NOMINATIONS TO THE FEDERAL ELECTION COMMISSION

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WEDNESDAY, JUNE 13, 2007

United States Senate,
Committee on Rules and Administration,
Washington, D.C.

The Committee met, pursuant to notice, at 10:02 a.m., in Room SR-301, Russell Senate Office Building, Hon. Dianne Feinstein, Chairman of the Committee, presiding.

Present: Senators Feinstein, Durbin, Reid, Bennett, and Chambliss.

Staff Present: Howard Gantman, Staff Director; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Counsel; Natalie Price, Professional Staff; Matthew McGowan, Professional Staff; Sue Wright, Chief Clerk; Carole Blessington, Assistant to Chief of Staff; Travis Smith, Rooms Coordinator; Mary Jones, Republican Staff Director; Matthew Petersen, Republican Chief Counsel; Shaun Parkin, Republican Deputy Staff Director; Michael Merrell, Republican Professional Staff; Trish Ken, Republican Professional Staff; Rachel Creviston, Republican Professional Staff.

Chairman Feinstein. Good morning. The Rules Committee will come to order, and I would like to welcome you. I just want to say we have a lot of interest in this hearing, so there is another room set aside for overflow, which is Room 385. If anyone cannot get in, please, we have closed-circuit television, and you will be able to see the performance.

Let me just quickly outline how we are going to conduct this hearing. The Majority Leader has asked to make a few comments. He will. I will make a few comments. The Ranking Member will make a few comments. And then certain Senators are here, specifically Senator Warner and Senator Ensign, to introduce the nominees. I believe another Senator will also be coming to do so. And then we will go through the Senators' comments and hear from each nominee. We would ask you to limit your remarks to 5 minutes.

We function here on the early-bird rule, and we alternate sides. So as Senators come in, they will receive their time allotment based on the time of their arrival.

We begin now with the Majority Leader, Senator Reid.

OPENING STATEMENT OF SENATOR REID

Senator Reid. Madam Chair, thank you very, very much for allowing me to testify out of order here, make a statement. This is the only Committee I serve on anymore, and it is obvious I am going to have to do something about the seniority aspect of it.

[Laughter.]

Senator Reid. Anyway, I appreciate very much your calling on me to recommend to the Committee the nominations of Chairman Lenhard and Commissioner Walther. I recommended both these men to the President for nomination almost 2 years ago. They were recess appointed to these positions shortly thereafter.

The main reason I am here, though, is to compliment my colleague, Senator Ensign. Senator Ensign is going to introduce Steve Walther. The reason that Senator Ensign and

I get along so well is a result of the friendship we have developed in 6-1/2 years. As he and I will always remember--and lot of people do not--we had a very bitterly contested election in 1998. As fate would have it, 2 years after that very bitter race, Senator Bryan unexpectedly announced his retirement, and Senator Ensign and I began serving together in the Senate. Over those years, we have developed a working relationship that Nevada has never seen before, and I think most States have never seen before, a Republican and Democrat working together.

Senator Ensign and I never, ever criticize each other, either publicly or privately. As a result of our working relationship, we have been able to get a lot done for the State of Nevada. He still maintains his proud membership in the Republican Party, as I do in the Democratic Party. But the reason I give you that little background here is that very bitter race that we had, there was a recount in that race, and the person that led the recount for me is Steve Walther, an Independent by party affiliation. But here we are these many years later, 8-1/2 years later, and Senator Ensign is going to introduce Steve Walther, the person that handled the recount for me in that 1998 election. And I have to say I think that is one reason the people of Nevada appreciate what we do together. And so I have said many, many times to many people in different areas how much I appreciate the working relationship I have with Senator Ensign and his friendship, but I appreciate his being here today to introduce Steve Walther. I did not want, because we have a big audience here, anything that I said to stand in the way of there being a fair hearing for these four men.

Could I be excused, Madam Chair?

Chairman Feinstein. Thank you very much, Leader. We appreciate it very much. I will then proceed with my statement.

OPENING STATEMENT OF CHAIRMAN FEINSTEIN

Chairman Feinstein. In 1974, the FEC was first established by statute in the Federal Election Campaign Act. This is the first time in its history that none of its current members are serving within a term for which he or she was nominated. This is a direct result of the Senate not acting on previous FEC nominations in either of the two sessions of the 109th Congress. So it is urgent that these nominations be addressed in this current Congress.

The FEC currently has five incumbent members and one vacant seat. Three of the nominees are serving under recess appointments made by the President on January 4, 2006. Another--Commissioner Mason--is eligible for reappointment made by the President on January 4, 2006, and now serves as a holdover since April 30, 2003. The fifth Commissioner--Ellen Weintraub--serves in a holdover capacity indefinitely because her term expired without a replacement. Finally, one vacant seat remains due to the resignation of Commissioner Michael Toner in March 2007. The President has not yet announced a nomination for this seat.

A very serious situation could develop if the Senate fails to confirm at least some of the Commissioners before recessing sine die. All three of the recessed nominees would no longer be eligible to serve on the FEC.

In order to perform many of its legal and

administrative duties under statute, the FEC must vote out certain matters with an affirmative four votes or the matter will not go forward. So we could potentially be faced with conditions that leave only two members serving as holdovers on the FEC. This would mean that the FEC would lack a majority of four votes to conduct essential business. And the most likely and timely way around it would be for the President to make three new recess appointments--but with no advice and consent from the Senate. This situation could be a recipe for disaster as America moves into the 2008 presidential and congressional election cycle with record campaign spending.

The FEC is the authoritative primary source for the amount of money raised and spent in Federal elections. With over 7,000 registered political and non-political committees filing reports with over $4 billion in spending, it is essential that such funding be subject to close scrutiny and disclosed in a searchable, transparent, timely, and user-friendly manner.

It is now 5 years since the enactment of the Bipartisan Campaign Reform Act, known as McCain-Feingold, and it is imperative that the FEC address a number of serious issues that have arisen under this law. Some of the most important outstanding issues are: the so-called hybrid party-candidate advertisements; ethics; grassroots lobbying--the pending Wisconsin Right to Life case; the millionaires' amendment--contribution limits/disclosure; local political activity--that is Federal election activity; public disclosure policies; the 2008 Presidential election and funding; and implementation of Supreme Court cases and congressional requirements. I expect there will be a number of questions on these issues.

Serious concerns have also been addressed to the Committee with regard to one of the Commissioner's past conduct in the Department of Justice. Several individuals and organizations have written the Committee, and I ask that these documents now be included as part of the record.

[The letters follows:]

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Chairman Feinstein. I believe these concerns need to be fully addressed because they go to the very heart of what we have seen to be a politicization of the Justice Department under the current administration. The Committee has a duty to be fully informed before making a recommendation to the full Senate on these nominations. So, in addition to the testimony today, the record will remain open for 5 business days for the Committee to receive other submissions for the record, as well as statements and questions for the nominees from members of this Committee. And there will be questions presented to the nominees in writing, so we would ask the nominees to respond within the deadline date provided as quickly as possible to those questions. The record will close on June 20, 2007 for all but the nominees' responsive answers.

After the Committee has had time to consider the record of these four nominees, I plan to make a decision about convening an executive meeting to report the nominations to the Floor for an up or down vote.

I now with pleasure yield to my Ranking Member, the distinguished Senator Robert Bennett.

OPENING STATEMENT OF SENATOR BENNETT

Senator Bennett. Thank you very much, Madam Chairman, and I congratulate you for the expeditious way in which you are handling this. I have nothing specific to add to your opening statement about the importance of our moving as quickly as we can, because I agree that it would be very unfortunate if we ended up with the President having to make interim appointments by virtue of the Senate's lack of action.

I will share a little personal history. When I first came to the Senate, there was an accusation made against me that ended up at the FEC, and being a total innocent in these matters, I assumed that the matter would be decided on the basis of the merits. And I was told by people who were more knowledgeable, "No, no, no, no. This is a partisan issue. You will be just fine because the three Republicans will guarantee that there will be no investigation of you." But I said, "I don't fear an investigation. The merits on my side." They said, "That doesn't make any difference. The three Democrats will vote against you, but the three Republicans will protect you." And I thought, "Well, that is not an agency that is functioning very well.

It turned out exactly that way on the charge that was made against me. The vote was three to three, and they did not have the four votes, and so the whole thing went away. But it left me with a fairly bad taste in my mouth about the way the FEC works. And one of the things that impresses me as I look through the testimony of the four that are before us is that, regardless of the fact that there happened to be two Democrats and two Republicans among these four, they all say nice things about each other, and they all make it clear that they work together very well and that the absolute Iron Curtain between Republicans and Democrats that was there in 1993 has been torn down.

So I look forward to the hearing, and my inclination at the moment, subject, of course, to discovering new things, is that we ought to confirm all four of them as a group. They have a history of working together, of working in a collegial manner, of looking at the merits of the matters that are before them, and I think that is something that is fairly rare in Washington, and we ought to do what we can to hang onto it.

Chairman Feinstein. Thank you very much, Senator Bennett.

We will now proceed to the Senators who are going to introduce the nominees, and they will speak in this order: Senator Warner for David Mason, Senator Ensign for Steven Walther, and Senator Isakson for Hans von Spakovsky.

Senator Warner, welcome.

STATEMENT OF HON. JOHN WARNER, A UNITED STATES

SENATOR FROM THE STATE OF VIRGINIA

Senator Warner. Thank you, Madam Chairman. By coincidence, the last time I appeared for Mr. Mason, I was seated in that Chair as Chairman of this Committee.

Chairman Feinstein. Is that right?

Senator Warner. And it is a very warm feeling to come back into this magnificent chamber, which I have always considered the most beautiful in the Senate, and once again join you and your distinguished leadership, together with my friend, Mr. Bennett, to vouch for Mr. Mason. He has been renominated to stay on the Commission.

Madam Chairman and colleagues, all of us in the courses of our career here have many people who come join our staffs, and I find it such an enormous reward when, in later years after they have departed, you can once again step in and vouch for their credibility, suitability, and professional ability to handle positions, particularly in the executive branch.

Mr. Mason was in the course of service with my staff singled out by all as one of the brightest, hardest-working, ablest individuals. I was always perplexed why he did not take these talents and go out and make several million dollars. But he has chosen to devote his life to service to the Congress or to the executive branch. He served other Senators--Senator Lott, and at that time Senator Lott was in the House of Representatives as the Whip--but he has had an extraordinary career.

Now, there is one other aspect of Mr. Mason which I always admired enormously. I am not sure I have got all the answers to it, but along the way he and his lovely wife have ten children. If I might indulge the Chair to ask the children to rise en banc, as we say, and if you will all stand, please, and his lovely wife. I will put into the record all of their names, but well done to Mrs. Mason for this extraordinary--

Chairman Feinstein. I am glad you give the woman all the credit.

[Laughter.]

Senator Warner. One of two of them are obscured by the tall fellows, but they are viewed now. All right. Thank you very much.

Madam Chairman, President Clinton originally selected David Mason for a position in 1998. That is when I had the opportunity to nominate him. But throughout his career, he served his country, as I say, in the Congress and the executive branch, and I think he is absolutely eminently qualified for renomination. I would urge the Committee to give him fair and objective consideration, and I shall vigorously defend his nomination, should anybody question it, as we proceed through the Senate.

I thank the Chair and the Ranking Member for this opportunity, and I will submit the balance of my statement for the record.

[The prepared statement of Senator Warner follows:]

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Chairman Feinstein. I thank you, Senator. We are delighted that you are here. Thank you very much.

Senator Ensign?

STATEMENT OF HON. JOHN ENSIGN, A UNITED STATES SENATOR FROM THE STATE OF NEVADA

Senator Ensign. Thank you, Madam Chair. I do find it kind of ironic that I sit before you today to recommend a

fellow Nevadan, Steven Walther, who was Senator Reid's spokesperson that handled the recount when Senator Reed and I ran against each other. But I think it is important that we have good people on the FEC, and having a Nevadan obviously makes us very proud.

Commissioner Steve Walther, like me, is a fourth generation Nevadan, and his family history in Nevada began the same year that Nevada became a territory. He and his family have contributed to the enrichment of our State through their long involvement in environmental, cultural, civic, and educational issues.

Commissioner Walther served as student body president of Reno High School, and that was just the beginning of his development as a leader. He worked to build one of the leading law firms in northern Nevada, where he remained for 33 years until he joined the FEC.

But his time was never limited to the confines of a law firm practice. Early in his career, he was appointed to the Nevada State Advisory Committee, to the U.S. Commission on Civil Rights, and he continued to serve in that capacity for approximately 34 years. He was appointed by Nevada Governor Paul Laxalt to the Nevada Indian Affairs Commission and was reappointed to the Commission by Governor Mike O'Callaghan.

Throughout his career he has also been a leader in the legal and judicial fields in Nevada and nationally. Commissioner Walther served on countless boards, committees, and sections of a multitude of legal organizations, and was elected president of the State Bar of Nevada. Part of his legacy while on the Board of Governors of the Nevada State Bar was his work to require mandatory legal education for Nevada lawyers. Additionally, he was elected to the Board of Trustees of the National Judicial College, which is located in Reno, Nevada, which is one of the leading educational institutions for judges in the country.

Commissioner Walther continues to be involved in numerous causes in northern Nevada, a tribute to his true appreciation for and commitment to his community. It is my pleasure to introduce Commissioner Steven Walther to you and recommend that he along with the others are approved.

Thank you, Madam Chair.

Chairman Feinstein. Thank you very much, Senator Isakson--Senator Ensign.

And now, Senator Isakson.

Senator Isakson. I should only look that good.

[Laughter.]

STATEMENT OF HON. JOHNNY ISAKSON, A UNITED STATES

SENATOR FROM THE STATE OF GEORGIA

Senator Isakson. Madam Chair, it is a privilege for me to be here today, and I say that with all sincerity because so many times we are called upon in this body to introduce people from our State, but people that we only know that which we have read or have been told. I have the chance today to introduce someone who has been a friend of mine and I have known intimately for 15 years, his wife, his family,--and, by the way, are they here, Hans? Would you please stand? There they are.

He does not have ten, but I went to his house for a

party about 10 years ago, and they can make as much noise as ten, I guarantee you. They are a wonderful family. His wife is a wonderful lady, and Hans is a very accomplished individual. He graduated from two institutions to which I could never aspire to be admitted--MIT and Vanderbilt University--which shows his intellect and his knowledge.

From the time he came to Sandy Springs, Georgia, in Fulton County, he volunteered his time in countless ways for organizations, including working and serving for 5 years on the Fulton County Board of Registration and Elections, the largest county in Georgia, supervising and administering elections in a county with 400,000 registered voters.

He has written extensively on election law and voting issues, and he has testified before the Senate twice--in fact, right before the Senate Rules Committee. He served honorably for 4 years in the Department of Justice on voting and election issues, including coordinating the Division's enforcement of the Help America Vote Act.

In the last 18 months on the FEC, he has shown his understanding of campaign finance laws and the ability to work with both Republican and Democratic Commissioners, as has been testified to, I think, by other introductions, in building consensus on many contentious issues.

I have known Hans a long time. I have known his family. He is an extraordinary individual and, like so many Americans, the son of European refugees who fled Europe in World War II to come to America to make a home for themselves and raise their families. He is articulate, he is knowledgeable, he is a family man. He has the experience, and I commend him to the Committee for his appointment and confirmation.

Chairman Feinstein. Thank you very much, Senator.

I believe we will now hear from the nominees, and perhaps we can go right down the line and begin with you, Mr. von Spakovsky. If you would try to confine your remarks to less than 5 minutes, the clock in front of you will run. I know there are a lot of questions from the Senators. Thank you.

TESTIMONY OF HANS A. VON SPAKOVSKY, OF GEORGIA, TO

BE A MEMBER OF THE FEDERAL ELECTION COMMISSION

Mr. von Spakovsky. Thank you, Chairman Feinstein, Senator Bennett, members of the Committee, Senator Isakson. I am pleased to be here with my fellow nominees--Robert Lenhard, Steven Walther, and Dave Mason--and for this opportunity to speak to you and--

Chairman Feinstein. Is your mike on?

Mr. von Spakovsky. I believe so.

Senator Bennett. Get it a little closer to you.

Mr. von Spakovsky. Okay. I am grateful to President Bush for the confidence he has shown in me by this nomination. I have to say, though, that this nomination and the Committee's consideration of me for this seat is really a reflection not so much of me but of what a great country this is. I think that only in America could a first-generation son of immigrants be considered for such a post of public service.

I would like to thank my wife, Susan, and my children, Elizabeth, Christopher, and Anna, for putting up with the long hours that I have worked since I moved to Washington in 2001. I would also like to thank my parents, particularly my mother, Traddell von Spakovsky, whose hard work and emphasis on education and taking advantage of all the opportunities this wonderful country has to offer is why I am sitting here before you today.

When I started at the FEC last January, I was 1 month short of the 55th anniversary of the day my parents arrived in the United States. They got here just like most immigrant families--my father without a job, almost penniless, with a 3-year-old and another child 6 weeks away from being born. They went on to have five children, all of whom have been very successful in their chosen professions, including my two brothers, who are here today--one of whom is an engineering professor at Virginia Tech and the other of whom works for the Department of Defense's Missile Defense Agency.

My mother grew up in Nazi Germany. My father escaped from Russia in the early 1920s when the Communists took over, and he settled in Yugoslavia. When World War II ended, he once again had to flee his adopted homeland when the Communists took control to avoid being arrested and shot. My childhood was full of stories from my parents about what life was like living in a dictatorship, and we learned how lucky we were to be living in this democracy that all of us call home.

I have understood from a very early age how important the right to vote is and how important it is to preserve our right to participate in the electoral process. If you want to know how we would carry out our duties if you confirmed us, you now have a year and 6 months' worth of votes and actions by the Commissioners sitting before you to see how we would act.

In 2006, the FEC had its most active year in its 32-year history. We collected $6.2 million in civil penalties, which is twice as much as any previous year. We have had 55 enforcement cases since the FEC opened its doors. Nineteen

of those cases, or more than one in three, were concluded in 2006 and 2007.

In the first quarter this year, we have collected $1.1 million in civil penalties, which, once again, is the most successful first quarter ever.

In 2006, we closed 316 enforcement cases, the largest number since 2001, and the average time to complete a case has dropped by a third since 2002. Almost 90 percent of our cases are now closed within the 2-year Federal election cycle, which is the fastest processing of cases in the agency's history, and all of us are intent on improving this even more.

We also issued 25 advisory opinions last year and completed seven regulatory rulemakings, but we also made policy changes to increase our efficiency and our transparency, including adopting a pilot program that provides oral hearings to targets of our enforcement investigations, which, in my mind, is a very basic due process right.

The American Bar Association recommended that we do that back in 1983, and it was the set of Commissioners sitting before you today who adopted this program unanimously.

Contrary to popular belief, Commissioners vote unanimously in about 99 percent of our enforcement cases. There is no partisan split between the Commissioners. The times we split 3-3 on a vote are very rare. we have a very collegial and bipartisan atmosphere at the Commission that I very much enjoy, and I can tell you that on the rare occasions when we do disagree on the meaning of specific provisions of the law, which I think even some of its authors might admit is not always crystal clear in its intent and reach, we do so on a reasoned, legal basis, take our votes, and move on to our next task.

I have pledged to the President and I pledge to you that I will work hard to ensure that the agency carries out its mission to protect our election system. The laws we enforce are intended to make sure that the ground rules governing campaigns are fair, aboveboard, and prevent corruption. The biggest lesson I have learned in a year and a half at the FEC is the rules must be clear, straightforward, and easy to understand. If they are so complex that they can only be understood by a high-priced Washington lawyer, then we are not doing our job. We have to assure that ordinary Americans who want to run for office or serve in a campaign as volunteers are not discouraged from doing so, and I can tell you that is a bipartisan goal that is shared by all of my colleagues.

Thank you very much.

[The prepared statement of Mr. von Spakovsky follows:]

Chairman Feinstein. Before proceeding to Mr. Mason, I neglected to issue the oath, and if you would stand, I would like to do that now, and please raise your right hand. Do you swear that the testimony you are about to provide is the truth, the whole truth, and nothing but the truth, so help you God?

Mr. von Spakovsky. I do.

Mr. Lenhard. I do.

Mr. Mason. I do.

Mr. Walther. I do.

Chairman Feinstein. Thank you. We will proceed. Mr. Mason?

TESTIMONY OF DAVID M. MASON, OF VIRGINIA, TO BE A

MEMBER OF THE FEDERAL ELECTION COMMISSION

Mr. Mason. Thank you, Madam Chairman. I wanted to summarize the statement which I have submitted for the record by making two general points about the Commission and two specific ones about its current operations.

First, the Federal Election Commission is a little agency with a big mission: preventing corruption in election campaigns. This mission is important because elections are the way Americans govern themselves. It is the means by which this great people preserve its liberty, and I am humbled and proud to play a small part in that process.

Because we are a free people, it is perfectly appropriate that the Government agency that regulates elections is small and is limited in its jurisdiction, which brings me to the second general point that I want to make.

The jurisdictional debate about the Commission is usually cast in terms of the First Amendment, but I believe the principle at issue is perhaps even more fundamental that that first and most important, perhaps, constitutional amendment, and that is that the elections are the way people choose the Government, and there a great danger in election regulation that improper regulation could become a way for the Government to perpetuate itself.

Thus, when we are looking at the Commission's jurisdiction, the limits on our jurisdiction are as important as the extent of the jurisdiction and the exercise of that jurisdiction. I think understanding that principle and understanding that as in the case of, for instance, the Internet rulemaking, our choice not to regulate, is not only equally valid but is supported by equally important underlying interests. And so whether we are talking about 3-3 votes or certain policy decisions, I think it is important to begin with that perspective and understand that our choices not to act, not to regulate, can not only be important but critical in how we do our job.

Indeed, as Commissioner von Spakovsky pointed out, 3-3 votes are extremely rare on the Commission these days. But, frankly, on a six-member commission, I would be concerned if they never occurred more than the fact that they occur occasionally.

There are two areas that I highlighted in 1998 about specific operations of the Commission in my testimony that I wanted to address again today, and the first is the pace of our action on enforcement cases. Again, as Commissioner von Spakovsky indicated, we are processing enforcement cases much more quickly today than we were in 1998. I think it is important to note that we are doing that without a substantial increase in resources. We did start a couple of new enforcement programs with the support of the Congress--the Alternative Dispute Resolution Program and the

Administrative Fines Program--and those helped take a lot of routine and lower-importance cases off our docket and allowed the attorneys in our General Counsel's office to spend more time concentrating on what I called in 1998 the "meat and potatoes" enforcement cases.

The other piece of the success in moving our enforcement docket was a focus on those cases, on the cases that were at the core of the Federal Election Campaign Act and not on pursuing abstract legal theories or trying to prove out the absolute extent of our jurisdiction in every case. And it is precisely that focus on those "meat and potatoes" cases which has led not only to moving more quickly, but has led to more significant fines and more significant other action.

Lastly, I highlighted in 1998 the Commission's rather poor record in defending its actions before the Federal courts. And while I think we have made some improvements in that regard as well, I have to admit that we are still being challenged. In fact, today we have opponents of the Bipartisan Campaign Reform Act challenging us in the Supreme Court, in the Wisconsin Right to Life decision. We have supports of that act challenging us because they believe we have not implemented regulations sufficiently vigorous to implement that to their choice. And so I have to admit to a certain degree, particularly with a still relatively new statute, we are going to be left at the mercy of the courts.

What this Commission has done that I think has improved the situation somewhat is to try to work with court decisions when we get them rather than to continue to fight them out in a protracted ground war. And these changes, though small, in many respects have been important to me in an effort to make the laws that we enforce work better and be more clear for the people who have to live with them.

Thank you, Madam Chairman.

[The prepared statement of Mr. Mason follows:]

Chairman Feinstein. Thank you very much.

Mr. Lenhard, before you speak, I ask unanimous consent to include in the record Senator Reid's statement. Thank you very much, Senator Bennett.

[The prepared statement of Senator Reid follows:]

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TESTIMONY OF ROBERT D. LENHARD, OF MARYLAND, TO BE

A MEMBER OF THE FEDERAL ELECTION COMMISSION

Mr. Lenhard. Chairman Feinstein, Ranking Member Bennett, and members of the Committee, thank you for allowing me to appear before you today.

Before I begin, I would like to also acknowledge my family. My lovely wife, Vivica Novak, is here in the audience, as are my two children, Nora and Thomas, as well as my parents, my in-laws, and my sister, Anne.

It is a great honor to be nominated to the Federal Election Commission and a great responsibility to serve as a Commissioner. I believe the Federal Election Commission plays a vital role in our democracy. It is the primary source of information about the financing of Federal elections, and it ensures that all participants in Federal

elections play by the same clear rules. The Commission's administration and enforcement of the campaign finance rules must be impartial and nonpartisan. At the same time, we must constantly be mindful that our actions can have an impact on political speech, a core First Amendment right, and tread carefully in these areas.

I have the good fortune to appear before you today and to be able to point to a record of significant accomplishments at the Federal Election Commission since I arrived there almost 18 months ago. Collectively, we have made visible and measurable improvements in every facet of the agency's operations, and I am particularly proud of our progress in four areas:

First, the FEC has improved how we present information to the general public about the money that is raised and spent in Federal elections. On Tuesday, we unveiled dramatic improvements to our Web search engine for contributions with an easy-to-use map icon. That search engine covers presidential elections today and should cover all of the data that we have by the end of 2007.

Second, we adapted our advisory opinion process last year to respond faster to time-sensitive requests. If a question is particularly urgent and the Commission believes the legal issues can be resolved quickly, we have been providing a draft answer for public comment and a vote on a final opinion in between 2 and 3 weeks rather than the traditional 60-day period.

Third, we have created a new pilot program that allows respondents and enforcement matters to request a hearing before the Commission prior to our deciding whether to find probable cause that a violation has occurred. The American Bar Association recommended that the Commission take this step in the early 1980s, and I am proud that this Commission was able to create the pilot program.

Finally, the agency has made great progress in the speed of its enforcement. Thanks to the hard work of everyone at the Commission, last year we processed our cases 30 percent faster than in earlier years, and we are currently closing more than 85 percent of our enforcement cases within 2 years of them being filed. We hope to improve on this even further going forward.

I go into great detail regarding these and other recent agency accomplishments in my written testimony. Thank you again for the opportunity to appear before you. I am happy to answer any questions.

[The prepared statement of Mr. Lenhard follows:]

Chairman Feinstein. Thank you very much.

Mr. Walther?

TESTIMONY OF STEVEN T. WALTHER, OF NEVADA, TO BE A

MEMBER OF THE FEDERAL ELECTION COMMISSION

Mr. Walther. Thank you, Madam Chairman. I understand I am to ask you if you would be willing to supplement the record with an amended opening statement that I prepared?

Chairman Feinstein. Yes, you may.

Mr. Walther. Thank you very much.

Madam Chairman, Ranking Member Bennett, and members of the Committee, it is a great honor and privilege to be here today and also to have been able to serve as Commissioner for the last 17 months. I would like to begin by introducing my wife, Diane, and to thank her for guiding our family 3,000 miles to be here from our home State of Nevada.

Chairman Feinstein. If she would stand, we would like to acknowledge her.

Mr. Walther. Thank you.

Chairman Feinstein. Welcome. Thank you very much.

Mr. Walther. And mention thanks also to our beautiful daughter, Natalie, who recently graduated from the University of Nevada; and my son, Mario, who recently graduated a couple of weeks ago from Montana State University; and our irrepressible 7-year-old, who is here today, Wyatt.

Chairman Feinstein. Why don't you all stand?

Mr. Walther. We only have Wyatt here today.

Chairman Feinstein. Since we have a number of children, we would love to see you. Hello. How are you?

[Laughter.]

Mr. Walther. The biggest problem this morning was to figure out which tie he was to wear.

I would also like to thank--first of all, their decision to make this change was critical to me, and their enthusiasm and my interest in serving here were factors that ultimately played a part to be here today, and it is such a pleasure to do so.

I would like to thank Brad Deutsch, my administrative assistant, for leaving the Office of General Counsel and a very comfortable position and joining me as my assistant throughout this and helping me prepare for the hearing today. It has been a wonderful association to have him join me.

I have had 17 months of on-the-job training as Commissioner to date, and I have a couple of observations I would like to begin with.

First, I think one of the finest experiences that I had upon joining the Commission was the staff itself. I found that most of the staff had been here 20 or 30 years. That has been their life. They love the Commission. They are loyal to it. They think about it. They care about it. And it is a small agency, so most everyone knows each other, and it is very much like a family. It is really quite an amazing thing to experience, and I just want to note that because a lot of the success the Commission has had over the years is due to that cohesive, dedicated group of public servants.

Second, another factor that was mentioned by Ranking Member Bennett, and I believe it to be very true, is the relationship that we have to work together. It was not clear to me when I joined the Commission what I would experience because I had read of instances in the past where that was not the case. So it was a little unclear to me and I had some trepidation when I entered the door the first time as a Commissioner. But we really began from the outset to a large degree, a tone was set by Michael Toner, who is the former Chairman, no longer with the Commission, and the dignified and civil way he brought us together to start

getting our work done. And that atmosphere continues under Chairman Lenhard, and each of us have a great deal of respect for each other. To each person, we work well together, and we do argue and debate our positions, and we vote it up, and we walk out the door and ask how our kids are doing. It is a very good working relationship, and it is on the merits. So that was another fine experience that I have had since appearing here.

I would like to say, since I am new to the Commission and new to this city, that I support completely the Federal Election Campaign Act as amended by the Bipartisan Campaign Reform Act. I believe in it. I believe that its goals are worthy. I believe the transparency it affords is a cornerstone of a good democracy. It affords the citizens the best means to assure that their will is achieved. Without transparency, no other constitutional or legislative provision designed to ensure democracy can have a realistic chance of fulfillment.

I also believe the structure of limited contributions does act to reduce corruption, and certainly the appearance of corruption. And in some instances, it also serves to level the playing field for those wishing to participate in our great democracy by seeking to represent us in Congress and in the Office of the Presidency.

You have heard about our achievements. I echo them and I am very proud of them. I would like to mention that internally we have done some things, too, that might be worth noting. We have three very active committees I have been lucky to serve on: the Finance Committee, the Litigation Committee, and the Personnel Committee. In each instance, we are looking at every way we can to improve agency performance, from A to Z. We are rethinking old precepts, talking about experiments, trying to make it more efficient, more effective, more fair, and that has also been a very nice part of being here at this particular time.

I would like to finally say I believe very strongly in the mission of this Commission. I did not appreciate what an important position it was in terms of being a prominent part of our Government service, and I strongly believe in the rule of law and will look first at the language and intent of our laws we have sworn to uphold as a lodestone for all decisions that come before me as a Commissioner.

Recently, as an example, I was privileged to provide information to a group of foreign dignitaries who joined us at our offices under the auspices of the State Department. They were astounded to learn that anyone anywhere in the world can get on a computer and, through our website, find out the identity of every donor who has made a contribution over $200 to a particular Federal candidate, or the identity of every Federal candidate that has received a contribution over $200 from any particular donor, since the Commission began placing that data online several years ago. It was a valuable reminder that the Commission plays a transparency role not available to that extent in any other country. It is a shining example of democracy at its best, and I am very proud to be a part of it.

It is a privilege that I will never forget to be before you today and to serve on the Commission. If confirmed by the Senate, I will work hard to serve our country and our

Commission well.

Thank you for allowing me to be here.

[The prepared statement of Mr. Walther follows:]

Chairman Feinstein. Thank you very much. We will now proceed with questions, and I would like to lead off.

Mr. von Spakovsky, I have four questions for you, and they deal with voting rights situations in four different States. As you are probably aware, your name has arisen in hearings recently held by the Judiciary Committee with statements made, and I would like to clear some of this up. The first one involves Georgia.

In April 2005, while you were advising the Assistant Attorney General for Civil Rights, Georgia passed a law requiring types of photo identification. That was 2 months prior to the publication of a law review article you wrote and admitted initially on your blog that you wrote over the pseudonym "Publius." Now, that is in direct contravention to Department of Justice rules regarding conflict of interest, 5 C.F.R. 2635.802.

In August of 2005, we now know that four out of five of Justice's civil service's employees objected to that law. Those employees were overruled by the Justice Department's political front office.

So here are my questions: In 2005, did you have any communication with any Georgia State legislator, their staff, or advocates in favor of the photo identification while their voter identification bill was being considered or debated?

Mr. von Spakovsky. Senator, the only communication I had was I believe at some point at the beginning of 2005 I received a call from a legislative staffer--and I frankly don't remember who it was--who asked questions not about their Georgia voter ID bill, but they asked questions about the voter ID provision in the Help America Vote Act. As you know, Title III of HAVA put in the first national voter ID requirement that Congress required of the States for first-time voters.

Chairman Feinstein. All right. I think that is not where I am going. I just want to know what contacts you had, and that is the only contact--

Mr. von Spakovsky. That was the only contact, asking to explain the HAVA ID requirement.

Chairman Feinstein. Okay. That answers that question.

On or before the day that the Georgia identification was precleared, did anyone at the Voting Section tell you that additional corrected data was being provided, that also indicated several hundred thousand voters did not have a driver's license?

Mr. von Spakovsky. Senator--

Chairman Feinstein. Yes or no?

Mr. von Spakovsky. I don't recall being told that there was data coming in that--

Chairman Feinstein. So you never knew that?

Mr. von Spakovsky. --several hundred thousand people did not have an ID.

Chairman Feinstein. Okay. Why was the decision to preclear the identification requirement made despite the new

information from the State? Because the data did come in.

Mr. von Spakovsky. Senator, to answer that question, can I explain a little bit about what my job was and the structure of the front office of the Civil Rights Division?

Chairman Feinstein. If you can do it quickly.

Mr. von Spakovsky. I will try to do that. I have seen many claims that I made this decision or I made that decision, and the problem with that is that I was not the decisionmaker in the front office of the Civil Rights Division. My job as a career counsel was to provide my legal advice and recommendations to the Assistant Attorney General, who is the person with the legal authority to make all decisions, and in his absence--

Chairman Feinstein. And who was that at the time?

Mr. von Spakovsky. At the time it was--I think it was--Alex Acosta was the Assistant Attorney General. Then he left, and so in his place as the Acting Assistant Attorney General was the Principal Deputy, Brad Schlozman.

Chairman Feinstein. All right. Thank you.

Mr. von Spakovsky. What would happen is when a matter would get sent up to the front office of the Civil Rights Division by the Voting Section, that recommendation would go from the Voting Section chief to the Assistant Attorney General and his deputies, and I would review it and add my advice or recommendations on it so that the Assistant Attorney General, the Principal Deputy, would see all the recommendations made by the Voting Section chief and also whatever comments I had on it.

The recommendation that came up from the Voting Section chief on the Georgia voter ID law was that the law should be precleared and that we should not object. I added my legal advice to that, and the Principal Deputy made, you know, the final decision on that.

Chairman Feinstein. What was your legal advice? Quickly, just what was it?

Mr. von Spakovsky. The problem,

Senator, is that, you know, I was acting as a legal counsel, and the legal advice that I gave is privileged. I will tell you that I--I mean, I can't reveal that. I can tell you that I believe based on the facts and statistics that I saw in the report that came up that I believe they made the correct decision. And I would be happy to explain why if you would like to me to.

Chairman Feinstein. I would like to move on. Perhaps in the second round. Let's go to Minnesota for a moment. The U.S. Attorney's Office in Minnesota, led by Tom Heffelfinger, contacted Main Justice in October 2004 to express concerns about a new rule issued by Minnesota's Republican Secretary of State, Mary Kittmeyer. The rule stated that tribal identification cards would not be accepted as valid identification at the polls. Heffelfinger believed that many legitimate Native American voters might not have other forms of identification and that the State's new rule would prevent these voters from voting.

According to a May 31st report in the Los Angeles Times, you ordered Joe Rich, who is here today--who I happened to come up in the elevator with, and I said, "Is this true?" And he said, "Yes." You ordered Joe Rich, the

chief of the Voting Section, to contact only the Secretary of State and not to contact any county officials to investigate the impact of the rule.

Rich told the Times that your instructions, together with an instruction from Brad Schlozman that Rich should not do anything without Schlozman's approval, effectively prevented any investigation of the issue. The Los Angeles Times reported on May 31st that you instructed Joe Rich, the head of the Voting Section at the time, not to contact anyone other than the Secretary of State. Is this true?

Mr. von Spakovsky. Senator, I do not remember a conversation with Joe Rich, and I don't remember that case. I should point out that the sheer volume of complaints that would come in before an election was very large. I mean, I was trying to think back the other day at how many e-mails I would normally get and respond to in a day, and it was probably at least a hundred.

The only thing I recall coming out of Minnesota was an inquiry from the Secretary of State regarding the provision in the Help America Vote Act with regard to having to take driver's license numbers or the last four digits of a Social Security number on a voter registration application form. I am not saying that I may not have talked to Joe Rich about it. I don't remember it. What I don't quite understand is--I read that article, too, and the article says that the Secretary of State was accused of a misinterpretation of a State statute that might have Federal implications. Well, logically, the first step in any investigation would be to contact the Secretary of State's office and find out what the interpretation is that is causing the problems.

I don't really understand how that would be viewed as shutting down an investigation.

Chairman Feinstein. Let me ask this: Do you recall any conversation with Brad Schlozman on this subject?

Mr. von Spakovsky. Ma'am, I don't remember any conversation.

Chairman Feinstein. And who was Brad Schlozman at that time?

Mr. von Spakovsky. At that time he was the Principal Deputy--no, actually, I think he was the Deputy Assistant Attorney General.

Chairman Feinstein. Who told you what to do.

Mr. von Spakovsky. He was my supervisor.

Chairman Feinstein. He was your supervisor?

Mr. von Spakovsky. Yes.

Chairman Feinstein. Do you remember any specific instructions from Mr. Schlozman on that matter?

Mr. von Spakovsky. I don't remember that--I don't remember that complaint at all.

Chairman Feinstein. And you do not remember his saying to you, as he said to us, on page 54 of the transcript, "This was something that we should be looking into"?

Mr. von Spakovsky. Senator, I don't remember that. I said the only incident I remember was the other complaint that I told you about.

Chairman Feinstein. Did he instruct you about who should or should not be contacts as part of the investigation?

Mr. von Spakovsky. Senator Feinstein, I don't recall

that investigation.

Chairman Feinstein. You recall not looking into any of the concerns then of the issue about Native Americans, perhaps a large number of them, not being to vote?

Mr. von Spakovsky. Senator, my job as the counsel was--I didn't do the investigations. That was done by the lawyers in the Voting Section, and they would get complaints all the time and begin investments, preliminary looks at things. They did not always notify me of every investigation or preliminary look they were doing. The only time that would normally come to my attention was usually after they had done an investigation, and they would come to the front office and say, you know, we have found the following things, we believe the Division ought to take the following actions.

Chairman Feinstein. Okay. I think my time is up. I will save the rest for the next round.

The Ranking Member, Senator Bennett.

Senator Bennett. There has been a lot in the press about voter ID and cleaning voter rolls. And at least the assumption that I get out of much of the press concern about these two issues is that anyone who wants to clean up a voter roll or anyone who wants to require voter ID is part of a conspiracy to try to hold down voter activity.

I would like any member of the panel to talk about these two subjects generically. Do you think voter ID is a good idea? And do you think keeping the voter rolls clean is a good idea?

Mr. Mason. Senator, let me say that you are probably going to have difficulty with the rest of us because at one time, as you are aware, the Commission had jurisdiction over what is now the Election Assistance Commission, and that was removed by the Help America Vote Act, and so my colleagues who are new to the Commission have never had any official experience with that and mine is 4 or 5 years old. So I would say, in my view, I think the challenge in this area is that you have competing goals. One goal is that every eligible voter should be allowed to vote and their vote should count. And the other goal, of course, is that everyone only votes once. And there is going to be some tension there, and I think the practical answer in any given situation is going to be that it is going to be a balancing act in terms of what protections you put on which side of that ledger based on what you think the problems are and what you think the practical solutions are.

But I hasten to say again that that is out of our jurisdiction as the Federal Election Commission.

Senator Bennett. Well, I appreciate that. The controversy surrounding at least

Commissioner von Spakovsky's appointment in the media is all on those two issues. So it may well be that those two issues are irrelevant to the Commission, but they are not irrelevant to the objections that have been raised.

I sat as a member of the Governmental Affairs Committee when Senator Lieberman was Chairman of that Committee the last time, and we had a hearing on the subject. Senator Bond from Missouri brought forward a voter card for Trixie Mexler, who happens to be a springer spaniel and who is, therefore, under age.

[Laughter.]

Senator Bennett. She is only about 13 years old. Now, for a dog that is pretty good. But there was clear concern about the propriety of cleaning up the voter rolls to make sure that everybody who was on the roll was, A, a human being and, B, alive and, C, qualified to vote. And yet there was a lot of controversy, and it came out in that hearing. I will not rehash all of the things that were said there.

But let me ask you your opinions, then, if you do not have an official position as Commissioners, if you think voter ID is a good idea.

Mr. von Spakovsky. Well, Senator, since many of the stories have been about my views about that, I will address that.

As I have said--and I think the first time I wrote an article about this was in 1997--I think voter ID is a good idea. The Baker-Carter Commission, when it came out with its report, I think in September of 2005, came out with the same requirement. But let me be very clear. I also believe very strongly that, you know, every eligible voter needs to be able to access the polling place and be able to vote without any problems whatsoever. And, you know, the times that I have written about this from a public policy standpoint, I have made it very clear that voter ID has to be issued in such a way that, you know, it is free, people are able to easily get it, and I think that is the same thing that the Carter-Baker Commission--I mean, I should point out, again, Congress itself thought this was a good idea since, when it passed the Help America Vote Act, it put into place the first national voter ID requirement. Now, it only applies to first-time voters who register by mail, but this was the first national voter ID requirement.

On the purge procedures, when I was at the Civil Rights Division, the Civil Rights Division's job was to enforce the National Voter Registration Act, and that act has two provisions that are key to that. On the one hand, it sets out some very specific notice requirements that jurisdictions have to comply with before they can delete someone from the rolls. But, second, there is also a list maintenance requirement. NVRA this is, again, Congress telling the States--says that you have to engage in regular list maintenance in order to take off people who are ineligible, such as voters who died.

Congress reinforced that again when it passed the Help America Vote Act since one of the requirements it put into Title III--I think it is Section 303 of the Help America Vote Act--was requiring all States to implement a statewide, computerized voter registration database and requiring the States to link that new database into other State databases such as Departments of Vital Records where they have records of people who have died, the Corrections Department where they have the records of people who are felons, if the State prohibits felons from voting.

So Congress itself, you know, they passed this requirement in the NVRA. Then they put it back in again in the Help America Vote Act. You have to do regular maintenance of your lists, but you also have to be very clear that you are following the NVRA rules when you are

actually going to delete someone to follow the very strict notice provisions.

Senator Bennett. So your position is that whatever you may have written or done with respect to voter ID or maintaining lists was simply enforcing the will of Congress?

Mr. von Spakovsky. Well, certainly it was when I was working at the Division since that is what we were charged with doing.

Senator Bennett. Thank you.

Chairman Feinstein. Thank you, Senator Bennett.

Again, we alternate. On the early-bird rules for speaking, Senator Durbin is next.

Senator Durbin. Thank you, Madam Chair.

Mr. von Spakovsky, this is my first chance to ask questions of you since you were a recess appointee, and my questions go to your service at the Department of Justice supervising the Voting Section. We have in hand and I am sure you have seen the letter from seven former career attorneys at the Department of Justice who served with you, and in the beginning of the letter, they write to us, "Mr. von Spakovsky played a major role in the implementation of practices which injected partisan political factors into decision-making on enforcement matters and into the hiring process, and included repeated efforts to intimidate career staff. Moreover, he was the point person for undermining the Civil Rights Division's mandate to protect voting rights."

Chief Justice Roberts, speaking to the Judiciary Committee, referred to Reynolds v. Sims, which called the right to vote the preservative right in our democracy. I understand by those words that we should take it as seriously or more seriously than any other right.

Serious questions have been raised about whether or not you were respectful of the right of Americans to vote. The Georgia photo ID law has been characterized by publications as a "national disgrace." The 2005 Georgia law was found by former Secretary James Baker and President Jimmy Carter to be “discriminatory.” It was struck down by the Federal district court, Which was unanimously affirmed by , the Eleventh Circuit.

I listened carefully as Senator Feinstein asked questions, and your memory failed you, but we have seen that that is an affliction which many people in the Department of Justice suffer from. But I am concerned about where your memory didn't fail you when you decided to publish this article in a conservative publication in Texas under a pseudonym, Publius. You were very critical of those who said the Georgia photo ID law went too far.

First, just administrative, did you clear your publication of that article with any ethics official in the Department of Justice?

Mr. von Spakovsky. Yes, sir, I did.

Senator Durbin. You did. Did you have written clearance?

Mr. von Spakovsky. First of all, Senator, let me say that my understanding is I completely followed to the letter the regulations governing this publication. I checked with the ethics officer. I also checked with the Principal Deputy in charge of the Civil Rights Division. He told me to check with the ethics officer. And what I was told was

that the specific regulations on this and also an opinion by Walter Dellinger, who I think in 1994 was head of the Office of Legal Policy, was that Federal employees and people working in the Department of Justice do not lose their First Amendment rights when they go to work. And the rules for publication were two. One is that you cannot reveal any confidential information, and there was no confidential information in that article. And the second rule was that you cannot use your title such that anyone reading it would believe that this is the official position of the agency.

Senator Durbin. Do you stand by the contents of that article as you wrote it?

Mr. von Spakovsky. I do, and there was nothing in that article that I hadn't said before. For example, my recommendations on photo ID, I made that same recommendation when I testified before the Senate Rules Committee in 2001 before I ever got a job at the Justice Department.

Senator Durbin. So can you tell me why you removed this article from your official FEC website? There was a reference to this article.

Mr. von Spakovsky. Senator, because at the time there started to be newspaper accounts about it, I was at the FEC and I was no longer working on these kinds of issues. As you know, the FEC doesn't have any--

Senator Durbin. You listed it on the FEC website and then removed it.

Mr. von Spakovsky. I did because I had all of the various publications that I had written up there. But I took it off because the controversy was, frankly, interfering with the work I was doing at the FEC.

Senator Durbin. Were you aware when you supported the Georgia photo ID law there was not a single place in the entire city of Atlanta where a voter could purchase a State-issued photo ID card, that State ID cards were sold in only 58 locations in 159 counties, that the Secretary of State of the State of Georgia in charge of overseeing elections said there had been no history of voter fraud at Georgia polling places?

Mr. von Spakovsky. Senator, the recommendation to preclear that came from the section chief, and the decision was made by the Principal Deputy of the Division and the Acting Assistant Attorney General.

Senator Durbin. It was not your decision?

Mr. von Spakovsky. It was not my decision to make.

Senator Durbin. You did not concur in that decision?

Mr. von Spakovsky. I made a recommendation to them. I'm not going to reveal what that recommendation was. I can't talk about the data that they received on which that I know that they based the decision.

Senator Durbin. In your role as Publius, the author, you seemed supportive of the Georgia voter ID, photo ID law.

Mr. von Spakovsky. I don't believe the Georgia voter ID law, the new one, was--well, I don't recall whether it was mentioned in that article or not.

Senator Durbin. Well, let me just go to the heart of the issue, the three facts I have just read to you. In your article you wrote voter ID requirements "are merely anecdotal and based on the unproved perception that minority groups such as African-Americans do not possess

identification documents to the same degree as Caucasians." That seems to relate to the heart of the issue on the Georgia photo ID law. Were you familiar at the time that you wrote that that a 2005 University of Wisconsin study showed that over 50 percent of the African Americans and Hispanics in Milwaukee did not have a valid driver's license?

Mr. von Spakovsky. Senator, we weren't looking at the Wisconsin study. What we were looking at was the data submitted by the State of Georgia, and the data submitted by the State of Georgia, by the DMV, Department of Motor Vehicles, showed that there were 6.5 million photo IDs issued in the State of Georgia. The voting age population was about 6.4 million. The registered voters were only 4.5 million. The racial data in the data that the DMV sent showed that of the individuals who had photo IDs, a slightly higher percentage of them were African American than the percentage of African Americans in the voting age population in the State. The data received from the Board of Regents of the State of Georgia--and college IDs were also an acceptable ID--showed that a slightly higher percentage of African American students were enrolled in the State colleges than in the voting age population. So, again, a slightly--

Senator Durbin. Well, let me--

Mr. von Spakovsky. A slightly higher number of African Americans--

Senator Durbin. My time is running out, and I would like to say this: Now that this Georgia photo ID law, which you precleared, has been termed a "national disgrace," has been labeled "discriminatory" by Republicans and Democrats alike, has been repudiated by a district court and unanimously repudiated by a circuit court, including Republican appointees, can you understand the concern a lot of people have when you still do not seem to be convinced that this was a bad law and really in a way deprived people of what we call our preservative right to vote and why some of us, as you ask to be appointed to the Federal Election Commission, take pause?

Mr. von Spakovsky. Senator, I understand the concern, but as I have made clear on more than one occasion, both in speeches and in writing, you know, my recommendations on voter ID are that they be put in such a way that people who are eligible to vote are able to vote and access the ballot box. I don't believe that any kind of requirement like that should be put in that is going to cause people to not be able to vote. I would like--

Senator Durbin. That is a good statement, but it is inconsistent, it is totally inconsistent with the position you took on the Georgia law.

Thank you, Madam Chairman.

Chairman Feinstein. Thank you, Senator.

Senator Chambliss?

Senator Chambliss. Thank you, Madam Chairman.

Let us pick up on that, Mr. von Spakovsky. Senator Durbin just made a pretty serious allegation that this is inconsistent. Let us talk about that Georgia law because I remember that case very well. Tell us, if you will, for the record what had to be precleared by the Department of

Justice versus what basis the court made their decision on to throw out the law.

Mr. von Spakovsky. Senator Chambliss, that is a very important point because under Section 5 of the Voting Rights Act, the Department is not able to take into account possible constitutional violations of the law or even other violations of other provisions of the Voting Rights Act. That is not the Department's decision. That is what the Supreme Court laid out in a case called Reno v. Bossier Parish. In that case, the Supreme Court said that when you are doing a Section 5 review, you can only take into account the Section 5 standard, which is retrogression. You can't preclear a change if there is going to be retrogression in the voting ability of minority voters. You cannot take into account any kind of constitutional claim.

In the League of Women Voters v. Billups case, which is the Federal court case in which the court issued an injunction, the judge issued the injunction based on the Equal Protection Clause of the 14th Amendment and the 24th Amendment, and specifically refused to issue or base his preliminary injunction on a claim under the Voting Rights Act saying that he didn't find sufficient evidence of racial discrimination. The fact that there were possible constitutional violations, the Division could not take that into account when it is doing its Section 5 review.

And I would point out that while the Federal judge in that case issued a preliminary injunction based on a constitutional violation, the Seventh Circuit Court of Appeals, which has looked at an almost identical voter ID law from the State of Indiana, upheld it against any constitutional claims, and the U.S. Supreme Court, in fact, dissolved an injunction that had been issued by the Ninth Circuit against a voter ID law in Arizona.

Senator Chambliss. So the reason that the Court issued the injunction stating that voters not be required to use their voter ID or any ID in that Georgia case had nothing to do with the issue that you reviewed and that your superior precleared. Is that correct?

Mr. von Spakovsky. That is correct,

Senator.

Senator Chambliss. So any charge that what you have just said is inconsistent with either what you did in that case or what you have said previously really is not correct.

You know, voter ID laws are not peculiar to Georgia. They are not something that was just pulled out of the air and passed by our legislature. In 2005, as I recall, there were 18 out of the 21 members of the Federal Commission, headed by former President Jimmy Carter as well as former Secretary of State James Baker, who came out in support of voter ID laws. Do you remember that?

Mr. von Spakovsky. Yes, sir. The report came out, I believe, in September of 2005, and they made that recommendation.

Senator Chambliss. And from a polling standpoint, this thing is off the charts. There was a Wall Street Journal poll that came out in 2006 that favored a photo ID requirement by 80 percent to 7 percent, and the idea had overwhelming support among all races. It is not limited to Georgia, certainly not limited to any one class of voters.

I am not sure what all this has to do with your qualification and your work on the Federal Election Commission over the last year and a half. But let me ask you about something that is more pertinent to your work on the Election Commission than all these other questions that have been out there.

I know that over the years there have been some due process concerns expressed by some over the role of the FEC as prosecutor, judge, and jury. And I think the institution of a pilot program to provide oral hearings to the respondents and enforcement proceedings is a positive step in addressing some of these concerns. And to all of you, could very quickly tell us a little bit more about this pilot program? How is it working? Is it anticipated to last? Mr. Walther, why don't we start with you.

Mr. Walther. Thank you, Senator. Yes, I think that is a fine innovation for us to have adopted. It was recommended, as you know, quite some time ago, and it was on the back burner. Commissioner Ellen Weintraub was a strong proponent of it, and to her credit, with some new Commissioners it was brought to our attention, and we took a hard look at it and decided, yes, we will proceed on a trial basis.

We have had one hearing so far, another is about to be schedule, and in my opinion, the oral argument that we had was extraordinarily helpful to us. I think it also made us prepare better for the hearing, and we were able to ask some questions and get some good answers that we never would have otherwise been able to have. So I am a big proponent of that, and I hope we will continue with it.

Mr. Lenhard. Thank you, Senator. I agree. The decision of whether to find probable cause in an enforcement case is among the last steps the agency takes before filing suit, and my sense was that by having pre-probable cause hearings in which the respondent would have an opportunity to appear directly before the Commission and make their arguments would both serve the due process concerns that Commissioner von Spakovsky mentioned earlier, as well as provide the Commissioners with a better pool of information upon which to decide whether to proceed to probable cause in any particular matter.

So I support it. We initially established it as an 8-month pilot program, but my sense is--the early response both among the Commissioners, among the staff, and among the regulated community is that it is a positive addition, and I anticipate that we will extend it.

Senator Chambliss. Mr. Mason?

Mr. Mason. Thank you, Senator, and I want to echo Commissioner Walther's thanks to Commissioner Weintraub, who is not at the table with us today, but who is here in the hearing room, who really was an energetic advocate of this, and it may well not have happened without her support. I think it is a good program. The thing that I want to watch during the trial period is to make sure that it does not slow down our enforcement process. We have got a balance to make between how much process, how much due process we put in, and how speedily we get to resolution. And that is my only concern about it, is that we do not give people an incentive to run the string out all the way out to the

probable cause stage by having this hearing at that late stage in the process. And so we will be watching that and trying to make sure that we continue to focus on getting cases resolved quickly, at the same time that we try to do it absolutely fairly.

Mr. von Spakovsky. Well, I just want to echo all that, and I want to say that this is a good sign, I think, to the Committee of how the Commissioners all, even though we may be of different parties, have many of the same ideas about due process and about how the enforcement process should work at the Commission. Everyone worked on putting this policy together. All the Commissioners had input into it, and it was adopted unanimously.

Senator Chambliss. Thank you, Madam Chairman.

Chairman Feinstein. Thank you very much, Senator. We will now do a second round, and I would like to go to the Texas redistricting preclearance.

In 2003, Texas decided to redistrict given the change in party composition in the Texas House. In the controversy that followed, the revised Texas map came to the Department of Justice for preclearance. Eight career staffers unanimously determined that the map was flawed and recommended against preclearance. As the Washington Post put it, "The staff said the redistricting plan illegally diluted black and Hispanic voting power in two congressional districts."

The staff memo concluded, and I quote, "The State of Texas has not met its burden in showing that the proposed congressional redistricting plan does not have a discriminatory effect."

The front office then rejected staff opinions and precleared the plan, and we all know what happened to it.

What was your involvement with the preclearance decision? And what recommendation did you make to the front office?

Mr. von Spakovsky. Senator, when the--

Chairman Feinstein. And you are under oath.

Mr. von Spakovsky. Yes, ma'am, I realize that very well. When the memorandum came up from the Voting Section chief which contained the analysis and recommendations, I reviewed it. The memorandum was sent to the Principal Deputy Assistant Attorney General who was the final decisionmaker on this particular case because the Assistant Attorney General, Alex Acosta, had recused himself from it.

I sent my review and recommendations to the Principal Deputy and--

Chairman Feinstein. And what was your recommendation?

Mr. von Spakovsky. Well, once again, Madam Chairman, I can't--that is privileged, and I can't tell you what my recommendation was. However, I will tell you that I think that subsequent events, including the subsequent elections and the court cases, show that the decision made by the Department was the correct one. I would be happy to explain why.

Chairman Feinstein. If you will.

Mr. von Spakovsky. The question in that case, Madam Chairman, under Section 5 was whether or not they met the retrogression standard. What the retrogression standard means from a redistricting standpoint basically is you have

to preserve the status quo. So if, for example, out of the 32 congressional districts that Texas had, eight of them were protected majority-minority districts, then when they drew up a new plan, they had to protect and draw eight majority-minority districts. The memorandum which came up from the Voting Section said that, well, no, there weren't 8 majority-minority districts in the State, there were 11.

The problem with that claim was that the prior redistricting plan, which was the benchmark plan for comparisons, had been drawn up by a Federal court in 2001 in a case called Balderas, and in that case, the three-judge panel said there were eight majority-minority districts.

To give you just one example of, you know, one of the claims that was simply wrong in the leaked memorandum, the Balderas court had said there were two African American protected majority-minority districts in Texas. The leaked memorandum said that, well, no, there were actually four and that, in addition to the two recognized by the Balderas court, which are the ones represented by the two African American Congresswomen from Texas, two other district--District 24 and District 25, represented by Martin Frost and Chris Bell--were protected minority districts, that those were districts in which African American voters could elect their candidates of choice, and that is the test for determining a majority-minority district.

Well, the Section 2 lawsuit that was later filed by the plaintiffs in Texas, the three-judge panel basically threw that out and said, no, District 24, represented by Martin Frost, is not an African American district. The Supreme Court in its final decision also threw that out and said, no, that is not an African American district.

The fourth African American district which the legal memorandum said should be recognized was represented by Chris Bell. Chris Bell was an Anglo Democrat who had been elected in an open-seat race in 2002. The problem with that recommendation was that the statistical analysis of the voting in the open-seat race showed that Chris Bell's opponent, who was a local, I believe, black Congressman-sorry, City Council member, had received a majority of the black vote. Despite the black candidate getting a majority of the black vote, he lost the race. Well, the key to determining whether you have a majority-minority district is whether the minority voters can elect their candidate of choice. So it, frankly, didn't make sense under the facts or the applicable Section 5 law to be arguing that Chris Bell, who had not gotten a majority of the black vote, was the candidate of choice of black voters, and that claim, although they made it initial, was dropped by the time that got to the Supreme Court.

Chairman Feinstein. Let me go to the heart of the matter, instead of doing this kind of questioning. We just completed some hearings in Judiciary on the politicization of Attorney General's office at the Department of Justice, and it is very unusual for us to have a letter signed by six career people in the Department--the chief of the Voting Section of the Civil Rights Division, the deputy chief of the Voting Section of the Civil Rights Division, three senior trial attorneys, and the political geographer--a 5-1/2-page letter, single spaced, that points out very clearly

that you corrupted practices within the Department.

Let me give you some specifics, because it is really problematic for this body to vote for someone with this letter on the record. And let me quote from it. "Mr. von Spakovsky oversaw the Voting Section as voting counsel to the Assistant Attorney General of the Civil Rights Division from early in 2003 until December 2005. While he was at the Civil Rights Division, Mr. von Spakovsky played a major role in the implementation of practices which injected partisan political factors into decisionmaking on enforcement matters and into the hiring process, and included repeated efforts to intimidate career staff. Moreover, he was the point person for undermining the Civil Rights Division mandate to protect voting rights. Foremost among his actions were his central decisionmaking role on a matter where he clearly should have recused himself." The letter goes on to say that you corrupted the established personnel practices that led to a productive working environment within the section, and on and on and on.

Why should we vote to confirm you with this on the record, this kind of thing, and knowing what we know has happened from the hearings in the Judiciary Committee?

Mr. von Spakovsky. Senator, many of the things in that letter are, frankly, inaccurate and wrong. Let me just take on example.

Those individuals have said--and, in fact, I saw--I think Mr. Rich quoted it in an article in the newspaper--that in the enforcement area that lawsuits were only being filed against Democratic jurisdictions. Well, all you have to do is go to the Web page of the Voting Section at the Department of Justice website where they list all of the litigation they file under the four statutes that they enforce, and you will find there case after case after case filed during this administration against Republican administrations.

Just to give you an example, they filed a lawsuit under the NVRA against the Indiana Secretary of State, who is a Republican. I remember suits being filed under UOCAVA, which is the Uniformed and Overseas Citizens Absentee Voting Act, against the State of Texas, the State of Oklahoma. I think everyone here knows the State of Texas has had a Republican Governor now for quite a while.

There are things that are claimed there that are easily disprovable, and frankly I really don't understand why they are making some of the claims they do. I think they have a certain political agenda, and that may be the basis for that.

Chairman Feinstein. Well, I will tell you, as of yesterday we have also received a letter from the Democratic delegation from the State of Texas strongly opposing your confirmation. We have a raft of letters in the file. I can tell you quite sincerely there is a very strong negative reaction, and really, if you will not tell us what your role was, if you will not tell us what your advice was, we can only come to believe that your advice was contrary or negative. And that is a real problem. I cannot speak for the Republican side, but I believe it is a real problem on the Democratic side.

Mr. von Spakovsky. Senator, if you want to ask me

questions about specific cases and specific incidents, I am happy to answer them because I think if you were to hear all of the facts and the applicable law on each of those cases, the decisions that were made were fully justified. I can't tell you, unless the Department of Justice, you know, waives the privilege right, what my particular opinion was. But I am happy to talk about the decision that was made and the subsequent events, including court decisions, which I think in each of these cases, from the Georgia ID to the Texas redistricting, make it clear that the decisions that were made by the Division were correct.

You know, when it comes to enforcement--

Chairman Feinstein. Even though overturned by the courts?

Mr. von Spakovsky. The three-judge panel in the Texas case did not overturn the decision, and when the Supreme Court overturned the decision, it only found a problem with one district out of 32, and that district was based on a compactness argument, which is not a consideration under Section 5.

Chairman Feinstein. Nonetheless, it was overturned. In any event, I am going to ask you to give a point-by-point rebuttal in writing within the next 5 days to the letter signed by the chiefs of the Voting Rights Section as well as the senior trial attorneys.

Mr. von Spakovsky. I would be happy to do that, Madam Chair.

Chairman Feinstein. Thank you.

[The information follows:]

/COMMITTEE INSERT

Chairman Feinstein. Senator Bennett?

Senator Bennett. Thank you. I think at this point in the record we should insert a letter from Ray Martinez, who is the former Commissioner of the U.S. Election Assistance Commission.

Chairman Feinstein. So ordered.

Senator Bennett. --a Democrat, who has addressed the letter to you and to me, saying, "I write today to strongly endorse Commissioner Hans A. von Spakovsky for a full term on the FEC." And the letter will be in the record, but I would highlight several items that he lists. He says, "In the many instances in which I dealt with Commissioner von Spakovsky during my tenure at the EAC, I found him to be fully informed, extremely knowledgeable of pertinent Federal law, and appropriately objective in his analysis and decisionmaking. Moreover, during this time, I was always impressed with the effort Commissioner von Spakovsky to actively seek my opinion on a wide variety of policy matters despite the well-known fact that our political views differed significantly on a number of hot-button issues confronting the field of election administration. I found him to be deliberative in his decisionmaking, loyal to his long-held views of jurisprudence and legal theory, and yet willing to listen and be persuaded by compelling opposing views."

Now, as you know, I am unburdened with a legal education, but I have been furnished with some copies of the

decision in Johnson v. Miller, and they make very interesting reading. I would ask consent that excerpts be submitted in the record at this point.

Chairman Feinstein. Without exception, and without objection, all letters received concerning any of the nominees will be entered into the record.

[The information follows:]

/COMMITTEE INSERT

Senator Bennett. All right. Let me just highlight a few of the things from the judge's decision. Quoting from the decision, "It is unclear whether DOJ's maximization policy was driven more by Ms. Wilde's advocacy or DOJ's own misguided reading of the Voting Rights Act. This much, however, is clear. The close working relationship between Ms. Wilde and the Voting Section, the repetition of Ms. Wilde's ideas in Mr. Dunne's objection letters, and the slow convergence of size and shape between the max-black plan and the plan DOJ finally precleared bespeak a clear link between the max-black plan formulated by the ACLU and the preclearance requirements imposed by DOJ. Succinctly put, the considerable influence of ACLU advocacy on the voting rights decisions of the United States Attorney General is an embarrassment."

Now, he is talking about the career attorneys who are objecting to Mr. von Spakovsky and their positions. That is referenced in a piece that appeared in this morning's Wall Street Journal that concludes this way: "Everyone has reason to be concerned about a politicized Justice Department, but to set up a cartoon version of reality in which principled career lawyers at Justice were battling Bush political appointees bent on voter suppression is absurd. The Civil Rights shop at Justice has been stuffed with liberal activists for decades. Many of the former career Justice lawyers complaining about Mr. von Spakovsky today now work at liberal groups such as People for the American Way, and their imaginative, hyper-aggressive enforcement of the Voting Rights Act hasn't fared well in court. During the Clinton years, when their theories were allowed to be put to a legal test, courts assessed Justice over $4.1 million in penalties in a dozen cases where it was found to have engaged in sloppy, overreaching legal arguments. In one case, the Supreme Court noted `the considerable influence of ACLU advocacy on the voting rights decisions of the Attorney General is an embarrassment.'"

So they picked up the same item that I noted, and then further in the opinion, the judge says, "A poignant example. In a notable faux pas, DOJ's second objection letter arrived at the Office of the Attorney General of Georgia only after members of the Georgia Black Caucus were already discussing it with the press. DOJ had notified the ACLU of its impending objection. The ACLU then notified the Black Caucus. This unfortunate spate of gossip created the impression that the ACLU and the Black Caucus wielded significant influence with DOJ's Civil Rights Division and significant control over Georgia's redistricting efforts. The State's leaders were understandably nonplused. The ACLU was exuberant. Georgia officials and citizens were mystified." Then the court: "We are simply troubled by the result. It is surprising that the Department of Justice was

so blind to this impropriety, especially in a role as sensitive as that of preserving the fundamental right to vote."

I do not think the career lawyers that are objecting to Mr. von Spakovsky have as clean a record as some might suggest.

Thank you.

Chairman Feinstein. Thank you, Senator Bennett.

Senator Durbin?

Senator Durbin. I might say to my friend Senator Bennett, having been personally damned by the Wall Street Journal editorial page on regular occasion, that I identify with the career attorneys here in their situation.

And I might also say to my friend Senator Chambliss, who has now left, that I think when he tried to draw a distinction between the responsibility of the Voting Section of the Department of Justice and the responsibility of a Federal court, he ignored the obvious, and that is that there is a responsibility at the Department of Justice to determine whether this State law--in this case the Georgia photo ID law--was retrogressive, that is, did it diminish the opportunity to vote and voting rights in this case for minorities. And that was a standard which Mr. von Spakovsky saw one way and the rest of the world saw the other way, at least in terms of Federal court decisions and the other career attorneys at the Department of Justice. So it was a unique position and one which he has defended, at least in theory, in his article that he published in the Texas publication.

I would like to ask you this, Mr. von Spakovsky: Do you concede the fact that race has been an issue when it comes to voters' rights in America?

Mr. von Spakovsky. Of course, Senator. Our whole job was to enforce the Voting Rights Act. We did so on many occasions in many different cases, and, you know, we were well aware of those problems, and, in fact, I think the Division had an outstanding enforcement record with regard to all of the statutes that it enforced.

Senator Durbin. So let me ask you this: During your tenure at the Justice Department, not a single case was filed on behalf of African American voters. The only race case you filed was on behalf of white voters in Mississippi. How do you explain that? If your goal is to protect the rights of Americans to vote and we understand historically race has been an issue in terms of this equality of opportunity, how could you go on for years and not find one occasion to bring a lawsuit on behalf of African American voters?

Mr. von Spakovsky. Senator, that is not correct. There were a number of cases that were either filed or litigated on behalf of African Americans. There was a case filed in Tennessee in 2001, a Section 2 lawsuit on behalf of African Americans. There was a lawsuit that the entire litigation process, the trial, the arguments before the Fourth Circuit were litigated by this Division on behalf of African Americans of Charleston County.

Senator Durbin. Would you provide me--

Mr. von Spakovsky. Charleston County, South Carolina.

Senator Durbin. Can you provide me with references to

those cases?

Mr. von Spakovsky. I can. I can also tell you that there were at least two other cases in which the Voting Section chief sent recommendations up to the front office of the Civil Rights Division when I was there, sent them to the Assistant Attorney General, to file two further Section 2 lawsuits on behalf of African Americans, one in Louisiana and one in Missouri. Both of those were approved by the Assistant Attorney General. The approvals were sent back down to the Voting Section chief, Mr. Rich. However, before suit could be filed, Mr. Rich sent up a request to withdraw his recommendation because it turned out that in these two jurisdictions in which they were recommending a Section 2 lawsuit, because their analysis, they say, indicated that African American candidates could not get elected. But in between the time the Assistant Attorney General had approved the recommendations, there had been local elections and, in fact, African American candidates had been elected.

I should also point out that I think while I was there, the Division filed the first voting rights suit ever on behalf of Haitian Americans under Section 208, which is another section of the law, and Section 2 does not protect only African American voters. It protects--

Senator Durbin. I never said that. I did not as you that.

Mr. von Spakovsky. I understand, Senator, but the job of the Division was to enforce that section whenever we got complaints and the investigations then showed that there were violations. And there weren't suits filed or litigated on behalf of African Americans. There were also Section 2 lawsuits filed and litigated on behalf of Chinese Americans, Vietnamese, Hispanics.

Senator Durbin. I get your point, and all I would ask you for is give me the references to the cases, if you would, please.

Mr. von Spakovsky. I would be happy to do so, Senator.

Senator Durbin. My last question is this: Your former colleague, Bradley Schlozman, testified last week before the Senate Judiciary Committee, which I serve on. One of the issues he was asked about was his decision as an interim U.S. Attorney in Kansas City to bring four indictments against a liberal voter registration group days before the November 2006 election. I would like to ask you a couple questions.

Did you have any conversations with Mr. Schlozman about these indictments? And if so, did those conversations take place before or after the indictments were brought?

Mr. von Spakovsky. I did not discuss those indictments, Senator. I was at the FEC at the time.

Senator Durbin. No discussions with Mr. Schlozman about those indictments?

Mr. von Spakovsky. No.

Senator Durbin. Thank you.

Thank you, Madam Chair.

Chairman Feinstein. I would like to, if I can, finish my questions--oh, I beg your pardon. I did not see you come back. Senator Chambliss, of course.

Senator Chambliss. Thank you, Madam Chairman. I wish I were as invisible on some other issues sometimes.

[Laughter.]

Senator Chambliss. The issue that Senator Durbin just mentioned relative to U.S. Attorneys, which I am not sure what indication there might be there. But have you ever had any conversation with anybody at the Department of Justice over this U.S. Attorney issue, the firings?

Mr. von Spakovsky. No, Senator.

Senator Chambliss. You were in no way involved in that?

Mr. von Spakovsky. No, Senator.

Senator Chambliss. Okay. The Texas case, Senator Feinstein says that there was a recommendation by some folks apparently under you, attorneys under you who gave an opinion that two of the 23 districts, I think, were violative of the voters' rights law. And apparently your boss made a decision to preclear that law anyway. It went to court, and the court came back and ruled one of those districts to be violative of the Voting Rights Act. Is that correct?

Mr. von Spakovsky. Of Section 2 of the Voting Rights Act, not Section 5, which was not at issue in the lawsuit.

Senator Chambliss. Right. So again, lawyers have opinions. That is what has allowed all us lawyers to make livings over the years, and lawyers disagree, and there was a disagreement among lawyers in that case, and the court is the one that actually made the final decision. Is that correct?

Mr. von Spakovsky. Well, Senator, I would like to point that out, because I think part of what has been happening here is people take the disagreements that lawyers normally have and are trying to elevate it into some kind of political crime. The three-judge panel in the Texas case twice upheld the redistricting plan that came through. Then when it got to the Supreme Court for the final decision, the Supreme Court Justices I think split 5-4, and almost every judge wrote a separate opinion on it.

That basically illustrates something one of my law school professors once told me, which was, you know, if you get four lawyers in a room, you will get six opinions. And I think that illustrates the fact that every time a case would get reviewed when I was at the Division, yes, sometimes the lawyers would be unanimous in their opinions on it, but other times there would be disagreements. And it was not just between the people who worked in the front office of the Division and the lawyers in the section. I mean, sometimes there would be disagreement among the lawyers in the section about a particular case, and there wasn't anything unusual about that. There wasn't anything involving politics. It was the different training and views that lawyers had in their interpretation of the law and how you apply it to the facts.

Senator Chambliss. Well, obviously, with the tone of the questions here today, there is some concern about the possibility that you bring partisanship to the FEC. Now, you have been there for about a year and a half now. Let's look at the record of the decisions that have been made since that time.

Do you know how the percentage of split votes at the Commission while you have been there compares with the years

in the recent past?

Mr. von Spakovsky. Senator, I do. We asked our staff to take a look at that, and since I have been on the Commission a year and a half, we have had almost 1,100 votes on enforcement matters. In 2006, we split 3-3 in nine-tenths of 1 percent of those votes, and this year we split 3-3 in two-tenths of 1 percent of those votes.

The long-term average from 2003 to 2007 is 1.1 percent, so actually in the last year and a half, we have been below the 5-year average for having split votes in enforcement matters.

Senator Chambliss. And I think you alluded to this earlier, but do you know how the level of civil penalties collected in 2006 compares with the recent past?

Mr. von Spakovsky. It was a record year, Senator. We collected more than twice as much as the FEC has collected in its entire 32-year history.

Chairman Feinstein. Thank you very much.

I would like to ask some questions on the last State, if I may, and that is Arizona. In May of 2005, outgoing Deputy Assistant Attorney General Sheldon Bradshaw on his last days at the Department issued a letter opinion to the State of Arizona. The letter wrongly informed Arizona that it could stop voters from receiving a provisional ballot if they did not have State identification.

In September of 2005, Brad Schlozman sent a letter to Arizona correcting the Department's opinion and stating that individuals can request and cast a provisional ballot for any reason.

In my Schlozman's sworn testimony last week, he says he had nothing to do with the drafting of the May 2005 letter, but it was probably done by "the voting counsel in the front office."

Was that not you?

Mr. von Spakovsky. I believe I drafted both letters, Senator, both the earlier letter and the corrected letter in September.

Chairman Feinstein. Okay. And you will not answer this, but for the record, because it is important, what did you say?

Mr. von Spakovsky. I drafted the letters, Senator, I was directed to draft on these issues with my recommendations of what they should be. What happened in between the two letters--

Chairman Feinstein. So you drafted a letter that, in essence, said it was possible to prevent a voter from receiving a provisional ballot if they did not have State identification. Is that correct?

Mr. von Spakovsky. I did draft that letter, yes, ma'am.

Chairman Feinstein. Okay. Thank you for being up front. If you would like to say something else, I appreciate it.

Mr. von Spakovsky. Well, I drafted that letter, Senator, but you need to understand. When the Help America Vote Act was passed, the system that was set up in the Division was we had a number of lawyers in the Voting Section who were dedicated to working on Help America Vote Act issues. And anytime a question came in--and I think Mr.

Bradshaw's letter was in response to an inquiry from the Secretary of State--that inquiry would get looked at by all the lawyers, including myself and the other career lawyers in the section. They would look at each of these inquiries and letters, whether they came in by e-mail or letter, and we would discuss what the response was that we thought should go out. So this was not me acting by myself. You know, I would have been consulting with the other attorneys there to do it.

We were contacted by the EAC, including Commissioner Martinez, who, as is often the case when you have two agencies with overlapping authority over a statute, asked us to reconsider that opinion, and the result of that was a meeting between the Civil Rights Division and the four Commissioners of the EAC and their general counsel, in which we discussed that issue and also we discussed the issue of the EAC making a correction to one of its best practices manual that had put in something that was contrary to the statute on a different issue. And basically after consulting, the Division agreed to take into consideration what the EAC Commissioners had said, and we changed the Department's position on that, and the EAC agreed to fix the problem that they had with their best practices manual.

Chairman Feinstein. Okay. What has happened, I think, is that you have become a lightning rod to many of the problems that have always been inherent in American voting. And it is a real problem, particularly because of this Commission and what we now know about the Department of Justice's performance at that time.

Why do you think six people with whom you worked would write such a letter with documentation, very intense? This is very unusual. You might have one letter. But six people who served with and under you have very strong things to say. Why do you think that is the case? They are lawyers. You may disagree on a case. People generally know we disagree on this. But they clearly do not believe you belong on this Commission.

Mr. von Spakovsky. I think part of the problem here, Senator, is the kind of problem that always occurs with an organization. Look, I served as a career counsel in the front office of the Civil Rights Division under three successive Assistant Attorney Generals. I served under all three of the individuals who served in that post. I didn't have decisionmaking authority on any matter. I didn't have hiring authority. My job was to provide each of those three Assistant Attorney Generals, you know, with my advice on any matter that was sent up by the Voting Section and the deputy chiefs to the Assistant Attorney General for a decision.

Now, the problem is--and it is just like any organization--when the President of a corporation makes a decision on a matter, he is not the one that goes down and tells the guys down the assembly line, "Here is how this is going to be done." You know, the president tells a senior vice president who tells a vice president who tells a manager, and it is the manager who goes and delivers the message to the line people. And, you know, when the Assistant Attorney General made a decision or the Principal Deputy made a decision on a matter, they weren't the ones that usually would call and talk to the chief or the deputy

chiefs or the line attorneys on a case. You know, they would tell me what the decision was on a matter, and, you know, sometimes they would agree with the recommendations I made, other times they wouldn't agree with the recommendations that I would make. But whatever the decision was, even if it was different from what I had recommended, my job then was to take what the Assistant Attorney General told me and go tell the people in the line areas, "Here is the decision." So the face they would see of the front office is me coming down and telling them, "Here is what we are going to do on this case," and so they automatically assume, well, I am the person who made the decision on this. And under the law and the regulations and the procedures of the Justice Department, that is just not the case. I was only one of half a dozen counsels in the front office working on matters between all ten of the sections of the Division.

Chairman Feinstein. Well, thank you very much. I am going to call on Senator Bennett, and I must excuse myself. I have a commitment at this time.

Senator Bennett. I will not abuse your absence.

Chairman Feinstein. You never have. No problem.

Senator Bennett. I just have a quick question for all of the panelists. All of this discussion has been with respect to Mr. von Spakovsky's activities prior to his joining the FEC. As I said in my opening statement, my first experience with the FEC was that it was highly politicized, and without going into details, I had additional confirmation of that in further conversations, with my own lawyer who ran up a comfortable bill dealing with the challenges that I had, but with some of my Democratic colleagues who confirmed that the FEC was a very troubled agency, riven with politics and, frankly, some incompetence.

You have served together. You have worked together now for 18 months. Will you give the Committee your opinion--Mr. von Spakovsky, we will leave you off of this. We will ask the other three. Give us your opinion of the degree of partisanship that exists now on the Commission and that you think would exist if all four of you were confirmed. Mr. Walther, we will start with you, Harry Reid's surrogate here--that is probably unfair, but Harry Reid's candidate nonetheless--and move down the table.

Mr. Walther. If I understand your question, it is to give a degree of variance that might occur with or without the Commissioner. Is that correct?

Senator Bennett. No. The degree of partisanship that is existing there now that would prevent you from doing the job in a proper fashion.

Mr. Walther. Well, I cannot speak to the past. I mentioned in my statement--

Senator Bennett. I do not want it in the past. I want your experience in the 18 months you have been there.

Mr. Walther. So far I believe that we have been able to work very well. We do not have the same views all the time. The Commission is really structured to allow for diverse views, and we have those, and we vote them up. And I believe that we have been able to--when we get close to a problem with a deadlock, we look at that and we work a

consensus. We have been very good at that.

I do not think we have been barred by our structure from making those judgments basically on the merits and in the absence of a claim of partnership. I would call it sometimes philosophical differences. We work on those. But, statistically you can see that most of our decisions are not just 4-2. Most are unanimous. We work very hard to try and get it done on the merits, and I really think we are doing a good job of it.

Senator Bennett. Mr. Lenhard?

Mr. Lenhard. Thank you. I will echo that. The FEC is a very unusual agency in the Executive Branch in the sense that it is administered by six Commissioners who overwhelmingly are of equal power. And it takes four votes to do almost everything at the FEC. And as a consequence, there is a premium on the ability to cooperate, build consensus, and compromise, because in many ways the thing that struck me when I first arrived is how legislative it is as a decisionmaking model in the sense that there are only six votes out there, you are looking for four, and there is an endless procession of issues that come before us. And so you may need somebody's vote today, but you are going to be back in that office in 2 or 3 days looking for a vote on a different matter.

So it has this sort of very interesting blending of a legislative decisionmaking model on top of an executive branch agency. And I think that I was very mindful when I arrived that there was talk that in the past in the agency there had been periods of time when Commissioners didn't get along very well and didn't communicate very well and that that was a barrier or a hindrance to decisionmaking. And I know when I arrived, Michael Toner was then the Chairman, and I became the Vice Chairman the first year I arrived, and I am the Chairman now. And Commissioner Toner was very good about trying to set a tone of collegiality, and I have tried to preserve that as well. And I think that we have been enormously successful. One, it has required a lot of hard work. We spent much more time walking around and talking to each other as a result. But I think that you can see the consequence in the output of the agency over the last 18 months.

I think that we have been enormously successful in every facet of the responsibilities of the agency in disclosure, in the advice we provide the regulated community, and in enforcement, and that that is the product of the willingness of the Commissioners to work together, to talk, to try and find consensus and compromise, and I think the thing that is most--one of the things that is striking about our tenure there is how frequently on very contentious issues the Commission has decided the matter on a 6-0 vote. I think that we are very conscious that that is important to the regulated community in understanding that this really is the rule and that there is a unity on the part of the Commission that this is the way we are interpreting the law in this area.

In gaining those four votes and finding consensus, or six votes or five votes, as the case may be, I have found overwhelmingly that the thing that is most persuasive is a logical argument built upon the law, and that that has been

the approach that most of the Commissioners take, that the doors are open to us, that all of the Commissioners roam from office to office talking through the difficult issues that we are trying to face and try and find where a compromise lies.

And so that has been my experience while I have been there.

Senator Bennett. Thank you.

Mr. Mason?

Mr. Mason. Thank you, Senator Bennett, and I want to echo everything the Chairman said and commend him for

continuing an approach that helped us build consensus. And I do want to say with some experience on the Commission that things are different now than when I came. And the thing that Chairman Lenhard put his finger on that has been the most important has been this communications process. And when Commissioners were reluctant to engage in an exchange of views--and that was certainly more the case in 1998 when I joined the Commission than today--it was then very difficult to get over the natural disputes. If you took any group of six people and said, well, the six of you decide, well, logic would tell you that something like 15 percent of the time there would be a 3-3 split. And yet we get it down to about 1.5 percent of the time, and we do that, as the Chairman described, through a process of discussing issues, working through them, listening to other Commissioners, and seeing if we can find some consensus. It has been rewarding. Sometimes it is a little frustrating. It can take some time. And sometimes you find yourself voting for a final disposition--I am sure it is like bills on the floor of the Senate. You are not happy with the whole package--or you are happy with it overall, you are not happy with some of the elements. And so we have been through that, and I think directly to the point of your question, I am proud of what the Commission has been able to do over the last 18 months, and over the 9 years that I have been on the Commission, I think this group of Commissioners has operated as well or better than any other. And I think the statistics show that, and I think that is the kind of performance you will continue to get if we are confirmed.

Senator Bennett. Well, I go back to my comment in my opening statement. I do not want to break up the team. I think you have achieved the kind of thing that we have heard described. Even though Mr. von Spakovsky has been present, you have done that, and I think we ought to confirm you all.

The Committee is adjourned.

[Whereupon, at 12:01 p.m., the Committee was adjourned.]