

Indiana Election Commission
Minutes
March 5, 2010

Members Present: Thomas E. Wheeler, II, Chairman of the Indiana Election Commission (“Commission”); S. Anthony Long, Vice Chairman of the Commission; Daniel A. Dumezich, member of the Commission; Sarah Steele Riordan, member of the Commission; Timothy Jeffers (proxy for S. Anthony Long and Sarah Steele Riordan).

Members Absent: None

Staff Attending: J. Bradley King, Co-Director, Indiana Election Division of the Office of the Indiana Secretary of State (Election Division); Leslie Barnes, Co-General Counsel of the Election Division; Dale Simmons, Co-General Counsel of the Election Division; Michelle Thompson, Campaign Finance Election Division staff

Also Attending: Ms. Laurel Judkins, Marion County Election Board; Ms. Cynthia Wagner; Mr. Woodrow “Woody” Wilcox; Mr. Bob Kern; Mr. Pierre Quincy Pullins; Ms. Kimberly B. Ward; Mr. Jeremy Lawson; Mr. Allan Katz; Mr. Don Hayes; Mr. Charlie Wyatt; Mr. Geoffrey Lohman, Groth & Towe; Ms. Susan Ellspermann; Mr. David M. Brooks; Ms. Samantha Dewester; Mr. Robbin Stewart; Mr. Bryan Babb; Mr. Eric Huneryager; Mr. Bruce C. Embrey; Mr. James R. Walker; Ms. Jackquan (Jackie) Gray; Dr. Raymond Scheele, Ball State University; Dr. Jay Bagga, Ball State University; Mr. Steve Pearson, Election Systems & Software.

1. Call to Order

The Chair called the March 5, 2010 meeting of the Commission to order at 2:40 p.m. in the Indiana Government Center South Conference Center, Conference Room C, at 402 West Washington Street, Indianapolis, Indiana.

The Chair noted that proper notice of the meeting had been given, as required by state law. A copy of the meeting notice, agenda, and designations of proxy are incorporated by reference in these minutes. *[Copies of all documents incorporated by reference are available for public inspection and copying at the Election Division Office.]*

2. Transaction of Business

The Commission transacted the business set forth in the Transcript of Proceedings prepared by Ms. Julie A. Wycoff, RPR, of Connor Reporting, Inc. A copy of this document is incorporated by reference in these minutes.

The following corrections of scrivener’s errors in this document are approved by the Commission:

Page 1, “Date: March 3, 2010” is amended to read “Date: March 5, 2010”.

Page 8, line 1, replace "officer" with "officers".

Page 17, line 23, delete "actual".

Page 25, line 3, replace "change the in" with "changed in".

Page 28, line 21, replace "serve" with "sure".

Page 50, line 19, delete "(Phonetic)".

Page 53, line 5, replace "do Russell" with "do know Russell".

Page 55, line 1, replace "require" with "required".

Page 60, line 12, delete "it".

Page 63, line 23, replace "prohibit" with "prohibits".

Page 76, line 10, replace "Do" with "Do you".

Page 85, line 7, replace "A" with "MR. HAYES:".

Page 91, line 22, replace "Ellsberger" with "Ellspermann".

Page 107, line 6, replace "alot" with "a lot".

Page 112, line 3, replace "aid" with "said".

Page 117, line 23, replace "pass" with "cast".

Page 126, line 21, replace "from" with "to".

Page 126, line 22, replace "the from" with "from".

Page 144, line 10, replace "NO" with "No".

Page 162, line 18, replace "envelop" with "envelope".

Page 162, line 21, replace "professional" with "provisional".

Page 169, line 19, replace "polled" with "pulled".

Page 169, line 20, replace "polled" with "pulled".

Page 169, line 25, replace "polled" with "pulled".

Page 172, line 5, replace "can" with "ask".

Page 181, line 1, replace "professional" with "professionalism".

Page 181, line 2, delete "liberalism".

Page 184, line 25, replace "formerly" with "formally".

Page 187, line 25, replace "poll" with "pull".

Page 188, line 15, replace "polled" with "pulled".

Page 199, line 3, delete "a".

Page 211, line 4, replace "PERC" with "PERF".

Page 230, line 8, delete "he".

Page 259, line 4, replace "the Bart" with "Bart".

Page 263, line 25, replace "Resolving" with "Revolving".

Page 271, line 15, replace "public access," with "for the Public Access"

Page 271, line 16, replace "counsel" with "Counselor".

Page 278, line 23, replace "an, attorney" with "an attorney".

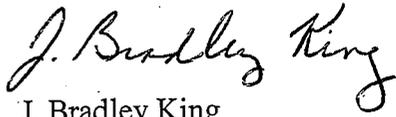
Page 280, line 10, replace "points" with "point".

Page 290, line 7, replace "hatch" with "Hatch".

3. Adjournment

There being no further items on the Commission's agenda, the Chair entertained a motion to adjourn. Mr. Long moved, seconded by Mr. Dumezich, that the Commission do now adjourn. The Chair called the question, and declared that with four members voting "aye" (Mr. Wheeler, Mr. Long, Mr. Dumezich and Ms. Riordan), and no Commission member voting "no," the motion was adopted. The Commission then adjourned at 7:45 p.m.

Respectfully submitted,



J. Bradley King
Co-Director



Pamela Potesta
Co-Director

APPROVED:



Daniel A. Dumezich
Chairman

1 STATE OF INDIANA
INDIANA ELECTION COMMISSION
2 PUBLIC SESSION
3
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7 HEARING TRANSCRIPT

8 Date: March 3, 2010
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11

12 At: Indiana Government Center South
13 Conference Center, Room C
14 402 West Washington Street,
Indianapolis, Indiana 46204
15
16
17

18 A STENOGRAPHIC RECORD BY:
19 Julie A. Wycoff, RPR
Notary Public
20 Stenographic Reporter
21
22
23

24 Connor Reporting, Inc.
1650 One American Square
Indianapolis, IN 46282
25 (317)236-6022

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INDIANA ELECTION COMMISSION

Mr. Thomas E. Wheeler, II, Chairman
Mr. S. Anthony Long, Vice-Chairman
Mr. Daniel A. Dumezich, Commission Member
Ms. Sarah Steele Riordan, Commission Member
Mr. Timothy Jeffers, Commission Member (Proxy)

INDIANA ELECTION DIVISION

Mr. J. Bradley King, Co-Director
Mr. Dale Simmons, Co-Legal Counsel
Ms. Leslie Barnes, Co-Legal Counsel
Ms. Michelle Thompson, Campaign Finance

1 CHAIRMAN WHEELER: I am going to call the
2 meeting of the Indiana Election Commission to
3 order. I notice that I have all four members of
4 the Commission here. It's been appropriately
5 noticed for today, March 5th, 2010, beginning
6 about 2:40 p.m.

7 I believe the first item on our agenda is
8 an approval of minutes, and I believe Pam is
9 sick.

10 MS. BARNES: Correct.

11 CHAIRMAN WHEELER: So, Brad.

12 MR. KING: Mr. Chairman, Members of the
13 Commission, in your packet are two a sets of
14 minutes, for September 28, 2009, and January 17,
15 2002. The longer version has previously been
16 submitted to the Commission for review, and the
17 codirectors have signed the September 28, 2009
18 minutes.

19 CHAIRMAN WHEELER: What about the 2002
20 minutes?

21 VICE-CHAIRMAN LONG: I've been reading them
22 off and on for several months. I have not
23 seen --

24 CHAIRMAN WHEELER: I believe you're the
25 only member.

1 VICE-CHAIRMAN LONG: -- that was here.

2 In all candor, the staff did a great job of
3 putting this together, and I see -- I can find
4 nothing that's contrary to my memory of them, so
5 I will move that the January 17, 2002, minutes
6 be approved.

7 CHAIRMAN WHEELER: Motion is made. Do I
8 have a second?

9 COMMISSIONER DUMEZICH: Second.

10 CHAIRMAN WHEELER: Motion has been made and
11 seconded. Any further discussion?

12 I wouldn't have you're the only one -- I
13 trust in your judgment.

14 VICE-CHAIRMAN LONG: That might be a risky
15 thing.

16 CHAIRMAN WHEELER: Having said that, all in
17 favor signify by saying "aye."

18 THE COMMISSIONERS: Aye.

19 CHAIRMAN WHEELER: Those opposed, same
20 sign.

21 (No response.)

22 CHAIRMAN WHEELER: Motion carries.

23 VICE-CHAIRMAN LONG: Then I move to the
24 other -- unless somebody has something to point
25 out -- I move the approval also of September 28,

1 2009.

2 COMMISSIONER DUMEZICH: Second.

3 CHAIRMAN WHEELER: Anything further for
4 discussion?

5 (No response.)

6 CHAIRMAN WHEELER: Hearing none, all in
7 favor signify by saying "aye."

8 THE COMMISSIONERS: Aye.

9 CHAIRMAN WHEELER: Those opposed, same
10 sign.

11 (No response.)

12 CHAIRMAN WHEELER: Motion carries.

13 Next item on the agenda is ratification of
14 campaign finance settlement agreements.

15 Who is doing that?

16 MS. THOMPSON: Mr. Chairman, Members of the
17 Commission, on your second tab is a list of
18 committees to ratify that agreed to pay the
19 settlement agreement and waive the hearing.

20 MR. KING: You need to identify yourself
21 for the record.

22 MS. THOMPSON: Michelle Thompson.

23 VICE-CHAIRMAN LONG: And these are
24 agreements that were made consistent with our
25 policies. A number -- are these ones we've

1 already heard?

2 MS. THOMPSON: No, these are new ones.
3 They were numbered yesterday.

4 VICE-CHAIRMAN LONG: And the fines are
5 consistent with what we would normally impose
6 based on the number of violations?

7 MS. THOMPSON: Correct.

8 VICE-CHAIRMAN LONG: Motion to approve.

9 CHAIRMAN WHEELER: Second motion?

10 VICE-CHAIRMAN LONG: So moved.

11 CHAIRMAN WHEELER: Do I have a second?

12 COMMISSIONER DUMEZICH: Second.

13 CHAIRMAN WHEELER: Motion's been made and
14 seconded to approve the settlement agreements
15 under the second tab in your binder.

16 Any further discussion?

17 (No response.)

18 CHAIRMAN WHEELER: Hearing none, all in
19 favor signify by saying "aye."

20 THE COMMISSIONERS: Aye.

21 Those opposed, same sign.

22 (No response.)

23 CHAIRMAN WHEELER: I have received a
24 request from one or more Commissioners that we
25 move Item Number 6, Agenda Item Number 6, form

1 approval, which I believe is going to be fairly
2 brief, up to the front.

3 Brad, are you going to do that with Pam not
4 here?

5 MR. KING: Mr. Chairman, I can perhaps
6 begin the presentation, but then I'll need to
7 defer to whoever is present for Marion County to
8 present the Request for Action by the
9 Commission.

10 In September of 2009, September 28th, the
11 Election Commission approved a request for
12 Marion County to use the ABS-7 Absentee Ballot
13 Security envelope that Leslie is distributing.

14 On the back of that envelope, Marion County
15 had printed the ABS-1 application. The issue
16 that the Commission was dealing with was in the
17 Box Number 4 of the gray area, the different
18 reasons that a person is entitled to vote by
19 mail.

20 In 2009, the Indiana General Assembly added
21 a new reason a member of the military or public
22 safety officer would be entitled to vote
23 absentee by mail, but these envelopes were
24 printed with the application that did not
25 include the reference to the members of the

1 military and public safety officer.

2 The Commission in September authorized the
3 use of this ABS-7/ABS-1 combination envelope
4 through the end of December 31st, 2009.

5 CHAIRMAN WHEELER: And I believe that was
6 based upon the fact that Marion County had
7 significant -- printed a significant number of
8 these. I note that Laurel Judkins is here.

9 Laurel, do you want to address the new
10 request?

11 MS. JUDKINS: Yes. Thank you, Chairman,
12 Members of the Commission, for hearing Marion
13 County Election Board's appeal to use these
14 hybrid envelopes, as we're calling them.

15 As you know, there was record turnout in
16 the presidential election of 2008, and Marion
17 County itself saw approximately 75,000 people
18 vote early in person.

19 In January 2009, we started working with
20 our printer on this hybrid envelope. Much time
21 was spent on matching up the applications, the
22 ABS-1, and then the security envelopes, the
23 ABS-7, making sure the signatures matched and so
24 forth. We found that this was a good way to
25 maximize our time and resources.

1 Mid 2009, went to print about 35,000 of
2 them at a cost of about \$4,000. And then in
3 September 2009, I believe almost the exact same
4 day that the Commission was considering the new
5 ABS-1s, our order arrived.

6 Again, as was correctly pointed out, the
7 Election Commission allowed to use these forms
8 for our special election, but we are here today
9 requesting that we allowed to exhaust our
10 remaining supply of which we have about 30,000
11 of these envelopes.

12 And it is important to point out that
13 Section 4A, which is the Voting By Mail section
14 to which there has been an addition for military
15 and uniformed officers, does not apply to those
16 who are showing up to vote in-person absentee,
17 which is the only purpose for which these hybrid
18 envelopes would be used.

19 CHAIRMAN WHEELER: Questions from the
20 Commission?

21 (No response.)

22 CHAIRMAN WHEELER: As I understand it, the
23 way that resolves -- the change that was made
24 was for military voters and police. I think
25 it's --

1 MR. KING: Yes, correct.

2 CHAIRMAN WHEELER: And that's a section
3 that is not in here. There isn't a box to check
4 on here now. As I understand it, your method
5 for dealing with that is that -- is to only use
6 these for in-person absentees.

7 MS. JUDKINS: That's correct. And so the
8 new addition of that voting by mail, we would
9 use the current form for those individuals.

10 CHAIRMAN WHEELER: Which has the
11 appropriate --

12 MS. JUDKINS: Correct.

13 VICE-CHAIRMAN LONG: I move we approve this
14 form subject to what we would use for in-house
15 voting until we exhaust the supply.

16 COMMISSIONER DUMEZICH: Second.

17 CHAIRMAN WHEELER: Till they exhaust their
18 current supply, or just through the primary?

19 COMMISSIONER DUMEZICH: Till they exhaust
20 their current supply.

21 VICE-CHAIRMAN LONG: They spent \$4,000 for
22 35,000, have 30 of them left.

23 CHAIRMAN WHEELER: I know, but last time
24 they only asked through December. They only
25 used up, what, 4,000?

1 MS. JUDKINS: At that time, I had attempted
2 to request we be able to exhaust.

3 VICE-CHAIRMAN LONG: I will amend to say
4 until they exhaust their current supply until --
5 or until December 31st of this year, whichever
6 first occurs.

7 CHAIRMAN WHEELER: What's your rate --

8 COMMISSIONER DUMEZICH: Second.

9 CHAIRMAN WHEELER: -- on using these?

10 MS. JUDKINS: Excuse me?

11 CHAIRMAN WHEELER: What's your rate on
12 using these guys, like in a primary? What do
13 you figure?

14 MS. JUDKINS: Well, I think it's only going
15 to serve -- I think the popularity of in-person
16 early voting continues to increase, and so it
17 might be close, but it's very possible that
18 we --

19 CHAIRMAN WHEELER: I suppose it depends on
20 how the Supreme Court rules on that photo ID.

21 Any further discussion?

22 (No response.)

23 CHAIRMAN WHEELER: Hearing none, motion is
24 made and seconded. All in favor significant by
25 saying "aye."

1 THE COMMISSIONERS: Aye.

2 CHAIRMAN WHEELER: Those opposed, same
3 sign.

4 (No response.)

5 CHAIRMAN WHEELER: Motion carries.

6 VICE-CHAIRMAN LONG: I think it's a good
7 idea.

8 CHAIRMAN WHEELER: Thanks.

9 VICE-CHAIRMAN LONG: I really like it. I
10 think it's something we maybe ought to recommend
11 elsewhere. That solves a lot of issues on
12 signatures.

13 MS. JUDKINS: Well, Jenny Troutman of the
14 Election Board was the inventor.

15 VICE-CHAIRMAN LONG: Good.

16 MS. JUDKINS: Thank you.

17 CHAIRMAN WHEELER: All right. And then
18 also we also have Vigo County.

19 VICE-CHAIRMAN LONG: Or "Vigo," as the case
20 may be.

21 MR. KING: Mr. Chairman, I can speak for
22 that. I don't know if there is any
23 representative here.

24 CHAIRMAN WHEELER: Doesn't look like it.
25 Where are they.

1 MR. KING: Mr. Chairman, Members of the
2 Commission, the final tab in your binder
3 designated "Forms" and if you'll flip to that
4 and then about three pages in is a letter from
5 Ms. Patricia Mansard, the clerk of the Vigo
6 County Circuit Court, who submitted a proposed
7 ABS-1 application that is tailored for in-person
8 or satellite voting. If turn the page, you'll
9 see a copy of proposed form.

10 Election Division staff did have a chance
11 to review the submission from Vigo County. It's
12 based on the most current edition of the ABS-1
13 that's been approved by the Commission. It
14 simply removes the various boxes that would
15 apply if a person was applying to vote by mail
16 or applying to vote by traveling board, but all
17 of the other components, the ABS-1 form appear
18 to be correct.

19 CHAIRMAN WHEELER: So if you contrast, for
20 example, the one with that Marion County just
21 had, basically they're knocking out this one,
22 this one, and just leaving the voting in person?

23 MR. KING: Yes, that's correct.

24 VICE-CHAIRMAN LONG: I guess I have a
25 question.

1 Keeping the same form number for different
2 forms is going to be confusing, is it not?

3 Could we not call that ABS-1 Vigo or
4 something, because that's only one we're
5 approving for this year, and I -- just happen to
6 hit me on the one for Marion County, that's also
7 an ABS-1. It's going to be different from
8 the ABS --

9 I don't see much of a problem, because it's
10 a limited-use form and they get hooked to the
11 envelope. But these are going to be regular
12 forms throughout the year, and -- but that's
13 only for the May primary. That's what the form
14 says. Maybe I answered my own question, limited
15 to the primary of this year.

16 MR. KING: Yes, sir, that's correct. The
17 form as submitted by the County is --

18 CHAIRMAN WHEELER: I've got some --

19 MR. KING: -- for the May.

20 CHAIRMAN WHEELER: -- concerns about
21 confusion.

22 COMMISSIONER DUMEZICH: Absolutely.

23 CHAIRMAN WHEELER: What happens if this
24 form gets in and -- not that people don't --

25 What happens if it gets mixed in with the

1 other forms, the other ABS-1s, particularly
2 given Tony's concern that it just says "ABS-1,"
3 and it goes out the to the voters and some voter
4 fills this out and tries to vote absentee by
5 mail with this?

6 COMMISSIONER DUMEZICH: My concern is that
7 this was approved by because of error and
8 mistake and with a limited use. Now if we
9 started doing this for everybody that wants a
10 change a form, we're going to be more form
11 changes than we are anything else in this
12 Commission.

13 So I would be against this. We've got 92
14 counties. We don't need to customize
15 everybody's form.

16 CHAIRMAN WHEELER: Any discussion?

17 (No response.)

18 CHAIRMAN WHEELER: I'll accept the motion.

19 COMMISSIONER DUMEZICH: Motion to deny the
20 use of the proposed ABS-1 form by Vigo County.

21 CHAIRMAN WHEELER: Do I have a second on
22 the motion?

23 (No response.)

24 CHAIRMAN WHEELER: I'll second the motion.
25 Any further discussion?

1 (No response.)

2 CHAIRMAN WHEELER: Hearing none, all in
3 favor of the motion signify by saying "aye."

4 THE COMMISSIONERS: Aye.

5 CHAIRMAN WHEELER: Those opposed, same
6 sign.

7 (No response.)

8 MS. STEELE RIORDAN: I said "aye."

9 CHAIRMAN WHEELER: That was all four.

10 VICE-CHAIRMAN LONG: That was a quiet
11 "aye."

12 CHAIRMAN WHEELER: A very quiet "aye."

13 Okay. Now, with respect to -- we're going
14 to start with the challenges to the primary
15 election candidates. We're going to go
16 basically down the ticket.

17 And first on the agenda, and we've got --
18 are these different?

19 Do we have each one?

20 First on the agenda is Wilcox, Woodrow
21 "Woody" Wilcox.

22 MR. SIMMONS: For all those who will
23 testify at today's Indiana Election Commission
24 meeting, please stand, raise your right hand,
25 and say "I do" after the administration of the

1 oath.

2 (All testifying individuals sworn.)

3 CHAIRMAN WHEELER: Now, the challenge has
4 the been filed by a Cynthia Wagner. Is Cynthia
5 Wagner here?

6 MS. WAGNER: Yes, I am.

7 CHAIRMAN WHEELER: And you are?

8 MR. WILCOX: Woodrow Wilcox.

9 CHAIRMAN WHEELER: All right. Ms. Wagner,
10 we've got -- the Commission Members have your
11 challenge and the attachments to your challenge.

12 MS. WAGNER: Yes.

13 CHAIRMAN WHEELER: The floor is yours.

14 MS. WAGNER: Okay. First I'd like to thank
15 you and the Commission for hearing this
16 challenge.

17 I filed this challenge because Mr. Wilcox
18 has filed his candidacy for two separate
19 elective offices. One being the United States
20 House of Representatives filed on February 16th
21 and the other being the Town of Griffith School
22 Board on the 19th.

23 So the statute actual that I have provided,
24 states that under those circumstances, the
25 original filing should be withdrawn. So I'd

1 like to draw your attention to the statute and
2 the packet, which is IC 3-8-2-15, which states:

3 Declarations for more than one compensated
4 office: A person may not file, one, a
5 declaration of candidacy for a nomination; and,
6 two, a petition for nomination and declaration
7 of intent to be a write-in candidate for school
8 board office that is elected at the same time as
9 the primary election.

10 Which then goes on to say if a person files
11 both a declaration of candidacy and petition of
12 nomination described in the subsection, the
13 matter shall be referred to the County Election
14 Board under Section 18 of this chapter. The
15 Board shall determine which document was most
16 recently filed and shall consider the previously
17 filed document to be withdrawn.

18 In addition -- which I have not provided --
19 I have one more Indiana code.

20 CHAIRMAN WHEELER: Just give us a second.
21 We've got the Codes.

22 MS. WAGNER: It is 3-8-7-19, and that is,
23 Names to appear only once on the ballot, which
24 states that a candidate for federal office of
25 vice president, except as provided in

1 subsection (b):

2 The name of a person who has been nominated
3 for an elected office may not appear in more
4 than one place on the ballot.

5 CHAIRMAN WHEELER: Can I ask just a quick
6 question?

7 MS. WAGNER: Sure.

8 CHAIRMAN WHEELER: Has he been nominated by
9 a party?

10 MS. WAGNER: He just filed the declaration
11 of candidacy, so nominated.

12 CHAIRMAN WHEELER: It cites being
13 nominated.

14 MS. WAGNER: Just the declarations.

15 CHAIRMAN WHEELER: So he hasn't been
16 nominated by either party, correct?

17 MS. BARNES: Mr. Chairman, he has been
18 nominated by the school board office. That's
19 what a petition notes. The petition is a
20 nomination form.

21 CHAIRMAN WHEELER: But is that a partisan
22 nomination?

23 MR. WILCOX: It's not partisan.

24 MS. BARNES: Not partisan, no, sir.

25 CHAIRMAN WHEELER: So he wouldn't be

1 nominated by a party, right, for the school
2 board?

3 MS. BARNES: Correct.

4 CHAIRMAN WHEELER: I'm just trying to work
5 on the applicability of the cite.

6 MS. WAGNER: Sure.

7 CHAIRMAN WHEELER: It strikes me that that
8 one isn't applicable.

9 COMMISSIONER DUMEZICH: I agree.

10 MS. WAGNER: All right. Well, then in
11 close, I suppose the relief that I am requesting
12 is that Mr. Wilcox's candidacy be withdrawn and
13 his name not be permitted on the ballot in the
14 First Congressional District for House of
15 Representatives but that he remain on the ballot
16 for Griffith School Board as the rule requires.

17 CHAIRMAN WHEELER: Mr. Wilcox?

18 MR. WILCOX: Thank you Chairman and thank
19 you Members.

20 My name is Woodrow Wilcox, and I understand
21 that Oliver Wendell Holmes once said that a page
22 in history is worth more than volumes of logic.
23 So I'd like to give a brief history.

24 I filed to be a democratic candidate and
25 run in the democratic primary for congress.

1 Some of my friends prevailed upon me to file for
2 the school board, and I said, "But I'm running
3 for something else." They said, "You don't have
4 to run, just file."

5 And the reason was because there is one
6 candidate for the school board who was what we
7 considered very negative. Last year during
8 debates about what to do with our historical
9 school, he pushed for closing that school and
10 selling it off, tearing it down, things like
11 that.

12 And my friends said, "You know, last year
13 when you would go up against him in debates
14 about that school, you were the only one that
15 could nail him to the wall. He's afraid of you.
16 If you will file, he will withdraw his
17 candidacy." And, you know, I don't want to run.
18 Don't run, just file. Get him off the ballot,
19 and then you can withdraw. And that was the
20 plan. The best-laid plans of mice and men
21 sometimes go awry.

22 So I did file, and the very next day, that
23 candidate withdrew from the school board race.
24 And so, I found out late Thursday, I intended to
25 go to the courthouse, remove my name from the

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1 school board on Friday morning. I went to my
2 office just to check in and say I'm going to the
3 courthouse.

4 Fridays are usually very slow, but on that
5 Friday, some senior citizens were there with
6 very bad problems, and my job is to help senior
7 citizens correct medical billing problems that
8 are caused by problems in the Medicare system.
9 I've saved senior citizens of our agency over
10 \$750,000 of bad medical bills.

11 And for the senior citizens, when they come
12 to the office with a problem, it's like they
13 have puppy dog eyes and really sad faces, and
14 I'm telling you, I just simply said, Well, I'll
15 work on these people's problems now, and I'll
16 work on the withdrawal from my candidacy later.

17 CHAIRMAN WHEELER: Can I ask a couple
18 questions?

19 MR. WILCOX: Sure, sir.

20 CHAIRMAN WHEELER: Is the school board --
21 which school board is this?

22 MR. WILCOX: Griffith Public School Board.

23 CHAIRMAN WHEELER: Are they paid? Is it
24 compensated?

25 MR. WILCOX: It is compensated, but right

1 now the Griffith School Board members have been
2 voluntarily not taking any salary.

3 CHAIRMAN WHEELER: But it's generally a
4 compensated position?

5 MR. WILCOX: Generally.

6 CHAIRMAN WHEELER: And you did file for
7 both?

8 MR. WILCOX: I did file for both.

9 CHAIRMAN WHEELER: So she's correct when
10 she says --

11 MR. WILCOX: She's correct on that
12 assertion.

13 CHAIRMAN WHEELER: And as I understand it,
14 your intent -- you always intended to run for
15 Congress but you wanted to knock this other guy
16 off the ballot.

17 MR. WILCOX: Right.

18 And I also have some copies of articles
19 that have been published about some of my work.
20 And not that Friday, but the following Monday,
21 there was a case of a couple that came in. We
22 thought they were going to have heart attacks or
23 strokes right there in the office. I wrote --

24 CHAIRMAN WHEELER: I understand and I
25 appreciate that. We really just need to focus

1 on --

2 MR. WILCOX: Okay.

3 CHAIRMAN WHEELER: -- what happened.

4 And so as I understand it, you filed for
5 both of these. Have you withdrawn from the
6 school board?

7 MR. WILCOX: I have not withdrawn from the
8 school board because they wouldn't -- I
9 understand that they would not let me after
10 12:00 noon on that Friday. And I am here
11 basically saying if you would allow me an
12 extension for filing to withdraw, make it
13 effective on Friday, February 19, before 12:00
14 noon, that would solve this problem, I believe.

15 CHAIRMAN WHEELER: Okay. Any questions
16 from Commission members?

17 COMMISSIONER RIORDAN: Mr. Wilcox, what was
18 the deadline for withdrawal of candidacy?

19 MR. WILCOX: 12:00 noon, February 19.
20 Friday, February 19.

21 COMMISSIONER RIORDAN: Is that correct?
22 Legal staff, is that correct?

23 MS. BARNES: February 22nd at noon?

24 MR. SIMMONS: Right. It was that following
25 Monday at noon pursuant to 3-8-2-20.

1 COMMISSIONER RIORDAN: That was my
2 understanding.

3 MR. SIMMONS: And that's been change the in
4 the last four years.

5 MR. WILCOX: I thought the form that I had
6 told me it was Monday. Well, Monday,
7 February 22nd was the date of the article that I
8 have here.

9 CHAIRMAN WHEELER: But either way, you did
10 not file a withdrawal?

11 MR. WILCOX: That's right.

12 CHAIRMAN WHEELER: As we sit here today,
13 you're still a candidate in both races?

14 MR. WILCOX: Yes, sir.

15 CHAIRMAN WHEELER: And that's what you're
16 concerned with?

17 MS. WAGNER: Mm-hmm.

18 COMMISSIONER DUMEZICH: When did you
19 attempt to file your withdrawal, Mr. Wilcox?

20 MR. WILCOX: Well, I understood that the
21 deadline was passed so I did not -- because I
22 had people in front of me, and so I did not
23 actually go to the courthouse to attempt to file
24 withdrawal; however, I would if that is
25 permitted.

1 CHAIRMAN WHEELER: Can I ask -- I'll ask
2 the question I was asking the vice-chair.

3 I'm concerned about the notation "the
4 county election board" in the statute. Why are
5 we hearing this and not the county election
6 board?

7 MR. SIMMONS: Chairman, Members of the
8 Commission, this is an issue actually Leslie and
9 I discussed, because there is an anomaly. It
10 refers to the county election board but it also
11 refers to Section 18. The Section 18 applies
12 solely to the Commission. Since this is a
13 candidate also for Congress --

14 CHAIRMAN WHEELER: Double race.

15 MR. SIMMONS: -- the only body that has
16 jurisdiction over that candidate under
17 3-8-1-2(c) would be the Commission.

18 VICE-CHAIRMAN LONG: I agree with it. It
19 would seem to me that the county election board
20 would have zero jurisdiction to enforce the
21 Section 15, as the congressional seat was filed
22 for first. They could not vacate that, but --
23 no more than we could vacate the school board
24 filing, because that would be within their
25 purview. I think if he had filed for -- if you

1 reversed the order here and filed for school
2 board first and then congress, then it would be
3 incumbent upon the county election board to rule
4 on the issue of the prior filing on that race.
5 We're on the same wavelength here.

6 MR. SIMMONS: I think that's correct.

7 CHAIRMAN WHEELER: With the contention
8 being that the congressional filing was invalid
9 and therefore the seat was invalid, invalidate
10 the congressional filing.

11 VICE-CHAIRMAN LONG: I think the fact of
12 life is this was -- well, we're still in the
13 hearing. If you want to close the hearing on
14 this, I'll make some comments --

15 CHAIRMAN WHEELER: Any further --

16 VICE-CHAIRMAN LONG: The facts are pretty
17 clear.

18 CHAIRMAN WHEELER: Any further questions,
19 for either party?

20 (No response.)

21 CHAIRMAN WHEELER: Hearing none, we're
22 close the hearing.

23 I'll accept a motion.

24 VICE-CHAIRMAN LONG: I want to make a
25 motion, but I want to tell --

1 CHAIRMAN WHEELER: I'm going to take a
2 motion, then discussion.

3 VICE-CHAIRMAN LONG: I'll move that we
4 grant the challenge.

5 CHAIRMAN WHEELER: Do I have a second?

6 MS. STEELE RIORDAN: Second.

7 CHAIRMAN WHEELER: Motion's been made and
8 seconded.

9 Discussion?

10 VICE-CHAIRMAN LONG: I think the thing that
11 troubles me the most is that, Mr. Wilcox, you
12 filed for school board race not because you
13 wanted to run but for a reason that I don't
14 think is a legitimate reason to file for an
15 office. I think you should file for an office
16 because you want to serve, and I think it's -- I
17 just --

18 I have a real difficulty with filing just
19 for the purpose of trying to drive somebody I
20 didn't like out of the race. If you wanted to
21 file and take him out, serve. I'm all for that.
22 I've been involved in a number of school board
23 races in my career, and it's been my experience
24 that most of those incumbents need to be taken
25 out.

1 The result is is the way you've done it and
2 what you've done here, I think you've made an
3 awful mistake, and that's why I made the motion,
4 because I think the statute's clear: You can
5 file for one office, you can file for another
6 one. That filing for that second one is a tacit
7 withdrawal of your candidacy of the first race.
8 That's my reason.

9 CHAIRMAN WHEELER: Any other discussion?

10 I guess, you know, from my standpoint, I
11 stand with the vice-chair. I think you tend to
12 be hoisted by your own petard.

13 MR. WILCOX: Okay.

14 CHAIRMAN WHEELER: And I have real concerns
15 with -- I think this is precisely what the
16 statute was designed to preclude, is people
17 taking a swing at a couple of races and seeing
18 who's in and who's out. And so I think you've
19 kind of left yourself open to going for Griffith
20 School, and apparently you've got an uncontested
21 field for that.

22 But I think that's a practical reading of
23 the statute, as I read it. It says pretty
24 clear. If you do it, it says -- it just says
25 you file two, the original declaration,

1 that's -- we're bounds but the statute. I don't
2 know where else we would go.

3 Any further discussion? Motion's been made
4 and seconded.

5 (No response.)

6 CHAIRMAN WHEELER: All in favor of the
7 motion, signify by saying "aye."

8 THE COMMISSIONERS: Those opposed, same
9 sign.

10 (No response.)

11 CHAIRMAN WHEELER: Challenge is granted.
12 Thank you both.

13 Next up is: In re: Bob Kern.

14 And, Mr. Kern, were you in here when they
15 took the oath.

16 MR. KERN: Yes, sir.

17 CHAIRMAN WHEELER: We have people coming in
18 through the back door.

19 And you are?

20 MR. PULLINS: Pierre Pullins.

21 CHAIRMAN WHEELER: And, Mr. Pullins, you
22 are the one who filed the challenge.

23 MR. PULLINS: Yes, sir.

24 CHAIRMAN WHEELER: Mr. Pullins, go ahead
25 and begin. Tell us what your challenge is.

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1 MR. PULLINS: Thank you, Mr. Chairman.
2 Good afternoon, the distinguished Members
3 of the Commission. Thank you for the
4 opportunity to speak today at this very
5 important hearing on this candidate challenge.
6 My name is Pierre Quincy Pullins. I am the
7 candidate who filed the challenge against Bobby
8 Kern.

9 I am also a candidate for the Democratic
10 nomination for the 7th congressional district.
11 I ran unsuccessfully for the nomination in 2006
12 and 2008. I'm a graduate of Broad Ripple High
13 School, class of '84; graduated from IUPUI with
14 a bachelor's of general studies in '93.

15 Attended Prairie View A&M University, Ivy
16 Tech State College. Served nearly 18 years of
17 active services in the Reserves in Texas, in the
18 Indiana Army National Guard before being
19 dismissed in 2003 with a full honorable
20 discharge, two years shy of my retirement.

21 I have an eight-year-old son. Haven't seen
22 him in seven years, but I'm current on my
23 support obligations. I'm 44 years old, have no
24 felonies, misdemeanors or domestic violence in
25 my background.

1 I believe the issues before the Commission
2 in this hearing is whether Bobby Kern, DOC
3 Number 890182, is eligible to run for federal
4 office while on parole and still under the
5 direction and control of the Indiana Department
6 of Corrections. And hereafter I'm going to
7 refer to them as the DOC.

8 CHAIRMAN WHEELER: Mr. Pullins, let me ask
9 you a quick --

10 MR. PULLINS: Go ahead.

11 CHAIRMAN WHEELER: And we've obviously had
12 the challenge in front of us. I've had a chance
13 to read the challenge.

14 Where does it say that being on parole
15 disqualifies you from running for this office?
16 What statute?

17 MR. PULLINS: I couldn't find the statute.
18 I don't know if there is a statute or not, but
19 it seems to me, and I had -- I was getting to
20 the point where the Administrative Code, when it
21 talks about the conduct of parolees --

22 CHAIRMAN WHEELER: Do you have a cite? Is
23 it part of the election code?

24 VICE-CHAIRMAN LONG: IEC.

25 CHAIRMAN WHEELER: Yeah, we're talking

1 about the IEC.

2 MR. PULLINS: I'm talking about the Indiana
3 Administrative Code, Title 2 -- I mean, Title
4 220, when it gets to conduct of parolees.

5 CHAIRMAN WHEELER: 220 is not election
6 code.

7 MR. PULLINS: It's not an election code.
8 My thing is, my position is -- and do you
9 want me to --

10 CHAIRMAN WHEELER: Here's my concern: As I
11 understand it, what you're saying is this man
12 lacks the character to run for office, he's
13 not -- he's under corrections -- he's had an
14 issue, he's under custody of the parole.

15 The problem for the Election Commission is,
16 we can only take him off a ballot if he's
17 violated one of election laws, if he's not
18 eligible for an election; for example,
19 Mr. Wilcox had filed two candidacies.

20 And I guess what I'm asking you is where in
21 the Indiana election laws does it say -- or
22 federal election laws, for that matter -- that
23 his status as a parolee, or the terms of his
24 parolee make him ineligible as a candidate?

25 MR. PULLINS: I don't know. It's probably

1 not in the election code. I don't even know if
2 the election code even addresses people on --
3 persons on parole.

4 MS. BARNES: It does.

5 MR. PULLINS: Does?

6 CHAIRMAN WHEELER: It does not. I think --
7 If you don't mind, let me confer with
8 counsel.

9 MS. BARNES: Sure. Mr. Chairman, Indiana
10 law requires in order to be a candidate that you
11 also be a registered voter, and it's in
12 Article 7, 3-7, that applies to registered
13 voters that talks about someone on parole is
14 eligible to register to vote.

15 CHAIRMAN WHEELER: So what I'm hearing you
16 say is his status as a parolee does not make him
17 either ineligible to vote or -- because he is
18 eligible to vote, he could also run for office,
19 correct?

20 COMMISSIONER DUMEZICH: Yes.

21 MS. BARNES: He could be disqualified as a
22 candidate under another section --

23 CHAIRMAN WHEELER: Sure.

24 MS. BARNES: -- but he is eligible to
25 register to vote, being on parole and --

1 CHAIRMAN WHEELER: The status of being on
2 parole does not preclude him from either voting
3 or running as a candidate?

4 MS. BARNES: Correct.

5 MR. PULLINS: Well, the code, if that's the
6 code, my position is, at some point -- and I
7 was -- that's -- I had the whole argument laid
8 out.

9 The point is, he can't even leave the
10 district without permission of his parole
11 officer. How can he serve as a congressman, how
12 can he serve as an elected representative when
13 he needs the permission of Department of
14 Corrections to do anything?

15 And my position is, let's -- I had it all
16 laid out. If Bob Kern wins the primary and wins
17 the -- let's say he won the primary and the
18 election, and the DOC says --

19 CHAIRMAN WHEELER: Well, the DOC could say
20 yes.

21 MR. PULLINS: They could say --

22 CHAIRMAN WHEELER: Here's the problem:
23 We're limited by what the law is.

24 MR. PULLINS: Okay. I understand.

25 CHAIRMAN WHEELER: And the problem is,

1 basically General Assembly says if is a parolee
2 wants to run for office, a parolee can run for
3 office. And if the people want to elect a
4 parolee -- and in fact, I believe there may be a
5 couple serving in Congress right now. That's a
6 rough guess.

7 COMMISSIONER DUMEZICH: Or future parolee.

8 CHAIRMAN WHEELER: You know, it's the for
9 the people to decide the candidacy, but I don't
10 know it's the basis for us to take somebody off
11 the ballot. That's my position.

12 Are there anywhere other questions?

13 VICE-CHAIRMAN LONG: The only observation,
14 the question would be is that it may be a
15 violation of his parole, but that --

16 MR. PULLINS: Absolutely.

17 VICE-CHAIRMAN LONG: -- would not be our --

18 COMMISSIONER DUMEZICH: That's not our --

19 CHAIRMAN WHEELER: That's the DOC.

20 MR. PULLINS: That's for the board of
21 parole.

22 CHAIRMAN WHEELER: I suspect the parole
23 officer may be able to address that, but it's
24 not --

25 MR. PULLINS: Is his parole officer here?

1 CHAIRMAN WHEELER: I have no idea.

2 MR. PULLINS: Did you tell your parole
3 officer?

4 CHAIRMAN WHEELER: From our standpoint --
5 you understand what I'm saying?

6 MR. PULLINS: I understand.

7 CHAIRMAN WHEELER: Any other questions from
8 the Commissioners?

9 VICE-CHAIRMAN LONG: I have none.

10 CHAIRMAN WHEELER: I'll close the hearing.

11 MS. STEELE RIORDAN: Wait. Can we hear
12 from Mr. Kern?

13 CHAIRMAN WHEELER: Oh, I'm sorry.

14 MR. KERN: My name is Bobby Kern. I'm 45
15 years old. I am a resident of Indianapolis,
16 Indiana. I have lived here for 45 years. Yes,
17 I have been incarcerated. My number is 890182.
18 I am on parole, but I wish to turn this over to
19 my campaign manager, who would be Kimberly B.
20 Ward.

21 MS. WARD: Actually, determining the
22 qualifications for federal candidacy rest
23 exclusively with the United States Constitution,
24 Article 1, Section 2, Clause 1 and 2. The
25 criteria is simply this: Age, citizenship, and

1 inhabitancy of the state at the time that you're
2 elected. Mr. Kern meets this criteria;
3 therefore, if duly elected, he is qualified to
4 serve in Congress.

5 The State does not make the determination
6 whether or not someone is qualified to serve in
7 the House of Representatives and, technically,
8 cannot add criteria to those qualifications.

9 And, you know, you were stating about how
10 other people have -- you know, could possibly be
11 parolees. In fact, in 2008 in Alaska Ted
12 Stevens ran for political office while being
13 tried for seven counts for failing to report
14 gifts. He was defeated eight days after his
15 conviction, but he was allowed to run.

16 In 1932, F. H. Shoemaker was elected after
17 serving time in Leavenworth for mail fraud. And
18 as far back as 1798, Vermont representative Matt
19 Lyon ran for office from prison and won.

20 Therefore, the challenge should be thrown
21 out and Mr. Kern should be allowed to remain on
22 the ballot.

23 Granted, Mr. Kern is not your typical
24 candidate. He is a convicted felon, he's
25 eccentric, and he can be flamboyant; but he has

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1 a good heart, he cares about his fellow man, and
2 he can add a unique perspective to the election.

3 The country is built on the premise that
4 individuals can make their own way and live the
5 American dream. To allow someone who has gone
6 through the judicial system to be rehabilitated
7 and then run for public office truly shows the
8 promise of this country.

9 Thank you.

10 CHAIRMAN WHEELER: Let me ask one follow-up
11 question.

12 MS. WARD: Yes, sir.

13 CHAIRMAN WHEELER: Is there a condition of
14 your parole related to running for office or
15 anything like that.

16 MR. KERN: Actually, my -- I gather that
17 Mr. Spurley, Agent Spurley, who is my agent,
18 parole agent, was contacted by Pierre; and he
19 had contacted me to let me know that someone was
20 making -- wanted me off the ballot and wanted to
21 know the challenge.

22 And I said, well -- he says, "Can you run?"
23 I said, "Yes, I can run." Because I'm a
24 convict -- I said, "Is there any problems on
25 your end, Agent Spurley?" And he said, "No, as

1 long as you're not breaking any laws, you're
2 fine."

3 And I have -- I have met every criteria of
4 the parole board. And, in fact, I will be off
5 parole before I win the next -- before I win the
6 election.

7 CHAIRMAN WHEELER: All right.

8 MR. KERN: So I will be able to serve in
9 Washington D.C.

10 VICE-CHAIRMAN LONG: Can I ask a question?

11 MS. WARD: Sure.

12 VICE-CHAIRMAN LONG: I've been on here a
13 long time. I remember you from your last trip
14 up here.

15 MR. KERN: Thank you.

16 VICE-CHAIRMAN LONG: You were running for
17 governor, I think.

18 MR. KERN: For U.S. Congress in the Sixth
19 Congressional District.

20 VICE-CHAIRMAN LONG: Okay. I seem to
21 recall you had a different name then.

22 MR. KERN: It was Bobby Kern.

23 MS. WARD: Bobby Hidalgo Kern.

24 VICE-CHAIRMAN LONG: Hidalgo?

25 MR. KERN: Yeah, probably Hidalgo.

1 VICE-CHAIRMAN LONG: That's all I had is --

2 CHAIRMAN WHEELER: Any further questions?

3 VICE-CHAIRMAN LONG: No.

4 CHAIRMAN WHEELER: Hearing none, I'll close
5 the hearing.

6 Do I have a motion?

7 VICE-CHAIRMAN LONG: Move to deny.

8 COMMISSIONER DUMEZICH: Second.

9 CHAIRMAN WHEELER: Motion made and
10 seconded.

11 Any further discussion?

12 (No response.)

13 CHAIRMAN WHEELER: Hearing none, all if
14 favor signify by saying "aye."

15 THE COMMISSIONERS: Aye.

16 CHAIRMAN WHEELER: Those opposed, same
17 sign.

18 (No response.)

19 CHAIRMAN WHEELER: Thank you very much.

20 MR. PULLINS: Thank you.

21 CHAIRMAN WHEELER: Good luck both of you.

22 MR. KERN: Thanks.

23 CHAIRMAN WHEELER: All right. The next
24 challenge I have is in re: John "The Man" Malan.

25 MR. LAWSON: Mr. Chairman, I'm here to

1 speak on John's behalf.

2 CHAIRMAN WHEELER: Let me see, is the
3 challenger here, Sharon Miller?

4 Give me just a minute.

5 All right. I note that Sharon Miller is
6 not here. Sharon Miller has sworn -- filed a
7 sworn certification challenging, noting that,
8 quote, "Don't feel we need such a wild card on
9 the ticket for the safety of all. See
10 attachment."

11 And I think her base allegation involves
12 some kind of stipulated plea agreement. Looks
13 like a domestic disturbance.

14 VICE-CHAIRMAN LONG: I think that's what
15 they said about me when I last ran.

16 CHAIRMAN WHEELER: Worse than that.

17 And you are speaking on behalf of
18 Mr. "MAY-lin"?

19 MR. LAWSON: It's "Ma-LAN," sir.

20 CHAIRMAN WHEELER: Malan, all right.

21 MR. LAWSON: Yes, sir.

22 CHAIRMAN WHEELER: And you are?

23 MR. LAWSON: I'm Jeremy Lawson. I'm the
24 sheriff's candidate for Newton County.

25 CHAIRMAN WHEELER: Okay. Go ahead.

1 MR. LAWSON: Well, I don't really want to
2 waste anybody's time. If she's not here, we can
3 withdraw her challenge. I would be satisfied
4 with that.

5 VICE-CHAIRMAN LONG: Is your position that
6 this challenge is not sufficient under the law
7 to challenge his candidacy?

8 MR. LAWSON: I believe so, yes, sir.

9 VICE-CHAIRMAN LONG: And that's your case?

10 MR. LAWSON: That's my case, yes sir.

11 VICE-CHAIRMAN LONG: I think he's testified
12 enough.

13 CHAIRMAN WHEELER: With a little leading
14 cross-examination. Nobody objected.

15 Any further questions from the Commission
16 members?

17 COMMISSIONER DUMEZICH: I just have one.
18 I'm looking at the letter that was sent in by
19 Mr. Malan.

20 MR. LAWSON: Yes, sir.

21 COMMISSIONER DUMEZICH: Is there a
22 significance to the bracketing around the zip
23 code and the failure to capitalize the U in
24 United States of America?

25 MR. LAWSON: It's a constitutional -- he

1 follows the writings of the Founders. They did
2 not the capitalize the U in the United States in
3 our Constitution or the declaration, so he does
4 the same.

5 COMMISSIONER DUMEZICH: And I guess they
6 didn't use zip codes, either.

7 MR. LAWSON: Well, he uses the bracket to
8 denote federal jurisdiction, to not claim
9 federal jurisdiction, and I don't -- I don't
10 want to get into his beliefs, because that's his
11 belief. I'm not of the same beliefs.

12 CHAIRMAN WHEELER: Is there a reason he's
13 not here?

14 MR. LAWSON: He's at a hearing in Seattle
15 they're trying -- the Department of Homeland
16 Security is trying to deport his wife. So he is
17 tied up out there. So he's got a lot of things
18 on his plate right now.

19 COMMISSIONER DUMEZICH: I would imagine.

20 VICE-CHAIRMAN LONG: That's why he's got
21 the name.

22 CHAIRMAN WHEELER: Any further questions?

23 (No response.)

24 CHAIRMAN WHEELER: I'll close the hearing.
25 I'll accept the motion on the challenge.

1 VICE-CHAIRMAN LONG: Move to deny the
2 challenge.

3 CHAIRMAN WHEELER: Do I have a second?

4 COMMISSIONER DUMEZICH: Second.

5 CHAIRMAN WHEELER: Motion's made and
6 seconded.

7 Any further discussion?

8 (No response.)

9 CHAIRMAN WHEELER: Hearing none, those in
10 favor signify by saying "aye."

11 THE COMMISSIONERS: Aye.

12 CHAIRMAN WHEELER: Those opposed, same
13 sign.

14 (No response.)

15 CHAIRMAN WHEELER: Motion carries.

16 Thank you.

17 MR. LAWSON: Thank you.

18 VICE-CHAIRMAN LONG: This your first
19 argument here on the candidacy, and you
20 performed one today. You can report back, one
21 of the things off his plate.

22 MR. LAWSON: Thank you.

23 CHAIRMAN WHEELER: Good luck on your
24 candidacy.

25 All right. Next is in re: Joseph Bachan.

1 MR. KATZ: Yes.

2 CHAIRMAN WHEELER: Come on up.

3 And you're --

4 MR. KATZ: My name is Allan Katz. I'm the
5 challenger in this case, and I'm challenging --

6 CHAIRMAN WHEELER: Hold on a second.
7 Is Joseph Bachan here, or anybody here?

8 MR. KATZ: No, I spoke with Joe's --

9 MR. KING: Mr. Chairman, is he the one
10 with -- Yeah, Mr. Chairman, in the binder, the
11 sixth piece of paper back under this tab is a
12 letter from Mr. Bachan that's addressed to
13 myself and Members of Commission regarding the
14 matter.

15 CHAIRMAN WHEELER: This is the March 1st,
16 2010, letter received by the Commission on
17 March 2nd.

18 MR. KING: Yes, Mr. Chairman.

19 CHAIRMAN WHEELER: And apparently he also
20 talked to you by telephone as well?

21 MR. KING: That is correct.

22 CHAIRMAN WHEELER: But in here, as I
23 understand, he says, "With a heavy heart but a
24 clear that conscience I will not contest [his]
25 challenge to my candidacy," which I take it to

1 mean that -- well, I guess that's not a
2 withdrawal, because there is nothing to
3 withdrawal, but he is not going to contest the
4 challenge.

5 MR. KING: Mr. Chairman, as noted earlier,
6 the deadline for withdrawal was February the
7 22nd.

8 COMMISSIONER DUMEZICH: So he will probably
9 have to --

10 CHAIRMAN WHEELER: We have to grant the
11 challenge.

12 VICE-CHAIRMAN LONG: The challenge is, one,
13 that he voted in had the democratic primary in
14 the 2008 election, and then filed as a
15 republican candidate in this election, did he
16 not?

17 MR. KATZ: Yes.

18 VICE-CHAIRMAN LONG: State representative
19 in the 19th District.

20 MR. KATZ: That's correct. And, in
21 addition, I have a letter notarized from the
22 chairman of the county stating that: "This
23 letter is to inform you that I've never signed a
24 waiver for Joseph L. Bachan (sic) to run as a
25 republican candidate" --

1 CHAIRMAN WHEELER: That's the republican
2 chair?

3 MR. KATZ: That's the republican chair.

4 CHAIRMAN WHEELER: So he did not get waiver
5 from the chairman.

6 MR. KATZ: Correct, he did not the get a
7 waiver from the chair.

8 And we submitted a certified copy of his
9 voting record showing he did vote as a
10 democratic.

11 COMMISSIONER DUMEZICH: Can we go a copy of
12 that letter?

13 CHAIRMAN WHEELER: I would like to get copy
14 of letter.

15 COMMISSIONER DUMEZICH: I think it's a
16 letter to us, so it's okay that we have it.

17 VICE-CHAIRMAN LONG: That you have into
18 evidence.

19 COMMISSIONER DUMEZICH: Do you want to read
20 it into the record?

21 CHAIRMAN WHEELER: It's actually from the
22 Lake County Republican Chair, Kim Krull,
23 indicating -- directed to the Indiana Election
24 Commission -- "This letter is to inform you that
25 I have never signed a waiver for Joseph Bachan

1 as republican candidate." It also says that he
2 voted as a democratic in the last primary.

3 So we will accept that.

4 Any further questions?

5 (No response.)

6 CHAIRMAN WHEELER: Hearing none, I'll
7 accept -- close the hearing, accept a motion.

8 VICE-CHAIRMAN LONG: Move to grant the
9 challenge.

10 COMMISSIONER DUMEZICH: Second.

11 CHAIRMAN WHEELER: Any further discussion?

12 (No response.)

13 CHAIRMAN WHEELER: Hearing none, all in
14 favor signify by saying "aye."

15 THE COMMISSIONERS: Aye.

16 CHAIRMAN WHEELER: Those opposed, same
17 sign.

18 (No response.)

19 CHAIRMAN WHEELER: Motion carried. Thank
20 you.

21 Next one I have is Susan Ellspermann.

22 If you guys could introduce yourselves
23 starting on this side.

24 MR. HAYES: My name is Don Hayes. I'm the
25 republican county chair in the Dubois County.

1 MR. WYATT: I'm the challenger, Charlie
2 Wyatt.

3 CHAIRMAN WHEELER: Don, you're down on this
4 side. And, Mr. Wyatt, who is with you.

5 MR. WYATT: Counsel.

6 MR. LOHMAN: Geoffrey Lohman, Fillenwarth,
7 Dennerline, Groth & Towe, on behalf of
8 Mr. Wyatt. I have an appearance form if you'd
9 like.

10 CHAIRMAN WHEELER: It will make it easier
11 for the court reporter --

12 MR. LOHMAN: Certainly.

13 CHAIRMAN WHEELER: -- keep it straight
14 here. Give that to the court reporter.

15 VICE-CHAIRMAN LONG: Before we start the
16 hearing, for the record, I'm -- my name is
17 Anthony Long. I'm the vice-chair of the
18 Commission. I want to make a disclosure. I
19 think it's required under AOPA (phonetic).

20 Number one, I live in the state
21 representative district that the challenged
22 candidate is seeking the elected office to a
23 seat held by Representative Stilwell.
24 Representative Stilwell is a democrat, as am I.
25 He's lived -- we've lived -- I've lived in his

1 district, or he's lived in mine. I don't know
2 whichever way is appropriate. Won his first
3 election to the House, District 74, I believe it
4 to be.

5 I don't think that in itself is
6 disqualifying situation, but I've learned --
7 actually, I learned it through blog that the
8 republican candidate against Ms. Ellspermann is
9 apparently a lady by the name of Sowers,
10 S-O-W-E-R-S. I do not know her, I've never met
11 her, to my knowledge. She is apparently married
12 to a person named Charles H. Sowers, III.

13 Mr. Sowers -- I maintain a law office in
14 Boonville, Indiana, along with my stepson and my
15 son under the name of Long & Mathies. The case
16 is in Warrick County. Again, I guess, it
17 belongs to my stepson; otherwise, I would've
18 realized it. I don't know Mr. Sowers either.

19 Mr. Sowers had a criminal case pending. It
20 is 87D01-0805-FC-077, filed as a habitual
21 traffic violater, and he was represented during
22 the initial case, which ended in 2008, by my
23 stepson and law partner, Warren Mathies, which
24 ended in December of 2008 with a plea agreement,
25 a plea and sentence, which apparently from

1 reading the chronological case summary, which
2 I'll give the reporter to include in the record,
3 but there was a community corrections sentence.

4 I've never looked at the file, didn't look
5 at the file after. This -- I've never appeared
6 in court, I've never filed a written appearance
7 for him, but on January the 6th of this year was
8 a community correction program request for
9 ramification of his status, which in our county
10 means they're asking to send him to the
11 Department of Corrections.

12 He was -- appeared with another attorney,
13 at least according to the docket sheet, J. Zach
14 Winsett in Warrick County on January the 25th.
15 But then I noted he appeared -- Warren Mathies
16 filed an appearance for him on February 8th,
17 still as his attorney.

18 I would -- this is a chronological case.
19 The way things are set up in our county,
20 whenever we have a criminal case, if one of us
21 appears, they show all of our names on the
22 docket sheet as the attorney. So the blogger
23 made an assumption that is wrong. I do not
24 represent Mr. Sowers but my partner does.

25 And I make that -- and that's the

1 chronological case summary that I've printed off
2 the Doxpop system last night, I believe, so that
3 I could make this disclosure here today.

4 I don't know Ms. Sowers; I don't know
5 Ms. Ellspermann. I do Russell Stilwell; I do
6 know Charles Wyatt. We had the fortune or
7 misfortune of growing up in the same town in our
8 county. Obviously, starting out quite a few
9 years a head of him.

10 But I make that disclosure, and while I am
11 personally comfortable in making an objective
12 decision on this case, I am offering my
13 disqualification if either the challenger or the
14 challenged candidate would like to have me
15 disqualified.

16 CHAIRMAN WHEELER: First of all
17 procedurally, the docket sheet that the
18 vice-chair has offered has been made part of
19 record, right?

20 MR. KING: That's correct, Mr. Chairman,
21 without objection of the members.

22 CHAIRMAN WHEELER: And then, I believe that
23 was a kind offer from the vice-chair. I don't
24 know that I see a conflict either, but as I
25 understood the vice-chair's offer, if either

1 party objects to his participation in this, he
2 will disqualify himself.

3 And I do believe we have a proxy ready,
4 willing, and available, because I believe we
5 will have a proxy later in some of these
6 challenges.

7 So I'll chart with the challenger: Do you
8 have any objection to the vice-chair serving?

9 MR. LOHMAN: The challenger has no
10 objection.

11 CHAIRMAN WHEELER: Mr. Brooks?

12 MR. BROOKS: We have no objection.

13 CHAIRMAN WHEELER: All right. In that
14 case, Mr. Wyatt, the floor is yours, or your
15 counsel, as the case may be.

16 MR. LOHMAN: Thank you, Mr. Chairman,
17 Members of the Commission. My name, again, is
18 Geoffrey Lohman with the law firm of
19 Fillenwarth, Dennerline, Groth & Towe. I'm here
20 on behalf of the challenger, Charles Wyatt.

21 The issue here is that Susan Ellspermann
22 filed her declaration of candidacy for primary
23 nomination on January 27 of 2010 requesting to
24 be placed on the Republican Party ballot for
25 state representative of District 74.

1 In this sworn declaration, and as require
2 by Indiana Code Section 3-8-2-7, Ms. Ellspermann
3 declared that in the most recent primary, she
4 had voted in what was the republican primary.
5 As Ms. Ellspermann has admitted publicly, I
6 believe this statement is not accurate.

7 Her voting records, which have been
8 submitted, I believe, along with the candidate
9 filing challenge, revealed that she voted in the
10 democratic primary in May of 2008, which was
11 also the last primary which she voted, and that
12 is how this challenge from Mr. Wyatt arose.

13 CHAIRMAN WHEELER: Let me stop you there.
14 As I understand it, you've attached a challenge,
15 a copy of Ms. Ellspermann's CAN-2, the second
16 page, at least the documents we have.

17 MR. LOHMAN: That's correct.

18 VICE-CHAIRMAN LONG: What the Commission
19 does is they copy all the papers that are filed,
20 they send them out to us, maybe a week, or
21 thereabout ahead of time of what they have so we
22 get a chance to study them before the hearing so
23 we at least can appear to be knowledgable.

24 MR. LOHMAN: Sure.

25 VICE-CHAIRMAN LONG: As best we can.

1 CHAIRMAN WHEELER: In looking at the CAN-2,
2 as I understand it, your challenge is under
3 Section 3, where it says, "I am claiming
4 affiliation with the Democratic or Republican
5 Party."

6 The box that is checked, in my looking at
7 the CAN-2 says, "The most recent primary
8 election in which I voted was the primary held
9 by the party with which I claim affiliation
10 above --"

11 MR. LOHMAN: Correct.

12 CHAIRMAN WHEELER: -- "i.e., the Republican
13 party.

14 MR. LOHMAN: Yes.

15 CHAIRMAN WHEELER: And in your challenge,
16 and there are attached documents indicating
17 Susan J. Ellspermann pulled a democratic ballot
18 in the 2008 primary election. You have -- those
19 documents are attached as well.

20 MR. LOHMAN: That's correct. In May of
21 2008, there is a voter profile which should be
22 attached to your documents. And I have another
23 set of documents in the event those documents
24 are not attached, but there is a voter
25 profile --

1 VICE-CHAIRMAN LONG: Is this what you're
2 talking about?

3 MR. LOHMAN: That's correct, yes.

4 CHAIRMAN WHEELER: We've got it.

5 MR. LOHMAN: If you'll look at the bottom
6 of the voter history, it shows that on May 6th
7 of 2008, which is the last primary election
8 listed in the voter history for Ms. Ellspermann,
9 she voted a democratic ballot in that election,
10 and that is the basis of challenge.

11 CHAIRMAN WHEELER: We have that, and I
12 believe we also have the actual election
13 signature pages as well.

14 MR. LOHMAN: That's correct. And it also
15 shows that there was a vote in the democratic
16 primary ballot, and --

17 VICE-CHAIRMAN LONG: Can we show all of
18 those received in evidence?

19 CHAIRMAN WHEELER: Please.

20 VICE-CHAIRMAN LONG: I think maybe all of
21 the attachments to the books in all these
22 cases --

23 CHAIRMAN WHEELER: The books.

24 VICE-CHAIRMAN LONG: -- automatically
25 brought into evidence for purposes of --

1 MR. KING: Will do as long as there is no
2 objection by the Commission Members.

3 VICE-CHAIRMAN LONG: I think that's for all
4 the cases permitted ahead of time, even the ones
5 we've already dealt with be a part of the
6 official record.

7 CHAIRMAN WHEELER: Let me ask a quick
8 question.

9 In that regard, we have -- and I believe we
10 you heard us discussing briefly in the last
11 challenge -- I believe there is an exception in
12 the event that the county chairs file
13 certification or verification that the
14 individual is, indeed, despite having voted in
15 that primary -- or pulled a different primary
16 ballot is, indeed, a Republican.

17 And from what I've seen, I have -- do you
18 know how many counties District 74 covers?

19 MR. LOHMAN: It's my understanding there
20 are four.

21 CHAIRMAN WHEELER: And which counties are
22 those?

23 MR. LOHMAN: I believe it's --

24 VICE-CHAIRMAN LONG: Warrick, Spencer,
25 Perry, and part of Dubois, I think.

1 MR. LOHMAN: That's right. Warrick,
2 Spencer, Perry, Pike.

3 VICE-CHAIRMAN LONG: Close. There is some
4 advantage since that is my district.

5 CHAIRMAN WHEELER: I happen to have in
6 front of us -- and I don't know if these are
7 shared with the parties. We have in front of us
8 from the Dubois County, Spencer County, and
9 Warrick County, and Perry County Republican
10 chairs verifying the candidate.

11 Have you shown those documents?

12 MR. LOHMAN: I have seen those.

13 CHAIRMAN WHEELER: Do you have any reason
14 to dispute any of those four?

15 MR. LOHMAN: I don't have any reason to
16 dispute the accuracy of those forms. I do have
17 a point to make regarding the validity of those
18 forms and whether or not it has any bearing on
19 your decision here, if I may.

20 CHAIRMAN WHEELER: Please.

21 MR. LOHMAN: The statute that's relevant is
22 Section 3-8-2-7, subsection (a)(4). And what
23 that says is that a candidate, in order to be
24 considered to be affiliated with a political
25 party, one of these three criteria has to be

1 met.

2 There is subsection (A) which says that,
3 "In the most recent primary election which the
4 candidate voted was a primary election held by
5 the party with which the candidate claims
6 affiliation."

7 And that's the box that Ms. Ellspermann
8 checked in her declaration of candidate filing,
9 that she had most recently voted in the
10 Republican primary. As you know, now, from the
11 documents that have been taken into evidence,
12 that's not accurate it. She voted in the
13 democratic primary. So she can't qualify as
14 being an eligible republican primary candidate
15 on the basis of subsection (A).

16 The second subsection, subsection (B),
17 which says, "The candidate has never voted in a
18 primary election and claims a particular party
19 affiliation."

20 Well, we know that's not applicable because
21 she obviously has voted in primary elections, as
22 those documents establish.

23 The third subsection, (C), which the
24 Chairman made reference to, is that the county
25 chairman of the political party with which the

1 candidate claims affiliation, and in which --
2 the county in which the candidate resides
3 certifies that the candidate is a member of
4 political party. And I presume that's why these
5 letters have been submitted to the Commission by
6 Ms. Ellspermann.

7 The problem with that is twofold,
8 basically. First, the statute is very explicit
9 about the timing. And there's a couple of
10 different statutes that you have to look to.

11 First, in Section 3-8-2-7 (a) (4), it says,
12 "If a candidate claims party affiliation under
13 clause (C)," which is the party chairman clause,
14 "the candidate must attach to the candidate's
15 declaration of candidacy the written
16 certification of the county chairman required by
17 clause (C)."

18 She didn't attach that to her declaration
19 of candidacy. None of those forms were attached
20 to her declaration of candidacy, which was filed
21 on January 27, 2010. Of course, that's plain
22 from the documents you've been provided.

23 I believe the letter, the cover letter that
24 was submitted to the Commission is dated
25 March 1st of 2008. The letters from the various

1 county chairman are dated February 26th, I
2 believe, is one of them. The other three were
3 dated February 28 of 2010. So those obviously
4 were not submitted by -- or along with the
5 declaration of candidacy.

6 CHAIRMAN WHEELER: So your reading of the
7 statute is that this Commission, if a challenge
8 is based on this particular section, that this
9 Commission would have to grant every challenge,
10 even though the county commissioner comes in and
11 testifies -- county chairman, I'm sorry, with
12 the commissioners -- the county chairman comes
13 in and testifies that individual is, indeed, of
14 that party, your position would be that that's
15 erroneous, that if the Commission had done that
16 in the past, the Commission had erred?

17 MR. LOHMAN: Well, my position would be is
18 that the statute would prohibit that sort of
19 after-the-fact testimony for the purpose of
20 making an otherwise ineligible candidate
21 eligible because of the timing of that
22 submission.

23 Statute plainly requires -- and uses the
24 term "must," which is a mandatory term -- that
25 it must be submitted in writing along with the

1 declaration of candidacy.

2 But there is a second set of statutes that
3 I'd like to draw your attention to as well,
4 which is the time for filing these declaration
5 of candidacy forms.

6 The -- under statute, the time for filing
7 the declaration of candidacy was 74 days prior
8 to the primary election, and those are at
9 Indiana Code, Section 3-8-2-4 and Indiana Code
10 3-8-2-11(b). They require it to be filed by
11 that particular day.

12 In this particular occasion, that date was
13 February 19th of 2010 by noon on that date.
14 And, thus, Ms. Ellsberger (sic) obviously knew
15 about that. She filed her declaration of
16 candidacy prior to that particular date, which
17 did not include the letters from the --

18 CHAIRMAN WHEELER: This argument is the
19 same as your prior argument, which is she didn't
20 attach them and she can't fix it later.

21 MR. LOHMAN: That's absolutely correct.
22 The point being that not only does that statute
23 I cited first, 3-8-2-7, prohibit it, but by also
24 3-8-2-4 and 3-8-2-11(b) prohibit it.

25 CHAIRMAN WHEELER: 3-8-2-4 and 3-8-2-11(b)

1 refer to declaration of candidacy. They don't
2 refer to this verification process. The only
3 section on the verification process is
4 3-8-2-7(a)(4).

5 MR. LOHMAN: Well, that's correct, but they
6 have to all be read in conjunction.

7 CHAIRMAN WHEELER: I understand the
8 declaration of candidacy there is timing on
9 that.

10 MR. LOHMAN: That's right. And so it's our
11 position that these sorts of after-the-fact
12 submissions by county chairmen after the
13 deadline that's required can't come into the
14 record for the purpose of fitting within
15 subsection (C) both under the plain language of
16 the 3-8-2-7(a)(4) and also as a result of the
17 statutes that provide a deadline for providing
18 the declaration of candidacy filing.

19 And so for those reasons, we believe that
20 Ms. Ellspermann is not an eligible candidate for
21 the republican primary and that the request that
22 she be declared an ineligible candidate be
23 granted pursuant to your authority, the
24 Commission's authority under Indiana Code
25 Section 3-8-1-2(g), which actually requires the

1 Commission to declare -- or to decline a filing
2 or reject the filing to the extent it doesn't
3 comply with the statutory requirements. And in
4 this case, it did not.

5 CHAIRMAN WHEELER: Thank you.

6 Mr. Brooks, are you speaking on behalf of
7 Ms. Ellspermann?

8 MR. BROOKS: I am. I don't believe I filed
9 an appearance form, but I'm absolutely certain I
10 don't have one with me.

11 CHAIRMAN WHEELER: If you can just tell her
12 who you are. We know where to find you.

13 MR. BROOKS: Okay. David Brooks with the
14 law firm of Brooks Koch & Sorg. That's 615
15 Russell Avenue, Indianapolis, Indiana 46225, and
16 I'm here on behalf of Susan Ellspermann.

17 Mr. Chairman, I would like to go through
18 two witnesses I think in relatively short order.
19 One is Ms. Ellspermann and one is Mr. Hayes, the
20 county chairman of her county of residence. I
21 think they're already sworn in. Format-wise --

22 CHAIRMAN WHEELER: If you want to question
23 them, it's up to you, however you want to
24 present your evidence.

25 SUSAN J. ELLSPERMANN,

1 having been duly sworn to tell the truth, the whole
2 truth, and nothing but the truth relating to said
3 matter, was examined and testified as follows:

4 DIRECT EXAMINATION,

5 QUESTIONS BY MR. DAVID MICHAEL BROOKS:

6 Q Sue, would you please state your full name for
7 the Commission.

8 A Susan Ellspermann.

9 Q And what's your job?

10 A I direct the Center for Applied Research at the
11 University of Southern Indiana.

12 Q Would I be correct that you filed to be a
13 candidate in the republican primary for House
14 District 74 for this year?

15 A Yes.

16 Q I note on your filing -- and I --

17 You have the CAN-2, Mr. Chairman, in
18 your --

19 CHAIRMAN WHEELER: We do have the CAN-2.
20 For the Commission Members, it's the second page
21 of the actual --

22 MR. BROOKS: So I would reintroduce that.

23 Q But I note on your CAN-2, you filed that in
24 January, well ahead of the deadline that the
25 attorney for the challenger said. Can you tell

1 us why you did that?

2 A To ensure that I had it in well ahead. I'm a
3 first-time candidate, so I wanted to make sure I
4 had filed.

5 Q And what party affiliation did you declare in
6 that?

7 A Republican.

8 Q I'm going to hand you a copy so that you can
9 look at what the Commission already has, but I'm
10 going to draw your attention to paragraph 3,
11 which counsel for challenger referred to
12 earlier.

13 And do you see the three choices that are
14 available for designating party affiliation?

15 A Yes, I do.

16 Q Those three choices essentially, if I'm correct,
17 mean you voted in the most recent republican
18 primary, or that you never voted in any primary,
19 or that your county chair certifies that you're
20 a member of the republican party; is that your
21 understanding?

22 A Correct.

23 Q Have you voted in primary elections prior to
24 your filing?

25 A Yes.

1 Q So clearly Number 2 was not an option for you --

2 A Correct.

3 Q -- is that correct?

4 So if you turn to Option 1, which you
5 checked, essentially you've indicated that you
6 voted in the most recent republican primary; is
7 that correct?

8 A That is what I indicated.

9 Q And at the time you checked that box, did you
10 believe that to be true and accurate and
11 complete to the best of your knowledge and
12 belief?

13 A I did believe that was true.

14 Q At this point, we're conceding that that was
15 incorrect and a mistake; is that right?

16 A That's correct.

17 Q Would you take a look at the third choice, the
18 county chairman certification?

19 A Yes.

20 Q Were you a republican in good standing at the
21 time of your filing?

22 A Yes, I was.

23 Q And do you believe that you could have procured
24 a letter from your county chairman had you
25 realized that the first box was incorrect?

1 A Absolutely.

2 Q Why did you not get a letter from your county
3 chairman to attach to your filing?

4 A Because I thought that I had voted in the
5 republican primary.

6 Q Once you checked the first box, did you make any
7 effort to proceed and see whether or not you
8 needed any other forms?

9 A No, I did not.

10 Q Why not?

11 A Because I thought that I had voted in the
12 republican primary.

13 Q If you look in the directions for Number 3, you
14 see where right before you move to the various
15 boxes it says "check one"?

16 A Yes.

17 Q Would there have been any reason for you to get
18 a certification from your county chairman once
19 you checked Box Number 1?

20 A No, there was not. And that was the box that I
21 checked.

22 Q Once you checked Box Number 1 and looking at the
23 directions saying you could only check one --

24 A Yes, it says checked one.

25 Q -- did you have any reason to think about the

1 third option?

2 A No.

3 Q Do you hold any position within the republican
4 party?

5 A I am a precinct committeeperson.

6 Q Generally since when?

7 A Since the early fall of 2009.

8 Q And when did you file your committee to run for
9 House District 74?

10 A September 1, 2009.

11 MR. BROOKS: Mr. Chairman, I have -- I have
12 a copy of that, but I think that's on committee
13 files that are with you guys. Would you prefer
14 me to hand them out or let me just give the
15 testimony and take notice of the fact that --

16 CHAIRMAN WHEELER: Have you got exhibits?

17 MR. BROOKS: We do.

18 CHAIRMAN WHEELER: We don't have that
19 stuff -- we don't have it with our packet. It
20 might have been filed with the Commission -- or
21 the division, but we don't have it for today.

22 BY MR. BROOKS

23 Q I'm referring, Sue, to your committee filing in
24 September of '09. Did you clearly mark your
25 party affiliation?

1 A Yes.

2 Q And as what --

3 A I checked --

4 Q -- party?

5 A -- it as republican.

6 Q And similarly, when you filed your finance
7 report in January of this year, did you also
8 mark your party affiliation on those documents?

9 A Yes, I did. I marked republican. In fact, it's
10 on there twice.

11 MR. BROOKS: I don't know if I should
12 formally offer you Exhibits A and B.

13 CHAIRMAN WHEELER: I think you should.
14 Identify them.

15 MR. BROOKS: A, I think, is the filing for
16 the committee and B is the finance report filed
17 in January of this year.

18 CHAIRMAN WHEELER: So A will be the CFA-1
19 and B will be the CFA-4, Brad?

20 MR. KING: Yeah, that's how they're marked.

21 CHAIRMAN WHEELER: You got it marked.

22 BY MR. BROOKS

23 Q And since filing your committee, have you been
24 campaigning and raising money in House District
25 74, and elsewhere, in an open and obvious ways

1 as a republican?

2 A Yes, I have.

3 Q And when did you first become aware of the
4 mistake in indicating that you voted in most
5 recent republican primary?

6 A Last Thursday I heard a rumor that I may not
7 have voted the way I thought I had.

8 CHAIRMAN WHEELER: Last Thursday was?

9 MS. ELLSPERMANN: The 24th of February.

10 CHAIRMAN WHEELER: February 24th?

11 MR. BROOKS: I think it's 25th. Friday was
12 the 26th, I think.

13 CHAIRMAN WHEELER: I'll -- I believe you,
14 David. Let me ask this question.

15 MR. BROOKS: I'm not sure I believe me.

16 MR. SIMMONS: 26th was Friday.

17 MS. ELLSPERMANN: So it would be Thursday
18 the 25th. Thank you.

19 BY MR. BROOKS

20 Q And did you then hear on Friday that an actual
21 challenge had been filed?

22 A Yes, I did.

23 Q And what did you do?

24 A Well, Friday morning, first thing, I wanted to
25 convince myself that I had, in fact, voted

1 democrat. So I went to the Boonville courthouse
2 and double-checked the voting records and saw
3 the verification that I had voted democrat.

4 VICE-CHAIRMAN LONG: You said you went to
5 the Boonville courthouse?

6 MS. ELLSPERMANN: To Boonville, to the
7 courthouse to the clerk's office to look at my
8 voting record.

9 VICE-CHAIRMAN LONG: I thought you lived in
10 Dubois.

11 A I live in Dubois -- I lived in Warrick County
12 until July of 2008.

13 VICE-CHAIRMAN LONG: No wonder we have so
14 many republican elections down there. All those
15 Dubois County folks coming down there and
16 voting.

17 CHAIRMAN WHEELER: Let me ask -- I don't
18 mean to interrupt your examination.

19 MR. BROOKS: We're almost done.

20 CHAIRMAN WHEELER: Let me ask the obvious
21 question: I have some difficulty understanding
22 that you didn't know that you pulled a
23 democratic ballot.

24 MS. ELLSPERMANN: I had -- I have
25 historically voted as a republican. I

1 considered myself a republican since I was 20
2 years old. So I generally vote -- but I'm not a
3 straight-ticket person. So you vote for the
4 quality of the candidate.

5 And in 2008, what I had to really remind
6 myself of this, 2008 was a unique primary in
7 Indiana. It was being decided maybe for the
8 country in what was happening in Indiana. And
9 so like many republicans did in 2008, I chose to
10 vote democrat.

11 But that did not stick in my mind when I
12 was filling out this form because of my --

13 CHAIRMAN WHEELER: I don't believe you're
14 the only challenge that we have like this here
15 today.

16 MS. ELLSPERMANN: I suspect that's true.

17 CHAIRMAN WHEELER: I guess my question is,
18 is I am just still struggling with the idea that
19 you didn't know that you pulled a democratic
20 ballot.

21 MS. ELLSPERMANN: Yeah, I did not -- I was
22 not convinced, until I saw it, that's the way --

23 VICE-CHAIRMAN LONG: How long did you think
24 that Barack Obama and Hillary Clinton live up --
25 a lot of people think that might be the case.

1 MS. ELLSPERMANN: I believe that it's
2 important that we each make -- as Americans and
3 voters, that we vote in the race that is
4 compelling and important to our country.

5 VICE-CHAIRMAN LONG: You say you
6 historically voted in the republican primary.
7 Seems to me from the voting history that's been
8 printed here, unless you have something contrary
9 to that, you only voted in two primaries: One
10 time in 2008, one time as a democratic, and one
11 time in 2006 as a republican.

12 And 2004, there's no -- you voted the
13 general election but you didn't vote in the
14 primary. 2002 you voted general, didn't vote in
15 the primary. 2000 you voted in the general but
16 you didn't vote in the primary.

17 MS. ELLSPERMANN: And in 2000 I lived in
18 Vanderburgh County, so it wouldn't have been --
19 Warrick would not have had -- in the primary,
20 they probably would not have had anything. I
21 moved in that -- in May of 2000 I still lived in
22 northern --

23 CHAIRMAN WHEELER: He's pulling from the
24 statewide file.

25 VICE-CHAIRMAN LONG: This is voter -- I

1 believe this is the --

2 MS. ELLSPERMANN: Well, it pulled Warrick.

3 VICE-CHAIRMAN LONG: I thought this was a
4 Dubois County file, because it says Dubois
5 County, where you live --

6 MS. ELLSPERMANN: That is where I live.

7 VICE-CHAIRMAN LONG: -- and I didn't
8 realize that you were at one point in Warrick.

9 But from 2000 on, you voted in two
10 primaries. Do dispute those records?

11 MS. ELLSPERMANN: I don't dispute those
12 records. I am just commenting that I moved into
13 Warrick, into Newburgh, in June -- July,
14 actually, of 2000.

15 VICE-CHAIRMAN LONG: In May of 2008 you
16 lived in Warrick County.

17 MS. ELLSPERMANN: In May of 2008, I lived
18 in Warrick County, correct.

19 VICE-CHAIRMAN LONG: Were you a precinct
20 committeeman there?

21 MS. ELLSPERMANN: No, no, I was not.

22 CHAIRMAN WHEELER: I think if you look at
23 the statewide voter file, it shows the change in
24 Warrick to Dubois from the primary to general.
25 Looks like somebody printed on February 24th.

1 VICE-CHAIRMAN LONG: Okay.

2 CHAIRMAN WHEELER: Which is our statewide
3 voter registration file has taken a lot of grief
4 on occasion, but in this particular case, it's
5 merged both those, Warrick and Dubois.

6 VICE-CHAIRMAN LONG: Dubois "Conty." Down
7 there it's pronounced "conty." My
8 daughter-in-law and wife are from there, so I go
9 quite a bit.

10 MS. STEELE RIORDAN: Are you finished with
11 your presentation?

12 CHAIRMAN WHEELER: I don't know if the
13 vice-chair --

14 VICE-CHAIRMAN LONG: I don't have any other
15 questions at this point.

16 BY MR. BROOKS

17 Q I think where finished off in the questioning,
18 you had gone to the clerk's to physically verify
19 that --

20 A Yes, I did.

21 Q -- had voted in the democratic primary.

22 Then what did you do next?

23 A I proceeded to contact the county chairs and
24 rectify the situation by getting their letters
25 of certification and support.

1 Q Did you have any trouble getting those?

2 A Not at all.

3 CHAIRMAN WHEELER: And those are the four
4 letters we've --

5 MS. ELLSPERMANN: Those are the four that
6 have been submitted.

7 MR. BROOKS: I haven't seen those, but I'm
8 assuming they're the same ones filed March 1st.

9 CHAIRMAN WHEELER: Filed March 1st,
10 12:01 p.m.

11 BY MR. BROOKS

12 Q So while at some point, at some level,
13 Mr. Chairman's question about remembering
14 whether you did or didn't vote in the primary,
15 is there any question in your mind that had you
16 remembered, it would have been simple and easy
17 to get it --

18 A Yes.

19 Q -- from the county chairs?

20 A Yes, it would have.

21 Q And, in fact, you filed way before the deadline,
22 so it wasn't a big rush, correct?

23 A Yes, correct.

24 Q As a new candidate, would it be fair to say that
25 all these forms and reports and so on are new to

1 you?

2 A That would be true.

3 Q And did you do the best that you could to comply
4 with them?

5 A Yes, I did.

6 MR. BROOKS: I don't have any mother
7 questions for this witness, Mr. Chairman?

8 CHAIRMAN WHEELER: Members, any questions?

9 VICE-CHAIRMAN LONG: Do I understand that
10 the position is you simply forgot.

11 MS. ELLSPERMANN: Made a mistake on the
12 form and --

13 VICE-CHAIRMAN LONG: Because you didn't
14 file in accordance with what the law requires
15 you to have filed, that we should say, okay -- I
16 think that's what you're asking us -- you forgot
17 so we'll forgive you and go ahead and deny this
18 challenge. That's the position you're taking?

19 MR. BROOKS: Well, I think we'll be
20 summarizing our position shortly.

21 VICE-CHAIRMAN LONG: I am just asking her.

22 MR. BROOKS: To the extent that you're
23 asking her for some legal questions --

24 CHAIRMAN WHEELER: I don't think that's
25 what he's asking.

1 VICE-CHAIRMAN LONG: A legal question of
2 what she's asking us to do, is that a legal
3 question?

4 MR. BROOKS: Well, I think how you get
5 there is -- go ahead and answer.

6 VICE-CHAIRMAN LONG: I am asking her what
7 she's asking today. She's the candidate.

8 MS. ELLSPERMANN: I am asking for you to
9 consider that it was a genuine oversight, not
10 intentional; that I have a strong record with
11 the republican party; that I have disclosed
12 myself as a republican in a very upfront, honest
13 way throughout my candidacy to this point; and
14 that, yes, I am asking you to accept that a
15 candidate can be less than perfect in a check
16 that they make, but it was a very unintentional
17 mistake.

18 VICE-CHAIRMAN LONG: And people that forget
19 their filing deadlines on their campaign finance
20 reports say, just an oversight, could you please
21 forgive me for that?

22 The deadlines are issues that -- I think
23 that's a troublesome thing. There has to be --
24 Well, I'll comment later.

25 CHAIRMAN WHEELER: I understand. Let me

1 ask a follow-up question.

2 There's no doubt, number one, that all of
3 the county chairs, republican county chairs
4 acknowledge you as a republican.

5 MS. ELLSPERMANN: Correct.

6 CHAIRMAN WHEELER: We got those four pieces
7 of paper.

8 MS. ELLSPERMANN: Correct.

9 CHAIRMAN WHEELER: As I understand the
10 purpose of the statute, when the county chairs
11 pushed the statute through, was to preclude
12 stealth candidates from filing who were
13 really -- and to be honest, where we see a lot
14 of these is in Lake County.

15 No knock to my good friend, Commissioner
16 Dumezich.

17 VICE-CHAIRMAN LONG: Filed.

18 CHAIRMAN WHEELER: He's tried to file as a
19 democratic several times.

20 But it's to prohibit stealth candidates
21 from filing in a majority district, majority
22 county one way or the other. But as I
23 understand it, in your standpoint you had no
24 problem getting these, it was very clear to
25 everyone -- you'll have to answer yes or no,

1 we're taking it down.

2 MS. ELLSPERMANN: Yes.

3 CHAIRMAN WHEELER: And you have no problem
4 getting these from the county chairs?

5 MS. ELLSPERMANN: Yes.

6 CHAIRMAN WHEELER: All four county chairs
7 which we have here, which is a little bit more
8 than which usually see. We which usually just
9 have one county chair, but in this case, it was
10 all four county chairs.

11 MS. ELLSPERMANN: Yes.

12 CHAIRMAN WHEELER: And as I understand it,
13 as I looked at the statute, you actually only
14 had to get the county in which the candidate
15 resides.

16 MS. ELLSPERMANN: Correct.

17 CHAIRMAN WHEELER: Which would have been at
18 this point --

19 COMMISSIONER DUMEZICH: Mr. Hayes.

20 CHAIRMAN WHEELER: I know, but I keep
21 wanting to say "Du-Bwa" instead of "Du-boys."
22 Dubois County.

23 And you went above and beyond that and got
24 letters from each of republican chairs in each
25 of the entire district?

1 MS. ELLSPERMANN: Yes.

2 CHAIRMAN WHEELER: All of district 74,
3 correct?

4 MS. ELLSPERMANN: Yes.

5 CHAIRMAN WHEELER: I guess that -- well,
6 I'll save my comments for later.

7 MR. BROOKS: I have a very abbreviated --

8 CHAIRMAN WHEELER: Do you have a question?

9 COMMISSIONER DUMEZICH: I'll wait.

10 MR. BROOKS: Just a short list of questions
11 for Mr. Hayes.

12 DONALD HAYES,
13 having been duly sworn to tell the truth, the whole
14 truth, and nothing but the truth relating to said
15 matter, was examined and testified as follows:

16 DIRECT EXAMINATION,

17 QUESTIONS BY MR. DAVID MICHAEL BROOKS:

18 Q And I would just like you to -- would you please
19 confirm for the Commission that there is no
20 question in your mind that Ms. Ellspermann was a
21 functioning, qualified member of the party at
22 the time she filed her CAN-2 in January and also
23 at the time of the challenge and also today.

24 A I'm satisfied she was. I worked hard to recruit
25 her.

1 Q And you heard her testimony about campaigning to
2 committee members, and you agree with that?

3 A Mm-hmm.

4 MR. BROOKS: I don't have any other
5 questions for this witness.

6 VICE-CHAIRMAN LONG: Do you have any doubt
7 in your mind she voted in the democratic primary
8 in 2008?

9 MR. HAYES: I don't have any doubts about
10 her political philosophy.

11 VICE-CHAIRMAN LONG: I didn't ask you that
12 question. Would you give me the courtesy of
13 answering my question.

14 MR. HAYES: I'd be glad to. She lived in
15 Warrick County, and I don't have access to those
16 records.

17 VICE-CHAIRMAN LONG: I didn't ask you that.
18 I'll ask it again.

19 Is there any doubt in your mind as you sit
20 here today that she voted in the democratic
21 primary in 2008 in Warrick County?

22 MR. HAYES: I saw the record.

23 VICE-CHAIRMAN LONG: You have no reason to
24 doubt that?

25 MR. HAYES: I have no reason to doubt that.

1 VICE-CHAIRMAN LONG: And have you seen her
2 declaration of candidacy?

3 MR. HAYES: Yes.

4 VICE-CHAIRMAN LONG: And would you have any
5 reason to doubt that it is wrong, whether it's
6 innocent, for whatever reason it is wrong?

7 A It is -- correct.

8 VICE-CHAIRMAN LONG: And would you have any
9 reason to doubt that all of the documents that
10 were supposed to be attached to her application
11 were not attached to her application,
12 declaration of candidacy, when they were filed?

13 MR. HAYES: They were not, that particular
14 one was not.

15 VICE-CHAIRMAN LONG: All four of them?

16 CHAIRMAN WHEELER: Well --

17 MR. HAYES: Only the one is required.

18 CHAIRMAN WHEELER: With all due respect,
19 I'm not sure that's a fair question.

20 VICE-CHAIRMAN LONG: Have you objected or
21 are you --

22 CHAIRMAN WHEELER: I was going to object.
23 I think that --

24 VICE-CHAIRMAN LONG: I'll ask the questions
25 that I chose to ask, and I don't believe you

1 have a standing to tell me that I can't ask.

2 CHAIRMAN WHEELER: I didn't say you
3 couldn't.

4 VICE-CHAIRMAN LONG: You can comment on
5 them, I guess, but I read the law pretty clear.
6 It says it has to be attached to the declaration
7 of candidacy and they were not. And I don't
8 think they are today.

9 CHAIRMAN WHEELER: The only reason they
10 have to be attached is with the declaration of
11 candidacy at the time it's filed is if you check
12 the box at the bottom, and she did not check the
13 box at the bottom so it isn't required to be
14 filed at that time.

15 VICE-CHAIRMAN LONG: Maybe we should serve
16 it to the prosecutor, because it's a felony to
17 file a false affidavit, at least according to
18 the quotation of codirector that's here today
19 that it's a felony to file a false affidavit in
20 a declaration --

21 COMMISSIONER DUMEZICH: I'm convinced by
22 her testimony --

23 MR. BROOKS: You can't file a false
24 affidavit --

25 COMMISSIONER DUMEZICH: Excuse me. Excuse

1 me.

2 I'm convinced by her testimony it was an
3 honest mistake, and I would not support moving
4 this to a county prosecutor to look at it.

5 I have a question.

6 Mr. Wyatt, are you under oath here today.

7 MR. WYATT: Yes, sir.

8 COMMISSIONER DUMEZICH: When was the last
9 time you voted in the primary election?

10 MR. WYATT: Last time we had one.

11 COMMISSIONER DUMEZICH: Which was?

12 MR. WYATT: '08.

13 COMMISSIONER DUMEZICH: Did you vote in a
14 republican or democratic primary?

15 MR. WYATT: I voted in both, but I -- the
16 last one I did vote a democrat.

17 COMMISSIONER DUMEZICH: Okay.

18 CHAIRMAN WHEELER: Did you vote in the
19 republican primary?

20 VICE-CHAIRMAN LONG: He has in the past.
21 That's what he said.

22 MR. WYATT: I have in the past.

23 COMMISSIONER DUMEZICH: And you said you
24 voted in the democratic primary, you're
25 relatively certain of that?

1 MR. WYATT: Yes.

2 CHAIRMAN WHEELER: Do you hold a party
3 position?

4 MR. WYATT: No, I don't.

5 COMMISSIONER DUMEZICH: So we have a
6 democrat challenge to a republican in a
7 republican primary, just so that I understand
8 it.

9 MR. WYATT: That was probably 1970s that I
10 voted in the republican primary.

11 CHAIRMAN WHEELER: Let me ask Mr. Wyatt one
12 last question.

13 You are the county chairman in which
14 Ms. Ellspermann resides; is that correct?

15 MR. HAYES: Correct.

16 CHAIRMAN WHEELER: Is there any doubt in
17 your mind that she is a member of the political
18 party that you represent, the republican party?

19 MR. HAYES: None whatsoever.

20 CHAIRMAN WHEELER: And you're making that
21 certification here today.

22 MR. HAYES: I am.

23 CHAIRMAN WHEELER: And you've made that
24 certification --

25 MR. HAYES: In writing.

1 CHAIRMAN WHEELER: -- was previously filed
2 on March 1st; is that correct?

3 MR. HAYES: Correct.

4 CHAIRMAN WHEELER: That's all I have.
5 You got anything else, Mr. Brooks?

6 MR. BROOKS: Yeah, actually, I had a legal
7 argument, but having at this point gone through
8 a lot of questions, let me just try to summarize
9 what I believe the case is; that I would remind
10 the Commission that the statutes applicable,
11 which counsel for the challenger has sited --
12 3-8-2-7 and some of these others -- are not
13 statutes that have been substantively
14 interpreted by the Court.

15 And so, while there certainly are some
16 statutes that have been generally strictly
17 construed -- such as recounts or contests --
18 that is by case law. That's not the case with
19 these particular statutes. And so I think what
20 we're really looking at, if there's not in case
21 law saying strict compliance, then what you
22 should be looking at is whether there's a
23 substantial compliance, and you -- I think we're
24 all entitled to do that by using common sense
25 guided by traditional legal concepts, and that

1 includes the concept of substantial compliance.

2 And I think the other thing to keep in mind
3 is what we're doing here versus what some of the
4 other statutes that are strictly construed do,
5 and that is, we're not saying that Sue
6 Ellspermann is disqualified; that is, we need to
7 protect the public from her running for office
8 because she's bribed or was a felon or anything
9 we're not saying that. We're not asking --
10 you're not the here to decide the outcome of an
11 election.

12 So this is a very different matter, and the
13 standard, I think, is very different. Even if
14 you look at the statutes with strict compliance,
15 such as recounts where it's not been uniformly
16 applied that every little thing had to have been
17 done absolutely correctly.

18 There are certainly cases now that --
19 stating you the cites and the, whatever, but
20 there are cases where identifying wards instead
21 of precincts have been allowed, failure to
22 include post office address been allowed,
23 failure to include name of opponents, all of
24 which arguably are part of the statute.

25 Those instances the courts did not require

1 strict compliance. Most recently Pabey versus
2 Pastrick the court waived the statutory deadline
3 for the trial court. In Peterson v. Borst the
4 Supreme Court granted an extension of filing
5 deadlines and challenging deadlines on the
6 request of the local election board.

7 The only point being it's not unheard of to
8 look at the purpose of the statute and have
9 substantial compliance. I mean, I think what
10 you got to look at here is what is the purpose
11 of these statutes? The purpose of the statute
12 is to provide an orderly and timely manner for
13 people's names to get on the ballot. We're
14 within that process time; that can happen.

15 So the question then becomes: Knowing that
16 she was fully qualified short of the letter at
17 the time of her filing at the time of the
18 challenge and arguably here today, whether you
19 let a challenger dictate who the people get to
20 elect versus the electorate. And so with that,
21 I would say to you that in our opinion, this
22 challenge should be overruled and Ms. Ellsberger
23 should be allowed to proceed to have her name on
24 the ballot.

25 We did -- my client did file an additional

1 CAN-2 today, which she did not -- actually,
2 unfortunately, I was in a another hearing when I
3 came over, but it is one that reflects the
4 reality and did attach the letters from the
5 county chairs. I would actually ask the
6 Commission whether it's their pleasure to accept
7 an amended or not, even those I think it's
8 already been here.

9 CHAIRMAN WHEELER: Let me ask you that.
10 There is an amended CAN-2 that's been filed?

11 MR. BROOKS: Yes. It doesn't say -- it's a
12 CAN-2 that checks the third box and has the
13 county chair letters on it.

14 MS. ELLSPERMANN: Not the county chair
15 letters; they're already submitted.

16 MR. BROOKS: Oh, the letters are already
17 here.

18 CHAIRMAN WHEELER: Do we have that?

19 MR. KING: Mr. Chairman.

20 CHAIRMAN WHEELER: If you could address
21 that.

22 MR. KING: Mr. Chairman, I think Ms. Barnes
23 and I can speak to the document that was
24 presented. It is correct that the document was
25 file-stamped. It was file-stamped by a member

1 of my staff. Who did not first consult with me
2 before it was presented.

3 In order for a document to be filed with
4 the Election Division -- or for any action to be
5 performed by the Election Division, both
6 codirectors to agree to the action. And in this
7 particular situation, again through an error on
8 the part of a member of my staff, this document
9 was file-stamped.

10 But under 3-5-4-1.9 it's after the deadline
11 for presenting the declaration of candidacy, so
12 we're precluded affirmatively under that statute
13 from accepting it for filing notwithstanding the
14 stamp.

15 MR. BROOKS: I would apologize to the
16 Commission for that. I was running late in the
17 hearing this morning and it was my fault. I
18 think I miscommunicated with my client. I was
19 hoping that I would have had it here but I think
20 my communication wasn't very good. And then we
21 would have had it in the event that you just
22 simply wanted a document that related back, yet
23 was proper. But if that's not the case, then
24 that's fine.

25 MR. KING: Mr. Chairman, we do have the

1 original that was presented and file-stamped as
2 I described.

3 CHAIRMAN WHEELER: And where is that?

4 So as I understand it, this should not have
5 been accepted and file-stamped, based upon what
6 you said.

7 MR. KING: That's correct.

8 CHAIRMAN WHEELER: So to the extent the
9 document has a file stamp, that should be purged
10 from the document?

11 MR. KING: That's correct.

12 MS. STEELE RIORDAN: I'm going to move that
13 we physically do that.

14 VICE-CHAIRMAN LONG: I'll second.

15 CHAIRMAN WHEELER: Motion seconded. Any
16 further discussion?

17 I have no objection to that. I think both
18 Brad and Leslie believe that's the appropriate
19 method of handling this document.

20 COMMISSIONER DUMEZICH: I'm sorry, I didn't
21 hear the motion.

22 VICE-CHAIRMAN LONG: Motion was to strike
23 the file mark.

24 I believe that's what you were saying.

25 MS. STEELE RIORDAN: Yes.

1 CHAIRMAN WHEELER: I think the case from
2 the counsel was that it was inappropriately
3 stamped.

4 MR. KING: Yes.

5 CHAIRMAN WHEELER: I'll continue the
6 discussion on that.

7 Motion made and seconded. All in favor
8 signify by saying "aye."

9 THE COMMISSIONERS: Aye.

10 CHAIRMAN WHEELER: Those opposed, same
11 sign.

12 (No response.)

13 CHAIRMAN WHEELER: Now, Ms. Ellspermann,
14 let me ask you if you would -- I don't know how
15 we're going to purge. Can we just X it out?

16 VICE-CHAIRMAN LONG: Strike, it's clearly a
17 clerical mistake.

18 MR. KING: Write "stricken" on the document
19 itself?

20 CHAIRMAN WHEELER: If you could return that
21 document to Ms. Ellspermann.

22 Ms. Ellspermann, do you want to tender that
23 document along with the four county chair
24 statements at this time?

25 MS. ELLSPERMANN: Yes, I would like to do

1 that.

2 MR. BROOKS: Once again, I apologize for
3 screwing up your procedure a bit, but at this
4 point we would offer what we would consider an
5 amended CAN -- or whatever you want to call
6 it -- but we would often this again,
7 Mr. Chairman.

8 MR. LOHMAN: Are their multiple copies of
9 that that I could have?

10 MS. BARNES: We have an extra copy.

11 MR. BROOKS: I think I can tell you that --

12 MS. BARNES: I marked my own.

13 CHAIRMAN WHEELER: So as I understand it,
14 you're submitting an amended CAN-2 with the
15 letters, correct?

16 MR. BROOKS: Yes. And it's for the
17 purpose, if the Commission prefers, to have a
18 corrected box and a single document that would
19 be available.

20 CHAIRMAN WHEELER: First, you're making a
21 motion --

22 COMMISSIONER DUMEZICH: I'd like to make a
23 motion to accept the amended CAN-2.

24 MR. LOHMAN: Could I be heard?

25 CHAIRMAN WHEELER: There is a motion on the

1 floor.

2 Do I hear a second?

3 (No response.)

4 CHAIRMAN WHEELER: The chairman will second
5 for purposes of discussion.

6 Any discussion?

7 VICE-CHAIRMAN LONG: You're asking -- as I
8 understand, the motion is for us to accept a
9 filing that's 16 days late and retroactive, and
10 I don't think that's permitted under the law.

11 If somebody can show me any law or case
12 that says we have the discretion to waive filing
13 deadlines, then I might be willing to consider,
14 but I see no basis in which we would accept an
15 amended filing of a document that was filed
16 incorrectly to start with.

17 CHAIRMAN WHEELER: Any further discussion?

18 (No response.)

19 CHAIRMAN WHEELER: All those in favor of
20 the motion, signify by saying "aye."

21 COMMISSIONER DUMEZICH: Aye.

22 CHAIRMAN WHEELER: Aye.

23 Those opposed?

24 MS. STEELE RIORDAN: Nay.

25 VICE-CHAIRMAN LONG: Nay.

1 CHAIRMAN WHEELER: Motion fails.

2 Mr. Brooks, would you like submit that as
3 an exhibit?

4 MR. BROOKS: I guess I just want to clarify
5 that we believe -- our position is the first
6 filing with the addition of the testimony and
7 the letters constitute substantial compliance
8 with the statute. So I'm happy to have that
9 marked as an exhibit.

10 Again, the purpose is only to have a
11 document with accurately reflects what we
12 believe was substantially complied with.

13 CHAIRMAN WHEELER: That would be Exhibit C.
14 Anything further?

15 MR. BROOKS: No.

16 CHAIRMAN WHEELER: I'm going to close the
17 hearing and open up to the discussion of the
18 ruling.

19 MS. STEELE RIORDAN: Is there a motion?
20 I'm going to move that we sustain the challenge.

21 VICE-CHAIRMAN LONG: Second.

22 CHAIRMAN WHEELER: Motion's made and
23 seconded.

24 You want to go first, or you want me to go
25 first?

1 COMMISSIONER RIORDAN: Sure. I have one
2 question for Mr. Brooks.

3 Do you have an example of another -- I know
4 that you discussed how the statutes at play here
5 have not the been substantially interpreted by
6 the courts, and I think you're right.

7 My question is do you have and example of a
8 precedent of this Commission in the past where
9 we have allowed a candidate filing with the
10 qualities of this candidate filing to be
11 sustained?

12 MR. BROOKS: Actually, I don't. With all
13 due respect, don't really follow the
14 Commission's -- I don't have a lot of exposure.
15 I have sort of heard --

16 COMMISSIONER RIORDAN: Well, it sounds to
17 me like you don't care about our precedent.

18 MR. BROOKS: No, I'm saying --

19 COMMISSIONER RIORDAN: I'm trying to
20 gather --

21 MR. BROOKS: -- I don't read them.

22 COMMISSIONER RIORDAN: -- my brethren on
23 the Commission as to why this challenge should
24 be sustained. I'd like to give them examples of
25 when we have done this in the past.

1 MR. BROOKS: I don't have an example for
2 you.

3 COMMISSIONER RIORDAN: And I don't think
4 that we have, but I wanted to --

5 MR. BROOKS: I don't have an example, not
6 because I'm familiar with all the decisions and,
7 therefore, have an informed opinion on it that,
8 but I'm not aware of one with the possibility --
9 I will say that --

10 I mean, I don't know what happened in this
11 case, but I was under the impression that there
12 was a judge case name Wiley a few years ago.

13 COMMISSIONER RIORDAN: Right, and I do
14 remember that.

15 MR. BROOKS: But I'm not positive if that
16 the result was there was a technical violation
17 of one sort or another, but she was allowed and
18 voted by the Commission to remain on the ballot.
19 But -- I think so, but I would hate to say,
20 which would be an example, I think, of what you
21 were asking me. But that's the only one I know
22 of.

23 COMMISSIONER RIORDAN: My recollection of
24 that case is that the candidate in that instance
25 did what your client tried to do today -- or

1 seeks to do today -- and that is to amend her
2 filing. But the candidate in that instance did
3 so before the deadline for filing had expired.

4 VICE-CHAIRMAN LONG: That's correct.

5 MR. BROOKS: I was under the impression
6 that from case that there was a multitude of
7 technical concerns about that, including the
8 failure to file some other form with the
9 judiciary Commission --

10 VICE-CHAIRMAN LONG: Crux of the case
11 was --

12 MR. BROOKS: -- or something.

13 VICE-CHAIRMAN LONG: The crux of case was
14 the amendment to the CAN-2 was made before the
15 filing deadline and typically county chairs --
16 typically verification of party affiliation was
17 attached to it as a part of the filing of the
18 amended form that was before the deadline with
19 the and the Commission.

20 It is my recollection that we voted to
21 accept that, because it was all done during the
22 appropriate time frame.

23 \ MR. BROOKS: And I would just say that I
24 would agree that if that was the case, then
25 that's a distinction. But my recollection from

1 reading a couple briefs was there were other
2 technical violations which were either not
3 considered because of substantial compliance,
4 but I could be wrong, so.

5 COMMISSIONER RIORDAN: I think this
6 challenge should be sustained. I think that
7 it's distinct from other cases in which we have
8 shown leniency with respect to deadlines because
9 there is a difference between a late waiver and
10 making a representation on a declaration of
11 candidacy that is not true.

12 You know, I've learn to the candidate's
13 testimony that that was -- that she simply
14 forgot that she voted in the democratic primary.

15 And with all due respect, ma'am, I find
16 that not particularly credible.

17 In one of biggest and most hotly contests
18 political primaries in the State of Indiana's
19 history, to not recall that you voted in the
20 other party's primary election is very difficult
21 for me to swallow.

22 I, too, have been a member of a political
23 party my whole life, and on the one occasion
24 when I voted for a republican, I will never
25 forget it as long as I live.

1 That being said, I think the statute is
2 extremely clear that a candidate who claims
3 party affiliation -- given that you did claim
4 party affiliation -- but you had actually voted
5 in the other political party's primary, you must
6 attach the declaration, and you must attach the
7 proper materials to your declaration, and you
8 must do so at the time of filing.

9 I think that this is a clear case of not
10 complying with the statute in a timely basis. I
11 don't think we have any precedent or authority
12 for accepting a filing at this late date, and I
13 think the challenge needs to be sustained.

14 VICE-CHAIRMAN LONG: I'll just give you a
15 precedent today. Allan Katz filed against -- I
16 can't pronounce his name -- Bachan, B-A-C-H-A-N,
17 District 19, who he acknowledged that -- sent us
18 a letter said he wasn't challenging it.

19 He did the same thing you did, except he
20 didn't go out and get the certification later,
21 and filed it after the deadline. He said he
22 was -- he said he was a republican and he
23 apparently decided to come over and vote in the
24 democratic primary and we welcome to people to
25 become democrats. That's not the issue.

1 The issue is that the law requires certain
2 things to occur before filings -- you know, and
3 I don't think that we have in this Commission
4 the authority to accept and disregard the
5 statutes or disregard the statutes that we pick
6 and choose.

7 There is a statute that says, an
8 attorney -- we're all attorneys, we're used --
9 we live by our rules. If you file a pleading by
10 certified mail, it's filed as of the date you
11 mail it. Not here, not here.

12 I think it's wrong. I think people should
13 be able to, hard as it is to get to our end of
14 the state from up here, I think you should be
15 able to put things in certified mail and get the
16 benefit of that filing date. And I've said that
17 many times on many motions.

18 But our code says we can't do that because
19 it has to be here. So I believe that -- and I
20 vote to sustain the law, and that's because, you
21 know, even though I disagree with it, I think
22 it's wrong. It's foreign to me from the
23 profession that I live in, but we -- this law is
24 here for a reason, and -- but the fact this case
25 may not fit squarely on the reason, the law is

1 the law.

2 Now, there was an article quoted in the
3 Evansville Courier that Ms. Ellspermann said she
4 did that to participate in the party's
5 still-competitive presidential contest, and that
6 was -- that was a momentous primary. It was an
7 organizational politics, and I thought it was
8 one of the more enjoyable primaries I've ever
9 been involved in.

10 And there were a lot of republicans that
11 came in to our primary and voted because the
12 republicans didn't have their primary.
13 Comparatively, it was boring. And -- not that
14 all of them were, but the national level. And
15 it was historical, and we had record number of
16 people who voted, and that was a good thing for
17 our state.

18 But the fact -- let me see the other one.

19 COMMISSIONER DUMEZICH: They were so
20 excited in Lake County, many people voted
21 several times.

22 VICE-CHAIRMAN LONG: They intended to vote,
23 each one of them. But then I read a report from
24 a news article that this isn't the only place
25 this happened in the state. And it happened the

1 republican party in wholesale form in Tippecanoe
2 county.

3 The county chairman up there is quoted as
4 saying that he called down here to the state
5 Election Board and they told him just to leave
6 it blank. That's what they were telling their
7 candidates up there, and he's -- something I
8 think we need to look into it.

9 The Chairman Hicks up there was quoted as
10 saying he got the advice from someone in the
11 Election Division, I guess, the Election
12 Board -- he didn't get it from me -- that that
13 box, when they said they voted -- and there were
14 six or eight candidates up there that did that,
15 he challenged two of those at the county
16 election level and the other he didn't.

17 I don't know -- there are so many good
18 faith people that come before us on violations
19 of the campaign finance, on campaign, the large
20 contribution violations. We never did collect a
21 fine because of a political dispute with these
22 commissioners from a candidate in Vigo County
23 that had dumped 60,000, I believe it was,
24 dollars in his campaign the last week and never
25 filed one report. And he was fined, and we

1 never proceeded because of the political
2 bickering that occurred at a time.

3 And we don't have that here, and in our
4 district. We're not going to -- we can deal
5 with each other. But the fact is, we don't have
6 alot of -- Our mandate is to enforce the
7 election laws of the State of Indiana. Period.
8 Not to -- for the purpose of trying to forgive
9 good faith mistakes or good faith errors.

10 If we had some middle ground, and we do
11 deviate under the authority of the law from our
12 penalty and late files and campaign finance when
13 people are -- they've had one violation or if
14 they've had ten. They're treated differently,
15 and it they should be.

16 But in these cases and all the people --
17 this Mr. Bachan, he's not on the ballot because
18 he did the same thing you did.

19 COMMISSIONER DUMEZICH: He didn't show up.

20 VICE-CHAIRMAN LONG: And says he's not
21 going to contest it because he's read the law
22 and agreed. He could have easily come down here
23 and said, oh, I forgot. And I don't accept that
24 either.

25 I mean, that was too big. That was just

1 too big. I voted for Richard Nixon, and I've
2 never forgotten that. And I probably would've
3 done it again. I'm not ashamed of it.

4 But I think if you're a member of a party
5 and you vote in another party primary, you don't
6 forget that. I just -- there were other excuses
7 that I would be more acceptable to. I think,
8 ma'am, in all candor to you, that you made a
9 mistake.

10 And I agree with them. I don't think you
11 set out to commit a felony. It is a felony
12 technically, if you do it intentionally. You
13 didn't set out to do a felony. And I wouldn't
14 vote to send this to the prosecutor either. But
15 that doesn't mean because it's not made a felony
16 that you've complied with the law, and I don't
17 think you have. And I think the law says this
18 is a requirement to be on the ballot and you
19 have not met that.

20 Thank you.

21 CHAIRMAN WHEELER: With respect to mine, I
22 guess I'm take issue with the vice-chair
23 slightly in comparing Ms. Ellspermann's
24 situation with the prior situation, Mr. Bachan.

25 The functional difference that I see is the

1 fact that Mr. Bachan's case, there was a
2 certification from the Lake County Republican
3 chairwoman Kim Krull that she would not have
4 verify or certificate that Mr. Bachan was,
5 indeed, a member in good standing with the
6 republican party.

7 As opposed to the chairman of Dubois
8 County, who has been here today and testified,
9 as well as the other three. And the reason that
10 is significant for me is I believe the purpose
11 of this statute -- I find it somewhat ironic
12 that the challenger is democratic, that my two
13 democratic brethren here object to this, when
14 the purpose of the statute is to preserve the
15 party integrity on -- in this particular case of
16 the republican primary ballot.

17 The purpose of the statute when enacted was
18 to ensure that the county chairs of each party
19 controlled who ran in their primaries instead of
20 stealth candidates who weren't being injected
21 into their primary situation who had, in fact,
22 been a member of a different party. And I think
23 that's significant for me, a significant factor
24 in interpreting this particular statute.

25 In that regard, I would also note that at

1 least two members of this Commission, myself and
2 Mr. Dumezich had a similar situation with a
3 provision last year. I don't believe
4 Commissioner Riordan sat in on this particular
5 one involving Kimberly Brown, Cause Number
6 2008-177.

7 Ms. Brown had checked and marked the wrong
8 precinct box, which is also a mandatory
9 provision on her form. That particular decision
10 split 2/2 because I believe -- and Mr. Dumezich
11 will speak for himself -- but we took the
12 position -- this case was a democratic
13 candidate, a democratic judicial candidate.

14 We took the position that she had made a
15 good-faith effort and had made a mistake. The
16 precincts had changed, and she had the wrong
17 precinct and she wanted to amend it, and we
18 voted in favor of maintaining her on the ballot
19 for two reasons:

20 One, we believed that she had substantially
21 complied with the statute, and we believed that
22 was an appropriate interpretation of the
23 statute, number one. And number two, I think
24 that frankly from our position the desire -- I
25 guess I'll speak for myself -- a desire within

1 these election laws to come as close as we can
2 to letting the people decide these disputes,
3 election disputes.

4 And so from my standpoint, I view the
5 statute as being a statute designed to protect
6 the integrity of the primary balloting process
7 through the county chairmanship's position,
8 which is to say, requiring, in the event they do
9 vote in a different party, requiring the county
10 chairman's approval or certification that that
11 individual should be running in that primary as
12 a member of that party.

13 In this case, you brought us not only your
14 chairman live here to testify, but tendered, in
15 addition, which were unnecessary, the statements
16 of the three other county chairs within that
17 state district.

18 And as a consequence, I believe that I feel
19 there has been substantial compliance with the
20 purpose of statute. I think it's very clear
21 that you are, indeed, a republican and you
22 received those certifications. And so I'm
23 personally going to vote against the challenge.

24 COMMISSIONER DUMEZICH: I would vote
25 against the challenge as well. My background is

1 one of federal income tax. And as we all know,
2 we all sign our federal incomes tax returns
3 under penalty of perjury. Having said that, many
4 people make mistakes. These are honest
5 mistakes. I happen to believe in this instance
6 this is an honest mistake.

7 Further, I think that in submitting the
8 amended return that she did here, the amended
9 CAN-1, that she showed that she could have at
10 the time obtained the signatures of these
11 people, showing that she was, in fact, able to
12 be a part of republican party.

13 With those things in mind, I think that the
14 weight of the evidence before me indicates that
15 it was an honest mistake and this Commission
16 should accept the evidence here today to put her
17 on the ballot.

18 I would also note that she is in a
19 contested primary, and the republican voters in
20 House District 74, I believe, will have the
21 opportunity to either forward her candidacy or
22 not. In fact, I'd go back to the fact that
23 giving access to the -- giving access to the
24 ballot, I think, is critical. I think it's
25 important that we do that.

1 And I think in 2008 the judge candidate
2 that had made a technical footfault -- much like
3 the technical footfault you had made -- went on
4 to win in the general election. And I think
5 that ultimately, this body must try to give the
6 voters the ability to have the people they want
7 represent them.

8 So I would vote against the challenge.

9 CHAIRMAN WHEELER: Motion made and
10 seconded. Any further discussion?

11 (No response.)

12 CHAIRMAN WHEELER: Hearing none, the motion
13 has the been made. Is --

14 Can someone read back the motion?

15 COMMISSIONER RIORDAN: To sustain the
16 challenge.

17 CHAIRMAN WHEELER: To sustain the
18 challenge.

19 All in favor signify by saying "aye."

20 VICE-CHAIRMAN LONG: Aye.

21 COMMISSIONER RIORDAN: Aye.

22 CHAIRMAN WHEELER: All opposed signify by
23 saying "nay."

24 COMMISSIONER DUMEZICH: Nay.

25 CHAIRMAN WHEELER: Nay.

1 The motion fails.

2 COMMISSIONER DUMEZICH: I'd like to make a
3 motion to deny the challenge.

4 CHAIRMAN WHEELER: The chairman will second
5 the motion.

6 Any discussion?

7 (No response.)

8 CHAIRMAN WHEELER: All in favor of the
9 motion, signify by saying "aye."

10 COMMISSIONER DUMEZICH: Aye.

11 CHAIRMAN WHEELER: Aye.

12 Those opposed, same sign.

13 VICE-CHAIRMAN LONG: Nay.

14 COMMISSIONER RIORDAN: Nay.

15 CHAIRMAN WHEELER: All right. In that
16 case, as I understand it, let me turn to legal
17 counsel on either side. If the Commission
18 members split 2/2, what's the affect on the
19 challenge?

20 MR. SIMMONS: Mr. Chairman, Member of
21 Commission, in that case, there is no official
22 action according to the state statute. It takes
23 the affirmative vote of at least three members
24 of the Commission to sustain either motion made.
25 And in that case, since both failed for lack of

1 three votes, the candidate would, in this case,
2 remain on the ballot.

3 CHAIRMAN WHEELER: And perhaps we will find
4 out how this statute gets interpreted.

5 VICE-CHAIRMAN LONG: Maybe.

6 CHAIRMAN WHEELER: I'm going to take a
7 ten-minute break, and we'll come back and start
8 with the challenge on Kristopher Owens.

9 (A recess was taken.)

10 CHAIRMAN WHEELER: All right. Call the
11 Commission meeting back to order.

12 The next challenge on the Commission's list
13 is in re: Kristopher Owens, Democratic Party
14 candidate for House District 97. The challenger
15 is Mary Jane Mahern.

16 Mary Jane Mahern?

17 Do we have Kristopher Owens?

18 And you both were sworn earlier.

19 MR. OWENS: Yes.

20 CHAIRMAN WHEELER: Share.

21 COMMISSIONER RIORDAN: I want to make a
22 complete disclosure that I am a registered voter
23 in House District 97. I am a friend of Mary Ann
24 Sullivan and I have also contributed money to
25 her campaign. Not yet in this election cycle

1 but in the last one. So if anybody objects -- I
2 don't think I'm going to have any problem being
3 impartial, but if anybody wants me disqualified,
4 I'd be willing to do that.

5 CHAIRMAN WHEELER: Mr. Owens, are you
6 comfortable with that.

7 MR. OWENS: That's fine.

8 CHAIRMAN WHEELER: Ms. Mahern?

9 VICE-CHAIRMAN LONG: I know Mary. We're
10 not the friends, but we've attended some common
11 gatherings. And I know her husband and son, but
12 we're -- I'm not offering to disqualify, I'm
13 just -- if somebody wants to object to, I'm
14 making that disclosure that we've known each
15 other casually for some significant period of
16 time.

17 CHAIRMAN WHEELER: Ms. Mahern, please
18 proceed. We do have the challenge and the
19 documentation regarding the voter ID.

20 MS. MAHERN: On February 4th Kristopher
21 Owens signed his voter registration form. It
22 could have been dated before he filed it. A
23 document included shows the Marion County
24 Election Board process registration form on
25 Friday, February 12, 2010. It would have been

1 processed the same day as it was received at the
2 Marion County Election Board.

3 On that board, it is noted that it was
4 processed through the BMV. Once a new
5 registration is submitted, a voter has seven
6 days for their status to go active. Monday,
7 February 15th was a holiday, so the business
8 days were the 16th through the 19th and the 22nd
9 and 23rd. Reference Indiana Code 3-7-33-5(f).

10 The paperwork included shows --

11 VICE-CHAIRMAN LONG: Give me that again, 3
12 what?

13 MS. MAHERN: 3-7-33-5.

14 VICE-CHAIRMAN LONG: Thank you. I'm sorry
15 to interrupt.

16 MS. MAHERN: The paperwork included shows
17 Mr. Owens became an active voter in the district
18 on Wednesday, February 24th, five calendar days
19 after the last date of the filing declaration of
20 candidacy for office. Reference Indiana Code
21 3-7-33-5(h).

22 If a voter had a pending status, they would
23 be forced to pass a provisional ballot.

24 CHAIRMAN WHEELER: Is that it?

25 MS. MAHERN: Yes.

1 CHAIRMAN WHEELER: Questions for
2 Ms. Mahern?

3 VICE-CHAIRMAN LONG: Straight and to the
4 point, succinct.

5 CHAIRMAN WHEELER: That's what we're
6 looking for.

7 VICE-CHAIRMAN LONG: Particularly at this
8 hour of the day.

9 CHAIRMAN WHEELER: Mr. Owens?

10 MR. OWENS: Thank you, Members of the
11 Commission. My name is Kristopher Owens. I
12 am -- for the past six years I've been an
13 educator. I'm currently serving the students of
14 Wayne Township. I'm also a candidate for the
15 democratic party for the Indiana House of
16 Representatives, District 97.

17 And Code 3-8-1-1 states that --

18 VICE-CHAIRMAN LONG: 3-8-1-1.

19 MR. OWENS: That's right.

20 -- a person is not qualified to run for a
21 state office, legislative office, local office,
22 or a school board office unless the person's
23 registered to vote in the election district the
24 person seeks to represent not later than the
25 deadline for filing the declaration or petition

1 for candidacy or certificate of nomination.

2 I received the voter registration
3 acknowledgment notice not later than the
4 deadline for filing.

5 CHAIRMAN WHEELER: Let me go back and back
6 you up.

7 MR. OWENS: Sure.

8 CHAIRMAN WHEELER: The paperwork I have
9 shows you actually registered on February 4,
10 2010.

11 MR. OWENS: That is the date that I signed
12 my card. It was taken to, actually, this
13 building on the 5th and not submitted to the
14 Marion County Election Board until the 12th in
15 person by myself.

16 CHAIRMAN WHEELER: So who did you file with
17 here?

18 MR. OWENS: I took it to E-204. And after
19 a week -- it was taken there on the 5th. I
20 called, and after a week of hearing nothing at
21 the Marion County Election Board, I came and got
22 the form myself from E-204 and took it to the
23 Marion County Election Board and filed it on the
24 12th, which was one week after it was initially
25 brought here.

1 CHAIRMAN WHEELER: Go ahead. I'm sorry.

2 MR. OWENS: I received this voter
3 registration acknowledgment notice not later
4 than the deadline for filing, and it tells me
5 that "This office received your voter
6 registration application or has processed an
7 update to your record, and you appear to be
8 eligible to vote. You will be registered to
9 vote at this address when you receive this
10 notice."

11 So when I received this notice I --

12 CHAIRMAN WHEELER: When did you receive a
13 that notice?

14 MR. OWENS: I received the notice, I
15 believe, the 17th or 18th of February.

16 COMMISSIONER RIORDAN: Is it postmarked?

17 MR. OWENS: It is not postmarked. I've
18 spoken with no less than three people at the
19 Board of Voters Registration of Marion County.
20 They faxed a form that indicated when it was
21 sent. And I also spoke with someone today
22 regarding --

23 CHAIRMAN WHEELER: Could I see both those?

24 MR. OWENS: Sure.

25 CHAIRMAN WHEELER: Do you have copies?

1 MR. OWENS: I do not have copies of this.

2 CHAIRMAN WHEELER: Already somebody make
3 sure I don't keep the originals.

4 So you received the document entitled Voter
5 Registration Acknowledgment Notice. Your
6 testimony is you received this either on the
7 17th or the 18th.

8 MR. OWENS: It was one of those two days.

9 CHAIRMAN WHEELER: And on here it says,
10 "Receipt of registration processed on
11 February 12th."

12 MR. OWENS: That's right. That's when I
13 submitted it in person.

14 CHAIRMAN WHEELER: And then you went to the
15 Marion County Board of Voter Registration, looks
16 like they e-mailed or faxed you something on
17 March 4.

18 MR. OWENS: Yesterday, yes, after I
19 received the challenge.

20 CHAIRMAN WHEELER: Which shows Voter
21 Registration Acknowledgment dated 2-16 or 2-18?

22 MR. OWENS: It says above "date sent" 2-16.

23 CHAIRMAN WHEELER: Date sent 2-16, so that
24 would comport with your testimony you received
25 it on the 17th or the 18th.

1 And what is the date -- what is the date it
2 had to be -- it has to be by the declaration of
3 candidacy?

4 MR. KING: Mr. Chairman, the deadline for
5 filing a primary election declaration of
6 candidacy is noon February 19th, 2010.

7 CHAIRMAN WHEELER: And as I understand it,
8 that point in time of the statute he needed to
9 be an active voter, correct?

10 MR. KING: That is correct, in my opinion.

11 CHAIRMAN WHEELER: Now, Ms. Mahern, it
12 looks to me like in this documentation he was an
13 active voter on 2-16, according to -- have you
14 seen these records?

15 VICE-CHAIRMAN LONG: I'm looking at the
16 voter registration, which is part of the
17 exhibit, and it shows that the only actions
18 that -- he says, he became active on February 4,
19 2010.

20 CHAIRMAN WHEELER: Is there a delay? This
21 shows -- from the same statewide voter
22 registration system, it shows his voter
23 registration acknowledgment is 2-16,
24 February 16th, 2010.

25 I mean, I suspect what happens is there a

1 processing delay between February 16th and
2 February 26th.

3 COMMISSIONER RIORDAN: What was the date on
4 which you declared your candidacy?

5 MR. OWENS: It was the 17th.

6 COMMISSIONER RIORDAN: Because I'm looking
7 at certification which says you signed it on
8 2-10-10 at the bottom of sheet.

9 CHAIRMAN WHEELER: Which page are you on?

10 COMMISSIONER RIORDAN: I'm on the CAN-2.

11 So you filed it on -- I can see the file
12 stamp on the 17th, but you signed it on 2-10-10.

13 MR. OWENS: That was the date that I had it
14 notarized.

15 COMMISSIONER RIORDAN: Okay. And so is
16 that your signature there, 2-10-10?

17 MR. OWENS: Yes.

18 COMMISSIONER RIORDAN: And you -- on that
19 date you basically certified that you were a
20 registered voter of precinct -- whatever --
21 which is not complete on the top of CAN-2
22 either, right? I mean, what I am looking at is
23 blank.

24 MR. OWENS: I'm sorry, could you repeat the
25 question?

1 COMMISSIONER RIORDAN: I'm looking at your
2 CAN-2 where it reads under General Information:
3 I, Kristopher Owens, certify, one: I am a
4 registered voter of precinct, blank, in the
5 township, Center, Indianapolis.

6 And then you certified at the bottom that
7 all of that was true on that date, right?

8 MR. OWENS: Could you -- I see. That's
9 right, I did sign it on the 10th of February.

10 COMMISSIONER RIORDAN: And tell us again
11 when did your registration become active?

12 MR. OWENS: According to the card, when I
13 received the Acknowledgment Notice in the mail,
14 which was I believe the 17th.

15 CHAIRMAN WHEELER: But you registered on
16 the 12th as I -- you said you brought it over
17 here, first, on what day?

18 MR. OWENS: That was on February 5th. My
19 wife actually brought it over, and --

20 CHAIRMAN WHEELER: And why did you bring it
21 over here versus filing it with the Marion
22 County Election Board?

23 MR. OWENS: When I went online, I saw E-204
24 as the address to submit the form to, and I
25 understand that they do collect the forms and

1 forward them on to the County, so I didn't see a
2 reason to not.

3 COMMISSIONER RIORDAN: You filed your --
4 your wife brought your CAN-2 here on the 5th?

5 MR. OWENS: No, my voter registration.

6 COMMISSIONER RIORDAN: Voter registration?

7 MR. OWENS: My address update.

8 COMMISSIONER RIORDAN: Change of address?

9 MR. OWENS: Right.

10 VICE-CHAIRMAN LONG: I've got a request.
11 We've got some tracking documents in the
12 notebook that we got, and I am trying to figure
13 out, starting with the first one, is a tracking
14 detailed on J225 798 6497, which appears to be a
15 UPS shipment from Dale Simmons to Kristopher
16 Owens, dated 2-29-10.

17 Then it follows what was sent to Mr. Owens
18 with that shipment, and also we've got a
19 tracking shipment of -- it's a different
20 document tracking number from UPS delivered to
21 the front door on 2-26, and it was a package.
22 And I'm not for sure who that was from or
23 what -- unless I'm missing something.

24 Can anybody explain what those are? Dale?

25 MR. SIMMONS: Mr. Chairman, Members of the

1 Commission, when we get a challenge, we are
2 obligated to provide the best possible notice.

3 CHAIRMAN WHEELER: So this is just
4 documentation relating to the challenge?

5 MR. SIMMONS: We prepare UPS overnight, we
6 get them out to the challenger, and the
7 challenge candidate both to give them notice of
8 the date, time.

9 VICE-CHAIRMAN LONG: Okay. So they don't
10 have anything to do with the filing. As I'm
11 sitting here --

12 CHAIRMAN WHEELER: Let me follow up with a
13 question that -- state with that one, because I
14 want to -- what is that?

15 MR. SIMMONS: It's a registration form.

16 CHAIRMAN WHEELER: That is Mr. Owens'
17 registration? It's dated 2-4 -- it looks like a
18 voter registration. Where did that come from?
19 It doesn't look like it was provided by either
20 party. Is that from here in the Division?

21 MR. KING: That was provided from the
22 Commission the from the challenger.

23 CHAIRMAN WHEELER: Did you provide that
24 document? What document.

25 MS. MAHERN: Which document?

1 CHAIRMAN WHEELER: I have a -- it says,
2 "Voter Document Detail," and it looks like --

3 COMMISSIONER DUMEZICH: Page 3 of 4.

4 CHAIRMAN WHEELER: -- voter registration
5 form.

6 VICE-CHAIRMAN LONG: Application.

7 CHAIRMAN WHEELER: The problem is we get
8 materials from the challenger, and we also get
9 supplemented by staff.

10 VICE-CHAIRMAN LONG: And they're not
11 stapled together.

12 CHAIRMAN WHEELER: Yeah, so we don't
13 know -- there is a voter registration card for
14 Kristopher Owens, looks likes a signature on
15 February 4, 2010.

16 MS. MAHERN: I am not sure.

17 CHAIRMAN WHEELER: Is that from you or not?

18 MS. MAHERN: I'm not sure.

19 CHAIRMAN WHEELER: Do you want to have a
20 look?

21 MS. MAHERN: I've got one.

22 CHAIRMAN WHEELER: So you have one, you
23 just don't know if you submitted it?

24 MS. MAHERN: Right.

25 CHAIRMAN WHEELER: Mr. Owens, have you seen

1 this?

2 MR. OWENS: I have a copy.

3 MS. MAHERN: The one that's dated -- this
4 side, yeah.

5 CHAIRMAN WHEELER: So we're all in
6 agreement, this is your voter registration form.

7 MR. OWENS: That's right.

8 CHAIRMAN WHEELER: This is a document you
9 took to E-204, or your wife did, on February
10 5th, I think you said?

11 MR. OWENS: Right.

12 CHAIRMAN WHEELER: And you then took the
13 same document -- or you come over, got the
14 documents here, took it over it Marion County on
15 February --

16 MR. OWENS: On February 12th.

17 CHAIRMAN WHEELER: And then the document
18 you got from -- you got the voter registration
19 acknowledgment notice that you've just given me
20 from Marion County Voters Registration states
21 processed 2-12-2010, correct?

22 MR. OWENS: Yes.

23 CHAIRMAN WHEELER: And then you testified
24 you got this either on the 17th or the 18th?

25 MR. OWENS: Yes.

1 CHAIRMAN WHEELER: And it says on there,
2 "You'll be registered to vote at this address
3 when you receive this notice."

4 So it's your understanding you were
5 registered to vote when you got this either on
6 the 17th or 18th?

7 MR. OWENS: That's right.

8 CHAIRMAN WHEELER: And that would have been
9 before the deadline, correct?

10 MR. OWENS: Yes.

11 CHAIRMAN WHEELER: Now, the question I have
12 goes back to something that Commissioner Riordan
13 was asking.

14 Sarah, I'm not sure if you were asking
15 whether --

16 Because you had filed your voter
17 registration card over here at E-204 at the time
18 you filed -- no, at the time you signed your
19 declaration of candidacy, but you did not file
20 your declaration of candidacy until after you
21 got in document; is that correct?

22 MR. OWENS: No. I filed -- I'm sorry. I
23 signed on the 10th, which is when I had it
24 notarized. And then I filed here on
25 February 17th.

1 CHAIRMAN WHEELER: Looks like 4:14 p.m.?

2 MR. OWENS: That's right.

3 CHAIRMAN WHEELER: My question is, did you
4 have this in hand when you filed this, or do you
5 know?

6 MR. OWENS: I did not.

7 CHAIRMAN WHEELER: You did not. This came
8 after this (indicating)?

9 MR. OWENS: That's right. I left work and
10 came straight here and filed it, which is why
11 it's 4:14 in the afternoon.

12 CHAIRMAN WHEELER: Is that when you picked
13 up your Voter Registration? You had already
14 done that --

15 MR. OWENS: I had done that.

16 CHAIRMAN WHEELER: -- five days earlier.

17 MR. OWENS: Right.

18 CHAIRMAN WHEELER: But you just hadn't
19 received this back?

20 MR. OWENS: Right.

21 CHAIRMAN WHEELER: Did you believe you were
22 registered to vote at that time, when you filed
23 this declaration of candidacy on February 17?

24 MR. OWENS: Yes, yes.

25 CHAIRMAN WHEELER: Because you had filed

1 the paperwork?

2 MR. OWENS: That's right. I assumed that
3 there would be no problem. It's also not a
4 requirement that I have that in hand. It's just
5 required that I be registered by the deadline,
6 which is February 19th.

7 CHAIRMAN WHEELER: And you did have this
8 back by then?

9 MR. OWENS: That's right.

10 VICE-CHAIRMAN LONG: I still am hung up on
11 the fact that he was pending until the 24th of
12 February and didn't become a registered voter
13 until February the 24th. And the statute says
14 that you have to be registered voter no later
15 than the deadline for filing declaration.

16 CHAIRMAN WHEELER: But let me ask this
17 question.

18 COMMISSIONER DUMEZICH: Wait a second.
19 That's okay.

20 Does the statute deal with how long we have
21 before -- if it's currently pending to active, I
22 mean, would these things sit for ten days like
23 this, or is there --

24 CHAIRMAN WHEELER: Do we know some process?

25 COMMISSIONER DUMEZICH: What's the guidance

1 on that?

2 MR. KING: Mr. Chairman, Members of
3 Commission, the provision that addresses that is
4 Indiana Code 3-7-33-5, and it's subsection (f).

5 It says, in part: During the seven days
6 following the mailing of the notice to the
7 voter, under this section the voter registration
8 office shall indicate in the statewide voter
9 registration system that the application is
10 pending.

11 Subsection (f) goes on to say: If the
12 notice is not returned by the postal service and
13 received at the county voter registration
14 office, or is received by the applicant and
15 presented in person by the applicant the county
16 voter registration office, at the expiration of
17 the seven-day period, under subsection (c), the
18 county voter registration office shall indicate
19 in the computerized list that the applicant is a
20 registered voter.

21 CHAIRMAN WHEELER: So it should have
22 changed from pending to active on February 19
23 not February 24th.

24 COMMISSIONER DUMEZICH: Which is the cutoff
25 date.

1 CHAIRMAN WHEELER: Well, noon.

2 MR. KING: Yes, it should have changed
3 automatically seven days afterwards.

4 MS. MAHERN: Business days.

5 MR. KING: No, it does not say business
6 days it says seven days under Indiana law.
7 Whether it's a business day or not is
8 irrelevant.

9 COMMISSIONER DUMEZICH: Was there a holiday
10 in that period?

11 MS. MAHERN: Yes.

12 MR. KING: Well, there was -- not a
13 state/federal holiday.

14 COMMISSIONER DUMEZICH: Refresh my
15 recollection if it falls on the seventh day,
16 then it's extended an additional, but if there's
17 a holiday during the course of that, does that
18 change our number counting on the days?

19 MR. KING: Mr. Chairman, Members of the
20 Commission, no, it does not. It does not change
21 the calculation. The only thing that's affected
22 is if that deadline fall on a state-observed
23 holiday.

24 COMMISSIONER DUMEZICH: So would I be
25 correct in saying that the interpretation of the

1 statute would be that he should have had it an
2 active voter registration as of February 19th,
3 based on the statute, as you understand it?

4 MR. KING: Yes. So assuming the pending
5 date of February 12th, there should be an
6 automatic activation status, barring one of
7 these intervening events on February the 19th.

8 COMMISSIONER DUMEZICH: I just wanted to
9 understand the facts. Thank you.

10 CHAIRMAN WHEELER: Any other questions?

11 VICE-CHAIRMAN LONG: But if he --
12 everything, as I understand the evidence on the
13 dates, the significance -- this one's different,
14 the one that was presented here, and it says
15 statewide voter registration system.

16 CHAIRMAN WHEELER: I think it's a
17 different --

18 VICE-CHAIRMAN LONG: But that is different.

19 CHAIRMAN WHEELER: That's under the
20 correspondence status.

21 VICE-CHAIRMAN LONG: Look at the status
22 pending. First thing that says, February the
23 12th --

24 CHAIRMAN WHEELER: Right.

25 VICE-CHAIRMAN LONG: -- was pending, and

1 I'm presuming that's when they got it and didn't
2 process it until 24th.

3 But this one says that it was an
4 acknowledgment, and now what acknowledgment
5 means --

6 CHAIRMAN WHEELER: That's your piece of
7 paper. This.

8 COMMISSIONER RIORDAN: The card with the
9 date on it.

10 CHAIRMAN WHEELER: This is just a list of
11 correspondence. So they sent him this voter
12 registration acknowledgment notice.

13 VICE-CHAIRMAN LONG: On the 16th.

14 CHAIRMAN WHEELER: 16th and processed on
15 the 12th?

16 VICE-CHAIRMAN LONG: Then according to what
17 Brad just read, then the seven days would have
18 started on the 16th and not the 12th.

19 CHAIRMAN WHEELER: No, the seven days
20 starts on the 12th.

21 VICE-CHAIRMAN LONG: During the seven days
22 following the mailing of the notice. That's
23 what --

24 CHAIRMAN WHEELER: So that's why they
25 switched. That's -- explains that.

1 VICE-CHAIRMAN LONG: So seven days, the
2 seven days started on the 16th, not the 12th.

3 CHAIRMAN WHEELER: That would explain why
4 they did that.

5 VICE-CHAIRMAN LONG: That's why -- and they
6 followed the law and then gave the seven days
7 and added it in and made him active on the 24th,
8 which the 19th.

9 CHAIRMAN WHEELER: Brad, what's the statute
10 again?

11 VICE-CHAIRMAN LONG: 37335.

12 MR. KING: Yes, Mr. Chairman, Member of the
13 Commission subsection (b). It says the county
14 voter registration office shall send the
15 notice -- which is the postcard that you have,
16 presented to you -- to each person from whom the
17 county voter registration office received a
18 voter registration application.

19 CHAIRMAN WHEELER: So just the time frame,
20 as I understand it, on February 12th, you went
21 to the county voter registration board with your
22 registration?

23 MR. OWENS: That's right.

24 CHAIRMAN WHEELER: So then they were
25 required to then send a notice back to you.

1 VICE-CHAIRMAN LONG: Which they did.

2 CHAIRMAN WHEELER: The provision Brad is
3 talking about, which they mailed out on
4 February 16, which you received either on the
5 17th or the 18th.

6 MR. OWENS: That's right.

7 VICE-CHAIRMAN LONG: Once you get down to
8 (f), and during the seven days filing, county
9 shall indicate that it is pending. And if the
10 notice is not returned by the post office
11 following the voter registration office, then --

12 CHAIRMAN WHEELER: But the fact --

13 VICE-CHAIRMAN LONG: Then it says the
14 expiration -- the seven-day period under
15 subsection shall indicate the computerized list,
16 the applicant is a registered voter.

17 CHAIRMAN WHEELER: It says it shall show it
18 as pending; however, this document --

19 VICE-CHAIRMAN LONG: What's the statute
20 that says when you're registered?

21 CHAIRMAN WHEELER: This document says
22 you're registered to vote when you receive this
23 notice.

24 VICE-CHAIRMAN LONG: What's the statute
25 say --

1 CHAIRMAN WHEELER: Brad?

2 VICE-CHAIRMAN LONG: -- when you were
3 officially registered.

4 MR. KING: Mr. Chairman, Members of the
5 Commission, the statute indicates that there are
6 two points at which one can become registered
7 under subsection (f). One is automatically
8 seven days following the mailing of the notice
9 if --

10 CHAIRMAN WHEELER: It doesn't come back.

11 MR. KING: -- the notice is not returned.
12 Right. That period can be shortened if the
13 person receives it and then presents it in
14 person to the county voter registration office,
15 which I don't understand to be alleged in this
16 case.

17 CHAIRMAN WHEELER: Right. You didn't take
18 this back down?

19 MR. OWENS: No.

20 COMMISSIONER RIORDAN: Or attempts to
21 exercise the right to vote, which wouldn't
22 happen in any case. So the seven days that the
23 voter registration office has, by statute, to
24 get this done and get it out the door.

25 And if it comes back to them, the person

1 doesn't really live there. If it doesn't come
2 back to them, the person has it. The seven days
3 is a little insurance policy for them, because
4 there's going to be no election, right?

5 CHAIRMAN WHEELER: Let me ask -- here's
6 what I don't understand. Is this -- this
7 document is not a form of ours; is that correct,
8 or is it?

9 MR. KING: Yes, it is.

10 CHAIRMAN WHEELER: So this is a
11 commission-approved form that says, and I quote:
12 "You will be registered to vote at this address
13 when you receive this notice." Period, close
14 quote. That's our form that says that?

15 MR. KING: That's correct.

16 CHAIRMAN WHEELER: And are you telling me
17 that that is in violation of the statute?

18 MR. KING: No, I'm saying it's a shortened
19 version of the statute. It does not spell out
20 the exceptions that I've described in --

21 CHAIRMAN WHEELER: But I think the
22 difference, what Commissioner Long was saying --
23 as I understand what you're saying -- is that in
24 the seven-day period you're pending?

25 COMMISSIONER RIORDAN: Right.

1 CHAIRMAN WHEELER: This says --

2 COMMISSIONER RIORDAN: You're registered.

3 CHAIRMAN WHEELER: -- you're registered to
4 vote when it gets in your hand, and that's a
5 Commission-approved document that says that.

6 MR. KING: That is correct.

7 CHAIRMAN WHEELER: And so if I'm a
8 candidate, and there's an exception that says,
9 well, gee, I can be if I take it down to the
10 voter registration office. That's not what our
11 document -- our approved document says, right?

12 MR. KING: That is correct.

13 CHAIRMAN WHEELER: And I'm concerned that
14 it would mislead a candidate, maybe in this
15 case, maybe not. I mean, if I get this, I look
16 at it and it says -- and I've gotten mine, these
17 are coming to all of us -- that says, "You will
18 be registered to vote at this address when you
19 receive this notice."

20 Okay, fine. I don't have to do anything.
21 I got the notice. I'm done.

22 MR. KING: That is correct.

23 CHAIRMAN WHEELER: And so if, in fact,
24 there is an additional requirement to shorten
25 that seven-day period, this conflicts with the

1 statute, in my opinion. In a case like this, at
2 least.

3 MR. KING: It does not set forth the
4 situation that applies in the case we're talking
5 about.

6 CHAIRMAN WHEELER: But it's not true. You
7 can receive this document in two days.

8 MR. KING: Mm-hmm.

9 CHAIRMAN WHEELER: And if you and Tony are
10 reading the statute correctly, the sentence in
11 here that says "You are registered to vote at
12 this address when you receive this notice" is
13 simply not true, correct? Under the statute,
14 it's not true. You will not be registered for
15 another five days.

16 Let's say this got mailed out and I got it
17 in two days.

18 COMMISSIONER RIORDAN: Right.

19 CHAIRMAN WHEELER: And that's what
20 happened. This was mailed to him on the 16th.
21 He gets it on the 17th or 18th, this document
22 says you're now registered to vote. You've got
23 it in hand, you're registered to vote.

24 The statute says, well, no, not really.
25 You have -- if you want to be registered to vote

1 within that seven-day window, you have to bring
2 this piece of paper down to us and show it in
3 person;

4 Is that correct?

5 MR. KING: That is correct.

6 CHAIRMAN WHEELER: And my concern is, it's
7 our form and it's just not true.

8 I mean, Leslie?

9 MS. BARNES: You're right, Mr. Chairman. I
10 think there's a concern with the acknowledgment
11 card.

12 And not to confuse the matters, but the
13 Election Division has -- I wanted to bring to
14 your attention too. The Election Division has
15 published what we refer to as standard operating
16 procedures. And you asked a minute ago when
17 does someone become legally registered to vote,
18 and our standard operating procedure, VRG 13.1,
19 says, "A voter registration applicant is not
20 legally registered to vote for any purpose,
21 including receiving an absentee ballot, until
22 the expiration of the seven-day pending period
23 required by state law."

24 I don't know if you need to see that.

25 COMMISSIONER RIORDAN: And I think the

1 reason --

2 CHAIRMAN WHEELER: That conflicts with the
3 statute, too, because the statute has an
4 exception, says you have --

5 MS. BARNES: And, yes.

6 CHAIRMAN WHEELER: There are other parts.

7 MS. BARNES: It does talk about the voter
8 coming back in with their acknowledgment form.

9 CHAIRMAN WHEELER: The problem is our form
10 says you don't need to come in.

11 MS. BARNES: Yeah.

12 CHAIRMAN WHEELER: That's my concern.

13 COMMISSIONER DUMEZICH: But also she
14 mentions the seven-day pending period, right,
15 and he went pending as the 12th.

16 MS. BARNES: I think the statutes says the
17 expiration of the seven-day pending period. So
18 on the 8th day -- I believe our business rule is
19 written that on the 8th day --

20 CHAIRMAN WHEELER: I think what Dan's
21 referring to, if you look at this voter
22 registration, the problem here is he went
23 pending on February 12th. That, according to
24 our statewide voter registration system, he went
25 pending on February 12th.

1 VICE-CHAIRMAN LONG: Which he says is the
2 day he delivered it.

3 CHAIRMAN WHEELER: But he did not become
4 active for 12 days and it says -- I think it
5 says pending period is only supposed to be seven
6 days.

7 VICE-CHAIRMAN LONG: Seven days from the
8 date of mailing.

9 MS. BARNES: Right.

10 CHAIRMAN WHEELER: NO, but the VR system
11 says he was pending on the 12th. At least from
12 the VR system, somebody says he was pending on
13 the 12th. Now, maybe they messed up, the 12th
14 versus the 16th when it was mailed. But the VR
15 system, our own documents, say he was pending on
16 the 12th; and, therefore, he was pending for 12
17 days.

18 MS. BARNES: It's also been my
19 understanding when the county generates the
20 acknowledgment card on the day they determine
21 that the individual is eligible to vote is when
22 they go active, and the acknowledgment card is
23 generated and mailed.

24 CHAIRMAN WHEELER: Something's wrong here.

25 VICE-CHAIRMAN LONG: The theory is -- the

1 statute reads, When it says the application is
2 mailed, it should then be marked pending, and I
3 agree with the form, and I think --

4 CHAIRMAN WHEELER: I get that part. I'm
5 with you on that.

6 VICE-CHAIRMAN LONG: I agree with you.

7 CHAIRMAN WHEELER: That's what I'm saying.

8 VICE-CHAIRMAN LONG: It first mentions,
9 pending it should have said application
10 received. And then the 16th, it should have
11 been elevated to pending. And then the 24th, if
12 they're counting the eighth day, it would have
13 been active.

14 CHAIRMAN WHEELER: Tony, I mean, if I'm a
15 voter and I looked at my registration system and
16 I happened to know what the statute says about
17 the seven days, it says pending on the 12th. So
18 I know I am good on the 19th.

19 I'm not saying you did that. I assume you
20 didn't go look.

21 MR. OWENS: No.

22 CHAIRMAN WHEELER: It is what it is.

23 COMMISSIONER DUMEZICH: We understand the
24 law, now it's just the application.

25 CHAIRMAN WHEELER: Mr. Owens, do you mind

1 if we accept these as exhibits? We've discussed
2 them, and obviously they're mentioned in the
3 record. I know these are your originals.

4 COMMISSIONER DUMEZICH: Copy and return
5 them.

6 CHAIRMAN WHEELER: I'd like to see if we
7 make copies and get them back to you. I don't
8 want to take your originals.

9 MR. OWENS: Sure.

10 CHAIRMAN WHEELER: But you do want to
11 submit these as part of record, so.

12 Anything else from any of the
13 Commissioners?

14 VICE-CHAIRMAN LONG: No.

15 CHAIRMAN WHEELER: Mr. Owens, anything
16 else?

17 MR. OWENS: No.

18 CHAIRMAN WHEELER: Ms. Mahern?

19 MS. MAHERN: (Shaking head.)

20 CHAIRMAN WHEELER: All right. I'll close
21 the hearing.

22 Discussion by Commission members.

23 VICE-CHAIRMAN LONG: My thought is, this is
24 what one I'm torn on. Again, I've these issues
25 too, the statute is pretty clear. I think that

1 he wasn't registered on the 19th. I mean, I
2 know for a fact he was not registered on the
3 19th.

4 The question is, I think, that the form
5 probably presented, put in his frame of mind,
6 that he thought he was. And probably -- and I
7 agree that the notification form is wrong. I
8 think we should correct that.

9 I read the statute as having -- and I am a
10 believer we don't have a lot of wiggle room on
11 these things. And I think he's done everything
12 he could have done, but I don't think at the
13 same time he accomplished being registered. And
14 that's the thing that troubles me. I think it's
15 probably a harsh treatment under the law, but I
16 think it's one of those that the law require.

17 CHAIRMAN WHEELER: Sarah? Anything?

18 COMMISSIONER RIORDAN: (Shaking head.)

19 COMMISSIONER DUMEZICH: Unfortunately for
20 me, I'm out again against the position taken by
21 my esteemed colleague. I think that in
22 situations like this where he had a good faith
23 reliance on the forms of this Commission, it
24 would be injustice to keep him off the ballot.
25 Once again, access to the ballots is key and

1 paramount. Allow people to make a choice.

2 CHAIRMAN WHEELER: And I'm going to agree
3 with Commissioner Dumezich on this. I have two
4 areas of concern on this one. One is that the
5 voter registration system shows him pending on
6 February 12th. Whether that's erroneous or not,
7 it shows him pending on the 12th. It shows him
8 not going active till the 24th. That's a 12-day
9 period, which in and of itself is a violation of
10 statutes as it's just been read to us, which is
11 a seven-day requirement.

12 Number two, I have a real concern with the
13 fact that the Commission's own document from
14 the Marion -- mailed out by Marion County says
15 that you are registered to vote upon receipt.
16 It does not provide them -- any voter,
17 candidate, or anybody else is going to take that
18 and say I'm registered.

19 And in your particular situation, if, in
20 fact, we assume a pending date of the 16th, had
21 you simply taken that document down -- for
22 example, document said in a shortened period you
23 can bring this down and show it and then you're
24 registered. I think the document itself was
25 misleading. Our document -- which I do, I agree

1 completely with Commissioner Long -- we need to
2 correct.

3 But I think in this particular case, I
4 think you've done everything you could and were
5 misled by, frankly, our documents. But you've
6 certainly made every effort to comply with it,
7 including -- I'm still trying to figure out why
8 you brought it to E-204.

9 But talking it back down, walking it over,
10 having your wife bring it over, and again,
11 consistent with my prior position, I view this
12 as a substantial compliance issue. You've done
13 everything you can to comply, and I'm going to
14 vote to deny the challenge.

15 Any further discussion from the Commission
16 members?

17 (No response.)

18 CHAIRMAN WHEELER: Hearing none, I'll
19 accept a motion.

20 COMMISSIONER DUMEZICH: Make a motion to
21 deny the challenge.

22 CHAIRMAN WHEELER: Chair will second for
23 purposes of discussion.

24 Any discussion on the motion?

25 (No response.)

1 CHAIRMAN WHEELER: Hearing none, all in
2 favor of the motion to deny the challenge
3 signify by saying "aye."

4 Aye.

5 COMMISSIONER DUMEZICH: Aye.

6 CHAIRMAN WHEELER: Those opposed, same
7 sign.

8 MS. MAHERN: Is it too late to ask a
9 question about this?

10 CHAIRMAN WHEELER: Give me one second.

11 VICE-CHAIRMAN LONG: I make a motion to
12 sustain the challenge.

13 CHAIRMAN WHEELER: I'll second the motion
14 from the chair.

15 All those in favor of the motion signify by
16 saying "aye."

17 VICE-CHAIRMAN LONG: Aye.

18 COMMISSIONER RIORDAN: Aye.

19 CHAIRMAN WHEELER: Those opposed, same
20 sign.

21 COMMISSIONER DUMEZICH: Aye.

22 CHAIRMAN WHEELER: Neither motion carries.
23 As I recall from our prior discussion that
24 means that the candidate remains on the ballot.

25 MS. MAHERN: I'm sorry, I didn't ask this

1 earlier.

2 CHAIRMAN WHEELER: I just wanted to get
3 through that part. Sorry.

4 MS. MAHERN: The reason for my challenge
5 was the question in my head: What if Mr. Owens
6 wins the primary, and then at the general
7 election this comes up and it's challenged?
8 Then I do sense a little bit of insecurity on
9 the answers to these questions, so.

10 CHAIRMAN WHEELER: I don't know that
11 there's going to be an answer to that. I mean,
12 we split. The Commission members, obviously --
13 certainly I think it's fair to say that there's
14 some ambiguity there.

15 VICE-CHAIRMAN LONG: Today the Commission
16 is putting on the democrats as strict
17 constructionists and republicans liberal.

18 COMMISSIONER RIORDAN: That's right, very
19 liberal.

20 VICE-CHAIRMAN LONG: They want to go down
21 in history as being the most liberal
22 republicans --

23 CHAIRMAN WHEELER: Wait a second.

24 COMMISSIONER DUMEZICH: How about
25 progressive?

1 CHAIRMAN WHEELER: As I recall Kim Brown,
2 you voted the same way 2/2 split on Kim Brown,
3 thus leaving her on the ballot.

4 Thank you very much, both of you.

5 Up next is the challenge of Robbin Stewart.

6 Mr. Stewart?

7 MR. STEWART: Yes.

8 CHAIRMAN WHEELER: And we have --
9 Mr. Brooks has returned to visit.

10 MS. DEWESTER: Actually, it's Samantha
11 Dewester. Mr. Brooks is just here for --

12 MR. BROOKS: You'll be glad to know -- most
13 likely, you'll be glad to know, I don't plan on
14 saying much of anything.

15 CHAIRMAN WHEELER: I guess among the
16 disclosures, I know Samantha.

17 MS. DEWESTER: Yes, I'm Samantha Dewester.
18 I live in House District 100, and I'm also an
19 attorney here in the Indianapolis.

20 CHAIRMAN WHEELER: Any other disclosures?
21 You're up.

22 MS. DEWESTER: Thank you, Chairman and
23 Members of the Commission.

24 We are here today to discuss the filing of
25 a candidate, a republican in District 100, for

1 house obviously. I think we first need to look
2 at 3-8-2-7, which is the declaration of
3 candidacy.

4 I've got some copies for you guys, and I'll
5 give one as an exhibit. I'll try not to
6 inundate with too much paper. And I'll try to
7 make this short and to the point so we're not
8 here all night. I appreciate you guys being
9 here today to listen to this.

10 What Mr. Brooks is handing to you is
11 Mr. Stewart's CAN-2. There are also some screen
12 shots of VoterVault, which is a system used by
13 our state party. There's also the FTIN screen
14 shots which the city uses.

15 CHAIRMAN WHEELER: Samantha, hold on just
16 one second.

17 MR. BROOKS: This isn't working out as well
18 as we thought.

19 CHAIRMAN WHEELER: Just give her one to
20 mark.

21 We have the CAN-2. What we don't have are
22 the -- what we have in our packet, we have the
23 CAN-2 in our packet. We do not have the voter
24 record in our packet, as we have had with other
25 candidates.

1 Okay. As I understand it, the basis for
2 your challenge is that as we've been hearing
3 about today --

4 VICE-CHAIRMAN LONG: You mean, we didn't
5 have a county chairman. That doesn't make any
6 difference.

7 MS. DEWESTER: He does not have a certified
8 letter from the chairman. He's not affiliated
9 with the republican party here in Marion County
10 either.

11 VICE-CHAIRMAN LONG: You're making the
12 argument.

13 MS. DEWESTER: Who me? I've actually done
14 all the research on it and am prepared for it,
15 so I don't think Mr. Brooks will be doing it.

16 VICE-CHAIRMAN LONG: It would be difficult
17 for your associate there to argue the same
18 points on different sides in the same hearing.

19 MR. BROOKS: Oh, contrary --

20 CHAIRMAN WHEELER: I see where you're
21 going.

22 VICE-CHAIRMAN LONG: I don't know if we
23 choose to enforce that today or not. Let's just
24 see how it comes out.

25 CHAIRMAN WHEELER: We got the CAN-2. To

1 make this -- to speed this up a little bit, it's
2 my understanding -- it's the your contention he
3 pulls a democratic ballot when.

4 MS. DEWESTER: Well, he did not vote in the
5 2008 election. Voting, I would define as --
6 voting by law, doing all the required functions
7 that you are required to do by law, means
8 showing your ID, and voting.

9 He -- what he did was he went down to the
10 clerk's office -- which is the second packet,
11 which he tendered in his own federal lawsuit
12 that a photo ID -- that's going on right now.

13 He went down to the Marion County Clerk's
14 office on April 18th, 2008, and asked for a
15 ballot to vote. He refused to show
16 identification.

17 CHAIRMAN WHEELER: What kind of ballot did
18 he ask for?

19 MS. DEWESTER: He asked for a republican
20 ballot.

21 CHAIRMAN WHEELER: In 2008 he tried to vote
22 a republican --

23 MS. DEWESTER: Yes.

24 CHAIRMAN WHEELER: You agree with me on
25 that?

1 MS. DEWESTER: Yes. However, there is some
2 inconsistency as to what -- on this form he
3 filled out -- he checked republican. What the
4 clerk's office -- she have made copies, you guys
5 can keep it. But it shows he checked the box
6 and signed he wanted a democrat ballot, so I'm
7 kind of confused as to which one was there.

8 VICE-CHAIRMAN LONG: Maybe he forgot the
9 primary.

10 CHAIRMAN WHEELER: Give me just a second.

11 All right. So what we got, the VoterVault
12 shows him trying to get a republican ballot but
13 it being rejected.

14 MS. DEWESTER: Yes.

15 CHAIRMAN WHEELER: And you don't dispute
16 that, that's your position, right?

17 MR. STEWART: We're still in litigation
18 about whether or not that gets counted. I
19 haven't seen what's in the VoterVault.

20 CHAIRMAN WHEELER: But you tried to poll a
21 republican ballot, correct?

22 MR. STEWART: That is correct.

23 VICE-CHAIRMAN LONG: And were refused.

24 CHAIRMAN WHEELER: And you were refused.

25 MR. STEWART: That's a live dispute.

1 CHAIRMAN WHEELER: What I -- I've got to
2 admit this is a little strange. And let me
3 share that.

4 Can you guys see this?

5 MR. STEWART: It absolutely was a
6 republican ballot and not democrat --

7 CHAIRMAN WHEELER: Give me just a second --

8 MR. STEWART: Yes.

9 CHAIRMAN WHEELER: -- I'm trying the
10 understand. The Vault says it was a republican
11 ballot. I don't understand.

12 Did you try to vote later at the precinct
13 in person?

14 MR. STEWART: I don't believe so.

15 CHAIRMAN WHEELER: Did you vote later in
16 the precinct? He's got absent. ABS is
17 absentee, right?

18 MS. DEWESTER: Well, to clarify the
19 absentee, if you look at what was submitted
20 about this question, the absentee on the --

21 CHAIRMAN WHEELER: You're talking about
22 this document?

23 MS. DEWESTER: A copy of. It says the
24 absentee ballot is also used when you vote in
25 person at the clerk's office.

1 MR. STEWART: That's correct.

2 CHAIRMAN WHEELER: Did you go down twice
3 and try to vote?

4 MR. OWENS: No. This was during early
5 voting at the county clerk's office.

6 CHAIRMAN WHEELER: Why does it say --
7 Dale, will you hand him that documents so I
8 can look at it.

9 Is that your signature?

10 MR. STEWART: What's the voter --

11 That is my -- my signature is on here
12 twice, and I see that the D box is marked, and
13 that confuses me. I don't know why that would
14 be.

15 CHAIRMAN WHEELER: And I am looking at your
16 application for an absentee ballot. You clearly
17 checked republican on that, which is dated
18 4-8-2008.

19 MS. DEWESTER: 4-18.

20 CHAIRMAN WHEELER: That's clearly marked
21 republican, which is part of this on there.

22 MS. DEWESTER: Right, and then obviously
23 you guys know that the clerk's office gives you
24 a specified amount of time to come down and
25 prove who you are. That --

1 CHAIRMAN WHEELER: And that's a
2 certification, next page from Andrew Mallon.

3 Just for full disclosure, he used to be an
4 associate of my law firm but now is an employee
5 of the Marion County Clerk's office.

6 MS. DEWESTER: Right.

7 COMMISSIONER RIORDAN: Actually, he's not
8 anymore. He's in private practice again with
9 another leading firm. Not mine.

10 CHAIRMAN WHEELER: I was waiting for that.

11 But anyway, there's a check-box there. It
12 says, "Voter is unable or declined to present
13 proof of identification, as required by law."

14 So, as I understand it, you went in,
15 couldn't provide your ID when you went in, you
16 voted provisionally, and then did ever come back
17 and provide your ID?

18 MR. STEWART: Are we discussing 2008 at
19 this point?

20 CHAIRMAN WHEELER: I'm still at 2008.

21 MR. STEWART: Right. Let me think about
22 that for a moment. Well, I didn't go back and
23 provide my ID. I can say that much.

24 VICE-CHAIRMAN LONG: I'm sorry, you did
25 not?

1 MR. STEWART: That's correct.

2 CHAIRMAN WHEELER: And I believe that
3 document is in here as part of your federal
4 lawsuit. There was a certification that on
5 May 19th, 2008, 30 days later, they marked
6 invalid due to failure to come in and present --

7 MR. STEWART: That's correct.

8 CHAIRMAN WHEELER: You had to do it within
9 a certain period of time and did not.

10 MS. DEWESTER: If you look at the last page
11 of that exhibit that you were referring to,
12 number three that Mr. Stewart points out
13 specifically says, "I have not been permitted to
14 vote in the primary election since 2005 because
15 I am unwilling to comply with an unwarranted
16 suspicion-less search of my driver's license
17 which I consider to be illegal and
18 unconstitutional demand under, among others,
19 Article II" --

20 CHAIRMAN WHEELER: So as I understand it,
21 you tried to vote in the primaries in '06 and
22 '08. In '08 you pulled a republican ballot it's
23 my understanding in or '06, you took a
24 democratic ballot.

25 MR. STEWART: And if I understand the

1 allegations in the contest here, she's saying
2 that was '07.

3 MS. DEWESTER: 2007 VoterVault has him --

4 MR. STEWART: Right.

5 MS. DEWESTER: -- as pulling republican --
6 he did not -- I believe the same thing happened
7 in '06. He went and pulled a ballot and did not
8 show his ID because the ID laws had changed that
9 year. In '07 VoterVault has him -- and FTIN has
10 him -- as a democratic. He polled democratic in
11 '07.

12 Under the statute 3-8-2-7, it specifically
13 says the most recent primary which would have
14 been '08, which he did not comply with the
15 guidelines to even vote in, so it's not
16 partisan.

17 CHAIRMAN WHEELER: I mean, would you agree
18 in '08 he was -- he tried to pull a republican
19 ballot.

20 MS. DEWESTER: I don't know because the
21 clerk's check-in sheet says a democratic and his
22 form says a Republican. The form that checked
23 said a democratic, and I am not sure if he went
24 back.

25 CHAIRMAN WHEELER: You would agree with me,

1 at least, that the form that was filed --

2 MS. DEWESTER: Yes.

3 CHAIRMAN WHEELER: -- in federal litigation
4 he tried to pull -- I mean, he applied for the
5 ballot of the republican party?

6 MS. DEWESTER: Yes.

7 CHAIRMAN WHEELER: And that was the '08
8 primary?

9 MS. DEWESTER: Yes.

10 CHAIRMAN WHEELER: And we all agree that --
11 Well, you would have cast a provisional
12 ballot, correct? You actually cast the ballot?

13 MR. STEWART: That's correct.

14 CHAIRMAN WHEELER: Did you cast a
15 republican ballot or democratic?

16 MR. STEWART: Republican.

17 CHAIRMAN WHEELER: I see the provisional
18 ballot security envelop is attached here.

19 MR. STEWART: Right.

20 CHAIRMAN WHEELER: But the provisional
21 ballot is not. Was a professional ballot
22 included in the federal litigation?

23 MR. STEWART: No, they don't want to
24 disclose that. It's like a voter secrecy thing,
25 so that wasn't included in my discovery request.

1 We don't have that.

2 CHAIRMAN WHEELER: Does that still exist?

3 MS. DEWESTER: Yes. The litigation is
4 still pending. It's not part of the public
5 record.

6 CHAIRMAN WHEELER: Has it been filed under
7 seal or anything?

8 MR. STEWART: No, because they haven't
9 provided it. That's probably still in the
10 clerk's office somewhere.

11 And the point I want to make here is that
12 we're in the same situation with the 2007
13 ballot, provisional ballots that weren't
14 counted, so if the republican one is no good
15 then the democratic is no good. They're in the
16 same category.

17 CHAIRMAN WHEELER: So you're saying her
18 argument that you voted -- if her argument that
19 you voted republican is invalid, it applies to
20 when you try to pull the democratic --

21 MR. STEWART: That's correct.

22 CHAIRMAN WHEELER: -- because they didn't
23 accept either one?

24 MR. STEWART: That's correct.

25 MS. DEWESTER: That's untrue.

1 CHAIRMAN WHEELER: But there's -- well,
2 give me one second.

3 But there's no -- there's a distinction
4 here between '08 and '07. Because in '07
5 there's no dispute. You tried to vote
6 democratic. You admit you tried to vote
7 democratic.

8 MR. STEWART: Right. I actually don't
9 recall, but her form says so, and we'll go with
10 that.

11 CHAIRMAN WHEELER: In '07.

12 MR. STEWART: Yes.

13 CHAIRMAN WHEELER: In '08, we know the form
14 says republican.

15 MR. STEWART: Okay.

16 CHAIRMAN WHEELER: You're telling me you
17 voted Republican?

18 MR. STEWART: That's right.

19 CHAIRMAN WHEELER: About the poll book says
20 democrat.

21 MR. STEWART: Right.

22 CHAIRMAN WHEELER: And you don't know why
23 that says that?

24 MR. STEWART: No.

25 CHAIRMAN WHEELER: Is that an error? You

1 think the poll book is in error?

2 MR. STEWART: It looks like an error.

3 MS. BARNES: Mr. Chairman, I might --

4 CHAIRMAN WHEELER: Maybe you can explain
5 it. If you could explain it, that would be
6 awesome.

7 MS. BARNES: I might have an explanation.

8 On the worksheet when on the absentee
9 ballots come in, the poll clerks with the
10 judges, they pull out if the absentee ballots,
11 and they mark on the poll book the individuals
12 who have submitted an absentee ballot.

13 So it's the poll clerk who marks either D
14 or R, and I wonder if that was a mistake.

15 COMMISSIONER DUMEZICH: That's his
16 signature.

17 MR. STEWART: It's my signature, but I
18 don't recall having made the X. She's saying
19 someone else did it.

20 CHAIRMAN WHEELER: So the signature would
21 have been done that same time the checkmark
22 should have been done?

23 MS. BARNES: Correct.

24 MS. DEWESTER: Right. And the main
25 difference between 2007, his ballot did count in

1 2007.

2 MR. STEWART: That's not true.

3 COMMISSIONER RIORDAN: I have a question.
4 What -- in 2008, did you actually mark a ballot
5 and hand it in and they wouldn't accept it
6 because you didn't show ID?

7 MR. STEWART: Right.

8 COMMISSIONER RIORDAN: And so it was put in
9 as a provisional. And so your position is that
10 that is not an act of voting?

11 MS. DEWESTER: It's not an act. It doesn't
12 count. Candidates can't rely on those when they
13 determines who wins or loses.

14 COMMISSIONER RIORDAN: But, I mean, if I go
15 in to the booth on election day and my vote -- I
16 vote but it's not put through the machine, as in
17 the case of my precinct and it's put in a
18 provisional ballot, then the argument you're
19 making is that I am not deemed to have voted.

20 I would see the distinction between I vote,
21 I'm voting but my vote isn't going to being
22 counted. And, you know, distinction between
23 voting and a vote not counted.

24 And I think the statute says, for purposes
25 of the subdivision, a candidate is considered to

1 be affiliated with a political party only when
2 following applies, in pertinent part, Section A,
3 the most recent primary election in which the
4 candidate voted was a primary election held by
5 the party with whom he or she claims
6 affiliation.

7 So what you're saying is in which the
8 candidate voted and the vote counted.

9 MS. DEWESTER: I'm saying when you follow
10 the law and you voted by legal standards. I
11 mean, he's not following legal standards.
12 Anybody can do this: Walk in and say, I'm not
13 going to follow the law. If you need a speeding
14 ticket for not the following the law and just
15 say I am not paying it; therefore, it doesn't
16 exist because I don't believe that I didn't do
17 any of it that, I'm not the paying for it, it
18 still exists.

19 COMMISSIONER RIORDAN: He went in and he
20 marked the ballot.

21 MS. DEWESTER: It doesn't count. He knew
22 that. He knew they challenged him on the spot,
23 told him they needed ID, that's why they filled
24 out the challenge form immediately. He knew it
25 was going to count. He files a federal lawsuit

1 the same day knowing that that wasn't going to
2 count, and, therefore, it's done.

3 VICE-CHAIRMAN LONG: When's the last time
4 he voted in your definition?

5 MS. DEWESTER: In 2007 when he polled --
6 when actually VoterVault and FTIN having
7 tracked --

8 VICE-CHAIRMAN LONG: Seems to me like it's
9 the same thing in 2007.

10 CHAIRMAN WHEELER: Didn't they deny it in
11 2007.

12 MS. DEWESTER: No.

13 CHAIRMAN WHEELER: The question I think
14 question Mr. Long is asking is in 2007, I
15 thought that he failed to produce ID as well as
16 and his vote was not counted.

17 MS. DEWESTER: From the information we
18 have, he -- the issue occurred in 2006 and 2008.

19 VICE-CHAIRMAN LONG: Let's talk about 2006.

20 MS. DEWESTER: In 2007.

21 VICE-CHAIRMAN LONG: Seven. Tell me what
22 he did that you've got that shows his vote was
23 counted in 2007.

24 MS. DEWESTER: In one of pages -- it looks
25 like this, VoterVault. This is 2008, he voted

1 but it did not count. 2007 DA means democratic.
2 In FTIN, which is what the secretary of state
3 has.

4 CHAIRMAN WHEELER: Let's go back.

5 In looking at this document it says in '08
6 primary, there's the designation "V." What does
7 that mean?

8 MS. MAHERN: That he polled a ballot.

9 COMMISSIONER DUMEZICH: Vote.

10 CHAIRMAN WHEELER: What does a V mean? And
11 this VoterVault, as -- Commissioner Dumezich,
12 this is the republican VoterVault?

13 MS. DEWESTER: Yes.

14 COMMISSIONER DUMEZICH: The state party.

15 MS. DEWESTER: Yes.

16 CHAIRMAN WHEELER: So you're just saying,
17 as far as state party is concerned, he voted
18 republican in the primary in '08, the V?

19 MS. DEWESTER: He polled a ballot?

20 CHAIRMAN WHEELER: He polled a republican
21 ballot?

22 MS. DEWESTER: Right, which as rejected.
23 There's another a screen shot in there from the
24 statewide --

25 CHAIRMAN WHEELER: In '07 he polled a

1 democratic --

2 MS. DEWESTER: That's correct.

3 CHAIRMAN WHEELER: My -- and the question
4 is, I think the question that the Commissioner
5 Long was asking is did his '07 democratic
6 ballot, was it counted or not?

7 MS. DEWESTER: From what I have from the
8 Secretary of State's office, the FTIN screen
9 shots, from 5-8-2007 primary, vote by mail,
10 democratic, it was counted. That's why they
11 have him in the Secretary of State's system as a
12 democrat.

13 CHAIRMAN WHEELER: Which sheet -- I'm lost.
14 What sheet are you on right now? Which sheet
15 are you on?

16 MR. STEWART: I haven't been given any of
17 it those exhibits.

18 MS. DEWESTER: They're all in the packet
19 she just gave you.

20 MR. STEWART: Oh, I'm sorry. Which page
21 are you on.

22 CHAIRMAN WHEELER: I'm looking at FTIN '08.
23 It says primary method at poll, ballot unknown.

24 MS. DEWESTER: Yes.

25 MR. STEWART: I don't have that.

1 CHAIRMAN WHEELER: So it doesn't tell us
2 what happened there? It should be in -- I think
3 it's in that packet.

4 MS. DEWESTER: It's unknown because it was
5 challenge, provisional --

6 CHAIRMAN WHEELER: Samantha, can you show
7 him. I don't think if it's on that document.

8 MS. DEWESTER: This shows a provisional,
9 and it was rejected, 2008.

10 MR. STEWART: What is VoterVault?

11 MS. DEWESTER: It's a statewide system that
12 tracks how people vote.

13 MR. STEWART: Who maintains it.

14 MS. DEWESTER: The republican state party.

15 CHAIRMAN WHEELER: Samantha, don't worry
16 about VoterVault. We're not going to give a lot
17 of credence.

18 MS. DEWESTER: FTIN Solutions is what the
19 Secretary of State uses. 5-8-2007 the
20 vote-by-mail democrat ballot.

21 CHAIRMAN WHEELER: Is says municipal
22 primary.

23 MS. DEWESTER: Right.

24 CHAIRMAN WHEELER: Vote by mail democrat
25 ballot.

1 COMMISSIONER RIORDAN: 2007.

2 MS. DEWESTER: Yes, in 2007. The others
3 are unknown.

4 CHAIRMAN WHEELER: So the question, does
5 that show -- let me can staff.

6 Brad, does that mean that that ballot was
7 counted or not?

8 MR. KING: I am sorry.

9 CHAIRMAN WHEELER: Does this track whether
10 that -- does that show whether that ballot was
11 counted or not?

12 COMMISSIONER DUMEZICH: May I change the
13 course of this, just for a moment.

14 CHAIRMAN WHEELER: No.

15 COMMISSIONER DUMEZICH: Just give me one
16 second.

17 Are you guilty of a felony conviction?

18 MR. STEWART: No.

19 MS. DEWESTER: I have got evidence in
20 exhibits that I can give you on that as well.

21 COMMISSIONER DUMEZICH: That you have
22 evidence that indicates that he's just not said
23 the truth under oath?

24 MS. DEWESTER: That's correct.

25 COMMISSIONER DUMEZICH: That might moot

1 this whole thing.

2 MR. KING: This is not from our
3 statewide --

4 CHAIRMAN WHEELER: This isn't ours?

5 MR. KING: -- so I can't.

6 CHAIRMAN WHEELER: What's this FTIN?

7 MS. DEWESTER: The Secretary of State,
8 that's what they track in their system for.

9 VICE-CHAIRMAN LONG: That is the secretary
10 of state's office down here?

11 MS. DEWESTER: It's a new -- it's a voter
12 system that is tracked -- this was provided to
13 me when I requested information as it relates to
14 the ballots in 2006, 2007, and 2008. This is
15 what's kept in the statewide database.

16 CHAIRMAN WHEELER: Tell you what, while
17 they figure this out, lets go to the felony
18 conviction issue.

19 What evidence do you have of a felony which
20 was the second part of your --

21 MS. DEWESTER: I have -- the conviction is
22 out of Delaware it's out of New Castle County
23 Delaware. It's from 1980, so granted the
24 information is --

25 CHAIRMAN WHEELER: Thirty years' old.

1 MS. DEWESTER: Do you want the original
2 with the seal?

3 CHAIRMAN WHEELER: Would you submit that
4 for the record, though?

5 MS. DEWESTER: Sure. You want me to swap
6 it out for the copy?

7 CHAIRMAN WHEELER: And does he have a copy
8 of this in front of him?

9 MS. DEWESTER: I don't know. I had six
10 copies made.

11 VICE-CHAIRMAN LONG: I've got two copies.

12 MS. DEWESTER: All right. That's the
13 problem. Sorry.

14 CHAIRMAN WHEELER: Samantha, where does --

15 MS. DEWESTER: In 2004, Mr. Stewart was
16 charged here in Marion County with a C felony
17 criminal confinement, a D felony battering a
18 child, and multiple batteries as misdemeanors on
19 children.

20 CHAIRMAN WHEELER: Samantha, slow down a
21 minute. Start over again.

22 MS. MAHERN: In 2004, Mr. Stewart was
23 charged with a C felony criminal confinement
24 charge that involved a child. A D felony,
25 battering on a child; and three B misdemeanors

1 relating in batteries on children.

2 CHAIRMAN WHEELER: Let me stop you there.
3 What happened to that court case? He was not
4 convicted of those?

5 MS. DEWESTER: It was dismissed because the
6 witnesses failed to participate.

7 CHAIRMAN WHEELER: All right. But those
8 are the documents? You're providing documents
9 from that hearing?

10 MS. DEWESTER: Because it cites the
11 Delaware --

12 CHAIRMAN WHEELER: Okay. Now, I see that
13 it says that he was convicted on October 17,
14 1980, of possession LSD in the State of
15 Maryland.

16 MS. DEWESTER: Right.

17 CHAIRMAN WHEELER: That is a pleading filed
18 by a deputy prosecuting attorney.

19 MS. DEWESTER: That's correct. It's a
20 sworn pleading filed by a deputized officer of
21 the court.

22 CHAIRMAN WHEELER: Where is it sworn?

23 MS. DEWESTER: In New Castle.

24 VICE-CHAIRMAN LONG: By a person
25 formally --

1 CHAIRMAN WHEELER: I'm sorry, there it is,
2 a verification: I swear or affirm.

3 MS. DEWESTER: And attached to her
4 pleading, the deputy prosecutor included an FBI
5 nationwide search, which is the NCIC that's
6 attached, and the fingerprint information from
7 the State of Delaware where he was arrested.

8 CHAIRMAN WHEELER: Where does it show that
9 he was convicted of a felony?

10 MS. DEWESTER: Because it's an old -- it's
11 from the 1980s, obviously. It's tough to
12 decipher the -- if you look at paragraph 7 of
13 the prosecutor's motion.

14 CHAIRMAN WHEELER: I see where it says
15 according -- but that's in reference to the
16 bottom matrix.

17 MS. DEWESTER: Right.

18 CHAIRMAN WHEELER: It says the bottom
19 matrix, he's got one felony conviction.

20 MS. DEWESTER: That's right. And it's
21 stating that this -- because he didn't disclose
22 this we needed to get a bond review, that
23 because of that, because he had one or more
24 felonies, which is that --

25 CHAIRMAN WHEELER: Let me shorten it. Can

1 I shorten this for a second?

2 MS. DEWESTER: Sure.

3 CHAIRMAN WHEELER: Were you convicted of a
4 felony in Delaware?

5 MR. STEWART: No, I was not. I was
6 charged.

7 VICE-CHAIRMAN LONG: Are you sincerely
8 serious that you're come here, try to prove that
9 a person has a felony record based on a pleading
10 filed by a deputy prosecutor in Marion County
11 four years ago?

12 MS. DEWESTER: Yes. And I've also talked
13 to the Delaware folks.

14 VICE-CHAIRMAN LONG: I don't care who you
15 talked to, ma'am. This doesn't prove a damn
16 thing to me.

17 MS. DEWESTER: Well, in his attorney's
18 response to the motion to remove, he doesn't
19 dispute that he was charged -- or that he was
20 convicted of a felony.

21 VICE-CHAIRMAN LONG: This is not the way
22 you prove a felony offense. You're a litigator.
23 I've litigated for 40 years. I'd be hauled out
24 of court by the judge if I came in and offered
25 that to prove that somebody had a felony

1 conviction.

2 There's ways to get limited criminal
3 history checks on people, there's ways to
4 investigate things, and to come in here and
5 allege somebody in a formal proceeding has a
6 felony conviction based on this I think is
7 embarrassing.

8 MS. DEWESTER: Well, I disagree with you.

9 The NCIC attached to it, for whatever
10 reason, it says "severity level unknown," which
11 is a nationwide FBI search that is done that was
12 done by the deputy prosecutor.

13 CHAIRMAN WHEELER: Let me ask you this:
14 The NCI search -- you have in front of you,
15 don't you?

16 MR. STEWART: Yes, I think so. Which page
17 is that?

18 CHAIRMAN WHEELER: I'm going to go to --
19 it's going to be page 4 of.

20 MR. STEWART: Okay, yes.

21 CHAIRMAN WHEELER: Page that says
22 "arresting agency," and it says that you were
23 arrested, charged, description, delivery of LSD.
24 Now I look down here it says delivery of LSD
25 changed to possession of LSD and notes you were

1 convicted.

2 Do you see that there?

3 MS. DEWESTER: That's what it says.

4 CHAIRMAN WHEELER: Were you convicted of
5 possession of LSD?

6 MR. STEWART: No, I was not. Those charges
7 were dropped.

8 CHAIRMAN WHEELER: Were they dropped later.

9 MR. STEWART: They were dropped later.

10 CHAIRMAN WHEELER: But were you convicted
11 of a felony?

12 MR. STEWART: No.

13 CHAIRMAN WHEELER: What were you convicted
14 of?

15 MR. STEWART: I was not convicted of
16 anything. I was initially charged with a
17 felony. Later that was -- the charges were
18 reduced.

19 This is based on my recollection, and I was
20 19 at the time, and I have limited
21 understanding. But I think it was reduced to a
22 misdemeanor, but it was never any conviction.
23 What was done was I -- there was a diversion
24 program where the charges were dropped after a
25 year.

1 MS. DEWESTER: Under the statute, that
2 doesn't change it. I've got the some facts with
3 the court in New Castle County said to me, as it
4 relates to the sentencing information from 1980,
5 it says, "dispossession guilty," and it was a
6 diversionary. It was a possession-of-drug thing
7 for a first-time offense.

8 Under the statute, which I looked it up --
9 I mean, what it is now. I don't mean what it
10 was then. But even under our statutes if a
11 felony is dropped through a diversion program,
12 it still doesn't negate the fact that it was
13 felony charge, regardless whether it was a
14 diversion.

15 CHAIRMAN WHEELER: But a felony charge
16 doesn't take you off the ballot. Am I correct?

17 MS. DEWESTER: No, that's incorrect. A
18 felony charge does take you off the ballot.

19 CHAIRMAN WHEELER: A felony --

20 COMMISSIONER DUMEZICH: A felony conviction
21 takes you off.

22 CHAIRMAN WHEELER: If he got acquitted --

23 MS. DEWESTER: He wasn't acquitted, sir.

24 VICE-CHAIRMAN LONG: I didn't ask you that.
25 You're going to show deference in this

1 proceeding. I expect a level of professional
2 liberalism out of you as an attorney appearing
3 by this court, this body.

4 What you just said, that a charge of a
5 felony keeps you off the ballot, and that's not
6 true.

7 MS. DEWESTER: A conviction.

8 VICE-CHAIRMAN LONG: I agree a conviction.

9 MS. DEWESTER: The statute also says if
10 it's diverted, it's later diversified and lowered,
11 reduced through a diversion program, that still
12 does not negate the fact that it was originally
13 a felony.

14 CHAIRMAN WHEELER: If he was convicted of a
15 felony. As I understand his testimony --

16 MS. DEWESTER: Or pled to it.

17 CHAIRMAN WHEELER: As I understand his
18 testimony, that was pled down.

19 What -- you say you weren't convicted of
20 anything. That's your testimony?

21 MR. STEWART: I have been told two slightly
22 different things. My original understanding at
23 the time was slightly different than what I was
24 told later when I investigated this to apply to
25 the Indiana bar and make sure I was providing

1 all the right documentation about my history.

2 What I was told at the time was that I
3 would have a conviction which would be expunged
4 after a year.

5 CHAIRMAN WHEELER: Conviction for what?

6 MR. STEWART: Possession.

7 CHAIRMAN WHEELER: Possession of LSD, is
8 that a felony or a misdemeanor?

9 MR. STEWART: I do not know.

10 CHAIRMAN WHEELER: Could it be a felony?

11 MR. STEWART: I do not know. I know the
12 original charge was a felony, but I believe it
13 was reduced to a misdemeanor when the charges
14 were reduced.

15 VICE-CHAIRMAN LONG: Do you believe you've
16 got a felony conviction?

17 MR. STEWART: No, I do not.

18 COMMISSIONER RIORDAN: Are you a member of
19 the bar now?

20 MR. STEWART: No, I'm not currently in good
21 standing as a member of the bar. I haven't been
22 practicing for about three years.

23 COMMISSIONER RIORDAN: But you were at one
24 point in time?

25 MR. STEWART: That's correct.

1 CHAIRMAN WHEELER: And why are you no
2 longer a member of the bar.

3 MR. STEWART: I'm not practicing.

4 CHAIRMAN WHEELER: Have you give that up
5 voluntarily or was that by action?

6 MR. STEWART: I had stopped taking the
7 classes.

8 COMMISSIONER RIORDAN: So you're not
9 current on your CLE hours?

10 MR. STEWART: CLE hours.

11 MS. DEWESTER: He has been suspended since
12 May 5, 2009, for failure to complete the
13 courses.

14 CHAIRMAN WHEELER: Just for CLE but
15 wasn't --

16 MS. DEWESTER: It's been three different
17 times.

18 VICE-CHAIRMAN LONG: So you were admitted
19 to the bar here in Indiana. Did you get a
20 waiver because of a felony conviction.

21 MR. STEWART: No.

22 VICE-CHAIRMAN LONG: And I assume they've
23 checked you out. I believe to be a member of
24 the bar, you have to say have you ever been
25 convicted of a felony.

1 MR. STEWART: That's correct.

2 VICE-CHAIRMAN LONG: And I assume that's on
3 file with the Supreme Court.

4 MR. STEWART: That's correct.

5 VICE-CHAIRMAN LONG: And I assume as
6 thorough as those folks are, that they would
7 have found out those things.

8 CHAIRMAN WHEELER: I've heard everything I
9 need to hear it.

10 COMMISSIONER DUMEZICH: Question.

11 CHAIRMAN WHEELER: I'm sorry.

12 COMMISSIONER DUMEZICH: Do you believe that
13 if you were convicted of a felony and was
14 subsequently expunged that when you were
15 questioned by the -- for your bar application
16 that that expungement would relieve you of the
17 obligation of reporting the felony?

18 MR. STEWART: No, I reported the whole
19 situation at the time. And in the process of
20 doing that, I called the Delaware court and
21 asked them about the records, and they couldn't
22 find records to send me.

23 But what they told me was that I was wrong
24 in thinking it had been expunged. What they
25 told me was that I was never formerly convicted

1 of anything. That it was just held in a file
2 for a year and then dismissed.

3 Now, I was told that over the phone, and I
4 believed it, but that's not necessarily true. I
5 don't have that in writing.

6 COMMISSIONER DUMEZICH: And you understand,
7 though, that the NCIS, the -- whatever the --

8 MS. DEWESTER: It's NCIC.

9 COMMISSIONER DUMEZICH: Indicates that you
10 were convicted. You understand that now?

11 MR. STEWART: Yes, and this is different
12 than what I -- than the information that I
13 recall seeing during that case when that came
14 up, but, yes.

15 COMMISSIONER DUMEZICH: When I asked you
16 the question earlier had you ever been convicted
17 of a felony, you answered no without
18 explanation. Was there any reason for that?

19 MR. STEWART: It was and is my belief that
20 I've never been convicted of a felony.

21 COMMISSIONER DUMEZICH: You didn't feel
22 compelled to explain the situation to me upon me
23 asking the question?

24 MR. STEWART: I'm here today to talk about
25 the Wilmington thing, and I think at some point

1 during today I've said that I was charged. I
2 believe those charges were reduced to
3 possession. But in the event -- in the end,
4 they were dismissed without a conviction.
5 That's what I've been told.

6 COMMISSIONER DUMEZICH: Long after I asked
7 my initial question and it was not volunteered
8 by you.

9 MR. STEWART: Okay.

10 MS. DEWESTER: And just to clarify,
11 Chairman, Members, under 3-8-1-5, it
12 specifically states the subsequent reduction of
13 a felony to a class A -- misdemeanor --

14 CHAIRMAN WHEELER: Subsequent reduction of
15 felony conviction.

16 COMMISSIONER RIORDAN: Maybe I can shed
17 some light on this.

18 In Indiana we have something known as
19 alternate misdemeanor sentencing, and in some
20 circumstances when the state agrees, it can
21 charge you with a felony, but you do certain
22 things as ordered by the court, then the
23 conviction that will be entered after a period
24 of time is an A misdemeanor.

25 But I don't have any feel for whether that

1 exists in Delaware or if that argument could be
2 made if that statutory provision doesn't apply
3 here.

4 MS. DEWESTER: Well, and I do criminal
5 work, and that's -- I understand the
6 diversionary stuff and the AMS. And I've spoken
7 with the court several times, and they've
8 ordered the original file to see.

9 I was told that the superior court in New
10 Castle County does not the handle anything but
11 felonies. That's all that handle. And if he
12 cover done some type of diversionary or
13 alternative misdemeanor sentencing, that would
14 be subsequently reduced it and sent him through
15 a diversionary program it would still be seen as
16 disqualified under 3-8-1-5.

17 CHAIRMAN WHEELER: I'm going to --
18 Samantha, let me stop on the felony stuff. I
19 think everybody's heard enough. Let me flip
20 back to the secondary, the other challenge, and
21 I guess the primary basis for the which involves
22 the voting and kind of summarize how I think we
23 are.

24 As I understand it, your testimony is that
25 you tried to poll a republican ballot in April

1 of 2008, did not show ID. It went provisional,
2 you did not come back and show ID, and therefore
3 the ballot was not counted.

4 MR. STEWART: I had been through this
5 process a number of times, and there have been
6 times when I -- oh.

7 CHAIRMAN WHEELER: I'm talking about '08.

8 MR. STEWART: No, I think I agree.

9 CHAIRMAN WHEELER: Because you and I went
10 through the --

11 MR. STEWART: I agree.

12 COMMISSIONER DUMEZICH: He agrees. Move
13 on.

14 CHAIRMAN WHEELER: It is also my
15 understanding then in '07 you polled a
16 democratic ballot and attempted to vote a
17 democratic ballot, and Samantha seems to think
18 that it did get counted.

19 Do you know if it got counted?

20 MR. STEWART: It did not.

21 CHAIRMAN WHEELER: You do not think it got
22 counted?

23 MR. STEWART: That's correct.

24 CHAIRMAN WHEELER: All right. Anything
25 else on the facts that you guys --

1 MR. STEWART: Or at least, I mean, at the
2 time I was told it wasn't being counted.

3 CHAIRMAN WHEELER: Anything else you guys
4 feel need to be asked?

5 COMMISSIONER RIORDAN: I think I have all
6 the information I need.

7 VICE-CHAIRMAN LONG: I have more than I
8 need.

9 CHAIRMAN WHEELER: That's all I have. Any
10 other questions from the commissioners?

11 COMMISSIONER DUMEZICH: Zero.

12 CHAIRMAN WHEELER: All right. I'm going to
13 close the hearing, and I'll accept a motion.

14 VICE-CHAIRMAN LONG: I move that we deny
15 this guy.

16 COMMISSIONER RIORDAN: Second.

17 CHAIRMAN WHEELER: Motion made and
18 seconded.

19 Any further discussion?

20 VICE-CHAIRMAN LONG: Only thing I can say
21 is that we don't know if he's got a felony
22 conviction or not. We do not know that. I do
23 not know whether or not he's ever voted in a
24 primary that got accepted. And I think that to
25 sustain the challenge, you've got to come in and

1 prove both of those allegations.

2 I think he in good faith believed that he
3 voted. And I'm not for sure whether he voted or
4 not. If I go in and vote, I cast a provisional
5 ballot, that's what the law says --

6 CHAIRMAN WHEELER: Right.

7 VICE-CHAIRMAN LONG: -- and then it just
8 doesn't get counted, if I go in and vote and I
9 got challenged.

10 Now we have a provisional ballot, and if
11 the challenge is sustained -- I think this man
12 made every effort to vote in the republican
13 primary last held and is entitled to run. Let's
14 let the voters decide who the appropriate
15 candidate for District 100 in the House of
16 Representatives is.

17 CHAIRMAN WHEELER: Anything?

18 COMMISSIONER DUMEZICH: (Shaking head.)

19 CHAIRMAN WHEELER: I think the vice-chair
20 stated it succinctly. It is my belief that the
21 statutes -- we're looking at substantial
22 compliance -- it strikes me that he's made the
23 effort to vote. Certainly he made the effort in
24 2008 primary election to vote in a republican
25 primary, at least initially.

1 I would prefer you to take your ID back. I
2 understand you have a disagreement with
3 providing your ID. But you at least made that
4 effort, and therefore, my position is to let the
5 voters decide, as it has been in the last two
6 challenges. And so therefore I am going to
7 following the vice-chair's direction as well.

8 Any further discussion on the motion?

9 (No response.)

10 CHAIRMAN WHEELER: Hearing none, the motion
11 on the table is a motion to deny the challenge
12 that has been made and seconded. All in favor
13 signify by saying "aye."

14 THE COMMISSIONERS: Aye.

15 CHAIRMAN WHEELER: Those opposed, same
16 sign.

17 (No response.)

18 CHAIRMAN WHEELER: Motion carried.

19 Thank you.

20 MR. STEWART: Thank you very much, all of
21 you.

22 CHAIRMAN WHEELER: All right. The next
23 challenge we have is Embrey.

24 COMMISSIONER RIORDAN: As a matter of
25 disclosure --

1 CHAIRMAN WHEELER: Let them get up here.
2 Challengers on the left. All right. I
3 believe we have initial --

4 COMMISSIONER RIORDAN: I have to disqualify
5 myself, regardless of whether I think I could be
6 impartial or not. Mr. Babb is my law partner.

7 CHAIRMAN WHEELER: And I believe there is a
8 proxy.

9 COMMISSIONER RIORDAN: There is. It's one
10 Mr. Timothy Jeffers.

11 CHAIRMAN WHEELER: And we appreciate you
12 waiting.

13 What I'm going to do, with all due respect
14 to you guys -- we still have people in behind
15 you -- is I'm going to give you guys 15 minutes
16 a side. Challenger goes first.

17 Identify yourself --

18 Obviously, Bryan you and I -- and, full
19 disclosure, I believe you and I were partners.
20 I believe that I departed prior to Mr. Babb
21 achieving his partner status. I am a former
22 partner of Bose McKinney & Evans. I left, I
23 believe, ten years ago, or thereabouts.

24 COMMISSIONER DUMEZICH: Under good terms?

25 CHAIRMAN WHEELER: I don't know. You have

1 to ask Bryan. He'll be real nice right now.
2 He'll tell you something differently later.

3 But I don't thinking that disqualifies me
4 from hearing this particular --

5 VICE-CHAIRMAN LONG: Seems to me to,
6 Mr. Chairman, we have -- this is one of the
7 reasons they send us material out ahead of time,
8 so we can review. And this is one of the more
9 complex issues that we've dealt with, in my
10 mind, and with our legal counsel in discussing
11 the issues.

12 So I think that probably all of us have a
13 reasonably decent grasp on the basic facts. The
14 city attorney that's running for office, and the
15 question is whether or not that's precluded as a
16 part of -- by virtue of the Hatch Act.

17 And those are the -- in my mind, I'm saying
18 that's what I'm going to have to be convinced of
19 one way or the other.

20 CHAIRMAN WHEELER: And to summarize that,
21 we, on the republican side, we've got a staff
22 member under Hatch Act, too, and we'll be very
23 interested to hear some specific issues --

24 VICE-CHAIRMAN LONG: I'm looking forward to
25 it.

1 (Interruption by the reporter.)

2 MR. EMBREY: May I comment?

3 In all due respect, you only have the facts
4 from the challenge that's being made, and they
5 are grossly inaccurate. So I hope you'll be
6 open to the fact --

7 CHAIRMAN WHEELER: Absolutely.

8 VICE-CHAIRMAN LONG: I'm talking about the
9 overall facts. The facts are important to me.
10 The candidate is the city attorney and is -- the
11 ultimate question is that a government position
12 under the Hatch Act or not. And when I was
13 referring that we have some knowledge of the
14 facts, that's the only facts.

15 CHAIRMAN WHEELER: He's given us the
16 statement of the issues.

17 VICE-CHAIRMAN LONG: But if you got
18 something you think is germane, I'm not going to
19 cut you off --

20 CHAIRMAN WHEELER: Without information.

21 VICE-CHAIRMAN LONG: That is a interesting
22 point.

23 CHAIRMAN WHEELER: We anticipate being
24 educated, Bryan.

25 MR. BABB: Thank you, Mr. Chairman,

1 Commissioners. My name is Bryan Babb. I am
2 here on behalf of Mr. Eric Huneryager, who is
3 the elected prosecuting attorney for Miami
4 County. We're here on a candidacy challenge for
5 Mr. Embrey --

6 Or shall I call you, Your Honor, Judge, or
7 doesn't matter?

8 MR. EMBREY: Doesn't matter what you call
9 me.

10 MR. BABB: Okay -- Mr. Embrey's eligibility
11 to be a candidate for the same office in the May
12 primary. And really what we're talking about
13 here is something that I refer to
14 Section 5(c)(6) under the Indiana Code 3-8-1-5.

15 This statute was the subjects last year of
16 a couple high-profile decisions from the Court
17 of Appeals, first, and then in the Indiana
18 Supreme Court. I argued both of those on behalf
19 of the mayor of the City of Terre Haute.

20 And with respect to the Court of Appeals
21 decision, I think one thing that comes out of
22 that is clear. It is -- it's a very serious
23 law, and it's also not known by a lot of people.
24 But I will tell you that in that particular
25 case -- there's really sort of a spectrum of

1 potential Hatch Act violations.

2 I think on the one spectrum, you have the
3 federal employees who know about the Hatch Act,
4 who've been briefed on it. They're at the far
5 end of the spectrum. They should know what the
6 limitations are.

7 At the other end of the spectrum, you have
8 what was really Mr. Bennett -- who is now Mayor
9 Bennett -- and when he was an employee, a
10 maintenance director of a local nonprofit.
11 That's really at the opposite end of the
12 spectrum. He wasn't a lawyer, and really his
13 only connection to federal funds was a very
14 small part of the federal funding for the Head
15 Start Program that they eventually traced back
16 to his job.

17 But he really -- and my argument, my
18 forcible argument was he really didn't have any
19 normal and foreseeable duties in connection with
20 that federal funding. Every now and then he'd
21 fix the toilet in a Head Start building or he
22 might repair a sidewalk in front of it, but he
23 didn't really have anything to do with that Head
24 Start unit. It had it's own stand-alone 35- to
25 40-person staff that dealt with that funding.

1 That's way out here; the federal employees
2 are way out the here. You have different
3 gradations in the middle of state employees.

4 Most state employees should know that
5 they're subject to the Hatch Act. We would
6 contend that certainly somebody who is a city
7 employee and an attorney that obviously would
8 either have actual, or certainly constructive,
9 knowledge of what the situations were last year
10 should know what the law is.

11 Now, I can tell you this: I'm at a little
12 bit of a disadvantage because -- and what I'd
13 like to do is be quiet and save my time for
14 rebuttal.

15 CHAIRMAN WHEELER: I'm not going to give
16 rebuttal, so take your best shot right now.

17 MR. BABB: Okay. It's tough because I
18 don't know what his position is going to be. I
19 mean, I really don't. I mean it's -- the
20 problem that we have is because of the law, this
21 has to be brought as a preelection challenge.
22 And he knows what my position is, but I don't
23 know what his position is.

24 And so, whereas you had it before, the
25 Indiana Supreme Court's decision, the

1 postelection challenges were brought in court,
2 and you could have a give and take. But right
3 now, I am not sure what his position is.

4 And so I guess without an ability to know
5 what he's going to say, I guess maybe I'd like
6 to ask some questions, if I could, of
7 Mr. Embrey, if that would be --

8 CHAIRMAN WHEELER: Let's do this, tell you
9 what. I'll let you reserve five minutes. I'll
10 let him give me his version of the facts and go
11 through this stuff. We'll give you a couple
12 minutes at the tail end, as we ask some
13 questions.

14 Because I know we're going to be out -- and
15 frankly, I think it's useful for us. As you
16 know, we're all practicing attorneys up here,
17 and asking questions and it's better for a give
18 and take from us as well. So I think you'll
19 have the opportunity to give-and-take process.

20 MR. BABB: I appreciate that, Mr. Chairman.

21 And if I could, I'd actually like to
22 just -- the only other thing I'd like to state
23 is this: We have requested an Office of Special
24 Counsel opinion. I tried to get it to the
25 Commission today. I am told that it will be

1 prepared by the 9th.

2 I understand that the Commission has to act
3 officially by noon on a the 11th. I also
4 understand that -- I assume the Commission has
5 to meet -- maybe to vote, or whatever -- but I
6 know that we'll have the opinion. I just
7 couldn't get it in today.

8 So with that, I'll be quiet and let Judge
9 Embrey give his position.

10 MR. EMBREY: I have also asked for an
11 opinion from the OSC, and I'm sure the facts I
12 submitted are vastly different from what
13 Mr. Babb submitted. I'd like to point out some
14 total inaccuracies in the statement in his
15 Complaint.

16 The first doesn't amount to much, except
17 for it points out the exaggeration. On page 7,
18 he makes reference to my voice mail saying that
19 I am a "very, very, very" --

20 CHAIRMAN WHEELER: Hold on, give me a
21 second. When you say page --

22 MR. EMBREY: 0007 in the third paragraph --

23 CHAIRMAN WHEELER: You were doing the right
24 thing. I was looking at the Candidate Filing
25 Challenge.

1 MR. EMBREY: Said my "Private practice is
2 minimal...uses house as address, you get
3 answering machine that says very, very, very
4 part time." It says "very part time." Once.
5 That's important because it's an exaggeration.

6 Secondly, I began doing that when I had
7 decided to run for prosecutor and have every
8 expectation of waning the office. I am going to
9 have to wind down my private practice. I don't
10 want to take on new clients. That's kind of one
11 way of doing it since I don't have a secretary
12 answering the phone.

13 It further alleges in that page that I'm
14 not in -- the days I'm not in City Hall -- or
15 I'm in City Hall when I'm not working as a
16 senior judge.

17 CHAIRMAN WHEELER: Can I ask you a quick
18 question?

19 MR. EMBREY: Yes.

20 CHAIRMAN WHEELER: This is a document that
21 Mr. Babb prepared?

22 MR. EMBREY: It's his Complaint, yes.

23 CHAIRMAN WHEELER: Well, I don't think it
24 is. That's what I don't understand, because
25 I've got -- his Can-1 has three pages. His

1 Can-1 says "See attached." I assume that's
2 these three pages right here. It's saying that
3 "Paragraph 6, Candidate Filing Challenge."

4 These three pages that you prepared, that's
5 your Challenge?

6 MR. BABB: That's correct.

7 MR. EMBREY: I have no idea who prepared --

8 CHAIRMAN WHEELER: What are these exhibits?

9 MR. BABB: That particular page right
10 there, Mr. Chairman, if you look at --

11 CHAIRMAN WHEELER: Tell me what these
12 exhibits are. There's Exhibits 01 through 50 --
13 66.

14 Are these your exhibits?

15 MR. BABB: They are my exhibits.

16 CHAIRMAN WHEELER: Obviously it's an APRA
17 request that you've made. What is -- Exhibit 2,
18 what is Exhibit 2, which this document is
19 marked?

20 MR. BABB: That is part of the notes
21 that -- some of the information that I was given
22 from Mr. Huneryager that I think he also heard
23 from other people.

24 CHAIRMAN WHEELER: Just, for example, how
25 does someone know 2009 Total Without Litigation

1 Billing, these numbers?

2 MR. BABB: I'll be able to walk through --
3 based on the APRA request that I issued to the
4 City, which I received, which was partial. But
5 I did get APRA request materials in connection
6 with that.

7 CHAIRMAN WHEELER: So who prepared this?
8 Somebody referred to him as Senior Judge,
9 spelled S-E-N-O-R.

10 MR. BABB: I didn't prepare it.

11 CHAIRMAN WHEELER: It doesn't strike me as
12 something that would come out of that office.
13 Who prepared that?

14 MR. BABB: I think -- I believe that right
15 there was something that Mr. Huneryager made.

16 Did you give me those?

17 MR. HUNERYAGER: Yes.

18 CHAIRMAN WHEELER: So that would have been
19 a document that you prepared.

20 MR. HUNERYAGER: (Nodding head.)

21 CHAIRMAN WHEELER: And you prepared it
22 based on what, your own personal investigation?

23 MR. HUNERYAGER: Part of it.

24 CHAIRMAN WHEELER: Well, his voice mail,
25 you called his home address?

1 MR. HUNERYAGER: That's what I was told.

2 CHAIRMAN WHEELER: But you didn't talk --
3 you didn't --

4 MR. EMBREY: This is all hearsay.

5 MR. BABB: I would certainly be willing to
6 stipulate that I don't have first-hand knowledge
7 of what it says. If it says "very part time," I
8 have to reason to disagree with that.

9 CHAIRMAN WHEELER: And then Exhibit 3 is
10 statutes.

11 MR. BABB: What page, Mr. Chairman?

12 CHAIRMAN WHEELER: Fourteen. And it looks
13 like Exhibit 4 is statutes as well.

14 MR. BABB: That's correct.

15 CHAIRMAN WHEELER: And then what is
16 Exhibit 5? Is this a City of Peru website?

17 MR. BABB: It is.

18 CHAIRMAN WHEELER: And then -- so City of
19 Peru website, Peru utilities website.

20 MR. BABB: And then there's also meeting
21 minutes that are also included.

22 CHAIRMAN WHEELER: These are all meeting
23 minutes? I suppose that's a documents that he's
24 serving as the attorney for the utility.

25 MR. BABB: And there's certain discussions

1 on those documents, Mr. Chairman.

2 CHAIRMAN WHEELER: And then Exhibit 7 is --

3 MR. BABB: It's a supplemental audit of
4 funds from the State of Indiana, describes how
5 much funds the City's receiving.

6 CHAIRMAN WHEELER: This is discussion of
7 federal funds?

8 MR. BABB: That's correct.

9 CHAIRMAN WHEELER: And that's something
10 that you guys prepared?

11 MR. BABB: That is, yes.

12 CHAIRMAN WHEELER: And Exhibit 8 is --

13 MR. BABB: Exhibit 8 is -- that is from the
14 Indiana Finance Authority's website that
15 identifies federal funds that were given the
16 City of Peru.

17 CHAIRMAN WHEELER: Okay. Now, hopefully
18 that helps you. At least it helps me a little
19 bit --

20 MR. EMBREY: It does.

21 CHAIRMAN WHEELER: -- as to what you're
22 responding to.

23 MR. EMBREY: What he is identified as the
24 City of Peru is actually -- the part that
25 relates to the SRF is actually Peru Utilities.

1 Those are two separate entities. Peru Utility
2 is a separate organization; has its own board.
3 It's a municipal utility.

4 I'm a lawyer who has, fortunately, two
5 clients, among others, City of Peru, Peru
6 Utility. They're separate entities, the pay
7 comes separately from them. I think you must
8 assess these allegations separately. But let me
9 begin. I've got an order of things that I'd
10 like to present to you.

11 Unquestionably, page 2 of the Complaint was
12 written by Mr. Babb, and he alleges that I
13 "coordinated the receipt of federal funds," that
14 I am "routinely involved in coordinating the
15 receipt and/or implementation of federal funds."

16 I am not. I have nothing to do with
17 receipt of federal funds, and I have never
18 implemented or administered projects funded with
19 federal money. I'm a lawyer, whether I'm
20 working for the City or the Utilities. I do the
21 things a lawyer does, and that does not include
22 receiving federal grant money or implementing
23 projects. Those allegations are false.

24 Mention was made of my being out on the
25 street at night helping. First, that was a

1 project that was not funded with federal money.
2 We did a project -- I wish we had more time so I
3 could tell you about it.

4 We were able to do a sizable street project
5 with the 20 percent match we had saved that we
6 wanted to do -- to use an INDOT grant for but
7 discovered that because of the red tape, we
8 could do the whole project for the 20 percent we
9 had already saved and do it with people who bid
10 locally, fortunately.

11 And we also used a lot of City employees in
12 what the Navy calls an "All Hands Evolution."
13 And I went out the on the street one night when
14 we were shorthanded and there was paving being
15 done. And the mayor and I directed traffic,
16 which was kind of interesting.

17 I also spent two or three afternoons
18 keeping kids off wet concrete when school was
19 let out. Because this was a project done
20 locally, it was done partly by the Street
21 Department, and a great deal of it by local
22 contractors. We're very proud of that. No
23 federal money in that project.

24 Let's take a look at the statue. Mr. Babb
25 included the statute in his paperwork, and if

1 you haven't read that --

2 CHAIRMAN WHEELER: Got a page number?

3 MR. EMBREY: Bottom of page 1 of his
4 Complaint, begins at the last paragraph.
5 "'State or local officer or employee' is defined
6 by 5 U.S.C. 1501."

7 CHAIRMAN WHEELER: You're using "Complaint"
8 two different ways. We have two separate
9 numbers.

10 When he's referring to that, it's a
11 Candidate Failing Challenge, paragraph 6, and he
12 is right there.

13 MR. EMBREY: There's a Candidate Failing
14 Challenge, there's an Appearance, and then
15 something numbered page 1.

16 CHAIRMAN WHEELER: The one that says
17 "Paragraph 6," that's the one you're referring
18 to is Paragraph 6.

19 VICE-CHAIRMAN LONG: Yeah, I've been
20 operating, when you use page numbers, the ones
21 with 000 --

22 CHAIRMAN WHEELER: Bates stamped.

23 MR. EMBREY: It was a little confusing.

24 CHAIRMAN WHEELER: If you jump to the Bates
25 stamps, tell us you're jumping.

1 MR. EMBREY: The statute is set forth in
2 that paragraph: "An individual employed by a
3 state or local agency whose principal employment
4 is in connection with an activity which is
5 financed in whole or in part by loans or grants
6 made by the U.S. or a federal agency."

7 Let's pick that a part a little bit. I am
8 not an employee. I am a lawyer who, among his
9 clients, has the City of Peru and Peru
10 Utilities. If I am an employee, does that mean
11 that all of you who are lawyers are employees of
12 people who engage your services? I don't think
13 so.

14 VICE-CHAIRMAN LONG: Let me ask you --

15 CHAIRMAN WHEELER: Can I ask you one
16 question? Can I see -- do you have a copies --

17 (Interruption by the reporter.)

18 VICE-CHAIRMAN LONG: It's my
19 understanding -- I don't represent a city, but a
20 represent a town. First of all, don't tell them
21 you were out directing traffic and guarding the
22 sidewalks.

23 But it's my understanding you represent a
24 city that there's a position known as the
25 Department of Law that chief counsel is the head

1 of the department --

2 MR. EMBREY: In a third class --

3 VICE-CHAIRMAN LONG: -- and one of the
4 things that I -- and the reason I'm bringing
5 this up, to the extent you can enlighten me on
6 that, how would you differentiate between the
7 head of the department of law and whether or not
8 it's an employee or nonemployee position,
9 whether or not it's an officer or an official of
10 the town.

11 It's my understanding from a long time ago,
12 research that was -- the head of the department
13 of law was considered a lucrative position and
14 that the -- there was a question of the special
15 prosecutor being appointed under some old law a
16 long time ago in our county and it was a
17 political mess.

18 But the bottom line was that the city
19 attorney, head of department of law, was not
20 eligible to be appointed because that was a
21 lucrative position.

22 That's -- that was an area this whole thing
23 is brought up in my mind that is of interest
24 to making this decision.

25 MR. EMBREY: I have not looked at the

1 position from that perspective, but I am
2 considered by the Workforce Development people
3 to be an appointed -- or a political -- a
4 part-time political appointee. I view it, and I
5 think the City and the Utilities view it, as
6 having engaged an attorney. I view them as my
7 client.

8 They pay me a retainer. The City pays me a
9 retainer, and the Utilities pay me a separate
10 retainer. I get separate forms, separate
11 paychecks, tax forms are different. Each of
12 them then pay me out of their own funds, at a
13 hourly rate for litigation and special projects.

14 VICE-CHAIRMAN LONG: Billed withhold taxes?

15 MR. EMBREY: They withhold on the retainer
16 portion. They do not withhold on the litigation
17 and special projects' portion. And I also get
18 \$500 from the City each month for clerical
19 expense. So --

20 COMMISSIONER DUMEZICH: When you say they
21 withhold, do they give you a W-2 or 1099?

22 MR. EMBREY: I get a W-2 for the retainer
23 portion from both. It's two separate W-2s.
24 Then I get 1099s on the litigation and special
25 projects' portion.

1 I receive no benefits. I'm not eligible
2 for them. I'm not eligible for health
3 insurance, life insurance, or unemployment
4 insurance, and I'm not eligible for PERC. I'm a
5 part-time political appointee. I am appointed
6 by the mayor, and I serve at his pleasure.

7 An issue was made of the fact that I have
8 an office in City Hall. One of the conditions
9 of the appointment that the mayor made was that
10 he wanted the City attorney there at a
11 designated time on certain days so that the
12 department heads and the employees could meet
13 with the City attorney and count on someone
14 being there to answer their questions. So
15 that's -- it's, again, a part-time office. It's
16 provided by the City.

17 I spend eight to eight-and-a-half weeks
18 every year doing judicial business: Sitting as
19 senior judge, sitting as special judge, I serve
20 on the Judicial Committee; and the rest of the
21 time, I'm either serving clients or playing
22 golf.

23 The way I structure my time, I spend about
24 40 percent of my total time serving the two
25 combined. I would break that down to 33 to

1 35 percent for the City, 5 to 7 percent for the
2 Utilities. On any given week, it can be
3 entirely different, but over the period of time
4 that I have worked there that I have had them as
5 clients, that's about what it is.

6 It is not my primary employment. The
7 income I have derived from it has never been
8 half or more of my income, and those are some of
9 criteria as well.

10 COMMISSIONER DUMEZICH: I would like to ask
11 you a question about this.

12 MR. EMBREY: Yes.

13 COMMISSIONER DUMEZICH: You had said that
14 both positions provide you with a W-2 and both
15 positions provide you with a 1099. And in
16 total, when you sum it up those four components,
17 it does not reach one half of your compensation?

18 MR. EMBREY: It does not.

19 COMMISSIONER DUMEZICH: May I ask you, the
20 compensation on the W-2s as compared to the
21 1099s, which are greater there?

22 MR. EMBREY: What's my.

23 COMMISSIONER DUMEZICH: Which is greater,
24 what's on the W-2 as compared to what's on the
25 1099?

1 MR. EMBREY: Usually the W-2. One year the
2 1099 because of a bond issue.

3 COMMISSIONER DUMEZICH: Usually the W-2.

4 But as you said, in total neither of those
5 things would sum --

6 MR. EMBREY: Does still not equal half.

7 VICE-CHAIRMAN LONG: Apart from the bond --

8 I'm sorry, were you done?

9 COMMISSIONER DUMEZICH: Yeah.

10 VICE-CHAIRMAN LONG: Apart from the bond
11 issues, are they a part of your compensation --
12 is any part of your compensation derived from
13 state or federal grants?

14 MR. EMBREY: No, sir.

15 VICE-CHAIRMAN LONG: Okay.

16 MR. EMBREY: In fact, the bond issue was a
17 State Resolving Fund bond issue payment, and I
18 didn't touch any federal grant that was related
19 to it. It was the -- there was stimulus money
20 put into a project for the utilities, but all I
21 did was the bond issue. I did not do anything
22 with the federal grant.

23 I've never seen the site where the work was
24 being done. I want to say that I've never seen
25 the grant, but I can't say that with certainty.

1 I don't believe I was ever asked to review it.
2 All I did was the local portion of the bond
3 issue, and that's been one time.

4 In the six years that I've worked for the
5 Utilities, that's the first bond issue -- or,
6 pardon me, it's the first federal grant they
7 have received, to my knowledge. They were
8 working under a federal grant when I first went
9 there. That project was another sewer -- sewage
10 treatment plant project. I had no involvement
11 in that.

12 I want to take a look at Principal
13 Employment, is an important thing. We talked
14 about the percentages I have and how the income
15 stacks up. The next one is in connection with
16 an activity. And I believe Mr. Babb is
17 asserting that the City of Peru is my activity.
18 That's not what the statute says.

19 The activity has to be -- well, it says, a
20 person is exempted if "an individual who
21 exercises no functions in connection with the
22 activity."

23 Now, that tells you the activity they're
24 talking about is the grant activity, not the
25 City or the Utility. The grant activity. I've

1 had virtually no contact with grants. I brought
2 the mayor and the clerk/treasurer to testify, if
3 we have time for that, about that very issue. I
4 have nothing to do with the grants.

5 We have a Nickel Plate Trail grant that we
6 are now LPA for. I would like to introduce, if
7 I may, a letter from the Nickel Plate Trail
8 people who tell you what the City of Peru's
9 involvement is. We are a pass-through. Not
10 only are we a pass-through, I have nothing to do
11 with this.

12 The only advice I gave the mayor was we are
13 now protected because I have a agreement with
14 Nickel Plate Trail. There's an indemnification
15 clause, and our contract with the Nickel Plate
16 Trail, which is a separate corporation, to
17 indemnify the City in the event that they have
18 some problem. I don't touch that federal money.
19 I don't administer it, I don't administer the
20 programs. I do the things a lawyer does: I
21 read contracts and give advice. So I have
22 nothing to do with that money.

23 CHAIRMAN WHEELER: Judge, let me hold you
24 one second.

25 All right, that has been marked as?

1 MR. SIMMONS: Exhibit 1.

2 MR. EMBREY: I have five exhibits. Could
3 we do that one Exhibit 6? Do you mind? Only
4 because. I think -- I'm just afraid it might
5 get confusing.

6 CHAIRMAN WHEELER: Actually, we already
7 have eight exhibits in here. Why don't we do
8 a --

9 MR. BABB: Exhibit A?

10 CHAIRMAN WHEELER: Did you premark yours?

11 MR. EMBREY: I did.

12 CHAIRMAN WHEELER: Are you going to have 1
13 through 5?

14 I think you need you to remark yours,
15 because you've already got eight exhibits in the
16 record.

17 MR. BABB: I can remark.

18 CHAIRMAN WHEELER: If you remark yours,
19 let's --

20 You do letters, and that will be A.

21 MR. EMBREY: Make this A.

22 CHAIRMAN WHEELER: And then yours will just
23 start after --

24 MR. BABB: Nine. That's fine.

25 MR. EMBREY: Let me sort of wrap that part

1 of the argument up, if I could.

2 My less-than-principal employment is with
3 the City of Peru. Of that percentage of time
4 that I've told you about that I spend with the
5 City and the Utilities combined, certainly my
6 principal time is not spent in an activity
7 within those functions that relates to grants.

8 CHAIRMAN WHEELER: Can I stop you for a
9 second? Just give me some percentages.

10 As I understand it, you've kind of got --
11 you've got three employments: One --

12 MR. EMBREY: At least.

13 COMMISSIONER DUMEZICH: Golf, how about
14 that?

15 CHAIRMAN WHEELER: City --

16 MR. EMBREY: I did retire once, and every
17 once in a while, I like to play during the week.

18 CHAIRMAN WHEELER: I've got City, Utility,
19 and -- actually, I'll give you four, because
20 there is your private practice.

21 MR. EMBREY: Private practice.

22 CHAIRMAN WHEELER: And then as I understand
23 it, you also act as senior judge.

24 MR. EMBREY: I served as a senior judge,
25 and one of the requirements of a senior judge is

1 that you retain all those nasty special judge
2 cases you had when you left the bench.

3 CHAIRMAN WHEELER: Now, give me the average
4 amounts of time a week you spend performing
5 functions as City attorney.

6 MR. EMBREY: I spend about 33 to 35 percent
7 of my time overall.

8 CHAIRMAN WHEELER: Okay.

9 MR. EMBREY: If you want the day -- the
10 day-by-day --

11 CHAIRMAN WHEELER: No, I just want --

12 COMMISSIONER DUMEZICH: When you say
13 "City," do you say City or City and Utility?

14 MR. EMBREY: City attorney.

15 CHAIRMAN WHEELER: I'm just breaking
16 into --

17 MR. EMBREY: And then 5 or 7 percent --

18 CHAIRMAN WHEELER: With Utilities. 5 to 7
19 percent for Utility, and your private practice?

20 MR. EMBREY: Well, let's do the senior
21 judge/special judge thing.

22 Eight to eight-and-a-half weeks every year,
23 whatever that percentage works out to. And the
24 rest of time is spent in private practice or
25 whatever else I choose to do.

1 CHAIRMAN WHEELER: We'll give you

2 17 percent over here.

3 MR. BABB: For what, Mr. Chairman?

4 CHAIRMAN WHEELER: For senior judge.

5 MR. BABB: 17 percent.

6 MR. EMBREY: Senior judge/special judge

7 and --

8 CHAIRMAN WHEELER: So your testimony is 40,

9 50, say 57 --

10 So about 43 percent of your time is in
11 private practice, or thereabouts?

12 MR. EMBREY: Private practice and anything
13 else that I do, yes. I'm also --

14 CHAIRMAN WHEELER: Client development.

15 MR. EMBREY: I'm also a general partner in
16 five apartment projects, a little bit of time
17 near there on that, not a whole lot.

18 CHAIRMAN WHEELER: Do you consider that
19 part of your private practice or is that
20 additional?

21 MR. EMBREY: No, that's a separate setup.

22 CHAIRMAN WHEELER: Give my how much time
23 you spend in there.

24 MR. EMBREY: Jeez, it's so infrequent.
25 Let's give it a week a year.

1 VICE-CHAIRMAN LONG: 2 percent.

2 CHAIRMAN WHEELER: That gets you down to
3 about -- all right, here we go. So what I've
4 got, based upon what you've given me, is you
5 spend about 34 percent on City work.

6 I'm splitting the difference, 5 to 7 -- so
7 I'll give you 6 percent on Utility.

8 MR. EMBREY: I'll settle for that.

9 CHAIRMAN WHEELER: All right. So that
10 takes me to 40. You give me 2 percent over here
11 in your general partnership which takes me to
12 42. I got 17 percent on judge, that's 59. So
13 that gives me 31 percent in private practice.

14 MR. EMBREY: There you go. I take a
15 vacation.

16 CHAIRMAN WHEELER: I realize that's a rough
17 estimate.

18 MR. EMBREY: Now, let's not get too hung up
19 on the 34 and the 6, because the language of
20 the -- the principal employment applies to a
21 project within that employment.

22 In other words, if I spend 34 percent of my
23 time with the City, and there is a project that
24 I spend time on, in order to fall under this
25 provision, I would have to -- that project would

1 have to be my principal employment.

2 CHAIRMAN WHEELER: I'm not sure I buy that.
3 I'm looking --

4 MR. EMBREY: That's what the statute says.

5 CHAIRMAN WHEELER: That employment to which
6 an individual devotes the most time and from
7 which he derives the most income.

8 That's the statutory language, right?

9 MR. EMBREY: It says, "An individual
10 employed by a state or local agency whose
11 principal employment is in connection with an
12 activity."

13 And then later in the statute under
14 Section A, it says, "An individual who exercises
15 no functions in connection with the activity" is
16 excluded.

17 So the "activity" they're talking about
18 can't be the City. You can't work for someone
19 and not spend any time in the function. So the
20 "activity" must be the grant activity.

21 CHAIRMAN WHEELER: Bryan, am I hampering
22 you by having this -- your case?

23 MR. BABB: No. Normally, Mr. Chairman --

24 CHAIRMAN WHEELER: Well, let me -- I'll get
25 you your time, here. Let's let Judge Embrey

1 finish up.

2 MR. EMBREY: Now, there is -- the only
3 grants we've had in the City of Peru in the six
4 years I've been there were two INDOT grants that
5 were already approved when I went there for a
6 road project on the west end of our town.

7 And as you -- I think most of you know,
8 INDOT takes the bids on those, INDOT does the
9 work on those. That's not something that the
10 City attorney is terribly involved in. In fact,
11 I had virtually nothing to do with that.

12 VICE-CHAIRMAN LONG: Review the contracts
13 with INDOT.

14 MR. EMBREY: Review contracts. In fact,
15 that had been done before I went to work there
16 because those grants had already been approved.

17 We have had --

18 MR. WALKER: We did Phase II of West
19 Jackson.

20 MR. EMBREY: There were two INDOTs. The
21 one actually ended three years ago, the work was
22 completed three years ago.

23 The latest road project we didn't take any
24 federal money for. The airport has perpetual
25 grant money going into it. I do some work and

1 bill it by the hour. That's considered a
2 special project for me. I have nothing to do
3 with their grants. Their board, their aviation
4 board takes care of their grants. I don't have
5 anything to do with them. I have read them and
6 said, yes, you're protect or, no, you're not.
7 But I have nothing to do with those grants.

8 So the amount of time that the City puts
9 in, if you consider it the principal activity,
10 the amount of time that the City is involved
11 with grants is de minimis, and the time I have
12 involved with grants is almost nonexistent. I
13 simply don't see how I can fall under this
14 provision.

15 Will I have time to ask a few questions of
16 my witnesses?

17 CHAIRMAN WHEELER: Yeah. I do want to give
18 you the opportunity to build a record, and I
19 know they've already submitted stuff.

20 MR. EMBREY: I've got a couple things that
21 I really think need to go into the record in the
22 event that this goes further.

23 CHAIRMAN WHEELER: But I want to give him a
24 little more time on the back end.

25 MR. EMBREY: This is a big issue. It's the

1 not something that I think we can handle in 15
2 minutes.

3 James R. Walker would be my witness.

4 BY MR. EMBREY

5 Q Would you state your name for the record.

6 A James R. Walker, Mayor of the City of Peru.

7 CHAIRMAN WHEELER: And you were here to be
8 sworn?

9 MR. WALKER: Yes.

10 CHAIRMAN WHEELER: Quite some time ago at
11 this point.

12 MR. EMBREY: As we recall.

13 COMMISSIONER DUMEZICH: Yesterday.

14 MR. EMBREY: This did serve one purpose. I
15 was nervous at 2:30; I'm not now. Just tired.

16 BY MR. EMBREY

17 Q Would you explain to the Commission what the
18 arrangement is -- are you the one that hired me?

19 A Yes.

20 Q And when did that take place --

21 Should I say appointed?

22 A We took office in 2004, and he was appointed to
23 come in when I first came into office in 2004.

24 Q Were there any requirements concerning my
25 presence?

1 A Yes. One thing I wanted to do is I had a lot of
2 projects, and I wanted to manage the City being
3 very proactive. I didn't want a mayor -- or an
4 attorney to come in and see the mayor once a
5 week. So I wanted dedicated hours each day so
6 that if I had issues, I could talk to him, get
7 it resolved quickly, instead of waiting.

8 Department heads -- being police chief,
9 fire chiefs, any of those other department
10 heads -- if they had some issues, they knew they
11 could come up, and we could resolve the issues
12 quickly and move on, instead of waiting for
13 someone to come whenever they didn't have
14 another client to take care of.

15 Q Did I have a law office at the time?

16 A Yes, you did.

17 Q And how close was it from City Hall?

18 A About a block away.

19 Q So was the office provided for my benefit or for
20 your benefit?

21 A For my benefit, because all the legal records
22 and documents were kept in that office instead
23 of in an office off the premises.

24 Q You heard me describe to the Commission the
25 grants that the City of Peru has received during

1 the time I've been there. Was I accurate in
2 that description?

3 A Yes.

4 Q Have there been any other grants you're aware of
5 that I have not described?

6 A We've identified the ones with West Main Street,
7 the Nickel Plate Trail, which is just beginning.

8 And just so I might add to that, the Nickel
9 Plate Trail that we're -- is getting funded now,
10 has just begun to start. Not one ounce of
11 pavement is being laid in the city limits of
12 Peru, Indiana. We're acting as an LPA, or they
13 would not have received the federal funding to
14 do the grant. So we acted so they could get the
15 grant. None of it is being paved in our city.

16 CHAIRMAN WHEELER: Let me ask a question of
17 either one of the two.

18 MR. WALKER: Yes.

19 CHAIRMAN WHEELER: You testified that you
20 were being paid both on a W-2 and 1099 by the
21 City and by the Utility. They both pay you --

22 MR. EMBREY: Yes.

23 CHAIRMAN WHEELER: -- with both of those?
24 Whichever one of you can answer this.

25 What are you paid for under the W-2, and

1 what are you paid for under the 1099?

2 MR. EMBREY: I'm paid the retainer with the
3 W-2. I'm paid monthly by the City. I'm paid
4 every two weeks by the utilities.

5 CHAIRMAN WHEELER: What's your retainer
6 with the City? This is the W-2 money you get.

7 MR. EMBREY: 30,000, give or take.

8 CHAIRMAN WHEELER: 30,000 divided pro rata.
9 Are you paid on a two-week cycle? Are you
10 paid --

11 MR. EMBREY: It's paid on a monthly cycle.

12 CHAIRMAN WHEELER: So you're paid 30,000
13 divided by 12.

14 MR. EMBREY: And part of that --

15 CHAIRMAN WHEELER: That's paid on a W-2.

16 MR. EMBREY: Part of that --

17 (Interruption by the reporter.)

18 MR. EMBREY: In addition to that, I'm
19 paid --

20 CHAIRMAN WHEELER: Well, let me stop --
21 hold on a second.

22 MR. EMBREY: Okay.

23 CHAIRMAN WHEELER: So you get a W-2 for
24 30,000 divided by 12.

25 MR. EMBREY: Roughly, yes.

1 CHAIRMAN WHEELER: Okay. Plus the 500 a
2 month in --

3 MR. EMBREY: And that's a 1099.

4 CHAIRMAN WHEELER: Is that the 1099 income?

5 MR. EMBREY: That goes on the 1099.

6 CHAIRMAN WHEELER: What else goes on the
7 1099?

8 Is that your all your W-2 income, the
9 30,000 divided by --

10 MR. EMBREY: Yes, that's all --

11 CHAIRMAN WHEELER: For the City.

12 COMMISSIONER DUMEZICH: For the City.

13 CHAIRMAN WHEELER: Now, for the Utility,
14 what is your W-2 income?

15 MR. EMBREY: Roughly 13,000 paid twice a
16 week -- pardon me, twice a month.

17 COMMISSIONER DUMEZICH: Let's just deal
18 with the annual.

19 CHAIRMAN WHEELER: All right. Now, the
20 1099 money from the City, what is that paid?

21 MR. EMBREY: The 1099 money from the City
22 is the \$500 for clerical and office and \$100 an
23 hour that I bill for litigation and special
24 projects.

25 CHAIRMAN WHEELER: All right. So basically

1 you've got a base contract then, and then
2 there's some kind of opt out where you say, all
3 right, this is in litigation, that is not under
4 my retainer, that's my opt out, the --

5 MR. EMBREY: This is a special project
6 yeah. We consider the airport a special
7 project.

8 CHAIRMAN WHEELER: Do you have a contract
9 with the City on the W-2?

10 MR. EMBREY: No.

11 CHAIRMAN WHEELER: No contracts, it's just
12 an oral agreement, or what is it?

13 MR. EMBREY: It's an oral agreement.

14 CHAIRMAN WHEELER: All right. Now, and the
15 1099, then, is the 500; and then the \$100 an
16 hour for other stuff: If the City sued, you'd
17 handle it, or something like that?

18 MR. EMBREY: There is a maximum --

19 MR. WALKER: Yeah.

20 MR. EMBREY: -- in the City budget of
21 22,000.

22 CHAIRMAN WHEELER: How do you know what's
23 covered? You guys just trust each, or what?

24 Let me give you an example. My law firm is
25 on retainer with the City of Indianapolis, and

1 we have a certain set rate and a set fee. And
2 then we have an opt out. We can go to the City
3 and say, no, this is outside the scope of our
4 retainer. We will flip over to an hourly rate.

5 You don't have any real --

6 MR. EMBREY: We have a pretty good
7 understanding. Litigation, of course, is
8 obvious. Special projects, we have he discussed
9 what's a project and what's not. And the --

10 CHAIRMAN WHEELER: But you don't do
11 individual agreements when you opt out or
12 anything?

13 MR. EMBREY: You what?

14 CHAIRMAN WHEELER: You don't do individual
15 agreements on an opt out; you don't do a
16 contract with the client?

17 MR. EMBREY: And the airport is considered
18 a project.

19 CHAIRMAN WHEELER: All right. Now, the
20 City Utility, you get \$13,000 on your W-2.
21 That's your base retainer.

22 MR. EMBREY: Yes. Last year I don't
23 believe I billed anything for litigation.

24 CHAIRMAN WHEELER: So the only 1099 money
25 from the Utility would be the opt out --

1 MR. EMBREY: Special projects.

2 CHAIRMAN WHEELER: Are you on the same opt
3 out for the same rate, \$100 an hour?

4 MR. EMBREY: Yes.

5 VICE-CHAIRMAN LONG: Are you compensated
6 for your membership on the Board of Works?

7 MR. EMBREY: No, I'm appointed. That's
8 strictly an appointment by the mayor.

9 MR. WALKER: No, I asked him to sit on
10 there for obvious reasons, being a legal mind,
11 you'd want a legal person to be on.

12 CHAIRMAN WHEELER: Sounds like free legal
13 advice on the Board.

14 MR. WALKER: Pardon?

15 MR. EMBREY: Sounds like free legal voice
16 on the Board.

17 MR. WALKER: Our budgets are tight.

18 (Simultaneous conversations among parties.)

19 CHAIRMAN WHEELER: I apologize for
20 interrupting you, Judge.

21 MR. EMBREY: That's okay, that's all right.

22 CHAIRMAN WHEELER: I just did not
23 understand.

24 BY MR. EMBREY

25 Q I would like for the mayor to also explain the

1 relationship between Peru Utilities and the City
2 of Peru.

3 A The City of Peru does own Peru Utilities, but
4 many years ago, prior to me coming into office,
5 it was decided that that should be taken out of
6 political hands, where any time a mayor would
7 change, wipe out everybody at the Utilities and
8 bring in all new members, so that the Utilities
9 Service Board was created to manage the Peru
10 Utilities.

11 There are five members on there. I have
12 appointments of three. City Council has
13 appointments of two. So all the appointments
14 are through City government. But as far as the
15 hiring of the manager, the managing -- or the
16 manager general manager is what I'm trying to
17 say -- that comes from the Utility Service
18 Board.

19 CHAIRMAN WHEELER: This is probably a
20 stupid question, and you may have already
21 answered it.

22 What federal money does the Utility get?

23 MR. EMBREY: The only federal.

24 CHAIRMAN WHEELER: I heard highway grants,
25 I heard Nickel Plate Trail grants. What federal

1 money would the Utilities get?

2 MR. EMBREY: Utilities get a grant, some --

3 MR. WALKER: Yeah, if they look at -- like
4 right now, I think they are looking at some RM
5 money.

6 CHAIRMAN WHEELER: The what?

7 MR. WALKER: Stimulus money.

8 They're looking at those types of things.

9 CHAIRMAN WHEELER: They haven't gotten any
10 of that, though?

11 MR. WALKER: I haven't heard that. I know
12 the application's in, but we have not heard
13 they've been awarded anything.

14 But also when they did a sewage treatment
15 plant upgrade, there were some federal funds on
16 that, but that was prior to 2004 when that was
17 awarded. But that would give you an example.

18 VICE-CHAIRMAN LONG: OCRA grants,
19 Department of Commerce grants.

20 MR. WALKER: State revolving loans.

21 VICE-CHAIRMAN LONG: We do those.

22 MR. EMBREY: You mean for the utilities?

23 VICE-CHAIRMAN LONG: Our utilities, in my
24 little town I represent, we have got last year
25 about \$7 million.

1 MR. EMBREY: They were under an IDEM
2 mandate to upgrade the sewage treatment plant at
3 the former Grissom Air Force Base. There was
4 stimulus money that went into that. I did the
5 bond issue. I had nothing to do with the grant
6 application.

7 I'd also like to ask Mrs. Gray a very few
8 questions about the grant situation.

9 BY MR. EMBREY

10 **Q Would you state your name for the record.**

11 A Jackquan, J-A-C-K-Q-U-A-N, Gray G-R-A-Y.

12 VICE-CHAIRMAN LONG: Sorry, first name?

13 MS. GRAY: Jackquan.

14 CHAIRMAN WHEELER: Jackquan, okay.

15 MR. EMBREY: Better known as Jackie. It's
16 a lot easier.

17 BY MR. EMBREY

18 **Q What's your position with the City of Peru?**

19 A I'm currently the City clerk-treasurer.

20 **Q How long have you been in that position.**

21 A Eleven years.

22 **Q You were in that position when I first began
23 working at the City of Peru?**

24 A I was.

25 **Q Have I -- what association have I had with any**

1 grants during that period of time?

2 A You've had no affiliation with the grants.

3 The Nickel Plate Trail grant was filed
4 through Nickel Plate Trail, Incorporated. We
5 are simply the LPA. The money is received
6 through our -- through the City of Peru with an
7 EFT. That money is returned directly to Nickel
8 Plate Trail.

9 The money is received through an LPA Claim
10 Voucher, so -- simply as Nickel Plate Trail.
11 It's, I believe, only been an LPA, so you've had
12 no affiliation with that grant.

13 Q How about the FAA grants that the airport
14 occasionally gets?

15 A The FAA grants that are received are submitted
16 and coordinated only through the Board of
17 Aviation, and so you've also had no affiliation
18 with those grants.

19 MR. EMBREY: I might add that I do not
20 attend the Board of Aviation meetings, unless
21 there is a specific reason. And the last time I
22 was asked to attend it was because they wanted
23 me to write a contract for the lease of some
24 farmland next to the airport, has nothing to do
25 with any grants there.

1 CHAIRMAN WHEELER: Judge, what else you
2 got? We're kinds of --

3 MR. EMBREY: Am I going to be -- there is
4 something I need to get in the record. I don't
5 know if this is the right time to do it or with
6 the wrap-up.

7 CHAIRMAN WHEELER: I think it's probably
8 the right time to do it so you can get it in the
9 record. What do you have?

10 MR. EMBREY: I think there is some
11 constitutional issues involved here: First
12 Amendment and, particularly, Equal Protection.
13 And I would like to introduce into evidence --

14 This is really a cheap way to do research,
15 but it's 50-page law-review article. I only
16 made one because I didn't want to kill a tree,
17 and I didn't think you'd want to read it this
18 afternoon.

19 But in the event this case goes farther,
20 I'd like for this article to be in the record,
21 because it points out some of the constitutional
22 issues in the Hatch Act area.

23 CHAIRMAN WHEELER: So you're going to
24 challenge the constitutionality of the Hatch Act
25 in front of us?

1 MR. EMBREY: I don't know where this is
2 going.

3 CHAIRMAN WHEELER: I understand.

4 MR. EMBREY: I just need --

5 CHAIRMAN WHEELER: I understand you want to
6 preserve the record. Absolutely.

7 MR. EMBREY: I just want to make a
8 record --

9 CHAIRMAN WHEELER: Fair enough.

10 MR. EMBREY: -- wind up in court someplace.

11 CHAIRMAN WHEELER: No, I understand.

12 MR. EMBREY: I want to have a record I can
13 use.

14 Candidates who have no means of using
15 federal funds to their advantage are deprived of
16 the right to run for office if this is applied
17 to me. It's going to apply to an awful lot of
18 lawyers who will be deprived of the right.

19 And by operation of this very outdated
20 intrusion of individual liberties, voters are
21 deprived the right to vote for candidates of
22 their choosing.

23 In my case, I'm in danger of being deprived
24 of the right to run against an incumbent who
25 takes federal money for victim-advocate

1 programs, hires employees, pays them entirely
2 with federal dollars, addresses them in his
3 T-shirt and uses them to campaign for him, while
4 I may not be able to run because two of my
5 clients rather infrequently receive federal
6 dollars over which I have no control. That is a
7 denial of Equal Protection in my book, and I
8 would ask you --

9 CHAIRMAN WHEELER: Are you also -- just --
10 are you asserting an Indiana Constitutional
11 claim as well, for example, under Article 1,
12 Section 23?

13 MR. EMBREY: Yes. And I think there could
14 be some Indiana Constitutional implications as
15 well.

16 CHAIRMAN WHEELER: Just thought I'd ask. I
17 spent all day yesterday with Mr. Groth
18 discussing the Photo ID Act and the
19 constitutionality of that.

20 MR. EMBREY: I hope not to have to raise
21 it, though, to be honest with you.

22 And finally, I would simply ask you to step
23 back away from the Hatch Act for a minute, take
24 a good look at it, take a good look at what I
25 do, and ask yourself if I am the evil one the

1 Hatch Act is trying to save the republic from.

2 Am I in a position to use anything related
3 to federal dollars to influence my election? Am
4 I in a position to coerce people who bid on
5 contracts that I never -- that I don't have
6 anything to do with, we don't take the bids. Am
7 I in a position to coerce them into paying my
8 campaign, hitting them up for funds?

9 I don't think I'm the person that this
10 statute is aimed at. I just can't see how any
11 connection I have with federal funds is going to
12 harm anybody, is going to threaten anything in
13 the federal government or in the State
14 government or cause any kind of serious breach
15 in the republic. I simply don't think I'm the
16 person it's aimed at.

17 And if it's aimed at me, it's aimed at
18 every lawyer who represents a school board, who
19 represents a sewer district, or who represents
20 anyone who takes federal dollars, whether or not
21 they're involved in it.

22 Thank you.

23 CHAIRMAN WHEELER: All right, Bryan.

24 MR. BABB: All right, Mr. Chairman,
25 Commission members. I'm begin by saying that I

1 could not empathize more with your situation.
2 In fact, I've argued till I'm blue in the face
3 for every argument that you've just made before
4 the Court of Appeals, and I flat lost.

5 And then I asked the Court of Appeals, I
6 said -- the Supreme Court, I said, Will you
7 please decide this case? Will you give us some
8 guidance on how this act applies? And they
9 didn't do it. All they did was say you have to
10 bring this challenge now.

11 CHAIRMAN WHEELER: Right.

12 MR. BABB: So I can tell you, Mr. Chairman,
13 Commissioners --

14 CHAIRMAN WHEELER: Can I ask you just a
15 procedural question?

16 As I understand the order in looking at
17 that -- I'm a sometime appellate practitioner --
18 I'll defer to you and Judy and those guys.

19 But when the Court took transfer, that
20 vacated the Court of Appeals' opinion.

21 MR. BABB: It did.

22 CHAIRMAN WHEELER: And then it affirmed the
23 trial court; is that correct?

24 MR. BABB: It did.

25 CHAIRMAN WHEELER: Based upon the fact --

1 not the definitions that are used in either of
2 those opinions, but based upon the fact that you
3 had to make the challenge at this point in the
4 process.

5 MR. BABB: Prior to the election.

6 CHAIRMAN WHEELER: That's the way I read --
7 is that a fair read?

8 MR. BABB: That's correct, Mr. Chairman.

9 So then what we're left with is we default
10 to the decisions out there that are largely from
11 the Merit Protection Board that deal with
12 controlling the Hatch Act.

13 CHAIRMAN WHEELER: And I assume that's
14 either MSPR or MSPB?

15 MR. BABB: That's correct. And I will tell
16 you, Mr. Chairman, a lot of this case is -- even
17 though it's functionally become vacated, that
18 decision, that analysis was really never part of
19 what happened at the Indiana Supreme Court.

20 And what I did is in my submission,
21 again -- not in the Bates stamped numbers, but
22 as part of my log here -- what I did was I
23 repeat some of those same principles with
24 respect to this dilemma that we have here. I
25 think it's important because what I just heard

1 Judge Embrey say, I think, is going to simplify
2 things a little bit.

3 I had a series of questions I was going to
4 ask him with respect to his job and how much
5 time he spent in it. And here's what I heard is
6 that at the end of day, he spends the most time
7 of all of those jobs that we talked about as
8 City attorney.

9 Now, he does -- at 34 percent. Now, he
10 does try to parse out a chunk -- I'll get to
11 that in a minute -- the Utility Board, tries to
12 say that that's different. But at the end of
13 the day, we're talking about 17 percent as a
14 senior judge; 34 percent as a city attorney; 31
15 percent is a private practice, golf and all the
16 other nice stuff we have, children and
17 grandchildren; and 2 percent as a general
18 partnership.

19 So, really, it -- I think at the end of the
20 day, it just comes down to whether or not what I
21 heard him say, which is: Are we principally
22 employed in connection with these sort of
23 federal duties.

24 And really, I want to take you to -- so I
25 don't think there's any question at all that he

1 meets the principal employment prong. I think
2 his position is is that really what I'm doing
3 with those federal funds is de minimis, so the
4 Hatch Act shouldn't apply; is that fair, Your
5 Honor?

6 MR. EMBREY: No, that's not at all.

7 CHAIRMAN WHEELER: Bryan, let me ask you,
8 explain that to me, because I don't know that I
9 agree with that.

10 MR. BABB: Right.

11 CHAIRMAN WHEELER: Your argument is his
12 principal employment falls within the Hatch Act.
13 That's what you just said, right?

14 MR. BABB: That's correct.

15 CHAIRMAN WHEELER: Tell me why you
16 believe -- I'm not the getting that.

17 MR. BABB: I know.

18 Here, let me go to -- let me tell you, if
19 you go to -- it's part of our handout. If you
20 go to page 9, Bates stamped page 9 of the
21 filing, okay. There is some quotes from some
22 cases, and it talks about principal employment.

23 "In determining an individual's principal
24 employment, the Merit System Protection Board
25 typically considers two factors: Time spent in

1 each position and income earned in each
2 position."

3 Then you go down, you see, "Although the
4 Board generally considers both factors, the
5 greatest weight is given to the time spent
6 factor."

7 So what we're talking about now is he
8 spends the most time doing City work. Now, what
9 he would like to say is that he want to parse
10 out the --

11 CHAIRMAN WHEELER: I'm struggling with
12 that.

13 MR. BABB: Okay.

14 CHAIRMAN WHEELER: I'm struggling with the
15 fact that simply because you're employed by the
16 City, and the City somewhere else takes a grant
17 that makes you subject to the Hatch Act. Is
18 that the position you're taking?

19 MR. BABB: No, what I'm trying to do is I'm
20 trying to parse out -- I'm trying to say your
21 good question right, Mr. Chairman, that's
22 something that we don't even get to until we
23 decide what his principal employment is. And
24 what I'm saying right now because that --

25 CHAIRMAN WHEELER: Let me, for purposes of

1 this -- of this dialogue we're having, let's
2 assume that his principal employment -- let's
3 assume that he's 100 percent employed by the
4 City.

5 MR. BABB: Okay. Let's do that.

6 CHAIRMAN WHEELER: And does -- simply
7 because the City receives federal funds?

8 MR. BABB: That's correct.

9 CHAIRMAN WHEELER: Does that, therefore --
10 is he, therefore, subject to the Hatch Act?

11 MR. BABB: If he has -- if you go to, and
12 this is on page 2 at the very beginning. This
13 is part of my filing. Not Bates Stamp 2, by
14 page 2 where I laid out the law.

15 Here's the real touchstone of what I
16 struggle with and what I tried to argue on
17 behalf of Mayor Bennett. It's really at the
18 top: "It has long been established an officer or
19 employee of the state or local agency is subject
20 to the Hatch Act," which is your question,
21 Mr. Chairman, "if as a normal and foreseeable
22 instance of his principal position or job, the
23 person performs duties in connection with an
24 activity financed in whole or in part by federal
25 funds."

1 CHAIRMAN WHEELER: And what duty as City
2 Attorney is he functioning -- I mean, I get the
3 Hatch Act.

4 For example, when I was on the Boone County
5 Council, I had a deputy sheriff who was on the
6 County Council with me. He went for reelection,
7 got taken out by the Hatch Act because a
8 majority of his money was -- a majority of his
9 pay was funded by a cops grant. Okay. I get
10 that.

11 I mean, you're probably aware that Bart
12 McAtee had a Hatch Act challenge decided
13 yesterday --

14 MR. BABB: I was.

15 CHAIRMAN WHEELER: -- that went the other
16 way by the Marion County Election Board.

17 MR. BABB: Right.

18 CHAIRMAN WHEELER: I get that. What I'm
19 struggling with is based upon the info that we
20 received here today?

21 MR. BABB: Right.

22 CHAIRMAN WHEELER: Even if he's a hundred
23 percent City attorney, I don't see where there
24 is income, there is payment, his salary is
25 derived from a federal grant. And I don't see

1 where he is working on any federal programs.

2 MR. BABB: And I have --

3 CHAIRMAN WHEELER: What am I missing here?

4 MR. BABB: And I have additional evidence
5 to show you there.

6 CHAIRMAN WHEELER: So you're going to
7 disagree factually with what they just said?

8 MR. BABB: Without a doubt.

9 CHAIRMAN WHEELER: Okay. That's what I'm
10 struggling with. Because if his version of the
11 facts are correct, I think you're losing.

12 MR. BABB: If as a normal and foreseeable
13 incident of the City Attorney to advise with
14 respect to federal funds. His duties in
15 connection with, Mr. Chairman. It doesn't say
16 your employment. It doesn't say your pay has to
17 be there.

18 In fact, he was paid with federal funds,
19 and I'll show you. And I believe I heard him
20 say that he was not. He absolutely was. And
21 so -- why don't we do this. I have -- let me,
22 first of all -- can you help me pass these out?
23 These are Exhibits 9. First of all, give one to
24 the Judge.

25 And, Your Honor, because I didn't get a

1 copy of it, can you state for the record what
2 that law journal article was.

3 CHAIRMAN WHEELER: Dale's got it here.

4 MR. EMBREY: Tell you what, I'm going to
5 give you my copy of it because I've got it on
6 the computer.

7 MR. SIMMONS: Do you have copies for all --

8 CHAIRMAN WHEELER: How many copies do you
9 have?

10 MR. SIMMONS: Just give me one. I should
11 have several.

12 MR. EMBREY: Of the law review article.

13 CHAIRMAN WHEELER: Give them the original,
14 and they'll mark that as 9.

15 (Simultaneous conversations among parties.)

16 CHAIRMAN WHEELER: Judge, you've got one,
17 right, 9?

18 MR. EMBREY: The exhibit, yes.

19 CHAIRMAN WHEELER: Do you want to start?
20 Do you want to do them one at a time?

21 MR. BABB: I do. I want to do them one at
22 a time, and I want to try to work through that.

23 What I've done on this is kind of like my
24 handwritten numbering, so I can reference, in
25 the lower right-hand corner. And we can just

1 focus on -- if you go to page 3, we can just
2 focus on 2009.

3 Now, this is a Resolution. If you look in
4 the first paragraph, it says he was paid by the
5 City an annual salary. And if you look down
6 there, it talks about: The salary to the City
7 Attorney shall be 1114.69 per month, plus
8 compensation of a thousand dollars per hour for
9 special projects and litigation, plus additional
10 fees for bond issues and other financing, as
11 from time to time is approved by the Board.

12 Now, it says there's also a salary for the
13 Utility Service Board membership of \$5700, but I
14 understand that Judge says he doesn't get paid
15 for that.

16 MR. EMBREY: I'm not on the Utility Service
17 Board.

18 MR. BABB: I understand that, but it says
19 that right there.

20 So what we have here is a Resolution. By
21 the way, I asked -- this is their APRA response.
22 I issued an APRA Response on the 23rd of
23 February. I believe I got a response on the
24 22nd (sic) two days later. No cover letter, no
25 explanation, no nothing, and this is all I

1 received.

2 CHAIRMAN WHEELER: And so you're --
3 Judge, do you have any reason to dispute
4 Resolution 1, 2009? I know it's not certified.

5 MR. EMBREY: Exactly.

6 CHAIRMAN WHEELER: Okay.

7 MR. BABB: Let's go to page 5. This is a
8 2009 Ordinance Establishing Salary. If you look
9 under City Attorney Department: 30,011.89.

10 CHAIRMAN WHEELER: Right, and he's
11 testified to both of those.

12 MR. BABB: That's correct.

13 CHAIRMAN WHEELER: When I asked him about
14 what is being paid.

15 MR. BABB: If you look at page 6, we were
16 told that this is the amounts of money that
17 were -- because, again, there was no explanation
18 with this APRA Request. We had to call back and
19 talk to the City and try to figure out what this
20 stuff was.

21 This was apparently the amount that was
22 paid to him -- I'm not sure what it is, whether
23 it's for litigation, or whatever it is. I don't
24 think this is his salary, because if you look at
25 those amounts --

1 CHAIRMAN WHEELER: The appropriation number
2 is 22,000, and there're spending down out of
3 this.

4 MR. EMBREY: For litigation.

5 MR. BABB: Litigation.

6 CHAIRMAN WHEELER: Are you comfortable with
7 asking back and forth?

8 MR. BABB: Absolutely, absolutely.

9 CHAIRMAN WHEELER: So as I understand it,
10 this is the \$100 an hour you were talking about?

11 MR. EMBREY: Yes.

12 CHAIRMAN WHEELER: You guys don't have --
13 is there a fund number? You guys don't have a
14 fund number?

15 MS. GRAY: 101 is the general fund. The
16 appropriation is 101006 --

17 CHAIRMAN WHEELER: So it's 10106. So 101
18 is the fund number?

19 MS. GRAY: It is.

20 CHAIRMAN WHEELER: And what's the latter
21 part of those numbers?

22 MS. GRAY: 101 the fund number; 006 is the
23 department, which is the law department; 130 is
24 the department -- the classification.

25 CHAIRMAN WHEELER: So litigation?

1 MS. GRAY: It's litigation.

2 CHAIRMAN WHEELER: So there would be
3 another one, which may be back here someplace.

4 VICE-CHAIRMAN LONG: That's 310.

5 CHAIRMAN WHEELER: So what's the 75 --
6 Do you mind if I go through this, Bryan?

7 MR. BABB: No, no, not the at all.

8 CHAIRMAN WHEELER: What's the 7500 on the
9 next page, which is --

10 MR. BABB: Which page are you on?

11 CHAIRMAN WHEELER: 006 is law department
12 and 310, what is that?

13 MS. GRAY: Those are for any
14 professional -- city attorney professionals. So
15 if there are law books or any professional
16 publications that have to be ordered, those
17 types of things. So if --

18 CHAIRMAN WHEELER: So there's 7500 for --
19 are you compensated under this -- is this a 1099
20 income or what is this?

21 MS. GRAY: No.

22 CHAIRMAN WHEELER: This is just an expense
23 for so the -- this is just sitting in your
24 office?

25 Do you have an office over there or not?

1 MR. EMBREY: Yes.

2 CHAIRMAN WHEELER: So these would be --

3 MR. BABB: We were told these were seminars
4 reimbursement for expenses, deposition stuff,
5 law books.

6 CHAIRMAN WHEELER: I see Thomson West, West
7 Payment Center, Beckley Office Equipment.

8 MR. EMBREY: That's correct.

9 MS. GRAY: That's correct. It is what it
10 is.

11 CHAIRMAN WHEELER: Then the ones to
12 Bruce C. Embrey Law would be reimbursements?

13 MS. GRAY: Correct. If he would have
14 purchased those same items online, or that type
15 of thing, that's reimbursement for those type of
16 things.

17 MR. BABB: Next one, page 8, Mr. Chairman,
18 is the amount that was paid for his secretarial
19 expense.

20 CHAIRMAN WHEELER: So this is the 500 a
21 month that we're talking about?

22 MR. EMBREY: Yes.

23 MR. BABB: And then the last part is --
24 I'll have maybe a question or comments later on,
25 but this is the Nickel Plate Trail federal

1 grant.

2 This is the only document that we received,
3 this document right here, apparently, that was
4 responsive to our request that we asked for any
5 documents that related to federal funding that
6 Mr. Embrey was involved in with respect to
7 whether it was the airport, the Utility Board,
8 the Workforce or City Attorney. This is the
9 only thing we were provided.

10 The next case is the Rynerson v. Franklin.

11 CHAIRMAN WHEELER: Let me stop.

12 Did I miss a fund? Where's the funds that
13 he's paying, the 30 -- where's his retainer
14 being paid?

15 MR. BABB: 30,000, I'll get to that, Mr.
16 Chairman.

17 MS. GRAY: It was in the Ordinance.

18 CHAIRMAN WHEELER: It was in the Ordinance,
19 but where's -- there wasn't a fund list. I
20 assume they --

21 MR. BABB: The 30,000 is separate and apart
22 from the judicial money.

23 CHAIRMAN WHEELER: The retainer 30,000 is
24 paid out of the fund as well. I just -- you
25 went through the other ones. I just didn't see

1 that one there. It's not right in there now.

2 MS. GRAY: I did not put it there because I
3 made the copy of the Ordinance, and that always
4 had that amount.

5 CHAIRMAN WHEELER: But the other fund
6 list --

7 MS. GRAY: So I didn't make a copy of the
8 fund for --

9 MR. WALKER: It would be a 100 category.

10 MS. GRAY: Yeah, it would be 101006105.

11 CHAIRMAN WHEELER: So it would be 105 --

12 MS. GRAY: 105 is the classification.

13 CHAIRMAN WHEELER: -- and show the same --
14 (Interruption by the reporter.)

15 CHAIRMAN WHEELER: I think I understand.
16 But that's not -- you provided -- in response to
17 their APRA request, you provided the ordinance
18 as opposed to with these other ones, you
19 actually provided the fund listing, like I see
20 the balance going down as payments are being
21 made.

22 MS. GRAY: That's correct.

23 CHAIRMAN WHEELER: If I wanted to see that
24 or if someone see it, they'd ask for 105?

25 MS. GRAY: Absolutely.

1 MR. BABB: So here's the reason why we
2 included the Rynerson case. This is the case
3 that dealt with Indiana Supreme Court decision
4 where essentially someone from the Works Board
5 who is the city attorney was going to recuse
6 himself but go ahead and represent somebody
7 before it. And there was a issue of whether or
8 not there was due process, et cetera.

9 If you go to -- if you go to page 5 of the
10 decision up in the right-hand corner, one of the
11 positions that I think I heard the Judge take
12 was that he really wasn't an employee. He's
13 sort of -- he's just not an employee of the
14 City. It's like a attorney-client relationship.

15 CHAIRMAN WHEELER: Did you highlight these
16 for everybody?

17 MR. BABB: I did.

18 CHAIRMAN WHEELER: This is your
19 highlighting.

20 MR. BABB: It is.

21 If you look down there in the right-hand
22 column a the bottom of paragraph C, it talks
23 about -- this is the Indiana Supreme Court -- it
24 talks about, "We note that is correct it is the
25 player who hires the city attorney," and then it

1 talks about the fact that this is an
2 employee-employer relationship.

3 CHAIRMAN WHEELER: He was paid on a W-2.
4 I'm not going to disagree. He is an employee.

5 MR. EMBREY: I don't view it that way.

6 CHAIRMAN WHEELER: I don't think he can
7 really dispute that.

8 MR. BABB: Okay. But this is important
9 with respect to trying to distance himself from
10 the Utility Board and what he does as city
11 attorney.

12 If you go here to next page down in the
13 left-hand, the very bottom, it says -- now this
14 wasn't about a utility board, but this was about
15 a works and safety board. "A third class city's
16 works and safety board is responsible for an
17 enormous amounts and variety of city business."

18 And I will contend that that's the exact
19 same thing as the utility board.

20 If you go over here to the right-hand
21 column, after it lists all the different things
22 that you do on behalf of the city works board,
23 "As can be seen from the partial list, much of
24 this work will require the assistance of the
25 city attorney." I mean, all of this stuff:

1 When you're advising, when you're doing any of
2 these things, you're requiring the assistance of
3 the city attorney.

4 "Contrary to the conclusion of the Court of
5 Appeals" -- not relevant here -- "we think that
6 to prohibit the city attorney from serving as a
7 member of works and safety board would work a
8 substantial disruption to the operations of the
9 city government."

10 So --

11 CHAIRMAN WHEELER: Let me ask you a
12 question about that, because one of the things
13 that troubles me is if you take the city
14 attorney, and we adopt a view of the Hatch Act,
15 as you're proposing, it strikes me that you're
16 going to make every attorney that works -- the
17 concern in this case is actually -- this case
18 refers to the fact that, look, the city attorney
19 if we read this in this fashion, it's going to
20 make it impossible for the city attorney to do
21 certain things. That's what this case says,
22 right?

23 MR. BABB: Yeah.

24 CHAIRMAN WHEELER: And my concern is if we
25 view the Hatch Act as broadly as you're

1 claiming, the reach is immense.

2 MR. BABB: Mr. Chairman, I'm telling you,
3 this is what I talked about until I was blue in
4 the face. I tried to get the Bart Stupak, who
5 is a congressman from Michigan, who is
6 desperately trying to amend the Hatch Act
7 because what he wants to do is he wants to have
8 it not apply to rural communities or counties
9 where the population is 5,000 or less. And the
10 reason why is because you have potentially
11 qualified people like Judge Embrey not able to
12 run. There is absolutely no doubt under the law
13 this applies to him, if he exercises duties in
14 connection with federal funds. There's no doubt
15 that it's --

16 CHAIRMAN WHEELER: What duty is he
17 exercising in connection with the federal funds?

18 MR. BABB: I'm telling you right now, I
19 heard him say that he talked about this -- well,
20 let me skip to -- all right, here we go
21 exhibit -- hand out the second exhibit, which is
22 Exhibit 10.

23 CHAIRMAN WHEELER: That would be the same
24 Stupak that's leading the democratic revolt to
25 the Obama healthcare plan?

1 MR. BABB: Don't paint me with that brush,
2 Mr. Chairman.

3 I'm just saying, I tried to get him to come
4 in because I was taking the same position. It's
5 unfair but it's the law.

6 MR. EMBREY: But you were dealing with a
7 postelection --

8 MR. BABB: Election challenge.

9 MR. EMBREY: And I don't know that those
10 arguments --

11 MR. BABB: If you're subject to the Hatch
12 Act, and it -- it's the same exact arguments,
13 Your Honor.

14 CHAIRMAN WHEELER: I mean, I'm with you. I
15 think preelection --

16 MR. BABB: It doesn't change at all.

17 CHAIRMAN WHEELER: You have a tough time
18 selling me.

19 MR. BABB: I understand. Just let me get
20 there.

21 Now, what this is, this is the State Board
22 of Accounts document that I just printed from
23 the website. And if you go to page 15.

24 CHAIRMAN WHEELER: First of all, this is
25 Exhibit 10?

1 MR. BABB: This is Exhibit 10.

2 MR. EMBREY: I don't have a copy of it.

3 CHAIRMAN WHEELER: Judge, do you have a
4 copy?

5 MR. BABB: He's going to get one.

6 CHAIRMAN WHEELER: What page?

7 MR. BABB: If you go to page 15.

8 CHAIRMAN WHEELER: Oh, you've highlighted
9 this, too.

10 MR. BABB: Yes.

11 You go to page 15, it talks about
12 Construction in Projects. It talks about the
13 Storm Water Utility Oakdale Project, which is
14 estimated at 2.2 million, involves the
15 separation of sanitary sewers and storm drains
16 in the City of Peru, Oakdale subdivision.

17 "Funding for this project is 1.2 million
18 from the remaining Wastewater Utility SRF loan."

19 Now, that's a State Revolving Fund loan.
20 From what I understand, that has federal funds
21 in it. Those are federal funds. It's a
22 \$500,000 ten-year term loan from American Trust
23 Bank, and \$200,000 loan from the Peru Wastewater
24 Utility.

25 If you go down to the bottom there where

1 I've also highlighted, it talks about the
2 Grissom Wastewater utility facility upgrade
3 estimated at 9.4 million, will be funded in part
4 by federal stimulus grant of 3.8 million and
5 State Resolving Fund loan for up to 5.7 million.
6 The estimated completion date for this project
7 is in the spring of 2011.

8 Now, what I heard, I believe, Judge Embrey
9 say is that in his role as the head of the
10 Department of Law, as advising the City on all
11 legal affairs, that he has no connection
12 whatsoever -- maybe even no idea -- what these
13 federal funds deal with.

14 And I will tell you, Mr. Chairman, that
15 that is not realistic. As the City attorney
16 there are federal funds out here, they have to
17 apply for these grants. At some point in time,
18 somebody -- either himself or somebody from his
19 office -- has to obviously approve those.

20 Grants don't go out with federal funds with
21 the city attorney not looking at them. When
22 those federal funds come in and they are
23 utilized, you have to -- as part of a closing on
24 the fund loan, you have to verify that you met
25 the requirements of the law.

1 Now, I will tell you that that brings me
2 to --

3 CHAIRMAN WHEELER: Bryan, let me stop you
4 there.

5 Judge, I'm not sure I heard you mention
6 these two projects.

7 MR. EMBREY: You did.

8 CHAIRMAN WHEELER: Okay.

9 MR. EMBREY: You heard me mention the
10 second project, because that's when I got the
11 \$30,000 fee from the SRF for doing a bond issue,
12 not a grant.

13 CHAIRMAN WHEELER: That's the one when you
14 said one year my 1099 was larger --

15 MR. EMBREY: Yes.

16 CHAIRMAN WHEELER: -- than my W-2.

17 MR. EMBREY: Right.

18 CHAIRMAN WHEELER: That's what you were
19 referring to.

20 MR. EMBREY: The first one is a loan --

21 CHAIRMAN WHEELER: Hold on, hold on.

22 So you were paid \$30,000 out of -- I'm not
23 a bond lower, nor do I pretend to be one.

24 MR. EMBREY: SR, State Revolving.

25 CHAIRMAN WHEELER: That was State Resolving

1 Funds. Now, Mr. Babb has indicated he thinks
2 that was federal money.

3 MR. EMBREY: I have no clue where the money
4 came from.

5 MR. BABB: It is, Your Honor --

6 VICE-CHAIRMAN LONG: I can tell --

7 MR. BABB: -- without a doubt.

8 VICE-CHAIRMAN LONG: -- you it's a
9 federally funded program. SRF Program is
10 federal money that comes from the state. The
11 state then can make out low-interest loans to
12 utility projects.

13 MR. EMBREY: Are all those fund federal
14 dollars?

15 VICE-CHAIRMAN LONG: I think so.

16 MR. BABB: They are.

17 MR. EMBREY: I have no idea.

18 MR. BABB: I talked to the attorney today.

19 MR. EMBREY: Also, they --

20 CHAIRMAN WHEELER: If we -- hold on. If we
21 assume that that's the case, then what year did
22 that --

23 MR. EMBREY: It happened last year.

24 CHAIRMAN WHEELER: So '09?

25 MR. EMBREY: It was done in '09.

1 CHAIRMAN WHEELER: Assuming that the
2 Vice-Chair is correct, you would have received
3 \$30,000 in federal funds --

4 MR. EMBREY: In '09.

5 CHAIRMAN WHEELER: -- that were paid to
6 you --

7 MR. EMBREY: Yes.

8 CHAIRMAN WHEELER: -- for your work in
9 connection with the Utility.

10 MR. EMBREY: The bond issue.

11 COMMISSIONER DUMEZICH: On a 1099.

12 MR. EMBREY: Yes.

13 COMMISSIONER DUMEZICH: That states
14 nonemployee compensation, so it ends in a red
15 herring for you.

16 MR. BABB: I'm not sure -- if it's a 1099,
17 I'm not sure why that matters.

18 CHAIRMAN WHEELER: I don't know about W-2
19 or 1099.

20 MR. EMBREY: Can we look at the first one,
21 Storm Water Oakdale project, as far as I know,
22 there's no federal money in that.

23 VICE-CHAIRMAN LONG: Other than your SRF
24 loan.

25 MR. EMBREY: I had nothing to do with that

1 grant.

2 CHAIRMAN WHEELER: You were not paid --

3 MR. EMBREY: I was not paid anything from
4 that grant, I don't remember ever seeing -- I'm
5 sure I didn't see the grant, it was at the
6 utilities.

7 CHAIRMAN WHEELER: Bryan, do you have any
8 reason to dispute what he's saying on that one?

9 MR. BABB: Only for the reason that I'll
10 get to in minute. When I asked for
11 documentations with respect to his involvement
12 in federal funding, I got essentially nothing.
13 And I will show the Commission here that I --
14 there should be something that I received that
15 says that when the city is involved with
16 receiving SRF loans that there is a role for the
17 city attorney, and it's typically when those
18 funds are closed and that loan is closed,
19 there's a Certificate of Attorney, where he
20 certifies on behalf of the city that they have
21 complied with the law.

22 VICE-CHAIRMAN LONG: That's true.

23 MR. BABB: And that is true, and I didn't
24 get any of it.

25 MR. EMBREY: I may have certified that. I

1 don't have any recollection of it.

2 CHAIRMAN WHEELER: But you would have --
3 would you have done that in your role at utility
4 attorney?

5 MR. EMBREY: Utility attorney.

6 CHAIRMAN WHEELER: On your W-2, your
7 regular retainer for utility?

8 MR. EMBREY: Yeah.

9 VICE-CHAIRMAN LONG: No, that would be part
10 of his compensation.

11 MR. EMBREY: Well, for the bonding.

12 VICE-CHAIRMAN LONG: Well, if he wasn't he
13 compensated for it --

14 CHAIRMAN WHEELER: He wasn't paid for the
15 bond issue.

16 MR. EMBREY: I got no compensation on the
17 first one.

18 VICE-CHAIRMAN LONG: I'm not sure it makes
19 any difference if you're compensated or not.

20 It's the duty you perform that you test --

21 MR. BABB: Duties in connection --

22 VICE-CHAIRMAN LONG: -- under the Hatch
23 Act.

24 CHAIRMAN WHEELER: All right. Go ahead. I
25 apologize.

1 MR. EMBREY: But if those duties are
2 de minimis --

3 VICE-CHAIRMAN LONG: And I appreciate that,
4 but I don't think it's -- it's not so important
5 that you have to have federal money that you can
6 track your paycheck or your 1099 as it is that
7 you're doing duties that relate to the
8 federal --

9 I mean, I think that's what I'm hearing
10 is -- I think that's the argument you're making.

11 MR. BABB: I agree. I think if you can
12 trace federal funds directly to a city attorney,
13 I think the case is stronger, but I don't think
14 it's required. The touchstone is reasonable
15 duties, foreseeable duties in connection with
16 activities involving federal funding.

17 So let me -- because I know he want to move
18 quickly, it's getting late.

19 Let me go to Exhibit Number 11. Give that
20 to the Judge.

21 Okay. Now, what this is is -- this is a
22 Certificate of Attorney that Mr. Embrey signed
23 as counsel for the City of Indiana (sic). This
24 is part of -- this is what I received today
25 from -- and I had to go get this from the State

1 Revolving Fund, and I had to get it from --
2 excuse me, from the Indiana Finance Authority,
3 and this is the closing loan document on this
4 Grissom Wastewater project.

5 And if you go to -- and I didn't make a
6 copy because I just got this this afternoon,
7 I'll do it, but if you go to 10, Tab 10 -- nope,
8 excuse me, if go to Tab 11 on this, this is the
9 actual closing binder, that is your Exhibit 11.

10 And that is Mr. Embrey essentially
11 certifying as the City attorney that this --
12 that they have complied, essentially, with all
13 the federal funding and requirements that
14 underwrote this bond on this project.

15 And what this is is this involves
16 \$3.8 million from the American Recovery and
17 Reinvestment Act -- 3.8 million, and that is a
18 forgivable loan. This is for the Grissom
19 Wastewater Treatment upgrade.

20 CHAIRMAN WHEELER: This is the document he
21 previously said that he had provided you. You
22 said -- you acknowledge this.

23 MR. EMBREY: This is the bond. This is
24 part of the bonding. The BAN, the bond.

25 MR. BABB: It's not -- he's not on here as

1 the public utilities attorney, Mr. Chairman.
2 He's on here as the City of Peru attorney. And
3 if you look at the Table of Contents --

4 CHAIRMAN WHEELER: I'm getting educated on
5 bond work from the Vice-Chair.

6 MR. BABB: I don't know -- I'm not sure I
7 quite know --

8 MR. EMBREY: A BAN is a bond in
9 anticipation of a loan.

10 CHAIRMAN WHEELER: That's what he was just
11 telling me.

12 VICE-CHAIRMAN LONG: You borrow the money
13 in anticipation of the issuance of the bond.

14 MR. BABB: But if you look at the Table of
15 Contents -- and I'm going to give this to the
16 Commission when I got the done -- you have a
17 Certificate of Engineer here, you have a
18 Certificate of Registrar and Paying Agent,
19 Agreement for Services of the Registrar and
20 Paying Agent, Certificate of Attorney -- that's
21 what that is. That is the Peru City attorney
22 acknowledging that they've complied with all the
23 requirements of Indiana law with respect to
24 essentially the implementation of these funds.

25 And it only makes sense. If you're going

1 to get \$9 million in federal funds, somebody
2 better step it up and say that they weren't used
3 to build an amusement park. They had to go and
4 they were used for the project that they were
5 intended to be used for and they comply with the
6 law.

7 And part of that -- and again, part of this
8 is there was \$30,000 of this money was paid
9 out -- of this federal money was paid out to
10 Mr. Embrey for his work on this. And so they
11 have a copy of this. The City has a copy of
12 this. I don't understand how it could not have
13 been provided with a copy of this for the APRA
14 request.

15 CHAIRMAN WHEELER: That's public access,
16 counsel. That's not for --

17 MR. BABB: I understand, Mr. Chairman, but
18 at the end of day, though, this is the City
19 attorney doing what he should do.

20 MR. WALKER: Mr. Chairman, could I ask you
21 a quick question?

22 CHAIRMAN WHEELER: Give me just a sec.

23 MS. GRAY: If you could clarify, the APRA
24 request that was sent -- if the APRA that was
25 sent to me, those are the documents I provided.

1 If there was one that was sent to Peru
2 Utilities, these are documents that were at Peru
3 Utilities and not at my office. So those are
4 documents that would have come from the City of
5 Peru Utilities.

6 CHAIRMAN WHEELER: I'm not going to figure
7 out -- an APRA request. Seriously, that's
8 public access, counsel.

9 MR. BABB: I understand.

10 CHAIRMAN WHEELER: I understand where
11 you're going.

12 Is that a copy for us, or are you going to
13 provide us that copy?

14 MR. EMBREY: This is the actual copy.

15 CHAIRMAN WHEELER: And you have photocopied
16 out of that document.

17 MR. BABB: I have photocopied out of that
18 document Tab 11.

19 CHAIRMAN WHEELER: Okay.

20 MR. BABB: I would also like to
21 reference -- and I'll give it to you, and I have
22 these tabs.

23 As part of tab 2, it talks about the cost
24 of obtaining the services of Ice Miller, who is
25 bond counsel -- Ice Miller was bond counsel, the

1 City attorney, and Umbaugh & Associates for the
2 engineer -- is considered as part of cost of the
3 project on an account -- et cetera, et cetera,
4 et cetera.

5 CHAIRMAN WHEELER: All right. So they can
6 roll it into the bond.

7 MR. BABB: All right. So -- and then you
8 go to -- on Tab 9, it talks about the purpose
9 of -- excuse me, Tab 6, it talks about the
10 purpose of this loan -- and this is very
11 interesting. It talks about -- there's a
12 "whereas" clause. This is essentially saying
13 here's what the purpose of the loan is, it's
14 federal funds, it's --

15 CHAIRMAN WHEELER: What page are you on?

16 MR. BABB: You don't have it, Mr. Chairman,
17 but it's Tab 6.

18 CHAIRMAN WHEELER: I know, but just for the
19 record because --

20 MR. BABB: It's Tab 6.

21 CHAIRMAN WHEELER: I've got to be real
22 honest, I think both of you guys are probably
23 talking to a higher court than us at some point,
24 which is why I've let this go on a lot longer,
25 because I want to make sure you make your

1 record -- for both of you.

2 So I just want to make sure as you're doing
3 that, since you're not in a position to make
4 that an exhibit, I want to make sure that for
5 the record later, you guys have the opportunity
6 to see what it is, where it is.

7 MR. BABB: Is Tab 6 of this closing loan
8 document. It talks about, "Whereas, the City of
9 Peru has previously entered into three financial
10 assisted grants with the State dated August 10,
11 1999; August 10, 1999; June 2, 2000."

12 Actually, you weren't there until 2004,
13 correct?

14 MR. EMBREY: Right.

15 MR. BABB: Then I withdraw that.

16 And that's really -- that part is not
17 important.

18 Let me go to the next exhibit, which --
19 which one is this? 12. Let me talk about this.

20 Mr. Roberts was the longest-serving
21 attorney for the City of Peru in the City's
22 history. And in order to try to get a sense for
23 what sort of duties the City of Peru attorney
24 had and the relationship between the City
25 attorney, the relationship between the Utility

1 Board, and the relationship between the Works
2 Board.

3 Mr. Roberts served in all three. He served
4 as the Peru City Attorney for 24 years and City
5 Utility Attorney for 25 years. He essentially
6 served -- I mean, he was involved in every
7 aspect. He was constantly involved in dealing
8 with federal funds.

9 I talked to him. He said it is not
10 plausible that grants that are made for federal
11 funding, and once federal funds are received and
12 then ultimately implemented, the City Attorney's
13 involved in the front end of those funds, he's
14 involved in the back end, like you see here with
15 this exhibit, and that's what you do. You
16 advise on those.

17 He said that there's -- he's aware of
18 several different reconstruction projects.
19 He -- and I don't believe I heard Judge Embrey
20 say otherwise, but there is reconstruction
21 projects, if you look at paragraph 11, that deal
22 with West Main Street and Broadway. And I
23 believe those are INDOT federal funds.

24 And at some point in time --

25 MR. EMBREY: No.

1 MR. BABB: -- I heard Mr. Embrey say I
2 looked at the contracts.

3 Again, those are duties in connection with
4 those federal funds.

5 MR. EMBREY: West Main Street -- I had
6 indicated to you, both projects on West Main
7 Street the grants had been approved before I
8 became City attorney, and we did North Broadway
9 without federal money. That was not a grant.

10 MR. BABB: Well, in any event, I do know
11 that certainly with respect to the Oakdale
12 subdivision has the State Revolving Fund and the
13 wastewater treatment plant.

14 And then two exhibit that are attached to
15 this are just -- they're also just APRA request
16 and the APRA production.

17 Let me also talk to you about this final
18 affidavit. And this is my last exhibit, and
19 this is 13.

20 The last two portions of Mr. Robert's
21 affidavit with respect to the principal
22 employment are really not relevant, because I
23 know that now the principal employment, most
24 time he spends is the City attorney.

25 This is an affidavit of my paralegal. And

1 what I had her do was I had her -- as I
2 understand, Mr. Embrey is the advisor to the
3 airport. And attached to this affidavit -- we
4 called the FAA and attached to this affidavit as
5 Exhibit B, if you look beginning on the second
6 page from 2004 on, there's all sorts of federal
7 FAA funds that come in.

8 Now, again, I can't imagine that if you're
9 the attorney that's advising the airport on
10 federal funding that you don't have any duties
11 in connection with those federal funds.

12 Are you saying, Judge, you have no duties
13 in connection whatsoever with those federal
14 funds?

15 MR. EMBREY: I have signed documents and I
16 have reviewed some grants. I have nothing to do
17 with implementation, I have nothing to do with
18 receipt of funds, I have nothing to do
19 reporting. I read the documents. I don't -- I
20 have not read all of these. That's done by
21 the -- a lot of it's done by the airport board.

22 MR. BABB: But they may not the extensive
23 but they're certainly duties. You're looking
24 at -- as the airport authority, you're looking
25 at those federal funds, you're reviewing those

1 documents.

2 MR. EMBREY: Not really. I've had very
3 little contact with the airport. I went two
4 years without going to an airport board meeting.
5 There is a board. The board takes care most of
6 their own business.

7 CHAIRMAN WHEELER: Bryan, what else have
8 you got?

9 MR. BABB: What I have, Mr. Chairman, is
10 this: If you go back again to my submission,
11 Paragraph 6, which would be page 2, after the
12 initial thing, do you have duties that are
13 normal and foreseeable in your principal
14 position. It talks about principal employment.
15 Okay. Now, if you go down to the first case --
16 the second case that's cited there is the
17 Hutchins case.

18 Do you see that, Mr. Chairman?

19 CHAIRMAN WHEELER: Yes.

20 MR. BABB: It says, "Should a stranger ask
21 the author of the brief, 'What is your
22 employment?' We think the answer would be 'I am
23 an, attorney,' not, 'I examine witnesses, I make
24 arguments, I write briefs, I draw wills and I
25 organize bodies corporate.'"

1 And essentially what he is trying to do is
2 the argument that I tried make for the mayor
3 unsuccessfully --

4 CHAIRMAN WHEELER: I get that part of the
5 argument.

6 Do the Commission members want to hear
7 additional argument on the exhibit?

8 MR. WALKER: Mr. Chairman, if I could
9 just -- one thing might help clarify a couple
10 things with the city attorney position as it
11 relates to utility.

12 As city attorney, you don't automatically
13 serve the utility. They can hire anyone they
14 want to.

15 CHAIRMAN WHEELER: I understand, because
16 you separated the two.

17 MR. WALKER: Yeah, it's not that he
18 automatically serves both.

19 COMMISSIONER DUMEZICH: How many people
20 live in Peru?

21 MR. WALKER: 13,000.

22 COMMISSIONER DUMEZICH: What's your total
23 budget for your city?

24 MS. GRAY: For the general fund, about
25 4.6 million. That's on property tax levy. The

1 total budget is about 10 million. But on
2 property tax levy for the general fund, it's
3 about 4.6 million.

4 CHAIRMAN WHEELER: Any other questions from
5 Commissioners?

6 MR. EMBREY: 816,000 less than last year.

7 MR. BABB: Can I have one final point,
8 Mr. Chairman?

9 CHAIRMAN WHEELER: I'll give you one very
10 brief points.

11 MR. BABB: With respect to trying to
12 disassociate the City Utility work from the
13 City, there was an article that appeared in the
14 paper on February 3, 2010, and it has the
15 mayor -- quoting the mayor, and what they were
16 talking about is that there are no raises
17 approved for City employees.

18 And I'll give the Commission this article.

19 These are supplemental salaries, and
20 there's going to be no -- people in these three
21 positions of the mayor, the city clerk, and the
22 city attorney, they received supplemental
23 salaries from the Peru Utilities, according to
24 state statute. Peru Mayor Jim Walker set up the
25 meeting because the Utility is City-owned, the

1 Utility can pay supplemental salaries to these
2 employees because a relationship exists between
3 the City and the Utility.

4 CHAIRMAN WHEELER: I don't think they're
5 disputing that that relationship exists.

6 MR. EMBREY: No.

7 CHAIRMAN WHEELER: I think he's just
8 explaining why they get a separate payment from
9 the City Utilities.

10 MR. EMBREY: There is an error in that,
11 however. The city attorney salary is not a
12 supplemental, it is the retainer that the
13 Utility pays. They are inaccurate with that.

14 MR. BABB: And my whole point is it's all
15 City business.

16 CHAIRMAN WHEELER: I understand. And it
17 astonishes me --

18 VICE-CHAIRMAN LONG: The utilities board --
19 (Interruption by the reporter.)

20 VICE-CHAIRMAN LONG: Stated the way the
21 mayor got three appointments on the utility
22 board, I can count, 60 percent of the board are
23 appointed by the mayor, pay some heed to his
24 counsel.

25 CHAIRMAN WHEELER: Any other questions from

1 the Commission members?

2 All right. I'm going to close the hearing.
3 I'll accept a motion.

4 VICE-CHAIRMAN LONG: I'd like to resign.

5 COMMISSIONER DUMEZICH: Seconded.

6 VICE-CHAIRMAN LONG: I am going commend
7 both of you. This was very informative and I
8 appreciate the professionalism which you've
9 shown. And this has been most enlightening. I
10 wished I was more of an expert. I know more
11 about the Hatch Act today than I did before, and
12 I am sure I know more than I want to know.

13 Where I have the difficulty here, and it's
14 on more than one plane, I think, is that -- I'm
15 going -- sometimes I read statutes closely, and
16 sometimes I maybe use more common sense. But
17 looking at the position, and I think most
18 particularly regarding the state and country,
19 they look at the municipal attorneys as lawyers
20 for the city and they're hired and they perceive
21 it more as a attorney-client relationship.

22 And I appreciate your authority, and I
23 looked through this when it came out. You-all
24 have obviously done a lot of work in putting
25 this together.

1 I'm troubled somewhat, the idea that -- and
2 this is just from my personal experience. When
3 we do bonds and projects, utilities, sewer
4 plants, water plants, there's a time in the
5 planning of the project itself that the
6 attorney, town attorney, is involved.

7 And I am known mostly as the pusher. You
8 know, every job's got to have a pusher. If
9 somebody doesn't push, it doesn't happen. And
10 getting the professionals together to make the
11 decisions as to what they need to do, and this
12 includes the bond council and grant
13 administrator and engineers.

14 And all of this project is going to be
15 funded by either a loan from SRF, generally.
16 Sometimes we go to general market. But assume
17 this is an SRF loan. It's an integral part of
18 the finance. And the grants that you get from
19 the stimulus money or the OCRA grants, or
20 whatever they are, and then you get paid for the
21 duties you do. That's -- usually you get a
22 paycheck, three or four years on a project.

23 And my concern there, and it's been the
24 concern through this whole thing, is that the
25 type of restriction -- I mean, is somebody -- I

1 haven't read a case or been cited a case or
2 anybody read me from a case that says a
3 municipal corporate lawyer is covered by the
4 Hatch Act. If that's been cited and I missed
5 it, I apologize. I think that's the troublesome
6 thing here.

7 And I have an experienced -- my paralegal
8 does more work than I do, but my name is usually
9 on the brief. I sometimes feel embarrassed not
10 having any corrections to it. She's better than
11 I am.

12 But the reality is we haven't got any
13 guidance that I see from any judicial authority,
14 common law, or opinions from attorneys general,
15 or anything other than this statutory law which
16 we've read and the authorities that you've given
17 me -- or given us, and I am uncomfortable with
18 it.

19 I mean, I can see, and I can -- as I listen
20 to your presentation, I was swayed that way.

21 As I listened to yours --

22 Really, when I -- to be honest, when I came
23 in here, my overall view is that you were going
24 to have to convince me, and you've done a really
25 good job of presenting this. But I don't know

1 that I'm convinced that the position of a small
2 town city attorney is covered -- a Hatch Act
3 covered entity.

4 We had a similar -- not a similar case, but
5 a case in Evansville, Indiana. A community
6 action program director -- I'm not for sure that
7 he was his title or not. He ran and was elected
8 as county commissioner, and they had a
9 litigation over that. And I didn't follow it
10 that closely, but he's still the commissioner so
11 I guess he won.

12 That's the legal problem I had. The
13 practical problem you alluded to, that Stupak
14 issue. The implication in a town --

15 I had a case in English, Indiana. It's
16 about 8,000 people in the community, and I was
17 talking to the prosecutor over there. I said,
18 boy, this is a great place, everybody is
19 friendly. He says, You know, the lawyers don't
20 get a long at all. And I said, I can't imagine
21 why not, there is only five of you. He said,
22 well, we all run against each other.

23 You get in a town like that, in English you
24 got a city attorney and then you might have a
25 utilities attorney, and another attorney, you

1 don't have anybody to run for any office that
2 require you to be a lawyer to be in that
3 position.

4 And it was -- it was a lovely county, and I
5 enjoyed going over there, but ours is a little
6 bigger.

7 But the fact is is that a number of
8 attorneys in all small communities have some
9 association with municipal government, whether
10 they be township trustees, as long as we still
11 have them; town boards; cities; park boards.
12 Does that mean that everyone, the impact of that
13 law is that every one of these people can't run
14 for office?

15 And what's the -- what happens to our
16 system when that -- if that is, in fact, the
17 rule of law and the precedent we set down on it.
18 Those things are really troublesome.

19 I'm anxious to hear comments from my fellow
20 commissioners and our proxy here on this. As I
21 sit here now, I haven't made up my mind. I want
22 to hear comments.

23 COMMISSIONER DUMEZICH: How much money did
24 you make in your private practice, other than
25 from the City and the Utility, approximately?

1 MR. EMBREY: For last year, I can't give
2 you a figure. I haven't finished my taxes. The
3 year before, it was 47,000, I believe; the year
4 before that was about 50,000; the year before
5 that it was well over a hundred thousand.

6 COMMISSIONER DUMEZICH: My analysis would
7 come down to two things: One, I don't believe
8 that the compensation that you're provided on a
9 1099 is employee compensation. I think that's
10 in the nature of what you do is -- anyone would
11 do as an attorney in a private practice.

12 I think that the balance of your private
13 practice is greater, and that is, in fact, the
14 dollar amounts you're receiving tilt towards the
15 private side.

16 I also believe based on the testimony I've
17 heard here today that the work involving federal
18 projects and federal money is closer to the
19 de minimis than significant. And with that in
20 mind -- because in my mind, those are the two
21 things you have to look to -- I would come down
22 and say that the challenge would not be
23 sustained based on that analysis.

24 VICE-CHAIRMAN LONG: I appreciate that
25 observation. I had not thought of it on the

1 first comment you made as to the -- thank you
2 for those comments.

3 CHAIRMAN WHEELER: Your shot.

4 COMMISSIONER JEFFERS: Thank you,
5 Mr. Chairman.

6 I agree with many of comments that
7 Mr. Dumezich just touched on. I guess as I sit
8 here, I think about what the original intent of
9 the Hatch Act was. And for those of you that
10 aren't aware of it, it was to prevent
11 corruption. I think it was originated in 1939.
12 And since that time, we have the Little Hatch
13 Act, and little Hatch Acts that hatched little
14 other Hatch Acts and -- it's terribly confusing.
15 To suggest there is a lack of clarity is a total
16 understatement and there obviously needs to be.

17 And I appreciate Mr. Babb, your
18 forthrightness in identifying that, in that you
19 found yourself on the other end of spectrum in
20 identifying this huge problem we have, and what
21 we are doing right now which is trying to
22 interpret the law and its practical impact, as
23 Mr. Long has spoken to.

24 So, I have a little bit of experience with
25 federal grants in the Department of

1 Transportation, and I'm quite aware that the
2 state and federal government have specific
3 guidelines on how those moneys are supposed to
4 be directed and it's not, I'll tell you, the way
5 for the mayor would like for it to be done.

6 So there is a reality, if you will, that
7 may not always be the best way to get things
8 done. But as was pointed out earlier by my
9 colleague, SRF, federal grants, I mean, that's
10 the only way really to get many of these things
11 done, whether you're talking about water
12 treatment or airports or transportation
13 projects, whether they be main street projects,
14 park projects. That's the reality.

15 It seems to me that -- and, again, I
16 appreciate your effort with the congressman, but
17 it seems to me that, you know, Congress and
18 potentially the courts, we sort of made a mess
19 of this. And my opinion is in line with
20 Mr. Dumezich's thinking that my observation has
21 traditionally been that this particular
22 position, this particular question, involves a
23 part-time political appointment. And as such, I
24 would be in a position to deny this challenge.

25 CHAIRMAN WHEELER: I'll take the liberty of

1 speaking last on this particular issue.

2 I am going to agree from the factual
3 standpoint. I just don't think it factually
4 fits within the framework.

5 I want to speak, because I have real broad
6 concerns. And, Bryan, I know your response is,
7 well, the hatch is what it is, tough luck. The
8 concern I have is if we view this in the fashion
9 that you're suggesting, broad fashion -- it may
10 be the court decides to view it that way -- the
11 nature of my practice is I represent a lot of
12 municipalities, and I represent most of schools.
13 And we're in line to receive substantial federal
14 funds.

15 And what you're telling me is your
16 interpretation of the Hatch Act is that every
17 lawyer, attorney representing one of those
18 entities is Hatch-Acted out from being the
19 prosecutor, too, in those little districts.
20 That's what you're telling me. I don't believe
21 it. I don't believe that the Act interpreted
22 that way, to take down all the those people.
23 We're talking about hundreds of local attorneys
24 that were taken out.

25 And I mean, I get that you're coming here

1 and saying, that's the same argument I made to
2 the Supreme Court, and they didn't buy it. I
3 understand that, Bryan.

4 But I don't believe that with all the
5 stimulus money that's coming in, whether it's
6 Race To The Top money, whatever money we've got
7 coming in, federal funds, I just don't buy that
8 we've Hatch-Acted out all of our local attorneys
9 statewide. I just don't buy it.

10 And certainly if the Indiana Supreme Court
11 wants to say that, if Congress wants to say
12 that, that's their business. From my
13 standpoint, I'm unwilling to read it that
14 broadly. And that's where I'm coming from.

15 So I'll take a motion.

16 COMMISSIONER DUMEZICH: Motion to deny the
17 challenge.

18 CHAIRMAN WHEELER: Second?

19 COMMISSIONER JEFFERS: Second.

20 CHAIRMAN WHEELER: Motion's been made and
21 seconded. All in favor, signify by saying aye.

22 THE COMMISSIONERS: Aye.

23 CHAIRMAN WHEELER: Those opposed, same
24 sign.

25 (No response.)

1 CHAIRMAN WHEELER: Motion carried.

2 Thank you.

3 (Discussions held off the record.)

4 CHAIRMAN WHEELER: Gentlemen.

5 DR. SCHEELE: Thank you, Mr. Chairman, for
6 the VSTOP program. We have three quick items on
7 the agenda. The first is the ES & S Assure 1.2
8 on the agenda. You should have --

9 CHAIRMAN WHEELER: We got your report.

10 DR. SCHEELE: Okay. You have the report.

11 The whole issue in this is you already
12 approved this system contingent upon the escrow.
13 We have received the escrow, and on page 2 of
14 the report, we received it from ES & S.

15 CHAIRMAN WHEELER: So to shorten this up,
16 is you got everything you need.

17 DR. SCHEELE: Right. We've got everything
18 we need.

19 CHAIRMAN WHEELER: Can we take a vote on
20 that?

21 VICE-CHAIRMAN LONG: It's over our head,
22 subject to the escrow.

23 CHAIRMAN WHEELER: Subject to the escrow.
24 You're just reporting back?

25 All right. Done.

1 MR. KING: Excuse me, Mr. Chairman.

2 CHAIRMAN WHEELER: I'm sorry.

3 MR. KING: I know, I'm sorry. I think,
4 actually, the Commission did not vote to
5 approve.

6 CHAIRMAN WHEELER: Did we vote to table
7 pending.

8 DR. SCHEELE: I think it could be table
9 pending.

10 COMMISSIONER DUMEZICH: Second it.

11 CHAIRMAN WHEELER: Motion's been made and
12 seconded. Any further discussion?

13 (No response.)

14 CHAIRMAN WHEELER: Hearing none, all in
15 favor signify by saying "aye."

16 THE COMMISSIONERS: Aye.

17 CHAIRMAN WHEELER: Those opposed, same
18 sign.

19 (No response.)

20 DR. SCHEELE: Very good. Item Number 2.

21 CHAIRMAN WHEELER: We're about 7:30 at
22 night on Friday night.

23 DR. SCHEELE: ES & S, the Optech 3P Eagle.
24 This was approved by -- or tabled, actually, by
25 the Commission in the last meeting in December.

1 MR. KING: Approved.

2 CHAIRMAN WHEELER: This one was approved.

3 DR. SCHEELE: I'm getting them mixed up.
4 This one was approved, but we found that there's
5 a restriction placed upon this approval back in
6 2006 by the Commission. That approval, we've
7 read the documents on this, dealt with federal
8 lab testing.

9 We've checked with ES & S, as this last
10 paragraph makes clear. The approval is to stand
11 with the restriction that was agreed to on
12 March 20th, 2006. The representatives of ES & S
13 agreed to this restriction --

14 CHAIRMAN WHEELER: Is anybody from ES & S
15 here?

16 MR. PEARSON: Yes.

17 CHAIRMAN WHEELER: You're good with that,
18 right?

19 MR. PEARSON: Absolutely.

20 DR. SCHEELE: We recommend the restrictions
21 stay in place.

22 CHAIRMAN WHEELER: The restriction is
23 already there, right?

24 MR. LOSCO: It's not clear because of your
25 vote to replace it.

1 CHAIRMAN WHEELER: We'll take a motion --

2 VICE-CHAIRMAN LONG: Move to keep the
3 restriction in place during the balance of
4 certification.

5 COMMISSIONER DUMEZICH: Second.

6 CHAIRMAN WHEELER: Motion made and
7 seconded. Any further discussion?

8 (No response.)

9 CHAIRMAN WHEELER: Hearing none, all in
10 favor signify by saying "aye."

11 THE COMMISSIONERS: Aye.

12 CHAIRMAN WHEELER: Those opposed, same
13 sign.

14 (No response.)

15 DR. SCHEELE: Finally, I'll turn it over to
16 Dr. Jay Bagga. The engineering change orders
17 are something relatively new, I think that the
18 Commission may be familiar, with but we now have
19 a host of ECOs that we must quickly deal with.

20 So, Jay.

21 DR. BAGGA: Jay Bagga, B-A-G-G-A.

22 Chairman and Members of the Commission, you
23 have four sets of ECOs from ES & S. And now
24 these are all de minimis engineering change
25 orders on the chart. The EAC definition of

1 de minimis is that it's a small change that does
2 not require testing. And these are all
3 de minimis changes, and we have verified that
4 there are VSD reports, lab reports, which
5 certify these changes to be de minimis, so we
6 start that, commence these ECOs it be accepted
7 as de minimis and further recommends that the
8 Commission authorize.

9 CHAIRMAN WHEELER: So when it says new
10 power supply.

11 DR. BAGGA: Right, or new packaging.

12 CHAIRMAN WHEELER: Just changing a cord.

13 DR. BAGGA: Changing a cord or changing the
14 packaging material, putting a new label on a
15 machine.

16 CHAIRMAN WHEELER: And all four of these
17 ECO recommendations are de minimis --

18 DR. BAGGA: That's right.

19 CHAIRMAN WHEELER: -- based upon the
20 recommendation.

21 DR. BAGGA: That's right.

22 CHAIRMAN WHEELER: What action do we need
23 to take on these?

24 MR. KING: To authorize their installation
25 on the ES & S equipment.

1 CHAIRMAN WHEELER: Even though they're
2 de minimis, we still have to authorize these
3 changes?

4 MR. KING: In an abundance of caution, we
5 are bringing this to the Commission --

6 CHAIRMAN WHEELER: Okay.

7 MR. KING: -- to make sure --

8 COMMISSIONER DUMEZICH: Do you want to read
9 the --

10 CHAIRMAN WHEELER: Why don't you take them
11 as a packet.

12 I was going to let Dan make a motion, and
13 I'll forward them in one slot or do you want to
14 do them individually?

15 COMMISSIONER DUMEZICH: One slot.

16 VICE-CHAIRMAN LONG: Move to approve all of
17 them?

18 COMMISSIONER DUMEZICH: Yeah, move to
19 approve voting system Unity 3.010 Amendment DRE
20 and OS and iVotronic.

21 CHAIRMAN WHEELER: So the voting system's
22 all the same, it's just we've got iVotronic --

23 DR. BAGGA: Different components, same --

24 COMMISSIONER DUMEZICH: Model 100.

25 DR. BAGGA: Yes.

1 COMMISSIONER DUMEZICH: Model Number 605.

2 DR. BAGGA: 650.

3 COMMISSIONER DUMEZICH: 650. Model
4 Number -- AutoMARK.

5 DR. BAGGA: And AutoMARK. That's right.

6 CHAIRMAN WHEELER: Motion's made do I have
7 a second?

8 VICE-CHAIRMAN LONG: Second.

9 CHAIRMAN WHEELER: Motion's made and
10 seconded. Any discussion?

11 (No response.)

12 CHAIRMAN WHEELER: Hearing none, all in
13 favor signify by saying "aye."

14 THE COMMISSIONERS: Aye.

15 CHAIRMAN WHEELER: Those opposed, same
16 sign.

17 (No response.)

18 CHAIRMAN WHEELER: I'm going to strike the
19 last grievance procedure since Pam Potesta is
20 not available to discuss it.

21 Do I have for a motion to adjourn?

22 VICE-CHAIRMAN LONG: Will do.

23 COMMISSIONER DUMEZICH: Second.

24 CHAIRMAN WHEELER: All in favor "aye".

25 THE COMMISSIONERS: Aye.

1 (Proceedings adjourned.)

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1 STATE OF INDIANA)
) SS:
 2 COUNTY OF HAMILTON)

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4 I, Julie A. Wycoff, RPR, and a Notary Public
 5 and Stenographic Reporter within and for the County
 6 of Hamilton, State of Indiana at large, do hereby
 7 certify that on the 5th day of March 2010, I took
 8 down in stenograph notes the foregoing proceedings;

9 That the transcript is an excerpt of the
 10 transcript made from my stenograph notes.

11 IN WITNESS WHEREOF, I have hereunto set
 12 my hand and affixed my notarial seal this _____
 13 day of April 2010.

14

15

16

 N O T A R Y P U B L I C

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18 My Commission Expires:
 August 26, 2015
 19 County of Residence:
 Hamilton County

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