

1 UNITED STATES DISTRICT COURT  
 2 FOR THE DISTRICT OF COLUMBIA

3 - - - - -X  
 4 SENATOR MITCH McCONNELL; :  
 REPRESENTATIVE BOB BARR; :  
 5 REPRESENTATIVE MIKE PENCE; ALABAMA :  
 ATTORNEY GENERAL BILL PRYOR; :  
 6 LIBERTARIAN NATIONAL COMMITTEE, INC.; :  
 ALABAMA REPUBLICAN EXECUTIVE COMMITTEE, :  
 7 AS GOVERNING PARTY FOR THE ALABAMA :  
 REPUBLICAN PARTY; LIBERTARIAN PARTY OF :  
 8 ILLINOIS; DuPAGE POLITICAL ACTION :  
 COUNCIL; JEFFERSON COUNTY REPUBLICAN :  
 9 EXECUTIVE COMMITTEE; AMERICAN CIVIL :  
 LIBERTIES UNION; ASSOCIATED BUILDERS :  
 AND CONTRACTORS, INC.; ASSOCIATED :  
 BUILDERS AND CONTRACTORS POLITICAL :  
 10 ACTION COMMITTEE; CENTER FOR INDIVIDUAL: Civ. No.  
 FREEDOM; CHRISTIAN COALITION OF : 02-CV-582  
 11 AMERICA, INC.; CLUB FOR GROWTH; : (CKK, KLH,  
 INDIANA FAMILY INSTITUTE; NATIONAL : RJL)  
 12 RIGHT TO LIFE COMMITTEE, INC.; NATIONAL: All related  
 RIGHT TO LIFE EDUCATIONAL TRUST FUND; : Actions.  
 13 NATIONAL RIGHT TO LIFE POLITICAL ACTION:  
 COMMITTEE; THE NATIONAL RIGHT TO WORK :  
 14 COMMITTEE; 60 PLUS ASSOCIATION, INC.; :  
 SOUTHEASTERN LEGAL FOUNDATION, INC.; :  
 15 U.S. d/b/a ProENGLISH; MARTIN CONNORS; :  
 THOMAS E. McINERY; BARRET AUSTIN :  
 16 O'BROCK; TREVOR M. SOUTHERLAND, :  
 :  
 17 Plaintiffs, :  
 18 v. :  
 19 FEDERAL ELECTION COMMISSION; FEDERAL :  
 COMMUNICATIONS COMMISSION, :  
 20 :  
 21 Defendants. :  
 22 - - - - -X  
 23 Washington, D.C.  
 24 Wednesday, October 23, 2002  
 25 DEPOSITION OF DAVID B. MAGLEBY

<p style="text-align: right;">Page 2</p> <p>1 Deposition of DAVID B. MAGLEBY, a witness  2 herein, called for examination by counsel for  3 Plaintiff in the above-entitled matter, pursuant  4 to notice, the witness being duly sworn by LORI G.  5 MACKENZIE, a Notary Public in and for the District  6 of Columbia, taken at the offices of Wilmer,  7 Cutler &amp; Pickering, 2445 M Street, N.W.,  8 Washington, D.C. at 9:35 a.m., on Wednesday,  9 October 23, 2002, and the proceedings being taken  10 down by Stenotype by LORI G. MACKENZIE, and  11 transcribed under her direction.  12  13 <b>APPEARANCES:</b>  14  15 On behalf of the Plaintiff AFL-CIO:  16 MICHAEL B. TRISTER, ESQUIRE  17 RICHARD L. THOMAS, ESQUIRE  18 Lichtman, Trister, Singer &amp; Ross  19 1666 Connecticut Avenue, N.W., Suite 500  20 Washington, D.C. 20009  21 202-328-1666 (Trister)  22 202-328-1666, ext. 357 (Thomas)  23  24  25</p>	<p style="text-align: right;">Page 4</p> <p>1 <b>APPEARANCES: (Continued)</b>  2  3 On behalf of the Defendants:  4 CHRISTOPHER J. PAOLELLA, ESQUIRE  5 PAUL M. DODYK, ESQUIRE  6 PETER LIGH, ESQUIRE  7 LATISHA VERNON, ESQUIRE  8 JAMES ABAMONT  9 Cravath, Swaine &amp; Moore  10 Worldwide Plaza  11 825 Eighth Avenue  12 New York, New York 10019-7475  13 212-474-1214  14  15  16  17  18  19  20  21  22  23  24  25</p>
<p style="text-align: right;">Page 3</p> <p>1 <b>APPEARANCES: (Continued)</b>  2  3 On behalf of the Plaintiff American Civil  4 Liberties Union Foundation:  5 MARK LOPEZ, ESQUIRE  6 American Civil Liberties Union Foundation  7 125 Broad Street  8 New York, New York 10005  9 202-549-2608  10  11 On behalf of the Plaintiff Republican National  12 Committee:  13 MICHAEL A. CARVIN, ESQUIRE  14 Jones, Day, Reavis &amp; Pogue  15 51 Louisiana Avenue, N.W.  16 Washington, D.C. 20001-2113  17 202-849-3939  18  19  20  21  22  23  24  25</p>	<p style="text-align: right;">Page 5</p> <p>1 <b>CONTENTS</b>  2  3 <b>THE WITNESS EXAMINATION BY COUNSEL FOR</b>  4 <b>DAVID B. MAGLEBY PLAINTIFF DEFENDANT</b>  5 By Mr. Carvin 7  6 By Mr. Trister 72  7  8 Afternoon Session 138  9  10 <b>EXHIBITS</b>  11  12 <b>MAGLEBY EXHIBIT NO. FOR IDENTIFICATION</b>  13 1 Report..... 7  14 2 Script of an AFL-CIO ad.....100  15 3 Radio ad run by the AFL-CIO in  16 September of 1998 .....103  17 4 Monograph.....113  18 5 Working document.....138  19 6 Notes from a meeting with Mr. Potter  20 and Mr. Jowers.....141  21 7 Set of screen images on secure web site...145  22 8 Case study for the New Mexico Third  23 District.....176  24 9 Material consulted in preparing  25 expert report.....189</p>

<p style="text-align: right;">Page 6</p> <p>1 INDEX OF EXHIBITS (Cont'd.)</p> <p>2</p> <p>3 MAGLEBY EXHIBIT NO. FOR IDENTIFICATION</p> <p>4 10 Handwritten notes.....248</p> <p>5 11 Memorandum.....261</p> <p>6 12 Document.....262</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 8</p> <p>1 A. No.</p> <p>2 Q. Okay. Is Exhibit No. 1 the report you</p> <p>3 have entered in this case?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. And, if you can turn to Page 39 of</p> <p>6 that report, please.</p> <p>7 I would like you to look at the third</p> <p>8 full paragraph under E, the first sentence says:</p> <p>9 Soft money is largely in competitive races, right?</p> <p>10 A. That's right.</p> <p>11 Q. And is that soft money spending by</p> <p>12 political parties?</p> <p>13 A. Yes.</p> <p>14 Q. And your conclusion was based on a</p> <p>15 systematic analysis of where soft money was spent</p> <p>16 by the political parties?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. If you could turn to Page 35 in</p> <p>19 the report, please.</p> <p>20 Now, I would like you to focus on the</p> <p>21 second full paragraph, under No. 1, Contribution</p> <p>22 Limits.</p> <p>23 And you state: Actual experience with</p> <p>24 soft money has demonstrated that soft money donors</p> <p>25 and federal candidates are very clearly linked,</p>
<p style="text-align: right;">Page 7</p> <p>1 PROCEEDINGS</p> <p>2 Whereupon,</p> <p>3 DAVID B. MAGLEBY,</p> <p>4 was called as a witness by counsel for Plaintiff,</p> <p>5 and having been duly sworn by the Notary Public,</p> <p>6 was examined and testified as follows:</p> <p>7 (The document referred to</p> <p>8 was marked Magleby Exhibit</p> <p>9 No. 1 for identification.)</p> <p>10 EXAMINATION BY COUNSEL FOR PLAINTIFF:</p> <p>11 BY MR. CARVIN:</p> <p>12 Q. Good morning, Dr. Magleby, my name is</p> <p>13 Michael Carvin, and I represent the Republican</p> <p>14 National Committee in this litigation.</p> <p>15 Have you ever been deposed before?</p> <p>16 A. Yes.</p> <p>17 Q. So, you understand that the court</p> <p>18 reporter needs a verbal response, not a nod or an</p> <p>19 uh-huh, something like that.</p> <p>20 And, if I ask you any questions that you</p> <p>21 are not clear on, please ask me to clarify, and I</p> <p>22 will be happy to do that.</p> <p>23 Is there any reason, such as medication,</p> <p>24 that you are not able to answer the questions</p> <p>25 today, truthfully and fully?</p>	<p style="text-align: right;">Page 9</p> <p>1 and that connection is enhanced through joint</p> <p>2 fund-raising or victory committees.</p> <p>3 Donors who are barred from giving more</p> <p>4 than \$2,000 per election cycle to a candidate can</p> <p>5 effectively channel unlimited amounts of money to</p> <p>6 that same contest through a soft money</p> <p>7 contribution.</p> <p>8 Do you see that?</p> <p>9 A. Yes.</p> <p>10 Q. There is no footnote to those assertions</p> <p>11 is there?</p> <p>12 A. No.</p> <p>13 Q. There is no support for those assertions</p> <p>14 cited anywhere in your report?</p> <p>15 A. Not in the report.</p> <p>16 Q. Okay. And, in your report, or in the</p> <p>17 accompanying documentation, have you researched or</p> <p>18 analyzed the question of whether there is an</p> <p>19 informal agreement between National Parties and</p> <p>20 soft money donors, where Party officials will</p> <p>21 expend soft money in races identified by the soft</p> <p>22 money donors?</p> <p>23 A. Would you restate the question, please?</p> <p>24 MR. CARVIN: Could you read that back.</p> <p>25 THE REPORTER: "Question: And, in your</p>

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1 report, or in the accompanying documentation, have  
2 you researched or analyzed the question of whether  
3 there is an informal agreement between National  
4 Parties and soft money donors, where Party  
5 officials will expend soft money in races  
6 identified by the soft money donors?"

7 THE WITNESS: I am not clear in the  
8 question of what the accompanying documentation is  
9 that you refer to.

10 BY MR. CARVIN:

11 Q. You reference various things in  
12 footnotes, external materials, and provided us  
13 with 11 boxes of documentation that support the  
14 various conclusions and assertions in the report.

15 So, either in the report, or in any of  
16 those accompanying documentations, have you  
17 researched the question I described?

18 A. Yes.

19 Q. Okay. And what documentation reflects  
20 that there is an informal agreement between  
21 national parties and soft money donors by which  
22 party officials expend soft money in races  
23 identified or preferred by the soft money donors?

24 A. In interviews conducted some years ago  
25 for the research for the money chase, Party

Page 12

1 with the staff of Senator Cranston in The Money  
2 Chase?

3 A. I am not remembering.

4 Q. Any other basis for that assertion?

5 A. The one given previously in my statement.

6 Q. The newspaper articles?

7 A. Uh-huh.

8 Q. Are any of those newspaper articles  
9 referenced in either your report or the  
10 accompanying documentation?

11 A. I think they probably are attributed in  
12 either the other campaign or in outside money.

13 Q. And do you recall, sitting here today,  
14 what those newspaper articles were?

15 A. No.

16 Q. Okay. And, the newspaper articles, you  
17 didn't have personal knowledge of what was in  
18 those newspaper articles?

19 MR. PAOLELLA: Of the facts reported in?

20 BY MR. CARVIN:

21 Q. Of the facts reported in.

22 A. No.

23 Q. Okay. Now, with respect to the staff of  
24 Senator Cranston, what did they tell you -- first  
25 of all, who on his staff told you this?

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1 officials indicated an informal system called the  
2 chit system, where soft money donors were  
3 perceived or attributed in some informal way to  
4 particular candidates.

5 And in interviews for the more recent  
6 research, and in newspaper and other accounts, it  
7 has been widely reported that victory funds and  
8 joint fund-raising committees have been used in  
9 the way described in Paragraph 2 under No. 1.

10 Q. Okay. And what does the chit system  
11 mean, that if a candidate is involved in raising  
12 soft money then a chit goes next to his name for  
13 the soft money donation?

14 A. That was my understanding.

15 Q. And was it also your understanding that  
16 the expenditures of that soft money would go to  
17 that candidate, because he was the one who had  
18 recruited or solicited the soft money donor?

19 A. To some extent. Not clear that it was a  
20 one-to-one.

21 Q. And who told you that?

22 A. Staff of Senator Cranston.

23 Q. Anyone else?

24 A. Not that I am remembering.

25 Q. And did you document that conversation

Page 13

1 A. I am not remembering.

2 Q. Was it his chief of staff?

3 A. I am not remembering.

4 Q. Was he working on the campaign?

5 A. I don't remember.

6 Q. Did he ever get involved in fund-raising?

7 A. Senator Cranston?

8 Q. No. The staff member to whom you talked.

9 A. I don't know.

10 Q. And was it a male or a female?

11 A. I don't remember.

12 Q. Do you remember race of the person?

13 A. No.

14 Q. Do you remember when this conversation  
15 took place?

16 A. Probably 1987 or 1988.

17 Q. Okay. And, this, again, just so I am  
18 clear, was in connection with your research for  
19 The Money Chase?

20 A. Yes.

21 Q. And, this person, did you talk to one or  
22 more people in Senator Cranston's staff?

23 A. I believe I have spoken to more than one  
24 person about the chit system.

25 Q. Can you recall who those other people

4 (Pages 10 to 13)

Page 14

1 might be?  
 2 A. They would be people on the Senatorial  
 3 Campaign Committee.  
 4 Q. The Democratic Senatorial Campaign  
 5 Committee?  
 6 A. Yes.  
 7 Q. And have you ever talked to any  
 8 Republican Party Committees who have indicated  
 9 something analogous to this chit system?  
 10 A. No.  
 11 Q. And who on the Democratic Senatorial  
 12 Campaign Committee did you discuss this alleged  
 13 chit system with?  
 14 A. I don't recall.  
 15 Q. Did you do that in connection with  
 16 researching the money chase?  
 17 A. Yes.  
 18 Q. And, what, if anything, did they tell you  
 19 about it?  
 20 A. Essentially what I have already said.  
 21 Q. And did Senator Cranston receive more  
 22 soft money dollars because of his solicitation of  
 23 soft money donors, than he otherwise would have  
 24 from the Democratic Senatorial Campaign Committee?  
 25 A. I don't know.

Page 16

1 A. Not that I am aware of.  
 2 Q. Do you have any other basis for your  
 3 assertion that donors, who were barred from giving  
 4 more than \$2,000 per election cycle to a  
 5 candidate, can effectively channel unlimited  
 6 amounts of money to that same contest through a  
 7 soft money contribution other than what you have  
 8 told me so far?  
 9 A. Yes, I do.  
 10 Q. What is that?  
 11 A. As reported in my research, interest  
 12 groups have indicated doing what -- have indicated  
 13 that they contribute soft money in amounts  
 14 exceeding \$2,000 aimed at helping in particular  
 15 races.  
 16 Q. And, they have an agreement with the  
 17 political parties that those monies will be  
 18 expended in the desired races by the interest  
 19 groups?  
 20 A. Agreement would not be the right word.  
 21 Q. Was there an informal wink-and-nod  
 22 agreement?  
 23 A. There was something of an understanding.  
 24 Q. And how was this understanding expressed?  
 25 A. In interviews with interest groups to

Page 15

1 Q. Was there any assertion that Senator  
 2 Cranston had received more soft money expenditures  
 3 by the Democratic Senatorial Campaign Committee  
 4 than he otherwise would have because of the  
 5 solicitation efforts?  
 6 A. That was implicit.  
 7 Q. Was it ever made explicit?  
 8 A. Not that I remember.  
 9 Q. Did you ever analyze the amount of  
 10 expenditures by the Democratic Senatorial Campaign  
 11 Committee for Senator Cranston?  
 12 A. I believe I did. But, I don't remember  
 13 the analysis, at this point.  
 14 Q. Do you remember how much soft money was  
 15 spent by the Democratic Senatorial Campaign  
 16 Committee in or about 1987 or 1988 for Senator  
 17 Cranston's election?  
 18 A. No, I don't.  
 19 Q. Was it more than \$1 million?  
 20 A. I don't recall.  
 21 Q. Was it more than 100,000?  
 22 A. I don't recall.  
 23 Q. Were there any advertisements purchased  
 24 with soft money in Senator Cranston's races in the  
 25 late 1980s?

Page 17

1 this effect.  
 2 Q. No. How is the understanding expressed  
 3 as between the political party and the interest  
 4 groups?  
 5 A. I don't know.  
 6 Q. Which interest groups told you this?  
 7 A. The trial lawyers.  
 8 Q. Okay. When did they tell you this?  
 9 A. There would be a footnote in the back of  
 10 my monograph with the date of the interview with  
 11 the Trial Lawyers Association. I don't remember  
 12 the date.  
 13 Q. Your monograph being something different  
 14 than this report?  
 15 A. Yes.  
 16 Q. What monograph would that be?  
 17 A. What was the title of the 2000 monograph?  
 18 The title is: Election Advocacy: Soft Money and  
 19 Issue Advocacy in the 2000 Congressional  
 20 Elections.  
 21 There is a list of all interviews  
 22 conducted for that monograph as an appendix.  
 23 Q. And who did you talk to at the Trial  
 24 Lawyers?  
 25 A. I don't recall the person's name.

5 (Pages 14 to 17)

Page 18

1 Q. Would that be, would the person be listed  
2 in the footnote?  
3 A. Yes. It would be listed in the appendix  
4 and the footnote.  
5 Q. And this person told you he had an  
6 informal understanding with which political party  
7 or party committee?  
8 A. I believe it is a she.  
9 Q. What is her name?  
10 A. I don't remember her name.  
11 Q. Okay. And what did she tell you about  
12 her understanding -- which political party she had  
13 any such understanding with?  
14 A. Would you repeat the question. I think  
15 there were two questions there.  
16 Q. Which political party did she have this  
17 alleged understanding with?  
18 A. The Democratic Party.  
19 Q. The Democratic National Committee?  
20 A. No. I believe it was either the  
21 Congressional Campaign Committee or the Senatorial  
22 Campaign Committee.  
23 Q. Can you remember, sitting here today,  
24 which one of those it was?  
25 A. No.

Page 19

1 Q. Okay. And when did this understanding or  
2 conversation giving rise to this understanding  
3 occur, according to your contact at the Trial  
4 Lawyers?  
5 A. I believe it would have been in reference  
6 to the 2000 election cycle.  
7 Q. Okay. So, the conversation would have  
8 occurred in 1999 or 2000?  
9 A. Or early 2001.  
10 Q. And there was one such conversation with  
11 either the Democratic Congressional Committee or  
12 the Democratic Senatorial Committee or numerous  
13 such conversations?  
14 A. No. We were speaking about the  
15 conversation I was having with the Trial Lawyers  
16 Association, I assumed. You may need to restate  
17 the question.  
18 I was answering in what I thought was the  
19 context of the interview with the Trial Lawyers  
20 Association.  
21 Q. Okay. Let me make it clear. To the best  
22 of your recollection, there was some implicit  
23 understanding between the Trial Lawyers and some  
24 national Democratic Committee and I am wondering  
25 if that understanding arose in one conversation,

Page 20

1 or two conversations, or three conversations,  
2 according to the person you talked to at the Trial  
3 Lawyers?  
4 MR. PAOLELLA: Conversations between the  
5 Trial Lawyers and the Democratic Committee?  
6 BY MR. CARVIN:  
7 Q. Sure.  
8 A. It wasn't clear to me from what the  
9 interviewee said how many conversations she had  
10 with the party committee.  
11 Q. Okay. To the best of your recollection,  
12 what did she say to the Democratic Committee, and  
13 what did they say to her?  
14 A. To the best of my recollection, she  
15 indicated that the party committee would indicate  
16 a need in amounts exceeding \$2,000 and that she  
17 would know of potential soft money donors able to  
18 contribute at that level and that she would help  
19 facilitate that contribution.  
20 Q. And the need related to a specific race?  
21 A. Yes, to a specific race.  
22 Q. And why would they have a need with  
23 respect to a specific race, as opposed to all of  
24 the competitive races that the committee was  
25 following?

Page 21

1 A. I don't know.  
2 Q. And, so, in this example, it was the  
3 Democratic Committee that was making the decision  
4 on where the expenditure would occur, and the  
5 interest group would be facilitating the funds?  
6 A. Yes.  
7 Q. So, this would not be an example of a  
8 soft money donor indicating where they wanted the  
9 money spent, and the Committee acquiescing,  
10 correct?  
11 MR. PAOLELLA: Objection.  
12 THE WITNESS: No.  
13 BY MR. CARVIN:  
14 Q. And how much money was raised in  
15 connection with this request or requests by the  
16 Democratic Committees?  
17 A. I believe the example she used was an  
18 amount of \$50,000.  
19 Q. And what race was that \$50,000 going to  
20 be devoted to by the Democratic Committee?  
21 A. I don't know.  
22 Q. If the Democratic Committee had decided  
23 to redeploy the \$50,000 to some other purpose,  
24 would that have been inconsistent with any such  
25 implicit understanding?

6 (Pages 18 to 21)

Page 22

1 A. Yes.  
 2 Q. Were the soft money donors from the state  
 3 where this race was occurring?  
 4 A. I don't know.  
 5 Q. Did any of the soft money donors have any  
 6 contact or conversations with the candidate in  
 7 that race?  
 8 A. I don't know.  
 9 Q. Okay. Do you have any other examples of  
 10 where a soft money donor has expressed a  
 11 preference to donate monies to a particular race  
 12 through an informal agreement?  
 13 A. Not that come to mind.  
 14 Q. Do you know, in the Trial Lawyers'  
 15 example you have given me, whether or not the  
 16 Democratic Committee did spend the \$50,000 in the  
 17 race?  
 18 A. No, I don't.  
 19 Q. Okay. What percentage of soft money  
 20 donors suppress a preference on where the money  
 21 will be spent?  
 22 A. Persons contributing to joint  
 23 fund-raising committees, or victory funds, convey  
 24 at least an implicit desire that those funds be  
 25 spent in that race.

Page 23

1 Q. And what percentage of soft money donors  
 2 is that?  
 3 A. I don't know.  
 4 Q. And how often is that implicit request  
 5 honored by the Committee?  
 6 A. I don't know.  
 7 Q. Have you ever heard of any such similar  
 8 understanding, as you have previously described,  
 9 involving the Republican Party Committee or Party?  
 10 A. Not that comes to mind.  
 11 Q. Does your report or any data supplied in  
 12 connection with your report reference any party  
 13 officials who have told you that they have  
 14 expended soft money on the basis of their desire  
 15 as soft money donors?  
 16 A. Not that I recall.  
 17 Q. Is there any data supplied in connection  
 18 with your report that indicates any candidates who  
 19 have stated to you that the party committees  
 20 expend soft money on the basis of the desires of  
 21 the soft money donors?  
 22 A. Not that I recall.  
 23 Q. Can you list any expenditure decisions by  
 24 any National Party Committees dictated in whole or  
 25 in part by donor preferences?

Page 24

1 A. No.  
 2 Q. Have you ever interviewed Party officials  
 3 and asked them that question?  
 4 A. I have never asked that question that  
 5 way.  
 6 Q. Okay. Are the federal office holders and  
 7 candidates who raise large amounts of soft money  
 8 donations typically in competitive races?  
 9 A. I would reword the question to say assist  
 10 in raising, and that is one of the major  
 11 categories. Another major category would be party  
 12 leaders.  
 13 Q. Party leaders meaning what?  
 14 A. The speaker in the House and the majority  
 15 leader and the whip and others on the leadership  
 16 ladder, the same for the Democratic Party, of  
 17 course holding aside speaker.  
 18 And in the Senate the majority leader and  
 19 whip and the Republican leader and whip.  
 20 Q. And do these party leaders, as you have  
 21 just defined it, assist in raising large amounts  
 22 of soft money?  
 23 A. Yes. And I should have added the chairs  
 24 of the respective campaign committees, so that,  
 25 for instance, in 2000, Mr. Toricelli played a

Page 25

1 substantial role in helping to raise soft money.  
 2 Q. Okay. And are they typically in  
 3 competitive races, those party leaders as you  
 4 define it?  
 5 A. Not as competitive races.  
 6 Q. And are those party leaders typically  
 7 able to raise large amounts of hard money?  
 8 A. They are able to assist in raising large  
 9 amounts of hard money.  
 10 Q. And did the party committees expend a  
 11 disproportionate amount of soft money on races  
 12 where party leaders are involved?  
 13 A. No. They do not expend a  
 14 disproportionate amount of soft money in races  
 15 where party leaders are involved.  
 16 Q. Are you aware of any correlation between  
 17 the amount of soft money --  
 18 A. May I modify that answer. With some  
 19 exceptions. For instance, Mr. Bonyer's district  
 20 in Michigan.  
 21 Q. And in what election was that?  
 22 A. '98 and 2000.  
 23 Q. Okay. And he was in a tightly contested  
 24 election?  
 25 A. It is a competitive district.

7 (Pages 22 to 25)

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1 Q. Do you have any reason to believe that  
 2 the Democratic Committees would have spent less  
 3 money in those races if Mr. Bonyer hadn't been a  
 4 party leader or assisted in the raising of soft  
 5 money?  
 6 A. No.  
 7 Q. Okay. Are you aware of any correlation  
 8 between the amounts of soft money expended in a  
 9 candidate's race, and the amount of soft money  
 10 raised by the federal candidate or office holder?  
 11 A. No.  
 12 Q. To the extent there is no correlation,  
 13 that would undermine the assertion that soft money  
 14 donors preferences or criteria in the national  
 15 party committee expenditures, would it not?  
 16 MR. PAOLELLA: Objection.  
 17 THE WITNESS: I need you to restate that  
 18 question, I am sorry.  
 19 BY MR. CARVIN:  
 20 Q. Well, to the extent there is no  
 21 correlation between the amount of soft money  
 22 raised by a candidate, and the soft money  
 23 expenditures that benefit the candidate, that  
 24 would undermine the assertion that those who  
 25 assist in raising soft money, or soft money donor

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1 report, or the accompanying data, which  
 2 substantiates the assertion that soft money  
 3 donations are used to circumvent the hard money  
 4 contribution limits to candidates?  
 5 MR. PAOLELLA: Mike, when you say  
 6 accompanying data, you are including all of his  
 7 prior publications that were produced in this  
 8 litigation?  
 9 MR. CARVIN: Yes.  
 10 THE WITNESS: So, let's restate the  
 11 question, please.  
 12 THE REPORTER: "Question: "Is there any  
 13 documentation in your report, or the accompanying  
 14 data, which substantiates the assertion that soft  
 15 money donations are used to circumvent the hard  
 16 money contribution limits to candidates?"  
 17 THE WITNESS: Yes.  
 18 BY MR. CARVIN:  
 19 Q. Is there any data in your report, or the  
 20 accompanying materials, in addition to what we  
 21 have discussed thus far this morning?  
 22 A. Yes.  
 23 Q. Okay. And what would that be?  
 24 A. In both '98 and 2000, we documented the  
 25 transfers by the national party committees to

Page 27

1 preferences, are a criteria in the National Party  
 2 Committee's expenditures of soft money, would it  
 3 not?  
 4 A. I disagree with the premise of the  
 5 question.  
 6 Q. Okay. If the premise is true, that would  
 7 tend to undermine the assertion that soft money  
 8 donor preferences are a criteria in national party  
 9 committee's expenditures, would it not?  
 10 A. If the premise is true, but it is  
 11 untested and unsubstantiated.  
 12 Q. And you haven't sought to substantiate it  
 13 one way or another, correct?  
 14 A. No.  
 15 Q. Okay. To the extent that the criteria  
 16 for the national party committee's soft money  
 17 expenditures is competitive races, then a soft  
 18 money donor preference for a noncompetitive race  
 19 would not be honored, correct?  
 20 A. I presume so.  
 21 Q. And are you aware of any soft money donor  
 22 preference leading to expenditures in  
 23 noncompetitive races?  
 24 A. No.  
 25 Q. Is there any documentation in your

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1 state party committees, both hard and soft money.  
 2 The amounts transferred typically  
 3 reflected the state and federal party match almost  
 4 exactly as needed by that state, or as eligible  
 5 for that state.  
 6 In the case of the Senate races, the  
 7 evidence is quite clear that the party committees  
 8 were using these soft money transfers with  
 9 accompanying hard money match transfers for  
 10 purposes of communicating with voters about the  
 11 candidates in that particular U.S. Senate race.  
 12 Q. Okay. And were any of these transfers  
 13 dictated or influenced by the request or  
 14 preferences of soft money donors?  
 15 A. I don't know.  
 16 Q. Okay. If you could turn to Page 36 of  
 17 your report. I am going to ask you questions  
 18 about essentially the first paragraph, if you  
 19 would take a moment to review that, please.  
 20 A. Yes.  
 21 Q. Okay. For the 1998 Nevada Senate race,  
 22 is there any documentation in your report, or the  
 23 accompanying data, disclosing if the Sierra Club  
 24 or the League of Conservation Voters made soft  
 25 money contributions to political parties in 1997

8 (Pages 26 to 29)



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1 or 1998?

2 A. I am relying here on the research  
3 conducted by a team of academics at the University  
4 of Nevada, Las Vegas, and the University of  
5 Nevada, Reno as indicated by the quote within this  
6 paragraph.

7 Q. And that is an excerpt from the book you  
8 edited, Outside Money?

9 A. Yes. It is from a chapter they wrote in  
10 the book I edited.

11 Q. Okay. And in that book, or in anything  
12 else accompanying your report, is there any  
13 information concerning whether or not the Sierra  
14 Club or the League of Conservation Voters made any  
15 soft money contributions to political parties in  
16 1997 or 1998?

17 A. Not that I recall.

18 Q. Okay. Do you know, sitting here today,  
19 whether or not the Sierra Club or the League of  
20 Conservation Voters made any soft money  
21 contributions to political parties in 1997 or  
22 1998?

23 A. I do not know. The premise of the  
24 question is that these were the only environmental  
25 groups in questions. The sentence reads, "such as

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1 soft money donation from those environmental  
2 groups would be spent in Nevada in 1998?

3 A. Yes.

4 Q. What is that?

5 A. It would be at Page 128 in the edited  
6 book, Outside Money, or in the monograph from  
7 which this material was drawn.

8 Q. Okay. And is this, I am sorry, this  
9 material is drawn from Outside Money, Page 128,  
10 correct?

11 A. That's correct.

12 Q. Okay. I am going to hand you Outside  
13 Money on Page 128.

14 Is there any documentation on that page  
15 suggesting or documenting any informal agreement  
16 between environmental groups and political parties  
17 that the environmental groups' soft money donation  
18 would be spent in Nevada in 1998?

19 A. Only what they say here.

20 Q. And is there a footnote at the end of the  
21 sentence that these groups attempted to influence  
22 the election via party contributions?

23 A. It is implicit in there, but there is not  
24 a footnote.

25 Q. Okay. And in any of the other

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1 those groups."

2 There may have been other environmental  
3 groups besides those.

4 Q. Is there any information in your report,  
5 or in the accompanying materials, indicating  
6 whether any other environmental groups had made  
7 soft money contributions to political parties in  
8 1997 or 1998?

9 A. Not that I recall.

10 Q. Do you know, sitting here today, whether  
11 any other environmental groups made soft money  
12 donations to political parties in 1997 or 1998?

13 A. I do not.

14 Q. Okay. Is there any evidence in the  
15 report, or the accompanying materials, that there  
16 was any informal agreement between the  
17 environmental groups and any political party to  
18 spend any soft money donation by those groups in  
19 Nevada in 1998?

20 A. The beginning of the question again,  
21 please?

22 Q. Is there any information in the report,  
23 or the accompanying materials, documenting any  
24 informal agreement between environmental groups  
25 and the political party to the effect that the

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1 accompanying materials to your report, is there  
2 any documentation of any informal agreement  
3 between environmental groups and political parties  
4 that the soft money donations of the environmental  
5 groups will be spent in Nevada in 1998?

6 A. Not that I recall.

7 Q. And this same article does discuss  
8 independent expenditures by the League of  
9 Conservation Voters and the Sierra Club in  
10 connection with the 1998 Senate race, does it not?

11 A. I believe it does.

12 Q. Is there any evidence in the report, or  
13 the accompanying materials, documenting that any  
14 interest group channeled soft money donations to  
15 races to supplement or replace direct expenditures  
16 by the interest groups in those races?

17 A. Yes.

18 Q. What is that?

19 A. The previously mentioned example of the  
20 Trial Lawyers Association.

21 Q. Okay. Anything else?

22 A. I believe there are some examples in  
23 which contributions by labor unions have been used  
24 to that same effect.

25 Q. Okay. Do you recall what those might be?

<p style="text-align: right;">Page 34</p> <p>1 A. Not at this moment.</p> <p>2 Q. Okay. And it is your understanding of</p> <p>3 the Trial Lawyers Association that they attempted</p> <p>4 to influence the election via party contributions</p> <p>5 so that they could keep anonymous their own</p> <p>6 involvement in the races?</p> <p>7 A. They did not make that explicit.</p> <p>8 Q. And was there any suggestion in this</p> <p>9 conversation with the person from the trial</p> <p>10 Lawyers Association that the soft money donation</p> <p>11 was done in lieu of direct expenditures by the</p> <p>12 Trial Lawyers Association with respect to the race</p> <p>13 that was involved?</p> <p>14 A. Yes.</p> <p>15 Q. And, prior to this conversation, they had</p> <p>16 with this unnamed person from the Democratic</p> <p>17 committee, they had planned on spending money for</p> <p>18 advertisements in that race?</p> <p>19 A. No. That is not what they said.</p> <p>20 Q. They had planned on spending money for</p> <p>21 get-out-the-vote or voter mobilizations in that</p> <p>22 race?</p> <p>23 A. I don't know.</p> <p>24 Q. They had planned on spending money in</p> <p>25 direct contributions the candidate in that race?</p>	<p style="text-align: right;">Page 36</p> <p>1 potential donor who might be interested in giving,</p> <p>2 and they facilitated the contribution from the</p> <p>3 individual to the party.</p> <p>4 These funds were not necessarily from the</p> <p>5 Trial Lawyers Association itself.</p> <p>6 Q. Okay. Could you turn to Page 49 of your</p> <p>7 report, please.</p> <p>8 The first sentence in the third paragraph</p> <p>9 reads: As I discuss elsewhere in this report, our</p> <p>10 estimate is that over half, and sometimes as much</p> <p>11 as three-quarters, of soft money expenditures go</p> <p>12 to broadcast advertising.</p> <p>13 Do you see that?</p> <p>14 A. I do.</p> <p>15 Q. And by that you mean soft money</p> <p>16 expenditures by political parties?</p> <p>17 A. I do.</p> <p>18 Q. Do you mean by national political parties</p> <p>19 or state political parties, or both?</p> <p>20 A. Both. Most of these expenditures are</p> <p>21 through state political parties, because of the</p> <p>22 more favorable hard to soft money ratio when funds</p> <p>23 are expended by state parties.</p> <p>24 Q. Okay. So, just so we are clear, is it</p> <p>25 your estimation that over half, and sometimes as</p>
<p style="text-align: right;">Page 35</p> <p>1 A. They may have already done that.</p> <p>2 Q. And was the \$50,000 soft money donation</p> <p>3 in lieu of additional contributions to the</p> <p>4 candidates in the race?</p> <p>5 A. It could have been or it could have been</p> <p>6 in addition to a maximum contribution.</p> <p>7 Q. Okay. So, what was it in the</p> <p>8 conversation that indicated that they provided</p> <p>9 \$50,000 in the soft money donation in lieu of some</p> <p>10 direct expenditure by the Trial Lawyers</p> <p>11 Association itself?</p> <p>12 A. I believe the conversation involved my</p> <p>13 asking about the rather large levels of soft money</p> <p>14 contributions and the process whereby the Trial</p> <p>15 Lawyers made those contributions to a national</p> <p>16 party committee.</p> <p>17 Q. And was the suggestion made by the person</p> <p>18 at the Trial Lawyers Association, we had \$50,000</p> <p>19 earmarked for some expenditure of any kind by the</p> <p>20 Trial Lawyers Association, but, instead, we</p> <p>21 provided \$50,000 in the soft money donation to the</p> <p>22 Democratic Committee?</p> <p>23 A. No.</p> <p>24 Q. Okay.</p> <p>25 A. As I said earlier, it was, they knew of a</p>	<p style="text-align: right;">Page 37</p> <p>1 much as three-quarters, of soft money expenditures</p> <p>2 directly by national party committees go to</p> <p>3 broadcast advertising?</p> <p>4 A. No. I am speaking of it in the broader</p> <p>5 sense. It would include transfers to state</p> <p>6 parties for purposes relating to House and Senate</p> <p>7 elections.</p> <p>8 Q. So, if I put together the direct</p> <p>9 expenditures of soft money by the national party</p> <p>10 committees, along with the transfers to state</p> <p>11 parties, it is your estimate that over half, and</p> <p>12 sometimes as much as three-quarters of that soft</p> <p>13 money, goes to broadcast advertising?</p> <p>14 A. When we are speaking of House and Senate</p> <p>15 elections. Not when we are speaking of DNC and</p> <p>16 RNC expenditures in presidential elections,</p> <p>17 gubernatorial elections or for other purposes.</p> <p>18 Q. Do you have an estimate of the amount of</p> <p>19 money, soft money raised directly by state</p> <p>20 parties, that goes to broadcast advertising in the</p> <p>21 Senate and Congressional races?</p> <p>22 A. In some instances, I think we have those</p> <p>23 estimates. We don't have them in all instances.</p> <p>24 It depends on state law and state disclosure</p> <p>25 provisions.</p>

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1 And typically these funds are not  
 2 expended for federal candidates.  
 3 Q. Okay. Do you have an estimate of how  
 4 much money raised, soft money raised by state  
 5 parties, on average, is spent on broadcast  
 6 advertising for any races?  
 7 A. No.  
 8 Q. Okay. Is there any documentation in your  
 9 report, or the accompanying materials,  
 10 documenting, on an annual basis, how much money is  
 11 spent by the national parties for broadcast  
 12 advertisements in Senate or Congressional races?  
 13 A. Yes.  
 14 Q. Okay. Where is that?  
 15 A. These estimates are typically from party  
 16 leaders themselves in response to the question  
 17 posed.  
 18 Q. All right. And, just so I am clear, at  
 19 this point I am asking for some kind of chart or  
 20 documentation of how much actual dollars were  
 21 spent in any given year by the national parties  
 22 for broadcast advertisements.  
 23 A. No. I don't have such a chart, in part  
 24 because once funds are transferred to state  
 25 parties, disclosure of how those funds are

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1 expenditures in a particular year.  
 2 A. With all due respect, I believe that may  
 3 be the only U.S. Senate election we have studied  
 4 in three cycles, in which they did not use the  
 5 State party transfer as the option.  
 6 So there is a very limited pool of races.  
 7 So, the answer is, no, I don't have such a table.  
 8 In general, there may be a table with respect to  
 9 North Carolina in 1998.  
 10 Q. Okay. And is there any table in your  
 11 reports or the accompanying documentations about  
 12 the amounts of money transferred to state parties  
 13 from the national parties, in any given year?  
 14 A. I believe so. I think we look at state  
 15 party transfers in several different places.  
 16 Q. But, is there any cumulative table  
 17 discussed?  
 18 A. Not that I recall creating a cumulative  
 19 table along these particular dimensions.  
 20 Q. Is there any information in your report  
 21 from which you can compile a cumulative table  
 22 reflecting all of the amounts transferred by the  
 23 national parties to state parties?  
 24 A. Not that I recall. The closest would be  
 25 the example of Senate elections. And there is a

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1 expended, it is difficult to document in such a  
 2 chart.  
 3 Q. Just so I am clear, Dr. Magleby, right  
 4 now my questions are focussing not on transfers.  
 5 I will get to that in one second. Right now I am  
 6 focussing on direct expenditures by the National  
 7 Parties.  
 8 A. And, just to be clear those are  
 9 relatively rare in Senate and House races.  
 10 Q. And there are no figures reflecting the  
 11 amount spent by national parties, the amounts of  
 12 soft money spent by national parties in Senate or  
 13 Congressional races, in your report or the  
 14 accompanying documentation?  
 15 A. I would have to refresh my recollection  
 16 on that. In the North Carolina Senate race in  
 17 1998, the Republican Senatorial Campaign Committee  
 18 did not transfer funds to the North Carolina state  
 19 party.  
 20 And, there may be a table in that case  
 21 study that looks at the question you have asked, I  
 22 don't recall it.  
 23 Q. Fair enough. But, at this point, I am  
 24 not asking for any case study in connection with a  
 25 particular race. I am asking for all of the

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1 table both in this report and in the  
 2 documentation.  
 3 It is Table 4, Transfers to state parties  
 4 in the five Senate elections we were monitoring in  
 5 2000.  
 6 Q. Just so I am clear, these were not the  
 7 only Senate elections in 1998 -- 2000?  
 8 A. No. There were three other competitive  
 9 elections in the year 2000. And the vast majority  
 10 of soft money transfers by both national party  
 11 committees in 2000 went into those eight U.S.  
 12 Senate races.  
 13 Q. And the totals for the other three  
 14 competitive races are not referenced in Table 4?  
 15 A. No. But, they are listed in the book,  
 16 The Other Campaign. There is a footnote where  
 17 this table is referenced. It is Table 2.3 and  
 18 there should be a footnote.  
 19 Well, I am not seeing it now, but it may  
 20 be in the monograph.  
 21 Do we have a copy of the monograph?  
 22 Q. When you refer to the monograph, it is  
 23 that 2000 monograph you provided earlier?  
 24 A. Right.  
 25 Q. And the document will speak for itself.

11 (Pages 38 to 41)

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1 Your recollection is that Table 4 is expanded  
 2 somewhere in that monograph to include the three  
 3 other competitive Senate races?  
 4 A. Yes. It is something in excess of 75  
 5 percent of all soft money expended by those two  
 6 party committees was expended in those eight  
 7 races.  
 8 Q. Okay. And just so the record is clear,  
 9 you are only looking at the Senatorial Committees?  
 10 A. Uh-huh, in that table and in that  
 11 instance.  
 12 Q. Okay. And did you look at the transfers  
 13 by the Republican National Committee, or the  
 14 Democratic National Committee?  
 15 A. Yes. We also looked at the House  
 16 campaign committees.  
 17 Q. Okay.  
 18 A. It is more difficult, however, to track  
 19 the direct expenditure of those funds.  
 20 Q. All right. Well, let's focus first on  
 21 the Republican National Committee and the  
 22 Democratic National Committee.  
 23 Is it your estimate that over half, and  
 24 sometimes as much as three-quarters, of monies  
 25 transferred by the RNC or the DNC to state parties

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1 expenditures, there are transfers of both soft and  
 2 hard money to state parties?  
 3 A. Yes.  
 4 Q. And how do you segregate out the soft  
 5 money from the hard money in those transfers and  
 6 the purposes to which they are devoted?  
 7 A. It is the aggregate transfer  
 8 accomplishing the match that we are referring to.  
 9 Q. Okay. So, it doesn't specifically  
 10 segregate out soft money?  
 11 A. One can't spend soft money alone by a  
 12 state party.  
 13 Q. Right. In 2000, how much was transferred  
 14 by the RNC to state parties?  
 15 A. I don't recall.  
 16 Q. Can you give me a rough estimate?  
 17 A. No.  
 18 Q. How about the DNC?  
 19 A. I don't recall.  
 20 Q. 20 million?  
 21 A. I don't recall.  
 22 Q. 30?  
 23 A. I don't recall.  
 24 Q. So, you don't even really have a rough  
 25 idea of how much money was transferred to state

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1 go to broadcast advertising?  
 2 A. No.  
 3 Q. Okay. And, how about the Congressional  
 4 committees, is it your estimate that over half,  
 5 and as much as sometimes three-quarters, of soft  
 6 money transferred to state parties by the  
 7 Congressional committees goes to broadcast  
 8 advertising?  
 9 A. Yes. Those were their words.  
 10 Q. Okay. And, again, this was based on the  
 11 estimates by Party leaders that is referenced in  
 12 your report?  
 13 A. Yes.  
 14 Q. Okay. Have you ever reviewed FEC  
 15 documents to see whether or not the money  
 16 transferred to state parties is expended on  
 17 broadcast advertisements and the amount to which  
 18 they are?  
 19 A. One cannot ascertain the answer to that  
 20 question through FEC documents.  
 21 Q. Okay. Is there state reporting documents  
 22 from which one could ascertain that answer?  
 23 A. Not to my knowledge.  
 24 Q. Okay. And when you say a half, and  
 25 sometimes as much as three-quarters, of soft money

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1 parties by either the Democratic National  
 2 Committee or the Republican National Committee in  
 3 the 2000 election cycle?  
 4 A. Not at this moment.  
 5 Q. Okay. When you say broadcast  
 6 advertising, is that advertising that mentions a  
 7 federal candidate?  
 8 A. The question was not worded that way.  
 9 Q. I am asking you to clarify. When you say  
 10 broadcast advertising --  
 11 A. The question I asked the interviewees was  
 12 not worded that way. So, I don't know if that is  
 13 what it would have been.  
 14 Q. So, I take it the basis of that estimate  
 15 is the conversations that you had with the Party  
 16 leaders referenced in your report?  
 17 A. Yes. Or in other documentation provided  
 18 in the case.  
 19 Q. Fair enough. If you could turn to  
 20 Page 44, the second full sentence under No. 2 at  
 21 the bottom there.  
 22 As noted above, between half and  
 23 three-quarters of this money has been passed  
 24 through the state party accounts on its way to pay  
 25 for broadcast advertising.

12 (Pages 42 to 45)

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1 Do you see that sentence?  
 2 A. I do.  
 3 Q. Okay. Just so I am clear, is the  
 4 assertion here that between half and  
 5 three-quarters of money transferred by national  
 6 parties to state parties was spent on broadcast  
 7 advertising?  
 8 A. No. That is not what it is saying.  
 9 Q. Okay.  
 10 A. What it is saying is that half to  
 11 three-quarters of the money transferred by the  
 12 four Congressional campaign committees, not the  
 13 DNC or the RNC.  
 14 Q. Okay.  
 15 A. As indicated in interviews with staff of  
 16 all four committees in '98 and 2000.  
 17 Q. Okay. So, just so I am clear, is there  
 18 any difference between the assertion --  
 19 A. No, same point.  
 20 Q. The same point made on Page 49.  
 21 A. Uh-huh.  
 22 Q. And the basis for the assertion is the  
 23 same as you have previously described?  
 24 A. It is elite interviews with party  
 25 leaders.

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1 Q. Thank you. In your interviews, were you  
 2 discussing all of the expenditures by the  
 3 Congressional or Senate committees, or the  
 4 expenditures in connection with the competitive  
 5 race, as you were analyzing for your reports and  
 6 books?  
 7 A. We were discussing the expenditures of  
 8 the funds transferred into the competitive races  
 9 we were studying.  
 10 Q. Okay. And how many were there in 2000?  
 11 A. There were five Senate and I think 16  
 12 House. I would have to add them up again. May  
 13 I -- I don't have the monograph.  
 14 So, it may be 17 races, I don't remember  
 15 the exact number of races in 2000.  
 16 Q. Those numbers would be reflected in the  
 17 2000 monograph you have referenced earlier?  
 18 A. To be clear, the monograph is the larger  
 19 document that includes all of the case studies.  
 20 In '98, we did 12 House races, and four Senate  
 21 races.  
 22 In 2000, we did five Senate races and I  
 23 believe 12 house races. We were doing somewhat  
 24 more than that in 2002, which is why the numbers  
 25 may be a bit cloudy in my mind.

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1 Q. Fair enough. Could you turn to Page 56  
 2 in your report please, Doctor.  
 3 A. Uh-huh.  
 4 Q. The first full sentence on that page  
 5 states: The raising of individual contribution  
 6 limits under BCRA has the potential of  
 7 strengthening parties significantly and will  
 8 encourage both parties and candidates to focus on  
 9 individual citizen donors.  
 10 Do you see that?  
 11 A. I do.  
 12 Q. Are you referring to both state and  
 13 national parties in that sentence?  
 14 A. I am referring to national parties, I  
 15 believe.  
 16 Q. Okay. And, in the report, or the  
 17 accompanying materials, have you analyzed the hard  
 18 money fund-raising efforts by the national  
 19 parties?  
 20 A. More in previous research published,  
 21 including The Money Chase.  
 22 Q. Okay. And that was the, when was that  
 23 published?  
 24 A. 1992.  
 25 Q. 1992. Have you looked, since 1992, in

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1 any systematic way at the hard money fund-raising  
 2 efforts by the national party committees?  
 3 A. Yes.  
 4 Q. And where is that analysis reflected?  
 5 A. Multiple sources listed in Nevada. There  
 6 are sections in the books and the monographs that  
 7 talk about hard money fund-raising.  
 8 I believe they speak about average  
 9 contributions, the advantage the RNC has, both in  
 10 numbers of donors and the ability of the donor, or  
 11 the ability of the base to remain active over time  
 12 going back to the efforts of Chairman Brock in the  
 13 1970s.  
 14 Q. Do you recall, sitting here, in very  
 15 rough terms what the average hard money  
 16 contribution is to the RNC?  
 17 A. I don't recall.  
 18 Q. It is less than \$500. Does that square  
 19 with your recollection?  
 20 A. I don't recall.  
 21 Q. Okay. Would it surprise you to hear that  
 22 it is less than \$500?  
 23 A. No. It wouldn't surprise me.  
 24 Q. Okay. Do you have an estimate of how  
 25 many potential donors to national party committees

13 (Pages 46 to 49)

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1 would give between \$1,000 and \$20,000 that have  
2 not been contacted or solicited by the national  
3 party committees?

4 A. One indication of the larger pool of  
5 individual donors to candidates would be the very  
6 successful fund-raising efforts of then Governor  
7 George W. Bush through his so-called Pioneers  
8 Effort, which suggests that there may well be  
9 untapped individual donors at the levels of the  
10 current FECA, as well as the levels of the BCRA,  
11 that are available to parties should they so  
12 desire to pursue those donors.

13 Q. And is it your understanding that the RNC  
14 has not sought out the people who gave \$1,000 or  
15 more to the Bush campaign to seek hard money  
16 contributions?

17 A. I don't know.

18 Q. Would it surprise you if they had not?

19 A. Yes.

20 Q. Okay. So, at least with respect to the  
21 RNC, do you have any basis for believing they  
22 haven't made aggressive efforts to seek out  
23 potential donors who would be willing and able to  
24 give between \$1,000 and \$20,000 to the national  
25 committees?

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1 One such way would be to allocate \$20,000  
2 of it to the hard money account and \$5,000 to the  
3 soft money account; isn't that correct?

4 A. That may be the practice.

5 Q. In either event, they would have, under  
6 current law the \$25,000, some portion allocated to  
7 the soft money account, and some portion allocated  
8 to the hard money account; correct?

9 A. That's correct.

10 Q. So, I guess I am confused as to why, if I  
11 was approaching the same donor, why my net revenue  
12 at the national party would increase simply  
13 because all 25,000 of that could now be counted as  
14 hard money?

15 A. Well, as indicated in the sentence that  
16 we are discussing, we are talking about focussing  
17 on individual citizen donors and not soft money or  
18 other large donors exclusively.

19 So it has to do with broadening the base  
20 of individual donors.

21 Q. And that is fair enough, and I want to  
22 get to that in a second, but my questions now  
23 focus on the raising of the individual  
24 contribution limits, in and of itself, as opposed  
25 to renewed emphasis or expansion of fund-raising

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1 A. I believe the parties have made efforts  
2 to raise money, yes.

3 Q. Okay. And have they been raising more  
4 hard money since, say, 1988?

5 A. There is a substantial search in hard  
6 money fund-raising in this cycle.

7 Q. Okay. Do you think that increasing the  
8 contribution limits for the national parties from  
9 \$20,000 annually to \$25,000 annually, in and of  
10 itself, will substantially increase the revenues  
11 of the national party committees?

12 A. It has that potential.

13 Q. And why is that?

14 A. Because the focus will then be on those  
15 donors and not on soft money donors.

16 Q. Well, if I am such a donor today and  
17 wanted to give \$25,000 to, let's say the  
18 Republican National Committee, I could write them  
19 a check for \$25,000 and 20,000 of that would go  
20 into the hard money account and five of it would  
21 go into the soft money account; isn't that right?

22 A. One more time, please.

23 Q. If I write a check today for \$25,000, the  
24 practice of the national parties is to allocate  
25 that in certain ways.

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1 efforts for individual citizen donors.

2 Does the raising of the contribution  
3 limit itself, in your estimation, have the  
4 potential for substantially increasing the  
5 revenues of the national party committees?

6 A. Yes. I would like to confirm this. But,  
7 I think you have mischaracterized the BCRA  
8 individual contribution limits, candidate and  
9 parties.

10 In the aggregate, in a two-year cycle, I  
11 think they can contribute more than you  
12 characterized.

13 And there is a limit, I think, of such an  
14 amount that it would mean that more money would  
15 potentially be available to the parties than you  
16 had characterized.

17 Q. Okay. Let's clear up that factual point.

18 What is your understanding of the annual  
19 contribution limit under BCRA to a national party?

20 A. I believe an individual, in a two-year  
21 cycle, can now give \$95,000.

22 Q. To all committees?

23 A. To all committees. And 37,500 or some  
24 figure like that to candidates.

25 Q. That would be the what we call the

14 (Pages 50 to 53)

Page 54

1 aggregate contribution?

2 A. To candidates.

3 Q. Correct. And the 95, just so I am clear,  
4 is it your understanding that the 95, that an  
5 individual could give, under BCRA, a \$95,000 check  
6 in one year to the Republican National Committee?

7 A. I am not sure about the transmission of  
8 the check in the new law whether anything has been  
9 done with respect to changing the joint  
10 fund-raising practice.

11 I am not familiar with that. So, I can't  
12 speak to that question. But, in the aggregate,  
13 whether it is one check or many checks, that is  
14 the amount.

15 And that is a larger amount in the  
16 aggregate than individuals are presently given to  
17 parties.

18 Q. Right. And, just so the record is clear  
19 on this, is it your understanding that in BCRA  
20 there are limits on how much one individual can  
21 give in a certain year to a particular national  
22 committee?

23 A. No. I am not familiar with whether there  
24 are those limits in BCRA.

25 Q. Okay. And, so your focus is on the

Page 56

1 aggregate limit from 50 to 95?

2 A. There are two things. It is the increase  
3 in the aggregate limit to 95, and it is the  
4 increase in the amount an individual -- well, it  
5 is also the increase in the amount an individual  
6 can give to a candidate, which will also help  
7 candidates as well.

8 Q. Okay. If you want to focus on the  
9 aggregate limit that is fine with me. It would  
10 just change the hypothetical slightly.

11 If I was willing, in the past, to give  
12 \$95,000 to all of the national committees, under  
13 current law before BCRA, I could do that, correct?

14 A. That's correct.

15 Q. And some would be allocated to soft money  
16 and some would be allocated to hard money,  
17 correct?

18 A. That's correct.

19 Q. So, again my, question would be: Why is  
20 it that raising the hard money limits will lead to  
21 an increase in net revenues for the parties if  
22 they could have had the \$95,000 under the old  
23 regime?

24 A. Well, I think it is unclear that it will  
25 lead to an increase in net revenues.

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1 aggregate limits to all of the national  
2 committees, correct?

3 A. Yes, and candidates. Those two aggregate  
4 limits.

5 Q. Okay. But, let's focus first, if we can,  
6 on the aggregate limits to all national  
7 committees.

8 A. Okay.

9 Q. And your understanding is there is a  
10 \$95,000 ceiling?

11 A. Minus the amount that you could give to  
12 candidates.

13 Q. Right. Minus the 37,500.

14 A. Exactly.

15 Q. And what is your understanding of the  
16 current aggregate limit under federal law prior to  
17 enactment of BCRA?

18 A. I believe I would like to refresh my  
19 memory on this, with so many figures floating  
20 around that it is \$50,000 in a two-year cycle,  
21 \$25,000 a calendar year.

22 Q. Okay. And that would include both party  
23 and candidate contributions?

24 A. That's right.

25 Q. Okay. And so it is the increase in

Page 57

1 That will depend upon expanding the base  
2 of individual donors and focusing less on very  
3 large soft money donors, well in excess of  
4 \$95,000.

5 Q. Okay.

6 A. Which has been a preoccupation of both  
7 party committees, both parties' committees.

8 Q. And under the law -- well, what is your  
9 understanding of the percentage of soft money  
10 donations that come from unions or corporations in  
11 the current practice?

12 A. They are among the most substantial soft  
13 money donors to the Democratic Party Committee.

14 Q. Do you know whether they provide more  
15 than 50 percent of the soft money?

16 A. I don't recall precisely.

17 Q. Okay. And how about for the Republican  
18 Committees?

19 A. Labor unions for the Republican  
20 Committees?

21 Q. No. Labor unions or corporations?

22 A. Corporations are among the larger  
23 contributors to the Republican Party. Relatively  
24 few union soft money contributions to the  
25 Republican Party.

15 (Pages 54 to 57)

Page 58

1 Q. So just so I am clear, my question is, do  
 2 you know, in the aggregate for all of the national  
 3 committees, what percentage of soft money  
 4 donations come from unions or corporations?  
 5 A. No.  
 6 Q. Okay. Is it roughly half?  
 7 A. It is a substantial amount, but I  
 8 wouldn't want to commit to a particular estimate  
 9 without counting it.  
 10 Q. Okay. And under the new regime, is it  
 11 your understanding that none of that money can be  
 12 donated to or received by the national committees?  
 13 A. No, that is not my understanding.  
 14 Q. Is it your understanding that unions and  
 15 corporations can still give donations to the  
 16 national committees?  
 17 A. PAC contributions, not corporate or union  
 18 treasury funds.  
 19 Q. Okay.  
 20 A. But, there are plenty of PACS in labor  
 21 unions and in corporations that make soft money  
 22 contributions under current law and would be able  
 23 to make them under BCRA.  
 24 Q. But no money from unions or corporate  
 25 treasuries?

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1 A. No. Under BCRA that is one of the  
 2 prohibitions.  
 3 Q. Okay. And do you know how much soft  
 4 money was raised by all six national committees in  
 5 the 2000 cycle?  
 6 A. Not off the top of my head.  
 7 Q. Does \$500 million sound about right?  
 8 A. It was a substantial amount.  
 9 Q. Have you done any analysis concerning  
 10 whether or not the national committees can raise  
 11 \$500 million more in hard money than they  
 12 currently are?  
 13 A. I have not done that analysis. However,  
 14 as indicated previously, history teaches us a  
 15 lesson about individual donors, and it is the  
 16 Republicans in the mid-1970s, when they  
 17 successfully expanded their individual donor base.  
 18 Q. And they have been expanding that donor  
 19 base ever since, correct?  
 20 A. They have, but they had the biggest surge  
 21 when they committed to it and made it a high  
 22 priority.  
 23 Q. Okay. And have you done any analysis of  
 24 whether or not state parties can replace their  
 25 soft money contributions with hard money or Levin

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1 (phonetic) funds?  
 2 A. No. I haven't done that analysis.  
 3 Q. When states receive money that is  
 4 transferred from the national parties, I take it  
 5 they haven't expended any money to raise those  
 6 funds, correct?  
 7 A. When states receive transfers they have  
 8 not expended money to raise those funds?  
 9 Q. Yes.  
 10 A. Typically not. But, they may have been  
 11 involved in helping host a joint fund-raiser. In  
 12 the case of the New York Senate race, I think  
 13 there are some examples of that in 2000.  
 14 Q. Do you know typically how much money was  
 15 expended by state parties in those joint  
 16 fund-raising efforts?  
 17 A. No, I don't.  
 18 Q. Do you have any estimate as to how much  
 19 fund-raising efforts of state parties will  
 20 increase under BCRA?  
 21 A. No.  
 22 Q. Also on Page 56, the next sentence says:  
 23 In short, BCRA returns parties to the campaign  
 24 finance world that existed before they found ways  
 25 to use soft money for candidate attack and

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1 promotion.  
 2 Do you see that?  
 3 A. I do.  
 4 Q. When did the parties find ways to use  
 5 soft money for candidate attack and promotion?  
 6 A. In the 1996 cycle, most specifically.  
 7 Q. Okay. And, before 1996, the parties  
 8 could spend soft money on activities that weren't  
 9 directly linked to electing or defeating  
 10 particular federal candidates?  
 11 A. True.  
 12 Q. And they cannot do that after BCRA,  
 13 correct?  
 14 A. They cannot do what?  
 15 Q. Spend soft money on activities not  
 16 directly linked to electing or defeating a  
 17 particular federal candidate?  
 18 A. National Parties cannot, state parties  
 19 with the Levin amendment can't.  
 20 Q. And just so we are clear they can't spend  
 21 soft money on that, they can spend a combination  
 22 of hard and Levin funds, correct?  
 23 A. Post BCRA, yes.  
 24 Q. So, focusing again on the national  
 25 parties, to that extent, BCRA does not return them

16 (Pages 58 to 61)



Page 62

1 to the campaign finance world that existed before  
 2 they found ways to use soft money for candidate  
 3 attack and promotion?  
 4 A. Yes.  
 5 Q. Okay. And until approximately 1990, is  
 6 it your understanding that states could spend all  
 7 of the soft money that they wanted without  
 8 reporting that to the FEC, without some allocation  
 9 formula?  
 10 A. There were some changes in the 1990. I  
 11 am not 100 percent sure that the one that you  
 12 mentioned was one of those.  
 13 Q. Is it your understanding that the current  
 14 regime, that state parties can spend money on what  
 15 is defined as federal election activity under  
 16 BCRA, if they allocate a certain portion of those  
 17 funds to federal and nonfederal account?  
 18 A. I am not certain of that. And, in fact,  
 19 I know that some states have rules prohibiting  
 20 that, specifically Connecticut.  
 21 Q. No, I am sorry. Now I am focusing on the  
 22 restraints, exclusively federal law.  
 23 A. Okay. Federal law restraints on state  
 24 parties.  
 25 Q. Okay. And under the current regime, the

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1 A. We're talking about the transfer of funds  
 2 in this instance?  
 3 Q. Yes.  
 4 A. Yes.  
 5 Q. And after BCRA, they can't expend any  
 6 soft money transferred from national party  
 7 committees to federal election activity, correct?  
 8 A. Correct.  
 9 Q. So, again, that is a difference between  
 10 the regime that existed prior to the time that the  
 11 parties found ways to use soft money for candidate  
 12 attack and promotion, and the regime that will  
 13 exist after BCRA, correct?  
 14 A. Yes. But it is important to note that  
 15 much of the surge in soft money receipts and  
 16 expenditures has occurred post this discovery of  
 17 the ability to use soft money for candidate attack  
 18 and promotion purposes.  
 19 Q. Okay.  
 20 A. Specific candidate attack and promotion  
 21 purposes.  
 22 Q. Okay. Why will parties be strengthened  
 23 if they are less dependent on large donors and  
 24 interest groups?  
 25 A. Because they will cultivate a donor base

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1 sole restraint on state party spending soft money  
 2 on federal election activities is allocating those  
 3 monies pursuant to the formulas that have been  
 4 developed by the Federal Election Commission; is  
 5 that correct?  
 6 MR. PAOLELLA: Is this pre-BCRA?  
 7 MR. CARVIN: Pre-BCRA.  
 8 THE WITNESS: This is a complicated  
 9 question, I am sorry.  
 10 Are we speaking of federal dollars  
 11 transferred to the state party, or are we talking  
 12 about dollars raised by the state party without  
 13 attribution to a federal candidate?  
 14 BY MR. CARVIN:  
 15 Q. Yes, the latter.  
 16 A. I don't remember the rules about that  
 17 latter category, precisely.  
 18 Q. Okay. Now, let's switch to your first  
 19 example.  
 20 In terms of monies transferred from the  
 21 national committees to the state parties, they  
 22 could, the state parties could expend that money  
 23 on federal election activity, so long as they  
 24 complied with the allocation formulas set forth by  
 25 the Federal Election Commission, correct?

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1 that is broader, that includes more voters.  
 2 Q. Okay. Will they be financially  
 3 advantaged as opposed to broadening their base of  
 4 voters?  
 5 A. It depends on their success in following  
 6 the Bush strategy of cultivating more individual  
 7 donors.  
 8 Q. Okay. And then the second full paragraph  
 9 in your conclusion on Page 56, the first sentence  
 10 states: The potentially corrupting influence of  
 11 large contributions has been a motivating factor  
 12 for multiple past acts of Congress and remains so  
 13 today.  
 14 Do you see that?  
 15 A. Uh-huh.  
 16 Q. In your report, have you analyzed the  
 17 extent to which large contributions have been a  
 18 motivating factor for Congressional actions?  
 19 A. The report or other documents and the  
 20 report?  
 21 Q. I want to focus on the report now.  
 22 A. It is hard for me to disentangle the  
 23 report from all of the other writing I have done  
 24 on this.  
 25 I think there are earlier references to

17 (Pages 62 to 65)

Page 66

1 legislation of roughly 100 years in age, and  
2 multiple instances that speak about legislative  
3 concerns upheld by the Court about the corrupting  
4 influences.

5 I believe the reference is in the report  
6 to the language of the Buckley decision, speaking  
7 of quid pro quo corruption from donors and so  
8 forth.

9 Q. That is what I am trying to disentangle  
10 in this sentence. One way to interpret this is  
11 that Congress has previously legislated concerning  
12 the potentially corrupting influence of large  
13 contributions.

14 A. Yes. I would say that the ban on  
15 corporate and union treasury funds is an example  
16 of that legislation.

17 Q. Fair enough. But, just I am trying to  
18 see if there is any ambiguity.

19 The other way to interpret this sentence  
20 is that large contributions have led Congress to  
21 vote in certain ways on legislation; is that the  
22 intent of this?

23 A. No. That is not what I was saying here.

24 Q. I was just trying to clarify that, thank  
25 you.

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1 THE WITNESS: Not to my knowledge.

2 BY MR. CARVIN:

3 Q. And did any representative of the Party  
4 or the candidate inform any of the authors  
5 referenced in this section that they had engaged  
6 in coordination that was illegal under federal  
7 law?

8 A. No. May I elaborate?

9 Q. Sure.

10 A. Interviews by both the academics in the  
11 cases, and my interviews with Party officials in  
12 Washington suggests that the Party Committees are  
13 less and less worried about the appearance of  
14 coordination.

15 And so, while not expressly telling  
16 candidates what to do, or candidates telling  
17 parties what to do, there is clearly understanding  
18 between parties and the candidates about the  
19 activities that may be undertaken by both the  
20 candidate and the party in the same race.

21 Q. Okay. Most professionals, political  
22 professionals, have an understanding, particularly  
23 if they are focusing on the race, of what the  
24 various campaigns are doing, correct?

25 A. Uh-huh, correct.

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1 On Page 48 of your report, you have a  
2 section entitled: Coordination Between Parties  
3 and Candidates Between Parties and Groups.

4 Do you see that?

5 A. Uh-huh.

6 Q. And the first sentence states: Academics  
7 in several races heard from party and campaign  
8 professionals that candidates were well aware of  
9 the activities of their political parties and vice  
10 versa.

11 Do you see that?

12 A. I do.

13 Q. And in any of the three examples that you  
14 cite in this section, did the authors of those  
15 observe or hear any conversations where the  
16 candidates and the parties coordinated in a manner  
17 that was illegal under federal law?

18 A. Not to my knowledge.

19 MR. PAOLELLA: Excuse me, Mike, are you  
20 asking if they physically heard a communication  
21 between the parties and the candidates, that they  
22 were a fly on the wall and heard them talking to  
23 each other?

24 MR. CARVIN: Right.

25 MR. PAOLELLA: Okay.

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1 Q. Okay. And you say one factor, when they  
2 used to be concerned about the appearance of  
3 coordination, was that the parties would devote  
4 more resources to ads attacking a candidate as  
5 opposed to promoting a candidate?

6 A. That is what party officials have told  
7 me. That is one of the motivations for why, but  
8 not the only motivation, for why party ads in  
9 these races funded by soft money tend to be more  
10 contrast or negative in tone.

11 Q. Okay. And, in the one example referenced  
12 here, that 1998 Nevada Senate race --

13 A. Yes.

14 Q. -- do you recall that the Republican  
15 candidate in that race, Ensign, felt that he was  
16 hurt on the expenditures on ads that wasn't done  
17 by his own campaign?

18 A. Let me read this paragraph to refresh my  
19 memory.

20 Q. Just so you are clear, I think the  
21 question comes more from the book than that, but  
22 feel free to refresh your recollection.

23 A. This certainly doesn't convey that Ensign  
24 communicated that. I am aware of other candidates  
25 who have communicated that, that we have

18 (Pages 66 to 69)

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1 documented, most specifically Mr. English in South  
2 Carolina.

3 There would be others in the 2000 cycle.  
4 But, I don't recall that Ensign himself said so.

5 Q. I am going to hand you the book you  
6 edited, Outside Money, and Page 128, which deals  
7 with the Nevada Senate race.

8 And what I am thinking of is the  
9 discussion at the end of the second full paragraph  
10 there.

11 A. Yes.

12 Q. And the gist of that, is it not, is that  
13 the candidate in that race, the Republican  
14 candidate, Ensign, felt it was difficult to get a  
15 clear message out because of the clutter created  
16 by the party expenditures and the interest group  
17 expenditures?

18 A. Yes, both. It does not say party only.

19 Q. Right.

20 A. So, it is by the noncandidate campaign or  
21 by the outside money created confusion.

22 Q. Okay. When we are talking about parties  
23 and candidates, as distinct from interest groups,  
24 is it surprising that there would be congruence  
25 between the themes of the candidates and the

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1 have been relatively successful to campaign on the  
2 same themes and messages, in fact, with remarkable  
3 consistency.

4 MR. CARVIN: Thank you, I have no further  
5 questions.

6 (Brief recess -- 10:55 a.m.)

7 (After recess -- 11:04 a.m.)

8 EXAMINATION BY COUNSEL FOR PLAINTIFF AFL-CIO  
9 BY MR. TRISTER:

10 Q. Professor Magleby, my name is Michael  
11 Trister, we met earlier. I am representing one of  
12 the Plaintiffs in this case, the AFL-CIO.

13 Would you turn to Page 9, please, of your  
14 report. And, specifically to the section that is  
15 headed Definitions.

16 And, referring to the first sentence in  
17 that paragraph, in which you say: In this report,  
18 I will use the term electioneering advertisements  
19 or electioneering advocacy to refer to  
20 communications that refer to an electioneering  
21 message.

22 And, you then have a footnote, that  
23 Footnote 5, which then refers to the BCRA  
24 definition of electioneering communications.

25 And my question for you is, are you using

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1 themes of the parties?

2 A. Not to me. The surprise was the NRCC in  
3 1998 -- excuse me, in 1998 with its Operation  
4 Breakout campaign where there was less congruence.  
5 It was also surprising to many Republican  
6 candidates.

7 Q. The folklore on that is that Operation  
8 Breakout was a net negative for the Republican  
9 candidates in those Congressional actions?

10 A. That would be the view of several  
11 Republican candidates that we interviewed.

12 Q. Are you suggesting that there is greater  
13 congruence between the ads run by the parties than  
14 those run by the candidates, than there is between  
15 the ads run by interest groups and the ads run by  
16 the candidates?

17 A. I would say that is true on average.

18 Q. On average. With exceptions going either  
19 way?

20 A. Well, there are more participants on the  
21 interest group side. So, you have a larger  
22 denominator.

23 Proportionately, Operation Breakout that  
24 we were just giving has more weight. But, holding  
25 that aside, the parties and the candidates seem to

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1 the terms electioneering advertisements and  
2 electioneering advocacy to be synonymous with  
3 electioneering communications as they are defined  
4 in BCRA?

5 A. To the extent possible. It is, in some  
6 ways, difficult to apply the BCRA definition to  
7 past data because the time definition and other  
8 elements aren't always clear in the data.

9 Q. Well, let me pursue that a bit. In the  
10 next sentence you say: There are indicators of an  
11 electioneering message including, and you then  
12 name several elements.

13 One of those is, being communicated  
14 during the period prior to a primary or general  
15 election.

16 A. Uh-huh.

17 Q. What period are you referring to in that  
18 sentence?

19 A. Well, our data that is the subject of  
20 this report is generally gathered after Labor Day.  
21 So, it would be in the final 60 days.

22 So it would typically follow under the  
23 definition of BCRA. But, there are occasionally  
24 advertisements that occur earlier than that --

25 Q. Well, I know there are advertisements

19 (Pages 70 to 73)

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1 that occur earlier than that.  
 2 A. -- that otherwise would fit the  
 3 definition.  
 4 Q. Are there advertisements that would  
 5 appear within more than 60 days before an election  
 6 that would fit that definition?  
 7 A. Rarely, but some, I think.  
 8 Q. That you have treated as  
 9 electioneering --  
 10 A. No, not that I treated.  
 11 Q. -- in your report.  
 12 A. No.  
 13 Q. So then, 60 days before a general  
 14 election would be the outside period, so far as  
 15 you are concerned?  
 16 A. Uh-huh.  
 17 Q. And you are, in fact, using something of  
 18 a shorter period?  
 19 A. Yes. Something of a shorter period,  
 20 uh-huh. In some instances we actually, when  
 21 examining the CMAG (phonetic) data, or when  
 22 gathering information from the stations aware of  
 23 advertising, the Nevada Senate race in 1998  
 24 started well before Labor Day, in terms of both  
 25 party candidate and interest group ads.

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1 And we were able to obtain that data from  
 2 the stations.  
 3 Q. Right. But, what I am trying to clarify  
 4 is, do you include, within the definition of  
 5 electioneering advertisements, broadcast ads that  
 6 run more than 60 days before the election?  
 7 A. Yes. There will be instances in which we  
 8 will have been able to gather that data. If we  
 9 did, we included it. We included anything we  
 10 could get within the cycle of the election.  
 11 Q. Well, I realize, I want to be precise  
 12 about that this. I understand that you have in  
 13 some instances have been able to get information  
 14 about advertisements that ran before, let's say,  
 15 Labor Day as a shorthand for 60 days.  
 16 A. Uh-huh.  
 17 Q. But, what I am asking you is whether you  
 18 have included those, any of those advertisements  
 19 that ran before Labor Day, as electioneering  
 20 communications?  
 21 A. Yes.  
 22 Q. You have?  
 23 A. We have.  
 24 Q. In your analysis?  
 25 A. In the analysis, as well as the research.

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1 Q. And how far back would that go?  
 2 A. As far as we can get data on the cycle  
 3 from either a station, a consultant or the CMAG  
 4 data.  
 5 Q. So, hypothetically, if you had an  
 6 advertisement that ran in June, you might still  
 7 treat that as an electioneering communication, in  
 8 your analysis?  
 9 A. Yes, that is right. Because --  
 10 MR. DODYK: Did you mean electioneering  
 11 communication or advertisement?  
 12 BY MR. TRISTER:  
 13 Q. As he is using electioneering  
 14 advertisement.  
 15 A. Yes, we would. To the best of my  
 16 recollection, we were trying to study the cycle.  
 17 And the academics sought to get records from  
 18 television stations, radio stations, newspapers,  
 19 about advertisements that had run during the cycle  
 20 that were relevant to that race.  
 21 Q. I want to come back to that a little  
 22 later. But, let me stay on this. One of the  
 23 elements that you mention in that second sentence  
 24 there is quote, "mentioning an election," unquote.  
 25 Now, what I am trying to understand here

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1 is that if you take all of the factors that you  
 2 have listed there, is an electioneering  
 3 advertisement, as you used the term, an  
 4 advertisement that has all of those elements, or  
 5 one of those elements, or something in between?  
 6 A. It would have been some combination of  
 7 those, not all of them. The report is written in  
 8 the context of a piece of legislation which passed  
 9 well after we began gathering research.  
 10 We were not aware of what BCRA's  
 11 definition was going to be and we did not impose  
 12 that on our data collection.  
 13 We were looking at data in terms of the  
 14 distinction one might draw between genuine issue  
 15 advocacy and electioneering advocacy falling under  
 16 the rubric of issue advocacy, as well as party  
 17 expenditures, soft and hard money, as well as  
 18 candidate expenditures.  
 19 So, in some ways this paragraph is trying  
 20 to link research that has been ongoing much longer  
 21 than the BCRA definition to that definition. And  
 22 the answer is no, we did not tell the academics  
 23 here is the criteria that they have to all meet.  
 24 But these were some of the criteria that  
 25 we said would be components of an electioneering

20 (Pages 74 to 77)

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1 communication.  
 2 Q. Would an electioneering advertisement or  
 3 an electioneering advocacy, as you use the term in  
 4 your report, ever include an advertisement that  
 5 did not include the likeness or name of the  
 6 candidate?  
 7 A. Not that I can think of.  
 8 Q. But would an electioneering advertisement  
 9 or electioneering advocacy include an  
 10 advertisement that included the name of the  
 11 candidate, but did not mention an election?  
 12 A. It is conceivable. I am not sure if I  
 13 can remember examples of any that do that.  
 14 Q. But, it is, as you are using the term, it  
 15 could be an ad that does not mention an election?  
 16 A. Right.  
 17 Q. Okay. Now, the next term, further on in  
 18 that paragraph, the last sentence on that page  
 19 reads: The term genuine issue advocacy is used to  
 20 refer to a communication by an individual or group  
 21 that advocates an issue or a policy position.  
 22 And my question for you is whether you  
 23 used the term genuine issue advocacy ever to  
 24 include an advertisement that includes the name or  
 25 likeness of a candidate?

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1 in that person's state or district.  
 2 Q. Right. But, since you were studying  
 3 elections in which there was an ongoing race, I  
 4 assume that the candidates in most instances were,  
 5 in fact, running for office?  
 6 A. That's right. But it was a hypothetical  
 7 and so I was trying to think how to respond to a  
 8 hypothetical in which someone might be not running  
 9 in that election cycle.  
 10 Q. Okay. Now, I would like to focus, in  
 11 your report, and also in your previous research,  
 12 you have reported on what, in my mind, I think of  
 13 as two different types of research.  
 14 One is what I might call the case studies  
 15 and the monitoring of specific races that you have  
 16 described in 1998 and 2000, and in the 2000  
 17 primaries.  
 18 The other, if I can use it, is the term  
 19 survey research that you did with respect to 2000.  
 20 And I would like to focus on that for the moment.  
 21 A. Okay.  
 22 Q. Now, in connection with the survey  
 23 research project that you did in 2000, am I  
 24 correct that you first showed eight specific  
 25 television ads to participants in one or more

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1 A. I could think of no examples of that that  
 2 occurred in '98 or 2000 in the cases we have  
 3 studied.  
 4 Q. But, I am asking you at this stage, not  
 5 an empirical question, but a definitional  
 6 question.  
 7 Do you include, within that definition as  
 8 you use the term, and that includes the likeness  
 9 or name of the candidate, or does the presence of  
 10 the name or likeness of a candidate preclude it,  
 11 in terms of your definition, from being treated as  
 12 a genuine issue?  
 13 A. Well, again, the context needs to be  
 14 further specified. We are looking at an  
 15 advertisement within the district or state in  
 16 which the person named or whose image is  
 17 represented is the incumbent, I presume. Is that  
 18 what you are assuming?  
 19 Q. With that qualification, sir.  
 20 A. Yes. The answer is then we would presume  
 21 it was electioneering.  
 22 Q. Okay.  
 23 A. And, further, if that person is running  
 24 for office, I guess is what I would add as the  
 25 other contextual element. Running for office and

Page 81

1 focus groups?  
 2 A. There was preliminary work done in  
 3 selecting which commercials and which pieces of  
 4 mail would be shown.  
 5 There were pretests conducted to be  
 6 confident that those were reasonable  
 7 representations of the category of communication  
 8 that we were, in fact, testing.  
 9 But, yes, that is, the focus groups saw  
 10 all eight of the ads that were part of the study.  
 11 Q. And then the second phase was to show the  
 12 same ads through what I refer to as an internet  
 13 survey; is that correct?  
 14 A. Well, I think it is a mischaracterization  
 15 to call it an internet survey.  
 16 Q. I am sorry. How do you characterize it?  
 17 A. It is a WebTV survey. And internet  
 18 surveys are, in methodological terms, quite  
 19 different in that it is a volunteered response.  
 20 Whereas a WebTV survey is based more on  
 21 the methodology of the Nielson television ratings  
 22 in which households, I believe something  
 23 approaching 100,000 households, are randomly  
 24 selected, provided free of charge WebTV access for  
 25 a year in return for completing surveys.

21 (Pages 78 to 81)

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1 Q. Fine.

2 A. In so doing, we have much greater  
3 confidence in the sample being representative of  
4 registered voters.

5 Q. Fine. And in terms of the WebTV portion  
6 of your study, did the participants see the same  
7 eight ads as the focus groups?

8 A. In the aggregate, the 2,000 plus  
9 respondents were exposed to eight ads. No  
10 individual respondent saw all eight in part  
11 because of limitations of downloading commercials  
12 into homes.

13 But the experimental design, as described  
14 in the methodology, gives us confidence that the  
15 treatment groups for this design is fair and  
16 representative as if they had seen all of the ads.

17 Q. Now, you said a moment ago that the ads  
18 were pretested in order to assure you that they  
19 were representative, how was that pretest  
20 conducted?

21 A. The process was the ads were drawn from a  
22 sample that we acquired from Hotline, it is a  
23 national journal affiliated campaign monitoring  
24 service for media and academic folks.

25 We looked at all ads relating to the

Page 84

1 the same tone and the same production quality.

2 And so we ran those by a set of students  
3 in focus groups, assessing some of those criteria,  
4 and tabulated those results and selected the eight  
5 ads that we used in the focus groups, and the  
6 Knowledge Networks WebTV survey.

7 The mail went through a similar selection  
8 process.

9 Q. Let me cut you off. I am not interested  
10 in the mail.

11 A. Okay.

12 Q. First of all, you said that you had a  
13 sample of ads that were provided to you by  
14 Hotline. How many ads were in that sample?

15 A. In the presidential election, as of the  
16 1st of September, 18 to 20 would be my best  
17 estimate. They were not primary election focused,  
18 they were general election focused.

19 Q. But, didn't you say that you had run,  
20 that the sample included ads run back well into  
21 the year?

22 A. Yes. But those often had a referent that  
23 were distinctively linked to a South Carolina  
24 primary audience, or to some referent that wasn't  
25 the general election.

Page 83

1 presidential election that were available up  
2 through the beginning of September.

3 We categorized the ads by type,  
4 presidential candidate ads, party ads relating to  
5 the presidential candidates, Bush and Gore,  
6 interest group ads that had an electioneering  
7 orientation, and interest group ads that were  
8 genuine issue advocacy, had no referent to a  
9 candidate or the campaign.

10 Those ads were categorized as I said.  
11 The representative in this question was done by  
12 excluding a few ads, most notably the "rats" ad,  
13 that had become quite controversial in the media,  
14 in which the subliminal cue of rats in a Bush ad  
15 had been planted vis-a-vis Mr. Gore.

16 We excluded that because we did not want  
17 an ad that had become, by itself, quite  
18 controversial to a part of the sample.

19 There were it turns out relatively few  
20 genuine issue ads. I think there were only three  
21 from which we selected two.

22 And, again, there were relatively few  
23 candidate general election ads that had run. We  
24 did not want the ads to, in terms of  
25 representative, we wanted them to have essentially

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1 Since we were going to be surveying in  
2 midst the general election, we selected ads that  
3 did not have a distinct presidential primary  
4 reference.

5 Q. What would such a reference be?

6 A. Addressing South Carolina voters, or  
7 California voters, or New York voters.

8 Q. But not necessarily mentioning that  
9 primary?

10 A. Right. But perhaps mentioning those  
11 voters.

12 Q. Did you, when you say that these are, the  
13 ads you selected were representative, I want to  
14 make sure I understand you.

15 You are saying they are representative of  
16 ads relating to the presidential election.

17 A. General election.

18 Q. General election. Not the Congressional  
19 elections?

20 A. That is exactly right. The reason for  
21 that was you are drawing a national sample and the  
22 common unit of reference in a 2000 election is the  
23 presidential election.

24 And they were going to be seeing these  
25 ads in the middle of the election, mid-October,

22 (Pages 82 to 85)

Page 86

1 therefore, it needed to have a consistency with  
2 the campaign that they would otherwise be  
3 experiencing.

4 Q. Yes. But aren't you drawing conclusions  
5 from your research that you apply to Congressional  
6 elections?

7 A. I think we were pretty careful in the  
8 language that we use in the monograph that these  
9 were ads that were in a presidential election  
10 context.

11 But, I do think that the conclusions are  
12 consistent with what we would find if we were to  
13 test Congressional ads.

14 Q. Well, aren't Congressional ads different  
15 from presidential ads?

16 A. Not in these dimensions.

17 Q. What about in the dimension of mentioning  
18 a specific piece of legislation?

19 A. I am not sure I am clear on what you mean  
20 by mentioning a specific piece of legislation.

21 Q. An ad which says there is a vote coming  
22 up on fast track legislation, tell your member of  
23 Congress to vote for or against it.

24 A. That exact ad does not mention a member  
25 by name, it mentions a type of legislation or

Page 88

1 MR. PAOLELLA: Because there have been a  
2 couple of interruptions here, can you restate the  
3 question again so we know exactly what you're  
4 asking about.

5 THE REPORTER: "Question: And you are  
6 saying that, on the basis of your research, you  
7 don't very often find those kinds of things?"

8 MR. PAOLELLA: My question is what kinds  
9 of things are you talking about.

10 MR. TRISTER: I am talking about ads that  
11 mention the name of a member of Congress and also  
12 mention a piece of legislation, and urge the  
13 viewers to contact that member of Congress about  
14 that legislation.

15 THE WITNESS: Well, that is not the  
16 question as I understood that you asked it. Yes,  
17 ads often mention pending pieces of legislation  
18 and they mention the theme of that legislation or  
19 the topic of that legislation.

20 Ads much less frequently mention the name  
21 of the sponsors of that legislation.

22 BY MR. TRISTER:

23 Q. I didn't say the sponsors of the  
24 legislation. I meant the member of Congress in  
25 the district where the ad is running.

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1 issue.

2 Q. What if it also mentions an individual by  
3 name?

4 A. What if what?

5 Q. I am asking you whether that is a  
6 characteristic of Congressional advertising which  
7 you would not find in presidential advertising?

8 A. You don't find it in either instance very  
9 often.

10 Q. You don't?

11 A. No.

12 Q. That is your testimony?

13 A. Uh-huh.

14 Q. That is the basis of your research is  
15 that you did not find advertisements that mention  
16 the names of candidates and also urge people to --

17 A. No. That was wasn't the way you worded  
18 the question. The way you worded it was the name  
19 of a legislation that had the name of a legislator  
20 attached to it.

21 Q. Correct. And you are saying that, on the  
22 basis of your research, you don't very often find  
23 those kinds of things?

24 A. You don't very often find ads that  
25 mention --

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1 A. They will say things like call  
2 Congressman so-and-so and ask him to vote for fast  
3 track legislation.

4 Q. Yes. Do you more frequently see that  
5 kind of message in Congressional advertisements  
6 mentioning the name of a Congressional member, as  
7 opposed to a presidential candidate?

8 A. I don't have data that would document  
9 that. The referent in the presidential soft money  
10 ads would also be call or tell, and it could have  
11 an issue referent as well.

12 Q. Do the two ads that you categorized as  
13 interest group electioneering ads have that  
14 referent?

15 A. Have a call or a tell?

16 Q. About legislation?

17 A. I don't recall those two ads at the  
18 moment, and that particular element of the  
19 content.

20 Q. You saying you don't recall, or you don't  
21 recall that it had that element?

22 A. I don't recall.

23 Q. Well, I believe the ads are on Page 93 of  
24 your report.

25 MR. PAOLELLA: These are summaries of the

23 (Pages 86 to 89)

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1 ads on Page 93.

2 BY MR. TRISTER:

3 Q. Well, I am asking him if he will refer to  
4 the American Family Voices ad and the Republican  
5 Leadership Coalition ad, which I think are the two  
6 ads we are referring to, and see if that refreshes  
7 your recollection.

8 A. With respect to the Republican Leadership  
9 Coalition, I am not remembering whether there have  
10 been some specific legislation on drug premiums,  
11 that the Clinton/Gore administration has been  
12 identified with. There may have been.

13 Q. But not the other ad?

14 A. The American Family Voices, I do not  
15 think had a legislative referent. In part because  
16 Governor Bush had been a governor, not a member of  
17 Congress, or in a presidential administration.

18 There is a notable NAACP National Voter  
19 Fund ad that has a referent to a veto by President  
20 Bush of hate crimes legislation.

21 Q. But you didn't use that ad?

22 A. That wasn't out yet. That came very late  
23 in the cycle.

24 Q. The focus groups that you -- I am sorry,  
25 let me go back.

Page 91

1 I am not sure you actually explained to  
2 me how you pretested the ads that you selected  
3 prior to giving them to the focus groups.

4 A. Well, they were screened and reviewed by  
5 me and by my research associates, a team of four  
6 or five others, based upon the criteria that I  
7 mentioned.

8 And then we had a questionnaire that we  
9 administered while showing the ads to one or more  
10 groups of students assessing the kinds of criteria  
11 that I mentioned.

12 Q. Did you regard that process of pretesting  
13 as an important part of your research methodology?

14 A. It was helpful. It was a step that I  
15 felt was important.

16 Q. Did you change any of the ads based on  
17 that pretest?

18 MR. PAOLELLA: Objection. Change them  
19 from what?

20 BY MR. TRISTER:

21 Q. Did you drop certain ads you intended to  
22 use and replace them with other ads based on the  
23 pretest?

24 A. Not that I recall. I believe the rats ad  
25 had been dropped before the pretest, for the

Page 92

1 reasons given.

2 Q. So, the same eight ads that you pretested  
3 were used in the focus groups?

4 MR. PAOLELLA: Objection.

5 THE WITNESS: As well as some additional  
6 ads that we didn't use.

7 BY MR. TRISTER:

8 Q. So, you pretested more than the eight?

9 A. Oh, yes.

10 Q. All right. Which ads did you not use?

11 MR. PAOLELLA: In the pretest or --

12 BY MR. TRISTER:

13 Q. No. That you used in the pretest that  
14 you did not use with the focus groups.

15 A. I don't recall them specifically.

16 Q. Do you recall why you dropped any of  
17 them?

18 A. Because for one or more of the reasons  
19 given, they didn't seem as fair a comparison. So,  
20 that would be the reason we would have dropped  
21 them.

22 And we only could use eight, so we were  
23 looking for two reasonable fair tests of what we  
24 were looking at.

25 Q. When you presented the ads in the focus

Page 93

1 groups, what were the participants told about when  
2 the ads ran?

3 A. The first factual clarification, I did  
4 not present the ads. They were presented by  
5 Mr. D. Alsop of Worthland Worldwide. And I don't  
6 recall explicitly the language.

7 It is in the documentation that we have  
8 provided to you, that presented them in as fair  
9 and as neutral a way as a professional researcher  
10 would do.

11 Q. I wasn't asking you to characterize how  
12 he presented them. I am asking you specifically  
13 what information was given to the focus groups'  
14 participants about when the ads ran, the date.

15 A. Well, I think, I don't remember the exact  
16 language or reference that Mr. Alsop used with  
17 respect to that question.

18 Q. Well, did some of the eight ads, or any  
19 of the eight ads, run prior to the period during  
20 which the focus groups were taking place?

21 A. Yes.

22 Q. Were the participants asked -- provided  
23 with the information as to when that was or were  
24 they asked to assume they were being run  
25 contemporaneously with the focus groups?

24 (Pages 90 to 93)



Page 94

1 A. I don't recall whether that information  
 2 was transmitted to the participants.  
 3 Q. So, it is possible that the participants  
 4 did not know when the ads ran?  
 5 A. Yes.  
 6 Q. Is that also true of the WebTV survey?  
 7 A. That the participants did not know when  
 8 the ads had run?  
 9 Q. Yes.  
 10 A. Yes. May I elaborate?  
 11 The purpose of that is to create as  
 12 natural an environment for them to evaluate the  
 13 ads as possible.  
 14 So, I think it was reasonable that that  
 15 information may not have been transmitted to them.  
 16 Evaluate this ad on these dimensions, please.  
 17 Q. But, when a viewer watches an ad on TV,  
 18 they know when the ad is running, do they not?  
 19 A. That is true.  
 20 Q. And your participants did not?  
 21 A. It wasn't relevant to what we were  
 22 studying.  
 23 Q. It wasn't relevant to your study when the  
 24 ad ran?  
 25 A. No. We were evaluating ads that were

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1 Is that a finding that is in any way  
 2 based on your 2000 survey research?  
 3 A. No.  
 4 Q. What about the second sentence: In  
 5 2000 --  
 6 A. No. These are measuring what came out of  
 7 the case studies or the data that we independently  
 8 collected at Brigham Young, not out of the focus  
 9 group, or Knowledge Networks data.  
 10 Q. Let me look at Page 15, please. And  
 11 would you look at the first sentence of the last  
 12 paragraph on that page.  
 13 The sentence that reads: Genuine issue  
 14 advocacy after Labor Day in the general election  
 15 setting, and within a month of a presidential  
 16 primary, was rare.  
 17 My first question is: I would like to  
 18 simply confirm that you are using the term genuine  
 19 issue advocacy in that sentence, in the same way  
 20 as you have defined it on Page 9, and, therefore,  
 21 you are not referring to any ad, you are only  
 22 referring to ads that do not mention a candidate  
 23 by name, or depict a candidate?  
 24 A. Right, that is correct.  
 25 Q. Now, what is the, is the source of that

Page 95

1 part of a presidential campaign environment.  
 2 Q. But, I think, in defining electioneering  
 3 advertisements, as we have discussed a moment ago,  
 4 you said one of the factors was whether an ad ran  
 5 close to an election.  
 6 A. That is one of the factors that BCRA  
 7 uses, yes.  
 8 Q. No. I am not referring to BCRA, I am  
 9 referring to your definition on Page 9.  
 10 A. Let's go back to Page 9. I thought I  
 11 made it clear earlier that we monitor campaign  
 12 communications as they occur in an entire election  
 13 cycle that have these elements.  
 14 And they may occur 60 days before an  
 15 election, or 30 days before a primary. In fact,  
 16 we know they occasionally do.  
 17 Q. Okay. Would you turn to Page 33, please,  
 18 and to the first full paragraph at the top of that  
 19 page. That paragraph that begins: In the context  
 20 we monitored.  
 21 A. Uh-huh.  
 22 Q. The first sentence of that paragraph, the  
 23 sentence beginning: In the contest we monitored  
 24 in 1998, most interest groups electioneering  
 25 advocacy came in the final weeks of the campaign.

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1 sentence in any way based on your 2000 survey  
 2 research?  
 3 A. No.  
 4 Q. Is it based on your case studies?  
 5 A. Yes. And the other references in that  
 6 sentence.  
 7 Q. And the other references. But not only  
 8 the other references?  
 9 A. Right.  
 10 Q. Okay. Well, we will come back to that.  
 11 Would you turn to Page 59, please, and to Table 2,  
 12 specifically. What does Table 2 show?  
 13 A. It shows you that when given a scale from  
 14 one to seven, upon which respondents could  
 15 indicate the purpose, or intent of an ad, with a  
 16 gratification as implied with the one to seven  
 17 scale, that respondents in the National WebTV  
 18 survey saw genuine issue ads as quite distinct  
 19 from candidate party and electioneering issue ads.  
 20 Q. Okay. Now, with reference to the two  
 21 columns dealing with election issue ads, the mean  
 22 score for both of those was 6.4; is that correct?  
 23 A. That's correct.  
 24 Q. Based on your review of those ads, did  
 25 you agree with that score?

25 (Pages 94 to 97)

Page 98

1 A. Yes.  
 2 Q. You did. So, you regarded those two ads  
 3 as being at the, shall we say, the top end of the  
 4 scale?  
 5 A. In terms of the intent being to influence  
 6 a person to vote against or for a particular  
 7 candidate, yes.  
 8 Q. Okay. Were you able, did you look for,  
 9 in constructing your study, any ads, election  
 10 issue ads as you have used the term, that, in your  
 11 judgment, fell closer to the lower end of the  
 12 scale?  
 13 A. I don't think there were any. It is  
 14 bimodal distribution.  
 15 Q. I am not sure I know what that means.  
 16 A. The election issue ads tend to have the  
 17 characteristics of, the same characteristics that  
 18 were part of these two ads. They are not atypical  
 19 in my judgment.  
 20 Q. Well, then what was the purpose in asking  
 21 people to rate from one to seven?  
 22 A. To see if they saw it. They are the  
 23 voters, and because there had been a distinction  
 24 drawn between ads that use the magic words, and  
 25 ads that do not.

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1 And I think this data conclusively  
 2 demonstrates that that was a meaningful  
 3 demonstration.  
 4 Q. Yes. But, I didn't ask you about magic  
 5 words, did I?  
 6 A. I don't recall.  
 7 Q. I don't think I have used those words in  
 8 this entire deposition, Professor.  
 9 A. But you asked a question that implied the  
 10 distinction.  
 11 Q. I didn't intend to. I didn't intend to  
 12 imply anything about magic words.  
 13 I am simply asking you whether -- do you  
 14 personally acknowledge that there are ads which  
 15 fall in the category of election issue ads which  
 16 would be at the lower end of that scale, as  
 17 distinct from the two ads that you show?  
 18 A. No.  
 19 Q. You do not believe that there are such  
 20 ads?  
 21 A. You think these are typical of election  
 22 issue ads.  
 23 MR. TRISTER: If you would have this  
 24 marked as Exhibit 2, please.  
 25 (The document referred to

Page 100

1 was marked Magleby Exhibit  
 2 No. 2 for identification.)  
 3 BY MR. TRISTER:  
 4 Q. Okay. Let me represent to you, Professor  
 5 Magleby, that this is a script, rather that it has  
 6 been identified, in other testimony in this case,  
 7 as a script of an AFL-CIO ad, that ran in  
 8 September of 1998, on TV, in various Congressional  
 9 districts and states.  
 10 Would you please study it and take as  
 11 long as you want to study it?  
 12 A. I would like you to restate what you  
 13 characterized about the ad. You said some things  
 14 that I would like to have restated. Could you  
 15 have her read what you said back.  
 16 THE REPORTER: "Question: Let me  
 17 represent to you, Professor Magleby, that this is  
 18 a script, rather that it has been identified, in  
 19 other testimony in this case, as a script of an  
 20 AFL-CIO ad, that ran in September of 1998, on TV,  
 21 in various Congressional districts and states.  
 22 "Would you please study it and take as  
 23 long as you want to study it."  
 24 THE WITNESS: So, now the question.  
 25 BY MR. TRISTER:

Page 101

1 Q. You are ready for the question?  
 2 A. Uh-huh.  
 3 Q. How would you rate this ad on your scale  
 4 in Table 2?  
 5 A. Was this ad run in Senator Whomever's  
 6 state?  
 7 Q. Yes.  
 8 A. Was Senator Whomever a candidate for  
 9 reelection in 1999?  
 10 Q. Yes.  
 11 A. Was it run in other places, besides in  
 12 districts in which that Senator was running?  
 13 Q. Does that make a difference?  
 14 A. I was just trying to get a context.  
 15 Q. Were your participants in the focus  
 16 groups told whether ads were run in other  
 17 districts?  
 18 A. I don't know what I am permitted to ask  
 19 for in trying to interpret an ad that I am only  
 20 getting a script of.  
 21 MR. DODYK: I think, Professor Magleby,  
 22 if you tell Mr. Trister what it is that you want  
 23 to know, to apply the assumptions. But this is  
 24 Mr. Trister's deposition.  
 25 THE WITNESS: So, back to my question.

26 (Pages 98 to 101)

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1 This same ad was run in multiple races including  
2 some in which senators were not running?

3 BY MR. TRISTER:

4 Q. Is that a relevant consideration in how  
5 you rank the ad?

6 A. I was just curious.

7 Q. Are you just curious or does it bear on  
8 your answer?

9 A. I don't know. Back to your original  
10 question. What was the question?

11 Q. My question is asking you to rank this  
12 ad, on your scale from one to seven, based on the  
13 information I have given you.

14 A. Well, I would have given this ad probably  
15 a six, maybe a five or six.

16 Q. And how would you have reached that  
17 conclusion?

18 A. Because the context, shortly before the  
19 election, mentioning the Senator by name using an  
20 issue that is relevant to the campaign, would have  
21 been seen as intended here.

22 Q. I didn't tell you it was relevant to the  
23 campaign.

24 MR. PAOLELLA: Did you have more in your  
25 answer?

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1 A. I would see this as a general issue ad.  
2 I might have given it a two or a three.

3 Q. Didn't you tell me a few moments ago that  
4 there is no such thing as an election issue ad  
5 that -- well, first of all, haven't you told me  
6 that a genuine issue ad, to be characterized as a  
7 genuine issue ad, you cannot mention a name of a  
8 candidate?

9 A. No. In the context of the ad, not the  
10 call lines and so forth. It doesn't mention how  
11 Representative Kingston has voted. It doesn't  
12 represent what Representative Kingston has said  
13 about the issue.

14 The body of the ad has no referent to  
15 Mr. Kingston whatsoever. The only referent to  
16 Mr. Kingston is the call line.

17 Q. Well, are you now changing your testimony  
18 or clarifying your testimony to say that your use  
19 of the term "genuine issue ads," includes ads that  
20 mention a candidate only in what you have called  
21 the call to action?

22 MR. PAOLELLA: Objection, that  
23 mischaracterizes the witness's prior testimony.

24 THE WITNESS: I am saying that there is  
25 no referent in this ad, until the call referent,

Page 103

1 THE WITNESS: No. I know because these  
2 issues were part of the 1998 campaign.

3 BY MR. TRISTER:

4 Q. Would it change your rating if I told you  
5 that the Brennan Center authors characterized this  
6 ad as a genuine issue ad?

7 MR. PAOLELLA: I am going to object to  
8 that characterization, but you can go ahead and  
9 answer.

10 THE WITNESS: No, it wouldn't change my  
11 characterization.

12 Q. Let me mark this ad as Exhibit 3.

13 (The document referred to  
14 was marked Magleby Exhibit  
15 No. 3 for identification.)

16 BY MR. TRISTER:

17 Q. Have you finished looking over the ad?

18 A. I have.

19 Q. Let me represent to you that there has  
20 been testimony, in this case, to the effect that  
21 this is a radio ad run by the AFL-CIO in September  
22 of 1998, and that it ran in Representative  
23 Kingston's district.

24 How would you rate this ad on your scale  
25 of one to seven?

Page 105

1 as to Kingston's position or past behavior.

2 And that merely mentioning the call or  
3 tell is not a sufficient link to the candidate.

4 BY MR. TRISTER:

5 Q. To your knowledge, does the definition of  
6 electioneering communications in BCRA make the  
7 distinction you are now making?

8 A. I am not certain.

9 Q. You are not certain?

10 A. I am not certain.

11 Q. Well, didn't you cite that definition in  
12 Footnote 5 of your report?

13 A. I am not certain with respect to the  
14 call-to-action question.

15 Q. Would you take a look at Footnote 5,  
16 please.

17 A. Uh-huh.

18 Q. And as you quote the definition of  
19 electioneering communications from BCRA, it says:  
20 Any broadcast cable or satellite communication  
21 that quote, "refers to a clearly identified  
22 candidate for federal office," is that correct?

23 A. Yes. But, there are several ellipses  
24 here. I have no idea what has been removed. I  
25 would have to see the whole definition. I don't

27 (Pages 102 to 105)

Page 106

1 recall the whole definition.  
 2 Q. Do you have an understanding of, do you  
 3 have any reason to believe that the definition in  
 4 BCRA makes the distinction that you are now  
 5 making?  
 6 A. I don't know.  
 7 Q. You don't know. Should it?  
 8 A. Perhaps.  
 9 Q. Why?  
 10 A. Well, because a generic call your  
 11 Congressman, call your Senator, when then linked  
 12 to a legislation and call your Congressman or  
 13 Senator about this legislation without a referent  
 14 to their position on the issue, seems to me  
 15 substantively different than when they are  
 16 mentioned in view of what their position is on  
 17 that issue.  
 18 Q. When you say substantively different, are  
 19 you referring to a difference with respect to  
 20 whether the advertisement communicates an  
 21 electioneering message?  
 22 A. Yes.  
 23 Q. Would you turn back to Page 59, please, I  
 24 am sorry to make you go back and forth.  
 25 I would like to refer you to Table 2A,

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1 So, in other words, they were seen as the  
 2 same within the category. So, they are not  
 3 statistically different.  
 4 Q. From each other?  
 5 A. From each other. But they are  
 6 statistically different from other categories.  
 7 So, the DNC ad is statistically different from the  
 8 candidate ad.  
 9 Q. All right. I am just trying to  
 10 understand what you mean by statistically  
 11 different.  
 12 A. If you look at the table above, the 6.4,  
 13 and the 6.4 are not going to be statistically  
 14 different, and that, in fact, is found in the  
 15 election issue ads, if you look at the fact that  
 16 there is no ampersand in either the voices or the  
 17 ILC.  
 18 Q. I see.  
 19 A. And there is a statistically different  
 20 difference between genuine and the others.  
 21 Q. Okay. I think I now understand your  
 22 table.  
 23 A moment ago when I showed you the ad  
 24 that has been marked as Exhibit 3, entitled  
 25 Barker, you said you would rank that as a two on

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1 and with the caveat that I am not a statistician,  
 2 would you explain to me, with respect to the  
 3 election issue ad columns.  
 4 Am I reading this correctly that you are  
 5 unable to confirm the statistical significance of  
 6 the results reported in Table 2?  
 7 A. No. They are statistically different  
 8 from both the candidate and -- well, let's see.  
 9 Read this table.  
 10 The ampersand means that it is a  
 11 statistical difference from the other ads listed  
 12 in the table.  
 13 MR. PAOLELLA: The asterisk?  
 14 THE WITNESS: The asterisk, yes.  
 15 BY MR. TRISTER:  
 16 Q. But the reason I am asking the question  
 17 is I don't see an asterisk, if you go from left to  
 18 right, for election issue ads, and you then come  
 19 down from election issue ads.  
 20 I only see, I see four boxes, three of  
 21 which are empty, and one of which has a number,  
 22 .536, that doesn't have an asterisk.  
 23 A. That means it is not different from  
 24 voices. Just as Bush is not different from Gore.  
 25 Just as the RNC is not different from the DNC.

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1 your scale.  
 2 A. Uh-huh.  
 3 Q. And, then I think you also said that you  
 4 would rate it as a genuine issue ad.  
 5 A. Uh-huh.  
 6 Q. I am wondering why you didn't include an  
 7 ad of this kind in your study?  
 8 A. Because I don't think we had any of this  
 9 kind. It would have been interesting to include  
 10 something like this.  
 11 Q. It would have been interesting.  
 12 A. I agree.  
 13 Q. In what way?  
 14 A. I think if we only had more resources we  
 15 would have loved to have tested more ads.  
 16 Q. And this would have allowed you to test a  
 17 different kind of ad?  
 18 A. Yes. It is a radio ad and we didn't test  
 19 any radio ads. But, sure, more data is better.  
 20 Q. Would you turn to Page 13, please. Let  
 21 me refer you to the sentence, it is in the first  
 22 full paragraph that says: Our second wave of  
 23 research.  
 24 A. Uh-huh.  
 25 Q. That paragraph. And further down in the

28 (Pages 106 to 109)

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1 sentence that begins: The study was conducted  
 2 between 25 and 31 October 2000.  
 3 A. Uh-huh.  
 4 Q. And then it says: Each treatment group  
 5 was shown three commercials, with the order of the  
 6 commercials randomized across each treatment group  
 7 to combat any possible learning effect during the  
 8 experiment.  
 9 A. Uh-huh.  
 10 Q. Would you explain what that means,  
 11 please.  
 12 A. Well, there are multiple ideas there. Do  
 13 you mean to combat the learning effect; is that  
 14 the element?  
 15 Q. Yes, the random?  
 16 A. It is the learning effect referent that  
 17 you want me to speak to?  
 18 Q. Yes.  
 19 A. There may have been an element of  
 20 learning going on where viewers became more  
 21 attuned to this or that element of an ad after  
 22 they had seen like ads or similar ads, given the  
 23 questions that we asked of the respondents.  
 24 So, they see an ad and they answer a set  
 25 of questions on that ad. They see the next ad and

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1 A. I don't know.  
 2 Q. Have you ever asked?  
 3 A. No.  
 4 Q. But you do rely on their studies?  
 5 A. I cite their studies.  
 6 Q. Is there a difference between citing  
 7 studies and relying on studies?  
 8 A. Probably not.  
 9 Q. Okay. You did participate in discussions  
 10 about the 1998 studies, at one point in time?  
 11 A. I did. Fairly early on in the design,  
 12 not at the point where the kinds of issues you  
 13 have just raised were discussed.  
 14 Q. Didn't you participate in discussions as  
 15 part of the Brennan Center Policy Committee about  
 16 the study after the research was done?  
 17 A. I am not recalling the timing of the  
 18 meetings. I attended I believe one meeting at the  
 19 Brennan Center but that was very early on. And I  
 20 think I was shown a couple of versions of draft  
 21 documents, draft questionnaires.  
 22 But, it was not a heavy involvement in  
 23 terms of that planning committee.  
 24 MR. TRISTER: Would you mark this as  
 25 Exhibit 4, please.

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1 they may be thinking of the questions they have  
 2 just answered on the previous ad, looking for  
 3 those elements in the second ad or the third ad.  
 4 Q. What do you do to combat that?  
 5 A. Randomize the order. So, within the  
 6 treatment group that have seen that ad, one-third  
 7 of it will have seen it first, one-third will have  
 8 seen it in the second position, and one-third  
 9 would have seen it in a third position.  
 10 That means you then can statistically  
 11 verify whether there are differences in the  
 12 responses that may have been attributable to  
 13 learning, having cued them with the questions when  
 14 they saw the first ad.  
 15 Q. Is that procedure, which you have just  
 16 described, a standard procedure in this kind of  
 17 research?  
 18 A. In experimental work with treatment  
 19 groups, yes.  
 20 Q. You are familiar with the two Buying Time  
 21 studies, are you not?  
 22 A. I am.  
 23 Q. Do you know whether the authors of those  
 24 studies randomized the presentation of the ads to  
 25 their codes in the way you have just described?

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1 (The document referred to  
 2 was marked Magleby Exhibit  
 3 No. 4 for identification.)  
 4 BY MR. TRISTER:  
 5 Q. And I will ask you if you can identify it  
 6 for us.  
 7 A. Yes. It is a monograph I prepared called  
 8 Dictum Without Data, the Myth of Issue Advocacy in  
 9 Party Building.  
 10 Q. And am I correct that the research  
 11 reported in this monograph is the same research  
 12 that you rely on in your expert report, and that I  
 13 have been referring to as the survey research?  
 14 A. Yes.  
 15 Q. And the results reported in Tables 1  
 16 and 2 are from that research; is that correct?  
 17 A. That is correct.  
 18 Q. Tables 1 and 2 of your report.  
 19 A. That's correct.  
 20 Q. And I believe that with respect to  
 21 Table 2 in your report on Page 59, you explain in  
 22 a note that this table, the results reported there  
 23 are somewhat different from what is reported in  
 24 the monograph; is that correct?  
 25 A. That's correct.

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1 Q. And with the exception of that difference  
2 that you have reported there, then, are there any  
3 other differences in your report, your expert  
4 report, as it relates to that study from what is  
5 reported in Dictum Without Data?  
6 A. I don't think there are any other  
7 differences. We reran those tables and there were  
8 a few cases. They did not change any of the  
9 significance tests or any of the findings.  
10 A few respondents, who I think had either  
11 overlooked the question, that is not answered, and  
12 then falsely classified that we corrected in the  
13 version that is in the report to the Court.  
14 Q. Okay. Let me ask you to look at two  
15 things simultaneously.  
16 A. Okay.  
17 Q. Table 1 to your expert report, and  
18 Appendix C to Dictum Without Data.  
19 A. Uh-huh.  
20 Q. Am I correct that the data reported in  
21 Table 1 of your expert report is data taken from  
22 the responses to Question No. 5 in Appendix C?  
23 A. Yes.  
24 Q. And referring still in Dictum Without  
25 Data to Appendix B --

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1 needed to add to the Knowledge Networks, promote a  
2 particular party, which was not a specific  
3 referent in the focus group, and may have been  
4 indicated by one or more respondents.  
5 And then not sure, seemed to be a  
6 response that felt more natural to a respondent  
7 than don't know. But, they are effectively the  
8 equivalent. Other than that, the questions are  
9 the same.  
10 It is standard practice in survey  
11 research to utilize focus groups as a way of  
12 refining questionnaire instruments before you use  
13 them on a large sample.  
14 Q. Now, am I correct that both Question 10  
15 of the focus group questionnaire and Question 5 of  
16 the national survey questionnaire, both ask the  
17 respondent to state what they believed, what he or  
18 she believed the primary objective or purpose of  
19 this ad was?  
20 A. Yes.  
21 Q. And, in both, I notice in the second, in  
22 the national survey, you actually underline the  
23 word, or highlighted the word primary; is that  
24 correct?  
25 A. Yes.

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1 A. Uh-huh.  
2 Q. -- is Question 10 -- Appendix B are the  
3 questions asked in the focus group.  
4 And the only question I want to ask you  
5 is whether Question 10, in that questionnaire is  
6 the equivalent, or identical to the Question 5  
7 in -- I am sorry, I think I have it wrong.  
8 MR. PAOLELLA: No. I think you have got  
9 it.  
10 THE WITNESS: I think you have got it.  
11 BY MR. TRISTER:  
12 Q. Do I?  
13 A. Yes.  
14 Q. I just want to establish that we're  
15 talking about the same question.  
16 A. I think we are, but let me just be clear.  
17 I want to compare it, literally, as well.  
18 The question of the Knowledge Networks  
19 survey has a couple of additional, that is, the  
20 WebTV survey, has a couple of additional items,  
21 that is Question 5 of the WebTV survey, as  
22 compared to Question 10 of the focus groups, which  
23 is, in part, one of the reasons you do focus  
24 groups.  
25 It probably was my judgment that we

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1 Q. Was there a reason for that?  
2 A. To emphasize that we wanted them to tell  
3 us what they thought the primary purpose was.  
4 Q. As distinct from what?  
5 A. Other purposes.  
6 Q. Now, if you will look just above, or  
7 rather if you will just continue on to Question 9?  
8 MR. PAOLELLA: Which appendix are we at?  
9 MR. TRISTER: Of Appendix C, the national  
10 survey question. I could ask it about the other  
11 one was well, but it is the same.  
12 BY MR. TRISTER:  
13 Q. The national survey questions,  
14 Question 9, uses the term main purpose.  
15 A. Uh-huh.  
16 Q. Is the distinction between main purpose  
17 and primary objective or purpose a significant  
18 one, or was it intended to have some significance?  
19 A. We wanted to be fair and see if it was  
20 different. As I recall, there were no major  
21 differences.  
22 Sometimes a nuance in question wording  
23 can be important. We were examining to see if  
24 that was the case.  
25 Q. Did you consider presenting Question

30 (Pages 114 to 117)

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1 No. 5 of the national survey questionnaire without  
2 using the term primary or main, that is, simply  
3 referring to the objective or purpose of the ad?

4 A. I don't recall. I don't recall whether  
5 we considered that. We may have. This felt  
6 clearer to me and more in response to the relevant  
7 policy question.

8 Q. And why is this more in response to the  
9 relevant policy question?

10 A. Because the relevant policy question is  
11 can you effectively communicate an electioneering  
12 message without using the magic words.

13 Q. And a study which asked essentially the  
14 same question, but did not ask about the primary  
15 objective or purpose, would not be as relevant in  
16 answering that question?

17 A. We do ask about what the primary  
18 objective or purpose was.

19 Q. No. I am asking about a study which does  
20 not ask about the primary objective or purpose,  
21 but instead asks about the objective without the  
22 use of the word primary.

23 A. I would say that the data, and I think  
24 that Mr. Alsop would so testify that the data out  
25 of the focus groups was clear that these were not

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1 is very compelling data in an index.

2 Q. Right. But, what about if you had a  
3 study that had more than two ads, both of which  
4 were at that end of the scale.

5 If you had a variety of ads that fell  
6 within a variety of those from one to seven, would  
7 it have an effect there?

8 A. I would love to see data. I don't know.

9 The answer is we don't know. These data are very  
10 compelling in terms of reinforcing the sense that  
11 you can communicate an electioneering message  
12 while avoiding the magic words and all of that  
13 means in terms of correct policy.

14 Q. Still in Dictum Without Data, would you  
15 turn to Page 10, and would you take a look at  
16 Table 4.

17 And, what does Table 4 -- well, first of  
18 all, is Table 4 based on one of the questions in  
19 the national survey?

20 A. Yes.

21 Q. And this purports to summarize the  
22 responses from those surveys?

23 A. Yes. And this would be all respondent,  
24 not treatment groups only.

25 Q. And what does it show?

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1 distinctions that the focus group respondents saw  
2 as meaningful.

3 These were ads that to them were clearly  
4 about electing or defeating a candidate. And  
5 whether or not we used primary or main or not,  
6 there was no reason to believe it would be  
7 different.

8 Q. Did you test, in your pretest, a  
9 questionnaire that didn't use the word primary or  
10 main?

11 A. I don't recall. We may have. Now, I  
12 have one other comment.

13 With respect to primary, I think the fact  
14 that I don't think that is a distinction that  
15 matters is evident by the consistency of the data  
16 between Tables 1 and 2 of the report, where we  
17 effectively asked the question about the intent of  
18 the ad.

19 And asked them to grade it between one  
20 and seven. And the extent to which they gravitate  
21 to the extremes, I think is evident that they saw  
22 these as clearly about electing or defeating a  
23 candidate.

24 When you get a mean of 6.3 and 6.4 in the  
25 party and interest groups electioneering ads, that

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1 A. Again, this was before the legislation  
2 was enacted. There were competing definitions of  
3 what elements might constitute a fuller or more  
4 meaningful definition of electioneering  
5 communication.

6 And so we simply tested for some of those  
7 that had been in discussion, including mentions  
8 the candidate's name. 90 percent felt that if  
9 that was the case, that was evidence of an  
10 electioneering communication.

11 Shows the candidate's likeness or image,  
12 83 percent. Mentions the party name, 65 percent.  
13 Mentions the election, 51 percent. Shown in the  
14 last few weeks before the election, 66 percent.

15 Discusses an issue, 74 percent. Uses any  
16 of the following words, and then we list some of  
17 the magic words, 88 percent.

18 Q. The respondents were permitted, were they  
19 not, to indicate more than one of these elements?

20 A. Oh, yes, they could say all of these were  
21 elements. Some may have.

22 Q. All right. Does this table tell you, or  
23 tell us anything about whether the respondents  
24 felt that any one of these elements, standing  
25 alone, would be sufficient to characterize an ad

31 (Pages 118 to 121)

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1 as indicating that it is to persuade or to vote  
 2 for or against a candidate?  
 3 A. No. That is not the way the question was  
 4 worded.  
 5 Q. So, just to understand completely, an  
 6 individual who may have felt that mentioning a  
 7 candidate's name alone would not convey that  
 8 message, but mentioning the candidate's name and  
 9 also mentioning the election would, might have  
 10 checked both of those elements.  
 11 A. Yes. I think that is a reasonable  
 12 possibility.  
 13 Q. All right. Did you present to your  
 14 respondents, in this question or in another  
 15 question, other elements that might suggest that  
 16 an ad was not intended to persuade them to vote  
 17 for or against a particular candidate?  
 18 A. I don't recall. I can review the  
 19 questionnaire.  
 20 Q. That would be good if you would.  
 21 A. Could you restate the question, please.  
 22 THE REPORTER: "Question: Did you  
 23 present to your respondents, in this question or  
 24 in another question, other elements that might  
 25 suggest that an ad was not intended to persuade

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1 The far more typically more difficult  
 2 pattern is to mention the candidate's name more  
 3 than once in the body of the ad in a very  
 4 disparaging way.  
 5 Q. Well, a lot of the evidence in this case  
 6 is about that very question. So, we will see what  
 7 the evidence shows on that question. But, I  
 8 understand that that is your understanding.  
 9 Let me ask you if this is a fair  
 10 conclusion to draw from the Table 4 on Page 10.  
 11 If I were to show a group, a  
 12 representative group, similar to your national  
 13 survey, not just the eight ads that you show them,  
 14 but, let's say 200 ads, would you expect that in  
 15 90 percent of the cases, an ad which mentions a  
 16 candidate by name would be characterized as having  
 17 an intention to persuade you to vote for or  
 18 against the candidate?  
 19 Is that a fair interpretation of this  
 20 data?  
 21 A. No. That is extrapolating from this data  
 22 beyond where I think I am confident you can go.  
 23 Q. Because for what reason?  
 24 A. Because you have a limited sample of ads  
 25 and you have a set of issues that would arise any

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1 them to vote for or against a particular  
 2 candidate?"  
 3 THE WITNESS: Well, the only one that may  
 4 be in that category is Question 18. I think that  
 5 taps into the same dimension. It doesn't word it  
 6 the way you worded it.  
 7 In your opinion, can ads that do not use  
 8 words like vote for or vote against be about the  
 9 election or defeat of a particular candidate, yes,  
 10 no, and with some more specificity, yes, no.  
 11 BY MR. TRISTER:  
 12 Q. Right. But, that is a very limited form  
 13 of the question I have just put to you, isn't it?  
 14 A. It is a different form of it, yes.  
 15 Q. Yes. I notice your question, in  
 16 describing the element, mentions a candidate's  
 17 name, did not distinguish between an ad that  
 18 mentions a candidate's name only in the  
 19 call-to-action, and an ad that mentions a  
 20 candidate's name in what you called the body of  
 21 the ad; is that correct?  
 22 A. Well, to be candid, I don't think I had  
 23 seen many ads. Maybe this is the first ad I have  
 24 ever seen which only mentions the candidate's name  
 25 in the call-to-action.

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1 time you show 200 commercials.  
 2 I, for one, would be quite worried about  
 3 the learning effect that would arise in that  
 4 number of commercials, human respondents trying to  
 5 figure out why are you making me do this.  
 6 So, I think there are a set of  
 7 methodological problems with a hypothetical.  
 8 Having said that, there is no reason, there is no  
 9 reason not to believe that this was, A, a  
 10 representative national sample.  
 11 B, that they had been given some exposure  
 12 to the topic such that they could comment on the  
 13 content. They had seen three ads, they were asked  
 14 other questions, they had been asked in a  
 15 straightforward neutral way.  
 16 I am confident we can generalize from  
 17 these data given that situation. Whether people  
 18 shown the sheer volume that you suggest in the  
 19 hypothetical would behave differently, I wouldn't  
 20 want to speculate about it.  
 21 Q. But, to the extent that you are willing  
 22 to generalize from your data, what I am trying to  
 23 get at is whether this table, when it says,  
 24 mentions candidate's name and then it has a 90,  
 25 which is the highest rating on the table, whether

32 (Pages 122 to 125)



<p style="text-align: right;">Page 126</p> <p>1 this tells us anything about how respondents 2 answer questions about ads? 3 A. It does in this context. We are in an 4 election context. This is administered a few 5 weeks before an election. They are observing ads, 6 evaluating ads, information, if you will, about 7 candidates. 8 And when an ad mentions a candidate by 9 name, the voters presume this must be about 10 electing or defeating that person who is running 11 for that office. It is a natural and 12 straightforward and understandable assumption. 13 Q. You are now confirming what I thought was 14 the conclusion from this data as well, which is 15 that this data tends to show that people looking 16 at a group of ads, and seeing the name of a 17 candidate, will make an assumption about its 18 purpose, as described in that table. 19 A. We were asked if they think that is an 20 indicator of whether it is about electing or 21 defeating a candidate, and they think so. 22 Which may be a much more compelling 23 indicia of electioneering than the words vote for, 24 vote against. 25 Q. If I were doing a study and I were</p>	<p style="text-align: right;">Page 128</p> <p>1 very clear they differentiate Tables 1 and 2 in 2 the report, I don't know what they are numbered 3 here in the Dictum Without Data, show that they 4 clearly differentiate a pure issue ad or a genuine 5 issue ad shown in the same time environment. 6 These were also shown in the presidential 7 election period broadly defined, and they clearly 8 differentiate those from the others. 9 Q. Yes, but -- 10 A. So -- 11 Q. But am I correct -- 12 A. I would worry given the issue content, 13 given the fact that they discuss an issue, 74 14 percent, that anything in that environment, given 15 your hypothetical, might be seen as an election 16 related ad. 17 The answer is they don't see it that way. 18 They do see the issue plus the mentioning of the 19 candidate's name, as differentiating that ad from 20 one that just mentions an issue, but doesn't 21 mention a candidate's name. And that is very 22 clear in Tables 1 and 2. 23 Q. I am not focusing on ads that don't 24 mention a candidate. Your general issue ad that 25 you showed the respondents didn't mention a</p>
<p style="text-align: right;">Page 127</p> <p>1 showing a group of ads to a representative sample, 2 and asking them to categorize the content of that 3 ad, in the same way as you did in Table 4, is 4 there a way for me to test or to present the 5 questions so as to eliminate the assumption that 6 you have just referred to? 7 Do you understand my question? 8 A. Can you create an abstract situation in 9 which there isn't an election environment that 10 they are going to be evaluating communications 11 about a candidate in an election? 12 Q. No. My question is slightly different. 13 It seems to me that in presenting a group of ads 14 to people, representative sample, and asking them, 15 with whatever information they are given, to give 16 an opinion about the content of those ads, and 17 particularly whether those ads convey an 18 electioneering message as a whole, the ads as a 19 whole, that there is potentially what I think of 20 as a chicken-and-egg problem. 21 Are they answering the question because 22 they see the name, or are they answering the 23 question because of other elements in the ad? 24 A. Well, I would answer your question by 25 saying I think they differentiate. I think it is</p>	<p style="text-align: right;">Page 129</p> <p>1 candidate, you have already testified to that. 2 I am trying to come up with a way, a 3 methodology, to look at ads that mention a 4 candidate, all of them mention a candidate, and to 5 determine whether those ads are all electioneering 6 ads because they mention a candidate, or is there 7 a way to test whether or not, in the minds of the 8 viewers, that they are basing that decision on a 9 collection of factors, not simply the name? 10 A. Well, that is a good question that some 11 day I would like to research. The answer, in 12 part, was, we were limited by what the political 13 consultants produce in any cycle when we are using 14 real ads. 15 And we used real ads, and there were no 16 such ads in the pool of ads in the Hotline file. 17 These ads tend -- 18 Q. I am not asking you about your study. 19 A. No. I understand, but if, in a future 20 cycle, consultants were to create ads that fit 21 your description, it would be an interesting test 22 and I don't know the answer to the question, 23 whether it would be different. 24 Q. Let me make one last try at this. I know 25 I am not being too articulate.</p>

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1 Let's assume that I show a group of ads  
2 all mentioning the name of the candidate, some of  
3 which are the kind of ads that you say are the  
4 only ads that are out there.

5 And I include a significant number of  
6 ads, like my exhibit, the Barker ad, that also  
7 mentions it, and there is a significant number in  
8 there.

9 How do I eliminate methodologically, the  
10 possibility that viewers would look at those  
11 Barker type ads, the ones you have called genuine  
12 issue ads, and rank them as electioneering ads  
13 because they have the name of a candidate in the  
14 call-to-action?

15 Can I design a study to do that?  
16 Assuming I have the kind of ads I have just  
17 described. You say you didn't, but you might.

18 A. Yes. I think you might be able to design  
19 such a study.

20 Q. How would you do that?

21 A. Well, you would have to deal with  
22 respondent fatigue. There probably is an upper  
23 limit on the number of ads that you can reasonably  
24 expect a person to view and evaluate.

25 Q. Excuse me, I don't mean to interrupt you,

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1 and the one that only mentions the candidate in  
2 the call-to-action.

3 And mentions really means, broadly  
4 defined, does not attack, there is not personal  
5 reference. It is not just mentioning the name, it  
6 could mention the equivalent of the name, like the  
7 incumbent. And you would test for that type of  
8 ad.

9 The reality is I am not aware of any  
10 television ads in the presidential race in 2000,  
11 nor am I aware of ads in Congressional races that  
12 would broadcast that only mentioned the name of  
13 the candidate in the call-to-action.

14 If that happened, and I don't think it  
15 did, it would be relatively rare. It is not the  
16 norm. When candidate names are mentioned, they  
17 are mentioned with a clear referent that is  
18 typically negative or contrast.

19 BY MR. TRISTER:

20 Q. Just a couple more questions about this  
21 survey part of your research and then I can think  
22 we can break for lunch.

23 The survey part of your research was, it  
24 appears to me, based on your writings that I have  
25 reviewed, was a new phase for you, a different

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1 but what would that limit be?

2 A. It would be different by the setting.  
3 You can do more in a focus group, than you can on  
4 a WebTV impersonal interaction.

5 Q. Let's say a focus group.

6 A. I don't know. I would like the focus  
7 group experts to tell me that answer. I don't  
8 know the answer to that.

9 Q. Give me a ballpark figure.

10 A. I don't know that you would want to show  
11 more than a dozen. And that may be, we may have  
12 been pushing the limit with eight.

13 Q. Certainly not hundreds?

14 A. No. You can't show hundreds to a focus  
15 group.

16 Q. I am sorry, I interrupted you when you  
17 say that you --

18 A. I have lost that train of thought.

19 Q. Yes. Let me see if, I can get back on  
20 it. Why don't you read back the last question.

21 (Whereupon, the record was read by the  
22 reporter as requested.)

23 THE WITNESS: Yes. I think you would  
24 have an ad that is otherwise similar to the one  
25 that mentions the candidate in the body of the ad

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1 approach, if it was.

2 How did you, how did that come about?

3 A. Well, I have long done survey research.  
4 I was trained to do this in graduate school. One  
5 of my books, The Myth of the Independent Voter,  
6 draws heavily on the national election studies at  
7 the University of Michigan.

8 So, I have long done survey research, and  
9 it seemed to me that there were a set of empirical  
10 questions that nobody had explored with actual  
11 voters that needed to be examined.

12 And so I proposed a test, using highly  
13 reputable professional firms, and peer review and  
14 so forth and so on, in the design and the  
15 administration of the study, to test for the very  
16 questions we are talking about.

17 Q. The idea for the doing of a study of this  
18 kind came from you, then?

19 A. Absolutely.

20 Q. Did PU Charitable Trust fund that  
21 research?

22 A. Yes.

23 Q. They didn't suggest this project to you?

24 A. No.

25 Q. When you say that there was no, I don't

34 (Pages 130 to 133)

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1 want to misstate your testimony, maybe we should  
2 have it read back, from a moment ago.

3 (Whereupon, the record was read by the  
4 reporter as requested.)

5 BY MR. TRISTER:

6 Q. When you say there was no empirical  
7 research in exploring these questions with actual  
8 voters, the Brennan studies, the two Buying Time  
9 studies, did not meet that standard?

10 A. No. That is a different -- we are  
11 talking it is in the same issue domain, but it is  
12 a different universe or population.

13 We are talking here not about coders with  
14 immediate supervision and so forth and so on, as  
15 in the Buying Time studies, we are talking about  
16 the actual voters out there who are the consumers  
17 of these ads with whatever level of education,  
18 income, occupation, background interest and so  
19 forth they may have, how do they evaluate these  
20 dimensions.

21 And, to my knowledge, those kinds of  
22 questions had not been asked.

23 Q. Are there limitations to a study that  
24 asks a group of students to code ads as  
25 distinguished from a group of voters to code those

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1 interpretation and assessment.

2 That is what the survey research is  
3 designed to do. It had all of the precautions and  
4 protections built in to try and remove bias.

5 It had substantial preadministration peer  
6 review, including of other polling firms who  
7 submitted bids and input about questionnaires and  
8 so forth.

9 With respect to the coding issue of the  
10 ads, that is an assessment, if you will, of sort  
11 of an aggregate counting of the intent and purpose  
12 of the ads, based upon a prescribed or common set  
13 of decision rules that are administered across the  
14 ads that presumably bring to the ads more  
15 sophistication in understanding and awareness of  
16 what they are looking for.

17 There is no cuing, in the survey, of what  
18 to look for. I would presume, in the coding of  
19 ads, there would be some such cuing and coding.

20 Q. Let me interrupt you. What do you mean  
21 by cuing?

22 A. You would train the coder. You would  
23 show an ad and you would say how would you  
24 interpret that, and help them identify what the  
25 elements would be of a particular coding scheme,

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1 ads?

2 A. Those are very different methodologies.  
3 And they are really kind of addressing different  
4 questions, I think.

5 Q. And what are the different questions?

6 A. For the survey research you are basically  
7 saying, in the eye of the beholder, which is the  
8 voter, do they see a meaningful distinction  
9 between communications that use the magic words  
10 and that don't, and that is the distinction in the  
11 law, and in regulatory policy.

12 Do they see -- there is a set of separate  
13 questions we haven't spoken about that speak to  
14 the topic this morning about party building, do  
15 they see the soft money ads as different from the  
16 candidate ads, and they don't.

17 But, those also had not been directly  
18 addressed of voters in this way, and they were  
19 also a relevant part of the policy debate.

20 And I think voters are a very important  
21 part of that equation. They are not the only part  
22 of that equation.

23 But how they evaluate, assess and  
24 interpret ads, I think ought to be an important  
25 part of the legislative policy and judicial

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1 which would be specified in writing, and available  
2 to others.

3 Q. And you would expect then, in a study of  
4 a kind that the Buying Time reports report, to  
5 have had that kind of training take place?

6 A. Yes.

7 MR. TRISTER: I have no further questions  
8 at this moment. Let's break for lunch.

9 (Whereupon, at 12:42 p.m., the deposition  
10 in the above-entitled matter was recessed, to  
11 reconvene at 2:09 p.m., this same day.)  
12  
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25

35 (Pages 134 to 137)

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1 AFTERNOON SESSION  
 2 (2:09 p.m.)  
 3 Whereupon,  
 4 DAVID B. MAGLEBY,  
 5 the witness on the stand at the time of recess,  
 6 having been previously duly sworn, was further  
 7 examined and testified as follows:  
 8 MR. TRISTER: I do, in fact, have a  
 9 couple of what I hope will be quick further  
 10 questions about the survey research.  
 11 (The document referred to  
 12 was marked Magleby Exhibit  
 13 No. 5 for identification.)  
 14 EXAMINATION BY COUNSEL FOR PLAINTIFF AFL-CIO  
 15 (RESUMED):  
 16 BY MR. TRISTER:  
 17 Q. First, this has been marked as Magleby  
 18 Exhibit 5.  
 19 Would you look through that and my only  
 20 question is going to be if you can identify it for  
 21 me.  
 22 A. No. Some working document. But, at what  
 23 stage, I don't remember.  
 24 Q. But you can identify it as a working  
 25 document?

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1 A. Yes. But this is not my handwriting.  
 2 Q. Uh-huh. Do you know whose handwriting it  
 3 is?  
 4 A. I don't. As you know, from the bankers  
 5 boxes full of material, I am a pack rat. So, this  
 6 could have been from any number of meetings with  
 7 any number of people talking about possible ways  
 8 to try and do this.  
 9 Q. Okay. And, this is a document that you  
 10 produced in response to the subpoena in this case?  
 11 A. I didn't produce it. I retained two  
 12 people to go through my files and respond to the  
 13 subpoena.  
 14 Q. Who are those people?  
 15 A. Eric Smith and Jeff McKinnon (ph.).  
 16 Q. And who are they?  
 17 A. They are, Jeff McKinnon is an  
 18 undergraduate student. Eric Smith is a former  
 19 research assistant who worked for me at the time  
 20 this project happened.  
 21 Q. But --  
 22 A. The Dictum was not out then. So, he  
 23 would have been, he may not have been involved at  
 24 the time of this in circulation.  
 25 Q. But, they were working under your

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1 supervision in connection with putting together  
 2 the response to the subpoena?  
 3 A. Well, I don't know quite what is meant by  
 4 under my supervision. When I was served with the  
 5 subpoena, it was quite broad and I knew I would  
 6 need help and I retained these two individuals to  
 7 help with the processing of the materials.  
 8 When it came to most day-to-day decisions  
 9 about compliance, they spoke with Mr. Dodyk of  
 10 Cravath. There were some, but only a few  
 11 decisions that I was involved in.  
 12 I did not see the bankers boxes. I was  
 13 not in the room as they assembled this. I asked  
 14 them to respond fully and completely.  
 15 Q. Okay. I don't have any further questions  
 16 about that document.  
 17 When you were designing the survey  
 18 research project that we have discussed at length  
 19 this morning, did you consult with Trevor Potter?  
 20 Let me first ask you, you know who Trevor  
 21 Potter is?  
 22 A. Yes. I may have met with him. I know I  
 23 met with him in each of these cycles. He and I  
 24 interact with each other in a variety of ways.  
 25 And so it is conceivable I would have

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1 asked him about this. I don't remember a specific  
 2 conversation.  
 3 Q. Let me have this marked as an exhibit.  
 4 (The document referred to  
 5 was marked Magleby Exhibit  
 6 No. 6 for identification.)  
 7 BY MR. TRISTER:  
 8 Q. And ask you, can you tell me what you  
 9 believe this to be?  
 10 A. These appear to be my notes from a  
 11 meeting with Mr. Potter and Mr. Jowers. I presume  
 12 it happened on August 29, 2000.  
 13 Q. And when it refers to experiment on  
 14 Page 1 at the top. Do you have an understanding  
 15 of what that would mean?  
 16 A. I don't remember.  
 17 Q. What about on Page 3 of the exhibit where  
 18 it again refers to experiment, and has some  
 19 additional notes?  
 20 A. Well, I may have mentioned to him  
 21 something about our project, which would have been  
 22 well in the design stage by then. But, I don't  
 23 remember what this is in reference to.  
 24 Q. Okay. Let's move on. I want to turn now  
 25 to the portions of your report that deal with the

36 (Pages 138 to 141)

<p style="text-align: right;">Page 142</p> <p>1 1998 and 2000, what I call monitoring studies.  2 A. Case studies.  3 Q. Case studies. First of all, would you  4 turn to Page 15, again of your report, and look at  5 the first sentence of the last paragraph.  6 A. Uh-huh.  7 Q. And I asked you earlier what the basis  8 for that statement was, and I believe you said  9 that it was in part based on the case studies that  10 we are now talking about; is that correct?  11 A. That's correct.  12 Q. Okay. Now, turn over to Page 18, please,  13 the paragraph that is numbered four.  14 A. Uh-huh.  15 Q. In the third sentence: They also are  16 aware in the period before an election.  17 Is that also based in part at least on  18 the '98 and 2000 case studies?  19 A. Yes.  20 Q. And then the following sentence says: In  21 the '98 and 2000 election contest monitored by  22 CSED, there were very few genuine issue ads.  23 So I would assume that too is referring  24 to the results of --  25 A. Yes.</p>	<p style="text-align: right;">Page 144</p> <p>1 report that information to the center?  2 A. Yes.  3 Q. And how did that take place?  4 A. There is a brief template that asked  5 about the content of the ad, and based upon their  6 description of the content of that ad, it was  7 ascertained whether or not it was a genuine issue  8 ad.  9 Q. It was ascertained by the academic or by  10 someone at the center?  11 A. By us at the center. But, I think the  12 academics also looked at this and, in some  13 instances, described it in their reports.  14 Q. Put aside what they described in their  15 reports, I am trying to find out what was in that  16 database.  17 And when the academics in 1998 reported  18 to the center on what you call the template, I  19 think, did they code the ads as genuine issue ads  20 versus electioneering ads?  21 Was that a specific question they were  22 asked?  23 A. No. I think there were a set of more  24 specific questions along the lines of what we  25 talked about this morning.</p>
<p style="text-align: right;">Page 143</p> <p>1 Q. Would you explain to me how you are able  2 to derive these observations, both the observation  3 on Page 15, and the observations on Page 18 from  4 the case studies that you have developed?  5 A. The academics monitoring the case studies  6 had a data entry protocol into a password  7 protected web site in which they recorded, based  8 on a set of criteria that we provided them,  9 whether these ads were genuine issue ads or not.  10 Q. Well, let me first ask, are you talking  11 about both 1998 and 2000, or just 2000?  12 A. More 2000 than 1998. I think we refined  13 the data entry. But, then we also interviewed all  14 of the academics, and as we prepared the report,  15 talked to them about the incidents.  16 I think they were actually, in some  17 instances, asked about that at the Press Club  18 event of genuine issue or pure issue ads in their  19 races.  20 Q. I would like to try to pin this down a  21 little bit more specifically, if I can.  22 In 1998, was there a means by which the  23 academics would code, and I am speaking  24 specifically of broadcast ads now, code the  25 broadcast ads that they had information about and</p>	<p style="text-align: right;">Page 145</p> <p>1 Did the ad mention a candidate by name,  2 did the ad mention an election, those kinds of  3 questions.  4 Q. Is it your testimony that the template  5 asked whether the ad mentioned an election?  6 A. Well, I would like to refresh my memory  7 by looking at the template for '98 to be sure.  8 Q. Well, I am not sure we can provide that  9 to you. But, let's go on to 2000.  10 In 2000, putting aside what the academics  11 may have reported to you in interviews and their  12 reports and so on, in terms of the database, did  13 they also have a template?  14 A. There is a data entry protocol, specific  15 questions that are asked, that I would need to be  16 refreshed on.  17 MR. TRISTER: Let me have this marked as  18 the next exhibit.  19 (The document referred to  20 was marked Magleby Exhibit  21 No. 7 for identification.)  22 BY MR. TRISTER:  23 Q. Can you identify this document that has  24 been marked as Exhibit 7?  25 A. This appears to be a set of images of the</p>

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1 screens that come up in the secure web site, the  
2 password protection web site where academics would  
3 enter data.

4 Q. For which year?

5 A. For 2000.

6 Q. And, if you would turn to the page that  
7 at the top says: Ad Data, Review and Print --

8 A. Is there some reason these haven't been  
9 Bates numbered? Just curious.

10 Q. The reason is that we downloaded, I can  
11 represent that we downloaded this from a CD that  
12 was provided to us with a Bates number.

13 A. I see. So, again, which page am I  
14 looking for?

15 Q. You are looking for the page --

16 MR. DODYK: I think it is ad data, review  
17 and print.

18 THE WITNESS: Yes.

19 BY MR. TRISTER:

20 Q. Now is this an accurate of representation  
21 of what you refer to a template for 2000?

22 A. A part of it, it pulls up follow-up  
23 screens depending on which item. But, yes, this  
24 is part of it.

25 Q. Well, when you say there is an additional

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1 page enter ad data, TV follow-up, ad data, review  
2 and print, and update the ad consultant info, that  
3 collectively those three pages indicate all of the  
4 information that the academics were asked to  
5 submit?

6 A. No. For instance, update the ad issues,  
7 et cetera, would have provided information about  
8 whether the ad supported or attacked a particular  
9 candidate.

10 As in the case of the National Smokers  
11 Alliance, it attacked Brian Schweitzer. So, that  
12 would also be an indicator.

13 Q. Well, let me ask the question in a  
14 slightly different way.

15 With the three pages that I have  
16 mentioned, and the additional page that you have  
17 just mentioned, does that provide us with an  
18 accurate picture of the information that the  
19 academics were asked to provide?

20 MR. DODYK: Meaning whether it is a  
21 complete set of the inquiries made?

22 MR. TRISTER: Yes.

23 THE WITNESS: So the question is, is this  
24 all of the information, one more time, please,  
25 restate the question.

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1 part, are you referring to the fact that there is  
2 room for additional information to be added,  
3 which, if you will skip about four pages further,  
4 it says there is a page called Update the Ad,  
5 Consultant Info?

6 A. Yes. But you could also update the ad  
7 with respect to other information on the previous  
8 page.

9 Q. The previous page being the page --

10 A. Enter ad data, TV follow-up info.

11 Q. I am not seeing it.

12 A. Down at the bottom it says other  
13 information.

14 MR. DODYK: It is prior to the ad data,  
15 review and print page.

16 THE WITNESS: The bottom of that page is  
17 a window that -- well, actually the whole database  
18 is interactive. As they learn more about the ad,  
19 they can go in and update and print.

20 BY MR. TRISTER:

21 Q. Right. What I am trying determine, as  
22 best we can from this document, is what  
23 information the academics were asked to provide to  
24 the database about the ads.

25 Am I correct that, if you will take the

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1 MR. TRISTER: Could you please read it  
2 back.

3 THE REPORTER: "Question: With the three  
4 pages that I have mentioned, and the additional  
5 page that you have just mentioned, does that  
6 provide us with an accurate picture of the  
7 information that the academics were asked to  
8 provide?"

9 BY MR. TRISTER:

10 Q. And that included the update the ad's  
11 issue, et cetera, where they do the brief ad  
12 description?

13 A. Yes. That is the ad-specific not the  
14 group-specific data windows.

15 Q. And when you say group specific data  
16 windows, what are you referring to?

17 A. Well, there are others that are  
18 organization about the group, update an  
19 organization.

20 Q. And that would be information about the  
21 organization that sponsored the ad?

22 A. Yes. And their consultants.

23 Q. But, in terms of the content of the ad,  
24 this would be the information that was provided to  
25 you?

38 (Pages 146 to 149)

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1 A. Right.  
 2 Q. Okay. Now, is there a place in which the  
 3 academic researchers that you worked with were  
 4 asked to classify the ads as electioneering ads or  
 5 issue ads, in those terms?  
 6 A. No.  
 7 Q. Okay. Now, having seen that for 2000,  
 8 would you -- I realize we don't have the 1998  
 9 template in front of us.  
 10 But, would that help you with respect to  
 11 whether or not --  
 12 A. Yes. I suspect there was not an explicit  
 13 request that they classify the ads, they, the  
 14 academics.  
 15 Q. Okay. Now, I see information beginning  
 16 with the page that is marked enter ad data, TV. I  
 17 see information about what race, what the title of  
 18 the ad was, when it was first seen.  
 19 And then I see something about what  
 20 issues did the ad address.  
 21 What I am trying to determine is, did you  
 22 collect information about the content of the ad,  
 23 other than whether the issue raised, whether it  
 24 named a candidate and whether, I believe, it asked  
 25 whether it attacked or supported that candidate?

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1 A. Those elements are all there as well as  
 2 the initial inquiry at the top of enter ad data  
 3 TV, whether or not it used the magic words.  
 4 Q. Yes.  
 5 A. So, adding that one to the list, yes, I  
 6 think those are the primary indicia that we would  
 7 have used to try to identify pure issue ads as the  
 8 subset of ads that did not use the magic words.  
 9 Q. Right. And, so, in reaching the  
 10 conclusions that I referred you to on Pages 15 and  
 11 18, this would have been the only information you  
 12 had available to you?  
 13 A. Right. What subset of ads did not either  
 14 support or attack a candidate and so forth and so  
 15 on, and there were relatively few.  
 16 MR. DODYK: Can I get a clarification,  
 17 Mike?  
 18 In your question, did you mean to include  
 19 the information which is contained on the page  
 20 which is captioned ad data, review and print?  
 21 When you said this, it wasn't clear to me  
 22 whether you were including that or not.  
 23 MR. TRISTER: I did intend to include it.  
 24 I am not trying to trick anybody or to exclude  
 25 anything.

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1 MR. DODYK: I am not suggesting you are  
 2 trying to trick anybody, but I think the reference  
 3 in the question is a little bit muddy.  
 4 MR. TRISTER: I did intend to include  
 5 enter ad data.  
 6 MR. DODYK: You have the page also which  
 7 is captioned ad data, review and print.  
 8 MR. TRISTER: Also the page ad data,  
 9 review and print. Also the page update the ad  
 10 consulting info, and update the ad issues.  
 11 BY MR. TRISTER:  
 12 Q. Those appear to me to be the --  
 13 A. They are the ad specific screens.  
 14 Q. -- the screens that would allow to you to  
 15 enter information about the ads.  
 16 Now, am I correct -- well, let me find  
 17 the place in which the ad asks about -- can you  
 18 show me where it asks whether the name of a  
 19 candidate appears in the ad?  
 20 A. On the ad data, review and print, the  
 21 attack, I would have to go back to the training  
 22 protocols.  
 23 But, I think the attack may have said if  
 24 a name is mentioned, who is mentioned in that  
 25 attack left-hand side, above issue.

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1 Q. Yes, I see that.  
 2 A. But, to be sure, I would like to see the  
 3 training protocols, and talk to the research  
 4 associates as they were working with the  
 5 academics, but that is my assumption.  
 6 Q. Now, if an ad mentioned the name of a  
 7 candidate in what I have been referring to as the  
 8 call-to-action, but did not refer to the name of a  
 9 candidate in the text, were the academic  
 10 researchers given instructions on how to code that  
 11 particular type of ad?  
 12 A. They would have been told to ask that  
 13 question. The research associates, there are  
 14 three of them, who helped liaise with these and  
 15 helped with the data entry.  
 16 And the research associates would have  
 17 been told to bring that question to me. It never  
 18 arose.  
 19 Q. So, the research associates that worked  
 20 with you in, at Brigham Young --  
 21 A. And one here in Washington, two at  
 22 Brigham Young and one here.  
 23 Q. But were the academics who were filling  
 24 out these reports, were they instructed on that  
 25 subject?

39 (Pages 150 to 153)

Page 154

1 A. No. Certainly not in the training and  
2 orientation sessions, they were not given specific  
3 instructions on that question.

4 Q. Now, am I correct that there is no field,  
5 if that is the proper term, in which the  
6 researchers could provide information about  
7 whether the ad mentioned a specific piece of  
8 legislation?

9 A. There is not an expressed view. They  
10 were encouraged with things like other information  
11 to give us as complete a set of notes as possible.

12 And some of them may have mentioned that  
13 if, in fact, legislation was mentioned. But, no,  
14 we did not expressly ask for that.

15 Q. Did you expressly ask whether an ad  
16 included a telephone number at which a member of  
17 Congress could be contacted to express, by a  
18 viewer to express his or her opinion about the  
19 subject matter of the ad?

20 A. No. We did not expressly ask that.

21 Q. What instructions did the researchers  
22 receive concerning which ads they should report  
23 on?

24 A. They were told to monitor all forms of  
25 communication in the particular race. And the

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1 CMAG story boards, and I gather in 1998 it was a  
2 different company.

3 A. It was.

4 Q. But it also provided story boards?

5 A. Uh-huh.

6 Q. Did you or your research associates add  
7 additional information to the database from your  
8 review of the ads, other than the information that  
9 is in the field?

10 A. Not to my knowledge. We would have  
11 created a set of question files and gone back to  
12 the academics.

13 We perceived this as something that we  
14 would interact with them, but we wouldn't want to  
15 change anything without their knowing.

16 We might have faxed them a story board,  
17 we may have said we want to show you a tape. But,  
18 by and large, I don't think we altered the data.

19 Q. In describing the interactions that you  
20 had with the researchers, I think you said that  
21 you asked them to report on all of the ads in the  
22 race, I think were your words.

23 A. Uh-huh.

24 Q. Does that mean every ad shown on  
25 television during a particular period of time?

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1 database includes some candidate ads as well.

2 And we did show them commercials, across  
3 a range of commercials to help them understand the  
4 distinction in terms of the magic words,  
5 distinction which permits interest groups to  
6 communicate election messages, while not  
7 disclosing who they are, or how much they are  
8 spending and why this was relevant. And therefore  
9 we were trying to monitor that as well as genuine  
10 issue advocacy, as well as candidate  
11 communications, as well as internal communications  
12 within organizations.

13 So, we have a fairly lengthy orientation  
14 that shows commercials and talks about all of  
15 that. And in many instances, we are also able to  
16 see the same ads ourselves because of the Hotline  
17 tapes.

18 And we are also able to see the story  
19 boards, either through Hotline or through CMAG.  
20 We indicated we would share those with them and  
21 have.

22 But, there was a lot that went into that  
23 orientation, I may not be remembering everything  
24 that was said.

25 Q. When you say that you had access to the

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1 A. No, not every ad shown on television.

2 They would have needed to exercise some judgment.

3 Q. Certainly not Pepsi Cola ads, for  
4 example?

5 A. Exactly.

6 Q. In exercising the discretion in order to  
7 narrow the ads they were looking at, what  
8 instructions did they receive with respect to how  
9 to exercise that discretion, in terms of which ads  
10 fell in this category of in the race?

11 A. Well, for instance, a question arose  
12 about whether an ad that mentions more than one  
13 candidate, say a Presidential candidate and a  
14 House or Senate candidate, arose, those were  
15 included in the database.

16 And they were informed at the outset  
17 about the distinction between pure issue advocacy,  
18 which is how I have almost typically described it,  
19 and election issue advocacy.

20 And they were told not to exclude pure  
21 issue advocacy, because that is a relevant  
22 dimension that we were looking at.

23 So, with respect to other contests that  
24 were happening simultaneously, gubernatorial,  
25 whatever, they were told please don't enter those.

40 (Pages 154 to 157)



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1 Q. They were limited to federal candidates?  
 2 A. Federal candidates. Unless there were  
 3 communications vehicles like slate mailers that  
 4 included federal and state, and those would then  
 5 be included.  
 6 Q. Right. But with respect to broadcast  
 7 ads.  
 8 A. Right, federal.  
 9 Q. Federal. Did the researchers receive any  
 10 instructions on whether to include an ad which  
 11 included the likeness and name of a candidate, but  
 12 was in the nature of a charitable solicitation?  
 13 A. We did not give any specific instructions  
 14 to include or exclude that.  
 15 Again, this is an interactive process  
 16 where we are studying something that requires  
 17 collegial interaction without classification and  
 18 codification.  
 19 The instructions would have been, if that  
 20 arose, to raise it and to ask how to classify it  
 21 and put it in the database initially to retrieve  
 22 it and then we talk.  
 23 I don't remember anyone raising a  
 24 charitable contribution solicitation that was a  
 25 broadcast ad in either cycle.

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1 which allowed you to reach the conclusions I  
 2 referred you to on Pages 15 and 18?  
 3 A. Yes.  
 4 Q. And what was that analysis?  
 5 A. I asked research associates to tally the  
 6 incidence of those items mentioned on Page 15. I  
 7 need to refresh my memory of specific reference.  
 8 Are we on 15 or 18? It is the same  
 9 thing, isn't it?  
 10 Q. I think it is the same thing.  
 11 A. Yes. There were very few, and whether  
 12 they gave me a number, or they gave me a  
 13 reference, very few, I relied upon that analysis.  
 14 Q. But, what ads did they include in telling  
 15 you, or informing you, that there were just very  
 16 few of such ads in the database?  
 17 MR. DODYK: Could you tell us what you  
 18 mean by include?  
 19 BY MR. TRISTER:  
 20 Q. Well, he said that the researchers  
 21 informed him of how many ads were in the database  
 22 that were genuine issue advocacy; is that correct?  
 23 A. Correct.  
 24 Q. And I am asking you which ads the  
 25 researchers included in the category of genuine

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1 Q. What about an ad that mentioned the name  
 2 of a candidate, but only in the title of a bill,  
 3 an example being McCain-Feingold, although I  
 4 understand you didn't monitor those races?  
 5 A. Again, that would have been one where I  
 6 presume they would have raised that with us. We  
 7 would have classified that as a relevant ad.  
 8 Q. If you were asked?  
 9 A. If we were asked, yes.  
 10 Q. Do you remember being asked about such an  
 11 ad?  
 12 A. I don't remember ever being asked about  
 13 such an ad. More typically the way legislation is  
 14 mentioned in ads, or referred to in ads, is by the  
 15 topic of the legislation.  
 16 Hate crimes, tariffs, jobs, whatever it  
 17 may be, not a particular bill by name, that is to  
 18 say sponsor name.  
 19 Q. In the title of the ad?  
 20 A. Either in the title of the ad or the  
 21 content of the ad.  
 22 Q. I see. Now, we have been talking about  
 23 the data which was provided to you in the  
 24 database.  
 25 Did you perform an analysis of that data

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1 issue advocacy?  
 2 MR. DODYK: Are you asking him to  
 3 identify particular ads, or a different question?  
 4 BY MR. TRISTER:  
 5 Q. No, the characteristics of those ads.  
 6 A. With respect to the presidential  
 7 primaries, we were aware of, and, in fact, had  
 8 observed some genuine issue ads in Iowa and New  
 9 Hampshire, and so the research associates were  
 10 alerted to this type of ad and monitoring it.  
 11 And there are two groups, the exact names  
 12 of the groups, I am wanting to get right and  
 13 Sensible Priorities is in the name of one of the  
 14 groups that did these ads, some ads in New  
 15 Hampshire and Iowa, and there was another group.  
 16 Compared to the activity of several other  
 17 groups, they were quite rare. And I couldn't give  
 18 you an exact number today, but they were more  
 19 frequent, however, than we were finding in Senate  
 20 races and House races.  
 21 They were examples of the kinds of ads we  
 22 showed the academics as we trained them for the  
 23 general election cycle.  
 24 Q. I am still trying to figure out what the  
 25 characteristics were of those ads, and

41 (Pages 158 to 161)

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1 specifically did those ads mention a candidate by  
2 name?

3 A. No. They did not mention a candidate by  
4 name. That would be one of the defining  
5 characteristics. And part of the data for that  
6 would come from the supports or attacks data entry  
7 window.

8 Part of it also from the description of  
9 the ad in the Iowa database, or the New Hampshire  
10 database.

11 Q. Did any of the case studies, that you  
12 conducted in 1998 and 2000, look at Congressional  
13 primary elections?

14 A. There were, in 2000, two cases, I  
15 believe. Again, I would like to refresh my  
16 memory, Oklahoma two, in which there was a  
17 contested primary in September, and another one  
18 that I have to go back and research, in which we  
19 did include an assessment of the primary with the  
20 general election.

21 But, by and large primaries that happened  
22 before the window in which we were gathering in  
23 this data, where relevant and where possible, we  
24 have tried to include them.

25 There aren't very many. There are two, I

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1 Association, which happens in late August.

2 They had been oriented before that time  
3 and provided with a binder, loose-leaf binder,  
4 with a set of background readings with an earlier  
5 kind of version of the secure web site templates.

6 With definitions and other relevant  
7 research preparation materials for them to read  
8 before the training and for them to provide to all  
9 of the assistants who were helping them in going  
10 to the stations.

11 So, a letter of introduction from the  
12 Federal Communications Commission, Mr. Baker, and  
13 so forth and so on. So, it was a rather extensive  
14 primer on the topic and how to do research on the  
15 topic.

16 Q. And one of the things you provided  
17 training on was how to obtain information about  
18 broadcast ads that were run?

19 A. Yes.

20 Q. Information from stations?

21 A. Yes.

22 Q. Any other sources?

23 A. We explained to them that we were going  
24 to be acquiring a set of backup data that might  
25 assist them in gathering data through CMAG, or

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1 think.

2 Q. Two that fell within your research  
3 period?

4 A. Exactly. And then the five presidential  
5 primaries.

6 Q. Yes. I realize that, I was asking you  
7 about Congressional and Senate primaries.

8 A. Right. Just to be completely clear, the  
9 other type of election which I think might attract  
10 quite a bit of soft money and electioneering  
11 advocacy and perhaps pure issue advocacy would be  
12 special elections, and we also did not include  
13 those.

14 Q. And, just to complete the list, did you  
15 look at any runoff elections?

16 A. No. Are you thinking of Louisiana?

17 Q. I am not sure. Yes, Louisiana is an  
18 example.

19 I believe you indicated earlier that  
20 there was some form of training that took place of  
21 the academics that you were working with in each  
22 of the jurisdictions.

23 Can you describe that training for me?

24 A. Sure. We brought them together at the  
25 meeting of the American Political Science

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1 Strategic Media in '98.

2 We explained to them how to go about  
3 building a reconnaissance network that involved  
4 political reporters, elites, friends, neighbors,  
5 whomever, to help collect mail.

6 We explained the methodology of elite  
7 interviews at multiple levels. So you speak to  
8 people from AFSCME at the local level, as well as  
9 we will talk to them in Washington.

10 And the same thing applied to the parties  
11 at multiple levels and consultants. I call it the  
12 wag-the-dog theory. They all want to claim credit  
13 if they win and it is somebody else's fault if  
14 they lost.

15 So, the elite interviewing component was  
16 also heavily emphasized, as well as the station  
17 visits, and the other data aggregation efforts.

18 Q. The CMAG data, which you have just  
19 referred to, or the CMAG information that you  
20 obtained from CMAG, that was used by you as a  
21 backup to determine whether there were ads that  
22 had run, but had possibly been missed by your  
23 researchers?

24 A. Or to try and help push stations to more  
25 fully report to us.

42 (Pages 162 to 165)

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1 So, for instance, our sampling design  
2 includes races that would not be in the top 75  
3 media markets, Montana, Reno, Nevada, for example,  
4 I could go on and on. Competitive races don't  
5 always happen in densely populated areas.

6 Q. And the significance of 75 is that CMAG  
7 doesn't report information for those?

8 A. Exactly. So, if we were depending on  
9 relying purely on CMAG, we would have not been  
10 able to study South Dakota this year. That is one  
11 we are studying.

12 So, we are not dependent on CMAG in that  
13 sense. The methodology very clearly says go to  
14 cable and broadcast stations.

15 And that is another important distinction  
16 between us and CMAG, we include going to cable  
17 stations, which are not included by CMAG, and  
18 radio, again, which is also not included by CMAG.

19 And in the course of gathering that data,  
20 the CMAG printouts of ads run in that market  
21 during that time period were helpful in that the  
22 extent of which stations organize themselves well  
23 varies.

24 And, so local station management may not  
25 include a group doing election advocacy in or near

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1 CMAG data, and that tells you about all of the  
2 ads, the TV ads, why would you go to all of the  
3 trouble of also going to the stations?

4 A. We were not 100 percent sure of the CMAG  
5 data.

6 Q. Why not?

7 A. We are suspicious by nature.

8 Q. In what way were you not sure?

9 A. It is a new technology. We are trying to  
10 learn about something that CMAG itself is not  
11 very -- I wasn't sure that it worked.

12 And so before I throw away a methodology  
13 that had proven rather successful in '98, I felt  
14 that we needed to, and I continue to feel, that we  
15 need to go to the stations.

16 So, the other reason is, it is very  
17 helpful, I think, to be able to document the  
18 extent to which the broadcasters increase their  
19 rates on these groups.

20 And you will note in the research that we  
21 have done that we can document that that is often  
22 extraordinary.

23 So, there is substantial profit-taking  
24 going on among broadcasters in certain markets for  
25 groups who want to communicate before an election.

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1 the political files.

2 And only when asked about this particular  
3 group, the Smokers Alliance, were they, oh, that  
4 is over here in this file cabinet.

5 And so, it was and is a useful device to  
6 help document what they should have already been  
7 doing from their own reconnaissance of what was  
8 running, watching tag lines, writing those down,  
9 and having others inform them of those tag lines.

10 So, in that sense the CMAG data  
11 supplemented what we tried to get from the  
12 stations. The other way that I think the CMAG  
13 data provides a minimal baseline is in the  
14 estimation of cost.

15 In most media markets we have been able  
16 to find at least one network affiliated station  
17 that provided rather complete cost and pricing  
18 information, some do not.

19 And the CMAG data at least gives you what  
20 the normal rate for that segment of time would be  
21 for that ad, which rather substantially  
22 underestimates the cost of what the ad actually  
23 costs, if it was a noncandidate commercial.

24 Q. It seems to me that if you have access in  
25 those jurisdictions where you have access to the

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1 Q. The National Association of Broadcasters  
2 is a Plaintiff in this case and they are not here  
3 to defend themselves.

4 A. Well, we are grateful for the National  
5 Association of Broadcasters form which provides  
6 very minimal information, but at least a local  
7 contact number, local name which, as you know from  
8 reading the monograph, proves very helpful.

9 We call those numbers and we try and  
10 track down those people. That also is not  
11 available in the CMAG data, by the way.

12 Q. Did you find any instances in your 2000  
13 studies in which you found ads, through your  
14 visits to the stations with your various  
15 in-the-field techniques, which had not been picked  
16 up by CMAG?

17 A. Yes.

18 Q. Can you give me the specifics?

19 A. Yes. I have asked the research  
20 associates to refresh their memories about this.  
21 It was relatively rare, but there were a few ads  
22 that we found that they did not.

23 Because we were exchanging information  
24 with the Wisconsin group, we notified Professor  
25 Goldstein of those ads when we found them. They

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1 are in our database, I don't know whether they are  
2 in his.

3 They were relatively rare, as I think I  
4 said.

5 Q. Do you remember how many?

6 A. I would think a handful of districts.  
7 And only one or two kinds of ads in those  
8 districts.

9 Q. But, those, you would only be comparing  
10 the CMAG list with your own list, and if you had  
11 missed ads, that CMAG had also missed, then you  
12 wouldn't know about that?

13 A. That's right. Again, we are going to all  
14 broadcast and cable affiliates in a market when we  
15 aggregate the two systems together the way we do,  
16 we are confident we don't miss very many ads.

17 The way we confirm that is by  
18 interviewing people. Who would we interview? We  
19 ask in the interviews both campaigns, both  
20 parties, the interest groups who are otherwise  
21 campaigning, all of whom are also simultaneously  
22 monitoring these very same events.

23 And we say to them, here are the groups  
24 we have seen active in this race, are there any  
25 that we have missed.

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1 A. With the interest groups that were active  
2 and players, and that includes mail. So it would  
3 take in the mail that we had retrieved and show  
4 them the mail and say were there other pieces of  
5 mail your group did?

6 I can remember other instances with the  
7 NEA, or, and there are even some groups now, I  
8 believe the conservation folks, for example, who  
9 saved their mail for us.

10 They said, why go to the bother of  
11 retrieving, we will just create a file for you.

12 Q. Let's turn to Page 26 of your report.  
13 And I am specifically referring to the section  
14 that begins on Page 26, and labeled D, Strategies  
15 and Techniques of Electioneering Advertisements  
16 and Election Advocacy.

17 I am somewhat confused as to what you are  
18 saying, not as to the specifics, but the general  
19 presentation.

20 Specifically, in the introduction to that  
21 section, you say, in the first sentence, you  
22 describe electioneering advertisements that are  
23 steady monitored, sidestep disclosure, et cetera.

24 A. I am --

25 Q. Because --

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1 So there is a corroboration that comes  
2 from the interviewing stage, including the  
3 consultants, and by that I mean the media  
4 consultants, who are also in the business of  
5 tracking and monitoring what the opposition is  
6 doing, including the interest groups and the  
7 parties.

8 Q. But, if I understand it --

9 A. So, everybody missed it if we missed it  
10 is what I am saying.

11 Q. I am trying to figure out what you mean  
12 by what was missed. The interviews would tell you  
13 whether there was a group that was active that you  
14 had missed.

15 A. Or whether there was a particular ad that  
16 a group had done. So, if in Nevada Senate, if the  
17 AFL did three ads that we thought, and this is a  
18 hypothetical, it didn't happen, it did happen with  
19 mail.

20 And, we said we found these three ads  
21 which you ran, and they said, oh, you are missing  
22 the Social Security ad.

23 Q. Did you in each instance when you did an  
24 interview review all of the ads that you had  
25 found? Did your researchers do that?

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1 A. Are we looking at the paragraph at the  
2 bottom of Page 26?

3 Q. No. I am right after D.

4 A. Okay.

5 Q. And you say, in the first sentence, there  
6 were certain ads that avoided express advocacy,  
7 but were, in your estimation, electioneering  
8 advertisements.

9 A. Uh-huh.

10 Q. Or were defined as internal  
11 communications. Then you go on to say  
12 nevertheless these communications were nearly  
13 universally oriented towards electing or defeating  
14 specific federal candidates and have distinct  
15 characteristics demonstrating their electioneering  
16 character.

17 And am I correct that it is then the  
18 characteristics, the distinct characteristics that  
19 you are referring to are then described in the  
20 following pages, these No. 1, theme and message,  
21 No. 2, masking identity, et cetera?

22 A. No. I think the theme and message,  
23 masking identity speaks to strategies and  
24 techniques more generally, not specifically to  
25 what defines or makes these an electioneering

44 (Pages 170 to 173)

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1 communication.  
2 So these are strategies and techniques of  
3 electioneering advertisements and election  
4 advocacy. Theme and message is one, masking  
5 identity is one, targeting members, demographic  
6 and other groups and so forth.

7 So it is more broadly, I think, than you  
8 have just described it.

9 Q. Well, don't you say in your discussion,  
10 and we will get into the specifics in a moment,  
11 but don't you say in various places that these  
12 characteristics demonstrate an electioneering  
13 purpose of the ad?

14 A. Yes. They are partial indicators.

15 Q. What other indicators would there be?

16 A. Oh, naming the candidate, showing the  
17 candidate, would be two others. Mentioning an  
18 election as referred to elsewhere in the report.

19 Q. Okay. We have got naming a candidate or  
20 depicting a candidate, mentioning an election.

21 Are these characteristics, which you have  
22 identified, are they necessary characteristics in  
23 addition to the ones that you have mentioned?

24 A. No. They are not necessary. They are  
25 rather indicators of the reality that interest

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1 And her assessment of the issue content  
2 of the ads, her description of the ads and so  
3 forth.

4 Q. Now, are you referring to a conversation  
5 you had before writing this report?

6 A. No. I would have, in the writing of this  
7 report, reviewed all of the case studies from '98  
8 and 2000, and this was an example from one of  
9 those case studies. This is from her.

10 Q. Now, did you verify the information in  
11 those case studies as to their accuracy?

12 A. No.

13 Q. When you refer to the case study for the  
14 New Mexico Third District, let me show you some  
15 pages I have excerpted from outside my --

16 (The document referred to  
17 was marked Magleby Exhibit  
18 No. 8 for identification.)

19 BY MR. TRISTAN:

20 Q. Is the material on Page 141, the third  
21 page of the exhibit, under the heading the  
22 AFL-CIO's campaign, is that the material that you  
23 have reviewed?

24 A. Yes.

25 Q. Now, one of the things I am curious about

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1 groups and parties have found ways to effectively  
2 run candidate-centered campaigns while avoiding  
3 the regulations of FECA. That is to disclosure  
4 and so forth.

5 MR. TRISTER: Could you read that back.

6 THE REPORTER: "Answer: No. They are  
7 not necessary. They are rather indicators of the  
8 reality that interest groups and parties have  
9 found ways to effectively run candidate-centered  
10 campaigns while avoiding the regulations of FECA.  
11 That is to disclosure and so forth."

12 BY MR. TRISTER:

13 Q. Let's turn to Page 27. And specifically  
14 to the paragraph at the top of the page which  
15 deals with certain AFL ads.

16 Have you had a chance to look at it?

17 A. Uh-huh.

18 Q. I will take that as a yes?

19 A. Yes. I am sorry, my apologies.

20 Q. What is the source of your information in  
21 this paragraph about the AFL ads?

22 A. This would be from Lonna Rae Atkinson,  
23 University of New Mexico, who was evaluating the  
24 New Mexico House race that is mentioned here, the  
25 Third District in '98.

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1 is in your description of the ads in your expert  
2 report, on Page 27, you describe, you say the  
3 AFL-CIO ran two television issue ad spots.

4 And you say the commercials focused on  
5 tax cuts that were paid for by raiding the Social  
6 Security Trust Fund.

7 In the case study that you have just said  
8 you reviewed, I see references to two different  
9 ads.

10 A. Yes. There is a reference to the second  
11 ad, which either got edited out or somehow  
12 omitted.

13 Q. I am sorry, edited out of your expert  
14 report?

15 A. I don't know how it didn't make it in  
16 there.

17 Q. You wrote your expert report, didn't you?

18 A. Oh, yes, I did.

19 Q. All right. And so the ad that is  
20 mentioned that did not make it into your expert  
21 report is an ad about HMOs; is that correct?

22 A. Exactly.

23 Q. Okay. Now let's focus on the ad that did  
24 make it into your report.

25 You go on, in your expert report, you

45 (Pages 174 to 177)

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1 say, but despite union funding, neither of these  
2 ads, referring to the Social Security Trust Fund  
3 ads, directly relates to core union issues, like  
4 working conditions, pay raises, or employment  
5 benefits.

6 Now, on what did you base that  
7 conclusion?

8 A. Well, the ad relating to Social Security  
9 Trust Fund and taxes does not relate to core union  
10 issues as described in that sentence.

11 Q. Well, how did you determine whether  
12 Social Security Trust Fund is a core union issue?

13 A. Based upon what a reasonable person might  
14 assume core union issues would be, like the ones  
15 listed in the report.

16 Q. Well, is it your position that any ad  
17 that the AFL might run on any issue, other than  
18 the issues mentioned in your report, working  
19 conditions, pay raises, or employment benefits,  
20 would be suggestive of the fact that it is an  
21 electioneering message?

22 A. No. That is not what I am saying. What  
23 I am saying is that interest groups, this is an  
24 example, have adopted, as their issue content,  
25 more generic or general issues than they have

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1 have a different view of what their core issues  
2 were?

3 A. No.

4 Q. They wouldn't?

5 A. No.

6 Q. And would you have a different view of  
7 what their core issues are?

8 A. No.

9 Q. You wouldn't? If I showed you that over  
10 a period of five years the AFL-CIO had testified  
11 in Congress on these very same Social Security  
12 issues on numerous occasions, would that change  
13 your view of what is a core issue?

14 A. It would suggest to me that the core  
15 issue for the AFL-CIO is also a core issue for  
16 more voters generally, which is the point of what  
17 this section of the report is about.

18 That the interest groups are adopting the  
19 issue strategies of the candidates more than they  
20 are adopting issues that one would readily  
21 identify with the group.

22 Q. But I am trying to identify who readily  
23 identifies them that way.

24 Doesn't the group define what is its core  
25 issues, what it cares most about?

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1 issues that directly relate to their core  
2 concerns.

3 Q. Are you saying that they, the AFL, chose  
4 the issue of the Social Security Trust Fund for  
5 its ad for electioneering reasons?

6 A. I assume so.

7 Q. Why do you assume that?

8 A. Because they are communicating to a  
9 general electorate. They are not communicating  
10 only to their members. These are television ads  
11 to a mass audience.

12 Q. That is quite true. But, why does the  
13 fact that they are communicating to a general  
14 electorate tell you that a Social Security Trust  
15 Fund ad is not a core issue of the AFL-CIO?

16 A. It says that it is not an issue that on  
17 its face is, or would normally be considered to  
18 be, a core concern of the AFL-CIO, like employment  
19 conditions.

20 Q. Normally by whom?

21 A. A reasonable voter who does not know the  
22 specifics of the issue concerns of the AFL-CIO.

23 Q. If the AFL had run numerous ads on the  
24 subject of Social Security over a period of five  
25 years in this district, would viewers possibly

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1 A. Sure, yes.

2 Q. It does. And so if it lobbied and spent  
3 hundreds of thousands of dollars lobbying on those  
4 issues that would help to demonstrate that it was  
5 a core issue.

6 A. Uh-huh.

7 Q. And if it had run ads over a period of  
8 years on those same issues, that would also help  
9 to show that it was a core issue; would it not?

10 A. The question to me is to whom. To  
11 persons who are monitoring all of those particular  
12 kinds of communications you are doing, yes.

13 To a voter, I am not confident that they  
14 would understand or know that. They would assume  
15 that matters that unions care about may be a much  
16 more narrow range of issues.

17 Q. And why would that matter to the viewer?

18 A. I am not sure that it does. The issue of  
19 this section is about the convergence of the issue  
20 agendas of those doing election advocacy of the  
21 candidates.

22 Q. Yes. But, when you use a term like  
23 convergence, I am hearing, perhaps you don't  
24 intend it, a suggestion that the group that is  
25 running the ads is deliberately choosing the topic

46 (Pages 178 to 181)

Page 182

1 of the ad because it is similar to the topic of  
 2 the ads which the candidates are running.  
 3 A. That's right. And there are examples  
 4 here that clearly demonstrate groups do that.  
 5 Q. But aren't there numerous examples in  
 6 which there could be a convergence of issues in  
 7 which the group set the agenda and the candidate  
 8 followed?  
 9 A. That is possible.  
 10 Q. And don't you, indeed, write about that  
 11 in a number of your pieces?  
 12 A. That is possible.  
 13 Q. And that is one of your concerns about  
 14 what you call outside money; is it not?  
 15 A. Yes.  
 16 Q. So, the fact that there is convergence  
 17 doesn't in itself tell us, one way or the other,  
 18 about the motive of the group in picking that  
 19 topic.  
 20 A. No. But what it does say is that that  
 21 group has an advantage, within the context of the  
 22 FECA laws, in communicating that message that  
 23 neither candidate -- that the candidates certainly  
 24 don't do, because they are constrained in  
 25 fund-raising and communicating.

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1 So if you look at it in a whole  
 2 perspective, it is a substantial expansion of the  
 3 ability of interest groups to communicate  
 4 election-specific messages on the same topics that  
 5 candidates are that are, in the eyes of the voter,  
 6 indistinguishable.  
 7 Q. Indistinguishable as to topic?  
 8 A. And to purpose.  
 9 Q. I don't understand --  
 10 A. That is the whole dictum of the research.  
 11 It shows, to the eyes of the voter, these are  
 12 about trying to help you elect or defeat a  
 13 candidate.  
 14 Q. But your dictum research didn't explore  
 15 in any way the convergence of issues, did it?  
 16 A. No. But it speaks to how voters  
 17 perceived it and we were speaking about voters.  
 18 Q. Perceived in the ads that you have showed  
 19 them.  
 20 A. The purpose of the ads, exactly.  
 21 Q. The purpose of the ads, of the eight ads  
 22 that you showed them in dictum and the information  
 23 that you gave them about those ads, right?  
 24 A. Right.  
 25 Q. And you didn't give them information,

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1 your focus groups, or your survey participants,  
 2 information about whether candidates were running  
 3 the same ads on the same topics?  
 4 A. No.  
 5 Q. Let me just make sure I understand. You  
 6 were not saying that an ad, which is not a core  
 7 union issue -- on a topic which is a core union  
 8 issue, was selected by the AFL, that that tells  
 9 you it was selected by the AFL for an  
 10 electioneering purpose?  
 11 A. No. I am not saying that.  
 12 Q. Let me turn over to Page 28. And you  
 13 make a reference there that the National Right to  
 14 Life Committee --  
 15 A. Uh-huh.  
 16 Q. -- in the first paragraph. And you  
 17 indicate that they ran ads on campaign finance  
 18 reform and I think you indicated, also, that that  
 19 would be an example of an ad that, in your view,  
 20 was on a topic that was not central to the group.  
 21 A. Correct.  
 22 Q. Now, again, how do you reach that  
 23 conclusion on what information tells you that  
 24 about the group?  
 25 A. The National Right to Life Committee has

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1 as its core focus, in my view, the protection of  
 2 the unborn and the issue of abortion.  
 3 This ad was not about the protection of  
 4 the unborn or abortion.  
 5 Q. But, can't the National Right to Life  
 6 Committee decide that, in order to achieve its  
 7 positions on abortion, it needs to take positions  
 8 on campaign finance reform and perspective reforms  
 9 which they believe will interfere with their  
 10 ability to achieve their position on abortion?  
 11 A. Yes.  
 12 Q. And, in fact, the National Right to Life  
 13 Committee has done that, have they not?  
 14 A. Yes.  
 15 Q. They are a Plaintiff in this case, I  
 16 believe?  
 17 A. Yes.  
 18 Q. And are you familiar with the litigation  
 19 that that organization and its affiliates have  
 20 brought over the last ten or more years  
 21 challenging various provisions of federal and  
 22 state campaign laws?  
 23 A. No, I am not.  
 24 Q. If I told you that they had probably  
 25 litigated more cases than any other interest group

47 (Pages 182 to 185)

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1 in the country, would that surprise you?  
 2 A. Yes.  
 3 Q. You might want to do a little extra  
 4 research.  
 5 If I told you that the National Right to  
 6 Life Committee, at least since 1997, has included  
 7 campaign finance reform as one of the legislative  
 8 issues on which they report Congressional voting  
 9 records to their members, would that surprise you?  
 10 A. No.  
 11 Q. That would not. And that would not  
 12 change your mind as to whether this was a core  
 13 issue?  
 14 A. No.  
 15 Q. Why not?  
 16 A. This section is simply talking about the  
 17 core issue focus of various interest groups, and  
 18 the advantage that they have in communicating  
 19 because of the laws interpreted in Buckley in  
 20 election issue advocacy.  
 21 And that that gives them rather wide  
 22 latitude to communicate on a broad range of  
 23 issues, some of which converge, some of which do  
 24 not.  
 25 Q. Let's continue on Page 28. You have a

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1 questions of himself, Mr. Eric O'Keefe of  
 2 Americans for Limited Terms, David Hanson of the  
 3 NRSC and Matt Engle of the DCCC, Mr. Rosenthal  
 4 made a statement, I believe I quoted in here, but  
 5 to the effect that the AFL-CIO does not mask its  
 6 identity.  
 7 Ms. Inland (ph.), in a question and  
 8 answer period, commented as in Connecticut 5,  
 9 labor was part of a group calling itself the  
 10 Coalition to Make Our Voices Heard, and in fact,  
 11 they had masked their identity.  
 12 Mr. Rosenthal responded that organized  
 13 labor, like other groups, plays by the rules as  
 14 they are now written, something to that effect.  
 15 Q. You say here that labor campaigned behind  
 16 a group called Coalition to Make Our Voices Heard.  
 17 And the word that I am focusing on is campaigned.  
 18 Is it your understanding that the ad that  
 19 ran in the Connecticut Fifth District by the  
 20 Coalition to Make Our Voices Heard was a campaign  
 21 ad?  
 22 A. Based upon the exchange, and the case  
 23 study, and I haven't read those to prepare for  
 24 today, I am happy to revisit those.  
 25 If this was election advocacy, as I

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1 section called Masking Identity, which is, again,  
 2 one of those characteristics that you referred to  
 3 earlier.  
 4 And you, if we can turn over to Page 29,  
 5 I am sorry, Page 30, in the second full paragraph,  
 6 you again refer to an ad that was run in the  
 7 Connecticut Fifth Congressional District.  
 8 And you say: In the Connecticut Fifth  
 9 Congressional District, labor campaigned behind a  
 10 group called Coalition to Make Our Voices Heard.  
 11 Now, what is the source of your  
 12 information in that paragraph?  
 13 A. Twofold. This is described in the  
 14 Connecticut 5K study in the 1998 monograph. I am  
 15 not remembering if the Connecticut case study is  
 16 an outside one.  
 17 And an exchange of the National Press  
 18 Club in early February of '99 in a roundtable  
 19 discussion that Mr. Steve Rosenthal participated  
 20 in, in which he was asked specifically about this  
 21 question, this group, I should say.  
 22 Q. What was Mr. Rosenthal asked about this  
 23 group?  
 24 A. Mr. Rosenthal had said in the after lunch  
 25 conversation, where reporters and others could ask

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1 assumed it was, then it was in essence a campaign  
 2 ad.  
 3 Q. And when you say election advocacy, you  
 4 mean an ad that mentions the name of candidates?  
 5 A. Or an election, or it occurs within 60  
 6 days of an election, and so forth.  
 7 Q. Let me show you Exhibit 9.  
 8 (The document referred to  
 9 was marked Magleby Exhibit  
 10 No. 9 for identification.)  
 11 BY MR. TRISTER:  
 12 Q. If it will make it easier for you, the  
 13 discussion of the AFL ad begins at the bottom of  
 14 Page 163 and continues over to 164.  
 15 Have you had a chance to look at this  
 16 material?  
 17 A. Yes.  
 18 Q. And is this the material you consulted in  
 19 preparing your expert report on this subject?  
 20 A. In part. I also read the transcript of  
 21 the exchange at National Press Club between  
 22 Ms. Inland and Mr. Rosenthal.  
 23 Q. Okay. We will get to Mr. Rosenthal's  
 24 comments in a second.  
 25 With respect to the other material that

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1 is in this paragraph, it states, does it not, that  
 2 the AFL-CIO in July spent at least \$75,690 on  
 3 television issue ads on the subject of patients  
 4 rights, does it not?  
 5 A. Yes.  
 6 Q. And these thank Representative Maloney  
 7 for supporting the proposal; is that right?  
 8 A. Yes.  
 9 Q. Can you think of any reason why the AFL  
 10 would run ads in July in their own name, and then  
 11 turn around subsequently and run ads in the name  
 12 of what you refer to as a front group.  
 13 A. Can I think of reason why they might have  
 14 is that question?  
 15 Q. Yes.  
 16 A. Yes.  
 17 Q. What would that be?  
 18 A. Polling might be one reason.  
 19 Q. What would polling tell them?  
 20 A. Maybe running in their own name didn't  
 21 work as well as running in another name.  
 22 Q. Now, did your researchers find any  
 23 evidence that that was the case?  
 24 A. No. You asked about what might have  
 25 happened.

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1 Q. I see. The article or the case study  
 2 refers to the fact that the Coalition to Make Our  
 3 Voices Heard was headed by Linda Chavez-Thompson  
 4 of the AFL and Reverend Jesse Jackson, does it  
 5 not?  
 6 A. Yes, it does.  
 7 Q. And, the Reverend Jackson, is, of course,  
 8 a well-recognized civil rights leader, is he not?  
 9 A. He is.  
 10 Q. And, is it possible, in your mind, that  
 11 the Reverend Jackson and this organization, with  
 12 which he is affiliated, was concerned with  
 13 encouraging members of the minority community in  
 14 Connecticut to vote in the upcoming election?  
 15 A. Could have been.  
 16 Q. And --  
 17 A. I don't know.  
 18 Q. It says here that the ad was run in  
 19 Hartford and possibly in Bridgeport.  
 20 Are those both cities, to your knowledge,  
 21 with reasonably large minority communities?  
 22 A. I am not sure.  
 23 Q. I see. If the ad in question, run by the  
 24 Coalition to Make Our Voices Heard, did not  
 25 include the magic words, did not mention the

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1 candidate by name, and urged viewers, or I guess  
 2 this is a radio ad, listeners to register and  
 3 vote, would you still regard that as a campaign  
 4 ad?  
 5 A. If those were the only elements of the  
 6 ad, I would not. But I am taking it from this  
 7 description that there were other elements of the  
 8 ad.  
 9 Q. And what other elements?  
 10 A. Specific attacks among the Republicans.  
 11 Q. On the subject of HMO reforms; is that  
 12 right?  
 13 A. I guess. It is not completely clear to  
 14 me what the content of the ad is, based upon this  
 15 paragraph.  
 16 Q. And that would make it an electioneering  
 17 ad, even though it doesn't mention the name of the  
 18 candidate?  
 19 A. I would only be comfortable  
 20 characterizing the ad if I were able to see it or  
 21 hear it in its entirety.  
 22 Q. If you will assume with me that the  
 23 Coalition to Make Our Voices Heard was an  
 24 organization which was interested in fostering  
 25 voter registration and voting within the minority

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1 communities in Connecticut, and even if the AFL  
 2 contributed money to that organization, wouldn't  
 3 you expect the ad still to be named in the name of  
 4 that organization?  
 5 MR. PAOLELLA: Could I hear the question  
 6 one more time?  
 7 THE REPORTER: "Question: If you will  
 8 assume with me that the Coalition to Make Our  
 9 Voices Heard was an organization which was  
 10 interested in fostering voter registration and  
 11 voting within the minority communities in  
 12 Connecticut, and even if the AFL contributed money  
 13 to that organization, wouldn't you expect the ad  
 14 still to be named in the name of the  
 15 organization?"  
 16 THE WITNESS: I am not sure I am clear  
 17 what the representation of that organization is,  
 18 the Coalition to Make Our Voices Heard?  
 19 BY MR. TRISTER:  
 20 Q. Yes. The coalition that was carrying  
 21 on this type of voter registration and other  
 22 get-out-the-vote activities in the minority  
 23 community.  
 24 A. I am not surprised. I would expect  
 25 organizations like Coalition to Make Our Voices

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1 Heard to do get-out-the-vote activities in an  
 2 innocuous name like this.  
 3 And interest groups like labor are also  
 4 not surprisingly interested and willing to do that  
 5 for the very reasons Mr. Rosenthal indicates.  
 6 He is quoted here as saying it helps to  
 7 get a broader group of supporters when you use the  
 8 innocuous name than when you use your real name.  
 9 And if the purpose is a broader group of  
 10 supporters by masking your identity, you have  
 11 accomplished your purpose.  
 12 Q. Right. When Mr. Rosenthal answered the  
 13 question at the panel, this was in a question and  
 14 answer period after the --  
 15 A. Yes, after lunch.  
 16 Q. After the lunch. Who spoke at the lunch?  
 17 A. Well, there were no speakers at the  
 18 lunch. We had had a set of panels in the morning  
 19 in which we discussed House and Senate races,  
 20 showed examples of commercials and mail, then had  
 21 a buffet lunch.  
 22 While people were finishing up we had a  
 23 panel discussion where Mr. Rosenthal as well as  
 24 Mr. O'Keefe, Mr. Hanson and Mr. Engle each were  
 25 invited to make brief comments and then respond

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1 question, if he believed that, why did you do this  
 2 in Connecticut 5.  
 3 Q. And he responded?  
 4 A. And he responded as indicated.  
 5 Q. Did he have any materials or written  
 6 materials in front of him at the time he was  
 7 responded to this about the AFL ads in 1998, about  
 8 specific AFL ads in 1998?  
 9 A. Nothing that we had provided him.  
 10 Whether he brought a folder with him, or had any  
 11 materials, I don't recall.  
 12 Q. And he didn't refer to any information  
 13 that was in front of him about this specific ad?  
 14 A. Not that I recall. It has been five  
 15 years ago, or three years ago.  
 16 Q. Did you, or anyone associated with your  
 17 project, your research project, interview  
 18 Mr. Rosenthal separately from this Q and A in  
 19 1998?  
 20 A. Yes.  
 21 Q. And was he asked about the Coalition to  
 22 Make Our Voices Heard?  
 23 A. Not that I remember.  
 24 Q. Was he asked about his role in the AFL  
 25 communications program in 1998?

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1 to questions. It was mostly an hour or so of  
 2 Q and A.  
 3 Q. Apart from this, how much of the time in  
 4 this Q and A, of this one hour in Q and A, was  
 5 devoted to the ad by the Coalition to Make Our  
 6 Voices Heard?  
 7 A. Oh, this was not a major focus. It was  
 8 in response to a statement that Mr. O'Keefe had  
 9 made from Americans for Limited Terms defending  
 10 the practice of not disclosing any of their  
 11 contributors.  
 12 A man named Kent Cooper asked two  
 13 questions of Mr. O'Keefe. One, would you identify  
 14 your three largest contributors, Mr. O'Keefe said  
 15 I would not.  
 16 Two, would you identify your average  
 17 contribution, and he said, I would not, and then  
 18 explained why.  
 19 And Mr. Rosenthal then, if I am  
 20 remembering this correctly, and we do have a  
 21 transcript, volunteered to want to speak further  
 22 on that point and indicated that he believed  
 23 people should campaign in their own name.  
 24 Q. He did.  
 25 A. At which point, Ms. Inland asked the

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1 A. Yes.  
 2 Q. And what did he say?  
 3 A. The conversation I remember best had to  
 4 do with the ground campaign in the Nevada Senate  
 5 race.  
 6 I had met with Mr. Blackie Evans who is  
 7 the AFL-CIO director in Nevada, and met Vinnie  
 8 O'Brien, who was the AFL-CIO staff person working  
 9 in the Nevada race.  
 10 And then after the election, asked to be  
 11 able to interview Mr. Rosenthal, and did so, and  
 12 spoke about the shift in strategy between  
 13 broadcast in 1996 and mail/phone personal contact,  
 14 GO-TV in '98.  
 15 There was at least one like the interview  
 16 with Mr. Rosenthal post election. There may have  
 17 been two.  
 18 Q. Right. And my question specifically was  
 19 whether you spoke to him about his role, not in  
 20 connection with what you refer to as the ground  
 21 war, but his role with respect to the AFL-CIO  
 22 advertisement in 1998?  
 23 A. Well, in general terms I do believe I  
 24 talked to him about that. He also referred me to  
 25 another person at the AFL, I have forgotten her

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1 name, it is not Karen Ackerman.  
 2 Q. Denise Mitchell?  
 3 A. It may be Denise Mitchell, that I have  
 4 also interviewed.  
 5 Q. Do you recall what her role was?  
 6 A. I don't.  
 7 Q. All right. If I tell you she was the  
 8 director of communications and is the director of  
 9 communications at the AFL-CIO, would that refresh  
 10 your recollection?  
 11 A. That helps.  
 12 Q. Did Mr. Rosenthal or Ms. Mitchell, in  
 13 your interviews with either of them, describe the  
 14 role of Mr. Rosenthal in the political department  
 15 in the advertising program of the AFL-CIO?  
 16 A. Not that I recall.  
 17 Q. Did they, either of them, mention the  
 18 fact that the political department was walled off  
 19 from making decisions about the advertising  
 20 program at the AFL-CIO in 1998?  
 21 A. Not that I recall.  
 22 Q. In your research, have you identified any  
 23 other instance in which the AFL-CIO has used the  
 24 so-called front group?  
 25 A. I was trying to find, and I am not sure

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1 whether this would fit your categorization of the  
 2 AFL-CIO. Would AFSCME --  
 3 Q. No. I am speaking of the AFL-CIO, not  
 4 one of its constituent units.  
 5 A. Not one of its constituent units.  
 6 Q. No.  
 7 A. I don't know of other examples. I do  
 8 know of an AFSCME one.  
 9 Q. And the one that you know about AFSCME is  
 10 American Family Voices?  
 11 A. Correct.  
 12 Q. But the AFL wasn't involved in that.  
 13 A. I just assumed that it was an affiliated  
 14 unit and it would fall under your question.  
 15 Q. Let me refer you back to Page 26. The  
 16 statement in the first paragraph under Theme And  
 17 Message in which you state: While the  
 18 noncandidate campaigns are presumed to be  
 19 independent of the candidates, there is remarkable  
 20 congruence between the themes of the candidate  
 21 campaigns and those of the interest groups and  
 22 parties.  
 23 My question is, are you suggesting in  
 24 that sentence that the reason for the congruence  
 25 is that the noncandidate campaigns are, in fact,

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1 not independent of the candidates?  
 2 A. I believe that they are aggressively  
 3 trying to pursue a category to defeat or elect a  
 4 candidate in ways that will reinforce what the  
 5 candidates are going to do that they hope to  
 6 benefit.  
 7 Therefore, it is not surprising that they  
 8 are campaigning on the same themes and messages  
 9 typically in a much more negative or contrasting  
 10 way.  
 11 Q. I don't think you answered my question.  
 12 MR. TRISTER: Would you read back the  
 13 question.  
 14 THE REPORTER: "Question: My question  
 15 is, are you suggesting in that sentence that the  
 16 reason for the congruence is that the noncandidate  
 17 campaigns are, in fact, not independent of the  
 18 candidates?"  
 19 MR. DODYK: I would object to the  
 20 commentary. But if you want him to try to answer  
 21 the question again, go ahead.  
 22 BY MR. TRISTER:  
 23 Q. Yes, why don't you try answering the  
 24 question again.  
 25 A. In effect, they are not independent of

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1 the candidates. In, as the Dictum Without Data  
 2 shows, the eyes of the voters, they are not  
 3 independent of the candidates.  
 4 Q. How does Dictum Without Data show that  
 5 that groups are not independent of the candidates  
 6 because of the congruence?  
 7 A. The voters perceive the campaign messages  
 8 to be about electing or defeating a candidate.  
 9 Q. Right. But, this is a section that  
 10 focuses on the congruence between the themes of  
 11 the candidate campaigns and those of the interest  
 12 groups and parties.  
 13 A. I am suggesting that the congruence  
 14 reinforces the other elements of the ads which  
 15 makes the ads by the interest groups and the  
 16 parties indistinguishable as to purpose or intent  
 17 in the eyes of voters.  
 18 MR. DODYK: When you get to a convenient  
 19 place, I would like to take a break.  
 20 MR. TRISTER: Okay.  
 21 BY MR. TRISTER:  
 22 Q. But, when I asked you a few moments ago,  
 23 I think you acknowledged that the survey research  
 24 that is the source of the Dictum did not in any  
 25 way provide information to the respondents about

51 (Pages 198 to 201)

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1 congruence of themes between candidate campaigns  
 2 and those of the interest groups.  
 3 MR. DODYK: I think that is a  
 4 mischaracterization of the testimony, but why  
 5 don't we just put a clean question in the record.  
 6 BY MR. TRISTER:  
 7 Q. Did you provide, as part of your research  
 8 in Dictum Without Data, information to the  
 9 respondents about congruence of themes between the  
 10 candidate campaigns and those of the interest  
 11 groups?  
 12 A. No. We did not provide explicit  
 13 information on that point. The context of the  
 14 data collection, however, was in the midst of a  
 15 campaign in which Social Security and other topics  
 16 were central to the campaign.  
 17 Q. Well, are you saying that the respondents  
 18 understood that, and when they saw a Social  
 19 Security ad they knew that candidates were also  
 20 running ads and they then factored that into their  
 21 characterization of the ads?  
 22 A. I am saying that is possible.  
 23 Q. Were either of the two ads that you have  
 24 characterized as electioneering advertisements in  
 25 your study, were they on the subject of Social

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1 Security?  
 2 A. Yes. The RLC ad was called Social  
 3 Security, and an older woman explains how  
 4 Al Gore's Medicare Drug Premium will cost the  
 5 program.  
 6 She ends up giving this message to  
 7 Al Gore, get your hands off my Social Security  
 8 check. It is not enough now.  
 9 Let me please check whether the American  
 10 Family Voices mentions Social Security. It  
 11 doesn't seem to.  
 12 Q. And when you tested, in the question that  
 13 became the basis for what I think we were  
 14 referring to as Table 4 in the Dictum report, the  
 15 one that refers to the reasons why -- that is the  
 16 one, yes -- the reasons why the respondents  
 17 characterized ads as being electioneering, did you  
 18 ask them about congruence between the themes in  
 19 the candidate campaigns?  
 20 A. No.  
 21 Q. Is it your position that the noncandidate  
 22 campaigns, and that is the phrase in your report,  
 23 but, let me take out of that equation the parties,  
 24 I am referring to the interest group component of  
 25 noncandidate campaigns.

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1 A. What page are we on?  
 2 Q. 26.  
 3 A. Okay.  
 4 Q. Is it your position that the noncandidate  
 5 campaigns, particularly the interest group  
 6 noncandidate campaigns, are not independent of the  
 7 candidates because they are running ads on  
 8 congruent themes as the candidate?  
 9 A. That is one indicator. There are others.  
 10 Q. What others?  
 11 A. Interviews with party leaders and others.  
 12 Evidence of party leadership signalling in advance  
 13 what the issue agenda of the 1998 Democratic  
 14 candidates would be, that kind of thing.  
 15 Q. Signalling to whom?  
 16 A. Voters, interest groups, donors.  
 17 Q. How did they signal?  
 18 A. I believe Mr. Gephardt, among others  
 19 identified three or four issue agendas in the 1998  
 20 cycle, including Social Security.  
 21 Q. Issues that he believed would be  
 22 important for Democratic candidates?  
 23 A. Uh-huh.  
 24 Q. And how would interest groups have  
 25 learned about that?

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1 A. Reading the newspaper.  
 2 Q. Reading the newspaper, other public  
 3 sources?  
 4 A. Any sources. It is also the case that in  
 5 these campaigns it is not atypical for the  
 6 steering or the coordinating committee for a  
 7 candidate to include people who are volunteers or  
 8 connected with these interest groups.  
 9 There are relatively few secrets in  
 10 politics. It is not hard to figure out what the  
 11 issue focus of a campaign would be.  
 12 Q. You are not suggesting, are you, that  
 13 interest groups met with the candidates?  
 14 A. No, no, I am not suggesting that. In  
 15 fact, I do not believe that happened.  
 16 Q. Okay. Are you familiar with the term  
 17 coordination as a legal matter?  
 18 A. Yes.  
 19 Q. You are not suggesting that the interest  
 20 groups coordinated with the candidates?  
 21 A. No.  
 22 MR. DODYK: Is this a good time?  
 23 MR. TRISTER: Yes.  
 24 (Brief recess -- 3:52 p.m.)  
 25 (After recess -- 4:05 p.m.)

52 (Pages 202 to 205)

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1 BY MR. TRISTER:  
 2 Q. Let me refer to what is the top of  
 3 Page 31. You state there that interest groups not  
 4 only target memberships or affiliates, they also  
 5 taken aim at particular states with competitive  
 6 U.S. Senate races or Congressional districts where  
 7 the outcome is in doubt.  
 8 Now, is this simply a descriptive  
 9 statement of your observations of what interest  
 10 groups are doing, or are you making a statement  
 11 here about the intention of these groups when they  
 12 target their memberships or they target  
 13 competitive U.S. races?  
 14 A. I am saying that interest groups often  
 15 have a strategy to communicate broadly with their  
 16 membership.  
 17 In addition to that, they focus  
 18 additional effort and resources at particular  
 19 states with competitive races or competitive  
 20 Congressional districts, and spend more, invest  
 21 more, campaign more there.  
 22 Q. So, you don't draw any inference from the  
 23 fact that interest groups do, in fact, target  
 24 their memberships?  
 25 A. No.

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1 part is there may be more media scrutiny on those  
 2 races than there would be on noncompetitive races.  
 3 Q. All right. And so the media might be  
 4 more interested in reporting what the interest  
 5 groups are doing and saying --  
 6 A. In those races.  
 7 Q. -- In those races, as distinct from  
 8 noncompetitive races?  
 9 A. Yes.  
 10 Q. At the bottom of 31, the last paragraph  
 11 on 31 and over on to 32, you are talking, you are  
 12 describing activities, and you state that  
 13 targeting discreet voter groups within the  
 14 district that are persuadable on an issue of  
 15 polling and communications has also become a  
 16 preferred strategy.  
 17 And you go on and describe that NARAL  
 18 phone banks, and so on, and the practice that I  
 19 see described there, that is properly called  
 20 voter ID?  
 21 A. Yes.  
 22 Q. And that is what you are describing  
 23 there?  
 24 A. Uh-huh.  
 25 Q. And voter ID is a process by which you

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1 Q. And, what inference, if any, do you draw  
 2 from the fact that interest groups, as you say,  
 3 take aim at states with competitive races?  
 4 A. They care about the outcome of the  
 5 election in general, and especially majority  
 6 control of one or both Houses of Congress.  
 7 Q. Okay.  
 8 A. And, therefore, they compete in the  
 9 battleground districts more intensively.  
 10 Q. Okay. Are there any other reasons why  
 11 interest groups might target competitive races,  
 12 other than the outcome of the vote?  
 13 A. Yes.  
 14 Q. And what would those be?  
 15 A. It may give them more credit with the  
 16 party that becomes the majority in terms of  
 17 helping to deliver the majority.  
 18 It may give them more visibility in the  
 19 media as a powerful group.  
 20 Q. With respect to visibility, more  
 21 visibility in the media because the race is a  
 22 competitive race, and there is a good deal of  
 23 media attention in the race; is that what you are  
 24 saying?  
 25 A. That may be part of it. An additional

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1 identify specific voters, and you then find out  
 2 how they are going to vote, or you hope you find  
 3 out how they are going to vote, and you then call  
 4 them before the election and make sure they vote,  
 5 if they are going to vote your way; is that  
 6 correct?  
 7 A. Yes.  
 8 Q. And this process of voter ID, this is a  
 9 process that takes place exclusively with  
 10 telephone banks; is that correct?  
 11 A. No.  
 12 Q. What else?  
 13 A. Person-to-person.  
 14 Q. Person-to-person?  
 15 A. Door-to-door.  
 16 Q. Other forms of what you call the ground  
 17 war?  
 18 A. And there are other ways.  
 19 Q. What other ways?  
 20 A. Workplace.  
 21 Q. What about broadcast advertising?  
 22 A. Not that I know of.  
 23 Q. Over on Page 32, down at the bottom of  
 24 the page under the Item 4, you state the timing of  
 25 electioneering advocacy often suggests

53 (Pages 206 to 209)

<p style="text-align: right;">Page 210</p> <p>1 coordination among the political parties,  2 candidates and interest groups.  3 A. Uh-huh.  4 Q. How does that happen?  5 A. I don't know how the coordination  6 happened.  7 Q. How does timing of electioneering  8 advocacy suggest coordination?  9 A. The example that we give is from the  10 Michigan Senate race in 2000. And in the book  11 there is more detail than I provide here about how  12 interest groups and the DSCC essentially  13 campaigned back-to-back, one week at a time during  14 the late summer, in the Stabinow (ph.) campaign  15 attacking Spencer Abraham.  16 And how in the Missouri Senate race, the  17 Party and allied groups also campaigned in ways  18 that seemed to be consistent with the strategy  19 that the candidate would have wanted.  20 Q. Now, what exactly happened in Michigan?  21 I am not sure I followed you.  22 A. Well, and this is confirmed also with  23 interviews with a woman named Dawn Ligands (ph.),  24 who was the consultant with the Stabinow campaign.  25 She is cited in the Michigan case study, she may</p>	<p style="text-align: right;">Page 212</p> <p>1 section, this section is about indicia of the  2 electioneering intent of what the interest groups  3 and the parties do, and by electioneering intent I  4 mean candidate-specific electioneering intent.  5 And so the timing of these ads in the  6 Michigan Senate race in 2000, suggests that we had  7 a parallel campaign operating with the Party and  8 two interest groups to assist Ms. Stabinow in her  9 Senate race.  10 Q. But, neither you nor your researchers  11 have any evidence of actual coordination with the  12 Stabinow campaign?  13 A. No. I am not asserting coordination with  14 the Stabinow campaign. I am saying that Dawn  15 Ligands, the Stabinow media manager, found the  16 impact of the ads to her liking.  17 Q. Right. But, if when candidates tell you  18 they didn't find ads to their liking, that doesn't  19 tell you anything either, does it?  20 A. Anything about?  21 Q. About the purpose of the group running  22 the ads?  23 A. Well, no, I disagree with that. There  24 are examples in which the candidates have  25 disagreed and it has been informative as to how</p>
<p style="text-align: right;">Page 211</p> <p>1 be footnoted here.  2 Abraham had substantially more cash on  3 hand than Stabinow did. She was husbanding her  4 resources for the end, and in that critical  5 period, a combination of interest groups and  6 parties, and I would have to refresh my memory to  7 remember exactly who, but one of which was the  8 DSCC, made substantial TV buys a week at a time  9 over a three-week period, three groups.  10 The timing of them coming up and going  11 down appeared coordinated.  12 Q. Coordinated with whom?  13 A. Amongst themselves in some way.  14 Q. I am sorry, amongst?  15 A. The interest groups and the parties.  16 Q. Not coordinated with the candidate?  17 A. No, not coordinated with the candidate.  18 Q. All right.  19 A. But, they did not overlap substantially  20 and in the view of Mr. Traugott (ph.) at the  21 University of Michigan, that timing of  22 communication was important to keeping Stabinow  23 afloat.  24 Q. And I am --  25 A. So the timing conveys, remember, in this</p>	<p style="text-align: right;">Page 213</p> <p>1 the purposes of the communication take.  2 For instance, the South Carolina Senate  3 race in '98, in which Mr. English, the Senatorial  4 candidate and NRSC disavowed the NRSC soft money  5 ads and asked that they be stopped.  6 There is a candidate who didn't like the  7 ads and by the very statement indicated that  8 point.  9 Q. He made that public?  10 A. Oh, yes, very much so.  11 Q. And what does that tell you about the  12 purpose of the groups that ran those ads?  13 A. It says the candidates don't always agree  14 with what their parties are saying on their  15 behalf.  16 Q. Well, I am talking about interest groups  17 now.  18 What does it say about the interest  19 groups that run the ads?  20 A. It says that interest groups occasionally  21 run ads that hurt candidates.  22 Q. And, presumably, when they do that, their  23 purpose is not to get them elected or defeated.  24 It is something else.  25 A. Well, that may, their purpose may be to</p>

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1 get somebody elected or defeated, and they may not  
2 be good at it.

3 Q. I see. Do you have other examples other  
4 than the Michigan race and the Missouri example of  
5 where the timing of ads suggests to you an  
6 electioneering purpose?

7 A. Oh, yes. In general, the expenditure in  
8 these areas, and for these purposes happens after  
9 Labor Day, and especially when it comes to mail  
10 and phone, ground war as I describe it, and  
11 internal communications, they happen in the last  
12 two to three weeks, which reinforced my conclusion  
13 that the real purpose of these communications is  
14 electioneering.

15 Q. And what about broadcast ads?

16 A. They also appear disproportionately in  
17 the last 60 days, or so before an election.

18 Q. Disproportionately in the last 60 days?

19 A. Before a general election.

20 Q. As compared to what?

21 A. The period before the 60 days. The  
22 timing, the question I believe was does it convey  
23 anything about the purpose of the ads, and the  
24 answer is more generally the timing does convey,  
25 that the purpose is electioneering.

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1 issues on the same, on the topic of the issues?

2 Do you ask for that information?

3 A. From whom?

4 Q. From the researchers.

5 A. The researchers are monitoring the  
6 campaign, not pending Congressional legislation.

7 Q. That is my point. And they don't report  
8 to you on whether there is pending legislation; is  
9 that correct?

10 A. They report to us on the advertising and  
11 the mail and the personal contact.

12 Q. Right. So I am not sure how you can  
13 reach the conclusion that you have just reached,  
14 that issues of this kind come up rarely.

15 A. We reviewed earlier the secure web site  
16 data entry windows in which the academics would  
17 have recorded and described briefly the content of  
18 the ad that spoke to an important piece of pending  
19 legislation.

20 Q. But, that is just a general question  
21 about the description, it doesn't say tell us  
22 whether there is pending legislation, does it?

23 A. It doesn't say that.

24 Q. Were they instructed to report on pending  
25 legislation?

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1 Q. But, I thought you didn't collect  
2 information on ads except for a few that ran  
3 before Labor Day.

4 A. We interview representatives of all of  
5 the interest groups, the parties, and ask them  
6 these very same kinds of questions about when you  
7 advertise and when you don't.

8 And the clear common sense is that you  
9 advertise close to election day. You move back  
10 only if it is going to be noisy and crowded, as it  
11 is currently in the South Dakota case.

12 Q. Is it not possible that legislative  
13 issues might arise in the last 60 days before an  
14 election that would cause a group, an interest  
15 group, to want to run broadcast ads during that  
16 period?

17 A. It is possible.

18 Q. Is it your testimony that that doesn't  
19 happen, or it does happen, or how rarely it  
20 happens?

21 A. It has arisen rarely in the two years  
22 that I have been monitoring this, '98 and 2000.

23 Q. When you get information from your  
24 researchers about ads to put in the database, do  
25 you get information about pending legislative

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1 A. No.

2 (Mr. Lopez leaves the room.)

3 (Discussion off the record.)

4 BY MR. TRISTER:

5 Q. Let me turn to Page 55. And,  
6 specifically the first paragraph, the first full  
7 paragraph.

8 The first sentence: In addition,  
9 individuals and groups can also spend unlimited  
10 amounts on electioneering advertisements.

11 Now, is this a statement about your  
12 understanding of what is permissible under BCRA?

13 A. As well as what is permissible under  
14 FECA, I am speaking there of independent  
15 expenditures.

16 Q. Well, when you use the term groups, you  
17 are not talking about corporations?

18 A. I am not talking about corporations or  
19 unions being able to use treasury funds. I am  
20 speaking about groups like the NAACP being able to  
21 do an independent expenditure.

22 Q. Isn't the NAACP an incorporated entity?

23 A. It may or may not be, I don't know.

24 Q. If it is incorporated, would you --

25 A. We are talking about the provision here

55 (Pages 214 to 217)

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1 of groups like the National Conservative Political  
 2 Action Committee in 1980 and '82 that spent a  
 3 large amount of money on independent expenditures.  
 4 We are talking about the NEA or the NRA,  
 5 who spend a lot of money on independent  
 6 expenditures.  
 7 Q. The NEA?  
 8 A. They are heavy independent expenditures  
 9 group.  
 10 Q. In treasury money?  
 11 A. No, not in treasury money.  
 12 Q. In hard money?  
 13 A. In hard money.  
 14 Q. And the NRA, when you say they are heavy  
 15 into independent expenditures, you are talking  
 16 about also --  
 17 A. Hard money.  
 18 Q. -- hard money through their PAC; is that  
 19 correct?  
 20 A. That's correct.  
 21 Q. You are not suggesting in that sentence  
 22 that incorporated groups and unions can spend  
 23 unlimited amounts on electioneering advertisements  
 24 from their treasury funds?  
 25 A. No, I am not. In fact, they may not.

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1 from their treasury funds, on electioneering  
 2 communications as compared to the amount of money  
 3 they raise in hard money?  
 4 A. No.  
 5 Q. You have never looked at that question?  
 6 A. Not that I can recall.  
 7 Q. All right. So, if it turned out that an  
 8 organization such as the AFL raises a tenth as  
 9 much money for its PAC as it spends on  
 10 electioneering communications, that wouldn't  
 11 surprise you?  
 12 A. I haven't looked at those data.  
 13 Q. BCRA doesn't raise the contribution  
 14 limits for PACs, does it?  
 15 A. No, it does not.  
 16 Q. Do you, have you formed any opinion as to  
 17 the ability of PACs to raise, union and corporate  
 18 PACs to raise hard money after BCRA takes effect  
 19 as compared to their ability to raise hard money  
 20 before BCRA takes effect?  
 21 A. I have not analyzed that, no.  
 22 Q. So, when you say corporations and unions  
 23 can also spend money on electioneering  
 24 advertisements as long as the expenditures are  
 25 through PACs, that is simply a simple statement of

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1 Q. And, in fact, two sentences later you say  
 2 corporations and unions can also spend money on  
 3 electioneering advertisements as long as the  
 4 expenditures are through PACs; is that correct?  
 5 A. Right.  
 6 Q. If a union were to spend money on  
 7 electioneering advertisements through their PAC,  
 8 would that not reduce the amount of money that  
 9 they have available for contributions to  
 10 candidates?  
 11 A. Presumably it would.  
 12 Q. And would it also reduce the amount of  
 13 money they have available for independent  
 14 expenditures, would it not?  
 15 A. It presumably would.  
 16 Q. Right. Now, have you formed an opinion  
 17 as to whether unions and corporations will be able  
 18 to spend as much money, as much hard money on  
 19 electioneering communications after BCRA takes  
 20 effect, as they are currently spending in treasury  
 21 money, on the same kind of communications?  
 22 A. No. I have not analyzed whether they  
 23 would be able to do that.  
 24 Q. Do you have any view as to the amount of  
 25 money that unions and corporations have spent,

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1 fact, you are not talking about probability, or  
 2 that they will be able to do that, or how much  
 3 money they will have available to do that?  
 4 A. I am just saying that that is an option  
 5 that will be available to them.  
 6 Q. That is theoretically an option under  
 7 BCRA?  
 8 A. I think it is more than theoretically an  
 9 option under BCRA. I think it is an option under  
 10 BCRA.  
 11 Q. Okay. I think you mentioned earlier, in  
 12 response to a question earlier in the day, that  
 13 you were currently engaged in research on the 2002  
 14 election; is that correct?  
 15 A. That's correct.  
 16 Q. Is that a monitoring project, as I have  
 17 been using the term, or is that a survey project?  
 18 A. Yes, both.  
 19 Q. Both. In the monitoring portion of the  
 20 project, how many jurisdictions are you looking  
 21 at?  
 22 A. Somewhat over 20. So, it is a somewhat  
 23 larger sample than in previous cycles. I don't  
 24 remember the exact number. I would have to do it  
 25 on a sheet of paper.

56 (Pages 218 to 221)



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1 Q. Are you using the same methodology as you  
2 used in 2000?

3 A. Essentially. There are a couple of  
4 components that are -- well, there is one  
5 component that is new, which is we are monitoring  
6 a set of control districts in which we don't  
7 anticipate soft money or electioneering advocacy  
8 to establish a baseline of that and to demonstrate  
9 that empirically within those district.

10 Q. To demonstrate what in those districts?

11 A. That it doesn't happen there. So, in the  
12 New Mexico Senate race, we are monitoring, even  
13 though Domenici is almost certain to win and there  
14 will be relatively little party or interest group  
15 electioneering advocacy.

16 Q. And why do you expect that?

17 A. Because it is not a competitive race.

18 Q. And so you are trying to verify that that  
19 supposition is true?

20 A. It is a helpful addition to what we have  
21 done before.

22 Q. What about your methodology in terms of  
23 how you collect data and information, have you  
24 changed that?

25 A. I think we have modified the secure web

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1 to do with how adequate they felt disclosure was,  
2 the tone and content of the campaign, the extent  
3 to which they were able to differentiate candidate  
4 from party and interest group advertising and so  
5 forth.

6 Q. Now, you are not showing them ads?

7 A. Not showing them ads.

8 Q. Are you showing any ads this time?

9 A. Not this cycle. The other survey  
10 component is to try to assess what voters do when  
11 they are essentially inundated with information,  
12 as we document they were in these races with '98  
13 and 2000, by asking them to complete a log.

14 It is a mail survey. We piloted it in  
15 the South Dakota primary. It will be in four  
16 states. The most prominent academic in mail  
17 surveys is Don Dillman at Washington State  
18 University. He is conducting that survey for us.

19 And the log suggests we will have a quite  
20 high response rate and this will permit us to have  
21 evaluations in real time, as to the mail and  
22 telephone and GO-TV context, which we anticipate  
23 will be heavy in the competitive races this year.

24 Q. Would you turn to Page 56, please, the  
25 second paragraph of the conclusion.

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1 site.

2 Q. Have you modified it in terms of the  
3 information you gather?

4 A. Yes. There may be a few additional  
5 questions that we have asked this time that we  
6 didn't ask before.

7 Q. Do you recall what those are?

8 A. I don't remember what those are, and the  
9 survey components are new and different.

10 Q. On the survey side of your research, are  
11 you, is it the same methodology?

12 A. No. We are testing a couple of new  
13 dimensions. One of them is to assess the reaction  
14 of voters, the view of voters about the campaign  
15 and election process in a panel study with three  
16 waves in highly competitive races.

17 So, we are in four jurisdictions. We  
18 have two prominent Republican and two prominent  
19 Democratic pollsters, Nellman and Yang on the  
20 Democratic side, Duvall and Goas (ph.) on the  
21 Republican side who are working with us.

22 We will release those data on  
23 November 13th at the National Press Club. And we  
24 will be interviewing people on election day or the  
25 day after to assess a range of questions that have

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1 A. Uh-huh.

2 Q. In the first sentence you say: The  
3 potentially corrupting influence of large  
4 contributions has been a motivating factor for  
5 multiple past acts of Congress and remains so  
6 today.

7 And, then you go on to say: Concern  
8 about the corruption that can come from large  
9 contributions is amplified when corporations or  
10 unions are able to use their treasury funds for  
11 campaign purposes.

12 Now, is it your understanding that under  
13 BCRA, corporations and unions can still make what  
14 are called membership communications or restricted  
15 class communications?

16 A. Yes.

17 Q. Using treasury money?

18 A. I believe so.

19 Q. And is it also your understanding that  
20 membership or restricted class communications can  
21 actually be coordinated with the candidate?

22 A. I don't know about that.

23 Q. You don't know. Now, it is also true, is  
24 it not, that under BCRA, unions and corporations  
25 can continue to engage in ground war types of

57 (Pages 222 to 225)

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1 activities aimed at the public, not just at their  
 2 members; is that correct?  
 3 A. That is my understanding.  
 4 Q. In fact, you made a proposal to Professor  
 5 Ornstein asking him to change the law on that  
 6 subject, didn't you?  
 7 A. I believe I did.  
 8 Q. And now, the question I have is: If  
 9 unions and corporations can continue to do both  
 10 types of activities under BCRA, have you formed an  
 11 opinion about the extent to which money, treasury  
 12 money, which is now spent on broadcasting ads,  
 13 will simply be reallocated by unions and  
 14 corporations into these other kinds of activities?  
 15 A. I don't know that they would do that.  
 16 Some have told me they would.  
 17 Q. Who has told you that?  
 18 A. I don't remember. It is just, it is a  
 19 range of the interviews I have done. I have  
 20 suggested that the money would simply be shifted  
 21 to the ground.  
 22 Which is why I suggested to Professor  
 23 Ornstein that this is a loophole.  
 24 Q. This is a loophole in what sense?  
 25 A. That groups will divert money from

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1 broadcast to mail, phone and ground.  
 2 Q. All right. And, if they do that, then  
 3 unions and corporations will be able to spend as  
 4 much under BCRA as they currently spend, is that  
 5 not correct?  
 6 A. Conceivably. I mean, I think what is  
 7 important to put on the record in response is that  
 8 a lot of the money now goes to soft money.  
 9 And of the nonparty soft money coming out  
 10 of corporate treasury funds or union treasury  
 11 funds that gets spent on electioneering advocacy  
 12 on television amounts to a substantial amount of  
 13 money.  
 14 Whether all of that can be productively  
 15 spent on the ground, I think is the question I  
 16 will research in 2004.  
 17 Q. If it should turn out, in your research  
 18 on 2004, that unions and corporations are  
 19 essentially reallocating money, treasury money,  
 20 from electioneering communications to these other  
 21 kinds of permissible activities, in your opinion  
 22 will there have been any change in the potential  
 23 for corruption as a result of union and corporate  
 24 expenditures?  
 25 A. The mode of communicating would have

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1 changed.  
 2 Q. Well, I realize that.  
 3 A. But, the corrupting influence seems to  
 4 be -- would not have changed.  
 5 Q. Would you turn to Paragraph 10, please.  
 6 MR. DODYK: Page 10?  
 7 THE WITNESS: Page 10?  
 8 BY MR. TRISTER:  
 9 Q. I am sorry, Page 10. And specifically to  
 10 Footnote 7.  
 11 A. Uh-huh.  
 12 Q. I am curious about something. At the end  
 13 of -- I am sorry, the first paragraph of  
 14 Footnote 7 you refer to --  
 15 MR. DODYK: There is only one  
 16 paragraph -- oh, I'm sorry, you are right.  
 17 THE WITNESS: There is two.  
 18 BY MR. TRISTAN:  
 19 Q. It is late, but not that late. The labor  
 20 campaign triggered a complaint to the Federal  
 21 Election Commission by the NRC.  
 22 A. I think it was NRCC.  
 23 Q. NRCC, yes. And you go on and describe  
 24 that and indeed you attach a copy of that  
 25 complaint to your report, which struck me as odd,

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1 since it is the only document that isn't produced  
 2 by you that is attached to your report.  
 3 Why did you attach that to the report?  
 4 A. Multiple reasons. One, we were aware of  
 5 the -- I was aware of the matter under review and  
 6 actually have copies of all of the documents from  
 7 that matter in my possession.  
 8 So, it is something that is on my  
 9 research agenda longer term. It is also a case  
 10 that in interaction with counsel, that they  
 11 suggested that this might be something useful to  
 12 integrate into the report, so I did.  
 13 Q. Did they suggest why?  
 14 A. Those are really --  
 15 MR. DODYK: Wait, wait, wait. Michael --  
 16 MR. TRISTAN: I will withdraw the  
 17 question.  
 18 BY MR. TRISTAN:  
 19 Q. First of all, you might have seen my ears  
 20 picked up.  
 21 You said you have the documents in that  
 22 case?  
 23 A. If this is the right case, I believe it  
 24 is. This is where the FEC released the documents  
 25 for a few days; is that correct?

58 (Pages 226 to 229)

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1 Q. Well, some of the documents.  
 2 A. Some of the documents. The ones that  
 3 were released were copied by Mr. Cooper, and I  
 4 secured a copy of that copy.  
 5 Q. I see. So you have what he secured, what  
 6 was released, and he secured?  
 7 A. Because I would like to read it on the  
 8 matter speaking to coordination as well as the  
 9 other complaint that wasn't released, I would like  
 10 to read that.  
 11 Q. But you don't have any of the documents  
 12 that were not released during that few-day period?  
 13 A. No. I don't have any of the documents.  
 14 Q. And are under a Court Order not to be  
 15 released.  
 16 A. No. I don't have those.  
 17 Q. Good. Are you aware of the outcome of  
 18 that case?  
 19 A. I believe so.  
 20 Q. And what do you believe?  
 21 A. I believe the FEC did not take any  
 22 action.  
 23 Q. And don't you think that should have been  
 24 mentioned, if you are going to attach this  
 25 complaint and refer to it in your footnote, just

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1 in the interests of completeness?  
 2 A. Perhaps, but the FEC so routinely doesn't  
 3 take action, that it doesn't seem extraordinary.  
 4 Q. I see. But, you only report, an entire  
 5 expert report of 50 some odd pages, you cite one  
 6 complaint out of thousands and thousands that have  
 7 been filed since 1996, and you leave it hanging  
 8 there without, for the Court, or anybody else to  
 9 read, as if there is something to be insinuated  
 10 from this complaint.  
 11 A. That is not my intent.  
 12 Q. It is not. What was your intent?  
 13 A. To document that the coordination issue  
 14 had been raised in the FEC, that there was a  
 15 matter under review and, in fact, that the  
 16 language under the matter of review speaks very  
 17 clearly and directly to the arguments that we were  
 18 talking about this morning, in terms of party  
 19 concerns about the impact of the initiative taken  
 20 by the AFL and quickly followed by the Coalition,  
 21 Chamber of Commerce, Triad and others, to invest  
 22 heavily in competitive races through  
 23 electioneering.  
 24 Q. But, you don't mention anything about  
 25 Triad in this paragraph.

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1 A. No. But I do elsewhere in the report.  
 2 Q. And so you attached a copy of the AFL-CIO  
 3 complaint filed by the National Republican  
 4 Congressional Committee in order to show that  
 5 there was coordination between --  
 6 A. No. To show the extent to which the  
 7 concerns of the NRCC about the impact of  
 8 electioneering advocacy by groups were relevant  
 9 and important.  
 10 Q. Have you considered the possibility that  
 11 the filing of this complaint by the NRCC had  
 12 certain political motives?  
 13 A. I haven't thought about what those might  
 14 be. I assume virtually everything in this area  
 15 has a political motive.  
 16 Q. We can agree on that. You weren't citing  
 17 the complaint for the truth of what is alleged in  
 18 there?  
 19 A. No. I do not presume to judge the truth  
 20 of it.  
 21 Q. I am sorry?  
 22 A. I do not presume to judge the truth of  
 23 it.  
 24 Q. On Page 18 in the report, under the  
 25 heading of Avoid Disclosure, as one of the reasons

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1 why electioneering is conducted outside of the  
 2 FECA framework, you say the 1996, '98 and 2000  
 3 election cycles all saw examples of groups who  
 4 sought to avoid accountability for their  
 5 communications by pursuing an electioneering  
 6 advertisement or election advocacy strategy, et  
 7 cetera.  
 8 And you make the same point, I think, in  
 9 several other places in your report about groups  
 10 wanting to avoid disclosure.  
 11 A. Uh-huh.  
 12 Q. Now, I assume that you are familiar with  
 13 the legislation enacted by Congress in June of  
 14 2000, amending Section 527 of the Internal Revenue  
 15 Code to require additional disclosure by certain  
 16 groups engaged in electioneering activities?  
 17 A. Yes. I am familiar with that.  
 18 Q. And, in fact, you have written about that  
 19 in various other places, have you not?  
 20 A. Yes.  
 21 Q. And do you mention that legislation  
 22 anywhere in your expert report?  
 23 A. I don't recall.  
 24 Q. Have you studied, in any way, the impact  
 25 of that legislation in achieving Congress' goals?

59 (Pages 230 to 233)

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1 A. We are currently studying the impact.  
 2 Q. Right. But, you have not yet formed an  
 3 opinion about it?  
 4 A. I am on my way to forming an opinion on  
 5 it, yes.  
 6 Q. But none that you have reported in this?  
 7 A. None that we have reported.  
 8 Q. All right.  
 9 (Discussion off the record.)  
 10 BY MR. TRISTER:  
 11 Q. Let me have you turn to Page 52, if I  
 12 may.  
 13 The paragraph under No. 2, Influence on  
 14 Election Outcomes. You start that paragraph by  
 15 saying: In terms of influencing the outcomes of  
 16 elections, several of the academics monitoring the  
 17 races with substantial party soft money or  
 18 interest group electioneering advocacy believed  
 19 that the noncandidate campaigning was important to  
 20 the outcome of the races they monitored.  
 21 A. Yes.  
 22 Q. Now, were any of these academics able to  
 23 analyze the outcomes, at a sufficient degree of  
 24 specificity to make a distinction between soft  
 25 money and interest group electioneering activity

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1 in terms of its impact?  
 2 A. I don't think any of them distinguish  
 3 within the category of noncandidate. I think they  
 4 are saying here that the noncandidate spending,  
 5 that is, soft money and interest group  
 6 electioneering, in the aggregate, was important.  
 7 It is fair to say that there is more soft  
 8 money activity in these races, typically, then  
 9 there is interest group electioneering activity.  
 10 Q. Coming back for a moment to the question  
 11 about corruption that we were discussing a moment  
 12 ago.  
 13 I have seen it suggested that the ability  
 14 of unions and corporations to make soft money  
 15 contributions to the parties is a potential source  
 16 of corruption.  
 17 And I have also seen it suggested that  
 18 their ability to engage in interest group  
 19 electioneering advocacy is a potential source of  
 20 corruption.  
 21 My question for you is: Are you aware of  
 22 any research, or studies of your own or anyone  
 23 else, who has tried to analyze the impact in terms  
 24 of corruption, political corruption, if the soft  
 25 money prohibition on unions making contributions

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1 and corporations making soft money contributions  
 2 were to remain in the law, but issue advocacy or  
 3 electioneering communications were not to be in  
 4 the law?  
 5 A. I am not familiar with that analysis.  
 6 Q. Now, back on Page 52, after quoting the  
 7 academics, you give three examples of instances in  
 8 which soft money and interest group advocacy may  
 9 have played an important part in the outcome of  
 10 the race.  
 11 The first example, I just want to clarify  
 12 is the Ohio Sixth, in 1998.  
 13 And I take it that the expenditure in  
 14 question is what is an independent expenditure; is  
 15 that correct?  
 16 A. In that case, it would have been.  
 17 Q. Not an electioneering communication.  
 18 A. That's right.  
 19 Q. And, in the third example, the American  
 20 Medical Association PAC ran an ad for Republican  
 21 John Fox, and I think you point out in Footnote  
 22 185 that that, too, may have been an independent  
 23 expenditure.  
 24 A. The AMA has typically used independent  
 25 expenditures. They are only now, I think,

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1 thinking of doing electioneering.  
 2 Q. All right. So, more likely than not --  
 3 A. More likely than not independent.  
 4 Q. All right. Now, the third that you use  
 5 is the support of the League of Conservation  
 6 Voters, which helped Udahl in New Mexico Third  
 7 Congressional District in 1998; do you know  
 8 whether that was an independent expenditure?  
 9 A. I don't know.  
 10 Q. Let me call your attention to Footnote  
 11 No. 183, which I don't think answers the question,  
 12 but it does, does it not, describe the person  
 13 interviewed, or the source of the information as  
 14 the independent expenditures campaign director?  
 15 A. Yes.  
 16 Q. It does. All right. And if we can take  
 17 a quick look at outside money in terms of the New  
 18 Mexico Third race. I don't have a copy of this,  
 19 but let me refer you to Page 141.  
 20 I guess it is already in the record,  
 21 Page 141, at the bottom of the page, where he is  
 22 talking about the League of Conservation Voters,  
 23 and what does the first sentence say?  
 24 A. It says: The League of Conservation  
 25 Voters, LCV, ran an independent expenditure

60 (Pages 234 to 237)

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1 campaign, period.  
 2 Q. So it sounds like all three of your  
 3 examples involve independent expenditures, does it  
 4 not?  
 5 A. Uh-huh, that's right.  
 6 Q. Let me ask you, we really haven't talked  
 7 much about you or your background in this  
 8 deposition. I was more interested in the report.  
 9 But, there are a few questions.  
 10 You are being paid for your testimony  
 11 today; is that correct?  
 12 A. That is correct.  
 13 Q. And you are being paid by the Brennan  
 14 Center?  
 15 A. I am.  
 16 Q. Do you know whether the Brennan Center is  
 17 receiving the money for this from Pugh Charitable  
 18 Trust?  
 19 A. I don't know.  
 20 Q. You are described in various places as  
 21 having an affiliation with the Senate for the  
 22 Study of Elections and Democracy, as well as being  
 23 a professor at Brigham Young, or a dean now at  
 24 Brigham Young.  
 25 A. That's correct.

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1 A. Not yet.  
 2 Q. All right. How is it funded?  
 3 A. It is funded entirely by outside grants.  
 4 Q. Foundation grants?  
 5 A. Yes.  
 6 Q. Including grants from Pugh Charitable  
 7 Trust?  
 8 A. Primarily from the Pugh Charitable Trust.  
 9 Q. And when you say primarily, what are you  
 10 talking about?  
 11 A. There are three other foundations who  
 12 have supported research. They are fully  
 13 documented in the footnote in the report.  
 14 I think it is Footnote 3, 2 or 3, which  
 15 mentions the -- yes, Footnote 2, the Joyce  
 16 Foundation, the Carnegie Corporation of New York,  
 17 and the Open Society Institute which jointly  
 18 funded the book I edited, Financing the 2000  
 19 Election.  
 20 Q. Right. But what proportion of the  
 21 funding of the center has come from Pugh?  
 22 A. A high proportion.  
 23 Q. Okay. What is high? Greater than 75  
 24 percent?  
 25 A. Yes.

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1 Q. What is the Senate for the Study of  
 2 Elections and Democracy?  
 3 A. I have long done exit polling in the  
 4 State of Utah since 1982, which involves college  
 5 students from nine universities and colleges in  
 6 the state. Also produced a voter guide for high  
 7 school students.  
 8 And I am an authority on the initiative  
 9 and referendum process and have done research in  
 10 that area.  
 11 And, so, in the context of no longer  
 12 being the department chair, I decided that it was  
 13 time to have a center that would permit us to  
 14 mount this and other studies.  
 15 Q. Structurally speaking, is this a center  
 16 within Brigham Young?  
 17 A. Yes. It is a center within Brigham  
 18 Young, it is the University Research Center.  
 19 Q. It is not separately incorporated?  
 20 A. It is fully within the university.  
 21 Q. Does it have an advisory committee of any  
 22 kind?  
 23 A. No.  
 24 Q. And would not have a board of directors  
 25 then?

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1 Q. Greater than 90 percent?  
 2 A. No. I don't have the exact figures in  
 3 front of me, but, I don't think so.  
 4 Q. Who is your program officer at PU?  
 5 A. Shawn Trailia (ph.).  
 6 Q. And he is the same program officer as for  
 7 the Brennan Center, I believe; is that correct?  
 8 A. I believe that is correct.  
 9 Q. And is his area campaign finance reform?  
 10 A. It is.  
 11 Q. I see. Now, are you also familiar with  
 12 something called the Campaign and Media Legal  
 13 Center?  
 14 A. I am.  
 15 Q. And I think you are on the advisory board  
 16 of that, am I correct?  
 17 A. I am.  
 18 Q. Now that is an entity that is not  
 19 affiliated with Brigham Young; is that correct?  
 20 A. That's correct.  
 21 Q. Is it affiliated with the University of  
 22 Utah?  
 23 A. That's correct.  
 24 Q. And who else is on the advisory board?  
 25 A. I believe Tom Mann of the Brookings

61 (Pages 238 to 241)

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1 Institution, Norm Ornstein of the American  
 2 Enterprise Institute. I am not remembering who  
 3 else.  
 4 Q. Doug Bailey?  
 5 A. I think Doug Bailey is on that, that's  
 6 right. I think Norm Benger, the former governor  
 7 of Utah is on there.  
 8 Q. How about Bradley Phillips?  
 9 A. I don't remember.  
 10 Q. I see. Do you know who Mr. Phillips is?  
 11 A. Uh-uh.  
 12 Q. I see.  
 13 A. I should have said no.  
 14 Q. Now, is the Campaign and Media Legal  
 15 Center affiliated in some way with the Center for  
 16 the Study of Elections and Democracy?  
 17 A. No.  
 18 Q. Are you aware of an article that appeared  
 19 recently in the National Journal which suggests  
 20 that the two entities are affiliated?  
 21 A. No. I am not aware of that article.  
 22 Q. I see. Were you interviewed for an  
 23 article by Mr. Stone from the National Journal  
 24 about either one of these entities in the last few  
 25 months?

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1 A. He is a leader of it.  
 2 Q. Was he involved in founding the  
 3 organization?  
 4 A. I believe so.  
 5 Q. Does the Center for Study of Elections  
 6 and Democracy provide research support to the  
 7 legal center?  
 8 A. No. Well, let me adjust that. We  
 9 provide research support through our monographs  
 10 and publications to anybody who reads them. If  
 11 they choose to read these, that is great.  
 12 Q. That is not what I meant. I meant  
 13 research in the sense of conducting research at  
 14 their request.  
 15 A. No. I have not done research at their  
 16 request.  
 17 Q. Are you aware of the fact that the Legal  
 18 Center has filed comments in response to FEC rule  
 19 making, under the BCRA regulations?  
 20 A. I am aware of that.  
 21 Q. How did you learn of that?  
 22 A. E-mails that arrive periodically.  
 23 Q. Were you in your capacity as a member of  
 24 the advisory board?  
 25 A. I am not sure why the E-mails are

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1 A. Not that I recall.  
 2 Q. I see. And you haven't seen that  
 3 article?  
 4 A. No. The research associate who helped do  
 5 outside money is Mary Ann Holt-Vari (ph.). She is  
 6 a former student and was the research associate.  
 7 So, she is a BYU alumnus, but there is no  
 8 institutional connection.  
 9 Q. There is no institutional affiliate?  
 10 A. Connection or affiliation.  
 11 Q. Does Pugh also fund the Campaign and  
 12 Media Legal Center?  
 13 A. I believe they are one of the funders of  
 14 that.  
 15 Q. I see. Primary funder?  
 16 A. I don't know.  
 17 Q. I see. And Trevor Potter is the general  
 18 counsel of the Campaign and Media Legal Center; is  
 19 that correct?  
 20 A. He is affiliated with it, I am not sure I  
 21 know his title within the center.  
 22 Q. Is it possibly chairman of the board?  
 23 A. It could be. I mean, he is a leader of  
 24 it in some way.  
 25 Q. He is the leader?

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1 arriving, maybe.  
 2 Q. Did you consult in any way with any of  
 3 the preparation of the comments?  
 4 A. No.  
 5 Q. Well, what was the purpose of the  
 6 e-mails?  
 7 A. I suppose informing me and anybody else  
 8 that is on their list server.  
 9 Q. I see.  
 10 A. These are their publically distributed  
 11 documents only.  
 12 Q. But you had no role in developing their  
 13 positions or their comments?  
 14 A. No. I have been very busy preparing this  
 15 report.  
 16 Q. Are you aware of whether the Legal Center  
 17 is involved in working with Senators McCain and  
 18 Feingold on what is sometimes referred to as  
 19 BCRA 2, some form of additional or future campaign  
 20 finance legislation?  
 21 A. No. I wasn't aware that they were  
 22 working with them.  
 23 Q. I see. And, so, if they are, you haven't  
 24 been involved in that?  
 25 A. I haven't been involved in any of that.

62 (Pages 242 to 245)

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1 Q. Now, earlier today I mentioned the policy  
2 committee at the Brennan Center, what was that?

3 A. I believe, in the early going, I, along  
4 with others, were invited to provide advice or  
5 input into how the Brennan Center might  
6 productively use CMAG type data.

7 I attended a one-day conference at the  
8 NYU Law School, along with others, where a  
9 discussion ensued about those possibilities.

10 Q. Do you remember when that discussion took  
11 place?

12 A. I don't. There had been an earlier  
13 meeting at the Brennan Center that was not related  
14 to an advisory board. And so I don't remember  
15 when that happened.

16 Q. The first meeting that you referred to,  
17 the earlier meeting when did that take place?

18 A. A year or so earlier.

19 Q. What was the purpose of that?

20 A. To discuss the possibility of the Brennan  
21 Center developing an emphasis in campaign finance  
22 reform.

23 There were some constitutional law  
24 scholars, three or four. There were some  
25 political scientists, and there were some others

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1 reform?

2 A. No. I don't think that was a topic that  
3 day.

4 Q. Do you recall ever attending a meeting at  
5 the Brennan Center, of the policy committee, in  
6 which that was the topic?

7 A. This is the only meeting I ever attended  
8 of the policy committee.

9 (Discussion off the record.)

10 (The document referred to  
11 was marked Magleby Exhibit  
12 No. 10 for identification.)

13 BY MR. TRISTER:

14 Q. Let me have this marked as Exhibit 10 and  
15 have you take a look at this.

16 A. Okay.

17 Q. First, let me represent to you, as  
18 indicated by the Bates numbers, that these are  
19 documents produced by the Brennan Center in  
20 response to a discovery subpoena in this case.

21 They appear to me to be handwritten notes  
22 from a meeting of the policy committee on  
23 October 25, 1999.

24 Is that what they look like to you?

25 A. That is what they may be.

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1 there as well as potential donors.

2 Q. Who were the donors?

3 A. George Psoras (ph.)

4 Q. Only Psoras?

5 A. To my recollection.

6 Q. Was Pugh there?

7 A. I don't think Pugh was there.

8 Q. At the meeting of the policy committee  
9 that you referred to earlier, a moment ago, was  
10 Pugh at that meeting?

11 A. I believe Mr. Trailia might have been at  
12 that meeting.

13 Q. Do you remember what was discussed at  
14 that meeting?

15 A. I believe Ken Goldstein and John Crasnow  
16 (ph.) took the lead in talking about the kind of  
17 data that might be available through Campaign  
18 Media Analysis Group, the kinds of questions that  
19 data would help address and answer.

20 How it might be relevant to both law and  
21 to political science. It was that kind of  
22 discussion.

23 Q. Do you recall any portion of that meeting  
24 being devoted to what I will call lobbying  
25 strategy with respect to passing campaign finance

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1 Q. Because the individuals mentioned are, in  
2 fact, members -- were, in fact, members of the  
3 policy committee; is that correct?

4 A. I believe so.

5 Q. And, in fact, you are identified in  
6 several places as having attended this meeting.

7 Having looked over these notes, does this  
8 refresh your recollection about possibly having  
9 attended a second meeting?

10 A. No. This is the meeting I attended.

11 Q. This is the meeting you attended, okay.

12 And let me first ask you, at the bottom of the  
13 first page, the note taker, which I assume was not  
14 you --

15 A. This is not my handwriting.

16 Q. Do you recognize the handwriting?

17 A. No.

18 Q. Is it possibly Nancy Northrup's?

19 A. I don't know.

20 Q. There is a comment at bottom, the very  
21 last comment on Page 1: Magleby: What do the  
22 instructions to the coders look like?

23 Does that look like --

24 A. Yes. I believe I asked that question.

25 Q. You did. And why did you ask that

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1 question?  
 2 A. Because I was curious about how the  
 3 coders were being instructed.  
 4 Q. And do you recall what the answer was?  
 5 A. No.  
 6 Q. Do you recall whether they received, you  
 7 were informed whether they were receiving any  
 8 instruction?  
 9 A. I believe this was in the very formative  
 10 stages and I was indicating that I thought it was  
 11 important that some of those things be thought  
 12 through carefully.  
 13 Q. When you say this is the formative  
 14 stages, this is October of 1999; is it not?  
 15 A. Yes. And I think, are we talking about  
 16 the 2000 data or not, I don't know what this is  
 17 about.  
 18 Q. I see. But, as to the 1988 (sic) study,  
 19 it was complete, if not published, as of the time  
 20 of this meeting.  
 21 A. I am not certain of that.  
 22 Q. I see.  
 23 A. In fact, I doubt that.  
 24 Q. All right.  
 25 A. I believe the --

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1 legislation might be framed?  
 2 A. I am not recalling, it may have been.  
 3 Q. Do you recall such a conversation taking  
 4 place at that meeting?  
 5 A. We were talking about how to study  
 6 election engineering advocacy using the CMAG data,  
 7 so, yes, if that is what this was about.  
 8 Q. Well, I am not asking you how to frame a  
 9 study of the CMAG data.  
 10 I am asking you whether there was also a  
 11 discussion about what I will refer to as  
 12 legislative strategy with respect to how to  
 13 construct and pass campaign finance reform  
 14 legislation.  
 15 MR. DODYK: Let me be clear here, you are  
 16 asking whether he recalls the meeting. You are  
 17 not asking him just to interpret the document.  
 18 BY MR. TRISTER:  
 19 Q. I am first asking him whether he recalls  
 20 such a discussion.  
 21 A. I recall the meeting. I recall Mr. Mann  
 22 being at the meeting. And I don't doubt Mr. Mann  
 23 would have talked about various approaches to  
 24 defining electioneering communications.  
 25 These were in the public record, I

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1 MR. DODYK: I think you are a little off  
 2 on your dates. You might want to check the date  
 3 on the report.  
 4 THE WITNESS: I think it came out in  
 5 2000.  
 6 BY MR. TRISTER:  
 7 Q. I think the report came out in 2000, but  
 8 the question was when was the research done, that  
 9 is what I am asking.  
 10 A. It was not done simultaneously with the  
 11 election, it was done after the election. The  
 12 CMAG data was transmitted to them later. So, I am  
 13 not certain.  
 14 But, I do not believe that they were  
 15 anywhere near finished, and may have been in the  
 16 early stages.  
 17 Q. Okay. Now, over on Page 3?  
 18 A. So, 863?  
 19 Q. Yes.  
 20 A. Okay.  
 21 Q. I am sorry, let's go back to Page 862.  
 22 A. Uh-huh.  
 23 Q. And picking up with the notes attributed  
 24 to Mr. Mann, and continuing, does that look to you  
 25 like a discussion about how campaign reform

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1 believe, based on the League of Women Voters'  
 2 project ideas, some wording of ideas in the Mann  
 3 and Ornstein.  
 4 Q. I am sorry, what was in the public  
 5 record?  
 6 A. That Ornstein and Mann had, I believe,  
 7 spoken about some of these kinds of ideas in terms  
 8 of campaign finance reform.  
 9 Q. Okay. Let me refer you on Page 3 to the  
 10 first comment attributed to you. Do you recall  
 11 making that comment?  
 12 A. I can't read it.  
 13 Q. Well, let me try. It appears to me to  
 14 say: Members don't like that the issue advocacy  
 15 is out of control, way to play on fear and what  
 16 will happen to them.  
 17 Does that seem like a fair reading of  
 18 that language?  
 19 A. I don't recall making that statement.  
 20 Q. I see. Is that a thought that you have  
 21 expressed at one time or another?  
 22 A. Yes. In fact, we, in the other campaign,  
 23 talked about some members who don't like issue  
 24 advocacy and earlier today I spoke with you about  
 25 Mr. English's views.

64 (Pages 250 to 253)



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1 Q. Now, does this comment, as you read it  
2 here, sound to you like you were making a  
3 suggestion of legislation strategy?

4 MR. DODYK: I believe that you need to  
5 interpret the document --

6 MR. TRISTER: I understand that.

7 THE WITNESS: I was not commenting on  
8 legislation strategy in this meeting.

9 BY MR. TRISTER:

10 Q. Well, what were you doing in making that  
11 comment, if you made it?

12 A. I was commenting on how members perceived  
13 the issue. We had two former members of Congress  
14 in the room. The topic somehow got to how do  
15 members feel about this.

16 Q. Well, if this is an accurate rendition of  
17 something you said, it says, way to play on fear,  
18 re what will happen to them.

19 That doesn't sound like simply an  
20 observation to me.

21 A. Well, I don't recall making that  
22 statement.

23 Q. I see. Were you involved, apart from  
24 this meeting, in lobbying -- well, set aside  
25 lobbying.

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1 A. I was.

2 Q. Apart from the studies that we have  
3 discussed today, and reports on issues related to  
4 Campaign Finance Reform, I assume you have also  
5 published and conducted studies in other areas  
6 over the years; is that correct?

7 A. That's correct.

8 Q. What other areas? I don't need an  
9 exhaustive list.

10 A. Initiative and Referendum Process, I am  
11 the author of the book. And frequently cited  
12 author on Direct Legislation, including a piece on  
13 Paycheck Protection.

14 I am a coauthor with others of a major  
15 American government text book, Government By The  
16 People. I have been involved with that book for  
17 the 15th through the 19th Edition, we are just  
18 finishing the 20th edition.

19 I am the author, with others, of a book  
20 on party identification, called the Myth of the  
21 Independent Voter.

22 Q. Who published that?

23 A. The University of California Press.

24 Q. Uh-huh. Speaking generally of your non  
25 campaign-finance-related publications, books and

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1 Were you involved, apart from this  
2 meeting, in discussions about the drafting of  
3 campaign finance legislation over the last five  
4 years?

5 A. Well, the reason I am pausing is I was  
6 involved in 1990 as one of six advisors to the  
7 United States Senate.

8 Q. Yes. You mentioned that in your report.  
9 I am trying to focus on --

10 A. I am trying to think if there is  
11 anything. No, I don't believe I have played that  
12 role.

13 Q. Okay. Were you involved in lobbying on  
14 the BCRA legislation or its predecessors?

15 A. No.

16 Q. Have you ever testified on it?

17 A. I testified in about 1998, '99.

18 Q. Before whom?

19 A. Before one of the Senate Committees.  
20 Senator Stevens of Alaska chaired the Committee.

21 Q. What was the subject of?

22 A. Campaign Finance Reform, my research.

23 Q. Your research?

24 A. Yes.

25 Q. Were you invited to testify?

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1 articles, have you ever hired a public relations  
2 firm to publicize the existence of those studies,  
3 or the findings of those studies?

4 A. The 2000 grant retained a public  
5 relations firm. The 1998 grant did not.

6 And we were urged by the Pugh Charitable  
7 Trust to do a better job of promoting our  
8 research, in terms of getting it into the public  
9 domain.

10 And, so, a public relations firm was  
11 involved in the 2000 project.

12 Q. And that was the Rabinowitz firm?

13 A. No. It was Woodmeyer & Baker initially  
14 and then the Rabinowitz firm.

15 Q. And when did Woodmeyer start?

16 A. At the beginning of the project.

17 Q. Which would be roughly when?

18 A. Roughly 1999.

19 Q. And when did Rabinowitz replace them?

20 A. Some time in 2000.

21 Q. My question, which I am interested in  
22 what you had to say, but my question was about  
23 your other noncampaign finance reports, and  
24 whether you had ever had a public relations firm  
25 associated with them.

65 (Pages 254 to 257)

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1 A. Oh, no.  
 2 Q. And so when you hired the Woodmeyer firm  
 3 in and the Rabinowitz firm that was the first time  
 4 you had had a public relations firm to assist you  
 5 with one of your projects?  
 6 A. It is the first time we have had a public  
 7 relations firm. In all of my previous projects,  
 8 we had relied upon the university's public  
 9 affairs, public relations officers to do that  
 10 task, and we used those people in 1998.  
 11 Q. And the use, in connection with the 2000  
 12 study, that was suggested to you by Pugh?  
 13 A. That's correct.  
 14 Q. Did Pugh refer you to the firms that you  
 15 used?  
 16 A. They suggested Woodmeyer as a good  
 17 candidate.  
 18 Q. I see. And then somebody from your  
 19 office interviewed them?  
 20 A. Yes. And looked into two or three  
 21 others.  
 22 Q. Okay. And how much did you pay the two  
 23 firms collectively from your project?  
 24 A. Our grant and the Brennan Center grant  
 25 for 2000 for administrative purposes were merged.

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1 happen, writing media alerts, or they have a term  
 2 of art for those, and so forth.  
 3 Q. Did they also try to drum up people to  
 4 come to the press event?  
 5 A. That was part of what they were supposed  
 6 to do.  
 7 Q. Did they also try to get articles written  
 8 about your research and your findings, other than  
 9 through the press release, through the press  
 10 conference?  
 11 A. Again, that was presumably part of what  
 12 they did.  
 13 Q. Did they also help you put together a  
 14 conference on Capitol Hill with members of  
 15 Congressional and Senate staff.  
 16 A. That was the Rabinowitz group.  
 17 Q. And that was also part of what Pugh  
 18 helped pay for?  
 19 A. Yes.  
 20 Q. I see. And can you tell me about that  
 21 meeting?  
 22 A. In a desire to share more broadly the  
 23 data, especially with relevant legislative  
 24 staffers from the Dictum Without Data research, we  
 25 hosted a briefing which was broadcast on C-Span,

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1 They were administered through Brigham  
 2 Young University and the two projects together  
 3 shared the account with Woodmeyer & Baker and then  
 4 later with Rabinowitz.  
 5 And I am not remembering exactly the  
 6 amount of money that was budgeted for public  
 7 relations, but something approaching \$250,000.  
 8 Q. When you say that the Brennan Center  
 9 project for 2000 was administratively integrated  
 10 with your project, are you talking about Buying  
 11 Time 2000?  
 12 A. The Buying Time 2000.  
 13 Q. I see. So Pugh made one grant to Brigham  
 14 Young and then Brigham Young passed on a portion  
 15 of the money to the Brennan Center, is that right?  
 16 A. That is exactly right.  
 17 Q. What did these firms do, these public  
 18 relations firms do in return for the money?  
 19 A. Their job was to help us with our  
 20 National Press Club events, in terms of informing  
 21 reporters, staffers, interested parties within the  
 22 Washington community and so forth.  
 23 They advised us about how to go about  
 24 scheduling and organizing such activities, putting  
 25 out the word that those activities were going to

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1 in which we presented essentially the same data  
 2 that we had presented the day before at the  
 3 National Press Club.  
 4 Q. And you presented it to --  
 5 A. Legislative staffers, primarily. I don't  
 6 think any members were in attendance.  
 7 Q. I see. Were these staffers selected  
 8 because they worked on Campaign Finance Reform?  
 9 A. I think there was a blanket invitation to  
 10 all staff to attend.  
 11 MR. TRISTER: Let me have this marked as  
 12 Exhibit No. 11.  
 13 (The document referred to  
 14 was marked Magleby Exhibit  
 15 No. 11 for identification.)  
 16 BY MR. TRISTER:  
 17 Q. I am not going to ask you any questions  
 18 about the substance, so I am only going to ask  
 19 you if you recognize this document.  
 20 A. I recognize the document.  
 21 Q. Did you receive this memorandum from  
 22 Rabinowitz?  
 23 A. Yes.  
 24 Q. I see. And, this is a report to you on  
 25 some of their activities?

66 (Pages 258 to 261)

Page 262

1 A. Yes.  
 2 Q. Now, and I think we are getting near the  
 3 end, earlier I asked you about an effort of yours  
 4 to, in connection with Mr. Ornstein, to have the  
 5 campaign finance legislation include a provision  
 6 banning or requiring disclosure -- I am sorry,  
 7 requiring disclosure of ground war activities by  
 8 interest groups; is that correct?

9 A. I believe I did communicate something to  
 10 that effect to Mr. Ornstein.

11 Q. I see. Do you remember how that came  
 12 about?

13 A. No. I don't remember how that came  
 14 about.

15 (The document referred to  
 16 was marked Magleby Exhibit  
 17 No. 12 for identification.)

18 BY MR. TRISTER:

19 Q. Okay. Let me see if this refreshes your  
 20 recollection.

21 A. Okay.

22 Q. Does this refresh your recollection as to  
 23 how your proposal to Mr. Ornstein came about?

24 A. No. I don't remember whether he e-mailed  
 25 me and said what do you think of this -- I don't

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1 A. It is a paper that I presented at a  
 2 conference called Measuring Advertising and  
 3 Advertising Effectiveness.

4 It is drawn from the same database that  
 5 Dictum Without Data is drawn from.

6 Q. And, if I could see it back for a second.

7 A. It is referred to in my vitae.

8 Q. Okay. I would like you to simply read  
 9 into the record, the sentence that begins "Outside  
 10 money," at the bottom of Page 21.

11 A. Outside money provides groups and parties  
 12 with a means to influence the agenda of the most  
 13 visible federal contests. In so doing, they may  
 14 advance their issue agenda or block an opponent.

15 Q. Thank you. I have no further questions.

16 MR. DODYK: We have no questions.

17 (Thereupon, at 4:33 p.m., the taking of  
 18 the instant deposition ceased.)

19 \_\_\_\_\_  
 20 Signature of the Witness

21 SUBSCRIBED AND SWORN to before me this \_\_\_\_ day  
 22 of \_\_\_\_\_, 20 \_\_\_\_.

23 \_\_\_\_\_  
 24 NOTARY PUBLIC

25 My Commission Expires: \_\_\_\_\_

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1 remember.

2 Q. Was he involved in the drafting of  
 3 campaign finance legislation?

4 A. I don't know.

5 Q. Well --

6 A. He may have been aware of it, I don't  
 7 know, I don't know how it came about. In any  
 8 event, he asked me to comment on something, and  
 9 this is my comment.

10 Q. And, if you will notice, on Page 1 of 1,  
 11 the first e-mail from you to him says: Thanks for  
 12 including me in the e-mail changes on this  
 13 subject. And the subject seems to be Shays-Meehan  
 14 in some way.

15 Do you recall participating in e-mail  
 16 exchanges on the subject of Shays-Meehan with  
 17 Mr. Ornstein and others?

18 A. I believe this may have been the only  
 19 e-mail I sent. In terms of exchanges this is the  
 20 only one I remember being a part of.

21 Q. I see. I am not going to mark this as an  
 22 exhibit, I don't have copies of it. But let me  
 23 ask you to see if you recognize this document.

24 A. Yes. I recognize this.

25 Q. And this is, what is it?

67 (Pages 262 to 264)

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