mr. Bopp, and thank you, Madam Chair.

CHAIR WEINTRAUB: Thank you, Mr. General Counsel. I just want to point out that--not that I necessarily want to hold up the FCC as a model for our conduct these days, but they do regulate speech as in some ways does the FTC, the Justice Department and other agencies that I'm probably not thinking of.

Mr. Staff Director.

MR. PEHRKON: Madam Chair, I have no additional questions.

CHAIR WEINTRAUB: Got to love that man.

MR. PEHRKON: I relinquish my time to whoever wants to use it.

[Laughter.]

CHAIR WEINTRAUB: No, no, no. You can't give it away because we're running behind schedule.

I want to thank once again the panel for a most illuminating and frank discussion, and we will take a 10-minute break and come back. I guess that makes it 3:02 for our next panel.

[Recess.]

CHAIR WEINTRAUB: We're back in session with our final panel for the day. We appreciate your coming here and just in case any of you missed the exciting day that we've had before this--I know Mr. Spies, you were out there, but the rest of you have missed a spirited discussion so far.

Just so you understand the system we're operating under, we're using the lights on the desk. You get 5 minutes to make your initial presentation. The light will go from green to yellow at 4-1/2, and at 5 the light will turn red, after which--after the opening statements, we'll have an opportunity for each of the Commissioners to question for 5 minutes, and then the General Counsel and the Staff Director, and then we'll do one more round, and then we will be done. And I will hold people to their 5-minute limits.

With that, we welcome Mr. Olson, Mr. Spies, Mr. Sandler and Mr. Reiff.

Mr. Olson, why don't you start us off?

MR. OLSON: Thank you, Chairman Weintraub. I'm delighted to be here. I've been here a few times before the Commission for similar rulemakings and other opportunities

to testify, and I think until now, nothing I've ever said has been accepted by the Commission. Maybe today will be a break in that.

I'm sure your motivation in having these hearings as we prepare our Supreme Court briefs has nothing to do with trying to keep us away from getting our work done. But I notice when Jan Baran filed his comments, he said, "I'm just too busy," and I sort of have that feeling myself. And not having been here, I don't know what good jokes have been used, so I'll just say that I'm representing Congressman Ron Paul in the BCRA litigation, as you may know. And many of us here, and probably at other panels, are involved in that litigation. And I can only say that I'm hoping that today's hearing is helping you arrange some of the deck chairs on the Titanic. But we'll have to see what the Supreme Court does.

[Laughter.]

MR. OLSON: Thank you, Commissioner McDonald, for your laughter.

I did file a statement. I picked four of the topics that I thought I knew something about, after having been around the Commission and enforcement actions on and off since 1977, not as a huge part of our practice but I have had the opportunity to be down here more than once.

I do believe that there are two items that I wanted to give specific attention to in our comments that I

thought would help. One is on the issue of what it takes to file a complaint before the Commission. And one of the things that's frustrating me is that on occasion I've had to defend against complaints which were brought based on nothing more than a letter from someone who said, "I have read an article in a newspaper. That article is attached. I believe the facts in that article to be true." The person having no firsthand information, nothing on which they could truly execute an affidavit under penalty of perjury, as the statute requires in 437(g).

They have no personal familiarity with the newspaper article except for the fact that they operate on the assumption that newspapers generally tell the truth. I think if the Commission were to get such a complaint, rather than put someone to the burden of having to respond to it and open a MUR and go to the expense of it, it would be a good practice for this Commission to write to the person filing the complaint and saying, "I'm sorry, you have filed a complaint, although under penalty of perjury, which does not meet the requirements of the Act" and simply return it. I think that would save all of us a great deal of time, and I urge that first reform.

Another that I've found terribly frustrating is this entire concept of not being allowed to take the deposition of your own client back with you after the reporter has recorded it. You know, I've come in even with

tape recorders and said, "I'm going to be taping this," and they say, "No, you're not." And if you fly a client in from halfway across the country, what are you going to do at that point? You're simply not--you're going to back down as against this instruction that you cannot tape it, you cannot get a copy of the transcript, the Office of General Counsel is in control.

And I've asked on several occasions what the origin of that particular rule is, and I've never gotten an adequate answer except to say the statute deals with persons who might violate the Act, and that privacy is required, and that to protect your own privacy, Mr. Respondent, we're going to keep you from having a copy of your own deposition.

And that's the kind of logic, as they say, that would appeal only to a lawyer. It's a bad reason to have a tactical advantage. And I hope that some of these issues--you know, it's funny. In the past, we've never had anyone to talk to about this, so this rulemaking is really exceptionally exciting, and you couldn't have kept me away from this. I appreciate your indulgence in allowing me to come down because this is the only time we get to talk about these things. And it's the only time we get to question other than in totally frustrating and futile discussions with the Office of General Counsel why things are the way they are.

And we were told when we questioned this at not point that, well, that's a rule that has come down from the General Counsel's office. I said, well, fine, give it to me in writing. Well, that doesn't exist in writing. It might exist in some internal procedures which you're not allowed to have.

Well, has the Commission ever acted on it? No, not that we know. Is it in the regs? No. Is it in the statute? No. And at some point you realize that you're not going to get anywhere, except to yield to the superior resources and position of the General Counsel's Office. And I do think that at some point this gets us to the issue of what the General Counsel's Office is. Is it a prosecutorial arm of the Commission to be an advocate? Or is it designed to be an ombudsman and sort of usher the process along? And I think out of this comes a lot of other issues, such as do we get to address you in representing our clients?

And I want to mention one thing. Did the red button go off? Oh, I'm sorry.

CHAIR WEINTRAUB: I was so interested, I wasn't even paying attention, but I appreciate your being honest enough to tell me.

MR. OLSON: I'm sure the rest will come out later.

CHAIR WEINTRAUB: I'm sure we'll have some interesting questions for you.

Mr. Spies?

MR. SPIES: Thank you, Madam Chair.

As we note in our comments, I am testifying not necessarily on behalf of the Republican National Committee or any particular candidate, but I would like to note that official on behalf of the RNC and, I'm going to presume to say, on behalf of Republican candidates nationwide, we'd like to wish Larry a happy birthday.

[Laughter.]

MR. NORTON: I was going to ask the Chair to remind you.

MR. SPIES: And you'll note the Democrats have not wished him one.

[Laughter.]

CHAIR WEINTRAUB: But they did this morning.

MR. SPIES: I think Jim Bopp got it right when he said that many of the problems we're hearing about were due to cultural problems at the Commission and not--and that there's no magic bullet, no structural magic bullet to solve those problems. And I agree with him on that.

But having said that, I think the culture at the Commission is much more favorable in terms of respect of due process and in terms of allowing a full fact-finding process now than it has been in the past. And I think that is due to some structural changes.

For example, I commend the Commission on the administrative fine process. That allows me to tell state

and local parties, local candidates, if you don't file your report, you're going to get fined. It's that simple. And it makes things simpler, and I think that has worked to deter folks from not filing the reports on time.

I also think the ADR program has worked in terms of being a less adversarial process for minor violations of the law or first-time violators that takes them out of at least what was previously seen as an extremely prosecutorial General Counsel's Office into a system where they can come to mutual agreement much more quickly.

One problem that still remains that I think everybody and even Mr. Noble basically conceded is a problem is the issue of getting copies of your own deposition transcripts. This happened with us just about six weeks ago, two months ago. We had a witness who had had his deposition taken. He was extraordinarily busy. We wanted to get a copy of it for him to review at his office or when he was traveling. We offered to proffer an affidavit signed by the attorney, an officer of the court, subject to rules, you know, rules of the bar, that if we falsely signed the affidavit we'd be in serious trouble with our bar membership, et cetera, saying that, you know, we were just going to let him look at it and then we'd return it. And even that was not enough. He had to come physically to this building or to the court reporter's office to review it on the schedule set, at least schedule it in terms of having to

come here, by the Commission and I have yet to hear a reason why that is necessary.

There are lots of other tribunals that cover lots of privacy issues, have lots of confidentiality concerns, have lots of money on the line, have lots of important issues, and yet they trust officers of the court to keep their word. This seems to me to be one of the only agencies that does not have that policy.

I'd also like to note one thing historically, and that is, the 1979--this regards the issue of having a hearing before the Commission. When the 1979 amendments were passed, Congress specifically considered whether to have a hearing at the probable cause phase. And at that time, they decided not to do it based on a couple of assumptions.

One assumption was that it would extend the process and be an unfair advantage for the D.C. legal base and people based in Washington, D.C. That was their first assumption.

The second assumption was that this would be a paper trial process; in other words, the General Counsel's Office would offer a brief, and then the respondent would be able to give a response brief, and that's it. The Commission would then examine both those briefs.

Both those factual assumptions have changed. In terms of the brief, it's not a paper trial where you have-

-and I realize it's not really a trial. We could go back to whether it's a--what sort of adjudication it is. But in terms of the fact finding the Commission is doing, it's not done on paper.

The General Counsel's Office offers a brief. The respondent gives a brief. The General Counsel then provides his spin to the respondent's brief, and then the General Counsel presents that brief and supposedly answers the questions of law and fact that the Commission may have. But even with the best intentions, they're not going to be providing that from the respondent's perspective.

If Congress had known that it would not be a paper trial, they have done this very differently. I think the situation has changed and we need to have hearings.

CHAIR WEINTRAUB: Thank you, Mr. Spies, and thank you for respecting the red light.

Mr. Sandler, I think you'd better start off by wishing the General Counsel happy birthday.

[Laughter.]

MR. SANDLER: Of course, of course.

COMMISSIONER McDONALD: No coaching the witness.

[Laughter.]

MR. REIFF: Should we lead a chorus?

MR. SANDLER: Well, of course we join our Republican colleagues in wishing him a happy birthday.

Madam Chair, members of the Commission, as regular--we're appearing today on behalf of our law firm, not on behalf of any particular client, and as regular practitioners before the Commission, we do appreciate the opportunity to address the very important issues raised in this notice.

We've reviewed obviously the comments of some of the other groups that have been critics of the Commission's enforcement process and find that we, in effect, really do start with the same premise, which is that there really isn't any process due to respondents because--as a technical, constitutional, legal matter because of the opportunity for trial de novo in court. So the real question is a policy one for the Commission, which is: Do you want to have an enforcement process in which respondents want to take everything to court? And does the General Counsel have the resources, the energy, and the willingness to litigate hundreds of civil enforcement cases in U.S. district courts across the country? Is that a good way to increase the efficiency and expedite the resolution of these cases?

And I think to ask the question is to answer it. As a policy matter, not because the Constitution requires it, respondents would be happy to tell the Commission, you know, next time there's an enforcement case, don't--save yourself the postage. We'll see you in court. That's an

option the Commission has legally without a doubt. But it is not a good policy option, in our view.

The various protections for respondents and due process we believe is a way to encourage people to undertake the conciliation process and will encourage more resolution of more cases without civil enforcement proceedings through litigation.

In terms of the concern about lengthening the process by affording these protections, we believe the right way to increase the efficiency of the enforcement process and get these cases resolved quickly is not to deprive respondents of due process right, but for the Commission to avail itself of the very kinds of structural changes that Charlie Spies gave some examples of. Another one that will come to my mind immediately is mediation. Since the program began, our firm--and it may be a coincidence or whatever--hasn't had a single case referred to mediation, despite requests by us in some cases that it be done. Not clear why that's the case.

We believe that beyond that, prioritization of cases based on--and we have a slightly different approach than some of the other commenters. Prioritization of cases based on the sums involved, the importance of the issues, not that the Commission shouldn't pursue routine intentional violations, but they don't--the Office of General Counsel does not need to conduct a two-year investigation to resolve

those cases, which is its practice now. And those kinds of structural approaches and a real genuine implementation of an enforcement priority system is a better way to expedite the process than to deprive respondents of due process, of additional due process protections that would--a deprivation which would only encourage greater resort to civil enforcement proceedings in the district courts, which is not to anybody's advantage.

Thank you very much.

CHAIR WEINTRAUB: Thank you.

Mr. Reiff, do you have an opening statement?

MR. REIFF: Sure, just a couple of brief points to add to Joe's opening statement. A couple of items that were not address in your notice that I just want to point out. Maybe I should characterize these more as a couple of personal peeves more than anything else.

But my first point I want to make is about internally generated MURs. It seems to me that there's a lot less due process involved in these kind of cases as opposed to an externally generated outside complaint. For example, in most internally generated cases, the respondent will not receive the case until it's already had a reason-to-believe vote. There has probably already been a General Counsel's brief prepared and the conciliation agreement, a pre-probable cause conciliation agreement already presented to the respondent. Obviously, there are many fewer bites at

the apple for the respondent in this type of case, and I would obviously recommend that an additional layer or two of due process be afforded to those respondents involved in an internally generated matter.

A second pet peeve--and I'll probably get hung by the D.C. Bar, Campaign Finance Bar for mentioning this--is the accessibility to MUR documents. The Commission has gone a long way with respect to its Internet site in getting advisory opinions available to the general public with searches even by word of the opinions. There is no similar process for the availability of MUR documents.

CHAIR WEINTRAUB: Ah, but had you been here this morning, you would have heard me make a commitment that at the end of the year we're going to start getting them--

MR. REIFF: That is great news. Well, on that note, I will end.

[Laughter.]

VICE CHAIRMAN SMITH: "Peeves" is not usually a word used in our hearings.

MR. REIFF: Well, I'm from Brooklyn.

[Laughter.]

CHAIR WEINTRAUB: You went from peeved to pleased. Good transition.

This time around Commissioner Toner gets to go first.

COMMISSIONER TONER: Thank you, Madam Chair. I wish we could solve all issues like we've just solved the first one that Mr. Reiff--

MR. REIFF: That was outstanding.

COMMISSIONER TONER: Thank you all for being here very much. It's been a very interesting hearing.

I want to start first with you, Mr. Olson. You mentioned a couple things in your opening comments. I just want to explore a couple of them. One was the complaint process and this idea of respondents relying solely on press clippings without any personal knowledge of the allegations they're making.

Would you have a hard and fast rule that we shouldn't accept any complaint where there isn't this element of personal knowledge?

MR. OLSON: Yes.

COMMISSIONER TONER: Would you sort of apply that across the board?

MR. OLSON: Oh, yes, I would. As a matter of fact, I believe that is what is envisioned in the Act. And I believe--

COMMISSIONER TONER: Is there a need for sworn testimony and the attestation?

MR. OLSON: The precise language is "may file a complaint with the Commission in writing, signed, sworn to

by the person filing such complaint, and notarized under penalty of perjury."

Now, what does it mean to swear to it? If one doesn't know the truth of the allegations, what does it mean to file it under penalty of perjury if you don't know the truth of the allegations?

I think that Congress did everything but say that personal knowledge is required in those words, but it said it in other words. And yet having had cases like that brought against our clients where we've gone in initially and said please, we'd ask the Commission to dismiss this in a motion or some other illegitimate procedure that we would just create out of thin air, we would always get the response that we've made our decision, we're beginning the investigation, either cooperate or don't.

COMMISSIONER TONER: And I think that's a very bona fide reading of the statute to start with that language. I think it's a solid reading.

To follow up on that, if we were to take that position across the board, it might very well lead to more internally generated MURs on the premise that perhaps we don't receive a complaint because no one has personal knowledge or the people who do have personal knowledge are not willing to come forward with a complaint, we would have the choice of either not pursuing matters or we would do it internally. And Mr. Reiff was indicating he had at least

some concerns with internally generated MURs in terms of process.

But if we were to adopt your position, would it trouble you at all if, in fact, that was the outcome, that we would do more internally generated MURs because of that?

MR. OLSON: Well, I look forward to hearing Mr. Reiff's follow-up because I've always had the same sense, and I'm not sure that I could defend it as well as he could. But it doesn't bother me that you follow the statute. It will never bother me that you follow the statute as long as we get to challenge the statute.

So I would say, yes, you should--that if there is one reform that comes out of this today that I would urge you to take, it would be to simply adopt a policy that says we're going to require personal knowledge.

COMMISSIONER TONER: Even if the practical outcome of that would be more internally generated MURs?

MR. OLSON: Follow the statute irrespective of the outcome I would say, Commissioner.

COMMISSIONER TONER: Does anyone else on the panel have comments on this issue? I think there are some interrelated issues here, but--

MR. REIFF: I'll just make a comment. The context of what I was talking about related more to internally generated MURs that probably comes from referrals from, say, audits and from reports analysis more so than external

newspaper articles, for example. So to that extent, I really wasn't trying to comment and encourage the Commission to go out and look at newspaper articles itself internally. It was more in the context of things that were the normal day-to-day process of the Commission.

COMMISSIONER TONER: Do you think we should have an across-the-board policy, as Mr. Olson was outlining, where we wouldn't go--we wouldn't accept a complaint unless there's this element of personal knowledge?

MR. SANDLER: It probably wouldn't be a bad idea to put--if somebody has allegations, to refer--you know, that they don't have personal knowledge of and it's a newspaper article, to refer it to the General Counsel's Office for consideration of whether the facts in the audit, if they add up, where they do amount to a violation.

You do run into the problem that Neil mentioned, which is that the respondent, potential respondent, has no opportunity to send anything to the Commission until they've decided to initiate an investigation. Probably the ideal combination would be that the--you know, there may be an increase in internally generated MURs with a more sort of intelligent application of the law to the raw information in a newspaper article, but that should be accompanied by some opportunity to respond to a pre-MUR General Counsel's report or something of that nature before the RTB finding launches an investigation.

MR. REIFF: Unless I'm mistaken, the Commission already has an internal policy of being able to generate MURs based upon newspaper articles, so it's not an addition of anything the Commission doesn't already do.

COMMISSIONER TONER: Mr. Spies, do you have any reaction?

MR. SPIES: I agree with the sentiment of this conversation, but it doesn't make me feel any better to think that Commission staff is going to be scouring newspaper articles looking for violations than political opponents or, you know, lobbying groups are going to be scouring newspaper articles. It seems to me you can't necessarily have a hard and fast rule on that.

If it meets the prima facie requirements of a complaint and it alleges a violation of the law, I don't think you can automatically throw it out because it's a newspaper article, if it's a well-researched article that presents evidence of a clear violation.

MR. OLSON: May I clarify what I said, Commissioner? Just very quickly, I didn't know that your question was suggesting that the Commission staff would take the article that had been submitted, they would dismiss the complaint, and then proceed based on the--I would say that would be an exercise in futility.

If it comes in, if it's an inappropriate complaint, if it fails to meet the requirements of the

statute as at least I read it--and maybe you do, Commissioner--then I think you have a duty to dismiss it, send it back with an admonition to the person filing the complaint, never advise the respondent, trash it. And please don't make it a part of the public record.

CHAIR WEINTRAUB: If it's in the newspaper, I think it's too late.

Commissioner McDonald?

COMMISSIONER McDONALD: Madam Chair, thank you. Bill, Charlie, Joe, Neil, welcome. Let me be clear about Joe and Neil's position first vis-à-vis the General Counsel. You want to wish him a very, very happy birthday. I couldn't hear, so you'll get old someday. It's hard.

MR. REIFF: For the record, I did offer to lead a chorus.

MR. SPIES: But that's personal. It's not on behalf of--

[Laughter.]

COMMISSIONER McDONALD: Well, I just don't hear as well as I used to. I thought that's what you said.

Let me, first of all, just in a philosophical vein, Bill, just ask you about--you'd referenced the Titanic. I feel like I've been on it three or four times at a minimum. In terms of the upcoming proceeding, just kind of an overall general philosophical question, is it your

theory that the FECA is basically unconstitutional on its face?

MR. OLSON: Absolutely. You've actually asked that of me before, and I think I've had a consistent answer.

COMMISSIONER McDONALD: Well, I like to just check back. I just want to be sure. It's an evolving process, after all.

MR. OLSON: And now we're happy to say that we have an opportunity to raise that issue in a coherent way and have a resolution of it, because the issue that we brought, as I'm sure you know, Commissioner, is that it violates freedom of the press and press principles that deal with prior restraint and other things that don't ordinarily come out in the speech context. Therefore, there's been this body of case law that deals with press activities, and for some reason, people think campaigns only have speech activities, but we make the case that they have very significant press activities as well, and that's in essence a thumbnail sketch of our case.

But, yes, to the extent that it was appropriate, we brought a challenge to FECA provisions which were modified by BCRA, otherwise just BCRA.

COMMISSIONER McDONALD: Thank you. Let me ask Charlie, I think maybe you have a little bit different slant on it than Joe and Neil have. I'm particularly interested in this alternative dispute resolution matter, and Allan

doesn't take this personal. We've had these discussions before.

By the very nature of the kind of disputes that are resolved, the Commission basically has taken the posture that they're kind of at the low end of the totem pole. And I know Charlie knows that from his time here.

I guess one of my questions I want to ask--and no one shares my point of view, so don't be concerned about it. But it strikes me as interesting that we would pursue matters that go into Joe's point that he had made and Neil had made in their presentation, in their paper, about, you know, the Commission can spend too much time on too small a matter. And I'm wondering if we're not better served, no matter what we do, to divert our resources either to more important cases or to current cases and expedite them more quickly by moving away from cases that we by our own admission don't think rate very high on the spectrum.

We have, as I think most of you know, a prioritization system. And I'm wondering if either of you have any thought on that, because I was interested in the comments that Joe and Neil had made in their presentation in terms of how the Commission ought to spend its time and resources, and going back to your observation as well, Charlie.

MR. SPIES: Well, in our comments we noted--and this may be a slight difference from Joe and Neil--that, at

least in my opinion, the Commission needs to be focusing on clear areas of the law. There are enough areas where everyone can agree it's a violation. They're the most common violations. And the Commission is pretty good at winning these cases if they ever have to. And if those can be disposed of, the Commission is doing a pretty good job. And ADR has been very good, to my knowledge, on that front in terms of taking what everyone can agree the law is; and the respondent, by going into ADR, although not always, but usually is agreeing that they violated the law, and at that point resolving it outside of the adversarial process. And if--you know, I think that even plays into really those that then think, you know, if you support the idea of going after sort of larger expeditions into grayer areas of the law, then that should free up resources to do that. And it could be a win-win.

COMMISSIONER McDONALD: Yes, I don't think--I think my point is that we by our own admission say those cases are of very little significance to us. So the question gets to be not to go into gray areas of the law, and maybe get resources into clearer areas of the law where there are bigger stakes to try to resolve the issues, was one of my questions.

MR. SANDLER: Well, I think it's partly a question not just so much clear areas of the law, but the extent to which the facts warrant--well, partly whether the fact--the

extent to which the facts warrant enforcement resources and partly the end you're trying to achieve.

Take the example of somebody, a corporate executive has no--never heard of the Federal Election Campaign Act, makes a contribution, is asked to make a contribution of \$2,000, makes the contribution, puts in for reimbursement from the corporation. Happens all the time. No idea what he was doing.

That situation--

COMMISSIONER MASON: Did you say it happens all the time?

[Laughter.]

COMMISSIONER McDONALD: I started to say, I didn't hear that.

MR. SANDLER: Of course, yes, so--

CHAIR WEINTRAUB: Mr. Norton, are you listening to this?

MR. SANDLER: That situation to me calls for a process in which that company would be required to institute a compliance program, to educate its employees, to get people aware of that, and an appropriate fine. No question about it. A civil penalty.

It doesn't take two--it seems to me the mediation program was designed to be able to come up with approaches like that and do it efficiently. It doesn't take--in a situation like that, at least our experience--of course, we

only do a tiny--you know, know about a tiny fraction of the cases. But in our experience, the approach of the General Counsel's Office now would be to go and investigate for two years and see if that guy did something in the fourth grade that would tell them it's knowing and willful and he really did know what he was doing.

CHAIR WEINTRAUB: Now, that would raise contributions from minors.

MR. SANDLER: So that's where I see the mediation, you know, alternative dispute resolution coming into play.

COMMISSIONER McDONALD: Well, I think that's helpful. I have a whole list of them. I don't see any cases that reflect what you're talking about. But I think that's helpful. I appreciate it.

CHAIR WEINTRAUB: Commissioner McDonald, thank you.

It's Commissioner Mason's turn.

COMMISSIONER MASON: Thank you, Madam Chair.

I just want to comment on that last point to begin with, and that is, I agree with Commissioner McDonald. I don't see a lot of routine garden-variety cases that have taken a long time. I do acutely remember some fairly small stakes cases that ended up taking a lot of time and a lot of our resources because we had very determined respondents. Some of Mr. OLSON's clients are convinced that the law is unconstitutional and they really didn't want to cooperate

with us, and maybe they cooperated a little, and they have a right to take it to court. And so we end up in court--not your clients, actually. Maybe. I'm not thinking of any particular cases.

But we have a case in court right now with tiny little stakes where the respondents, you know, are just very determined about their view of the law, and we've spent years now in litigation over something that is eventually going to settle out for probably less than \$1,000. And it was bigger than that when it started. So I think that's one category.

And on these reimbursements, frankly, we don't have a way to know--we've seen some huge corporate reimbursement cases. And so when we get a person who says they've done that, we kind of have an obligation to ask, well, you know, is there a pattern? And there are some things we can look at.

So we're not willing to take, you know, an assertion on its face that, gee, this only happened once and there was only one person that did it, you know. And so sometimes the cases look potentially more complicated at the beginning than they end up being, and I think that's the reason why we would say, hey, an admitted case of a corporate reimbursement, you know, how did this get past the corporate compliance and so on, may need a more serious look. And, yes, if we come through at the end and it's one

or two cases for a couple thousand dollars, sure. But I think sometimes those do legitimately require some more investigation.

Mr. OLSON, I think I know what answer I'm going to get, but I want to try anyway, on newspaper articles. We had one complaint based on an allegation by an unnamed person that the Chairman of the DNC said something in a closed meeting. Now, it wasn't--the reporter wasn't there. Somebody else was there. It was hearsay. It was hearsay reported in the newspaper, and somebody sent that in as the basis of a complaint. And I think there's a serious question about whether that's sufficient to open an investigation.

We had another complaint that came in where the Chairman of one of the Republican entities said they were "setting up stuff." And that quote was then associated with an organization that didn't exist at the time that he said that, and, you know, the allegation was made, well, he obviously meant, you know, this organization and so, you know, their affiliate. And I think there's a legitimate question about whether you ought to proceed.

On the other hand, we had a tiny little case where some poor donor had written a check, supposedly from himself and his wife, and some local reporter called him up about it, and he says, "Oh, my wife didn't know about that." Well, you know, he admitted to a violation. It wasn't a

very serious violation, but he admitted to it. And I want to know if you would make a distinction between newspaper articles, on the one hand, that are blind as to sources, that represent fundamental hearsay, and, on the other hand, articles that may be based on investigation of the report or direct quotes from known persons, which, you know, could be followed up on, as it were, and determined through a relatively expeditious investigative process.

MR. OLSON: No, Commissioner Mason, I would not make that distinction. I hope that was the right answer you--

COMMISSIONER MASON: Well, it wasn't the right answer. I'm not surprised, but I wanted to probe anyway.

MR. OLSON: No, but, obviously, the reason is if the reporter wanted to file the complaint and had personal information from somebody who had a bug in the room, let him file the complaint. But you may not act, I believe, pursuant to the authority you've been given to consider that a bona fide complaint.

Now, I'm not really speaking to the next issue, which is what can you do for internally generated MURs. But it certainly is not a complaint, should be dismissed. You should have a clear statement of this, I believe, in the rules, in the regulations, and in the campaign guides and such. I mean, put this out there, and then you will not have this problem.

CHAIR WEINTRAUB: Thank you, Commissioner Mason.
Over to you, Commissioner Thomas.

COMMISSIONER THOMAS: Thank you, Madam Chair.
First, can we get you all to agree with Larry
Noble--

CHAIR WEINTRAUB: Probably not.

COMMISSIONER THOMAS: --that perhaps the primary
function of this agency is to enforce against violations of
the Federal Election Campaign Act?

MR. SPIES: Maybe the statement, but not the
attitude that went with it.

[Laughter.]

COMMISSIONER THOMAS: That's a perfect answer. It
is. It really is. I mean, it's an important concept. I
hope you all can appreciate that Larry's perspective coming
in was that he was really the only one who was coming from
the perspective of dealing with it from this side for years
and dealing with the fact that certainly he's been up
against a lot of very good lawyers, and his staff have over
the years. And a lot of lawyers have fought really, really
hard to basically protect their clients. And so he's sort
of seen, I guess, from his side some resistance, if you
will, to some of the Commission's efforts to try to dig up
facts, dig up evidence, seen some evidence of lawyers
representing their clients zealously and not making it easy
for the Commission staff.

So, I mean, if--I don't mean to defend the way Larry perhaps got as emotional as he did about it, but I do think it's important that you all basically be willing to concede that that is a very important function of this agency to actually see if the campaign finance laws, in fact, are enforced, and that certainly for serious violations we really ought to focus our efforts there.

Is that a fair statement? Do you all agree with that proposition?

MR. SANDLER: I agree with it that it's a critical function of the agency to enforce the law. I think an equally critical function is the disclosure, a disclosure function and everything that happens. It's the unsung heroes downstairs that, you know, make it available to the press and the public that are ultimately the ones that apparently ensure that the laws are obeyed. But, yes, it's critical--to implement and enforce the Act is obviously the central mission of the agency.

MR. SPIES: And I would also note that there was a little bit of this beleaguered one out of eleven coming before the Commission, and often you see all the practitioners coming to the Commission and you don't hear from the other side.

There's a very well-funded lobby on the other side. There's an ACU report that said they spent--they've raised and spent, I think, over \$75 million over the last

few years trying to convince the public that the Commission doesn't work and that everyone in the political process is trying to get around the laws.

So the other side is heard. It's well funded with soft money. It's out there. It always submits comments here. We all read them. They're out there.

COMMISSIONER THOMAS: That's a very fair point.

Let me focus on the question I raised with one of the earlier panels, the aftermath of a three-three split in an enforcement case here. I was really interested in exploring with people who have been involved filing complaints and had had their complaint meet with that unfortunate end.

I had noted that the Commission in their litigation in that area has been wildly successful in developing the doctrine of standing such that it's very difficult for some complainants to work their way through the courts in terms of filing an (a) (8) suit challenging the Commission's failure to go forward.

I'm just wondering: Do you have any ideas or suggestions that the Commission could work with in that area to perhaps strengthen the right of complainants? Is there any way, working with the standing doctrine such as it is and as developed by the courts, that the Commission itself can somehow improve the rights of complainants in that context?

MR. SANDLER: At the administrative level, I'm not sure there is. I think that the three-three--or the requirement of four votes is obviously a statutory one. I think it ties directly to the questions that were raised about complaints in newspaper articles. In a way, the Commission does--with all respect to Congressman Paul's position, the Commission does have to entertain complaints based on newspaper articles because a lot of times people don't have firsthand knowledge from the other side.

But at the same time, it's the responsibility in a situation like that that Commissioner Mason mentioned, where it was hearsay, or the reporter, in fact, just outright lied in the article in that particular article, that the Commission--that the General Counsel's Office should recommend and the Commission should say there is no reason to believe, end of story. That's where the reason-to-believe stage is so critical and the three-three--or the requirement of four votes from Congress at that stage is quite deliberate and intentional.

COMMISSIONER THOMAS: Thank you.

CHAIR WEINTRAUB: Thank you.

And the Vice Chairman?

VICE CHAIRMAN SMITH: Thank you, Madam Chair.

There were some interesting things presented here. Mr. OLSON, you mentioned earlier--you were talking something about the unlimited--I don't remember if you used the term

"limited" or what--resources at the Counsel's office. And it strikes me that people are talking about the Counsel's resources in two ways: one is sort of globally, i.e., how many people we have to pursue all cases; but the other question is--but there's another thing, which is, from a micro level, if you're a respondent in a case, generally speaking when you represent clients before the Commission, do you feel that the government has more resources than you do? Would that be a fair statement?

MR. OLSON: Of course.

VICE CHAIRMAN SMITH: I guess you wouldn't know how much we spend on these things, but I think that's worth knowing. I don't think it's--from the standpoint of someone who's being told by their government that they're under investigation, I don't think there's any question but that the government is bringing more resources to bear than are those individuals. And there's a question--it's a separate question--as to whether we need more resources to bring more people before us and how we handle that.

Another question that I want to ask of Mr. Sandler based on some things that have been said today, it's been suggested that, in fact--I don't know if you--I don't believe you were here when he spoke. I don't know if you read Mr. Bauer's comments this morning talking about the standard for naming additional respondents. And he suggested that it should be if the complaint, taking the

facts as true, would lead to that being a violation of the law, it should go forward. And it was suggested that that is, in fact, largely the standard the Commission uses.

Is that your experience?

MR. SANDLER: No, it's not. I agree with Bob Bauer's comments in that regard, I think, and our comments actually mirrored that, that that is the correct standard, but it has not been our experience that that applied. And obviously one major case or category of examples involves our client, the Democratic National Committee. You know, people come in with a newspaper article and say the Democrats have done so-and-so. And the Office of General Counsel names the Democratic National Committee even though there's a thousand, five thousand Democratic Committees in America, party committees, state, local, and national and so forth.

So that is an issue. I think that the standard is not a difficult one to apply. It's basically if the facts are taken as true, do they state a violation of the act by that particular individual or entity who is to be named as a respondent. Are they specific enough? You know, just like you would in a court complaint.

VICE CHAIRMAN SMITH: And a question this round for Mr. Olson and Mr. Sandler both, if you would respond, because you both mentioned in your comments that you think we should make public some of our enforcement standards, our

directives and guidelines and so on. And I wonder if both of you would comment on what benefits you would see coming from that. And would you see that improving or hindering the law enforcement function of the agency?

Mr. Olson, why don't you go first?

MR. OLSON: I think I raised that in the context of depositions. I am frustrated by getting into a dispute with the Office of General Counsel, having them say that it is because it is our policy, having them then not be able to provide to me that policy. I think that has an--it sort of leads to the appearance of arbitrariness and--not impropriety, really. Everything leads to corruption or the appearance of corruption, I guess. But, I mean, it just leads to the appearance of arbitrariness in that there's no written rule and that there's no action by the Commission.

That's why these hearings are so exciting for me as a practitioner before you because you're going to be forced by the proceedings to consider some of these matters that before I don't know have--maybe they have. I don't think if they've come to the level of the Commission because they've been dealt with with the Office of General Counsel.

So, yes, I think knowing more in writing as to how the procedure works will protect everyone, including the Commission.

VICE CHAIRMAN SMITH: Mr. Sandler, do you want to add anything?

MR. SANDLER: I think as a general matter, if you look at the philosophy behind the Sentencing Guidelines, for example, the idea that transparency with appropriate discretion and adjustments and so forth case by case ensures that like cases are treated alike, which is a fundamental standard of appropriate agency action.

On the other hand, I'm not sufficiently familiar with the practice of the Securities and Exchange Commission or the CFTC and these other agencies that have similar civil penalty authority and whether there is some reason on the other side to keep the policies secret. It seems to me that transparency would serve the interests of expediting these proceedings.

MR. REIFF: In that regard, it's a perfect example if you're negotiating a conciliation agreement for a particular type of case, and you don't have any access, especially if you're out of--you know, you're not a D.C. attorney, you don't have access to any MUR records to see what is a similarly situated case to know what exactly the standards are you're basing that negotiation upon. So guidelines would be very helpful.

CHAIR WEINTRAUB: They can fix that for you, Mr. Reiff. I told you that.

MR. REIFF: I can't wait to see it.

[Laughter.]

CHAIR WEINTRAUB: And I know you'll remind me if we don't make that deadline.

MR. REIFF: I'm sure I will.

CHAIR WEINTRAUB: I want to go back to the issue of newspaper articles and whether that gives us sufficient cause to go to RTB if a complaint comes in just based on newspaper articles, because I would agree that--and I have commented publicly on this in the past--I don't think we ought to be basing legal findings on newspaper articles.

However, the RTB stage, we're at a fairly preliminary stage. We're just saying we have reason to investigate. And I have some experience with--this is not the first time I've dealt with this issue of newspaper articles, as Joe knows and some of the rest of you, and perhaps some of you don't. In a prior lifetime, I was counsel to the House Ethics Committee, and we used to confront the same issue all the time. Should we start the investigatory process based on newspaper articles? Was that fair to the members? And if we didn't, even when it was written into the rules that newspaper articles shouldn't in and of themselves be the basis for accepting a complaint, that there had to be this personal knowledge, what would inevitably happen is exactly what's been described here before.

The committee then felt that they were in possession of information. I mean, everybody in the world

was in possession of this information because it had been written about in the newspapers. And for them to ignore that and not at least conduct some preliminary investigation as to whether there was any wrongdoing would reflect poorly on the credibility of the institution, of the committee. And I think we face the same problem, that if there are newspaper articles out there that everybody in the world is reading that says, you know, some political actor is out there blatantly violating the Federal election laws, for us not to at least look into that, see whether there is reason to, you know, go forward, is really an abdication of our responsibility to enforce the law.

And having made my little speech, I feel that I must give you an opportunity to respond. It's not really a question, but, you know, I have a feeling I know what you're going to say, Mr. OLSON, but go ahead.

MR. OLSON: Well, there's just a vast difference between the Commission acting pursuant to a complaint which is based on no personal information and giving some credibility to what's in the newspaper article per se versus an internally generated MUR which can come from somebody hearing something on a Metro.

An internally generated MUR can begin with, I would say, anything. It can begin with the front page of the Wall Street Journal, which is why people say keep your

clients off the front page of the Wall Street Journal, all government agencies read it.

So I have no problem really with trying to hem in the Commission with respect to internally generated MURs. I'm just asking the Commission to follow what I believe the law to require for an external complaint. The filing of a complaint begins a process which is a costly process for our clients. They are put in the position of having to go back and reconstruct what happened, to retain counsel, to have counsel prepare filings. There is a lot of cost involved in that, pain, anguish, and you simply don't begin that based on a complaint based on a newspaper article. And the statute doesn't allow it, in any event.

CHAIR WEINTRAUB: But if we are going to end up in the same place, if we're are going to end up investigating your client, anyway, wouldn't you rather know about it?

MR. OLSON: If there is an article in the Washington Times discussing some elaborate Republican, Democrat, or third-party scheme to evade election laws and you act on it, act on it. But please do not send a letter out saying we're acting based on a complaint which was inappropriately filed.

CHAIR WEINTRAUB: Anybody else want to comment on that?

MR. SPIES: I would look at it somewhat differently. I think Commissioner Mason at least took the

easy cases in terms of, you know, if someone confesses that they did something in the newspaper, I think that's a pretty clear case, where if someone cares enough to file a complaint, it's a valid complaint on its face.

Now, whether the Commission wants to spend its resources on that or whether you get rid of it quickly in ADR, you know, that's a different issue. But on its face, that's a complaint based on a newspaper article. And, again, I would say I would have to respectfully disagree in that I don't like the idea of the Commission generating--of internally generated MURs. I would rather have somebody in the community throw--you know, that took the time to read the article, do a little fact finding, lay it into a complaint, and cared enough to do it, than have it internally generated from the Commission.

MR. SANDLER: I think that you have to draw a distinction between whether a newspaper article is going to be regarded as an adequate basis for a complaint and the reason-to-believe finding. For the reasons you stated, Madam Chair, I do believe that newspaper articles have to be regarded as an adequate basis for a complaint.

Reason to believe is a different story. There I think it's incumbent you say, well, do we have an obligation to investigate based on that? The respondent gets an opportunity to respond prior to RTB, to respond to the complaint, and then I think it's incumbent then on the

Office of General Counsel and the Commission to evaluate the credibility of the complaint and the response and how it all adds up and to draw the very kinds of distinctions, for example, that Commissioner Mason made in the examples he used to determine whether, in fact, reason to believe should be found. And that should not be--because it involves an investigation, that should not be a low standard.

CHAIR WEINTRAUB: So just a quick yes-no question. So you would not agree with Mr. OLSON? You would say that we can at least start looking at a complaint based on a newspaper article?

MR. SANDLER: Correct.

CHAIR WEINTRAUB: Okay. And with that, since my time is up, Mr. General Counsel.

MR. NORTON: Thank you, Madam Chair.

Mr. Sandler, you in your opening statement, and I think in your written comments, said that this is really not a matter of constitutional due process, and I think that's right. It's a matter of policy and what's appropriate, and I agree with that.

You said that the real question is: Do you want to have a process where respondents want to take everything to court? And I must be misunderstanding you because that isn't my observation of the current process. In fact, very few matters go through the enforcement process and end up in

court. And I was wondering if you could elaborate on your argument there.

MR. SANDLER: Right. I think that that situation is going to change dramatically because of BCRA. Assuming that some substantial--for the sake of discussion, that some substantial parts of BCRA are ultimately upheld, the vast scope of that law and this incredible severity of the penalties involved is going to mean that you are going to have an inducement for people not to cooperate with Commission investigations, not cooperate in the sense of invoking the privileges, witnesses and respondents invoking the privilege, the Fifth Amendment, and to force things into court where the full panoply of procedural due process is there lest they, you know, endanger themselves under the BCRA scheme.

And I think, therefore, it is going to be--you're going to find that affording more procedural due process in the administrative process I believe will help facilitate resolution of more cases at the administrative level rather than through civil enforcement proceedings in the courts.

MR. NORTON: Are there other manifestations of the current process--and I guess we'll see whether that happens or not. I was wondering if there are other manifestations of the current process that you think as a matter of policy dictate that we ought to provide more procedural rights and more process, such as hearings?

For instance, it occurs to me that if you said that there were lots of General Counsel reports, probable cause reports that we previously made public before the AFL ruling, and you saw that there were representations in those reports that were misleading and that were not presented in the brief so that you could respond to them, that would be a reason to provide a hearing.

Are there other things besides your concern that BCRA will mean that parties are driven into litigation for affording additional procedural rights?

MR. SANDLER: Well, I think you just pointed to one, and it was one that Charlie Spies had mentioned earlier, that basically--yes, the right to a hearing I think will allow a lot of questions to be answered and Commissioners' concerns and issues to be addressed a lot more efficiently than having a respondent write a brief, have that filtered through the Office of General Counsel and, you know, the Commission isn't really able to have any direct interchange with the respondent. I think that would--I agree with that specifically as an example to facilitate the resolution of these cases.

MR. NORTON: Mr. Sandler, you and others were here just a few days ago testifying that the Commission ought to conclude that Congress didn't intend to change anything about convention financing because they're certainly well aware of conventions and that conventions are financed and

nothing appears in the legislative history to indicate an interest in doing that.

Congress is, I assume, at least equally aware that the Commission has an enforcement process, and it, in fact, amended 437(g) to increase the penalties. But there isn't anything I've ever heard is in the legislative history and certainly nothing in the statute suggesting that the Commission--there's something broken about the process and that it ought to afford, for example, hearings at the probable cause stage.

Should the Commission infer anything from the fact that Congress didn't take up this issue and didn't deal with the issue in BCRA?

MR. SANDLER: I think it's clear that Congress made a deliberate decision to defer this whole issue of structuring of the FEC, and the sponsors made no bones about the fact that they cared about that issue but they were going to put it off for another day. I don't think there's anything in BCRA that requires or mandates or in any way indicates that the Commission should revisit its enforcement procedures. I think it's appropriate for the Commission, again, to do so as a matter of policy as it searches for ways to enforce the law more efficiently.

MR. NORTON: Mr. Spies?

MR. SPIES: I would just note on that, I think that's a little unfair in that the Commission, most of its

enforcement procedures are secret. I mean, we see the results of them, but when Congress--many Members of Congress have never seen the enforcement manual, I assume most of them haven't. They don't know the internal operations. So that to then assume that because they haven't passed legislation to change what they don't know about is not necessarily a fair assumption.

MR. NORTON: I didn't intend it as a judgment. It was just a question.

Thank you very much, and thank you, Madam Chair.

CHAIR WEINTRAUB: Thank you, Mr. General Counsel.

Mr. Staff Director?

MR. PEHRKON: Thank you, Madam Chair.

Mr. Reiff, Mr. Sandler, Mr. Spies, Mr. OLSON, welcome to the Commission.

Mr. Reiff, I'm going to go back to your pet peeves, or at least one of them. You've already gotten an answer of yes, which you haven't decided to accept yet.

[Laughter.]

MR. PEHRKON: But what I want to know, assuming the courts agree with you, what would you like to see as far as MUR records available? And if you're not prepared to answer that now, if you send--

MR. REIFF: Since Joe was more involved in the AFL case, I'm going to ask him to respond to that.

MR. SANDLER: The General Counsel's reports are not at issue in the AFL case. Everyone agrees that the basis for the Commission's action, statements of reasons in the final General Counsel's report can be made public. So certainly that would be an appropriate--

MR. REIFF: Conciliation agreements obviously would be helpful. Some type of computerized index by citation. Jump in if you have any requests.

[Laughter.]

MR. REIFF: Obviously, citation cross-referencing would be helpful.

MR. PEHRKON: You would be satisfied with strictly what the court has laid out as to the type of documents that should be available.

MR. REIFF: At a minimum, sure. I mean, that would be--

MR. PEHRKON: What I'm asking is: If you were to expand it, where would you go beyond where the--

MR. SANDLER: In terms of--

MR. REIFF: Some of the documents, source documents.

MR. SANDLER: It's really not necessary to expand it even if the AFL and DNC case didn't exist, because we're talking about the ability to cite things as precedent, to see how the Commission has treated like cases. And those materials that have been referred to should be sufficient

for that purpose, the description of the case and the basis for the Commission's action. Those are the reported decisions of the Commission. We don't have, like, the FCC, you know, opinions and so forth.

MR. PEHRKON: One of the areas that I'm sort of curious about is a copy of the complaint. Should that be on the record itself?

MR. REIFF: I think that would be helpful to give context to the record.

MR. PEHRKON: Because that goes beyond, I believe, the current decision.

MR. REIFF: That's obviously not covered by the AFL case, and it's something that the complainant can publicize anyway. Absolutely.

In terms of adding responses by respondents, that might be also helpful. I don't know if you have any comment within the context of the litigation, but if feasible, perhaps, any responses by the respondent, if that's feasible, that would be helpful as well.

MR. PEHRKON: Thank you.

CHAIR WEINTRAUB: Mr. Reiff, you look like a kid in a candy store.

MR. REIFF: I can't wait. Give me a call when it's live.

[Laughter.]

CHAIR WEINTRAUB: I'm going to ask my staff to remind me to do exactly that.

We're back to you, Commissioner Toner.

COMMISSIONER TONER: Thank you, Madam Chair.

Mr. Reiff, we will send you--you will be here for the press unveil. We'll do a virtual tour. We'll do the whole deal. We'll have you here, and we look forward to that.

I want to follow up on a couple of things that were discussed earlier. One was Commissioner McDonald made mention of ADR and how under current practice it handles primarily lower-tier cases and how that plays out in terms of resource allocation within the agency. And the question I have is there's been some discussion internally about whether ADR should be expanded to handle higher-tier cases. And I saw in your comments that, in general, you were positive about the ADR program, but I was wondering: Would you support from a policy perspective ADR being used in higher-tier cases?

MR. SPIES: I think if what makes it a higher-tier case is the nature of the actor or the amount in question, then, yes, I think that makes a lot of sense to be able to opt into ADR.

If what made it a higher-tier case is a complex legal issue, then--I don't think you would make that

judgment, anyway, but clearly that's not the sort of thing that belongs in ADR.

COMMISSIONER TONER: Mr. Sandler, Mr. Reiff, any comments on that?

MR. SANDLER: I basically agree with what Charlie said. I think that if the ADR program should be expanded to the range of cases where what the Commission should be looking for, apart from, you know, retribution or punishment and so forth, is better compliance systems within an organization or an entity, and it's something that you never seem to get to--a negotiator is never a positive part of the discussions in conciliation now, and I guess we had been hopeful that the ADR program would bring that kind of approach into play.

COMMISSIONER TONER: Mr. OLSON, any comments on that?

MR. OLSON: Thank you. Yes, just one, which is--it may sound strange at the outset, but I think ADR could be used in a certain class of the administrative fine cases. Now, I know that they're supposed to be cookie-cutter and it's supposed to be automatic. But there are some instances in which the Commission has found there to be a rationale for some mitigation of penalty. And it seems to me that those ought to be added to the list, at least in those cases where there is some compelling reason for ADR.

And another advantage is that there's another rule--when Mr. Norton was asking questions, he didn't direct it to me, but what I would have said ties into this, which is that I believe the Commission may not be applying the new section on administrative fines correctly because it does require that parties be given--that there may be no adverse decision until the person has been given written notice and an opportunity to be heard before the Commission.

Now, I don't know if anyone has discussed this internally because I'm out here, but it does seem to me that that's quit different than the references to the response in writing to a complaint and the response in writing at probable cause. It seems to me that there is something other than writing. It just says a hearing. And I don't know that there is any procedure stated in the regulations now which would allow that type of personal counsel appearance on these matters, and yet I think the statute requires it.

COMMISSIONER TONER: I'd be interested in the panel's thoughts real briefly. In the earlier panel, we talked about downward adjustments and the fact that the U.S. Sentencing Commission recognizes downward adjustments when defendants come in sua sponte and volunteer information of wrongdoing.

From a policy perspective, would you support the agency thinking about looking at downward adjustments and

recognizing that there is always the practical issue of what constitutes a sua sponte submission and whether people have met that criteria? But do you think from a policy perspective that's something we should look at seriously? For anyone on the panel who might be interested.

MR. SPIES: I see no downside to valid sua sponte, and--

COMMISSIONER TONER: Do you think it might encourage people to be more forthcoming?

MR. SPIES: If somebody comes to me and says was I allowed to do that, and hypothetically the answer was no, you weren't allowed to do that, and then--and it's something relatively minor, and they say, well, what do I do? Obviously the first thing you do is correct it. But then the question is: Do you turn yourself into the Commission?

Well, what's the advantage to turning yourself into the Commission if there's not going to be some sort of downward adjustment or reward?

And from the brief time I worked at the Commission, I would say I did not necessarily see that there was a--I felt that there was--if there's a sua sponte submission, there was an assumption that they had an ulterior motive and there was an assumption that they were doing this because they were about to get caught or because it was about to be in the newspaper. There was always a

suspicion, and that has not been my experience from the outside that that's necessarily valid.

COMMISSIONER TONER: Thank you.

CHAIR WEINTRAUB: Thank you.

Wait a minute. I don't want to run your time before I call on you. Commissioner McDonald?

COMMISSIONER McDONALD: Madam Chair, thank you.

Well, that's an interesting comment, Charlie, but I must say--I think he and I were here at the same time. I don't recall it like that. I think that the questions that were raised this morning were very good ones. It has been my recollection--and, you know, if he can think of something, I wouldn't mind if you would drop me a note, because I can't think of anything under the scenario that he posed.

We had matters that had--forgive me, Bill, but we had matters that were in the press, and people suddenly got religious and decided they did want to see us. We had people file complaints, and then people kind of announced that they needed to come and see us.

But, be that as it may, it's not an issue that I think we've spent a great deal of time on. We get them from time to time, and I think the point is well taken that certainly if someone wants to come in and make their case truly sua sponte, we certainly ought to take that into account and have--what are we calling it?--a downward...

COMMISSIONER TONER: Downward adjustment.

COMMISSIONER McDONALD: Downward adjustment, which in the cultural environment we're now in, we have fairly frequently. So the chances are they're in pretty good shape.

Let me ask, since nobody has taken very much interest in this, I gather all of you have filed complaints. Am I wrong about that? Has any of you not filed a complaint with the Commission, or not? Maybe I'm not right about that.

MR. OLSON: I have prepared them for others, if that's--

[Laughter.]

MR. OLSON: But I think only once, because--

COMMISSIONER McDONALD: Wait a minute. Is that complaints in the name of another?

I suppose--you know, I'm fascinated by the whole proceeding today, and I am not unmindful--I thought Charlie made a very good point on the other side, the money that's been funded. I'm anxious to read what I'm sure is a very fair and balanced report, the one he referred to. And I want to read it. I really do. It's clear that everybody is out--

MR. SPIES: Cleta Mitchell wrote it.

COMMISSIONER McDONALD: Well, that resolves it for me. You'll never know what I have in mind. Cleta's one of my oldest friends in life, I must tell you.

But I am kind of interested because we're kind of at the end of the day and we're trying to--we've gone over, very thoroughly, I think, the respondents and all the ills that beset them, and I think I take to heart the issues that have been raised.

When you've represented a complainant, I just can't help but envision--Cleta said something that caught my attention, which is--I have been in politics a long time. I'd already lost a race before most of you, maybe Dave and I had lost races before most of you were in the process. I don't know. But we lost early. And I've participated in politics for a long period of time. And we lost unjustly, I might add. I just want to be very clear. Since we're talking about fairness today, both of us lost somewhat unjustly.

My question, though, is this: I'm out there, and I know that something is going on. But I'm not a real insider like everybody that has appeared today, whether it be Larry Noble or you all or Bob Bauer or whoever. And I'm not wise to the way of the world in terms of making a complaint and knowing exactly who all the players are.

I mean, let's just take the corporate structure or the labor structure or any other. You know, I'm not sure

how it all works, but I can certainly see that something is amiss there.

What do you do for complainants? I mean, there is the other side of the law. You know, the law really was created under the theory that, as Joe pointed out, and rightfully do, disclosure, number one, but you only get disclosure if you have a way to have compliance. If I knew the IRS wasn't going to audit me, I don't think my returns would be quite as up to par as I try to make them.

So what do you do in terms--how do you advise a complainant who comes to see you and says, okay, here's what you need to do? And is there anything that we could be doing for the complainants? Because surely you represent some folks who have made complaints against somebody in the process.

MR. SPIES: The people that I advise on filing complaints usually have very solid, factual bases.

COMMISSIONER McDONALD: Of course.

[Laughter.]

MR. SPIES: So it's very easy for them to put it together.

COMMISSIONER McDONALD: That's very good, by the way.

MR. SANDLER: Well, I realize there's--

COMMISSIONER McDONALD: And encouraging.

MR. SANDLER: --a tension here, but I think the best thing that can be done for complainants and respondents is to resolve the cases more quickly. And I realize there is a tension. I thought that Commissioner Mason made some excellent points in this regard. But if there's a factual pattern and it's, you know, a normal litigator or fortunately just, you know, two depositions and these specific documents, we can figure out whether this is true or not and get it resolved in a decision before the election, that's where I think the public interest and the respondents and the complainants are best served.

You know, against that is let's see what else we can find. I mean, there is that--maybe there's more here. Maybe this is part of the pattern. You know, I think you have to weigh that against getting these things resolved, and that's what complainants are looking for. A complainant who has a solid basis, you know, what Charlie was talking about--and, of course, I don't think any of his do.

[Laughter.]

MR. SPIES: Therein lies the problem.

MR. SANDLER: That's right. If a complainant does have a solid basis and it's filed in April or May or June and if the Commission could actually resolve it before the election, if the candidate is truly not--hasn't committed a violation, that's a just result. If they have committed a

violation, the complainant's happy. They've got actually a vindication of their position.

MR. SPIES: And at the risk of sounding simplistic, but to directly answer your question, I think the Commission puts out a very good brochure on how to file a complaint and--

COMMISSIONER McDONALD: I'm just looking at it.

MR. SPIES: And if people--you know, if it's somebody who I think probably doesn't have a real good basis for a complaint, I'll refer them to the FEC website or send them the brochure on how to file a complaint. And so with that in mind, if you do change the process at all, I would update that brochure.

COMMISSIONER McDONALD: It just goes back to the point made earlier that someone alluded to--it may have been Joe, but I may be wrong about that. But someone said, well, you know, if they've never heard of the Federal Election Commission, and there may be several very uninformed people, of course--

CHAIR WEINTRAUB: I don't believe it. I don't think it's possible.

[Laughter.]

CHAIR WEINTRAUB: But I'm always happy to hear that we're doing something well, even if it's only putting out a brochure.

Commissioner Mason?

COMMISSIONER MASON: First, I want to assure Mr. Olson that we actually did fully discuss the issue of opportunity to be heard in the context of the administrative fines case and concluded that there's actually very different language in the APA that's intended when a full hearing is intended. And that was discussed. It was in the hearings. I believe you'll even find it in ENJ. And so we explicitly didn't reach the reading you're urging, but we had a pretty good basis in the APA and other practices and procedures as to why we didn't, and we did lay out that basis.

Now, if you want to take it up, but I just wanted to assure that we did discuss it. We discussed it in public, and we put out the rationale there for people to examine.

MR. OLSON: I'm sure you always have a good reason for what you do--

COMMISSIONER MASON: No, I--well--

MR. OLSON: But I meant--you know more about it than I do. But I do think that the different language, usually evidence is different intent, and so apart from knowing what you know, I have come to my conclusion. But I will defer to your greater knowledge at the moment.

COMMISSIONER MASON: Well, no, I think the important point was that we did discuss it in public, and I

put out the rationale. And so I wanted you and anyone else to know that.

Mr. Reiff, I don't know if it's in your testimony or someone else's. There was a discussion that, well, for internally generated MURs, maybe we ought to send something equivalent to a complaint, and I think that's not a bad idea. But I don't want to leave uncorrected the impression that internally generated MURs are virtually ever a surprise to the respondent, because the two big categories of internally generated MURs are RAD referrals and audit referrals. And in an audit, you've had an exit conference where there's a serious issue. You have a preliminary audit report. And you've had a final audit report. So you've had three notices and three opportunities to address and deal with the issues that were brought up there.

And so by the time you get an audit referral, it ought not to be a surprise. And, similarly--it's not precisely the same process, but similarly with RAD referrals, those do not occur without multiple opportunities for the reporting entity to address the issue.

I know in the RAD context it sometimes looks like it's not always perfectly clear to the respondent what RAD, you know, is asking and so on. But I just wanted to make it clear that we do have those opportunities, and I think it is worth thinking about sort of putting one more, you know, to wrap it up as we introduce under the enforcement policy.

But I didn't want to leave the misimpression that by and large people should be surprised by these.

MR. REIFF: Well, I guess the important thing here is to just distinguish those are not enforcement processes. So when you get it into the enforcement process, it's pretty far down the line. We're almost at pre--we're at pre-probable cause at that point. And in many cases, the respondent is disputing an item, perhaps, in the audit context or in the RAD context, and to have that bite at that apple to make their case to the Commission prior to perhaps a reason-to-believe finding I think is an important piece of due process in that instance.

COMMISSIONER MASON: I think it's reasonable, particularly RAD referrals. In audit, you've had the opportunity to make the case in the audit referral. But as I said, I think it's worth thinking about.

Mr. Sandler, I perceived a little bit of a difference in your urgings about how we treated the development of law in enforcement cases from particularly Mr. Bauer, I think, and Mr. Bopp, who I think it's fair to characterize both of them as saying we really shouldn't use the enforcement process to develop the law when the law is unclear. And as I read your statement and heard your testimony, I thought you said, well, maybe, you know, that's one of the times when, you know, we ought to use the

enforcement process. The law isn't clear. Maybe that would be a plus factor for taking a case forward.

I just wanted to give you an opportunity to expand on when and what circumstances it may be appropriate to use the enforcement process to clarify the law.

MR. SANDLER: Well, I think that any enforcement agency, it's appropriate to, you know, intelligently pick a test case in which to resolve an unclear area of the law, and that's a case where, particularly if there are complex facts that go into it, or maybe not, just in terms of the time that it takes to consider the legal issues, where enforcement resources and the time of the Commission is justified.

COMMISSIONER MASON: Thank you, Madam Chair.

CHAIR WEINTRAUB: Commissioner Mason, you are a marvel. Haven't gone into red yet.

Let me see if I know how to reset this thing.
Commissioner Thomas?

COMMISSIONER THOMAS: Thank you, Madam Chair.

The question I want to turn to now involves the interplay between the Commission's enforcement program and the Department of Justice's enforcement program. I gather as a general proposition you would all prefer to be dragged through the FEC enforcement process, however unfair, rather than the Department of Justice prosecution procedures.

We are asking for commentary about how the current memorandum of understanding defines the relative roles of those two government entities. Currently that memorandum of understanding is worded in terms of the Department of Justice will focus on matters that involve substantial knowing and willful violations. Implicit is that the FEC will take everything short of that.

I gather it would be in your interest to help us, if we take a run at working that over with the Department of Justice, you would like us to take to them a message that indeed they should only handle a relatively small area, and we should handle a relatively large area.

What sort of argument--here's your chance. Tell us how you want us to go into those negotiations. Do you have any advice about how the lines should be drawn any differently? Do you think it's a pretty good set-up right now that shouldn't be changed? Is it about as good as you can imagine it being right now? Do you have any recommendations for us?

MR. SANDLER: I'm not sure I can shed much--or be of much assistance on this, Commissioner. It is not my experience or understanding that the Department of Justice observes that memorandum of understanding in any substantive way right now. It's just not clear to me what effect it currently has on their decisions as to what cases to bring

and how to bring them. So I'm not sure, you know, what can be achieved by amending it.

COMMISSIONER THOMAS: You think it's a wasted effort? Is that where you're going? You think that they disregard the memorandum when there's no--

MR. SANDLER: That's our experience, yes.

COMMISSIONER THOMAS: You think that they've brought charges in circumstances that fall short of that standard I referenced?

MR. SANDLER: And have not brought charges in situations that clearly do meet the standard.

COMMISSIONER THOMAS: Okay.

MR. SANDLER: Again, they have policies which are, you know, obviously highly confidential to which we're not privy. And I don't know what rhyme or reason there may be to it, but it's not our impression that has anything to do with the memorandum of understanding.

COMMISSIONER THOMAS: Any comment from--

MR. OLSON: Just the obvious, that if an American citizen runs the risk of going to jail for five years for criticizing a Member of Congress in a way that the Member of Congress didn't want to be criticized, we'd rather not be subject to that penalty and have you have the action on it. I suspect that would be a logical view.

COMMISSIONER McDONALD: I knew we were looking better.

[Laughter.]

COMMISSIONER THOMAS: We're making progress.

MR. SPIES: And on that line, I think I agree with the assumptions on which you based your question. And that gets you to under the new BCRA, as you rightfully pointed out, with the extreme new penalties, and my experience has been that many people at all levels are extremely scared of the new penalties, and it's chilling political activity. Then what can be done to tell people it's not necessarily going to be the U.S. Attorney, local U.S. Attorney coming to get you and drag you through a criminal proceeding? Anything that can be done with beefing up the memorandum of understanding or re-ratifying it or something along those lines I think probably makes sense. That's the big-picture answer. Again, I'll chat with Tom about specifics and if we have ideas get back to you.

COMMISSIONER THOMAS: If we could iron out a new agreement, one thing we could probably do better is publicize it. I think that sort of would hold the Department of Justice to that kind of a standard.

I have a little time. I want to have a little fun. We're sort of toying with the idea of maybe putting out press releases when we close out cases. Do you have any reaction to having the Federal Election Commission develop a press release when it closes out an enforcement case to sort of maybe in plain English summarize what was in the case,

rather than just relying on our current press release generic, rather unclear explanation of what went on in the case?

MR. OLSON: Well, I'll start with that one. I would hate to see the FEC spin be put into a press release on what was resolved. One of the things that happens before different administrative agencies is that some--they seem to, in my experience, view differently the requirement that you make an admission of guilt. And we've had clients who have been absolutely persuaded they did not violate something, and to reach a conciliation agreement, they've said, well, the Office of General Counsel has said you must make an admission of guilt. And in some cases, it's afforded settlement and such. And yet others have gone ahead and said I guess I can convince myself to say it, that I violated it in at least the way they're reading it.

And if you put out a press release, I would sure like to have the respondents go through it, but that's almost an impossible task, too.

So I would say do what you're doing.

MR. SPIES: Yes, the devil's in the details, but that does--you are inherently a political agency. You regulate the political process. And I think it would be very hard to come up with press releases that were not exacerbating the political process in terms of I think the

actors involved have ample reason to publicize whatever results they want.

MR. REIFF: I would just add the Commission is already summarizing some selected MURs in their Record, so I guess there is some--not that I'm encouraging a press release of each case as a press release, but there is some effort by the Commission to summarize what I guess they believe to be important cases.

I did note, I think in the June issue of the Record, there is new language in the conciliation agreements the Commission has added recently, I've just noticed, about having cease and desist violations. And it seems to be in all of the conciliation agreements, even if the violation may have been a one-time transaction that happened three or four years ago, which, you know, we can talk about, something that I have a problem with generally. But I noticed in the Record in the summary of that MUR it also said "and the respondent was ordered to cease and desist violations." And I think the Commission should obviously, if they do go forward with that, choose their words carefully, have a political sensitivity to--

COMMISSIONER McDONALD: Is that a peeve?

MR. REIFF: Absolutely. My third peeve of the day.

CHAIR WEINTRAUB: Let me assure you that the press release policy under discussion involves no spinning, but

merely summarizing in plain English, for those who have trouble with the legalese.

Mr. Vice Chairman?

VICE CHAIRMAN SMITH: Thank you, Madam Chair.

Mr. Spies, we passed you over last time, so let's see if we can direct some questions your way. I am interested, too--I note that you and Mr. Josefiak here on the brief have the somewhat unique experience of having actually been on both sides of the aisle. You've both worked here on the enforcement side. Of course, Mr. Josefiak, former Chairman of the Commission, and you've worked on the side representing respondents and filing complaints.

I wonder to some extent. I presume that when you left the FEC, like other former staffers, you took with you, in your head, at least, some knowledge of the enforcement priority system that has been mentioned here today that is not known to the public.

MR. SPIES: You can't erase that.

VICE CHAIRMAN SMITH: You can't erase anything from Spies. I'll remember that. Okay.

[Laughter.]

VICE CHAIRMAN SMITH: And I presume that you probably took away some knowledge of the penalty schedule which--as I think Mr. Baran called it, you have a secret penalty schedule. Would it be fair to say that that's true?

MR. SPIES: Sure.

VICE CHAIRMAN SMITH: Do you think that this gives you an advantage over other people who might practice before the Commission who have not been made privy to these devices?

MR. SPIES: I think it puts--does it give an advantage relative to practitioners from outside of the Beltway who have never come before the Commission? Yes. Does it give an advantage relative to the sort of--the group of 12 that Larry Noble was referring to, the people who have been doing this for a long time in D.C.? Probably not. They know the cases also.

VICE CHAIRMAN SMITH: But at least over some. Just some quick questions here. Given your experience both inside and outside, do you think that if we name more respondents rather than less respondents, as suggested by Mr. Noble, we should err on the side of--

CHAIR WEINTRAUB: Fewer respondents? I'm shocked at you, Mr. Vice Chairman.

VICE CHAIRMAN SMITH: Pardon?

CHAIR WEINTRAUB: It's not less respondents. It's fewer respondents.

VICE CHAIRMAN SMITH: Fewer respondents.

[Laughter.]

VICE CHAIRMAN SMITH: I was not an English professor.

If we had fewer rather than more--

[Laughter.]

VICE CHAIRMAN SMITH: Do you find that that speeds up or slows down the process of resolving disputes, resolving MURs?

MR. SPIES: I think naming more--I'm choosing my words carefully--slows it down, clearly. And I would note on that from--I think the key to naming the correct amount in my opinion is good oversight from the Commission and from, you know, the powers that be.

I'm thinking specifically of an instance in the last couple years where I think someone was named just because he was sort of famous and they had heard of him. And there was absolutely no allegation against him. It caused a lot of turmoil. Eventually, a few--probably three weeks after that happened, the situation was corrected. But there was no--had the Commission or had someone been paying attention in the first place, that never should have happened.

VICE CHAIRMAN SMITH: Right, and obviously the goal is not really to name more for the sake of naming more, fewer for the sake of naming fewer. The goal is to name the right respondents, and I think the kind of criteria that Mr. Sandler and Mr. Bauer have talked about today make some sense in terms of thinking about internally generated respondents.

How about providing documents at the--just making the record available automatically, at least at the probable cause stage? Do you think that would speed up the process or slow the process down?

MR. SPIES: I think it speeds it up. You have a lot of times the instance where a case is dragged out for years, and then, you know, the respondent is given 15 days to prepare a response brief with the "sword of Damocles" over them that they have to extend the statute of limitations if they want to find an educated response to something that took years to prepare. And the sooner you can get documents available to respondents and the more you can do leads to better crafted responses and moves the process along, ultimately.

VICE CHAIRMAN SMITH: You mentioned earlier that you think there's been something of a change in culture and that you think that's important. Do you think that a change in culture that perhaps places more concern on the perceptions of the community that it's fair or beneficial? And, actually, I want to cut you, because I see I've got my 30-second light, and I want to make a few comments to close.

What I was getting at, obviously, is that I reject the dichotomy that a couple people have suggested that for some reason making sure that the process seems fair to those who are caught in the process in some way is contrary to enforcement. Sometimes it might create delay, but I think

many more times it will not create delay, and it may speed things up, and it may lead to greater cooperation and earlier or easier settlements.

I agree that law enforcement is a key thing of what we're doing, but it's not the only thing. We do disclosure. We do public education. And in any cases, it is to be done. It's our key function, but it's a key function with respect for due process. And there may be due process minimums required by the Constitution, but those are minimums. Those are not the maximum that is required.

In recent months, this Commission, the same Commission that has enough concern to call this hearing and listen to this, has done two enforcement matters. One was, I think, if memory serves me, our second largest conciliation agreement ever with anyone. Another just a few weeks ago was, I believe, our large conciliation ever with a sitting Member of Congress. And I think those things show that the idea that robust enforcement is incompatible with the types of concern over fairness and due process is simply a false dichotomy.

I thank you all for coming today. Thank you.
Thank you, Madam Chair.

CHAIR WEINTRAUB: Thank you, Mr. Vice Chairman.

Just a couple of questions. I take it that you would all agree--there's been a lot of discussion here about whether we should make public our enforcement manual or some

version, perhaps even in summary form, of our enforcement manual setting forth, you know, what we look at, you know, the penalties and how we rate different cases in terms of their priority for our resources.

I take it you would all agree that that would be something that the regulated community would view as a positive step and one that would increase the fairness of the process in the minds of the regulated community. Any disagreement on that?

MR. SANDLER: No.

CHAIR WEINTRAUB: I want to go to a comment that Mr. Reiff made. This is really sort of a new area for this discussion today, but it goes to one of my pet peeves. As a former practitioner before this agency--and I think that in fairness to the General Counsel's Office, I should say that I've seen more flexibility in this regard since I've been here than I actually perceived when I was on the outside. But when I was negotiating conciliation agreements with OGC, I always perceived that OGC was somewhat rigid in the wording, that there were boilerplate phrases that had to be included in there in a certain way; and that when I said, well, gee, could we change the wording in paragraph 3, I was told, well, no, no, no, paragraph 3 has to go the way it is. You know, we can negotiate over paragraph 10, maybe, but not over paragraph 3 because that's our standard boilerplate.

Would you all agree with me that if we--and as I said, I've seen more flexibility in this regard since I've been here, and, in fact, very recently. But would you agree with me that if we were willing to engage a little bit more in the more typical settlement negotiations where you argue over the wording, that we might, in fact, increase the penalties, that people might be willing to pay more money in return for changes in the wording, and that we would probably increase our chances of getting to conciliation quicker?

MR. OLSON: Yes.

MR. SANDLER: Yes, I would strongly agree with that. I think that particularly--and there has been, again, some more flexibility, I guess, in the recent period, but particularly willingness to reflect the position of respondents or even go so far as what other agencies do, which is to accept in the appropriate circumstances a conciliation in which the respondent neither admits nor denies liability. That's not appropriate for every case, but, you know, the current policy is inflexibly that it can never be accepted in a conciliation agreement.

All those things would greatly increase the willingness of respondents to enter conciliation and would expedite the conciliation process.

MR. OLSON: And one of the reasons that's always given as to why that paragraph 4 cannot be changed is the

Commission will simply not accept it unless those words are in there. And, of course, that is, in a sense, a wonderful bargaining position to be in with a disclosed principal who you can't touch, can't talk to.

CHAIR WEINTRAUB: Well, I have about a minute and a half left, so let me throw it open to you. Is there anything that you think that we ought to be considering as we look at our enforcement procedures?

MR. REIFF: More peeves?

CHAIR WEINTRAUB: Any more peeves, Neil?

MR. OLSON: I'll add one thought, which is that I think there's a separation of powers issue as to the role--as to the rights of a complainant. I think once a complainant comes to you and puts an issue in your lap, how you deal with it is how you deal with it. And I've never been very big on private attorneys general. I think the executive branch of government ought to decide these issues, and there are a thousand considerations as to how they do it and generally ought not to be challenged, just as a matter of constitutional law.

MR. REIFF: Just to close, I'll just reiterate something in our written comments from a recent case and experience we had.

We had a case that took about four years for the Commission to get from, I guess, a reason-to-believe finding to the next stage. And it was a relatively large case and

somewhat complex, and we asked for a few more days to respond to, you know, pre-probable cause brief. And at every stage at that point we were requested and required for any extension of time to allow for the statute of limitations to be expanded. In that case, I thought that was patently unfair that we had to give up our rights because the Commission took so long, at least at that stage of the game, to move the case along.

So I think at that initial stage where the Commission has always as a general matter given those types of extensions, it was unfair to take into account the amount of time it took the Commission to move the case forward.

CHAIR WEINTRAUB: That sentiment has been expressed previously, you may not be surprised to hear.

MR. OLSON: Can I also just clarify? Because Mr. Sandler--

CHAIR WEINTRAUB: Six seconds or less.

MR. OLSON: --referenced Congressman Paul. I'm representing him in the suit, but not here. I'm here for the Free Speech Coalition and the Conservative Legal Defense and Education Fund.

CHAIR WEINTRAUB: Thank you very much.

Over to you, Mr. General Counsel.

MR. NORTON: Thank you, Madam Chair.

Mr. Spies, you raise concerns with the Commission's confidentiality advisement, and you make the

point that it misleads witnesses into thinking that they're prohibited from talking to respondents. And I'm sympathetic to that, and I think that we ought to be clearer about it and certainly ought to be clear that that's not the effect of the advisement.

But you then say that the Commission should, if asked, reveal to the witness who the respondents to the matter are, and that one strikes me as awfully problematic. In other words, we're interviewing a third-party witness, and the third-party witness says, "Who are you investigating here?" It doesn't seem to me as a cardinal matter of law enforcement and, frankly, our confidentiality statute that we ought to be disclosing that.

Do you disagree?

MR. SPIES: I fully agree that there's competing interests there, and I think that's a hard question, but I think you may end up getting a more accurate statement if they're informed of what they're testifying about.

MR. NORTON: Mr. Sandler?

MR. SANDLER: I think it's perfectly appropriate as a matter of law enforcement process to advise a witness at that point that they are a witness and not a respondent and not to reveal the status of other participants.

MR. NORTON: Mr. Spies, in your comments, you address a question that's come up many times today, and that is who we name as a respondent in connection with a

complaint. You say we ought to limit it to an allegation in the complaint of a violation of the Act by a particular respondent. I think, Mr. Sandler, you and Mr. Reiff say we shouldn't make assumptions.

It seems to me there's a competing interest there, too, and that is that the statute doesn't mandate very rigorous pleading requirements, and that many of the complaints we get are by private citizens and are necessarily not very articulately drafted, don't identify individuals as respondents. Should we approach those more liberally in terms of inferring from the complaint what they allege has occurred and who they allege has violated the Act?

MR. SPIES: It seems to me if they attach evidence that clearly shows a violation of the Act, yet the complaint is not sworn out, you know, citing the part of the statute or the regs, you don't penalize them for their lack of familiarity with the statute. But I don't--many of the complaints I--you're right that a lot of citizens file complaints because things don't sound right or because they read in the newspaper about something that didn't sound fair. And I don't think the Commission should do their work for them and read into that, well, you know, this is what they could have meant.

MR. NORTON: Mr. Sandler--oh, I'm sorry.

MR. OLSON: Well, I'm just saying this has nothing to do whatsoever with being unfair to a complainant who doesn't know the fine points of law. This is jurisdictional. The complaint must meet certain attributes, or you have no jurisdiction to begin an investigation based on that complaint.

MR. NORTON: Do you want to respond to that, too?

MR. SANDLER: Well, the courts, of course, deal with this situation all the time, particularly in the context of pro se complaints. And there is an argument to be made for interpreting the legal theories liberally. But at some point, somebody has to look at the complaint and say--or the newspaper article attached, and say if what is being alleged here, trying to make sense of it, is true, is there a violation of the Act or the Commission's regulations? And if so, by whom? And that should be the starting point.

Of course, as the investigation reveals that other people should be respondents, they can be named as respondents.

MR. NORTON: I asked this question of the first panel, and I'd be interested in your reactions. As you know, 437(g) provides that if there are four or more votes to find reason to believe, the Commission makes an investigation, I think is the language, conducts an investigation.

It has occurred to me on occasion that the information we've received from the respondents leaves some question unaddressed or perhaps ambiguous, and that if we could follow up and clarify with the respondent, request additional information on a strictly voluntary basis, it would help tip the determination, may well tip the determination and the recommendation of the office that there is, in fact, no basis for finding reason to believe.

Do you think that the statute prohibits that sort of informal contact follow-up with respondents? And if not, do you think it's a matter of good or bad policy?

MR. SANDLER: I would say the statute absolutely does not prohibit it. There's nothing that precludes the--and I think the notice itself cites the authority for the proposition that the agency can always afford additional process in addition to what the statute provides for. And I think it's a great idea as a matter of policy and would indeed have the beneficial effect that you've suggested.

MR. SPIES: I agree with Joe that clearly the statute doesn't prohibit it. As a policy matter, the way you laid it out, it sounds--I think it makes a lot of sense. My concern would be if it was part of a "gotcha" thing where just a little more information could get you to RTB, then I would have more concerns about it.

MR. NORTON: Well, thank you very much, and thank you, Madam Chair.

CHAIR WEINTRAUB: Thank you, Mr. General Counsel.
Mr. Staff Director?

MR. PEHRKON: Madam Chair, I have no further
questions.

CHAIR WEINTRAUB: Let me just conclude then with a
couple of comments. I want to, of course, thank all of the
witnesses who have been here today, this panel and all the
previous ones, for all of your time and for coming in here.
I know you're all busy.

I want to give a slight apology to Messrs. Spies,
Sandler, and Reiff. We always seem to put you on at the end
of the day after the press has gone home, although I told
them that you would be really entertaining and informative
and they should come and stick around and here what you had
to say.

All of the panelists today have given us a lot of
food for thought, and while we cannot promise to accept all
of the suggestions that were put forth today--in fact, we
couldn't do that since some of them were contradictory--we
will certainly consider all of them, take them very
seriously, and I hope this will be the beginning of a
dialogue and not the endpoint. I think the Commission
learns when it sits down and talks to people who practice
before it and have a lot of experience here.

I want to--I think I was going to say something
else in conclusion, but I can't remember, anymore, because

it's the end of a long day--oh, I know what else I was going to say. I am not surprised that, despite my request and the request from others that we not address personalities in the General Counsel's Office, that several witnesses felt compelled to compliment the staff of the General Counsel's Office who are, I think without exception, people of integrity and great public spiritedness, and I very much appreciate their willingness to engage in this process, which had some potential for not being the most positive day for them. But I think maybe it didn't turn out as badly as perhaps we thought it might because, really, you guys do a great job, and I think all the witnesses acknowledged that.

And, with that, I thank you all, thank all the Commissioners and the General Counsel and the Staff Director, and this meeting is adjourned.

[Whereupon, at 4:48 p.m., the hearing adjourned.]