FEDERAL ELECTION COMMISSION

PUBLIC HEARING

ON

HYBRID COMMUNICATIONS

Washington, D.C.

Wednesday, July 11, 2007
PARTICIPANTS:

COMMISSION:

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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
as Esa Sferra and Bob Knop.

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

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

We have a light system at the witness table to help you keep track of time. The green light will start to flash when you have one minute left, the yellow light will go on when you have 30 seconds left, and the red light means that it's time to wrap up your remarks. I've been given a small box
here to monitor that, which is called the Shockotron here at the FEC, so please try and comply with those rules. The balance of time for the panels is reserved for questions by the Commissioners and answers by the witnesses.

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

In preparation for today's hearing, I did something a little procedurally out of the ordinary as a consequence of my experiences in last year's hearing, which is that I put out on the public record the questions that I thought I'd be asking the
witnesses to provide them with some time to think about those questions.

Stephen Hoersting, of the -- I'm going to blank on the name of his group now, unfortunately -- the Center for Competitive Politics -- was kind enough to provide written responses on the Internet last night, and I appreciate that. Unfortunately, our staff has raised the meddlesome question of whether we can accept those given that the comment period has closed.

And so the Commission has decided to reopen the comment period for an additional week to resolve any kind of outstanding procedural questions. And certainly, Mr. Hoersting's comments will be accepted during that time period, and anybody else who would like to make additional comments is free to over the next seven days.

With that, I understand that some of my colleagues, and certainly the Vice Chairman, would like to make opening
statements, and so I now turn the microphone over to him.

Mr. Vice Chairman?

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

And there is a point important to me that I want to make about the history of political party activity, for which I begin in Safire's Political Dictionary with a curious entry called Hymie's Ferryboat, attributed to Hymie Shorenstein, the Brooklyn Democratic leader who was challenged in the 1920s when FDR was the governor of New York by a local candidate who wanted to know why all the party's money was being spent on
Roosevelt's signs -- making the point that everybody already knew Roosevelt, and the party needed to do something to increase the candidate's name ID.

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

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

Now, Safire goes on to indicate that after he first published this story, he was contacted by several people who attributed it back to Jimmy Walker, one-time mayor of New York -- back further to Nicholas Murray Butler, president of Columbia University -- who himself said he had heard
the story from Boies Penrose, a leader of the Pennsylvania delegation in the Republican Convention of 1912 -- had heard of similar stories. He then cross-references the section on coat-tails, which includes a speech by a then back-bench Congressman named Abraham Lincoln in 1848. He talked about the coat-tails of Zachary Taylor, and on back to those of Andrew Jackson.

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

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

And when we debate this question
about are the parties doing something that is trying to get around FECA or get around BCRA or abuse it, it's important to me to look back to the past and say, well, what did the parties do before these limits existed? And in fact, there is strong, incontrovertible evidence that parties in fact formed their campaigns around the ticket leaders from the beginning of the party system.

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

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

MR. LENHARD: Certainly. Thank
you. I'm sure we all appreciate that it's never boring to hear you, and the story was actually better in the second telling than the first.

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

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

We generally proceed alphabetically, which means that unless you gentlemen have arranged otherwise, we'll hear Mr. Hoersting, and then we'll go to Mr. Josefiak and Mr. Reiff.
Seeing no indication that you have agreed otherwise, Mr. Hoersting, please proceed, and I will try and see if I can make this machinery work properly.

MR. HOERSTING: Thank you, Chairman Lenhard, Vice Chairman Mason, Commissioners.

Thank you for the opportunity to comment on the hybrid ad rulemaking. And I appreciate you putting my supplemental comments into the record. And frankly, the reason I wrote them last night, honestly, was to give time for Joe, and I guess, Neil -- excuse me, Tom and Neil, Joe is not here -- to really answer most of your questions this afternoon, because let's be honest: they have real candidates in the 2008 cycle that will really be impinged or benefited by what you do here today.

Let me note at the outset that I've noticed some discussion in the comments, and perhaps some disagreement or confusion about time and space allocations versus number of
participant allocation, and I'd like to suggest here that there's not really any conflict there, that the Commission should consider using both allocation methods if it's going to craft a rule that addresses all public communications.

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

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

The test is not benefit actually derived, it's benefit reasonably to be derived. The Commission is supposed to employ objective criteria to protect the in-kind contribution limits, provide notice to the party committees in allocating an activity, and allow them freedom under the First Amendment to use phrases and monikers
that they believe will best suit their
purposes, if at all possible.

So it's the point of the FEC to
look at an ad, at its text, to find some
evidence of an objective placeholder for the
party committee, and then decide, well, how
much of that ad can fairly be attributed to
the party committee. What is its value.

What the Commission should not be doing is
employing subjective criteria, either
empirical data, anecdotal evidence, or social
research data to look at the relative benefit
of a phrase such as "liberals in Congress"
versus "Democrats in Congress," for the
Commission to regulate in this way is to
engage in a content-based regulation.

Now, we have express advocacy
tests, and electioneering communication tests
which are content-based regulations in FECA
and BCRA, but those are to cure against
vagueness and over-breadth and to protect
speakers, not as bases for the Commission to
probe relative value of monikers or phrases.

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

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

Finally, the Republican Party decided to cut a new ad with a new approach.
The NRSC decided to tie the Murkowski race to the fate of Alaska Senator Ted Stevens, just as the Republican Party tied the fate of "leaders in Congress" to President Bush in 2004. Murkowski came from behind to defeat Knowles. Though she was scarcely mentioned in the ad, she enjoyed all the benefits of being tied to Stevens, and the NRSC knew that.

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

Why? Because they knew that tying Murkowski to that other person, or being associated with that other person, created a benefit for Murkowski. Otherwise, the NRSC would have wasted its money. But we know the
NRSC did not waste its money, just as we know that down-ticket benefits from generic references are real.

Thank you.

MR. LENHARD: Thank you.

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

I guess Mr. Josefiak is next.

MR. JOSEFIAK: Thank you,

Mr. Chairman. Good morning. Good morning, Commissioners.

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

First would be, should there continue to be hybrid ads? And the answer in my mind is yes. I don't think you need a
regulation, or a sanction and a regulation, to have hybrid ads. So personally, I'm not opposed to having a regulation that spells out what the Commission's position is, particularly outside of Washington, D.C.

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

Allocation by parties.

Commissioner Mason has talked about the beginning of modern political parties. I've been accused of being around since then, but I'm not going to talk about going back that
far. I want to talk about, in the FEC, BCRA era, of what parties have done. From the very beginning of this Commission, with regard to party allocation, the Commission acknowledged in its own regulations the ability of party committees to allocate in a generic sense on a reasonable basis.

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

Over the years as well, the Commission adopted policies and procedures to deal with what happens when candidates and party committees do things together. They did polls together. They shared phone calls together. They shared space together. In every one of those cases, the Commission took
the position that you pay for whatever your
share was, based on the time and space
devoted to your operation.

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

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

But the bottom line -- and what I
want to emphasize -- it was never a question
of whether it could be done, it was what the
percentage was. And then based on that, we enter the era of this Commission, for most of you Commissioners, at least, where you had your regulation dealing with phone banks, you had your advisory opinion dealing with mail.

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

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

Personally, I'm not opposed to setting a minimum floor of 50 percent, but still time and space, so it could be more than 50 percent. But when you get to the Congressional level, I don't think you can make that judgment call, because there are so
many variables in there where it could be
much less than 40 percent dealing with one
candidate, and particularly if you're going
to get involved with multiple candidates.

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

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

Thank you, Mr. Chairman.

MR. LENHARD: Thank you very much.

Mr. Reiff?

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

MR. LENHARD: No, we won't.

MR. REIFF: Mr. Chairman,

Commissioners, thank you for the opportunity
to testify today regarding hybrid ads.

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

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

The DNC believes that a rule permitting hybrid ads should adhere to two main principles: first, hybrid ads should be permitted not only in connection with one federal office, but multiple federal offices.
Second, the Commission should provide guidance to the regulated community as to what types of communication should be considered as hybrid ads.

We are aware that other commenters have suggested that the Commission should leave it to the regulated community to define what is and what is not a hybrid ad. While the DNC supports maximum flexibility to be provided to the regulated community, the Commission does not take this opportunity to provide that -- some standard in this instance, potential confusion and abuse of this rule may require the Commission to re-fight battles regarding hybrid ads, which I assume is the reason why we're here today.

Second, potential abuse of the rule could cause the Commission to revisit whether hybrid ads are even feasible at all.

Ultimately, by providing clear guidance to the regulated community, the Commission will ensure the long-term success and viability of
hybrid ads. With the recent court decision
in Wisconsin Right To Life, which may serve
to empower outside interests, as well as the
recent decrease in party identification by
voters, parties now more than ever will
desire to identify its candidates with their
party and encourage straight-ticket voting.
Hybrid ads are an essential component to that
strategy.

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

MR. LENHARD: Thanks very much.

Let me see if I can make this machine stop
here.

Questions from the Commission?

Vice Chairman Mason.

MR. MASON: Thank you. I'd like to
ask all of the panel about our approach to
this. Tom sort of got into it on the
multiple candidate question. But really to
ask this, what are we trying to protect? And
I'd like to get your response to the
proposition that we're not mostly -- there's
nothing we're protecting in the movement of
money, services, goods from candidates to
parties. For two reasons.

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

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

But what I want to ask or suggest
is, does that make or shape our
regulation-writing task?
In other words, if we assume that it's not a lot of importance how much the candidate bears -- how much of the cost the candidate bears -- what does that do to our thinking about the regulation in terms of a minimum party share? For instance, particularly if we have more than one candidate, why does it make a difference? In other words, why is the ad less valuable to a party when you mention two candidates or three rather than one?

MR. JOSEFIAK: I think that's why we support, Commissioner Mason, the idea of having hybrid ads include multiple candidates. We can't make a judgment call whether that makes any political sense in every situation, but it may make sense in some other situations to do that. And that's why I raised the issue. I don't think it becomes an issue between how much the parties spend -- you've got a coordinated expenditure limit -- but I think
the concern is that unless you come up with a
fair recognition of what the value
is -- whether the candidate pays for it or
not -- to that candidate, you could -- and if
the candidate is reimbursing for its share,
which has always been a premise of this
Commission -- you can reimburse for your
share of costs, and that's not a contribution
or a coordinated expenditure -- then the
candidate himself may be making a
cortribution to another candidate.

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

And I think that's the only reason
time and space makes sense when you have
multiple candidates -- looking at how much
time each candidate is getting -- and that
also goes back to the Commission's position
when you have candidate-to-candidate ads.
That has never been an issue, and I believe
106.1 addresses that in the regulations, and
advisory opinions have addressed that.
When you have two candidates
getting together and doing an ad, you're
basing it on the time and space devoted to
each one of those candidates.
MR. LENHARD: Would anyone else
like to --
MR. REIFF: Sure. I absolutely
agree with Tom. I would acknowledge that in
our comments, again, we support multiple
candidate references. Really no reason to
artificially limit this to one candidate.
There could be several compelling reasons why
we'd want to have a multiple candidate ad and
a generic down-ballot reference, and we
acknowledge in our comments that there
probably is some kind of degradation to the
value of the generic reference when you have multi-candidate references.

And we do suggest --

MR. MASON: Why? Why?

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

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

Because if you attack your opponent and support your own candidate, that
shouldn't necessarily count as two elements, that should just be one element. So we believe a regulation should use the term "office" and not "candidate." And obviously, there's only three federal offices that we're working with here. So it's not, in our opinion at least, an overly complex formula that you would have to create.

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

MR. LENHARD: Mr. Hoersting.

MR. HOERSTING: Mr. Vice Chairman, leaving aside issues of reimbursements or whether -- calculating the 441a(d) limit, let me just simply say that yes, you should have -- either under time and space or number of participants -- you should have an equal division based on the number of participants in the case of number of participants.
Also according to the time and space, you should have an allocation based on obviously the time and space.

And there's no reason in my opinion that the generic party reference should not be counted, or should be in any way degraded. Because if you think about it -- and perhaps Neil is thinking of this -- as you have more participants to an ad, there will be a type of degradation as the equal share reduces. That may or may not be what Neil's talking about.

But the thing is that generic party reference in the speech of the party needs to be recognized here as well. The parties are not joined at the hip with their candidates, even though they may tell you that they are. They have a right under Colorado 1, and recognizing McConnell, to speak independently of their candidates.

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

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

MR. JOSEFIAK: Commissioner --
MR. LENHARD: Mr. Josefiak.

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

And I think that's why we feel very
strongly that when you get into a multiple
candidate situation with a party message, the only way to deal with that effectively is on a time and space argument, rather than anything that might seem more attractive like a minimum floor of 50 percent or something that's more fixed.

MR. LENHARD: Very good. Other questions?

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

And I want to highlight a distinction Mr. Hoersting mentioned a number of times in his comments, that we shouldn't
look to this question -- that in fact, the
parties are making foolish decisions, and our
regulations should not get in the way of
that. And I agree with that sentiment. But
it's more complex for me, in part because I
think the party has multiple goals.

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

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

And Vice Chairman Mason has also
cited some anecdotal evidence.
I'd appreciate hearing from the panelists what evidence there is -- what leads parties to make these, make these decisions; what is it that prompts them to think that there is a down-ticket benefit, and this is especially true as the reference to the party becomes vaguer and vaguer in some of these.

Mr. Reiff, you --

MR. REIFF: Actually, I'll just make one I think compelling example, which is the 2006 elections. I think 2006 showed more than ever, at least from a Democratic perspective, that the party label I think has been making a major comeback, at least from our side of the aisle.

The ability to tie the Democratic label to candidates transcended what usually happens in Congressional elections, where candidates being outspent four to one because they were Democrats were able to win what were normally un-winnable elections.
MR. LENHARD: If I could interrupt.

So did you change the content of the ads in '06 to try to reflect that sense?

I mean, does the mention --

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

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

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

I think the loss of party identification, I think we want to make a
comeback in that area and try to recapture some Democratic voters who may now vote independent or split their ticket in voting. So I think it will be a very important part of our strategy in 2008.

MR. LENHARD: Mr. Josefiak.

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

This is our attempt using federal dollars the best we can to deal with an issue that gets down to the grassroots level, that says hey -- and go and support the rest of
the ticket in the way we did. But there were
go ing to be issues that are down-ticket,
there are going to be issues that we're
trying to support other federal candidates
that are running, or Congressional
candidates, so that could be federal to
federal, but you also have the general
statement of what else is going on in that
particular state, whether it's a battleground
state or not.

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

So I don't think we at the RNC base
it on any empirical evidence that we do this
because it has an effect. We can put out an
ad on a candidate that doesn't have the
effect, and quite frankly, it can backfire
depending on what the message is. The idea is, it's our responsibility as a national party organization to do whatever we can to support the entire ticket. And we don't base it on the fact that it's being effective or not, but it's based on a strategy that this is something we're doing and we're required to do because we have a responsibility to do it.

MR. LENHARD: Mr. Hoersting?

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

But I think if you think about it with me, you could imagine a year in which while the RNC or DNC is doing everything it can to get its President elected, its Presidential candidate elected, you may not see any hybrid ads. And the reason is
because that candidate is so unpopular or has so botched his campaign that the party committee has made a judgment that tying their other candidates which they legitimately care about -- Neil and Tom have told you that -- you won't see the hybrid ads in a cycle like that.

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

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

MR. LENHARD: Thank you.

Commissioner Weintraub?

MS. WEINTRAUB: Thank you,
Mr. Chairman. I think that there's not much controversy in saying that the ads ought to be allocated according to the benefits reasonably expected to be derived. The point of this is to figure out what that is. What is the benefit reasonably expected to be derived under the various different types of ads? Now, I think that a party might well make the decision that if they have a really strong leader at the top of their ticket, that there will be a coat-tail effect, and that will help all of their down-ticket candidates.

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

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

Am I correct on that much?

MR. REIFF: Yes, I agree with that.

MR. HOERSTING: Totally.

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

I see Mr. Hoersting wants to take
that on.

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

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

MS. WEINTRAUB: Reasonably expected to be derived.

MR. HOERSTING: Thank you.

You should look at objective criteria and say is this the party's message or not, not do I think it really helps them or not. Or is it a wise use of their cash or are they stupid, or are they really trying to fool me, or are they winking at me because
they know it's not that deft a use. If the Commission can objectively say that is their message, then you shouldn't be second-guessing whether it's really going to benefit the party or not.

Shouldn't be doing that.

MS. WEINTRAUB: Well, if your point is that we shouldn't try and determine your intent in paying for the ad, I think Chief Justice Roberts among others would probably agree with you on that. And that's fine.

But it still doesn't answer the question of what is the reasonably expected benefit. Suppose you have an ad that says it's all about -- it's almost the same as the last one -- all about John Doe and what a great guy he is, and the tag line is now, vote for John Doe and the great Paisley Party team; okay?

Would you argue that the party should be able to pay for 50 percent of that ad?
MR. JOSEPIAK: Again, one of the problems that you face with an example like that, that is not the ad. I think when you look at an ad, you have visuals, you have audio, you have text and you put it all together and you look at what is -- how much is given to a candidate, how much is given to --

MS. WEINTRAUB: I'm saying it's all about the candidate.

MR. JOSEPIAK: But if it's all about that, then I think that's why time and space is important. There may be a very small part of that that's allowed to be treated as a generic message, but you look at time and space and you say, okay, is that mostly about a Presidential? And the Presidential has to pay more -- that's the way the Commission in my mind for years looked at these kinds of situations.

And you've got an understanding and I think this goes back to I think what the
Chairman said, the coat-tail provisions in the statute recognized there was some benefit by one candidate, but you always had to mention another candidate, so that the other candidate mentioned was getting a coat-tail benefit from that, and that wouldn't be viewed as a contribution in certain circumstances.

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

MR. JOSEFIAK: But what we're talking about now is a candidate and a generic message from the party as two distinct identifiable things. And I think instead of getting involved in trying to subjectively decide what categorizes something as allowed and disallowed, the Commission's much better off coming in with a strict definition of what a hybrid ad is. A hybrid ad is an ad that refers to at least one specific candidate, and
generically to others.

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

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

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

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

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

MR. JOSEFIAK: I would.

MS. WEINTRAUB: And John Boehner?

MR. JOSEFIAK: I would.

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

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

In my mind, what happened in '04 on
the Democratic side was a clear message to me what they meant, and I would respectfully say what happened on our side from their perspective, they understood what we were talking about -- we were talking about the Democrats in Congress, they were talking about the Republicans in Congress, and were we satisfied with that.

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

MS. WEINTRAUB: I agree with you, and that's what we're trying to do. Because the reality is, Mr. Josefiak, that what you were perfectly comfortable with both in 2000
and in 2004, I was not.

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

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

And yet there is that struggle between the clarity and freedom and ambiguity
and the regulatory regime, and so we're obviously wrestling with those things.

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

And trying to discern whether in fact the parties' funding of hybrid ads in those contexts was really for the purpose of the down-ticket races, or was for the purpose of electing the person at the top of the ticket.
And so then there was I think a
disagreement as to what the answer to that
question was.

But certainly in looking at the
reality of how those ads were cut, the
content of the ads and the actual realities
in the districts that were down-ticket, it was
I think reasonable to discern that the
benefit -- that the goal in some cases was to
inure a benefit to the person at the top of
the ticket, the clearly identified candidate.

And so I think that we just are
trying to ensure that whatever rule we come
up with really in general application going
forward will ensure that the party is able to
spend money to benefit down-ticket candidates
in the way that it wants to, but that it's
not a means by which to get around the
restrictions of 441a(d).

So I guess with that in mind -- I
mean, do any of you have any comments about
the issue or the struggle that I think one
can reasonably go through in looking at hybrid ads that have run in the past, and trying to discern whether there really was indications, given the way those races were structured or the way the down-ticket ballots were running, that the parties were really seeking in those cases to influence down-ticket races as opposed to simply trying to increase the benefit available to the clearly identified candidate in the ad.

Go ahead, please.

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

Neil.

MR. REIFF: I'd say -- as a Democratic Party strategy, and Tom can speak to the Republicans -- generic advertising has always been a core and very important element
of our strategies, especially in minority areas -- what we call our base votes.

Generic advertising is kind of the advertising of choice, especially in targeted radio and things like that.

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

MR. LENHARD: Other questions?

Commissioner von Spakovsky.

MR. von SPAKOVSKY: Mr. Reiff, if I could follow-up on that, let me ask you a question. And I think you said before you particularly believe that the party label and brand were very important in the last election, and maybe in the next. That's a little bit at odds with the written comments.
Within the written comments from the DNC, it said that the allocation would be "based on a reasonable estimate of time or space devoted to the candidate and to the generic party reference, but with a minimum 50 percent allocable to the candidate."

Why do you -- I mean, given what you say about the importance of the party branding, why do you think there ought to be a 50 percent minimum going to the candidate? I mean, if you have an ad where, on a time and space -- 10 percent is the candidate, and all the rest of it is really generic party trying to do that kind of labeling, why put in a 50 percent minimum?

MR. REIFF: I think, frankly, we were forgetting about the politics and strategy side of why communications are important. I'll just come back to you, and I think this goes back to my opening statement -- I think the Democratic National Committee really wants and believes that a
rule regarding hybrid ads is important. And
I think our comments is more an effort to be
pragmatic, and to find a rule that hopefully
more than three Commissioners will agree that
should be passed.
And I think we start with the
baseline, and I think the 50 percent of
course derives from Advisory Opinion 2006-11.
And that seems -- I didn't really hear many
complaints from my side, from the regulated
community, about that advisory opinion, and
whether or not that was unreasonable.
And I think the Commission had
countervailing concerns that they had to
balance in that advisory opinion, and we
believe the Commission reached a good
balance.
I'm more interested in making sure
a viable rule gets passed than worrying about
what percentages -- we face the minimum. So
I think Joe and I were being more predictive
about what we think is pragmatic and viable
to ensure that a rule does get passed.

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

Commissioner von Spakovsky?

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

MR. LENHARD: Welcome to our world.

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

MR. REIFF: Right.

MR. von SPAKOVSKY: The DNC has suggested that there has to be a specific reference to the party affiliation. So I'm assuming that means there would have to be a reference to the Democratic Party and not some other general term or moniker.
I know Mr. Hoersting has said the opposite; you should leave it up to the party to decide.

MR. REIFF: I guess you don't necessarily -- and again, permutations to this will be seen over the next several election cycles if a rule is passed. But we didn't believe that it was unreasonable. And I share Commissioner Weintraub's concerns in this area, to at least have some minimal reference to a political party, whether it would be a nickname or the actual reference. You can just state perhaps a clearly identified political party as opposed to saying a Democratic or Republican or other party, and perhaps then we'll come up and perhaps a nickname will appear in the next cycle or a political party if that becomes popular.

So you don't necessarily have to mandate the name of the parties, but maybe possibly borrowing from your regulation on
generic, which is 100.25, where it just says
a reference to a clearly identified political
dparty. We don't believe that to be
unreasonable and we share Commissioner
Weintraub's concerns about pushing the
everse and possibly having the rule lead
itself down the line.

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

I can easily imagine -- I shouldn't
say easily -- I can imagine that one day,
someone saying the Paisley Party believes
this and the Paisley Party would do that, and
the Paisley Party -- at that point, they
would run an ad about the Paisley Party. It wouldn't be one of the examples in your E&J. They'd come before the Commission and they take their chances. The beauty of that is you have not foreclosed the possibility by a restrictive example of the committee ever running an ad about the Paisley Party. You hold open that possibility and they take their chances.

MR. JOSEPIAK: I'd like to know which one of us you consider the Paisley Party.

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

Commissioner Walther, please.

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

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

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

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

I think only one candidate spent
like $150,000 on TV ads -- over $2 million
were spent in supporting -- which was
allocated to the other party. So in that
regard, it just seemed to me that it was
important for me to get a better
understanding of why people would spend that
kind of money if they really thought it was a
50/50 split of benefits here.
So I'd welcome thoughts from any of
you.
MR. REIFF: I'll make two points.
You know, the methodology that we're putting
out there is -- well, first of all, it was
time and space with a ceiling. So you
couldn't necessarily abuse -- depending on
from which side you look at it. What you're
really looking at there is the content of the
ad. It's really difficult I think for the
Commission, and even the lawyers, to try to
import a strategic element here, and try to
regulate strategy and regulate targeting.
For example, even 527, if you are
looking at 527 advertising, non-profit
advertising, you'll find that the
overwhelming majority of that was in those same exact states, yet there really isn't much you can do from a regulatory perspective to police the targeting of the ads.

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

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

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

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

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

At no point in time, though, in both my examples, are you saying you know what, those guys in Wyoming look at the bottom of the paper. And I know that they're going to get a heck of a lot more than 25 percent benefit out of that. Bush should only have to pay 65 percent, and the party'd
be getting off easy if we let them pay
25 percent. That's not the business you want
to be in. And I think you agree with that.
So that's what I keep trying to get
at when I say "objective," which is some
criteria based on the ad versus
reasonable benefit to be derived in the mind
of the hearer. That's what I'm trying to get
at. I'm not saying it particularly well, but
that's what I'm trying to get at.

MR. JOSEFIAK: And I think Steve's
saying it very well. I think the idea is
that, again subjectivity, you could look at
the same thing and come up with, "I think that
goes 100 percent one way or 100 percent the
other way." The objective criteria has been
time and space and/or the 50 percent,
depending on if it's phone bank or the mail.
And I think that's where the
objectivity standard comes in, not
necessarily what actually practically
happens, but the objectivity
standard -- you've got a message, how can
you best decide how that message should be
divided. And I think he said that very well.

MR. LENHARD: Okay, Ms. Duncan.

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

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

Perhaps it's been characterized
today as objective, but I've heard it
characterized before as subjective. And I
wonder if you might address what you believe
may be some challenges -- if you believe
there are any -- in the actual practical
application of that calculation, particularly
in the context of television ads, where you
have audio and visual components.

Thank you.

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

We would pull out our rulers -- everyone had a pretty reasonable method. I can't say that there was a unified method, but everyone had at least a
reasonable method to do it. And I understand
the Commission always looks at reasonableness
and if it's reasonable, they will not try to
interject their own methodology. TV gets
much more difficult. And I'll be honest with
you, I haven't had that many opportunities to
do time and space in a TV context as I have
in print and other mediums, so it will be a
challenge.

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

MR. JOSEFIAK: I think you're
raising a very legitimate point -- time and
space is a challenge. I think that having
been around long enough, it has been a
position of the Commission, as Neil said, for
lots of reasons, particularly for state
parties over the years -- how you allocate
costs, but having gone through the experience of actually having to do television ads on time and space, it's challenging, because you're looking at every word in the text, every picture by frame, and you're looking at what is being said versus what is on the screen.

And so that it is a challenge to ensure that if you're coming up with a 50/50 standard -- or time and space standard, that you feel comfortable enough that based on your analysis -- because that's where it all comes down, based on your analysis -- you're making that point. But I think even though it's challenging, it's the fairest approach to take, because you cannot, in my mind, come up with a one-size-fits-all rule about a 50/50 or whatever, because what may be true in a Presidential context may not be true in a Senate context or a Congressional context when you're at that level.

And I think you've got to leave
enough flexibility to have at least the
opportunity to invoke a time and space
allocation. But it's a challenge, there's no
question.

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

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

You really want to have time and
space available I think -- for the
Commission, I would think -- and enforcing
allocation regulations for a phone bank just
like that one. So while I agree that there's
a difficulty in television, I always think of
that phone bank thing -- that call to someone
on Election Day. You can split that 50/50 or

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

MS. DUNCAN: Thank you.

MR. LENHARD: Vice Chairman Mason?

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

Any agency that enforces
regulations sometimes ends up in the
enforcement process in trying to determine
the fine points. None of you gentlemen want
your clients -- Mr. Hoersting may not have
clients with the hat he's got on - who are
likely to be here. With the other two, you
don't want your clients, your parties, your
candidates, in the enforcement process.

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

And when I'm in the enforcement
process, what I'm looking for is where is the
ruler, where is the ruler? And if the only
thing is reasonability, there isn't one. I'm
not comfortable sitting here and making some
kind of jury-style tort reasonability
analysis to go back in and then make a
$40 million repayment analysis.
And that's why we're here.

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

I think a regulation ought to be flexible, but if there's a suggestion that the enforcement process is a good way to flesh out the contours of that regulation.

I'd just reject it.

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

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

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

And the problem I have is
Mr. Hoersting's problem -- there -- how are
we supposed to judge what whether a picture
of the Capitol, because Congress meets in the
Capitol -- goes to House and Senate candidates or does it go to something else. And when you start matching up the video, the audio and the text, then I think you end up with a very mushy sort of regulation. Now, I'm not uncomfortable giving parties and candidates in that context a significant amount of leeway, but I want some kind of bound or some kind of a criteria out there -- which is why for instance, a minimum percentage is very appealing, because then it puts some sort of bound out there, some ultimate bound on how far can you go, and if you disagree with the judgment, where can you take it?

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

Is that what you want?

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

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

MR. JOSEFIAK: By looking at the ad and making a decision whether it's reasonable. That's my point. When I first opened -- in my opening remarks, I said I don't think you need a regulation to allow this to occur. However, in my personal opinion, because everyone doesn't live inside the Beltway, and everyone isn't going to spend the time that we have to spend going
through ad by ad, that they need some direction. And so that I understand that it needs to happen.

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

And that's where I said if someone has a problem with that, then you have the enforcement mechanism, but I certainly think there has to be a sort of a blueprint as to what is sort of an acceptable proposition. I feel very comfortable that both parties followed that in the past and will continue to follow that, but obviously, people on the agency don't feel that way, and that's what is sort of baffling to me, quite frankly, on the history of where this agency has been in the past.
Any guidance that you give -- I think it's going to be important for the future that if you are going to take a different view, it needs to spelled out so that the community doesn't fall within the parameters of the enforcement process.

MR. REIFF: I agree with Tom. I don't believe that the concept of time and space is a new concept, a foreign concept to us, and I think both Tom and I, and I hope that I speak for other party lawyers, are very comfortable with the idea.

Now obviously, TV creates a new challenge to us. I don't feel like our clients or Tom or I can come up with a methodology that we believe the Commission would find reasonable. And I'm comfortable that we could accomplish that, and I think it will stand the test of the possible enforcement action, so I don't think that is our biggest concern.

Again, echoing Tom. Anything to
make this as simple and reasonable as possible is fine, but I'm not worried about
time and space.

MR. LENHARD: Commissioner von Spakovsky?

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

We've heard some comments and some arguments that while the rule should be different for different kinds of media, would
they have different effects. What do you all think about that particular comment?

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

So I think the Commission can craft a rule that is flexible for different types of communications. So I don't have a problem with there being one unified regulation for all public communications.
MR. JOSEPIAK: Commissioner, I agree with that. Our comments actually reflect that 106.8 should be amended to reflect that it applies to everything in one place. And Neil is right, it was easy and quite frankly practical when the Commission developed the rule on phones, because usually a phone is a very short message and it made sense for all practical purposes, it would be somewhere in the range of 50/50.

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

TV creates its own little challenges, and radio does as well, but again -- going back to the time and space analogy that it all sort of works out. But I think we've had experiences with the phones, we've had experiences with the mail
based on the advisory opinion. We've had the experience with TV and radio, and now based on the '04 cycle. And I think the Commission, quite frankly, could look at all of that in the context of developing a single rule that would be fair across the board so there wouldn't have to be multiple --

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

Then two years later, you had the opportunity to re-address the same exact issue with mail, and you could have gone the route of saying, okay, we'll just, by analogy, take the phone bank reg and apply it to the mail. But the Commission I believe
recognized that mail was a different animal
than this phone bank regulation, and crafted
a more flexible rule. So it's clear that the
Commission can craft a rule that covers
different types of media.

MR. LENHARD: Commissioner Walther.

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

But when we get to the
television -- I doubt any of you may remember
this in person -- but I certainly do in 1964
when they had that one ad. I don't remember if
it even had any visual, any audio or not,
but it was about the little girl picking the
petal off the flower and the mushroom cloud
behind her and that -- and some would argue
that it sunk the Presidential campaign.

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

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

MR. HOERSTING: I'm not either of
the party committees -- I'm sure you know
that, but I used to be. What I'd say to
that, frankly, is, I would not prefer that
approach. And I think the way to look at the
other side of the coin of what you said,
Commissioner, is it is the judgment of the
national party committee that by tying with
the Presidential candidate, they most
benefit their down-ticket candidates.

That's what they're really doing.

You know, one could fairly say that. As
fairly as you said the other, I could fairly
say the reason they're tying to Bush is
because that's how they get the Senators and
House members elected until '06. Then they
wouldn't do anything with Bush, because it
died them to be affiliated with Bush.

But you see my point?

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

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

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

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

So if you look at it from that perspective, that doesn't always bear out,
because a lot of times, the money's spent
where there's -- like in Michigan, for
example, I think there were 15 Congressional
candidates, and only one had a close race.

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

And I don't believe there's
anywhere else in the federal law regulations
where such a value judgment is made, other
than to say that there are better limits for
different races. But in terms of the
Commission writing allocation regulations, I
think that wouldn't be a good precedent to
MR. JOSEFIAK: The other thing, Commissioner, you gave the impression that the candidates didn't spend any money in those states. You mentioned the $20 million that were spent, when theoretically they spent 10, because it was still their money, but they decided they were going to coordinate with the party with a generic message as opposed to just doing a 100 percent candidate spot.

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

MR. LENHARD: I want to go back I think to a point that the Vice Chairman was
wrestling with, which is what do we - to the
degree that you're seeking a standard or that
we're looking at considering a standard that is
very flexible or ambiguous -- how that relates
to the enforcement process.

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

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

And my sense from the colloquy here
is that you're comfortable with a world
where, whether the Democratic Party is -- the
Software on Terrorism Party -- the nickname for
the Democratic Party is one that's best left
to the enforcement action -- if people want to
take their chances with that, so be it. But
I'm not sure that's really what you were
saying.

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

MR. HOERSTING: You're looking for
objective evidence of a party placeholder.
At least that's the way I'd say it. I'm not
quite sure how you'd say it, Chairman Lenhard.
You're looking for objective evidence of a
party placeholder, and you're wondering if
those soft on terrorism is sufficient.
It may not be sufficient.
But another thing I do want to
point out -- and it's a related point, I
think it's important, though. If you look at
your hypothetical in your question, it says
Candidate X has stood shoulder to shoulder with those who are soft on terrorism. In vote after vote, Candidate X has refused. But it says nothing about what those who are "soft on terrorism" have done or have not done, what they believe or do not believe, votes they have cast or have not cast.

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

And I think that's a very important point. I'm not sure quite how to think about it. It struck me last night when you posed these questions -- I'm not sure how the Commission works this in or whether you
should or not. But there's a weakness in
your hypothetical in terms of genuinely
holding a place for the party committee,
because you don't have the Soft-on-Terrorism
people doing anything, believing anything, or
casting any votes.

And therefore, we wonder whether
there really are any -- or whether they
really are a true organization, which context
would bear out, by the way. We wonder
whether they really are a true organization,
which is the very thing you're pointing up.
You're saying, "Steve, how can this be a real
organization? It just says soft on
terrorism.

And I'm saying back to you,
Chairman Lenhard, if you had them voting, if
you had them believing something, if you had
them with a plan, if you had them siding
with trial lawyers, if you had them believing
in tax relief, if you had them -- et cetera,
perhaps you would be okay with "soft on
terrorism" as a moniker for the opponents. I don't know that. You might not be.

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

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

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

Sorry for the long answer.
The length of the answer I think is fine. I guess what I'm struggling with -- I think that saying someone's soft on terrorism is casting them or giving them a position on a policy issue that is pejorative but real.

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

What I'm saying is that in each of the ads you're dealing with, you always see the other organization -- be it liberals in Congress. Some people are saying, listen, you either have to have Republicans in Congress, or you have to have Democrats in Congress, or it's not a generic party reference, because otherwise, you can't expect the voters to vote against their
opponents -- let's say, for liberals in Congress.

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

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

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

MR. JOSEFIAK: Chairman, I struggle with your example because first of all, I wouldn't do it. I wouldn't let that go as being what I'd consider a hybrid ad, because there's -- but I think the mistake again that
people are making, is they're taking a line out of context, and it's a script versus looking at an ad that again has the visuals.

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

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

MR. LENHARD: Vice Chairman Mason.

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

MR. JOSEFIAK: The difference is --

MR. MASON: But what happens to that?

MR. JOSEFIAK: Bloomberg doesn't have to use a party.

(Laughter)

MR. MASON: Does that qualify? I mean, that gets to nicknames. I mean, the GOP is a pretty common nickname for the Republican Party, and that's pretty easy. I mean, most of the time, the Republican Party
doesn't use that acronym in its ads. But you could go through and do some market research and all of a sudden conclude, "Hey, you know what? People like that."

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

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

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

MR. JOSEFIAK: Sure it does.

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

MR. JOSEFIAK: The reference is
generic, but what the implication is when Bloomberg is putting out an ad talking about a party, is he talking about the Presidential candidates of that party, or is he talking about something else that would consider itself to be a --

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

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

MR. LENHARD: Commissioner Weintraub.

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

I think part of the exchange
between the Chairman and Steve brought up
something that I was thinking about when I read
your response to the Chairman's questions
that you had posted on your website, and it
seems to me that what you're suggesting is a
more content-based investigation where we would
have to go into the content of the ad and say
not only who's identified, but what are we
saying about them?
Are we saying good things about
them? Are we saying bad things about them?
Are we saying how they vote or what positions
they've taken? And that struck me as going
sort of in the opposite direction from most
of the comments. And I was curious whether
Tom and Neil have the same reaction that I
did, that maybe we don't want to go down that
road.
MR. JOSEFIAK: I certainly would
agree.
MR. REIFF: I'd definitely agree.
That's why I think we need to -- our approach
to generic party references I think is a
clear rule, it's easy to understand, and I
think it would be less intrusive.

MR. LENHARD: Ms. Duncan.

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

And it seemed that Mr. Reiff, in
your comments, you went further than that and
added some more structure to indicate that at
least the party nickname would be required.
And I just wondered if you would talk a bit
more about that. You've answered briefly in
response to Commissioner Weintraub's
question.
But I wonder -- would you accept, for example, a generic party reference to identify a political party unambiguously, without using the nickname -- with something else that might make that reference.

MR. REIFF: Again, I said this earlier. I think probably the best approach from a regulatory perspective -- I don't have the regs and I don't have a regulation book, but probably to echo either the language in the Advisory Opinion 2006-11, although that doesn't give a lot of specific guidance, but I think 100.25, for example -- the definition of generic I think is a relatively easy term to understand.

I believe it says reference -- you can decide whether you want to make it a reference task or a promote, support, attack or oppose type of test. But then it says a clearly identified political party without - I hope I'm getting this right -- clearly identified political party
without reference to any candidates.

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

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

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

MR. REIFF: Sure.

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

MR. HOERSTING: The Commission should -- when I say "objective evidence," the Commission can't obviously rely entirely on the party committees to tell them where their generic reference is. They have to set
a standard. I say give examples. And if a
dparty committee says, hey, we want to go. We
believe in the enforcement case. We can
cconvince you that even though you didn't put
this in as an example five, six years ago,
it's valuable now as a legitimate party
placeholder. And that's the way I see it.

MR. LENHARD: Okay.

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

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

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

MS. CLARK: No, Mr. Chairman.
MR. LENHARD: Gentlemen, I cannot express how much we appreciate you coming and spending time with us on this. It is enormously helpful for us, and I want to thank you for doing that. And thank your clients for helping to arrange that.

We're going to take a short recess, and we'll reconvene at noon.

Thank you.

(Recess)

MR. LENHARD: Good afternoon.

The special session of the Federal Election Commission will reconvene.

Our second panel today consists of Sean Cairncross, on behalf of the National Republican Senatorial Committee; Marc Elias, on behalf of the Democratic Senatorial Campaign Committee, Donald McGahn II on behalf of the Illinois Republican Party and the National Republican Congressional Committee; and Brian Svoboda on behalf of the Democratic Congressional Campaign Committee.
Each witness will have five minutes to make an opening statement. The green light at the witness table will start to flash when you have one minute left. The yellow light will then go on when the speaker has 30 seconds left, and the red light means that it's time to wrap up your remarks.

The balance of the time is reserved by questions by the Commissioners. As with our earlier panel, we'll proceed alphabetically.

So Mr. Cairncross will be the first to go. After that, we'll have Mr. Elias, Mr. McGahn, and then Mr. Svoboda.

So Mr. Cairncross, at your convenience, please proceed.

MR. CAIRNCROSS: Good afternoon, Chairman Lenhard, Vice Chairman Mason. Thank you to the Commission for having us here to testify today. It's much appreciated, I know, on behalf of all three party committees, that our comments
I'll briefly summarize the RNC's and the NRCC and the NRSC's comments, and then make one or two additional points.

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

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

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

With respect to the generic party
reference, we do believe -- and I know it's
clear to me that the Commission is not in
agreement on this -- that it's a
self-enforcing mechanism to a degree, and
that is a standard of reasonableness should
apply on the basis of -- if you try to draw a
distinction and impose particular monikers
that a party must use -- list examples -- by
virtue of doing that, you are engaged in a
content-based restriction essentially on
party speech and its ability to identify
itself or its counterpart in a way that it
deems appropriate.

And that's not to say we'd like to
throw this to the wind and rest on your
enforcement procedures. But it is to say in
our past history with this -- our recent history
is that in 2004, both parties appeared comfortable
with the identifications that the others
made, and that there is an enforcement
process should a party committee run an ad
that crosses the line, and both parties
certainly are aware of that.

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

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

MR. CAIRNCROSS: No, it's --

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

MR. CAIRNCROSS: That's correct.

Thank you. Tap dancing for a second.

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

Thank you very much.

MR. LENHARD: Thank you. I believe,
Mr. Elias, you're next.

MR. ELIAS: Thank you,

Mr. Chairman, members of the Commission.

I'll try to be brief, and make two points
which were not covered in our written
comments for my opening statement.

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

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

But in my testimony there, which
raised some eyebrows, I think, I vigorously
defended the need to keep the 441a(d)
limits. And one of the reasons for that,
which I received vigorous questioning from
from both sides of the aisle, had to do with
the fact that this agency is capable of
having rules that give parties breathing room
under the 441a(d) limits.

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

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

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

And I think you have an opportunity
here in the hybrid rulemaking context to
make clear that that's not true, that there
are going to be ads that benefit the party,
benefit candidates, and in that way, give
parties the opportunity to manage their
441a(d) limit in a way that does not
require its ultimate repeal. That's one of
the reasons why I support the 50/50 extension
of the phone bank regs to other forms of
public communications.
The second point I just want to make briefly has to do with complexity, and this is a subject that I turn to over and over again every time I appear before this agency. So I'd be remiss if, having done it in every other rulemaking, I didn't do it here.

McCain-Feingold is a very complicated law. And my clients -- now speaking on behalf of the DSCC -- my clients, my Senate campaigns, my party committee, are constantly trying to figure out what the law is. Is it 120 days before an election? Is it 30 days before an election? Is the bi-aggregate annual limit for out-of-cycle contributions to Senate candidates counted at this cycle or are they counted in future cycles? You all change your minds a lot. Some of it, in fairness to the Commission, has been the result of litigation. Okay. But where there is something that is clear and brightline, that
is preferable to something that's not clear
and not brightline. So as between a 50/50
rule that may in some cases be slightly
over-inclusive, in some cases might be
slightly under-inclusive, or a -- how do I
measure an ad versus how does Mr. McGahn
measure an ad, and how does the General
Counsel's office treat a visual of this
candidate versus a visual of a party. Rather
than getting into the uncertainties that come
with that, I'd rather have this Commission
put forward brightline, clear rules so that
we don't wind up in a situation where we're
explaining to our clients again, "Well, you
see, it's not actually that simple."
If they hear me say one more time
it's not that simple, they may fire me, which
would be unfortunate for me and my family and
my firm. So those are the two points I
wanted to make.

One is that as you go about today,
I would have you keep in mind the fact that
what you're doing involves all hard
money and is actually a way to preserve the
current regulatory regime. And second, that
I'd urge the Commission to take an approach
that is going to value simplicity over
100 percent precision.

Thank you.

MR. LENHARD: Thank you very much.

Mr. McGahn, you are next.

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

My clients want to bring a little
bit different perspective to the table, and
that is those who are not running for
President, those who do not necessarily think
of hybrid ads as their first method of
communication but nonetheless would wish to
maybe have it be something in the future they
would like to do depending on the circumstances.

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

For example, it's certainly within
the realm of possibility that a state party
would like to do an ad that uses a federal
candidate in the ad to simply draw attention.
The federal candidate gets on
screen and says, "I'm Congressman Jones, and
like I've done in Washington, the Republican
Party in Illinois is really doing the job
standing up for Illinois values,"
blah-blah-blah, and he talks about the party for the remaining 30 seconds of the ad.

If you adopt an arbitrary, for lack of a better word, 50/50 ratio, that's not really fair in that case. When you come at it maybe from the Presidential perspective, maybe 50/50 makes some sense. I'm not really passing judgment on that -- I want to come at it from the other perspective, where there are going to be situations I see where the party committee really will be the primary beneficiary of the ad.

Whether it's for folks who are down-ticket or simply because the party wants to get its own message out, brand its own image, push legislation, issue advocacy, what not, so my clients suggest we want to bring the perspective of not a one-size-fits-all rule based upon the Presidential model.

The issue of nicknames is interesting, because regardless of whether you do time/space, which is what my clients
recommend -- we see that as the current law,
and we think that works fine from our
perspective -- or a 50/50 or some other rule,
it really begs the question as to what is a
tax reference.

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

The fourth quote, we think that's a
maybe depending on context, because
Presidential candidate again -- a little bit
different than my clients working with
Congressional leaders to pass key
legislation. That could be a party reference
depending on what Congressional leaders we're
talking about and what legislation we're
talking about.

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

It is maybe issue ad versus
express advocacy in past MURs, but in this context,
I think it's an apples and orange comparison.
But that still begs the essential question of
nicknames. The Illinois Republican Party is
housed in the Land of Lincoln. It is the
party of Lincoln. In Illinois, that's a
nickname that makes a lot of sense. It's not
something that someone in Hawaii would maybe
instinctively think of as a Republican thing. But certainly for the Illinois Republican Party, that would be something that anyone looking at it would think that's a party nickname. So I heard Mr. Hoersting's comments early about providing examples. Those are always helpful. There's been prior rulemakings where there's been examples in the E&J, very helpful.

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

It is one thing to enforce limits, it's another thing to reach out and touch speech. And if you reach too far and try to be too precise with the nickname issue,
you're going to inevitably cut off creative
thinking, which is something that my clients
hope does not happen. With respect to the
enforcement and -- I'll just wrap up. I see
the red light is on.

Again, it's a situation where

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

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

Ever since the Commission is
formed, FECA, BCRA, regardless of where we
were in our trajectory of law, there's always
been wide discretion in the spending of
campaign funds. It's not the sort of thing
the Commission second-guesses.

Matching funds, different story.

But regular campaign funds, Commission does
not get in and micromanage whether or not
that was legitimate campaign spending short
of personal use. So there's precedent for
deferece. I think that could be useful here
as an example.

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

Thank you.

MR. LENHARD: Thank you very much.

Mr. Svoboda.

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

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

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

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

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

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

Or is the Commission's answer going
to be altogether different -- as one of the
commenters urged on the Commission -- to not
only ask the parties to continue to operate
within the tight restrictions of Title I of BCRA, but to take the principles of those restrictions and apply them also to the question of what is or isn't a contribution, or what is or isn't a coordinated expenditure for purposes of the campaign finance laws.

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

I mean, here at the House and Senate levels, we're about to see an example of that this cycle. There is a form of exempt activity available only to the Presidential
ticket that allows for telephone banks to support the Presidential ticket. And the Commission's interpretation of those rules has always allowed an incidental message of House or Senate candidates in that phone call.

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

The Commission has made a judgment - or Congress made a judgment -- that it was important to preserve the institutional power of the parties and their adherence with their candidates and their identification with their candidates to allow...
these sorts of things to happen, that it was
not simply good for the candidates, but it
was good for the party as a whole.

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

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

Well, in Michigan for example, you
saw very competitive races for the state
legislature, where the balance of party
control was very much at this moment in play.
And you saw Democratic gains that people on my side of the aisle were very happy about. You saw a Democratic governor who won re-election under circumstances where it did not seem at all assured going into the cycle, and you've recently seen a Democratic Senator win re-election.

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

So those are the questions I think we'd like the Commission to think about today, which is -- just what is the role of the parties after BCRA, and how much freedom are they going to have, or little freedom are they going to have to manage their hard money resources? And do they have anything to do other than simply supporting federal
candidates? And the answer to that latter question I think clearly is yes.

MR. LENHARD: Thank you very much.

Questions? Vice Chairman Mason?

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

That was there.

And what it reminded me of is the fact that in the 1970 elections, Nixon actually did ads for Republican candidates. Now, it was a little simpler -- of course we didn't have FECA -- and he wasn't a candidate. But it brought home the example, the reality of the fact that you might have someone -- and it would be very easy to
imagine for instance a popular Senator in a state being asked to cut an ad for the state party, say, on behalf of legislative candidates. And I don't think any of us would have the purpose of prohibiting that.

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

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

How do we write a rule that allows a state party to pay for all of that but
doesn't allow the state party in the next state where the Senator's in a 50/50 race to put --

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

whereas the 50/50 doesn't necessarily reflect
reality when it comes to how much time it's
on the screen or what not.

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

And frankly, the candidate who may
be running away with it probably doesn't
really want to be in the party ad, but if all
of a sudden he has to pay 50 percent, he's going to say no. But if you can present an ad that says listen, you're going to be in it for five seconds and you're going to pay this much, can you do it? Okay, they may say yes to that. So it's a concern. And that's why I think time/space is really the proper approach, because that's something that you can objectively get a stopwatch and work with.

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

MR. LENHARD: Commissioner von Spakovsky.

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

MR. ELIAS: Yes. Let me say a couple of things about that. The first is it's not self-evident -- just to be clear, it would be fine with me -- but it's not self-evident that everybody else in this room would agree that a picture of "Lincoln, the flag, and an eagle" is equal in time/space to a picture of the candidate. And that's one
of the problems with time/space, is that
you wind up -- how do you depict John Kerry
and the Democrats? Okay, I know how you depict
John Kerry, put up a big picture of John
Kerry. Do you put a picture of the
Capitol, do you put a picture of the
Democratic headquarters building, put a
picture -- a generic shot. Well, these are
all real examples --

SPEAKER: So far so good.

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

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

We'd be back in the days in 1998, the National Republican Senatorial Committee filed a complaint against every ad run in the entire country by the Democratic Senatorial Campaign Committee. Back in the day of the issue ads. And we did the same thing back. And if we get -- and that was because back then, we had all this squishiness about issue ads. And now if we get into time/space, it's just an invitation into how do we decide
whether or not this was in fact -- frankly,

if we want to go with Mr. McGahn's -- the

parties decide how much benefit is derived

with a presumption? That I think is easier.

MR. von SPAKOVSKY: You mentioned

the difference between different media.

We've had some discussion here about how there

ought to be a unified rule because that's

simpler. Would you prefer that even though

there's easier ways of doing it with

different kinds of media?

MR. ELIAS: I think there ought to

be one unified rule.

MR. von SPAKOVSKY: Okay.

MR. LENHARD: Commissioner

Weintraub.

MS. WEINTRAUB: Thank you. I

assume, Mr. Elias, that you're not in favor

of enforcement as a method of figuring it all

out down the road.

MR. ELIAS: Let me just say one

thing about that. The answer is no. I mean,
I think that there are regs that you all have passed over the years that lead to natural enforcement opportunities, and there are those that don't. I would advise for favorable consideration the polling reg; right? You can do it this way, you can do it this way, or you can do it any other way that's reasonable; okay?

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

I will note one thing though about enforcement, which is that I believe -- and I may off by a couple -- but I believe that during the course of the 2004 campaign, John Kerry for President and Kerry Edwards 2004 received 19 FEC complaints. So it was clear to me that the Republicans and the people who
didn't like Senator Kerry knew how to find
the FEC and knew how to file a complaint.
I don't think I'm revealing any
secrets. None of them involved hybrid ads,
and as far as I know, none of the -- I'm sure
the Bush Campaign found themselves in the
similar position -- and none of those
complaints involved -- as far as I know,
obviously not privy to whatever is
confidential with the agency -- but I assume
none of those involved hybrid ads.
So I don't think there's a huge
clamor of enforcement queued up against
hybrid ads.
The DSCC ran hybrid ads in 2006.
We did a lot of hybrid mail. We did a lot of
hybrid radio. We did some hybrid television,
and we did some hybrid phones. As far as I
know, no complaints filed. So I don't fear
the enforcement mechanism, because I don't
think that there's a clamor for it out there,
but I would not recommend that we gin one up.
MS. WEINTRAUB: If I may --

MR. LENHARD: Please --

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

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

So I'm going to give you an opportunity to respond to that. How can we, given that we're supposed to be enforcing the 441a(d) limits -- and I agree with everyone
who said we don't want to say every single
thing that a party does should count against
it -- but doubling the limits is kind of a
big deal without Congressional action.

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

MR. ELIAS: Two things I'll say.

One is I assume that the earlier person was a
member of the reform industry or a reform
group.

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

MR. ELIAS: And what I find curious
about this is -- I wake up one day in 2004
and see what is now I understand to be a
hybrid ad, the first Bush hybrid ad. There
was an AP story later that day saying that
this is what the Bush campaign did. I was
the general counsel to the Kerry-Edwards
campaign. I scratched my head and said, huh,
that's interesting. And then I read that
Larry Noble, who at the time was with one of
those groups, proclaims that it's perfectly legal. Okay. Fair enough.

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

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

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

MR. SVOBODA: And if I could add a comment to that. I got my start in politics before practicing law working for the Nebraska Democratic Party in 1988, when you might recall George Bush was running against Michael Dukakis, who was immensely popular in the state, and when Bob Kerry was running against Dave Karnes. Now, if you'd had an ad in Nebraska in 1988 sponsored by the Nebraska Democratic Party saying vote for Bob Kerrey and the Democratic ticket, the Campaign Legal
Center through their comments would say that 100 percent of that value should be ascribed to Bob Kerrey, Elias and Svoboda would be here telling you it should be 50 percent. Our colleagues on the panel would be saying you should be allocated based on time/space.

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

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

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

The parties not only have
down-ticket concerns, but building the party
brand is very important to the Republican
Party. It's very important for us to try to
attach our brand to our entire ticket of
candidates, and thereby grow the party. So
there's absolutely independent benefit that's
derived from a hybrid ad, from our perspective.

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

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

And those efforts paid off -- I mean not simply in 1968 or 1972 -- I mean they paid off for Republicans in many jurisdictions in the country in many
different ways at many different levels. And the effect of that -- it's apparent to us all as political professionals and people who are familiar with politics -- and you can say the same things about similar efforts on the Democratic side of the aisle -- the Gingrich Congress, for example -- but each of these goes to show that these effects are real and perhaps impossible to quantify.

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

MR. ELIAS: The only thing I'd add to that which is very anecdotal -- and I don't want to portray it as anything else -- just my experience with the Senatorial Committee is that when we engage in a hybrid ad program, which we did last
cycle, hybrid media program, we had interest
from not only the party but from the
down-ballot people.

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

So there's some tradeoff in the
making it hybrid, and especially with the
allowance for exempt party activity, you can
easily make something entirely one
candidate-focused and still have it not count
against 441a(d). So I think that there really are benefits. But again, that's anecdotal.

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

But the party is very concerned that what they're trying to do with their message -- which they hope will pay dividends down the road -- is going to be snuffed out at some point. Yet again, BCRA was tough enough on a state like Illinois. It's a corporate money state, essentially similar to Virginia. It's kind of a full reporting, anything goes kind of state. And all of a
sudden, they learned they have to spend a lot of hard money nearing Election Day, and now they're trying to do an off-year branding that will maybe help them next year, the year after, the year after that, and they want federal officeholders to help.

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

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

MR. LENHARD: Commissioner von Spakovsky?

MR. von SPAKOFSKY: I'd like to ask the panel as a whole to play off something that Mr. McGahn said, and that is -- I'm
assuming that if we were to come up
with -- say that the standard's going to be
time and space allocation -- do you all
believe that the kind of standard that the
Commission then ought to use in an
enforcement matter -- it sounds like you all
probably would be in favor of almost an
abusive discretion. In other words, we would
not overturn what the party decided was the
proper allocation unless we really thought
that they'd abused their discretion -- more
than just a reasonable standard. What do you
think about the standard we ought to use?

MR. CAIRNCROSS: I think that an
abusive discretion standard -- if such a
thing would fly, would be great.

I don't mean that in a smart way.

MR. McGAHN: But that standard
flies every day --

MR. CAIRNCROSS: Right --

MR. McGAHN: In federal and state
courts. It's not a novel concept that
there's deference given. Now, you could --

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

MR. McGAHN: -- come back and say, but

that's two different decisionmaking -- but

nonetheless, the idea of deference to a decision
made at the time is not something novel in our
jurisprudence or legal system. Abusive discretion
has the advantage of - it's a term that we understand.

We would certainly welcome that sort of standard.
The fear, of course, and I think this is part of
what Mr. Elias is handing out with the merits of
the 50/50 is you don't want to be second-guessed.

And 50/50, at least you know you

won't be second-guessed.

But 50/50, from my client's

perspective, doesn't really get you there

either on the practical side of spending. So

I think some sort of deference is in play,

which should be there. And again, there's

plenty of examples, even in federal election

law, where there's deference given to
spending decisions that are not second-guessed by the Commission. And the polling reg is a good example of where you do have quite a bit of discretion and you have a question or you have -- there's all sorts of ways you can allocate a poll.

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

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

MR. SVOBODA: And Commissioner, I think your question at least to me seems to acknowledge that how you make a time/space allocation -- depending on the media in particular -- you can do it any number of different ways. One of the things I've had
to do in practice for the last 10 years is in context outside the hybrid context, just figuring out time/space for multiple candidates mentioned -- that I can tell you as you sit with the ruler and the abacus and you calculate it out, there's four or five different ways to slice the bologna. Some of them are more aggressive, some of them are less aggressive.

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

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

And as Mr. Elias said, virtually no complaints filed on hybrid ads. The parties
are aware of what the other party is doing
and are paying close attention.

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

MR. LENHARD: Mr. Elias?

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

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

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

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

MR. LENHARD: Commissioner Walther?

MR. WALTHER: One of the things that I think was on our minds as we were dealing with the audits, you're doing with public funding, you're dealing with us deciding to what extent was the public funding augmented by hybrid ads, and feeling a special sense of responsibility in that particular case to exercise their judgment, determine what's
reasonable and what's not, and whether that
would translate into other situations is
probably less likely.

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

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

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

That doesn't necessarily militate
that percentage precisely, but on the other
hand, it is a factor on what people think when they spend their money, the benefit that's being gained.

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

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

MR. ELIAS: Well let me just address the 92 percent, because I can speak to that from first-hand experience. Senator Kerry was being asked to pay for half of those ads. So
the deal is, if the Ohio Democratic Party
wanted Senator Kerry to help the down-ballot
ticket and the Idaho Democratic Party wanted
John Kerry to help the down-ballot ticket, we
were more likely to help the Ohio Democratic
Party ticket, because we were paying for half
of the ad.

If the Commission wants to pass a
rule that we don't have to pay for any of the
ad where we're helping down-ballot people,
then I'm sure you would have seen hybrid ads
in other states. But we can't lose sight
of the fact that there was actually a
candidate component to those expenditures,
and therefore, you need both the party and
the candidate to agree to spend in that
jurisdiction, for the same reason that you
now see candidates more willing to raise
money for the Iowa Democratic or Republican
parties than they probably are to raise money
for the Idaho Democratic or Republican
parties.
It doesn't mean that the party is getting any less benefit from the attendance at that fundraiser, it just means that the candidates see more utility in helping some parties more than others.

MR. McGAHN: If I could chime in on that a little a bit and pick up on that point. It's tough to look at the money spent on just one ad and draw a conclusion that therefore, someone was trying to stretch the coordinated limits or play games with where they were spending in certain states, which is why arguably the matching funds regime is a little bit different, spending limits, that kind of thing.

My clients don't see that so much. But you need to really look -- to the extent you're really going to go down that road -- realize that how complicated it is to allocate assets for a campaign -- we're dealing with all hard money here, we're dealing with how to split up who pays for
what share of an ad.

There is no moral rule here that we're playing with. There's no metaphysical correct limit for coordinated expenditures. For example, on the mail side, hybrid mail, hybrid -- that's okay, what about do it as volunteer mail? Fully coordinated with the state party committee, all hard money volunteer component. There's a myriad of examples where for every ad where you think gee, maybe that was a little bit odd, there's all sorts of other explanations why it's really not in context. I just want to make that point, that there's many ways to skin -- from a state party perspective, hard money is such a premium -- those sorts of decisions are going to become more complicated, not less complicated, and this is why to us, time/space makes more sense.

MR. LENHARD: Ms. Duncan?

MS. DUNCAN: Thank you

Mr. Chairman.
Good afternoon. I wanted to direct this question to Mr. Elias, but others could comment as well. And I just wanted to press a bit more on your preference for the 50/50 allocation, if we haven't done that enough already.

And that is, I understand that you prefer it because it is a brightline, and that time/space allocation or attribution can have its practical problems, and that also the benefit to the party is difficult to quantify. But I'd ask why that particular brightline? What evidence could you offer for the Commission that that brightline is more defensible than say a 75 percent brightline?

MR. ELIAS: It's a good question, it's a fair question. Let me answer in a couple of ways.

First, which may be unsatisfactory, or may leave you feeling empty -- but the Commission already adopted a regulation with
50/50, so it held a rulemaking very similar
to this one, and determined that 50/50 was
the place to be.

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

I'm willing to use the nomenclature
hybrid ads because it's recognizable. But
it's kind of ingrained in the culture
somewhat at this point that these are 50/50
ads. It doesn't mean that it can't be
changed.
And I'm not sure that's a satisfactory answer to your question, but that's at least as much as anything else why.

MR. McGAHN: We actually call them split ads. The 50/50 -- to cite the prior rulemaking, I assume that's a phone bank we're talking about?

The thing about phones -- and this really doesn't help -- I'm actually kind of piling on and not really helping the 50/50 argument -- I'll explain why -- in fact somebody may sue -- which is really the gist of the question -- how do you defend the 50/50 in case someone says it really should be 25/75, this is arbitrary.

Phones are a little bit different than TV and radio because phones, given the myriad of state laws, whether you need a live funded call or you need a robo call or a hybrid of the, to use the term hybrid of the robo, there's so much on the state level that regulates how you do calls that it's very
difficult to really time a call.

If it's a live phone bank, let's say it's a state where you have to make live calls, somebody could read it quickly, somebody could read it slowly, somebody could read the candidate part fast and the party part really slow. So 50/50 there I think makes some sense. It seems defensible because you have so many different -- I don't think anybody is going to sue you over 50/50 split on phones.

TV and radio and mail are a little bit different. You take out a ruler, you take out a stopwatch, so I'm not so sure that 50/50 can be justified on the same basis as the phone. I think it's an over-simplification to say well, the phone rule's 50/50, so therefore we can do 50/50 everywhere.

It's the opposite answer that I think you were hoping for, but it's food for thought. Maybe you can -- Marc?
MR. LENHARD: Vice Chairman Mason?

I'm sorry, Mr. Svoboda, please?

MR. SVOBODA: I think to respond to

Don a little bit, one of the things I think it illustrates is that time/space has never been the exclusive means within Commission rules for analyzing the division of benefit, and the polling regulations are the classic example of that. The Commission developed a schedule for the diminishment of poll value over time that -- I hesitate to say it was arbitrary -- it's survived for 20, 30 years, -- but I don't think that the benchmarks in terms of time frame and percentage value were developed based on rigorous scientific analysis.

I think it was based on the Commission's best expert judgment, based on its own experience, frankly, as people who either used to be political professionals or regulate political professionals and see what they do. Their sense of just how much
utility that poll had over a stage of time. So I think the law permits you to make those rough judgments. Now, why 50/50 versus 75/25 or 100/0? I think 50/50 is more defensible than 100/0 if you start from the premise that the candidate enjoys a diminished benefit of the ad by the inclusion of somebody or something else. And I think that can be readily documented in the course of a rulemaking. That brings you to the question of why 50/50 versus 75/25 or some other number selected. 50/50 strikes me as a proxy for recognizing that the value has been diminished. So for example, again, we go back to the polling regulations -- if under the regs it's now written if there's a poll done and two people purchase it, the rules would regard that, each side basically as having 50 percent of the value of the poll. It's divided by the value of the number of the recipients, even though
everybody -- even though each of the people
has an entire poll, there's a sense implicit
in the rules that the value is diminished
based on the fact that somebody else has it.

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

MR. McGAHN: I hate to speak again,
but the 50/50 approach -- assuming you pass a
reg, which my clients don't feel you need to
do, but assuming we go down that road -- a
50/50 rule would be much more defensible if
there were one of two or three other options
where you have a 50/50 approach, you have a
hybrid approach, and maybe you have an actual
value approach -- not unlike the polling reg,
and I think if someone would challenge the
50/50 approach, you then have much more
flexibility in the reg to say well, you're
not stuck with 50/50, that's just one way you
could do it. You could elect to do another
And one final comment on that. The 50/50 does have I think some difficulty addressing a multi-candidate hybrid ad, and that's something I think the Commission should consider as well --

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

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

And I want to approach it two ways.

One is, I put out a couple of different
examples of communications -- I think some
were to the questions that I originally
proposed to Mr. Hoersting and I think -- one
to Mr. Cairncross where, that I had actual
text, and the question was do these rise to
the level of the reference to a generic party
communication?

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

I appreciate knowing both a mixture
of how you read these kinds of communications, whether they qualify as generic party communications, and therefore if they were placed in an ad, whether it would qualify as a hybrid ad. And secondly, and probably more importantly, how you think we end up best off phrasing that -- to meet those, all of those somewhat inconsistent goals.

Anyone want to take a stab at that?

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

MR. LENHARD: I'll read it to you because I've got it in front of me. I've brought all my questions to the meeting today as I did, which I did because they're mine. The four or five examples I had the one -- first one or the last one to you was, Candidate X stood shoulder-to-shoulder
with those who are soft on terrorism. In vote after vote, she's refused to give our troops the support they need. And I didn't give a close-out. The choice is now -- the decision is yours or something like that.

MR. CAIRNCROSS: Right.

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

MR. CAIRNCROSS: And specifically with the shoulder-to-shoulder on terrorism and something like that, I know Mr. McGahn addressed the prior examples earlier, and said it's a little bit difficult to take out of context as a single standalone statement --
MR. LENHARD: Even though the next sentence refers to our votes on the Hill?

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

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

MR. CAIRNCROSS: That's right, to the candidate, but not to a generic party.

But there again, in an ad that says -- that finishes vote against Candidate X and her colleagues in Congress or -- in our case, the Democratic Party.

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

MR. ELIAS: Since we're here to testify, not to ask questions, I'm nevertheless just tempted to ask a question, which is that -- in 1996 or 1998, it was Newt
Gingrich. In 2006, more contemporaneously, George Bush -- I mean, Tom Kane and the Bush team want New Jersey to do X, Y and Z. You know, on Election Day vote against Tom Kane Jr. and the Bush team. Was there any doubt in anyone's mind that we were making a generic party reference for Republicans? I think pretty much people knew that the Bush team didn't include Democrats in the State of New Jersey. George Bush is fabulously unpopular in the State of New Jersey, I might add, and was being run away from by Don's clients in the State of New Jersey, I might add. And so it was a more effective way frankly than saying the New Jersey Republican Party, which is actually less unpopular in that phraseology, so our nickname for the party in New Jersey, the "Bush Team."

And I think you need to leave that flexibility. I grant you, these shoulder-to-shoulder -- I share the
skepticism.

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

What do we do in terms of a reg?

MR. McGAHN: The reg should certainly include the obvious references, party names. The New Jersey example is one that is transient. In four years, running an ad about the Bush team is not going to make a whole lot of sense, so it is tough to sort of quantify those. And that's really the challenge, and that's why the reg does need
to build in the flexibility and the deference
to the decisionmaking -- otherwise you're
going to lock in -- because I'm not sure I
could write a reg that encompasses all
potential names other than in the E&J list
examples, that are maybe contemporaneous down
the road can be used by analogy.

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

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

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

MR. LENHARD: Vice Chairman Mason.

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

In other words, would we draw the
safe harbor on the party side or the
candidate side, if we did?
MR. ELIAS: No, in the AOs --

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

MR. ELIAS: I suspect unanimity among us.

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

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

MR. SVOBODA: And then the terms of how you deal with that in the enforcement
process, I think there's a presumption -- it
maybe reflects the differences in
perspectives between where you sit and where
we sit. But I think there's a presumption
perhaps on the Commission's part that every
complaint that comes in about one of these
ads, assuming that there is any, necessarily
needs to be a priority in the enforcement
process, and needs to occasion stern to
bow review and a completion of the
process. And the fact of the matter is that
the Commission has prosecutorial discretion.
The Commission can decide how important or
how less important this issue is relative to
other priorities -- what sorts of cases are
ripe for review and what sorts of cases are
not ripe for review.

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

MS. WEINTRAUB: If it were up to
me, you wouldn't know.
MR. SVOBODA: But the fact of the matter is, the Commission can make these judgments. So while one way I think is, as Marc talked about -- spelling out some regulatory criteria that give people a basis for proceeding. You know, the Commission also is just going to face a decision as to -- assuming the complaints do come in, how are they going to review them?

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

MR. LENHARD: The hard thing obviously for us is especially when you get into TV -- these are big ticket items, and to see them
in enforcement means that there's a lot of
dollars after whatever is involved.
And so, to the degree that we can
sort of provide enough clarity at the front
end, that people can shape their
decisionmaking in the pre-spending phase
accordingly, it's going to make life I think
for everybody a lot easier. Because once
they -- now you indicate that nothing has
certainly come out of the pipe and you may
not be aware of anything involving hybrid ads
so far, but to the degree that you do end up
in the enforcement side, the TV buy dollars
on these -- there's a lot at stake.

MR. SVOBODA: It occurred to me
this may not be directly responsive to
Commissioner Mason's question. But there's
another context where the Commission has had
to implement spending limits, has sought to
provide relief to people from those limits to
some degree and give them reasonable basis of
complying, and it's the Presidential, primary
public funding state limits. The Commission basically said there are going to be five categories of spending that are going to count against the state cap, and these are it. We'll list them for you in the rule. And if it falls into one of these categories, it counts, if it falls outside of the category, it doesn't count. So that's an example of how perhaps you can provide -- it may be as roughly analogous to what Marc talked about -- the reference to the polling rules and presenting the option of time/space or 50/50 or benefit reasonably derived, it also I think drives home another important point, though, which is the Commission in interpreting the spending limits, whether in the Presidential primary process or the party coordinated expenditure limits, has never been the catcher in the rye standing at the end of cliff catching every dollar before it falls over.

I mean, it has always historically
given some flexibility in the interpretation and enforcement of these limits.

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

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

(Laughter)

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

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

(Laughter)

MR. LENHARD: Just teasing.
MR. McGAHN: I'll come back tomorrow and so --

(Laughter)

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

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

MS. WEINTRAUB: Just one.

MR. LENHARD: Ms. Weintraub --

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

MR. McGAHN: Thank you.

MR. LENHARD: Very good. Thank you. This concludes our hearing on the
Commission's Proposed Revised Rules for the Hybrid Communications. I'd like to thank the witnesses for coming and attending.

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

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

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

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