

FEDERAL ELECTION COMMISSION

PUBLIC HEARING  
ON  
HYBRID COMMUNICATIONS

Washington, D.C.

Wednesday, July 11, 2007

1 PARTICIPANTS:

2 COMMISSION:

3 ROBERT D. LENHARD, Chairman  
4 DAVID M. MASON, Vice Chairman  
5 ELLEN L. WEINTRAUB  
6 STEVEN T. WALTHER  
7 THOMASENIA P. DUNCAN  
8 HANS A. von SPAKOVSKY  
9 PATRINA M. CLARK

10 PANEL ONE:

11 STEVEN M. HOERSTING  
12 Center for Competitive Politics  
13 THOMAS J. JOSEFIAK  
14 Republican National Committee  
15 NEIL P. REIFF  
16 Democratic National Committee

17 PANEL TWO:

18 SEAN CAIRNCROSS  
19 National Republican Senatorial Committee  
20 MARC E. ELIAS  
21 Democratic Senatorial Campaign Committee  
22 DONALD F. McGAHN II  
Illinois Republican Party  
National Republican Congressional Committee  
BRIAN G. SVOBODA  
Democratic Congressional Campaign Committee

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

(10:03 a.m.)

MR. LENHARD: Good morning. This is a special session of the Federal Election Commission for Wednesday, July 11, 2007. I would like to welcome everyone to the Commission's hearing on hybrid ads rulemaking.

We published a Notice of Proposed Rulemaking in the Federal Register on May 10, 2007, and sought and received comments on the proposed rule that would define when and how a political party could attribute the cost of a public communication that refers to a clearly identified federal candidate, and that also generically refers to other candidates or political parties without clearly identifying them.

I would like to thank the Office of the General Counsel staff for their hard work in the preparation of this proceeding and the rule itself. And especially I would like to thank Rosie Smith and Amy Rothstein, as well

1 as Esa Sferra and Bob Knop.

2 I'd also like to thank all of the  
3 people who took the time and the effort to  
4 comment on the proposed rules -- and in  
5 particular for those who agreed to appear as  
6 witnesses today and bring to us both their  
7 practical experience and their expertise on  
8 the issues raised in the rulemaking.

9 Briefly, this is the format that we  
10 will follow today. We expect to have a total  
11 of seven witnesses, who will be divided into  
12 two panels. Each panel will last an hour and  
13 a half, and we'll have a short break between  
14 the two panels. Each witness has five  
15 minutes to make an opening statement.

16 We have a light system at the  
17 witness table to help you keep track of time.  
18 The green light will start to flash when you  
19 have one minute left, the yellow light will  
20 go on when you have 30 seconds left, and the  
21 red light means that it's time to wrap up  
22 your remarks. I've been given a small box

1 here to monitor that, which is called the  
2 Shockotron here at the FEC, so please try and  
3 comply with those rules. The balance of time  
4 for the panels is reserved for questions by  
5 the Commissioners and answers by the  
6 witnesses.

7           For each panel, we'll begin with  
8 questions from the Commissioners;  
9 Commissioners that have a question will seek  
10 recognition from the Chair. We will not use  
11 the lighting system to time the questions or  
12 the answers during that time. We trust that  
13 all involved will be concise, and I will  
14 provide guidance or insight if I am concerned  
15 that too much time is being taken by any  
16 particular witness at today's hearing.

17           In preparation for today's hearing,  
18 I did something a little procedurally out of  
19 the ordinary as a consequence of my  
20 experiences in last year's hearing, which is  
21 that I put out on the public record the  
22 questions that I thought I'd be asking the



1 statements, and so I now turn the microphone  
2 over to him.

3 Mr. Vice Chairman?

4 MR. MASON: Thank you,  
5 Mr. Chairman, and I apologize that I'm going  
6 to bore my colleagues and the Commission  
7 staff by repeating something I had said at an  
8 earlier stage in the rulemaking, but there is  
9 a specific reason I'm doing this. This is  
10 the point at which we are building a record  
11 that some future judge may look at and say  
12 why did the Commission do that.

13 And there is a point important to  
14 me that I want to make about the history of  
15 political party activity, for which I begin  
16 in Safire's Political Dictionary with a  
17 curious entry called Hymie's Ferryboat,  
18 attributed to Hymie Shorenstein, the Brooklyn  
19 Democratic leader who was challenged in the  
20 1920s when FDR was the governor of New York  
21 by a local candidate who wanted to know why  
22 all the party's money was being spent on

1 Roosevelt's signs -- making the point that  
2 everybody already knew Roosevelt, and the  
3 party needed to do something to increase the  
4 candidate's name ID.

5           Rather than answering directly,  
6 Hymie asked, "Did you ever watch the ferries  
7 come in from Staten Island?" The candidate  
8 allowed as to how he had, and waited for  
9 Hymie's point. "When that big ferry from  
10 Staten Island sails into the ferry slip, it  
11 never comes in strictly alone; it drags in  
12 all the crap from the harbor behind it."

13           Hymie let the message sink in  
14 before adding, "FDR is our Staten Island  
15 ferry."

16           Now, Safire goes on to indicate  
17 that after he first published this story, he  
18 was contacted by several people who  
19 attributed it back to Jimmy Walker, one-time  
20 mayor of New York -- back further to Nicholas  
21 Murray Butler, president of Columbia  
22 University -- who himself said he had heard



1 the story from Boies Penrose, a leader of the  
2 Pennsylvania delegation in the Republican  
3 Convention of 1912 -- had heard of similar  
4 stories. He then cross-references the  
5 section on coat-tails, which includes a  
6 speech by a then back-bench Congressman  
7 named Abraham Lincoln in 1848. He talked  
8 about the coat-tails of Zachary Taylor, and  
9 on back to those of Andrew Jackson.

10 My point is that the coat-tail  
11 effect of party leaders upon down-ticket  
12 candidates has been present in American  
13 politics since the founding of modern  
14 political parties in the Jacksonian era.

15 And it's important to me because  
16 all of this discussion -- virtually all of  
17 the comments that we have received -- have  
18 focused on this in the context of BCRA, and  
19 even more narrowly in the context of the all  
20 hard money post-BCRA world -- I meant to say  
21 first in post-FECA, 1974-76.

22 And when we debate this question

1 about are the parties doing something that is  
2 trying to get around FECA or get around BCRA  
3 or abuse it, it's important to me to look  
4 back to the past and say, well, what did the  
5 parties do before these limits existed? And  
6 in fact, there is strong, incontrovertible  
7 evidence that parties in fact formed their  
8 campaigns around the ticket leaders from the  
9 beginning of the party system.

10 And that perspective is critical to  
11 me in judging what's going on, or what's  
12 reasonable in terms of thinking about how  
13 parties conduct their activity, and  
14 consequently, what expenses we allow a party  
15 to attribute to the party as opposed to  
16 particular candidates.

17 And I thank my colleagues for -- I  
18 apologize for them having to listen to this a  
19 second time, but it's a point that I want on  
20 the record at a point when we're making the  
21 record a third time.

22 MR. LENHARD: Certainly. Thank

1 you. I'm sure we all appreciate that it's  
2 never boring to hear you, and the story was  
3 actually better in the second telling than  
4 the first.

5 Are there any other opening  
6 statements for any of the other  
7 Commissioners? Okay, very good.

8 We will then move to our first  
9 panel, who may advance. Our first panel this  
10 morning consists of Stephen M. Hoersting, who  
11 is here on behalf of the Center for  
12 Competitive Politics; Thomas J. Josefiak, a  
13 former chairman of this agency, and currently  
14 appearing on behalf of the Republican  
15 National Committee; and Neil Reiff, who is  
16 appearing on behalf of the Democratic  
17 National Committee.

18 We generally proceed  
19 alphabetically, which means that unless you  
20 gentlemen have arranged otherwise, we'll hear  
21 Mr. Hoersting, and then we'll go to  
22 Mr. Josefiak and Mr. Reiff.



1 participant allocation, and I'd like to  
2 suggest here that there's not really any  
3 conflict there, that the Commission should  
4 consider using both allocation methods if  
5 it's going to craft a rule that addresses all  
6 public communications.

7           Depending on certain media, time  
8 and space may make sense, whereas number of  
9 participants could make sense in another  
10 medium.

11           The biggest concern for the CCP in  
12 this rulemaking is the way the Commission  
13 will flesh out its test benefit reasonably to  
14 be derived.

15           The test is not benefit actually  
16 derived, it's benefit reasonably to be  
17 derived. The Commission is supposed to  
18 employ objective criteria to protect the  
19 in-kind contribution limits, provide notice  
20 to the party committees in allocating an  
21 activity, and allow them freedom under the  
22 First Amendment to use phrases and monikers

1 that they believe will best suit their  
2 purposes, if at all possible.

3 So it's the point of the FEC to  
4 look at an ad, at its text, to find some  
5 evidence of an objective placeholder for the  
6 party committee, and then decide, well, how  
7 much of that ad can fairly be attributed to  
8 the party committee. What is its value.  
9 What the Commission should not be doing is  
10 employing subjective criteria, either  
11 empirical data, anecdotal evidence, or social  
12 research data to look at the relative benefit  
13 of a phrase such as "liberals in Congress"  
14 versus "Democrats in Congress," for the  
15 Commission to regulate in this way is to  
16 engage in a content-based regulation.

17 Now, we have express advocacy  
18 tests, and electioneering communication tests  
19 which are content-based regulations in FECA  
20 and BCRA, but those are to cure against  
21 vagueness and over-breadth and to protect  
22 speakers, not as bases for the Commission to

1 probe relative value of monikers or phrases.

2 Now, the reformers say that the  
3 value of a public communication identifying a  
4 federal candidate inures entirely to the  
5 identified candidate regardless of whether a  
6 generic party reference is included in the  
7 communication. We would disagree with this.  
8 And the Commission may want some assurance  
9 that down-ticket benefits are real, just as  
10 the Vice Chairman mentioned, and as the Vice  
11 Chairman brought it up, I'm not sure I can  
12 improve upon it.

13 But I'd leave with the reformers  
14 one example that I believe rebuts their case.  
15 And it's the 2004 Senatorial race in Alaska  
16 between Governor Knowles and Lisa Murkowski.  
17 For months, Knowles led Murkowski by  
18 significant margins, and the NRSC's  
19 advertising was not helping Senator  
20 Murkowski.

21 Finally, the Republican Party  
22 decided to cut a new ad with a new approach.

1 The NRSC decided to tie the Murkowski race to  
2 the fate of Alaska Senator Ted Stevens, just  
3 as the Republican Party tied the fate of  
4 "leaders in Congress" to President Bush in  
5 2004. Murkowski came from behind to defeat  
6 Knowles. Though she was scarcely mentioned  
7 in the ad, she enjoyed all the benefits of  
8 being tied to Stevens, and the NRSC knew  
9 that.

10 Now, the reformers may reply,  
11 "listen, Stevens wasn't even a candidate in  
12 2004, so your analogy breaks down." But this  
13 is really something for the Commission to  
14 consider: if Stevens was not a candidate,  
15 there was no way the NRSC could have  
16 benefited him by touting him or mentioning  
17 him, yet they chose to do so.

18 Why? Because they knew that tying  
19 Murkowski to that other person, or being  
20 associated with that other person, created a  
21 benefit for Murkowski. Otherwise, the NRSC  
22 would have wasted its money. But we know the



1 NRSC did not waste its money, just as we know  
2 that down-ticket benefits from generic  
3 references are real.

4 Thank you.

5 MR. LENHARD: Thank you.

6 I can't remember who I said was  
7 going to be next.

8 I guess Mr. Josefiak is next.

9 MR. JOSEFIK: Thank you,  
10 Mr. Chairman. Good morning. Good morning,  
11 Commissioners.

12 There are three individuals here  
13 today that have signed on to the comments  
14 that we have prepared, so I'm not going to be  
15 redundant and try to quote from the comments.  
16 But I thought perhaps this morning I could be  
17 helpful to you in trying to give you my  
18 perspective just very briefly on a number of  
19 issues.

20 First would be, should there  
21 continue to be hybrid ads? And the answer in  
22 my mind is yes. I don't think you need a

1 regulation, or a sanction and a regulation,  
2 to have hybrid ads. So personally, I'm not  
3 opposed to having a regulation that spells  
4 out what the Commission's position is,  
5 particularly outside of Washington, D.C.

6 I mean, I am perfectly comfortable  
7 with what the Commission has done in the past,  
8 and I'm going to discuss that a little bit as  
9 far as why I think the regulations and the  
10 law on their face allow for it, and that  
11 there should not be very much subjectivity  
12 promoted by the Commission in trying to draft  
13 a regulation, so that regulation needs to be  
14 very simplistic and just reinforce what  
15 actually I think is already in the law and  
16 current regulations and current practice of  
17 this Commission.

18 Allocation by parties.  
19 Commissioner Mason has talked about the  
20 beginning of modern political parties. I've  
21 been accused of being around since then, but  
22 I'm not going to talk about going back that

1 far. I want to talk about, in the FEC, BCRA  
2 era, of what parties have done. From the  
3 very beginning of this Commission, with  
4 regard to party allocation, the Commission  
5 acknowledged in its own regulations the  
6 ability of party committees to allocate in a  
7 generic sense on a reasonable basis.

8 Then, based upon negotiations  
9 between groups in the courts, the Commission  
10 then came up with a percentage based  
11 on -- for state parties, it was based on a  
12 number of candidates on the ballots, federal  
13 versus non-federal, and how you would split  
14 those costs. For the national party  
15 committees, it was a fixed percentage.

16 Over the years as well, the  
17 Commission adopted policies and procedures to  
18 deal with what happens when candidates and  
19 party committees do things together. They  
20 did polls together. They shared phone calls  
21 together. They shared space together. In  
22 every one of those cases, the Commission took

1 the position that you pay for whatever your  
2 share was, based on the time and space  
3 devoted to your operation.

4 I think the most graphic example of  
5 the Commission's position was the  
6 Commission's discussion and debate not only  
7 at the Commission level but also at the staff  
8 level in the 2000 Bush audit. In that audit,  
9 the question wasn't whether or not you could  
10 allocate, the question was what the  
11 percentage was.

12 The campaign took the position that  
13 at the time, it was based on time and space,  
14 based on the history of this Commission, and  
15 based on the position of Commissioners up  
16 until that time. The audit staff and the  
17 general counsel staff took a position that in  
18 those kinds of situations, it should be  
19 50 percent, based on very different theories.

20 But the bottom line -- and what I  
21 want to emphasize -- it was never a question  
22 of whether it could be done, it was what the

1 percentage was. And then based on that, we  
2 enter the era of this Commission, for most of  
3 you Commissioners, at least, where you had  
4 your regulation dealing with phone banks, you  
5 had your advisory opinion dealing with mail.

6 So there was never any concept that  
7 you couldn't do this. The question is what  
8 the percentage was. We are really advocating  
9 going back to a time and space percentage.

10 Why? Because we think it's the  
11 most fair, for a number of reasons. But  
12 personally, on the Presidential level -- and  
13 I think the Commission has to look at  
14 this -- you can't just lump all candidates  
15 together, certainly on the Presidential  
16 level.

17 Personally, I'm not opposed to  
18 setting a minimum floor of 50 percent, but  
19 still time and space, so it could be more  
20 than 50 percent. But when you get to the  
21 Congressional level, I don't think you can  
22 make that judgment call, because there are so

1 many variables in there where it could be  
2 much less than 40 percent dealing with one  
3 candidate, and particularly if you're going  
4 to get involved with multiple candidates.

5 And that's the other point I want  
6 to make, that we endorse the idea that hybrid  
7 ads can include multiple candidates, and  
8 they're the only sense that make any sense.

9 The only regulation that makes any  
10 sense is the time and space. Not so much  
11 because of the party contribution to the  
12 candidates, but the candidate contributions  
13 to each other being excessive.

14 Thank you, Mr. Chairman.

15 MR. LENHARD: Thank you very much.

16 Mr. Reiff?

17 MR. REIFF: Thank you. Well, first  
18 of all, please don't let Steve off that easy  
19 today.

20 MR. LENHARD: No, we won't.

21 MR. REIFF: Mr. Chairman,  
22 Commissioners, thank you for the opportunity

1 to testify today regarding hybrid ads.

2 I'd like to briefly summarize our  
3 comments made on behalf of the Democratic  
4 National Committee. The DNC generally  
5 supports promulgation of a rule permitting  
6 hybrid ads.

7 However, the DNC wants to ensure  
8 that we're not back here four years from now  
9 re-visiting this issue again amidst new  
10 controversies and concerns. Therefore, the  
11 DNC supports a rule that provides clear  
12 guidance to the regulated community and is  
13 easily understood and applied. The DNC's  
14 concern is that the failure to provide clear  
15 guidance would invite the same types of  
16 controversies that surrounded the use of  
17 hybrid ads in the 2004 election.

18 The DNC believes that a rule  
19 permitting hybrid ads should adhere to two  
20 main principles: first, hybrid ads should be  
21 permitted not only in connection with one  
22 federal office, but multiple federal offices.





1 hybrid ads. With the recent court decision  
2 in Wisconsin Right To Life, which may serve  
3 to empower outside interests, as well as the  
4 recent decrease in party identification by  
5 voters, parties now more than ever will  
6 desire to identify its candidates with their  
7 party and encourage straight-ticket voting.  
8 Hybrid ads are an essential component to that  
9 strategy.

10 Thank you for your time, and I will  
11 be happy to take any questions.

12 MR. LENHARD: Thanks very much.  
13 Let me see if I can make this machine stop  
14 here.

15 Questions from the Commission?

16 Vice Chairman Mason.

17 MR. MASON: Thank you. I'd like to  
18 ask all of the panel about our approach to  
19 this. Tom sort of got into it on the  
20 multiple candidate question. But really to  
21 ask this, what are we trying to protect? And  
22 I'd like to get your response to the

1 proposition that we're not mostly -- there's  
2 nothing we're protecting in the movement of  
3 money, services, goods from candidates to  
4 parties. For two reasons.

5 One is that candidates now may  
6 transfer unlimited sums to parties for any  
7 reason. And so if a candidate for some  
8 reason decided to make an ad that somehow  
9 represented a contribution to the party,  
10 there's no substantive issue that would  
11 relate to that. There may be some reporting  
12 issue or something like that, but not a  
13 substantive problem.

14 So what we are trying to protect is  
15 the limit on party-coordinated spending. And  
16 I know that there are some people who want to  
17 do away with that. That would be fine -- I'd  
18 be happy if Congress did away with that, but  
19 that's what's in the law now.

20 But what I want to ask or suggest  
21 is, does that make or shape our  
22 regulation-writing task?

1           In other words, if we assume that  
2       it's not a lot of importance how much the  
3       candidate bears -- how much of the cost the  
4       candidate bears -- what does that do to our  
5       thinking about the regulation in terms of a  
6       minimum party share? For instance,  
7       particularly if we have more than one  
8       candidate, why does it make a difference?

9           In other words, why is the ad less  
10      valuable to a party when you mention two  
11      candidates or three rather than one?

12           MR. JOSEFIAK: I think that's why  
13      we support, Commissioner Mason, the idea of  
14      having hybrid ads include multiple  
15      candidates. We can't make a judgment call  
16      whether that makes any political sense in  
17      every situation, but it may make sense in  
18      some other situations to do that.

19           And that's why I raised the issue.  
20      I don't think it becomes an issue between how  
21      much the parties spend -- you've got a  
22      coordinated expenditure limit -- but I think

1 the concern is that unless you come up with a  
2 fair recognition of what the value  
3 is -- whether the candidate pays for it or  
4 not -- to that candidate, you could -- and if  
5 the candidate is reimbursing for its share,  
6 which has always been a premise of this  
7 Commission -- you can reimburse for your  
8 share of costs, and that's not a contribution  
9 or a coordinated expenditure -- then the  
10 candidate himself may be making a  
11 contribution to another candidate.

12 That's the concern I think you have  
13 to deal with. If you come up with a straight  
14 50 percent divided equally among those  
15 candidates or just a one-third, one-third,  
16 one-third, or whatever it is, that may not be  
17 the way the ad actually airs, and there may  
18 be one candidate that's much more focused on  
19 than other candidates.

20 And I think that's the only reason  
21 time and space makes sense when you have  
22 multiple candidates -- looking at how much

1 time each candidate is getting -- and that  
2 also goes back to the Commission's position  
3 when you have candidate-to-candidate ads.  
4 That has never been an issue, and I believe  
5 106.1 addresses that in the regulations, and  
6 advisory opinions have addressed that.

7 When you have two candidates  
8 getting together and doing an ad, you're  
9 basing it on the time and space devoted to  
10 each one of those candidates.

11 MR. LENHARD: Would anyone else  
12 like to --

13 MR. REIFF: Sure. I absolutely  
14 agree with Tom. I would acknowledge that in  
15 our comments, again, we support multiple  
16 candidate references. Really no reason to  
17 artificially limit this to one candidate.  
18 There could be several compelling reasons why  
19 we'd want to have a multiple candidate ad and  
20 a generic down-ballot reference, and we  
21 acknowledge in our comments that there  
22 probably is some kind of degradation to the

1 value of the generic reference when you have  
2 multi-candidate references.

3 And we do suggest --

4 MR. MASON: Why? Why?

5 MR. REIFF: Again, I think we're  
6 trying to find a pragmatic -- I think the  
7 more content in a piece, the more competing  
8 with the attention of the different elements  
9 of the ad -- I'm more concerned not  
10 necessarily with the why, but as to the  
11 potential abuse of the rule.

12 So for example, if you have three  
13 candidates and the generic reference to  
14 compartmentalize the entire three candidates  
15 into that 50 percent ceiling that you can  
16 allocate to generic, I thought that was maybe  
17 a bit too much for us to chew on. So we've  
18 suggested a sliding scale based on how many  
19 candidates are referenced. Or I shouldn't  
20 say candidates. We use the term "office."

21 Because if you attack your opponent  
22 and support your own candidate, that

1 shouldn't necessarily count as two elements,  
2 that should just be one element. So we  
3 believe a regulation should use the term  
4 "office" and not "candidate." And obviously,  
5 there's only three federal offices that we're  
6 working with here. So it's not, in our  
7 opinion at least, an overly complex formula  
8 that you would have to create.

9           But the more offices you  
10 reference -- we just believe the generic  
11 reference should have equal weight -- I think  
12 that's the best way of putting it -- to the  
13 number of offices referenced.

14           MR. LENHARD: Mr. Hoersting.

15           MR. HOERSTING: Mr. Vice Chairman,  
16 leaving aside issues of reimbursements or  
17 whether -- calculating the 441a(d) limit,  
18 let me just simply say that yes, you should  
19 have -- either under time and space or number  
20 of participants -- you should have an equal  
21 division based on the number of participants  
22 in the case of number of participants.





1 legitimately find a placeholder -- evidence  
2 of that placeholder in that ad -- there's no  
3 reason they can't share on the cost of that  
4 ad. Now, I suppose if you had an ad that  
5 listed every candidate including governor and  
6 perhaps everyone in the state house or state  
7 Senate, and a party reference, we could  
8 debate that.

9           But I really doubt the Commission  
10 will ever see that scenario.

11           MR. JOSEFIK: Commissioner --

12           MR. LENHARD: Mr. Josefiak.

13           MR. JOSEFIK: Just to clarify -- I  
14 think in Neil's example of having three  
15 candidates in a party, to me, there are four  
16 participants. And based on time and space,  
17 if there's less space devoted to the generic  
18 message, that's going to be less that's  
19 allocable to the party part of it and more  
20 allocable to the candidate part.

21           And I think that's why we feel very  
22 strongly that when you get into a multiple

1 candidate situation with a party message, the  
2 only way to deal with that effectively is on  
3 a time and space argument, rather than  
4 anything that might seem more attractive like  
5 a minimum floor of 50 percent or something  
6 that's more fixed.

7 MR. LENHARD: Very good. Other  
8 questions?

9 Maybe I'll jump in. One of the  
10 things -- I think Commissioner Mason  
11 correctly points to one of the things that  
12 we're struggling with here is that we're  
13 trying to ensure that we continue to enforce  
14 441a(d), the coordinated spending limits.  
15 And that obviously is the hard part. And one  
16 of the things that I'd asked -- or that I  
17 wanted to ask of everybody is what evidence  
18 there is that the down-ticket candidates  
19 actually benefit from these ads.

20 And I want to highlight a  
21 distinction Mr. Hoersting mentioned a number  
22 of times in his comments, that we shouldn't

1 look to this question -- that in fact, the  
2 parties are making foolish decisions, and our  
3 regulations should not get in the way of  
4 that. And I agree with that sentiment. But  
5 it's more complex for me, in part because I  
6 think the party has multiple goals.

7           It has both the goal of electing  
8 its down-ticket candidates, but it also has  
9 the license and goal of electing the  
10 candidates whose name is specifically  
11 identified in the ad. And we need to parse  
12 through which of those goals is being  
13 achieved.

14           The regulations are designed, or  
15 the rules are designed to try and do that,  
16 because we have to comply with -- we have to  
17 enforce the 441a(d) provision of the statute  
18 as well. And despite that in your written  
19 comments, you do actually point to some  
20 specific evidence in support of that.

21           And Vice Chairman Mason has also  
22 cited some anecdotal evidence.



1           MR. LENHARD: If I could interrupt.  
2       So did you change the content of the ads in  
3       '06 to try to reflect that sense?

4           I mean, does the mention --

5           MR. REIFF: I can't speak for the  
6       DNC because I don't think the DNC itself ran  
7       any hybrid ads in 2006, so I can't speak to  
8       any empirical evidence myself. Perhaps you  
9       might want to ask the Congressional  
10      campaign lawyers this afternoon if they had  
11      run any types of ads like that, because I'm  
12      not aware of any personally.

13           And I'm thinking more ahead to  
14      the types of branding that we probably  
15      will -- or may want to do in 2008.

16           I think using the party label and  
17      tying them to a strong Presidential nominee,  
18      for example, will be a very important part of  
19      our strategy, especially in very strong  
20      Democratic performing areas.

21           I think the loss of party  
22      identification, I think we want to make a

1 comeback in that area and try to recapture  
2 some Democratic voters who may now vote  
3 independent or split their ticket in voting.  
4 So I think it will be a very important part  
5 of our strategy in 2008.

6 MR. LENHARD: Mr. Josefiak.

7 MR. JOSEFIK: In response,  
8 Mr. Chairman, I don't know of any empirical  
9 evidence, but I think it's important to make  
10 the point that not only is it happening, but  
11 it's the responsibility of a national party  
12 committee. We feel very strongly it's our  
13 responsibility to support the entire ticket,  
14 and particularly in the post-BCRA era, where  
15 we don't have the ability to go out and have  
16 our old RNC accounts where we can use  
17 non-federal money to go to unspecific  
18 candidates.

19 This is our attempt using federal  
20 dollars the best we can to deal with an issue  
21 that gets down to the grassroots level, that  
22 says hey -- and go and support the rest of

1 the ticket in the way we did. But there were  
2 going to be issues that are down-ticket,  
3 there are going to be issues that we're  
4 trying to support other federal candidates  
5 that are running, or Congressional  
6 candidates, so that could be federal to  
7 federal, but you also have the general  
8 statement of what else is going on in that  
9 particular state, whether it's a battleground  
10 state or not.

11 There are Congressional elections,  
12 there are state legislative elections, and  
13 there are gubernatorial elections in a lot of  
14 states next year. And it's a party  
15 responsibility to do whatever it can to  
16 encourage people to get out and vote for the  
17 entire ticket.

18 So I don't think we at the RNC base  
19 it on any empirical evidence that we do this  
20 because it has an effect. We can put out an  
21 ad on a candidate that doesn't have the  
22 effect, and quite frankly, it can backfire

1 depending on what the message is. The idea  
2 is, it's our responsibility as a national  
3 party organization to do whatever we can to  
4 support the entire ticket. And we don't base  
5 it on the fact that it's being effective or  
6 not, but it's based on a strategy that this  
7 is something we're doing and we're required  
8 to do because we have a responsibility to do  
9 it.

10 MR. LENHARD: Mr. Hoersting?

11 MR. HOERSTING: Mr. Chairman, I'm  
12 trying to think of an example as I sit here,  
13 and I'm not thinking of one. For that, I  
14 apologize, but I think you can easily imagine  
15 the DNC or the RNC will always care to elect  
16 its President.

17 But I think if you think about  
18 it with me, you could imagine a year in which  
19 while the RNC or DNC is doing everything it  
20 can to get its President elected, its  
21 Presidential candidate elected, you may not  
22 see any hybrid ads. And the reason is



1 because that candidate is so unpopular or has  
2 so botched his campaign that the party  
3 committee has made a judgment that tying  
4 their other candidates which they  
5 legitimately care about -- Neil and Tom have  
6 told you that -- you won't see the hybrid ads  
7 in a cycle like that.

8           You know more about politics than I  
9 do. I'm sure you can imagine that scenario  
10 very well where there wouldn't be any hybrid  
11 ads out of an RNC or DNC because their  
12 candidate stinks, and that would be their  
13 judgment -- not protecting their candidate or  
14 helping their Presidential candidate,  
15 protecting their down-ticket candidates.

16           And I believe that while it's a  
17 rough analogy and I wish I had a better  
18 example for you -- I think it's worth  
19 mentioning.

20           MR. LENHARD: Thank you.

21           Commissioner Weintraub?

22           MS. WEINTRAUB: Thank you,

1 Mr. Chairman. I think that there's not much  
2 controversy in saying that the ads ought to  
3 be allocated according to the benefits  
4 reasonably expected to be derived. The point  
5 of this is to figure out what that is. What  
6 is the benefit reasonably expected to be  
7 derived under the various different types of  
8 ads? Now, I think that a party might well  
9 make the decision that if they have a really  
10 strong leader at the top of their ticket,  
11 that there will be a coat-tail effect, and  
12 that will help all of their down-ticket  
13 candidates.

14 But would any of you think that the  
15 party could then say, we want to pay for half  
16 of an ad that just talks about the great  
17 qualities of the leader at the top of the  
18 ticket, and says vote for John Doe for  
19 President -- makes no reference to any other  
20 candidates, office, party committee, code  
21 word. It's all about John Doe.

22 Now, even if you believe that

1 having John Doe being really popular is going  
2 to help your other candidates, I assume that  
3 none of you -- or tell me if you  
4 disagree -- would say that the party still  
5 should be able to pay for part of that ad  
6 without it counting against the coordinated  
7 spending limit.

8 Am I correct on that much?

9 MR. REIFF: Yes, I agree with that.

10 MR. HOERSTING: Totally.

11 MS. WEINTRAUB: You're laughing,  
12 but it seems to me that when people start  
13 making the argument that well, the party  
14 ought to be able to decide what's a benefit  
15 to it and what's not, the party could make  
16 that -- you know, that's a logical conclusion  
17 of the argument, that if they think that's a  
18 benefit to them, they ought to be able to pay  
19 for it.

20 I see Mr. Hoersting wants to take  
21 that on.

22 MR. HOERSTING: What I want to say

1 is that under the First Amendment -- let's  
2 say circa 1800, that might be an argument,  
3 but we do have 441a(d) limits now, and the  
4 Commission has to protect those. No, no, I'm  
5 not telling you that.

6 I'm saying that for the purposes of  
7 the record. We have 441a(d) limits now  
8 that have been enforced. And my point to you  
9 is what should the Commission do now to  
10 respect the First Amendment rights of the  
11 parties? And my suggestion to you is in  
12 order to determine benefit reasonably to be  
13 derived --

14 MS. WEINTRAUB: Reasonably expected  
15 to be derived.

16 MR. HOERSTING: Thank you.

17 You should look at objective  
18 criteria and say is this the party's message  
19 or not, not do I think it really helps them  
20 or not. Or is it a wise use of their cash or  
21 are they stupid, or are they really trying to  
22 fool me, or are they winking at me because





1 Chairman said, the coat-tail provisions in  
2 the statute recognized there was some benefit  
3 by one candidate, but you always had to  
4 mention another candidate, so that the other  
5 candidate mentioned was getting a coat-tail  
6 benefit from that, and that wouldn't be  
7 viewed as a contribution in certain  
8 circumstances.

9 MS. WEINTRAUB: But does the other  
10 candidate have to be identifiable in some  
11 way?

12 MR. JOSEFIK: But what we're  
13 talking about now is a candidate and a  
14 generic message from the party as two  
15 distinct identifiable things. And I think  
16 instead of getting involved in trying to  
17 subjectively decide what categorizes  
18 something as allowed and disallowed, the  
19 Commission's much better off coming in with a  
20 strict definition of what a hybrid ad is.

21 A hybrid ad is an ad that refers to  
22 at least one specific candidate, and

1 generically to others.

2           And that should be where the  
3 Commission comes down, and leave up to the  
4 parties to decide what it means, and if  
5 someone disagrees with that, there is the  
6 enforcement process. But for you to sit  
7 there and try to decide on a case by case  
8 basis, and put out a criteria as to what is  
9 and what is not going to fall under allowable  
10 activity I think is a big mistake.

11           MS. WEINTRAUB: I think what you're  
12 suggesting is that we come up with a vague  
13 rule and then let you guys file complaints  
14 about it, and find out two years later when  
15 we resolve the enforcement matters -- and I  
16 can't believe that's really what you want.

17           MR. JOSEFIK: Not a vague rule,  
18 because the hybrid ad by its very nature  
19 describes what it is. It's a clearly  
20 identified candidate and a reference to the  
21 party -- other candidates or  
22 generically -- to how they want to describe



1 themselves.

2 MS. WEINTRAUB: But again, then we  
3 get into the question of what constitutes a  
4 generic reference.

5 Would you define Mitch McConnell as  
6 a leader in Congress? Mr. Josefiak?

7 MR. JOSEFIK: I would.

8 MS. WEINTRAUB: And John Boehner?

9 MR. JOSEFIK: I would.

10 MS. WEINTRAUB: I would, too, but  
11 they are in the minority, and yet the hybrid  
12 ads that were run in the last election made  
13 references to the President and leaders in  
14 Congress, and that was perceived as a generic  
15 reference to --

16 MR. JOSEFIK: We're not going  
17 back, we're going to the future, but even  
18 there, I'd respectfully say you've got to  
19 look at the entire ad. Not only the text of  
20 the ad, but the visuals and the audio and the  
21 pictures and who was on there.

22 In my mind, what happened in '04 on

1 the Democratic side was a clear message to me  
2 what they meant, and I would respectfully say  
3 what happened on our side from their  
4 perspective, they understood what we were  
5 talking about -- we were talking about the  
6 Democrats in Congress, they were talking  
7 about the Republicans in Congress, and were  
8 we satisfied with that.

9 I don't think there's any reason to  
10 go backwards. I think what we're doing now  
11 is going forward and trying to decide how  
12 we're going to deal with this issue, and I'm  
13 comfortable with what the regs say now, but  
14 I'm also willing to say that for the rest of  
15 the regulated community, if the Commission is  
16 going to take different views, the Commission  
17 owes it to the regulated community to tell  
18 the regulated community what those views are.

19 MS. WEINTRAUB: I agree with you,  
20 and that's what we're trying to do. Because  
21 the reality is, Mr. Josefiak, that what you  
22 were perfectly comfortable with both in 2000

1 and in 2004, I was not.

2 MR. JOSEFIAK: Right. But that's  
3 why I think a regulation is important. I  
4 believe, and respectfully would say that  
5 from my experience on the Commission going  
6 from -- that's why I talked about the  
7 history -- there was a built-in process not  
8 only from the beginnings of the statute, but  
9 from the beginnings of the Commission, as  
10 to what was legitimately considered a  
11 party-allocable expenditure, and that was a  
12 mere extension of what the Commission had  
13 already done in the past.

14 MR. LENHARD: I think that this is  
15 obviously a struggle, and as I've indicated I  
16 think with my question to Mr. Hoersting, that  
17 we're struggling with this choice  
18 between -- I think there's no doubt that this  
19 Commission will attempt to be extremely clear  
20 about what we're concluding.

21 And yet there is that struggle  
22 between the clarity and freedom and ambiguity

1 and the regulatory regime, and so we're  
2 obviously wrestling with those things.

3           And one of the things I think that  
4 makes the assessment of whether these ads,  
5 whether the party is seeking the goal of  
6 electing the person at the top of the ticket,  
7 or influencing the races down-ticket in part  
8 derives out of some of the examples that we  
9 looked at in some earlier cases which are now  
10 on the public record -- where you looked at  
11 messages about leaders in Congress running in  
12 districts where there were no leaders in  
13 Congress in the down-ticket side -- where the  
14 ads were being run in districts where there  
15 was no competitive race down-ticket at the  
16 federal level.

17           And trying to discern whether in  
18 fact the parties' funding of hybrid ads in  
19 those contexts was really for the purpose of  
20 the down-ticket races, or was for the  
21 purpose of electing the person at the top of  
22 the ticket.



1 can reasonably go through in looking at  
2 hybrid ads that have run in the past, and  
3 trying to discern whether there really was  
4 indications, given the way those races were  
5 structured or the way the down-ticket ballots  
6 were running, that the parties were really  
7 seeking in those cases to influence  
8 down-ticket races as opposed to simply trying  
9 to increase the benefit available to the  
10 clearly identified candidate in the ad.

11 Go ahead, please.

12 MR. HOERSTING: I'll say one quick  
13 thing and then defer to Neil. There is  
14 always the problem of media markets, and they  
15 don't neatly divide amongst Congressional  
16 districts, and I'm sure you are aware of  
17 that, but I did want to point that out.

18 Neil.

19 MR. REIFF: I'd say -- as a  
20 Democratic Party strategy, and Tom can speak  
21 to the Republicans -- generic advertising has  
22 always been a core and very important element

1 of our strategies, especially in minority  
2 areas -- what we call our base votes.  
3 Generic advertising is kind of the  
4 advertising of choice, especially in targeted  
5 radio and things like that.

6 So the ability to tie a very strong  
7 nominee or a strong federal candidate to a  
8 generic message I think would be of very,  
9 very huge benefit to the Democratic Party,  
10 and I think we would want to use it  
11 extensively. I think that to be able to make  
12 that connection will very much enhance our  
13 message and our ability to get out Democrats.

14 MR. LENHARD: Other questions?  
15 Commissioner von Spakovsky.

16 MR. von SPAKOVSKY: Mr. Reiff, if I  
17 could follow-up on that, let me ask you a  
18 question. And I think you said before you  
19 particularly believe that the party label and  
20 brand were very important in the last  
21 election, and maybe in the next. That's a  
22 little bit at odds with the written comments.





1 rule regarding hybrid ads is important. And  
2 I think our comments is more an effort to be  
3 pragmatic, and to find a rule that hopefully  
4 more than three Commissioners will agree that  
5 should be passed.

6 And I think we start with the  
7 baseline, and I think the 50 percent of  
8 course derives from Advisory Opinion 2006-11.  
9 And that seems -- I didn't really hear many  
10 complaints from my side, from the regulated  
11 community, about that advisory opinion, and  
12 whether or not that was unreasonable.

13 And I think the Commission had  
14 countervailing concerns that they had to  
15 balance in that advisory opinion, and we  
16 believe the Commission reached a good  
17 balance.

18 I'm more interested in making sure  
19 a viable rule gets passed than worrying about  
20 what percentages -- we face the minimum. So  
21 I think Joe and I were being more predictive  
22 about what we think is pragmatic and viable

1 to ensure that a rule does get passed.

2 MR. LENHARD: I thought that sort  
3 of pragmatism was the domain of only those  
4 who worked here.

5 Commissioner von Spakovsky?

6 MR. REIFF: I'm sure I'll get  
7 lambasted by my colleagues on that very  
8 comment. But what're you gonna do?

9 MR. LENHARD: Welcome to our world.

10 MR. von SPAKOVSKY: There seems to  
11 be a lot of agreement here between the two  
12 parties -- nice show of bipartisanship -- but  
13 one of the areas that I saw that there was  
14 disagreement on is how generic a generic  
15 party reference should be.

16 MR. REIFF: Right.

17 MR. von SPAKOVSKY: The DNC has  
18 suggested that there has to be a specific  
19 reference to the party affiliation. So I'm  
20 assuming that means there would have to be a  
21 reference to the Democratic Party and not  
22 some other general term or moniker.



1 generic, which is 100.25, where it just says  
2 a reference to a clearly identified political  
3 party. We don't believe that to be  
4 unreasonable and we share Commissioner  
5 Weintraub's concerns about pushing the  
6 envelope and possibly having the rule lead  
7 itself down the line.

8 MR. HOERSTING: Commissioner, if I  
9 may, I think perhaps what we should consider  
10 is crafting a rule not unlike what Tom  
11 mentioned four or five minutes ago, of what a  
12 hybrid ad is -- and then listing several  
13 examples perhaps in the E&J and leaving open  
14 but not foreclosing other possibilities, and  
15 leave it to more aggressive committees to  
16 fare how they will in the enforcement  
17 context.

18 I can easily imagine -- I shouldn't  
19 say easily -- I can imagine that one day,  
20 someone saying the Paisley Party believes  
21 this and the Paisley Party would do that, and  
22 the Paisley Party -- at that point, they

1 would run an ad about the Paisley Party. It  
2 wouldn't be one of the examples in your E&J.

3 They'd come before the Commission  
4 and they take their chances. The beauty of  
5 that is you have not foreclosed the  
6 possibility by a restrictive example of the  
7 committee ever running an ad about the  
8 Paisley Party. You hold open that  
9 possibility and they take their chances.

10 MR. JOSEFIK: I'd like to know  
11 which one of us you consider the Paisley  
12 Party.

13 MR. HOERSTING: Obviously, you know  
14 my position is that you look at -- I think  
15 you have got to look at the context of an ad,  
16 not just the text, and from the ad itself.  
17 In my humble opinion, it's obvious what party  
18 you're supporting or opposing, and you don't  
19 need the magic buzzwords and it should be  
20 left up to the individual parties to decide  
21 how they want to describe themselves in the  
22 opposition.

1 MR. LENHARD: I'm sorry.

2 Commissioner Walther, please.

3 MR. WALTHER: Being somewhere new  
4 to this process, I wanted to mention one of  
5 the factors important to me when we had our  
6 debate on this issue on audits, and that was  
7 my belief that the people who spend the kind  
8 of money that's spent on these really know  
9 where it's supposed to get the most benefit,  
10 and I think that's a given. They understand  
11 what they want, and they spend the money the  
12 way they best think they're going to get what  
13 they want, with typical results.

14 There may be other types of  
15 benefits as well, but when I looked at the  
16 figures, it became a concern to me, when we  
17 were facing the argument of the 50/50 split  
18 when we looked at the way the money was  
19 spent, because roughly -- I think, the  
20 percentage may be off by one or two -- but  
21 not by very much.

22 The Republicans spent roughly

1 85 percent of their hybrid ad money in the  
2 battleground states, and the Democrats spent  
3 approximately 92 percent of their money in  
4 the battleground states, which led me to  
5 believe that they must have thought the  
6 reason why that money was best spent was to  
7 sway votes for the Presidential ticket. And  
8 I grant you that we shouldn't be sitting here  
9 trying to figure out factor by factor what's  
10 the best percentage.

11           And that's not really where we have  
12 the expertise, but to look at what the  
13 benefit was reasonably expected to be derived was,  
14 I feel, when that kind of money is being spent,  
15 and the way it was spent really swayed me into  
16 thinking that that kind of an allocation  
17 wouldn't really be persuasive to me, even in  
18 Michigan where, there wasn't a Senatorial candidate,  
19 there was quite a bit of money spent.

20           I think only one candidate spent  
21 like \$150,000 on TV ads -- over \$2 million  
22 were spent in supporting -- which was

1 allocated to the other party. So in that  
2 regard, it just seemed to me that it was  
3 important for me to get a better  
4 understanding of why people would spend that  
5 kind of money if they really thought it was a  
6 50/50 split of benefits here.

7 So I'd welcome thoughts from any of  
8 you.

9 MR. REIFF: I'll make two points.  
10 You know, the methodology that we're putting  
11 out there is -- well, first of all, it was  
12 time and space with a ceiling. So you  
13 couldn't necessarily abuse -- depending on  
14 from which side you look at it. What you're  
15 really looking at there is the content of the  
16 ad. It's really difficult I think for the  
17 Commission, and even the lawyers, to try to  
18 import a strategic element here, and try to  
19 regulate strategy and regulate targeting.

20 For example, even 527, if you are  
21 looking at 527 advertising, non-profit  
22 advertising, you'll find that the



1 overwhelming majority of that was in those  
2 same exact states, yet there really isn't  
3 much you can do from a regulatory perspective  
4 to police the targeting of the ads.

5 So I understand the concerns, but I  
6 think from a legal perspective, it's  
7 difficult to address that question.

8 MR. HOERSTING: I will take another  
9 run at this if I can. It won't be an  
10 emphatic run, but here we go.

11 I think, Commissioner Walther, what  
12 you may be looking at is the benefit to be  
13 derived from the point of view of a hearer,  
14 and that's not a determination the FEC really  
15 wants to be involved in. And I think you  
16 sense that, because I've heard some of your  
17 earlier statements to that effect. You  
18 really don't want to be involved in picking  
19 of the percentages necessarily based on your  
20 impression of how effective something would  
21 be.

22 So in order to enforce the

1 441a(d) limit which you are obliged to  
2 do -- you are absolutely right about  
3 that -- you need to look at the text of an ad  
4 and say listen, this is the party committee's,  
5 I don't know if it's going to persuade  
6 somebody in Wyoming a lot, or persuade them  
7 not much, but I do know it's theirs. I can  
8 tell that if something says President Bush  
9 and our leaders in Congress believe "X," and  
10 the X is all attributed to both of them, then  
11 I can do 50/50.

12 If I have an 8-1/2 by 11 piece of  
13 paper, and three quarters of it has a picture  
14 of Bush and a quarter of it says Republicans  
15 are great, that's 75 percent.

16 At no point in time, though, in  
17 both my examples, are you saying you know  
18 what, those guys in Wyoming look at the  
19 bottom of the paper. And I know that they're  
20 going to get a heck of a lot more than  
21 25 percent benefit out of that. Bush should  
22 only have to pay 65 percent, and the party'd

1 be getting off easy if we let them pay  
2 25 percent. That's not the business you want  
3 to be in. And I think you agree with that.

4 So that's what I keep trying to get  
5 at when I say "objective," which is some  
6 criteria based on the ad versus  
7 reasonable benefit to be derived in the mind  
8 of the hearer. That's what I'm trying to get  
9 at. I'm not saying it particularly well, but  
10 that's what I'm trying to get at.

11 MR. JOSEFIK: And I think Steve's  
12 saying it very well. I think the idea is  
13 that, again subjectivity, you could look at  
14 the same thing and come up with, "I think that  
15 goes 100 percent one way or 100 percent the  
16 other way." The objective criteria has been  
17 time and space and/or the 50 percent,  
18 depending on if it's phone bank or the mail.

19 And I think that's where the  
20 objectivity standard comes in, not  
21 necessarily what actually practically  
22 happens, but the objectivity

1 standard -- you've got a message, how can  
2 you best decide how that message should be  
3 divided. And I think he said that very well.

4 MR. LENHARD: Okay, Ms. Duncan.

5 MS. DUNCAN: Thank you. Thank you  
6 Mr. Chairman. Good morning, gentlemen.

7 All of you it seems to a certain  
8 degree have indicated a preference for a  
9 time/space component of the attribution  
10 method. And it seems to me, though, that  
11 some in the regulated community historically  
12 have somewhat disagreed with that view  
13 because they have indicated that that's sometimes  
14 a difficult calculation to apply.

15 Perhaps it's been characterized  
16 today as objective, but I've heard it  
17 characterized before as subjective. And I  
18 wonder if you might address what you believe  
19 may be some challenges -- if you believe  
20 there are any -- in the actual practical  
21 application of that calculation, particularly  
22 in the context of television ads, where you

1 have audio and visual components.

2 Thank you.

3 MR. REIFF: Let me make a general  
4 comment about time and space, and I'll see  
5 what I can do on specifics. I've been an  
6 attorney for state parties for many, many  
7 years, and they're probably the one entity  
8 that most has to use time and space analysis,  
9 because we're doing -- especially before  
10 BCRA, we had to do time and space based on  
11 the FEC regulations -- not so much now,  
12 because, for example, exempt activities are  
13 now on a split. But prior to BCRA, we were  
14 doing time and space on a daily basis during  
15 the campaign, and we -- especially with  
16 respect to printed material and telephone  
17 scripts, radio scripts, we got pretty good at  
18 doing it.

19 We would pull out our  
20 rulers -- everyone had a pretty reasonable  
21 method. I can't say that there was a unified  
22 method, but everyone had at least a

1 reasonable method to do it. And I understand  
2 the Commission always looks at reasonableness  
3 and if it's reasonable, they will not try to  
4 interject their own methodology. TV gets  
5 much more difficult. And I'll be honest with  
6 you, I haven't had that many opportunities to  
7 do time and space in a TV context as I have  
8 in print and other mediums, so it will be a  
9 challenge.

10 I can't say I have a magic answer  
11 on how to do it because I really haven't  
12 tried to do it or thought of a formula. But  
13 I think we can figure something out, and I  
14 think it will be reasonable, and hopefully  
15 the Commission will agree.

16 MR. JOSEFIAK: I think you're  
17 raising a very legitimate point -- time and  
18 space is a challenge. I think that having  
19 been around long enough, it has been a  
20 position of the Commission, as Neil said, for  
21 lots of reasons, particularly for state  
22 parties over the years -- how you allocate



1 enough flexibility to have at least the  
2 opportunity to invoke a time and space  
3 allocation. But it's a challenge, there's no  
4 question.

5 MR. HOERSTING: I would simply echo  
6 what they've said, and also say this: I  
7 realize it's difficult to apply in television  
8 particularly because of the two cents issue  
9 that Chairman Lenhard raised in his posted  
10 questions on the web.

11 But whenever I think about whether  
12 we should retain time and space, I always  
13 think about the phone bank poll that would  
14 say, "John McCain's great, John McCain's a  
15 war hero, John McCain would protect us  
16 nationally, John McCain's good on taxes, John  
17 McCain's good on Social Security, oh by the  
18 way, elect Dinglethorpe and Shaw."

19 You really want to have time and  
20 space available I think -- for the  
21 Commission, I would think -- and enforcing  
22 allocation regulations for a phone bank just



1 like that one. So while I agree that there's  
2 a difficulty in television, I always think of  
3 that phone bank thing -- that call to someone  
4 on Election Day. You can split that 50/50 or  
5 25/25/25. Anyway.

6 MR. JOSEFIAK: One other point is  
7 to try to relive history here -- there is  
8 technology now where you can put this on your  
9 own computer screen and second-by-second,  
10 frame-by-frame go through it and feel fairly  
11 comfortable that you are allocating this in a  
12 manner that is based on time and space.

13 MS. DUNCAN: Thank you.

14 MR. LENHARD: Vice Chairman Mason?

15 MR. MASON: I just want to follow  
16 up on that, but first, I want to go back to  
17 this enforcement premise and say that I  
18 personally am highly dissatisfied by that.

19 Any agency that enforces  
20 regulations sometimes ends up in the  
21 enforcement process in trying to determine  
22 the fine points. None of you gentlemen want

1 your clients -- Mr. Hoersting may not have  
2 clients with the hat he's got on - who are  
3 likely to be here. With the other two, you  
4 don't want your clients, your parties, your  
5 candidates, in the enforcement process.

6 And the first thing I can tell  
7 you -- the first thing you'll tell us is,  
8 "Oh, you didn't say that." It's not fair in  
9 the enforcement process to come along and  
10 issue an interpretation that wasn't out there  
11 before, and so the Commission -- and there's  
12 six of us -- and there's party divisions and  
13 there's philosophical divisions, then it  
14 becomes very hard.

15 And when I'm in the enforcement  
16 process, what I'm looking for is where is the  
17 ruler, where is the ruler? And if the only  
18 thing is reasonability, there isn't one. I'm  
19 not comfortable sitting here and making some  
20 kind of jury-style tort reasonability  
21 analysis to go back in and then make a  
22 \$40 million repayment analysis.

1                   And that's why we're here.

2                   I know Commissioner Weintraub was  
3 frustrated by that answer. I want to express  
4 that as well. And if it really is the  
5 unified position of the party that the  
6 enforcement process is the way to work these  
7 things out, and that we should make repayment  
8 determinations and assess fines because you  
9 in good faith made a determination and the  
10 Commission six months or a year or two years  
11 later made a different reasonableness  
12 interpretation, then fine, let's get that out  
13 and go down that road. I don't think you  
14 want to be there, either, so I think what  
15 you're suggesting is well, give us leeway, I  
16 don't disagree with that.

17                   I think a regulation ought to be  
18 flexible, but if there's a suggestion that  
19 the enforcement process is a good way to  
20 flesh out the contours of that regulation.  
21 I'd just reject it.

22                   And I want to go back to the video

1 thing, because I understand that you could  
2 sit there and -- my first experience was back  
3 to the '96 campaign, so then-Commissioner  
4 Thomas in very good faith wanted to queue up  
5 the ads and have the Commission watch the ads  
6 and make a determination.

7 I was not satisfied there because  
8 we couldn't answer before we watched the ads  
9 what we were looking for. And I didn't want  
10 to be in a position of just sort of looking  
11 at the ads and deciding, well, were these  
12 really party ads, were these candidate ads?  
13 It was a different set of legal issues, but  
14 it was the same ultimate question.

15 And we could reach very different  
16 judgments in looking frame-by-frame about,  
17 for instance, what a picture of the Capitol  
18 meant.

19 And the problem I have is  
20 Mr. Hoersting's problem -- there -- how are  
21 we supposed to judge what whether a picture  
22 of the Capitol, because Congress meets in the

1 Capitol -- goes to House and Senate  
2 candidates or does it go to something else.

3           And when you start matching up the  
4 video, the audio and the text, then I think  
5 you end up with a very mushy sort of  
6 regulation. Now, I'm not uncomfortable  
7 giving parties and candidates in that context  
8 a significant amount of leeway, but I want  
9 some kind of bound or some kind of a criteria  
10 out there -- which is why for instance, a  
11 minimum percentage is very appealing, because  
12 then it puts some sort of bound out there,  
13 some ultimate bound on how far can you go,  
14 and if you disagree with the judgment, where  
15 can you take it?

16           But let me just get back to this:  
17 Do you really want to have a situation where  
18 in order to defend your time and space  
19 analysis, you have to have some kind of memo  
20 of -- okay, here's what we did. We sat down  
21 and went through frame-by-frame, and here's  
22 how we allocated it this way, and then have

1 the Commission second-guessing that.

2 Is that what you want?

3 MR. JOSEFIAK: I guess I'd be  
4 curious why the Commission would even  
5 second-guess it. I guess that's where I  
6 would start off --

7 MR. MASON: Because we have a  
8 regulation that says reasonable, and we're  
9 enforcing the regulation, and we have an  
10 obligation to determine whether that was  
11 reasonable or not. And if we have no  
12 description of how the decision was reached,  
13 then how do we know if this is reasonable?

14 MR. JOSEFIAK: By looking at the ad  
15 and making a decision whether it's  
16 reasonable. That's my point. When I first  
17 opened -- in my opening remarks, I said I  
18 don't think you need a regulation to allow  
19 this to occur. However, in my personal  
20 opinion, because everyone doesn't live inside  
21 the Beltway, and everyone isn't going to  
22 spend the time that we have to spend going

1 through ad by ad, that they need some  
2 direction. And so that I understand that it  
3 needs to happen.

4           Having said that, the question is  
5 where do you draw the line? And my view is  
6 that you leave as much flexibility with the  
7 party committees to make that decision how  
8 they're going to identify themselves, and  
9 what is and what is not in their view the  
10 generic message.

11           And that's where I said if someone  
12 has a problem with that, then you have the  
13 enforcement mechanism, but I certainly think  
14 there has to be a sort of a blueprint as to  
15 what is sort of an acceptable proposition. I  
16 feel very comfortable that both parties  
17 followed that in the past and will continue  
18 to follow that, but obviously, people on the  
19 agency don't feel that way, and that's what  
20 is sort of baffling to me, quite frankly, on  
21 the history of where this agency has been in  
22 the past.





1 make this as simple and reasonable as  
2 possible is fine, but I'm not worried about  
3 time and space.

4 MR. LENHARD: Commissioner von  
5 Spakovsky?

6 MR. von SPAKOVSKY: Gentlemen, let  
7 me ask you a question about a comment that  
8 former Commissioner Sandstrom, his client, Mark  
9 Brewer -- who's the President of the  
10 Association of State Democratic Chairs put in.  
11 And his comment was -- he says the allocation  
12 rule for a phone bank should not be different  
13 from the rule for direct mail or for a  
14 broadcast communication, because he says  
15 different allocation requirements would  
16 regularly lead to unwitting violations of the  
17 law. And I think he's particularly talking  
18 about local and state parties who are not as  
19 up-to-date.

20 We've heard some comments and some  
21 arguments that while the rule should be  
22 different for different kinds of media, would

1 they have different effects. What do you all  
2 think about that particular comment?

3 MR. REIFF: I think the Commission  
4 can craft a rule that can be a unified rule for  
5 all types of public communications, and then  
6 of course the nature of each communication  
7 will take care of itself, because for  
8 example, if you were doing a GOTV phone  
9 bank and you're only getting on and off the  
10 phone in 10 seconds and you're saying vote  
11 for Smith and the rest of the Democratic  
12 ticket, by its own nature, it will be more  
13 likely to be a 50/50 split. If you're doing  
14 a mail piece and you're devoting more time to  
15 a candidate-specific communication, by its  
16 own nature, it will be a higher candidate  
17 percentage to the allocation.

18 So I think the Commission can craft  
19 a rule that is flexible for different types  
20 of communications. So I don't have a problem  
21 with there being one unified regulation for  
22 all public communications.

1                   MR. JOSEFIAK: Commissioner, I  
2 agree with that. Our comments actually  
3 reflect that 106.8 should be amended to  
4 reflect that it applies to everything in one  
5 place. And Neil is right, it was easy  
6 and quite frankly practical when the  
7 Commission developed the rule on phones,  
8 because usually a phone is a very short  
9 message and it made sense for all  
10 practical purposes, it would be somewhere in  
11 the range of 50/50.

12                   The mail advisory opinion obviously  
13 is a little more challenging, because the  
14 rhetoric is longer and mail can be from one  
15 page to 50 pages depending on what the  
16 message is.

17                   TV creates its own little  
18 challenges, and radio does as well, but  
19 again -- going back to the time and space  
20 analogy that it all sort of works out. But  
21 I think we've had experiences with the  
22 phones, we've had experiences with the mail

1 based on the advisory opinion. We've had the  
2 experience with TV and radio, and now  
3 based on the '04 cycle. And I think the  
4 Commission, quite frankly, could look at all  
5 of that in the context of developing a single  
6 rule that would be fair across the board so  
7 there wouldn't have to be multiple --

8 MR. REIFF: And I'll say this, the  
9 Commission wrote a rule for phone banks, and  
10 I think it was based on -- and you can  
11 correct me if I'm wrong -- a very simplistic  
12 assumption, that phone banks were a very  
13 quick in-and-out message. You get on the  
14 phone and you say vote for in the ticket and  
15 you're out, and I think the regulation was  
16 based upon that simplistic assumption.

17 Then two years later, you had the  
18 opportunity to re-address the same exact  
19 issue with mail, and you could have gone the  
20 route of saying, okay, we'll just, by  
21 analogy, take the phone bank reg and apply it  
22 to the mail. But the Commission I believe

1 recognized that mail was a different animal  
2 than this phone bank regulation, and crafted  
3 a more flexible rule. So it's clear that the  
4 Commission can craft a rule that covers  
5 different types of media.

6 MR. LENHARD: Commissioner Walther.

7 MR. WALTHER: I think there is a  
8 special problem when you have different  
9 mediums and we have a telephone conversation  
10 where there could be back-and-forth on the  
11 conversation. Or we have a mailer which is  
12 really you're talking about basically  
13 space -- if you want to look it that way,  
14 unless you want to look at factors beyond  
15 that.

16 But when we get to the  
17 television -- I doubt any of you may remember  
18 this in person -- but I certainly do in 1964  
19 when they had that one ad. I don't remember if  
20 it even had any visual, any audio or not,  
21 but it was about the little girl picking the  
22 petal off the flower and the mushroom cloud

1 behind her and that -- and some would argue  
2 that it sunk the Presidential campaign.

3           Then how do we measure that? So I  
4 think we don't really feel like we want to  
5 get in the business of doing that, measuring  
6 the impact of a visual message. So I think  
7 we're striving for a brightline rule of some  
8 kind. If that's so, and if most of the  
9 money -- like 80 percent to 90 percent of the  
10 money is really spent on hybrid ads for the  
11 Presidential election -- intuitively, it  
12 tells me that that's really -- the President  
13 has the biggest benefit to be derived -- how  
14 would you feel about a higher percentage  
15 based upon the office?

16           Here is a President as opposed to  
17 Senator candidate, with some flexibility  
18 above that. So a minimum of X for one office  
19 who is the President, but Y for Congress or  
20 Senate?

21           MR. HOERSTING: I'm not either of  
22 the party committees -- I'm sure you know

1 that, but I used to be. What I'd say to  
2 that, frankly, is, I would not prefer that  
3 approach. And I think the way to look at the  
4 other side of the coin of what you said,  
5 Commissioner, is it is the judgment of the  
6 national party committee that by tying with  
7 the Presidential candidate, they most  
8 benefit their down-ticket candidates.

9 That's what they're really doing.  
10 You know, one could fairly say that. As  
11 fairly as you said the other, I could fairly  
12 say the reason they're tying to Bush is  
13 because that's how they get the Senators and  
14 House members elected until '06. Then they  
15 wouldn't do anything with Bush, because it  
16 killed them to be affiliated with Bush.

17 But you see my point?

18 It's not that they run hybrid ads  
19 just to elect the President, they run at the  
20 top of the ticket because those generic  
21 references help everybody down-ticket. And I  
22 don't think the Commission has any evidence

1 for saying otherwise, frankly.

2 And the method of going by the  
3 number of participants or time and space has  
4 the benefit of keeping those decisions within  
5 the party committees - the speakers.

6 MR. WALTHER: There is a little bit  
7 of evidence in that respect, if you want to  
8 spend a little more time on that. But if you  
9 look at some of the way the money was spent,  
10 say, in Michigan, Minnesota, and New Mexico,  
11 they spent a total of \$20 million on hybrid  
12 TV ads where the candidates themselves only  
13 spent a minuscule amount.

14 I can't remember, like -- it was  
15 \$407,000 on TV ads. And it does tell me that  
16 in those particular cases, the candidates  
17 certainly would have spent a lot more money  
18 if they were -- if that was a true measure of  
19 what the impact was going to be. But some of  
20 those races were not even close.

21 So if you look at it from that  
22 perspective, that doesn't always bear out,



1 because a lot of times, the money's spent  
2 where there's -- like in Michigan, for  
3 example, I think there were 15 Congressional  
4 candidates, and only one had a close race.

5 MR. REIFF: I don't think the  
6 Commission should be in a position to write a  
7 regulation based upon impact. I think the  
8 Commission has to take a fact pattern that's  
9 put before it in a particular ad and they  
10 have to make a judgment based upon a  
11 particular communication. And I think it  
12 would be a dangerous precedent for the  
13 Commission to start saying that one type of  
14 federal office has more value than another  
15 federal office.

16 And I don't believe there's  
17 anywhere else in the federal law regulations  
18 where such a value judgment is made, other  
19 than to say that there are better limits for  
20 different races. But in terms of the  
21 Commission writing allocation regulations, I  
22 think that wouldn't be a good precedent to

1 do.

2 MR. JOSEFIAK: The other thing,  
3 Commissioner, you gave the impression that  
4 the candidates didn't spend any money in  
5 those states. You mentioned the \$20 million  
6 that were spent, when theoretically they  
7 spent 10, because it was still their money,  
8 but they decided they were going to  
9 coordinate with the party with a generic  
10 message as opposed to just doing a  
11 100 percent candidate spot.

12 So the other 400 and whatever  
13 thousand they were spending in that state was  
14 a 100 percent candidate spot, because they  
15 decided they wanted it to be left alone and  
16 not be tied to anybody else. So it's not  
17 like they didn't spend the money. They spent  
18 it in cooperation and coordination with the  
19 party. And I think that's an important point  
20 to make --

21 MR. LENHARD: I want to go back I  
22 think to a point that the Vice Chairman was

1 wrestling with, which is what do we - to the  
2 degree that you're seeking a standard or that  
3 we're looking at considering a standard that is  
4 very flexible or ambiguous -- how that relates  
5 to the enforcement process.

6           And I've given a hypothetical in I  
7 guess my questions to Mr. Josefiak, that of  
8 an ad -- and this goes more to the point, but  
9 that I think both Mr. Josefiak and  
10 Mr. Hoersting raised, which is that the party  
11 should be free to create their own nicknames.

12           And my question is, doesn't that  
13 include, unfortunately, as we're wrestling  
14 through this, making up the nicknames of your  
15 opponents? And the example I drafted was  
16 Candidate X stood shoulder to shoulder with  
17 those who are soft on terrorism. In vote  
18 after vote, she has refused to give our  
19 troops the support they need.

20           And my sense from the colloquy here  
21 is that you're comfortable with a world  
22 where, whether the Democratic Party is -- the

1 Soft-on-Terrorism Party -- the nickname for  
2 the Democratic Party is one that's best left  
3 to the enforcement action -- if people want to  
4 take their chances with that, so be it. But  
5 I'm not sure that's really what you were  
6 saying.

7 But that's often the practical  
8 world we find ourselves in, and I think the  
9 source of some of his frustrations, certainly  
10 some of mine.

11 MR. HOERSTING: You're looking for  
12 objective evidence of a party placeholder.  
13 At least that's the way I'd say it. I'm not  
14 quite sure how you'd say it, Chairman Lenhard.  
15 You're looking for objective evidence of a  
16 party placeholder, and you're wondering if  
17 those soft on terrorism is sufficient.

18 It may not be sufficient.

19 But another thing I do want to  
20 point out -- and it's a related point, I  
21 think it's important, though. If you look at  
22 your hypothetical in your question, it says

1 Candidate X has stood shoulder to shoulder  
2 with those who are soft on terrorism. In  
3 vote after vote, Candidate X has refused.  
4 But it says nothing about what those who are  
5 "soft on terrorism" have done or have not  
6 done, what they believe or do not believe,  
7 votes they have cast or have not cast.

8           Whereas if you look at every ad in  
9 the '04 cycle, it says Bush and our leaders  
10 in Congress have a plan. John Kerry and the  
11 liberals in Congress side -- both of them are  
12 taking these actions, hold these beliefs,  
13 have cast these votes. That's absent in your  
14 hypothetical. You don't have anybody who is  
15 "soft on terrorism" doing anything, believing  
16 in anything, espousing policies, casting  
17 votes.

18           And I think that's a very important  
19 point. I'm not sure quite how to think about  
20 it. It struck me last night when you posed  
21 these questions -- I'm not sure how the  
22 Commission works this in or whether you



1 terrorism" as a moniker for the opponents. I  
2 don't know that. You might not be.

3           What I think you should do is I  
4 think you should -- if you're willing to  
5 craft a rule, you should put a bunch of  
6 examples of what you believe to be adequate  
7 party placeholders, or what some people might  
8 call a generic party reference. And if  
9 someone wants to run an ad that doesn't fit  
10 within that, then they have to go to the  
11 enforcement process.

12           That leaves open their ability to  
13 actually speak, to use the words "soft on  
14 terrorism."

15           Two things -- I don't think you're  
16 going to actually see that ad. I don't think  
17 you are. And the other thing is you've  
18 already accommodated for the possibility  
19 they're going to be in trouble in the  
20 enforcement process, yet you've allowed them  
21 to exercise their First Amendment rights.

22           Sorry for the long answer.

1           MR. LENHARD: The length of the  
2 answer I think is fine. I guess what I'm  
3 struggling with -- I think that saying  
4 someone's soft on terrorism is casting them  
5 or giving them a position on a policy issue  
6 that is pejorative but real.

7           But I guess the more fundamental  
8 question is do you believe that generic party  
9 references -- a reference to a group only  
10 qualifies as a generic party reference to the  
11 degree that you ascribe a policy position to  
12 them? And can you characterize whether  
13 that's a good or bad policy position.

14           MR. HOERSTING: What I'm saying is  
15 that in each of the ads you're dealing with,  
16 you always see the other organization -- be  
17 it liberals in Congress. Some people are  
18 saying, listen, you either have to have  
19 Republicans in Congress, or you have to have  
20 Democrats in Congress, or it's not a generic  
21 party reference, because otherwise, you can't  
22 expect the voters to vote against their



1 opponents -- let's say, for liberals in  
2 Congress.

3 But in your scenario, you have  
4 Candidate X doing a lot of things. You have  
5 Candidate X standing shoulder to shoulder  
6 with people, but you don't have the  
7 Soft-on-Terrorism people voting, you don't  
8 have them believing anything. And I'm just  
9 saying it would be rare that you would ever  
10 see a hybrid ad that looks like that.

11 And perhaps, Tom and Neil will  
12 either jump in and disagree with me  
13 vehemently or they'll say yeah, you would  
14 never see a hybrid ad like that. You just  
15 wouldn't see one like that."

16 MR. LENHARD: Gentlemen, an  
17 opportunity to jump in.

18 MR. JOSEFIAK: Chairman, I struggle  
19 with your example because first of all, I  
20 wouldn't do it. I wouldn't let that go as  
21 being what I'd consider a hybrid ad, because  
22 there's -- but I think the mistake again that

1 people are making, is they're taking a line out  
2 of context, and it's a script versus looking  
3 at an ad that again has the visuals.

4 Liberals in Congress with Ted  
5 Kennedy and a bunch of other people that  
6 people already recognize as leaders of the  
7 Democratic Party, it was clear in my mind  
8 that we were talking about Democrats. And I  
9 don't think Democrats would disagree with  
10 that. But at the same time, in an amorphous  
11 setting, like she votes with people who are  
12 soft on terror, it doesn't say where she is  
13 or what she is doing or what the exhortation  
14 is -- vote for whom?

15 And so I think that you've got to  
16 look at it in the context of what the ad is,  
17 and not a line from an ad as to whether or  
18 not it meets the standard. And that was what  
19 I was struggling with, because this in my  
20 mind doesn't say anything to me that says  
21 it's a hybrid ad. But I don't see the rest  
22 of the ad to make that determination. But

1 that alone in my mind wouldn't qualify,  
2 because it's amorphous.

3 MR. LENHARD: Vice Chairman Mason.

4 MR. MASON: I just want to hone in  
5 on this. Maybe Michael Bloomberg will found  
6 a party or affiliate with a party. And  
7 Mr. Bloomberg's party could run an ad that  
8 says, "There are two parties in  
9 Washington: the evil party and the stupid  
10 party. It's time for competence and common  
11 sense. Vote Bloomberg."

12 MR. JOSEFIK: The difference is --

13 MR. MASON: But what happens to  
14 that?

15 MR. JOSEFIK: Bloomberg doesn't  
16 have to use a party.

17 (Laughter)

18 MR. MASON: Does that qualify? I  
19 mean, that gets to nicknames. I mean, the  
20 GOP is a pretty common nickname for the  
21 Republican Party, and that's pretty easy. I  
22 mean, most of the time, the Republican Party

1 doesn't use that acronym in its ads. But you  
2 could go through and do some market research  
3 and all of a sudden conclude, "Hey, you know  
4 what? People like that."

5 And that would be easy. But when  
6 you get beyond that, it seems to me you need  
7 some bound for what constitutes a generic  
8 reference and --

9 MR. JOSEFIAK: But I guess the  
10 first question I have would have in your  
11 example, is he saying vote for or against  
12 their candidates for President, which is  
13 voting -- or is it vote against the party  
14 leaders in party -- in Congress. But you  
15 don't vote for the party, you vote for  
16 candidate --

17 MR. MASON: The question is, does  
18 that constitute a generic party reference. I  
19 mean, you know --

20 MR. JOSEFIAK: Sure it does.

21 MR. MASON: We can -- so you --

22 MR. JOSEFIAK: The reference is

1 generic, but what the implication is when  
2 Bloomberg is putting out an ad talking about  
3 a party, is he talking about the Presidential  
4 candidates of that party, or is he talking  
5 about something else that would consider  
6 itself to be a --

7 MR. MASON: Let's assume that they  
8 throw in enough to indicate the whole party  
9 and other candidates, that you would say that  
10 those names -- "evil" and "stupid" are  
11 effective generic party references.

12 MR. JOSEFIK: If he's only talking  
13 about two parties, well then we got to decide  
14 which one is which.

15 MR. LENHARD: Commissioner  
16 Weintraub.

17 MS. WEINTRAUB: Thank you. I also  
18 wanted to follow up on part of the exchange.  
19 And by the way, Mr. Josefiak, I completely  
20 agree with you, Ted Kennedy is definitely a  
21 Democrat.

22 I think part of the exchange

1 between the Chairman and Steve brought up  
2 something that I was thinking about when I read  
3 your response to the Chairman's questions  
4 that you had posted on your website, and it  
5 seems to me that what you're suggesting is a  
6 more content-based investigation where we would  
7 have to go into the content of the ad and say  
8 not only who's identified, but what are we  
9 saying about them?

10 Are we saying good things about  
11 them? Are we saying bad things about them?  
12 Are we saying how they vote or what positions  
13 they've taken? And that struck me as going  
14 sort of in the opposite direction from most  
15 of the comments. And I was curious whether  
16 Tom and Neil have the same reaction that I  
17 did, that maybe we don't want to go down that  
18 road.

19 MR. JOSEFIK: I certainly would  
20 agree.

21 MR. REIFF: I'd definitely agree.  
22 That's why I think we need to -- our approach

1 to generic party references I think is a  
2 clear rule, it's easy to understand, and I  
3 think it would be less intrusive.

4 MR. LENHARD: Ms. Duncan.

5 MS. DUNCAN: Thank you. This may  
6 be a bit of a repetition of the last  
7 question, but I think it might be important  
8 to ask. And at the risk of simplifying what  
9 I think your positions are on generic party  
10 references, it seems that Mr. Hoersting would  
11 look only for objective evidence of a party  
12 placeholder for that, and Mr. Josefiak at base  
13 would allow the party really to define what  
14 the generic party reference is.

15 And it seemed that Mr. Reiff, in  
16 your comments, you went further than that and  
17 added some more structure to indicate that at  
18 least the party nickname would be required.  
19 And I just wondered if you would talk a bit  
20 more about that. You've answered briefly in  
21 response to Commissioner Weintraub's  
22 question.





1 without reference to any candidates.

2 And you can craft a regulation that  
3 says that portion of the ad, then tracking  
4 that language I'd suggest would be a good  
5 approach.

6 MS. DUNCAN: Thank you. That's  
7 all.

8 MR. JOSEFIAK: I still think that  
9 even under that approach, you would have to  
10 define what you mean by "clearly identified."

11 MR. REIFF: Sure.

12 MR. JOSEFIAK: Because it gets into  
13 the whole nickname thing again. GOP is  
14 clearly identified to some; it may not be to  
15 others. I think you're just going to have to  
16 figure out where you're going to draw that  
17 line.

18 MR. HOERSTING: The Commission  
19 should -- when I say "objective evidence,"  
20 the Commission can't obviously rely entirely  
21 on the party committees to tell them where  
22 their generic reference is. They have to set

1 a standard. I say give examples. And if a  
2 party committee says, hey, we want to go. We  
3 believe in the enforcement case. We can  
4 convince you that even though you didn't put  
5 this in as an example five, six years ago,  
6 it's valuable now as a legitimate party  
7 placeholder. And that's the way I see it.

8 MR. LENHARD: Okay.

9 MR. JOSEFIAK: And the way I see it  
10 is, it's our responsibility to look at  
11 whatever regulation you come up with and make  
12 sure that we feel comfortable enough that it  
13 fits under that standard without you having  
14 to spell it out exactly what that standard  
15 is. And we'll take that responsibility, but  
16 we recognize that you will come up with a  
17 standard.

18 MR. LENHARD: Any other questions,  
19 comments, thoughts?

20 Ms. Clark, any thoughts from the  
21 Staff Director's office at this point?

22 MS. CLARK: No, Mr. Chairman.





1 represented.

2 I'll briefly summarize the RNC's  
3 and the NRCC and the NRSC's comments, and  
4 then make one or two additional points.

5 In sum, we believe that the  
6 Commission's existing regulations are  
7 adequate to govern hybrid ads -- and that is,  
8 ads with a specific federal candidate and a  
9 generic party reference -- a specific federal  
10 candidate or candidates and a generic party  
11 reference based upon time/space.

12 As a personal matter, I would have  
13 no objection to a 50/50 safe harbor provision  
14 for a single candidate ad in the Presidential  
15 context.

16 Mr. Josefiak covered that earlier  
17 this morning, and I believe as he does that  
18 in context outside of the Presidential  
19 campaigns, I can certainly envision  
20 situations in which a 50/50 split may not be  
21 appropriate, or may not govern.

22 With respect to the generic party



1 certainly are aware of that.

2 Recognizing, however, that not  
3 everybody deals with this on a day-to-day  
4 basis inside the Beltway, and that the  
5 Commission is subject to change in personnel,  
6 and that the law does change --

7 MS. WEINTRAUB: Don't rub it in --

8 MR. CAIRNCROSS: No, it's --

9 MR. LENHARD: He's referring to the  
10 empty chair.

11 MR. CAIRNCROSS: That's correct.

12 Thank you. Tap dancing for a second.

13 That if a regulation is necessary,  
14 we do believe a unified approach works well,  
15 and that would be as we stated in our  
16 comments, to amend 106.8 to cover all  
17 communications, and it would also entail some  
18 addition of language addressing multiparty or  
19 multi-candidate ads, and that would also then  
20 be allocated on a time/space ratio.

21 Thank you very much.

22 MR. LENHARD: Thank you. I believe,

1 Mr. Elias, you're next.

2 MR. ELIAS: Thank you,  
3 Mr. Chairman, members of the Commission.  
4 I'll try to be brief, and make two points  
5 which were not covered in our written  
6 comments for my opening statement.

7 Several weeks ago, I had the honor  
8 and the privilege of testifying for the  
9 Senate Rules Committee, something I know  
10 several of you have had the honor and  
11 privilege of doing recently as well.

12 My topic was less interesting,  
13 which was the potential repeal of Section  
14 441a(d), and let me just state clearly at  
15 the outset for clarity's sake, I testified  
16 there and offered my own personal views, not  
17 those of the Democratic Senatorial Campaign  
18 Committee or any others.

19 But in my testimony there, which  
20 raised some eyebrows, I think, I vigorously  
21 defended the need to keep the 441a(d)  
22 limits. And one of the reasons for that,



1     which I received vigorous questioning from  
2     from both sides of the aisle, had to do with  
3     the fact that this agency is capable of  
4     having rules that give parties breathing room  
5     under the 441a(d) limits.

6             You are not bound to a fixed  
7     interpretation of 441a(d) that counts every  
8     dime that is ever spent in a way that might  
9     benefit a candidate against 441a(d). And  
10    as a matter of public policy, I argued to the  
11    Senate Rules Committee, it would be better to  
12    allow the law to develop at the  
13    administrative level in a fashion that allows  
14    441a(d) to remain, but allow it to remain  
15    in an environment where parties are given  
16    wide latitude to determine which expenditures  
17    are and are not counted against that limit.

18            This rulemaking is the first  
19    opportunity to see whether or not my  
20    prediction to the Senate Rules Committee  
21    turns out to be correct or not.

22            Frankly, and I say this not with

1 any -- as someone who supports the 441a(d)  
2 limits, I suppose I say this hopefully -- I  
3 hope you come to a conclusion that does not  
4 push Congress in the direction that frankly  
5 on a bipartisan basis -- and interestingly  
6 enough, on across the spectrum basis they seem to  
7 be leaning -- which was that the requirement  
8 that every party expenditure, or most party  
9 expenditures that involve public  
10 communications, be counted against 441a(d),  
11 is not desirable.

12           And I think you have an opportunity  
13 here in the hybrid rulemaking context to  
14 make clear that that's not true, that there  
15 are going to be ads that benefit the party,  
16 benefit candidates, and in that way, give  
17 parties the opportunity to manage their  
18 441a(d) limit in a way that does not  
19 require its ultimate repeal. That's one of  
20 the reasons why I support the 50/50 extension  
21 of the phone bank regs to other forms of  
22 public communications.



1 is preferable to something that's not clear  
2 and not brightline. So as between a 50/50  
3 rule that may in some cases be slightly  
4 over-inclusive, in some cases might be  
5 slightly under-inclusive, or a -- how do I  
6 measure an ad versus how does Mr. McGahn  
7 measure an ad, and how does the General  
8 Counsel's office treat a visual of this  
9 candidate versus a visual of a party. Rather  
10 than getting into the uncertainties that come  
11 with that, I'd rather have this Commission  
12 put forward brightline, clear rules so that  
13 we don't wind up in a situation where we're  
14 explaining to our clients again, "Well, you  
15 see, it's not actually that simple."

16 If they hear me say one more time  
17 it's not that simple, they may fire me, which  
18 would be unfortunate for me and my family and  
19 my firm. So those are the two points I  
20 wanted to make.

21 One is that as you go about today,  
22 I would have you keep in mind the fact that

1 what you're doing involves all hard  
2 money and is actually a way to preserve the  
3 current regulatory regime. And second, that  
4 I'd urge the Commission to take an approach  
5 that is going to value simplicity over  
6 100 percent precision.

7 Thank you.

8 MR. LENHARD: Thank you very much.

9 Mr. McGahn, you are next.

10 MR. MCGAHN: Mr. Chairman, Mr. Vice  
11 Chairman, Commissioners, I appreciate the  
12 opportunity to be here and testify today on  
13 behalf of the NRCC and the Illinois  
14 Republican Party. First, I'd like to note  
15 that we appreciate the Chairman's questions  
16 ahead of time. I had never seen that before.  
17 Very helpful in preparing the testimony. I  
18 hope to address those in my opening comments,  
19 and then if there's follow-up questions,  
20 happy to answer those questions.

21 My clients want to bring a little  
22 bit different perspective to the table, and

1 that is those who are not running for  
2 President, those who do not necessarily think  
3 of hybrid ads as their first method of  
4 communication but nonetheless would wish to  
5 maybe have it be something in the future they  
6 would like to do depending on the circumstances.

7 I caution the Commission against  
8 passing a rule too soon, and a rule that  
9 would preclude future conduct by party  
10 committees and other federal candidates other  
11 than those running for President, in an  
12 effort to judge what the last cycle or cycle  
13 before did or did not do.

14 For example, it's certainly within  
15 the realm of possibility that a state party  
16 would like to do an ad that uses a federal  
17 candidate in the ad to simply draw attention.

18 The federal candidate gets on  
19 screen and says, "I'm Congressman Jones, and  
20 like I've done in Washington, the Republican  
21 Party in Illinois is really doing the job  
22 standing up for Illinois values,"



1 recommend -- we see that as the current law,  
2 and we think that works fine from our  
3 perspective -- or a 50/50 or some other rule,  
4 it really begs the question as to what is a  
5 party reference.

6           Clearly, if you say Republican or  
7 Democrat, I think we all agree that's a party  
8 reference. To turn to the Chairman's  
9 questions, and in order -- Congressman X has  
10 been battling the Liberals in Washington, it is  
11 tough to say without seeing the full context  
12 of the ad on its face, on its four corners; I  
13 don't see a party reference there, nor do I  
14 see one for the second photo of the Capitol.

15           You really need context on that  
16 one.

17           The fourth quote, we think that's a  
18 maybe depending on context, because  
19 Presidential candidate again -- a little bit  
20 different than my clients working with  
21 Congressional leaders to pass key  
22 legislation. That could be a party reference



1 depending on what Congressional leaders we're  
2 talking about and what legislation we're  
3 talking about.

4           The fourth point, does it matter if  
5 an ad refers to other political actors and  
6 their status as legislatures or as opposed to  
7 candidates? I don't think so, because the  
8 party has the ability, whether or not they  
9 are actually flacking for a candidate or  
10 flacking for an issue position or just a  
11 party position, the distinction between  
12 referencing a legislator or a candidate I  
13 don't think is a distinction in this context.

14           It is maybe issue ad versus  
15 express advocacy in past MURs, but in this context,  
16 I think it's an apples and orange comparison.  
17 But that still begs the essential question of  
18 nicknames. The Illinois Republican Party is  
19 housed in the Land of Lincoln. It is the  
20 party of Lincoln. In Illinois, that's a  
21 nickname that makes a lot of sense. It's not  
22 something that someone in Hawaii would maybe

1 instinctively think of as a Republican thing.

2           But certainly for the Illinois  
3 Republican Party, that would be something  
4 that anyone looking at it would think that's  
5 a party nickname. So I heard Mr. Hoersting's  
6 comments early about providing examples.  
7 Those are always helpful. There's been prior  
8 rulemakings where there's been examples in  
9 the E&J, very helpful.

10           But again, you cannot possibly  
11 sitting here today come up with all the  
12 possible labels that someone may ascribe to a  
13 party committee, and ultimately, in addition  
14 to the possible circumvention arguments  
15 that are made, you're also touching the  
16 spending side, which is something that really  
17 is a little bit different when you pass a  
18 reg.

19           It is one thing to enforce limits,  
20 it's another thing to reach out and touch  
21 speech. And if you reach too far and try to  
22 be too precise with the nickname issue,

1 you're going to inevitably cut off creative  
2 thinking, which is something that my clients  
3 hope does not happen. With respect to the  
4 enforcement and -- I'll just wrap up. I see  
5 the red light is on.

6           Again, it's a situation where  
7 you're regulating spending, I think there  
8 needs to be some deference to determinations  
9 made at the time. This is not a novel  
10 concept in American jurisprudence. Appellate  
11 court review, child court rulings all the  
12 time. There's de novo review. There's  
13 clearly erroneous, and then there's the  
14 in-between abuse of discretion. Not really  
15 hard to see how that would work.

16           There is always a temptation of an  
17 auditor, General Counsel's office, or a  
18 Commissioner, or majority of the Commission  
19 to second-guess. But I think in this case  
20 there's precedent for deference.

21           Ever since the Commission is  
22 formed, FECA, BCRA, regardless of where we

1 were in our trajectory of law, there's always  
2 been wide discretion in the spending of  
3 campaign funds. It's not the sort of thing  
4 the Commission second-guesses.

5           Matching funds, different story.  
6 But regular campaign funds, Commission does  
7 not get in and micromanage whether or not  
8 that was legitimate campaign spending short  
9 of personal use. So there's precedent for  
10 deference. I think that could be useful here  
11 as an example.

12           And with that, I conclude my  
13 comments and I'm happy to answer any  
14 questions.

15           Thank you.

16           MR. LENHARD: Thank you very much.

17           Mr. Svoboda.

18           MR. SVOBODA: Thank you, everybody,  
19 for having us here, to the Commissioners, and  
20 thank you to the staff for helping set this  
21 up. I too am grateful to Chairman Lenhard  
22 for the questions, but also to Steve

1 Hoersting for the answers.

2           It's like a really smart guy in my  
3 law school section. He took good notes and  
4 made copies for everybody.

5           I'll be really brief. The big  
6 issue I think for the Commission here in this  
7 rulemaking is -- this is about how political  
8 parties are going to work after BCRA. When  
9 BCRA was written, there was great pains, I  
10 think, taken by the Congress to try to at  
11 least recognize the balance of the parties  
12 versus other players in the political  
13 process, once they passed the law and  
14 restricted various people from doing various  
15 things.

16           It's why, for example, you saw not  
17 simply a soft money ban on the national  
18 parties, and soft money restrictions on the  
19 state parties, but you saw also the  
20 electioneering communication restrictions on  
21 outside groups in Title II.

22           There was a great fear that the

1 power of the parties was going to be  
2 diminished relative to outside groups once  
3 the law began to play out. Well, it's  
4 appropriate we're here now, because two weeks  
5 ago, the Supreme Court just blew a hole of  
6 whatever size in Title II of BCRA. And how  
7 that's going to play out in terms of that  
8 distribution of power in the system really  
9 remains to be seen.

10 But it puts an urgent question  
11 before the Commission, which is, is the  
12 Commission's answer to that situation now at  
13 this time going to be to give parties the  
14 flexibility and the certainty they need to  
15 plan their own affairs and spend what is  
16 their own hard money? And I'd emphasize  
17 that, "Their own hard money," in light of  
18 these developments.

19 Or is the Commission's answer going  
20 to be altogether different -- as one of the  
21 commenters urged on the Commission -- to not  
22 only ask the parties to continue to operate

1 within the tight restrictions of Title I of  
2 BCRA, but to take the principles of those  
3 restrictions and apply them also to the  
4 question of what is or isn't a contribution,  
5 or what is or isn't a coordinated expenditure  
6 for purposes of the campaign finance laws.

7           And that would be an altogether new  
8 development for the Commission and for the  
9 Congress even in the history of the Federal  
10 Election Campaign Act. As my colleague Marc  
11 Elias mentioned and as Mr. McGahn mentioned,  
12 the Act and Commission advisory opinions and  
13 Commission rules are replete with  
14 instances where the Commission has stopped  
15 short of saying that every expense that can  
16 be construed to provide some level of benefit  
17 to a candidate has to be captured by the  
18 coordinated expenditure limits.

19           I mean, here at the House and  
20 Senate levels, we're about to see an example  
21 of that this cycle. There is a form of exempt  
22 activity available only to the Presidential

1 ticket that allows for telephone banks to  
2 support the Presidential ticket. And the  
3 Commission's interpretation of those rules  
4 has always allowed an incidental message of  
5 House or Senate candidates in that phone  
6 call.

7           Clearly, there's a benefit being  
8 derived to the House and Senate candidate.  
9 Clearly, in any even numbered year that's  
10 not divisible by four, you would have a  
11 contribution of coordinated expenditure. But  
12 you have nonetheless an example of where the  
13 Commission has allowed parties to spend money  
14 in support of its House and Senate candidates  
15 and not capture all of the benefit that  
16 they're going to derive.

17           The Commission has made a  
18 judgment - or Congress made a judgment -- that  
19 it was important to preserve the  
20 institutional power of the parties and their  
21 adherence with their candidates and their  
22 identification with their candidates to allow



1 these sorts of things to happen, that it was  
2 not simply good for the candidates, but it  
3 was good for the party as a whole.

4 And that brings me, I guess, to the  
5 last question -- fundamental question that's  
6 before the Commission today, which is, do the  
7 parties have a role -- do the parties have an  
8 interest that continues beyond the support of  
9 their candidates right here and right now?  
10 And the answer to that I think obviously is  
11 yes.

12 I mean, for example, I listened to  
13 some of the discussion in Panel 1 and some of  
14 the questions that Commissioner Walther asked  
15 about the use of hybrid advertising in  
16 battleground states, and how hybrid ads  
17 tended to be ran in battleground states such  
18 as Michigan.

19 Well, in Michigan for example, you  
20 saw very competitive races for the state  
21 legislature, where the balance of party  
22 control was very much at this moment in play.

1 And you saw Democratic gains that people on  
2 my side of the aisle were very happy about.  
3 You saw a Democratic governor who won  
4 re-election under circumstances where it did  
5 not seem at all assured going into the cycle,  
6 and you've recently seen a Democratic Senator  
7 win re-election.

8 So these Presidential cycles, even  
9 at that moment when people are thinking about  
10 a particular candidate, you have an interest  
11 for the party in building the party in a  
12 particular jurisdiction for the long haul,  
13 not simply for future Presidential races, but  
14 also at the state and local level as well.

15 So those are the questions I think  
16 we'd like the Commission to think about  
17 today, which is -- just what is the role of  
18 the parties after BCRA, and how much freedom  
19 are they going to have, or little freedom are  
20 they going to have to manage their hard money  
21 resources? And do they have anything to do  
22 other than simply supporting federal

1 candidates? And the answer to that latter  
2 question I think clearly is yes.

3 MR. LENHARD: Thank you very much.

4 Questions? Vice Chairman Mason?

5 MR. MASON: Thank you. Mr. McGahn,  
6 your comments reminded me of Richard Nixon.  
7 Everyone thinks of Richard Nixon as a  
8 supremely unpopular politician, but at one  
9 time, that was not the case. My former boss,  
10 Trent Lott, got elected to Congress the first  
11 time by appealing to voters in Mississippi  
12 that Dick Nixon needed Trent Lott in  
13 Congress. He doesn't want to remember that.  
14 That was there.

15 And what it reminded me of is the  
16 fact that in the 1970 elections, Nixon  
17 actually did ads for Republican candidates.  
18 Now, it was a little simpler -- of course we  
19 didn't have FECA -- and he wasn't a  
20 candidate. But it brought home the example,  
21 the reality of the fact that you might have  
22 someone -- and it would be very easy to

1     imagine for instance a popular Senator in a  
2     state being asked to cut an ad for the state  
3     party, say, on behalf of legislative  
4     candidates. And I don't think any of us  
5     would have the purpose of prohibiting that.

6             But if we did that, and you  
7     mentioned that it becomes a different problem  
8     if we had matching funds -- how would we  
9     write in such a distinction? In other words,  
10    let's say the Senator is in cycle but he's  
11    running away with the race, and that's all  
12    the more reason that the state party wants  
13    that Senator's support.

14            In other words, he's polling  
15    75 percent. And yeah, there's an opponent on  
16    the ballot, and so their strategy is to get  
17    everybody who pulls the lever for that  
18    Senator to pull the lever for their party's  
19    candidate, and yet there you got the Senator  
20    on screen.

21            How do we write a rule that allows  
22    a state party to pay for all of that but

1 doesn't allow the state party in the next  
2 state where the Senator's in a 50/50 race to  
3 put --

4 MR. MCGAHN: That's why -- you end  
5 up with the lesser of all evils, I think,  
6 unless you just deal with -- my clients would  
7 prefer a system where we can make judgments  
8 based upon what we think the value is to the  
9 respective participants in the ad. I'm not  
10 so sure that's going to go anywhere, so I'm  
11 not going to belabor that point, which is why  
12 to me, the time/space method makes the most  
13 sense because at least that is something that  
14 you can measure, and then when producing an  
15 ad objectively pass judgment on, at least as  
16 a lawyer advising the client, and at least  
17 the creative folks in the political world you  
18 can give them framework and say, well, it's  
19 going to be how much time somebody is on the  
20 screen versus the picture of Lincoln and the  
21 flag, and the eagle and everything else  
22 talking about the party sort of things.

1           And that is something that works;  
2       whereas the 50/50 doesn't necessarily reflect  
3       reality when it comes to how much time it's  
4       on the screen or what not.

5           I hope I don't personally remind  
6       you of Richard Nixon. I hope the ads Richard  
7       Nixon were in made you think of that. But I  
8       agree with the point, that you're going to  
9       have different things in different states,  
10      and different candidates are going to be in  
11      different perspectives. And what I see in  
12      the future is, because state parties are  
13      becoming increasingly limited as to what they  
14      can and can't do, and they have to  
15      essentially use all hard money -- when it  
16      counts anyway -- to use federal candidates  
17      who aren't in particularly competitive races  
18      to help whether to turn out a party message  
19      or what not.

20           And frankly, the candidate who may  
21      be running away with it probably doesn't  
22      really want to be in the party ad, but if all

1 of a sudden he has to pay 50 percent, he's  
2 going to say no. But if you can present an  
3 ad that says listen, you're going to be in it  
4 for five seconds and you're going to pay this  
5 much, can you do it? Okay, they may say yes  
6 to that. So it's a concern. And that's why  
7 I think time/space is really the proper  
8 approach, because that's something that you  
9 can objectively get a stopwatch and work  
10 with.

11 MR. CAIRNCROSS: I'll just add one  
12 thing to that which I think also supports  
13 time/space, and that is, even in a case, say  
14 a Senate race where the Senator is running  
15 away with it -- at that time -- politics is a  
16 very fluid thing, and I can think of at least  
17 one race last cycle where a Senator who was  
18 leading heavily suddenly was not. And  
19 therefore, the value to the Senator to being  
20 attached to an ad with the party may have  
21 suddenly increased -- and therefore, I think,  
22 time/space is probably -- is the correct way

1 to allocate that cost.

2 MR. LENHARD: Commissioner von  
3 Spakovsky.

4 MR. von SPAKOVSKY: I just want to  
5 follow-up on this. Mr. Elias, if I  
6 understood what you were saying, I think your  
7 view was that the time and space is, what,  
8 too complicated or too liable to  
9 second-guessing, and because of that, you'd  
10 prefer a simple rule, like if there's two  
11 federal candidates mentioned in a generic  
12 party reference, it's one-third, one-third,  
13 one-third. Is it because it is too liable to  
14 second-guessing?

15 MR. ELIAS: Yes. Let me say a  
16 couple of things about that. The first is  
17 it's not self-evident -- just to be clear, it  
18 would be fine with me -- but it's not  
19 self-evident that everybody else in this room  
20 would agree that a picture of "Lincoln, the  
21 flag, and an eagle" is equal in time/space to  
22 a picture of the candidate. And that's one



1 of the problems with time/space, is that  
2 you wind up -- how do you depict John Kerry  
3 and the Democrats? Okay, I know how you depict  
4 John Kerry, put up a big picture of John  
5 Kerry. Do you put a picture of the  
6 Capitol, do you put a picture of the  
7 Democratic headquarters building, put a  
8 picture -- a generic shot. Well, these are  
9 all real examples --

10 SPEAKER: So far so good.

11 MR. ELIAS: You do a shot of the  
12 chamber where you can't make out individual  
13 faces, but you see them all sort of sitting  
14 there? The problem I have with time/space is  
15 not conceptual. It's not conceptual. It's  
16 practical, which is that time/space for radio  
17 is relatively straightforward, and for mail,  
18 a little bit harder. For TV, I'll just tell  
19 you -- and I realize I'm sort of jumping hats  
20 here, so now I'm going -- I watched all of  
21 the Bush-Cheney ads, okay? All of them.

22 From the first ad they ran to the

1 last ad they ran. And it never occurred to  
2 me that it was anything other than 50/50.  
3 And I think if Mr. Josefiak was here, he  
4 would say that it never occurred to him as  
5 anything other than 50/50. In other words, I  
6 wasn't breaking out a ruler to see how it was  
7 they were going to depict Bush and how they  
8 were going to depict other generic  
9 Republicans unmentioned on the ballot. If I  
10 had done that and if he had done that, we'd  
11 have 350 FEC complaints pending before you  
12 right now.

13 We'd be back in the days in 1998,  
14 the National Republican Senatorial Committee  
15 filed a complaint against every ad run in the  
16 entire country by the Democratic Senatorial  
17 Campaign Committee. Back in the day of the  
18 issue ads. And we did the same thing back.  
19 And if we get -- and that was because back  
20 then, we had all this squishiness about issue  
21 ads. And now if we get into time/space, it's  
22 just an invitation into how do we decide

1 whether or not this was in fact -- frankly,  
2 if we want to go with Mr. McGahn's -- the  
3 parties decide how much benefit is derived  
4 with a presumption? That I think is easier.

5 MR. von SPAKOVSKY: You mentioned  
6 the difference between different media.  
7 We've had some discussion here about how there  
8 ought to be a unified rule because that's  
9 simpler. Would you prefer that even though  
10 there's easier ways of doing it with  
11 different kinds of media?

12 MR. ELIAS: I think there ought to  
13 be one unified rule.

14 MR. von SPAKOVSKY: Okay.

15 MR. LENHARD: Commissioner  
16 Weintraub.

17 MS. WEINTRAUB: Thank you. I  
18 assume, Mr. Elias, that you're not in favor  
19 of enforcement as a method of figuring it all  
20 out down the road.

21 MR. ELIAS: Let me just say one  
22 thing about that. The answer is no. I mean,

1 I think that there are regs that you all have  
2 passed over the years that lead to natural  
3 enforcement opportunities, and there are  
4 those that don't. I would advise for  
5 favorable consideration the polling reg;  
6 right? You can do it this way, you can do it  
7 this way, or you can do it any other way  
8 that's reasonable; okay?

9 Probably not that many FEC  
10 complaints get filed around the polling  
11 rules. They are both clear-cut. This number  
12 of days -- it counts this much. This number  
13 of days, it counts that much, and then when  
14 you get into allocation questions there's a  
15 lot of discretion left to the parties.

16 I will note one thing though about  
17 enforcement, which is that I believe -- and I  
18 may off by a couple -- but I believe that  
19 during the course of the 2004 campaign, John  
20 Kerry for President and Kerry Edwards 2004  
21 received 19 FEC complaints. So it was clear  
22 to me that the Republicans and the people who

1 didn't like Senator Kerry knew how to find  
2 the FEC and knew how to file a complaint.

3 I don't think I'm revealing any  
4 secrets. None of them involved hybrid ads,  
5 and as far as I know, none of the -- I'm sure  
6 the Bush Campaign found themselves in the  
7 similar position -- and none of those  
8 complaints involved -- as far as I know,  
9 obviously not privy to whatever is  
10 confidential with the agency -- but I assume  
11 none of those involved hybrid ads.

12 So I don't think there's a huge  
13 clamor of enforcement queued up against  
14 hybrid ads.

15 The DSCC ran hybrid ads in 2006.  
16 We did a lot of hybrid mail. We did a lot of  
17 hybrid radio. We did some hybrid television,  
18 and we did some hybrid phones. As far as I  
19 know, no complaints filed. So I don't fear  
20 the enforcement mechanism, because I don't  
21 think that there's a clamor for it out there,  
22 but I would not recommend that we gin one up.

1 MS. WEINTRAUB: If I may --

2 MR. LENHARD: Please --

3 MS. WEINTRAUB: I'll go back to you  
4 at first, and then I'll ask everyone else to  
5 comment -- but you said you're in favor of  
6 the 441a(d) limits, and I'm not sure that  
7 anyone else on the panel may agree with you  
8 on that, but you said that -- and that  
9 Congress was considering changing them. Of  
10 course they've been considering changing them  
11 for quite some time.

12 And obviously if they wanted to  
13 double the limits, they could. That's one  
14 option that's available to Congress. Now,  
15 one of the other commenters, who is not here  
16 with us on the panel, has suggested that a  
17 50/50 rule would be an effective doubling of  
18 the 441a(d) limits.

19 So I'm going to give you an  
20 opportunity to respond to that. How can we,  
21 given that we're supposed to be enforcing the  
22 441a(d) limits -- and I agree with everyone

1 who said we don't want to say every single  
2 thing that a party does should count against  
3 it -- but doubling the limits is kind of a  
4 big deal without Congressional action.

5 So I'll give you an opportunity to  
6 respond to that.

7 MR. ELIAS: Two things I'll say.  
8 One is I assume that the earlier person was a  
9 member of the reform industry or a reform  
10 group.

11 MS. WEINTRAUB: It's a written  
12 comment from -- yes.

13 MR. ELIAS: And what I find curious  
14 about this is -- I wake up one day in 2004  
15 and see what is now I understand to be a  
16 hybrid ad, the first Bush hybrid ad. There  
17 was an AP story later that day saying that  
18 this is what the Bush campaign did. I was  
19 the general counsel to the Kerry-Edwards  
20 campaign. I scratched my head and said, huh,  
21 that's interesting. And then I read that  
22 Larry Noble, who at the time was with one of

1 those groups, proclaims that it's perfectly  
2 legal. Okay. Fair enough.

3 I look at it, decide he's  
4 fundamentally right, we go ahead do the same  
5 thing. So now fast forward. It's time to  
6 deal with 441a(d) repeals. Turns out the  
7 reform industry was all in favor of repealing  
8 441a(d) as part of a deal to do away with  
9 527s. So I never quite know what to make of  
10 the comments from the reform industry about  
11 441a(d), because it seems like sometimes  
12 they're in favor of them. Sometimes  
13 they're in favor of getting rid of them, that  
14 they're functionally meaningless.

15 I mean, I testified on a panel with  
16 someone from one of the reform groups who was  
17 talking about how 441a(d) is functionally  
18 meaningless. So I'm not sure I know what to  
19 make of any one particular set of comments.  
20 I'll say this: It's not a doubling of the  
21 441a(d) limits.

22 The fact is, there's a benefit



1 derived by the party in these ads. I'm not  
2 arguing that the party should run ads that  
3 are simply candidate ads. I'm saying that  
4 hybrid ads benefit the party. What I guess  
5 I'm quarreling with slightly is that we  
6 should -- we should worry about the precision  
7 about whether or not that ad benefits the  
8 party 40 percent or 60 percent at any one ad.  
9 And we can just say you know what, we're just  
10 going to say as a fiat, those ads benefit the  
11 party 50/50.

12 MR. SVOBODA: And if I could add a  
13 comment to that. I got my start in politics  
14 before practicing law working for the  
15 Nebraska Democratic Party in 1988, when you  
16 might recall George Bush was running against  
17 Michael Dukakis, who was immensely popular in  
18 the state, and when Bob Kerry was running  
19 against Dave Karnes. Now, if you'd had an ad  
20 in Nebraska in 1988 sponsored by the Nebraska  
21 Democratic Party saying vote for Bob Kerrey  
22 and the Democratic ticket, the Campaign Legal

1 Center through their comments would say that  
2 100 percent of that value should be ascribed  
3 to Bob Kerrey, Elias and Svoboda would be here  
4 telling you it should be 50 percent. Our  
5 colleagues on the panel would be saying you  
6 should be allocated based on time/space.

7           If you'd asked his campaign manager  
8 in 1988, he would have told you that the  
9 value was zero. In fact, it would have been  
10 sub-zero. In fact, the NRSC would have taken  
11 that ad, put their disclaimer on it and run  
12 it -- to great effect. So that goes to show  
13 that all of these are rough judgments about  
14 benefit derived, and that there's some  
15 diminished benefit in most circumstances to a  
16 candidate in having a reference to a party as  
17 long as themselves, because if you left them  
18 to their own devices, you wouldn't have a  
19 picture of Abraham Lincoln and an eagle and  
20 the Capitol next to the candidate, you'd have  
21 just another picture of the candidate.

22           I mean, that's what they want. And

1 so there's necessarily some accommodation,  
2 some diminishment of the value that they make  
3 when they participate in the hybrid ad. So  
4 it's an example I think of how even time/space  
5 is not always a -- it's a rough judge  
6 for trying to figure out value, but it's not  
7 always an accurate one.

8 MR. CAIRNCROSS: Indeed, some of  
9 this goes to Commissioner Walther's questions  
10 earlier about target states and hybrid ads  
11 appearing therein. And the campaigns  
12 themselves and the candidates have to -- not  
13 just the parties -- have to make an  
14 assessment of value to these ads, and they  
15 are independent.

16 The parties not only have  
17 down-ticket concerns, but building the party  
18 brand is very important to the Republican  
19 Party. It's very important for us to try to  
20 attach our brand to our entire ticket of  
21 candidates, and thereby grow the party. So  
22 there's absolutely independent benefit that's

1 derived from a hybrid ad, from our  
2 perspective.

3 MS. WEINTRAUB: Do you have any  
4 evidence of that? I mean, we had asked if  
5 there was any empirical data. Nobody came up  
6 with any, so we have to look to other  
7 sources, I suppose. But what can you add to  
8 that, any of you, in terms of evidence for  
9 the benefit to the party of the hybrid ads.

10 MR. SVOBODA: Commissioner, I think  
11 actually that those benefits are extremely  
12 hard to quantify. I think they may be  
13 impossible to quantify. And I'll give you an  
14 example. The Republican Party from 1968 to  
15 1988 invested a lot at every level in their  
16 operations to develop the term "liberal" as a  
17 brand for the Democratic Party, and you know  
18 what? They succeeded.

19 And those efforts paid off -- I  
20 mean not simply in 1968 or 1972 -- I mean  
21 they paid off for Republicans in many  
22 jurisdictions in the country in many

1 different ways at many different levels.

2           And the effect of that -- it's  
3 apparent to us all as political professionals  
4 and people who are familiar with  
5 politics -- and you can say the same things  
6 about similar efforts on the Democratic side  
7 of the aisle -- the Gingrich Congress, for  
8 example -- but each of these goes to show  
9 that these effects are real and perhaps  
10 impossible to quantify.

11           When a party tries to brand itself,  
12 develop adherence for the long haul, it's  
13 something that transcends electoral politics.  
14 It's something that serves the party for  
15 years and years and years in myriad different  
16 ways.

17           MR. ELIAS: The only thing I'd add  
18 to that which is very anecdotal -- and I  
19 don't want to portray it as anything  
20 else -- just my experience with the  
21 Senatorial Committee is that when we engage  
22 in a hybrid ad program, which we did last

1 cycle, hybrid media program, we had interest  
2 from not only the party but from the  
3 down-ballot people.

4           The fact is when we did hybrid  
5 mail, in Missouri for instance -- obviously  
6 Senator McCaskill was happy, but so were the  
7 people at the party, the people who were on  
8 the ballot with her in what was in a  
9 non-Presidential year a battleground state.  
10 So anecdotally these are activities that are  
11 not shunned by -- in fact they're appreciated  
12 by the down-ballot people and the party,  
13 because as Brian -- I think it was Brian who  
14 said this -- all things being equal, they'd  
15 make the entire mail piece about McCaskill.  
16 All things being equal, it would just be a  
17 McCaskill piece.

18           So there's some tradeoff in the  
19 making it hybrid, and especially with the  
20 allowance for exempt party activity, you can  
21 easily make something entirely one  
22 candidate-focused and still have it not count

1 against 441a(d). So I think that there  
2 really are benefits. But again, that's  
3 anecdotal.

4 MR. MCGAHN: If I could jump in. I  
5 agree that it's very tough to quantitize  
6 benefit. But as a representative of a state  
7 party, I see it at that level almost every  
8 day. In Illinois right now, the focus is  
9 much more on the state-level politics, the  
10 governor there has newspaper articles all the  
11 time -- corruption allegations all sorts of  
12 things. The usual kind of stuff I guess you  
13 see in Chicago. Who knows?

14 But the party is very concerned  
15 that what they're trying to do with their  
16 message -- which they hope will pay dividends  
17 down the road -- is going to be snuffed out  
18 at some point. Yet again, BCRA was tough  
19 enough on a state like Illinois. It's a  
20 corporate money state, essentially similar to  
21 Virginia. It's kind of a full reporting,  
22 anything goes kind of state. And all of a

1 sudden, they learned they have to spend a lot  
2 of hard money nearing Election Day, and now  
3 they're trying to do an off-year branding  
4 that will maybe help them next year, the year  
5 after, the year after that, and they want  
6 federal officeholders to help.

7           And the fact that just the nature  
8 of the things I'm seeing -- it's tough  
9 without revealing privilege or really inside  
10 baseball to get into details -- but I can  
11 represent to the Commission on behalf of the  
12 client that certainly there's all sorts of  
13 anecdotal evidence, and certainly in their  
14 minds all sorts of reasons that would answer  
15 your question.

16           And I think I'm the only commenter  
17 from a state party. So --

18           MR. LENHARD: Commissioner von  
19 Spakovsky?

20           MR. von SPAKOVSKY: I'd like to ask  
21 the panel as a whole to play off something  
22 that Mr. McGahn said, and that is -- I'm





1 there's deference given. Now, you could --

2 MR. LENHARD: But that's a district  
3 court and an appellate court, right?

4 MR. MCGAHN: -- come back and say, but  
5 that's two different decisionmaking -- but  
6 nonetheless, the idea of deference to a decision  
7 made at the time is not something novel in our  
8 jurisprudence or legal system. Abusive discretion  
9 has the advantage of - it's a term that we understand.  
10 We would certainly welcome that sort of standard.  
11 The fear, of course, and I think this is part of  
12 what Mr. Elias is handing out with the merits of  
13 the 50/50 is you don't want to be second-guessed.

14 And 50/50, at least you know you  
15 won't be second-guessed.

16 But 50/50, from my client's  
17 perspective, doesn't really get you there  
18 either on the practical side of spending. So  
19 I think some sort of deference is in play,  
20 which should be there. And again, there's  
21 plenty of examples, even in federal election  
22 law, where there's deference given to

1 spending decisions that are not  
2 second-guessed by the Commission. And the  
3 polling reg is a good example of where you do  
4 have quite a bit of discretion and you have a  
5 question or you have -- there's all sorts of  
6 ways you can allocate a poll.

7           And although there aren't a lot of  
8 MURs, occasionally in audits people get a  
9 little antsy about how you allocated polls,  
10 so you maybe want to let the auditors know  
11 that the rules are as easy as you say they  
12 are.

13           But that's an example of a  
14 situation where there already is a rule that  
15 allows for discretion and there's some  
16 deference given as to judgments made.

17           MR. SVOBODA: And Commissioner, I  
18 think your question at least to me seems to  
19 acknowledge that how you make a time/space  
20 allocation -- depending on the media in  
21 particular -- you can do it any number of  
22 different ways. One of the things I've had

1 to do in practice for the last 10 years is in  
2 context outside the hybrid context, just  
3 figuring out time/space for multiple  
4 candidates mentioned -- that I can tell you  
5 as you sit with the ruler and the abacus and  
6 you calculate it out, there's four or five  
7 different ways to slice the bologna. Some of  
8 them are more aggressive, some of them are  
9 less aggressive.

10 The question is how are people  
11 going to be able to approach that task  
12 reasonably with some certainty that they're  
13 not going to be second-guessed if they  
14 approached it reasonably some years later.

15 MR. CAIRNCROSS: And in a sense, an  
16 abusive discretion standard is the way that  
17 the party is -- at least my party has thought  
18 of this in the past, and in a sense with a  
19 self-enforcing mechanism that we had without  
20 a regulation between the parties.

21 And as Mr. Elias said, virtually no  
22 complaints filed on hybrid ads. The parties

1 are aware of what the other party is doing  
2 and are paying close attention.

3 So we have been operating in a  
4 sense under that standard right now.

5 MR. LENHARD: Mr. Elias?

6 MR. ELIAS: The only thing I'd just  
7 add to this is that if you go time/space,  
8 that would be very helpful. I'm very wary  
9 that unless it's very, very clearly stated  
10 and clearly articulated, that that will hold  
11 over time. I've had recent experience with  
12 this Commission, which will joyfully for all  
13 of us continue for some time -- where there's  
14 a regulation that says 60 percent of the  
15 cost, only to have the auditors come in and  
16 say, well no, but we meant to incorporate  
17 GAAP into what we meant. Even though it's  
18 not in the reg, we meant to incorporate that.

19 And the fact is that's one  
20 Presidential audit where the auditors get to  
21 import one phony standard into an audit.

22 But we can't have that with party

1 hybrid ads. That's a Presidential audit. It  
2 will be a one-off deal. We'll hammer that  
3 out at the appeal stage, but where you're  
4 about to promulgate rules on things that  
5 involve core party activities that parties  
6 and candidates are going to rely on on both  
7 sides, we can't wind up in a place where it  
8 looks like we have certainty, when in fact we  
9 don't have certainty.

10 So I'd actually prefer just 50/50,  
11 because I don't think there's any way even  
12 the audit staff can read 50/50 as anything  
13 other than 50/50.

14 MR. LENHARD: Commissioner Walther?

15 MR. WALTHER: One of the things  
16 that I think was on our minds as we were  
17 dealing with the audits, you're doing with public  
18 funding, you're dealing with us deciding to  
19 what extent was the public funding augmented  
20 by hybrid ads, and feeling a special sense of  
21 responsibility in that particular case to  
22 exercise their judgment, determine what's

1 reasonable and what's not, and whether that  
2 would translate into other situations is  
3 probably less likely.

4 But I think all of us here would  
5 love to have the opportunity to have a line  
6 that would work without us having to  
7 second-guess everybody.

8 We were unable to agree, as you're  
9 quite aware, on a 50/50 split; and if we look  
10 at a way to find a brightline standard, say a  
11 fixed percentage, then what factor should we  
12 take into consideration if we can't agree on  
13 a 50/50 split?

14 A couple of things are important to  
15 me as I mentioned earlier this morning is the  
16 fact that so much money -- and I mentioned  
17 roughly 85 percent of the money was on hybrid  
18 ads was spent in battleground states for  
19 Republicans, and roughly 92 percent was spent  
20 on the Democratic side.

21 That doesn't necessarily militate  
22 that percentage precisely, but on the other

1 hand, it is a factor on what people think  
2 when they spend their money, the benefit  
3 that's being gained.

4 If they really want to help the  
5 down-ticket in some areas, why not spend the  
6 money in some state where the President is  
7 really popular rather than just on the ragged  
8 edge of 50/50?

9 I look at that and I think it's  
10 hard to agree on a 50/50 split in that  
11 particular case. On the other hand, I don't  
12 think we want to get in the business of  
13 weighing every ad and taking a look at how  
14 you calculated amongst yourselves, giving you  
15 the benefit of the doubt with whatever  
16 standard we pick. I see you're always saying  
17 we want specific guidance. I don't blame  
18 you. I'd feel the same the way.

19 MR. ELIAS: Well let me just address  
20 the 92 percent, because I can speak to that from  
21 first-hand experience. Senator Kerry was  
22 being asked to pay for half of those ads. So



1 the deal is, if the Ohio Democratic Party  
2 wanted Senator Kerry to help the down-ballot  
3 ticket and the Idaho Democratic Party wanted  
4 John Kerry to help the down-ballot ticket, we  
5 were more likely to help the Ohio Democratic  
6 Party ticket, because we were paying for half  
7 of the ad.

8           If the Commission wants to pass a  
9 rule that we don't have to pay for any of the  
10 ad where we're helping down-ballot people,  
11 then I'm sure you would have seen hybrid ads  
12 in other states. But we can't lose sight  
13 of the fact that there was actually a  
14 candidate component to those expenditures,  
15 and therefore, you need both the party and  
16 the candidate to agree to spend in that  
17 jurisdiction, for the same reason that you  
18 now see candidates more willing to raise  
19 money for the Iowa Democratic or Republican  
20 parties than they probably are to raise money  
21 for the Idaho Democratic or Republican  
22 parties.







1 50/50, so it held a rulemaking very similar  
2 to this one, and determined that 50/50 was  
3 the place to be.

4           Since that time, there have been  
5 50/50 ads run in two publicly financed  
6 Presidential campaigns where there had been  
7 audit reports adopted by the Commission that  
8 with dissent noted have been nevertheless  
9 accepting that. So if you go back to my  
10 opening statement, to some of it -- this  
11 is where I realize it may leave you sort of  
12 feeling like that's not enough -- but some of  
13 it is, this is what -- the regulated  
14 community -- on the Democratic side, for what  
15 its worth, we refer to these more often as  
16 50/50 ads than we do hybrid ads.

17           I'm willing to use the nomenclature  
18 hybrid ads because it's recognizable. But  
19 it's kind of ingrained in the culture  
20 somewhat at this point that these are 50/50  
21 ads. It doesn't mean that it can't be  
22 changed.





1 MR. LENHARD: Vice Chairman Mason?

2 I'm sorry, Mr. Svoboda, please?

3 MR. SVOBODA: I think to respond to  
4 Don a little bit, one of the things I think  
5 it illustrates is that time/space has never  
6 been the exclusive means within Commission  
7 rules for analyzing the division of benefit, and  
8 the polling regulations are the classic  
9 example of that. The Commission developed a  
10 schedule for the diminishment of poll value  
11 over time that -- I hesitate to say it was  
12 arbitrary -- it's survived for 20, 30 years,  
13 -- but I don't think that the benchmarks in  
14 terms of time frame and percentage value were  
15 developed based on rigorous scientific  
16 analysis.

17 I think it was based on the  
18 Commission's best expert judgment, based on  
19 its own experience, frankly, as people who  
20 either used to be political professionals or  
21 regulate political professionals and see what  
22 they do. Their sense of just how much



1 utility that poll had over a stage of time.

2           So I think the law permits you to  
3 make those rough judgments. Now, why 50/50  
4 versus 75/25 or 100/0? I think 50/50 is more  
5 defensible than 100/0 if you start from the  
6 premise that the candidate enjoys a  
7 diminished benefit of the ad by the inclusion  
8 of somebody or something else.

9           And I think that can be readily  
10 documented in the course of a rulemaking.  
11 That brings you to the question of why  
12 50/50 versus 75/25 or some other number  
13 selected. 50/50 strikes me as a proxy for  
14 recognizing that the value has been  
15 diminished. So for example, again, we go  
16 back to the polling regulations -- if under  
17 the regs it's now written if there's a poll  
18 done and two people purchase it, the rules  
19 would regard that, each side basically as  
20 having 50 percent of the value of the poll.

21           It's divided by the value of the  
22 number of the recipients, even though

1 everybody -- even though each of the people  
2 has an entire poll, there's a sense implicit  
3 in the rules that the value is diminished  
4 based on the fact that somebody else has it.

5 So you have at least an analogy  
6 that you can go to in other Commission rules  
7 where you've made that sort of rough judgment  
8 before.

9 MR. MCGAHN: I hate to speak again,  
10 but the 50/50 approach -- assuming you pass a  
11 reg, which my clients don't feel you need to  
12 do, but assuming we go down that road -- a  
13 50/50 rule would be much more defensible if  
14 there were one of two or three other options  
15 where you have a 50/50 approach, you have a  
16 hybrid approach, and maybe you have an actual  
17 value approach -- not unlike the polling reg,  
18 and I think if someone would challenge the  
19 50/50 approach, you then have much more  
20 flexibility in the reg to say well, you're  
21 not stuck with 50/50, that's just one way you  
22 could do it. You could elect to do another

1 way.

2 MR. CAIRNCROSS: And one final  
3 comment on that. The 50/50 does have I think  
4 some difficulty addressing a multi-candidate  
5 hybrid ad, and that's something I think the  
6 Commission should consider as well --

7 MR. LENHARD: One of the things  
8 that we struggle through here a lot is that  
9 there's the sense that everybody wants a  
10 clear rule, one that allows a lot of  
11 flexibility. They want it to be simple, but  
12 it also should be tailored for lots of  
13 different circumstances, and for whatever  
14 else we do, we should make sure that it  
15 isn't the kind of thing that gets sorted out  
16 in enforcement.

17 And when we actually get trying to  
18 put pen to paper, it's hard to achieve all  
19 those goals, and yet that's what in essence  
20 we try and do. And I want to turn a little  
21 bit on to talking about what the generic  
22 party reference -- what the regulation should

1 say about what is necessary to qualify as a  
2 generic party reference.

3 And I want to approach it two ways.  
4 One is, I put out a couple of different  
5 examples of communications -- I think some  
6 were to the questions that I originally  
7 proposed to Mr. Hoersting and I think -- one  
8 to Mr. Cairncross where, that I had actual  
9 text, and the question was do these rise to  
10 the level of the reference to a generic party  
11 communication?

12 There is one possibility that we  
13 simply define that simply as a party name or  
14 nickname. The other is that we give  
15 examples. Others have suggested we simply  
16 provide people with as much flexibility as  
17 possible. Mr. McGahn was kind or brave  
18 enough to actually say which of these he  
19 thought qualified as generic party references  
20 and which did not, and which were close  
21 calls.

22 I appreciate knowing both a mixture

1 of how you read these kinds of  
2 communications, whether they qualify as  
3 generic party communications, and therefore  
4 if they were placed in an ad, whether it would  
5 qualify as a hybrid ad. And secondly, and  
6 probably more importantly, how you think we  
7 end up best off phrasing that -- to meet  
8 those, all of those somewhat inconsistent  
9 goals.

10                   Anyone want to take a stab at that?

11                   MR. CAIRNCROSS: I'll start, since  
12 one of the questions was specifically  
13 addressed to me. And I believe the question  
14 was an ad that said she stood  
15 shoulder-to-shoulder --

16                   MR. LENHARD: I'll read it to you  
17 because I've got it in front of me. I've  
18 brought all my questions to the meeting today  
19 as I did, which I did because they're mine.

20                   The four or five examples I had  
21 the one -- first one or the last one to you  
22 was, Candidate X stood shoulder-to-shoulder

1 with those who are soft on terrorism. In  
2 vote after vote, she's refused to give our  
3 troops the support they need. And I didn't  
4 give a close-out. The choice is now -- the  
5 decision is yours or something like that.

6 MR. CAIRNCROSS: Right.

7 MR. LENHARD: The others included  
8 Congressman X has been battling Liberals in  
9 Washington. Congressman X has been  
10 battling the tax-and-spend crowd in  
11 Washington, photo of the Capitol behind a  
12 candidate that was running for the Executive  
13 Branch -- Presidential Candidate X has been  
14 working with Congressional leaders to pass  
15 key legislation, were the examples that I  
16 tossed out there.

17 MR. CAIRNCROSS: And specifically  
18 with the shoulder-to-shoulder on terrorism  
19 and something like that, I know Mr. McGahn  
20 addressed the prior examples earlier, and  
21 said it's a little bit difficult to take out  
22 of context as a single standalone statement --

1 that statement alone -- shoulder-to-shoulder  
2 with those who were soft on terror -- I don't  
3 believe it would qualify.

4 MR. LENHARD: Even though the next  
5 sentence refers to our votes on the Hill?

6 MR. CAIRNCROSS: To the individual,  
7 to the candidates --

8 MR. LENHARD: To the candidate's  
9 votes on the Hill, that doesn't draw? Okay.

10 MR. CAIRNCROSS: That's right, to  
11 the candidate, but not to a generic party.  
12 But there again, in an ad that says -- that  
13 finishes vote against Candidate X and her  
14 colleagues in Congress or -- in our case, the  
15 Democratic Party.

16 MR. LENHARD: Obviously the  
17 question gets a lot easier if you put "and  
18 the Democratic Party" at the end of the ad.

19 MR. ELIAS: Since we're here to  
20 testify, not to ask questions, I'm  
21 nevertheless just tempted to ask a question,  
22 which is that -- in 1996 or 1998, it was Newt





1 skepticism.

2 MR. LENHARD: So is there a way to  
3 do the drafting part of this that doesn't  
4 leave it off to enforcement to figure out  
5 whether they were close enough and whether they  
6 agreed or not? And now, maybe if we get to  
7 Don's point where in enforcement we approach  
8 things with a more relaxed view of what  
9 constitutes a nickname, but does that  
10 provide -- I'm not sure that gives you guys  
11 any guidance as you're trying to figure out  
12 whether you're to approve the ad or not  
13 before it goes out the door.

14 What do we do in terms of a reg?

15 MR. MCGAHN: The reg should  
16 certainly include the obvious references,  
17 party names. The New Jersey example is one  
18 that is transient. In four years, running an  
19 ad about the Bush team is not going to make a  
20 whole lot of sense, so it is tough to sort of  
21 quantify those. And that's really the  
22 challenge, and that's why the reg does need

1 to build in the flexibility and the deference  
2 to the decisionmaking -- otherwise you're  
3 going to lock in -- because I'm not sure I  
4 could write a reg that encompasses all  
5 potential names other than in the E&J list  
6 examples, that are maybe contemporaneous down  
7 the road can be used by analogy.

8 MR. CAIRNCROSS: And in part, I  
9 think that's contained -- in the definition  
10 of a hybrid ad, it contains a clearly  
11 identified reference to a generic party, and  
12 that I think gets to Commissioner von  
13 Spakovsky's point as to what standard.

14 MR. ELIAS: I do want to clarify  
15 one thing, because I do think there was a  
16 disconnect at times during the '04 cycle, and  
17 in this discussion I hear it again. There is  
18 one theory upon which you can pass these regs  
19 that says what you're trying to do is help  
20 the candidate and the party. There's another  
21 theory in which you're trying to help the  
22 candidate and generic unnamed candidates of

1 that party.

2 And the phone bank reg is actually  
3 not about the party, it's actually about  
4 other unnamed candidates of that party. So I  
5 personally would say that either should  
6 suffice, but I do think it's important for  
7 the Commission to spell that out -- in other  
8 words, whether we're trying to help the  
9 Democratic Party, we're trying to help  
10 unnamed Democrats in running the ad.

11 MR. LENHARD: Vice Chairman Mason.

12 MR. MASON: There's been a little  
13 bit of circling around on this panel. I  
14 think it maybe was even more direct on the  
15 one before about -- and it's implicit, in some  
16 of this discussion of options. If we were to  
17 take a position that said we'll draw a safe  
18 harbor but leave time and space or something  
19 like that, how would we do that?

20 In other words, would we draw the  
21 safe harbor on the party side or the  
22 candidate side, if we did?

1 MR. ELIAS: No, in the AOs --

2 MR. MASON: As long as at least  
3 50 percent is paid for by the candidate or  
4 would you say as long as at least 50 percent is  
5 paid for by the party? It makes a difference and --

6 MR. ELIAS: I suspect unanimity  
7 among us.

8 MR. MASON: That's fine. And then  
9 if we do that, what do we say about the time/  
10 space? Do we just leave it where it is? Do  
11 we give some other guidance as to when it  
12 would be supportable or what factors we might  
13 look at?

14 MR. ELIAS: Since no one else wants  
15 to take the -- I think you could do what you  
16 did in the polling allocation ranks, you  
17 could say a candidate or party may allocate  
18 the ad in any one of the following ways --  
19 one, 50/50; two, time/space; three, any other  
20 reasonable method of allocation --

21 MR. SVOBODA: And then the terms of  
22 how you deal with that in the enforcement

1 process, I think there's a presumption -- it  
2 maybe reflects the differences in  
3 perspectives between where you sit and where  
4 we sit. But I think there's a presumption  
5 perhaps on the Commission's part that every  
6 complaint that comes in about one of these  
7 ads, assuming that there is any, necessarily  
8 needs to be a priority in the enforcement  
9 process, and needs to occasion stern to  
10 bow review and a completion of the  
11 process. And the fact of the matter is that  
12 the Commission has prosecutorial discretion.  
13 The Commission can decide how important or  
14 how less important this issue is relative to  
15 other priorities -- what sorts of cases are  
16 ripe for review and what sorts of cases are  
17 not ripe for review.

18 I wish I knew what the enforcement  
19 priority system looked like and how my  
20 clients could safely avoid it.

21 MS. WEINTRAUB: If it were up to  
22 me, you wouldn't know.

1                   MR. SVOBODA: But the fact of  
2 the matter is, the Commission can make these  
3 judgments. So while one way I think is, as  
4 Marc talked about -- spelling out some  
5 regulatory criteria that give people a basis  
6 for proceeding. You know, the Commission  
7 also is just going to face a decision as  
8 to -- assuming the complaints do come in, how  
9 are they going to review them?

10                   And actually, probably, more to the  
11 point -- Don mentioned this earlier in the  
12 panel, what sort of instructions are you  
13 going to provide the auditors during the  
14 field work when they audit state parties,  
15 because that's probably the way in which this  
16 issue is going to most likely come up, and  
17 may be the only in which this issue is going  
18 to come up, which is in the Commission's  
19 audit of state party committees.

20                   MR. LENHARD: The hard thing  
21 obviously for us is especially when you get into  
22 TV -- these are big ticket items, and to see them

1 in enforcement means that there's a lot of  
2 dollars after whatever is involved.

3 And so, to the degree that we can  
4 sort of provide enough clarity at the front  
5 end, that people can shape their  
6 decisionmaking in the pre-spending phase  
7 accordingly, it's going to make life I think  
8 for everybody a lot easier. Because once  
9 they -- now you indicate that nothing has  
10 certainly come out of the pipe and you may  
11 not be aware of anything involving hybrid ads  
12 so far, but to the degree that you do end up  
13 in the enforcement side, the TV buy dollars  
14 on these -- there's a lot at stake.

15 MR. SVOBODA: It occurred to me  
16 this may not be directly responsive to  
17 Commissioner Mason's question. But there's  
18 another context where the Commission has had  
19 to implement spending limits, has sought to  
20 provide relief to people from those limits to  
21 some degree and give them reasonable basis of  
22 complying, and it's the Presidential, primary





1 given some flexibility in the interpretation  
2 and enforcement of these limits.

3 MR. McGAHN: Which I think is  
4 distinguished from a safe harbor, right? I  
5 think there's a difference between a safe  
6 harbor where you almost have to prove that  
7 you fit into it, versus a reg that gives you  
8 options. And I think what I'm hearing is  
9 more the option approach like the polling reg,  
10 not the safe harbor approach.

11 It took me that long to think  
12 through in answering the question, and now I  
13 understand that is it 50 for the candidate  
14 if it depends on --

15 (Laughter)

16 MR. McGAHN: -- kind of what you're  
17 asking. Don't have an answer yet, but --

18 MR. LENHARD: Would you like to  
19 just take a few more moments so you can think  
20 through some of the earlier questions too --

21 (Laughter)

22 MR. LENHARD: Just teasing.

1                   MR. MCGAHN: I'll come back  
2 tomorrow and so --

3                   (Laughter)

4                   MR. LENHARD: As I indicated  
5 earlier, the record will remain open for an  
6 additional week, and so obviously -- I'm not  
7 sure everybody was here for that -- but upon  
8 discussions with our counsel, we will be  
9 keeping the written record open for an  
10 additional week if people wish to submit  
11 further information.

12                   Other questions, comments, from the  
13 Commission or the staff?

14                   MS. WEINTRAUB: Just one.

15                   MR. LENHARD: Ms. Weintraub --

16                   MS. WEINTRAUB: I just want to  
17 state for the record that I think Mr. McGahn  
18 bears absolutely no resemblance to Dick  
19 Nixon -- much better hair.

20                   MR. MCGAHN: Thank you.

21                   MR. LENHARD: Very good. Thank  
22 you. This concludes our hearing on the

1 Commission's Proposed Revised Rules for the  
2 Hybrid Communications. I'd like to thank the  
3 witnesses for coming and attending.

4 Mr. Elias, we promise that if we  
5 have another session with four witnesses,  
6 we'll look at a bigger table, so that you'll  
7 have full use of that.

8 Thank you very much. This brings  
9 the meeting to a close.

10 (Whereupon, at approximately 1:18  
11 p.m., the PROCEEDINGS were  
12 adjourned.)

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