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FEDERAL ELECTION COMMISSION

ORAL HEARING

MURs 5712 and 5799

Wednesday, March 18, 2009

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

JARDIM REPORTING ASSOCIATES
(703) 867-0396

COMMISSION MEMBERS:

STEVEN T. WALTHER, Chairman

MATTHEW S. PETERSEN, Vice Chairman

CYNTHIA L. BAUERLY, Commissioner

CAROLINE C. HUNTER, Commissioner

ELLEN L. WEINTRAUB, Commissioner

DONALD F. McGAHN II, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel

ROBERT A. HICKEY, Staff Director

JULIE McCONNELL, Office of the General Counsel

JIN LEE, Office of the General Counsel

WITNESSES:

TREVOR POTTER, ESQ., Caplin & Drysdale

SCOTT E. THOMAS, ESQ., Dickstein Shapiro, LLP

KRISTY BERNARD TSADICK, ESQ., Caplin & Drysdale

MATTHEW T. SANDERSON, ESQ., Caplin & Drysdale

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1 CHAIRMAN WALTHER: Good morning. This is a
2 supplemental probable cause hearing on MURs 5712, 5799 and
3 is a follow-up on probable cause hearing that we had before
4 on this matter. Present, as I understand, are Trevor
5 Potter, Scott Thomas, Kristy Tsadick and Matthew Sanderson.
6 Welcome to the Commission and we look forward to
7 hearing your comments. I'll make just kind of orally
8 opening comment. MURs 5712 and 5799 concern the activities
9 of Senator John McCain in connection with fundraising events
10 held on behalf of candidates for state office.
11 On February 21, 2007, the Commission, in MUR 5712
12 found reason to believe that Senator John McCain violated 2
13 U.S.C. Section 441i(e) and 11 CFR Section 300.62 by
14 soliciting non-federal funds in connection with a
15 fundraising event on behalf of Governor Arnold
16 Schwarzenegger and the California Republican Party, and
17 to a finding of probable cause
18 to believe.
19 On April 10, 2007, the Commission under 5799 found
20 reason to believe that Senator McCain also violated 2 U.S.C.
21 Section 441i(e) and 11 CFR Section 300.62 by soliciting non-
22 federal funds on behalf of South Carolina Adjutant General

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1 Stan Spears and authorized conciliation prior to a finding
2 of probable cause.
3 The General Counsel's brief dated August 14, 2007,
4 notified respondent that the General Counsel planned to
5 recommend that the Commission find probable cause to believe
6 that Senator McCain violated 2 U.S.C. Section 441i(e) and 11
7 CFR Section 300.62 by soliciting non-federal funds.
8 Senator McCain submitted a reply brief on
9 September 20, 2007, requesting a probable cause hearing. On
10 October 20, 2007, the Commission held such a hearing. We
11 are here today because we have four new commissioners who
12 joined the Commission in 2008 and were not here to
13 participate in the hearing that took place in October 2007.
14 It was argued that we should offer an opportunity to appear
15 before us once again in view of the fact that we have four
16 new commissioners and we're glad to see here today.
17 Please feel free to begin whenever you're ready
18 and who will be the first person to make opening comments?
19 I should have been -- for ground rules, we'll start -- we're
20 going to be flexible and we'll start with opening comments
21 by you and any questions by the commissioners. We'd like to
22 really conduct the hearing within an hour if possible.

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1 MR. POTTER: Thank you, Mr. Chairman, very much.
2 CHAIRMAN WALTHER: Please proceed.
3 MR. POTTER: I greatly appreciate the opportunity
4 to appear before you again to discuss the facts and law in
5 MURs 5712 and 5799. Scott Thomas of the Dickstein Shapiro
6 Law Firm and I are here to represent Senator John McCain, as
7 are my two colleagues from Caplin & Drysdale, Kristy Tsadick
8 and Matt Peterson.
9 We welcome the occasion to discuss this matter
10 with you and especially with the majority of the Commission
11 who were not present when the first hearing on this matter
12 was held in 2007. I must say that when I received the
13 invitation to return for a second hearing, it was not
14 greeted with complete and loud joy. But having prepared for
15 this and reviewed the transcript, I am in fact grateful for
16 the opportunity because I think there are a number of things
17 that we did not have a chance to emphasize which we'd like
18 to today.
19 I will start and then turn our opening comments
20 over to Scott. The issue before us, of course, relates to
21 the prohibition in the Bipartisan Campaign Reform Act on the
22 solicitation of impermissible funds by federal officeholders

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1 and candidates.

2 We believe Senator McCain made no such

3 impermissible solicitation here. The record shows he agreed

4 to be a speaker at two state events in 2006, one for a non-

5 federal candidate in South Carolina and one for a party and

6 state candidate in California.

7 The committee sponsoring the events listed Senator

8 McCain's name on both of those invitations as a special

9 guest. He was not a chair of the events or on the host

10 committee or in any of the organizing positions which have

11 caused the Commission to deadlock in the past. He was

12 merely a speaker, a role he is previously expressly

13 permitted to fill in BCRA.

14 Finally, he did not sign the invitation, another

15 action which would trigger solicitation concerns for the

16 Commission. There is no suggestion that he solicited any

17 funds of any kind during his speeches.

18 The invitations themselves stated that the

19 solicitation for funds was not by Senator McCain. We

20 decided this time not to bring audio visuals which seemed

21 unhelpful, but we have got a few copies of what would be

22 slides, had we slides, and you have, I think, those in front

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1 of you. There are only a couple of them and the first one
2 is copies of the actual language on the invitation.
3 As you know from my previous testimony, I was
4 council to Straight Talk America PAC at the time and I told
5 its executive director that this language in the invitations
6 was appropriate to ensure that it was clear that Senator
7 McCain's role was only that of a speaker and that the
8 solicitation for funds was not being made by him.
9 I was also familiar with the holdings of FEC
10 Advisory Opinions 2003-03, the Cantor AO, and 2003-36 RGA,
11 which appeared to me and to others, election law attorneys,
12 to require an additional statement for events at which
13 others were soliciting federally impermissible money, an
14 express statement that the federal official was not
15 soliciting any non-federal funds.
16 Accordingly, these invitations contained both
17 statements, who was soliciting the state party or candidate
18 and what Senator McCain was not soliciting. As you also
19 know, the record includes sworn statements that Senator
20 McCain never saw or approved either invitation or ever was
21 aware that his name was being used on either invitation.
22 On these facts, we believe that Senator McCain,

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1 the covered official covered by the statute here, did not
2 solicit any impermissible funds in connection with either
3 state event. The invitation stated the solicitations were
4 being made only by the state committees and that he was not
5 soliciting non-federal funds.
6 The Office of General Counsel has disagreed with
7 this analysis, stating that the Commission has come up with
8 a clear test and that the mere permission to use a federal
9 candidate's or officeholder's name on an invitation that
10 solicits impermissible funds is per se a prohibited
11 solicitation.
12 For many reasons we believe this conclusion is
13 incorrect. But the fundamental reason is that it fails to
14 draw the distinction between what the federal officeholder
15 or candidate himself or herself says or does and what others
16 say and do, a distinction crucial to the Commission's
17 consideration of this matter. It therefore fails to address
18 the fact that the Commission has not had a four-vote
19 majority for the counsel's formulation of law in its binding
20 precedent to date.
21 The ultimate question in this matter is whether
22 the invitations themselves include or constitute an

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1 impermissible solicitation of non-federal funds by Senator
2 McCain, the federal officeholder or candidate. In the words
3 of the Commission in Advisory Opinion 2003-03, to be liable,
4 the federal candidate must ask for non-federal funds.
5 You already have before you a fairly exhaustive
6 summary of what we believe are the Commission's confusing
7 advisory opinions on this subject, both in the pleadings in
8 these MURs and in the transcript of the oral argument. Let
9 me therefore quickly summarize the highlights.
10 The first advisory opinion on this subject was
11 Advisory Opinion 2003-03, a request by Congressman Cantor of
12 Virginia, a federal officeholder seeking to assist state
13 candidates. The Commission repeatedly made it clear in the
14 advisory opinion that a federal officeholder may participate
15 in a non-federal fundraiser so long as he or she does not
16 personally solicit non-federal funds.
17 The key question therefore becomes what
18 constitutes an impermissible solicitation by a covered
19 official. To avoid such a solicitation, the AO says the
20 official should expressly state that he or she is only
21 asking for federally permitted funds and provided suggested
22 language for such a disclaimer.

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1 Most significantly, in response to Cantor's
2 question five, the Commission's inability to articulate a
3 standard for referring to federal covered officials in pre-
4 event solicitations, became clear. That is at page three of
5 our handout. The advisory opinion stated that agreeing to
6 serve in a position specifically related to fundraising,
7 such as serving on a host committee for a fundraising event,
8 constituted a solicitation by a covered official, and
9 therefore, that the funds requested using the federal
10 official's name must be limited to federally permissible
11 amounts.
12 However, the Commission said expressly that it had
13 not determined whether agreeing to appear on an invitation
14 in a non-fundraising capacity, such as honorary chair of the
15 event, constituted an impermissible solicitation if the
16 invitation was not signed by the federal official.
17 This is precisely the situation before us today.
18 Senator McCain's name appears on the invitations as a
19 special guest and not in any specific fundraising capacity,
20 along with the statement that the solicitation of funds was
21 only by the state committees and no non-federal funds were
22 being solicited by the senator. Senator McCain did not sign

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1 the invitation.

2 In their concurrence in Advisory Opinion 2003-03,
3 three commissioners, Smith, Mason and Toner, again
4 emphasized that the Commission had not reached a conclusion
5 on this issue. They said, and we quote it and repeat in
6 page four of our handbook, the Commission concluded that if
7 a covered person's name appeared in a specific fundraising
8 context for an event that solicited impermissible funds,
9 those materials would require a disclaimer.

10 The Commission could not agree whether the covered
11 person's name could appear on campaign letterhead as
12 honorary chair when that letterhead is used for a
13 solicitation without the campaign also remembering to
14 include the federal disclaimer.

15 From this the regulated community could and did
16 reasonably conclude that at least half the Commission
17 believed that appearing to appear on the letterhead as an
18 honorary chair, or an even less concrete special guest, did
19 not constitute a solicitation by the covered official.

20 The Commission next addressed this question in
21 Advisory Opinion 2003-36, the RGA opinion, where it again
22 confirmed that the Commission had reached no conclusion on

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1 whether a covered official, agreeing to be featured in an
2 invitation constituted a solicitation by the official. That
3 quote is on page five of our handout.
4 First, the RGA advisory opinion restates the
5 Cantor holding that the mere mention of a covered individual
6 in the text of a written solicitation does not, without
7 more, constitute a solicitation or direction of non-federal
8 funds by that covered individual. That sentence is then
9 famously footnoted as follows.
10 Although Advisory Opinion 2003-03 might be read to
11 mean that a disclaimer is required in publicity or other
12 written solicitations, it expressly asks for donations in
13 amounts exceeding the act's limits and from sources
14 prohibited from contributing under the act, that was not the
15 Commission's meaning. The Commission wishes to make clear
16 that the covered individual may not approve, authorize,
17 agree or consent to appear in publicity that would
18 constitute a solicitation by the covered person of funds
19 that are in excess of the limits or prohibitions of the act,
20 regardless of the appearance of such a disclaimer.
21 However, the Commission could not agree on whether
22 the use of a covered person's name in a position not

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1 specifically related to fundraising, such as honorary
2 chairperson, on a solicitation not signed by the covered
3 person, is prohibited under the act.
4 Let me try a translation of that footnote. A
5 disclaimer does not transform a solicitation by a federal
6 candidate into a non-solicitation, but the Commission still
7 has no consensus in RGA whether a covered official
8 consenting to be featured on an invitation as an honorary
9 chairperson or other non-fundraising role, such as special
10 guest here, turns the invitation into a solicitation by the
11 covered official.
12 In ABC, a February 2004 advisory opinion, the
13 Commission appeared to temporarily reach a majority
14 consensus that agreeing to appear as an honorary chair on an
15 invitation would constitute a solicitation. However, that
16 consensus was short-lived because in November of 2004, in
17 the face of considerable controversy, the Commission stated
18 in a Federal Register notice that the ABC advisory opinion
19 was superseded.
20 As Scott Thomas will describe in a moment, the
21 same Commission split on the lack -- and the lack of a
22 majority consensus on the question of when the use of a

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1 federal officeholder's name constitutes a solicitation in an
2 invitation surfaced thereafter in a 2007 advisory opinion
3 and in a MUR of that same year.
4 So in light of the actual majority holdings of the
5 advisory opinions in place in 2006, when these invitations
6 were issued, I believed it was permissible to have Senator
7 McCain listed as a special guest on the state committee's
8 invitations in California and on the candidate invitation in
9 South Carolina with the additional statement that the
10 solicitation of funds was being made only by the non-federal
11 entities.
12 To that was added the disclaimer described in
13 Cantor or RGA, since those advisory opinions were read at
14 the time, to mandate such a disclaimer when persons other
15 than the federal officeholder were soliciting non-federal
16 funds for the event.
17 Looking back at the invitation and its specific
18 language, I do not believe it can fairly be read to say that
19 Senator McCain, a federal covered official, was himself
20 soliciting any impermissible funds. To demonstrate that
21 consensus in at least part of the regulatory community, let
22 me direct your attention to page number six and seven of the

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1 handouts.

2 As you will see, this is guidance given by the

3 Republican National Committee at a nationwide training

4 seminar for state party officials and state legal counsel in

5 June of 2006. The RNC has distinguished and capable lawyers

6 and I was not one of the lawyers who prepared this

7 compliance handout.

8 The date is interesting because it falls squarely

9 in the middle of the two invitations at issue here. As you

10 can see from the handout, it was the view of the Republican

11 National Committee that a disclaimer was required and was

12 sufficient. Our disclaimer, we believe, went beyond that.

13 At this point, I would like to ask Scott Thomas to

14 discuss the legal effect of the Commission's inability to

15 agree on a standard for what constitutes an impermissible

16 solicitation in these circumstances.

17 MR. THOMAS: Thank you members of the Commission.

18 I will be brief. I just will start noting that given the

19 guidance, or as we are trying to argue, the lack of guidance

20 perhaps, what was available at the time in March and August

21 of 2006, and given the senator's total lack of awareness or

22 involvement in preparation of the invitations, this is not

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1 an appropriate case for imposing any sanctions. We
2 respectfully urge that the two matters should be dismissed.
3 The Cantor and the RGA opinions, both of which
4 dealt with the non-party situations covered in the
5 applicable regulation at 300.62, were really the only
6 guidance available. Trevor has pointed out how these
7 precedents did not resolve the threshold issue here today,
8 whether the invitations constituted solicitations by Senator
9 McCain or at most his name appeared as a "special guest."
10 The Commission's standing precedent indicates that
11 a majority at the FEC has not up until this point considered
12 merely authorizing use of a name in a party or candidate
13 solicitation with no signature by the covered official or
14 agreement to serve in a position specifically related to
15 fundraising to be solicitation.
16 This comes from number one the Cantor opinion,
17 specifically addressing -- specifically the response to
18 question five and the concurring opinion of Commissioners
19 Smith, Mason and Toner; number two, the RGA opinion, which
20 says the same thing; number three, the superseding of the
21 ABC advisory opinion; number four, the later deadlock on
22 this question in Advisory Opinion 2007-11, which involved

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1 the California Republican and Democratic parties in the
2 party context; and number five, in MUR 5711, which involved
3 Senators Boxer and Feinstein and Representative Pelosi,
4 where there were only three commissioners from the stated
5 third principle of Cantor, as it was described, which is in
6 essence that a candidate cannot appear in a solicitation
7 regardless of disclaimer if soft money actually is being
8 raised.
9 So you got really a string of five different
10 matters that show even up until this point there doesn't
11 seem to be a majority for saying what happened in our
12 situation should be deemed a solicitation.
13 So even if you disregard all the important
14 disclaimer language that Mr. Potter crafted, there's still
15 no solid legal basis for claiming a violation for simply
16 referring to Senator McCain as the "special guest" for the
17 events in question.
18 Given this legal reality, an enforcement action
19 cannot be justified. Now on top of that, Mr. Potter, on
20 behalf of Straight Talk, tried to make it expressly clear
21 that the invitations were not to be deemed solicitations by
22 Senator McCain period. The wording used actually goes

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1 beyond the protected disclaimer wherein the FEC had
2 suggested in the Cantor and RGA situations.
3 In circumstances like this where the prior
4 precedent at best is muddled and those involved in the
5 actions at issue were trying to cure any potential concerns
6 through learned counsel, the FEC consistently has shown good
7 judgment about declining to pursue enforcement action. This
8 is the perfect case for doing that.
9 If the Commission wishes to clarify this area, it
10 should craft a regulation that makes the relevant
11 distinctions. What really is a solicitation by a covered
12 official? Is it merely agreeing to be listed as honorary
13 chair or special guest? And what type of disclaimer is
14 appropriate? Does "this is not a solicitation by Senator
15 McCain," for example, have a legal effect or not? A
16 regulation proceeding is the proper way to resolve these
17 questions.
18 Now let me just end by reviewing the
19 solicitation's language. On pages eight and nine we've sort
20 of again given you the relevant language in the handouts.
21 First, both did not include a message from Senator McCain
22 and did not contain his signature. Both simply referred to

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1 him as a special guest.

2 It was clear in both instances that the

3 solicitations were being made by the benefitting

4 organizations and in communications that were paid for by

5 those organizations. This presents the stark realty. It is

6 a long stretch to say these amounted to solicitations by

7 Senator McCain under any common sense reading.

8 Second, the Spears invitation gave every

9 indication it was focused only on raising funds from

10 individuals. You will note on the response card it uses

11 phrases like "I will attend" or "I will not attend" or "I'm

12 unable to attend."

13 It seems to be personalized and directed only

14 toward individuals and it does not solicit corporate or

15 labor funds in that sense. It only sought up to $3,500 per

16 election cycle. That's the South Carolina approach to

17 contribution limits.

18 Now this is below the amount that Senator McCain

19 could have solicited under Section 441i since he could have

20 solicited $4,200 per cycle at the time, $2,100 for the

21 primary and another $2,100 toward a general election,

22 whether it happened or not at general election.

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1 To us it seems it's a bit of a hopeless argument
2 to claim that this was an impermissible solicitation for
3 soft money. So that's just an additional complication we
4 think that you would face if you were to pursue this as an
5 enforcement matter.
6 So given the actual text of these invitations, the
7 Commission would be well advised to use its discretion to
8 dismiss these cases and do what it can to clarify in a
9 rulemaking proceeding what the regulated community can and
10 cannot do in various situations similar to what occurred
11 here. Thank you.
12 CHAIRMAN WALTHER: Counsel, thank you very much.
13 Is there anything further? If not we'll --
14 MR. POTTER: No, I think we would welcome any
15 questions the Commission has.
16 CHAIRMAN WALTHER: Take some questions. I think
17 we'll proceed based upon who's interested in starting out
18 and we'll go. Any commissioners want to begin?
19 Commissioner McGahn.
20 COMMISSIONER McGAHN: Thank you. Thanks for being
21 here again. I read the transcript, so I don't want to
22 rehash too much, but there's a couple lines of questioning

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1 that sprung up and quickly sort of surfaced again like a
2 submarine that I'd like to explore a little bit more.
3 I want to take a step back from this particular
4 case and ask a rather general question. What is the
5 purpose, as you understand it, of the so-called soft money
6 ban for federal officials? And by giving context, you have
7 a federal official here who's alleged to have solicited soft
8 money in a state where he's not elected and he's at no -- I
9 don't think there's any evidence that any of this money was
10 used to benefit him personally, so the notion of corruption
11 or appearance thereof seems somewhat attenuated, even anti-
12 circumvention rationale, but then circumventing what?
13 Unless it comes back to help him, it's essentially
14 the answer of the first go-around, but want to try to expand
15 that a little bit more. Is it oversimplifying it to couch
16 it the way I couch it or is there more to it, just the
17 purpose of why we're even -- why this even matters?
18 MR. POTTER: Let me take a shot at that, then see
19 what Scott wants to say. I think what you've said does get
20 to the heart of the matter. The purpose of the soft money
21 ban was to ensure that federal officials were not -- covered
22 officials were not raising funds that were going to be used

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1 directly or indirectly in federal elections.

2 If you go back and look at the history, you had

3 had soft money starting out as something used by party

4 committees for state party purposes and then over time there

5 developed a number of ways in which that money was being --

6 was benefitting directly federal campaigns, was being spent

7 by state parties in conjunction with and in coordination

8 with federal elections and once that became a use of the

9 money, it made a lot of sense for covered officials, federal

10 officeholders and candidates to raise those funds to assist

11 the state parties because they recognize that the spending

12 would be to their benefit.

13 And so you then developed a pretty direct

14 situation in which officeholders are raising large sums of

15 money that they were not allowed to raise under federal law.

16 For federal purposes the money was being routed through

17 state entities, but then turned around and used again to

18 benefit, sometimes directly, sometimes the whole ticket, the

19 federal candidates.

20 And so the goal was to remove the temptation for

21 federal officeholders to raise money which would be used one

22 way or another for their benefit.

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1 MR. THOMAS: I would only add that the perspective
2 that I've always had is that although Congress did impose
3 that ban on soliciting soft money, it also was fully aware
4 of the complications of trying to overdo it and so you see
5 things built into the statute like the special allowances
6 for helping the party committees raise money.
7 Candidates can actually freely appear and even
8 make speeches at those kinds of events, even though they are
9 soft money events, and the Commission early on in Cantor
10 made the same sort of construction of the law with regard to
11 appearing at candidate-related events.
12 It's okay, you can appear, you can speak. There's
13 always been a need to build in some flexibility there, so I
14 think maybe that goes to the heart of your concern.
15 COMMISSIONER McGAHN: Doesn't the structure of the
16 statute itself support what you're saying, and by that I
17 mean the argument to support the so-called soft money ban of
18 the national parties was all the record evidence of federal
19 officials saying that they raised the money and it was going
20 to be spent on their election and that sort of thing. It
21 was perceived to be a very direct connection to the money.
22 State parties or the federal election activity

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1 concept which covers this, right, I mean the federal
2 government has not federalized everything. They've only
3 looked at four categories. Some have said, including me in
4 the past, that well that reaches essentially everything you
5 really want to do on election day, but that's beyond the
6 scope of why we're here today.
7 When it comes to state or local candidates, it
8 seems to me you're getting further and further away from the
9 epicenter of what really is the only rationale for any of
10 this corruption or appearance thereof, and circumvention, of
11 course, is a subset event, but it's not it's own free
12 floating. And circumventing something that is wholly
13 irrelevant to your own election or personal agenda is not
14 really something that's corruption or appearance thereof, so
15 I'm just trying to get a sense of the continuum here.
16 MR. POTTER: I think the key there is the
17 statement in your question that candidates, federal
18 officeholders may solicit funds from people who are really
19 irrelevant to their own political activities. You and I
20 could come up with scenarios and I think the drafters of
21 BCRA did come up with scenarios, where it was possible for a
22 federal candidate without this provision to say to a state

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1 candidate in a state that allowed unlimited funds, well I'll
2 help you raise all this money and I'll do an event and you
3 get all the money and then you'll turn around and spend it
4 in some way that actually does directly help me.
5 That's why in the record we have made a point of
6 saying that those were not the circumstances and facts here,
7 that Senator McCain wasn't involved in deciding to have
8 these events. He didn't ask to -- them to put on the
9 events. He didn't ask to appear at them. He was
10 approached. He wasn't part of the design of the events. He
11 didn't decide what money was going to be raised.
12 All those things that I think are indicative of
13 him being at one end of the spectrum, having no involvement
14 with these events other than agreeing to appear as a speaker
15 at them, versus the situation you could have had where a
16 federal candidate was deeply involved in all of those
17 decisions.
18 COMMISSIONER McGAHN: Continuing on this sort of
19 statutory structural argument, is there -- are there lessons
20 to be learned here or any application of Shays III --and I
21 understand that the issue in Shays III that I'm thinking of
22 was the party committee -- I'll call it the party committee

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1 exception -- the Commission had taken the position that this
2 was a, for lack of better word, anything goes exception
3 where you could, even in giving a speech at a party event,
4 do so without restriction, presumably would include a
5 solicitation.
6 But can we take from Shays III that there's a
7 distinction even in the statute between being a guest, being
8 a featured speaker, and actually soliciting money or are
9 those really the same thing?
10 MR. POTTER: I think that comes back to the point
11 I was just trying to make, that it does depend on the level
12 of involvement of a federal candidate. I think there's a
13 difference between a federal officeholder appearing at an
14 event to give a party speech and a federal officeholder
15 appearing at an event to solicit soft money and saying we
16 need all your corporate and labor money because we're way
17 behind and we'll find a way to use it in this federal
18 election.
19 One would, I think, be a problem under BCRA and
20 one, I think, would not be.
21 COMMISSIONER McGAHN: Because what I'm getting at,
22 it can't be just a mere reference standard, merely because

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1 you have someone's name on something where someone else is
2 asking for money. I mean, clearly it's a solicitation by a
3 state campaign, right, so there's a solicitation somewhere,
4 but the question is by whom? And merely mentioning someone,
5 is that enough as a matter of law to make a solicitation?
6 MR. POTTER: I think that is -- the key question
7 is, is the person -- is the name in fact soliciting or is
8 the name there for some other reason?
9 I was thinking as I thought through this, and you
10 take a slightly different situation, same legal standard
11 though, if President Obama was featured on an invitation by
12 the Illinois Democratic Party to a large dinner to raise
13 unlimited funds, as permitted in Illinois, from corporate
14 and labor sources and there were two invitations and one of
15 them had President Obama's picture at the top of it and it
16 said, in honor of our president, you are invited to the
17 annual fundraising dinner for the state party, and the other
18 invitation had President Obama's picture at the top and it
19 said, in honor of our president, you are invited to the
20 annual fundraising dinner for the state party, two identical
21 invitations, but one of them the DNC, as a agent of the
22 president, had agreed to have his picture featured and the

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1 other they hadn't asked and had just run it, under the
2 standard that is being advocated here, one of those would be
3 an illegal solicitation by a federal officeholder and one of
4 them wouldn't because one of them would have been run with
5 consent and one without.
6 I would argue that neither of those is in fact a
7 solicitation of non-federal funds if all they're saying is
8 that we're featuring Obama because he's from us and famous
9 and it will encourage you to come to the dinner, but Obama
10 is not himself soliciting that money. And I think that that
11 is -- the heart of it is, what is the federal officeholder
12 actually doing by agreeing to appear as the speaker or on
13 the invitation?
14 COMMISSIONER McGAHN: In this case, whether or not
15 Senator McCain knew or didn't know his leadership may or may
16 not have been approving invites to me doesn't seem
17 particularly relevant because it still comes back to did
18 Senator McCain or an agent of Senator McCain ask, without
19 getting into the regulatory battle of whether to ask was
20 enough or not, but just shorthanded, solicit funds?
21 MR. POTTER: I think that the opening question, is
22 did you --

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1 COMMISSIONER McGAHN: It's really the only
2 question, did he solicit soft money? All this other stuff
3 is --
4 MR. POTTER: The agent's --
5 COMMISSIONER McGAHN: -- that's great, but why do
6 we even need to go there?
7 MR. THOMAS: It can be seen as the threshold
8 question. The last time we were here we sort of started out
9 focusing on the other aspects about the senator having not
10 had any awareness or involvement in the development of the
11 invitation and you could see that as a threshold issue as
12 well.
13 But we're here today pointing out maybe the
14 threshold issue probably you ought to reach is is what
15 occurred here something that would amount to a solicitation
16 by the senator?
17 CHAIRMAN WALTHER: Can I ask you a question? In
18 connection with just that point -- sorry to interrupt -- but
19 in the invitation -- and the comment is here in accordance
20 with federal law, Senator McCain is not soliciting
21 individual funds beyond the federal limit.
22 To me in both of these it implies that up to that

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1 amount you'd certainly support a contribution. I think to
2 not say that there's not money being solicited, it certainly
3 isn't clear to me that he's not soliciting up to the federal
4 amount. It's a little concerning that the following
5 sentence says, and by the way, you can contribute to $3,500.
6 We find ourselves here trying to, as you can see
7 from our own history, work out the way the law, to be with
8 more precision.
9 MR. POTTER: If I could respond to that --
10 CHAIRMAN WALTHER: Of course.
11 MR. POTTER: -- question, Mr. Chairman. This is --
12 that is the issue I found the hardest in drafting this
13 disclaimer because our position was this -- at the time,
14 this was a event by the South Carolina candidate. They were
15 paying for it. Senator McCain was only a speaker. He was
16 not soliciting funds for this. He was only attending and
17 thus the line, the solicitation of funds is being made only
18 by Spears for adjutant general. Had I had my way that's
19 where we would have left it.
20 However, we were, as I saw it, stuck with two
21 advisory opinions that contained in them specific disclaimer
22 language which federal covered officials were advised to use

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1 if they were going to be at an event at which non-federal
2 funds were going to be raised.
3 And so I felt compelled to add this language to
4 protect the -- to follow the advice of those advisory
5 opinions as a safe harbor. The problem was it was
6 intellectually contradictory. If the funds are only being
7 solicited by the state party, then the additional statement
8 that he is not soliciting any non-federal funds I think was
9 disjointed, but I felt -- let me put it this way. If I was
10 actually writing what I was thinking at the time, it would
11 have said, only the state party is soliciting funds. In
12 case there's any question about whether Senator McCain is
13 soliciting funds, he is under no circumstances soliciting
14 impermissible non-federal funds but only funds permitted
15 under federal law, that that was the construct of it using
16 those AOs.
17 CHAIRMAN WALTHER: Thanks. I appreciate that.
18 Commissioner Weintraub.
19 COMMISSIONER WEINTRAUB: Thank you, Mr. Chair.
20 Just a point of clarification on that. You're not
21 suggesting that our AOs mandated that you include the
22 sentence, South Carolina state law allows campaign

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1 contributions of up to $3,500 per election cycle?
2 MR. POTTER: No, South Carolina law requires that.
3 This is a fundraiser for a state candidate that is governed
4 only by federal law to the extent that Senator McCain is the
5 featured speaker, but is otherwise governed by South
6 Carolina law that requires you indicate what the South
7 Carolina limits are.
8 COMMISSIONER WEINTRAUB: Would it be illegal under
9 South Carolina law to solicit $2,100?
10 MR. POTTER: No. You could solicit anything under
11 their cycle limit. The point Scott was making though is the
12 3,500 is not in excess of the federal limit because it's per
13 cycle, which is primary and general. So even -- well, by
14 mentioning the South Carolina figure, you're not soliciting
15 a figure that is in excess of the federal figure.
16 COMMISSIONER WEINTRAUB: I hear you.
17 CHAIRMAN WALTHER: Any further comments,
18 questions? Back to Commissioner McGahn.
19 COMMISSIONER McGAHN: Did I hear --
20 CHAIRMAN WALTHER: Sorry for the interruption.
21 COMMISSIONER McGAHN: -- South Carolina law
22 requires that? Because different state laws require all

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1 kinds of disclaimers and I know there are states that do
2 require different sorts of language than federal law because
3 they have different bans and prohibitions. I read that when
4 it was just a clean statement of law.
5 MR. THOMAS: Yeah, South Carolina, as I recall,
6 has similar disclaimer requirements in terms of paid for
7 under certain circumstances who authorized -- that kind of
8 disclaimer. This was -- I think what Trevor was saying is
9 South Carolina required it in the sense that you had to be
10 clear in essence. You were advised always to be clear about
11 what the limit is so that you wouldn't get people
12 contributing more than the limit.
13 MR. POTTER: South Carolina limits it to 3,500 per
14 cycle. You wouldn't want someone to check -- send in a
15 check for $5,000, so the solicitation is capped at what the
16 state limit is for a contribution for the cycle.
17 COMMISSIONER McGAHN: Thank you.
18 CHAIRMAN WALTHER: I have a procedural question.
19 The comment was made that since we've been in a deadlock on
20 a certain amount of matters, which is quite correct, that
21 we're now unable to break that deadlock by a vote of four
22 commissioners or we have to adopt regulations and the poor

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1 person who is subject to the breaking of the deadlock is now
2 subject to -- is not given fair notice that we're about to
3 clear up our deadlock.
4 And I say that because also if we were the first
5 ones to -- suppose there was no deadlock. Somebody has to
6 be first when it comes to enforcement and having to
7 interpret something. I just wondered if you want to clarify
8 your comments on the deadlock versus have to do regulations
9 issue?
10 MR. THOMAS: It certainly raises the fairness and
11 notice issue so that it becomes in essence a legal defense
12 later on if it were to then proceed to litigation. I would
13 first of all state that. We hope it doesn't come to that.
14 I recall a few instances where we were confronted
15 with that when I was a commissioner and I tried to persuade
16 my colleagues sometimes -- Commissioner Weintraub will
17 recall this -- that it's okay if we go ahead and find a
18 violation here as long as we don't take any -- impose any
19 sanction. I was urging that we would use the enforcement
20 process to clarify the law.
21 But I could never persuade a majority of
22 commissioners to do that and I think their concern stemmed

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1 from the fact that in the enforcement track we have a long
2 series of precedents that suggest there is not a four-vote
3 majority.
4 That adds an element of difficulty to at some
5 point then saying you are going to take that approach with
6 regard to the next person that comes down the line. And
7 that's why in this circumstance, I would say it's an even
8 stronger argument that really your only non-legally
9 complicated approach is to go the regulation route.
10 CHAIRMAN WALTHER: I understand. Commissioner
11 Weintraub.
12 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
13 You're not suggesting, Scott, in this case, that we should
14 find the violation as long as we don't impose a penalty?
15 MR. THOMAS: I would take that as my second best
16 estimate.
17 COMMISSIONER WEINTRAUB: I just want to -- because
18 this point has come up several times, I just want to draw a
19 distinction here, because the notion that there's never been
20 four votes for this proposition I think is factually
21 inaccurate.
22 You are -- and I say this as the only person at

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1 the table who's been here through the whole convoluted
2 evolution of these standards. You are drawing an analogy
3 between having your name on the letterhead up in the upper
4 left-hand corner along with the roster of names as honorary
5 chairperson, which is a specific thing that was addressed
6 where the Commission couldn't agree, you're saying that's
7 exactly the same as having John McCain emblazoned in big
8 letters and using his photo and whatever in the middle of
9 the invitation.
10 I would argue that that is not at all the same
11 thing and in fact, that is not what was meant by the
12 commissioners either. That's my understanding. I'm just
13 telling you this for your own edification. That's my
14 understanding of where commissioners were, that there were
15 in fact four votes for the name emblazoned in the middle and
16 the big picture, that that would be considered legally
17 distinct from fine print in the upper left-hand corner along
18 with a lot of other names as listed as honorary chairperson
19 and not -- you're kind of saying, oh it's all the same.
20 But I don't think it is and I don't think that was
21 the view of other commissioners. But that's just -- that's
22 an argument that you could make and you can argue that well

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1 it was confusing and you know I think that's a fair argument
2 and it may be persuasive to some commissioners. But I do
3 think it's important to draw that distinction because I'm
4 confident, having sat through those discussions, that that
5 distinction was in the mind of the people that were for it.
6 MR. POTTER: I fully accept that you, having sat
7 through those discussions, can accurately say not only was
8 that in your mind, but it may have been in the mind of other
9 people. The problem is, I'm stuck as a practitioner. I can
10 remember going to the computer and printing out the AOs and
11 the concurrences and sitting here with the little black
12 letters on the white paper trying to figure out how it all
13 lined up and what it meant and what we had to do.
14 I think the point I was making and I think Scott
15 has made is that if that was what the Commission had in
16 mind, it did not end up communicating itself in the actual
17 pieces of paper that somebody who's not at the meeting and
18 part of the internal process then has to look at and work
19 through. I think that's the argument that causes Scott to
20 say, if you have a conclusion here how you want it to run,
21 spelling it out in a reg would be really useful because this
22 continues to come up.

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1 I've had to advise people since this whole matter
2 began --
3 COMMISSIONER WEINTRAUB: I bet your message
4 changed.
5 MR. POTTER: What is it that you do say or you
6 don't say becomes the question.
7 COMMISSIONER WEINTRAUB: But speaking of what you
8 advise your clients, there is one point that I was a little
9 bit confused about when I was rereading the transcript from
10 the first hearing and believe me, I'm not going to repeat
11 every question that I asked the first time around. We've
12 all got that illuminating transcript for whatever it's
13 worth.
14 But it's not entirely clear to me, are you or are
15 you not making an advice of counsel argument here; are you
16 asserting an advice of counsel defense?
17 MR. THOMAS: Technically Senator McCain, since he
18 wasn't even aware of any of this, it's kind of hard to say
19 that he's technically himself making an advice of counsel
20 argument. However, it is clear that those people who were
21 aware of the development of these invitations were indeed
22 relying on advice, as I described, learned counsel, and so

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1 you certainly had that as a critical element here.

2 To the extent somehow you were going to somehow

3 disregard the fact that the senator himself had no idea that

4 any of this was going on, certainly those people who were

5 involved in causing this solicitation or these invitations

6 which have become the issue, were relying very carefully on

7 someone pulling out the AOs from the computer and studying

8 them and agonizing over them and developing disclaimer

9 language that he thought was sufficient.

10 So I really urge you to keep that in mind. I

11 think it is a very important factor.

12 COMMISSIONER WEINTRAUB: But it's not formal

13 advice. You're not actually making an advice of counsel

14 argument here?

15 MR. POTTER: Correct. I think you're making a

16 sort of best efforts --

17 COMMISSIONER WEINTRAUB: I just want to know --

18 MR. POTTER: Best efforts to comply argument.

19 CHAIRMAN WALTHER: Mr. Vice Chairman.

20 VICE CHAIRMAN PETERSEN: Thank you, Mr. Chairman.

21 If I could go back to the South Carolina solicitation for a

22 moment. You were talking just a moment ago about the South

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1 Carolina state law allows campaign contributions of up to
2 $3,500 per election cycle.
3 In 11 CFR 300.2(m), at least the 2006 version --
4 it's since been modified slightly, but for ways that aren't
5 relevant for this discussion -- it read at the time, a
6 solicitation does not include merely providing information
7 or guidance as to the requirement or particular law.
8 In your opinion, does that statement regarding
9 South Carolina fit within this sentence of 300.2(m), which
10 says that this is just merely providing -- this is just
11 information or guidance as to a requirement of law?
12 MR. THOMAS: I think you could make the argument
13 that that particular phrase by itself is covered by that
14 regulation. It would not in and of itself be a
15 solicitation. But I have to tell you, we don't come here
16 suggesting to you that this overall piece that was sent in
17 South Carolina was not a solicitation. We have to concede,
18 I think, that that overall piece was a solicitation by
19 Adjutant General Spears for his campaign. But I mean you
20 had a response card and you would put in all the relevant
21 information.
22 But you are correct, that particular phrase in and

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1 of itself would fit within that particular parameter of the
2 regulation; I think you could safety say that.
3 VICE CHAIRMAN PETERSEN: Yeah, I don't think there
4 would be any disagreement that the overall documents would
5 constitute a solicitation, but since it would seem that that
6 particular phrase would be considered, if we were to find
7 this a solicitation of soft money by a federal candidate,
8 that that would be considered to be somewhat problematic.
9 But if it fits within that language, that this is
10 just merely providing information or guidance, I guess then
11 that might be considered a little bit differently.
12 Just in terms of a larger question. I think the
13 concerns -- you know, as I've been reading back through the
14 past advisory opinions and the MUR back in 2007, there's
15 obviously been a concern expressed by the Commission about
16 solicitations that could be, for a lack of a better word,
17 mixed.
18 You have mention of a federal candidate within
19 them and maybe even have the appropriate disclaimers, but
20 there's also a part of the solicitation is a request for
21 amounts that may be in excess of federal limits or from
22 sources that are prohibited by the federal law.

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1 So in this sort of a mixed solicitation, how do we
2 draw the line of when the federal candidate has crossed the
3 line from being either merely mentioned or considered a
4 special -- you know, a special guest or a special featured
5 speaker and when does the cross the line into -- from your
6 perspective, in your legal judgment, into the federal
7 candidate then actually soliciting money that would be
8 prohibited by the act?
9 MR. POTTER: Well the Commission has correctly
10 said, and starting on the first AO, that in order to be a
11 prohibited activity, the candidate has to ask. So I think
12 you start with the question of, is the candidate asking?
13 There are two different questions here. One is what does
14 the statute absolutely require? And the other is what is it
15 that the Commission thinks is the best practice to avoid the
16 problem the statute was trying to deal with?
17 The point we're making is we don't think the
18 Commission has so far been clear about what it wants to
19 require. If your question is what should the Commission
20 require in a regulation, I think there are a couple of
21 routes the Commission could go.
22 At a minimum, we think the statute without a

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1 regulation has to have an ask by the candidate and I don't
2 think looking at this that you have an ask by the candidate
3 when the ask is an invitation from a state official, paid
4 for by the state official to come to an event for the state
5 official and it says a solicitation is being made only by
6 the state official.
7 I think in terms of what you could do in a
8 regulation, you could specify that the invitation has to
9 include the phrase of who is asking for the funds or that
10 the federal candidate is not soliciting but merely agreeing
11 to appear as a speaker. I think that would be an acceptable
12 outcome.
13 You could go the other way and say because of the
14 danger of a misunderstanding, you may not use the name of a
15 federal candidate, a federal covered official, on an
16 invitation to an event that is soliciting non-federal money.
17 I'm not sure I would suggest you go there, but what I am
18 saying is I don't think that's where you've been so far.
19 VICE CHAIRMAN PETERSEN: Okay, thanks.
20 MR. THOMAS: Yeah, I think, if I could just also
21 add. I think you have really gotten pretty close to a clean
22 standard. It's a difficult standard in application, but

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1 it's a pretty standard. You have made in studies to some
2 places reference to a signature by the person being
3 adequate.
4 Obviously if a person's signature appears there,
5 again assuming they have approved it and authorized it, you
6 got what you need. Likewise, you've articulated this
7 concept that if someone has agreed to serve in a position
8 specifically related to fundraising, that is sufficient and
9 that sort of describes your outcome when someone agrees to
10 serve on a host committee for an event.
11 But really what I think you need to do is just
12 really kind of flesh out, again I would say through
13 regulation, some concrete examples. You have many examples
14 in your regulations where you give some good examples and
15 lay out enough so that the regulated community would really
16 get a good appreciation for where you draw those lines.
17 CHAIRMAN WALTHER: Thank you. Commissioner
18 Weintraub.
19 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
20 Your client agreed to be a speaker at a fundraiser, correct?
21 MR. POTTER: Correct.
22 COMMISSIONER WEINTRAUB: He knew it was a non-

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1 federal fundraiser, correct?

2 MR. POTTER: Well what we know is he agreed to

3 appear at a event in California, a state party dinner, and

4 an event in South Carolina. I think we can assume he knew

5 it was a fundraiser, but what you're told is, South Carolina

6 Adjutant Spears wants you to come and speak at a dinner on X

7 date or the California party and Schwarzenegger are having

8 an event.

9 I can't speak to whether anyone said the word

10 "this is a fundraiser" or it seems to me unlikely they said,

11 "this is a fundraiser and these are the categories of funds

12 that are going to be solicited by the state event." That

13 level of detail is usually not part of it.

14 COMMISSIONER WEINTRAUB: I'm sure that's right,

15 although why would that level of detail need to be there? I

16 mean, if you knew it was a fundraiser for in one case a

17 state candidate, in the other case a state candidate and the

18 state party, one would assume that the funds that were being

19 raised were appropriate for those candidates and entities,

20 right?

21 MR. POTTER: I would assume that. I'm just making

22 clear it's an assumption.

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1 COMMISSIONER WEINTRAUB: He's a sophisticated guy,
2 right?
3 MR. THOMAS: I need to say this; you know what
4 happens when you assume.
5 MR. POTTER: I know.
6 COMMISSIONER WEINTRAUB: I'm just not going to
7 touch that.
8 CHAIRMAN WALTHER: I think the word came from
9 counsel's table, however.
10 COMMISSIONER WEINTRAUB: The argument as to --
11 that he had no -- he wasn't there in a fundraising capacity,
12 that unlike say being on the host committee, that this was
13 something separate.
14 I'm trying to figure out how a sophisticated
15 candidate would attend a fundraising event where he agreed
16 to be the featured speaker, and whether he reviewed the
17 invitation or not, one might certainly -- it certainly
18 wouldn't be surprising to someone in that position that his
19 name might be on the invitation. I mean, that would be
20 something that one could reasonably anticipate, correct?
21 MR. POTTER: Right. Let's say for the sake --
22 COMMISSIONER WEINTRAUB: Isn't he there to help

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1 with the fundraiser?

2 MR. POTTER: For the sake of argument, what you

3 normally deal with in these circumstances is a federal

4 candidate, officeholder is asked to come to a state event to

5 raise money for the state party or a state candidate, and

6 that's what's going on.

7 That is permitted. What is not -- they can attend

8 these events. What they can't do is solicit non-federal

9 funds and what the Commission has done in these advisory

10 opinions is try to figure out where the line is between

11 attending those events, which they can do, speaking at those

12 events, which they can do, and solicit.

13 COMMISSIONER WEINTRAUB: No, but let's parse that

14 out though because you said the statute expressly permits

15 this and what the statute expressly permits is speaking at

16 state party events. The statute is silent on state

17 candidate events and one can draw whatever conclusions one

18 draws from silence. But it certainly is not expressly

19 permitted that one can speak for a state candidate.

20 I guess what I'm -- I'm trying to get to the

21 reality of the situation where it just seems to me that

22 everybody would understand that if you show up at a -- you

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1 know, you get a big name federal officeholder to show up at
2 a fundraising event that is there to help with the
3 fundraising.
4 To go back to the anti-corruption, you know,
5 where's the harm, where's the corruption here? Well, you've
6 got a candidate who has run for national office before and
7 could be contemplating a national run again. Who knows,
8 right? What year was this?
9 MR. POTTER: This is 2009. I'm not sure there's
10 any evidence he's a again contemplating that.
11 COMMISSIONER WEINTRAUB: Yes, but these
12 invitations were issued before that. And he's traveling to
13 states that would be important in a national run, South
14 Carolina and California. And you know candidates do this
15 all the time. They're trying to pick up chits with local
16 officials that might help them in a later run. It seems to
17 me it's not a great stretch.
18 I'd be really interested to hear you guys opine on
19 this. As I said in the first hearing, and I think that my
20 predictive powers will turn out to be correct, I wouldn't be
21 at all surprised to hear any of these arguments raised by
22 Don McGahn. What surprised me all along was to hear Scott

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1 Thomas and Trevor Potter making these arguments.

2 If someone is going to a fundraising event and

3 donors see that A) here's somebody I'd like to hear. I'm

4 going to -- maybe I wouldn't have gone to this event, but I

5 will go now because boy, I'd love to hear John McCain speak.

6 He's a great speaker. He's a fascinating guy. He's an

7 interesting guy. You never know what he'll say.

8 And maybe, since I know he'll be there, maybe

9 he'll appreciate the fact that I'm coming to an event that

10 he's taking the time out of his busy schedule to attend, so

11 it's obviously important to him to raise money for this

12 entity or this candidate. So maybe he will be grateful that

13 I show up and make a big contribution at this event. Is

14 that inconceivable? Do you really see that there's no

15 possible anti-corruption purpose?

16 MR. POTTER: No, I think it is conceivable and

17 that's the hard line that Congress was drawing when it wrote

18 BCRA, because it could have said -- I don't think

19 politically it would have been feasible, but it could have

20 said and it would have made sense, given the argument you're

21 making, to say federal officeholders may have nothing to do

22 with state parties and state candidate events. They simply

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1 may not -- they may not go, they may not talk about them,
2 they may not appear at them, they may not appear and shake
3 hands and say nothing, because of all those reasons.
4 But that wasn't the line they drew. What they
5 drew was you can't solicit the money, but you can go to the
6 events and as I recall, the Commission has gone no. They
7 don't ban them from going to any state candidate events.
8 MR. THOMAS: Just to interject, the Commission
9 itself from Cantor on has made it very clear that at
10 candidate events likewise, they can appear and they can be
11 speakers and that does not in and of itself --
12 COMMISSIONER WEINTRAUB: I don't dispute that.
13 I'm just arguing about what the statute itself says.
14 CHAIRMAN WALTHER: Let me get in on a little bit
15 on this. We're five minutes over the hour, although we've
16 never been exacting on how we do this. I suggest that we
17 take 10 more minutes and if the commissioners have questions
18 then we'll give you at least five minutes to close and if
19 you need a few more, we'll probably -- as well.
20 I didn't mean to interrupt, but I just did want to
21 remind everybody where we're heading. Continue on.
22 COMMISSIONER WEINTRAUB: I only have one more

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1 question and that is, given that the Campaign Legal Center,
2 of which you, Trevor, are president, on its website was not
3 at all confused about these rules and in fact took a
4 contrary position to the one that you're advocating here.
5 Given that just as recently as yesterday we've
6 been chastised by a spokesperson for that organization,
7 being the failure to enforce commission, I'm just wondering
8 whether we're going to get another press release out of the
9 Campaign Legal Center if we were to dismiss this case saying
10 that once again we're failing to enforce what they knew as
11 the clear law.
12 MR. POTTER: I too read with interest on the web
13 after it had been written Meredith's comments on the
14 Commission. I suppose it just goes to show that no good
15 deed goes unpunished. I think the fair thing to say is that
16 I do not interfere with the day-to-day operations of the
17 very good people at the Legal Center and try to maintain a
18 line between my private practice and the advice I give
19 clients and the positions taken by the Legal Center.
20 As you and I discussed in the last hearing on
21 this, I was puzzled when in my conversations and first
22 meetings with the counsel's office, they had pointed out

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1 what the Campaign Legal Center had on the website because it
2 was not how I had viewed the case. So there is, I guess,
3 some degree of separation there.
4 COMMISSIONER WEINTRAUB: I'm not asking you for a
5 commitment. I'm actually just teasing you.
6 CHAIRMAN WALTHER: Thanks. Commissioner McGahn.
7 COMMISSIONER McGAHN: I'm tempted to say what they
8 do with a press release. I collect them. I have several.
9 I liked the one yesterday because -- the article
10 by Ms. McGehee because she's also on the record in a piece
11 about me saying nice things about me and I guess somehow the
12 honeymoon must be over because I guess she didn't like one
13 vote on one case.
14 But let's talk about another case, because I don't
15 remember -- I'm not sure why it's at all relevant what the
16 Campaign Legal Center may or may not say in the abstract.
17 Lawyers are free to make all sorts of arguments and they're
18 free to in their own capacity write law review articles,
19 white papers, do panel discussions and do all kinds of
20 things that really do not in any way compromise their
21 ability to represent clients and make the argument they need
22 to make, particularly when in this case your client's the

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1 fellow who sponsored the law.

2 But I don't remember seeing a Campaign Legal

3 Center press release on what I call the Angelides MUR, which

4 I think came out right around the time of the first oral

5 argument in this matter. As I understand that MUR, you had

6 a gubernatorial candidate in California, had a website and

7 on his page listed in pictures and names three federal

8 officeholders and on that page there was, it's kind of a hot

9 button, to contribute.

10 I can make a real compelling argument that that's

11 an open-ended ask and taking the logic of where we find

12 ourselves here today in taking the argument, the probable

13 cause recommendation out to its logical conclusion, that too

14 should be a violation. You have a federal officeholder on a

15 solicitation by a state candidate. I mean the word

16 "contribute" can only mean one thing there and I think the

17 rationale was well the solicitation really didn't occur

18 maybe until you clicked and got to the next page.

19 But can we talk about that MUR a little bit; does

20 that help or hurt you, that MUR?

21 MR. THOMAS: We have been relying on it simply for

22 the proposition that one tiny aspect of it points out that

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1 this inability to agree on what is a solicitation continued
2 on. There's a small reference under the footnotes to the
3 von Spakovsky disagreement with the third principle of
4 Cantor which goes to the point we're dealing with here
5 today, the third principle as described in the statement of
6 reason, so it was issued in that MUR.
7 But in terms of whether beyond that, the ultimate
8 result there helps or hurts, I mean, I would certainly argue
9 that if that wasn't a solicitation, it's kind of hard to get
10 a sense that this should be treated as solicitation by
11 Senator McCain under these circumstances where he didn't
12 even know about it, about the invitations themselves.
13 So I would argue, of course, that it helps us.
14 But I grant you, it's a kind of case that it points out the
15 difficulty of analysis. The IRS, you're probably familiar
16 with, has this same kind of difficulty. They're always
17 trying to figure out whether something that's up on
18 someone's website that links to something else or where you
19 have to click through another page amounts to political
20 intervention activity and they have all sorts of complicated
21 guidance where they're trying to deal with that and is it a
22 close click away, is it many clicks away?

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1 I mean, they've kind of gotten into that same kind
2 of analysis that you had to deal with there. But you got a
3 case as much as anything points out that you're in a very
4 complicated area. Again, a regulation, if you could deal
5 with all of the issues that have come up so far and give
6 guidance and draw the lines, I think would be very helpful.
7 MR. POTTER: It is a helpful case because what the
8 Commission did there was look at it and say we don't really
9 believe that the federal candidates were soliciting non-
10 federal funds just because their names and images appeared
11 on a page with a contribute button, even though contribute
12 is a request, is a solicitation, is a request to give and in
13 California you can give unlimited amounts.
14 Because they looked at it and said we don't think
15 the federal candidates are the ones who are actually asking
16 for this and I think that is analogous to where Senator
17 McCain is on these invitations.
18 COMMISSIONER McGAHN: Given that the Commission
19 did what it did --
20 CHAIRMAN WALTHER: We're getting close to the end
21 of time. Go ahead.
22 COMMISSIONER McGAHN: Doesn't that somehow, I

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1 don't know if bind's he word, but doesn't that sort of
2 affect how the agency can then go forward in the next case,
3 just in statement of reasons over the years why certain
4 commissioners have opined that once the agency doesn't act
5 in an enforcement context, the only way to then go after
6 that sort of fact pattern would be through rulemaking.
7 Given the Angelides MUR ended up where it ended
8 up, you have a clear fact pattern and a clear conclusion.
9 How you get there, you know, you can probably get there many
10 different ways, but the result is the same regardless of how
11 you get there and in this case, is there any sort of
12 argument to be made that our hands are already tied?
13 MR. THOMAS: I think it ties back into yes, what
14 we've been arguing is certainly every time that kind of
15 decision is added to the record, it complicates the notice
16 issue for you. It complicates, it adds to the due process
17 defense that respondents have.
18 In terms of binding you, I guess I would only say
19 it only binds you to the extent that a court gets a hold of
20 it, if that's where it ends up. If the court says you just
21 can't, given the prior record, say that adequate notice was
22 provided to these folks, you cannot proceed against them.

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1 CHAIRMAN WALTHER: Thank you very much. Does
2 anyone have any other comments?
3 MR. POTTER: I think we would just thank you very
4 much for the time and attention. And again, we do
5 appreciate the opportunity to talk through some of these
6 issues with you and we think there is, between what was
7 there before and the discussion today, adequate grounds for
8 concluding that this was not a solicitation by the senator.
9 CHAIRMAN WALTHER: Thank you very much, Counsel.
10 We appreciate it very much. It was good to have you here.
11 MR. POTTER: Thank you, Mr. Chairman.
12 CHAIRMAN WALTHER: I apologize, I did not ask OGC
13 if you had any questions and that's something we'll open up.
14 I didn't see any hands, but I but do you have any questions
15 you want to ask on this?
16 MS. DUNCAN: Well I was tempted to say no, but now
17 I'm tempted to say yes. I just have one question.
18 MR. POTTER: Resist temptation.
19 MS. DUNCAN: I'm going to resist temptation. It
20 seems that one of the centerpieces of your argument is that
21 the Commission hasn't really made a determination about
22 whether a federal officeholder or candidate is making a

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1 solicitation if he appears on an invitation as a featured
2 guest or speaker.
3 I think I just wanted to ask, don't you agree that
4 that very issue was addressed in the ABC AO and the
5 Commission said that yes, that is a solicitation. Now
6 albeit, the ABC AO has been superseded on other grounds with
7 respect to the allocation issues, but if you agree that in
8 fact that was addressed there in the way that I've
9 suggested, is there anything else that suggests that that
10 part of the reasoning of that advisory opinion was somehow
11 unsound or could not have been relied upon?
12 MR. POTTER: I think there is. As you say though,
13 the AO was superseded. Thereafter you have the two matters
14 that Scott has discussed, the Advisory Opinion 2007-11,
15 where the same issue came back and there again were not four
16 votes for the proposition that having the individual on the
17 invitation without more would be a problem and then in MUR
18 5711, that exact issue is addressed in the footnote that
19 Scott referred to where there are only three votes for the
20 proposition that it is impermissible to have them agree to
21 be on the invitation if the invitation solicits non-federal
22 funds.

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1 So I think what we would say is we don't know what
2 happened in ABC. We read it. We then saw it was
3 superseded, so it --
4 COMMISSIONER WEINTRAUB: Scott knows.
5 MR. POTTER: But again, at the time you're sitting
6 there reading these opinions in 2006, what you have are
7 candidate RGA, then you have ABC, which appears to resolve
8 it, but then is superseded and thus, we don't know which --
9 what the thinking was on the superseding, but it's not
10 there.
11 So yes, and then thereafter, after we had given
12 the advice after the invitations are written, you have these
13 two 2007 situations where again the Commission says we don't
14 know what to do there.
15 MS. DUNCAN: I appreciate that. Even so, what's
16 your opinion about whether that was a reasonable line to
17 draw that if you are indicated as a featured speaker, host
18 or honored guest and you've agreed to be on the
19 solicitation, then that means that you in fact are
20 soliciting; is that not a reasonable line to cross?
21 MR. POTTER: I think in retrospect it's not the
22 line I would advise the Commission to draw because of the

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1 discussion we've had today. You do have federal officials
2 who frequently are asked to speak at state, local events and
3 for non-federal candidates. They're going to be on --
4 therefore, it's logical to have them on the invitation and
5 say you're coming to hear so and so.
6 What I think the line ought to be is to make it
7 clear that they are not soliciting. That would be, I think,
8 perhaps a better line to draw.
9 MS. DUNCAN: And you would suggest that their
10 appearance on an invitation like that has nothing to do with
11 the purpose of encouraging invitees and also encouraging
12 fundraising?
13 MR. POTTER: I think there's a difference between
14 encouraging people to attend the event and sure, the bigger
15 the name you have, the more likely people will go out of
16 curiosity, interest, support for that person, whatever. But
17 I do think there's a fair line distinction to draw between
18 that and whether that person is soliciting specific
19 contributions.
20 MS. DUNCAN: Thank you. Thank you, Mr. Chairman.
21 CHAIRMAN WALTHER: Thank you. Sorry I missed
22 that. Is there any further questions of major importance?

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1 If not then we'll conclude. But thank you very much for
2 coming. We appreciate it very much. It was very edifying
3 for all of us. Again, take care.
4 MR. POTTER: Thank you for letting us come.
5 CHAIRMAN WALTHER: We will consider this matter
6 behind us. Thanks.
7 (Whereupon, at 11:20 a.m., the hearing was
8 adjourned.)
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I, JENNIFER O'CONNOR, the officer before whom the foregoing testimony was taken, do hereby testify that the testimony of witnesses was taken by me stenographically and thereafter reduced to a transcript under my direction; that said record is a true record of the testimony given by the witness; that I am neither counsel for, nor related to, nor employed by any of the parties to the action in which this testimony was taken; and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto nor financially or otherwise interested in The outcome of the action.

Jennifer O'Connor

JENNIFER O'CONNOR