

TRANSCRIPT OF PROCEEDINGS

In Re: MUR 5712 and 5799)

Senator John McCain)

29044240115

Pages: 1 through 92

Place: Washington, D.C.

Date: October 24, 2007

HERITAGE REPORTING CORPORATION

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BEFORE THE FEDERAL ELECTION COMMISSION

In Re: MUR 5712 and 5799)
Senator John McCain)

Probable Cause Hearing

United States
Federal Election Commission
999 E Street, Northwest
Washington, D.C.

2:06 p.m.

Wednesday, October 24, 2007

MEMBERS OF THE PANEL:

- ROBERT D. LENHARD, CHAIRMAN
- DAVID M. MASON, VICE CHAIRMAN
- ELLEN L. WEINTRAUB, COMMISSIONER
- STEVEN T. WALTHER, COMMISSIONER
- HANS A. VON SPAKOVSKY, COMMISSIONER

29044240116

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1 P R O C E E D I N G S

2 (2:06 p.m.)

3 CHAIRMAN LENHARD: Good afternoon. I
4 would like to convene the probable cause
5 hearings in MURs 5712 and 5799 involving
6 Senator John McCain. It is October 24th,
7 2007. We have with us this morning counsel
8 for Senator McCain former commissioners Trevor
9 Potter and commissioner Scott Thomas, and
10 would somebody please get Scott Thomas a water
11 jug with some water in it. Seems like a mean
12 trick to play there.

13 COMMISSIONER WEINTRAUB: Yeah, but did he
14 get one of the triple cups?

15 CHAIRMAN LENHARD: One of the terrible
16 additions here. The -- gentlemen, welcome. I
17 think this is the first time you have attended
18 one of these probable cause hearings. The
19 practice is reasonably informal. You have 20
20 minutes for your own statements which you can
21 divide in any way you would like.

22 My impression is you would like to simply
23 have an opening statement and reserve the
24 balance of your time for the end of the
25 closing. If I have been misguided in that,

1 please let me know.

2 After that we will simply open the floor
3 for questions. Commissioners will seek
4 recognition and I will recognize them as I
5 notice them. They -- there is no particular
6 order. There is no particular sequence in
7 which we go. The commissioners are entitled
8 to have follow-up questions and pursue lines
9 of inquiry.

10 In addition, the general counsel and the
11 staff director will have an opportunity to ask
12 questions as well. And again, there is no
13 procedural commission recognition. We will --
14 I will recognize them in due course. So the
15 -- that's the format that we will pursue
16 today.

17 I think unless there are other
18 administrative matters which I have forgotten,
19 you may proceed at your convenience.

20 MR. THOMAS: Mr. Chairman, and members of
21 the commission, madam staff director and
22 members of counsel, I am Scott Thomas. I am
23 from the law firm Dickstein Shapiro. I am
24 appearing today with Trevor Potter of Caplin &
25 Drysdale, and also with us today is Kristy

1 Tsadick of Caplin & Drysdale.

2 I was asked by Trevor Potter to help with
3 the presentation at this stage in order to
4 provide a fresh perspective and I suppose to
5 the extent possible some outside, impartial
6 analysis of the relevant legal issues.

7 We are representing Senator John McCain
8 in connection with two complaints concerning
9 events held in March and August of 2006. The
10 complaints essentially assert that Senator
11 McCain may have authorized the use of his name
12 in a joint solicitation of the California
13 Republican Party and Governor Schwarzenegger
14 and he has solicitation by a South Carolina
15 Adjutant General Stan Spears.

16 The complaints go on to suggest that if
17 this is the case, solicitations appear to put
18 Senator McCain in a position of improperly
19 soliciting funds that would be in excess of
20 federal contribution limits and resources that
21 are federally prohibited.

22 We are here to tell you that there was no
23 improper solicitation by Senator McCain. I
24 will first explain that the senator did not
25 even know about the solicitations at issue let

1 alone authorize the use of his name. Further
2 under the relevance solicitation restriction,
3 there is no basis for saying he solicited
4 through an agent or an entity acting on his
5 behalf.

6 Trevor Potter will then explain how the
7 commission's precedence that's offered led
8 Straight Talk America PAC to believe, in good
9 faith, that adding disclaimer language like
10 that used would further ensure the legality by
11 making it crystal clear that the Senator was
12 not soliciting any funds whatsoever.

13 I understand we have about 20 minutes for
14 our part of the hearing. We will use I'm
15 hoping about 17 minutes initially for the
16 opening phase and then, with the
17 Commissioners' permission, we will reserve
18 about 3 minutes at the end.

19 Let's first look at the relative
20 statutory language. Essentially, it would
21 require the FEC to find that Senator McCain
22 solicited federally impermissible funds either
23 himself or acting through an agent or through
24 an entity functioning on behalf of him.

25 I hope we can dispose of any assertion

1 that the Senator himself solicited any federal
2 impermissible funds. The Senator has provided
3 a sworn declaration that states, "I have never
4 seen the invitations to these two events, and
5 never approved the use of my name or image in
6 these invitations or the wording of the
7 invitations. At no time did I ever authorize
8 anyone to use my name to solicit funds for
9 these events."

10 The facts provided to the commission
11 shows that unbeknownst to Senator McCain, Greg
12 -- Craig Goldman of Straight Talk America PAC
13 took it upon himself to review the
14 solicitation materials at issue and in
15 conjunction with Straight Talk America PAC
16 counsel, Mr. Potter, came up with the initial
17 disclaimer language that was designed to make
18 it clear that Senator McCain was not, in fact,
19 soliciting any funds.

20 Mr. Goldman backs up the Senator's sworn
21 statement. He himself has sworn that he never
22 discussed the invitations with Senator McCain
23 either directly or indirectly and that to his
24 knowledge Senator McCain never authorized the
25 use of his name on the invitations or was

1 aware of or approved any of the language on
2 the invitations.

3 Now in anticipating some of your
4 questions, let me make a few brief points. We
5 are left to analyze whether the FEC should
6 find that Senator McCain somehow solicited
7 federally impermissible funds through an agent
8 or through an entity functioning on behalf of
9 him.

10 Neither Mr. Goldman nor counsel for
11 Straight Talk America PAC were agents of
12 Senator McCain when they reviewed the
13 solicitation at issue. They were functioning
14 as Straight Talk America PAC but that is very
15 different. As the Commission is aware, the
16 regulation is made clear that an agent in the
17 context of the solicitation restriction must
18 have actual authority. Either expressed or
19 implied to undertake the solicitations on
20 behalf of the federal office holder involved.

21 The definition of agents at 300.2(b)
22 requires authority to engage in specified
23 activities, quote, on behalf of the specified
24 person, end quote. Well, Craig Goldman would
25 probably be an agent of Straight Talk America

1 PAC for purposes of raising funds for the PAC,
2 he would not fit the definition of agent as it
3 relates to raising funds for Senator McCain.

4 Senator McCain has no authority or
5 control regarding Straight Talk America PAC.
6 He is not an officer with any formal functions
7 and he is not on the board of directors. His
8 informal title as Honorary Chairman means no
9 more than that. At most, he has supported
10 Straight Talk America PAC by appearing on his
11 behalf if his schedule permits and by lending
12 the use of his name when it solicits its own
13 PAC funds.

14 He did not have authority to select Mr.
15 Goldman or to assign him duties. And he has
16 taken no action that would give Mr. Goldman
17 implied authority to solicit funds on behalf
18 of Senator McCain himself. Whatever functions
19 Mr. Goldman performed on his own initiative to
20 review requests that the Senator participate
21 in events and to serve as a liaison with the
22 Senator's staff for scheduling purposes, those
23 were performed on behalf of the PAC for which
24 he served as executive director.

25 Senator McCain did not have authority to

1 place him -- Mr. Goldman in those roles and
2 those roles certainly did not create any
3 implied authority bestowed by the Senator to
4 approve solicitation materials using the
5 Senator's name.

6 While those groups seeking Senator
7 McCain's attendance may come to the PAC
8 thinking the PAC is his agent, a loose variety
9 of parent authority perhaps, this is not the
10 principal agent content the FEC has adopted
11 for its solicitation restriction.

12 I will turn to the question on whether
13 Senator McCain can be held liable on some
14 theory that Straight Talk American PAC as an
15 entity was acting on his behalf.

16 Importantly in this context the
17 Commission has been emphatic that so-called
18 leadership PACs are not, again, not, to be
19 treated as an authorized committee of any
20 person who may be a candidate. By revising
21 today at 100.5(g) and 2003 along these lines,
22 the FEC formally distanced leadership PACs
23 from the political operations of related
24 candidates.

25 In fact, in the explanation justification

1 for the regulation change the Commission said,
2 "The Commission concludes that since its first
3 examination of leadership PACs, these
4 committees cannot be assumed to be acting as
5 authorized committees."

6 The FEC would engender massive confusion
7 if it were to take the position in these cases
8 that the actions of Straight Talk America PAC
9 and corporate operatives, should be deemed
10 actions on behalf of Senator McCain himself
11 through some sort of agency or acting on
12 behalf of theory.

13 Straight Talk America PAC was established
14 in 2005. There had been a PAC in existence in
15 the 2000 to 2003 time frame but that PAC
16 essentially dissolved. To preserve the legal
17 argument that the current PAC would not be,
18 quote, established, financed, maintained or
19 controlled by Senator McCain or acting on his
20 behalf for purposes of the new BCRA
21 solicitation rules, he was not given any role
22 in its establishment, finance maintenance or
23 control.

24 While Senator McCain is asked to serve in
25 an honorary role and is the face of the PAC

1 for purposes of PAC appearances and PAC
2 fundraising, he still has none of these
3 legally significant connections with the PAC.
4 As in terms of the statute and the FEC regs,
5 the actions of Mr. Goldman and counsel for
6 Straight Talk America PAC were on behalf of
7 that PAC not on behalf of Senator McCain.

8 The agent and the entity acting on behalf
9 of portions of the solicitation restriction,
10 cannot fairly be implied to impose liability
11 on Senator McCain for what Straight Talk
12 America PAC functionaries did.

13 Now you might think this argument is too
14 lawyerly and that it cuts against the common
15 perception that Senator McCain runs the PAC.
16 But the perception is the same for many
17 leadership PACs. And yet the Commission
18 itself deliberately drew a legally distinction
19 saying leadership PACs are not to be treated
20 as authorized committees of the leader in
21 question.

22 And in view of the bid solicitation
23 restriction, I would not be surprised if
24 election lawyers have advised many members to
25 steer clear of formal ties to leadership PACs

1 to avoid the very issue we face here today.
2 These lawyerly distinctions, the steps taken
3 on advice of counsel do ensure that the
4 Senator does not, in fact, run the PAC, must
5 be given a high rank than mere perceptions.

6 Let me turn it over.

7 MR. POTTER: Thank you. What I'm about
8 to say is only relevant if you determine that
9 the use of Senator McCain's name on the two
10 invitations was, in fact, authorized by
11 Senator McCain.

12 You have made it clear that the
13 solicitation prohibition cannot be violated
14 without personal involvement by the federal
15 office holder or candidate. However, if
16 contrary to what we believe to be the facts
17 you determine that Senator McCain did
18 authorize the use of his name on these
19 invitations in this way, then the question
20 becomes whether the language on the
21 invitations constituted an impermissible
22 solicitation of nonfederal funds by Senator
23 McCain.

24 Let me begin by noting the wording of the
25 disclaimers on the two invitations at issue

1 here. As you can see the invitations clearly
2 state that only the state party or the state
3 candidate are soliciting funds and in any case
4 Senator McCain is only soliciting funds
5 permitted by federal law.

6 As a matter of the statute and the
7 regulations, we believe this should settle the
8 matter. The invitations make it clear by
9 their actual words that Senator McCain himself
10 is not soliciting impermissible nonfederal
11 funds.

12 However, the Counsel's office believes
13 that this is not the end of the question.
14 Citing the language of several advisory
15 opinions interpreting the statute and
16 regulations as a sword for this purpose. Of
17 course, the advisory opinions are supposed to
18 provide a safe harbor for Requestors and other
19 similarly situations.

20 The statute prohibits their being used to
21 establish commission policy which must be done
22 through rule making. That said, let's look at
23 the advisory opinions. I'd like to say at the
24 outset that I felt that Counsel's office and I
25 have been the proverbial ships passing in the

1 night on this matter. It seemed clear to me
2 from the outset that the disclaimer used on
3 these invitations was suggested by the
4 Commission itself and the Cantory Advisory
5 Opinion and reaffirmed in the Republican
6 Governor's Association Advisory Opinion.

7 The Counsel's Office expressed disbelief
8 that I could think this and disbelief that my
9 view was widespread in the election law bar.
10 All very politely expressed I might add. It
11 may well be that there is more than one fair
12 view of these advisory opinions; but if so,
13 respondents should not be punished for the
14 confusion created by commission statements
15 that can have multiple, apparently opposite,
16 readings.

17 It may also be that the Commission's view
18 of these issues has evolved since these
19 advisory opinions were issued, such as, in the
20 state of reasons in MUR 5711 released in the
21 last few days. However, I respectfully argue
22 that the outside world has not been given
23 adequate and certainly not regulatory notice
24 of any such evolution and that such an
25 evolution should not be retroactive.

1 In terms of my belief that my reading of
2 Cantor and RGA was widely shared by election
3 lawyers when these invitations were sent in
4 2006, let me begin by showing you the guidance
5 given by the Republican National Committee at
6 a nationwide training seminar for state party
7 officials of legal counsel in June of 2006.

8 This date is interesting because it is
9 squarely in the middle of the two invitations
10 at issue. The March California event and the
11 August South Carolina one. Here is what the
12 RNC said about invitations that solicit
13 impermissible nonfederal funds.

14 As you will see, the RNC says you use
15 the two-fold analysis, if the answer is yes,
16 then the invitation needs to have the
17 candidate disclaimer on it. Now how did the
18 RNC Legal Counsel Offices and many others I
19 have conferred get the idea that this
20 disclaimer was what the Commission was
21 requiring?

22 The tale begins with advisory opinion
23 2003-03 a request by Congressman ^ Canter of
24 Virginia a federal office holder seeking to
25 assist state candidates in Virginia, a state

1 which allows unlimited, individual, corporate
2 and labor contributions. Here is what the
3 Commission said in answer to the question
4 whether ^ Congressman Cantor could allow his
5 name to be used on and invitation soliciting
6 funds not permitted in federal elections.

7 As you can see, the Commission says that
8 a solicitation must expressly qualify or limit
9 the request and provides an example. In case
10 that statement was not sufficiently clear,
11 three commissioners wrote a concurring
12 opinion, Commissioners Mason, Smith and Toner.

13 Before they discussed the areas on which
14 the Commissioners differed, they stated the
15 common ground. This is what they said, "The
16 Commission has also ruled that Federal
17 candidates and office holders may speak and be
18 featured guests at such events provided if
19 federal permissible funds are raised,
20 appropriate disclaimers are given.

21 Then they said, "For written
22 solicitations that contain a "general pitch"
23 (which under Virginia law could be a
24 solicitation for any amount from any source) a
25 disclaimer such as that provided in 1.c of the

1 Opinion should be included." And the
2 disclaimer is of course, the one we just
3 looked at.

4 That is where things stood until an
5 Advisory Opinion Request from the RGA what
6 became Advisory Opinion 2003-36. This
7 question involved a 527 not a state candidate.
8 And again the question was the degree to which
9 federal candidates or office holders could
10 allow their names to be used on an invitation
11 to an event raising funds in excess of the
12 federal limits or from nonfederal sources.

13 In answering this questions the advisory
14 opinion drops a footnote on which the office
15 of general counsel now relies heavily. This
16 footnote says, as you can see, and I would
17 draw your attention to the footnote and in
18 particular to the language about a
19 solicitation by the covered person.

20 And the reason I do so, is that reading
21 Footnote nine the question arises what is a
22 lawyer advising clients to think this means in
23 this context. The line I have highlighted led
24 me to believe that the Commission was driving
25 at the idea that the covered person must make

1 it clear that he or she was not soliciting any
2 permissible funds if the invitation itself did
3 so.

4 Any other reading would have overruled
5 the Cantor Advisory Opinion in its entirety
6 and meant that the disclaimer was completely
7 unnecessary because the invitation itself
8 would not have been asking for impermissible
9 funds. That may be the position that the
10 General Counsel and the Commission may now
11 likely take but I do not believe that either
12 Cantor or RGA took that position.

13 To explain why not take another look at
14 the rest of the RGA Advisory Opinion. In RGA
15 the Requestor asked whether the covered
16 individual may sign or appear in written
17 invitations, such as, the invitation letters
18 where the donations solicited exceed the asked
19 amounts and where the solicitation does not
20 include a notice that the covered individual
21 is not raising funds in the so-called Cantor
22 Disclaimer.

23 What does the Commission say? It says,
24 "No the covered official may not participate
25 under such circumstance. The requirements

1 described above can -- are applicable to the
2 situation described here including the need
3 for the notice that the covered individual is
4 asking for funds only up to the applicable
5 limits of the act and is not asking for funds
6 outside the limitations or prohibitions of the
7 act."

8 I think this is key because, again, the
9 question was the invitation has a solicitation
10 for impermissible funds and the Commission's
11 answer is, you have to have the disclaimer.
12 What is commonly known as the Cantor
13 Disclaimer.

14 So that's where we were when the RNC
15 issued its compliance guidance; and when I
16 reviewed the California and later the South
17 Carolina invitations. The Counsel's Office
18 argues that I should also have relied on the
19 ABC Advisory Opinion also issued in 2003, but
20 that did not involve invitations for state
21 party or state candidate fundraisers and had
22 in any case been declared superceded by the
23 Commission in 2004.

24 So in 2006, I reviewed the invitation at
25 the request of Mr. Goldman and Straight Talked

1 PAC, my client. I told him it was not clear
2 that listing Senator McCain as the featured
3 speaker made him a solicitor because he was
4 not on the host committee or any other
5 fundraising position.

6 However, I told him to be safe. The
7 invitation should make it clear that the state
8 party and the candidate not Senator McCain was
9 making the solicitation. Then out of an
10 abundance of caution and having waded through
11 Cantor and RGA, I said the invitation also
12 should state that if Senator McCain was seen
13 as soliciting anything, it was only funds
14 permitted in federal elections.

15 After the complaint was filed in the
16 California invitation, I was again asked to
17 review an invitation for a South Carolina
18 candidate event. Obviously, I gained
19 character reviewed the Advisory Opinion and
20 consulted with others.

21 To be safe and taking account of the
22 California complaint, I advised Straight Talk
23 PAC that it should insist specific amounts of
24 the federal limits be added to the disclaimer
25 since that was cited in the California

1 complaint as a deficiency in the California
2 invitation.

3 So in summary, Straight Talk America
4 relied on the clear advice of legal counsel in
5 having these disclaimer placed on the
6 invitation. Counsel relied on his best
7 reading of the advisory opinions and a common
8 understanding of other election lawyers as I
9 have shown.

10 The invitations explicitly stated that
11 Senator McCain was not soliciting funds and if
12 doing so, was only soliciting federal
13 permissible funds. I accordingly believe it
14 would be wrong to find that Senator McCain
15 solicited impermissible funds.

16 Thank you. I reserve the balance of my
17 time.

18 CHAIRMAN LENHARD: Thank you. Questions?
19 There is always sort of an element of being
20 the first person to jump in the water here has
21 been my experience. The -- I guess I will
22 start. Question would like to begin. Okay,
23 please, Vice Chairman Mason.

24 VICE CHAIRMAN MASON: Who authorized the
25 use Senator McCain's name in connection with

1 these fundraisers?

2 MR. POTTER: Mr. Goldman of Straight Talk
3 America PAC was the person with whom the
4 fundraisers dealt with. So I suppose in that
5 sense, he authorized it.

6 VICE CHAIRMAN MASON: And who gave him
7 authority to authorize the use of Senator
8 McCain's name?

9 MR. POTTER: Well, it's pretty clear that
10 Senator McCain did not. I don't know the
11 answer of who, if anyone, did or whether he
12 took it upon himself to do so.

13 VICE CHAIRMAN MASON: Well, you are
14 counsel to Senator McCain are you not?

15 MR. POTTER: I am in this hearing, yes.
16 I was not at that time.

17 VICE CHAIRMAN MASON: Would you not be
18 rather disturbed someone without authorization
19 was telling people out and about they could
20 use Senator McCain's name in connection with a
21 federal fundraising event?

22 MR. POTTER: Well, as Scott has explained
23 what we have here is an interesting situation
24 obviously of the leadership PAC. You have a
25 leadership PAC which has Senator McCain as its

1 honorary chair. He has no legal authority
2 over the PAC, but I think it's fair to say
3 that Senator McCain did authorize the
4 leadership PAC to use his name as Honorary
5 Chair of the PAC.

6 And, furthermore, traveled on behalf of
7 the PAC, had his expenses paid by the PAC,
8 signed letters on behalf of the PAC, so there
9 was a public association of Senator McCain
10 with the PAC. And just not an authorization
11 by Mr. Goldman.

12 VICE CHAIRMAN MASON: You think Mr.
13 Goldman was just carrying this a little too
14 far?

15 MR. POTTER: I think that would be a fair
16 characterization.

17 MR. THOMAS: And perhaps to answer your
18 initial question, I'm just guessing, I'm just
19 guessing the Senator is not very pleased at
20 the turn of events.

21 VICE CHAIRMAN MASON: By who -- who --
22 whose PAC was it?

23 MR. POTTER: It's a leadership PAC.

24 VICE CHAIRMAN MASON: Who controls it?

25 MR. THOMAS: It has a Board of Directors.

1 The Board of Directors controls it.

2 VICE CHAIRMAN MASON: I just have to say
3 beyond -- you know, I understand the
4 lawyer-like arguments and that's fine. We
5 just had a statute pass, for instance, that
6 relies further on the distinctions that we
7 made about leadership PACs to, for instance,
8 prohibit private airplane travel under certain
9 circumstances by leadership PACs.

10 And the consequence of this argument
11 would seem to be that there is no such thing
12 as a leadership PAC because when we say this
13 is not an authorized committee, we mean, of
14 course, that it is not to -- for the
15 reelection campaign of that candidate. And
16 yet Congress has seemed to rely on this
17 concept of leadership PAC; and if this wasn't
18 Senator McCain's leadership PAC, and here we
19 have this affidavit of Mr. Goldman, "I'm the
20 Executive Director of Straight Talk America,
21 Senator John McCain's Leadership PAC.

22 MR. POTTER: It is.

23 VICE CHAIRMAN MASON: That's what is
24 says. And so if that leadership PAC is what
25 Congress is talking about in S-1 they imposed

1 these restrictions on air travel, then I don't
2 see how we can have this kind of cut off --
3 cut out and say, well, yeah, it's my PAC but
4 I'm not responsible for what they did.

5 MR. THOMAS: There is a valid distinction
6 there. Leadership PACs they are the
7 perception -- they are perceived to be
8 someone's leadership PAC. And there is no
9 doubt that the folks who are actually running
10 the day-to-day operations of the leadership
11 PAC consult with Senator McCain when an
12 invitation comes in. They have to go and find
13 out are you willing to go to this so there is
14 some degree of interaction.

15 And certainly there is a public
16 perception that he is associated with it. So
17 if you had to label it something, you would
18 say it's his leadership PAC. But then a legal
19 matter, as a matter of control and as a matter
20 of authorization and that is what we are
21 working with now, it isn't his to control. He
22 doesn't have the ability to control it.

23 CHAIRMAN LENHARD: But the question I
24 think is -- is a little harder than that,
25 isn't it because Mr. Goldman was arranging the

1 travel for Senator McCain, correct? And
2 that's why they went to the leadership PAC
3 when they wanted him to come speak.

4 MR. THOMAS: I think it's clear that he
5 was basically taking on the role of dealing
6 with people who wanted the Senator to come
7 speak and so he would then get back with his
8 staff --

9 CHAIRMAN LENHARD: But that did come to
10 pass because he took on that role.

11 MR. THOMAS: Well, I guess as we describe
12 leadership PACs, it is understood that they're
13 sort of the political face of some of these
14 political leaders. And so when a party
15 committee wants someone to come and speak for
16 a political event, they have to go to the
17 entity that is most closely associated with
18 that part of a person's life. So it has
19 become fairly natural for members of Congress
20 to say, in essence, if people want to ask me
21 about travel, let's see if they will go
22 through the leadership PAC. That is kind of
23 the common understanding.

24 CHAIRMAN LENHARD: Okay. That's what
25 happened here and they went and asked the

1 leadership PAC whether Senator McCain would
2 come to this fundraising event, correct?

3 MR. POTTER: That appears to be what
4 happened. One of the things here, as you
5 know, there is actually a relatively slim
6 record because there was no investigation
7 here. What there are affidavits by
8 respondents and then briefs. So we are all
9 operating --

10 VICE CHAIRMAN MASON: Are you not aware
11 of how Senator McCain arranged this travel
12 during the relevant period?

13 MR. THOMAS: We haven't done any in -- we
14 haven't --

15 VICE CHAIRMAN MASON: So you're
16 representing him and you're representing the
17 PAC and you just don't know. Senator McCain
18 traveled all over the country and he managed
19 somehow to get to the airport with these
20 planes being paid for by this leadership PAC
21 that he didn't have anything to do with were
22 taking off and he got on the plane willingly
23 of his own free will, over and over again and
24 you are somehow telling me that he didn't
25 authorize that?

1 MR. POTTER: No.

2 VICE CHAIRMAN MASON: It just doesn't
3 pass the credibility test, gentleman.

4 MR. POTTER: If we were saying he had
5 nothing to do with the PAC, it would not pass
6 the credibility test. That is respectfully
7 not anything we have said in the briefs or
8 today. What we have said is, it is his
9 leadership PAC that does and does not have
10 certain legal consequences.

11 He is the honorary chair of the
12 leadership PAC. The records shows, the
13 affidavit shows that leadership PAC paid for
14 his travel. That doesn't answer every precise
15 question about how the leadership PAC operated
16 on a day-to-day basis.

17 CHAIRMAN LENHARD: Of course not and I
18 guess the thing that we are struggling with is
19 whether -- I mean, it would appear to the
20 outside world that Mr. Goldman was the means
21 by which one got John McCain to fundraising
22 events and that, in fact, the perception was
23 accurate because, in fact, they did make the
24 request. Mr. Goldman asked them to get the
25 invitation, they forwarded the invitation, and

1 I guess in one case he approved it and in one
2 case made he suggestion changes and they
3 accepted those changes; and lo and behold John
4 McCain appeared at their event. Which -- I'm
5 not sure whether -- I take for granted Senator
6 McCain did, in fact, appear at these events
7 and funds were raised.

8 And so I guess it is not at all
9 surprising that it is perceived by the outside
10 world that, in fact, Mr. Goldman was the means
11 by which one gets John McCain to sorts of
12 these events. And I find it hard to imagine
13 that Mr. Goldman found -- or received an
14 invitation that was unacceptable and believed
15 to be a detriment to Senator McCain, that
16 Senator McCain ultimately would have shown up
17 any way.

18 I can't imagine and I guess -- and I
19 think the record would reflect that in the one
20 case where he did make suggestion changes,
21 those changes were adopted and accepted. And
22 yet it's sort of hard to perceive Mr. Goldman
23 as an independent actor related to Senator
24 McCain and Senator McCain bearing no
25 responsibility for the decisions that Mr.

1 Goldman was making in what appeared to be a
2 series of transactions on behalf of Senator
3 McCain.

4 And I guess I am struggling with this
5 notion that -- that they're using this
6 methodology Senator McCain can divorce himself
7 from conduct of Mr. Goldman. And I guess my
8 question is, were we to adopt that approach,
9 aren't we left in a world where members of
10 Congress using leadership PACs can, in fact,
11 solicit soft money so long as the invitations
12 and are -- and events are created and crafted
13 by leadership PAC staff?

14 Because, you know, our view, were we to
15 follow your line of thinking, would be that
16 the leadership PAC staff are not acting on
17 behalf of the federal candidate or office
18 holder and therefore their conduct, their --
19 their, you know, solicitation activities can't
20 be imputed to that candidate and isn't that
21 really going to leave us in a place that is
22 completely in conflict with what the people
23 who drafted this statute intended.

24 MR. THOMAS: Well, I think that you are
25 left right now with a set of rules where you

1 really -- we don't have it that easy. We are
2 going to have to impact to look into the
3 specifics on a case-by-case basis. I think
4 there are some leadership PACs where because
5 of prior planning and so on, they have taken
6 whatever precaution they can think of to make
7 sure that the so-called leader is not in a
8 position where they have established,
9 financed, maintained or control of the PAC.

10 Those are legally significant terms and
11 so when some leadership PACs have been
12 restructured, as it was going through the
13 pipeline, they were set up so that they could
14 basically say these are being run by other
15 people. They will confirm with the leader.

16 They will go to get the leader's approval
17 to go on a particular trip that has been
18 suggested and basically offer to provide ideas
19 and options for travel arrangements but still
20 the leader in question, in this case Senator
21 McCain, it was always really up to him whether
22 he would go on a particular trip; and it was
23 not unlike someone asking him to go some place
24 in his official Senate capacity.

25 It's up to him. People will come to him

1 with ideas and suggestions. They will suggest
2 travel times that might work to schedule an
3 event, but it's unidentical to put him in a
4 position of being responsible for what all of
5 those people do through their own agents.

6 Now admittedly he had a close
7 relationship with this particular leadership
8 PAC as Vice Chairman pointed out. He made a
9 lot of trips on behalf of -- I have been
10 trying to think of an example, I recalled
11 Commissioner Smith at the time was doing a
12 fair number of trips traveling around to
13 society events.

14 And I'm guessing that they probably went
15 a fair way down the road to providing him
16 options about what time would be good, what
17 the topics might be but they were always
18 coming to him for approval.

19 And it would have been unfair I suppose
20 even though he was doing a fair number of
21 those trips to say he should somehow be liable
22 in one of their solicitation pieces they
23 basically accused him of something or made him
24 represent that he was attacking someone's
25 personal reputation or include some slanderous

1 remark or something like that. He -- I don't
2 think you'd want to go down the road of saying
3 that in all these circumstances in these
4 leadership situations who generate this type
5 of liability.

6 MR. POTTER: If I could answer that.

7 CHAIRMAN LENHARD: Sure.

8 MR. POTTER: It is a long and tortured
9 history here starting with the fact that they
10 don't appear anywhere in the statute until
11 quite recently. But just as you have
12 presented the scenario of what happens if the
13 leadership PAC is out there acting and the
14 member legally has no responsibility for it, I
15 would present the opposite scenario, which is
16 what happens under this statute which refers
17 to what a office holder or candidate is
18 prohibited from doing if you infer liability
19 to that office holder and candidate for
20 something that somebody else did without any
21 authorization or knowledge. I think that too
22 presents a very dangerous possibility.

23 CHAIRMAN LENHARD: So if Mr. Goldman had
24 said in the invitation that one of -- the
25 changes are going in the wrong way, we're

1 going to add a title to this which says John
2 McCain asks you to give \$100,000 to help the
3 state of California -- Governor Schwarzenegger
4 in this matter and your sense is that, you
5 know, Governor Schwarzenegger said sure.
6 That's the way the invitation appeared,
7 Senator McCain appears at the event to roaring
8 applause and the money is raised, your sense
9 is that that is a reasonable interpretation of
10 how the statute should operate?

11 MR. POTTER: I think that is a factual
12 question for the judicial -- did Senator
13 McCain know about this personally, if not --

14 CHAIRMAN LENHARD: It remains the same
15 that we have here the only change is he had --
16 not the addition of the disclaimer but --

17 MR. POTTER: No, I would say there that
18 Mr. Goldman was not acting with Senator
19 McCain's authorization. If he did so, it was
20 without authorization. That would clearly be
21 Senator McCain's response. It is in this MUR.

22 CHAIRMAN LENHARD: So as long as
23 candidates identify a leadership PAC staffer
24 as the person to invest through their campaign
25 travel for other candidates we're done --

1 MR. THOMAS: No, we are not saying. We
2 are saying it depends on the facts. If on the
3 other hand Mr. -- Senator McCain had been
4 responsible for bringing in Mr. Goldman to the
5 position, if they had had some sort of
6 discussion where he said I want you do vet
7 these invitations and I want you to have
8 authority to sign off on the language and the
9 solicitation, factually, I think that that
10 give the Commission a completely different set
11 of circumstances. We don't have evidence like
12 that on the record.

13 CHAIRMAN LENHARD: Commissioner
14 Weintraub.

15 COMMISSIONER WEINTRAUB: Thank you, Mr.
16 Chairman.

17 Trevor, are you still representing
18 Straight Talk America?

19 MR. POTTER: I am.

20 COMMISSIONER WEINTRAUB: Do you know
21 what's on their web site?

22 MR. POTTER: I do not.

23 COMMISSIONER WEINTRAUB: Well, let me
24 show you. In fact, I show you. You've got a
25 visual aid, I've got a visual aid. If you go

1 to www.StraightTalkAmerica.com you get a
2 screen. It's all black and in big white
3 letters it says, "McCain please visit John
4 McCain 2008 at www.JohnMcCain.com.

5 That's what you get when you go to
6 Straight Talk America PAC. It does not seem
7 to be doing anything except promoting John
8 McCain's now presidential campaign.

9 At the time when you reviewed these
10 invitations, you have made it clear -- you
11 have been very careful to say you weren't
12 representing John McCain, was somebody else
13 representing John McCain?

14 MR. POTTER: Not to my knowledge in this
15 matter. He may have other lawyer.

16 COMMISSIONER WEINTRAUB: No, no, no. I
17 mean when John McCain wanted campaign finance
18 advice in 2006, who'd he call?

19 MR. POTTER: He didn't call me.

20 COMMISSIONER WEINTRAUB: Didn't call you?

21 MR. POTTER: No.

22 COMMISSIONER WEINTRAUB: Really. That's
23 interesting.

24 MR. POTTER: I don't know that he asked
25 for campaign advice in 2006 but he was not a

1 client of mine at this time.

2 COMMISSIONER WEINTRAUB: But Straight
3 Talk America was?

4 MR. POTTER: Correct.

5 COMMISSIONER WEINTRAUB: Now the
6 invitations that you reviewed made no
7 reference to Straight Talk America PAC, am I
8 remembering that correctly?

9 MR. POTTER: Yes.

10 COMMISSIONER WEINTRAUB: So why were you
11 reviewing them as Straight Talk America PAC's
12 counsel?

13 MR. POTTER: Because they asked me to.
14 And I knew that Mr. Goldman was the person who
15 would arrange for Straight Talk to pay for
16 Senator McCain's flights and arrange for him
17 to get to these events. Senator McCain, I
18 think it stated in his affidavit, was
19 traveling on behalf of Straight Talk
20 throughout that year campaigning for
21 candidates across the country.

22 COMMISSIONER WEINTRAUB: Did you suggest
23 to either Mr. Goldman or anybody that Senator
24 McCain ought to have his own lawyer review it?

25 MR. POTTER: I did not.

1 COMMISSIONER WEINTRAUB: You didn't think
2 his interests needed to be checked by some
3 other source? You weren't such an independent
4 person, right? You were representing him, you
5 weren't looking out for his interest when you
6 were reviewing these invitations?

7 MR. POTTER: As the conversation
8 indicates this is a gain one of the aspect
9 peculiarities about leadership PACs. If
10 Senator McCain is the honorary chairman of the
11 leadership PAC, his face and name is plastered
12 all over everything he does, it is important
13 that the Senator be seen to comply with the
14 law.

15 I don't see anything wrong with Straight
16 Talk being the entity that asks that and that
17 pays me for it, but I did view part of my
18 responsibilities for Straight Talk is making
19 sure that its honorary chairman didn't do
20 something that would reflect badly on him or
21 on Straight Talk or that Straight Talk put him
22 in a position that would be bad for him or
23 Straight Talk.

24 COMMISSIONER WEINTRAUB: Who paid for the
25 funds to Straight Talk America PAC that paid

1 you to provide that legal advice?

2 MR. POTTER: Lots and lots of mailings,
3 many of which Senator McCain signed.

4 COMMISSIONER WEINTRAUB: I'm just -- I
5 think that you are seeing that, you know, we
6 are having a little bit of trouble with your
7 argument here that there's some clear, you
8 know, and -- there is a distinction that we
9 should respect between Straight Talk America
10 PAC and John McCain.

11 I think if you ask any person in America
12 who's heard of Straight Talk America PAC the
13 only association they would have with it would
14 be John McCain unlike the federal society.
15 You say federal society people are not going
16 to leap up and say oh that's Brad Smith's
17 organization. This is John McCain's
18 organization.

19 And, honestly, I can't believe that,
20 Scott, if you were still sitting up here and
21 somebody else was sitting out there making
22 that argument that you would not describe it
23 as perhaps beyond silly to say that John
24 McCain was just the honorary chairperson of
25 this PAC and it wasn't really acting upon his

1 behalf or as his agent. It just doesn't fly.

2 MR. POTTER: Well, it flies if you
3 actually have to interpret the statute. And
4 you have to come up with the distinctions that
5 you have come up with between actual authority
6 and apparent authority. It seems to me you
7 have a classic case here where --

8 COMMISSIONER WEINTRAUB: There is no
9 implied authority?

10 MR. POTTER: -- you are saying the whole
11 world thinks this is apparent and I'm saying I
12 don't see either a factual or an implied
13 authority.

14 COMMISSIONER WEINTRAUB: Not --

15 MR. POTTER: And you have statements by
16 the two principals here, the Senator and Craig
17 Goldman, that said that Craig Goldman was
18 never given authority by Senator McCain.

19 COMMISSIONER WEINTRAUB: Who hired Craig
20 Goldman?

21 MR. POTTER: The Straight Talk PAC which
22 according to the affidavit that you have was
23 principally lead by John Weaver and Carla
24 Eudy.

25 COMMISSIONER WEINTRAUB: So did they

1 decide?

2 MR. POTTER: I don't know that. It's not
3 in the record but they are the people Senator
4 McCain dealt with.

5 COMMISSIONER WEINTRAUB: Did you set up
6 Straight Talk America PAC?

7 MR. POTTER: I did the legal work for it,
8 yes.

9 COMMISSIONER WEINTRAUB: Because you just
10 don't seem to have a lot of factual
11 information of how this PAC was operated.

12 MR. POTTER: Well, I sit in an office
13 across town. I was not involved on a
14 day-to-day basis with whatever was happening
15 in the Straight Talk Headquarters. We are
16 just saying, we don't know. You are asking a
17 good question. I don't know the answer.

18 COMMISSIONER WEINTRAUB: Do you believe
19 that John Weaver is an agent of John McCain?

20 MR. POTTER: At that time, well, he
21 certainly had more daily contact with the
22 Senator then according to affidavits than
23 Craig Goldman did. I don't know whether
24 Senator McCain -- what Senator McCain would
25 say to that question. Did he say go ahead and

1 act on my behalf? He may have. I don't know
2 the answer to that. He didn't say that about
3 Mr. Goldman.

4 COMMISSIONER WEINTRAUB: Well how did --
5 You were involved in setting up the PAC. So
6 how did this happen that this PAC got set up?
7 Who decide to do this?

8 MR. POTTER: I was called by Carla Eudy
9 and asked to set the PAC up again. Remember
10 this is the second incarnation because after
11 the 2000 campaign, the Senator shut down his
12 presidential campaign and Straight Talk
13 America was created under the regulations then
14 and my interpretation of them, Senator McCain
15 was not referred to as his leadership PAC and
16 the web site was far more discreet in the use
17 of his name because it wasn't clear what the
18 line was authorized his committee.

19 And then when the Senator ran for
20 re-election, the PAC was shut down because it
21 was the Senator's view that he would not raise
22 money for two federal entities at once so
23 Straight Talk was shut down and his re-elect
24 committee was under way.

25 When the re-election was over, I was then

1 told by Carla Eudy that Straight Talk America
2 would be set up again. Now at that stage, the
3 Commission had changed its regulation and it
4 was therefore permissible to refer to it as
5 Senator John McCain's leadership PAC or
6 Straight Talk America. Because it wasn't his
7 authorized committee but the Commission had
8 said you could still do that. So that's why
9 they did it at that stage.

10 COMMISSIONER WEINTRAUB: I remember the
11 regulations. Well, I have more questions but
12 let me give somebody else a chance.

13 CHAIRMAN LENHARD: Mr. Walther.

14 COMMISSIONER WALTHER: Are you telling
15 the Commission that Senator McCain did not
16 have anyone authorized by him to ensure that
17 he complied with the McCain --

18 MR. POTTER: No, I'm telling you I don't
19 know the answer to what lawyer in 2006, if
20 any, was advising him.

21 COMMISSIONER WALTHER: And you didn't
22 inquire to who that person might be?

23 MR. POTTER: I don't know there was
24 anyone else, sir.

25 COMMISSIONER WALTHER: Okay. So it may

1 be that the Senator had someone representing
2 him.

3 MR. POTTER: That's possible. He may
4 have had congressional legal counsel. He may
5 not have had questions, I don't know.

6 COMMISSIONER WALTHER: Is it your
7 representation that because it was adopted
8 before the theory of parent authority there
9 was no apparent authority and but that it had
10 in the Commission in place apparent authority
11 at the time it might have been covered under
12 that doctrine?

13 MR. POTTER: I think if the Commission
14 had said apparent authority was sufficient to
15 create agency, that you'd have a much better
16 argument that Straight Talk had apparent
17 authority because it was referred to as John
18 McCain's leadership PAC. And so I think the
19 facts here are that Mr. Goldman did not have
20 authority.

21 But I was drawing the distinction because
22 I was responding to Commissioner Weintraub's
23 comment that the whole world thinks it's John
24 McCain. And my point is that the Commission
25 has gone lawyerly distinctions regardless of

1 what the whole world thinks.

2 COMMISSIONER WALTHER: So Mr. Goldman
3 thought he had authority I assumed to modify
4 or to set in place the final language for the
5 invitations?

6 MR. POTTER: He doesn't appear to have
7 thought he had authority from Senator McCain
8 because he said he didn't. I think it's clear
9 that he thought in part that he had authority
10 from Straight Talk, I guess to do that, yes.

11 COMMISSIONER WALTHER: And Straight Talk
12 gave him that authority?

13 MR. POTTER: I don't know that.

14 COMMISSIONER WALTHER: So he thought
15 Straight Talk gave him the authority. He
16 thought that he had the authority on behalf of
17 Straight Talk to bind the campaign -- bind the
18 Senator on complaints language?

19 MR. POTTER: I don't know if he conferred
20 with anyone else at Straight Talk before going
21 ahead. He's the person who called me, I
22 responded directly to him.

23 COMMISSIONER WALTHER: Because the way I
24 read the affidavit he thought he was acting in
25 a capacity and was taking steps to do it

1 talking to counsel and making sure the
2 compliance existed, and suggested language
3 which leads me to believe that there are facts
4 out there that led him to think he could do
5 this.

6 MR. POTTER: Yeah, I agree with you. I
7 think the affidavit says all that. What I'm
8 replying is I don't know that he then had to
9 check with anyone else before going ahead.

10 COMMISSIONER WALTHER: Let me go on the
11 concept of actual authority then because you
12 keep saying he never got it directly from the
13 Senator. But the regulation says actual
14 authority impressed or implied. Am I correct
15 on that?

16 So if it's implied authority it doesn't
17 mean that he has to give direct authority
18 that'd be expressed authority. If it's
19 implied authority, it doesn't mean generally
20 that a person such as the Senator would set in
21 motion a series of events that leads someone
22 to believe they had authority whether they had
23 it or not.

24 The Senator expressly intended to give it
25 but actually taken to lead somebody to believe

1 they had actual authority. And in fact, nor
2 that doctrine you don't have to give expressed
3 authority if based upon that a person believes
4 he has authority regardless of what the third
5 party thinks.

6 MR. POTTER: The Senator actually has to
7 do something to grant that authority.

8 COMMISSIONER WALTHER: Let's talk about
9 that. You are saying the Senator had --
10 traveling around, going to fundraisers, was
11 basically acting without any guidance
12 whatsoever he felt was in place to make sure
13 he was in compliance?

14 MR. POTTER: No, I haven't said that.
15 The question was, was I his lawyer then,
16 answer, no.

17 COMMISSIONER WALTHER: Right. I
18 understand that.

19 MR. POTTER: The other question is, did I
20 know whether if somebody else was giving him
21 advice, the answer is, no, I do not know.

22 COMMISSIONER WALTHER: Did he intend to
23 bind the Senator, am I not correct on that?

24 MR. POTTER: I don't know if I would say
25 he intended to bind the Senator. I was giving

1 advice to somebody who asked if this
2 invitation was alright. And my response was
3 no it was not. It need a disclaimer.

4 COMMISSIONER WALTHER: Um-hmm.

5 MR. THOMAS: I think people involved
6 thought they were helping the Senator, there
7 is no doubt about that. In hindsight, it
8 hasn't worked out quite that way. But we did
9 carefully try to put it in the record a small
10 statement from both of these individuals that,
11 in fact, the Senator himself had done nothing
12 to indicate authorization for Mr. Goldman to
13 perform this function, and this is an
14 important function.

15 I mean this is the Senator's liability on
16 the line. And it's not the kind of thing that
17 Senators should take lightly in light of the
18 tough restrictions but both the Senator and
19 Mr. Goldman are very emphatic that at least as
20 to this authority to sign off on solicitation
21 material, there is absolutely no such
22 authority given by the Senator and from Mr.
23 Goldman's perspective the Senator did not give
24 it to him either.

25 So that kind of I think goes to the

1 implied authority analysis. I agree, you do
2 have a broader authority with the implied
3 authority concept but you -- you still have to
4 have something fairly concrete to indicate
5 that the Senator himself, as you say, put in
6 motion, put Mr. Goldman in a position where he
7 would be led to believe he has this kind of
8 authority.

9 COMMISSIONER WALTHER: I understand that
10 it doesn't have to be intentional on the part
11 of the Senator to give actual authority if
12 there were sufficient facts of which he was
13 aware that the person could reasonably believe
14 that he or she had it.

15 And in a case like this because of the
16 credibility factor, it is tough to believe of
17 all people Senator McCain had no one out there
18 to safeguard in terms of invitation law.

19 MR. THOMAS: Learning here that I had a
20 business opportunity that someone overlooked
21 back in this time frame but I do think that
22 the coincidence of events was at that
23 particular time he was between campaigns and a
24 function -- the relationship he had with
25 Trevor Potter was, basically, either over from

1 the '04 campaign or related exclusively to
2 whatever role Trevor Potter had with Straight
3 Talk America.

4 CHAIRMAN LENHARD: I kind of had the
5 thought, oh, come now. Was all that I could
6 come out of my mouth. This is a leadership
7 PAC that bears the name of his former
8 presidential campaign, that has on its back
9 people who were involved in its presidential
10 campaign, that has on as its counsel people
11 who are involved in presidential campaigns.
12 These are people that he knew. They are
13 vetting through, you know, travel for him and
14 I'm sure he knew and trusted many of the
15 people involved in all of this.

16 So I just -- I have this difficulty
17 envisioning Senator McCain as sort of lost in
18 between campaigns and drifting counseless
19 through this process of political life in
20 America. I take, you know --

21 MR. THOMAS: I don't think I said that.

22 CHAIRMAN LENHARD: It was sort of the way
23 it was all beginning to sound. I take your
24 part in it that leadership PACs do have
25 distinct legal constraints and legal

1 structures, and I'm sure that those were
2 honored in this circumstances. But the notion
3 that Mr. Goldman was not performing these
4 duties on behalf of Senator McCain, is just
5 very difficult for me to accept. Mr. Von
6 Spakovsky.

7 COMMISSIONER VON SPAKOVSKY: Well, I'm
8 not going to pile on but I will say that I
9 understand my colleagues concern with the
10 agency issue. You have made that part of your
11 presentation but for me it's kind of a red
12 herring. And I, frankly, agree that there is
13 no way that Mr. Goldman would be agreeing to
14 appearances for the Senator unless he had the
15 authority to do that and he certainly wouldn't
16 be agreeing to particular dates unless he
17 first had to check with not just the Senator
18 but he has to check with the Senator's
19 scheduler in his office to make sure he is
20 available.

21 But the question I've got for you is --
22 and I think you probably know this from
23 reading the Advisory Opinion and the SOR that
24 he did on the California democrat or
25 California republican. This really to me

1 comes down to where do you draw the line with
2 441i(e), because 441i(e) says that a federal
3 candidate cannot solicit funds for state
4 elections, nonfederal elections, that are
5 outside the federal restriction and outside
6 the federal sources.

7 So my question to you is, where do you
8 draw the line with that? And we keep getting
9 a lot of questions about this as you know from
10 that AO on invitations. And the question that
11 I have for you is, is it okay to be listed as
12 a guest speaker, as Senator McCain was here,
13 at an event where amounts are being solicited
14 for over the federal limits as long as the
15 federal candidate puts in the kind of
16 disclaimer that the Senator put in.

17 If you can do that, okay, what's the next
18 step? Can you be listed as an honorary chair
19 of a state event like this as long as you make
20 it clear that you're not soliciting? Where --
21 you represent Senator McCain, Mr. Potter, he
22 was responsible in large part for this
23 provision. How far can a federal candidate go
24 with these kind of state fundraising events,
25 and how far can he protect himself by using a

1 disclaimer?

2 MR. POTTER: There are a bunch of
3 questions in that one which is fine. Let me
4 take them in order. You started by making a
5 comment in the agency context before you moved
6 on to the rest of the question and you said
7 something that others had said in slightly
8 different ways but since you said it last, I
9 wanted to address it on the record and that
10 is, you made a reference to Mr. Goldman
11 accepting events on behalf of Senator McCain
12 or making commitments for Senator McCain.

13 I don't think the record shows that. The
14 record shows and the affidavit states is that
15 invitations came to him. I don't think
16 anywhere it says he acting unilaterally on his
17 own without consulting anyone else decided
18 what the Senator was going to go to or not go
19 to.

20 The record shows that Senator McCain only
21 met with Mr. Goldman a few times. He
22 routinely met with John Weaver and Carla Eudy.
23 I know and have said that Carla Eudy was the
24 person who asked me to do the legal work for
25 the PAC. So I just want to be clear here.

1 There's a fair amount we don't know on the
2 record of exactly how the PAC operated.

3 And one of those is exactly what
4 authority Mr. Goldman had internally never
5 mind from Senator McCain, how things worked
6 when they came in; who he consulted, as I've
7 indicated, who, if anyone, he went to with the
8 advice I gave him before going back to the
9 state parties on it. So I just wanted to be
10 clear on that factual point.

11 In terms of the entire question of what a
12 federal office holder can or cannot do on a
13 policy basis, clearly the statute intends that
14 the office holder or someone acting on behalf
15 of the office holder should not be raising
16 excessive funds, funds not permitted in
17 federal elections.

18 The Commission has dealt with this in
19 several of these advisory opinions. I have
20 said that I now think they are very confusing
21 advisory opinions. When I was looking at them
22 in 2006, I actually thought they were pretty
23 clear. But having extended conversations with
24 the Counsel's Officer where my clarity and
25 their clarity were on completely different

1 pages, I now understand the arguments that
2 they were making that there was other language
3 in there that should have been read
4 differently.

5 And so I think the immediate result of
6 that is to say it is very confusing, and I
7 think the first thing the Commission ought to
8 do is be clear on it. I have just -- I will
9 say very recently read the statement of
10 reasons in the California Internet MUR where I
11 thought for the first time the Commission
12 stated clearly, in a series of paragraphs,
13 exactly what it thought the rules were.

14 Those were not my understanding before.
15 I don't think they will reflect what the
16 Commission has said before; but if that's
17 where the Commission is going to be, I think
18 that's acceptable and it's clear.

19 It's just -- then you need to provide
20 notice and I don't think you can actually do
21 that in a statement of reasons in a MUR and
22 say that's sufficient notice. I think if
23 that's where the Commission is, it ought to
24 speak in a Notice of Comment Regulation.

25 COMMISSIONER VON SPAKOVSKY: I'm the

1 first to agree with you. I think the past AOs
2 are confusing. But what I'm asking you is,
3 let's just assume for a second that these
4 rules are confusing that they are murky.

5 MR. POTTER: Um-hmm.

6 COMMISSIONER VON SPAKOVSKY: I'm asking
7 you where do you think -- what do you think
8 the rules should be? Where should we draw the
9 line? How far can a candidate go? Is it okay
10 to be listed as a guest speaker? Is it okay
11 to be listed as the honorary chair. Which
12 again you know state fundraisers, local
13 fundraisers they -- an honorary chair we know
14 has absolutely nothing to do with the event
15 itself, you know, organizing and raising it
16 like that, but they put a federal candidate's
17 name on as honorary chair because they know
18 that that gets attention to the invitation.
19 It draws people in.

20 I'm asking you in your interpretation of
21 441i(e) and the ban on solicitation of funds
22 for state elections, where should the line be?
23 How far can the federal candidate go in this
24 --these invitational materials? Because I
25 think everyone here knows how much it takes to

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1 keep the record that when he was actually at
2 the events, there was no solicitation by
3 Senator McCain.

4 Okay, but this whole argument, these
5 entire MURs are all about the invitations. So
6 where -- what should -- if this was an ideal
7 world and you could draw the rules, what do
8 you think the rules should be?

9 MR. POTTER: And in that regard I'd say I
10 can give you a personal answer. I am here as
11 counsel to Senator McCain. I do not know what
12 his views would be on that. I have not sat
13 down with him and said exactly where would you
14 draw the line?

15 My own personal reaction as someone who
16 has practiced in this area and somebody who is
17 involved in the statute that having someone as
18 the featured speaker at an event is not a
19 solicitation. If they say something at the
20 event and solicit, that's different. But
21 merely noting that they are going to be the
22 featured speaker at the event.

23 I mean, just look at the facts here.
24 First of all, we don't know at the moment
25 whether it would have been all right if the

1 invitation had only been for the California
2 Republican party because the Commission is
3 uncertain about that.

4 Then you add the fact that this is
5 California Republican Party and a candidate
6 for governor. So it takes it out of the
7 regulation on appearance and party events. I
8 don't see the problem with having a United
9 States Senator appear at a dinner that is
10 jointly sponsored by the California party and
11 its gubernatorial candidate as their principal
12 speaker if it's raising money under state law.

13 And then you move to the next piece which
14 is what if the candidate for statewide office
15 and there isn't a party committee. Again, it
16 seems to me, that the awkwardness to me of the
17 disclaimer, which I got to because of reading
18 Cantor and RGA, it seems to me better to say
19 the -- this invitation is from the state party
20 of or the spears for general campaign and the
21 solicitation is being made by the state party,
22 the state candidate and not by Senator McCain,
23 period.

24 To go ahead and say and, in any case, if
25 he is soliciting, he is only soliciting

1 federal money within the federal limits. I
2 think is very confusing. I think just make it
3 clear that this is not a solicitation by your
4 speaker. The speaker is an honored guest and
5 essentially a extra piece of the event but not
6 responsible for the event.

7 COMMISSIONER VON SPAKOVSKY: Is that
8 where you draw the line that you are not just
9 a special guest but you're an honorary chair
10 does that start intruding on 441i(e)?

11 MR. POTTER: Well, as this discussion has
12 illustrated, I'm not sure any of us know what
13 exactly an honorary chair is. No, I would
14 draw that you are actively involved in
15 planning the event. Once you move from being
16 the imported speaker or the name as used along
17 with every other office holder in California
18 on the state party web site to the point where
19 you have some role.

20 CHAIRMAN LENHARD: What if you are
21 editing or writing the invitation material?

22 MR. POTTER: Well that's obviously
23 interesting because as the Commission has been
24 told in a lot of context, there is an argument
25 in favor of making certain that the material

1 is the legally sufficient and state parties
2 local candidates are often not going to know
3 what the federal law is so I think there is --
4 if it's, I guess, the answer is if it's for
5 compliance purposes, I think it's okay. If
6 what you're doing is --

7 VICE CHAIRMAN MASON: For what it's
8 worth, we were offered that and we
9 specifically rejected that theory in the Bush
10 MUR so.

11 MR. POTTER: I agree.

12 CHAIRMAN LENHARD:
13 Commissioner Weintraub.

14 COMMISSIONER WEINTRAUB: Thank you, Mr.
15 Chairman. 2006, Trevor, you had some position
16 with the Campaign Legal Center, didn't you?

17 MR. POTTER: Yes.

18 COMMISSIONER WEINTRAUB: You were what?

19 MR. POTTER: I was and am President of
20 the Campaign Legal Center.

21 COMMISSIONER WEINTRAUB: Would it
22 surprise you to learn that on the web site
23 because I think it was attached to our papers,
24 on the web site of the Campaign Legal Center
25 in 2006 there was this discussion of what you

1 claim was a very confusing RGA opinion. Let
2 me just find where the sentence starts here.

3 "The advisory upon also sets rules for
4 written solicitations of funds featuring
5 federal candidates and office holders among
6 other things clarifying that RGA solicitation
7 materials in which federal office holders or
8 candidate are authorized to his or her
9 appearance so, you know, don't start in on
10 that one, just put that to one aside for a
11 moment, may not ask for donations, may not ask
12 for donations from federally impermissible
13 sources or exceeding federal amounts
14 limitations, e.g., the solicitation cannot ask
15 for a \$50,000 contribution from individuals
16 but then indicate that the federal office
17 holder is only asking for \$5,000 donations
18 from individuals."

19 Campaign Legal Center doesn't seem to be
20 confused.

21 MR. POTTER: Well, I'm not surprised to
22 hear that because the Counsel's Office
23 helpfully pointed that out to me in my first
24 meeting with him when I was explaining that I
25 thought many people read Cantor differently

1 than they did. They pointed out that CLC web
2 site says that and I believe also that Bob
3 Bauer's web site said it.

4 COMMISSIONER WEINTRAUB: Right. But I'm
5 not going to hold you responsible for what Bob
6 Bauer said.

7 MR. POTTER: Well, I will -- actually to
8 answer your question I was surprised that is
9 what the CLC web site said partly because of
10 the conversations I had had with people at CLC
11 as we were pawing through Cantor and RGA and
12 that is not what I had taken back. To be
13 clear I did not write what you're reading.

14 COMMISSIONER WEINTRAUB: I suspected not.

15 MR. POTTER: But, yeah, I think that to
16 me it demonstrated how there really were to
17 very divergent views of what these advisory
18 pages meant.

19 COMMISSIONER WEINTRAUB: How did that
20 demonstrate there were two views if that only
21 expresses one view?

22 MR. POTTER: Oh, because I was always
23 aware of the other view from the RNC and from
24 reading the advisory opinions and from talking
25 to a number of other counsel. So to be clear

1 the second view I first became aware of when I
2 actually got the counsel's -- first became
3 aware of when I got the Counsel's factual
4 analysis in the California MUR and sat down
5 with him and went through it.

6 Up until that time I had never heard of
7 the view that Cantor -- I never heard a view
8 that said the disclaimer wasn't sufficient.

9 COMMISSIONER WEINTRAUB: You should read
10 your own web site.

11 MR. POTTER: Clearly.

12 CHAIRMAN LENHARD: I am going to take up
13 issue with a point that you raised at the
14 beginning that it was the Commission's
15 responsible for confusion and that we are
16 using AOs as swords rather than shields.
17 Because my sense is that the sordidness of the
18 statute creates a flat prohibition on federal
19 candidates and office holders being involved
20 in soft-money solicitations. The statute
21 creates an exception for state party
22 fundraisers.

23 I wish the -- one could reasonably
24 construe the advisory applies to state party
25 candidates as well. But therein lie -- this

1 strikes me therein lies the sword in all of
2 this and the question is whether one can draw
3 from the advisory opinions a -- a
4 interpretation that this activity was
5 permitted that one could have a blanket
6 solicitation for funds that are not permitted
7 under federal law and then immunize or remove
8 the taint of that with a disclaimer was the
9 issue.

10 But really I don't think it can be fairly
11 kept as a product of confusion created by the
12 Commission that is leading us to this point.
13 It may be that your interpretation of whether
14 there was an additional exemption of what the
15 circumstances may have been and derived from
16 the reading of your AO's but that in the first
17 instance it starts with the liability that's
18 growing out of the statute.

19 MR. POTTER: Mr. Chairman, I absolutely
20 agree with you, the liability grows out of the
21 statute. The point I was making is if you
22 have just the statute and the reg which quotes
23 the statute, and then you had these
24 disclaimers, I don't think you would say that
25 Senator McCain was soliciting nonfederal

1 funds.

2 You would look at this and say the
3 solicitations for funds were being made only
4 by California for Schwarzenegger and the
5 California party. And according to federal
6 law, Senator McCain is not soliciting
7 individual funds beyond the corporation or
8 labor units; but if that's the two things you
9 had, I don't think we would be here. We are
10 here because we have a series of advisory
11 opinions that say, no, we're going to -- we're
12 going to convert the Senator's appearance on
13 the invitation to a solicitation for federal
14 funds because he's the speaker and he's
15 allowed his name to be on the invitation.

16 You know, without it you would say okay,
17 he's the speaker, he's not doing to
18 solicitation. The state party is doing the
19 solicitation. If he is soliciting, he is only
20 soliciting nonfederal funds. You wouldn't
21 have a problem with the statute. That's where
22 I said I think, A, the confusion has come to
23 exist.

24 We may now all agree we don't know what
25 the disclaimer meant in Cantor but I think

1 that caused some of the confusion but, B, that
2 is then being used as the sword in a sense
3 that the violation is being created here
4 because our advisory meetings say that having
5 his name on the invitation with his consent,
6 which is another issue, but let's say it's
7 with his consent, that having his name on with
8 a consent constitutes a solicitation per se.
9 Without that clause, you have, he can't
10 solicit, he didn't solicit.

11 CHAIRMAN LENHARD: Commissioner
12 Weintraub.

13 COMMISSIONER WEINTRAUB: Are you
14 saying --

15 MR. POTTER: Help, Scott.

16 COMMISSIONER WEINTRAUB: I'm sorry, I
17 just if it wasn't you, if it wasn't you too
18 here then, you know, this might be easier
19 actually to swallow. If it was the Don McGhan
20 making these arguments, I would say it's what
21 he's been saying for years. But I mean,
22 Trevor, you worked on this statute, didn't
23 you?

24 MR. POTTER: Yes.

25 COMMISSIONER WEINTRAUB: Are you saying

1 that it was your understanding when he stood
2 up on the Senate floor and said after this law
3 is passed, I don't know exactly what he said,
4 but I'm guessing he said something pretty
5 close to this, federal candidates will not be
6 able to solicit soft money anymore, that what
7 he had in mind was, oh, but if a governor
8 wants some help in fundraising and asks if he
9 can put my picture prominently on an
10 invitation to a soft-money fundraiser, that'll
11 be okay.

12 That is his and your understanding --

13 MR. POTTER: Not surprisingly I thought
14 about the question of what exactly was
15 congress trying to do before.

16 COMMISSIONER WEINTRAUB: Wait. Wait, say
17 that again.

18 MR. POTTER: I think the answer is that
19 the perceived soft-money problem was federal
20 candidates soliciting funds themselves,
21 directly, etc., from the in excess of all
22 these federal limits are from impermissible
23 sources with the computer understanding and
24 reality that that money would then circle back
25 and be used for them or by them to help their

1 election.

2 That is the whole coffee issue with I
3 can't take the money but you can give it to
4 the DNC they can use it on my behalf.

5 COMMISSIONER WEINTRAUB: What's about the
6 part about raising nonfederal funds for
7 nonfederal candidates? There is a provision
8 in there.

9 MR. POTTER: Yes, what I'm saying is the
10 focus of the law, the greatest problem was
11 seen as, what I have just described which is
12 the notion that federal candidates are raising
13 money for their own benefit. Then you have
14 the issues of, well, how are we going to avoid
15 people getting around it and wouldn't you just
16 have the state party or the state candidate
17 become that outside vehicle?

18 So I think the answer is if you were
19 talking about what people thought was the
20 principle point, it was raising money for
21 yourself. And the anti circumvention
22 provision was you can't solicit in excess of
23 the federal funds for other people because
24 then they may end up being the conduit and
25 turning around and doing it for you.

1 COMMISSIONER WEINTRAUB: So that was your
2 understanding at the time as long as they
3 weren't going to use that money for you it was
4 really not a problem for Senator McCain to be
5 out there helping somebody raise hundreds of
6 thousands of dollars in soft money, letting
7 donors perceive that they were doing him a
8 favor by doing so, that was all okay?

9 MR. POTTER: I will say that what I have
10 just stated, not your characterization, but
11 what just stated is my clear understanding. I
12 will not speak for what Senator McCain's
13 understanding was. There was a moment a few
14 years ago where I spoke to the Commission of
15 what Senator McCain's understanding was as I
16 understood it, and I was then after informed
17 by him that if I wanted to know what his
18 understanding was, I should ask him. So I am
19 speaking on behalf of myself on that.

20 COMMISSIONER WEINTRAUB: Let me just ask
21 one other thing because there is something
22 else that I found very striking and it was
23 part of your presentation, Scott, because of
24 our mutual procedures for rules of PAC, rule
25 making.

1 If I scribbled this down correctly, I
2 think you said that in that rule making the
3 Commission allowed as a result of that rule
4 making -- I only wrote part of the sentence
5 down, that the candidates would now be more
6 formally distanced from the leadership PAC,
7 that somehow the leadership PAC created a
8 bigger barrier between the candidates and the
9 leadership PAC. Is that your understanding of
10 what that rule making did?

11 MR. THOMAS: Yes, I mean the Commission
12 did with that rule making took away the
13 possibility of saying that someone's
14 leadership was an authorized committee. It's
15 to be treated as a nonauthorized committee and
16 you can't automatically assume that it has to
17 share contribution limits with the candidates
18 own authorized committee as a result. So that
19 does create a very formal separation
20 distinction whereby the leadership PAC cannot
21 be treated as if it's a candidates own
22 authorized committee.

23 COMMISSIONER WEINTRAUB: As a matter
24 that's right. That was a point to say that
25 they weren't going to be considered the

1 authorized committee but wasn't the whole real
2 point of that to free up candidates to be more
3 open in their association with their
4 leadership PACs.

5 I mean that's why the second time Trevor
6 was asked to set up Straight Talk. It was
7 they said now you are going to put John
8 McCain's name all over it. Because I clearly
9 remember a conversation that you and I had at
10 the time where I went into your office and I
11 said, please, Scott, don't do this because you
12 are going to break down the flimsy barriers
13 that there are between the candidates and the
14 leadership PAC.

15 And so I would be very surprised to learn
16 that actually you thought you were making the
17 wall higher.

18 MR. THOMAS: Well, yes, I do think the
19 wall is higher. But at the same time it was
20 done with an understanding that are really
21 designed to help other people get elected.
22 And inherent that rule making was a sense that
23 we were going to remove the unfairness, if you
24 will, of saying these kinds of groups are
25 going to have to be treated as part and parcel

1 of the candidate's own authorized campaign
2 structure.

3 And this gives leadership PACs that are
4 legitimate the ability to go ahead and go out,
5 help other candidates and they don't have to
6 be treated as if they were part and parcel of
7 the candidate's own structure and have to live
8 by the same contributions.

9 So this is another argument as well
10 because there are some leadership PACs that
11 spend a lot of time helping going out and
12 helping other people get elected. I think
13 Senator McCain is in that category. It has a
14 different function. And so I think this was a
15 way to recognize that, that distinction, that
16 formal distinction.

17 VICE CHAIRMAN MASON: The problem I have
18 with that because my recollection is the same
19 as yours is that part of the purpose of that
20 was to do away with the pretense. Everybody
21 knew what was going on. Everybody knew what
22 was in control. And the problem I'm having --
23 and so the purpose was to say well if the
24 purpose is to elect this candidate, then
25 that's an authorized committee. If the

1 purpose is to elect other people, that's a
2 nonauthorized committee and the candidate can
3 be involved in that.

4 And the trouble I'm having is that the
5 huge benefit to that was to get everything
6 above board and put it in the regulatory
7 structure and have people fess up to what they
8 were really doing and let them be frank and
9 open about it. And the arguments that I'm
10 hearing today takes us right back in the other
11 direction. And somehow say, well, yeah, I
12 mean he had signed all the fundraising
13 appeals, his name was there and all this other
14 stuff but he's really not responsible.

15 MR. THOMAS: Part of what we are saying
16 is that BCRA came along. And BCRA imposed
17 this very solicitation restriction that we are
18 talking about, and it's a brave new world.
19 It's a scary world out there.

20 VICE CHAIRMAN MASON: But we addressed
21 the solicitation restriction in BCRA regs.
22 And in fact in one respect we went further
23 than Senator McCain wanted to go. I believe
24 it may have been Trevor or other people who
25 said, well, if you have a leadership PAC

1 that's controlled by a federal candidate,
2 Senator McCain had a floor statement that said
3 well, you can raise \$5,000 in hard money and
4 \$5,000 in soft money. And the Commission
5 looked at the statute and said no we don't
6 think you can interpret it that way.

7 Now the theory that you guys are
8 suggesting would say well this isn't
9 controlled by the Senator so they go out and
10 raise, you know, and have their soft money
11 accounted for. We dealt with this.

12 MR. THOMAS: The way you dealt with it,
13 look at the regulation which is very clear.
14 You would have dealt with solicitation
15 restriction in terms of whether or not it is a
16 commission, established, financed, maintained,
17 or controlled by the covered official.

18 VICE CHAIRMAN MASON: I think as a
19 factual matter, most of us anyway, are saying
20 this was established, finance, maintained, and
21 controlled by Senator McCain. And we are
22 having a very difficult time with the argument
23 that somehow taking his campaign manager and
24 his chief fundraiser and using them as cutouts
25 and still allowing him to sign all the

1 fundraising letters and be the face of the
2 committee and use the committee to arrange his
3 travel or to arrange his appearance at
4 fundraising events, but he's not really in
5 charge.

6 As a factual matter, this isn't
7 persuasive with us.

8 MR. POTTER: Well, the factual matter I
9 believe is, he having done all those things
10 did not solicit impermissible funds; and he
11 did not authorize Mr. Goldman to solicit
12 impermissible funds who is the person who
13 talked to the state party here. We are fine
14 up to there.

15 But if you want to say is because of all
16 those facts, we are going to hold him legally
17 responsible for what Mr. Goldman did, despite
18 the fact he didn't know about Mr. Goldman
19 doing it and he wouldn't have let Mr. Goldman
20 do it if he could, that's where we stop.

21 VICE CHAIRMAN MASON: I don't know a
22 about your last statement but the point in
23 BCRA where it went over and over about agents
24 is exactly there, that as we look and as a
25 factual matter including the Straight Talk

1 America was an agent of Senator McCain and we
2 can't sort of go out and parse out among
3 employees and this again, you know, some kind
4 of cutout, well, yeah, he hired the executive
5 director but the executive director hired all
6 these other people. That doesn't get him out
7 of the agency.

8 MR. THOMAS: That's not on the record by
9 the way who hired these folks.

10 VICE CHAIRMAN MASON: I find this very
11 annoying. You are representing two clients
12 here and you are saying that you don't know
13 and you are using you don't know as a reason
14 for not finding liability. And let me just
15 suggest that if you think there is some lack
16 of clarity here that's an excuse but it is
17 your client who's failed to come back with the
18 relevant information, then you need to go back
19 and get it.

20 MR. THOMAS: You have the burden.

21 VICE CHAIRMAN MASON: If you go to court,
22 fine. If you go to court, we will have the
23 burden and if you are raising a defense, you
24 will have a burden of showing facts.

25 MR. THOMAS: We are sort of in the

1 awkward position of not having the -- sort of
2 structured how this case was going to be
3 brought here. There really wasn't an
4 investigation. It was sort of assumed I think
5 early on that this would be resolved as a pure
6 legal question. So get everybody involved.
7 We didn't approach it where we needed to do an
8 investigation of some of these factual
9 questions.

10 And that's where we are. Of course if
11 there is any information the Commission feels
12 it needs, you know, I suppose there's an
13 opportunity for some more gathering with all
14 the facts and we think that the facts would be
15 determinative. But I --

16 VICE CHAIRMAN MASON: I guess my
17 suggestion is you are the one who has come to
18 the Commission and said these facts are
19 relevant and we don't have them. And my
20 suggestion is the burden is on you. If you
21 think there are facts out there that you maybe
22 dispositive, you've had several opportunities
23 to respond and you have to come forward and
24 now at the last minute you are saying, well,
25 we don't have the facts to resolve this is

1 coming too late.

2 MR. THOMAS: The fact of whether implied
3 authority was created, I guess, would require
4 some evidence that the Senator had done
5 something. It's true, we have come to you to
6 point out things the Senator has done that
7 might indicate that there is an implied
8 authority. We haven't felt like that's our
9 job.

10 VICE CHAIRMAN MASON: I understand. But
11 my point is, I believe and I suspect my
12 colleagues believe, let me just say this
13 footnote. But both of you well understand I
14 heard this rhetoric about Counsel's Offices
15 and Counsel's Offices didn't do anything
16 without Commission's approval.

17 And so, you know, when the Counsel's
18 Office is coming to argue a legal position,
19 you can rest assured that it was vetted by the
20 Commission, the Commission approved it and so
21 that there was no --

22 MR. THOMAS: I didn't mean to take any
23 responsibility away from you.

24 VICE CHAIRMAN MASON: But the -- the -- I
25 think the position that you are seeing

1 represented in briefs is that we think
2 authority is established here. And so if
3 you're arguing somehow that it's not, then you
4 need to come forward or show us but by the
5 establishment and financing of this PAC, we
6 believe that it's Senator McCain's PAC and
7 that they have authority to do what they, in
8 fact, did.

9 And that somehow parsing out that making
10 the travel arrangements and arranging the
11 dates and so on like that was one thing but
12 reviewing the invitations was somehow
13 segregated off and they had authority to do
14 one but not authority to do the other is not a
15 distinction that I see any basis for.

16 MR. THOMAS: Let me just make one small
17 point. I hope we have come across in pointing
18 out that the information in the affidavits you
19 can appreciate that indeed Mr. Goldman had a
20 role and basically taking in invitations and
21 trying to assess which ones he wanted to
22 present to the Senator for approval.

23 Likewise, if and when the Senator would
24 approve something it's very apparent Mr.
25 Goldman would basically go to the Senator and

1 all right, here are some travel options and
2 plan your travel accordingly. And so my point
3 is those are situations where at worse the
4 Senator is being given a chance to approve.

5 Mr. Goldman is in position of trying to
6 go out and gather information to bring it back
7 to the Senator and get some sort of approval.
8 If you wanted to carry that parallel forward
9 to this about approving the solicitation, it
10 would at least out of fairness think that
11 there had to be some sort of step where Mr.
12 Goldman should come likewise to the Senator
13 for approval.

14 You just don't see that here. This is
15 something -- I don't know why he did it that
16 way. But, again, you are right, we haven't
17 flushed out the record in that regard. But
18 you don't see any indication of approval and
19 you do have flat denials from both the Senator
20 and MR. Goldman that there wasn't any such
21 approval.

22 MR. POTTER: If I could one factual basis
23 correction on that on the record. Senator
24 McCain says he met with Mr. Goldman only on a
25 few occasions and principally dealt with John

1 Weaver and Carla Eudy. So that would be
2 consistent with my earlier comments that I
3 think Craig Goldman would have dealt more with
4 the questions and invitations. I just wanted
5 to be clear on that.

6 CHAIRMAN LENHARD: I guess I am in a
7 similar place with the Vice Chairman on this.
8 I am fueled in somewhat by what I understand
9 to be the consequences where we would adopt
10 the alternative provision or version for the
11 -- the members of Congress used the Staff of
12 their leadership PACs to vet through, you
13 know, approve edit and change soft-money
14 solicitations that there would be therefore
15 insulated from any responsibility for what
16 those solicitations said even if the member
17 appeared by part of the invitation by name and
18 photograph and the consequences of that I
19 think are not in line with what the statute's
20 about.

21 So I have both of those concerns about
22 the agency argument which is why I thought
23 Commissioner Von Spakovsky was merciful in
24 trying to direct things over to federal what I
25 thought were better arguments about the

1 confusion of the law. But we just give it
2 back to agency. The general counsel has soft
3 recognition.

4 MS. DUNCAN: Thank you very much. I just
5 wanted to ask a few questions about the agency
6 theory. Mr. Potter, I think you said during
7 your presentation or in response to a question
8 that there is a lack of information on the
9 record about the relationship between Senator
10 McCain and Mr. Goldman. And I think we would
11 both agree is that one reason for that is the
12 -- that the agency argument seemed to have
13 been first raised in your response to our
14 probable cause brief.

15 But there are a few, all be it, brief
16 references to this relationship or this agency
17 issue in the record and I just wanted to draw
18 your attention to two of them and ask you
19 perhaps to try to reconcile those references
20 to what you said today because it appears to
21 me those references are inconsistent with the
22 notion that there was no agency relationship
23 between the Senator and Mr. Goldman or between
24 the Senator and the PAC.

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That's the first one and I wonder if you might address that.

MR. POTTER: I think I actually addressed both of them. Because I'm assuming the other is the agency reference in my correspondence.

MS. DUNCAN: It's not.

MR. POTTER: Okay. Well I -- two answers to that. First, we really focus on the entire agency late in the probable cause stage for the simple reason that when the reply briefs were submitted in the relief stage, which I stated and I think made pretty clear, it was

1 my understanding that the invitations fully
2 complied with Cantor and RGA and all of the
3 Commission's guidance and that therefore that
4 was the only issue in the case.

5 And it was only after it became clear
6 that there was another view of that espoused
7 by the Counsel's Office on behalf of the
8 Commission that it became clear we ought to
9 look at whether, in fact, the Senator had
10 violated the statute on the basis that if the
11 Commission was going to come to the conclusion
12 that this was in fact, a solicitation contrary
13 to what we thought, then we better know
14 whether it was authorized by the Senator. So
15 that's why it came late.

16 As I said in my comments, I interpreted
17 my role and I think from the affidavit Mr.
18 Goldman interpreted his role, as protecting
19 Straight Talk and the Senator as its honorary
20 chair any sort of a violation by the Senator
21 would be a problem for the Senator and his
22 leadership PAC.

23 MS. DUNCAN: Let me just draw your
24 attention to the other reference, and I know
25 about the one you are talking about but this

1 is a slightly different one. And this is even
2 more brief but I wonder about it as well.
3 This is your response in the MUR 5799 and it's
4 stated September 22nd, 2006. And you refer to
5 the sentences as detailed in the attached
6 affidavit Executive -- I'm sorry, Craig
7 Goldman Executive Director of Senator McCain's
8 Straight Talk America PAC, Senator McCain and
9 his agents had no role in planning the event
10 or designing the format of the invitation.
11 And I wondered what at that point you were
12 referring to because I think you have
13 responded to questions today that you didn't
14 understand or know whether Senator McCain had
15 an agent for purposes of reviewing these
16 invitations for their compliance with federal
17 law and approving his appearance or his name
18 or likeness being used in them.

19 MR. POTTER: Can give me that site again.
20 I think I know the answer but I don't want to
21 do it off the top of my head.

22 MS. DUNCAN: Sure. September 22nd, 2006.
23 It was your response to the complaint in MUR
24 5799 and it's the first paragraph. It's the
25 first paragraph under the section heading "the

1 facts".

2 MR. POTTER: Sorry, I'm supposed to have
3 a chronological file here but No. 2 is not
4 popping up. I have a September 20 response,
5 would that be the same? Oh, I'm sorry. It is
6 the South Carolina one.

7 The best answer I can give you is that
8 what I was referring to is Senator McCain and
9 anyone associated with Senator McCain is
10 attempting to do as broad an answer possible
11 saying that nobody in the McCain office had
12 anything to do with how the fundraiser was
13 organized or put together and Senator McCain
14 invitations to appear at it and had no role in
15 planning it. Maybe an imprecise -- but I
16 don't think I was referring to one person in
17 particular in reading that.

18 MS. DUNCAN: Thank you.

19 CHAIRMAN LENHARD: Do you have any
20 questions Commissioners, Staff Director?
21 Anybody?

22 Okay. I guess that brings it to your
23 closing remarks. You've reserved several
24 minutes. And if you want to take a moment to
25 compose yourself. I don't know exactly what's

1 left on the clock. 15 seconds so that may
2 help you to frame your thoughts.

3 MR. THOMAS: We actually have 15 seconds.

4 CHAIRMAN LENHARD: Obviously we will
5 grant you more than that, if you have closing
6 thoughts for us.

7 MR. POTTER: Thank you very much.

8 I will be brief. I recognize that the
9 Commissioners have clearly some antipathy to
10 the agency argument. I will say that we felt
11 it incumbent on us as lawyers to make what
12 think is a valid legal argument and that just
13 as the Chairman is concerned about the effects
14 of saying the people working for leadership
15 PACs can be sort of loose cannons out there
16 without responsibility for who the office
17 holder whose name is associated with it.

18 But the other side of it is also a
19 problem which is people acting without
20 consulting the office holder in a way that can
21 result in the office holder having a legal
22 violation and most potentially a criminal
23 violation. And under those circumstances we
24 really need to look at and be clear on exactly
25 why Mr. Goldman qualified as an agent of

1 Senator McCain when Mr. Goldman did what he
2 did here.

3 We want to focus on that because I think
4 it is an important step in the analysis.
5 Beyond that, I think we have made pretty clear
6 the point that, in our view, there are
7 alternative readings of these Advisory
8 Opinions that the area of law perhaps up until
9 the Commission's statement of reasons in a
10 recent California MUR and it has been quite
11 murky and the California statement of reasons
12 does not really provide broad guidance to the
13 regulative community unless you are going to
14 send it out to everybody and put it on the
15 front page of the web site and say this is
16 where we are.

17 And as a result, we don't think what
18 occurred here should be pursued by the
19 Commission given the confusion that I -- I
20 think was there back in 2006.

21 And given that while you may view the
22 advice as misguided, at least there was a
23 conscientious attempt to comply with the law
24 here and to put every possible bell and
25 whistle on these invitations to ensure that

1 they did comply with what was understood to be
2 the Commission's rules here.

3 MR. THOMAS: Well, no I would -- I only
4 want to emphasize the very last point. The
5 folks who for one reason or another felt they
6 had the role of looking at these materials,
7 did try to get legal counsel, respected legal
8 counsel, and I would just urge that the
9 Commission take that into account as well.
10 This may not be a technical perfect example on
11 legal counsel but it certainly from the
12 perspective of those involved as looking at
13 these materials was the base for their
14 conclusion. And keeping in mind as the last
15 thought Senator McCain by himself, if you
16 knew, never even knew about these materials,
17 never saw them, never talked to anybody about
18 them, no one ever came to him about them. So
19 we want to leave you with that impression in
20 terms of whether or not he should be held to
21 be personally in violation of these
22 circumstance. Thank you very much.

23 CHAIRMAN LENHARD: Thank you very much.
24 With that, we will bring the hearing to a
25 close. Thank you.

1 (Whereupon, at 3:42 p.m., this executive
2 session of the Federal Election
3 Commission was concluded.)
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1 CERTIFICATE OF REPORTER

2 DOCKET NO.: --

3 CASE TITLE: MUR 5712 etc Senator John McCain

4 HEARING DATE: October 24, 2007

5 LOCATION: Washington, D.C.

6

7 I hereby certify that the proceedings and
8 evidence are contained fully and accurately on the
9 notes reported by me at the hearing in the above
10 case before the federal Election Commission.

11

12 Date: 10/24/07

13

14 Stephanie A. McCarn, RPR

15 Official Reporter

16 Heritage Reporting

17 Corporation

18 Suite 600

19 1220 L Street, N.W.

20 Washington, D.C. 20005-4019

21

22

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25

DECLARATION OF JOHN S. MCCAIN

1. I am John S. McCain, currently serving as a United States Senator.
2. I have been told that two complaints have been filed in connection with two fundraising invitations, one for a joint fundraising event for the California Republican Party and Governor Swartzegger's campaign committee, and one for the campaign committee of Adjutant General Stan Spears of South Carolina.
3. I have never seen the invitations to these two events, and never approved the use of my name or image in these invitations, or the wording of the invitations. At no time did I ever authorize anyone to use my name to solicit funds for these events.

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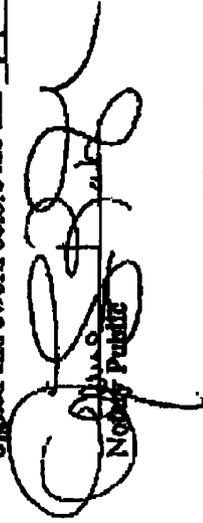
6. At no time did I ever approve the use of my name on those invitations, either directly, or through Mr. Goldman or any other person, and Mr. Goldman was not authorized by me to approve any mailings in which my name or image was used to solicit non-federal funds. Mr. Goldman and I never had a conversation at any time about these mailings or

BEFORE THE FEDERAL ELECTION COMMISSION
SUPPLEMENTAL DECLARATION OF CRAIG GOLDMAN

5.) I never discussed these invitations with Sen. McCain, either directly or indirectly, and to my knowledge he was not aware of their format or language or that his name was on them. To my knowledge, he never authorized the use of his name on the invitations, or was aware of or approved any of the language on the invitations. To this date, I have never had a discussion with Senator McCain about these invitations.

DISTRICT OF Columbia, ss:

Signed and sworn before me this 19th day of September, 2007


Notary Public

LEWIS B. MITZ
Notary Public of District of Columbia
My Commission Expires December 14, 2007


Craig Goldman

§ 441: FEDERAL ELECTION CAMPAIGN LAWS

(e) *Federal candidates.*

(1) *In general.* A candidate, individual holding Federal office, agent of a candidate or an individual holding Federal office, or an entity directly or indirectly established, financed, maintained or controlled by or acting on behalf of 1 or more candidates or individuals holding Federal office, shall not—

(A) solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, unless the funds are subject

A[n]...individual holding Federal office, agent of...an individual holding Federal office, or an entity directly or indirectly established, financed, maintained, or controlled by or acting on behalf of 1 or more...individuals holding Federal office, shall not...solicit [funds for non-federal elections in excess of federal limits or from federally prohibited sources].

solely in connection with such election for State or local office if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.

amount limitations for making and receiving contributions. Requiring them to abide by a single contribution limit means choosing a limitation that is not intended for one of those committees. Consequently, it is logical to view an authorized committee and a leadership PAC as separate committees, and transactions between them that benefit the authorized committee as contributions and not as a basis to find

presumptions as to their status. To the extent that leadership PACs are used to pay for costs that could and should otherwise be paid for by a candidate's authorized committee, such payments are in-kind contributions, subject to the Act's contribution limits and reporting requirements.

The Commission also concludes that in instances when leadership PAC activity results in an in-kind

The Commission also noted that the final rules in the *Public Financing of Presidential Candidates and Nominating Conventions*, 68 FR at 47406, "in no way address situations where the Commission determines that the multicandidate political committee and the candidate's principal campaign committee are affiliated under 11 CFR 100.5(g)(4)." With the new rule, the Commission has decided to examine

The Commission concludes that since its first examination of leadership PACs, these committees cannot be assumed to be acting as authorized committees. Rather, these PACs are worthy of the same treatment as other unauthorized committees that operate without presumptions as to their status.

to supporting candidates for election to State and local offices, that had previously been the campaign committees of the State's then-governor, was affiliated with a Federal political committee that had been organized by the governor and that had as its purpose supporting candidates for Federal office). Thus, the rule in new 11 CFR 100.5(g)(5) provides no new avenue for circumventing the separate contribution limitations applicable to authorized and unauthorized committees.

contributions benefiting publicly funded Presidential candidates. *Find Rules on Public Financing of Presidential Candidates and Nominating Conventions*, 68 FR 47386, 47407 (Aug. 8, 2003); 11 CFR 303.4, 10; 11 CFR 110.2(i). Although that rule was aimed at a somewhat different range of activity, the explanation and justification stated, "For other situations not addressed in the new regulations governing pre-candidate activity with a

determining whether an issuer's committee is affiliated with the Federal candidate and off-shooter's authorized committee. Rather, the Commission would analyze the facts to determine whether the issuer's committee made an in-kind contribution to the Federal candidate and off-shooter. Furthermore, the Commission will continue to use the affiliation factors in 11 CFR 300.24(d) to determine whether the Federal candidate and off-shooter or his agent directly or indirectly

§ 441:

FEDERAL ELECTION CAMPAIGN LAWS

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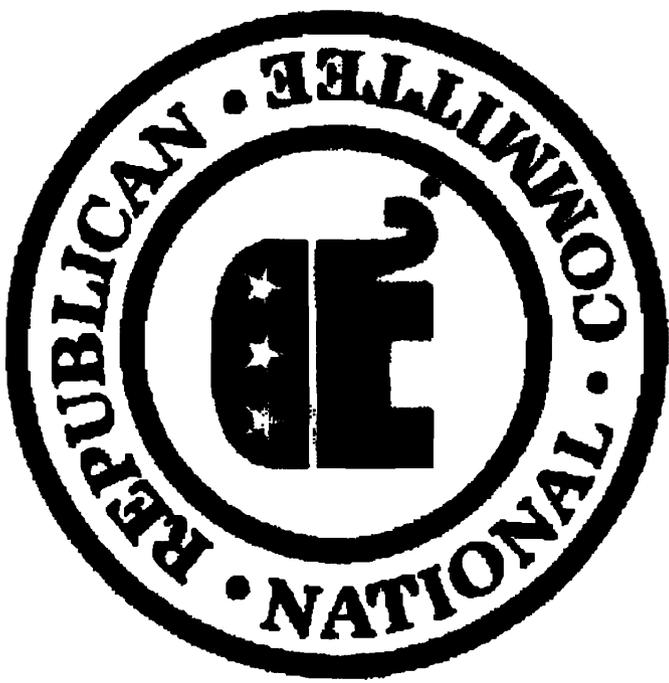
"We are honored to have Senator John McCain as our Speaker for this event. However, the solicitation for funds is being made only by Californians for Schwarzenegger and the California Republican Party. In accordance with federal law, Senator McCain is not soliciting individual funds beyond [the] federal limit, and is not soliciting funds from corporations or labor unions."

--Disclaimer on California Invitation

"Contributions to Spears for Adjutant General are not tax deductible for federal income tax purposes. The solicitation of funds is being made only by Spears for Adjutant General. We are honored to have Senator John McCain as our Special Guest for this event. In accordance with federal law, Senate McCain is not soliciting individual funds in excess of the \$2,100 per person, nor is he soliciting corporate, labor union, or foreign national contributions. South Carolina state law allows campaign contributions of up to \$3,500 per election cycle. Registered lobbyists please disregard."

--Disclaimer on South Carolina Invitation

29044240214



Counsel's Office

June 16, 2006

Seattle, WA

**REPUBLICAN NATIONAL COMMITTEE
COUNSEL'S OFFICE**



Federal Candidate Solicitations

Analysis is Two-Fold:

1. Is the name of a federal candidate or officeholder appearing on the solicitation?
2. Is that federal candidate/officeholder aware that their name is on the solicitation?

If "yes" to both questions, then the invitation needs a disclaimer:

- Example: *"Candidate X is only soliciting funds within the source and amount limitations of federal law."*



REPUBLICAN NATIONAL COMMITTEE
COUNSEL'S OFFICE



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 29, 2003

AO 2003-3

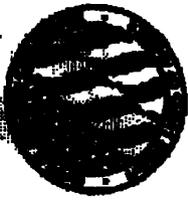
Page 6

1. c. *Are oral or written limitations on the solicitation appropriate, and if so, what should they say?*

Yes. As a general matter, a covered person asking for funds in connection with a non-Federal election in a State that permits donations that would not be lawful if in connection with a Federal election must expressly qualify or limit his or her request so that it is clear that he or she is asking only for funds that comply with the Act's amount limitations and source prohibitions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. The Commission would find the following language to be an adequate disclaimer:

I am asking for a donation of up to \$2000 per election from an individual's own funds [or up to \$5,000 per election from a multi-candidate political committee or a political party committee]. I am not asking for funds from corporations, labor organizations or minors.

When it is clear from the presence of adequate disclaimers that a covered person is not soliciting funds in violation of the Act, it is not necessary for a disclaimer to be repeated at every point in a written solicitation at which a general request for funds is made or orally in the course of every individual conversation at a fundraising event. This should not, however, be construed to permit a covered person to inculcate a solicitation of non-Federal funds by reciting a rote limitation, but then encouraging the potential donor to disregard the limitation.



FEDERAL ELECTION COMMISSION

WASHINGTON, D C 20463

CONCURRENCE IN ADVISORY OPINION 2003-03

Vice Chairman Smith, and Commissioners Mason and Tener

The Commission also ruled that federal candidates and officeholders may speak and be featured guests at such events provided, if federally impermissible funds are raised, that appropriate disclaimers are given.

As a start, we understand that the Commission must interpret the Act and its Regulations to comport with the constitutional liberties of affected individuals and groups. A solicitation ban prohibiting speech on the basis of its content, burdens both speech and association freedoms at the core of the First Amendment, and must be narrowly tailored to serve a compelling state interest. *Republican Party of Minnesota v. White*, 172 S.Ct. 2528, 2534 (2002); *Village of Schaumburg v. Citizens for a Better Environment*, 100 S.Ct. 826, 833 (1980). That the covered persons at issue are public officials is also important: "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Republican Party of Minnesota*, 172 S.Ct. at 2538 (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)).

Concurrence in Advisory Opinion 2003-03
Page 2 of 4

hedge and trim." *Buckley v. Valeo*, 424 U.S. 1, 43 (quoting *Thomas v. Collins* (1945) 323 U.S. 516, 535 (1945)).

For written solicitations that contain a "general pitch" (which, under Virginia law could be a solicitation for any amount from any source) a disclaimer such as that provided in 1.c of the Opinion should be included.

The Requestors sought advice on whether general solicitations that mention no dollar amount would be lawful under BCRA. Our preferred view would be to presume that covered persons who make unqualified solicitations intend to comply with the law, while prohibiting overt solicitations of impermissible funds. Otherwise, we believed the Commission is essentially assuming that a solicitor who makes no mention of a specific amount meant to violate the solicitation restrictions. The Opinion as released instead requires that general solicitations contain disclaimers that recite the federal restrictions. For written solicitations that contain a "general pitch" (which, under Virginia law could be a solicitation for any amount from any source) a disclaimer such as that provided in 1.c of the Opinion should be included.



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 29, 2003

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Page 6

1. c. *Are oral or written limitations on the solicitation appropriate, and if so, what should they say?*

Yes. As a general matter, a covered person asking for funds in connection with a non-Federal election in a State that permits donations that would not be lawful if in connection with a Federal election must expressly qualify or limit his or her request so that it is clear that he or she is asking only for funds that comply with the Act's amount limitations and source prohibitions. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62. The Commission would find the following language to be an adequate disclaimer:

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FEDERAL ELECTION COMMISSION
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January 12, 2004

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Page 6

⁹ Although Advisory Opinion 2003-03 might be read to mean that a disclaimer is required in publicity or other written solicitations that explicitly ask for donations "in amounts exceeding the Act's limitations and from sources prohibited from contributing under the Act," that was not the Commission's meaning. The Commission wishes to make clear that the covered individual may not approve, authorize, agree, or consent to appear in publicity that would constitute a solicitation by the covered person of funds that are in excess of the limits or prohibitions of the Act, regardless of the appearance of such a disclaimer. However, the Commission could not agree whether the use of a covered person's name in a position not specifically related to fundraising, such as "honorary chairperson," on a solicitation not signed by the covered person, is prohibited under the Act.



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2. With respect to the RGA Conference Account, may a covered individual sign or appear on written solicitations, such as signing imitation letters, or appear as a featured guest or speaker at a fundraising event, where the donations solicited exceed the Act's amount limits or are from prohibited sources but the solicitation does not include a notice that the covered individual is not raising funds outside the amount limits and source prohibitions of the Act?

No, the covered individual may not so participate under those circumstances. The requirements described above in response to questions 1.a, 1.b, and 1.c are applicable to the situations described in question 2, including the need for the notice that the covered individual is asking for funds only up to the applicable limits of the Act, and is not asking for funds outside the limitations or prohibitions of the Act.

The Event Publicity Rules for Not Federal Candidate Fundraisers

Analysis is Two-Fold:

1. Is the name of a federal candidate or officeholder appearing on the solicitation?
2. Is that federal candidate/officeholder aware that their name is on the solicitation?

If "yes" to both questions, then the invitation needs a disclaimer:

- *Example: "Candidate X is only soliciting funds within the source and amount limitations of federal law."*



REPUBLICAN NATIONAL COMMITTEE
COUNSEL'S OFFICE

“We are honored to have Senator John McCain as our Speaker for this event. However, the solicitation for funds is being made only by Californians for Schwarzenegger and the California Republican Party. In accordance with federal law, Senator McCain is not soliciting individual funds beyond [the] federal limit, and is not soliciting funds from corporations or labor unions.”

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