Questions for Mr. Hans von Spakovsky, FEC Nominee,
Submitted by Chairman Dianne Feinstein
for the U. S. Senate Committee on Rules and Administration
Hearing Record of June 13, 2007

1. On April 6, 2006, while a Federal Election Commission Member, you and Chairman Lenhard participated in a conference sponsored by the Federal Bureau of Investigations. Your speech focused on assessing the relationship between the FEC and the Department of Justice. During that speech, provided to the Committee, you noted that under the current enforcement scheme, the FEC has a "...close working relationship with DOJ, and quite frankly, we would like to improve the relationship, particularly our exchange of information on violations of the FECA and the ability to jointly prosecute and settle civil and criminal violations. DOJ and the FEC have a Memorandum of Understanding that was negotiated in the 1970's, and we are in the midst of discussions to try to update and improve that agreement."

   - *Explain what you meant by that comment and whether your comment reflected Agency policy or your individual direction for the relationship between FEC and DOJ?*

   - *In your view, what is the status of the "Memorandum of Understanding," is it still under policy that controls the referral process between the FEC and DOJ? What if any changes would you recommend to that Memorandum?*

   - *How do you see the role and relationship of the FEC and DOJ moving forward into the 2008 election cycle?*

Response: In every presentation I have made since joining the Commission, I have spoken only on my own behalf. Unless authorized by the other Commissioners, one Commissioner cannot speak on behalf of the agency. At the FBI conference, I was expressing only my own views.

The comments underlined above were simply a reference to the current state of affairs regarding campaign finance law enforcement, as described in the Memorandum of Understanding ("MOU") entered into on December 5, 1977, between the FEC and DOJ. The 1977 MOU is still effective until such time as the FEC and DOJ determine to alter

the arrangement. When I arrived at the FEC in January of 2006, I was advised that there had been some discussions between the agencies on whether the MOU needed to be updated to take into account amendments made to the Federal Election Campaign Act since 1977; however, no agreement has been reached with respect to any revisions.

I do not have specific changes to particular provisions of the MOU to recommend. Generally speaking, I would support revisions that foster good working relations between the agencies through the sharing of information and the clear delineation of enforcement responsibilities. I believe that there is better and more efficient enforcement of FECA if the FEC and DOJ cooperate and coordinate closely when both agencies have possible jurisdiction over violations of the law, *i.e.*, when there appear to be both civil and criminal violations of the law. I believe global settlements – in which the targets of law enforcement investigations settle both the civil and criminal violations of the law simultaneously –should be encouraged. Enforcement should not be delayed because one agency does not provide information or referrals to the other agency or delays notifying the other agency about a possible violation. Each agency should be encouraged to refer matters to the other agency as called for under the MOU as soon as the laws and regulations governing the confidentiality of information and law enforcement investigations allows them to do so. Going into the 2008 election year, I hope both agencies closely cooperate whenever possible to ensure the efficient and timely investigation of violations of the law.

2. There are some who criticize the Federal Election Commission as a largely ineffective agency. New appointments to the Commission are subject to the public scrutiny that they might undermine implementation of the Bipartisan Campaign Reform Act of 2002, and previous campaign finance legislation.

   - *Explain, from your perspective, as to how your record at the FEC reflects a willingness to effectively enforce campaign finance laws?*

Response: When I was first appointed, I believed, and I continue to believe, that the job of a Federal Election Commissioner is to enforce the law as it is written by Congress and interpreted by the courts. This strongly held belief precludes me from advancing positions that would "undermine" any of the laws I have been tasked with enforcing. Throughout my tenure on the Federal Election Commission, I have always tried to enforce the federal campaign finance laws as they are written.

My record at the Commission reflects my commitment to fairly apply the law to the facts at hand – a commitment shared by all my fellow Commissioners. The FEC can only function well when its Commissioners engage in bipartisan consensus building to issue regulations, conduct audits, and enforce the law when conducting investigations of violations. The record that the four nominees have established over the past 18 months

while they have served on the Commission demonstrates our ability to work together to enforce the Federal Election Campaign Act.

Enforcement

In enforcement matters, for example, we have cast 1,094 votes. Votes on enforcement matters are a true test of the ability of Commissioners to work together on a nonpartisan basis, because these are votes that determine whether or not the Commissioners believe that a political candidate or political party or political committee have violated the law based on the investigation conducted by the FEC's Office of General Counsel. In 2006, the percentage of split votes was only 0.9%, and in 2007, it was only 0.2% through June 5. This is a remarkable achievement that shows that the Commissioners of both parties are intent on enforcing the law without regard to partisan advantage.

Advisory Opinions

The current Commission has voted on 42 Advisory Opinions. *See* Attachment A. Twenty-three of these opinions were adopted unanimously. Nine were adopted with only one dissenting vote. In three cases, the Commission split and was unable to approve a response to the requestor. Of the 39 cases in which the Commission issued an Opinion, I have cast only five dissenting votes. The record shows that every current Commissioner has dissented more than once during this period. There is a healthy diversity of opinion among the Commissioners which is invaluable when considering the issues that come before us. Overall, I think this record demonstrates a remarkable ability on the part of each Commissioner to work with his colleagues to reach agreement on difficult issues.

Regulations

Since I was appointed to this position, the Commission has adopted seven (7) new Final Rules, and I voted as part of a bipartisan majority in each of those instances. The Commission also voted twice to retain existing rules. I dissented in one of those matters because I believed the Commission should undertake a rulemaking to produce *additional* regulations to provide guidance to the regulated community on the subject of when a 527 organization becomes a federally regulated "political committee."[1] The Commission's rulemakings are detailed at Attachment B.

My willingness to enforce the law as it is written is further demonstrated by a case recently decided by the Supreme Court –Federal Election Commission v. Wisconsin Right to Life, Inc. As you know, Wisconsin Right to Life brought an as-applied challenged to BCRA's electioneering communication provision. Throughout the Wisconsin Right to Life litigation, which included two rounds before a three-judge panel of the District Court of the District of Columbia and argument before the Supreme

[1] My statement on this matter has previously been provided to the Committee and is available at http://www.fec.gov/members/von_Spakovsky/speeches/statement20060531.pdf.

Court[2], the Commission vigorously defended BCRA's electioneering communication rules. As a member of the Commission's Litigation Committee, I (along with Commissioner Walther) supervised the Commission's defense of the law (in consultation with the other Commissioners, of course). I actively supported the Commission's defense of BCRA even though I previously introduced a regulatory amendment that would have provided an exemption similar to that which Wisconsin Right to Life sought through its litigation[3], and which the Supreme Court ultimately granted. While my personal views may have been sympathetic to the legal position advanced by Wisconsin Right to Life, I understood my job as a Commissioner to require me to enforce the existing law. If in the future, my own policy preferences and the law as it exists diverge, I will once again perform my duty as a Commissioner and enforce the law as it exists.

3. One of the controversial split votes that the Federal Election Commission has made during your tenure on the Commission is in respect to the Audit of Bush-Cheney '04, Inc., on March 22, 2007. That audit in question involved "hybrid advertisements," where the national candidates as well as members of Congress were mentioned. Please explain your vote and your general perspective with handling disputes on such advertisements.

Response: In the Bush-Cheney '04 audit, the Commission split 3-3 on the issue of whether the "hybrid ads" financed jointly by the Bush-Cheney campaign and the Republican National Committee were permissible under the law. Chairman Toner, Commissioner Mason and I voted to find no violation of the law. Vice Chairman Lenhard and Commissioners Walther and Weintraub voted to find a violation. The Commission split 3-3 on precisely the same issue in the Kerry-Edwards audit. (The initial vote on the "hybrid ads" issue was taken on the same day in both audits, but the Bush-Cheney Final Audit Report was made public before the Kerry-Edwards audit. For that reason, the "hybrid ads" issue has been associated in the press with the Bush-Cheney audit.)

At the time the Final Audit Report on the Bush-Cheney '04 campaign was approved and released to the public, I issued a statement (along with Commissioner Mason) explaining the basis of my vote in the "hybrid ads" matter. That statement is included at Attachment C, and is also available at http://www.fec.gov/members/von_Spakovsky/speeches/statement20070322.pdf. In my view, the "hybrid ads" at issue, and the method by which their costs were shared, was consistent with all applicable Commission regulations and precedent.

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[2] The Solicitor General represented the Commission before the Supreme Court. The Commission was consulted on briefing and other matters, however.

[3] *See Proposed Interim Final Rule Exempting Grassroots Lobbying Communications From the Definition of "Electioneering Communications,"* as introduced by Hans A. von Spakovsky, at http://www.fec.gov/agenda/2006/mtgdoc06-53.pdf.

In the Bush-Cheney 2000 audit, the Commission found that a "hybrid" telephone bank program jointly funded by the Bush-Cheney campaign and several state party committees was lawful. The Commission subsequently adopted a regulation that codified this decision. In 2004, the Commission issued an Advisory Opinion that approved a television advertisement that was jointly funded by two Federal candidates. In 2006, the Commission adopted an Advisory Opinion that approved a proposal to distribute "hybrid" mailers. In light of this background and precedent, I believe that both campaigns' reliance on the positions the Commission took in the past was both consistent with that Commission action and reasonable. I believe the state of the law required me to vote to find no violation. The campaigns' actions comported with comparable past activity that was deemed lawful, and they did not violate the terms of any specific statutory or regulatory provision. Absent a statutory or regulatory change in the law, I will continue to vote accordingly when materially similar "hybrid ads" come before the Commission.

As you know, the Commission has undertaken a rulemaking to consider issuing new regulations on the "hybrid ad" issue. The Commission issued a draft proposal that includes several options[4], and is scheduled to hear from witnesses on July 11, 2007. If the Commission adopts a new approach to "hybrid ads" as a result of this rulemaking, I will of course enforce the law accordingly.

4. In the June 13, 2007 hearing, both Senator Durbin and I raised concerns regarding your publication of an anonymous law review article that advocated a particular public policy that related to your official duties. Without focusing on the policy itself, you made that advocacy, while you were in a key position with the government. You position at the Department involved assisting in quasi-judicial determinations as to whether those very types of policies had a "retrogressive effect" under Section 5 of the Voting Rights Act. [Section 5 states that "the Attorney General shall make the same determination that would be made by a court...]

   - *You mention in your testimony that you received approval to write the article. Please indicate the name[s] of the individual[s] who gave you that approval, and provide documentation showing that approval was granted. Were these individuals aware that the article was going to be anonymous?*

   - *When it was clear that you were giving preclearance advice related to a policy you had advocated for in your personal*

[4] *See Notice of Proposed Rulemaking on Hybrid Communications*, 72 Fed. Reg. 26,569 (May 10, 2007) *available at* http://www.fec.gov/pdf/nprm/hybrid/notice_2007-10.pdf.

capacity, did you approach either Department's Ethics or your superior to receive approval? Please explain and provide documentary support for that approval.

- *Did a Department of Justice superior ever discourage you from writing a law review article? Please explain. Did you ever discourage any current or former Department employee from writing about the Civil Rights Division?*

- *On August 18, 2005, you sent an e-mail to the U.S. Election Assistance Commission urging the EAC to revoke the research contract awarded to Daniel Tokaji of the Moritz College of Law at Ohio State University and stating that, in your view, Professor Tokaji was an opponent of voter ID laws. In your view, does the fact that a person previously expressed a position on voter ID requirements undermine their objectivity to evaluate those laws?*

Response: I provided a draft of the entire article to the Principal Deputy Assistant Attorney General, Sheldon Bradshaw, to review, and the draft included the name of the author, Publius. At Mr. Bradshaw's suggestion after he reviewed the article, we called the designated Civil Rights Division ethics officer for advice on the rules governing publication of a legal article in a law review. We were advised orally that any employee of DOJ could publish an article as long as the employee followed 5 C.F.R. §2635.703(a) and §2635.807(b). 5 C.F.R. §2635.703(a) prohibits the disclosure by a federal employee of "nonpublic information." Section 2635.807(b) requires that the employee "not use or permit the use of his official title or position to identify him in connection with his teaching, speaking or writing activity." Since there was no nonpublic information in the law review article and I did not use my title or provide any information that would lead the public to believe that the views expressed were "the views of the agency or the United States," I fully complied with the regulations and was able to publish the article.

In my law review article, I recommended generally that voter identification requirements be adopted to improve the integrity of elections from a public policy standpoint, similar to the recommendation made by the Baker Carter Commission in September of 2005. *See* "Building Confidence in U.S. Elections," *Report of the Commission on Federal Election Reform*, p. 18-21. Congress itself imposed the first national voter identification requirement when it passed the Help America Vote Act of 2002. Section 303(b) of HAVA requires voters who register by mail and are voting for the first time to present certain identification documents. There is nothing remarkable about the views expressed in my article. Most of the lawyers with whom I worked at the

Division also had strong personal opinions about how certain laws could be improved or changed, or how the applicable law should be enforced, and these opinions did not interfere with their ability to enforce the requirements of the law. I have written extensively on public policy issues related to voting and elections, including testifying before the Rules Committee in 2001 on this very issue. Writing on election and voting issues does not pose a conflict of interest under any applicable rule of professional conduct and did not interfere with my ability to objectively review the application of Section 5 to a specific statute.

I have no documents related to the review of this article. I did not seek any further advice from the Division's ethics officer on this issue. I was not discouraged by anyone from writing this article and as best I can recall I did not discourage anyone else from writing any law review articles. I did have a debate with one Voting Section employee over an article he was submitting for publication on the renewal of Section 5 of the Voting Rights Act. I attempted to persuade him that his view that the administration of the Section 5 review process had been "partisan" was not supported by either the facts or court decisions. However, he was not persuaded and submitted his article for publication as drafted. In Mr. Pitts' article, he specifically thanked me (along with six others) for my "helpful ideas and comments." *See* "Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act," Michael J. Pitts, 84 NEB. L. REV. 605 fn a1 (2005) ("Thanks to .... and Hans von Spakovsky for their helpful ideas and comments.").

There were no rules, regulations or practices that required me to obtain "approval" to review matters that came before the Division that happened to involve the same general subject matters addressed in my prior writings. My immediate supervisors were aware of my article, including the fact that I had written it, and I was not required to recuse myself from any preclearance review as a result of my authorship of that article. On the issue of recusal, to borrow from a parallel situation, a judge is not required to recuse himself from a case simply because he has expressed views on the subject at issue, and there is ample legal precedent to that effect. For example, the Sixth Circuit specifically held that a judge was not required to recuse himself in an eminent domain case simply because he had previously written a law review article on the general subject. *See Goodpasture v. Tennessee Valley Authority*, 434 F.2d 760, 765 (6th Cir. 1970) ("We hold that District Judge William E. Miller did not err in failing to recuse himself because of a law review article written by him entitled 'Federal and State Condemnation Proceedings – Procedure and Statutory Background.'"). *See also Laird v. Tatum*, 409 U.S. 824, 831 (1972) (memorandum of Justice Rehnquist) ("My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench."); *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982) ("Judge Grady had, in the past, written and spoken on the subject of contingent fees. He was not required, however, to recuse himself merely because he holds and had expressed certain views on that general subject."); *U.S. v. Crowell*, 586 F.2d 1020, 1027 (4th Cir. 1978) ("The fact that the district judge had researched the problems in advance and was able to make an immediate ruling does not

establish prejudgment."); *Lawton v. Tarr*, 327 F.Supp. 670, 673 (E.D.N.C. 1971) ("I do not believe that my strong aversion to the Vietnam War and my belief that it is the most tragic national mistake made in my lifetime will have the slightest effect or influence upon my judgment as to the time of termination of exposure under the selective service law. It is hornbook law that attitude or feeling a judge may entertain toward the subject matter of a case does not disqualify him.").

On the final issue of an email sent to the U.S. Election Assistance Commission, I was concerned that the empirical research and subsequent analysis would lack validity as an empirical matter given the prior categorical statements of the researcher that voter identification laws were always discriminatory. My concern was not the researcher's ability to evaluate the laws as a lawyer. Rather, my concern was his ability to objectively design a study and collect and analyze data. Under the HAVA statute, the duty of the Board of Advisors to the EAC is to provide the EAC Commissioners with advice on the work being done by the agency. I thought it was incumbent upon me, as a member of the Advisory Board, to share my concerns that researchers be objective in their work. I believe that action was entirely appropriate and continue to believe that I gave good advice. My concerns were related to social science research, which is entirely distinct from a lawyer's ability to apply a specific law to a set of specific facts regardless of his personal views, something inherent in a lawyer's training and experience. My role as an attorney advising the senior leadership of the Civil Rights Division did not implicate the same concerns. Lawyers take very seriously their ethical obligation to provide unvarnished legal advice to a client without regard to personal views or feelings.

5. With regards to the Georgia testimony, reports indicate that you were informed that revised data submitted by Georgia was obtained. That same day, the staff memo recommending against preclearance was completed. One day following the receipt of that data and the staff memo, the Georgia identification law was precleared. You state in your testimony that the recommendation for preclearance came from the Section Chief of the Civil Rights Division. We have heard concerns that not only were career professional's recommendations reversed, they were reversed so hastily that there was not even time to consider the merit of their recommendations.

   - *Did you ever communicate your desired course of action, or the intention of your superiors to the Section Chief of the Civil Rights Division to encourage or discourage him from preclearing the Georgia identification legislation, the Texas Redistricting legislation, or the Arizona Proposition 200 implementing legislation?*

- *You testified that "I don't recall being told that there was data coming in showing several hundred thousand people didn't have an ID." Do you recall being told that there was data coming in from Georgia during the week of August 22-26, 2005, that would show the number of citizens in Georgia without state-issued driver's licenses or IDs? Were you aware that Georgia produced new data on or immediately before August 26, 2005? If so, did you review this data? If not, do you recall that there was an outstanding request for complete data from Georgia? Did you or anyone else in the Department ever instruct anyone in the Voting Section to analyze the new information, given that 35 additional days remained in the review period when Georgia submitted the additional information on August 26? If not, why not?*

- *What were the reasons why the Department overruled the career staff's conclusion that it would be "unsupportable" to rely on the Department of Driver Services (DDS) data to infer the number or race of people who lacked DDS cards? If you do not know, why do you not know? Did you ask anyone?*

- *Did you ever request to review staff memorandum in the above preclearance actions? Did you review all the underlying data that the career staff received from Georgia? If so, (without detailing your legal advice) did your recommendations to your superiors include responses to concerns raised by the staff recommendation memos? Did you inquire why career staff memos were being overruled by the Section Chief? Do you believe that you had sufficient time to review the memorandum prepared by the career staff and to analyze the data Georgia produced? Did you or anyone else at DOJ prepare another data analysis to support a different conclusion than that reached by the career staff? Please explain.*

- *Regarding the Georgia preclearance and the Georgia legislature, you state that the only communication that you had was from a legislative staffer, and that was concerning interpretation of federal law. Did you ever have communications with members of the Georgia legislature or*

their staff regarding election reform legislation? Were there any communications with former Georgia State Representative Sue Burmeister regarding any legislation while you were employed at the Department of Justice? If there were any communications, please identify each one, their frequency, and what was discussed.

- *Former Department of Justice staff members reported that after the public release of the memo written by career staff recommending that DOJ object to Georgia's law, staff were instructed that they could no longer make written recommendations in Section 5 review cases. This reversed decades-long practice. At any point after the Georgia law was precleared, did the Voting Section change its policy or practice as to whether career staff should make written recommendations regarding preclearance decisions? When? Was that decision made before November 17, 2005, when the Washington Post released a copy of the August 25, 2005 career staff memorandum on the Georgia law?*

- *In your response to the Senate Rules Questionnaire, you have submitted draft legislation that focuses on voting machine manufacturers, copyrighted in 2001. Aside from your work on the federal Help America Vote Act, have you drafted or assisted in drafting model legislation on election issues? If so, please provide copies of the draft legislation, and indicate (irrespective of whether it was related to HAVA) who you provided the draft legislation to, when you provided it, and whether you had conversations related to that draft legislation with legislators or their staff.*

Response: This inquiry asks a series of questions about internal communications between lawyers at the Division and the Division's investigative process. Such communications are confidential and privileged communications and I am barred by the professional code of conduct from divulging those communications. It is my understanding that there was a complete and thorough review of all of the information and data submitted by the State of Georgia, including four sets of data received from the state on driver's licenses, before the Voting Section Chief completed his review and made his recommendation to the Front Office of the Civil Rights Division. I was not a member of the team of lawyers in the Voting Section that performed the basic investigation and analysis, so I did not review every document or all of the data submitted

to the Voting Section. My job was to review and analyze the memorandum sent to the Front Office by the Voting Section Chief on the Georgia voter identification statute, Texas redistricting plan, and Arizona submission after the Section Chief and his team completed their review, and then provide my recommendation to the senior leadership of the Division. In no way did I "dictate" what the results of the Voting Section's review should be in any case.

As the Assistant Attorney General of the Office of Legislative Affairs, William Moschella, explained in a letter to Senator Christopher Bond dated October 7, 2005, about the Georgia voter identification submission, the data received by the Division showed the following:

- Almost 6.5 million Georgians possessed identification from the Department of Motor Vehicles ("DMV") acceptable under the state statute– more than the Census total projected voting age population of Georgia when ineligible individuals such as noncitizens and prisoners are subtracted.
- Thus, there were 2 million more issued state DMV identification cards then there were registered voters.
- The racial composition of the DMV data indicated that 28% were African American, a percentage slightly higher than the African-American percentage of the voting age population in Georgia.
- Information from the state university system, which issues identification cards to all students that are acceptable under the law, showed that the number of African-American students enrolled and thus possessing acceptable identification was slightly higher than the percentage of African-American students in the voting age population.
- Census data showed that about 14.3% of whites and 19.4% of African-American Georgians worked for governments at the local, state or federal level; therefore, a higher percentage of African-Americans than whites would have access to acceptable government-issued employee identification cards.
- Individuals who were unable to afford an identification card could receive one without paying a fee and the state had a mobile licensing program traveling to counties without licensing offices.
- No identification card was needed to vote by absentee ballot.

Mr. Moschella's letter also cites other factors that were taken into account by the Division in making its decision. Applying the applicable retrogression standard under Section 5, as interpreted by the Supreme Court, the Section Chief concluded that the State of Georgia had met its burden and that no objection was warranted.

On the issue of communications with Georgia legislators and their staff, I certainly had such communications before I moved to Washington, D.C., in 2001 to work at the Department of Justice. I was a member of the Fulton County Registration and Election Board and I sometimes talked to legislators when the General Assembly was in session and bills on voting and election issues were being considered that would affect the work I was doing administering elections in Fulton County. I even testified before a

state committee at some point prior to 2001 when they were considering an early voting bill However, the contacts basically ceased after I moved to Washington and went to work at the Department of Justice, with the exception of occasional social contacts with one or two individuals. During the pendancy of the Section 5 submission of Georgia's voter identification law, however, I do not recall having any conversations with Georgia legislators or staffers on either a professional or personal basis. However, as I told the Rules Committee during my testimony, I do recall a conversation at the beginning of 2005 when a staffer called asking for an explanation of the identification requirements in the Help America Vote Act. Such a call was not unusual because the Front Office of the Division and the Voting Section received hundreds of calls from local and state legislators, election officials, and their staff, asking about the requirements of HAVA after it became law.

I do not recall speaking with Ms. Burmeister while I was at the Department of Justice, but as I said, we received many calls from state officials all over the country asking questions about HAVA, the National Voter Registration Act, the Uniformed and Overseas Citizens Absentee Voting Act, and the Section 5 submission process under the Voting Rights Act during my time in the Division and I cannot remember every specific call. It was also normal for the Front Office and the Voting Section to receive letters and telephone calls from members of the public and local and state officials during the public comment period when the Division was reviewing a specific Section 5 submission. I believe Ms. Burmeister may have been interviewed by a lawyer in the Voting Section during the Section 5 review of Georgia's voter identification law. I recall speaking with members of the ACLU and the Lawyers Committee for Civil Rights about the submission during the public comment period.

I am not aware of any change in policy regarding the Section 5 review process. As I understood the process, each member of the team working on a particular submission would share his or her assessment and recommendation with the senior management in the Voting Section, and the ultimate recommendation made by the Chief of the Section was made with the full awareness of the views of each staff member involved.

Finally, I am asked whether I drafted model legislation in addition to the 2001 model legislation on voting machine manufacturers, a copy of which I sent to the Rules Committee, and aside from my work on HAVA while I was at the Division. I do not recall drafting any other model legislation other than the 2001 model legislation on voting machine manufacturers, which I prepared prior to commencing my employment with the Department of Justice.

6. U.S. Attorney Tom Heffelfinger raised an issue of concern with Minnesota Tribal identification cards. He claims he indicated to Department staff that many legitimate voters might unlawfully be turned away because of a Minnesota identification interpretation by Secretary of State Mary Kiffmeyer. During your hearing

testimony, you did not recall much of that incident. According to Joe Rich, you specifically ordered him to contact only the Minnesota Secretary of State, and not the Hennepin or Ramsey County election offices that raised the complaints. Upon greater reflection on this issue, I would like you to reconsider the following questions.

- *Do you recall restricting the contact in regards to this matter? If so, did you restrict the staff contact on this matter to the Secretary of State of Minnesota and prohibited Justice attorneys from communicating with the Hennepin or Ramsey County Boards of Election, the offices that complained about the directive. Wouldn't a thorough investigation entail talking to the individuals who issued the complaint in the first place?*

- *Did you ever inform the Voting Section staff that the reason for restricting Voting Section contact to the Secretary of State was to avoid a leak to the media? Were you concerned about any leaks in connection with this matter? If so, why was this matter so sensitive? If applicable, what made you believe that there was a significant chance that a leak would occur if the Voting Section undertook a traditional investigation into this matter?*

- *To clarify, you have no recollection on any relevant discussion with Mr. Schlozman, the Section Chief, or the Assistant Attorney General on this issue? If you do have any recollections, please indicate who these conversations were with, and what was discussed.*

Response: As I told the Committee in my testimony, I do not recall any complaint from the U.S. Attorney in Minnesota, Tom Heffelfinger. I also do not remember having any conversations with Mr. Rich or Mr. Schlozman about these issues. As I told the Committee, the Front Office and the Voting Section normally receive thousands of complaints before an election and I am not able to remember the specific details of every issue brought to my attention in the Front Office. I do recall an issue in Minnesota involving the Secretary of State's inquiry over the acceptance of driver's license identification numbers in compliance with Section 303(a)(5) of the Help America Vote Act. I certainly do not remember "shutting down" any investigation, nor do I remember receiving any recommendation from the Chief of the Voting Section to file suit against Minnesota over a violation of federal law.

7. Arizona was another area of concern in the Committee's review of your testimony. As part of your article as "Publius," you commented on a Department of Justice position where you had played a role. In the article in your personal capacity, you state: "In November 2004, Arizona voters passed a requirement that individuals registering to vote provide "satisfactory evidence of United States citizenship"; it is a good model for other states to follow, particularly in regard to the list of documents that will satisfy the requirement. Arizona is also covered by section 5 of the Voting Rights Act, ... The Attorney General precleared the citizenship proposition without objection on January 24, 2005, indicating that the Department of Justice concluded that this requirement would not have any discriminatory impact on minority voters."[Emphasis added.] In light of your personal promotion of Arizona's citizenship policies:

- *Did staff recommend additional information prior to preclearing the Arizona law? If so, why was additional information not approved?*

- *From 2004 to present date, have you had any communication with the Arizona Secretary of State's office, the Arizona Attorney General's office, or members or staff of the Arizona Legislature regarding election issues? If applicable, please identify these communications, when they took place, what the subjects of those conversations were.*

- *Regarding the letter you drafted in May 2005, you had testified that "any time" a request such as the one from Arizona was received, "that inquiry would get looked at by all the lawyers." According to a letter dated June 18, 2007 from seven former staff in the Voting Section, this process was not followed with respect to the April 2005 letter to Arizona. Those staff members claim an Arizona government official contacted the Department about the letter after receiving it, but at that time the Section Chief had never seen or heard of the letter. How did you receive this letter, with whom did you discuss the issues related to this letter? Did you discuss this interpretation of the Help America Vote Act with any person outside the Department of Justice? Please explain in detail these discussions. Please also*

indicate if you provided to any person the same legal interpretation made in the April 2005 letter to any person outside the Department.

- *From 2003-2005, the Voting Section began issuing "opinion letters" interpreting various provisions of federal voting rights laws, and especially the Help America Vote Act. This was reportedly a departure from prior DOJ policy, which was to avoid issuing advisory opinions outside the context of litigation in which the DOJ was involved. In those opinion letters, former Department of Justice employees indicate that Justice often took positions that would make it more difficult for Americans to vote or to have their votes counted. Was there a change in policy that would allow these "opinion letters" where there was no case, controversy, or, in some cases, no federal issue present? Aside from the 2005 Arizona letters, did you have any role in drafting these letters? Who would draft these letters?*

- *With regard to the April 15, 2005 Department letter to Arizona regarding provisional ballots, did you show that letter to Assistant Attorney General Acosta? When, if ever, was Mr. Acosta apprised of this letter?*

- *In emails recently publicized in the McClatchy papers, it indicates you claim the Department of Justice would not retract the Arizona letter unless the Election Assistance Commission changed one of its opinions. If the Department was so convinced that it retracted its' original opinion-letter, why was there a need for a "deal"?*

- *Mr. Schlozman sent a letter to the Iowa Attorney General a week before the 2004 election, issuing an interpretation of the Help America Vote Act. Did you have any involvement with that letter? If so, who asked that the letter be sent? Identify the circumstances surrounding that letter. If the Department issued the letter of its own accord, please identify how the dispute between two state officials came to the attention of the Department of Justice, and whether it is the policy of the Department to monitor such disputes and issue its' advisory opinion.*

Response: This inquiry asks several questions about internal communications between lawyers at the Division during the review of a Section 5 submission from the State of Arizona and letters sent to the state over the issue of provisional ballots; such communications are confidential and privileged communications and I am barred by my professional code of conduct from divulging the contents of those communications. The Assistant Attorney General approved preclearance of this submission after reviewing the recommendation from the Chief of the Voting Section.

I do not recall having any conversations with members of the Arizona legislature or the Arizona Attorney General's Office. On April 5, 2005, the Arizona Secretary of State, Janice K. Brewer, sent a letter to the Office of Legal Counsel at the Department of Justice requesting an opinion on the requirements of Section 302(a) of HAVA. I may have had a telephone conversation with someone on Ms. Brewer's staff concerning this inquiry letter after it came in, but I do not remember for certain. A reply to Secretary of State Brewer's inquiry was sent out on April 15, 2005, by Sheldon Bradshaw, Principal Deputy Assistant Attorney General. Ms. Brewer's office may also have called the Front Office after her receipt of the September 1, 2005, letter on the same topic that revised the Department's views on this provision, but again, with the passage of two years, I simply do not remember for certain. As I informed the Committee at my hearing, I prepared the initial drafts of both letters sent to Arizona on provisional balloting requirements at the direction of my supervisors. As I recall, I may not have consulted with the Section prior to drafting the first letter. I believe, however, that I did consult with the Section on the second letter and incorporated suggested edits. I do not recall speaking with anyone outside of the Division about the April 15, 2005, letter, prior to it being sent to Secretary of State Brewer. There were discussions with EAC Commissioners over the letter once it became public as outlined below.

The revised September 1, 2005, letter was prepared after a meeting with the Commissioners of the EAC and the EAC's General Counsel to discuss the views of both agencies on the issue of provisional ballots so a consensus could be reached on the requirements of the provision. The "deal" referred to in the email concerned the fact that the Division believed that the EAC had also made a legal error in one of its published "Best Practices" manual, mistakenly stating that a local registrar could complete an applicant's registration even if the applicant had failed to answer the new citizenship question added to the federal voter registration form by Congress in Section 303(b)(4)(A)(i) of HAVA. (Section 303(b)(4)(B) provides that if an applicant "fails to answer the question," the local registrar is obligated to "notify the applicant of the failure and provide the applicant with an opportunity to complete the form in a timely manner to allow for the completion of the registration form prior to the next election for Federal office.") A consensus was reached on these issues and the Division revised its position on provisional ballots while the EAC corrected its "Best Practice" manual.

With regard to the letters sent to election officials, such as the Arizona letters discussed above, these were not "advisory opinions." President Bush signed HAVA into law on October 29, 2002. Title III of HAVA contained a series of new requirements for

states in the areas of provisional balloting, computerized voter registration lists, voter identification requirements, and others. All of the states and territories covered by these new federal requirements needed to pass implementing legislation and regulations if their state laws did not match the new requirements of HAVA. The Division began receiving telephone calls, emails, and letters from state and local election officials and legislators all over the country making inquiries about this new federal law and what its provisions required. Unfortunately, the new Election Assistance Commission created by the statute was not yet in existence and did not start its operations until almost a year and a half later, and was not empowered by Congress to issue regulations, provide legal opinions, or enforce the statute.

The Division, on a limited basis, attempted to provide guidance to state and local officials on the requirements of the law based on how the Division intended to enforce it. To that end, the Division established a web page devoted to explaining HAVA's requirements that provided answers to some of the most commonly asked questions, and where the Division could post its responses to specific inquiries. *See* http://www.usdoj.gov/crt/voting/hava/hava.html and http://www.usdoj.gov/crt/voting/misc/faq.htm#faq22. These were not "advisory opinions," as the letters themselves are careful to state. For example, one of these letters reads:

> The Attorney General has assigned to the Civil Rights Division the Department's enforcement responsibilities under Section 401 of HAVA. Although the Department states its formal positions with respect to statutes it enforces only through case-by-case litigation, the Department does on occasion offer its general views on the manner in which it intends to enforce a particular statue or set of laws. Therefore, while we cannot issue a formal advisory opinion, we will attempt to answer the questions posed in your letter to the extent we can based on our responsibilities to enforce Title III of HAVA, which imposes uniform and nondiscriminatory election technology and administration requirements on the 55 States and Territories..

See Letter of May 20, 2003 to Ann McGeehan, from Joseph D. Rich, Chief, Voting Section, available at http://www.usdoj.gov/crt/voting/hava/tx_ltr.pdf.

There were prior instances of the Division issuing guidance to the public. For example, on January 18, 2001, during the prior Administration, the Voting Section published a document for the States and local jurisdictions covered by Section 5 that stated "it is *appropriate* to issue guidance concerning the review of redistricting plans submitted to the Attorney General for preclearance pursuant to Section 5 of the Voting Rights Act." 66 Fed. Reg. 5412 (emphasis added). Another example of guidance provided by the Division was the "ADA Checklist for Polling Places," released on February 20, 2004, which was intended to improve accessibility at polling places for disabled voters and available at http://www.usdoj.gov/crt/ada/votingck.htm.

In short, providing guidance to the public on the requirements of the laws it enforces is not unusual, and given the situation immediately after HAVA was enacted, it was not unwarranted. Furthermore, this guidance not only helped states implement the law, but avoided forcing the Division to file *more* enforcement actions under HAVA, thereby preserving Division resources.

A review of the guidance letters on the Voting Section's web page make it clear that there nothing improper about them, and that they are, in fact, rather unexceptional. They interpret the statute on a well-reasoned basis as the Division understood the intent of Congress in passing the legislation, and certainly do not make it more difficult for Americans to vote or to have their votes counted. The letters represent an attempt by the Division to carry out the intent of Congress in passing HAVA by helping the states come into compliance with a new federal statute that changed the way local jurisdictions administered federal elections. This was part of a comprehensive attempt to educate state and local officials on the requirements of HAVA that also included numerous presentations at meetings of election official organizations, such as the National Association of Secretaries of State, the National Association of State Election Directors, the National Association of County Officials, the Election Center, and state election official associations.

The letters attempt to explain the requirements of different provisions of Title III and are signed by various officials at the Division, including Mr. Rich and me. The vast majority of these letters were produced after consultation and discussion by the lawyers assigned to enforcement of HAVA on what was the legally correct response; some were drafted by me and then reviewed by lawyers in the Voting Section; some were drafted by lawyers in the Voting Section and then reviewed by me.

Finally, I do not recall how it came to the attention of the Division that the Iowa Attorney General had issued an opinion that wrongly interpreted the provisional ballot requirement of Section 302(a) of HAVA. The Division had lawyers in the Voting Section monitoring HAVA developments in every state. I believe the letter speaks for itself. It explains the requirements of HAVA and informs the state that:

> If Iowa wants to pass legislation or regulations requiring election officials to count as valid any provisional ballot cast outside of a voter's assigned precinct, it is certainly free to do so. However, HAVA does not require such legislation or regulations, nor does it preempt Iowa's current laws and regulations on this matter. Instead, the statute permits a state like Iowa to continue its long tradition of only counting votes (cast provisionally or otherwise) that were cast in a voter's assigned correct precinct.

The Iowa Attorney General's opinion that HAVA preempted Iowa law and that the federal statute required Iowa election officials to count every provisional ballot cast in the wrong precinct was clearly erroneous. When a state official wrongly interprets a federal statute such as HAVA that the Attorney General has responsibility for enforcing, the Department obviously has an obligation to inform the state official that he is

incorrect. The Division's view prevailed in every final court of record that examined this issue in litigation filed in 2004. *See Florida Democratic Party v. Hood*, 342 F.Supp.2d 1073 (N.D. Fla.2004); *Sandusky County Democratic Party v. Blackwell*, 386 F.3d815 (6th Cir. 2004) and 387 F.3d 565 (6th Cir. 2004) (The Sixth Circuit held that Congress did not intend to override traditional precinct-based voting by the states when it passed HAVA and that HAVA does not require a state to count a provisional ballot "if it is cast outside the precinct in which the voter resides.").

8. One state the Committee did not get to ask about was Missouri. On August 8, 2002, the Department of Justice sued the City of St. Louis in part due to the manner in which the city had been removing voters from its' rolls. Justice's suit then argued that St. Louis was removing voters too aggressively. On November 22, 2005, the Department of Justice sued Missouri, in part, to force the state to purge its voter rolls more aggressively. These, and other similar litigation practices, exhibit conflicting messages at best, and political opportunism at worst.

- *The Help America Vote Act required Missouri to establish a computerized statewide voter registration list in 2006, which would, among other things, allow the state to clean its voter rolls more readily. Given that the deadline for establishing this database had not yet occurred, do you know why did the Department of Justice choose to file suit against Missouri in November 2005?*

- *Did you speak to or otherwise communicate with anyone in the White House, the Missouri legislature or any political party regarding this lawsuit? If so, whom, on what date or dates did these communications occur, and in what form? [If in written form, please provide.]*

- *Were you aware that Missouri ACORN workers were also indicted immediately prior to the 2004 election? If you had any input or conversations outside the Department of Justice regarding those indictments, please explain.*

Response: There was categorically no "political opportunism" involved in the Assistant Attorney General's approval of the lawsuit against Missouri, which was filed under the National Voter Registration Act, rather than the Help America Vote Act. The Justice Department is responsible for enforcing Section 8 of the NVRA. Among its other

requirements, Section 8 requires states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant; or (B) a change in the residence of the registrant." 42 U.S.C. §1973gg(a)(4).

The lawsuit against Missouri concerned both the state's failure to properly maintain voter registration lists as required under Section 8, as well as improperly removing voters by failing to follow the required notice provisions, similar to the problems the Division sued St. Louis over in 2002. The complaint is available at http://www.usdoj.gov/crt/voting/nvra/mo_nvra_comp.htm. Paragraph 13 of the complaint states in part that there are local election jurisdictions that "have not always followed the notice and timing requirements of Section 8 of the NVRA with respect to voters who may have moved. These practices have resulted in the removal of voters from voter registration lists in elections for federal office prematurely in a manner not consistent with federal law." This enforcement action was the result of an investigation conducted by career lawyers within the Voting Section (as described in the complaint) that showed that the Secretary of State and certain Missouri counties were not complying with the law. The suit had absolutely nothing to do with politics or partisanship or the fact that the Missouri Secretary of State is a Democrat – in fact, the Division filed an almost identical suit under the NVRA for the same failure to properly maintain the voter registration list against the Indiana Secretary of State, who happened to be a Republican. *See* http://www.usdoj.gov/crt/voting/nvra/in_nvra_comp.htm. Although a federal judge dismissed the suit because he held that DOJ needs to sue the individual counties at fault, it is my understanding that the dismissal is being appealed by the Division.

In the identical Indiana NVRA suit, the Secretary of State agreed to remedy the violation and entered into a Consent Decree that was approved by a federal judge. *See* http://www.usdoj.gov/crt/voting/nvra/in_nvra_cd.pdf. The same is true of the NVRA lawsuit in New Jersey – the defendants entered into a Consent Decree approved by a federal court. *United States v. State of New Jersey*, Civil No. 06-4889 (D. N.J. October 12, 2006). This lawsuit was filed over violations of Section 8 of the NVRA as well Section 303(a) of HAVA

Of these three NVRA lawsuits, two were settled with the explicit approval of federal judges and one is on appeal. List maintenance is required in both the NVRA and HAVA and it is the responsibility of DOJ to enforce those laws.

I do not recall having any conversations with anyone at the White House or the Missouri legislature or at any political party over these lawsuits. I may have read about the indictment of ACORN workers in 2004 in newspaper accounts, but I do not recall having any conversations with anyone over these particular indictments. Criminal prosecutions of election crimes are handled by the Public Integrity Section of the Criminal Division of the Department of Justice, not the Civil Rights Division.

9. Right before the 2004 elections, DOJ filed a series of amicus briefs, arguing that there is no private right of action under the

Help America Vote Act and that HAVA permits states to refuse to count provisional ballots cast by voters in the wrong precinct or who do not have identification. The briefs were filed in the following cases: the consolidated cases of *Bay County Democratic Party v. Land* and *Michigan State Conference of NAACP Branches v. Land* (E.D. Mich., amicus filed Oct. 18, 2004; 6th Cir., amicus filed Oct. 26, 2004); *Sandusky County Democratic Party v. Blackwell* (6th Cir., amicus filed Oct. 22, 2004); *Florida Democratic Party v. Hood* (N.D. Fla. Oct. 19, 2004). This was the first time the Department of Justice and the Civil Rights Division has taken a position against a private right of action under a federal voting law. Every one of those federal courts rejected Justice's position on the private right of action.

- *Were you involved in the decision to file amicus briefs in October 2004 in the following cases: Bay County Democratic Party v. Land; Sandusky County Democratic Party v. Blackwell; Florida Democratic Party v. Hood?*

- *Were you involved in drafting the amicus briefs the Department filed in those cases? Were you the principal author of any portion of those briefs? Was the Department invited to participate in any of those cases? If you were involved, why did you think it necessary to participate in these cases so close to the elections? Had the Department previously ever filed an amicus brief in a case involving political parties in the weeks before an election? During this time, the Department file any amicus briefs in support of the side the Democratic Party, or in opposition to the side of the Republican Party? Had the Department previously ever taken the position that there is no private right of action under any federal voting law? If yes, please provide examples.*

Response: No amicus brief can be filed without the Assistant Attorney General's authorization. A review of the briefs reveals the names of the attorneys at the Division who prepared and approved these briefs on behalf of the Department of Justice – they included Assistant Attorney General R. Alexander Acosta and the head of the Appellate Section, David K. Flynn, along with the lawyers in the Section who drafted the briefs, David White and Chris Wang. My name appears nowhere in the briefs, although I reviewed drafts prepared by Mr. Flynn and his Appellate Section lawyers, as did other lawyers in the Front Office of the Division. Decisions regarding the contents of these

briefs, and whether to file them, were made by the Assistant Attorney General and the Principal Deputy Assistant Attorney General. This is entirely consistent with the law, regulations, and the usual and customary practices of the Division. I participated in discussions about the briefs, but my specific advice and recommendations are confidential and privileged.

The cases in which these amicus briefs were filed in Florida, Michigan, and Ohio (including the Sixth Circuit) were the first major cases under HAVA. Each raised significant issues about the availability of a private right of action and the Section 302 requirement that states provide provisional ballots to certain voters. 42 U.S.C. §15482. The briefs at issue are available on the HAVA web page of the Voting Section at the Division's website at http://www.usdoj.gov/crt/voting/hava/hava.html.

Section 401 of HAVA gives the Attorney General authority to enforce the statute. Although I do not believe the Division received a request from the courts to file briefs, the Division files amicus briefs in a wide variety of cases that affect voting rights. In these briefs, the Department noted that other voting rights statutes, namely the Voting Rights Act and the National Voter Registration Act, clearly recognize a private right of action, while HAVA does not. This issue was even debated by members of Congress and Senator Dodd, one of HAVA's main sponsors, indicated that HAVA was not privately enforceable. Senator Dodd stated:

> "While I would have preferred that we extend [a] private right of action..., the House simply would not entertain such an enforcement provision. Nor would they accept federal judicial review of any adverse decision by a State administrative body." 148 Cong. Rec. S10488-02, S10512 (Oct. 16, 2002).

The Sixth Circuit ultimately disagreed with the Department's position and held that although "HAVA does not create a private right of action," HAVA does create a right to cast a provisional ballot under certain circumstances that is enforceable against state officials under 42 U.S.C. § 1983. *See Sandusky Co. Democratic Party v. Blackwell*, 387 F.3d 565, 572-573 (6th Cir. 2004). However, the briefs, in my opinion, present a reasoned argument based on the text and structure of the statute, as well as its legislative history.

With respect to the second issue raised in these cases, provisional ballots, in each of these three cases, the Division's position prevailed. The Florida federal district court and the Sixth Circuit (which decided both the Ohio and Michigan cases), agreed with the Division's position on provisional balloting. *See Florida Democratic Party v. Hood*, 342 F.Supp.2d 1073 (N.D. Fla.2004); *Sandusky County Democratic Party v. Blackwell*, 386 F.3d815 (6th Cir. 2004) and 387 F.3d 565 (6th Cir. 2004).

The issue in each of these cases was whether Section 302 of HAVA requires states to count the provisional ballots of individuals who voted outside of their assigned precincts. The Division's amicus briefs addressed only the very narrow federal question – they did not address whether or not precinct-based voting is appropriate in any

particular state. The Division's briefs argued that HAVA requires a state to provide a provisional ballot to an individual who does not appear on the registration list at a polling place, but believes he or she is registered and eligible to vote there. However, Congress did not prohibit a state from declining to count that ballot if the voter is not, in fact, eligible to vote at that polling place. The Sixth Circuit rejected the arguments advanced by the plaintiffs, and held that Congress did not intend to override traditional precinct-based voting by the states when it passed HAVA and that HAVA does not require a state to count a provisional ballot "if it is cast outside the precinct in which the voter resides." Thus, every final court of record in each of these cases agreed with the Division's position on provisional ballots.

Since I was not in the Appellate Section, I do not have the information needed to answer the questions about previous amicus briefs filed in other cases, when they may have been filed, or the circumstances of their filing.

10. You stated on multiple occasions during your testimony that you could not reveal the substance of the advice you gave to the decision-makers in the Civil Rights Division because that advice was privileged. At the same time, you revealed – without claiming privilege – that the chief of the Voting Section recommended preclearing the Georgia voter identification law, and that there were two cases in which the chief of the Voting Section recommended filing Section 2 lawsuits on behalf of African Americans.

    - *Please explain what privilege you are claiming and the specific legal basis for the privilege you believe applies to the advice you provided.*

    - *Please identify all federal court decisions that recognize the privilege you believe applies to the advice you provided.*

    - *Why is your own advice privileged if the section chief's advice is – as you must concede based on your testimony – not privileged?*

    - *If upon reflection you conclude that no privilege applies to your advice, please answer all questions for which you asserted a privilege during your testimony.*

Response: I am licensed to practice law in Georgia and Tennessee.

The Georgia Rules of Professional Conduct follow the Model Rules in Rule 1.6:

> (a) A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, or are required by these rules or other law, or by order of the Court...(e) The duty of confidentiality shall continue after the client-lawyer relationship has terminated.

The Rules of Professional Conduct of the Supreme Court of Tennessee provide in Rule 1.6:

> (a) Except as provided below, a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.

Under Comment 6, the Tennessee Rules state that "[t]he requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance." Comment 20 also provides that the "duty of confidentiality continues after the client-lawyer relationship has been terminated."

Rule 1.6 of the Model Rules of Professional Conduct (Confidentiality of Information) reads:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Comment [2] explains that, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation." *See* http://www.abanet.org/cpr/mrpc/rule_1_6_comm.html.

I also bring to the Committee's attention Comments [3] and [4]:

> [3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a

> lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.
>
> [4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

As noted in Model Rule 1.6, the attorney-client privilege is one of the elements of the general rule of confidentiality. The privilege is an evidentiary/testimonial rule that is the product of common law, although it has been codified by some states. Under Federal law, the Federal Rules of Evidence provide that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501.

The most famous formulation of the attorney-client privilege is found in John Henry Wigmore's treatise:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

8 J. Wigmore, *Evidence in Trials At Common Law* § 2292, at 554 (McNaughton rev. 1961). *See also* Judge Wyzanski's formulation, in *U.S. v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950).

The attorney-client privilege in the context of federal government communications has long been recognized by the courts. *See, e.g., In re Bruce R. Lindsey*, 148 F.3d 1100, 1104 (D.C. Cir. 1998) ("Courts, commentators, and government lawyers have long recognized a government attorney-client privilege in several contexts."); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 , 863 (D.C. Cir. 1980) ("it is clear that an agency can be a "client" and agency lawyers can function as "attorneys" within the relationship contemplated by the privilege"); *Martin v. Valley Nat'l Bank of Ariz.*, 140 F.R.D. 291, 307 (S.D.N.Y. 1991) (memorandum from Acting

Associate Solicitor of U.S. Department of Labor to Deputy Assistant Secretary of Pension and Welfare Benefits Administration is protected from disclosure by attorney-client privilege); *Detroit Screwmatic Co. v. U.S.*, 49 F.R.D. 77, 78 (S.D.N.Y. 1970) (sustaining government's assertion of attorney-client privilege because "[a]s to the last item, prepared by counsel after the commencement of this suit, so clearly is it the attorney's work product, as well as a privileged communication between attorney and client, that there is no basis for discovery"); *U.S. v. Gates*, 35 F.R.D. 524, 526 (D. Colo. 1964) ("a government agency, like any other party, can claim the attorney-client privilege for confidential communications passing between the agency, as client, and the Department of Justice, as its attorney").

The Freedom of Information Act specifically incorporates the privilege by excluding from disclosure documents and materials that would otherwise be protected by the attorney-client privilege. *See* 5 U.S.C. § 552(b)(5) (excluding "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"); *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) ("Exemption 5 protects, as a general rule, materials which would be protected under the attorney-client privilege.").

As the District of Columbia Circuit Court of Appeals explained:

> The practice of attorneys in the executive branch reflects the common understanding that a government attorney-client privilege functions in at least some contexts. The Office of Legal Counsel in the Department of Justice concluded in 1982 that ["] although the attorney-client privilege traditionally has been recognized in the context of private attorney-client relationships, the privilege also functions to protect communications between government attorneys and client agencies or departments, as evidenced by its inclusion in the FOIA, much as it operates to protect attorney-client communications in the private sector.["] Theodore B. Olsen, Assistant Attorney General, Office of Legal Counsel, *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. Off. Legal Counsel 481, 495 (1982).

In re Bruce R. Lindsey, 148 F.3d 1100, 1105 (D.C. Cir. 1998).[5] *See also Petition for Writ of Certiorari of the Office of the President in Office of the President v. Office of Independent Counsel*, 1997 WL 33556978 (May 12, 1997).

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[5] Both the 8th Circuit Court of Appeals and the District of Columbia Circuit Court of Appeals have held that the White House cannot invoke the attorney-client privilege in the context of a grand jury investigation of possible criminal conduct. *See In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997); *In re Bruce R. Lindsey*, 148 F.3d 1100 (D.C. Cir. 1998). Neither of these cases rejects the general availability of the attorney-client privilege to government lawyers and their Federal government client, however. Rather, they reject the availability of the privilege in a particular context – a grand jury investigation of potential criminal offenses. These cases obviously do not apply to the present situation since this is not a grand jury criminal investigation.

Thus, the government attorney-client privilege has been recognized by all three branches of the Federal government. I am, therefore, obligated by the professional rules of conduct to maintain the confidentiality of privileged communications and legal advice that I provided when I was employed at the Department of Justice unless and until the Department waives that privilege.

With regard to my hearing where I stated that the Chief of the Voting Section had recommended preclearance of the Georgia voter identification law and that there were two cases in which the Chief of the Voting Section had recommended filing Section 2 lawsuits on behalf of African Americans that were approved by the Assistant Attorney General, I provided that testimony only because that information had been previously disclosed to Congress during oversight hearings or in responses by the Assistant Attorney General and the Attorney General to written questions.

ADVISORY OPINIONS

Date	*AO Number*	*AO Requestor*	*Vote*	*Dissenter(s)*
1/19/2006	2005-20	Pillsbury Winthrop Shaw Pitman	6-0	
3/9/2006	2006-01	PAC For A Change (Boxer)	6-0	
3/9/2006	2006-02	Robert Titley	5-1	Toner
3/9/2006	2006-06	Francine Busby for Congress	4-2	Toner, Mason
3/23/2006	2006-03	Whirlpool Corp. PAC	6-0	
3/29/2006	2006-04	Tancredo for Congress Committee	4-2	Toner, von Spakovsky
4/20/2006	2006-07	J.D. Hayworth for Congress	4-1	Weintraub
4/20/2006	2006-09	American Institute for Certified Public Accountants PAC	3-2	*AO not adopted.*
4/20/2006	2006-11	Washington Democratic State Central Committee	4-1	Lenhard
4/20/2006	2006-12	International Association of Machinists & Aerospace Workers	5-0	
5/4/2006	2006-08	Matthew Brooks	4-2	Weintraub, Walther
5/4/2006	2006-13	Dennis Spivak	6-0	
5/9/2006	2006-16	Nancy Detert	6-0	
5/18/2006	2006-15	TransCanada Corp.	5-1	Walther
6/5/2006	2006-19	Los Angeles County Democratic Party Central Committee	5-1	Walther
6/22/2006	2006-14	National Restaurant Association PAC	3-2	*AO not adopted.*
6/22/2006	2006-17	Berkeley Electric Cooperative Inc.	5-0	
6/22/2006	2006-18	Kay Granger Campaign Fund	4-1	Lenhard
6/30/2006	2006-10	EchoStar Satellite LLC	5-1	Toner
8/29/2006	2006-21	Cantwell 2006	6-0	
8/29/2006	2006-26	Texans for Henry Bonilla	6-0	
9/6/2006	2006-25	Jon Kyl for US Senate	6-0	
9/14/2006	2006-22	Wallace for Congress	6-0	
10/4/2006	2006-20	Unity '08	5-1	von Spakovsky
10/4/2006	2006-24	National Republican Senatorial Committee	4-2	Toner, von Spakovsky
10/13/2006	2006-31	Bob Casey for Pennsylvania Committee	3-3	*AO not adopted.*
11/2/2004	2006-29	Rep. Mary Bono	6-0	
11/9/2006	2006-30	ActBlue	4-2	Mason, Weintraub

Attachment A

Date	*AO Number*	*AO Requestor*	*Vote*	*Dissenter(s)*
11/21/2006	2006-32	Progress for America	4-2	Toner, von Spakovsky
12/21/2006	2006-33	National Association of Realtors PAC	4-2	Weintraub, Walther
1/25/2007	2006-35	Kolbe for Congress	4-0	
1/25/2007	2006-37	Kissin for Congress	4-0	
2/8/2007	2006-34	Working Assets, Inc.	6-0	
2/8/2007	2006-36	Green Senatorial Campaign Committee	6-0	
2/8/2007	2006-38	Sen. Casey State Committee	6-0	
3/1/2007	2007-03	Obama Exploratory Committee	5-0	
3/8/2007	2007-02	Arizona Libertarian Party	5-0	
3/22/2007	2007-01	Sen. Claire McCaskill	5-0	
4/19/2007	2007-04	Atlatl, Inc.	4-1	von Spakovsky
5/3/2007	2007-05	Erik Iverson	4-0	
5/3/2007	2007-06	Libertarian Party of Indiana	5-0	
5/31/2007	2007-07	Craig for US Congress	5-0	

Rulemaking Votes

1. Revised Explanation and Justification for Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures (11 CFR 109.3 and 300.2(b)), 71 Fed. Reg. 4,975 (Jan. 31, 2006).
   - Final vote, 4-2, taken January 23, 2006. Commissioners Lenhard, Mason, Toner and von Spakovsky voted affirmatively for the decision. Commissioners Walther and Weintraub dissented.

2. Final Rules and Explanation and Justification on the Definition of Federal Election Activity (11 CFR 100.24), 71 Fed. Reg. 8,926 (Feb. 22, 2006).
   - Final vote, 6-0, taken February 9, 2006. Commissioners Lenhard, Mason, Toner, von Spakovsky, Walther, and Weintraub voted affirmatively for the decision.

3. Interim Final Rule on the Definition of Federal Election Activity (Modifying the Definition of "In Connection with an Election in which a Candidate for Federal Office Appears on the Ballot" (11 CFR 100.24(a)(1)(iii)), 71 Fed. Reg. 14,357 (Mar. 22, 2006).
   - Final vote, 4-2, taken February 9, 2006. Commissioners Mason, Toner, von Spakovsky, and Walther voted affirmatively for the decision. Commissioners Lenhard and Weintraub dissented.
   - Final Explanation and Justification adopted on March 16, 2006. Commissioners Mason, Toner, von Spakovsky, and Walther voted affirmatively for the decision. Commissioners Lenhard and Weintraub dissented.

4. Final Rules on the Definitions of "Solicit" and "Direct" (11 CFR 300.2(m) and (n)) , 71 Fed. Reg. 13,926 (Mar. 20, 2006).
   - Final vote, 4-2, taken March 13, 2006. Commissioners Mason, von Spakovsky, Toner, and Walther voted affirmatively for the decision. Commissioners Lenhard and Weintraub dissented.

5. Final Rules and Explanation and Justification on Internet Communications, 71 Fed. Reg. 18,589 (April 12, 2006).
   - Final vote, 6-0, taken March 27, 2006. Commissioners Lenhard, Mason, Toner, von Spakovsky, Walther, and Weintraub voted affirmatively for the decision.

6. Final Rules on Coordinated Communications, 71 Fed. Reg. 33,190 (June 8, 2006).
   - Final vote, 6-0, taken April 7, 2006. Commissioners Lenhard, Mason, Toner, von Spakovsky, Walther, and Weintraub voted affirmatively for the decision.

- Final Explanation and Justification adopted, 6-0, on June 2, 2006. Commissioners Lenhard, Mason, Toner, von Spakovsky, Walther, and Weintraub voted affirmatively for the decision.

7. Final Rules on Increase in Limitation on Authorized Committees Supporting Other Authorized Committees, 71 Fed. Reg. 54,899 (Sept. 20, 2006).

- Final vote, 6-0, taken September 14, 2006. Commissioners Lenhard, Mason, Toner, von Spakovsky, Walther, and Weintraub voted affirmatively for the decision.

8. Supplemental Explanation and Justification on Political Committee Status, 72 Fed. Reg. 5,595 (Feb. 7, 2007).

- Final vote, 4-2, taken January 31, 2007. Commissioners Lenhard, Mason, Walther, and Weintraub voted affirmatively for the decision. Commissioners Toner and von Spakovsky dissented.

9. Finals Rules on Best Efforts in Administrative Fines Challenges, 72 Fed. Reg. 14,662 (March 29, 2007).

- Final vote, 5-0, taken on March 22, 2007. Commissioners Lenhard, Mason, von Spakovsky, Walther, and Weintraub voted affirmatively for the decision.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF VICE CHAIRMAN

STATEMENT OF VICE CHAIRMAN DAVID M. MASON
AND
COMMISSIONER HANS A. von SPAKOVSKY

ON

FINAL AUDIT REPORT ON BUSH-CHENEY '04, INC.

We write separately to explain our views on the "hybrid ad" issue addressed in the Final Audit Report on Bush-Cheney '04, Inc. ("BC04"), and Bush-Cheney '04 Compliance Committee, Inc. BC04 complied with the applicable regulations and precedent of this Commission and did not violate the law in their allocation of the costs of these hybrid ads that benefited both BC04 and other candidates of the Republican Party.

I. Background

Following the 2004 Republican National Convention, after President Bush and Vice President Cheney had accepted public funding for the general election period, the Bush-Cheney campaign and the Republican National Committee spent $81,418,812 on media advertisements.[1] These costs were shared evenly. The advertisements referred to President Bush and/or Senator Kerry and also included references to either "Democrats," "Republicans," "our leaders in Congress," "Congressional leaders," "liberals in Congress," or "liberal allies." The question facing the Commission was whether these expenses were properly shared, and if not, if BC04 had accepted improper funds during the publicly-funded general election period.

We cast votes in this matter to affirm the permissibility of attributing the costs of these television advertisements to both BC04 and the Republican National Committee.[2] The permissibility of such cost-sharing is well-established by agency precedent, and the

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[1] On September 25, 2004, the Kerry-Edwards campaign and the Democratic National Committee followed suit and launched their own series of "hybrid ads." *See* Liz Sidoti, *Kerry Campaign, DNC to Run Joint Ads*, AP Online (Sept. 24, 2004). This joint effort spent a substantial amount. *See* Michael J. Malbin, ed., *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act* at 32 (2006).

[2] Chairman Toner and Commissioners Mason and von Spakovsky voted to find no violation of the law. Vice Chairman Lenhard and Commissioners Walther and Weintraub voted to find a violation, which in turn would have yielded a finding that BC04 illegally accepted over $40,000,000 in in-kind contributions from the Republican National Committee. The remedy for such a finding would be payment by BC04 of this amount to the U.S. Treasury.

parties acted entirely reasonably and in reliance on prior decisions by the Federal Election Commission.

Some sensibilities may be offended by the sheer size of the advertising buys at issue, but dollar amounts should in no way impact the legal issues at stake. Others may argue that attribution was impermissible because no specific exemption from the general public funding rules exists in our regulations. By the same token, no specific prohibition exists either, and in the face of consistent Commission sanction, the parties involved cannot be faulted for believing their actions to be within the bounds of the law, as in fact they were.

II. Analysis

A. Attribution According To Benefit Derived: 11 CFR § 106.1

The basic principle behind two entities sharing the cost of a mutually beneficial, single communication is expressed in 11 CFR § 106.1, which states that "[e]xpenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates." Although this regulation applies specifically to communications made jointly by two or more candidates, the Commission has consistently and repeatedly applied the principle of § 106.1 to situations not explicitly captured by the language of the regulation.

B. Phone Banks

1. Bush-Cheney 2000 Audit

During the 2000 general election, Bush-Cheney 2000, Inc., and 15 Republican state party committees shared the cost of a phone bank get-out-the-vote effort. The calls urged individuals to "get . . . families and friends . . . out . . . to vote for Governor George W. Bush and all of our great Republican team."[3] The state party committees paid 75% of the costs ($1,495,973) and Bush-Cheney 2000 paid the remaining 25% ($498,658). The Audit Division examined the content of the phone bank script, and determined that "the script was equally devoted in space and time to Governor Bush and 'our great Republican

[3] *See Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc., Office of General Counsel Memorandum (Dec. 2, 2002)* at 3, *available at* http://www.fec.gov/audits/2000/p00-02-05.pdf.

team." The Audit Division concluded that a 50% / 50% attribution was appropriate.[4] As the General Counsel observed, the Audit Division "treated the reference to 'our great Republican team' as another clearly identified candidate," and applied the attribution method set forth in 11 CFR § 106.1.[5]

The Office of General Counsel (OGC) also recommended that the Commission require a 50% / 50% allocation for the phone bank, albeit for different reasons. OGC disagreed with the Audit Division's treatment of "our great Republican team" as a "clearly identified candidate" under 11 CFR § 106.1. But, OGC noted that "[i]n the past, the Commission has permitted allocations that were not provided for in the regulations with respect to expenditures involving multiple purposes."[6] OGC explained:

> In this matter, the phone bank communication appears to have had the multiple purpose of benefiting then-Governor Bush as well as "our great Republican team." This Office does not have information that suggests that the phone bank communication exclusively benefited then-Governor Bush. This Office is not aware of the identity or the number of candidates that were being referenced by the term "our great Republican team" in the phone bank script. However, it appears likely that this reference in the communication provided some benefit to the state party committees as such organizations are generally interested in promoting the election of all federal, state, and local candidates on the Republican ticket. Under the circumstances, this Office believes that it would be reasonable for the Commission to recognize the apparent multiple purposes for which the phone bank expenditures were made, and to accordingly permit allocation of the costs. Given that the script was equally devoted in time and space to then-Governor Bush and "our great Republican team," this Office believes it is reasonable to allocate the costs of the phone bank on a 50% basis. This allocation percentage is consistent with the Commission's treatment of other expenditures involving two purposes.[7]

Ultimately, however, neither proposal garnered the required four votes, and the parties' 25% / 75% allocation was allowed to stand. It is notable that the debate among Bush-Cheney 2000, the Audit Division, and OGC was not about *whether* allocation was permissible, but whether the *particular percentages* used were reasonable and appropriate.

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[4] *See Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc., Report of the Audit Division* at 6-7, *available at* http://www.fec.gov/audits/2000/p00-02-05.pdf.

[5] *See Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc., Office of General Counsel Memorandum (Dec. 2, 2002)* at 3, *available at* http://www.fec.gov/audits/2000/p00-02-05.pdf.

[6] *Id.* at 4.

[7] *Id.* at 5.

2. 11 CFR § 106.8

a. Enactment

In November 2003, the Commission adopted 11 CFR § 106.8 (party committee telephone banks), to "address the proper attribution of a party committee's or party organization's disbursements for communications that refer to a clearly identified Federal candidate when the party's other candidates are referred to generically, but not by name."[8] This rulemaking was obviously prompted by the Commission's experience in the Bush-Cheney 2000 Audit.

Under 11 CFR § 106.8, the costs of a political party phone bank communication that includes (1) a reference to a clearly identified Federal candidate; (2) a generic reference to other candidates of the Federal candidate's party without clearly identifying them; and (3) does not solicit a contribution, should be attributed 50% to the clearly identified Federal candidate. The other 50% is not attributable to any particular candidate, meaning the party may pay that portion of the total cost.

b. Meaning

At least four key conclusions relevant to the matter before us may be drawn from that rulemaking[9]:

1. The Commission extended the mutual benefit theory to communications featuring both a clearly identified Federal candidate and generically referenced candidates, and the benefit to the generically referenced candidates may accrue to those candidates' political party.[10]

2. The rule applies to all Federal candidates, "[b]ecause there is no apparent reason to distinguish presidential and vice presidential candidates from other Federal candidates."[11]

3. The Commission considered requiring a 100% attribution to the clearly identified Federal candidate, but rejected that option. Instead, a 50% attribution requirement was enacted.[12]

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[8] *Final Rule: Party Committee Telephone Banks*, 68 Fed. Reg. 64,517 (Nov. 14, 2003).

[9] Commissioner von Spakovsky was not a member of the Commission when the phone bank regulation was adopted.

[10] *See id.* ("Although the specific mention of the clearly identified Federal candidate provides something of value to the candidate being promoted, it also provides the party with a benefit. The final rules . . . reflect that such communications benefit both the candidate and the party.").

[11] *Id.* at 64,517.

4. The regulation "allows party committees and organizations to treat the portions of disbursements attributed to clearly identified Federal candidates as . . . expenses to be reimbursed by the clearly identified Federal candidates," meaning the costs of these phone bank communications may be shared.[13]

Not one of these conclusions supports the view that the "hybrid ads" of BC04 and the Republican National Committee were unlawful.

c. Scope

Some of our colleagues objected to BC04's reliance on § 106.8 on the grounds that that regulation applies only to phone banks, and the Commission did not extend the regulation to other forms of communications. Some on the Commission seem to believe that the specificity of the phone bank regulation impliedly means that joint communication attribution is not permissible with respect to other media. However, the words the Commission used in 2003 are not so stark:

> In answer to the Commission's question of whether 11 CFR 106.8 should include other forms of communications such as broadcast or print media, the commenter urged the Commission to defer consideration of extending the final rules to include other forms of communications. The Commission has decided to limit the scope of new section 106.8 to phone banks at this time because each type of communication presents different issues that need to be considered in further detail before establishing new rules.[14]

We do not read this language to state that the Commission determined that attribution for any type of communication other than a phone bank is unlawful unless and until subsequent permissive regulations are enacted. Activities that do not violate any specific provision of the Federal Election Campaign Act, or a Commission regulation, do not require express approval from the Commission to make them lawful. With respect to 11 CFR § 106.8, the Commission simply acted to provide guidance on a particular issue that had created confusion in the past. The regulation supercedes the Commission's approach to phone banks taken in the Bush-Cheney 2000 Audit, but nothing more. No broad hidden or implied prohibitions became law upon its enactment.

d. Generic References

Some Commissioners argued that even if the Commission were to apply the phone bank regulation's essential requirements to the matter at hand, the "hybrid ads"

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[12] *Id.* at 64,518 ("Because these phone bank communications contain two references – one to a clearly identified Federal candidate and one that generically refers to other candidates – it is appropriate that the disbursement for the communications be attributed evenly between the two references.").

[13] *Id.* at 64,519.

[14] *Id.* at 64,518.

distributed by BC04 and the RNC did not satisfy the "generic reference" requirement, which requires that the communication "generically refer[] to other candidates of the Federal candidate's party." They understand this provision to require a reference to the name of a political party, *i.e.*, "our great Republican team." The "hybrid ads" aired by BC04 and the Republican National Committee more typically used phrases such as "our leaders in Congress," "Congressional leaders," "liberals in Congress," and "liberal allies."[15]

In the past, it is true that the "generic references" with which the Commission has considered have tended to include specific political party references, *e.g.*, Republican, Democratic, Green. However, it should be remembered that the "generic reference" standard is intended primarily to indicate that it does not benefit any particular candidate, but instead benefits generally a group of candidates. We see no reason then, why *only* a generic reference that includes the name of a political party should be viewed as potentially beneficial to a political party.[16] If a political party believes that it is benefited most by promoting "our leaders in Congress," why should the Commission object? And while the phone bank regulation requires the generic reference to be "to other candidates of the Federal candidate's party," it is also true that casting aspersions on "liberals in Congress" would be viewed by many as beneficial to a Republican party committee. The Commission should apply any "generic reference" requirement with the flexibility required to avoid dictating advertising content.

C. Coordination and Attribution: Advisory Opinion 2004-1 (Bush / Forgy Kerr)

On January 8, 2004, BC04, along with Alice Forgy Kerr for Congress, sought the Commission's guidance on how to run advertisements featuring President Bush endorsing Ms. Kerr in a special congressional election that took place within the then-applicable coordinated communication window (*i.e.*, within 120 days of Kentucky's presidential primary). The Commission concluded that certain advertisements described would qualify as "coordinated communications," but that if those advertisements were properly attributed according to the methods set forth in 11 CFR § 106.1, no in-kind contribution to President Bush would occur.

In other words, BC04 was permitted to reimburse the Kerr campaign for its attributable share of the advertisements, thereby "negating" any in-kind contribution that would otherwise flow to the campaign as a result of these coordinated communications. This Advisory Opinion clearly affirmed the viability of making joint, coordinated

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[15] *See Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc., Report of the Audit Division* at 10, *available at* http://www.fec.gov/audits/2000/p00-02-05.pdf.

[16] "Generic" means "relating to or descriptive of an entire group or class; general." *American Heritage Dictionary: New College Edition* (1976). The term permits a broad usage and does not require any particular linguistic formulation.

communications that are allocated in such a way so as to avoid making an in-kind contribution to one party.

In light of the result of the Bush-Cheney 2000 audit, the subsequently enacted phone bank regulation, and Advisory Opinion 2004-1, BC04 and the Republican National Committee were on firm legal ground when they ran joint advertisements in the fall of 2004. The Commission had assented to joint communications in the 2000 Audit, with both the Audit Division and OGC arguing that allocation of a joint-message phone bank was reasonable and appropriate. Shortly thereafter, the Commission affirmed that view by enacting the phone bank allocation regulation (11 CFR § 106.8), which is based on the assumption that a communication can benefit two parties, and that those two parties may split the costs of that communication. The following year, in 2004, the Commission upheld a proposal in which two Federal candidates appeared in a coordinated advertisement, with the costs allocated to prevent one party from making an in-kind contribution to the other. And if this were not enough to consider the issue settled, in 2006 the Commission specifically approved a jointly funded, coordinated mass mailing paid for and distributed by the state party and a Federal candidate – *i.e.*, a communication legally indistinguishable from the hybrid ads at issue here.

D. Advisory Opinion 2006-11 (Washington Democratic State Central Committee)

Although Advisory Opinion 2006-11 was issued in April 2006, long after the events of the Audit took place, this Advisory Opinion very clearly establishes that the attribution method of 11 CFR § 106.1 may be used by candidates and political party committees that distribute mutually beneficial, joint communications. In fact, at the time this Advisory Opinion was approved, we understood it to settle the basic legal issue surrounding the "hybrid ads" in this Audit.[17]

III. Conclusion

BC04 relied on the position that the Commission took in prior audits and Advisory Opinions that clearly allowed a 50% allocation of the costs of advertisements that featured a clearly identified Federal candidate and a generic reference to the candidates of his political party. After this Agency had completed the substantial work of this particular audit, and the Commissioners were well aware of this issue, the Commission adopted an Advisory Opinion approving a similar 50% allocation of the same type of advertising conducted by the Washington State Democratic Central Committee in connection with the 2006 Congressional elections. It is too late to now attempt to claim that BC04's actions were somehow unlawful or not reasonably based on prior Commission actions or that BC04 should be required to repay the cost of these

[17] Of course, Advisory Opinions are limited to the facts presented. At the same time, though, the Commission seeks to consistently apply its legal precedents.

advertisements. That is simply not the case, and to the extent that the Kerry Campaign may have engaged in the same type of activity, as has been reported publicly in the press, we also do not believe they violated the law or our regulations on this specific issue.

March 22, 2007

Commissioner Hans A. von Spakovsky

Vice Chairman David M. Mason