

**Indiana Election Commission**  
**Minutes**  
**August 1, 2008**

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

**Members Absent:** None.

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

**Also Attending:** Anthony (Ty) Bibbs; David Buskill; Martha Carmichael; Rebecca Crumes; Chad Duran, Office of the Attorney General; Michael Gillenwater; Barbara Hutton; Nancy Kraft; Charles Mitchell; Daniel Moore; David Mosley; The Honorable Abraham Navarro, Judge of the Clark County Circuit Court; Rodney Pate; John Vissing; Larry Wilder; Doris Wilkerson.

## **1. Call to Order**

The Chair called the August 1, 2008 meeting of the Commission to order at 10:00 a.m. in the Indiana Government Center South Conference Center Rooms 1 and 2, 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 Rhonda J. Hobbs of Connor Reporting. 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 6, line 3, replace “welcomed” with “welcome”.

Page 9, line 7, replace “Debold (Phonetic)” with “Diebold”.

Page 35, line 4, replace “king” with “King”.

Page 39, line 17, replace “Democrat” with “Democrats”.

Page 43, line 11, replace “3-6-4.23” with “3-6-4.2-3”.

Page 46, line 9, delete “came”.

Page 56, line 11, replace “3-13-1.6” with “3-13-1-6”.

Page 56, line 12, replace “3-13-1.6” with “3-13-1-6”.

Page 67, line 13, replace “115(d)” with “15(d)”.

Page 74, line 4, replace “suth sayer” with “soothsayer”.

Page 75, line 3, replace “3-13-16 as applying 3-13-19” with “3-13-1-6 as applying 3-13-1-9”.

Page 78, line 12, replace “6-8-2—6-8-2” with “6(a)(2)”.

Page 87, line 11, replace “error” with “err”.

Page 88, line 18, replace “judge in” with “judge and in”.

Page 90, line 9, replace “within” with “with”.

Page 100, line 12, replace “American” with “America”.

Page 106, line 1, replace “Simmons” with “Simmons’s”.

Page 106, line 19, replace “can’t” with “can”.

Page 106, line 25, replace “dismisses” with “dismiss”.

Page 116, line 9, replace “should ES&S” with “should contact ES&S”.

Beginning on page 121, line 11, replace all references in the document to “J. WILKERSON” with “D. WILKERSON”.

Page 126, line 4, replace “permeations” with “permutations”.

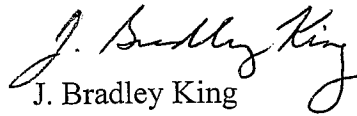
### 3. Adjournment

There being no further items on the Commission's agenda, the Chair entertained a motion to adjourn. Ms. Riordan 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 1:00 p.m.

Respectfully submitted,

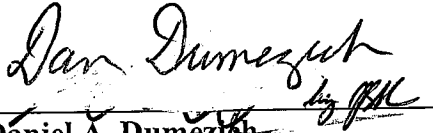


Trent Deckard  
Co-Director



J. Bradley King  
Co-Director

**APPROVED:**



~~Daniel A. Dumezich~~  
Chairman

ORIGINAL

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INDIANA ELECTION COMMISSION  
PUBLIC SESSION NOTICE

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Taken On: Friday, August, 1, 2008

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At: Indiana Government Center South  
Conference Rooms 1 and 2  
402 West Washington Street  
Conference Room 20  
Indianapolis, Indiana 46204

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A STENOGRAPHIC RECORD BY:  
Rhonda J. Hobbs, RPR  
Notary Public  
Stenographic Reporter

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**INDIANA ELECTION COMMISSION**

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

**INDIANA ELECTION DIVISION**

Mr. Dale Simmons - Co-General Counsel  
Ms. Leslie Barnes - Co-General Counsel  
Mr. Bradley King - Co-Director  
Ms. Pamela Potesta - Co Director

1           **CHAIRMAN T. WHEELER:** All right. I'm going  
2 to call the meeting of the Indiana Election  
3 Commission to order. It's Friday, August 1,  
4 2008. The Commission is meeting pursuant to a  
5 notice previously published. I have to my right  
6 Commissioner Domezich, and I have to my left  
7 Commissioner Riordan, Commissioner Long should  
8 be here in a moment.

9           As a consequence of that, we're going to go  
10 a little bit out of order and hear a couple of  
11 things that we can hear with just three  
12 commissioners here.

13           What I'd like to do is invite the Attorney  
14 General's Office, which is Item 7 on the agenda,  
15 to give us a brief report on the appeal of the  
16 Micro Vote decision.

17           **MR. C. DURAN:** Where would you like me  
18 to...

19           **CHAIRMAN T. WHEELER:** We don't even have a  
20 podium so wherever you're comfortable. If you  
21 want to come to the middle or stand there...

22           **MR. C. DURAN:** I'll just stand back here.

23           **CHAIRMAN T. WHEELER:** Chad, go ahead and  
24 introduce yourself because we're on the record.

25           **MR. C. DURAN:** Thank you. My name is Chad

1 Duran. I'm the deputy attorney general with the  
2 Indiana Attorney General's Office, and we have  
3 been requested to represent the Indiana Election  
4 Commission in a judicial review of the June 20th  
5 final order with respect to the Micro Vote  
6 matter.

7 **CHAIRMAN T. WHEELER:** And I've asked Chad  
8 to come here and give the commissioners a  
9 brief -- just a brief review of the status of  
10 what it is and what our duties are with respect  
11 to this while that Micro Vote matter is pending  
12 given the fact that it could conceivably be  
13 remanded to the Commission.

14 **MR. C. DURAN:** The chairman is absolutely  
15 correct on that point. The judicial review  
16 action was filed on July 18th, and there is a  
17 preliminary hearing scheduled for August  
18 20th with respect to staying the decision of the  
19 Indiana Election Commission, and while this  
20 action is pending, the protection of AOPA are  
21 certainly in place, and the Commission should  
22 continue to refrain from speaking outside of the  
23 administrative arena.

24 **CHAIRMAN T. WHEELER:** With respect to the  
25 appeal, do you need anybody from the

1 Commission -- who is -- the party to the  
2 appeal -- I know the stay is to be issued  
3 against the Commission; is that correct, and the  
4 Commission's order; is that correct, so  
5 therefore, we are a party to the appeal.

6 **MR. C. DURAN:** The Commission is the only  
7 named party to the appeal.

8 **CHAIRMAN T. WHEELER:** Not the Division?

9 **MR. C. DURAN:** Not the Division.

10 **CHAIRMAN T. WHEELER:** Can we communicate  
11 with the Division, and I'll leave this to Brad,  
12 too, because this has been an issue, over --  
13 it's difficult for us to communicate with our  
14 staff -- our staff or the parties during the  
15 Micro Vote matter; should we still refrain from  
16 communicating with the Division on Micro Vote  
17 matters as well?

18 **MR. C. DURAN:** That's correct, until --  
19 until you receive further word from our office,  
20 that would be an excellent idea.

21 **CHAIRMAN T. WHEELER:** Do you have need a  
22 commission member or a representative of the  
23 commission at the stay hearing; is it your  
24 recommendation that we have somebody there?

25 **MR. C. DURAN:** We don't presently have any



1 need for anyone to attend that hearing. Any  
2 member who wishes to attend is certainly  
3 welcomed to attend that hearing. However, one  
4 thing that we would request is that a point of  
5 contact with the commission be established so  
6 that we can communicate any needs that we might  
7 have.

8 **CHAIRMAN T. WHEELER:** I guess I'd make an  
9 informal motion that Commissioner Riordan be the  
10 contact for the Micro Vote litigation matter,  
11 since I know she's conveniently located not  
12 right across the street but right around the  
13 corner for the hearing; would you be able  
14 available to attend that hearing?

15 **COMMISSIONER S. RIORDAN:** I will actually  
16 be in trial unless we settle it, but if that  
17 changes, I will be glad to.

18 **CHAIRMAN T. WHEELER:** If not, I'll make a  
19 motion for you to be there just to hear what  
20 goes on. Anything else?

21 **MR. C. DURAN:** Nothing further.

22 **CHAIRMAN T. WHEELER:** We appreciate it, and  
23 we appreciate the Attorney General's Office  
24 staying on top of this and representing us.

25 **MR. C. DURAN:** Thank you very much.

1           **CHAIRMAN T. WHEELER:** Thank you. Next item  
2 ratification of campaign finance settlement  
3 agreements, who is doing that?

4           **MR. B. KING:** Michelle Thompson, Mr.  
5 Chairman.

6           **MS. M. THOMPSON:** Mr. Chairman and Members  
7 of the Commission, you have a list in front of  
8 you of two committees to ratify -- that have  
9 agreed to pay the settlement agreement and waive  
10 the hearing.

11           **CHAIRMAN T. WHEELER:** And as I understand  
12 it, Dale/Leslie, we can go ahead and approve  
13 these with just three commission members;  
14 correct?

15           **MS. L. BARNES:** Yes, only if you're waiving  
16 the final.

17           **CHAIRMAN T. WHEELER:** We're not waiving the  
18 final; correct?

19           **MS. L. BARNES:** Right.

20           **MR. D. SIMMONS:** Right.

21           **CHAIRMAN T. WHEELER:** All right. I'll  
22 accept a motion on ratifying the settlement  
23 agreements.

24           **COMMISSIONER D. DUMEZICH:** Motion to  
25 approve the settlement agreements for...

1           **CHAIRMAN T. WHEELER:** I'll accept a second.

2           **COMMISSIONER S. RIORDAN:** Second.

3           **CHAIRMAN T. WHEELER:** The motion's been  
4 made and seconded. All in favor of approving  
5 the settlement agreements with the committee to  
6 elect Lon Keyes and the committee to elect Don  
7 Metzler-Smith, signify by saying Aye?

8           **THE COMMISSIONERS:** Aye.

9           **CHAIRMAN T. WHEELER:** Those opposed, same  
10 sign?

11           *(No response.)*

12           **CHAIRMAN T. WHEELER:** Motion carries.  
13 That's Item 2 on the agenda. I am now going to  
14 move to Item 6 on the agenda, voting system  
15 certification applications. It is my  
16 understanding, and again, and I will defer to  
17 the two co-counsels, that we can -- by three  
18 commissioners can go ahead and approve the  
19 applications; is that correct, with only three?

20           **MR. D. SIMMONS:** Yes -- Mr. Chairman and  
21 Members of the Commission, that's correct.  
22 Affirmative action of three members of the  
23 commission would be sufficient to take official  
24 action.

25           **CHAIRMAN T. WHEELER:** Okay. With that

1 being said, who's doing what?

2 **MR. B. KING:** Mr. Chairman, in your binders  
3 near the end, there's a memorandum from the two  
4 co-directors concerning the voting system  
5 certification application -- we actually have  
6 three. There were two from Premier Election  
7 Systems, formerly Debold (Phonetic) -- there's a  
8 letter at the very end of your stapled packet  
9 there requesting --

10 **CHAIRMAN T. WHEELER:** The July 24th letter  
11 from Don Vopalensky?

12 **MR. B. KING:** Yes, requesting withdrawal of  
13 those two applications. They plan to submit  
14 apparently an upgraded application in the  
15 future.

16 **CHAIRMAN T. WHEELER:** All right. So the  
17 Premier is moved off the agenda because they've  
18 withdrawn their application for the present  
19 time. There is only the Hart InterCivic and  
20 there's a memorandum on Hart InterCivic in the  
21 packet dated August 1st from the co-directors.

22 **MR. B. KING:** And Mr. Chairman, the memo  
23 reviews the status of the application, the  
24 application form and fee having been paid, the  
25 escrow of the firmware and software having been

1 documented. The original hardware, firmware and  
2 software was demonstrated to the Commission at  
3 the time of its initial certification.

4 There is an independent testing authority  
5 report from CIBER Laboratories from August 2006.  
6 We did in the memo call the Commission's  
7 attention to the fact that following the  
8 issuance of that report CIBER as part of a  
9 transitional accreditation program lost its  
10 accreditation as an independent testing  
11 authority, but within the last month, it has  
12 been recommended by NIST, the National Institute  
13 of Standards & Technology to be reinstated and  
14 the Election Assistance Commission at the  
15 federal level has acted to invite them to  
16 proceed with the certification process.

17 **CHAIRMAN T. WHEELER:** So at the time that  
18 CIBER issued their report, CIBER was a qualified  
19 testing authority; though; correct?

20 **MR. B. KING:** That is correct, Mr.  
21 Chairman.

22 **CHAIRMAN T. WHEELER:** So at the time the  
23 report was issued, they were approved, and CIBER  
24 is a laboratory that we've used before in a  
25 variety of different things?

1           **MR. B. KING:** Yes, that is correct. I  
2 don't know, Mr. Chairman, if Mr. Lawrence Leach  
3 or anyone else is here on behalf of Hart  
4 InterCivic.

5           **CHAIRMAN T. WHEELER:** Is there anyone here  
6 from Hart?

7           *(No response.)*

8           **CHAIRMAN T. WHEELER:** Any questions from  
9 the commissioners?

10           **COMMISSIONER S. RIORDAN:** Yes, Mr.  
11 Chairman. So we are certifying or reviewing an  
12 application that is based upon a 2006 report  
13 from CIBER; is that -- do I understand that  
14 correctly?

15           **CHAIRMAN T. WHEELER:** It's a July 25th,  
16 2007 application which included a report from  
17 the prior year.

18           **COMMISSIONER S. RIORDAN:** So it was a 2006  
19 independent testing for a report based on  
20 200\_ -- which formed the basis for the 2007  
21 application, which we're reviewing in 2008, but  
22 the testing authority somewhere in the interim  
23 has lost its accreditation and has since been  
24 reaccredited; is that right?

25           **MR. B. KING:** If I can clarify, is in the

1 process of being reaccredited.

2 **COMMISSIONER S. RIORDAN:** I guess my only  
3 question would be, and this may go to counsel,  
4 and that is can we appropriately face our review  
5 up or down of this application on the 2006  
6 report; is there any -- they expire after a  
7 period of time?

8 **MR. D. SIMMONS:** Mr. Chairman, and Members  
9 of the Commission, it would be my view that --  
10 also, another piece of this is that they're  
11 reviewing this to see if they are sufficient  
12 under the 2002 Federal Election Commission  
13 Standards, so when they did that, they -- then  
14 that's currently our statute. We incorporate  
15 those standards.

16 When they reviewed that, they were  
17 accredited. That report indicated that they had  
18 passed those standards, and that would be  
19 sufficient whenever -- my view, whenever the  
20 application was submitted. It would be  
21 sufficient -- if they were accredited at the  
22 time, it's sufficient then and it's sufficient  
23 now.

24 **COMMISSIONER S. RIORDAN:** Is there any  
25 reason that we should be concerned that the

1 independent testing authority's report has  
2 become stale over time; does anyone have any  
3 concerns about that?

4 **MS. L. BARNES:** No, we do not.

5 **CHAIRMAN T. WHEELER:** Any other questions?

6 **COMMISSIONER S. RIORDAN:** No.

7 **CHAIRMAN T. WHEELER:** I'll accept a motion  
8 on the application for voting systems  
9 certification for Hart InterCivic and I will  
10 leave the upgrade numbers as mentioned in the  
11 memorandum. Do I hear a motion?

12 **COMMISSIONER D. DUMEZICH:** Motion to  
13 accredit Hart InterCivic for certification.

14 **CHAIRMAN T. WHEELER:** Do I have a second?

15 **COMMISSIONER S. RIORDAN:** Second.

16 **CHAIRMAN T. WHEELER:** Motion's been made  
17 and seconded, any further discussion?

18 *(No response.)*

19 **CHAIRMAN T. WHEELER:** I would note one  
20 thing. I would like the Hart people to come in  
21 and I would prefer them to have been here to  
22 have answered some of Sarah's questions. Put  
23 them on the agenda for the next meeting so we  
24 can talk about what exactly they're doing, and  
25 hopefully, by that time they'll be able to show



1 us...

2 **COMMISSIONER S. RIORDAN:** Mr. Chairman, let  
3 me ask one question before you call for a vote?

4 **CHAIRMAN T. WHEELER:** Please do.

5 **COMMISSIONER S. RIORDAN:** How many counties  
6 are customers of Hart InterCivic; is it only  
7 Cass County?

8 **MR. B. KING:** Cass County is the only  
9 Indiana county.

10 **COMMISSIONER S. RIORDAN:** And has anyone  
11 heard from Cass County, in terms of any  
12 objections that they have or are they a  
13 satisfied customer, as far as we know?

14 **CHAIRMAN T. WHEELER:** Is Cass County a new  
15 customer of Hart?

16 **MR. B. KING:** Cass County is a relatively  
17 new customer.

18 **CHAIRMAN T. WHEELER:** They're -- Cass  
19 County is one of the four counties that was left  
20 in the lurch by whoever left?

21 **MR. B. KING:** Yes, that's right.

22 **COMMISSIONER S. RIORDAN:** So we don't have  
23 any objections of any kind from them?

24 **CHAIRMAN T. WHEELER:** They just -- they  
25 just purchased that system because of some

1 problems.

2 **COMMISSIONER S. RIORDAN:** I don't have any  
3 other further questions, Mr. Chairman.

4 **CHAIRMAN T. WHEELER:** Tony, here's your  
5 opportunity. For the record, I will note that a  
6 motion has been made and seconded that the  
7 Election Commission approve Hart InterCivic's  
8 application for voting system certification for  
9 an upgrade to their system that's currently  
10 being used in Cass County. All members in  
11 favor, signify by saying Aye?

12 **THE COMMISSIONERS:** Aye.

13 **CHAIRMAN T. WHEELER:** Those opposed --

14 **COMMISSIONER A. LONG:** Before I vote, was  
15 there anything in the oral report different from  
16 the written material?

17 **CHAIRMAN T. WHEELER:** No.

18 **COMMISSIONER A. LONG:** Then Aye.

19 **CHAIRMAN T. WHEELER:** All in favor, signify  
20 by saying Aye?

21 **THE COMMISSIONERS:** The Ayes have it.  
22 Those opposed, same sign?

23 *(No response.)*

24 **CHAIRMAN T. WHEELER:** Motion carries, Hart  
25 InterCivic has been approved. I did ask them to

1 have Hart InterCivic in our next meeting to walk  
2 us through a little bit. All right, that takes  
3 care of those items.

4 Now moving onto the next item I suspect  
5 most people are here for. It involves the Clark  
6 County Circuit Court Judge's dispute. Do we  
7 have people here for Dan Moore?

8 **MR. M. GILLENWATER:** Yes, Mr. Chairman. My  
9 name is Michael Gillenwater and I'm here for  
10 Mr. Moore.

11 **CHAIRMAN T. WHEELER:** Is Mr. Moore here?

12 **MR. M. GILLENWATER:** He is.

13 **MR. D. MOORE:** Yes, sir, I'm Daniel Moore.

14 **COMMISSIONER A. LONG:** You said Michael  
15 who?

16 **MR. M. GILLENWATER:** Gillenwater.

17 **CHAIRMAN T. WHEELER:** And then on behalf of  
18 Mr. Navarro is?

19 **MR. L. WILDER:** Yes. Mr. Chairman, Ms.  
20 Riordan, Mr. Long and Mr. Dumezich, my name is  
21 Larry Wilder, W-I-L-D-E-R. I'm an attorney in  
22 Jeffersonville, Indiana, and I'm here on  
23 behalf -- with Judge Navarro, who's to my right,  
24 and David Buskill, who's the chairman of the  
25 Republican Party of Clark County.

1           **CHAIRMAN T. WHEELER:** Is Mr. Pate here as  
2 well?

3           **MR. R. PATE:** I am.

4           **CHAIRMAN T. WHEELER:** And you are the Clark  
5 County Democratic chair?

6           **MR. R. PATE:** Yes, sir.

7           **CHAIRMAN T. WHEELER:** There's a Democratic  
8 chair and a Republican chair, and you are?

9           **MR. J. VISSING:** John Vissing, an attorney?

10           **CHAIRMAN T. WHEELER:** For, who are you  
11 representing?

12           **MR. J. VISSING:** John Vissing.

13           **COMMISSIONER A. LONG:** Two S's?

14           **MR. J. VISSING:** Two S's, and David Mosley  
15 here to my right, who's --

16           **MR. D. MOSLEY:** Good morning, Dave Mosley.

17           **MR. J. VISSING:** -- an attorney, and Mr.  
18 Pate.

19           **CHAIRMAN T. WHEELER:** You guys are loaded  
20 up.

21           **MR. D. MOSLEY:** M-O-S-L-E-Y.

22           **CHAIRMAN T. WHEELER:** You've got Mr. Wilder  
23 3 to 1.

24           **MR. L. WILDER:** Your Honor, I'm used to  
25 that.

1           **MR. J. VISSING:** And Your Honor, this is  
2 Nancy Kraft, vice chair of the Democratic Party.

3           **CHAIRMAN T. WHEELER:** Now what I'm going to  
4 go ahead and do is have the -- it is the  
5 tradition of the Commission to have individuals  
6 that are going to be giving testimony before the  
7 Commission be sworn in, and I will ask Mr. King  
8 to administer that oath, or Mr. Simmons.

9           **MR. B. KING:** And Mr. Chairman, do you want  
10 those who are testifying to take the oath at  
11 this time?

12           **CHAIRMAN T. WHEELER:** What else have we  
13 got? Are we taking testimony?

14           *(A discussion was held.)*

15           **MR. B. KING:** If everyone who will be  
16 testifying in either this matter or any other  
17 matter on the agenda which would include the  
18 grievance procedure, who plans to testify,  
19 please raise -- stand and raise your right hand?

20           **MR. L. WILDER:** In fact, Mr. King, the  
21 lawyers have to take the oath in this matter;  
22 correct?

23           **MR. B. KING:** The lawyers will be taking  
24 the oath.

25           **MR. L. WILDER:** We are so not used to that.

1           **MR. B. KING:** Please respond I do at the  
2 conclusion of the oath. I do solemnly swear  
3 that the testimony I will give to the Commission  
4 at its hearing today will be the truth, the  
5 whole truth and nothing but the truth, so help  
6 me, God?

7           **THE AUDIENCE:** I do.

8           **CHAIRMAN T. WHEELER:** And what I would like  
9 to do with respect to this Clark County hearing  
10 which is both the jurisdictional hearing  
11 involving Mr. Moore and the Navarro challenge is  
12 ask the Division for just a brief moment and  
13 both sides of the Division procedurally give me  
14 a brief -- procedurally, where are we, in terms  
15 of the jurisdictional hearing and the candidate  
16 challenge and I will follow up with that  
17 question.

18           **MR. B. KING:** Do you want to address the  
19 findings that have been made and there's a  
20 question under AOPA and the jurisdiction to the  
21 Commission?

22           **MR. D. SIMMONS:** Well, Mr. Chairman, I  
23 guess there are several issues the Commission  
24 should consider. We do have a candidate  
25 challenge filed on CAN-1 so this is a -- in that

1 respect -- with respect to that an AOPA hearing  
2 and so there are no disconsideration to the  
3 party for that hearing.

4 **CHAIRMAN T. WHEELER:** And the CAN-1, the  
5 candidate challenge is Cause 2008-180 which  
6 involved Judge Navarro; correct?

7 **MR. D. SIMMONS:** Right.

8 **CHAIRMAN T. WHEELER:** With respect to Mr.  
9 Moore --

10 **MR. D. SIMMONS:** And with respect to Mr.  
11 Moore --

12 **CHAIRMAN T. WHEELER:** -- the CAN-1  
13 challenge, he has been certified as the  
14 candidate; is that correct, and that's why a  
15 CAN-1 challenge is appropriate?

16 **COMMISSIONER A. LONG:** Judge Navarro.

17 **CHAIRMAN T. WHEELER:** Judge Navarro, I'm  
18 sorry.

19 **MR. D. SIMMONS:** The certification occurs  
20 on August 22nd by noon.

21 **CHAIRMAN T. WHEELER:** I apologize. The  
22 filings have been accepted with respect to him?

23 **MR. D. SIMMONS:** The filings have been  
24 accepted by the Republicans, the co-director. I  
25 do not -- I cannot speak for the Democratic

1 co-director on that.

2 **COMMISSIONER A. LONG:** We're talking about  
3 Judge Navarro.

4 **CHAIRMAN T. WHEELER:** Judge Navarro. I  
5 just want to understand the difference between  
6 the two -- the procedural standing in the two  
7 cases. Navarro, we have a CAN-1 challenge  
8 that's been filed; correct?

9 **MR. D. SIMMONS:** We do, and if there has  
10 been a filing...

11 **CHAIRMAN T. WHEELER:** Moore, there has not  
12 been; correct?

13 **MR. D. SIMMONS:** There has not been a CAN-1  
14 filed; right, that's correct.

15 **CHAIRMAN T. WHEELER:** And that is why  
16 Navarro is subject to --

17 **MR. D. SIMMONS:** AOPA.

18 **CHAIRMAN T. WHEELER:** -- AOPA notice right  
19 now?

20 **MR. D. SIMMONS:** Correct.

21 **CHAIRMAN T. WHEELER:** And this one really  
22 is currently set on the agenda as a  
23 jurisdictional hearing?

24 **MR. D. SIMMONS:** As a request to the  
25 Commission as to whether they have jurisdiction



1 at this stage to intervene and make some  
2 decision regarding the tendered filing.

3 **CHAIRMAN T. WHEELER:** So the current  
4 hearing on Moore is simply a jurisdictional --  
5 what's set currently as a jurisdictional  
6 hearing, not an AOPA hearing; correct?

7 **MR. D. SIMMONS:** Correct.

8 **CHAIRMAN T. WHEELER:** All right. What --

9 **MS. P. POTEITA:** Mr. Chairman, if I could  
10 interject a moment on Dale's question. I, the  
11 Democratic co-director, have not agreed with  
12 Navarro's submission, but I have put our list as  
13 well just for the record.

14 **CHAIRMAN T. WHEELER:** I'm sorry, I didn't  
15 hear you. Dan was talking. I apologize, say  
16 that again?

17 **MS. P. POTEITA:** That I as Democratic  
18 co-director do not agree with Navarro's filing  
19 and I have put Dan Moore's on the list as well  
20 for us.

21 **MS. L. BARNES:** And Mr. Chairman --

22 **COMMISSIONER D. DUMEZICH:** Is it accepted  
23 for filing --

24 **CHAIRMAN T. WHEELER:** Which one?

25 **COMMISSIONER D. DUMEZICH:** -- or do you

1 disagree with the CAN-1, the candidate's filing,  
2 Navarro's filing?

3 **CHAIRMAN T. WHEELER:** It was accepted for  
4 filing, Navarro's filing?

5 **MS. P. POTESA:** No.

6 **MR. D. SIMMONS:** Okay.

7 **CHAIRMAN T. WHEELER:** That's why I'm  
8 struggling with the procedural difference  
9 between the two of these.

10 **MS. L. BARNES:** And Mr. Chairman, we  
11 understand it was your request to place Dan  
12 Moore's petition on the agenda strictly for  
13 consideration whether the Commission has  
14 jurisdiction. State statute provides that if a  
15 registered voter of the district files a  
16 verified petition questioning the eligibility of  
17 a candidate...

18 **CHAIRMAN T. WHEELER:** A verified petition  
19 on a CAN-1?

20 **MS. L. BARNES:** Right.

21 **CHAIRMAN T. WHEELER:** You agree that a  
22 CAN-1 has not been filed on Moore?

23 **MS. L. BARNES:** Correct. Correct. The  
24 Commission has adopted a CAN-1 in order for a  
25 registered voter to state why they think a

1 candidate is ineligible. The Commission has not  
2 created a form, but the General Assembly has  
3 allowed the Commission to consider cases in  
4 which a candidate's eligibility is questioned.

5 **MR. D. SIMMONS:** Mr. Chairman, can we  
6 address these point by point because that  
7 certainly is not our...

8 **CHAIRMAN T. WHEELER:** I understand you  
9 disagree.

10 **MR. D. SIMMONS:** Absolutely.

11 **CHAIRMAN T. WHEELER:** But I want to  
12 understand where Leslie is coming from now.

13 **MR. D. SIMMONS:** Okay.

14 **MS. L. BARNES:** Thank you. It was our hope  
15 that the verified petition would place this  
16 issue before the Commission for a discussion on  
17 the merits --

18 **CHAIRMAN T. WHEELER:** Which --

19 **MS. L. BARNES:** -- but we understand...

20 **CHAIRMAN T. WHEELER:** Hold on. Hold on.  
21 Which verified petition -- I've only seen one  
22 verified petition?

23 **MS. L. BARNES:** There's a verified  
24 petition.

25 **CHAIRMAN T. WHEELER:** Which challenges

1 Navarro?

2 **MS. L. BARNES:** It was submitted actually  
3 before the CAN-1 challenge form. It was  
4 incorporated with the CAN-1 challenge. It was  
5 submitted July 8th. Dale and I received the  
6 only originals. Neither he nor I file stamped  
7 it.

8 **CHAIRMAN T. WHEELER:** This is the one  
9 called Rodney Pate?

10 **MS. L. BARNES:** Right.

11 **CHAIRMAN T. WHEELER:** And says  
12 introduction, Dear Mr. King and Ms. Potesta,  
13 which is now the second page of the  
14 Commissioners' packets?

15 **MS. L. BARNES:** Right, and it was  
16 overnighted to our office.

17 **CHAIRMAN T. WHEELER:** And your contention  
18 is that that's sufficient to perform the same  
19 function -- this is sufficient to go ahead and  
20 either challenge the candidate or place Mr.  
21 Moore's candidacy at issue, in terms of AOPA in  
22 front of the Commission?

23 **MS. L. BARNES:** Correct.

24 **CHAIRMAN T. WHEELER:** Then why -- why was  
25 there a CAN-1 form filed on Navarro?

1           **MS. L. BARNES:** The CAN-1 form -- we felt  
2 by looking at the wording on the form that it is  
3 designed to -- for a voter to allege that a  
4 candidate is ineligible, and when the  
5 co-directors could not agree whether to accept  
6 Mr. Moore's filing, Mr. Pate had asked me how to  
7 get that issue before the agenda, and we pointed  
8 to 3-8-1-2, the verified petition, and  
9 3-8-1-16.5, and it says the Commission shall  
10 resolve all issues questioning the eligibility  
11 of a certificate of candidate selection, a  
12 CAN-29 form.

13           **CHAIRMAN T. WHEELER:** All right. Let me  
14 ask both -- both staff at this point, does the  
15 Division -- what is the position of the two  
16 either co-counsel directors as to whether or not  
17 the Commission itself has jurisdiction in the  
18 absence of a CAN-1 being filed? I take -- your  
19 position is it doesn't matter as long as  
20 something's been filed; that's your response?

21           **MS. L. BARNES:** As long as a sworn  
22 statement has been filed.

23           **CHAIRMAN T. WHEELER:** And I take it you  
24 disagree?

25           **MR. D. SIMMONS:** I disagree. The 3-8-1-2

1 that gives the Commission jurisdiction says  
2 there must be a sworn statement, as Leslie says,  
3 that questions the eligibility of a candidate.

4 Now the Commission has approved under its  
5 authority to approve uniformed forms a specific  
6 form, the CAN-1 to question the eligibility of a  
7 candidate. Now 3-5-4-8, and if I can give you a  
8 page citation on that one, 3-5 --

9 **CHAIRMAN T. WHEELER:** I've got it on Page  
10 44 under approval of forms.

11 **MR. D. SIMMONS:** A) indicates that when the  
12 Commission acts to approve a form to use  
13 throughout Indiana, then the person must use the  
14 most recent version approved by the Commission  
15 to comply with its title, and then under  
16 Subsection C, if they haven't done so, that  
17 filing must be rejected. Now I haven't --

18 **CHAIRMAN T. WHEELER:** All right. So as I  
19 understand your position, your position is --  
20 Leslie's position is look, all we need to file  
21 is the sworn statement?

22 **MR. D. SIMMONS:** Right.

23 **CHAIRMAN T. WHEELER:** And your position  
24 it's form over substance to require CAN-1 -- I  
25 don't want to put words in your mouth, but Dale

1 is saying you've got to file a CAN-1, and if you  
2 don't file on the CAN-1, you can't -- the  
3 Commission does not have jurisdiction; is that  
4 what you're saying?

5 **MR. D. SIMMONS:** Correct, and part of the  
6 reason for that is you question your  
7 eligibility -- you question the eligibility of  
8 the candidate, that's the words at 3-8-1-2.  
9 I've not seen anything that questions the  
10 eligibility of a candidate.

11 **COMMISSIONER A. LONG:** Could I ask a  
12 question?

13 **MR. D. SIMMONS:** I mean notwithstanding the  
14 more fundamental question about whether there's  
15 been a filing.

16 **CHAIRMAN T. WHEELER:** I believe  
17 Commissioner Long has a question.

18 **COMMISSIONER A. LONG:** Dale, is CAN-1's  
19 purpose to challenge a candidate?

20 **MR. D. SIMMONS:** Question the eligibility.  
21 That's the words in the statute.

22 **COMMISSIONER A. LONG:** In essence -- so  
23 give me some latitude and let's not go into  
24 semantics. What if you have a filing for a  
25 candidate and one of the co-directors wants to

1 accept and the other one doesn't, which is  
2 apparently the case in both of these here?

3 **MR. D. SIMMONS:** Yeah.

4 **COMMISSIONER A. LONG:** And with no  
5 challenge for eligibility, how does that get  
6 resolved, in your opinion?

7 **MR. D. SIMMONS:** Yeah, on his -- is he  
8 directing this to me?

9 **CHAIRMAN T. WHEELER:** I believe he's  
10 directing it to you, and I'm trying to give both  
11 sides the opportunity to respond.

12 **COMMISSIONER A. LONG:** I think Leslie says  
13 this is a vehicle to get somebody that says I  
14 want you to determine this impasse at the  
15 co-director's level and get this to the  
16 commission to decide, and Dale says no, you've  
17 got to file a CAN-1, which challenges --  
18 questions the eligibility, and my question is  
19 what if you have an impasse through the  
20 co-directors and that's all you've got, how does  
21 it get resolved?

22 **MR. D. SIMMONS:** And historically -- Mr.  
23 Chairman, historically, that has occurred at  
24 least twice, and it's occurred three times, but  
25 two have resulted in lawsuits to mandate one of



1 the co-director or both of them to perform their  
2 statutory duty to certify the candidate.

3 The co-directors have been sort of  
4 forthcoming advising the candidate if they  
5 requests something in writing because the  
6 certification deadline is not until August 22nd.  
7 It's important to get these things resolved  
8 because ballots are printed and we need to get  
9 these things resolved so they both have been  
10 very cooperative in saying this is our position  
11 or this is my position, I understand you want to  
12 know it now so you can have your remedy in  
13 court.

14 That's how impasses have been resolved  
15 between the co-directors, and that's how  
16 impasses, I assume, are resolved with the  
17 Commission. If they are 2 to 2 -- they're tied  
18 2 to 2 in this case on the issue, then the only  
19 remedy there is to go to court. It's an  
20 impasse. That's the way we're set up. It's  
21 always been frustrating, but that's just...

22 **CHAIRMAN T. WHEELER:** Dale, let me ask a  
23 follow-up question.

24 **COMMISSIONER A. LONG:** I'd like to get an  
25 answer to my question.

1           **CHAIRMAN T. WHEELER:** I'm sorry. I  
2 apologize.

3           **COMMISSIONER A. LONG:** The question is  
4 you've got -- forget these cases, we've got  
5 somebody that's filing for office and one of the  
6 co-directors won't approve it or the other one  
7 or maybe even they both disagree.

8           **MR. D. SIMMONS:** Yes, and that's happened.

9           **COMMISSIONER A. LONG:** Is there a vehicle  
10 to get it before the Commission who's statutory  
11 responsibility is to enforce the election laws  
12 for the State of Indiana -- I mean is there some  
13 vehicle to get it to us or do we just circumvent  
14 it and tell people to run to court?

15           **MR. D. SIMMONS:** My view is that there is  
16 no vehicle and the way to do it is go to court,  
17 and historically, that's what happened.

18           **CHAIRMAN T. WHEELER:** Let me ask my  
19 follow-up question then. Could not -- tell me  
20 what prevents a CAN-1 -- let's assume that they  
21 fill out a CAN-1 right now and hand it to me, do  
22 I then have jurisdiction over this matter -- I  
23 apologize, does the Commission have jurisdiction  
24 over this matter subject to notice, obviously?

25           **MR. D. SIMMONS:** There's two -- there's two

1 parts to that. One is has there been a filing  
2 challenged? My view is that there's been no  
3 filing 3-8-1-2 and the other statute applies  
4 here 3-13-1-16.5 indicates a filing may be  
5 challenged, and that was -- it's come up sort of  
6 like what -- what if somebody comes in two days  
7 before the election and files as a write-in  
8 candidate -- well, we have to reject late  
9 filings. If they need to address that, they  
10 need to go to court. So the first issue is has  
11 there been a filing, and our view is no, there's  
12 not been a filing, apparently.

13 **CHAIRMAN T. WHEELER:** Why has there not  
14 been a filing in the Moore case?

15 **MR. D. SIMMONS:** In the what case?

16 **CHAIRMAN T. WHEELER:** In the Moore case,  
17 why has there not been a filing?

18 **MR. D. SIMMONS:** There's not been a filing  
19 in that case because there's not been a timely  
20 tender of a CAN-30. There's three documents  
21 related to -- well, with respect to a judge,  
22 four documents, related to certifying an  
23 individual who's selected at caucus to fill a  
24 ballot vacancy. You file a CAN-30 notice at  
25 caucus, and at noon, ten days before the caucus,

1 you file -- you've got to file your -- and  
2 that's with the Election Division for judge.

3 **CHAIRMAN T. WHEELER:** You've got -- the  
4 CAN-30 is notice of filing?

5 **MR. D. SIMMONS:** The CAN-30.

6 **CHAIRMAN T. WHEELER:** And the fact that  
7 that was not filed caused -- that's the --  
8 that's the error here; correct?

9 **MR. D. SIMMONS:** Two errors.

10 **CHAIRMAN T. WHEELER:** All right.

11 **MR. D. SIMMONS:** The CAN-31, declaration of  
12 candidacy also must be filed with the Election  
13 Division at least 72 hours before the caucus.  
14 Neither of those were done. Now there was as --  
15 we certainly agree and Mr. Buskill brought these  
16 documents in, there was a CAN-29, the  
17 certification of selection tendered to our  
18 office on -- before noon July 3rd. It was  
19 actually tendered about 11:20 and noon  
20 July 3rd was the deadline for that document.

21 It did have, I believe, a copy of the  
22 CAN-31 with it, but at that point -- you know,  
23 my view was that this -- we didn't have a  
24 CAN-30, that the other documents were timely, so  
25 this was an untimely filing.

1           **CHAIRMAN T. WHEELER:** So a CAN-30 was never  
2 filed at all?

3           **MS. L. BARNES:** Mr. Chairman, not exactly.

4           **CHAIRMAN T. WHEELER:** Hold on, let me --  
5 let me understand his position.

6           **MS. L. BARNES:** Okay.

7           **CHAIRMAN T. WHEELER:** Your position is that  
8 a CAN-30 was never filed?

9           **MR. D. SIMMONS:** Not with the Election  
10 Division.

11           **CHAIRMAN T. WHEELER:** It is filed  
12 somewhere?

13           **MR. D. SIMMONS:** Apparently so. I don't  
14 know how the Election Division came to it. I  
15 just know when we copied documents that somebody  
16 in our office had been provided a copy of this  
17 document, the CAN-30, and the CAN-31, I believe,  
18 both were filed with the circuit court clerk of  
19 Clark County.

20           **CHAIRMAN T. WHEELER:** And when were they  
21 filed -- I assume they have a file stamp on  
22 them?

23           **MR. D. SIMMONS:** I don't have the dates,  
24 but I think I calculated those, that if they had  
25 been filed with the Election Division, they

1 would have been timely.

2 **COMMISSIONER A. LONG:** My CAN-31 is file  
3 marked May 30th and at -- at least that's what  
4 they sent out to Mr. king and he sent it to the  
5 rest of us, I assume -- I believe that's where  
6 we got it. I appreciate that Brad.

7 **COMMISSIONER S. RIORDAN:** Mr. Chairman, I  
8 guess I would ask that in reviewing the CAN-30,  
9 CAN-31 and the CAN-29 issue, we're really  
10 getting into more of the merits and that goes  
11 beyond the jurisdictional question; is that  
12 fair?

13 **MR. D. SIMMONS:** Yeah, I'm just responding  
14 to questions.

15 **CHAIRMAN T. WHEELER:** I don't -- I don't  
16 know that I'm getting to the merits because I  
17 want to understand -- I want to understand the  
18 basis for the jurisdictional part of the  
19 argument that --

20 **COMMISSIONER S. RIORDAN:** So do I.

21 **CHAIRMAN T. WHEELER:** -- they have.

22 **COMMISSIONER S. RIORDAN:** So do I.

23 **CHAIRMAN T. WHEELER:** I mean that's what I  
24 thought, the reason they haven't made a filing  
25 is because it was not complete. That's why I

1 didn't want to get into the merits of it.

2           **COMMISSIONER S. RIORDAN:** But I understand  
3 the jurisdictional issue to be framed more along  
4 the lines of -- the view that a CAN-1 is  
5 required, and that's what gets the  
6 jurisdiction -- that's what triggers the  
7 jurisdiction of this commission. A CAN-1 has  
8 not been filed but a sworn statement has been  
9 filed, and so the issue is are we going to  
10 accept the sworn statement as basis for  
11 exercising our jurisdiction; right -- is that  
12 the jurisdictional issue, and then once we  
13 decide, either we're going to punt or we're  
14 going to take it on and look at the merits, then  
15 we start looking at the validity of the timing  
16 of the required forms; is that correct?

17           **MR. D. SIMMONS:** No, not entirely, and I  
18 think it's because -- and I don't -- I just want  
19 to make sure you understand in this regard that  
20 my whole discussion on filing -- in our view, it  
21 requires a filing. I think you have to take two  
22 steps as a commission.

23           You say regardless of the co-directors'  
24 view here whether there has been a filing -- we  
25 find that there's been a filing, No. 1, and No.

1 2, we find that filing has been challenged  
2 notwithstanding that a CAN-1, a form we've  
3 approved for this purpose, has not been filed.  
4 I think it's really two steps.

5 **CHAIRMAN T. WHEELER:** But the first step is  
6 is there a filing, and what I heard you say is  
7 that determination is in the exclusive  
8 jurisdiction of the co-directors and without, in  
9 your opinion, review by the Commission; correct?

10 **MR. D. SIMMONS:** Right, but I'm not going  
11 to go that far to say what your jurisdiction is.  
12 Here's where, you know, my -- my main obligation  
13 is...

14 **CHAIRMAN T. WHEELER:** I'm considering  
15 telling you what I think our jurisdiction is.

16 **MR. D. SIMMONS:** You have every right to  
17 tell me I'm wrong, the Commission does.

18 **CHAIRMAN T. WHEELER:** You've espoused with  
19 respect to the Moore situation, is that a filing  
20 has not been made, therefore, the Commission  
21 does not have jurisdiction, and I assume even if  
22 they tried to file a CAN-1, a CAN-1 in your  
23 position would be inappropriate because there's  
24 been no filing?

25 **MR. D. SIMMONS:** In addition if a CAN was



1 filed today, then you'd trigger AOPA  
2 requirements.

3 **CHAIRMAN T. WHEELER:** I understand AOPA.

4 **COMMISSIONER A. LONG:** What if Mr. Pate  
5 would stand up and say I withdraw my CAN-1, my  
6 challenge to Mr. Navarro, what if he did that  
7 today, then I guess taking Dale's analysis one  
8 step further, we just go home because we  
9 wouldn't have anything -- there's nothing for us  
10 to hear. Our jurisdiction has been divested. I  
11 think that's --

12 **CHAIRMAN T. WHEELER:** On Navarro.

13 **COMMISSIONER A. LONG:** On Navarro, and he  
14 says it's because there's no filing, it's been  
15 withdrawn, it's been dismissed, nonexistent, so  
16 we're in the same boat on both of them.

17 **CHAIRMAN T. WHEELER:** No, because Navarro  
18 has made a -- at least the argument, I assume,  
19 is Navarro has been made a filing which then  
20 made the CAN-1 appropriate.

21 **COMMISSIONER A. LONG:** No, I don't think  
22 so. The co-director says she's not approved  
23 Navarro.

24 **CHAIRMAN T. WHEELER:** That's why I -- my  
25 next step was probably -- I want to understand

1 it's the filing issue, and that's why I got --  
2 was getting into the merits of what was actually  
3 filed.

4 **UNIDENTIFIED SPEAKER:**

5 **MR. M. GILLENWATER:** Mr. Chairman, if I  
6 might speak up for Mr. Moore. I would point out  
7 to you that the CAN-1 form is only for  
8 challenging the validity of a candidate. It  
9 does not have language on there that asks the  
10 Commission to certify the validity of the  
11 candidate.

12 **CHAIRMAN T. WHEELER:** Let me hold you  
13 there. I understand what -- I'll give you guys  
14 a shot. I'm working on the internal debate  
15 between -- and it's one of the problems with  
16 this commission, is we have both Republicans and  
17 Democrat and two of everything. I want to make  
18 sure I understand, and this is where Tony is  
19 going, --

20 **COMMISSIONER A. LONG:** We will resolve it.

21 **CHAIRMAN T. WHEELER:** -- the difference  
22 between -- the difference between the two  
23 candidates and the procedural process of the  
24 candidates, because as I understand what you're  
25 saying, you think they're both in the same boat;

1 is that where you're going, with the fact that  
2 you've not certified -- you've not accepted  
3 Navarro and this side has not accepted Moore?

4 **MS. L. BARNES:** Correct.

5 **CHAIRMAN T. WHEELER:** And therefore,  
6 neither one has a filing; is that the position  
7 you're taking -- your position is Moore and  
8 Navarro should be treated as the exact same  
9 slot, they should be treated exactly the same?

10 **MS. P. POTESA:** I don't think one has any  
11 more filing than the other. I believe that Dave  
12 Moore has submitted all necessary paperwork in a  
13 timely fashion. I don't know how else to  
14 describe that to you.

15 **CHAIRMAN T. WHEELER:** Let me -- that's why  
16 I got to the CAN-30 and 31, is I -- did Navarro  
17 file all of his stuff here in Indianapolis at  
18 the right time?

19 **COMMISSIONER A. LONG:** I think that's open  
20 for debate.

21 **MS. L. BARNES:** And that's open for debate.

22 **COMMISSIONER A. LONG:** Correct. He filed  
23 in Indianapolis on July the 3rd.

24 **MS. L. BARNES:** On July 3rd before noon.  
25 We're just not sure which deadline applied in

1 that case.

2 **CHAIRMAN T. WHEELER:** I understand, but  
3 Moore has the additional problem, as I  
4 understand it, which is the CAN-30 was filed in  
5 the wrong place, or the CAN-31 was filed in the  
6 wrong place; correct?

7 **COMMISSIONER A. LONG:** I think it was filed  
8 in both places. It was filed timely in the  
9 county, perhaps untimely with the Division. I  
10 think we're clear on what the facts are.

11 **CHAIRMAN T. WHEELER:** Right. So that would  
12 be the one distinction between the two?

13 **MS. L. BARNES:** And there are additional --

14 **CHAIRMAN T. WHEELER:** I mean we can argue  
15 about whether a caucus should have taken place  
16 and whether notice should have been...

17 **MS. L. BARNES:** Right.

18 **CHAIRMAN T. WHEELER:** And go through the  
19 authority -- I mean the appointing authority --  
20 I understand that, and that's what I consider to  
21 be merits. I just want to understand...

22 **MS. L. BARNES:** Both certificates of  
23 selection, both CAN-29s came to our office on  
24 July 3rd before noon.

25 **CHAIRMAN T. WHEELER:** And they were, in

1 fact, filed by the same person; correct?

2 **MS. L. BARNES:** Tendered by the same  
3 person.

4 **CHAIRMAN T. WHEELER:** And I appreciate  
5 Mr. Buskill's bipartisan -- bringing up the  
6 Democratic paperwork as well.

7 **COMMISSIONER A. LONG:** They, obviously, get  
8 along very well.

9 **CHAIRMAN T. WHEELER:** All right.

10 **MS. L. BARNES:** And Mr. Chairman, there is  
11 a definition of filing, too. I don't know if  
12 the Commission wanted to look at the definition  
13 or...

14 **CHAIRMAN T. WHEELER:** And I do, absolutely,  
15 and explain that together with what is the  
16 impact of this cross refusal to accept by the  
17 co-directors? I mean does that impact the  
18 status -- I mean I heard Dale, and I think he  
19 said that impacts the status, there's not been a  
20 filing, and therefore there's -- and the ability  
21 of the directors to refuse a filing, that  
22 divests us from jurisdiction, is kind of what I  
23 heard?

24 **MR. D. SIMMONS:** Yep, a break with usual  
25 precedent and agree with Mr. Long on that. I

1 think he's nailed that issue perfectly.

2 **COMMISSIONER A. LONG:** I'm not used to  
3 somebody agreeing with me. I believe it's, in  
4 essence, the point of -- you've got all your  
5 questions...

6 **CHAIRMAN T. WHEELER:** I've got all my  
7 questions.

8 **COMMISSIONER A. LONG:** It would be my  
9 position -- let me make sure it's not my wife --  
10 no, it's not -- priorities are priorities. I'm  
11 looking at 3-6-4.23, which is the authority of  
12 the co-directors, that's their powers and  
13 duties, and I'm looking at 3-6-4.1\_ -- I had it  
14 here just a minute ago -- 14, that it appears to  
15 me that the co-directors are a subservient body,  
16 and I don't mean that disrespectful, but their  
17 duties are to render assistance in the Division  
18 and administration, that the Division shall  
19 assists the Commission -- this is Section 2 of  
20 4.2, and the Secretary of State in  
21 administration of this title.

22 Their authorities are, subject to the  
23 following, carry out the policies and decisions  
24 and recommendations of the Commission, and then  
25 the Commission's powers and duties are to simply

1 administer Indiana election law. I think that  
2 is a superior position. It is my belief to so  
3 move and accept jurisdiction in both of these  
4 cases.

5 I think that we're shirking our  
6 responsibility to the system to relegate it over  
7 to the courts. I think the courts always have  
8 jurisdiction to do what they choose to do. They  
9 decide their own jurisdiction so I think,  
10 therefore, we perhaps decide ours, but I believe  
11 we have jurisdiction under the statutes that I  
12 cited and would move that we accept jurisdiction  
13 on both these causes and render a decision --  
14 that's it.

15 **COMMISSIONER D. DUMEZICH:** Seconded.

16 **CHAIRMAN T. WHEELER:** A motion's been made  
17 and seconded, any discussion, Commissioner  
18 Riordan?

19 **COMMISSIONER S. RIORDAN:** Well, I guess  
20 I -- I appreciate and am grateful for Mr.  
21 Simmons careful reading of the statute as  
22 always -- I happen to disagree, and I am also  
23 going to vote in favor of this. I realize forms  
24 are forms and sometimes form does become  
25 substance in our work, but in this case, I think

1 it's not because the purpose of the CAN-1 is  
2 just different enough from the issue that the  
3 challenger has attempted to raise, and you know,  
4 this Commission cannot possibly address every  
5 single scenario that comes up under our  
6 sometimes wild and crazy Indiana election law.

7 And so I think in this instance it would be  
8 important for us to accept jurisdiction on both  
9 causes and to address these issues on the merits  
10 because what we tend to do frequently in most  
11 cases is to favor access to the ballot for  
12 candidates and for voters and so I think we  
13 really need delve through the jurisdictional  
14 issue and get down to that so I'm going to vote  
15 in favor of this.

16 **CHAIRMAN T. WHEELER:** I agree with  
17 Commissioner Riordan as well, not for her  
18 characterization of Mr. Simmons' legal position,  
19 but with respect to the desire -- this  
20 commission, at least since I've been on it, and  
21 Tony's been on it a lot longer -- Commissioner  
22 Long has been on it a lot longer than I have,  
23 has not tried to elevate form over substance as  
24 we have gone through here. We have a couple of  
25 overriding concerns. I think we understand



1 those. Generally, we would like to see that the  
2 people of the State of Indiana have an  
3 opportunity to make a decision and not us, No.  
4 1, and No. 2, not to elevate form over substance  
5 in that regard.

6 I also have some concerns with what I at  
7 least hear from the implied decision of the  
8 co-directors that by playing kind of the game  
9 got you, they came can divest us as jurisdiction  
10 and force the candidates to go to court. I  
11 think that is -- I'm not necessarily suggesting  
12 that happen, but I certainly would invite that,  
13 if we took the position that the Commission  
14 would not have jurisdiction in a situation like  
15 this.

16 I think the Commission provides a quick,  
17 easy and cheap, despite the multiple attorneys  
18 that are already here, method of resolution.  
19 It's a lot cheaper than going to court, and it  
20 give you at least an additional shot to take a  
21 look at what the directors do have, No. 1, and  
22 No. 2 is you get a little better record from the  
23 court as to where we're coming from if you do  
24 choose to go that route.

25 So the idea that we don't have jurisdiction

1 simply because a director refused the filing and  
2 therefore we don't have a CAN-1, and I think our  
3 jurisdiction goes beyond that based upon Tony's  
4 analysis as well so I would vote in favor as  
5 well. All in favor of the motion, signify by  
6 saying Aye?

7 **THE COMMISSIONERS:** Aye.

8 **CHAIRMAN T. WHEELER:** Those opposed, same  
9 sign?

10 *(No response.)*

11 **CHAIRMAN T. WHEELER:** Mr. Moore, I will ask  
12 you if -- you and/or your attorneys would be  
13 willing to waive the AOPA notice and  
14 requirements such that we can actually delve  
15 into the merits of your matter at the same time  
16 we delve into the merits of Judge Navarro's  
17 matter?

18 **MR. D. MOORE:** Certainly, sir.

19 **MR. L. WILDER:** Mr. Chairman, if I may, I  
20 don't want this to be interpreted in any way  
21 that Judge Navarro is waiving any of his rights,  
22 as a waste of his ability as either a taxpayer  
23 and/or a candidate to challenge Mr. Moore's  
24 candidacy as in the same manner that Mr. Moore  
25 has challenged his.

1           In as much as -- my sense is we're here  
2 today and the Commission wants to take up  
3 propriety of Mr. Moore's filings, and Judge  
4 Navarro and/or Mr. Buskill have not raised the  
5 issues that they would feel were salient as it  
6 relates to whether or not that that is a filing  
7 that should be considered.

8           And certainly, without the ability for us  
9 to go forward in the manner that we would hope  
10 to go forward with the evidence and the  
11 preparation -- certainly, the res judicata  
12 effect of any decision today would certainly be  
13 devastating to us because we are not prepared to  
14 address that because we did not raise this issue  
15 for the reason that we did not believe the  
16 subject matter of jurisdiction was clear and  
17 whether or not this board had subject matter  
18 jurisdiction based upon the failings of Mr.  
19 Moore's filings.

20           **CHAIRMAN T. WHEELER:** I understand your  
21 reservation. I'm not sure what the  
22 effectiveness of it is, but I do understand your  
23 reservation and that may be resolved at some  
24 point but not by us.

25           **MR. L. WILDER:** Thank you, sir.

1           **COMMISSIONER D. DUMEZICH:** At least it's  
2 very possible that we plan on resolving -- what  
3 this commission can resolve today and not hear  
4 this stuff again.

5           **CHAIRMAN T. WHEELER:** There is clearly a  
6 commitment on that for a variety of different  
7 reasons, and I think that's -- that's to be fair  
8 to the candidates as well because I believe  
9 we've got 96 days before the election. You want  
10 to be focusing on him during the election rather  
11 than doing this in front of us.

12           **MR. L. WILDER:** Thank you, sir.

13           **CHAIRMAN T. WHEELER:** With that being said,  
14 procedurally, do any of the commissioners have a  
15 feeling for how we want to hear this?

16           **COMMISSIONER A. LONG:** I would make an  
17 observation that both sides of this issue have  
18 presented us with sufficient facts that we  
19 have -- I have, and I've read these things, I  
20 think a reasonably thorough understanding of  
21 where they are factually.

22           I think if they have anything to add, I  
23 would for one adopt or recommend the adoption of  
24 the -- his principle and presentation of this,  
25 don't tell us what we already know. If you know

1 something that we don't know or maybe you do  
2 that we don't know, I would certainly invite  
3 that, but everything has been put into  
4 petitions, responses and letters that have been  
5 tendered with these filings, and I don't use  
6 that term legally, but I think all the  
7 commissioners are fully abreast of that.

8 It would be counterproductive in my mind to  
9 rehash those things. I think we know what the  
10 facts are, I believe we understand what the law  
11 is, but if they want to give us a brief amount  
12 of time -- I don't want to cut anybody off, but  
13 judges sometimes do that to me and I guess it's  
14 okay. With all due respect, I'm going to get  
15 over to Clark County some day, is my  
16 understanding. Sometimes shorter is better.

17 **COMMISSIONER D. DUMEZICH:** You said you're  
18 not going to get over to Clark County. How  
19 about three minutes each side, and let's go.

20 **CHAIRMAN T. WHEELER:** What I'd like to do  
21 is I'm going to go ahead -- everybody on the  
22 Commission have read this and I think most of us  
23 have researched it ourself as well as  
24 consulting -- I suspect you consulted with  
25 Democratic counsel and we certainly consulted

1 with our counsel and are apprised of this. With  
2 that being said, I'm going to go ahead and  
3 give...

4 **COMMISSIONER A. LONG:** I think we have one  
5 duty, I'm sorry. I'm thinking of our counsel,  
6 Mr. White. Don't you think we ought to disclose  
7 that we received this?

8 **CHAIRMAN T. WHEELER:** Yeah, you should  
9 because I think that came to all of the  
10 commissioners here. Are you going to put your  
11 copy in the record?

12 **COMMISSIONER A. LONG:** I can. I  
13 received -- we all received a letter  
14 purportedly, and I don't -- I don't know what  
15 this entity is -- Southern Indiana Legislators,  
16 but it purports to be signed by seven  
17 legislators on this issue. I think that we try  
18 to make disclosure. I think it's our obligation  
19 when we've had outside contact.

20 I did look at one of the legislator's -- I  
21 did read that letter so I disclose it. I  
22 individually received a letter from a young lady  
23 by the name of Sharon Routh, R-O-U-T-H, that --  
24 I have not read all of her letter, and I don't  
25 mind giving you a copy -- I want to read it

1 later because I know her. She used to be an  
2 employee in my office years ago, and there was a  
3 little cover letter, a sticky, and I did read  
4 that, and it said don't know if you remember me,  
5 and Frank is your husband -- she worked for us  
6 back in 1983, sent the letter to me, and I want  
7 to follow up and contact her later and say hi,  
8 but I received that and I have not read it, the  
9 substance part of the letter, so I make that  
10 disclosure, and here's my copy of the Southern  
11 Indiana Legislators.

12 **MS. L. BARNES:** We'll make sure it gets in  
13 the record.

14 **CHAIRMAN T. WHEELER:** Are you done now?

15 **COMMISSIONER A. LONG:** Yes.

16 **CHAIRMAN T. WHEELER:** I believe each of the  
17 commissioners received that and I know I  
18 certainly reviewed it. I would note for the  
19 record and certainly make a copy, but Mr.  
20 Wilder, I believe, that is in support of keeping  
21 all the candidates on the ballot, at least  
22 Mr. Moore on the ballot. It was written by all  
23 of the signatory legislators, two senators  
24 before a congressional -- four house members are  
25 all -- happen to be Southern Indiana Democrats,

1 at least based upon my brief review -- one, I  
2 believe, who's running for lieutenant governor.

3 **COMMISSIONER A. LONG:** I did recognize  
4 that.

5 **MR. D. BUSKILL:** Are any of them residents  
6 of Clark County?

7 **CHAIRMAN T. WHEELER:** I don't know the  
8 answer to that.

9 **MR. L. WILDER:** I would suspect not.

10 **MR. D. MOORE:** No, sir, it's not. None of  
11 them are residents of Clark County.

12 **CHAIRMAN T. WHEELER:** For that -- for  
13 what -- at least from my standpoint, it is  
14 really for what it's worth.

15 **COMMISSIONER A. LONG:** We make the  
16 disclosure for technical legal reasons and  
17 certainly not belabor it.

18 **CHAIRMAN T. WHEELER:** I'm not, but I  
19 appreciate the input from the other branch.  
20 With that being said and with the admonition of  
21 the commission members -- I will siding with  
22 Commissioner Dumezich, and I'm going to give  
23 five minutes to each side. You can address any  
24 of the issues that you wish to address with  
25 respect to the Pate filing or the Moore



1 candidacy. I will start with the  
2 representative -- Mr. Moore, if you wish to  
3 share some of your time with Mr. Pate or his  
4 attorney, you're welcomed to do that.

5 **MR. M. GILLENWATER:** So that I understand,  
6 you are putting Mr. Pate's complaint and Mr.  
7 Moore's position in the same basket, so we have  
8 to do that in five minutes?

9 **CHAIRMAN T. WHEELER:** Correct.

10 **MR. M. GILLENWATER:** How do you want to do  
11 this?

12 **MR. R. PATE:** It's your call.

13 **CHAIRMAN T. WHEELER:** I suspect it'll be  
14 useful for the commission members if you were  
15 doing some comparing in contrast between the two  
16 situations. Certainly, it asks for that.

17 **MR. D. SIMMONS:** Mr. Chairman, the court  
18 reporter has asked that they identify before  
19 they speak.

20 **MR. J. VISSING:** John Vissing, 432 East  
21 Court Avenue, Jeffersonville, 624-10. We have a  
22 mess here that none of us made. Clark Circuit  
23 Court was not due to be up for election this  
24 year. Judge Donahue is a married to a cousin of  
25 mine, who is a diabetic. They want to -- she's

1 had a heart attack -- he wants to take her and  
2 move to Seattle, take her autistic child and be  
3 near their other child and move to Vancouver,  
4 and he has elected to leave the bench two years  
5 early.

6 Now we done that -- if he had followed out  
7 his term -- no one in Clark County has ever  
8 dealt with this situation before, all right,  
9 never dealt with these forms in this capacity  
10 before. We also note that Dan made the decision  
11 to resign and talked about it for months, but he  
12 didn't resign until June the 1st, and I would  
13 maintain that he was the judge until June the  
14 1st.

15 He could have said, you know, I change my  
16 mind -- he's got a house that hasn't sold, he  
17 could have said you know, I'm not going to  
18 leave, and there's no one who could have taken  
19 him out of office. Now I think holding a caucus  
20 on March 4th, the Republicans is incorrect.  
21 They didn't file their notice. There's no  
22 filing at all. David, do you want to share that  
23 with them, from that caucus?

24 **MR. D. MOSLEY:** My name Dave Mosley, and  
25 the reason that this is -- this part that's been

1 handed to me is because when these issues arose,  
2 it was my job to try to find out what I could  
3 about the Republican meeting that occurred on  
4 March 4th.

5 This is the meeting -- this has to do with  
6 the authority of the Republican chair to appoint  
7 a candidate, which is one of the methods by  
8 which a vacancy can be filled, so what I'm  
9 looking at, Indiana Code Section that talks  
10 about I believe -- it's 3-1 --

11 **MS. L. BARNES:** 3-13-1.6.

12 **MR. D. MOSLEY:** Yeah, 3-13-1.6, and that  
13 provides for a meeting, a committee meeting  
14 which we understand is defined as the precinct  
15 committeemen or women of the -- from the  
16 Republican Party to meet and under caucus and  
17 give that authority their county chair.

18 Now when Mr. Navarro submitted his CAN  
19 form, he identified himself as being appointed  
20 by caucus. We looked at those requirements.  
21 There was not a notice of a caucus filed. There  
22 was simply this March 4th, which I think is in  
23 your material, designating here's the meeting  
24 minutes of this caucus, I believe, that he  
25 called it, where the authority at that meeting

1 was given to the Chairman, Mr. Buskill, to  
2 appoint vacancies of the candidates.

3 **CHAIRMAN T. WHEELER:** You used the word  
4 "caucus," I look at the statute, and it uses the  
5 word "County Committee?"

6 **MR. D. MOSLEY:** Yes.

7 **CHAIRMAN T. WHEELER:** Are you using caucus  
8 and committee interchangeably or not?

9 **MR. D. MOSLEY:** Well, for these purposes, I  
10 am, because I understand that both parties have  
11 defined committee meeting to mean a meeting of  
12 their precinct committeemen or women. In any  
13 case, factually, I contacted -- got the list of  
14 precinct committeemen appointed and elected for  
15 the Republican Party in Clark County, and  
16 selected ten persons who I've contacted, and  
17 I've got a affidavit about that process, that I  
18 tendered to the --

19 **CHAIRMAN T. WHEELER:** Affidavit by whom?

20 **MR. D. MOSLEY:** By me, about what I did.

21 **CHAIRMAN T. WHEELER:** You weren't at any of  
22 these meetings, you're just telling me what  
23 people told you?

24 **MR. D. MOSLEY:** Yes.

25 **MR. L. WILDER:** With all due respect, Mr.

1 Wheeler, I realize this is an administrative  
2 proceeding, however, I think it would be remiss  
3 for this committee to take double hearsay from  
4 Mr. Mosley.

5 He's going to purport to say things that  
6 precinct committee people or the Republican  
7 Party allegedly said to him. I think if the  
8 Republican Party had any problem with that  
9 procedure, then the proper method and who had  
10 standing to challenge that meeting would be a  
11 member of the Republican Party, either through  
12 an action -- or raising some action here, and  
13 I'm not sure how they can raise it here.

14 So I don't think that this is appropriate.  
15 I don't think they have standing to challenge an  
16 internal meeting of the party because the  
17 parties as we know are established by the rules  
18 that are established by the party.

19 **CHAIRMAN T. WHEELER:** My concern isn't so  
20 much that. You weren't there?

21 **MR. D. MOSLEY:** No.

22 **CHAIRMAN T. WHEELER:** Did you call any of  
23 these people or subpoena any of these people or  
24 is there anybody here?

25 **MR. D. MOSLEY:** When you say call, I

1 called --

2 **CHAIRMAN T. WHEELER:** As much as I want to  
3 hear you tell me what they told you -- I'm not  
4 giving that a lot of credibility, I'd rather see  
5 somebody who was sitting here that was there.

6 **MR. D. MOSLEY:** Sure.

7 **CHAIRMAN T. WHEELER:** Do you have anybody?

8 **MR. D. MOSLEY:** No, we don't.

9 **MR. M. GILLENWATER:** Mr. Chairman, what we  
10 have done --

11 **MR. J. VISSING:** Excuse me, Michael, I  
12 would like to finish up one point. As I'm here  
13 on behalf of Mr. Pate and the Democratic Party,  
14 what I do think is -- if there is a requirement  
15 of a called committee, you're going to find no  
16 evidence of that being filed either in Clark  
17 County Circuit Court Clerk's Office or here. So  
18 if there is a requirement of notice, you're not  
19 going to find evidence of that here. And, of  
20 course, I'm prepared to tell you what I learned  
21 when I talked to these committee persons about  
22 this meeting -- if you determine that's not  
23 appropriate to hear, fine, but I know that that  
24 is a deficiency in that meeting that I think  
25 divests that there wasn't sufficient authority.

1           **CHAIRMAN T. WHEELER:** Where is there -- let  
2 me ask you this question, and if you know the  
3 answer or not, where is there a requirement that  
4 there be a notice for that meeting; where does  
5 it say that?

6           **MR. D. MOSLEY:** I think there's a  
7 requirement in Section 9.

8           **MR. M. GILLENWATER:** It's 3-13-1-9.

9           **CHAIRMAN T. WHEELER:** 3-13-1-9 refers to a  
10 meeting under Section 7, not a meeting under  
11 Section 6.

12           **MR. D. MOSLEY:** We believe that the voices  
13 of the committee --

14           **CHAIRMAN T. WHEELER:** You're referring to  
15 Section 6?

16           **MR. D. MOSLEY:** Yes.

17           **CHAIRMAN T. WHEELER:** And Section you say  
18 refers -- the time limit refers to Section 7,  
19 not Section 6; right, you would agree with me on  
20 that?

21           **MR. D. MOSLEY:** Yes.

22           **CHAIRMAN T. WHEELER:** I'm trying to  
23 understand why that timing position applies to  
24 Section 6?

25           **MR. D. MOSLEY:** I think that as is part of

1 the election law, my understanding is that the  
2 committee that's referred to in those sections  
3 has been defining accepted by both parties as  
4 the precinct committeemen and women and vices  
5 but we don't have vices in this case so...

6 **CHAIRMAN T. WHEELER:** Sarah.

7 **COMMISSIONER S. RIORDAN:** I just wanted to  
8 understand what the significance -- without  
9 going into the substance of what you were told  
10 by the Republican committee people, the reason  
11 why -- your position, if I understand it, is as  
12 of March 4th when the Republican Party conducted  
13 its caucus or its committee, there was no  
14 vacancy to fill?

15 **MR. D. MOSLEY:** That's Jack's part, yeah.

16 **COMMISSIONER S. RIORDAN:** So regardless of  
17 what happened at that meeting, what you're  
18 saying is what took place at that meeting could  
19 not have effectively given anyone of the  
20 Republican Party the authority to fill a vacancy  
21 on the ballot?

22 **MR. D. MOSLEY:** Correct.

23 **COMMISSIONER S. RIORDAN:** Understood.

24 **CHAIRMAN T. WHEELER:** All right. Under  
25 that position, could they say -- could they have



1 said at that meeting if there is a vacancy, we  
2 anticipate a vacancy, we authorize the county  
3 chairman to fill that vacancy if there should be  
4 a vacancy; would you agree with me that they  
5 could have done that?

6 **MR. D. MOSLEY:** You know, I think.

7 **CHAIRMAN T. WHEELER:** I mean legally, they  
8 could have done that; correct?

9 **MR. D. MOSLEY:** I believe that and you  
10 know...

11 **CHAIRMAN T. WHEELER:** And in fact, that  
12 happens throughout the state all the time. I  
13 believe we have -- I believe we had eight  
14 judicial vacancies in other counties that were  
15 filled in in that exact same fashion?

16 **MR. D. MOSLEY:** I think you're exactly  
17 right. I think the traditional -- I think the  
18 history of the selections have been just that.  
19 I do think that if you take a strict reading of  
20 this statute, then you'll find that there's a  
21 deficiency there, and we wouldn't be bringing it  
22 up before this commission if we weren't -- if  
23 Mr. Moore's filing weren't being held to the jot  
24 and tittle of the law so it's our fundamental --

25 **CHAIRMAN T. WHEELER:** It's just kind of a

1 tit for tat kind of thing, they got us so we're  
2 going to get them?

3 **MR. D. MOSLEY:** Well, we -- exactly. We  
4 went through and looked at each portion of what  
5 was done to -- for the Republicans to select a  
6 candidate because we felt that the same thing  
7 was being applied to us so these are  
8 deficiencies that we found.

9 **CHAIRMAN T. WHEELER:** Would you agree with  
10 me, could a county committee meet in 2004 and  
11 give ongoing authorization and say our policy  
12 and practice of this county is that the county  
13 chair has the authority to fill any vacancies,  
14 any ballot vacancies that come up?

15 **MR. D. MOSLEY:** No, no, because who -- who  
16 is that meaning? If you don't have a notice of  
17 the -- to go after the precinct people where  
18 they can convene and vote, and there --

19 **COMMISSIONER A. LONG:** You've got a  
20 legitimate meeting.

21 **CHAIRMAN T. WHEELER:** And the notice simply  
22 says we're going to have a meeting, we're going  
23 to have an appropriately -- appropriate noticed  
24 meeting that says we are giving -- my question  
25 is do you have to have this meeting every time a

1 vacancy occurs or can you give a county chair  
2 the authority that any time a vacancy occurs, he  
3 has ongoing authority to fill that vacancy, and  
4 I would suggest to you that's the way that  
5 most -- most of the counties in Indiana do that.

6 **MR. M. GILLENWATER:** Again, Michael  
7 Gillenwater for the court reporter. That would  
8 be okay if you were convening in one year --  
9 given authority for the same year for something  
10 that was on the ballot that you anticipated, but  
11 when something occurs that's not anticipated or  
12 you go beyond the term of your office as a  
13 precinct committeeman, you cannot give authority  
14 for somebody to do something two years from now  
15 if there is a different precinct committeemen  
16 because those precinct committeemen who are  
17 members of the committee have the right to vote  
18 on this.

19 **CHAIRMAN T. WHEELER:** But the authority --  
20 the authority can be given just by the county --  
21 the executive committee; correct, under  
22 Section...

23 **MR. M. GILLENWATER:** Not without a properly  
24 called meeting, not without a properly called  
25 meeting.

1           **CHAIRMAN T. WHEELER:** A properly called  
2 meeting of those individuals.

3           **MR. M. GILLENWATER:** Of the committee and  
4 the committee is more than the executive  
5 committee.

6           **COMMISSIONER D. DUMEZICH:** You say you have  
7 permanent rules associated with your  
8 committees -- they could be incorporated into  
9 the permanent rules, and it would be the  
10 obligation of the subsequent committeemen to  
11 amend those rules if they differed, so I'm  
12 not -- I'm not impressed with that argument  
13 so...

14           **MR. M. GILLENWATER:** Well, I would like to  
15 move forward to a different position. It's  
16 somewhat relative to that but it's more clear.  
17 This vacancy occurred because Judge Donahue  
18 resigned prior to the time his office was over.

19           The vacancy occurred on June 1st. It did  
20 not occur when he tendered his letter of intent  
21 to resign. It occurred on June 1st. You can  
22 interpret it how you want, but the Supreme Court  
23 has said that the vacancy occurs when the office  
24 is empty. That happened on June 1st.

25           That vacancy, I.C. 3-13-1-15 Subsection D,

1 has to be appointed and notice of that  
2 appointment has to be filed in the  
3 commissioner -- in the Division within 72 hours.  
4 That did not happen in this case.

5 The meeting, or the appointment occurred on  
6 June 23rd, which meant it should have been here  
7 by June 26th. It was not here by June 26th. We  
8 all agree on that. It wasn't -- it was filed in  
9 Clark County but it was refiled here -- just  
10 like Mr. Moore's was filed in Clark County and  
11 later refiled here, but it was not done in a  
12 timely manner if you look at this statute.

13 Now the statute says that if it's a primary  
14 vacancy, it can be filed by July 3rd, and that's  
15 what both county chairmen thought they were  
16 doing because these forms are not as clear as we  
17 would like them to be -- in fact, they contain  
18 other errors, and I don't want to go into that  
19 because we put some of that in our written  
20 materials.

21 But the forms are not as clear as we would  
22 like them to be. Obviously, both county  
23 chairmen had trouble understanding those forms.  
24 All of the documents that are required got here  
25 by July 3rd, and we would submit that, as we've

1 heard today, that you should try and interpret  
2 these laws in such a way as to encourage fair  
3 elections.

4 The Indiana Supreme Court says the intent  
5 of the election laws and the efforts of the  
6 commission should be to secure to the electorate  
7 an opportunity to freely and fairly cast his  
8 ballot and to uphold the will of the electorate  
9 and prevent disenfranchisement. In the absence  
10 of fraud, actual or suggested, statutes must be  
11 liberally construed to accomplish this purpose.

12 **CHAIRMAN T. WHEELER:** Let me back you up  
13 and ask you -- you gave me a cite to 115(d), I  
14 thought?

15 **MR. M. GILLENWATER:** Yes.

16 **CHAIRMAN T. WHEELER:** Now explain to me the  
17 distinction that you're making, and I want to  
18 you explain it so that Mr. Wilder will be able  
19 to respond to it --

20 **MR. M. GILLENWATER:** That's fine.

21 **CHAIRMAN T. WHEELER:** -- because I want to  
22 make sure I understand it and I want Mr. Wilder  
23 to respond to it.

24 **MR. M. GILLENWATER:** When there's a vacancy  
25 in the office of the circuit court judge, the

1 vacancy -- well, there's two types of vacancies,  
2 and under 3-13-1-15, and I think we will need to  
3 look under Subsection C and Subsection D,  
4 Subsection C says "This subsection applies to a  
5 candidate vacancy resulting from a vacancy on  
6 the primary election ballot."

7 Okay, primary election ballot -- we will  
8 agree that Judge Donahue's office was not over  
9 for another couple of years. There was not a  
10 vacancy on the primary election ballot. I think  
11 we can all agree on that.

12 **CHAIRMAN T. WHEELER:** And I just want to  
13 understand because I don't think I did  
14 understand that. When does Donahue's current  
15 term expire?

16 **MR. M. GILLENWATER:** In a couple of years.

17 **CHAIRMAN T. WHEELER:** He's 2010?

18 **MR. M. GILLENWATER:** 2010.

19 **CHAIRMAN T. WHEELER:** Okay, that's one of  
20 the things that I didn't understand.

21 **MR. M. GILLENWATER:** Subsection D, "This  
22 subsection applies to all candidate vacancies  
23 not described by subsection (c)". Those can be  
24 through withdrawal from -- a death from a  
25 resignation. The certificate required shall be

1 filed not more than three days excluding  
2 Saturdays and Sundays after selection of the  
3 candidate.

4 **CHAIRMAN T. WHEELER:** And what you're  
5 saying is both sides screwed this up because  
6 they were looking at Section C, not D -- you  
7 both did the same thing?

8 **MR. M. GILLENWATER:** That's correct. The  
9 form says you can file this with the local  
10 clerk's office or the state office. It seems to  
11 say that you can do one or the other -- in fact,  
12 there's several options there. It doesn't say  
13 it has to be filed at the Division under this  
14 circumstance.

15 I think this is an unusual occurrence.  
16 It's not likely to reoccur. To my knowledge or  
17 anybody I've spoken to, it's never happened in  
18 Clark County before where a sitting judge  
19 resigned after the primary but before the  
20 general election and I believe that both  
21 chairmen were confused -- it's obvious, or they  
22 would have filed their paperwork in a timely  
23 manner.

24 The way I understand this or see this, the  
25 Commission has a couple of options that are



1 available to it in order to try and help the  
2 people vote here and not disenfranchise them.

3 You can determine in your reading of the  
4 statutes that there has been substantial  
5 compliance, that the forms that we've filed,  
6 albeit it may be in the wrong place, the Clark  
7 County Circuit Court Clerk, they all got here by  
8 July 3rd, they were filed in a timely manner  
9 where they needed to be filed or someplace where  
10 the public could see them -- in fact, more than  
11 necessary was done because it was even published  
12 in the newspaper on the Democrat's part. You  
13 can balance the benefit of an election --

14 **CHAIRMAN T. WHEELER:** All right. Let's get  
15 past this. What are you asking that we do?

16 **MR. M. GILLENWATER:** I'm asking that you do  
17 one or two things, that you either find that  
18 both candidates are on the ballot by saying  
19 there's substantial compliance. In good faith,  
20 they filed it in Clark County, it got here  
21 eventually before July 3rd, and advise your  
22 division directors, co-directors that you would  
23 like to see them interpret the law in that way  
24 when deciding whether or not to certify these  
25 candidates, or in the alternative, determine --

1 because there is confusion that was created by  
2 the information in the forms -- the  
3 misinformation, as it is, the statute that was  
4 cited wrong, and the language that was hard to  
5 understand, that there is an emergency that  
6 exists in this particular election year, in this  
7 particular county because of the resignation of  
8 the circuit court judge -- in effect, midyear,  
9 and define that there is a emergency, declare  
10 it -- you have to do that unanimously as a  
11 commission and give extension to file this  
12 paperwork.

13 If you do that, I want you to understand,  
14 and I don't know what type of law you practice,  
15 an emergency is in effect whatever you say is an  
16 emergency. The courts aren't going to look at  
17 that too closely. It can be a natural disaster  
18 but it can be something else.

19 There are two options. We are not  
20 necessarily on behalf of Mr. Moore asking that  
21 Mr. Navarro not be, or Judge Navarro not be on  
22 the ballot, but if you're going to apply the  
23 same standard to both candidates, neither of  
24 them are going to be on the ballot this fall and  
25 the voters will be disenfranchised and that's

1 not what we want.

2 **CHAIRMAN T. WHEELER:** What happens if  
3 neither one is on the ballot?

4 **MR. M. GILLENWATER:** If neither one is on  
5 the ballot, then you'll have a lawsuit.

6 **COMMISSIONER D. DUMEZICH:** Before you...

7 **COMMISSIONER A. LONG:** Before you start  
8 using that...

9 **MR. M. GILLENWATER:** And I understand that,  
10 and I'm not saying that to threaten you, you  
11 will probably have a lawsuit, but if not, Judge  
12 Navarro will sit there until the next general  
13 election if the court does not determine that --

14 **CHAIRMAN T. WHEELER:** So assuming no one is  
15 on the ballot, Navarro -- Navarro sits til 2010?

16 **MR. M. GILLENWATER:** That's my  
17 understanding of the law. If neither is on the  
18 ballot, the people in Clark County don't get to  
19 vote on who their next judge is going to be.

20 **CHAIRMAN T. WHEELER:** They wouldn't have  
21 got to vote for two years anyway; right?

22 **MR. M. GILLENWATER:** But they selected the  
23 last one that was there.

24 **CHAIRMAN T. WHEELER:** I understand.

25 **MR. M. GILLENWATER:** They will have

1 somebody ruling on their cases who they didn't  
2 get a chance to vote for or against.

3 **CHAIRMAN T. WHEELER:** All right. Thank you  
4 very much. Mr. Wilder.

5 **MR. L. WILDER:** I was going to say Chairman  
6 Wheeler, do I get the same kind of 5 minutes  
7 that -- there's only one of me and certainly  
8 more of them.

9 **COMMISSIONER A. LONG:** Certainly.

10 **CHAIRMAN T. WHEELER:** I suspect -- you and  
11 I know each other, I suspect that -- knowing  
12 you, you're certainly able to handle...

13 **MR. L. WILDER:** Hold my own. I've  
14 certainly been accused of that. What we believe  
15 is the most important aspect of this is Judge  
16 Navarro's filings were correct. They comply  
17 with the statute. He is a candidate for circuit  
18 court judge as a Republican in Clark County for  
19 the upcoming election.

20 Mr. Buskill's ability to appoint Judge  
21 Navarro unilaterally was provided to him through  
22 a meeting of the precinct committee people in  
23 the Republican Party of Clark County on March  
24 4th of 2008.

25 Now Mr. Moore's counsel argue that because

1 Judge Donahue merely tendered a resignation with  
2 an effective date, the giving of Mr. Buskill  
3 that right has some flaw, and I call that the  
4 suth sayer argument, because what if someone who  
5 run in the primary election as a Republican and  
6 won had died, so their argument would mean that  
7 because Mr. Buskill and the committee could not  
8 foresee a death, that in fact he could not  
9 unilaterally make that appointment.

10 So to argue that the mere fact that the  
11 Republicans only knew by virtue of a January  
12 7th, 2008 letter that Judge Donahue was going to  
13 effectively be no longer judge on June 1 negates  
14 the idea that his resignation was effective  
15 January 1, 2008.

16 So taking that into consideration, the  
17 Republicans gave him the authority to appoint  
18 anyone necessary to fill any vacancies on the  
19 ballot for the Republicans. That does not  
20 require the type of caucus notice that the  
21 Democrats failed to undertake.

22 **CHAIRMAN T. WHEELER:** Why not?

23 **MR. L. WILDER:** Because the statute does  
24 not provide that you have to in order to have  
25 the meeting of the committee of the party to

1 vote to give him that authority.

2           **CHAIRMAN T. WHEELER:** Mr. Mosley tells me  
3 that 3-13-16 as applying 3-13-19 does require  
4 that.

5           **MR. L. WILDER:** That's an incorrect  
6 interpretation of the law.

7           **CHAIRMAN T. WHEELER:** Why?

8           **MR. L. WILDER:** Because the -- there was  
9 not a caucus as described and as contemplated  
10 that is necessary to replace someone that the  
11 Democrats chose, Mr. Chairman. Had the  
12 Democrats chosen the same method, and they were  
13 certainly within their abilities, to have a  
14 meeting of the precinct people and bestow Mr.  
15 Pate with the full unilateral right as to who  
16 ran for that seat, it would be the same issue,  
17 and they would come under the same rules that we  
18 have come under.

19           **CHAIRMAN T. WHEELER:** I think everybody  
20 agrees that at the March 4th meeting the  
21 authority was actually given, but that -- their  
22 argument is that notice was required and that  
23 notice was not given; correct, it wasn't filed  
24 with the Division?

25           **MR. L. WILDER:** There's no necessity.

1 There's no requirement in the statute that the  
2 meeting...

3 **CHAIRMAN T. WHEELER:** Do you agree that  
4 notice was or was not given?

5 **MR. L. WILDER:** No, I disagree, because Mr.  
6 Buskill actually notified all the precinct  
7 committee people they were having their normal  
8 regular meeting, and Mr. Buskill is present here  
9 to testify live under oath as to what notice was  
10 provided to his precinct committee.

11 **CHAIRMAN T. WHEELER:** But you would agree  
12 that no notice was filed with the Division;  
13 correct?

14 **MR. L. WILDER:** No notice was filed with  
15 the Division because it's not a necessity, no,  
16 sir.

17 **CHAIRMAN T. WHEELER:** That's your -- your  
18 argument isn't that we filed, your argument is  
19 we didn't file because we didn't have to?

20 **MR. L. WILDER:** Yes, sir, that's correct.

21 **CHAIRMAN T. WHEELER:** And we didn't have no  
22 because of why?

23 **MR. L. WILDER:** Because there's no  
24 requirement under that particular code that  
25 there be notice given to the Election Commission

1 regarding that meeting, because the notice  
2 directly to the Commission has an attachment to  
3 the fact that this is a judicial office.

4 So there's no necessity because there was  
5 no ability to know, or there's no ability to  
6 contemplate that you're going to need to appoint  
7 judicial officers or a prosecutor, and there's  
8 just no statutory requirement that their -- that  
9 the Republican Party of Clark County notice that  
10 meeting every time.

11 I agree with the commission member who  
12 indicates that in 2004 the Republican Party  
13 could have bestowed that same unilateral right  
14 on the chairman and that the remedy would be for  
15 that party to ask for another meeting where they  
16 want to rescind, because as we all know, the  
17 party mechanisms are governed by the parties  
18 themselves.

19 So to go on, as it relates to the next set  
20 of facts that we believe support Judge Navarro  
21 as being accurately and correctly appointed,  
22 Judge Navarro was appointed unilaterally by  
23 Mr. Buskill with that authority. Judge Navarro  
24 then filed his paperwork. There's not the same  
25 three-day requirements that exists when you are



1 a caucus appointed candidate that Mr. Moore was  
2 subject to, and going to that issue, Mr.  
3 Wheeler --

4 **CHAIRMAN T. WHEELER:** You're saying that  
5 I.C. 3-13-1-15(d) does not apply?

6 **MR. L. WILDER:** That does not apply.

7 **CHAIRMAN T. WHEELER:** Why?

8 **MR. L. WILDER:** When you read a) -- because  
9 when you read a) it sets out what the county  
10 chairman's obligations are as it relates to  
11 someone who is filling a vacancy pursuant to  
12 6-8-2 -- 6-8-2 is the provision where the  
13 unilateral right to make that appointment  
14 relates to Mr. Buskill, and then you move  
15 down -- I don't think you read (a) (1) and (2)  
16 and say (c) and (d) are not separate from (1)  
17 and (2).

18 **COMMISSIONER A. LONG:** Do you think this  
19 was a primary vacancy?

20 **MR. L. WILDER:** Pardon me, sir?

21 **COMMISSIONER A. LONG:** Do you think this  
22 was a primary vacancy?

23 **MR. L. WILDER:** No, I don't because he did  
24 not resign, so this was an appointment for a  
25 candidate to be on the ballot, which he had the

1 right to do as a result of the March  
2 4th meeting, and then the Democrats chose the  
3 caucus format which kicked in -- three days'  
4 notice before the caucus June 14th, which you  
5 guys know.

6 **COMMISSIONER A. LONG:** My understanding is  
7 if this was a primary vacancy, you had until  
8 July 3rd to get it filed, and if it's not a  
9 primary vacancy, you've got -- what is it, 30  
10 days?

11 **MS. L. BARNES:** Three days after the  
12 selection.

13 **COMMISSIONER A. LONG:** Three days after the  
14 selection.

15 **CHAIRMAN T. WHEELER:** Regardless of the  
16 method of selection?

17 **MS. L. BARNES:** Correct.

18 **COMMISSIONER A. LONG:** Yeah.

19 **MR. L. WILDER:** And I -- I disagree with  
20 that. The method of selection is what triggers  
21 the timing. They those the method. The method  
22 they chose was the caucus where they had --

23 **CHAIRMAN T. WHEELER:** Where does it say the  
24 method of section sets the time -- I read the  
25 statute as saying if it's a primary, it's

1 July 3rd, and if it's not -- if it's something  
2 other than a primary vacancy, it's three days.

3 **MR. L. WILDER:** And we're talking about  
4 three days of being appointed by the -- having  
5 the caucus occur and the vote happen, then  
6 there's three days to provide notice. This was  
7 not a caucus. This was an appointment.

8 **COMMISSIONER A. LONG:** And I thought it was  
9 three days after the -- for filling the vacancy,  
10 for filing the certificate of the --

11 **CHAIRMAN T. WHEELER:** Candidate selection.

12 **COMMISSIONER A. LONG:** The appointing  
13 process, be it appointment or a caucus, then  
14 you've got -- you have that -- that event  
15 happens and that triggers a three-day calendar  
16 except for Saturday and Sunday to file the  
17 notice.

18 And you think -- you honestly think the  
19 legislature intended that if you have a big  
20 meeting of all the county precinct committeemen  
21 and they fill a vacancy that there's a different  
22 reporting time frame than there would be if the  
23 county chairman filled under his statutory  
24 authority?

25 **MR. L. WILDER:** And my understanding is

1 that Judge Navarro filed that notice on the...

2 **COMMISSIONER A. LONG:** No, I didn't ask you  
3 that. That's a -- that's a good answer, but the  
4 wrong question, wrong answer.

5 **MR. L. WILDER:** Well, that's the answer to  
6 your question.

7 **COMMISSIONER A. LONG:** I thought I heard  
8 you say that if the county chairman appoints  
9 under the authority of the statute given to him  
10 by the committeemen, that triggers one notice of  
11 provision deadline, but if a caucus is held and  
12 they have a meeting and make an appointment,  
13 that that is a different time frame?

14 **MR. L. WILDER:** With all due respect,  
15 Commissioner Long, I misunderstood you. I was  
16 talking about the three days prior to caucus,  
17 that there was a notice that Mr. Moore and --

18 **COMMISSIONER A. LONG:** I'm not talking  
19 about notice. I'm talking about the vote,  
20 either one person vote as a county chairman or  
21 52 votes of precinct committeeman and the act  
22 occurs -- we appoint somebody to run for this  
23 office; isn't that the triggering mechanism that  
24 starts counting the days?

25 **MR. L. WILDER:** And the 23rd is when Judge

1           Navarro was appointed and the 26th is when he  
2           provided the appropriate filings. I  
3           misunderstood your question when you talked  
4           about the three days.

5           **CHAIRMAN T. WHEELER:** All right. So when  
6           this side says that we both got it wrong,  
7           okay -- as I understood it, they said both sides  
8           screwed this up, they misunderstood, they  
9           thought the date was July 3rd -- you disagree  
10          with that; correct?

11          **MR. L. WILDER:** I don't disagree that they  
12          screwed it up. I disagreed that we did.

13          **COMMISSIONER A. LONG:** When did you file?

14          **COMMISSIONER S. RIORDAN:** July 3rd.

15          **COMMISSIONER A. LONG:** When did he make the  
16          appointment?

17          **MR. L. WILDER:** On June 23rd.

18          **COMMISSIONER A. LONG:** So is that -- on my  
19          side of the state, that's more than three days.

20          **MR. L. WILDER:** Well, we live on the same  
21          side. It's just we see -- see three days  
22          differently.

23          **COMMISSIONER A. LONG:** I'm talking about  
24          the west side versus the north and south, but  
25          notwithstanding, that's obviously more than

1 three days?

2 **MR. L. WILDER:** He filed the 26th, his  
3 paperwork in the Clark Circuit Court on the  
4 26th.

5 **COMMISSIONER A. LONG:** I understand.

6 **CHAIRMAN T. WHEELER:** You filed it with the  
7 Clark Circuit Court?

8 **MR. L. WILDER:** Yes.

9 **COMMISSIONER A. LONG:** You're late getting  
10 it filed here; do you agree with that?

11 **MR. L. WILDER:** We don't believe we're late  
12 because we don't believe that we failed to file  
13 it correctly.

14 **CHAIRMAN T. WHEELER:** Where was it filed?

15 **COMMISSIONER A. LONG:** Same place that the  
16 other side filed. I don't understand how you're  
17 not late but they are if they both -- if you all  
18 filed in the same place?

19 **MR. L. WILDER:** Because we believe that  
20 it's --

21 **COMMISSIONER D. DUMEZICH:** A different  
22 mechanism.

23 **MR. L. WILDER:** Yes, exactly, thank you.  
24 It's a whole different mechanism, Mr. Long, and  
25 that's what we're trying to get to. They chose

1 an election at a caucus which kicks in a  
2 different set of procedures.

3 The Republicans on March the 4th chose --  
4 allowed David Buskill the unilateral ability to  
5 make that appointment, and what happens at that  
6 point is he had to make that appointment before  
7 June 30th and he made that appointment as a  
8 candidate before June 30th, that's the rule, and  
9 he had to have that paperwork filed here with  
10 the Commission by July 3rd before noon.

11 **COMMISSIONER A. LONG:** And my fellow  
12 commissioner from the north, I'm not real  
13 persuaded by that argument.

14 **MR. L. WILDER:** Well, I'm...

15 **COMMISSIONER A. LONG:** It's a good  
16 argument, though.

17 **MR. L. WILDER:** Thank you, sir.

18 **COMMISSIONER A. LONG:** I've heard all I  
19 needed to hear.

20 **CHAIRMAN T. WHEELER:** Larry, you have two  
21 or three minutes to conclude, what are -- what  
22 are you asking for, tell me what you're asking  
23 for?

24 **MR. L. WILDER:** Mr. Chairman and members of  
25 the committee, what we're asking for is that the

1 statutes be strictly construed as they should  
2 be, that -- you know, we've got four lawyers  
3 here today that showed up for Mr. Moore and  
4 those four lawyers are telling you that those  
5 documents were too confusing for someone to  
6 figure out how to file them correctly.

7 I don't think there's any question. They  
8 didn't file their notice of caucus timely. Mr.  
9 Moore did not file himself as being a candidate  
10 timely. They had a caucus. The caucus was a  
11 nullity. He wasn't a candidate at his own  
12 caucus. Therefore, there is no way that Mr.  
13 Moore could be a candidate for circuit court  
14 judge in Clark County, Indiana because nothing  
15 happened that was correct to allow him that  
16 opportunity.

17 Now Judge Navarro was appointed correctly  
18 by the chairman of the Republican Party after a  
19 duly called meeting on March the 4th of 2008.  
20 The Republican committee members have not  
21 objected to that committee. You've heard the  
22 argument let the folks in Clark County vote --  
23 well, you've got to follow the rules to get to  
24 the ballot to get in the box.

25 And we do not believe that Mr. Moore's



1 campaign followed the rules, and merely arguing  
2 that he didn't understand the statutes well  
3 enough to know how to do it isn't enough,  
4 particularly, when he, obviously, has plenty of  
5 attorneys that are willing to provide him with  
6 legal advice. We're asking that Judge Navarro  
7 remain on the ticket and Mr. Moore's candidacy  
8 not be certified.

9 **COMMISSIONER D. DUMEZICH:** I make a motion  
10 to put Mr. Moore and Judge Navarro on the ballot  
11 for the upcoming election.

12 **COMMISSIONER S. RIORDAN:** Seconded.

13 **COMMISSIONER A. LONG:** Seconded.

14 **CHAIRMAN T. WHEELER:** The motion's been  
15 made and seconded, any discussion?

16 **COMMISSIONER A. LONG:** I just think that --  
17 do you want to start at that end -- you always  
18 get to go first.

19 **CHAIRMAN T. WHEELER:** That's probably --  
20 that's the way the council -- we started at the  
21 far end. They always voted first and had a  
22 discussion.

23 **COMMISSIONER S. RIORDAN:** I appreciate the  
24 arguments of both sides, and I think it's  
25 another one of these very tricky situations that

1 we have under our Indiana Election Code, which  
2 should be much much thinner than it is, but I  
3 think that, you know, looking at the relative  
4 positions or being asked to look at the internal  
5 workings of each party, and I know that the  
6 statutes call upon us to do that to a certain  
7 degree, but I don't see that any party did  
8 everything exactly the way that it was supposed  
9 to.

10 I think that -- my philosophy is that we  
11 error on the side, putting people on the  
12 ballots, then the voters get to make the  
13 decision rather than the four of us sitting here  
14 making the decision and so I'm going to vote in  
15 favor of my fellow commissioner's motion.

16 **COMMISSIONER A. LONG:** I concur -- you  
17 know, if we did it, and I don't mean to pick on  
18 Mr. Wilder, but I don't think we're here to --  
19 if we strictly construe every election law, we  
20 might not have any candidates -- certainly, in  
21 this race, we wouldn't have any candidates, and  
22 I think if we strictly approve all that you ask  
23 us to do, Judge Navarro is off the ballot and  
24 Mr. Moore's off the ballot, and I think that's  
25 not what we're intending to do.

1           I think we should administer the law. I  
2 think we should administer them liberally. I  
3 can nothing in this case where anyone -- either  
4 candidate has had any prejudice -- not one word  
5 of argument that has been made that because this  
6 error occurred on the other side, I've been  
7 prejudiced, my candidate's been prejudiced, not  
8 one word has been said.

9           We have each side saying we made some  
10 technical mistakes, and I agree that's the case,  
11 but I want the citizens of Clark County to pick  
12 their judge, and I'm going to vote for this  
13 motion.

14           **COMMISSIONER D. DUMEZICH:** Mr. Chairman.

15           **CHAIRMAN T. WHEELER:** That's the advantage  
16 of being chairman. I get to go last.

17           **COMMISSIONER D. DUMEZICH:** Having both the  
18 honor and privilege of serving as a judge in the  
19 general assembly, I'd like to say that the  
20 statutes are, in fact, very confusing. However,  
21 whoever is ultimately elected in this position,  
22 I hope they more carefully parse the statutes  
23 than they did during their candidacy, and I will  
24 vote for my motion.

25           **CHAIRMAN T. WHEELER:** That being said, let

1 me ask one procedural question of the legal  
2 counsel or either co-directors. If the  
3 Division -- if the Commission were to split  
4 2/2 -- what is the effect on the election if the  
5 Commission were to split 2/2 if they were -- and  
6 let me -- on Moore and Navarro, if we were split  
7 2/2 on Moore, where would we be?

8 **MR. D. SIMMONS:** I think we would be  
9 returned to status quo.

10 **CHAIRMAN T. WHEELER:** Which is Moore is not  
11 on the ballot?

12 **MR. D. SIMMONS:** Right.

13 **CHAIRMAN T. WHEELER:** If we split 2/2 on  
14 Navarro, Judge Navarro, where are we?

15 **MR. D. SIMMONS:** We're in the same place --  
16 2/2?

17 **CHAIRMAN T. WHEELER:** If we split 2/2 -- as  
18 I understand it, 2/2, there would be no  
19 Commission action?

20 **MR. D. SIMMONS:** Right.

21 **CHAIRMAN T. WHEELER:** What is the effect on  
22 Judge Navarro's candidacy?

23 **MR. D. SIMMONS:** Since there's been a  
24 challenge, there's a statute, it's 3-13-1-16,  
25 it's on Page 422, since there's been a challenge

1 to his candidacy that has not been resolved,  
2 then the way 3-13-1-16 works is that the  
3 co-directors are obligated by this section to  
4 advise the county there's been a challenge  
5 filed, the challenge -- they shall not place the  
6 candidate's name on the ballot until that  
7 challenge is resolved by the Commission, which  
8 they would not under the 2/2 vote, or a court  
9 within jurisdiction in the matter. So the  
10 instructions to the county would be don't place  
11 this candidate on the ballot until you hear from  
12 the Commission further or you hear from the  
13 court.

14 **CHAIRMAN T. WHEELER:** Do you agree with  
15 that analysis?

16 **MS. L. BARNES:** No.

17 **CHAIRMAN T. WHEELER:** Why?

18 **MS. L. BARNES:** Well, it's true that it  
19 takes at least three to take official action.  
20 If the Commission deadlocks 2/2, we interpret  
21 that the challenge has been denied and the  
22 candidate would go on the ballot.

23 **CHAIRMAN T. WHEELER:** So if we were to lock  
24 2/2, your position is, for example, on Judge  
25 Navarro, Judge Navarro would go on the ballot;

1 correct?

2 **MS. L. BARNES:** Yes. And at that point if  
3 somebody wanted to take it to court -- the  
4 person would have exhausted all administrative  
5 remedies and then they could ask the court to  
6 take jurisdiction.

7 **CHAIRMAN T. WHEELER:** So if we go 2/2,  
8 according to them, you're both off the ballot,  
9 and if we go 2/2, according to you, they're both  
10 on the ballot; correct?

11 **MS. L. BARNES:** No, I thought the question  
12 was with Navarro.

13 **CHAIRMAN T. WHEELER:** No, is it different  
14 with respect to Navarro?

15 **MS. L. BARNES:** If you deadlock...

16 **CHAIRMAN T. WHEELER:** I assume it would  
17 because...

18 **MS. L. BARNES:** I hadn't thought that one  
19 through. I had thought this one through as I've  
20 been asked this question.

21 **CHAIRMAN T. WHEELER:** As I understand it,  
22 the right side of the table is telling me if we  
23 vote 2/2, we split 2/2, and I've heard where the  
24 left side, and it just happens to be where we're  
25 sitting.

1           **COMMISSIONER A. LONG:** Procedurally -- if I  
2 can ask Commissioner Dumezich to allow me to  
3 table your motion for about a minute to make  
4 another motion, and I will tell you why, I think  
5 procedurally for our record we -- first to  
6 accomplish what I believe we have all expressed,  
7 the --

8           **COMMISSIONER D. DUMEZICH:** Agreed.

9           **COMMISSIONER A. LONG:** -- three of us, I  
10 think we should have a motion to deny the  
11 challenge and then vote on that motion, and that  
12 takes the challenge off the table if it's  
13 denied, and then what I hear, and I'm confused  
14 is the steps of Judge Navarro's race.

15           I think I -- I disagree with my learned  
16 Democratic counsel here, that I think if his  
17 challenge is denied -- if our co-director has  
18 told us that she's not approved his candidacy,  
19 that I think their candidacy filings are on  
20 equal standing.

21           So what my -- my thinking is procedurally  
22 our record should show that the challenge will  
23 be denied and then go back to vote on the -- the  
24 only challenge that's been filed, and the only  
25 challenge against Judge Navarro, the one that

1 was filed by Mr. Pate, I believe, was -- that  
2 that challenge be denied, and then I think it  
3 would be right for the motion from our fellow  
4 commissioner that both candidates be -- directly  
5 be directly placed on the ballot. That gets  
6 the...

7 **CHAIRMAN T. WHEELER:** That handles -- that  
8 handles the administrative...

9 **COMMISSIONER A. LONG:** That gets rid of all  
10 of our -- and it's only procedural that you can  
11 get there; would you...

12 **COMMISSIONER D. DUMEZICH:** Agreed.

13 **COMMISSIONER A. LONG:** I would move that we  
14 table the preceding motion for a minute or two.

15 **COMMISSIONER D. DUMEZICH:** Then you make  
16 your motion.

17 **CHAIRMAN T. WHEELER:** We have to vote on  
18 this one.

19 **COMMISSIONER A. LONG:** Second.

20 **CHAIRMAN T. WHEELER:** It has been seconded.  
21 All in favor of tabling the original motion  
22 vote, signify by saying Aye?

23 **THE COMMISSIONERS:** Aye.

24 **CHAIRMAN T. WHEELER:** Those opposed, same  
25 sign?



1           (No response.)

2           **CHAIRMAN T. WHEELER:** Motion carries, table  
3 that motion. Now as I understand it, you have  
4 another motion?

5           **COMMISSIONER A. LONG:** I have a motion to  
6 make that the challenge filed -- was it by Mr.  
7 Pate -- I have a tendency not to go by names  
8 much, that the CAN-1 challenge of Judge Navarro  
9 be denied.

10          **COMMISSIONER D. DUMEZICH:** Second.

11          **CHAIRMAN T. WHEELER:** Motion made and  
12 seconded, any further discussion?

13          ( No response.)

14          **CHAIRMAN T. WHEELER:** Let me ask this  
15 question again, if this motion breaks 2/2, which  
16 may be a moot point --

17          **COMMISSIONER D. DUMEZICH:** It is.

18          **CHAIRMAN T. WHEELER:** If this motion were  
19 to break 2/2, the answer is Navarro would not be  
20 on the ballot; correct, pending court action?

21          **COMMISSIONER D. DUMEZICH:** I think that's  
22 where the difference -- the difference would be.

23          **COMMISSIONER A. LONG:** And I think the  
24 motion is not sustained. The motion --  
25 sometimes we've been advised to move in the

1 affirmative and then it fail. I think in that  
2 result if this motion -- if we lock up 2/2 here,  
3 I would turn around and make a move to approve  
4 and then I think it would lock up 2/2 and it's  
5 in effect denied, and then we move onto Dan's  
6 motion.

7 **CHAIRMAN T. WHEELER:** Do you agree that  
8 that's what would happen?

9 **MR. D. SIMMONS:** Yes.

10 **CHAIRMAN T. WHEELER:** Would that constitute  
11 action under the statute which would then keep  
12 him on the ballot?

13 **MR. D. SIMMONS:** Not if there's a 2/2...

14 **CHAIRMAN T. WHEELER:** So if we break -- if  
15 we break 2/2, Navarro is not on the ballot  
16 pending court action?

17 **MR. D. SIMMONS:** True.

18 **CHAIRMAN T. WHEELER:** Okay, that's my  
19 question, at least on my side -- my side of the  
20 aisle has been through that, which my -- which  
21 means if we go on partisan, everybody's off  
22 anyway.

23 **COMMISSIONER A. LONG:** We don't do that.  
24 So infrequently, I -- I mean you get those  
25 newspaper writers in here writing their

1 articles.

2           **CHAIRMAN T. WHEELER:** I just want -- I just  
3 want to procedurally understand if we break on a  
4 partisan basis, you're both off, and that's --  
5 from my standpoint --

6           **COMMISSIONER A. LONG:** Point well taken.

7           **COMMISSIONER D. DUMEZICH:** That is  
8 unacceptable.

9           **CHAIRMAN T. WHEELER:** From -- from my  
10 standpoint, that is a bad result. That forces  
11 you into litigation. If you guys want to both  
12 go along and try to take each other off later,  
13 that's your business, knock yourselves out, so I  
14 guess that's my comments on this.

15           **COMMISSIONER D. DUMEZICH:** But we're not  
16 going to make you do it.

17           **CHAIRMAN T. WHEELER:** If we go the other  
18 way and break 2/2, you're forced into  
19 litigation. At least this way you have the  
20 option of deciding whether you want to litigate  
21 against each other and file additional  
22 challenges.

23           From my standpoint, I'd rather see --  
24 because you're off if we break 2/2, okay, but  
25 I'd rather see you both on and then you guys --

1 I'd rather see -- you guys can decide what venue  
2 you want to fight in, but I would rather see and  
3 the commissioners have clearly expressed our  
4 intent, that we'd rather see that fight take  
5 place in front of the people, the election of  
6 Clark County, and let them take a swing at it,  
7 but if you guys want to take another option,  
8 that's yours. Motion's been made and seconded  
9 to deny the petition --

10 **COMMISSIONER A. LONG:** The challenge.

11 **CHAIRMAN T. WHEELER:** I'm sorry, the  
12 challenge to Judge Navarro. Those in favor,  
13 signify by saying Aye?

14 **THE COMMISSIONERS:** Aye.

15 **CHAIRMAN T. WHEELER:** Those opposed, same  
16 sign?

17 *(No response.)*

18 **COMMISSIONER A. LONG:** Now I move to remove  
19 from the table Commissioner Dumezich's motion  
20 and then bring it back up for a vote.

21 **COMMISSIONER S. RIORDAN:** Second.

22 **CHAIRMAN T. WHEELER:** Okay. The motion has  
23 been made and seconded which is to...

24 **COMMISSIONER A. LONG:** To bring it from the  
25 table first, get it back up on the floor, the

1 previous motion.

2 **CHAIRMAN T. WHEELER:** All right. That  
3 motion's been made and seconded, all in favor,  
4 signify by saying Aye?

5 **THE COMMISSIONERS:** Aye.

6 **CHAIRMAN T. WHEELER:** All right. Now we  
7 are voting on Commissioner Dumezich's prior  
8 motion which is...

9 **COMMISSIONER D. DUMEZICH:** Put them both on  
10 the ballot.

11 **CHAIRMAN T. WHEELER:** Is that at the  
12 direction of the co-directors?

13 **COMMISSIONER A. LONG:** Yes.

14 **CHAIRMAN T. WHEELER:** To certify...

15 **COMMISSIONER A. LONG:** To certify both  
16 candidates for the election. That's the motion,  
17 as I understand it.

18 **CHAIRMAN T. WHEELER:** And does that have --  
19 to the co-directors, does that have the  
20 practical effect of putting both of them on  
21 ballot if the Commission directs you to do that?

22 **MR. B. KING:** Yes, Mr. Chairman, that has  
23 the practical effect, as far as I'm concerned.  
24 I reserve the jurisdictional point made by Dale  
25 Simmons earlier with regard to the separate role

1 of co-directors, but if the Commission votes in  
2 this case, I will certify both candidates on the  
3 ballot.

4 **CHAIRMAN T. WHEELER:** Thank you.

5 **MS. P. POTESTA:** Yes, Mr. Chairman, if you  
6 so direct me to certify both candidates, that I  
7 certainly will.

8 **CHAIRMAN T. WHEELER:** I appreciate the  
9 cooperation of the co-directors and that -- the  
10 motion's been made and seconded, any further  
11 discussion?

12 *(No response.)*

13 **CHAIRMAN T. WHEELER:** All in favor, signify  
14 by saying Aye?

15 **THE COMMISSIONERS:** Aye.

16 **CHAIRMAN T. WHEELER:** Those opposed, same  
17 sign?

18 *(No response.)*

19 **CHAIRMAN T. WHEELER:** Motion carries.

20 **COMMISSIONER A. LONG:** Good luck to both of  
21 you.

22 **CHAIRMAN T. WHEELER:** We do have some  
23 additional business and we've already received  
24 the written report so I'm emphasizing the word  
25 "brief."

1           **MR. D. SIMMONS:** Yeah, I just wanted to  
2 know -- yeah, how much time. This is the first  
3 time we've been through --

4           **CHAIRMAN T. WHEELER:** Will legal counsel  
5 keep it down, please.

6           **MR. D. SIMMONS:** This involves a grievance  
7 process. This is the first time we've been  
8 through this process so we're trying to feel our  
9 way through it and we think this is the first  
10 sort of case we can sort of set forth a template  
11 in how we'll proceed in others.

12           But basically, in 2002, the Help American  
13 Vote Act said State, you've got to have a  
14 administrative complaint procedure to address  
15 violations of the Help America Vote Act. It's  
16 important to remember that's what we're to  
17 address through this federally mandated  
18 grievance procedure.

19           What we do and what the co-directors did  
20 when they created the form was to create a  
21 broader form. It's -- it's broad and  
22 accessibility to -- and we contemplated that we  
23 would address -- we're not going to require the  
24 citizen to know the Help America Vote Act, to  
25 state a violation, we're going to collect their

1 concerns and then decide whether we're going to,  
2 you know, proceed under this administrative  
3 review process or under some other process.

4 The process set out in the statutes, and  
5 these are 3-6-4.5, and this starts on Page 60  
6 that describes this administrative review  
7 process, is that the co-directors go through and  
8 decide first has a violation of HAVA been  
9 stated, assuming all the facts are true? If  
10 they say no, they've got to publish that in the  
11 Indiana Register. If they say yes, then they've  
12 got to investigate.

13 Well, what they did is say we think there  
14 might be something stated here so we're going to  
15 investigate, and what they did on October 11,  
16 2007, was investigate several grievances arising  
17 out of the Madison County election -- it was  
18 Anderson -- an Anderson City election, filed by,  
19 I think the number is 25 different grievances  
20 with various allegations; some of them involving  
21 anxiety about the accuracy of the voting system;  
22 some of them about whether the proper review  
23 screen, whether the review screen was working  
24 properly, whether they had an opportunity to  
25 view and change their vote; some about whether



1 their absentee ballot was properly rejected.

2 We actually did an examination of the  
3 voting systems on October 11th, 2007. That  
4 was attended --

5 **CHAIRMAN T. WHEELER:** So you went to  
6 Madison County and physically examined this  
7 stuff?

8 **MR. D. SIMMONS:** They physically examined  
9 it.

10 **CHAIRMAN T. WHEELER:** It was a highway  
11 garage; is that correct?

12 **MR. D. SIMMONS:** It was a highway garage,  
13 yes. Some of the grievants showed up for that  
14 examination and this report is the result -- the  
15 results from that examination. We did some  
16 functionality testing.

17 **CHAIRMAN T. WHEELER:** And the Commission  
18 members all have a copy of the report and it was  
19 circulated?

20 **COMMISSIONER S. RIORDAN:** Yes.

21 **COMMISSIONER D. DUMEZICH:** Yes.

22 **COMMISSIONER A. LONG:** Yes, it was.

23 **CHAIRMAN T. WHEELER:** Can you just very  
24 briefly summarize the results of the report?

25 **MR. D. SIMMONS:** The results of the report

1 were that we performed tests to determine  
2 whether votes would be counted accurately in  
3 those races -- they were. We tested to  
4 determine whether an under vote would be  
5 accepted in the race, and the race that was  
6 really at issue was the City Council At Large  
7 race in the primary, and we tested it to  
8 determine -- to have a look at the review  
9 screen, because we had several complaints about  
10 whether the review screen was proper, and there  
11 was some anxiety.

12 And our test of that functionality did  
13 result in us making some observations, the  
14 co-directors making some observations that it  
15 was nonintuitive, it was confusing, and there  
16 was some problem with that. We can understand  
17 why that might cause some anxiety among voters,  
18 however, we did not find it technically went so  
19 far as to violate HAVA, the Help America Vote  
20 Act, because you could actually review your  
21 choices.

22 You were always taken back to the screen,  
23 though, and it didn't tell you what your choices  
24 were. It either told you you voted for all in  
25 that race or you did not vote for all in that

1 race. That's the only information you got in  
2 that review screen. You could see every other  
3 vote you had cast, but with respect to the City  
4 Council At Large race, you only saw -- you  
5 either voted for all three or you didn't vote  
6 for all three, but the finding there was, again,  
7 no violation of HAVA.

8 **COMMISSIONER A. LONG:** Did you find that  
9 the instructions -- before we hear from the  
10 folks, the instructions, there was a deficiency  
11 in the instructions -- I thought I read that in  
12 there that they had to vote for all three?

13 **MR. D. SIMMONS:** Yeah, there was another  
14 allegation that they were given that the poll  
15 workers -- the instruction on the ballot is  
16 correct, --

17 **COMMISSIONER A. LONG:** Okay.

18 **MR. D. SIMMONS:** -- vote for no more than  
19 three candidates for this -- for this race. The  
20 grievants -- many grievants filed their  
21 grievance and explained, well, when I went to  
22 vote in Anderson on that day, I was told by the  
23 poll worker that I must vote for three or none  
24 of my votes would count.

25 And we did address that as a -- that's

1 contrary to law, that instruction would be  
2 contrary to law, but the ballot was correct in  
3 its instruction. The contrary -- the  
4 instructions given by the poll workers may have  
5 been contrary to the law in that respect. If  
6 they gave that, that was contrary to law. It  
7 may have confused some voters. It may have  
8 resulted in some votes that the voters didn't  
9 intend to cast. So we did make some  
10 observations there, too.

11 The other allegations were with respect to  
12 absentee ballots, and the short and short of  
13 that is co-directors can't -- their conclusion  
14 is they can't put themselves in the place of  
15 county elected officials to make judgments about  
16 whether a signature on an application, an  
17 absentee ballot application matches a signature  
18 on the absentee ballot. They have a structure  
19 in place to do that, that is their assigned  
20 statutory duty, and the co-directors just do not  
21 feel -- and certainly, the co-directors could  
22 speak for themselves, feel comfortable second  
23 guessing those judgments made by those  
24 individuals at the county level.

25 **MR. B. KING:** Mr. Chairman, for the sake of

1 Mr. Simmons' voice, if I could just add one  
2 thing to that last point, one of the -- one type  
3 of grievance also alleged with regard to the  
4 absentee ballots that the individual who had  
5 returned the ballot was not notified, that the  
6 County Election Board had determined that the  
7 signatures did not match.

8 We found in examining, certainly, federal  
9 law and Indiana law, that there is no  
10 affirmative requirement, with the exception of  
11 military and overseas voters, to notify voters  
12 when an absentee ballot is rejected.

13 **CHAIRMAN T. WHEELER:** All right. Any other  
14 questions from the commissioners on the report?

15 **COMMISSIONER S. RIORDAN:** Procedurally,  
16 what's our next step, Mr. Chairman?

17 **CHAIRMAN T. WHEELER:** As I understand it,  
18 it is a list of possible actions that the  
19 Division has kindly put down. We can't -- under  
20 I.C. 3-6-4.5, we can affirm the report or amend  
21 the report or refer the matter to the Election  
22 Division for further investigation and  
23 submission of an updated report.

24 If we determine there's no violation, then  
25 we dismisses the grievances and publish the

1 order. If there is a violation, then we  
2 determine what an appropriate remedy is.

3 **COMMISSIONER A. LONG:** We've got some  
4 grievances here?

5 **CHAIRMAN T. WHEELER:** We do. It's my  
6 understanding that we do -- I'm sorry, Sarah.

7 **COMMISSIONER S. RIORDAN:** I was going to  
8 ask if voters had come to talk about their  
9 experiences, whether the Commission is going to  
10 entertain testimony, but I would like to take a  
11 five-minute break, if that is what we plan to  
12 do.

13 **CHAIRMAN T. WHEELER:** I was going to do  
14 fairly short testimony.

15 **COMMISSIONER S. RIORDAN:** I would like a  
16 five-minute break.

17 **CHAIRMAN T. WHEELER:** All right. In that  
18 case, we'll call a five-minute break, and then  
19 we will accept comments and testimony regarding  
20 the result.

21 *(A recess was taken.)*

22 **CHAIRMAN T. WHEELER:** I'll encourage you  
23 not to make a redundant presentation. If there  
24 is a spokesman for -- is there a brief or...

25 **MS. R. CRUMES:** No, I just want to address

1 one issue that was in the report.

2 **CHAIRMAN T. WHEELER:** All right.

3 **MR. B. KING:** Excuse me, Mr. Chairman.

4 **CHAIRMAN T. WHEELER:** I don't think we're  
5 taking testimony.

6 *(A discussion was held off the record.)*

7 **CHAIRMAN T. WHEELER:** All right. We're  
8 back on the record. As I understand it, we do  
9 have two members of the county election board  
10 here. Could you guys identify yourselves,  
11 please?

12 **MS. B. HUTTON:** I'm Barbara Hutton. I'm  
13 the Republican member of the Madison County  
14 Election Board.

15 **MS. M. CARMICHAEL:** I'm Martha Carmichael,  
16 Democratic chairman of the county commission.

17 **CHAIRMAN T. WHEELER:** And then one member  
18 is missing. I assume you have a three person...

19 **MS. M. CARMICHAEL:** Our clerk is missing...

20 **UNIDENTIFIED SPEAKER:** She's on her way.

21 **MS. M. CARMICHAEL:** Oh, she's on her way?

22 **UNIDENTIFIED SPEAKER:** She's at Fall Creek  
23 and Meridian.

24 **COMMISSIONER D. DUMEZICH:** She'd better  
25 really rush.

1           **CHAIRMAN T. WHEELER:** I was going to say.

2           **MS. B. HUTTON:** I would like to explain  
3 why, her daughter has a medical problem.

4           **CHAIRMAN T. WHEELER:** We didn't ask  
5 Commissioner Long why he was late.

6           **COMMISSIONER A. LONG:** I can give you a  
7 long litany of excuses.

8           **CHAIRMAN T. WHEELER:** Something about a  
9 coal truck.

10           **MS. L. BARNES:** Mr. Chairman, I'm sorry,  
11 the clerk had asked us last week if she needed  
12 to be present if the Commission was going to  
13 take testimony and I had indicated to her this  
14 was not an evidentiary hearing. I don't know if  
15 that is a concern.

16           **MR. B. KING:** Mr. Chairman, if I could  
17 respond. I, personally, spoke to Lydia Watkins,  
18 the Madison County Circuit Court Clerk on Monday  
19 morning. I had faxed her a copy of this agenda  
20 Friday afternoon just as people were leaving the  
21 office, but I think it is a question that if the  
22 county election board members are present or  
23 willing to waive any notice -- objections,  
24 there's no legal impediment to the Commission  
25 proceeding.



1           **MS. M. CARMICHAEL:** No.

2           **MS. B. HUTTON:** No.

3           **CHAIRMAN T. WHEELER:** Okay. The  
4 individuals -- everybody speaking has been sworn  
5 because we previously swore them, so how many  
6 people are interested in speaking, raise your  
7 hand?

8           *(The participants complied.)*

9           **CHAIRMAN T. WHEELER:** Okay. Ma'am, stand  
10 up and identify yourself -- you can stand right  
11 there just as long as the court reporter can  
12 hear you.

13           **MS. R. CRUMES:** Okay. My name is Rebecca  
14 Crumes, and I'm one of the complainants. On  
15 election day, May 8th, my machine malfunctioned  
16 and I understand I was given the wrong  
17 information so I'm not going to address that,  
18 I'm going to address the functionality of the  
19 machines.

20           That day when that happened, I let it go,  
21 and upon talking to other people on election  
22 day, I found that similar people had had similar  
23 problems with the machine so I started doing  
24 research. I also called the election board and  
25 spoke with a clerk, which I have a copy of her

1 notes that day, because I did report a  
2 malfunctioning of the machine, if anybody would  
3 like to see her note.

4 Also, when we contacted Mr. King and they  
5 set up the investigation of the machines -- we  
6 had several months to prepare ourselves for  
7 their coming to inspect the machines. Now I  
8 agree with Mr. King, everything worked  
9 beautifully that day, but because of my  
10 research, I knew what to look for and what  
11 questions to ask.

12 And even though I agree with everything  
13 that he said, I come to a different conclusion  
14 because my conclusion is upon asking you guys to  
15 further your investigation. When we got there,  
16 I asked ES&S tech about the internal audit  
17 report.

18 That report is inside the computer that  
19 will tell every event that happened that day.  
20 So I was kind of relieved because I just knew,  
21 since we had several months to prepare for this  
22 looking at the machines, that he would at least  
23 have that. He did not. He told Mr. King that  
24 that report was very lengthy and it took too  
25 long to report.

1           Mr. King then asked him to please get the  
2 report as soon as possible. I to this day have  
3 not seen that report. Also, as they set up the  
4 screen to show Mr. King, the election day  
5 screen, I looked at the screen, and that screen  
6 was nowhere near like the screen that I voted  
7 on. I relayed that information to Mr. King. I  
8 said that is not the screen that I voted on. It  
9 was a whole different page.

10           The technician's response was well, I  
11 recreated the screen as best I could. So then I  
12 also started observing the machines itself. My  
13 research had told me to be sure and look for ID  
14 numbers. I noticed on the compartments that the  
15 IDs were paper stickers. We took pictures.  
16 They're on a disk.

17           If you continue your investigation, I can  
18 provide those pictures, which show that the  
19 machines -- the stickers were on top of  
20 stickers, stickers had been moved because they  
21 left paper -- you know, where you tear off a  
22 sticker and place another one, there was paper  
23 left, and we took pictures of all of that.

24           So I asked Mr. King how do you even know  
25 those are the machines that came out of my poll?

1 He then says I don't. I have to rely on their  
2 information. There has to be some level of  
3 trust here. Well, because of all we have been  
4 through, there is no level of trust with me  
5 regarding our local election, so that also was  
6 in my notes.

7 Also, upon my investigation and research on  
8 these machines -- this was my first time voting  
9 on these ES&S iVotronic machines so I looked at  
10 the pros, I looked at the cons, I also wrote a  
11 two-page letter to Mr. Groh, the vice president  
12 of ES&S, which I never got a response, if  
13 anybody would care to see that, letting him know  
14 of some of the things that I was getting reports  
15 on.

16 I also got a copy of the Help America Vote  
17 Act which also states in Title 3 that records  
18 must be kept, a maintenance records of system  
19 errors. Also, this is our first -- and some of  
20 you -- it will be very interesting for some of  
21 you to look at this because these problems  
22 affect your vote count.

23 **COMMISSIONER A. LONG:** Ma'am, are these.

24 **CHAIRMAN T. WHEELER:** You're probably  
25 talking about the grievances?

1           **MS. R. CRUMES:** No, this is what I got from  
2 the clerk's office through the public access  
3 records, the problem logs of the machines that  
4 were reported on election day, things that were  
5 going on. Although they are poorly written and  
6 poorly maintained, but there is still enough on  
7 there that you will get an idea of what happened  
8 election day with these machines so...

9           **CHAIRMAN T. WHEELER:** Do you have copies?

10          **MS. R. CRUMES:** I could get copies, but  
11 I...

12          **CHARIMAN T. WHEELER:** I would be interested  
13 in seeing the letter that you wrote to ES&S and  
14 copies of those, if you think those are relevant  
15 to the complaint that you're making.

16          **MS. R. CRUMES:** Yeah, they're relevant  
17 because they prove the functionality of the  
18 machines --

19          **CHAIRMAN T. WHEELER:** They show the  
20 problems going on.

21          **MS. R. CRUMES:** -- that affect your count.

22          **CHARIMAN T. WHEELER:** I don't want to take  
23 all -- if those are her originals, I don't want  
24 to take her originals.

25          **MS. R. CRUMES:** No, I have another copy of

1 these.

2           **CHAIRMAN T. WHEELER:** Oh, so that's copies  
3 for us?

4           **MS. R. CRUMES:** Yes.

5           **CHARIMAN T. WHEELER:** Give them to the  
6 court reporter.

7           **MR. B. KING:** Okay.

8           **MS. R. CRUMES:** And also, when I was doing  
9 research about these machines, I found out --  
10 now these are the same machines that were  
11 assembled in the Philippines, and as you -- as  
12 some of you may know, the Philippines used these  
13 machines for one election and then they banned  
14 them because of the problems.

15           Their quality test consisted of a shake  
16 test -- if you shook it and nothing rattled,  
17 they were passed. Now this was a well  
18 documentary that they done, so these are the  
19 same machines that we're using. These machines  
20 have been banned throughout the United States --  
21 several states had banned their use.

22           I'm not trying to put our election under.  
23 I am trying to make this Commission aware -- we  
24 can sweep this under the rug, but we're going to  
25 be back, but there are problems with these

1 machines. Not only did it happen in May but  
2 also in the November election.

3 I also took like an informal survey and  
4 asked people about problems, and we had the same  
5 problems over again. When I went back to the  
6 clerk's office to publicly access the problem  
7 logs from each precinct, I was then given a  
8 letter by our county clerk saying they no longer  
9 kept problem logs, that I should ES&S.

10 Now I want to know from this Commission who  
11 is responsible for these problem logs, ES&S or  
12 the county, and if ES&S are responsible, how do  
13 we go about finding out what problems we have?

14 We can no longer continue to sweep problems  
15 under the rug and hope they just work themselves  
16 out or we disenfranchise enough people -- I  
17 think our voting records are low enough now, our  
18 voting participation is low enough, and then we  
19 wonder why people don't take the time to vote.

20 And all the people that I talk to that had  
21 problems, especially, some of those whose votes  
22 weren't counted, said that they would not vote  
23 that way again.

24 Now the reason I'm asking that you further  
25 your investigation is because of the research

1 that I've done on these machines and their  
2 functionality. Any technician can set up a  
3 controlled environment and show you how they  
4 work perfectly, but the fact of the matter is  
5 all of these machines are not tested before  
6 they're put out in the field. They only do  
7 sample testing.

8 I also found out in my research that the  
9 storage and the keeping of these machines also  
10 affect their functionality, from the climate,  
11 from how they're stacked, from how their -- the  
12 climate control area -- when we went to that  
13 area to see where they were stored, they were  
14 stored on a cement slab stacked ten high, which  
15 we took pictures of. We took pictures of the  
16 ceiling and the ceilings were leaking.

17 **CHARIMAN T. WHEELER:** Let me ask you  
18 actually a question and do a little procedural  
19 thing. You tendered an e-mail message here  
20 dated November 29th, 2007 to a jsgroh@ess?

21 **MS. R. CRUMES:** Right, and I got that  
22 e-mail from Mr. King's e-mail to me when he was  
23 sending me a copy of an answer of a problem.

24 **CHARIMAN T. WHEELER:** Right. But you sent  
25 this and you said that Mr. Groh never responded



1 to this?

2 MS. R. CRUMES: No, he hasn't.

3 CHAIRMAN T. WHEELER: I'm going to make  
4 this Hearing Exhibit 1.

5 MS. R. CRUMES: Okay.

6 CHAIRMAN T. WHEELER: You also have given  
7 me a list of call -- what looks like call center  
8 logs related to election day voting problems on  
9 ES&S's system?

10 MS. R. CRUMES: Uh-huh, some of them.

11 CHAIRMAN T. WHEELER: Some of them that you  
12 received, and I'm going to make those as Group  
13 Exhibit 2, assuming no commissioners have any  
14 objections.

15 COMMISSIONER A. LONG: No objections.

16 COMMISSIONER S. RIORDAN: No objection.

17 COMMISSIONER D. DUMEZICH: No objection.

18 MS. R. CRUMES: And these are from the  
19 clerk saying they no longer keep logs so I will  
20 have to contact ES&S.

21 CHARIMAN T. WHEELER: I will -- I will make  
22 that Exhibit 3.

23 CHAIRMAN T. WHEELER: And the same concerns  
24 you're addressing here, you addressed to Mr.  
25 Groh?

1           **MS. R. CRUMES:** Uh-huh, and that is my  
2 basis asking the Commission to please further  
3 their investigation and give people time to  
4 address you concerning the functionality of the  
5 machine.

6           **CHAIRMAN T. WHEELER:** I understand. My  
7 thought on this, rather than going directly to a  
8 report, because I think you indicated that  
9 during the Division's review, things went pretty  
10 well. My suggestion perhaps of the Commission  
11 is that we ask for a response because you never  
12 got a response to your letter; correct?

13           **MS. R. CRUMES:** No, but things went well  
14 because we were in a controlled environment --

15           **CHAIRMAN T. WHEELER:** I understand.

16           **MS. R. CRUMES:** -- and that was not the  
17 screen that I voted on.

18           **CHARIMAN T. WHEELER:** My thought is to  
19 provide them this information and perhaps these  
20 logs and ask for a response, a written response  
21 from ES&S to the concerns that you've raised in  
22 this proceeding.

23           **MS. R. CRUMES:** And the problem logs from  
24 the November election and the internal audit  
25 sheets from that election that would have showed

1 all of the events on those machines.

2 **CHARIMAN T. WHEELER:** I believe one of the  
3 co-directors...

4 **MS. P. POTESA:** Mr. Chairman, I want to  
5 make on the record for our court reporter and  
6 for the minutes that Mr. King and I both worked  
7 on the machines all day and both of us concur  
8 with these findings. It was just not Mr. King.

9 **CHARIMAN T. WHEELER:** The co-directors?

10 **MS. P. POTESA:** Yes.

11 **CHAIRMAN T. WHEELER:** Thank you. I  
12 appreciate that. Let me go ahead. I need to  
13 get through this. There were two other people  
14 that wanted to speak.

15 **MS. R. CRUMES:** I just wanted to make it  
16 clear, did you put in your record the internal  
17 audit that will record all of the events that  
18 happened that day on a particular machine was  
19 not present, and that's the report that I am  
20 looking for, the May election and also the  
21 November election.

22 **CHARIMAN T. WHEELER:** That wasn't present  
23 at the time that the Division...

24 **MS. R. CRUMES:** No. He said it took too  
25 much time to print that and he didn't have it.

1           **CHAIRMAN T. WHEELER:** Okay. We will...

2           **COMMISSIONER A. LONG:** Do you want to make  
3 a request that her statement be transcribed for  
4 them to get the internal sheets, --

5           **MS. R. CRUMES:** Internal audits.

6           **COMMISSIONER A. LONG:** -- to provide that  
7 and come back with an answer and have our folks  
8 look at it again because I do want to hear from  
9 the other folks.

10          **CHARIMAN T. WHEELER:** Who was next up?

11          **MS. J. WILKERSON:** I want to speak. I just  
12 had one concern --

13          **CHAIRMAN T. WHEELER:** Would you just  
14 identify yourself?

15          **MS. J. WILKERSON:** My name is Doris  
16 Wilkerson.

17          **COMMISSIONER A. LONG:** Wilkerson?

18          **MS. J. WILKERSON:** Wilkerson, yes.

19          **CHARIMAN T. WHEELER:** And you're one of the  
20 grievants as well?

21          **MS. J. WILKERSON:** Yes, I do have one.

22          **CHAIRMAN T. WHEELER:** Okay.

23          **MS. J. WILKERSON:** My grievance is  
24 concerning the candidate I had voted for. When  
25 I realized he had only lost by 21 votes, I was

1 very disappointed, because as I was voting on  
2 the new voting machine, I had to ask for help in  
3 which to continue, and when she discovered that  
4 I had not voted for three city councilmen, she  
5 said I couldn't go on until I voted for three.

6 I had only voted for one because I didn't  
7 have -- didn't know the other two, but I had to  
8 go back and vote for three in order to continue  
9 my voting process. So I was very disappointed  
10 because I thought that I shouldn't have had to  
11 vote for people I didn't want to vote for, so  
12 that's what my concern was. My husband's  
13 concern was the same and he had to go put more  
14 money in the meter so he's not here.

15 **CHARIMAN T. WHEELER:** I think two  
16 commissioners have a similar position.

17 **COMMISSIONER A. LONG:** We'll accept his  
18 comments, and I'm sure you speak for him anyway.

19 **MS. J. WILKERSON:** Yes, I can.

20 **CHAIRMAN T. WHEELER:** I would suspect she  
21 does. Anyone else -- yes, sir?

22 **MR. A. BIBBS:** Yes, Anthony (Ty) Bibbs.  
23 I'm a resident of Anderson, Indiana, 810 West  
24 12th Street.

25 **COMMISSIONER A. LONG:** I didn't catch your

1 last name.

2 **MR. A. BIBBS:** Bibbs, B-I-B-B-S.

3 **COMMISSIONER A. LONG:** Okay.

4 **MR. A. BIBBS:** I was a candidate on this  
5 disputed election, but I'm not here in that  
6 capacity. I'm here in the capacity to represent  
7 the voters that were disenfranchised, and I  
8 would like to thank you, Mr. Chairman, for  
9 having us, and I would also like to thank the  
10 Election Division and all the hard work they did  
11 in putting together this report. I have several  
12 things that I would like to put into the record.

13 **CHARIMAN T. WHEELER:** Actually, bring them  
14 up to me and I'll read them into the record and  
15 get them marked. Group exhibit or do you want  
16 them individually?

17 **MR. A. BIBBS:** Individual.

18 **CHAIRMAN T. WHEELER:** These are our copies?

19 **MR. A. BIBBS:** There's four copies of each  
20 one.

21 **CHARIMAN T. WHEELER:** Four copies of each  
22 one. Okay, go ahead, I'm sorry.

23 **MR. A. BIBBS:** All I have is concerns with  
24 the report and that's what I'm asking for you  
25 all to refer back to the Division so they can

1 continue their further investigation.

2 As a major problem on Page 6, other than  
3 the report, in Paragraph 2 it is stated that  
4 five candidates competed for three at large  
5 seats in a 2007 municipal primary. That's an  
6 erroneous statement. There were actually nine  
7 candidates -- Anthony (Ty) Bibbs, Rodney  
8 Chamberlain, Foree Dixon, David Eicks --

9 **CHAIRMAN T. WHEELER:** And those are on --  
10 your Exhibit 1 actually lists all those?

11 **MR. A. BIBBS:** Yes.

12 **CHAIRMAN T. WHEELER:** These are the  
13 official -- I assume these are the official  
14 tallies?

15 **MR. A. BIBBS:** Yes, from one precinct.

16 **CHARIMAN T. WHEELER:** And if I can -- it  
17 does say unofficial results here, but I'm going  
18 to list that as Exhibit --

19 **COMMISSIONER A. LONG:** -- 4. I've just  
20 written -- wrote a small number on the report,  
21 pick them up later and stick a tab over them.

22 **CHARIMAN T. WHEELER:** Expert record  
23 keeping. And so those are the...

24 **MR. A. BIBBS:** So I don't need to continue  
25 reading the names then?

1           **COMMISSIONER A. LONG:** No.

2           **CHARIMAN T. WHEELER:** No. So your concern  
3 is that there were nine rather than eight?

4           **MR. A. BIBBS:** It says there were five --  
5 the report says there were five and they have  
6 actual tables from that information, but there  
7 were actually nine, so therefore, the  
8 information in the report in that manner is  
9 inaccurate.

10           **CHARIMAN T. WHEELER:** Let me stop you  
11 there. What page is it?

12           **MR. A. BIBBS:** It's on Page 6, Paragraph 2.

13           **CHARIMAN T. WHEELER:** So Page 6 --

14           **MR. A. BIBBS:** -- Paragraph 2.

15           **CHAIRMAN T. WHEELER:** It does say five  
16 candidates, three at large seats; is that right,  
17 Brad, nine candidates on that -- I think the  
18 report is inaccurate, at least the one I'm  
19 looking at?

20           **MR. B. KING:** Mr. Chairman, on the sheet  
21 that's been presented, there are nine names of  
22 candidates -- Bibbs, Chamberlain, Dixon, Eicks,  
23 Ferguson, Harrison, Leever, Muir and Reese.

24           **CHARIMAN T. WHEELER:** So the -- the report  
25 is inaccurate, when he refers to five?



1           **MR. B. KING:** The report, I think, reflects  
2 what Pam and I saw, because we were very  
3 thorough in going through the -- the various  
4 permeations and checking out the effects of  
5 under voting for the candidates.

6           **CHARIMAN T. WHEELER:** That strikes me as an  
7 issue of concern then?

8           **MR. B. KING:** Yes, it does.

9           **COMMISSIONER A. LONG:** Well, it's six on  
10 Page 7, six candidates.

11           **MR. A. BIBBS:** Some of those were  
12 Republican on Page 7, that was for the  
13 Republican side, but on the Democratic side,  
14 it's obvious that the machines were programmed  
15 differently for when the Election Division came  
16 to review them as to when they were programmed  
17 on the actual election.

18           **COMMISSIONER A. LONG:** Okay.

19           **CHARIMAN T. WHEELER:** It strikes me as  
20 problematic, what am I missing?

21           **COMMISSIONER A. LONG:** Well, I think that's  
22 a question that needs to be answered.

23           **CHARIMAN T. WHEELER:** I think that's a  
24 legitimate question to answer, and I will ask  
25 the co-directors to look into that before we

1 approve the report.

2 **MR. B. KING:** Mr. Chairman, we can  
3 certainly contact in writing the Madison County  
4 Election Board and ES&S to ask for additional  
5 information for the Commission.

6 **CHAIRMAN T. WHEELER:** I do note that we do  
7 have two members of the Madison County Election  
8 Board. Do you have any idea why the machines as  
9 set up before the co-directors viewed it had  
10 five versus nine?

11 **MS. B. HUTTON:** It would be the same as it  
12 probably would be on election day, and frankly,  
13 I don't remember...

14 **MS. M. CARMICHAEL:** There were nine.

15 **CHAIRMAN T. WHEELER:** There were nine, but  
16 as I understand it, when the co-directors viewed  
17 it, there were only five.

18 **MS. M. CARMICHAEL:** And it would be the  
19 same thing on election day as it was when you  
20 looked at them.

21 **CHARIMAN T. WHEELER:** I think we need to  
22 take a look at that.

23 **MR. D. SIMMONS:** There was one additional  
24 evidence that were not able to obtain for today.  
25 The co-directors asked State Police Officer John

1 Kelly to attend and videotape some of the  
2 examination. We could not -- he's out in  
3 Redkey, Indiana, and we could not get that here  
4 for Friday's meeting, however, that is available  
5 to look at just to double-check to make sure  
6 that our observations are accurate in this  
7 report.

8 **CHARIMAN T. WHEELER:** What I think is  
9 appropriate, as Commissioner Long said, have  
10 somebody to look into that.

11 **MR. A. BIBBS:** Additionally, in the last  
12 paragraph on Page 17, it is stated that there is  
13 no legal requirement that a voter be notified if  
14 their absentee ballot is rejected, and this has  
15 been standard operating procedure.

16 And there's a document signed by Ludy  
17 Watkins, who's the Madison County Clerk,  
18 secretary of the election board entitled,  
19 "Incoming Absentee Ballot Procedure for Election  
20 Room," and I gave you that as an exhibit.

21 **CHARIMAN T. WHEELER:** I will mark that as  
22 Exhibit 2, or I'm sorry, Exhibit 5.

23 **MR. A. BIBBS:** It clearly states in the  
24 last sentence of the first paragraph that the  
25 election director attempts to contact the voter

1 (sometimes 3 & 4 times), if there is a problem  
2 with the ballot envelope signature.

3 Also, the next exhibit, it is in the  
4 election board's own documentation that they  
5 contacted Tami Howard, Jacob Phipps and Cassius  
6 Nunn.

7 **CHAIRMAN T. WHEELER:** And I'll introduce  
8 those as Exhibit 6.

9 **MR. A. BIBBS:** So as the report stated,  
10 that the -- the findings that were in the  
11 report, if they did notify one person, then they  
12 had obligation to notify everyone, and since  
13 that has proven to be not the case, then once  
14 again we would ask that you have further  
15 investigation.

16 **CHARIMAN T. WHEELER:** Response from the  
17 Division?

18 **MR. D. SIMMONS:** Mr. Chairman, we just want  
19 to make sure, if -- if that is an allegation,  
20 then it wouldn't fall within HAVA. It's now a  
21 Help America Vote Act allegation that would fall  
22 outside of this administration.

23 **COMMISSIONER A. LONG:** So it would fall  
24 outside of this administration?

25 **MR. D. SIMMONS:** Yes, sir.

1           **COMMISSIONER A. LONG:** In follow up, I  
2 would like to have the issue -- my state  
3 representative has suggested that that might not  
4 be a bad thing to go into law with, but if  
5 you're going to reject someone's vote, that they  
6 be given at best some kind of notice, a postcard  
7 or something and say hey, your vote was not  
8 accepted.

9           **CHARIMAN T. WHEELER:** Okay, next item.

10          **MR. A. BIBBS:** There were grievances filed  
11 by Vikki and Todd Barron, that they were allowed  
12 to review their choices for city councilman at  
13 large. They voted at Forest Hills Elementary  
14 School. This would once again show that the  
15 machines were not uniformly programmed across  
16 the city, which therefore, in my opinion, would  
17 constitute a violation of HAVA, because you  
18 can't have some people voting on one standard  
19 and another group of people on a different side  
20 of town voting on a different standard, and  
21 that's documented also.

22          **CHARIMAN T. WHEELER:** And I've marked that  
23 as No. 7, the Vikki Barron, these two  
24 statements.

25          **MR. D. SIMMONS:** And again, HAVA would be

1 very narrow -- does it accurately count? Does  
2 it provide review? It doesn't get into did you  
3 correctly format your ballot? Did you program  
4 it correctly? Those are...

5 **CHARIMAN T. WHEELER:** So you're saying HAVA  
6 doesn't -- this would be an operational issue,  
7 because of the defect in the machine, it does  
8 not allow you to review; correct?

9 **MR. D. SIMMONS:** Most -- yes.

10 **MR. A. BIBBS:** They were allowed to review.

11 **CHARIMAN T. WHEELER:** These people were,  
12 some people were; correct?

13 **MR. D. SIMMONS:** They were allowed to  
14 review -- no, not what we observed, not what's  
15 documented in the report. You could review but  
16 it wasn't intuitive. You had to hit a back  
17 button, you had to hit the office to get back to  
18 the office.

19 **CHARIMAN T. WHEELER:** Which is presumably  
20 what these people did, except...

21 **MR. A. BIBBS:** They said they didn't have  
22 to. They'll come in. It was a two-day notice  
23 and you can have all 24 people here.

24 **CHAIRMAN T. WHEELER:** In here, all it says  
25 is I was able to review my selections, and the

1 Division is telling us that yes, you could have  
2 done that, but it was just a little difficult.

3 **MR. B. KING:** Mr. Chairman, if I could add  
4 one point from my perspective. Assuming the  
5 facts as stated in the grievance by the Barrons  
6 are correct, it raises Equal Protection  
7 arguments and potential Section 2, Voting Rights  
8 Act arguments, but they're not Help America Vote  
9 Act arguments.

10 **CHARIMAN T. WHEELER:** So not within the  
11 scope of this investigation?

12 **MR. B. KING:** Because here the Barrons are  
13 saying that it worked correctly for them.  
14 They're not alleging that it didn't work  
15 incorrectly.

16 **CHAIRMAN T. WHEELER:** But we do have  
17 grievances alleged that it worked incorrectly,  
18 do we not?

19 **MR. B. KING:** We do, but not by these two  
20 individuals.

21 **MR. D. SIMMONS:** If I could add -- as we  
22 put in the report, these type of allegations are  
23 also typically part of recounts or contests -- I  
24 mean those are good remedies to pursue to, you  
25 know, say this was not a fair election. You

1 can't possibly tell who won by -- by the way it  
2 was done.

3 **CHARIMAN T. WHEELER:** The appropriate  
4 way -- the way this really ought to have been  
5 done -- as a practical matter, and I saw it in  
6 your e-mail that you had sent to Brad, and you  
7 refer to the fact that if I had been able to get  
8 the recount or contest into court -- I take it  
9 you're agreeing with Dale, so how come -- how  
10 come this didn't get into court?

11 **MR. A. BIBBS:** I actually tried to get it  
12 but they said that I didn't properly verify the  
13 recount petition. I did it myself, and I didn't  
14 understand that there's a difference -- a  
15 legalese between confirming and verifying. I  
16 confirmed everything, but that wasn't good  
17 enough, you have to verify.

18 **CHARIMAN T. WHEELER:** So they tossed it?

19 **MR. A. BIBBS:** So they tossed it.

20 **CHAIRMAN T. WHEELER:** Okay. But as I  
21 understand it -- what you're telling me, Dale,  
22 is that would have been resolved there?

23 **MR. D. SIMMONS:** Yeah, the HAVA  
24 administrative process is not a substitute for  
25 recounts, contests.



1           **CHARIMAN T. WHEELER:** So the place where  
2 that got issued would have been the recount?

3           **MR. D. SIMMONS:** Right.

4           **MR. A. BIBBS:** And that's why I began my  
5 testimony by saying I don't want this to be  
6 about me, I want this to be about the voters who  
7 didn't get the opportunity to cast their ballot.

8           **CHAIRMAN T. WHEELER:** And I appreciate  
9 that. That's what I saw in your e-mail was --  
10 because I think you agree that had you been able  
11 to get this recount...

12           **MR. A. BIBBS:** Right, I've taken that off  
13 the table. I feel obligated because these  
14 individuals came out and supported me --

15           **CHAIRMAN T. WHEELER:** Right.

16           **MR. A. BIBBS:** -- so I want to make sure I  
17 support them.

18           **CHARIMAN T. WHEELER:** Absolutely. I think  
19 you've made some good points that we're going to  
20 follow up on. Sarah, did you have anything?

21           **COMMISSIONER S. RIORDAN:** I do. I want to  
22 thank the voters and also the members of the  
23 County Election Board for coming. These issues  
24 are incredibly important, whether they fall  
25 under HAVA, whether they fall under the United

1 States Constitution, whether they fall under the  
2 Voting Rights Act or whether they fall under the  
3 procedures of the county or your contract with  
4 your election machine, that these are the kinds  
5 of things that scare me to death because  
6 elections can turn on these things.

7 And even if -- if that weren't the scariest  
8 thing at all -- I mean the right of a person to  
9 cast his or her vote and have that vote count  
10 properly is the most important thing that we  
11 deal with here and one of the most important  
12 rights that we have, but I think we need to  
13 absolutely hold vendors accountable.

14 And I don't put any kind of blame on the  
15 Election Board for shortcomings in the  
16 performance of a vendor because you all have to  
17 take a huge leap of faith when you go into  
18 business with them and trust them to make sure  
19 that all of these matters are going to be  
20 handled exactly according to -- and there's a  
21 lot of stuff that you can't bear down on and  
22 know every single detail, and I understand that.

23 So I think that it's very important for us  
24 to raise these specific issues, even though it's  
25 too late for anybody to take action on the

1 outcome of the election, but we really need to  
2 make sure that these issues regardless of who  
3 has governance over them are raised with the  
4 vendors by the board of elections and also by  
5 the commission.

6 I think we have the authority and the  
7 responsibility to do precisely that, and I'm  
8 glad that we're taking all of these matters into  
9 the record, and I'm glad that we're going to be  
10 raising them with ES&S and asking them to  
11 respond, because this is a matter of extreme  
12 importance, and this is exactly the reason why  
13 we're here in my view so I appreciate your  
14 coming in and telling us about this and I also  
15 appreciate the board and understand the  
16 predicament that you're in.

17 So the board -- the board, I would say, as  
18 somebody who cares about making sure that votes  
19 count, hold ES&S's feet to the fire -- you know,  
20 they get a huge benefit for doing business in  
21 Indiana, but they have a huge responsibility to  
22 make sure that things like this don't occur, and  
23 that's just my view, but thank you all for  
24 your...

25 **MS. R. CRUMES:** I have just --

1           **CHARIMAN T. WHEELER:** Let me follow up, and  
2 we'll make a similar commitment on ES&S,  
3 particularly, with respect to your complaints,  
4 then I would ask the Division to ask for a  
5 prompt and timely response so we get some kind  
6 of response in September so we can deal with  
7 that response if we need to prior to the  
8 election.

9           Obviously, most of the large counties are  
10 voting on the ES&S machines, and therefore, I --  
11 you know, I think it's important if we see that  
12 response before we go into the general election.

13           **MS. R. CRUMES:** And I have one more  
14 exhibit. Now this is a letter from the clerk  
15 acknowledging the problems that existed and a  
16 copy of an e-mail from the technician changing  
17 the programming so that we not have that problem  
18 again, but because I was unable to obtain by  
19 public records the problem log, I don't know  
20 that we had any problem.

21           **CHARIMAN T. WHEELER:** Let me attach that  
22 and make sure that that goes to ES&S as well so  
23 they've got...

24           **MS. R. CRUMES:** So someone has to be  
25 knowledgable in this programming, and is the

1 board supposed to be certified when they change  
2 the programming or change the programming in the  
3 machine, does anybody...

4 **COMMISSIONER A. LONG:** It depends on what  
5 the programming they change is.

6 **CHARIMAN T. WHEELER:** But we'll work  
7 through it and we'll give them that information  
8 and we'll get a response and I will make sure  
9 that you get a copy of that. Your address --  
10 her address is in the file as part of the  
11 grievance so...

12 **MR. B. KING:** Yes, sir.

13 **COMMISSIONER A. LONG:** I would move that  
14 our action on this report today that we refer it  
15 back to the Division for further investigation  
16 and the evidence that we've received today that  
17 they follow up on comments by the witnesses that  
18 have testified as far as specific items that  
19 they have requested and were not produced and  
20 see that ES&S is brought into the loop and that  
21 we have a subsequent report and that these folks  
22 who have taken the time to come here today be  
23 given notice when this next comes before the  
24 board. As a side to my motion, I thank you guys  
25 for coming up here to -- the election board

1 members.

2 **COMMISSIONER D. DUMEZICH:** Seconded.

3 **COMMISSIONER A. LONG:** My purpose on the  
4 motion was -- I think there were some questions  
5 raised that are clearly outside of what you  
6 all -- your bailiwick. I mean you guys...

7 **CHARIMAN T. WHEELER:** It's an ES&S issue,  
8 not your issue.

9 **MS. M. CARMICHAEL:** And something in  
10 defense of ES&S, we have a young man with ES&S  
11 that works with us and he is terrific. If we  
12 have problems, they're usually pretty well  
13 solved.

14 **CHAIRMAN T. WHEELER:** Tell us who you are  
15 so that the court reporter knows?

16 **MS. M. CARMICHAEL:** I'm Martha Carmichael,  
17 the chairman of the county election board, and I  
18 think you all will admit -- I've been doing this  
19 for over 60 years and no election has ever been  
20 perfect. I remember we did it on ballot, paper  
21 ballot machines punching.

22 **MS. B. HUTTON:** I was just told --

23 **COMMISSIONER A. LONG:** Your name.

24 **MS. B. HUTTON:** This is Barbara Hutton. I  
25 was just told that our ES&S representative did

1 offer to come today, but he was told he was not  
2 allowed to speak and so he didn't come but he  
3 was willing.

4 **CHAIRMAN T. WHEELER:** He will get an  
5 opportunity to speak. I don't know...

6 **COMMISSIONER D. DUMEZICH:** By whom?

7 **UNIDENTIFIED SPEAKER:** When I said he  
8 wasn't allowed. He wasn't aware.

9 **MS. B. HUTTON:** She's on the registration  
10 board.

11 **UNIDENTIFIED SPEAKER:** I'm on the  
12 registration board.

13 **MR. A. BIBBS:** She's not sworn in.

14 **CHARIMAN T. WHEELER:** That's not a  
15 testimony kind of thing. We're just -- we are  
16 concerned as a commission that if we fail or  
17 somehow our staff fails to give people an  
18 opportunity to speak, and we just wanted to make  
19 sure that that was -- and nobody had told him he  
20 couldn't speak.

21 **UNIDENTIFIED SPEAKER:** No.

22 **MS. M. CARMICHAEL:** The gentleman that was  
23 speaking, his name was Charles Mitchell.

24 **CHAIRMAN T. WHEELER:** Okay. What we will  
25 do is -- all right, there's a motion that's been

1 made and seconded, any further discussion?

2 **MR. A. BIBBS:** One more comment.

3 **MS. M. CARMICHAEL:** What was the motion?

4 **COMMISSIONER A. LONG:** The motion was to  
5 refer back to the Division to follow up on the  
6 issues that have been raised today, plus any  
7 other witnesses that would...

8 **COMMISSIONER D. DUMEZICH:** And notice --  
9 and notice up everybody.

10 **CHARIMAN T. WHEELER:** And we'll notice you  
11 guys for additional response once we see what he  
12 has to say.

13 **COMMISSIONER D. DUMEZICH:** Seconded again.

14 **CHARIMAN T. WHEELER:** Motion's been  
15 seconded, any further discussion?

16 *(No response.)*

17 **CHAIRMAN T. WHEELER:** All those in favor,  
18 signify by saying Aye?

19 **COMMISSION MEMBERS:** Aye.

20 **CHAIRMAN T. WHEELER:** Those opposed, same  
21 sign?

22 *(No response.)*

23 **CHAIRMAN T. WHEELER:** I will give you an  
24 opportunity for the last comment.

25 **MR. A. BIBBS:** I'd like to say it's nice to



1 see everybody come together now, but up until  
2 this moment, they stood in every avenue -- in  
3 our way of trying to find out the truth, and  
4 basically, we just want the truth out there, and  
5 now they're trying to pass it to ES&S, but  
6 they've been working hand in hand the whole time  
7 to fight against this, all this information  
8 coming out, and I would just ask you to at least  
9 review and go ahead and get to the truth of the  
10 matter, and that's what we're asking -- one  
11 person, one vote.

12 **CHAIRMAN T. WHEELER:** I encourage you to  
13 hold our feet to the fire, we will have another  
14 meeting, we will give you notice, and we'll have  
15 an ES&S response, and if they want to come and  
16 talk...

17 **COMMISSIONER A. LONG:** The responses we get  
18 will be public record.

19 **CHARIMAN T. WHEELER:** Absolutely. You will  
20 get copies of those.

21 **MR. A. BIBBS:** Thank you very much.

22 **CHAIRMAN T. WHEELER:** I will accept a  
23 motion.

24 **COMMISSIONER S. RIORDAN:** Move to adjourn.

25 **COMMISSIONER D. DUMEZICH:** Motion to

1 adjourn -- seconded.

2           **COMMISSIONER A. LONG:** Thank you all for  
3 coming.

4           **CHARIMAN T. WHEELER:** Thanks for sitting  
5 through that.

6           *(At this time the proceedings were*  
7 *adjourned.)*

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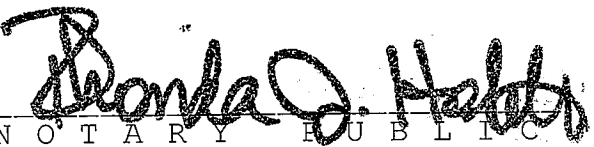
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1 STATE OF INDIANA )  
 ) SS:  
2 COUNTY OF HENDRICKS )  
3

4 I, Rhonda J. Hobbs, RPR, and a Notary Public  
5 and Stenographic Reporter within and for the County  
6 of Hendricks, State of Indiana at large, do hereby  
7 certify that on the 1st day of August, 2008, I took  
8 down in stenograph notes the foregoing proceedings;

9 That the transcript is a full, true and  
10 correct transcript made from my stenograph notes.

11 IN WITNESS WHEREOF, I have hereunto set  
12 my hand and affixed my notarial seal this 15<sup>th</sup>  
13 day of August, 2008.

14  
15   
16 NOTARY PUBLIC

17  
18 My Commission Expires:  
19 Septemer 12, 2009  
20 County of Residence:  
21 Hendricks County  
22  
23  
24  
25